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Laboratories of Democracy: State Law as a Partial Solution to Workplace Harassment

Ann C. McGinley

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LABORATORIES OF DEMOCRACY: STATE LAW AS A PARTIAL SOLUTION TO WORKPLACE HARASSMENT

ANN C. MCGINLEY*

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I. INTRODUCTION: STRUCTURAL, LEGAL, AND POLITICAL FAILURES

Despite the recent public awakening concerning both sexism and racism in our society,¹ the federal courts have systematically chipped away at employees’ civil rights under Title VII of the 1964 Civil Rights Act to be free of both sexual and racial harassment at work.²

Since the 1970s, lower federal courts have recognized hostile work environments caused by race and sex as violative of Title VII of the 1964 Civil Rights Act.³ In 1986, the U.S. Supreme Court concluded in *Meritor Savings Bank v. Vinson* that sexually hostile work environments constitute

1. See Emma Brockes, *Me Too Founder Tarana Burke: ‘You Have to Use Your Privilege to Serve Other People,’* GUARDIAN (Jan. 15, 2018, 12:57 AM), <https://perma.cc/2P3W-29PX?type=image> (responding to the Harvey Weinstein sexual assault scandal, actress Alyssa Milano virally tweeted “#MeToo,” a term created twelve years earlier by Tarana Burke); Monica Anderson, *The Hashtag #BlackLivesMatter Emerges: Social Activism on Twitter,* PEW RSCH. CTR. (Aug. 15, 2016), <https://www.pewresearch.org/internet/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter/> (noting The Black Lives Matter (“BLM”) movement went viral with the #BlackLivesMatter hashtag in 2013 after the acquittal of George Zimmerman for the murder of Black teenager Trayvon Martin); *Black Lives Matter Movement,* HOW. U. L. LIBR. [https://library.law.howard.edu/civilrights/history/BLM\(explaining that the BLM movement hosted numerous protests after several state killings of Black people including George Floyd in Minneapolis\)](https://library.law.howard.edu/civilrights/history/BLM(explaining%20that%20the%20BLM%20movement%20hosted%20numerous%20protests%20after%20several%20state%20killings%20of%20Black%20people%20including%20George%20Floyd%20in%20Minneapolis)); Minyvonne Burke, *Woman Shot and Killed by Kentucky Police in Botched Raid, Family Says,* NBC NEWS (May 12, 2020, 6:51 PM), <https://www.nbcnews.com/news/us-news/black-woman-shot-killed-after-kentucky-police-entered-her-home-n1205651> (arguing that Breonna Taylor was killed for “sleeping while black” in her home).

2. See *infra* Section II. This “chipping away” results from interpretations of substantive and procedural law.

3. See 42 U.S.C. § 2000e-1 et seq.; *Rodgers v. Equal Emp. Opportunity Comm’n,* 454 F.2d 234, 238 (5th Cir. 1971) (stating that “‘terms, conditions, or privileges of employment’ in § 703 is an expansive concept that sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination”); *Barnes v. Costle,* 561 F.2d 983, 994-95 (D.C. Cir. 1977) (holding that it is sex discrimination for a woman to suffer tangible employment losses for refusing to submit to requests for sexual favors).

sex discrimination prohibited by Title VII.⁴ But despite some progressive Supreme Court opinions since then,⁵ the Court has also decided cases that narrow plaintiffs' rights to be free of employment discrimination under various federal statutes.⁶ Moreover, generally, federal district courts and the U.S. Courts of Appeals have on many occasions signaled their lack of interest in protecting the rights of individuals to be free of illegal harassment and other illegal discrimination.⁷ This anti-plaintiff orientation results not only from substantive doctrines applied to the interpretation of Title VII, most of which do not appear in the text of the civil rights acts, but also from the application of procedural rules to Title VII and other employment discrimination cases that has unduly reduced the success rates of plaintiffs.⁸

4. *Meritor Savs. Bank, v. Vinson*, 477 U.S. 57, 66-67 (1986); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (confirming that racial harassment is governed by the same legal standards as sexual harassment).

5. *See, e.g., Oncale v. Sundowner Serv., Inc.*, 523 U.S. 75, 79 (1978) (holding that Title VII forbids sexual harassment by individuals of the same sex, and that romantic or sexual interest need not motivate the harassment for it to be illegal); *Bostock v. Clayton Cty., Ga.*, 140 U.S. 1731, 1737 (2020) (holding that discrimination based on a persons' sexual orientation or transgender status is discrimination prohibited because of sex under Title VII).

6. *See, e.g., Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013) (narrowing the definition of "supervisor" in harassment law, and thereby making it more difficult for plaintiffs to prove employer liability); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (concluding that to prove retaliation under Title VII, a plaintiff must prove "but for" causation); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) (narrowing the types of evidence a plaintiff may use to prove "commonality" when moving for class certification); *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (holding that an employer may not throw out results of a test with a racially disparate impact unless the employer has a strong basis in evidence that it would be liable for disparate impact if it failed to do so); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (concluding that to prove age discrimination under the ADEA, a plaintiff must prove age was a "but for" cause, rather than a motivating or substantial factor); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624-25 (2007) (holding that a plaintiff loses her right to sue for pay discrimination if she doesn't bring her claim within 180 days of the employer's pay decision, even if the plaintiff had no reason to believe that she was being paid less than comparable male employees).

7. *See Nancy Gertner, Losers' Rules*, 122 YALE L. J. ONLINE 109, 109 (2012), <http://yalelawjournal.org/2012/10/16/gertner.html> (arguing that the federal courts are responsible for "changes in substantive discrimination law since the passage of the Civil Rights Act of 1964 [that] were tantamount to a virtual repeal").

8. *See id.* at 110 (attributing the courts' anti-plaintiff orientation to "asymmetric decision-making," where judges are encouraged to write comprehensive opinions when they grant summary judgment or motions to dismiss but not to do so when they deny it, which has led to a distortion of the lens through which judges see and decide the law);

Empirical research confirms an “anti-plaintiff effect” in employment discrimination cases at all stages of litigation in federal courts.⁹ In federal district courts and in the U.S. Courts of Appeals, employment discrimination plaintiffs suffer a significant disadvantage compared to non-employment discrimination plaintiffs in federal court and employment discrimination defendants.¹⁰ For example, one study found that although plaintiffs in civil cases other than discrimination cases had a success rate of 51%, plaintiffs in employment discrimination cases won at a rate of only 15%.¹¹ Moreover, while the research shows that both judges and juries find for plaintiffs less frequently in employment discrimination cases than cases alleging other violations, plaintiffs in employment discrimination cases do better with juries than in bench trials.¹² Considering the low rate of success that

see also SANDRA SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW 203-23 (2018) (discussing judge-manufactured doctrines such as “stray remarks doctrine,” “same actor inference,” and the “honest belief rule”); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518, 537-38 (2010) (discussing how the federal summary judgment trilogy, and changes to motions to dismiss and evidentiary standards, all instigated by interpretations of the Supreme Court, harm plaintiffs in civil rights cases).

9. *See generally* Kevin M. Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL’Y REV. 103, 104-05 (2009) [hereinafter Clermont & Schwab] (explaining that employment discrimination plaintiffs bring fewer cases now, cases that go to court terminate less favorably for plaintiffs, and plaintiffs fare remarkably poorly at the appellate level).

10. *See id.* at 127 (finding in an empirical study that from 1979 to 2006, plaintiffs won employment discrimination cases in federal court at a rate of 15%, a rate that is drastically lower than the win rate of 51% of non-employment discrimination cases in the same courts).

11. *See id.* at 128 (showing that employment discrimination plaintiffs from 1979-2006 won 3.59% of pretrial adjudications compared to 21.05% of non-employment cases in pre-trial adjudications); *see also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283-84, 309 (1997) (arguing that plaintiffs’ meritorious cases lose on appeal); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560 (2001) (claiming that employers prevail in 98% of federal court employment discrimination cases resolved at the pretrial stage); Marcia L. McCormick, *Let’s Pretend that Federal Courts Aren’t Hostile to Discrimination Claims*, 76 OHIO STATE L. J. 1, 2 (2015) (noting that extensive research demonstrates that plaintiffs fare worse in federal court at all stages of the litigation than plaintiffs in other types of cases).

12. Clermont & Schwab, *supra* note 9, at 130 (explaining that juries found for employment discrimination plaintiffs in 37.63% of cases, whereas judges found for employment discrimination plaintiffs in only 19.62% of cases before them; these numbers contrast with the win rates of plaintiffs before juries in other types of cases (44.41%) and those before judges in other types of cases (45.53%)).

employment discrimination plaintiffs have at the trial level, it is even more remarkable that the federal courts of appeals reverse plaintiffs' victories at a considerably higher rate than they reverse defendants' employment discrimination victories.¹³

Additionally, lower courts have created substantive doctrines out of whole cloth that makes it nearly impossible for plaintiffs to succeed.¹⁴ These doctrines, which former federal district court judge Nancy Gertner calls "loser's rules" and "heuristics,"¹⁵ are applied unthinkingly by other district courts, citing the original district courts that use these made-up doctrines for precedent. This creates a repetitive loop of cases decided by judges using dubious rules unrelated to the text of Title VII.

Equally alarming, as noted above, the lower courts have used procedure to shortcut cases, depriving plaintiffs of their rights to have their cases decided by a jury of their peers. In essence, the creation of pro-employer substantive doctrine that is far removed from the text of Title VII and the loosening of standards regarding motions for summary judgment and to dismiss precipitated by the Supreme Court's 1985 Trilogy and the *Twombly* and *Iqbal* cases have led to oppressive results in civil rights cases.¹⁶

13. See *id.* at 111 (noting that the U.S. courts of appeals reverse plaintiff's pretrial victories at a rate of 30% and victories of defendants in pretrial adjudications at a rate of only 11%, but when employment discrimination plaintiffs win at trial, the appellate courts overturn the verdicts 41% of the time; in contrast to 9% of the time when defendants win); Dan M. Kahan et al., *Whose Eyes are You Going to Believe? Scott v. Harris & the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841-42 (2009) (cautioning judges from prematurely granting summary judgment after an empirical study found that Black, low-income workers and residents of the Northeast tended to see what happened on a videotape, a crucial piece of evidence in the case, differently than the Supreme Court); Dan M. Kahan et al., "*They Saw a Protest*": *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 854 (2012) (arguing that cultural cognition—"the unconscious influence of individuals' group commitments on their perceptions of legally consequential facts").

14. See SPERINO, *supra* note 8, at 204.

15. See Gertner, *supra* note 7, at 110-11.

16. The cases in the summary judgment trilogy are *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (holding that to oppose a motion for summary judgment, the evidence must show that the respondents suffered harm as a result of the petitioners' illegal activity and that economic factors constrain courts from construing inferences in the light most favorable to the side opposing the motion); *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986) (holding that when deciding on a motion for summary judgment, courts should consider the substantive evidentiary standard of proof that would apply at a trial on the merits); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (holding that a party making a motion for summary judgment does not need to provide affirmative evidence in the form of affidavits to support its motion);

Lower courts have created damaging substantive rules that have no basis in the statute's text. The Supreme Court has not reviewed most of these cases.¹⁷ Lower courts cite each other's opinions and adopt rules that permit them to grant summary judgment or motions to dismiss without addressing genuine issues of fact presented by the cases.¹⁸ The law, then, is made not by Congress or even by the U.S. Supreme Court, but rather by the lower federal courts, which may be influenced either explicitly or implicitly by ideology or their own experiences (or lack thereof, given the composition of the federal courts).¹⁹ Even absent explicit or implicit judicial bias, federal judges have significant incentives to dispose of these cases and methods of doing so rather than to allow them to go to trial.²⁰

Even when issues get to the Supreme Court, the Court often (but not

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that a complaint must allege sufficient facts that, if accepted as true, would state a claim to relief that is plausible on its face in order to defeat a motion to dismiss for failure to state a claim); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (reaffirming *Twombly*'s plausibility standard).

17. See Gertner, *supra* note 7, at 118-20.

18. See *id.* at 123 (comparing how courts blindly recite these "rules" to a child's game of telephone).

19. See *id.* at 117 (explaining that in 1994, a trainer told a group of new judges "how to get rid of civil rights cases," and then recited a list of what Judge Gertner calls "losers' rules"). The training demonstrates the lack of respect that federal judges are taught to have for civil rights cases and may lead, in part, to their conclusion that most civil rights cases are frivolous and should be disposed of rapidly. I suggest a likely combination of causes for this attitude: a need to clear busy dockets of cases considered to be meritless, a dislike of employment cases because of their focus on individuals and not on what some judges would consider "meaty" issues of federal law, and an implicit bias toward business owners over employees. See e.g. Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L. REV. 1443, 1482-90 (1996) (discussing reasons why judges were less interested in protection of civil rights); Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship between Professional Diversity and Judicial Decisions*, DEMAND JUSTICE 1, 3, 4, 15, (2021) <https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> (finding in empirical study that federal judges who were corporate lawyers before serving on the bench were 43% less likely to find for plaintiffs in employment law cases than those without a corporate law background, and judges who had been prosecutors before appointment to the bench were 56% less likely to rule for plaintiffs in employment law cases than those who had not been prosecutors; also finding that federal judges with private corporate law firm and/or prosecutorial backgrounds are significantly overrepresented on the bench).

20. See Gertner, *supra* note 7, at 110 (explaining that federal judges are trained to have less respect for civil rights cases and may lead, in part, to their conclusion that most civil rights cases are frivolous and should be disposed of rapidly).

always) goes astray in its interpretation of the law.²¹ Congress has the power to override the Court's faulty interpretation by amending the law to enact more protective civil rights laws. There was a time in the not-so-distant past that Congress regularly corrected the Court's interpretive errors.²² When the Supreme Court decided cases that were clearly violative of the spirit, if not the letter, of Title VII and other civil rights laws, both Republicans and Democrats joined forces to overrule the offending Supreme Court cases with statutory amendments.

But that time has passed. Given the extreme partisanship in the U.S. Congress, the Republican party's move to the right, the filibuster in the Senate, which, in effect, requires sixty votes rather than a simple majority to pass legislation, there is little hope that Congress will legislatively overturn future problematic decisions by the Supreme Court as it has done in the past.²³ Practically speaking, to assure the possibility of legislative overrides

21. See *id.* at 117 (positing that the Court is more concerned with transaction cost to defendants than the impact on plaintiffs).

