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Editors' Page: Articles from the 71st Annual Conference on Labor at the Center for Labor and Employment Law, NYU School of Law

The faculty editors of the *ABA Journal of Labor & Employment Law* are pleased to welcome our new collaboration with the Center for Labor and Employment Law at the NYU School of Law. Each year, the NYU Center holds its Annual Conference on Labor, a two-day event touching upon an important area of focus for labor and employment lawyers, government officials, and academics. We are pleased to publish a selection of articles from NYU's 71st Annual Conference on the topic "Labor & Employment Law Initiatives, Proposals, and Developments During the Trump Administration." The following summary of these articles is provided on behalf of the NYU Center by Professor Charlotte Alexander and Professor Samuel Estreicher, with assistance from law student Lindsay Roach.

—Marcia McCormick, Miriam A. Cherry & Matthew Bodie, Faculty Editors, Saint Louis University Law School

Introduction

The Center for Labor and Employment Law at New York University's School of Law has long been a leader in advancing the discussion among practitioners, policy makers, and scholars about labor and employment law topics. This issue furthers that tradition by providing updates, opinions, and guidance in the areas of sexual harassment, employment contracts, and union relations. The authors' contributions assist practitioners in counseling their clients and advocating for change in order to mitigate risk against a shifting legal landscape. As the authors point out, societal norms around work and employment, enforcement patterns, and courts' interpretation of labor, employment, and related laws are experiencing substantial change, and "business practices will be challenged both more frequently and more vigorously" across a variety of work-related contexts.[1]

1. Eric S. Hochstadt & Nicholas J. Pappas, *Restrictions on Employee Change of Jobs: Antitrust Challenges to "Non-Compete" and "No-Poach" Clauses*, 34 ABA J. Lab. & Emp. L. 253 (2020); Shlomit Yanisky-Ravid, *Making Physical and Virtual Sexual Harassment Illegitimate: The US #MeToo Movement and the Israeli Prevention Act*, 34 ABA J. Lab. & Emp. L. 181 (2020).

The first two articles, by Philip M. Berkowitz and Sixtine Gosselin, and Shlomit Yanisky-Ravid, respectively, focus on sexual harassment law in the #MeToo and #TimesUp era, identifying challenges, providing a framework for workplace investigations, and presenting a comparative analysis of best practices in the United States and Israel. The next three articles, authored by Zachary D. Fasman, Zoe Salzman, and Eric S. Hochstadt and Nicholas J. Pappas, examine three types of provisions found within employment agreements: mandatory arbitration requirements, non-compete and other employment contract limitations, and liquidated damages terms. These authors explain the risks involved and employers' options for risk avoidance, management, and mitigation. The final article presented at the conference, authored by Alan M. Klinger and Dina Kolker, addresses union agency fees, the prohibition on such fees from the U.S. Supreme Court's *Janus v. American Federation of State, County, and Municipal Employees, Council 31* case, and employers' options in light of this prohibition.

Binding these articles together is the common recognition that practitioners need real-world, practical guidance in each of these evolving areas of law. Together, the articles in this issue provide just such insight, equipping practitioners and their clients to navigate employment and labor law changes.

I. Sexual Harassment

Countries around the world take substantially different approaches to addressing employment-related sexual harassment. In our first article, Berkowitz and Gossellin explain that although "a third of countries . . . do not have any workplace-specific prohibitions of sexual harassment in place, . . . some common-law countries . . . have rules broadly consistent with the U.S. model," and a few countries "impose thorough sex harassment laws and even criminalize sex harassment."[2] Given this variation, Berkowitz and Gossellin offer lessons for American companies when dealing with sexual harassment claims overseas. The authors provide a non-exclusive list of considerations for companies operating across borders, including the following: selection of investigation team personnel; attorney-client privilege; culture and language differences; representation rights for complaining parties; witness interview considerations; privacy concerns; and the form, content, and disclosure of investigation reports. Practitioners can thus identify tangible action items to assist their clients in preparing for and conducting both domestic and global sexual harassment workplace investigations.

An additional challenge to tackling workplace sexual harassment around the globe is simply defining sexual harassment, as Shlomit Yanisky-Ravid explains in our second article on this topic. This

2. Philip M. Berkowitz & Sixtine Gossellin, *Cross-Border Sexual Harassment Claims and Investigations*, 34 ABA J. LAB. & EMP. L. 161 (2020).

foundational question has become especially important as the #MeToo movement raises questions about the sufficiency of the current definitions.[3] While U.S. law treats "sexual harassment [as] a form of unlawful sex discrimination" and sets forth the quid pro quo and hostile work environment frameworks for analyzing sexual harassment, "[o]verseas, the legal framework in which sexual harassment claims are governed differs dramatically from country to country."[4] Yanisky-Ravid encourages U.S. policy makers to "rethink their tactic in fighting against sexual harassment, possibly by learning from other countries' experience, when it comes to effective enforcement."[5] To this end, Yanisky-Ravid offers a close analysis of Israel's Prevention of Physical and Virtual Sexual Harassment Act. She highlights the Israeli Act as "an example for other nations and states [that] provid[es] a clear path to assist individuals who are subject to sexual harassment misconduct," including specifically harassment in virtual spaces.[6]

Together, Berkowitz, Gossellin, and Yanisky-Ravid provide an extremely useful international and comparative perspective on sexual harassment law today, allowing both domestic and global U.S. employers to learn from each other in addressing—and ultimately ending—workplace sexual harassment.

II. Employment Agreement Provisions

This issue also addresses a second trend in employment relations: the prevalence of contractual provisions that shape employees' substantive and procedural rights vis-à-vis their employers, along with their post-employment options. As one scholar has observed, "Overall, terms in today's employment agreements tend to trend toward protection of the employer and its flexibility to manage aberrant behavior or poor performance . . . [as] [e]mployers simply want to maintain an at-will relationship where possible" and maintain the upper hand in employee termination decisions and management of that process.[7] In this section, Fasman, Salzman, Hochstadt, and Pappas analyze the benefits and risks for employers arising from mandatory arbitration, liquidated damages, non-poaching, non-compete, and wage-fixing provisions in employment contracts.

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3. Yanisky-Ravid, *supra* note 1, at 183.

4. Berkowitz & Gossellin, *supra* note 2, at 162; *see also* Donald C. Dowling, Jr., Littler, How to Launch an Employment Discrimination, Harassment, Diversity or Affirmative Action Initiative on a Global Scale 3, 7–8 (2017), https://www.littler.com/files/how_to_launch_an_employment_discrimination_harassment_diversity_or_affirmative_action_initiative_on_a_global_scale_0.pdf [https://perma.cc/5D4N-GUQG]; Kevin Gomez, Melissa McClure & Destinee McCulley, *State Regulation of Sexual Harassment*, 18 Geo. J. Gender & L. 815 (2017).

5. Yanisky-Ravid, *supra* note 1, at 216.

6. *Id.* at 188.

7. Christopher E. Parker, *Drafting Employment Agreements That Secure Talent and Maintain Flexibility to Mitigate Bad Employment Relationships*, 2014 WL 4785366, at *3 (2014).

Fasman examines the role that collateral estoppel plays in arbitration generally, and in relation to mandatory arbitration provisions in employment contracts specifically.[8] The main issue here is "whether an employee or a consumer can use an award won by a different employee or consumer in an earlier arbitration to preclude a defendant from relitigating the issue in a subsequent arbitration"; in other words, the issue considers "whether a defendant should be legally bound by the result of a prior arbitration case involving the same issues brought by a different claimant."[9] Fasman, based on his own experience as a professional arbitrator and mediator, believes that arbitrators should not be legally obligated to follow prior arbitration awards, but instead should be free, but not required, to use antecedent awards if persuasively relevant, especially when dealing with the same or similar issues.[10] Fasman contends that his approach "comports with the FAA's language and spirit, Supreme Court precedent, and makes for sound public policy" and lays out both the benefits and disadvantages to applying the doctrine of offensive, non-mutual collateral estoppel in a class action arbitration.[11]

Salzman takes on another set of terms that frequently appear in employment contracts: protections against "damages flowing from the departure of employees."[12] Such measures include non-compete agreements, confidentiality clauses, mandatory arbitration provisions, and liquidated damages provisions. Focusing in particular on liquidated damages, Salzman explains that employers may use such contract terms to establish, *ex ante*, a monetary penalty that employees must pay if they quit their jobs.[13] Drawing on the liquidated damages analysis set forth by the Florida Supreme Court in *Lefemine v. Baron*, Salzman argues that the courts are likely to view liquidated damages clauses as unenforceable attempts to extract a penalty from departing employees as a punishment for quitting.[14] He thus provides a framework for employers to analyze their own liquidated damages provisions to ensure that they are legally defensible.

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8. Zachary D. Fasman, *Offensive Non-Mutual Collateral Estoppel in Arbitration*, 34 ABA J. LAB. & EMP. L. 217, 219 (2020) (stating that that the goal of *res judicata* is to "determine the effect of prior judgments" and is made up of "two subdoctrines—claim preclusion and collateral estoppel (issue preclusion)").

9. *Id.* at 217.

10. *Id.* at 238.

11. *Id.*

12. Zoe Salzman, *Liquidated Damages Clauses in Employment Agreements*, 34 ABA J. LAB. & EMP. L. 239, 239 (2020).

13. *Id.* at 240 ("Liquidated damages are contractual clauses used in a variety of contracts to set a fixed amount of damages to be paid in the event of a breach.").

14. *Id.* at 241 (citing RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981); Lefemine v. Baron, 573 So.2d. 326, 329–30 (Fla. 1991); Complaint, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. Beaton, No. 2017-CC-012511-O (Fla. Cir. Ct. filed Oct. 13, 2017)) ("The test for liquidated damages [as described in the *Lefemine* case] is similar . . . to the general analysis applied in most states, . . ." and the two-prong test "is the one generally used by both state and federal courts alike in evaluating liquidated damages clauses.").

In the final article on employment agreements, Hochstadt and Pappas take a broader approach, examining such agreements, as a whole, through the lens of antitrust law. The authors warn that "employment-related information exchanges and especially agreements have been, and will continue to be, . . . area[s] of increasing scrutiny for antitrust enforcers and private plaintiffs."[15] The article examines no-poach, non-compete, and wage fixing jurisprudence, explaining each concept and then examining possible antitrust challenges.[16] Similar to Fasman and Salzman, the authors provide concrete insight for employers and practitioners into the potential risks of these types of employment agreement provisions.

III. Union Membership Post-*Janus*

In the final article presented at the conference, Klinger and Kolker speak to practitioners who counsel public sector employers and unions, focusing on mandatory agency fees and their impermissibility post-*Janus*.[17] Klinger and Kolker offer a realistic view of the impacts of *Janus* on public sector unionization efforts.[18] As the authors explain, *Janus* overturned previous caselaw that permitted a two-tiered system in which both members and nonmembers paid union dues, and nonmember dues were used to support collective bargaining efforts but not political projects.[19] The *Janus* Court invalidated this system, holding that under the First Amendment, "agency fees could not be extracted from nonconsenting employees."[20] *Janus* thus "upended public sector labor law by creating a novel First Amendment right to refuse to pay union fees," dramatically changing the legal landscape for public unions, their members, and their employers.[21]

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15. Hochstadt & Pappas, *supra* note 1, at 266.

16. *Id.* at 253; Josh M. Piper & Erik Ruda, *Employee "No-Poaching" Clauses in Franchise Agreements: An Assessment in Light of Recent Developments*, 38 Franchise L.J. 185, 198 (2018).

17. Alan M. Klinger & Dina Kolker, *Public Sector Unions Can Survive* Janus, 34 ABA J. Lab. & Emp. L. 267, 267 (2020) (referencing Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018)).

18. "Public sector unions are unions that represent state employees in the public sector," and scholars have recognized that "a storm ha[s] been building by virtue of dual attacks upon both relatively successful public sector unions generally, and upon union security agreements, in particular." Kavitha Iyengar, Janus v. AFSCME, 40 Berkeley J. Emp. & Lab. L. 183, 183 (2019); William B. Gould IV, *How Five Young Men Channeled Nine Old Men:* Janus *and the High Court's Anti-Labor Policymaking*, 53 U.S.F.L. Rev. 209, 220 (2019); *see also* Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2015) (per curiam); Harris v. Quinn, 573 U.S. 616 (2014); Knox v. Serv. Emps. Int'l Union, Local 100, 567 U.S. 298 (2012).

19. Iyengar, *supra* note 18, at 187; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Aaron Tang, *Life After* Janus, 119 Colum. L. Rev. 677, 691 (2019).

20. Gould, *supra* note 18, at 225, 229–30 (noting that this reversal may have been due to changes in the composition of the United States Supreme Court, up to and including the Trump era nomination and confirmation of Neil Gorsuch).

21. Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 Calif. L. Rev. 1821, 1821–23 (2019).

Klinger and Kolker close by offering alternatives to the long-standing agency fee model, including a member-only option, employer support for unions, and charitable contributions, and then analyze the benefits and disadvantages of each. Klinger and Kolker's in-depth examination of *Janus* and its implications offers both union- and management-side practitioners valuable insight into next steps for their clients.

Conclusion

As the articles in this issue ably demonstrate, the changes that are occurring in labor and employment law warrant careful consideration by employees, employers, and their legal counsel. By examining sexual harassment law through an international and comparative lens, reviewing potential employment agreement pitfalls, and assessing *Janus'* impact on the future of public sector unions, the authors map the current lay of the land and provide realistic action items for practitioners and the clients they serve.

—Charlotte Alexander, Connie D. and Ken WomenLead Chair, Associate Professor of Law and Analytics, Robinson College of Business, Georgia State University
—Sam Estreicher, Dwight D. Opperman Professor of Law, New York University School of Law

Further Note

Although not part of the annual conference for the Center for Labor and Employment Law at New York University's School of Law, Francine Eichhorn's student note, *How the NFL "Protects" Cheerleaders with Discriminatory Policies*, complements the other articles in this issue well. In her article, Eichhorn takes the case of Jacalyn Bailey Davis, a former cheerleader for the New Orleans Saints, as a starting point to examine how NFL policies might promote discriminatory working environments for cheerleaders. Davis was fired from her job as a cheerleader for the Saints for posting an Instagram picture of herself in lingerie and receiving social media messages from NFL players, which violated the teams' anti-fraternization policy. That policy applies only to cheerleaders, and not to players. In a sex-segregated workplace, where cheerleaders are women and players are men, Eichhorn argues that a policy that applies only to one job is sex discrimination. The note further explores whether the NFL's stated rationale for its policy, which is to protect the cheerleaders from predatory actions by the players, could be a valid defense under Title VII.

Cross-Border Sexual Harassment Claims and Investigations

Philip M. Berkowitz & Sixtine Gossellin***

Introduction

Workplace investigations are not new. Employers frequently investigate allegations of sexual harassment or other wrongdoing in order to determine the relevant facts and, if necessary, take remedial action to correct the problematic conduct. What is new, however, is the increase in international criminal and civil charges, and allegations of cross-border misconduct. In the wake of the #MeToo movement, multinational corporations increasingly must focus on the challenges of cross-border workplace investigations and conflicts of laws. The need to conduct multiple investigations in different jurisdictions can overwhelm an HR department and indeed their counsel.

Sophisticated investigations conducted by in-house or outside counsel, attorney-client privilege, and discovery, among other tools, are cornerstones of U.S. investigations. Rationally, U.S. companies assume that other jurisdictions, and especially the European Union, will have a corollary for these American tools. Many multinational corporations discover all too late that this assumption is incorrect. Failure to implement and conduct an internal investigation in compliance with local rules and customs can create corporate liability and damage a company's reputation.

American companies must consider local law and custom overseas before carrying out an investigation—just as we would expect an overseas-based company to do prior to carrying out an investigation in the United States. The issues are wide-ranging, and they are cultural and legal: who may or should conduct the investigation, who may be questioned, the right to review documentary evidence, data privacy, discipline, collective rights, the attorney-client privilege, interactions with local government, and many more.

* Philip M. Berkowitz is the U.S. practice co-chair of Littler Mendelson, P.C.'s International Employment Law Practice Group and co-chair of the Financial Services Industry Group. He advises multinational and domestic companies on a wide range of industries on employment-related matters.

** Sixtine Gossellin, an attorney at Factorhy Avocats, Paris, France, represents and advises employers on French and international employment-related matters.

I. Oversight and Principles of Sexual Harassment Law in the United States and Abroad

The first issue to evaluate, upon receiving an employee's allegations of sexual harassment, is the law of the relevant jurisdictions. Great differences from country to country underlie the legal landscape for eradicating workplace sexual harassment and can create significant problems if investigators do not respect these differences. Understanding the legal framework will permit the employer to determine, among other matters, how broad the scope of the investigation must be, what investigative tools may be appropriate to use, and what legal analysis will need to be performed.

A. Overview of Sexual Harassment Law

1. U.S. Approaches

In the United States, sexual harassment is a form of unlawful sex discrimination which violates Title VII of the Civil Rights Act of 1964 (Title VII).[1] It includes both (a) *quid pro quo harassment*, occurring when employment benefits are granted in exchange for submission to unwelcome sexual advances;[2] and (b) *hostile work environment harassment*, occurring when unwelcome sexual conduct is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.[3]

2. Overseas Responses

The legal frameworks for handling sexual harassment claims differ dramatically from country to country.[4] More than a third of countries, including Russia, Indonesia, Saudi Arabia, and Nigeria, have no workplace-specific prohibitions of sexual harassment in place.[5] In 2015, the Russian State Duma considered monetary penalties on sexual harassment and unwanted flirting, but it ultimately did not vote the

1. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64–67 (1986).
2. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).
3. Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991).
4. *See generally* Donald C. Dowling, *U.S. Workplace Investigation Practices Raise Concerns Overseas*, SOC'Y FOR HUM. RESOURCE MGMT. (May 6, 2013), https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/workplace-investigations-overseas.aspx [https://perma.cc/DZK2-L5GK] [hereinafter Dowling, *SHRM*]; Donald C. Dowling, *How Well Do Your Anti-Harassment Tools Work Overseas?*, LITTLER (Dec. 7, 2017), https://www.littler.com/publication-press/publication/how-well-do-your-anti-harassment-tools-work-overseas [https://perma.cc/6HR6-RF6W] [hereinafter Dowling, *Littler*]. *See generally* Marion Crane & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56 (2019); Catharine A. MacKinnon, *Where #MeToo Came from, and Where It's Going*, ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313 [https://perma.cc/ N6CA-8BL6].
5. WORLD POL'Y ANALYSIS CTR., PREVENTING GENDER-BASED WORKPLACE DISCRIMINATION AND SEXUAL HARASSMENT: NEW DATA ON 193 COUNTRIES 3, 5 (2017), https://www.worldpolicycenter.org/sites/default/files/WORLDDiscriminationatWorkReport.pdf [https://perma.cc/PUQ7-XSJU].

policy into law.[6] In Indonesia, an employee may file an action in tort to recover damages for an unlawful act, but the employment law does not provide any remedy for harassment.[7] In Nigeria, only general laws against violence are in place. Similarly, Saudi Arabia prohibits immoral conduct, but not sexual harassment per se.[8] In Japan, no express provision of law clearly prohibits sexual harassment at the workplace, except criminal law provisions regarding rape and forcible indecency.[9]

In contrast, some common-law countries, like England, recognize sexual harassment as a form of gender discrimination and prohibit it by statute, similar to the U.S. model. The United Kingdom's Equality Act 2010 specifically prohibits harassment in employment based on, among other characteristics, sex and sexual orientation. Under the Equality Act 2010, a claimant need only show one instance of harassment.[10]

France, Angola, and India impose thorough sexual-harassment laws and even criminalize sexual harassment. Harassers can go to jail, and their conduct can implicate their employers. Employers in France may be held liable under both civil and criminal laws prohibiting sexual harassment.[11] Sexual harassers in Angola can face civil and criminal liability.[12] In India, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, requires employers to create internal committees dedicated to investigating and resolving claims of sexual harassment. Employers must also assist employees in filing a criminal complaint, should the circumstances warrant.[13]

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6. Alexander Titov & Anna Fufurina, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Russia § 4.4 (Trent Sutton ed., 6th ed. 2018).

7. Theodoor Bakker et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Indonesia § 4.4 (Kristen Countryman ed., 6th ed. 2018).

8. Fadi Nader et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Saudi Arabia § 4.4 (Eric A. Savage ed., 6th ed. 2018); Inam Wilson & Ijeoma Uju, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Nigeria § 4.4 (Johan Lubbe & Kristen Countryman eds., 6th ed. 2018).

9. Kazutoshi Kakuyama et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Japan § 4.4 (Kristen Countryman ed., 6th ed. 2018).

10. Equality Act 2010, c.15, § 26 (U.K.); Hannah Mahon & Richard Harvey, Littler, The Littler Mendelson Guide to International Employment and Labor Law, United Kingdom §§ 1.1, 4.4 (Tahl Tyson ed., 6th ed. 2018).

11. Dowling, *Littler, supra* note 4, at 24–25; Alexandre Roumieu & Sixtine Gosselin, Littler, The Littler Mendelson Guide to International Employment and Labor Law, France § 4.4 (Kristen Countryman & Geida Sanlate eds., 6th ed. 2018).

12. Marta de Oliveira Pinto Trindade et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Angola § 4.4 (Johan Lubbe ed., 6th ed. 2018).

13. Dowling, *Littler, supra* note 4, at 25; Vikram Shroff et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, India § 4.4 (Anthony Rizzotti & Kristen Countryman eds., 6th ed. 2018).

Other countries have tough anti-harassment laws on paper, but not in practice. For example, China and Mexico[14] purport to ban workplace harassment, but tend not to provide enforceable remedies. Thus, among the thirty-four Chinese cases of sexual harassment from 2010 to 2017 available publicly, only two were brought by victims suing alleged harassers, and both of those cases were dismissed for lack of evidence.[15] That said, there are exceptions to this trend. In February 2013, Chinese "[m]ilitary prosecutors indicted a one-star general on charges of sexually harassing a military officer."[16] One report states that, in Mexico, over 23,000 employees resigned from their workplace in just three months in early 2019 to avoid a hostile work environment.[17]

Other countries maintain anti-sexual harassment laws, but do not consistently support the discipline of harassers. In Thailand, for example, some cases have held dismissals of sex harassers to be "'without cause' and the employer has been required to pay severance."[18]

It is no secret that many countries' cultures tolerate and even condone the demonstration of affection in the workplace. A kiss between colleagues may be perfectly appropriate in Latin America and many European countries, but no culture or social norms should tolerate the demeaning of any individual based on their gender, or their unwelcome submission to sex in exchange for workplace advances, or their unwelcome exposure to sexual conduct that creates a hostile work environment. Companies must make clear that they do not tolerate these activities if they wish to have a productive workforce where employees are free to do their jobs and if these companies wish to attract women as employees.

14. Mexico, for example, bans sexual harassment under Ley Federal del Trabajo [LFT] art 47, Diario Oficial de la Federación [DOF] 10-4-1970, Últimas reformas DOF 12-06-2015.

15. Sophie Richardson, *China's Victims of Sexual Harassment Denied Justice*, HUM. RTS. WATCH (July 31, 2018, 8:00 PM EDT), https://www.hrw.org/print/321111[https://perma.cc/SG3H-SNU4].

16. Joseph Yeh, *One-Star General Indicted for Sexual Harassment*, CHINA POST (Feb. 26, 2013), https://chinapost.nownews.com/20130226-99989 [https://perma.cc/C727-ZVKM].

17. *Workplace Harassment Prevails in Mexico*, EL UNIVERSAL (July 8, 2019), https://www.eluniversal.com.mx/ english/workplace-harassment-prevails-mexico [https://perma.cc/UDM2-X2SM].

18. DOWLING, *Littler, supra* note 4, at 25 (citing S. Sangrungjang & V. Sucharitkul, *Thailand: Sexual Harassment and the Workplace*, IBA DISCRIMINATION & EQUALITY L. NEWS, Oct. 2014, at 15).

B. Sexual-Harassment Prevention (Policy) and Response (Investigation)

The International Labor Organization adopted the Violence and Harassment Convention in 2019.[19] The Convention recommends that members mandate, through laws and regulations, that employers maintain a workplace violence and harassment policy that will protect the rights of workers and provide complaint and investigation procedures.[20] Further, it recommends that members take appropriate measures to protect migrant workers and work arrangements where exposure to violence and harassment could be more likely, such as night work, hospitality, and domestic work.[21] Among the core principles of the recommendation is that members ensure that all workers have the right to collectively bargain "as a means of preventing and addressing violence and harassment and, to the extent possible, mitigating the impact of domestic violence in the world of work."[22]

1. U.S. Approaches

In the United States, the Supreme Court has created an affirmative defense to "hostile environment" sexual harassment claims.[23] The affirmative defense is only available when the employer can show that it took reasonable care to prevent or correct harassment and that the employee unreasonably failed to complain under the employer's policy, or otherwise to avoid harm. Some U.S. jurisdictions, such as New Jersey, have adopted a version of the defense for state law purposes, but others, such as California and the New York City, have not.[24] The presence of such an affirmative defense nevertheless provides a strong incentive for employers to take preventative action to avoid harassment in the first place,[25] to investigate, and to take any necessary disciplinary steps thereafter.[26]

2. Different Approaches Overseas

Sexual harassment policies and internal investigations abroad are subject to a panoply of restrictions under the local law and culture.

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19. International Labor Organization (ILO), Violence and Harassment Recommendation (R206) (June 21, 2019), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:400 0085 [https://perma.cc/7PSN-CSQA].

20. *Id.* § 7.

21. *Id.* § 9.

22. *Id.* § 4.

23. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998).

24. Kevin M. Kraham et al., Littler, Littler on Harassment in the Workplace 4–5 (2018).

25. *See* Kohler v. Inter-Tel Techs., 244 F.3d 1167, 1180 (9th Cir. 2001) (describing how the employer's policy in that case was appropriate preventive action).

26. *See* Andreoli v. Gates, 482 F.3d 641, 644 (3d Cir. 2007) (describing effective investigation); Holly D. v. Cal. Tech., 339 F.3d 1158, 1177–78 (9th Cir. 2003) (same).

Similar to the U.S. model, in the United Kingdom, employers are expected to be proactive in preventing sexual harassment by implementing clear policies and providing training to their staff—particularly to managers, who may be in a position of power over other employees.[27] After a study found that forty percent of women and eighteen percent of men have at some point experienced unwanted sexual behavior, the United Kingdom announced its intention to develop a statutory Code of Practice "so employers better understand their legal responsibilities to protect their staff as part of a package of commitments to tackle sexual harassment at work."[28]

In the European Union**,** a recent survey found that thirty percent of establishments had procedures in place to deal with bullying and harassment at work.[29] Procedures were most common in companies in the Scandinavian countries and less observed in the southern and eastern countries, as well as in some continental countries, such as Austria and Germany.[30] Another survey found that workplace policies to deal with bullying and harassment were in place in fewer than twenty percent of organizations in Hungary, Estonia, Bulgaria, Latvia, and Portugal.[31] In addition, procedures to cope with harassment are more common in the public sector than in the private sector.[32]

Costa Rica,[33] India, and South Korea require employers to adopt specific rules on sexual harassment policies and training.[34] The Indian Sexual Harassment Act (SH Act) and the Sexual Harassment of Women at Workplace Act[35] require employers to establish and maintain an

27. *See* MAHON & HARVEY, *supra* note 10, § 10.1.

28. Press Release, Government of the U.K., Government Announces New Code of Practice to Tackle Sexual Harassment at Work (Dec. 18, 2018), https://www.gov.uk/government/news/government-announces-new-code-of-practice-to-tackle-sexual-harassment-at-work [https://perma.cc/HL9K-R9KN].

29. *See* EUR. AGENCY FOR SAFETY & HEALTH AT WORK, SECOND EUROPEAN SURVEY OF ENTERPRISES ON NEW AND EMERGING RISKS (ESENER-2) OVERVIEW REPORT: MANAGING SAFETY AND HEALTH AT WORK 50–52 (2016), https://osha.europa.eu/en/tools-and-publications/publications/second-european-survey-enterprises-new-and-emerging-risks-esener [https://perma.cc/TPQ5-J2WV].

30. EUROFOUND, VIOLENCE AND HARASSMENT IN EUROPEAN WORKPLACES: EXTENT, IMPACTS AND POLICIES 39, 41–42, 47–48 (2015), https://www.eurofound.europa.eu/sites/default/files/ef_comparative_analytical_report/field_ef_documents/ef1473en.pdf [https://perma.cc/8KLL-9PFS].

31. *See* POL'Y DEP'T FOR CITIZENS' RIGHTS & CONST. AFFAIRS, EUR. PARLIAMENT, BULLYING AND SEXUAL HARASSMENT AT THE WORKPLACE, IN PUBLIC SPACES, AND IN POLITICAL LIFE IN THE EU 49 (2018), http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604949/IPOL_STU(2018)604949_EN.pdf [https://perma.cc/C6GQ-9BLK].

32. EUROFOUND, *supra* note 30, at 4.

33. L. 7476, Ley Contra el Hostigamiento Sexual en el Empleo y la Docencia [Law against Sexual Harassment in Teaching and Employment], La Gaceta, marzo 3, 1995, num. 45, pp. 1–2 (Costa Rica).

34. DOWLING, *Littler, supra* note 4, at 27.

35. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

Internal Complaints Committee (ICC) at each office with a minimum of ten employees; organize workshops and awareness programs at regular intervals for employees and orientation members of the ICC; provide necessary facilities to the ICC for dealing with a complaint and for conducting an inquiry; assist in securing the attendance of the respondent and witnesses before the ICC; and formulate and disseminate an internal policy on the prohibition, prevention, and redress of sexual harassment at the workplace.[36] In South Korea, the Gender Equality Employment and Work-Family Balance Support Act (GEEA) and its Enforcement Decree require employers to conduct training on sexual harassment prevention at least once a year.[37]

In Japan, the Equal Opportunity Act requires employers to establish specific measures to prevent sexual harassment, provide appropriate counseling to employees, and otherwise deal with the issue, so that (1) employees do not suffer any disadvantage in their working conditions by reason of being subject to sexual harassment in the workplace; and (2) the working environment is not disturbed by any sexual harassment.[38] The government has also developed guidelines that specify the measures that employers are required to take to prevent sexual harassment.[39]

In China, on July 1, 2018, the Special Regulations on Labor Protection of Female Employees of Jiangsu Province took effect, and, for the first time in China, they provide detailed requirements for employers to establish internal policies and systems against sexual harassment.[40] Additionally, China is preparing a Civil Code, which is expected to be adopted in 2020. The most recent draft of the code imposes requires employers to take reasonable measures to prevent sexual harassment, such as establishing reporting and investigating procedures. It also

36. *See* SHROFF ET AL., *supra* note 13, § 4.4.

37. Act on Equal Employment and Support for Work-Family Reconciliation, Act No. 3989, Dec. 4, 1987, *amended by* Act Nos. 4126, 4876, 5933, 6508, 7564, 7822, 8372, 8781, 9792, 9795, 9998, 10339, art. 13 (S. Kor.).

38. Act on Securing, Etc. of Equal Opportunity and Treatment Between Men and Women in Employment, Law No. 113 of 1972, art. 11, translated in (Ministry of Health, Labour and Welfare), https://www.mhlw.go.jp/file/06-Seisakujouhou-11900000-Koyoukintoujidoukateikyoku/0000133458.pdf (Japan).

39. Guidelines Concerning Measures to Be Taken by Employers in Terms of Employment Management with Regard to Problems Caused by Sexual Harassment in the Workplace, Notice No. 615 of 2006, translated in (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp (Japan).

40. K. Lesli Ligorner & Dora Wang, *Time to Review Your Policies Against Workplace Sexual Harassment in China*, SHRM (Aug. 24, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-china-anti-harassment-requirements.aspx [https://perma.cc/L8YR-3HLZ].

extends civil liability to employers that do not properly investigate sexual harassment claims.[41]

Other countries have laws that require investigation of complaints, including Austria, Chile, Costa Rica, India, Japan, South Africa, and Venezuela.[42] However, the scope of the investigation may differ from country to country.[43]

3. Starting Points for Conducting the Investigation

Because U.S. anti-harassment policies were engineered for the U.S. at-will employment environment, simply exporting these tools into overseas investigations may cause problems. While U.S. employers must investigate and attempt to eliminate sexually harassing conduct, U.S. law imposes few constraints on how an American employer may investigate suspicions of employee wrongdoing. Overseas, however, the legal environment differs greatly.

Under French law, for example, when employee representatives raise a sexual harassment claim, the employer must include employee representatives in the investigation.[44] An occupational physician may also be involved in the investigation to provide contextual information.[45] In addition, the Labor Inspector may be advised of the situation and may decide to start an on-site investigation to determine whether sexual harassment has occurred.[46]

At the very least, multinational employers must consider the following issues: (1) identifying the proper investigation team; (2) the application and possible preservation of the attorney-client privilege;

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41. Erika C. Collins et al., *China Responds to #MeToo; Employers Stay Alert*, PROSKAUER (Jan. 15, 2019), https://www.internationallaborlaw.com/2019/01/15/china-responds-to-metoo-employers-stay-alert [https://perma.cc/FQ9T-9EJ4].

42. DOWLING, *Littler, supra* note 4, at 27.

43. The Swedish Labor Court, for example, recently clarified that an employer providing in-home care services had no obligation to investigate an employee's claims of sexual harassment when the person who allegedly harassed the employee was the client's cohabitant and not considered to perform any work for the employer. The court declined to consider the cohabitant as a worker; thus, the company was not required to investigate the harassment. Arbetsdomstolen [AD] [Labor Court] 2017 case. no. 61/17, ¶ 45, http://www.arbetsdomstolen.se/upload/pdf/2017/61-17.pdf [https://perma.cc/U3KD-5U4F] (Swed.); Anna Jerndorf, *Swedish Labor Court Clarifies Employer's Obligation to Investigate Claims of Sexual Harassment in the Workplace*, LITTLER (Jan. 19, 2018), https://www.littler.com/publication-press/publication/littler-global-guide-sweden-q4-2017 [https://perma.cc/ET4D-KSPL].

44. CODE DU TRAVAIL [FRENCH LABOR CODE] art. L. 2312-59 (Fr.), https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=271AF741D1D17BFB3B3A707D5265F3DA.tplgfr37s_3?idArticle=LEGIARTI000038791189&cidTexte=LEGITEXT000006072050&categorieLien=id&dateTexte=.

45. MINISTÈRE DU TRAVAIL, HARCÈLEMENT SEXUEL ET AGISSEMENTS SEXISTES AU TRAVAIL: PRÉVENIR, AGIR, SANCTIONNER (2019), https://travail-emploi.gouv.fr/IMG/pdf/30645_dicom_-_guide_contre_harce_lement_sexuel_val_v4_bd_ok-2.pdf.

46. Richard Lister, *How Employers in European Countries Should Deal with Workplace Sexual Harassment*, IUS LABORIS (Dec. 13, 2017), https://theword.iuslaboris.com/hrlaw/insights/how-employers-in-european-countries-should-deal-with-workplace-sexual-harassment [https://perma.cc/2A4G-C4V].

(3) culture and language differences; (4) the rights of representation for the reporting party as well as the subject and the witnesses interviewed; (5) possible discipline imposed based on the investigation results; (6) privacy concerns during the collection, preservation, and analysis of a broad spectrum of information; and (7) the form, content, and disclosure of the investigation reports.

Investigators must be aware of and consult the employer's policies and code of conduct and must have a working knowledge of the specific country's laws on the subject, or be assisted by individuals who have that knowledge. Policies should make it clear that employers will not retaliate against employees for raising concerns or participating in the investigation.[47]

C. Proper Investigation Team

1. Choosing the Proper Investigation Team

In every event, choosing the proper investigator is crucial. A sexual harassment investigation is far more intricate than simply asking the accused if he or she is guilty or asking the parties involved what happened. The investigator ideally should have a background in employment law, have experience conducting investigation, and understand whom to talk to and when, how to ask questions, and how to document the process. And, as emphasized below, an investigator must know local law and workplace customs, or be guided by an individual who has that knowledge. Of course, investigations should be conducted in an unbiased manner, regardless of the rank or importance of the accused, and in a manner that is likely to be perceived as unbiased. A company should have a detailed procedure or protocol that outlines which department or individuals will bear responsibility for overseeing the investigation.

Among the possible investigator or investigative team leaders are in-house human resources, in-house counsel, internal audit, and outside counsel (U.S. or foreign). And, in many circumstances, this may be a combination of different resources that will need to work together to carry out the investigation and formulate remedial measures.

2. Potential Conflict Issues and Other Consequences of Retaining Internal vs. Outside Investigators

Each of these different types of investigators offers advantages and disadvantages, which are set forth below.[48]

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47. Philip M. Berkowitz, *Investigations Guidance for Multi-Nationals*, N.Y. L.J. (May 10, 2017), https://www.law.com/newyorklawjournal/almID/1202785747011/Investigations-Guidance-for-MultiNationals.

48. *See* Helene Wasserman, *Dear Littler: Can I Immediately Fire a VP Based on Sexual Harassment Allegations?*, Littler (Feb. 28, 2018), https://www.littler.com/files/18_dearlittler_feb_immediately_fire_vp_sexual_harass ment_allegations.pdf.

a. Internal Investigator

If an employer faces allegations lodged against an employee who is not high up in the company, the employer certainly normally performs the investigation in-house. The advantages offered by having an internal investigator do the work include cost containment and the speed of the deployment, both because such an investigator is cognizant of the organization and because that investigator may already be located in or near the place of the necessary fact-finding.[49]

Nonetheless, the company needs to be aware of an internal investigator's potential lack of impartiality and independence. Legal or compliance personnel who may be familiar with the employee's conduct under investigation due to their having played a role in reviewing or making decisions regarding the employee's duties at the time that conduct was occurring normally should not actively participate in an investigation of that conduct. Those legal and compliance personnel may be potential witnesses who themselves may need to be interviewed. Separating them from the investigation team will maintain the integrity of the investigation.

b. Outside Investigator

It is often recommended that the employer retain an outside investigator, especially if the alleged harasser is a senior executive in the organization or if the allegation involves alleged criminal or other high-risk conduct. Moreover, with the significant increase in the need for workplace investigations in the #MeToo era, many human resources officers are simply unavailable to handle all the necessary investigations.

An outside investigator can offer several advantages. First, the outside investigator normally has expertise in conducting sensitive investigations. Second, the outside investigator may be less likely to be influenced by internal politics, favoritism, or preconceived perceptions of the parties involved. His or her livelihood does not depend on the employee's or the employer's success. That detachment can help ensure a neutral and fair investigation. Third, hiring a dedicated, impartial investigator signals to the alleged victims, their coworkers, and others that the employer is taking the allegations seriously. This step can encourage cooperation and trust in the neutral and the process, which benefits everyone involved.

However, the employer should carry out due diligence into the third party's credentials and experience and establish a protocol for assuring that investigations are carried out in an acceptable manner and for follow-up regarding investigation results, potential discipline,

49. D. Jan Duffy, Best Practices in Internal Investigations: 2013 Edition (2013) (unpublished manuscript), https://www.americanbar.org/content/dam/aba/events/labor_law/Transatlantic%20conferences/2013/whistleblowing_duffy.authcheckdam.pdf.

and appropriate documentation. The employer should maintain communication with the investigator as they go about doing their job and be sure that the investigator keeps the employer informed of the process of the investigation. Counsel should be consulted in this process, which may require imposing certain limitations, for example, on the number of individuals to be interviewed and access to documentation to assure confidentiality, and limiting the investigator's mandate as may be appropriate.

Sometimes, it is appropriate to retain a law firm to conduct an independent investigation. Normally, this choice should not be the firm with which the company has an ongoing relationship. The firm should be experienced in conducting investigations and should have subject matter expertise. The decision whether to retain a law firm to conduct the investigation may depend on a number of considerations. For example, if the alleged victim has filed a lawsuit and has left the company, retaining a law firm likely becomes essential. If the alleged victim remains employed, other factors, such as the seriousness of the charges, the alleged victim's and harasser's levels in the company, the number of alleged victims, and similar issues become important considerations.

In the United States, the investigation and advice regarding the investigation may be shielded by the attorney-client privilege if the investigation is conducted by counsel or if the investigator is retained by the company's attorneys for the purpose of providing legal advice to the employer. Again, however, the ability to keep an investigation confidential as privileged is viable only in countries that recognize a true attorney-client privilege and not just an obligation on counsel to keep confidential advice it renders to the client.

Employees overseas may have certain due process rights during investigations, such as being accompanied by their own lawyers or other representatives. A U.S.-based lawyer acting without knowledge of these rights could ultimately prejudice the multinational employer by inadvertently preventing the employer from being able to impose discipline on the employee.

c. Local Lawyers or Investigators

In a cross-border investigation, counsel must be conversant with local laws, rules, and custom. Because foreign workplace laws tend to have no counterpart to U.S. employment-at-will, they often confound American investigators. In Europe, instead, grounds for employee dismissal are often quite limited and provide far more job security for workers, whether at the outset of employment or after completion of a probationary period.[50]

50. *See, e.g.*, Thomas Griebe et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Germany § 14.1 (Jeffrey L. Adams & John Lubbe eds., 6th ed. 2018); Salvador del Rey Guanter, Littler, The Littler Mendelson Guide to

American investigators who are unfamiliar with these essential differences may be reluctant to tamper with their sophisticated and familiar investigation strategies. However, overseas clients and witnesses may find the approach of a brash American questioner who uses adversarial cross-examination to be off-putting and inappropriate.

The failure to modify U.S. investigatory practices abroad may expose an investigator to a charge of violating the local law of the workplace, to say nothing of diminishing the utility of the investigation itself.[51] Local counsel can provide guidance both on the jurisdiction's legal framework and cultural sensitivities, and on how failing to pay attention to these may jeopardize the success of an internal investigation.

At the outset of any investigation, careful attention must be given to the laws, bar rules, and privilege customs of the local jurisdiction in which the investigation is being conducted. In France, for example, the Parisian Bar Association, in 2016, developed strict guidelines that specify the measures that lawyers are required to take in conducting internal investigations.[52] Furthermore, the French Supreme Court has held that an external lawyer cannot assist an employer when conducting a pre-dismissal meeting.[53]

Under the inquisitorial system in place in many countries outside the United States, a judge, not a lawyer, normally conducts witness questioning, and witnesses are not usually subject to aggressive investigatory questions. Overseas, lawyers often simply do not ask questions of witnesses, both as a matter of practice and as a matter of other legal and cultural sensitivities. Depositions, for example, are purely an American phenomenon; it is part of the discovery process, which simply does not exist in the vast majority of countries.

Cultural differences also may hinder an employee's ability or willingness to participate in an investigation. In many Asian communities, for example, traditional social norms mean that many women and men fear speaking up due to a deeply rooted stigma associated with sexual

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INTERNATIONAL EMPLOYMENT AND LABOR LAW, SPAIN § 14.1 (Peter Susser ed., 6th ed. 2018); ANNA JERNDORF ET AL., LITTLER, THE LITTLER MENDELSON GUIDE TO INTERNATIONAL EMPLOYMENT AND LABOR LAW, SWEDEN § 14.1 (Kristen Countryman ed., 6th ed. 2018); MAHON & HARVEY, *supra* note 10, § 14.1.

51. Dowling, *SHRM*, *supra* note 4.

52. Avocats Barreau, Conseil de l'Ordre, Nouvelle Annexe XXIV : Vademecum de l'avocat chargé d'une enquête interne (Sept. 13, 2016), http://www.avocatparis.org/mon-metier-davocat/publications-du-conseil/nouvelle-annexe-xxiv-vademecum-de-lavocat-charge-dune.

53. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 27, 1998, Bull. Civ. V, No 284 (Fr.).

harassment.[54] And, of course, it is essential to retain an interpreter who speaks the local language and dialects to help conduct interviews.[55]

D. Attorney-Client Privilege Abroad, as Contrasted with the Privilege in the United States

1. Different Approaches

a. United States

In the United States, companies investigating claims of sexual harassment must be concerned with the possibility that the results of the investigation—wherever in the world conducted—may be subject to discovery in a lawsuit or arbitration brought by the alleged victim, or by the government, or even in related claims brought by others. However, discovery normally may not be had of information that is protected by the attorney-client privilege. Of course, the privilege is often waived in order to assert an affirmative defense, and it may be waived by necessity if the employer seeks to rely on the investigation results in formulating a legal defense. Nevertheless, the employer is best advised to assure that the attorney-client privilege attaches to the investigation.[56]

b. Overseas

Overseas rules of privilege and confidentiality often catch U.S. attorneys and clients by surprise. These U.S. doctrines are limited only to the United States and to a limited number of other common-law jurisdictions, such as the United Kingdom, Australia, and Hong Kong, where legal professional privilege protects from disclosure (a) confidential communications between a client and their lawyer that come into existence for the purpose of giving or receiving legal advice, as well as (b) confidential communications and documents generated for the sole or dominant purpose of actual or contemplated litigation.

