



NOTE

The Privatization of Sexual Harassment Adjudication and the Eclipse of Civil Rights

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Abstract. In 1998, the Supreme Court established a standard for employer vicarious liability for sexual harassment in the cases *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. Together, these cases hold that an employer is presumptively liable for any actionable sexual harassment by a supervisor. No affirmative defense is available when harassment results in tangible employment action; however, when harassment does not result in tangible employment action, an employer may raise an affirmative defense to liability and damages. Rather than attempting to settle the debates over whether the *Faragher-Ellerth* affirmative defense is good public policy, this Note advances a distinct, novel, and more fundamental critique of the *Faragher-Ellerth* regime: that the affirmative defense is problematic because it privatizes the adjudication of a civil right. Although the affirmative defense is pled in court, its effect is to make employers' training and reporting systems outcome-determinative, thereby deferring to employers' regulation of sexual harassment. This Note argues that, by shifting the enforcement of anti-sexual harassment principles from legal proceedings to corporate self-regulation, the *Faragher-Ellerth* regime ignores the essential nature of the harm of sexual harassment: the violation of the victim's civil rights and public claim to equal citizenship. Privatization of sexual harassment adjudication, then, is fundamentally incompatible with the underlying antidiscrimination principles foundational to sexual harassment jurisprudence.

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Introduction

In 2013, Tristana Hunt—a long-time employee of Wal-Mart’s Crestwood, Illinois store—began working the overnight shift in the electronics department.¹ From 10:00 PM until 7:00 AM, she and assistant manager Daniel Watson were the only employees working on their side of the store.² Hunt first met Watson on a shift in May 2013, during which “Watson came up to her and asked her why she was wearing a particular shirt, saying that he could see her breasts.”³ In the months that followed, Watson persistently sexually harassed Hunt. In one incident, “Watson walked up behind Hunt while she was bending over, stood really close to her, and made another comment about her breasts; when she told him to stop and walked away, he followed her and told her he wanted to shower with her and feel up her breasts.”⁴ In another incident, “Watson snatched [Hunt’s] phone from her and looked through it for nude pictures, saying, ‘I know you have naked pictures . . . I want to see those pictures.’”⁵ For several months, Watson lingered near Hunt throughout her shift, making comments about Hunt’s breasts and giving unwelcome shoulder rubs daily.⁶ Hunt initially did not report the harassment because she feared retaliation from Watson, who was empowered to fire her.⁷

On September 27, 2013, Hunt reported Watson’s harassment to store manager Mark Turner.⁸ Turner opened a formal investigation, during which he interviewed only Hunt and Watson, not any third-party witnesses.⁹ Although Wal-Mart policy dictated that it “may be necessary” to separate the accuser and accused for the duration of a sexual harassment investigation, Turner did not separate Hunt and Watson during the eight-day investigation, during which the harassment continued.¹⁰ Following the investigation, Turner concluded that “Hunt’s claim was unsubstantiated and unfounded because no witnesses had corroborated her allegations and Watson had denied engaging in any harassment.”¹¹ Apart from asking Watson to repeat Wal-Mart’s

1. Brief for the Plaintiff-Appellant at 5, *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624 (7th Cir. 2019) (No. 18-3403).

2. *Id.*

3. *Hunt*, 931 F.3d at 626.

4. Brief for the Plaintiff-Appellant at 8, *Hunt*, 931 F.3d 624 (No. 18-3403).

5. *Id.*

6. *Id.* at 9-10.

7. *Id.* at 10.

8. *Id.*

9. *Id.* at 11.

10. *Id.*

11. *Id.* at 12.

antiharassment training, Wal-Mart took no corrective action.¹² Watson was not disciplined, and Hunt and Watson were not separated on the job.¹³

Hunt was not the first employee Watson allegedly sexually harassed. In the fall of 2012, six months before Watson began harassing Hunt, Wal-Mart employee Toyanna Campbell complained that “Watson had told [her] he liked her several times” and, after she refused his advances, “he closed the door and window to his office, put his hand on her arm, and refused to let go of her until she screamed.”¹⁴ For this offense, Watson received only a “coaching,” a write-up “intended to provide instruction and assistance when an employee’s performance is not up to Wal-Mart’s standards.”¹⁵ A few weeks later, Campbell reported that Watson had made additional advances.¹⁶ Wal-Mart responded not by demoting, suspending, or terminating Watson, but by “provid[ing] Watson with a second written coaching and mov[ing] him to the overnight shift.”¹⁷ This shift change left Watson alone with Tristana Hunt, thereby exposing her to his harassment. Moreover, store manager Mark Turner did not consider Campbell’s substantiated allegations when evaluating Hunt’s complaint—even though under Wal-Mart’s policy, investigators must “take into account prior similar allegations.”¹⁸

In June 2016, Hunt sued Wal-Mart, alleging that Watson’s sexual harassment subjected her to a hostile work environment.¹⁹ The district court granted summary judgment for Wal-Mart.²⁰ In 2019, the Court of Appeals for the Seventh Circuit affirmed,²¹ citing Wal-Mart’s allegedly “effective anti-harassment policy” and “prompt investigation” of Hunt’s complaint.²² The court of appeals also found that, by reporting the harassment four months after it began, Hunt “unreasonably failed to take advantage of the preventive or corrective opportunities the employer provided,” despite the fact that the delay was motivated by fear of retaliation.²³ As a result, Wal-Mart’s human-resources bureaucracy—the institution that responded to sexual harassment claims with

12. *Id.*

13. *Id.*

14. *Hunt*, 931 F.3d at 626.

15. *Id.*

16. *Id.*

17. *Id.*

18. Defendant’s Response to Plaintiff’s Statement of Additional Facts in Response to the Motion for Summary Judgment at 17, *Hunt v. Wal-Mart Stores, Inc.*, No. 16-cv-5924, 2018 WL 4931999 (N.D. Ill. Oct. 10, 2018) (No. 89).

19. *Hunt*, 931 F.3d at 627.

20. *Hunt*, 2018 WL 4931999, at *1.

21. *Hunt*, 931 F.3d at 626.

22. *Id.* at 630 (quoting *Porter v. Erie Foods Intern., Inc.*, 576 F.3d 629, 636 (7th Cir. 2009)).

23. *Id.* at 631.

only written warnings and shift transfers—was given the final authority to adjudicate Hunt’s sexual harassment allegations.

This Note argues that the theory and practice of employer sexual harassment bureaucracy underlying *Hunt v. Wal-Mart* are incompatible with the definitions and remedies associated with sexual harassment under the law. The miscarriage of justice in Tristana Hunt’s case is the direct consequence of the standard for employer vicarious liability for sexual harassment established in the 1998 Supreme Court cases *Faragher v. City of Boca Raton*²⁴ and *Burlington Industries, Inc. v. Ellerth*.²⁵ Together, these cases held that an employer is presumptively liable for any actionable sexual harassment “created by a supervisor with immediate (or successively higher) authority over the employee.”²⁶ No affirmative defense is available in cases where harassment results in tangible employment actions like termination of employment, demotion, or change in compensation.²⁷ But when harassment does not result in tangible employment action, a defending employer may raise an affirmative defense to liability and damages.²⁸

The Court reasoned that this affirmative defense incentivizes both parties to fulfill their respective duties—the employer’s “obligation to prevent violations” and the employee’s “coordinate duty to avoid or mitigate harm.”²⁹ But in practice, the *Faragher-Ellerth* affirmative defense creates a “virtual safe harbor” for employers, keeping the vast majority of sexual harassment cases out of the courts.³⁰ Employers have frequently been found to have met their burden by simply adopting sexual harassment policies and reporting systems—regardless of whether they succeed at preventing harassment.³¹ And victims have often been found to have not met their burden due to perceived delays in reporting, even when those delays were brief or motivated by fear of retribution.³² The *Faragher-Ellerth* affirmative defense explains why Tristana Hunt had no viable chance of relief through a Title VII suit, despite the particularly egregious sexual harassment she suffered. Hunt’s case, moreover, is not unique: Courts dismiss numerous sexual harassment cases under the

24. 524 U.S. 775 (1998).

25. 524 U.S. 742 (1998).

26. *Faragher*, 524 U.S. at 807.

27. *Id.* at 808.

28. *Id.* at 807.

29. *Id.* at 806.

30. Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 675 (2000).

31. *See infra* Part I.A.

32. *See infra* Part I.A.

Faragher-Ellerth affirmative defense each year.³³ The defense likely deters plaintiffs' lawyers from filing others.

In legal commentary, the *Faragher-Ellerth* affirmative defense has been challenged primarily on public policy grounds. Some object to the very concept of the affirmative defense, making the case that a strict liability regime would increase victim relief, square the treatment of sexual harassment with other areas of Title VII and agency law, and incentivize effective deterrence of sexual harassment.³⁴ Others accept the defense in principle but contend that it has been enforced in a manner skewed toward employer success, arguing that current applications of the defense demand too little of employers and impose unreasonable expectations on victims.³⁵ Under this theory, the *Faragher-Ellerth* standard could be salvaged by (1) requiring employers to adopt provably effective policies in order to meet their burden of reasonable care, and (2) accounting for why sexual harassment victims may not report harassment according to employer policies.³⁶ Finally, still others have endorsed the affirmative defense, arguing that employers can and should adopt procedures for reporting and addressing unwanted sexual conduct, but that employers cannot be expected to prevent or discipline "every ill-considered comment, unwelcome pass, or off-color joke"—and any attempt to do so may generate harms like the over-policing of legitimate workplace speech.³⁷

33. There is no comprehensive data regarding how frequently *Faragher-Ellerth* is successfully invoked. However, summary judgment was granted or affirmed under *Faragher-Ellerth* in at least ten sexual harassment cases in 2024 alone. See *Ferrara v. Sterling, Inc.*, No. 23-0454-cv, 2024 WL 485742, at *2 (2d Cir. Feb. 8, 2024); *Taylor v. McDonough*, No. 23-60106, 2024 WL 1504343, at *1 (5th Cir. Apr. 8, 2024); *Moon v. Okla. Dep't of Corr.*, No. 23-6091, 2024 WL 1696791, at *2 (10th Cir. Apr. 19, 2024); *Williams v. Memphis Light, Gas & Water*, No. 23-5616, 2024 WL 3427171, at *8 (6th Cir. July 16, 2024); *Simmons v. Top Deck, Inc.*, No. 09-22-00222-cv, 2024 WL 5087331, at *12 (Tex. App. Dec. 12, 2024); *Burns v. Intermodal Cartage Co.*, No. 22-cv-00979-E, 2024 WL 1018526, at *17 (N.D. Tex. Mar. 8, 2024); *Hoekstra v. Ford Motor Co.*, No. 22 C 3615, 2024 WL 3519986, at *6 (N.D. Ill. July 24, 2024); *Wolf v. Kum & Go, L.C.*, No. civ-23-00754, 2024 WL 3706501, at *7 (W.D. Okla. Aug. 7, 2024); *Fay v. City of Newburgh*, No. 21-cv-3140, 2024 WL 4169552, at *4 (S.D.N.Y. Sept. 12, 2024); *Kulp v. Norfolk S. Ry. Co.*, No. 22-cv-1818, 2024 WL 4665185, at *6 (M.D. Pa. Nov. 4, 2024).

34. See Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 196-98 (2021).

35. See Grossman, *supra* note 30, at 719-20; Elizabeth C. Potter, Note, *When Women's Silence Is Reasonable: Reforming the Faragher/Ellerth Defense in the #MeToo Era*, 85 BROOK. L. REV. 603, 605 (2020); E. Jacob Lindstrom, Note, *All Carrots and No Sticks: Moving Beyond the Misapplication of Burlington Industries, Inc. v. Ellerth*, 21 HASTINGS WOMEN'S L.J. 111, 120 (2010); Brianna Messina, Comment, *Redefining Reasonableness: Supervisory Harassment Claims in the Era of #MeToo*, 168 U. PA. L. REV. 1061, 1064-65 (2020).

36. Messina, *supra* note 35, at 1094-95, 1097.

37. Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1412-13 (2014).

