



## ESSAY

## Open Statement on Sexual Harassment from Employment Discrimination Law Scholars

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For Law Professors Rachel Arnow-Richman, Ian Ayres, Susan Bisom-Rapp, Tristin Green, Rebecca Lee, Ann McGinley, Angela Onwuachi-Willig, Nicole Porter, Vicki Schultz, and Brian Soucek

### Introduction

We, the undersigned legal scholars and educators with expertise in employment discrimination law, seek to offer a new vision and agenda for eliminating sexual harassment and advancing workplace equality. We are inspired by the #MeToo movement: The courage and sheer number of people who have come forward to report harassment and abuse, the cross-race, cross-class solidarity among activists, the media's in-depth and sustained coverage, and the public's willingness to hear and believe so many victims all suggest this is a watershed moment for change.

Inspired by recent events and renewed activism, we wish to contribute to the current momentum by broadening the conversation about the law. We know that law alone cannot create change. Yet we know also that change rarely occurs without the law. For over forty years, employees, activists, educators, and policymakers have looked to the legal system to address sexual harassment

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\* Ford Foundation Professor of Law and Social Sciences, Yale Law School. I would like to thank the other members of UNLEASH (United Legal Educators Against Sexual Harassment) EQUALITY, namely Professors Rachel Arnow-Richman, Brian Soucek, Ann McGinley, Nicole Porter, Angela Onwuachi-Willig, Susan Bisom-Rapp, Rebecca Lee, and especially Professor Tristin Green, for providing insightful ideas and comments on this Open Statement. I am grateful also to my Yale research assistants Will McGrew, Chris Talbot, and Alyssa Peterson for supplying outstanding editing, research, and commentary; Andra Lim, Jane Kessner, Claire McDonald, and other members of *Stanford Law Review Online* lent expert editorial assistance. Many thanks go also to my other students, past and present, and to my daughter Natalie Schultz-Henry for inspiring me to return to this important subject.

in the workplace. These efforts have produced important theories and information, steps forward and setbacks, that yield important lessons for the future. Title VII<sup>1</sup> and other existing laws against discrimination provide an important tool in the fight against sexual harassment, one that will require continued leadership from enforcement agencies.<sup>2</sup> But broader reforms are needed to address the conditions in which harassment flourishes and to make the legal system more responsive to employees. To reduce sexual harassment and move toward a fairer, more inclusive workplace and society for people of all sexes and genders, we offer the following principles and proposals for reform gained from years of working for change within the law.

### **Ten Principles for Addressing Sexual Harassment**

#### **Principle #1: The problem with workplace harassment is sexism, not sexual desire.**

In the popular imagination, sexual harassment refers to unwanted sexual advances, usually by powerful male bosses or benefactors against less powerful women.<sup>3</sup> This is an important pattern of harassment, one that reforms must address. But it is crucial to recognize that not all harassment fits this pattern.

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1. Title VII of the 1964 Civil Rights Act is the major federal law prohibiting discrimination in employment, including sex discrimination. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2016)). In 1986, the Supreme Court held that hostile work environment sexual harassment is a form of sex discrimination prohibited by Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986). Most of the law pertaining to harassment has evolved as judicial interpretations of Title VII.
  2. The federal Equal Employment Opportunity Commission (EEOC) is the lead agency responsible for enforcing Title VII and other federal laws prohibiting employment discrimination. Through its administrative enforcement process, the EEOC investigates and resolves complaints of discrimination and issues policy guidance interpreting the law. The EEOC also has authority to bring lawsuits against private employers and to conduct hearings in cases against federal employers. *See* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 103-07 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-5 (2016)); *Administrative Enforcement and Litigation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://perma.cc/QD3W-ZMVT> (archived June 10, 2018). The Department of Justice (DOJ) has the authority to sue state and local governmental employers. 42 U.S.C. § 2000e-4 to -6. Historically and today, the EEOC has played a crucial role in addressing sexual harassment. *See, e.g.*, CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016) [hereinafter EEOC TASK FORCE REPORT], <https://perma.cc/2K3M-MMRL>. The DOJ has announced initiatives to fight harassment in the workplace and housing. *See Justice Department Launches Initiative to Fight Sexual Harassment in the Workplace*, U.S. DEP'T JUST., <https://perma.cc/6RME-57QH> (archived June 10, 2018).
  3. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692 (1998) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*] (explaining and labeling this popular perception of sexual harassment as the “sexual desire-dominance paradigm”).

We must have an informed understanding of what harassment is and why it occurs to know what can be done about it.

Contrary to popular perceptions, harassment is not always sexual in nature; it assumes a variety of nonsexual forms, as discussed below. Nor is it usually perpetrated by bosses or power brokers: Coworkers, customers, and even subordinates all engage in sex-based harassment.<sup>4</sup> In addition, harassment is not always a male-to-female phenomenon. Men harass other men who don't conform to prescribed images of who "real men" are supposed to be. Gay, lesbian, bisexual, transgender, and other people who defy traditional gender norms are subject to high rates of harassment, including physical assault. Black women and other women of color are especially vulnerable to harassment.

In all these scenarios, the bottom line is that harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality. Harassment provides a way for some men to monopolize prized work roles and to maintain a superior masculine position and sense of self.<sup>5</sup> Women, too, sometimes act to uphold their relative positions.<sup>6</sup> Even where unwanted sexual misconduct occurs, it is typically a telltale sign of broader patterns of discrimination and inequality at work such as sex segregation and gender stereotyping, as explained below.

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4. See, e.g., Jennifer L. Berdahl & Jana L. Raver, *Sexual Harassment*, in 3 APA HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY: MAINTAINING, EXPANDING, AND CONTRACTING THE ORGANIZATION 641, 647 (Sheldon Zedeck ed., 2011) (describing studies on prevalence of harassment by type of perpetrator); Heather McLaughlin et al., *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77 AM. SOC. REV. 625, 636 (2012) (finding that female supervisors are more likely to be harassed than other women); Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 154 (2007) (citing studies showing that coworker harassment is more common than harassment by supervisors).
  5. For further elaboration of this theory of sexual harassment, see Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 27, 33-34, 44-47 (2018) [hereinafter Schultz, *Reconceptualizing Sexual Harassment, Again*]; and Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1755-74. For examples of social science work adopting a similar theoretical position, see George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 723, 733, 737 (2000) (drawing on Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, to propose a new economic approach that considers gendered social identity to explain workplace harassment and labor market outcomes); Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 642-48 (2007) (drawing on Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, to propose a similar theory of harassment based on threats to gendered social status and identity); and Emily A. Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 L. & HUM. BEHAV. 25, 36 (2011) (concluding that "much of the time, harassment . . . has little or nothing to do with sexuality but everything to do with gender" (quoting Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1687)).
  6. See generally Ramit Mizrahi, Note, *"Hostility to the Presence of Women": Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 1579 (2004) (documenting and explaining female-on-female harassment).

**Principle #1: Proposed reforms.**

1.1. Research and education should provide an informed understanding of what harassment is, what forms it takes, what causes harassment, what conditions foster it, and how it is linked to broader patterns of discrimination and inequality, for purposes of raising awareness and determining effective solutions.

1.2. Enforcement agencies, reform efforts, and the news media should also investigate these issues and promote an informed understanding of harassment, clarifying its links to larger forms of discrimination and inequality and raising public awareness.

1.3. Federal, state, and local governmental agencies should consider additional steps to promote an informed understanding of harassment. Institutions of higher education and secondary public schools could, for example, design curricula to teach about workplace and school-based harassment, clarifying the links to broader patterns of discrimination and inequality at work and on campus. The Surgeon General and the Centers for Disease Control and Prevention could designate harassment a public health problem and initiate a broad educational campaign to raise public awareness.

**Principle #2: Harassment includes many forms of sexism and abuse, not just sexual misconduct.**

Recent reports have focused mostly on unwanted sexual advances, including serious sexual assaults. These acts seriously harm careers and lives. They humiliate victims, brand them as inferiors in the workplace, drive them away from jobs and industries they love, and cause lasting psychological anguish and trauma.

The same is true of many other nonsexual forms of sexism and abuse women experience at work simply because they are women. Patronizing treatment, physical assaults, hostile or ridiculing behavior, social ostracism and exclusion, and work sabotage, for example, are all used to make women feel inferior, just like sexual come-ons. Bosses not only demand sexual favors; they also insist that women serve food or clean up, submit to their angry tirades, or behave or dress in ways that please them.<sup>7</sup> Bosses and coworkers engage in sexual advances and ridicule; they also downplay or take credit for women's accomplishments, exclude them from meetings and information, undermine

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7. Film producer Harvey Weinstein not only preyed and forced himself sexually upon unwilling female actors, for example; he also berated, abused, and discriminated against female and some male employees in a variety of nonsexual ways but still sex-biased ways, driving at least one out of the industry completely. See Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 5, at 35-37 (documenting and discussing Weinstein's pernicious nonsexual harassment and discrimination); cf. Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1767-68 (providing other examples of nonsexual, but sex-based harassment of female employees by bosses).

their work and reputations, and comment or otherwise convey that women don't belong.<sup>8</sup> Subordinates, too, deploy nonsexual, as well as more sexual, actions to subvert the authority of female supervisors.<sup>9</sup> Research shows these nonsexual hostilities are far more common than unwanted sexual overtures.<sup>10</sup> Typically, even sexual overtures are accompanied by broader sex-based harassment,<sup>11</sup> revealing that harassment is often less about hooking up than about putting women down.

