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Beyond the Bad Apple—Transforming the American Workplace for Women after #MeToo

Claudia Flores[†]

INTRODUCTION

This recent era of the #MeToo Movement has caused many to question whether U.S. sexual harassment laws and policies are responsive to workplace realities. Complaint-based employer policies, contractually-mandated arbitration agreements, time-limited administrative exhaustion requirements, and narrow judicial interpretations of actionable conduct have created a myriad of barriers to workers seeking enforcement. For women (and some men) targeted by harassing behavior it has often been too costly—financially, professionally, and personally—to navigate a system that depends almost exclusively on individual complainants to prompt social reform.

U.S. law has largely relied on the “bad apple” theory of harassment.¹ The harasser is a wayward employee and the employer an innocent third party to interpersonal relations and relation(ship)s that have gone awry. Though courts have found Title VII to provide a legal remedy for sexual harassment, they have struggled to define this form of gender discrimination, instead developing complex tests that rely on prevailing opinions of gendered interactions, sometimes reproducing the very sexism Title VII sought to correct.

Meanwhile, numerous studies have found that sexual harassment is best understood not as isolated occurrences between individuals but as patterns of behavior that are prominent in certain workplaces and correlated with workplace features within an employer’s control. Moreover, research indicates that sexual harassment is both impacted by the work environment and alters that environment by reducing employee

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¹ See Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817 (2004).

satisfaction, productivity and efficacy, and, unsurprisingly, discouraging women from entering and staying, as well as hampering their rise to positions of influence.

Congress sought to transform the American workplace with Title VII, but the implementation of the statute has failed to do so. In this Article, I will explore how we might move past the “bad apple” theory of sexual harassment to better change the workplace for women. I will argue that our current legal framework cannot provide the necessary shift in workplace practices. Instead, we need a transformation of both our understanding of sexual harassment and our approach to eradicating it. We need to focus less on sex and more on harassment and less on liability and more on prevention to move towards gender equality in employment.

In Part One, I will begin by summarizing U.S. law on sexual harassment and the legal standard that has emerged. I will discuss how our aversion to regulating workplace behavior, narrow judicial interpretations, and reliance on existing social norms has led to an impoverished enforcement system. In Part Two, I will explore Title VII’s transformative purpose in the context of what research and scholarly work have concluded about the nature, purpose, and impact of harassment. In Part Three, I will review international standards and comparative jurisdictions that have taken an alternative approach to sexual harassment that positions it as one form of workplace abuse, among others. I will discuss how this alternative approach, which is grounded in the dual concepts of human dignity and equality, has allowed for greater emphasis on prevention of the conditions that enable sexual harassment. In Part Four, I will explore the possibility and advantages of engaging with this approach in the U.S. context, and our need to develop a standard of workplace behavior against which to measure the inequality harassment engenders. Finally, in Part Five, I will discuss the importance and possibility of developing a positive vision of the workplace, grounded in women’s dignity and equality, in order to build an American workplace that fulfills the original vision of Title VII.

I. U.S. LEGAL FRAMEWORK

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination in hiring, firing, and compensation, and terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.² Congress intended Title VII to transform the American workplace by “improv[ing] the economic and social conditions of minorities and women by providing equality of opportunity in

² Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e *et seq.* (1964).

the work place,” recognizing that “[t]hese conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.”³ Congress also understood that the liability mechanism created in Title VII could only be a component of a broader effort to move towards equality in the workplace, and “strongly encouraged employers, labor organizations, and other persons subject to title VII . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action.”⁴

In the mid-80s, courts began to recognize workplace sexual harassment as a form of gender discrimination under Title VII.⁵ As courts developed jurisprudence around harassment claims, they acknowledged Title VII’s reformatory aim: “[t]he purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.”⁶ Yet, courts often struggled to implement these goals in a manner that captured the social transformation Title VII envisioned,⁷ instead often relying on the very societal prejudices Title VII sought to eradicate.⁸ Consequently, over time, Title VII’s goal of redefining the workplace against cultural norms of inequality was lost.

³ 29 C.F.R. § 1608.1 (1979).

⁴ *Id.*

⁵ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986); Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1267 (1994) (“The victim of sexual harassment is a vulnerable player within the courts. Sexual harassment protections in America are almost completely the product of the judiciary; as a statute, Title VII gives virtually no guidance about this type of sex discrimination.”).

⁶ *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998); *Meritor*, 477 U.S. at 64; *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)) (“The language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment”); *Ellison v. Brady*, 924 F.2d 872, 879, 880 (9th Cir. 1991) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (“By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to “run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.”)

⁷ *Ellison*, 924 F.2d at 881 (quoting *Andrews v. Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)) (“Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, “Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.”)

⁸ See e.g., *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017, 1018 (8th Cir. 1988): (“Title VII does not mandate an employment environment worthy of a Victorian salon. Nor do we expect that our holding today will displace all ribaldry on the roadway. One may well expect that in the heat and dust of the construction site language of the barracks will always predominate over that of the ballroom. What occurred in this case, however, went well beyond the bounds of what any person should have to tolerate.”); See *Gallagher*, 139 F.3d at 338, 342 (“Today, while gender relations in

Courts have more or less divided sexual harassment claims into two categories—quid pro quo harassment and harassment that creates a “hostile work environment.”⁹ Quid pro quo means “something for something” and involves claims where submission to or rejection of unwelcome sexual conduct results in a tangible employment action that adversely impacts the complainant. The classic example is when a supervisor offers a promotion in exchange for sex. Courts have found these sorts of claims to be straightforward—achieving consensus on the fact that women (and men) should not be required to provide sexual favors or attention in exchange for workplace benefits or concessions.¹⁰

Hostile work environment claims have proven to be the more difficult category. These claims involve harassment that result in no clear adverse employment action other than the impact of the harassment on the employee and her or his work experience. In order to make out a claim for a hostile work environment, a complainant must prove that the conduct was severe or pervasive.¹¹ The “employment action” in a hostile work environment case must come in the form of some alteration of the workplace. The employee must demonstrate that (1) the employee was subjected to unwelcome harassment, (2) the harassment was based on sex, (3) the harassment was sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment (judged by both an objective and subjective standard), and (4) that the employer knew or should have known of the harassment.¹² This analysis requires a mixed inquiry of law and fact by judges and juries.¹³

the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation.”). For an explanation for why juries are not well situated to make sexual harassment determinations and often reflect community prejudices in their assessments of workplace hostility see Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813 (1998).

⁹ *Meritor*, 477 U.S. at 65.

¹⁰ See, e.g., *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); see also EEOC, *Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism*, No. 915.048 (Jan. 12, 1990), <https://www.eeoc.gov/policy/docs/sexualfavor.html> [<https://perma.cc/R8QU-Z5P7>].

¹¹ See generally, *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004) (to be actionable under Title VII, plaintiffs must show “harassing behavior ‘sufficiently severe or pervasive to alter the conditions of [their] employment’”) (quoting *Meritor*, 477 U.S. at 67).

¹² See *Henson v. City of Dundee*, 682 F.2d 891, 903–05 (11th Cir. 1982) (identifying elements of a sexual harassment claim).

¹³ See Scheindlin & Eloffson, *supra* note 8, at 815 (discussing allocation of sexual harassment determinations between judges and juries).

The first step is determining whether the harassment occurred because of the plaintiffs' sex.¹⁴ The harassing conduct need not be motivated by sexual desire but only general hostility to the presence of a certain sex in the workplace.¹⁵ While this standard appears to address a broad category of gender-motivated harassment, courts have repeatedly rejected claims in which general hostility to women is evident but not made explicit in sexualized comments.¹⁶ Claims based on behavior that side-lines, humiliates, excludes, demeans, or otherwise treats women in a hostile manner in the workplace are not necessarily considered by courts to be "because of sex."¹⁷

The second requirement—that the harassment is sufficiently severe and pervasive—is a threshold-setting standard for the behavior in question. Courts have looked at 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."¹⁸ The Supreme Court has differentiated between the workplace (1) that is "permeated with 'discriminatory intimidation, ridicule, and insult,'" and (2) where there is the "mere utterance of an . . . epithet which engenders offensive feelings in an employee."¹⁹ In general, relatively isolated instances of non-severe misconduct will not support a hostile work environment claim.²⁰ "A recurring point in [our] opinions," the Court stated in *Faragher v. City of Boca Raton*,²¹ "is that 'simple teasing,' offhand comments, and

¹⁴ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex.'").

¹⁵ *Id.* ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

¹⁶ *See Williams v. General Motors Corp.*, 187 F.3d 553, 572 (6th Cir. 1999) (Ryan, J., dissenting) ("The majority's artificial construct—that non-sexual harassment of a female in the workplace can give rise to Title VII sex discrimination liability if it evinces 'anti-female animus' is a radical rewriting of settled Title VII sex discrimination jurisprudence."); *see also Faragher vs. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' A recurring point in [our] opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. These standards for judging hostility are sufficiently demanding to ensure the Title VII does not become a 'general civility code.'").

¹⁷ Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. FORUM 22 (2018).

¹⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

¹⁹ *Id.* at 21.

²⁰ The Supreme Court has distinguished between a workplace that is "permeated with 'discriminatory' intimidation, ridicule, and insult" and one where there is the "mere utterance" of an offense. *Harris*, 510 U.S. 17 at 21 (quoting *Meritor*, 477 U.S. at 65, 67); *see also Young v. Phila. Police Dep't*, 94 F. Supp. 3d 683, 700 (E.D. Pa. 2015), *aff'd* 651 F. App'x 90 (3d Cir. 2016).

²¹ *Faragher*, 524 U.S. at 788.

isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”²²

The third element of the claim is whether the behavior created an abusive work environment, an assessment involving an objective and subjective determination. In *Harris v. Forklift Sys., Inc.*,²³ the Supreme Court rejected the approach taken by three circuits which had required a “serious effect” since “concrete psychological harm [is] an element Title VII does not require.”²⁴ Instead, the *Harris* Court adopted a requirement that the plaintiff must show that the defendant’s conduct was both objectively and subjectively hostile or abusive. To meet the objective standard, conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment.²⁵ To meet the subjective standard, the plaintiff needs to prove that she or he perceived the environment to be abusive.²⁶

Both the subjective and objective determination of what constitutes an abusive work environment have significantly limited the anti-discriminatory impact of Title VII, circumscribing the universe of abusive treatment that the statute deters. The objective standard, which requires courts to determine how a reasonable person would receive the harassment, has, unsurprisingly, led to complexities around the vantage point of the “reasonable person.” Some courts experimented with adding specific attributes to the reasonable person, asking whether a reasonable African American woman would find the harassment offensive, or whether a reasonable person in plaintiff’s position would find the behavior offensive.²⁷ To resolve this, in 1998, the Supreme Court attempted to offer some clarification in *Oncale v. Sundowner Offshore Services, Inc.*,²⁸ questioning whether “the objective severity of harassment should be judged from the perspective of a reasonable person in

²² *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, 81 (1998)).

²³ 510 U.S. 17 (1993).

²⁴ *Id.* at 22.

²⁵ *Id.* (“So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious.”).

²⁶ *Id.* at 21–22 (“If the victim does not subjectively perceive the environmental to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.” However, “Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing their careers.”).

²⁷ *Compare* *Watkins v. Bowden*, 105 F. 3d 1344, 1356 (11th Cir. 1997) (upholding reasonable person jury instruction as opposed to “reasonable African American or women” jury instruction) *with* *West v. Phila. Elec. Co.* 45 F.3d 744, 753 (3d Cir. 1995) (where the objective standard was reviewed as “reasonable person of the same protected class in that position.”).

