"Nothing Personal:" Individual Liability Under 42 U.S.C. § 1983 for Sexual Harassment As an Equal Protection Claim

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Professor Anderson examines sexual harassment as an equal protection claim, asserted under 42 U.S.C. § 1983, and finds that some courts have misconstrued or misapplied equal protection and/or Section 1983 doctrine and have inappropriately limited sexual harassment claims. The author demonstrates that these courts require an additional element of "intent" in equal protection sexual harassment claims which in effect brings back a long-rejected theory that plaintiffs can prevail only if they show the defendant's actions were not based on some type of personal sexual desire for them.

Further, the author evaluates the limiting devices of Section 1983 doctrine, including qualified immunity and the "color of law" requirement, and concludes that the rationales that lead to adoption of such defendant-friendly standards in other cases do not apply to harassment claims seeking to hold the harasser individually liable. Rather, individual liability under the Equal Protection Clause for sexual harassment by government agents is necessary in order to provide victims of harassment complete justice.

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I.
INTRODUCTION

"What the Supreme Court has reaffirmed is that every public official remains accountable for their personal and private conduct."[1]

The opening quote was made by the plaintiff's counsel in a sexual harassment suit brought under 42 U.S.C. § 1983[2] and the Equal Protection Clause[3] against the current President of the United States. Ironically, if the acts alleged in that suit were indeed "personal and private," there will be no accountability on the part of this country's highest public official under § 1983.

As the law is currently being construed in the lower courts, the supposed personal and private nature of sexual harassment has served as the justification to dismiss § 1983 equal protection claims brought against individual state actors. Presented with a different, non-Title VII context, these courts engage in the same dismissive analysis described by Catharine Mc-

1. Attorney Joseph Cammarata, commenting on the Supreme Court ruling permitting his client, Paula Jones, to proceed with a suit for sexual harassment, pursuant to 42 U.S.C. § 1983, against President Bill Clinton. *Paula Jones Sex Suit vs. Clinton Can Proceed, Court Rules*, COM. APPEAL (Memphis Tenn.), May 28, 1997, at A1.

2. 42 U.S.C. § 1983 (1994). Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

3. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

Kinnon in 1979 as common to early Title VII analysis: "Personal is the most common descriptive term for the incidents. It is usually used as if it conclusively renders legal remedies unavailable, as if to the extent an occurrence can be described as personal the person has no legal rights."[4] This article will demonstrate that this approach is no more appropriate to equal protection/§ 1983 analysis than it is to Title VII analysis, and that those courts which employ it are imposing an unwarranted restriction on what could otherwise be a powerful anti-discrimination tool.

Most courts agree that an alleged victim of sexual harassment may be entitled to bring a civil suit under § 1983.[5] The exact relationship between § 1983 and Title VII as they relate to sexual harassment claims has not been fully explored.[6] Nor has § 1983 individual liability doctrine been examined in light of the social concerns accompanying laws prohibiting sexual harassment.

At least one court has characterized a § 1983 equal protection claim as "superfluous," on the grounds that § 1983 provides "[n]o greater or lesser protection against discriminatory practices" than does Title VII of the Civil Rights Act of 1964.[7] This statement overlooks the differences between § 1983 and Title VII in terms of availability of damages, length of the statute of limitation, and requirements regarding exhaustion of administrative remedies.[8] More crucially, it also underestimates the role of § 1983 as a means to impose individual liability, something that does not appear to be available under Title VII.[9] Unfortunately, the potential of that added liability has for the most part been lost, largely due to the courts having determined that the "personal" nature of harassment does not warrant imposing § 1983 liability on the individual actor.

To set the stage for the proposition that § 1983 is the primary potential source for individual liability, the status of this liability under Title VII and related statutes must first be briefly addressed. Courts are increasingly restricting the ability of discrimination claimants under such statutes to hold the individuals committing the discriminatory acts personally liable for those acts. All circuit courts save one which have addressed this issue have

4. CATHARINE A. MCKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN, 84 (1979).

5. *See, e.g.*, Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539, 549-50 (5th Cir. 1997)(noting that most circuits which have considered this issue allow a plaintiff to pursue both a Title VII claim and a § 1983 equal protection claim for sexual harassment). The Eighth Circuit has recently indicated that it has yet to reach this question. *See* Nicks v. Missouri, 67 F.3d 699, 704 n.3 (8th Cir. 1995).

6. In a recent race discrimination case, the Supreme Court "assum[ed]" in a footnote that Title VII's framework is "fully applicable" to employment discrimination cases brought under § 1983. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 n.1 (1993). This is the closest the Court has come to addressing the relationship between the two statutes in terms of standards to prove intentional employment discrimination.

7. *See* Carrion v. Yeshiva Univ., 535 F.2d 722, 729 (2d Cir. 1976).

8. *See infra* notes 39-42 and accompanying text.

9. *See infra* notes 10-13 and accompanying text.

held that individual liability suits are not permitted under these statutes.[10] This is based on the language of the statute extending coverage to "employers."[11] Although the definition of that term includes "any agent" of the employer,[12] that language has been interpreted as intended only to incorporate respondeat superior liability.[13]

This, unfortunately, is probably the conclusion best supported by Title VII. Both in the original version and the version amended in 1991, Title VII reflects that Congress indeed did not contemplate a federal cause of action against individual perpetrators.[14] Rather, Congress focused on creating a mechanism to force employers to comply with what they viewed as a national policy to promote equal employment opportunity.[15]

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10. *See* Equal Employment Opportunity Comm'n v. AIC Sec. Investigation, Ltd., 55 F.3d 1276, 1280-82 (7th Cir. 1995) (rejecting individual liability under Title VII and Title I of the ADA); Grant v. Lone Star Co., 21 F.3d 649, 651-53 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994)(individual not liable for backpay under Title VII); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (Title VII); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 (9th Cir. 1993) (Individual not liable under Title VII or ADEA); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991); *see also* Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 381 (8th Cir. 1995) (reserving issue under federal law but finding no individual liability under similar Missouri statute).

The one circuit court which deviates from this rule appears to be in a state of flux, reasoning that actions not "plainly delegable" by the employer can be the basis for individual liability, but without defining this concept. *See* Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510-11 n.1 (4th Cir. 1994) (distinguishing Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) *vacated in part on other grounds*, 900 F.2d 27 (1990)). Those cases rejecting individual liability also did not rule out all suits against individuals, but rather limited them to suits brought against the individual in his or her "official" capacity. *See, e.g., Busby*, 931 F.2d at 772 (ruling that the "proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly").

11. *See* 42 U.S.C. § 2000e-2(a) (1994). Section 2000e-2(a) provides as follows:

> It shall be an unlawful employment practice for an *employer*—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. (emphasis added).

12. *Id.* § 2000e-2(b) (1994).

13. *See Miller*, 991 F.2d at 587 (asserting that the "obvious purpose" of the agent language was to incorporate respondeat superior liability into the statute).

14. *See* Michael D. Moberly & Linda H. Miles, *The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability*, 18 OKLA. CITY U. L. REV. 475, 494-95 (1993).

15. The history of Title VII bears this out. The initial version of Title VII submitted in the 88th Congress would have placed enforcement authority in the EEOC, with limited judicial review, following the model of the National Labor Relations Board (NLRB). *See* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1315 (1990) (citing H.R. Reps. 405, 570, 88th Cong., 1st Sess. (1963)). An alternative model was subsequently approved by the House and submitted to the Senate, which carried over the remedial scheme of the first version, but limited the EEOC's enforcement powers to seek backpay and injunctive relief in the federal courts, and only after the agency pursued attempts to conciliate and settle the dispute. *Id.* at 1315-16. This alternative was apparently driven by concerns that employers needed a "fairer forum" than the adjudicative-agency model could provide, and that the threat of judicial involvement would promote

If a victim of harassment wishes to seek redress from the party who actually committed the harassment, the victim must look to another source of law. In some cases, a common law claim may be available.[16] Often, however, common law claims are summarily dismissed by courts.[17] When possible, the victim may, alternatively, seek to impose individual liability through the use of a statute such as § 1983.