The law prohibiting workplace harassment now covers all sex-based harassment, sexual and nonsexual.<sup>12</sup> For these reasons, the terms “sex-based”

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8. For detailed accounts of how women working in venture capital and technical roles in the Silicon Valley technology industry are systematically harassed, excluded, marginalized, and undermined at work by their male colleagues, see EMILY CHANG, BROTOPIA: BREAKING UP THE BOYS' CLUB OF SILICON VALLEY 105-09, 117-18, 121-27, 129-30, 136-37, 154-57, 160-70 (2018); and ELLEN K. PAO, RESET: MY FIGHT FOR INCLUSION AND LASTING CHANGE 71, 76-77, 88, 98, 111-13, 117-18, 120-21, 123-25, 127-29, 143 (2017). See also Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 5, at 37-42. This type of behavior affects not only highly-paid women, but also their blue-collar and low-wage counterparts. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1762-66 (discussing sexual and nonsexual forms of harassment that undermine women across a wide range of occupations and industries, including blue-collar and low-wage jobs); see also PAO, *supra*, at 65-66, 86-87, 88-89 (recounting similar race-based incidents).
  9. McLaughlin et al., *supra* note 4, at 636 (reporting that women in supervisory positions are more likely to be harassed than women in other positions); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1722, 1767 (citing cases in which male subordinates harassed female supervisors and even resorted to work stoppage rather than submitting to the authority of a woman). Indeed, this phenomenon is sufficiently widespread that researchers have coined the term “contrapower” harassment to describe it. See McLaughlin et al., *supra* note 4, at 626 (citing Kathleen M. Rospenda et al., *Doing Power: The Confluence of Gender, Race, and Class in Contrapower Sexual Harassment*, 12 GENDER & SOC'Y 40 (1998)).
  10. See EEOC TASK FORCE REPORT, *supra* note 2, at 8-10 (discussing recent studies); Berdahl & Raver, *supra* note 4, at 646 (describing studies). For one recent study, see Leskinen et al., *supra* note 5, at 31, 34, which found based on samples of female military personnel and female attorneys that the overwhelming majority of women who were harassed experienced gender-based sexist or crude behavior, not sexual advances.
  11. See, e.g., Berdahl & Raver, *supra* note 4, at 646 (collecting studies showing that unwanted sexual attention and sexual coercion co-occur with gender-based harassment, as well as with other types of discrimination); Louise F. Fitzgerald et al., *Measuring Sexual Harassment: Theoretical and Psychometric Advances*, 17 BASIC & APPLIED SOC. PSYCHOL. 425, 438 (1995); Sandy Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCHOL. 483, 487, 490 (2005).
  12. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998) (recognizing that harassment can be but need not be sexual in nature); *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://perma.cc/8JFL-2VXW> (archived May 28, 2018) (same). For additional cases acknowledging that both sexual and nonsexual harassment are actionable and should be considered together for purposes of determining whether the misconduct amounts to a hostile work environment, see, for example, *O'Rourke v. City of Providence*, 235 F.3d 713, 730 & n.5 (1st Cir. 2001) (citing Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, for this proposition); and *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 (3d Cir. 1999) (same).

and “sex” harassment are more descriptively accurate than specifically “sexual” harassment,<sup>13</sup> and we sometimes adopt those terms below.

**Principle #2: Proposed reforms.**

2.1. Harassment policies, trainings, and reforms should cover all conduct that demeans, intimidates, excludes, undermines, or otherwise treats people differently because of sex, rather than focusing narrowly on unwanted sexual advances and other sexual behaviors. Examples should include a wide range of conduct, emphasizing that both sexual and nonsexual forms of harassment can contribute to a hostile work environment based on sex.

2.2. Enforcement efforts, education, research, and media coverage should highlight and address nonsexual as well as sexual forms of harassment, contributing to a broader public understanding of the prevalence and effects of the full spectrum of workplace sexism and abuse.

2.3. Organizations should hold owners, managers, and supervisors accountable for implementing harassment policies and preventing and addressing harassment. These efforts should be linked to broader efforts to achieve equality, inclusion, and fairness, as discussed below.

**Principle #3: Sexual harassment is directly linked to sex segregation and inequality.**

Reformers who highlight the importance of gender parity are right<sup>14</sup>: Sex segregation and inequality in employment, where men hold most of the top positions or prized jobs in an organization, field, or industry, and women are relegated to lower-status jobs, are a major cause of sex harassment. Research

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13. See EEOC TASK FORCE REPORT, *supra* note 2, at v, 8-10 (adopting the term “sex-based harassment”); Berdahl & Raver, *supra* note 4, at 642; Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights into Gender and Context*, 38 L. & HUM. BEHAV. 58, 60 (2014).

14. See, e.g., Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will*, HARV. BUS. REV. (Nov. 15, 2017), <https://perma.cc/NMD3-YF9S> (“We already know how to reduce sexual harassment at work, and the answer is pretty simple: Hire and promote more women.”); Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 5, at 42-44 (highlighting the importance of eliminating sex segregation to end harassment); *Home*, 5050BY2020, <https://perma.cc/5NKT-BZRH> (archived May 28, 2018) (calling for 50% female representation in all entertainment jobs and leadership positions to fight harassment and abuse); *Leadership*, PARADIGM FOR PARITY, <https://perma.cc/BG3B-57ZJ> (archived May 28, 2018) (calling for “full gender parity by 2030, with a near-term goal of women holding at least 30% of senior roles”); *Time’s Up*, TIME’S UP, <https://perma.cc/HRJ8-P9EY> (archived May 28, 2018) (advocating for increased representation of women at all levels as a solution to harassment); see also Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2172-84 (2003) [hereinafter Schultz, *The Sanitized Workplace*] (proposing that sexual harassment liability standards be set to incentivize eliminating sex segregation as a means to end harassment).

shows that harassment is more prevalent where women work in traditionally male-dominated jobs or settings.<sup>15</sup>

Women's absence from some jobs and predominance in others fosters gender stereotypes like "men are leaders" and "women aren't tough enough to lead," or "men are breadwinners" and "women put their families first"—ideas that make the underlying segregation and inequality seem natural when they are not. These stereotypes foster harassment, encouraging men to view and treat women as "different" and second class. By harassing women who dare to enter traditionally male jobs and roles, or imposing sexist demands that remind women they are still women in a man's world, men can shore up their masculine status and sense of masculine superiority at work. Harassment in turn reinforces the original segregation and stereotypes by driving women away and confirming ideas that they can't cut it or don't belong.<sup>16</sup> Supervisors and organizational leaders often fail to respond or look the other way, completing the cycle.<sup>17</sup>

Segregation not only affects male jobs: Women who work in traditionally female jobs are often at increased risk of harassment and exploitation, too,<sup>18</sup>

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15. Berdahl & Raver, *supra* note 4, at 647-48 (collecting studies); Jennifer L. Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPLIED PSYCHOL. 425, 427 (2007) (same); James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 302-03, 313-14 (1998) (same); McLaughlin et al., *supra* note 4, at 627-28 (same).
  16. Engineer Susan Fowler's account of working at Uber provides a vivid example of how sex segregation, stereotyping, and harassment can reinforce each other. When Fowler began working there, Uber was sex-segregated: women represented only 25% of the engineers in her unit. On Fowler's first day on the job, her manager made a sexual overture, an act that turned out to be only the first in a longer series of discriminatory behaviors. Eventually, Fowler alleges, Uber threatened to fire her in retaliation for protesting such mistreatment, leaving her no choice but to leave. Other women also exited Uber in droves; by the time Fowler left, women were only 3% of her unit's engineers. Human resources personnel justified the dearth of female engineers through stereotypes, saying "sometimes certain people of certain genders and ethnic backgrounds were better suited for some jobs than others" and suggesting women "needed to step up and be better engineers." Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, (Feb. 19, 2017), <https://perma.cc/T4KM-HQGZ>.
  17. For a more complete analysis of how sex segregation fuels sex-based harassment and vice versa, see Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1755-1762. For a generalized description of how sex-segregated social institutions breed inequality, see David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 535-52 (2010).
  18. Some studies suggest that women who work in traditionally female-dominated jobs who interact frequently with men experience high levels of harassment, with some forms approximating the levels experienced by women in traditionally male-dominated jobs. See BARBARA A. GUTER, *SEX AND THE WORKPLACE* 140-45, 141 tbl.1, 143 tbl.2 (1985). Commentators have pointed out that for some women in traditionally female jobs, performing sexual and other sex-biased requirements are so endemic that some people may think of harassment as simply part of the job. See *id.* at 142; see generally Ann C. McGinley,

especially where the jobs require displaying heterosexual sex appeal or performing other stereotypically female roles.<sup>19</sup> Men who work in female-dominated industries and jobs also are sometimes harassed or treated differently by their supervisors or coworkers because of their sex.<sup>20</sup>

Research shows that sex-segregated employment is typically tied to discrimination, not choice.<sup>21</sup> Without the power and safety that comes with equal representation and numbers, women cannot effectively counter stereotypes or deter or resist harassment. Skewed numbers leave women outnumbered and vulnerable at work, left to curry favor with men or compete on an unequal basis.<sup>22</sup> With few women in positions of influence in so many industries, it is little wonder that so little progress in reducing harassment has been made.

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*Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65 (2006).

19. See McGinley, *supra* note 18, at 68-87 (describing sexual harassment in three female-dominated, sexualized occupations and jobs in the Las Vegas gaming and prostitution industries). The restaurant industry represents another highly sex-segregated arena in which women face persistent harassment. See, e.g., Stefanie K. Johnson & Juan M. Madera, *Sexual Harassment Is Pervasive in the Restaurant Industry. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 18, 2018), <https://perma.cc/K43E-XCUW> (analyzing factors that lead to prevalent sexual harassment in the restaurant industry, including sex segregation and an emphasis on appearance for female employees). For an analysis of sex and race segregation in the restaurant industry, see generally Rest. Opportunities Ctrs. United, *Ending Jim Crow in America's Restaurants: Racial and Gender Occupational Segregation in the Restaurant Industry* (2015), <https://perma.cc/C3WZ-S35U>.
20. See, e.g., Kevin Stainback et al., *The Context of Workplace Sex Discrimination: Sex Composition, Workplace Culture and Relative Power*, 89 SOC. FORCES 1165, 1178, 1181 (2011) (reporting based on a 2002 national survey that men working in token positions (where men are less than 25% of those who do the job) are significantly more likely to report subjective experiences of discrimination than men in other contexts); see also Kevin D. Henson & Jackie Krasas Rogers, "Why Marcia You've Changed!" *Male Clerical Temporary Workers Doing Masculinity in a Feminized Occupation*, 15 GENDER & SOC'Y 218, 222-30 (2001) (documenting, through participant observation and semi-structured interviews, patterns of sex-based harassment, stereotyping, and differential treatment of male temporary clerical workers who occupied token status in a feminized employment setting); Jane Gross, *Now Look Who's Taunting. Now Look Who's Suing*, N.Y. TIMES (Feb. 26, 1995), <https://perma.cc/QQC7-Z4ZK> (describing a harassment case brought by a weight loss center's male employees, who claimed that their female supervisor forced them to perform traditionally male activities, like shoveling snow or emptying trash as part of a general campaign of harassment).
21. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1816-24 (1990) [hereinafter Schultz, *Telling Stories*] (discussing social science research refuting the idea that workplace segregation is attributable to women's pre-labor market preferences).
22. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 206-44 (1977); Belle Derks et al., *The Queen Bee Phenomenon: Why Women Leaders Distance Themselves from Junior Women*, 27 LEADERSHIP Q. 456, 458-60, 464 (2016); Robin J. Ely, *The Effects of Organizational Demographics and Social Identity on Relationships Among Professional Women*, 39 ADMIN. SCI. Q. 203, 224-30 (1994).



