FROM PIG IN A PARLOR TO BOAR IN A BOARDROOM: WHY ELLERTH ISN'T WORKING AND HOW OTHER IDEOLOGICAL MODELS CAN HELP RECONCEPTUALIZE THE LAW OF SEXUAL HARASSMENT

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INTRODUCTION

Imagine that Beth works for corporation x, which has implemented proactive policies to prevent and deal with sexual harassment. Her supervisor, however, constantly makes inappropriate advances towards her, often threatening that her failure to comply with his requests will result in "complications" for her at the corporation. She finally tells him that she will not be intimidated and that she will report his behavior if it continues. The next week, she is excluded from a career-advancing conference that most others at her level of employment are invited to. She is also pulled from a big project she is working on, and loses the commission that she stood to make from her participation in the project.

Now imagine that another woman, Bonnie, works for the same corporation x. Her supervisor also makes inappropriate advances and comments, making her feel objectified and degraded. He makes ambiguous statements, implying that certain people at the corporation will have a far easier time getting ahead than others, but he never actually threatens her. She is made to feel extremely uncomfortable. When she asks him to stop his behavior, he laughs and says he doesn't know what she is talking about. Not long after, she receives her expected promotion along with the rest of her class, but continues to work for the same supervisor. Because Bonnie is too intimidated to report his tacit threats, and in light of her success at the corporation she fears ruining her chances of further advancement, she remains silent.

After the reporting of Burlington Industries Inc. v. Ellerth[1], we know that Beth will most likely be able to make out a *quid pro quo* claim under Title VII, suing the corporation and citing the tangible adverse employment action taken against her so soon after she resisted the advances and threats of her

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[1] 118 S. Ct. 2257 (1998).

supervisor. Because the adverse job action is seen through the lens of case law to have emanated directly from the corporation, Beth should be able to recover damages. Bonnie, however, will have no tangible adverse employment action to cite, and she will be forced to bring a hostile work environment claim. She will have to demonstrate, beyond a certain evidentiary threshold, that her environment was transformed into a hostile working zone such that it interfered with her work. Furthermore, even if she is able to make out a claim, it will be vulnerable to the interposition of an affirmative defense by the corporation that: 1) the corporation had policies in place deemed "adequate" by a court; and 2) Bonnie failed to take advantage of these policies. The corporation will most likely succeed with this defense, and Bonnie will have no recourse to her corporation and will not be able to recover any substantial amount under Title VII.[2]

While Title VII's goals have been clearly expounded, refined, and articulated in case law, the constructs of the law still often render it ineffectual and thwart its goals. Situations like Bonnie's fall somewhere outside of the two mainstay claims (*quid pro quo* and hostile work environment) as they have been defined and developed. Agency theory has been applied to afford recourse to women who have been victims of *quid pro quo* harassment by conferring accountability upon their companies. However, for women like Bonnie, the Supreme Court's promulgation of agency theory absolves the corporation of liability by allowing it to focus solely on the reasonableness of its own behavior and the victim's behavior, and not on the *un*reasonableness of what the victim of sexual harassment and gender discrimination has been made to endure. In other words, a malicious firing, demotion, by a supervisor is seen to be an action of the corporation, and the corporation is held responsible. The constant looming threat of a tangible job action is not viewed similarly. The law ignores similarities between the situations. Courts will be able to justify the disparate treatment of the two cases by reference to agency theory. Ellerth seems to have construed agency principles as imputing corporate liability based upon the technical nature of the damages incurred by the victims. Has Beth really been made to suffer so much more than Bonnie that her recourse to the corporation should be so dramatically different with respect to recovery?

DEFINITION OF THE LAW: SUMMER 1998

In the June 26, 1998 decision handed down in Burlington Industries, Inc. v. Ellerth, the Supreme Court held that:

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[2] The question of whether or not a harassing supervisor may be considered an employer himself has been raised, but is outside the scope of this paper. For more on this topic, *see* Scott B. Goldberg, Discrimination by Managers and Supervisors: Recognizing Agent Liability under Title VII, 143 U. Pa. L. Rev. 571 (1994).

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[3]

The Court found that "[a]gainst a background of repeated boorish and offensive remarks and gestures which [plaintiff's supervisor] allegedly made, Ellerth place[d] particular emphasis on three alleged incidents where [his] comments could be construed as threats to deny her tangible job benefits."[4] Kimberly Ellerth, like the hypothetical Bonnie, refused the inappropriate advances of her supervisor, and never summoned the courage to inform an appropriate corporate authority of the behavior.[5] Her supervisor's comments, like those of Bonnie's supervisor, could have been construed as "threats to deny her tangible job benefits," and like Bonnie, Ellerth not only kept her job, but was even promoted once during the course of the harassment.[6] Finally, like Bonnie, Ellerth had her claim automatically relegated to the realm of the hostile work environment category, as opposed to *quid pro quo*. Her recourse was therefore limited by the backstop of the affirmative defense offered to her employer in accordance with that claim.

BASIS FOR THE ARGUMENT: THE TECHNICAL "TANGIBLE JOB DETRIMENT" DISTINCTION

My argument is that agency theory, as it was applied by the Supreme Court in Ellerth, is a clumsy fit in Title VII cases. Essentially, a *quid pro quo* claim, once successfully established, automatically imputes liability to the employer, giving a victim direct and unfettered recourse to her corporation. A hostile work environment claim, once successfully established *prima facie*, is then rendered vulnerable to the interposition of an affirmative defense—a defense premised on a negligence calculus that assesses the reasonableness of

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[3] Burlington Industries Inc. v. Ellerth, 118 S. Ct. 2257 at 2270.

[4] *Id.* at 2262.

[5] *Id.*

[6] *Id.*

the employer's actions. A meritorious *quid pro claim* is not similarly subject to being extinguished.

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[7]

And on what does the all-important distinction between a *quid pro quo* claim and a hostile work environment claim turn? According to the Supreme Court in Faragher v. City of Boca Raton:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor.... When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages.... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[8]

The technical nature of the damages, then—tangible and pecuniary or more intangible—predicates the vulnerability of an otherwise viable claim.[9] Later in this article, I will argue that a similar ideology was recognized in the claims of trespass and nuisance, and that this conceptual framework may help us to better see the problems that arise from such a technical distinction. This distinction thwarts the goals of Title VII and conceptualizes harassment such that the realities of its landscape are ignored in the courts' treatment of claims. This distinction also engenders the disparate treatment of victims of different kinds of harassment: harassment with effects that are tangible, and harassment that consists of tacit, less palpable threats. The latter type of harassment has an impact that is often tantamount to the damage that the realization of the threats would have caused. Essentially, someone at work who receives tacit

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[7] *Id.* at 2270.

[8] Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-3 (1998).

[9] Not only is a hostile work environment claim divested of its potency by the interposition of an affirmative defense, the threshold requirements needed to make out a colorable claim of harassment are far more protracted in hostile work environment claims than they are in quid pro quo claims. As the Ellerth Court stated: "Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." Ellerth, 118 S. Ct. 2257 at 2265.

threats is made to feel controlled, victimized, and helpless, much as someone who has actually been demoted or terminated does.