Rather than attempting to settle the debate over whether the *Faragher-Ellerth* affirmative defense appropriately allocates liability for workplace sexual harassment, this Note advances a distinct, novel, and more fundamental critique of the regime established by *Faragher* and *Ellerth*: that the affirmative defense effectively privatizes the adjudication of a civil right. Although the affirmative defense is pled in court, its effect is to defer to the employer's regulation of sexual harassment by making the employer's training and reporting systems outcome-determinative. By shifting the adjudication and enforcement of anti-sexual harassment principles from legal proceedings to corporate self-regulation, the *Faragher-Ellerth* regime ignores the essential nature of the harm committed by sexual harassment: the violation of the civil rights of the victim and her public claim to equal citizenship.

This Note proceeds in three Parts. Part I first describes the doctrinal contours of the *Faragher-Ellerth* affirmative defense. Then, it shows how that affirmative defense transformed the adjudication of sexual harassment in two core respects: (1) by enabling employers to escape vicarious liability for sexual harassment, even when they have not effectively prevented sexual harassment; and (2) by displacing the bulk of sexual harassment adjudication to private employer bureaucracies, rendering those bureaucracies the only source of justice available to many would-be plaintiffs. As Part I ultimately demonstrates, these private sector dispute resolution systems operate according to the interests of the employer, not of the victim, and are not well suited for addressing the structural phenomenon of sexual harassment.

Following Part I's exposition of the pathologies of sexual harassment adjudication under *Faragher-Ellerth*, Part II retraces the development of sexual harassment jurisprudence from its origins in second-wave feminist thought through early jurisprudential treatments and culminating in the landmark decision *Meritor Savings Bank, FSB v. Vinson*.³⁸ The Part concludes by reaffirming what remains the jurisprudential bedrock principle of sexual harassment law: that sexual harassment is discrimination on the basis of sex.³⁹

38. 477 U.S. 57, 66 (1986) (holding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment").

39. A methodological note: The Supreme Court has unequivocally stated that plaintiffs can assert a claim of sexual harassment regardless of their gender. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) ("[W]e conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII . . ."). This Note, however, frequently discusses sexual harassment with respect to women. It does so for two reasons. First, as a statistical matter, sexual harassment disproportionately affects women. See Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), <https://perma.cc/Z68T-R4MH> (explaining that 59% of women, as compared to 27% of men, report having experienced workplace sexual harassment); *Sexual Harassment in Our Nation's Workplaces*, U.S. EEOC (Apr. 2022), <https://perma.cc/AA3J-S2MX> (noting that, between 2018 and 2021, women filed 78.2% of all sexual
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Finally, Part III shows, with the support of influential liberal and post-liberal theories of civil rights, why the bureaucratic approach to sexual harassment adjudication does not adequately address the public, political nature of sex discrimination. The adjudication of civil rights claims is necessarily a matter of public interest, and the affirmation of the law's protection carries an expressive value that demands a forum beyond workplace bureaucracies.

Ultimately, this Note argues that the employer bureaucracies that emerged in the wake of *Faragher-Ellerth* have perverted our legal and theoretical understanding of sexual harassment, thereby hindering the law's ability to effectively prevent and remedy it. There are many reasons to suspect that employer sexual harassment bureaucracies do not adequately protect workers from sexual harassment. This Note contends that these bureaucracies *cannot* by their very nature carry out the antidiscrimination mandate of Title VII: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."⁴⁰

I. *Faragher-Ellerth* and the Development of the Sexual Harassment Bureaucracy

The Supreme Court's 1998 landmark decisions in *Faragher v. City of Boca Raton*⁴¹ and *Burlington Industries, Inc. v. Ellerth*⁴² restricted and reoriented the adjudication and remedies available to workplace sexual harassment victims in two distinct yet interrelated ways. First, like any affirmative defense, the *Faragher-Ellerth* rule forces plaintiffs to meet a pleading and proof threshold that is independent of the underlying merits question—here, whether sexual harassment has occurred. Therefore, this affirmative defense enables employers to escape liability in court even when they have not implemented effective sexual harassment prevention mechanisms. Second, the affirmative defense incentivizes employers to create internal sexual harassment bureaucracies that functionally become the only source of adjudication and justice available to most would-be sexual harassment plaintiffs. Victims of sexual harassment who

harassment complaints submitted to the EEOC). Second, the second-wave feminist movement, to which contemporary sexual harassment jurisprudence owes much, concerned the subordination of women and argued accordingly for sexual harassment's inclusion as a Title VII cause of action. See *infra* Part II.A. This emphasis on women plaintiffs, however, should not be taken to denigrate the harms of sexual harassment for victims of all genders. Moreover, the Note's account of the perversities of the *Faragher-Ellerth* affirmative defense, and the attendant dysfunctions of private bureaucratic adjudication of sexual harassment claims, applies with equal force to all victims of sexual harassment.

40. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

41. 524 U.S. 775 (1998).

42. 524 U.S. 742 (1998).

do not successfully navigate these bureaucracies see their lawsuits dismissed under *Faragher* and *Ellerth*. Public adjudication in court is thus supplanted by private dispute resolution systems oriented toward mediation and corporate efficiency.⁴³ This inverts the enforcement scheme Congress contemplated in legislating to prevent sex discrimination, which empowered both rights-holders to have their day in court and the Equal Employment Opportunity Commission (EEOC) to reinforce such suits using the tools of agency enforcement.⁴⁴ Although there are virtues in private forms of dispute resolution, there are well-documented pathologies as well, especially in the context of sexual harassment in the workplace.⁴⁵ This Part will first describe the affirmative defense established in *Faragher* and *Ellerth*, then treat each of these effects in turn.

A. *Faragher & Ellerth*: Revising Vicarious Liability Standards in Title VII Sexual Harassment Actions

In 1986, the Supreme Court held in *Meritor Savings Bank, FSB v. Vinson* that sexual harassment—including hostile workplace harassment—constitutes actionable discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964.⁴⁶ This case marked the decisive resolution of second-wave feminism’s decade-long legal and political battle for the recognition of sexual harassment as legally impermissible discrimination.⁴⁷ But numerous doctrinal ambiguities in the burgeoning field of sexual harassment law remained.⁴⁸ One such question was the appropriate legal standard for employer vicarious liability for harassment perpetrated by supervisory employees—the issue which the Court ultimately resolved in the 1998 landmark cases *Faragher* and *Ellerth*.

Prior to *Faragher* and *Ellerth*, courts almost universally held employers automatically liable for the conduct of their supervisory employees in “classic” *quid pro quo* cases—cases “where a supervisor takes an adverse action against a

43. See *infra* Part I.B.

44. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (describing the legislative purpose of Title VII: “to make persons whole for injuries suffered on account of unlawful employment discrimination”).

45. See *infra* Part III.

46. 477 U.S. 57, 66 (1986) (holding that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment”).

47. See *infra* Part II.B.

48. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18-19 (1993) (“consider[ing] the definition of a discriminatorily ‘abusive work environment’ (also known as a ‘hostile work environment’) under Title VII of the Civil Rights Act of 1964”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998) (considering “whether workplace harassment can violate Title VII’s prohibition against ‘discriminat[ion] . . . because of . . . sex,’ when the harasser and the harassed employee are of the same sex” (citation omitted)).

subordinate employee based on the employee's refusal to submit to sexual advances."⁴⁹ But there was no consensus among lower federal courts regarding vicarious liability in "unfulfilled threat" cases (where a supervisor threatens adverse employment action in an effort to coerce an employee to have sex but does not actually take that action when the employee refuses) and "submission" cases (where an employee submits to a supervisor's sexual advances under threat of adverse employment action).⁵⁰ The standard for vicarious liability in hostile workplace harassment cases was even more varied among the circuit courts.⁵¹ While some courts held employers strictly liable, others required evidence of employer knowledge of the harassment.⁵² And an employer's enactment of an anti-harassment policy mitigated liability in some circuits, but it had no bearing on liability in others.⁵³

In *Faragher* and *Ellerth*, the Court unified these standards, holding that an employer is presumptively liable for any actionable sexual harassment "created by a supervisor with immediate (or successively higher) authority over the employee."⁵⁴ No affirmative defense is available in cases where the harassment results in tangible employment action—for instance, "discharge, demotion, or undesirable reassignment."⁵⁵ But when the harassment does not result in tangible employment action, a defending employer may raise an affirmative defense to liability and damages.⁵⁶ To satisfy this affirmative defense, the employer must prove by a preponderance of the evidence: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁵⁷

According to the Court, this affirmative defense is structured to reflect the parties' respective duties—the employer's "obligation to prevent violations" and the employee's "coordinate duty to avoid or mitigate harm."⁵⁸ The first prong,

49. Grossman, *supra* note 30, at 679.

50. *Id.* at 679-80.

51. *See id.* at 687.

52. *Id.* at 687-88. The original 1980 EEOC sexual harassment guidelines "stated that employers were strictly liable for supervisor harassment," but these guidelines had no binding authority and were not universally followed. Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 153-54 (2001).

53. Grossman, *supra* note 30, at 688.

54. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)).

55. *Id.* at 808.

56. *Id.* at 807.

57. *Id.*

58. *Id.* at 806.

the Court suggests, incentivizes employers to adopt and enforce policies that prevent harassment, while the second prong prevents employers from being held liable for harm that the victim could have averted.⁵⁹ The affirmative defense, then, seems to demand that both employer and employee do their part to prevent sexual harassment. And because it presumes that employers are vicariously liable in the first instance and requires them to prove otherwise, many commentators expected the affirmative defense to increase victims' ability to obtain redress from their employers.⁶⁰ But in practice, the defense has proven unduly favorable to employers, granting them a "virtual safe harbor" while denying numerous would-be sexual harassment plaintiffs the ability to seek legal recourse.⁶¹

Assessing each prong of the affirmative defense shows the way in which the affirmative defense is unduly favorable to employers. The first prong ostensibly demands that employers make good-faith and reasonably calibrated efforts to prevent and correct sexual harassment. But courts have by and large required just the promulgation and dissemination of a facially valid, written antiharassment policy.⁶² Indeed, some courts have not even required that employers maintain an anti-harassment policy to avail themselves of the affirmative defense.⁶³ Courts have not uniformly required that policies be well-publicized.⁶⁴ Nor do courts require that employers implement additional

59. *Id.* at 806-07.

60. Grossman, *supra* note 30, at 675 ("Many commentators interpreted the new standards as a blow to employers based on the perception that employers would now be held accountable for workplace harassment without regard to their culpability.").

61. *Id.*

62. For examples of cases treating a written antiharassment policy as sufficient to satisfy the first prong, see *Helm v. Kansas*, 656 F.3d 1277, 1288-89 (10th Cir. 2011); and *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999). See also Cunningham-Parmeter, *supra* note 34, at 160 (characterizing *Faragher* and *Ellerth* as having "functionally granted immunity to employers with antiharassment policies and reactive procedures"). Courts have generally considered antiharassment policies legally sufficient so long as they include "(i) a description of prohibited conduct; (ii) a list of individuals to whom complaints should be made, with a bypass procedure to ensure that no victim will have to complain to her harasser; and (iii) a grievance procedure calculated to bring out complaints." Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment*, 26 HARV. WOMEN'S L.J. 3, 11 (2003).

63. See, e.g., *Quinn v. Griffith*, 515 F. App'x 543, 547-48 (6th Cir. 2013) ("*Ellerth* and *Faragher* permit an employer to defend against Title VII respondeat superior liability even absent an anti-harassment policy.").

64. See, e.g., *Helm*, 656 F.3d at 1288 (finding adequate a sexual harassment policy that was "buried . . . in the middle of a fifty-page employee handbook" and of which "numerous employees . . . were completely unaware"); *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1227-28 (M.D. Fla. 2004) (finding adequate a policy that the plaintiff described as "buried" in the personnel manual").

preventative measures like sexual harassment training,⁶⁵ although they have often looked favorably upon this.⁶⁶ Perhaps most importantly, courts do not consider whether antiharassment policies are actually effective at preventing sexual harassment.⁶⁷ As a result, today, employer sexual harassment policies, reporting systems, and training schemes are nearly ubiquitous but of dubious quality.⁶⁸ By some estimates, as many as 98% of United States employers maintain a sexual harassment policy,⁶⁹ and the vast majority of employers also require sexual harassment training.⁷⁰ Nearly every United States employer, then, satisfies the prevention requirement of the affirmative defense's first prong as a matter of course—regardless of how successful they are at actually preventing sexual harassment.

