

THE BAD APPLE THEORY IN SEXUAL HARASSMENT LAW

*Anne Lawton**

"[M]any told the [Office of Inspector General] that . . . the sustained incidents of sexual harassment and sexual misconduct are isolated actions by individuals and not evidence of a larger, ongoing problem with the State Police. This is the theory of the 'rotten apple' in an otherwise clean barrel."¹

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¹ OFFICE OF INSPECTOR GENERAL, COMMONWEALTH OF PENNSYLVANIA, INVESTIGATIVE REPORT ON SEXUAL HARASSMENT AND SEXUAL MISCONDUCT AT THE PENNSYLVANIA STATE POLICE 76 (Sept. 8, 2003), available at http://www.oig.state.pa.us/inspgen/lib/inspgen/PSP_Final_Report.pdf [hereinafter OIG REPORT].

INTRODUCTION

Nine years ago, I was an Assistant Professor of Business Law in the finance department at a public university's business school. At the start of my second year, a colleague, who had just earned tenure, began to engage in sexually aggressive behavior toward me. Like most victims of sexual harassment, I did nothing at first,² except speak to a female friend on the faculty. I did not report the behavior to the chair of my department nor did I register a grievance with the university's affirmative action office. But, as the harassment escalated, I realized I had no choice but to report it.

The university had both formal and informal complaint procedures, and, initially, I chose the latter. Doing so was a mistake. While the informal procedure stopped the harassing behavior, it involved no fact finding. Thus, I had no basis for removing this colleague from my promotion and tenure committee, or for objecting to the department's decision, made only three months after my informal complaint, to host its annual party at this colleague's home.

At the time, I believed that the only way to manage the subtle, negative effects of having filed an informal complaint was to "go formal" and initiate an internal investigation by the university's affirmative action office. I did so, and ultimately prevailed—in a sense. The university found that my colleague had violated the university's sexual harassment policy,³ but he received only a written reprimand.⁴ Meanwhile, I had wasted valuable time and money—I had hired an attorney—negotiating the ins and outs of the university's internal grievance procedure.

After the formal finding, I transferred to the management department, having realized that my harassment complaint had soured my relationship with the chair and certain tenured members of the finance department. At first, I thought that the transfer had solved my problems. I was wrong.

² See Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 85-87 (1999) [hereinafter *Emperor's New Clothes*] (citing research on victim reporting).

³ Memorandum, Letter of Findings regarding Anne M. Lawton's formal sexual harassment complaint against John Smith, at 4 (Apr. 30, 1997) (on file with author). In the citations to the documents from my sexual harassment case, I use the pseudonyms *John Smith* for the professor whom I charged with sexual harassment, *Jack Brown* for the chair of the Management Department, and *Bob White* and *Mark Jones* for the Associate Provost and University President, respectively.

⁴ Letter from Bob White, Associate Provost, to Mark Jones, President, regarding Sexual Harassment Complaint of Anne Lawton, Findings and Recommendation, at 1-2 (July 2, 1997) (recommending that a letter of reprimand be placed in the professor's personnel file) (on file with author); Letter from Bob White, Associate Vice President for Academic Affairs and Associate Provost to author and Professor John Smith, regarding Sexual Harassment Complaint of Anne Lawton, Proposed Findings and Recommendation, at 2 (June 17, 1997) (same) (on file with author).

Each year at the business school, members of each department evaluate their tenure-track faculty. After the dean of the business school comments on the department's recommendation, it proceeds to the university level. During my fourth year at the business school, I received a positive recommendation from the management department.⁵ But, the acting provost decided that my package of annual promotion and tenure materials warranted the writing of a cautionary letter.⁶ In that letter, the provost concurred with the management department's "[assessment] of [my] teaching and service" but was "less accepting of the nature, sufficiency and quality of [my] published work."⁷ The provost recommended that I "seek informally an early external evaluation" of my scholarly work,⁸ even though no other tenure-track faculty at the business school had to do so. Moreover, while the provost wrote letters of concern to seven other tenure-track faculty members across the university that same year, mine was the only letter in which he disagreed with the department's evaluation.⁹

By this time, I realized that my decision to file any sort of internal harassment complaint had been a mistake. The acting provost had been the university official responsible for my sexual harassment case after the initial findings by the affirmative action office.¹⁰ I came to the realization that I would face an uphill battle if I were to apply for tenure. Thus, I decided to leave the university.

My personal experience at the university made me aware of the deficiencies of what I call the individual model of workplace sexual harassment. That model depicts harassment as an individual, often sexualized, dispute between the harasser and his victim.¹¹ As a result, it renders largely invisible the organizational employer's role in creating or fostering a hostile work environment. The organizational predictors of harassment—a sex-segregated work force, male-defined jobs, and an organizational tolerance for harassing behavior—play little, if any role, in the federal courts' adjudi-

⁵ Letter from the Department of Management Tenure Committee to author (Feb. 5, 1999) (on file with author).

⁶ Letter from Bob White, Acting Provost, to author, regarding Fourth-Year Review (Mar. 9, 1999) (on file with author).

⁷ *Id.*

⁸ *Id.*

⁹ I made a public records request for copies of those other seven promotion and tenure letters, which I have on file. The Acting Provost withdrew his recommendation that I seek early external review after my department submitted additional information to him about my scholarly work. Letter from Bob White, Acting Provost, to Jack Brown, Chair, Department of Management, regarding Anne Lawton's Fourth-Year Review (Apr. 15, 1999).

¹⁰ *See supra* note 4.

¹¹ I use masculine pronouns when referring to the harasser because most harassers are men. *Emperor's New Clothes*, *supra* note 2, at 76 n.6 (1999).

cation of sexual harassment complaints. As a result, the organizational employer is presumed to be objective and competent to screen and resolve complaints of sexual harassment within the workplace. Moreover, because the employer is presumed to be a neutral, objective mediator of these workplace disputes, the federal courts view with skepticism, and even hostility, victims' claims that subsequent, negative work evaluations constitute retaliation.¹² Finally, because the individual model locates the source of the harm with the individual harasser, the assumption is that, without notice, the organizational employer is unaware of the harassing conduct. Thus, the burden falls on the victim to complain. If she fails to do so, it is her fault for not alerting her employer so that it could take steps to stop the harassing behavior.

I saw the individual model of harassment in operation in my case. Women faculty members were in the minority at the business school. When I left in 2000, women comprised less than 15% of the tenured and tenure-track faculty members at the business school. During my two-year stint in the finance department, I was the only untenured faculty member, and there were only two women—myself and a senior, tenured faculty member—out of approximately fifteen tenured and tenure-track faculty members.

The significant disparity in numbers of male versus female faculty members affected the working environment. A university-sponsored study conducted in 1999 at the business school found that there was “no broad-based support of diversity among faculty/[administration,] and some evidence of clear resistance.”¹³ Moreover, university studies “establish[ed] that women suffer[ed] from a “‘chilly or hostile’ environment.”¹⁴ Finally, an internal memorandum from the university’s provost office dated less than a year before I filed my informal harassment complaint concluded that “females [were] less likely to be tenured than males and more females proportionately leave [the] University than males before the point of the tenure decision.”¹⁵

The university, however, considered none of this evidence relevant to my sexual harassment complaint. Yet, the social science research demonstrates that organizational factors are reliable predictors of the incidence of workplace harassment. The university treated my harassment complaint as an individual problem that I was having with a specific faculty member,

¹² See *infra* notes 193-94, 203-06 and accompanying text.

¹³ Plaintiff Elizabeth Li’s Memorandum in Opposition to Motion for Summary Judgment at 24, *Li v. Miami University*, No. C-1-97-395 (S.D. Ohio Aug. 21, 2000) (citation omitted) (copy on file with author).

¹⁴ *Id.* at 49 (citations omitted).

¹⁵ Memorandum from Anne H. Hopkins, Information on Hiring and Retention of Tenure Track Faculty by Gender, at 1 (May 2, 1996) (copy on file with author).

rather than as evidence of a larger pattern of discriminatory workplace conduct. Moreover, because my complaint was against a specific faculty member, the university presumed that any further complaints I raised were not evidence of retaliation, but rather the ordinary tribulations of a tenure-track faculty member. By framing the problem within the dominant model of sexual harassment, the university missed the larger context in which the harassment was occurring. Thus, I became yet another statistic: one of the many women who decided to leave the university prior to her tenure year.¹⁶

This Article is about the individual model of workplace sexual harassment, which I contend is fundamentally flawed. In Part I.A., I describe the three liability standards currently applied in cases of workplace sexual harassment. I conclude that all three standards share a common theme: they are based on the assumption that the organizational employer plays no role in creating the hostile work environment. I contend that the liability rules reflect the manner in which the Supreme Court defined the problem of sexual harassment on the job—as an individual, rather than an organizational, problem. I then trace, in Part I.B., the development of the individual model from the Supreme Court's first sexual harassment case—*Meritor Savings Bank v. Vinson*¹⁷—through the Court's enunciation of an affirmative defense in cases of harassment by workplace supervisors in *Burlington Industries v. Ellerth*¹⁸ and *Faragher v. City of Boca Raton*.¹⁹ In all three opinions, the Court framed the problem of workplace sexual harassment as a tort-like, interpersonal dispute in which the employer is an innocent bystander. By doing so, the Court shifted the focus away from the organizational predictors of harassment and created incentives for employers to engage in litigation-limiting, rather than discrimination-reducing, strategies.

In Part II of the Article, I describe why the individual model does not accomplish its stated goal of deterrence. Part II.A. sets forth the predictors of workplace sexual harassment, which are largely organizational in nature. In Part II.B., I explain how the individual model of harassment shifts the focus of analysis away from the organizational causes of harassment toward the employer's paper policies and procedures. Thus, the lower federal courts either ignore or deem irrelevant evidence of the organizational predictors of harassment and concentrate on what the individual model renders relevant—the employer's anti-harassment policy and grievance procedure. I argue that by doing so, the federal courts create distorted incentives for employers—incentives to promulgate litigation-proof anti-harassment programs that do little to attack the root causes of workplace sexual harass-

¹⁶ See *supra* note 15 and accompanying text.

¹⁷ 477 U.S. 57 (1986).

¹⁸ 524 U.S. 742 (1998).

¹⁹ 524 U.S. 775 (1998).

ment. Finally, in Part II.C., I examine how the individual model displaces responsibility for eliminating workplace sexual harassment onto the victims of harassment. The problem, however, is that few victims report harassment. Moreover, the lack of judicial oversight allows employers to redefine workplace discrimination issues as interpersonal problems to be corrected by the application of appropriate management techniques. This reframing, in turn, reinforces a conception of harassment as a non-gendered, personal conflict that simply happens to occur at work.

In Part III of the Article, I argue that two conclusions emerge from the sexual harassment case law. The first, discussed in Part III.A., is that the Court obscured the reasons for its decision to fashion an individual model of harassment by invoking the mantra of fidelity to statutory language and Congressional intent. The second, which I examine in Part III.B. of the Article, is that the primary goal of the individual model is the preservation of an intent-based model of anti-discrimination law premised on a triad of assumptions about merit, employer rationality, and the wisdom of market-based solutions to employment discrimination.

Finally, I conclude with a brief outline of an alternative model of workplace sexual harassment which holds employers directly liable for their role in creating or fostering a hostile work environment. But, I am not sanguine about the prospects for change. The individual model of harassment is not the result of fidelity to Congressional intent or the product of considered evaluation of the social science research on the predictors of harassment and the behavior of victims. It stems from deeply held, but controversial, beliefs about merit and the ability of the market to correct problems of workplace discrimination. Unfortunately, until these unexamined assumptions are subject to more critical scrutiny, it is unlikely that meaningful change in sexual harassment legal doctrine will occur.

I. DEFINING THE PROBLEM

*"In any situation, the way a problem is defined generally dictates the kind of solution that is proposed; that is, the proposed solution fits the defined problem."*²⁰

A. *The Proposed Solution: The Current Liability Framework*

There are currently three liability schemes used in cases of workplace sexual harassment.²¹ The articulated standard of liability varies depending on whether the harasser is a supervisor or a co-worker and, if a supervisor, whether the harassment culminates in a tangible employment action.

When the harasser is the victim's co-worker, the employer is liable only if it fails to respond to the harassment once it knows or should have known of the offending workplace conduct.²² In cases of harassment by workplace supervisors, if the harassment culminates in a tangible employment action, such as termination or a failure to promote,²³ then the employer is vicariously liable for its supervisor's conduct.²⁴

²⁰ Barbara A. Gutek, *Sexual Harassment at Work: When an Organization Fails to Respond*, in 5 *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* 272, 285 (Margaret S. Stockdale ed., 1996) (citing V.F. NIEVA & BARBARA A. GUTEK, *WOMEN AND WORK: A PSYCHOLOGICAL PERSPECTIVE* (1981)).

²¹ B. Glenn George argues that the lower federal courts have improperly applied the affirmative defense enunciated in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) to cases involving employer negligence. See B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 *YALE J.L. & FEMINISM* 133, 134 (2001). She contends that a proper reading of *Ellerth* and *Faragher* results in four liability schemes: (1) negligence for co-worker harassment, (2) vicarious liability for harassment by a supervisor resulting in a tangible employment action, (3) vicarious liability subject to an affirmative defense for harassment by a supervisor that does not result in a tangible employment action and of which the employer is unaware, and (4) negligence for harassment by a supervisor of which the employer is aware and to which the employer fails to respond. See *id.* Accepting George's argument does not change the fact that the Supreme Court's description of the liability framework is missing a critical component—the organization's liability for its role in creating the hostile work environment.

²² See *Faragher*, 524 U.S. at 799-800 (citing lower federal court decisions); *accord* *Loughman v. Malnati Org.*, 395 F.3d 404, 407 (7th Cir. 2005); *Minnich v. Cooper Farms, Inc.*, 39 F. App'x 289, 293-94 (6th Cir. 2002) (per curiam); *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000); *Burrell v. Star Nursery*, 170 F.3d 951, 955 (9th Cir. 1999).

²³ A tangible employment action is "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 (citations omitted).

²⁴ See *Faragher*, 524 U.S. at 790-92. In *Pa. State Police v. Suders*, 124 S. Ct. 2342 (2004), the Court said that employers may be held "strictly liable." 124 S. Ct. at 2352. While "strict liability" de-

When the harassment does not culminate in a tangible employment action—the “affirmative defense” cases—the employer, once again, is vicariously liable²⁵ but may assert a two-pronged defense to liability.²⁶ Prong one of the affirmative defense requires the court to examine the reasonableness of the employer’s efforts “to prevent and correct promptly any sexually harassing behavior.”²⁷ Under prong two, the court must determine whether the “employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²⁸ The employer must prove both elements of the defense by a preponderance of the evidence.²⁹

These three standards of employer liability share a common theme: they all are premised on the assumption that the organizational employer does not create or foster the harassing work environment. In co-worker harassment cases, the federal courts hold the employer liable only if it fails to promptly respond to reported harassment.³⁰ As the Sixth Circuit explained in *Minnich v. Cooper Farms, Inc.*,³¹ “[t]he act of discrimination in such a case is not the harassment, but rather the inappropriate response to the charges of harassment.”³² In other words, liability adheres based on the employer’s improper response to harassment, not its role in cultivating a hostile work environment.

The analysis is remarkably similar in the affirmative defense cases. While an employer must exercise reasonable care to prevent workplace harassment by supervisors—an obligation not imposed in co-worker cases—the Supreme Court has held that an employer may satisfy its pre-

notes “liability without proof of fault,” it most often is applied to cases involving abnormally dangerous activities or manufacturers of defective products. See DAN B. DOBBS, *THE LAW OF TORTS* 3 (2000).

²⁵ “Although the Court has described this liability-with-a-defense as vicarious liability, the presence of a defense sharply distinguishes it from the ordinary case of vicarious liability, where the employer cannot defend by showing reasonableness of its actions.” DOBBS, *supra* note 24, at 915-16; accord Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 719-20 (2000).

²⁶ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. While the Supreme Court in *Ellerth* explained that an employer might “raise an affirmative defense to liability or damages,” *Ellerth*, 524 U.S. at 765, recently, in *Suders*, the Court described the affirmative defense as a “defense to liability,” *Suders*, 124 S.Ct. at 2349. Even before the Court’s recent decision in *Suders*, however, the lower federal courts had interpreted the affirmative defense as precluding liability altogether, rather than merely limiting the employer’s liability for damages. See Grossman, *supra* note 25, at 676-77.

²⁷ *Faragher*, 524 U.S. at 807.

²⁸ *Id.*

²⁹ *Id.*

³⁰ The Supreme Court has not yet ruled on the employer liability standard for a co-worker harassment case. *Suders*, 124 S. Ct. at 2352 n.6.

³¹ 39 F. App’x 289 (6th Cir. 2002).

