

Bending Towards Justice: An Essay in Honor of Charles Sullivan

*Michael Selmi**

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I. INTRODUCTION

It is an honor to be included in this Symposium celebrating the work of Professor Charles Sullivan, who has played a highly influential role both with his scholarship and his mentorship during his properly celebrated career. In preparing for this Symposium, I set out to read Professor Sullivan’s body of work to identify themes that run through the work. One clear theme is that of justice—a belief that the aim of the law should always be justice and in much of his work, Professor Sullivan has highlighted how the law has fallen short of its central aspiration.

There is a related strand to his scholarship that I want to highlight in this essay, and that is his sense of optimism. Professor Sullivan frequently critiques court decisions, arguing how the courts got the doctrines wrong and why it matters. And they have frequently gotten things wrong in a way that seems to most commonly benefit employers. Yet, one reason, perhaps the

* Foundation Professor of Law, Arizona State Sandra Day O’Connor College of Law. An earlier version of this paper was presented at the Symposium honoring the work of Charles Sullivan and I was extremely grateful for and benefitted from comments I received at that time, including from Professor Sullivan. Michael Green provided additional helpful comments for which I am equally grateful.

sole reason, to critique doctrine is because one believes it matters and that courts can get it right, and that is the optimism I think underlies Professor Sullivan's work.

In this essay, I want to explore the optimistic side of two areas of employment discrimination law that most scholars think courts have largely gotten wrong, at least in some significant respects: arbitration and sexual harassment law. With respect to arbitration, I will suggest that the law the Supreme Court set in motion by approving arbitration for statutory claims has been shaped in the lower courts to ensure fair procedures and substantive equivalency so that arbitrating a claim should not lead to any significant disadvantage compared to a court proceeding. I will also suggest that the common perception that employees fare worse in arbitration compared to court is a misperception predicated on final decisions only, ignoring the substantial number of cases that are dismissed on summary judgment in courts but not in arbitration. So my optimistic assessment is that things may not be as bad as we are often led to believe, the glass is maybe one-third full.

With respect to sexual harassment law, in the course of a decade the Court issued four decisions, all in favor of the plaintiffs and all adopting the positions advocated by those plaintiffs with one exception, and I will suggest that in those decisions the Court crafted doctrine that both created and ably protected claims of hostile environment sexual harassment. At the same time, as we have certainly learned with the rise of the #MeToo movement and tales of old-fashioned hostile workplaces in Silicon Valley, the law clearly has been incapable of eliminating and possibly even reducing workplace harassment. Sexual harassment continues to be prevalent and underreported at levels that are quite similar to what they were at the time the doctrine developed in the mid-1980s. One reason may be that harassment remains too inexpensive for employers to adopt better prevention mechanisms and it also likely reflects the limited progress we have made with gender equity in the workplace over the last several decades. This glass turns out to be not very full at all, but I will suggest the fault does not lie in the doctrine.

II. ARBITRATION IN THE LOWER COURTS

In 1991, the Supreme Court approved of mandatory arbitration for statutory claims, including statutory discrimination claims.¹ That decision unleashed a torrent of criticism that has gone relatively unabated for nearly thirty years.² Yet, the criticism has largely overlooked how lower courts

¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

² The initial critiques came fast on the heels of the *Gilmer* case. See Kathryn Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Stephen J. Ware, *Employment Arbitration and*

have shaped the doctrine to ensure that the arbitral forum is a fair forum. This section will chart the ways in which lower courts have reviewed and often invalidated arbitration agreements.

A. *Development of Arbitration Due Process in the Lower Courts*

The Court's *Gilmer* decision was both accidental and propitious in opening a new avenue for employers to channel employment claims. It was accidental in that the employee's arbitration agreement was actually part of his securities registration agreement and although it applied to his employment, it was primarily designed to cover claims filed by investors against the broker in the days when there were stockbrokers.³ As part of its decision, the Supreme Court specifically approved of the procedures established by the New York Stock Exchange, which allowed for some discovery, a procedure for selecting arbitrators, and required that the decision be in writing.⁴

It was also propitious in that the decision was rendered during what was then considered a crisis in the courts regarding crowded dockets.⁵ Several years earlier, the Supreme Court had begun to approve of arbitration proceedings in various nontraditional contexts, including antitrust, and there was some sense that the Court so strongly embraced arbitration as a way of helping to unclog the congested caseload of lower courts.⁶ Employment discrimination cases had always played a central role in courts' dockets and with the subsequent passage of the Civil Rights Act of 1991 were soon to form the largest category of cases within the federal courts. As a result, the arbitration gates were opened.

It is worth noting that arbitration was hardly new and had long played a central role in unionized workplaces where many workplace grievances were arbitrated in what amounts to a private forum with very limited judicial

Voluntary Consent, 25 HOFSTRA L. REV. 83 (1996); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996). There has been virtually no let up since. For recent articles, see Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

³ The rules applicable at the time specifically mentioned they were designed "for the resolution of disputes between broker-dealers and their customers." See Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., May 1989, cited in *Gilmer*, 500 U.S. at 1654.

⁴ *Gilmer*, 500 U.S. at 1654–56.

⁵ Judge Posner's work was probably the best known for highlighting the crisis facing the courts. See RICHARD A. POSNER, *THE FEDERAL COURTS CRISIS AND REFORM* (1985).

⁶ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Solera Chrysler-Plymouth*, 473 U.S. 614 (1985).

review, and commercial contractors had likewise frequently resorted to arbitration. But a central difference was that in those two contexts the parties chose their forum and they were generally seen as acting as equal partners. In contrast, employment arbitration was forced on employees, and often, as in *Gilmer*, unwittingly, and the initial agreements were often exceedingly one-sided since they were drafted exclusively by employers and rarely, if ever, the product of negotiation.

Much ink has been spilt on the *Gilmer* decision, and I will not retread that ground here other than to note that the Court did not sanction any and all arbitration proceedings. Rather, borrowing language from an earlier case, the Court held that the key inquiry was whether “the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”⁷ The Court added, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”⁸ These twin principles have guided the development of the law in the lower courts and allowed courts to police agreements in order to ensure fairness in the proceedings.

Before discussing the judicial developments, it is important to highlight developments among private arbitration groups. There were, at the time, a number of private arbitration groups—JAMS and the American Arbitration Association were the most established—and they quickly saw a huge business opportunity when the Court opened up statutory employment claims to arbitration, which had previously been thought to be out-of-bounds. The damage provisions of the 1991 Civil Rights Act created further incentives for employers to shift from what would now be jury trials for Title VII and ADA claims to an arbitration forum. But the groups, particularly the American Arbitration Association, also realized that courts were likely to invalidate agreements that were grossly one-sided or unfair, and they thus promulgated due process protocols for employment proceedings. Promulgated in 1995, the AAA protocol establishes procedures for selecting arbitrators, requires certain training for arbitrators (there was a concern, particularly after *Gilmer*, that arbitrators may have no knowledge of substantive employment law), as well as including provisions for discovery and fees.⁹

Nevertheless, the fears of those opposing arbitration for statutory claims were quickly realized as many employers adopted mandatory

⁷ *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

⁸ *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

⁹ The protocol is available at: https://www.adr.org/sites/default/files/document_repositary/Employment%20Due%20Process%20Protocol_0.pdf.

arbitration and sought to create procedures that were clearly favorable to employers. But courts did not blindly approve them, and indeed, they took the Supreme Court's admonition in *Gilmer* that arbitration was intended as an alternative forum, not a more favorable one seriously, striking down hundreds of arbitration agreements in the process.

I will not go through all the cases but will only highlight some of the major issues that arose early on in the development of arbitration clauses, which took a number of years to reach appellate courts. One issue that still often plagues arbitration agreements is the issue of fees—arbitrators are paid, and sometimes at an hourly rate, and there was a concern that arbitration fees could deter employees from proceeding at all. This was undoubtedly a well-founded fear, and there is little question that at least some plaintiffs were deterred by the prospect of high fees, but courts policed the agreements in a series of cases, a number of which involved the former electronics retailer Circuit City. In one such case, the en banc court of the Sixth Circuit reviewed an agreement that required the parties to split arbitration costs, and while it did not strike down all such clauses it noted:

“Under *Gilmer*, the arbitral forum must provide litigants with an effective substitute for the judicial forum; if the fees and costs of the arbitral forum deter potential litigants, then that forum is clearly not an effective, or even an adequate, substitute for the judicial forum.”¹⁰

The court went on to hold that the employee must be provided with an opportunity to demonstrate that the particular costs at issue would “deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum.”¹¹ Although the Sixth Circuit's approach likely represented the majority approach among circuits, several courts held that it was impermissible to require employees to split costs, and in those circumstances the agreements were typically invalidated when there was a cost splitting provision.¹²

In no case did a court, at least in a reported appellate decision, hold that whatever the employer imposed was permissible. Rather courts carefully

¹⁰ *Morrison v. Circuit City Stores*, 317 F.3d 646, 659 (6th Cir. 2003) (en banc). The Fifth Circuit took a nearly identical approach. *See Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 763 (5th Cir. 1999) (holding that *Gilmer* “plainly indicates that an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims.”), *cert. denied*, 529 U.S. 1099 (2000). *See also Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1286 (11th Cir. 2001) (“Federal statutory claims are arbitrable only when arbitration can serve the same remedial and deterrent functions as litigation, and an agreement that limits the remedies available cannot adequately serve those functions.”).