**Principle #3: Proposed reforms.**

3.1. Reducing harassment requires eliminating sex segregation in employment and business settings. Organizations and industries must include women and men in equal numbers in every job at every level, especially in top positions.

3.2. Achieving this goal means ending discrimination in recruiting, hiring, assignment, and promotion, and ensuring that women are paid and valued equally in every role. Leadership and accountability are crucial.

3.3. Harassment policies should be linked to larger plans to eliminate sex discrimination, facilitate full inclusion, and achieve equal numbers of women, men, and gender nonbinary people of all races in all jobs at every level throughout the organization. Both traditionally male-dominated and traditionally female-dominated jobs should be integrated.

3.4. Organizations should hold owners, managers, and supervisors accountable for implementing non-discrimination and equal inclusion plans through measurable goals. Their own career advancement should depend on success in meeting these goals, along with success in preventing and remedying harassment.

3.5. Organizations should use time-honored equal employment opportunity strategies and other creative measures to achieve these goals. Where employing equal numbers of women is not feasible due to women's present lack of qualifications, for example, employers should take active steps to ensure that women catch up in training or education. Employers should also take active steps to attract women to male-dominated jobs and to ensure that they are welcomed and protected from harassment; they should not accept women's alleged lack of interest as an excuse for significant underrepresentation. Employers should take similar steps to integrate men equally into mostly-female jobs.

3.6. Federal and state enforcement agencies should bring lawsuits combining challenges to sex-based harassment with challenges to discriminatory practices that lead to sex segregation and inequality, such as discrimination in hiring, promotion, and assignment. These lawsuits can help expose and break the links between harassment and larger patterns of discrimination and stereotyping.

3.7. Reforms should challenge segregation and inequality in their own right and emphasize their contribution to harassment, creating public awareness and generating consensus about the need to integrate organizations and workforces along sex-gender lines in order to prevent and address harassment.

**Principle #4: Same-sex harassment and LGBTQ harassment are prohibited sex discrimination, too.**

Contrary to popular perception, women are not the only victims of harassment. Men, too, frequently experience sex-based harassment—mostly at

the hands of other men.<sup>23</sup> At times, powerful men prey on other men for sexual favors, just as men do upon women. But more often, men harass other men through acts of gender-based hostility<sup>24</sup>—including hostility toward those who don't live up to images of “real men” prescribed by hegemonic codes of masculinity.<sup>25</sup> Male-on-male harassment is often mistaken for harmless hazing, but it is rooted in gender bias and stereotypes just like male-on-female harassment. Harassment against LGBTQ people is also widespread, with transgender individuals experiencing the highest rates of all.<sup>26</sup>

While the motive for such harassment is rarely sexual desire, the means include both sexual and nonsexual abusive behaviors. City landscapers attack

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23. See Vicki J. Magley et al., *The Impact of Sexual Harassment on Military Personnel: Is It the Same for Men and Women?*, 11 MIL. PSYCHOL. 283, 289, 297-98 (1999) (reporting that in a sample of military personnel, men were more likely to be harassed exclusively by other men than by women or by both men and women); Craig R. Waldo et al., *Are Men Sexually Harassed? If So, by Whom?*, 22 L. & HUM. BEHAV. 59, 69 (1998) (finding, based on three samples, that male employees were more likely to experience sex-based harassment from other men than from women).
24. See, e.g., Magley et al., *supra* note 23, at 288-89 (finding in a sample of military personnel that “the great majority of male-to-male harassment situations involved gender harassment ... rather than unwanted sexual attention or sexual coercion”).
25. See ANN C. MCGINLEY, MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS 1-7, 15-34 (2016); Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 100-02 (2018) [hereinafter McGinley, *The Masculinity Motivation*]; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 1774-89; see also Cohen, *supra* note 17, at 523-25 (explaining hegemonic masculinity as the dominant view of manhood in a particular context and the one to which all men feel pressure to confirm, and citing classic sources).
26. See, e.g., HUMAN RIGHTS CAMPAIGN FOUND., DEGREES OF EQUALITY: A NATIONAL STUDY EXAMINING WORKPLACE CLIMATE FOR LGBT EMPLOYEES 21 (2009), <https://perma.cc/8QAN-XZA3> (finding that, according to a national probability-based survey, 58% of LGBT respondents working at organizations with LGBT equal employment opportunity policies had heard derogatory comments about sexual orientation or gender identity); JAMIE M. GRANT ET AL., NAT'L GAY & LESBIAN TASK FORCE AND NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011), <https://perma.cc/NUX4-DJQU> (finding that 90% of transgender or gender nonbinary people surveyed reported experiencing harassment, mistreatment, or discrimination on the job or presented themselves differently to try to avoid it); BRAD SEARS & CHRISTIE MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 4-8 (2011), <https://perma.cc/LJN4-BZ99> (citing finding from a 2008 national probability-based survey that 35% of LGB people had been harassed, as well as other non-probability-based surveys showing that transgender people report even higher levels of employment discrimination or harassment); U.S. COMM'N ON CIVIL RIGHTS, WORKING FOR INCLUSION: TIME FOR CONGRESS TO ENACT FEDERAL LEGISLATION TO ADDRESS WORKPLACE DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AMERICANS 11-14, 17-21 (2017), <https://perma.cc/KWV3-VT7T> (collecting studies documenting workplace harassment and discrimination against LGBT individuals and showing that transgender people experience intensified forms).

vulnerable teenagers perceived as too soft, gay, or fat to work alongside them,<sup>27</sup> for example, while male lawyers demean male colleagues seen as spending too much time caring for their families.<sup>28</sup> Police officers assault colleagues who stand up for openly gay men or women,<sup>29</sup> and men of all stripes attack, ridicule, and catcall men and boys perceived as effeminate or gay.<sup>30</sup> Lesbians and transgender individuals are severely harassed for violating gendered expectations for those who do the job.<sup>31</sup> By attacking women, LGBTQ people, and heterosexual men who fail to conform to prescribed gender norms, harassers reinforce the masculine composition and character of their jobs and shore up their own sense of masculine identity.

Although female-on-female harassment is less visible than other types, women do sometimes demean and ostracize other women, especially in sex-segregated job settings where they lack power and feel they must compete for favor on stereotypical female terms.<sup>32</sup> Women may also harass, exclude, or stigmatize women perceived as improperly feminine, including open lesbians, in an effort to project a sense of mainstream femininity and to protect it from contamination by pariah femininities.<sup>33</sup>

Because harassment and discrimination against LGBTQ individuals is necessarily rooted in prescriptive stereotypes about the “appropriate”

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27. See, e.g., *Doe ex rel. Doe v. City of Belleville*, 119 F.3d 563, 566-67 (7<sup>th</sup> Cir. 1997), cert. granted and judgment vacated, 523 U.S. 1001 (1998).
28. See, e.g., *Ayanna v. Dechert, LLP*, 914 F. Supp. 2d 51, 56 (D. Mass. 2012); cf. Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 353, 356 (2013) (finding that fathers who spend time caring for their children are more likely to be harassed than other men).
29. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759-60 (6<sup>th</sup> Cir. 2006).
30. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9<sup>th</sup> Cir. 2002) (en banc); *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*1, \*4-8 (6<sup>th</sup> Cir. 1992); see generally McGinley, *The Masculinity Motivation*, supra note 25, at 102-05 (citing additional examples from Title VII and Title IX cases); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014) (comprehensively analyzing federal appellate cases alleging gender-based harassment that includes anti-gay bias).
31. See, e.g., Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 67-69, 70-76 (2018) (discussing *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018), in which male firefighters viciously harassed and assaulted an openly lesbian firefighter).
32. See Ely, supra note 22, at 224-30; Mizrahi, supra note 6, at 1597-1605, 1611-14.
33. See, e.g., *Durkin v. Verizon N.Y., Inc.*, 678 F. Supp. 2d 124, 128 (S.D.N.Y. 2009) (involving a female technician whose female coworkers spread rumors that she was promiscuous, tore open her blouse to expose her brassiere and breasts, commented on her breast size repeatedly, and suggested that she used her large breasts to advance and get special treatment in the company); see also Mimi Schippers, *Recovering the Feminine Other: Masculinity, Femininity, and Gender Hegemony*, 36 THEORY & SOC’Y 85, 94-96 (2007) (defining pariah femininities as those characteristics which, when embodied by women, threaten the complementary system of hegemonic masculinity and femininity and which therefore must be contained and stigmatized).

appearance, sexual partners, and/or gender identity for men and women,<sup>34</sup> courts have begun to recognize that sexual orientation and transgender discrimination are forms of sex-based discrimination prohibited by law.<sup>35</sup> Reforms must specifically address harassment based on sex/gender stereotyping, sexual orientation, and gender identity, clarifying that they are all prohibited sex-based harassment and discrimination, regardless of whether the motive or means are sexual in nature or whether the harassment is directed at someone of the opposite or same sex.

**Principle #4: Proposed reforms.**

4.1. Harassment policies, training, and reforms should cover same-sex harassment and harassment based on sex/gender stereotyping, sexual orientation, and gender identity, regardless of whether the harassment is sexual in nature or is directed at someone who is of the opposite or same sex.

4.2. Federal and state lawmakers, courts, and agencies should clarify that harassment and other discrimination based on sex/gender stereotyping, sexual orientation, and gender identity are prohibited forms of discrimination.

4.3. Enforcement efforts, education and research, and media coverage should highlight and address this point, contributing to a broader public understanding of the prevalence and harms of these forms of harassment.

