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## MOVING FORWARD, LOOKING BACK: A RETROSPECTIVE ON SEXUAL HARASSMENT LAW

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### INTRODUCTION

When Jane Corne and Geneva DeVane filed a complaint in the mid-1970s against their employer, Bausch and Lomb, they alleged what they deemed a form of discrimination.<sup>1</sup> The two women worked as clerical staff and were supervised by a man named Leon Price, who, they alleged, subjected them to repeated verbal and physical sexual advances at work, which escalated to a point that both women were forced to resign.<sup>2</sup> The complaint alleged that this behavior violated Title VII of the Civil Rights Act of 1964,<sup>3</sup> enacted more than a decade earlier, because the imposition of unwanted sexual advances by a supervisor or the granting of rewards for sexual submission were forms of illegal sex discrimination.<sup>4</sup>

The district judge was openly incredulous about their claim.<sup>5</sup> All previous cases of sex discrimination “arose out of company policies” and involved “apparently some advantage to, or gain by, the employer from such discriminatory practices.”<sup>6</sup> But here, “Mr. Price’s conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. . . . [He] was satisfying a personal urge.”<sup>7</sup> And if that was the case, how could “it be

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<sup>1</sup> *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975).

<sup>2</sup> *Id.*

<sup>3</sup> 42 U.S.C. § 2000e *et seq.* (2012).

<sup>4</sup> *Corne*, 390 F. Supp. at 162-63.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 163.

<sup>7</sup> *Id.*

construed that the conduct complained of was company-directed policy which deprived women of employment opportunities”<sup>8</sup> Indeed, the court continued, a “reasonably intelligent reading of the statute” shows that it cannot be read to cover actions, even by a supervisor, which “had no relationship to the nature of the employment.”<sup>9</sup> It would be “ludicrous” to find this conduct actionable simply because it was directed at females alone (lots of them, according to the complaint), and recognition of this cause of action would mean “a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.”<sup>10</sup> Employers would be forced to “have employees who were asexual” since that would be the “only sure way . . . [to] avoid such charges.”<sup>11</sup> (And one could imagine the court’s wondering whether there were enough asexual adults in the workforce to make millions and millions of contact lenses.) The court thus concluded that the women had failed to state a claim under Title VII and dismissed the complaint.<sup>12</sup>

The ruling in *Corne*, like a similar ruling the following year in which a federal district court dismissed a discrimination complaint alleging sexual assault on the theory that Title VII was “not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley,”<sup>13</sup> is a touchstone in the development of sexual harassment law. It signaled the emerging awareness of “sexual harassment,” a newfound label for conduct that had long been experienced by (mostly) women in the workplace, but seldom discussed and never challenged. But the ruling also marked the beginning of sexual harassment law by raising questions that courts and commentators would spend decades trying to answer: What is sexual harassment? What does it have to do with equal employment opportunity? And who can be held liable for it?

The history of sexual harassment law—which I have occasion to consider as part of this symposium on the fiftieth anniversary of Title VII—can be divided, if not neatly, into three eras. The 1970s was home to the emergence of consciousness about the frequency and harm of sexually harassing behaviors in the workplace—and a name to describe them. The 1980s and 1990s saw the development and embrace of a theoretical understanding of sexual harassment as a form of discrimination, outlined in Catharine MacKinnon’s path-breaking 1979 book, *The Sexual Harassment of Working Women*,<sup>14</sup> and the development

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 163-64.

<sup>12</sup> *Id.* at 165.

<sup>13</sup> *Tomkins v. Pub. Serv. Elec. & Gas. Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976).

<sup>14</sup> CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). The foremother of harassment law has written her own reflection on the law’s development. See Catharine A. MacKinnon, *The Logic of*

of a comprehensive set of substantive principles about what constitutes actionable harassment and who can be held liable for it. Finally, the last decade and a half has seen critique on both ends—from some scholars who claim sexual harassment law has gone too far (or in the wrong direction) and from others who claim it has failed to transmit cultural understandings necessary for equality and stalled with a type of complacency about a system that has largely failed to eradicate the harassing behaviors that continue to impede women's equal opportunity in the workplace.

In a landmark article, political scientists Felstiner, Abel, and Sarat examined the complex social process that connects injury to a remedy.<sup>15</sup> They set forth three stages in the emergence of disputes: naming (“saying to oneself that a particular experience has been injurious”); blaming (occurring “when a person attributes an injury to the fault of another individual or social entity”); and claiming (occurring “when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy”).<sup>16</sup> All three transformations must occur in order for an aggrieved individual to gain access to justice.<sup>17</sup> At a broader level, though, these same processes must occur for a particular type of conduct—in this case, sexual harassment—to be addressed. We must collectively identify a behavior and deem it wrongful, decide who can be blamed (or at least held accountable), and then provide the legal and extralegal mechanisms through which the blameworthy can be forced to remedy the harm to the victims. In this Essay, I will trace the key

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*Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002).

<sup>15</sup> William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81).

<sup>16</sup> *Id.* at 635. On this social process, see also Austin Sarat, *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in Popular Culture*, 50 DEPAUL L. REV. 425 (2000) (discussing *The Sweet Hereafter*, a film that “tells a story in words and pictures of the seldom seen processes of naming, blaming, and claiming,” and thereby “provides a vehicle for understanding the manner in which civil justice is mythologized”); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81) (exploring “the origins of disputes in grievances and claims,” and finding that while claims are often made in a vast majority of problem types, such as real property and debt, “[t]he one exception to this pattern is found among discrimination grievants, of whom only 29.4 percent made a claim”); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 11-26 (1983) (“[E]ven where injuries are perceived, a common response is resignation” and how this may be explained by those who “decide that the gain is too low, or the cost is too high, including the psychic costs of pursuing the claim.”).

<sup>17</sup> See Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1155 (2000) (“[A] victim must identify the behavior as harassment, recognize the availability of a legal remedy, and report her victimization to some forum in some manner.”).

developments in sexual harassment law and theory over the last forty years, as we move from naming to blaming to claiming—and perhaps to questioning.

