

Harassment Trainings: A Content Analysis

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Harassment prevention training programs are ubiquitous, yet researchers have not systematically examined their content or how they have changed over time. This study begins to fill that gap through a content analysis of 74 current and historical harassment trainings spanning a period of 1980 to 2016. Results suggest that trainings are heavily influenced by early content developed in the 1980s and early 1990s. Changes in training content over time are like software updates, periodically adding new features without fundamentally altering the nature of the training. Consequently, current trainings include large quantities of tangential legal information and overemphasize sexual conduct at the expense of other forms of harassment. They also tend to suggest that relatively trivial slights could give rise to harassment-related liability. Overall, trainings tend to gloss over the discrimination-based origins and purpose of harassment law, which might otherwise serve as a moral anchor for the trainings. I discuss the costs and benefits of this approach, and offer some ideas for future directions in training.

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I. INTRODUCTION

In February 2017, an Uber engineer’s harassment allegations went viral. In a blog post, Susan Fowler accused her boss of propositioning her, and described a pattern of discrimination and retaliation she faced as a female engineer.¹ Human resources refused to fire the harasser because he “was a high performer.”² Her request for a promising transfer was denied.³ Uber also downgraded her performance review for an “undocumented” performance problem, which rendered her ineligible for a graduate program.⁴ Fowler also recounted how Uber ordered leather jackets for male engineers, but not their female counterparts⁵ because the small number of female engineers did not qualify for a bulk discount.⁶ According to Fowler, the director of engineering said that “it wouldn’t be equal or fair. . .to give the women leather jackets that cost a little more than the men’s jackets.”⁷ When Fowler complained at an “all-hands” meeting about the “dwindling numbers of women” in engineering, the director allegedly answered that “the women of Uber just needed to step up and be better engineers.”⁸

1. Susan Fowler, *Reflecting on One Very, Very, Strange Year at Uber* (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>.

2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*

In response to the scandal, Uber hired former attorney general Eric Holder to investigate.⁹ The investigation eventually encompassed some 215 employee complaints.¹⁰ Following the investigation, Uber fired more than 20 employees, and made numerous recommendation for addressing the company's human resources practices, hiring practices, board oversight, and culture.¹¹ Uber's founder and CEO, Travis Kalanick, eventually resigned.¹² Holder's recommendations to Uber included numerous trainings, including training for managers on "diversity, inclusion and unconscious bias . . . equal employment opportunity and bias, harassment, discrimination, and retaliation policy compliance and record-keeping."¹³

While the Uber example is extreme in some respects, it is also emblematic of the complex mix of social and structural barriers that women and other underrepresented groups face in the workplace. Fowler's problems began with, but were not limited to sexual advances from her boss. They also arose from weak systems for making personnel decisions. Fowler's experience was also tainted by superiors that blamed women for their underrepresentation, and failed to consider the symbolic effect of withholding leather jackets from female engineers.

Fowler is not alone in this regard.¹⁴ A contemporaneous New York Times article interviewed a number of women who were denied a CEO position at various companies.¹⁵ They described how others viewed them as "dependable" rather than "visionary," and lacking in "gravitas."¹⁶ They also described men who were "threatened by assertive women."¹⁷ These CEO candidates reported they were "disproportionately penalized" for mistakes and poorly prepared for the self-promotion and "unapologetically competitive" jockeying for a position at the top.¹⁸ They had difficulty

9. Maya Kosoff, *Uber C.E.O. Orders "Urgent Investigation" into Sexual Harassment Allegations*, VANITY FAIR (Feb. 20, 2017), <https://www.vanityfair.com/news/2017/02/uber-ceo-orders-urgent-investigation-into-sexual-harassment-allegations>.

10. Maya Kosoff, *Mass Firings at Uber as Sexual Harassment Scandal Grows*, VANITY FAIR (June 6, 2017), <https://www.vanityfair.com/news/2017/06/uber-fires-20-employees-harassment-investigation>.

11. *Id.*; Covington and Burling LLP, *Recommendations* (June 13, 2017), <https://drive.google.com/file/d/0B1s08BdVqCgrUVM4UHBpTGROLXM/view>.

12. Mike Isaac, *Uber Founder Travis Kalanick Resigns as CEO*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html?_r=0.

13. Covington and Burling LLP, *supra* note 11, at 5.

14. A representative survey of American women found that 60% reported having experienced harassment on the basis of gender. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

15. Susan Chira, *Why Women Aren't C.E.O.s, According to Women Who Almost Were*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/sunday-review/women-ceos-glass-ceiling.html>.

16. *Id.*

17. *Id.*

18. *Id.*

breaking into “the intangible but crucial circle of male camaraderie.”¹⁹ One former CFO said “male colleagues sometimes told her they were reluctant to have dinner or drinks with female subordinates—important bonding activities in the corporate world—because it might be seen as flirtatious.”²⁰

Other historically underrepresented groups face similar barriers to equal opportunity in the workplace. Only two percent of Fortune 500 CEOs are Black and three percent are Latino.²¹ In a convenience sample on racial and ethnic harassment, between 40% and 60% of respondents reported such harassment.²² Convenience samples examining disability and age-based harassment found harassment in the 20% to 25% range.²³

Training is broadly viewed as a useful measure to prevent and reduce workplace harassment.²⁴ Some states now mandate harassment prevention training.²⁵ The California Chamber of Commerce estimated that the California anti-harassment training mandate affects 1.7 million employees in supervisory positions.²⁶ Even without a legislative mandate, most employers outside of California voluntarily elect to conduct trainings for compliance purposes.²⁷

This study broadly examines whether harassment prevention trainings meaningfully engage with the complex social headwinds that women, people of color, and other disadvantaged groups face in the workplace today. I approach this question by examining the content of current and historical harassment prevention trainings. Despite the ubiquity of harassment

19. *Id.*

20. *Id.*

21. Stacy Jones, *White Men Account for 72% of Corporate Leadership at 16 of the Fortune 500 Companies*, FORTUNE (June 9, 2017), <http://fortune.com/2017/06/09/white-men-senior-executives-fortune-500-companies-diversity-data/>.

22. EEOC, *supra* note 14.

23. *Id.*

24. Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 148 (2001) [hereinafter Bisom-Rapp, *Fixing Watches*]; Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1 (2001) [hereinafter Bisom-Rapp, *Ounce of Prevention*]; LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 168–77, 184–92 (2016).

25. CAL. GOV'T CODE § 12950.1(a) (West 2016); CONN. GEN. STAT. § 46a-54-204 (2016); ME. REV. STAT. tit. 26, § 807 (3) (2016).

26. Ilana DeBare, *The Cost of Compliance/Sexual Harassment Training Becomes a Lucrative Business*, S.F. CHRON. (Oct. 28, 2005), <http://www.sfgate.com/business/article/The-cost-of-compliance-Sexual-harassment-2598839.php>.

27. Elissa Perry et al., *The Impact of Reason for Training on the Relationship Between 'Best Practices' and Sexual Harassment Training Effectiveness*, 21 HUM. RESOURCE DEV. Q. 187, 187 (2010); Frank Dobbin & Erin Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. OF SOC. 1203, 1204 (2007).

prevention trainings, researchers have not systematically examined anti-harassment training content or how it has changed over time.²⁸

Examining the content of actual trainings used in the field provides both a quantitative and qualitative window into the larger messages these trainings send to employees, and whether they align with the broader purpose of harassment jurisprudence. Comparing current trainings to earlier ones also provides insight into why current trainings look and feel the way they do. Lastly, an accounting of current content permits a candid assessment of whether trainings are engaging and persuasive.

The sample consists of 74 harassment prevention trainings produced between 1980 and 2016, the majority of which are relatively current. Current materials were obtained from law firms, professional trainers, online trainers, and YouTube between 2013 and 2016 (“contemporary sample”).²⁹ Earlier materials were obtained through an interlibrary loan system, and primarily consisted of DVDs and VHS tapes, as well as a few written materials, created between 1980 and 2012 (“historical sample”).

Results revealed substantial continuity in training content over time. Trainings from the 1980s and 1990s were almost exclusively focused on sexual harassment. They tended to frame the issue with reference to the Equal Employment Opportunity Commission’s (EEOC) 1980 Guidelines, which defined harassment in terms of sexual conduct.³⁰ Consequently, the trainings focused on legal concepts and analysis relating to sexual conduct. Much of

28. A few researchers have made anecdotal observations about training content in the course of studies examining the effectiveness of a single training program. Elissa L. Perry, Carol T. Kulik & James M. Schmidtke, *Individual Differences in Effectiveness of Sexual Harassment Awareness Training*, 28 J. OF APPLIED SOC. PSYCHOL. 698, 700 (1998) (noting that videos tend to define harassment, provide factual information, discuss legal information, and provide behavioral examples); Magley et al. describe two types of harassment trainings: communicative training programs and sensitivity trainings. Vicki Magley et al., *Changing Sexual Harassment within Organizations via Training Interventions: Suggestions and Empirical Data*, in THE FULFILLING WORKPLACE: THE ORGANIZATION’S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH 228 (Burke & Cooper eds., 2013). Communicative trainings serve to “train supervisors and employees to recognize sexual harassment and to understand the organization’s policies and procedures for responding to potential incidents.” *Id.* Sensitivity trainings serve to “sensitize employees to the seriousness of sexual harassment” through role plays “in which employees take on the parts of victims and harassers,” “[present] harassment scenarios,” and include “discussions among male and female employees about the degree of offensiveness of sexual harassment.” *Id.* at 226. The goal of such trainings is to “alte[r] individual-level attitudes about sexual harassment” and its effect on the workplace. *Id.* Magley et al. note that the “distinction between communicative and sensitization programs is largely theoretical” since “most training programs incorporate both types of material.” *Id.*

29. I use the terms “contemporary sample” and “historical sample” to refer to the different methods used to collect the data, rather than to suggest that 2013 represented a historically significant turning point. As explained in greater detail in Part III, 2013 represented the start of the study period, when I began asking trainers to provide copies of their most recent harassment training materials. Thus, 2013 represents the start of the “contemporary sample.” Of the materials available through the interlibrary loan system, the most recent dated back to 2012.

30. 45 Fed. Reg. 74676 (1980) (to be codified at 29 C.F.R. § 1604.11).

this early content persists in more recent trainings from the 2000s and 2010s. Current trainings continue to center on sexual conduct even as Supreme Court jurisprudence³¹ and litigation trends³² suggest that trainings should focus instead on harassment based on status (e.g., race, gender, religion). Although recent trainings incorporated new legal developments, they tended to cover it alongside the older content rather than changing their approach.

Most of the examples and illustrations in recent trainings continue to relate to sexual conduct. They are often used to illustrate a proliferation of quasi-legal categories such as verbal, visual, and physical harassment, third-party harassment (harassment by contractors or customers), bystander harassment (harassment through observing the conduct of others), and off-site harassment (harassing conduct away from the office). Current trainings also tend to illustrate less severe forms of sexual harassment, like jokes, teasing, and comments about an employee's appearance. Only in recent years have trainers included examples relating to harassment based on other protected categories, such as age, race, or disability.

Training content appears to have solidified into a genre sometime in the mid-1990s. The genre consists of an authority figure summarizing legal rules, providing examples of prohibited conduct, and offering conduct advice. The genre has proven remarkably durable, with few trainings departing from the format, even in interactive online trainings and on YouTube. While fidelity to the genre may afford a certain legitimacy to trainings, it may ultimately undermine innovation.

Early trainings framed harassment as an abuse of power and as a business problem—a productivity drain, morale killer and source of litigation costs. The power-based frame is largely absent in more recent trainings, subsumed by the business justification. More recent trainings characterize harassment as a violation of company policy, and advise victims and supervisors to invoke the company's institutionalized systems for investigating and responding to harassment.

Overall, current trainings present a few troubling meta-narratives around harassment law. First, they suggest that harassment is not bad because it is morally wrong or a form of discrimination, but because it is bad for business. This pitch may not ultimately be persuasive to employees. Second, the proliferation of legal categories and use of marginal examples of misconduct imply that the law is extremely complex, a wide swath of behavior is legally prohibited, and that a layperson will have trouble distinguishing between permissible and impermissible behavior.

31. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

32. Sexual harassment claims only represent about one quarter of all harassment claims filed with the EEOC. *See* discussion *infra* Part V.B.

When harassment law is framed in this way, it risks inadvertently signaling to employees that the best way to avoid trouble under the harassment policy is to avoid informal interactions with women, people of color, or other potential harassment victims. This risk is exacerbated when trainings fail to emphasize that inclusion and equal employment opportunity are the driving force behind Title VII of the Civil Rights Act of 1964 and its prohibition on harassment. To be sure, participants in a training program should learn not to make disparaging comments about another employee's race, religion, or gender at an off-site networking event. However, training programs should also emphasize the importance of inviting those underrepresented employees to the networking event in the first place.

This article proceeds as follows: Part II describes the legal history in which harassment prevention trainings developed and summarizes extant scholarly research on employer practices relating to harassment. Part III describes the methodology of the study. Part IV summarizes the results. Part V contextualizes the results within existing theory, and Part VI offers some ideas for new approaches to harassment training.

