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Mark M. Hager

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ARTICLES

HARASSMENT AND CONSTITUTIONAL TORT: THE OTHER JURISPRUDENCE

Mark M. Hager*

I. INTRODUCTION

Sexual harassment law is booming. Charges have skyrocketed in recent years for three main reasons. First, workplace harassment and mistreatment are distressingly frequent. Second, Title VII doctrine makes it easy to state a claim of harassment. Third, amendments passed in 1991 authorize compensatory and punitive damages against employers for Title VII violations, thereby augmenting plaintiff and lawyer incentives to sue. In coming years, harassment litigation will occupy more and more attention from courts and employers.

This proliferation has spawned a small but growing amount of literature debating the nature and wisdom of Title VII harassment doctrine. Reservations have been raised around a number of themes, among them: whether and when it makes sense to view harassment as employment discrimination; whether compliance with harassment law chills expression and other valued freedoms at work; whether employer

* Professor of Law, American University, Washington, D.C.
5. See Hager, supra note 4, at 411; Kingsley Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St. L.J. 481, 483 (1991); Eugene Volokh, Free Speech and Workplace Harassment, 30 UCLA L. Rev. 1791.
in-house investigation and discipline violate fairness and due process values. A period of close and critical debate on these and other problems has begun to supersede an earlier period when zeal to suppress harassment fueled expansion of Title VII law as the chief weapon against it.

For the past two decades, harassment law's most important developments have been under Title VII's prohibition against employment discrimination based on sex. The volume of cases has been large and the commentary on them prolific. This dominance has inscribed Title VII's model of sexual harassment as discrimination. Title VII models sexual harassment as discrimination in two senses: as sex discrimination and as employment discrimination. Both are crucial to the actionability of sexual harassment under Title VII.

Unnoticed by many, a secondary body of federal anti-harassment law has emerged besides Title VII, within the framework of "constitutional tort" jurisprudence under 42 U.S.C. § 1983 and Bivens v. Federal Bureau of Narcotics. My most minimal purpose in this Article is to call attention to this body of law. But I have other purposes as well.

First, I highlight contrasts between constitutional tort and Title VII jurisprudence on harassment. Second, I use those contrasts to underscore weaknesses, tensions, and ambiguities in Title VII's discrimination model of harassment. Third, I urge particular doctrinal structures and standpoints for harassment law generally.

I examine the harassment law of constitutional tort first, to explore its contours and tensions, and second, to cast comparative and critical light on Title VII doctrine. This facilitates a more probing inquiry into the nature of harassment's wrongfulness than is sometimes found. I highlight ambiguity, ambivalence and dissensus on morality and policy in harassment law not so readily apparent within the widely-studied world of Title VII alone. This may help suggest worthwhile modifications in Title VII doctrine and policy. Furthermore, I scrutinize how constitutional tort law can be used to defend workplace speech freedoms and victims of unfair harassment accusations and discipline. Here again, I suggest ramifications for Title VII doctrine.

Plaintiffs alleging sexual harassment at work typically seek relief

8. See id.
9. 403 U.S. 388 (1971) (stating that the Fourth Amendment of the United States Constitution provides private right of action for damages against federal officials).
under Title VII. Harassment has been treated by courts as a species of forbidden discrimination on the basis of “sex.” Title VII provides remedies to both private and public employees. Under Title VII, actionable harassment is defined broadly. A “hostile environment,” the easiest claim to state, essentially requires only conduct of a sexual nature that causes a hostile work environment. Neither a culpable mind on the harasser’s part, nor a tortious injury on the plaintiff’s part is required for actionability. Moreover, attribution of vicarious liability is broad. Employers answer for harassment perpetrated by their employees based on standards ranging from very strict attribution to moderately strict attribution based on constructive knowledge.

Given Title VII’s favorable contours, plaintiffs often feel little need to search elsewhere for relief. There are, however, some anti-plaintiff dimensions to Title VII that may be avoidable by recourse to alternative claims. For example, Title VII has a short statute of limitations; requires administrative process with the Equal Employment Opportunity Commission (“EEOC”) before claims may be filed; allows suit only against employers, not individual perpetrators; and may bar some same-sex harassment suits. Alternative claims may overcome such problems. They may arise under common law tort, state anti-discrimination statutes, and state constitutional protections.

For public employees specifically, there may be claims for federal constitutional violations under § 1983 (for state employees) or under

14. See Harris, 510 U.S. at 21; Morrison, 108 F.3d at 439.
17. See id. § 2000e-5(c) (stating that victims of unlawful employment practices may not sue individually until 60 days after proceedings commenced by EEOC).
18. See id. § 2000e(b) (defining employer as a “person engaged in an industry affecting commerce who has fifteen or more employees for each working day” and “any agent of such a person”); see also Redman v. Lima City Sch. Dist. Bd. of Educ., 889 F. Supp. 288, 292 (N.D. Ohio 1995) (stating that Congress did not intend individual liability under Title VII, but that intent was to impose employer liability).
19. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998) (stating that some same-sex harassment suits are actionable under Title VII but other same-sex suits may be barred).
Bivens (for federal employees),\(^{20}\) which protect against violations of constitutional rights by persons acting under "color of law."\(^{21}\) Actions for constitutional tort arise against persons who invoke constitutional rights while acting under color of law.\(^{22}\) Roughly, color of law means the use of government-conferred authority.\(^{23}\) When the government authority used to invade rights is state law, actionability arises under § 1983;\(^{24}\) when it is federal law, actionability arises according to Bivens.\(^{25}\) When the rights invaded arise from the Constitution, § 1983 and Bivens suits implicate the jurisprudence of "constitutional tort."\(^{26}\) Currently, harassment in public workplaces may be actionable not only as employment discrimination under Title VII, but also as constitutional tort.

When perpetrated under color of law, harassment arguably entails deprivation of equal protection. Like Title VII, this approach models harassment as discrimination. Over the years, a number of suits have asserted as much.\(^{27}\) Below I report on the doctrinal structures and controversies emerging from these suits and use them to raise questions about Title VII doctrine and policy.

There is a more profound and coherent model for harassment as a constitutional violation. Harassment under color of law may entail an invasion of constitutionally protected autonomy, dignity and privacy, thereby violating substantive due process under the Fourteenth (state employees) and Fifth (federal employees) Amendments. Though autonomy, dignity and privacy may be the precise rights most clearly invaded when harassment occurs under color of law, I have seen no case raising this claim. Below I sketch out the jurisprudence of such claims.

Depending on the interplay of circumstance and doctrine, constitutional tort suits may lie against harassers for active perpetration of harassment, and against supervisors, officials, and municipal governments for failures to prevent harassment. So far, the constitutional claim has been for violation of equal protection under the Fourteenth and Fifth Amendments. Therefore, harassment has been modeled as "sex discrimination" by analogy with Title VII's


\(^{21}\) See id.

\(^{22}\) See Carlos v. Santos, 123 F.3d 61, 65 (2d Cir. 1997); Kern v. City of Rochester, 93 F.3d 38, 43 (2d Cir. 1996).

\(^{23}\) See Bivens, 403 U.S. at 388.

\(^{24}\) See 42 U.S.C. § 1983 (1994); Carlos, 123 F.3d at 65.

\(^{25}\) See Bivens, 403 U.S. at 389.


\(^{27}\) See Bivens, 403 U.S. at 388.
employment model. However, constitutional tort is not fundamentally a jurisprudence of employment discrimination. It is a jurisprudence of state-inflicted constitutional harm in which workplace settings are incidental. It is therefore no surprise that liability doctrines in constitutional tort differ from those evolved under Title VII. Moreover, harassment law structured by § 1983 doctrines may be wiser than what has emerged under Title VII.

The constitutional tort jurisprudence of sexual harassment differs intriguingly from Title VII harassment law due to the different doctrines they were derived from. First, constitutional tort (referred to hereinafter by the term “§ 1983”) suits lie against “persons” acting under “color of law,” while Title VII suits lie against “employers.” Second, vicarious liability, cognizable but puzzling under Title VII, is sharply narrower under § 1983 due to an outright ban on respondeat superior. Third, because it is not limited to “discrimination” based on “sex,” § 1983 may allow broader actionability—for same-sex harassment, for example—than does Title VII. Fourth, Title VII recognizes prima facie liability based on discriminatory impact alone, while § 1983 may require higher culpability, even as high as discriminatory intent. Fifth, Title VII actionability requires no tortious injury to state a claim, but § 1983 might. Each of these points will be examined below.

There is one crucial respect, however, in which constitutional tort jurisprudence mimics the Title VII jurisprudence: treating harassment under a sex discrimination model. One of my themes here will be to explore replacing the sex discrimination model with what I call a “personhood” model. The anti-harassment project under Title VII has been to model harassment as discrimination. Though plausible for some situations, that model is hardly the most compelling one, and it is certainly not the only one. More tangible and accessible is a model of harassment as intentional tort—the non-consensual invasion of personal autonomy, dignity, and privacy. I call this model of harassment a

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32. See id. § 2000e-2(19).
35. See Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982); Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985).
"personhood" model, to contrast it with the discrimination model of harassment that prevails under Title VII. The personhood model conceptualizes harassment basically as an assault on "personhood": individual rights of autonomy, privacy, and dignity.

One of my themes is to highlight the advantages of a personhood model over a discrimination model for sexual harassment. Important implications may flow from this difference. With the personhood model, the wrongfulness and harm of harassment appear as essentially tortious. Compared with Title VII's discrimination model, a tort approach implies reduced harassment liability for employers but expanded liability for individual harassers. Sanctions would be pursued by victims with direct lawsuits against perpetrators rather than with discrimination suits attempting to manipulate employers into controlling harassment. The pros and cons of such an approach deserve careful scrutiny.

The remainder of the article proceeds as follows:

Part II explores in various ways and from various perspectives the theme of harassment as an assault on "personhood," implicating substantive due process under the Constitution.

Subpart II.A analyzes the Paula Jones complaint against President Clinton. It highlights problems with Jones's theories of actionability under current harassment law and also with claims she raises under the First Amendment and under substantive due process. It explains how she might have framed a more coherent substantive due process claim.

Subpart II.B explains further the paradigm of harassment as a wrong of assaulted personhood, commenting on how such a paradigm may improve upon the paradigm of harassment as sex discrimination. This subpart also explores the doctrinal grounding for treating harassment as a substantive due process personhood offense and comments on appropriate limits on actionability.

Subpart II.C comments on implications of the assaulted personhood paradigm for Title VII harassment law and tort.

Subpart II.D develops the comparison between the discrimination paradigm for harassment and the assaulted personhood paradigm by exploring the concepts of "discrimination" and "discriminatory intent."

Subpart II.E compares the two paradigms further by exploring the law of damages under § 1983 and Title VII.

Subpart II.F develops that comparison still further by exploring

theories of recovery for same-sex harassment under Title VII and § 1983.

Part III explores the problem of which parties should be legally answerable for harassment and on what basis. It does this by exploring existing § 1983 harassment doctrine critically, and also by comparing it with Title VII doctrine. It suggests that harassment liability should largely be based on breach of duty to prevent harassment, measured under a standard of "deliberate indifference," familiar to § 1983 jurisprudence.

Subpart III.A compares Title VII doctrine on attribution of harassment to employers with "color of law" jurisprudence in § 1983 harassment cases. This comparison highlights clashing notions in current law on how to view legal relations between actual harassers and other parties—both persons and organizations—arguably implicated in the harassment. In this context, the subpart raises the theme of "deliberate indifference" as a general standard of liability for failure to prevent harassment by other parties.

Subpart III.B argues substantively for a deliberate indifference standard of duty to prevent harassment by other parties. It defends that standard as more restrictive on liability than the broader negligence and strict liability standards applied under current Title VII doctrine. It explores the disadvantages of expansive duty in order to highlight the advantages of a narrower duty, which could be applied under both § 1983 and Title VII.

Subparts III.C through III.H explore the law of municipal liability for harassment under § 1983. They try to suggest what a sound and coherent doctrinal approach to municipal liability would look like.

Subpart III.C explains the basic doctrinal landscape of municipal liability under § 1983, contrasting it with employer harassment liability under Title VII.

Subpart III.D offers simple criteria for municipal harassment liability under a standard of deliberate indifference.

Subpart III.E comments on the proper doctrinal treatment of municipal anti-harassment policies in assessing liability.

Subpart III.F comments on the proper role of municipal "failure to train" jurisprudence for harassment liability.

Subpart III.G comments on the proper role of "final policymaking authority" jurisprudence for municipal harassment liability.

Subpart III.H comments on an odd relation between quid pro quo and hostile environment municipal liability.

Part IV explores the contrapuntal theme of treating anti-harassment
policies as infringements of constitutional rights. Though law may require that steps be taken against harassment, law may also limit those steps so as to preclude abridgement of protected interests other than that of freedom from harassment. This Part comments on how such limits may get articulated under § 1983 law. Subpart IV.A deals with using the First Amendment to guard against overregulation of speech under workplace anti-harassment policies. Subpart IV.B deals with using procedural due process law to guard against unfair dismissals of alleged harassers.

Part V concludes.

II. HARASSMENT AND ASSAULTED PERSONHOOD

A. The Paula Jones Complaint

The Paula Jones case against President Clinton brought § 1983 harassment law out of obscurity, placing it into some limelight. It is worth exploring in some detail the key features of § 1983 law, harassment law under Title VII, and the relationship between the two.

The Paula Jones suit seeks compensatory and punitive damages against Clinton and former Arkansas trooper Danny Ferguson for alleged harassment of Jones when Clinton was the Arkansas governor. Jones was a low-ranking employee in the Arkansas Industrial Development Commission (“AIDC”), a division within the executive branch of the State of Arkansas headed by Clinton.37 In her First Amended Complaint, Jones pleads several claims. The pertinent claims are that the defendants, acting under “color of law,” deprived Jones of constitutional equal protection, due process, and First Amendment rights, and that they intentionally inflicted emotional distress.38

The complaint alleges that Clinton, using Ferguson as his intermediary, invited Jones to visit his hotel suite during an executive branch management conference.39 Jones had never met Clinton, but complied with the request, thinking that the visit “might lead to an enhanced employment opportunity with the State.”40 She soon found

38. See id. ¶¶ 60-65, 71-74.
39. See id. ¶ 7, 10.
40. Id. ¶ 12.
herself alone in Clinton’s suite. During brief small talk, Clinton referred to Dave Harrington, AIDC director and Jones’s ultimate superior, as his “good friend.” Clinton had appointed Harrington to his post.

Clinton then pulled Jones close to him, whereupon Jones retreated and Clinton approached again, saying “I love the way your hair flows down your back,” and “I love your curves.” Then, without Jones’s consent, he reached toward her crotch with his hand and attempted to kiss her neck. Jones cried, “What are you doing?” and retreated again, attempting to distract Clinton with talk about his wife. She took a seat at the end of a sofa nearest the door. Clinton asked whether she was married. She told him she had a regular boyfriend.

Clinton then sat down and lowered his pants, exposing his erect penis. He asked Jones to “kiss it.” Horrified, Jones refused, jumped up, and said, “Look I’ve got to go,” telling Clinton she might get in trouble for being away from her post. Fondling his penis, Clinton said, “Well, I don’t want to make you do anything you don’t want to do.” He rose, pulled his pants up, and said, “If you get in trouble for leaving work, have Dave call me immediately and I’ll take care of it.” As Jones departed, he looked at her sternly, saying “You are smart. Let’s keep this between ourselves.”

Such are Jones’s allegations concerning her visit to Clinton’s suite. If true, they recount a terribly distressing unwelcome sexual advance. Other key allegations frame the incident into possible sexual harassment claims under both quid pro quo and hostile environment rubrics. Jones alleges that other women working for the State of Arkansas gained promotions, perquisites and pay hikes by complying with Clinton’s

41. See id. ¶ 16.
42. Jones Complaint, supra note 37, ¶ 17.
43. See id.
44. Id. ¶ 20.
45. See id.
46. See id. ¶ 21.
47. See Jones Complaint, supra note 37, ¶ 21.
48. See id.
49. See id.
50. See id.
51. Id.
52. See Jones Complaint, supra note 37, ¶ 23.
53. Id.
54. Id. ¶ 24.
55. Id.
56. See id. ¶¶ 61-62.
requests for sexual favors, but that she herself, upon refusing Clinton, was denied merit increases awarded to employees and transferred pretextually to a dead-end position where she was denied the higher pay supposedly warranted by its higher grade status. She also alleges post-incident surveillance and fear of job loss for having rebuffed Clinton and for her potential to report his conduct.

In pleading legal claims purportedly established, Jones contends that the events she alleges constitute gender discrimination, thereby depriving her of her constitutional right to equal protection. In this respect, her complaint tracks familiar contours of harassment law under Title VII. The pleadings thereby provide an opportunity to raise questions about ambiguities in existing Title VII law. More intriguing, however, is that Jones also pleads deprivation of due process liberty and property rights. It is difficult to say from the murky face of the complaint what due process rights she contends she had, and of which she was deprived. She claims her “property interest in her public employee job” was jeopardized; that she was subjected to fear of losing that job; that she was subjected to a sexual quid pro quo for keeping it; and that she was subjected to “fear of losing the enjoyment of a proper and pleasant work environment” which “deprived [her] of the proper enjoyment and efficiency of her work.”

Jones pleads further legal claims based on her allegations: first, that she was deprived of her First Amendment rights to report Clinton’s misconduct because she was intimidated, and second, that Clinton’s actions established the common law tort of intentional infliction of emotional distress.