³² *Id.* at 294 (citation omitted).

vention obligation by “install[ing] a readily accessible and effective policy for reporting and resolving complaints of sexual harassment.”³³ In theory, the lower federal courts are supposed to evaluate the effectiveness of the employer’s sexual harassment grievance procedure, but, in practice, the courts require nothing more from employers than “file-cabinet” compliance, i.e., the mere existence of a policy and procedure.³⁴ In effect, there is no substantive prevention obligation, and the inquiry in affirmative defense cases, like that in co-worker harassment cases, amounts to little more than an examination of the employer’s response to reported harassment.³⁵ Consequently, the employer’s liability stems from its failure to control a rogue employee, not from any independent role that it plays in creating the work environment in which harassment was likely to and actually did occur.³⁶

Even when the supervisor’s harassment culminates in a tangible employment action, the Supreme Court has fashioned a liability framework that creates a theoretical boundary between the supervisor and his employer. Labeling the employer’s liability for supervisor harassment as vicarious is curious. Vicarious liability is liability without fault.³⁷ Thus, the employer is liable because “he must stand good for the wrong of another

³³ *Suders*, 124 S.Ct. at 2347 (The employer must also show “that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus.”).

³⁴ See Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 216-222 (2004) [hereinafter *Empirical Vacuum*] (citing cases and concluding that most federal courts “equat[e] an employer’s creation and distribution of an anti-harassment policy with prevention of harassment”).

³⁵ In theory, there is another difference between the affirmative defense and co-worker harassment cases: in the former, the employer bears the burden of proof on the affirmative defense, while the employee bears the burden of proof on liability in the latter. See, e.g., *Swinton v. Potomac Corp.*, 270 F.3d 794, 803-04 (9th Cir. 2001) (explaining that the employer liability standard for co-worker harassment was “substantively similar to the *Ellerth/Faragher* defense,” with the “chief difference” being which party bore the burden of proof); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 n.4 (10th Cir. 1998) (explaining that while “many of the same facts will be relevant to both negligence and vicarious liability claims, in asserting that the employer was negligent, the plaintiff bears the burden of establishing that the employer’s conduct was unreasonable, while in a misuse of authority claim, the employer bears the burden of establishing as an affirmative defense that it exercised reasonable care to prevent harassment”); *Bartniak v. Cushman & Wakefield, Inc.*, 223 F. Supp. 2d 524, 529 (S.D.N.Y. 2002) (citing *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1180 (2d Cir. 1996)) (explaining that “the major difference” in employer liability standards between a co-worker and supervisor harassment case is the burden of proof). In practice, however, the standards of liability are essentially the same. By shifting the burden of proof on the affirmative defense from the employer to the employee, the lower federal courts have blurred any real difference between the two. See *Empirical Vacuum*, *supra* note 34, at 235-42, 260-66.

³⁶ This conclusion holds true even if the Supreme Court intended to maintain a separate cause of action based on the employer’s failure to respond once it obtained notice that harassment was occurring in the workplace. See *Gutek*, *supra* note 20.

³⁷ See *DOBBS*, *supra* note 24, at 906.

person³⁸—a supervisor whom the employer had the misfortune of hiring. The employer has no independent liability based on its part in the creation of a discriminatory work environment.

Thus, the current liability framework for workplace harassment is flawed in at least two respects. First and foremost, there is no theory of direct liability for the employer's role in creating or fostering a hostile work environment. An employer may be held directly liable for failing to respond once an employee reports the harassing conduct. However, holding an employer liable for its failure to respond to harassment is not the same as making the employer responsible for its role in creating the hostile work environment in the first instance.

Second, the Supreme Court's decision to label the employer's liability for supervisor harassment as vicarious is simply inconsistent with Title VII jurisprudence. If a supervisor at IBM decides not to promote a female manager because of her sex, IBM is directly liable for that decision. But, if the same female manager loses a promotion because she refuses to have sex with her male superior, then IBM is vicariously liable for the supervisor's harassment.³⁹

These flaws in the liability framework are a direct result of the way in which the Supreme Court has defined the problem of sexual harassment at work. In its sexual harassment liability opinions, the Court has shifted the focus away from the organizational employer onto the individual harasser and his victim. By situating the source of sexual harassment with the individual harasser and depicting the organizational employer as an "innocent" bystander, the Court has painted a picture of workplace harassment as an interpersonal, tort-like dispute, thereby obscuring its connection to larger organizational problems of sex discrimination. Finally, by defining harassment as an interpersonal and individual dispute, the Court has created a need for employer notice and has justified its conditioning of victim recovery upon exhaustion of the employer's internal grievance procedure.

³⁸ *Id.*

³⁹ The example in the text is drawn from a question posed by one of the Justices to counsel for the City of Boca Raton during oral argument in *Faragher*. See Transcript of Oral Argument at *35-36, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1998 U.S. TRANS LEXIS 20.

B. *How the Court Defined the Problem of Workplace Sexual Harassment*

1. How *Meritor* Shaped the Debate

*Meritor Savings Bank v. Vinson*⁴⁰ was the Supreme Court's first opinion on workplace sexual harassment. *Meritor* began when Mechelle Vinson filed suit against Sidney Taylor, her supervisor, and Capital City Federal Savings and Loan Association (the "Bank"),⁴¹ alleging "sex discrimination in the form of sexual harassment," in violation of Title VII and the Fifth Amendment to the U.S. Constitution.⁴² After an eleven-day bench trial, Judge Penn of the district court for the District of Columbia rendered a decision in favor of defendants Taylor and the Bank.⁴³ Judge Penn found that Vinson had not been "required to grant Taylor or any other member of Capital sexual favors as a condition of either her employment or in order to obtain promotion."⁴⁴ Therefore, he found that Vinson had not been "the victim of sexual harassment and was not the victim of sexual discrimination while employed at [the Bank]."⁴⁵

The D.C. Circuit Court of Appeals reversed, holding that the trial court had improperly limited its inquiry to whether Taylor had made out a claim for quid pro quo harassment.⁴⁶ The D.C. Circuit held that on remand the trial court should evaluate the evidence in light of a hostile work environment theory of sexual harassment.⁴⁷ The Supreme Court affirmed the decision of the D.C. Circuit on the question of whether Title VII includes a claim for a hostile work environment based on sex. The Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."⁴⁸

Meritor was a seminal employment discrimination decision because it recognized the right of victims of workplace sexual harassment to sue under Title VII not only for quid pro quo harassment, but also for the far more

⁴⁰ 477 U.S. 57 (1986).

⁴¹ Capital City was the name of Vinson's and Taylor's employer prior to a 1985 bank merger. See Brief for the Petitioner at ii, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 669769 (The brief explains that Capital City merged with Northern Virginia Federal Savings and Loan Association, effective May 2, 1985, taking on the name of PSFS Savings Bank. PSFS changed its name to Meritor Savings Bank four months later, effective August 29, 1985.).

⁴² *Vinson v. Taylor*, No. 78-1793, 1980 U.S. Dist. LEXIS 10676, at *1 (D.D.C. Feb. 26, 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd*, 477 U.S. 57 (1986).

⁴³ *Id.* at *24.

⁴⁴ *Id.* at *20, ¶ 4.

⁴⁵ *Id.* at *22-23, ¶ 21.

⁴⁶ See *Vinson v. Taylor*, 753 F.2d 141, 144-45 (D.C. Cir. 1985), *aff'd*, 477 U.S. 57 (1986).

⁴⁷ See *id.* at 145.

⁴⁸ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

common form of workplace harassment—hostile work environment.⁴⁹ The decision, however, was perplexing for at least two reasons. First, the Court addressed the issue of welcomeness and the apparently related question of the admissibility of evidence of Mechelle Vinson’s dress and speech,⁵⁰ even though neither issue was relevant to the case on remand. Second, even though it admitted that the “debate over the appropriate standard for employer liability ha[d] a rather abstract quality to it given the state of the record,” the majority⁵¹ nonetheless established the parameters of a liability rule that was at odds both with the EEOC Guidelines and prevailing Title VII precedent. For the majority, the two issues were intertwined: framing the facts within a discussion of welcomeness and workplace attire individualized the harm, thereby making it easier to craft a liability standard premised on notice to the organizational employer.

a. *Revealing Assumptions About Workplace Attire*⁵²

In *Meritor*, the Supreme Court drew a distinction between “voluntary” and “welcome” sex-related conduct, holding that voluntary participation in sexual conduct is not a defense in a Title VII case.⁵³ The Court concluded that the critical inquiry was not the voluntary nature of the sexual contact, but whether the plaintiff welcomed the sexual advances made to her.⁵⁴ The Court further explained that in evaluating whether a woman finds sexual advances welcome, evidence of “sexually provocative speech or dress” is not *per se* inadmissible.⁵⁵

What is striking about this portion of the *Meritor* opinion is that Sidney Taylor, whom Mechelle Vinson claimed had harassed her, denied having had any sexual contact with Vinson.⁵⁶ Why, in a case in which the victim alleged that the advances were unwelcome and the defendant harasser

⁴⁹ See Tanya Kiteri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 211-12 n.159 (2001).

⁵⁰ *Meritor*, 477 U.S. at 68-69.

⁵¹ Justice Marshall wrote a concurring opinion in *Meritor* because he disagreed with the majority’s notice-liability standard. *Id.* at 74-78 (Marshall, J., concurring). Justices Brennan, Blackmun, and Stevens joined in Marshall’s concurring opinion. *Id.* at 74.

⁵² While *Meritor* involved sexual harassment by a workplace supervisor, the Court’s analysis of welcomeness and the relevance of evidence of the victim’s attire applies equally well to co-worker harassment cases.

⁵³ *Meritor*, 477 U.S. at 68. The Court used the term voluntary “in the sense that the complainant [is] not forced to participate against her will” in sexual conduct. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 68-69.

⁵⁶ See *Vinson v. Taylor*, No. 78-1793, 1980 U.S. Dist. LEXIS 10676, at *6 (D.D.C. Feb. 26, 1980), *rev’d*, 753 F.2d. 141 (D.C. Cir. 1985), *aff’d*, 477 U.S. 57 (1986).

claimed that he had never even engaged in the complained-of sexual conduct, would the Court debate whether the proper standard in a hostile environment case was the welcomeness versus the voluntariness of sexual advances? Furthermore, if the advances were either not welcome, as Vinson claimed, or non-existent, as Taylor contended, then of what relevance was evidence of Vinson's workplace attire? In order to understand the context in which these issues arose, it is necessary to revisit the lower court opinions in *Meritor*.

There are two noteworthy aspects of the trial court's opinion in *Meritor*. First, while the district court found that Vinson's granting of sexual favors had not been a condition of her employment,⁵⁷ it went on to make an unusual, alternative finding. The court concluded that even if Vinson and Taylor had "engaged in an intimate or sexual relationship during the time of [Vinson's] employment with Capital, that relationship was a voluntary one."⁵⁸

What is unusual about this finding is that it was "directly at odds with both parties' version of the events."⁵⁹ At trial, Taylor denied having had any sexual contact with Vinson, voluntary or otherwise. "He testified that he never fondled [Vinson], never made suggestive remarks to her and never engaged in a sexual relationship with her and never asked her to do so."⁶⁰ Of course, Vinson testified to the contrary, alleging that she had engaged in sexual relations with Taylor against her will, that Taylor often had raped her, and that he had fondled her and made suggestive remarks.⁶¹ It is unclear, then, on what evidence the trial court based its alternative finding of fact.⁶²

Second, the district court never mentioned Vinson's dress or speech in its written opinion and findings of fact.⁶³ Moreover, even though the issue of the admissibility of Vinson's dress or speech was not briefed on appeal

⁵⁷ See *id.* at *20, ¶ 4.

⁵⁸ *Id.* at *20, ¶ 5.

⁵⁹ Brief for the American Federation of Labor and Congress of Industrial Organizations et al. as Amici Curiae in Support of Respondent at 15 n.6, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 669774 [hereinafter AFL-CIO Brief].

⁶⁰ *Vinson*, 1980 U.S. Dist. LEXIS 10676, at *6.

⁶¹ *Id.* at *3-4.

⁶² See AFL-CIO Brief, *supra* note 59, at 15 n.6 (contending that even if "the District Court's eccentric finding [were] entitled to the usual degree of respect, the question would remain whether that finding [was] clearly erroneous . . . [as] the defense was that there had been no sexual relationship at all, [and, thus,] the evidence tending to show that what took place between Taylor and Vinson was not, as Vinson claimed, coerced [was] scant to say the least.").

⁶³ See generally *Vinson*, 1980 U.S. Dist. LEXIS 10676.

to the D.C. Circuit,⁶⁴ it surfaced, albeit briefly, in the D.C. Circuit's majority opinion.⁶⁵ The majority noted that it was uncertain what the district court had meant when it found that if Taylor and Vinson had engaged in sexual relations, that conduct was voluntary.⁶⁶ But, the D.C. Circuit explained that if the district court had meant that voluntary submission to sexual relations negated the possibility of a finding of sexual harassment under Title VII, then the district court was incorrect.⁶⁷ While unnecessary to its decision on voluntariness, the majority then speculated in a footnote that while "[t]he District Court [had] not elaborate[d] on its basis for the finding of voluntariness . . . it may have considered the voluminous testimony regarding Vinson's dress and personal fantasies."⁶⁸ The court further noted that because "a woman does not waive her Title VII rights by her sartorial or whimsical proclivities . . . that testimony had no place in this litigation."⁶⁹ These two lines dropped into a footnote in the majority's decision formed the basis not only for an impassioned dissent by Judge Bork (joined by Judges Scalia and Starr) to the panel's decision to deny rehearing *en banc*,⁷⁰ but also for the Bank's petition for certiorari.⁷¹

It is odd, then, that the Supreme Court granted certiorari on an issue that merited no mention in the trial court's opinion and only a two-line reference in a footnote in the Court of Appeals' decision. Moreover, because Taylor had testified at the original trial that no sexual conduct, whether proper or improper, had occurred,⁷² on remand, he could not testify that Vinson had welcomed his advances without subjecting himself to charges of perjury.⁷³ And, if Taylor could not argue that Vinson had welcomed a

⁶⁴ Transcript of Oral Argument at *32, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1986 U.S. TRANS LEXIS 86, at *32 [hereinafter *Meritor* Oral Argument Transcript] (explanation by Patricia Barry, counsel for Vinson, that the "issue of evidence and dress is now before this Court without also having been briefed in the Court of Appeals").

⁶⁵ See *Vinson v. Taylor*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985), *aff'd*, 477 U.S. 57 (1986).

⁶⁶ *Id.* at 145-46.

⁶⁷ *Id.* at 146.

⁶⁸ *Id.* at 146 n.36. Apparently, the court drew this conclusion from portions of the trial transcript provided by the Bank on appeal. See *id.*; see also *infra* note 90 and accompanying text.

⁶⁹ *Vinson*, 753 F.2d at 146 n.36.

⁷⁰ See generally *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting).

⁷¹ In its petition for certiorari, the Bank asked the Supreme Court to take up three questions. The third was whether "evidence that the complaining employee invited and welcomed her supervisor's sexual advances and voluntarily engaged in workplace sexual conduct [was] admissible in defense of her Title VII claim." Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at (i), *PSFS Savings Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

⁷² See *Vinson v. Taylor*, No. 78-1793, 1980 U.S. Dist. LEXIS 10676, at *6 (D.D.C. Feb. 26, 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd*, 477 U.S. 57 (1986).

⁷³ *Meritor* Oral Argument Transcript, *supra* note 64, at *37.

sexual relationship with him, what relevance did evidence of Vinson's dress and speech have to the case on remand?

The answer is that neither issue was relevant to the *Meritor* litigation itself. But, both afforded the majority the opportunity to sketch out the parameters of a liability rule that was at odds with traditional Title VII jurisprudence.

b. *Agency Principles and Rules of Liability*

In *Meritor*, the Supreme Court rejected a rule of "automatic" employer liability for workplace sexual harassment by supervisors.⁷⁴ Instead, the Court held that "Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evince[d] an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."⁷⁵ Citing generally to Sections 219-237 of the Second Restatement of Agency, the Court then explained that the lower federal courts should look to agency law principles to guide their analysis of employer liability.⁷⁶

The Court's resort to agency principles and its citation to Sections 219-237 of the Second Restatement of Agency is perplexing for several reasons. First, nothing in the statutory text of Title VII compelled the conclusion that the word "agent" evinced Congress's intent to limit employers' liability for their employees' conduct under Title VII.

Defenders of *Meritor* . . . can argue that the blame for this situation, if any, lies with Congress rather than with the Court. Agency law, they would maintain, is relevant to the employer liability question simply because Title VII makes it relevant. . . . For better or worse, therefore, it seems that agency law controls, and that the courts' task is to make the best selections from the array of available agency rationales. This dilemma, however, is a false one, for Section 701(b) of Title VII almost certainly does not compel recourse to the common law of agency.⁷⁷

⁷⁴ See *Meritor*, 477 U.S. at 72 (citation omitted) (holding that employers are not "automatically liable for sexual harassment by their supervisors").