¹¹ *Morrison*, 317 F.3d at 663.

¹² *See, e.g., Shackle v. B-G Maint. Mgt. Col., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Comput. Techs. Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns, Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

analyzed agreements to ensure that an employee would have a fair opportunity to vindicate her rights. For example, many employers sought to limit the damages an employee could obtain in arbitration, sometimes by limiting the amount they could recover or by prohibiting the recovery of punitive damages, even though under the Civil Rights Act of 1991 punitive damages were available for claims of intentional discrimination and a form of punitive damages had always been available under the ADEA. Courts struck down those provisions, and in at least one such case, the employer conceded the provision was not enforceable.¹³ Courts likewise struck down bans on recovering attorney's fees, shortened statute of limitations, and various odd requirements of where arbitrations would be held.¹⁴ Courts also struck down agreements that allowed employers to choose the arbitrator or that gave them an advantage in doing so.¹⁵

This was not perfect justice to be sure. Undoubtedly, many employees never challenged legally impermissible agreements, and many were likely deterred from proceeding in arbitration as a result of cost provisions. This would be particularly problematic for employees who were unable to retain counsel to challenge the agreements. But this is more a feature of employment litigation generally rather than something unique to arbitration

¹³ See, e.g., *Booker v. Robert Half, Int'l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 1998). In a subsequent consumer arbitration case, the Supreme Court noted that arbitration costs could be so large as to "preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000). This language has largely been construed in favor of a case-by-case analysis but courts continue to strike down agreements when the arbitration costs would serve as a deterrent to proceeding, even when there is the possibility of reimbursement after a hearing. See *Nexbitt v. FCNH, Inc.*, 811 F.3d 371 (10th Cir. 2016).

¹⁴ See *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 285 (3d Cir. 2004) (holding that while a loser pays provision is not per se unconscionable, it would be if the employee can establish she would be unable to pay the judgment); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 270 (3d Cir. 2003) (finding cost provision unconscionable); *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 626 (7th Cir. 2002) (a provision that prohibits recovery of attorney's fees was unenforceable because "[t]he right to attorney's fees . . . is central to the ability of persons to seek redress for violations of Title VII[]"); *Capili v. Finish Line, Inc.*, 116 F. Supp. 3d 1000, 1007 (N.D. Cal. 2015) (invalidating a provision that required a California employee to arbitrate claim in Indianapolis); *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 421 (N.D. Cal. 2015) (same, but arbitration to be held in Dallas).

¹⁵ See *Beltran v. AuPairCare, Inc.*, 907 F.3d 1240 (10th Cir. 2018) (provision allowing employer to select arbitrator was unenforceable but severable). There has always been a concern that an unrepresented employee might have a difficult time knowing how to choose an arbitrator but that is a function of any arbitration, and again primarily highlights the difficulty unrepresented employees will have. There certainly may be circumstances where an employee would be able to obtain counsel for a federal court claim but not when that same claim proceeds in arbitration but over time, as attorneys have become more accustomed to arbitration, that concern should have faded. There has also been a concern that employers will have what is defined as a repeat player advantage, an issue addressed in the next section.

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agreements. Many employers impose questionable agreements on employees (noncompete agreements are common) that employees do not have the wherewithal to challenge, and *pro se* plaintiffs, as will be discussed more in the next section, are always at a significant disadvantage no matter the forum. What courts did, and continue to do, is police the agreements to ensure a modicum of fairness. The *Gilmer* Court rejected the idea that employees were entitled to all the trappings of a judicial forum in arbitration and so the process is likely to be less formal, with less discovery than might be available in federal court. But short of that, there is little reason to believe that courts have routinely allowed anything goes arbitrations.

Indeed, my reading of the case law is that courts—most courts might be more accurate—have been vigilant in striking down arbitration clauses that were clearly favorable to employers. As the Third Circuit explained in striking down an agreement that had a short filing deadline and provided an advantage to the employer in selecting the arbitrator:

[T]he pervasively one-sided nature of the arbitration agreement's terms demonstrates that the employer did not seek to use arbitration as a legitimate means for dispute resolution. Instead, the employer created a system that was designed to give it an unfair advantage through rules that impermissibly restricted employees' access to arbitration and that gave the employer an undue influence over the selection of the arbitrator.¹⁶

Based on the way courts have approached arbitration agreements, it is not a stretch to say that to the extent the agreements are designed to provide an alternative forum, they are upheld, but when the agreement is intended to provide a more favorable forum, it is likely to be struck down.

I should be clear that not all of the developments have been positive, particularly at the Supreme Court where arbitration clauses are welcomed with open arms. The recent sanctioning of class action waivers—an issue on which the lower courts were split—may seriously limit the ability of class claims to move forward.¹⁷ Even when it comes to class action waivers, it has not all been a loss for plaintiffs. A recent report demonstrated that class certifications in employment cases had increased in the last year and a number of enterprising plaintiffs' attorneys have begun to file a massive number of individual claims, so much so that companies have started to resist arbitration of such claims.¹⁸ Nevertheless, there remains a strong suspicion

¹⁶ *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 196 (3d Cir. 2010).

¹⁷ *See Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018). The stage was set for permitting class action waivers in employment claims by a pair of consumer cases in which the Supreme Court upheld the waivers. *See Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

¹⁸ *See Vic Gurrieri, Class Cert. Grants Reach Record Levels, Study Says*, LAW360 (Jan. 7, 2020) (reporting results of report by law firm Seyfarth Shaw regarding employment

that forced arbitration is unfair and disadvantageous to employees, an issue I will take up in the next section.

B. Do Employees Fare Worse in Arbitration than Court?

Although there remain philosophical objections to mandated employment arbitration—including its compulsory rather than chosen nature—the primary concern now appears to be that employees fare worse in an arbitral forum than in court, and there has also emerged a recent concern that many employees may be forgoing the filing of claims altogether in light of their arbitration agreements.¹⁹ I will discuss these concerns in turn below.

The idea that employees fare worse in arbitration than in court, if true, would be a strong condemnation of arbitration since for years scholars, myself included, have documented just how difficult it is for plaintiffs to succeed in federal court. Cornell scholars Kevin Clermont and Stewart Schwab have, in several articles, shown that employment discrimination plaintiffs have an exceedingly difficult time prevailing in federal court, and when they do win, they have just as hard a time holding onto the win on appeal.²⁰ The most recent studies on federal court litigation are from 2015 and find nearly identical results, and there is no reason to believe the statistics have improved over the last few years. Indeed, it is not too much to suggest that every study that has analyzed judicial employment case resolutions has

litigation). A recent dispute with DoorDash has turned the tables on the company—5,000 couriers have filed for arbitration, paid their \$300 fee, and the company will be required to pay the rest of the costs, including a minimum of \$2,650 in fees for each arbitration as well as the arbitrator's fees. The company is resisting arbitration, although the District Court—while noting the company's hypocrisy—has ordered the arbitrations to move forward and the company has even tried to change their arbitration agreement. *See Order Re Motion to Compel Arbitration, Motion to Stay Proceedings, and Motion to Seal, Abernathy v. DoorDash*, No. C-1907545, N.D. Cal. (Alsup, J.), Feb. 10, 2020. In its concluding paragraph the court noted, “For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers . . . and forced class-action waivers upon them too . . . The irony in this case is that the workers wish to enforce the very provisions on them by seeking, even if by the thousands, individual arbitrations . . . [I]n irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.” *Id.* at 8. In other words, be careful what you ask for.

¹⁹ Judith Resnik, for example, has focused on the lack of public access to arbitration, including to the hearing itself, compared to an open judicial forum. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2805 (2015). This is true, but it also largely ignores the fact that most cases, and all administrative proceedings, will be resolved privately without meaningful public access or participation.