I will comment here on several aspects of the complaint and use that commentary to serve several purposes. I provide a basic orientation to § 1983 issues to be developed more fully in later parts. I offer arguments that Jones’s sexual harassment claims as framed should have been dismissed. I then offer a reformulation of the complaint’s notion that due process rights were violated if Clinton harassed Jones as alleged.

Relief under § 1983 lies against any “person” using state law

57. See Jones Complaint, supra note 37, ¶ 39.
58. See id. ¶ 36-37.
59. See id. ¶ 60.
60. See id. ¶ 62-63.
61. Id. ¶ 62.
62. See Jones Complaint, supra note 37, ¶ 64.
63. See id. ¶ 71-74.
authority to infringe constitutional rights. For purposes of basic orientation, we can distinguish four classes of theoretically possible defendants: states; municipalities or other political subdivisions of states; state or municipal officials and employees; and private parties. States may not be sued in some jurisdictions under § 1983. Therefore, Paula Jones could not state a § 1983 claim naming Arkansas as a defendant. Though Jones could theoretically have named Arkansas, Clinton’s employer, as a Title VII defendant, the statute of limitations for Title VII had lapsed by the time she filed her first complaint some three years after her first encounter with Clinton. Municipalities can be sued under § 1983 for customs, policies, or practices causing constitutional infringements. Officials and employees can be sued for infringements, unless they are entitled to qualified immunity on grounds that the right allegedly infringed was not clearly established or that the infringement was not an unreasonable one. Private parties can be sued under § 1983 if classified as “state actors” for the matter in question.

The cases show that harassment in the form of sexual discrimination means the same under § 1983 as it means under Title VII. In other words, Supreme Court rulings and EEOC regulations defining what acts constitute “sexual harassment” are also authoritative under § 1983. Therefore, issues to be raised here regarding Jones’s claims are issues equally presented under Title VII.

Those issues are several fold. Do Jones’s allegations state a gender discrimination claim and if so, how?

Harassment as gender discrimination has been conceptualized in
terms of two types: so-called quid pro quo and hostile environment.\(^7\) Quid pro quo, the narrower category, is subjection to demands for sexual favors under threat of job loss or other penalty for refusing.\(^7\) Hostile environment, a broader category, refers to unwelcome sexual advances causing a hostile work environment.\(^7\) It is not obvious why these two types should be distinguished from each other. Any quid pro quo harassment arguably involves an unwelcome sexual advance creating a hostile environment. This makes quid pro quo a particular subset of hostile environment. There is no need for precise delineation between quid pro quo and hostile environment, unless the distinction makes a legal difference. Some courts take the position that such a legal difference lies in standards of employer liability under Title VII: strict liability for quid pro quo and negligence liability for hostile environment.\(^7\) Not all jurisdictions accept this difference and its soundness is open to question.\(^7\) The Jones complaint helps illustrate how blurry the distinction on which it is based can become.

If there is a quid pro quo claim in the complaint, it is that women who gave Clinton sex were accorded favorable treatment while Jones, who refused, was not. If allegations to this effect are true, it suggests that Jones was denied favorable job treatment for refusing. But several difficulties beset any such claim. One is that proving it will typically require establishing the sexual affairs of people who strongly and justifiably wish to keep those affairs secret. At minimum, courts should grant protective orders against being forced to testify concerning consensual intimacies. This of course will make such claims tough to prove, yielding routine grants of summary judgment against plaintiffs. But plaintiffs will also seek to prove their claims through third-party testimony about the sexual relationships of others. The resulting psychic carnage may be intense in the form of false accusations, defamed reputations, destroyed marriages and friendships, vendettas, intrigues, perjury, and more. This disturbing spectacle arguably warrants protective orders. But protective orders may not suffice to protect privacy adequately. Even being summoned and forced to seek protective


\(^{73}\) See id. at 293.


\(^{75}\) See id. at 494.
orders may place many people in awkward, embarrassing and humiliating positions, i.e., “Do I tell my wife about this subpoena?” The harms that may ensue are huge and incalculable.

The whole nature of claims turning on the sexual affairs of others is so indelicate, intrusive, and explosive as to suggest that such claims should be dismissed outright. Even if it makes sense to say that a workplace where sexual dalliance promotes advancement is discriminatory based on sex, the harms of litigating such claims may greatly outweigh the harm done by such discrimination.

Moreover, there are major ambiguities in conceptualizing such claims as discrimination based on sex. First, if those favored for their sexual willingness are women, one must at least hesitate before calling this discrimination against women. Indeed, the situation may confer advantages on certain women over their male counterparts. Second, what of those women (and men) who do not find favor because they are not sought out for sex in the first place? Falling behind for being left uninvited seems every bit as unfair as being left behind for refusing. But those never asked have no quid pro quo claim and they have a hostile environment claim only under a theory that a workplace where sexual availability promotes advancement is inherently hostile. Jones in fact describes her inferior treatment compared with Clinton’s alleged sexual partners as a “hostile work environment.”76 The enormous potential breadth of such actionability and the psychic carnage that proof of affairs may bring should be considered very soberly. The implications of allowing such claims were dramatically underscored in Jones v. Clinton77 when Monica Lewinsky was subpoenaed. The foreseeable damage from such claims is immense, even when no presidents are involved.

Without doubt, there is galling unfairness in a workplace where sex promotes advancement. But anti-discrimination law does not, should not, and cannot outlaw all forms of nonmeritocratic preference. Whether sexual availability preference is more unfair than other nonmeritocratic preferences is open to question. It is also open to question whether it is widespread and serious enough to justify legal claims with so many inherent harms entailed in the proof.

Further problems loom into view when one ponders what

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employers might do to avoid liability for such claims. Hostile environment law already puts employers under strong pressure to monitor and regulate workforces against harassment or situations that could lead to it. The burden on employers and onerous effects on employees and workforces are plenty worrisome. These difficulties accelerate greatly if employers know they may face lawsuits based even on fully consensual affairs, filed by nonparticipants.

The remainder of Jones's sex discrimination claim alleges fear of job loss, fear of adverse employment actions, and subjection to surveillance for having rebuffed Clinton. Such a claim is child's play to plead by anyone who rebuffs a boss's proposition. Any unwelcome sexual advance by a boss might be characterized as causing a hostile environment of fear. Theoretically, a hostile environment claim based on a boss's unwelcome sexual advances can be conceptualized as consisting of three indispensable elements: (1) the advances, (2) causing, and (3) a hostile work environment. But Jones's pleading suggests that (2) and (3) can easily be conjured out of (1). Perhaps sensing the arguable overbreadth of this, Jones's lawyers allege an implied threat conveyed by Clinton's remarks, intonations, body language, and innuendo, as well as subsequent actions by Ferguson and Clinton. A claim pleading no threats as objective basis for fear should probably be subject to dismissal, for reasons suggested just above. But implied threats may be so easy to claim that the threat requirement means little. Concern about overbroad actionability may be what prompted the Supreme Court to grant certiorari last term on whether an unimplemented threat of adverse job consequences for refusing a sexual advance can constitute actionable harassment. If unimplemented threats are actionable, unwelcome sexual advances by bosses become almost inherently actionable.

Jones's claim for First Amendment infringement is probably dismissible. Though Clinton allegedly intimidated Jones from reporting

80. See Jones II, 974 F. Supp. at 724.
81. See id.
82. See Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2265-71 (1998) (ruling that unimplemented threats may be actionable).
his misconduct, this would not infringe established public employee free speech rights. Those rights protect her freedom to express herself on matters of "public concern," but not on matters of "personal interest."\(^{83}\) It is not easy to see how Jones’s personal distress or job anxiety could be framed as matters of public concern. Perhaps public concern lies in the sexual misconduct of a state governor. A more straightforward approach would confine "public concern" to commentary on a governor's execution of his official duties.

Jones’s complaint tracks Title VII law in treating harassment as sexual discrimination. Interestingly, however, it also sets forth conceptions other than sex discrimination for the illegality of Clinton’s alleged actions. For one, it claims those actions establish the common law tort of intentional infliction of emotional distress.\(^{84}\) For another, it claims that they deprived Jones of due process liberty and property rights.\(^{85}\) The complaint must be read carefully to bring these due process claims into view. When brought into view, several are anything but clear. The clearest pleads a version of forced imprisonment by Clinton and Ferguson, presumably violating a liberty interest in personal mobility.\(^{86}\) Another pleads deprivation of her job enjoyment and work efficiency, impliedly asserting that she has due process liberty or property rights to them.\(^{87}\) Jones also pleads violation of an asserted property interest in her public sector job and asserts liberty interests to be free from fear of job loss, fear of coercion into sex with Clinton, and perhaps fear of losing job enjoyment and pleasurable work atmosphere.\(^{88}\)

There is some wheat and much chaff in these tangled due process claims and it is worthwhile trying to sort them. At one end of things, there is no doubt that forcible detention could infringe a cognizable liberty right. Whether Jones’s factual allegations support her claim of forcible detention is more dubious. At the other end, there is little doubt that Jones had no cognizable liberty or property rights to job enjoyment or work efficiency. If she has no constitutional rights to such things, it would seem she also has no constitutional rights not to be placed in fear of losing them. Though of dubious status as constitutional

\(^{84}\) See Jones Complaint, supra note 76, ¶¶ 71-74.
\(^{85}\) See id. ¶¶ 62-63.
\(^{86}\) See id. ¶ 64.
\(^{87}\) See id. ¶ 62.
\(^{88}\) See id. ¶¶ 61-62.
infringements, such fears may conceivably be part of the intentionally inflicted emotional distress she pleads as a common law claim.

Problems also beset Jones’s claim that constitutional infringements inhere in her fear of job loss for rebuffing Clinton and her fear of being forced into sex with Clinton in order to keep her job. Though Jones claims she had a “property interest in her public employee job,” she probably had none because Arkansas had conferred her no right to tenure in her job. Of course, she does not claim that she lost her job because of Clinton. Even if she had, she would state no claim for deprivation of property. Instead, her discharge would give her a claim for quid pro quo harassment. Job loss would figure as an element of that claim and as an item of damages perhaps, but would infringe no property right.

Jones pleads no deprivation of her asserted property right in her job, but she ambiguously pleads fear of job loss as a constitutional deprivation. She also pleads fear of being forced into sex with Clinton in order to avoid losing it. If Jones has no right to her job, it is unclear how she can state a claim for fear of losing it. There is no right as such not to be placed in fear of job loss. In the absence of any such right, Jones’s claim comes under a heavy cloud. Comparable fogginess surrounds Jones’s claim over fear of being forced into sex in order to keep her job. Jones has a right to not to be raped, but has no right not to be asked. She asserts a right not to be placed in fear of being asked upon pains of losing her job. Since she has no right not to be asked, no right to her job, and no right not to be placed in fear of losing it, it is hard to see how she had a right not to be placed in fear of being asked upon pains of losing it.

Of course, if Jones actually lost her job for rebuffing Clinton, she would state a quid pro quo claim under current law. But her effort to shoehorn herself into the due process clause based on her various fears yield claims that are highly tenuous.

Still, there is something profound in the instinct that Clinton’s actions, as alleged, implicate the due process clause. The complaint runs aground trying to formulate a due process claim in terms of dubious rights to job tenure, job enjoyment, work efficiency, and rights not to be subject to various fears, where there are no underlying rights not to be

89. See Jones I, 853 F. Supp. at 904.
91. See Jones Complaint, supra note 76, ¶ 62.
92. See Jones II, 974 F. Supp. at 726.
subject to the things feared. 4 This approach, searching obsessively for
tenuous liberty and property interests, misses the forest for the trees. The
crucial wrongfulness of Clinton’s actions, as alleged, lies in its
assault on Jones’s dignity, privacy, autonomy, and emotional well-
being. 5 If Jones’s allegations are true and omit nothing significant,
Clinton perpetrated a deed in that hotel suite of astonishing callousness,
contempt, and disrespect for another human being. This is what lies at
the heart of Jones’s common law claim for intentional infliction of
emotional distress.

As alleged, Clinton’s deed is quite simply shocking to the
conscience. Conscience-shocking treatment of people by means of
government power violates due process rights. 6 Citizens have a
substantive liberty right against unconscionable treatment by
government. 7 Attempting to grasp harassment law from that standpoint
is one of the major objectives of this Article.

If Clinton’s action in the hotel suite was unconscionable, there may
be no need to scrutinize other facts and events, including Jones’s
circumstances or subsequent experiences, in order to frame up a due
process claim. Jones’s various fears come to bear a very different kind
of relevance, not as the basis for claims, but as items of damage within
her overall experience of emotional distress.

The complaint’s ambiguous groping for a cognizable due process
claim reflects a surprising fact about harassment law under § 1983.
Harassment has not, in and of itself, been understood or recognized as a
due process offense. This is unfortunate and there is no good normative
reason for it. The explanation seems to lie in the history of harassment
law generally. First, under Title VII and then by imitation under § 1983,
harassment has been conceptualized as a matter of sex discrimination. 8
This conceptualization has eclipsed competing conceptualizations,
especially that of grasping harassment as a matter of fundamental
assault on personhood, aside from all considerations of sex or gender.
As I shall insist below, the conceptualization of harassment as sex
discrimination is beset with ambiguities and disadvantages. The
eclipsed alternative conceptualization, assaulted personhood, is not just

94. See Jones Complaint, supra note 76, ¶¶ 61-62.
95. See id. ¶¶ 57, 64, 72-73.
96. See Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 528 (10th Cir. 1998).
available and coherent, but in several respects, superior. If such a conceptualization were prevalent, a complaint like Jones's could be framed more compellingly and less mischievously. Quid pro quo and hostile environment allegations would become superfluous to stating a claim. Among the happy consequences of this would be that opportunity for redress of a basic wrong like Clinton's alleged deeds in the hotel suite would not turn on proving the occurrence of private consensual affairs.

There is no great strain to pleading a common law tort claim of intentional infliction of emotional distress under Jones's allegations. Such a claim requires: (1) outrageous action; (2) committed intentionally or recklessly; (3) causation of; and (4) severe emotional distress. There is no doubt that if the allegations are true and omit nothing significant, Clinton's actions would amount at least to reckless causation of some emotional distress. There could be some argument whether his acts were "outrageous" and whether they caused "severe" emotional distress. Were I the judge ruling on a motion to dismiss, I would probably allow Clinton's alleged acts to be deemed "outrageous" by a jury under a standard of shock to the conscience, the same standard used to identify actionable assault upon personhood rights under §1983. I might hesitate to recognize "severe" emotional distress in the pleadings, though the question may admittedly be treated as one of fact. The complaint could be judged thin on pleading severe distress

99. See Jones I, 858 F. Supp. at 904.
100. See Jones II, 974 F. Supp. at 729.
101. See id. at 730.
103. See 42 U.S.C. § 1983 (1994); Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (holding that the "shock conscience" standard requires a high level of outrageousness); Uhlig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (stating that in order to satisfy the "shock the conscience" standard, a plaintiff must demonstrate "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking").
104. See Declaration of Patrick J. Carnes, Ph.D., Plaintiff's Opposition To Defendant Clinton's Motion For Summary Judgement, In The United States District Court For The Eastern District Of Arkansas Western Division (No. LR-C-94-290) (visited Mar. 1, 1999) <http:llinton.cnn.com/ALLPOLITICS/1998/...ones.clinton/docs/patrick.carnes/001.jpg> (stating that Jones suffers from "severe emotional distress," post-traumatic stress syndrome, "severe and long-term" trauma, "extreme anxiety, intrusive thoughts and memories and consequent sexual aversion") (on file with the Hofstra Labor & Employment Law Journal). But see President Clinton's Reply In Further Support Of His Motion For Summary Judgment at 8-11, In The United States District Court For The Eastern District Of Arkansas Western Division (No. LR-C-94-290) (stating that plaintiff's deposition testimony indicates absence of severe emotional distress; expert opining that plaintiff suffered severe emotional distress lacked qualifications, based opinion on "symptoms... described," not on independent psychological evaluation) (on file with the Hofstra Labor & Employment Law Journal).
caused by the central incident itself. Of course, it could conceivably be re-pled to remove this difficulty.

The common law emotional distress claim does not require that Clinton acted under color of law when allegedly propositioning Jones. This makes it easier to plead the common law tort claim than a § 1983 claim for unconscionable assault on personhood, or any other § 1983 claims, claims which do not arise unless the defendant acted "under color." On the other hand, the common law tort requires "severe" emotional distress to state a claim. In this respect, it is harder to plead than any claim under § 1983, including unconscionable assault on personhood. I propose that presumed damages to personal dignity, privacy and autonomy be recognized for conduct such as Clinton's in the incident as alleged, even if Jones suffered no emotional distress whatsoever.

Any § 1983 claim Jones might have is dismissible if Clinton's alleged misdeeds fall outside "color of law." Against dismissal, it could be urged that Clinton's high office and high rank over Jones bring such misdeeds under color of law. This argument is weak, unless we accept that any conceivable mistreatment of subordinate employees by a governor takes place under color of law. Supporting dismissal is the fact that any sexual overture was made for personal reasons, not in execution of Clinton's state duties. On the other hand, Clinton allegedly utilized a state employee, Ferguson, in effecting his overture. This could be ruled incidental rather than integral to any constitutional infringement, since Clinton may not have contemplated his most outrageous alleged act until Jones was in his presence. If I were judge, however, I would be inclined to let a jury decide on "color of law" as an issue of fact, instructing that this decision should turn on whether Ferguson's role

105. See Jones II, 974 F. Supp. at 719.
106. See RESTATEMENT (SECOND) OF TORTS, § 46. Section 46 provides:
   (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results form it, for such bodily harm.
   (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
      (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
      (b) to any other person who is present at the time, if such distress results in bodily harm.