4.4. Reform efforts should foster solidarity and support for people who face or risk facing these forms of harassment.

**Principle #5: Race-based harassment and intersectional race/sex harassment and discrimination against women and men of color must be specifically addressed.**

Women and men of color experience higher rates of racial-ethnic harassment than white employees.<sup>36</sup> Women of color also report and

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34. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 122 (2d Cir. 2018) (en banc) (“[S]exual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.”); Soucek, *supra* note 31, at 81-82; see also Zachary R. Herz, Note, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 405-06 (2014) (explaining prescriptive stereotyping).

35. See, e.g., *Zarda*, 883 F.3d at 108 (holding discrimination based on sexual orientation a form of sex discrimination prohibited by Title VII); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 340-41 (7th Cir. 2017) (en banc) (same); see also *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567-600 (6th Cir. 2018) (extending analogous protection to transgender people). For analyses of the issues raised in such cases, see generally William N. Eskridge Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017); and Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J.F. 115 (2017).

36. Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCHOL. 426, 432 (2006) (finding, based on a survey of employees in five organizations in a major North American metropolitan area, that harassment was more

experience higher rates of harassment than white women, often on the basis of both sex *and* race.<sup>37</sup> Men of color may also be more likely than white men to experience gender-based harassment at the hands of other men.<sup>38</sup> In general, people who experience sex-based harassment are more likely to experience racial-ethnic harassment,<sup>39</sup> further suggesting the importance of intersectional analysis pioneered by Black feminists.<sup>40</sup>

Despite the social invisibility of Black women's distinctive struggles,<sup>41</sup> sexual harassment law has been shaped from the courageous struggles of Black women. From Title VII's inception, Black women have helped expose and resist unwanted sexual advances, including sexual assault and rape, along with the everyday onslaught of racism and misogyny. (Think of Carmita Wood, Paulette Barnes, Sandra Bundy, Mechelle Vinson, Eleanor Holmes Norton, Anita Hill, and Tarana Burke.<sup>42</sup>)

Black women have been subjected to sexual and labor exploitation for centuries, dating back to slavery. Women of color generally face increased risk of harassment, and enduring, pernicious myths about their sexuality. For example, stereotypes portray Black women as wanton and lascivious, Latinas as sexy and "spicy," Asian women as exotic and submissive, and Muslim women as meek and oppressed—images that invite unwanted sexual advances at work

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common for racial-ethnic minorities and "for those who reported working in groups dominated by an ethnicity that differed from their own"); Mindy E. Bergman et al., *Racial and Ethnic Harassment and Discrimination: In the Eye of the Beholder?*, 12 J. OCCUPATIONAL HEALTH PSYCHOL. 144, 156-57 (2007) (finding, based on large survey of active duty military personnel, that employees of color were more likely to experience racial/ethnic harassment and discrimination than whites, especially hostile harassing behaviors).

37. See Berdahl & Moore, *supra* note 36, at 432 (finding that "[m]inority women were significantly more harassed than minority men, majority women, and majority men when both ethnic and sexual harassment were combined into an overall measure of harassment"). For a pioneering study documenting and analyzing the disproportionate rate of sexual harassment complaints to the EEOC filed by women of color compared to white women, see Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 186-87 (2001). Cf. *Written Testimony of Mindy Bergman, Associate Professor of Psychology, Texas A&M University*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 15, 2015), <https://perma.cc/T3H6-8H26> [hereinafter *Written Testimony of Mindy Bergman*].

38. Berdahl & Moore, *supra* note 36, at 432-33.

39. *Written Testimony of Mindy Bergman*, *supra* note 37.

40. For classic citations, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). For a review of intersectional race/sex discrimination against women and men in the labor market, see Irene Browne & Joy Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. SOC. 487 (2003).

41. See Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 106-07, 111-12 (2018).

42. Raina Lipsitz, *Sexual Harassment Law Was Shaped by the Battles of Black Women*, NATION (Oct. 20, 2017), <https://perma.cc/PD9E-PPQZ>.

and elsewhere.<sup>43</sup> Women of color also face persistent nonsexual negative stereotypes, including images of the “angry Black woman”<sup>44</sup> or dangerous Muslim terrorist<sup>45</sup> who refuse to submit to proper (male) authority; Black women are also further stereotyped as unqualified and incompetent.<sup>46</sup> These ideas further foster sex- and race-based harassment and marginalization on the job.<sup>47</sup>

Women of color are also disproportionately clustered in low-paying, unskilled occupations,<sup>48</sup> leaving them further vulnerable to and less able to resist stereotyping and harassment. Immigrants, including many women of color, often lack information about their rights, and undocumented workers fear deportation and reprisal, making them less likely to stand up for themselves or complain. Men of color, too, face pervasive stereotypes and are sometimes targeted for harassment or discrimination because of their race and sex.<sup>49</sup> Queer

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43. On stereotypes of Black women, see Carolyn M. West, *Mammy, Jezebel, Sapphire, and Their Homegirls: Developing an “Oppositional Gaze” Toward the Images of Black Women*, in LECTURES ON THE PSYCHOLOGY OF WOMEN 286, 288, 294-95 (Joan C. Chrisler et al. eds., 4th ed. 2008). On stereotypes of Latina women, see Anais Rivero, *Why the “Hot and Spicy” Stereotype of Latina Women Needs to End*, AFFINITY (May 19, 2017), <https://perma.cc/PWX7-8DYN>. On stereotypes of Asian women, see Rachel Kuo, *How Rape Culture and Racism Combine to Hurt Asian Women*, HUFFPOST (May 30, 2017), <https://perma.cc/JZ6Y-9BVE>. On stereotypes of Muslim women, see Hadiya Abdelrahman, *Are We Weak or Are We Terrorists? The Violent Stereotypes of Muslim Women*, ESTABLISHMENT (Nov. 24, 2017), <https://perma.cc/4HNM-ABBF>. For a general discussion of such stereotyping, see generally Browne & Misra, *supra* note 40, at 498-502.
44. See Onwuachi-Willig, *supra* note 41, at 117 & n.55 (citing Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 W.M. & MARY J. WOMEN & L. 53 (1999) and discussing stereotypes about Black women, including that of the angry Black woman); Ameer Hasan Loggins, *ESPN’s Jemele Hill Is Being Reduced to an ‘Angry Black Woman,’* GUARDIAN (Oct. 12, 2017, 11:02 EDT), <https://perma.cc/8CDF-69RL>.
45. Abdelrahman, *supra* note 43.
46. Browne & Misra, *supra* note 40, at 501 (describing study in which black women felt they were stereotyped as incompetent and unqualified); see also PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 78-80 (2d ed. 2000) (describing the “welfare queen” stereotype of indolent Black women of low morals, content to collect welfare, shunning work and passing on bad values to their offspring).
47. See Onwuachi-Willig, *supra* note 41, at 112-18 (showing how Leslie Jones and Jemele Hill experienced mostly nonsexual, but still sex- and race-based hostility rooted in stereotypes about Black women).
48. See Ariane Hegewisch & Heidi Hartmann, Inst. for Women’s Policy Research, *Occupational Segregation and the Gender Wage Gap: A Job Half Done* 9-10 (2014), <https://perma.cc/4Q4M-28TB> (showing continuing patterns of occupational segregation for women of color); Olga Alonso-Villar & Coral del Río, *The Occupational Segregation of Black Women in the United States: A Look at Its Evolution from 1940 to 2010*, at 24-28 (ECINEQ Soc’y for the Study of Econ. Inequality, Working Paper No. 304, 2013), <https://perma.cc/QQ6H-3F6H> (same).
49. See Browne & Misra, *supra* note 40, at 490 (discussing popular stereotypes of Black men as “hypersexualized” and Asian men as “desexualized” or “feminized”); *supra* note 38 and

people of color, often stigmatized as lacking in respectability,<sup>50</sup> may be especially vulnerable to abuse.<sup>51</sup>

Research suggests that women of color have a particularly difficult time proving discrimination under existing law.<sup>52</sup> Reforms must promote policies, plans, and decisions that better protect women and men of color from harassment and discrimination, including intersectional forms.

**Principle #5: Proposed reforms.**

5.1. Harassment policies, training, and reforms should cover race-based and other types of harassment and discrimination (race, color, religion, national origin, age, and disability, for example, in addition to sex, sexual orientation, sex/gender stereotyping, and gender identity). They should explicitly cover and explain harassment and discrimination that is intersectional (based on more than one factor).

5.2. Harassment policies and training should be linked to larger plans to eliminate race, race/sex, and other forms of intersectional discrimination and to facilitate full and equal inclusion of women and men of all races into all jobs at every level throughout the organization, especially top positions.

5.3. Organizations should hold owners, managers, and supervisors accountable for implementing these specific policies and plans through measurable goals.

5.4. Enforcement efforts, education and research, and media coverage should highlight and address the nature and prevalence of race/sex and other intersectional discrimination.

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accompanying text (showing that men of color are more likely to experience gender harassment than white men).

50. On respectability and the politics of respectability for LGBTQ people, including people of color, see generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Cathy J. Cohen, *Deviance as Resistance: A New Research Agenda for the Study of Black Politics*, 1 *DUBOIS REV.* 27 (2004); Julian Glover, *Representation, Respectability, and Transgender Women of Color in Media*, *BLACK PERSP.* (Apr. 27, 2017), <https://perma.cc/9RBB-CWEX>; and Mark Simpson, *Respectability Is the New Closet*, *GUARDIAN* (June 2, 2009, 5:30 EDT), <https://perma.cc/77LF-ABHS>.
51. See, e.g., NPR, Robert Wood Johnson Found., & Harvard T.H. Chan Sch. of Pub. Health, *Discrimination in America: Experiences and Views of LGBTQ Americans* 1, 10-11 (2017), <https://perma.cc/Q4HT-8E6E> (finding, based on a probability-based survey of 489 U.S. adults, that LGBTQ people of color are twice as likely to report personal discrimination due to being LGBTQ when applying for jobs or interacting with police, compared to white LGBTQ people).
52. See Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 *L. & SOC'Y REV.* 991, 1009 tbl.4 (2011) (finding in a representative sample of judicial opinions that nonwhite female plaintiffs won in only 13% of federal equal employment opportunity law cases, compared with 17% for nonwhite male plaintiffs, 35% for white female plaintiffs, and 36% for white male plaintiffs).