### I. THE EARLY YEARS: PUTTING A NAME TO A BEHAVIOR

Sexual harassment preceded sexual harassment *law*. We can point to the sexual abuse and harassment of female slaves by their masters,<sup>18</sup> the sexual hostility and attacks of early twentieth century female industrial workers in the factories where they worked,<sup>19</sup> or the generations of secretaries groped by their bosses in the office (depicted masterfully on the big screen by Dabney Coleman and Dolly Parton in *Nine to Five*).<sup>20</sup> And if we look only in the modern era but across different contexts, we find it not only in the workplace, but also in schools, prisons, housing authorities, on the street, and in virtually every type of institution. But it is naming the behavior rather than its mere existence that leads to the establishment of a legal structure to control it. For sexual harassment, this happened in the late 1970s as a number of forces coalesced. A popular women's magazine, *Redbook*, published results of a survey titled *What Men Do to Women on the Job*,<sup>21</sup> which found unwelcome sexual comments and advances to be pervasive in the workplace. In 1981, the federal government published a groundbreaking study reporting that four in ten female employees had experienced harassing behaviors in the prior two years.<sup>22</sup> Other studies and surveys joined a growing chorus that led to the collective labeling of certain behaviors as "sexual harassment" and the eventual melding of outrage with the protections of Title VII, a statute that had been on the books for more than a decade already.<sup>23</sup> In the background was the

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<sup>18</sup> See KERRY SEGRAVE, *THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993*, at 16-17 (1994); see also LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 40-44* (1978).

<sup>19</sup> See SEGRAVE, *supra* note 18, at 61-80 ("Sexual harassment continued unabated in factory work well into the 20th century.").

<sup>20</sup> See *id.* at 103-22; see also Jill Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Traveled and the Distance Yet to Go*, 10 CAP. U. L. REV. 445 (1981); *NINE TO FIVE* (IPC Films 1980).

<sup>21</sup> Claire Safran, *What Men Do to Women on the Job*, *REDBOOK*, Nov. 1976, at 217.

<sup>22</sup> See U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* 20 (1981).

<sup>23</sup> See, e.g., CARROLL M. BRODSKY, *THE HARASSED WORKER 27-28* (1976); FARLEY, *supra* note 18, at 18-21 (discussing studies and surveys finding widespread sexual harassment); U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE* (1988); Douglas D. Baker et al., *The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment*, 22 SEX ROLES 305, 305-06 (1990) ("Research findings over the past fifteen years indicate that sexual harassment is both a pervasive and serious problem."); Susan R. Meredith, *Using Fact Finders to Probe Workplace Claims of Sexual Harassment*, 47 ARB. J. 61, 61 (1992) (citing studies that estimate that fifty to eighty percent of female workers have been sexually harassed); Beth E. Schneider, *Consciousness About Sexual Harassment*

women's rights movement, and in the foreground was Catharine MacKinnon's theory of why harassment should be deemed an actionable wrong.<sup>24</sup> Sexual harassment was, in Martha Chamallas's words, the "quintessential feminist harm . . . . The term was invented by feminist activists, given content by feminist litigators and scholars, and sustained by a wide-ranging body of scholarship generated largely by feminist academics."<sup>25</sup> And with its roots firmly established, sexual harassment was thrust on a very public stage when Anita Hill accused Supreme Court nominee Clarence Thomas of sexually harassing her while he was chairing the federal agency in charge of implementing the nation's anti-discrimination laws.<sup>26</sup> He was confirmed to the Supreme Court despite her allegations, but her airing of the issue catalyzed public awareness, litigation, and judicial awareness of sexual harassment. The rest, as they say, is history.

## II. THE ADOLESCENT YEARS:

### THE WHO, WHAT, WHEN, WHERE, WHY, AND HOW OF SEXUAL HARASSMENT

After a few false starts in the mid-1970s, courts slowly began to recognize that sexual harassment in the workplace could violate Title VII. *Barnes v. Costle*,<sup>27</sup> a 1977 case in the D.C. Circuit, is credited with being the first appellate decision to recognize quid pro quo harassment as actionable under Title VII. There, the court concluded that if a woman proved she was fired because she refused to have a sexual relationship with her supervisor, she had established actionable discrimination.<sup>28</sup> "It is much too late in the day," the

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*Among Heterosexual and Lesbian Women Workers*, 38 J. SOC. ISSUES 75, 83-85 (1982) (discussing a study showing that "significant proportions of each sexual identity group experienced [sexual harassment] incidents in the year prior to the study"). For narrative descriptions of this history, see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (discussing the current sexual desire-dominance paradigm); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2074-82 (2003) (discussing the American women's movement)..

<sup>24</sup> See NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 66 (2006) (explaining MacKinnon's influence and that the "law of sexual harassment represents one of the most direct translations of legal theory into legal doctrine").

<sup>25</sup> MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 237 (2d ed. 2003).

<sup>26</sup> See Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445 (1992) (discussing her reaction to the response from her Senate Judiciary Committee Testimony); see also CHAMALLAS, *supra* note 25, at 246 (stating that the "confirmation hearing of Justice Clarence Thomas marked the most intense moment of public awareness and public debate about sexual harassment").

<sup>27</sup> 561 F.2d 983 (D.C. Cir. 1977). Other cases in the first batch include *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); and *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

<sup>28</sup> *Barnes*, 561 F.2d at 989 n.49 ("The vitiating sex factor thus stemmed not from the fact that what appellant's superior demanded was sexual activity . . . but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not

court wrote, “to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job.”<sup>29</sup> And “but for her womanhood . . . her participation in sexual activity would never have been solicited. . . . [She] was asked to bow to his demands as the price for holding her job.”<sup>30</sup> And the federal agency for which the plaintiff worked was in no position, factually speaking, to exonerate itself under a theory that the supervisor’s actions contravened company policy and were redressed as soon as discovered.<sup>31</sup>

Two years later, MacKinnon’s game-changing book was published, in which she gave a cogent explanation for why sexual harassment should be treated as intentional discrimination and distinguished between two types of harassment—quid pro quo and hostile environment.<sup>32</sup> Literally “this for that,” quid pro quo harassment involved threats of adverse action to coerce sexual submission.<sup>33</sup> Hostile environment harassment came to be understood as unwelcome sexual conduct that is severe or pervasive and which creates a subjectively and objectively hostile or abusive working environment.<sup>34</sup> Her framework was adopted virtually wholesale by the EEOC, which published its first guidelines on sexual harassment 1980.<sup>35</sup> The guidelines defined actionable harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an

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have fastened upon a male employee.”).