²⁰ Kevin Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 *HARV. L. & POL'Y REV.* 103 (2009); Kevin Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 *EMP. RTS. & EMP. POL'Y* 547 (2003); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 *J. EMP. LEG. STUD.* 429 (2004).

concluded that plaintiffs have a very steep hill to climb.²¹ Only in the anti-arbitration literature are federal courts presented as an attractive option.

The supposed preference for court adjudication is based on several empirical studies that suggest that plaintiffs who receive an arbitration award win in somewhere between 21–24% of arbitrations, depending on the particular data set,²² while it has been shown that plaintiffs who get to a jury in federal court prevail closer to one-third of the time, although the numbers vary a bit in the analyses and plaintiffs generally fare worse before judges than juries although bench trials have become far less common today.²³ It is possible to dispute these figures but for my purposes, it is not necessary to do so, other than to say that the arbitration data are quite limited, as they are typically based on reported results from the American Arbitration Association as mandated by California law. The American Arbitration Association is the most common established group for employment claims, but it still only handles a fraction of all claims filed, and they may not be representative of the broader realm of claims. The data also make clear that arbitration win rates vary by whether the employee has counsel (*pro se* plaintiffs fare poorly no matter where they proceed but are more likely to get to an arbitration hearing than a jury trial), the nature of the defendant, and the nature of the arbitrator, as recent data indicate employees have higher success rates when arbitrating before retired judges.

But putting the win rates aside, if one is trying to assess the merits of an arbitral forum compared to a judicial one, it is surely inadequate to focus solely on completed claims or cases. The most recent data indicate that under 5% of cases filed in federal court will go to trial—which means that if you

²¹ See, e.g., Ruth Colker, *Winning and Losing Under the Americans With Disabilities Act*, 62 OHIO ST. L.J. 239 (2001); Wendy Parker, *Juries, Race & Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209 (2011); Michael Selmi, *Why Are Employment Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

²² One of the first studies to focus on data of the American Arbitration Association found a win rate of 21.4%, and this seems to be the most commonly cited statistic. See Alexander J.S. Colvin, *An Empirical Study of Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011). In the same paper, Dean Colvin noted that win rates in litigated cases ranged between 33-36%. *Id.* at 13. A more recent study found a plaintiff win rate in AAA arbitrations of 26.72% when *pro se* plaintiffs were excluded. See Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 34 (2019). That study also analyzed data from other arbitration services and generally found higher success rates. *Id.* at 41 (JAMS) & 46 (ADR Serv.). The success rates vary considerably depending on the nature of the attorneys on either side and often based on the arbitrator as well.

²³ Plaintiff win rates at trial have consistently been in the 30% range. See Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 10 (2015) (indicating win rate of 30.4%). This win rate is generally significantly lower than other civil claims such as for torts where the win rate is closer to 50%. *Id.* See also Clermont & Schwab, *supra* note 20, at 129 (finding win rate overall of 28.47% and 37.6% for jury trials).

are one of the few who ever gets to trial, you have about a one-third probability of succeeding.²⁴ But the likelihood of getting to trial is rather poor. In contrast, far more arbitrations go to decision—somewhere between 20–30%.²⁵ So although one's chance of prevailing at the hearing might be lower in arbitration, the chance of getting to a hearing is at least four times as high.

The reason is fairly simple: summary judgment. Although summary judgment can be used in at least some arbitral forums, it is not nearly as common in arbitration as it is in federal court.²⁶ And, as anyone who has studied employment discrimination doctrine knows, defendants file and win summary judgment motions at high rates, and it is highly unusual for plaintiffs to either file or prevail in summary judgment. Many employment discrimination cases (and most of the analysis focuses on employment discrimination rather than broader employment categories) are also determined on motions to dismiss, which needless to say are always defendant-initiated. Studies indicate that between about 16 and 30% of cases are terminated through motions, or four to eight times as many cases as end up at trial.²⁷

And there is another layer to consider: when employment plaintiffs prevail at trial in federal courts, their victories are often appealed, and frequently reversed. One study indicated that about 45% of trial verdicts for plaintiffs are appealed, and about 41% of those appeals result in a reversal.²⁸

²⁴ The most recent data from the Administrative Office of the Courts indicated that 4.2% of employment discrimination cases went to trial with an even lower rate (1.5%) for FLSA claims. The data is from the Annual Administrative Office of the Courts report on judicial caseload; the most recent data is from 2018. UNITED STATES COURTS, TABLE C-1—U.S. DISTRICT COURTS—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (Mar. 31, 2018), <https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2018/03/31>.

²⁵ In Dean Colvin's 2011 study, 30.7% of the arbitrations went to a hearing. See Colvin, *supra* note 22, at 1. In *Arbitration Nation*, the authors reviewed 1,659 awards out of 12,641 employment arbitrations, indicating that 22% of the claims went to a hearing. Chandrasekher & Horton, *supra* note 22, at 34; see also Alexander Colvin & Kelly Pike, *Saturns & Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 71 (2014) (26.9% of studied claims went to a final hearing).

²⁶ See Chandrasekher & Horton, *supra* note 22, at 57 (“According to the conventional wisdom, summary judgment is so rare to be statistically insignificant.”) (citation and quotation omitted). One study by Colvin and Pike found that summary judgment was raised in 23% of files. See Colvin & Pike, *supra* note 25, at 72. As far as I am aware, no other study, including the recent comprehensive review in the California Law Review, found any indication of significant motion practice in arbitration.

²⁷ This is what I concluded in an earlier study. See Selmi, *supra* note 21, at 559. In a review of case files in employment discrimination cases, Wendy Parker found that about 30% of employment discrimination cases were terminated by pretrial motions. See Parker, *supra* note 21, at 217.

²⁸ See Clermont & Schwab, *supra* note 20, at 109 n.20 (“[I]n our sample defendants initiated appeal from 45.31% of their trial losses, while plaintiffs pursued 33.01% of theirs[.]”); *id.* at 110 (documenting a 41% reversal rate for defendants appealing trial

Certainly if one is going to compare win rates, it would be important to take into account cases terminated prior to trial as well as those wins that are reversed. Plaintiffs are also able to have some trial losses reversed, but their success is far lower than defendant appeals.²⁹ In contrast, except in rare cases, arbitration awards are final. When motion practice and appeals are factored into the equation, it is not at all clear that arbitration is a less attractive forum for employees.³⁰

In assessing the judicial forum, one should also include the EEOC administrative process given that filing a charge with the EEOC is a prerequisite to a judicial complaint but not arbitration. As has long been documented, employees have a very low success rate with EEOC claims, if success is measured by obtaining relief from the process. As is true in all forums, many EEOC claims will settle and be voluntarily withdrawn. Looking at the latest data, the EEOC resolved just over 80,000 charges in Fiscal Year 2019, and nearly 70% of those resolutions were no cause determinations, the equivalent of a loss, although the determination does not preclude the individual from filing a federal court claim even though the vast majority of those who receive a no cause determination will not do so. About 12% of the claims were settled with benefits, and another 3% received a reasonable cause determination, which (loosely defined) would suggest a success or win rate of roughly 15% in the administrative process where the largest number of claims are filed in the federal system.³¹

All of this is to say that the win rate for those who enter the federal court system is far lower than 30% and almost certainly significantly lower than the win rate for arbitration, though at the end of the day it is difficult to make direct comparisons, in part because the case selection is likely different.³² Most of the studies involving federal claims revolve around employment discrimination statutes, whereas arbitration is likely to cover a

verdicts).

²⁹ Plaintiffs succeeded in reversing only 8.72% of their appealed trial losses and 10.69% of their appealed pretrial losses. *Id.* at 110.

³⁰ This was the conclusion of a study that evaluated the early iteration of arbitration studies. See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN L. REV. 1557, 1578 (2005) (“[T]here is no evidence that plaintiffs fare significantly better in litigation.”).

³¹ The EEOC data is available on its website at <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>. The data on resolutions have been consistent for many years, though the number of charges and resolutions fluctuate modestly. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 13 (1996) (finding that 15.5% of charges resulted in some relief through the process).

³² A recent article by Samuel Estreicher and his co-authors, who have contributed significantly to the debate on employment arbitration, makes many similar points and also explores damage awards and other issues that I have opted not to discuss. See Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375 (2018).

broader swath of cases, including state wrongful discharge cases. This is one reason I have also decided not to focus on monetary recoveries in either forum, given that the cases may be quite different and so few federal claims go to trial. A far more interesting statistic would focus on settlement amounts to determine whether there might be a discrepancy in the amount recovered through the far more common method of resolution, namely settlements. It appears from the various studies that claims settle at similar rates in the two forums: somewhere in the neighborhood of 60–70% of all claims settle, and presumably some of those claims settle without any monetary relief.³³ But it is extremely difficult to obtain comprehensive data on settlements, regardless of the forum.