Most countries do not recognize the attorney-client privilege at all, or recognize only a principle of confidentiality that is not coextensive with the protections provided by the privilege in the United States.[57] Thus, many jurisdictions may prohibit the lawyer from revealing

54. *See* Motoko Rich, *She Broke Japan's Silence on Rape*, N.Y. Times (Dec. 29, 2017), https://www.nytimes.com/2017/12/29/world/asia/japan-rape.html; Mandy Zuo, *Why Chinese Women Don't Speak out About Sexual Harassment in the Workplace*, S. China Morning Post (Apr. 21, 2018), https://www.scmp.com/news/china/society/article/2142703/why-chinese-women-dont-speak-out-about-sexual-harassment.

55. Philip M. Berkowitz, *10 Tips for an Effective Cross-Border Investigation*, Law360 (Oct. 31, 2012, 1:39 PM EDT), https://www.law360.com/articles/390178/10-tips-for-an-effective-cross-border-investigation.

56. *Id*.

57. *Id.*; *see* Felix Helmstädter et al., *Maximizing Protection of Attorney-Client Privilege in Germany*, Morrison Foerster (Aug. 13, 2018), https://www.mofo.com/resources/publications/180813-attorney-client-privilege-germany.html.

communications with the client, but do not protect the client from having to disclose communications with counsel, nor will the law protect the attorney's advice from being subpoenaed by the government.

In China, for example, there is no concept of legal privilege, although there is a similar concept of confidentiality.[58] However, communications with the client can be disclosed if required by law or court order.[59] Thus, as explained by some commentators, Chinese and U.S. lawyers may view the scope of their fiduciary duty to clients differently. A U.S. lawyer advising in China could be compelled to testify regarding what that lawyer might otherwise consider confidential or privileged company information.[60] Similarly, in Japan, no attorney-client privilege exists. While the confidentiality of communications between an attorney and a client may be protected, the protection is not overarching and does not belong to the client.[61]

To illustrate the point, in Germany, prosecutors have dramatically conducted numerous "dawn raids" on U.S. law firms, seizing records of internal investigations that would be considered protected from discovery by U.S. privilege law. Courts throughout Europe are grappling with the scope of the legal professional privilege and the confidentiality of internal investigations.[62]

2. Special Considerations for In-House Counsel

U.S. courts, consistent with *Upjohn Co. v. United States*,[63] generally recognize that the privilege may attach to communications between in-house counsel and the corporate client. Yet again, this approach has limited utility outside the United States. Indeed, the European Court of Justice held in September 2010 that communications with in-house counsel simply are not privileged. The court held, in sum, that in-house counsel are not sufficiently independent to warrant extending a legal professional privilege.[64] While the no-privilege

58. Leah M. Christensen, *A Comparison of the Duty of Confidentiality and the Attorney-Client Privilege in the U.S. and China: Developing a Rule of Law*, 34 T. JEFFERSON L. REV. 171, 172–73 (2011).

59. *See id.* at 184–85.

60. *See id.* at 185; Kyle Wombolt et al., *China*, 2 GLOBAL INVESTIGATIONS REVIEW, THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 162, 174–75 (Judith Seddon et al. eds., 4th ed. 2020).

61. *See* Mayu Arimoti, *Is There Attorney-Client Privilege in Japan?*, LLM L. REV. (June 16, 2018), llmlawreview.com/2018/06/16/is-there-attorney-client-privilege-in-japan; ALVIN HIROMASA SHIONZAKI, LEX-MUNDI, IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE: JAPAN (2009), http://www.lexmundi.com/Document.asp?DocID=1942.

62. "German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry," N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html.

63. 449 U.S. 383 (1981).

64. Case C-155/79, Akzo Nobel Chems. Ltd. V. Comm'n, 2010 E.C.R. I-08301; Case 155/79, AM & S Eur. Ltd. V. Comm'n, 1982 E.C.R. 1575.

rule has only been recognized in antitrust cases, the rule could permit access to valuable information that would otherwise be privileged as attorney-client communications. The question is left to counsel and the multinational company to determine risk tolerance.[65]

While EU regulation has led to some measure of consistency in member states' laws dealing with attorney-client privilege, there are still significant differences of emphasis and approach. Thus, the United Kingdom, Denmark, Ireland, Netherlands, Romania, Germany, and Spain protect the confidentiality of the communications with in-house counsel, but France, Italy, and Sweden do not.[66]

Because the status of in-house counsel as a professional legal advisor for the purposes of applying the U.S. attorney-client privilege is not guaranteed overseas, employers may need to consider involving outside counsel to help ensure application of the privilege.

E. Understanding Culture and Language Differences

Understanding culture differences can play a pivotal role in interviewing individuals in order to avoid potential misunderstandings and helping to put a witness at ease. Indeed, in the United States, people are more accustomed to confrontational and even accusatory interviews. Again, however, this is less common outside the United States, where it may result in a hostile and unproductive reaction.

For example, in many cultures (even in the United States), an investigator suggesting to an employee that he is accused of wrongdoing, rather than just gathering evidence, can trigger push-back and anger. Even body language may differ from country to country and may affect the interview process. For example, looking someone in the eye may be considered rude in some countries, and so not maintaining eye contact with an investigator does not necessarily signal that a person is obfuscating.[67]

As noted above, outside the United States, lawyers may rarely question a witness. In most instances, the judge, and not the lawyer, asks the questions. Many countries operate under the inquisitorial system, whereby the judge may question witnesses.[68] In contrast, as noted

65. J. Triplett Mackintosh & Kristen M. Angus, *Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 Int'l Law. 35 (2004).

66. Jacques Buhart, *Comparaison internationale des statuts de juristes internes*, Juriste d'Enterprise Mag., Apr. 8, 2014, at 101, 102.

67. *See* KPMG Int'l, Cross-Border Investigations: Are You Prepared for the Challenge? 16 (2013), https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf [https://perma.cc/D7D2-VVCN].

68. *See*, *e.g.*, Neil Montgomery & Helena Penteado Moraes Calderano, *Legal Systems in Brazil: Overview*, Thomson Reuters Practical Law Global Guide § 24 (last updated Jan. 1, 2020); Catherine Allen & Rachel Hanly, *Legal Systems in Ireland: Overview*, Thomson Reuters Practical Law Global Guide § 24 (last updated Jan. 1, 2020);

previously, under the adversarial system in the United States, lawyers conduct the questioning. This difference in style and practice may lead to miscommunications or conflict in countries where individuals are not familiar with the practice.

F. Rights of Representation and Imposing Discipline of the Individuals Under Investigation

One of the starkest differences between domestic and cross-border investigations is that, in some jurisdictions, the employee may have (a) the right to representation during an interview, (b) the right to be informed of procedural rights during the investigation, and (c) the right to have access, at least to some degree, to investigation materials that identify the employee.

France, for example, strictly protects the rights of all individuals under investigation. Under some circumstances, the French investigator must explain to these individuals that they can be assisted by lawyers.[69] In Finland, if an employer is seeking to terminate the employee, the employee must be informed of his or her right to have a lawyer present during an interview.[70] Likewise, in Nigeria, investigators must inform a witness that he or she has the right to legal representation during an interview.[71] In contrast, the United States and the United Kingdom generally do not impose such duty.[72]

In certain countries, the employee interview must be suspended if the interview reveals that the employee engaged in wrongful conduct that may subject him or her to discipline. Statutory rules concerning representation (for example by a union committee, an employee representative, or a work council), as well as considerations regarding legal prerequisites to imposing discipline, must be considered. In China, for example, the applicable union must be consulted for any unilateral termination of employment by the employer even if it is based on a statutory ground.[73]

Marco Gubitosi & Sara Colombera, *Legal Systems in Italy: Overview*, THOMSON REUTERS PRACTICAL LAW GLOBAL GUIDE § 24 (last updated Nov. 1, 2019).

69. *See* Avocats Barreau, *supra* note 52.

70. *See* Markus Kokko & Vilma Markkola, *Finland: Corporate Investigations 2020*, § 7.3, ICLG, https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/finland [https://perma.cc/UP8A-QFPG] (last visited May 1, 2020).

71. *See* Kunle Obebe & Bode Adegoke, *Nigeria: Corporate Investigations 2020*, §7.3,ICLG,https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/Nigeria [https://perma.cc/F3SS-2XY4] (last visited May 1, 2020).

72. *See* Jean-Pierre Grandjean, *L'avocat chargé d'une enquête interne, une révolution!*, GAZETTE DU PALAIS, Dec. 13, 2016, at 8, 8–9, https://www.gazette-du-palais.fr/wp-content/uploads/2017/12/904.pdf [https://perma.cc/8T27-KPZY].

73. Melvin Sng et al., *China: Handling Internal Investigations*, GLOBAL INVESTIGATIONS REV. (Sept. 20, 2016), https://globalinvestigationsreview.com/insight/the-asia-pacific-investigations-review-2017/1068616/china-handling-internal-investigations [https://perma.cc/T6QP-EJKG].

In some jurisdictions, such as France, employees have the right to refuse to cooperate with an employer-led investigation, even if they are not its target. [74] The refusal to cooperate will not preclude the ongoing investigation and subsequent consequences.[75] Witnesses who refuse to cooperate for fear of retaliation should, in any event, be reminded of their right to be protected against retaliation.[76]

In some instances, it may be advisable, once litigation commences, to permit an employee's lawyer to be present during an interview, even if it is not required, to maintain the integrity of the investigation. Any such decision should be made only after consultation with legal counsel cognizant of the local implications.

G. Collection, Preservation, and Analysis of Data

1. Data Privacy Concerns

a. Collection of Data

Any efforts to search email—whether or not located on company-owned systems and computers—or even to review any personnel records, must be considered with privacy law issues in mind. Many European countries prevent companies from extracting the employee's email accounts without the employee's consent.[77] In Japan, when an employer collects employees' personal information, the employer must disclose in advance the purpose for which such employees' personal information is to be used.[78] Disclosure may be made by, for example, a written notice provided to each employee or in the form of a website notice on the intranet of the employer.

b. Transmission of Data

Data privacy permeates all aspects of an investigation carried out overseas or that involves the transmission of data—whether electronic or hard copies—from overseas to the United States. In Europe, French and Swiss "blocking statutes" prevent the transmission of evidence abroad unless certain procedural safeguards are met.[79] Moreover, the European Union's expansive data privacy regime, the General Data

74. *See* Daniel Fridman & Ludovic Malgrain, *Under Scrutiny: Internal Investigations*, White & Case (July 1, 2015), https://www.whitecase.com/publications/insight/under-scrutiny-internal-investigations [https://perma.cc/8P6J-CMYZ].

75. Ministère du Travail, *supra* note 45.

76. *See id.*

77. *See* Jérôme Aubertin, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Belgium § 11.2 (John Lubbe & Trent Sutton eds., 6th ed. 2018); Griebe et al., *supra* note 50, § 11.2; Cătălin Roman, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Romania § 11.2 (Philip M. Berkowitz & Kristen Countryman eds., 6th ed. 2018).

78. Article 18, Paragraph 2, Japan Act on the Protection of Personal Information.

79. *See* Fridman & Malgrain, *supra* note 74.

Protection Regulation (GDPR),[80] is more restrictive than previous data privacy regulations (containing strict rules requiring consent, legitimate interest, and necessity to perform a contract for processing personal data), and will have a significant impact on the way both cross-border internal investigations are conducted. The GDPR defines personal data broadly to include any information related to an identified or identifiable natural person. Significantly, the GDPR applies to all EU residents, whether or not they are EU citizens. Violations of the GDPR carry significant administrative fines.[81]

Similarly, China imposes tough requirements regarding the collection and analysis of "state secrets" and other information that is in China's "national interests." However, these notions of state secrets and national interests are not clearly defined by China's laws.[82] Companies can help ensure compliance by keeping much information within China's borders and hiring local experts who are intimately familiar with the risks of violating China's laws.[83]

The Japanese Data Privacy Law does not restrict the export of personal information. However, generally, when an employer transfers employees' personal information to third parties (including a U.S. company), in principle, the employer is required to obtain the relevant employees' consent before the transfer.[84]

Even after the conclusion of the cross-border investigation, a company needs to keep in mind the differences in data privacy laws between nations. Some countries prohibit outdated personal information from being retained, even if it is contained in investigatory materials. This ban could affect the applicability of certain laws and regulations that require a U.S. company to maintain investigatory materials and work product for a period of time. In Brazil, for example, employment-related documents must be kept in the company's files even after an employee's termination. The term of retention varies from two to thirty

80. *See* General Data Protection Regulation (GDPR) 2016/679, 2016 O.J. (L 119) 1 (EU).

81. *Id.*; PHILIP L. GORDON, TEN STEPS FOR U.S. MULTINATIONAL EMPLOYERS TOWARDS COMPLIANCE WITH EUROPE'S NEW DATA PROTECTION FRAMEWORK—THE GENERAL DATA PROTECTION REGULATION 1 (2016), https://www.littler.com/files/2016_1_10stepsformultinationalemployers_dataprotection.pdf.

82. *See* Jerry C. Ling, *Traps for the Unwary in Disputes Involving China*, JONES DAY (Aug. 2012), https://www.jonesday.com/en/insights/2012/08/traps-for-the-unwary-in-disputes-involving-china.

83. *See* KPMG INT'L, *supra* note 67; *see also* Susan Ning et al., *Development of PRC Regulations on Cross-Border Data Transfer*, CHINA LAW INSIGHT (June 19, 2019), https://chinalawinsight.com/2019/06/articles/crossing-borders/development-of-prc-regulations-on-cross-border-data-transfer [https://perma.cc/N2LU-HFAY].

84. Act on the Protection of Personal Information, *supra* note 78, art. 24; *see also* KAKUYAMA ET AL., *supra* note 9, § 11.3(a).

years, depending on the document.[85] In France, records concerning the employee's use of the Internet should not be retained by the employer for more than six months.[86] The disciplinary file can be retained beyond the statute of limitation of three years.

Failure to anticipate the impact of local data protection laws not only can significantly impede an investigation, but it also can be costly in terms of added expenses, sanctions, and, in some cases, prosecution. European "data subjects," for example, have a private right of action for data law violations.[87] In France, exceeding the maximum retention duration for personal data provided either by law or regulation, by a request for authorization or opinion, or by a prior declaration addressed to the French data privacy watchdog (CNIL), where applicable, may constitute an offense punishable by a five-year imprisonment and a fine.[88]

c. Preservation of Data

At the commencement of the investigation, the investigation team must consider whether to issue a legal hold instructing employees to retain documents related to the investigation. Promptly issuing and assuring compliance with document preservation notices can help the company preserve foreign evidence while disputes are resolved with any regulatory bodies concerned with blocking statutes, or with employees refusing to consent.

H. Investigation Report

1. Form and Content

At the close of the investigation, the company will typically prepare an investigation report, unless legal considerations suggest a different approach. The appropriate form and content of the report in a cross-border investigation will depend on many factors and the unique factual circumstances of the matter investigated. The labor laws in a particular jurisdiction may call for a written report, especially if disciplinary action is taken or if the company has the duty to provide certain investigatory material, including a written investigatory report, to the target or the witness under investigation. Of course, careful attention must also be paid to the content of the report. The report should focus on the facts of the alleged conduct, information gathered during the

85. Vilma Toshie Kutomi, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Brazil § 11.6 (Kristen Countryman & Geida Sanlate eds., 6th ed. 2018).

86. *Les outils informatiques au travail*, CNIL (July 25, 2018), https://www.cnil.fr/fr/les-outils-informatiques-au-travail [https://perma.cc/V4ME-QL7N].

87. GDPR, *supra* note 80, arts. 77–84.

88. Code pénal [Penal Code] arts. 226–20 (Fr.).

investigation, and whether the conduct runs counter to the company's applicable policies, as opposed to whether laws were broken.

Again, the employer must be sure that every individual, consultant, management or director—whether local or outside of the country—who receives the report complies with the local data privacy laws. The report should be shared in a manner that preserves the attorney-client privilege where applicable. It is often advisable to consult with in-house or outside counsel prior to finalizing any drafts of the report.

2. Required or Optional Disclosure

As noted previously, a key difference between domestic and cross-border disclosure regulation is the lack of discovery, per se, in most jurisdictions overseas.[89] Civil law jurisdictions, especially in Europe, generally limit disclosure of evidence to what is proffered by each party as evidence in support of the party's case. In contrast, pre-trial discovery obligations in common law countries, particularly in the United States, but also in the United Kingdom, are much broader. This can be especially challenging when investigatory materials or other evidence sought in discovery by a U.S. party include information considered by European countries to be "personal information" relating to an individual, raising privacy concerns.[90]

In addition, in some jurisdictions, resolutions may require the disclosure of investigatory findings to the U.S. government or authorities located outside of the United States. In Australia, for example, the company has a duty to report evidence of certain criminal offenses to police.[91]

Conclusion

Workplace investigations, becoming quite commonplace in the wake of the #MeToo movement, increasingly implicate global issues with which HR executives and counsel who advise them must be familiar. Multinational companies and their counsel must consider the cultures and the laws of the countries in which they do business before carrying out investigations that involve cross-cultural issues and the laws of multiple jurisdictions.

89. *See* Samantha Cutler, *The Face-off Between Data Privacy and Discovery: Why U.S. Courts Should Respect EU Data Privacy Law When Considering the Production of Protected Information*, 59 B.C. L. REV. 1513, 1514 (2018).

90. *See* Karin Retzer & Sherman Kahn, *Balancing Discovery with EU Data Protection in International Arbitration Proceedings*, NYSBA N.Y. DISP. RESOL. LAW., Spring 2010, at 47, 47.

91. *See* KPMG INT'L, *supra* note 67.

Making Physical and Virtual Sexual Harassment Illegitimate: The US #MeToo Movement and the Israeli Prevention Act

*Shlomit Yanisky-Ravid**

Introduction

Awareness of sexual harassment as an undesirable and harmful phenomenon has been raised recently through the #MeToo movement. This "wake-up call" has driven women and men to come forward, mainly in the media, and share instances in which they were sexually harassed. Although U.S. courts have recognized sexual harassment as illegal against all genders under Title VII, that statute does not mention the word "harassment"; hence, unfortunately, the phenomenon remains largely unreported. Sexual harassment cases based on Title VII are complicated and rely on court decisions and EEOC guidelines that impose many prior procedural conditions. This paper argues that more specific legislation that addresses the prevention of sexual harassment with a broad, up-to-date, theoretically based and preventive perspective would be more accessible, understandable, and ultimately enforceable beyond the workplace. This adjustment may lead to a better level of enforcement that will break the victims' silence about the harassments.

This article discusses the Israeli approach to how sexual harassment is tackled. Already coined the most progressive law of its kind in the world, the revolutionary Israeli Prevention of Sexual Harassment Act, 5758-1988 ("Act" or "Israeli Act"), has allowed women and other victims of sexual harassment to take legal action against harassers in an efficient and accessible manner.[1] This article also draws on the

* Professor of Law, Ono Law School (OAC), Israel, Associate Professor of Law, The Shalom Comparative Legal Research Institute, Founder and Director, Co-Founder and Academic Director of Working Women Center (CWW), in cooperation with the Israel Women's Network, Israel. The CWW deals with discrimination against women in the workplace, illegal firings, sexual harassment at work, equal pay, proper representation for women, and women from minority and excluded groups, as well as women inventors and creators' rights. Former Chairperson for the Legislation Amendments Committee Labor Relations and Employment, including antidiscrimination and sexual harassment, Israel Bar Association, Founder and Director of the Center for IP Rights at Workplaces and Inventors Rights. The Center provides pro bono legal advice to employees. It also acts as a consultant to various governmental committees and members of the Knesset.

legendary work of William Felstiner, Richard Abel, and Austin Sarat,[2] who addressed the transformation process by which injurious experiences turn into perceived grievances and ultimately disputes. These authors claim that transformation studies provide a spotlight on the alleged conflict in the United States and explore the question of whether these conflict levels are too low. Following that foundation, this article

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Former Advisor for Governmental Committee for Promotion of Women in Academia. Fordham Law School, Visiting Professor, Fordham CLIP, Head of the IP-AI & Blockchain Project, *Yale Law School, ISP, Professor Fellow.* I would like to thank Professor Samuel Estreicher, NYU Law School, Dwight D. Opperman Professor of Law, the Director for Labor and Employment Law and Co-Director for the Institute of Judicial Administration for his support and friendship, and his excellent staff, Torrey Whiteman and Allison Chifinia, for perfectly organizing the annual conference. I am grateful for the Academic Editor of this issue, Professor Charlotte Alexander for her wonderful work. Special thanks to Professor Frances Raday, Chair of the esteemed UN Human Rights Council Working Group on Discrimination Against Women, former Member on the UN Committee on the Elimination of Discrimination against Women and Founding Chair of the Israel Women's Network Legal Center and Advisory Council for Israel's Equal Employment Opportunity Commission, and among others, Chair of the Committee for Advancement of Women of the Israel Bar Association—for being a role model and inspiring me to write this article. I am grateful also to Prof. Catharine A. MacKinnon, my former teacher, for her tremendous contribution to promote women's rights around the globe and assist with the fight against sexual harassment. I would also like to thank another former teacher of mine, Prof. Vicki Schultz, for teaching and enlightening different aspects of feminism globally. Thanks to Adv. Shlomit Shalit, NYU Law School, for her assistance and important contribution. Finally, yet importantly, I am thankful to my research assistants, my former student Adv. Tamara Lev, Fordham Clip Fellow, Nimrod Ravid, and the staff of the *ABA Journal of Labor & Employment Law* for outstanding work on this paper. Special thanks to Professor Marcia McCormick, Associate Dean for Academic Affairs and Professor of Women's and Gender Studies, for the excellent comments, suggestions, and wonderful collaboration. This article is dedicated to three women Ministers (out of eight) in the 2020 twenty-third Israeli Government who were my former students, in my course Gender Equality and Feminist Theories, in which I was fortunate to teach some of the fundamental concepts about gender equality discussed in this article: the Minister of Environmental Protection and former Minister for Social Equality, Gila Gamliel; the Minister of Aliyah and Integration, Pnina Tamano-Shata (the first ever Israeli Minister from the Ethiopian-Israeli community); and the Minister of Diaspora Affairs, Omer Yankelevich (the first ever female Israeli Orthodox Minister).

1. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 (Isr.); Tsili Mor, *Law as a Tool for a Sexual Revolution: Israel's Prevention of Sexual Harassment Law-1998*, 7 MICH. J. GENDER & L. 291, 292 (2001) ("Today, Israel boasts an extraordinary law, billed as one of, if not the most, progressive laws of its kind in the world. The law provides wider protection and holds greater potential for social change than any existing laws.").

2. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631, 631 (1980–1981). Since the dawn of history, people have fought epidemics and indeed a war in the "plague" of abuse of human rights in society, including the workforce. However, before fighting a phenomenon, it must be clearly defined to formulate a cause of action in its case. The article defined three major stages in the development of every legal "battle": naming, blaming, and claiming. The article provides a framework for studying the process, by which injurious experiences become (1) perceived ones (naming); (2) grievances (blaming); and (3) disputes (claiming). *Id.* at 635–36. The article argues that the transformation between the stages are caused by, inter alia, the objectives sought, the prevailing ideology, the scope of conflict, the mechanism chosen, the attributions of responsibility, the reference groups, representatives and officials, and the dispute institutions. *Id.* at 639–49.

further develops the transformation theory and analyzes the struggle against the sexual harassment epidemic via the Israeli Act, according to four steps: "Naming, Blaming, Shaming and Amending." "*Naming*" identifies the harmful conduct, the hidden mechanism underneath and the outcome of excluding the victims, followed by broadly defining sexual harassment to target potential harassers. "*Blaming*" attributes guilt to the wrongdoer—the harasser, using enforceable legal steps within the workplace and courts, resulting in enforcing legal sanctions against the harasser. "*Shaming*," an additional step, is the process of attributing illegal and non-acceptable social values to the harassers, which include public figures. In addition, I argue that a further necessary step to keeping the Act relevant with the rapidly evolving reality is "*Amending*." An example of "amending" is adapting to the new appearance of sexual harassment in digital spheres. This has become a concern that does not go unnoticed, hence the Act's amendments and its inclusion in the definition of sexual harassment.

Furthermore, this article provides a theoretical analysis of the underlying harassment and explains the phenomenon in both the real and virtual spheres, which excludes women from the workplace and public domain, while violating their rights and shares in the distribution of justice.

This article not only joins other scholars and legal practitioners claiming that specific state laws can offer greater protections against sexual harassment, but also suggests a model to increase the enforcement level. While several states, such as California and recently Connecticut, and cities, like New York City, have adopted specific laws against sexual harassment, which represents an important step forward, their approaches still reflect a narrow perspective which focuses on antidiscrimination in the workplace. Additionally, many U.S. states still rely on Title VII, which requires complicated prerequisite procedures like proving discrimination and meeting other prior conditions.

This article will describe how, despite the #MeToo and other movements,[3] many of the U.S. states have yet to adopt a specific statute to regulate the prevention of sexual harassment,[4] while deliberating

3. *See About*, Me Too, https://metoomvmt.org/about/ (last visited May 8, 2020). The #MeToo movement was started to help survivors of sexual harassment. The slogan was later used for the anti-sexual harassment movement. Powerful men in the entertainment industry and politicians were subject to the hashtag, which followed loss of careers and major embarrassment worldwide. #*MeToo—A Timeline of Events*, Chi. Trib. (May 8, 2020), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-html story.html (presenting the major publicized events in the development of the #MeToo Movement, since the term was coined in 2006 by Tarana Burke).

4. Following the #MeToo movement, an Associated Press survey of state legislatures indicated that house and senate chambers nationwide were considering making changes to sexual harassment policies, although only a few states passed laws regarding sexual harassment in the private sector. David A. Lieb, *Half of States Act as #MeToo Sexual Misconduct Claims Mount*, AP News (Aug. 26, 2018), https://apnews.com/83caf61841a84db3bbd85648bce8fec5.

in depth the features of the Israeli Act.[5] This article will reflect lessons learned and what characteristics of the Act made it in essence so powerful and influential, among other aspects, in hearing the sound of silence.[6] Policy makers are urged to rethink the current U.S. legal regime that currently places hurdles when it comes to enforcement surrounding this phenomenon.[7]

I. U.S. Approach

Since 1986, when the United States Supreme Court decided *Meritor Savings Bank v. Vinson*, sexual harassment has been illegal in the United States under Title VII of the Civil Rights Act of 1964.[8] Even though Title VII does not mention the word "harassment," U.S. courts

5. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 (Isr.). On rethinking the current legal regime, see Vicki Schultz, *Open Statement on Sexual Harassment*, 71 STAN. L. REV. ONLINE 17 (2018), https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars [hereinafter Schultz, *Open Statement*]; Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22 (2018), https://www.yalelawjournal.org/pdf/Schultz_k6kcog1p.pdf [hereinafter Schultz, *Reconceptualizing Again*]; Vicki Schultz, *Understanding Sexual Harassment Law in Action—What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1 (2006) [hereinafter Schultz, *Understanding*].

6. In 2017, 121,5000 sexual harassment claims were reported in Israel. Although the number seems to be alarming, it indicates that the Act raised awareness and victims are now able to defend themselves against the harasser with legal implications. Amihai Attali, *121,500 Sexual Harassment Reports in a Year*, YNET NEWS (Nov. 19, 2018, 9:35 PM), https://www.ynetnews.com/articles/0,7340,L-5409024,00.html.

7. Ramit Mizrahi, *Sexual Harassment After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121 (2018), https://www.yalelawjournal.org/pdf/Mizrahi_fdk1ngup.pdf (arguing for direct and specific acts against sexual harassment, while discussing some of the proposed legislation that was inspired by the #MeToo and #TimesUp movements, by seeking to prevent harassment and the protection of employees who come forward by using the California law that addresses sexual harassment via the antidiscrimination act in the workplace). Recently New York City enacted the Stop Sexual Harassment in NYC Act. Press release, N.Y.C. Office of the Mayor, Mayor DeBlasio Signs Legislation Strengthening Protections Against Sexual Harassment (May 9, 2018), https://www1.nyc.gov/office-of-the-mayor/news/243-18/mayor-de-blasio-signs-legislation-strengthening-protections-against-sexual-harassment#/0; *see also* Local Law 96 of 2018 (N.Y.C.), https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/Local_Law_96.pdf (last visited May 11, 2020). Prior to the end of the 2019 legislative session on June 5, 2019, the Connecticut General Assembly passed several significant bills that will affect employers of all sizes in Connecticut, including new and expansive sexual harassment training obligations, as well as additional investigative and remedial authority granted to the Connecticut Commission on Human Rights and Opportunities. *Sexual Harassment Prevention Resources*, CONN. COMM'N ON HUMAN RIGHTS & OPPORTUNITIES, https://www.ct.gov/chro/cwp/view.asp?a=5019&Q=609536&chroNav (last visited May 8, 2020).

8. 477 U.S 57, 64–67 (1986); *see also* 29 C.F.R § 1604.11 (2019). Title VII of the Civil Rights Act of 1964, which applies to employers with fifteen employees or more, provides that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a) (2012). Between 1964 and 1986 sexual harassment was illegal in some states and in parts of the federal system but not in others; in some states, plaintiffs still brought suit under Intentional Infliction of Emotional Distress in tort law. *See* Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 11–15 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Jean C.

have recognized, based on their interpretation of Title VII, that harassment may be perpetrated against people of all sexes and genders, takes both sexual and nonsexual forms, and is often motivated by bias and hostility.[9] Some states, such as California and recently New York, have enacted specific acts trying to mitigate sexual harassment, mainly in the workforce and under the antidiscrimination framework. While this article views the specific state acts as an important reform, they still reflect a narrow approach. Despite these legal protections, sexual harassment is still a persistent phenomenon with a high percentage of victims suffering in silence.[10] As noted by Catharine MacKinnon:

> Many survivors realistically judged reporting pointless. Complaints were routinely passed off with some version of "she wasn't credible" or "she wanted it." I kept track of this in cases of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.[11]

In fact, the EEOC conducted a study of harassment in the workplace. After examining complex issues associated with harassment in the workplace, the study found that (1) workplace harassment remains a persistent problem; (2) workplace harassment too often goes unreported; (3) there is a compelling business case for stopping and preventing harassment; (4) it starts at the top—leadership and accountability are critical; and (5) training done over thirty years *has not worked as a prevention tool* and therefore must change.[12]

Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 Wash. & Lee L. Rev. 123, 135–42 (1990).

9. Mizrahi, *supra* note 7, at 122 (exploring from the perspective of an attorney whose practice focuses on plaintiff-side employment law in California ways that state laws can offer greater protections to employees).

10. *See* Chai R. Feldblum & Victoria A. Lipnic, Equal Emp't Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace 9–10 & n.21 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (showing that 58 percent of women are being subject to harassment at work and that harassment is a persistent problem). Workplaces at greater risk for sexual harassment include those with "high-value" employees, significant power disparities, younger employees, or homogenous workforces. *Id.* at 25–29. They also include workplaces where employees do not conform to gender norms, focus on customer service or client satisfaction; and workplaces that encourage drinking, or are isolated and decentralized. *Id.*; *see also* Mizrahi, *supra* note 7, at 122, 124–25 (twenty years after the publication of Vicki Schultz's *Re-conceptualizing Sexual Harassment* and after U.S. courts broadly recognized sexual harassment, sexual harassment persists and remains largely unreported and employees silently suffer through harassment because they need to keep their jobs).

11. Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. Times (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html ("[I]t is widely thought that when something is legally prohibited, it more or less stops. This may be true for exceptional acts, but it is not true for pervasive practices like sexual harassment.").

12. *See* Feldbum & Lipnic, *supra* note 10, at vi. The final report includes detailed recommendations and several helpful tools to aid in designing effective anti-harassment

The #MeToo movement and others, such as #TimesUp, have motivated individuals to speak out in the media about sexual harassment. Nevertheless, many of the alleged harassers have not been subject to court proceedings or legal sanctions, and many of those who speak remain vulnerable to retaliation.[13]

This article argues that the lack of specific legislation addressing sexual harassment in many states and the necessity to rely on complicated procedures that, inter alia, may require proving discriminatory actions, make enforcement more complicated and less accessible to victims of sexual harassment.[14] Consequently, mitigating this phenomena may require facing essential procedural hurdles that result in the persistence of sexual harassment and with victims who remain largely unreported.[15] Thus, legislative change is necessary to fight against sexual harassment and gender violence at work. State laws can offer greater protection for a wider range of actors in the workplace, expanded liability, greater remedies for victims, and more accessible courts.[16] These examples are already a part of the Israeli Act, which is the focus of this study. Unlike U.S. law, which requires certain

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policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace "risk factors" for harassment.

13. Mizrahi, *supra* note 7, at 125–26; *see also id.* at 139–50 (proposing additional legislation that was inspired by the #MeToo and #TimesUp movement, which seeks to prevent harassment and to protect employees who come forward); MacKinnon, *supra* note 11 ("The #MeToo movement is accomplishing what sexual harassment law to date has not. This mass mobilization against sexual abuse, through an unprecedented wave of speaking out in conventional and social media, is eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims. . . . Sexual harassment law prepared the ground, but it is today's movement that is shifting gender hierarchy's tectonic plates.").

14. Title VII does not mention the word "harassment." *See* 42 U.S.C. § 2000e-2(a) (2012) (defining unfair employment practices in terms of hiring, firing, segregating, classifying, and discriminating). U.S. courts recognized sexual harassment as discrimination under Title VII, in many cases. *E.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (same sex sexual harassment and sex stereotypes are recognized under Title VII); Meritor Savings Bank v. Vinson, 477 U.S 57 (1986) (recognizing hostile environment even in instances where there was no direct financial harm, adopting EEOC guidelines); Barnes v. Costle, 561 F.2d 983, 994–95 (D.C. Cir. 1977); Hill v. Children's Vill., 196 F. Supp. 2d 389 (S.D.N.Y. 2002); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); *see* 29 CFR § 1604.11(a) (1981); *see also* JOEL W. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION, CASES AND MATERIALS 190 (11th ed. 2017) (stating that for a plaintiff to establish the existence of sex-based hostile work environment harassment, he must prove that the challenged conduct (1) was severe and pervasive; (2) created a hostile or abusive working environment; (3) was unwelcome and; (4) was based on the plaintiff's sex).

15. S*ee generally* FELDBUM & LIPNIC, *supra* note 10; Mizrahi, *supra* note 7; MacKinnon, *supra* note 11.

16. Mizrahi, *supra* note 7, at 132 ("Because the protections and remedies under the FEHA are greater than those under federal law, and because there are advantages to remaining in state court, California employment lawyers usually assert FEHA claims on behalf of their clients.").

pre-conditions (such as being a member of a protected class), the Israeli Act is more protective of victims.

Yet, drawing on the legal transformation theory, this article addresses other essential components. For example, the Israeli Act has been described as providing wider protection and as holding "greater potential for social change than any existing law in the United States, Canada and most European nations."[17] Therefore, the Israeli Act can serve as a model for state legislators to explore, establish, or expand the current U.S. law. The "bridge" that I will draw between the two different jurisdictions relies on key similarities. Israel adopted similar legal principles of antidiscrimination, which are already well embedded in many Israeli laws; the Prevention of Sexual Harassment Act was directly influenced by American perceptions against sexual harassment; and the impact of U.S. scholars on the Act and its interpretations given by courts is highly noticeable since the day of enactment.[18] Thus, this article will discuss the Israeli Act in detail, noting the lessons learned and the characteristics that made the Act so impactful.

This article argues that the model of "naming, shaming, and blaming" with an additional phase of "amending," showcases the efficiency of the adaption and implementation of the Israeli Act. This model, which is the focus of the article, makes the Israeli Act revolutionary. The high level of enforcement against public figures, the evolving landscape in male dominant entities such as the police force and the Israeli Defense Forces (IDF), and the inclusion of sexual harassment in virtual spheres ultimately created an Act that was unique.[19] The

17. Mor, *supra* note 1, at 292 (noting that the innovative approach of the law can be found as a whole revolutionary act with specific provisions within that allow the ease of implementation of the law that encompasses sociocultural factors, feasibility and potential impact).

18. *See* Equal Employment Opportunities Law, 5748-1988 § 2, 42 LSI 31 (Isr.) ("An employer shall not discriminate between employees or those seeking work on the basis of sex, sexual orientation, personal status, pregnancy, fertility treatment, IVF treatment, parenthood, age, race, religion, nationality, country of origin, place of residence, opinion -view, political or other party, IDF or reserves' service."); Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 (Isr.).

19. For general data about sexual harassment in Israel in general, and in the IDF see Ina Levi & Sarah Ben-David, Sexual Harassment in the Army (2002) (Isr.), https://www.ariel.ac.il/images/stories/site/personalSites/SarahBenDavid/mamrim/mamrim2/b16.pdf. The Israeli Act covers the police and the IDF. Following the Act, the IDF established a special center against sexual harassment which provides mental and medical support for the victims. Soldiers that were sexually harassed, experienced any sort of violence within the family sphere, or in a relationship, have a legal remedy. Moreover, the center provides support for female soldiers that deal with unplanned pregnancy; other support to males and females, while keeping their information confidential; support groups for those sexually harassed; and offers training for self-protection ("Krav-Maga"). The center works together with all the different units in the IDF and is in touch with medical agents and the community care services. The IDF also created a special position for such cases, the IDF Chief of Staff's Gender Affairs Advisor. *Get to Know the Center*, Isr. Def. Forces, https://www.idf.il/%D7%90%D7%AA%D7%A8%D7%99%D7%9D/%D7%99%D7%95%D7%94%D7%9C%D7%9D/%D7%99%D7%95%D7%94%D7%9C%D7%9D/%D7%9E%D7%A8%D7%9B%D7%96-%D7%9E%D7%94%D7%95%D7%AA (Isr.) (last

Israeli Act can be seen as an example for other nations and states, as it provides a clear path to assist individuals who are subject to sexual harassment misconduct.

II. "Naming"—Starting from Specific Legislation

The transformative theory discusses

> a neglected topic in the sociology of law—the emergence and transformation of disputes—the way in which experiences become grievances, grievances become disputes, and disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding. Studying the emergence and transformation of disputes means studying a social process as it occurs. It means studying the conditions under which injuries are perceived or go unnoticed and how people respond to the experience of injustice and conflict. . . . Our purpose in this paper is to provide a framework within which the emergence and transformation of disputes can be described.[20]

> . . . This first transformation—saying to oneself that a particular experience has been injurious—we call naming. Though hard to study empirically, naming may be the critical transformation; the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision.[21]

A. The Landscape Before the Israeli Act

During the presidency of the former President Ezer Weizman and Prime Minister Benjamin Netanyahu, new legislation came into effect

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visited May 9, 2020). Following the awareness of sexual harassment after the #MeToo movement, in 2018, there was a sharp increase of complaints of sexual harassment in the IDF. The IDF Chief of Staff's Gender Affairs Advisor, Brigadier General (equivalent to NATO OF-6), Sharon Nir, says that the sharp increase comes from the raising awareness of the soldiers and commanders, related to sexual harassment as an illegal norm. Also, in 2017, 24 percent of the complaints regarding sexual harassment in the IDF caused disciplinary reaction, while only 5 percent of the complaints outside of the IDF were indicted. This data reflects the high level of reported case as well as enforcement. Anna Ahronheim, *Dramatic Rise in Number of IDF Soldiers Reporting Sexual Assault*, JERUSALEM POST (Nov. 20, 2018, 7:33 PM), https://www.jpost.com/Israel-News/Dramatic-rise-in-number-of-IDF-soldiers-reporting-sexual-assault-572369; *Police Revolution*, DAVAR (June 14, 2017, 7:12 AM), https://www.davar1.co.il/72006 (Isr.); Moore Shimoni & Eric Bender, *Contrary to Citizenship Situation: A Significant Increase in Reports of Sexual Harassment in the IDF*, MAARIV (Nov. 12, 2018, 6:59 PM), https://www.maariv.co.il/news/military/Article-674961. In 2012, 161 IDF soldiers were suspected of sexual harassment, and 28 of them were convicted. In 2016, only 110 soldiers were suspected of sexual harassment, but the same number were convicted. The increase in conviction in relation to the complaints proves that the IDF's system deals with the complaints in a serious manner that involves punishment. Emery Levy Sedan, *IDF 110 Suspected Soldiers a Year: Sexual Harassment Figures Are Revealed*, WALLA (Nov. 20, 2017, 8:02 AM), https://news.walla.co.il/item/3112855 (Isr.). The Israeli police report a sharp decrease in the number of complaints of sexual harassment: from 59 in 2015 to 21 in 2016. Shirit Avitan Cohen, *A Dramatic Drop in the Number of Complaints of Police Harassment*, MAKORRISHON (June 13, 2017, 2:53 PM), https://www.makorrishon.co.il/nrg/online/1/ART2/881/981.html; *see also* Mor, *supra* note 1, at 292.

20. Felstiner, Abel & Sarat, *supra* note 2, at 632.

21. *Id.* at 635.

on March 19, 1998. This statute was passed by the Israeli Parliament, the Knesset, with only one dissenting vote.[22] According to a leading commentator, "The final draft broadened the scope and the jurisdiction of sexual harassment beyond its traditional focus in the workplace or in exploitative relations of authority."[23] This revolutionary legislation became an integral part of the current Israeli law.

At that time, sexual harassment was not broadly defined, and the existing laws (i.e., criminal and tort laws) targeted mainly physical misconduct and did not include other types of sexual harassment. For example, at that time, the law did not include either verbal and non-verbal misconduct, or a hostile environment in the legal definition of sexual harassment.[24] Moreover, surveys from the time revealed a high rate, 30–50 percent of women, suffering from sexual harassment across different sectors of the economy and social life. These rates of sexual harassment behavior were significantly high in male-dominated settings such as the army, police force, government entities, private firms, and some educational institutions.[25]

Well-known examples from the time showcase the sexist attitudes and behaviors that were viewed as normal. For instance: former Israeli President Ezer Weizman—who later signed the Act—said, during one of his speeches, that exceptionally qualified boys should become pilots within the IDF, and later on the slogan changed, adding that exceptionally qualified girls should take the pilots as their husbands.[26] His statement indicated that a woman should not find a career as a pilot, but if her heart desires she should marry one instead. Such chauvinistic statements were reflective of the Israeli culture of the time and that of international Western culture as a whole.[27]

Another statement of former President Weizman occurred when he called a female soldier "sweetheart" ("maideleh").[28] While the

22. Mor, *supra* note 1, at 292.

23. *Id.* (arguing that, in particular, the legislative framework should be considered in the context of a nation founded and conducted on democratic liberalism and on the same time traditional religious tenets of Judaism).

24. Rachel Benziman, *Sexual Harassment at the Workplace*, *in* Women's Status in Israeli Law & Society 318, 323, 332–33, 336–37 (Frances Raday, Carmel Shalev & Michal Liban-Kooby eds., 1995) (providing that the law then further required an active refusal from the employee to reflect that the proposition or act was unwelcome and injury to the employee should be a result of the employee's rejection to the harassment).

25. *Id.*; Mor, *supra* note 2, at 294–97 ("Sexual harassment sports an expensive price tag; the social costs compound the individual economic, mental and physical harm. The consequences of sexual harassment translate into revenue loss to employers from reduced productivity, legal fees and compensation, and damage to the company's reputation, as well as ongoing impediments to the advancement of women's social and economic status.").

26. *See generally* Rafi Mans, It Is Inconceivable (1998).

27. *See* Pretty Woman (Touchstone Pictures 1990). In the famous movie *Pretty Woman*, the prostitute's dream (played by Julia Roberts) was to marry the pilot (played by Richard Gere).

28. This was said to Alice Miller, a female pilot, who fought to open a pilot course for women. Former President Ezer Weizman made a chauvinist remark, stating,

former President did not mean it in a derogatory way, these statements nevertheless reflected the acceptable culture and the dominant legal regime of those days. It has become the symbol for the need to enact specific laws to counter the stereotypes that females are only "sweethearts." Yet, besides being beautiful and nice while focusing on motherhood and household chores, women are independent, educated, professional, equal, and powerful human beings. The prime example in Israeli history is the story of Alice Miller. She is known as the first female to ever fight for women's rights in the army. A lifelong dream of hers was to be a pilot, yet in those days women were not accepted to flight training courses in the air force because Israel barred women from combat. Knowing this, Alice Miller sent a letter to former President Weizman asking for him to reconsider the decision.[29] Eventually, Alice Miller posed this issue before the High Court of Israel, where she argued that the ban on women pilots created a fundamental inequality. The Supreme Court of Justice ruled, for the first time, that women could join the IDF pilot's course and serve as pilots.[30]

When former Minister Moshe Dayan was alleged to be having affairs with multiple women under his command, at the time many people thought of them as "lucky," rather than considering this situation to be sexual harassment (as the Act later defines).[31] When the first Prime Minister of Israel David Ben Gurion said that every women is the state's uterus, he was recognized as a symbol for supporting the country during its first phase. However, this quote may not provide the full picture. First Prime Minister of Israel David Ben Gurion also asked to change the expression of the Hebrew word for husband, from "my owner" to a more gender-neutral phrase.[32] But this past cultural behavior was difficult to fight against. The landscape changed

"Sweetheart, have you ever seen a man knit socks?" The direct quote can be found at Smadar Schmueli, *The President Who Fails His Tongue*, YNET (May 28, 2000, 11:52 AM), https://www.ynet.co.il/articles/0,7340,L-12222,00.html.