Individual liability is without question recognized under § 1983,[18] which at first blush suggests that the statute may have more to offer than mere duplication of Title VII protections. However, the claimant faces many hurdles in the use of this statute, such that it ultimately may afford only limited recourse. One such hurdle is that many courts refuse to allow a § 1983 claim to be based on deprivation of rights secured by Title VII.[19] The claimant must assert an independent constitutional basis for his or her claim, which often means alleging violation of the Equal Protection Clause.[20]

Here, the plaintiff encounters another hurdle. A number of courts have suggested that there is a separate and additional "intent" requirement that must be pled in an equal protection claim under § 1983.[21] According to

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settlement. *Id.* at 1316 (citing 1964 U.S. Code Cong. & Admin. News at 2515-16 (additional views of Senator McCulloch)). The final version, a bipartisan compromise which emerged from the floor debate in the Senate, again retained the original remedial scheme, but further limited the EEOC's enforcement power by placing the right to seek redress with individual complainants, rather than with the EEOC. *Id.* at 1316.

Thus, the structure of Title VII arose from a model that was originally intended to facilitate equal opportunity by "watchdogging" employers and subjecting them to powerful administrative agency oversight, but ended up including private enforcement mechanisms. This private enforcement was not included to provide injured parties with greater remedies, but to provide the employer a "fairer forum" than the self-interested agency was seen to afford. In other words, from its inception in the House bill, Title VII focused on coercing employers to comply, not on identifying causes of discrimination and imposing liability on all culpable parties. Congress showed no concern about making sure the discriminatory actor was held responsible for his or her acts.

The Civil Rights Act of 1991, which amended Title VII and other related statutes, did little to change this conclusion. The Act simply expanded the type of remedies by grafting new subsections onto the existing remedial plan. *See* Moberly & Miles, *supra* note 14, at 494-95. The Act did not change the enforcement scheme that placed liability on "employers." *See id.*

16. Common law claims that might be asserted against individual defendants include, among others, assault and battery, intentional infliction of emotional distress, tortious interference with contractual relationships, and invasion of privacy. Susan M. Faccenda, Note, *The Emerging Law of Sexual Harassment: Relief Available to the Public Employee*, 62 NOTRE DAME L. REV. 677, 683 (1987).

17. *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (reasoning in a sexual harassment case that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress") (citing Cox v. Keystone Carbon, 861 F.2d 1265 (3rd Cir. 1979)); Faccenda, *supra* note 16, at 683-85 (evaluating various tort claims as providing "inadequate" relief in a sexual harassment case).

18. *See infra* notes 35-38 and accompanying text.

19. *See infra* notes 50-52 and accompanying text.

20. *See infra* notes 41-42 and accompanying text.

21. *See, e.g.*, Trautvetter v. Quick, 916 F.2d 1140, 1149 (7th Cir. 1990).

these courts, proof of the prima facie elements of sexual harassment developed under Title VII is not sufficient to meet this burden.[22]

In construing this "intent" requirement, some courts have in effect regressed sexual harassment doctrine. They find that harassment is a "personal" act unless it is directed at the victim's "status" as a member of a protected group.[23] Thus, acts that are directed at a plaintiff for "personal," as opposed to status, reasons do not violate equal protection.[24]

As reflected in the quote from Professor McKinnon earlier in this article[25], defining alleged sexual harassment incidents as "personal" was the same technique used to dismiss claims against employers before the Supreme Court agreed that sexual harassment is a form of sex discrimination.[26] Courts employing this technique continue to view sexual harassment as an act of sex, or desire, rather than an abuse of power and status. In the § 1983 context, this interpretation is particularly unjustified. Rather than using the theory to limit claims against employers, who might arguably have been in a better position to argue a lack of culpability warranting liability,[27] these courts are using the theory in § 1983 actions to exonerate the perpetrator.[28]

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22. *See id.*

23. *See e.g., infra* note 78-82 and accompanying text.

24. *Id.*

25. *See supra* note 4 and accompanying text.

26. *See e.g., Trautvetter*, 916 F.2d 1140, 1149. The Supreme Court agreed that sexual harassment was indeed a form of sex discrimination in its decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

27. An employer may be held liable for two types of harassment: quid pro quo and hostile environment. In quid pro quo cases, a supervisory employee requests sex in exchange for such things as being hired, being promoted, or just keeping a job at all. *See* Faccenda, *supra* note 16, at 680-81. Courts impute the supervisor's conduct to the employer, generally employing a form of strict liability. Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 669 (1995). In most jurisdictions, hostile environment cases impose a less strict "knew or should have known" standard: the employer is liable if it knew or should have known of the conduct and failed to take appropriate remedial action. *See id.* at 675-76. In either case, the employer itself is not necessarily the one who acts with intent, but rather its employee's intent to harass is attributed to the employer. The employer's level of culpability is thus arguably less than that of the employee who actually commits the intentional act of discrimination.

28. Disparate treatment claims under Title VII require proof of intent to discriminate, just as do claims under the Equal Protection Clause. *See* St. Mary's Honor Center. v. Hicks, 509 U.S. 502, 507-08 (1993) (emphasizing that right to recover under Title VII requires showing of intent to discriminate); Washington v. Davis, 426 U.S. 229, 240-41 (1976) (holding that the Equal Protection Clause requires proof of intentional acts). As previously noted, however, under Title VII, "intent" is something of a fiction when it comes to the employer. *See supra* note 27. Often, the employer's actions can be characterized as nonfeasance rather than malfeasance.

There is no similar fiction in a personal capacity act under § 1983. The focus is directly on the perpetrator of the harassment and that person's conduct. In effect, by this device of it being a "personal" act, courts find the same acts sufficient to impose liability for intentional discrimination on the employer who did not commit the acts but not "intentional" for purposes of the liability of the harasser himself or herself under the Equal Protection Clause. In Part II of this article, I evaluate whether equal protection doctrine actually compels this result.

A similar hostility is apparent in the courts' application of general § 1983 doctrine regarding qualified immunity and the "color of state law" requirement. Courts have demonstrated their distrust of sexual harassment doctrine by finding the defendant qualifiedly immune either because the law regarding sexual harassment under the Equal Protection Clause is not "clearly established," or because the state actor's conduct was "objectively reasonable in light of" the law that is clearly established.[29] If the plaintiff survives that test, the defendant can still avoid liability by claiming another variation on the "personal" concept. The defendant argues that the actions were "personal" in the sense that they were not taken under color of law.[30] In other words, the actions amounted to "generic workplace power relationships," not an abuse of state-granted authority as required by § 1983.[31]

Yet, as the quote by Paula Jones' counsel demonstrates, the ability to hold the alleged harasser personally responsible is often extremely important to the victim of discrimination, particularly in cases of sexual harassment. Without individual liability, victims are left with an incomplete sense of justice, while harassers suffer only that sanction, if any, their employer chooses to place upon them.[32]

This article examines the individual liability, or personal capacity, suit for sexual harassment asserted under § 1983.[33] In Part II of this article, I address how sexual harassment is actionable as a § 1983 claim. In this section, I establish that the substantive aspects of sexual harassment claims

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29. *See infra* notes 169-73 and accompanying text.

30. *See infra* notes 207-12 and accompanying text.

31. *See* Anthony v. County of Sacramento, 845 F. Supp. 1396, 1400-02 (E.D. Cal. 1994) (rejecting defense argument that conduct involved "generic workplace power relationships" because of actions of defendants which involved assertion of state-granted authority).

32. There is no common law right of contribution among tortfeasors under Title VII. *See* Northwest Airlines v. Transportation Workers Union of America, 451 U.S. 77, 94-95 (1981). The perpetrators of the harassment may, therefore, escape any direct financial responsibility for the damages awarded the plaintiff. In addition, because the sanction to the harasser is effectively within the control of the employer, and thus not consistently applied, there may be no particular sense of either consequence or personal responsibility on the part of the harasser. Somewhat ironically, the more important the harasser is to the employer, the more this sense of consequence or responsibility may diminish as the harasser knows the employer may seek to protect him or her, rather than the victim or the workplace as a whole. Title VII was intended to control discrimination by coercing employers into deterring the conduct, but by doing so, it has made the anti-discrimination principle primarily an economic one, rather than a personal one.