As an aside, although it is relevant to measuring the success of the process, the general absence of motion practice in arbitration also eliminates the various hurdles employees encounter in court. This is particularly true with respect to the issues that stump employees in summary judgment, including the increasingly perplexing issue of whether a plaintiff has adequately identified similarly situated individuals and whether doing so is part of the prima facie case necessary to survive summary judgment.³⁴ Although employment arbitrators under most established protocols should be familiar with the law, they are not required, and generally do not, impose pleading and prima facie standards, and if these issues come up they are likely to do so in the formal arbitration hearing. Employees surely may lose in the arbitration hearing if they are not able to identify similarly situated individuals who were treated differently, but that has always been the primary means of proving discrimination based on circumstantial evidence, for better or worse. It also suggests that some of the cases plaintiffs are likely losing in an arbitration decision are cases that would be lost earlier in the process in federal court.³⁵

³³ This has been a consistent finding across studies. See David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 466 (2016) (finding an arbitration settlement rate of 64%); Colvin & Pike, *supra* note 25, at 71 (59.5% arbitrations settled). In his work, Ted Eisenberg has estimated settlement rates at between 60–75% and concluded that employment cases tend to settle at lower rates than other cases. See Eisenberg, *supra* note 23, at 23.

³⁴ For critiques of the comparator requirement, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011), and Charles Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALABAMA L. REV. 191 (2009).

³⁵ Scholars—including Professor Sullivan—have critiqued just about every facet of existing case law under Title VII and related statutes. The list is endless, but for a sampling, see Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101 (2017); Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological & Legal Licensing of Bias*, 104 CALIF. L. REV. 1 (2016); Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115 (2019); SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017); Charles Sullivan, *Tortifying Employment Discrimination*, 92

That leaves one complicating question, which is state court filings. Many employment discrimination cases are filed in state rather than federal courts but obtaining data on state court processes or verdicts is notoriously difficult. Maybe it is enough to say that most comparisons indicating that arbitration is a less favorable forum for employees have been primarily, and often exclusively, to federal courts, and the analysis above suggests the simple comparison based on final decisions can be misleading. It is certainly possible that employees fare best in state court forums, but there is no data to suggest a sharp increase in state filings, especially at the expense of federal claims. Judicial filings of employment discrimination claims in federal court have been quite steady over the last decade and certainly, outside of California, the focus of study continues to be on federal rather than state law.³⁶

More recently a separate issue has arisen and that is the absence of arbitrations. Professor Judith Resnik has documented the low number of consumer arbitrations, while Professor Cynthia Estlund has emphasized the paucity of employment arbitrations.³⁷ I will set aside the consumer issue other than to say that most consumer claims are simply too small to warrant bringing individually, either in court or in arbitration, and the real issue has to do with the Supreme Court's approval of class action waivers. But this strikes me as less about arbitration and more about the inability to aggregate small claims in any forum.

Professor Estlund's claim is based on a recent study by Dean Alexander Colvin that suggested as many as 56% of employees are subjected to arbitration clauses.³⁸ This was a significant increase from Colvin's prior estimate of between 20 and 25%.³⁹ The 56% figure, however, seems too

B. U. L. REV. 1431 (2012); Charles Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011).

³⁶ In a rare study of state employment cases, David Oppenheimer reviewed a sampling from California cases decided in 1998 and found an overall success rate for employment cases of 53% but a significantly lower rate (36%) for race cases. See David Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveal Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 516–17 (2003). His study only analyzed jury verdicts.

³⁷ See Estlund, *supra* note 2, at 680; Resnik, *supra* note 2, at 2804.

³⁸ See Estlund, *supra* note 2, at 689. The report, which was based on a phone survey and done in conjunction with the Economic Policy Institute, concluded that 56.2% (or 60 million) private sector nonunion employees were subject to mandatory arbitration agreements. See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 1–2 (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>.

³⁹ See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007). This was the prevailing figure as recent as 2015. See Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers Of Legal Protection*, 80 BROOK L. REV. 1309, 1310 (2015).

high in light of the various filing activity that we can observe, particularly when one focuses on employment discrimination litigation. According to Colvin's recent study, mandatory arbitration clauses have more than doubled over the last decade; if this were true, one would expect a substantial decrease in court litigation and EEOC filings, but that has not occurred. Based on data collected by the Administrative Office of the Courts, court filings for employment discrimination cases have been relatively steady over the last decade.⁴⁰ There has been a decline from the height of federal filings, but that decline primarily occurred prior to 2008 and is more likely a result of the rise and then decline of disability cases in light of Supreme Court rulings that were later overturned by statute. It is certainly possible that many individuals are foregoing filing claims in the face of arbitration clauses and there is some sense that many attorneys are reluctant to proceed in arbitration, even though it has been part of the employment landscape for thirty years. But the filing data do not support the notion that many people with viable claims are failing to find (or seek) an available forum.

Finally, a brief mention of an issue that has dogged arbitration for years, namely the question of arbitrator bias in the form of what is called repeat player bias. The parties to an arbitration traditionally choose their arbitrator, and it has long been hypothesized that arbitrators are likely to curry favor with employers as a way of gaining future business given that many large employers, and perhaps even smaller ones, are likely to be repeat players in the process whereas employees are not (their attorneys surely might be). Some early studies conducted by Professor Lisa Bingham documented that employers fared better before arbitrators and later studies have sometimes, but not always, demonstrated an advantage for parties who appear before an arbitrator more than once.⁴¹ A repeat player advantage, however, need not stem from arbitrator bias, and one would expect it would be problematic for any arbitrator to garner a reputation for bias since plaintiffs (or more likely their attorneys), and the arbitration service, would be wary of any such arbitrator. Moreover, repeat player attorneys who represent plaintiffs also

⁴⁰ The data is collected by the Administrative Office of the Courts and reviewing year by year filings. The number of cases has clearly decreased over time, but Ted Eisenberg concluded that the decrease occurred in the 2000s. See Eisenberg, *supra* note 23, at 21–22. Between Fiscal Years 2008 through 2013, EEOC charges ranged from a high of 99,947 to a low of 93,277. There has been a steady decrease since 2014 so that in 2019, the EEOC received 72,675, or 27% less than its peak. But one explanation is likely a stronger economy.

⁴¹ Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 213 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998). For a more recent study finding a repeat player advantage, see Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. LAB. REL. REV. 1019 (2015).

experience an advantage in arbitration.⁴²

But, and this seems like a rather obvious but often overlooked point, the whole concept of a repeat player advantage was developed around litigation, and there is no clear reason to think the problem is worse in arbitration.⁴³ It might be worse if there was evidence of bias among the arbitrators, but to date, the studies have not demonstrated bias, just an advantage that likely stems from experience both in arbitration and federal courts. There also seems to be a relatively easy fix to the problem of arbitrator bias and that is to randomly assign arbitrators rather than allowing the parties to choose who will decide the case. This would obviously parallel how judicial cases are conducted, and there is very little rationale for allowing the parties to select an arbitrator, particularly in an employment case where there is likely to be an imbalance in power and more importantly an imbalance in information. Allowing the parties to choose the arbitrator is a procedure established for commercial and labor arbitrations where both parties are in similar positions to make an informed choice, but there is no compelling reason it needs to carryover to employment claims.

This simple fix will eliminate any concern regarding arbitrator bias that might arise from a desire to obtain future business, though it will not necessarily eliminate repeat player advantage or arbitrator bias more generally. But that is also true of a judicial forum, since many judges have their own biases and frequent court participants will likely have some advantage as well. And here is the optimistic message: the system the Supreme Court set in motion in *Gilmer* is not as bad as is often assumed.

III. THE DEVELOPMENT OF SEXUAL HARASSMENT LAW AND ITS EFFECT

The development of sexual harassment law has followed a similar path but, in this instance, it has been the Supreme Court rather than lower courts that has created the law with a bend towards justice. Not full tilt justice to be sure, but a bend nevertheless. And just as was true with arbitration case law, there is no suggestion that the law has led to perfect justice or could not be improved, but on the whole, the law has created reasonably adequate

⁴² See Chandrasekher & Horton, *supra* note 22, at 9 (“Arbitration favors employers on both sides. In a variety of different settings, serially arbitrating plaintiffs’ law firms also fare particularly well.”). Some of the early research was criticized, and it seems properly so, for including in the analysis the first arbitration since there is no particular reason to consider that arbitration as involving repeat players, at most it involves potential repeat players but that would be true of any arbitration. See Sherwyn et al., *supra* note 30, at 1570.