⁷⁵ *Id.* Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b) (2000).

⁷⁶ *Meritor*, 477 U.S. at 72.

⁷⁷ Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Sav. Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1257 (1991); cf. Lauren B. Edelman, Christopher Uggen & Howard Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 445 (1999) [hereinafter *Rational Myth*] (concluding that the fact "[t]hat the EEOC must make a case for how agency principles should be interpreted in the

In fact, inclusion of the word “agent” in the definition of employer could have signaled Congress’s intent to *expand* liability by holding not only organizational employers, but also individual employees, responsible for their discriminatory conduct.⁷⁸

Second, at the time that the Court decided *Meritor*, the EEOC Guidelines provided that “general Title VII principles,” not agency law rules, governed the employer’s liability for workplace harassment by a supervisor.⁷⁹ Thus, if an employee proved that her supervisor had violated Title VII, her employer was liable for that discriminatory decision, regardless of whether the employer had knowledge or notice of the discriminatory conduct.⁸⁰

Third, Sections 219 through 237 appear in that portion of the Restatement governing the employer’s liability for its employees’ torts.⁸¹ But, as Professor MacKinnon explained in her brief on behalf of Mechelle Vinson in *Meritor*, sexual harassment is not a tort.

[W]hile the facts of sexual harassment may be tortious, and torts are compatibly appended in a typical claim, sexual harassment as a term of art is not technically a tort any more than

context of hostile environment cases—and that *Meritor* cites the EEOC brief in its opinion on what agency principles mean—show that there agency principles do not *require* courts to defer to internal grievance procedures”); Houtt Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 288 (1995) (describing “[t]he absence of any textual basis for vicarious discrimination liability [as] something of a conundrum”).

⁷⁸ See Phillips, *supra* note 77, at 1258 & n.158 (citation omitted) (concluding that § 701(b), which defines employer, “is an individual liability provision” and noting that “Title VII provides that an employer’s agent can be individually liable for his discriminatory acts by specifically including agents in the definition of employer”). A majority of federal courts, however, have held that individual employees are not liable under Title VII. See Tracy L. Gonos, *A Policy Analysis of Individual Liability—The Case for Amending Title VII to Hold Individuals Personally Liable for Their Illegal Discriminatory Actions*, 2 N.Y.U. J. LEGIS. & PUB. POL’Y 265, 271-76 (1998/1999).

⁷⁹ 29 C.F.R. § 1604.11(c) (1985); *Meritor*, 477 U.S. at 74 (citing the 1985 EEOC Guidelines on Discrimination Because of Sex) (“Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.”). As Justice Marshall explained in his concurring opinion in *Meritor*, the notice rule that the majority adopted could not “coherently be drawn from the law of agency.” *Meritor*, 477 U.S. at 77 (Marshall, J., concurring).

⁸⁰ See 29 C.F.R. § 1604.11(c) (1985); see also *Meritor*, 477 U.S. at 75 (Marshall, J., concurring) (citation omitted) (explaining that the EEOC and “the courts ha[d] held for years that an employer is liable if a supervisor or an agent violate[d] the Title VII, regardless of knowledge or any other mitigating factor”).

⁸¹ See RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958). The Restatement of Agency is currently under revision. See RESTATEMENT (THIRD) OF AGENCY (Tentative Draft No. 5, 2004).

other species of discrimination in employment are technically torts. Because group-based bigotry is not accidental or individualized, as torts tend to be, tort tests tend not to fit.⁸²

What is missing from an analysis premised on tort is a recognition that sexual harassment occurs *because* of sex. Harassment is not an individual, personal dispute, but rather a form of sex discrimination. In fact, “[s]exual harassment and sex discrimination appear to go together,”⁸³ even though “people do not routinely see the connection between gender-related discrimination in the workplace and sexual harassment.”⁸⁴ Viewing sexual harassment as an individual, tort-like injury obscures the relationship between sexual harassment and sex discrimination, both of which occur because of group-based bigotry.

c. *The Path Established by Meritor*

While unnecessary to the disposition of Vinson’s lawsuit on remand, the Court’s discussion of welcomeness and the admissibility of evidence of a victim’s workplace attire set the stage for its liability analysis. In *Meritor*, the Court deviated from both traditional Title VII liability rules and the existing EEOC Guidelines when it held that employers are not “automatically liable for sexual harassment by their supervisors.”⁸⁵ An individualized model of workplace harassment provided the theoretical justification for that deviation.

If sexual harassment is an individual, tort-like dispute, then it seems only fair that employers be held liable only for their failure to respond to reported harassment. As counsel for Meritor Savings Bank contended at oral argument, “there is something . . . very unfair about hailing [sic] an innocent employer into court for a problem that it was unaware of and would have corrected voluntarily.”⁸⁶ This presumption of employer innocence, in turn, creates a need for victim reporting. After all, if the employer

⁸² Brief of Respondent Mechelle Vinson, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1986 WL 728234. The original brief does not contain page numbers.

⁸³ Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 32 (1993).

⁸⁴ Audrey J. Murrell, Josephine E. Olson, & Irene Hanson Frieze, *Sexual Harassment and Gender Discrimination: A Longitudinal Study of Women Managers*, 51 J. SOC. ISSUES 139, 146 (1995) (citation omitted).

⁸⁵ *Meritor*, 477 U.S. at 72 (citation omitted).

⁸⁶ *Meritor* Oral Argument Transcript, *supra* note 64, at *19; *see also* Good v. MMR Group, Inc., No. 3:00CV-182-H, 2001 U.S. Dist. LEXIS 20036, at *15 (W.D. Ky. Dec. 4, 2001) (noting that the employer “could not address problems of which it was unaware”).

is unaware of the harassment and plays no role in creating the hostile work environment, then “[f]ederal law cannot help to correct the problem of workplace discrimination ‘without the cooperation of the victims.’”⁸⁷ Thus, the individual model shifts the burden of alleviating workplace harassment from the employer to the victim of harassment.⁸⁸

However, if harassment results from the interplay of individual and organizational factors, then it is far more difficult to justify a rule of either vicarious liability or one premised on notice to the employer of the discriminatory harassment. If the organizational employer is, in part, responsible for creating the hostile work environment, then why should it not be liable for it and why would notice be necessary?

In *Meritor*, the Court began to craft a theory of workplace harassment premised on a model of individual, rather than organizational, harm. The Court’s analysis of whether sexual advances are welcome, evidenced, in part, by a woman’s workplace attire and speech,⁸⁹ served to focus attention on the individual harasser and his victim. By including these issues in its first opinion on sexual harassment, in particular, in a case when neither was relevant to the litigation on remand and there was an incomplete trial court transcript,⁹⁰ the Court began to shape a conception of harassment as a tort-like, individual dispute that simply happens to occur in the workplace.

2. *Ellerth and Faragher: Meritor’s Legacy*

In *Burlington Industries v. Ellerth*⁹¹ and *Faragher v. City of Boca Raton*,⁹² the Supreme Court continued what it began in *Meritor*—creating

⁸⁷ *Lawrence v. Wal-Mart Stores, Inc.*, 236 F. Supp. 2d 1314, 1328 n.23 (M.D. Fla. 2002) (racial harassment case).

⁸⁸ *See Reese v. Meritor Auto., Inc.*, 5 F. App’x 239, 245 (4th Cir. 2001) (noting that “[t]he effects of excusing failures to report would be far reaching and inconsistent with Title VII’s goal of purging the workplace of sexual harassment”); *see also infra* Part II.C.

⁸⁹ *See* Brief of Petitioner at 26, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 669769 (noting that evidence of a victim’s workplace attire and speech “show the personal nature of the alleged relationship and the welcomeness of the alleged advances”).

⁹⁰ AFL-CIO Brief, *supra* note 59, at 19 n.7 (explaining that the Court of Appeals had only those portions of the trial court transcript provided by the Bank). Neither the Court of Appeals nor the Supreme Court had a complete transcript because Vinson lacked the funds to pay for one, and the district court denied her request, pursuant to 28 U.S.C. § 753(f), for a free transcript. *See Meritor* Oral Argument Transcript, *supra* note 64, at *28 (explanation by Patricia Barry, counsel for Vinson, that her client had been unable to afford a trial transcript). The district court explained its decision to deny Vinson’s request for a free transcript on the ground that Vinson’s case did not “[present] a substantial question which requires a transcript be furnished at taxpayers’ expense.” *Vinson v. Taylor*, No. 78-1793, 1980 U.S. Dist. LEXIS 12365, at *5 (D.D.C. June 10, 1980) (citation omitted).

⁹¹ 524 U.S. 742 (1998).

an individualized model of workplace sexual harassment.⁹³ Peppered throughout the opinions in *Ellerth* and *Faragher* are descriptions of workplace behavior which situate the source of sexual harassment with the individual harasser. At the same time, the Court's opinions make clear that the employer is normally nothing more than an "innocent" bystander in the process.

In *Ellerth*, the Court held that as a "general rule . . . sexual harassment by a supervisor is not conduct within the scope of employment."⁹⁴ The Court reached this conclusion by analogizing sexual harassment to an intentional tort.⁹⁵ Drawing on part of the Restatement's scope of employment test, the Court found that sexual harassment normally is not "actuated, at least in part, by a purpose to serve the employer"⁹⁶ because "[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer."⁹⁷ The Court then noted that employers are not liable for the actions of a supervisor "seeking a personal end"⁹⁸ or for an employee's tort "committed while 'acting purely from personal ill will.'"⁹⁹

This language is interesting: it locates the source of the harassment within the pathology of the harasser. The words "personal"¹⁰⁰ and "motives"¹⁰¹ illustrate the Court's individual and psychological focus. The harasser is driven by ill will and his own personal motives¹⁰²—motives antithetical to the employer's rational business goals and objectives.

⁹² 524 U.S. 775 (1998).

⁹³ While both *Ellerth* and *Faragher* dealt with an employer's liability for its supervisors' conduct, the Court's discussion of the source of workplace harassment applies equally to cases involving co-worker harassment. Moreover, while the Court has not yet ruled on the employer liability standard to apply in a co-worker hostile environment case, under current theory, the stronger case for imposing liability without notice is one involving harassment by a supervisor. Thus, the Supreme Court's requirement of notice in supervisor cases justifies the lower federal courts' insistence on notice in co-worker cases. Moreover, it would be odd indeed if the Court made it *easier* for a plaintiff to establish employer liability in a co-worker case than a supervisor case.

⁹⁴ *Ellerth*, 524 U.S. at 757.

⁹⁵ *See id.* at 756; *cf. supra* notes 81-84 and accompanying text.

⁹⁶ *Ellerth*, 524 U.S. at 756 (citing RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1958)).

⁹⁷ *Id.* (citations omitted).

⁹⁸ *Id.* at 757 (citing F.P. MECHEM, OUTLINES OF THE LAW OF AGENCY § 368 (4th ed. 1952)).

⁹⁹ *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 235, Illustration 2 (1958)).

¹⁰⁰ "Personal" means "of or peculiar to a certain person." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1008 (3d ed. 1997).

¹⁰¹ The word "motive" is defined as "some inner drive [or] impulse . . . that causes a person to do something." *Id.* at 886.

¹⁰² In *Ellerth*, the Court acknowledged that "[t]here are instances . . . where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer." *Ellerth*, 524 U.S. at 757 (citation omitted). But, the Court made clear that such cases were the exception, not the rule.

The Court's opinion in *Faragher* paints a similar picture. In *Faragher*, the Court rejected the argument that workplace harassment by supervisors is conduct that falls within the scope of employment.¹⁰³ The Court's primary reason for doing so was its conclusion that "[a]s between an innocent employer and an innocent employee," adopting a scope of employment test would mean that employers could be liable not only for workplace harassment by supervisors, but also harassment by co-workers.¹⁰⁴

The decision to depict employers as "innocents" is an interesting one. It is odd to use language more appropriate to a criminal law defendant when referring to a defendant in a civil law case. But, the word "innocent" effectively conjures an image of an organizational employer caught between its corporate objective of maintaining a discrimination-free workplace and its unfortunate decision to hire a supervisor whom the employer could not predict would engage in harassing conduct within the workplace.

In its analysis of the scope of employment test, the Court in *Faragher* reinforced this framing of the problem. The Court explained that the reason for the dizzying array of decisions about the propriety of holding employers vicariously liable for intentional torts stemmed from the "differing judgments about the desirability of holding an employer liable for his *subordinates' wayward behavior*."¹⁰⁵ Later, the Court backed away from the implications of this policy-oriented approach, concluding that there was no evidence that in enacting Title VII, Congress intended the courts to ignore the distinction between scope of employment and "frolics or detours."¹⁰⁶

Both statements by the Court emphasized the individual and personal nature of harassment. The employer is held responsible, not because it fostered or created a hostile work environment, but because it hired a wayward employee, who engaged in a "frolic and detour"—conduct typically associated with the employee's own "personal amusement"—during work hours.¹⁰⁷ Once again, the Court's language reinforced a conception of harassment as a harm caused by individual bad actors working for an otherwise "innocent" organizational employer.

The problem with the Court's analysis, however, is that the causes of sexual harassment are both individual and organizational. Defining the problem of sexual harassment as one of individual rogue employees shifts the focus from the organizational employer to the individual harasser. This, in turn, affects the framing of the liability rules: employers are rewarded for

¹⁰³ *Faragher*, 524 U.S. at 793-801.

¹⁰⁴ *Id.* at 800.

¹⁰⁵ *Id.* at 796 (emphasis added).

¹⁰⁶ *Id.* at 798.

¹⁰⁷ The correct phrase is "frolic and detour," not "frolic or detour," as suggested by the Court. DOBBS, *supra* note 24, at 912.

promulgating paper policies and procedures, not for addressing the more difficult organizational causes of sexual harassment.¹⁰⁸ Thus, employers generally need do nothing but wait for victims to report. The resulting liability scheme makes the victims of harassment shoulder much of the burden for eliminating workplace harassment and undermines what the Court considers to be Title VII's primary purpose—the deterrence of workplace discrimination.¹⁰⁹

II. DETERRING DETERRENCE

“Nietzsche’s observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomfiting relevance to legal science.”¹¹⁰

In *Faragher v. City of Boca Raton*, the Supreme Court held that Title VII's primary objective was the deterrence of workplace sexual harassment.¹¹¹ The individual model of harassment, however, creates incentives for employers to engage in behaviors that effectively undercut this stated goal of deterrence.

The social science research demonstrates that organizational factors strongly predict the incidence of workplace sexual harassment. The current liability framework, however, rewards employers for establishing and disseminating anti-harassment policies and procedures, even though there is no evidence supporting the deterrent value of these paper policies and procedures.¹¹² Employers commonly escape liability with this “file-cabinet compliance”; thus, they have no incentive to address these underlying organizational causes of workplace sexual harassment. Because the individual model shifts the focus away from these organizational predictors, the lower federal courts either ignore or deem irrelevant evidence of sex-segregated workplaces, male-dominated jobs, and organizational tolerance for sexual

¹⁰⁸ See generally *Empirical Vacuum*, *supra* note 34 (concluding that the affirmative defense provides employers with no incentive to develop strategies for addressing the predictors of workplace sexual harassment).

¹⁰⁹ See *Gawley v. Ind. Univ.*, 276 F.3d 301, 312 (7th Cir. 2001) (citation omitted) (explaining that *Faragher's* requirement that harassment victims exhaust their employer's internal grievance procedure is “tied to Title VII's primary objective, which is not meant to provide redress but rather to avoid harm”). Professor Grossman contends that prior to *Ellerth* and *Faragher*, compensation and deterrence were “two separate, yet equally important goals” of Title VII, but that in those decisions, the Court “elevated deterrence to the ‘primary’ goal and left compensation by the wayside.” Grossman, *supra* note 25, at 720-21 (footnotes omitted).

¹¹⁰ L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 *YALE L.J.* 52 (1936).

¹¹¹ *Faragher*, 524 U.S. at 806.

¹¹² See *Empirical Vacuum*, *supra* note 34, at 233 & n.162.

harassment. Even when the organizational predictors of workplace sexual harassment are present in the facts of a case, an employer escapes liability under Title VII so long as it has created and disseminated an anti-harassment policy and a grievance procedure that provides victims with several avenues to lodge complaints.¹¹³ As a result, the individual model renders largely invisible the employer's role in creating the hostile work environment.

At the same time, because deterrence is tied to victim reporting, the model shifts to the victim the responsibility for eliminating workplace sexual harassment. But, as the social science research consistently has demonstrated, reporting is an uncommon response to sexual harassment. In addition, the lower federal courts have failed in their oversight of employers' judgments on how to implement anti-harassment policies and procedures. Doing so has provided employers with incentives to make reporting more difficult, thereby reducing the cases in which they receive notice of workplace harassment. Perhaps more important, however, the lack of judicial oversight has allowed employers to redefine cases of workplace sexual harassment as instances of non-gendered work conflict, thereby perpetuating the individual model's conception of harassment as a tort-like, interpersonal dispute.