<sup>29</sup> *Id.* at 989-90.

<sup>30</sup> *Id.* at 990.

<sup>31</sup> *Id.* at 993. Often lost in the conventional telling of sexual harassment history is that Barnes, like many of the women plaintiffs in the early cases, was African-American. See MacKinnon, *supra* note 14, at 826 (suggesting that women’s race combined with the fact that “most of the men judges . . . had confronted their own group-based inequalities” may explain the earliest cases that recognized harassment as a civil rights issue). That sexual harassment is often racialized is important, but seldom discussed. See generally Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177 (1997); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993).

<sup>32</sup> MACKINNON, *supra* note 14, at 32. MacKinnon distinguished between harassment “in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity,” and harassment that is a “persistent condition of work.” *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> EEOC, Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11(c) (1980)). This section of the Guidelines was rescinded in 1999 and replaced with new guidelines reflecting new Supreme Court opinions on employer liability, discussed *infra*.

individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.<sup>36</sup>

The guidelines also proposed standards for employer liability, providing that vicarious liability for harassment by supervisors would turn on "the particular employment relationship and the job functions performed by the individual."<sup>37</sup> The EEOC guidelines were a kind of Kool-Aid. The default had now flipped—from the incredulous reaction by courts to the very idea that harassment could be actionable under Title VII to a virtual consensus that harassment was not only actionable, but also struck at the very heart of women's inequality in the workplace. But right from the start there was disagreement, or at least confusion, about whether employers ought to be held responsible for harassment by employees, even those with supervisory authority, when the harassment itself was so clearly outside the scope of employment in most cases. George MacKinnon, a D.C. Circuit judge and also Catharine MacKinnon's father, raised this question in a concurrence in *Barnes v. Costle*, querying whether an employer could be deemed at fault for conduct it did not order or condone.<sup>38</sup>

The Supreme Court, in its first foray into sexual harassment law, in *Meritor Savings Bank v. Vinson*,<sup>39</sup> affirmed the consensus that quid pro quo and hostile environment harassment are actionable forms of discrimination. And while it agreed that harassment must be "unwelcome" in order to be actionable—and, controversially, that "a complainant's sexually provocative speech or dress" may be relevant and admissible—it held that a complainant's participation in "sexual episodes" may be voluntary, but nonetheless "unwelcome."<sup>40</sup> The *Meritor* Court, however, cemented confusion over the proper standard for employer liability, eschewing a clear rule in favor of a vague direction to lower courts to look to "agency principles" in deciding when employers could be held liable for sexual harassment in the workplace.<sup>41</sup> In defining the possible continuum of employer liability, the Court rejected both a rule of automatic liability and a rule requiring actual notice.<sup>42</sup> Lower courts then plunged into the amorphous concept of "agency principles" to determine whether employers could or should be held liable for sexual harassment under various

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Barnes v. Costle*, 561 F.2d 983, 995 (D.C. Cir. 1977) (MacKinnon, J., concurring) (reasoning that the common law imputes no liability on the employer, and that any liability must come entirely from statute).

<sup>39</sup> 477 U.S. 57, 64 (1986).

<sup>40</sup> *Id.* at 67.

<sup>41</sup> *Id.* at 72.

<sup>42</sup> *Id.*

circumstances.<sup>43</sup> They tended to agree that employers were strictly liable when supervisors carried out quid pro quo threats—the women who didn't sleep with them despite being threatened were fired—but reached wildly inconsistent results in other types of cases.<sup>44</sup> There was no consensus to be found in cases where women submitted to their supervisor's demands, where the supervisor failed to carry out the threatened action, or where the harassment was the hostile environment variety.<sup>45</sup>

While lower courts volleyed over the employer liability standards, the Supreme Court decided two more cases on the definition of actionable harassment. In 1993, in *Harris v. Forklift Systems, Inc.*,<sup>46</sup> the Court considered how badly hostile environment harassment must injure its victim before it becomes actionable (before causing severe psychological injury) and from whose perspective it should be judged (a reasonable person in the shoes of the victim).<sup>47</sup> Five years later, it considered whether same-sex harassment could be actionable given the statute's requirement that unlawful discrimination be

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<sup>43</sup> The Supreme Court interpreted Title VII, under which the term "employer" is defined to include "agents," to require this analysis. *Meritor*, 477 U.S. at 72.

<sup>44</sup> See, e.g., *Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997) ("In a situation of quid pro quo sexual harassment by a supervisor, where the harassment results in a tangible detriment to the subordinate employee, liability is imputed to the employer."); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994) ("Once quid pro quo sexual harassment has been established, the harasser's employer is, ipso facto, liable."); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994); *Kaufmann v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Carrero v. N.Y.C. Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) ("Hostile environment and quid pro quo harassment causes of action are not always clearly distinct and separate."); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) ("The Guidelines go on to reaffirm that an employer is responsible for discriminatory acts of its agent and supervisory employees with respect to sexual harassment just as with other forms of discrimination, regardless of whether the employer authorized or knew or even should have known of the acts. . .").

<sup>45</sup> Compare *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997) (holding that the mere threat of adverse action conditioned on sexual submission constitutes a quid pro quo in violation of Title VII), *Nichols*, 42 F.3d at 511 (same), and *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir. 1994) (same), with *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (only threats that are carried out constitute an actionable quid pro quo).

<sup>46</sup> 510 U.S. 17, 21 (1993).

<sup>47</sup> Plaintiff had urged the court to adopt a "reasonable woman" standard for evaluating whether an environment was objectively hostile enough to be actionable. This issue had been ruled on by the Ninth Circuit and fully briefed, but the Supreme Court never mentioned the issue in its ruling. Instead, it reformulated the test to reflect the perspective of the "reasonable person in the victim's shoes," presumably making room for factfinders to account for the influence of the victim's gender on perceptions of the hostile environment. *Id.* at 20-21 ("This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.").