29. In the letter, Alice Miller wrote about her dream to be a female pilot and how the current system did not allow her the possibility to follow her dreams. Letter from Alice Miller to Ezer Weizman, State President, Israel (June 17, 1990), https://storage.cet.ac.il/Toldot/22101.jpg; *see* HCJ 4541/94 Miller v. Minister of Defense 49(4) P.D. 94 (1995) (Isr.).

30. HCJ 4541/94 Miller v. Minster of Defense 49(4) P.D. 94, 124 (1995) (Isr.). Alice Miller's lawyer stated: "The fact that men go to combat and women keep the home fires burning, has a deep impact on the way our society views women . . . . [S]ociety will look at them differently if they have a chance to participate as men do." Joel Greenberg, *Israeli Woman Sues for Chance to be a Combat Pilot*, N.Y. TIMES (Nov. 3, 1994), https://www.nytimes.com/1994/11/03/world/israeli-woman-sues-for-chance-to-be-a-combat-pilot.html.

31. *See generally* HADASA MOR, BURNING WAYS (1963) (Isr.) (the author telling the story about her affair with former Minister Moshe Dayan). *See* Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 3(a)(4), (a)(6)(c) (Isr.).

32. *See* Letter from David Ben-Gurion, Prime Minister of Israel, to Levi Eshkol, Minister of Finance, Israel (May 5, 1953), https://www.israelpost.co.il/unforget.nsf/lettersbycategory/A10FF8701947E6E342256C7E004D6878?opendocument.

dramatically in 1998, when the Act came into force and the anti-sexual harassment revolution began.

B. The Significance of "Naming"

The first phase of the revolution to prevent sexual harassment was after "naming" the behavior and phenomenon of sexual harassment as illegal and then defining accessible venues to enforce the law against harassers. Until the Act's enactment and validation, many types of sexual behaviors (which were not actual assaults or deemed harmful at the time) were not always perceived as abnormal or illegal.[33]

First, verbal references to one's sexuality and the exposure of a woman to a hostile environment were not considered illegal under the law until the Act came into effect. Legal tools and enforcement were limited and inefficient at that time. The Act adopts gender-neutral language and forbids many different types of behaviors, some of which were not deemed illegal beforehand and could not, therefore, be brought against harassers.

The second factor is that the Act clearly and expressly defines what is illegal sexual harassment. The definitions cover a wide range of behaviors and statements that involve sexual connotations and declare them illegal.[34] The Act also explains the ways to submit complaints in an easy and efficient manner in order to simplify the process and make it accessible to all, rather than providing complicated procedures that include proving discrimination and involving third parties that are required by the U.S. system.[35] Once the Act came into force, for the first time there was a direct and relatively short path for bringing a claim of sexual harassment. Although not "easy," the process outlined in the Act allowed victims to bring their harassers to court.

Third, I assert that there is a deeper dynamic, whereby adopting new broad definitions for sexual harassment and completing the first step of "naming" is significant. "Naming" means bundling together under the same title acts that were never grouped before as one, deeming them undesirable, unacceptable, and unwelcome. The "stamp" of illegitimacy that comes with naming contributes tremendously to the victims' ability to bring cases to courts. "Naming" has important value when discussing sexual harassment because of the psychological

33. "Prior to the new legislation, sexual harassment was confined solely to the workplace and focused on the effects, rather than the actual phenomenon and prevention of sexual harassment." Mor, *supra* note 1, at 299. "Technically, some legal reference to sexual harassment in the workplace had already been made a decade before the Knesset enacted this law. . . . [A]s a practical matter, Israel had no sexual harassment law until 1998." Orit Kamir, *Sexual Harassment Law in Israel*, 7 Int'l J. Discrimination & L. 315, 315 (2005).

34. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 3.

35. *Id.* § 6. Section 6 discusses the damages given for sexual harassment. *See infra* note 43 and accompanying text.

difficulties in reopening the set of events and emotions when submitting a claim to court. The third important aspect of "naming" is defending not only the wrongness of behavior, but also the legitimate goal of prevention, which supports and strengthens the Act. Therefore, it is important to emphasize that the declared goals of the Act are rooted in important liberal values, such as dignity, honor, and respect. These values are all found in the Basic Law, as well as privacy, autonomy and freedom of the harassed person, and they promote gender equality.[36]

The effect of the Act was not noticeable for quite some time. It took the population a few years to internalize and understand how significant this move was. Although the first phase of the revolution began with "naming," it would not be complete without the other steps of "blaming" and "shaming," which continued the process of successful implementation of sexual harassment laws.

C. The Broad Definition of Sexual Harassment

The purpose of the Israeli Act was expressly included in its first section: "The purpose of this law is to prohibit sexual harassment in order to defend human dignity, freedom and privacy and in order to promote equality between the genders."[37] The Act rightfully targets all genders. However, statistically, women are one of the most vulnerable groups that suffer from sexual harassment.[38] In addition, it was feminist theories addressing sexual harassment against women that forced the legislative process to move forward. Therefore, although the Act itself is gender-neutral, and although other groups, such as homosexuals, children, and transgender people, suffer from sexual harassment, this article focuses on sexual harassment of women.[39]

The Act broadly defines sexual harassment as illegal conduct. The definition of sexual harassment includes not only requests for sexual favors or unwanted sexual advances, but also any sexual, verbal or physical conduct, repeated references directed towards a person that

36. The Basic Laws of Israel enjoy a super-legal status since Israel does not have a constitution. This gives the Supreme Court the authority to nullify any law that contradicts the Basic Laws. *See* Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 1. This approach relying on dignity was criticized. *See* Noya Rimalt, *Stereotyping Women, Individualizing Harassment: The Dignitary Paradigm of Sexual Harassment Law Between the Limits of Law and the Limits of Feminism*, 19 YALE J.L. & FEMINISM 392, 392–94 (2008). Israeli law proclaims that sexual harassment violates, first and foremost, human dignity, along with liberty and privacy, which refers to equality between the sexes as an alternative. In a broader context, the dignitary paradigm of the Israeli legislation can be understood and evaluated against women, such as murder to protect the woman or family dignity. Women are then stereotyped as fragile, sexually pure, and in need of special protection. *Id.*

37. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 1.

38. Benziman, *supra* note 24, at 323.

39. Draft Bill for The Prevention of Sexual Harassment, 5758-1998, HH No. 3641 (Isr.), https://www.nevo.co.il/Law_word/law17/PROP-2641.pdf. (In Israel, as elsewhere, sexual harassment is a phenomenon, which is especially harmful and affects women).

focus on her/his sexuality, or an intimidating or humiliating reference directed towards a person concerning her/his sex, or sexuality, including his/her sexual tendencies. All of these types of behaviors, whether "quid pro quo," "hostile environment," or others (i.e., staring or a compliment to someone's body), were included in the definition of sexual harassment under the Israeli Act.[40]

Section 3 of the Israeli Act is the most important, since it defines sexual harassment. The definition includes the following:

> Sexual harassment is any of the following acts: (1) Extortion by threats, as defined in Section 428 of the Penal Law, when the act that the person is required to do is of a sexual nature; (2) indecent acts as defined in Sections 348 and 349 of the Penal Law; (3) repeated offers of a sexual nature, addressed to a person who has shown the harasser that he or she is not interested in the said proposals; (4) repeated references to a person that focus on his or her sexuality when that person has shown to the harasser that he or she is not interested in the said references; (5) derogatory or degrading treatment directed at a person in relation to his or her sex or sexuality, including his or her sexual orientation.

The Act expressly and generally forbids sexual harassment: "A person may not sexually harass another or subject her/him to prejudicial treatment."[41] Furthermore, the Act defines sexual harassment and adverse treatment as a criminal offence subject to imprisonment, ranging from two to four years according to the type of misconduct as defined by the Act.[42]

Sexual harassment and adverse treatment are defined by the Act as civil wrongs according to the tort regime. The harassed person or the person subject to adverse treatment is entitled, in addition, to proven damages. Being aware of the difficulty of proving damages and specifically the complexity of evaluating damages of violations of human honor and dignity, the Act awards compensation without proven damages, in an amount that shall not exceed 120,000 NIS, equal roughly to $33,333 U.S. (depending on the exchange rate). This damage amount is updated monthly according to the cost of the living index.[43]

Sexual harassment is considered unlawful discrimination. Thus, when there is a presumption that the misconduct occurred, then, regardless if actual damages are proved, the Act awards, subject to the court's discretion, punitive damages to victims of sexual harassment.

The definitions are an important factor since it is the reflection of the theoretical goals within these definitions that support the legislation. The next subchapter addresses the subordinate rule.

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40. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 3.
41. *Id.* § 4.
42. *Id.* § 5.
43. *Id.* § 6(b).

D. Adopting and Implementing the "Subordinate Rule" in Hierarchical Relations of Authority

1. The Subordinate Rule

Innovatively, the Act embeds a very interesting feminist approach.[44] The Act, which was based on feminist theories (as will be discussed later on), adopts the subordinate rule.[45] In a context of hierarchical relationships (like those with bosses and subordinates) in which authority is being exploited, the Act waives the requirement that the victim refuse. When it comes to relations of authority, sexual harassment is deemed to exist with or without consent. Therefore, references to a person based on his or her sexuality or offers of a sexual nature are to be considered sexual harassment and are illegal. In other words, it is still sexual harassment even when the individual has not specifically rejected the conduct or told the harasser that he/she is not interested.[46] Workplaces (i.e., an employee in the framework of labor relations) are considered hierarchical structures that inherently embed the subordinate rule. Thus, a consensual relationship, or even more so, an affair between a manager and his/her subordinate would be considered illegal sexual harassment.[47]

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44. Rimalt, *supra* note 36, at 392. The Sexual Harassment Act in Israel was inspired and promoted by feminist activists and academics, with cooperation with members of the Knesset. This law and its subsequent interpretation and application presents an important example of feminist lawmaking in action, as well as its actual impact on women's lives. In addition, feminist proponents of the Israeli legislation aspired to offer a new conceptualization of sexual harassment, in comparison to the American example. *Id. See* Orit Kamir, *Dignity, Respect and Equality in Sexual Harassment Law: Israel's New Legislation*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 8, at 561, 576–77 (providing a brief history as to how feminist approach brought the enactment of the Act: "[i]n drafting the statute we tried to voice women's experiences, our perceptions, and insights gained through feminist jurisprudence").

45. Draft Bill for the Prevention of Sexual Harassment, 5758-1998, HH No. 3641 (Isr.). The draft was based on the subordinate rule, which states that the goal is to prevent a person from imposing himself on someone who is not interested, especially when it involves misuse of power when employers and others exploit their authority over their subordinates for their own sexual benefit. The subordinates' dependence on those people cause them real distress, and they often submit and acquiesce in such conduct, which is not only reprehensible and in poor taste, but humiliates the person that is subject to it, and gravely offends this person's dignity and privacy.

46. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 3(a)(6) ("Proposals or references referred to in paragraphs (3) or (4), which are addressed to any of the persons listed in the sub-paragraphs below, under the circumstances specified in these sub-paragraphs, even if the harassed has not shown the harasser that she/he is not interested in the said proposals or references.").

47. CA 274/06 Plonit v. Almoni (2008) (Isr.), http://www.glima.info/verdicts/27406.pdf. The court concluded that a consensual sexual and romantic relationship between a manager and an employee fell under the sexual harassment definition. The court continued by deeming the manager's actions as sexual harassment by following the subordinate rule. The court came to this conclusion by looking at the definition of sexual harassment per the definition in the Act, which states that even in instances where there is no refusal and the sexual conduct was under consent, it may still be considered harassment. Though the court provided a few tests to distinguish between an affair and sexual

Labor relations at the workplace are the core of sexual harassment when addressing the subordinate rule. Under the Act, labor relations are defined broadly. The definition includes employees, independent contractor relationships, applicants, workers with disabilities, and employees in service (for example: the security task force). The definition even includes nonwork relationships and civilian services (as defined in the Civil Service Law), like a person who is affiliated with the workplace, such as a client or customer.[48]

However, the Act implements the subordinate rule in a variety of circumstances beyond labor relations and workplaces. Per the evolving court decisions, the list of what is deemed as sexual harassment has been amended multiple times. The list now includes sexual harassment of a minor or helpless person (when under fifteen years of age, even without exploiting authority); a patient in the context of mental, health, medical, or paramedical care while taking advantage of the patient's dependence on the analyst (including psychological therapy); a student in high school, who is not a minor, all while taking advantage of the relationship of authority in studies; a student, who studies at an institution that provides academic, religious, or professional education, while taking advantage of the relationship of authority in studies; a person under a relationship of authority or dependence, within the framework of guidance or counseling of a religious figure or of a person who posits as a religious figure or a person known or presenting himself or herself as possessing special spiritual qualities; a person, on the part of a public servant in the performance of his or her duties or in connection with him or her, and by abuse of his or her authority—by exploiting the relationship of authority or dependence of the person to the public servant; a person with disabilities who is employed in a protected enterprise—taking advantage of relations of authority or dependence.[49] The common element in all of the categories listed above is the subordinate rule.

Although the workplace is a common area for sexual harassment claims to take place, misconduct can be found in other realms.[50] The subordinate rule allows for the prevention of harassment in these other situations where power is imbalanced.

2. Sexual Harassment or Courtship?

In *Plonit v. Almoni*, a famous case that was brought to the National High Labor Court, a woman alleged sexual harassment by

harassment, an affair between a manager and his/her subordinate would be considered illegal sexual harassment unless otherwise proven.

48. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 §§ 1, 3(a)(6)(c)(i), 6(a) (Isr.).

49. *Id.* § 3(a)(6)(a)–(i).

50. *Id.* § 3(a)(6).

her manager, with whom she had a consensual sexual relationship.[51] The relationship took place mostly within the premises of the workplace and lasted a few years. Since both of them were married at that time, the affair was not reported to the manager's supervisor. The court ruled that the male manager sexually harassed the employee by exploiting his authority over her. It was his responsibility as a manager toward his subordinate employee to stop sexual harassment, and, due to such misconduct, the subordinate employee was entitled to compensation. In addition, the court differentiated between illegal sexual harassment and acts of courtship. In the opinion, the court tried to draw the line between permissible relationships and prohibited sexual harassment. In doing so, the court provided guidelines to employers in terms of handling legitimate courtship that occurs at the workplace.[52]

Following this case, the court clarified and provided details pertaining to what would be considered forbidden in labor relations.[53] First, a report of the relationship should be conducted as soon as the relationship is known. Second, employees should take actions to avoid and possibly change the subordinate relationship. One option is to move the employee to another department, when possible, and provide another manager. Such a change breaks the hierarchical relationship between the couple and unties the subordinate role or at least mitigates the consequences.[54] This can be done by professional separation or by transfer of authority to another manager. In any case, actions to change authority are necessary. Two acceptable options are physical relocation of the individual to a different department or changing the manager to another manager with whom there is no relationship.[55]

In this significant ruling, the court developed the differentiation between sexual harassment and courtship.[56] This includes a different set of tests, such as determining whether the sexual relationship was solely focused in the workplace and during work hours, or whether they were living together and dating outside of the workplace. Was the action done willingly (using the free willingness factor)? Other factors include exploiting the managerial power over the subordinate in terms of age, economic dependency, languages spoken, education, and skills.

In general, the attitude of the court reflects the guiding principle that a person shall not sexually harass a subordinate. The labor relations framework was also specifically emphasized by the court. The court noted that the workplace can be considered, in regard to sexual harassment, as any other place in which activity on behalf of the

51. CA 274/06, *Plonit*, at 18–38.
52. *Id.*
53. *Id.* at 69.
54. *Id.* at 18–38.
55. *Id.*
56. *Id.*

employer occurs either in the course of employment or by the exploitation of authority in labor relations. The workplace is the sphere where sexual relations violate the employee's obligation to do what he or she was brought to do—work. This has a negative influence and impact on the other employees all while creating a toxic environment within the workplace.[57]

However, one can criticize the court's ruling based on the grounds of intruding into the privacy of the employees' private lives. The basis for the criticism is that the workplace is a location where creating relationships is beneficial for the culture of the workforce, and it does not always lead to sexual harassment. In addition, adults should have the autonomy to decide how to conduct their private lives.

Even with the Act and subsequent court decisions, there are still many vague and unsolved situations. For instance, if an employee "eyes" a female co-worker, would that be considered sexual harassment? Would the answer depend on if the employee is staring versus just looking? How does one differentiate between the two? The question may seem simple, yet the answers can be complex.

Nevertheless, the high rate of sexual harassment in the workplace and the assumption that the number of reports is less than the actual amount of misconduct calls for action to make legal tools for court submission less threatening and more accessible.[58]

E. The Employer's Responsibility and Accountability for Reporting, Investigation, and Prevention

The Act and subsequent court decisions specifically targeted workplaces. First, the Act specifically addresses labor relationships. The Act conceives of employment in a broad sense, bringing into its ambit employees, contractors, job applicants and people within the security task force (such as the IDF and policemen), individuals working on behalf of the employer, and non-employee-employer relationships.[59]

Additionally, the Act recognizes that the employers are held responsible and accountable to combat sexual harassment, and therefore, they must take steps toward prevention. These preventative steps include handling complaints efficiently, as sexual harassment can be a time-sensitive issue with serious consequences for the employer.

Employers are obliged to follow the accessible and easy to understand Act (contrast these to EEOC guidelines) and to (a) prescribe an efficient procedure for filing a complaint, and for the examination of

57. *Id.*

58. Following the #MeToo movement, the number of calls to the Israeli hotline for sexual harassment rose over 300 percent. The Israel Women's Network, One Year of the #MeToo Movement, What Has Changed in the Workforce (2018), http://iwn.org.il/wp-content/uploads/2018/11/סופי_2018-אוקטובר-בישראל-הנשים-שדולת_-למיטו-שנה-דוח.pdf.

59. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 §§ 7, 9, 11 (Isr.); *see* Levi & Ben-David, *supra* note 19.

the complaint; and (b) deal efficiently with the case, and do everything within their power to prevent a recurrence of the problematic conduct. In addition, they must rectify the harm caused to the complainant. Employers that employ more than twenty-five employees shall, in addition to all other duties and responsibilities, prescribe "a code of practice" that meets the model included in the Act, which details the procedures of filing and handling such complaints. Employers must publish this code of practice among employees in a place where it will be seen by them. If the employer fails to comply with these duties, they shall be deemed liable for harmful conduct as a civil wrong. In instances where the employer fails to display the code, an additional fine is added for every week in which the offense continues.[60]

F. The Labor Court

The jurisdiction over claims under the Act is given to the labor court, which is considered more accessible to the public, and in which the decisions are made by the judges presiding over the case. The panel of judges includes two representatives of the public, one representing employers and the other representing employees.[61]

III. "Blaming" and "Shaming"

The first step discussed above was the naming—in other words—defining the problem and, through the Act, setting particular legal rules in place. However, the passage of the Act was not enough; it did not prevent all sexual harassment in Israel. Nevertheless, the "blaming" phase makes the threat of legal enforcement real. Many complaints are submitted every year, and the number keeps on growing.[62] Many public figures have been accused of, and sent to prison for, sexual harassment and ultimately have lost their positions. It is difficult to measure the mitigating effect of the Act, since the Act provides accessible legal tools to fight against sexual conduct, while concurrently, those same tools raise the number of complaints and legal proceedings by victims who used to remain silent. There are growing numbers of sexual harassment cases; this does not necessarily reflect an increasing amount of sexual harassment misconduct at large, but it does reflect the public awareness and the reverberation of the Act. Rather, the fact that more

60. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 §§ 7, 8.

61. Labor courts are cheaper and are more flexible. *See* Labor Courts Law, 5729-1969, 23 LSI 76, §32 (1969) (Isr.) (noting, generally, that the labor court is not bound by the rules of evidence); *id.* § 33 (in any procedure the court shall act in a manner that it deemed to be good to pursue a just trial, unless otherwise explicitly written in the law); *see also infra* part IV.

62. In 2017 the number of cases brought to the labor court rose by 20 percent from 2016. As seen in the graph, the number throughout the years keeps on rising, since individuals are using the tool in an efficient way. ASS'N OF RELIEF CENTERS FOR VICTIMS OF SEXUAL ASSAULT, 20 YEARS OF SEXUAL HARASSMENT LEGISLATION (2018), https://www.1202.org.il/images/דוח_שנתי_2018_מלא.pdf (Isr.).

victims submit complaints regarding behavior that was not subject to legal repercussions in the past indicates the illegitimacy of the conduct and the feasibility of the venue.[63] For example, political leaders, mayors, commanders in the Israeli IDF, and police force personnel were all subject to legal procedures under the Act. By paying the price for their deeds, many of them found themselves in jail and had to leave their careers behind. Among many were former President Mr. Moshe Katsav, former Chief of the Labor Union Mr. Haim Ramon, and the Mayor of Or Yehuda.[64]

The accusations against powerful public figures prove that the Israeli legal system provides a high level of enforcement and democratic norms. In Israel, no one is considered above the law by virtue of his position.

Note that I am not suggesting that once the naming phase occurs, sexual harassment ceases to exist. However, the naming phase, besides having legal implications, has brought Israel into a new era. The term, with its connotations, has become an integral part of society and the education system at all levels. The landscape is currently clear, where the right to not be harassed has become part of everyone's knowledge and values. The revolution has begun, but it cannot make significant progress without the additional phases of "shaming" and "blaming" as discussed below.

Thus, shaming the harassers developed as a means to prevent sexual harassment misconduct. Public figures, following complaint submissions and court proceedings, are losing their prestige and career opportunities. This loss occurs even if the complaint is not legally binding, if it refers to a case that falls outside the period of limitations, that was extended from three years to seven years.[65] When victims come out years later with sexual harassment claims, they cannot bring their complaint to court, but the fact of making the misconduct public shames the harasser and provides an incentive for them to not sexually harass an individual because it could potentially become a news item.

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63. One of the main reasons for this is the #MeToo movement. In Israel, there was a large spike in sexual harassment claims due to awareness of the law. *See id*.

64. Former President Moshe Katsav went to prison because he was convicted of two counts of rape, obstruction of justice, and other crimes. Ethan Bronner, *Israeli Ex-President Avows Innocence on Eve of Prison*, N.Y. Times (Dec. 6, 2011), https://www.nytimes.com/2011/12/07/world/middleeast/moshe-katsav-ex-israeli-president-prepares-for-jail.html. Haim Ramon was found guilty for sexually harassing a solider by kissing her against her will at the Prime Minister's office. Vered Luvitch, *Ramon Found Guilty of Indecent Conduct*, Ynet (Jan. 31, 2007), https://www.ynetnews.com/articles/0,7340,L-3359150,00.html. The Mayor of Or Yehuda was charged with allegations of sexual harassment while abusing his authority as the mayor. Yaniv Kubovich, *Or Yehuda Mayor Arrested for Sex*, HAARETZ (May 27, 2015), https://www.haaretz.com/.premium-or-yehuda-mayor-arrested-for-sex-crimes-1.5366441.

65. Statute of Limitations, 5718-1958, §5 (1958) (Isr.).

Even after naming sexual harassment as illegal behavior, the Act would not be considered as innovative without the following phase. The last phase, which is never ending, is perceived as "amending." This is due to the fact that the legislation is ever evolving in instances where sexual harassment appears in new spheres. Since it was enacted, the Israeli Act was amended roughly fourteen times, and the most innovative and important amendment was recognizing sexual harassment in virtual spheres as discussed below.

IV. "Amending": Sexual Harassment in the Virtual Spheres—A Vivid and Evolving Act

A. Keeping the Definitions up to Date—The Virtual Sphere

What would happen to the definition of sexual harassment when new forms of harassing behavior appear? What if those new forms of harassment fall outside the scope of the existing legislation? This gap has occurred repeatedly with the Israeli Act. The digital era has allowed society to progress in many aspects especially within the virtual sphere. Although virtual sexual harassment was not included in the Israeli Act's definition, it has been amended over the years to include digital harassment such as, but not limited to, revenge porn.[66] This subchapter addresses this change and some amendments of the Act.

Contrary to the prevailing perception that sexual harassment misconduct occurs only when people either physically or personally meet each other, the new digital era brought with it new forms of sexual harassment—virtual sexual harassment. This change contrasts with perceiving the Internet as a democratic, accessible, collaborative, and egalitarian venue. In other words, sexual harassment can happen in cyberspace as well as any other place.

B. The Illusory Image of Cyberspace as a Safe Arena

Increasingly, the prime focus of being online is to create an open exchange of information and communication. This goal fits neatly within the feminist approach to democratize content creation and community. Collaborative websites, such as blogs and social networks, represent a cyberspace community entirely outside the structures of the traditional (intellectual) proprietary paradigm. This one professes to

66. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 5 (Isr.); *see* Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 709 (2016). Waldman defines "revenge porn," as a distribution of sexually graphic or intimate images of individuals without their consent. In this article, he argues for adding tort law, of breach of confidentiality, to criminal law in fighting against the phenomena of cyber-harassment. Presenting evidence from, and among other sources, a series of first-person interviews with victims of cyber-harassment, this essay shows that nonconsensual pornography is violent to essential social norms of trust at the core of social interaction. As such, the tort of breach of confidentiality, which focuses on remedying breaches of trust, should be deployed to help victims of "revenge porn" obtain justice. For further discussion on revenge porn, see Section VI, *infra*.

truly embody the philosophy of a completely open, free, and democratic resource for all. In theory, collaborative websites are the solution that social activists, intellectual property opponents, and feminist theorists have been waiting for.[67]

In a different publication, I argued that this cyberspace dream does not exist as anticipated, since it is neither neutral nor open to all.[68] These sites facilitate new ways to exclude, downgrade, and harass women. Gender bias has become quite the norm, even in the most open-ended sites. This can be seen by using a two-point model: (1) controlling websites and filtering out women by the sites' editors and users; and (2) by exposing women, who survived the first stage, to sexual harassment misconduct via different types of hostile web-environment comments.

The virtual sphere created new issues for sexual harassment law. At first, one thinks of cyberspace as a place where everyone has equal access to content, and gender, age, race, and disabilities are not obstacles. From the accessibility perspective, where it is open to all, women and men are deemed equal—unlike workplaces which are hierarchical and exclude women. Before we address the negative side of open-access virtual sites, it is important to identify the utopian features that I featured, in another place. "These 'promised land[s]' share seven common features: (1) free flow of information and freedom of expression; (2) egalitarian foundation; (3) physical peace; (4) freedom from government and border controls; (5) anonymity; (6) community based; and (7) unregulated or self-regulated arena."[69] Below, I elaborate on these features due to the relevancy of these features to sexual harassment.

First, the free and open flow of information is one of the foundations of society formed via the virtual sphere. Information is available and accessible without limits to anyone anywhere.[70] The free flow of these sites not only provides a widespread ability to gain knowledge and education, but they have also become one of the main tools through which we all participate in society, culture, commercial life, progress, and innovation in the digital era. Thus, by denying some people access to these digital spheres, people are excluded from information and from being active participants in society.[71] By creating our own

67. Amendment 10 of 2014 to the Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661.

68. *See generally* Shlomit Yanisky-Ravid & Amy Mittelman, *Gender Biases in Cyberspace: A Two-Stage Model, the New Arena of Wikipedia and Other Websites*, 26 Fordham Intell. Prop. Media & Ent. L.J. 381 (2016).

69. *Id.* at 386.

70. *Id.* at 389–91.

71. *See* David Kravets, *U.N. Declares Internet Access a Human Right*, Wired (June 3, 2011), http://www.wired.com/2011/06/internet-a-human-right (discussing a U.N. Human Rights Council report which protests blocking internet access to quell political unrest as a violation of human rights); Sherif Elsayed-Ali, *Internet Access Is Integral to Human Rights*, Egypt Indep. (Jan. 15, 2012), http://www.egyptindependent.com//opinion

content, freedom of expression is upheld and preserved.[72] Open accessibility to the web provides the free flow of information and the ability to exchange our thoughts via posting on blogs and social networking sites and by adding data to Wikipedia. It allows us to share our collective knowledge and enables us to describe our individual activities and contributions to the society at large. Second, one of the hallmarks of our society is that, by our nature, it allows anyone to participate.[73] The restraints of gender, race, disabilities, and other exclusions should be irrelevant in the virtual sphere. Users can create their own identities and can contribute equally. In other words, open sites provide equal opportunities to all users. Third, the virtual sphere, in essence, is a peaceful environment, which lacks violence and physical limitations. Since one's existence is virtual, there is typically no physical vulnerability.[74] One can avoid violence, such as rape or other physical means of attack, by staying within the world of interaction that is one step removed.[75] This is not to say that there is no violence or vulnerability, which will be discussed in greater depth below, but rather that it takes a different form. Fourth, the virtual sphere evades geographical borders and complete governmental control.[76] While there may be

/internet-access-integral-human-rights (noting that people denied access to the Internet would be "cut off from the outside world").

72. *See* Nicola Lucchi, *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, 19 CARDOZO J. INT'L & COMP. L 645, 654 (2011) (freedom of expression finding "one of its fullest realizations in the Internet").

73. *See* Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 22–26 (2011) (focusing on sexual harassment in cyberspace, such as revenge porn, and arguing that the unwilling avatars that exist in cyberspace make the virtual sphere even more discriminatory than the physical world and discussing "the view of cyberspace as a utopian realm of the mind where all can participate equally, free from social, historical, and physical restraints").

74. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1 (2008). The vulnerability approach focuses on privilege and favor conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the institutions and structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality. *Id. See generally* MARTHA ALBERTSON FINEMAN, THE VULNERABLE SUBJECT: ANCHORING EQUALITY IN THE HUMAN CONDITION (2013).

75. Franks, *supra* note 73, at 226 (noting that cyberspace harms are, by their nature, not physical).

76. *See e.g.*, Gilad Lotan et al., *The Revolutions Were Tweeted: Information Flows During the 2011 Tunisian and Egyptian Revolutions*, 5 INT'L J. COMM. 1375, 1380 (2011) (discussing Twitter's role in critical world events); Alberto Dainotti et al., Analysis of Country-Wide Internet Outages Caused by Censorship, Address at the Internat Measurement Conference (Nov. 2, 2011), http://www.caida.org/publications/papers/2011/outages_censorship/outages_censorship.pdf (discussing the civil unrest in Egypt during what has been called the "Arab Spring" and noting that "[t]he heavy-handed attempt to block communications in the country did not quell the protests, and may have even increased the number of people in the streets; protests intensified and continued even after Internet connectivity was restored five days later").

some restrictions imposed by the governments of certain countries, the Internet is so grand that it is impossible to control completely. Providing one with a sphere free from outsiders' control contributes to its global nature. Fifth, the virtual sphere provides one with the capability to be anonymous (to a certain degree), either by using pseudonyms or creating a new identity through virtual reality.[77] This freedom to act without restraints is another fundamental virtue of a utopian society. Sixth, cyberspace is community-based, where the content is created collectively by collaborating with different and diverse users.[78] Wikipedia is one example of this phenomenon. Last but not least, seventh, cyberspace is an unregulated or self-regulated arena with few limitations.[79]

An example of how these characteristics actually excluded women is Wikipedia. The site along with many others demonstrated the execution of the two-point model. First, editors (mainly male) filter out women, and second, the women who "survived" the first phase are exposed to hostile comments and feedback, which ultimately results in excluding women from the virtual sphere with all the implications thereof.[80]

C. New Forms of Sexual Harassment in the Virtual Sphere

The virtual world has clearly not been able to evade hostility towards women and harassment (of a sexual nature). In 2002, Tammy Blakey alleged that she was the victim of sexual harassment on her company's Internet chat line.[81] She subsequently sued her employer, Continental Airlines, raising the questions of whether an employer has a duty to monitor its website for sexual harassment and, if so, whether a court has jurisdiction over the employer for the activities conducted on its website.[82] This case showcases another example of how culture,

77. Franks, , *supra* note 73, at 226 (explaining that cyberspace facilitates a wall between a person's "real" identity and the virtual one, and thus, cyberspace provides a powerful counter to the real world with no physical limitations and free from prejudice).

78. *See generally* James S.H. Kwok & S. Gao, *Knowledge Sharing Community in P2P Network: A Study of Motivational Perspective*, 8 J. KNOWLEDGE MGMT. 94 (2004) (proposing the idea of a virtual knowledge sharing community that is based on decentralized P2P technology. In the community, each member plays an equal role of knowledge producing, receiving and coordinating.); Barry Wellman et al., *Computer Networks as Social Networks: Collaborative Work, Telework, and Virtual Community*, 22 ANN. REV. SOC. 213 (1996) (explaining that when computer networks link people as well as machines, they become social networks; such computer-supported social networks (CSSNs) are becoming important bases of virtual communities, computer-supported cooperative work, and telework).

79. *See generally* JEANNE PIA MIFSUD BONNICI, SELF REGULATION IN CYBERSPACE (2008) (describing how self-regulation of cyberspace is still an indispensable part of regulating the Internet and will arguably remain so in contrary to what is often supposed in the literature—private regulation fills substantive gaps where state regulation is missing).

80. Yanisky-Ravid & Mittelman, *supra* note 68, at 395–400, 407–09.

81. Blakey v. Continental Airlines Inc., 751 A.2d 538, 543–44 (N.J. 2000).

82. *Id.*; *see also* Michele Ann Higgins, Note, Blakely v. Continental Airlines, Inc.*: Sexual Harassment in the New Millennium*, 23 WOMEN'S RTS. L. REP. 155, 156 (2002)

and courts working as arbiters, must adjust and view gender discrimination in the new virtual reality.

Virtual gender discrimination has a disparate impact on women. While women are subject to harassment—both on- and offline—virtual discrimination is a new method of social exclusion.[83] This harassment cannot be ignored by arguing that it takes place in the form of something intangible; something that the *Blakey* court took as a first step towards recognizing.[84]

A key issue in fighting against cyber harassment is that the interaction or intimidation may not be physical since it typically begins solely online. Although the latter has been recognized by courts as part of sexual harassment, damages in these cases are harder to prove. The approach that U.S. courts have used for the treatment of online sexual harassment is often problematic,[85] despite the existence of guidelines regarding sexual harassment created by the Equal Employment Opportunity Commission (EEOC), which include both quid pro quo and hostile environment forms of harassment.

To constitute actionable sexual harassment, the U.S. Supreme Court requires the harassment to be "severe or pervasive" in hostile environment cases.[86] This is a challenge since many cases do not reach that stringent standard. A solution would be for courts to adopt a reasonable person standard, while acknowledging that the reasonable person in sexual harassment cases is typically a woman.[87] This is probably best understood through the lens of one of the examples of the new phenomenon of sexual harassment in cyberspace called revenge porn, which predominantly victimizes women.[88] Revenge porn is the term

(suggesting that the composition of the traditional workplace is being redefined to include the virtual workplace and in its decision, the court in *Blakely* took a first step towards that redefinition).

83. *See* Natasha T. Martin, *Diversity and the Virtual Workplace: Performance Identity and Shifting Boundaries of Workplace Engagement*, 16 LEWIS & CLARK L. REV. 605, 608 (2012).

84. *See* Higgins, *supra* note 82, at 163–65.

85. *See generally* Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 85–86 (2003) (arguing that inconsistency has led lower courts to misinterpret the "severe or pervasive" language to bar many meritorious sexual harassment claims and that because of the "severe or pervasive" standard, sexual harassment cases have been judged much more stringently than racial harassment cases).

86. *Id.* at 142 (claiming that the Court has decided sexual harassment cases much less strictly than the "severe and pervasive" terminology would indicate).

87. *Id.* at 140–42.

88. Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 249 (2015) (demonstrating that victims currently have no effective legal recourse because civil suits, including privacy-based torts and copyright claims, fail to remove images or deter perpetrators; because a greater deterrent is needed, revenge porn should be criminalized.); Janice Richardson, *If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law*, *in* FEMINIST PERSPECTIVES ON TORT LAW 145, 145 (Janice

used to describe "an intimate image or video that is initially shared within the context of a private relationship but is later publicly disclosed, usually on the Internet, without the consent of the individual featured in the explicit graphic."[89]

Typically, revenge porn occurs when an ex-lover tries to harass or humiliate a former lover by posting pictures or videos that sexually exploit the individual online.[90] This includes linking images to other social networks such as LinkedIn, where personal contact information is shared as well.[91] Once the images are on the web, a simple Google search of the victim's name will lead to pages upon pages of picture results.[92] I argue that this type of sexual harassment in cyberspace can be harmful at the workplace, especially because of the career-related information available on sites like LinkedIn.[93]

One of the disturbing aspects of revenge porn is that sexually graphic images are taken without consent and distributed publicly for all to see. Even if the victim took the picture herself and sent it to her then-lover, or agreed to have the picture taken, consent was not given to distribute the pictures outside their private relationship.[94] Furthermore, once the images have been posted, it is very difficult to stop the harassment. Websites dedicated to revenge porn allow users to make sexual, crude, and insulting comments. The abuse that follows includes sexual solicitations from strangers, rape threats, false prostitution ads, and shaming the victim by calling her—or him in some cases—a "slut."[95]

Revenge porn affects the victim's life in numerous ways, including the potential loss of jobs, reputation, relationships, opportunities, and one's self-esteem.[96] Revenge-porn victims often have to resort to

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Richardson & Ericka Rackley eds., 2012); Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on "Revenge Porn" Websites for Posting Photos They Didn't Consent to*, A.B.A. J., Nov. 1, 2013, at 45, 46 (quoting University of Maryland law professor Danielle Citron). As the vast majority of victims are women, I will refer to the perpetrators as male and the victims as female. *See* Laird, *supra*, at 45.

89. Aubrey Burris*, Hell Hath No Fury Like a Woman Porned: Revenge Porn and The Need Federal Nonconsensual Pornography Statute*, 66 Fla. L. Rev. 2325, 2325 (2014) (arguing that a federal statute is needed to combat nonconsensual pornography and that a clear and narrow federal statute can pass First Amendment scrutiny). Ari Ezra Waldman provides another definition, targeting tort law due to breach of trust. Waldman, *supra* note 66, at 716–19 (claiming that nonconsensual pornography violates essential social norms of trust, which constitutes the core of social interactions).

90. Ann Bartow*, Copyright Law and Pornography*, 91 Or. L. Rev. 1, 44–45 (2012); Kitchen, *supra* note 88, at 247.

91. Kitchen, *supra* note 88, at 248 (proposing a solution to protect victims' rights that will avoid constitutional concerns through the First Amendment's obscenity exception and through careful drafting, including examples of appropriate legislative language); *see also* Bartow, *supra* note 90.

92. Kitchen, *supra* note 88, at 248; Laird, *supra* note 88.

93. Yanisky-Ravid & Mittelman, *supra* note 68, at 411–13.

94. Burris, *supra* note 89, at 2328, 2333.

95. Kitchen, *supra* note 88, at 248 nn.9–12.

96. *Id*. at 248.

changing their names, altering their appearances, and even quitting their jobs in order to not be recognized. At times, the victim cannot attend school or find a job due to revenge porn. Individuals who are targeted by revenge porn often have to avoid certain sites and "close down email accounts that have been flooded with abusive and obscene messages."[97] In fact, revenge porn is "potentially even more pernicious and long lasting than real-life harassment."[98] Many victims suffer psychological harm, and some have resorted to suicide or have been stalked, assaulted, or even killed.[99]

Due to the nature of the virtual world, revenge porn has no limits or bounds. It can be seen by a large number of people and can last forever on the Internet. Legal tools are lacking when it comes to defeating the phenomenon, and feminist groups argue that the dissemination of revenge porn denies the victim control over his or her body, life, and reputation. Degrading insults and harassment in forms of "slut-shaming" are a result, and it ultimately diminishes a woman's (or man's) self-worth. When intimate images are distributed nonconsensually, the betrayal of trust presents a significant threat to human intimacy, gender equality, and privacy.[100]

Focusing on revenge porn, many U.S. scholars argue that enacting specific acts to prevent the phenomenon should be done by adopting criminal and/or tort regimes.[101] The Israeli Act took a different and broader approach, by including sexual harassment in cyberspace as part of the existing Act. The Act includes an enforceable and accessible mechanism that is well-known to the public and workforce, but also includes tort, criminal, discrimination, privacy (which is a solid basic right) and other relevant legal regimes. The next subsection will discuss this amendment.

D. The Amendment to the Israeli Act—Sexual Harassment in Virtual Spheres

While the Israeli Prevention of Sexual Harassment Act was enacted in 1998, amendments have taken effect many times throughout the

97. *Id*. at 248–49.

98. *Id*. at 249.

99. *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 89 (2009); *see also* Elizabeth Adjin-Tettey, *Sexual Wrongdoing: Do the Remedies Reflect the Wrong?*, *in* FEMINIST PERSPECTIVES ON TORT LAW, *supra* note 88, at 179, 181 (noting that psychological, long-term harm may affect self-esteem, feelings of safety, ability to focus and obtain education, difficulties in maintaining employment and interpersonal relationships); Burris, *supra* note 89, at 2336; Franks, *supra* note 73, at 246; Kitchen, *supra* note 88, at 248–49.

100. Burris, *supra* note 89, at 2338–39 nn.73–76.

101. Waldman, *supra* note 66, at 716–19 (relying on, inter alia, interviews with victims of cyber-harassment, the author shows that nonconsensual pornography violates the social norms of trust and therefore recommends policy makers to focus on remedying breaches of confidentiality and trust to help victims of revenge porn obtain justice). Others focus on criminal law. *See* Kitchen, *supra* note 88, at 250.

years. The first amendment took place in 2004, and, in 2007, one of the amendments focused on the statute of limitations. Change to the existing law occurs regularly. As the world has evolved, so has the Israeli Act.

One of the most disturbing issues of cyberspace, as stated previously, is the issue of sexual harassment in the virtual realm which includes potential harassment on the Internet including revenge porn. Living in the midst of the digital revolution of advanced technology, artificial intelligence, blockchain, and a cyber-focused world, the definition of sexual harassment did not originally fit well with the definition in the Israeli Act.

Innovatively at the time, the Israeli Knesset noticed the phenomenon and the destructive potential that such acts have upon an individual and decided to change the Act and add virtual harassment as a form of sexual harassment. In 2014, the Act was amended to meet and forbid new forms of virtual sexual harassment. Section 3(a)(5A) of the Act states that sexual harassment now includes "[t]he publication of a photograph, film or recording, of a person, which focuses on his sexuality, under circumstances in which the publication may humiliate or degrade the person, and without the consent of this person." The Act expressly states that the photography, film or recording can include edits so long as the individual can be identified.[102]

Infringing the amended section subjects the perpetrator to criminal punishment in the form of imprisonment. Point-blank, the Act affirms that a person who harasses a person as stated in Section 3(b) shall be subject to imprisonment for a term of three years.[103]

In addition, the Israeli Act recognizes that disobeying the section is a violation of privacy against the Privacy Act: "[T]he person (who virtually harassed another, as defined above) . . . shall be deemed to be a person who intentionally harms the privacy of another person as stated in Section 5 of the Protection of Privacy Law, 5741-1981."[104]

While typically the amendment is more victim-focused, the legislature added defense mechanisms for the potential harasser in order to create a balance. Thus, if the harasser posted the material, he or she will not be condemned if (1) the publication is done in good faith taking into account the circumstances of the publication, the content, form, scope, and purpose; (2) the publication was made for a rightful purpose; and (3) the publication is justified due to public interest, depending on the circumstances of the case, provided that the publication is not false, or it is deemed as an expression of opinion or criticism of a public official in connection with his or her function, and

102. Prevention of Sexual Harassment Act, 5758-1988, 1998, SH No. 1661 § 3(a)(5A) (Isr.).

103. *Id.* § 5.

104. *Id.*

the publication did not deviate from the reasonable realm in order to achieve its purpose.[105] This is just one example of the amendment that the Act adopts which targets the prevention of sexual harassment.

Although Israel was one of the first to amend the Act to include sexual harassment in the virtual sphere, currently forty-six states have enacted revenge-porn laws.[106] The key difference has been that Israel deems revenge porn (and other virtual harassment) as a new form of already existing sexual harassment that should be included in the definition of sexual harassment. U.S. legislators focus on revenge porn as connected to tort, criminal, and possibly privacy law, and therefore the states' legislation is usually done separately, rather than placing this troublesome issue under the same umbrella of harassment.

One should ask whether the Israeli legislature should have enacted a different law to address virtual spheres, or whether it was correct to include virtual harassments in the existing law. The answer should depend on the goals and purposes of the Israeli Act. The theoretical justifications explain the Act's purpose. In the case of sexual harassment, as discussed below, the goals are the same. Although in appearance it may seem different, including the virtual sphere in the existing law was the right decision, given pre-existing approaches.

After discussing "Naming, Blaming, Shaming and Amending" in the physical world and in virtual spheres, the next sub-section addresses the theory behind different types of sexual harassment.

V. The Theoretical Aspects of Sexual Harassment: Virtual and Physical

A. The Theoretical Justification

Adopting legislation regarding revenge porn, as the United States has done is important, but it focuses on different aspects (such as tort or criminal law) and may miss the importance of the theoretical aspects under the prevention of sexual harassment—that this sub-section discusses at length.

Israel is a prime example of implementing feminist theories into the Prevention of Sexual Harassment Act.[107] I argue that understanding the need to regulate the prevention of sexual harassment specifically,

105. *Id.* §§ 3(a)(5A)(a)–(c).

106. Forty-six states now have revenge-porn laws. *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws (last visited May 10, 2020).