²⁸ 523 U.S. 75 (1998).

the plaintiff's position."²⁹ The Supreme Court set forth an analysis based upon the objective reasonable person standard that looked at "the social context in which particular behavior occurs and is experienced by its target" which inevitably "depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."³⁰ While this standard attempted to provide more nuance, it also yielded more discretion to draw upon problematic societal norms.³¹

The subjective test, which essentially asks whether the conduct was unwelcome, is a complicity test of whether or not the plaintiff welcomed the behavior.³² Conduct is unwelcome if the plaintiff did not solicit or incite it and if the plaintiff regarded the conduct as undesirable or offensive.³³ Courts have held that certain conduct, particularly rape, is unwelcome by definition.³⁴ However, determinations of whether conduct was welcome have sent courts down the rabbit hole of assessing a plaintiff's behavior to determine if the alleged harassment was a component of acceptable gendered interactions or not.³⁵

The final question is whether employer liability is triggered or whether the employer knew or should have known the harassment occurred. For claims related to a supervisor, the employer is vicariously liable but may utilize an affirmative defense. The employer may avoid liability by demonstrating that (1) the employer exercised reasonable

²⁹ *Id.* at 81–82.

³⁰ *Id.*; see also *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 460 (5th Cir. 2013), (citing *Oncale*, 523 U.S. at 80, 118 (1998) ("We view the alleged harassment with '[c]ommon sense, and an appropriate sensitivity to social context' to determine whether it constitutes 'conduct which a reasonable person in the plaintiff's position would find severely hostile.'").

³¹ For example, there is some indication in psychological research that juries are resistant or unable to apply reasonable person standards from particular perspectives in discrimination cases. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1332–33 (2011).

³² See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (for conduct to constitute sexual harassment, it must be unwelcome to the victim).

³³ See *Frensley v. N. Miss. Med. Ctr., Inc.*, 440 F. App'x 383, 386 (5th Cir. 2011); *Burnes v. McGregor Electr. Indus., Inc.*, 989 F.2d 959, 962 (8th Cir. 1993); *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

³⁴ See, e.g., *Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008) ("It goes without saying that forcible rape is 'unwelcome physical conduct of a sexual nature.'") (citing *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002)).

³⁵ *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) (Similarly, a plaintiff's participation in foul language or sexual innuendo in a consensual setting outside the workplace "does not waive her legal protections against unwelcome harassment."); *E.E.O.C. v. Wal-Mart Stores, Inc.*, Nos. 97-02229, 97-02252, 1999 WL 1032963 (10th Cir. 1999) (Evidence that a plaintiff had consensual sexual relationships with other co-workers outside of work "is not relevant to [plaintiff]'s claims of harassment at work."); see also *Wilson v. City of Des Moines*, 442 F.3d 637 (8th Cir. 2006) (evidence of female employee's sexual behavior and comments in the workplace was "highly probative of issue of whether the alleged harassment was unwelcome."); *Excel Corp. v. Bosley*, 165 F.3d 635, 641 (8th Cir. 1999) (evidence of alleged sexual relations between employee and ex-husband outside the workplace during period when harassment occurred should be excluded).

care to prevent and correct sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of this protection.³⁶ The employer is liable for harassment by non-supervisory employees or non-employees over whom it has control, if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.³⁷ An employer is merely required to be responsive—having an available anti-harassment policy with a complaint procedure which the employee unreasonably failed to use would defeat the claim.³⁸

Overall, this complex test has created barriers to claimants³⁹ and failed to provide effective guidance to employers and employees.⁴⁰ The core legal concepts the test relies on—“severe and pervasive”, “unwelcome” and “offensive”—remain vague and have often resulted in inconsistent and narrow assessments of sexual harassment claims.⁴¹ Scholars have proposed various reforms that seek to alter the allocation of fact-finding determinations between judges and juries in hopes of better capturing the reformative aims of Title VII. Some have proposed that the judiciary should exercise greater influence in factual determinations as it has done in other contexts in which uniformity and predictability are paramount.⁴² Excessive reliance on juries to assess the severity and offensive nature of harassment, scholars have argued, yields inconsistent decisions without precedential value, often reflecting the predominating prejudices Title VII seeks to transform.⁴³ In contrast, some researchers have found that judges consistently downplay and minimize instances of harassment to the detriment of litigants.⁴⁴ The current composition of the judiciary, it is argued, is far too disconnected

³⁶ See *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); see also *Faragher vs. City of Boca Raton*, 524 U.S. 775, 788 (1998).

³⁷ EEOC, *Harassment; Employer Liability for Harassment*, <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/A9RD-84AY>].

³⁸ *Id.*

³⁹ Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST COMPANY, (July 31, 2017), <http://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits> [<https://perma.cc/4J5A-U5VZ>] (finding that, of the cases filed in court that are not settled or voluntarily dismissed, less than 1 percent result in a favorable outcome); Eyer, *supra* note 31 at 1299 (exploring the reasons for the low success rates of discrimination lawsuits).

⁴⁰ See generally SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (Oxford University Press, 2017); Scheindlin & Eloffson, *supra* note 8; U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, 115TH CONG., *So I Tolerated It—How Work Places Are Responding to Harassment and the Clear Need for Federal Action: Minority Staff Report* (December 2018) [henceforth *Minority Staff Report*] [<https://www.help.senate.gov/imo/media/doc/Senator%20Murray%20Harassment%20Report%20Final.pdf>].

⁴¹ Scheindlin & Eloffson, *supra* note 8; U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, *Minority Staff Report*, *supra* note 40 at 31–33.

⁴² Scheindlin & Eloffson, *supra* note 8 at 834–37.

⁴³ *Id.*

⁴⁴ Theresa M. Beiner, *Let the Jury Decide: The Gap between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 809–17 (May 2002).

from the realities of the workplace to effectively assess harassment claims.⁴⁵

Both perspectives reflect a similar concern that the legal framework developed by the courts impedes the policy goals of Title VII. Without a path towards the social reform Title VII seeks, sexual harassment determinations in our courts are bound to be vague and regressive.⁴⁶ As one commentator noted, “[s]ociety can hardly be expected to reform itself without notice as to what title VII requires.”⁴⁷ That this problematic adjudicative process is placed within an administrative process that most agree also limits the reform aims of Title VII is even more concerning. In hostile work environment claims, employees must first file with their employer’s internal complaint process. Then they must file their claims through the Equal Employment Opportunity Commission’s (EEOC) administrative process and must do so within 180 to 300 days of the offense.⁴⁸ Due to limited resources, the EEOC only pursues a small portion of reported claims, often issuing right to sue letters for complainants to pursue private litigation, a costly undertaking which is prohibitive to many.⁴⁹ Thus, the cases that make it to court already represent a small portion of the claims filed with the EEOC.⁵⁰

The result of these administrative process hurdles and our legal determination of harassment is that few instances of gender-motivated abusive workplace behavior are held to account under Title VII.⁵¹ Ultimately, the costs of litigation, both financial and otherwise, are rarely worth it to the aggrieved party. Loss of career status, pursuit of claims

⁴⁵ 33.3 percent of Supreme Court justices are women, 36.8 percent of Circuit Court of Appeals judges are women, and 34 percent of Federal District Court judges are women. AM. BAR ASS’N, *A Current Glance at Women in the Law*, at 5 (Jan. 2018), <https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.pdf> [<https://perma.cc/2KHX-XPAC>].

⁴⁶ Researchers have concluded that features of American culture create reluctance by any fact-finder (judge or jury) to attribute workplace wrongs to status discrimination. Eyer, *supra* note 31, at 1299.

⁴⁷ Scheindlin and Eloffson, *supra* note 8, at 834.

⁴⁸ EEOC, *Time Limits for Filing a Charge*, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/CHE6-6D7Q>].

⁴⁹ EEOC, *What You Can Expect After You File A Charge*, <https://www.eeoc.gov/employees/process.cfm> [<https://perma.cc/LWA9-N225>].

⁵⁰ EEOC, *All Charges Alleging Harassment (Charges Filed with the EEOC) FY 2010-FY2018*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm [<https://perma.cc/N535-9WVF>].

⁵¹ U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, *Minority Staff Report*, *supra* note 40, at 10–15 (discussing EEOC charge data and lack of reliable data on sexual harassment charge success).

resulting in job losses, personal investments, cost of legal representation, and the emotional drain of the process all make harassment claims a burdensome pursuit.⁵²

II. RECONSIDERING THE U.S. APPROACH

Half a century later, Title VII's original transformative goals appear to have been, at best, curtailed and, at worst, rendered ineffectual, by a complaint-dependent, liability-focused process, saddled with under-resourced administrative hurdles and courts that have narrowed the statute's potential. Our unwillingness to address the misogyny and sexism that underpins harassment—maintaining instead a focus on its individual and inter-personal nature—has undermined Title VII's impact on women in employment, undercutting its original aim to “liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.”⁵³ The question is now whether we can reorient our approach to sexual harassment and fulfill Title VII's transformative intention.

A return to the goals of Title VII and the intention of Congress to “liberate the workplace” from gender inequality requires a more forward-looking approach than the one we have employed thus far. Like the Civil Rights Act of 1964, which sought to end segregation in schools, Title VII sought to fundamentally alter the workplace, a task its implementation has not achieved.⁵⁴ A transformative approach to discrimination is one that understands that inequalities are rooted in history, and that divisions are not arbitrary or irrational but often deliberately preserve current structures.⁵⁵ This approach requires an inquiry into the values, behaviors, institutions, and power relations that maintain women's inequality through sexual harassment.⁵⁶

By this measure, determinations ungrounded in policy goals or reliance on dominant cultural norms and public opinion is misguided. A legal assessment of sexual harassment that seeks transformation would not aim to reflect social norms but instead would pursue an assessment

⁵² Christine O. Merriman and Cora G. Yang, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 84 note 6 (1985) (citing an unpublished 1979 Working Women's Institute Study (WWI)).

⁵³ *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

⁵⁴ Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).

⁵⁵ The Constitutional Court in South Africa provides a good example of a transformative approach to discrimination claims. See Catherine Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. AFR. J. ON HUM. RTS. 253 (2007).

⁵⁶ *Id.*

of harassment that advances women's workplace equality and recognizes the barriers to that equality. In other words, our laws on sexual harassment and their implementation should move us forward rather than merely reflect our discriminatory surroundings.

A. Sexual Harassment and the Structure of the Workplace

As discussed, our legal conception of sexual harassment focuses primarily on ensuring those with authority in the workplace do not use it to elicit sexual services, favors, and interactions, and that extreme sexually degrading and/or intrusive behavior is punished.⁵⁷ While these are important features of sexual harassment, they do not address the broader context and elements of the American workplace that make harassment possible and advantageous. By focusing on the bad actors/rotten apples that abuse their authority or openly degrade their female coworkers, our legal approach to sexual harassment misses and renders acceptable many other forms of sexual harassment that impede women from attaining their full economic potential through employment.

The last decade of research has painted an increasingly clear picture of sexual harassment—its nature, benefit and impact—which differs from the one reflected in our jurisprudence. Research indicates that sexual harassment is often not an isolated event nor one disconnected from other features of a workplace, but a tactic that defines certain workplaces and is a critical component of them. Sexual harassment is not merely the experience of a few unlucky women but a practice that advances, entrenches, and preserves workplace inequalities, discouraging women from pursuing higher-level positions or even entering certain industries. This more complex understanding of harassment puts into question the judicial approach of requiring “a showing of tremendous harm done to a flawless plaintiff.”⁵⁸

Studies have identified various predictors of harassment, including particular workplace practices and industries prone to high levels of harassment. Male-dominated workplaces (e.g., construction),⁵⁹ low-wage workplaces populated by women (e.g., retail and care providers),⁶⁰

⁵⁷ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> [<https://perma.cc/6CAK-UW65>].

⁵⁸ See Bernstein, *supra* note 5, at 1271.

⁵⁹ Kim Parker, *Women in Majority-Male Workplaces Report Higher Rates of Gender Discrimination*, PEW RESEARCH CENTER (Mar. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/> [<https://perma.cc/47DZ-6TMJ>].