22. See, e.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 203 (1993) (describing how the 1991 Civil Rights Act was passed by overwhelming bipartisan votes in both the Senate and the House and overruled numerous cases decided by the Supreme Court in the 1989 term, all of which cut back on employee rights under civil rights statutes); WILLIAM N. ESKRIDGE JR. ET AL, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 82-83 (6th ed. 2020); See Megan Slack, *From the Archives: President Obama Signs the Lilly Ledbetter Fair Pay Act*, OBAMA WHITE HOUSE (Jan. 30, 2012, 1:14 PM), <https://obamawhitehouse.archives.gov/blog/2012/01/30/archives-president-obama-signs-lilly-ledbetter-fair-pay-act> (describing how Congress passed The Lilly Ledbetter Fair Pay Act in 2009, which overturned the decision in *Ledbetter* and made it easier for women who suffer pay discrimination to sue in court). See also *ADA Amendments Act of 2008*, EEOC (2008), <https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008> (explaining that a bipartisan Congress passed The Americans with Disabilities Amendments Act of 2008, which overturned Supreme Court decisions that narrowed the definition of "disability" under the Americans with Disabilities Act).

23. See Molly E. Reynolds, *What Is the Senate Filibuster and What Would It Take to Amend It?*, BROOKINGS (Sept. 9, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/>. This situation has been exacerbated in the House of Representatives by gerrymandering in states when they draw congressional districts. Joseph Ax, *How the Battle over Redistricting in 2021 Could Decide Control of U.S. Congress*, REUTERS (Feb. 18, 2021, 6:08 AM) <https://www.reuters.com/article/us-usa-politics-redistricting/how-the-battle-over-redistricting-in-2021-could-decide-control-of-the-u-s-congress-idUSKBN2A11CX>. There is at least one notable exception to the lack of bipartisanship in civil rights legislation. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act passed both houses on a bipartisan basis. See Deirdre Walsh, *Congress*

of problematic Supreme Court civil rights cases, there would have to be a majority of sixty Democrats in the Senate—a majority that is unlikely to exist soon—as well as a majority of Democrats in the House of Representatives.²⁴

Given this complex situation, we face the federal courts' dismantling of Title VII sexual and racial harassment law. This is true for both the U.S. Supreme Court and the lower federal courts. The Trump administration appointed to the Supreme Court three Justices with records that promise little protection for workers from sexually and racially hostile environments,²⁵ one of whom had a serious allegation of sexual assault against him.²⁶ The alignment on the Supreme Court is currently six-three, conservatives to liberals, with at least five of the six being extremely conservative. Besides Justice Kavanaugh, the Trump appointee alleged to have committed sexual assault as a teenager, Justice Thomas, who has been on the Court since 1991, allegedly sexually harassed his female subordinates when he was the EEOC. Chairman and as head of the Department of Education.²⁷ We cannot expect this bench to protect workers from harassment sufficiently.

Approves Bill to End Forced Arbitration in Sexual Assault Cases, NPR (Feb. 10, 2022, 12:16 PM), <https://www.npr.org/2022/02/10/1079843645/congress-approves-bill-to-end-forced-arbitration-in-sexual-assault-cases>.

24. A political sea change has occurred when it comes to civil rights legislation. There are only fifty senators who are Democrats or regularly vote with Democrats (with the Vice President, Kamala Harris, to break a tie vote). But even with a majority, Democrats, unlike in the recent past, are unable to attract Republican votes (or at least ten Republican votes sufficient to overcome a filibuster) even on the most basic legislation that supports civil rights. This situation differs substantially from the times when both Republican and Democratic Senators joined to amend civil rights legislation. See, e.g., ESKRIDGE JR. ET AL.'s history of the passage of the 1991 Act, *supra* note 22, at 81-83 (demonstrating that there was significant bipartisan support for the bill).

25. See *The Conservative Club That Came to Dominate the Supreme Court*, THE HARV. GAZETTE (March 4, 2021) [hereinafter *The Conservative Club*], <https://news.harvard.edu/gazette/story/2021/03/in-audiobook-takeover-noah-feldman-lidia-jean-kott-explore-how-federalist-society-captured-supreme-court/> (detailing that six of the nine sitting Supreme Court Justices are current or former members of the Federalist Society, three of them Trump appointees).

26. See generally Ann C. McGinley, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMPLOYEE RTS & EMP. POL'Y J. 59, 59 (2019) (recounting Dr. Christine Blasey Ford's testimony at a Senate Judicial Committee hearing about then-Judge Brett Kavanaugh's alleged behavior at a high school party, in which he sexually assaulted her while his friend encouraged him).

27. Julia Jacobs, *Anita Hill's Testimony and Other Key Moments from the Clarence Thomas Hearings*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html> (comparing the sexual assault accusation against Brett Kavanaugh and the following Congressional hearings to sexual harassment accusations against then Judge Clarence Thomas in his 1991 hearings).

Moreover, there is little hope that the lower federal courts will protect employment discrimination plaintiffs more than they have in the past. Due to then-Majority Leader Mitch McConnell's efforts to approve many of Trump's appointments to the lower federal courts, the Trump Administration ushered in many conservative judges, most of whom are strongly pro-business and show little interest in protecting the civil rights of workers.²⁸ Therefore, it is highly likely, given this record number of lifetime appointments by the Trump Administration, that workers' protection against illegal harassment will falter, continuing the downward spiral of the federal courts' role in affirming workers' civil rights. All of this is occurring when our society is especially interested in and attuned to the damage that sex-based harassment can cause at work and supportive of causes such as those advanced by Black Lives Matter. There is little question that, given exposure to the facts on the ground regarding sex- and race-based harassment in some workplaces, the public would support eliminating these behaviors.²⁹

The question is, how can those who wish to improve the situation respond? My answer is to focus on state laws as interpreted by state supreme courts to further the civil rights of their own state citizens and residents. Encouraging reliance on state laws to protect civil rights is not a novel idea.³⁰ During the Reagan era, many advocated compensating for the cutbacks on civil rights and environmental protections afforded by the federal government by enacting state legislation and regulations.³¹ But, even compared to the

28. Mark Sherman, et. al, *Trump's Impact on Courts Likely to Last Long Beyond His Term*, AP NEWS (Dec. 26, 2020), <https://apnews.com/article/joe-biden-donald-trump-mitch-mcconnell-elections-judiciary-d5807340e86d05fbc78ed50fb43c1c46>.

29. Dennis Thompson, *#MeToo Sparked Awareness about Sexual Harassment: Study*, MEDICAL XPRESS (Dec. 22, 2018), <https://medicalxpress.com/news/2018-12-metoo-surge-awareness-sexual.html>.

30. See e.g., Steven Andrew Smith & Adam Hansen, *Federalism's False Hope: How State Civil Rights Laws Are Systematically Under-Enforced in Federal Forums (And What Can Be Done about It)*, 26 HOFSTRA LAB. & EMP. L.J. 63 (2008) (using Minnesota as an example and advocating for use and enforcement of more protective state civil rights laws to afford greater rights to employees); see also William S. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing that state constitutions may provide greater protection than the federal constitution does).

31. See, e.g., Howell Raines, *Reagan Reversing Many U.S. Policies*, N.Y. TIMES (July 3, 1981), <https://www.nytimes.com/1981/07/03/us/reagan-reversing-many-us-policies.html> (1981) (detailing Reagan's effort to appoint business-friendly individuals to positions designed to further civil rights and environmental protection); Drew S. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 346 (1984) (detailing how the Reagan Administration broke with all

Reagan (and the following H.W. Bush) eras, we find ourselves in novel times, at least when it comes to hostile environment law. Things are worse than they have ever been in the federal courts. The combination of rights-limiting substantive decisions in this area of Title VII law with procedural mechanisms that have the effect, if not the design, of curtailing plaintiffs' rights to jury trials has resulted in an ever-encroaching diminishment of protection of victims who suffer harassment at work.

Moreover, even a generous interpretation of Title VII would impose significant limitations on civil rights in the workplace, especially for the most vulnerable Americans. This is true because federal law protects employees rather than independent contractors, limits coverage to employers with fifteen or more employees, and caps combined compensatory and punitive damages to between \$50,000 and \$300,000, depending on the size of the

previous administrations of both parties by attempting to cut back on civil rights); Robert Pear, *States Are Found More Responsive on Social Issues*, N.Y. TIMES (May 19, 1985), at 1 (explaining that states stepped up to fill in the gaps left by the Reagan administration); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM. L. REV. 1, 6–7 (1988) (“In addition, state and local governments check federal authority by regulating areas that the federal government chooses to ignore. When President Reagan vetoed a bill designed to alleviate the high rate of unemployment among American youth, cities and states around the country created more than thirty programs to employ teenagers in productive tasks. Similarly, when the federal Food and Drug Administration refused to require fast-food chains to label their ingredients, New York and several other states compelled the chains to disclose that information. And, although both the Department of Justice and the United States Commission on Civil Rights have rejected the concept of comparable worth, at least five states have adopted comparable-worth legislation and twenty-four others have shown interest in the idea. Thus, state governments check federal power by balancing the content of regulatory programs. With two levels of government, the political pendulum is less likely to swing too far towards either conservative or liberal ideas”); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1754 (1986) (“Although that proposal was killed shortly after President Reagan took office, the same proposal remains open to a future administration with a different orientation. At present, all the positive action is taking place at the state and local level. A few states have been persuaded to implement pay adjustments for their own employees based on a comparable worth analysis of their salary structures, and a number of other states are now engaged in systematic job evaluation as a prelude to such action”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1519 (1987) (“Even if states have not always taken seriously their role in protecting individual constitutional rights against the federal government, they should do so. All those who wield the power of government—Court and Congress, state judge and state legislator—should take seriously the obligation to use that power to promote the ultimate sovereignty of the People as embodied in the Constitution”); John-Mark Stensvaag, *State Regulation of Nuclear Generating Plants Under the Clean Air Act Amendments of 1977*, 55 S. CAL. L. REV. 511, 570 (1982) (arguing for state regulation of nuclear waste).

employer.

This Article analyzes the substantive and procedural problems created by the federal judiciary in Title VII hostile work environment law that concurrently drains federal anti-harassment law of its meaning. The premise is that, at least for the near future, relying on federal courts and/or the U.S. Congress to protect employees' civil rights is likely fruitless. Instead, we should encourage state legislatures that seek to improve civil rights in employment in their own jurisdictions and state supreme courts to interpret their own state laws to recognize employees' civil rights to the fullest extent possible. Part II analyzes how federal courts decide cases under Title VII. It focuses on how procedural injustice, combined with the courts' creation of substantive doctrines that help them dispose of cases earlier in the litigation process, deprives the most vulnerable workers of their civil rights. Finally, Part III discusses how states can protect workers' rights to be free of race- and sex-based harassment by enacting more protective legislation, refusing to adopt federal procedures, and limiting doctrines when courts interpret their own state laws.

As states experiment with laws that protect their residents from hostile work environments to a greater extent than federal law, scholars should conduct theoretical and empirical research to ascertain which state laws truly work to improve civil rights. Thus, we can hope that in the future, when the federal government and judiciary are more attuned to the interests of workers, Title VII can be interpreted and/or amended to grant further protection than it has granted so far. As Justice Brandeis noted in *New State Ice Co. v. Liebmann*, the states should be the laboratories of democracy.³² This Article concludes that it is necessary to use these laboratories to advance workers' civil rights.

II. ANALYSIS OF THE CURRENT SITUATION IN FEDERAL ANTI-HARASSMENT LAW

A. *Procedural Injustice*

As we shall see in this subpart, it is impossible to evaluate the protection afforded by Title VII by looking only at the substantive legal doctrines. The procedure, especially summary judgments, Federal Rule of Civil Procedure 12(b)(6) dismissals, differential application of procedural rules for plaintiffs and defendants having the burden of persuasion on the issue, and frequent removal by defendants of cases to federal courts combine to deprive Title VII plaintiffs of their right to be heard by a jury of their peers.

32. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

i. Summary Judgments and Dismissals

As scholars have demonstrated throughout the years, in Title VII and other employment discrimination cases, the lower courts have interpreted the U.S. Supreme Court's procedural jurisprudence in ways that diminish the civil rights of plaintiffs.³³ In response to the Supreme Court's summary judgment trilogy decided in 1986,³⁴ the same term in which the Supreme Court recognized a cause of action for a hostile work environment, lower courts began to grant summary judgment in Title VII cases at a higher rate than before. The courts in these cases often intruded upon the factfinder's role to make credibility determinations and failed to draw all reasonable inferences in favor of non-moving parties on defense motions for summary judgment.³⁵ The result: these cases wrongfully deprived plaintiffs of their right to jury determination of difficult issues of intent.³⁶ The liberal grants of summary judgment to defendants in these cases were further exacerbated, as Professor Elizabeth Schneider demonstrates, by *Daubert v. Merrill Dow Pharmaceuticals, Inc.* and the other cases in the expert evidence trilogy.³⁷ These cases encouraged further judicial oversight and scrutiny of expert witness qualifications and testimony.³⁸ Pre-trial *Daubert* determinations that exclude expert evidence in stereotyping and other issues relevant to proving illegal discrimination have led to more grants of defense motions for summary judgment.³⁹

Moreover, at least one study found a significant difference between white and non-white judges as to their rate of granting defense motions for summary judgment in employment discrimination cases.⁴⁰ While white

33. See generally McGinley, *supra* note 22, at 207-09; Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 805-06 (2002); Schneider, *supra* note 8, at 519.

34. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

35. See McGinley, *supra* note 22, at 205-09; Beiner, *supra* note 33, at 806-08.

36. See McGinley, *supra* note 22, at 205-09; Beiner, *supra* note 33, at 806-08.

37. 509 U.S. 579, 589-90 (1993) (federal judges told to refuse to admit expert testimony that is not reliable and relevant). Other cases in the trilogy include *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138 (1999) and *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

38. See Schneider, *supra* note 8, at 551 (explaining how the combination of different procedural cases and their application by lower court judges exacerbated barriers to justice for civil rights and employment discrimination plaintiffs).

39. *Id.* at 551-55.

40. See Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy:*

judges granted 61% of defense motions for summary judgment in employment discrimination claims, judges of color granted only 38% of the same type of motions.⁴¹ The authors concluded that the different attitudes, opinions, and experiences of white and non-white judges led to this significant difference.⁴²

Making a bad situation worse, two U.S. Supreme Court cases permit dismissal if the trial judge finds the allegations in the complaint “implausible.” *Bell Atlantic Corporation v. Twombly*⁴³ and *Ashcroft v. Iqbal*⁴⁴ have made grants of motions to dismiss more frequent and more likely, deleteriously affecting employment discrimination plaintiffs’ opportunities to prove their cases.⁴⁵ An empirical study by Raymond Brescia and his co-author of 598 employment and housing discrimination cases found that the number of motions to dismiss increased fivefold from the pre-*Twombly* to the post-*Iqbal* periods.⁴⁶ While the percentage of grants of motions to dismiss rose overall, the increase in grants of these motions was statistically significant for judges appointed by Republican presidents, male judges, and white judges, but not for judges appointed by Democratic presidents, female judges, and Black judges.⁴⁷ The combination of these procedural cases and judge-made substantive requirements that have no support in the text of Title VII has seriously undermined plaintiffs’ rights to

Discrimination, Experience, and Judicial Decisionmaking, 85 S. CAL. L. REV. 313, 338-39 (2012).

41. *Id.* at 337.

42. *Id.* at 346.