Id.

108. See id.
109. See id.
was incidental or integral.

B. Harassment and Substantive Due Process

Harassment assaults personal dignity, autonomy, and privacy rights protected under the due process clause.\textsuperscript{110} Though these are often called “liberty” rights, I call them “personhood” rights because that label seems broader and more evocative of autonomy, privacy, and especially dignity values connected with fundamental respect for individual human beings.

Jurisprudence under § 1983 has long recognized actionability for personal mistreatment that “shocks the conscience.”\textsuperscript{111} Such mistreatment violates constitutional liberty rights protected under the due process clause.\textsuperscript{112} To date, this jurisprudence has not been applied to harassment. Instead, § 1983 actions—modeled on Title VII—have treated harassment as discrimination.\textsuperscript{113} Yet, harassment lies near the heart of what substantive due process forbids. If shocking physical mistreatment violates due process, the same should be true of egregious psychic or dignitarian mistreatment. That is what harassment sometimes is.

There is a tight mutual resonance among the core ideas of substantive due process, individual natural rights, and basic common law tort. Deliberate infliction of harm upon a person is the very paradigm of wrongfulness under all three conceptions. The rootedness of substantive due process protections in common law tort principles is widely understood, as is the rootedness of those common law principles in notions of natural rights against personal invasion. Sexual harassment, indeed any harassment, fits easily within these conceptions of wrongfulness.

Of course, actionability should not lie for modest wrongs. Instead, actionability for sexual harassment should track standards of culpability and definitions of due process personhood offense already developed.

\textsuperscript{110} See U.S. CONST. amend. XIV, § 1.
\textsuperscript{113} See, e.g., Meritor Savs. Bank v. Vinson, 477 U.S. 57, 65 (1986) (discussing that sexual harassment is a form of sex discrimination prohibited by Title VII); Bohen v. City of E. Chicago, 799 F.2d 1180, 1185 (7th Cir. 1986) (explaining that sexual harassment constitutes sex discrimination in violation of the Equal Protection clause and is actionable under § 1983).
Accordingly, actions for harassment should require showings of shocking misbehavior and of deliberate indifference toward the plaintiff's rights.\footnote{114} By these rights, the prevailing definition of sexual harassment under Title VII seems unduly broad. Minimum pleading allegations for Title VII hostile environment actionability require sexual behavior causing a detriment to the target's work performance.\footnote{115} These pleading elements seem broader than the type of egregious personal assaults that violate substantive due process. It seems implausible to conceptualize core personhood rights so broadly as to include protection against sexual behavior that impedes work. Core personhood rights are rights against deliberate personal affront. Actionability for harassment should track this profound and established constitutional notion of sacrosanct personhood.

Though this due process paradigm would in one respect constrict actionability by narrowing the definition of harassment, it would in another respect broaden actionability because it bypasses any requirement to plead discrimination. Harassment under color of law violates due process personhood rights regardless what group identity, orientation, or attitude the target or perpetrator may have. Harassment as assault on personhood sweeps beyond sexual harassment—beyond racial, ethnic, or religious harassment as well—to encompass unconscionable dignitarian assault of any kind. It includes as a subset those forms of harassment which arguably constitute discrimination (equal protection violations). However, it also renders the discrimination/equal protection theory superfluous and redundant as constitutional ground for actionability. As an assault on personhood, sexual harassment is inherently no more grievous than harassment based on personal animosity, cruelty, callousness, power intoxication, or whimsy. Public employees, like citizens generally, have a constitutional personhood right against unconscionable treatment by persons acting under color of law.

Judge Posner has penned an interesting concurrence exploring the

\footnote{114. Courts have been divided as to what level of defendant culpability must be pleaded to state a claim for infringement of substantive due process rights. See Daniels v. Williams, 474 U.S. 327, 331-32 (1986). Ordinary negligence is not enough. See id. Standards applied by courts have included gross negligence, recklessness, deliberate indifference and shock to the conscience. See Mitchell J. Edlund, Note, In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured, 30 VAL. U. L. REV. 161, 165-67 (1995).}

\footnote{115. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (stating that to show a hostile environment, the court looks to whether it unreasonably interferes with an employee's work performance).}
theoretical basis of assessing municipal liability for failure to protect against harassment.116 Exploring his opinion helps clarify the contours of harassment jurisprudence under § 1983's discrimination model of equal protection. It also helps clarify a due process personhood approach, without ever mentioning it.

Posner explores what the proper basis might be for municipal harassment liability under equal protection.117 In keeping with the axiom that states have no strict duty to protect citizens from third party harms, he suggests that municipalities bear only a limited and contingent duty to protect employees from harassment.118 They do not bear an affirmative duty to protect, but they do bear a duty not to deny protection on a discriminatory basis. Analogizing, he writes: "Although there is no constitutional right to police protection, there is a right not to be denied such protection because one is black or a woman."119 Posner then explores how failure to protect against harassment may constitute forbidden discrimination. How can failure to protect against harassment count as "deliberate withdrawal of... protection from a female employee because of her sex"?120 Posner explains how harassment's disparate impact on women, which is nonactionable under § 1983, can be converted into discriminatory intent, which is actionable.121 This in turn explains how an affirmative duty to protect specifically against harassment can emerge within a context that denies affirmative duties in general.

Posner reasons that a pattern of harassment's disparate impact upon women, combined with municipal knowledge and inaction, yields a presumption of illegal discriminatory intent.122 This presumption places the municipality under a rebuttal burden of coming forward with some legitimate reason for inaction.123 Proof that preventing harassment is inordinately costly could constitute such a legitimating reason, Posner maintains.124 In the case before him, Posner quickly finds liability because the municipality offers no excuse whatsoever for inaction on

117. See id.
118. See id.
119. Id. at 1190.
120. Id.
121. See Bohen, 799 F.2d at 1190.
122. See id.
123. See id. at 1190-91.
124. See id. at 1191.
harassment complaints.\(^\text{125}\) That proves indifference to women's welfare which, even if it is not outright hostility, meets the discriminatory intent threshold for equal protection liability. It is exactly as if a municipality ignored the fact that its firemen repeatedly refused to put out fires in homes owned by blacks.\(^\text{126}\)

Posner indicates that a pattern of known harassment and inaction is required to establish municipal liability in this manner. Such a pattern requirement makes sense for inferring intent from impact because discriminatory impact seems to require multiple incidents. However, a pattern requirement is unsettling because it may leave seriously harassed individuals remediless.

Posner serves up a striking point as he fleshes out his theories of discrimination and limits on duty to prevent. He holds that a municipality could decide for purely fiscal reasons not to protect employees from any sort of misconduct by other employees.\(^\text{127}\) If there is no requirement to prevent third-party harm, this would not violate rights of harmed employees. Posner rules against the municipality before him because he assumes that it tries to protect its employees from interpersonal workplace injuries other than sexual harassment.\(^\text{128}\) The city does not contend otherwise. If that same city makes no effort to forestall sexual harassment, one can infer that it is selectively indifferent to sexual harassment while responsive to other forms of interpersonal workplace injury.

Posner argues that if selective indifference to sexual harassment is unexcused, it is discriminatory.\(^\text{129}\) But selective indifference could be excused if forestalling sexual harassment is disproportionately costly compared with preventing other interpersonal workplace injuries. If excused, selective indifference is non-discriminatory.

Posner suggests ways in which sexual harassment prevention measures may indeed be disproportionately costly compared with measures against other interpersonal workplace harms.\(^\text{130}\) He also suggests ways in which anti-harassment measures may be disproportionately weak in cost-effectiveness.\(^\text{131}\) He comes up with three points distinguishing sexual harassment from other interpersonal

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\(^{125}\) See id.
\(^{126}\) See Bohen, 799 F.2d at 1190-92.
\(^{127}\) See id. at 1191.
\(^{128}\) See id.
\(^{129}\) See id.
\(^{130}\) See id.
\(^{131}\) See Bohen, 799 F.2d at 1191.
workplace injuries: (1) it cannot ever be fully extirpated; (2) it may be hard to police because it outwardly resembles flirtation; and (3) anti-harassment surveillance may be deeply intrusive upon workers. Posner might have added two other items: (1) harassment’s intentional, self-serving and often covert nature, and (2) its frequency. Separately or together, these features may distinguish harassment from other interpersonal workplace harms enough to excise selective indifference, rendering it non-discriminatory.

Of course, sexual harassment’s frequency may seem an odd justification for failure to act against it. However, frequency does magnify the costs of successful prevention action. True, it also augments harassment’s disparate impact on women and the hints of discriminatory intent in ignoring it. Frequency also magnifies sexual harassment’s productivity costs compared with other employee-interpersonal workplace harms, and this must be set off against the higher costs of eliminating it in an overall assessment of costliness and cost-effectiveness. But Posner’s point remains that the discriminatory aspect of selective inaction against sexual harassment cannot be measured without considering possible disproportions in prevention cost and cost-effectiveness.

Opinions may differ on whether sexual harassment differs enough from other interpersonal workplace harm in prevention cost or cost-effectiveness to justify selective inaction. It is useful to have the issue raised. But some puzzling questions are also raised by Posner’s reasoning. One stems from his stress on sexual harassment’s disparate anti-women impact. This focus makes it difficult to explain how male-victim or same-sex harassment equals discrimination. Another question concerns his premise that nondiscriminatory inaction is perfectly constitutional. Both questions highlight the advantage of conceptualizing harassment as a due process personhood offense, regardless of discrimination. Conceptualizing non-prevention of harassment as a due process personhood offense recasts several points Posner raises: (1) it suggests that inaction on harassment may be unconstitutional, even if nondiscriminatory; (2) it avoids pressure to seek a pattern of incidents and inaction so that “discrimination” can be identified as a prerequisite to liability; and (3) it explains how male-victim and same-sex harassment are actionable, despite lack of disparate impact.

The essential point is that inaction against harassment, even if non-

132. See id.
discriminatory, may constitute a due process personhood offense. This is true if the inaction is sufficiently culpable to embody contempt for personhood. If there is no constitutional offense except where inaction against harassment is highly culpable, the duty to prevent third-party harm is kept to manageable scope.

Fear of overly broad duty to prevent haunts all jurisprudence of third-party harm. No party, not even the state, should be required to serve as a roving good Samaritan, fending off all menace. Where private parties are so burdened, their independent life pursuits may be subordinated to the task of protecting others. Where the state is so burdened, it may impose controls and regulations in order to meet its duty that undermine civil liberty. Still, there are situations where failure to intervene against third-party harm shocks the conscience. This may be true where a party has a special relationship to the victim or to the perpetrator. It may also be true where the threatened harm is great, the cost of intervention low, and the likelihood of successful intervention high.

Where both victim and perpetrator are employees, the employer arguably has a special relationship to each. Those special relationships arguably impose special duties: to protect victims and to curb perpetrators. Enhancing this "special" character of the employment relationship is that difficulties of prompt exit tie employees to their particular employers. This gives the relationship a quasi-custodial character that may bring employers under some further duty to protect employees. Furthermore, some workplace harassment is both deeply harmful and easily preventable. All of these factors justify a limited affirmative employer duty to protect employees from harassment.

Posner slights all this when he assumes that a municipality may constitutionally tolerate all interpersonal workplace harm, so long as its inaction is non-discriminatory. Posner notwithstanding, such inaction may offend fundamental constitutional personhood rights protected by the Constitution. Where a municipal employee faces severe harassment of any kind, her plight may not simply be ignored. A municipality that fails to intervene must at least offer some valid reason. This requirement of a valid reason for inaction tracks Posner's conception of the prevention duty, and dispenses with his focus on discrimination.

Existing due process jurisprudence under § 1983 supports the notion of a municipal duty, a limited one, to prevent workplace harassment. To be sure, one important case, Collins v. City of Harker

133. See id.
Heights,\textsuperscript{134} seems to belie any such duty. The decedent in that case died of asphyxia while working for the city in a manhole.\textsuperscript{135} Plaintiff, the decedent’s widow, sued the city for infringing due process personhood rights, but the complaint was ruled non-actionable on grounds that the city had no per se constitutional duty to provide its employees safe work conditions.\textsuperscript{136} The Supreme Court reasoned first that the employment relationship was voluntary, not custodial, and second that workplace safety levels were a matter of contested costs, benefits, and priorities properly left to municipal discretion, not dictated by constitutional norms.\textsuperscript{137} This might seem to preclude any municipal obligation to protect employees from workplace harassment. But though Collins limits municipal duty to prevent job dangers, it does not repudiate all duty.\textsuperscript{138} Instead, it focuses on certain items of neglect (lack of safety training and failure to warn of known dangers) and finds them not “conscience-shocking.”\textsuperscript{139}

But this implies there could be municipal callousness toward employee safety that would be conscience-shocking. It is hard to understand how Collins did not see non-supply of safety equipment as conscience-shocking. Be that as it may, its standard of conscience-shock is not the same as a blanket no-duty rule.

A more careful analysis than Collins’s can be found in L.W. v Grubbs.\textsuperscript{140} In Grubbs, a prison nurse, terrorized and raped by an inmate, pressed a due process claim under § 1983.\textsuperscript{141} According to Grubbs, Collins does not rule that no constitutional duty whatever is owed to protect employees from third-party harm.\textsuperscript{142} If deliberately indifferent to preventing her harm, defendants may be liable. The court seems to regard deliberate indifference and conscience-shock as functionally equivalent.\textsuperscript{143} Arguably, employment could be deemed a relationship of either enhanced (“custodial”) or diminished (“voluntary or assumed risk”) duty compared with baseline duties owed generally to citizens under § 1983. Grubbs seems to adopt neither the enhanced- nor the
diminished-duty view, perhaps because they offset each other. Instead, Grubbs seizes in on the classic affirmative-duty issue whether defendants created the danger which befell the plaintiff. If so, they owed her a duty of protection. Grubbs understands danger creation to include facilitating or creating opportunity for third-party harm. Facilitating opportunity lies in municipal failure to control the inmates despite knowledge of their dangerous proclivities. The Grubbs defendants were individual state employees, not a municipality. But there is no big stretch in extending Grubbs to municipalities, not just individual officials, and to workplace harassment, not just physical assault. Where the harassment is sufficiently substantial, foreseeable, and preventable without undue cost, municipal indifference amounts to facilitating harm. This means there should be liability for municipal failure to prevent serious, foreseeable and easily preventable harassment. Some critics might consider such liability appropriate for physical harm but misplaced for non-physical harm like harassment. But to preclude liability for non-physical harm, no matter how egregious, devalues important personhood rights. Liability for conscience-shocking infliction of non-physical harm is embodied in the tort known as intentional infliction of emotional distress. When municipalities or officials facilitate such harm through deliberate indifference toward prevention, they should incur liability for offense to constitutional personhood rights.

Of course, the duty should be narrowly circumscribed. It must weigh considerations of special relationship, custody, severity of harassment, prevention costs and cost-effectiveness, and negative third-party consequences, like increased surveillance and control of workforces. However, negative aspects of the duty should not blind us to the point of principle calling for vindication: the right to be left alone. The cross-cutting factors pertinent to delineating the proper scope of duty must be folded into a single intuitive standard, one that balances competing concerns and allows for fact-sensitive adjudication. It is hard to improve on the deliberate indifference formula ubiquitous in § 1983 jurisprudence and implicitly endorsed by Posner. Because the same factors arise for all employers and all forms of harassment, the

144. See id.
145. See id.
146. See Grubbs, 974 F.2d at 122.
147. See id.
deliberate indifference standard could wisely be applied to workplace harassment of all kinds, sexual and otherwise, public employer and private. Specifically, deliberate indifference might be the right standard for defining employer duty to prevent harassment under Title VII.

C. Non-constitutional Application of the Personhood Paradigm

The due process personhood approach has implications back in the world of non-constitutional anti-harassment jurisprudence under Title VII and common law tort. It suggests that "discrimination" is a distorted and superficial conceptualization of the wrong inherent in harassment. A more penetrating and fundamental conceptualization of that wrong is one of assaulted personhood. "Discrimination" is secondary or incidental to that fundamental wrong and, in many cases, completely absent.

Arguments for decisional or statutory expansions of Title VII employer anti-harassment duties—to cover same-sex harassment, for example, or workplace harassment generally—ironically spotlight the assaulted personhood nature of anti-harassment law as they stretch the employment discrimination model to the breaking point.

Harassment can fruitfully be analyzed and treated as a tort, not employment discrimination. Employer liability harassment under Title VII should therefore be re-examined. Such liability essentially burdens employers with a duty to prevent harassment that is overbroad under tort principles. The wisdom of this broad employer duty is doubtful, as argued above. It burdens employers, encourages tighter employer control over work forces, and accomplishes little in curtailing harassment. It may be good to expand harassment liability, but not against employers as in employment discrimination. Instead, liability should be targeted at individual harassers as tortfeasors with employers liable only insofar as they too are tortfeasors. In general, showings of individual tortious conduct and injury should be required for harassment.

149. See id. at 386-87.
151. See Hager, supra note 148, at 428.
152. See id. at 389.
liability. By this token, individual harassers should be liable according to the requirements of tort claims for intentional infliction of emotional distress. Employers should be liable according to the requirements of tort claims for negligent hiring/retention/supervision.

D. Nature of the Wrong: Discrimination and Discriminatory Intent

Intriguing issues concerning the nature and wrongfulness of harassment come to light by juxtaposing § 1983’s concept of actionable discrimination with Title VII’s. A case of unconstitutional discrimination under § 1983 requires proof of discriminatory intent. Employment discrimination under Title VII requires no such proof of intent. It can be established based on disparate impact alone.