What, then, is needed to qualify as a "tangible employment action"? According to the Court in Ellerth: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[10] Laboring under the constant threat of a tangible employment action, as Kimberly Ellerth did, would ultimately not be seen as a "significant change in employment status" when viewed through the narrow queries posited by the Court.

THWARTING THE GOALS OF TITLE VII

The Court, in casting the hostile work environment claim in its present form, turns a blind eye to reality. Title VII seeks to prevent women's being denied entrée into the professional arena and their being made to feel any less viable than a man once they secure employment. Unfortunately, this purpose is subverted by the Court's failure to recognize that tacit, less palpable forms of harassment that encroach upon a woman's sense of sanctity and well-being at work, once proven, are every bit as repugnant to the legislation and goals as are realized threats. Title VII's stated goal is to prevent "discriminat[ion] against any individual with respect to his...terms [or] conditions...of employment, because of...sex,"[11] and aims to "make persons whole for injuries suffered on account of unlawful employment discrimination."[12] Is this dual goal of prevention and restoration of the victim served by distinguishing between a woman whose supervisor follows through on threats with tangible action and a woman who labors under the constant threat of impending consequences? I argue that the goal is actually controverted by this technical distinction. Why is a viciously-motivated firing seen through the lens of agency theory as being executed by an arm of the corporation while a looming but unrealized threat of employment action is not?

THE "ACTUAL DAMAGES" DISTINCTION HISTORICALLY RECOGNIZED AS SURMOUNTABLE

It is important to note that courts in certain circumstances have deemed the subtle distinction between tangible and less palpable harm insignificant. Often the technical distinction has been recognized as just that

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[10] *Id.* at 2268.

[11] 42 U.S.C. § 2000e-2(a)(1).

[12] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

-technical- and the courts have refused to preclude recovery in cases where a victim suffered obvious though "intangible" damages. In 1986, the Supreme Court determined that Title VII demonstrated "...a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[13] This formulation arguably encompasses looking at the totality of the damages inflicted and not just at whether or not they may technically be termed "actual" or "tangible."

Another more recent exposition of a court's recognition of this technical distinction is the opinion in Leibovitz v. New York City Transit Authority.[14] In this pre-Ellerth case,[15] a woman who worked in an atmosphere rife with sexual harassment, but had not been the victim of any harassment or discrimination herself sued her employer under Title VII. She prevailed before a jury on the grounds that she was aggrieved by the hostility and harassment pervasive in her work environment. In reviewing the trial, Judge Weinstein noted that the plaintiff did, indeed, have standing to sue: "Her injury is distinct and actual."[16] Responding to arguments that the victim's damages were too impalpable to uphold the jury verdict, Judge Weinstein took issue with the reality of the situation that he was asked to ignore based on the technicalities of the circumstances:

> Does the law deny that an environment where a superior refers to co-workers in vulgar sexual terms, while studiously avoiding calling one favored female profane names, is demeaning, harassing, and incompatible with the dignity and well-being of all the women in that workplace... Title VII...affords "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[17]

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[13] Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 64 (1986), quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978).

[14] Leibovitz v. New York City Transit Authority, 4 F.Supp.2d 144 (1998).

[15] It should be noted that Judge Weinstein's exposition of the distinction between a *quid pro quo* claim and a hostile work environment claim resonates with other pre-Ellerth analyses, taking a more thoughtful and less mechanized, damages-based stance: "Quid pro quo harassment is based upon direct harassment—unwelcome sexual activities, advances, innuendoes, and the like.... Sexual harassment through a hostile work environment is less direct but no less egregious...". *Id.* at 148.

[16] *Id.*

[17] *Id.* at 152, quoting Meritor, 477 U.S. at 65.

It has also been recognized that "...while emotional injuries cannot be measured with precision, ...they are...real."[18]

In yet another pre-Ellerth case, Karibian v. Columbia University, "Karibian claimed that Urban implicitly threatened to fire her and to damage her career if she did not comply. If true, Urban's conduct would constitute quid pro quo harassment because he made and threatened to make decisions affecting the terms and conditions of Karibian's employment based upon her submission to his sexual advances."[19] The plaintiff in this case, however, *did* acquiesce to her supervisor's advances, and thus not only suffered no "tangible job detriment," as a result of resisting his advances, but received raises and seemed to flourish professionally. When she tried to make out a *quid pro quo* claim of sexual harassment, an appellate court recognized the inherent unfairness of precluding the claim based upon the nature of the harm that she walked away with, rather than the totality of the circumstances that had been imposed upon her:

> Karibian argues that the district court erred when it required her to present evidence of actual, rather than threatened, economic loss in order to state a valid claim of quid pro quo sexual harassment. We agree. There is nothing in the language of Title VII or the EEOC Guidelines to support such a requirement.[20]

The court in this case unpacked the rationales and justifications for validating a *quid pro quo* claim in light of fairness considerations and the incentive goals of Title VII:

> True, in the typical quid pro quo case, the employee who refuses to submit to her supervisor's advances can expect to suffer some job-related reprisal (citation omitted). Accordingly, in such "refusal" cases, evidence of some job-related penalty will often be available to prove quid pro quo harassment. But that is not to say that such evidence is always essential to the claim. In the nature of things, evidence of economic harm will not be available to support the claim of the employee who submits to the supervisor's demands (citation omitted). The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not.... We do not read Title VII to punish the victims of sexual harassment who

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[18] McIntyre v. Manhattan Board, Lincoln-Mercury Inc., N.Y., 128889/94 (Sup. Ct., New York County, 1997).

[19] Karibian v. Columbia University, 14 F.3d 773, 778 (2d Cir. 1994)

[20] Karibian v. Columbia University, 14 F.3d 773, 778 (2d Cir.1994).

> surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence.[21]

The court thus found that "once an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a quid pro quo claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences, or (b) submits to the advances in order to avoid those consequences."[22] The Karibian court finally concluded that "imposing an 'actual economic loss' requirement in a quid pro quo case where the employee submits to the unwelcome sexual overtures of her supervisor places undue emphasis on the victim's response to the sexual harassment. The focus should be on the prohibited conduct, not the victim's reaction."[23]

ENTER ELLERTH: IMPACT IN THE LOWER COURTS

Moving along the terrain as mapped out by the Court from a colorable *quid pro quo* claim to a hostile work environment claim, the emphasis shifts from a determination of what is reasonable to ask a woman to endure (the law seems to say it is intolerable for a woman to be fired, demoted, *etc.* on the basis of her gender), to how unreasonable a corporation must act before a woman being demoralized or controlled by threats will be granted recourse through the courts. Post-Ellerth case law demonstrates that judges appear to feel increasingly comfortable taking what ought to be a meaningful distinction (the determination of when the recognition of a *quid pro quo* claim is indeed merited) and distilling what was once a more thoughtful analysis down to the very technical nature of the damages inflicted. At times, a rote application of the Supreme Court's categorizations seems to preclude a thoughtful determination of when a tacit, constructive measure taken to inflict sex-based discrimination on a plaintiff warrants the advantages afforded to the plaintiff by a *quid pro quo* claim:

> Here, there is no evidence that plaintiff suffered any loss of job benefits as a result of not responding to Figueroa's winks. . .

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[21] *Id.* (emphasis added).

[22] *Id.* at 779.