“because of sex.”<sup>48</sup> In *Oncale v. Sundowner Offshore Services*,<sup>49</sup> the Court held that Title VII does not categorically exclude same-sex harassment (as the lower court had held), but that an employee pursuing such a theory would have to specifically prove the conduct occurred because of sex (e.g., the harasser was motivated by homosexual desire or targeted only people of one sex).<sup>50</sup> Nor does Title VII require that harassment be sexual in nature, as long as it is because of sex (gender). “[H]arassing conduct need not be motivated by sexual desire,” the Court wrote, “to support an inference of discrimination on the basis of sex.”<sup>51</sup>

In its first three sexual harassment cases, the Supreme Court had ruled in favor of a broad reading of Title VII and robust substantive law against harassment, but of course it left many substantive issues for the lower courts to resolve. The Court established early on and without dispute that individuals could not be held liable for harassment,<sup>52</sup> but neither were their motives relevant to the determination whether a hostile environment had been created.<sup>53</sup> Nor, in most cases, do restrictions on verbal or visual harassment violate fundamental principles of free speech.<sup>54</sup> Other cases considered less central, but still important, questions. Courts have considered, for example, whether sexual favoritism is actionable under Title VII. Most have concluded that it can be, in accordance with the EEOC’s position on the issue, but only if it is sufficiently widespread to change the entire tenor of the workplace.<sup>55</sup> Thus, a

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<sup>48</sup> 29 C.F.R. § 1604.11 (2002).

<sup>49</sup> 523 U.S. 75, 79-80 (1998).

<sup>50</sup> *Id.* at 80-82. The “because of sex” question can be raised in contexts other than same-sex harassment. For example, in *Orton-Bell v. Indiana*, 759 F.3d 768 (7th Cir. 2014), a woman complained about, among other things, the fact that co-workers were having sex on her desk at night when she wasn’t there. While the court agreed this conduct was disturbing and hostile, there was no evidence that the choice of her office was made because of her sex and therefore was not an actionable form of discrimination. *Id.* In a related vein, the Second Circuit affirmed that the actions of an equal opportunity harasser—a fire department chief grabbed men by their testicles and women by their breasts—did not harass “because of sex.” *Carpenter v. City of Torrington*, 100 F. App’x 858, 860 (2d Cir. 2004).

<sup>51</sup> *Oncale*, 523 U.S. at 80; see also *Harris*, 510 U.S. at 19 (treating comments like “[w]e need a man as the rental manager,” and references to the complainant as a “dumb ass woman” as part of an actionable hostile environment).

<sup>52</sup> See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995). Nonetheless, a high-ranking officer’s behavior can be imputed to the employer under an alter ego theory of liability. See, e.g., *Torres v. Pisano*, 116 F.3d 625, 634-35 & n.11 (2d Cir. 1997).

<sup>53</sup> *MacKinnon*, *supra* note 14, at 826 (discussing the irrelevance of motive).

<sup>54</sup> See generally J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999).

<sup>55</sup> See, e.g., *Miller v. Dep’t of Corr.*, 115 P.3d 77, 90 (Cal. 2005) (interpreting California’s anti-discrimination law to ban sexual favoritism in the same circumstances as

prison warden who played his three paramours off one another in a quest for his approval and promotions, turning the prison into a highly sexualized environment, ran afoul of this standard.<sup>56</sup> Courts have also considered the standard for evaluating sexual harassment of adolescents, concluding in one case, for example, that sexual advances towards individuals below the age of sexual consent are unwelcome as a matter of law.<sup>57</sup> Many courts have considered whether context is relevant to the creation of a hostile environment. For example, is graphic sex talk in a comedy writers' room less likely to constitute harassment than in a law office? The California Supreme Court, interpreting a state discrimination law with similar protections, said yes—context matters, and mere talk, if not directed at anyone in particular and not reflecting hostility to women as a group, was not actionable.<sup>58</sup>

In a separate, but extremely important set of cases, the court developed the retaliation doctrine—protection for employees who complained of harassment or cooperated with investigations of complaints by others. As with the core sexual harassment doctrine, the Supreme Court handed down a series of rulings that, at least on their face, purported to sweep broadly in favor of victims of harassment. With some statutes, such as Title IX of the Education Amendments of 1972, the Supreme Court had to first decide *whether* retaliation against discrimination complainants was actionable at all because Congress made no mention of such protection in the text. But the Court had no trouble deciding in the Title IX context that protection against retaliation is an integral part of protection against discrimination in the first instance. Thus, it ruled in *Jackson v. Birmingham Board of Education*<sup>59</sup> that protection against retaliation is an essential and therefore inherent component of an antidiscrimination law.<sup>60</sup> The alternative would be to create a cruel Catch-22

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Title VII does).

<sup>56</sup> *Id.*; see also *EEOC Guidance No. 915.048*, EEOC (Jan. 12, 1990), <http://www.eeoc.gov/policy/docs/sexualfavor.html>, archived at <http://perma.cc/334G-7MMK>; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 858 (1988) (arguing that little sexual liberty is lost when an employer prohibits “amorous relationships in which one party has direct authority to affect the working . . . status of the other”).

<sup>57</sup> *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2008).

<sup>58</sup> *Lyle v. Warner Bros.*, 132 P.3d 211, 228, 231 (Cal. 2006). Compare *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984) (rejecting claim by a woman in a blue collar job because “Title VII was not meant” to change an environment in which “sexual jokes, sexual conversations and girlie magazines may abound”), and *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995) (rejecting claim by a female truck driver because in “the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior.”), with *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) (finding the Tenth Circuit’s reasoning in *Gross* “illogical”).

<sup>59</sup> 544 U.S. 167, 184 (2005).