5.5. Reform efforts should foster solidarity and support for people who face or risk facing race-based, race/sex and other intersectional discrimination.

**Principle #6: Broader occupational and other structural vulnerabilities must be reduced.**

Many women work in occupations or situations that leave them vulnerable to sex-based harassment and exploitation. Hotel maids and private housekeepers work in isolated locations where they can readily be harassed,<sup>53</sup> for example. Agricultural workers “work in the shadows of society in isolated fields and packinghouses that are out of sight and out of mind” to most people.<sup>54</sup> Waitresses or bartenders who depend on tips may feel compelled to tolerate harassment by customers in order to make a living—and women in these positions are often forced to wear revealing costumes or told to “show more skin” on the job to improve their wages.<sup>55</sup> Assistants who depend on personalistic relationships with executives for career mobility may feel pressured to comply with sexual or other sexist demands from their bosses. Women in the skilled trades who depend on their male coworkers for informal training and teamwork face similar risks.

Even apart from such specialized vulnerabilities, many employees also face a more generalized risk for harassment and abuse—bosses or benefactors who have unchecked, *carte blanche* authority to make or break the employees’ careers and life prospects based on the higher-ups’ own subjective say-so.<sup>56</sup> Due to sex segregation and inequality, most of these bosses and benefactors are men. The simple truth is that too many men have too much unconstrained institutional power over the women (and men) who depend on them for their livelihoods.

The gendered character of the hierarchy contributes to the problem, but so does the nature of the hierarchy itself. Heading private fiefdoms where they can hire, fire, and direct other people with impunity puts higher-ups in a position

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53. See Donna Bryson, *US Hotel and Casino Workers Fight Back Against Violence and Harassment*, EQUAL TIMES (Nov. 23, 2016), <https://perma.cc/J3L7-2B9X> (describing efforts by the EEOC and labor unions to protect hospitality industry employees from harassment).

54. Alianza Nacional de Campesinas, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <https://perma.cc/7KST-USQP>.

55. See generally Johnson & Madera, *supra* note 19.

56. Such unconstrained, subjective authority is rooted partially in subjective selection systems, which vest unconstrained discretionary authority in supervisors to use personalistic criteria to hire, promote, and evaluate employees based on their own say-so. See generally David L. Rose, *Subjective Employment Practices: Does Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 68 (1988) (explaining subjective employment practices). It is also rooted in at-will employment, which gives supervisors the unconstrained authority to fire employees for any reason or no reason at all. See generally ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 53-60 (2017); Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 88-89 (2018).



to indulge their biases;<sup>57</sup> bosses can impose sexual demands or other sexist behavior on women, demean “lesser” men, and punish those who resist such abuses. Research shows that managers who are given unfettered, discretionary authority over subordinates are more likely to abuse it.<sup>58</sup> The problem is exacerbated when those who occupy such positions are “stars” with high value to the organization.<sup>59</sup> Regardless of their perceived worth to an organization or industry, bosses should not be given unconstrained power to control or direct other people’s careers. Excessive, unchecked discretion not only provides a ready mechanism for discrimination; it also provides a powerful platform for harassment and intimidation.<sup>60</sup>

Time-honored principles from employment discrimination law can help restrain excessively subjective, unconstrained decision-making systems in the name of eliminating discrimination. These principles can and should be mobilized to impose greater objectivity, oversight, and accountability on arbitrary managerial authority.<sup>61</sup> Yet the existing laws against discrimination alone cannot solve this problem; additional measures are needed to incentivize employers and empower workers to make the needed changes.<sup>62</sup>

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57. For an analysis of how unchecked subjective authority to hire, fire, promote, and direct employees encourages harassment, see Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 5, at 50-55, 57-58.
58. See David Kipnis, *Does Power Corrupt?*, 24 J. PERSONALITY & SOC. PSYCHOL. 33, 36, 39-40 (1972) (reporting from a field simulation that managers vested with unchecked supervisory authority to control employees’ behavior by firing or transferring them or paying them less exercised greater control over subordinates’ behavior, devalued subordinates’ performance and efforts, viewed them as objects of manipulation, and desired greater social distance from them than managers who lacked such power).
59. See EEOC TASK FORCE REPORT, *supra* note 2, at 24-25.
60. Title VII jurisprudence has long recognized this point. See *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (“recogniz[ing] that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination”); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1063 n.364 (2015) (collecting additional cases).
61. See Vicki Schultz, *Rationalizing the Workplace: Title VII’s Lasting Contribution to American Society* (June 21, 2017) (unpublished manuscript) (on file with author) (describing how federal agency lawyers and courts successfully restrained excessively subjective employee selection systems under Title VII in the early enforcement era).
62. Tort law could impose greater liability for supervisory abuse of authority, for example, without regard to whether discrimination has occurred. See Regina Austin, *Employer Abuse, Worker Resistance, and Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 4-5 (1988). State laws could also place limits on the operation of at-will employment, providing employees greater protection from being fired or punished in excessively arbitrary or abusive fashion. See Rachel Arnov-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 5 nn.10 & 11, 7, 36-48 (2010). Antidiscrimination law could be revitalized to ensure subjective authority is not wielded in a discriminatory manner. See generally Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 5, at 63-65. Contract law could impose an implied obligation of good faith and fair dealing to protect employees and students from sex-based harassment and discrimination. See Brief of

**Principle #6: Proposed reforms.**

6.1. Organizations should reduce the occupational, physical, social, legal, sexual, and structural vulnerabilities of employees wherever and whenever possible.

6.2. Organizations should minimize the delegation and use of unchecked, subjective supervisory authority wherever and whenever possible in favor of more open, objective, evenhanded, accountable systems for hiring, firing, evaluating, and directing the work of employees.

6.3. State and federal lawmakers, courts, and agencies should create incentives for organizations to eliminate employee vulnerabilities, curb unchecked supervisory authority, and make other needed changes through antidiscrimination law, labor and employment law, private law, and other means; labor unions should do so through collective bargaining agreements.

6.4. Federal and state employment laws should be amended to require all employers to pay a minimum wage to covered employees without regard to tips or commission, for example, treating customer-based compensation as a bonus and not as a basic living.<sup>63</sup>

6.5. Federal and state antidiscrimination laws should also require organizations to eliminate sex-specific grooming and dress requirements; such requirements foster sex stereotyping and harassment and are almost never necessary to perform essential job functions.

6.6. Enforcement efforts, education, and media coverage should create public awareness of employees' structural vulnerabilities, encouraging reforms through legislation, litigation, labor and employment contracts, and social activism.

**Principle #7: Banning all sexual behavior is not a solution and can even be harmful to the cause of eliminating harassment.**

In an effort to avoid legal liability, employers have almost universally adopted written policies that broadly prohibit all sexually-oriented remarks, jokes, and behavior in the workplace, regardless of their purpose or effect; some organizations even ban dating among same-level employees.<sup>64</sup> Such sweeping prohibitions tend to be unhelpful; they can even hinder the cause of eliminating harassment and discrimination at work.

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Professors of Contract Law and Professors of Sexual Harassment and Sex Discrimination Law as *Amici Curiae* in Support of Plaintiff-Appellant at 18, *Doe v. Hagenbeck*, No. 18-185-cv (2d Cir. May 3, 2018). For an analysis of the state of California's efforts to reduce harassment by addressing employees' vulnerabilities, see Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 129-31, 140-50 (2018).

63. See *One Fair Wage*, RESTAURANT OPPORTUNITIES CTRS. UNITED, <https://perma.cc/7RSE-F966> (archived May 28, 2018).

64. See Schultz, *The Sanitized Workplace*, *supra* note 14, at 2090-2103, 2124-31.

Common sense suggests that not all sexual conversations, invitations, or relationships are discriminatory or harmful; this is why the law requires that harassment be unwanted or unwelcome. Yet policies that ban all sexual talk and conduct permit companies to punish employees for harmless interactions, even where they aren't linked to sexism or other bias and even where women (or other potential victims of harassment) do not find them unwelcome. Furthermore, research shows that companies sometimes use alleged harassment as a pretext for firing employees for less salutary reasons, such as sexual orientation, race, or age.<sup>65</sup>

Such an overzealous approach to sexual expression invites cynicism and backlash against initiatives to combat harassment. It fails to promote equality for women, while leaving LGBTQ people, men of color, and others who are stereotyped as overly sexual vulnerable to disproportionate punishment and job loss.<sup>66</sup> Labeling all sexual expression harassing without attention to context can also chill interactions among employees and can reduce equality and solidarity by hindering close ties between men and women at work. Fear of being accused of harassment for benign comments or interactions can also encourage higher-ups to exclude or avoid women, further fueling sex-segregated patterns of employment.<sup>67</sup>

Although sexuality is often used as a weapon of sexism, it is important to recognize that sexual talk and behavior are not inherently discriminatory or degrading to women at work. Employees may resort to sexual conversation for many benign purposes, including building solidarity, relieving tension, and

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65. See Arnov-Richman, *supra* note 56, at 97-99 (2018) (discussing examples); Schultz, *The Sanitized Workplace*, *supra* note 14, at 2113-16 (same). In one recent case, Donald Zarda, a gay male skydiving instructor who was about to dive tandem with a female client, their bodies strapped tightly together, sought to reassure her about the close physical proximity by remarking that he was gay “and ha[d] an ex-husband to prove it.” *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (alteration in original). The woman later told her boyfriend that Zarda had touched her breast inappropriately while they were sky-diving through the air and had made up being gay as an excuse. Zarda’s boss fired him, despite the implausibility of an openly gay man sexually assaulting a woman after jumping from a speeding airplane at 4,000 feet and somersaulting, free fall, through the air. See Chris Rovzar, *Woman Gets Man Fired for Spooning Her in Midair*, N.Y. (Oct. 4, 2010, 10:37 AM), <https://perma.cc/XT3G-RYDY>. The company said it fired Zarda for sexual harassment, but the real reason seemed to be his sexual orientation. All the heterosexual instructors made similar jokes with the clients, but only Zarda, the gay instructor, was fired. See *Zarda*, 883 F.3d at 108-09.