⁶⁰ Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment*

and industries where workers are excluded from labor law protections (e.g., domestic work and farm labor)⁶¹ are all associated with higher levels of sexual harassment. Poorly structured work environments (e.g., laborer working in isolation, poor management structures, excessive supervisory discretion, lack of clear rule making and enforcement) and workplaces with inadequate complaint systems also evidence higher levels of harassment.⁶²

Male-dominated workplaces have consistently been found to have higher rates of harassment of female workers than gender-balanced workplaces.⁶³ For example, a study relying on charge data from the EEOC found that, in a male majority industry like construction (91% male workers), women were 27 times more likely than men to report sexual harassment. In comparison, in health care and social assistance industries, where 21% of workers are male, women were only 1.2 times more likely to report sexual harassment than men.⁶⁴ In male-majority industries, female supervisors are also more likely to experience harassing behaviors than in predominately female industries.⁶⁵

Women in female-dominated workplaces where women are in low-wage positions with high levels of turnover, such as retail and elder or child care, also report high levels of sexual harassment. EEOC charge data, again, revealed that the largest number of claims were filed in the accommodation and food services industry followed by retail trade. Both industries are dominated by women and pay low-wages at high turnover rates.⁶⁶ Domestic (household) workers have long been subjected to harassment and abuse in isolated and unregulated workplaces, many instances even rising to the level of human trafficking and servitude.⁶⁷

The infrastructure of the work environment has also been found to impact the prevalence of sexual harassment. For example, an Institute for Women's Policy Research study identified several work-related features associated with increased risk of sexual harassment and assault

across Industries Affects All Workers, CTR. FOR AM. PROGRESS (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/> [<https://perma.cc/WF4U-H6AY>].

⁶¹ *Id.*

⁶² Elyse Shaw, Ariane Hegewisch & Cynthia Hess, *Sexual Harassment & Assault at Work: Understanding the Costs*, B376 IWPR 1–12 (Oct. 2018), https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf [<https://perma.cc/X58H-9CWT>].

⁶³ See Parker, *supra* note 59.

⁶⁴ Women's Initiative, *Women Disproportionately Report Sexual Harassment in Male-Dominated Industries*, CTR. FOR AM. PROGRESS (Aug. 6, 2018), <https://www.americanprogress.org/issues/women/news/2018/08/06/454376/gender-matters/> [<https://perma.cc/JR4J-AQD2>].

⁶⁵ Heather McLaughlin, Christopher Uggen & Amy Blackstone, *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77(4) AMERICAN SOCIOLOGICAL REV. 625, 634 (2012), <http://journals.sagepub.com/doi/pdf/10.1177/0003122412451728> [<https://perma.cc/MWE7-WCCN>].

⁶⁶ See Frye, *supra* note 60.

⁶⁷ See Shaw et al., *supra* note 62, at 3.

in the workplace, including: compensation mechanisms that relied on tips; work environments in which workers labored in isolation; employment of workers with irregular immigration status (or where their status was dependent on their jobs); and work settings with employees with significant power differentials.⁶⁸

Other elements of the workplace—e.g., lines of management, supervisory discretion, mechanisms for employee well-being and retention—can all impact the prevalence of sexual harassment.⁶⁹ A committee of experts analyzing the agricultural industry in an International Labor Organization (ILO) report, for example, found that the prevalence of sexual harassment was impacted by unequal power relations, discriminatory work practices, the precariousness of the workers' employment, frustration of the right to association and collective bargaining,⁷⁰ poor working conditions, work intensity or unrealistic production goals, the prevalence of informal work,⁷¹ and weak enforcement mechanisms.⁷²

Many of these factors, if not all, are features of a workplace within the employer's design and control. Who employers hire, how they treat their employees, how they expose them to customers, what forms of safety mechanisms are in place, and employee job security all appear to have some impact on the prevalence of sexual harassment in the workplace and are all decisions employers make in designing and maintaining a workplace. While an employer may not have absolute control over

⁶⁸ *Id.* at 4. The last example has been highly publicized in this past year through articles by women harassed in the entertainment industry, as well as law clerks and in academia, and, in general all professions that instill certain individuals with high levels of unchecked authority. See, e.g., Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 17 (2018) <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Gertner-1.pdf> [<https://perma.cc/TY5Z-YKAS>]; see also Katie Benner, *Women in Start-Up World Speak Up About Harassment*, N.Y. TIMES, July 4, 2017, <https://www.nytimes.com/2017/07/04/insider/technology-sexual-harassment.html> [<https://perma.cc/K7AQ-BSQK>]; Pamela Hutchinson, *#MeToo and Hollywood: What's Changed in the Industry a Year On?* THE GUARDIAN, Oct. 8, 2018, <https://www.theguardian.com/world/2018/oct/08/metoo-one-year-on-hollywood-reaction> [<https://perma.cc/A5YY-AAQT>].

⁶⁹ Int'l Labor Org., Conditions of Work and Equality Dept. [ILO], *Final Report*, at ¶ 62, 105, 110, Meeting of Experts on Violence against Women and Men in the World of Work, MEVWM/2016/7 (Geneva, 3–6 October 2016), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/meetingdocument/wcms_546303.pdf [<https://perma.cc/9QGE-BYVH>].

⁷⁰ *Id.* at ¶ 12, 13, 101; see also Int'l Labour Office, *Ending Violence and Harassment Against Women and Men in the World of Work*, ILC.107/V/1 29, 70 (2018), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf [<https://perma.cc/B38L-VA6J>].

⁷¹ *Id.* at ¶ 12, 101.

⁷² *Id.*

whether harassment occurs, the employer is clearly in a position to significantly reduce the opportunity, motivation, and reward systems that enable and promote it.⁷³

Finally, the negative impact of harassment, both on the intended victims and the workplace more generally, is clear. Studies have identified a variety of negative consequences on the health and well-being of workers, including increased stress for victims (which can lead to a variety of physical ailments), inability of victims to focus on doing their tasks correctly and safely, inability of co-workers and managers to effectively respond to or deal with sexual harassment, intimidation that causes victims to be reluctant to raise legitimate safety issues for fear of being ridiculed, and workplace violence.⁷⁴

B. Redefining Sexual Harassment

When placed in the context of this research, our legal definition of and policy approach to harassment appears badly in need of updating. While research has made it evident that harassment is an institutional and societal problem, Title VII's implementation continues to focus on isolated inter-personal issues among individuals, such as badly worded jokes and inappropriate sexual pursuits of aberrant actors.⁷⁵ For more than a decade now, scholars and advocates have urged lawmakers, courts, and employers, with little success, to treat sexual harassment claims as part of a larger pattern of workplace discrimination and inequality, consistent with the spirit of Title VII.⁷⁶ Our current approach has not only failed to capture the nature and full range of behavior that causes inequality of women in the workplace, but it has undermined Title VII's ability to eradicate gendered employment discrimination, at the significant cost of many women and men.

Vicki Schultz and others⁷⁷ have proposed the adoption of an approach to harassment that more comprehensively captures the nature of the problematic behavior. Schultz has argued that the sexual comments and behavior courts focus on ignores many of the sex-based words and actions in the workplace that are aimed at and succeed in

⁷³ Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183 (2006).

⁷⁴ See, e.g., ILO, *Final Report*, *supra* note 69, at ¶ 49; Shaw et al., *supra* note 62, at 4–6; see also Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOLOGY 127 (2007); Morton Nielson, et al., *Prospective Relationships between Workplace Sexual Harassment and Psychological Distress*, 62(3) OCCUP. MED. (LOND) 226 (Mar. 2012).

⁷⁵ Lawton, *supra* note 1.

⁷⁶ *Id.* at 820–21.

⁷⁷ See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 17.

undermining women and limiting their achievements.⁷⁸ As Schultz has explained, even traditional forms of sexual harassment are not, as was previously understood, power used to gain access to sex but sexualized behavior used to maintain or attain power.⁷⁹ This understanding builds off of Catharine MacKinnon's original framing of sexual harassment as domination of one sex over another.⁸⁰

Under this framework, sexual harassment is a tool of male workers to maintain their status in the workplace and limit economic advancement and opportunities for women (and men who do not meet accepted standards of masculinity).⁸¹ When understood as a systematic form of workplace advantage-seeking behavior, an institutional response by the employer seems called for. As discussed in Section II(A), studies show that such interventions are impactful.⁸² Moreover, if this behavior is aimed at and succeeds in preserving the very gender inequality our policies seek to eradicate, interventions that go beyond merely adjudicating employee complaints through litigation also seem advisable. Our failure to do any of this begs the question of whether we seek to eradicate sexual harassment or merely regulate it to a socially acceptable degree. And, if the latter, isn't the tolerance for sexual harassment a symptom of the very sexism Title VII was intended to address?⁸³ Are we resigned to the contention that sex-based harassment and abuse are simply a part of women's working life even if such behavior leads to perpetuating the exclusion of women from the workplace and creating barriers to their economic equality?

III. INTERNATIONAL AND COMPARATIVE APPROACHES

The ILO standard setting process, "Ending Violence and Harassment Against Women and Men in the World of Work," began at its 325th Session in November of 2015 and provides some insight into alternative

⁷⁸ *Id.* at 26.

⁷⁹ *Id.* at 27.

⁸⁰ See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 27–28 & n. 13 (1979).

⁸¹ McLaughlin et al., *supra* note 65 (explaining that sexual harassment is used to counterbalance women in positions of power and might be motivated more by desire for control and domination than sexual desire).

⁸² Ryan K. Jacobson and Asia A. Eaton, *How Organizational Policies Influenced Bystander Likelihood of Reporting Moderate and Severe Harassment at Work*, 30:1 *EMPLOY. RESPONSE RIGHTS J.* 37 (2018) (Participants in zero-tolerance policy condition were more likely to intend to formally report the harassment to their organization).

⁸³ Brenda L. Russell and Kristin Y. Trigg, *Tolerance of Sexual Harassment: An Examination of Gender Differences, Ambivalent Sexism, Social Dominance, and Gender Roles*, 50(7–8) *SEX ROLES* 565 (2004) (explaining that ambivalence and hostility toward women are much greater predictors of tolerance of sexual harassment than is gender alone).

ways to address sexual harassment in the workplace.⁸⁴ The ILO initiated this process with the goal of achieving a consensus among its 187 member states on the nature of violence and harassment in the workplace and developing a framework for prevention and response.⁸⁵ Through this process, the ILO has consolidated national laws and explored the policy approaches to sexual harassment that have emerged through international agreements and within member states.

As captured in the ILO's report, the international human rights legal system, as well as some of our peer countries, address sexual harassment within the larger context of workplace rights and standard violations. Sexual harassment is treated as a form of violence and abuse that burdens the workplace.⁸⁶ It is considered to be rooted in gender discrimination that results in violations of human dignity and equality, two historically core principles of the international human rights legal system.⁸⁷ Human dignity is the fundamental principle that an individual should be treated as an end rather than a means and is considered the basis for all human rights.⁸⁸ The concept of equality requires some equal distribution of rights, benefits and opportunities, and ensures that any distinctions made among groups that create any disparate enjoyment of the above is justified. Without a foundation, equality alone does not determine what rights, benefits, and privileges must be redistributed.⁸⁹ Human dignity provides that guide and allows an assessment of whether group distinctions are justified, serving as the basis upon which they can be judged as permissible or impermissible.⁹⁰

⁸⁴ ILO, *Ending Violence and Harassment Against Women and Men in the World of Work, Report* [henceforth *Ending Violence and Harassment*] V(1), ILC. 107/N/1, 1–31, 45–59, 77–83 (May 12, 2017), https://www.ilo.org/wcmsp5/groups/public/-/ed_norm/-/relconf/documents/meetingdocument/wcms_553577.pdf [<https://perma.cc/BW68-KCRF>].

⁸⁵ *Id.* at 33–44, 63–75.

⁸⁶ ILO, *Ending Violence and Harassment*, *supra* note 84, at 6, 9, 14–16, 34, 41, 76, 97.

⁸⁷ The Universal Declaration of Human Rights (UDHR), the foundation of the human rights system, begins with an assertion of the “inherent dignity and of the equal and inalienable rights of all members of the human family.” G.A. Res. 217 (III) A, Pmbl., Universal Declaration of Human Rights (Dec. 10, 1948). Similarly, the International Covenant on Civil and Political Rights (1966), one of the system's first and still most widely recognized treaties, asserts that basic human rights “derive from the inherent dignity of the human person” and that the animating principle of the covenant is the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world.” G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966).