II. LEGAL AND SCHOLARLY CONTEXT

Below, I provide an overview of the development of harassment law as background for understanding the content of current and historical harassment prevention trainings. I then describe scholarly research examining harassment prevention trainings.

A. Legal History

At its core, harassment represents a form of discrimination under Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from discriminating against an employee “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”³³ Employees harassed on the basis of their membership in a protected category (race, color, religion, sex, national origin) have suffered discrimination on the basis of the “conditions” of their employment.³⁴ Other federal laws protect employees from harassment on the basis of other protected categories, such as age,³⁵ disability,³⁶ and veteran status.³⁷ Some state laws provide more expansive protection than federal law,

33. 42 U.S.C. § 2000e-2 (2012).

34. *Meritor Sav. Bank v. Vinson*, FSB, 477 U.S. 57, 67 (1986).

35. 29 U.S.C. § 621 *et seq.* (2012).

36. 42 U.S.C. § 12112 (2012).

37. 38 U.S.C. § 4311 (2012).

protecting membership in other categories, such as sexual orientation and marital status.³⁸

The statutory language of Title VII does not include the word “harassment.” Rather, the concept of harassment arose through case law interpreting Title VII. The first federal appellate case to recognize harassment under Title VII involved harassment on the basis of race, in the 1971 case, *Rogers v. EEOC*.³⁹ That case involved a Latina employee, Josephine Chavez, who alleged her employer’s practice of segregating optometry patients represented a form of discrimination against her. The EEOC sought discovery into the segregation practices, arguing that it “might be so offensive to Mrs. Chavez’s sensibilities as to make her uncomfortable”⁴⁰ and thus subject her to adverse terms, conditions, or privileges of employment. The Fifth Circuit agreed. Drawing upon jurisprudence taking an expansive view of Title VII’s purpose, the Fifth Circuit reasoned that “employees’ psychological as well as economic fringes are statutorily entitled to protection from employer abuse.”⁴¹ Thus, “working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers” are inconsistent with Title VII’s purpose.⁴² As Judith Johnson explained, “*Rogers* is not only the judicial origin of hostile environment harassment, but . . . the origin of the idea that the harassment must be so severe as to pervade the working atmosphere and cause psychological damage to the employee.”⁴³

The first religious harassment case, *Compston v. Borden*, followed in 1976. That case involved a Jewish employee subject to “numerous derogatory epithets” and “a patterned course of conduct designed to make his working environment a miserable one.”⁴⁴ The court concluded that the record supported a determination that the plaintiff had been “harassed” on the basis of his religion in violation of Title VII.⁴⁵ However, the court only awarded nominal damages and attorneys’ fees because he had not “suffered any

38. See, e.g., CAL GOV’T CODE §12940 (West 2016), N.Y. EXEC. LAW § 296 (McKinney 2014); OR. REV. ST. § 659A.030 (2017).

39. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). See Rhonda Reaves, *One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 889 (2004) (“[H]arassment as a form of discrimination was first held to violate Title VII in the race context[.]”); Pat Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006).

40. *Rogers*, 454 F.2d at 238.

41. *Id.*

42. *Id.*

43. Judith Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85, 92 (2003).

44. *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976).

45. *Id.* at 161.

diminution of wages” and Title VII did not then permit compensatory and punitive damages.⁴⁶

The history of harassment claims on the basis of sex is more complex, and to some extent contested. Some scholars attribute the concept of “sexual harassment” to the women’s movement generally,⁴⁷ efforts by federal and state agencies to study the problem,⁴⁸ and to Professor Catherine MacKinnon’s 1979 book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*.⁴⁹ Professor MacKinnon offers a different account, asserting that “judicial recognition of sexual harassment as a form of sex discrimination preceded all of this. Social movements did not first define the issue of sexual harassment in the public mind to the degree that courts did.”⁵⁰

The first federal case to recognize harassment on the basis of sex was a 1976 district court case, *Williams v. Saxbe*.⁵¹ That case involved a federal employee, Williams, who refused her supervisor’s sexual advances and thereafter was subjected to “unwarranted reprimands, refusal to inform her of matters for the performance of her responsibilities, refusal to consider her proposals and recommendations, and refusal to recognize her as a competent professional in her field.”⁵²

However, Williams had a difficult case to make on the question of whether her adverse treatment was “because of sex.” As the defendants argued, “Plaintiff was allegedly denied employment enhancement not because she was a woman, but rather because she decided not to furnish the sexual consideration claimed to have been demanded.”⁵³ There was also some authority for the proposition that the law tolerated discrimination against a subset of women – for example, excluding pregnancy from disability coverage because both men and women would be equally denied

46. *Id.* Congress amended Title VII to provide for compensatory and punitive damages in the Civil Rights Act of 1991. 42 U.S.C. § 1981a(1) (2012).

47. Eleanor K. Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M. L. REV. 91, 96–98 (1987); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2079 (2003).

48. Bratton, *supra* note 47, at 97.

49. Steven Wilborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 677 (1999); Martha Chamallas, *Writing about Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN’S L.J. 37, 39 (1993); Schultz, *supra* note 47, at 2079–80.

50. Catharine MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 817 (2002).

51. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *vacated and remanded* *Williams v. Bell*, 587 F.2d 1240, 1242 (D.C. Cir. 1978), *Williams v. Civiletti*, 487 F. Supp. 1387, 1389 (D.D.C. 1980) (finding on remand that “submission to the sexual advances of the plaintiff’s supervisor was a term and condition of employment”); MacKinnon, *supra* note 50, at 818–19; Johnson, *supra* note 43, at 92.

52. *Williams*, 413 F. Supp. at 655–56.

53. *Id.* at 657.

pregnancy coverage.⁵⁴ Nevertheless, the Court analogized to contrary authority prohibiting treatment of a subset of women differently from a similarly situated subset of men – for example, employer policies prohibiting women but not men from getting married.⁵⁵ The Court in *Williams* ultimately concluded that demanding sexual favors of a female subordinate “created an artificial barrier to employment which was placed before one gender and not the other.”⁵⁶

Catherine MacKinnon’s 1979 landmark book argued that sexual conduct towards women in the workplace was symptomatic of their subordination within the workplace, and a barrier to their advancement.⁵⁷ MacKinnon also recognized that sexual conduct towards women did not fit squarely into the overall forms of proof and types of harms previously recognized under Title VII.⁵⁸ The court in *Williams* did not use the term “harassment” and assessed Williams’ claims under discrimination law.⁵⁹ MacKinnon thus sought to expand legal definitions to better conform to women’s lived experience.⁶⁰ She developed two new legal concepts: “quid pro quo” and “condition[s] of work” sexual harassment. MacKinnon defined quid pro quo as a form of harassment “in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity.”⁶¹ She defined “conditions of work” harassment as a “situation in which sexual harassment simply makes the work environment unbearable.”⁶²

In 1980, the Equal Employment Opportunity Commission issued guidelines (hereinafter, the “Guidelines”) that drew heavily from MacKinnon’s book.⁶³ Entitled “sexual harassment,” the guidelines provided that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” are harassment when they are

54. See CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 5 (1979). See also *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 139 (1976) (excluding pregnancy-related disability from disability benefits not gender discrimination); *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974) (finding that disability coverage that excludes pregnancy does not violate Equal Protection Clause).

55. *Williams*, 413 F. Supp. at 659; *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971); *Phillips v. Martin Marietta Corp.*, 499 U.S. 542, 544 (1971).

56. *Williams*, 413 F. Supp. at 657.

57. MACKINNON, *supra* note 54, at 18, 27.

58. *Id.* at 26 (“The strictures of the concept of sex discrimination will ultimately constrain those aspects of women’s oppression that will be legally recognized as discriminatory. At the same time, women’s experiences, expressed in their own way, can push to expand that concept. . . . Women’s lived-through experience . . . should begin to provide the starting point and context out of which is constructed the narrower forms of abuse that will be made illegal on their behalf.”).

59. *Id.*; *Williams*, 413 F. Supp. at 655.

60. MACKINNON, *supra* note 54, at 26.

61. *Id.* at 32.

62. *Id.* at 40.

63. 45 Fed. Reg. 74676 (Nov. 10, 1980) (to be codified in 29 C.F.R. § 1604.11).

(1) “made either explicitly or implicitly a term or condition of an individual’s employment;” (2) “submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual;” or (3) “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁶⁴ The first and second definitions were equivalent to MacKinnon’s concept of “quid pro quo” harassment. The third is equivalent to MacKinnon’s “condition of work” harassment, which is now generally referred to as “hostile work environment.” The Guidelines also suggested that employers would be held strictly liable for harassment by their supervisors.⁶⁵

Importantly, the EEOC does not appear to have intended to crowd out all other forms of harassment through its Guidelines. A footnote to the Guidelines states “the principles involved here continue to apply to race, color, religion or national origin.”⁶⁶ Although it made no reference to other non-sexual forms of gender-based harassment – for example, hostile treatment of women in non-traditional occupations – this omission did not necessarily mean that the EEOC considered such conduct non-actionable. Hostile acts toward women, as well as racial or religious minorities, fit more squarely within existing discrimination jurisprudence, as illustrated by *Rogers* and *Borden*. The EEOC may have instead intended to bring sexual conduct that was previously considered non-actionable within a broader definition of harassment.

The EEOC Guidelines are not binding on courts tasked with interpreting Title VII.⁶⁷ Nor did the concepts in the Guidelines necessarily follow existing jurisprudence. As MacKinnon asserted, her concepts arose from the lived experience of working women, rather than a strict reading of case law.⁶⁸ By drawing from MacKinnon, the EEOC was getting ahead of the case law and attempting to shape it in a future direction.

However, as discussed in greater detail below, the Guidelines proved very influential as to the content of harassment trainings. MacKinnon’s book likewise proved influential in lower court rulings, which started using the term “quid pro quo.”⁶⁹ As Vicky Schultz has famously argued, “the

64. *Id.*

65. *Id.* (“[A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.”)

66. *Id.*

67. Bisom-Rapp, *Fixing Watches*, *supra* note 24, at 154.

68. MACKINNON, *supra* note 54, at 26.

69. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). *See also* Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J. L. & PUB. POL’Y 307, 309 (1998) (discussing

prevailing conception of harassment defines it first and foremost as an abuse of women's sexuality."⁷⁰ Both the popular imagination and lower courts "have tended to conceptualize hostile work environment harassment in terms of sexual conduct."⁷¹ Schultz documented numerous cases in which gender-based harassment that did not involve sexual overtures were overlooked by lower courts.⁷²

In its first case to address harassment, the Supreme Court borrowed from both the MacKinnon/EEOC approach and the earlier discrimination-based model that predated MacKinnon's 1979 book. The 1986 *Meritor Savings Bank v. Vinson* case involved a bank vice president who made sexual advances toward Mechelle Vinson, a bank manager.⁷³ Vinson first refused, but later succumbed out of fear for her job.⁷⁴ She acquiesced to the vice president's various requests for sexual favors, and was also raped by the vice president on "several occasions."⁷⁵ The Court in *Meritor* used the term "sexual harassment," citing the EEOC Guidelines, as well as the terms "hostile environment" and "quid pro quo." However, it also harkened back to the *Rogers* decision, and cited its language regarding "working environments so heavily polluted with discrimination."⁷⁶ The Court also sketched a framework for defining harassment, asserting that sexual harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."⁷⁷ It also identified unwelcomeness as the "gravamen of any sexual harassment claim."⁷⁸

Over time, the Supreme Court moved away from defining "sexual harassment" as a separate concept, and instead sought to define harassment as a type of discrimination motivated by the victim's membership in a protected category.⁷⁹ The 1993 *Harris v. Forklift* case involved a manager

Henson v. Dundee); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 342 (1990) (same).

70. Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 5 (2006) [hereinafter Schultz, *Understanding Sexual Harassment Law*]. See also Schultz, *supra* note 47.

71. Schultz, *Understanding Sexual Harassment Law*, *supra* note 70, at 11.

72. *Id.*

73. *Meritor Sav. Bank v. Vinson*, FSB, 477 U.S. 57, 60 (1986).

74. *Id.*

75. *Id.* at 61.

76. *Id.* at 66.

77. *Id.* at 67 (internal quotations omitted).

78. *Id.* at 68.