[23] *Id.*

> [Plaintiff]...claims that Figueroa and the district manager told him how to fire someone by changing their schedules.[24]
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> However, *neither negative comments nor remarks about firing people amount to a tangible job detriment in this case.* In fact, it is undisputed that after being under Figueroa's tutelage for seven weeks, plaintiff eventually completed the rest of his training program successfully and was promoted.... He received a pay raise and was eligible for other benefits.... *Ultimately, there is not one scintilla of evidence demonstrating that plaintiff was adversely affected in his job because he ignored any advances by Figueroa.*[25]

Another post-Ellerth opinion evinces what looks like a heavy-handed application of sweeping maxims and mantras, as well as a blunt comparison to Ellerth, that all lead to a highly mechanized determination, bereft of any real analysis:

> [T]he Court must first determine whether Plaintiff suffered a tangible job detriment.... In Burlington Industries, Inc. v. Ellerth, the plaintiff's allegations were similar to those presently before the Court.... According to the plaintiff, on several occasions the supervisor made comments which implied he would deny her tangible job benefits because of her failure to acquiesce to his advances.... Plaintiff did in fact receive a promotion, in spite of her refusal, *and thus suffered no tangible job detriment*.... Similarly, Plaintiff herein...was not fired, and therefore suffered no tangible job detriment.[26]

In another post-Ellerth case, the plaintiff's supervisor

> [R]epeatedly tried to kiss her;...gave her "pills" containing sexually explicit messages; used meetings alone with her to tell her that he could not control his feelings for her, felt like grabbing her all day, and could not take his eyes off her; *threatened her with suspension and extra work assignments if she continued to refuse his*

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[24] According to the case, "Hearing of his purportedly imminent transfer back to Cupey I...caused (plaintiff) to resign from his employment." Landrau Romero v. Caribbean Restaurants Inc., 14 F.Supp.2d 185, 188 (D. Puerto Rico 1998).

[25] *Id.* at 189-190 (emphases added).

[26] Speight v. Albano Cleaners, Inc., 21 F.Supp.2d 560, 563-64 (E.D.Va. 1998) (emphasis added).

> *advances*;...and assigned her extra and inappropriate work assignments which were not in her job description.[27]

Even the defendants in this case were willing to concede that the plaintiff, Reinhold, had been harassed by her supervisor on the basis of her gender. In their defense, the defendants only contested their own enterprise liability which would, of course, turn on their being able to raise an affirmative defense *if* the damages were not found to be "tangible employment actions."[28] The court's simplistic distillation that ignored Reinhold's injury in the context of Title VII went as follows:

> In this case, Reinhold's evidence does not support the conclusion that she suffered a "tangible employment action" sufficient to give rise to the automatic imputation of liability against Appellants for Martin's actions. As the Supreme Court made clear in Ellerth, a "tangible employment action" requires "a significant change in employment status." .... While Reinhold alleges that she was assigned extra work and suffered other harm as a result of Martin's sexual advances, she does not allege that she experienced a change in her employment status akin to a demotion or a reassignment entailing significantly different job responsibilities.[29]

It seems that courts, in making what should be a thoughtful determination, are using the presence or absence of tangible job actions to dismiss a plaintiff's valid assertions that she is laboring under intolerable threats and innuendoes inflicted because of her gender. The cases are filled with over-simplified tautologies and citations of promotions and raises as dispositive of the fact that the plaintiff could not have been the victim of *quid pro quo* harassment.

The language in several cases demonstrates that the unilateral action of a victim to remove herself from a bad situation has often been ignored as harassment, which the courts say must emanate from the supervisor. Thus, instances of constructive firings through actions like reassignment have gone unrecognized by courts anxious to see the employer as "reasonable," technically innocent of having created actual damages for the victim, and thus unable to incur liability for his corporation under Ellerth.[30] According to the

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[27] Reinhold v. Commonwealth of Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (emphasis added).

[28] *Id.*

[29] *Id.* (citing Ellerth at 2268-69).

[30] *Id.* at *4 (noting that "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.").

district court in Marsicano v. American Society of Safety Engineers: "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control."[31] The Marsicano court went on to state:

> It could be said that Marsicano suffered a significant change in her employment status in that she quit her job in response to the harassing conduct at issue in this case. But, as defined by the Supreme Court, the concept of tangible employment action for vicarious liability purposes does not embrace a responsive action on the part of the employee that brings about a change in employment status.[32]

In another case that came after Ellerth, the plaintiff, a minor, worked under the management of a harassing supervisor at a Denny's restaurant until she requested, and was ultimately granted, a transfer.[33] When, however, the plaintiff attempted to characterize her transfer away from her supervisor as an "undesirable reassignment" that should warrant a viable *quid pro quo* claim, the court held that "[w]here, as here, Smith's transfer occurred at her request rather than Denny's, the transfer does not constitute an 'undesirable reassignment'"[34] When the plaintiff attempted to argue that the intolerable conditions predicating the reassignment amounted to a constructive discharge, the court responded:

> [T]o establish that she was constructively discharged, Smith would have to show that she was forced to quit because of intolerable working conditions due to sexual harassment.... [I]n the Tenth Circuit, a sexual harassment plaintiff cannot state a claim for constructive discharge where, as here, a job transfer ends the alleged harassment. ...Under these circumstances, therefore, I conclude that no tangible employment action resulted from the alleged sexual harassment.[35]

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[31] Marsicano v. American Society of Safety Engineers, 1998 WL 603128, *6 (N.D.Ill. 1998).

[32] *Id.*

[33] Duran v. Flagstar Corporation, 17 F.Supp.2d 1195, 1202 (D.Colo. 1998).

[34] *Id.*

[35] *Id.* at 1202-03.

So what has the overall result of the specific articulations of the Ellerth and Faragher holdings been? District and appellate courts nationwide, seeing the holding set forth as it is, now seem to wrap their analyses of cases in which a woman, for one reason or another, did not report her harassment in a sufficiently timely fashion, around the language of Ellerth and Faragher. These courts relegate victims to hostile work environment claims and then allow the employers to invoke the aid of the affirmative defense.

MISUSE OF THE AFFIRMATIVE DEFENSE: THE FIRST PRONG

Basing the negligence calculus of the affirmative defense, even in part, on the reasonableness of the employer's behavior splays the disparity between the *quid pro quo* claim and the hostile environment claim even further. In the quid pro quo instance where the victim has what the Court terms a "tangible job detriment," the harassment is sufficient, once proved, to impute liability without any regard for how reasonable the employer acted in the promulgation and implementation of its policies. Once relegated to a hostile work environment claim, however, a victim with a viable claim must submit to the court's assessment of her employer's reasonableness, notwithstanding the fact that the victim's well-being is threatened at work.[36]

In the pre-Ellerth case of Leibovitz v. New York City Transit Authority, the corporation being sued put forth the defense that it could not be held liable for a hostile work environment because it had working internal procedures to prevent and deal with sexual harassment.[37] In this case, Judge Weinstein was able to recognize "That the Authority had internal mechanisms for dealing with harassment complaints does not prevent a factual finding that it was deliberately indifferent to the sexually harassing actions of supervisors if the internal procedures were insufficient or were not adhered to."[38] More recently, however, it has been noted in Landrau that:

> The Supreme Court in Faragher implied that issuance of an explicit antiharassment policy with a compliant procedure would satisfy the

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[36] The Second Circuit has said:

> To prevail on a hostile work environment claim, a plaintiff who is harassed by a co-worker must show both (1) a hostile work environment and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer. ...An employer who has notice of a hostile work environment has a duty to take reasonable steps to eliminate it.