43. 550 U.S. 544, 556 (2007) (holding in an antitrust case that a plaintiff’s complaint must allege facts that are plausible to avoid a successful defense motion to dismiss).

44. 556 U.S. 662, 678-79 (2009) (clarifying that the *Twombly* standard for motions to dismiss applies to all federal pleadings and explaining that the lower courts must first separate the factual statements from the conclusions in a complaint and then decide whether the factual statements are plausible).

45. See Schneider, *supra* note 8 (citing to empirical studies); see also Joseph Seiner, *After Iqbal*, 45 WAKE FORREST L. REV. 179, 179-80 (2010) (citing to an early study that demonstrated that only months after *Twombly* was decided the federal courts were already granting motions to dismiss more aggressively in employment discrimination cases); but see William Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 475 (2017) (finding no empirical proof that these cases led to increased dismissals of civil rights claims).

46. See Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation under the New Plausibility Standard*, 47 AKRON L. REV. 329, 353 (2014).

47. *Id.* at 356-59.

be free of employment discrimination.⁴⁸ And, the disparity between the results reached by white/of color; male/female; Republican/Democratic-appointed judges raises serious questions about fairness in adjudication of the very laws whose purpose is to protect more vulnerable workers because of their race and sex.

II. BURDENS OF PERSUASION: DIFFERENTIAL TREATMENT

When faced with plaintiffs' cases and defendants' affirmative defenses, many federal courts treat plaintiffs' and defendants' proof differently when they have the burden of persuasion. For example, although plaintiffs ordinarily have the burden of persuasion in employment discrimination cases, there are instances where the burden of persuasion shifts to the defendant. These situations include cases brought under 42 U.S.C. § 2000e-2 (m), which allows a plaintiff to prevail if she proves that the protected characteristic is a "motivating factor" in the adverse employment action.⁴⁹ If, however, the defendant responds by demonstrating by a preponderance of the evidence that it would have taken the same action even absent the discriminatory motive, the defendant reduces the plaintiff's remedies significantly to injunctive and declaratory relief, attorneys' fees, and costs.⁵⁰

A second situation in which a defendant has the burden of persuasion is the affirmative defense in a disparate impact case. Once the plaintiff proves that a neutral policy or practice causes a disparate impact on a protected group, the burden of persuasion shifts to the defendant to prove, by a preponderance of the evidence, that the policy or practice in question is job-related and consistent with business necessity.⁵¹

48. See *Schneider*, *supra* note 8, at 520.

49. 42 U.S.C. § 2000e-2(m).

50. 42 U.S.C. § 2000e-5(g) provides:

"(B) On a claim in which an individual proves a violation under § 703(m) [42 U.S.C. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court — (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under § 703(m); and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)."

51. Even if the defendant proves that the challenged policy or practice is job related and consistent with business necessity, the burden shifts back to the plaintiff who will prevail if she proves that there was an alternative employment practice that had a less discriminatory effect and that the defendant refused to adopt it. 42 U.S.C. § 2000e-2 (k)(1) states:

"(k)BURDEN OF PROOF IN DISPARATE IMPACT CASES

A third type of Title VII case that shifts the burden of persuasion to the defendant is the hostile work environment case where the harasser is a supervisor, and there is no tangible employment action (such as firing, refusal to promote, etc.). In cases where the harasser is the supervisor, the defendant employer is vicariously liable to the plaintiff for the harassment if there is a tangible employment action.⁵² However, if there is no tangible employment action, the employer is liable to the plaintiff for the harassment unless the defendant proves an affirmative defense.⁵³ In this situation, to escape liability, the employer must prove by a preponderance of the evidence that:

the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior—the first prong of the defense; and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise—the second prong of the defense.⁵⁴

While it is *extremely* rare for a plaintiff to win a motion for summary judgment in a Title VII lawsuit, it is relatively common for courts to grant summary judgment to defendants *even on issues for which they have the burden of persuasion*. It makes sense that courts would hesitate to grant motions for summary judgment filed by plaintiffs in Title VII cases because most of the cases involve issues concerning whether the defendant intentionally engaged in discriminatory treatment or, in other words, whether the employer's adverse actions occurred because of the plaintiff's protected traits. These cases ordinarily involve diverse and complicated facts, which require complex analysis. Factfinders should judge the credibility of the witnesses and draw inferences about why the employer acted as it did from a rich mosaic of facts, which may build upon themselves to create a picture of the employer's motivation. In very few instances, judges would grant

(1)

(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the *respondent* fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the *complaining party* makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.”

52. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 744-45 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777-78 (1998).

53. See *Ellerth*, 524 U.S. at 744-45; *Faragher*, 524 U.S. at 777-78.

54. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

summary judgment to plaintiffs in disparate impact cases, even though plaintiffs usually prove disparate impact cases by statistics. That proof shifts the burden to the employer to demonstrate that the neutral policy or practice that creates a disparate impact is job-related and consistent with business necessity. And, in sex-based and other harassment cases where the employer's affirmative defense is involved, courts rarely grant summary judgment to the plaintiff.

While few plaintiffs move for summary judgment in Title VII cases, the frequent refusal to grant summary judgment is most often correct when plaintiffs move for summary judgment. Both parties should have the right to have the factfinder hear the evidence and determine the facts. But it is puzzling that even though the defendants have the burden of persuasion in proving their affirmative defenses, courts *regularly grant summary judgment to the defendants in these types of cases*.⁵⁵ This is particularly problematic because the defendants' affirmative defenses, too, often deal with questions of credibility, motive, and intent, facts that the factfinder more easily determines.⁵⁶

Moreover, specifically in hostile work environment cases, the issues before the courts on the affirmative defense deal with whether the parties acted *reasonably*, a determination that is much better suited for the factfinder in a trial, as in negligence cases where a jury regularly judges the issue of the parties' reasonableness.⁵⁷ In essence, a conclusion in a harassment case on

55. See, e.g., *Delgado-O'Neil v. City of Minneapolis*, 745 F. Supp. 2d 894, 912 (D. Minn. 2010), *aff'd*, 435 F. App'x 582, 585 (8th Cir. 2011) (assuming plaintiff had made out its prima facie case of disparate impact, defendant defeated the claim by showing that the practice was related to job performance and was consistent with business necessity); see also *Lanning v. SEPTA*, 308 F.3d 286, 295 (3d Cir. 2002) (finding that employer met its burden of proving business necessity of an aerobic test that eliminated 90% of female applicants even though one woman who did not pass the aerobics test and was accidentally accepted was successful); *Pacheco v. New York Presbyterian Hosp.*, 593 F. Supp. 2d 599, 620-21 (S.D.N.Y. 2009) (assuming that plaintiff made out prima facie case of proving English language only rule, defendant met its burden of demonstrating that the rule was job related and consistent with business necessity).

56. See B. Glenn George, *If You Are Not Part of the Solution, You Are Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J. L. & FEM. 133, 135, 155-57 (2001) (noting that few of plaintiffs' motions for summary judgment are granted in hostile work environment cases but that defendants frequently win motions for summary judgment even when they have the burden of proving the affirmative defense).

57. See generally James Fleming, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L. J. 667, 676 (1949); DAN B. DOBBS, *THE LAW OF TORTS*, 34 (2000); see also *McKinney v. G4S Government Solutions, Inc.*, 179 F. Supp. 3d 609 (W.D. Va. 2016), *aff'd*, 711 F. App'x 130, 133 (4th Cir. 2017) (concluding that seriously

the second prong that the plaintiff acted unreasonably, is decided by a federal judge in chambers without an opportunity to hear the plaintiff's testimony and to judge her credibility in a situation of (often) extreme power inequalities is extremely odd.⁵⁸

III. REMOVAL TO FEDERAL COURT

Under 28 U.S.C. § 1446, when a plaintiff files a lawsuit in state court that includes federal claims or where there would be diversity jurisdiction in federal court, the defendant may remove the case to federal court within thirty days of receipt of the complaint.⁵⁹ State and federal courts have concurrent jurisdiction over Title VII claims other than those claims filed by federal employees.⁶⁰ Lawyers who have experience defending Title VII cases regularly remove cases that include federal claims because the federal courts proceed much more harshly with these claims, especially regarding pre-trial practice.⁶¹ As we will see in Part III below, many state courts have

discriminatory behaviors in a racial harassment case, including display of noose and white sheet in a cone like a Ku Klux Klan-type hat and laughing of coworkers and supervisors were insufficient to go to the jury as a matter of law).

58. See generally Zev J. Eigen, David S. Sherwyn & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 109 NW. U. L. REV. 109, 147, 156-7 (2015) (explaining potential reasons for the judges' behavior).

59. See 28 U.S.C. § 1446; *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) (holding that state and federal courts have concurrent jurisdiction over Title VII actions); see also *Bullock v. Napolitano*, 666 F.3d 281, 284 (4th Cir. 2012) (holding that Congress waived sovereign immunity under Title VII, but under 42 U.S.C. § 2000e-16 it explicitly restricted jurisdiction over claims by federal employees to federal courts).

60. 28 U.S.C. § 1446 (b)(1).

61. See e.g., Andrew H. Friedman, *Removal: Overview*, in 2 LITIGATING EMPLOYMENT DISCRIMINATION CASES §5:155.1 (2020) (stating “[s]ome of the perceived advantages [of removal for defendants] include, depending upon the state, the following: Federal Judiciary’s Hostility Toward Employment Law Cases . . . Pleading Standards . . . Less Discovery . . . Summary Judgment . . . Jury Verdicts.”); Seyfarth Shaw, *U.S. Supreme Court Rules That Third-Party Counterclaim Defendants Are Not Entitled To Removal Under The CAFA*, WORKPLACE CLASS ACTION BLOG (May 29, 2019), <https://www.workplaceclassaction.com/2019/05/u-s-supreme-court-rules-that-third-party-counterclaim-defendants-are-not-entitled-to-removal-under-the-cafa/> (noting “[r]emoval should be in the arsenal for any company facing a class action in an unfavorable state jurisdiction”); 26.III.I. *Supplemental Federal Jurisdiction Over Common Law Claims*, in AGE DISCRIMINATION IN EMPLOYMENT LAW (Third Edition) (Eric Kinder, ed., 2020 update) (“Where plaintiffs can assert state FEP and common law claims with remedies more generous than those available under the ADEA, they may prefer to litigate in state, rather than federal, court. Defendants, however, often prefer to litigate in federal court,

not adopted the federal court standards for summary judgment, motions to dismiss, and for the admissibility of expert evidence that often doom plaintiffs in Title VII action. Moreover, there are more liberal discovery standards in many state courts, and jury verdicts do not have to be unanimous in many state courts.⁶²

Even though state courts are often more protective of plaintiffs' rights given their fewer doctrinaire policies concerning summary judgment, there is no question that the federal courts' liberal grant of summary judgment have affected the state courts' responses to summary judgment motions, even in states that have not adopted the federal rule.⁶³

On the other hand, even where state courts (or rule-making bodies) have adopted the federal summary judgment standards, they may not necessarily apply them in the same way as the federal courts. Knowing this, many employment discrimination plaintiffs bringing federal and state claims, file their suits in state courts with the hope that defendants' lawyers will miss the short thirty-day deadline to remove the case imposed by the federal statute.⁶⁴

Often to no avail. Employment discrimination defense counsel belong to a sophisticated group of lawyers who regularly remove claims filed in state court to federal court. For this reason, states must enact strong civil rights legislation that protects employees from illegal discrimination and affords at

particularly because of the willingness to consider motions for summary judgment more favorably in the federal courts"). See also Sarah B. Schlehr & Christa L. Riggins, *Why Employment-Discrimination Cases Usually Belong in State Court*, *ADVOCATE*, June 2015, <https://www.advocatemagazine.com/article/2015-june/why-employment-discrimination-cases-usually-belong-in-state-court>; The Rutten Law Firm, APC, *State Court v. Federal Court in Employment Litigation*, *THE RUTTEN L. FIRM, APC* (Sep. 17, 2015), <https://www.californialegaladvocates.com/blog/2015/09/state-court-vs-federal-court-in-employment-litigation/> ("Though federal court is often available to employment plaintiffs, it is usually more advantageous for plaintiffs to sue under state employment laws, and to bring their cases in state court Because state court is advantageous to plaintiffs, defendants will typically attempt to remove lawsuits that were initiated in state court to federal court"); NELA, *Summary Judgment: The Bad, The Ugly . . . And The Good!* NELA (Oct. 14-15) <https://www.nela.org/product/nela-2016-seminar-summary-judgment-the-bad-the-ugly-and-the-good/> (seminar that explains how plaintiffs can avoid summary judgment in employment cases as well as discussing when, if at all, it is appropriate for plaintiffs to move for summary judgment).

62. See Schlehr & Riggins, *supra* note 61.

63. Arthur Miller, *The Ascent of Summary Judgment and its Consequences for State Courts and State Law*, *POUND CIV. JUST. INST.*, 2008 Forum for State Appellate Court Judges, 17 (noting that some state courts had adopted the federal trilogy standards through rule modification but that others had followed the federal standards by judicial decision making).

64. See Schlehr & Riggins, *supra* note 61.

least the same remedies as those granted by federal statutes. With these laws in effect, plaintiffs can choose to bring only state civil rights claims and forego their federal claims to avoid removal of their claims to federal courts. This strategy will protect plaintiffs from federal courts that are more likely to grant defendants' procedural motions and thereby destroy or seriously damage the plaintiffs' cases. Even in the absence of new state legislation, state courts can and should interpret their own anti-discrimination statutes more generously than federal courts interpret Title VII, and state courts should also refuse to overreach in granting motions to dismiss and for summary judgment in anti-discrimination cases.

Of course, plaintiffs' counsel must examine their own cases to determine the best strategy. For example, in state jurisdictions whose anti-discrimination law mirrors federal law, a plaintiff bringing a race discrimination case may still be better off raising a federal claim under 42 U.S.C. §1981, which makes it illegal to discriminate based on race in making or enforcing contracts. A race-based claim under § 1981 may be preferable because under § 1981, there is no damages cap, a longer statute of limitations than Title VII claims, and no requirement to file with the Equal Employment Opportunity Commission before the suit is filed.⁶⁵

B. Substantive Injustice in Sex- and Race-Based Harassment Law

Although the first cases in the courts to recognize that harassment may constitute illegal discrimination under Title VII were race-based harassment cases, the U.S. Supreme Court set the standard in sex-based harassment cases that lower courts apply to both race- and sex-based harassment cases.⁶⁶ Title VII contains no language dealing with sex- or race-based harassment as a cause of action. The courts, however, have interpreted the broad language of Title VII to reach harassment that occurs because of an individual's membership in a protected group.⁶⁷ The law makes it illegal to discriminate against any individual or otherwise to alter the individual's terms or conditions of employment because of the individual's sex, religion, race,

65. See 42 U.S.C. §1981.

66. See e.g., *Rogers v. E.E.O.C.*, 454 F.2d 234, 240-41 (5th Cir. 1972) (noting that employers' mistreatment of Hispanic customers created a hostile work environment for Hispanic employee); *Vance v. Ball State Univ.*, 570 U.S. 421, 429 (2013) (assuming that racial harassment follows the same standards as sexual harassment under Title VII).