66. See, e.g., Joel Mittleman, *Sexual Orientation and School Discipline: New Evidence from a Population-Based Sample*, 47 EDUC. RESEARCHER 181, 187-88 (2018); Jane Ward, *Bad Girls: On Being the Accused*, BULLY BLOGGERS (Dec. 21, 2017), <https://perma.cc/7KZY-7JH8>.

67. Consider, for example, Vice President Mike Pence’s rule of never dining alone with a woman who is not his wife or attending events where alcohol is served without her there—a rule that limits women’s but not men’s social interactions with Mr. Pence. Tara Isabella Burton, *Former Trump Adviser Says the “Pence Rule” Would Have Protected Women from Weinstein. He’s Wrong*, VOX (Oct. 12, 2017, 2:30 PM EDT), <https://perma.cc/X6QB-ELVN> (discussing the rule’s assumptions and consequences).

staving off anxiety.<sup>68</sup> Indeed, women's experience of sexual talk or behavior at work may depend importantly on the context—including whether the job setting is sex-segregated or more gender-balanced.<sup>69</sup> In traditionally male-dominated settings, men frequently use sexual (and nonsexual) behavior to intimidate and harass women; it is unsurprising that in these settings, women experience sexual talk and behavior as threatening. In less sex-segregated, more equal settings, however, women may have greater presence and power to shape the workplace culture, including sexual norms. Indeed, evidence suggests that in these settings, women are less likely to experience sexual harassment,<sup>70</sup> and less likely to perceive sexual remarks and behavior they experience as harassing,<sup>71</sup> providing further support for the importance of attending to structural factors such as sex segregation in order to reduce harassment.

Although eliminating sex segregation should reduce harassment, some people may experience harassment even in more gender-integrated, egalitarian organizations;<sup>72</sup> organizations must have well-designed, local policies and practices to address such incidents. To help prevent and detect discriminatory enforcement of harassment policies, it is important to ensure fair and evenhanded investigatory processes for people accused of harassment, as well as for accusers; progressive discipline should be required for all employees.<sup>73</sup> But given that most Americans are at-will employees with no protection against unjust firing, it is unrealistic to rely on fair process alone to combat overly broad prohibitions and pretextual punishments. Reforms should discourage one-size-fits-all, zero-tolerance bans on all sexual expression, and should stress the need for concrete, localized, and holistic plans for achieving

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68. See Schultz, *The Sanitized Workplace*, *supra* note 14, at 2149-50.

69. See *id.* at 2143-52.

70. See, e.g., McLaughlin et al., *supra* note 4, at 627 (citing studies showing that “[t]he weight of the evidence suggests that harassment, of both men and women, most often occurs in male-dominated work settings”).

71. For quantitative evidence, see McLaughlin et al., *supra* note 4, at 634 (finding that women who work in male-dominated settings are far more likely to label sexual behaviors as sexual harassment, because those behaviors “may be interpreted as more menacing, malicious, or degrading at jobsites where [they] are socially and numerically isolated,” as or because “when women are surrounded by men, they may interpret behaviors differently and be more likely to label sexualized behaviors as harassment than will women in more gender-balanced settings”); and Schultz, *The Sanitized Workplace*, *supra* note 14, at 2144 & nn.333-36 (discussing additional quantitative evidence). For qualitative studies, see Schultz, *The Sanitized Workplace*, *supra* note 14, at 2145-52 & nn.338-68 (discussing such studies). See also Kari Lerum, *Sexuality, Power, and Camaraderie in Service Work*, 18 GENDER & SOC’Y 756, 757-58, 772-74 (2004).

72. See generally Rebecca K. Lee, *Beyond the Rhetoric: What It Means to Lead in a Diverse and Unequal World*, 71 STAN. L. REV. ONLINE 110, 110-13 (2018).

73. See Arnow-Richman, *supra* note 56, at 97 & n.50, 101-02 (explaining progressive discipline and recommending it and other protections for lower-level at-will workers accused of harassment).

full equality, inclusion, and freedom from unwelcome, sex-based harassment for all employees.

**Principle #7: Proposed reforms.**

7.1. Harassment policies, training, and reforms should refer to all forms of sex-based harassment, rather than focusing narrowly on sexual remarks, jokes, and behaviors.

7.2. Organizations should communicate clearly and honestly about expected behaviors and offenses. Harassment policies and training programs should provide concrete examples and discussions of the circumstances in which sexual remarks, jokes, or behaviors do and do not amount to harassment.

7.3. Organizations should discipline only employees who engage in unwelcome sex-based harassment that negatively affects another employee's psychological well-being, work performance, employment status, or professional advancement, or that if left unchecked will contribute to a discriminatory work environment.<sup>74</sup>

7.4. Organizations should not prohibit dating or sexual interactions among same-level employees except where necessary to prevent conflicts of interest, in which case nonsexual forms of intimacy, such as close friendships, should also be evaluated for conflicts of interest.

7.5. To ensure fairness and avoid retaliation against complainants, organizations should undertake fair and evenhanded investigations of harassment allegations, should ensure confidentiality to the extent possible, and should use counseling and progressive discipline that is proportionate to the infraction.

7.6. Organizations should permit both accusers and those who are accused of harassment to have an advocate present at any investigatory proceeding, even if they are not members of labor unions or other collective employee representation groups.

7.7. Organizations should refrain from using harassment as a pretext for punishing employees for other reasons. Doing so promotes resistance to anti-harassment initiatives and undermines confidence in the complaint process and the organization.

7.8. Organizations should monitor the results of the complaint process and ensure that findings and punishments are consistent across cases and that some alleged perpetrators are not found to have engaged in harassment more often or be punished more severely than others because of race, national origin, sexual orientation, age, or other discriminatory factors.

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74. This standard is slightly broader than the legal definition, giving employers some scope to address discriminatory conduct that would not rise to the level of being legally actionable. See EEOC TASK FORCE REPORT, *supra* note 2, at iv (seeking to address conduct which may not be legally actionable but which, left unchecked, may set the stage for unlawful harassment).

7.9. Reform efforts should promote unionization and other forms of collective employee representation as methods to safeguard fair investigations, to secure rights for both accusers and accused to have advocates present, to protect the accused from wrongful or pretextual firing, and to ensure evenhanded, progressive, and proportionate discipline.

7.10. Eliminating segregation and ensuring equality for women of all racial and ethnic backgrounds should remain an independent goal aimed at reducing harassment. Not only does equal inclusion provide women the strength and safety to counter stereotypes and resist harassment; it also empowers them to participate effectively in crafting non-sexist workplace cultures and in establishing appropriate sexual norms.

**Principle #8: Protection against retaliation for victims of harassment and people who stand up for them must be strengthened.**

Eliminating sexual harassment requires solidarity with victims. Harassment can be eliminated only if people who are harassed are safe in coming forward and if other people can safely stand up for them.

To end harassment, organizations must create cultures of equal inclusion and respect; leaders set the tone and example. Managers can provide time, money, and organizational resources to prevent harassment, investigate complaints fairly, monitor results, and establish a climate of respect for all employees.<sup>75</sup> They can also desegregate along sex and gender lines and create structural conditions in which equality and respect can flourish.

But addressing harassment is too important to be left to management alone. Employees have a vital stake and role to play in creating nondiscriminatory workplace cultures and ensuring inclusion for everyone. Politicians, reporters, educators, activists, shareholders, consumers, and ordinary citizens can also stand up for victims—and for what is right—across traditional boundaries of sex, gender, sexual orientation, race, national origin, and occupational status.

Past and present reports provide inspiring examples of this solidarity. During the civil rights era, a Spanish-surnamed medical employee in Houston, Texas claimed her work environment was hostile and discriminatory because her employer racially segregated Black patients.<sup>76</sup> Two decades later, white male police officers in Richmond, Virginia filed suit when they were punished for protesting mistreatment of white and Black female officers by a higher-up.<sup>77</sup>

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75. See EEOC TASK FORCE REPORT, *supra* note 2, at 31-59 (discussing steps organizations can take to create hospitable, accountable work cultures).

76. *Rogers v. Equal Emp't Opportunity Comm'n*, 454 F.2d 234, 236 (5th Cir. 1971); *id.* at 243 & n.2 (Roney, J., dissenting). In doing so, Josephine Chavez made a lasting contribution to civil rights law. The resulting decision was the first to recognize a claim for hostile work environment harassment under Title VII. See *id.* at 237-38.

77. *Childress v. City of Richmond*, 907 F. Supp. 934, 937-38 (E.D. Va. 1995), *claims by male officers dismissed*, 919 F. Supp. 216 (E.D. Va. 1996), *vacated and remanded*, 120 F.3d 476 (4th

Today, prominent Hollywood actors and poor Latina farmworkers who face harassment stand up for each other.<sup>78</sup>

The legal system should provide robust protection from retaliation for victims of harassment and the allies who support them. But it does not.<sup>79</sup> Research shows that most people who experience harassment do not report it, largely because they fear retaliation<sup>80</sup>—and with good reason. The law fails to protect employees from retaliation in several respects, including the following important ways.<sup>81</sup>

First, anti-retaliation law fails to protect employees when they object to perceived harassment that does not yet rise to the level of severity or pervasiveness a “reasonable” person would find hostile and abusive.<sup>82</sup> This requirement creates a stark dilemma for victims: They must report acts of harassment to their employers within a short time frame in order to preserve the right to sue, but they must not report before the acts have become sufficiently severe or pervasive to be deemed legally actionable.<sup>83</sup> Negotiating this terrain requires an acumen lacked by many lawyers, let alone by the ordinary employees the law is supposed to protect. It is little wonder that few victims complain.<sup>84</sup> Discouraging victims from reporting not only robs them of relief; it also deprives employers and society of the victims’ view of what harassment is and how law and policy should address it.

In addition, the courts fail to protect employees from many common forms of retaliation by employers, holding that these acts are not “materially adverse” actions that would dissuade a reasonable person from reporting harassment or

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Cir. 1997), *panel opinion vacated and judgment below aff'd*, 134 F.3d 1205 (4th Cir. 1998) (en banc) (per curiam). For an illuminating discussion of the *Childress* case and the legal barriers to attaining cross-race, cross-gender solidarity generally, see Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002).