Distasio v. Perkin Elmer Corp., 157 F.3d 55, 62 (2d Cir. 1998).

[37] Leibovitz, *supra note* 14.

[38] *Id.* at 153.

> first prong of the affirmative defense that the employer exercised reasonable care to prevent and correct sexually harassing behavior. In fact, the Court specified that such a policy is not necessary as a matter of law and that *even a less obvious policy may sometimes suffice*.[39]

It thus seems apparent that while sexual harassment law was in a more nascent stage, judges had more of an opportunity to inject their own common sense reasoning into their analyses and applications of the law, as was done in the Leibovitz case. Since Ellerth was decided, however, the first prong of the affirmative defense it afforded has been rigidly and mechanically reaffirmed and applied in many cases. Courts' analyses now sound more automatic and mechanized despite compelling arguments that a standard policy should not always be able to exculpate a defendant from liability simply because a plaintiff's damages were not of a certain technical nature. The Landrau court just quoted above went on to declare without any further analysis: "There being no genuine issue of material fact regarding the fact that CBI had such a policy in place, defendant has satisfied the first prong of the affirmative defense as a matter of law."[40] Shouldn't the adequacy of the policy, in light of the fact that it allegedly failed to prevent harassment, have been an issue for the jury to determine?

Recall that the Ellerth affirmative defense may only be invoked in cases where no tangible job detriment has been incurred; as soon as a victim can show that some action was actually taken (undesirable reassignment, *etc.*), her assertions are not susceptible to any such mechanized judgments or squaring of doctrine with policy. Why should the reasonableness of the employer be a factor in this calculus at all when it is not in cases where threats made to the harassment victim are realized?

MISAPPLICATION OF THE SECOND PRONG OF THE AFFIRMATIVE DEFENSE

"The second prong of the defense is that the employee must have unreasonably failed to avail himself of any corrective or preventive opportunities provided by the employer."[41] The second prong of the affirmative defense looks at the woman's behavior in utilizing a complaint mechanism to report the harassment or not. Again, reasonableness (this time, that of the victim) is being assessed by a trier of fact. The reasonableness assessments made in both prongs of the affirmative defense, it should be

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[39] Landrau, *supra* note 24, at 192 (emphasis added).

[40] *Id.*

[41] *Id.*

underscored, are made only after it has been determined that a victim has endured indignities that are not reasonable for her to have endured, that is, once a viable claim has been made out in court. The affirmative defense enters so that recourse to the victim's employer may be established or denied, but, again, it only enters if she has been harassed tacitly and endures no tangible job detriment.

Some might argue that this prong makes the Ellerth holding comport with notions of fairness and efficiency; the victim must be a willing participant in her own recourse, and the intended deterrence of Title VII is expedited through the corporation's own channeled procedure. This argument can be countered with several points. As the courts have conceded when recounting victims' narratives, there are often circumstances where a victim's fear of retaliation or stigma or hesitance keeps her from reporting the harassment. Countless narratives telling of the alleged incidents of harassment in Title VII suits bear this out. In one case, a plaintiff claimed that she "stopped reporting the harassment to [her supervisor] because he had told her not to say anything and threatened that she would lose her job if she did."[42] In Landrau, another post-Ellerth case, a male plaintiff sued his corporation for alleged harassment by his male supervisor, maintaining that he "never reported any sexual harassment to anyone because he was ashamed, and afraid that by doing so, he would not be able to recover money owed to him by [the corporation]."[43]

As soon as courts anxious to run straight through the Ellerth analysis provide for the invocation of the affirmative defense afforded, the victim's inaction is often immediately deemed unreasonable. This is done in accordance with Ellerth, despite what are often genuinely compelling circumstances to recognize the inaction as quite reasonable. At that point, the plaintiff's own behavior, as the second prong of the defense, is sufficient to block liability. For example, the plaintiff in Landrau cited four reasons for not reporting his harassment: "he did not want anything to do with [his harasser] ever again,... he was too ashamed to tell anyone what was happening,...he did not trust the district manager..., and...he was afraid that the company would not give him back pay if he told them of harassment."[44] The court deemed these arguments unreasonable, seemingly anxious to fix the facts of the case into the language of Ellerth: "These four reasons do not reasonableness equal, and plaintiff would have been unable to negate the second prong of the

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[42] Distasio, *supra* note 36, at 60.

[43] Landrau, *supra* note 24, at 188.

[44] *Id.* at 192.

affirmative defense as a matter of law."[45] Furthermore, although the affirmative defense clearly provides that the plaintiff must have "unreasonably failed...to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,"[46] the court's assessment of reasonableness sounds sweeping and simplistic, almost automatic, and without sufficient regard for the specificity of various circumstances. "...[T]he fact that plaintiff was too ashamed to tell anyone cannot stand as a valid reason for avoiding the company's channels for dealing with sexual harassment. The company's stated policy of having complaints be handled confidentially alleviates the problem of shame""[47]

An additional note on this point is that "reasonableness" at the time that it is assessed, and "reasonableness" as it is evinced at the time of action occurs in two very different temporal and evaluative contexts. At the actual point at which a court *assesses* a victim's reasonableness in not reporting harassment, the victim has presumably already made out a valid hostile work environment claim in court and the trier is attempting to see if the affirmative defense may be invoked. In hindsight, it must generally seem reasonable for a woman who has been (now demonstrably) harassed to have reported it at the time of the harassment. However, a woman, acting at the time of her harassment has not necessarily made up her mind to go public with her experience at all. She certainly has no basis to take her case to court with any confidence that she will be believed by anyone, much less prevail. In order to properly assess a woman's reasonableness *vis-à-vis* the second prong of the affirmative defense, a trier must judge her inaction, if it need be judged at all, from the vantage point of one who is 1) currently employed at the corporation and 2) has no way of ascertaining that she will be believed and validated in a public forum. Indeed, it appears as though courts that judge victims as unreasonable in such a mechanized way are looking at the victims through the eyes of one prescient enough to know that the *prima facie* case has been taken to court and successfully made out before a tribunal.

EDUCATION OF HARASSERS?

Furthermore, I submit that all the law, as it has been cast and framed by the Supreme Court decisions of the summer of 1998, does is educate employers as to how to harass workers effectively while incurring the least amount of liability for the harasser's employer. For example, a potential harasser, educated in the language of Burlington and Faragher, will now

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[45] *Id.*

[46] Ellerth, 118 S. Ct. 2257, at 2261.