<sup>60</sup> *Id.* at 174; see also *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003) (finding implied

for victims—either say nothing and have no legal recourse against the harassment, or speak up and risk retaliation with no legal recourse to challenge it.<sup>61</sup>

The Court could skip this preliminary question in Title VII because the statute expressly, if inartfully, prohibits retaliation against those who oppose unlawful discrimination or participate in complaint proceedings.<sup>62</sup> The questions, then, focused on what types of actions qualified as retaliatory and what types of opposition or participation triggered protection against them. In *Burlington Northern & Santa Fe Railway Company v. White*,<sup>63</sup> the Court ruled broadly in favor of the plaintiff, Sheila White, a female track laborer who was removed from a more desirable position after she complained about her supervisor's anti-woman comments and who was written up for a false infraction after complaining a second time.<sup>64</sup> In response to the two questions it was asked, the Court ruled first that retaliatory action could be unlawful even if not work-related (e.g., a threat of bodily harm) and second that retaliation is actionable if it is materially adverse, meaning "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."<sup>65</sup> In White's case, a month-long suspension without pay and reassignment to a less desirable position were certainly sufficient to meet this standard.<sup>66</sup>

But what the Court gave with one hand—meaningful protection against retaliation in *Burlington Northern*—it took away with the other. In a quiet, per curiam decision, *Clark County School District v. Breeden*,<sup>67</sup> the Court dismissed a retaliation claim because "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard."<sup>68</sup> The "single incident" was a conversation and a chuckle between two men about a job applicant, who had allegedly once told a co-worker "I hear making love to you is like making love to the Grand Canyon."<sup>69</sup> Vicki Breeden, also in the meeting to screen applicants, complained about the

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right against retaliation in Title VI).

<sup>61</sup> *Jackson*, 544 U.S. at 180-81.

<sup>62</sup> See 42 U.S.C. § 2000e-3 (2012) (prohibiting "discrimination for making charges, testifying, assisting, or participating in enforcement proceedings"). The protection against retaliation is divided into two clauses: the opposition clause and the participation clause. The former protects those who complain formally or informally of discrimination or who cooperate with investigations into the complaints of others (see discussion of *Crawford*, *infra* notes 71-77 and accompanying text), while the latter protects only those who participate in the investigation of formal EEOC charges.

<sup>63</sup> 548 U.S. 53 (2006).

<sup>64</sup> *Id.* at 57-59.

<sup>65</sup> *Id.* at 67-68.

<sup>66</sup> *Id.* at 70.

<sup>67</sup> 532 U.S. 268, 271 (2001).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 269.

discussion.<sup>70</sup> And while a single comment of this nature, even directed at the employee, would not be severe or pervasive enough to trigger liability under Title VII, the Court's sweeping and casual pronouncement that only objectively *reasonable* complaints of discrimination trigger retaliation protection would unleash a torrent of bad case law, discussed below.

The ruling in *Breedon* would undercut the benefits of a later retaliation case, *Crawford v. Metropolitan Government of Nashville and Davidson County*,<sup>71</sup> in which the Court ostensibly handed down another victory for victims of retaliation. It reversed a federal appellate ruling that had denied protection from retaliation to employees who participate as witnesses in an employee's internal investigation into harassment charges brought by other employees.<sup>72</sup> When Vicky Crawford was interviewed in connection with a harassment charge brought by a co-worker, she told the investigator of many instances in which the accused harasser had behaved in a sexually inappropriate way in the workplace.<sup>73</sup> The "opposition clause" was broad enough to encompass the provision of information relevant to an investigation or charge, regardless of whether the employee actively "opposed" discrimination by coming forward independently, or passively "opposed" by merely cooperating.<sup>74</sup> Employers could not turn internal investigations into charades by punishing those who provided relevant information, even if they did not insist on being heard.<sup>75</sup> The Sixth Circuit had ruled that Crawford was not protected by the "participation" clause because the investigation with which she cooperated was internal rather than part of the formal enforcement mechanisms for Title VII, an EEOC charge.<sup>76</sup> The Supreme Court did not need to consider that ruling since it held that Crawford was protected under the opposition clause, even as it held that protection under the participation clause is significantly broader.<sup>77</sup> Per *Breedon*, an employee who "opposes" conduct she perceives as discriminatory is only protected against retaliation if the court agrees that her belief that discrimination occurred was objectively reasonable, a hurdle discussed more in the next section.<sup>78</sup>

In 1998, the Court returned to the issue of employer liability for harassment, taking up the most common points of contention in lower courts—how much weight to give an employer's harassment policy in determining liability and

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<sup>70</sup> *Id.*

<sup>71</sup> 555 U.S. 271, 280 (2009).

<sup>72</sup> *Id.*

<sup>73</sup> Crawford was herself a victim of harassment by the same man, Gene Hughes, but had not complained because Hughes was the person responsible for receiving harassment complaints. *Id.* at 274.

<sup>74</sup> *Id.* at 277.

<sup>75</sup> *Id.* at 273.

<sup>76</sup> *Id.* at 275.

<sup>77</sup> *Id.* at 280.

<sup>78</sup> See *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 271 (2001).

whether to penalize plaintiffs who failed to make use of available grievance procedures.<sup>79</sup> In *Faragher* and *Ellerth*, the Court jointly held that for supervisory harassment culminating in a tangible employment action (new lingo to describe an unsuccessful quid pro quo), employers are automatically liable.<sup>80</sup> While supervisors are seldom acting within the scope of employment when they harass—indeed, the Court noted in *Ellerth*, they often act “for personal motives, motives unrelated and even antithetical to the objectives of the employer”<sup>81</sup>—they are typically aided by the existence of the agency relation, an independent basis for imposing vicarious liability. But for supervisory harassment without such a consequence, employers may assert a two-prong affirmative defense, which operates as a bar to liability or damages<sup>82</sup>:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>83</sup>

The Court in these cases also approved the lower court consensus that claims involving co-worker rather than supervisory harassment should be governed by a negligence standard, holding employers liable only when they knew or should have known of the harassment, but failed to take prompt and

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<sup>79</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

<sup>80</sup> *Faragher*, 524 U.S. at 807; see *Ellerth*, 524 U.S. at 765. A tangible employment action is one that constitutes “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 524 U.S. at 761.

<sup>81</sup> *Ellerth*, 524 U.S. at 757.

<sup>82</sup> Whether an employer who makes out the affirmative defense escapes liability altogether or simply avoids paying damages is a matter of dispute. I have argued in an earlier piece that the affirmative defense should not operate to bar liability, but only to reduce damages. See Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 704-09 (2000). Some courts, however, have construed the defense quite broadly as a complete defense to liability. See *id.* at 709-15 (citing cases).