A. *The Predictors of Harassment*

Over the past twenty years, social science researchers consistently have found that organizational factors play an influential, if not determinative, role in the occurrence of sexual harassment in the workplace. Three critical predictors of workplace harassment emerge from the research: (1) an individual's propensity to harass; (2) the organization's tolerance for harassment; and (3) the job gender context—whether the victim performs a “male identified” job in a predominantly male workplace.

First, certain men have a predisposition to engage in sexually harassing behavior.¹¹⁴ Professor Pryor and his colleagues,¹¹⁵ as well as Professors

¹¹³ See *infra* Part II.B.

¹¹⁴ See John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 *SEX ROLES* 269 (1987); see also *Empirical Vacuum*, *supra* note 34, at 223-24 (describing study).

¹¹⁵ See John B. Pryor, Janet L. Giedd, & Karen B. Williams, *A Social Psychological Model for Predicting Sexual Harassment*, 51 *J. SOC. ISSUES* 69, 78 (1995); John B. Pryor, Christine M. LaVite, & Lynette Stoller, *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction*, 42 *J. VOC. BEHAV.* 68, 77 (1993); see also *Empirical Vacuum*, *supra* note 34, at 223-24 (describing research). Pryor and his colleagues only measured the impact of behavioral norms on the likelihood of men to engage in quid pro quo harassment. With quid pro quo harassment, the employer conditions a job benefit on the employee providing the employer with sexual favors. See *Burlington Indus. v. Ellerth*,

Dekker and Barling,¹¹⁶ however, have demonstrated that organizational norms, such as the presence of harassing as opposed to professional role models, influence the willingness of men to engage in harassing conduct. Harassment by supervisory personnel both reflects an organizational tolerance for sexual harassment and shapes the behavior that male subordinates consider appropriate in the workplace.¹¹⁷ In other words, the supervisor serves as a proxy for organizational climate, “sending a signal” that harassment is “acceptable conduct in which [co-workers may] indulge safely without fear of reprisal.”¹¹⁸

Second, numerous research studies confirm that organizations that tolerate or condone sexual harassment have higher incidences of workplace sexual harassment.¹¹⁹ “[W]omen employees who believe their organization is tolerant of sexual harassment—that is, complaints are not taken seriously, it is risky to complain, and perpetrators are unlikely to be punished—experience considerably higher levels of harassment.”¹²⁰ As organ-

524 U.S. 742, 752 (1998). In *Ellerth*, the Supreme Court held that the labels “quid pro quo” and “hostile environment” harassment were of “limited utility” in determining an employer’s liability for sexual harassment by a workplace supervisor. *Id.* at 751.

¹¹⁶ Inez Dekker & Julian Barling, *Personal and Organizational Predictors of Workplace Sexual Harassment of Women by Men*, 3 J. OCC. HEALTH PSYCH. 7 (1998). Dekker and Barling measured the effect of organizational tolerance for harassment on the likelihood of men engaging in both gender or environmental harassment, and sexualized harassment, which the researchers defined to include “unwanted or inappropriate attention, physical or otherwise, and pressure for social contact outside work.” *Id.* at 11.

¹¹⁷ See *Empirical Vacuum*, *supra* note 34, at 233 n.163 (citing cases); *cf.* *Mason v. S. Ill. Univ. at Carbondale*, 233 F.3d 1036, 1048-49 (7th Cir. 2000) (Ripple, J., concurring) (explaining that racially derogatory comments by co-workers made when supervisor (who also had made such comments) was not present were relevant to “show that the supervisor’s statements to the coworkers signaled that the supervisor condoned, or even encouraged, the racial harassment of the employee”).

¹¹⁸ *Mason*, 233 F.3d at 1048-49 (Ripple, J. concurring) (race harassment case).

¹¹⁹ See Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 238 (2002); Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCH. 578 (1997); Theresa M. Glomb et al., *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 ORG. BEHAV. AND HUM. DECISION PROCESSES 309 (1997); Charles W. Mueller et al., *Sexual Harassment in the Workplace: Unanticipated Consequences of Social Control in Organizations*, 28 WORK & OCCUPATIONS 411, 415 (2001); Jill Hunter Williams et al., *The Effects of Organizational Practices on Sexual Harassment and Individual Outcomes in the Military*, 11 MIL. PSYCH. 303 (1999); *see also Empirical Vacuum*, *supra* note 34, at 225-26 (describing studies); Thom Shanker, *Inquiry Faults Commanders in Assaults on Cadets*, N.Y. TIMES, Dec. 8, 2004, at A18 (reporting results of the Pentagon inspector general’s report on sexual harassment and assault at the Colorado Springs campus of the Air Force Academy and noting that “the service only recently imposed measures to change a climate that tolerated abuse of female cadets”).

¹²⁰ See Fitzgerald et al., *supra* note 119, at 586.

izational tolerance for harassment increases, so does the likelihood that employees will experience sexual harassment on the job.

Third, sex segregation on the job plays a critical role in predicting the likelihood of workplace sexual harassment. Most Americans work in sex-segregated jobs, i.e., occupations in which one sex or the other predominates.¹²¹ Describing an occupation as segregated by sex signals not merely a “physical separation” but also “a fundamental process in social inequality.”¹²² For sex segregation is not a neutral phenomenon. It leads to differences in pay, benefits, training, and opportunity that benefit men and disadvantage women.¹²³

Women are more likely to experience sexual harassment if they work in male-dominated workplaces performing “male” identified jobs, e.g., police officer or electrician.¹²⁴ The research demonstrates that sexual harassment is both a consequence of and a mechanism for perpetuating occupational sex segregation. Several studies have found that women who suffer harassment on the job “[report] higher levels of absenteeism, stronger turnover intentions, and spent more time thinking about leaving their jobs than women who ha[ve] not been harassed.”¹²⁵ Thus, women who work at nontraditional jobs, which often are marked by skewed gender ratios, are more likely to be sexually harassed and, as a result, are more likely to consider quitting their jobs. As Professor Schultz has cogently argued, “[h]arassment serves a gender-guarding, competence-undermining function: By subverting women’s capacity to perform favored lines of work,

¹²¹ See Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 242 (1993) [hereinafter Reskin I]; see also Barbara F. Reskin, *Employment Discrimination and Its Remedies*, in SOURCEBOOK OF LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 567, 586-87 (Ivar Berg & Arne L. Kalleberg eds., 2001) [hereinafter Reskin II] (citation and footnote omitted) (explaining, based on pooled Current Population Survey data for the years 1998, 1999, and 2000, that “at the end of the twentieth century, 53 percent of women would have had to change to an occupation in which they were underrepresented for the sex’s [sic] distributions across detailed occupations to be identical”).

¹²² Reskin I, *supra* note 121, at 241.

¹²³ *Id.* at 242 (citing studies).

¹²⁴ See Fitzgerald et al., *supra* note 119, at 586; Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED SOC. PSYCH. 877, 895 (1997); Mueller et al., *supra* note 119, at 426.

¹²⁵ Fitzgerald et al., *supra* note 119, at 586; see Glomb et al., *supra* note 119, at 323 (finding that “[w]omen who experience sexually harassing behaviors, or are members of work groups where ambient sexual harassment is prevalent, report higher levels of absenteeism, intentions to quit, and are more likely to leave work early, take long breaks, and miss meetings”); Mueller et al., *supra* note 119, at 432 (explaining that there was a “significant difference between [women] who strongly agreed and [women] who strongly disagreed to the item ‘Sexual harassment is not a problem for me at work’: Those strongly perceiving sexual harassment as a problem intend to quit more than those strongly perceiving sexual harassment as not a problem”).

harassment polices the boundaries of the work and protects its idealized masculine image—as well as the identity of those who do it.”¹²⁶

This connection between occupational sex segregation and sexual harassment is missing from most judicial opinions on sexual harassment. In fact, the research on the predictors of sexual harassment plays little, if any, role in most federal court decisions on sexual harassment, even when those predictors are presented by the facts of the case.

B. *Distorted Incentives*

The federal court decisions on sexual harassment are a sanitized analysis of harassment divorced from the context in which the harassment actually occurs. The courts routinely ignore evidence of the organizational causes of harassment and focus on the employer’s anti-harassment policy and procedure when evaluating the employer’s liability for sexual harassment.

*Caridad v. Metro-North Commuter Railroad*¹²⁷ illustrates how the federal courts fail to appreciate the connection between sexual harassment and a male-dominated workplace and sex-segregated work. In *Caridad*, Veronica Caridad, an African-American woman, alleged that her supervisor, Will Clarke, had sexually harassed her, including “unwanted sexual touchings,” and that her male co-workers had “treated [her] hostilely.”¹²⁸ Caridad worked as an electrician, which is a predominantly male occupation.¹²⁹ During her tenure with the firm, she was the only woman working her shift; the remaining twelve employees were all male.¹³⁰ The brief description of the

¹²⁶ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683, 1691 (1998).

¹²⁷ 191 F.3d 283 (2d Cir. 1999).

¹²⁸ *See id.* at 290. Neither the district court nor the Second Circuit provided much detail about the complained-of conduct. The district court suggested that both Caridad’s supervisor and co-workers had engaged in the harassment, *see Robinson v. Metro-North Commuter R.R.*, Nos. 94 Civ. 7374, 95 Civ. 8594, 1998 WL 17742, at *8 (S.D.N.Y. Jan. 16, 1998), *aff’d sub nom. Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), but the Second Circuit addressed only the supervisor’s alleged harassing behavior. *See Caridad*, 191 F.3d at 290-96.

¹²⁹ According to the EEOC’s 2000 Census Data, women hold only 2.6% of all electrician positions in the United States. *See* U.S. CENSUS BUREAU, CENSUS 2000 EEO DATA TOOL, <http://www.census.gov/eo2000/index.html> (Select “Employment by OPM Occupation Groups” and hit “Next” button. At the next screen, select “US Total” and the “Next” button. Then request data table for “Electricians (635) SOC 47-2111” and hit “Display table” button). Results are on file with the author. Black, non-Hispanic women comprise less than one half of one percent of all electricians. *See id.* (Black, non-Hispanic women comprised .3% of the total pool of electricians in the United States according to the 2000 Census data.). The Second Circuit described Caridad as an African-American woman. *Caridad*, 191 F.3d at 290.

¹³⁰ *Caridad*, 191 F.3d at 290.

Metro-North workplace offered by the Second Circuit confirmed that it was a male bastion. The court explained that “[h]istorically, Metro-North ha[d] been predominantly male and White.”¹³¹ Even Caridad recognized the dilemma she faced at Metro-North. When the company offered her a transfer after she had complained about Clarke’s sexual harassment, she “declined the transfer, stating that she did not feel it would solve the problem because the other work site was also predominantly male.”¹³²

Even though the Second Circuit, in its factual summary, noted that Metro-North was a largely white and male firm and that Caridad was the only woman on her work crew, the court failed to see the relevance of historic hiring patterns and a male-dominated workplace to Caridad’s sexual harassment claim. Instead, the Second Circuit affirmed the trial court’s order granting summary judgment to Caridad’s employer on her sexual harassment claim, concluding that Caridad had unreasonably failed to use her employer’s grievance procedure to report the harassment.¹³³

Caridad highlights the problem with the assumptions underlying sexual harassment law. The Second Circuit assumed that Caridad’s problem lay with a specific “bad apple”—her supervisor, Clarke. Thus, had she complained earlier or even followed through with an internal complaint,¹³⁴ Metro-North could have taken steps to “remedy [the] [problem]”¹³⁵ that she had with Clarke.

An equally plausible explanation, however, was that Caridad threatened a male preserve—she held a well-paying, skilled job typically performed by men in a historically male firm. Research demonstrates that “the attractiveness of an establishment as an employment setting [is] negatively related to the share of jobs women and racial minorities hold . . . [and that] the more establishments pay, the less likely they are to employ racial minorities and women.”¹³⁶ By creating a hostile work environment, Caridad’s supervisor and co-workers, whom she claimed “treated [her] hostilely,”¹³⁷ could drive her from the job, thereby “defend[ing] their occupational turf from incursion by women” and protecting the economic value of their jobs.¹³⁸ What the Second Circuit missed in its analysis was the possibility

¹³¹ *Id.* at 288.

¹³² *Id.* at 290.

¹³³ *Id.* at 295.

¹³⁴ *See id.* at 290 (stating that Caridad “failed to report this harassment, at least initially” and explaining that Caridad did not pursue an internal complaint with Stephen Mitchell, the Director of Affirmative Action).

¹³⁵ *Id.* at 295.

¹³⁶ Barbara F. Reskin, Debra B. McBrier, & Julie A. Kmec, *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 ANN. REV. SOC. 335, 354 (1999) [hereinafter Reskin III].

¹³⁷ *Caridad*, 191 F.3d at 290.

¹³⁸ Schultz, *supra* note 126, at 1758.

that Caridad may have been unable to avoid the harm: a transfer would not change the fact that she performed a traditionally male job in a historically male workplace. Moreover, by dismissing Caridad's hostile environment claim based on little more than the employer's promulgation of an anti-harassment policy and grievance procedure, the Second Circuit sent an important message to employers: they will escape liability for discriminatory harassment even if they do nothing to address a key organizational predictor of sexual harassment.

Plaintiffs fare no better with their efforts to introduce evidence of the other major contributor to workplace harassment—an organizational climate tolerant of sexual harassment. When faced with such evidence, the federal courts either ignore its significance or deem it irrelevant to an individual claim of sexual harassment.

In *Gawley v. Indiana University*,¹³⁹ the Seventh Circuit chose the former course of action. Nancy Gawley, a police officer for the university's police force, "produced evidence that the department had a history of sexual harassment of its female employees dating back to the early 1980s."¹⁴⁰ While the Seventh Circuit mentioned this history in its factual summary, it ignored it completely in its analysis of Gawley's sexual harassment claim. Instead, the court relied on the employer's grievance procedure and Gawley's delay in reporting her supervisor's harassment to affirm the trial court's order granting summary judgment to Gawley's employer on her hostile work environment claim.¹⁴¹

In both *Clardy v. Silverleaf Resorts, Inc.*¹⁴² and *Suders v. Pennsylvania State Police*,¹⁴³ the district courts for the Northern District of Texas and the Middle District of Pennsylvania, respectively, held that evidence that the employer tolerated or condoned sexual harassment in the workplace was not germane to the plaintiffs' individual harassment claims.

In *Clardy*, Regina Clardy sued her employer, claiming that she had been sexually harassed by both her supervisor Pete Loreda and her co-workers.¹⁴⁴ The district court granted the employer's motion for summary

¹³⁹ 276 F.3d 301 (7th Cir. 2001).

¹⁴⁰ *Id.* at 306.

¹⁴¹ *Id.* at 311-12.

¹⁴² No. 3:99-CV-2893-P, 2001 U.S. Dist. LEXIS 16481 (N.D. Tex. Oct. 10, 2001).

¹⁴³ *Suders v. Pa. State Police*, No. 1:CV-00-1655 (M.D. Pa. Mar. 3, 2005) (PACER—Docket #80).

There are several documents, in the ensuing footnotes on the *Suders* case, that I obtained from Public Access to Court Electronic Records ("PACER"), a service that makes available for a fee the dockets and, in some cases, copies of documents filed with various federal courts. The service is located at <http://pacer.psc.uscourts.gov>. Documents obtained from PACER include a parenthetical reference to PACER and a docket number. I have copies on file of all PACER documents.

¹⁴⁴ *Clardy*, 2001 U.S. Dist. LEXIS 16481, at *2-8. The court concluded that the co-workers' conduct did not rise to the level of an actionable claim for sexual harassment. *See id.* at *21-24.

judgment on Clardy's allegations of both supervisor and co-worker harassment.¹⁴⁵ On her claim of supervisor harassment, the court declined to consider affidavits by former Silverleaf employees that "allege[d] that they also were victims of sexual harassment by Silverleaf supervisors."¹⁴⁶ The district court concluded that the co-worker affidavits might be relevant in a class action lawsuit, but otherwise had no "bearing on Clardy's individual claim of sexual harassment by Mr. Laredo."¹⁴⁷

The district court in *Suders* reached a similar conclusion. In *Suders*, Nancy Lynn Suders, a police communications operator, sued the Pennsylvania State Police ("PSP") alleging that three of her supervisors had sexually harassed her.¹⁴⁸ While her case wended its way through the federal appellate process, ultimately reaching the Supreme Court on the issue of whether a constructive discharge amounted to a tangible employment action,¹⁴⁹ a scandal was brewing at the PSP.

In June of 2003, the Office of Inspector General ("OIG") for the Commonwealth of Pennsylvania undertook an investigation into allegations of widespread sexual harassment and sexual misconduct by members of the PSP.¹⁵⁰ The OIG initiated its inquiry in response to a lawsuit filed by Ashley Haber, a teenage runaway, who alleged both sexual misconduct on the part of Michael K. Evans, a PSP officer,¹⁵¹ and a policy or practice on the part of the PSP of condoning such misconduct.¹⁵² In September of 2003, the OIG issued a ninety-five page report, which contained a wide-ranging critique of the PSP's handling of sexual harassment and sexual misconduct within its ranks.¹⁵³ The OIG concluded that within the PSP, there existed an

¹⁴⁵ *Id.* at *31-32.