[47] Landrau, *supra* note 24, at 192.

realize that if he or she works for what would qualify as a "reasonable" corporation and wishes to avoid bringing about enterprise liability, his best bet of using sexual threats and suggestions to control the dynamics of his relationship with a subordinate is to make sure that the threats and suggestions go unrealized. Although the victim will feel the intended sting of humiliation, as well as the pressure of the looming threats, she will garner no actual damages. Furthermore, if she, for almost any reason, fails to report the incident properly, she will most likely unwittingly satisfy the second prong of the corporation's affirmative defense. Due to the dynamics of many corporations where established, client-friendly professionals are often forgiven their discriminatory transgressions in exchange for their continuing to add value to their jobs, an employee who does not incur corporate liability will most likely fare well after an incident, and will almost invariably fare better than one who actually does incur corporate liability. Again, in the given situation, the only difference between incurring the liability and not incurring the liability is the nature of the damages that the harasser bestows upon the victim; it certainly behooves a potential harasser to become schooled on this issue.

Additionally, when courts acknowledge that "...such a[n] [extensive] policy is not necessary as a matter of law and that even a less obvious policy may sometimes suffice,"[48] are they validating policies that don't fully educate potential victims as to their rights and responsibilities under Ellerth? Is a woman in job training always told under the least passable anti-harassment policy that her failure to report harassment may preclude her recovery from the corporation should the case ever be successfully brought to trial? A worker is presumptively less informed about corporate policy and the laws that often underlie and shape it than are those above her who set this policy. The courts need to ensure that when policies are assessed, they are deemed passable only if potential plaintiffs are armed with the knowledge that they will need to make "reasonable" decisions when they are called upon to do so.

TOWARD DISMANTLING THE RIGIDITY: RECONCEPTUALIZING THE PARADIGM

Professor Vicki Schultz argues that the conceptualization of sexual harassment on the job as necessarily encompassing a paradigmatic pursuit with explicitly sexual overtones has rendered decisions overly rigid within the narrow strictures of *quid pro quo* and hostile work environment.[49] According to Schultz:

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[48] *Id.*

[49] Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (Apr. 1998).

> That feminists (and sympathetic lawyers) have inspired a body of popular and legal opinion condemning harassment in such a brief period of time is a remarkable achievement. Yet the achievement has been limited because we have not conceptualized the problem in sufficiently broad terms. The prevailing paradigm for understanding sex-based harassment places sexuality—more specifically male-female sexual advances—at the center of the problem. ...Although this sexual desire-dominance paradigm represented progress when it was first articulated as the foundation for quid pro quo sexual harassment, using the paradigm to conceptualize hostile work environment harassment has served to exclude from legal understanding many of the most common and debilitating forms of harassment faced by women (and many men) at work each day.[50]

Enshrined in the prevailing paradigm, then, is the dangerous notion that the disparate treatment of women at work (lack of mentoring, social exclusion, *etc.*) lies somehow outside of the realm of that which is actionable.[51] It is precisely this sort of rigidity of thinking that permeates lower court decisions, making arbitrary and artificial distinctions among victims and their claims, and creating a false sense that it is acceptable to do so.

In a decision relegating a plaintiff's case to a hostile work environment claim and calling for the invocation of the affirmative defense in a sexual harassment suit, the court in Newton v. Caldwell Laboratories was left to assess the validity of the lower court's determination that "Even assuming that (the supervisor) pursued [Newton] after their affair, there is no evidence that job benefits were associated with submission to those advances."[52]

The court's reasoning is yet another example of how harassment jurisprudence allows discrete parcels of facts and reasoning to predicate determinations that should be premised in broader considerations. Has a woman been made to feel encroached upon or unjustly scrutinized/ignored/threatened at work by virtue of the fact that she is a woman? This query needs to underlie a just adjudication of a harassment dispute; reliance on the explicit amounts to a failure to discern injustice from a holistic, "totality of the circumstances" analysis. In Newton, despite the fact that "Newton testified that [her supervisor] forced her to participate in a sexual act against her will..., continually 'hovered' around her ...and could not reach an agreement with another supervisor to allow Newton to transfer

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[50] *Id.* at 1686

[51] *Id.*

[52] Newton v. Caldwell Lab., 156 F.3d 880, 883 (8th Cir.1998).

from [his] supervision,"[53] the court, adhering to rigid technicalities, found that "[b]ecause Newton's claim does not involve either fulfilled threats or other detrimental employment action resulting from her refusal to submit to [her supervisor's] sexual overtures, Newton's claim 'should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.'"[54] Indeed, despite the fact that the plaintiff testified to having suffered one of the most severe forms of the indignities actionable under Title VII—having been forced to commit a sexual act against her will—her case was not considered for a moment as a *quid pro quo* claim.

TOWARD DISMANTLING THE RIGIDITY: HOW WAS AGENCY THEORY CIRCUMVENTED IN ELLERTH?

It is also important to point out that the Supreme Court in Ellerth cites Restatement §219(2)[55] to expound upon all of the recognized circumstances that impute enterprise liability, but somehow manages to dismiss each plausible means of finding employer liability as inapplicable. I argue not that the Supreme Court was incorrect in its interpretation, but merely that it did not have to come to the interpretation that it did. According to the Restatement § 219(2) as cited by Ellerth:[56]

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Looking at how the Court systemically rejected each of these four scenarios may lead one to question the necessity of interpreting these terms as not applicable to Ellerth's situation. According to the Court, (a) and (c) are not applicable,[57] and I posit that in the context of most supervisor harassment, this is arguably acceptable. (b), too, is dismissed, as Ellerth sought the imposition

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[53] *Id.* at 881.

[54] *Id.* at 883, quoting Ellerth, 118 S. Ct. at 2265.

[55] Rest. 2d. Agen., § 219(2) (1957 Main Vol.) (1958).

[56] Ellerth, 118 S. Ct. at 2267.

[57] *Id.*

of a strict liability, and not a negligence standard in her case.[58] The Court then turned its attention to subsection (d) as a possible means for imposing enterprise liability. "As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power."[59]

The Court, however, in setting up this contrast, cites to the Restatement of Agency and its definition of "apparent authority." According to the definition, however, apparent authority is "apparent" in the eyes of the third party (here Ellerth), and furthermore:

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons. ... The power to deal with third persons which results from (apparent authority) may, however, be identical with the power created by authority as it is where the principal's statements to the third person are the same as to the agent and are similarly interpreted.[60]

I submit that empowering a supervisor to fire a subordinate could be seen to qualify that supervisor as having apparent authority in comportment with the definition given in the Restatement. If a harassed victim is under the rational impression that her supervisor can tangibly alter her job status, or even threaten to do so with the legitimate backing of the corporation, why are the threats made to her by that supervisor not well within the ambit of apparent authority with respect to the victim? According to the Ellerth Court: "In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context."[61]

It thus seems that when the supervisor acts in the scope of his employment and harasses a victim, the Restatement imputes liability. Furthermore, according to the Court, when the false impression of authority creates a reliance, an enterprise liability analysis is appropriate. However, when the actual empowerment of a supervisor to alter employment status is misused, the Court construes the analysis to be irrelevant. I argue that this interpretation makes little sense, and that the Court could have reasonably found that apparent authority exists. The Restatement says: "The rules of

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[58] *Id.*

[59] *Id.* at 2267-68.

[60] Rest. 2d. Agen., § 8 and commentary (1957 Main Vol.) (1958).

[61] Ellerth, 118 S. Ct. at 2268.

interpretation of apparent authority are, however, the same as those for authority, substituting the manifestation to the third person in place of that to the agent."[62] Where, then, is the meaning in the distinction between the "misuse of actual power" and the "false impression of its existence"?

