

2007

Rejecting Reasonableness: A New Look at Title VII's Anti-Retaliation Provision

Briane J. Gorod

Law Clerk, U.S. Court of Appeals for the Second Circuit, briane.gorod@gmail.com

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Gorod, Briane J. "Rejecting Reasonableness: A New Look at Title VII's Anti-Retaliation Provision." *American University Law Review* 56, no. 6 (August 2007):1469-1523.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

Rejecting Reasonableness: A New Look at Title VII's Anti-Retaliation Provision

Abstract

This Article argues that the “reasonableness” requirement of Title VII should be rejected. Under this approach, a plaintiff’s complaint would be protected unless the defendant could establish that the plaintiff was acting in bad faith at the time she made the complaint. Such a standard would offer employers some protection from retaliation suits based on frivolous complaints without compromising the significant goals the retaliation provision can serve. Part I provides background on Title VII and the anti-retaliation provision, particularly the “opposition” clause, explains why the anti-retaliation provision is necessary and how courts have interpreted the scope of the conduct it protects, and identifies the problem with the current approach, namely, that the “reasonableness” requirement provides too little clarity as to what conduct is protected and gives courts a powerful tool by which they can limit the scope of protected conduct under the statute. Part I concludes with a discussion of the D.C. and Fourth Circuit decisions that illustrate the problems this approach creates. Part II explains why these decisions are so problematic, especially in the context of hostile work environment claims, examines how these courts’ definitions of the term “reasonableness” threaten to undercut the anti-retaliation provision’s effectiveness by discouraging harassment victims from reporting what they are experiencing, especially in the earliest stages of the harassment, and then argues that the way to address this problem is not to craft some alternative definition of the term reasonable; rather, the better approach is to reject the “reasonableness” requirement altogether. Part III explores the benefits of this approach and discusses how a stronger anti-retaliation provision will serve Title VII’s myriad goals. These benefits relate, in part, to enforcement: Individuals will be more likely to report conduct if they believe that their complaint will be protected, and this approach will also facilitate more informal methods of resolving harassment claims. But the benefits go beyond enforcement. By encouraging individuals to report harassment, the anti-retaliation provision can facilitate a change in the norms that govern the workplace and can ameliorate the harms that harassment causes.

Keywords

Title VII Reasonableness requirement, Workplace discrimination, Hostile work environment, Harassment in the workplace

ARTICLES

REJECTING “REASONABLENESS”: A NEW LOOK AT TITLE VII’S ANTI-RETALIATION PROVISION

BRIANNE J. GOROD*

TABLE OF CONTENTS

Introduction.....	1470
I. Background	1474
A. Title VII.....	1475
B. Anti-Retaliation Under Title VII.....	1478
C. Defining Protected Conduct.....	1482
D. The Questions: Applying “Reasonableness”.....	1485
II. Changing the Paradigm: Rejecting “Reasonableness”	1489
A. The Problem.....	1490
B. The Solution	1497
III. The Benefits of the New Paradigm.....	1503
A. Preventing Harm	1504
B. Informal Resolution	1507
C. Ameliorating Harm	1511
D. Changing Norms	1515
Conclusion	1522

* Law Clerk, Honorable Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit; J.D., *Yale Law School*, 2005; B.S./M.A., *Emory University*, 2002. For their helpful comments and support, I am very grateful to Herbert Gorod, Lynn Gorod, Gillian Metzger, Jennifer Peresie, Judge Jed S. Rakoff, Andrew Woolf, and Steven Wu. I would also like to thank the staff of the *American University Law Review* for their helpful editorial assistance.

INTRODUCTION

Enacted to facilitate enforcement of Title VII's prohibitions on workplace discrimination, the statute's anti-retaliation provision has received neither the attention nor the acclaim that has been focused on the statute as a whole. To the contrary, its significance—particularly its potential significance if interpreted appropriately—has been underappreciated by commentators and courts alike. Although courts have acknowledged the important role the provision plays in encouraging the reporting of Title VII violations,¹ the provision can—and should—play a much more significant role in achieving the goals Title VII was enacted to realize.

Title VII prohibits discrimination in the workplace,² but it is more than a top-down enforcement mechanism, imposing equality values on an unwilling society. It also plays a fundamental role in radically reshaping societal norms in a way that can facilitate meaningful change from the bottom-up.³ And just as Title VII does more than simply provide a rule of liability for those who discriminate, the anti-retaliation provision can do more than facilitate the imposition of that liability. By ensuring that individuals report possible discrimination, it can facilitate open communication about what conduct violates that norm, and it can help victims cope with, and recover from, the psychological and dignitary harms that such discrimination often causes. But if the anti-retaliation provision is interpreted too narrowly, such that it often fails to protect individuals who report conduct that they believe violates Title VII, it will be unable to serve any of these purposes.

1. See, e.g., *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2412 (2006) (noting that Title VII's anti-retaliation provision "secur[es] [Title VII's] primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees").

2. More specifically, the statute makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2000). With this broad prohibition, Title VII is the primary federal law regulating discrimination in the workplace. Although other pieces of federal legislation govern aspects of the employment relationship, they are, generally speaking, more narrow in scope. See, e.g., *The Equal Pay Act of 1963*, 29 U.S.C. § 206(d) (2000) (proscribing wage discrimination on the basis of sex); *Federal Age Discrimination in Employment Act*, 29 U.S.C. §§ 621-34 (2000) (prohibiting age discrimination in employment).

3. By rejecting the idea that racial stereotypes and gender norms are acceptable, Title VII has helped to create a widespread societal commitment to the equality principle. In this sense, Title VII is what Linda Hamilton Krieger has described as a "transformative law," one "aimed at changing social norms which it perceives to be unjust or otherwise undesirable." Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 479 (2000).

Yet the interpretation that courts currently give the provision’s “opposition” clause suffers from just this flaw. Under the opposition clause, an employer may not “discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice” by Title VII.⁴ In *Clark County School District v. Breeden*,⁵ the Supreme Court held that the plaintiff could not prevail on his retaliation claims because “no one could reasonably believe that the incident [he experienced] violated Title VII.”⁶ The Court did not evaluate possible alternatives to this “reasonableness” requirement; nor did it offer any justification for it. Instead, it merely assumed that was the appropriate standard because it was the one the Ninth Circuit had applied below.⁷ Indeed, prior to *Clark County*, the courts of appeals had overwhelmingly converged on this standard, denying a plaintiff legal protection under the provision’s “opposition” clause for any retaliation experienced, unless the plaintiff could establish a “good faith, reasonable belief that the challenged practice violate[d]” the statute.⁸

This standard was originally articulated in response to claims that the provision should be construed to protect only individuals who opposed practices that were actually unlawful under the statute.⁹ In response to such arguments, the courts expressed concerns that “[s]uch a narrow interpretation . . . would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances.”¹⁰ Yet at the same

4. 42 U.S.C. § 2000e-3(a).

5. 532 U.S. 268 (2001) (per curiam).

6. *Id.* at 270.

7. *Id.*

8. *See infra* note 10 (noting several courts of appeals decisions in support of a “good faith, reasonable belief” standard under the opposition clause).

9. *See, e.g.,* *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (discussing the arguments against a narrow interpretation of the opposition clause).

10. *Id.*; *see Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. Unit A Sept. 1981) (“[I]nterpreting the opposition clause to protect an employee who reasonably believes that discrimination exists is consistent with a liberal construction of Title VII to implement the Congressional purpose of eliminating discrimination in employment.”) (internal quotation marks & citation omitted); *Parker v. Balt. & Ohio Ry. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981) (“[M]aking the protected nature of an employee’s opposition to alleged discrimination depend on the ultimate resolution of his claim would be inconsistent with the remedial purposes of Title VII.”); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980) (noting that “[t]he district court’s literal reading undermines Title VII’s central purpose, the elimination of employment discrimination by informal means; destroys one of the chief means of achieving that purpose, the frank and nondisruptive exchange of ideas between employers and employees; and serves no redeeming statutory or policy purposes of its own”).

time, the courts recognized the need to provide employers with some protection against retaliation claims based on frivolous complaints,¹¹ and the courts determined that “[t]he employer is sufficiently protected against malicious accusations and frivolous claims by a requirement that an employee seeking the protection of the opposition clause demonstrate a good faith, reasonable belief that the challenged practice violates Title VII.”¹²

Yet this standard, originally intended to construe the opposition clause liberally in service of Title VII’s broad remedial purposes, has paradoxically had the opposite effect, providing too little protection for employees in return for too little benefit to employers. This result was in some sense inevitable: “Reasonableness” is, in any context, an amorphous concept.¹³ The difficulties in relying on it as a decisionmaking tool are only compounded in the context of sexual harassment, which is itself a nebulous concept because the unlawful conduct generally occurs not in one discrete act, but in repeated instances of harassment over time. This makes it difficult to know where exactly the line between the lawful and the unlawful lies.¹⁴ The ambiguity of the line was bound to make it difficult for plaintiffs to know when their complaint would be protected and when it would not.

But two recent courts of appeals decisions illustrate how the “reasonableness” requirement can be used to narrow considerably

11. *Parker*, 652 F.2d at 1020 (asserting that “[c]ourts have recognized the need to balance the employer’s interest in smooth functioning of his business against employees’ interest in achieving internal resolution of discrimination disputes”). Although employers remain free to fire employees who complain so long as they can establish a lawful reason for doing so, that does not mean frivolous complaints are not without costs to employers. Employers must investigate such complaints, and if they do decide to fire the employee, the costs of litigating a retaliation claim can be substantial, even if the employer ultimately prevails.

This concern with balancing the rights of employees and the legitimate business interests of employers is a theme that pervades much of Title VII case law, including interpretations of the substantive anti-discrimination provision. See Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMPLE POL. & CIV. RTS. L. REV. 1, 5 (1996) (stating that opponents of Title VII “feared federal regulation, and the creation of a ‘despotic’ regulatory agency that would ‘subject a great part of American industry to bureaucratic whims, prejudices and caprices’” (quoting 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1298 (Bernard Schwartz ed., 1970) (remarks of Sen. Tower))).

12. *Parker*, 652 F.2d at 1020.

13. Cf. Edward A. Marshall, *Title VII’s Participation Clause and Circuit City Stores v. Adams: Making the Foxes Guardians of the Chickens*, 24 BERKELEY J. EMP. & LAB. L. 71, 89 (2003) (claiming that “[t]he rigor with which the lower courts have applied the subject matter reasonableness requirement has varied from circuit to circuit”).

14. See *infra* Part II.A (elaborating on the difficulty in defining sexual harassment).

the protections the anti-retaliation provision offers.¹⁵ In one decision, the D.C. Circuit suggested that a plaintiff’s belief that conduct was unlawful could satisfy the “reasonableness” requirement only if a reasonable juror could find that the alleged discrimination was a violation of Title VII,¹⁶ thereby effectively holding individuals accountable for knowing the Title VII case law. This result is especially troubling in the context of sexual harassment, where the general public’s perception of what is unlawful likely does not align with the definition provided in the case law.¹⁷ In the other decision, the Fourth Circuit held that a plaintiff who complained about an incident of harassing behavior that was not yet unlawful, but would be if repeated, could establish that his belief was reasonable only if he could establish that he had reason to believe that the conduct would continue.¹⁸ This decision, thus, applied the “reasonableness” requirement in a way that discourages individuals from reporting harassment when it first occurs.

These decisions are especially problematic given the significant role that the anti-retaliation provision, more broadly construed, could play in serving the larger objectives of Title VII. This Article argues that the better approach would be to reject the “reasonableness” requirement. Under this approach, a plaintiff’s complaint would be protected unless the defendant could establish that the plaintiff was acting in bad faith at the time she made the complaint. Such a standard would offer employers some protection from retaliation suits based on frivolous complaints without compromising the significant goals the retaliation provision can serve.

Part I provides background on Title VII and the anti-retaliation provision, particularly the “opposition” clause. It explains why the anti-retaliation provision is necessary and how courts have interpreted the scope of the conduct it protects. It then begins to identify the problem with the current approach, namely, that the “reasonableness” requirement provides too little clarity as to what conduct is protected and gives courts a powerful tool by which they can limit the scope of protected conduct under the statute. Part I concludes with a discussion of the D.C. and Fourth Circuit decisions that illustrate the problems this approach creates.

15. *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006); *George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005).

16. *George*, 407 F.3d at 416.

17. See *infra* Part II.A (explaining the public’s difficulty in distinguishing between “offensive” conduct, which is lawful under the statute, and “abusive” conduct, which is unlawful under the statute).

18. *Jordan*, 458 F.3d at 332.

Part II explains why these decisions are so problematic, especially in the context of hostile work environment claims. It examines how these courts' definitions of the term "reasonableness" threaten to undercut the anti-retaliation provision's effectiveness by discouraging harassment victims from reporting what they are experiencing, especially in the earliest stages of the harassment. It then argues that the way to address this problem is not to craft some alternative definition of the term reasonable; rather, the better approach is to reject the "reasonableness" requirement altogether. Originally designed to balance the rights of employees and the legitimate business interests of employers, the "reasonableness" requirement offers relatively little help to employers in comparison to the significant harms it imposes on harassment victims. A better balance would be achieved if courts rejected this requirement and instead protected a plaintiff's complaint unless the employer could show that the complaint was made in bad faith.

Part III explores the benefits of this approach and discusses how a stronger anti-retaliation provision will serve Title VII's myriad goals. These benefits relate, in part, to enforcement: Individuals will be more likely to report conduct if they believe that their complaint will be protected, and this approach will also facilitate more informal methods of resolving harassment claims. But the benefits go beyond enforcement. By encouraging individuals to report harassment, the anti-retaliation provision can facilitate a change in the norms that govern the workplace and can ameliorate the harms that harassment causes.

I. BACKGROUND

For most workers around the country, Title VII is their foremost source of protection from on-the-job discrimination. Consistent with its libertarian roots, the employment sector in this country historically operated on an at-will basis in which both employers and employees, at least theoretically, had maximum freedom of movement,¹⁹ and employees could be fired for any cause or for no cause at all.²⁰ Title

19. See, e.g., Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000) (stating that the doctrine of at-will employment "has been, and still is, a basic premise undergirding American labor law"); see also Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1515-16 (2002) ("Prior to [Title VII's] passage, employment was viewed primarily as a private contract between employer and employee. The law generally did not interfere with personnel decisions regardless of their unfairness or irrationality.").

20. See, e.g., Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653 (2000) (explaining that "the employment

VII, however, places some constraints on this freedom by making some causes of termination impermissible.²¹ It also makes it unlawful for employers to treat employees differently on account of the protected characteristics of race, religion, gender, and national origin.²² Thus, when Title VII was passed as part of the Civil Rights Act of 1964,²³ it marked, at least theoretically, an important watershed in the history of the United States's treatment of both civil rights and the employment sector.²⁴

A. Title VII

In the workplace, perhaps more than any other institution in this country, individuals with different backgrounds and beliefs come together and interact.²⁵ As a result, the workplace provides a space in

relationship, absent a contract to the contrary, is 'at-will' meaning that either the employer or the employee can terminate the relationship at any time for any reason, even for no reason, without legal liability attaching").

21. For an argument that Title VII's limitations on the at-will employment doctrine have been rendered largely illusory by recent Supreme Court decisions, see generally William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 332 (1996) (arguing that "management prerogatives are being used to suppress the discrimination laws" and "once the whole of discrimination law is weakened by the results in the individual cases, employment at will is left reigning over the landscape of employment relations because fewer victims of discrimination are willing to sue given their small chances of prevailing").

22. 42 U.S.C. § 2000e-2(a) (2000).

23. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

24. See, e.g., Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 947 (1984) (describing the passage of Title VII as the embodiment of the second "major statutory revolution[]" in the area of employer-employee relations); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 379 (1995) [hereinafter Turner, *Thirty Years*] (noting that the Civil Rights Act has been hailed as "the greatest liberal achievement of the decade and the most important civil rights legislation of this century") (internal quotations & footnote omitted). While Title VII offered the promise of significant change in this area, the extent to which it has realized that promise remains the subject of significant dispute. See, e.g., Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1334 (1989) ("What has been the net effect of the cascade of laws and lawsuits aimed at eliminating sex discrimination in employment? This is maddeningly difficult to say, but it is possible that women as a whole have not benefited and have in fact suffered."); Turner, *Thirty Years*, *supra*, at 470 (noting that "Title VII protection of incumbent employees may provide employers with a disincentive to hire blacks or members of other protected groups").

25. According to commentator Cynthia S. Estlund:

[T]he workplace is perhaps the most important sphere in which significant integration has taken place. . . . [I]t is an arena in which individuals interact on a daily basis, often over years, within a common enterprise which necessitates, to varying degrees, trust and cooperation. The workplace is thus one of the very few settings in which adults spend a significant amount of time interacting intensively and constructively with others from different families, different neighborhoods, different religions, and, importantly, different racial and ethnic groups.

which individuals can learn to see beyond stereotypes and to recognize the superficialities of the differences that still too often divide us.²⁶ At the same time, the diversity of the workplace also makes it readily susceptible to hostility and tension, at times intentional and at other times not.²⁷ Primarily enacted to provide minorities who were then openly excluded from many jobs greater access to employment opportunities,²⁸ Title VII's protections were subsequently extended to protect individuals, first minorities and later women, from workplace harassment.²⁹ Despite federal, state, and local laws all designed to eliminate such harassment in the workplace,³⁰ there is considerable evidence that it remains pervasive.³¹ Employment laws initially enacted to address explicit discrimination

Cynthia S. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 52-53 (1998).

26. See *id.* at 62 (“[T]he existence of racially integrated workplaces is a matter of critical societal importance . . . because they create arenas for continual, constructive social interaction among individuals of different racial groups in a society in which this is still too infrequent.”); cf. EARL BLACK & MERLE BLACK, *POLITICS AND SOCIETY IN THE SOUTH* 56-57, 72, 170 (1987) (observing that the political alignment of working-class whites and blacks helped improve interracial social relationships in the South).

27. Estlund, *supra* note 25, at 55-56 (observing that “the workplace, like other intermediate institutions, can become an enclave of intolerance, exclusion, provinciality, and prejudice on the basis of race, sex, religion, and other salient lines of social division”).

28. Turner, *Thirty Years*, *supra* note 24, at 380.

29. In one of the earliest cases recognizing the possibility of so-called “hostile work environment” claims under Title VII, Judge Goldberg of the Fifth Circuit explained that “[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.” *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). Liberal constructions of Title VII’s proscriptions, coupled with important theoretical works on the serious problem posed by sexual harassment, see CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION I* (1979), led courts to recognize Title VII claims based on sexual harassment.

30. See, e.g., William M. Landes, *The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507, 507 (1968) (noting the proliferation of state fair employment laws and commissions on discrimination established by municipalities to “supplement the state commissions”); see also David C. Belt, *Election of Remedies in Employment Discrimination Law: Doorway into the Legal Hall of Mirrors*, 46 CASE W. RES. L. REV. 145, 156 (1995) (“While only half the states had comprehensive fair employment practices laws at the time of Title VII’s enactment, forty-nine states now have such legislation. Much of the current state legislation is broader in coverage than federal legislation.”) (internal footnotes omitted); Sarah E. Wald, *Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination*, 5 HARV. WOMEN’S L.J. 35, 41 (1982) (explaining that forty-two states have fair employment practices laws and “most mirror the general protections of Title VII”).

31. See, e.g., Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2489 (1997) (“Studies put the incidence of sexual harassment at fifty percent to eighty percent of all working women, with five percent of men and fifteen percent of women suffering sexual harassment each year.”) (internal footnotes omitted).

in hiring and firing are not always well-equipped to address more subtle forms of harassment.³²

In its efforts to achieve its various goals, Title VII has supported both an ideology and a vision—an ideology about the significance of equality in this country and a vision of what a workplace in which that ideology was realized would look like. While there have been tremendous strides toward the realization of that vision since Title VII was first enacted, much remains to be done.³³ The ideology of equality has been largely accepted, at least in theory, but its promise has not yet been realized. Different groups are not yet equally positioned in the workplace,³⁴ and the norms that govern the

32. See, e.g., Tristin K. Green, *Targeting Workplace Conduct: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 659 (2003) (“Discrimination in the workplace today is increasingly less a problem of overt employer policies or targeted discriminatory animus than it is a problem of subtle, often unconscious, bias creeping into everyday social interactions and judgments on the job.”) (internal footnote omitted); see also John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *STAN. L. REV.* 983, 983-84 (1991) (observing that “[t]he nature of employment discrimination litigation in the federal courts . . . has changed considerably since Title VII went into effect Although the authors and early architects of employment discrimination laws envisioned them as tools for opening employment opportunities to blacks, women, and other minorities, this is no longer their primary use.”); Ronald Turner, *A Look at Title VII’s Regulatory Regime*, 16 *W. NEW ENG. L. REV.* 219, 236-37 (1994) [hereinafter Turner, *A Look*] (noting that “employers face a diminished risk of Title VII hiring suits” because, in part, “an applicant who is not hired by a company may be less likely to suspect, and most likely will not be in a position to shape, and prove, a claim of discrimination”).

33. See, e.g., Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 *HOFSTRA LAB. & EMP. L.J.* 601, 601 (2005) (claiming that Title VII has produced “obvious substantial improvements in distribution of jobs on the basis of race, gender, and ethnicity, and a reduction in the earnings gap between whites and blacks and men and women,” but that it “has neither eliminated discrimination in the workplace nor [produced] complete equality”); cf. Turner, *Thirty Years*, *supra* note 24, at 474 (“Title VII has, to some extent, benefited many African-Americans, as exemplified by the rise and existence of a black middle class. The statute has been effective to the extent that employers no longer overtly discriminate Aside from these general observations, the available evidence on the impact of Title VII is meager.”).

34. See, e.g., Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 *NOTRE DAME L. REV.* 61, 61 (1986) (“[T]he data suggests that the economic status of women, as indicated by wage differentials and occupational segregation, has changed very little relative to white males.”); Symposium, *Department of Justice and the Civil Rights Act of 1964*, 26 *PAC. L.J.* 765, 795, 798-99 (1995) [hereinafter Symposium, *Civil Rights Act*] (noting that there have been some improvements in occupation distribution and wage differentials, but that wage differences remain); *id.* (observing that “unemployment rates for racial minorities have remained stubbornly higher than the unemployment rates for Caucasians”); Posner, *supra* note 24, at 1324 (“It is easy enough to find particular instances where these laws opened up jobs that were previously closed to women or resulted in a realignment of women’s pay scales, but it is difficult to see any major effects on broad trends in women’s wages or employment.” (quoting VICTOR R. FUCHS, *WOMEN’S QUEST FOR ECONOMIC EQUALITY* 27 (1988))); Turner, *Thirty Years*, *supra* note 24, at

workplace remain rooted in traditions of the past and have not yet been shaped by the new realities of the present.³⁵ As a result, vestiges of the old system remain, and women and minorities still struggle to find their place—and to make that place comfortable—in the modern workplace.

How then to facilitate Title VII's efforts to ensure greater progress toward the realization of the vision it was enacted to effect? One fact seems clear: The potential of Title VII's promise will not be realized if individuals are reluctant to report what they perceive to be violations of that norm and that vision. Yet another fact is clear as well: Individuals often are reluctant to report such violations. There are many explanations for this reticence, one of the most obvious being the fear of employer retaliation,³⁶ and the statute's anti-retaliation provision has not alleviated the concerns of many employees.

That a reluctance to report Title VII violations persists is a serious problem because Title VII's ability to realize its potential depends, more so than with much other federal legislation, on the willingness of victims of workplace discrimination to bring that discrimination to light.³⁷ The remainder of this Part introduces Title VII's anti-retaliation provision and the recent decisions that threaten to curtail its important role in effectuating the statute's purposes.

B. *Anti-Retaliation Under Title VII*

The fact that retaliation victims are often afraid to report discrimination can hardly be disputed.³⁸ One study found that “more than one-third of those who reported unfair treatment took no

478 (claiming that the employment sector remains, to a large degree, “racially stratified”).

35. See *infra* Part III.C (arguing that the traditional stereotypes to which women continue to be subject cause humiliation and embarrassment in the workplace, which leads to psychological, physical, and financial damage).

36. See *infra* notes 38-43 and accompanying text (explaining the reluctance of victims of sexual harassment to report harassment due to fears of retaliation).

37. See, e.g., Donohue & Siegelman, *supra* note 32, at 1000 (maintaining that “the EEOC has played an essentially passive role in the growth of employment discrimination suits”). Donohue and Siegelman explain that the EEOC “has brought relatively few cases,” and “it seems not to have been responsible for the growth in private litigation.” *Id.* at 1000. For further discussion of the EEOC's lack of authority to implement the statute, and the burden on individual victims to enforce the provisions of Title VII, see *infra* note 134.

38. See, e.g., Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 587-88 (“Prospective Title VII plaintiffs worry about retaliation, particularly if they are still employed by the defendant, and worry about being labeled ‘trouble makers.’”).

further action, and only 3% reported suing their employer."³⁹ While other causes certainly contribute to this reluctance,⁴⁰ fear of employer retaliation appears to be a significant factor.⁴¹ One commentator revealed that "one ombudsman involved with over 6000 sexual harassment victims" claimed that "over seventy-five percent of victims express serious concern about some form of retaliatory or adverse consequences flowing from their complaint."⁴² The fact that

39. Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 241 (2004).

40. One commentator has noted "that the most common way victims deal with harassment is not to complain, but rather, to avoid or dismiss it. These passive strategies run from simply ignoring the harassment to transferring or quitting one's job." Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1154 (2000). Employees may also worry about straining their relationships with co-workers and supervisors, even if they do not face formal retaliation. See, e.g., Turner, *Thirty Years*, *supra* note 24, at 470-71 (questioning whether victims should be "concerned that bringing a claim may affect [their] future relationship with [their] employer and coworkers, that [their] ongoing employment relationship will be strained by [their] daily contact with individuals whom [they have] identified as discriminators, or that the employer will in some way unlawfully retaliate against [them] because [they] filed a claim"). Some commentators have also expressed concern that certain entities have established affirmative roadblocks to the filing of employee complaints. See, e.g., Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 838 (2006) [hereinafter Lawton, *Bad Apple Theory*] (claiming that employers have "incentives to make reporting more difficult" because "the lower federal courts have failed in their oversight of employers' judgments on how to implement anti-harassment policies and procedures"); Nielsen & Beim, *supra* note 39, at 241-42 (noting the "significant barriers confronting plaintiffs, including . . . a managerialized version of dispute processes that favors the organization, that the EEOC turns away almost 80% of complainants with no relief, that victims are unlikely to file suit, that plaintiffs who file lawsuits face low chances of success, and that plaintiffs who manage to win at trial are likely to lose on appeal"); Turner, *Thirty Years*, *supra* note 24, at 461 (highlighting one lawyer's concern that "EEOC investigators 'have a strong incentive to discourage people from making a charge that is hard to investigate'" (quoting Peter T. Kilborn, *Backlog of Cases Is Overwhelming Jobs-Bias Agency*, N.Y. TIMES, Nov. 26, 1994, at 10)).

41. See, e.g., Turner, *A Look*, *supra* note 32, at 239-40 (discussing employee concerns about employer retaliation, including whether the "practical costs of bringing a claim . . . outweigh the benefits available under the statute"); cf. Yelnosky, *supra* note 38, at 621-22 (surveying the law under Title VII's anti-retaliation provision and concluding that it may not presently be structured to offer much assurance of protection from employer retaliation).

42. Bond, *supra* note 31, at 2501; see Lawton, *Bad Apple Theory*, *supra* note 40, at 846-47 (discussing Title VII's reliance on victim reporting in order to be successful and noting that that the majority of victims do not report harassment to anyone in an authority position). That many victims perceive that their complaints will do nothing to end the behavior also explains why they see no reason to run the risk of retaliation by complaining. See, e.g., Hoyman & Stallworth, *supra* note 34, at 62-63 (asserting that women do not complain because of "the inevitable economic and non-economic costs which the individual incurs upon filing a complaint," "the perception which women hold of their historical and legal status in society, particularly in the workplace," and because "[h]istorically, women have not fared well in the law"); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055, 1083-84 (2000) (acknowledging the perception that laws are not effective in preventing harassment);

complainants, especially in the sexual harassment context, tend to be “wom[e]n with low income and little power” only compounds this problem.⁴³

But if people do not complain, the Act’s protections will be largely hollow, unable to help achieve the equality of opportunity that its authors envisioned. It is for that reason that the Act required employers to “post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice . . . setting forth excerpts from or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.”⁴⁴ The EEOC, too, enacted regulations noting that “[p]revention is the best tool for the elimination of sexual harassment” and requiring employers to “take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under [T]itle VII, and developing methods to sensitize all concerned.”⁴⁵ But notice of these rights is meaningless if individuals do not feel comfortable attempting to enforce them.⁴⁶ Indeed, against the

Quinn, *supra* note 40, at 1172 (“To use the law instrumentally requires two acts of faith, so to speak. First, one must believe that change is possible. Second, one must judge that the power for this change rests (at least partially) with the law.”). These concerns about the likelihood of prevailing on their claims are hardly irrational. *See, e.g.,* Nielsen & Beim, *supra* note 39, at 257-58 (“[S]ome social scientists, legal scholars, and potential plaintiffs view anti-discrimination law as largely ineffective in redressing employment discrimination, as biased in favor of defendants, and as providing very weak remedies for those who actually experience workplace discrimination.”). Of course, if it is true, as has been noted, that the media “portray[s] greater win rates and higher award amounts in employment discrimination lawsuits than is the case in federal court outcomes,” *id.* at 251, that may undercut somewhat this explanation for employees’ unwillingness to sue.

43. Bond, *supra* note 31, at 2500; *see* Hodges, *supra* note 33, at 612 (“Data . . . indicate[s] that lower paid employees are less successful than higher paid employees both in litigation and . . . have less access to courts.”); *id.* at 609 (“The cost of litigating such claims is beyond the means of the average employee and an even greater hurdle for the discharged employee with substantially reduced income.”). Indeed, Donohue and Siegelman note that some believe “civil rights opponents intended the private enforcement mechanism as a deliberate road-block to plaintiffs’ effective pursuit of their rights, especially given that ‘many of those discriminated against would be poor and legally unsophisticated.’” Donohue & Siegelman, *supra* note 32, at 1023 (quoting PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS* 28 (1985)).

44. 42 U.S.C. § 2000e-10(a) (2000).

45. 29 C.F.R. § 1604.11(f).

46. It is this concern that led two commentators to question whether “relying on individual citizens to bring suits is the most effective enforcement strategy.” Donohue & Siegelman, *supra* note 32, at 1023. As they explain, “if enforcement is left in the hands of private litigants, and if private and social incentives to bring suit

backdrop of the Jim Crow system in the South,⁴⁷ the idea that there might be a gap between the law in theory and the law in practice would be familiar to many of the Act’s intended beneficiaries.⁴⁸

Thus, Congress enacted the anti-retaliation provision to try to ensure that individuals would be willing to report violations of the Act.⁴⁹ The anti-retaliation provision provides that

it [is] unlawful . . . for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title⁵⁰

Although there has been considerable litigation under Title VII’s anti-retaliation provision,⁵¹ significant questions about the scope of that provision’s protections remain. It was only last term that the Supreme Court began to provide guidance as to what the term “discrimination” means in that context.⁵² And that question is actually secondary to another question raised in many Title VII

differ, the system may fail to produce the optimal amount (and perhaps the optimal composition) of litigation.” *Id.*

47. See generally D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin de Siecle*, 92 MICH. L. REV. 2311 (1994) (describing racial relations during the 1950s and Title VII’s impact on the historic conflicts of that era).