⁸⁸ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) EUR. J. INT'L L. 655, 689–92 (2008).

⁸⁹ Susie Cowen, *Can Dignity Guide South Africa's Equality Jurisprudence*, 17 S. AFR. J. ON HUM. RTS. 34, 48 (2001).

⁹⁰ McCrudden, *supra* note 88; Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 Jan. 1986 (Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica requested by the Government of Costa Rica), at ¶¶ 55–56 (“notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.”).

Various international human rights treaties explicitly protect the right to dignity and equality in the workplace. The Universal Declaration of Human Rights (UDHR) recognizes that “everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity.”⁹¹ ILO conventions have been interpreted to prohibit sexual harassment as a form of physiological coercion, sex discrimination, and violation of workplace health and safety, among other grounds.⁹² Under the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), sexual harassment is not only a direct violation of dignity, but a form of inequality that interferes with women’s ability to enjoy other basic human rights, such as the right to work, safety, and health in the workplace, and equal conditions of employment.⁹³ Under other treaties, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), sexual harassment interferes with women’s right to just and favorable conditions of work on par with men.⁹⁴ Sexual harassment in the workplace is understood to undermine basic tenets of human dignity—self-respect, self-worth, physical and psychological integrity, and autonomy.⁹⁵

Against this background, a state duty to exercise due diligence in preventing and protecting individuals from sexual harassment violations in the workplace has emerged.⁹⁶ State parties to the relevant trea-

⁹¹ G.A. Res. 217 (III), *supra* note 87, art. 23.

⁹² ILO, *ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration*, at 9 (2006).

⁹³ Though the text of CEDAW is silent on sexual harassment, in 1992, the CEDAW Committee issued a comment on gender-based violence, explaining that the state duty to eradicate all forms of gender-based violence, including sexual harassment and domestic violence, was implied under the treaty obligations to eliminate all forms of gender discrimination. UN Comm. on the Elimination of Discrimination Against Women (CEDAW) on its Eleventh Session, G. Rec. No. 19 (1992).

⁹⁴ G.A. Res. 2200 (XXI) A *supra* note 87, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, (Dec. 16, 1966) at 2–3, ¶ 7, (“rights of everyone to the enjoyment of just and favourable conditions of work” with regard to fair wages and “equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”).

⁹⁵ McCrudden, *supra* note 88, at 689–92; The importance of providing economic justice was understood as a crucial part of this international movement to secure peace and stability. Article 23 of the League of Nations Covenant included the “fair and humane conditions of labour for men, women, and children” and envisioned the establishment of international organizations to realize this objective. This goal was the focus of the International Labour Organization (ILO) established in 1919 in Paris to promote fair and humane conditions for workers through legal mechanisms and monitoring procedures.

⁹⁶ CEDAW, *supra* note 93; *Jessica Lenahan (Gonzales) et al. v. United States*, Merits Report, Inter-Am. Commission on H.R., No.80/11 (July 21, 2011) (explaining that states must exercise due diligence to protect women from all forms of gender-based violence).

ties are required to put in place legal and policy mechanisms that prevent harassment rather than merely responding to it once it has occurred.⁹⁷ One such mechanism has been imposition of a duty of care on employers that requires them to address, investigate, and respond to harassment as a workplace well-being matter.⁹⁸ This duty requires not only an effective and responsive complaint mechanism, but also a searching assessment of workplace conditions that cause and enable harassment.⁹⁹ An employer must ensure, as far as is practicable, the health and safety of its employees, including protection from harassment. Employers must address badly structured workplace mechanisms that facilitate or enable bullying and abusing of women. According to the ILO, which reviewed the sexual harassment laws and policies of 80 countries, 18 countries in Europe and Central Asia, seven countries in Asia and the Pacific, six countries in the Americas, and one country in Africa (none in the Arab States) required employers to take some preventative steps to eliminate harassment.¹⁰⁰

The European Union has issued directives on sexual harassment that frame it as a discriminatory violation of dignity and requires state

⁹⁷ For instance, Article 26(1) and (2) of the Council of Europe European Social Charter (Revised) of 1996 requires states to adopt rules on violence and harassment, which include requiring state parties to work with employers and workers to promote awareness, provide information and prevent both sexual and moral harassment in the workplace (although a third of the states who have ratified do not consider one or both of these paragraphs of the Charter to be binding); the 2011 Council of Europe Convention (Istanbul Convention) obligates ratifying members to “prohibit, prevent, prosecute and eliminate violence against women, including sexual harassment, and all forms of domestic violence, including economic violence,” ILO, *Ending Violence and Harassment*, *supra* note 84, at 41, § 3.5, ¶ 174 and ¶ 175.

⁹⁸ *Id.* at 56, ¶ 221, p. 65, § 5.3, ¶ 249 and ¶ 251. See also *McAleenon v. Autism Initiatives NI* [2013] NIIT 815/12 [¶ 65] (N. Ir.) (explaining the “danger of an employer not being proactive in circumstances where members of staff are known to engage in physical contact”); *Grobler v. Naspers* 2004(4) SA 220(C) (South Africa Labor Court) (finding the employer liable where harassment was a foreseeable risk); *Cour de Cassation [Cass.] [supreme court for judicial matters] soc.*, Jan. 30, 2019, Bull. Civ. V, No. 17-28905 (Fr.) (finding obligation of the employer to take effective measures to protect their employees when it is in a situation to exert de facto authority on non-salaried persons who are responsible for the sexist harassing behavior.)

⁹⁹ EEOC, *Enforcement Guide on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, (April 6, 2010), <https://www.eeoc.gov/policy/docs/harassment.html> [<https://perma.cc/XJ4N-6HDC>]. See also *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 118 (3d Cir. 1999) (“*Ellerth* and *Faragher* do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort;” defendant failed to prove affirmative defense where it issued written policies without enforcing them, painted over offensive graffiti every few months only to see it go up again in minutes, and failed to investigate sexual harassment as it investigated and punished other forms of misconduct.); see also *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 422 (11th Cir. 1999) (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action).

¹⁰⁰ ILO, *Ending Violence and Harassment*, *supra* note 84, at 63–64, § 35.1, ¶¶ 244–47.

members and employers to enact policies aimed at prevention.¹⁰¹ In the United Kingdom, for example, sexual harassment is considered a “health and safety problem” that an employer has a duty to address, ensuring, as far as is practicable, that employees are protected from it.¹⁰² Employers must conduct risk assessments to identify groups and individuals who may be vulnerable to sexual harassment and take action.¹⁰³ Fulfilment of the duty can include, among other things, encouraging access to counseling services for sexual harassment victims, for example. Employers generally have a full legal defense if they can demonstrate they have taken all practicable steps to prevent sexual harassment by active workplace policies and awareness strategies.¹⁰⁴

Other countries have focused more broadly on systemic work environment management which includes taking measures that reduce opportunities for sexual harassment and other forms of “bullying.” The Swedish Work Environment Authority (SWEA) conducts inspections that are aimed at “strengthening the workplace’s own ability to prevent risks.”¹⁰⁵ The investigations conducted are corrective and restorative in nature. Investigators are instructed to “carr[y] out [inspections] with a preventative purpose in mind” and that they “[s]hould not dwell on the

¹⁰¹ EP Committee on Women’s Rights and Gender Equality (FEMM), Article 31 of EU Resolution on Measures to Prevent and Combat Mobbing and Sexual Harassment at Workplace, in Public Spaces, and Political Life in the EU (2018) calls on Member States and social partners to ensure that employers organize “mandatory training on sexual harassment and bullying”; Article 33 “stresses that companies should have a zero tolerance approach to sexual harassment. Resolution on Measures to Prevent and Combat Mobbing and Sexual Harassment at Workplace, in Public Spaces, and Political Life in the EU, Eur. Parl. Doc. P8_TA-PROV(2018)0331; *see also* Article 26 of the European Directive on Sexual Harassment “Prevention of discrimination[.] Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast), 2006 O.J. (L 204) 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0054&from=EN> [<https://perma.cc/5S26-2Q5S>]; Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination versus Dignity*, 9 COLUM. J. EUR. L. 241 (2002).

¹⁰² Part I, Section 2 of the Health & Safety at Work Act 1974 “It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health safety and welfare at work of his employees,” Health and Safety at Work etc. Act 1974, 1, § 2, (Eng.).

¹⁰³ The Management of Health and Safety at Work Regulations 1999 were introduced to reinforce the Health and Safety at Work Act 1974. Regulation 3 states that employers “shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work,” The Management of Health and Safety at Work Regulations 1999, SI 1999/3242, art. 3, ¶ 1 (Eng.).

¹⁰⁴ *Id.* at sec. 7, ¶ 1–5., generally a defense to an alleged breach of sexual discrimination legislation by employers.

¹⁰⁵ Swedish Work Env’t Auth., *Inspections, Investigations and Checks*, <https://www.av.se/en/work-environment-work-and-inspections/inspections-investigations-and-checks/inspection/> [<https://perma.cc/PB9J-T4TH>].

question of blame.”¹⁰⁶ In determining whether harassment may be altering work conditions impermissibly or creating a hostile work environment, the SWEA follows an ordinance on violence and menaces in the working environment that identifies several signs of victimization, bullying, and harassment among individuals and groups.¹⁰⁷ Signs of victimization in an individual employee can include, reduced performance, high stress, physical illness, and suicidal thoughts.¹⁰⁸ Victimization among a group of workers can include reduced efficiency and productivity, erosion of existing rules or freezing of rules, criticism of the employer, increased friction, and high sickness absenteeism.¹⁰⁹

In Finland, the Occupational Safety and Health Administration (OSH) sends out a survey to all employees before periodic inspections which include questions on harassment and workplace bullying and then target those issues.¹¹⁰ The OSH Administration defines harassment as a psychosocial workload factor—“properties related to work content, work organization and social interaction in the work community” that can cause “harmful work-related strain.” These factors cause harmful work-related strain if they are not appropriately managed or if workplace conditions are poor.¹¹¹ In reference to violence and harassment, the Finnish Occupational Safety and Health Act No. 738/2002 includes specific sections both on the threat of violence and on harassment, requiring employers to prevent any harassment or inappropriate behavior towards employees.¹¹² In courts, the same conduct can be recognized as a work-safety offense and work discrimination.¹¹³

Canadian provinces have incorporated violence and sexual harassment in their occupational health and safety laws as well.¹¹⁴ In Ontario,

¹⁰⁶ *Id.*

¹⁰⁷ Ordinance on Violence and Menaces in the Working Environment (Swedish Work Environment Authority’s Statute Book [AFS] 1993:17) (Swed.).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Psychosocial Workload*, Occupational Safety and Health Administration Finland, 2 (2017) TYOSUOJELU.FI WEBSITE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION IN FINLAND, <https://www.tyosuojelu.fi/web/en/about-us/publications> [<https://perma.cc/J2WT-4YXR>].

¹¹¹ *Id.*

¹¹² Malgorzata Milczarek, *Workplace Violence and Harassment: A European Picture*, Eur. Agency for Health and Safety at Work, EU-OSHA, 29 (2010), <https://osha.europa.eu/en/tools-and-publications/publications/reports/violence-harassment-TERO09010ENC> [<https://perma.cc/TK3U-9LE7>].

¹¹³ Riitta Sedig, *Hidden Issue Brought to Daylight*, Labor & Employment Law Strategic Global Topics: Sexual Harassment Law in the Workplace Around the World, 1 (2018).