The Ellerth Court goes on to dismiss the second contingency of subsection (d): the possibility that the supervisor was "aided...by the existence of the agency relation."[63] The Court, after examining the statement that "Proximity...may afford a captive pool of potential victims," declares that the assemblage of people in a workplace environment where any one may do harm to any other naturally casts too wide a net for unfettered enterprise liability to be appropriate, and that "[t]he aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself."[64] The Court then decides to rely on the idea of a tangible employment action as the bright-line division between that harm which any co-worker may inflict on another and that corporately-backed harm which "could not have been inflicted absent the agency relation."[65] The Court declares that "[t]angible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company...."[66] The proposition that an apparent authority analysis is inappropriate must be taken alongside the notion that a supervisor exercising his authority to threaten to take action falls short of the "agency relation" standard. It seems that a corporation which confers power upon a harasser who abuses this power in the course of harassment evades liability under the narrow construction and interpretations of the Court, because the agency connection is invariably severed, regardless of which doctrine is applied.

The Court, in the course of its analysis, concedes that, "[t]he aided in the agency relation standard, however, is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment."[67] Citing the need for an impetus to report harassing behavior and comportment with the Restatement's tenets, the Court announced its holding.[68]

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[62] Rest. 2d. Agen., § 8 commentary (1957 Main Vol.) (1958)

[63] Ellerth, 118 S. Ct. 2257 at 2268.

[64] *Id.*

[65] *Id.* at 2269.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 2270.

I posit that the Court, while hammering out what looked like a workable framework for grappling with Title VII claims, was not bound to construe the law as it did, and that other models of grappling with claims might have been more useful. These models may be discerned from other areas of law.

THE LAW THROUGH A NEW LENS

"As knowledge, needs, and social values evolve with time and changed circumstances, what once seemed innocuous may grow noxious..."[69]

"[C]hanged circumstances or new knowledge may make what was previously permissible no longer so."[70]

"Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for analysis of a problem; the defendant's interference with the plaintiff's interests is characterized..., and there is nothing more to be said."[71] Prosser wrote those words in 1984 about nuisance, but his words resonate just as deeply with reference to the term "tangible job detriment" and its treatment and promulgation in the context of sexual harassment law. With this duality of the two spheres of law in mind, I will attempt to show why the evolution of the actions of trespass and nuisance is a conceptual model whose doctrinal tenets might be a well-applied framework within which to view sexual harassment jurisprudence. My purpose in proposing this is to analogize the inequities in the development of the laws and to raise awareness of a plaintiff-centered view of circumstances that has been encouraged by certain advocates in response to tensions in the area of property encroachments. It is important to note that state tort law varies from state to state, and that I will therefore be looking at the common law as it developed along the lines of general trends.

RIGHTS, REASONABLENESS, AND RESPONSIBILITY IN TENSION

I have already argued that recognizing that a woman has a right to hold employment unfettered by gender-fueled adverse employment action, or a real threat of the same, will realize the goals of Title VII fully, while keeping

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[69] John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 Colum. J. Envtl. L. 1, 17 (1993).

[70] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031(1992).

[71] W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 571 (5th ed. 1984).

technicalities from denying women in certain adverse circumstances from holding their corporations accountable for the job detriments that they have been made to endure. Like the *quid pro quo* and hostile work environment claims available to victims of employment harassment, nuisance and trespass have historically provided victims of invasion with very disparate means of recourse and recovery based upon the technical nature of the damages accrued. Scholarly discourse over the course of the claims' evolution led to the recognition that it serves no purpose to grant recovery to one victim and deny it to another who had been encroached upon in a comparable, but technically distinct manner. Concomitant to this recognition have come arguments for the dismantling of rigid semantic constructs that made the channels victims were encouraged to go down ineffectual in the meting out of appropriate remedies.

Furthermore, the arguments and analyses that have been made in the context of and against what was the disparity between the two claims mirror the current disparity between the claims of *quid pro quo* and hostile work environment. In each of the scenarios, two claims seek to remedy an encroachment resulting inevitably in the course of the defendant's non-negligent maintenance of an operation on his property. In each case, one claim affords a more direct and plaintiff-friendly remedy, and the two claims are distinguished based upon the technical nature of the damages sustained by the plaintiff. A plaintiff's treatment within the legal system may be mapped as follows: After a viable claim of a transgression has been made out before a trier, a plaintiff who has not sustained "actual damages" or a "direct intrusion" is cast from the realm of the more favorable claim and relegated to the second claim. While the first claim would have afforded the plaintiff direct recourse by virtue of the proof that the encroachment occurred and without much further inquiry, the second claim then predicates recovery on an assessment of "reasonableness," typically pitting the defendant's behavior against the now relative right of the plaintiff to be free from interference. The collapse, confluence, or even the reconciliation of the claims of nuisance and trespass has long been promoted by policy-makers, environmentalists, and scholars who have recognized the channeling of victims down wildly inconsistent paths in pursuit of recompense. Such people have argued for a plaintiff-centered view of rights, reasonableness, and of the constrained zone of protection plaintiffs have historically been afforded against intolerable interferences. Such a view would not prevent claims from being made out based upon the technical nature of the damages sustained; rather a holistic analysis of the totality of the situation would be used in the assessment. Plaintiffs who have withstood substantial interference but could not translate that interference into "tangible" damages would not have to suffer the indignity of having the adjudication of their cases turn on the behavior of the defendant. Indeed, the defendant could not then march into court using the reasonableness, utility, or non-negligence of his behavior as a proffered shield from liability. An analysis of these arguments gives rise to the stark analogy

between the movements that have been occurring over time in property law, and the realizations, recognitions, and ameliorations that need to be made in the law of sexual harassment.

THE HISTORY OF NUISANCE LAW

The inception of the private nuisance action occurred in the twelfth century, and the cause of action evolved in the thirteenth and fourteenth centuries, affording recourse to a plaintiff whose use and enjoyment of his own land had been interfered with.[72] The notion of an action on the case to redress more indirect encroachments began to take shape by the onset of the seventeenth century,[73] and plaintiffs had a choice between parallel actions in different courts and with different remedies.[74]

By the start of the American Revolution, a legal doctrine called *sic utere tuon ut alienum non laedas* ("one should use his own property in such a manner as not to injure another") had been promulgated.[75] Under this doctrine, those facets of land use and enjoyment deemed essential (light, clean air, *etc.*) could not be transgressed upon under the threat of an absolute liability.[76] By the nineteenth century, however, the tenets of *sic utere* began to clash with the cornerstone of economic and industrial development—economic incentives to build, experiment, and cultivate one's land without having to compensate one's neighbor for the inevitable transgressions that progress, even prudently encouraged progress, would generate.[77] At this crucial point in the history of the nuisance claim, the law took two very important steps to mitigate the impact that the protections historically extended to the sanctity of land ownership would have on progress. First, a series of legal doctrines were promulgated by the courts to limit the sphere and reach of the nuisance claim, by exculpating mills, railroads, and other operations working under government auspices, in the absence of negligence.[78] Second, courts increased the burden imposed upon

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[72] Jeff L. Lewin, Boomer and the American Law of Nuisance: Past, Present, and Future, 54 Alb. L. Rev. 189, 193 (1990).