79. Wilborn, *supra* note 49, at 698, 700–701; MacKinnon, *supra* note 50, 828 ("Sexual harassment doctrine also quickly and axiomatically came to encompass gender-based harassment, whether or not the abuse was specifically sexual.").

subjected to both sexual and gender-based harassment by her supervisor.⁸⁰ In addition to offering to negotiate Harris's raise at the Holiday Inn and asking her to retrieve "coins from his front pants pocket," the supervisor also called her a "dumb ass woman," told her "[y]ou're a woman, what do you know" and that "we need a man as the rental manager."⁸¹ Although the court used the term "sexual harassment," it used the word "discriminatory" with greater frequency through such phrases as "discriminatorily abusive work environment," "discriminatory intimidation, ridicule and insult," and an "objectively hostile or abusive working environment."⁸² It also referenced harassment on the basis of other protected categories, formulating the cause of action as one that "create[s] a work environment abusive to employees because of their race, gender, religion, or national origin."⁸³

Like *Meritor*, the 1993 *Harris* case set a relatively high bar for conduct that qualifies as harassment. The court reiterated that harassment must be severe or pervasive to be legally actionable.⁸⁴ A "mere utterance" of an "epithet which engenders offensive feelings" is not actionable.⁸⁵ The *Harris* decision also clarified that the conduct must not only be subjectively offensive to the victim, but must also be objectively offensive – conduct that "a reasonable person would find hostile or abusive."⁸⁶

The Supreme Court further developed the contours of harassment claims in 1998 through two important decisions: *Oncale v. Sundowner Offshore Services, Inc.*⁸⁷ and *Faragher v. City of Boca Raton*.⁸⁸ *Oncale* involved an all-male work crew on an oil platform. Other male employees subjected Oncale, a male worker, to "sex-related, humiliating actions," "physically assaulted [him] in a sexual manner," and "threatened him with rape."⁸⁹ In *Oncale*, the court clarified that any verbal or physical harassment can qualify as harassing if it is "because of sex." The court explained that cases involving sexual conduct present somewhat of an easier case because courts assume "those proposals would not have been made to someone of the same sex."

80. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710–1712 (1998).

81. *Harris*, 510 U.S. at 19.

82. *Id.* at 21–22, 24.

83. *Id.* at 22.

84. *Id.* at 20. The 1998 *Oncale* decision emphasized that Title VII is not a "general civility code" and should not "mistake ordinary socializing in the workplace" for discrimination. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). In this regard, the Supreme Court urges "common sense, and an appropriate sensitivity to social context" in distinguishing objectively severe conduct from ordinary workplace behavior. *Id.* at 82.

85. *Meritor Sav. Bank v. Vinson, FSB*, 477 U.S. 57, 67 (1986) (quoting *Rogers*).

86. *Harris*, 510 U.S. at 21.

87. 523 U.S. 75.

88. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

89. *Oncale*, 523 U.S. at 77.

However, a harassment case can also arise from same-sex conduct or conduct “motivated by a general hostility to the presence of women in the workplace.”⁹⁰ Through *Oncale*, the Supreme Court formally disaggregated harassment from sexual conduct.⁹¹

In *Faragher v. City of Boca Raton*, the Supreme Court addressed the issue of vicarious liability of employers for acts of harassment by supervisors.⁹² The Court afforded employers an affirmative defense in cases of harassment where a supervisor harasses employees but has not engaged in a tangible employment action (e.g. a demotion, denial of promotion, or reduction in compensation).⁹³ In such cases, the employer can assert the affirmative defense that it took reasonable efforts to prevent and correct the harassment and that the employee “unreasonably failed to take advantage of any preventative or corrective opportunities.”⁹⁴ Professor Joanna L. Grossman has characterized this doctrine as “the first bite is free” because employers can essentially avoid liability for the first offense through their reasonable measures, accruing liability only if the harassment continues beyond their initial efforts to prevent and correct the harassment.⁹⁵

B. Scholarly Research on Harassment-Related Practices.

Since that time, considerable scholarly attention has been devoted to employer practices relating to harassment, including harassment prevention trainings. Social scientists sought to measure the efficacy of trainings, although they primarily tested training content that they developed themselves.⁹⁶ Results were mixed.⁹⁷ Although they found that the trainings

90. *Id.* at 80.

91. MacKinnon, *supra* note 50, at 829; Wilborn, *supra* note 49, at 684–685; Schultz, *Understanding Sexual Harassment Law*, *supra* note 70, at 15.

92. *Faragher*, 524 U.S. 775; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

93. *Faragher*, 524 U.S. at 807.

94. *Id.*

95. Joanna Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 711 (2000).

96. Vicki Magley et al., *supra* note 28, at 228 (noting methodological limitations in the research, and that it “almost exclusively evaluates research-designed training, not training that is actually implemented in the workplace”); Elissa Perry, Carol Kulik & Marina Field, *Sexual Harassment Training: Recommendations to Address Gaps Between the Practitioner and Research Literatures*, 48 HUM. RESOURCE MGMT. 817, 818 (2009) (“we know surprisingly little about when and why sexual harassment training is effective”).

97. Heather Antecol & Deborah A. Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826, 838 (2003); Sheeren G. Bingham & Lisa L. Scherer, *The Unexpected Effects of a Sexual Harassment Educational Program*, 37 J. OF APPLIED BEHAV. SCI. 125, 142 (2001); Elissa Perry et al., *The Impact of Reason for Training on the Relationship Between “Best Practices” and Sexual Harassment Training Effectiveness*, 21 HUM. RESOURCE DEV. Q. 187, 199 (2010) (“[T]he current study found little evidence that best training practices had positive implications for training effectiveness across situations.”); EEOC, *supra* note 14.

could be effective at conveying information, few studies show favorable improvements in attitudes and behaviors.⁹⁸ As one researcher observed, “attitudes could prove extremely difficult to change . . . particularly attitudes about what constitutes appropriate and inappropriate behavior between sexes because these might be based on gender roles learned during early childhood.”⁹⁹ Moreover, several factors with a strong influence over training success are independent of the training itself, and relate more to organizational influences, individual differences, and pre- and post-training activities.¹⁰⁰ Consequently, in a 2016 Report summarizing the state of extant research, the EEOC concluded that “empirical data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment.”¹⁰¹

Sociologists Lauren Edelman, Frank Dobbin, and Erin Kelly, have also devoted substantial attention to employer practices regarding harassment. Dobbin and Kelly characterize harassment trainings as an attempt by human resources professionals to expand their power and influence in organizations.¹⁰² Their research suggests that harassment-related trainings and policies tend to predate solid legal arguments justifying the need for such policies and trainings.¹⁰³

98. Antecol & Cobb-Clark, *supra* note 97, at 838 (training associated with men identifying unwanted sexual behaviors as harassment); Bingham & Scherer, *supra* note 97, at 140 (training increased knowledge, however, men who participated in the training were “significantly more likely to blame the victim”); Magley et al., *supra* note 28, at 229; EEOC, *supra* note 14; Lisa K. Kearney, Aaron B. Rochlen & Eden B. King, Male Gender Role Conflict, Sexual Harassment Tolerance, and the Efficacy of a Psychoeducative Training Program, 5 PSYCH. OF MEN & MASCULINITY 72, 79 (2004) (training improved recognition of harassment, but had no effect on attitudinal measures); Gerald L. Blakely, Eleanor H. Blakely & Robert H. Moorman, *The Effect of Training on Perceptions of Sexual Harassment Allegations*, 28 J. OF APPLIED SOC. PSYCH. 71, 77 (1998) (training participants more likely to identify behavior as sexual harassment); Benjamin M. Walsh, Timothy J. Bauerle & Vicki J. Magley, *Individual and Contextual Inhibitors of Sexual Harassment Training Motivation*, 24 HUM. RESOURCE DEV. Q. 215, 217 (2013) (“there is empirical evidence of backlash to sexual harassment training”). *But see* Perry, Kulik & Schmidtke, *supra* note 28 (training reduced harassing behavior by men with a high propensity to harass); Sharyn J. Potter & Mary M. Moynihan, *Bringing in the Bystander In-Person Prevention Programs to a U.S. Military Installation: Results from a Pilot Study*, 176 MILITARY MEDICINE 870, 872 (2011) (bystander training increased reported bystander interventions four months after training).

99. Magley et al., *supra* note 28, at 229. *See also* Kearney et al., *supra* note 98, at 79 (“attitude change may only be possible after more long-term, experientially oriented interventions”).

100. *Id.*; Dobbin & Kelly, *supra* note 27; Perry et al. (2010) *supra* note 27, at 200 (post-training activities reduced frequency of harassment complaints); Perry et al. (2010), *supra* note 27; Perry et al. (2009), *supra* note 96, at 820 (noting the importance of supervisory support and individual characteristics); Walsh et al., *supra* note 98, at 217 (measuring variables that influence an individual’s motivation to learn in a sexual harassment training context); C.M. Hunt, M.J. Davidson, S.L. Fielder & H. Hoel, *Reviewing Sexual Harassment in the Workplace—An Intervention Model*, 39 PERSONNEL REV. 655, 656 (2010).

101. EEOC, *supra* note 14.

102. Frank Dobbin & Erin Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organization*, 112 AMER. J. OF SOC. 1203, 1206, 1209-1210 (2007).

103. *Id.*

Lauren Edelman further argues that these trainings represent “symbolic” evidence of compliance.¹⁰⁴ In this view, trainings are not intended to comply with the law so much as create the appearance of compliance. Instead, trainings are a form of conspicuous consumption signaling an employer’s “attention to” legal rules.¹⁰⁵ Courts legitimize these symbolic structures by giving employers credit for their adoption, regardless of their effectiveness.¹⁰⁶ In other words, employers tend to adopt superficial preventative measures – like anti-harassment trainings – for the purpose of “checking a box,” and courts reinforce that behavior by failing to scrutinize those practices. Indeed, Edelman’s study of court decisions following *Faragher v. Boca Raton* found that courts tended to defer to employers’ internal grievance structures even if the actual evidence in the case suggested those structures were not working.¹⁰⁷

Edelman, Dobbin, and Kelly’s work provide an useful framework for thinking about employers’ decisions around harassment trainings. They would argue that employers have little reason to evaluate or improve their training practices. The effectiveness of the training is, in a sense, beside the point. The purpose of trainings, as Dobbin and Kelly would argue, is to cement human resources as the organizational focal point for harassment complaints and personnel decisions. Likewise, Edelman would argue that employers need not concern themselves with the effectiveness of trainings because courts will give them credit regardless.¹⁰⁸

A third stream of research emerged from legal scholars, in particular Professors Vicki Schultz and Susan Bisom-Rapp. In a famous 2003 law review article titled “The Sanitized Workplace,” Professor Schultz cited numerous studies finding that most harassment policies “track the language of the [1980] EEOC guidelines” and defined harassment in terms of sexual conduct.¹⁰⁹ Schultz argued that employers prefer to discourage sexual conduct in order to promote a neo-Taylorist model of efficiency, where “the

104. EDELMAN, *supra* note 24, at 101.

105. *Id.* (describing “symbolic legal structures” as an organizational practice or policy intended to signal attention to and compliance with legal rules, regardless of its efficacy, and including “diversity training programs” and “the like” as examples of such structure).

106. *Id.* at 174–177, 180–181 (describing three types of judicial deference to symbolic structures, and then measuring an increase in judicial deference over time); Bisom-Rapp, *Fixing Watches*, *supra* note 24, at 159.

107. EDELMAN, *supra* note 24, at 173–174, 184–186.

108. *Id.*; David Sherwyn, Michael Heise & Zev G. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1300–01 (2001) (training had no effect on whether courts applied the *Faragher* defense in employer’s favor).

109. Schultz, *supra* note 47, at 2094–2095 (The “overwhelming majority of American companies have sexual harassment policies” and “most of the surveys and policies track the language of the EEOC guidelines[:]. . . ‘unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature.’”).

workplace [is] a sterile zone in which workers suspend all their human attributes while they train their energies solely on production.”¹¹⁰ Hence, “sexuality is seen as something ‘bad’ – or at least beyond the bounds of professionalism – that should be banished from organizational life.”¹¹¹ Title VII’s prohibition on harassment represents a convenient vehicle to accomplish this preexisting preference.

Schultz further argues that the “sexual model [of harassment] . . . has obscured more fundamental problems of gender-based harassment and discrimination that are not primarily ‘sexual.’”¹¹² Companies can “treat harassment as a stand-alone phenomenon – a problem of bad or boorish men who oppress or offend women – rather than as a symptom of larger patterns of sex segregation and inequality.”¹¹³ In other words, sexual conduct is a convenient target for employers because it is easier to fix than the thornier problem of providing meaningful equal opportunity in the workplace.

In a 2001 law review article, Professor Susan Bisom-Rapp took aim at anti-harassment trainings specifically, noting that the social science evidence supporting the effectiveness of such trainings was thin. Professor Bisom-Rapp theorized that harassment trainings were “likely prompted” by the EEOC’s 1980 Guidelines, which suggested that employers would be strictly liable for harassment. Characterizing harassment training as a “billion dollar industry”, Bisom-Rapp worried that ineffective trainings presented a number of real risks: “backlash, sending the wrong message, and creating the erroneous impression that ‘something is being done about harassment.’”¹¹⁴ Bisom-Rapp argued that courts should “look beyond symbols” and deny credit to employers for any training program “unless, in the context of a given dispute, it is demonstrably effective.”¹¹⁵

This article adds grist to the scholarly literature by testing those models against the content observed in the research sample. Is sexual content overrepresented in harassment trainings, as Schultz’s theory would suggest? Do these trainings – as Dobbin and Kelly theorize – attempt to consolidate power in the human resources department? Consistent with Lauren Edelman’s theory, do the trainings appear to serve a “box checking” function? Results provide some support for all three theories, and further press the question posed by Bisom-Rapp in 2001 of whether current approaches present unintended risks.