67. See 42 U.S.C. Sec. 2000e-2 (a) (making it illegal for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-66 (1986).

color, or national origin. Sex- or race-based harassment that threatens or leads to a tangible employment action or that is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment will create a cause of action.⁶⁸

As noted above, the Supreme Court first recognized that harassment based on sex is illegal under Title VII in *Meritor Savings Bank v. Vinson*.⁶⁹ Although *Meritor* is a hostile work environment case, the Court in *Meritor* recognized two types of sex-based harassment cases under Title VII: quid pro quo and hostile work environment cases.⁷⁰ The quid pro quo cases are basically illegal attempts at sexual blackmail: a supervisor threatens a subordinate to coerce the subordinate into a sexual relationship.⁷¹ Or, in some cases, the supervisor promises a professional reward to pressure the subordinate to have sex with him.⁷² While the quid pro quo cases still exist, hostile work environment cases appear more common. Supervisors, co-workers, clients, or customers can create hostile work environments that alter the terms or conditions of the plaintiff's employment if the behavior occurs because of the individual's sex or other protected characteristic, is unwelcome (in sex hostile work environment cases), and is sufficiently severe or pervasive.⁷³ In *Harris v. Forklift Systems, Inc.*,⁷⁴ the U.S. Supreme Court clarified that the plaintiff need not prove severe psychological damage to meet the severe or pervasive standard. But a plaintiff must prove that the behavior is severe or pervasive from both a subjective perspective and from the perspective of a reasonable person.⁷⁵

Although the Supreme Court in *Meritor Savings Bank* refused to hold an

68. Because of the concept that sexual harassment occurs out of romantic or sexual interest, the Court also requires that the behavior be unwelcome in sex harassment cases. This does not require, however, proof that the plaintiff did not consent. One can consent and at the same time find the behavior unwelcome. See *Meritor*, 477 U.S. at 69.

69. See *id.*

70. See *id.* at 65 (relying on guidance by the Equal Employment Opportunity Commission).

71. See *The Law and Your Job*, ABA (Mar. 13, 2013), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/sexualharassment_quidproquo/ (2013).

72. *Id.*

73. See *Meritor Sav. Bank*, 477 U.S. at 67-68 (stating that behavior must be unwelcome and severe or pervasive if no quid pro quo).

74. See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21-23 (1993).

75. *Id.* at 21-22. See also Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 24-25 (2012) (explaining that after *Harris* used the "reasonable person" standard, some lower courts continued to use the reasonable woman or reasonable person with the same defining characteristics as the victim standards).

employer vicariously liable for all harms resulting to its employees from illegal sex-based harassment, the Court stated that employer liability would depend on agency principles.⁷⁶ In *Burlington Northern v. Ellerth* and *Faragher v. City of Boca Raton*, the Court used agency principles to explain the conditions under which employers are liable.⁷⁷ Employer liability standards depend on the identity of the harasser or harassers.⁷⁸ The employer is liable under the alter-ego theory if the harasser is very high up in the defendant's company.⁷⁹ If, however, the harasser is a supervisor higher in the chain of command than the plaintiff but not an owner of the company or sufficiently powerful to be treated as an alter-ego of the company, employer liability depends on whether there is a tangible employment action. The employer is vicariously liable for the supervisor's behavior if there is a tangible employment action—a firing, failure to promote, etc.⁸⁰ If the harasser is a supervisor, but there is no tangible employment action, the employer is vicariously liable unless it proves an affirmative defense.⁸¹ To escape liability, the employer must prove by a preponderance of the evidence that:

[t]he employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁸²

In *Faragher* and *Ellerth*, the Court also stated that if the harasser is a co-worker or other third party exposed to the victim through work, the courts will determine employer liability using a negligence standard.⁸³ The employer is liable if it knew or should have known of the sexually harassing behavior but failed promptly to correct it.⁸⁴ The definition of “supervisor” was narrowed considerably in *Vance v. Ball State University*.⁸⁵ In this racial harassment case, the Court held that for the purposes of *Ellerth* and *Faragher*, an employee is not a supervisor unless the employee has the

76. See *Meritor Sav. Bank*, 477 U.S. at 72.

77. See *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 742, 791 (1998).

78. See *Ellerth*, 524 U.S. at 755; *Faragher*, 524 U.S. at 800-01.

79. *Ellerth*, 524 U.S. at 758.

80. *Id.* at 762-63.

81. *Id.* at 765.

82. *Id.*

83. See *id.* at 759

84. See *id.*; see also *Vance v. Ball State Univ.*, 570 U.S. 421, 445-46 (2013) (concluding that employers are liable for their own negligence when co-workers harass).

85. 570 U.S. at 423, 431-32.

power to exercise tangible employment actions such as hiring, firing, and promotions of the employee.⁸⁶ Given *Vance*'s restrictive definition of who is a supervisor to determine employer liability, courts will likely decide fewer cases using the vicarious liability standard. In these cases where the harasser does not meet *Vance*'s definition of supervisor, the employee has the burden of proving that the employer knew or should have known of the harassment and failed to respond reasonably.⁸⁷

Most of the issues in the hostile work environment cases deal with whether the behavior was sufficiently severe or pervasive to alter the terms or conditions of employment or in the case of harassment by supervisors, whether the employer proved the two prongs of its affirmative defense. Because both standards rely on determining reasonableness, sometimes of the victim and other times of the employer, they often create subtle questions that are better suited to a determination by the factfinder, preferably a jury. Unfortunately, however, many courts hold that no reasonable jury could find that a reasonable person could find the behavior to be sufficiently severe or pervasive to alter the terms or conditions of employment.⁸⁸ In other words, the behavior was not sufficiently severe or pervasive as a matter of law to constitute harassment. Or, if the conduct is sufficiently severe or pervasive to create a fact question, many courts conclude as a matter of law that the alleged victim did not act reasonably in reporting (or failing to report) the behavior.⁸⁹ Even if the alleged victim reports the behavior quickly, numerous courts have granted summary judgment because the employer acted promptly to remedy the situation.⁹⁰ This latter failure to hold the employer accountable contravenes the Supreme Court's standard that requires that the defendant prove *both* prongs of the affirmative defense. Even more troubling here is how the procedural and the substantive decisions work together to create unequal treatment of plaintiffs and defendants. As noted above, courts frequently grant summary judgment for defendants even when defendants have the burden of proof on the issue.

86. *Vance*, 570 U.S. at 431-32 (describing a racial harassment case narrowing the definition of "supervisor" for purposes of vicarious employer liability to those who have the power to take a tangible employment action).

87. See CHARLES A. SULLIVAN AND MICHAEL J. ZIMMER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 353 (9th ed. 2017).

88. See e.g., *Brooks v. City of San Mateo*, 229 F.3d 917, 926 (9th Cir. 2000); Joan C. Williams, et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. STATE L. REV. 139, 154 (2019).

89. See *Eigen*, et al., *supra* note 58.

90. See *id.* at 156.

C. A Lethal Mix of Substance and Procedure

Because lower federal courts tend not to publish opinions in which they deny motions for summary judgment,⁹¹ we cannot analyze the fact patterns of the cases that may have correctly denied defendants' motions for summary judgment. There may be many situations in which the lower court correctly denied summary judgment to defendants in hostile work environment cases.⁹² But because lower federal courts typically publish opinions granting summary judgment to the defendants, we can analyze those cases. What is clear is that in many of the published cases, the courts have wrongfully granted summary judgment. In many cases, the courts have concluded as a matter of law that the environment was not sufficiently severe or pervasive to alter the plaintiff's terms or conditions of employment. This subpart focuses on a lethal mix of the courts' substantive doctrines and procedural standards that, even in an era when sexual harassment has become an important public issue, defeat what appear to be robust and viable sex and race harassment cases before they even get to a jury.

As early as 2002, Professor Theresa Beiner explained that there was a broad consensus in the American public about what behaviors constituted sexual harassment.⁹³ In *Let the Jury Decide: The Gap between What Judges and Reasonable People Believe Is Sexually Harassing*, Professor Beiner used social science research to support her claim that although there was some ambiguity in some areas, a consensus existed as to what types of behaviors constitute sexual harassment.⁹⁴ This consensus, which has solidified since the #MeToo era,⁹⁵ is critical because of the importance sexual harassment law gives to reasonableness of the parties' actions. In a sexual harassment suit, the factfinder should assess the reasonableness of a plaintiff's reactions to certain behaviors at work: the plaintiff's reasonableness in finding the conduct severe or pervasive, and the plaintiff's reasonableness in reporting or failing to report the harassment. The factfinder should also determine the employer's reasonableness in its efforts to eliminate sexual harassment in the workforce. On a motion for summary judgment, the judge must decide how a reasonable jury would decide the reasonableness of the plaintiffs and defendants in the litigation. Determinations of whether individuals have acted reasonably (or not) have

91. See Gertner, *supra* note 7, at 113, 115.

92. See Williams, et al., *supra* note 88, at 166, 176 (examining published hostile work environment cases from different circuits).

93. See Beiner, *supra* note 33, at 794.

94. *Id.* at 794-5.

95. See Williams, et. al., *supra* note 88, at 142, 151.

always been within the province of the jury, and, as we shall see below, courts run into significant trouble when they shortcut the process by determining reasonableness or unreasonableness of the plaintiff's or the employer's actions.

To analyze this issue, let's consider a few sample sex- and race-based harassment cases and the effects rendered by the courts' grants of defendants' dispositive motions. First, we will look at the sexual harassment cases, specifically the severe or pervasive requirement and the employer's proof of its affirmative defense. We will then consider the racial harassment cases, focusing primarily on the severe or pervasive requirement.

i. Severe or Pervasive

An infamous case dealing with the severe or pervasive standard is *Brooks v. City of San Mateo*.⁹⁶ In *Brooks*, the plaintiff, a telephone dispatcher at the city police department alleged that a male dispatcher had repeatedly approached her, physically harassed her by touching her bare stomach and her breast under her bra, and had "boxed her in" while fondling her breast by placing his body in the way of escape as she was taking a 911 call. Judge Kozinski, who later resigned from the ninth circuit bench due to allegations of sexual harassment of law clerks and staff, described the facts in the opinion:

Our story begins when Patricia Brooks, a telephone dispatcher for the City of San Mateo, California, and her co-worker, senior dispatcher Steven Selvaggio, manned the city's Communications Center, taking 911 calls on the evening shift. During the evening, Selvaggio approached Brooks as she was taking a call. He placed his hand on her stomach and commented on its softness and sexiness. Brooks told Selvaggio to stop touching her and then forcefully pushed him away. *Perhaps taking this as encouragement* (emphasis added), Selvaggio later positioned himself behind Brooks's chair, boxing her against the communications console as she took another 911 call. He forced his hand underneath her sweater and bra to fondle her bare breast. After terminating the call, Brooks removed Selvaggio's hand again and told him that he had "crossed the line." To this, Selvaggio responded "you don't have to worry about cheating [on your husband]; I'll do everything." Selvaggio then approached Brooks as if he would fondle her breasts again. Fortunately, another dispatcher arrived at this time, and Selvaggio ceased his behavior. Soon thereafter, Selvaggio took a break and left the building. Brooks immediately reported the incident and, the following day, the city placed Selvaggio on administrative leave pending an investigation.⁹⁷

96. *Brooks v. City of San Mateo*, 229 F.3d 917, 921-22 (9th Cir. 2000).

97. *Id.* at 921-22.

The facts also demonstrate that Selvaggio had previously acted similarly with other co-workers, but the victims of those assaults had not reported the abuse.⁹⁸ Accordingly, the federal district court granted the defendant's motion for summary judgment, holding that the behavior was not sufficiently severe or pervasive to alter the plaintiff's terms or conditions of employment.⁹⁹ The Ninth Circuit affirmed that harassment in a "single incident" case must be extremely severe to be actionable. Because the employer immediately placed Selvaggio on administrative leave, the court concluded, a reasonable woman would not consider the terms or conditions of her employment altered by the event.¹⁰⁰

This case is exceptionally troubling for various reasons. First, it improperly merges the issue of whether the behavior was sufficiently severe or pervasive to create a hostile working environment with the question of whether the employer is liable, concluding that a reasonable woman would not find the incident severe or pervasive because of the employer's subsequent actions. Second, even though the behavior was sufficiently severe to place the perpetrator in jail for four months, the court downplayed the assaults by contrasting them with an extremely violent assault in *Al-Dabbagh v. Greenpeace, Inc.*,¹⁰¹ where the perpetrator "slapped [plaintiff], tore off her shirt, beat her, hit her on the head with a radio, choked her with a phone cord and ultimately forced her to have sex with him."¹⁰² Moreover, the *Brooks* opinion noted that in *Al-Dabbagh*, the assailant imprisoned the victim overnight, and she was hospitalized from the attack once she escaped.¹⁰³ Third, the opinion in *Brooks* justified the assailant's criminal behavior by suggesting that the assailant had perhaps taken "as encouragement" the plaintiff's reaction upon his first approach.¹⁰⁴ Her reaction had been to tell him to stop and to push him away forcefully.¹⁰⁵ Even to suggest that Selvaggio may have taken Brooks' strong verbal and physical rebuff as encouragement for his sexual assault is insulting to the plaintiff and dangerous for all victims.

Whether a hostile working environment existed is not related to whether the employer should have been liable for the employee's behavior. The

98. *Id.* at 922.

99. *Id.*

100. *Id.* at 926-27.

101. 873 F. Supp. 1105 (N.D. Ill. 1994).

102. *Brooks*, 229 F.3d at 926 (quoting *Al-Dabbagh*, 873 F. Supp. at 1108).

103. *Id.*

104. *Id.* at 921.

105. *Id.*

question of employer liability is whether the employer had acted negligently in light of the situation at the workplace. Although there had been other incidents of harassment perpetrated by the assailant at the workplace on other victims, the court concluded that because the plaintiff had not been aware of those other acts, they could not have altered the terms or conditions of her employment.¹⁰⁶ But the existence of other assaults is much more relevant to the issue of whether the employer was negligent or not. The opinion mentions that the other victims did not report the assaults they suffered. Still, there is no analysis about whether the employer knew or otherwise should have known of Selvaggio's other assaults. The court never analyzes the employer's liability;¹⁰⁷ the court focuses only on whether the behavior was severe. And, instead of analyzing the severity of Selvaggio's behavior first and then analyzing whether the employer was negligent in allowing that behavior to occur, the court considers only the employer's response in determining whether the harassment was severe; the employer's placing of the officer on administrative leave, the court concluded, significantly diminished the severity of the assault and the injury to the victim. Most reasonable women would likely disagree.