⁴³ The concept of a repeat player stems from the classic article by Mark Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974). This point has not always been overlooked. See Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 752 (2001) (“The most important point about the repeat-player effect, however, is that this effect may be at least as prevalent in litigation as arbitration.”).

protections for victims of harassment. As discussed further below, the problems that have occurred with sexual harassment, many of which stem from various disincentives to report harassment, are mostly outside the purview of the Supreme Court.

A. *Four Supreme Court Cases and the Developing Law*

Sexual harassment law emerged in the lower courts in the late 1970s. It was not until 1986, in the case of *Meritor Savings Bank v. Vinson*, that the Supreme Court acknowledged that sexual harassment was a form of sex discrimination that violated Title VII.⁴⁴ The case involved a bank teller who, shortly after she began her employment, was required to engage in sexual relations with her supervisor on numerous occasions. Even though the plaintiff, Mechelle Vinson, testified at her trial that she was raped by her supervisor and engaged in the sexual relations only because she feared she would otherwise lose her job, the case was treated as a hostile work environment claim as opposed to quid-pro-quo harassment, the latter of which is often defined as requiring sex as a condition of employment.⁴⁵ The reason, it appears, was because Vinson did not suffer any economic loss as a result of the harassment but instead ultimately lost her job because of alleged performance deficiencies.⁴⁶ Although the issue was not before the Court, it would have seemed quite likely that whatever performance issues may have existed could have resulted from the pervasive harassment that Vinson experienced, and likely also the fact that she eventually broke off relations with her supervisor.

Vinson prevailed in the D.C. Circuit, where much of the early law on sexual harassment was developed, and by the time the case reached the Supreme Court, most lower courts had embraced the notion that sexual harassment was a form of sex discrimination, although in its early stages many courts struggled with the idea.⁴⁷ The more contentious issue that was percolating in the lower courts involved the question of employer liability since the employer—the company—rarely knew about or sanctioned the

⁴⁴ 477 U.S. 57, 66 (1986).

⁴⁵ It has always puzzled me why the *Vinson* case was treated as a hostile environment claim. As best I can tell, it had to do with the District Court's (where she lost) determination that Mechele Vinson did not have to accede to sex as a condition of employment, and that her promotion was based on merit rather than her relationship with her supervisor. See *Vinson v. Taylor*, 753 F.2d 141, 144 (D.C. Cir. 1985).

⁴⁶ *Vinson*, 477 U.S. at 65.

⁴⁷ See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (noting that Title VII is "not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of the supervisor . . . which happened to occur in a corporate corridor rather than a back alley"); *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (no sexual harassment based on supervisor's "personal proclivity, peculiarity or mannerism").

abusive behavior.

Justice Rehnquist's opinion for a unanimous Court passed on the question of the company's liability but delineated the contours of the hostile environment cause of action by effectively adopting the guidelines promulgated by the Equal Employment Opportunity Commission.⁴⁸ Those standards established the now familiar elements of a claim: the conduct must be unwelcome and sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment.⁴⁹

Given the developments in the lower courts, the case broke no new ground, although it was certainly important for the Supreme Court to establish definitively that sexual harassment was a form of sex discrimination even when it did not result in tangible economic loss. Over the years, the Court's standard has been criticized for its inclusion of an "unwelcomeness" requirement, and for the intemperate comments of Justice Rehnquist, who noted that an employee's "sexually provocative speech or dress" could be relevant to determining whether the challenged behavior was unwelcome.⁵⁰ For the most part, the unwelcomeness inquiry has not played a prominent role in the development of the law,⁵¹ but it has always been part of the doctrine. In fact, Mechelle Vinson's brief, co-authored by Catherine

⁴⁸ 29 C.F.R. § 1604.11(a)(3) (2019).

⁴⁹ *Vinson*, 477 U.S. at 67–68.

⁵⁰ An early and prominent critique was by Harvard Law Professor Susan Estrich. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991). For an additional, more recent critique, see Henry L. Chambers, *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733 (2002).

⁵¹ In the early years of the development of sexual harassment law, many courts concluded that plaintiffs who used foul language in the workplace were effectively immune from harassment claims because they were not offended and the conduct was not unwelcome. A number of appellate courts, however, squashed that notion with one leading case written by Judge Posner, who in his inimitable style, rejected the district court's conclusion by noting, "Of course, it [the behavior] was unwelcome." *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1011 (7th Cir. 1994). In his decision, Judge Posner noted that the plaintiff was the sole woman in the workplace and added that the balance of power would have likely explained why the plaintiff engaged in some off-color behavior. But for the court, the fact that the plaintiff complained indicated the behavior was unwelcome. *Id.* Similarly, in a well-known case where a plaintiff was harassed, in part, because she had posed nude in a magazine and the magazine was then passed around the workplace, the Eighth Circuit rejected the district court's notion that her behavior meant that she could not have been offended. In the second of two opinions criticizing the lower court's approach, the court concluded, "The plaintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive." *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 963 (8th Cir. 1993). In the earlier opinion the court described the lower court's position as "a person who would appear nude in a national magazine could not be offended by the behavior which took place at the McGregor plant." *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 566 (8th Cir. 1992). See also *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (holding that behavior was "unwelcome" despite the plaintiff's use of vulgar language in the workplace).

MacKinnon, acknowledged the unwelcomeness requirement as part of establishing a hostile environment claim.⁵² It is also worth noting that in the *Meritor Savings* case no party advocated, and no lower court had adopted, a broader definition of sexual harassment. The Supreme Court adopted the standard advocated by plaintiffs and the EEOC—and this was the same Court, and the same Justice, that not so many years earlier had concluded that discrimination based on a woman’s pregnancy was not sex discrimination under Title VII and that would issue a series of hostile decisions that would ultimately be overturned by the Civil Rights Act of 1991.⁵³

The question that bedeviled the lower courts and which occupied significant space in the Supreme Court briefs was the standard for employer liability. Because the district court had failed to resolve conflicting testimony regarding what had occurred, the Court declined “the parties’ invitation to issue a definitive ruling on employer liability,” adding, “but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.”⁵⁴ Presaging how the law would develop, in a concurring opinion Justice Marshall applied agency principles to conclude that employers should be held strictly liable for harassment perpetrated by supervisors.⁵⁵

It was seven years before the Court took up another sexual harassment case, and the Court was again unanimous in its decision. The case, *Harris v. Forklift Systems, Inc.*,⁵⁶ involved the question of what it means for harassment to be sufficiently severe or pervasive to constitute a hostile working environment. In an earlier case, the Sixth Circuit had adopted the position that a claim could only be advanced if the “psychological well-being” of the plaintiff was affected, a standard that no other court at the time

⁵² The Vinson brief noted “the unwelcomeness of a sexual encounter in employment is crucial to a sexual harassment claim.” Brief of Respondent Mechelle Vinson at 23, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (Feb. 11, 1986). The brief went on to note that unwelcomeness had not been an issue in the case, largely because the supervisor testified that he never made advances towards Vinson and they did not have sexual relations. *Id.*

⁵³ The Civil Rights Act of 1991 overturned eight Supreme Court decisions that were decided between 1986-1991 and which were considered extremely hostile to the interests of plaintiffs in employment discrimination cases. See Michael Selmi, *The Supreme Court’s Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281 (2011). In an opinion written by Justice Rehnquist, the Supreme Court held that discrimination based on pregnancy was not sex discrimination based on his now infamous division of the world into pregnant and nonpregnant people. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

⁵⁴ *Vinson*, 477 U.S. at 72.

⁵⁵ *Id.* at 78 (Marshall, J., concurring). Justice Marshall’s opinion was joined by Justices Brennan, Blackmun and Stevens.