110. *Id.* at 2069.

111. *Id.* at 2064.

112. *Id.* at 2065.

113. *Id.* at 2067.

114. Bisom-Rapp, *Fixing Watches*, *supra* note 24, at 165.

115. *Id.*

III. METHODOLOGY

A. Sample.

The contemporary sample consists of a combination of materials collected between 2013 and 2016, primarily from professional trainers and law firms, and historical training materials collected from a library network.

The contemporary sample was collected by contacting U.S.-based harassment training providers identified through searches on Google and LinkedIn and requesting copies of their harassment training materials. In order to identify training materials with the broadest reach and impact, the study population was limited to trainers serving multiple clients, such as law firms, professional trainers, or training companies.¹¹⁶ Where a single law firm appeared multiple times in the sample, I contacted the individual lawyer that appeared to have the most seniority.¹¹⁷

The contemporary sample was based on list of 175 law firms and professional training entities.¹¹⁸ I contacted each firm/entity on the list via email and letter and requested copies of their harassment training materials.¹¹⁹ Twelve law firms and 17 non-law firm training entities provided materials, producing a response rate of 16.5%.¹²⁰ Many of the respondents provided materials for more than one training (e.g., multiple Microsoft PowerPoint presentations).¹²¹ Likewise, online trainers typically provided access to multiple trainings. Responses from these 29 training providers thus produced 39 trainings for analysis.¹²² These training providers were promised that their training materials would be kept confidential and used for research

116. To focus on training materials with the widest reach, I excluded trainers that appeared to work in-house, as well as business consultants, judges, expert witnesses, or others that did not appear to offer their training services to the public.

117. The original database included 46 attorney names where the associated firm appeared more than once in the sample. Based on my personal experience working at a large law firm, I assumed that lawyers working for a common firm used a common set of training materials. To avoid duplicative materials and wasting attorney time, I wrote to only one attorney at each firm. I selected the attorney in the sample that appeared to have the most seniority at the firm.

118. Of these, 77 addressees were at law firms and 98 were at non-law firm entities.

119. Of these, 19 were returned as undeliverable and 11 responded they had no written materials or did not provide harassment training. I specifically requested "harassment training" material, and notably did not request "discrimination training" or "EEO training," which is sometimes marketed as a separate standalone training.

120. See discussion *infra*, for an assessment of the limitations associated with a 16.5% rate.

121. For example, some provided multiple PowerPoint trainings reflecting the different types of harassment trainings they provide. Some trainers provided PowerPoints with speakers' notes or handouts. Where a particular training document could be matched to other documents provided (for example, a PowerPoint presentation with an accompanying handout), I analyzed them as a single training. Otherwise, I analyzed them separately.

122. One of these trainings was not included in the analysis because it focused on investigations in response to harassment complaints.

purposes only, and that they would not be individually identified without their consent.

The contemporary sample also included some trainings made publicly available on the internet¹²³ from seven different training entities.¹²⁴ These included two PowerPoint templates downloaded from the Society for Human Resources Management and eight YouTube videos.¹²⁵

Historical¹²⁶ harassment trainings were collected through a library search of the University of Oregon's interlibrary loan network, composed of both a regional consortium (Orbis Cascade Alliance), as well as a global network (Global Reference Network Guidelines or OCLC). Trainings that focused primarily on Title IX obligations were excluded from the sample.¹²⁷ The historical sample consisted of 25 trainings from 21 different training providers, copyrighted between 1980 and 2012. Most were on VHS tape or DVD, although some trainings were on written workbooks or trainer manuals. Most were created by private entities (16 out of 25 trainings), with the remainder from federal or state government agencies, educational institutions, and non-profit organizations.¹²⁸ None of the historical trainings originated from law firms.

Some trainings from the 1980s and early 1990s did not fit squarely within what would later be solidified as the "genre" of harassment prevention training, which I define in greater detail below. These include two documentary-like videos (one from the Public Broadcasting Service (PBS), and another called "Power Pinch"), and an episode of the Phil Donahue Show. All three were marketed for educational purposes. These videos were included after a review suggested their content and purpose were similar to that of other trainings, despite apparent differences in format and approach.

123. Some trainings from universities were publicly available on the internet. I ultimately declined to use them because they tended to focus heavily on Title IX liability, which presents a particular set of risks for employers that do not always apply in the Title VII context.

124. The YouTube videos were included based on a keyword search for harassment training. Videos that did not include training content but instead satirized harassment trainings or commented on harassment trainings were not included. The true identities of YouTube posters can be somewhat uncertain. They appeared for the most part to be training or media companies, although one training linked to a referral site for plaintiff's lawyers. Most of the YouTube videos were brief, although one was a two-hour teleconference intended to comply with a California law requiring that supervisors receive two hours of training every two years.

125. These trainings were posted between 2011 and 2016.

126. See *supra* note 29 for an explanation for how I define "historical."

127. See *supra* note 123.

128. Lauren B. Edelman's research revealed that the federal government tended to innovate with respect to equal opportunity rules, offices, and grievance procedures, and that those practices later "diffused" out to state governments, colleges, and eventually private businesses. EDELMAN, *supra* note 24, at 113–17. Here too, it may be that government agencies and educational institutions took the lead in developing the earliest trainings, and that training approach later diffused to the private sector. These early trainings may have been less subject to corporate constraints regarding how harassment is portrayed and addressed.

The data analyzed herein ultimately consisted of 74 trainings from 61 training providers. Although the absolute number of training providers included in the sample is small, their reach is substantial. Many such providers have been in business for decades, according to promotional materials on their websites. One provider in the historical sample, Kantola Productions, claims that its library of materials “are used by 89% of the Fortune 100” companies.¹²⁹ Videotapes were the most commonly used form of training as of 1991, such that library-held copies could be a reasonable proxy for how such information was conveyed during that period.¹³⁰ For the contemporary sample, several providers listed well-known companies as clients. Even smaller training companies refer to having served dozens of companies, or in one case, hundreds of companies. Views for the YouTube videos included in the sample ranged from 755 views¹³¹ to more than 128,000 views.

Table 1 presents a summary of the different types of trainings represented in the sample.

Table 1: Types of Training Providers

Training Entity	Number of Training Providers	Percentage
Non-law firm private entities	39	65
Law firms	13	20
Government agencies	7	11
Educational/non-profit	2	4
Total	61	100

The majority of training providers were private entities other than law firms (65%). Law firms represented 20%, and government agencies and educational/nonprofit represented 15%.

Table 2 illustrates the format of the trainings included in the analysis. The most common format was video (39%), followed by PowerPoint presentations (and accompanying handouts) at 32%. The remaining materials were standalone handouts, workbooks, written guides, and interactive online trainings.

129. Kantola Training Solutions, *About Us*, LINKEDIN, <https://www.linkedin.com/company/kantola-productions> (last visited Apr. 23, 2018).

130. Chris Lee, *Who Gets Trained in What—1991*, TRAINING, Oct. 1991, at 47.

131. The video with 755 views, a lengthy two-hour YouTube webinar training, had a much smaller viewership than other trainings in the sample, which were in the thousands or tens of thousands.

Table 2: Format of Training Materials

Training Medium	Number of Trainings	Percentage
Video (streamed, DVD, VHS)	29	39
PowerPoint (and accompanying handouts, if any)	23	32
Other handouts	9	12
Workbook, written guide, or training manual	9	12
Interactive online	4	5
Total	74	100

The majority of trainings (64%) in the sample were recent, dating from 2010 to 2016. (See Table 3.)

Table 3: Date of Training Materials

Time Period	Number of Trainings	Percentage
1980-1989	6	8
1990-1999	12	16
2000-2009	9	12
2010-2016	47	64
Total	74	100

The sample is subject to a number of limitations. First, the response rate of 16.5% was quite low, which I attribute to the proprietary and valuable nature of the materials. It is likely that the absence of extant research on anti-harassment training content is due to the extreme difficulty associated with gaining access to these materials. Training materials are owned by the trainers that sell their live training services to individual employers. These trainers typically do not sell their materials on the open market, since their livelihood depends on fees associated with live trainings to customers. Live training sessions from law firms “can cost thousands of dollars per session.”¹³² Online trainers can charge on a per-employee basis, in the range

132. Ilana DeBare, *The Cost of Compliance/Sexual Harassment Training Becomes a Lucrative Business*, S.F. CHRON. (Oct. 28, 2005), <http://www.sfgate.com/business/article/The-cost-of-compliance-Sexual-harassment-2598839.php>.

of \$20 per employee, which adds up quickly.¹³³ Harassment training DVDs can cost hundreds of dollars.¹³⁴ Some trainers stated they considered their materials too confidential to disclose. It is possible that those who declined to participate use training materials that differ in important respects from those included in the sample.

Second, the size of the sample is somewhat small, especially as to the historical trainings. Materials from the 1980s and 1990s only comprised of 18 trainings, which meant that each such training was disproportionately influential when examining trends over time. Third, because the sample was limited to outside trainers, as opposed to in-house trainers serving their employers, the results here are not generalizable to the practices of in-house trainers.¹³⁵ Fourth, the contemporary sample primarily consists of materials from long-established businesses and entities, with the exception of some YouTube videos and online interactive training providers. Trainers that have been in business for many years might be more likely to rely on older content than more recent entrants to the market.

In addition, the historical sample was limited to trainings in a fixed format: videos and workbooks. Unlike the contemporary sample, it does not include materials that reflect the content of in-person trainings. To the extent that live trainings historically departed from the content of fixed format trainings, the results described relating to historical trends will be biased. Likewise, PowerPoint materials and handouts included in the contemporary sample may not reflect the entirety of the content delivered in the training. For example, live trainers may include hypotheticals or demonstrations not reflected in the written materials. The absence of such information may bias estimates about the examples used, advice given, and the most common types of content.

In light of these limitations, the results described here represent a rough sketch of common training content, which would be more precise and perhaps somewhat different with a more representative sample.

133. *Id.* See also *Training for a Harassment-Free Workplace eLearning—Employee Version*, KANTOLA TRAINING SOLUTIONS, <https://www.kantola.com/Training-for-a-Harassment-Free-Workplace-eLearning-Employee-Version-PDPD-547-K.aspx> (last visited Apr. 23, 2017).

134. *Anti-Harassment Employee Training DVD*, HR DIRECT, <http://www.hrdirect.com/training-and-testing/workplace-training/harassment-training/anti-harassment-employee-training-video> (last visited Apr. 23, 2018) (DVD priced at \$243.00); *Harassment and Diversity: Respecting Differences—Employee Version DVD*, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT STORE, <https://store.shrm.org/harassment-diversity-employee-version.html> (last visited Apr. 23, 2018) (DVD priced at \$189.00 for members, \$199.00 for non-members).

135. Because there is no published literature on training content, it is unknown whether in-house trainings differ from external trainings.

B. Coding Methodology.

Electronic and paper trainings were scanned and converted to a text format. DVDs and VHS tapes were transcribed. Interactive trainings were recorded in a more structured way to manage the large quantity of content, due to quizzes, activities, and informational pop-up windows. The content of each training was then distilled by summarizing the content in short form as a list in Microsoft Excel. For example, if the training described the standard for employer liability in the event of harassment by a co-worker, the content was coded as “Co-worker liability.” If the training advised viewers to refrain from physically touching others in the workplace, the content was coded as “Don’t touch employees.” This process resulted in a list of content covered in each training.

Topics were then assigned one of 378 numerical codes, unless the content appeared unique to a particular training. The coding process was largely unstructured, and was intended to be responsive to the content observed in the training and to preserve the specificity of content in the subsequent quantitative analysis. The topics can broadly be categorized into three groups: (a) substantive or legal topics (161 topics); (b) examples (100 topics); and (c) advice (117 topics). In some of the analysis, examples and advice were condensed into larger groupings. I then analyzed the codes for the frequency of their appearance.

IV. RESULTS

In the 1980s, content was presented in a variety of ways – including in written self-study guides, through real testimonials/interviews, and in one case, a talk show. Sometime in the mid-nineties, trainings coalesced into a “genre.”¹³⁶ Broadly, the genre is characterized by an authoritative figure (often a “talking head” on video) informing participants of the costs of harassment and the legal rules, interspersed with cautionary examples. These examples illustrate conduct that transgresses the expert’s definition of permissible behavior. The training concludes with advice for training participants.

By the 1990s, the talking head genre was more common than other methods of approaching the material. Written study guides appear to decline

136. In describing the characteristics of video trainings, Perry et al. offer a similar summary: “Videos used in sexual harassment awareness training generally share three characteristics. First, the videos define sexual harassment and provide factual information. Second, the videos provide behavioral examples of appropriate and inappropriate interpersonal behavior. Finally, the videos discuss legal issues surrounding sexual harassment.” Perry et al., *supra* note 27, at 700; Magley et al. described two different types of harassment trainings: “communicative training” programs, which are intended to convey information about policies and legal rules, and “sensitivity” trainings, which sensitize employees to the seriousness of harassment. Magley et al., *supra* note 28, at 227.