The reasonable care standard for correcting sexual harassment is equally lax. While courts look to whether employers have undertaken a “prompt

65. *Weger v. City of Ladue*, 500 F.3d 710, 720 (8th Cir. 2007) (finding that a failure to provide sexual harassment training or counseling did not render department policy deficient).

66. *See, e.g., Morales-Diaz v. P.R. Elec. Power Auth.*, 899 F. Supp. 2d 170, 177 (D.P.R. 2012) (finding that evidence of the provision of sexual harassment trainings “amply sustains that PREPA [Puerto Rico Electric Power Authority] met its duty under the first prong”); *Zakrzewska v. New Sch.*, 598 F. Supp. 2d 426, 433 (S.D.N.Y. 2009) (describing that, though the employer met its burden, its position would have “been even stronger had it ensured that its employees took the supposedly mandatory training”); *Terry v. Laurel Oaks Behav. Health Ctr., Inc.*, 1 F. Supp. 3d 1250, 1270 (M.D. Ala. 2014) (citing “annual training” as evidence of effective publication of sexual harassment policy). *See also* Grossman, *supra* note 62, at 13 (“Courts weigh anti-harassment training as a factor in evaluating an employer’s preventative efforts . . .”).

67. *See* Grossman, *supra* note 62, at 4-5 (describing how courts reward employers for “enacting standard-issue policies and procedures, regardless of whether those efforts actually reduce harassment . . .”).

68. Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PNAS 12255, 12255, 12258 (2019) (finding that “[s]exual harassment remains a cancer on the workplace despite the widespread adoption of grievance procedures, manager training, and employee training” and that “sexual harassment grievance procedures and training may be managerial snake oil”); CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at v (2016), <https://perma.cc/BL53-GQW5> (“Much of the [sexual harassment] training done over the last 30 years has not worked as a prevention tool . . .”).

69. Debbie S. Dougherty, *The Omissions That Make So Many Sexual Harassment Policies Ineffective*, HARV. BUS. REV. (May 31, 2017), <https://perma.cc/N47E-5BQG>.

70. In 2017, some 71% of employers required some form of sexual harassment training for employees. *See* Megan Cole, *71 Percent of Organizations Offer Sexual Harassment Prevention Training*, ASS’N TALENT DEV. (Nov. 12, 2017), <https://perma.cc/8LM5-AR6C>. Given the increased focus on training in the years after #MeToo, this number has likely increased.

investigation⁷¹ or other corrective measures like retraining employees,⁷² separating the complaining employee from the accused employee,⁷³ or imposing disciplinary sanctions,⁷⁴ an employer need not actually stop the harassment from recurring.⁷⁵ Ineffective corrective measures suffice if they are “reasonably calculated to end the harassment.”⁷⁶

The second prong of the *Faragher-Ellerth* affirmative defense, which considers whether the victim exercised reasonable care, is generally reduced to a single inquiry: Did the employee fail to report harassment according to the procedures outlined in the antiharassment policy?⁷⁷ If so, the employee has by definition acted unreasonably, and the employer has satisfied the second requirement of the affirmative defense. The vast majority of sexual harassment victims, however, fail to file a report—let alone a timely one—with their employers, precluding the employer’s vicarious liability.⁷⁸ Indeed, according to a report by the EEOC, “[t]he least common response . . . to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint [A]pproximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.”⁷⁹

About a third of sexual harassment victims do eventually report their harassment to someone,⁸⁰ but many of these victims are likewise deemed to

71. *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001) (“The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified.”); *Porter v. Erie Foods Int’l, Inc.*, 576 F.3d 629, 636 (7th Cir. 2009) (“[A] prompt investigation is the ‘hallmark of a reasonable corrective action.’” (quoting *Lapka v. Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008))).

72. *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624, 631 (7th Cir. 2019).

73. *Swenson*, 271 F.3d at 1194.

74. *Fields v. Ill. Dep’t of Corr.*, No. 03-cv-4222, 2006 WL 2645200, at *15 (S.D. Ill. Sept. 12, 2006).

75. *Porter*, 576 F.3d at 637 (7th Cir. 2009) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998)); see also *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) (“An employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct.”); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 933 (7th Cir. 1999) (“Title VII does not require that the employer’s responses to a plaintiff’s complaints of supervisory sexual harassment successfully prevented subsequent harassment . . .”).

76. See *Adler*, 144 F.3d at 676 (“Because . . . an employer must only respond reasonably, a response may be so calculated even though the perpetrator might persist.”).

77. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (“[S]howing an unreasonable failure to use any complaint procedure provided by the employer . . . will normally suffice to satisfy the employer’s burden under the second element of the defense.”).

78. *Cunningham-Parmeter*, *supra* note 34, at 174.

79. *FELDBLUM & LIPNIC*, *supra* note 68, at 16.

80. See *id.*

have “unreasonably failed to take advantage of any preventive or corrective opportunities”⁸¹ by failing to report in accordance with employer policy. Because harassment policies often specify when and to whom a report must be made, courts have found employee conduct deficient for short delays⁸² or for reporting through improper channels.⁸³ In assessing the reasonableness of delays, courts have refused to consider the “generalized fear of retaliation,” which victims of sexual harassment frequently experience.⁸⁴

The *Faragher-Ellerth* affirmative defense, then, does more than just incentivize reasonable conduct by employers and employees. In practice, it allows victims to proceed against their employers in court only if they file in-house complaints and their employers fail to adequately address the problem.⁸⁵ Thus, the opportunity to recover under Title VII is available to only exceedingly narrow classes of victims:

(1) victims whose “supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment”;⁸⁶

(2) victims whose employers do not maintain a “facially valid” antiharassment policy;⁸⁷

(3) victims who are harassed by a supervisor “empowered [by the employer] . . . to take tangible employment actions against the victim,” if the harassment is reported promptly through the avenues specified by employer policy, and the employer nevertheless does not take reasonable action to correct the harassment;⁸⁸ or

81. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

82. *See, e.g., Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1288-90 (11th Cir. 2003) (finding a delay of two or two-and-a-half months unreasonable); *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009) (finding a delay of two-and-a-half months unreasonable); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007) (finding a delay of three months and two weeks unreasonable).

83. *See, e.g., Lacasse v. Didlake, Inc.*, 712 F. App’x 231, 238 (4th Cir. 2018) (finding a report to two non-supervisory individuals “but never [to] anyone in the official reporting channel” unreasonable); *Green v. MOBIS Ala., LLC*, 995 F. Supp. 2d 1285, 1291-92, 1303-04 (M.D. Ala. 2014), *aff’d*, 613 F. App’x 788 (11th Cir. 2015) (finding a report to a supervisor on another shift and through an anonymous complaint box after a three-month delay unreasonable).

84. *Pinkerton*, 563 F.3d at 1063.

85. *Cunningham-Parmeter*, *supra* note 34, at 174.

86. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

87. *Weger v. City of Ladue*, 500 F.3d 710, 720 (8th Cir. 2007).

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

(4) victims who faced harassment by any employee and can prove their employer’s “negligen[ce] in controlling working conditions.”⁸⁹

Each year, the thousands of sexual harassment victims in the United States who do not fall within these categories are left without legal recourse.⁹⁰

B. The Emergence & Growth of Employer Sexual Harassment Bureaucracies

The thousands of sexual harassment victims excluded from court under the *Faragher-Ellerth* affirmative defense are left with only one path of redress: their employers’ sexual harassment bureaucracies. Each comes with “its own cadre of professionals and its own legal character”⁹¹—decisionmaking bodies which, since *Faragher* and *Ellerth*, have “essentially privatize[d] the adjudication of public rights.”⁹² This outsourcing of sexual harassment enforcement to private employers was an explicit aim of the *Faragher-Ellerth* affirmative defense. The *Ellerth* Court novelly characterized Title VII’s legislative purpose as to

89. *Id.* at 424. In order to make out a claim for negligence, a harassment victim must prove that the employer “knew or reasonably should have known about the harassment but failed to take remedial action.” *Id.* at 427. Asserting an employer-negligence theory of workplace harassment presents victims with an even “steeper substantive and procedural hill to climb” than a vicarious liability claim under *Faragher-Ellerth*, as plaintiffs in negligence actions bear the burden of demonstrating the employer’s negligence, including actual or constructive knowledge of the harassment, whereas in vicarious liability actions under *Faragher-Ellerth*, employers bear the burden to satisfy the affirmative defense. *Id.* at 466–67 (Ginsburg, J., dissenting); see also Jennifer A.L. Sheldon-Sherman, *The Effect of Vance v. Ball State in Title VII Litigation*, 2021 U. ILL. L. REV. 983, 1038–39 (2021) (“[T]he negligence standard is difficult to meet and considers only how the employer reacts once on notice of the harassing behavior. Therefore, it provides little incentive for employers to proactively monitor the workplace for harassment.”); Recent Case, *Anderson v. Mott Street*, 138 HARV. L. REV. 1481, 1486 (2025) (“It is actually quite difficult for employees to prevail under a negligence liability regime unless they reported the harassment to the employer. This bars many employees from remedies, since sexual harassment victims are often hesitant to report . . .”).

90. There exists no decisive statistic as to the yearly incidence of sexual harassment. In 2018, 7,609 people reported sexual harassment to the EEOC. *Sexual Harassment in Our Nation’s Workplaces*, *supra* note 39. Studies suggest that only between 6% and 13% of victims file a formal sexual harassment complaint with the EEOC. *Id.* If these figures are accurate, a simple calculation suggests that over 58,000 workers are sexually harassed each year—over 40,000 of whom never report their harassment to a workplace authority like a supervisor, manager, or union representative. Based on these numbers, and the near ubiquity of sexual harassment policies and trainings, it stands to reason that thousands of workers each year, should they decide to bring suit, would be defeated under *Faragher-Ellerth*.

91. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 21 (2006).

92. Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 497–98 (1993) (describing the effects of using internal dispute resolution systems to adjudicate equal employment opportunity and affirmative action Title VII complaints).

“encourage the creation of antiharassment policies and effective grievance mechanisms” that would allow employers to combat workplace discrimination on their own.⁹³ The Court hoped that, by shielding from liability employers who implemented sexual harassment prevention and reporting programs, they could incentivize the development of employer sexual harassment bureaucracies that could prevent harassment while also promoting judicial efficiency.⁹⁴

Given the fear of liability surrounding the issue of sexual harassment in the United States,⁹⁵ and the costs of litigation, it is no surprise that employers responded to that incentive by developing internal regulatory systems tailored toward satisfying the *Faragher-Ellerth* affirmative defense. Sexual harassment trainings are one core component of this response. Sexual harassment trainings have existed since the 1980s,⁹⁶ but following *Faragher* and *Ellerth*, the demand for them skyrocketed, transforming sexual harassment training into “a routine feature of the American workplace.”⁹⁷ The sexual harassment training industry is estimated to earn billions of dollars in revenue each year.⁹⁸ Employers have also developed internal reporting and disciplinary systems.⁹⁹ Thus, “there is now an entire phalanx of human relations officers whose very job it is to figure

93. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). The *Ellerth* Court is the first to posit that the purpose of Title VII was to induce employer self-regulation without acknowledging the coeval injunctive and compensatory purposes of the statute. The notion that one statutory purpose of Title VII was to “cause[] employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, [discrimination]” finds some support in past Supreme Court precedent. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)). But in reaching that conclusion, the same Court held that “[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination”—a purpose “shown by the very fact that Congress took care to arm the courts with full equitable powers.” *Id.*

94. *Ellerth*, 524 U.S. at 764 (suggesting that the affirmative defense would “promote conciliation rather than litigation in the Title VII context”).

95. KATHRIN S. ZIPPEL, *THE POLITICS OF SEXUAL HARASSMENT* 5 (2006) (“In the United States there is a *politics of fear* centered on sexual harassment; employers and male employees are told to be afraid of women’s lawsuits.”).

96. See Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 503 (2018) (describing the content of 1980s sexual harassment trainings).

97. Bisom-Rapp, *supra* note 52, at 154-55 (“[D]emand for sexual harassment training has reportedly increased since 1998, when the Supreme Court handed down two decisions that signaled a major shift in Title VII jurisprudence and, ultimately, express judicial incorporation of the longstanding employer practice of harassment training into legal doctrine.”).

98. *Id.* at 154.