¹¹⁴ For example, New Brunswick has amended the *General Regulation—Occupational Health and Safety Act NB Reg 91-191 [General Regulation] Amendment*, (2019) (“OHSA”) in order to protect employees from violence and harassment (other jurisdictions in Canada have already enacted this kind of legislation).

for example, the Workplace Violence & Harassment under the Occupational Health and Safety Act¹¹⁵ gives inspectors from Ministry of Labour broad powers to investigate complaints, enter workplaces without notice or warrants, make orders requiring the employer to make changes to the workplace, and compel them to investigate workplace harassment.¹¹⁶ According to the Ministry of Labor, “[w]orkplace harassment includes, but is not limited to: offensive comments or jokes; bullying or aggressive behavior; inappropriate staring; sexual harassment; isolating or making fun of a worker because of their gender identity.”¹¹⁷ These are just a few examples of the sorts of mechanisms that attempt to address harassment in a more systemic manner with emphasis on prevention.

IV. DIGNITY AND EQUALITY IN THE AMERICAN CONTEXT

Some U.S. scholars have viewed the dignity-based approach that places sexual harassment in the context of other workplace abuses with skepticism. In particular, scholars engaged with women’s equality have been concerned that it lacks a focus on the gendered elements of sexual harassment to its detriment.¹¹⁸ U.S. scholars argue that sexual harassment benefits from its special status, and that a generalized legal obligation aimed at reducing workplace abuse would redirect resources for sex-based sexual harassment as well as undermine the gravity with which the law approaches it.¹¹⁹

Similarly, U.S. scholars have viewed the focus on dignity, particularly in Europe, as a preoccupation with civility, inappropriate for the American social context and meriting a far lower place on the scale of legal importance than status discrimination.¹²⁰ America’s history of racism, the mobility of its workforce, and cultural ethos of unregulated

¹¹⁵ Ontario Women’s Justice Network, *Workplace Violence and Harassment – Occupational Health and Safety Act*, OWJN, (August 1, 2016), owjn.org/2016/08/workplace-violence-and-harassment-occupational-health-and-safety-act/ [<https://perma.cc/3474-7553>].

¹¹⁶ HR Proactive Inc., *An Employer’s Guide to Conducting Harassment Investigations*, https://harassmentinvestigation.ca/employer_guide_harass_invest.pdf [<https://perma.cc/Z9KS-G2CN>]; Crisis Prevention Institute, *Nonviolent Crisis Prevention*, CPI, <http://educate.crisisprevention.com/OntarioBill168NowKnownAsSection32OntarioOHS.html?code=ITG081PSRW&src=Pay-Per-Click> [<https://perma.cc/6EHC-GCRL>].

¹¹⁷ *Being Harassed at Work? Information for Workers*, ONTARIO MINISTRY OF LABOR (May 2017), https://www.labour.gov.on.ca/english/hs/pubs/fs_vvh_atwork.php [<https://perma.cc/645H-8NCH>].

¹¹⁸ Jessica A. Clarke, *Beyond Equality—Against the Universal Turn in Workplace Protections*, 86 IND. L. J. 1219 (Fall 2011); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment* 83 CORNELL L. REV. 1169 (1998); Friedman and Whitman, *supra* note 101, at 273.

¹¹⁹ Abrams, *supra* note 118, at 1249.

¹²⁰ Friedman and Whitman, *supra* note 101, at 264–65.

speech are thought to make the focus on workplace dignity and regulation of workplace behavior ill-suited to the U.S. context.¹²¹

These objections raise a number of questions. The first is whether women have really experienced gains through the separation of sexual harassment from general workplace protections.¹²² Second is whether our aversion to dignity-focused protections has deprived us of meaningfully assessing what we have, implicitly, already recognized as violations of dignity—behavior that offends, humiliates and abuses. The third is whether the competing values we seek to protect (speech and authenticity in the workplace, prioritization of status discrimination, and dogged deterrence through liability) are being served or would be at risk were reforms to involve increased workplace interventions.

Alternatively, embracing a dignity-based approach could provide us with a positive vision of the workplace, which we currently lack. Without a positive vision for the workplace, it is difficult for us to determine what it should look like for women, and consequently it is difficult to discern our policy goals for gender equality in the workplace. Jurisdictions that address harmful workplace dynamics and dignitary issues necessarily proceed with an understanding of how employees should relate to one another in the workplace and what workers may expect in terms of standards and norms in their place of employment.¹²³ Our reluctance to recognize social patterns of harassment and aversion to regulating private conduct has caused us to struggle to develop a conception of a sexual harassment free work environment.

Moreover, we have missed out on the practical and policy-oriented advantages of an approach that prioritizes prevention of workplace practices that promote or facilitate harassing behavior. Systems that focus on prevention avoid complaint dependence, an approach that burdens women and produces irregular and ineffective deterrence.¹²⁴ A focus on prevention, along with involvement of both the state and employer, would better position us to make systemic change and ultimately alter the incentive system that rewards harassment with gains in benefits and power.¹²⁵ Conceiving of harassment as a workplace wellbeing issue would also more effectively compel employer responsibility for crafting responsive workplaces,¹²⁶ as harassment would not be

¹²¹ Friedman & Whitman, *supra* note 101, at 269–71.

¹²² At various points, scholars and commentators have seen the advantages of an approach that conceives of harassment as a dignitary workplace safety and wellbeing issue. Anita Bernstein and Catherine McKinnon have both noted the regulatory and preventative advantages. See MACKINNON, *supra* note 80, at 159; Bernstein, *supra* note 5 at 1256–1311.

¹²³ ILO, *Ending Violence and Harassment*, *supra* note 84, at ¶ 12, 13, 29, 70, 101.

¹²⁴ See, e.g., SPERINO & THOMAS, *supra* note 40, at 177.

¹²⁵ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 17, at 30, 59–66.

¹²⁶ ILO, *Ending Violence and Harassment*, *supra* note 84, at ¶ 25 and 44.

conceived as an inevitable feature of work itself (which studies suggest it is not), but an element specific to particular workplaces that facilitate or promote it.¹²⁷ Conceiving of sexual harassment as an occupational health and safety issue, for example, has allowed other jurisdictions to focus on the psychological well-being and safety of employees in an affirmative sense. Contrast this with our approach that asks just how abusive the harassment must be before we allow legal action against the harasser.

Finally, and perhaps key, this approach allows us to better understand how harassment works and how to address it. Sexual harassment as a manifestation of gender discrimination is both unique (in the sense that it is rooted in and seeks to preserve gender inequality) and not unique in the sense that workplace harassment can also be rooted in and seek to preserve other forms of inequality (based in race, caste, disabilities, economic status, ideology).¹²⁸ By placing sexual harassment in context to focus more on the bullying and abuse and less on sex, we can begin to understand harassment as a tool for workplace (and economic) benefits and craft a better strategy to eradicate it.

Pursuing an approach that considers dignity and equality, as intertwined, does not mean we must abandon prioritizing gender discrimination. A focus on dignity does not mean a failure to focus on equality; dignity provides content to anchor the goals of equality. We can draw from the concept of substantive equality under CEDAW which understands gender discrimination as a barrier that impedes women's enjoyment of their fundamental rights.¹²⁹ Here, dignity has long been the complementary foundation for equality, as women's inequality is understood as policies and practices that deprive women of their human dignity and other basic rights.¹³⁰ Jurisdictions, like South Africa, that have prioritized addressing matters of non-discrimination have long approached equality determinations with an implicit foundation of human

¹²⁷ Arianna Rossi, *Ending Violence at the Workplace*, WORLD OF WORK MAGAZINE OF ILO (2017) at 37–40.

¹²⁸ Workers in poor working conditions, atypical employment (particularly temporary jobs), women entering industries traditionally dominated by men, and self-employed or low-hours workers who are outside the scope of labor law are particularly vulnerable to violence. ILO, *Ending Violence and Harassment*, *supra* note 84, at ¶ 108. *See also* Article 35 of EU Measures to Prevent and Combat Mobbing and Sexual Harassment at Workplace, in Public Spaces, and Political Life in the EU which “calls on Member States to take measures to ensure equal pay between women and men . . . as a means of promoting gender equality and respect for human dignity, which is fundamental to combating VAW. EU Measures, *supra* note 101.

¹²⁹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, A/RES/34/180, Art. 11, ¶ 18; G.A. Res. 1325, Convention on the Elimination of Discrimination Against Women (1979); UN Comm. on the Elimination of Discrimination Against Women on its Thirtieth Session, G. Rec. No. 25 (2004).

¹³⁰ *Id.*

dignity.¹³¹ An approach rooted in human dignity would both preserve our focus on eradicating status discrimination while also providing a touchpoint for workplace rights and standards that comport with our sense of what human dignity requires.

The balance between general workplace rights and a focus on status discrimination has been described as a targeted universalist approach—an approach which identifies a basic standard and analyzes how groups are being deprived of that standard.¹³² As an example, a goal set for a population could be access to health care and groups would be evaluated for their access to that goal.¹³³ While this may move us in the right direction, the additional challenge in this context is that we lack an actual standard. Including more groups into those with access to rights, benefits, or resources is necessary, but not sufficient to address harassment in our workplaces.¹³⁴ We need first a concept, and I have suggested human dignity, around which to orient workplace norms and standards.

The better conceptual model for addressing sexual harassment in the U.S. is that of transformation, which goes beyond ensuring that more groups are brought into the fold of existing circumstances and benefits. As Catherine Albertyn has explained, in reference to the jurisprudence of the South African Constitutional Court, inclusivity often struggles with fundamental transformation—inclusive approaches resist altering basic structures, seeking instead to preserve the status quo but with a broader base of beneficiaries. An inclusive approach may focus on hiring more women in a particular workplace, whereas a transformative approach may ask what policies and practices were excluding them in the first place (e.g., lack of maternity leave or comprehensive health insurance), whether skills and talents valued rely on gender stereotypes (e.g., approaches to marketing or making sales that reward stereotypical gendered behavior), or whether the women who are hired are being hampered in some way that is encouraging turn over or limiting their advancement. A transformative approach would then ask whether these conditions are necessary features of the work being performed and how they can be altered so as to create a workplace that equally incorporates and supports women. A transformative approach to equality demands an analysis of fundamental social and institutional structures, what they prioritize, who they exclude, and the values they

¹³¹ For an example of how dignity and equality interact in other jurisdictions, see Cowen, *supra* note 89, at 34–58.

¹³² John A. Powell, *Post-Racialism or Targeted Universalism*, 86 DENV. U. L. REV. 785, 802–03 (2008).

¹³³ *Id.*

¹³⁴ See, e.g., Clarke, *supra* note 118, at 1281–84.

are based on. This approach identifies the why and how with the goal of reconceiving the system so as to alter its present dynamics.¹³⁵

The creation of a standard that provides content to human dignity in the workplace along with a re-evaluation of existing inequalities would provide a more robust strategy for addressing sexual harassment. It would require development of a policy goal—a model of the workplace as a healthy, productive, and safe environment that nurtures all worker capacity and discourages and addresses abuses, humiliations, and avoidable burdens.

Such a conception or model for the workplace would give us a better sense of the goals in eradicating harassment as well as a yardstick by which to measure the progress towards ensuring all enjoy and have full access to the workplace and the economic benefits it provides. An approach based in equality and dignity with a positive vision of the workplace would also be responsive to our major jurisprudential challenge—the difficulty courts have had in extracting a norm against which sexual harassment is measured due to significant elements of sexism and misogyny that dominate our culture. Without a marker of what is and is not permissible in the workplace, courts cast about for intuition of what is a bridge too far when it comes to humiliation and objectification of women.

Ultimately, a standard for the workplace would elevate judicial inquiries (and that of juries under judicial guidance) from a realm of arbitrating disputes in personal relationships to one with institutional import. This kind of standard would also engage employers in the work of prevention. To build a better workplace for women, we need to simply build a better workplace—one that, at the outset, understands the social inequality it seeks to correct.