Moreover, there were allegations that once the plaintiff returned to work, she was mistreated and shunned by the assailant's friends. These facts could have contributed to a hostile working environment that altered her terms or conditions of employment.¹⁰⁸ But the court brushed those facts aside, slicing and dicing the various behaviors so that each, when viewed alone, did not amount to a cause of action.

The point is that looking at the totality of the circumstances in the San Mateo Police Department, there was at least a question of fact for the jury as to whether Selvaggio's assault was sufficiently severe to alter the terms or conditions of the plaintiff's employment. Moreover, combined with the plaintiff's claims that Selvaggio's officer friends shunned and harassed Brooks upon her return, and management apparently did nothing about it, there was also a genuine issue of material fact as to whether this reaction furthered the reasonable perception of the victim that she was working in a hostile working environment that continued beyond the first assault. Or, in the very least, there was a question of fact as to whether the behavior that occurred after her return constituted sufficient evidence of retaliatory

106. *Id.* at 924.

107. *Id.*

108. *Id.* at 927-28.

harassment to go to the jury.¹⁰⁹

Of course, there will always be bad cases, and *Brooks v. San Mateo* is one of them. The problem is that *Brooks* does not stand alone along either a horizontal or a vertical timeline. By a horizontal timeline, I refer to cases decided at about the same time as *Brooks*. Many of these cases also adopted a strict view of the severe or pervasive requirement, a belief that likely would not have resonated at least with female jurors at the time. By a vertical timeline, I refer to cases that use *Brooks* and other similar cases as precedent, and that decide, even today, based on a comparison to the facts of those cases, that no reasonable jury could conclude as a matter of law that the behavior constituted illegal sexual harassment.

As Professor Joan Williams and her co-authors demonstrate in *What's Reasonable Now? Sexual Harassment Law after The Norm Cascade*,¹¹⁰ courts continue to rely on *Brooks v. San Mateo* and other older sexual harassment cases as precedent. This reliance is wrong, the authors argue, even if we assume that *Brooks* and other cases like it were correctly decided at the time because the #MeToo era has ushered in a “norm cascade” surrounding sexual harassment.¹¹¹ A “norm cascade” occurs when society experiences a sudden and sharp change in norms about a particular issue.¹¹²

In support of their argument, Williams and her co-authors rely on three different types of polls to verify attitudes toward sexual harassment in society.¹¹³ The first type compares views represented in polls before and after #MeToo; the second type of data “reports the overwhelming agreement among the American public that sexual harassment is a serious problem;”¹¹⁴ and the third type of poll asks respondents whether they believe that there has been a severe change of norms recently.¹¹⁵ Combined, the results of these polls demonstrate a significant shift in societal views. Today, the

109. Retaliatory harassment is harassment that takes place in retaliation against the victim of sexual harassment because the victim reported the original harassment. Under *Nat'l R.R. Passengers Corp. v. Morgan*, 536 U.S. 101, 116 (2002), depending on the fact pattern, the retaliatory harassment may occur as part of the original hostile work environment. Or, the retaliatory harassment may be a separate retaliation claim that alleges severe or pervasive harassment instead of an adverse employment action. See e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004) (explaining that retaliatory harassment can constitute retaliation in a religion case).

110. See Williams, et al., *supra* note 88, at 162.

111. See *id.*, at 144-45.

112. See *id.* at 149-50.

113. See *id.* at 150.

114. See generally Williams, et al., *supra* note 88.

115. See *id.*

dominant social norms hold that sexual harassment is a severe problem,¹¹⁶ that employers should not tolerate sexual harassment,¹¹⁷ and that victims who report sexual harassment are credible.¹¹⁸ Moreover, there is broad agreement about what behaviors constitute sexual harassment.¹¹⁹ According to the authors, these results are significantly different from those observed before the #MeToo explosion.¹²⁰

Given that reasonableness is key to both the procedural law of summary judgment and the substantive law of sexual harassment, determining whether a norm cascade has occurred is essential to analyze the courts' opinions. For example, if most Americans agree that certain behaviors are intolerable in the workplace, shouldn't courts defer to juries to make the reasonableness determination in most sexual harassment cases? This has become particularly important since 1991 when the Civil Rights Act added damages and the right to a jury trial to Title VII to protect harassment victims. Congress passed the 1991 amendments in response to the nomination of Clarence Thomas to the Supreme Court and the hearings in which Anita Hill, a young lawyer who had worked for Thomas, testified that he had harassed her at work.¹²¹

Brooks is not an outlier; other egregious sexual harassment cases abound.¹²² Williams and her co-authors point to four older cases that courts

116. *See id.* at 151 (noting that while only 34% of respondents in the 1990s believed this, today about 75% do).

117. *See id.* at 153 (reporting that 86% of respondents believe in a zero-tolerance policy).

118. *See id.* at 153-54 (stating that only 31% of respondents believe that victims who report harassment are not credible).

119. *See id.* at 152-53.

120. *See id.* at 150-54.

121. *See* Carrie N. Baker, *Looking Back, Moving Forward: Anita Hill, #MeToo and What Comes Next*, MS. MAG. (Dec. 11, 2017), <https://msmagazine.com/2017/12/11/looking-back-moving-forward-history-tells-us-uprising>.

122. *See, e.g.,* *Chesier v. On Q Financial Inc.*, 382 F. Supp. 3d 918, 921-22 (D. Ariz. 2019) (granting the defendant's motion for summary judgment, concluding that harassment was only one incident and not sufficiently severe or pervasive where there was a three-hour exchange (over email) of harassing conduct, and the plaintiff testified that the exchange was unwelcome, that she shook and cried throughout the exchange, that she was concerned for her safety, that she answered the emails out of fear, and that she reported the behavior the next day. In the conversations, the harasser asked about the plaintiff's underwear, spoke about his dominance in the bedroom, asked about her measurements, a request to which she conceded; he stated he wanted to suck on her breasts and to make her wet; plaintiff played along but declined to send him photos. He also asked to "feel [her] and suck on [her] tits," "feel [her] and then taste [his] fingers,"

continue to cite and rely on as precedent: *Mendoza v. Bordan*,¹²³ *Baskerville v. Culligan*,¹²⁴ *Bowman v. Shawnee State University*,¹²⁵ and *Shepherd v. Comptroller of Public Accountants*.¹²⁶ Through an analysis of cases that cite them, the authors demonstrate forcefully that these four cases have been used either as the standard or to “ratchet up” the requirements for proving unlawful sex-based harassment.¹²⁷

In the context of racial harassment, a similar story exists.¹²⁸ There are countless cases in which the plaintiff alleges that a noose was hung in the

and “make [her] put [her] wet fingers in [his] mouth.” The plaintiff testified, “I was just worried about trying to get through this day safely so I could get home and break down and figure out what to do”); *McDowell v. Sw. Airlines, Co.*, 412 F. Supp. 3d 978, 982 (S.D. Ind. 2019) (granting summary judgment and concluding that the behaviors alleged were not sufficiently severe or pervasive to go to a jury, where there were four incidents that the plaintiff included in her charge to the EEOC, one of which was of a pilot patting the plaintiff on the buttocks, another was a flight attendant lying across her lap, and the others included comments about giving her an orgasm, etc. The court refused to consider allowing five other incidents to relate back to her charge because it concluded that they were not reasonably related, even though they were similar to the incidents complained of earlier but by different harassers); *see also Kortan v. California Youth Authority*, 217 F.3d 1104, 1110, 1112 (9th Cir. 2000) (stating that the supervisor called female employees “castrating bitches,” “Madonnas,” and “Regina” repeatedly in the plaintiff’s presence, but concluding that calling the plaintiff “Medea” was insufficient to create a hostile work environment).

123. *See Mendoza v. Bordan*, 195 F.3d 1238, 1241 (11th Cir. 1999) (upholding a directed verdict for the defendant where the plaintiff’s supervisor engaged in repeated sexual comments, and gestures and rubbed his body against the plaintiff’s body).

124. *See Baskerville v. Culligan Int’l Co.*, 50 F.3d 428 (7th Cir. 1995) (overturning a jury verdict for the plaintiff even though her manager told her numerous dirty jokes, commented on her in sexual terms, mimed masturbation, and claimed that his wife thought he was harassing plaintiff like “Anita Hill”).

125. *See Bowman v. Shawnee State Univ.*, 220 F.3d 456 (6th Cir. 2000) (affirming the lower court’s grant of the defendant’s motion for summary judgment where the female supervisor had groped, consistently made sexualized comments about the male plaintiff, who was her subordinate, and propositioned him numerous times).

126. *See Shepherd v. Comptroller of Pub. Accountants*, 168 F.3d 871 (5th Cir. 1999) (affirming the lower court’s grant of summary judgment to the defendant where her coworker had made repeated sexual remarks to her, including comments about her nipples, feigned looking up her dress, tried to look down her top repeatedly, and stroked her arm from her shoulder to her wrist).

127. *See Williams, et al.*, *supra* note 88, at 162, 173, 179, 186.

128. *See generally* Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615, 616 (2006) (noting that although there is a “similar” story in that many courts do not recognize the severity of the allegations and often take the cases from juries, racial harassment is different from sexual harassment and there is a debate as to whether the same standards should be used for both claims).

workplace, that racial epithets, including the “n-word,” were used, that there were physical assaults, and/or verbal taunts that may or may not have been related to the race of the victim.¹²⁹ These cases come out both ways on defense motions for summary judgment. Still, there are too many cases in which the lower courts grant the defendant’s motion, concluding that the behavior was insufficiently severe or pervasive to constitute a hostile work environment as a matter of law.¹³⁰ In doing so, courts use the technique of “slicing and dicing” the evidence, a method that undervalues both the severity and the pervasiveness of the complained-of behavior.¹³¹ The underlying question should be, when considering all the evidence in its totality, was the work environment hostile because of the alleged victim’s race? In other words, looking at all of the evidence, could a reasonable jury conclude that the behavior was sufficiently severe or pervasive to alter the terms or conditions of the plaintiff’s workplace?

A good example of how courts often decide racial harassment cases is the trial court’s opinion in *Henry v. Regents of the University of California*.¹³² Henry filed two EEOC charges (and a supplemental one), let the statute of limitations lapse on the first charge, and ultimately brought suit on the second charge. He alleged that he had suffered from racial harassment and retaliation.¹³³

The EEOC charge, unfortunately, was thin on facts, but it did allege that the *Henry’s* supervisor had hung up a noose and had harassed him because of his race. The complaint, which was timely filed after the plaintiff received a right to sue letter, was much more voluminous. The complaint detailed numerous other incidents that occurred to Henry, including physical assaults, name-calling, and harassing behaviors by co-workers, the noose incident, and a statement by his supervisor that he did not want to hire a Black

129. See generally *id.*

130. See, e.g., *E.E.O.C. v. Wedco*, 65 F. Supp 3d 993, 1003-04 (D. NV. 2014) (distinguishing *Henry* because in that case, the noose was displayed in the plaintiff’s presence).

131. Mike Zimmer first used the term “slicing and dicing” the evidence in a discussion of *Reeves v. Sanderson Plumbing, Products Inc.*, 530 U.S. 133 (2000), in which the lower court refused to consider the evidence in the prima facie case in the pretext analysis. See Michael Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577, 584 (2001). I am using the term slightly differently to describe the practice of judges to separate pieces of evidence that must be viewed together to get the true picture of the situation. This is particularly crucial in hostile work environment claims and the assessment of severity or pervasiveness when analyzing the defendants’ dispositive motions because it is the whole environment that must be analyzed.

132. See *Henry v. Regents of the Univ. of Cal.*, 37 F. Supp. 3d 1067 (N.D. Cal. 2014).

133. See *id.* at 1079.

manager. However, the trial judge refused to consider the allegations in the complaint that referred to behaviors other than those by the plaintiff's supervisor because the EEOC charge did not mention any other employees by name.¹³⁴ In essence, the court concluded that behavior by anyone other than the supervisor was not "reasonably related" to the plaintiff's charge of a hostile work environment based on race because only the supervisor was mentioned in the EEOC charge. Consequently, the court limited its consideration of the facts that would potentially establish the claim based on the supervisor's behavior only.¹³⁵ Perhaps this approach would make sense if this were a lawsuit against the supervisor. But, given that this was a suit against the employer for a racially hostile working environment, which can be created by the combined behaviors of supervisors, co-workers, and customers, this approach seriously and wrongfully limited the plaintiff's access to important evidence to prove his case. And it did so at the earliest stage in the litigation—literally, pre-litigation.¹³⁶

Moreover, the court strongly suggested that unless perpetrators use racist language as they engage in harassing behavior, the harassment cannot have occurred because of the victim's race.¹³⁷ This is curious, given that it directly contravenes a Ninth Circuit decision in a sex-based harassment case.¹³⁸

Henry demonstrates the danger of requiring that every fact be alleged in the EEOC charge. There is no question that the defendant had notice of a hostile work environment claim based on the plaintiff's race, and this notice goes as far back as the filing of the EEOC charge. The complaint, then, added allegations that fleshed out the hostile work environment claim that was alleged in the EEOC charge. The complaint did not bring in a different claim; it merely detailed the behaviors that, when taken together, constituted the race-based hostile work environment. Even though the charge specifically mentioned the supervisor, it also alleged a hostile work environment based on race, and the allegations in the complaint of additional behaviors and comments by the supervisor and other workers should have given sufficient notice to the defendant of the evidence that existed to establish the hostile work environment. Indeed, had the plaintiff not alleged these additional facts in the complaint, chances are that the court would have

134. *See id.* at 1082.

135. *See id.* at 1068, 1087 (stating that in the alternative, the trial judge concluded that physical and verbal harassment by co-workers was not "race-related" as a matter of law).

136. *See* 37 F. Supp. 3d at 1072.

137. *See id.*

138. *See* E.E.O.C. v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840 (9th Cir. 2005) (holding that abusive behavior toward women did not have to be sexual in nature or even openly based on gender in order to constitute sexual harassment).

granted a motion to dismiss pursuant to *Twombly* and *Iqbal*.

Despite this notice, the lower court's holding, which requires detailed pleading in the charge, moves *Twombly* and *Iqbal* rules into the earlier EEOC charge stage, which, depending on the state, must be filed no later than 180 or 300 days after the last action in creation of the hostile working environment.¹³⁹ While it makes sense that the complaint cannot allege facts in support of a totally different cause of action (age or gender discrimination, for example, instead of race discrimination) or against a different party (the defendant always remained the University of California) than alleged in the EEOC charge, prohibiting an employee from providing more detail at the complaint stage is inconsistent with the policy of deciding cases on the merits and giving defendants due notice of the allegations.