107. Draft Bill for the Prevention of Sexual Harassment, 5758-1998, HH No. 3641 (Isr.), https://www.nevo.co.il/Law_word/law17/PROP-2641.pdf. The Act was a byproduct of women parliament members, feminist activists, pro-feminist jurists at the Ministry of Justice, and feminist legal academics. While teaching in Hebrew University, Orit Kamir proposed a new model law based on the feminist approach, which was later accepted by the Ministry of Justice, Israel's Parliament Committee for the Empowerment of Women and the Israeli's Women Network. Kamir, *supra* note 44, at 576–77.

rather than by relying on other legal regimes, such as antidiscrimination laws, criminal laws, tort laws, or on general moral social norms—starts from social, legal, and theoretical justifications.

These theoretical justifications, the founding stones behind sexual harassment, mostly rely on the feminist approaches that were developed based on gender discourse. Sexual harassment can potentially target all genders, ages, and races. Nevertheless, there is a direct connection between sexual harassment and gender, and most victims are women.[108] Other potential victims are homosexual men and children.[109]

Feminist academic research and publications reveal the need to enact specific laws to prevent sexual harassment as an active step towards a more equal and greater society. I claim that the enactment of the Act is one of the most significant examples; academic studies supported by feminist organizations made a revolutionary impact and influenced policy makers to take active steps to prevent negative behavior.[110]

As I argue earlier, sexual harassment leads to women being left out from taking part at the workplace and other areas (which include the virtual sphere).[111] Policy makers enacted the Israeli Act to fight against this exclusion of women from the workforce. Sexual harassment results in the violation of women's rights, which take a toll on their dignity and personality, since the harassment is based on their gender and sexuality. But what seemed most concerning to the policy makers was that sexual harassment results in the exclusion of women from the job force and, therefore, harms the economic growth and the general economic welfare of the country.[112]

Many feminist theories explain sexual harassment as a behavior that should be stopped by a specific Act in legislation.[113] Israeli law at

108. In 2017, 89 percent of sexually harassed people were women. Ass'n of Relief Centers for Victims of Sexual Assault, *supra* note 62, at 17.

109. According to the Association of Relief Centers for Victims of Sexual assault, 55.6 percent of adult transgender individuals were sexually harassed. This infographic is from 2017. *Id.*

110. *See generally* Ramit, *supra* note 36; Kamir, *supra* note 44.

111. *See supra* Part IV.

112. When the owner of the the Fox-Wiesel Group was accused of sexually harassing women, the Israel Women's Network responded by saying: "The fact that women have to deal with situations of this kind while they are only interested in a business relationship puts them in a Catch-22: If you don't cooperate or at least remain polite and smile, you won't get business opportunities." Hader Kane, *Israeli Fashion Group Owner Under Fire over Sexual Harassment Allegations,* Haaretz (Aug. 23, 2018, 5:45 PM), https://www.haaretz.com/israel-news/israeli-fashion-group-owner-attacked-for-sexual-harassment-allegations-1.6411148.

113. Carol Gilligan, In a Different Voice: Psychological Theory and Woman's Development 5–6 (1982) (describing traits that emphasize support for relationships, typically attributed to females and traits that emphasize hierarchy and power, traditionally, attributed males as neither objective nor neutral but taken as different in a manner that reinforces hierarchy such that those traits can be used to exclude women from receiving the same benefits as the standard (male)).

the time of the enactment relied heavily on Catherine MacKinnon's power-based approach.[114] After taking classes and reading studies under Professor MacKinnon, her former student returned to Israel and took an active part in drafting the Act and promoting its legislation.[115]

The following discussion will focus on the theoretical feminist arguments that discuss the misconduct of sexual harassment. Feminist analysis is often concerned with issues of hierarchy and control.[116] While radical feminists claim that such legal norms are political, Professor MacKinnon argued that the focus should be on the distribution of power to those alleged to be different, where such difference is then used to exclude the outsider group from enjoying rights, benefits, power, capital, and promotion.[117] Her theory explains the connection between a structured hierarchy that enables a small number of controlling or dominant men to exclude women that creates the preconditions that create sexual harassment.[118]

Hierarchical structures result in the subordination of weaker parties, presenting an example of an exclusionary mechanism worthy of condemnation. These structures place an obstacle in the individual's path to self-fulfillment as part of the evolving society, and their perpetuation leaves the individual without any alternatives. Wherever there is power, there is hierarchy, and vice versa; wherever there is hierarchy and power, there are dominant and dominated people. Power is the ability to influence another person.[119]

Sexual harassment reflects the notion that no matter how many years women study or their capabilities, their professionalism is in constant jeopardy because women are constrained by gender stereotypes associated with homemaking. Thus, women are neither being treated correctly nor being appreciated accordingly. Therefore, women tend to be exposed to unpleasant experiences and are threatened to be pushed out of the public sphere, to the so called "safe zone"—one's home.

Sexual harassment, according to Professor MacKinnon and other feminist scholars, is an example of the subordinate rule in operation.

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114. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 40–45 (1988).

115. This former student was Tzili Mor, Fellowship Attorney, Center for Reproductive Law and Policy.

116. *See generally* MACKINNON, *supra* note 114; Owen M. Fiss, *What Is Feminism*, 26 ARIZ. ST. L.J. 413 (1994).

117. CATHARINE A. MACKINNON, *Difference and Dominance, on Sex Discrimination*, *in* FEMINISM UNMODIFIED, *supra* note 114, at 32, 34 (arguing that difference between men and women created their division but men dominated to the point where women are measured according to their lack of correspondence with men).

118. Shlomit Yanisky-Ravid, *Eligible Patent Matter—Gender Analysis of Patent Law: International and Comparative Perspectives*, 19 AM. U. J. GENDER, SOC. POL'Y & LAW 851, 855 (2011) (using feminist theories to analyze patent law to explain the exclusion of women from patents' rights and benefits).

119. JERALD GREENBERG & ROBERT A. BARON, BEHAVIOR IN ORGANIZATIONS 289–322, 401–27 (6th ed. 1997); MACKINNON, *supra* note 114, at 40–41.

Men use their power to exclude women and benefit from such exclusion. Sexual harassment is an unfair mechanism that perpetuates the distribution of unequal shares of economic and social power to different groups.[120] I claim that we can view sexual harassment as unfair enrichment misconduct in which the harasser receives a bigger and better share at the expense of the victim. This is an inefficient result that calls for strong regulation and better practices.

The current practice of sexual harassment consequently influences the unequal distribution of rights and resources in society at large.[121] The result of sexual harassment is that the female voice in public places, such as workplaces, the military, and other hierarchical structures, remains silenced.[122] Female contributions can only be expressed where there is no fear, which cannot exist alongside sexual harassment.

Recognition of these power dynamics is important because it is the first step to taking corrective action.[123] The Israeli legislature followed this path when enacting the Prevention of Sexual Harassment Act in view of this theory in order to prevent this unjust phenomenon.

B. Virtual Hierarchical Structure as a Strainer

Although cyberspace was supposed to be equal and open to all, men continue to be dominant online, and women continue to be harassed in a new forum. The result is that women tend to be excluded from the new arena of the digital and virtual world. I argue that women are being excluded systematically from the virtual spheres by virtual means. Excluding women in cyberspace has become more frequent by less obvious means.[124]

Professor Yochai Benkler addressed the situation and claimed that, where in the day and age of the Internet, sharing and caring does not occur despite accessibility to the Internet.[125] This occurrence is a result of the legal structures that block the ability to create a common

120. "The harasser—who may stand to harassee in the role of superior, co-worker, or subordinate—uses harassment as an informal way to exclude women he lacks formal legal or institutional authority to fire . . . the woman has violated gendered work spaces or roles and . . . sexualized conduct aims to restore the gendered order of work by expressing all the ways a woman invading male work space is out of her proper role and place." Siegal, *supra* note 8, at 19.

121. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, SIGNS 8, at 635, 638–39 (1983) (claiming that male dominance is the most pervasive power in history because such point of view is the standard).

122. *See* MACKINNON, *supra* note 117, at 44–45 (arguing that as long as women's voices are not heard and sex equality is limited by sex difference, women cannot achieve true equality).

123. Yanisky-Ravid, *supra* note 118, at 855.

124. See Gillian Youngs, *Cyberspace: The New Feminist Frontier*, *in* WOMEN AND MEDIA: INTERNATIONAL PERSPECTIVES 185, 199 (Karen Ross & Carolyn M. Byerly eds., 2004), for a detailed discussion of gender issues on the Internet.

125. Yanisky-Ravid & Mittelman, *supra* note 68, at 390–91, 401.

community. Thus, Benkler encouraged cooperative trends.[126] I claim that this mechanism enables male dominancy on the Web similarly to actual life, resulting in excluding women from this arena as well. Professor Dan Burk supports a similar conclusion; his claim is that the existence of non-hierarchical structures is important for impartial discourse.[127] Wherever there is a position of controlling and filtering of one user by another, accessibility is lost, and, therefore, the dominant party can gain control of a particular platform or website and potentially exclude weaker parties.

Supporters of liberal equality assert that open access sites and web activities are, by definition, open to all genders and represent an equal opportunity for all who wish to participate. However, this claim does little to address the crux of the problem, leading to the exclusion of women, which is clearly problematic in the reality of the current Internet culture. I argue that the conclusion cannot be avoided; perpetuating the current situation where the virtual spheres only benefit one gender cannot be sustainable if we intend to create a more harmonious system in which we all participate. Where, for example, if a woman is being harassed online, it would not be a rare occurrence for the individual to stop blogging or using social medial as a platform to "get away" from such instances.

Contrary to the democratic ideal of open and accessible websites, the exclusion of women creates a clearly undemocratic reality and places women in a disadvantaged position online. Furthermore, limiting the advancement of women results in our not taking maximum advantage of the entire collective of human potential, which ultimately leads to commercial and economic inefficiency. To reopen the "virtual gates" to women, additional research is needed to identify the tools that will help. After all, "integration of a new voice requires finding new words and creating new methods."[128]

VI. The Advancements and the Drawbacks of the Act

A. The Advancements of the Act

The Prevention of Sexual Harassment Act was revolutionary for Israel. The Act created a domino effect, thus starting with the large increase in the number of complaints that in the past remained

126. Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1260–61, 1270–72 (2003) (claiming that the digital information environment encourages desirable norms of cooperation and economy but these are broken by intellectual property law); *see also* Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 445 (2002).

127. Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U.J. GENDER SOC. POL'Y & L. 519, 535–37 (2006) (discussing the trend of "hypertext" as being indicative of a move towards nonlinear, relational creation outside the scope of current copyright regimes).

128. GILLIGAN, supra note 113, at 3–4.

unreported. The complaints were followed by a high rate of court procedures and convictions and the changed perception that public figures can no longer escape now from their misconduct. The media, which plays an essential role in discovering and making the stories available and public to all, assisted in the process of naming. Then the harasser had to face possible career obstacles and the possibility of harm to reputation and status (shaming and blaming). Women and other employees, in all sectors, are currently more aware of the nature of harassment, since training and education starts from the outset. Entities with over twenty-five employees must provide their employees with documentation regarding the prevention of sexual harassment in the workplace. Procedures for submitting complaints with an individual whose main task is to take care of the misconduct are mandatory. The victims (and all others who help the individual) receive legal protection and immunity against any course of action taken against them in retaliation. Sexual harassment falls under many legal umbrellas, such as tort law, antidiscrimination law, criminal law, and violation of privacy, and recently was considered bullying at the workplace. The amendments take into consideration the emerging developments in society, as seen with sexual harassment misconduct that occurs on the web. The Act includes sexual harassment that may occur in other venues, where the subordinate rule exists. The procedural process is accessible to all, damages do not need to be proven, and the burden of proof is shifted to the harasser. Lastly, male dominated organizations, such as the police and IDF, took responsibility and established special units to cease sexual harassment in those environments.[129]

B. The Drawbacks and Criticism of the Act

Although the Act was deemed revolutionary, there is a place for criticism and arguments against the Act that are discussed below. First, the title "Prevention of Sexual Harassment" in retrospect could

129. *See supra* notes 18–19, 64, 129 and accompanying text; Kamir, *supra* note 33, at 329 (stating that the amendment to the Act that requires the burden of proof to be on the harasser is "likely to influence the outcomes of many complaints"); Gideon Allon, *IDF Sees Spike in Sexual Harassment Complaints in 2018*, Isr. Hayom (Dec. 12, 2018), http://www.israelhayom.com/2018/12/12/idf-sees-spike-in-sexual-harassment-complaints-in-2018 (Gender Affairs Adviser to the Chief of Staff indicated that the "IDF is pursuing considerable measures to ⌈eliminate the social phenomenon of sexual abuse. The increase in these reports indicates that there is ⌈an increase in awareness of the legitimacy to report⌉every case ."); Moran Azulay, *Knesset Outlaws Revenge Porn*, Ynet (June 1, 2014, 8:30 PM), https://www.ynetnews.com/articles/0,7340,L-4473849,00.html (quoting MK Kariv who stated that amending the Act to include revenge porn was revolutionary and that the legislation must always trail the advancements of technology); *Spike Seen in Israeli Women Reporting Sexual Abuse After #MeToo*, Times of Isr. (Nov. 8, 2017, 1:27 PM), https://www.timesofisrael.com/spike-in-number-of-sexual-abuse-cases-reported-by-israeli-women-after-metoo (emphasizing that in the past women did not know they could complain when it comes to harassment, and today they are not afraid, and women do not want to be seen as an object anymore).

be quite misleading. Although the enforcement has been increased and many more victims break their silence and report misconduct, the fact is that sexual harassment still exists. This can be seen by the large number of reports that continue to grow daily.[130]

Second, the value of dignity, which is emphasized in the Act, can be used against women (attacking women for behaving in a certain way, which is considered disrespectful to the family dignity).[131]

Third, although the statute of limitations is just seven years (and previously it was only three years),[132] it can be argued that this period should be lengthened to at least thirty-five years. This extension would be considered reasonable as it would allow the victim to take the time to process the misconduct that occurred.

Fourth, there are many scenarios that remain questionable and unclear under the Act, such as love affairs or compliments. Additionally, certain legal restrictions change based on the individual's culture and the people that are involved. Hugs are considered a symbol of warmness, which is acceptable and common among the secular population, including in the workplace, academy, or schools. Nevertheless, it can be considered sexual harassment when done toward religious people and can create a hostile environment when done among others in the presence of religious people.[133]

Fifth, sexual harassment sanctions by workplaces are often overused, which may violate other values, such as meeting new people, creating personal relationships, or even meeting a future spouse.[134]

Sixth, victims who speak out and go public typically suffer from social attacks and accusations that can result in victim shaming. They are accused of trying to seduce men or blackmailing their employer to receive benefits or block the public figure's (the harasser's) progress for

130. *See* Schultz, *Reconceptualizing Again*, *supra* note 5, at 34, 53–58 (drawing on the technology and film industries as case studies to show that sex segregation and unchecked subjective authority are the main causes of sex-based harassment, which will require a structural reform to ensure sexual harassment isn't still prevalent twenty years from now).

131. Rimalt, *supra* note 36, at 413–41.

132. *See supra* note 65 and accompanying text.

133. *See generally* Azy Barak, William A. Fisher & Sandra Houston, *Individual Difference Correlates of the Experience of Sexual Harassment*, 22 J. APPLIED SOC. PSYCHOL. 17–37 (1992) (exploring how different personal identity characteristics and experiences lead to different perceptions of whether particular conduct is sexual harassment); Louis F. Fitzgerald, Suzanne Swan & Vicki Magley, *But Was It Really Sexual Harassment? Legal, Behavioral, and Psychological Definitions of the Workplace Victimization of Women*, *in* SEXUAL HARASSMENT: THEORY, RESEARCH AND THERAPY 5 (William O'Donohu ed., 1997); *see also* Rimalt, *supra* note 36, at 404–05 (explaining the different meaning of the value of dignity in different cultures).

134. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003) (arguing that sexual harassment policies can suppress sexuality and intimacy).

political motives. Although theoretically possible, accusing the victim is a difficult process in many circumstances.[135]

Seventh, I argue that mandatory psychological support should be provided to the victims of sexual harassment and sponsored by their employers. The IDF adopted this idea and offers psychological support for those who report. I claim that the personal suffering of the victim should be understood, the support should be sponsored by the employers, and, in return, the employer should be able to sue the harasser for monetary compensation. Moreover, the support should be provided automatically under the complaint procedure unless the victim refuses.[136]

The fight against sexual harassment has faced challenges throughout the years. The process by which injurious experiences turn into perceived grievances and, ultimately, disputes is an evolving process. For the change to be noticeable, social and economic efforts need to take place. Preventing sexual harassment is only one example of the fight for civil rights. One major benefit of our current era is the possibility to learn from past experiences and to adopt and integrate components that have proven to work in other legal systems. The purpose of bringing the Israeli law to the attention of people around the world is to expand awareness of sexual harassment.

Conclusion

If you tell someone in your workplace that she has nice legs, does that ultimately deem you as a harasser? What if you just compliment her on a nice dress? Or on her cleavage? Sexuality is part of humanity, and love is natural. However, sexual harassment is a phenomenon that excludes women and other groups from the workforce and from the digital sphere, which are crucial for being part of society. More than twenty years ago, Israel adopted the Prevention of Sexual Harassment Act. In this article, I argue that the Act is efficient as it reflects the model of "Naming, Blaming, Shaming and Amending." The four components combined create an effective and efficient law. Amending the Act so it fits the evolving reality of the digital era has also been a crucial component. The open-ended concern that remains is that—although the Israeli Act changed the landscape of the workplace (as well as male-dominated entities), and many more complaints are being submitted and court decisions are being given—the phenomenon of sexual

135. Vered Levi Barzilai, *What Is the Legal Consequence of a Woman with Non-Modest Outfit*, Haaretz (updated Oct. 31, 2011), https://www.haaretz.co.il/1.1528688 (relating the story of sexual harassment at universities and the pro male attitude of professors and academic leaders); *see* Levi & Ben-David, *supra* note 19.

136. *See* Levi & Ben-David, *supra* note 19, at 35 (describing the emotional -psychological harm of the victims). For general information about psychological support in the IDF special unit to address sexual harassment, see *supra* note 19.

harassment still exists. Future works will have to look for a fifth component (or possibly even more) that will mitigate sexual harassment and ultimately reduce its existence dramatically.

Although the United States is gaining momentum when it comes to sexual harassment, as seen post the #MeToo movement, and many states are enacting laws to diminish the occurrence of sexual harassment, the legislative reform effort is still nowhere near complete. Following the #MeToo and other movements, states and local governments have enacted specific legislation, most recently New York City, which, under the "Stop Sexual Harassment in NYC Act," requires employers to distribute an employee factsheet regarding their rights under the city's Human Rights Law.[137] Looking at the innovative Israeli Act can be helpful for these efforts at legislative reform. Thus, U.S. policy makers should rethink their tactic in fighting against sexual harassment, possibly by learning from other countries' experience, when it comes to effective enforcement.[138]

137. *See supra* note 7. The Stop Sexual Harassment in NYC Act consists of a number of bills aimed to address the fight against sexual harassment within the context of workplaces. Press release, *supra* note 7. Effective September 6, 2018, employers are required to display an anti-sexual harassment rights and responsibilities poster, and distribute an information sheet on sexual harassment to new hires. Effective April 1, 2019, employers with fifteen or more employees are required to conduct annual anti-sexual harassment training for all employees, including managers. The training must be "interactive" and cover a number of topics, including an explanation of how to bring complaints, and bystander intervention. Local Law 96 of 2018 (N.Y.C.), https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/Local_Law_96.pdf (last visited May 11, 2020). In addition, a new New York state law requires employers to adopt sexual harassment policies and provide sexual harassment trainings that meet certain standards. The state is also expected to produce a sexual harassment model training program. Private employers are expected to either utilize the state's training program, or establish their own program that equals or exceeds the standards provided by the state's model program. These requirements took effect on October 9, 2018. S07507 pt. KK (Jan. 18, 2018) (N.Y.), http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S07507&term=2017&Summary=Y&Memo=Y&Text=Y.

138. *See generally* Schultz, *Open Statement*, *supra* note 5; Schultz, *Reconceptualizing Again*, *supra* note 5; Schultz, *Understanding*, *supra* note 5.

Offensive, Non-Mutual Collateral Estoppel in Arbitration

*Zachary D. Fasman**

Introduction

The Supreme Court has held, in case after case, that Congress envisioned a regime of bilateral arbitration when it enacted the Federal Arbitration Act (FAA) in 1927, and that arbitration's principal attributes—speed, flexibility, and economy—are not realized in class or collective proceedings, even where the underlying statutory rights are commonly enforced in court through multi-party litigation.[1] The Court's decision in *Epic Systems Corp. v. Lewis*,[2] holding that class action waivers in employment agreements are valid and enforceable, will undoubtedly send claimants with similar, if not identical, claims to individual arbitration proceedings, absent specific agreement by the parties to employ class or collective procedures in arbitration.[3] The result—repetitive arbitration of a multitude of similar claims before different arbitrators—raises a host of practical and legal questions, not least of which is whether a defendant should be legally bound by the result of a prior arbitration case involving the same issues brought by a different claimant.

Application of the judicial doctrine of non-mutual offensive collateral estoppel to the arbitral sphere is both an unsettled and underdeveloped area of the law. Courts have exhibited a general willingness to give valid and final arbitral awards that have been confirmed by a judge (and which have afforded the parties a full and fair opportunity to litigate an issue) the same issue preclusive effect as a court

* Zachary Fasman, Esq,, is an arbitrator and mediator in New York City and the principal of Fasman ADR. The author would like to thank Bassam Gergi of Proskauer Rose for his assistance on this paper. An earlier version of this paper was presented at the 71st NYU Annual Conference on Labor in 2018.

1. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 672–73 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 349 (2011); Stolt-Nielsen SA v Animal Feeds Int'l Corp., 559 U.S. 662 (2010).

2. 138 S. Ct. 1612, 1621 (2018).

3. Parties have the option of agreeing to class or collective procedures in arbitration, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 566 (2013), although there is a significant dispute about what language should constitute consent. *Compare Oxford*, 569 U.S. at 566, *with* Lamps Plus Inc. v. Varela, 139 S. Ct. 1407, 1413 (2019).

judgment in subsequent judicial proceedings.[4] They also have held that arbitrators are required to give collateral estoppel effect to prior judicial rulings.[5] But far less has been said about whether arbitrators are required as a matter of law to abide by prior arbitration awards. Courts have yet to take up in earnest whether an employee or a consumer can use an award won by a different employee or consumer in an earlier arbitration to preclude the defendant from relitigating the issue in the subsequent arbitration.

While superficially appealing as a means to avoid repetitive arbitrations, application of offensive, non-mutual collateral estoppel to arbitral proceedings is inconsistent with the core principles that have guided the Court's arbitration jurisprudence. The Court has plainly and repeatedly endorsed arbitration in individual as opposed to multiparty class or collective actions. The Court has held, again and again, that, in enacting the FAA, Congress designed an arbitral system that is, in meaningful ways, fundamentally distinct from the judicial forum. The advantages of arbitration—and perhaps its continued use—are likely to be undermined if parties must confront the perilous reality that one arbitration award may be used as a matter of law to determine hundreds or thousands of other cases.[6]

Under such conditions, reasonable parties will conclude that the principal benefits of arbitration—informality, expediency, simplicity, and particularly the absence of what is normally seen as costly and time-consuming judicial review—have become significant liabilities. Rather than entrust a decision on a monumental issue of law to an arbitrator whose ruling is not subject to meaningful judicial review,[7] parties may choose to forego arbitration altogether rather than face the disconcerting prospect of implicitly litigating in every individual arbitration hundreds if not thousands of attendant cases. This result would achieve the very end that the FAA was intended to combat—the evisceration of arbitration as a viable means of alternative dispute resolution, to the detriment of an already overburdened judicial system.[8] It would also contravene established arbitral practice, under which

4. Christopher Drahozal, *The Issue Preclusive Effect of Arbitration Awards*, *in* ARBITRATION AND MEDIATION OF EMPLOYMENT AND CONSUMER DISPUTES: PROCEEDINGS OF THE NYU 69TH ANNUAL CONFERENCE ON LABOR 81 (Elizabeth C. Tippett & Samuel Estreicher eds., 2018).

5. *See, e.g.*, Aircraft Braking Sys. Corp. v Local 856 UAW, 97 F.3d 155, 162, 162–63 (6th Cir. 1996).

6. This possibility would also raise the problem of one-way estoppel, an issue discussed below.

7. The judicial power to review awards is "among the narrowest known to the law." Denver & Rio Grande W. R.R. v. Union Pac. R.R., 119 F.3d 847, 849 (10th Cir. 1997) (citation omitted).

8. Joe Palazzolo, *In Federal Courts, the Civil Cases Pile up*, WALL ST. J. (Apr. 6, 2015), https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746 (noting that according to the Administrative Office of the United States Courts, the number of pending civil cases rose more than twenty percent between 2004 and 2014).

arbitrators have routinely held that they are not bound to accept prior awards as binding.

Moreover, even if offensive non-mutual collateral estoppel might be applied in arbitration, this doctrine is discretionary: it does not contemplate the automatic preclusion that some advocates of its use envision.[9] Its application must be guided by careful consideration of the significant fairness issues sketched out by the Supreme Court in *Parklane Hosiery*,[10] discussed ahead, where the Court first approved the application of this doctrine in the federal courts while expressing significant concerns about its broad applicability. It cannot be applied mechanically by either the courts or arbitrators, who should remain free to consider and accord prior arbitration awards persuasive relevance as they deem appropriate; that is, later arbitrators may consider a prior arbitrator's reasoning on the same or similar issues without being legally obliged to follow it. This non-binding approach prevents the stakes of individual arbitrations from being raised too high, and most closely comports with the purposes of the FAA and the principles subsequently established by the Supreme Court. This approach also saves arbitration from becoming, to paraphrase Shakespeare, the perch by which one arbitrator's erroneous judgment is woodenly and unfairly applied in subsequent arbitrations.[11]

Part I of this paper discusses the judicial doctrines of *res judicata* and the Supreme Court's expansion of collateral estoppel to include its offensive application to non-mutual parties. Part II discusses the preclusive effect that courts and arbitrators have given arbitration awards. Part III provides an overview of the arguments in favor of applying the judicial doctrine of offensive, non-mutual collateral estoppel to arbitration. Part IV, finally, shows why the application of offensive, non-mutual collateral estoppel to arbitration would be a serious error and then suggests several alternatives to prevent unnecessary repetitive arbitration of similar disputes.

I. The Judicial Doctrines of *Res Judicata*

Although state and federal courts have a fair amount of leeway to fashion their own preclusion rules, the common law concept of *res judicata* is generally applied in both state and federal courts to determine the effect of prior judgments. *Res judicata*, however, is actually comprised of two subdoctrines—claim preclusion and collateral estoppel (issue preclusion)—both of which are tied to the judicial system's interest in preventing relitigation of the same controversy. *Res judicata* or collateral estoppel may be used offensively, when a plaintiff

9. *See* discussion *infra* Part IV.

10. 439 U.S. 322, 331 (1979).

11. William Shakespeare, Measure for Measure, act 2, sc. 1 ("We mustn't let the law turn into a scarecrow—something you set up to scare away birds of prey but then never change, until the birds get so used to it that they sit on it rather than fear it.").

argues claim or issue preclusion in order to advance a claim, or defensively, when a defendant argues preclusion in order to defeat a claim. In both the offensive and defensive situations, the party against whom estoppel is asserted has litigated and lost in an earlier action; preclusion cannot be applied against a party that has never had a chance to litigate the claim or issue.[12]

Both subdoctrines recognize that judicial resources are finite; for every dispute or issue that is reheard, another will necessarily have to be delayed. These doctrines thus help conserve scarce judicial resources. Moreover, once a final judgment has been rendered, the prevailing party has an interest in the stability of that judgment. Parties bring actions to resolve controversies; a judgment would be of little use if the parties were free to ignore it and to relitigate the same claims or issues again and again.[13]

There are significant differences between the two subdoctrines, however. Claim preclusion precludes identical parties (or parties in privity with them) from relitigating the same or a sufficiently similar cause of action in a subsequent lawsuit. It is unfair, courts have reasoned, for a party to sue another party more than once for the same or similar wrong: there should only be one bite at the apple.[14] In contrast, collateral estoppel advances the objectives of *res judicata* beyond the confines of claim preclusion by giving preclusive effect to the determination of *an issue* decided in a prior adjudication, even if the parties in the subsequent proceeding cannot be said, even in the broadest sense, to share the same ultimate claim.[15]

Traditionally, to invoke collateral estoppel, parties were required to demonstrate (1) a final judgment on the merits that decided the issue in question, (2) identity of the issue, and (3) mutuality of parties.[16] The first two requirements, that a proceeding must have been actually litigated on the merits and that the issue to be precluded must be the same, are elementary; it would be patently unfair to bind a later party by a former finding if that issue was not litigated to resolution or was part of a default order. The purpose of the doctrine is to preclude repetitious litigation of specific claims or issues, and, if the issue in the latter proceeding is different, that interest does not come into play.[17] The third requirement, however—mutuality of parties—was changed in 1971, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.[18]

12. Yuval Sinai, *Reconsidering* Res Judicata*: A Comparative Perspective*, 21 Duke J. Comp. & Int'l L. 353, 359–60 (2011).

13. Jack Friedenthal et al., Civil Procedure 616 (5th ed. 2015).

14. Gene Shreve et al., Understanding Civil Procedure 542 (5th ed. 2014).

15. *Id.* at 553.

16. *See* Bernhard v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 122 P.2d 892 (Cal. 1942).

17. Maurice Rosenberg, *Collateral Estoppel in New York*, 44 St. John's L. Rev. 165, 172–73 (1969).

18. 402 U.S. 313 (1971).

There, the Supreme Court noted that up to that point it had been an established "principle of general elementary law that the estoppel of a judgment must be mutual," but it stated that fundamental changes taking place in the "court-produced doctrine of mutuality of estoppel" necessitated reexamining whether mutuality was still viable.[19] The Court referred to what it termed the "gaming table" problem to demonstrate that, under the mutuality requirement,[20] a plaintiff could relitigate the same issue countless times so long "as the supply of unrelated defendants holds out."[21] Although the Court admitted that the adversary system does not function perfectly in all cases and that relitigation might at times be deemed appropriate, it held that strict application of the mutuality requirement was no longer tenable and that, so long as the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior proceeding, issue preclusion in a later proceeding may be appropriate.[22] Nonetheless, the Court closed by observing that *Blonder-Tongue* did not involve "offensive use" questions, in which a non-party plaintiff attempted to assert collateral estoppel against a defendant that had lost on an issue in a prior non-mutual proceeding.[23] It was not until 1979, when the Supreme Court decided *Parklane Hosiery Co., Inc. v. Shore*, that the use of offensive, non-mutual collateral estoppel was first authorized on the federal level.[24] *Parklane Hosiery* dramatically expanded the preclusion doctrine and set the legal stage for more aggressive uses of collateral estoppel and the attendant concerns regarding such use.

In *Parklane Hosiery*, a shareholder brought a class action in federal court against Parklane, alleging that the company and its directors had violated the Securities Exchange Act by issuing a false and misleading proxy statement before a potential merger.[25] Shortly after the shareholder filed suit, the Securities and Exchange Commission (SEC) filed suit against the same defendants in federal court, alleging that the proxy statement issued by Parklane was materially false and misleading in essentially the same respects as had been alleged in the shareholder's complaint.[26] After a four-day trial on the SEC's claim, the district court held that the proxy statement had in fact been false and misleading, and it issued a declaratory judgment to that effect. The shareholder then moved for partial summary judgment against Parklane, arguing that Parklane was collaterally estopped from relitigating the issue that had been resolved against it in the SEC action.[27]

19. *Id.* at 320–21 (citation omitted).
20. *Id.* at 322–23.
21. *Id.* at 329 (citation omitted).
22. *Id.* at 334, 345.
23. *Id.* at 330.
24. 439 U.S. 322, 337 (1979).
25. *Id.* at 347.
26. *Id.*
27. *Id.* at 324–25.

The question before the Court was whether a non-party plaintiff could use a judgment on an issue from another action offensively, to preclude a defendant from relitigating an issue that had been resolved adversely in the earlier non-mutual proceeding.[28] The Court's answer was yes, but with significant qualifications. The Court noted, first, that the offensive use of collateral estoppel does not promote judicial economy in the same manner that defensive use does.[29] The defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely switching adversaries; offensive use has the potential to create precisely the opposite incentive by allowing a plaintiff to pick and choose among judgments as they are rendered.[30] Because a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by the previous judgment if the defendant triumphs, "the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment."[31]

The Court also stressed that offensive, non-mutual collateral estoppel could easily be applied unfairly to a defendant. The Court noted that if the defendant in the first action was sued for small or nominal damages, there may have been little incentive to defend vigorously, particularly if future suits were not foreseeable.[32] It would be unfair to the defendant, the Court commented, to impose large costs stemming from an issue the defendant believed posed only limited risk.[33] It would also be unfair, the Court reasoned, if the judgment relied on to effect estoppel was itself inconsistent with one or more previous judgments, or if the second action afforded the defendant procedural opportunities unavailable in the first action that could readily cause a different result.[34] The Court stated that plaintiffs should not be permitted to pick and choose which judgments to apply or what initial forum might serve as the best leverage for their claims.

Despite these myriad concerns, the Court concluded that the preferable approach was not to bar federal district courts from considering the use of offensive, non-mutual collateral estoppel, but to permit the district courts discretion to determine when it should be applied.[35] In order to guide this exercise of discretion, the Court set out four factors that should be considered to determine whether its use would be fair: (1) whether the non-party plaintiff could have joined the prior litigation; (2) whether it was foreseeable to the defendant that later suits

28. *Id.* at 326.
29. *Id.* at 329.
30. *Id.* at 329–30.
31. *Id.* at 330 (citations omitted).
32. *Id.*
33. *Id.* at 331.
34. *Id.* at 330–31.
35. *Id.* at 331.

would follow and, thus, whether it had every incentive to litigate the original lawsuit fully and vigorously; (3) whether the judgment being relied upon to collaterally estop the defendant is inconsistent with any previous decision; and (4) whether there are any procedural opportunities available in the subsequent proceeding that were unavailable in the first that might cause a different result.[36]

Since *Parklane Hosiery*, some state courts, which are not obligated to follow the Supreme Court's lead in this area, have rejected non-mutual collateral estoppel outright,[37] and federal courts have differed about when offensive, non-mutual collateral estoppel is appropriate.[38] For example, in *In re Light Cigarettes Marketing Sales Practices Litigation*, smokers of "light" cigarettes brought a claim against a tobacco company, arguing that the company had fraudulently marketed and advertised light cigarettes as a healthier alternative to regular cigarettes and were unjustly enriched at plaintiffs' expense.[39] The plaintiffs, relying on a prior federal action against the company that had been brought by the Department of Justice (DOJ) as a RICO claim, moved to apply non-mutual offensive issue preclusion in their case.[40] The district court rejected their motion, reasoning that while the prior DOJ action had been actually litigated and had reached a final determination on the merits, *Parklane Hosiery*'s fairness considerations counseled against giving it preclusive effect for several reasons.[41]

The court noted, first, that the DOJ lawsuit was a bench trial, whereas the tobacco company was entitled to a jury trial in the present action.[42] Second, the court was concerned with the possibility of jury confusion and lack of efficiency. The court reasoned that if issue preclusion was applied to some of the issues in the case but not all of them, the jury, despite instructions to compartmentalize certain factual findings, could be confused about which facts may or may not be considered when determining punitive damages.[43] The court also warned that proving causation and reliance in the present case might involve

36. *Id.* at 332–33.

37. *See, e.g.*, Scales v. Lewis, 541 S.E.2d 899, 901 (Va. 2001) ("'[T]here also must be "mutuality," *i.e.*, a litigant cannot invoke *collateral estoppel* unless he would have been bound had the litigation of the issue in the prior action reached the opposite result.'" (quoting Angstadt v. Atl. Mut. Ins. Co., 457 S.E.2d 86, 87 (Va. 1995))); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992) ("For purposes of both *res judicata* and *collateral estoppel* in this state, only parties or their privies may take advantage of or be bound by the former judgment.").

38. Stephen DeSalvo, Comment, *Invalidating Issue Preclusion: Rethinking Preclusion in the Patent Context*, 165 U. PA. L. REV. 707, 710–12 (2017) (explaining the divergent tests used in the federal circuits to determine when issue preclusion applies).

39. 691 F. Supp. 2d 239, 242 (D. Me. 2010).

40. *Id.* at 243, 244. RICO refers to the Racketeer and Influenced Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1961–68 (2012).

41. 691 F. Supp. 2d at 251.

42. *Id.*

43. *Id.*

the introduction of evidence that duplicated the earlier findings, thus erasing any efficiency benefits.[44]

Significantly, courts opting to disallow the use of offensive, non-mutual issue preclusion under *Parklane Hosiery*, as illustrated in *In re Light Cigarettes*, tend to focus on whether an issue was actually litigated and decided, whether there was a full and fair opportunity to litigate, and the impact that application of the prior finding would have on the current litigation. The emphasis appears to be on both the foreseeability and the weight that should be accorded to a prior judicial determination, as well as on the fairness of the doctrine's application in a later case.

II. The Preclusive Effect of Arbitration Awards

A. Judicial Precedent

Courts have generally exhibited a willingness to afford confirmed arbitration awards preclusive effect in subsequent judicial proceedings where it is determined that the party opposing preclusion had a full and fair opportunity in the prior arbitration to litigate the issues.[45] Indeed, some states, including New York, permit an arbitration award to be used as a statutory basis to dismiss a court action.[46] This understanding is embodied in the *Restatement (Second) of Judgments*, which states that "a valid and final arbitral award by arbitration has the same effects under the rules of *res judicata* . . . as a judgment of the court."[47] The *Restatement*'s endorsement comes with the significant caveat that an arbitral award should be deemed conclusive under the rules of *res judicata* only insofar as the arbitral proceeding entailed the "essential elements of adjudication," including:

a) Adequate notice to persons who are to be bound by the adjudication;
b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

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44. *Id.*

45. *See, e.g.*, Brown v. Wheat First Sec., Inc., 257 F.3d 821, 827 (D.C. Cir. 2001) (holding that plaintiff was precluded from pursuing Civil Rights Act claim in court was barred by claim preclusion because he had brought a similar claim which had been decided in arbitration and confirmed by the district court); Keil-Koss v. CIGNA, No. 99-1265, 2000 WL 531462, at *1, *4 (10th Cir. May 3, 2000) (affirming district court's summary judgment dismissal of plaintiff's employment discrimination claims against her employer where the claims had previously been submitted to arbitration and the arbitrator denied all of her claims); *see also* Bernard v Proskauer Rose LLP, 927 N.Y.S. 2d 655, 657–58 (App. Div. 2011); *In re* Stasz, 352 F. App'x 154, 155 (9th Cir. 2009).

46. *See* N.Y. CIV. PRAC. L. & R. § 3211(a)(5) (2019) ("A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of arbitration and award, collateral estoppel.").

47. RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (AM. LAW INST. 1982).

c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.[48]

These essential elements, particularly element (e), are broad, and whether a court actually applies issue preclusive effect to an arbitral award often turns on several factors, including the discovery and evidentiary procedures used in the arbitration. Courts have also cautioned that whether to afford an arbitration award preclusive effect in subsequent proceedings is within a court's broad discretion.[49] In exercising that discretion, courts typically require that the award contain sufficient reasoning to serve as a legitimate basis to apply *res judicata* or collateral estoppel.[50] The determination about whether to endow an award with preclusive effect is made on a case-by-case basis, as directed in *Parklane Hosiery*, and courts tend to examine whether the procedural mechanisms in the arbitration were so lacking that it is likely defendants would receive a different determination if the issue were to be relitigated.

For example, in *Universal American Barge Corp. v. J-Chem, Inc.*, the Fifth Circuit held that offensive collateral estoppel could be applied to issues previously determined in arbitration if the arbitral procedures had afforded due process and no federal interests warranted special protection.[51] The case itself involved a dispute about who should pay for damages after a fire. In finding that a prior arbitral award could be used to estop fumigators from relitigating issues relating to indemnification and liability, the Fifth Circuit conceded that arbitral findings "typically lack the supervisory scrutiny of authoritative review, giving rise to the argument that arbitration risks determinations based on irrelevant or hearsay evidence, or the personal whims of arbitral panel members."[52] Nonetheless, the Fifth Circuit stated that the application of collateral estoppel based upon arbitral findings is discretionary and that district courts are free to determine whether procedural opportu-

48. *Id.* § 83(2)(a–e).

49. Bear Stearns Sec. Corp. v. 1109580 Ontario, Inc., 409 F.3d 87, 91–92 (2d. Cir. 2005).

50. Lunding v. Biocatalyst Res., Inc., No. 03 C 696, 2004 WL 547250, at *3 (N.D. Ill. Feb. 10, 2004) (holding that preclusion did not apply where the arbitrator failed to explain his reasoning).

51. 946 F.2d 1131, 1142 (5th Cir. 1991).

52. *Id.* at 1137.

nities available to a party in a subsequent action "might be likely to cause a different result."[53]

The Fifth Circuit noted that the defendants against whom collateral estoppel was being applied had argued that the prior arbitration had failed to afford them a "full and fair" opportunity to litigate their case due to limitations on pretrial discovery, the ability to call witnesses, to conduct cross-examination, and the ability to challenge the admissibility of evidence.[54] It nonetheless rejected the defendants' arguments against estoppel as "vague" and allusive, holding that they had failed to make any "particularized showing of harm" from the lack of trial-type procedure in arbitration.[55]

Clarke v. UFI, Inc., also involved an arbitration award that was given preclusive effect.[56] There, a former employee brought a Title VII claim in the Eastern District of New York after losing in arbitration under a collective bargaining agreement.[57] The defendant, the plaintiff's former employer, argued that the plaintiff was estopped from bringing his court action because similar issues had been litigated and decided in the prior arbitration.[58] The court proceeded to analyze both the issues and the procedures used at the arbitration.

In holding that the prior arbitration award should be given preclusive effect, the court emphasized that:

1. The plaintiff had had the benefit of a plenary proceeding in which to air his claims;
2. There was no question that arbitrators were competent, "at least in principle," to determine legal and factual issues relating to federal statutory claims; and
3. The "inescapable impression" was that the arbitral proceeding had been fair because the hearings had taken place during the course of five days, testimony was given under oath, all parties were represented by counsel, and the arbitrator had issued a "meticulous, well-reasoned, and finally persuasive opinion."[59]

Because the court determined that the arbitral resolution of the factual issues left nothing to litigate, it granted the employer's motion for summary judgment.

In contrast to the general judicial willingness to at least consider whether an arbitration award satisfies the factors for preclusive effect, the California Supreme Court, in *Vandenberg v. Superior Court*, rejected what it termed "[t]he predominant view" and held

53. *Id.* at 1137–38 (quoting Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 332 (1979)).
54. *Id.* at 1137.
55. *Id.* at 1138.
56. 98 F. Supp. 2d 320 (E.D.N.Y. 2000).
57. *Id.* at 322.
58. *Id.* at 335.
59. *Id.* at 336.

that a private arbitration award under California law could not have non-mutual collateral estoppel effect without an express agreement by the parties.[60] The court stressed that parties who choose arbitration should not be treated as submitting to the same rules of finality that are afforded court judgments.[61] The court instead reasoned that when parties choose private arbitration, they evince a clear intent to bypass the judicial system and to avoid the potential delays and expense that accompany the judicial system's procedures.[62] Accordingly, the court concluded that if the parties are silent as to the collateral estoppel effects of an arbitration decision, it is more logical to assume that the parties anticipated that the inherent separation between arbitration and the judiciary would be honored.[63]

B. Arbitral Rulings

Significantly, arbitrators themselves are far more skeptical than most courts about giving preclusive effect to prior awards.[64] This attitude originated in labor arbitration.[65] While labor arbitrators have been noted to "recogniz[e] the undoubted wisdom of seeking to profit from experience," the mechanical application of *res judicata* and collateral estoppel has been fiercely resisted by labor arbitrators.[66] Even the mere reporting of awards has been subject to pushback, with critics pointing out that the publication of awards leads to a greater reliance on "precedent" and that "one of the great advantages of arbitration—its high degree of informality—is lost should the arbitration tribunal be bound by precedent."[67] Although labor arbitrators often find "support" and rely upon the rationale of prior awards, the general rule is that, absent express language in an agreement that mandates the binding effect of an arbitral award for all future cases, arbitrators are free to ignore arbitral precedent.[68]

This principle has been generally accepted by reviewing courts. The First Circuit, in *El Dorado Technical Services, Inc. v. Union*

60. 982 P.2d 229, 240 (Cal. 1999).
61. *Id.* at 241.
62. *Id.* at 238.
63. *Id.* at 239–40.
64. *See* Elkouri & Elkouri, How Arbitration Works § 11.1 (Kenneth May ed., 8th ed. 2018).
65. While the FAA does not apply to arbitrations arising out of collective bargaining agreements (CBAs), proceedings relating to CBAs are governed by the Labor Management Relations Act of 1947 (LMRA), and courts often draw upon the FAA for guidance. *See* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987); *see also* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 298 n.6 (2010) (explaining that it is appropriate for the circuit courts, when analyzing arbitral awards under the LMRA, to "discuss precedents applying the FAA because they employ the same rules of arbitrability that govern labor cases").
66. Elkouri & Elkouri, *supra* note 64 § 11.1.A.
67. *Id.* § 11.1.B.
68. *Id.* § 11.4.

