

Yale Law Journal Collection
Essay Abstracts

Vicki Schultz, Ford Foundation Professor of Law and Social Science, Yale Law School, vicki.schultz@yale.edu. *Reconceptualizing Sexual Harassment, Again:*

Sexual harassment has always been more about sexism than it is about sex. Nearly twenty years ago, Vicki Schultz pioneered a new understanding of sexual harassment that recognized and theorized this empirical reality. The framework she developed in two articles published in the *Yale Law Journal*—*Reconceptualizing Sexual Harassment* and *The Sanitized Workplace*—still holds important lessons for today. The emergence of the #MeToo movement has brought about a welcome, renewed focus on sexual harassment and motivated long-overdue terminations of accused harassers across industries. Yet pervasive narratives still narrowly emphasize sexualized forms of harassment and assault—at the expense of broader understandings of harassment and its causes. This Essay revisits and expands on Schultz’s previous work in the contemporary context, drawing on Hollywood and Silicon Valley as case studies and showing that sex segregation and unchecked, subjective authority are central institutional causes of sexual harassment. Ending harassment will require more than firing individual harassers. Instead, it will require structural reforms to eliminate arbitrary supervisory authority and sex segregation at work. Bold solutions are needed if we are to ensure sexual harassment isn’t still prevalent twenty years from now.

Brian Soucek, Professor of Law, U.C. Davis School of Law, bsoucek@ucdavis.edu. *Queering Sexual Harassment Law:*

Franchina v. City of Providence, a recent First Circuit decision involving the sexual harassment of a lesbian firefighter, may be the first judicial opinion of the #MeToo movement. But the opinion also points beyond the #MeToo movement’s dominant conception of sexual harassment. By foregrounding the experience of a lesbian firefighter harassed by her male subordinates, *Franchina* describes harassment that is sex-based without always being sexualized, thereby supplementing the stories of unwelcome sexual advances and assaults that #MeToo has emphasized. *Franchina*’s brutal narrative demonstrates that sexual harassment is motivated not by sexual desire so much as a desire to maintain gender roles. And by showing this, *Franchina* also illustrates why harassment based on sexual orientation—which similarly arises from and enforces gender stereotypes—constitutes sex discrimination prohibited by Title VII.

Rachel Arnow-Richman, Chauncey Wilson Memorial Research Professor, University of Denver, Sturm College of Law, rarnow@law.du.edu. *Of Power and Process: Handling Harassers in an At-Will World:*

In the wake of the #MeToo movement, companies have taken swift and severe disciplinary action against alleged harassers, raising questions in some instances as to whether their responses were justified. This Essay argues that balancing the goals of the #MeToo movement with principles of fairness to the accused demands attention to an overlooked aspect of the problem: the employment status of the alleged harasser. The background rule of employment at will, coupled with employer contracting practices and the law of sexual harassment itself, produces a world in which employers are inclined to tolerate sexual harassment and other misconduct by top-level employees, but aggressively police “inappropriate” behavior by the rank-and-file. This Essay concludes that changing this calculus will require abandoning long-standing contracting practices that protect top-level employees and adopting collective bargaining-style protocols for dealing with vulnerable workers accused of harassment.

Angela Onwuachi-Willig, Chancellor's Professor of Law, UC Berkeley School of Law, aonwuachi@law.berkeley.edu. *What about#UsToo?: The Invisibility of Race in the #MeToo Movement:*

Women involved in the most recent wave of the #MeToo movement have rightly received praise for breaking long-held silences about harassment in the workplace. The movement, however, has also rightly received criticism for both initially ignoring the role that a woman of color played in founding the movement ten years earlier and in failing to recognize the unique forms of harassment and the heightened vulnerability to harassment that women of color frequently face in the workplace. This Essay highlights and analyzes critical points at which the contributions and experiences of women of color, particularly black women, were ignored in the moments preceding and following #MeToo's resurgence. Ultimately, this Essay argues that the persistent racial biases reflected in the #MeToo movement illustrate precisely why sexual harassment doctrine must employ a reasonable person standard that accounts for complainants' different intersectional and multidimensional identities.

Ramit Mizrahi, Attorney, Mizrahi Law, contact@mizrahilaw.com. *Sexual Harassment Law After #MeToo: Looking to California as a Model:*

There has been significant progress in protecting employees from sexual harassment over the past twenty years. Courts have recognized that sexual harassment is perpetrated by and against people of all sexes and genders, takes sexual and nonsexual forms, and is often motivated by bias and hostility, not sexual desire. Yet sexual harassment persists and remains largely unreported. The #MeToo and #TimesUp movements have motivated people to speak out about sexual harassment, but many of those now choosing to speak remain vulnerable to retaliation. This Essay provides the perspective of an attorney whose practice focuses on plaintiff-side employment law in California. It explores the ways that state laws can offer greater protections to employees, using California as a model. It then reflects on some of the shortcomings of current state and federal law. Finally, it discusses some of the proposed legislation that, inspired by the #MeToo and #TimesUp movements, seeks to prevent harassment and to protect employees who come forward.