78. See *Alianza Nacional de Campesinas*, *supra* note 54.

79. For recent discussions of the failings of retaliation law, see generally Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49 (2018). See also Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 136-39 (2014) (using the term “reasonable belief trap” to describe this dilemma faced by employees who must decide when to report harassment).

80. See Porter, *supra* note 79, at 50-52, 58 (discussing how fear of retaliation deters reporting harassment and collecting sources).

81. See EEOC TASK FORCE REPORT, *supra* note 2, at 16-17 & nn.65-68 (discussing social science research documenting the prevalence of retaliation).

82. See *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) (per curiam).

83. See SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 49-55 (2017) (showing how courts limit retaliation claims by construing this standard narrowly).

84. See, e.g., EEOC TASK FORCE REPORT, *supra* note 2, at v (stating that roughly three out of four people who experience harassment never even talk to a supervisor, manager, or union representative about it).

discrimination.<sup>85</sup> Judges have held that disciplinary actions, reprimands, negative performance evaluations, changes in schedule and work assignments, paid suspensions, and even acts of shunning and ostracization do not constitute actionable retaliation,<sup>86</sup> despite evidence that such actions would deter most people from complaining.<sup>87</sup>

The courts also fail victims by holding them to impossible standards for proving their employers retaliated “because” they complained about harassment or discrimination. Employees must show that their complaints were the but-for cause, and not simply one reason, for the retaliation;<sup>88</sup> this standard allows employers to prevail by proving that they may have taken additional, non-retaliatory factors into account before acting. Furthermore, to prove causation through temporal proximity—the only evidence most plaintiffs will ever have—the retaliation must follow very closely on the heels of known complaints.<sup>89</sup> Smart employers can evade liability by waiting patiently before acting, documenting problems with the employee’s record, and taking punitive actions short of firing. Much of the time, employers do not even need to actually retaliate to deter complaints: “Retaliation performs most of its work simply by being threatened (explicitly or implicitly).”<sup>90</sup>

All these problems, and more, confront allies who wish to stand up for victims of harassment or discrimination. The law does not adequately protect employees who object to harassment or discrimination against customers or other non-employees, for example, or employees who object to carrying out a discriminatory order in the future.<sup>91</sup> Nor does the law consistently recognize that employees punished for opposing mistreatment of people of a different race or sex are themselves victims, not beneficiaries, of intergroup discrimination.<sup>92</sup> To end harassment, the law should not only protect, but also actively encourage, managers and employees to identify and stand with people

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85. The Supreme Court has held that a retaliation complainant must show that the employer engaged in a “materially adverse” employment action sufficiently harmful to dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). Although this standard sounds reasonable, lower courts have held that a wide variety of actions are not materially adverse. See SPERINO & THOMAS, *supra* note 83, at 44-49.

86. Porter, *supra* note 79, at 54-55 (citing cases).

87. SPERINO & THOMAS, *supra* note 83, at 46-49 (reporting results from Sperino’s survey of law students, of whom about 80% thought they would or might be dissuaded from complaining by a negative evaluation and more than half would or might by a paid suspension, office relocation, changed job responsibilities, or social ostracism).

88. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (requiring retaliation plaintiffs to show but-for causation under Title VII).

89. Porter, *supra* note 79, at 56.

90. *Id.* at 52 & n.19 (citing Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 39-40 (2005)); see also Mizrahi, *supra* note 62, 137-38.

91. See Zatz, *supra* note 77, at 93-99, 105-08.

92. *Id.* at 136-38.



who are experiencing harassment and discrimination.<sup>93</sup> Without empowering victims and their allies to protest perceived wrongdoing, there is no way to eliminate harassment or to move the law forward.

**Principle #8: Proposed reforms.**

8.1. Retaliation should be defined broadly to include any adverse action an employee believes in good faith is detrimental. Courts should not second-guess employees, the people who are most familiar with and most affected by workplace power dynamics.

8.2. Organizations should protect from retaliation all employees who allege, oppose, report, complain about, resist, or participate in a process investigating an incident of subjectively perceived harassment or discrimination, provided that the employee has a good faith belief that the conduct violates the law and regardless of whether it may reasonably be believed to do so.

8.3. Organizations should also protect from retaliation all employees who support, defend, associate with, or resist taking adverse actions against people who allege, oppose, report, complain about, resist, or experience harassment or discrimination by a member, customer, or other stakeholder of the organization. This protection should be given regardless of whether the supporters are managers, supervisors, coworkers, or subordinates of the victims, and regardless of whether the victims share the sex, race, or other group-based affiliation of those whom they support.

8.4. Organizations should not permit retaliation to be a motivating factor in decision-making about employees and should hold all managers, supervisors, and employees accountable for retaliation even where it is not a but-for cause of any negative decision.

8.5. Lawmakers, courts, and agencies should strengthen federal and state antidiscrimination laws to require organizations to offer these protections.

8.6. To encourage greater support for victims of harassment and discrimination, organizations should consider experimenting with and documenting results from bystander intervention programs, which are designed to give employees the tools to intervene when they witness harassment or discrimination against coworkers,<sup>94</sup> and which may hold promise for altering patterns of complicity and acquiescence in wrongdoing.

**Principle #9: Victims of harassment should have the same recourse to**

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93. For a substantive discrimination theory that promises to deliver such protection and transcend the limits of Title VII's anti-retaliation clause, see *id.* at 108-23.

94. See EEOC TASK FORCE REPORT, *supra* note 2, at vi, 57-60.

**the legal system as other victims of discrimination.**

Sexual harassment is a form of discrimination, and it should be treated the same as other types of discrimination under the law. But it is often treated differently, to the detriment of harassment victims.

The most glaring exception involves legal liability for employers. In all other discrimination lawsuits, when a supervisor discriminates in making an employment decision such as hiring, firing, promoting, or paying employees, the law imposes strict liability on the employer; this means the employer cannot escape responsibility for the supervisor's discrimination even if higher-ups did not know about it and had no reason to know. Victims can go straight to the EEOC (or comparable state agency) and file a charge of discrimination, and then file suit without first complaining to the employer. Strict liability pressures employers to monitor for and prevent discrimination before it occurs, and to address it afterward. Without it, the law would have made little progress toward eliminating discrimination.

The rules for sexual harassment are different. Even though hostile work environment harassment is simply a form of discrimination in the terms and conditions of employment, the Supreme Court has said employers do not face the usual strict liability for this type of harassment.<sup>95</sup> If the harassment does not lead to a concrete employment decision, such as firing or demotion, victims of hostile work environment harassment cannot complain directly to an agency and court; they must first report the harassment to the employer through its internal complaint process or else risk losing later in court.<sup>96</sup>

There is little evidence that employers' internal complaint processes do much to stop harassment. They are often created merely to ward off legal liability and are staffed by people who face pressure to resolve complaints quickly with little disruption to the organization.<sup>97</sup> Even when they work well to resolve individual complaints, these processes cannot really prevent harassment. They only respond to problems that are already occurring, and they do not address the broader workplace conditions that foster harassment in the first place. They also place the onus of managing harassment on individual victims, who for many reasons are often reluctant to report harassment. For these reasons, it is unsurprising that evidence suggests such measures have not worked to reduce harassment.<sup>98</sup> Ultimately, requiring victims to report harassment through internal complaint processes discourages them from

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95. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 791-92, 807-08 (1998).

96. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

97. See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 124-25 (2016).

98. See, e.g., EDELMAN, *supra* note 97, at 127-33, 137-38; Dobbin & Kalev, *supra* note 14; cf. Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 68, 70 (2018).

challenging harassment at all, because many victims fear reprisal from harassers, higher-ups, and unsympathetic coworkers who may learn about their complaints through the company grapevine.<sup>99</sup>

In addition to imposing more stringent complaint requirements and employer liability rules on harassment victims, the law also requires them to prove elements that are not required of other employees who experience discrimination. While all complainants must show that the alleged discrimination was based on sex, only hostile work environment harassment victims must prove that the conduct was sufficiently “severe or pervasive” that a reasonable person would find that it created an intimidating, hostile, or abusive work environment.<sup>100</sup> The courts have set an unduly high bar for meeting this standard that prevents many victims from having their day in court, let alone winning.<sup>101</sup> Judges have also turned a blind eye to sexism, refusing to find that harassment is “because of sex” when it is clearly driven by sexism and stereotyping.<sup>102</sup> These barriers are unacceptable. So long as harassment makes it more difficult for people to do their work because of their sex or gender, it should be prohibited just like all other forms of discrimination.

It is unfair and unwise to subject harassment cases to more onerous legal rules than other forms of discrimination. Doing so not only harms harassment victims: Eventually, it harms everyone, as the courts inevitably borrow and apply the special rules created for harassment to limit protections for employees in other areas of discrimination law.<sup>103</sup> All victims of harassment and discrimination should have recourse to the legal system on equal, accessible terms.

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99. *See supra* note 80; *see also* Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1262-63, 1266 (2006) (suggesting that women of color mistrust employers’ internal complaint processes more than other workers and thus requiring employees to use these processes causes women of color to forfeit or lose harassment lawsuits at a higher rate).

100. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

101. *See SPERINO & THOMAS, supra* note 83, at 32-40 (collecting cases); David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 500-01 (2009) (showing that even after *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), clarified that harassment need not be sexual in nature, plaintiffs in federal appellate cases continued to fare worse on proving the “severe or pervasive” element where the complained-of conduct was largely or wholly nonsexual).

102. Schultz, *Reconceptualizing Sexual Harassment, supra* note 3, at 1749-55 (discussing cases in which courts failed to find that harassment occurred because of sex); Walsh, *supra* note 101, at 490-91, 491 tbl.5 (finding that in hostile work environment cases, plaintiffs had the most difficulty establishing the “because of sex” requirement and that the problem became worse after 1998).

103. *See, e.g., Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 544-45 (1999) (applying agency principles as elaborated in sexual harassment decisions to limit the vicarious liability of employers for punitive damages under Title VII).

**Principle #9: Proposed reforms.**

9.1. Congress should amend Title VII to override Supreme Court decisions imposing different rules for establishing employer liability for hostile work environment harassment than those that apply to other forms of discrimination.

9.2. State lawmakers, courts, and agencies should clarify that hostile work environment harassment is subject to strict liability on the same terms as other forms of discrimination.