General De Trabajadores de Puerto Rico, explained that "[i]t is black letter law that arbitration awards are not entitled to the precedential effect accorded to judicial decisions. Indeed, an arbitration award is not considered conclusive or binding in subsequent cases involving the same contract language but different incidents or grievances."[69] This freedom from precedent permits labor arbitrators to be alert to factual and contractual distinctions between arbitral cases and to accord other awards persuasive relevance when proper. Markedly, even when a contract clause states that an award is to be "final and binding"—as the FAA itself states—courts have permitted arbitrators to exercise their discretion over how much weight, if any, to accord a prior award.[70]

The Financial Industry Regulatory Authority ("FINRA"), which oversees securities firms doing business with the public and whose arbitrators tend to resolve monetary and business disputes between and among investors, securities firms, and individual registered representatives, has come out strongly against having its arbitrators confer preclusive or precedential effect to arbitral awards. In March 2009, the Securities and Exchange Commission approved FINRA's amendments to its code of arbitration procedures, which now require FINRA arbitrators to issue written decisions, explaining their findings, at the joint request of parties.[71] In its regulatory notice announcing the rule change, FINRA clarified that the absence of such written decisions had been a common complaint of non-prevailing parties who were concerned that arbitrators might be reaching unreasoned and potentially unfair determinations.[72] FINRA's "explained decision" rule was intended to increase parties' confidence in the fairness and transparency of the arbitration process and to ensure that arbitrators' opinions are fact-based and provide the underlying rationale for an award.

Yet rather than requiring that these written opinions be given precedential or preclusive effect, FINRA's notice expressly stated that its arbitrators' opinions "will have no precedential value in other cases" and that "[a]rbitrators will not be required to follow any findings or determinations set forth in prior explained decisions."[73] In the years since its rule change, FINRA has continued to assert that it does not intend that a prior arbitrator's award will have precedential value, in

69. 961 F.2d 317, 321 (1st Cir. 1992).

70. Collins v D.R. Horton, Inc., 505 F.3d 874, 876 (9th Cir. 2007) (arbitrators not abusing their broad discretion by refusing to afford collateral estoppel effect to prior award); Bear Stearns Sec. Corp. v 1109580 Ontario, Inc., 409 F.3d 87, 91 (2d Cir. 2005) (same, refusal not manifest disregard of law); Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc., 202 F.3d 965, 968 (7th Cir. 2000) (disputes concerning construction of agreement, including finality provision regarding arbitration, are for arbitrator rather than court).

71. FIN. INDUS. REGULATORY AUTH., REGULATORY NOTICE 09-16, at 1 (2009), http://www.finra.org/sites/default/files/NoticeDocument/p118141.pdf [https://perma.cc/2ZJ4-FF33].

72. *Id.* at 2.

73. *Id.* at 3 n.2.

any way, in a later arbitration case.[74] Although FINRA arbitrators, like labor arbitrators, have the option of reading prior explained awards for their persuasive value, there is no requirement—indeed, there are explicit directives to the contrary—that they accord those awards any weight whatsoever.

Surprisingly, the judiciary may be willing to accord the determinations of FINRA's arbitrators greater precedential weight than FINRA would have even its *own* arbitrators do. In *Willliamson v. Stallone*, a judge in the Supreme Court of New York County was asked to give defensive preclusive effect to an award issued by a FINRA panel.[75] The court did not balk at the request, noting that "[w]here there has been a final determination on the merits, an arbitration award, even one never confirmed, may serve as the basis for the defense of collateral estoppel in a subsequent action."[76] The court nonetheless held that the FINRA award could not serve as the basis for the defense of collateral estoppel in that case because there was "insufficient information available on which to determine exactly what issues were decided in the FINRA arbitration proceeding."[77]

C. Who Decides the Preclusion Issue?

While scant judicial attention has been paid to whether one arbitrator's decision should bind a subsequent arbitrator, there is little doubt that this question is for arbitral and not judicial resolution. Substantial authority establishes that, as a threshold matter, the preclusive effect of a prior award is an issue for subsequent arbitrators to decide and that courts must compel arbitration despite a claim that a second arbitration is barred by *res judicata* or collateral estoppel.

In *Citigroup, Inc. v. Abu Dhabi Investment Authority*, the Second Circuit considered this issue in a dispute arising from investments totaling billions of dollars that the Abu Dhabi Investment Authority (ADIA) had made in Citigroup, Inc.[78] ADIA alleged that Citigroup had engaged, *inter alia*, in fraud by diluting the value of its investments by issuing preferred shares to other investors. The agreement between ADIA and Citigroup required arbitration, and, after a hearing before

74. Fin. Idus. Regulatory Auth., Dispute Resolution Arbitrator Training, Explained Decisions (2010), https://www.finra.org/sites/default/files/ArbMed/p121132.pdf [https://perma.cc/N68S-L6XX].

75. 905 N.Y.S.2d 740, 745 (Sup. Ct. 2010).

76. *Id.* at 754–55.

77. *Id.* at 757. A recent article, Samuel Estreicher & Lukasz Swiderski, *Issue Preclusion in Employment Arbitration After* Epic Systems v Lewis, 4 U. Pa. J. L. & Pub. Aff. 15, 16–17 (2018), assumes the desirability of collateral estoppel in arbitration and suggests rule changes to ensure that arbitration providers such as AAA make awards public, and contends that provisions in arbitration agreements requiring confidentiality and limiting the preclusive effects of prior awards be deemed unenforceable because preempted by the Federal Arbitration Act.

78. 776 F.3d 126, 127 (2d Cir. 2015).

the American Arbitration Association, ADIA's claims were rejected and an award was returned in favor of Citigroup.[79] A district court in the Southern District of New York subsequently confirmed the award. Following confirmation of the award and while that matter was still pending before the Second Circuit, ADIA initiated another arbitration asserting the same or similar claims as had been decided in the initial proceeding.[80] Citigroup asked the district court to enjoin the second arbitration on the ground that ADIA's claims were barred by *res judicata*. ADIA moved to dismiss Citigroup's complaint and to compel arbitration, arguing that the claim preclusive effect of an arbitral award is a matter to be decided by arbitrators, not the courts.[81]

The district court granted ADIA's motion to compel, holding that Citigroup's preclusion defense was properly resolved in arbitration because the parties' agreement had a "broad arbitration clause" that governed any dispute arising thereunder.[82] The Second Circuit affirmed, reasoning that the FAA "authorizes the federal courts to conduct only a limited review of discrete issues before compelling arbitration, leaving the resolution of all other disputes to the arbitrators."[83] Noting that courts are permitted to inquire (1) whether parties are bound by a given arbitration clause and (2) whether an arbitration clause is a binding contract that applies to a particular type of controversy, the court stated that "[a]ll other questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide."[84] Thus, the court held that the claim-preclusive and issue-preclusive effects of a federal judgment confirming an arbitral award are issues to be resolved by arbitrators.[85]

Similarly, in *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, the Ninth Circuit held that the question of *res judicata* defense is itself an arbitrable issue that must be decided by an arbitrator, not the court.[86] In *Chiron Corp.*, the complainant had tried to argue that, unlike a determination on the merits of an arbitrable claim, the defense of *res judicata* is not arbitrable.[87] The complainant further argued that because courts generally determine the preclusive effect of a court judgment on a subsequent judicial proceeding, the court rather than an arbitrator should decide the merits of the objections.[88] The Ninth Circuit was unpersuaded, stating that "the simplest answer" was

79. *Id.*
80. *Id.*
81. *Id.* at 128.
82. *Id.*
83. *Id.* at 129.
84. *Id.* (quotations omitted).
85. *Id.*
86. 207 F.3d 1126, 1128 (9th Cir. 2000).
87. *Id.* at 1129.
88. *Id.* at 1132.

to "look once again at the parties' agreement."[89] Nowhere, the court emphasized, was *res judicata* "treated differently or singled out for exclusion."[90] Other courts to have considered the question have agreed with the Second and Ninth Circuits.[91]

III. Arguments in Favor of Applying Offensive, Non-Mutual Collateral Estoppel to Arbitration Awards

The basic argument that proponents of the application of offensive, non-mutual collateral estoppel to arbitration assert—aside from the unstated premise that this would allow class remedies in arbitration—is that because arbitration can and often does provide parties an opportunity to litigate an issue through to final judgment, those final judgments, even though issued by an arbitrator in a non-judicial forum, should be given the same effect in arbitration as any judgment of a court. Pointing out that arbitration of individual statutory claims has become more formal and more closely aligned with the civil procedure found in the courts, proponents argue that it is only natural that parties to an arbitration should anticipate that they will be bound by the judgments of both in much the same manner. A recent paper, "Arbitration: The 'New Litigation,'" made this case, arguing that "the arbitration experience has become increasingly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including prehearing discovery and motion practice."[92] These proponents argue that the same reasoning that either supports or militates against the application of offensive, non-mutual issue preclusion to court proceedings should be applied today in the arbitral sphere.

In addition to ensuring the finality of judgments,[93] proponents of issue preclusion in arbitration claim that this doctrine would make arbitration more efficient by preventing needless relitigation of settled issues. Application of the doctrine would encourage all parties to arbitrate each case and litigate every issue with intensity to try to reach a correct result. If the defendant who designed the arbitration pro-

89. *Id.*

90. *Id.*

91. *See, e.g.*, Vessal v. Citibank S. Dak. N.A., No. 2-16-0430, 2017 WL 438590 (Ill. App. Jan. 31, 2017); Employers Ins. Co. of Wausau v OneBeacon Am. Ins. Co., 744 F. 2d 25 (1st Cir. 2014); John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132 (3d Cir. 1998).

92. Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1, at 9.

93. Anne Conley, *Promoting Finality: Using Offensive, Non-Mutual Collateral Estoppel in Employment Arbitration*, 5 U.C. Irvine L. Rev. 651, 653 (2015). Finality of judgments in this context is something of a misnomer. No one doubts that a judicial or arbitral resolution of a particular dispute is not final as to the parties. The question under *Parklane* and its successors is not finality but the preclusive effect a judgment or an award should have, which as discussed above is at most a matter committed to judicial discretion.

cess litigates and loses,[94] it is more efficient for the defendant to settle with the remaining plaintiffs with the same legal issue than to rearbitrate the same case over and over again. Proponents also claim that defendants against whom a preclusion claim is brought necessarily have access to all relevant arbitration awards and that, therefore, the concern that broad confidentiality in arbitration agreements and the absence of a written record may make it near-impossible for later arbitrators to discern what was "actually decided" in an earlier proceeding is overstated.[95] Finally, and in the alternative, proponents argue that if parties to arbitration agreements desire not to be bound by the arbitral awards in other cases, they may make that clear through an express statement in their agreement that indicates that the parties agreed to contract out of the issue preclusive effect of awards.[96]

IV. Arguments in Opposition to Applying Offensive, Non-Mutual Collateral Estoppel to Arbitration Awards

What proponents of offensive issue preclusion in arbitration overlook is that arbitration— despite some similarities to a court proceeding—is a different creature, with a fundamentally distinct structure and purpose. The Supreme Court has repeatedly explained that in enacting the FAA, Congress created a body of federal substantive law of arbitrability,[97] a principal purpose of which is to ensure arbitration agreements are enforced "according to *their terms*."[98] Those terms, particularly where a class action waiver is applicable and bilateral arbitration has been agreed, do not include class action procedures or class-based remedies. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court held that "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator."[99] Highlighting that "in bilateral arbitration parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," the Court reasoned that a party may not be compelled to participate in a process

94. *Id.* at 666 (noting that defendants who designed the arbitration process cannot legitimately claim surprise).

95. This concern is overstated because the defendants will have written decisions. The American Arbitration Association rules require that awards shall be in writing and shall provide the written reasons for the award unless the parties agree otherwise. AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES R. 43(b) (2014); AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES R. 39(c) (2009).

96. Stipanowich, *supra* note 92, at 16. *But see* Estreicher & Swiderski, *supra* note 77 at 32–33 (arguing that such provisions should be preempted by the FAA).

97. Perry v. Thomas, 482 U.S. 483, 489 (1987) (emphasis added).

98. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989).

99. 559 U.S. 662, 685 (2010).

that changes the fundamental nature of bilateral arbitration; the FAA requires more than "an implicit agreement."[100] In the line of cases following *Stolt-Nielsen*, including *Epic Systems*, the Supreme Court has repeatedly held that arbitration under the FAA contemplates bilateral individual proceedings, and, absent specific agreement to the contrary, it is not class or collective actions that determine the rights of hundreds or thousands of other parties.[101]

Application of offensive issue preclusion in arbitration creates exactly the situation that the Court has gone to great pains to prevent, in decision after decision. Allowing one individual arbitration award to determine the outcome of hundreds or thousands of other cases is simply inconsistent with the arbitration regime envisioned by the Court.

Wholly apart from this doctrinal conflict, endowing individual arbitration awards with issue preclusive effect generates numerous other legal problems, as outlined below.

- Undermining efficient resolution of individual disputes. Endowing each individual award with the potential to resolve hundreds if not thousands of cases undermines the FAA's other primary purpose, which is to "encourage efficient and speedy dispute resolution."[102] The courts have routinely found that arbitration is vital precisely because it is a lower-cost, expeditious means of dispute resolution.[103] Application of offensive collateral estoppel in arbitration would transform the primary advantages inherent in bilateral arbitration—informality, efficiency and limited judicial review—into serious disadvantages. Parties, particularly defendants, aware that a single determination by an arbitrator may have far-reaching consequences, could reasonably decide to protect their interests by contracting for "procedural formalit[ies]" that "make[] the process slower [and] more costly."[104] Defendants will have to account for the possibility that any arbitral resolu-

100. *Id.* at 684–85.

101. *See*, *e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) (holding that ambiguity about whether class arbitration is allowed does not establish agreement); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (enforcing class action waiver in employment arbitration agreement and holding such waiver was not barred by the National Labor Relations Act or Norris-LaGuardia Act); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (enforcing class action waiver in arbitration agreement in consumer contract even where plaintiff's cost of individual arbitration will exceed potential recovery); Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013) (affirming arbitrator's finding that parties agreed to class arbitration); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (upholding class action waivers in consumer arbitration agreements).

102. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

103. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 633 (1985) ("[I]t is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.").

104. *Concepcion*, 563 U.S. at 348–49.

tion could be used against them in future arbitrations and will therefore be induced to contest each and every case and each and every issue vigorously and to ensure that more complete formal procedural safeguards permit them to do so. This consequence would deprive parties of the advantages envisioned by the FAA, thereby running afoul of the "liberal federal policy favoring arbitration."[105] This perverse effect was contemplated by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, where the Court predicted that class arbitration (like issue preclusion) would lead parties to require additional procedural formality and thereby discourage the use of arbitration.[106]

- Relying on an unreviewable arbitral resolution to govern the rights of hundreds if not thousands of parties. Arbitrators are creatures of contract and are generally relied upon to divine the parties' intent in agreeing upon a particular contract provision.[107] But when arbitrators are required to interpret statutory obligations—involving sophisticated and perhaps unsettled questions of law—they are asked to step outside the realm of contract construction into a legal domain about which they may have little knowledge. There is, of course, no requirement that an arbitrator be a lawyer, let alone that they be trained in legal issues underlying the FLSA, the NLRA, or Title VII. Yet if granted offensive collateral estoppel effect, an arbitrator's judgment will have a multiplicative force far beyond the single dispute she has been chosen to evaluate. This multiplicative force should be of particular concern because an arbitrator's construction of legal obligations is largely insulated from meaningful judicial review; as Judge Ambro wrote in the labor arbitration context, the deferential standard of judicial review of awards often means that awards are upheld "but for snow in August" and that courts often apply a "rubber stamp" to awards.[108] Awards may thus impose significant and unwarranted legal obligations upon a defendant in a fashion never envisioned by Congress.[109]

105. *Id.* at 339.

106. *Id.* at 348.

107. Consistent with the consensual nature of arbitration, parties "are generally free to structure their arbitration agreements as they see fit." Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995). Accordingly, parties may (and often do) agree on the issues they choose to arbitrate, the forum in which the arbitration will take place, the rules under which arbitration will proceed, and who will resolve specific issues. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683 (2010). Parties also "may specify *with whom* they choose to arbitrate their disputes." *Id.*

108. Brentwood Med. Assocs. v. United Mine Workers of Am., 396 F.3d 237, 246–47 (3d Cir. 2005) (Ambro, J., dissenting).

109. As the Supreme Court has stressed, "[T]he sole question for [the reviewing court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013).

Consider one example: an individual who is fifty-five years old contends that he was the victim of age discrimination because he was laid off in a reduction in force that displaced "too many" fifty-five-year-old workers like him. His statistical proof—unaccompanied by any expert testimony—is limited to a comparison of the average number of workers between fifty-five and sixty-five laid off to the number of workers laid off as a whole. His statistical evidence, while inconsistent with established judicial standards for proving age discrimination,[110] is accepted by the arbitrator as "simple and clear" despite the defendant's best efforts to the contrary. Although such a ruling would be reversed on appeal if rendered by a court, it is doubtful that a reviewing court would overturn an award for such a mistake of law.[111] Are subsequent arbitrators required to follow that award, in case after follow-on case, brought by every fifty-five year old who was laid off?

- Creating one-way intervention. The application of non-mutual offensive collateral estoppel to arbitration awards creates the same problem of one-way intervention in class actions that Federal Rule of Civil Procedure 23 was intended to combat. Plaintiffs could potentially wait for a favorable arbitral opinion to be handed down before bringing a cause of action against a common defendant. Such a scenario is patently unfair because it permits a plaintiff to benefit from a favorable merits decision without bearing the binding effect of an unfavorable one. As persuasively explained by the Seventh Circuit in the judicial context, the rule against one-way intervention protects defendants from "being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success."[112] Arbitration would not long survive if defendants realized that the effect of the offensive use of collateral estoppel would be to turn them into bread for the pecking.
- Inconsistent, incomplete or confidential awards. The scenario envisioned above—of multiple awards reaching conflicting rulings—is by no means hypothetical. A defendant who wins one case can pit his ruling against a plaintiff's successful award; which award governs? The first in time? The last? The most persuasive? *Parklane Hosiery* would say that neither should

110. *See, e.g.*, Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 111 n.6 (2d Cir. 2001) (proof of impact must focus on entire protected group, and not merely employees over fifty).

111. Significantly, the Supreme Court held in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 586–87 (2008) that the grounds stated in sections 10 and 11 of the FAA are the exclusive grounds for review of an arbitrator's award and parties cannot, by contract, expand those grounds to include mistakes of law.

112. Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 363 (7th Cir. 1987).

form the basis for issue preclusion because they are inconsistent. What happens where the defendant's award is rendered in a case where the parties have agreed to strict confidentiality, as can be the case not only in harassment claims but in a wide variety of other disputes in which both parties wish to keep the dispute off the record? Or when the plaintiff's award is cryptic and does not allow the subsequent arbitrator to determine whether a particular issue was in fact decided? To be sure, there has been an emphasis on producing clear and well-written arbitration awards in recent years, but that is not always the case. Applying offensive issue preclusion in any of these situations raises more questions than answers.[113]

- Binding non-contracting parties to the results of a litigation to which they never agreed. Arbitration at its core is a matter of consent; binding absent class members to the results of an arbitration proceeding raises serious concerns about both fairness and power. Justice Alito's concurrence in *Oxford Health Plans LLC v. Sutter* emphasized that an agreement between two parties did not authorize an arbitrator, who derived his authority from their contract, to bind absent members who had not consented to allow an arbitrator to decide on their behalf that class procedures would be applied in arbitration.[114] Arbitration cases can be won and lost, and issue preclusion can operate against as well as in favor of plaintiffs.

In sum, the contractual nature of arbitration, the informality of its processes, the purposes for which it is typically employed (efficient, low-risk adjudication), questions concerning arbitral competence on legal issues, and the narrow review of arbitration awards, all weigh heavily against granting arbitrators' awards preclusive effect pursuant to the doctrine of non-mutual collateral estoppel.

Conclusion

The issue preclusive effect of one arbitration award on another arbitrator is a question of more than mere theoretical significance. Plaintiffs who otherwise would litigate their claims collectively in a court will undoubtedly claim that by winning one arbitration against an employer, they can then have it summarily applied, via offensive issue preclusion, to all subsequent arbitrations, achieving by collateral estoppel what they are barred from pursuing on a traditional class or collective basis.

113. *See* Estreicher & Swiderski, *supra* note 77, at 24–32 (arguing that awards should not be allowed to remain confidential and urging rule changes to this effect).

114. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071 (2013).

Such an attempt would severely undermine the core purposes of arbitration and raise the stakes of individual bilateral arbitrations so high as to compel defendants to either settle hundreds or thousands of dubious claims or to transform arbitration into little more than a high-stakes game of roulette, where a defendant will find itself forced to go all in on each and every spin of the wheel in order to stave off the impact of one adverse determination by one arbitrator. This outcome is inconsistent with established doctrine precluding class arbitration except by express agreement and with the majority opinion in *Epic Systems Corp.*, which stated that "new devices and formulas" that would reshape individualized arbitration without parties' consent and that manifest antagonism toward arbitration are "off limits."[115]

This does not mean that the problem of repetitive arbitration of similar statutory claims has no solution. The parties themselves have a vested interest in avoiding arbitration of hundreds or thousands of cases turning on the same issue. Even if a defendant is not legally bound by a prior award, losing arbitration after arbitration is not an appealing prospect, especially if arbitrators use their discretion to rely upon a prior award as determinative. Many if not most defendants, faced with a losing streak, will conclude that spending good money after bad is an unwise investment and will seek a settlement rather than arbitrate again and again. Moreover, even before the issues are contested in multiple arbitrations, the parties to potentially repetitive arbitrations may choose to litigate a number of sample cases, allowing them to project the results on a larger sample and determine an appropriate resolution of the larger group.[116] Finally, arbitration agreements do not deprive enforcement agencies of their jurisdiction,[117] and the EEOC or the Department of Labor on the federal level can step in and resolve what otherwise might become a prolonged arbitration regime.

Thus, while the arguments for the application of offensive, non-mutual issue preclusion to arbitration are superficially attractive—underlining the efficiency benefits and the FAA's finality requirement—the arguments are erroneous. The differences between bilateral arbitration and judicial litigation are too great for arbitrators to presume, consistent with their limited powers and the structure of arbitral proceedings under the FAA, that the parties' mere silence on the issue of collateral estoppel constitutes binding consent to have one arbitrator's award used to resolve hundreds or thousands of other disputes. As has been discussed, one fundamental precept of the FAA is that arbitration

115. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

116. Sampling also may avoid the problem of multiple negative value suits, a problem the Supreme Court has not deemed sufficient to detract from mandatory arbitration of such claims. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 237–38 (2013).

117. EEOC v. Waffle House, Inc., 534 U.S. 279, 288 (2002).

"is a matter of consent, not coercion."[118] If arbitrators were to force non-mutual parties to abide by another arbitrator's determination as a matter of law, the advantages of arbitration as envisioned by the FAA would be lost, thereby running afoul of the "liberal federal policy favoring arbitration"[119] and creating a strong incentive for parties to make arbitration as complex as litigation or to avoid arbitration altogether. This outcome is precisely what the FAA was meant to eradicate.

Rather than violate these core principles, offensive issue preclusion in arbitration should be recognized for what it is: a way around the basic proposition applied time and again by the Supreme Court that arbitration at its core is and must be an individual dispute settlement mechanism. To be sure, parties can agree upon class arbitration if they make their intention clear. But absent such clarity, arbitration must be seen as an expedited method for resolving disputes between individual parties, as opposed to a means for deciding the rights and responsibilities of hundreds or thousands of parties. Arbitration does not provide the procedural or substantive safeguards required for decisions involving such massive disputes.

This conclusion is by no means inconsistent with the foundational principle, recognized by the Supreme Court in scores of cases, that individual statutory or common law claims are susceptible to resolution in arbitration. To be sure, an arbitrator may err in construing federal law or may misapply the common law, and the limited scope of judicial review may make such an error effectively unreviewable. That argument against arbitration was considered and rejected by the Supreme Court in case after case when it held federal statutory and common-law claims were appropriately resolved in an arbitral forum.[120] But the possibility of an individual miscarriage of justice through one erroneous award is a powerful argument against routinely applying awards in bilateral arbitration, effectively insulated from judicial review, to determine the rights of hundreds or thousands of individuals through the use of offensive issue preclusion.

Stated another way, there is no legal or logical reason for arbitrators to alter their normal practice and consider themselves legally obligated to follow a prior award. Subsequent arbitrators should remain free to consider and afford prior awards whatever persuasive relevance they see fit, analyzing (where possible) the reasoning of those arbitrators on the same or similar issues, but without considering themselves bound by their reasoning or conclusions as a matter of positive law. This approach comports with the FAA's language and spirit and Supreme Court precedent, and makes for sound public policy.

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118. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

119. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

120. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).

Liquidated Damages Clauses in Employment Agreements

*Zoe Salzman**

Introduction

If you practice in the field of employment law, you know that employers across a wide range of industries are increasingly resorting to measures designed to protect the company from damages flowing from the departure of employees. Non-compete agreements, which prohibit a departing employee from working for a competitor, are common.[1] So are confidentiality clauses or non-disclosure agreements that require departing employees to return all company proprietary and confidential information and that prohibit them from using such information in future employment.[2] Arbitration agreements, which force almost all employment disputes into private dispute resolution, are also increasingly common and keep many of these issues outside of the public eye and removed from the public discourse.[3]

Employers are also resorting with increased frequency to liquidated damages clauses. These clauses require a departing employee to pay a fixed amount of money to the company, in order to—in theory—compensate the company for the harm caused by the employee's departure. Rather than requiring the company to prove the actual extent of the damage that it has suffered as a result of the employee's departure, liquidated damages clauses set the amount of damages in advance, as a sum certain.

Liquidated damages recently made news, after it was revealed that Sinclair Broadcast Group, the largest broadcasting corporation in the United States, used such clauses to require that employees who

* Zoe Salzman is a partner at the law firm of Emery Celli Brinckerhoff & Abady LLP in New York City. She specializes in employment law.

1. A recent study estimated that about thirty million workers, representing about eighteen percent of the workforce, are covered by non-compete agreements. J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 Mich. St. L. Rev. 369, 461.

2. *See* Orly Lobel, *NDAs Are out of Control. Here's What Needs to Change*, Harv. Bus. Rev. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change (citing Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 Vand. L. Rev. 1 (2015)).

3. Alexander J.S. Colvin, *The Metastisization of Mandatory Arbitration*, 94 Chi.-Kent L. Rev. 1, 9 (2019) (finding that about fifty percent of non-union employers with fifty or more employees have mandatory arbitration).

leave before their contract is up to pay the company over forty percent of their annual salary.[4] Sinclair has found itself the subject of controversial headlines before, including for forcing its anchors and reporters to read an identical script about the dangers of "fake news" that many perceived as "pro-Trump propaganda." Unlike many companies, Sinclair also sought to actually enforce these liquidated damages clauses, bringing suit against two reporters who had left the company for amounts that were significant to the reporters but insignificant to a company of Sinclair's size and dwarfed by the costs of litigating such claims. Sinclair voluntarily dismissed both cases last year.

This article examines the general law applicable to liquidated damages clauses, then applies that law to the clauses in Sinclair's contracts, using the Sinclair clauses as a case study. The article concludes that the courts were likely to find Sinclair's clauses an unenforceable attempt to extract a penalty from departing employees, to punish them for quitting, rather than a permissible liquidated damages clause.

I. What Are Liquidated Damages Clauses?

Liquidated damages are contractual clauses used in a variety of contracts to set a fixed amount of damages to be paid in the event of a breach. In most contract disputes, the amount of damages that flow from a breach is a question for a jury (or, sometimes, a judge) to determine based on the presentation of evidence showing the harm caused by the failure to complete the deal. But liquidated damages remove that analysis from the equation: they fix, in advance, as part of the contract themselves, the amount that will be paid in the event of a breach. They can be used in real estate contracts, to fix the amount of damage to be paid in the event of a breach of a long-term lease, or they can be used in commercial contracts between sophisticated entities to quantify the damages that would flow from the breach of a complex transaction.

It is now increasingly common to see liquidated damages clauses in employment agreements. In this context, liquidated damages clauses are used to fix, in advance, the amount of money that an employee must pay to her employer when she leaves her job. Courts vary in how they have approached such clauses, balancing two competing issues of public policy: the freedom to contract and the freedom to work (including the freedom to leave one's work).

Questions of contract law, the legality of liquidated damages clauses, and the legality of other contractual restrictions on an employee's ability to leave a job (*e.g.*, non-compete clauses) are largely governed by state law and therefore subject to variation from state to state. California law prohibits liquidated damages clauses (as well

4. *See infra* Part II, describing these events.

as non-compete clauses) as unlawful restrictions on trade.[5] In most states, however, the general rule is that liquidated damages clauses are permissible—but penalties are not.

What determines whether a clause is a permissible attempt to contract for liquidated damages or an impermissible attempt to levy a penalty? According to the *Restatement of Contracts*, liquidated damages clauses are permitted "but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."[6]

Public policy concerns animate this test: on the one hand, a liquidated damages clause that fixes the amount of damages at a sum certain "saves the time of courts, juries, parties and witnesses and reduces the expense of litigation."[7] But public policy does not sanction a clause that seeks to punish a breach of contract (rather than compensate for it) because "[p]unishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy."[8]

In most states, the test for determining whether a clause is a permissible liquidated damages clause or an unenforceable penalty has two parts. First, the court examines whether the amount sought as liquidated damages is reasonable, either because "it approximates the actual loss that has resulted from the particular breach" or because "it approximates the loss anticipated at the time of the making of the contract."[9] Second, the court considers "the difficulty of the proof of loss," that is, whether it is difficult to calculate the sum needed to compensate for the loss resulting from the breach, making a liquidated damages clause necessary.[10]

In New York, for example, "a contractually agreed upon sum for liquidated damages will be sustained where (1) actual damages may be difficult to determine and (2) the sum stipulated is not plainly disproportionate to the possible loss."[11] This test is applied "strictly" by New York courts, and, "where the damages flowing from a breach of a contract are easily ascertainable, or the damages fixed are plainly disproportionate to the contemplated injury, the stipulated sum will be treated as a penalty and disallowed."[12]

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5. *See* Golden v. Cal. Emergency Physicians Med. Grp., 782 F.3d 1083, 1090–91 (9th Cir. 2015) (citing Chamberlain v. Augustine, 156 P. 479, 480 (Cal. 1916)).

6. Restatement (Second) of Contracts § 356 (Am. Law Inst. 1981).

7. *Id.* cmt. a.

8. *Id.*

9. *Id.* cmt. b.

10. *Id.*

11. U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 369 F.3d 34, 70–71 (2d Cir. 2004) (internal quotation omitted).

12. *Id.* at 71.

These two factors are, paradoxically, in some tension with one another: the first requiring proof that the sum fixed was a reasonable estimate of the loss; the second requiring proof that the amount of the loss is difficult to estimate. Nevertheless, this test is the one generally used by both state and federal courts alike in evaluating liquidated damages clauses.

Before continuing further with this analysis of liquidated damages, it is worth pausing for a moment to examine another paradox inherent in the concept. In a country where the vast majority of employees are "at-will" employees, who can be fired or leave their jobs without any basis, the concept of paying liquidated damages to an employer to leave one's job may seem intuitively wrong to many readers. Indeed, some courts have ruled that liquidated damages clauses are not enforceable in at-will employment relationships, because

> in an at-will employment relationship, either party may terminate the employment relationship at any time for good cause, bad cause, or no cause at all, without liability for future lost wages. The liquidated damages provision, as set forth in [defendant's] at-will employment agreement, violates that principle as a matter of law.[13]

In the Eastern District of New York, for example, a judge certified a class action in 2018 of Filipino nurses whose contracts required them to pay $25,000 to the staffing agency if they left before their contracts expired and who alleged that these liquidated damages clauses were "demonstrative of defendants' practice of using legal action to coerce foreign nurses, including plaintiff, to continue working for defendants."[14] The claims were brought under the Trafficking Victims Protection Act.[15]

Notwithstanding these paradoxes, most courts in most states continue to consider liquidated damages using this two-prong test. In a recent 2014 case, the New York Court of Appeals held that the defendants should have been allowed to present evidence that the amount sought as liquidated damages was disproportionate to the actual loss sustained by the plaintiff.[16] The court explained: "A provision which requires damages 'grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable.'"[17] When the

13. Polimera v. Chemtex Envtl. Lab., Inc., No. 09-10-00361-CV, 2011 WL 2135062, at *5 (Tex. App. May 19, 2011) (citation omitted); *see also* McMillian v. FDIC, 81 F.3d 1041, 1054 (11th Cir. 1996) (explaining that termination of at-will employment "did not, by itself, breach a contract, and thus, the termination logically could not give rise to liquidated damages").

14. Paguirigan v. Prompt Nursing Emp't Agency LLC, No. 17 Civ. 1302, 2018 WL 4347799, at *3 (E.D.N.Y. Sept. 11, 2018).

15. *Id.* at *1 (citing 18 U.S.C. §§ 1589-97 (2012)).

16. 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc., 25 N.E.3d 952, 957–58 (N.Y. 2014).

17. *Id.* at 957 (alteration in original) (quoting Truck Rent-A-Ctr. v. Puritan Farms 2nd, 361 N.E.2d 1015, 1018 (N.Y. App. 1977)).

amount set "is not proportionate to any loss or gain" that might flow from a breach, but instead "is intended to compel [the defendant's] performance" with the contract, it is an unenforceable penalty.[18]

Similarly, "some courts have explained that a damages provision that awards a specified sum no matter the timing of the breach is likely to be a penalty clause because not all breaches are of the same gravity and thus the fixed damage award is not a reasonable effort to estimate damage."[19] In addition, "liquidated and actual damages are mutually exclusive remedies."[20] That means that the plaintiff suing on breach of contract cannot recover *both* compensation for its actual damages sustained as a result of the breach, and liquidated damages as well.[21] For example, in a recent decision by New York's Fourth Department Appellate Division refused to enforce a liquidated damages clause on this basis. In *Franklin First Financial, Ltd. v. Contour Mortgage Corp.*, the company alleged the departing employee had taken 100,000 files containing the company's confidential information with him when he left; it sought to enforce a liquidated damages clause that required the employee to pay $100 per day that he failed to return the confidential information.[22] The court held the clause was not enforceable because the contract also provided for the company to receive actual damages, "*in addition* to the $100 a day fine" and "[u]nder no circumstances will liquidated damages be allowed where the contractual language and attendant circumstances show that the contract provides for the full recovery of actual damages."[23] This provision was fatal to enforcement of the liquidated damages clause, even though the court also found that the defendant employees failed to demonstrate "either that the damages flowing from the prospective breach were readily ascertainable at the time the parties entered into the Confidentiality Agreement or that the liquidated-damages clause is conspicuously disproportionate to the foreseeable or probable losses."[24]

Consider a recent case out of New Jersey's Appellate Division, applying this analysis. In *Borough of Madison v. Marhefka*, the

18. Leviton Mfg. Co. v. Pass & Seymour, Inc., No. 17 Civ. 46, 2017 WL 3084404, at *6 (E.D.N.Y. July 19, 2017).

19. *Id.* (invalidating liquidated damages clause as a penalty).

20. U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 369 F.3d 34, 71 (2d Cir. 2004); *see also* Lefemine v. Baron, 573 So. 2d 326, 329–30 (Fla. 1991).

21. *U.S. Fid. & Guar. Co.*, 369 F.3d at 71 (holding liquidated damages sought were not "a reasonable measure of the anticipated harm" and the contract already provided for actual damages sustained as a result of delay); *see also* 555 W. John St., LLC v. Westbury Jeep Chrysler Dodge, Inc., 149 A.D.3d 796, 798 (N.Y. App. 2017) (holding plaintiff could not recover "liquidated damages" where contract provided "a remedy for the whole extent of any injury that would be sustained as a result of a holdover, in addition to the sum of $5,000 per day in liquidated damages").

22. No. 604159-15, 62 Misc. 3d 1220(A), 2019 WL 886000 (Table), *3-4 (N.Y. Sup. Ct. Feb. 19, 2019).

23. *Id.* at *5.

24. *Id.* at *4–5.

Borough of Madison, New Jersey, sued a probationary police officer who had left the Borough's employ during the first year of service (in order to take a job as an officer on a force that was closer to his home), demanding that he pay the Borough $5,000 in liquidated damages for leaving his job before completing five years of service.[25] The New Jersey Appellate Divisions refused to enforce the clause, holding it to be an impermissible penalty. First, the court reasoned that the amount was "not a reasonable forecast of the provable injury resulting from the breach," rejecting the Borough's argument that "an officer's resignation during the first five years deprives the Borough of the experience and knowledge that the resigning officer earned while working for the Borough," because the Borough actually assessed *smaller* fines against more senior officers leaving the force, which "strongly indicated the amounts assessed are penalties for early resignation rather than forecasts of the harm to the Borough."[26] Second, the court found, that "the harm to the Borough was not incapable or very difficult of accurate estimate" because "[t]he Borough contended it paid other officers overtime to cover defendant's duties, but the costs of overtime should not be very difficult to estimate" and "the cost of hiring a new officer does not appear very difficult to estimate."[27] "The Borough made no attempt to show the assessments, which declined from $5000 to $1000 as the officer gains experience, were a forecast of the cost of overtime to cover for him, the cost of a new hire to replace him, or the harm to the security of the Borough."[28] Finally, the court found, assessing $5000 against the police officer was "not reasonable under the totality of the circumstances," because he only made a salary of $41,000 and $5000 was "a significant penalty to him" and therefore "a penalty, which is unenforceable on grounds of public policy."[29] The court emphasized that "this was not a commercial contract, and nothing indicates defendant was a sophisticated party or acting with advice of counsel."[30] Similarly, the court rejected the idea that the police officer employee had voluntarily entered into the contract, finding: "An unreasonable penalty provision is unenforceable even if the parties voluntarily enter into it, or one party relies upon it."[31]

But other courts have enforced liquidated damages clauses. For example, the Indiana Court of Appeals recently upheld the enforcement

25. No. A-5206-15T1, 2018 WL 3059940, at *3-6 (N.J. App. June 21, 2018).

26. *Id.* at *4 (internal quotations omitted) (quoting Wasserman's, Inc. v. Twp. of Middleton, 645 A.2d 100, 106, 107 (N.J. 1994)).

27. *Id.* (internal quotations omitted) (quoting *Wasserman's, Inc.* 645 A.2d at 106–07).

28. *Id.*

29. *Id.* at *5 (internal quotations omitted) (quoting Metlife Cap. Fin. Corp. v. Washington Ave. Assocs. L.P., 732 A.2d 493, 494 (N.J. 1999)).

30. *Id.*

31. *Id.* at *6.

of a liquidated damages clause against engineers who had left their employer to work for a competitor, finding that "liquidated damages in this case serve exactly the purpose for which they were designed" and reasoning that "[t]hese were negotiated agreements" with "clear and explicit terms;" "[t]he relative bargaining power of the parties was reflected in the agreements, in that the agreements had different provisions and different damages calculations depending on the employee's tenure and position"; "[t]he actual damages are difficult to calculate" because it was difficult to value the client contacts of the departing employees and how much business was lost due to their departures and because the company had to "seek and train *multiple* new people" to replace the departing employees.[32] Similarly, in *Mathew v. Slocum-Dickson Medical Group, PLLC*, a lower court in New York upheld a liquidated damages against departing employees who were physicians specializing in cardiology who had left to work for a competitor, finding that the harm of losing physicians to a competitor was difficult to quantify and finding that the liquidated damages of $50,000 or fifty percent of the departing doctor's salary (whichever is greater) was a reasonable measure of the anticipated harm flowing from the breach, including "potential damages caused by the loss of intra-organizational referrals, the loss of good will caused by the departure of critical members of its professional staff, the investment made by defendant in the development of plaintiffs' practices and the cost associated with the recruitment of replacement physicians and the development of those new practices."[33]

II. Sinclair Broadcasting Group's Liquidated Damages Clauses

A. Sinclair Broadcast Group's Liquidated Damages Clauses Revealed in the Wake of the "Fake News" Script Scandal

Sinclair Broadcast Group is the largest broadcaster in the United States; it currently owns or operates 193 television stations and reaches the households of millions of Americans.[34] Sinclair made headlines at the beginning of April 2018 when it became clear that the company had directed all of the anchors at its stations to read the same script warning about the dangers of "fake news."[35] The script quickly drew criticism from Democrats as "pro-Trump propaganda."[36] Sinclair regularly

32. Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc., 104 N.E.3d 573, 591–92 (Ind. Ct. App. 2018), *vacated*, 136 N.E.3d 208 (Ind. 2019).

33. 160 A.D.3d 1500, 1502–03 (N.Y. App. 2018).

34. Jacey Fortin & Jonah Engel Bronwich, *Sinclair Made Dozens of Local News Anchors Recite the Same Script,* N.Y. Times (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html [https://perma.cc/VD3Z-2L7S].

35. *Id.*

36. *Id.*

sends such "must-run" segments to its stations, which the stations are required to broadcast, and which "include content like terrorism news updates, commentators speaking in support of President Trump or speeches from company executives."[37] During the 2004 presidential election, Sinclair was in the headlines for another controversial "must-run" when it announced that it would require its television stations to broadcast during prime time a documentary called "Stolen Honor" that was highly critical of then-presidential candidate Senator John Kerry and was denounced by many as political propaganda intended to influence the presidential election, but which Sinclair characterized as "news."[38]

When the controversy surrounding the fake news script broke in April 2018, some Sinclair anchors said they were "forced" to read the script.[39] Many asked why the anchors had gone along with such a "forced" script. Some may have feared being fired if they refused to read the script. Sinclair has a reputation for crushing employee criticism of its programming with a heavy hand; in 2004, for example, Sinclair fired its Washington bureau chief, Jon Lieberman, after he publicly criticized the plans to air "Stolen Honor," calling it "biased political propaganda, with clear intentions to sway the election."[40]

But it turns out that Sinclair also has other tools to dissuade its employees from quitting if they disagree with the company's practices. In the wake of the "fake news" script scandal, additional reporting revealed that Sinclair requires its employees to sign contracts that contain liquidated damages clauses.[41]

B. Sinclair's Liquidated Damages Clause and Other Contractual Provisions

A review of the employment contracts filed by Sinclair in two recent cases seeking to enforce the liquidated damages clauses reveals the following. The contracts contain a liquidated damages clause that requires the departing employee to pay the company "liquidated damages (and not as a penalty) an amount equal to forty percent (40%)

37. *Id.*

38. Jim Rutenberg, *TV Group to Show Anti-Kerry Film on 62 Stations*, N.Y. TIMES (Oct. 11, 2004), https://www.nytimes.com/2004/10/11/politics/campaign/tv-group-to-show-antikerry-film-on-62-stations.html [https://perma.cc/PVV3-7QAK].

39. Fortin & Bronwich, *supra* note 34.

40. Joel Roberts, *Sinclair Amends Kerry Film Plans*, CBS NEWS (Oct. 19, 2004), https://www.cbsnews.com/news/sinclair-amends-kerry-film-plans [https://perma.cc/7Y4U-WJLE].

41. *See* Jordyn Holman, Rebecca Greenfield & Gerry Smith, *Sinclair Employees Say Their Contracts Make It Too Expensive to Quit*, BLOOMBERG (Apr. 3, 2018), https://www.bloomberg.com/news/articles/2018-04-03/sinclair-employees-say-their-contracts-make-it-too-expensive-to-quit [https://perma.cc/7Y4U-WJLE]; *see also* Eriq Gardner, *Can Sinclair Force TV Anchors to Pay up If They Quit?*, HOLLYWOOD REP. (Apr. 3, 2018), https://www.hollywoodreporter.com/thr-esq/sinclair-broadcasting-contracts-make-it-expensive-tv-news-anchors-quit-1099293 [https://perma.cc/PTN7-HHGS].

of Employee's then annual compensation multiplied by a percentage equal to the greater of (a) twenty-five percent (25%), or (b) the percentage of the current contract year remaining after such termination."[42] The clause goes on to provide that if Sinclair does not enforce this liquidated damages clause, it "shall have the right to seek any and all remedies and damages available as a result of Employee's breach of this Agreement."[43]

In addition, the contract also separately provides that an employee who leaves "at any time" before the contract is up, or an employee fired by the company for cause in the first year of her employment, is required to reimburse Sinclair "for the total amount of payments made by [Sinclair] (or the value of any advertising provided by [Sinclair] in trade) for Other Benefits," which are defined as the benefits the employee receives pursuant to the company Employee Handbook (presumably, health insurance, etc.).[44] Sinclair's contract also requires its employees to agree to: (1) non-disclosure;[45] (2) non-compete for six months or one year after leaving the company;[46] (3) one-sided attorneys' fees, to be awarded to Sinclair only in the event it prevails in a dispute with the employee;[47] and (4) mandatory arbitration.[48]

C. Sinclair Seeks to Enforce Its Liquidated Damages Clauses

The public reaction to the reporting on Sinclair's liquidated damages clauses was that the clauses were draconian and unfair.[49] But are they legal?