33. As stated, the primary focus of this article is the individual liability of the harasser, for hostile environment sexual harassment. Entity liability and liability of supervisors who are not the actual harassers raise additional and complex issues that will be addressed only as they relate to this primary focus. Sexual harassment is a particularly appropriate focus of the individual liability question, because it is in the context of this claim that the Title VII model of coercing the employer to control the behavior of the employee most clearly breaks down. Whereas an employer might be able to keep close eye on hiring and firing decisions, and the acts of an employee who engages in discrimination in these processes is readily imputable to the employer whose business he or she is doing, acts of sexual harassment are not so closely governed. The rules of employer liability in effect reflect this, by allowing the employer to escape liability in cases in which the employer neither knew nor should have known of the harassment. *See supra* note 27.

have been narrowly construed to limit § 1983 as a means to obtain individual liability. In Part III, I address how § 1983 doctrine has been used as a vehicle to limit individual liability claims, through qualified immunity and the requirement that acts be "under color of state law."

Finally, in Part IV, I look at the broader concerns reflected in § 1983 doctrine, such as overdeterrence of state actors and intrusion into government policy. I argue that the reasons that have been asserted in support of a narrow, defendant-friendly application of § 1983 do not readily apply to claims against an individual for sexual harassment. Further, the existence of employer liability under Title VII is not sufficient to vindicate the plaintiff's rights and warrant restricting access to § 1983. Rather, the victim of sexual harassment at the hands of a state actor should have access to § 1983 to hold that person personally responsible.

II.
INDIVIDUAL LIABILITY FOR SEXUAL DISCRIMINATION/ HARASSMENT AS A VIOLATION OF EQUAL PROTECTION

As previously noted, there is no question that individuals may be held liable under § 1983 in certain circumstances. Unlike Title VII, which rests liability on "employers," § 1983 applies to "persons."[34] The Supreme Court has held that state actors directly involved in the deprivation of rights may be sued as individuals.[35] Thus, a supervisor who merely fails to supervise would not be subject to individual liability under § 1983 for violation of the 14th Amendment.[36] However, the individual who actually commits the harassment, as well as any supervisor who encourages or otherwise participates in the harassment, would be a proper § 1983 defendant.[37]

There is also no question that § 1983 has much to offer a plaintiff, once the right to pursue such a claim is established. When the statute is available, it offers significant advantages to a claimant, including full recovery of both compensatory and punitive damages,[38] often a longer statute of

34. *See* 42 U.S.C. § 1983 (1994).

35. *See* Rizzo v. Goode, 423 U.S. 362, 377 (1976) (holding that relief could not be granted against individual police supervisors who played no affirmative part in depriving claimants of any constitutional rights).

36. *See id.*

37. *See* Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (finding that personal liability attaches to a supervisor who knows of the conduct and facilitates, approves, condones or turns a blind eye to that conduct).

38. *See* Carey v. Piphus, 435 U.S. 247 (1978) (finding that compensatory damages are available in § 1983 suits); Smith v. Wade, 461 U.S. 30, 56 (1983) (finding that punitive damages may be recovered in a proper case under § 1983). The remedial advantages of a § 1983 claim have been significantly diminished by the addition of compensatory and punitive relief to Title VII and related statutes in the Civil Rights Act of 1991 (42 U.S.C. § 1981a(a)(1),(2)(1994)), but the caps on those damages still make § 1983 a more attractive alternative. *See* 42 U.S.C. § 1981a(b)(3)(1994) (setting out damage caps).

limitations,[39] and no requirement that the claimant pursue administrative remedies before bringing a civil action.[40] The ability to take advantage of § 1983 has been limited, however, in several respects.

The first of these limitations relates to the basis for the sexual harassment claim itself. Specifically, many courts have concluded that the harassment claim must exist independent of Title VII or related federal anti-discrimination statutes.[41] This generally means that the claimant must allege and prove a violation of the Equal Protection Clause of the Fourteenth Amendment.[42] Then, interpreting this equal protection claim, many courts have asserted that the § 1983 claimant has an independent requirement to prove "intent" not present in a Title VII claim.[43] These courts have further suggested that harassment that is based on "personal" attributes of the plaintiff cannot support a § 1983 claim.[44] In both regards, the scope of § 1983 has been construed in an unduly narrow manner.

A. *The Need to Allege an Independent Constitutional Violation*

Section 1983 provides a remedy for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[45] At least on the surface, the statute presents two potential bases for an employment discrimination claim: a violation of a right secured by a specific provision of the Constitution such as the Equal Protection Clause of the Fourteenth Amendment and a violation of federal statutory law such as Title VII.[46] The vast majority of courts, however, have rejected the latter as a basis for a § 1983 claim.[47]

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39. Title VII actions have a 180 or 300 day statute of limitation, depending on whether the plaintiff is in a "deferral" state. *See* 42 U.S.C. § 2000e-5 (1994). Because § 1983 does not have its own statute of limitations, it borrows from state tort statutes of limitations, which are generally several years. *See* Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987) (citing Wilson v. Garcia, 471 U.S. 261 (1985)).

40. *See* 42 U.S.C. § 2000e-5 (1994) (Title VII administrative provisions); 29 C.F.R § 1614 (1996). The fact that a § 1983 claim would allow plaintiffs direct access to federal court, bypassing any administrative provisions in any parallel federal anti-discrimination statute, has led some courts to deny § 1983 claims altogether when such overlap exists. *See, e.g.*, Zombro v. Baltimore City Police Dept., 868 F.2d 1364, 1368-69 (7th Cir. 1989) (holding that plaintiff whose interests were covered under the Age Discrimination in Employment Act (29 U.S.C. § 621 (1994)) could not bring parallel claim under 1983). Most courts, however, hold that a § 1983 claim may be asserted if it rests on an independent constitutional basis. *See infra* note 50 and accompanying text.

41. *See, e.g.*, Keller v. Prince George's County, 827 F.2d 952, 962 (4th Cir. 1987) (holding that Title VII does not preempt an action under § 1983 that is based on an alleged violation of the Fourteenth Amendment).

42. *See id.* For the text of the Equal Protection Clause, *see supra* note 3.

43. *See* Trautvetter v. Quick, 916 F.2d 1140, 1149 (7th Cir. 1990) (reasoning that "intent to discriminate must be shown under equal protection while Title VII requires no such showing").

44. *See id.* at 1150.

45. 42 U.S.C. § 1983 (1994).

46. *See generally* Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 265 (1987).

47. *See id.* at 256-66.

Most courts that have considered this issue have held that a plaintiff is precluded from asserting a § 1983 claim based solely on rights established by Title VII or related federal statutes.[48] These courts were persuaded that Congress did not intend to allow plaintiffs to circumvent the administrative and remedial provisions of Title VII by asserting the same rights through a § 1983 claim.[49] When the plaintiff has an independent basis for the claim, however, based on violation of a constitutional provision, the plaintiff may assert that claim along with a largely parallel Title VII claim.[50] Otherwise, Title VII preempts the § 1983 sexual harassment claim.

This "independent basis" concept has caused some confusion in the lower courts.[51] For example, one court concluded that if the matter *could be* covered by Title VII or related federal statutes, the plaintiff cannot bring a § 1983 claim.[52] Part of this confusion stems from the overlap of elements necessary to prove either a Title VII or § 1983 claim.

Section 1983 claims of employment discrimination are construed as having two parts: a requirement unique to § 1983 that the defendant acted

48. *See, e.g.*, Notari v. Denver Water Dept., 971 F.2d 585, 588 (10th Cir. 1992) (concluding that claims that rely upon Title VII's provisions for their substantive validity are foreclosed under § 1983); Gray v. Lacke, 885 F.2d 399, 414 (7th Cir. 1989) (concluding that there is no remedy under § 1983 for violation of rights created by Title VII, but rather only for deprivation of constitutional rights).

49. *See, e.g.*, Zombro v. Baltimore City Police Dept., 868 F.2d 1364, 1368-69 (4th Cir. 1989) (reasoning in an age discrimination case that, although a constitutional claim does not rest on alleged violations of substantive rights under ADEA, plaintiffs cannot bypass the comprehensive statutory scheme "merely because they are employed by an agency operating under the color of state law"); Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1204 (6th Cir. 1984) (finding that Title VII provides the exclusive remedy when §1983 claim is based only on a violation of Title VII); *but see* Trigg v. Fort Wayne Community Sch., 766 F.2d 299, 302 (7th Cir. 1985) (concluding that public employee could bring § 1983 claim for violation of Fourteenth Amendment and escape Title VII's comprehensive remedial scheme even if facts suggest a violation of Title VII); *see generally* Levit, *supra* note 46, at 282-84.