48. Cf. Christine Jolls, *The Role and the Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 146, 169 (Richard B. Freeman et al. eds., 2005) (explaining that workers “benefit from a host of specific prohibitions on arbitrary or inappropriate behavior by employers,” but that “[t]here is . . . a critical and oft-emphasized distinction between the law ‘on the books’ and the law ‘in action,’” and that this distinction is “clearly important in the employment law context, where employees are ordinarily not in a strong position to enforce”).

49. 42 U.S.C. § 2000e-3(a) (2000).

50. *Id.* Title VII’s explicit prohibition on retaliation distinguishes it from some other civil rights statutes, such as 42 U.S.C. § 1981 and Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 (2000)). The Supreme Court has, however, interpreted Title IX’s prohibition on sex-based discrimination to encompass a prohibition on retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). Likewise, some lower courts have interpreted § 1981 to prohibit retaliation. See, e.g., *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998) (maintaining the view that, “in light of the broad sweep of § 1981(b), . . . a retaliation claim may be brought under § 1981”); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997) (noting, in the context of racial discrimination, that “a claim of retaliation . . . can violate both Title VII and 42 U.S.C. § 1981”). Nonetheless, whether § 1981 prohibits retaliation remains unsettled.

51. Between 1997 and 2006, the number of retaliation claims brought under Title VII increased by twenty percent. EEOC, Charge Statistics FY 1999 Through FY 2006, <http://www.eeoc.gov/stats/charges.html> (last visited June 16, 2007).

52. *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2414 (2006) (holding that “Title VII’s substantive [anti-discrimination] provision and its anti-retaliation provision are not coterminous” and that “[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm”).

retaliation cases, that is, whether an employee's conduct in opposing perceived discrimination or harassment is "protected," thereby entitling the employee to the statute's safeguards in the first place. After all, if the plaintiff has neither "opposed" a practice made unlawful by the statute nor "participated" in a proceeding under it, it is immaterial, at least from a legal perspective, whether the employer fired or otherwise retaliated against the plaintiff in response to that conduct. Because of the background regime of at-will employment, the employer may fire the employee because of the complaint, and the employee will have no legal recourse. Thus, the anti-retaliation provision's protection of employees can be no broader than the definition of what conduct it protects. It is to that issue that I turn next.

C. *Defining Protected Conduct*

The anti-retaliation provision's participation clause largely delivers what it promises: absolute protection from retaliation for participation, of any kind, in a proceeding related to Title VII.⁵³ In contrast, it is much less clear that the opposition clause delivers what it promises. This is because, in part, it is not clear what exactly it does promise. While there is little dispute that the clause describes some category of conduct broader than the provision's "participation" clause, the language of the provision does not make it at all clear just how broad a category that is.

To determine whether any given plaintiff has, in fact, "opposed a practice made unlawful by Title VII," courts must answer not one, but two, discrete questions. The first question is whether the form of the complaint constitutes "opposition"; the second is whether that opposition was directed toward "conduct made unlawful by Title VII."⁵⁴ Although courts have been grappling with these questions since Title VII's enactment over thirty years ago, the Supreme Court has yet to address the first question and only recently provided limited guidance with respect to the second.⁵⁵

Despite the lack of Supreme Court guidance on the first question, it seems fairly well-settled in the courts of appeals that "opposition to

53. Dorothy E. Larkin, Note, *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations*, 33 GA. L. REV. 1181, 1191 (1999).

54. 42 U.S.C. § 2000e-3(a).

55. See *infra* notes 65-71 and accompanying text (discussing the Supreme Court's holding in *Clark County School District v. Breeden*, 532 U.S. 270, 271 (2001) (per curiam), which turned on the reasonableness of the victim's belief that the action complained of violated Title VII).

a Title VII violation need not rise to the level of a formal complaint to receive statutory protection.”⁵⁶ Thus, for example, a plaintiff is protected if she “mak[es] complaints to management, writ[es] critical letters to customers, protest[s] against discrimination by industry or by society in general, and express[es] support of co-workers who have filed formal charges.”⁵⁷ Some courts have also held that “opposition” encompasses efforts to deter future acts of discrimination, as illustrated in *EEOC v. HBE Corp.*⁵⁸ In *HBE Corp.*, the Eighth Circuit concluded that the plaintiff had engaged in protected conduct when he refused to fire another employee because he believed that the employer’s decision was racially motivated.⁵⁹ The court explained that “[o]pposition must be based on a reasonable belief that an employer has engaged in discriminatory conduct, and it can include refusal to implement a discriminatory policy.”⁶⁰ In *EEOC v. Navy Federal Credit Union*,⁶¹ the plaintiff objected to losing supervisory authority over an employee and refused to sign what she viewed as a misleading evaluation of that employee because she believed it was all part of a scheme to terminate the employee in retaliation for her allegations of discrimination.⁶² The Fourth Circuit held that this conduct was protected, noting that “protected oppositional activities may include ‘staging informal protests and voicing one’s own opinions in order to bring attention to an employer’s discriminatory activities.’”⁶³

In answering the second question, whether a plaintiff’s opposition was directed toward conduct made unlawful under Title VII, most courts have held that “an employment practice need not actually violate Title VII for the protected activities element of a retaliation claim to be satisfied. The plaintiff is only required to have had a good faith, reasonable belief that [s]he was opposing an employment practice made unlawful by Title VII.”⁶⁴ Thus, a plaintiff may be able

56. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000).

57. *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990).

58. 135 F.3d 543 (8th Cir. 1998).

59. *Id.* at 557.

60. *Id.* at 554.

61. 424 F.3d 397 (4th Cir. 2005).

62. *Id.* at 406.

63. *Id.* (quoting *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998)).

64. *McHenemy v. City of Rochester*, 241 F.3d 279, 285 (2d Cir. 2001); *see Trent v. Valley Elec. Ass’n*, 41 F.3d 524, 526 (9th Cir. 1994) (“[A] plaintiff does not need to prove that the employment practice at issue was in fact unlawful under Title VII.”); *Alexander v. Gerhardt Enters.*, 40 F.3d 187, 195 (7th Cir. 1994) (“The conduct a plaintiff opposes need not actually violate Title VII.”) (citation omitted); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981) (“[A]s long as the employee had a reasonable belief that what was being opposed constituted discrimination

to prevail on a retaliation claim even if a jury ultimately determines that the activity about which the plaintiff complained was not discrimination. Although it might initially seem counter-intuitive that an employer that never engaged in unlawful discrimination would nonetheless retaliate against an employee, it is actually unsurprising that an employer who did not initially discriminate might nonetheless respond negatively to an employee complaint. In fact, in the case in which an employer did nothing wrong, the employer might be that much more likely to respond negatively to an employee complaint because the employer might view the complaint as frivolous and the employee who made it as a troublemaker. Responding to such complaints requires time and energy on the part of the employer, and an employer who believes that a particular employee is likely to make a practice of filing frivolous complaints may deem it in his best interest to sever the employment relationship.

While the courts of appeals seem to have largely settled on this standard, differences are starting to emerge in how that standard is applied. This result is hardly surprising, given that the standard actually says little about what a plaintiff must show in practice to establish that her conduct is protected. What does it mean, one might well wonder, for an individual's belief to be reasonable? Because the standard is, in part, objective, it makes sense that there must be some baseline against which the plaintiff's beliefs are measured, but what is the appropriate standard? Should it be the governing case law, or the general public's views, or some other alternative altogether? What if the plaintiff could not have reasonably believed that the practice she was opposing was unlawful, whatever that means, but the conduct about which she complained would have been unlawful had it continued into the future?

The answers two courts of appeals recently provided to these questions show how easily the anti-retaliation provision's protections can be undermined when plaintiffs must establish the reasonableness of their beliefs to merit protection. Just as troubling as these answers is what they reveal more generally about the "reasonableness" standard, that is, the significant variation in application that it permits. This variation is particularly problematic in the case of the

under Title VII, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII.") (internal citation & quotation marks omitted); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137 (5th Cir. Unit A Sept. 1981) (agreeing that "it was sufficient to establish a prima facie case if [the plaintiff] had a reasonable belief that defendant had engaged in the unlawful employment practices").

anti-retaliation provision because its success depends, in large measure, on the consistency and uniformity of its application.

D. The Questions: Applying “Reasonableness”

These recent courts of appeals decisions raise two discrete, albeit related, questions about what it means for a plaintiff to have a “good faith, reasonable belief” that a given employment practice is unlawful. Both of these questions lurked in the background of the single case in which the Supreme Court confronted the question of what it means for a plaintiff to oppose conduct made unlawful by Title VII. In *Clark County School District v. Breeden*,⁶⁵ the female plaintiff’s job required her to review applicants’ psychological examinations.⁶⁶ One of the examinations reported that the applicant had once told a co-worker, “I hear making love to you is like making love to the Grand Canyon.”⁶⁷ At a meeting, the plaintiff’s supervisor read the comment aloud, looked at the plaintiff and stated, “I don’t know what that means,” at which point a co-worker said, “Well, I’ll tell you later,” and both men chuckled.⁶⁸ The Court assumed, without deciding, that those comments did not need to be unlawful for the plaintiff’s complaint about them to be protected under Title VII’s anti-retaliation provision.⁶⁹ The Court nonetheless concluded that the plaintiff’s claim failed because “[n]o reasonable person could have believed that the single incident [about which the plaintiff complained] violated Title VII’s standard,”⁷⁰ which provides that harassment is not actionable unless it is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁷¹

The result in that particular case is unsurprising. The sexually explicit comment was in a report the plaintiff was required to review as part of her job; the co-workers’ response was relatively innocuous; and none of the comments were directed at the plaintiff.⁷² Yet two

65. 532 U.S. 268 (2001) (per curiam).

66. *Id.* at 269, 271.

67. *Id.* at 269.

68. *Id.*

69. *Id.* at 270.

70. *Id.* at 271.

71. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and alteration omitted). Katherine Franke has noted that *Meritor Savings Bank* adopted much of MacKinnon’s perspective “[s]even years after MacKinnon made the argument for understanding sexual harassment as a form of sex discrimination.” Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 704 (1997).

72. *Clark County*, 532 U.S. at 271.

important questions were left unasked, not to mention unanswered, by the Supreme Court's decision in *Clark County*. While these questions have yet to receive sustained treatment in the courts of appeals, the early answers suggest that the courts may be poised to limit workers' ability to sue when they are retaliated against for claiming that they have been the victims of discrimination.

In *Clark County*, it seems indisputable that no reasonable juror could have concluded that the conduct at issue constituted "sexual harassment." But does that necessarily render unreasonable the *plaintiff's* belief that it was unlawful? It is just that position that the D.C. Circuit seems to have implicitly taken in *George v. Leavitt*.⁷³ There, the plaintiff, an African-American woman from Trinidad and Tobago named Diane George, complained that her co-workers

made insulting and demeaning statements to her. On different occasions, she was told by three separate employees to "go back to Trinidad" or to "go back to where [she] came from." On these and other occasions, her co-workers shouted at her, told her that she should never have been hired, and told her to "shut up."⁷⁴

Shortly after she complained about these incidents to her supervisor, the supervisor met with the rest of the staff and told them to keep their distance from the plaintiff.⁷⁵ The plaintiff eventually sued under Title VII, "claiming unlawful discrimination based on race, sex, and national origin; a hostile work environment; and retaliation."⁷⁶

After noting that "offhand teasing" cannot create a hostile work environment, the court concluded that the district court

correctly recognized that the facts alleged by George, even if true, would not permit a reasonable jury to conclude that George's workplace was "permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." At best, they constitute exactly the sort of "isolated incidents" that the Supreme Court has held cannot form the basis for a Title VII violation.⁷⁷

73. 407 F.3d 405 (D.C. Cir. 2005). This holding would not eviscerate the well-established rule that a plaintiff can prevail on her anti-retaliation claim even if the conduct about which she complained was not unlawful. In any given case, a jury could find for the plaintiff on her retaliation claim and find that the complained-about conduct was not unlawful. That does not mean that a reasonable jury *could not* have found otherwise as to the discrimination claim.

74. *Id.* at 407-08 (alteration in original).

75. *Id.* at 408.

76. *Id.* at 410.

77. *Id.* at 416-17 (alteration in original).

With no additional analysis, the court rejected the plaintiff’s retaliation claim. It concluded that “the incidents of which George complained could not reasonably be thought to constitute an abusive working environment in violation of Title VII.”⁷⁸ Thus, with no discussion, the D.C. Circuit seems to have assumed that the appropriate benchmark for assessing the reasonableness of the plaintiff’s belief was the definition of “sexual harassment” established in the case law. It appears to have assumed, as well, that the only conduct it should consider was the past harassing conduct, and that it need not consider whether a continuation of that conduct would have created a hostile work environment.⁷⁹

The Fourth Circuit is the only circuit to give this latter question sustained attention. In *Jordan v. Alternative Resources Corporation*,⁸⁰ the plaintiff alleged that he was in a room with a co-worker who was watching television when the news reported that John Allen Muhammed and Lee Boyd Malvo, the individuals responsible for the 2002 D.C. area sniper attacks,⁸¹ had been captured.⁸² In response to that report, the co-worker exclaimed that “[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them.”⁸³ Following this incident, the plaintiff complained

78. *Id.* at 417.

79. The Second Circuit has suggested that it might adopt a similar approach, although it has not yet definitively reached the issue. In *Reed v. A.W. Lawrence & Co.*, the plaintiff complained about, among other things, the fact that a co-worker, in a phone conversation, had begun a sentence by saying “if you think my pecker is getting in the way,” at which point she hung up the phone. 95 F.3d 1170, 1175 (2d Cir. 1996). The court noted that the “plaintiff likely would not have passed the ‘good faith reasonable[ness]’ test . . . if the only evidence offered at trial had been [the co-worker’s] isolated comment,” but it declined to reach that issue because it found that “a review of the record reveals that the evidence presented to the jury included more than this one remark.” *Id.* at 1179 (alteration in original) (footnote omitted). The Seventh Circuit, by contrast, has suggested that a single isolated comment can make conduct protected under Title VII. In *Alexander v. Gerhardt Enterprises*, the Seventh Circuit held that the district court’s conclusion that the plaintiff reasonably believed that she was opposing a practice made unlawful under Title VII when she complained about the statement “if a [n-word] can do it, anybody can do it” was not clearly erroneous. 40 F.3d 187, 190, 195-96 (7th Cir. 1994). There, the court did not resolve whether that statement created a hostile work environment because plaintiff did not bring such a claim. *Id.* at 190. It is worth noting, however, that the Seventh Circuit treated this as a finding of fact, rather than a question of law, and thus evaluated the district court’s conclusion under a very deferential standard of review. *Id.* at 195.

80. No. 05-1485 (4th Cir. May 12, 2006), *vacated and reh’g granted*, No. 05-1485, 2006 U.S. App. LEXIS 16794 (4th Cir. July 5, 2006), *affirmed on reh’g*, 458 F.3d 332 (4th Cir. 2006), *reh’g en banc denied*, 467 F.3d 378, 379 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2036 (2007).

81. James Dao & Lisa A. Bacon, *Young Suspect in Sniper Case Becomes Central Figure in a Trial That Is Not His*, N.Y. TIMES, Oct. 31, 2003, at A12.

82. *Jordan*, No. 05-1485, slip op. at 4.