This is not an abstract legal question. Sinclair sued at least two of its reporters, seeking to enforce the liquidated damages clauses in their contracts. The company sued a West Palm Beach reporter named James Jonathan Beaton, who left Sinclair to start a public relations firm, seeking $5,700 in alleged liquidated damages plus attorneys' fees and costs.[50] Sinclair also filed suit against another West Palm Beach reporter, Lauren Hills, who also left the company to work in public relations; in that case, Sinclair is seeking $17,050 in liquidated damages plus attorneys' fees and costs for what it claims is Ms. Hills' breach of her $46,500/year contract.[51]

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42. Sinclair Employment Agreement § 8.2(c) (on file with author).
43. *Id.*
44. *Id.* § 8.2(b).
45. *Id.* § 7.
46. *Id.* § 11.1.
47. *Id.* § 14.8.
48. *Id.* § 15.
49. *See*, *e.g.*, Gardner, *supra* note 41; Holman, Greenfield & Smith, *supra* note 41.
50. Complaint, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. James J. Beaton, No. 2017-CC-012511-O (Fla. Cir. Ct. filed Oct. 13, 2017). According to Westlaw's docket entry, the case was closed on August 22, 2018.
51. Complaint, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. Lauren Hills, No. 50-2017-CA-012261-XXXX-MB (Fla. Cir. Ct. Filed Nov. 8, 2017); *see also* Nicole

These cases are unusual in several respects. Neither Ms. Hills nor Mr. Beaton went to competitor news organizations (both leaving the industry altogether). As Ms. Hills said: "I'd given Sinclair my absolute best and was proud of everything I had done there, but I was just ready to move on. . . . I literally left the industry. It's not like I jumped ship for another TV station."[52] Neither was a well-known or celebrity on-air personality; both were local reporters. As Mr. Beaton said, "Sinclair argues that I caused them irreparable harm by leaving. Believe me, I was a good reporter, but not that good."[53] But, according to some former broadcasters, "the type of contracts that are coming back to haunt Beaton and Hills are ubiquitous in the TV news industry."[54]

Review of the dockets confirms that Sinclair voluntarily dismissed both cases in 2018.[55]

D. Applying the Law to the Facts: Sinclair's Liquidated Damages Clauses Are Likely Unenforceable

The test for liquidated damages is similar in Florida, where Sinclair filed its two suits seeking to enforce its liquidated damages clause, to the general analysis applied in most states, described above. According to the Florida Supreme Court, the test for determining whether a clause is a proper liquidated damages clause or an unenforceable penalty is twofold:

> First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.[56]

Goodkind, *"I'm Not a Slave to Sinclair Broadcasting": "Trapped" Reporters Sued for Leaving Company Speak out*, NEWSWEEK (Apr. 9, 2018), http://www.newsweek.com/sinclair-fake-news-employee-contracts-877746 [perma.cc/WFW6-6R24]. According to Westlaw's docket entry, the case was voluntarily dismissed on May 2, 2018.

52. Goodkind, *supra* note 51.

53. Jonathan Beaton, *I Quit Working for Sinclair and They Sued Me. Here's Why I'm Fighting Back,* HUFF. POST (Apr. 6, 2018), https://www.huffingtonpost.com/entry/jonathan-beaton-sinclair-suing_us_5ac60f6fe4b09ef3b2441237 [perma.cc/RW4Y-YHRW].

54. Jane Musgrave, *Broadcast Giant, Sinclair, Sues Two Former WPEC-Channel 12 Reporters*, PALM BEACH POST (Apr. 17, 2018), https://www.palmbeachpost.com/news/crime--law/wpec-channel-reporters-among-those-sued-sinclair-media-giant/re20zEErApRFrvERRqOF2J [perma.cc/U5HN-Z7M2].

55. Docket, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. James J. Beaton, No. 2017-CC-012511-O (Fla. Cir. Ct. Aug. 22, 2018) (on file with author); Docket, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. Lauren Hills, No. 50-2017-CA-012261-XXXX-MB (Fla. Cir. Ct. May 2, 2018) (on file with author); *see also* Hal Boedeker, *Sinclair Drops Suit Against Orlando Man*, ORLANDO SENTINEL (Aug. 30, 2018), https://www.orlandosentinel.com/entertainment/tv-guy/os-et-sinclair-drops-suit-against-orlando-man-20180830-story.html [perma.cc/M8JU-PASE]; Jane Musgrave, *Sinclair Drops Breach of Contract Lawsuit Against Former WPEC Reporter*, PALM BEACH POST (May 8, 2018), https://www.palmbeachpost.com/news/crime--law/sinclair-drops-breach-contract-lawsuit-against-former-wpec-reporter/FmSORDuDjqbF3HZ1nZeVIK [perma.cc/PP8T-M55D].

56. Lefemine v. Baron, 573 So. 2d 326, 328 (Fla. 1991).

Under these general legal standards that govern liquidated damages clauses, Sinclair's clauses are likely to be held unenforceable penalties, rather than proper liquidated damages clauses.

First, Sinclair's employment contract provides for Sinclair to recover *either* liquidated damages *or* actual damages, because the contract provides that if Sinclair does not enforce this liquidated damages clause, it "shall have the right to seek any and all remedies and damages available as a result of Employee's breach of this Agreement."[57] The contract also provides that Sinclair can recover actual damages in the form of reimbursement for benefits that it paid to the employee.[58]

Exactly this sort of option to seek either liquidated damages or actual damages has been held by the Florida Supreme Court to render the clause unenforceable because "the option granted to [Sinclair] either to choose liquidated damages or to sue for actual damages indicates an intent to penalize the defaulting [employee] and negates the intent to liquidate damages in the event of a breach."[59] Since Sinclair has the ability to recover actual damages, it cannot establish that the damages are difficult to estimate, and therefore it cannot show that a liquidated damages clause is necessary, meaning that its only purpose is to penalize.

Second, the amount set is disproportionately high when compared to the estimated actual damages. If enforced, the clause would allow Sinclair to recover forty percent of the employee's salary multiplied by a percentage equal to the greater of (a) twenty-five percent, or (b) the percentage of the current contract year remaining after such termination.[60] This is an extremely high amount for an employee to pay (e.g., Ms. Hills is reported to have made only $46,000 annually, yet Sinclair is suing her for $17,050). By contrast, the amounts sued for ($5,700 from Mr. Beaton and $17,050 from Ms. Hills) should be insignificant to a company the size of Sinclair (which reportedly earned over $440 million last year) and not even worth the costs of litigating to collect them—except for the fact that Sinclair has also inserted a one-sided attorneys' fees clause into its contracts, entitling only Sinclair but not the employee, to recover its attorneys' fees and costs from the employee if it prevails.[61]

57. Sinclair Employment Agreement, *supra* note 42, § 8.2(c).

58. *Id.* § 8.2(b).

59. *Lefemine*, 573 So. 2d at 329–30. The same is true in New York. *See*, *e.g.*, Agerbrink v. Model Serv. LLC, 196 F. Supp. 3d 412, 418–19 (S.D.N.Y. 2016) ("The general, common-sense rule underlying this determination is that liquidated damages and actual damages are mutually exclusive remedies under New York law. After all, the purpose of a valid liquidated damages provision is to provide a reasonable estimate of the extent of the injury that would be sustained as a result of a breach of the agreement when other measures of damages are unavailable.") (internal quotation and citations omitted).

60. Sinclair Employment Agreement, *supra* note 42, § 8.2(c).

61. *Id.* § 14.8.

It is also highly unlikely that such a high number reflects any correlation to the actual costs incurred by Sinclair (e.g., hiring and training a replacement) as a result of a local reporter such as Ms. Hills or Mr. Beaton leaving their station. Unlike liquidated damages clauses that apply to celebrity figures who may have a value that is difficult to quantify and who may be difficult to replace,[62] Mr. Beaton and Ms. Hills—by their own account—were far from irreplaceable. "Florida courts will not enforce a penalty which is disproportionate to the damages and is agreed upon in order to enforce performance of a contract and held *in terrorem* over the promisor to deter him from breaking his promise."[63]

Further evidence that the clauses are designed to punish rather than compensate may exist in the fact that Sinclair chose to file the cases against Mr. Beaton and Ms. Hills in court—notwithstanding the fact that the contract contains a mutually binding arbitration clause, in which both Sinclair and its employees agreed that "arbitration shall be [the] exclusive means of resolving any dispute or controversy arising out of or relating to this Agreement, Employee's employment with Employer, or termination of Employee's employment."[64] Except in limited non-applicable circumstances, this clause should have required Sinclair to bring its disputes against Ms. Hills and Mr. Beaton in arbitration, not in court. Sinclair's choice to file both cases in court, rather than in the required arbitration forum, suggests it may have had motivations other than compensation.

Third, to the extent the clause is intended to cover actual costs of hiring and training a replacement reporter, those costs seem quantifiable and easy to estimate in advance and provide for in the contract: they are not difficult to ascertain and therefore not properly the subject of a liquidated damages clause in the first place.

Fourth, the amount is set and apparently applies to all breaches, regardless of severity.[65] Mr. Beaton, for example, reportedly quit when he had only a month remaining on his contract,[66] making it very

62. *Contra* Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 755–56 (6th Cir. 1999) (upholding liquidated damages clause in university football coach's contract where the lower court found that "[t]he potential damage to Vanderbilt extends far beyond the cost of merely hiring a new head football coach. . . . It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc.").

63. Coleman v. B.R. Chamberlain & Sons, Inc., 766 So. 2d 427, 429–30 (Fla. Ct. App. 2000) (internal quotation and citation omitted) (striking down liquidated damages clause which have resulted in paying plaintiff "more than the amount of its actual damages").

64. Sinclair Employment Agreement, *supra* note 42, § 15.

65. *Contra* Ashcraft & Gerel v. Coady, 244 F.3d 948, 955 (D.C. Cir. 2001) (holding liquidated damages clause enforceable where it applied only to "material breaches" of the contract and was otherwise a reasonable estimate of the loss sustained).

66. Musgrave, *supra* note 55.

unlikely that Sinclair could show it sustained any loss at all as a result of his departure.

Finally, it is irrelevant that Sinclair has used the term "liquidated damages" to label the clause.[67]

Conclusion

Based on all of the preceding, it appears that Sinclair's purported liquidated damages clause would likely not have been enforceable. It is likely that the courts would have held the clause "is not proportionate to any loss or gain" that might flow from a breach, but instead "is intended to compel [the departing reporter's] performance" with the contract.[68]

67. Agerbrink v. Model Serv. LLC, 196 F. Supp. 3d 412, 418–19 ("In this analysis, it is not material what the parties themselves have chosen to call the provision—courts look to substance and not to form to determine whether the provision is a valid liquidated damages clause or an unenforceable penalty.") (internal quotation and citation omitted).

68. Leviton Mfg. Co. v. Pass & Seymour, Inc. No. 17 Civ. 46 (BMC), 2017 WL 3084404, at *6 (E.D.N.Y. July 19, 2017).

Restrictions on Employee Change of Jobs: Antitrust Challenges to "Non-Compete" and "No-Poach" Clauses

*Eric S. Hochstadt & Nicholas J. Pappas**

Introduction

Agreements among competing employers related to terms of employment can raise meaningful antitrust risks if they are not tethered to an efficiency enhancing business transaction (like a sale of a business or a joint venture) and result in firms pulling "competitive punches" when it comes to the hiring and compensation of current and/or prospective employees. Similarly, exchanges of competitively sensitive information among employers can create risks of a potential anticompetitive agreement being inferred to exist among competing firms. In recent years, the landscape of private and public antitrust enforcement has become increasingly aggressive in scrutinizing employment practices across various industries. This paper explores the trends in civil and (now) potentially criminal antitrust enforcement in the employment area.

* This article was originally published in April 2018 for NYU's 71st annual conference on Labor & Employment Law Initiatives, Proposals, and Developments During the Trump Administration. An update of the article in summer 2019 was done for this publication. Eric Hochstadt is a partner in Weil, Gotshal & Manges LLP's litigation department, where he focuses on civil antitrust, class action, and other complex and sports-related litigation, including extensive experience with consumer and antitrust class action litigation, as well as criminal cartel investigations and antitrust counseling. He represents clients in a broad range of industries, including broadcasting, e-commerce, electronics, financial services, pharmaceuticals, private equity, publishing and transportation. Nicholas Pappas is a partner in Weil, Gotshal & Manges LLP's Employment Litigation Practice Group, where he litigates and counsels with respect to complex employment disputes, including in relation to antidiscrimination laws, noncompetition agreements, executive employment agreements and terminations, benefits, and disability, among other issues. Mr. Pappas also concentrates on the defense of ERISA class actions challenging the administration of health care benefit plans, 401(k) plans, and defined benefit plans. The authors are grateful for the contribution from Alexandra Shear, a former employee at Weil, Gotshal & Manges LLP, and for the contribution from Tzvi Novak, a summer associate at Weil.

I. Federal Antitrust Law—Section 1 of the Sherman Act

The governing federal law in this area is section 1 of the Sherman Act.[1] As interpreted long ago by the Supreme Court, section 1 prohibits *unreasonable* "restraints of trade."[2]

Courts that consider the legality or reasonableness of challenged restraints of trade analyze them under the so-called "rule of reason" analysis, or apply automatic illegality or *per se* treatment to them.[3] Under the rule of reason, a court looks at various factors, including the history of the challenged restraint, and weighs the anticompetitive effects in a properly defined market against the procompetitive justifications for business practice at issue.[4] By contrast, *per se* treatment condemns as a matter of law a business practice without consideration of any anticompetitive effects or procompetitive justifications.[5] *Per se* treatment is reserved for a limited category of business practices that always, or nearly always, are harmful to competition, meaning that, on their face, they lead to higher prices or reduced output or lessened innovation.[6] Price-fixing, bid-rigging, and customer or market allocation schemes are typical examples of business conduct that has been treated as *per se* illegal under section 1.[7]

In terms of enforcers, federal antitrust law relies on a system of dual enforcement. An antitrust plaintiff may be a private entity or citizen, or a class thereof consistent with Federal Rule of Civil Procedure 23. Under the Clayton Act, a private plaintiff can sue for damages—that are automatically trebled—and injunctive relief, as well as recover attorneys' fees and costs.[8] In a conspiracy case under section 1, which employment cases have been historically, liability is joint and several with no right of contribution.[9] Thus, the potential civil antitrust exposure in a private antitrust lawsuit can be significant.

In addition to private enforcement, the Antitrust Division of the United States Department of Justice or the Federal Trade Commission

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1. 15 U.S.C. § 1 (2012).

2. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 60–68 (1911). This paper does not purport to address treatment of employment-related agreements under state antitrust or other state laws. However, many state antitrust statutes have so-called "harmonization" provisions that result in state antitrust law following or incorporating federal antitrust jurisprudence.

3. For a more detailed discussion of the "rule of reason" and *per se* analysis under the Sherman Act, see generally Adam Weg, Note, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L.J. 1535 (2009).

4. *See, e.g.*, Bd. of Trade v. United States, 246 U.S. 231 (1918).

5. *See, e.g.*, Broad. Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979).

6. *Id.* at 8.

7. U.S. DEP'T OF JUSTICE, ANTITRUST DIV., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2, https://www.justice.gov/sites/default/files/atr/legacy/2007/10/24/211578.pdf (last visited May1, 2020).

8. *See* 15 U.S.C. §§ 15(a), 26 (2012).

9. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642–46 (1981).

can enforce section 1. Both federal agencies may bring civil cases, but only the Department of Justice may bring criminal cases.

II. History and Evolution of "No-Poach" and "Wage Fixing" Jurisprudence

The idea that there is a market for employing individual—or groups of—employees and that that market is subject to the same rules protecting competition as any other market is not a new one. For years, in evaluating whether certain information exchanges among competitors violate the antitrust laws, antitrust enforcers and private antitrust litigants have considered whether communications among competitors concerning employment may constitute an anticompetitive information exchange.[10]

However, in recent years, the frequency and intensity with which employment-related agreements—either not to "poach" a rival's employees or to suppress wages, benefits, and other terms of employment within an industry—that have been challenged under the antitrust laws have increased dramatically.[11] Correspondingly, private and public enforcers have treated these agreements more severely, alleging that *per se*, rather than rule of reason, treatment is appropriate and (now according to the federal regulators) that they constitute criminal, rather than civil, violations of antitrust law.

In considering the history and evolution of cases challenging employment-related agreements and information exchanges, one can observe this as an area of growing risk for companies. Although few cases reach a final adjudication on the merits and many are resolved by settlement with no admission of wrongdoing, the growing frequency of these cases, the attention received by the federal regulators, and the magnitude of the penalties lend support for this observation. In this paper we have grouped the types of antitrust challenges into four categories of cases, involving: (1) information sharing; (2) "ancillary" agreements to efficiency enhancing business transactions where the parties to a deal enter into reasonable restrictions related to the hiring of certain employees; (3) "naked' agreements concerning employment or hiring; and (4) potentially criminal agreements not to compete for certain employees' services.

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10. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at ABA Section of Antitrust Law and ABA Center for Continuing Legal Education, Antitrust Issues Related to Benchmarking and Other Information Exchanges (May 3, 2011), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-issues-related-benchmarking-and-other-information-exchanges/110503roschbenchmarking.pdf.

11. *See, e.g.*, Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

A. Information Exchanges or Sharing

In 2001, in *Todd v. Exxon Corp.*, the Second Circuit—in an opinion written by then-Judge Sotomayor—reversed a decision granting a motion to dismiss a private civil antitrust class action complaint alleging that fourteen oil and gas companies violated section 1 of the Sherman Act by sharing information concerning salaries paid to certain types of professional (nonunion) employees.[12] Specifically, the complaint in *Todd v. Exxon* alleged that the fourteen defendant employers regularly met to discuss the results of periodically conducted surveys of employees' past and current salaries, as well as the employers' current and projected salary budgets.[13] Salary and other compensation data were regularly collected, analyzed, and distributed among the defendants by themselves and by a third-party consultant.[14] Plaintiffs alleged that this exchange constituted a violation of section 1 under the rule of reason because it had the purpose and effect of keeping salaries for the affected employees lower than they would have been absent the information exchange.[15]

The district court dismissed the complaint, holding, among other things, that the plaintiffs did not allege facts that supported the existence of an actual *agreement* to set compensation levels for the affected employees.[16] On appeal, the Second Circuit clarified that information exchanges challenged under section 1 of the Sherman Act are subject to the rule of reason.[17] The Second Circuit also enumerated certain factors to be used in applying the rule of reason analysis, principally the "structure of the industry involved and the nature of the information exchanged."[18]

In addressing the "nature of the information exchanged," the Second Circuit clearly laid out the four factors that courts should consider in determining whether the information exchange is anticompetitive. The first is the *timeframe* to which the information pertains. The exchange of historical information poses less risk of harm to competition than the exchange of information that is current or prospective because competitors cannot react to historical information in real time.[19]

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12. 275 F.3d 191, 214–15 (2d Cir. 2001).
13. *Id.* at 196.
14. *Id.*
15. *Id.*
16. *Id.* at 197.
17. *Id.* at 199 ("As plaintiff does not allege an actual agreement among defendants to fix salaries, we analyze plaintiff's complaint solely as to whether it alleges unlawful information exchange pursuant to this rule of reason.").
18. *Id.* (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).
19. *Id.* at 211 ("The first factor to consider is the time frame of the data. . . . The exchange of past price data is greatly preferred because current data have greater potential to affect future prices and facilitate price conspiracies. By the same reasoning, exchanges of future price information are considered especially anticompetitive.").

The second is the *specificity* of the information being exchanged. The more specific the information being exchanged is, the more likely it could be used by competitors in an anticompetitive manner.[20]

The third factor the court identified is whether the information is *publicly available*. Public dissemination of the information being exchanged can reduce the likelihood of competitors acting with an unfair advantage based on unequal access to information that could inform the decision-making process.[21]

The fourth factor is the *context* in which the information is exchanged, including the existence or absence of precompetitive reasons for the information exchange.[22] Because the complaint in *Todd v. Exxon* alleged the exchange of current and forward-looking salary data, which was detailed and specific as to which defendants it described (in that case, not aggregated beyond three competitors), not made publicly available, and exchanged in frequent meetings among competitors with no other precompetitive purpose, the Second Circuit held that it adequately alleged an unlawful information exchange under the rule of reason. "In sum, the 'nature of the information exchanged' weighs against the motion to dismiss. The characteristics of the data exchange in this case are precisely those that arouse suspicion of anticompetitive activity under the rule of reason."[23]

In 2011, then-Federal Trade Commissioner J. Thomas Rosch delivered a speech entitled *Antitrust Issues Related to Benchmarking and Other Information Exchanges*.[24] As for benchmarking where "a firm compar[es] its practices, methods, or performance against those of other companies," Commissioner Rosch concluded that "[b]enchmarking has

20. *Id.* at 212 ("[A]nother factor courts look to is the specificity of the information. Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices. Courts prefer that information be aggregated in the form of industry averages, thus avoiding transactional specificity.") (citations omitted).

21. *Id.* at 213 ("Another important factor to consider in evaluating an information exchange is whether the data are made publicly available. Public dissemination is a primary way for data exchange to realize its procompetitive potential. . . . A court is therefore more likely to approve a data exchange where the information is made public.").

22. *Id.*

23. *Id.* After the Second Circuit's ruling, the case was remanded and transferred by the Judicial Panel on Multidistrict Litigation. *See In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., 206 F. Supp. 2d 1374 (J.P.M.L. 2002). Class certification was denied. *See In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., No. 02 Civ. 2924, 2006 U.S. Dist. LEXIS 249, at *29 (D.N.J. Jan. 4, 2006) (denying class certification under Fed. R. Civ. P. 23(b)(1), (2)); *In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., No. 02 Civ. 2924, 2003 U.S. Dist. LEXIS 22836, at *11–12 (D.N.J. May 22, 2003) (denying class certification under Fed. R. Civ. P. 23(a), (b)(3)). And the district court granted defendants' motion for summary judgment on the issue of the relevant market. *In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., No. 02 Civ. 2924, 2008 U.S. Dist. LEXIS 63633 (D.N.J. Aug. 19, 2008). A settlement was eventually reached.

24. Rosch, *supra* note 10.

obvious procompetitive potential. It allows companies to learn about more efficient means of production and distribution, which can in turn lead to better and lower cost products for consumers."[25] But because benchmarking can potentially lead to tacit collusion without an express agreement, companies have been subjected to antitrust scrutiny for benchmarking exercises.

In his remarks, Commissioner Rosch analyzed the *Todd v. Exxon* case in the context of section 1 antitrust jurisprudence and identified the following "factors that raise the antitrust scrutiny of [information] exchanges":[26]

1. "a concentrated industry";
2. "a fungible product or service";
3. "inelastic demand";
4. "use of current or future data";
5. "non-aggregated results";
6. "not making the survey results public";
7. "frequent meetings among participants"; and
8. "agreements regarding the use of the [information exchanged]."[27]

For practitioners and in-house counsel examining information exchanges, this is a useful guide for compliance with section 1 when it comes to employment-related information exchanges. Ultimately, Commissioner Rosch concluded that "information exchanges are likely to be reviewed under the full rule of reason rather than under a *per se*, truncated, or 'quick look' analysis."[28] Nevertheless, while the plaintiffs in *Todd v. Exxon* ultimately lost, a rule of reason antitrust class action can consume lots of time and resources for a company.[29]

B. Ancillary v. Naked Restraints of Trade Concerning Employment

Next, we turn to communications among competitors concerning employment that include agreements as to how to treat employees, as contrasted with pure exchanges of information that the employers may use as they see fit. In *Addyston Pipe & Steel Co. v. United States*, the Supreme Court held that certain restraints of trade may be lawful when they are "ancillary" to an agreement that is otherwise lawful and procompetitive and so should be analyzed under the rule of reason.[30] The same restraint, if "naked"—meaning if it were the sole or primary purpose of the agreement being challenged—would be *per se* unlawful.

25. *Id.* at 15–16.
26. *Id.* at 20.
27. *Id.*
28. *Id.*
29. *See* 15 U.S.C. § 1 (2012).
30. 175 U.S. 211, 239 (1899).

Since antitrust doctrine has long given ancillary restraints of trade rule of reason treatment, it is not surprising that agreements concerning employment, when they are part of a broader agreement among competing employers, are also analyzed under the rule of reason. It is worth noting here that we are not addressing traditional "non-compete" agreements, where a separating employee agrees not to work for a competitor of his or her former employer within certain reasonable geographical and temporal restraints.[31] Rather, we are discussing agreements of the sort typically described as a "no-poach" agreement, where competing employers reach an agreement concerning whether or how to hire one another's current, former, or even potential future employees.

A notable challenge to what plaintiffs characterized as a naked "no-poach" agreement concerns skilled high-tech workers in Silicon Valley.[32] In that case, the Antitrust Division of the United States Department of Justice filed a civil suit against seven named Silicon Valley companies alleging a *per se* agreement among the defendants to abstain from hiring one another's employees, or to do so only pursuant to conditions agreed upon by the defendants.[33] The defendants settled with the Department of Justice agreeing to abandon the challenged business practice.[34] Because that settlement provided no monetary compensation to the injured employees, private plaintiffs subsequently sued the same seven defendants and an additional two hundred unnamed companies and individuals on behalf of a putative class of injured employees.

Specifically, a putative class of employees alleged that:

> Defendants' senior executives entered into an interconnected web of express agreements to eliminate competition among them for skilled labor. This conspiracy included: (1) agreements not to recruit each other's employees; (2) agreements to notify each other when making an offer to another's employee; and (3) agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer.[35]

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31. S*ee, e.g.*, J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 Mich. St. L. Rev. 369.

32. Consolidated Amended Complaint, *In re* High-Tech Employee Antitrust Litig., No. 11-CV-2509-LHK, 2015 WL 5159441 (N.D. Cal. Sept. 2, 2015), 2011 WL 11683784.

33. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

34. United States v. Adobe Systems, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement, 75 Fed. Reg. 60,820 (Oct. 1, 2010), https://www.govinfo.gov/content/pkg/FR-2010-10-01/pdf/2010-24624.pdf.

35. Consolidated Amended Complaint at 1, *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-2509-LHK, 2011 WL 11683784.

As further alleged, "Defendants entered into the express agreements and entered into the overarching conspiracy with knowledge of the other Defendants' participation, and with the intent of accomplishing the conspiracy's objective: to reduce employee compensation and mobility through eliminating competition for skilled labor."[36]

The class complaint claimed that "Defendants' conspiracy and agreements restrained trade and are *per se* unlawful under federal and California law."[37] The class complaint also explicitly noted that the Department of Justice alleged a *per se* violation of the antitrust laws because the agreements not to compete for the high-tech employees' services were naked agreements, and not ancillary to any legitimate or precompetitive restraints:

> [T]he DOJ concluded that Defendants had agreed to naked restraints of trade that were *per se* unlawful under the antitrust laws. The DOJ found that Defendants' agreements "are facially anticompetitive because they eliminated a significant form of competition to attract high tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities." The DOJ further found that the agreements "disrupted the normal price-setting mechanisms that apply in the labor setting."
>
> The DOJ also concluded that Defendants' agreements "were not ancillary to any legitimate collaboration" and were "much broader than reasonably necessary for the formation or implementation of any collaborative effort."[38]

By contrast, the defendants argued that the conduct alleged did not constitute an antitrust violation meriting *per se* treatment. The issue was litigated in the district court, which ultimately held that the plaintiffs adequately pled, at the motion-to-dismiss stage, that the *per se* standard applied to the challenged "no poach" conduct in that case.[39] Ultimately, because the class plaintiffs settled with the defendants,[40] the issue of whether the alleged agreement at issue actually

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36. *Id.* at 10.

37. *Id.* at 1.

38. *Id.* at 19–20.

39. *See In re* High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) ("Moreover, the Court need not engage in a market analysis until the Court decides whether to apply a *per se* or rule of reason analysis. Defendants' argument relies on the false assumption that the Court should apply a rule of reason analysis, but as the parties agree, the Court need not decide now whether *per se* or rule of reason analysis applies. Indeed, that decision is more appropriate on a motion for summary judgment. Plaintiffs have successfully pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion, and therefore no market analysis is required at this time.") (citations omitted).

40. *See* Lance Whitney, *Apple, Google, Others Settle Antipoaching Lawsuit for $415 Million*, CNET (Sept. 3, 2015, 8:32 AM PT), https://www.cnet.com/news/apple-google-others-settle-anti-poaching-lawsuit-for-415-million.

constitutes a *per se* violation was never reached and there was no final adjudication based on the full evidentiary record.

It is worth noting, however, that the size of the settlement reached in the Silicon Valley no-poach case is an indication of how seriously these cases are to be taken. In August 2014, the district court rejected the plaintiffs' settlement with the four then-remaining defendants of $324.5 million on the ground that it was insufficient to compensate the class based on an earlier, smaller settlement in the litigation.[41] The district court put on the public record detailed factual evidence as to why the strength of the case against the remaining defendants warranted an even larger settlement.[42] According to the district court:

> The Court recognizes that Plaintiffs face substantial risks if they proceed to trial. Nonetheless, the Court cannot, in light of the evidence above, conclude that the instant settlement amount is within the range of reasonableness, particularly compared to the settlements with the Settled Defendants and the subsequent development of the litigation. The Court further notes that there is evidence in the record that mitigate at least some of the weaknesses in Plaintiffs' case.[43]

Finally, the district court concluded that there was no evidence offered that the agreements at issue were either ancillary restraints or procompetitive. Specifically:

> As to the contention that Plaintiffs would have to rebut Defendants' contentions that the anti-solicitation agreements aided collaborations and were therefore pro-competitive, there is no documentary evidence that links the anti-solicitation agreements to any collaboration. None of the documents that memorialize collaboration agreements mentions the broad anti-solicitation agreements, and none of the documents that memorialize broad anti-solicitation agreements mentions collaborations. . . . Thus, despite the fact that Defendants have claimed since the beginning of this litigation that there were procompetitive purposes related to collaborations for the anti-solicitation agreements and despite the fact that the purported collaborations were central to Defendants' motions for summary judgment, Defendants have failed to produce persuasive evidence that these anti-solicitation agreements related to collaborations or were pro-competitive.[44]

The district court noted further that

> the U.S. Department of Justice ("DOJ") also determined that the anti-solicitation agreements "were not ancillary to any legitimate collaboration," "were broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted

41. *See In re* High-Tech Employee Antitrust Litig., No.: 11-CV-02509-LHK, 2014 WL 3917126, at *3–4 (N.D. Cal. Aug 8, 2014) ("The Court finds the total settlement amount falls below the range of reasonableness.").

42. *See generally id.*

43. *Id.* at *15.

44. *Id.* at *16.

> the normal price-setting mechanisms that apply in the labor setting." The DOJ concluded that Defendants entered into agreements that were restraints of trade that were per se unlawful under the antitrust laws.[45]

The significance of a prior government enforcement action (even if settled with no admission of wrongdoing) cannot be understated on follow-on civil litigation.

In the end, the district court subsequently approved a modified class action settlement with the remaining defendants for $415 million.[46]

C. Potential Future Criminal Enforcement by the Department of Justice

Following the Silicon Valley "no-poach" cases, in 2016, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission jointly issued guidance for human resource professionals in connection with hiring practices (the HR Guidance).[47] The stated purpose of the guidance is "to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws . . . which apply to competition among firms to hire employees."[48] The HR Guidance makes clear that the federal antitrust laws apply to all aspects of hiring, stating: "An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities."[49]

The HR Guidance warns that "[v]iolations of the antitrust laws can have severe consequences. Depending on the facts of the case, the DOJ could bring a criminal prosecution against individuals, the company, or both."[50] The HR Guidance addresses both agreements among potential employers—noting that the agreement need not be express or written—as well as information exchanges.[51] The HR Guidance reiterates the Department of Justice's position in its civil suit against the

45. *Id.* (internal citations omitted).

46. *In re* High-Tech Employee Antitrust Litig., No.: 11-CV-02509-LHK, 2015 WL 5159441 (N.D. Cal. Sept. 2, 2015); Whitney, *supra* note 40.

47. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.justice.gov/atr/file/903511/download [perma.cc/79MY-VDYD].

48. *Id.* at 1.

49. *Id.*

50. *Id.* at 2.

51. *Id.* at 3–6.

Silicon Valley firms that a naked agreement not to compete for employees' services is a *per se* antitrust violation.[52]

The HR guidance highlights recent civil enforcement actions directed at naked employment-related agreements by both the Antitrust Division of the United States Department of Justice and the Federal Trade Commission in four different industries—hospitals, technology, nursing, and fashion—before warning that the Department of Justice will, in the future, prosecute similar agreements as *criminal* antitrust violations.[53] The HR Guidance puts companies and industry stakeholders on notice as to the future "rule of the road":

> *Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.* These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.[54]

Finally, the HR Guidance concludes with a warning to self-report suspected criminal violations.[55]

The HR Guidance goes on to state that employment-related information exchanges, while not *per se* illegal and not subject to criminal prosecution, might also be found to violate the antitrust laws:

> *Sharing information with competitors about terms and conditions of employment can also run afoul of the antitrust laws.* Even if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement. While agreements to share information are not *per se* illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect. Even without

52. *Id.* at 3 ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws. That means that if the agreement is not separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects.").

53. *Id.* at 3–4.

54. *Id.* at 4 (emphasis added).

55. *Id.* at 11 ("With respect to potential criminal violations, in particular, it can be beneficial to report personal involvement in an antitrust violation quickly. Through the Division's leniency program, corporations can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.").

> an express or implicit agreement on terms of compensation among firms, evidence of periodic exchange of current wage information in an industry with few employers could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation.[56]

The HR Guidance also notes the conditions under which information exchanges may be lawful, largely echoing the four factors described above that the Second Circuit examined in *Todd v. Exxon*.[57]

Since the issuance of the HR Guidance, the Antitrust Division of the United States Department of Justice has announced on many occasions that employment-related agreements among *competing* employers will become an enforcement priority, with the Department of Justice bringing more cases in this area and seeking to criminally prosecute offending companies and individuals where justified.[58] Prior to the HR Guidance, antitrust enforcement of employment-related agreements—even naked "no-poach" agreements—was only civil, with the only question being whether the Department of Justice would seek rule of reason or *per se* treatment. From recent statements, it is clear that the Department of Justice will seek *per se* treatment of such agreements among true competitors, and the question has become whether it will bring a civil or criminal suit.

Tellingly, in April 2018, the Department of Justice settled a civil antitrust challenge to a no-poach agreement between rail equipment suppliers Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec) that allegedly began in 2009 and was discovered by the Department of Justice prior to the issuance of the HR Guidance in October 2016. For that reason only, the Department of Justice stated it chose to bring a civil, rather than criminal, suit.[59] The Department of

56. *Id.* at 4–5 (emphasis added).

57. *Id.* at 5.

58. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete[perma.cc/6VJW-4GCM].

59. *Id.* ("Beginning in October 2016, the department has made several announcements that it intends to bring criminal, felony charges against culpable companies and individuals who entered into these types of no-poach agreements. In an exercise of prosecutorial discretion, the department will pursue as civil violations no-poach agreements that were formed and terminated before those announcements were made. Knorr's and Wabtec's respective no-poach agreements were discovered by the Division and terminated by the parties before October 2016, prompting the Division to resolve its competition concerns through a civil action."). The case was ultimately resolved via public consent decree enjoining the challenged conduct. United States v. Knorr-Bremse AG, No. 1:18-cv-00747-CKK, 2018 U.S. Dist. LEXIS 142125 (D.D.C. July 11, 2018).

Justice has told the bar that grand jury investigations in new criminal matters are now underway.[60]

Given the new, potential aggressive criminal enforcement in this area, the federal regulators came forward with some possible "Red Flags" for HR professionals.[61] These include:

- "Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range."
- "Agree with another company to refuse to solicit or hire that other company's employees."
- "Agree with another company about employee benefits."
- "Agree with another company on other terms of employment."
- "Express to competitors that you should not compete too aggressively for employees."
- "Exchange company-specific information about employee compensation or terms of employment with another company."
- "Participate in a meeting, such as a trade association meeting, where the above topics are discussed."
- "Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings."
- "Receive documents that contain another company's internal data about employee compensation."[62]

To be clear, the federal regulators explicitly state that, on the one hand, this is not an exhaustive list of "red flags," and, on the other hand, "the presence of a red flag does not necessarily mean that there has been an antitrust violation."[63] For now, following the agencies' guidance combined with monitoring enforcement actions is the best way to keep abreast of the trends in potential criminal exposure in the employment area and navigate antitrust risk appropriately.

60. Press Release, Fed. Trade Comm., FTC and DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how [perma.cc/K7CX-RW8U].

61. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Red Flags for Employment Practices (Oct. 2016), https://www.justice.gov/atr/file/903506/download.

62. *Id.* at 1.

63. *Id.* at 2.

D. DOJ Clarifies Approach on Distinguishing between Per Se and "Rule of Reason" Analysis

In 2019, the Department of Justice filed a number of "Statements of Interest" in civil class action litigation in this area to clarify and curb potential misuse of the HR Guidance. Specifically, in a follow-on class action to the Government's April 2018 enforcement action against the rail equipment suppliers (that would have been criminally prosecuted if the conduct occurred before the HR Guidance), the Department of Justice reaffirmed its view that a naked no-poach agreement among competing firms is a type of horizontal market allocation that should be assessed under the *per se* rule.[64]

Yet, in class actions challenging some form of contractual provision in the context of a fast-food franchise system, the Department of Justice has taken the position that franchises should be treated differently.[65] Among other things, the Government made clear that some form of hiring restriction that is ancillary to a broader economic transaction, such as within the context of a franchise system, should be subject to the traditional, full-blown "rule of reason" standard based on a definition of a proper relevant market and after balancing the procompetitive benefits against any anticompetitive effects.[66] The Government said that a *per se* or "quick look" "rule of reason" is inappropriate in the franchise context because, unlike the enforcement actions discussed above, a franchisor and its franchisees are not "horizontal" competitors.[67] According to the Department of Justice, "The franchise relationship is in many respects a vertical one because the franchisor and the franchisee normally conduct business at different levels of the market structure. Restraints imposed by agreement between the two are usually vertical and thus assessed under the rule of reason."[68]

Conclusion

There can be no question that employment-related information exchanges and especially agreements have been, and will continue to be, an area of increasing scrutiny for antitrust enforcers and private plaintiffs. It can be expected that these business practices will be challenged both more frequently and more vigorously. The law is developing, and companies and practitioners will continue to see this as a top area of focus.

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64. U.S. Dep't of Justice, No-Poach Approach (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [perma.cc/9546-NJTN].

65. Corrected Statement of Interest of the United States, Stigar v. Dough Dough, Inc., Nos. 2:18-cv-00244, -00246, -00247 (E.D. Wash. Mar. 8, 2019) (including consolidated cases Richmond v. Bergey Pullman Inc. and Harris v. CJ Star, LLC).

66. *Id.* at 11–13.

67. *Id.* at 16.

68. *Id*. at 11.

Public Sector Unions Can Survive *Janus*

*Alan M. Klinger & Dina Kolker**

Introduction

Dress rehearsals are always useful to prepare an ensemble to go live. In the case of public sector labor, the "near miss" presented by the Supreme Court's consideration of *Friedrichs v. California Teachers Ass'n*, was a loud and clear wakeup call that unions and public employers needed to be better prepared for the possibility that the Court would take a second look at mandatory agency fees in the public sector.[1] A short two years later, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Supreme Court rendered the most sweeping national change to the landscape of public sector labor relations in decades.[2] This time, the public sector labor movement would be ready for the stage. Post-*Friedrichs*, unions looked within, to their bargaining partners, and to state and local legislatures for a multifaceted approach to reinvigorating their constituents and recalibrating their practices. Not every union was comfortable with the approach taken by some, but different approaches tailored to each workforce are the strengths of having a diverse community of unions and members. Those preparations, carried through in the post-*Janus* world, reinvigorated many unions and prepared them and their members for the challenges ahead.

I. Looking Within

Using New York as a case study, it is clear that most public-sector unions understood that internal organizing was an essential element

* Alan Klinger is Stroock's Co-Managing Partner and Chair of its Government Affairs and Relations Group. *City & State New York* magazine recently named Alan to its Law Power 50, Fifty Over 50 and Labor Power 100 lists. He was also shortlisted for New York Attorney of the Year by the publication *Benchmark Litigation*, and he holds accolades in *The Legal 500, Super Lawyers* and *Best Lawyers*. He leads the firm's representation of public sector unions and employee benefits funds.

Dina Kolker is a partner at Stroock and works with some of New York City's largest public employee unions. She has been recognized as a "Future Star" by *Benchmark Litigation*, as a *Super Lawyers* "Rising Star" and in *The Legal 500*. She represents clients in negotiations, arbitrations, administrative proceedings, and litigation in a variety of areas in both state and federal court, including labor, employment, contract, pension issues and constitutional rights.

1. 136 S. Ct. 1083, 1083 (2016).
2. 138 S. Ct. 2448 (2018).

to surviving an adverse result in *Janus*.[3] Many unions had become complacent in their internal organizing activities in the agency fee environment. They focused their resources on negotiations and contract administration, not on securing members. Some, as discussed *infra*, did not even necessarily know how many "agency fee" or "fair share fee" payers they had because, unbeknownst to the union, the payroll system would automatically drop individuals from member status in certain circumstances.[4]

Realizing how close they had come to a loss in *Friedrichs*, unions understood they needed to demonstrate the value of the union to their constituents more actively. Unions designated internal teams specifically tasked with reaching out to existing members and existing fair-share fee payers. They modernized their communications systems and developed innovative ways to have multiple "touches" with existing and new members. In the past, where a union might only highlight the ultimate result of a campaign or negotiation, now they endeavor to give members a look behind the curtain to see the effort and resources it takes to accomplish the types of terms of employment and services that they have come to expect. They are resources that, post-*Janus*, would need to be funded. This more interactive, member-focused infrastructure would prove essential to fend off "quit your union" campaigns and motivated unions to stay better connected with their members.

Many unions emphasized spreading a culture of inclusion, volunteerism, and collective power. Some equally mobilized unions took a different approach: Looking to workforces in the federal government that have long struggled in a right-to-work environment, they turned to negative social pressure, preparing lists of "scabs." Other unions used a little of both for good measure. They posted lists of union members to both celebrate those who were committed to the union and more subtly called out those who would be "free riding."

Some unions began media campaigns to show members what it might be like without a union, emphasizing the positive role of unions in society as well as the workplace. But, human nature being what it is, some determined that positive promotion alone may not suffice in the long term when non-member employees can (seemingly) receive all the same benefits for free.

3. As indicated *infra*, other states have also taken action to address *Janus* issues.

4. Fair share fees, also called agency fees, are fees charged to employees who are represented by a union but who opt not to join the union. They represent the employee's "fair share" of the cost of collective bargaining and services which the employee enjoys as a part of the bargaining unit. *See Janus*, 138 S. Ct. at 2460 (labelling these agency fees); *id.* at 2489 (Kagan, J., dissenting).

II. Looking Without

Across the country and in New York, in particular, organized labor has also looked to their government employers and state government to adapt the rules of the game to the massive shift in labor law that *Janus* represented. Some states, which chose to prohibit agency fees prior to *Janus*, had already made adjustments to the relationship between nonmembers and unions. Florida, for example, has an explicit statutory provision stating that unions "shall not be required to process grievances for employees who are not members of the organization."[5] Nebraska provides that employees have a right to choose their representative in any grievance proceeding.[6] That choice includes the ability for a nonmember to pay for union-provided representation.[7]

Nevada has come to a similar rule through practice and judicial review. In *Cone v. Nevada Service Employees Union/SEIU Local 1107*, the Nevada Supreme Court approved of a local union charging fees for individual representation of nonmembers in grievances under Nevada Law.[8] Following the loss of 100 union members, the union created a new policy establishing the fee schedule.[9] The court reasoned that being an "exclusive" representative for bargaining purposes under Nevada law did not prohibit the union "from charging nonunion members service fees for individual grievance representation."[10] This was further supported by another Nevada statute providing that an individual has "a right to forego union representation . . . . Implicit in the plain language of this provision is the requirement that a nonunion member pay for pursuing his or her grievance, even if such payment is made to a union."[11] Further, the union's policy did not violate Nevada's right-to-work laws because "[p]aying a service fee for grievance representation is not a condition of employment."[12] Rather, "an individual may opt to hire . . . counsel, and thereby forego giving the union any money at all without fear of losing his or her job."[13]

5. Fla. Stat. § 447.401 (2019).
6. Neb. Rev. Stat. § 48-838 (2019).
7. *Id.*
8. 998 P.2d 1178, 1179–80 (Nev. 2000).
9. *Id.* at 1180.
10. *Id.* at 1181.
11. *Id.* at 1181–82.
12. *Id.* at 1182.
13. *Id.* The court in *Cone* recognized that its holding was contrary to National Labor Relations Board (NLRB) precedent, applicable to private-sector unions. *Cone*, in turn, was briefly distinguished by the NLRB in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Indus. & Serv. Workers International Union*, 199 L.R.R.M. (BNA) 1074 (2014), *adopted as modified*, 362 N.L.R.B. 1649 (2015) (adopting the ALJ's rulings, findings, and order), which upheld NLRB precedent first established in *International Association of Machinists* and applied it to a union in Florida, a right-to-work state.