¹⁴⁶ *Id.* at *30 (citation omitted).

¹⁴⁷ *Id.* at *30-31.

¹⁴⁸ *Suders v. Easton*, 325 F.3d 432, 435 (3d Cir. 2003), *vacated and remanded*, 542 U.S. 129 (2004).

¹⁴⁹ The Supreme Court held that an employer *may* invoke the affirmative defense even when the employee proves that her resignation qualified as a constructive discharge. *See Pa. State Police v. Suders*, 124 S.Ct. 2342, 2347 (2004). The affirmative defense is unavailable to the employer only when the employee "quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation." *Id.* The Court remanded the case because there were genuine issues of material fact relating to Suders's claims of sexual harassment and constructive discharge. *Id.* at 2357.

¹⁵⁰ OIG REPORT, *supra* note 1, at i-ii.

¹⁵¹ Evans previously had pleaded guilty to various charges, including solicitation of prostitution, corruption of minors, and indecent assault, and been sentenced to 5 to 10 years in state prison. *Id.* at 5.

¹⁵² Complaint, *Haber v. Evans*, No. 2:03-cv-03376 (E.D. Pa. May 30, 2003) (PACER—Docket #1). The PSP settled with Haber, as well as three other women, in a \$5 million global settlement in September of 2004. *See Shannon P. Duffy, Pa. Trooper Sex Abuse Suits Settled*, THE LEGAL INTELLIGENCER, Sept. 3, 2004, at 1. Claims by two other women were settled for \$1.3 million. *See id.*

¹⁵³ *See generally* OIG REPORT, *supra* note 1. Pennsylvania Governor Ed Rendell also appointed Kroll Associates, Inc. as an independent monitor of the PSP's compliance with the recommendations

“organizational culture and attitudes that [did] not regard sexual harassment and sexual misconduct as serious issues.”¹⁵⁴

When the Supreme Court remanded Suders’s case, her counsel sought to introduce portions of the OIG Report at trial,¹⁵⁵ but the district court ruled to exclude the report in its entirety.¹⁵⁶ In the most telling portion of its opinion, the court ruled to exclude the OIG’s findings of a culture tolerant of sexual harassment, concluding that such findings were simply irrelevant to the legal issue at trial.

These pages discuss a perceived attitudinal problem within the PSP with respect to sexual harassment. This discussion is simply not relevant to the instant matter. This evidence does not go to the weakness of the PSP’s sexual harassment policy, but rather to general problems regarding sexual harassment that allegedly existed throughout the PSP.¹⁵⁷

The decision in *Suders*, like those in *Caridad*, *Clardy*, and *Gawley*, reveals the shortcomings of the individualized model of harassment. Depicting harassment as a tort-like, interpersonal dispute in which the employer plays no part shifts the focus away from the organizational causes of harassment and toward the victim’s interaction with the harasser and her response to his behavior. Evidence that the employer’s workforce is segregated by sex, that a victim performs a “male-defined” job, or that the organization has a history of sexual harassment or sex discrimination gener-

made in the OIG Report. See Bill Toland, *Firm to Monitor State Police; Will Probe Allegations of Sexual Misconduct*, PITTSBURGH POST-GAZETTE, Sept. 17, 2003, at B-1. Kroll has issued four quarterly reports, the most recent on February 21, 2005. See KROLL ASSOCS., INC., REPORT OF THE INDEPENDENT MONITOR OF THE PENNSYLVANIA STATE POLICE, FOURTH QUARTERLY REPORT FOR THE PERIOD ENDING DECEMBER 31, 2004 (Feb. 21, 2005), available at http://www.psp.state.pa.us/psp/lib/psp/Qtr4_Kroll_Report_Final.pdf.

¹⁵⁴ OIG REPORT, *supra* note 1, at xii.

¹⁵⁵ See Plaintiff’s Motion to Admit in Her Case in Chief, or in the Alternative, in Rebuttal, the Kroll Report, and the Office of Inspector General’s Report, *Suders v. Easton*, No. 1:CV-00-1655 (M.D. Pa. Feb. 18, 2005) (PACER—Docket #69). On remand, *Suders* and the PSP were unable to settle, and the district court scheduled the case for trial on its March 2005 calendar. See Scheduling Order, *Suders v. Easton*, No. 1:CV-00-1655, at 1 (M.D. Pa. Dec. 10, 2004) (PACER—Docket #40); see also Plaintiff’s [sic] Status Report as per the Court’s September 14, 2004 Order, *Suders v. Easton*, No. 1:CV-00-1655, at 1-2, attached letter (M.D. Pa. Sept. 27, 2004) (PACER—Docket #38) (indicating, as of September 14, 2004, rejection by defendants of plaintiff’s settlement offer and unwillingness to make a counteroffer).

¹⁵⁶ See *Suders v. Pa. State Police*, No. 1:CV-00-1655, at 5 (M.D. Pa. Mar. 3, 2005) (mem.) (PACER—Docket #80).

¹⁵⁷ *Id.* at 4-5. *Suders*’s case went to trial in March of 2005, and the jury returned a verdict in favor of the defendant PSP on her sexual harassment claim. See Verdict Form, *Suders v. Pa. State Police*, No. 1:CV-00-1655, at 1 (M.D. Pa. Mar. 22, 2005) (PACER—Docket #100). The jury found that *Suders* had not proven that she was subjected to “severe and pervasive” harassment. *Id.* at Question 1. The standard is “severe or pervasive.” *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

ally does not figure into a court's analysis of employer liability. The reason is that such evidence is not relevant if the employer is presumed "innocent" of any role in creating or fostering the hostile work environment.

Thus, the prevailing model of harassment provides employers with distorted incentives. Employers escape liability by drafting and disseminating anti-harassment policies and grievance procedures, even though there is no evidence that such conduct has any deterrent effect on workplace sexual harassment.¹⁵⁸

[W]hen a prevention program is being offered, it gives the impression that "something is being done." However, the reality is that it is unclear whether the program makes any difference. . . . Ineffective programs can cause significant harm because they may meet an institution's burden of doing something about sexual harassment without having any effect on the bottom line: reducing the incidence of sexual harassment.¹⁵⁹

Thus, employers create the illusion that they are addressing sexual harassment, while very little is done to change the organizational factors that predict workplace harassment. By rewarding such behavior, the federal courts ultimately undermine the deterrent effect of Title VII. Rather than attacking the root of the problem, the courts are doing little more than nipping around the edges.

C. *The Problem with Victim Reporting*

While the current model of sexual harassment renders largely invisible the organizational employer's role in creating a hostile work environment, it magnifies the significance of the victim's role in preventing sexual harassment. Many federal courts assume that the employer is powerless to stop workplace harassment unless the victim reports it. As the Fourth Circuit explained in *Barrett v. Applied Radiant Energy Corp.*,¹⁶⁰ "[l]ittle can be done to correct [harassing] behavior unless the victim first blows the whistle on it."¹⁶¹ Thus, the individual model of harassment ties the success of

¹⁵⁸ *Empirical Vacuum*, *supra* note 34, at 233.

¹⁵⁹ Elizabeth O'Hare Grundmann, William O'Donohue, & Scott H. Peterson, *The Prevention of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 182 (William O'Donohue ed., 1997).

¹⁶⁰ 240 F.3d 262 (4th Cir. 2001).

¹⁶¹ *Id.* at 268; *see also* *Gonzalez v. Beth Israel Med. Ctr.*, 262 F. Supp. 2d 342, 356 (S.D.N.Y. 2003) (explaining that "placing the burden on employees is logical because they are the ones with direct knowledge of the harassment and without their participation, 'Title VII's remedial and deterrent purposes would not be served'"); *Good v. MMR Group, Inc.*, No. 3:00CV-182-H, 2001 U.S. Dist. LEXIS 20036, at *15 (W.D. Ky. Dec. 4, 2001) (noting that the employer "could not address problems of which it was unaware").

Title VII's goal of deterring harassment to the victim's exhaustion of her employer's internal grievance procedure.¹⁶²

But the vast majority of victims do not report the harassment to any person in authority.¹⁶³ In fact, "[t]he research over the past twenty years . . . has consistently shown that 'filing a formal complaint or reporting the harassment to an authority appears to be a very uncommon occurrence.'"¹⁶⁴ Because the individual model of harassment, in large part, predicates employer action on employee reporting, a low reporting rate suggests that the vast majority of discriminatory workplace harassment is left unchecked.

Furthermore, the federal courts have largely abdicated their responsibility for overseeing the effectiveness of employers' internal grievance procedures. Because the courts consider sexual harassment to be an interpersonal, tort-like dispute, they defer to employer judgments on how best to create and implement anti-harassment policies and procedures, considering such determinations to fall within basic managerial prerogatives.¹⁶⁵ By do-

¹⁶² An employer may be liable for co-worker harassment even if the victim does not formally report the conduct using the employer's internal grievance procedure. *See, e.g.,* *Flowers v. Honigman Miller Schwarz & Cohn*, No. 04-71928, 2005 U.S. Dist. LEXIS 9062, at *22 (E.D. Mich. May 16, 2005) (noting that "[i]t is not necessary that the plaintiff herself put the employer on notice" when the employer knew or should have known of the harassment). But, the threshold for constructive notice of workplace harassment is high. *See, e.g.,* *Rennard v. Woodworker's Supply, Inc.*, 101 F. App'x 296, 304 (10th Cir. 2004) (citation omitted) (explaining that an employer has constructive knowledge of co-worker harassment "[o]nly when the acts of harassment are so egregious, numerous, and concentrated as to add up to a campaign of harassment"); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003) (citation omitted) (holding that "[c]onstructive notice is established when the harassment was so severe and pervasive that management reasonably should have known of it"); *Sharp v. City of Houston*, 164 F.3d 923, 930 (11th Cir. 1999) (explaining that an employer has constructive knowledge of co-worker harassment only when someone "with remedial power over the harasser . . . knew or should have known" of the harassing conduct); *see also* Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT. 391, 439-40 (2002) (footnote omitted) (explaining that "[a]bsent notification, courts will find constructive knowledge only if harassment is public and constant, or if the acts of harassment are 'so egregious, numerous, and concentrated' that they amount to a 'campaign'"). Because the standard for constructive knowledge is difficult to satisfy, the victim in a co-worker harassment case is likely to lose unless she can establish actual employer knowledge through a report using the employer's own grievance procedure. *See, e.g.,* *Rennard*, 101 F. App'x at 304 (stating that the employer has actual notice of harassment when the victim reports to "management-level employees").

¹⁶³ *See Empirical Vacuum, supra* note 34, at 208-10 (citing studies).

¹⁶⁴ *Id.* at 208 (footnote and citation omitted).

¹⁶⁵ *See, e.g.,* *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (citation omitted) (in co-worker sexual harassment case, explaining that it would have been easier to conclude that employer had responded promptly and effectively to plaintiff's complaint had employer "reminded its employees of the harassment policy" and provided the plaintiff with "an alternative to dealing directly with [the harasser]," but that the court did "not 'sit as a super-personnel department'" and employer's response sufficed); *Lawrence v. Wal-Mart Stores, Inc.*, 236 F. Supp. 2d 1314, 1328-29 (M.D. Fla. 2002) (citation omitted) (in race harassment case, concluding that employer's failure to follow its

ing so, they create incentives for employers to make reporting more, rather than less, difficult.¹⁶⁶ The Eleventh Circuit's opinion in *EEOC v. Total System Services, Inc.*,¹⁶⁷ and the Tenth Circuit's decision in *Rennard v. Woodworker's Supply, Inc.*,¹⁶⁸ illustrate how leaving to employers the task of investigating and remedying workplace harassment creates disincentives for employees to report such harassment.

In *Total Systems*, the employer terminated Lindy Wright Warren after concluding that she had lied during the employer's internal investigation of a sexual harassment complaint filed by Susan Norwood,¹⁶⁹ one of Warren's coworkers.¹⁷⁰ The EEOC sued Total Systems, alleging that Warren had been "fired for participating in the employer's investigation and opposing what she believed was an unlawful employment practice."¹⁷¹ The district court granted the employer's motion for summary judgment and the EEOC appealed, contending that a trial was required to determine whether Warren had indeed lied to her employer.¹⁷² The EEOC argued that the "employer

own policy and inform plaintiff of the discipline imposed against harasser did not prevent employer from successfully invoking the affirmative defense because the court would "not reexamine how Defendant's management chose to implement its internal policies").

¹⁶⁶ In affirmative defense cases, the federal courts routinely allow employers to define when they obtain notice of harassing conduct, thereby discounting victim reports of harassment made to the "wrong" supervisory personnel. *Empirical Vacuum*, *supra* note 34, at 246-53 (citing cases). The lower federal courts also defer to employers on the form that complaints must take, letting stand internal grievance procedures that require a written complaint prior to any investigation by the employer of harassing conduct. *See, e.g., Rennard*, 101 F. App'x. at 298, 306 n.10 (10th Cir. 2004) (affirming trial court order granting summary judgment to employer on plaintiff's claim of co-worker harassment and concluding that employer's policy, which penalized victims of sexual harassment for failing to report such harassment in writing within a week of its occurrence, had not deterred plaintiff from reporting earlier); *Ritchie v. Stamler*, No. 98-5750, 2000 U.S. App. LEXIS 568, at *7-8 (6th Cir. Jan. 12, 2000) (affirming trial court order granting summary judgment to employer on plaintiff's claim of supervisory harassment and concluding that employer's policy requiring that harassment complaints be made in writing to the firm's president did not indicate that the employer had failed to use reasonable care to prevent workplace harassment); *Duviella v. Counseling Servs.*, No. 00-CV-2424, 2001 U.S. Dist. LEXIS 22538, at *41-42 (E.D.N.Y. Nov. 20, 2001) (granting summary judgment to employer on plaintiff's claim that her supervisor had sexually harassed her and holding that employer's policy was not ineffective even though the employer would not investigate complaints of harassment without a written complaint), *aff'd*, *Duviella v. Counseling Servs.*, 52 F. App'x 152 (2d Cir. 2002).

¹⁶⁷ 221 F.3d 1171 (11th Cir. 2000), *reh'g en banc denied*, 240 F.3d 899 (11th Cir. 2001).

¹⁶⁸ 101 F. App'x 296 (10th Cir. 2004).

¹⁶⁹ Norwood claimed that her supervisor Arthur Wimberly had sexually harassed her. *Total System Servs.*, 221 F.3d at 1173.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1175.

must bear the risk of Title VII liability,” absent a showing that Warren had actually lied to her employer during its investigation.¹⁷³

The Eleventh Circuit disagreed. It concluded that Total Systems was protected from a finding of retaliation so long as its determination that Warren had lied was an “honest” one.¹⁷⁴ In a remarkable passage, the court stated that when the employer is investigating workplace harassment, it is conducting its own business and that the courts should defer to such management decisions.

[W]hether to fire an employee for lying to the employer in the course of the business’s conduct of an important internal investigation is basically a business decision; this decision, as with most business decisions, is not for the courts to second-guess as a kind of super-personnel department. . . .

In the kind of investigation involved in this case, the employer is not acting pursuant to the statute or under color of law, but is conducting the company’s own business.

When the employer is told of improper conduct at its workplace, the employer can lawfully ask: is the accusation true? When the resulting employer’s investigation (not tied to the government) produces contradictory accounts of significant historical events, the employer can lawfully make a choice between the conflicting versions—that is, to accept one as true and to reject one as fictitious—at least, as long as the choice is an honest choice.¹⁷⁵

The problem with the Eleventh Circuit’s analysis is that it is at odds with the requirements of federal anti-discrimination law. In affirmative defense cases, an employee generally must invoke her employer’s grievance procedure or risk losing in any subsequent Title VII litigation. The story is similar in co-worker harassment cases: the employer is only liable for failing to remedy harassment of which it is aware. Given the difficulty of establishing an employer’s constructive knowledge of workplace harassment,¹⁷⁶ the most reliable method to establish notice in a co-worker harassment case is for the victim to report the harassing conduct, using her employer’s grievance procedure. Yet, these same employees do not enjoy protection from retaliation in the Eleventh Circuit for what they say during the employer’s internal investigation. As Judge Barkett pointed out in his dissent from the Eleventh Circuit’s decision to deny rehearing en banc, the court’s rule creates a disincentive for employees to participate in the employer’s internal investigation and for victims to report harassment to their employer.

The panel opinion . . . fashions a disincentive to employees’ participation in internal investigations by drastically reducing their protection against retaliation unless the investigation arises as a result of a specific complaint filed by the EEOC. Furthermore, participants in

¹⁷³ *Id.*

¹⁷⁴ *See id.* at 1176.

