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Harassment: A Separate Claim?

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HARASSMENT: A SEPARATE CLAIM?

BY SANDRA F. SPERINO[*]

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INTRODUCTION

In 2017, media attention focused on sexual harassment as victims reported harassment and assault as part of the #MeToo movement. Although many of the accounts focused on sexualized treatment, this treatment often occurred within a broader context of unequal treatment, such as pay inequality and the disproportionately low promotion rate of women into leadership positions. For decades, legal scholars have noted the interplay between broader work constructs and harassment.[1]

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1. Vicki Schultz, *Reconceptualizing Sexual Harassment,* 107 YALE L.J. 1683 (1993) [hereinafter *Schultz, Reconceptualizing Sexual Harassment*]; *see also* Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory,* 38 HARV. C.R.-C.L. L. REV. 91 (2003) [hereinafter Green, "*Workplace Dynamics"*]; Tristin K. Green, *Work Culture and Discrimination,* 93 CALIF. L. REV. 623 (2005); Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029 (2015); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach,* 101 COLUM. L. REV. 458 (2001).

When combined, stories and scholarship offer a powerful critique of the way many judges and practitioners currently conceive of harassment: as a separate, stand-alone "claim" under Title VII. When the Supreme Court first recognized harassment in the mid-1980s, it created frameworks for harassment cases that seemed to separate harassment from other types of disparate treatment. It also tended to separate various categories of harassment, labeling harassment with words such as "quid pro quo" or "hostile work environment."[2] Hostile-work-environment cases often focus on whether the alleged conduct was unwelcome, whether it was "severe or pervasive," and whether it objectively and subjectively altered the work environment of the plaintiff.[3]

In contrast, when a plaintiff files other types of disparate-treatment cases, the courts use different analytical frameworks. For example, if a plaintiff alleges single-motive disparate treatment based on circumstantial evidence, courts usually analyze the case under the three-part, burden-shifting framework developed in *McDonnell Douglas v. Green*.[4]

This Article argues that viewing harassment as a separate, stand-alone claim likely misinterprets Title VII and the Supreme Court's jurisprudence surrounding harassment. Unfortunately, this error represents the dominant view among federal appellate and district courts and has profound consequences for the reach of harassment law.

This Article argues that harassment is not, and never was, intended to be a separate claim under Title VII.[5] It does so by showing that the history of discrimination law is plagued with procedural ambiguity. The Supreme Court has regularly used civil-procedure words like "proof," "burden," and "claim" inartfully.[6] This inexact use has resulted in decades of confusion.[7]

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2. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998).

3. *See, e.g.*, Fuller v. Idaho Dep't of Corr., 865 F.3d 1154, 1174 (9th Cir. 2017).

4. *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S.Ct. 1338, 1354 (2015); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

5. This Article focuses on sexual harassment and thus Title VII. However, the arguments made in this Article would also apply in other contexts, such as the Age Discrimination in Employment Act and the Americans with Disabilities Act.

6. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 339 (2013) ("Title VII retaliation *claims* must be *proved* according to traditional principles of but-for causation. . . . ") (emphasis added); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009) (quoting Schaffer v. Weast, 546 U.S. 49, 56 (2005)) ("Where the statutory text is 'silent on the allocation of the *burden* of persuasion,' we 'begin with the ordinary default rule that plaintiffs bear the risk of failing to *prove* their *claims*.'") (emphasis added); *cf.* Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 564 (2014) (exposing the commonality of "errors involv[ing] precision in word choice" in Supreme Court opinions based partly on "sharply contrasting views on the proper definition of some words and even their existence").

7. *See, e.g.*, Green, *Workplace Dynamics*, *supra* note 1, at 151 (discussing "confusion surrounding claims alleging system-wide discriminatory bias operating through decentralized, highly subjective decisionmaking processes"); Grossman, *supra* note 1, at 1035 (discussing how "[t]he *Meritor* Court . . . cemented confusion over the proper standard for employer liability"); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 120

In several instances, the Supreme Court has stepped in to clear up the procedural confusion.[8] When doing so, it often interprets federal discrimination law in ways that are procedurally distinct from the dominant paradigm existing at the time. This Article provides an overview of a number of instances in which the Supreme Court has done this. Harassment law is equally due for the same procedural clarification. Consistent with current Supreme Court jurisprudence, courts can and should clarify that harassment is not a stand-alone claim.

This jurisprudential transition would have profound procedural, substantive, and theoretical implications. It affects what a plaintiff must plead to survive a motion to dismiss. In addition, it affects whether a judge can issue jury instructions related to harassment if a plaintiff does not directly allege harassment in a complaint. On the substantive and theoretical levels, it affects how courts and litigants view harassment's connection to other types of facts supporting discrimination. Viewing harassment as a Title VII claim, rather than a stand-alone harassment claim, also affects whether and how courts will apply 42 U.S.C. § 2000e–2(a)(2) to harassment facts.

This Article proceeds as follows: Section I describes Title VII's statutory language and the main Supreme Court cases addressing harassment law. This section focuses on the way the Supreme Court uses words like "claim" and "theory" to describe harassment and shows how these words could cause courts and litigants to be confused about what harassment doctrine is. Section II discusses the procedural, substantive, and theoretical consequences that stem from perceiving harassment as a separate claim under Title VII. In Section III, this Article examines other instances in which the Supreme Court has issued decisions that are procedurally ambiguous. As a direct result, the lower courts and litigants then developed a dominant understanding about the procedural implications of the ambiguity. In later cases, the Supreme Court has returned to these earlier cases and interpreted them in ways that often contest the dominant procedural paradigm. Section IV explores how this same shift can and should occur in harassment law.

I. BACKGROUND

Title VII is the cornerstone federal employment discrimination statute. Title VII prohibits an employer from discriminating against a worker on the basis of race, sex, national origin, color, or religion.[9] Title VII's main operative provision consists of two subparts. Under the first subpart, it is an unlawful employment practice for an employer to do the following:

(2011) ("Even assuming that some confusion would be generated by a lack of guidance, the Supreme Court's frameworks have generated quite a few problems on their own.").

8. *Nassar*, 570 U.S. at 355; Swierkiewicz v. Sorema N. A., 534 U.S. 506, 509–10 (2002).

9. 42 U.S.C.A. § 2000e-2(a) (West 2012).

> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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[.][10]

Under Title VII's second subpart, it is unlawful for an employer to do the following:

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[11]

These two subparts form the foundation of Title VII's text.[12] The field of employment discrimination is laden with proof structures. The federal courts have developed an elaborate system of analytical frameworks through which courts evaluate cases alleging employment discrimination.[13]

The Supreme Court first recognized that plaintiffs can prevail under Title VII if they face harassment (or a hostile work environment) in *Meritor Savings Bank v. Vinson*.[14] In *Meritor*, the Supreme Court started its analysis by quoting the language of 42 U.S.C. § 2000e–2(a)(1).[15] This reference is important for two reasons. First, it means that the Court derived the statutory authority for harassment from the main operative provision of Title VII. Harassment is not a different claim, separately stated within Title VII. Rather, it is part of the same provision from which most of the other theories of discrimination derive.

Second, as discussed in more detail below, it means that the courts have not fully articulated the possible scope of harassment. Title VII's main operative provision has two subparts, and the Supreme Court has yet to consider how harassment would proceed under the second subpart.

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10. *Id.* at § 2000e-2(a)(1).

11. *Id.* at § 2000e-2(a)(2).

12. As stated earlier, Congress amended Title VII in 1991. However, this does not change the fact that the foundational text of Title VII is contained in 42 U.S.C.A. § 2000e-2(a) (West 2012).

13. *See generally* Sperino, *supra* note 7. Fully describing each framework is not necessary for this Article. However, by way of example, the courts have developed different frameworks to analyze cases involving direct evidence, circumstantial evidence of single-motive disparate treatment, circumstantial evidence of mixed-motive under Title VII, pattern or practice, and disparate impact.

14. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

15. *Id.* at 63.

In *Meritor*, the Supreme Court discussed whether the words "terms, conditions, or privileges of employment" encompass sexual harassment.[16] The Court stated, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[17] The Court continued, "we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[18] The Court then stated that harassment affects the "terms, conditions, or privileges of employment" when it is "sufficiently severe or pervasive to alter the conditions of the victim's employment."[19]

The textual focus of *Meritor* is on the words "terms, conditions, or privileges of employment." Importantly, the Supreme Court did not purport to fully define these words.[20] Rather, the Supreme Court defined one set of circumstances under which those terms would be fulfilled.[21] In other words, a severe or pervasive "hostile work environment" is one way for a plaintiff to establish that she faced discrimination in the terms, conditions, or privileges of her employment because of a protected trait.[22]

In *Meritor*, the Supreme Court did not clearly articulate what it was creating in a procedural sense. Several parts of the opinion demonstrate that the Court was not recognizing a new separate cause of action. For example, the Court cited to the main language of Title VII.[23] The case focused on defining whether harassment could be a type of harm that fell within the language of 42 U.S.C. § 2000e–2(a)(1).[24] The Supreme Court also used the word "theory" to describe "hostile work environment."[25] Unfortunately, it also used the word "claim" to describe "hostile work environment."[26]

It is vitally important to know what the Court created in *Meritor*. If the Supreme Court created a separate "claim" called harassment (or "hostile work environment"), then *Meritor* should be read as starting a conversation about the "elements" of that separate claim. As such, a plaintiff would be required to prove the elements of this claim to prevail on a harassment claim.

However, a better reading is that *Meritor* recognized a subset of harm within the contours of Title VII. Although the differences between these two descriptions may seem to be mere semantics, Section II demonstrates how

16. *Id.* at 64.
17. *Id.* (internal citations omitted).
18. *Id.* at 66.
19. *Id.* at 67 (citation omitted).
20. *See id.* at 63, 65, 70, 72 (discussing the definitions of "sexual harassment" and "employer," but not "terms, conditions, or privileges").
21. *See id.* at 64 ("unwelcome sexual advances that create an offensive or hostile work environment").
22. *Id.* at 67.
23. *Id.* at 63.
24. *Id.*
25. *Id.* at 68, 71.
26. *Id.* at 59, 62, 67, 68, 73.

the choice among these alternatives creates radical differences in the way we conceive of harassment.

The Supreme Court did not clarify the ambiguity in its next harassment case, *Harris v. Forklift Systems, Inc.*[27] Notably, in *Harris*, the Court did not use the word "claim" to describe harassment as a separate cause of action. The Court noted:

> When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," . . . that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,". . . Title VII is violated.[28]

The Supreme Court held that a plaintiff alleging harassment need not allege psychological injury but would be required to establish that she subjectively believed the environment to be hostile or abusive and that the environment would be so viewed by an objective person.[29] In making this latter inquiry, the Court noted:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[30]

The Court also indicated that the harassing conduct must be unwelcome.[31]

Just like in *Meritor*, *Harris* does not focus on setting up a distinct cause of action or claim under Title VII. Rather, *Harris* further clarified

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27. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

28. *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (internal brackets and quotation marks omitted)).

29. *Id.* at 21–22.

30. *Id.* at 23. Although there are some variations, courts tend to articulate harassment as requiring proof that the plaintiff is a member of a protected class, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that it affected a term, condition, or privilege of employment. Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 801 (8th Cir. 2009). When determining whether harassment affected a term, condition, or privilege of employment, courts look at both objective and subjective components, requiring the harassment to be "severe or pervasive enough to create an objectively hostile or abusive work environment," as well as requiring the victim to subjectively perceive the working conditions to be so altered. *Id.*

31. *Harris*, 510 U.S. at 21–22 ("Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

when the harm alleged in a sexual harassment case will be sufficient to meet the "terms, conditions, or privileges of employment" language of Title VII.

In *Oncale v. Sundowner Offshore Services., Inc.*,[32] the Supreme Court considered whether same-sex sexual harassment could be discrimination on the basis of sex under Title VII. As with *Meritor*, the Supreme Court began its substantive discussion by citing to 42 U.S.C. § 2000e–2(a)(1).[33] This time, the court focused on what it means to discriminate against an individual "because of sex."[34] The Court held that a man can indeed discriminate against another man because of his sex.[35]

Without explaining the procedural implications, the Supreme Court used the word "claim" multiple times to describe same-sex sexual harassment. The Court noted:

> Some, like the Fifth Circuit in this case, have held that same-sex sexual harassment claims are never cognizable under Title VII. . . . Other decisions say that such claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire). . . . We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.[36]

At the same time, the Court made clear that same-sex sexual harassment fell under the general umbrella of discrimination provided for in 42 U.S.C. § 2000e–2(a)(1).[37]

Other major Supreme Court cases discussing harassment deal with circumstances when an employer will be held liable for such harassment.[38]

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32. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78–79 (1998).
33. *Id.* at 78.
34. *Id.*
35. *Id.* at 79.
36. *Id.* (citing Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988) (internal citation omitted)).
37. *Id.* at 82.
38. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746–47 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998). In these cases, the Supreme Court created a multi-step process for determining when an employer will be held liable for harassment. An employer will be liable for a supervisor's harassment if it results in a tangible employment action. *Ellerth*, 524 U.S. at 762. The Court defined a tangible employment action as "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." *Id.* at 761. If a supervisor engages in harassment that does not result in a tangible employment action, the employer will be liable for the harassment unless the employer can establish an affirmative defense. As articulated by the Court, the affirmative defense has two 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." *Id.* at 765.