⁵⁶ 510 U.S. 17 (1993).

had adopted.⁵⁷ Since the plaintiff, Harris, had not demonstrated that she suffered severe emotional distress, she failed to prevail under the appellate court's nutty standard. By the time the case reached the Supreme Court, no one was defending the Sixth Circuit's standard, instead the company which had prevailed below sought to establish an alternative basis for upholding the decision on the ground that no work conditions had been affected.⁵⁸

The Court disposed of the case in a short opinion authored by Justice O'Connor, who curtly and memorably noted "Title VII comes into play before the harassing conduct leads to a nervous breakdown."⁵⁹ The Court reiterated that courts should apply a "totality of the circumstances" test and then inserted that in assessing whether the allegations rise to the level of a hostile environment, courts should employ a reasonable person test: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."⁶⁰ Whether intentional or not, this sentence resolved a heated debate over whether a reasonable person test was appropriate or whether, as the Ninth Circuit had concluded, courts should view the evidence from the perspective of a reasonable woman, or a reasonable victim as the standard was often defined.⁶¹ In the Supreme Court, several amici had urged the Court to adopt the reasonable woman test given that there was a broad consensus that men and women differed on what kind of workplace conduct was appropriate or offensive.⁶² This issue was technically not before the Court, and the Court slipped in the reasonable person standard without any discussion of

⁵⁷ See *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (holding that a hostile environment claim is established only if the harassment "affected seriously the psychological well-being of the [plaintiff] . . ."). If that was not enough, the court also stated that the environment—in this instance a jail where abusive behavior was common and tolerated—should be taken into account, as if to suggest that women entering predominantly male workplaces should expect to be harassed. *Id.* at 620–21.

⁵⁸ The Court noted this in its decision. See *Harris*, 510 U.S. at 23 ("Forklift, while conceding that a requirement that the conduct seriously affect psychological well-being is unfounded, argues that the District Court nonetheless correctly applied the *Meritor* standard.").

⁵⁹ *Id.* at 22.

⁶⁰ *Id.* at 21.

⁶¹ See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("[W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim."). The court later referred to the standard as one involving a "reasonable woman" and did so based on the notion that men and women often differed regarding what behavior rose to the level of harassment. See *id.* at 879. No other appellate court adopted the reasonable woman standard but that may be due to the short time period between the Ninth Circuit's decision in *Ellison* and the Supreme Court decision in *Harris*.

⁶² See, e.g., Nancy Ehrenreich, *Pluralist Myth and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (cited in *Ellison* and documenting differences in beliefs between women and men).

alternatives, but because no one was defending the Sixth Circuit's psychological injury test, many of the amicus briefs had turned to the question of the propriety of a reasonable woman standard.⁶³

Although the ultimate issue in *Harris*—whether psychological injury was a necessary component of a sexual harassment claim—was easily resolved, the case took on an air of greater importance since it was the first harassment case the Court addressed after Justice Thomas had joined the Court following his contentious hearings over allegations of Anita Hill that Thomas had harassed her while he was chair of the Equal Employment Opportunity Commission. It was also Justice Scalia's first opportunity to opine on the doctrine of sexual harassment, and he did so in a very unusual but short concurring opinion. While noting his frustration with what he described as a lack of "clarity" in the Court's standard, he ultimately concluded, "I know of no alternative to the course that the Court today has taken."⁶⁴ Justice Thomas notably joined the majority's opinion in full without joining Justice Scalia's curious concurrence.

Perhaps the most lasting aspect, other than the adoption of the reasonable person test, of the case was contained in Justice Ginsburg's concurrence, which has helped shape sexual harassment doctrine ever since. Like the other opinions, hers was short but her focus was different in that she emphasized the effect harassment has on the ability to do one's job, on how women, through harassing conduct, are invariably compelled to work under different conditions than they would if they were a man.⁶⁵ In this way, Justice Ginsburg succinctly defined the harm of harassment, even where there were no economic harms, and even when women put up with abusive behavior rather than quitting—they were being treated differently from men based on their gender, essentially the basic definition of sex discrimination that the Court had always used.

The third case was similar to the prior two in two respects: another unanimous and short decision but this time the case was accepted to resolve a highly divisive split among the lower courts. In *Oncale v. Sundowner Offshore Services, Inc., et al.*, the Supreme Court considered the question whether same sex harassment was cognizable under Title VII.⁶⁶ Lower courts had deeply struggled over the question, producing a rather bizarre array of decisions that sometimes focused on the intent of the harasser,

⁶³ The amicus briefs do not appear to be readily available now so I am relying on my memory as an attorney who worked on the case for an amicus brief that the Lawyers' Committee for Civil Rights contributed to.

⁶⁴ *Harris*, 510 U.S. at 24 (Scalia, J., concurring).

⁶⁵ *Id.* at 25 (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

⁶⁶ 523 U.S. 75 (1998).

sometimes instead ensuring that there was no sexual intent, and other courts had held that same sex harassment was always or never permissible.⁶⁷ The divide was presumably attributable to the prevailing consensus at the time that Title VII did not prohibit discrimination that was based on one's sexual orientation, and so courts sought to fit the concept of same sex harassment within that framework.

In what was a bit of a surprise, the Supreme Court had little trouble concluding that same sex harassment was cognizable under Title VII without regard to the intent of the harasser. This time it was Justice Scalia who wrote for a unanimous court. After reviewing the confusing array of lower court decisions, Justice Scalia concluded, "We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from coverage of Title VII,"⁶⁸ later adding that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."⁶⁹ As a way of providing assurance that the decision was creating no new ground on the possible scope of harassment, Justice Scalia quoted from Justice Ginsburg's *Harris* concurrence to observe that "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms and conditions of employment to which members of the other sex are not exposed."⁷⁰ And in his first statement on sexual harassment, Justice Thomas wrote a one-sentence concurring opinion that the plaintiff must prove that discrimination was "because of . . . sex."⁷¹

In retrospect, the Court's first three opinions on the developing law of sexual harassment were rather remarkable. All were unanimous, and all adopted the positions advocated by employees. There were no compromises or mixed decisions, the only limiting issue that resonated throughout the opinions was a stated concern that not any level of harassment would be construed as a violation, hence the severe and pervasive restriction in *Meritor*, the mention of the reasonable person in *Harris*, and Justice Scalia's emphasis on context in *Oncale*, in his view the difference between a sports

⁶⁷ See, e.g., *McWilliams v. Fairfax Cty. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 519 U.S. 819 (1996) (no claim available when both parties are heterosexual); *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997) (permitting same sex harassment claims without restriction); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996) (permitting claim where harasser was gay).

⁶⁸ *Oncale*, 523 U.S. at 79.

⁶⁹ *Id.* at 80.

⁷⁰ *Id.* (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

⁷¹ *Id.* at 82 (Thomas, J., concurring). The full sentence was: "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'"

field and the workplace.⁷² This limitation, however, runs throughout antidiscrimination law and is usually referred to as the requirement, stemming back to some of the original cases, that the employee suffer an adverse employment action.⁷³ And given the Court's clear hostility to the rights of plaintiffs in other aspects of employment discrimination doctrine, it seems clear that the Court was far better in terms of the development of sexual harassment law than most other areas, such as the proof and pleading standards plaintiffs had to satisfy.

It was the Court's next opinion—opinions actually—that stirred the most controversy, as the Supreme Court finally addressed the question left open in *Meritor*, namely the appropriate standard for establishing employer liability. Lower courts had long struggled with this issue because harassment was often seen as a supervisor's unauthorized act, and in some cases, an employer would be able to contend accurately that it was unaware of what was going on. As an indication of just how the issue had divided the lower courts, in one of the cases the Court accepted for review, the en banc court of the Seventh Circuit issued eight separate opinions, none of which captured a court majority.⁷⁴

As noted, the Supreme Court took two cases and, for reasons that were never explained, issued two decisions that varied only slightly in their analysis. Justice Kennedy wrote one opinion and Justice Souter the other, neither of which could be described as elegant and both of which had a reluctant tone to them. The problem for the Court stemmed from its own decision in *Meritor*, which, although the Court failed to address the issue in a definitive way, made two statements— that employers should not be automatically liable for harassment perpetrated by their supervisors and lower courts should follow agency principles in determining employer

⁷² In *Harris*, Justice O'Connor stated the limitation this way: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment—an environment that a reasonable person finds hostile or abusive—is beyond Title VII's purview." *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993). She also noted that the standard adopted by the Court took a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* The analogy used by Justice Scalia in *Oncale* emphasized context: "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office." *Oncale*, 523 U.S. at 81.

⁷³ Courts have long held employees must suffer an adverse employment action in order to have a claim under Title VII. Although the issue arises most frequently in retaliation cases, the concept applies to any discrimination claim. See *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53 (2006) (defining adverse employment action in retaliation claim); *Manning v. Metro. Life Ins. Co., Inc.*, 127 F.3d 686 (8th Cir. 1997) (requiring adverse employment action in substantive discrimination claim).

⁷⁴ See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 494 (7th Cir. 1997) (per curiam).

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BENDING TOWARDS JUSTICE

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liability.⁷⁵ But as Justice Marshall explained in his *Meritor* concurrence, those two principles were in tension: applying agency principles would mean that employers would be held strictly liable for most, if not all, supervisor harassment.