As argued above, there is a deep ambiguity in the notion that harassment—certain forms of it at least—amounts to discrimination in the first place. With erotic overtures, the harasser’s motives are not primarily ones of contempt for the target, nor is the harassment directed at an entire sex. Instead, the harassment is elicited by the eroticized features of a particular person. To be sure, excessive or improper attention may invade that person’s right to be left alone or set terms for interaction. When egregious, such harassment may be deeply harmful and should be actionable. However, the notion that it constitutes discrimination is strange.

Though several notions can be offered on how erotic harassment equals discrimination, none is especially plausible. One is that because erotic fixation is elicited by the target’s sex, the harassment reflects discriminatory intent or treatment by the harasser. This makes little

155. See id. at 432.
156. See id. at 426.
161. See Hager, supra note 148, at 376.
162. See Ramona L. Paetzold, Same-Sex Sexual Harassment: Can It Be Sex-Related for Purposes of Title VII, 1 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 25, 49 (1997).
163. See id.
sense because erotic attraction is seldom elicited by all members of a given sex, but instead from particular qualities of the eroticized person. It would be bizarre to treat particular attractions as episodes of "discrimination" against folks with wavy hair, fierce intelligence, silky skin, quirky humor, shapely shoulders, generous spirits, and killer smiles. There is no right not to be eroticized by others. There is a right not to have one's autonomy, dignity, and privacy invaded non-consensually for reasons erotic or otherwise. However, that has nothing to do with discrimination.

A second notion of harassment as discrimination seizes not on the perpetrator's motivation, but on the negative experience or circumstances created for victims. This resonates roughly with notions of discriminatory impact under Title VII. But the resonance is rough indeed because discriminatory impact classically refers to the retarding effect of some employment practice upon an entire class such as women. This is not the typical erotic harassment scenario, where the negative impact of overtures is experienced by particular people, not a whole sex. Though some envision generalized anti-woman effect from "targeted" erotic harassment, that seems contrived. It abstracts away from particular harassment incidents and workplaces by modeling erotic overtures as a social institution with presumptive and generalized adverse impact on the female sex. Even if this model has some truth for women, it does not explain how harassment of men or same-sex harassment count as discrimination. And even for women, it lies far afield from standard Title VII disparate impact analysis. It aggregates incidents across society and then assumes a socially aggregate disparate impact, rather than proving disparate impact case by case in particular workplaces, as in classic disparate impact jurisprudence.

The contention that erotic harassment, with its focus on a particular person should not count as discrimination may seem to stumble over a well-recognized principle of discrimination law under both Title VII and § 1983. Mistreatment need not reach all available class members to count as discrimination. Intentional discrimination against even one

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167. See Hager, supra note 148, at 382.
person because of his or her group identity counts as discrimination.\textsuperscript{171} On the issue of erotic harassment, however, this principle is more question-begging than dispositive. The question is precisely whether erotic harassment is “intentional discrimination . . . because of” the target’s gender identity. It is purely sophistic to conclude the answer is yes.

Despite this, treatment of harassment as discrimination is now thickly entrenched in Title VII. It has never been clear whether and how harassment should be mapped onto Title VII’s categories of discriminatory treatment and disparate impact. The discussion just above highlights that erotic overture harassment differs from both discriminatory intent and disparate impact in their conventional meanings. Erotic harassment typically involves neither animus nor class-wide effect. This lack of fit is further reason for skepticism on conceptualizing erotic overtures as discrimination.

Puzzlement only deepens in the wake of the 1991 amendments to the Title VII structure. Those amendments provide for the first time that punitive and compensatory damages may be awarded for Title VII violations.\textsuperscript{172} The newly-available compensatory damages are limited to cases of “intentional discrimination”\textsuperscript{173} and punitive damages are limited to situations of “malice” or “reckless indifference” to protected rights.\textsuperscript{174} For harassment suits, this forces confrontation with a previously neglected issue: whether and when harassment falls within the category of intentional discrimination. My guess is that courts have routinely treated harassment as intentional discrimination under the 1991 amendments for purposes of awarding damages. This is difficult to verify because, to date, only one decision, \textit{Canada v. Boyd Group, Inc.},\textsuperscript{175} has squarely addressed the issue. Its analysis is obscure at best.

\textit{Canada} rules that hostile environment harassment does constitute intentional discrimination, at least for purposes of awarding compensatory damages.\textsuperscript{176} Though discriminatory intent conventionally requires proof in particular cases, \textit{Canada} invokes jurisprudence that because discriminatory intent may be hard to prove directly, it can be presumed upon establishing a “prima facie case of discrimination.”\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{173} \textit{See} 42 U.S.C. \$ 1981a(a) (1994).
\item \textsuperscript{174} \textit{See id.} \$ 1981a(b)(1).
\item \textsuperscript{175} 809 F. Supp. 771 (D. Nev. 1992).
\item \textsuperscript{176} \textit{See Canada}, 809 F. Supp. at 781.
\item \textsuperscript{177} \textit{Id.}
\end{itemize}
This presumption effectively winds up treating all hostile environment cases as intentional discrimination, though many—erotic overture cases especially—are completely devoid of employer animus.

In superficial compliance with earlier jurisprudence, Canada allows inference of discriminatory intent upon establishment of a prima facie case. The problem is that for hostile environment cases, the elements of a prima facie actionability are not nearly demanding enough to justify such a presumption. The presumption jurisprudence stems from cases of denied tangible job benefits: positions, pay, promotions, and the like. To establish a prima facie case, a grievant must demonstrate basic eligibility for the denied benefit, whereupon the employer is called to offer a non-discriminatory reason for denying it. If no such reason can be offered, an inference of discriminatory animus makes sense.

However, this makes no sense for hostile environment, which is by definition not concerned with tangible prerequisites. Canada does not explain or even ask what prima facie showing should be required to establish a presumption of animus in hostile environment cases. It probably comes down to the minimum pleading elements for stating a claim: sexual behavior causing impeded work environment. But that prima facie case, because it does not deal with tangible benefits or grievant eligibility for them, does nothing to strengthen an inference that animus is afoot. On the contrary, actionability for hostile environment either presumes the presence of animus axiomatically and irrebuttably, or else jettisons the animus element entirely. The two descriptions produce functionally identical outcomes: animus is not an active pleading element.

Axiomatic presumption of discriminatory intent is especially misplaced for erotic overtures, but may be equally misplaced for all hostile environment cases except the vanishingly rare ones where the harasser acts as true employer agent. At any rate, if hostile environment axiomatically means discriminatory intent, there is no need for the subterfuge of prima facie cases and presumptions in order to establish it. If we are not actually inquiring about animus, but simply declaring it present, let’s say so. Alternatively, if animus is in principle irrelevant to hostile environment actionability, let’s say so, not conjure intentional discrimination damages by sleight-of-hand involving misplaced prima facie cases and presumptions that magically wind up finding animus.

178. See id.
179. See Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
every time.

Canada’s reasoning grows even more opaque when it comes to analyzing how the prima facie presumption of discriminatory intent may be rebutted. Opportunity for rebuttal is crucial in benefit denial cases, allowing defendants to offer reasons for the denials other than animus. In the hostile environment context, however, the notion of rebuttal is as hollow as the notions of prima facie case and presumption that precede it. There can be no non-animus rebuttal to an animus presumption built on a prima facie case (sexual conduct causing impeded work environment) which is not factually probative of animus in the first place, but instead either presumes animus or ignores it.

Not surprisingly then, Canada’s notion of rebuttal is conceptually empty. The ruling indicates that the presumption of animus can be rebutted either by defeating the prima facie case or by showing appropriate remedial action. Both alternatives essentially allow rebuttal of discriminatory intent, thus negating damages, only by defeating the hostile environment case in its entirety. Therefore, there is no such thing as a valid hostile environment case not involving discriminatory intent and all hostile environment cases will thereby warrant damages. This clarifies that we are dealing with an axiom: hostile environment equals discriminatory intent. But again, that axiom is deeply perplexing.

All this is not to say that damages should not be available for hostile environment harassment. They should be available for the right parties and for the right reason: chiefly from individual harassers for assaulting personhood rights. But Congress has thrown matters into great confusion by making intentional discrimination the prerequisite for damages, compounding confusion already rampant in equating hostile environment with employment discrimination. Puzzlement deepens again when § 1983 law is juxtaposed. Courts routinely invoke the axiom that unconstitutional discrimination requires proof of intent, even if employment discrimination does not. Therefore, in § 1983 harassment claims, courts strain to articulate and apply an element for prima facie actionability they need not contend with under Title VII: discriminatory intent.

Though some rulings note the intent requirement as a theoretical distinction between § 1983 and Title VII, it seldom makes any real difference. Some § 1983 cases mention the issue, but give no serious

180. See id. at 780.
181. See McCleskey v. Kemp, 753 F.2d 877, 924, 925 (11th Cir. 1985).
analysis. The intent requirement winds up empty of content. The line it theoretically draws between § 1983 and Title VII jurisprudence vaporizes.

A few § 1983 decisions intriguingly depart from this weightless notion of the intent requirement. They apply a heftier intent requirement, though not the one contemplated in classic equal protection jurisprudence: discriminatory animus. Erotic harassment cases would almost never be actionable under a requirement of discriminatory animus. Even those courts applying a hefty, non-empty notion of discriminatory intent stop short of requiring animus. Instead, their notion of the intent requirement is essentially an exclusion for a certain category of cases: soured romances. There is no liability for harassment in the context of romances gone sour because harassment pursuant to soured romances is deemed to lack requisite discriminatory intent.

The argument is that there is no discriminatory intent in purely personal harassment. Soured-romance harassment is purely personal because it stems from the perpetrator's relationship with a particular person, not from her sex. It is therefore not discriminatory. This reasoning is sound, but proves too much. As I argue above, erotic harassment stems from fixations on particular persons. The target's sex is necessary but hardly sufficient to fuel the fixation. This is true of soured romances, but equally true of any unrequited fixation. If taken seriously, the "purely personal" notion marks no true middle ground between broad and narrow conceptions of discriminatory intent, but instead confines it to its narrowest scope—animus against one sex or the other. That makes sense. It means that no erotic harassment should be


183. See Trautvetter v. Quick, 916 F.2d 1140, 1151 (7th Cir. 1990) (holding that "soured romance scenario" is not covered as intenitional discrimination requirement under the equal protection clause); Huebschen v. Department of Health and Soc. Servs., 716 F.2d 1167, 1172 (7th Cir. 1983) (stating that discrimination by a female supervisor against a male employee was not motivated by his male status, but rather his status as "former lover who had jilted her").

184. See Trautvetter, 916 F.2d at 1151.

185. See id.

186. See id.

187. See id.; Huebschen, 716 F.2d at 1172.

188. See Trautvetter, 916 F.2d at 1151.

189. See id.; Huebschen, 716 F.2d at 1172.
actionable as discrimination.

It might be thought that though erotic overtures in general should indeed count as discrimination, no liability should apply to soured-romances because the target has assumed the risk, so to speak. But even if romance arguably entails assuming the risk of post-romance harassment, the target’s assumption of risk has nothing to do with the question of the perpetrator’s discriminatory intent.

Erotic harassment might also be thought to differ in general from the narrower category of soured-romances because erotic harassers focus on a series of targets, not just one. This suggests the behavior is directed at an entire sex, not at particular persons. But this image of non-selective harassers is pure hyperbole. Hyperbole aside, no one fixates erotically on everyone of a given sex. If someone’s harassment focuses on everyone of a given sex, it does bespeak animus, not eros. True erotic harassment is intrinsically selective, even if some harassers select more than one.

Again, my point is not that erotic harassment should never be actionable. On the contrary, it should be actionable under the right circumstances, but not as discrimination. Instead, erotic harassment, if egregious, should be actionable under § 1983 as a substantive due process offense of assaulted personhood. Because such rights are not waived in a romance, I believe there is no per se reason for excluding soured-romance harassment from liability.

The strange twist is that the “purely personal” analysis, soberly applied, seems every bit as relevant to Title VII discrimination as to § 1983, even though it emerges from the intent requirement that supposedly separates § 1983 from Title VII. The particularized personal focus in erotic harassment makes its Title VII actionability as discrimination dubious, or should. Likewise with equal protection actionability under § 1983.

From the standpoint of affording relief, it might not matter much under § 1983 if erotic harassment is deemed non-actionable as discrimination, so long as it remains actionable as assault upon personhood. All harassment currently actionable would remain so, against identical defendants, unless not egregious enough to be conscience-shocking. Indeed, actionability would partly broaden because there would be no enclaves of non-actionability due to lack of discrimination or discriminatory intent.

With Title VII, however, abandoning the discrimination paradigm would have more complex effects. Where there is no discrimination, there is no Title VII actionability against employers, therefore no Title
VII actionability period, except under the dubious minority view that private individuals, as employer "agents," should be individually liable under Title VII. Therefore, curtailing the discrimination focus, though it could widen the world of harassing acts made actionable under § 1983, would curtail Title VII claims against employers. Private sector employers would then be answerable for erotic harassment only within the contours of common law duty. That duty would not encompass responsibility for erotic harassment, except in unusual circumstances. That is as it should be. The employer's duty to control erotic fixation among employees should be narrow. Instead, legal control over such harm should lie in the realm of personal injury lawsuits. Public employers, though excused from Title VII responsibility, would retain their potential erotic harassment liability under § 1983. That too is as it should be, provided it is no broader than established contours of municipal liability under § 1983.

E. Nature of the Wrong: Damages

Damages jurisprudence under § 1983 subtly reinforces the personhood paradigm for understanding anti-harassment rights and undermines the discrimination paradigm. Under established jurisprudence, monetary damages under § 1983 must be geared toward compensating plaintiffs for specific and actual personal damages. This may include pain and suffering and emotional distress, but not sums for abstract offense to the right in question. In tort-like fashion, damages must measure harm to the person, not offense to constitutional values as such.

This doctrine casts a weird light over damages for harassment under the equal protection clause. A plaintiff may not be compensated for the purported offense to equality in the abstract. She may be compensated only for whatever harm—mainly emotional distress in a typical case—the purported offense to equality causes her. The strange part is that little of harassment's emotional distress typically comes

191. See id.
193. See Stachura, 477 U.S. at 310.
194. See id. at 311.
195. See id. at 310.
from a feeling of disparaged equality. It stems instead from the outrage
to personhood: assaulted dignity, autonomy, and privacy. A harassed
woman feels less distressed that the harassment is not happening to the
men around her than because it is happening to her. Damages stemming
from outraged equality as such may often be zero.

This does not mean she should receive no compensation for her
distress. The point is that equal protection logic, closely followed, might
not really provide it. This problem is avoided, however, if harassment is
grasped as an offense to personhood rights. Such rights embrace
freedom from unjustly-inflicted distress, including sexual harassment.
Full compensation for that distress flows smoothly from the nature of
the right offended.

The rule against abstract constitutional damages leaves an
intriguing ambiguity in § 1983 damages jurisprudence. Emotional
distress is compensable while abstract offense to constitutional values is
not.196 Is there an intermediate category for affront to personhood,
 Experienced as damage, but not as emotional distress? Should such an
item be compensable? Several causes of action in tort have traditionally
afforded recovery for damaged dignity, aside from any pecuniary, pain
and suffering, and aside from emotional distress damages. So-called
presumed or dignitarian damages are normal for defamation, offensive
battery, and lack of informed consent, to name several. Such damages
could be called "noumenal" in that they compensate for nonempirical
outrage to human dignity, not for empirical suffering of any sort,
physical or emotional.197 Such noumenal dignitarian damages could
perhaps be recognized for the assault on personhood entailed in
harassment. But it is not obvious how to separate noumenal personhood
damages from nonrecoverable abstract offense damages.

If not compensating for emotional distress or other empirical
damage, noumenal damages seem indistinguishable from abstract
offense damages. If so, they are non-recoverable. Some observers

196. See id. at 310-11.

197. With apologies, I borrow the term "noumenal" loosely from Kant’s philosophy. Kant
uses the term "noumenal" to refer to the transcendental existence of a thing, the thing in itself,
 inaccessible to empirical experience or knowledge. See, e.g., IMMANUEL KANT, GROUNDWORK
FOR THE METAPHYSICS OF MORALS 59 (1981). I use the term here to capture an idea of damage to
personhood aside from any experience of pain or suffering by the damaged person. See id. A
comparable term for such damage would be “dignitarian,” but I use the term “noumenal” to
suggest theoretically possible categories of damage which are not empirical pain, suffering, or
distress, but are also not damages to “dignity” as such. See id. For example, could there be damage
to noumenal “equality,” distinct from noumenal “dignity”? My answer, as explained in the text, is
“No,” but I find the question intriguing.
suggest that noumenal individual damages, aside from emotional
distress and other actual damages, should be recoverable under § 1983
for all constitutional infringements.198 This would require recognizing a
distinction between recoverable noumenal damages and non-
recoverable abstract offense damages. However, such a distinction
verges on double-talk. Noumenal damages seem to be just abstract
offense damages in drag. If so, allowing noumenal damages subverts the
rule forbidding abstract damages. But the rule against abstract
constitutional damages should not be allowed to frustrate award of
noumenal damages for assaulted personhood. With noumenal
personhood rights, unlike other rights, there is no offense to the abstract
constitutional value without a simultaneous dignitarian offense to a
particular person. The noumenal personal damage should not be made
nonrecoverable by thoughtless application of the rule banning recovery
for abstract offenses.