These cases reiterate that harassment (or "hostile work environment") falls within the larger ambit of a Title VII violation. For example, in *Faragher v. City of Boca Raton*, the Court considered whether an employer is liable for "sexual harassment of subordinates [that] ha[ve] created a hostile work environment amounting to employment discrimination."[39] Simply put, harassment is one subset of discrimination harm. In *Faragher*, the Court referred to the plaintiff's claim as a "Title VII claim"[40] and noted that its prior cases discussed the "substantive contours of the hostile environments forbidden by Title VII."[41]

In *Burlington Industries, Inc. v. Ellerth*, the Court quoted 42 U.S.C. § 2000e–2(a)(1) and noted that the text of Title VII does not contain the words "hostile work environment."[42] *Ellerth* described *Meritor* as follows: "There we considered whether the conduct in question constituted discrimination in the terms or conditions of employment in violation of Title VII."[43] The Court continued:

> We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII. We distinguished between *quid pro quo* claims and hostile environment claims, see [*Meritor*], and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive.[44]

This part of *Ellerth* is important because the Court appears to understand *Meritor* as recognizing at least two different fact patterns that will establish harassment liability under Title VII: "quid pro quo" and "hostile environment."[45] This would suggest that there are at least two, if not more, evidentiary paths to establishing what the Court called harassment. However, in *Faragher* and *Ellerth*, the Court once again used the word "claim" when referring to harassment. For example, in *Faragher*, the Court noted that "environmental claims are covered by the statute."[46]

By looking at the Supreme Court harassment jurisprudence in its totality, and with an eye toward procedure, a few themes emerge. It is certainly correct that the Supreme Court has used the word "claim" to

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39. *Faragher*, 524 U.S. at 780.
40. *Id.* at 780, 784.
41. *Id.* at 788.
42. *Ellerth*, 524 U.S. at 752.
43. *Id.*
44. *Id.*
45. *Id.* at 752–54.
46. *Faragher*, 524 U.S. at 786.

describe harassment. However, in doing so, it has not proclaimed or described any particular procedural importance to the use of this word. The cases also show that the Court has repeatedly noted that harassment is a subset of harm recognized under the language of "terms, conditions, or privileges of employment." There are also at least two kinds of harassment: "quid pro quo" and "hostile work environment." This means that there are at least two paths to establish harassment, so that harassment is, at the very least, not one claim with one set of elements.

The Supreme Court's harassment cases to date are ones textually supported under 42 U.S.C. § 2000e–2(a)(1). This is important for two reasons. First, harassment jurisprudence derives from and is part of Title VII's main operative provision. It is not a stand-alone claim set forth in a separate statutory provision. Second, the Supreme Court has not considered what harassment theory might look like under 42 U.S.C. § 2000e–2(a)(2).

II. HARASSMENT CLAIMS VERSUS TITLE VII CLAIMS

Thinking about harassment as a separate claim with elements, rather than as one way to prove a violation of Title VII, has a number of consequences. Overwhelmingly, courts and scholars use language that perceives harassment as a separate claim.[47] In the interest of full disclosure, I have also used this language in articles, although I am trying to be more careful about using the word "claim." Here are some important implications that follow from this framing choice, ranging from the procedural to the theoretical.

A. Procedural Issues

If harassment is a separate, stand-alone claim from other kinds of discrimination, this directly impacts what a plaintiff must plead in the complaint. The Federal Rules of Civil Procedure require the plaintiff to state the claim and provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[48] Recent Supreme Court cases re-interpret Federal Rule of Civil Procedure 8 to require the plaintiff to plead facts sufficient to plausibly support the claim in the complaint.[49] A judge may

47. *See, e.g.*, Deters v. Rock-Tenn Co., 245 F. App'x 516, 521 (6th Cir. 2007); Mendoza v. Borden, Inc., 195 F.3d 1238, 1242, 1244 (11th Cir. 1999); EEOC. v. G.F.B. Enters., LLC., No. 01-4035-CIV-SEITZ, 2002 WL 1908496, at *1 (S.D. Fla. June 20, 2002). *See also* Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2215 (2018); Laura T. Kessler, *Employm ent Discrimination and the Domino Effect*, 44 FLA. ST. U. L. REV. 1041, 1066 (2017).

48. FED. R. CIV. P. 8(a)(2).

49. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

properly dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), if the plaintiff fails to meet the pleading requirement.[50]

Thinking of harassment as a separate, stand-alone claim means that a plaintiff must use words that suggest harassment and plead facts supporting harassment, even if the plaintiff's complaint otherwise properly pleads other types of discrimination. A court could dismiss the plaintiff's harassment "claim" in such a circumstance, even while allowing other "claims" of discrimination to proceed. Consistent with this view of harassment as a separate "claim," courts often dismiss complaints alleging harassment if the plaintiff fails to plead sufficient facts to support the "elements" of a harassment "claim."[51]

Likewise, if harassment is a separate claim, it would be appropriate for a judge to refuse to consider such a claim at the summary judgment stage or refuse to give jury instructions on such a claim, should the plaintiff not plead the claim of harassment in her complaint.[52] Some courts have articulated harassment in such a way.[53]

Thinking of harassment as a stand-alone claim also has repercussions related to administrative exhaustion. Prior to filing a Title VII claim in court, a plaintiff must file a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") or a comparable state agency.[54] If the plaintiff does not inform the EEOC of a claim, the plaintiff may not later raise that claim in court unless the allegations are reasonably related to the original charge.[55] Courts have dismissed plaintiffs' harassment claims when plaintiffs submit sex-discrimination facts to the EEOC that do not specifically mention acts of harassment.[56] In these instances, the courts seem to view harassment as a separate claim from other claims of discrimination.

In contrast, if harassment is really a Title VII claim, then the plaintiff should be able to proceed with a harassment claim even if her Charge does

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50. *Iqbal*, 556 U.S. at 678.

51. *See, e.g.*, Blomker v. Jewell, 831 F.3d 1051, 1061 (8th Cir. 2016); Edwards v. Prime, Inc., 602 F.3d 1276, 1300 (11th Cir. 2010).

52. For examples of this phenomenon in another context, see Ginger v. District of Columbia, 527 F.3d 1340, 1345 (D.C. Cir. 2008); *see also* Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 105 n.3 (1st Cir. 2005) (refusing to consider a motivating factor test on appeal); EEOC v. Aldi, Inc., No. 06–01210, 2009 WL 3183077, at *12 (W.D. Pa. Sept. 30, 2009).