In New York, compulsory fair share fees were so engrained in the statutory structure that a union's ability to make any distinctions between the benefits and services offered to members and nonmembers was almost non-existent. The labor law, always looking to balance rights and interests, was heavily tipped by the weight of fair share fees. So much so that prior to the 2018 amendments to New York State's Public Employees' Fair Employment Act (commonly known as the Taylor Law), the Public Employment Relations Board (PERB), which administers it, had held that a union's duty of fair representation (DFR) to a nonmember required that the union provide virtually the same benefits and services to the nonmember as to dues-paying members. Several decisions had made reference to a union's obligation to treat members and nonmembers equally with regard to "substantial economic benefits" and "job-related" benefits. Indeed, PERB's DFR publication, discussing the Taylor Law and DFR (now partially superseded), contains a single paragraph focused on membership status and collective bargaining, stating bluntly that "[a] union may not discriminate between the rights of members and nonmembers when negotiating for and administering a collective bargaining agreement (CBA) and may not provide or attempt to secure certain benefits, generally employment-related, for its members to the exclusion of non-union unit members."[14] However, this paragraph, and, indeed, much of the analysis of this issue, rests on a handful of cases some thirty or more years old, and, of course, adopted in the context of agency fees. While arguments could have been crafted (and were leading up to *Janus*) that might have prompted PERB to reconsider its prior decisions in light of a world without agency fees, it was, of course, safer to seek legislative clarification. That is precisely what occurred.

Because of the scheduling realities of the New York State Legislature, which completed its 2018 session prior to the issuance of *Janus* and was not scheduled to resume until January 2019, the New York labor movement and the state government determined to address these issues in anticipation of *Janus* or be handicapped by a half-year or more delay in the ability to respond. As a result, significant changes were adopted ahead of *Janus*, effective April 12, 2018 (the Amendments).[15]

A. Taylor Law Amendments

Generally, the Amendments grant more options to public sector unions. They are designed to allow unions to differentiate membership, improve internal organizing, and provide mechanisms for greater financial certainty. The changes support member mobilization and solicitation for new members and introduce some measure of stability

14. PHILIP L. MAIER, PUB. EMP'T RELATIONS BD., THE TAYLOR LAW AND THE DUTY OF FAIR REPRESENTATION 70 (2d ed. 2008).

15. A.9509-C, 2017-18 Sess. pt. RRR (N.Y. 2018), https://legislation.nysenate.gov/pdf/bills/2017/A9509C (a component of the Budget Bill).

to potential revocation of dues authorizations. In keeping with the varied approaches of unions serving different workforces, the Amendments are permissive, not mandatory. In essence, they create a broader toolbox for unions to use.[16]

To understand the Amendments, it is helpful to look at the historical relationship of a union's exclusivity and the DFR.[17] The DFR had been interpreted broadly to require that members and nonmembers be treated equally with regard to anything of economic value or "work-related." The requirement was not limited to benefits contained in a CBA and severely limited a union's ability to differentiate the benefits of union membership.

Similarly, New York General Municipal Law § 93-b provided authorization for public employees to effectuate dues deduction, but provided that such authorization may be withdrawn by the employee *at any time*.[18] Within a construct where withdrawal meant that an employee moved from paying dues to paying an agency fee, the timing of withdrawal did not meaningfully impact a union's ability to responsibly plan its finances and resources. *Janus* has changed that paradigm.

The Amendments target these issues with three categories of changes:

(1) Dues Payments and Authorizations:

- Employer must start dues deductions and transmit the deductions no later than thirty days after receiving proof of a card and no later than thirty days after the deduction is made, respectively;[19]
- Card format may now be electronic, so long as it complies with article 3 of the State Technology Law;[20]
- Membership revocation is subject to the terms of the authorization;[21] and
- Membership continuity is preserved, including after reinstatement of employee within one year.[22]

16. PERB also voted to adopt an amendment to § 204.4 of its Rules of Procedure on October 23, 2018. The new section provides a somewhat expedited process for disputes relating to the amended scope of the duty of fair representation owed by a union to a nonmember. Pub. Emp't Relations Bd., Notice of Adoption and Assessment of Public Comment, http://www.perb.ny.gov/wp-content/uploads/2018/10/Notice-of-Adoption.pdf (last visited May 2, 2020). The rule became effective on November 14, 2018. *Id.*

17. The Taylor Law was amended in 1990 expressly to provide that a union's breach of its DFR is an "improper practice" falling within PERB's jurisdiction. *See* N.Y. Civ. Serv. Law § 209a(2)(c) (McKinney 2019). Before and after this amendment, New York courts and PERB recognized that they have concurrent jurisdiction over DFR claims brought by public sector employees against their unions. *See* DeCherro v. Civil Serv. Emp. Ass'n, Inc., 60 A.D.2d 743, 744 (N.Y. App. 1977); *In re* Int'l Longshoreman's Ass'n Local 2028, 32 PERB ¶ 3038 (1999).

18. N.Y. Gen. Mun. Law § 93-b (McKinney 2019).

19. N.Y. Civ. Serv. Law § 208(4)(a).

20. *Id.* § 208(1)(b).

21. *Id.* § 208(1)(b)(i). Also, see further discussion *infra* at Section II(B).

22. N.Y. Civ. Serv. Law § 208(1)(b)(ii); *see also id.* § 208(1)(c) (providing for automatic reinstatement after restoration to active duty from a leave of absence).

(2) Access to employees:

- Employer must notify union after employee is hired, promoted or transferred along with providing the name, address, job title, employing agency, department and work location;[23] and
- Employer must allow union access to meet with employee during work time without charge to leave credit. The meeting shall be for a "reasonable time," during his or her "work time," and the scheduling must be done "in consultation with the designated representative of the public employer."[24]

(3) Recalibration of DFR with regard to nonmembers to combat the free-rider problem:

- Union's representation obligation to nonmembers limited to negotiations and administration of CBA;[25]
- Union can provide members-only benefits that are legal, economic or job-related "beyond those provided in the agreement";[26] and
- Union is not obligated to represent nonmembers:
  - during employer "questioning";[27]
  - in statutory or administrative proceedings or to enforce statutory or regulatory rights;[28] or
  - in disciplinary grievance arbitration where nonmember has the right to proceed without union representation.[29]

While the law provides the permissible scope of differentiation, unions need to look to their agreements to see what specific rights and services are promised. Many unions in New York City had and continue to consider potential changes in the most recent rounds of bargaining to take advantage of the Amendments. In this effort, unions have to grapple with the potential costs and benefits of making distinctions between members and nonmembers. Many are undertaking this task. Some statewide and national unions, however, have determined, as a policy matter, that their constituents should not make these differentiations. They view them as contrary to the spirit of inclusion and also a potential gift to those seeking to challenge union exclusivity on constitutional grounds. The potential issues raised in those challenges are discussed *infra* at Section V(C). On a practical level, unions need to consider the potential loss of control over the grievance process as a

23. *Id.* § 208(4)(a).
24. *Id.* § 208.4(b).
25. *Id.* § 209-a(2).
26. *Id.*
27. *Id.*
28. *Id.*; *see, e.g.*, *id.* § 75 (governing removal and disciplinary action); N.Y. EDUC. LAW § 3020-a (McKinney 2019) (governing discipline of teachers); N.Y. C.P.L.R. art. 78 (McKinney 2019) (governing proceedings against public officers).
29. N.Y. CIV. SERV. LAW § 209-a(2).

possible cost of taking advantage of this option. Several aspects need be considered: (1) contract interpretation; (2) arbitration/grievance filtering and scheduling; and (3) the possibility that a right-to-work organization will step in and provide its own representation as a foothold in the bargaining unit.

B. Maintenance of Dues

The issue of maintenance of dues (also called "window periods") merits its own attention, for it is crucial to the ability of unions to make financial plans. Previously, in New York, the law provided that a member could withdraw his or her dues authorization at any time. This had little impact on financial planning, as the default was payment of the agency fee. Now, individuals can come in and out of membership—potentially gaming the system as they have need of union services—making financial planning difficult for the union.

Section 93-b was enacted in 1958 (prior to the adoption of the Taylor Law) to "authoriz[e] payroll deduction of dues in civil services associations or organizations of certain public employees at their request."[30] Specifically, section 93-b provided that "the fiscal or disbursing officer of every municipal corporation or other civil political subdivision of the state is hereby authorized to deduct from the wage or salary of any employee . . . such amount that such employee may specify in writing . . . for the payment of dues," and may transmit that amount to the appropriate labor organization.[31] Dues deduction authorization under section 93-b(1) "may be withdrawn by such employee or member at any time by filing written notice of such withdrawal with the fiscal or disbursing offer."[32]

The Amendments remove that restriction.[33] Absent that restriction, a limited cancellation period in a private contract entered into between a public employee and his or her union would be a matter of contract law. This is no different from limitations on canceling health club memberships or cable television subscriptions. There is no constitutional dimension to a voluntarily undertaken one-year sports membership that can only be canceled if the member moves more than thirty miles from a participating gym. The Amendments restore that freedom to contract.

At least one circuit court has agreed with this construct, holding that cards that require dues payments for a period of time, and provide a window within which one can withdraw, are enforceable under

30. *See* Bill Jacket, 1958 ch. 862, N.Y. Legis. Serv.

31. *See* N.Y. Gen. Mun. Law § 93-b(1) (McKinney 2017).

32. *Id*.

33. A.9509-C, 2017-18 Sess. pt. RRR, § 2 (N.Y. 2018), https://legislation.nysenate.gov/pdf/bills/2017/A9509C.

principles of contract law.[34] The district court upheld dues deduction irrevocability outside of an opt-out window, since "the promise made by the employees, supported by adequate consideration, is sufficient to withstand the argument of free speech and free association violations."[35] The court reasoned:

> A worker has every right to voluntarily associate with a union in order to promote better working conditions and wages. . . . But, once she joins voluntarily, in writing, she has an obligation to perform the terms of her agreement. The freedom of speech and the freedom of association do not trump the obligations and promises voluntarily and knowingly assumed. The other party to that contract has every reason to depend on those promises for the purpose of planning and budgeting resources. The Constitution says nothing affirmative about reneging legal and lawful responsibilities freely undertaken.[36]

The Ninth Circuit, in an unpublished decision, agreed, holding that "the First Amendment does not preclude the enforcement of 'legal obligations' that are bargained-for and 'self-imposed' under state contract law."[37]

Granted, *Fisk* is but persuasive outside the Ninth Circuit, and challenges are pending before other courts,[38] yet it illustrates that the contractual obligations of a membership card, knowingly entered into by an employee, may be sufficient to nullify arguments based in public policy and forced association. Anticipating such challenges, unions would be wise to make the terms of their cards explicit and reasonable to be in a better position to defend them.

III. Looking to Work Together

While the Taylor Law Amendments addressed some of the operational issues facing public sector unions—regarding time frames for transfer of dues and sensible membership continuity—many unions had been working with public employers on such issues long before the Amendments were proposed and enacted. For example, District Council 37, AFSCME (DC 37), which holds the citywide certificate for the largest group of civilian New York City public employees, together with the NYC Municipal Labor Committee (MLC), an umbrella organization for NYC labor unions, worked closely with New York City and

34. Fisk v. Inslee, No. 16-5889RBL, 2017 WL 4619223, at *4–5 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F. App'x 632 (9th Cir. 2019).

35. *Id.* at *4.

36. *Id.* at *5

37. *Fisk*, 759 F. App'x at 633.

38. *See*, *e.g.*, Mendez v. Cal. Teachers Ass'n, 419 F. Supp. 3d 1182 (N.D. Cal 2020) (appeal pending); Hendrickson v. AFSCME Council 18, ___ F.Supp.3d __, No. CIV 18-1119 RB/LF, 2020 WL 365041 (D.N.M. Jan. 22, 2020) (appeal pending); Smith v. N.J. Educ. Ass'n, 425 F. Supp. 3d 366 (D.N.J. 2019) (appeal pending).

other employers regarding various citywide matters that could assist (or hamper, if unaddressed) the unions in their operations.[39]

Initially, the unions conducted a review of those in agency fee status on the payroll system and discovered that a variety of programming quirks resulted in numerous individuals being dropped from membership status without the union or the employee being aware. Other items discussed include:

- Timely and meaningful notice of new hires/transfers/promotions.
- Opportunity to provide materials pertaining to the union and welfare fund benefits as part of new hire documentation/orientation.
- Time for the union during orientation.
- Time for the union one-on-one with new employees.
- General access to worksites for union representatives.
- Time requirements for dues check-off and transfer.
- Continuity of membership/dues authorization in various circumstances.
- Enforcement and maintenance of authorization cards.

IV. Looking at Other Options

In anticipation of the *Janus* decision, commentators, practitioners, and union leaders all turned their minds to alternative approaches to the long-standing agency fee model. While many unions determined to overcome *Janus* through enhanced inclusion, internal organizing and services, some of the ideas developed may still bear consideration as the post-*Janus* environment matures and unions face continuing attacks (discussed *infra* at Section V).

A. Members Only Option: Do away with Exclusivity?

Some right-to-work groups and commentators tout the ability of unions to enter into so-called members-only contracts.[40] But, those contracts refer to a circumstance in which a union does not seek to be certified as the exclusive bargaining representative of a bargaining unit. Rather, it seeks simply to give voice to a portion of unit members, allowing the employer to set different terms and conditions for the remainder of the unit. This scenario presents a variety of concerns, and

39. The authors were involved in this work, and the assertions in this section are based on their knowledge and notes.

40. *E.g.*, Trey Kovacs, Competitive Enterprise Inst., On Point No. 242, Supreme Court Can Strike a Victory for Worker Freedom in Janus Case (2018), https://cei.org/sites/default/files/Kovacs%20-%20Supreme%20Court%20Can%20Strike%20a%20Victory%20for%20Worker%20Freedom.pdf.

it is not clear if this type of voluntary avoidance of exclusivity could be utilized, for a public employer would have no statutory obligation to bargain in good faith with an organization that is not the certified exclusive representative of its employees.

Some have proposed simply to do away with exclusivity and thus the DFR with regard to nonmembers. The union could then just represent members and more freely demonstrate the benefits of membership. That model, however, has pitfalls. First, it poses a problem for employers, who generally prefer to bargain with a single union. The majority and minority organizations create the possibility of multiple contracts, confusion, and loss of efficiency.

Professors Catherine Fisk and Martin Malin describe past experiences in California, Tennessee, and Wisconsin with variations of members-only bargaining in their paper *After* Janus.[41] None of those experiences resulted in positive or stable labor relations. California's experience was so bad that it abandoned the policy in favor of more traditional majority rule representation.[42]

The proposal also poses a problem for unions that could face challenges from minority unions that may be willing to sacrifice certain non-economic terms in exchange for inflated wage increases to destabilize the majority union. This breaking up of large majority unions and their affiliates also could fracture and weaken the collective power that unions spent decades building.

B. Employer Support of Unions

Some have advocated, as an alternative to funding via dues and agency fees, that the public employers directly fund or support the union.[43] While the approach has obvious appeal, it also faces some institutional and legal hurdles. A paradigm shift like this would require extensive statutory amendments for which it may be difficult to build support.

The first hurdle would be the prohibition against the domination of or interference with a union, a historical issue in American labor relations that has led to multiple laws prohibiting financial support of a union by an employer.[44] Several states—including Massachusetts, California, Illinois, Michigan, New York, Connecticut, Washington, Minnesota, Pennsylvania, and Vermont—ban employer payments to unions.[45] New York's language is typical and based upon federal law. The Taylor Law prohibits an employer from "dominat[ing] or interfer[ing]

41. Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 CALIF. L. REV. 1821, 1835–36 (2019).

42. *Id.* at 1835.

43. *See* Aaron Tang, *Life After* Janus, 119 COLUM. L. REV. 677, 706 (2018); *see also* Fisk & Malin, *supra* note 41, at 1844–50.

44. Fisk & Malin, *supra* note 41, at 1852–53.

45. *Id.* at 1853 n.157 (citations omitted).

with the formation or administration of any employee organization."[46] There is a dearth of precedent interpreting section 209-a.1(b) and the concepts of "domination" and "interference"; however, PERB considers precedent under section 8(a)(2) of the National Labor Relations Act (NLRA) instructive.[47] In *In re Board of Education, City School District of Albany*, the Board stated that "§ 209-a.1(b) was an attempt by the Legislature to emulate the structures of § 8(a)(2) of the [NLRA]. If this analysis is correct, the import of subsection 209-a.1(b) was to proscribe employer domination of an employee organization or the grant of unlawful assistance or support to an employee organization."[48] Notably, the language of the Taylor Law is not identical to the NLRA, which explicitly proscribes the "contribut[ion of] financial or other support."[49] Nonetheless, several cases reference all three prohibitions—against domination, interference, and support—in describing the prohibition under section 209-a.1(b).[50]

Although the mere existence of employer-given economic support may not be a Taylor Law violation *per se*, such support is a factor to be considered and violates section 209-a.1(b) when it is "substantial" and the employee organization "does not have a viable existence independent of [the employer's] active involvement therein."[51] In *In re Monroe Boces #1 Employees Association*, PERB found that an employer had dominated and supported an employee committee in violation of section 209-a.1(b) when the employer had initiated the committee, a manager advised the committee, and committee members were compensated for their participation. PERB looked to the Seventh Circuit case *Electromation, Inc. v. NLRB*,[52] noting that "the policy considerations prompting New York's prohibition of employee organizations which are dominated, interfered with, or supported by a public employer are exactly the same as those driving the comparable prohibition in the private sector."[53] PERB further stated:

> *Electromation*, and the cases arising under the NLRA before and after that case, stand for the general proposition that a union is dominated when the impetus behind the formation of the organization emanates from the employer and the employee organization has no effective

46. *See* N.Y. Civ. Serv. Law § 209-a.1(b) (McKinney 2019).
47. *See, e.g.*, *In re* Bd. of Educ., City Sch. Dist. of Albany, 6 PERB ¶ 3012 (1973).
48. *Id.*
49. 29 U.S.C. § 158(a)(2) (2012).
50. *See, e.g.*, *In re* Monroe Boces #1 Emps. Ass'n, 28 PERB ¶ 3068 (1995) ("Section 209-a.1(b), however, addresses the damage inflicted upon the employee by an employer's domination, interference or support of an employee organization and an employer's subjective intent to violate the Act is wholly unrelated to the damage sought to be avoided.") (emphasis added).
51. *See id.*
52. 35 F.3d 1148 (7th Cir. 1994), *enforcing* Electromation, Inc., 309 N.L.R.B. 990 (1992).
53. *Boces #1*, 28 PERB ¶ 3068.

> existence independent of the employer's active involvement. We find this standard equally useful in the interpretation of § 209-a.1(b) of the Act because, for many of the reasons previously stated, there is simply nothing in the language or the policies of the Act which would establish that the Legislature intended some other standard to apply.[54]

For those unions that do not exclusively represent public employees, there may well be a second hurdle. While the Labor-Management Reporting and Disclosure Act (LMRDA) does not apply to unions representing solely public employees, hybrid unions are treated the same as private-sector unions.[55] The LMRDA defines "labor organization" as a "labor organization engaged in an industry affecting commerce and includes any organization of any kind . . . which exists for the purpose, *in whole or in part*, of dealing with employers . . . other than a State or local central body."[56] Indeed, the regulation enforcing this provision expressly provides that "in the case of a national, international or intermediate labor organization composed of both government and non-government or mixed locals, the parent organization, as well as its mixed and non-government locals, would be 'labor organizations' and subject to the [LMRDA]."[57] Relying on this regulation, courts have been quite clear that a local union that represents "both public and private sector employees are labor organizations subject to LMRDA provisions."[58] This includes the ability of a public employee in a mixed union being able to bring a claim pursuant to the LMRDA.[59]

Pursuant to the LMRDA, it is unlawful for an employer to "pay, lend, or deliver, or agree to pay, lend, or deliver any money or other things of value . . . to any labor organization . . . which represents . . . any of the employees of such employer."[60] There are, however, exceptions to this general rule.[61] One that may be relevant in some instances is the exception for payments made with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business.[62] However, it is not clear that direct payments to a union to defray the cost of collective bargaining could be made to fit this exception.

One proposal made to avoid these hurdles is to create a general collective bargaining fund from which the union might obtain

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54. *Id.*
55. 29 U.S.C. § 402 (2012).
56. *Id*. § 402(i) (emphasis added).
57. 29 CFR § 451.3(a)(4) (2019).
58. Cunningham v. Local 30, Int'l Union of Operating Eng'rs, AFL-CIO, 234 F. Supp. 2d 383, 391 (S.D.N.Y. 2002).
59. *Id.* at 391.
60. 29 U.S.C. § 186(a)(2) (2012).
61. *See id.* § 186(c).
62. *Id.*

reimbursement for expenses, thus avoiding direct payment from the employer. This approach was proposed in Hawaii, but not adopted.[63] However, in practice, any negotiation with a public employer works with the reality of the cost of the overall agreement. Money moved to a fund in one part of the agreement often comes at the expense of otherwise attainable wage increases or other benefits in another. Employees (more importantly, union opponents) understand this dynamic and may challenge the diversion of what otherwise might have been larger wage increases to a bargaining fund. However, that would open the possibility of claims regarding the diversion of any money in the cost of an agreement that could potentially have been used for wages.

Beyond the legal hurdles that this approach presents, many union leaders believe that this type of financial dependence on direct government funding would severely reduce the independence of the union in the eyes of its members, if not in practice.

C. Charitable Contribution Option

Professor Samuel Estreicher has published an article that advocates for public workers to be given the option to make a contribution to a charity of their choosing in lieu of agency fees so there would be no free ride.[64] The underlying premise is that by allowing a contribution to a charity of the objecting employee's choosing it would remove First Amendment objections as well as the incentive to freeride. This approach would separate those with genuine objections from those who merely wanted to save money. However, this opt-out model, which was proposed prior to the *Janus* decision, may be hampered by the Supreme Court's explicit caution at the end of the decision against any opt-out model for fees.[65]

Moreover, the same groups that supported the *Janus* litigation would surely find an objector who neither wants to join the union nor desires to support any charity. Forced contributions to a charity, even one the objector supports, might be viewed as forced speech and association. It would be like passing a law requiring all registered Republicans to contribute at least $100 to the Republican Party. Forced financial support of the Republican Party, it could be argued, is still forced association beyond that which the individual would have preferred and potentially violative of the First Amendment. Furthermore, some argue that even if constitutionally sound, the approach may not achieve the

63. Fisk & Malin, *supra* note 41, at 1854.

64. Samuel Estreicher, *How Unions Can Survive a Supreme Court Defeat*, Bloomberg Law (Mar. 2, 2018), https://www.bloombergquint.com/view/how-unions-can-survive-a-supreme-court-defeat.

65. *See* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2486 (2018) (prohibiting any agency fee from being "deducted from a nonmember's wages . . . . [U]nless the employee affirmatively consents to pay . . . waiver cannot be presumed").

desired result of weeding out true objectors.[66] If an individual can, for the same money, both support a favored charity and still continue to receive all the benefits of collective bargaining, why not do both?

V. Looking at Post-*Janus* Challenges

While *Janus* itself was the culmination of a decades-long campaign to undo *Abood v. Detroit Board of Education*,[67] the war is far from over. The legal precedent set in *Janus* (indeed, the mere expectation of that precedent) spawned myriad new and renewed challenges to unions on a variety of grounds. Many of these—cases challenging window periods, for example—were among the factors that unions and legislators had in mind when crafting new policies. Unions and labor lawyers all over the country have been and continue to defend against this onslaught. By the last count, more than forty-eight cases are pending, spread across nearly ten federal circuits. One of these post-*Janus* cases, *Seidemann v. Professional Staff Congress Local 2334*, commenced in the Southern District of New York presents a focused stab at the core issue presented by the vast majority of the cases: recovery of past agency fees. [68] This claim is central in many pre- and post-*Janus* filed cases.[69] While the claims run the gamut, the larger and more complicated include, in addition to retroactivity, challenges to the validity of existing member dues authorizations, window periods (discussed *supra*), and challenges to exclusive representation.

A. Retroactive Fees

The vast majority of post-*Harris v. Quinn*,[70] and post-*Janus* cases assert a claim for the return of previously paid agency fees going back years. For a union that, at times, may have had a substantial group of agency fee payers and has, in all likelihood, already spent those monies for the benefit of the entire bargaining unit, a loss could result in extreme financial hardship. These claims hinge on two necessary elements: the retroactive application of *Janus* and the absence of a good-faith defense. While challengers continue to press these claims, they have, thus far, failed. In an unbroken line of decisions, the Second, Sixth, Seventh, and Ninth Circuits, together with myriad district courts, have rejected claims seeking retroactive agency fees and various forms of prospective relief.[71]

66. *See* Fisk & Malin, *supra* note 41, at 1864.
67. 431 U.S. 209 (1977) (holding that fair share fees were constitutional).
68. No. 18 Civ. 9778, 2020 WL 127538 (S.D.N.Y. Jan. 3, 2020).
69. *Id.*
70. 573 U.S. 616 (2014).
71. *See*, *e.g.*, Wholean v. CSEA SEIU Local 2001, 955 F.3d 332, 336 (2d Cir. 2020); Ogle v. Ohio CSEA, AFSCME Local 11, AFL-CIO, 951 F.3d 794 (6th Cir. 2020); Lee v. Ohio Educ. Ass'n, 951 F.3d 386 (6th Cir. 2020); Danielson v. Inslee, 945 F.3d 1096 (9th Cir. 2019) (petition for cert. filed March 16, 2020); Janus v. Am. Fed'n State Cty. & Mun. Emps., Council 31, 942 F.3d 352 (7th Cir. 2019) (petition for cert. filed March 10, 2020);

As an attempted end-run, several challenges also assert related state tort claims for conversion or unjust enrichment, which, much like the primary claim under 42 U.S.C. § 1983, also turn, at least in part, upon the retroactive application of *Janus*.[72] That retroactive application, however, is far from apparent.

Pursuant to *Harper v. Virginia Department of Taxation* and its progeny, the specific language in the *Janus* opinion is pivotal to determining the retroactive applications of the decision.[73] According to *Harper*, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[74]

Prior to *Harper*, courts applied the three-part *Chevron* test to determine whether a constitutional decision has retroactive effects:

> First, the decision to be applied non retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weigh[] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.[75]

Mooney v. Ill. Educ. Ass'n, 942 F.3d 368 (7th Cir. 2019) (petition for cert. filed March 13, 2020); Pellegrino v. N.Y. State United Teachers, 18-cv-3439 (NGG) (RML), 2020 WL 2079386 (E.D.N.Y. Apr. 30, 2020); Mattos v. AFSCME, AFL-CIO, Council 3, No. GLR-19-2539, 2020 WL 2027365 (D. Md. Apr. 27, 2020) (appeal pending); Chambers v. AFSCME, AFL-CIO, __ F. Supp. 3d __, No. 3:18-cv-1685-SI, 2020 WL 1527904 (D. Or. Mar. 31, 2020) (appeal pending); Grossman v. Haw. Gov. Emps. Ass'n/AFSCME Local 152, __ F. Supp. 3d __, No. 18-cv-00493-DKW-RT, 2020 WL 515816 (D. Haw. Jan. 31, 2020) (appeal pending); Seidemann v. Prof'l Staff Cong. Local 2334, No. 18 CIV. 9778 (KPF), 2020 WL 127583 (S.D.N.Y. Jan. 10, 2020) (appeal pending); Aliser v. SEIU Cal., 3:19-cv-00426 VC, __ F. Supp. 3d __, 2019 WL 6711470 (N.D. Cal. Dec. 10, 2019); Allen v. Santa Clara Cty. Correctional Peace Officers Ass'n, 400 F. Supp. 3d 998 (E.D. Cal. 2019) (appeal pending); Diamond, 399 F. Supp. 3d 361, 394, 401 (W.D. Pa. 2019); Hernandez v. Am. Fed'n of State Cty. & Mun. Emps. Cal., 386 F. Supp. 3d 1300, 1306 (E.D. Cal. 2019); Doughty v. State Emps. Ass'n of N.H., SEIU, Local 1984, No. 19-cv-53-PB, 2019 U.S. Dist. LEXIS 114242 (D.N.H. May 30, 2019); Babb v. Cal. Teachers Ass'n, 378 F. Supp. 2d 857, 875–76 (C.D. Cal. 2019); Akers v. Md. State Educ. Ass'n, 376 F. Supp. 3d 563, 575 (D. Md. 2019); Bermudez v. SEIU Local 521, No. 18-cv-04312-VC, 2019 WL 1615414, at *1 (N.D. Cal. Apr. 16, 2019); Hough v. SEIU Local 521, No. 18-cv-04902-VC, 2019 WL 1785414, at *1 (N.D. Cal. Apr. 16, 2019); *Crockett*, 367 F. Supp. 3d at 1005–06; Carey v. Inslee, 364 F. Supp. 3d 1220, 1220 (W.D. Wash. 2019); Cook v. Brown, 364 F. Supp. 3d 1184, 1184 (D. Or. 2019).

72. *E.g.*, *Babb*, 378 F. Supp. 3d at 877–78; *Bermudez*, No. 18-cv-04312-VC, 2019 WL 1615414, at *1; *Mooney*, 372 F. Supp. 3d at 707–08.

73. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 111 (1993).

74. *Id.* at 97.

75. Chevron Oil Co. v. Hudson, 404 U.S. 97, 106–07 (1971) (internal citations omitted).

Harper resulted in noted confusion among the circuits, with many concluding that *Harper* did not explicitly overrule the three-part *Chevron* test and that the test still applied (in some form) under certain circumstances. For example, in *Hajro v. U.S. Citizenship & Immigration Services*, the Ninth Circuit refused to apply *Chevron* but held that "[w]hen the Supreme Court announces a new rule and retroactively applies it to the cases before it, all courts must apply the rule retroactively. Silence on the issue indicates that the decision is to be given retroactive effect. Otherwise, the retroactivity depends on the three-prong test from [*Chevron*]."[76] Likewise, the Second Circuit has reasoned that *Harper* "did not require retroactive application where the Supreme Court explicitly 'reserve[s] the question whether its holding should be applied to the parties before it.'"[77]

The Second Circuit recently brought some structure to the analysis. In *Wholean v. CSEA SEIU Local 2001*,[78] the court observed that "nothing in *Janus* suggests that the Supreme Court intended its ruling to be retroactive." Rather, *Janus* clearly states that *Abood* is overruled and explicitly remands the case for further proceedings consistent with the opinion.[79] Accordingly, an argument can be made (and is being made in several pending cases) that it would be left to the lower court to apply the *Chevron* factors to determine retroactive effect.

Even assuming *Janus* is applied retroactively, unions have successfully asserted a "good faith" defense under § 1983. *Jarvis v. Cuomo*[80] provided a good road map for this defense in an unreported post-*Harris* context, which was endorsed by the Second Circuit's published opinion in *Wholean*.[81] In *Jarvis*, the Second Circuit explicitly rejected claims for retroactive fees and rejected arguments that the good-faith defense was not applicable because First Amendment violations do not require proof of motive.[82] Plaintiffs have responded to this decision by asserting that the good-faith defense is only available in § 1983 cases where the analogous state tort contains a motive or scienter component.[83] Taking that a step further, plaintiffs also added state-law tort claims such as conversion and unjust enrichment, which, they claim, contain no good-faith defense.[84] As set out *supra*, none has been successful, aided in part by clarifying legislation adopted by certain states prohibiting suit

76. 811 F.3d 1086, 1099 (9th Cir. 2016).
77. Shah v. Pan Am. World Servs., Inc., 148 F.3d 84, 91 (2d Cir. 1998).
78. 955 F.3d 332, 336 (2d Cir. 2020) (holding that good faith defense precluded retroactive disgorgement of fees).
79. *See id.*; Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2486 (2018).
80. 660 F. App'x 72 (2d Cir. 2016).
81. 955 F.3d at 335–36.
82. 660 F. App'x at 75.
83. *E.g.*, Mooney v. Ill. Educ. Ass'n, 372 F. Supp. 3d 690, 702 (C.D. Ill. 2019).
84. *E.g.*, Babb v. Cal. Teachers Ass'n, 378 F. Supp. 3d 857, 867–68 (C.D. Cal. 2019).

for the disgorgement of pre-*Janus* agency shop fee deductions under state law.[85] The constitutionality of these statutes have been upheld.[86]

Additionally, some plaintiffs have read the *Janus* majority to provide a back-door attack on "good faith" reliance. In addressing not the good-faith reliance defense, but the component of *stare decisis* that focuses on widespread reliance on prior precedent, Justice Alito wrote that unions should have been "on notice" that agency fees may not be constitutional since 2012.[87] But this statement stands as an exercise in bootstrapping, as the prior criticism of *Abood* that Justice Alito references in *Knox v. Service Employees International Union*[88] and *Harris*[89] was, of course, planted by Justice Alito himself. Moreover, the analysis, while ostensibly about "reliance," does not address the good-faith defense. Past and recent decisions have confirmed that reliance on a presumptively valid law—as is the case here—is inherently reasonable.[90]

Although it has not been the case thus far, should any cases proceed past initial motions to dismiss, they would face the additional hurdle of making out class allegations. Nearly all of the retroactive agency fee cases are asserted as class actions. While this obviously makes the risks greater for unions, the class certification presents its own obstacles for plaintiffs, namely that the reasons and beliefs motivating agency fee payers are far from monolithic.

Riffey v. Rauner is instructive. There, the Seventh Circuit affirmed a decision of the district court declining to certify a class of home health aides seeking the return of their agency fees from April 2008 through June 30, 2014 (the *Harris* decision).[91] The district court had refused to certify the class because plaintiffs could not show that all the proposed class members subjectively opposed the union or fair share fees at the time those fees were paid. If some proposed class members took no posi-

85. *See*, *e.g.*, N.Y. Civ. Serv. Law § 215(1) (McKinney 2019) (public employers and employee organizations "shall have a complete defense" to pre-Janus agency shop fee deductions); Cal. Gov. Code § 1159 (2019) (same).

86. *See*, *e.g.*, Seidemann v. Prof'l Staff Cong. Local 2334, No. 18 CIV. 9778 (KPF), 2020 WL 127583, at *12 (S.D.N.Y. Jan. 10, 2020) (appeal pending); *Babb*, 378 F. Supp. 3d at 878–82.

87. *See* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2485 (2018).

88. 567 U. S. 298, 311 (2012).

89. Harris v. Quinn, 573 U.S. 616 (2014).

90. *See, e.g.*, Wholean v. CSEA SEIU Local 2001, 955 F.3d 332, 336 (2d Cir. 2020); Pinsky v. Duncan, 79 F.3d 306, 313 (2d Cir. 1996) ("[I]t is objectively reasonable to act on the basis of a statute not yet held invalid.").

91. 910 F.3d 314, 315 (7th Cir. 2018), *cert. denied sub nom*. Riffey v. Pritzker, 139 S. Ct. 2745 (2019). The Seventh Circuit had initially affirmed the district court's denial of class certification in *Riffey v. Rauner*, 873 F.3d 558, 569 (7th Cir. 2017), decided prior to *Janus*. Plaintiffs appealed, and the Supreme Court vacated and remanded so that the matter could be considered in light of *Janus*. Riffey v. Rauner, 138 S. Ct. 2708 (2018). On remand, the court again affirmed the denial of certification. *Riffey*, 910 F.3d at 320.

tion with regard to paying fair share fees, voluntarily or accidentally (believing they were members) paid fair share fees, they would not have commonality with the named plaintiffs. These intentions matter as the injury complained of is not the taking of money, it is a moral objection to forced support of the union. To the extent that individuals paid fees for any reason other than this strongly held objection, they would not have commonality with true objectors.

B. Membership Cards

The controversial last section of *Janus* has prompted a new kind of challenge that was not as widely anticipated. Union opponents have latched on to the Supreme Court's admonition that

> [n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. . . . Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. . . . Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.[92]

The use of the words "nor any other payment to the union" has invited challenges seeking to expand the Court's ruling from agency fee payers to all union members, arguing that any membership dues authorization that was signed pre-*Janus* is now invalid. If successful, these challenges could result in the cessation of dues check-offs nationally and the need for public sector unions immediately to re-sign their members. For large unions with tens of thousands of members (or more), this undertaking would be burdensome and expensive.

Several pending cases have been brought, amended, or clarified to include a challenge to pre-*Janus* membership cards. Each is brought on a class basis with potentially sweeping impact. In at least two cases, plaintiffs have sought temporary restraining orders and/or preliminary injunctions prohibiting government employers in Washington State and New Jersey, respectively, from continuing to deduct dues for any public employee who had signed a membership card pre-*Janus*.[93] Each has thus far been rejected by the courts.

In *Belgau v. Inslee*, Judge Robert Bryan (a Reagan appointee) denied plaintiffs' motion for a temporary restraining order and motion for a preliminary injunction and, ultimately, dismissed the case.[94] There, the union had a dues check-off provision in its collective bargaining agreement requiring the employer to honor the terms of the

92. *Janus*, 138 S. Ct. at 2486 (citations omitted) (emphasis added).

93. *See, e.g.*, Belgau v. Inslee, 359 F. Supp. 3d 1000 (W.D. Wash 2019); Smith v. N.J. Educ. Ass'n, 425 F. Supp. 3d 366 (D.N.J. 2019) (appeal pending).

94. 359 F. Supp. 3d at 1009.

cards. State law also obligated the state to enforce the agreement and respect the dues deduction provision.[95] In July 2017, the union had also begun using new dues authorization cards which renewed annually and provided for a ten-day window each year in which a member could withdraw the authorization.[96] Each of the named plaintiffs signed a new card in 2017 and in 2018 but did not withdraw their membership during the relevant window periods. After *Janus* was decided, they sought to withdraw.[97]

The court found that plaintiffs had failed to demonstrate either state action or a constitutional violation in connection with the terms of the membership cards. The court distinguished *Janus* as applicable to nonmembers and not addressing those individuals who had agreed to be union members:

> Further, Plaintiffs' assertions that the agreements are not valid because they had not waived their First Amendment rights under *Janus* in their authorization agreements because they did not know of those rights yet, is without merit. Plaintiffs seek a broad expansion of the holding in *Janus*. *Janus* does not apply here–Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here. . . . "The relationship between unions and their voluntary members was not at issue in *Janus*." The notion that the Plaintiffs may have made a different choice if they knew "the Supreme Court would later invalidate public employee agency fee arrangements [in *Janus*] does not void" their previous knowing agreements.[98]

In *Smith v. New Jersey Education Ass'n*, the court granted summary judgment for the defendants, holding that the union dues contracts signed by the plaintiffs were enforceable contracts.[99] Among the plaintiffs there were six school teachers who had signed agreements to join the union and pay membership dues, but who, after *Janus*, resigned their memberships. These plaintiffs sought reimbursement of membership fees paid prior to the *Janus* decision.[100] Similar to the reasoning in *Belgau*, the court held that the membership and dues agreements were enforceable contracts that *Janus* left undisturbed.[101] Moreover, the court held that *Janus* did not invalidate the contractual opt-out procedure from those contracts, so the plaintiffs were not entitled to reimbursement of fees paid before they followed those procedures.[102]

95. Wash. Rev. Code § 41.80.100 (2019).
96. *Belgau*, 359 F. Supp. 3d at 1006–07.
97. *Id.* at 1007–08.
98. *Id.* at 1016–17 (internal citations omitted).
99. 425 F. Supp. 3d 366, 369 (D.N.J. 2019).
100. *Id.* at 368–69.
101. *Id.* at 374.
102. *Id.* at 374–75.

C. Challenges to Exclusivity: The Expected Next Frontier

There have been a slew of federal cases since *Harris* challenging exclusivity on the grounds that it violates First Amendment associational and speech rights. These challenges have consistently failed, and ruling courts often cite *Minnesota State Board for Community Colleges v. Knight*,[103] as seminal precedent unaffected by *Harris*. These efforts have increased since *Janus* made its way to the Supreme Court, with some seven cases being commenced in 2018 alone.

In *Knight*, community college faculty challenged a Minnesota statute providing for the election of an exclusive bargaining representative to "meet and negotiate" and "meet and confer" with their state employer as a violation of their First Amendment associational rights.[104] The Supreme Court disagreed, reasoning that the challengers' First Amendment speech and associational rights had

> not been infringed by Minnesota's restriction of participation in "meet and confer" sessions to the faculty's exclusive representative. The state has in no way restrained [their] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative. Nor has the state attempted to suppress any ideas.[105]

Despite the fact that the exclusive representative's voice may be "amplified" by that status, and the possibility that nonmembers may "feel some pressure" to join the union due to that enhanced power, "the pressure is no different from the pressure to join a majority party that persons in the minority always feel."[106] This rationale formed the bases for upholding the constitutionality of exclusive representation in various post-*Harris* rulings.[107]

In a decision issued shortly after *Janus*, the Eighth Circuit reaffirmed the applicability of *Knight* to challenges to exclusivity and explicitly held that neither *Harris* nor *Janus* supersedes *Knight* in this regard.[108] The court noted that *Janus* undermined the reasoning of *Knight* to some extent when it characterized a state's requirement that a union serve as an exclusive representative as "a significant

103. 465 U.S. 271 (1984).

104. *See id.* at 278–79

105. *Id.* at 288.

106. *Id.* at 290.

107. *See, e.g.*, Hill v. Serv. Emps. Int'l Union, 850 F.3d 861 (7th Cir. 2017); Bierman v. Dayton, 227 F. Supp. 3d 1022 (D. Minn. 2017), *aff'd*, 900 F.3d 570 (8th Cir. 2018); D'Agostino v. Patrick, 98 F. Supp. 3d 109 (D. Mass. 2015), *aff'd sub nom* D'Agostino v. Baker, 812 F.3d 240 (1st Cir. 2016); Jarvis v. Cuomo, No. 5:14-cv-1459, 2015 WL 1968224 (N.D.N.Y. Apr. 30, 2015), *aff'd*, 660 F. App'x 72 (2d Cir. 2016); Mentele v. Inslee, No. C15-5134-RBL, 2016 WL 3017713 (W.D. Wash. May 26, 2016) ("*Harris* addressed only whether a state could compel partial-public employees to contribute to a union. It did not consider an exclusive bargaining agent's effect on employees' First Amendment rights."), *aff'd*, 916 F.3d 783 (9th Cir. 2019).

108. Bierman v. Dayton, 900 F.3d 570, 574 (8th Cir. 2018).

impingement on associational freedoms that would not be tolerated in other contexts,"[109] but concluded that because *Janus* never mentioned *Knight* and did not raise issues regarding exclusive representation, *Knight* continued to control.[110]

What is left out of citations to that section of the *Janus* decision is the key first part of the sentence, where the Court stated with regard to the exclusivity that "[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees."[111] In fact, the Supreme Court explicitly found that exclusivity and agency fees "are not inextricably linked."[112] Accordingly, the invalidation of agency fees does not in any way require the invalidation of exclusivity. Moreover, a careful reading of *Janus* reveals that the continued availability and importance of exclusivity is cited by the majority as a reason why unions do not need agency fees to continue to represent public employees successfully.[113]

The Ninth Circuit followed the same reasoning in *Mentele v. Inslee*, affirming the decision below and holding that *Janus* did not overrule *Knight* and that *Knight* continues to be the "more directly applicable precedent."[114] Plaintiffs applied to the Supreme Court for *certiorari*, which was denied in a memorandum opinion.

Conclusion

While the blow dealt by *Janus* to the public sector labor movement was substantial, it is by far not the first (or the last) time that public-sector employee organizations have come under attack. Nor does it appear to have been the death knell that many predicted (and some hoped). Unions have been reinvigorated by the challenge and worked to strengthen their relationships with members and improve their services and accessibility. Despite right-wing pressure, public-sector employees and unions continue to fight for their own benefit as well as for the public welfare. Indeed, one need only look to last year's teacher protests in Wisconsin, Oklahoma, and West Virginia, hardly current bastions of liberal thought, and the public support they derived—raising issues of public employment but also public education—to know that workers will continue to organize and make their voices heard.

109. *Id.* (citing Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2478 (2018)).

110. *Id.*

111. *Janus*, 138 S. Ct. at 2478.

112. *Id.* at 2480.

113. *See id.* at 2465–68.

114. Mentele v. Inslee, 916 F.3d 783, 790 (9th Cir. 2019), *cert. denied sub nom* Miller v. Inslee, 140 S. Ct. 114 (2019).

How the NFL "Protects" Cheerleaders with Discriminatory Policies

*Francine Eichhorn**

Introduction

Jacalyn Bailey Davis is a former cheerleader for the New Orleans Saints (hereafter the Saints or the Team), a National Football League (NFL) team.[1] Davis alleges the Saints fired her after she posted a picture to her private Instagram account of herself wearing a lacey lingerie one-piece outfit.[2] The outfit was a black body suit which had flowers strategically positioned over her breasts.[3] Before she was fired, the Saints also accused Davis of attending the same party as an NFL football player and of receiving messages from NFL players on Instagram.[4] Davis denied attending the party but did admit to receiving messages from NFL players.[5] However, Davis stated she never responded to any of the messages from NFL players that she received on her private Instagram account.[6] The Saints justified the firing based on the reasoning that Davis violated the Team's anti-fraternization policy, which requires the Saints' cheerleaders to avoid contact with NFL players not only in person, but online as well.[7]

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1. Ken Belson, *How an Instagram Post Led to an N.F.L. Cheerleader's Discrimination Case*, N.Y. Times (Mar. 25, 2018), https://www.nytimes.com/2018/03/25/sports/saints-cheerleader.html [perma.cc/8AY8-PPBA].