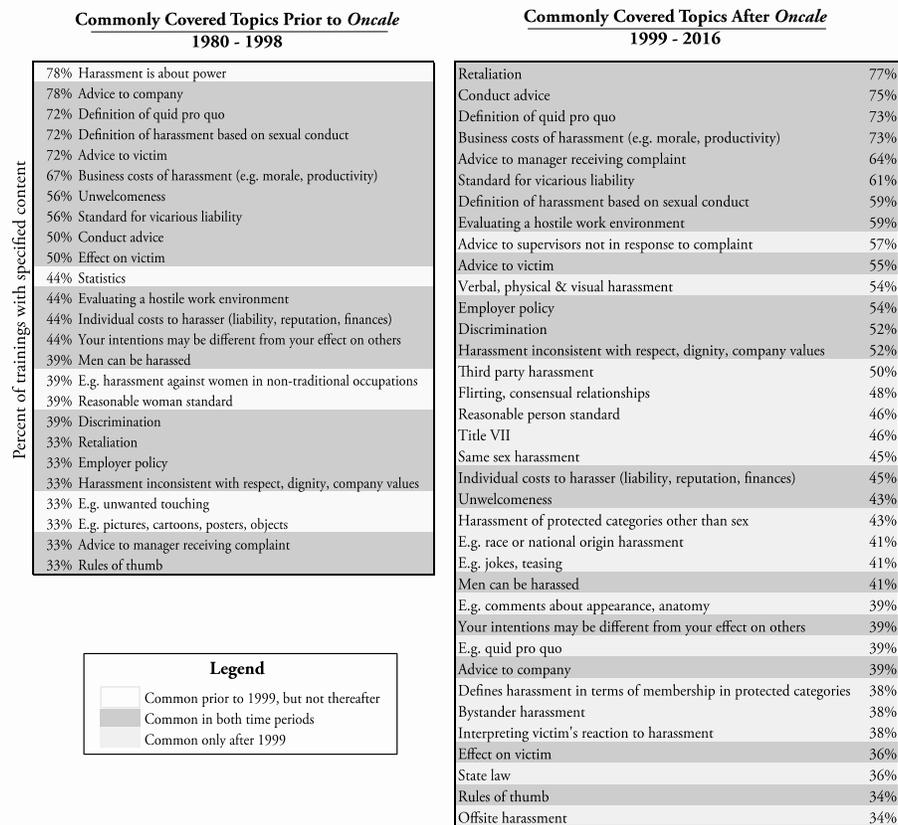
during the 1990s and had largely disappeared by the 2000s. Videos and DVDs in the 2000s also strongly conformed to the genre. Even YouTube videos now conform to the genre, although the authority figure sometimes appears as a voice over rather than a talking head.

In addition to the convergence in genre, there were also common threads within the content of the trainings. Figure 1 consists of “composite” trainings: a list of topics that appear in 33% or more of trainings during that time. The composites are divided into two time periods – before and after the Supreme Court’s 1998 decision in *Oncale v. Sundowner*. As previously noted, *Oncale* was significant because it closed the door on the EEOC’s definition of harassment. It set forth a definition of harassment that did not depend on sexual conduct or sexual harassment, but one that inquires whether the harassment was motivated by the victim’s membership in a protected category. In theory, trainers should have revisited their content after 1998 and rebuilt it around a definition of harassment based on membership in protected categories.

However, as Figure 1 illustrates, there was substantial continuity in content before and after 1998. The dark gray portions of the table indicate content that was commonly covered before and after 1998. Almost all of the content commonly covered between 1980-1998 remained common in the later trainings. (The white portions of the 1980-1998 composite include the topics that did not meet the 33% threshold in later trainings, although they did not disappear completely.) Indeed, these legacy topics represented 13 of the 15 most commonly covered topics between 1999 and 2016, with the newer topics (light gray) covered somewhat less frequently.

Overall, the composites suggest that training content has an additive quality, with trainers adding new content based on legal developments and litigation trends without discarding older content entirely. For example, 72% of older trainings included a definition of harassment based on sexual conduct, and that definition remained in 59% of newer trainings. Although the newer trainings were much more likely to include definitions of harassment based on protected category (38% of trainings), the newer definition remained eclipsed by the older one.

Figure 1: Harassment Training Composites



The composites also illustrate a number of trends. The early trainings provided two competing narratives for why harassment is problematic. First, they presented harassment as an abuse of power that took a substantial toll on victims. The earliest trainings sometimes even included testimonials from women affected by harassment. Second, they argued that harassment was a business liability that affected morale, productivity, and imposed litigation costs on the company. They argued that these costs could also be levied against individual harassers through individual liability or a loss of reputation.

As Figure 1 illustrates, the power-based narrative faded over time, and was overtaken by the business-based justification. Only 20% of the newer trainings state that harassment is about power, compared to more than 75% of the older trainings. Overall, trainings rarely justified harassment prevention trainings within the larger project of securing equal employment opportunities in the workplace or explained why harassment represents a

form of discrimination. Although recent trainings commonly referenced discrimination or Title VII, they tended to do so in passing or as part of a generic historical overview. Similarly, while half of the post-*Oncale* trainings characterized harassment as disrespectful or inconsistent with individual dignity or company values, the subtext tended to be more civility-based than rights-based.

The earliest trainings were also overwhelmingly focused on sex-based harassment, despite case law at the time recognizing harassment on the basis of race and religion. Consequently, both the examples and legal concepts covered in the early trainings tended to be specific to that context. They covered *quid pro quo* harassment, unwelcomeness, the “reasonable woman” standard, and explained that men could be victims of harassment. They also claimed that a harasser’s intentions mattered little – the important question was the effect of the harassment on the victim. Common examples in earlier trainings tended to involve harassment of women in non-traditional occupations, unwanted touching, and pictures, cartoons, posters, and objects with sexual content (often pin-up calendars).

The post-*Oncale* trainings preserved much of this sexual content and expanded on it. They included a discussion of flirting and consensual relationships. They added examples involving jokes, teasing, and comments about appearance.¹³⁷ In newer trainings, pin-up calendars are subsumed within the broader taxonomy of verbal, physical, and visual harassment. Newer trainings also include a proliferation of other “types” of harassment – third party harassment (by a non-employee), offsite harassment (occurring away from the workplace or outside of normal working hours), and bystander harassment (harassment by observing the offensive conduct of others). These sub-types, rarely covered in any depth in the average employment discrimination textbook (if at all), receive substantial attention in recent harassment prevention trainings. For the most part, trainers do not use the terminology to expand conceptions of harassment beyond sexual conduct. Instead, they typically serve as further examples of impermissible sexual conduct in multiple contexts.

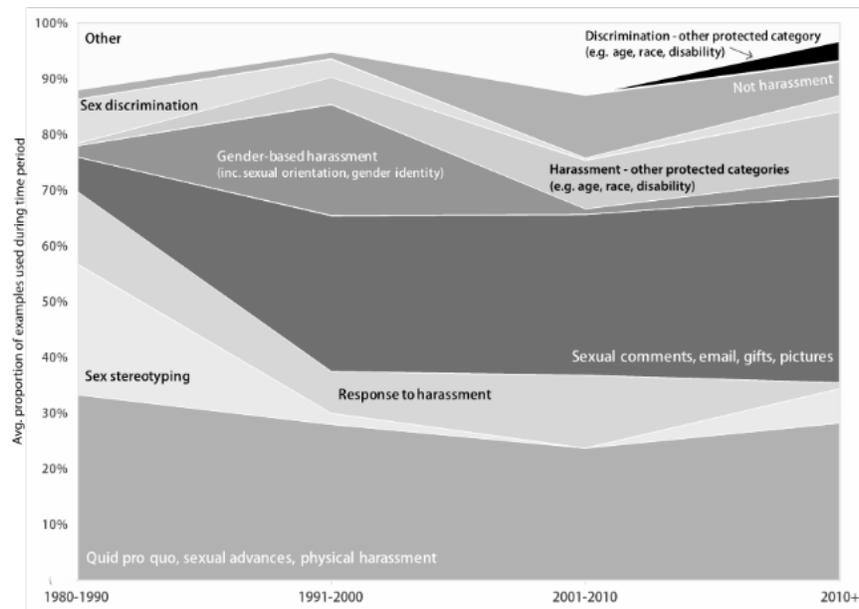
Post-*Oncale*, more trainings included a discussion of harassment based on categories other than sex, such as race or national origin. They were also much more likely to include an example or illustration relating to race or national origin harassment. However, many trainings appear to have only made marginal changes in that regard. For the most part, harassment based on other protected categories (race, national origin, age, disability) tends to

137. In a trade journal, one commentator noted that “most trainers say it is harassment to tell jokes, use endearments, or give compliments. That is not true. Jokes and endearments . . . are trivial[.]” Rita Risser, *Sexual Harassment Training: Truth and Consequences*, 53.8 TRAINING & DEV. 21, 21 (1999). The commentator also criticized fellow trainers for presenting their personal values as “the law.” *Id.* at 21–22.

be lumped into the category of “not sex” and given similar billing as other subcategories of harassment, like third party harassment.

Figure 2 below illustrates trends in the types of examples trainers use. Each decade presents a snapshot of the proportion of examples devoted to each topic. Topics broadly fall into nine groups, as well as an “other” category.

Figure 2: Types of Examples Used in Harassment Trainings, by Time Period



During the 1980s and 1990s, around 25–30% of the examples used by trainers related to the more severe forms of sexual harassment (quid pro quo, overt sexual advances, and unwanted touching). That proportion has remained relatively stable over time.

The earliest trainings also tended to include examples relating to sex stereotyping, such as assigning women to certain types of work. These types of examples all but disappeared later on, with a slight uptick in recent trainings. The earliest trainings also devoted more attention to sex discrimination. Likewise, in the 1990s there was greater emphasis on gender-based harassment, such as referring to women as “honey” or “sweetie” or harassing women in non-traditional occupations. These examples also faded over time and remain uncommon in current trainings.

The examples involving gender equality that animated the earliest trainings appear to have been replaced with examples involving less severe

sexual conduct. In the 1990s, trainers started devoting around 30% of their examples to sexual comments, messages, and jokes. This level has remained relatively constant. Notably, current trainings devote 60% of their examples to some form of sexual conduct. Surprisingly, a smaller proportion of examples from the earliest trainings related to sexual conduct, at a time when the trainings defined harassment almost exclusively in terms of gender.

Nevertheless, current trainers include some examples of harassment and discrimination based on other protected categories, such as age, race, or disability. About 15% of examples in current trainings are now devoted to those topics.

Recent trainings include more examples of non-harassing conduct, like counseling a subordinate over poor performance, using profanity, or making otherwise innocuous comments. The pedagogical purpose of these examples was not always clear, as the materials did not always reveal whether the trainer considered the conduct harassment. Sometimes the examples were used to illustrate permissible managerial behavior, presumably to reduce frivolous harassment complaints. In other cases, the context suggested the trainer thought the conduct was inadvisable even if it did not qualify as harassment.

Figure 3 below compares the most common advice from trainings before and after the 1998 *Faragher v. Boca Raton* case. As previously discussed, *Faragher* granted employers an affirmative defense in harassment cases where they made reasonable efforts to prevent and correct the harassment, and where the employee failed to avail themselves of those preventative/corrective measures.¹³⁸ The *Faragher* decision represented an additional inducement for employers to develop systems to respond to harassment complaints. To the extent employers adopted such systems more widely in response to the *Faragher* decision, advice delivered in the trainings would presumably reflect such implementation.

138. *Faragher*, 524 U.S. at 807.

Figure 3: Most Common Advice Pre- and Post-Faragher

1980-1998	1999-2017
<ol style="list-style-type: none"> 1. Make a written record (to victim). 2. Talk to friends and support network. 3. Intervene if you observe inappropriate behavior. 4. Investigate. 5. Advice on how to confront harasser. 6. Confront the harasser. 7. Complain to supervisor or harasser's supervisor. 8. Monitor the work environment. 9. Train/educate employees. 10. Examine your own behavior. 11. Tell human resources. 12. Take immediate and appropriate corrective action. 13. Adopt a policy. 	<ol style="list-style-type: none"> 1. Investigate. 2. Tell human resources. 3. Train/educate employees. 4. Confront the harasser. 5. Intervene if you observe inappropriate behavior. 6. Take complaints seriously. 7. Complain to supervisor, or harasser's supervisor. 8. Document the harassment (to manager). 9. Understand the policy. 10. Don't promise confidentiality. 11. Walk your talk, be a good role model. 12. Respond immediately to complaints. 13. Follow the policy.