53. *See, e.g.,* Mason v. S. Ill. Univ. at Carbondale, 233 F.3d 1036, 1044 (7th Cir. 2000) (refusing to instruct jury on "claim" of co-worker harassment where plaintiff only asserted "claim" of harassment by a supervisor).

54. 42 U.S.C.A. § 2000e-5(b) (West 2012).

55. Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 962–63 (4th Cir. 1996).

56. *See, e.g.*, *id.* at 963; *see also* Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 503 (7th Cir. 1994) ("[O]rdinarily, a claim of sexual harassment cannot be reasonably inferred from allegations in an EEOC charge of sexual discrimination."); Callahan v. Univ. of Cent. Mo., No. 12-0281-CV-W-HFS, 2013 WL 796560, at *3 (W.D. Mo. Mar. 4, 2013) (dismissing age harassment claims even though plaintiff specifically mentioned that the terms of her employment were altered); Alston v. U-Haul Co. of Kan., No. 06-2403-CM, 2007 WL 1412672, at *2 (D. Kan. May 10, 2007).

not separately delineate harassment. For example, the EEOC has a form Charge.[57] On the form, there are boxes where complainants can check the type of discrimination faced. Complainants may check boxes for one or more protected classes and for retaliation. There is no separate box for a plaintiff to check for harassment. Complainants are also asked to provide the dates of the alleged misconduct.

In most cases, if a plaintiff (1) alleges sex discrimination, (2) claims that her sex negatively impacted the terms or conditions of her employment, and (3) notes the appropriate date range in her Charge, she should be allowed to later raise sexual harassment facts, even without mentioning harassment specifically. In most cases, the facts supporting the harassment are reasonably related to the stated allegations because all of the facts are part of the same claim: the one claim for discrimination.

Likewise, the plaintiff would only need to submit a complaint asserting a violation of Title VII, without any specific reference to harassment. The plaintiff's complaint would then need to contain facts to provide notice to the defendant that the plaintiff could establish the broader contours of Title VII. If the plaintiff wants to have her facts analyzed under the harassment rubric, she could provide facts to support such a theory in her complaint, but she would not be required to do so. As long as the plaintiff could prevail under any framework cognizable under Title VII, her claim should be allowed to proceed upon a challenge under Federal Rule of Civil Procedure 12(b)(6). As discussed in the following section, the Supreme Court has recognized that a plaintiff need not select at the pleading stage the particular theory upon which she will later proceed.[58]

Additionally, as long as the plaintiff properly responds to discovery requests about alleged harassment, the plaintiff should be allowed to assert harassment facts at the summary judgment and trial phases, without separately pleading harassment in the complaint.[59] Again, the idea is that harassment is not a separate claim with separate elements, but rather part of the broader concept of discrimination under Title VII.

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57. Note that the EEOC "Charge of Discrimination" form contains no mention of the word "harassment," and harassment is not listed on the form as a separate type of discrimination. EQUAL EMP'T OPPORTUNITY COMM., EEOC FORM 5: CHARGE OF DISCRIMIN ATION (2009), https://www.eeoc.gov/eeoc/foia/forms/upload/form_5.pdf [https://perma.cc/ V8R9-UNRJ].

58. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 (2002).

59. Scholarship supports the proposition that the discovery phase, rather than the complaint and motion-to-dismiss phase, performs a more central function in litigation, especially when complex arguments are presented with various theories and factual scenarios that require additional fact-finding. *See* Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2101 n.39 (2014) ("Complaints often present a reduced version of a complex argument . . . [and] provide a framework for discovery. After the motion-to-dismiss phase . . . , the complaint is typically no longer the centerpiece of the litigation; focus turns instead to evidence gained through discovery and to the lawyers' briefs and elaborated arguments in subsequent motions.").

B. Substantive and Theoretical Issues

Outside of the procedural context, the differences between harassment as part of Title VII, and harassment as a stand-alone claim, have enormous substantive and theoretical consequences.

1. Separating Theories of Discrimination and Worker Choice

Professor Laura Kessler has urged courts and scholars to consider the interplay between bias, structural discrimination, and worker choice in producing unequal outcomes in the workplace.[60] In her article, *Employment Discrimination and the Domino Effect*, she presents a lengthy hypothetical about a female professor who is granted tenure, but who does not apply for full professor.[61] The hypothetical begins with the junior professor avoiding an important male colleague in her department after he invited her to dinner while emphasizing that his wife was out of town. The same male professor also places his hands on her shoulder while they stand in the buffet line at a weekly faculty lunch. Although it is unclear whether this conduct would meet the "severe or pervasive" standard under Title VII, Professor Kessler argues that the combined effect of this early behavior with later incidents of bias, structural barriers, and employee choice yield unequal outcomes between the female professor and male colleagues with respect to promotion to full professor.

At the same time, Professor Kessler notes that courts have been reluctant to allow plaintiffs to combine harassment claims based on sexualized conduct with other kinds of disparate treatment.[62] For example, in the prior hypothetical, imagine that the male colleague's unwarranted dinner invitation and touching at the buffet line causes the female professor to avoid that faculty member, who is an important person in her field. Imagine that when she applied for tenure, another male colleague peer-reviewed her teaching and noted that "she seemed distracted because she must be spending too much time caring for her newborn baby." This negative evaluation went into her file. Even though the professor received tenure, she was rated as "good," rather than "excellent."

If we assume that harassment is a different claim from disparate treatment (as courts often do), the court will separately analyze the dinner invitation and buffet-line touching from the negative evaluation. It is unlikely that the dinner invitation and buffet-line massages will meet the severe or pervasive requirement, and so the court will dismiss that "claim." The court may even forbid the plaintiff from raising any evidence related to this conduct in support of her case. Even though this early conduct relates to the later negative outcome, categorizing harassment as a stand-alone claim may

60. Kessler, *supra* note 47, at 1050.
61. *Id.* at 1060–65.
62. *Id.* at 1066.

cause the courts to disallow the plaintiff from connecting the harassing behavior with the plaintiff's failure to become a full professor.

Shortly after the Supreme Court recognized harassment, Professor Vicki Schultz showed how courts had difficulty recognizing non-sexualized harassment as a cognizable harm.[63] Professor Schultz also noted how courts had difficulty recognizing a unified claim against the employer when a plaintiff alleged that one person engaged in sexual conduct toward her, while another person engaged in non-sexual harassment.[64] In addition, she discussed how courts tended to evaluate non-sexual acts and comments under the rubric of disparate treatment, while evaluating sexual speech and comments under the harassment frame.[65]

Professors Schultz and Kessler correctly describe and theorize many of the problems with how the courts conceive of harassment. This Article asserts that some of these problems derive from a procedural ambiguity: viewing harassment as a separate, stand-alone claim. As discussed in more detail throughout this Article, if one views Title VII as the claim itself (rather than harassment), there is more flexibility for the cause of action to be provable under different theories and evidentiary patterns, especially as we gain a better understanding of how and why inequality exists in the workplace. Moreover, there is greater flexibility for judges and juries to find that new types of factual scenarios viably establish that a person faced discrimination on the basis of a protected trait. The choice of civil-procedure language about what constitutes a claim, and what does not, has enormous impacts on the substantive and theoretical framing of cases involving harassment.