V. A POSITIVE VISION OF THE WORKPLACE

The task is now to cultivate a positive vision of the workplace in which to root a legal and policy framework that addresses workplace sexual harassment. To transform the American workplace, a positive vision must express value for the worker generally and for the female worker specifically, addressing both notions of human dignity and equality. With a positive vision of the workplace, our society can define the workplace more clearly, including what conditions of employment workers can expect and the role of the employer in providing them. With this vision, we can better gauge when humiliations, abuses, and other tactics are employed by individuals in the workplace to discriminate

¹³⁵ Albertyn, *supra* note 55.

against women and gain advantage from gender inequality. We can establish what constitutes discrimination, not by measuring behavior against social norms that may be discriminatory themselves, but by measuring against standards of human dignity and equality. Our assessment of sexual harassment can be grounded in an understanding of its role in exploiting and reinforcing “socially constructed power imbalances”¹³⁶ to the benefit of harassers, the ill Title VII sought to remedy.

We are not entirely without a positive vision of the American workplace. For example, some American companies have stepped forward to craft better workplaces for their female employees.¹³⁷ Though now outdated and significantly weakened, we once enacted a legislative scheme, the Fair Labor Standards Act, aimed at protecting the American workforce and respecting the dignity of the worker that set basic wages and some conditions for employment.¹³⁸ We have recognized the importance of sexual harassment prohibitions in implementing “the goals of human dignity and economic equality in employment”¹³⁹ but we lack a contemporary vision in which to ground a renewed effort to transform the workplace.¹⁴⁰

¹³⁶ Eric Stener Carlson, *The ILO's Innovative Approach to Ending Gender-Based Violence and Harassment: Towards a New International Framework for the World of Work*, ABA (2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/11/conference/papers/CARLSON-The%20ILOs-Innovative-Approach-to-Ending-Gender-based-Violence-and-Harassment.pdf [<https://perma.cc/X5UV-GQYQ>].

¹³⁷ As of 2017, 14 percent of the US workforce was offered an employer-sponsored paid family leave program. See Trish Stroman et al., *Why Paid Family Leave Is Good Business*, BOSTON CONSULTING GROUP (February 2017) at 3–4, 17; Microsoft and Uber have eliminated forced arbitration agreements for employees or customers who make sexual harassment claims. See Nick Wingfield and Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html> [<https://perma.cc/2H8P-TCTT>]; Sarah Ashley O'Brian, *Uber Will No longer Force Victims of Sexual Assault into Arbitration*, CNN BUSINESS (May 15, 2018), <https://money.cnn.com/2018/05/15/technology/uber-eliminates-forced-arbitration/index.html> [<https://perma.cc/85KC-PFHE>].

¹³⁸ As President Franklin Roosevelt stated when he sent the FLSA bill to Congress on May 24, 1937, “a self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling worker’s wages or stretching worker’ hours . . . conditions that do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.” See Jonathan Grossman, *US Dep’t. of Labor, Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, (quoting Franklin Roosevelt, Public Papers VI (May 24, 1937) at 209–14).

¹³⁹ *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

¹⁴⁰ The primary federal employment and labor legislation are the Fair Labor Standards Act, 29 U.S.C. § 203, that sets a national minimum wage and requires overtime for hours worked over 40 per week for qualifying workplaces; the National Labor Relations Act, 29 U.S.C. §§ 151–169, that provides protections for workplace organizing and the formation of unions; the Occupations Health and Safety Act, 29 U.S.C. § 651, that provides basic standards of health and safety in U.S. workplaces; the Family Medical Leave Act, 29 U.S.C. § 2601, which guarantees basic unpaid leave for pregnancy, illness and caretaking; the Agricultural Workers Protection Act (AWPA), 29 U.S.C. § 1801, that provides some basic protections to farmworkers in contracting and recruitment, wages, working conditions, and compliance; the Uniformed Services Employment and Reemployment Rights Act (USERRA) 38 U.S.C. §§ 4301–35 ensures that workers who enter the military for

For numerous reasons commented on by many—the U.S. individualistic culture, the mobility of our population and workforce, commitment to free market principles, corporate influence and flexible communities—we have never fully developed robust labor and employment legal protections.¹⁴¹ In comparison to similar economies and societies with our institutional capacity, the American worker labors at the will and whims of an employer, under terms set almost exclusively by that employer with little intervention by the government.¹⁴² Thus, our workers rely on a minimum wage that has not been updated in nearly a decade¹⁴³ (that many argue has increased poverty levels in the U.S.);¹⁴⁴ overtime pay that excludes a large and vulnerable sector of the labor market (including farmworkers and domestic workers, among others);¹⁴⁵ the absence of pension requirements or other retirement guarantees provided as par for the course in many other jurisdictions;¹⁴⁶ and at-will employment arrangements that create insecurity.¹⁴⁷ Similarly,

short periods can return to their private sector job without loss of seniority or benefits, and the statutes that prohibit status discrimination such as Title VII, 42 U.S.C. § 2000e, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 1801.

¹⁴¹ Friedman & Whitman, *supra* note 101, at 265–70; see also, Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L. J. 84, 84–86 (2007); see also generally, Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3:1 U. PA. J. LAB. & EMP. L. 65 (Fall 2000).

¹⁴² See Jean R. Sternlight, *Is the U.S. out on a Limb – Comparing the U.S. Approach to Mandatory Consumer and Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002) (Though widespread in the U.S., mandatory arbitration policies are rarely employed in other countries); see also Carol Daugherty Rasnic, *Balancing Respective Rights in the Employment Contract: Contrasting the U.S. “Employment-At-Will” Rule with the Worker Statutory Protections against Dismissal in European Community Countries*, 4 J. INT’L L. & PRAC. 441, 442 (1995) (Benefits required by European domestic statutes include a guaranteed paid vacation time of four weeks or longer and an average of fourteen to sixteen weeks of paid maternity leave. By contrast in the U.S. vacation time “is a privilege rather than a right” and the Family and Medical Leave Act only mandates twelve weeks of unpaid leave per year for family-related medical needs).

¹⁴³ The minimum wage in the U.S. is \$7.29 an hour and was last updated in 2009, see U.S. DEP’T OF LABOR, *Minimum Wage*, <https://www.dol.gov/general/topic/wages/minimumwage> [https://perma.cc/SSL9-7M98]. In comparison, as of 2013, Australia had the highest minimum wage of \$9.54 an hour, followed by Luxembourg at \$9.24. See Paul Muggeridge, *This Is What the Minimum Wage Looks Like Around the World*, WORLD ECONOMIC FORUM (June 30, 2015), <https://www.weforum.org/agenda/2015/06/this-is-what-the-minimum-wage-looks-like-around-the-world/> [https://perma.cc/W7SU-WZQR].

¹⁴⁴ Ben Zipperer, *The Erosion of the Federal Minimum Wage Has Increased Poverty, Especially for Black and Hispanic Families*, ECONOMIC POLICY INSTITUTE (June 13, 2018), <https://www.epi.org/publication/the-erosion-of-the-federal-minimum-wage-has-increased-poverty-especially-for-black-and-hispanic-families/> [https://perma.cc/RRQ7-4JWH].

¹⁴⁵ For a complete list see U.S. DEP’T OF LABOR, *Exemptions*, ELAWS Fair Labor Standards Act Advisor, <https://webapps.dol.gov/elaws/whd/flsa/screen75.asp> [https://perma.cc/46FL-P8KL].

¹⁴⁶ *Pensions at a Glance in 2017: How Does the United States Compare?*, ORG. FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) (Dec. 5, 2017), <https://www.oecd.org/unitedstates/PAG2017-USA.pdf> [https://perma.cc/NHK3-PLYH].

¹⁴⁷ Stone, *supra* note 141, at 84.

sick pay, unemployment benefits, and annual leave are far less generous in the U.S. in comparison to our peers. In a recent study of 14 European countries and the U.S., we fared worse than all comparators.¹⁴⁸ For example, unemployment compensation in our peer countries is often provided at a rate of 90% of previous earnings for an approximate 100 weeks. We provide between 40% and 50% of earnings for up to 26 weeks, depending on the individual state.¹⁴⁹

Even those protections we do grant by virtue of the employer and employee relationship do not extend to all American workers. One in ten workers in the US labor market is in a “contingent and alternative employment arrangement.”¹⁵⁰ Nearly 7% of these workers are classified as independent contractors.¹⁵¹ These designations, though often arranged very similarly to an employee and employer relationship, liberate the employer from paying the minimum wage and overtime under the Fair Labor Standards Act, paying for unemployment and compensation benefits, as well as from providing accommodations under the Americans with Disabilities Act.¹⁵² Employers have become wise to this option and have increasingly classified their employees as independent contractors, which has led to a rash of litigation.¹⁵³

Thus, we have primarily left it to the employer to craft a just and functional workplace. Workers are expected to either accept the terms set by the employer or leave. Members of our workforce have few legal rights and employers have few restrictions or obligations to ensure worker well-being. Time and again courts have defended the principle of at-will unregulated employment, resisting contractual obligations

¹⁴⁸ The report, conducted in cooperation with Llewellyn Consulting, reveals that the countries offering the most generous workplace and welfare benefits overall are Denmark, France and Spain, with Denmark and Belgium in particular offering the best unemployment benefits (pay and eligibility period). See Llewellyn Consulting, *Which Countries in Europe Offer Fairest Paid Leave and Unemployment Benefits*, GLASSDOOR at 12 (2016), https://www.glassdoor.com/research/app/upload/sites/2/2016/02/GD_FairestPaidLeave_Final.pdf [<https://perma.cc/LP9K-E2Z5>].

¹⁴⁹ *Id.* at 11.

¹⁵⁰ U.S. Dep’t of Labor, *Contingent and Alternative Employment Arrangements*, BUREAU OF LABOR STATISTICS (June 7, 2018), <https://www.bls.gov/news.release/conemp.nr0.htm> [<https://perma.cc/388N-RY6V>].

¹⁵¹ *Id.*

¹⁵² U.S. DEP’T OF LABOR, *Wage and Hour Division (WHD)*, <https://www.dol.gov/whd/workers/misclassification/> [<https://perma.cc/4PUZ-347F>].

¹⁵³ See, e.g., *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 42 (Cal. 2018), (where the California Supreme Court held that delivery drivers were employees rather than independent contractors and announced a new test for establishing independent contractor status that considers franchise or licensing relationships); see also, *Simpkins v. DuPage Housing Authority*, 893 F.3d 962 (7th Cir. 2018) (reversing a district court’s grant of summary judgment and holding that the plaintiff was an independent contractor, as opposed to an employee); *Thornton v. Mainline Commc’ns. LLC*, 157 F. Supp. 3d 844 (E.D. Mo. 2016) (where the district court found that cable repair and installation technicians were misclassified as independent contractors).

and, time and again, any effort to demand workplace security or minimal terms has been struck down.¹⁵⁴ Even in situations where workers are under the control and behest of their employers (such as temporary foreign labor programs, where the worker's presence in this country is subject to their employment), courts have rarely and reluctantly found any entitlements or obligations.¹⁵⁵

These conditions have meant that particularly vulnerable populations, such as our low-wage sector, which is populated by many immigrants with irregular immigration status,¹⁵⁶ has been marred by wage violations and abuses.¹⁵⁷ The limited capacity of the Department of Labor,¹⁵⁸ as well as the weakening of our unions, has made the workplace a difficult place for low-wage workers.¹⁵⁹ Anti-immigrant messaging has created even greater room for exploitation of the low-wage sector. Immigrant workers labor in industries often excluded from our already

¹⁵⁴ See, e.g., *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (upholding the validity of employer requirement that employees submit to individual arbitration of wage-and-hour and other work place conditions claims).

¹⁵⁵ See, e.g., *Hoffman Plastic Compound v. NLRB*, 535 U.S. 137 (2002) (holding that an undocumented worker who was not authorized to legally work in the U.S. was not eligible to receive back pay under the NLRA); for an example of recent acknowledgments by courts that some contractual obligation may exist for temporary foreign laborers see, *Jimenez v. GLK Foods LLC*, No. 12-CV-00209, Dkt. 50 (E.D. Wis. 2013) (finding contractual obligations for H2-B workers).