Figure 3 suggests that responses to harassment claims became much more institutionalized after *Faragher*. The most common advice pre-*Faragher* consisted of self-help measures. In particular, they commonly advised victims of harassment to create written documentation of the harassment. This advice all but disappeared in later trainings. The early trainings also advised victims to make use of a personal support network, perhaps to maintain their sense of health and well-being. This advice also rarely appeared post-*Faragher*. The early trainings seemed to assume organizational systems were unlikely to be responsive to harassment complaints – hence the need to document on one's own and seek personal support. While trainings both pre- and post-*Faragher* advised victims to confront the harasser if they felt comfortable doing so, the earlier trainings offered more concrete behavioral advice on how to do so. Advice to supervisors from the early trainings also tended to assume that supervisors were on their own in addressing harassment. The supervisor was instructed to intervene, investigate, and also to take corrective action in response to the complaint.

Current trainings suggest a much more institutionalized response to harassment. Although “investigate” is the most common advice, “tell human resources” is a close second. Current trainings also treat supervisors as the first stop in a harassment complaint, but their role appears limited to providing “intake” – documenting the initial complaint of harassment and

conveying it to human resources (HR). They are no longer advised to take corrective action in response to a complaint; that role has been ceded to HR. Instead, trainings offer specific instructions to supervisors on how to conduct the intake – do not promise confidentiality, respond immediately, and take complaints seriously.

Current trainings also assume that employers have a detailed harassment policy in place. While early trainings advised employers to adopt a policy, more recent trainings advise supervisors to understand and follow the employer's policy.

V. DISCUSSION

A. Summary of Trends.

Results support some broad themes and trends. First, the content of current trainings appears to have been influenced by older content.¹³⁹ This propensity to perpetuate older content was exemplified by one contemporary training I reviewed, in which a dated video clip, seemingly from the 1980s or early 1990s, had been pasted into a PowerPoint presentation. Training content appears to be cumulative, where trainers are more inclined to add new topics than discard old ones.

In this way, changes to training content operate somewhat like software updates – where the existing substrate is patched and new features are added – but the original code remains intact.¹⁴⁰ Consequently, the core content of harassment trainings may be somewhat ossified,¹⁴¹ even as some content adapts over time.¹⁴²

Overall, results suggest that the EEOC's non-binding 1980 Guidelines on harassment cast a long shadow. The earliest trainings incorporated the

139. See Figure 1.

140. As previously noted, it is possible that this study overestimates the continued influence of older content because the sample was biased toward established trainers and entities within the industry. More established trainers might be working from older material that they (or their predecessors) developed. Some of the newer entrants to the market—in particular, some of the interactive online training providers—used examples that more closely reflected current litigation trends. To the extent that newer entrants are under-sampled proportional to their representation in the overall market, this study overestimates the continued influence of older content.

141. Cynthia L. Estlund used this term to describe the state of American labor law, arguing that it was “sealed off . . . from democratic revision and renewal and from local experimentation and innovation.” Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

142. One might also have the opposite objection to this study's results, and argue that trainers have no choice over the content they include in harassment trainings. Under this view, the “genre” was pre-ordained, because there are limited ways to approach the material and limited formats in which to present them. There is some truth to this objection: all harassment trainings would be expected to cover the basic legal rules. Many components of the composite trainings are a direct function of the case law. However, as I explain in greater detail below, there are a number of possible alternatives to the current genre.

EEOC's definition of sexual harassment based on sexual conduct. Sixty percent of the post-*Oncale* trainings continue to define harassment with reference to sexual conduct. MacKinnon's distinction between quid pro quo harassment and hostile work environment harassment also remains influential. The large majority of current trainings include a definition of quid pro quo harassment, and the proportion of trainings using that definition has not changed over time.¹⁴³ At the same time, current trainings are trending toward broader definitions of harassment. They are more likely than older trainings to define harassment in terms of protected categories. They are also more likely to include examples relating to harassment or discrimination on the basis of other protected categories, albeit in small numbers.

The narrow focus on sexual conduct also extends to other portions of the training. Trainers continue to focus on legal topics specific to sexual harassment, such as unwelcomeness, flirting, consensual relationships, and the question of whether men can be harassed.¹⁴⁴ Trainers also devote a disproportionate number of their examples to sexual conduct. Even in current trainings, the large majority of examples are devoted to sexual conduct, equally divided between severe forms of sexual harassment (such as physical harassment or quid pro quo harassment) and relatively less severe conduct (such as suggestive jokes, comments about appearance, and inappropriate emails).

A focus on sexual conduct also appears to color the overall framing of the training and legal rules. Although trainings often reference Title VII, they tend to do so in passing as part of a brief historical overview or as a citation to legal authority. Only about half mention discrimination at all.¹⁴⁵ This may be due to differentiation within the training market, where a "harassment training" is marketed as a different training than "anti-discrimination training" or "diversity training." However, it also means that harassment has become unmoored from its larger purpose of ensuring access to equal workplace opportunity. This is especially the case in more recent trainings, where the claimed authority for the prohibition on various forms of misconduct arises not from the law, but company policies. Within this frame, harassment is a productivity drag that the company deems inconsistent with its business goals.

Current trainings contain a proliferation of "types" of harassment, which do not reflect legal terminology so much as admonitions regarding various forms of impermissible (often sexual) conduct. Trainers explain prohibitions on "visual," "verbal," and "physical" harassment. The expanding taxonomy of harassment types suggests that harassment can occur by anyone at any

143. See Figure 1.

144. *Id.*

145. *Id.*

time – unintentionally by a well-meaning but clueless supervisor, off-site by a contractor or customer, by an employee observing another employee’s conduct, by an employee of the same sex, or by a woman (towards a man). The sheer quantity of legal and quasi-legal concepts explored in the training sends an implicit message that harassment is too complex for a layperson to understand, and that a large swath of workplace conduct and interactions have the potential to be implicated by one or more of the enumerated categories.¹⁴⁶

Despite the heavy emphasis on legal content, trainings tended to gloss over one critical component of the legal definition of harassment: that it must be severe or pervasive to be actionable. They tended to embed that content within a formalistic definition of “hostile work environment” or into a vague discussion of the importance of context and situational factors. In addition, other content tends to undermine this component of the legal definition. Trainings that incorporate a company’s harassment policy often warn that conduct failing to meet the legal definition may nevertheless violate the company’s policy and result in adverse employment action. In addition, a substantial portion of examples trainers use, involving sexual comments, jokes, and emails, represent borderline conduct that may not constitute harassment. Trainers do not always provide an explanation of whether the conduct would qualify as harassment, which may lead participants to infer that such conduct would be strictly prohibited. Recent trainings further blur legal boundaries through the (less frequent) inclusion of innocuous or job-related conduct that clearly does not qualify as harassment.¹⁴⁷ Likewise, these examples are not always clearly designated as non-harassing conduct.

Social events with both women and men (or where a man invites a woman to a social event) tend to be presented as an especially risky environment, where the man says something offensive, flirts with the woman, or invites the woman to the event as a form of quid pro quo harassment. One training from the early 1990s included a vignette involving a man inviting a subordinate to join him for celebratory drinks with clients after work. The training did not portray the social invitation as an opportunity for advancement but as a means of objectifying the subordinate. Indeed, it was quite unusual for trainings to acknowledge the important role that social functions and informal interactions play in bona fide career advancement.

146. As discussed in greater depth, *infra*, trainers and employers may prefer to send the message that all such conduct is prohibited to deter employees from making comments that might give rise to discrimination-related liability. See also Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 228, 286–287 (2018) (discussing discrimination-related liability that can arise from comments that do not meet the legal threshold for harassment). One commentator in a trade journal recounted that when a “client hired a law firm to train its employees . . . they tried to scare the men by saying that everything and anything was harassment if a woman perceived it as such.” Risser, *supra* note 137, at 23.

147. See *supra* Figure 2.

Only a few contemporary trainings included any content or examples advising viewers to include women or other underrepresented groups in informal mentoring, networking opportunities, client development, or business-related social functions.

Lastly, results suggest a trend toward more institutionalized responses to harassment. Post-*Faragher*, trainings advise employees and managers to inform human resources of any harassment-related concerns, while pre-*Faragher* trainings tended to emphasize self-help. Whereas the earliest trainings tended to focus on providing advice to victims of harassment, current trainings focus on advising managers, who are best positioned to mitigate the liability associated with harassment.

B. Possible Explanations for Observed Results.

The observed results cannot solely be explained by legal developments. The narrow focus on sexual conduct, and on women as primary victims of harassment, was not compelled by legal rules. As discussed in Part II, harassment claims based on race predated sexual harassment claims, and the first religious discrimination case arose in 1976. Although the 1986 *Meritor* decision to some extent elevated sexual harassment as a separate legal concept, later decisions from 1993 onward characterized harassment within a larger legal context of anti-discrimination protections for women and other protected categories. Any lingering uncertainty as to whether sexual conduct was necessary for a harassment claim based on gender was put to rest in the 1998 *Oncale* decision. However, the results of this study suggest that once harassment prevention trainings were cemented as an educational effort to restrict sexual misconduct in the workplace in the 1980s and early 1990s, they have proven remarkably durable.

Trainings have not been entirely immune to changes in litigation trends. The recent, somewhat modest trend towards broader definitions of harassment may track larger trends in charges filed with the EEOC. As of 2016, sexual harassment charges represent only about a quarter of all harassment charges filed with the EEOC. The rest alleged sex-based harassment unrelated to sexual conduct, or harassment based on other protected categories like race, national origin, or age.¹⁴⁸ Increased attention to harassment based on other protected categories may reflect this statistical

148. *Compare Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010–FY 2018*, EEOC https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited May 19, 2018) (6,758 sexual harassment charges alleging sexual conduct) *with Charges Alleging Harassment other than Sexual Harassment FY 2010 FY 2010–FY 2018*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/harassment_new.cfm (last visited May 19, 2018) (23,528 harassment charges based on other protected categories). *See also* Chew & Kelley, *supra* note 39 (documenting a rise in race-based harassment claims after 1997, although case law dating back to 1971 established the availability of race-based harassment claims).

shift. Nevertheless, if trainings devoted time and attention proportional to the EEOC statistics, they would look different. All of the trainings would talk about harassment based on other protected categories, and they would devote at least half of their examples to those types of harassment, dividing the other half equally between sex-based harassment and sexual harassment.

The results observed do not align perfectly with a pure law and economics model, where employers are motivated to reduce litigation risk and adopt measures calculated to reduce that risk.¹⁴⁹ In a robust and competitive market for training services, one might have expected more radical shifts in training content following changes in the law and in litigation trends.

Schultz's theory is instructive. Her approach would suggest that the continued influence of the 1980 EEOC Guidelines and the disproportionate emphasis on sexual harassment reflect employer preferences.¹⁵⁰ Employer demand for trainings is driven less by legal strictures and more by corporate values that disfavor sexual conduct.¹⁵¹ They are, it would seem, willing to keep the focus on sex even at the expense of their litigation budget (assuming that more updated content would in fact prevent other harassment claims). Alternatively, Schultz might argue that the sex-based misdirection ultimately serves employers' economic interests. It distracts from scrutiny of underlying employment practices and workplace inequality, which would be much more complex and expensive to address.¹⁵²

Edelman, Dobbin, and Kelly's theories offer a different perspective. In this view, harassment prevention trainings do not strictly conform to legal rules, but anticipate and to some extent influence them. As they argue, in the 1980s and 1990s, it was far from certain whether harassment prevention trainings would offer much legal benefit to employers, but human resource professionals pushed for them nevertheless.¹⁵³ The results of this study suggest that the genre was cemented in the early 1990s, before much of harassment jurisprudence was fleshed out in the later *Harris*, *Oncale*, and

149. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 193 (5th ed. 1998) (describing how stock markets are viewed to be "efficient" in that "new information about a stock is disseminated so rapidly that . . . the cost of finding out whether or not it is correctly valued will usually exceed the profit to be made from knowing its true value."). This theory, as applied to the dissemination of risk information, would posit that firms adapt quickly to new information and adjust their practices in response to a changing risk environment. See also Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law & Economics*, 50 *STAN. L. REV.* 1471, 1484 (1998) (noting economic predictions fail to take loss aversion into account).

150. Schultz, *supra* note 47, at 2064.

151. *Id.*

152. *Id.* at 2068.

153. Dobbin & Kelly, *supra* note 27.

Faragher decisions. It then came to symbolize compliance with harassment law,¹⁵⁴ no matter how much harassment law subsequently changed.