9.3. Through these and other pronouncements, federal and state law should clarify that internal complaint processes for harassment and discrimination are voluntary, not mandatory. Victims should not be required to use them before filing an agency complaint or lawsuit.

9.4. Research should investigate the best ways to design and implement internal complaint processes for purposes of encouraging victims to report harassment and discrimination and incentivizing companies to address these problems effectively, recognizing that these processes are no substitute for more proactive measures to prevent harassment and discrimination.

9.5. Organizations should offer complainants a choice among multiple processes (formal and informal), among multiple complaint handlers in different positions (immediate supervisor, others in the chain of command, human resources manager, ombudsman, employee-assistance counselor, anonymous hotline operator), and should ensure diverse representation among complaint handlers and decision-makers.<sup>104</sup>

9.6. Federal and state lawmakers, courts, and agencies should adopt a standard for proving hostile work environment harassment that comports with common understanding: So long as the harassment makes it more difficult for people to do their work because of their sex or gender, it is discrimination in the terms and conditions of employment prohibited by law.

9.7. Enforcement, education, media coverage, and reform efforts should call attention to these limitations and work to create public awareness and political consensus for change.

**Principle #10: Prevention and remedies must move beyond punishing individual wrongdoers to encourage systemic institutional change.**

Harassment is a large-scale problem; it requires bold solutions. Organizations should hold individual harassers accountable for their actions, as discussed above. But allowing serious harassers to resign quietly does not do anything to prevent them from causing harm elsewhere. Even publicly firing them fails to remedy the career and personal setbacks suffered by the victims—

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104. See *Written Testimony of Lilia M. Cortina, Ph.D., Professor of Psychology and Women's Studies, University of Michigan*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 15, 2015), <https://perma.cc/8WM9-X3XH>.

or to prevent similar harassment from recurring in the future. Eventually, other harassers will take their place unless the underlying conditions and cultures that fostered the harassment in the first place are changed. Harassment cannot be eliminated by rooting out individual harassers one by one.

To move beyond the status quo requires moving beyond individual solutions to approaches that hold institutions accountable for systemic harassment and its sources.<sup>105</sup> We urge combining claims of hostile work environment harassment with class-wide claims of discrimination in recruiting, hiring, assignment, and promotion, for example, as a way to challenge sex segregation and harassment, expose the links between them, and obtain remedies to deal with both problems simultaneously. Such challenges can be made inside and outside the legal system, appealing to ideals of equality and fairness while seeking justice in many arenas.

Inside the legal system, recent Supreme Court decisions make it difficult to seek justice along these lines; in a society governed by the rule of law, these decisions cannot be allowed to stand. The Court has cut back on the availability of Title VII class actions,<sup>106</sup> for example, and upheld mandatory arbitration agreements for discrimination claims.<sup>107</sup> The Court has even upheld mandatory arbitration agreements that bar class-wide claims and collective actions,<sup>108</sup> despite the fact that many employees lack any realistic ability to decline to enter into such agreements. These decisions force employees into private arbitration forums that tend to favor employers and prevent people from joining with their coworkers to challenge injustices together. Not only do such decisions limit access to justice for employees who have experienced

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105. See TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 1-6 (2017); Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 Yale L.J.F. 152, 166-67 (2018); Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 5, at 58-65; Schultz, *Telling Stories*, *supra* note 21, at 1756, 1826, 1832-35, 1841-43 (offering a structural account of sex segregated employment).

106. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 343-44, 359-60 (2011) (invalidating a nationwide class action sex discrimination challenge to a subjective system for promotion and pay associated with under-hiring and underpaying women on the ground that the action failed to satisfy the common “questions of law or fact” requirement for a class action certified under FED. R. CIV. P. 23(a) and 23(b)(2)).

107. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009) (upholding the validity under federal law of a collective bargaining agreement requiring employees to submit age discrimination claims to mandatory, binding arbitration); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (upholding the validity under the Federal Arbitration Act of an agreement requiring employees to submit all employment disputes, including discrimination claims, to mandatory, binding arbitration).

108. See *Epic Sys. Corp. v. Lewis*, No. 16-285, slip op. at 1-3 (May 21, 2018) (upholding the validity under the Federal Arbitration Act and the National Labor Relations Act of a mandatory arbitration agreement requiring employees to waive their right to pursue class or collective actions to enforce their employment rights under the Fair Labor Standards Act).

harassment and discrimination; even enforcement agencies are hindered in obtaining meaningful reforms when the courts treat harassment as a problem of individual bad actors, rather than as a product of the broader workplace structures and environments in which those individuals work and interact.

To make matters worse, many employees are not covered by the laws that might help them. People who work for small businesses are not protected by most federal or state antidiscrimination laws, for example; the same is true for unpaid interns and volunteers. Contract workers are not covered by antidiscrimination or other employment laws at all, even though they constitute a growing share of the economy. Nor are people involved in business relationships other than employment, such as founders and investors, members of boards of directors, or customers or consumers, typically protected by the relevant laws. Even for people who are covered by the laws, a variety of barriers remain. Many employees are asked to sign nondisclosure agreements forbidding them from disclosing anything about the company or saying anything that would portray the company or its executives in a negative light.<sup>109</sup> Short statutes of limitations prevent others from suing. For those who can sue, Title VII imposes limits on damages, making it difficult for middle-class and low-wage earners who experience sexual harassment or sex discrimination to find lawyers to help them vindicate their claims.<sup>110</sup> These are only a few of the problems that stand in the way of individual justice and legal reform. State laws have a leading role to play in solving these problems,<sup>111</sup> but many of the existing laws have limits.

Employees, advocates, policymakers, educators, labor unions, activists, students, and ordinary citizens must think expansively about how to facilitate systemic change to prevent and remedy harassment and discrimination. We must move beyond individual punishment to embrace actions that will alter the structure and culture of our institutions and encourage greater equality, respect, and solidarity among those who inhabit them. Such actions can and should be undertaken inside and outside the legal system, inspired by enduring legal ideals of equality and fairness for all. To facilitate more universal access to the legal system and more systemic change in and through the law, we propose the following reforms.

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109. See Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 76-77 (2018); Mizrahi, *supra* note 62, at 134-35; Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://perma.cc/Q7CE-38FF>.

110. The TIME'S UP Legal Defense Fund established through the National Women's Law Center is attempting to address the problem by subsidizing viable sexual harassment complaints for victims whose monetary awards would be too low to attract competent legal counsel. See *TIME'S UP Legal Defense Fund*, NAT'L WOMEN'S L. CTR., <https://perma.cc/9JKW-NF95> (archived May 28, 2018).

111. See, e.g., Mizrahi, *supra* note 62, at 128-31, 140-50.

**Principle #10: Proposed reforms.**

10.1. Organizations should monitor harassment and discrimination complaints for larger patterns of bias and broader hostile work environments. Responding to individual complaints and resolving them one by one is inadequate where they are part of a broader culture of stereotyping, discrimination, and inequality in the workplace.

10.2. To facilitate more effective enforcement by private litigants, Congress should amend Title VII to allow aggrieved parties to bring class-wide claims.

10.3. Congress should amend Title VII to permit aggrieved parties to bring lawsuits in federal or state courts regardless of any mandatory arbitration agreements and to bring class-wide claims regardless of agreements barring collective actions.

10.4. Congress should amend the Federal Arbitration Act to override decisions interpreting the statute to uphold mandatory arbitration provisions in employment contracts.

10.5. State lawmakers, courts, and agencies should reject decisions cutting back on class actions, upholding mandatory arbitration agreements, and upholding agreements barring class-wide claims and collective action, and should clarify that employees can challenge harassment and discrimination in state courts through individual and class-wide claims.

10.6. Through such pronouncements, federal and state law should clarify that private arbitration for harassment and discrimination claims is voluntary, not mandatory. Victims should not be required to use arbitration before filing an agency complaint or lawsuit.

10.6. To increase employers' incentives to address harassment and to encourage lawyers to bring claims on behalf of low-wage workers, Congress should amend Title VII to remove or increase the caps on individual damages.

10.7. Awarding money damages alone will not end harassment. Given the link between sex-based harassment and sex segregation, enforcement agencies and private litigants should seek, and courts should order, injunctive relief requiring employers to take affirmative steps to eradicate discrimination and segregation as a remedy in harassment cases. The same is true of race-based and intersectional harassment and segregation.

10.8. To prevent organizations from simply passing on harassment problems to others, federal and state lawmakers and courts should impose legal liability on organizations when they fail to disclose a record of severe, pervasive, or serial harassment in recommending current or former employees to future organizations, and the employee engages in harassment again.

10.9. Federal and state law should restrict the use in standard employment contracts of broad nondisclosure agreements that prohibit employees from revealing information about their companies or executives, enforcing them only where workplace information is directly tied to an employer's innovative

or competitive advantage.<sup>112</sup> The law should also restrict the use of such agreements in the context of settling an employee's legal claims, enforcing them only where they meet certain requirements designed to permit disclosure of serial harassment or discrimination.<sup>113</sup>

10.10. Federal and state laws should be amended or interpreted to extend to contract workers (and not just employees), unpaid interns and volunteers, employers with small numbers of employees, and organizations and individuals involved in business dealings other than employment, such as investors. The goal should be universal coverage.

10.11. Educators and policymakers should continue research in the social sciences and law to determine which measures are most effective in eliminating harassment and discrimination. Employers should seek out experts to design meaningful measures to reduce harassment in their individual workplaces.

10.12. Harassment should not be further criminalized unless it rises to the level of rape or sexual assault. Criminalization offers an individualized, punitive approach. The way forward is education and systemic change.

### **Conclusion**

As scholars of employment discrimination law, we emphasize solutions and remedies that focus on the workplace and business dealings. There is much work to be done in those arenas. Yet it's clear that biased attitudes begin earlier and exist throughout society. Colleges and universities, vocational technical schools, and post-secondary training programs prepare people for professional life; women and men interact with each other from a young age in school settings. Title VII, Title IX, and other laws guaranteeing equality should be debated and enforced on campuses and in schools, ensuring that young people come of age in institutions that model gender inclusion and equal treatment instead of sex segregation and harassment. Ultimately, all institutions and all people must do their part. There is no substitute for continuing education and activism.

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112. See Lobel, *supra* note 109.

113. See Ayres, *supra* note 109, at 79.