2. Slicing and Dicing Within the Harassment Paradigm

Under Title VII jurisprudence, the courts recognize different factual scenarios that will lead to liability under the general rubric of harassment, including "quid pro quo," harassing conduct that culminates in an adverse action, and harassing conduct that does not result in an adverse action.[66] As discussed in the cases below, some courts appear to view each of these as a separate "claim" with "separate elements."

One of the substantive consequences that may result from seeing these factual scenarios as separate "claims" is the phenomenon that the late

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63. Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 1, at 1689; *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 24 (2018) (discussing how the #MeToo movement also often focuses on sexualized harassment).

64. Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 1, at 1701–05.

65. *Id.* at 1714.

66. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–54 (1998); Bowman v. Shawnee State Univ., 220 F.3d 456, 461 n.4 (6th Cir. 2000). Courts have been inconsistent in their use of the words "tangible employment action" and adverse action in describing the required "elements" for harassment that culminates in an adverse action.

Professor Michael Zimmer calls "slicing and dicing."[67] When a judge slices and dices the facts of a case, the judge subdivides the evidence into multiple claims and only considers the evidence for each claim in isolation, failing to put the evidence together to tell a more complete story about what is actually happening in the workplace.

In some instances, the slicing and dicing causes alleged discriminatory acts to disappear. Take the following example. In one case, a plaintiff alleged that a supervisor harassed him because of his sex, and that the supervisor temporarily reassigned him to another position as part of the harassment.[68] A court might view this as a claim for harassing conduct that culminates in an adverse action.[69] However, the court might find as a matter of law that removing the plaintiff from a job temporarily does not meet the adverse action requirement because it is temporary. The court might then dismiss the "claim" for harassment that culminates in an adverse action.

Given the lack of an adverse action, the court may then consider whether the plaintiff has a "claim" for harassment that does not result in an adverse action.[70] The court will consider whether the conduct is "severe or pervasive."[71] In doing so, it will omit the temporary loss of the position from the list of items that support the plaintiff's allegations that he faced severe or pervasive conduct. This allegation simply disappears from the second "claim" because the court does not view it as an adverse action and does not otherwise view it as harassment.

In other cases, the court may refuse to draw causal connections between events and outcomes that the court considers to fall within different "causes of action." For example, in one case a woman alleged that her supervisor repeatedly insinuated that her tenure and advancement with a company would be enhanced if she engaged in a sexual relationship with him. The woman claimed the following:

> [The plaintiff] asserts that, after she was hired, [the supervisor] persistently showed her an unusual amount of attention of a sexual nature, including frequently staring at her breasts, genitals, and legs while praising her "performance" and offering her raises. She alleges that [he] also engaged in numerous unwelcome sexual advances, including, on one occasion, rubbing her neck and shoulders and resting the heel of his hands on her shoulders with his fingertips just above the tops of her breasts; asking her if she had watched a James Bond movie involving a secretary

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67. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 584 (2001).

68. For a case with similar allegations, see generally *Bowman*, 220 F.3d at 461.

69. *Id.*

70. *Id.* at 462.

71. *Id.*

> named Money Penny who had a sexual relationship with her boss; offering her raises and other benefits, including overtime pay, company day care, and travel, at the same time asking her to meet him privately and socially after regular working hours or in his office on the weekends for drinks; "stalking" or following her around Fort Dodge; and showing inappropriate attention to or asking inappropriate questions about her personal and social life, including whether she had a boyfriend who would be angry if she met [him] after work.[72]

This worker alleged that because of this conduct, she (1) avoided taking overtime opportunities where fewer people would be in the office, (2) avoided the supervisor at work, and (3) eventually took a medical leave due to emotional distress.[73] The total time span of the alleged conduct, including the medical leave, was little more than a year.[74] The company disputed many of the allegations.

In ruling on summary judgment in this case, the court held that all of these allegations were relevant to a hostile environment claim; however, the court found them to be too remote in time to be relevant to a constructive discharge claim.[75] The plaintiff's case was allowed to proceed; however, the court held there was no constructive discharge.[76] The court perceived "hostile work environment," "quid pro quo," and the constructive discharge to be three separate claims that each required different sets of evidence.[77]

Conceptual problems also arise when a plaintiff alleges harassing conduct, but the court does not believe that the conduct rises to the level of a request for sexual favors. Imagine a case in which a worker alleges that her supervisor did the following:

> She testifies that she told [him] not to touch her after he touched her on the shoulder down the middle of her back. This is the only instance of physical conduct alleged and the only instance she allegedly acknowledged his "advances." She states that [the supervisor] called her pretty, said she had a girly body, wore sexy jeans, alluded that she smelled like soap, alluded that she might gain weight, commented that

72. EEOC v. Am. Home Prods. Corp., No. C 00-3079-MWB, 2001 WL 34008505, at *2 (N.D. Iowa Dec. 21, 2001).
73. *Id.*
74. *Id.*
75. *Id.* at *11.
76. *Id.*
77. *Id.* at *1, *11.

> [she] walked passed without speaking, and stared at her. [She] states she ignored his comments and staring.[78]

The plaintiff then alleged that she was falsely accused of insubordination and the company fired her.[79] The company contested the plaintiff's allegations and evidence supporting the allegations.[80]

In this case, the court dismissed the plaintiff's "quid pro quo" claim because it found that the plaintiff could not establish that the supervisor's behavior amounted to a request for sexual favors.[81] Thus, the court recognized "quid pro quo" as a separate "claim" from "hostile work environment" that required the plaintiff to establish a separate set of elements to proceed. What is odd is that a court would be comfortable in making these kinds of value-based judgments about the intended effect of the behavior. The Court did not view the comments about the women's body or the looks as part of a possible quid pro quo. Viewing "quid pro quo" as a separate "claim" with certain required elements (i.e., a request for sexual favors) invites this kind of inquiry.