In *Henry*, once the lower court had eliminated from the case all but two pieces of evidence that were referred to in the EEOC charge, there remained only the noose and an allegation that the supervisor had said that the department was “not going to let a black man manage anybody.”¹⁴⁰ There is no discussion about the symbolic meaning of a noose, its historical significance, or the context of hanging a noose in the workplace and its meaning to Black employees. This contradicts at least two occasions where the Supreme Court warned that courts should consider context and history in making their determinations in discrimination cases.¹⁴¹ Despite the egregious history surrounding nooses in this country and the terror that they represent to members of the Black community as well as the allegation that the supervisor in *Henry* made a racist statement, the court blithely concluded that the harassment alleged was not sufficiently severe as a matter of law to maintain a cause of action. Many Black Americans would disagree.¹⁴²

139. See *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/time-limits-filing-charge> (last visited Jan. 26, 2022).

140. See 37 F. Supp. 3d at 1087.

141. See Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 29 (2012) (explaining how the court encouraged the use of context, history, tone, etc. in determining whether sexual harassment or discrimination exists).

142. See Tess Godhardt, *Reconciling the History of the Hangman's Noose and its Severity Within Hostile Work Environment Claims*, 51 J. MARSHALL L. REV. 137, 151 n.146, 152 (2017) (describing the display of a noose in the workplace, “the noose in this context is a symbol not just of racial discrimination or of disapproval, but of terror. Those of us for whom a particular symbol is just that-- a symbol--may have difficulty appreciating the very real, very significant fear that such symbols inspire in those to whom they are targeted. No less than the swastika or the Klansman's hood, the noose in this context is intended to arouse fear.”); Tyiarah Adewakun, *Hanging On To Justice: Why the Display of the Hangman's Noose in the Workplace Gives Rise to a Racially*

Unfortunately, a ninth circuit panel affirmed the lower court's judgment in an unpublished decision.

Other racial harassment cases face similar problems.¹⁴³ There is no question that racially hostile conditions continue to exist both in workplaces and in other areas of society.¹⁴⁴ In workplaces, nooses are increasingly displayed.¹⁴⁵ But many courts conclude that one noose is insufficient to show race-based discrimination, especially if the noose is not directed

Hostile Work Environment, 20 RUTGERS RACE AND L. REV. 13, 18 (2018) (“Today, the hangman’s noose is still considered to be one of the most powerful visual symbols directed against African Americans because it is closely associated with the practice of lynching. For African Americans, a noose is a representation of a time of ‘fear, marginalization, and degradation.’”) (Footnotes omitted).

143. See, e.g., *McCoy v. City of New York*, 131 F. Supp. 2d 363, 364 (E.D.N.Y. 2001) (finding that the race-based incidents, including the display of a noose, were insufficiently severe or pervasive to alter the conditions of employment); *Bolden v. PRC, Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) (affirming the grant of defense motions for summary judgment even though plaintiff was called a “n-----” and told by coworkers that he “better be careful because we know people in [the] Ku Klux Klan”) (alteration added); *Nichols v. Mich. City Plant Planning Dep’t*, 755 F.3d 594 (7th Cir. 2014) (holding that one comment in which plaintiff was called a “black n-----” was insufficiently severe, and six incidents of harassment, including one where the plaintiff was called a “boy,” were not sufficiently pervasive to withstand summary judgment); *Colenburg v. Starcon Int’l, Inc.*, 619 F.3d 986 (8th Cir. 2010) (finding not sufficiently severe racial harassment where supervisor compared pace of plaintiff’s work to speed that a Black man had been dragged to his death behind a truck).

144. See, e.g., Chris Isidore, *Former Tesla Contractor Awarded 137 Million in Racial Harassment Suit*, <https://www.cnn.com/2021/10/05/business/tesla-racial-harassment-jury-verdict/index.html> (Oct. 5, 2021); Timothy Bella, *Slurs and Monkey Sounds Blare Near a Black Family’s Home. Some Wonder Why It’s Not a ‘Hate Crime,’* WASH. POST (Oct. 6, 2021), <https://www.washingtonpost.com/dc-md-va/2021/10/06/virginia-beach-black-family/>.

145. See Taylor Telford, *Dozens of Nooses Have Shown Up on U.S. Construction Sites. The Culprits Rarely Face Consequences*, WASH. POST (July 22, 2021), <https://www.washingtonpost.com/business/2021/07/22/noose-construction-industry-racism/> (detailing racism in the construction industry); Fatima Huseein, *Racist and Dangerous, Nooses in the Workplace Raise Safety Concerns*, Bloomberg L. News (Mar. 27, 2019), <https://news.bloomberglaw.com/safety/racist-and-dangerous-nooses-in-workplace-raise-safety-concerns>; Steven Murray, *In 2020, The Noose is Alive in the Workplace*, L. WEEK COLO. (Aug. 5, 2020), <https://www.lawweekcolorado.com/article/nooses-in-the-workplace/>; Richard Cohen, *Does One Noose in the Workplace Constitute a Hostile Work Environment?: If Not, How Many?* LEXOLOGY (Aug. 16, 2016), <https://www.lexology.com/library/detail.aspx?g=9b26388f-7fa6-4723-afb6-c18878352403>. See Adewakun, *supra* note 142, at 20 (noting the increase of nooses over the past few years).

specifically at the plaintiff.¹⁴⁶ Given American history and current context, these opinions are outdated and insensitive. These cases unthinkingly follow precedent and apply an “uninformed reasonable (or not so reasonable) white man” standard to determine whether hostile work environments are severe or pervasive. Like many of the sexual harassment cases, these decisions are particularly problematic because of the procedural posture: a conclusion that no reasonable jury could conclude that the plaintiff suffered a racially hostile work environment not only harms the individual plaintiff but also signals to society that American courts are willing to overlook diverse viewpoints in favor of upholding the historically white, male precedent.

Although there may not be polling establishing a “norm cascade” regarding racial harassment at work, race discrimination lives in the shadows of the swift change in societal norms concerning police violence against Black individuals. For example, the Black Lives Matter (“BLM”) movement originated in 2013 in response to the acquittal of George Zimmerman, who was tried for the murder of Trayvon Martin.¹⁴⁷ BLM’s support grew after the Michael Brown shooting in Ferguson, Missouri, and reached its zenith in June 2020, after the murder of George Floyd by Minneapolis police, when two-thirds of Americans said they supported or strongly supported BLM¹⁴⁸ Although this support softened somewhat in the months since the protests against the Minneapolis police, even today, 55% of U.S. adults express at least some support for BLM.¹⁴⁹ And, while there is a difference in support among racial groups, with 83% of Black people, 68% of Asians, 60% of Hispanics, and 47% of whites expressing support for BLM, there is a clear and growing majority of U.S. adults that favor the movement.¹⁵⁰

These figures demonstrate a growing consensus in the United States that violence against Black individuals is not acceptable. It is likely that this consensus also indicates a change in attitudes about what constitutes race-based harassment in the workplace and whether employers share

146. See e.g., cases *supra* note 143.

147. See HERSTORY, <https://blacklivesmatter.com/herstory/> (last visited Jan. 15, 2022).

148. See Juliana Menasce Horowitz, *Support for Black Lives Matter Declined after George Floyd Protests, but Has Remained Unchanged Since*, PEW RESEARCH CTR. (Sept. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/09/27/support-for-black-lives-matter-declined-after-george-floyd-protests-but-has-remained-unchanged-since/>.

149. See *id.*

150. See *id.* (noting that support for BLM is growing because research demonstrates that support among young adults is greater than that among older adults: 67% of adults between the ages of 18 and 29 and 58% of adults between the ages of thirty and forty-nine support BLM, 49% and 46% of adults fifty-sixty-four years of age and over sixty-five years old support BLM respectively).

responsibility for it. Given these changed attitudes, especially concerning determining whether Black or other employees of color harbored a reasonable perception that certain harassing behaviors were severe or pervasive, courts should avoid granting summary judgment to defendants in cases like *Henry* and let juries determine the reasonableness of the plaintiff's response.

Indeed, in both sex- and the race-based harassment cases, this result is particularly necessary, given two facts noted above: first, statistics show a clear anti-plaintiff effect in employment discrimination cases, and at the trial level, juries find for plaintiffs more frequently than judges do;¹⁵¹ second, in a study of grants of motions to dismiss after *Twombly* and *Iqbal*, there was statistical significance in the increase of grants of motions to dismiss by white, male, and Republican-appointed judges, but not by minority, female, or Democratic-appointed judges.¹⁵² Given that the study on the results of *Twombly* and *Iqbal* demonstrated a difference in the demographics of judges granting motions to dismiss and that judges in general find for employment discrimination defendants at trial at a considerably higher rate than juries do, judges should proceed with caution when confronted with dispositive motions that require them to predict whether individuals are acting or reacting reasonably. A jury of the plaintiffs' peers may better represent society's views of what behaviors should be sufficient to alter a plaintiff's terms or conditions of employment, whether a plaintiff was reasonable in failing to report the behavior, and whether the employer should be liable.¹⁵³

151. See Clermont & Schwab, *supra* note 9, at 108-15, 130 (2009).

152. See generally Brescia & Ohanian, *supra* note 46.

153. See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879-81, 895-96 (2009) (demonstrating through an empirical study that Black, low-income workers and residents of the Northeast tended to see what happened on a videotape differently from what the Supreme Court and the majority of subjects saw, concluding that one's cultural context and identity affect what one sees, and finding that judges, like all human beings, engage in what social psychologists call "naïve realism," which is "an asymmetry in the ability of most people to identify the effects of value-motivated cognition"). See also Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. Sch. L. Rev. 865, 894-7 (2012-2013) (applying Kahan's cultural cognition theory to *Ricci* and concluding that judges' identities and backgrounds can unconsciously influence their fact finding, which can be problematic when they grant summary judgment even though other identifiable groups would interpret the facts differently); Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 630-31 (2012) (explaining that judges appear to decide summary judgment motions based on their "gut reaction," and arguing that juries provide a check on the judge's individual reaction, which may not reflect community values).

ii. *The Affirmative Defense: Reasonable Employers and Unreasonable Plaintiffs*

As noted above, if an employee can demonstrate that a supervisor-created hostile work environment exists, the employer can still defend against liability by proving the affirmative defense established in *Ellerth* and *Faragher*. That defense has two prongs: the employer must prove that it was reasonable in preventing and correcting harm and that the employee acted unreasonably in failing to take advantage of preventive or corrective opportunities or otherwise to avoid the harm. In practical terms, the employer can usually prove the first prong by demonstrating that it has a policy, it has trained its employees about the policy, that the substance of the policy is adequate, and that in response to a complaint, it did an investigation. However, *Ellerth* and *Faragher* hold that an employer must also prove that the plaintiff had unreasonably failed to take advantage of the employer's corrective opportunities. This ordinarily means that the plaintiff failed to report the behavior and that this failure was unreasonable or that the plaintiff was unreasonable in delaying the report to the employer.

On a defense motion for summary judgment, the defendant has the burden of proving both prongs, as a matter of law. The courts regularly grant defendants' motions even though it seems that the determination of whether the employer acted reasonably and whether the plaintiff acted unreasonably should be questions of fact for the jury. Empirical research by Zev J. Eigen, David S. Sherwyn, and Nicholas F. Menillo demonstrates that the courts do not necessarily conform to the rules laid down by the Supreme Court.¹⁵⁴ The scholars studied 131 decisions in which the lower courts granted summary judgment on the employers' *Ellerth/Faragher* affirmative defense and how they fared in the courts of appeals.¹⁵⁵

The results of the study are somewhat startling. Employers prevailed 70% of the time on appeal.¹⁵⁶ Although the Supreme Court had established an affirmative defense that is conjunctive—the defendants must prove both prongs—nearly all the cases in which defendants acted responsibly held that the defendant was not liable, even though the plaintiff acted reasonably as well.¹⁵⁷ In other words, defendants prevailed by proving only the first prong of the affirmative defense.¹⁵⁸ If the defendants acted promptly and

154. See generally Eigen et al., *supra* note 58 (describing results of empirical research on whether judges properly applied the second prong of the *Ellerth/Faragher* defense).

155. See *id.* at 146-47.

156. See *id.* at 147.

157. See *id.* at 156-57.

158. See *id.*

responsibly, courts found that the plaintiff did not act reasonably, ordinarily by concluding as a matter of law that the plaintiff's complaint was not timely.

Moreover, in determining whether the defendants proved the first prong of the affirmative defense, courts generally looked merely to whether a policy existed and did not regularly delve into the effectiveness of the policy.¹⁵⁹ As a result, the authors concluded that courts were hesitant to hold for the plaintiffs, even though the defendants had not proved the affirmative defense in those cases where they did a reasonable job at investigating and remedying the behavior. The authors stated:

The significance of both employee and employer behavior suggests that the court is engaging in mental gymnastics to avoid penalizing well-behaved employers. The Unreasonable Employee Prong is supposed to evaluate employee behavior. In theory, the employer's response is immaterial to whether the employee acted unreasonably precisely because it occurs *after* the employee's behavior. But it is hard to justify applying vicarious liability to an employer that did all it reasonably could have done to both prevent and correct harassment. The result we have observed suggests that, when confronted with an employer who corrects well, courts scrutinize the employee's conduct to find it unreasonable. Courts appear to accomplish this result via the timeliness of the employee's complaint . . .¹⁶⁰

Indeed, empirical evidence supports the finding that courts consider employer behavior in assessing the timeliness of an employee's harassment [complaint] . . .¹⁶¹

In contrast to the apparent intentions of the affirmative defense as set forth by the Supreme Court, employers that exercise reasonable care to prevent harassment and react well to a complaint will almost always prevail at summary judgment. To justify this, courts must declare the plaintiff untimely, and therefore unreasonable, regardless of whether the delay, if any, was reasonable and regardless of how much time it took to report.¹⁶²

Even more concerning, courts reach these results-oriented conclusions in response to defense motions for summary judgment on issues of the parties' reasonableness—traditional fact questions for juries—for which defendants have the burden of persuasion. As a result, scores of cases have been decided wrongfully, ignoring U.S. Supreme Court precedent, and none of these cases has gone to the Supreme Court for review. It may be too late now for the Supreme Court to fix the problem. With a six-three conservative

159. *See id.* at 147.

160. *See id.* at 152.

161. *See id.* at 157.

162. *See id.* at 165.

supermajority, the conservatives on the Court would likely affirm the lower courts' decisions, thus changing the rules to conform to the lower court holdings and thereby reducing employers' liability.

Scholars have found that employer policies and training are ineffective at preventing harassment at work; instead, such policies operate to shield employers from liability.¹⁶³ In creating the rules, the Supreme Court was most likely concerned with prevention of harassment at work. Many employers have followed the Court's lead out of fear of liability: a vast array of resources has developed to aid employers in creating policies and procedures and training employees. Some research has found that certain provisions are more successful than others. Still, empirical research inside workplaces is needed to test which provisions and training efforts are the most effective in reducing harassment at work. States provide the opportunity to do that research, as discussed below.