The distinction between abstract and noumenal damages is real, not
just double-talk, for this one particular class of case: when the offense in
question consists purely and simply of assaulted personhood. That is
precisely what harassment entails. Because dignity of personhood is
exactly the abstract constitutional value in question, noumenal
personhood damage has been inflicted whenever the abstract
constitutional value has been offended. If this noumenal damage is
non-recoverable, victims go personally uncompensated for precisely the
harm to personhood that makes up the constitutional offense in
question. A distinct item of personhood damages would delineate the
dignitarian individual offense involved. This logic applies only to
dignitarian personhood rights and does not expand to swallow the entire
ban on abstract offense damages for other types of violation. Or does it?

In this hazy realm, it is interesting to pose the discrimination
question again. If harassment is generally a personhood offense
warranting noumenal or dignitarian damages, does it sometimes also
violate equal protection (i.e., harassment motivated by actual
anti-woman animus)? If so, could there be an item of noumenal
compensatory damages for discrimination in addition to the one for
offended personhood? Such an item would demarcate a personal interest
in equal dignity, beyond the interest in fundamental personal dignity.

198. See Jean C. Love, Damages: A Remedy for the Violation of Constitutional Rights, 67
CAL. L. REV. 1242, 1245-46, 1285 (1979); Note, Damage Awards for Constitutional Torts: A
Reconsideration After Carey v. Piphus, 93 HARV. L. REV. 966, 976-80 (1980); Jean C. Love,
Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice
But can such a personal interest in equal dignity be distinguished from the abstract constitutional value of equal protection, so that damages for individualized offense to noumenal equality could be awarded without violating the rule against abstract offense damages?

The answer is no, because a right of equal treatment is derivative from fundamental respect for personhood. There is one fundamental noumenal personhood right, not two. To conceptualize two separate noumenal personhood interests—fundamental respect and non-discrimination—posits that discriminatory disrespect is somehow more damaging than non-discriminatory disrespect. But disrespect is not an experience that comes in two classes: discriminatory (worse) and non-discriminatory (not as bad). Because discrimination, if present, is incidental to the fundamental personhood harm inflicted by harassment, noumenal damages should lie only for offense to personhood, not for discrimination. Noumenal compensatory damages for discrimination would be indistinguishable from impermissible abstract equal protection damages.

Still, there is a place where damages for discriminatory harassment have their proper home. That place is punitive damages. To harass with discriminatory animus is especially reprehensible. Wrongful contempt for personhood is compounded by animus or bigotry. Evidence of animus or bigotry should therefore be admissible for punitives, though ruled out for compensatories.

There is currently an odd aspect in Title VII law that provokes further thought on the theme of damages and the nature of the wrong involved in hostile environment harassment. This is that the 1991 amendments seem to authorize tort-like compensatory and punitive damages, but the Supreme Court's ruling in *Harris* authorizes a hostile environment claim to be stated even in the absence of any tortious injury. This juxtaposition reveals how hostile environment harassment under Title VII dwells in a twilight zone between discrimination and tort.

As noted above, the 1991 amendments authorize compensatory and punitive damages for intentional discrimination. If compensatory damages for harassment have become routine since enactment of the amendments, it makes sense in two respects. First, given the juxtaposition of the 1991 amendments with the Hill-Thomas hearings and surrounding uproar over sexual harassment, allowing compensatory

damages for harassment probably reflects Congressional intent. Second, even if it is not intentional discrimination, hostile environment harassment is a form of intentional wrongdoing causing personal damage. Through this tort-like lens, recoverability of compensatory (and punitive) damages seems completely fitting. (Whether such damages should be recoverable from employers, as under Title VII, remains a separate question). Meanwhile, Harris establishes that plaintiffs need not plead tortious injury to sue for harassment. Harris rules specifically that plaintiffs need not plead tortious injury to state a claim. If you need not plead even psychological damage, much less any more tangible damage, your claim seems not to sound in tort. This makes sense within the discrimination perspective: if harassment is at least sometimes discrimination, why should actionability require pleading tort damages? Damages should lie instead for discrimination-caused harm.

But this is puzzling because hostile environment harassment by definition does not concern denials of tangible benefits. For discriminatory benefit denials, damages center on having the denied benefits granted. With hostile environment there is no such relief. What then are the damages?

In a hostile environment case with no conventional tortious injury, would a compensatory award be proper, and if so, for what? There are four imaginable items of damage distinguishable from classic discrimination remedies on the one hand and conventional tort remedies on the other: (1) compensation for non-tangible retardation of employment performance, prospects or progress; (2) damages for abstract offense to constitutional equality values; (3) compensation for offense to noumenal personal equality rights; and (4) compensation for offense to noumenal personhood rights, aside from psychic or physical harm. Should a court allow itemizable compensatory damages on any or all of these grounds? Because the last item fits best with preexisting doctrine, it makes the best sense of Harris.

Non-tangible employment retardation (1), if not simply presumed but subjected to case specific proof, may be too speculative to comport with conventional damages law. Damages for abstract equality offense (2) must quickly be ruled out if § 1983 jurisprudence is treated as authoritative on the meaning of compensatory relief. If abstract offense damages are out, noumenal equality damages (3) are also out, as I argue

201. See id.
202. See id.
above.

Therefore, *Harris* and the 1991 amendments make most sense together if the compensatory relief specifically proper for a hostile environment, without any psychic or physical injury, is noumenal personhood damage. The essential tort character of such relief reveals a subtle misstep in *Harris*. In articulating the minimum damage a hostile environment claim must plead, *Harris* should have proposed disparaged dignity or personhood, not damaged work performance. However, such a correction would require a further reconceptualization of what it takes to state a hostile environment claim, because it rebounds into the conduct element for pleading a claim. Damage to dignity of personhood implies conscious disrespect for victim by perpetrator. Dignity is not assaulted through mere inadvertence. There is no outrage to dignity absent contempt by the perpetrator. Defining hostile environment harassment merely as conduct of a sexual nature is therefore too broad. Because hostile environment damage sounds essentially in dignitarian assault on personhood, actionability should require a pleading of conscious disrespect. This conscious disrespect could be called “deliberate indifference.” That would fit with doctrinal rhetoric and structures already richly developed under § 1983, where “deliberate indifference” is a master jurisprudential concept.

**F. Same-Sex Harassment: From Sex Discrimination to Anti-Gay Discrimination to Assaulted Personhood**

Cases of same-sex harassment raise thorny issues for Title VII’s model of harassment as sex discrimination. Some of those issues need not arise under § 1983, which can approach cases of same-sex harassment without being constrained to conceptualize it as sex discrimination. This theme is worth exploring for two main reasons. First, it highlights ambiguities in Title VII’s project of conceptualizing harassment as sex discrimination. Second, it may provide concrete assistance to same-sex harassment victims in municipal workplaces.

Courts have grappled with and split over the question whether “same-sex” harassment qualifies for Title VII actionability. The Supreme Court settled at least part of the issue in *Oncale v. Sundowner*.

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Offshore Services, Inc., 204 which rules that at least some types of same-sex harassment are actionable under Title VII as sex discrimination. 205 The simple justice of allowing actionability for same-sex misconduct if it would be actionable in an opposite-sex setting does not belie certain anomalies.

It is strange to conceptualize same-sex harassment under the statutory meaning of discrimination based on "sex." Congress unquestionably understood "sex" discrimination to mean disregard based on male or female status. 206 It has always been a stretch to apply the notion of discrimination to erotic advances which often entail no such disregard, even if they are unwelcome. But unwelcome erotic advances can loosely be understood as discrimination if the focus is that the target's sex is part of what elicits the advance. One can even suggest that erotic advances, unwelcome ones at least, inherently imply gender contempt, though this idea is more than a little strange. Whatever the rationale or lack thereof, unwelcome heterosexual advances have been classed as sex discrimination under Title VII. 207 In light of these developments, treating unwelcome gay advances as sex discrimination involves no additional anomaly. Oncale makes this point in ruling that unwelcome gay advances are actionable under Title VII. 208 However, this does not solve the whole problem of Title VII actionability for same-sex harassment, which does not always involve erotic advances.

The complexities can be highlighted with a partial taxonomy of same-sex harassment scenarios, distinguishing four paradigms: (1) straight perpetrator/gay target ("gay-bashing" derision); (2) straight perpetrator/straight target (mistreatment through sex-oriented talk or behavior); (3) gay perpetrator/gay target (erotic overtures); and (4) gay perpetrator/straight target (erotic overtures). For conceptualization as sex discrimination, each scenario may require its own distinct theory.

Gay-bashing seems closest to a core meaning of "discrimination" as contemptuous disregard. The problem for Title VII analysis is that such disregard is directed at the victim's sexual orientation, not at male or female status. Because of this focus, actionability for gay-bashing runs afoul of the fact that Title VII does not ban discrimination based on sexual orientation. 209 Whether it should is another question.

205. See Oncale, 118 S. Ct. at 1002.
206. See id.
207. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.11(a) (1996).
208. See Oncale, 118 S. Ct. at 1002.
209. See Erin J. Law, Oncale v. Sundowner Offshore Services, Inc.: The United States
Though gay-bashing fits the most common sense meaning of "discrimination," the irony is that Oncale may exclude gay-bashing from Title VII actionability. The Court's opinion by Scalia stresses that same-sex actionability lies for homoerotic advances and also for hostile abuse based on the victim's male or female status. This cryptic emphasis hints by omission that gay-bashing would not be actionable because it involves hostile abuse based on the victim's sexual preference, not male or female status as such. Justice Thomas's one-sentence concurrence highlights as the reason for concurring the Court's insistence that same-sex actionability lies only for discrimination "because . . . of sex." Both Thomas and the Court's opinion covertly invite lower courts to exclude gay-bashing from the realm of discrimination based on sex. This will be painful irony for gay and lesbian rights groups who submitted amicus briefs for the plaintiff in Oncale.

Mistreatment between straights using sexual talk or behavior seems furthest from any established meaning of "discrimination." It entails neither group-based contempt nor erotically-motivated sex selectivity. It is hard to see why sex-coded words or behavior by themselves turn mistreatment into discrimination. If employers may be held liable for all sex-coded mistreatment, why not for all employee mistreatment of each other? Why single out sex-coded mistreatment? The answer that Title VII bans discrimination based on "sex" is unconvincing. That fixation on the word "sex" obfuscates the central focus: discrimination.

Oncale is perplexing on whether abusive sexual "horseplay" among straights is actionable under Title VII. It cautions explicitly that "male-on-male horseplay" should not be deemed actionable. But that is in the context of warning that there should be no actionability for harassment not sufficiently severe and pervasive enough to be abusive. Oncale itself involves exactly such abusive male-on-male
The plaintiff was forced to touch the privates of other men, was threatened with rape, and had a bar of soap pushed up his anus. The Court’s ruling suggests that this is actionable, but leaves ambiguities at several levels.

*Oncale* may leave the lower court discretion to find that the abuse alleged in the case was not “because of... sex.” On remand, the lower court could find that the harassment was not inflicted “because of... sex.” It could find that the plaintiff was abused because his tormentors thought him gay, and that this is not discrimination “because of... sex.” Or it could rule that he was abused because his tormentors just disliked him personally. If the very fact that he is male by itself makes any abuse of him “discrimination... because of... sex” then any abuse of anyone by anyone becomes actionable sex discrimination. On that view, the Court’s attempted restriction of actionability to “discrimination... because of... sex” would be rendered meaningless and null. The Court’s “because of... sex” limitation is clearly designed to exclude actionability for some same-sex harassment scenarios. But exactly what it excludes is unclear.

Gay-on-gay erotic overtures entail “discrimination” in the form of gender-selective attraction and thereby seem close to Title VII’s now-accepted theory of sexual advances as discrimination. However, insofar as the perpetrator knows the target’s homosexual orientation, such advances seem to involve selectivity based on sexual orientation as much as on male or female status. Therefore, actionability might again confound the axiom that Title VII does not ban sexual orientation discrimination. Nevertheless, *Oncale* suggests that unwelcome gay-on-gay overtures would be actionable, because a gay harasser would not pursue a member of the opposite sex.

Unwelcome gay-on-straight erotic overtures square easiest with established Title VII theory. *Oncale* unmistakably rules them actionable. They involve selectivity based on attraction, not the target’s sexual orientation, at least not the actual one. Therefore,
gay-on-straight overtures seem the scenario for actionability easiest to square with current doctrine.

Complexities explored in the foregoing paragraphs all stem from a context of conceptualizing varieties of same-sex harassment under a heading of sex discrimination. In the Title VII context, actionability for same-sex harassment turns entirely on the plausibility of characterizing it as sex discrimination. In the world of § 1983, problems of same-sex harassment and its actionability could be approached from a very different standpoint because there need be no tie to the concept of sex discrimination.

Therefore, under § 1983, actionability for at least some same-sex harassment is less convoluted than under Title VII. Harassment need not qualify as sex discrimination in order to be actionable under § 1983. Harassment under color of state law can be viewed as a deprivation of constitutionally protected equality or liberty, even if it does not count as sex discrimination.

Discrimination based on sexual orientation in itself violates constitutional equal protection. Though sexual orientation is not recognized as a heightened-scrutiny class like sex, the equal protection clause does not protect only heightened-scrutiny classes. It bans irrational discrimination against any identifiable class. If gays are an identifiable class, they are protected by the equal protection clause from discrimination without rational basis.

Rational basis means a legitimate state purpose. Because harassment has no legitimate state purpose, it violates equal protection when based on a target’s sexual orientation. Therefore, gay-bashing counts as discrimination and should be actionable under § 1983, even if it is not actionable under Title VII. Conversely, gay-on-straight erotic overtures hardly count as anti-gay discrimination. Neither does straight-on-straight abusive sex horseplay. Gay-on-gay overtures present a mixed picture as anti-gay discrimination. If the inherent confusion in viewing erotic overtures as discrimination is ignored under accepted Title VII doctrine, gay-on-gay overtures count as anti-gay

224. See id. at 1002.
225. See id.
226. See id.
229. See id. at 635.
230. See id.
231. See id. at 633-34.
232. See id. at 631-32.
discrimination, violate equal protection, and should therefore be actionable under § 1983.

Aside from equal protection, there is a more fundamental sense in which all same-sex harassment may violate the Constitution. Harassment of any sort under color of law infringes substantive due process rights. Same-sex harassment, like all harassment, should be actionable as a due process personhood violation.

III. DELINEATING EMPLOYER, SUPERVISOR AND MUNICIPAL LIABILITY

A. Comparative Contours of Harassment Liability

Because Title VII lodges liability against “employers,” courts have largely refused to recognize actions against individual employees who perpetrate harassment. Title VII’s assessment of liability against firms rather than harassers is its most telling and troubling aspect. By contrast, under § 1983, courts inquire first about liability against individual “persons” who engage in or countenance harassment “under color of law.” Meanwhile, insofar as it bars respondeat superior, § 1983 makes it harder than Title VII does to lodge liability against organizational entities. These differences provide food for thought regarding the cogency of harassment liability structures.

Under loose and confused applications of “agency” principles, Title VII holds employers liable for harassment perpetrated by employees. This employer liability tortures normal principles of vicarious liability, especially in hostile environment harassment. Because harassment entails intentional misconduct serving no employer interest, it falls outside normal principles for attributing liability from

233. See Romer, 517 U.S. at 631-36.
234. See Chatman v. Gentle Dental Ctr. of Waltham, 973 F. Supp. 228, 239 (D. Mass 1997). “[T]his court weighs in with the nearly-unanimous view of the federal circuits that an employee/supervisor, who does not otherwise qualify as an ‘employer,’ cannot be held liable under Title VII.” Id.
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perpetrator to firm. Nevertheless, Title VII allows attribution of harassment to firms both when the harasser is the grievant’s supervisor and when he is a non-supervisory peer, though the attribution may be stricter for supervisors than for peers. Title VII’s attribution of harassment from perpetrator to firm is anomalously broad from the standpoint of vicarious liability principles.

This anomaly is highlighted by very different jurisprudence found under § 1983. Courts have ruled that peer harassers cannot be held liable under § 1983 because they do not act “under color of law” when harassing. Courts reason that peer harassers act in pursuit of their own personal interests, not any state purpose. For this reason, they cannot be regarded as wielding state authority, therefore do not act “under color,” and cannot be held liable under § 1983. Generalized, such logic could prove far too much, implying that no state employee misconduct could ever be “under color” since misconduct does not serve state interests. Though courts have rejected this logic as a general proposition, they find it persuasive in the harassment context because the intentional personal purposes behind harassment seem to separate it sharply from state purposes or interests.

Such logic, barring peer liability under § 1983, could naturally be applied under Title VII to bar vicarious attribution from harassers to firms. If harassers do not act “under color” in § 1983 analysis because they do not serve state purposes or interests, they likewise do not serve employer purposes or interests. Therefore, vicarious liability under Title VII seems misplaced. The divergence between § 1983 “color of law” and Title VII vicarious liability analysis is striking because the inquiry is so similar. Stressing the intentional personal purposes behind harassment, as in § 1983 jurisprudence, highlights the strangeness of the Title VII vicarious liability doctrine holding firms liable for intentional

239. See Noland v. McAdoo, 39 F.3d 269, 271 (10th Cir. 1994) (holding that for a § 1983 claim, defendant must be a supervisor or otherwise exercise state authority over plaintiff); see also Murphy v. Chicago Transit Auth., 638 F. Supp. 464, 467-68 (N.D. Ill. 1986) (holding that there is no § 1983 liability among state co-workers because sexual harassment is unrelated to “powers and duties” of defendants’ jobs or to “state authority” conferred on defendants).
241. See Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992).
242. See Noland, 39 F.3d at 271 (stating that for a § 1983 claim, defendant must be a supervisor or otherwise exercise state authority over plaintiff); see also Woodward, 977 F.2d at 1400 (discussing cases that have not found liability under § 1983 against a co-employee for harassment when the harassment did not involve the use of state authority or position).
and personal employee misconduct.