99. See *supra* notes 68-70 and accompanying text.

out and guide internal policies on exactly what kind of behavior is harassing and what appropriate individual and institutional responses should look like.”¹⁰⁰

By instructing employees about which kinds of behaviors constitute sexual harassment and purportedly enforcing those rules through workplace sanctions, employer sexual harassment policies, trainings, and reporting systems have developed their own definitions of sexual harassment that diverge from legal definitions. Under the law, the essential inquiry in sexual harassment cases is whether the alleged conduct entails differential treatment of individuals based on membership in a protected category (in this case, sex)—in other words, whether the conduct is discriminatory.¹⁰¹ The legal standard for sexual harassment under Title VII likewise requires that the discriminatory conduct be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”¹⁰² The Court has made clear that it has “never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”¹⁰³ Title VII, the Court has admonished, is not a “general civility code” and “requires neither asexuality nor androgyny in the workplace.”¹⁰⁴ It does not prohibit “ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation.”¹⁰⁵ The prohibition of sexual harassment under Title VII, then, does not bar gendered or sexual conduct that is not targeted based on gender or that is not of the requisite level of severity. As such, it maintains a relatively narrow focus on targeting gender-based discrimination—not ordinary interpersonal conflict.

The definitions of sexual harassment promoted by workplace sexual harassment policies and trainings, by contrast, regularly depart from the antidiscrimination mandate of Title VII. Employers approach sexual harassment according to the “logic of management.”¹⁰⁶ Rather than targeting conduct that entails severe and pervasive disparate treatment based on sex, employers utilize sexual harassment policies to proscribe broad swaths of

100. Carol Sanger, *Consensual Sex and the Limits of Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 77, 78 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

101. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

102. *Harris*, 510 U.S. at 21 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

103. *Oncale*, 523 U.S. at 80.

104. *Id.* at 80-81.

105. *Id.*

106. Edelman et al., *supra* note 92, at 522 (noting that the objective of internal dispute resolution systems is to “detect problems that might interfere with organizational productivity”); *see also* Lindstrom, *supra* note 35, at 127 (characterizing internal dispute resolution systems as “system[s] in which corporate efficiency is valued above due process”).

disruptive workplace conduct. Employer sexual harassment bureaucracies seek to guard against any behavior deemed to be “a productivity drag that the company deems inconsistent with its business goals,” not to safeguard their employees’ right to be free from sex discrimination.¹⁰⁷

This different incentive structure is reflected in the sorts of behavior that employer sexual harassment policies prohibit. The range of conduct proscribed by the typical employer sexual harassment bureaucracy is far more expansive than Title VII: “[M]any companies are proscribing sexual conduct that would not amount to sexual harassment . . . under the law[,] . . . disciplining (and even firing) employees for these perceived sexual transgressions without bothering to examine whether they are linked to sex discrimination in purpose or effect.”¹⁰⁸ Examples of such conduct include “jokes, teasing, and comments about an employee’s appearance.”¹⁰⁹ As a 2018 study of sexual harassment training materials describes:

The expanding taxonomy of harassment types [in current trainings] suggests that harassment can occur by anyone at any time—unintentionally by a well-meaning but clueless supervisor, off-site by a contractor or customer, by an employee observing another employee’s conduct, by an employee of the same sex, or by a woman (towards a man) Despite the heavy emphasis on legal content, trainings tended to gloss over one critical component of the legal definition of harassment: that it must be severe or pervasive to be actionable [A] substantial portion of examples trainers use, involving sexual comments, jokes, and emails, represent borderline conduct that may not constitute harassment.¹¹⁰

Relatedly, in an effort to ward off potential sexual harassment suits, some companies “incorporate language discouraging fraternization directly into the company’s sexual harassment policy.”¹¹¹ Some go as far as to ban sexual relationships between employees outright¹¹² or to require employees in such relationships to sign so-called “consensual relation agreements” promising that, should the relationship end, it would not lead to adverse employment

107. Tippet, *supra* note 96, at 511.

108. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2065 (2003). This tendency towards overregulation without concern for discrimination has become more acute since #MeToo. See, e.g., *Consensual Relationship Policies in the #MeToo Era*, DEBEVOISE & PLIMPTON (Feb. 13, 2019), <https://perma.cc/Q7RK-4KFL> (recommending that employers adopt policies regulating consensual relationships in an attempt to respond to the liability risk posed by #MeToo—despite the fact that these consensual relationships do not entail discrimination). Jacob Gersen and Jeannie Suk have termed these ever-growing regulations the “bureaucratic sex creep,” criticizing such policies’ conflation of the harms of sexual violence with “ordinary sex.” Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 885 (2016).

109. Tippet, *supra* note 96, at 486.

110. *Id.* at 511-12.

111. Schultz, *supra* note 108, at 2123.

112. *Id.* at 2130 (discussing the movement among Human Resources professionals to ban consensual relationships in an effort to minimize sexual harassment liability).

consequences.¹¹³ These proscriptions on consensual relationships are not tailored toward preventing sex-based discrimination; rather, they simply decrease the likelihood of relationship conflict affecting work performance.

Although this approach might seem to be prophylactic and therefore designed to ensure maximum compliance, the evidence shows that it both fails to target sex-based discrimination and risks exacerbating it. Overinclusive definitions of harassment fail to “emphasize that inclusion and equal employment opportunity are the driving force behind Title VII of the Civil Rights Act of 1964 and its prohibition on harassment.”¹¹⁴ In this way, they may “inadvertently signal[] to employees that the best way to avoid trouble under the harassment policy is to avoid informal interactions” with women and other marginalized groups.¹¹⁵ This diminishes the status within the workforce of those groups most likely to experience the discriminatory effects of sexual harassment in the first place—namely, women and LGBTQ people.¹¹⁶

The rhetoric of sexual harassment trainings likewise demonstrates that employer policies are concerned with mitigating workplace conflict, not with antidiscrimination. These trainings generally omit any mention of differential treatment based on protected identity¹¹⁷—the core legal inquiry of a sexual harassment claim.¹¹⁸ One study found that only about half of trainings reference discrimination at all.¹¹⁹ Rather, by instructing employees to file reports whenever they even suspect inappropriate behavior, these trainings “cement human resources as the organizational focal point for harassment complaints and personnel decisions.”¹²⁰

The logic of management infiltrates not just the way employer bureaucracies define sexual harassment but the remedies available to victims. As

113. Sanger, *supra* note 100, at 85-86.

114. Tippet, *supra* note 96, at 487.

115. *Id.*

116. Data suggests that women are sexually harassed at much higher rates than men. See Graf, *supra* note 39 (reporting that 59% of women, as compared to 27% of men, report having experienced sexual harassment in their lifetime); *Sexual Harassment in Our Nation's Workplaces*, *supra* note 39 (noting that, between 2018 and 2021, women filed 78.2% of all sexual harassment complaints submitted to the EEOC). While less data is available, studies suggest that LGBTQ people experience sexual harassment at higher rates than the general population. See Women's Initiative, *Gender Matters*, CTR. AM. PROGRESS (Aug. 6, 2018), <https://perma.cc/6WQY-3B33> (describing “[t]wo existing studies suggest[ing] high rates of sexual harassment experienced by many [LGBTQ and nonbinary] workers”).

117. Tippet, *supra* note 96, at 505-06 (“[T]rainings rarely justified harassment prevention trainings within the larger project of securing equal employment opportunities in the workplace or explained why harassment represents a form of discrimination.”).

118. See *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 79, 80 (1998).

119. Tippet, *supra* note 96, at 511.

120. *Id.* at 496.

a threshold matter, the enforcement of these broad prohibitions on sexual behavior are notoriously ineffective¹²¹—a condition directly enabled by the *Faragher-Ellerth* affirmative defense. As described above, the employer’s burden requires only a facially valid harassment policy and reporting scheme, not an effective one. This legal regime incentivizes what organizational sociologist Lauren Edelman calls “symbolic compliance”—the adoption of institutions and practices which signal compliance with principles of law, even if they do not successfully implement (or even aspire to implement) the underlying mandates of the law.¹²² Discrimination reporting systems exemplify symbolic compliance, as they “signify attention to civil rights laws and due process generally” while at once “substantively safeguarding managerial interests.”¹²³ The same is true of sexual harassment training in particular, which “gives the impression that ‘something is being done’” so as to signal compliance with law and public morals, even if the training scheme is ultimately ineffective.¹²⁴ The presence of formal sexual harassment policies, then, offers no guarantee that sexual harassment will be rectified.

Moreover, even where employers do enforce their policies, the remedies employed are not tailored toward the discrimination-based harms of sexual harassment. Because the chief goals of employer sexual harassment policies are liability avoidance and productivity maximization, internal dispute resolution systems serve not as a source of protection or rights vindication for victims, but rather as a device for restoring the cordiality between employees that make the smooth operation of business possible.¹²⁵ If the interests of the victim are addressed at all, “the subtext tend[s] to be more civility-based than rights-

121. See Dobbin & Kalev, *supra* note 68, at 12255, 12258 (describing the ineffectiveness of sexual harassment trainings and grievance procedures); FELDBLUM & LIPNIC, *supra* note 68, at v (same).

122. LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 107 (2016); see also Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOCIO. 1401, 1436 (1990) (“[T]he creation of a grievance procedure for nonunion employees may well be a symbolic gesture to the legal environment with no real benefit to employees.”); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIO. 1531, 1542 (1992) (“Laws that are ambiguous, procedural in emphasis, and difficult to enforce invite symbolic responses—responses designed to create a visible commitment to law, which may, but do not necessarily, reduce employment discrimination. Organizations respond visibly to law by elaborating their formal structures.”).

123. Edelman et al., *supra* note 92, at 501, 508.

124. Bisom-Rapp, *supra* note 52, at 163 (quoting Elizabeth O’Hare Grundmann, William O’Donohue & Scott Peterson, *The Prevention of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT* 175, 182 (William O’Donohue ed., 1997)).

125. Edelman et al., *supra* note 92, at 528 (“[R]emedies in internal complaint forums are primarily geared toward repairing and improving management techniques and relations between employees and their supervisors.”).

based.”¹²⁶ And when misconduct is recognized, company policies focus not on addressing structural, identity-based discrimination but on individual behavior: Employers “treat harassment as a stand-alone phenomenon—a problem of bad or boorish men who oppress or offend women—rather than as a symptom of larger patterns of sex segregation and inequality.”¹²⁷ In fact, one study found that, in some cases, employer bureaucracies not only evinced a disinterest in rectifying the discriminatory aspect of sexual harassment but “used mediation as a means of convincing the employee that there was no discrimination.”¹²⁸

By treating sexual harassment as relational problems between workers, these policies “individualize[] and depoliticize[]” claims of discrimination, placing “greater emphasis on grievance resolution without a concomitant effort to reduce discrimination.”¹²⁹ This failure of employer internal dispute resolution systems to vindicate the interests of victims is especially problematic because, as explored above, the affirmative defense established in *Faragher* and *Ellerth* makes these employer bureaucracies the only remediation processes available to most victims. The civil rights jurisprudence of sexual harassment has thus been supplanted, at the invitation of the Supreme Court, by private sector dispute resolution systems, which are not oriented toward the structural or identity-based harms that antidiscrimination law is designed to redress. Paradoxically, then, employer policies and dispute resolution systems both amplify repressive work conditions and compliance culture in the name of workplace efficiency, without preventing or rectifying sex discrimination.

II. The Emergence of Sexual Harassment as Sex Discrimination

Although it is hard to imagine, given how well-entrenched the sexual harassment bureaucracy and the legal incentivizes in favor of it have become, *Faragher-Ellerth’s* approach to sexual harassment law marks a radical departure from the theory of sexual harassment that led to its initial recognition as a Title VII cause of action. As this Part demonstrates, the second-wave feminists who originally theorized sexual harassment contended that sexually harassing conduct is discrimination that subordinates women in the workplace and civil life. This theory of sexual harassment ultimately became the bedrock of Supreme Court sexual harassment jurisprudence. Although the legal standard for sexual harassment still reflects this antidiscrimination purpose, *Faragher-Ellerth’s* exportation of sexual harassment adjudication to employer bureaucracies reframes and distorts the fundamental harm of sexual harassment

126. Tippet, *supra* note 96, at 506; see also Lindstrom, *supra* note 35 at 127 (“Internal dispute managers tend to recast legal issues as interpersonal and management issues.”).