III. THE UNTAPPED POTENTIAL OF STATE LAW

Nothing in Title VII prohibits state or local jurisdictions¹⁶⁴ from granting more expansive civil rights to workers than those already provided by federal law.¹⁶⁵ Indeed, as the federal courts continue to ignore, or, even worse, discriminate against civil rights in employment claims, not all state legislatures and courts have stood idly by.¹⁶⁶ Although it is beyond the scope of this Article to analyze every piece of state legislation in anti-discrimination law, this Section discusses the types of state legislation that have been or could be enacted to compensate for weak protection under federal law. It also considers how state courts have distinguished the interpretation of their state laws from that of federal law. Further, it encourages state legislatures and courts to see themselves as integral to

163. See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, & SYMBOLIC CIVIL RIGHTS* 163-67 (2016); see also Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education & Prevention*, 71 *STAN. L. REV. ONLINE* 62 (June 2018).

164. Nearly all the arguments applicable to state legislatures will also apply to local legislative bodies as well. To avoid repetition below, I limit my comments to state legislatures, but my arguments can apply to jurisdictions that would be open to using local law to protect against workplace discrimination.

165. See generally *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 272 (1987) (holding that a California statute requiring employers to provide leave and reinstatement to employees disabled by pregnancy was not inconsistent with Title VII).

166. See Iris Hentze & Rebecca Tyus, *Sexual Harassment in the Workplace*, NAT'L CONF. OF STATE LEG. (Aug. 12, 2021), <https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx> (detailing recent state legislation regarding sexual harassment).

protecting their citizens' civil rights in employment, especially when the federal courts' interpretation is falling short.

State legislatures and courts can protect the public's civil rights in the workplace by going well beyond the protections afforded by Title VII.¹⁶⁷ There are some weaknesses in Title VII itself that directly harm employees. For example, the statute of limitations under Title VII is extremely short—injured parties have only 180 or 300 days from the date of the alleged discriminatory offense (depending on whether there is a state equal rights commission) to file a charge with the EEOC. State legislatures can expand the statute of limitations for filing claims with their equal employment commissions under state anti-discrimination statutes; moreover, state laws may allow plaintiffs the option of bypassing such commissions and permit them to file in state court with a statute of limitations that mirrors state tort claims. Various state legislatures have enacted anti-discrimination laws with extended statutes of limitation.¹⁶⁸ In *2020 Progress Update: MeToo Workplace Reforms in the States*, Andrea Johnson and her co-authors explain that the lengthier statutes of limitations are necessary for the most vulnerable workers who, with a very limited statute of limitations, must choose between spending their time looking for jobs and finding a lawyer to bring a claim.¹⁶⁹

Second, Title VII covers employers with fifteen or more employees, but some states' laws cover all employers with one or more employees.¹⁷⁰

167. I focus on state statutes in this article, but it is equally as important to consider state constitutions as sources of additional rights for state citizens. *See generally*, JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021). *See also* *Constitutions: Amend with Care*, <https://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx> (Sept. 1, 2015) (explaining that some state constitutions are easier to amend than the federal constitution is).

168. *See generally* Andrea Johnson et al., *2020 Progress Update: MeToo Workplace Reforms in the States*, NAT'L WOMEN'S LAW CTR. 1, 15 (2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report.pdf (explaining that in 2019 and 2020, California, New York City, New York State, Connecticut, Maryland, and Oregon extended the statute of limitations for their anti-discrimination claims).

169. *See id.* at 3.

170. *See* Maya Raghu & Joanna Suriani, *#MeToo What Next: Strengthening Workplace Sexual Harassment Protections and Accountability*, NAT'L WOMEN'S LAW CTR. 1, 2, (2017), <https://nwlc.org/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf>. (stating that, by 2017, at least thirteen states and the District of Columbia cover employers with one or more employees under some provisions of their anti-discrimination laws); *see also* Johnson et al., *supra* note 168, at 7 (noting that, in 2020, Illinois, Maryland, and New York expanded their laws to cover small employers for all types of discrimination. In 2019, New York City expanded coverage of small employers for gender-based harassment).

Furthermore, because many vulnerable workers are not considered employees and are therefore not covered by Title VII, California, Washington, and New York City, Vermont, New York, Delaware, Maryland, Illinois, and South Dakota have gone a step further. Each of these jurisdictions has extended coverage of at least some of their anti-discrimination laws to independent contractors, interns, volunteers, and/or apprentices.¹⁷¹ These individuals have no rights under Title VII.

Third, Title VII severely limits combined compensatory and punitive damages to between \$50,000 and \$300,000 per plaintiff, depending on the employer's size.¹⁷² All states should provide for uncapped compensatory and punitive damages that track state tort law remedies.¹⁷³ California,¹⁷⁴ Connecticut,¹⁷⁵ Hawaii,¹⁷⁶ Massachusetts,¹⁷⁷ New Jersey,¹⁷⁸ New York,¹⁷⁹ Ohio,¹⁸⁰ Oregon,¹⁸¹ Vermont,¹⁸² Virginia,¹⁸³ and West Virginia¹⁸⁴ do not limit plaintiffs' compensatory and punitive damages in civil rights cases. In

171. See Cal. Gov't. Code § 12940(j)(1) (West 2021) (making it an unlawful employment practice “[f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of . . . sex [or] gender . . . to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract”); see generally N.Y.C. Admin. Code § 8-101-102 (2020) (stating that the Supreme Court of Washington has interpreted its anti-discrimination law to apply to independent contractors); see generally *Marquis v. City of Spokane*, 922 P.2d 43 (Wash. 1996) (interpreting state law to apply to independent contractors); see also *Johnson et al.*, *supra* note 168, at 6.

172. See 42 U.S.C. § 1981a(b)(3) (2021).

173. Punitive damages would be limited by due process only. See, e.g., *State Farm v. Campbell*, 538 U.S. 408, 42 (2003) (holding that due process requires some limitation on punitive damages, which generally includes a ratio of approximately 9:1, punitive to compensatory damages).

174. See CAL. GOV'T CODE § 12965 (2022).

175. See S.B. 3, § 6, 2019 Gen. Assemb. (Conn. 2019).

176. See HAW. REV. STAT. ANN. § 368-17 (2021).

177. See MASS. GEN. LAWS ANN. ch. 151B, § 9 (2002).

178. See N.J. STAT. ANN. § 10:5-3 (2020).

179. See A8421, § 5, 2019-2020 Reg. Sess. (N.Y. 2019).

180. See OHIO REV. CODE ANN. § 4112.99 (2021).

181. See OR. REV. STAT. ANN. § 659A.885 (2021).

182. See VT. STAT. ANN. TIT. 21, § 495b (2018).

183. See S.B. 868, 2020 Reg. Sess. (Va. 2020).

184. See W. VA. CODE ANN. § 5-11-13 (2020).

contrast, other states' laws grant fewer remedies than Title VII does.¹⁸⁵ The federal caps were put into place when Congress added compensatory and punitive damages and jury trials for the first time in the 1991 Civil Rights Act.¹⁸⁶ Even at the time—thirty years ago—the capped damages were considered inadequate, and Democrats have since then attempted to remove the caps from Title VII.¹⁸⁷ Today, these damages are woefully low, and plaintiffs must often rely on claims brought under state tort law along with the Title VII claims to receive full recompense for their injuries.¹⁸⁸

In the wake of the #MeToo movement (and even before the movement occurred), states have also enacted legislation granting greater rights to sexual harassment victims. Some of these laws apply only to sexual harassment, but others apply more broadly to all victims of harassment or discrimination. Under Title VII, liability is limited to the employer. There is no cause of action against individual harassers; however, some state anti-discrimination statutes have been interpreted to hold individual harassers personally liable.¹⁸⁹ Moreover, states have placed limitations on non-

185. See ARIZ. REV. STAT. ANN. § 41-1481 (2021); N.D. CENT. CODE ANN. § 14-02.4-20 (2021); S.C. CODE ANN. § 1-13-90 (2006); UTAH CODE ANN. § 34A-5-107 (2018); WIS. STAT. ANN. § 111.39 (2015); WYO. STAT. ANN. § 27-9-106 (2005).

186. See 42 U.S.C. § 1981(a) (2021).

187. See Paul J. Siegel, *Change Will Happen – The Future of Workplace Law Under President-Elect Barack Obama*, JACKSON LEWIS (Dec. 11, 2008), <https://www.jacksonlewis.com/resources-publication/change-will-happen-future-workplace-law-under-president-elect-barack-obama> (describing the Equal Remedies Act of 2007 and the Civil Rights Act of 2008, both of which would have removed the caps from Title VII damages). Neither of the aforementioned bills was enacted into law. See also Equal Remedies Act of 2007, S. 1928, 110th Cong. (2007); Civil Rights Act of 2008, S. 2554, 110th Cong. (2007).

188. See Sharon T. Bratford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L. J. 1611, 1618-19 (1990) (describing the state tort law claims that could be used to collect damages in a hostile work environment claim).

189. See CAL. GOV'T CODE § 12940(j)(3) (2021); *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1010 (N.D. Cal. 2001) (noting that harassers can be held personally liable under the California Fair Employment and Housing Act); *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) (holding that a supervisor can be personally liable under the Iowa Civil Rights Act); see also *Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1023 (N.D. Iowa 2011) (finding that the plaintiff plausibly alleged coworkers' personal liability); *Payne v. U.S. Airways, Inc.*, 987 A.2d 944, 953 (Vt. 2009) (concluding that there is supervisor personal liability under the Vermont Fair Employment Practices Act); *Wyatt v. City of Barre*, 885 F. Supp. 2d 682, 700 (D. Vt. 2012) (finding that the Vermont Fair Employment Practices Act also encompasses coworker personal liability).

disclosure agreements in harassment cases.¹⁹⁰ These provisions take different approaches, but since 2018, many jurisdictions have enacted legislation limiting the use of non-disclosure agreements under certain conditions.¹⁹¹ Various states also now require training of employees, anti-harassment policies, and climate surveys in the workplace.¹⁹² Whether these statutes have a salutary effect likely depends on the quality of training and policies enacted, and how dedicated company leaders are to eliminating harassment. The policies must cover all types of harassing behaviors and motives for harassment. Sexual and racial harassment often have intersectional causes, and a policy covering only sexual harassment will not fully protect women of color who often face the intersection of racial and sexual harassment.¹⁹³

A few state legislatures and/or courts have reacted directly and positively to the weak protections caused by the federal courts' interpretations of Title VII. These legislatures and courts have clarified that, under state anti-discrimination statutes, the standards for proving liability differ from those under Title VII. Among those changing standards are: (1) a severe or pervasive standard that explicitly allows single incidents to meet the standard; (2) employer liability that defines "supervisor" more broadly than federal law does; (3) amelioration of a plaintiff's duty to report harassment to her employer; and, (4) further explanation of the roles of judges and juries in harassment cases.

These state statutes can provide important relief to harassment victims in these jurisdictions. All states should seriously consider adopting these changes to protect their citizens from harassment at work. State courts should recognize the intent and purpose of the state legislatures in adopting different language in the states' laws and refuse to adopt federal courts' limiting interpretations of the substantive portions of the law.

Even if state legislatures have not enacted different language in their laws, state courts can interpret the language in their laws in ways that are more

190. See, e.g., Jeong Park, *California Bans Nondisclosure Agreements in Workplace Harassment, Discrimination Cases*, THE SACRAMENTO BEE (Oct. 7, 2021), <https://www.sacbee.com/news/politics-government/capitol-alert/article254420038>.

191. See Andrea Johnson et al., *supra* note 168, at 8-10 (listing Hawaii, New Mexico, Illinois, Louisiana, Nevada, New Jersey, New York, Oregon, Tennessee, Virginia, Arizona, California, Maryland, Vermont, and Washington).

192. See *id.* at 19-21; see also *2021 State-Specific Sexual Harassment Training Requirements (United States)*, OPEN SESAME (last visited Jan. 6, 2020), <https://www.opensesame.com/site/blog/2021-state-specific-sexual-harassment-training-requirements-united-states/>.

193. Johnson et al., *supra* note 168, at 4-5.

protective of civil rights in employment than the federal interpretations.¹⁹⁴ They can also explicitly reject federal law and/or case interpretations, and detail more protective standards for deciding state law.¹⁹⁵ For example, state courts can refuse to adopt federal substantive doctrines to diminish plaintiffs' rights and shortcut the legal process.¹⁹⁶ State courts can also apply state procedures that respect the parties' jury trial rights and decline to usurp the jury's role in determining liability.

A. *Procedural Justice Under State Law*

Some states have not adopted the federal standards for summary judgment and/or motions to dismiss.¹⁹⁷ Even though they may not have formally adopted the federal standards, many state courts have been influenced to grant summary judgments more readily than they had done so before the summary judgment trilogy.¹⁹⁸ Professor Arthur Miller cautioned state court judges to use summary judgment judiciously because, as he opined, the overuse of dispositive procedural motions deprives litigants of their jury trial rights.¹⁹⁹ On the other hand, even state courts that have adopted the federal standards in one or both of these procedural motions are not as aggressive in granting summary judgment and motions to dismiss generally in state anti-discrimination actions.²⁰⁰ Litigating employment discrimination cases in these jurisdictions will ordinarily benefit plaintiffs.

Additionally, state law is often more friendly to plaintiffs alleging workplace discrimination. State rules usually permit more discovery than the federal rules do, and many state juries' verdicts do not need to be unanimous, unlike jury verdicts in federal court.²⁰¹ Even if the substantive state law is the same as Title VII law, getting a case to a jury with more

194. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d. 222 (Minn. 2020) (overturning lower court's grant of summary judgment to defendant, stating that courts should use contemporary standards in applying the "severe or pervasive" standard in Minnesota law, and warning that the totality of the circumstances must be taken into account, and the decision will most often be one for the jury).

195. *See id.*

196. *See generally id.*

197. *See* Arthur Miller, *The Ascent of Summary Judgment and its Consequences for State Courts and State Law*, POUND CIV. JUST. INST., 2008 Forum for State Appellate Court Judges, at 19.

198. *See id.* at 17.

199. *See id.* at 20.

200. *See* Andrew H. Friedman, 2 LITIGATING EMPLOYMENT DISCRIMINATION CASES 5-63 (James Publishing, Inc. 2020 ed.).

201. *See id.* at 8-3.

discovery and the possibility of a split verdict is beneficial to plaintiffs in workplace discrimination cases.

B. *Substantive Fairness Under State Law*

i. *Severe or Pervasive?*

The severe or pervasive requirement, which often allows federal courts to grant defense motions for summary judgment, either does not exist under some state laws or is interpreted to at least allow the individual plaintiff to get the case to a jury. In 2019, the New York State legislature brought the test for a hostile work environment into line with the test that the New York City Human Rights Commission had used for a decade.²⁰² Rejecting the “severe or pervasive” standard, the New York legislature adopted a standard that merely requires employees to demonstrate that the plaintiff works under inferior conditions because of one or more protected characteristics. The employer can defend itself by demonstrating that the complained-of behavior does not rise above the level of “what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.”²⁰³ This standard is far from that in the Title VII cases described above.