Edelman's work would suggest that employers continue to demand a standard "sexual harassment" training, because it checks the symbolic box for employers.¹⁵⁵ Trainings that stray too far from the conventions of harassment training – in content or format – risk being too "out of the box" for box-checking purposes. Edelman's account could explain why trainings strongly conform to the "genre" of talking heads interspersed with examples, even in the context of newer formats like YouTube videos. Employers strongly prefer trainings that look and feel like the sorts of trainings that will get them credit for having completed them. Thus, ossified training content does not reflect market failure so much as a market that rewards conformity. This tendency may have been exacerbated by statutes that demand "sexual harassment" trainings. For example, the California statute mandating harassment prevention trainings is titled "sexual harassment: training and education" and refers to "sexual harassment" throughout (although it also requires trainers to cover "harassment, discrimination and retaliation").¹⁵⁶

More mundane factors may also contribute to the observed results. Trainers may be highly risk averse. Trainers entering the industry may inherit their material from veterans or build materials based on their experience or research on other similar trainings. These new entrants may be deferential to preexisting content, particularly if they notice that employers seem to demand traditional content. Moreover, the dearth of social science research on the effectiveness of actual training materials means trainers have little useful guidance for developing new materials. Absent good data, they are left to rely on what essentially amounts to folk knowledge and tradition.

Even when trainers learn about new legal developments, they may be reluctant to discard older material, an example of Kahneman and Tversky's concept of loss aversion.¹⁵⁷ In deciding whether to discard a topic or example, the potential cost of doing so feels highly salient – what if that nugget of information would have prevented an employee from engaging in that very form of misconduct? However, this frame of reference discounts the costs of perpetuating older content. These costs come in many forms, discussed in greater detail below.

154. EDELMAN, *supra* note 24, at 101.

155. *Id.* at 101.

156. CAL. GOV'T CODE § 12950.1(a) (West 2016), *supra* note 25.

157. See generally Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. OF ECON. 1039–1061 (1991).

C. The Benefits & Costs of Current Training Practices.

Existing approaches to harassment prevention training offer some clear benefits to employers, but also impose a number of potential costs that may have been largely overlooked. As to benefits, existing trainings offer peace of mind to employers, who have a fair amount of predictability in the service they are purchasing and can readily assert that they have complied with statutory training obligations. In the event of future litigation, they can also use the training in support of their defense.¹⁵⁸

Beyond prohibitions on sexual conduct, contemporary training content tends to protect employer interests. Indeed, trainers appeared to have learned rather quickly that their business depended upon having employers as clients and avoiding content that undermined their legal or business interests. For example, earliest trainings included detailed advice to harassment victims to protect their legal interests by documenting the harassment and contacting a lawyer. That advice, however, quickly disappeared from later training content.

Trainings tend to include other content that surreptitiously advances employers' legal and business interests. Glossing over the "severe or pervasive" part of the test, focusing on less severe conduct, and encouraging employees to report violations¹⁵⁹ allow the employer, in theory, to intervene earlier. This might benefit employees to the extent that less severe conduct tends to escalate into worse (and more legally actionable) conduct. It also allows employers to exercise greater control over employee behavior and build a favorable paper trail for any subsequent litigation.

However, this approach also imposes hidden costs. By decoupling harassment from discrimination, and focusing heavily on sexual conduct, the prohibition on harassment loses much of its moral force. The earliest trainings were better at explaining why quid pro quo and hostile work environment harassment toward female subordinates was wrong: because it occurred in a context where women primarily or even exclusively occupied subordinate roles.¹⁶⁰ As MacKinnon argued so persuasively, sexualizing this subordinate role exploited existing power structures, and in other respects maintained the status quo.¹⁶¹ This message is more complex where women and other historically disadvantaged groups occupy more managerial positions, and may themselves exploit the power of their position. However, unless trainings explain that sexual conduct is problematic where it operates

158. *But see* Sherwyn, Heise & Eigen, *supra* note 108, at 1301 (training had no effect on availability of Faragher defense).

159. Dobbin & Kelly, *supra* note 27, at 1209 (redirecting harassment claims to human resources also places it as a locus of institutional power in the organization).

160. MACKINNON, *supra* note 54, at 4; Schultz, *supra* note 47, at 2079–80 (discussing MacKinnon).

161. MACKINNON, *supra* note 54, at 4.

through the power and authority of supervisors, employees may start to question the value of the employer's prohibition, the underlying legal rules, or even the training itself.¹⁶²

Title VII's mandate is and could be morally compelling to employees, if conveyed in a more honest way. Trainers rarely discuss the law as a moral prohibition, perhaps on the assumption that employees find legal rules unpersuasive. However, the opposite may be true.

A recent study by Professor Jamillah Williams randomly exposed participants to either a short training discussing the business benefits of diversity, or a training explaining that Title VII demands equal treatment.¹⁶³ Those assigned to the Title VII condition were less likely to make discriminatory promotion decisions in a subsequent hypothetical.¹⁶⁴ Explaining to employees that harassment is wrong because it denies employees an equal opportunity to succeed in the workplace may be more persuasive than one containing a large number of admonitions supported by a lengthy corporate policy.

Trainings that define – and illustrate – harassment in a very broad and overly complex manner also risk undermining Title VII's purpose of removing barriers to equal employment opportunity. Trainings replete with terms that suggest a plethora of legal categories relating to harassment (verbal, physical, off-site, bystander), and include a laundry list of prohibited conduct, send the implicit message that harassment law is too complicated to understand in a meaningful way. Employees that receive this message might believe that their behavioral options are limited. They could simply reject the training content and behave as they always have. Or they could avoid or reduce their interactions with employees that are members of underrepresented groups.¹⁶⁵ While both outcomes are problematic, the

162. See, e.g., Magley et al., *supra* note 28, at 239 (some employees had a cynical response to trainings); Bingham & Scherer, *supra* note 97, at 140 (men who participated in the training were "significantly more likely to blame the victim"). See also Sara Rynes & Benson Rosen, *A Field Survey of Factors Affecting the Adoption and Perceived Success of Diversity Training*, 95 PERSONNEL PSYCHOL. 247, 259 (1995) (in a survey of human resources professionals regarding diversity training, half were described as having a "neutral" or "mixed" effect and 18% were characterized as "largely" or "extremely" ineffective).

163. J.B. Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1498 (2017).

164. *Id.* at 1500.

165. Ellen Fagenson-Eland & A. Hurley, *Challenges in Cross-Gender Mentoring Relationships: Psychological Intimacy, Myths, Rumors, Innuendoes and Sexual Harassment*, 17 LEADERSHIP & ORG. DEV. J. 42 (1996); Christa Ellen Washington, *Mentoring, Organizational Rank, and Women's Perceptions of Advancement Opportunities in the Workplace*, FORUM ON PUB. POL'Y, 1, 2 (2010) (noting that women have difficulty finding mentors).

avoidance response would contribute to the erosion of equal opportunity through reduced access to informal mentoring and networking.¹⁶⁶

A more honest description of Title VII would reveal that harassment must be severe or pervasive to meet the legal definition, and that Title VII does not operate as a civility code.¹⁶⁷ In truth, Title VII affords considerable latitude for employee behavior, provided it does not operate to marginalize or exclude employees based on their membership in a protected category. Moreover, harassment and discrimination are much more closely intertwined than existing trainings suggest. Systematically excluding women from a social event with clients may not offend Title VII's harassment jurisprudence, but it would be contrary to antidiscrimination protections. Employees should not leave a harassment training with the mistaken belief that avoiding social contact is the best way to comply with legal rules.

Discrimination law also offers a more honest path for explaining the legal significance and risks associated with comments about another employee's membership in a protected category. A supervisor's comments about an employee's appearance, or even jokes that implicate an employee's religion or race, are unlikely on their own to give rise to harassment-related liability unless extremely offensive. However, if that employee is later fired, or passed over for a promotion, that comment will likely be central to the litigation because it reflects the supervisor's discriminatory animus towards that protected category.¹⁶⁸ This example illustrates the true constraint in which supervisors operate: ensuring that the most important employment decisions in an employee's life – hiring, firing, promotion, compensation – are made on an equal footing. Discrimination jurisprudence suggests that supervisors should take care in their behavior and attitudes towards subordinates as part of the larger project of protecting the integrity of employment decisions.

Trainings that overemphasize prohibitions on sexual conduct are also problematic because they do so at the expense of other forms of harassment. A manager focused on avoiding sexual conduct may overlook gender-based comments that leave female employees feeling disempowered and hurts their employment prospects. Focusing on sexual conduct also ignores racial, religious, age-based, disability-based, and other forms of harassment that

166. Fagenson-Eland & Hurley, *supra* note 165 (“[M]ale mentors . . . may feel their offers to mentor will be seen as sexual advances by the protégé or that others in the firm will view their offers as such[.]”); Washington, *supra* note 165, at 2–3 (“[W]omen have difficulty in identifying and finding persons to commit to being their mentor” and “are behind in having networks that can connect them with decision makers that lead to their advancement in the workforce.”).

167. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). See also Risser, *supra* note 137, at 23 (“A better approach is to tell the truth about the law and appeal to people's good natures to set their own behavior at a high standard.”).

168. For an in-depth treatment of this question, see Tippett, *Legal Implications of the MeToo Movement*, *supra* note 146 at 286–293.

marginalize disadvantaged groups. These groups now file the bulk of all harassment charges with the EEOC.¹⁶⁹ Ignoring these claims leaves the affected employees vulnerable, as well as the employers on the receiving end of those charges.

Lastly, current trainings offer little in the way of advice for victims beyond advising them to invoke an institutional response. They seem to assume that an institutional response is always preferred over other options, which may be true from a liability reduction standpoint.¹⁷⁰ On the other hand, employee well-being may be better served by offering an array of options for how to respond.¹⁷¹ The EEOC's 2016 Report cited research finding that the large majority of harassment victims never report it to a supervisor or to the company.¹⁷² Additionally, some of these victims – even if inclined to report – may be poorly served by an institutional response if the harassment involves low-level conduct unlikely to produce strong institutional intervention.¹⁷³ Providing meaningful advice to those disinclined to report may ultimately improve their experience of the workplace and confidence in their ability to respond.

VI. FUTURE DIRECTIONS FOR TRAINING

How might trainers and employers improve upon the status quo? The question assumes that training is itself a worthy goal. As Edelman and Bisom-Rapp suggest, trainings cost money and time that might be better spent on other efforts to promote equal opportunity.¹⁷⁴ I will nevertheless assume that some form of educational intervention could ultimately be proven helpful, in part, because infrastructure already exists for such

169. See *supra* note 148.

170. From a purely legal standpoint, employees also preserve their legal interests by complaining early. However, if the conduct does not meet the legal definition of harassment, there is no claim to preserve in any event.

171. NiCole T. Buchanan, Isis H. Settles, Angela T. Hall & Rachel C. O'Connor, *A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U.S. Military*, 70 J. OF SOC. ISSUES 687, 690 (2014) (discussing the importance of offering options for employees seeking to report harassment).

172. EEOC, *supra* note 14.

173. *Id.* (citing research that reporting “is often followed by organizational indifference or trivialization of the harassment complaint”); Laura A. Reese & Karen E. Lindenberg, *Employee Satisfaction with Sexual Harassment Policies: The Training Connection*, 33 PUB. PERSONNEL MGMT. 99, 109 (2004) (survey respondents that had experienced harassment significantly less likely to feel positive about employer's policy and process). Reporting harassment also places victims at risk of informal or formal retaliation.

174. Bisom-Rapp, *Fixing Watches*, *supra* note 24, at 163–167. EDELMAN, *supra* note 24, at 237 (“When organizations develop effective mechanisms for change, legal deference to those structures is likely to buttress reform. It is only when legal institutions defer to structures that are ineffective that legal endogeneity undermines the ideals of law. Thus, further research might point to the conditions under which symbolic structures are generally more effective at achieving legal goals.”).

interventions. Existing expertise and resources might as well be redirected toward innovation and improvement, rather than dismantled entirely. Second, the technology has never been better to evaluate innovations in training. Online interactive training, for example, makes it possible for individual employers to randomly assign employees to different training groups and compare the results.

Courts and legislatures would do well to encourage employers and trainers to innovate and evaluate different approaches to educational interventions. Instead of treating training as a form of symbolic compliance, courts should inquire whether employers invested in measures to evaluate and improve employee training. Legislatures may also want to revisit strict training mandates that specify required content, label the training “sexual harassment trainings,” or specify a minimum duration.¹⁷⁵ These restrictions may ultimately constrain innovation.

Trainers will need to try new and different approaches to figure out what works best. Below, I offer a number of ideas, drawing from concepts in other disciplines, social science research on existing training approaches, and memorable training content from the sample.

A. Data-Driven Content.

One possible approach would be to adjust the content of trainings to reflect the relative frequency of different causes of action. Such a training would devote time and attention proportional to the frequency with which different claims are alleged. It would also focus preferentially on legal rules most relevant to current disputes. Trainers might also pare back the quantity of content to an amount that an employee could reasonably digest.

This approach represents a variation on current trainings. To the extent that trainings serve the primary purpose of knowledge transfer, better curating the knowledge to impart may be worthwhile. However, it may be no more effective than existing offerings at altering beliefs, attitudes, and behavior.

B. Trainings that Account for Individual Differences.

Training content in isolation may not succeed in improving employee attitudes or behavior. Improving training outcomes may demand leveraging other factors that have a greater bearing on success – like organizational influence, individual differences, and pre- and post-training activities.¹⁷⁶

175. See CA GOVT. CODE § 12950.1, *supra* note 25.

176. See *supra* note 100.

For trainings focused on knowledge acquisition, one might imagine a training that tests participant knowledge prior to the training, and then sorts participants into trainings with different degrees of difficulty depending on what they already know. This could most readily be achieved through online trainings, where the software redirects participants to different training based on their score.