127. Schultz, *supra* note 108, at 2067.

128. Edelman et al., *supra* note 92, at 528.

129. *Id.* at 499-500, 505 (emphasis omitted).

by drawing attention away from gender-based discrimination and toward interpersonal mediation and corporate efficiency.

A. Second-Wave Feminism and Early Theoretical Accounts of Sexual Harassment as Sex Discrimination

Faragher and *Ellerth's* mandate that sexual harassment be adjudicated outside of a discrimination-based civil rights framework is a radical departure from the theoretical foundations of sexual harassment jurisprudence. While workplace sexual misconduct has existed as long as women have worked,¹³⁰ the second-wave feminist movement of the 1970s coined the term sexual harassment, translating the pervasive phenomenon of women's exposure to unwanted sexual conduct at work into a discrete, legally cognizable concept.¹³¹ Early work around the newly recognized issue of sexual harassment was oriented toward consciousness-raising: bringing women together to speak out and raise awareness around their shared experiences of workplace mistreatment.¹³² But, as this Subpart chronicles, second-wave feminist pioneers also developed a theoretically rich account of sexual harassment—a conceptualization tied directly to the legal framework of sex discrimination Congress prohibited in Title VII.

The core theoretical insight of second-wave feminism with regard to sexual harassment was that workplace sexual misconduct is not just a constellation of isolated incidents of boorish men misusing their authority to harm individual women; rather, sexual harassment constitutes a group-based harm wherein misconduct directed at individual women subordinates all women as a sex-based underclass in the workplace and public life.

This theory was first formalized in feminist activist Lin Farley's groundbreaking 1978 book *Sexual Shakedown: The Sexual Harassment of Women on the Job*.¹³³ Farley describes sexual harassment as “an assertion of male power that undermines the autonomy and personhood of female workers.”¹³⁴

130. Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

131. There is some disagreement about precisely when and by whom the term “sexual harassment” was coined, although the general consensus is that the term was developed by Working Women United leadership at some point in 1975. For varying accounts of the initial use of “sexual harassment,” see FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 509 n.218 (2009).

132. One example of consciousness-raising is the “speakouts” coordinated by groups like Working Women United. Carrie N. Baker, *The Emergence of Organized Feminist Resistance to Sexual Harassment in the United States in the 1970s*, 19 J. WOMEN'S HIST. 161, 161 (2007).

133. LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB, at xv-xvi (1978).

134. *Id.* at 18.

According to Farley, systematic sexual mistreatment had long been a tool through which men kept women “in line.”¹³⁵ But once Title VII made it illegal for men to formally exclude women from the workplace, men’s unsolicited sexual aggression at work offered an informal way of reifying the traditional sex hierarchy of the workplace by making women unsafe at work and deterring women from obtaining or keeping jobs traditionally held by men.¹³⁶ In Farley’s words, “The function of sexual harassment in nontraditional jobs is to keep women out; its function in the traditional female job sector is to keep women down.”¹³⁷ According to Farley, the subordination of women enforced by sexual harassment reaches beyond the context of the workplace, implicating women’s status in broader society by reinforcing women’s powerlessness, submission, and subordination in their own eyes and the eyes of others.¹³⁸

But it was Catharine MacKinnon’s theory of sexual harassment, introduced in her pioneering book *Sexual Harassment of Working Women*,¹³⁹ that brought the idea of sexual harassment into the legal and political mainstream.¹⁴⁰ Similar to Farley’s formulation, MacKinnon understands sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power”—more specifically, the inequality between man and woman and the inequality between boss and subordinate.¹⁴¹ This dual imbalance of power serves to put women in their places, so to speak, as both workers and gendered subjects: Women are trapped in dead-end jobs where they are expected to be sexual spectacles, perform “wifelike tasks,” and “avoid the open refusals [of unwanted sex] that anger men and produce repercussions.”¹⁴² As such, MacKinnon argues that sexual harassment must be understood not just as interpersonal injuries but in the context of “internalized and structural forms of power”—in other words, as precisely the kind of discrimination on the basis of a protected identity category that Title VII prohibits.¹⁴³

135. *Id.* at xvii.

136. *Id.* at 90.

137. *Id.*

138. *Id.*

139. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

140. See Ginia Bellafante, *Before #MeToo, There Was Catharine A. MacKinnon and Her Book ‘Sexual Harassment of Working Women’*, N.Y. TIMES (Mar. 19, 2018), <https://perma.cc/S37G-ZUSD> (describing how MacKinnon’s *Sexual Harassment of Working Women* “brought the idea [of sexual harassment] broader attention, charting a course for the legal system to more effectively handle instances of harassment as cases of sex discrimination, under Title VII of the Civil Rights Act of 1964”).

141. MACKINNON, *supra* note 139, at 1.

142. *Id.* at 44.

143. *Id.* at 1.

B. Translating Theory to Jurisprudence: Sexual Harassment and Title VII

Title VII of the Civil Rights Act became a “master frame” through which feminists argued that sexual harassment entails employment discrimination because of sex.¹⁴⁴ MacKinnon, for one, noted Title VII’s success in ameliorating racial employment discrimination and urged its application to the issue of sexual harassment.¹⁴⁵ As MacKinnon emphasized: “When women’s sexuality is treated differently from men’s sexuality, similarly situated women and men will have been differentially treated, to women’s comparative disadvantage, and that is sex discrimination Discrimination law exists to remedy such disparities.”¹⁴⁶ The extension of antidiscrimination law to sexual harassment is practically important for victims because it makes available remedies even when other areas of law—for instance, criminal or tort—offer no redress.¹⁴⁷

But sexual harassment’s inclusion within antidiscrimination law also serves a core expressive, social, and political function. MacKinnon describes a long history in which men dismissed women’s complaints of sexual harassment as merely “personal,” thereby placing the harm beyond reach of “scrutiny, criticism, and regulation by legal intervention,” and indeed, beyond the domain of politics.¹⁴⁸ Against the backdrop of this history, classifying sexual harassment as legally cognizable sex discrimination “defines what has been considered private and personal as another dimension of the public order.”¹⁴⁹ Not only would sexual harassment’s assimilation into Title VII enable victims to recover, but doing so in court and through the framework of antidiscrimination law reflected the nexus between the nature of the harm of sexual harassment (identity-based subordination) and the remedy.¹⁵⁰

As early as 1974, litigants in federal court began to make a similar case for sexual harassment as Title VII sex discrimination.¹⁵¹ But these early attempts were largely unsuccessful, as courts continued to regard sexual harassment as an

144. ZIPPEL, *supra* note 95, at 51.

145. See MACKINNON, *supra* note 139, at 128-29 (“[S]ufficiently striking similarities in social pathology and legal treatment of blacks and women as groups have been observed to justify qualified comparison Comparison would seem particularly appropriate under Title VII . . .”).

146. *Id.* at 215-16, 220.

147. *Id.* at 220 (“Violations that would not be seen as criminal because they are anything but unusual may, in this context, be seen as discriminatory for precisely the same reason.”).

148. *Id.* at 83.

149. *Id.* at 58.

150. See *id.* at 128-29, 215-16, 220 (arguing that sexual harassment is a form of identity-based discrimination and so fits squarely within the harms to be redressed under Title VII).

151. *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev’d sub nom.*, *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

interpersonal rather than group-identity-based harm.¹⁵² The first courts to encounter sexual-harassment-as-discrimination claims refused to recognize workplace sexual misconduct as discriminatory, writing it off as “nothing more than a personal proclivity, peculiarity or mannerism”¹⁵³ or a “physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.”¹⁵⁴ One court even characterized sexual harassment as the product of the “natural sex phenomenon” of heterosexual attraction.¹⁵⁵

This jurisprudential orientation gave way as second-wave feminism gained influence. In the 1976 case *Williams v. Saxbe*, the District Court for the District of Columbia became the first court to recognize sexual harassment as actionable under Title VII.¹⁵⁶ The court concluded that the alleged sexual harassment amounted to discrimination because “the conduct of the plaintiff’s supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated.”¹⁵⁷ A year later, the Fourth Circuit followed suit in *Garber v. Saxon Business Products*.¹⁵⁸

In the July 1977 case *Barnes v. Costle*, the Court of Appeals for the District of Columbia became the first appellate court to robustly theorize why sexual harassment entails discrimination under Title VII.¹⁵⁹ The court rejected the notion that sex discrimination must affect all group members to be actionable.¹⁶⁰ Instead, the court concluded that the harassment occurred on the basis of sex because the plaintiff’s supervisor had conditioned “retention of her job . . . upon submission to sexual relations—an exaction which the supervisor would not have sought from any male.”¹⁶¹ In November 1977, the Third Circuit

152. See MACKINNON, *supra* note 139, at 59 (“The first women to complain that sexual harassment is sex discrimination—Jane Corne and Geneva DeVane, Paulette Barnes, Margaret Miller, and Adrienne Tomkins—were all unsuccessful in the lower courts.”).

153. *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975).

154. *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev’d*, 568 F.2d 1044 (3d Cir. 1977).

155. *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev’d*, 600 F.2d 211 (9th Cir. 1979).

156. 413 F. Supp. 654, 661, 663 (D.D.C. 1976), *vacated sub nom.*, *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

157. *Id.* at 657-58.

158. 552 F.2d 1032, 1032 (4th Cir. 1977).

159. 561 F.2d 983, 994-95 (D.C. Cir. 1977).

160. *Id.* at 993 (“A sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant’s gender are affected.”).

161. *Id.* at 989 n.49, 989-90.

likewise recognized sexual harassment as sex discrimination under Title VII in *Tomkins v. Public Service Electric & Gas Co.*¹⁶²

By the final years of the 1970s, then, federal courts had begun to indicate their openness to Title VII discrimination accounts of sexual harassment. But it was ultimately MacKinnon's 1979 *Sexual Harassment of Working Women* that brought the theory into the legal mainstream.¹⁶³ Not only did the book include MacKinnon's theoretical account of why sexual harassment constitutes discrimination, but it also proposed a judicially administrable scheme for the classification of harassing behavior.¹⁶⁴ That framework divides sexual harassment into two categories: (1) quid pro quo harassment, wherein "sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity," and (2) hostile workplace harassment, wherein unwanted sexual conduct becomes "a persistent condition of work."¹⁶⁵

When the EEOC issued its first guidelines on sexual harassment in 1980,¹⁶⁶ it adopted MacKinnon's two-part classification of sexual harassment.¹⁶⁷ And while the EEOC guidelines were "interpretive rather than legislative rules,"¹⁶⁸

162. 568 F.2d 1044, 1048-49 (3d Cir. 1977).

163. MACKINNON, *supra* note 139, at 5-6. MacKinnon's influence on feminist theory more broadly in the 1970s and 1980s—as well as today—cannot be overstated. See HALLEY, *supra* note 91, at 27 ("By far the most brilliant and forceful thinker about sexuality in U.S. feminist legal theory for the last twenty-five years has been Catharine A. MacKinnon."); Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929, 929 n.2 (1994) (describing Catharine MacKinnon as "the most important contemporary theorist" of radical feminism). Ranging far beyond sexual harassment, her writings and speeches are some of the defining feminist-theoretical works on topics including pornography, sexual violence, sex work, abortion, and international law. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 1, 3 (1987) (collecting essays and speeches on issues including rape, abortion, sexual harassment and pornography); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, at xii (1989) (extending Marxist structural analysis of domination and the state to propose a feminist theory of the state as an apparatus of gendered subordination); CATHARINE A. MACKINNON, ONLY WORDS 9-10, 16-17, 27, 45 (1993) (characterizing pornography as gendered and racialized subordination, violence, and harassment not protected by the First Amendment); CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 1-2 (2006) (arguing that women lack the same transnational human rights protections as men).

164. MACKINNON, *supra* note 139, at 31-32.

165. *Id.* at 32.

166. Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74677 (1980) (to be codified at 29 C.F.R. § 1604.11).

167. Robert D. Lee, Jr. & Paul S. Greenlaw, *The Legal Evolution of Sexual Harassment*, 55 PUB. ADMIN. REV. 357, 358-59 (1995).