83. *Id.*

to a number of his supervisors, claiming that he was offended and that he did not believe his co-worker should “speak so callously in the office.”⁸⁴ During the month following his complaint, the plaintiff alleged that his shift was changed; he was given additional work assignments; a supervisor made a derogatory remark to him; and he was ultimately fired because “he was ‘disruptive,’ his position ‘had come to an end,’ and IBM employees and officials ‘don’t like you and you don’t like them.’”⁸⁵

The Fourth Circuit “readily conclude[d] that [the plaintiff] was not” complaining of an actual hostile work environment because the isolated comment “was not directed at any fellow employee[,]” and was a “singular and isolated exclamation.”⁸⁶ Therefore it did not “alter[] the terms and conditions of his employment.”⁸⁷ The Fourth Circuit also held that it was not sufficient that “Jordan reasonably concluded that the remark was inappropriate and should not have been made,” because he failed to show that he had “a reasonably objective belief that [the opposed conduct would] continue or [would] be repeated.”⁸⁸ The court explained that “an employee seeking protection from retaliation must have had an objectively reasonable belief in light of all the circumstances that a Title VII violation had happened or was in progress. Thus, we cannot simply assume, without more, that the opposed conduct will continue or will be repeated unabated.”⁸⁹

Judge King dissented, disagreeing with his colleagues that “an employee lacks Title VII protection for reporting racially charged conduct, unless he has ‘a reasonably objective belief that it will continue or will be repeated.’”⁹⁰ He instead took the position that “employees are protected under Title VII from employer retaliation if they oppose conduct that, if repeated, could amount to a hostile work environment . . . even absent an independent basis for believing the conduct might be repeated.”⁹¹ Judge King expressed concern that the majority’s decision would result in employees

fac[ing] . . . a “Catch-22.” They may report such conduct to their employer at their peril (as Jordan did), or they may remain quiet and work in a racially hostile and degrading work environment

84. *Id.*

85. *Id.*

86. *Id.* at 8, 9.

87. *Id.* at 9.

88. *Id.* at 9, 10.

89. *Id.* at 10.

90. *Id.* at 23 (King, J., dissenting) (citation omitted).

91. *Id.* at 24.

with no legal recourse beyond resignation. Of course, the essential purpose of Title VII is to avoid such situations.⁹²

Moreover, as discussed in greater detail below,⁹³ if the employee fails to report the harassing behavior, the employer may have an affirmative defense to liability should the employee eventually sue after the behavior becomes too much to bear.⁹⁴ This “Catch-22” scenario that Judge King predicted reflects a more general problem with the “reasonableness” requirement, namely, that individuals cannot know when their complaints will be protected and when they will not.

II. CHANGING THE PARADIGM: REJECTING “REASONABLENESS”

While retaliation claims can be brought—and often are brought—in the context of many different kinds of discrimination claims, they often present particularly challenging questions in the context of sexual harassment. Consider, for example, the following hypothetical. Rosa Smith is talking with one of her co-workers when another co-worker comes up behind her, pinches her, and says with a sneer, “I bet you enjoyed that, honey.” Although it is the first time she has ever experienced that kind of treatment at work, she is both embarrassed and offended by the co-worker’s conduct, and she reports the incident to her supervisor. She describes the incident,

92. *Id.* at 25. Following its decision, the court granted the plaintiff’s petition for rehearing and vacated its original decision. *Jordan v. Alternative Res. Corp.*, No. 05-1485, 2006 U.S. App. LEXIS 16794 (4th Cir. July 5, 2006). On rehearing, the court affirmed its earlier decision. *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006). On plaintiff’s request for the court to rehear the case *en banc*, five judges voted to rehear the case, and five voted not to do so. Because a majority of the full court was required to go *en banc*, the plaintiff’s request was denied. *Jordan v. Alternative Res. Corp.*, 467 F.3d 378, 379 (4th Cir. 2006). Judge King again dissented from that decision. This time, he was joined by four other judges of the court. He also “urge[d] the Supreme Court to accord serious consideration to any petition for certiorari that Jordan may file.” *Id.* at 383 (King, J., dissenting).

93. See *infra* Part III.A (discussing the Supreme Court’s requirement of early reporting in the context of employer liability).

94. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1201 (1989) (“In deciding whether a defendant’s behavior created an environment that was ‘intimidating, hostile, or offensive,’ courts often dismiss the plaintiff’s perceptions. Some courts discount the anguish reported by the plaintiff, because of factors such as timorousness or delay in reporting the harassing conduct.”) (footnote omitted); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 243 (2004) [hereinafter Lawton, *Operating*] (“[C]ourts engage in fact-finding on motions for summary judgment and judgment as a matter of law, concluding that any ‘delay’ in reporting equals an unreasonable failure on the part of the plaintiff to use her employer’s reporting machinery.”). Lawton notes the oddity of this response, given that empirical research shows that while “formal reporting of sexual harassment is an uncommon occurrence, retaliation in response to such complaints is not.” Lawton, *Operating, supra*, at 243, 254-55.

explains how it made her feel, and asks the employer to try to prevent similar incidents from occurring in the future. The employer promptly fires Rosa for complaining about her co-worker's conduct and does nothing to the harassing co-worker.

A. *The Problem*

Viewed against the background of the case law on sexual harassment, this hypothetical hardly presents a unique situation. To the contrary, it is merely the beginning of the scenarios described in many hostile work environment cases, and the iterative nature of these claims makes clear why the questions raised by the *George* and *Jordan* cases are so important.

In the hostile work environment context, the Supreme Court has cautioned that not every offensive utterance or epithet is actionable under Title VII;⁹⁵ rather, “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁹⁶ In determining whether conduct is “severe or pervasive,” the Supreme Court has instructed the lower courts to consider “all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁹⁷ Thus, the Court has tried to provide some guidance as to when conduct is unlawful, but that guidance hardly provides definitive answers as to how a court will rule in any given case.

To the contrary, all this guidance makes clear is that there is a line between conduct that is merely “offensive” and conduct that is “abusive,” and that line is sometimes fine.⁹⁸ Indeed, one

95. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (noting that Title VII “takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury”).

96. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and alteration omitted).

97. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998) (internal quotation marks omitted).

98. As one commentator has noted, “[b]ecause aggression is so pervasive and integral to social life, yet simultaneously ambiguous and subtle, it is—not surprisingly—difficult to create a working legal definition of harassment, i.e., of that particular category of severe and repetitive emotional abuse that a humane legal system might want to prohibit.” Brady Coleman, *Pragmatism’s Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & EMP. POL’Y J. 239, 242 (2004). Even Justice Scalia has noted that the word “[a]busive’ (or ‘hostile,’ which in this context I take to mean the same thing) does not seem to me a very clear standard,” and the level of “clarity is [not] at all increased by adding the adverb ‘objectively’ or by appealing to a ‘reasonable person[’s]’ notion of what the

commentator has noted that “[w]hile judges and scholars try to define and explain hostile environment sexual harassment, its meaning—a nimble Houdini of legal doctrine—continues to escape their chains.”⁹⁹ If judges and scholars cannot arrive at a satisfactory definition of sexual harassment, how are workers supposed to anticipate how the courts will define it in any given case? And if courts struggle to determine where exactly that line falls in individual cases, is it any surprise that employees, unfamiliar with the law, may wonder as well?

Moreover, in some cases, the difficulty is not in knowing where the line falls, but in knowing that the line exists at all. The prevalence of sexual harassment, and the burgeoning efforts of employers to ameliorate it, means there is much popular writing aimed at helping women to recognize what behavior is sexual harassment.¹⁰⁰ Unfortunately, that advice is not always perfect. Many employers now have sexual harassment materials that warn employees against any teasing or flirting behavior in the workplace.¹⁰¹ While the fineness of the line between the legal and the illegal makes it sensible for such material to warn against any potentially inappropriate behavior, it may cause individuals to believe that any such conduct is not only inappropriate, but also illegal. Thus, employees like the one in the hypothetical will be tempted to report such behavior the very first time it occurs, despite the fact that an isolated incident of such

vague word means.” *Harris*, 510 U.S. at 24 (Scalia, J., concurring) (final alteration in original).

99. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 448 (1997); see *id.* at 449 (“Because courts have been unable to enunciate a clear standard, juries remain unguided, as do men and women in the workplace.”); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 528-29 (1995) (noting that some have argued that “employers do not know what exactly Title VII prohibits as sexual harassment” because “the definition of hostile environment sex harassment is entirely context specific, takes into account multiple factors [and] does not define how much of any one factor is required”).

100. See *infra* note 101 (describing some common literature provided to women regarding sexual harassment in the workplace).

101. One book on sexual harassment explains that “[a]ny *unwanted* or *inappropriate* sexual attention is sexual harassment. That includes touching, looks, comments, or gestures.” ELIZABETH BOUCHARD, EVERYTHING YOU NEED TO KNOW ABOUT SEXUAL HARASSMENT 21 (rev. ed. 1994). Although the book also noted that “[s]exual harassment almost always *happens over and over*,” and “[t]he offensive gesture, invitation or action is repeated again and again,” these statements appeared to be descriptive, and not definitional. *Id.* at 23. The book encourages women to “[j]ust say no to any advances, right from the start,” *id.* at 38, and explains that “the worst thing you can do is to ignore harassment.” *Id.* at 41. The book encourages women to write a letter to the harasser, *id.* at 43, and, if that does not work, to “go to someone in charge and report what’s going on.” *Id.* at 44.

conduct is only rarely sufficient to establish a “hostile work environment.”¹⁰²

After all, when an employee in Rosa’s situation feels that she has been the victim of discrimination, her belief is most often intuitive; it is the product not of a studious examination of the Federal Reporters, but rather the product of popular understanding. The D.C. Circuit’s approach—what I call “the reasonable juror standard”—assumes the contrary, however, because when jurors determine whether conduct is unlawful under Title VII, they are doing so after an instruction in the appropriate law to apply.¹⁰³ The D.C. Circuit’s approach, although appealing in its simplicity, does not identify this premise on which it implicitly rests, that is, that the benchmark for determining the reasonableness of the plaintiff’s belief should be what the law is, rather than what the general public believes it to be. In other words, the D.C. Circuit’s approach effectively holds plaintiffs responsible for knowing the current state of the case law on “hostile work environment.”¹⁰⁴

102. Although a single incident can be sufficient to constitute sexual harassment, it must be sufficiently severe to alter the conditions of plaintiff’s employment. *See, e.g.,* *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (“Although Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group in which Howley was the only female and many of the men were her subordinates. And his verbal assault included charges that Howley had gained her office of lieutenant only by performing fellatio.”).

103. *See generally* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 *BROOK. L. REV.* 1081 (2001) (discussing the need for clearer jury instructions so that juries will comprehend the relevant law and make better decisions).

104. The D.C. Circuit is not the only court to take this view. One commentator has noted that “the [Supreme] Court’s lengthy recitation of sexual harassment caselaw before dismissing the plaintiff’s complaint as ‘unreasonable’ [in *Clark County*] belies any notion that a layperson’s perception of unlawfulness of the challenged conduct will shield opposition activity from employer retaliation.” Marshall, *supra* note 13, at 93.

The Eleventh Circuit, for example, has rejected the argument that:

[W]hen judging the reasonableness of [the plaintiffs’] belief, we should not charge them with substantive knowledge of the law as set forth in . . . the cases cited above. We reject the plaintiffs’ argument because it would eviscerate the objective component of our reasonableness inquiry. If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge.

Harper v. Blockbuster Entm’t Corp., 139 F.3d 1385, 1388 n.2 (11th Cir. 1998) (citation omitted).

The difference between the D.C. Circuit and Eleventh Circuit’s approaches is that the latter court suggested that while it must hold plaintiffs responsible for knowing the state of the law in an area, the fact that they sometimes make mistakes in their understanding of that law will not automatically render their belief unreasonable. In *Harper*, the court concluded that the plaintiff could not have believed that Blockbuster’s policy on hair lengths was unlawful because that claim “[was] belied by

In some contexts, such an approach might present little cause for concern. For example, most people would know that an employer's decision to fire an individual because of her race violates the law, even if they could not name the precise law that it violates. And, indeed, most people would also correctly assume that if an employee's supervisor repeatedly told her he wanted to have sex with her and touched her inappropriately, that conduct would be unlawful. However, as discussed above, "hostile work environment" claims are unique in that by "[t]heir very nature [they] involve[] repeated conduct,"¹⁰⁵ and their beginnings may be inappropriate, but not unlawful. Thus, this context seems to threaten to produce a high number of false positives, or situations in which members of the general public might assume that conduct was unlawful even though the conduct clearly is not unlawful under well-established case law.¹⁰⁶

One commentator has noted that

holding laypersons to a standard that requires not only familiarity with caselaw, but the ability to distinguish precedent based on the facts of a given case before their opposition to an employer's policy is protected under Title VII . . . undeniably has the potential to expose many individual complainants to employer retaliation without redress.¹⁰⁷

the unanimity with which the courts have declared grooming policies like Blockbuster's non-discriminatory." *Id.* at 1388.

105. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002).

106. As the Fourth Circuit has explained, "[i]f a witness in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forthcoming." *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999). There is no reason to think that this "slippery" standard will not also make individuals more hesitant to oppose practices made unlawful under Title VII.

107. Marshall, *supra* note 13, at 91. Marshall also notes that when the

[u]nlawfulness of the challenged practice [is] "measured against existing substantive law" . . . an employee engaging in opposition conduct runs a significant risk that his actions will fall outside the range of "protected activity" under the opposition clause, since the courts applying that standard have been unmoved by arguments regarding the reasonableness of the average layperson's belief as to what might constitute unlawful employment discrimination.

Id. at 89-90 (footnote omitted). Similarly, another commentator writes:

Sexual harassment often partakes, at least to some degree, of "I-know-it-when-I-see-it-ness." The average person can likely distinguish between a tentative, but unwanted, sexual overture or a clumsy compliment on the one hand and a hostile and demeaning series of sexual threats and mockeries on the other. Nonetheless, to the extent that talk of sexual harassment tends inevitably to generate some hostile comments and questions, some of the ridicule and hostility may arise out of a deeply felt sense that sexual harassment doctrine is filled with vagueness and contradictions.

Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 6-7 (1999) (footnote omitted).

There is considerable reason to think that this theoretical possibility is likely a reality. Although commentators have noted the ability of legal norms to shape social norms and vice versa,¹⁰⁸ commentators have also noted that “popular understandings are not necessarily the same as the technical legal definition.”¹⁰⁹ Moreover, employees’ understandings of what constitutes harassment will be shaped in large part by media accounts.¹¹⁰ Thus, to the extent that the media paints a broader picture of sexual harassment, the general public may begin to accept that belief.¹¹¹ While this phenomenon might arguably affect jurors as well, thus contributing to an increase in plaintiff success at trial, that matters only if cases actually make it to trial. Many do not.¹¹² And, again, a jury decides a case only after having been instructed in the law, generally with a warning from the judge that jurors must follow his instructions and not their own preconceived notions of what the law is or should be.¹¹³

While the possibility that popular understandings of legal concepts will not map exactly onto their precise legal definition undoubtedly

108. See Krieger, *supra* note 3, at 478 (“[F]ormal law and informal social norms are not mutually independent. Social norms both shape and are shaped by formal law.”).

109. Jack Balkin, *The Proliferation of Legal Truth*, 26 HARV. J.L. & PUB. POL’Y 5, 9 (2003).

110. See Nielsen & Beim, *supra* note 39, at 257-58 (“Americans’ beliefs and expectations are shaped, in large part, by media portrayals. If the media paints a distorted picture, Americans come to have a distorted view.”).

111. According to Nielsen and Beim:

Ordinary workers who come to think of the anti-discrimination law system as a windfall for plaintiffs may come to have unrealistic expectations about what constitutes illegal workplace discrimination and their likelihood of winning (should they pursue a claim), as well as the remedy they are likely to obtain should they prevail. These unrealistic expectations may be one of the many factors fueling increased claiming behavior in the last decade.

Id. at 260. Nielsen and Beim also note that notwithstanding this increase in claims, “it is still the case that the vast majority of employees who think they have been discriminated against in the workplace do not pursue a formal complaint either within the organization or with the appropriate state or federal agency.” *Id.* at 261.

112. See, e.g., Symposium, *Civil Rights Act*, *supra* note 34, at 794 (“Summary judgment is routinely affirmed by the Fourth Circuit in cases where there are big factual issues.”).