One might also imagine designing trainings around differences in employee attitudes, beliefs, or self-reported behavior. For example, Perry and her co-authors found that training was most beneficial for the subset of participants with a high propensity to harass.¹⁷⁷ Thus, one might imagine a pre-test that sorts employees based on attitudes and beliefs and provides content that speaks to their frame of mind.¹⁷⁸

This is essentially the approach taken in the public health field for helping people exercise or quit smoking, which is known as the “transtheoretical model” or the “theory of planned behavior.”¹⁷⁹ The model identifies how likely a person is to change unhealthy behavior in the near term depending on whether they are in stages of change – pre-contemplation, contemplation, determination, action, maintenance, termination.¹⁸⁰ Someone hostile towards the idea of changing harassing behavior or hostile to the inclusion of women or minorities in the workforce might be in the “pre-contemplation” or “contemplation” stage. A training that offers a thin justification for its purpose and then proceeds to transmit a large quantity of technical content would be a poor match for a “pre-contemplation” employee.¹⁸¹ Those employees may be better matched to a group discussion with a respected high-level employee to discuss the leader’s own workplace

177. Perry, Kulik & Schmidtke, *supra* note 28.

178. It would be important to implement these sorting mechanisms in a way that does not stigmatize employees or serve as a basis for discipline. Online trainings can be implemented in a somewhat unobtrusive way, although employees may compare the trainings they receive and notice differences. If the sorting mechanism is formulaic, employees may also share the formula that would help them avoid longer or undesirable trainings (although such gaming might be a useful source of information about employee preference). One possible way to avoid the costs of forced sorting would be to allow employees to self-select into different trainings, or make recommendations to them about which trainings might suit them best based on answers. Offering more employee choice may also improve employee engagement and buy-in during the trainings.

179. See generally James O. Prochaska & Wayne F. Velicer, *The Transtheoretical Model of Health Behavior Change*, 12 AM. J. HEALTH PROMOTION 38 (1997).

180. *Id.* at 39.

181. Employees that have never considered their workplace behavior, or why it might make sense to change it, have no motivation to learn the content presented in the training. *Id.* (explaining in the context of health behaviors like drinking, smoking or overeating, “Precontemplation is the stage in which people are not intending to take action in the foreseeable future . . . [They] tend to avoid reading, talking or thinking about their high risk behaviors. They are often characterized in other theories as resistant or unmotivated clients” and noting that these individuals were portrayed as “not ready” for a health promotion program, when in fact, such programs were “not ready for such individuals and were not motivated to match their needs.”).

values, and how those values relate to employment equality. Such a training may not alter the employee's behavior in the near term, but it may move them from a "contemplation" stage to the "determination" stage. By contrast, an employee that is very motivated to learn more and improve upon existing behaviors could be matched to an online or in-person training that encourages reflection upon existing practices and offering ideas for improvement.

C. More Persuasive Messaging.

Research in the marketing field teaches that employees are sophisticated consumers of persuasive content. Over the course of their lifetimes, individuals develop structures of knowledge around persuasion that allow them to identify persuasive attempts and tactics.¹⁸² Harassment trainings are educational, but they are also persuasive – they seek to persuade viewers that they are legitimate conduits of legal rules and employer policies, that the legal rules and policies are themselves legitimate, and that employees should conform their behavior to those rules and policies.

Trainers have not adapted their messaging over time to address employee skepticism on these fronts. The most common feature of all harassment trainings in this study's sample is the argument that harassment is costly to the employer and a productivity drain. This seems like a legitimate message. In an environment where the bottom line matters and money is the currency of power, explaining the monetary costs at least appears to cater to employee preference.

However, such messaging is also susceptible to a more cynical interpretation. A lot of things cost money in business, like copy paper and holiday parties. Just because they cost money does not mean they are bad. Second, it sends the implicit message that the purpose of the training is to save the employer money rather than to help employees. Indeed, Magley's 2013 study of a harassment training found that most considered it helpful, but a small minority (six percent of women, nine percent of men), thought the training "was designed so that the company could protect itself from lawsuits."¹⁸³ In addition, a majority of those commenting on the employer's commitment to follow through were "fairly negative and cynical."¹⁸⁴

It is worth measuring whether productivity-based arguments are most persuasive or whether other approaches might be better. For example,

182. See generally Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. OF CONSUMER RES. 1 (1994); Margaret C. Campbell & Amna Kirmani, *Consumers' Use of Persuasion Knowledge: The Effects of Accessibility and Cognitive Capacity on Perceptions of an Influence Agent*, 27 J. OF CONSUMER RES. 69 (2000).

183. Magley et al., *supra* note 28, at 239 (the small number of negative responses could suggest that the training used in Magley's study had a fair amount of credibility among participants).

184. *Id.*

trainings rarely offered a moral justification based on legal rules (e.g., that harassment represents a form of discrimination and that Title VII demands equal treatment). As previously discussed, trainings that discuss the public policy justification for the legal rule may actually be more persuasive.

Other approaches to persuasion may also be fruitful. One YouTube video in the sample offered a creative approach to persuasion, offering illustrations and analogies based on familiar social norms. It advised viewers to pay attention to the social context of their interactions, analogizing to someone answering a cell phone at a funeral. The video also contrasted sexual overtures at a party (illustrated by an offended woman throwing a drink in a man's face), to those in the office, where the affected employee cannot leave. Although the video was short on legal content, it was memorable and persuasive.

D. More Authentic Content.

Relatedly, trainings may suffer from an authenticity problem.¹⁸⁵ To viewers accustomed to social media, user-generated content on YouTube, and reality television, scripted demonstrations in harassment trainings can feel like watching a sitcom from the 1990s. Even when the demonstrations are based on real cases, scripted discussions between harassers and victims seem inauthentic. Live trainers may also suffer from this problem to the extent they use older examples or examples drawn from contexts distinct from the workplace in which the training occurs. Relatedly, outsiders (whether appearing in person or on video) may not be viewed as a credible authority on how to interact in a particular workplace.

Some of the videos managed to convey a greater sense of authenticity. For example, early trainings covered less content but included more interviews and testimonials from harassment victims, business leaders, and in some cases, admitted harassers. These interviews sometimes appeared in the “talking head” format, but also in documentary-style videos. Testimonials lent emotional authenticity and moral conviction that can be harder to achieve through staged demonstrations or trainer admonitions.

Another training – a DVD from the early 2000s – sought to educate managers on responding to likely harassment scenarios in the restaurant industry. The training consisted of a series of case studies, where realistic (possibly real) victims of harassment described their experience. Restaurant managers were then shown the footage and asked how they would respond to the situation. A lawyer then weighed in on the manager's response. Although the DVD covered less content than more overtly instructional

185. See, e.g., Joseph Petraglia, *The Importance of Being Authentic: Persuasion, Narration, and Dialogue in Health Communication and Education*, 24 HEALTH COMM. 176, 179–280 (2009).

videos, it also brought a degree of authenticity that made the content seem more relevant, perhaps because all the participants seemed real, and it was filmed on location in restaurants.

This approach also raised a question as to whether “one-size-fits” all trainings resonate across different work contexts. More contextual approaches to education may help employees apply the content more readily. Indeed, in a 2016 Report, the EEOC stated that “training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees.”¹⁸⁶

Authenticity can also be enhanced through messengers that carry a lot of credibility. That messenger might be a business leader with an employee’s unit or organization.¹⁸⁷ There may also be third parties that employees might find persuasive, like business leaders, government officials or judges, athletes or other celebrities, or quasi-celebrities viewed as authoritative on the subject. However, in doing so, it is critical that the messenger offers a perspective from their own voice and experience. Trainings in the sample that included canned letters or scripted statements from company leaders were not especially authentic even though they originated from credible sources.

E. Skills Training.

Skills training may have a legitimate place in harassment training. Education-based research suggests that behavioral modeling, practice, and feedback can be important for learning and applying that learning in context.¹⁸⁸ Some of the early trainings were oddly empowering because they offered some skills training on how to respond to harassing conduct. The most compelling examples of modeling for victims actually came from testimonials, where employees described the things they said and did in response to the harassment. Although those cases also tended to involve severe harassment that continued unabated, the testimonials offered ideas for responding while avoiding the subtext that the victim is responsible for stopping the harassment. On the other hand, some of the simulated skills demonstrations from early trainings did not seem practical or realistic. For example, one training recommended the “broken record” approach: repeating your objection repeatedly regardless of what the harasser said. By contrast, current trainings rarely offer behavioral advice beyond advising employees to contact human resources.¹⁸⁹

186. EEOC, *supra* note 14.

187. *Id.* (describing the importance of leadership commitment).

188. Perry, Kulik & Field, *supra* note 96.

189. *See supra* Figure 3.

In its 2016 report, the EEOC recommended “bystander training” or “workplace civility” training as possible options.¹⁹⁰ Each of these offer contrasting skills. Bystander training teaches employees how to confront harassment they observe,¹⁹¹ while workplace civility counsels treating others respectfully as a matter of courtesy. Both offer somewhat crimped narratives of workplace relationships, which may make employees less inclined to implement the advice. Depending on the content of the bystander training, it may recommend confrontational approaches that exceed the comfort level of reticent employees. By contrast, workplace civility training feeds into a different narrative, where laws constrain employees from interacting authentically with each other. Employees may find this version of the workplace equally impractical.

Professor Mary Gentile’s book, *Giving Voice to Values*, offers a more balanced and potentially promising approach to skills training.¹⁹² Gentile’s intervention was developed in the context of business ethics.¹⁹³ Gentile argues that workers share a number of values – such as equality and respect – but that they often fail to articulate them or act upon them out of fear.¹⁹⁴ Professor Gentile advises employees to revisit their assumption of isolation, and to speak and act in manner consistent with those values.¹⁹⁵

Rather than teaching new interpersonal skills, Gentile advises employees to draw upon all of their existing interpersonal skills.¹⁹⁶ In doing so, workers have many options for responding to transgressions of their values, both in terms of content, and in the time, place, and manner of their response. If another employee makes an apparently discriminatory decision, the employee might choose to respond by asking why or by explaining facts that might favor another decision.¹⁹⁷ In response to an offensive comment, an employee might later take the offending employee aside to express their objection or the impact of their comment.¹⁹⁸ This approach provides

190. So-called “sensitivity trainings,” of which “workplace civility” training is an antecedent, have been associated with positive behavioral changes, although not measured in the context of harassing behavior. Myles S. Faith, Frank Y. Wong & Kenneth M. Carpenter, *Group Sensitivity Training: Update, Meta-Analysis, and Recommendations*, 42 J. OF COUNSELING PSYCH. 390 (1995). However, sensitivity trainings already form part of the body of harassment training content. Magley et al., *supra* note 28, at 227. Thus, sensitivity training may not represent much of an innovation in the field.

191. There is some evidence that bystander training can be effective at increasing helpful interventions on the part of bystanders. See Potter & Moynihan, *supra* note 98, at 872.

192. MARY C. GENTILE, *GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT’S RIGHT* (2009).

193. *Id.* at xxx-xxxii, 24–26.

194. *Id.* at xxix-xxxiv.

195. *Id.* at 18–19, 135–52.

196. *Id.* at 8–9, 156–60.

197. *Id.* at 11–13, 148–52, 157–58.

198. *Id.*

employees both the intrinsic motivation to intervene and allows them to calibrate their response to the context.

A few of the contemporary trainings have also waded back into skills training to varying degrees, primarily to educate potential harassers on being more sensitive to context and social cues from others. This too seemed like an interesting approach that could potentially yield benefits for the work environment.

VII. CONCLUSION

Current harassment trainings owe their content to a number of competing influences, including legal rules, past content, and employer preferences. Trainers may find themselves constrained to deliver the content employers have come to expect: stern prohibitions on sexual conduct with myriad watered-down examples and large quantities of legal information. In doing so, they lose sight of harassment law as a means of advancing equal opportunity in the workplace.

Without a morally compelling legal core to animate the purpose of the training and provide coherence to the rules, harassment training becomes a hollow exercise in corporate compliance. The experience of attending a standard harassment training eventually starts to resemble a meal at a chain restaurant. While the uniformity of the offerings protects against an even worse experience, it also cuts off the possibility of an experience that is innovative, engaging, meaningful, or tailored to the consumer's preferences or needs.

When employees grumble about harassment trainings, it is easy for employers to blame them for failing to take the issue seriously. But the cost of outdated or ineffective trainings is primarily imposed on employees, who pay with their time. And when trainings fail to reduce harassment or advance equality in the workplace, underrepresented employees also pay through lost opportunities.

Employees should demand and employers should provide better trainings that deliver meaningful content. Such trainings should be evidence-based and continually improved through data analytics. When employers and trainers identify an approach that works, those innovations should be shared to improve the state of the field overall.