Ultimately, in *Faragher* and *Burlington Industries*, the Supreme Court accepted that employers should be held strictly liable for what had traditionally been defined as quid pro quo harassment, although the Court sought to move away from that label and instead focused on what it defined as a tangible employment action. This was a term that was akin to the more common adverse employment action, which the Court stated included things like hiring, firing, promotion, compensation, and work assignments.⁷⁶ In other words, when an employee suffered a tangible employment action as a result of supervisor sexual harassment, the employer would be held strictly liable. This was how the law had mostly developed in the lower courts and was not particularly innovative, and it was a standard that clearly benefitted many employees. This was not, however, the controversial part of the opinions.

The Court still had to address the liability standard when the employee did not suffer a tangible employment action, what would have traditionally been described as a hostile environment claim. This was the situation in both *Faragher* and *Burlington Industries*, wherein both cases the women had been subjected to repeated and demeaning comments and behavior but no explicit sexual demands. Although the Court had concluded that “a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer,”⁷⁷ that was not necessarily the same when there was no such action, since this is the circumstance in which it might have been possible that the employer did not have any knowledge regarding the harassment. Dividing the employer’s liability around tangible employment actions was also a way to preserve fidelity to its earlier declaration that employers should not be held automatically liable in all circumstances.

So, the Court proceeded to create an affirmative defense that would be available to employers when there had been no tangible employment action when, for example, the proven harassment did not clearly lead to any economic consequence or have the potential to do so. The affirmative

⁷⁵ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (noting that “courts [should] look to agency principles for guidance” on establishing employer liability). *Id.* (“Congress’ decision to define ‘employer’ to include any ‘agent’ of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.”).

⁷⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷⁷ *Id.* at 762.

defense had two parts. The employer had to demonstrate:

- (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunity provided by the employer or to avoid harm otherwise.⁷⁸

In *Faragher*, Justice Souter explained that the defense was consistent with the broader principle that requires plaintiffs to mitigate damages, which in turn meant that “[i]f the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.”⁷⁹ And in its *Burlington Industries* opinion, the Court explained that “[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would serve Title VII’s deterrent purpose.”⁸⁰

The Court, however, provided little guidance as to how the affirmative defense should be implemented, other than to mention that employers would generally be expected to have an official policy regarding sexual harassment and that the policy should provide for alternative reporting channels when the harassment was perpetrated by a supervisor.⁸¹ One consequence of this emphasis on the need for employer policies designed to prevent harassment has been the rise of harassment training, most of which has been shown to be of little value and occasionally of negative value.⁸² Perhaps that was to

⁷⁸ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries*, 524 U.S. at 765. Although parts of the opinions differed in their analyses, the affirmative defense was the same in both opinions.

⁷⁹ *Faragher*, 524 U.S. at 806–07.

⁸⁰ *Burlington Industries*, 524 U.S. at 764.

⁸¹ See *Faragher*, 524 U.S. at 807 (“While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.”). The Court used identical language in its *Burlington Industries* opinion. See *Burlington Industries*, 524 U.S. at 765.

⁸² Following the revelations associated with the #MeToo movement, there have been a number of reviews of the literature regarding the efficacy of training programs, most of which have concluded that the training rarely changes behavior and can, on occasion, have negative consequences. See, e.g., Mark V. Roehling & Jason Huang, *Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call For Research*, 39 J. ORGAN. BEHAV. 134, 146 (2017); Vicki J. Magley & Joanna L. Grossman, *Do Sexual Harassment Prevention Trainings Really Work?*, SCIENTIFIC AMERICAN BLOG (Nov. 10, 2017), <http://blogs.scientificamerican.com/observations/do-sexual-harassment-prevention-trainings-really-work/>. The EEOC convened a special task force to study workplace harassment and concluded that more research was necessary, but that many training programs are designed to provide legal cover rather than meaningful training. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE

be expected if what employers would likely do is simply check boxes to ensure they could avail themselves of the affirmative defense.⁸³

But it was the second prong of the defense that generated substantial criticism because it seemed to require that an employee would have to report any harassment in order to proceed on a discrimination claim. This stood in the face of considerable research documenting that most harassment went unreported and noting that women often had substantial reasons for not reporting harassment, including the very real fear that they might lose their jobs, suffer further harassment or quite likely both.⁸⁴ In neither opinion did the Court address these concerns other than to include in the affirmative defense that it would only be successful if the employer proved the employee “unreasonably” failed to report the harassment, which suggested that in some circumstances a plaintiff might be able to demonstrate that failing to report the behavior was, in fact, reasonable. Nor was there any guidance to be found in the lower courts since, as Justice Thomas rightly noted in his dissenting opinion, the Court had created the affirmative defense out of whole cloth.⁸⁵

Before discussing the affirmative defense and how it has been implemented, it is worth pausing to point out that in the course of a decade the Supreme Court had issued four decisions on the law regarding sexual harassment and all were in favor of the employees. Three were unanimous, and the other drew a dissent that included only Justices Thomas and Scalia, and which supported part of the majority’s opinion regarding the liability standard for quid pro quo harassment. Even in the liability cases, the Supreme Court reversed two en banc decisions, both of which had adopted

WORKPLACE, 46–48 (2016). Concerns regarding sexual harassment training were raised early on following the Court’s creation of the affirmative defense. *See, e.g.*, Susan Bissom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 148–49 (2001).

⁸³ Lauren Edelman has demonstrated that courts frequently defer to organizational structures regardless of the efficacy of those structures. *See, e.g.*, Lauren Edelman, et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 888 (2011).

⁸⁴ This has been a widely-documented phenomenon going back many years. *See, e.g.*, L. Camille Hebert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 731 (2007). It is hard to know the full extent of the issue, but it is often stated that “only about one in four women feels comfortable coming forward with a complaint of sexual harassment in the workplace.” Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent With Executives*, 23 EMP. RTS. & EMP. POL’Y J. 115, 127 (2019) (footnote omitted). In its Task Force Report, the EEOC noted that about thirty percent of those who are harassed speak with a workplace official and even fewer file formal complaints. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 82, at 16.

⁸⁵ *Burlington Industries*, 524 U.S. at 771 (Thomas, J., dissenting) (“This rule is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based.”).

a negligence standard for hostile environment cases,⁸⁶ and while the affirmative defense offered a narrower standard than some lower courts had adopted—and from what Justice Marshall suggested in *Meritor*—as written, it was still broader than the prevailing negligence standard.⁸⁷ And rather than remanding the case, the Court entered judgment for Beth Faragher, who is now a Colorado state court judge.⁸⁸

Since the Court's decisions, much has been written on the affirmative defense, and there is little question that the way it has been interpreted has created a substantial barrier to recovery for plaintiffs.⁸⁹ But that is not the result of the way the defense was written, but rather the way lower courts have interpreted the second prong of the defense. And there is some logic to that interpretation. As David Sherwyn and his co-authors have demonstrated, lower courts typically focus on the employer's behavior rather than the employee's, and, to the extent the employer acts in a manner that would be deemed appropriate, it typically prevails regardless of whether the employee reported the behavior.⁹⁰

⁸⁶ A majority of the en banc Seventh Circuit court in *Burlington Industries* (which was combined with another case) held that negligence was the "proper standard of employer liability in cases of hostile-environment harassment even if . . . the harasser was a supervisor." *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 494 (7th Cir. 1997) (per curiam). See also *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535 (11th Cir. 1997) (adopting negligence standard for all claims of harassment).

⁸⁷ In his concurring opinion in *Meritor*, Justice Marshall concluded that, based on agency principles, employers should be strictly liable for all supervisor harassment. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 77 (1986) (Marshall, J., concurring). One reason Justice Marshall concluded that strict liability was appropriate was because at the time only injunctive relief was available. *Id.* at 77. It is possible he may have reconsidered his position after the Civil Rights Act of 1991 brought damages into the analysis. The Second Circuit was generally seen as having adopted strict liability for all supervisor harassment, though the leading opinion was quite confusing in its approach. See *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994).

⁸⁸ See *North Denver's Beth Farragher Appointed to County Court*, NORTH DENVER NEWS (May 9, 2014), <https://northdenvernews.com/north-denvers-beth-faragher-appointed-county-court/>.

⁸⁹ For criticisms of the rule both as adopted and applied, see Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. OF PITTSBURGH L. REV. 671 (2000); Ann Lawton, *Operating in an Empirical Vacuum: The Ellerth & Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004).