There is an irony to be glimpsed here. First, §1983’s color of law doctrine highlights the strangeness of employer liability under Title VII and points to the harasser himself as the appropriate liability target. But the “color of law” doctrine then insulates the harasser from liability, at least under § 1983. Recourse against him lies in the field of common law intentional tort.

Further anomalies emerge from examining “color of law” analysis for supervisor harassment liability. Courts have held supervisors liable for harassment under § 1983 by virtue of two different theories: for perpetrating harassment themselves, and for failing “under color of law” to prevent harassment by subordinates. The first anomaly is to regard supervisors who harass to be acting “under color,” while peer harassers are ruled not to be acting “under color.” Supervisor harassers, pursuing intentional and personal purposes, are de-linked from state interests just as much as peer harassers, and therefore seem to fall outside “color of law” just as much. The only basis for different treatment is to imagine that supervisor harassers abuse power over grievants conferred by the state, while peer harassers do not. That distinction holds no water in true agency analysis, but posits instead that the supervisor’s “office” goes with him whatever he does on the job. Such a principle would obviously not apply to murder, theft, or other forms of turpitudinous misconduct. Why harassment should get unique treatment is puzzling. Hence, the supervisor/peer distinction for color of law analysis is at least elusive and perhaps illusive.

There is a second type of “supervisor” liability under § 1983, referring not to the victim’s supervisor but to the harasser’s. Supervisors may be held liable for failure to prevent harassment by their subordinates. The difference between a supervisor’s failure to forestall harassment by a subordinate and his harassment of a subordinate has not been made significant for “color of law” analysis, but it should be. A supervisor’s failure to forestall harassment goes not to his personal agenda, but to his exercise of state-conferred responsibility over subordinates. Supervisors should prevent subordinate public employees from harassing other workers, and anyone else for that matter. Misfeasance in this supervisory responsibility occurs “under color”

243. See Wise, 928 F. Supp. at 368.
244. See id.
245. See Anderson, supra note 235, at 67.
246. See id.
even if acts of harassment themselves because of their intensely personal motivation do not. Ironically, supervisor liability under § 1983 makes more sense for failure to prevent harassment than for active harassment.

Supervisor liability under § 1983 for failure to prevent harassment invites comparison with Title VII employer liability. In this dimension, supervisors in § 1983 doctrine are more analogous to employers than to supervisors under Title VII because they can be named as defendants and because their responsibility, rightly understood, sounds in duty to prevent. The key question is what standard should define the scope of duty breached by a failure to prevent. Both Title VII and § 1983 establish duties by some parties to prevent harassment by others and confront the same issue: how broad that duty to prevent should be. But they give very different answers.

Defining the scope of any duty to prevent harm inflicted by others requires attention to at least three general factors: egregiousness of harms to be prevented, the duty-bearing party’s capacity to prevent such harms, and negative effects of successful or unsuccessful prevention efforts. Depending on variations in these factors, duties to prevent can be wisely set according to standards ranging from lax to stringent. Such varying standards are traditionally differentiated from each other by virtue of distinct levels of culpability established as prerequisites for stating claims against duty-burdened parties. The familiar menu of possible standards for duties to prevent, ranged along a spectrum of culpability levels, high to low, include: (1) malice or specific intent; (2) actual knowledge; (3) reckless disregard; (4) gross negligence; (5) deliberate indifference and similar standards such as negligence, foreseeability, constructive knowledge, knew or should have; and (6) strict duty (any occurrence represents breach of duty to prevent). Along this spectrum, the scope of the duty to prevent moves from narrow to broad to absolute.

Numerous § 1983 decisions wrestle with the scope of supervisor liability for workplace harassment. There is clarity at two poles and fuzziness in between. At one pole, supervisors are liable for harassment they perpetrate directly upon subordinates, even though such acts arguably fall outside color of law. At the other pole, supervisors are not strictly liable for harassment committed by subordinates. Less

247. See Wise, 928 F. Supp. at 368.
clear is where the line of liability runs over the murky middle ground. What is the scope of supervisor duty to prevent harassment by subordinates?

Decisions are scattered across this middle terrain. Some rulings, strongly pro-defendant, allow supervisor liability only for active participation or encouragement, very close to direct supervisor perpetration. Other decisions and holdings require actual knowledge of the harassment. Other decisions, more plaintiff-friendly, allow supervisor liability based on constructive knowledge. All these approaches suggest some affirmative supervisor duty to prevent, premising liability on culpable failure to prevent. They differ on the scope of that duty. It is conceivable, however, that a consensus could emerge. An incipient consensus in the bulk of the cases is toward a limited affirmative duty to prevent. Such a limited duty could aptly be captured by a standard of “deliberate indifference.” That murky standard can perhaps best be understood as the failure to prevent in circumstances where capacity to prevent is high and its burdensomeness is low. It lies between ordinary negligence and outright malice: the indifference must be deliberate, not inadvertent, but the deliberateness need not equal malice. Whether and how deliberate indifference differs

F.2d 1469, 1478 (3d Cir. 1990).

249. See Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996) (finding that there must be a causal connection, meaning encouragement, condemnation, acquiescence, or deliberate indifference between the supervisor and the harassment in order to hold the employer liable); Cross v. State of Alabama, 49 F.3d 1490, 1508 (11th Cir. 1995) (finding liability only when the supervisor personally participates or there is a “causal connection” between the supervisor’s actions and the violation); Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988) (requiring personal participation of supervisors to impose liability); Farrell v. State of New York, 946 F. Supp. 185, 195 (N.D.N.Y. 1996) (finding that personal involvement by supervisor, is defined as: “(1) direct participation, or (2) failure to remedy the alleged wrong after learning of it, or (3) creation of a policy or custom under which unconstitutional practices occurred, or (4) gross negligence in managing subordinates”); Wise v. New York City Police Dep’t, 928 F. Supp. 355, 368 (S.D.N.Y. 1996) (holding that supervisors may be held liable “if they are personally involved in actions that cause the deprivation of constitutional rights”); Redman v. Lima City Sch. Dist. Bd. of Educ., 889 F. Supp. 288, 295 (N.D. Ohio 1995) (requiring actual encouragement or direct participation in the incident to impose liability on supervisor).


from gross negligence, recklessness, and shock to the conscience is at best obscure.

Defining the duty to prevent harassment by a deliberate indifference standard nevertheless seems intuitively fair because it respects inherent limits on capacities to prevent willful misconduct by human beings and also because it limits liability pressure which could compel duty-burdened parties to institutionalize onerous surveillance and control over subordinates. The deliberate indifference standard also resonates with § 1983 jurisprudence on other issues. It has at least three pertinent antecedents.

First, deliberate indifference is the liability standard applied to government entities for failure to train officials and employees against constitutional infringements. Liability based on failure to train implies or assumes a governmental duty to prevent constitutional violations by officials/employees. “Deliberate indifference” defines that duty’s scope.

Second, deliberate indifference is the liability standard often applied for individual violators of substantive due process liberty rights to be free from personal injury. The right to be free from state-imposed sexual harassment is arguably such a due process right, a theme elaborated above.

Third, deliberate indifference has already been deployed in some harassment cases on another issue: as a synonym for discriminatory intent, which must be proved in order to establish deprivations of constitutional equal protection rights arguably violated by harassment under color.

Synthesizing and abstracting from these sources suggests that deliberate indifference may emerge as the master harassment jurisprudence under § 1983, defining prevention duties for both government entities and supervisors. This development is preconditioned by the proliferation of deliberate indifference standards already established in § 1983 jurisprudence and also by caution over imposing broad § 1983 duties to protect citizens from third-party harm. Deliberate indifference as a standard establishes an affirmative duty to forestall harassment but carefully limits its scope. Moreover, “deliberate indifference” is morally evocative in defining prevention failures egregious enough to warrant actionability.

255. See Murphy v. Chicago Transit Auth., 638 F. Supp. 464, 469-70 (N.D. Ill. 1986) (holding that the discriminatory intent requirement is satisfied where the supervisor was “deliberately indifferent” to sexual harassment of subordinate).
In a liberal democracy, the state and its officialdom should not be deemed comprehensively responsible for citizen well-being, yet should not be deliberately indifferent to preventable harm. Even in the workplace, where the state’s duty of care could arguably be tightened in light of notions that employment constitutes a “special relationship” or is quasi-custodial, a limited duty has much to recommend it. A heightened duty could saddle officials with distracting burdens to monitor and regulate complex social interactions in the workplace and to devise preventive interventions. It is not obvious that harassment merits such solicitude more than other evils that may befall citizens or state workers, nor that municipalities and taxpayers should constitutionally be required to shoulder the costs. Forestalling harassment, like forestalling malicious misconduct of any sort, is difficult. There are many other things municipalities need to do.

The possible emergence of deliberate indifference as the duty to prevent standard under § 1983 is striking because that standard is less stringent than either strict duty or negligence—the only existing Title VII standards on vicarious liability for employee harassment. Instead of viewing Title VII standards in terms of vicarious liability, we can view them as duty to prevent standards. This makes extra sense when recalling the strangeness of applying vicarious liability to acts of harassment sharply removed from any employer purpose or interest. Though confusingly discussed as vicarious liability, employer liability under Title VII makes far more sense when understood in terms of a duty to prevent. Where the harasser is the victim’s supervisor, some courts apply a strict employer duty to prevent while others apply a negligence standard. A negligence standard also operates where the harasser is the victim’s peer. The Title VII standards impose a prevention duty stricter than § 1983’s, requiring less culpability to establish liability.

B. General Norms for Employer Duty to Prevent

This discrepancy between Title VII and § 1983 standards provokes reflection on the pros and cons of stringent and lenient duties to prevent. If containing harassment were the only concern, a stringent duty to prevent would recommend itself. However, there are serious

257. See id. at 494.
disadvantages to a stringent duty and its advantages may be less than they seem. A stringent duty places employers under liability pressure to regulate, monitor, propagandize, and investigate work forces. These practices may be onerous to both employers and workers. Furthermore, there is great doubt whether they successfully curtail harassment, especially the most egregious harassment. If tightened control over workforces has slight impact on egregious harassment, its negative consequences should be weighed heavily in choosing a standard for duty to prevent. Less stringent may be wiser.

Imposing a prevention duty on employers will not curb harassment unless employers routinely hit harassers with severe sanctions like discharge. But it is difficult for employers to gauge misconduct and discipline it in proper degree. Overly harsh and intrusive anti-harassment rules, inquests, and sanctions will produce repressive and repressed workplaces. On the other hand, insufficiently harsh and intrusive prevention will fail to curb harassment or protect firms from liability. Firms can scarcely hope to put a dent in real harassment without harshness and intrusiveness severe enough to cast a repressive pall over workplace climates. Moreover, serious problems attend the harassment investigations employers perform to protect themselves from liability exposure created by broad duties to prevent.

First, employers may have strategic interests in the outcomes of such investigations, leading to bias. Deterrence of harassment through this indirect mechanism—employer liability and employer-sponsored sanctions—may produce biases of over-inclusiveness or under-inclusiveness, excesses of severity or leniency. Employers may sanction egregious incidents too lightly so as to downplay their seriousness and perhaps avoid liability, or may sanction petty incidents too heavily so as to prove anti-harassment zeal, again in order to avoid liability. They may also sanction egregious incidents lightly when the harasser is high in value to the firm and sanction petty or unproved incidents heavily when the real or alleged culprit is low in value. This gamesmanship is not conducive to optimal deterrence of egregious harassment nor to proportionality between the harasser’s degree of wrongdoing and his severity of punishment. Rational deterrence is more likely to emerge from suits filed directly against harassers than from the roundabout and imprecise operation of employer duties to prevent. The wisdom of stringent employer duties to prevent is therefore questionable.

Second, broad liability exposure and the desire to escape it may drive employers to conduct investigations that violate privacy, defame reputations, disrupt workplace friendships and comity, and flout due process norms of notice, relevance, hearsay, privilege, search, and self-incrimination. No law before harassment law ever forced employers to inquire so routinely into employee misconduct. And there are no legal rules to govern or control how they do it. The implications of having employers engage systematically in quasi-legal inquests without legal constraints deserve far more attention than they have received so far. Again, this calls into question the wisdom of stringent employer prevention duties.\textsuperscript{259}

Since the duty to prevent issues differ little between Title VII and § 1983 contexts, a unifying standard would make sense. If so, for reasons just discussed, the Title VII standard should be relaxed to comport with § 1983’s “deliberate indifference” threshold. In other words, employers should not be liable under Title VII without proof of deliberate indifference to harassment in the workplace. Though this would make Title VII recovery tougher, it would not cause increased harassment if the stringent prevention duty does not curb harassment anyway. Under a less stringent employer duty, more harassment targets would be left without redress against employers, but victims of egregious harassment could find redress in suits filed directly against harassers. Such suits, for intentional infliction of emotional distress and other claims, would yield stronger, more precise deterrence than Title VII’s expansive prevention duty produces and would ease pressure for intrusive workplace control and surveillance.\textsuperscript{260}

A deliberate indifference approach would aptly define the scope of employer duty to prevent and could clear the underbrush away from current Title VII doctrine, with its tangled rules of faux-vicarious liability and inquiries into adequate preventive steps. Factors currently treated under these discrete doctrines of attribution and prevention could be folded into a unified fact-sensitive inquiry into deliberate indifference. As in § 1983, deliberate indifference would imply some affirmative duty to prevent, but within tightly circumscribed boundaries, sensitive to the costs of prevention measures, their limited effectiveness, and their negative side effects.

A circumscribed duty to prevent, encapsulated in a deliberate indifference standard, would have the further virtue of roughly matching

\begin{itemize}
\item \textsuperscript{259} See id. at 411-16.
\item \textsuperscript{260} See id. at 389-93.
\end{itemize}
the prevailing doctrine on employer duty to prevent employee intentional torts. Intentional torts by employees normally lie outside the scope of employment, and are therefore not subject to vicarious liability. However, they can yield employer liability non-vicariously, if the employer breaches a direct duty to prevent them. Employers have such a direct duty under doctrines of negligent hiring, retention, and supervision. These doctrines tell employers they must keep employees from using their job positions to inflict tortious harm.

This direct employer duty is not strict, or else it would equal vicarious liability, thereby flouting the rule that employee intentional torts fall outside the scope of employment. Instead, duty is defined by a negligence norm, suggested in the doctrinal names themselves: negligent hiring/retention/supervision. This negligence norm imposes a limited employer duty to prevent employee use of job positions to inflict intentional harm. The negligence norm is more limited than strict duty, but may not be limited enough. It may allow creeping duty expansion.

Negligence norms impose liability based on foreseeability and/or constructive knowledge. Under such norms, firms who know or should know of an employee’s dangerous proclivities are liable when he inflicts harm. This may yield liability broad enough to burden firms heavily in their employee management practices. Avoiding undue burdens should be a key factor in setting standards of care. Fortunately, employer duties under negligent hiring/retention/supervision doctrine may be narrower in practice than the foreseeability/constructive knowledge standard suggests. Decisions imposing negligent hiring/retention/supervision liability typically stress actual employer knowledge of dangerous employee proclivities. If the liability standard is closer to actual than constructive knowledge, the duty imposed is relaxed. This relaxed duty acknowledges employer burdens in predicting and forestalling employee misconduct.

However, an actual knowledge standard may be too narrow. Requiring proof of actual knowledge may encourage employers to hide

262. See id. at 793.
263. See id. at 788-89.
266. See id.
267. See id. at 1470 (citing Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983)).
268. See Hager, supra note 258, at 428-29.
in willful ignorance of employee proclivities. A balanced approach, weighing employer capacity to foresee and prevent employee torts against the burdens of doing so, lies between constructive and actual knowledge. Deliberate indifference falls in that middle zone. Tort jurisprudence on negligent hiring/retention/supervision seems to converge around that standard. That is a good thing. An anti-harassment duty tuned to that standard is also a good thing.