113. For example, one jury instruction reads:

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them On these legal matters, you must take the law as I give it to you. . . . You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be—or ought to be—it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

4 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 71.02 (Release No. 50A 2007).

exists throughout the law,¹¹⁴ the danger is even more pronounced in the context of hostile work environment claims involving sexual harassment. As noted above, this is in part because courts often take meaningfully different approaches in deciding what constitutes sexual harassment.¹¹⁵ If the courts cannot agree, how are individual citizens supposed to know? But there is an additional reason why this approach presents cause for special concern in the sexual harassment context. Studies have shown that there is "a gender gap in the definition of sexual harassment. In general, women have a broader, more inclusive definition of sexual harassment and are more likely than men to view mild social sexual behavior as sexual harassment."¹¹⁶

114. In considering whether to hold individuals responsible for knowing the relevant law, it is interesting to consider the very different field of qualified immunity. The doctrine of qualified immunity shields government officials from suits for damages unless their actions violate clearly-established rights of which an objectively reasonable official would have known. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). In this context, courts have recognized that "it is inevitable that law enforcement officials will in some cases 'reasonably but mistakenly'" believe that their actions are lawful. *Id.* at 641. Thus, "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Law enforcement officials are accorded this room to make mistakes because "the public interest requires that public officials be able to carry out their discretionary duties and act decisively without the intimidation that would result if good-faith errors in judgment were later to subject them to liability for damages." *Laverne v. Corning*, 522 F.2d 1144, 1149 (2d Cir. 1975). If we recognize that even law enforcement officials, who can reasonably be expected to know the law, will sometimes make mistakes, it makes sense to recognize that lay people will often make mistakes as well. Some courts have accorded plaintiffs this same breathing room in the context of hostile work environment claims. See *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980) ("The plaintiff here was an educated and informed layperson who should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute.").

115. See *supra* Part II.A (discussing the difficulties of adequately defining sexual harassment).

116. Barbara A. Gutek et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCH. PUB. POL'Y & L. 596, 607 (1999); see Abrams, *supra* note 94, at 1202 ("[M]en regard conduct, ranging from sexual demands to sexual innuendo, differently than women do."); Bernstein, *supra* note 99, at 465-66 ("In positing a genderless victim of sexual harassment, the reasonable person standard pushes under the rug an embarrassing mass of evidence indicating that gender affects the way men and women perceive sexual behavior in the workplace. A reasonable person standard implicitly denies that women and men are likely to react differently to sexual invitations, innuendo, teasing, or displays in the workplace. Yet empirical findings show that men are relatively likely to feel flattered or amused, whereas women are relatively likely to feel frightened or insulted, by sex-related behavior or displays at work.") (footnote omitted); Nielsen & Beim, *supra* note 39, at 241 ("Research on the prevalence of discrimination in the workplace shows a striking disjuncture between the perceptions of white women and people of color in the workplace and those of their white [male] colleagues and supervisors."); cf. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUMAN RTS. L. REV. 529, 565-66 (2003) ("Minorities are considerably more likely to perceive an event as discriminatory than are whites."). While some commentators have urged the

These studies not only support the idea that popular understandings of sexual harassment often differ from the legal definition, but they also suggest an additional reason not to employ the “reasonable juror” standard in determining what conduct is protected under Title VII. After all, if women tend to have a broader view of what conduct constitutes sexual harassment, then women, one of the groups Title VII was intended to protect, will be most likely to get caught in the gap between what members of the public may view as reasonable and what the law does.¹¹⁷

Indeed, as a result of the “reasonable juror” standard, women who report early will be unprotected from retaliation, and other women may wait to report harassing behavior until it occurs repeatedly and they feel comfortable that the conduct is such that a “reasonable juror” could find that it is unlawful under Title VII. The Fourth Circuit’s approach—what I call the “repeated conduct” standard—suffers from the same problem. It requires the plaintiff to establish that it was reasonable for her to believe that the conduct would be repeated.¹¹⁸ In most cases, a woman cannot know whether the conduct will likely be repeated; thus, this standard effectively forces her to wait to complain until the co-worker repeats his actions if she wants her complaint to be protected. Thus, both the “reasonable juror” and the “repeated conduct” standards deter reporting, and just as importantly, they deter early reporting. As a result, they threaten to undercut many of the fundamental purposes underlying Title VII.

adoption of a reasonable woman standard to address this concern, such a standard is not without its own problems. See Bernstein, *supra* note 99, at 471-77 (detailing the various arguments against a reasonable woman standard, and the difficulties in ascertaining what that standard means and how it can and should be applied).

117. Admittedly, one could adopt the position that even if members of the general public do not know the law in this area, they should know it, and adopting the “reasonable juror” standard will encourage acquisition of that knowledge. But this may be an area in which widespread knowledge does more harm than good. Do we want individuals who might consider harassing their co-workers to know that isolated comments will not subject them to liability? Will that help to achieve Title VII’s objectives? Even if we did want to encourage knowledge of the law, is there any reason to think that we should not allow for reasonable mistakes on the part of individuals who complain about discrimination? And, perhaps most significantly, there is little reason to place the burden of acquiring knowledge on employees when we could place on employers the burden of educating their employees.

118. *Jordan v. Alternative Res. Corp.*, No. 05-1485, slip op. at 10 (4th Cir. May 12, 2006), *vacated and reh’g granted*, No. 05-1485, 2006 U.S. App. LEXIS 16794 (4th Cir. July 5, 2006), *affirmed on reh’g*, 458 F.3d 332 (4th Cir. 2006), *reh’g en banc denied*, 467 F.3d 378, 379 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2036 (2007).

B. The Solution

What then to do about it? How can courts provide sufficient protection to employees without intruding on the legitimate decisionmaking prerogatives of employers? While one solution might be to adopt a "reasonable woman" standard, it is questionable how effective such a solution would be. A "reasonable woman" standard is hardly more concrete than any other "reasonableness" standard, and it is unlikely that courts will find it any easier to apply. Moreover, according to one commentator:

Because most judges are men, who have experienced the traditional forms of male socialization, their instinctive reaction is to accept the perspective of the employer. . . . [A] characteristically "male" view, which depicts sexual taunts, inquiries or magazines as a comparatively harmless amusement, or as the treatment women should expect when they push their way into the workplace, pervades many recent opinions.¹¹⁹

Thus, it may be difficult for these male judges to understand what would be acceptable to the hypothetical "reasonable woman."¹²⁰ As a result, while such an approach might produce greater sensitivity to the problem, it is not at all clear that it would actually produce tangible results that would bring us closer to solving it.

Surprisingly, the Fourth Circuit's decision in *Jordan* came close to providing an answer, at least a partial one. One of the situations in which an individual is most likely to erroneously believe that she is the victim of sexual harassment, even though existing case law does not define the conduct she has experienced as such, is when she has experienced an isolated incident of relatively subtle harassment or sexual teasing. Yet if there were repeated instances of such conduct, it is likely that they could rise to a level that would be "severe or pervasive" enough to alter the terms and conditions of the plaintiff's employment and thus constitute a "hostile work environment." In other words, if the Fourth Circuit had simply held that a plaintiff's belief is reasonable if she experiences conduct that, if repeated, would constitute sexual harassment, it would have gone far toward creating a standard that can be applied with relative ease and would allow most plaintiffs to report harassing conduct early without fear

119. Abrams, *supra* note 94, at 1203.

120. Although juries will presumably be more gender-balanced than the federal judiciary, many cases will never make it to a jury. In *George v. Leavitt*, for example, the district court dismissed the plaintiff's retaliation claim on summary judgment, and the D.C. Circuit affirmed because "the incidents of which [the plaintiff] complained could not reasonably be thought to constitute an abusive working environment in violation of Title VII." 407 F.3d 405, 417 (D.C. Cir. 2005).

that they will fall outside of the anti-retaliation provision's protective scope. However, what the Fourth Circuit gave with one hand, it took away with the other. Where the Fourth Circuit went astray was in requiring that plaintiffs be able to show that it was reasonable for them to believe that such conduct would recur.¹²¹ In many cases, if not most, plaintiffs will have no way of knowing whether such conduct is likely to be repeated. And leaving to chance whether they will be subjected to future unwanted, embarrassing advances is neither a desirable outcome, nor one that will advance the goals of Title VII.

Rather than placing the burden on plaintiffs, the Fourth Circuit could have established an affirmative defense that would be available to defendants that could show that it was unreasonable for the plaintiff in a given case to believe that the conduct was likely to recur. In *Jordan*, the court noted that the racial epithets, as offensive and inappropriate as they were, constituted a heated, emotional response to a news report; in the lengthy time in which the plaintiff had worked there, they had not previously occurred.¹²² If the Fourth Circuit had established an affirmative defense, the defendant could have made these arguments to a jury and, had the jury accepted them, there would have been no liability. While an affirmative defense does not spare a defendant the costs of litigation, it nonetheless represents a reasonable compromise between the need to provide broad protection to employees without unduly impeding on the personnel decisions of employers. And, perhaps even more importantly, it represents a way to serve the goals of Title VII in the process of striking that compromise. After all, even if the plaintiff loses at trial, getting to trial is itself significant because it helps to facilitate greater conversation about what types of workplace conduct are appropriate and allows those who believe they have been victimized to speak out in a public forum.

The question then is whether such an approach goes far enough. Could situations arise in which an employee believes that an isolated incident is sexual harassment even though it would not, even if repeated, meet the requirements of sexual harassment law? Unfortunately, examples abound. For example, a woman might believe it is harassment if a co-worker repeatedly asks her out on a date, but some courts—although by no means all—have suggested that romantic interest, no matter how often repeated, is never sexual

121. *Jordan*, No. 05-1485, slip op. at 10.

122. *Id.*

harassment.¹²³ Or a woman might think it is sexual harassment if she observes males harassing other women in the office, but this, too, has not been consistently treated as sexual harassment under the case law.¹²⁴ There is no reason why these women are any less deserving of protection from retaliation for reporting conduct that they believe, albeit erroneously and perhaps not even reasonably by some measures, to be sexual harassment. Thus, this approach, too, fails to provide sufficient protection to employees.

While Judge King's approach may not provide a sufficiently broad definition of "protected conduct" under the anti-retaliation provision, the Fourth Circuit's decision in *Jordan* contains an additional lesson well worth considering. One point, albeit implicit, on which both the majority and dissent agree is that, under at least some circumstances, a woman's complaint should be protected even if the conduct she has thus far experienced cannot reasonably be viewed as sexual harassment, at least as defined by existing case law. What they disagree about is what those circumstances are, and indeed, that is hardly surprising. The conflicting decisions in the sexual harassment case law about what crosses the line, the gap between the legal definition of sexual harassment and the public's knowledge of that definition, and the discrepancies between men and women's views as to what constitutes sexual harassment, all operate to make it virtually impossible to provide a comprehensive definition of what conduct would make a complainant's views reasonable. In other words, it is exceedingly difficult to determine

123. Compare *O'Dell v. Trans World Entm't Corp.*, 153 F. Supp. 2d 378, 386 (S.D.N.Y. 2001), *aff'd*, No. 01-7807, 2002 U.S. App. LEXIS 14446 (2d Cir. July 16, 2002) ("Plaintiff has presented evidence that while Rosen was both a co-employee and her supervisor, he repeatedly asked her out. Rosen made comments about her appearance, sent her e-mails professing his love for her, called her at work and at home, invited her to tour New York City with him, gave her three gifts, and played her a song that she found offensive. This conduct, however pervasive, was not sufficiently severe as to alter the conditions of her employment . . .") (citation omitted), with *Osorio v. Source Enters.*, No. 05 Civ. 10029 (JSR), 2006 U.S. Dist. LEXIS 63032, at *13 (S.D.N.Y. Sept. 5, 2006) ("Although defendants argue, rather improbably, that these expressions of 'romantic interest' do not constitute harassment, their counsel's professed inability . . . to distinguish between romantic interest and sexual harassment speaks more to counsel's unworldliness than to any realistic defense.") (citations omitted).

124. See Christopher M. O'Connor, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501, 537 (1991) (describing sexual harassment claims brought by those who were not targeted as being in their "infancy"); cf. Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 88 (2004) (describing a hypothetical woman who "believes she is the victim of sexual harassment because her work environment is filled with sexual innuendo and vulgarity," but whose "claim may be doomed before it even gets started" because the harassment was not "because of sex").

what beliefs are reasonable because beliefs about harassment are too contextual and individual, and the law on sexual harassment is too undefined and little-known.

It is unlikely then that the best solution is to try to craft some intricate definition of what will satisfy the “reasonableness” requirement; any attempt will likely provide too little guidance to district courts or be insufficiently comprehensive. Instead, the best solution may be to abandon altogether the requirement that a plaintiff establish that her belief was reasonable. Certainly, there is no reason that every complaint, even ones made in bad faith, should be protected; to offer protection that broad would hardly serve the purposes of Title VII. But limiting protection to those complaints that are reasonable does not serve Title VII’s purposes either. Although this requirement is designed to offer some protection to employers,¹²⁵ an employer’s most significant protection against a retaliation claim is that he can always fire someone so long as the complaint was not the cause. The anti-retaliation provision does not make an employee who files a complaint immune from termination; it only means that the employer cannot fire her because she filed the complaint.¹²⁶ Consequently, an employer will not be held liable if he can establish that there was some lawful reason for the decision to fire the plaintiff.¹²⁷

Courts could simply reframe the “reasonableness” requirement. Instead of requiring a plaintiff to prove that her belief was reasonable, courts could establish an affirmative defense to liability that would place the burden on the employer to establish that the plaintiff’s belief was unreasonable. Unfortunately, such an approach is unlikely to provide sufficient protection to the victims of retaliation because simply shifting the burden, in theory, does not change the realities that make it difficult for plaintiffs to establish that their beliefs are reasonable. There will still be a gap between the case law and public perceptions; there will still be differences in the way sexual harassment cases are resolved; and there will still be differences in the ways men and women perceive harassing behavior.

125. Chambliss, *supra* note 11, at 21 (“Title VII . . . seeks to minimize economic disruption, and opposition by employees obviously has the potential to be both costly and disruptive for employers.”).

126. *See, e.g.*, Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271-72 (2001) (per curiam) (analyzing the temporal relationship between the alleged retaliation and the time the complaint was filed).

127. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that once the plaintiff has made a valid claim, the burden then shifts to the defendant to articulate a nondiscriminatory reason for termination).

The burden may shift, but defendant employers will still be able to point to all of these factors, and courts will likely continue to find that the plaintiff's belief was unreasonable. Thus, the tangible effect of shifting the burden may be modest.

Courts could try to craft a stronger burden, requiring employers to put forward specific evidence that it was unreasonable for an individual in the plaintiff's position to believe that the conduct complained of was unlawful, but this approach is not without its practical limitations. First, it is difficult to know what exactly this approach would require of employers or how it would play out in practice. Perhaps if an employer regularly held employee trainings on sexual harassment with materials that accurately described the current state of sexual harassment law and ensured that employees participated in those trainings, those actions might be sufficient to establish that the plaintiff should have known that her belief was unreasonable. Alternatively, if the employer could establish that the plaintiff filed repeated complaints after going through an investigation process that apprised her of what conduct violates Title VII, that showing might also prove sufficient to meet the employer's burden.

But there is a real danger that no matter how much courts required of employers in theory, they would require little in practice. As discussed at greater length below, the Supreme Court has established that, under some circumstances, an employer can avoid vicarious liability for sexual harassment by establishing that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that the plaintiff failed to take advantage of those opportunities.¹²⁸ This requirement has been the focus of much criticism because courts

are interpreting "reasonable care" in the first prong of the new affirmative defense to require only minimal prevention efforts by the employer. For example, some courts have held that the mere promulgation of a policy, without any effective enforcement mechanism, is enough to meet the employer's burden of reasonable care under prong one of the affirmative defense.¹²⁹

There is a real danger that an affirmative defense in this context would suffer the same fate. In theory, it would encourage employers to go to greater lengths to educate their workers, but in practice,

128. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

129. Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 461 (2002).

courts would simply rubber-stamp “paper policies” and use them to justify the dismissal of retaliation claims.¹³⁰

Second, there is a more fundamental problem with reframing the “reasonableness” requirement as an affirmative defense. No matter who has the burden of establishing whether the plaintiff’s belief was reasonable, the requirement itself necessitates a baseline against which the plaintiff’s belief may be measured and, thus, assumes the reasonableness of that baseline. Yet that baseline may reflect antedated notions and stereotypes about women, or male notions about what is acceptable behavior in the workplace, and the anti-retaliation provision, properly construed, should allow women to speak out and challenge those ideas without fear of retaliation. If a woman cannot speak out without fear of retaliation simply because her employer has educated her about the existing case law, then she is largely stripped of her ability to challenge that case law.