50. *See Day*, 749 F.2d at 1205; *see also* Keller v. Prince George's County, 827 F.2d 952, 962 (4th Cir. 1987) (collecting cases that hold Title VII does not preempt an action under § 1983 based on violation of the Constitution). Some courts have limited this rule to Title VII cases which involve race and sex discrimination. *See, e.g., Zombro*, 868 F.2d at 1370-71 (4th Cir. 1989) (holding that ADEA preempts a constitutional claim under § 1983 for age discrimination because "[t]here is no claim of denial of equal protection based upon race or sex or discrimination based upon the exercise of protected First Amendment rights"). The *Zombro* court was persuaded not only by the ADEA's comprehensive enforcement framework, but by the fact that the United States Supreme Court has refused to grant heightened scrutiny to classifications based on age. *Id.* at 1370 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)).

51. The Fifth Circuit is an example of the confusion that the "independent basis" standard has created. That circuit issued two apparently conflicting decisions on whether plaintiffs alleging the same conduct as a violation of Title VII and as a violation of the Fourteenth Amendment under § 1983 could proceed with the § 1983 claim. *Compare* Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1573 (5th Cir. 1989) (allowing the parallel claims) *with* Jackson v. City of Atlanta, 73 F.3d 60 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996) (disallowing the parallel claims). A recent decision from that circuit apparently resolved the conflict in favor of allowing the same facts to form the basis for both claims. *See* Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539, 549 (5th Cir. 1997).

52. *See* Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir.) (concluding that plaintiff would not have been entitled to bring an action under § 1983 for violation of the Fourteenth Amendment because she could initially have sued under Title VII and did not do so), *cert. denied*, 116 S. Ct. 190 (1995).

under color of state law and a requirement that the plaintiff prove the elements of a discrimination claim in an analytical framework essentially identical to a Title VII claim.[53] Many of the courts which hold that Title VII and similar statutes preempt § 1983 sexual harassment claims have been swayed by the similarity of the two claims as reflected in that latter requirement.[54]

The Tenth Circuit provides a better statement of the law: "Because the substantive legal standards that govern these claims emanate from different sources, as long as the substantive legal bases for the claims are distinct, [the] 'independence' requirement is satisfied . . . ."[55] The Tenth Circuit properly satisfied this standard by simply alleging that the § 1983 claim was a claim that the defendant acted under color of state law to violate the plaintiff's rights to equal protection and due process of law.[56] A claim against an individual under § 1983, as opposed to a claim against an employer, presents an interesting twist on this "independent basis" analysis. As noted above, when the employer is sued, courts have raised concerns about the existence of Title VII remedies and procedures and the plaintiff's perceived attempt to circumvent them by using § 1983.[57] In contrast, the growing consensus is that there is no remedy against the individual defendant under Title VII or related statutes.[58] Under these circumstances, the § 1983 claim can be perceived as "independent." It is not only independent, it is the only claim available.

As a Sixth Circuit opinion reflects, however, if a court concludes that Title VII preempts a § 1983 claim against the employer, it will probably conclude that it preempts a claim against the individual employee as well.[59] The Sixth Circuit refused a claim against individual defendants to the extent that it was based on a violation of Title VII rights, because "Title VII does not provide 'the basis for the cause of action sued upon.'"[60] The circuit had

53. *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1565 (S.D. Fla. 1994) (breaking plaintiff's § 1983 claim for sexual harassment into a color of state law "prong" and an equal protection prong which used Title VII standards), *modified on other grounds*, 76 F.3d 1155 (11th Cir. 1996); *see also* Boutros v. Canton Reg'l Transit Auth., 997 F.2d 198, 202, 203 (6th Cir. 1993) (noting that Sixth Circuit has held that the prima facie elements for proving a racially or sexually hostile work environment are the same under Title VII and under § 1983); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988) (noting that First Circuit has recognized that the analytical framework for proving discriminatory treatment under Title VII is equally applicable to a § 1983 claim).

54. *See supra* note 46.

55. Notari v. Denver Water Dept., 971 F.2d 585, 587 (10th Cir. 1992).

56. *Id.* at 588.

57. *See, e.g.*, *Hughes*, 48 F.3d at 1383 n.6.

58. *See supra* notes 8-13 and accompanying text.

59. *See* Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988).

60. *Poe*, 853 F.2d at 428. The Sixth Circuit in *Poe* was construing Davis v. Scherer, 468 U.S. 183 (1984), in which the Supreme Court stated that state officials do not lose their immunity by violating the clear command of a statute or regulation unless that statute or regulation provides the basis for the cause of action sued upon. *Poe*, 853 F.2d at 428 (quoting *Davis*, 468 U.S. at 194 n.12). The Sixth Circuit in *Poe* went on to reason that this requires the statute itself to authorize a cause of action for damages, or to

earlier joined those courts persuaded that Title VII preempted § 1983 claims.[61] In the subsequent opinion dismissing the individual liability claims, the court did not evaluate the difference between a claim against the employer clearly subject to Title VII's administrative and remedial scheme, and a claim against the individual not likely contemplated by Congress in devising that scheme.[62]

The language of § 1983 on its face suggests that the defendant's acts in violating Title VII should support a claim under § 1983. The statute allows suit against a "person" who violates not only the Constitution, but also the "laws" of the United States.[63] In recognizing individual liability in the first place, the Supreme Court has indicated that such liability is analytically separate from the "official" actions of the government entity or the individual state actor.[64] If the actions of the defendant deprive the plaintiff of rights secured by a federal law such as Title VII, the existence of a claim against the government entity or the individual in his or her "official" capacity is, accordingly, beside the point.[65] Section 1983 should provide the avenue to holding the individual personally liable for the discriminatory acts, whether based on Title VII or some "independent" constitutional basis.

The preemption issue as a practical matter would be of little consequence, except for the way that a number of courts have construed the so-called "independent" constitutional claim of sexual harassment. As I indicate in the next section, courts have misconstrued the nature of that claim to impose an additional and more onerous "intent" requirement on plaintiffs.

B. The "Intent" Requirement of the Equal Protection Sexual Harassment Claim

Absent the right to assert an individual liability claim under § 1983 for deprivation of rights secured by Title VII, victims of sexual harassment

provide a basis for an action brought under § 1983. *Id.* Then, in rather circular and cursory reasoning, the court stated that "Title VII does not provide 'the basis for the cause of action sued upon' because 1) [the plaintiff] had abandoned her Title VII claims to pursue her claims under section 1983; and 2) Title VII does not provide the basis for an action brought under section 1983." *Id.* (internal references omitted).

61. *See* Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1204 (6th Cir. 1984).

62. *See supra* note 13 discussing how Title VII's structure came about.

63. *See* 42 U.S.C. § 1983 (1994).

64. *See* Hafer v. Melo, 502 U.S. 21, 25-27 (1991).

65. *Cf. Hafer*, 502 U.S. at 25 (reasoning that plaintiff in a personal capacity suit need not establish a connection to any governmental policy or custom in order to sustain her suit). Given that the impetus behind § 1983 was to ensure that victims of government misconduct had a federal avenue of relief against the individuals who commit civil rights violations, *see* Monroe v. Pape, 365 U.S. 167, 172 (1961), relief against individual defendants for violating Title VII rights accomplishes what the drafters of § 1983 envisioned. This is particularly true in light of the "knew or should have known" standard of employer liability for sexual harassment under Title VII, which relieves the employer of liability if the employer responds appropriately after the harassment has occurred. As interpreted by most courts, however, an allegation that the defendant's actions violated Title VII would not suffice, even in a claim against an individual. *See supra* note 21.

must turn to an independent claim that their rights to equal protection under the law, as secured by the 14th Amendment, have been violated. The Equal Protection Clause, as interpreted by the United States Supreme Court, contains a "federal constitutional right to be free from gender discrimination" that does not "serve important governmental objectives" and is not "substantially related to those objectives."[66]

The typical sexual harassment case brought under the Equal Protection Clause focuses on whether the alleged actions implicate a constitutional right, rather than on the relationship between those actions and any "governmental objectives."[67] As the Seventh Circuit has noted,

> it is most unlikely that a defendant can defeat a claim of sexual harassment by showing that the harassment was justified or had a legitimate business purpose. The nature of the harm is such that there is virtually no scenario imaginable where sexual harassment is a necessary business practice or is substantially related to important governmental objectives.[68]

Thus, the focus in equal protection sexual harassment claims is on whether the conduct alleged by the plaintiff is covered by the Equal Protection Clause in the first instance. Most of the courts that have addressed the issue have applied the same prima facie elements as they do in a Title VII claim.[69] An equal protection sexual harassment case would then follow the same three-prong *McDonnell-Douglas* analytical framework as if it had been brought under Title VII.[70]

Not all courts, however, see the prima facie elements of an equal protection claim and Title VII claim as coextensive.[71] A number of courts

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66. *See* Davis v. Passman, 442 U.S. 228, 234-35 (1979). Although *Davis* involved a claim against the federal government under the Fifth Amendment, its equal protection analysis is also applicable to state actors. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263-66 (1977).