¹⁵⁶ See Miriam Jordan, *8 Million People are Working Illegally in the U.S. Here's Why That's Unlikely to Change*, THE NEW YORK TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html> [<https://perma.cc/Y33B-LT4H>]; Lisa Rapaport, *U.S. Relies Heavily on Foreign-Born Healthcare Workers*, THOMPSON REUTERS (Dec. 4, 2018), <https://www.reuters.com/article/us-health-professions-us-noncitizens/u-s-relies-heavily-on-foreign-born-healthcare-workers-idUSKBN1O32FR> [<https://perma.cc/8V5K-LEJD>].

¹⁵⁷ In 2016, research from Oxfam found that one in four low-wage workers in the US did not have a single day of earned sick time, see OXFAM, *Millions of Low-Wage Workers in the US Are Struggling to Survive*, (June 21, 2016), <https://www.oxfamamerica.org/explore/stories/millions-of-low-wage-workers-in-the-us-are-struggling-to-survive/> [<https://perma.cc/Z9VC-A2L4>].

¹⁵⁸ During the last three decades, funding levels for agencies that enforce laws against workplace violations have declined precipitously despite the fact that the labor force has grown. For instance, the number of inspectors enforcing minimum wage and overtime laws declined by 31%, while the labor force increased by 52% between 1980 and 2007. See Annette Bernhardt, et al., *Broken Law, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NATIONAL EMPLOYMENT LAW PROJECT at 52 (2009).

¹⁵⁹ In 2017, only 10.7% of wage and salaried workers in the U.S. were members of labor unions, while in 1983, 20.1% of wage and salaried workers were members of labor unions, see, Hanna Fingerhut, *More Americans View Long-Term Decline in Union Membership Negatively than Positively*, PEW RES. CENTER (June 5, 2018), <http://www.pewresearch.org/fact-tank/2018/06/05/more-americans-view-long-term-decline-in-union-membership-negatively-than-positively/> [<https://perma.cc/7L6N-2MK5>].

thin employment protections.¹⁶⁰ These industries, unsurprisingly, have reported high levels of sexual harassment.¹⁶¹

The low value we place on the worker is then compounded by our even lower estimation of the woman worker, a consequence of which is the dearth of women in decision-making positions in most fields.¹⁶² On all protections and benefits aimed at facilitating women's participation in the workforce, we provide little. The U.S. is one of the few countries (and alone among its economic peers) that does not provide paid maternity leave.¹⁶³ In addition, the lack of any real child care alternatives for women, certainly none that are legally mandated, makes child care a nearly prohibitive cost for many working women.¹⁶⁴ In contrast, flexible working practices that benefit employees with childcare responsibilities are common in countries like Denmark, Germany, and the Netherlands.¹⁶⁵ In the Netherlands, the Dutch government has developed

¹⁶⁰ Domestic workers are not covered by the NLRA ("the term "employee" . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home"); farmworkers are not covered by the NLRA ("the term "employee" . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home"). See 29 U.S.C. § 152 (1935). See also U.S. DEPT OF LABOR, *Handy Reference Guide to the Fair Labor Standards Act*, <https://www.dol.gov/whd/regs/compliance/hrg.htm#2> [https://perma.cc/SM4T-FED9]. Farmworkers, with few exceptions, are not covered by the FLSA's minimum wage and maximum hour requirements. See 29 U.S.C. § 213 (1938) at ¶ 6 ("Minimum wage and maximum hour requirements . . . shall not apply with respect to . . . any employee employed in agriculture . . .").

¹⁶¹ *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME MAGAZINE (November 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [https://perma.cc/98NN-GFKU].

¹⁶² Our lack of prioritization of the woman worker is reflected in women's workplace participation. In most industries, women are absent in management and supervisory positions, longevity in employment and other positions of influence. Women make up 44 percent of the S&P 500 labor force, and 36 percent of first or mid-level officials and managers in those companies, however only 25 percent of executive and senior level officials and managers are women; only 20 percent of board seats are held by women; and only 6 percent of CEOs are women. Women make up 54 percent of the workforce in the financial services industry, but only 29 percent of executive and senior level managers and 2 percent of CEOs are women. In the legal field, 45 percent of associates are women, but only 22 percent of partners are women and 18 percent of equity partners. In the medical field, 37 percent of all physicians and surgeons are women, but only 16 percent of permanent medical school deans are women. Judith Warner and Danielle Corley, *The Women's Leadership Gap: Women's Leadership by the Numbers*, CENTER FOR AMERICAN PROGRESS (May 21, 2017).

¹⁶³ The United States and Mexico are the only two OECD countries that do not guarantee at least 14 weeks of paid leave to mothers of infants, see Amy Raub et al., *Paid Parental Leave: A Detailed Look at Approaches across OECD Countries*, WORLD POLICY ANALYSIS CENTER (2018). Data from the Organization for Economic Cooperation and Development (OECD) shows that among 41 nations, the U.S. is the only country that does not mandate any paid leave for new parents, See Gretchen Livingston, *Among 41 Nations, U.S. is the Outlier When it Comes to Paid Parental Leave*, PEW RESEARCH CENTER, (September 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/> [https://perma.cc/HD5K-ABWR].

¹⁶⁴ Drew Desilver, *Rising Cost of Child Care May Help Explain Recent Increase in Stay-at-Home Moms*, THE PEW RESEARCH CENTER, (April 8, 2014), <http://www.pewresearch.org/fact-tank/2014/04/08/rising-cost-of-child-care-may-help-explain-increase-in-stay-at-home-moms/> [https://perma.cc/4XPZ-GUPR].

¹⁶⁵ Lisa Harker, *The Family-Friendly Employer in Europe*, in THE WORK-FAMILY CHALLENGE:

childcare centers that are partly funded by the government and partly by employers.¹⁶⁶ This, combined with the unwillingness of employers to provide access to health insurance plans that cover women's reproductive health,¹⁶⁷ mean women's career choices and experiences at work are impacted heavily by their reproductive choices.¹⁶⁸

Our employer policies to keep compensation private also make it difficult for women to determine whether (or more realistically to what extent) they are being compensated at lower rates than their male peers. As of 2019, the Institute for Women's Policy Research reported a 20 percent gender wage gap between men and women in the U.S., with female full-time, year-round workers making 80.5 cents for every dollar earned by men.¹⁶⁹ The gender wage gap in the U.S. is higher than that of France, Ireland, Spain, Mexico, Switzerland, Germany, and the UK.¹⁷⁰

Why does this matter? As the research discussed earlier suggests, sexual harassment is likely to thrive in environments where workers are not valued, where women workers are particularly undervalued, and where employers have not provided a functional environment that discourages exploitation of existing societal status-based hierarchies

RETHINKING EMPLOYMENT 49 (Suzan Lewis & Jeremy Lewis eds., 1996).

¹⁶⁶ *Id.*, at 54. Publicly funded or employer sponsored childcare provisions have also become popular in countries like the UK, where the percentage of parents receiving support for childcare from their employer is rising. Dep't of Education, *Childcare and Early Years Survey of Parents in Education*, (Dec. 2017) at 11, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669857/SFR73_2017_Text.pdf [<https://perma.cc/HT66-N4ZP>].

¹⁶⁷ *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014); *Wheaton Coll. v. Burwell*, 574 U.S. 958 (2014) (holding that the college was not required to follow the mandate under Patient Protection and Affordable Care Act (ACA) and related regulations that it provide its employees and students with health insurance coverage for contraceptive services). *See also* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 26 CFR 54, 147, 2590 (2015); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 26 CFR 54, 147, 2590 (2015).

¹⁶⁸ In October of 2017, the Trump administration issued rules that provide exceptions to the Affordable Care Act's contraceptive coverage, allowing employers to cite religious or moral beliefs to avoid ACA requirements. Amy Goldstein, Juliet Eilperin and William Wan, *Trump Administration Narrows Affordable Care Act's Contraception Mandate*, WASH. POST, (Oct. 6, 2017), https://www.washingtonpost.com/national/health-science/trump-administration-could-narrow-affordable-care-acts-contraception-mandate/2017/10/05/16139400-a9f0-11e7-92d1-58c702d2d975_story.html?noredirect=on&utm_term=.316e32c6961d [<https://perma.cc/PYM9-MUJ6>]. At the same time, women continue to suffer career consequences as a result of childbearing, in part because gender roles are "lagging behind labor force trends," and because of the way that society views the "bond between mothers and their children." *See* Kim Parker, *Women More than Men Adjust Their Careers for Family Life*, PEW RESEARCH CENTER, (Oct. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/> [<https://perma.cc/N3FT-LV8Q>].

¹⁶⁹ *Pay Equity Discrimination*, INST. FOR WOMEN'S POL'Y RES., <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/> [<https://perma.cc/Q4ZC-XQBC>].

¹⁷⁰ *Gender Wage Gap*, ORG. FOR ECON. CO-OPERATION AND DEV., <https://data.oecd.org/earnwage/gender-wage-gap> [<https://perma.cc/PJ4G-MPGF>].

and inequalities. As discussed above, job insecurity, excessive discretion, workforce turn-over, ineffective management practices, inadequate reporting mechanisms, uneven workload distribution, and the absence of messaging around employer values and priorities can all enable environments in which sexual harassment will thrive. #MeToo reports circulated in the media this year were filled with examples of workplaces with no regulation, little worker value, and the absence of working systems of accountability. Law clerks to the judiciary,¹⁷¹ seasonal farmworkers,¹⁷² interns for star record producers,¹⁷³ and graduate students¹⁷⁴ all emerged as examples of workers left by their institutional employers to labor at the mercy of their supervisors in environments where the female worker was clearly not the employers' priority.

We cannot disassociate the general workplace environment from sexual harassment practices, nor should we try. Women work in contexts where harassment persists because that is what is available to them. Workplaces fail to correct this behavior because they do not have to. In this context, it is simply unrealistic to expect that we would target sexual harassment in a culture of workplace neglect and unrealistic to think courts should reach for larger themes of employee and worker protection and rights when few currently exist. The message of the workplace is already that workers are not priorities, and women workers even less. To change this approach, we must change how the workplace values the woman worker and set standards and practices that facilitate women's presence, prioritize their equality and human dignity, and remove any reward systems that encourage sexual harassment and abuse.

As discussed above, research and comparative country examples provide some guidance for how to address dynamics in the workplace that are promoting a culture of gender-motivated abuse. A case study from within the U.S. also illustrates what a transformation could look like, courtesy of the very group of workers provided with the least protections and often subject to the highest levels of abuse—low-wage immigrant farmworkers.¹⁷⁵ The Coalition of Immokalee Workers (CIW),

¹⁷¹ See Vanessa Romo, *Federal Judge Kozinski Retires Following Sexual Harassment Allegations*, NPR, (Dec. 18, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/18/571677955/federal-judge-retires-in-the-wake-of-sexual-harassment-allegations> [<https://perma.cc/3EZW-BZVJ>].

¹⁷² The Farmworker Sexual Violence Technical Assistance Project, *Sexual Violence Against Farmworkers: A Guidebook for Legal Providers*, https://www.victimrights.org/sites/default/files/Farmworkers%20Legal%20Providers_0.pdf [<https://perma.cc/HHT6-SYE4>].

¹⁷³ See, e.g., Shelley Cobb and Tanya Horeck, *Post Weinstein: Gendered Power and Harassment in the Media Industries*, 18:3 FEMINIST MEDIA STUDIES 489–91 (2018).

¹⁷⁴ Alexandra Witze, *Sexual Harassment Is Rife in the Sciences, Finds Landmark US Study*, 558 NATURE INT'L J. OF SCI. 352–53 (June 12, 2018).