168. Barbara West, *Sexual Harassment of Working Women: The EEOC Guidelines—Panacea or Placebo?*, 1 N. ILL. U. L. REV. 283, 296 (1981).

they were expressly adopted by a number of districts¹⁶⁹ and circuits.¹⁷⁰ Adherence to the EEOC recommendations, however, was not universal among federal courts—especially regarding hostile workplace discrimination.¹⁷¹

Faced with the lower courts' inconsistent approaches to hostile workplace harassment, the Supreme Court took up the issue in 1986. In *Meritor Savings Bank, FSB v. Vinson*, the Court held that sexual harassment—including hostile workplace harassment—constitutes actionable sex discrimination under Title VII of the Civil Rights Act of 1964.¹⁷² In the Court's words, "the language of Title VII . . . evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."¹⁷³ Even as the Court extended its sexual harassment jurisprudence to cover new fact patterns in *Harris v. Forklift Systems, Inc.*¹⁷⁴ and *Oncala v. Sundowner Offshore Services, Inc.*,¹⁷⁵ it maintained the core understanding of sexual harassment as discrimination, holding that the "critical issue" in Title VII sexual harassment cases "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁷⁶

As this history reveals, sexual harassment jurisprudence is the direct outgrowth of the theory, dating back to second-wave feminist activists, that sexual misconduct at work entails discrimination because exposing a victim to unwelcome sexual conduct at work on account of their sex functions to subordinate women as a group based on protected group identity. The core harm of sexual harassment that led to its recognition under Title VII, then, is the way in which it violates the civil rights of a protected class—not merely the interpersonal harm or dysphoric experiences of individual victims.

169. See, e.g., *Zabkowicz v. W. Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984); *Hayden v. Atlanta Newspapers*, 534 F. Supp. 1166, 1178 (N.D. Ga. 1982); *Jeppsen v. Wunnicke*, 611 F. Supp. 78, 79 (D. Alaska 1985); *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 432-33 (E.D. Mich. 1984); *Coley v. Consol. Rail Corp.*, 561 F. Supp. 645, 649-50 (E.D. Mich. 1982); *Vermett v. Hough*, 627 F. Supp. 587, 603-04 (W.D. Mich. 1986).

170. See, e.g., *Bundy v. Jackson*, 641 F.2d 934, 946-47 (D.C. Cir. 1981) (adopting expressly the 1980 EEOC guidelines on sexual harassment); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) (same); *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983) (same).

171. See, e.g., *Ferguson v. E.I. duPont de Nemours & Co.*, 560 F. Supp. 1172, 1198 (D. Del. 1983) ("The EEOC guidelines, while entitled to deference, do not have the force and effect of law and . . . the Court declines to apply the guidelines in a hostile environment case involving supervisory personnel.").

172. 477 U.S. 57, 64, 66 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

173. *Id.* at 64 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)).

174. 510 U.S. 17, 18-19, 22-23 (1993) (finding that severe and pervasive gender-related harassment can entail sexual harassment, even though the victim was not solicited for sex).

175. 523 U.S. 75, 82 (1998) (extending sexual harassment precedent to same-sex conduct).

176. *Id.* at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

Formally, the antidiscrimination core of sexual harassment jurisprudence developed in *Meritor* and affirmed in *Harris* and *Oncale* remains good law regarding whether sexual harassment has occurred. But because the *Faragher* and *Ellerth* affirmative defense leads to dismissal at the 12(b)(6) or summary judgment phase and channels victims into the dead end of employer administrative procedures, many victims never get their day in court.¹⁷⁷ This not only reduces liability and results in underenforcement, but, as the next Part shows, it distorts the core harm of sexual harassment, reframing it as the very kind of private, interpersonal conflict that second-wave feminism exposed as part of the machinery of sex-based subordination.

III. Theorizing Sexual Harassment and Civil Rights Adjudication

As a threshold matter, there is good reason to suspect that the effective privatization of sexual harassment adjudication under *Faragher* and *Ellerth* leads to underenforcement of the law's anti-sexual harassment mandate. The enforcement structure of the affirmative defense places employers in charge of their own sexual harassment policies, reporting standards, and internal dispute resolution, endorsing self-regulation.¹⁷⁸ However, a large body of organizational sociology research suggests that "effective self-regulation depends on maintaining a serious background threat of public enforcement."¹⁷⁹ Excessive judicial deference to employers' bureaucratic judgment and the functional immunity from Title VII liability created by *Faragher-Ellerth* nullifies that threat. Moreover, there is extensive evidence that self-regulation regimes tend to incentivize so-called "cosmetic compliance," the adoption of "sham

177. See *supra* Part I.A.

178. See *supra* Part I.B.

179. Cynthia Estlund, *Corporate Self-Regulation and the Future of Workplace Governance*, 84 CHL-KENT L. REV. 617, 624 (2009); see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 47-49 (1992) (describing how "without the spectre of sanctions in the background, . . . social responsibility concerns would not occupy the foreground of our deliberation" within free-market institutions); Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 457-458 (2007) ("[B]y reinforcing self-regulation with the threat of legal sanction, companies are required to take their responsibilities seriously. These legal penalties prevent corporations from manufacturing 'paper' compliance solely for public-relations purposes."); Neil A. Gunningham, *Towards Effective and Efficient Enforcement of Occupational Health and Safety Regulation: Two Paths to Enlightenment*, 19 COMP. LAB. L. & POL'Y J. 547, 564-72 (1998) ("Even the most credible self-regulatory mechanism may succumb to the temptations of short term self-interest, absent outside forces capable of blowing the whistle and keeping it on track."); Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361, 366 (2010) ("Research has shown that organizations will not reliably self-regulate without the pressure of deterrence.").

policies that reduce regulatory scrutiny or reduce liability without reducing wrongdoing.”¹⁸⁰

To be sure, the alternative of suits by rightsholders is not without drawbacks. Litigation is inefficient, logistically complex, expensive, and unpredictable—costs that not only harm rightsholders who do decide to bring suit, but that may deter rightsholders from asserting claims in the first place.¹⁸¹ Litigation, moreover, presents challenges specific to the sexual harassment context: Victims of gendered violence may experience re-traumatization when navigating the court system.¹⁸²

On the other hand, attempts to avoid these costs through alternative dispute resolution have their own pitfalls. As Owen Fiss has identified, the less powerful bargaining party may be coerced to accept unfavorable terms, and extrajudicial resolutions are less likely to deliver the full vision of justice contemplated by the law.¹⁸³ Private suits, Fiss argues, are especially crucial against background conditions of injustice: “[W]hen one sees injustices that cry out for correction . . . the value of avoidance diminishes and the agony of judgment

180. Estlund, *supra* note 179, at 625; see also Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 490-91 (2003) (“The inherent danger posed by a legal system that is overly reliant on internal compliance structures as a liability determinant stems from the extraordinarily favorable legal treatment received by organizations that adopt such systems, and the correspondingly harsh legal treatment of organizations without them. This leads to two potential problems: (1) an under-deterrence of corporate misconduct and (2) a proliferation of costly-but arguably ineffective-internal compliance structures.”); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOB. LEGAL STUD. 401, 420 (2001) (“By diverting attention to management monitoring systems, and away from classic voice mechanisms through labor-management dispute settlement machinery, self-regulatory initiatives run the risk of supplanting rather than buttressing democratic participation in the workplace.”); Edelman et al., *supra* note 92 at 511-13 (describing how the availability of external sanctions makes internal dispute resolution systems more effective by incentivizing complainant satisfaction rather than the mere appearance of nondiscrimination).

181. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (surveying the distinctive American system of adversarial legalism, including the costs and inefficiencies associated with a system centered around litigation and legal contestation).

182. See, e.g., Karla Fischer & Mary Rose, *When “Enough is Enough”: Battered Women’s Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 419 (1995) (finding that victims’ “fear of the court process can be so overwhelming as to cause a traumatic dissociative reaction”); Mary P. Koss & Elise C. Lopez, *VAWA After the Party: Implementing Proposed Guidelines on Campus Sexual Assault Resolution*, 18 CUNY L. REV. F. 4, 6 (2014) (“Criminal justice response to sexual assault . . . [has] been found to include policies and practices that . . . re-traumatize victims . . .”); Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights From Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 267 (1999) (finding that 81% of mental health professionals believe that contact with the legal system can psychologically harm rape victims).

183. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

becomes a necessity.”¹⁸⁴ Comparatively, self-regulation runs a far higher risk of subverting the underlying purpose of sexual harassment jurisprudence through underenforcement.

In the sexual harassment context, lawmakers have already recognized and acted to limit these risks of extrajudicial dispute resolution. In 2022, Congress passed and President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which voids pre-dispute arbitration clauses in sexual misconduct and sexual harassment cases.¹⁸⁵ The legislation reflects the beliefs that mandatory arbitration’s informality and non-reviewability is poorly suited for adjudicating such serious claims, and, moreover, that the court system is crucial to deterring and remedying such misconduct.¹⁸⁶

This Part, however, advances a more fundamental critique. Rather than merely recounting practical failures of privatized, bureaucratic sexual harassment adjudication as it currently stands, this Part argues that employer bureaucracies cannot faithfully carry out the fundamental purpose of Title VII sexual harassment jurisprudence. Private bureaucracies can neither offer the rigorous, formal enforcement that civil rights demand, nor can they target the essential harm that underlies antidiscrimination rights: the fundamental interest in equal access to public life.

A. Civil Rights and Demands for Enforcement

To call the theoretical literature on civil rights enormous would be an understatement.¹⁸⁷ Full engagement with it is happily unnecessary to assess the shift to employer bureaucratic management of sexual harassment adjudication. Two discrete theories of civil rights—one liberal and one post-liberal—shed light on the incompatibility between the status of the prohibition on sexual harassment as a civil right and the privatization and bureaucratization of sexual harassment adjudication.

184. *Id.* at 1086.

185. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.).

186. See David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 9 (2022); Rachel M. Schiff, Note, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases*, 53 U.C. DAVIS L. REV. 2693, 2708-10 (2020).

187. For an overview of philosophy on civil rights, see generally Robin L. West, *Civil Rights*, STAN. ENCYC. PHIL. (Nov. 6, 2024), <https://perma.cc/TK63-LUY9>.

1. Ronald Dworkin: “rights as trumps”

In *Taking Rights Seriously*, Ronald Dworkin argues that rights function as “trumps.”¹⁸⁸ Dworkin’s starting unit of analysis is the “political aim,” a political justification to be considered in determining whether to adopt a policy.¹⁸⁹ He then divides the category of political aims into two subcategories: goals and rights. Goals, such as economic efficiency or military strength, “encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit”; political decisionmakers may determine it appropriate for some individuals to bear costs to maximize utility for the community.¹⁹⁰

Rights are subject to a heightened level of scrutiny relative to goals. While rights need not be absolute, they possess “a certain threshold weight against collective goals in general.”¹⁹¹ An ordinary, utility-based justification or collective goal “is not enough” to justify the abridgement of individual rights against the government.¹⁹² Rights are essential because, by placing the liberty of citizens beyond the reach of ordinary utilitarian policymaking, they “protect the fundamental right of citizens to equal concern and respect”—a moral commitment enshrined in the Constitution and other rights-giving documents.¹⁹³ As Jamal Greene has summarized, Dworkin’s position is essentially that “to subject rights to balancing against the public good is to deny them altogether.”¹⁹⁴

Under Dworkin’s theory, the privatized, bureaucratic adjudication of sexual harassment claims prompted by *Faragher-Ellerth* is tantamount to the denial of one’s right to be free of sexual harassment. Because sexual harassment has been classified as sex discrimination under Title VII, it is a civil right and thus should be beyond the reach of utilitarian, collective-minded cost-benefit analysis. Employer bureaucracies are “system[s] in which corporate efficiency is valued above due process.”¹⁹⁵ When sexual harassment is alleged, employers—unlike courts—are not obliged to offer substantial remedies to all those who can meet their burden of demonstrating sexual harassment. Rather, they implement informal dispute resolution mechanisms like mediation and education—responses designed to promote workplace cohesion and productivity rather than to vindicate the civil rights of victims.¹⁹⁶ Dworkin’s insistence that civil

188. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977).

189. *Id.* at 91.

190. *Id.* at 91-92, 191.

191. *Id.* at 92.

192. *Id.* at 191.

193. *Id.* at 277.

194. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 32 (2018).