¹⁷⁵ *Total System Servs.*, 221 F.3d at 1176 (emphasis added).

¹⁷⁶ *See supra* note 162.

internal investigations are *more* vulnerable to retaliation, as they are conveying potentially damaging information, not to neutral EEOC investigators, but to the very people who wield absolute control over their employment situation, and who stand to be sued if the complaint proves valid

. . . .
 [In addition,] [u]nder [the rule in *Faragher* and *Ellerth*], the employee essentially is required to take advantage of any preventive or corrective opportunities provided by the employer. Thus, if the corrective grievance process provided by the employer includes an internal investigation, then the employee must participate in such investigation, even though he or she will not be protected from retaliatory acts for her statements in participating in the investigation. . . . Such a situation exposes employees to precisely the type of risks against which Title VII was intended to guard.¹⁷⁷

The Eleventh Circuit's decision in *Total Systems* is troublesome. If the stated goal of Title VII is to increase deterrence of workplace harassment, then the courts should strive to make reporting less risky and burdensome for victims. The Eleventh Circuit's decision does the exact opposite. Fear of retaliation is a common reason offered by victims for not reporting harassment.¹⁷⁸ The Eleventh Circuit's decision, however, makes the prospect of retaliation more, rather than less, likely. Furthermore, the court's caveat that the employer is only protected for "honest" determinations made about an employee's participation in an internal investigation is small comfort. Short of an admission by the employer, how exactly would an employee prove that her employer had acted dishonestly?¹⁷⁹

The Tenth Circuit's decision in *Rennard* is equally problematic. When Nancy Rennard complained to her employer, Woodworker's Supply, Inc. ("WSI"), about harassment by her co-worker Larry Rogers, her employer disciplined both her and Rogers.¹⁸⁰ Rennard received a "written reprimand" because she had not reported Rogers's harassment within a week of when it began, as required by WSI's anti-harassment policy.¹⁸¹ In addition, the day after receiving the written reprimand, Rennard received an evaluation by her supervisor.¹⁸² The evaluation stated that Rennard had "recently . . . become a high maintenance employee" and that "[a] high level of Man-

¹⁷⁷ EEOC v. Total Sys. Servs., Inc., 240 F.3d 899, 902, 903 (11th Cir. 2001) (Barkett, J., dissenting).

¹⁷⁸ See *Empirical Vacuum*, *supra* note 34, at 258-59 (citing studies).

¹⁷⁹ Cf. Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 645-651 (2000) [hereinafter *Meritocracy Myth*] (noting the difficulty for plaintiffs of an honest belief standard in establishing discrimination in a circumstantial evidence case).

¹⁸⁰ *Rennard v. Woodworker's Supply, Inc.*, 101 F. App'x 296, 300 (10th Cir. 2004). WSI suspended Rogers without pay for two days. *Id.*

¹⁸¹ *Id.* at 298, 300. WSI's policy provided that the firm would "not tolerate sexual or ethnic/racial harassment" and that "[a]ny occurrence of such harassment [had to] be reported to the Personnel Manager or President in writing within one week." *Id.* at 298. The policy provided for "discipline or dismissal" for failure of victims of sexual harassment to report within the one-week time frame. *Id.*

¹⁸² *Id.* at 301.

agement's time, as well as other WSI employees' time has been interrupted, causing an undesirable work atmosphere conducive to a high productivity level."¹⁸³ Apart from these comments, Rennard's supervisor rated her either satisfactory or good on the other elements of her work performance.¹⁸⁴ But, Rennard claimed that this evaluation "was key to [WSI's] decision not to give [her] a raise at the 90-day point [of her employment]."¹⁸⁵

Rennard filed a complaint with the Wyoming Fair Employment Program ("WFEP"), which discovered other female employees at WSI who claimed that Rogers had sexually harassed them.¹⁸⁶ WSI then asked Rogers to resign and "verbally reprimanded" another female employee who had not reported Rogers's harassment to management.¹⁸⁷ The WFEP found reasonable cause to believe that Rennard's allegations were true,¹⁸⁸ and Rennard sued WSI for sexual harassment, retaliation, and constructive discharge.¹⁸⁹ The district court granted WSI's motion for summary judgment on all three claims, and the Tenth Circuit affirmed.¹⁹⁰

Rennard argued to the Tenth Circuit that WSI had constructive knowledge of Rogers's harassment because its anti-harassment policy, which penalized even minor delays in reporting, deterred victims from complaining.¹⁹¹ The court, in one sentence, rejected this argument, concluding that Rennard offered no evidence that the firm's policy had discouraged her or other female employees from reporting incidents of sexual harassment.¹⁹²

The Tenth Circuit also rejected Rennard's contention that both the written reprimand and her performance evaluation constituted retaliation. The court held that because neither the reprimand nor the performance evaluation resulted in "any immediate or practical effect on her job status," Rennard could not establish that she had suffered an adverse employment action, which is a required element for a Title VII claim of retaliation.¹⁹³ As for Rennard's claim that she had not received a raise because of her per-

¹⁸³ *Id.* (quoting Evaluation Report).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 308 (internal quotation marks omitted).

¹⁸⁶ *Rennard*, 101 F. App'x at 301.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* n.8.

¹⁸⁹ *Id.* at 297.

¹⁹⁰ *Id.* at 303.

¹⁹¹ *Id.* at 306 n.10.

¹⁹² *Rennard*, 101 F. App'x at 306.

¹⁹³ *Id.* at 307. The Tenth Circuit used the definition of a tangible employment action, which determines the employer's vicarious liability for supervisory harassment, to define what constitutes an adverse employment action for a retaliation claim. *See id.* The two concepts are not necessarily co-extensive.

formance evaluation, the court concluded that there was no evidence that the evaluation had adversely affected WSI's decision.¹⁹⁴

Rennard illustrates the problems created by the federal courts' lack of oversight of employer grievance procedures. Currently, under federal law, an employee has either 180 or 300 days, depending on whether the employee lives in a state with a fair employment agency, to file a complaint with the EEOC for a violation of Title VII.¹⁹⁵ The Tenth Circuit allowed WSI to significantly shorten that time period—from 300 days to one week.¹⁹⁶ Even though *Rennard* filed her complaint with the WFEP in a timely fashion, WSI disciplined her for not complying with its own reporting "statute of limitations."¹⁹⁷ Thus, the Tenth Circuit allowed WSI to create a private statute of limitations that, in effect, trumps Title VII's reporting period. WSI's "statute of limitations" controlled reporting because failure to adhere to its internal deadline carried with it not only possible dismissal of any subsequent Title VII lawsuit filed by *Rennard*, but also immediate and adverse work-related consequences.

Moreover, the Tenth Circuit failed to provide any recourse to *Rennard* with regard to the reprimand that she received. The court rejected her claim that WSI had constructive notice of Rogers's harassment because the firm's policy, by penalizing even minor delays in reporting, deterred women from reporting.¹⁹⁸ The Tenth Circuit also rejected *Rennard*'s contention that the reprimand influenced WSI's decision not to give her a raise after ninety days.¹⁹⁹ Both conclusions are flawed.

First, shortening the reporting time frame in cases of workplace harassment is problematic. By its very nature, a hostile work environment normally arises out of a series of harassing events that occur over time.²⁰⁰ "[A] woman may brush aside early harassing events only to realize later that those events were the beginning of a pattern of harassment that has not abated."²⁰¹ In fact, that is exactly what Nancy *Rennard* did. She did not report Rogers's early conduct, even though she considered it "offensive," because she did not think it was sexual harassment.²⁰² Moreover, the court's

¹⁹⁴ See *id.* at 308.

¹⁹⁵ See Anne Lawton, *Tipping the Scales of Justice in Sexual Harassment Law*, 27 OHIO N.U. L. REV. 517, 520 (2001) [hereinafter *Tipping the Scales*].

¹⁹⁶ *Rennard*, 101 F. App'x at 300.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 306 n.10.

¹⁹⁹ *Id.* at 306-07.

²⁰⁰ See, e.g., *Munroe v. Compaq Computer Corp.*, 229 F. Supp. 2d 52, 61 (D.N.H. 2002) (explaining that "harassment serious enough to create a hostile work environment often involves a cumulative process in which a series of acts or events mount over time to create an unlawfully hostile atmosphere").

²⁰¹ *Tipping the Scales*, *supra* note 195, at 522.

²⁰² *Rennard*, 101 F. App'x. at 298.

determination that the policy had not deterred Rennard from reporting highlights the deficiencies of the individual model. The question is not the impact of the policy on Rennard, but its effect on reporting in general. If the purpose of having an anti-harassment policy and procedure is to increase reporting, then the issue is whether that policy creates incentives or disincentives to report. It certainly is debatable, in particular on review of a trial court's order granting summary judgment, whether a policy would deter reporting if it threatened victims with discipline or dismissal for failing to report harassment within a week of its occurrence.

Second, Rennard received her performance evaluation ninety days after beginning work, and, apparently, ninety days was the period after which she would be eligible for a pay raise.²⁰³ Thus, any pay raise would have been contemporaneous with her first performance evaluation. Even the Tenth Circuit acknowledged that the "high maintenance" comment in Rennard's performance evaluation "appear[ed] to be directly related to plaintiff's complaints about Rogers."²⁰⁴ It is at least arguable, then, especially when reviewing a trial court's order granting summary judgment, that WSI retaliated against Rennard for complaining about Rogers's harassment. But, the Tenth Circuit narrowly defined an adverse employment action to cover only employer conduct having an immediate and quantifiable impact on the employee's status, for example a demotion or termination.²⁰⁵ As a result, the Tenth Circuit, like the Eleventh Circuit in *Total Systems*,²⁰⁶ significantly reduced the protection from retaliation that employees who report workplace harassment could expect under Title VII.

The social science research draws into question the assumption that mandating victim reporting increases deterrence of harassing conduct. Most victims do not report harassment. But, even if reporting were a common response to harassment, the federal courts have made it increasingly difficult for victims to report by failing to effectively oversee employers' grievance procedures. This judicial deference reinforces the tendency of em-

²⁰³ See *id.* at 298, 301, 308. Rennard began work on September 11, 2000, and received her first performance evaluation on December 12, 2000, which is approximately ninety days from the start of her employment. See *id.*

²⁰⁴ *Id.* at 308.

²⁰⁵ See *id.* at 307.

²⁰⁶ The Tenth and Eleventh Circuits are not alone in weakening the protection against retaliation that is available to employees under Title VII. See, e.g., *Empirical Vacuum*, *supra* note 34, at 265 (noting that the federal courts were split on whether an unfair performance evaluation qualifies as an adverse employment action for purposes of Title VII's protection against retaliation); *Meritocracy Myth*, *supra* note 179, at 660 (discussing the Fifth Circuit's requirement of an ultimate employment decision in order to make out a claim for retaliation under Title VII). The Supreme Court recently granted certiorari to determine what constitutes an adverse employment action for purposes of a Title VII retaliation claim. See *Burlington N. & Santa Fe Ry. v. White*, No. 05-259, 2005 U.S. LEXIS 9047 (Dec. 5, 2005).

employers to “recast legal problems in managerial terms.”²⁰⁷ By doing so, employers transform what, in theory, is an absolute right to a harassment-free work environment, into an interpersonal conflict subject to mediation and compromise by the employer.²⁰⁸

Whereas the rhetoric of rights is central to courts and administrative agencies, the rhetorics of management and therapy are far more pervasive in organizational complaint handlers’ accounts. In contrast, there is almost no language about legal rights. By deflecting attention from legal rights and focusing instead on organizational problems, complaint handlers’ conception of dispute resolution privatizes and depoliticizes the public right of equal employment opportunity. Individual complaints are rarely linked to public rights and ideals, and the complaint resolution process does not involve public recognition of those rights or public articulation of a standard to which other employees may appeal. Thus, each employee must renegotiate the meaning of discrimination.²⁰⁹

Moreover, the research shows that government oversight improves, rather than compromises, enforcement of anti-discrimination laws.²¹⁰ But, the federal judiciary, in effect, has entrusted employers with discharging the societal commitment to a harassment-free workplace. This deference to employer decision-making has created an environment in which employers “develop their own rule systems regarding sexual harassment . . . without serious ideological competition from the state. Where we might expect a court review and potential rejection of organizational ideology, federal sexual harassment law tends to defer to and incorporate organizational ideology into state law.”²¹¹

Thus, an employer can pre-empt the statute of limitations for Title VII sexual harassment claims by shortening the applicable reporting period in its own internal harassment policy.²¹² It can alter the burden of proof applicable to a Title VII claim by refusing to sanction employees for sexual harassment ““if there is any shadow of doubt”” about whether the harassment occurred.²¹³ Employers may make reporting more difficult for victims by

²⁰⁷ *Rational Myth*, *supra* note 77, at 449; see Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC’Y REV. 497, 511 (1993) [hereinafter *IDR*].

²⁰⁸ See *IDR*, *supra* note 207, at 503-05, 511, 515-19.

²⁰⁹ *Id.* at 529-30.

²¹⁰ See Reskin III, *supra* note 136, at 342 (citing studies); Reskin I, *supra* note 121, at 249 (citing studies and concluding that “[w]hen regulatory agencies fail to enforce laws, they send a message to employers, condoning segregative personnel practices”).

²¹¹ MIA L. CAHILL, *THE SOCIAL CONSTRUCTION OF SEXUAL HARASSMENT LAW* 87 (2001).

²¹² See *supra* notes 195-97, 200-02 and accompanying text.

²¹³ *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003); see also *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (explaining that employer had responded effectively to plaintiff’s complaint, and concluding that even though there were deficiencies in employer’s response, the court did not sit as a “super-personnel department” (quoting *Ransom v. CSC Consulting*,

requiring written complaints.²¹⁴ They also can narrow the circumstances under which they must respond to workplace harassment by limiting, in their sexual harassment policies, when they obtain notice of the harassing conduct.²¹⁵

What this judicial deference to employer decision-making has created is not a more efficient system for eradicating workplace sexual harassment, but rather a system that advances employer interests at the expense of Title VII's intended beneficiaries. While employees have the right to a harassment-free workplace in theory, the federal courts have largely eroded that right in practice.

III. OBSCURING CHOICES

*"To disguise a choice in the language of definitional inexorability obscures that choice and thus obstructs questions of how it was made and whether it could have been made differently."*²¹⁶

Two conclusions emerge from the Supreme Court's jurisprudence on workplace sexual harassment. The first is that the individual model of harassment is not the inevitable consequence of the Court's fidelity to statutory language or Congressional intent. Nor is it the result of the Court's attention to the empirical evidence on victim reporting as it relates to Title VII's primary objective of deterring workplace harassment. Rather, the Supreme Court deliberately deviated from established Title VII liability rules when it created the individual model of workplace sexual harassment.

The second conclusion that emerges from the Supreme Court's sexual harassment jurisprudence is that the individual model undermines, rather than fosters, the deterrence of workplace sexual harassment. That conclusion, in turn, gives rise to an important question: What is the primary goal of the individual model, if not deterrence? It is the preservation and perpetuation of an inherently conservative, intent-based vision of anti-

Inc., 217 F.3d 467, 471 (7th Cir. 2000)); Coughlin v. Wrigley Mfg. Co., No. 02 C 7849, 2004 U.S. Dist. LEXIS 8088, at *40 (N.D. Ill. May 6, 2004) (citation omitted) (rejecting plaintiff's contention that employer had not properly responded to her harassment complaint and noting that court did not "sit as a super-personnel department").

²¹⁴ See, e.g., Rennard v. Woodworkers' Supply, Inc., 101 F. App'x 296, 298 (10th Cir. 2004) (requiring written complaint to president or personnel manager); Ritchie v. Stamler Corp., No. 98-5750, 2000 U.S. App. LEXIS 568, at *7 (6th Cir. Jan. 12, 2000) (requiring written complaint to president); Duviella v. Counseling Servs., No. 00-CV-2424, 2001 U.S. Dist. LEXIS 22538, at *40-42 (E.D.N.Y. Nov. 20, 2001) (requiring written complaint prior to investigation).

²¹⁵ See *Empirical Vacuum*, *supra* note 34, at 246-53 (discussing and citing affirmative defense cases in which federal courts defer to employer definitions of notice).

²¹⁶ Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 513-14 (1988).

discrimination law premised on assumptions about merit, employer rationality, and the wisdom of “market” solutions to problems of employment discrimination. The individual model of harassment with its pro-employer liability standard fits neatly into a model of discrimination that requires conscious intent and overt bias to discriminate. That model, in turn, serves to reinforce unspoken assumptions about the dominance of merit-based employment decisions, the rationality of employer decision-making processes, and the effectiveness of market-based solutions to problems of workplace discrimination.