Tristin K. Green, Professor of Law, University of San Francisco School of Law, tgreen4@usfca.edu. *Was Sexual Harassment Law a Mistake? The Stories We Tell:*

It may seem heresy in this #MeToo moment to ask whether sexual harassment law was a mistake—it has provided thousands of plaintiffs over the past more than thirty years their day in court, a chance to tell their stories of harassment as discrimination in violation of Title VII of the federal Civil Rights Act. But sexual harassment law as it has developed negatively affects the larger project of reducing harassment and discrimination in work in a number of ways. This Essay focuses on one of those ways: harassment law today constrains the stories we tell about harassment and discrimination, to ourselves and to others, and it dampens considerably our calls for meaningful reform. Drawing from publicly available court filings in several well-known Supreme Court cases, this Essay tells the stories that the plaintiffs might have told and, in at least some of the cases, tried to tell. And it shows how the Supreme Court tamped down those stories and in doing so limited their power (and the power of many other harassment stories told in courtrooms across the country since) to trigger meaningful change. It turns out that we will need to change the law, not just public perception, if the #MeToo movement is to have a lasting effect on our work environments.

Stanford Law Review Symposium

Vicki Schultz, Ford Foundation Professor of Law and Social Science, Yale Law School, vicki.schultz@yale.edu. *Open Statement on Sexual Harassment from Employment*

Discrimination Law Scholars: Inspired by the #MeToo movement, and authored by Yale Law School professor and sexual harassment expert Vicki Schultz, ten of the nation's leading employment discrimination law scholars propose a new vision and agenda for eliminating sexual harassment and advancing workplace equality. The scholars set forth 10 principles for understanding and addressing sexual harassment, including the idea that harassment is about sexism not sexual desire, that banning all sexual behavior in the workplace is not a solution, that LGBTQ harassment and race-sex intersectional harassment must be specifically addressed, and that occupational vulnerabilities must be reduced in order to combat harassment. The scholars also offer 63 specific reforms for addressing sexual harassment and moving toward a fairer, more inclusive workplace for people of all sexes and genders. Supported by references to social science and legal literature, this Statement provides a valuable resource for journalists, lawmakers, policymakers, educators, activists, managers, employees, and ordinary citizens seeking to address harassment and discrimination in today's climate.

Ian Ayres, William K. Townsend Professor of Law, Yale Law School, ian.ayres@yale.edu.

Targeting Repeat Offender NDAs: Since the rise of the #MeToo movement, some academics and policy makers have proposed making nondisclosure agreements (NDAs) unenforceable. Professor Ian Ayres offers a more nuanced reform: NDAs should be enforceable, provided that they meet three conditions. First, NDAs should explicitly disclose the rights the survivor retains to report the perpetrator's behavior to the Equal Employment Opportunity Commission (EEOC). Second, NDAs should state that any misrepresentation by the perpetrator about the survivor and perpetrator's past interactions will constitute a material breach giving the survivor the option to cancel the NDA. Third, the survivor allegations underlying an NDA should be deposited in an information escrow that would be released for investigation by the EEOC if another complaint is received against the same perpetrator.

Nancy Gertner, Harvard Law School, ngertner@law.harvard.edu.

Sexual Harassment and the Bench: The #MeToo movement has cast all employment settings – including the judiciary – in a new, more critical light. Judge Nancy Gertner reviews the progress made thus far by the Judiciary Conduct Working Group, which formed after Judge Alex Kozinski was accused of sexual misconduct and resigned. The Working Group's "curiously passive" proposals have failed to eradicate sexual harassment in ordinary employment settings, Judge Gertner writes. Given the unique characteristics of judicial employment, Judge Gertner concludes that the "best approach" for the judiciary "may well be all about prevention rather than formal complaints and enhanced procedures."

Susan Bisom-Rapp, Professor of Law, Thomas Jefferson School of Law, susanb@tjssl.edu.

Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention: After taking stock of the newfound popular acceptance of sex harassment training's inefficacy, Professor Bisom-Rapp reaffirms the thesis she first put forward more than a decade ago: that harassment and diversity training should be legally irrelevant to employer liability and compensatory damages in Title VII lawsuits.

Rebecca K. Lee, Associate Professor of Law, Thomas Jefferson School of Law, rlee@tjisl.edu. *Beyond the Rhetoric: What It Means to Lead in a Diverse and Unequal World:* Professor Rebecca K. Lee argues that while gender integration in the work setting is an important step toward eliminating sex harassment, it is not enough. After delving into three case studies where sex harassment occurred under leadership that publicly touted feminist values, Lee calls for stronger workplace leaders who are committed to promoting equal and fair treatment.

Nicole Buonocore Porter, Professor of Law, University of Toledo College of Law, nicole.porter2@utoledo.edu. *Ending Harassment by Starting with Retaliation:* Professor Nicole Buonocore Porter demonstrates that the fear of retaliation significantly contributes to the problem of sex harassment and argues that ending harassment must start by addressing retaliation. In addition to canvassing legal changes proposed by others, Porter offers two reforms of her own that would increase protection for employees who experience retaliation.

Ann C. McGinley, William S. Boyd Professor of Law, William S. Boyd School of Law University of Nevada, Las Vegas, ann.mcginley@unlv.edu. *The Masculinity Motivation:* Though #MeToo movement has focused on women as victims and men as perpetrators, there is also a substantial group of male victims who endure harassment in schools and workplaces. Professor Ann C. McGinley demonstrates how courts often fail to recognize harassment among men and boys as illegal sex discrimination under Title VII and calls for clarification of what counts as harassment.