[73] Lewin, *supra* note 71, at 194.

[74] Courts of equity could dispense injunctions or "abatements," whereas common law courts awarded money damages.

[75] *Id.* at 196.

[76] *Id.*

[77] *Id.* at 197.

[78] *Id.* at 197-198.

a plaintiff to make out a public nuisance claim "by narrowing the definition of special injury through a requirement that the plaintiff's damages be 'different in kind' from those of the general public."[79]

NUISANCE AND TRESPASS

The evolution and ideological confluence of the actions of nuisance and trespass is an ideal mirror that reflects the *quid pro quo*/hostile work environment dichotomy. Originally, a colorable claim for trespass could only be made when the plaintiff's land had sustained an actual physical invasion.[80] In contrast, a defendant's interference with the plaintiff's use and enjoyment of her holdings that did not entail a direct palpable intrusion relegated the plaintiff to an action for nuisance.[81] The two claims afforded vastly disparate remedies; the trespass remedy was much stronger than the remedy typically awarded in nuisance cases.[82] Additionally, the statute of limitations for trespass were generally far more generous than that for nuisance.[83]

This distinction between the claims turned on the technical nature of the damages sustained, and, as courts, scholars, and theorists soon came to realize, focused little on the totality of the circumstances surrounding the plaintiff's sustained damages and injury:

> [I]n a pollution situation....suppose that Arthur operates a cement plant that deposits dust on Galahad's adjoining land. This scenario has been treated as a classic nuisance case. But could it not just as easily be argued that a trespass occurred? Even though invisible particles were the offending agent, would not their intrusion upon Galahad's possession constitute a direct physical invasion?[84]

When examining the courts' rote and mechanistic application of the principles set forth in Ellerth, it is helpful to look to the commentary of scholars on the nuisance/trespass issues as analogous in certain respects. In the context of

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[79] *Id.* at 198 (citing M. Horowitz, The Transformation of American Law, 1780-1860, at 76-78 (1977)).

[80] H. Marlow Green, Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future, 30 Cornell Int'l L.J. 541, 558 (1997).

[81] *Id.* at 558.

[82] *Id.*

[83] *Id.*

[84] *Id.*

tracing the nuisance/trespass entanglement, Green notes that "Although largely relegated to history, the distinction between direct and consequential harm has still caused problems in this century."[85] This resonates strongly with the precepts put forth by Judge Weinstein in Leibovitz, and the other rejected tenets of Title VII jurisprudence claiming that the actual/constructive damages distinction should not impinge upon the recovery of a plaintiff who has been encroached upon. Furthermore, like the progressive thinking apparently stymied by Ellerth, Green's reasoning in analyzing the *status quo* recognizes the danger of allowing a common sense approach to constructing law to falter under the weight of technical minutiae. After expounding upon the Galahad and other paradigmatic scenarios, Green notes: "These examples demonstrate that the question of whether a plaintiff has a remedy under classic notions of trespass or nuisance can easily become dependent upon a court's willingness to accept ridiculous semantic arguments."[86]

In the area of nuisance, the movement of certain courts away from rigid applications of static rules and towards a more just, holistic, and realistic analysis of liability and recompense can be mapped by looking at property jurisprudence in this century. A variety of twentieth-century cases demonstrate the courts' willingness to get beyond the technical distinction between an actual invasion and an intangible encroachment and focus on the extent of the injury incurred by the plaintiff as a result of the defendant's behavior.

According to Green, cases like Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336 (1948) were once the jurisprudential standard.[87] In that case, the plaintiff complained that the bright lights from the defendant's racetrack, which bordered his land, interfered with the plaintiff's quiet enjoyment of his own land.[88] The court's two-part analysis of how to resolve the claim mirrors almost exactly the analytical structure of courts' treatment of Title VII sexual harassment suits after Ellerth. The first step the court took in its analysis was to relegate the claim from an action in trespass (more favorable to plaintiffs) to a nuisance action (more favorable to defendants).[89] "[T]he mere suggestion that the casting of light upon the premises of a plaintiff would render a defendant liable without proof of any actual damage,

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[85] *Id.* at 559.

[86] *Id.* at 558-559.

[87] *Id.* at 559.

[88] *Id.*

[89] *Id.*

carries its own refutation."[90] In the second step of the court's analysis, the encroachment was found not to qualify as a nuisance, because under the Restatement of Torts, the social utility of the defendant's illumination divested the plaintiff of his right to recover.[91]

This two-part analysis shares the framework of the harassment cases discussed previously, in which cases of harassed victims who walked away with no tangible job detriment were first cast out of the realm of a *quid pro quo* claim and then relegated to a hostile work environment claim. *Quid pro quo* claims are 1) easier to make out than hostile work environment claims (only the harassment and damages must be shown, as opposed to needing to meet the heightened threshold standard of proving a work environment where gender-based hostility is sufficiently pervasive); and 2) impervious to the affirmative defense that contemplates the reasonableness of the defendant. Similarly, trespass claims appear to have been more easily discernible (the invasion being tantamount to the tangible job detriment) than nuisance claims, and viable irrespective of any consideration of the defendant's behavior or reasonableness.

A PATH PAVED WITH THEORIES: EXAMINING THE APPROACHES USED

It is important to note that while the evolution of nuisance law and the imposition of liability led to many compromise doctrines that ultimately failed,[92] these doctrines may serve as alternate ideological models in cases of harassment, where the issues[93] that precluded the compromises in the nuisance cases are not present.[94] It is to the evolution of the compromise models and

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[90] *Id.*, quoting Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847 (Or. 1948).

[91] *Id.*

[92] According to Lewin, the utility of the defendant's conduct invariably became a factor in a balancing of the equities. The crippling of technology and the march of progress had to be a consideration in nuisance jurisprudence, because encroachment was often concomitant to the defendant's activities. Lewin, *supra* note 71.

[93] It should be noted that often, a nuisance was an inadvertent and inevitable byproduct of technological advances, whereas harassment remains unnecessary.

[94] I posit that in the case of harassment, severe and predictable harassment is not an inevitable result of a corporation's normal functioning. Additionally, concerns that an activity is contextually out of place (unreasonably hazardous) are not germane here; there is no locale on earth where harassment is tolerable as typical. Thus, while none of the compromise doctrines worked in the nuisance context, they might remain viable in the harassment context: "None of these compromises was successful, and they ultimately undermined the natural rights foundation of property rights, setting the stage for a positivist reformulation of nuisance law in the Restatement of Torts." *See* Lewin, *supra* note 72, at 200.

doctrines that I now turn. These models might enable society to reconceptualize sexual harassment as a clash between what is unreasonable to ask someone to endure and what is unreasonable to ask a corporation to accept liability for.

The onset of the industrial age placed the rights and responsibilities of members of society in conflict. The promulgation of doctrines designed to achieve a compromise between the absolute right of a plaintiff not to be encroached upon and a defendant not to be held liable while engaging in non-negligent cultivation of his own affairs was soon underway. I assert that each of these doctrines demonstrates a different way of conceptualizing any transgression in which the transgressor acted without personal and direct culpability. The transposition of these doctrines over the backdrop of sexual harassment is thus powerful; the idea of a non-negligent defendant pleading his own reasonableness resonates with a non-negligent corporation seeking to divest a victim of a hostile work environment claim for compensation.