¹⁷⁵ Tracie Cone, *Report: Sexual Abuse of Female Farmworkers Common*, WASH. POST, (May 16,

recent recipients of the MacArthur Genius grant, in an effort to sidestep our broken labor enforcement system, have created a private regulation program based on worker dignity and equality that has drastically reduced sexual harassment in agriculture.¹⁷⁶ Through an innovative organizing campaign that received much acclaim, CIW managed to compel the U.S. tomato-growing industry (which amounts to 50%–90% of U.S. tomato consumption) to agree to transform their workplaces into ones grounded in concepts of dignity and equality committed to providing fair wages and conditions of employment and environments free of sexual harassment and abuse.¹⁷⁷

This private regulation system, known as the Fair Food Program (FFP), consists of a complex system of education, prevention, enforcement, and accountability that involves the employer, supervisors, and workers in a collaborative process to jointly transform their work environments.¹⁷⁸ The program was formed by leveraging consumer influence over tomato buyers (fast food restaurants, grocery chains, and restaurants suppliers) to compel tomato farms to participate in a joint program to regulate and improve worker conditions.¹⁷⁹ To date, 90% of tomato growers in Florida, approximately 12 growers and over 30,000 workers, participate in FFP, along with major tomato buyers such as McDonalds, Whole Foods, Walmart, Burger King, Subway, and Taco Bell.¹⁸⁰ The program, which is designed around the concept of human dignity in the workplace (both as a right and expectation) has, after six years, reported virtual elimination of repeat sexual harassment incidents in participating workplaces in an industry previously known for abuses.¹⁸¹

2012), https://www.washingtonpost.com/politics/report-sexual-abuse-of-female-farmworkers-common/2012/05/15/g1QA7sfWTU_story.html?utm_term=.bfd1f60d2dbf [https://perma.cc/3GW7-Q8FF].

¹⁷⁶ Bernice Yeung, *What Hollywood Can Learn From Farmworkers*, SLATE (Sept. 19, 2018), <https://slate.com/human-interest/2018/09/farmworkers-janitors-sexual-harassment-training.html> [https://perma.cc/623B-6GWL]; Joann Lo and Ariel Jacobson, *Human Rights from Field to Fork: Improving Labor Conditions for Food-Sector Workers by Organizing across Boundaries*, 5:1 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 61 (2011); Greg Asbed and Sean Sellers, *The Fair Food Program: Comprehensive, verifiable and sustainable change for farmworkers*, 16 U. PA. J. L. & SOC. CHANGE 39 (2013).

¹⁷⁷ FAIR FOOD PROGRAM, *2017 Annual Report*, <http://www.fairfoodprogram.org/wp-content/uploads/2018/06/Fair-Food-Program-2017-Annual-Report-Web.pdf> [https://perma.cc/9C68-BT7T].

¹⁷⁸ FAIR FOOD PROGRAM, *About the Fair Food Program*, <http://www.fairfoodprogram.org> [https://perma.cc/5P2A-H9AE].

¹⁷⁹ Michael Sainato, *Farmworker Campaign Heads to Wendy's Headquarters: Will the Fast Food Giant Finally Listen?*, THE NATION (June 4, 2018), <https://www.thenation.com/article/farmworker-campaign-heads-wendys-headquarters-will-fast-food-giant-finally-listen/> [https://perma.cc/7BAE-FXXS].

¹⁸⁰ Fair Foods Standards Council, *Partners*, FAIR FOOD PROGRAM, <http://www.fairfoodprogram.org/partners/> [https://perma.cc/C2JJ-QE5A].

¹⁸¹ FAIR FOOD PROGRAM, *2017 Annual Report*, *supra* note 177.

The program consists of four components: a workplace code of conduct, worker to worker education, external auditing, and a complaint resolution mechanism that prioritizes timely resolution and immediate consequences along a graduated system that has, to date with one exception, avoided recourse to arbitration. The code of conduct is built around the concepts of fair and just conditions and worker dignity. It was developed by the workforce to address practical challenges of agricultural employment. It sets employment practices along with a tiered system of violations and consequences for employees and employers. It regulates wages, health and safety (e.g., shaded structures, protective gear, rest breaks, availability of medical treatment), conditions of termination, workplace violence, sexual harassment, and anti-discrimination.¹⁸²

The worker education component involves yearly on-site and interactive training sessions (for workers and supervisors), focused on the right to be safe, secure, and respected in the workplace; scenarios on sexual harassment are debated through group discussions and workshop breakouts. It discusses, among other things, power dynamics and what abuse of power means, societal discrimination based on gender, race, and ethnicity, and sexual harassment in various forms and its consequences for women workers and the workplace more generally.¹⁸³ Participating employers agree to pay worker representatives to be trained and facilitate sessions.

The Fair Food Standards Council (FFSC), which consists of 15 employees under the direction of retired New York State Judge Laura Safer Ezpinoza, monitors workplaces through yearly audits (and sometimes unannounced audits). These audits involve interviews with at least 50% of workers on each farm with employer cooperation, including open access to records. In 2017, the FFSC conducted approximately 200 field and financial audits.¹⁸⁴

Finally, the program contains an independent complaint mechanism that includes a 24-hour hotline for worker reports, which has addressed 1800 complaints since 2011, or approximately 400 a year. An investigation is conducted and findings are issued, often within weeks. There are three levels of violations around workplace violence and abuse within the system. Tier 1 is forced labor or the repeated use of child labor; Tier 2 is status discrimination, abuse, sexual harassment, or the systemic failure to pay wages; and Tier 3 is the failure to afford

¹⁸² FAIR FOOD STANDARDS COUNCIL, *Fair Food Code of Conduct*, <http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct/> [https://perma.cc/JT9P-M7DQ].

¹⁸³ FAIR FOOD PROGRAM, *Worker Education Modules* 1–4.

¹⁸⁴ FAIR FOODS STANDARDS COUNCIL, *About*, <http://www.fairfoodstandards.org/about/> [https://perma.cc/WEU5-T8UJ].

rest breaks or adequate drinking water. The required employer responses to abuse and harassment vary depending on its severity. Sexual harassment that involves physical contact, for example, requires immediate termination upon issuance of a finding, or the participating employer is suspended from the program. Harassment that did not include physical contact requires specified remedial action to avoid suspension or probation, which can include progressive discipline (a written warning and second time termination) and a corrective action plan for hostile work environment. Finally, the program contains sanctions for non-compliant employers which can include suspension, probation, and elimination from the program.

The FFP aptly illustrates several features fundamental to transformation of any workplace. It is based on a positive vision of the workplace that is grounded in human dignity—respect, security, and valuation of the worker—and places sexual harassment in this context, while still acknowledging its roots in gender inequality. It builds employee consciousness through worker to worker trainings and sets clear expectations for workplace behavior in an effort to define workplace culture. More broadly, it creates a dialogue in the workplace community about sexual harassment and gender discrimination which itself, over time, can serve to transform the culture. It supports women workers specifically by developing women's leadership through trainings and monitoring, increasing women's power and leverage in the workplace. It is structured so as to create workforce buy-in at all levels with low and mid-level supervisor training and peer-to-peer engagements, better ensuring that messaging and direction is consistent at all levels of management. Finally, it has robust but graduated consequences that allow for correction and adaptation before concerns about liability and damage awards begin to disincentivize the employer from acknowledging the existence of harmful workplace dynamics. The goals of the corrective consequences are at once restorative and prompt, allowing the workplace to transform while maintaining its integrity.

These approaches could be applied to workplaces more broadly with employer engagement. For example, workers could be invited to participate in creating dignity-based workplaces. Women workers could be encouraged to take leadership roles in defining what such a workplace would look like. Corrective mechanisms could be, at least in initial stages, aimed at improving workplace dynamics through restorative justice and other means rather than focusing on punishment and legal consequences. The FFP model, coupled with a legal framework that involves employers in preventing and addressing dynamics that facilitate harassment, could be more effective in sustainably combatting workplace sexual harassment.

VI. CONCLUSION

It is a unique moment for the issue of sexual harassment, which often struggles to gain the attention of policy makers and the public. Following #MeToo reports, stars pledged to add inclusion riders to their contracts, corporations declared they would abandon practices of mandating arbitration agreements, and coalitions of powerful female influencers called for action. These are all encouraging developments, but, beneath these efforts, we are left with a policy approach and legal mechanism that do not effectively address the workplace violations they seek to target.

The ILO has tried to provide a framework for conceiving of sexual harassment within a larger vision of a just workplace, one rooted in respect for human dignity and correction of inequalities that violate that dignity. The framework acknowledges that women are deprived of their basic human rights because of the “socially constructed power imbalances”¹⁸⁵ which society at large and workplaces, in particular, exploit and further entrench. The Coalition of Immokalee Workers’ Fair Food Program provides a worker-run private sector model for self-regulation in an industry attempting to change workplace culture and values. The program targets sexual harassment while addressing workplace dignity violations in a holistic manner.

Both approaches recognize the inefficacy of any attempt to address inequality without a foundation of rights and expectations. Our current approach to sexual harassment (and gender discrimination more generally) falls into this very trap. We ask only whether a claimant was treated with sex-based hostility against some unidentified social norm left to the discretion of a judge or jury. Our legal framework has yet to make explicit norms or expectations on the treatment of individuals in the workplace, which would allow us to determine whether the treatment in question violated these expectations. We need to understand not only that gender discrimination in the workplace is prohibited, but what rights, benefits, and privileges the workplace affords that require equal distribution and access between the genders. For this, we need a positive vision of a just and functional workplace to guide expectations and then determine how to ensure it is realized for all workers.

Various reforms would move us in the right direction. Legislation and policy reforms aimed at better protecting worker’s rights (job security, benefits, limitations of independent contractor classifications, wage violations), the passage of healthy workplace legislation¹⁸⁶ establishing a duty of care for employers (that addresses harassment and

¹⁸⁵ Carlson, *supra* note 136.

¹⁸⁶ One example for such legislation (albeit status-blind) has been proposed by David Yamada.

other forms of abuse), and extra-discrimination remedies¹⁸⁷ (that assist in ensuring available benefits are accessible to all) would provide a foundation for workplace standards and expectations. Supplementing this, reforms that target harassment, such as congressional clarification of Title VII's intent and definition of sexual harassment, promulgation of industry-specific recommendations on harassment,¹⁸⁸ and incorporation of harassment into Occupational Safety and Health Administration's preventative mandate¹⁸⁹ would assist in addressing sexual harassment directly. Finally, policies that accommodate women in the workplace, such as paid maternity leave and comprehensive health insurance, make women more secure and communicate their value to the workplace. These policy changes could, in turn, decrease opportunities for harassment by lessening women's vulnerability to abuses of power. Reforms such as these would provide our judiciary and juries with a standard against which to measure liability for sexual harassment cases and employers and employees direction on expectations and duties. As the Court recognized in *Obergefell v. Hodges*,¹⁹⁰ the recognition of women's dignity and equality is a process of evolution, as "women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity."¹⁹¹ To move forward towards recognition of women's equal dignity, we must protect and identify workplace rights and benefits as well as ensure that women are afforded their equal enjoyment.

See e.g., David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000).

¹⁸⁷ Eyer, *supra* note 31, at 1341–1360.

¹⁸⁸ U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, *Minority Staff Report*, *supra* note 40, at 38–40.

¹⁸⁹ The Occupational Safety and Health Administration is the only agency besides the EEOC responsible for regulating the workplace and, unlike the EEOC, OSHA engages in preventative activities and general mandate inspections. OSHA has jurisdiction over about 7 million worksites where it conducts inspections of workplaces in order to investigate (in the following order of priority): imminent danger situations; severe injuries and illnesses; worker complaints; referrals from other government bodies or individuals; high hazard industries or workplaces that have experienced high rates of injuries or illnesses, and past violations. See U.S. DEPT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., *About Inspections*, https://www.osha.gov/Osh-Data/data_General_Facts/factsheet-inspections.pdf [<https://perma.cc/CH6E-ZAZ8>]; while there are no current OSHA standards that specifically address workplace violence, courts have understood OSHA's general duty clause as a legal obligation for employers to provide workplaces free of conditions that could result in serious physical harm. OSHA has developed enforcement procedures to address occupational exposure to workplace violence, which include inspections related to workplace violence, see U.S. DEPT OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., *Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence CPL 02-010-058*, (Jan. 10, 2017), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-058.pdf [<https://perma.cc/7RR6-ELBZ>]. Thus, regulating employer duty of care to prevent sexual harassment would be a natural extension of OSHA's mandate.

¹⁹⁰ 135 S. Ct. 2584 (2015)

¹⁹¹ *Id.* at 2597.