<sup>83</sup> *Ellerth*, 524 U.S. at 765 (citation omitted); *Faragher*, 524 U.S. at 807 (providing identical language). Several courts have quite inexplicably eliminated the second prong of the affirmative defense entirely. See Grossman, *supra* note 82, at 711 (citing cases); see also *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153, 164 (D. Md. 2000) (holding that the employer need not prove the second prong of the affirmative defense when the first prong is satisfied); *Brown v. Henderson*, 155 F. Supp. 2d 502, 512 (M.D.N.C. 2000) (same).

effective remedial action.<sup>84</sup> Distinguishing between a supervisor and co-worker has obvious importance, and the Court ruled in a 2013 case, *Vance v. Ball State University*,<sup>85</sup> that a harasser does not qualify as a supervisor unless he or she has the power to “take tangible employment actions against the victim”—colloquially, the power to hire and fire.<sup>86</sup> This standard omits those employees who dictate many or all aspects of one’s daily working conditions, but lack the ultimate power over one’s job.

The affirmative defense, which carves out an exception to a general rule of automatic liability, represents a key shift in Title VII law from an emphasis on substance to an emphasis on procedure. The question is not whether employers have successfully prevented or responded to problems of harassment, but whether they have erected an internal system designed to do those things—whether successful or well-engineered or neither. As Justice Kennedy declared in *Ellerth*, the very purpose of Title VII is “to encourage the creation of antiharassment policies and effective grievance mechanisms.”<sup>87</sup> This shift was reinforced the following year in *Kolstad v. American Dental Ass’n*,<sup>88</sup> in which the Court held that an employer may not be forced to pay punitive damages (which are authorized by statute) for supervisory harassment when the conduct is contrary to the employer’s good-faith efforts to comply with Title VII.<sup>89</sup>

After this burst of activity at the close of the twentieth century, including two key decisions on sexual harassment in the educational context,<sup>90</sup> the Court

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<sup>84</sup> See *Faragher*, 524 U.S. at 799 (stating that lower courts have “uniformly judg[ed] employer liability for co-worker harassment under a negligence standard”); see also *id.* (collecting cases); 29 C.F.R. § 1604.11(d) (2002) (“With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”).

<sup>85</sup> 133 S. Ct. 2434 (2013).

<sup>86</sup> *Id.* at 2439.

<sup>87</sup> *Ellerth*, 524 U.S. at 764. Justice O’Connor echoed this approach the following year in *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999), declaring that law encourages employers “to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.” Theresa Beiner has criticized courts for making voluntary compliance with prophylactic rules a central rather than collateral purpose of Title VII. See generally Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273 (2001) (reviewing literature on the training effect and victim response to harassment).

<sup>88</sup> 527 U.S. 526, 545.

<sup>89</sup> *Id.*

<sup>90</sup> See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (holding that Title IX recipients are liable for harassment by students based on the same standard as for harassment by employees); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (holding that Title IX recipients can be held liable for sexual harassment by teachers or other employees only if they have actual notice of the harassment and respond with

largely stepped back from the issue, allowing lower federal courts to start filling in the gaps. In addition to *Vance*, mentioned above, it decided only a handful of relatively narrow harassment cases in the first fifteen years of the next century, only two of which are worth noting.<sup>91</sup> In *Pennsylvania State Police v. Suders*,<sup>92</sup> the Court tackled the thorny question of constructive discharge, which was made more complicated by the Court's distinction in *Faragher* and *Ellerth* between the standards of liability for different types of harassment.<sup>93</sup> In *Suders*, the plaintiff alleged that she quit her job with the state police because of pervasive sexual harassment by her supervisors and escalating harassment and derision when she complained.<sup>94</sup> The Court ruled that constructive discharge constitutes a "tangible employment action"—triggering automatic liability with no opportunity for the employer to prove the affirmative defense—only if the employee's resignation was precipitated by some official, employer-sanctioned adverse action.<sup>95</sup> In *National Railroad Passenger Corp. (Amtrak) v. Morgan*,<sup>96</sup> the Court held that hostile environment harassment is a so-called continuing violation such that a Title VII's relatively short statute of limitations (180 or 300 days, depending on the level of coordination between the federal and state anti-discrimination agencies) is triggered anew by each related incident.<sup>97</sup> A complainant, then, can sue not only for the incident that occurred within the limitations period, but also for the whole course of acts that together comprised the hostile working environment.<sup>98</sup>

Over the course of almost three decades, courts constructed sexual harassment doctrine, and a cottage industry of anti-harassment advice, policies, and procedures developed in its wake. In the next section, I consider the questions that the fast-moving law left little time for: Did it work, and at what cost?

### III. THE MIDLIFE CRISIS: HAVE WE GONE TOO FAR OR NOT FAR ENOUGH?

A recent controversy over Harvard Law School's sexual harassment policy is somewhat emblematic of a larger debate. The federal Office for Civil Rights

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deliberate indifference);

<sup>91</sup> Minor cases include *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), in which the Court ruled that front pay is a form of equitable relief that is not subject to the damages cap under Title VII, and *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), in which it held that the employer-size requirement under Title VII was not jurisdictional in nature and therefore could be waived if not challenged at the appropriate time.

<sup>92</sup> 542 U.S. 129, 133 (2004).

<sup>93</sup> *Id.* at 137-40.

<sup>94</sup> *Id.* at 135-37.

<sup>95</sup> *Id.* at 148-49.

<sup>96</sup> 536 U.S. 101 (2002).

<sup>97</sup> *Id.* at 117.

<sup>98</sup> *Id.* at 117-19.

cited Harvard for a policy that did not go far enough to implement Title IX's prohibition of sexual harassment;<sup>99</sup> meanwhile, its faculty protested publicly that the policy went too far, compromising the rights of the accused harassers and basic principles of fairness.<sup>100</sup> The broader academic debate about the direction of sexual harassment law raises a version of the same question: Has it gone too far or not far enough?