Thus, reframing the “reasonableness” requirement is not enough. Instead, courts should reject the “reasonableness” requirement altogether and recognize that employers have no right to fire an employee, or otherwise retaliate against her, simply because she has made a good faith effort to assert her rights under Title VII. Under this approach, a plaintiff’s complaint would be protected unless the employer can prove that it was made in bad faith. This approach will be considerably easier for courts to apply, and for litigants to understand, than the current “reasonableness” standard. In a context in which it is critical that individuals be able to know *ex ante* whether their conduct will be protected, a test that is easier to apply and more protective of employee rights offers many advantages over the current standard.¹³¹ Moreover, because this approach would

130. The doctrine’s emphasis on training and educational programs has also endured significant criticism because there is little evidence that such tools have been effective in creating meaningful change in the workplace. *See, e.g.*, Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *BERKELEY J. EMP. & LAB. L.* 1 (2001) (chronicling training efforts taken by employers and considering the negative effects of such efforts); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 *HARV. WOMEN’S L.J.* 3, 3 (2003) (noting that “the rules of employer liability for harassment are calculated to ensure that employers adopt basic policies and procedures with respect to workplace harassment, not, surprisingly, to ensure that they actually prevent it”); *id.* (“[T]here is little evidence in the vast social science literature to support this emphasis on rule compliance. In fact, cookie-cutter sexual harassment policies and procedures do not seem to have any reliably negative effect on the incidence of harassment.”).

131. *See generally* Pierre Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379 (1985) (discussing the relative pros and cons of rules and standards in different areas of constitutional law).

focus less on the plaintiff's beliefs about the state of the law and more on whether she was acting in good faith when she filed the complaint, it would better reflect the purposes of the anti-retaliation provision, namely, to protect those individuals who are trying to protect their rights under Title VII.¹³²

III. THE BENEFITS OF THE NEW PARADIGM

That the courts' current approach does not strike the best balance becomes all the more clear when one considers the substantial benefits a broader interpretation of the anti-retaliation provision offers. Courts and commentators alike have recognized the critical role that private complaints about discrimination and harassment play in enforcement of Title VII.¹³³ To some extent, this role is obvious—if individuals do not report harassment, past conduct will not be punished. And this role is particularly important in the context of Title VII enforcement given the EEOC's relatively limited role in enforcing Title VII's protections.¹³⁴

132. In some respects, this approach might provide a broader defense against retaliation claims than is currently available to employers. Consider this example: An employee experiences clear sexual harassment for a sustained period of time, but never files a complaint. Then, recognizing that she is about to be fired for some unrelated reason, she files a complaint solely so she can bring a retaliation claim after she is fired. Under the current test, this bad faith arguably provides the employer no defense so long as the plaintiff reasonably believed that the conduct was unlawful; however, under the alternative this Article advances, the employer could argue that the complaint was made in bad faith, and if the jury accepted this argument, the employer would not face liability for retaliation. *See, e.g.,* *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980) (noting that a complaint under Title VII may not be "raised as a smokescreen in challenge to the supervisor's legitimate criticism").

Although this presents some risk that employees might be penalized for waiting too long to complain, the employer would still have to prove that the delay was not the result of fear or confusion; he would have to prove that the plaintiff was acting in bad faith. Moreover, the law already makes it risky for employees to wait too long to report harassment. *See infra* Part III.A.

133. As one commentator has noted, if individuals do not report violations of the Act, "[g]overnment agencies [will not adequately] fill the enforcement gap. The agencies with employment law responsibilities have limited resources." Hodges, *supra* note 33, at 609; *see* Jolls, *supra* note 48, at 146 ("[T]he government is limited in its ability to provide direct legal representation for employees, both as a matter of theory and as an empirical matter.").

134. Unlike some administrative agencies that play an active role in enforcing the statute they are charged with enforcing, the EEOC lacks the power of enforcement. *See, e.g.,* *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969) ("While it can subpoena witnesses, hold hearings, and attempt conciliation, it has no authority to issue orders or compel enforcement. More than that, except [in limited situations] . . . , [the] Government does not enter the litigation. The suit is between private parties. The burden of enforcement rests on the individual through his suit in Federal District Court."); *see also* Marshall, *supra* note 13, at 73-74 ("In practice, if not by design, Title VII places the initial burden of enforcing its substantive provisions upon the individual victims of workplace discrimination. Although the

But Title VII serves many purposes, and its anti-retaliation provision, if interpreted with the appropriate breadth, can serve those other purposes as well. The approach this Article advances—namely, rejecting the “reasonableness” requirement—will enable the anti-retaliation provision to serve these purposes by encouraging women to report harassment and, just as importantly, to report it early. Early reporting is important not only because it can help prevent additional harassment, but also because it is an important means to achieve other valuable ends.

Early reporting can facilitate conciliation and informal resolution of harassment claims, thereby avoiding the costs, monetary and otherwise, that litigation imposes. Early reporting also enables harassment victims to ameliorate the psychological and dignitary harms that harassment causes. And, perhaps most importantly, early reporting makes it easier to challenge and change the gender norms and stereotypes that continue to pervade the workplace.

A. Preventing Harm

The Supreme Court has recognized the important prophylactic role of Title VII enforcement, explaining that its “primary objective[]’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.”¹³⁵ To achieve that end, the Supreme Court has encouraged individuals to report discrimination and to report it early.¹³⁶ In fact, the Supreme Court has done more than simply encourage individuals to report discriminatory conduct; it has made such reporting a precondition to employer liability.¹³⁷

The Court first gave the issue of employer liability sustained attention in *Faragher v. City of Boca Raton*,¹³⁸ in which the plaintiff alleged that her supervisors “repeatedly subject[ed] [her] . . . to ‘uninvited and offensive touching,’ by making lewd remarks, and by speaking of women in offensive terms.” The plaintiff sued not only her supervisors, but also her employer.¹³⁹ The Supreme Court noted that courts had universally taken the view that employers should be

[EEOC] has the authority to investigate and commence claims on its own initiative, it does so with pronounced infrequency.”) (footnote omitted).

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

136. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

137. See *infra* notes 138-151 and accompanying text (detailing the Supreme Court’s decision to allow employers an affirmative defense if the employee unreasonably fails to invoke the employer’s remedial procedures).

138. 524 U.S. 775 (1998).

139. *Id.* at 780.

held liable where “discriminatory employment actions [had] tangible results, like hiring, firing, promotion, compensation, and work assignment.”¹⁴⁰ Additionally, numerous cases in the courts of appeals and district courts had held employers liable “on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop.”¹⁴¹

The Court then turned to agency law to consider why “harassing behavior ought to be held within the scope of a supervisor’s employment, and the reasons for the opposite view.”¹⁴² The Court rejected the view that employers should always be held liable for the harassing behavior of their supervisors because such a view was unsupportable under traditional agency law, and it would almost certainly mean making employers liable for the harassing acts of co-workers as well.¹⁴³ The Court did, however, hold that “it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor” when that conduct was “made possible by abuse of his supervisory authority.”¹⁴⁴ It then sought a limiting principle, noting that “there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship.”¹⁴⁵ The Court ultimately held that “[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense.”¹⁴⁶ In those cases, an employer could avoid liability if he could establish that he “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁴⁷ The Court explained:

Although Title VII seeks “to make persons whole for injuries suffered on account of unlawful employment discrimination,” its “primary objective” . . . is not to provide redress but to avoid harm. . . . It would therefore implement clear statutory policy and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent

140. *Id.* at 790.

141. *Id.* at 789.

142. *Id.* at 797.

143. *Id.* at 798-800.

144. *Id.* at 802.

145. *Id.*

146. *Id.* at 807.

147. *Id.*

violations and give credit here to employers who make reasonable efforts to discharge their duty.¹⁴⁸

This affirmative defense created a two-way street, placing a burden not only on the employer, but also on the employee.¹⁴⁹ The Court likened the requirement that an employee avail herself of available complaint mechanisms to the general mitigation principles under the law of damages.¹⁵⁰ Thus, “[i]f the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.”¹⁵¹ In *Burlington Industries, Inc. v. Ellerth*,¹⁵² decided the same day as *Faragher*, the Court reaffirmed that “encourag[ing] employees to report harassing conduct before it becomes severe or pervasive . . . would also serve Title VII’s deterrent purpose.”¹⁵³

The Supreme Court’s language could not be clearer. Employees should report sexual harassment not only early, but before it is even harassment. But under the “reasonableness” standard, particularly as interpreted by the D.C. and Fourth Circuits, a plaintiff cannot report too early, lest a court determine that she could not have reasonably believed that the conduct about which she was complaining was unlawful. It truly is a frustrating “Catch-22” situation—report too early, and the behavior is not harassment, but wait too long, and there is little point in reporting because the employer may no longer be held liable. Indeed, several courts have been unwilling to excuse plaintiffs’ failure to report their complaints based on their claim that they feared doing so might subject them to retaliation.¹⁵⁴ And other

148. *Id.* at 805-06 (internal citation omitted).

149. In fact, *Ellerth* and *Faragher* have been criticized for “creat[ing] a legal rule that from its inception was unlikely to promote the stated goal of prevention” by “hinging liability on a response to harassment that is uncommon,” that is, formal reporting of sexual harassment. Lawton, *Operating, supra* note 94, at 198.

150. *Faragher*, 524 U.S. at 806.

151. *Id.* at 805-07. Anne Lawton argues that the Supreme Court’s decision in *Faragher*

shift[ed] the focus from the organizational employer to the individual harasser. . . . [which] in turn, affects the framing of the liability rules: employers are rewarded for promulgating paper policies and procedures, not for addressing the more difficult organizational causes of sexual harassment. Thus, employers generally need do nothing but wait for victims to report. The resulting liability scheme makes the victims of harassment shoulder much of the burden for eliminating workplace harassment and undermines what the Court considers to be Title VII’s primary purpose—the deterrence of workplace discrimination.

Lawton, *Bad Apple Theory, supra* note 40, at 836-37 (internal footnotes omitted).

152. 524 U.S. 742 (1998).

153. *Id.* at 764.

154. See West, *supra* note 129, at 479-86 (highlighting case law to show that “vague and subjective fears do not justify a failure to complain”); see also Ann M. Henry, Comment, *Employer and Employee Reasonableness Regarding Retaliation Under the*

courts have required victims “to produce hard-to-find evidence of specific facts justifying any failure on their part to complain to employers . . . [thereby placing on] victims of sexual harassment . . . a heavy production burden to justify a failure to file an internal complaint.”¹⁵⁵

Thus, the “reasonableness” requirement creates a significant tension in the case law’s treatment of Title VII reporting. By rejecting the “reasonableness” requirement, it will be much easier for employees to complain early without fear that they will have no legal recourse if they then become the victims of retaliation. As a result, it will be easier to achieve the purpose that the Supreme Court has identified as one of Title VII’s most important: the prevention of harm.

B. *Informal Resolution*

Early reporting is beneficial not only because it helps to prevent harm, but also because it allows the employer and employee to address problems before the conduct is so entrenched and the relationship so damaged that it is difficult to address the situation in an informal manner. The statute itself prioritizes informal resolution of Title VII claims, providing that if the EEOC “determines . . . that there is reasonable cause to believe that [a] charge is true, [it] shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”¹⁵⁶ Indeed, the very existence of the opposition clause suggests Congress’ interest in promoting informal, internal

Ellerth/Faragher *Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 563 (1999) (“Several courts applying the new affirmative defense have concluded that the employee acted unreasonably when failing to complain of harassing behavior out of fear of retaliation.”).

155. West, *supra* note 129, at 461. West notes that “federal courts are applying the [Ellerth/Faragher] affirmative defense without any examination of women’s reluctance to complain because of fear of reprisal.” *Id.* West’s proposed solution is “requir[ing] an employer to demonstrate the effectiveness of its prevention policy by documenting for employees the actions it took in addressing prior sexual harassment complaints.” *Id.* at 497.

Courts have not yet determined whether it is appropriate to consider an employer’s own policies in determining whether a plaintiff’s belief that she was the victim of unlawful discrimination is reasonable. If courts do not consider such materials, then a greater proliferation of materials that often (wisely) describe sexual harassment in liberal terms could paradoxically result in more women making complaints that are unprotected under Title VII’s anti-retaliation provision. West also argues that “[p]ublic education is necessary to tell women about the federal courts’ new legal requirement that women must complain before filing suit. At a minimum, plaintiffs’ attorneys must educate women clients about the need to tell the employer about the harassment before filing suit.” *Id.* at 522.

156. 42 U.S.C. § 2000e-5(b) (2000).

resolution of disputes under Title VII.¹⁵⁷ The Supreme Court, too, has noted that it was “Congress’ intention to promote conciliation rather than litigation in the Title VII context,”¹⁵⁸ and that “[c]ooperation and voluntary compliance were selected as the preferred means for achieving” Title VII’s goals.¹⁵⁹

Another benefit of abandoning reasonableness as a *prima facie* element of a plaintiff’s retaliation claim is that it will encourage individuals to file informal complaints with their employers rather than turning immediately to the EEOC. Why is this so? Under the current framework, a plaintiff who “unreasonably” opposes a practice made unlawful under Title VII receives no protection under the statute. However, if the plaintiff had skipped the informal complaint and immediately “made a charge” with the EEOC, her conduct would likely have been protected, no matter how unreasonable. The Supreme Court suggested as much in *Clark County*.¹⁶⁰ In that case, as discussed earlier, the plaintiff alleged that her employer retaliated against her for complaining about conduct that the Supreme Court held she could not have reasonably believed was sexual harassment.¹⁶¹ However, she not only complained, but also “fil[ed] charges against [her employer] with the Nevada Equal Rights Commission and the Equal Employment Opportunity Commission (EEOC),” and she alleged that her employer retaliated against her for filing those charges and the lawsuit.¹⁶² Having already held that the plaintiff could not have reasonably believed that the underlying conduct was unlawful, one might have expected the Supreme Court to dismiss all of her retaliation claims. It did not, however. Instead, it went on to consider whether the plaintiff’s filing of the charges was the cause of her termination.¹⁶³ If the Court had determined that her employer did fire her because she filed those charges, she would have prevailed on her retaliation claim, even though she would not have prevailed had she simply filed an informal, internal complaint with her employer.

Several courts of appeals have adopted a similarly broad approach in protecting individuals who file charges with the EEOC. For example, the Fifth Circuit has held that a charge filed with the EEOC is protected even if it contains “malicious material,” so long as “the

157. Chambliss, *supra* note 11, at 21.

158. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

159. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

160. 532 U.S. 268 (2001) (*per curiam*).

161. *Id.* at 270.

162. *Id.* at 271.

163. *Id.* at 271-72.

charge otherwise satisfies the liberal requirements of a charge."¹⁶⁴ The Fourth Circuit has also held that "[r]eading a reasonableness test into section 704(a)'s participation clause would . . . undermine the objectives of Title VII. . . . A straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action."¹⁶⁵

The discrepancy between the protection afforded under the two provisions led the Ninth Circuit to warn that "[a]ccusations made in the context of charges before the Commission are protected by statute; charges made outside of that context are made at the accuser's peril."¹⁶⁶ Commentators have also noted that the greater protections afforded by the "participation" clause should give employees pause before "participating in their employer's internal investigations."¹⁶⁷ An employee who knows that she may be unprotected for lodging an informal complaint, but who knows that filing a formal charge with the EEOC will accord her complete protection, will likely do the latter. Thus, the "reasonableness" requirement, especially when reasonableness is defined as narrowly as it is by the D.C. and Fourth Circuits' standards, encourages individuals to file a charge with the EEOC without first notifying their employers of the problem.¹⁶⁸

164. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969). The court explained that the case presented competing interests. "On the one hand is the protection of the employer from damage caused by maliciously libelous statements and on the other is protection of the employee from racial and other discrimination." *Id.* It also noted that

[i]n Title VII Congress sought to protect the employer's interest by directing that EEOC proceedings be confidential and by imposing severe sanctions against unauthorized disclosure. The balance is therefore struck in favor of the employee in order to afford him the enunciated protection from invidious discrimination, by protecting his right to file charges.