Should all victims of hostile work environments be given unfettered recourse without any regard to the nature of the damages they each sustained? I do not believe that they should, but I do believe that more malleable guidelines need to be put into place that enable courts to focus on the totality of the circumstances without getting enmeshed in technical aspects of the scenario. This will force the judicial system to focus on those aspects of Title VII violation that the legislation demands be looked at: severity of harassment, how easily harassment could have been foreseen, and, overall, the true nature of the corrosion of well-being and sanctity that a victim has experienced based upon gender. The operable argument is that while, admittedly, one has no legal property interest in one's job, the right that one has *at* work to be free from abusive, discriminatory behavior may be properly analogized to the inviolability of a landowner's right to be free from unreasonably intrusive encroachments.

THE PLAINTIFF-CENTERED STATIC THEORY

According to the Plaintiff-centered static theory, potential clashes of rights and reasonableness were parsed out in favor of emphasizing the plaintiff's absolute right not to be encroached upon.[95] According to Lewin:

> Within the static model, the primary restriction on the rights of a residential plaintiff was the threshold requirement of substantial injury. A plaintiff's property rights were infringed only if the

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[95] *Id.* at 200.

> offending activity substantially interfered with comfort and enjoyment and materially depreciated the property's value.[96]

Applying such a theory to sexual harassment, one might wonder if the "material depreciation" requirement was as unforgiving when this theory was under consideration as the "tangible job detriment" requirement is currently. I submit that it is not as unforgiving; material depreciation of land requires a substantial interference that disables the land in some way from looking and functioning as it once did. Such an alteration in land causes its value to go down. In the sexual harassment context, one may say that harassment severe enough to impair or disable a victim to a certain extent—like unrealized but imposing threats made by one with the continuing power to carry them out—should be seen as constituting a substantial interference that causes a tenable drop in the status and well-being of a woman in the workplace—a material depreciation of a sanctity that Title VII was enacted to safeguard. The corrosive effects of such abuse continued over time should be appreciated in this context. A focus on the rights of plaintiffs (as posited by this theory) that attempted to grapple with the administration of the law of nuisance would indeed be viable in the arena of sexual harassment.

THE DEFENDANT-CENTERED DYNAMIC THEORY

The Defendant-centered dynamic theory developed around the Lockeian ideal that each member of society relinquishes rights as he/she partakes in that society, so is each member able to reap the benefits of each other member having relinquished rights.[97] Essentially, then, behavior of the defendant is made central by this theory, and an encroachment is only viewed as actionable when it results from a legal wrong.[98] This is akin to the mechanism at work under the current legal regime in sexual harassment law. Once in the realm of a hostile work environment claim, a case in which a corporation acted non-negligently and the victim did not speak out is essentially foreclosed. The correctness of the defendant's behavior is a shield from liability, irrespective of what harm has been sustained by the plaintiff. The rationale for such a focus has historically been the encouragement of technological progress and economic expansion,[99] a focus that has no place in sexual harassment cases. While a corporation may be held liable for the behavior of a supervisor who was properly educated not to harass, this will

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[96] *Id.* at 201.

[97] *Id.* at 201.

[98] *Id.* at 201.

[99] *Id.* at 201.

only occur when the behavior reaches a certain threshold level of encroachment. The amounts corporations will be forced to pay out should not bankrupt the corporations or prevent them from operating efficiently.

COMPETING NATURAL RIGHTS AND THE RULE OF REASONABLE USE

The theory of competing natural rights/rule of reasonable use was developed as a compromise vantage point midway between the two aforementioned ways of conceptualizing transgressions. The goal, according to Lewin, was to "expand the protection afforded to plaintiffs under the dynamic model without abandoning the conception of property rights as being natural and absolute."[100] Again, however, two variations of the test promulgated under this theory came into being, one which emphasized the rights of the plaintiff and another which emphasized the rights of the defendant.[101] According to the plaintiff-centered version of this theory:

> The defendant's right to beneficial use was limited by the plaintiff's right to be free of unreasonable interference. By focusing on the unreasonableness of the damage to the plaintiff instead of on the reasonableness of the defendant's conduct, this version of the reasonable use rule would have imposed nuisance liability on even the most well-run industrial enterprises if they inflicted an unacceptably high level of harm on neighboring landowners.[102]

I posit that such a general approach toward harassment cases would redress the unjustness inherent in the courts' application of the Ellerth holding. It is interesting to note that while under the courts' promulgation of the nuisance doctrine, plaintiffs could not recover for "purely aesthetic injury," injury in the form of "physical invasion *or* damage to the plaintiff" was, by contrast, sufficient for recovery.[103] It should also be noted that political and economic pressures to curb the zone of plaintiffs' absolute rights to be free of interference impinged upon a proper promulgation of plaintiff-centered tests.[104] In the context of sexual harassment, society gains nothing from allowing victims to go uncompensated for hostile work environment

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[100] *Id.* at 202.

[101] *Id.* at 202.

[102] *Id.* at 204.

[103] *Id.* at 205.

[104] *Id.* at 206.

harassment; in the case of nuisance law, progress was invariably forestalled by the recognition of plaintiffs' rights not to be encroached upon by technology.

THE CORRELATIVE THEORY AND THE "RELATIVE RIGHTS" RULE OF REASONABLE USE

By the 1930s a "balancing of the equities" approach was predominant in nuisance assessments.[105] According to this approach, the impact of stopping the defendant's behavior was weighed against the impact of stopping the harm inflicted upon the plaintiff.[106] Under the newly-emerging Correlative theory, "rights were relative in that they were defined by the social context, including existing economic conditions and technology."[107] How would this doctrine apply to sexual harassment? It seems as though even if absolute rights ceased to be seen as such, and a relativistic view of conflicting rights were espoused, harassment that rose to a certain level of job disturbance would be viewed as incurring liability for a non-negligent corporation.

These theories provide a lens through which harassment law may be seen as evolving in ways that systemically disadvantage certain plaintiffs and ignore the corrosive effects of the infliction of non-tangible damages from gender-based harassment.

SO NOW WHAT?

I have argued, for a multitude of reasons, that the holding in Ellerth has resulted in lower courts using literal and technical language to disregard sexual harassment. This has led to a disparity in the treatment of victims that undermines the goals of Title VII, extinguishes claims prematurely, and has created poor policy implications. I have shown that the court's reasoning was not, as it maintained, the only reasonable approach it could have taken. Finally, I have introduced a model of a similar jurisprudential situation in which a comparable disparity was discerned and grappled with. How should the law be contoured? While the details of such a scheme are outside the scope of this paper, I posit that courts should be encouraged to look at the totality of the circumstances with respect to the severity, frequency, and even the foreseeability of the harassment a victim is able to prove in court. At this point, a thoughtful analysis, and not a mechanized formula, should determine whether or not an assessment of reasonableness is appropriate. It is through

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[105] *Id.*

[106] *Id.*

[107] *Id.* at 207.

such a shift in jurisprudence that the realities faced by many women in the workplace will at last be given fair recognition without pigeon-holing victims' experiences or laying the responsibility and burden of preventing such experiences squarely at the feet of the victims.