However, it should be noted that this state of affairs is not dictated by the text of Title VII, but rather how the courts have inartfully divided harassment into separate "claims." The question Title VII asks is whether a plaintiff faced a different outcome because of her sex or other protected trait. The text clearly allows the woman to combine instances of harassment from seemingly separate instances of disparate treatment. These are not separate "claims," under Title VII's text. And, the text of Title VII places liability at the employer, and not the individual, level.[82] There is no textual barrier to aggregating all actions that occur under one employer within the time frames allowed for bringing claims under the statute.[83]

Thinking about Title VII as a general cause of action may induce both judges and factfinders to view the facts more holistically because they are not looking at the evidence through narrow silos, but rather through the broader lens of the statutory language of Title VII.

3. Damages

The court's use of the term "claim" also has important implications for damages. Courts recognize that harassing conduct can culminate in an

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78. Gilliam v. Berkeley Contract Packaging, LLC, No. 12-cv-1174-DRH-SCW, 2014 WL 2927023, at *5 (S.D. Ill. June 27, 2014).

79. *Id.*

80. *Id.* at *2.

81. *Id.* at *5.

82. 42 U.S.C.A. § 2000e-2(a) (West 2012).

83. Work is needed to reconcile this underlying set of facts and issues of employer liability. *See* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

adverse action.[84] For example, imagine a plaintiff has a supervisor who uses highly derogatory language on four occasions over a year stating that women would not make good managers. The plaintiff is qualified for a managerial position and applies for the job, but the supervisor chooses a less qualified male candidate for the manager position.

In such a case, the woman faces harm over the year-long period in which her supervisor makes these comments. She faces uncertainty about whether the supervisor will judge her fairly in any future decisions. She faces the dilemma of whether to complain about the comments and possibly face workplace retaliation for the report. Given the current state of retaliation law, if she complains too early, she may not be protected against retaliation.[85]

Now imagine a second case. A supervisor does not make any of the comments to the plaintiff. Instead, at the time of promotion, he simply hires a less qualified male candidate over the plaintiff. There is evidence he did not hire the plaintiff because of her sex, but the plaintiff does not know about it until after the supervisor makes the promotion decision.

In both cases, a woman faced discrimination because of a protected trait. Let's assume that both women suffered the same amount of emotional distress from the failure to promote. However, a question arises about whether the plaintiff in the first case could seek damages for the comments made before the promotion decision, if she could establish that the comments caused her emotional distress. It seems that the answer should be yes, given that the harassing comments and the failure to promote both harmed the plaintiff, and taken together, they meet Title VII's threshold for harm to the "terms, conditions, or privileges of [the plaintiff's] employment."

Yet, such an outcome appears to be at odds with the idea that harassment is a separate claim. Indeed in *Ellerth*, the Supreme Court noted:

> When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. 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.[86]

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84. *See Ellerth*, 524 U.S. at 761 (listing examples of materially adverse actions).

85. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 78–79 (2005).

86. *Ellerth*, 524 U.S. at 753–54 (1998); *see also* Lowe v. Am. Eurocopter, LLC, No. 1:10CV24-A-D, 2010 WL 5232523, at *9 (N.D. Miss. Dec. 16, 2010) (reasoning that the

Viewing harassment as a claim (or set of claims) with separate elements that is distinct from other claims under Title VII contributes to numerous problems. It creates unnecessary procedural hurdles to harassment and creates questions about damages.[87] It makes it more likely that courts will disaggregate harassment from other discrimination facts.[88] Courts may even disaggregate different kinds of harassment from one another, carefully slicing the "claims" of "quid pro quo," "hostile environment" that culminates in an adverse action, and hostile environment that does not culminate in an adverse action. Courts may also separate the actions of different actors, separating the harassing conduct of some actors from the otherwise discriminatory conduct of others. Further, courts may separate all of this conduct from other dynamics that create inequality, like structural discrimination.

III. PROCEDURAL AMBIGUITY

If viewing harassment as a claim distorts discrimination law, it is worth considering whether harassment is a stand-alone claim. For the past several decades, the Supreme Court has been adjudicating procedurally ambiguous cases and then resolving those procedural ambiguities in ways that contest the dominant procedural paradigm being used at the time by the lower courts. The procedural ambiguity that we see in harassment cases is part of a broader jurisprudential picture. Consistent with this broader picture, it is likely that the dominant paradigm is both unintentional and can easily be changed or clarified.

The most prominent example of this happened in *Swierkiewicz v. Sorema N. A.*[89] In that case, the Supreme Court addressed similar (although not identical) confusion about what constitutes a "claim" under Title VII. In *Swierkiewicz*,[90] the Supreme Court considered whether a court may dismiss a plaintiff's complaint if the plaintiff fails to plead sufficient facts to support each of the factors of the *McDonnell Douglas* prima facie case.[91]

In 1973, the Supreme Court first developed a test called *McDonnell Douglas* that courts use to analyze some (but not all) individual disparate treatment discrimination cases.[92] The test begins with a multi-part first step, called the prima facie case. In *McDonnell Douglas Corp. v. Green*, the Supreme Court held that the plaintiff can establish the prima facie case by showing the following:

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plaintiff must separately establish the severe or pervasive element for pre-termination conduct).

87. *See* discussion *supra* Sections II.B.2–3.
88. *See* discussion *supra* Section II.B.2.
89. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002).
90. *Id.*
91. *Id.*
92. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[93]

The Supreme Court cautioned, however, that the facts required to establish a prima facie case will necessarily vary, depending on the factual scenario of the underlying case.[94] The Supreme Court has stated on numerous occasions that the prima facie case is not supposed to be onerous.[95]

After the plaintiff establishes this prima facie case, a rebuttable presumption of discrimination arises.[96] The analysis then proceeds to the second step of *McDonnell Douglas*. After a plaintiff makes a prima facie showing, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the allegedly discriminatory decision or action, thereby rebutting the presumption.[97] In the third step, the plaintiff is then provided the opportunity to show that the employer's stated reason for the employment action was pretext, or other evidence that shows that the employee's protected trait played a role in the outcome.[98]

In *Swierkiewicz*, the United States Court of Appeals for the Second Circuit treated the *McDonnell Douglas* test as if the test comprised elements of a claim.[99] The idea that *McDonnell Douglas* states the elements of a claim was infused throughout the jurisprudence at this time.[100] From that assumption, the Second Circuit found it proper to dismiss the plaintiff's claim based on a failure to plead and properly support those elements.[101]

However, the Supreme Court held that the *McDonnell Douglas* prima facie case does not represent the elements of a Title VII claim.[102] Instead, it explained:

> The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and

93. *Id.*
94. *Id.* at 802–03.
95. *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S.Ct. 1338, 1354 (2015); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
96. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–12 (1996).
97. *Id.* at 311.
98. *McDonnell Douglas Corp.*, 411 U.S. at 804.
99. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002).
100. *Id.* (noting that the Second Circuit applied circuit precedent in requiring the plaintiff to plead a prima facie case of discrimination under *McDonnell Douglas* in order to survive a motion to dismiss).
101. *Id.* at 509.
102. *Id.* at 510.