C. Municipal Liability

Under § 1983, harassment victims may claim liability against the municipality or other state political subdivision they work for.269 Under current law, of course, municipalities may also be answerable as “employers” under Title VII.270 From the standpoint of liability doctrine, plaintiffs will generally find it far easier to win under Title VII than under § 1983. There are, nevertheless, reasons why plaintiffs may wish to plead § 1983 claims against municipal employers. First, § 1983 claims avoid EEOC administrative process requirements and tight filing deadlines for Title VII claims.271 Second, § 1983 claims avoid limits on compensatory and punitive damages imposed under Title VII.272 Third, certain categories of public employees may be excluded from protection under Title VII.273

Title VII liability is easier to establish than § 1983 municipal liability due to the greater stringency of duty it imposes to forestall employee misconduct.274 Under Title VII, employers are held to strict liability,275 a facsimile of respondeat superior for supervisor harassment in some courts or else constructive knowledge liability.276 This is slightly weaker than respondeat superior for supervisor harassment in some courts and for peer harassment.277 Courts also inquire whether an

271. See id. §§ 2000e-5(e), -5(e)(1) (listing administrative process requirements and filing deadlines).
277. See Jansen, 123 F.3d at 498.
employer failed to take effective remedial steps.\textsuperscript{278}

By contrast, §1983 law explicitly repudiates municipal respondeat superior liability and municipal liability based on negligence.\textsuperscript{279} Municipal liability under § 1983 requires—in theory at least—active infringement of a constitutional right: a custom, policy, or practice giving rise to the deprivation.\textsuperscript{280} There are said to be three distinct ways to establish proof of such a custom, policy, or practice.\textsuperscript{281} The first, and rarest, is by proof of an explicit policy.\textsuperscript{282} The second is by an act or decision by an official with policymaking authority over the matter in question.\textsuperscript{283} The third is by "deliberate indifference" in failure to forestall a particular infringement, usually couched as failure to train employees how to avoid it.\textsuperscript{284} The basic drift is to require active municipal wrongdoing, not merely the passive employer culpability actionable under Title VII.\textsuperscript{285}

In \textit{Faragher v. City of Boca Raton},\textsuperscript{286} for example, women lifeguards harassed by their supervisors brought a medley of claims against their municipal employer and several of its employees.\textsuperscript{287} Plaintiffs sued the municipality only under Title VII, not § 1983, even though they asserted § 1983 claims against the individual employees.\textsuperscript{288} There was no point in naming the municipality under § 1983 because the Title VII claim was easier to prove. Even more telling is the decision in \textit{Jarman v. City of Northlake}.\textsuperscript{289} There, a city's alleged five-month delay before responding to an employee's harassment complaint was ruled sufficient to establish Title VII liability for failure to take prompt remedial steps,\textsuperscript{290} but insufficient in itself to establish a municipal custom or policy of non-responsiveness to harassment.\textsuperscript{291}

Even though \textit{Jarman} suggests that long delay may not by itself suffice to establish municipal liability under § 1983, a crucial

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Jacksonville Shipyards}, 760 F. Supp. at 1531.
\item See \textit{Starrett v. Wadley}, 876 F.2d 808, 818 (10th Cir. 1989).
\item See \textit{Howard}, 935 F. Supp. at 860.
\item See \textit{id.}
\item See \textit{id.}
\item See \textit{id.}; see also \textit{Starrett}, 876 F.2d at 818 (requiring official to be responsible for establishing final government policy before municipality can be held liable).
\item See \textit{id.} at 385.
\item 76 F.3d 1155 (11th Cir. 1996), \textit{rev'd}, 118 S. Ct. 2275 (1998).
\item See \textit{Faragher}, 76 F.3d at 1158.
\item See \textit{id.}
\item 950 F. Supp. 1375 (N.D. Ill. 1997).
\item See \textit{Jarman}, 950 F. Supp. at 1379.
\item See \textit{id.} at 1382.
\end{enumerate}
\end{footnotesize}
pro-defendant fact was that remedial steps were eventually taken.\textsuperscript{292} Other decisions make clear that failure to take remedial steps can be construed as constituting policy so as to establish § 1983 municipal liability.\textsuperscript{293} This jurisprudence co-exists uneasily with doctrine that municipal liability turns on active perpetration. This passive/active tension invites courts to assess actionability based on fact-intensive inquiries into severity and pervasiveness of harassment, degrees of municipal knowledge, and existence of anti-harassment policies.\textsuperscript{294} This, of course, sounds much like Title VII harassment jurisprudence. Municipalities with actual knowledge of harassment episodes clearly stand under a liability cloud if they fail to take ameliorative steps.\textsuperscript{295} However, § 1983 and Title VII are separated, at minimum, by the difference between deliberate indifference and constructive knowledge.\textsuperscript{296}

\textbf{D. Municipal Deliberate Indifference}

I argue above that municipalities commit a due process personhood violation when they manifest deliberate indifference toward employee harassment. Of course, the actual law, § 1983 law, has treated harassment as a discrimination offense.\textsuperscript{297} Under that rubric, a jurisprudence of municipal harassment liability has begun to emerge. I wish to examine that jurisprudence and offer normative comments on it. For these purposes, the difference between the personhood and discrimination models is not terribly important. I begin with a quick summary of municipal liability issues likely to arise on a recurring basis, and how I think those issues should be handled. I then explore some of them in more detail.

At minimum, municipalities must ensure that harassment can safely be reported to disinterested supervisors or authorities and that such parties will take non-burdensome steps to stop it. In a sense, that is all there is to say about municipal duty. To the extent that municipalities fail to provide for safe and effective reporting and fail to take non-burdensome steps to stop harassment, they convict themselves of

\begin{itemize}
  \item \textsuperscript{292} See id.
  \item \textsuperscript{294} See Farris, 924 F. Supp. at 1048-49.
  \item \textsuperscript{295} See Woodward v. City of Worland, 977 F.2d 1392, 1400 (10th Cir. 1992).
  \item \textsuperscript{296} See id.; Jacksonville Shipyards, 760 F. Supp. at 1529.
  \item \textsuperscript{297} See Farris, 924 F. Supp. at 1048; Jarman, 950 F. Supp. at 1380.
\end{itemize}
deliberate indifference. Three subsidiary questions present themselves, however. One, should anti-harassment policies preclude municipal liability? Two, should municipalities be liable for failure to train workforces against harassment? My answer to both these questions is no. Three, what analysis should be used for determining whether unconstitutional acts by officials constitute official policymaking?

E. Anti-Harassment Policies

It would be unfortunate for courts to fall for the foolish proposition that municipalities can meet their anti-harassment obligations simply by promulgating policies. At least one court has made that mistake. In Carrero v. New York City Housing Authority,298 a woman subjected to repeated sexual advances by her supervisor brought several claims, including a § 1983 claim against her municipal employer.299 The court curtly dismissed that claim, ruling that the harassment could not be attributed to the municipal agency because “its stated policies are explicitly nondiscriminatory.”300 Remarkably enough, the court saw no need to analyze those policies or even describe them.301 Neither did it bother to ask whether those policies were earnestly or effectively implemented.302 In the court’s mind, the sheer existence of stated anti-harassment policies nullified per se any allegation that harassment could be municipal “policy.” The defect in this reasoning is glaring.

It is well-established in § 1983 jurisprudence that courts should inquire into municipal “custom” and “practice,” not just policy.303 One reason for this is simply that an organization’s real policies may depart from its stated policies. A per se defense based on stated anti-harassment policies encourages municipalities to promulgate such policies for the record in order to defeat liability, but also encourages lax execution since mere promulgation provides full liability protection. A per se defense may reward deliberate indifference, not punish it. The law should instead seek to encourage active concern. On the other hand, absence of a stated anti-harassment policy should not be deemed deliberate indifference per se. Instead, stress should be laid on specific organizational shortcomings: reporting obstructions, fear of retaliatory

298. 890 F.2d 569 (2d Cir. 1989).
299. See Carrero, 890 F.2d at 574.
300. Id. at 577.
301. See id. at 570.
302. See id.
303. See Farris, 924 F. Supp. at 1048.
discharge, and failures to discipline misconduct.

F. Failure to Train

Failure to train a workforce in avoiding unconstitutional acts has long been recognized as a ground for municipal liability under § 1983.\(^{304}\) At least one ruling has approved such a theory with respect to harassment.\(^{305}\) However, liability for training failure is not a good idea with harassment. The paradigm for proper application of training failure liability is with police schooling on constitutional law and proper practices for searches, arrests, force, and the like. Training deals with essentials of proper job execution, deficiencies of which tend to cause constitutional infringements. Anti-harassment training has scant similarity to this because anti-harassment training has little or nothing to do with reducing harassment. Harassment stems not from poor job execution but from the malicious or callous proclivities of harassers. It is caused by harasser turpitude, not by failure to train. Failure to train claims with respect to harassment should be dismissed because it is unreasonable to conclude that deficient training causes harassment. No one can know what "training" might prevent deliberate misconduct.

An anti-harassment training duty would snarl municipalities with a vague and undefined task unrelated to delivery of good government and services. There would be other negative effects as well. First, it would entrench the notion that training can successfully suppress harassment, even though anti-harassment training probably achieves little except creating jobs for dubious consultants.\(^{306}\) Second, it would place municipalities under enormous pressure to sponsor training (at taxpayer expense) for their patronized workforces. Third, it would bring about the equivalent of respondeat superior liability, because any harassment committed by employees could produce liability for a municipality that had failed to train. Preclusion of respondeat superior liability is a bedrock of § 1983 jurisprudence (for better or worse), but failure to train liability would erode that rock wherever harassment training was absent. Fourth, it would suck major resources, experts and all, into litigating the adequacy of any training that did get offered. This huge inquiry would need to evade and deny the acid question lodged in its


\(^{306}\) See Judith I. Avner, Sexual Harassment: Building a Consensus for Change, 3-SPG KAN. J.L. & PUB. POL'Y 57, 74 (1994). There are assertions in the literature that anti-harassment training is effective, but such assertions lack empirical substantiation. See id.
heart: whether there is or could be training adequate to suppress harassment.

If skepticism over anti-harassment training is warranted under § 1983, it is warranted under Title VII as well. Title VII doctrine—with its faux-vicarious liability and defenses based on adequate remedial steps—will in coming years build more and more pressure to litigate the existence and adequacy of anti-harassment training. Sensitivity training firms already thrive in the market for anti-harassment programming created by Title VII liability.\textsuperscript{307} Among the marvels enterprise has produced for this market-driven and corporate-sponsored moral education are videos, CD-Rom exercises, and “role-playing” sessions.\textsuperscript{308} I have three comments on all this: (1) it’s insipid; (2) it’s demeaning; and (3) it’s futile. Aside from horse sense about human nature, there is at least some empirical evidence that anti-harassment training does not help much.\textsuperscript{309} Such training has been common in federal workplaces for at least a decade, yet harassment rates appear to be unchanged and no correlation is discernible showing reduced harassment in bureaus where training has occurred.\textsuperscript{310} If such training is fruitless, costly, and even harmful, Title VII harassment doctrine needs serious reconsideration.

\textbf{G. Final Policymaking Authority}

Courts have grappled with questions of whether, when, and how unconstitutional acts of single officials establish municipal policy for purposes of assessing § 1983 liability. It is hard to establish municipal liability if one can never impute municipal policy from the acts and decisions of officials. On the other hand, over-liberal imputation of policy from acts by officials verges on respondeat superior liability, impermissible under § 1983. The question-begging test, often invoked for assessing when an official’s acts constitute policy, is whether he has exercised the municipality’s “final policymaking authority” over the matter. This test is silly putty in the hands of courts deciding whether


\textsuperscript{308} See \textit{id}.


\textsuperscript{310} See \textit{Sexual Harassment in the Federal Government}, supra note 309.
municipalities should stand liable for particular bad acts by officials. Several § 1983 decisions have struggled with this issue in the specific context of harassment. Their reasoning falls short, but this is partly because the issue and test are inherently ambiguous. In Howard v. Town of Jonesville, harassment came at the hands of the town mayor. Since the mayor is a town’s “ultimate policymaker,” the court reasons quite simply that his acts of harassment while mayor constitute municipal policy. However, this implies that any wrong he might commit (in the workplace at least) represents policy. The line separating this from respondeat superior is thin indeed. A better analysis might be as follows: “policymaking” occurs only when an official mobilizes the peculiar powers of his specific office in executing some action. Contrast a mayor who will not appoint black department chiefs with one who will not hire blacks for his personal staff. The former is municipal policymaking, but the latter arguably not because it does not wield distinctive mayoral prerogatives. Though the mayor should be liable personally for all his racism under color of law, including all hiring decisions, his personal staffing decisions do not in themselves constitute municipal hiring policy. Similarly, it is also not municipal policymaking when a mayor harasses, using no peculiar mayoral power but only the general power of any supervisor over his staff.

Under Howard’s reasoning, Clinton’s alleged harassment of Jones would constitute Arkansas state policy, by virtue of Clinton’s status as governor. No claim on this ground can be recognized because states are immunized from § 1983 suits. Still, it is interesting to ponder what the test for Clinton as a “state policymaker” might properly be, if Arkansas did not have immunity. If his misdeeds with employees do not inherently constitute “official policymaking,” what about his use of state employees or other state resources in committing them? I suggest above that such use, if not merely incidental, would bring his conduct under “color of law.” Should it also be deemed “official policymaking”?

Imputing harassment as municipal policy may ironically make more sense for lower-level supervisors than for high-ranking officers. If no policy has been set above, a supervisor’s authority over a particular staff may be a key aspect of his office. If so, discrimination or harassment by supervisors becomes policymaking for that office.

313. See id.
In *Williams v. District of Columbia*\(^{314}\) and *Murphy v. Chicago Transit Authority*,\(^{315}\) courts made imputations of municipal policy from supervisor acts of harassment. Neither ruling offers very painstaking analysis. *Williams* features one boilerplate paragraph of imputation analysis, invoking doctrines such as: “‘plausible nexus’ between the challenged conduct and the authority conferred”; whether a supervisor had “final policymaking authority” under D.C. law; and whether the harasser’s actions stemmed from “the scope and nature of the authority that the District has vested in her.”\(^{316}\) Without further ado, the court quickly validates the plaintiff’s claim for municipal imputation. Though the supervisor’s policymaking authority is conventionally treated as an issue of law, *Williams* treats it as a triable issue of fact.\(^ {317}\)

By contrast with *Williams*, *Murphy* makes little of doctrinal formulas, dwelling instead on logical and factual analysis. The reasoning is unconvincing, combining logical sleight-of-hand with a dubious factual inference. The court starts by noting that claims in the case have been validly stated against individual supervisors for deliberately indifferent failure to stop harassment by the plaintiff’s peers.\(^{318}\) Strangely, the court suggests that such indifference constitutes official policymaking because the supervisors were deliberately indifferent as policymakers to their own deliberate indifference as violators, commenting: “Precisely because the underlying constitutional violations here are based on the deliberate indifference of the supervisors, it follows that the supervisors were deliberately indifferent to their own constitutional violations.”\(^{319}\) This reasoning turns circles because the point is to inquire whether the supervisors had their policymaking hats on when manifesting deliberate indifference in the form of failure to prevent. The court’s reasoning would turn all supervisory indifference into municipal policymaking, in effect constructing an enclave of impermissible respondeat superior.

The court seems to break out of this weird logic by stressing that the supervisory indifference was not “a single, isolated constitutional violation,” but was “sustained continually over a five-month period.”\(^{320}\) But how does this prove policymaking? If supervisory indifference

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317. *See id.* at 7.
319. *Id.* at 471.
320. *Id.*
cannot long persist without becoming policy, duration itself constitutes policymaking.

This shorts any focus on the nature of the supervisory office or the supervisor's relationship to perpetrators and victim. It also shorts any focus on efforts made or not made on high to contain harassment generally or this harassment in particular. Of course, duration may help prove that supervisory indifference amounted to municipal policy, or alternatively, that the municipality itself manifested deliberate indifference. Nevertheless, the court's per se approach with duration treads on the line forbidding respondeat superior. It implies that municipal liability applies whenever supervisory indifference persists over time. Nevertheless, supervisory indifference would rarely count as deliberate unless it did persist over time. Therefore, the same fact that establishes individual supervisory liability establishes municipal liability. Any difference between that and respondeat superior is purely semantic. To be sure, the wisdom of § 1983's ban on respondeat superior is questionable and the theoretical distinction between respondeat superior and agency is often hazy anyway. However, if that ban and that distinction are to be defended, analysis must be more careful than that in Murphy.

Sound outcomes and clarity might both be served by completely avoiding official policymaker liability for harassment cases. It creates more confusion than it is worth. Official policymaker cases on harassment can arise in two basic types: (1) where the "acts" of the supposed policymaker are ones of harassment; and (2) where those "acts" take the form of deliberate indifference toward harassment by subordinates. With either type, findings involve confusions even beyond those normal to the "official policymaker" area.

For the first type, one may ask how personally-motivated affronts to personhood could ever be sensibly called official policy. The strangeness of this redoubles the strangeness of deeming harassment to fall under "color of law" in the first place, except here the outcome is municipal liability, not just personal liability. Because of harassment's deeply personal aspect, the strangeness of treating it as a manifestation of municipal agency is higher than for normal situations of official policymaker analysis. Consequently, it is difficult to see treating acts of harassment as official policymaking as other than sheer exercise of respondent superior. That itself runs afoul of normal "scope of the employment" analysis, of course. Moreover, it runs afoul of the ban on respondeat superior liability under § 1983. Therefore, this whole approach has little to recommend it.
Equally serious problems beset the second type of official policymaker cases, where the underlying “acts” consist of deliberate indifference toward subordinate harassment. Under what logic could such “acts” of deliberate indifference be deemed acts of “official policymaking”? It is almost impossible to make this inquiry intelligible without flopping over into respondeat superior logic or else inquiry into direct deliberate indifference by the municipality itself toward the subordinate’s harassment, in which case the “official policymaker” inquiry winds up superfluous and confusing. Respondeat superior is out of bounds and direct deliberate indifference by the municipality toward employee harassment is on the table anyway. The whole “official policymaker” game is not worth the candle.

What is left of municipal liability? If my arguments are sound, approaches based on failure to train and official policymaker should both be rejected for harassment cases. Liability based on explicit policy of harassment can be expected to be rare or nonexistent. What’s left is simply liability based on municipal deliberate indifference to harassment. Though municipal deliberate indifference may defy precise specification, the purpose and logic of the inquiry are close and unified. This is far from the case with failure to train and official policymaking analysis. Decisions emerging from these lines of analysis are likely to be idiosyncratic and less sound and comprehensible than those produced by straightforward inquiry into municipal deliberate indifference.