The Supreme Court decisions that limn the contours of sexual harassment law are only the beginning of the story. With the cornerstones of the doctrine in place, the next phase of construction was left to lower federal courts and, perhaps more importantly, employers and their consultants trying to navigate the relatively new regime. A significant critique from the "not far enough" camp arises from the way in which lower federal courts fleshed out the doctrinal details. In turning the Supreme Court's broad brush pronouncements into a more detailed set of rules and standards, federal courts often misconstrued the intended scope of Title VII and narrowed the protections for victims of harassment. Let's consider just a handful of examples that support this critique.

The *Faragher/Ellerth* affirmative defense imposes, in effect, a policy-and-procedure requirement on employers and a prompt complaint requirement on harassed employees. According to the Court's articulation of the defense, an employer can avoid liability or damages if it has taken reasonable care to prevent and correct sexually harassing behavior *and* the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer . . ."<sup>101</sup> Armed with these instructions, lower federal courts issued a series of rulings that ignored the express terms of the defense, as well as the social realities of the workplace, and lost sight of the law's purpose of promoting employment equality through the elimination of sexually harassing behaviors. Several courts, for example, held that if an employer satisfies the first prong of the affirmative defense—the one focused on the employer's conduct—it does not also need to satisfy the second one, despite the Court's clear use of a conjunctive to join the two clauses and clear intent to err on the

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<sup>99</sup> See Letter from Joel J. Berner, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Martha Minow, Dean, Harv. Law Sch. 2-3 (Dec. 30, 2014), available at <http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf>, archived at <http://perma.cc/2FTR-GHVT>.

<sup>100</sup> See Elizabeth Bartholet et al., Editorial, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE, Oct. 15, 2014, at A11. Faculty at Penn Law School published a similar "open letter," protesting its university's sexual assault procedures. See Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities* (Feb. 18, 2015), available at <http://media.philly.com/documents/OpenLetter.pdf>, archived at <http://perma.cc/CY3M-YMPA>.

<sup>101</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

side of employer liability.<sup>102</sup> Other courts took a strict and entirely unrealistic view of how quickly and assertively employees must complain<sup>103</sup> about harassment and how many obstacles they must overcome to do so.<sup>104</sup> Courts' refusals to consider context as a determinant of reasonableness is a thread that runs through contemporary discrimination law more generally, making anti-discrimination rights among the hardest to enforce.<sup>105</sup>

At the same time courts were insisting that employees rush to file complaints for fear of forfeiting their substantive rights against discrimination, they were weakening the protections against retaliation. As discussed above, the Supreme Court has made grand proclamations about the harm of retaliation and the right to be protected from it. But doctrinal developments of those pronouncements have weakened the protection substantially and allowed a common problem to flourish. Moreover, less protection against retaliation provides a further deterrent to complaining, which, as discussed above, reduces an employee's ability to enforce substantive rights against harassment. The weakening has taken two primary forms.

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<sup>102</sup> See, e.g., *McCurdy v. Ark. State Police*, 375 F.3d 762, 772 (8th Cir. 2004) (“[T]he ASP is entitled to a modified *Ellerth/Faragher* affirmative defense, despite the ASP’s inability to prove the second element.”); *Watkins v. Prof’l Sec. Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841 (4th Cir. Nov. 15, 1999) (finding that when the first element was satisfied, no reasonable jury could find an employer liable); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 271 (5th Cir. 1999);

<sup>103</sup> See, e.g., *Walton v. Johnson & Johnson*, 347 F.3d 1272, 1292-93 (11th Cir. 2003) (concluding that a three-month delay was unreasonable as a matter of law); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1300-02 (11th Cir. 2000) (finding that complaining to managers not designated by the policy is unreasonable for purposes of the affirmative defense); *Green v. Wills Grp., Inc.*, 161 F. Supp. 2d 618, 626 (D. Md. 2001) (holding that complaining to wrong person rendered victim’s behavior unreasonable); *Marsicano v. Am. Soc’y of Safety Eng’rs*, No. 97-C7819, 1998 WL 603128, at \*7 (N.D. Ill. Sept. 4, 1998) (finding seven-day delay in complaining unreasonable even though harassment began on first day of employment). For a more exhaustive analysis of the affirmative defense caselaw, see Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3 (2003) [hereinafter Grossman, *Culture of Compliance*]; Grossman, *supra* note 82, at 704-15; L. Camille Hebert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711 (2007).

<sup>104</sup> *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001) (holding that “a generalized fear of retaliation does not excuse a failure to report sexual harassment”); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (holding that being “too scared” is not a justification for failing to complain without evidence to substantiate such fears); *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 644 (7th Cir. 2000) (holding that “apprehension does not eliminate the requirement that the employee report harassment”).

<sup>105</sup> For an exhaustive argument to this effect, see Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008).

First, the “materially adverse” standard set forth in *Burlington Northern* was interpreted with little concern for the context that surrounds the decision of an actual discrimination victim whether to complain. In *Higgins v. Gonzales*,<sup>106</sup> for example, the Eighth Circuit ruled that withholding mentoring or supervision was insufficiently adverse to deter complaints—and therefore did not qualify as actionable retaliation.<sup>107</sup> Neither, the court suggested, would involuntary transfer to a different city, despite all the inconveniences of uprooting home and family.<sup>108</sup> Rather, the implication of *Burlington Northern* and its progeny is that reasonable employees are “resilient, self-sufficient, and willing to risk the loss of congenial relationships at work in exchange for the assertion of civil rights.”<sup>109</sup>

Second, courts have taken the “reasonable belief” doctrine casually suggested in *Breeden* and turned it into an almost insurmountable hurdle for retaliation claims brought under the opposition clause. Courts require retaliation plaintiffs to prove that they had sufficient factual evidence of discrimination before they complained—in a context where employers hold far more of the information than employees. This puts pressure on employees to lie low and gather evidence before complaining, while the prompt-filing doctrine discussed above counsels just the opposite. Moreover, the standard is so high in some jurisdictions that it equals the standard to survive summary judgment on the underlying discrimination claim—a standard that would only be applied *after* discovery had taken place.<sup>110</sup> Courts also require retaliation plaintiffs to show they had a reasonable belief that the conduct complained of was against the law—measured, by some courts, by their knowledge of existing law—including circuit-specific precedents.<sup>111</sup>

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<sup>106</sup> 481 F.3d 578, 585-86, 590 (8th Cir. 2007).