67. Bohen v. City of East Chicago, 799 F.2d 1180, 1187 (7th Cir. 1986).

68. *Id.* at 1187 (footnote omitted).

69. *See, e.g.*, Boutros v. Canton Reg'l Transit Auth., 997 F.2d 198, 202 (6th Cir. 1993) (citing Second, Fifth and Seventh Circuit precedent as in accord with its conclusion that the elements of the substantive causes of action under Title VII and § 1983 are the same); Busby v. City of Orlando, 931 F.2d 764, 777 (11th Cir. 1991) (noting that "nature of" prima facie showing of racial discrimination under § 1983 and Title VII is the same).

70. *See* White v. Vathally, 732 F.2d 1037, 1039 (5th Cir. 1984) (citing McDonnel-Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973)). Under the *McDonnell-Douglas* three-prong approach as most recently articulated by the Supreme Court, the plaintiff must first show prima facie evidence of discriminatory treatment. St. Mary's Honor Center. v. Hicks, 509 U.S. 502, 506-07 (1993). The employer then has the burden to produce evidence that it acted for legitimate, non-discriminatory reasons. *Id.* Finally, the plaintiff must prove that the employers' stated justification was pretextual, either by disproving the reasons given by the employer or producing other evidence of intentional discrimination. *Id.* at 2749; *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, 93 MICH. L. REV. 2229, 2232-2235 (1995) (outlining prima facie case and Supreme Court precedent leading up to *Hicks* decision).

71. *See* Trautvetter v. Quick, 916 F.2d 1140, 1149 (7th Cir. 1990) (noting that § 1983 claim generally follows the contour of Title VII claim except for addition of requirement of proof of intent to discriminate against protected class).

have drawn a distinction between the two claims in one particular area—intent to discriminate. The Equal Protection Clause requires a showing of discriminatory intent or purpose.[72] As most strikingly illustrated by a series of cases out of the Seventh Circuit, courts have had a surprisingly difficult time responding to this intent requirement. In a nutshell, these courts fail to recognize that the Title VII framework already adequately accounts for intent. They suggest that sexual harassment that is "personal" does not amount to sex discrimination under the Equal Protection Clause.[73] The development of this doctrine in a series of Seventh Circuit cases is discussed in the next section.

1. Defining "Intent" to Exclude Sexual Harassment Cases Purported to be "Personal" for Equal Protection Purposes

A series of Seventh Circuit cases reflects a court struggling with the concept of sexual harassment as a form of sex discrimination under the Equal Protection Clause. That circuit has crafted a rule in which there is an additional requirement of "intent" in sexual harassment claims under § 1983, because it fails to perceive that Title VII standards adequately establish the required proof of intent.

The Seventh Circuit first directly addressed the issue of sexual harassment as a violation of equal protection in 1983, in *Huebschen v. Department of Health and Social Services*.[74] The plaintiff in *Huebschen* had engaged in a brief affair with his supervisor at her urging, and was later dismissed from a probationary position after he broke off the relationship and the supervisor recommended his dismissal.[75] The court dismissed the plaintiff's § 1983 claim in that case because he could not show that his former supervisor intentionally discriminated against him because of his membership in a particular class.[76] Rather, the court concluded that the actions were taken against the plaintiff merely on an "individual" (i.e., "personal") basis.[77]

In reaching its conclusion, the Seventh Circuit shows how easily the intent requirement in an equal protection case can be given an inappropriately narrow application:

> We are not convinced . . . that [the supervisor] discriminated against [the plaintiff] as a man rather than merely as an individual. We are persuaded that the evidence, even when viewed most favorably to the [plain-

72. *See* Washington v. Davis, 426 U.S. 229, 240-41 (1976) (holding that showing of disparate impact alone is not sufficient to state claim under equal protection doctrine because constitutional claims require showing of discriminatory purpose).

73. *See, e.g., Trautvetter*, 916 F.2d at 1152 (concluding that sexual harassment based on nothing more than "personal attraction" does not violate the Equal Protection Clause).

74. Huebschen v. Department of Health and Soc. Services, 716 F.2d 1167, 1171 (7th Cir. 1983).

75. *Id.* at 1169.

76. *Id.* at 1172.

77. *See id.*

> tiff], establishes that [his] gender was merely coincidental to [the supervisor's] actions. . . . [The supervisor's] motivation in doing so was not that [the plaintiff] was a male, but that he was a former lover who had jilted her. Furthermore, we note that there is no evidence that [the supervisor] discriminated against other men in the office or that she attempted to have romances with other men in the office.
>
> Thus, the proper classification, if there was one at all, was the group of persons with whom [the supervisor] had or sought to have a romantic affair. . . . As unfair as [the plaintiff's] treatment . . . may have been, we are simply not persuaded that the Equal Protection Clause should protect such a class.[78]

Based on the reasoning in this case, there is no equal protection violation if the actions of the defendant arise out of a personal relationship with, or attraction to, the plaintiff because that argument fails to show an intent to discriminate against a protected class. Title VII doctrine easily reveals the fallacious nature of this analysis,[79] but *Huebschen* gave no consideration to that doctrine.

In subsequent cases, the Seventh Circuit cited this part of *Huebschen* for the proposition that actions which are personal do not violate the Constitution, but nonetheless found in each case that the plaintiff had established she was harassed because of her sex.[80] These subsequent cases continued to draw a distinction between equal protection claims and Title VII claims on the basis of intent.[81]

The first of these two cases, *Bohen v. City of East Chicago*,[82] saw the difference between these two claims in the basic nature of the inquiry: "[T]he ultimate inquiry is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII as to whether or not the sexual harassment altered the conditions of the victim's employment."[83]

Despite having described this "ultimate inquiry," the court in *Bohen* never actually addressed it.[84] Rather, the court focused on the very types of

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78. *Huebschen*, 716 F.2d at 1172. The Seventh Circuit in *Huebschen* never directly addressed the issue whether an equal protection claim existed for sexual harassment. The court simply ruled that the plaintiff had not articulated unequal treatment of a constitutionally protected class. *See id. Huebschen* was later cited in that circuit as "assuming" such a claim existed. Bohen v. City of East Chicago, 799 F.2d 1180, 1184 (7th Cir. 1986).

79. *See infra* notes 112-13 and accompanying text.

80. *See* King v. Board of Regents of Univ. of Wisc. Sys., 898 F.2d 533, 538 (7th Cir. 1990) (characterizing *Huebschen* as a case in which the plaintiff was harassed because he had spurned a lover, not because he was male); Bohen v. City of East Chicago, 799 F.2d 1180, 1187 (7th Cir. 1986) (citing *Huebschen* as establishing a defense if employer can show harassment was directed at plaintiff for personal reasons rather than because of plaintiff's sex).

81. *King*, 898 F.2d at 538-39; *Bohen*, 799 F.2d at 1187.

82. Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).

83. *Id.* at 1187.