Id. (internal citation omitted).

165. *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999).

166. *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990).

167. Larkin, *supra* note 53, at 1184.

168. *See, e.g., Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (noting that interpreting the protections of the "opposition" clause too narrowly "would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances"); *see also Henry, supra* note 154, at 571 ("[C]ourts should interpret Title VII's retaliation provisions liberally so that employees feel they can follow *Ellerth* and *Faragher's* instruction to use internal complaint procedures without making themselves targets for retaliation.").

At least one commentator has argued that the affirmative defense established in *Faragher* and *Ellerth* does not provide employees with the option of going first to the EEOC. She explains that "[i]f the employee does not complain internally first, the employer gains the protection of part (b) of the defense and potentially avoids liability for the acts of its supervisors." Larkin, *supra* note 53, at 1210. It is unclear

Yet it is by filing internal complaints with their employers that employees can most easily set in motion informal methods of resolving their claims of discrimination. Multiple commentators have extolled the benefits of informal resolution of Title VII claims,¹⁶⁹ noting that all involved in sexual harassment claims seek a quick resolution to the dispute.¹⁷⁰ Dorothy Larkin, for example, has argued that encouraging employees to bypass internal complaint mechanisms is troubling for two primary reasons. “First, resolving an incident internally is often more efficient. Internal grievance procedures are cheaper, faster, and more informal.”¹⁷¹ Because these processes are often quicker and more informal than litigation, they offer the additional benefit that the parties may be able to resolve their claims without doing additional damage to their relationships. Such a result is much less likely after the adversarial litigation process has been initiated. Moreover, informal resolution may facilitate more of a conversation about the behavior and why the plaintiff found it offensive; this conversation may lead all parties to a greater appreciation of each other and a better understanding of what is acceptable workplace behavior. Such a conversation is also less likely to occur in the context of formal litigation.

The second disadvantage Larkin identifies in formal resolution mechanisms is that the “EEOC budget cuts have diminished the effectiveness and efficiency of the charging procedures.”¹⁷² As Larkin notes, these budget cuts came at the same time that the jurisdiction of the EEOC was expanded with the enactment of the Americans with Disabilities Act and the Civil Rights Act of 1991.¹⁷³ These budget cuts have impaired the ability of the EEOC to process these claims, resulting in longer delays for those waiting for the EEOC to evaluate

that this is true, however, because the affirmative defense requires only that plaintiffs notify their employer *or otherwise mitigate their harm*.

169. Yelnosky, *supra* note 38, at 598-99. Admittedly, there are drawbacks to informal, private resolution of Title VII claims, *see, e.g.*, Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 524 (1987) (asking “whether informal dispute resolution interferes with the eradication of discrimination. . . . [because] the focus on resolving individual controversies [might] pose the danger of clouding a pervasive picture of discrimination?”), but what is important for present purposes is that harassment victims feel comfortable pursuing their claims informally if they so choose. Informal resolution is almost certainly better than no resolution at all.

170. Bond, *supra* note 31, at 2501.

171. Larkin, *supra* note 53, at 1186.

172. *Id.* Larkin proposes that courts extend “participation” clause protection to employees who participate in an internal investigation, regardless of whether or not a formal charge has been filed with the EEOC. *Id.* at 1206-11. Even if courts were to adopt this approach, it would not necessarily protect plaintiffs who simply file internal complaints with their employer.

173. *Id.* at 1215.

their claims. In the meantime, the resolution of claims hangs in the balance; and as time passes, memories fade, and it may be more difficult to achieve real justice at the end of the day.¹⁷⁴ Moreover, if the EEOC must investigate claims brought by individuals afraid to complain to their employer, it will expend resources on many claims that may ultimately turn out to be frivolous. Given the cuts to the EEOC’s budget and its significant backlog,¹⁷⁵ the EEOC has no resources to waste, and the time and energy devoted to investigating these claims will necessarily detract from the time available to investigate more serious charges.¹⁷⁶

But it need not be this way. The language of the anti-retaliation provision suggests no reason to impose a “reasonableness” requirement on claims brought under one clause and not the other. If plaintiffs are not required to establish that their beliefs are reasonable, this gap in the amount of protection afforded under the two clauses will be significantly eliminated, and individuals will be much more likely to seek informal resolution of their Title VII claims.

C. *Ameliorating Harm*

Reporting violations of Title VII is important not only because it allows for the punishment of those who committed the wrong, but also because it is a step in the healing process for those who have been victimized.¹⁷⁷ As many commentators have noted, one of the primary harms of sexual harassment is the harm to the dignity and self-respect of those it victimizes.¹⁷⁸ This dignitary harm inheres in workplace harassment, no matter its source or method.¹⁷⁹ As one commentator has noted:

[B]y humiliating, intimidating, tormenting, pressuring, or mocking individuals in their places of work, sexual harassment is an insult to the dignity, autonomy, and personhood of each victim;

174. *Id.*

175. Bond, *supra* note 31, at 2490 (noting that the EEOC then had a backlog of 80,000 cases).

176. Larkin, *supra* note 53, at 1216.

177. Quinn, *supra* note 40, at 1154-55.

178. See, e.g., Coleman, *supra* note 98, at 260 (explaining that in continental Europe harassment in the workplace, sexual or non-sexual, is seen as a dignitary harm); Ehrenreich, *supra* note 107, at 16 (noting that “[t]he harm of workplace sexual harassment is a dignitary harm”).

179. See Ehrenreich, *supra* note 107, at 25 (“[T]he application of tort conceptions of ‘dignity’ to workplace harassment rests not on an argument that courts *should* adopt a particular conception of human dignity and personality, but instead rests on a recognition that courts simply *do* assume that human beings have a certain inherent dignity and that this dignity may not be violated, either by the state or by other private individuals.”).

such harassment violates each individual's right to be treated with the respect and concern that is due to her as a full and equally valuable human being.¹⁸⁰

Title VII doctrine has been criticized for being insufficiently attentive to these aspects of the harm of harassment. As one scholar explained, "The neglect or discounting of emotion—an inevitable effect when reason is the legal standard—not only mischaracterizes the experience of sexual harassment but also cheapens the measure of the plaintiff's damage."¹⁸¹

The fact that the workplace is the setting for this mocking and tormenting may also compound the psychological harm, in part because it affects the victim's sense of both personal and professional self-worth.¹⁸² One commentator maintained that "[s]exual harassment at work has a public, communal dimension, even when the offending behavior takes place behind a closed door. Being humiliated at work can diminish settled beliefs about one's competence and relative status vis-à-vis other workers."¹⁸³ Another commentator has explained the significance of the workplace in exacerbating the harms of harassment as follows: "[O]ne's life takes on publicly intelligible meaning largely through participation in market work. The job not only constitutes one's chief claim to wealth, but is also the prime determinant of one's status."¹⁸⁴

The fact that women are often "comparative newcomers to many kinds of work" may only compound these feelings of embarrassment and humiliation when they are harassed in the workplace.¹⁸⁵ As Kathryn Abrams has explained, "[M]any women view their position in the workplace as marginal or precarious. They are likely to construe

180. *Id.* at 16; see Bernstein, *supra* note 99, at 450 (describing hostile environment sexual harassment as "a type of incivility or . . . disrespect"). Richard Posner, too, has noted that "[i]t is possible that the economic costs of sex discrimination law are offset by gains not measured in an economic analysis—gains in self-esteem, for example." Posner, *supra* note 24, at 1335.

181. Bernstein, *supra* note 99, at 462.

182. See David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 483 (2000) (explaining that workplace bullying may lead to psychological effects such as depression and low self-esteem); see also Quinn, *supra* note 40, at 1154 (noting that victims of sexual harassment may have "lowered satisfaction with one's job and one's life").

183. Bernstein, *supra* note 99, at 490-91.

184. Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 108 (1999); see Estlund, *supra* note 25, at 73 ("Expression[s] of hatred, contempt, or disrespect on the basis of race, sex, religion, or the like may inflict greater harm within the workplace than in the public square partly because of the close and ongoing personal engagement that the workplace compels.").

185. Abrams, *supra* note 94, at 1204.

disturbing personal interactions, stereotypical views of women, or other affronts to their competence as workers as serious judgments about their ability to succeed in the work environment.”¹⁸⁶ The fact that this mocking and humiliation may be part of a more general environment of sex discrimination may compound these feelings. While awareness of the discriminatory context may alleviate the psychological harm to some victims,¹⁸⁷ it may make it worse for others. “[S]he may feel doubly undermined and attacked, both as an individual and as a woman. Her suffering may be compounded if she feels trapped—condemned always to be targeted for an attribute she cannot change.”¹⁸⁸

Unsurprisingly then, many commentators report the serious effect that sexual harassment may have on its victims.¹⁸⁹ Sexual harassment harms its victims “psychologically, physically, and financially,”¹⁹⁰ producing “serious, even devastating, effects.”¹⁹¹ One commentator has gone so far as to liken it to “a form of psychological pollution that corrodes the well-being of . . . [its] victims.”¹⁹² Thus, many employees who believe they have been the targets of sexual harassment will report the behavior not only because they want to bring it to an end, but because the very act of reporting is an effort to regain some

186. *Id.* at 1205; see James C. Chow, Comment, *Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-Cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims*, 33 LOY. L.A. L. REV. 133, 144 (1999) (arguing that even “stray remarks” can “undermine the competence of women”); John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610 (1992) [hereinafter Donohue, *Advocacy Versus Analysis*] (stating that “the heart of sexual harassment is the violation of personal autonomy”).

187. Rosa Ehrenreich explains this phenomenon:

[H]er awareness of having been targeted for discriminatory reasons may . . . diminish her individual suffering, because she may feel better able to brush off the harassment precisely because she knows that nothing she did or could have done would have prevented it; she may feel empowered by her awareness that she is integral to a broader struggle to demand that all women be treated as full persons.

Ehrenreich, *supra* note 107, at 19-20.

188. *Id.* at 19.

189. See, e.g., Quinn, *supra* note 40, at 1154 (discussing the many harms that result from sexual harassment including negative side effects in one’s private and professional life); Yamada, *supra* note 182, at 483 (discussing the various psychological and physical effects of workplace harassment, including “stress, depression, mood swings, loss of sleep (and resulting fatigue), and feelings of shame, guilt, embarrassment, and low self-esteem”).

190. Bond, *supra* note 31, at 2499.

191. Yamada, *supra* note 182, at 483. According to Yamada, “workplace bullying,” a concept much broader than sexual harassment, is so damaging to both its victims and business as a whole that he has advocated the adoption of a status-blind hostile work environment protection. *Id.* at 523-29.

192. Donohue, *Advocacy Versus Analysis*, *supra* note 186, at 1588.

control over the situation and to reclaim some of the dignity that they have lost.¹⁹³

Terry Smith has noted the “psychological and physical injury” that discrimination causes, and has suggested “that opposition conduct is both a symptom of these injuries and a self-defense to avoid continued harm.”¹⁹⁴ While Smith’s work focuses on racial discrimination and discusses how it often engenders in its victims antagonistic feelings toward society,¹⁹⁵ there is reason to think that women would experience similar feelings of outrage and frustration when confronted with sexual harassment. Moreover, like minorities who find themselves without a support system at work to help alleviate the stress,¹⁹⁶ women may also feel very much alone. As Smith has noted, “the failure to engage in some form of opposition conduct—that is, the internalization of anger over perceived racism—threatens greater injury.”¹⁹⁷

Perhaps in response to concerns of this kind, continental Europe “appears increasingly to view harassment as an issue primarily of dignity rather than discrimination.”¹⁹⁸ One commentator has suggested that “[t]he broad European enactment of anti-harassment protection in recent months and years . . . may represent a . . . decisive attempt to replace modern expressions of duelling with the rule of law.”¹⁹⁹ The same commentator has questioned whether “[t]he annual American toll of workplace homicides and assaults . . . , even clinical depression and drug abuse, might be seen as a manifestation of these contemporary forms of ‘self-help’” in a society whose legal system is not sufficiently concerned with respect and dignitary harms.²⁰⁰ While this expression of concern may appear to over-dramatize the problem, it may be more right than many would want to believe. The pervasiveness of sexual harassment is well-

193. See Ehrenreich, *supra* note 107, at 19-20 (noting that when a woman knows she is being discriminated against, her knowledge of the situation may compel her to recover not only her dignity, but the dignity of all women).

194. Smith, *supra* note 116, at 546; see *id.* at 548 (“Although the Harvard-Kaiser Foundation study is significant for its verification that discrimination causes actual injury, it also suggests that opposition conduct is necessary to prevent or reduce the injury.”).

195. See *id.* at 549 (explaining that the “bitterness and anger” which results from racial discrimination is felt not only by the discriminating individual, but by society as a whole).

196. See *id.* (referencing a study which found that an African-American employee who works in a non-racially diverse environment lacks social support to cope with stress).

197. *Id.* at 566.

198. Coleman, *supra* note 98, at 260.

199. *Id.* at 287.

200. *Id.*

established,²⁰¹ and if women come to believe that they cannot speak out about this harassment—that they cannot give voice to their feelings of frustration, anger, and fear—it seems reasonable to believe that those feelings, borne of the initial harassment but compounded by the forced silence, will manifest themselves in other, potentially destructive, ways.

Again, the “reasonableness” requirement, especially as interpreted by the Fourth and D.C. Circuits, makes it more difficult for victims to speak out and give voice to those feelings of frustration and sadness and anger. Moreover, for those victims who do speak out, the current state of the doctrine risks inflicting additional psychological injury by describing as unreasonable the victim’s perceptions of what she experienced and her feelings about it. Eliminating the requirement that the plaintiff bear the burden of establishing that her belief was reasonable eliminates the suggestion, implicit in the current doctrine, that the plaintiff’s feelings are not legitimate until she can prove that they are accepted by society. Thus, this proposed alternative not only helps prevent additional wrongs by encouraging early reporting, but also does much to help the victims of workplace discrimination and harassment recover from the wrongs they have already experienced.

D. *Changing Norms*

Of course, the most significant, and most challenging, goal of Title VII is not ameliorating the harms of harassment, or even responding soon after it begins. Title VII’s greatest triumph would be realized if it could actually affect broader change in workplaces around the country by helping to create workplace environments in which both men and women feel equally comfortable, and in which women feel that they are treated like, and respected as, individuals. Multiple commentators have noted that most women in the workplace, even those who do not believe themselves to be the victims of explicit sexual harassment or offensive behavior, nonetheless “do not feel that they are treated as equals in the workplace, and survey data indicate that they have reason for this belief.”²⁰² While the specter of

201. See Ehrenreich, *supra* note 107, at 3 (noting that sexual harassment claims increased fifty percent during the 1990s); Abrams, *supra* note 94, at 1197-98 (“Fifty-three percent of working women report having experienced behavior that they describe as sexual harassment.”).

202. John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1339 (1989) [hereinafter Donohue, *Prohibiting Sex Discrimination*].

sexual harassment is, in part, a cause of these feelings,²⁰³ the more significant cause is the continued existence in the workplace of gender norms and stereotypes.