<sup>107</sup> *Id.* at 585 (“Any lack of mentoring or supervision simply does not rise to the level of an adverse employment action, as she cannot establish the absence had any effect on her employment situation.”).

<sup>108</sup> *Id.* at 591; *see also* Halfacre v. Home Depot, U.S.A., Inc., No. 05-6619, 2007 WL 1028860, at \*9 (6th Cir. Apr. 3, 2007) (refusing to treat ostracism by management as materially adverse); McGowan v. City of Eufala, 472 F.3d 736 (10th Cir. 2006) (holding that denial of transfer from night shift to day shift after supporting coworker’s complaint of discrimination was not materially adverse).

<sup>109</sup> Brake & Grossman, *supra* note 105, at 907.

<sup>110</sup> *See, e.g.*, Bazemore v. Georgia Tech. Auth., No. 1:05-CV-1850-WSD-WEJ, 2007 WL 917280, at \*3-4 (N.D. Ga. Mar. 23, 2007) (concluding that belief of discrimination was unreasonable even though black plaintiff knew that white coworker who engaged in similar misconduct was not subjected to disciplinary action); Kennedy v. Guthrie Pub. Sch., No. CIV-05-1440-F, 2007 WL 895145, at \*5-6 (W.D. Okla. Mar. 22, 2007) (concluding that plaintiff’s perception of discrimination was unreasonable where he knew that eleven white high school principals were given raises, but he, a black high school principal, was not).

<sup>111</sup> *See, e.g.*, Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002) (“[P]laintiffs may not stand on their ignorance of the substantive law to argue that their belief was reasonable.”); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d

The examples discussed in this section are far from exhaustive, but they are illustrative of twin trends to narrow substantive protections against harassment (despite the Supreme Court's broad pronouncements) and erect procedural obstacles that make those protections even more elusive. Thus, despite more than thirty years of doctrinal development and broad proclamations about its interference with equal employment opportunity, sexual harassment remains disturbingly common and unaddressed.<sup>112</sup> Perhaps worse, the law has done little to change the cultural understanding of sexual misconduct and the ways in which it impedes workplace equality. We are left instead with a somewhat confused doctrine that rewards the proliferation of policies and procedures, but never inquires whether they have had the desired effect.<sup>113</sup>

While some voices criticize sexual harassment law for stopping short of its goal, others complain of its overreach. Vicki Schultz, for example, published a powerful critique of sexual harassment doctrine, in which she argued that the law has facilitated a "neo-Taylorist project of suppressing sexuality and intimacy in the workplace. . . without even inquiring into whether that behavior undermines gender equality on the job."<sup>114</sup> Schultz faults current doctrine for failing to distinguish between harmless sexual behavior and discriminatory sexual behavior—and for being satisfied by the elimination of sex from the workplace, regardless of whether sex-based conduct continues to

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701, 707 (7th Cir. 2000) (rejecting plaintiff's retaliation claim for lack of reasonable belief; plaintiff's complaint of sexual orientation discrimination was not objectively reasonable because such discrimination is not prohibited under Title VII); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999) (measuring plaintiff's underlying claims of sexual harassment against "existing substantive law" and whether conduct was "severe or pervasive enough that a reasonable person would find it hostile or abusive" in a retaliation claim).

<sup>112</sup> For varied criticism of sexual harassment law's inefficacy, see THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* (2005) (arguing that the disconnect between judicial assumptions about typical responses to workplace harassment and the social realities undermines the law's efficacy); LEVIT & VERCHICK, *supra* note 24, at 72 (discussing critique that civil rights victories of the 1970s "are being quietly rolled back by lax enforcement officers and hostile judges"); Brake & Grossman, *supra* note 105; Hebert, *supra* note 103, at 715 (arguing that the rules of employer liability have been applied "in ways quite hostile to the interests of women who have been sexually harassed and quite favorable to the interests of employers whose supervisory employees have been accused of sexual harassment").

<sup>113</sup> For more on this critique, see Grossman, *Culture of Compliance*, *supra* note 103.

<sup>114</sup> Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2064 (2003); see also Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *BERKELEY J. EMP. & LAB. L.* 1 (2001) ("Until we know much more about anti-discrimination training and its effects, the existence of sexual harassment or diversity programs should not be considered a fact relevant to employer liability for compensatory damages in any discrimination suit.").

oppress.<sup>115</sup> Janet Halley argues that we should “take a break from feminism” and rethink the treatment of sexuality in law.<sup>116</sup> These and other feminist critiques of sexual harassment law do not question the existence of inequality, but rather whether the law is focusing on the right conduct or the right categories, and whether it is being effectively deployed.

#### CONCLUSION

The fiftieth anniversary of Title VII provides an appropriate occasion to look back—in this case, to an era when women suffered sexual abuse in the workplace (and many other places) with no possible recourse. Once feminist writers and litigators connected the dots, judges came to understand that a broad mandate to end sex discrimination had to include a mandate to eliminate sexual harassment at work. The decades that followed saw the step-by-step construction of a doctrine that ostensibly protects employees from unwanted sexual behavior at work. The question for the next decade is whether the structure we have created is doing the job we want—and what changes might be justified.

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<sup>115</sup> Schultz, *supra* note 114, at 2064; see also Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 746 (1997) (“Shutting down all sexual behavior seems like an overreaction to the problem of sexual harassment, and requires some very disturbing assumptions about the possibility of female sexual agency . . .”).

<sup>116</sup> JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). Sexual harassment law has also been critiqued from libertarian perspectives for unjustifiably restraining speech and for invading employee privacy. See, e.g., Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (urging courts to distinguish between targeted sexual speech and undirected speech). Some feminists have cited similar concerns. See, e.g., JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 13 (2000) (“Because it is difficult to know in advance what kind of sexually related behavior or speech a reasonable juror might find hostile or offensive, prudent employers and school administrators, in an effort to avoid liability, have a strong incentive to monitor and punish far more private speech and conduct than the law actually forbids.”); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997).