84. The district court in *Bohen* had dismissed the plaintiff's § 1983 claim in relevant part because it found the Equal Protection Clause did not support a claim for sexual harassment. *See id.* at 1183.

facts regarding the alteration and abusive nature of the plaintiff's work conditions that it had just suggested were not at issue.[85] The court restated *Huebschen's* "personal" standard,[86] but the closest it came to making a finding in that regard was its quotation of the district court's findings, which included the statement that "had [the plaintiff] been a man, she would not have suffered as she did."[87] Without explicitly stating so, the court was apparently swayed by the evidence of a history of abusive working conditions for other female employees and the fact that the employer clearly knew about this history and did nothing to rectify it.[88] In other words, the court in effect equated alteration of the workplace "because of sex" with the equal protection intent standard.[89]

In the next case, *King v. Board of Regents of University of Wisconsin System*,[90] the Seventh Circuit was directly confronted with a defendant who invoked the "personal" distinction. The defendant in *King* claimed his actions did not amount to intentional discrimination because they were based on physical attraction.[91] This time, the court saw the difference as one of perspective:

> One difference between sexual harassment under equal protection and under Title VII, however, is that the defendant must intend to harass under equal protection, [citation omitted] but not under Title VII, where the inquiry is solely from the plaintiff's perspective.[92]

As in *Bohen*, however, the court in *King* reveals its confusion about the sexual harassment/equal protection inquiry in the distinction it drew.

The defendant in *King* raised two arguments in reliance on *Huebschen*. First, he argued that the plaintiff was not a member of a protected class, but rather a member of a class of people with whom the defendant wished to have an affair.[93] Second, he argued that he lacked "hatred of [a] protected class."[94] As to the first argument, the court responded broadly that the

85. *Id.* at 1187-88. These facts included such things as offensive touching, a threat of rape, exposure to conversations with lurid sexual description, and a rumor that the plaintiff was a lesbian when she refused to participate in "this good fun." *Id.* at 1188. When the plaintiff was hired, she was also told by her supervisor that she should not socialize with her male co-workers and that she should "cover herself from neck to toe." *Id.* at 1187-88.

86. The court in *Bohen* states that "[i]t is a good defense, however, if the employer can show that the harassment suffered by the plaintiff was directed at the plaintiff because of factors personal to her and not because she is a woman." *Id.* at 1187 (citing Huebschen v. Department of Health and Soc. Services, 716 F.2d 1167).

87. *Id.* at 1188.

88. *See id.* at 1187-88.

89. I argue in the next section that this is in fact the correct conception of intent for equal protection purposes. *See infra* notes 127-42 and accompanying text.

90. King v. Board of Regents of Univ. of Wisc. Sys., 898 F.2d 533 (7th Cir. 1990).

91. *Id.* at 538.

92. *Id.* at 537-38.

93. *King*, 898 F.2d at 537-38.

94. *Id.*

plaintiff was a woman and "[t]hat is all that is required."[95] The court did not address the language in *Huebschen* that actually endorsed the distinction the defendant raised.[96] As to the second argument, the court found that discriminatory intent did not require hatred; that even laws intended to be of benefit to a protected class can be discriminatory.[97]

The court characterized the defendant's claim as an assertion that harassment based on sexual desire is not based on gender.[98] Indeed, the language of *Huebschen* quoted earlier in this discussion squarely supports such an argument.[99] The court in *King* saw the defendant's argument as consisting of three main points: 1) the defendant's acts did not reflect a policy of discrimination against womanhood generally; 2) his desires for a sexual relationship was based on the plaintiff's characteristics other than sex; and 3) his acts did not intend to harass.[100] Each of these arguments was rejected as misconstruing the nature of the analysis.[101]

As to the first argument that his acts did not show a policy of discrimination against womanhood itself, the court cited *Bohen* for the proposition that the plaintiff need only prove discrimination against *this* woman because of her membership in a protected class.[102] As to the second argument, the court articulated what was the greatest retreat from *Huebschen*:

> Another argument to support [the defendant's] position might be that his desire for a sexual affair was based on her characteristics other than sex, . . similar to the defendant in *Huebschen* who disliked the plaintiff as a person. To this end, [the defendant] claims it was [the plaintiff] as an individual to whom he was attracted, not [the plaintiff] as a woman. This argument, however, misses the point. [The defendant] wanted to have an affair, a liaison, illicit sex, a forbidden relationship. His actions were not consistent with platonic love. His actions were based on her gender and motivated by his libido.[103]

Analogizing to quid pro quo harassment cases, the court concluded that the defendant's "sexual desire does not negate his intent; rather it affirmatively establishes it."[104]

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95. *Id.*

96. *See id.*; *see also* Huebschen v. Department of Health and Soc. Services, 716 F.2d 1167, 1169.

97. *Id.* at 539. The court specifically cited the following cases: Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974) (involving state protective laws); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (laws requireing women to take maternity leave); City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (pension laws presumably benefitting women).

98. *King*, 898 F.2d at 539.

99. *See supra* note 76-77 and accompanying text.

100. *King*, 898 F.2d at 539.

101. *See id.* at 539-40.

102. *See id.* at 539 (citing *Bohen*, 799 F.2d at 1187 (citations omitted)).

103. *Id.*

104. *King*, 898 F.2d at 539. Quid pro quo harassment occurs when a supervisor demands sexual favors in exchange for benefits related to employment, making the demand a condition of employment. *See* 29 C.F.R. § 1604.11(a)(1)-(2) (1996). The court in *King* noted that the Sixth Circuit had previously dismissed arguments that quid pro quo demands based on sexual desire were not based on sex. *King*,

On similar grounds, the court rejected the defendant's claim that he did not intend to harass, finding that it was clear his actions were unwelcome, and that he knew they were unwelcome.[105] The jury was ultimately justified in inferring intent to harass from the facts in the case.[106]

The reasoning in *King* is interesting in several ways. First, it effectively reduces *Huebschen* to a case of personal dislike, rather than one involving sexual harassment. Second, although couched in terms of "the defendant's perspective"—which the court previously stated distinguishes this claim from a Title VII claim looking at the "plaintiff's perspective"—the opinion reflects essentially the same analysis that courts already apply to Title VII claims.

The plaintiff must show unwelcome actions taken "because of sex" to state a Title VII claim.[107] Cases that involve mere personal conflict between individuals are not actionable under general Title VII standards.[108] Thus, the *King* decision reflects a construction of intent under equal protection law that is consistent and coextensive with existing Title VII standards.

This advance was short-lived, however, as later that same year the Seventh Circuit decided *Trautvetter v. Quick*,[109] which again reflects a most egregious misconstruction of sexual harassment doctrine. The court in *Trautvetter* asserts that there is "an important distinction" between § 1983 and Title VII claims: "intent to discriminate must be shown under equal protection while Title VII requires no such showing."[110]

The *Trautvetter* court returned to the *Huebschen* articulation of the "personal" distinction. The defendant's sexual advances must thus have been made "because of," not "in spite of" the plaintiff's status as a woman.[111] A plaintiff who fails to show that the defendant's actions "were

898 F.2d at 539 (citing Horn v. Duke Homes, 755 F.2d 599, 604 (7th Cir. 1985)). Because the demand for sex in the quid pro quo context would not have occurred but for the fact of the victim's womanhood, this established that "treatment of [an] individual based on sexual desire is sexually motivated." *Id.*

105. *Id.* at 539-40.

106. *Id.* at 540.

107. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); *see also infra* text accompanying notes 113-14. A common articulation of the prima facie case of hostile environment sexual harassment under Title VII requires the plaintiff to prove that: 1) she belongs to a protected group; 2) she was subject to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition, or privilege of employment; and 5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

108. *See, e.g.*, McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986) ("Personal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII. The plaintiff cannot turn a personal feud into a sex discrimination case by accusation.") Under this standard, *Huebschen* would probably be actionable on a theory that females in that workplace were not subject to work conditions based on sexual relationships, but might perhaps be lost on a welcomeness issue.

109. Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990).

110. *Id.* at 1149 (citations omitted).

111. *Id.* at 1150 (quoting Huebschen v. Department of Health and Soc. Services, 716 F.2d 1167 (7th Cir. 1983)).

based on anything but a personal attraction" to the plaintiff[112] would not have a claim for sex discrimination under § 1983, regardless of the environment created by the defendant's actions.

In operation, the "personal" distinction limits sexual harassment claims under § 1983 to two types. The plaintiff must either present evidence of similar treatment of other members of his or her protected class or statements by the defendant disparaging a group as a whole, such as statements that women or African-Americans or members of other protected groups do not belong in certain occupations or lack certain capacities.[113]

By adopting the *Huebschen/Trautvetter* construct of discriminatory intent, the Seventh Circuit has reinjected into sexual harassment jurisprudence an argument that was once successfully raised by Title VII defendants but has since been soundly rejected: that a plaintiff must show how a defendant's actions were motivated by something other than personal attraction.[114] Under Title VII, courts now recognize that if a victim is forced to endure sexual harassment, even if based on personal desire, that

112. *Trautvetter*, 916 F.2d at 1152.