195. Lindstrom, *supra* note 35, at 127.

196. Tippet, *supra* note 96, at 511.

rights “cannot be defeated by appeal to any of the ordinary routine goals of political administration” applies with equal force to the routine goals of workplace administration.¹⁹⁷ The relegation of these victims to private bureaucratic adjudication systems, then, creates conditions for disregarding the right to be free from sexual harassment, reducing antidiscrimination to a mere goal to be counterbalanced against other utility-generating options.

Dworkin’s theory of rights emerges from a liberal tradition that presupposes that rights have a special legal and ontological status apart from ordinary politics.¹⁹⁸ This conception of rights, and particularly antidiscrimination rights, has been fiercely contested by the various strains of critical legal thought of the past half-century—most notably by consequentialists, for whom all matters of social policy depend upon cost-benefit analysis, and by the Critical Legal Studies (CLS) movement, which denies the determinacy and political neutrality of rights.¹⁹⁹ But, as the next Subpart illustrates, one need not rely on Dworkin to reject privatized, bureaucratic antidiscrimination procedures.

2. Patricia Williams: legal formality as a source of equality

In *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, Critical Race Theory (CRT) pioneer Patricia Williams advances an alternative, pragmatist theory of rights.²⁰⁰ She acknowledges the persuasiveness of CLS critiques of rights, which deride rights as “contradictory, indeterminate, . . . [and] selectively invoked to draw boundaries, to isolate, and to limit.”²⁰¹ Nevertheless, Williams ultimately challenges CLS’s outright rejection of rights by emphasizing the symbolic and practical importance of rights in the Black struggle for civil rights.²⁰² While the CLS critique of rights, Williams summarizes, would have us replace the discourse of rights with the discourse of needs, the needs of Black people, she reminds, have persistently been disregarded.²⁰³ Against this backdrop, legally enforceable rights are crucial because they offer “a political mechanism that can confront the denial of need.”²⁰⁴

197. DWORKIN, *supra* note 188, at 92.

198. *See id.* at vii (describing the purpose of the book as to “define and defend a liberal theory of law”).

199. *See* ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 10-11 (2019).

200. *See generally* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

201. *Id.* at 404-05.

202. *Id.* at 404.

203. *Id.* at 409-10 & n.22.

204. *Id.* at 413 (emphasis omitted).

However, the utility of rights depends in part on a formal legal system of enforcement. As Williams recounts, one dimension of the anti-rights CLS movement is the belief that justice is better served by informal relationships and negotiating processes, not by the assertion and legal enforcement of formal rights.²⁰⁵ Williams replies that the empowerment, community, and trust that CLS associates with such informal needs-vindicating processes is an experience contingent on race. White people, who have historically enjoyed greater autonomy, may feel confident in navigating transactions and controversies informally, without relying on “conventional expressions of power” or formal processes.²⁰⁶ But for Black people, these informal, relational approaches to dispute resolution “are frequently dominated by historical patterns of physical and psychic dispossession.”²⁰⁷ Against this historical pattern of subordination, legal formalities publicly declare the legitimacy of Black people as rights-holders and provide a “protective distance” from adverse parties who may seek to leverage informal bargaining procedures to replicate racial subordination.²⁰⁸

A broader history of informal civil rights adjudication supports Williams’s conviction that formal legal systems are central to the existence of meaningful civil rights. Attempts to vindicate civil rights through extralegal, non-adversarial institutions have by and large failed to vindicate Black people’s entitlement to equality. Take, for instance, so-called “Bureau courts” established by the Freedman’s Bureau to enforce freedpeople’s civil rights in the postbellum south.²⁰⁹ Or, nearly a century later, the Second Reconstruction’s attempt to enforce civil rights in the workplace through federal and state fair employment practices commissions (FEPCs).²¹⁰ Both institutions’ non-adversarial, noncoercive, conciliation-based approaches to civil-rights enforcement ultimately rendered them toothless, ineffectual, and short-lived.²¹¹ Williams’s

205. *See id.* at 406-08.

206. *See id.* at 407.

207. *Id.* at 404-05, 407 (emphasis omitted).

208. *See id.* at 409 (describing how Williams experiences legal formalities during transactions not as alienating but as meaningful recognition of equal status against a background of racial subordination).

209. For an account of Bureau courts and their failure to effectively enforce civil rights, see AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 264-321 (2017).

210. For an account of the weaknesses of FEPCs as civil-rights enforcers, see David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1074-1075 (2011).

211. *See* KESSLER, *supra* note 209, at 303, 321 (noting that the extralegal and paternalistic character of Bureau courts precluded freedpeople from “assert[ing] their own independence and dignity,” and their informality left them vulnerable to capture by a “dominant white planter class,” enabling them to “exploit a subordinated African-American community”); Freeman Engstrom, *supra* note 210, at 1074 (describing FEPCs as “timid implementers” that “failed to move significant numbers of African Americans into labor markets”).

theory of the importance of formal, judicially enforced rights in cases of structural inequality, then, both echoes and explains this instructive history of informal adjudication of civil-rights claims.

This theory of the connection between informal adjudication and the denial of the civil rights of subordinated groups is useful for assessing the desirability of private bureaucratic adjudication of sexual harassment claims. To be sure, anti-Black racism and sex discrimination are distinct phenomena; this Note should not be read as equating the two.²¹² Nevertheless, women have faced a long history of subordination, including as workers.²¹³ For much of the twentieth century, women were vastly underrepresented in the workforce. In the first few decades of the twentieth century, only about one in five women worked outside of the home, the vast majority of whom were young and unmarried.²¹⁴ During that era, those women who were employed were largely confined to sex-segregated, poorly paid sectors of the economy, finding employment in roles such as piece workers in factories or as domestic workers.²¹⁵ The sex-segregation of the early-twentieth-century labor market was exacerbated by women-only protective legislation, passed in the majority of states between 1900 and 1920, which largely restricted women from better-paid, more prestigious male employment sectors.²¹⁶

By the mid-twentieth century, women began to enter the workforce in greater numbers. By 1970, half of single women and 40% of married women worked outside the home.²¹⁷ Protective legislation had largely been repealed or

212. For an account of the harms of comparing racism and sexism, see generally Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 398, 411 (1991) (explaining that analogizing other forms of oppression to racism risks perpetuating racism and white supremacy by allowing white people to focus on their own experiences rather than inciting them to listen and challenge the status quo).

213. The same could be said of sexual minorities, who are likewise disproportionately subject to sexual harassment. See Logan S. Casey et al., *Discrimination in the United States: Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Americans*, 2019 HEALTH SERV. RSCH. 1454, 1455 (noting “a long history of discrimination [against LGBTQ people], including criminalization and classifications as mentally ill, attempts to forcibly change [their] sexual orientation and/or gender identity, hate crimes and violence, and exclusion from employment, housing, public spaces, and social institutions”). For an account of workplace discrimination against LGBTQ people, see generally BRAD SEARS, NEKO MICHELLE CASTLEBERRY, ANDY LIN & CHRISTY MALLORY, *LGBTQ PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT* (2024) (documenting pervasive employment discrimination and harassment against LGBTQ workers).

214. Janet L. Yellen, *The History of Women’s Work and Wages and How It Has Created Success for Us All*, THE BROOKINGS INSTITUTION (May 2020), <https://perma.cc/79VF-262P>.

215. *Id.*

216. NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890s-1990s* 1 (2015); Ava Baron, *Protective Labor Legislation and the Cult of Domesticity*, 2 J. FAM. ISSUES 25, 28-29 (1981).

217. Yellen, *supra* note 214.

invalidated.²¹⁸ Nevertheless, the labor force remained starkly segregated, with the vast majority of working women relegated to predominately female and generally low-paying occupations such as clerical work, sales, waitressing, manufacturing, and nursing.²¹⁹ As Catharine MacKinnon described, “[W]omen [were] almost universally restricted to a limited range of jobs at the bottom of the socioeconomic system because of their sex.”²²⁰ Workplaces were also vertically stratified by sex, with women comprising only 5% of managerial jobs, even in traditionally female industries.²²¹ Women of color were often positioned at the bottom of these stratified employment structures.²²² In 1974, full-time women workers only earned 57 cents per every dollar earned by a man.²²³ Women of color earned significantly less—making, on average, 25% less than white women, 33% less than Black men, and 57% less than white men.²²⁴

Today, women are closer to gender equality in the workplace than ever before, but they nevertheless remain disadvantaged; women’s workforce participation remains substantially lower than men’s, and women earn approximately 17% less than men on average.²²⁵ While women pursue post-secondary education at higher rates than men, they comprise only about a third of workers in the country’s ten highest-paying occupations, less than a third of federal and state legislators, and only 11% of Fortune 500 CEOs.²²⁶ The gendered wage gap persists, with women making an average of 82 cents per every dollar earned by a man.²²⁷ Women of color remain especially underrepresented and undercompensated.²²⁸

Women workers, then, have long faced—and continue to face—a significant, gendered imbalance of power in the workplace. This fundamental inequality of women in the labor market, which enables and is entrenched by

218. WOLOCH, *supra* note 216, at 3 (noting the “death of women-only protective laws in the late 1960s and early 1970s, which took place mainly though not exclusively in federal court”).

219. MACKINNON, *supra* note 139, at 10.

220. *Id.* at 11 (emphasis omitted).

221. *Id.* at 12.

222. *See id.* at 14.

223. *Id.* at 13.

224. *See id.* at 245 n.28.

225. Yellen, *supra* note 214.

226. Katherine Schaeffer, *For Women’s History Month, a Look at Gender Gains—and Gaps—in the U.S.*, PEW RSCH. CTR. (Feb. 27, 2024), <https://perma.cc/K5GJ-SRZ3>.

227. *Id.*

228. Hispanic and Black women face a much wider gender wage gap than white women—a source of income equality linked in part to their overrepresentation in the service, care, and domestic work sectors, which are historically low-paying. Robin Bleiweis, Jocelyn Frye & Rose Khattar, *Women of Color and the Wage Gap*, CTR. AM. PROGRESS (Nov. 17, 2021), <https://perma.cc/M65M-ZG4W>.

sexual harassment, is the problem that the recognition of sexual harassment as sex discrimination was meant to solve. But as Williams's theory and the history of informal adjudication systems for enforcing the civil rights of Black people illustrate, conciliation-oriented, extralegal systems fail to effectively safeguard civil rights against background conditions of inequality—indeed, they risk further entrenching these background conditions. Sexual harassment bureaucracies, as demonstrated above, epitomize conciliation-oriented adjudication; they employ mediation strategies to restore workplace harmony and productivity rather than swift sanctions to vindicate absolute rights.²²⁹ We might expect such informal systems to effectively mediate disputes between workers who are not unequally positioned by structural inequality—for instance, two upper-management men working through a heated workplace disagreement. But given men's relative privilege as sexual agents and as workers, one might expect systems predisposed toward compromise rather than rights enforcement to produce resolutions which favor male harassers and disadvantage female victims.

Civil rights protections are useful precisely because they marshal state force to disrupt background conditions of identity-based inequality. To quote civil rights pioneer Elmer Carter's objection to the conciliation-based FEPC approach to racial employment discrimination, "There can be no conciliation' . . . 'of a basic civic right.'"²³⁰ So too in the context of sexual harassment. Adjudication in the court of law is more appropriate to realize the full benefits of antidiscrimination provisions.

B. Civil Rights and Civic Belonging

As the foregoing Subpart demonstrates, conciliation-oriented informal mediation is essentially incompatible with both liberal and post-liberal theories of civil rights. In this Subpart, I suggest an additional theoretical incompatibility between civil rights protections and privatized, bureaucratic dispute-resolution systems: that they are concerned with fundamentally different harms. Whereas employer bureaucracies are concerned with interpersonal conflict between two employees and its effect on the broader workplace, civil rights protections are oriented toward guaranteeing the equal standing of all people as members of the political community, regardless of their protected identity characteristics. As such, the privatization of sexual harassment adjudication is problematic because employer bureaucracies are oriented toward the wrong harm.