The California legislature amended its anti-discrimination law in 2018 to redefine hostile work environments. The law expressly states a single incident can create a hostile work environment and that summary judgment should be rare in hostile work environment cases; moreover, it explicitly rejects the decision in *Brooks*.²⁰⁴ As explained in *Litigating Employment Discrimination Cases*:

First, the new law legislatively redefines hostile work harassment to mean “a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, to disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine the victim’s personal sense of well-being.” See Cal. Govt. Code §12923(a). In this regard, the law explicitly approves of the liberal standard set forth

202. See *New Decision Eases Burden for Employees Bringing Sexual Harassment Claims Under NYC Human Rights Law*, PATTERSON BELKNAP WEBB & TYLER LLP (Feb. 2009), https://www.pbwt.com/content/uploads/2015/07/Alert_Employment_NYCHRL_Feb09.pdf (noting a New York appellate court decision refused to apply the “severe or pervasive” standard to cases brought under New York City Human Rights Law).

203. See Assemb. A.B. A8421, 2019-2020 Reg. Sess. (N.Y. 2019).

204. See CAL. GOV’T CODE §12923(b) (2021).

by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), that in a workplace harassment suit, “the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.” *Id.* at 26. Second, the new law specifically rejects the 9th Circuit’s opinion in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000), and states that that opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.²⁰⁵

The New Jersey Supreme Court recently held that under the New Jersey Law Against Discrimination, a supervisor’s use of two racial slurs to a Hispanic employee was sufficiently severe for a reasonable jury to conclude that the supervisor had created a hostile working environment.²⁰⁶ The court used the “severe or pervasive” test from Title VII cases. But it looked at the facts from the perspective of a reasonable Hispanic employee and concluded that the lower court erred in granting the defendant’s motion for summary judgment.²⁰⁷

In Minnesota, the state Supreme Court concluded that the state anti-discrimination law should continue to use the “severe or pervasive” test from Title VII, but that courts must apply the standard considering contemporary views about harassment.²⁰⁸ In *Kenneh v. Homeward Bound, Inc.*, the court overturned the lower court’s grant of summary judgment to the defendant, and warned that:

[f]or the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes toward what is acceptable behavior in the workplace Today, reasonable people would

205. See Friedman, *supra* note 200, at §8:01.

206. See *Rios v. Meda Phar., Inc.*, 252 A.3d 982, 989 (N.J. 2021); Martin Fojas et al., *NJ Justices’ Ruling Instructs on Hostile Work Environment Claims*, LAW360 (July 15, 2021), <https://www.law360.com/articles/1402690/nj-justices-ruling-instructs-on-hostile-workplace-claims>.

207. See *Rios*, 252 A.3d at 987, 989-90.

208. See Terran C. Chambers, *Minnesota Supreme Court: Standard for Workplace Sexual Harassment Should Reflect Today’s ‘Societal Attitudes’*, INSIGHTS, Faegre Drinker Biddle & Reath LLP (June 9, 2020), <https://www.faegredrinker.com/en/insights/publications/2020/6/mn-supreme-court-standard-for-workplace-sexual-harassment-should-reflect-societal-attitudes> (discussing *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222 (Minn. 2020), which overturned lower court’s grant of summary judgment to defendant, stating that courts should use contemporary standards in applying the “severe or pervasive” standard, and warning that the totality of the circumstances must be taken into account, and the decision will most often be one for the jury).

likely not tolerate the type of workplace behavior the courts previously brushed aside as an ‘unsuccessful pursuit of a relationship,’ . . . or ‘boorish, chauvinistic, and decidedly immature[.]’ (citations omitted).²⁰⁹

The Minnesota Supreme Court also explained that, because the question of whether harassment is severe or pervasive is generally left to the jury, courts should be cautious to avoid usurping the jury’s role when evaluating hostile work environment claims. It also concluded that factfinders should consider the totality of the circumstances.²¹⁰

ii. Employer Liability, Supervisors/Co-Workers, and Affirmative Defenses

Finally, some states’ laws hold employers vicariously liable for the acts of supervisors without using the *Faragher/Ellerth* defense as interpreted by the federal courts. For example, in 2019, New York amended its law to clarify that an employer cannot escape liability merely because the harassment victim failed to report the harassment to the employer.²¹¹ In *State Department of Health Services v. Superior Court*,²¹² the California Supreme Court held that defendant employers are strictly vicariously liable for harassment by supervisors. Hence, the plaintiff’s suit was not subject to the *Faragher/Ellerth* affirmative defense for liability purposes. However, the court noted that an employer may reduce the plaintiff’s damages by demonstrating that the plaintiff could have avoided her injury “with reasonable effort and without undue risk, expense, or humiliation.”²¹³

Moreover, states do not necessarily follow *Vance*, which severely narrowed the definition of “supervisor” under federal law and significantly limited employer vicarious liability.²¹⁴ For example, the Delaware and Maryland legislatures have amended their anti-discrimination laws to reject *Vance*’s narrow definition of the term “supervisor.”²¹⁵

Even if state law has not been amended by the legislature to change the *Faragher* defense or to state that *Vance* does not apply to state law, state courts might be reluctant to follow *Vance* or to conclude as a matter of law that an employee alleging sex- or race-based harassment acted unreasonably

209. See *Kennah*, 944 N.W.2d. at 231.

210. See *id.* at 231-32.

211. See Assemb. A.B. A8421, 2019-2020 Reg. Sess. (N.Y. 2019).

212. See *State Dep’t Health Serv.’s v. Super. Ct. of Sacramento Cty.*, 31 Cal. 4th 1026, 1034, 1041 (2003).

213. See *id.* at 1034, 1038-39, 1041.

214. See *Vance v. Ball State Univ.*, 570 U.S. 421, 431-32 (2013).

215. See H.B. 679, Reg. Sess. (Md. 2019); H. Substitute No. 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018).

when she failed to report the harassment because of fear of retaliation.

A better approach would eliminate the *Faragher/ Ellerth* defense and hold employers vicariously liable for the harmful acts of supervisors, co-workers, customers, and clients. Doing so would incentivize employers to create policies and trainings that eliminate harmful workplace behaviors and to monitor the effectiveness of the company's procedures and policies. But even if states merely were to refuse to rely on the federal courts' application of the defense, that refusal would benefit employees a great deal.

C. Compensation, Deterrence, and Prevention: A Scientific Approach

Anti-discrimination law aims to compensate victims for economic and emotional harms they suffer in the workplace and deter and prevent future illegal behavior at work. Focusing on state law, both legislation and court interpretation allow researchers to determine what laws and interpretations of those laws provide the fairest results, the best compensation to victims, deterrence of wrongdoers, and prevention of sex- and race-based harassment that harms not only the direct victims, but also entire workplace and society itself.

i. Compensating Victims' Harm

Many of the state statutes and court interpretations discussed above appear to grant more opportunity for victims to receive compensation for the harms they suffer at work. Legal and social science researchers should study the different variations from the federal law to establish which state statutes and court interpretations of the law are more effective in providing fair compensation to victims for harms suffered. Certainly, extended statutes of limitation and covering more employers and employees under state law will compensate more victims and create a fairer society because many of those left out by the federal statute are the most vulnerable workers.

Further, it seems clear that statutes and interpretations that reinforce the roles of judge and jury and thereby assure that more cases go to trial by jury, permit a fairer enforcement of the law. Lifting the damage caps and permitting injured plaintiffs to collect compensation for all their losses should result in fairer compensation and a recognition of the economic and dignity harms suffered from harassment.

There are other statutory provisions and court interpretations either discussed above or that are being proposed to state legislatures. These different ways of dealing with the same problems provide an important opportunity for employment law and social science scholars to understand which provisions offer the best compensation to victims, the best deterrence of wrongdoers, and the greatest fairness in process and results. For example,

is vicarious liability a more significant deterrent than negligence? Are employers more likely to use better policies, practices, and training if they are vicariously liable? What are the best policies, practices, and training for any workforce or industry? All of these and more questions should be studied empirically to assure the best compensation for the lowest price and effort on employers' behalf.

ii. Detering Harassers and Preventing Harassment: Policies and Training

Unfortunately, no research finds that policies or training alone effectively reduce harassment.²¹⁶ Some studies show that harassment actually increases with training.²¹⁷ Scholars who have studied policies and training report that they protect employers because they create a system of symbolic civil rights that judges tend to equate with employer compliance.²¹⁸ And, of course, the *Faragher* and *Ellerth* opinions encourage employers' use of policies and training, but the courts do not evaluate the effectiveness of the employers' programs.²¹⁹ Instead, if employers have policies and training, courts generally conclude that they comply if they conduct an investigation and respond to its results.²²⁰ So, employers have few incentives to create the best policies available or to do effective training.

While acknowledging the limitations in research findings concerning policies and training, The Equal Employment Opportunity Commission ("EEOC") Select Task Force on the Study of Harassment in the Workplace,

216. See Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education & Prevention*, 71 STAN. L. REV. ONLINE 62 (June 2018); see generally Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [hereinafter EEOC TASK FORCE REPORT].

217. See Lauren B. Edelman, *What's the Point of Sexual Harassment Training? Often, to Protect Employers*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/outlook/whats-the-point-of-sexual-harassment-training-often-to-protect-employers/2017/11/17/18cd631e-c97c-11e7-aa96-54417592cf72_story.html; see also Debbie S. Dougherty & Marlo Goldstein Hode, *Binary Logics and the Discursive Interpretation of Organizational Policy: Making Meaning of Sexual Harassment Policy*, 69 HUM. REL. 1729, 1738-41 (2016) (finding in an empirical study that employees reinterpreted sexual harassment policy in a way that reinforced masculinity and blamed women who were actually the victims for reporting men, and that the men then became victims in the group's view).

218. See Edelman, *supra* note 163, at 164-65.

219. See *id.*

220. See, e.g., *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000).

a bipartisan group that did a comprehensive literature study, hearings, and interviews, concluded that there are some employer practices that many believe are effective. To create effective policies and trainings, leadership must be committed to the enterprise, and there must be accountability of individual harassers and middle management in their handling of complaints.²²¹ The EEOC Task Force recommends that policies include a clear explanation of prohibited conduct with examples; assurance that participants will be protected from retaliation; a complaint process with multiple accessible avenues of complaint; assurance of confidentiality to complainants to the extent possible; a prompt, thorough and impartial investigation; assurance of immediate corrective action when the employer finds that harassment has occurred as well as an appropriate response to questionable behavior that has not yet become legally-actionable harassment.²²² The Task Force also recommends frequent in-person training of all employees, including regular training of middle managers.²²³ Finally, it suggests that policies address all types of illegal harassment, not only sex-based harassment.²²⁴

Numerous states have enacted legislation that requires employers to have effective policies and employee training.²²⁵ These laws vary as to which employers are covered, the hours of training required, who must be trained, and the training content.²²⁶ The laws also vary as to which employers must have policies, and what those policies must contain.²²⁷ As a result, it is unclear how effective these policies are or will be. Additionally, New York City passed legislation requiring that public employers conduct climate surveys of the workplaces. Vermont authorized its Attorney General and Human Rights Commission to inspect the workplace and require training and climate surveys, if necessary.²²⁸ A climate survey is described as:

[a] tool used to assess an organization's culture by soliciting employee knowledge, perceptions, and attitudes on various issues. Anonymous climate surveys can help management understand the true nature and scope of harassment and discrimination in the workplace, inform important matters to be included in training, and identify problematic behavior that may be addressed before it leads to formal complaints or

221. See EEOC TASK FORCE REPORT *supra* note 216, at 7-8.

222. See *id.* at 38.

223. See *id.* at 51.

224. See *id.* at 43.

225. See Johnson, et al., *supra* note 168, at 19-21.

226. See *id.*

227. See *id.*

228. See *id.* at 21.

lawsuits.²²⁹

The problem with these laws is that they do not always assure that sound policies and training will occur. Moreover, the research on policies and training is now at an early stage; it has been difficult to evaluate policies and practices because of lack of access to workplaces for researchers to perform empirical, demographic research that would give us a much better idea of what types of policies, provisions, and approaches to training actually work to reduce harassment.²³⁰ The research in workplaces is somewhat discouraging.²³¹ But, policies and training should be both industry- and workplace-specific because different risk factors exist in various sectors and workplaces within those industries.²³² Because the best research is performed at the company and industry level with real employees, responsible managers should permit researchers to do that research in their workplaces. Legislation that would protect employers if they were to enable scholars to engage in such in-person research may create a host of information that would move us forward regarding the effectiveness of policies and training in workplaces and industries.²³³

IV. CONCLUSION: THE STATES AS LABORATORIES OF DEMOCRACY FOR THE NATION

Because of the unique situation in which we find ourselves, federal and state laws dealing with sex- and race-based harassment in workplaces vary significantly. Given that federal courts have virtually given up on their responsibility to enforce Title VII law at a time when society is readier for enforcement than it has ever been, states have begun to step up. Various state legislatures and courts have welcomed the opportunity to fill in the federal void – to assure the protection of workers from race- and sex-based

229. *See id.*

230. *See generally* Ann C. McGinley, *Sex- and Gender-Based Harassment in the Gaming Industry*, 9 UNLV GAMING L. J. 157, 175 (2019) (opining that a multi-faceted approach is required to solve issues of discrimination and harassment in the workplace).

231. *See* Debbie S. Dougherty & Marlo Goldstein Hode, *Binary Logics and the Discursive Interpretation of Organizational Policy: Making Meaning of Sexual Harassment Policy*, 69 HUM. REL. 1729 (2016).

232. *See* McGinley, *supra* note 230, at 173-75.

233. *See Works in Progress: Measuring the Efficacy of Harassment Training Programs: The Collective Accountability in the Workplace Scale (CAWS); Harassment: Predicting Outcomes in Federal and State Courts*, <https://www.jamillahwilliams.com/works-in-progress> (explaining that Jamillah Bowman Williams and Elizabeth Tippet are currently engaged in important empirical research of state anti-discrimination laws and state courts and the effectiveness of harassment prevention policies and trainings).

harassment. This Article aims to encourage those states that have taken the plunge and those that have not yet done so. State courts and state legislative bodies are at the center of protecting residents' rights. Their efforts are integral to the anti-harassment project.

The different provisions of state law and the state courts' interpretation of their laws help guarantee the rights of their residents. However, they also provide a rare opportunity for researchers to determine which provisions are the most effective in reinforcing workers' rights, encouraging employers to do right by their employees, and guaranteeing to all workers fairness and dignity. I hope that employers will join researchers in this endeavor, opening doors in good faith to social scientists and legal researchers to determine what measures and programs are most effective in preventing harassment in the context of specific industries and workplaces.

With some luck, Congress will once again take up national legislation that will include the most protective amendments to harassment law under Title VII. When it does, it will rely on researchers' findings regarding the state experiments that promote the best available laws. If that happens, the progressive states will have acted as proper laboratories of democracy. If not, at least the citizens of the states that have recognized workers' civil rights will have the state law to rely upon. The only concern is for those individuals who live and work in states that do not guarantee greater rights at work. Without federal legislation, they will live in a regime where sex- and race-based harassment may flourish.