113. The Seventh Circuit in *Trautvetter* disavowed the notion that it was creating a rule that required a plaintiff to show similar treatment of others. *See id.* at 1151 (stating that an individual plaintiff could pursue a sexual discrimination claim based solely on acts of discrimination directed towards her). However, given the narrow concept of discriminatory intent articulated by the court, as a practical matter, requiring the plaintiff to show similar treatment is exactly what the court has done. This is further borne out by the earlier concurring and dissenting opinions in the *King* case by one member of the *Trautvetter* panel. *See King*, 898 F.2d at 542 (Manion, J., concurring and dissenting). In his separate opinion, Judge Manion disagreed that the defendant had sexually harassed the plaintiff in violation of the equal protection clause. *See id.* He argued that the defendant's actions were not directed at a protected class, i.e., women, but at a class of one person, i.e., the plaintiff, toward whom he was physically attracted. *Id.* The court in *Trautvetter* (with Judge Manion now in the majority) subsequently adopted this argument. *See Trautvetter*, 916 F.2d at 1151. Absent evidence of group-disparaging comments, similar treatment of *other* women may be the only way a plaintiff can avoid this "class of one" analysis.

114. Early Title VII cases distinguished between two types of sexual harassment cases: "complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances . . . ." Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048 (3d Cir. 1977). The latter, which involved quid pro quo harassment, was actionable; the former, which just created a hostile working environment, was not. *See id.* at 1048-49. One court went so far as to say that it was "ludicrous" to hold that Title VII was intended to reach conduct that just involved "amorous or sexually oriented advances toward another." Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977). Culminating with the Supreme Court's decision in *Meritor Savings Bank*, courts began rejecting the premise that sexual advances and conduct that had no tangible economic job consequences did not violate Title VII. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986) (finding that hostile environment harassment is sex discrimination without need to prove tangible loss of an economic nature); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (finding that sexual harassment which creates a hostile environment for members of one sex to be a form of arbitrary sex discrimination); Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981) (reasoning that work environment "poisoned" by hostile environment harassment violates Title VII because endurance of it becomes an implicit condition of that employment).

victim bears an additional, arbitrary condition of employment not imposed on employees of the other sex.[115]

Nonetheless, a number of other courts have blindly cited the *Huebschen/Trautvetter* construct.[116] Other courts have taken pains to distinguish the cases on their facts, rather than evaluate the doctrine.[117] As the next section demonstrates, however, evaluation of what the Supreme Court means by "intent" reveals that the distinction drawn between § 1983 and Title VII cases is simply wrong.

2. *The Proper Conception of Intent in Sexual Harassment Cases under the Equal Protection Clause*

The intent issue stems from a statement taken out of context from the Supreme Court's opinion in *Feeney v. Personnel Administrator*:[118] "[T]he decisionmaker [must have] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[119] From this, courts like the Seventh Circuit have constructed a rule of law that excludes constitutional harassment claims based on "sexual desire" for the individual plaintiff.[120]

However, *Feeney* was decided in the context of the constitutionality of a gender neutral statute, namely a veteran's preference statute.[121] When it made that statement, the Court was refining a standard first articulated in *Washington v. Davis*,[122] rejecting use of the disparate impact model of proof in equal protection cases.[123] On this point and this point alone, the

115. *See* Barnes v. Costle, 561 F.2d 983, 989-90 (D.C. Cir. 1977).

116. *See* Howard v. Town of Jonesville, 935 F. Supp. 855, 860 (W.D. La. 1996) (identifying intent requirement as "one significant difference" between § 1983 and Title VII claims); Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1565 (S.D. Fla. 1994) (citing *Trautvetter* for proposition that there are two "prongs" to a § 1983 action—a harassment prong and intent prong); *see also* Gonzales v. Kahan, 1996 WL 705320 at *2 n.3 (E.D.N.Y. Nov. 25, 1996) (suggesting that the "intent requirement" may pose a problem for the plaintiff).

117. *See, e.g.*, Boutrous v. Canton Reg'l Transit Auth., 997 F.2d 198 (6th Cir. 1993). In *Boutrous*, a national origin harassment case, the Sixth Circuit reversed a district court ruling which relied on *Trautvetter* to find the defendant's verbal abuse was motivated by the plaintiff's personal characteristics, not the generic status of his national origin. *Id.* at 204. The Sixth Circuit noted *Trautvetter* held that some verbal comments and advances may not be the result of personal characteristics, and concluded that the facts in *Boutrous* made *Trautvetter* inapposite. *Id.* The relevant statements in *Boutrous* included references to the plaintiff being a "camel jockey" and a "rich Arab." *Id.* The Sixth Circuit concluded that these references were to "nothing but" the plaintiff's national origin and ancestry. *Id.* In so ruling, the court apparently accepted the lower court's reasoning that the plaintiff had to show harassment motivated by "the generic status of [the plaintiff's] national origin." *Id.*

118. Feeney v. Personnel Adm'r, 442 U.S. 256 (1979).

119. *Id.* at 279 (quoted in Huebschen v. Department of Health & Soc. Services, 716 F.2d 1167, 1171 (7th Cir. 1983)).

120. *See Trautvetter*, 916 F.2d 1140, 1151 (7th Cir. 1990).

121. *Feeney*, 442 U.S. at 276-80.

122. Washington v. Davis, 426 U.S. 229 (1976).

123. *Id.* at 239-41.

Court distinguished use of Title VII standards.[124] In no respect did the Court suggest that Title VII disparate treatment standards diverge from equal protection standards for sex discrimination.[125]

To the contrary, the Court has reiterated that the plaintiff in a Title VII case must prove that the defendant acted "because of" or "by reason of" a protected characteristic like sex.[126] This is true even in a sexual harassment case: "Without question, when a supervisor sexually harasses a subordinate *because of* the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[127] This "because of" element has been widely interpreted to establish a "but for" test; "but for" the plaintiff's sex, he or she would not have been harassed.[128]

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124. *See id.* at 238-39.

125. The Court addresses this subject only to the extent of a footnote in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 n.1 (1993). The Court noted it was assuming that Title VII's framework was "fully applicable" to § 1983 employment discrimination cases. *Id.* The footnote may or may not signal that the Court is inclined to see possible distinctions. The Court was simply noting an issue decided by the Court of Appeals and not raised by the parties on appeal. *See id.*

126. *See, e.g., id.* at 523-24 (reasoning that Title VII permits a damage award only against employers proven to have taken adverse employment action "by reason of" a protected characteristic); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (reasoning that plaintiff must prove defendant intentionally discriminated against him because of a protected characteristic). This reasoning reflects the language of Title VII which makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1)(1994).

127. Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986) (emphasis added); *see also* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (quoting *Meritor* "because of" language in sexual harassment case brought under Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681-1688 (1997). The reasoning in a recent Seventh Circuit opinion involving a claim of same sex harassment in fact emphasized this "because of sex" element of Title VII claims. Doe v. City of Belleville, 119 F.3d 563, 569-70, 574 (7th Cir. 1997) (holding that plaintiff may establish valid claim under Title VII for same sex harassment without regard to sexual orientation of the harasser). Even Judge Manion, the partial dissenter in *King* and member of the majority in *Trautvetter*, repeatedly noted in *Doe* that Title VII liability attaches when the defendant's acts are "because of sex." *Id.* (Manion, J., concurring and dissenting) (agreeing with majority that Title VII permits same sex harassment claim when plaintiff can show harassment occurred "because of" the plaintiff's sex, citing *Meritor*); *see also supra* note 113.