It is these assumptions, rather than fidelity to statutory language or deference to Congressional intent, that underlie the individual model of harassment. It is important to realize that the debate over sexual harassment law is not a debate about Congressional intent or the empirical evidence on victim reporting. It is a battle about beliefs: beliefs about the frequency of employment discrimination and the wisdom of the market. The individual model, with its pro-employer assumptions, bolsters these beliefs, but does so at the expense of Title VII’s goal of deterring workplace sexual harassment.

A. *Cloaked in Congressional Legitimacy*

In *Meritor*, *Ellerth*, and *Faragher*, the Supreme Court portrayed the liability standards²¹⁷ it created as the inevitable result of its adherence to statutory language, its faithfulness to Congressional intent, and its desire to effectuate the statutory policy of deterring workplace sexual harassment. This portrayal, however, obscured the choices that the Court made in fashioning the parameters of employer liability for workplace sexual harassment.

First, the majority in *Meritor* cast its decision to look to agency law principles as pre-ordained by Congress’s decision to include the word “agent” in the definition of “employer” in Title VII.²¹⁸ The Supreme Court reiterated this theme of strict allegiance to statutory language in its opinion in *Ellerth*: “In express terms, Congress has directed federal courts to interpret Title VII based on agency principles.”²¹⁹ But, nothing in the statutory definition of employer “compel[led] recourse to the common law of agency.”²²⁰ Moreover, nothing in the word “agent,” by itself, denotes a limi-

²¹⁷ See *supra* note 93.

²¹⁸ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

²¹⁹ *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

²²⁰ Phillips, *supra* note 77, at 1257; see also notes 77-80 and accompanying text.

tation on employer liability, as contended by the majority in *Meritor*.²²¹ Thus, there is no necessary connection between the statutory definition of employer in Title VII and *Meritor*'s notice-liability standard.

Second, the liability rules that the Supreme Court created in *Meritor*, *Ellerth*, and *Faragher* are not the predictable outcome of the Court's deference to Congressional intent. In *Meritor*, the majority adopted the notice-liability standard advocated by the EEOC because it concluded that Congress had intended to "place some limits on the acts of employees for which employers under Title VII [were] to be held responsible."²²² Then, in its affirmative defense cases, the Court determined that Congress's decision, during deliberations on and passage of the Civil Rights Act of 1991,²²³ "to leave *Meritor* intact"²²⁴ required allegiance to *Meritor*'s holding that employers are not automatically liable for harassment by workplace supervisors.²²⁵ But, in both *Meritor* and the affirmative defense cases, the Court ignored evidence that Congress did not intend to condition employer liability on notice or for employers to act as private EEOC's, responsible for conciliating and settling sexual harassment complaints.²²⁶

In *Meritor*, members of the 99th Congress filed an amici curiae brief with the Court, challenging the notice-liability rule proposed by the EEOC as contrary both to the language of Title VII and the statute's remedial purpose.²²⁷ They argued that "[f]aithfulness to the language and intent of Title VII requires that an employer's liability for its agents' sexually harassing acts be measured by the identical standard of liability uniformly applied in every other Title VII context."²²⁸

In the affirmative defense cases, *Ellerth* and *Faragher* provided the Court with legislative history from the Civil Rights Act of 1991,²²⁹ showing

²²¹ *Meritor*, 477 U.S. at 72.

²²² *Id.*

²²³ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

²²⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 n.4 (1998).

²²⁵ *See id.* at 804.

²²⁶ In *Ellerth*, the Court explained that the employer exhaustion requirement "would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." 524 U.S. 742, 764 (1998) (citation omitted). The problem with this argument is that it assumes that because Congress wanted to promote conciliation with the EEOC, it also intended to *force* victims to conciliate their complaints with their employers—the defendant in any impending litigation.

²²⁷ Brief of Amici Curiae Members of Congress in Support of Respondent at 18-20, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 669773 [hereinafter *Members of Congress Amici Brief*]. Twenty-nine members of Congress, both Democrats and Republicans, signed the brief. *Id.* at 1-2.

²²⁸ *Id.* at 18-19.

²²⁹ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). On the references to the legislative history, see Brief for Respondent at 37-38, *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)

that the House Committee on Education and Labor²³⁰ affirmatively rejected an employer exhaustion requirement in a substitute bill, H.R. 1375, offered by then House Minority Leader Michel.²³¹ Michel's bill would have denied recovery to any plaintiff who "failed to avail himself or herself of a procedure, of which the complaining party was or should have been aware, established by the employer for resolving complaints of harassment in an effective fashion within a period not exceeding ninety days."²³² The House Committee found the employer exhaustion requirement troubling. It concluded that such a requirement "would in effect punish the *victim*, particularly given testimony the Committee received from sex harassment expert Dr. Freada Klein that . . . (2) '[v]ictims perceive that to come forward within their workplaces is to be labeled as 'troublemakers' or 'oversensitive.'"²³³ Moreover, even though it was not a specific commentary on the exhaustion requirement in H.R. 1375, the full House did reject, by a vote of 266-162, Michel's proposed bill.²³⁴

It certainly is possible that the Court found all of this legislative history to be unpersuasive on the question of Congress's intent. For example, the amici curiae brief filed by members of the 99th Congress represented the opinion of only twenty-nine members of Congress.²³⁵ Nonetheless, it is odd that that in three different opinions raising the issue of Congress's intent, the Court never mentioned, not even in a footnote discounting its relevance, evidence suggesting that Congress did not intend to hinge employer liability on notice. The failure of the Court to address this evidence of legislative intent is most telling in the affirmative defense cases. In *Ellerth* and

(No. 97-569), 1998 WL 145325, and Reply Brief for Petitioner at 15 n.19, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1998 WL 66037.

²³⁰ On April 24, the House Committee issued its report on House Report 1, a "bill . . . to amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment," recommending passage of the bill, as amended. H.R. REP. NO. 102-40, pt. 1, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549. The Committee rejected Michel's proposed substitution of House Bill 1375 for House Bill 1. *See* H.R. REP. NO. 102-40, pt. 1, at 103(1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 641. Congress did not enact H.R. 1 into law. In November of 1991, the House passed Resolution 270 to consider Senate Bill 1745, which Congress ultimately enacted into law as the Civil Rights Act of 1991. *See* H.R. Res. 270, 102nd Cong. (1991).

²³¹ Michel's proposal, House Bill 1375, would have added language to 42 U.S.C. § 2000e-2(a), thereby expanding the scope of unlawful employment practices under Title VII to explicitly include harassment of "any employee or applicant for employment because of that individual's race, color, religion, sex, or national origin." H.R. 1375, 102nd Cong. § 8(a) (1991). House Bill 1375 "was identical to the 1991 proposal endorsed by and introduced on behalf of the [Bush] Administration." H.R. REP. NO. 102-40, pt. 1, at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635.

²³² H.R. 1375, 102nd Cong. § 8(a) (1991).

²³³ H.R. REP. NO. 102-40, pt. 1, at 103 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 641.

²³⁴ 137 CONG. REC. H3908 (daily ed. June 4, 1991).

²³⁵ Members of Congress Amici Brief, *supra* note 227, at 1-2.

Faragher, the Court crafted an exhaustion requirement, which the full House rejected when it voted against Representative Michel's substitute bill, and which contravened the express intent of the House Committee on Education and Labor not to condition liability on the victim's use of her employer's grievance procedure.

Finally, in addition to its invocation of statutory language and Congressional intent, the Court appealed to statutory policy to justify its decision to create the employer exhaustion requirement in *Ellerth* and *Faragher*. In *Faragher*, the Court held that deterrence of discriminatory workplace conduct is Title VII's "primary objective."²³⁶ Obviously, the Court considered employers to be integral cogs in the statute's machinery of deterrence. Thus, it concluded that giving employers incentives to prevent workplace harassment, by tying employer liability to employers' promulgation of anti-harassment policies and grievance procedures, would "implement clear statutory policy and complement the Government's Title VII enforcement efforts."²³⁷

The problem with the Court's reasoning is that the success of employer grievance procedures depends on victim reporting, which is an uncommon response to harassment. More importantly, however, the Supreme Court was aware of the empirical evidence on victim reporting when it created the affirmative defense. In fact, amici curiae, in briefs to the Court in *Ellerth*²³⁸ and *Faragher*,²³⁹ cited to various studies, including reports by the Merit Systems Protection Board of sexual harassment in the federal workplace,²⁴⁰ which concluded that very few victims of sexual harassment formally report harassment.²⁴¹ The Court, however, ignored this evidence on the low incidence of victim reporting, instead explicitly conditioning a victim's right to recovery on use of her employer's internal grievance procedure.

²³⁶ *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (internal quotation marks omitted).

²³⁷ *Id.*

²³⁸ See Brief Amici Curiae of Equal Rights Advocates et al. on Behalf of Respondent at 14 n.7, *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569), 1998 WL 145349.

²³⁹ See Brief Amici Curiae of National Women's Law Center et al. on Behalf of Petitioner at 26, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1997 WL 800075.

²⁴⁰ See MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995) [hereinafter MSPB 1995], available at <http://www.mspb.gov/studies/sexhar.pdf>; MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE (1988) [hereinafter MSPB 1988], available at <http://www.mith2.umd.edu/WomensStudies/GenderIssues/SexualHarassment/MSPBReport/full-text>.

²⁴¹ See MSPB 1995, *supra* note 240, at 33 (finding that "only about 6 percent of victims who responded to our 1994 survey said they had taken formal action"); MSPB 1988, *supra* note 240, at 27 (finding that only 5% of victims formally reported the harassment). For background on the MSPB surveys, see *Emperor's New Clothes*, *supra* note 2, at 79-81 (1999).

The Supreme Court repeatedly has obscured the choices that it made in constructing the individual model of workplace sexual harassment and its related liability standards. By invoking mantras about fidelity to statutory language, Congressional intent, and statutory policy, the Court has portrayed as inevitable its choice to transform employers into private EEOC's. The end result is a liability framework that is a distorted amalgam of agency law principles and policy-based interpretations of Congressional intent.²⁴² What actually underlies the individual model of harassment is not fidelity to agency law principles, statutory language, or Congressional intent, but rather a set of unarticulated assumptions about the dominance of merit, the rationality of employers, and the wisdom of market solutions to problems of workplace discrimination.

B. *The Dominant Discourse*

The Supreme Court crafted the individual model of workplace sexual harassment because it is consistent with the dominant discourse in the United States about employment discrimination. Underlying the individual model of workplace sexual harassment is a constellation of three interrelated assumptions about merit, employer rationality, and the efficacy of market solutions to employment discrimination.²⁴³

²⁴² See *Faragher*, 524 U.S. at 802 n.3 (explaining that Section 219(2)(d) of the Restatement of Agency was only the "starting point" for its analysis and noting that it was necessary to adapt agency principles "to the practical objectives of Title VII").

²⁴³ No doubt there are other reasons why the Supreme Court created an individual model of harassment, but I contend that these beliefs best explain the Court's creation and the lower federal courts' implementation of the individual model. Other reasons for the model include the Court's acceptance of cultural stereotypes about women's behavior that are reminiscent of myths drawn from rape law, and the judiciary's persistent substitution of procedural protections for meaningful substantive review of employer decision-making. For example, the Supreme Court's holding in *Meritor* that a victim's "sexually provocative speech or dress" was relevant to whether "she found particular sexual advances unwelcome," *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986), is oddly reminiscent of the belief that seductive clothing serves as a proxy for a woman's consent to rape, see DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 11 (1997). This blame-the-victim phenomenon is a common response to accusations of rape, see *id.*, and to charges of sex discrimination, see Erika Hayes James & Lynn Perry Wooten, *Restoring Reputation: Firm Response Strategies for Managing a Discrimination Crisis* 26 (Darden Graduate School of Business Administration at the University of Virginia Working Paper Series, Paper No. 04-02, 2005), available at <http://ssrn.com/abstract=520982>. On the procedure/substance dichotomy, see Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1538-39 (1992) (concluding that procedures may mask a failure to substantively comply with anti-discrimination law). For an analysis of the judicial tendency to create "process-perfecting theories" in order to avoid "divisive controversies over substantive values" in the realm of constitutional adjudication, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

The first—that merit alone determines success—dominates discussions of employment discrimination in the United States.²⁴⁴ The belief in merit is so deeply ingrained that claims of employment discrimination, including harassment, often are met with skepticism.²⁴⁵ It is not surprising, then, that “many Americans believe that [sexual harassment] is widely exaggerated.”²⁴⁶

The belief in merit, in turn, is entwined with the assumption that employers behave rationally, and thus do not discriminate. But, if employers behave rationally, then sexual harassment cannot result from systemic or structural causes; it must originate “outside” the organization, i.e., within the pathology of individual harassers, and in an episodic and necessarily unpredictable fashion. In part, then, a concern for fairness to employers—giving the employer the chance to discipline or terminate a harassing employer before holding it liable—underlies the Court’s notice rule.²⁴⁷ But, fairness only partially explains the federal judiciary’s deference to employer decision-making in sexual harassment cases.

The deference accorded employers also derives from a deeply ingrained belief, bolstered by the writings of the law and economics movement,²⁴⁸ in the efficacy of market-based solutions to employment discrimination.²⁴⁹ Thus, the belief in employer rationality is tied to the assumption that the market can correct its own imperfections.²⁵⁰ But, if the market is self-correcting, then government regulation is both unnecessary and poten-

²⁴⁴ See SONIA OSPINA, *ILLUSIONS OF OPPORTUNITY: EMPLOYEE EXPECTATIONS AND WORKPLACE INEQUALITY* 14 (1996); *Meritocracy Myth*, *supra* note 179, at 592-99.

²⁴⁵ Cf. Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, *STAN. L. & POL’Y REV.* 237, 242 (2004) (noting that “[d]espite the recent advances in research on discrimination claims, the myth of litigiousness is still pervasive in popular culture and in politics”).

²⁴⁶ RHODE, *supra* note 243, at 97.

²⁴⁷ See *supra* note 86-88 and accompanying text.

²⁴⁸ See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 301-419 (1995) (examining the effect of economic thinking on American jurisprudence and, in particular, the impact of the modern law and economics movement on the judiciary over the past several decades).

²⁴⁹ Cf. Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 *U. CHI. L. REV.* 1463, 1471 (1996) (describing the dominance of the laissez faire principle in American jurisprudence in the period after Reconstruction and before the New Deal and explaining that that time period “established a baseline of economic freedom and government largesse to which powerful business entities, their allies in academia and think tanks, and the neo-muckrakers of the conservative media persistently return”); DUXBURY, *supra* note 248, at 329 (concluding that while the New Deal dealt a blow to the laissez faire principle, “faith in the efficacy of unregulated markets . . . remained intact”).

²⁵⁰ See, e.g., Robert Cooter, *Market Affirmative Action*, 31 *SAN DIEGO L. REV.* 133, 139 (1994) (concluding that “perfect competition eliminates discrimination by employers” because employers who discriminate in hiring incur higher costs to get the same qualified labor pool and in a perfect market, “lower cost producers eliminate higher cost producers”).

tially inefficient. This “ideological deference to the efficiency of the market” is one factor “influenc[ing] how [the government] regulates organizational life.”²⁵¹ Allowing employers to screen and resolve complaints of workplace sexual harassment is consistent with this faith in the market’s and employers’ rationality.

It is important to recognize that *Meritor* was decided in 1986, during a period when these assumptions became more influential both politically and jurisprudentially. It is no surprise that the Reagan-era²⁵² EEOC, which Clarence Thomas chaired from 1982 until 1990,²⁵³ advocated the notice-liability standard adopted by the majority in *Meritor*.²⁵⁴ In fact, the majority’s justification for deviating from both the EEOC Guidelines and established Title VII liability rules—that the term “agent” implied some limitation on employer liability—is taken almost verbatim from the Solicitor General’s brief on behalf of the Reagan administration and the EEOC.²⁵⁵

At the same time, the Supreme Court began to embrace a more limited conception of what constitutes employment discrimination. Only three years after the decision in *Meritor*, the Court handed down its controversial decision in *Wards Cove Packing Co. v. Atonio*,²⁵⁶ which heralded the demise of the disparate impact theory²⁵⁷ that the Court had adopted 18 years

²⁵¹ Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441, 442 (1998).

²⁵² “[R]egulatory relief” was one of the four primary goals of [President Reagan’s] ‘economic recovery program.’” McGarity, *supra* note 249, at 1475 (footnote omitted).

²⁵³ FEDERAL JUDICIAL CENTER, JUDGES OF THE UNITED STATES COURTS, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Nov. 25, 2005). During Thomas’s tenure at the EEOC, “the number of cases in which the EEOC found cause to suspect discrimination plummeted from 72.5 percent in October 1979 to 43.9 percent by the first half of 1986.” Carol M. Swain, *Double Standard, Double Bind: African-American Leadership After the Thomas Debacle*, in RACE-ING JUSTICE, ENGENDERING POWER 215, 217 (Toni Morrison ed., 1992) (footnote omitted); *see also* Reskin II, *supra* note 121, at 588. Thomas dissented in both *Ellerth* and *Faragher*, arguing that negligence should be the standard of liability in harassment cases. *See Ellerth*, 524 U.S. at 766 (Thomas, J., dissenting).