2. *See* Ahiza Garcia, *NFL Cheerleader Files Complaint over 'Discriminatory' Measures Governing Conduct*, CNN (Mar. 26, 2018, 7:34 PM), https://money.cnn.com/2018/03/26/news/companies/new-orleans-saints-cheerleaders-gender-discrimination/index.html [perma.cc/9Z5S-2FLB]; *see also* Joanna Grossman, *NFL Cheerleaders Have to Follow Bizarre, Sexist Rules. But Are They Legal?*, Vox (Apr. 11, 2018, 8:30 AM), https://www.vox.com/the-big-idea/2018/4/11/17218804/nfl-cheerleaders-sexist-rules-fraternizing-instagram-new-orleans-saints [perma.cc/53B2-MN24].

3. The photograph was taken by the BBC from Jacalyn Bailey Davis's Instagram account, but Davis deleted the picture after the article was published. *See* Marianna Brady, *NFL Cheerleader Says She Was Fired over Instagram Photo*, BBC (Mar. 29, 2018), https://www.bbc.com/news/world-us-canada-43576681 [https://perma.cc/KKT8-N4X8].

4. *See* Garcia, *supra* note 2.

5. *Id*.

6. *Id*.

7. *See* Belson, *supra* note 1.

In response, Davis filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging gender discrimination.[8] According to her complaint, the Saints' anti-fraternization policy strictly constrains its cheerleaders' behavior outside of working hours to avoid any contact with NFL players. The policy requires cheerleaders to block NFL players on social media, not contact NFL players, not respond to messages from NFL players, and not "like" any NFL players' social media photos.[9] The policy also bars cheerleaders from following NFL players or NFL coaches on any social media platform.[10] The Saints' cheerleaders must avoid contact in person and online with not only the Saints' players, but all players in the NFL.[11] Approximately 2000 players are in the NFL, and the Saints' cheerleaders are required to block all of them on social media platform.[12] Some NFL players even have social media accounts under pseudonyms, and the Saints' cheerleaders are required to block those social media accounts as well.[13] Davis stated the Saints' cheerleaders were told to remove their last names from their Instagram accounts to avoid NFL players from finding them online.[14]

According to Davis's EEOC complaint, the restrictions on contact between the Saints' cheerleaders and NFL players goes beyond social media to govern in-person interactions, including those that are incidental to the cheerleaders' work. The Saints' cheerleaders, per Davis's complaint, are required to avoid making eye contact with NFL players and are supposed to move to the side if they encounter an NFL player in the tunnel that leads into the football stadium.[15] If the Saints' cheerleaders encounter NFL football players in public, Davis noted they must leave the location immediately, even if the player shows up after the cheerleader arrived.[16] Even an exchange of words beyond "hello" is a potential violation of the anti-fraternization policy for the Saints' cheerleaders, according to the complaint.[17]

The essence of Davis's case in front of the EEOC was that the Saints' cheerleaders are penalized for violating the anti-fraternization policy, but NFL players are not.[18] The Saints' football players do not have a

8. *Id*.
9. *See* Garcia, *supra* note 2.
10. *Id*.
11. *See* Grossman, *supra* note 2.
12. *Id*.
13. *Id*.
14. Brady, *supra* note 3.
15. *See* Garcia, *supra* note 2.
16. *Id*.; Lauren Stiller Rikleen, *There Are Strict Rules for NFL Cheerleader. The Players? Not so Much*, WBUR (Apr. 4, 2018), https://www.wbur.org/cognoscenti/2018/04/04/nfl-cheerleader-gender-discrimination-lauren-rikleen [perma.cc/L3AQ-ZJRB].
17. *See* Grossman, *supra* note 2.
18. *See* Belson, *supra* note 1.

limit on whom they can follow on their social media platforms and are not required to block any NFL teams' cheerleaders on social media.[19]

As stated earlier, according to her EEOC complaint, Davis alleges she was fired not only for alleged contact with NFL players in person and online, but also for posting a picture of herself on social media in a one-piece outfit.[20] Davis alleges that the Saints' cheerleaders are subject to termination if they post a picture that the Team considers "semi-nude" or "lingerie."[21] The Saints also prohibit cheerleaders from posting any images in Saints attire to social media.[22] Again, she claimed that the Saints' players were not subject to these same restrictions regarding their social media usage.[23] For example, Wil Lutz, a kicker for the Saints, posted a picture to his Instagram account on November 13, 2017, of a nude man streaking across the football field during a game.[24] Lutz has played for the Saints since 2016 and posted this picture while employed by the New Orleans Saints.[25] If such a picture was posted by a Saints' cheerleader, that cheerleader would have been subject to termination, according to Davis's complaint because it is a picture of a nude man. In contrast, Wil Lutz, as of the 2019–2020 football season, is still employed by the Saints and was not punished, to anyone's knowledge, for posting the picture.[26]

The Saints have responded to Davis's complaint of gender discrimination by saying the anti-fraternization policy is designed to protect the cheerleaders from NFL "players preying on them."[27] Even if the anti-fraternization policy was put into place to protect its cheerleaders, the policy places the burden to comply with it solely on the cheerleaders.[28] According to Davis, the Saints told the cheerleaders that activity—such as liking or commenting on anything posted online about a Saints' player—would give the NFL players the impression that the cheerleaders were available to the players' advances.[29]

Gregory Rouchell of Adams and Reese LLP is the outside legal counsel for the Saints.[30] Rouchell stated in response to Davis's EEOC complaint, "The New Orleans Saints is an equal opportunity employer,

19. *Id*.

20. David Lisko & Paul Punzone, *NFL Cheerleader's Title VII Claim May Face Legal Hurdles*, Law360 (Apr. 13, 2018), https://www.law360.com/articles/1031447/nfl-cheerleader-s-title-vii-claim-may-face-legal-hurdles.

21. *Id*.

22. *See* Garcia, *supra* note 2.

23. *Id*.

24. Wil Lutz (@wil_lutz5), Instagram (Nov. 13, 2017), https://www.instagram.com/p/BbcToCMBQwq [perma.cc/4MM5-7VCC].

25. *Wil Lutz*, NFL, http://www.nfl.com/player/willutz/2556601/careerstats (last visited Jan 14, 2020) [https://perma.cc/7ECS-FA78].

26. *Id.*

27. *See* Belson, *supra* note 1.

28. *See* Garcia, *supra* note 2.

29. *See* Brady, *supra* note 3.

30. Eun Kyung Kim, *Former New Orleans Saints Cheerleader Says Her Coaches Called Players "Predators*," Today (Mar. 28, 2018, 1:59 PM), https://www.today.com/news

and it denies that Ms. Davis was discriminated against because she is female. The Saints will defend these allegations in due course, and the Organization is confident that its policies and workplace rules will withstand legal scrutiny."[31]

The NFL has a strict policy against employment discrimination on the basis of sex.[32] The NFL's personnel conduct policy "prohibits any form of unlawful discrimination in employment based on an individual's race, color, religion, sex, national origin, age, disability, or sexual orientation regardless of whether it occurs in the workplace or in other NFL sponsored settings."[33]

This Note argues that the anti-fraternization policy of the Saints' cheerleaders with NFL players discriminates against the female cheerleaders based on their sex. The anti-fraternization policy discriminates on its face because it requires only the female cheerleaders to take action to prevent contact with the male NFL players. This article examines the Saints' anti-fraternization policy in depth, but the Saints are not the only team with this kind of policy. In fact, this Note argues that the NFL's anti-fraternization policies are problematic, as are the other ways that the NFL structures the cheerleaders' working environment. The article begins in Part I by giving a background on Title VII. Part II discusses the history of cheerleading and cheerleading in the NFL. Part III applies the relevant laws to Davis's claim of sex discrimination. Part IV discusses the other inequalities present in the NFL. Part V discusses potential solutions to prevent discriminatory anti-fraternization policies.

I. Title VII

Title VII of the Civil Rights Act makes it unlawful "for an employer to . . . discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[34] In a Title VII claim, a complainant states a claim when she shows that (1) she was a member of a protected class; (2) she was discharged; and (3) a comparable employee outside of her class was treated differently.[35]

This kind of discrimination has been labelled disparate treatment. Disparate treatment occurs when members of a race, sex, or ethnic

/former-new-orleans-saints-cheerleader-our-coaches-called-players-predators-t126046 [perma.cc/3J58-SVAM].

31. *Id.*

32. *See* Belson, *supra* note 1.

33. *Id*.

34. 42 U.S.C. § 2000e-2 (2018).

35. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (creating a burden shifting framework to prove that protected class was the reason for an adverse employment action that compels an employer to articulate a reason other than protected class); Russell v. UPS, 673 N.E.2d 659, 662 (Ohio App. 1996).

group have been denied employment, promotion, membership, or other employment opportunities that are available to other employees or applicants.[36] In other words, "the employer simply treats some employees less favorably than others because of their race, color, religion, sex, or national origin."[37] Proof of discriminatory motive is critical in a disparate treatment analysis.[38] Discriminatory motive can be inferred from the mere fact of difference in treatment.[39] Liability for disparate treatment cases depends on whether the protected trait actually motivated the employer's decision.[40]

Disparate treatment that is overtly or facially discriminatory can be easier to prove because of the direct evidence explicitly linking an adverse action to a person's protected class.[41] Disparate treatment can also occur when an employer treats members of a protected class differently, allegedly based on a reason other than membership in that protected class, but the plaintiff shows that the employer's reason is only a pretext for intentional discrimination.[42]

Still, the employer may defend a claim of gender discrimination on the basis that gender is a bona fide occupational qualification (BFOQ).[43] To prove a BFOQ defense, an employer must show a high correlation between sex and the ability to perform job functions.[44] Courts reject a BFOQ for sex where sex is merely useful for attracting customers of the opposite sex, but where hiring both sexes will not alter or undermine the essential function of the employer's business.[45] Courts consistently construe the BFOQ defense very narrowly.[46] The BFOQ analysis focuses on the ability of the individual to perform the duties of the particular job.[47] An employer must establish a nexus between sex and job performance to justify differential treatment based on sex under the BFOQ defense.[48]

II. Cheerleading in the NFL Is a Female-Dominated Sport

Cheerleading has not always been a female-dominated sport; it actually began as all male clubs.[49] In 1869, Princeton University and

36. 29 C.F.R. § 1607.11 (2019).
37. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 n.15 (1977).
38. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).
39. *Id*.
40. *Id*. at 610.
41. Meredith L. Jason, Note, International Union v. Johnson Controls, Inc.*: Controlling Women's Equal Employment Opportunities Through Fetal Protection Policies*, 40 Am. U.L. Rev. 453, 458 (1990).
42. *Id*. at 460.
43. 42 U.S.C. § 2000e-2(e) (2018).
44. White v. Dep't of Corr. Servs., 814 F. Supp. 2d 374, 385 (S.D.N.Y. 2011).
45. Wilson v. Sw.t Airlines Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981).
46. Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991).
47. *See* Jason, *supra* note 41, at 459–60.
48. *Id*. at 460.
49. *History of Cheerleading*, Am. Cheerleader, Feb. 2010, at 26.

Rutgers University played the first intercollegiate football game.[50] At this game, residents of Princeton's Nassau Hall did a cheer of "Sis Boom Rah!"[51] In the 1880s, an all-male pep club was formed at Princeton, and the pep club created an organized yell.[52] This organized yell was then introduced at the University of Minnesota in 1884.[53] In 1900, the University of Minnesota "introduced the first organized cheerleaders and the first official 'fight song.'"[54] Women were not welcomed onto the University of Minnesota's team until 1923.[55] But it was not until the 1940s that cheerleading became a female-dominated sport because many college-aged men were fighting in World War II.[56] Cheerleading came to the NFL in 1954 when the Baltimore Colts introduced a cheer squad.[57] The Baltimore Colts' cheerleaders' uniforms consisted of lettered sweaters, ankle or bobby socks, and homemade pom-poms.[58] In the 1970s, the Dallas Cowboys' general manager reinvented the team's cheerleaders for television.[59] The Dallas Cowboys' cheerleaders uniforms were changed to royal-blue halter tops, star-spangled vests, hot pants, and white go-go boots.[60] In 1976, the Dallas Cowboys' cheerleaders performed at Super Bowl X.[61] The exposure of the Dallas Cowboys' cheerleaders on national television created a new trend in cheerleading where an emphasis was placed on dance routines.[62] Since 1954, only females have been cheerleaders in the NFL.[63] However, the Los Angeles Rams made history in 2018 when Napoleon Jinnies and Quinton Person became the first male cheerleaders to be a part of an NFL cheerleading team.[64]

While cheerleading has been a part of the NFL since 1954, it has not been without its controversies. Davis is not the only NFL cheerleader to make a claim of discrimination against an NFL team. Kristan Ann Ware filed a lawsuit against the Miami Dolphins and the NFL, alleging that she was discriminated and retaliated against because

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50. *Id.*
51. *Id.*
52. *Id.*
53. SUSAN SALIBA, CHEERLEADING 9 (2004).
54. *Id.*
55. *History of Cheerleading*, *supra* note 49, at 27.
56. *Id.*
57. Ralph Warner, *Male Cheerleaders Set to Make NFL History in 2018*, NFL (Aug. 6, 2018, 7:42 PM), http://www.nfl.com/news/story/0ap3000000945403/article/male-cheerleaders-set-to-make-nfl-history-in-2018 [perma.cc/K9NG-HX8C].
58. Michelle Ruiz, *Sex on the Sidelines: How the N.F.L. Made a Game of Exploiting Cheerleaders*, VANITY FAIR (Oct. 4, 2018), https://www.vanityfair.com/style/2018/10/nfl-cheerleaders-history-scandal [perma.cc/LCE5-MLKG].
59. *Id.*
60. *Id.*
61. *Id.*
62. SALIBA, *supra* note 53, at 14.
63. Warner, *supra* note 57.
64. *Id.*

of her religion and gender.[65] Ware filed her claim of discrimination in April 2018.[66] Like Davis, Ware claims that NFL football players are held to different standards regarding social media and expressions of faith.[67] More specifically, Ware alleged she was told to not discuss her decision to abstain from sex before marriage after posting a picture of her baptism on social media.[68] As with the conduct rules that are the focus of this article, NFL players are not restricted in what they post to their personal social media accounts and are free to express their religious beliefs.

In the past few years, there has been an increase in litigation between cheerleaders and their NFL teams, not only concerning discrimination but also concerning wages.[69] In 2018, six former cheerleaders of the Houston Texans filed a law suit alleging brutal working conditions that included harassment and unpaid hours.[70] In 2013, the Oakland Raiders' (the Raiders) cheerleaders filed a class action suit against the Raiders claiming they were not being paid minimum wage or overtime and were not being reimbursed for expenses associated with the job.[71] The Raiders agreed to pay over $1.25 million to over 100 women who were employed as cheerleaders from 2010 to 2013.[72] The class action against the Raiders sparked an increase in litigation over wages between other NFL teams and their cheerleaders. In 2015, the Tampa Bay Buccaneers, the New York Jets, and the Cincinnati Bengals settled lawsuits with their respective cheerleaders relating to wages.[73]

If the Raiders' cheerleaders' class action suit is taken as an example of what happens when someone decides to speak out, Davis's claim

65. Scott Gleeson, *Former Dolphins Cheerleader Alleges Religious Gender Discrimination in Lawsuit*, USA Today (Apr. 13, 2018, 8:28 AM), https://www.usatoday.com/story/sports/nfl/dolphins/2018/04/12/dolphins-cheerleader-kristan-ann-ware-lawsuit-discrimination/511511002 [https://perma.cc/7C69-KQ6B].

66. *Id*.

67. *Id*.

68. *Id*.

69. *See* Lisko & Punzone, *supra* note 20.

70. *Male Cheerleaders Join 2 NFL Squads amid Complaints and Lawsuits*, CBS News (Sept. 12, 2018), https://www.cbsnews.com/news/male-cheerleaders-join-nfl-los-angeles-rams/; Tony Dokoupil, *Ex-Cheerleaders Sue Houston Texans, Allege Brutal Working Conditions and Harassment*, CBS News (June 1, 2018, 6:38 PM), https://www.cbsnews.com/news/ex-cheerleaders-sue-houston-texans-allege-brutal-working-conditions-and-harassment-2018-06-01.

71. *See* Robin Abcarian, *Cheerleaders' Wage-Theft Lawsuit to Cost Oakland Raiders $1.25 Million*, L.A. Times (Sept. 4, 2014, 3:07 PM), https://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html.

72. *Id.*; Vic Tafur, *Raiderettes Get Payouts from $1.25 Million Settlement*, S.F. Chron. (May 10, 2017, 4:49 PM), https://www.sfchronicle.com/raiders/article/Raiderettes-get-1-25-mil-in-settlement-11136363.php.

73. Rebecca R. Ruiz, *Jets Become Latest N.F.L. Team to Settle a Wage Lawsuit Filed by Cheerleaders*, N.Y. Times (Jan. 27, 2016), https://www.nytimes.com/2016/01/28/sports/football/jets-become-latest-nfl-team-to-settle-a-wage-lawsuit-filed-by-cheerleaders.html.

could achieve a similar result. The Raiders' cheerleaders' class action suit increased wages of not only their team's cheerleaders, but several other teams' cheerleaders as well. Davis's claim of discrimination, likewise, could lead to more equal treatment of NFL cheerleaders and NFL players, sparking the change that is needed to get rid of outdated, discriminatory NFL practices.

Many differences between the job of cheerleaders and football players besides just gender exist. The Saints' cheerleaders have less prestigious jobs compared to the NFL football players.[74] The cheerleaders are more easily replaced than NFL players.[75] Additionally, the Saints' football players and the cheerleaders occupy two separate hierarchical systems in the Saints' organization.[76] The football players are also unionized, and the cheerleaders are not.[77] Union protections, however, cannot fully justify the disparity. Nor should the fame or unique abilities of the football players account for such drastic differences in treatment. The football players should at least be subject to the same or a very similar anti-fraternization policy. Davis's complaint attracted a large amount of publicity. The publicity, amplified by #MeToo, should make other NFL teams and businesses in general take a hard look at their anti-fraternization policies with the aim of decreasing their potential liability and creating an equal environment free of discrimination.

III. The Saints' Anti-Fraternization Policy May Be Held to Discriminate on the Basis of Sex Because It Applies to a Job Category Held Almost Exclusively by Women and Reinforces Sex Stereotypes

The Saints' anti-fraternization policy applies only to cheerleaders. The policy itself does not distinguish between sexes, distinguishing instead between job titles, but historically, only females were cheerleaders and only males were football players. Thus, when the Saints referred to cheerleaders, Davis can argue that it meant females, and, when it referred to football players, it meant males. In other words, although the policy does not mention sex, Davis may argue that it still discriminates based on sex because it only applies to the female cheerleaders. The Saints' anti-fraternization policy would be facially discriminatory if it replaced the job titles with the sexes associated with cheerleaders and football players.

Because the job of cheerleader was segregated by sex, historically, in my opinion, the Saints' anti-fraternization policy discriminates based on sex. Where a policy will, practically, only effect one sex, that policy has been considered to be discriminatory. For example,

74. *See* Grossman, *supra* note 2.
75. *Id.*
76. *See* Lisko & Punzone, *supra* note 20.
77. *See id.*

in *International Union v. Johnson Controls*, the Supreme Court found Johnson Controls' fetal-protection policy to be facially discriminatory because it did not apply to the reproductive capacity of male employees in the same way that it applied to that of female employees.[78] The Saints' anti-fraternization policy is similar to the policy at issue in *Johnson Controls* because it requires only the female cheerleaders to take action to prevent contact of any kind with NFL players, while the male NFL players are not limited by a similar policy.[79] Further, the anti-fraternization policy is not sex-neutral because the Saints' cheerleaders, all female, are the only parties that receive penalties for violating the policy, while the Saints' players, all male, are not held to the same standards.[80] Essentially, the Saints require the members of their cheerleading squad to "be fully responsible for ensuring that they pose no temptation to the players by avoiding any social interaction with them in any setting."[81]

The Saints have responded to Davis's discrimination complaints by saying that the anti-fraternization policy is not discriminatory because it is designed to protect the cheerleaders from NFL players preying on them.[82] The Saints told their cheerleaders that liking or commenting on anything posted online about a Saints' football player would give the football players the impression that the cheerleaders were available to the football players' advances.[83]

No matter how good the intentions are behind an anti-fraternization policy that affects only one sex, an employer cannot escape discrimination liability by arguing that they lack animus. Again, the *Johnson Controls* case is instructive. In that case, the Supreme Court considered a policy of excluding women capable of bearing children from jobs that exposed them to lead, which had been adopted as a way to protect those women and their potential offspring.[84] The lower courts had held that because of the policy's benign motive, the policy was sex-neutral and should be analyzed using the disparate impact framework for discrimination, which is more deferential to employers.[85] The Supreme Court rejected the premise that the policy was neutral, holding instead that the policy was discriminatory because it did not apply to the reproductive capacity of male employees in the same way it applied

78. 499 U.S. 187, 199 (1991) (banning fertile women but not fertile men from most jobs).

79. *See* Garcia, *supra* note 2.

80. *See* Belson, *supra* note 1.

81. *See* Lauren Stiller Rikleen, *There Are Strict Rules for NFL Cheerleader. The Players? Not so Much*, WBUR (Apr. 4, 2018), https://www.wbur.org/cognoscenti/2018/04/04/nfl-cheerleader-gender-discrimination-lauren-rikleen.

82. *See* Belson, *supra* note 1.

83. Brady, *supra* note 3.

84. *Johnson Controls*, 499 U.S. at 191–92.

85. *Id.* at 193–94.

to that of female employees.[86] Johnson Controls' policy was concerned with the harms that may occur to the unborn offspring of only its female employees.[87] Johnson Controls' policy allowed only fertile men, not fertile women, to choose whether they wanted to risk their reproductive health for a particular job.[88] In reaching its conclusion, the Court held that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."[89] The purported lack of maliciousness behind the Saints' anti-fraternization policy does not give the team the right to create discriminatory policies.[90]

As in *Johnson Controls*, the Saints are not allowing some of their employees, their cheerleaders, to make their own choices concerning their own safety. The Saints insinuate that the football players are potentially dangerous and that the anti-fraternization policy is, in effect, to protect the cheerleaders. However, the Saints' cheerleaders should be able to make their own choices on whether to risk their safety, or the Saints should alter the anti-fraternization policy to apply to the NFL players also and thus be facially neutral and not discriminate on the basis of sex. If safety is really the issue, the Saints could focus on the player or players who pose a potential safety risk. Instead of the Saints protecting the cheerleaders from this danger, they should remove the dangerous players all together. In other words, the cause of the safety risk is what needs to be focused on. The Saints are worried about the side effects but are not worried about the source. It is more efficient to stop the harm from its source than trying to dilute the effects of the harm.

Another way that the anti-fraternization policy might be viewed as discriminatory is that its application only to cheerleader stereotypes, not only the female cheerleaders but also the male NFL players. A gender stereotype is "a generalized view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by or performed by women and men."[91] The subject of an employment practice cannot be based on stereotypes of employees' gender. In *Price Waterhouse v. Hopkins*, the Supreme Court held that an employer engages in impermissible gender discrimination when making employment decisions based on the idea that women "cannot be aggressive," a notion based on the stereotype that women should be passive or

86. *Id*. at 197–98.
87. *Id*. at 198.
88. *Id*. at 199.
89. *Id*.
90. *See* Brady, *supra* note 3.
91. *Gender Stereotyping*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, https://www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx [https://perma.cc/C28L-LP5H] (last visited Mar. 8, 2019).

submissive.[92] In *Price Waterhouse*, Hopkins was denied admission to the firm's partnership because she was not perceived as feminine enough.[93] Hopkins was also advised that to improve her chances for partnership the following year, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[94] The Supreme Court found that stereotyped remarks, like these, can be evidence that gender played a part in discriminatory acts.[95] Women are generally stereotyped as being in need of protection, while men, especially athletes, are generally stereotyped as being aggressive.[96] Another stereotype of male athletes is that they dominate over women.[97]

Anti-fraternization policies are often defended because they protect female employees from male employees. The Saints defended the policy as intended to protect female cheerleaders from male NFL players preying on them.[98] The use of the word "prey" here is significant. The Merriam-Webster dictionary definitions of the verb "prey" include, "to make raids for the sake of booty; to seize and devour prey; to commit violence or robbery or fraud; and to have an injurious, destructive, or wasting effect."[99] The verb "prey" paints a picture of aggression and conquest.

The Saints' defense of its anti-fraternization policy plays heavily into gender stereotyping. The Saints profess concern that the cheerleaders will be preyed upon by the NFL players, which seems to rest on the gender stereotype that females are weak and need to be protected but are also careless and invite harm. The Saints are essentially telling the cheerleaders that they are asking for harassment if they allow the NFL players to follow them on social media or even allow the NFL players to talk to them. Pictures that a cheerleader decides to post to her social media are in no way invitations to harassment.

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92. 490 U.S. 228, 235; Erin E. Goodsell, *Toward Real Workplace Equality: Non-subordination and Title VII Sex-Stereotyping Jurisprudence*, 23 Wis. J.L. Gender & Soc'y 41, 45 (2008).

93. 490 U.S. at 235.

94. *Id*.

95. *Id.* at 251.

96. *See generally* Syda Kosofsky, Note, *Toward Gender Equality in Professional Sports*, 4 Hastings Women's L.J. 209, 218–26 (1993) (describing stereotypes connected with sports and masculinity and their effect on women); Jacqueline McDowell & Spencer Schaffner, *Football, It's a Man's Game: Insult and Gendered Discourse in* The Gender Bowl, 22 Discourse & Soc'y 547 (2011) (analyzing a reality television program called, *The Gender Bowl*, which featured a full-contact football game between women and men); *see also* Nina Passero, *Effects of Participation in Sports on Men's Aggressive and Violent Behaviors*, NYU Applied Psychol. Opus, https://wp.nyu.edu/steinhardt-appsych_opus/effects-of-participation-in-sports-on-mens-aggressive-and-violent-behaviors (last visited May 14, 2020).

97. *See* Passero, *supra* note 96.

98. *See* Belson, *supra* note 1.

99. *Prey*, Merriam-Webster, https://www.merriam-webster.com/dictionary/prey (last visited Mar. 8, 2019) [https://perma.cc/47LG-YY3L].

The NFL players are adults who should not think that a certain type of social media post or eye contact means that a cheerleader is asking for harassment.

Further, because using the verb "prey" emphasizes the male stereotypes of being aggressive and emphasizes male dominance over women, the Saints' rationale for the policy suggests that either the Saints are worried about NFL players being aggressive or that the team believes it is potentially dangerous for the cheerleaders to be around the NFL players. The proffered Saints defense to its anti-fraternization policy is a classic example of gender stereotyping.

If NFL teams believe female cheerleaders need to be protected from aggressive male NFL players, it would make more sense to require the football players to be subject to the anti-fraternization policy's burdens as well. The NFL at club level or a league level should start by banning the bad behavior in addition to an anti-fraternization policy that is applied evenhandedly, to all job categories. To ensure cheerleaders are not "preyed upon" by NFL players, NFL teams should make sure that both are going out of their way to avoid contact with each other. A policy like this would also prohibit football players from initiating contact with cheerleaders, especially if the teams are worried that the football players will prey on the cheerleaders.

More specifically, NFL teams can adapt the current anti-fraternization policy to require the football players take an active role in preventing contact both in person and online. These changes could hold the party who sent the message or initiated contact, online or in person, responsible and not punish the person who did not initiate any form of contact. Again, if the Saints are so worried about the cheerleaders' safety that the Team instructs them to ensure "that they pose no temptation to the players by avoiding any social interaction with them in any setting,"[100] it would make more sense to place punishment on the NFL players if they succumb to temptation. This policy would prevent an innocent person, like Davis, from being terminated for reasons out of her control.

Since these anti-fraternization policies apply only to cheerleaders and reinforce sexual stereotypes, they are not neutral, and teams that are using them may need to show that women's conformance to this policy is a BFOQ.[101] In other words, they may have to show that the anti-fraternization policy is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[102] The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is

100. *See* Rikleen, *supra* note 16.
101. *See* 42 U.S.C. § 2000e-2(e) (2018).
102. *Id*.

sex discrimination and thus may be defended only as a BFOQ.[103] The BFOQ standard is exacting, but safety can make sex a BFOQ in some circumstances. In *Dothard v. Rawlinson*, the Supreme Court considered a policy that prohibited women from being employed in penitentiaries in certain positions where they could come into contact with male inmates.[104] Alabama's penitentiaries, when the plaintiff applied for a position, were described as "peculiarly inhospitable . . . for human beings of whatever sex."[105] The Supreme Court found that because Alabama's penitentiaries were so violent, inmates who were sex offenders or "other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.[106] This risk of violence and to security more generally would put other correctional officers and other inmates at risk.[107] This risk of danger to third parties made sex a BFOQ.[108] This type of safety exception is limited to instances in which sex actually interferes with the employee's ability to perform the job, though.[109] The potential danger to a woman herself does not justify discrimination.[110] Additionally, the need for sex to be considered must be linked to the job in a way that goes to the essence of the employer's business. That was satisfied in *Dothard* because protecting inmates was the essence of a correctional officer's job, but it was not satisfied in *Johnson Controls* where the third parties to be protected were the female employees' potential offspring.[111] Protection of offspring was not a necessary component to the production of batteries.[112]

Under these precedents, it does not appear that the anti-fraternization policy at issue could satisfy the BFOQ standard. It is a stretch to argue that the anti-fraternization policy's differential treatment based on sex is required to protect third parties from harm or that it establishes a nexus between sex and job performance. Teams have defended the anti-fraternization policy as protecting the female cheerleaders from the male NFL players. However, potential danger to an employee herself does not justify discrimination.[113] Nor have any third parties at risk even been identified. Further, there is not a strong correlation between the sex of the cheerleaders, anti-fraternization, and the functions of their jobs. There is no reason why the male foot-

103. Int'l Union v. Johnson Controls, 499 U.S. 187, 200 (1991).
104. 433 U.S. 321, 325–26 (1977).
105. *Id*. at 334.
106. *Id.* at 335–36.
107. *Id.* at 336.
108. *Id.* at 336–37.
109. Int'l Union v. Johnson Controls, 488 U.S. 187, 202 (1991).
110. *Id*.
111. *Id.* at 203–04 (citing *Dothard*, 433 U.S. at 335).
112. *Id.*
113. *Id.* at 203.

ball players cannot also play a role in preventing online and in-person contact with the female cheerleaders.

Another way the Saints might rebut the presumption of discrimination is by arguing that the policy is gender-neutral because it does not differentiate on the basis of sex within the job category of cheerleader. However, the EEOC has found that sex discrimination does not require an actual disparity of treatment of men and women in the same job classification. In *Neal v. American Airlines, Inc.*, a stewardess was terminated six months after she got married.[114] The stewardess's contract contained a clause that American Airlines could terminate a married stewardess's employment at any time six months after her marriage.[115] When *Neal* was decided, only females were employed as stewardesses.[116] American Airlines argued that if only one sex was in a particular job classification, then the rules related to that job could not be discriminatory on the basis of sex.[117] The court disagreed, stating that "it is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirement of the job."[118] Further, the EEOC found in *Neal* that the relevant question was whether all employees of the airline were subject to the same restrictions, not just the stewardesses.[119]

Because, as noted previously, men can technically become cheerleaders for an NFL team, the Saints might argue that the anti-fraternization policy is not sex-based. The Saints can point to its current cheerleading squad as an example, in fact. Jesse Hernandez is the first male cheerleader that was welcomed to the New Orleans Saints' cheerleading squad for the football season of 2018.[120] As a cheerleader, he may be subject to the same anti-fraternization policy as the formerly all-female New Orleans Saints cheerleading squad. Further, the New Orleans Saints can argue that women could technically become football players. There is no outright ban against women being drafted into the NFL.[121] Like for male cheerleaders, potential female NFL players may be subject to the same policy (or lack thereof) as the current male NFL players.

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114. 1 CCH EMPL. PRAC. GUIDE ¶ 6002 (EEOC 1968).

115. *Id*.

116. *Id*.

117. *Id*.

118. *Id*.

119. *Id*. *Neal* may seem to have less relevance today because no-marriage requirements have largely been eliminated. And in many states, marital status discrimination is separately prohibited. As of 2015, twenty-one states "prohibit marital status discrimination in housing, employment, or both." Courtney Joslin, *Martial Status Discrimination 2.0*, 95 B.U. L. REV. 805, 808 (2015).

120. David Williams, *NFL's First Male Dancers Will Hit the Sidelines this Season*, ST. LOUIS POST-DISPATCH (Aug. 7, 2018), https://www.stltoday.com/sports/professional/nfl-s-first-male-dancers-will-hit-the-sidelines-this/article_c66f0aba-7946-58a7-a98a-d9f27af55f72.html [https://perma.cc/8XVH-XDND].

121. *See* Lisko & Punzone, *supra* note 20.

Although Jesse Hernandez may be subject to the same anti-fraternization policy as the Saints' all-female cheerleading squads were in previous seasons, there is an argument against applying the same policy to Jesse Hernandez. The motivation behind the current anti-fraternization policy is to protect the Saints' cheerleaders from NFL players, which, again, is highly stereotyped based on gender. Since the motivation stems from gender stereotypes, it might not be equally enforced with mixed genders.[122] There is a possibility that the anti-fraternization policy will not be extended to male cheerleaders because they do not need the same "protection" as female cheerleaders.

There also seem to be presumptions of heterosexuality in these stereotypes, as in male football players are only interested in female cheerleaders. The Saints assume male football players would not harass men, assuming that harassment is motivated by sexual desire. The stereotypes about male football players include that straight men never desire other men and that men are always straight. The Saints stereotype their football players and make it seem like the players will inevitably "prey" on the cheerleaders because they are interested in their bodies and sexuality. Even if the Saints did think men would harass other men, the justification used for the female cheerleaders suggests they would not be worried about the harassee's safety. Since the Saints base their policy on highly stereotypical traits, the Saints may think that the male harasee can stand up for himself because men do not need to be protected.

The Saints might also try to rebut the presumption of discrimination by arguing that the applying the anti-fraternization policy does not treat similarly situated employees differently on the basis of sex because the male football players are not comparable employees to the female cheerleaders. In general, the jobs of cheerleaders and NFL players are completely different in their nature and level of prestige.

Even if football players and cheerleaders are not in a similar job classification, an anti-fraternization policy can still be discriminatory under the logic of the *Neal* case discussed earlier, in which the EEOC found that sex discrimination does not require disparity in the same job classification.[123] Based on the statements of the team, the anti-fraternization policy seems clearly created to protect female cheerleaders from male football players. But cheerleading is not a job that inherently is risky—at least not risky from injuries caused by football players. Like in *Neal*, the Saints anti-fraternization policy is applied to cheerleaders because they are women, and not because of their job classification as cheerleaders.

122. *See* Belson, *supra* note 1.
123. 1 CCH Empl. Prac. Guide ¶ 6002 (EEOC 1968).

IV. Broader Inequalities in the NFL

Anti-fraternization policies are just one part of the discriminatory environment that NFL cheerleaders face. Historically, players have been treated more leniently for policy violations than cheerleaders have.[124] For example, in 2017, a Saints' wide receiver, Willie Snead, was suspended for three games after receiving charges of driving while intoxicated and failing to maintain proper control of a vehicle.[125] In 2015, the Saints' tight end, Orson Charles, was suspended for one game after he was accused of a road rage incident that involved Orson Charles pointing a gun at another driver.[126] Another example occurred in 2016, when a Saints' cornerback, Damian Swann, received no punishment after being arrested for reckless driving and speeding charges.[127] These are just a few examples of lenient punishment for football players when they violated NFL's policies. Compare these rule violations, all of which involved serious risks to third parties and reflect poorly on the Saints, to the team's treatment of Davis, who wore a lacy body suit on Instagram.

As it can be seen from the Saints' history of punishment, football players have been suspended from football games temporarily for legal charges, while cheerleaders have been fired for allegedly violating the anti-fraternization policy. The way that the Saints punish football players compared to cheerleaders is drastically different. The football players are accused—and even sometimes convicted of crimes—and still avoid termination, while a cheerleader accused or convicted of a crime would almost certainly lose her job.

Women seem to be negatively affected by other aspects of the working environment, as well. For example, consider after-hours conversations to which the cheerleaders might be subjected. Davis alleges that she was fired after being accused of receiving messages from NFL players via her social media account.[128] Depending on the types of messages that Davis received from the NFL players, she could make an argument for sexual harassment. If Davis did receive inappropriate messages amounting to sexual harassment, the messages would pose a strong

124. *See* Rikleen, *supra* note 16.

125. Mike Triplett, *Saints WR Willie Snead Suspended Three Games*, ESPN (Sept. 2, 2017), http://www.espn.com/nfl/story/_/id/20536056/willie-snead-new-orleans-saints-suspended-three-games [https://perma.cc/SVV5-PY9T].

126. Mike Triplett, *Saints' Orson Charles Suspended 1 Game for Violating Conduct Policy*, ESPN (July 31, 2018), http://www.espn.com/nfl/story/_/id/13357196/orson-charles-new-orleans-saints-suspended-one-game-violating-nfl-personal-conduct-policy [https://perma.cc/35AM-J88C] (noting that the Saints did not disclose the reason for the suspension).

127. *See* Jason Butt, *Former Georgia, Saints CB Damian Swann Arrested for Reckless Driving While Going 100 mph*, TELEGRAPH (Mar. 21, 2016, 12:05 PM), https://www.macon.com/sports/college/university-of-georgia/bulldogs-beat/uga-football/article67316137.html; *see also* Rikleen, *supra* note 16.

128. *See* Garcia, *supra* note 2.

argument for the ineffectiveness of the Saints' anti-fraternization policy's focus on cheerleaders alone, especially because the alleged motive behind the Saints' anti-fraternization policy is to protect the cheerleaders from being "preyed" upon by the NFL players.

Sexual harassment includes

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[129]

An employer is liable for sexual harassment in the workplace if the employer knows or should have known of the conduct.[130]

Thus, the Saints could be responsible for any sexual harassment of cheerleaders. If the messages were requests for sexual favors or other verbal conduct of a sexual environment and they created a hostile working environment, the Saints would need to reevaluate the Team's anti-fraternization policy. These messages might more effectively be prevented by targeting their source and requiring the Saints' players to block cheerleaders on social media and avoid contact with cheerleaders online and in person.

V. Solutions

Davis filed her gender discrimination claim against the Saints shortly after #MeToo gained popularity. #MeToo has had a large impact not only on popular culture but also on how businesses conduct their daily activities.[131] Companies increasingly have added anti-fraternization policies following #MeToo.[132] Non-discriminatory

129. 29 C.F.R. § 1604.11 (2019).

130. *Id.*

131. #MeToo gained popularity after Alyssa Milano tweeted on October 15, 2017, asking people to reply to her tweet with a "me too" if they had been sexually harassed or assaulted. Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied*, NBC News (Oct 15, 2018, 4:59 PM), https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246 [https://perma.cc/2K8G-UM5U]. #MeToo's purpose is to convey to victims of sexual abuse around the world that they are not alone. Vasundhara Prasad, Note, *If Anyone Is Listening, # MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. Rev. 2507, 2511 (2018).

132. Jena McGregor, *Intel's CEO Resigned After Violating a No-Dating Rule. More Companies Are Adding Them in the #MeToo Era*, Wash. Post (June 22, 2018, 6:11 AM CDT), https://www.washingtonpost.com/news/on-leadership/wp/2018/06/22/intels-ceo-resigned-after-violating-a-no-dating-rule-more-companies-are-adding-them-in-the-me too-era [https://perma.cc/L5JQ-ASSM].

anti-fraternization policies can be a great tool for businesses. A carefully crafted anti-fraternization policy can limit potential quid pro quo harassment.[133] Anti-fraternization policies can decrease the potential of sexual harassment claims, ultimately decreasing the amount of money spent by the business defending these claims. Further, carefully crafted anti-fraternization policies can also decrease the risk of favoritism claims.[134]

A less positive effect of #MeToo on workplaces is adoption of the "Pence Rule." In 2002, Mike Pence stated that he made a point to never dine alone with a woman who is not his wife, or attend events where alcohol might be served without his wife there.[135] After this statement, the "Pence Rule" was coined to describe when a man declines to be alone with a woman other than his wife.[136] The Pence Rule is supposed to reduce the risk of sexual harassment liability.[137] More specifically, the Pence Rule is said to help "upstanding, honorable men avoid creating situations that might be misinterpreted by supposedly hysterical, unstable women, or else contorted by someone looking for a quick payout."[138]

Businesses have begun imposing rules that limit mixed-gender travel, and male employees have canceled one-on-one meetings with female colleagues.[139] However, implementing this rule can lead to gender discrimination. Men refusing to be alone with women can hinder women's future career. Women can lose out on opportunities for career advancement, especially in male-dominated fields and workplaces. In the workplace, one-on-one discussions are typically when a manager discloses important business information.[140] When men refuse to be alone with women, but not other men, these men are gaining a great

133. Seth Howard Borden, Note, *Love's Labor Law: Establishing a Uniform Interpretation of New York's "Legal Recreational Activities" Law to Allow Employers to Enforce No-Dating Policies*, 62 BROOKLYN L. REV. 353, 379 (1996).

134. Allen Smith, *Review Your Company Dating Policy in Light of #MeToo Movement*, SOC'Y FOR HUM. RES. MGMT. (Jan. 31, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dating-policy-metoo-movement.aspx [https://perma.cc/NA5G-GAK6].

135. Tara Isabella Burton, *Former Trump Advisor Says the "Pence Rule" Would Have Protected Women from Weinstein. He's Wrong*, VOX (Oct. 12, 2017, 2:30 PM), https://www.vox.com/identities/2017/10/12/16463680/pence-rule-weinstein [https://perma.cc/RC9A-Q739].

136. Allen Smith, *Men's Mentorship of Women at Odds with "Pence Rule*," SOC'Y FOR HUM. RES. MGMT. (Mar. 15, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/male-mentorship-women-pence-rule.aspx [https://perma.cc/6Q2L-PXFZ].

137. *Id*.

138. *See* Burton, *supra* note 135.

139. Harris O'Malley, *Treating Men Like Idiots Is the Wrong Way to Stop Sexual Harassment*, WASH. POST (Feb 1, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/01/for-men-in-the-metoo-era-the-mike-pence-rule-is-the-easy-way-out/?utm_term=.8a0da09d6d86 [https://perma.cc/6L2X-KGX3].

140. *See* Smith, *supra* note 136.

potential advantage over the similarly situated women employees.[141] Men already dominate the workforce, and the Pence Rule would lead to more success for men and less for women.

Women already face hurdles in the business world. In 2015, the Bureau of Labor Statistics found that women made up 39.2% of the seventeen million people employed in management occupations.[142] Men outnumber women significantly in management positions and as executives.[143] When men do not want to be alone with a woman, they will be less able to mentor women. Mentoring is viewed by some as a, "necessary stepping stone for women's professional advancement."[144] Not only will women will be harmed if businesses continue to adopt the Pence Rule, but businesses will suffer as well. They will lose out on the full measure of talent available, and there will be an increase in gender discrimination claims, which will lead to an increase in spending to defend these lawsuits. Businesses should adopt gender-neutral policies that do not discriminate against women or men. The gender-neutral policies should place an equal burden on both men and women.

Conclusion

Davis's claim of gender discrimination against the Saints should be taken seriously and should cause the Saints and all NFL teams to view cheerleaders in a different light. The Saints should not view the cheerleaders as inferior to the players. They should be valued as equals, especially in the enforcement of the Saints' anti-fraternization policy. As an economic matter, though, the football players are worth more to a football team than the cheerleaders are. Because the cheerleaders are more expendable than the football players, change will likely be a very slow process. Thus, the law should step in and give all NFL teams legal incentives to change their policies. The Saints appear to view both cheerleaders and football players in a stereotypical light, perceiving the former as needing protection from the aggressive nature of the latter. The Saints' football players outnumber the Saints' cheerleaders, so it would make more sense to place an equal burden on both the team's cheerleaders and its players to avoid contact in-person and online.

Further, cheerleaders should not be punished for receiving messages from NFL players, especially if they do not reciprocate or respond to the NFL players. The best way to prevent fraternization is through a policy that places an equal burden on both the cheerleaders and the football players to avoid contact. In general, businesses should adopt gender-neutral policies that place an equal burden on both men and women.

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141. *Id*.

142. *39 Percent of Managers in 2015 Were Women*, U.S. Bureau of Labor Statistics (Aug. 1 2016), https://www.bls.gov/opub/ted/2016/39-percent-of-managers-in-2015-were-women.htm [https://perma.cc/Q26C-7UG2].

143. *See* Smith, *supra* note 136.

144. *Id*.