The power of these norms cannot be overstated. “Informal social norms not only constrain our conduct in relation to others, they also shape our expectations about how others will behave toward us.”²⁰⁴ Katherine Franke has described sexual harassment as “a sexually discriminatory wrong because of the gender norms it reflects and perpetuates.”²⁰⁵ She argues that other theories of sexual harassment focus only on the harm done to women and fail to recognize that “sexism . . . is something that affects and regulates us all, male and female. . . . [T]he net effect of [sexist] conduct extends beyond any particular case in that it solidifies what ‘real men’ and ‘real women’ should be.”²⁰⁶

The perpetuation of these norms may reflect “part of a discriminatory backlash: a last-ditch effort by men to preserve the playgrounds of male power from female competitors.”²⁰⁷ While “[n]ot all workplace harassment of women is motivated by a desire—explicit or implicit—to keep women out of male-dominated jobs,” Rosa Ehrenreich argues that “failure to recognize that much—perhaps most—workplace harassment of women is motivated by discriminatory male attitudes would be to miss the forest for the trees.”²⁰⁸ Vicki Schultz, too, has noted that “[h]arassment has the form and function of denigrating women’s competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers.”²⁰⁹

203. Abrams, *supra* note 94, at 1208; *see id.* (“Sexual inquiries, jokes, remarks, or innuendos sometimes can raise the spectre of coercion, but they more predictably have the effect of reminding a woman that she is viewed as an object of sexual derision rather than as a credible coworker.”).

204. Krieger, *supra* note 3, at 478.

205. Franke, *supra* note 71, at 693.

206. *Id.* at 763; *see* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1689 (1998) [hereinafter Schultz, *Reconceptualizing*] (“[M]any men are harmed at work by gender-based harassment that fits only uneasily within the parameters of a sexualized paradigm.”).

207. Ehrenreich, *supra* note 107, at 16.

208. *Id.*

209. Schultz, *Reconceptualizing*, *supra* note 206, at 1755. In addition, Schultz explains that harassment does not need to be sexual to maintain a male-dominated work place:

To render visible many of the nonsexual forms of harassment that remain hidden, we should also recognize that much of the behavior that creates a hostile work environment is conduct that has the purpose or effect of undermining the perceived or actual competence of women (and some men) who threaten the idealized masculinity of those who do the work. By engaging in hostile work environment harassment, incumbent male workers

While Title VII has almost certainly helped to facilitate some change in views "about the propriety of certain forms of workplace harassment,"²¹⁰ the fact remains that "because men still exercise control over most workplaces, their views of sexual behavior in the workplace remain the norm, the measure of 'business as usual.'"²¹¹ Thus, "[s]exual harassment is a potent reminder that the entry of women into the workplace is the beginning, not the end, of a social transformation."²¹²

Indeed, to Kathryn Abrams, the effort to change these norms represents the second major fight of the battle for gender equality in the workplace.²¹³ She writes that

one can describe the struggle for gender equality in the workplace as having two overlapping phases: the first concerned with ending the exclusion of women from many types of employment, and the second concerned with transforming the male-centered norms that created both the exclusion and the workplace as women now find it. . . . [T]he present day finds us not at the end of the path, but navigating a crucial bend in the road.²¹⁴

To her, these norms have tangible consequences in the workplace.²¹⁵ "Women who fought for access to jobs, property, and the political arena have discovered that increased access alone does not create conditions in which equality is possible. Women often are channeled into jobs that accord them little respect and few opportunities for advancement."²¹⁶ In addition,

lay claim to certain forms of work and the competence entailed as specifically masculine forms of labor.

Id. at 1762. She further explains that

much of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content. Indeed, many of the most prevalent forms of harassment are actions that are designed to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority.

Id. at 1686-87. Moreover, she contends that "harassment functions as a way of undermining women's perceived competence as workers." *Id.* at 1712.

210. Coleman, *supra* note 98, at 248.

211. Abrams, *supra* note 94, at 1203.

212. *Id.* at 1197.

213. See *id.* at 1186 (explaining that after gaining access to greater employment opportunities, women must alter the norms of male dominance within the workplace).

214. *Id.*; see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) ("'Second generation' claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.").

215. See Abrams, *supra* note 94, at 1187 (finding that male-centered workplace norms negatively affect relationships among co-workers, hinder the opportunities for women to advance professionally, and subject women to sexual harassment).

216. *Id.* at 1184-85; see Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1025 (1994) ("While it is true

[t]hese norms shape intangibles such as the “appropriate” professional demeanor: the tone of voice, air of command, and quickness to accommodate or anger that mark a “successful” employee. They also dictate the acceptable forms of professional camaraderie, and prescribe the boundaries between the workplace and the rest of the world²¹⁷

How then to effect greater change? How to transform a formal equality into a meaningful one in which all doors are open—and wide-open—to all people? Certainly the courts have a role to play.²¹⁸ But there is evidence that these norms exist not just in the workplace, but in the courts as well.²¹⁹ As noted above, the fact that most judges are men means they may subconsciously be more inclined to side with employers in sexual harassment cases.²²⁰ In fact, one empirical analysis of judicial decision-making found that “female judges mattered to outcomes in Title VII sexual harassment and sex discrimination cases. . . . Although plaintiffs lost in the majority of cases . . . , they were significantly more likely to win when a female judge was on the bench.”²²¹

Moreover, only if women feel comfortable reporting behaviors they find offensive when the harassment first occurs will cases presenting such conduct make their way to court, allowing these views to be challenged. Only then will judges have the opportunity, should they be so inclined, to condemn more and additional types of offensive

that anti-discrimination laws prohibit discriminatory conduct, not prejudice or stereotypes, much discriminatory conduct is based on stereotypical attitudes about the characteristics and qualifications of women and minorities.”); Posner, *supra* note 24, at 1317-21 (noting that among the causes of discrimination against women are ignorance and generalizations about the average working woman); *cf.* Estlund, *supra* note 25, at 73 (stating that expressions of hostility in the workplace “may undermine workplace equality and reinforce occupational segregation”). As Donohue and Heckman have noted in the context of race, much of Title VII’s value came from “overcom[ing] the informal enforcement mechanisms of the [segregationist] norm or forc[ing] people who do not share the law’s premise of equality to confront that view.” John J. Donohue III & James Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1729 (1991).

217. Abrams, *supra* note 94, at 1189. Abrams argues for “an approach that transforms the dominant male norms by integrating norms that reflect women’s needs and experiences.” *Id.* at 1192.

218. See Krieger, *supra* note 3, at 478 (finding that case law advances and changes informal social norms).

219. See Abrams, *supra* note 94, at 1203 (explaining that many court opinions in sexual harassment cases display male-centered norms that view such harassment as “harmless amusement, or as the treatment women should expect when they push their way into the workplace”).

220. *Id.*; see Krieger, *supra* note 3, at 485 (“The operation of subtle cognitive and motivational biases which distort social perception and judgment may further constrain the implementation of transformative law.”).

221. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1786-87 (2005).

behavior, and only then will we, perhaps, begin to see changes in the case law. To the extent that judicial decisions and definitions do help to define what is acceptable and what is not, the fact that women may be deterred from bringing these claims may mean that we are losing one possible means by which we can bring about change in societal norms and stereotypes.²²²

But history teaches that a conversation limited to the confines of the courtroom is not enough. If the social transformation is to continue, we will need a larger, national conversation about which behaviors are acceptable and which are not.²²³ As one commentator has noted, “[D]irect complaint of harassment is crucial. This is true whether we consider the instrumental power of the law (‘law as tool’) or its often more complex rhetorical and discursive power.”²²⁴ If we assume that some sexually harassing behavior is not motivated by the intent to harm women, but simply derives from a misunderstanding about what is offensive, this behavior can be changed, but only if men are alerted to what conduct women find offensive. But a meaningful conversation is only possible if there are multiple actors speaking and multiple voices being heard, and this is especially true in the context of sexual harassment where women see things so much differently than men, and where what changes the “conditions of employment” for a woman may seem trivial or insignificant to her male co-worker.

222. 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, 1757 (1990) [hereinafter Schultz, *Telling Stories*] (“Judges’ interpretations of sex segregation enter a broader stock of cultural knowledge that organizes people’s experience and gives meaning to what we see when we observe men and women doing separate tasks in everyday life.”).

223. See Sturm, *supra* note 214, at 462-63 (“[N]ormative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas, including but not limited to the judiciary.”). However, a national conversation must also create individual conversations to produce social change. As Cynthia S. Estlund explains in the context of race relations:

We would do much to heal racial divisions if people of different races, and particularly black and white citizens, had more conversations—about race and, perhaps more importantly, not about race—with each other. A “national conversation about race” may ultimately do less to improve race relations in this country than would millions of individual conversations among people of different races.

Estlund, *supra* note 25, at 50.

224. Quinn, *supra* note 40, at 1154 (citation omitted). Quinn goes on to explain that “[i]f one fails to name the harm as sexual harassment, the law is immobilized both ideologically and instrumentally. It is this instance that informs the present analysis, the process by which the law is ‘stilled’—both instrumentally and rhetorically—by everyday tactical maneuvers that serve to preclude this requisite naming.” *Id.* at 1155.

As long as we discourage women from speaking out and identifying the behavior that they find offensive, this conversation will be meaningless, and we will be unable to replace male-driven norms with a more realistic assessment of what all members of society find offensive. Indeed, if women are reluctant to report the conduct that they believe crosses the line, and are thus silenced, that silence will in effect reinforce existing norms about what is and is not acceptable in the workplace.²²⁵ And to the extent that women do feel comfortable, or at least more comfortable, reporting offensive behavior once it has become “severe or pervasive,” that later reporting may lead some to conclude that the earlier harassment was not offensive, and that the pre-existing norms are the correct ones.²²⁶

Thus, again, the “reasonableness” requirement and the narrow ways in which both the Fourth and D.C. Circuits have applied it are cause for great concern because they threaten to make it more difficult for women to speak out, and to speak out early. The fact that women will not be speaking openly about what behavior they find inappropriate and offensive will limit the effectiveness of any conversation about appropriate workplace norms and will make it more difficult for norms and stereotypes to change. As noted above, this maintenance of the status quo will make it more difficult for women to prevail in court and less likely for there to be meaningful change in offices around the country.

And this problem feeds on itself. The lack of reporting perpetuates the existing norms, and the existence of those norms then demoralizes women and discourages them from seeking to engage in behavior that will change the norms.²²⁷ As one

225. See Bond, *supra* note 31, at 2494-95 (“Because men have historically been over-represented in positions of power in the workplace, their views are often considered normative. Therefore, use of the reasonable person standard runs the risk of validating the majority male perspective of acceptable on-the-job behavior.”).

226. See Donohue, *Prohibiting Sex Discrimination*, *supra* note 202, at 1355-56 (“In the absence of legal protection, the response to sexual harassment will frequently be either to quietly endure or to quietly leave—neither of which would provide useful information to the employer or to prospective workers.”).

227. See Estlund, *supra* note 25, at 73 (“[E]xpression [of hatred, contempt, or disrespect in the workplace] may undermine workplace equality and reinforce occupational segregation. Such expression may also poison the workplace as a forum for pluralistic exchange and destroy the possibility of constructive engagement.”); cf. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1629-30 (1991) (noting in the context of racial differences that it is particularly troubling “when one social disadvantage after another accumulates on one racial group” that has historically been the victim of prejudice because, in part, “it severely demoralizes the members of the group”). Moreover, even if women wanted to speak out, the existence of these norms may make the workplace an uncomfortable environment in which they do not feel comfortable doing so. Estlund, *supra* note 25, at 73.

commentator has explained, “women’s work aspirations are shaped . . . primarily by the structures of incentives and social relations within work organizations.”²²⁸ Thus, women may internalize these norms and submit passively to pre-existing ideas about what women can and cannot do in the workplace. And then when women do not speak out as a result, when they are passive and submissive, they only reconfirm the view that women are not assertive, not capable of control, not deserving of the positions and the respect that they have been traditionally denied.²²⁹ In other words, they behave in ways that further entrench the ideas that society already has about women—and, indeed, that many women have about themselves.

The role that gender norms play in our workplaces is complex, pervasive and, perhaps most importantly, persistent. These norms are entrenched, the product of centuries of one way of thinking and the experiences that that way of thinking produced. While it is unquestionable that these norms have begun to change—and Title VII has played a significant role in that process—much remains to be done. The norms that remain are likely the most intractable, and therefore changing them will prove to be the most challenging. Commentators have noted that the structure of employer liability for sexual harassment is such that it places more emphasis on “policies and procedures” and on “providing sexual harassment training to their employees . . . [r]ather than providing employers with incentives to address the predictors of workplace harassment, such as the organization’s culture and the job gender context.”²³⁰ Thus, changes to organizations’ cultures and contexts will have to come from other directions. A conversation about those contexts and

228. Schultz, *Telling Stories*, *supra* note 222, at 1816; see Quinn, *supra* note 40, at 1160-61 (noting that sexual harassment can “reinforce[] . . . power relations through the play of gendered and sexual identities”).

229. Schultz explains that traditional gender roles reduce women’s status in the workplace:

By portraying women as naturally “feminine” creatures who approach the workworld with preordained preferences for suitably “feminine” work, courts validate sexist views of women as inauthentic workers fit only for the lowest-paying, least-challenging jobs. By portraying work itself as naturally “masculine” or “feminine,” they legitimate the structures and processes through which employers construct work and work aspirations in gendered terms.

Schultz, *Telling Stories*, *supra* note 222, at 1840; see Hoyman & Stallworth, *supra* note 34, at 63 (noting that the fact that “[h]istorically, women have not fared well in the law . . . reflects society’s perception of the proper place of women”).

230. Lawton, *Operating*, *supra* note 94, at 198. Lawton notes that these policies and procedures amount to “file cabinet compliance” and “have little effect on the incidence of workplace harassment.” *Id.*

cultures would be a good place to start—if the courts will let it happen.

CONCLUSION

Although some commentators have criticized the courts for intentionally attempting to limit Title VII's protective reach,²³¹ the D.C. Circuit's decision in *George* hardly appears to be an active attempt to limit the protective scope of Title VII's "opposition clause." To the contrary, it appears more likely to have been an attempt to craft a relatively easy way to deal with a frequently recurring problem, that is, identifying when an employee's harassment complaint is reasonable. Faced with increasingly heavy dockets, it is understandable why courts might prefer easy solutions to difficult ones. Yet, as discussed above, the "reasonable juror" test adopted in *George* is too easy, threatening to unnecessarily and inappropriately limit the ability of individuals to report what they believe to be discrimination without fear of retaliation. In doing so, it threatens to limit the extent to which Title VII's prohibitions are enforced, and just as importantly it threatens to undercut Title VII's other critical, if less tangible, purposes.

But what is the alternative? How should courts determine the objective reasonableness of a plaintiff's belief that she was the victim of sexual harassment? As much as anything else, the courts' decisions in *George* and *Jordan* reveal that there is no good way to define which beliefs are reasonable and which are not, especially in the context of hostile work environment claims. And these difficulties in definition have serious consequences in this context because they mean that individuals are less likely to report harassment, especially in its earliest stages, thereby compromising the ability of the anti-retaliation provision to advance the goals of Title VII. Balanced against these negatives, the benefits of requiring plaintiffs to establish the reasonableness of their beliefs as part of their prima facie retaliation case are too few, especially when those benefits can be served almost as well by allowing employers an affirmative defense to liability when they can establish that the plaintiff's complaint was made in bad faith.

Title VII has been the source of acclaim, controversy, and considerable commentary. Its anti-retaliation provision has been the

231. Cf., e.g., Symposium, *Civil Rights Act*, *supra* note 34, at 793-94 (noting that some Title VII lawyers had "stopped bringing Title VII cases because they got such a hostile reception from the federal bench that they couldn't do it any more").

2007]

REJECTING "REASONABLENESS"

1523

subject of less commentary, but it is no less critical. Indeed, in some respects, it is even more critical because of the fundamental and multi-faceted support it provides for Title VII's substantive anti-discrimination provision. Title VII may not be perfect, and its ability to achieve equality in the workplace may be limited by various forces external to the statute itself, but in its anti-retaliation provision it has an internal source of support that should not be discounted, at least so long as the courts do not diminish it to nothing. Courts should recognize that the anti-retaliation provision not only helps to prohibit discrimination, but also acts to preserve the freedom to speak and to heal. In determining how much opposition activity to protect, the courts should interpret the provision so that its breadth is commensurate with the many purposes it serves.