> allocation *of proof* in a private, non-class action challenging employment discrimination." In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) ("In [*McDonnell Douglas*,] we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.)[103]

Swierkiewicz demonstrates that even though courts describe an analytical structure as a claim and treat it as a claim for decades, the then-existing structure may not represent a claim at all. As the Court noted in *Swierkiewicz,* there are many ways for a plaintiff to prove that he faced discrimination under Title VII. One of those ways is through the *McDonnell Douglas* framework. However, the plaintiff can prevail through different iterations of *McDonnell Douglas* and the plaintiff can also prevail without proceeding through *McDonnell Douglas* at all.[104] Additionally, the plaintiff is not required to choose whether to use *McDonnell Douglas* at the pleading stage, but can wait to choose her proof structure until she obtains discovery, as long as she presents sufficient facts to support a Title VII claim.[105]

This same problem with characterizing a proof structure too strictly also has occurred at the circuit-court level. In *Ortiz v. Werner Enterprises, Inc.*, the Seventh Circuit held that a plaintiff may prevail on a discrimination claim through either a direct method or an indirect method.[106] The Court further held that a plaintiff could prevail under the direct method by showing a convincing mosaic of circumstantial evidence. However, the Seventh Circuit recently retracted the convincing mosaic framework, in part, because judges were improperly transforming the convincing mosaic framework into required elements of a "claim."[107] As the Seventh Circuit noted, "The district court treated each method as having its own elements and rules, even though we have held that they are just means to consider whether one fact (here, ethnicity) caused another (here, discharge) and therefore are not 'elements' of any claim."[108]

The Seventh Circuit also noted that even though it had tried to warn courts not to treat the convincing mosaic test as the "elements" of a "claim," its admonitions did not work.[109] Importantly, the Seventh Circuit itself

103. *Id.* (citation omitted).
104. *Id.* at 511–12.
105. *Id.*
106. Ortiz v. Werner Enters., Inc., 834 F.3d 760, 765 (7th Cir. 2016).
107. *Id.* at 764–65.
108. *Id.* at 763.
109. *Id.* at 764.

lapsed into language that categorized the convincing mosaic framework as a legal requirement.[110] The Seventh Circuit noted:

> Today we reiterate that "convincing mosaic" is not a legal test. We overrule the opinions in the previous paragraph to the extent that they rely on "convincing mosaic" as a governing legal standard. We do not hold that any of those cases was wrongly decided; our concern is only with the treatment of "convincing mosaic" as if it were a legal requirement. From now on, any decision of a district court that treats this phrase as a legal requirement in an employment-discrimination case is subject to summary reversal, so that the district court can evaluate the evidence under the correct standard.
>
> That legal standard, to repeat what we wrote in *Achor* and many later cases, is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect."[111]

Like *Swierkiewicz*, *Ortiz* demonstrates that courts often use language that suggests an employment discrimination test or analytical structure represents the "elements" of a "claim," when this is not accurate. *Ortiz* emphasizes that the cause of action is a Title VII claim and that all evidence of discrimination should be considered together.[112]

Another Supreme Court case, *University of Texas Southwestern Medical Center v. Nassar*, offers an additional example of procedural ambiguity.[113] In the 1989 case of *Price Waterhouse v. Hopkins*, the Supreme Court interpreted Title VII as allowing a plaintiff to prevail by establishing that a protected trait operated as a motivating factor in an employment outcome.[114]

110. *Id.*
111. *Id.* at 765.
112. *Id.*
113. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).
114. Price Waterhouse v. Hopkins, 490 U.S. 228, 241–42 (1989).

In 1991, Congress amended Title VII[115] by adding § 2000e–2(m) to the statute. That section provides that a plaintiff may prevail under Title VII by establishing that a protected trait was a motivating factor in an employment decision.[116] Congress also created an affirmative defense, which, if proven, would be a partial defense to damages.[117]

Even though the text of Title VII did not use the terms "mixed-motive," courts began referring to § 2000e–2(m) as establishing a "mixed-motive" claim.[118] Some courts distinguished these "mixed-motive" claims from what the courts called the "single-motive" claim provided under the statute's main language in § 2000e–2(a).

In *Nassar*, the Supreme Court held the following: "For one thing, § 2000e–2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII."[119] *Nassar* clarified that the underlying claim was a violation of Title VII.[120] A plaintiff may prove that claim through many different paths.[121] The plaintiff can use *McDonnell Douglas* prima facie test.[122] The plaintiff can also use the causation language found in § 2000e–2(m).[123]

Similarly, the courts have been inaccurate when they use other civil-procedure language, such as language related to burdens of production and burdens of persuasion.[124] For example, there have been decades of confusion about how the burdens of production and persuasion work at each step in the *McDonnell Douglas* test.[125]

As these cases show, the courts have, for decades, regularly and incorrectly, used terms like "claim" and "element." A later case may then radically change the legal landscape by rejecting the idea that a particular test represents the elements of a claim.

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115. 42 U.S.C.A. § 2000e-2(m) (West 2006).

116. *Id.*

117. *Id.* at § 2000e-5(g)(2)(B) (West 2006).

118. *See, e.g.*, Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005).

119. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 355 (2013).

120. *Id.*

121. *See generally* Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 719–23 (2018) (listing methods of proving Title VII claims).

122. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (laying out the burden-shifting framework).

123. The Supreme Court has not clarified how and whether 42 U.S.C.A § 2000e-2(m)(West 2012) and *McDonnell Douglas* intersect with one another.

124. *See* Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 91–93 (2008) (similar problem in ADEA disparate impact context in characterizing burdens of production and persuasion); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–56 (1981); *see also* Smith v. City of Jackson, 544 U.S. 228 (2005).

125. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508–10 (1993) (holding that while the factfinder's rejection of the employer's proffered reason permits the factfinder to infer discrimination, it does not compel such a finding); *Burdine*, 450 U.S. at 256.

IV. HARASSMENT AS FACTS SUPPORTING A TITLE VII CLAIM

The prior section shows that the Supreme Court often interprets Title VII in procedurally ambiguous ways. The lower courts often respond to this procedural ambiguity by choosing one of the possible routes. At times, the Supreme Court has returned to the procedural ambiguity and resolved it in ways that upset the dominant paradigm.

In some instances, the courts' ambiguous language relates to whether certain facts constitute a "cause of action" with required "elements." The Supreme Court has twice demolished the dominant procedural paradigm created by the inexact language surrounding "claim" and "element." The Supreme Court (in *Swierkiewicz* and *Nassar*) and the Seventh Circuit in *Ortiz*, both emphasized that the overall claim is a Title VII claim, and a plaintiff may prove that claim using different procedural methods and evidentiary paths.