⁹⁰ In two separate articles, David Sherwyn and his co-authors have demonstrated that lower courts have interpreted the affirmative defense primarily by focusing on the employer's response and often engage in "mental gymnastics [regarding employee behavior] to avoid penalizing well-behaved employers." Zev J. Eigen, David S. Sherwyn & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 100 NW. U. L. REV. 109, 156 (2014). An earlier study reached the same conclusion. See David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265 (2001). In the more recent study, the authors note: "[I]n this study, and in our earlier study, employer behavior is a significant predictor of the

Although this is not necessarily the way the affirmative defense was written, it is consistent with its intent. What the Court seemed to be trying to do in creating the affirmative defense was not just to help employers avoid liability, but rather to create incentives for employers to take harassment seriously. And to the extent an employer takes prompt remedial action—ironically what amounts to a version of the negligence standard Justice Thomas advocated for—courts appear reluctant to impose any liability, likely infused by a sentiment of what else should the employer have done? In an ideal world, this surely makes sense since it is better to remedy harassment once the employer has knowledge than to focus solely on compensation issues and, going back to *Meritor*, the Supreme Court has always expressed concern about imposing liability on employers who were unaware of the harassment. But this also means that some plaintiffs will be left without any meaningful remedy despite suffering workplace harassment, which is another reason the law here bends towards justice without ever reaching it entirely. Would it have been better if the Court had held that employers were strictly liable for any harassment perpetrated by their supervisors? Perhaps, though that would have been inconsistent with the early language from *Meritor*, and I suspect many courts would still have held employers blameless when they acted promptly to remedy harassment, most likely by finding that the harassment did not rise to the level of a hostile environment.⁹¹ More to the point, when there is no clear answer to an employer's query what more should we have done, they are likely to avoid liability no matter what the standard. Additionally, had the Court imposed strict liability for all harassment, at least some employers likely would have seen little advantage in taking remedial action, particularly in cases involving a valued, high-level supervisor. In other words, if an employer is held liable regardless of what they do, they may choose to do less rather than more.⁹²

But as discussed in the next section, the emphasis within the affirmative defense on how employers need to establish effective policies against harassment may have encouraged meaningful policies on paper without meaningful follow-up, and as we certainly know from recent events, the affirmative defense did little to deter a substantial amount of egregious harassment.

employee's reasonableness." Eigen et al., *supra* note 90, at 155.

⁹¹ One reason I say this is based on the hundreds of pages that were devoted to the issue of employer liability in the Seventh Circuit en banc opinions in *Burlington Industries* and the Eleventh Circuit en banc opinions in *Faragher*.

⁹² In his opinion in the *Jansen* case (consolidated with *Burlington Industries* below), Judge Posner explored the likely implications of holding employers liable for all forms of supervisor harassment. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 511 (7th Cir. 1997) (Posner, J., concurring).

B. *So, What Happened?*

At this point, one might reasonably ask, if the law has developed to address hostile environment harassment and to encourage employers to create remedial programs, how is it that sexual harassment remains such an entrenched feature of so many workplaces? The #MeToo movement has demonstrated just how pervasive harassment is, and how it is often perpetrated by valuable, high-level officials that cause companies to look the other way.⁹³ In the last few years, there have also been revelations about highly male-cultured workplaces in Silicon Valley, and a rash of lawsuits, all of which suggests that looking to the next generation for change may be misplaced.⁹⁴

But I think one thing we have learned over the years is that the law cannot do all of the work. I would add that the problem we face with the persistence of sexual harassment is less about the law and more about us, more about how society has failed to embrace the harms of workplace harassment. As has been recounted going back to the seventies, the primary problem with trying to rid the workplace of harassment is that too many women fail to report, and often when they do, particularly when the harasser is a powerful figure in the company as is so often the case, they are retaliated against in any number of ways.⁹⁵ The Supreme Court, in a series of cases,

⁹³ In a recent article—one of many—Elizabeth Tippett chronicles the high-level men who have been exposed by the #MeToo movement, often leading to the loss of jobs or, in some instances, the loss of businesses altogether. See Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229 (2018).

⁹⁴ An increased focus on workplace cultures in Silicon Valley was sparked by a blog post by Susan Fowler based on her time working at Uber. See Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER (Feb. 17, 2017), <https://www.susanjfoowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>. Her post led to, or perhaps substantially contributed to, the ouster of the company's CEO and the termination of more than twenty employees. See Johana Bhuiyan, *With Just Her Words, Susan Fowler Brought Uber to Its Knees*, VOX, (Dec. 6, 2017), <https://www.vox.com/platform/amp/2017/12/6/16680602/susan-fowler-uber-engineer-recode-100-diversity-sexual-harassment>. But Uber was not the only company in the news—Google attracted a shareholder suit and worker protests after sending off a harasser with a \$90 million exit package. See Daisuke Wakabayashi, *Alphabet Board Investigates Sexual Misconduct Accusations*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/technology/google-sexual-harassment-lawsuits.html>. For additional accounts of sexual harassment in Silicon Valley, see EMILY CHANG, *BROTOPIA: BREAKING UP THE BOYS' CLUB IN SILICON VALLEY* (2018); Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html>; Maya Kosoff, *Silicon Valley's Sexual Harassment Crisis Keeps Getting Worse*, VANITY FAIR (Sept. 12, 2017), <https://www.vanityfair.com/news/2017/09/silicon-valleys-sexual-harassment-crisis-keeps-getting-worse/>.

⁹⁵ This has been a concern from the beginning of the establishment of sexual harassment law. See, e.g., Lousie F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Response to Sex Harassment*, 51 J. OF SOC. ISSUES 117 (1995).

has crafted what I consider reasonably strong protections against retaliation, but clearly they have not spurred more reporting or even more workplace remediation.⁹⁶ Most women would be unfamiliar with the legal standards governing retaliation, and very few are willing to endure the near certainty of retaliation in the hope that somewhere down the line a court will provide some legal relief. For many women, either finding a new job or putting up with the harassment may be the most reasonable option. I will also add that one of the most depressing aspects of preparing this essay was to read work on sexual harassment from the 1970s and 1980s, particularly when it comes to reporting concerns, only to see how little has changed.⁹⁷

But the law has virtually nothing to do with that—the law did not give a greenlight to sexual misconduct, nor did it tell executives at places like Uber that they were free to create a hostile environment for its female employees, and the #MeToo movement has reminded us just how prevalent, and debilitating, sexual harassment remains. The movement has also reminded us of the very high tolerance so many companies have for the bad behavior of their senior level employees and for traditional exclusionary workplaces. And more recently with revelations about Judge Reinhardt—for many years widely considered the most liberal federal appellate judge in the country—we have also been reminded about how many people act privately in ways that are inconsistent with their public persona.⁹⁸

There is, I think, a change in the law that could help, although it is not a change that the Supreme Court could enshrine. Under federal law, the damages for individual claims of sexual harassment are capped at \$300,000, the very same limits that were instituted nearly thirty years ago as part of the Civil Rights Act of 1991. Adjusted for inflation, those damage caps are now worth approximately \$154,000, and if corrected for inflation, should now be capped at \$563,000. Whether this would make a difference to

⁹⁶ See *Thompson v. N. Am. Stainless L.P.*, 562 U.S. 170, 177–78 (2011); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011); *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 277–78 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005).

⁹⁷ An early *New York Times* article discussed many of the issues that continue to permeate the workplace today. See Enid Nemy, *Women Begin to Speak Out Against Sexual Harassment*, N.Y. TIMES, Aug. 19, 1975, at 38. For a look into the federal government see Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Is It a Problem?* (1981).

⁹⁸ Catie Edmondson, *Former Law Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES, Feb. 13, 2020. Although this is not the place to debate who knew what, given Judge Reinhardt's long tenure on the court, it seems likely that some individuals chose to protect his reputation at the expense of future law clerks, something that undoubtedly occurs in many workplaces. The clerk who sought to report the harassment, and had difficulty doing so within the federal judicial system, clerked for the judge during his final year of service.

companies, it is difficult to know. But it is hard to imagine that the low cost of harassment does not play some role in the decisions of companies to put the interests of their high-powered harassers over their employees. It is also worth noting that because intentional claims of race and national origin discrimination can be pursued under section 1981, which has no caps, the damage caps of Title VII apply only to sex discrimination, religion and disability claims.

IV. CONCLUSION

That is not ending on a very optimistic note and perhaps these final thoughts relate more to Professor Sullivan's unwavering commitment to justice rather than the latent optimism in his work. In this short essay, I sought to show how the law often—though not always—also bends towards justice, though in the end whether it reaches justice will depend as much on us as any doctrine that is created.