Whatever their metaphysical or jurisprudential grounding, civil rights fundamentally "invite participation in some core sphere of civil society:

229. See *supra* Part I.B.

230. Freeman Engstrom, *supra* note 210, at 1092 (quoting Letter from Elmer A. Carter, Member, N.Y. Unemployment Ins. Appeal Bd., to Thurgood Marshall, NAACP (Nov. 17, 1944)).

education, insurance markets, neighborhoods, family, marriage, or employment.”²³¹ They are “rights to enter” the various spaces which constitute the shared life of a political community.²³² The underlying conduct that characterizes discrimination—for instance, a decision to hire or fire someone, verbal abuse, or improper touching—is not of interest to the law because it harms the individual worker, or even because it prevents one worker from entering *one* workplace, but because it denies members of a protected identity group the right to participate fully in the shared spaces of public life—by some accounts, the central benefit of citizenship itself.²³³

Civil rights protect individuals as citizens entitled to “participation in civil society.”²³⁴ Barriers to this participation are not random; rather, they frequently arise from membership in an identity class that has historically been subordinated. The state takes a special interest in securing civil rights as “rights of belonging” to the various spheres of civil society because the state recognizes the equal claim of all citizens to belong.²³⁵

Despite their role as spheres of civil society, workplaces will not be inclined to view an employee who complains of discriminatory conduct in her capacity as a citizen-member of a protected class. The employer may understand that workers are guaranteed the right not to be discriminated against, but at best, the employer will see this legal right as a guarantee to be free from certain kinds of functional conduct—for instance, nonconsensual touch or unwanted sexual advances. To that end, the employer adopts policies that prohibit certain functional conduct and requires employees to avoid and report incidences of such conduct. When policy violations do occur, sanctions are oriented toward dissuading behavioral violations—take, for instance, the “coachings” employed by Wal-Mart.²³⁶ Employers, then, may act to ameliorate the conditions of employment for their workers (or, less generously, to minimize the friction in the workplace), but they are ill-equipped to recognize the source and significance of a civil-rights entitlement—the claim to equal respect that an employee makes *qua* citizen.

231. WEST, *supra* note 199, at 223.

232. *Id.*

233. Hannah Arendt argued that the activities of shared political life set humans apart from animals and can only occur in the public sphere, defined by a radical equality among citizens. HANNAH ARENDT, *THE HUMAN CONDITION* 22-24, 31-32 (1958). For Arendt, equality as citizens, the necessary precondition for participation in public life, is “the very essence of freedom.” *Id.* at 32-33.

234. *See* WEST, *supra* note 199, at 16.

235. *See generally* Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347 (2005) (theorizing civil rights as rights of belonging).

236. *See supra* notes 15-17 and accompanying text.

A resultant difficulty of tasking private actors with civil rights enforcement is the necessarily private nature of that enforcement. Employers can only respond to discrimination as a discrete event harming a single victim rather than for what it is: a violation of a fundamental right shared by all. Workplace sexual harassment bureaucracies therefore necessarily constrain the expressive function of affirming a civil right.²³⁷ Employers need not actively obfuscate the results of such proceedings to obscure the public nature of the rights violations that constitute sexual harassment; the very fact that these procedures happen in a private setting according to ad hoc rules and regulations means that they cannot publicly affirm sexual harassment's discriminatory, subordinating function. The private setting and opacity of employer sexual harassment adjudication actively contribute to a perception of gendered violence as a private or interpersonal matter rather than as a shared public concern—an ironic return to the orientation of the mid-twentieth-century courts that first encountered (and dismissed) the legal argument that sexual harassment entails discrimination.²³⁸

Conclusion

This Note began with an account of the egregious treatment of one worker, Tristana Hunt, at the hands of an employer sexual harassment bureaucracy replete with cosmetic compliance and a finely honed legal strategy of blaming the complainant for not properly availing herself of it. Hunt's experience, while troubling, is no anomaly; indeed, it is the status quo of sexual harassment adjudication following the 1998 introduction of the *Faragher-Ellerth* affirmative defense.

The *Faragher-Ellerth* defense has been criticized for its implementation—lenient toward employers, while punitive toward victims—which makes it exceedingly difficult to hold employers vicariously liable in court. This Note, however, has revealed a more fundamental problem with the defense: that it has functionally rendered employer sexual harassment bureaucracies the only forum in which numerous would-be sexual harassment plaintiffs can seek justice. This privatization of sexual harassment adjudication is, as this Note has demonstrated, incompatible with the underlying antidiscrimination principles

237. Theresa M. Beiner has criticized the privatization of employment discrimination dispute resolution on similar grounds, emphasizing that since anti-discrimination law “set norms of behavior for workplaces and workers in the area of equal employment opportunity,” sexual harassment trials “provide an important public function in setting norms of appropriate workplace behavior and practices as well as setting monetary values for the harm employment discrimination causes its victims.” Theresa M. Beiner, *The Many Lanes out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD.L. REV. 837, 841 (2014).

238. See *supra* Part II.B.

that have been the foundation of sexual harassment jurisprudence since its introduction as a Title VII cause of action in the 1970s.

Employer sexual harassment adjudication and civil rights suits are oriented toward different aims. While employer bureaucratic proceedings target individual acts of inappropriate behavior and implement mediation- and amelioration-focused strategies to restore the status quo of workplace efficiency, civil rights suits vindicate victims' fundamental right to be free from employment discrimination. While employer bureaucracies are concerned with interpersonal misconduct between two employees, civil rights litigation emphasizes the group-based harm of subordination that makes sexual harassment a form of discrimination in the first instance. And while employer bureaucracies may sometimes protect workers' interest in being free from certain behaviors qua their status as workers, civil rights suits vindicate and publicly proclaim victims' right to equal standing in various spheres of public life, including the workplace, qua their status as members of a political community.

These perversities do not arise from ill-functioning employer bureaucracies and cannot be addressed through reforms to these private dispute resolution forums; they are inherent to bureaucracies, which cannot—by virtue of their conflicting interests, procedural informalities, and position within the private sector—perform the same equality-affirming function of private suits. To that end, one tragedy of Tristana Hunt's case is Wal-Mart's failure to effectively prevent sexual harassment. But the deeper problem is the way in which, through the *Faragher-Ellerth* affirmative defense, Hunt was denied the legal resources to hold Wal-Mart accountable and vindicate her entitlement, affirmed by antidiscrimination law, to equality and belonging in the public sphere.

How, then, might we reform sexual harassment adjudication in the post-*Faragher-Ellerth* era? The most straightforward path forward would be for the Supreme Court to overturn or modify the *Faragher-Ellerth* affirmative defense such that it no longer denies victims their day in court. The Court might do so on any number of grounds—for instance, that agency law has changed since their 1998 decisions,²³⁹ or that a strict liability scheme is most consistent with the legislative purpose of Title VII.²⁴⁰ The Roberts Court, however, seems unlikely to revise its precedent in such a way.²⁴¹

239. Cunningham-Parmeter, *supra* note 34, at 196-207 (summarizing how shifts in agency law since 1998 support the revision of the *Faragher-Ellerth* affirmative defense to a pure strict liability regime).

240. *Id.* at 213-14 (discussing how a strict liability scheme would better comport with the compensatory legislative purpose of Title VII).

241. The Roberts Court has already issued an undoubtedly pro-employer decision on Title VII vicarious liability: *Vance v. Ball State University*, 570 U.S. 421 (2013), which circumscribed the definition of a supervisor so as to limit employer liability for
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Alternatively, lower court judges applying the *Faragher-Ellerth* affirmative defense could hold employers to a higher standard of care and adjust expectations of plaintiff conduct to account for the unique challenges faced by sexual harassment victims—an application of the defense that would keep more cases in courts. Judge Margerie Rendell of the Court of Appeals for the Third Circuit has already modeled this approach in the 2018 case *Minarsky v. Susquehanna County*.²⁴² But this approach, while beneficial to individual plaintiffs, is not an adequate solution. For one thing, it would provide relief only to those plaintiffs lucky enough to draw a sympathetic judge. Moreover, should judicial reinterpretation produce a circuit split, the Supreme Court may be inclined to grant certiorari to resolve the application of *Faragher-Ellerth*—an outcome that risks the establishment of a new vicarious liability regime even more friendly to employers and hostile to sexual harassment victims.²⁴³

Transforming the current regime of adjudication requires the sort of radical reorientation that only legislative intervention can provide. While Congress has acted to challenge some extreme employer sexual harassment adjudication practices such as mandatory arbitration,²⁴⁴ correcting the present dysfunction of privatized sexual harassment adjudication would require a more comprehensive approach—ideally, the statutory abrogation of the *Faragher-Ellerth* affirmative defense.²⁴⁵ Strikingly, no such legislative push emerged from

harassment. This is but one employment law case among many that has produced “a legal playing field that significantly favors employers relative to the rules that existed prior to 2005”—a trend only expected to continue with a six-Justice conservative bloc, many of whom are far from retirement age. Scott A. Budow, *How the Roberts Court Has Changed Labor and Employment Law*, 2021 U. ILL. L. REV. ONLINE 281, 288-289, 298 (2021).

242. 895 F.3d 303, 312-315 (2018). For a prior treatment of the significance of Judge Rendell’s departure from the ordinary application of the *Faragher-Ellerth* affirmative defense, see Potter, *supra* note 35, at 616.

243. Such a holding would be in line with the general leaning of the Roberts Court, which has been called “the most pro-business [Court] of all time,” with “data show[ing] a degree of pro-business sentiment today far exceeding even the pre-Depression highs.” Felix Salmon, *The Most Pro-Business Supreme Court Ever*, AXIOS (Aug. 4, 2022), <https://perma.cc/3H4T-BA4V>.

244. In 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, invalidating forced arbitration clauses in sexual harassment cases. Deirdre Walsh, *Congress Approves Bill to End Forced Arbitration in Sexual Assault Cases*, NPR (Feb. 10, 2022, 12:16 PM ET), <https://perma.cc/J4B4-G9V5>.

245. At the local and state level, New York City, California, and Illinois have passed such legislation, eliminating the *Faragher-Ellerth* affirmative defense by imposing strict liability for supervisory harassment actions under state antidiscrimination law. N.Y.C. ADMIN. CODE § 8-107(13)(b) (holding employers liable for “an unlawful discriminatory practice based upon the conduct of an employee or agent . . . [who] exercised managerial or supervisory responsibility”); *Zakrzewska v. New Sch. (Zakrzewska II)*, 620 F.3d 168, 170 (2d Cir. 2010) (holding that the New York City statute does not enable employers to avoid liability through the *Faragher-Ellerth* defense); *State Dept. of Health Servs. v. Superior Ct. of Sacramento*, 79 P.3d 556, 562-563 (Cal. 2003) (interpreting California’s

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what was one of the major social movements of the past quarter century, the #MeToo movement.²⁴⁶

This Note has elucidated precisely why #MeToo's central call for employer and harasser "accountability" was doomed to fail. By accepting the general premise of the *Faragher-Ellerth* regime—that sexual harassment is a problem to be addressed in the private sphere, through corporate best practices targeted at preventing and punishing individual-level misconduct—#MeToo missed what should have been its true political aims: insisting on sexual harassment's status as a civil rights issue rather than a workplace dysfunction and calling on political actors to issue new standards that demand its treatment as such. Such organizing would represent a return to the legacy of the second-wave feminists who agitated for the recognition of sexual harassment as discrimination in the first instance.

But such a realignment in sexual harassment activism—let alone law and policy—requires that legislators, organizers, and workers, like their second-wave forebears, understand sexual harassment as sex discrimination and comprehend the ways in which private bureaucratic adjudication by its nature fails to address this harm. By excavating the theoretical foundations of sexual harassment jurisprudence and documenting how *Faragher-Ellerth's* push toward privatization has betrayed these foundations, this Note represents one step toward this necessary paradigm shift.

Fair Employment and Housing Act as forbidding *Faragher-Ellerth*); *Sangamon Cty. Sheriff's Dep't v. Ill. Human Rts. Comm'n*, 908 N.E.2d 39, 45-46 (Ill. 2009) (interpreting the Illinois Human Rights Act as forbidding *Faragher-Ellerth*).

246. For an account of #MeToo's accomplishments and deficiencies, see Cunningham-Parmeter, *supra* note 34, at 171-75. The prevalence of sexual harassment has not decreased since the #MeToo movement's heyday. Mary Whitfill Roeloffs, *Study Finds No Change in Sexual Assault, Harassment Prevalence Since #MeToo Movement Began*, FORBES (Sept. 16, 2024, 12:00 AM EDT), <https://perma.cc/9RLD-5CDY>.