Applying these lessons in the context of Title VII provides a roadmap for convincing courts that the current dynamic of treating harassment as a separate claim is incorrect. As discussed earlier, it is not clear that the Supreme Court meant to crystallize harassment as a separate claim. Although it used some "claim" language, it has also repeatedly emphasized that harassment is part of a larger Title VII claim.

Rather than thinking about harassment as a separate claim, it is more accurate to state that in *Meritor* and *Harris*, the Supreme Court was merely offering examples of some types of conduct that would satisfy (a)(1)'s language that the unlawful employment practice affects the "terms, conditions, or privileges of employment."[126] When doing so, the Court did not provide a complete list of all of the factual situations that would reach such a level.[127] Nor did it say that harassing acts and other discriminatory acts were separate and could not be considered together when thinking about whether the plaintiff could cross the required harm threshold.[128]

Thinking about harassment in this way can clarify many of the procedural issues discussed in Section III. Title VII is the claim. Plaintiff is not required to separately plead a count or a claim called "harassment,"

126. 42 U.S.C.A. § 2000e-2(a)(1) (West 2012).

127. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) ("The appalling conduct alleged in *Meritor* . . . merely present[s] some especially egregious examples of harassment. [It does] not mark the boundary of what is actionable."); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (noting that "'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination" (quoting Rogers v. EEOC, 454 F.2d 234, 238 (1971)).

128. *See Harris*, 510 U.S. at 23 ("[W]e can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at *all* the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (emphasis added)).

although the plaintiff may do so, if she chooses.[129] As long as the plaintiff has given appropriate notice in the complaint and properly responded to discovery, the plaintiff may prevail on any set of facts that establishes liability under Title VII.[130]

A plaintiff should be able to aggregate all harms that occur with the same employer to meet Title VII's required harm threshold, whether they are perpetrated by one individual, a small group of connected individuals, or a group of unconnected individuals.[131] The plaintiff can also show how policies and structures impacted employment. The key question under section (a)(1) is whether the plaintiff faced certain negative employment outcomes or was "otherwise . . . discriminate[d] against . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"[132] Title VII focuses liability at the employer level.[133]

By thinking of harassment in this way, we can open up section (a)(2) as an option for exploring it . Courts often narrow harassment by focusing on a single victim and a single perpetrator or small group of perpetrators. In her recent essay, Professor Tristin K. Green ponders whether recognizing sexual harassment as a separate form of discrimination is a mistake.[134] Professor Green argues,

> Sexual harassment is a form of discrimination because more often than not it is tied to broader inequality in the workplace. But our law has not embraced this reality. Instead, the existing law of harassment constrains permissible narratives on both sides. On the victim side, it rewards thinking of ourselves and our experiences of harassment in isolation, when we might instead see our experiences as members of groups embedded within broader environments. On the perpetrator side, it asks whether a specific, identified harasser engaged in acts of harassment, thereby ignoring others in the organization and the organizational structure itself as causes of ongoing hostile environments.[135]

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129. *See, e.g.*, Bowman v. Shawnee State Univ., 220 F.3d 456, 460 (6th Cir. 2000).

130. *See* discussion *supra* Section III.

131. *See, e.g.*, Smith v. Rosebud Farm, Inc., 898 F.3d 747, 749 (7th Cir. 2018); Stella v. Mineta, 284 F.3d 135, 139–40 (D.C. Cir. 2002); *Bowman*, 220 F.3d at 458–59.

132. 42 U.S.C.A. § 2000e-2(a)(1) (West 2012).

133. *Id.* at § 2000e-2(a) (West 2012) ("It shall be an unlawful employment practice *for an employer*—") (emphasis added).

134. Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152 (2018).

135. *Id.* at 153.

Professor Green properly criticizes the Supreme Court's test as focusing too much on identifying conduct directed at an individual and for preventing plaintiffs from pursuing "a collective claim, and thereby more easily present[ing] a collective story."[136]

While this individualized focus is embedded in the contemporary harassment doctrine, it need not be so if courts and litigants can reframe harassment as one type of harm that is connected to other types of harmful discrimination. The language of Title VII's second operative provision provides for a more expansive view of harassing behavior. That language makes it unlawful for an employer:

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[137]

To date, the courts have not considered what harassment might look like under section (a)(2). They have framed harassment as a "claim" that is derivative of section (a)(1).[138] However, by viewing harassment as being a theory of harm under the larger umbrella of Title VII, it becomes clearer that harassment litigants can argue for broader conceptions of discrimination under section (a)(2).

For example, the provision in section (a)(2) prevents employment practices that "deprive or tend to deprive" a person of employment opportunities or "otherwise adversely affect his status as an employee."[139] This language does not rely on the "terms, conditions, or privileges of employment language."[140] In the prior hypothetical involving the female professor, the professor should be able to argue that her employment opportunities were "adversely affect[ed]" by her colleagues' actions.

Additionally, because the language includes practices that "tend to deprive"[141] an employee of opportunities, people should be able to pull together the collective experience of other employees in the protected class and demonstrate how those experiences affected the plaintiff. For example, if women in a department are routinely harassed and passed over for

136. *Id.* at 162.

137. 42 U.S.C.A. § 2000e-2(a) (West 2012).

138. *See, e.g.*, Smith v. Rosebud Farm, Inc., 898 F.3d 747, 750 (7th Cir. 2018) ("Title VII does not impose a flat ban on all harassment. . . . It prohibits harassment that discriminates against an individual 'because of such individual's . . . sex.'" (citing 42 U.S.C. § 2000e-2(a)(1))).

139. 42 U.S.C.A. § 2000e-2(a)(2) (West 2012).

140. *Compare* 42 U.S.C.A. § 2000e-2(a)(1) (West 2012) *with* 42 U.S.C.A § 2000a-2(a)(2).

141. *Id.* at § 2000e-2(a)(2) (West 2012).

promotion, a plaintiff might be able to establish that her chance to be promoted is affected by this environment, even if she is not a direct target of harassment.

V. CONCLUSION

Courts often characterize harassment as a separate claim with a separate set of elements. This frame brings with it a number of procedural, substantive, and theoretical consequences.

As this Article shows, it is more likely that when courts speak about harassment as a "claim," they are not overtly grappling with the consequences that derive from this framing. As with other cases in the past, it is likely that the Supreme Court's early use of "claim" language was simply inaccurate. Although this language has come to have a host of collateral effects, it is not too late to correct the framing problem. Following the model in *Swierkiewicz* and *Nassar*, the Supreme Court or lower courts can unwind the damage done by this inartful use of civil-procedure language and empower future plaintiffs to plead harassment within the larger ambit of Title VII.