²⁵⁴ *See* DUXBURY, *supra* note 248, at 358 (discussing Reagan’s efforts to change “the ideological perspective of the federal judiciary by selecting individuals who . . . doubt[ed] the wisdom of government intervention into the affairs of business”); *cf.* Reskin II, *supra* note 121, at 588 (describing how the “probusiness presidencies of Reagan and Bush reined in the enforcement of . . . Title 7”).

²⁵⁵ *See* Phillips, *supra* note 77, at 1236-37.

²⁵⁶ 490 U.S. 642 (1989). Only a year before, the Court handed down its decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), a plurality opinion that foreshadowed the Court’s decision in *Wards Cove*. *See Wards Cove*, 490 U.S. at 661 (Blackmun, J., dissenting) (noting that “a bare majority of the Court [took] three strides backwards in the battle against race discrimination . . . reach[ing] out to make last Term’s plurality opinion in *Watson v. Fort Worth Bank & Trust* the law”) (citations omitted).

²⁵⁷ On the demise of the disparate impact theory, *see* Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479 (2003); Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL

earlier in *Griggs v. Duke Power Co.*²⁵⁸ The disparate impact theory focused not on employer intent or motivation, but rather on the “consequences of employment practices.”²⁵⁹ Thus, disparate impact theory not only broadened the potential for employer liability, it also provided the beneficiaries of Title VII with a tool for attacking the more subtle forms of discrimination that predominate in the modern workplace.²⁶⁰ By limiting the availability of disparate impact theory, the Court in *Wards Cove* narrowed the possible grounds on which employers could be held liable under Title VII.²⁶¹ As a result, most Title VII plaintiffs now sue using disparate treatment theory,²⁶² which requires either direct or circumstantial evidence of discriminatory intent.²⁶³ At the same time, however, the lower federal courts, by “narrowing the legal definition of actionable discrimination,”²⁶⁴ have made it increasingly difficult for employment discrimination plaintiffs to prevail even on a theory of disparate treatment.²⁶⁵

The individual model of sexual harassment fits within this larger judicial trend toward interpreting more narrowly the grounds for employer liability under Title VII. First, the individual model is basically an intent, rather than a consequence, based theory of discrimination. Apart from claims of supervisor quid pro quo harassment, which are rare,²⁶⁶ the liability standard for both co-worker and supervisor hostile work environment cases requires intent to discriminate by the organizational employer, not simply the harassing employee. This distinction is most apparent in cases of hostile work environment harassment by supervisors. An organization can only act

L. REV. 1194, 1205-08 (2000). On the federal courts’ rejection of disparate impact theory in pay equity cases, see ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 347 (1999).

²⁵⁸ 401 U.S. 424 (1971).

²⁵⁹ *Id.* at 432; see also Higgins & Rosenbury, *supra* note 257, at 1205 (noting that disparate impact theory created a “standard . . . of neutrality of impact, not neutrality of intent”).

²⁶⁰ See, e.g., *Meritocracy Myth*, *supra* note 179, at 599-612 (on changing nature of discrimination).

²⁶¹ Congress enacted The Civil Rights Act of 1991, in part, in response to *Wards Cove*. See Civil Rights Act of 1991, Pub. L. No. 102-166 § 2(2), 105 Stat. 1071 (1991) (explaining that *Wards Cove* had “weakened the scope and effectiveness of Federal civil rights protections”). On the effect of The Civil Rights Act of 1991 on disparate impact theory, see DeSario, *supra* note 257, at 501-07.

²⁶² See Higgins & Rosenbury, *supra* note 257, at 1205; see also *id.* (noting that “disparate impact cases have become exceedingly rare”).

²⁶³ See *Meritocracy Myth*, *supra* note 179, at 612-14 (explaining the differences between direct and circumstantial evidence cases).

²⁶⁴ *Meritocracy Myth*, *supra* note 179, at 616.

²⁶⁵ See generally *id.*

²⁶⁶ Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 565 (2001) (concluding from study of almost 650 reported federal court sexual harassment opinions handed down between 1986 and 1996 that “[t]he bulk of sex harassment cases involve hostile environment claims”).

through its individual employees. In a non-harassment Title VII case, the act of the supervisor *is* the act of the organizational employer.²⁶⁷ But, in a hostile work environment case, even if a supervisor intends to discriminate against a female employee by sexually harassing her, that act does not automatically become the act of the organizational employer.²⁶⁸ The notice requirement established in *Meritor*, *Ellerth*, and *Faragher* bridged that gap between the harassing supervisor and the organization: the employer's failure to act once it obtains notice of harassing workplace conduct satisfies the element of discriminatory intent.²⁶⁹

Second, the lower federal courts are making it increasingly difficult for a victim of workplace sexual harassment to recover against her employer. Judicial skepticism of sexual harassment claims is not uncommon. The concern is that absent tight judicial oversight sexual harassment law will become the legal dumping ground of hypersensitive employees.²⁷⁰ In *Faragher*, for example, the Supreme Court explained that the requirement that workplace harassment be "severe or pervasive" was necessary to "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" ²⁷¹ Moreover, the Court's admonition that Title VII not become a "general civility code" ²⁷² is an oft-repeated refrain in the lower federal court decisions on sexual harassment.²⁷³

²⁶⁷ See *supra* note 39 and accompanying text.

²⁶⁸ See, e.g., *Meritor* Oral Argument Transcript, *supra* note 64, at *38-39 (statement from one Justice during oral argument exchange with counsel for Vinson, agreeing that Title VII "defines an agent of an employer as an employer himself" but disagreeing about the implications of that definition, noting that "all that means is there are two employers in this case; one is Taylor and the other is the bank . . . the statute doesn't say that each employer is liable for the acts of the other").

²⁶⁹ See, e.g., *id.* at *9-13 (argument of Bank that Title VII's requirement of intentional discrimination requires a "notice and opportunity to cure rule," because such a rule provides clear indication of discriminatory intent on the part of the employer).

²⁷⁰ See *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1237, 1252 (M.D. Ala. 2001) (citation omitted) (stating that in affirmative defense cases, the court "should place a thumb on the side of the scale favoring summary judgment . . . given 'the universal knowledge that it takes only an aggressive employee, a complaisant lawyer and \$150 to embroil any employer in protracted and expensive litigation'"); cf. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (expressing unease with the "abusive" or "hostile" standards for determining when harassment becomes objectively severe or pervasive to amount to an actionable Title VII claim and contrasting a cause of action for negligence, explaining that "the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute 'abusiveness' is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation").

²⁷¹ *Faragher*, 524 U.S. at 788 (citation omitted).

²⁷² *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

²⁷³ See, e.g., *Singleton v. Dep't Corr. Educ.*, 115 F. App'x 119, 122 (4th Cir. 2004); *Vitt v. City of Cincinnati*, 97 F. App'x. 634, 638 (6th Cir. 2004) (race harassment); *Lee-Crespo v. Schering-Plough*

The judiciary's skepticism of the sexual harassment cause of action manifests itself most clearly in the way that federal judges handle sexual harassment complaints. The federal courts have interpreted the elements of a hostile work environment claim so narrowly that it is extraordinarily difficult for a plaintiff to survive an employer motion for summary judgment, let alone prevail at trial.²⁷⁴ Even when a plaintiff has endured physical assault²⁷⁵ or other criminal behavior at work,²⁷⁶ some courts have granted her employer's motion for summary judgment, concluding that the complained-of conduct was simply not severe or pervasive enough to constitute a hostile work environment.

Restricting the right of victims to recover for workplace sexual harassment is consistent with the dominant assumptions about merit, employer rationality, and the value of market-based solutions to employment discrimination. Interpreting narrowly the elements of the sexual harassment cause of action means that there are fewer successful claims against employers, which legitimates employer decision-making. This, in turn, rein-

Del Caribe, Inc., 354 F.3d 34, 37-38 (1st Cir. 2003); *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003).

²⁷⁴ See *Empirical Vacuum*, *supra* note 34, at 213-16 (explaining the trend by the lower federal courts to grant employer motions for summary judgment in affirmative defense cases); *Tipping the Scales*, *supra* note 195, at 533 (describing study by Professor Theresa Beiner of sexual harassment decisions issued between 1986 and 1997 showing high rate at which federal courts grant employer motions for summary judgment on the basis that the complained-of conduct was neither severe nor pervasive). The trend in granting employer motions for summary judgment in sexual harassment cases has occurred during a period of time in which the number of harassment complaints filed with state and federal fair employment agencies has increased. Victims filed 10,532 complaints in 1992, and 13,136 complaints in 2004, an increase of 2604 complaints, or 25%, from 1992 to 2004. U.S. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, SEXUAL HARASSMENT CHARGES—EEOC & FEPAS COMBINED: FY 1992-FY 2004 (2005), <http://eeoc.gov/stats/harass.html>.

²⁷⁵ See, e.g., *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 297, 299 (5th Cir. 2001) (affirming trial court order granting summary judgment to employer and noting that it was a "close" question whether co-worker's conduct was severe or pervasive because the "unwelcome touching" happened for only "a few minutes each day," even though plaintiff alleged that co-worker had touched her "on a daily basis"); *Diviny v. Village of Cottage Green*, No. 03-5096, 2004 U.S. Dist. LEXIS 22191, at *11 (E.D. Pa. Nov. 1, 2004) (granting summary judgment to employer on liability question and noting that it was "doubtful" that plaintiff could establish that co-worker's conduct was severe or pervasive, even though co-worker, on two occasions, grabbed plaintiff, put his arms around her waist, and kissed her on the neck and on a third occasion, grabbed plaintiff and attempted to kiss her).

²⁷⁶ See, e.g., *Durkin v. City of Chicago*, 199 F. Supp. 2d 836, 850-51 (N.D. Ill. 2002) (granting employer's motion for summary judgment on the ground that fellow officer's exposing his penis to the plaintiff while he was urinating and telling her to "suck this" was not sufficiently severe or pervasive, even though employer had not "move[d] for summary judgment on this basis"), *aff'd*, 341 F.3d 606 (7th Cir. 2003). In Illinois, "[a] lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person" is a Class A misdemeanor. 720 ILL. COMP. STAT. 5/11-9(2) (2005).

forces the assumption that merit, rather than discriminatory workplace conditions such as harassment, determines success on the job.

Moreover, by limiting a victim's right to recovery unless she uses her employer's internal grievance procedure, the federal courts send two powerful messages. The first is that the victim's problem lies not with her employer, but with an individual employee.²⁷⁷ For example, it would be odd indeed to require a non-breaching contracting party to exhaust a grievance procedure designed by the very party claimed to have breached the parties' agreement. Why, then, must a victim of harassment exhaust her employer's grievance procedure, unless her employer were not responsible for the harm alleged? Thus, the conditioning of employer liability on notice reinforces the assumption that employers generally behave rationally, and thus do not discriminate in the terms and conditions of employment.²⁷⁸

The second is that employer solutions to harassment, such as internal grievance procedures and anti-harassment policies, are as effective as government regulation in protecting an employee's right to a harassment-free workplace under Title VII. In their study of employer EEO grievance procedures, Professor Edelman and her colleagues found that the federal courts play an important role "in the *production* of ideologies of rationality."²⁷⁹ Thus, they found that the Supreme Court's decision in *Meritor* "legitimated the grievance procedure defense."²⁸⁰ Prior to the decision in *Meritor*, employers rarely invoked their internal grievance procedure as a defense to liability for harassment. After *Meritor*, however, "many more employers raise[d] the grievance procedure defense, and courts [were] far more predisposed to listen."²⁸¹ In other words, employer responses to harassment are not inherently rational; rather, the federal courts, in their sexual harassment decisions, cloak employers with the appearance of rationality. By deferring to employers' implementation of their internal grievance procedures, the courts reinforce the belief in the efficacy of market-based solutions to employment discrimination issues. As a result, employers become an integral part of the "Government's Title VII enforcement efforts."²⁸²

²⁷⁷ On the "inherent conflict" created by these employer grievance procedures, see *Tipping the Scales*, *supra* note 195, at 526-27.

²⁷⁸ Cf. NELSON & BRIDGES, *supra* note 257, at 12-15 (arguing that the courts locate the source of male-female wage disparities outside the employing organization, thereby "legitimat[ing] institutionalized forms of gender inequality in the workplace"); Reskin II, *supra* note 121, at 588 (concluding that "many members of the federal judiciary accept as fact the ideology that 'the market' is a neutral, unbiased mechanism that sets wages").

²⁷⁹ *Rational Myth*, *supra* note 77, at 408.

²⁸⁰ *Id.* at 439.

²⁸¹ *Id.*

²⁸² *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

The problem, however, with this entire model is that the victims of harassment are often deprived of the financial remedies afforded them under federal law. The Civil Rights Act of 1991 provided the victims of sex discrimination with the right to compensatory and punitive damages against private employers²⁸³—a right that had been denied them under the Civil Rights Act of 1964.²⁸⁴ Employers, however, do not award compensatory or punitive damages to victims of harassment. By deferring to employers' solutions to workplace harassment, the federal courts effectively limit the remedies available under federal law. The end result of this judicial deference to employer decision-making is an inequitable system that advances employer interests at the expense of Title VII's intended beneficiaries. While employees have the right to a harassment-free workplace in theory, the federal courts have largely eroded that right in practice.

CONCLUSION

If the individual model of harassment provides an ineffective framework for addressing the problem of workplace sexual harassment, what, then, is the alternative? It is a theory of direct liability against the employer for its role in creating or fostering the hostile work environment. Not all employers could be held liable under such a theory. Nonetheless, in many sexual harassment cases, the federal courts fail to recognize the connection between instances of sexual harassment and other indicia of sex-based discrimination in the workplace.²⁸⁵ Thus, the direct liability theory would supplant the individual model in many, but not all, cases of workplace sexual harassment.

How would such a theory of liability work in practice? While the purpose of this Article is not to outline in detail the parameters of such a theory, a brief explanation is in order.

First, it would apply in any or all of the following fact scenarios: (1) the employer maintains a sex-segregated workplace; (2) the victim performs a "male-identified" job; or (3) the employer has a history of excluding women from the workforce, e.g., sex discrimination or sexual harassment litigation.²⁸⁶ Some critics might argue that it is unfair to hold an employer liable based, for example, on the gender identification of certain jobs or the sex-segregated nature of its workforce. They would contend that the

²⁸³ See BARBARA LINDEMANN & PAUL GROSSMAN, 2 EMPLOYMENT DISCRIMINATION LAW 1821-22 (3d ed. 1996). The Act extended this right only to victims of intentional discrimination. *Id.* at 1822.

²⁸⁴ See *id.* at 1821.

²⁸⁵ See, e.g., *supra* Parts II.A-B.

²⁸⁶ See, e.g., *supra* notes 139-41 and accompanying text.

employer cannot control the sex composition of particular jobs or its overall workforce. This unfairness argument, however, is premised on the assumption that the “market,” not the individual employer, controls the sex composition of the employer’s workforce. It is not clear, as an empirical matter, that that is the case. For example, Professors Nelson and Bridges found that organizational practices, not simply the “market,” serve to maintain inequities in the pay structure for women within an organization.²⁸⁷ Similarly, the sex composition of an employer’s workforce may reflect market forces, organizational practices, e.g., managers’ expectations as to which sex fills which job and stereotypical evaluations of men and women’s competence for certain types of work, or both. Assuming that the market alone controls the sex composition of an individual workforce confuses an empirical question with an ideological position.

Second, employers would have an affirmative obligation to monitor their workplaces for evidence of harassment. One of the deficiencies of the individual model is that it presumes, contrary to a substantial body of social science research, that employers generally maintain harassment-free workplaces. Thus, the onus for change rests with the victim of harassment. Given the pervasiveness and persistence of sexual harassment as a workplace problem, employers should enjoy no such presumption. In other words, employers should have an affirmative obligation to periodically survey their employees’ perceptions of the work environment. An employer’s failure to do so would serve as evidence of an organizational culture tolerant of workplace sexual harassment.

Third, a victim of harassment invoking a direct theory of liability would have no obligation to use an employer grievance procedure. Under a direct theory of liability, the victim is suing the employer for its role in creating the hostile work environment. Therefore, it makes little sense to expect the victim to entrust her complaint to the very party that created the harassing work environment.

The advantage of a direct theory of liability is that it provides employers with incentives to address the underlying organizational causes of workplace sexual harassment. The problem is that the theory is simply unpalatable given the federal judiciary’s current stance towards employment discrimination claims. The debate over sexual harassment law and, in fact, employment discrimination law, in general, is not about the empirical evidence on harassment or other forms of workplace discrimination. It is a debate about deeply held beliefs. Until the federal courts adopt a more skeptical stance toward the assumptions of employer and market rationality, little progress will be made in eradicating sexual harassment in the modern workplace.

²⁸⁷ See NELSON & BRIDGES, *supra* note 257, at 1-15.