**H. Quid Pro Quo and Hostile Environment**

The distinction between quid pro quo and hostile environment harassment carries ambiguous implications for municipal policy analysis. At first glance, it would seem easier to impute municipal policy from quid pro quo than from hostile environment harassment. Because quid pro quo entails manipulation of tangible job status and benefits, it touches on the formal contractual relationship between a municipality and the victim employee. In manipulating terms of that relationship, the harasser impersonates agency power. Though the harasser wields agency power only as an impostor, the risk of abuse of position should lie with the party granting it, not with victims. Therefore, municipalities should be liable for quid pro quo harassment. The matter is arguably quite different with hostile environment. By definition, hostile environment harassment involves no manipulation of formal job status or prerogatives. In itself, it does not implicate municipal policy. Therefore, municipal liability should not lie for
This basic line of thought seems to get played out in *Starrett v. Wadley.* In that case, the harasser fired his subordinate for refusing sexual advances and for consulting an attorney regarding the harassment. He faced personal § 1983 claims for the discharge and for prior intrusive advances. The court addressed whether those claims laid any foundation for claims against the municipality. It treated the dismissal as municipal policy because the perpetrator "had final authority to set employment policy as to the hiring and firing of his staff." On the other hand, hostile environment harassment that occurred prior to discharge was deemed personal, not official, because it did not involve tangible employment perquisites like "job title or description" and "salary levels."

*Starrett* differs sharply from Title VII doctrine on imputing supervisor harassment to firms. Under Title VII, both quid pro quo and hostile environment harassment may be imputed from supervisors to firms. However, if the line *Starrett* draws between quid pro quo and hostile environment makes sense for § 1983, it makes equal sense under Title VII. If so, Title VII hostile environment liability should be narrowed.

Under § 1983, the relationship between quid pro quo and hostile environment can get even more perplexing. An inversion can emerge in which organizational liability is easier to establish for hostile environment than for quid pro quo because of the rule against respondeat superior. Imputing quid pro quo harassment to a municipality could be viewed as impermissible respondeat superior. *Poulsen v. City of North Tonawanda* holds exactly that.

While rejecting the municipal quid pro quo claim, *Poulsen* allows a hostile environment claim against the city, based on failure to
investigate and remedy repeated harassment. Therefore, contrary to conventional Title VII assumptions, Poulsen represents harassment liability attributed more tightly for hostile environment than for quid pro quo. This can happen whenever the person charged with preventing hostile environment harassment is deemed a policymaker, but the quid pro quo harasser is not. Though the outcome seems strange under Title VII conventions, perhaps those conventions deserve more searching scrutiny.

The conflict between Starrett and Poulsen is total. Courts therefore seem to have three basic options: (1) Starrett's position that quid pro quo harassment counts as municipal policy; (2) Poulsen's position that imputing quid pro quo, without more, to a municipality is impermissible respondeat superior; and (3) a middle position that counts quid pro quo as policy depending on whether the harasser holds final policymaking authority. No decision that I know of has explicitly adopted position (3). Application of that approach would return courts to the same strange situations explored above concerning final policymaking authority.

IV. LEGAL LIMITS ON ANTI-HARASSMENT POLICIES

A. First Amendment Concerns

Free expression concerns get triggered by harassment law because harassment involves speech. As commentators have observed, Title VII harassment doctrine and employer steps to avoid lawsuits may yield repression of workplace speech and expression. Whether this puts Title VII afoul of constitutional speech protections is an important question. The constitutional issues grow even more tangled when § 1983 is factored in.

Though the Title VII/First Amendment conundrum has received almost no sustained attention in the courts, the academic debate has

333. See id.
334. See Starrett, 876 F.2d at 820.
336. See Starrett, 876 F.2d at 820.
been lively. That debate has focused mainly on private employers under Title VII. However, municipalities may also be sued for harassment under Title VII, not to mention § 1983. Moreover, public sector supervisors are personally suable under § 1983. The tension between anti-harassment norms and free speech norms is actually more direct in the public sector than in the private sector because public parties, directly bound by the Constitution, may be liable under § 1983 for suppression of free expression rights. Private employers, by contrast, bear no constitutional duties, and therefore, cannot be sued for speech infringements because they are not state actors, at least at first glance. The same goes for private sector supervisors who suppress expression in the name of enforcing employer anti-harassment policies. This public/private contrast vanishes if private parties can be regarded as state actors with duties to observe constitutional norms like free speech. I will briefly explore below whether Title VII harassment law could convert private parties into state actors by compelling or encouraging them to stifle protected speech.

If private employers bear no constitutional duty to protect free expression, they are free to protect themselves from harassment liability through policies regulating workplace speech. Such policies may be as drastic as they wish. Though the spectre of speech-repressive workplaces may impel some to reconsider the wisdom of Title VII anti-harassment law in its current contours, private employers may have no constitutional duty to minimize speech-restricting regulation. The matter is otherwise with public employers. If they regulate workplace expression beyond constitutional limits, whatever those are, they could easily face § 1983 lawsuits for offending employee First Amendment rights. In the public workplace, anti-harassment rights and free expression rights confront each other directly on the field of constitutional doctrine.

Two important rulings, Robinson v. Jacksonville Shipyards, Inc.

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338. See id.
339. See Starrett, 876 F.2d at 814.
342. See Harrington, 118 F.3d 359, 365 (5th Cir. 1997).
343. See Harrington, 118 F.3d 359, 365 (5th Cir. 1997).
and \textit{Johnson v. County of Los Angeles Fire Department},$^{345}$ help dramatize the issues. In \textit{Jacksonville Shipyards}, a workplace rife with obscene vocabulary, offensive sexual advances, misogynist remarks, pornography, and vulgar sexual humor was judged a hostile environment for women, violating Title VII.$^{346}$ As relief, the trial court entered a sweeping injunction requiring the company to enact rules and discipline against a variety of practices, including pornography display and sexually oriented humor.$^{347}$ The breadth of that relief sets free expression nerves on edge. The fear is that repressive censorship will pervade the American workplace, by force of injunctions or pro-active steps employers take to forestall harassment liability.

In this context, it is possible that public sector constitutional law may teach by example how free expression and anti-harassment rights should be balanced in the workplace. In \textit{Johnson}, the plaintiff sued his municipal employer for banning his practice of perusing nudie magazines at work.$^{348}$ The ban sought to eliminate workplace features that might create a hostile environment for women, and quite likely was motivated by a desire to avoid Title VII liability.$^{349}$ Nevertheless, the court struck down the nudie mag ban as unconstitutional, ruling that the municipality infringed plaintiff's First Amendment rights by censoring his reading material.$^{350}$

It is not easy to reconcile \textit{Johnson} with \textit{Jacksonville Shipyards}. The obvious differences are that \textit{Jacksonville Shipyards} involved a private employer that was actually sued for harassment,$^{351}$ while \textit{Johnson} involved a public employer moving proactively against harassment or against harassment liability at least.$^{352}$ This difference prevents direct confrontation between the two rulings on First Amendment terrain, at least for now. But the conflict in values they embody cannot be ignored and could easily provoke a pitched engagement under the ambit of § 1983. For drama's sake, one can imagine crosscutting § 1983 suits within a single public workplace that bans pornography viewing and display and threatens discipline for infractions. One suit complains that the ban itself violates free

\begin{itemize}
\item $^{345}$ 865 F. Supp. 1430 (D. Cal. 1994).
\item $^{346}$ \textit{See Jacksonville Shipyards}, 760 F. Supp. at 1529.
\item $^{347}$ \textit{See id.} at 1541.
\item $^{348}$ \textit{See Johnson}, 865 F. Supp. at 1434.
\item $^{349}$ \textit{See id.} at 1434-35.
\item $^{350}$ \textit{See id.} at 1442.
\item $^{351}$ \textit{See Jacksonville Shipyards}, 760 F. Supp. at 1490-91.
\item $^{352}$ \textit{See Johnson}, 865 F. Supp. at 1433.
\end{itemize}
expression rights. The other complains that lax enforcement of the ban creates a hostile environment. (A Title VII hostile environment claim could play the same role.) Should the municipality tighten its anti-porn rules or rescind them?

In the end, the most natural way to reconcile free expression concerns with anti-harassment concerns is some sort of “directed act” or “intentionally offensive” requirement for defining speech as harassment. Under this approach, evidence of harassment could not be found in an act of expression unless it was “directed at” particular people, intending offense to them. Municipalities and supervisors could not be liable for harassment unless they culpably failed to curtail “directed” harassment. On the other hand, they could not be liable under the First Amendment if they suppressed or regulated only “directed” harassment.

Free expression and anti-harassment zealots may both object to this middle approach. Free expression zealots may insist that the First Amendment protects even deeply wounding speech. Anti-harassment zealots may insist that protection from harassment justifies broad censorship of low-value speech. Alongside these polarized objections is another difficulty: the meaning of “directed” or “intentionally offensive” harassment is open to different interpretations, which could set very different balances between anti-harassment and free expression protections. A better approach is hard to discern, however. If both anti-harassment and free expression rights have constitutional status, defining harassment as targeted intentional offense seems optimal, if not fully satisfying. It curtails the most egregious harassment, while protecting from censorship all but the lowest-value expression.

Pressure from First Amendment plaintiffs could serve to prevent public employers from over-regulating workplace expression in the name of curtailing harassment. Equivalent pressure may not ever emerge in the private sector. The result could be that expression would wind up much less protected for private sector than for public employees. Private sector workers might seem “compensated” for this by greater protection from harassment than their public sector counterparts receive. But this is doubtful. There is no proportional relation between broad sweep of an employer’s anti-harassment rules

353. See id.
354. See Jacksonville Shipyards, 760 F. Supp. at 1510.
355. See Brief of Amicus Curiae Feminists for Free Expression in Support of Petitioner at 6, Harris v. Forklift Sys., Inc., 976 F.2d 733 (6th Cir. 1992) (No. 92-1168).
and successfully reduced harassment. On the contrary, there are diminishing returns. As expression constraints reach beyond targeted offensiveness to milder, less direct harassment, the harm forestalled incrementally shrinks. Meanwhile, the potential value of the suppressed speech rises as the scope of suppression broadens from egregious direct harassment outward. In other words, as speech restraints grow broader, the amount of harassment they prevent shrinks, and the value of the additional speech they suppress rises. Though offsetting constitutional pressures from free speech plaintiffs could lead to a wise balancing of anti-harassment and free speech norms in the public workplace, free speech in private workplaces may be left undefended.

This is by no means inevitable. First, if harassment is redefined for the public sector as targeted offensiveness—under First Amendment pressure perhaps—this redefinition could cross to the private sector even if no direct First Amendment pressure registers there. To protect First Amendment concerns in the public sector, municipalities would need protection not just from § 1983 suits but also from Title VII suits. Therefore, successful First Amendment suits could produce statutory or case law narrowing Title VII’s definition of harassment for public workplaces. But if the Title VII harassment definition is narrowed for the public sector, it would almost surely get narrowed for the private sector as well to maintain uniformity in Title VII law. Therefore, the First Amendment would project its shadow into the private sector, though unable to enter bodily.

A more complex scenario is that the First Amendment could come to play an active part in private sector harassment litigation. This could happen if employers set the First Amendment up as a defense in harassment suits against them. The argument would be that compliance with Title VII harassment law requires of them an unconstitutional stifling of expression. Though it might seem there is no state action where expression is stifled by employers seeking to avoid a purely private lawsuit, cases like *Hustler Magazine v. Falwell*, *New York Times Co. v. Sullivan*, and *Shelley v. Kraemer* give defendants

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356. 485 U.S. 46, 51 (1988) (holding that the plaintiff’s use of state courts to secure tort judgments against defendant would involve the state in punishing defendant’s exercise of First Amendment freedoms to discuss public figure and would therefore violate Constitution).

357. 376 U.S. 254, 264 (1964) (holding that the plaintiff’s use of state courts to secure tort judgments against defendant would involve state in punishing defendant’s exercise of First Amendment freedoms to discuss public figure and would therefore violate Constitution).

358. 334 U.S. 1, 20 (1948) (holding that the plaintiff’s use of state court to enforce racially restrictive neighborhood housing sale covenant would involve state violating defendant’s Constitutional equal protection rights).
plenty of ammunition to resist the “no state action” argument. More daunting to defendants might be the need to assert a direct employer interest in perpetrating offensive expression as grounds for their First Amendment defense. This is risky as a litigation strategy, at odds with the employer’s more natural impulse to distance itself from any relationship to and responsibility for the tainted expression. This strategic awkwardness may explain why employers have not already mounted First Amendment defenses to Title VII harassment suits.

Perhaps an employer could invoke the First Amendment without invoking a direct interest in protecting offensive utterances. A law encouraging one private party to stifle the speech of another may violate the First Amendment in itself. Employers may be entitled to invoke the First Amendment defense simply because enforcement of Title VII may infringe employee First Amendment interests. So employers could raise a First Amendment defense to a Title VII suit and vindicate employee free speech interests by proxy. The intrigue of this is only heightened by the fact that employers may freely stifle workplace speech on their own initiative without the faintest concern for the First Amendment.

There is an even stranger scenario waiting in the wings. A private employee—discharged, disciplined, or restricted in speech under an anti-harassment policy—might bring a § 1983 suit against his private employer for stifling his First Amendment rights. To gain First Amendment protection, the employee might have to show that the stifled speech went to “public concern,” not just “personal interest.”359 This threshold might be hard to meet for standard-issue harassment. The reasoning in Johnson, finding “public concern” in reading nudie mags, is not without its difficulties.360 Moreover, such a suit could fly only if the private employer can be deemed a state actor in stifling speech. But this is by no means out of the question. Under current doctrine, private parties who infringe constitutional interests can be deemed state actors if state law compels or encourages them to effect the deprivation in question.361 Title VII arguably compels and encourages private employers to stifle workplace speech unconstitutionally. If so, private employers could find themselves targeted by § 1983 suits seeking to vindicate speech rights. This could place private employers in the same squeeze between anti-harassment and free speech norms already felt by

public employers and supervisors.

B. Due Process for the Accused?

Public employees dismissed as alleged harassers may assert claims for infringements of constitutional rights other than First Amendment rights, namely procedural due process rights to notice and hearing. Those rights provide partial protection against false accusation or undue discipline. They can be contrasted with First Amendment rights, which vindicate a privilege to engage in offensive speech. Like free speech rights, notice and hearing rights do not exist for private sector employees unless private employers can be characterized as state actors under compulsion or encouragement from Title VII law when discharging alleged harassers.362

Unjust dismissal of alleged harassers may violate a liberty interest in good reputation or a property interest in job tenure.363 Such interest may not easily sound in substantive due process. Defaming someone’s reputation invades a substantive right only if it amounts to deliberate indifference or shock to the conscience. Dismissing someone for being an accused harasser does not invade a substantive right to job tenure. Job tenure is at most a property right conferred by the state.364 It is not a fundamental constitutional privilege.365

Public employee anti-discharge rights may more easily sound in procedural due process rights to notice and fair hearing, not as substantive rights.366 Employees wrongfully dismissed from tenured jobs may conceivably bring procedural due process claims for inadequate notice or hearing, even if they cannot sustain a substantive due process claim. In theory, this leaves wrongfully discharged employees in the odd posture of having rights to protest faulty procedures in the discharge decision but not to protest substantive error in the decision itself. The court scrutinizes process, not outcome.367 In practice, however, the procedural protection may be as valuable as a substantive

one. First, damages from a procedural deficiency may be measured by the value of substantive deprivations resulting from it. Relief may include reinstatement and cash. Second, such relief should provide public employers and supervisors incentives to make notice and hearing procedures meaningful and fair because the risks of a wrongful discharge would then have to be weighed against the risks of liability for inaction against harassment. If a plaintiff can prove a defendant was predisposed to discharge him in order to avoid harassment liability, that bias might violate his due process right to an impartial hearing.

But notice and hearing rights may often be unavailable. They apply only if the grievant has been defamed or deprived of state-conferred job tenure. Many grievants will have been neither defamed nor deprived of tenure. There is no defamation if the reason for discharge is kept secret or if publication of the reason is protected within a privilege to investigate harassment charges. And a grievant loses no property interest if discharged from a position not accorded tenure under state law.

State officials may be protected from wrongful dismissal suits by qualified immunity and municipalities cannot be held liable unless the wrongful dismissal represents municipal custom, policy or practice. To overcome qualified immunity, plaintiffs need to prove that the dismissal violated a “clearly established” constitutional right as understood by a reasonable person. Despite limitations, the possibility of suits by at least some wrongfully discharged harassers may impel public employers and supervisors toward providing regular notice and hearing and this may confer some protection against wrongful dismissal. Limited as they are, these protections for accused harassers in public sector workplaces highlight the absence of protections in the private sector. Accused harassers in the private sector have no right of fair process against employers who discharge them. At best, some might be covered by contractual rights against discharge without good cause.

368. See, e.g., Hill v. City of Pontotoc, 993 F.2d 422, 423-24, 427 (5th Cir. 1993) (affirming award of $30,000 compensatory damages and $103,704 front pay to firefighter discharged without proper due process, based on finding that if due process had been given, plaintiff would not have been fired).
369. See Black, 857 F. Supp. at 1547.
Anti-harassment obligations give both private and public employers one more reason to resist conferring job tenure on employees, because tenure thwarts efforts to cleanse the workplace of accused harassers.

V. CONCLUSION

I have tried here to give a picture of what § 1983 jurisprudence has said or might have to say about issues of harassment. I have stressed the following themes: (1) the conventional law of harassment as discrimination is beset with problems, weaknesses, and ambiguities; (2) there is much to be said for conceptualizing harassment as intentional assault upon personhood or, in constitutional terms, deprivation of substantive due process; (3) harassment liability of organizational entities can wisely and coherently be conceptualized in terms of a circumscribed duty to prevent, articulated under a deliberate indifference standard; and (4) constitutional law under the First Amendment and procedural due process could play a role in checking harassment law's pressures toward over-regulating work places and over-disciplining accused harassers.

Constitutional tort jurisprudence has much of interest to say on harassment. I hope I have conveyed that.