128. *See* Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977). The exact status of this "but for" standard is not clear after the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In *Hopkins*, a plurality suggested that "but-for causation" is not required by Title VII, but that if the plaintiff can meet that standard, she will prevail. *Hopkins*, 490 U.S. at 240 n.6. The plurality ruled that gender need only be a motivating factor in an employer's job decision. *Id.* at 250. Justice White, in his concurring opinion, suggests that the plurality rule applies only in the narrow context of "mixed-motive" cases where the evidence establishes both legitimate and illegitimate factors played a role in the employment decision. *Id.* at 259-60 (White, J., concurring). There is currently a great deal of scholarly debate over the implications of *Hopkins* and the "but for" test. *See generally* Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1 (1995) (arguing that *Hopkins* standard does not adequately handle issues of sexism in employment); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that current Title VII disparate treatment standards relying on motivational concepts fail to adequately address the more subtle forms of discrimination prevalent today). Regardless of how these debates are resolved,

Section 1983 does not require more. No additional frame of mind need be alleged or proved in a § 1983 action beyond that required to prove the underlying violation.[129] The underlying violation in a discrimination case requires proof of intent, whether under § 1983 or Title VII.[130] Proof of intent in discrimination claims is commonly made by inference from circumstantial evidence.[131] The Seventh Circuit formulation overlooks the fact that satisfying the prima facie case under Title VII gives rise to an inference of intent to discriminate.[132] Even the courts using the Seventh Circuit formulation refer to "evidence" of intent.[133] This "evidence" exists once the plaintiff produces and proves the prima facie claim of sexual harassment.

Cases such as *Feeney* and *Washington* articulate the role that intent must play when a neutral policy is attacked because of the effect it has on a protected group. Rather than categorically ruling out Fourteenth Amendment challenges to policies which have a disparate impact, the Supreme Court tried to articulate how discriminatory purpose might be shown in such a context.[134] The Court rejected the Title VII model of disparate impact because it required no showing of discriminatory motive or purpose.[135]

Incorporating intent into what would otherwise be a disparate impact case necessarily involves proof of purposeful treatment of a group, rather than of an individual. Consequently, the plaintiff must show that a particular policy was chosen because of its impact on that group. The mere fact that a particular plaintiff happens to be a member of a protected group proves nothing. This explains the "because of, not merely in spite of" language in *Feeney*.[136] However, the Seventh Circuit's transmutation of this standard into a disparate treatment standard which asserts that harassment based on personal attraction is not sufficient unless the defendant intended

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however, the underlying concept that harassment is a form of intentional discrimination and must be "because of sex" will likely remain in place.

129. *See* Daniels v. Williams, 474 U.S. 327, 329-30 (1986).

130. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) for proposition that the "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff").

131. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

132. *See Hicks*, 113 S. Ct. at 2747.

133. *See, e.g.*, Redpath v. City of Overland Park, 857 F. Supp. 1448, 1456, 1456 n.1 (D. Kan. 1994) (discussing in summary judgment context arguments on plaintiff's "evidence of intent").

134. *See Washington*, 229 U.S. at 242 (reasoning that invidious discriminatory purpose may often be inferred from the totality of relevant facts "including the fact . . . that the law bears more heavily on one race than another"). In a subsequent case, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), the Court articulated what additional factors might support an inference of intent. These factors include the general historical background of the challenged decision, the specific sequence of events leading up to the decision, departure from normal procedure or failure to consider the usual substantive factors, and the legislative or administrative history of the action. *Id.* at 266-68.

135. *Washington*, 229 U.S. at 246-47.

136. *See Feeney*, 442 U.S. at 279.

to discriminate against the plaintiff's *status* as a woman simply misses the point.[137]

Requiring the plaintiff to prove only the Title VII prima facie case is perfectly consistent with the role that intent should play in an equal protection sexual harassment claim. At least one commentator argues that intent in the equal protection context functions to allocate burdens of proof between the government and the individual differently in different contexts, as the individual need is balanced against societal needs.[138] Concerns about the second part of the general equal protection test, the relationship between the defendant's actions and the government's objectives, influences the standard of intent imposed in cases like *Feeney* and *Washington*.[139]

In such cases, courts are being asked to examine governmental policy, an area in which courts are hesitant to tread.[140] Thus, the plaintiff bears a greater burden of proof up front to establish more than the mere effect of the government's choice, but rather the purposeful intent in that choice. In the context of sexual harassment, the concerns simply are not the same. The focus is on individual treatment of the plaintiff, not on governmental objectives.[141]

Some courts, such as the Second Circuit, have not adopted the Seventh Circuit "intent" standard, but nonetheless suggest that not all sexual harassment amounts to sex discrimination.[142] The Second Circuit opinion is not

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137. *See* Katherine M. Franke, *The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 92 n. 405 (1995) (describing *Trautvetter's* view of the "wrong" of sexual harassment as "odd").

138. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1107, 1134-35 (1989).

139. *See id.* at 1139-40. Ortiz advances an argument that the standard of intent formulated by the Court in the employment and housing contexts actually reflects a lessened standard of review of the government action. *Id.* at 1114-15. This is a reflection of the Court's discomfort with an analysis that has it playing a role "uncomfortably close" to that of a legislature. *Id.* at 1113-14. The Court would otherwise be weighing conflicting values and policies without "neutral" or "objective" criteria to guide it. *Id.*

Thus, the Court uses the intent requirement to separate classifications which are proxies for discrimination based on a protected characteristic like race, requiring a stricter review, and those which are mere cohorts of such protected characteristics. *Id.* at 1139. Mere cohorts are not of constitutional concern, and are left to regulation by the market. *Id.* at 1139-40. The Equal Protection Clause therefore balances the interests in the employment context to impose the greater burden on the individual to show intentional discrimination by establishing actual intent. *See id.* Of course, this analysis relates to cases like *Feeney* and *Washington*, in which the attack is at its core directed at the neutral government policy itself, not the individual treatment of the plaintiff. The "market force" and legislative role concerns do not translate into the sexual harassment context.

140. For example, the Court, in *Washington*, rejected Title VII disparate impact standards in no small part because of the "probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives . . . ." Washington v. Davis, 426 U.S. at 247.

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

142. *See* Annis v. County of Westchester, 36 F.3d 251, 254 (2nd Cir. 1994) (concluding that while not all sexual harassment equals sex discrimination, harassment "that transcends coarse, hostile and boorish behavior" and which is evidently calculated to drive someone out of the workplace is tantamount to sex discrimination and is actionable under the Fourteenth Amendment). In *Annis*, the conduct the court found sufficient included vulgar sexual references, harsh and unfounded criticism, assignment

clear about whether it makes a distinction between Title VII and equal protection standards, or just repeats a basic proposition of sexual harassment law.[143] But its hesitancy reflects a skepticism similar to that which emerges in *Huebschen* and *Trautvetter* about whether sexual harassment is really sex discrimination.

In order to amount to actionable sexual harassment, the conduct must be severe and pervasive enough to alter the working conditions and create a hostile work environment.[144] If such conduct occurs, and occurs "because of sex," it violates Title VII. Sexual harassment that violates this standard is sex discrimination, and sex discrimination violates the equal protection clause when committed by state actors.[145]

Thus, the proper inquiry under § 1983 should be: had the plaintiff not been a woman, would the harassment have occurred? If the answer is "no," sex discrimination has occurred.[146] Whether the exact reason for the harassment is based on sexual desire, loathing, fear, discomfort, or other motivations, does not matter. Those courts suggesting that sexual harassment does not necessarily amount to sex discrimination under the Equal Protection Clause are simply reinfesting sexual harassment law with the notion that sexual harassment is really based on individual idiosyncracies for which we cannot or should not hold the perpetrator legally responsible. The second bite at this apple is unnecessary, and unwise.

III.
INTERPRETING "UNDER COLOR OF LAW:" QUALIFIED IMMUNITY AND "PERSONAL" ACTIONS

Even if the sexual harassment claimant can establish that he or she was deprived of equal protection by the actions of the individual defendant, that claimant still might not be able to pursue the § 1983 claim. Section 1983 applies only to "state actors" who act "under color of law."[147] From this

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to duties generally relegated to lower grade officers, removal of plaintiff's name from the overtime duty roster, and similar conduct. *Id.* at 253.

143. To be actionable sexual harassment, the conduct must be severe and pervasive. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993). Accordingly, not all harassing behavior will violate Title VII. *See id.* at 370 (noting that conduct that is not objectively severe and pervasive, or that the victim does not subjectively perceive to be abusive, does not violate Title VII because it has not altered the plaintiff's working conditions); *see also* Cohen v. Litt, 906 F. Supp. 957, 965 (S.D.N.Y. 1995) (applying Title VII standards to find single sexual advance insufficient to establish severe and pervasive hostile environment claim under § 1983).

144. *See Harris*, 114 S.Ct. at 370.

145. *See* Davis v. Passman, 442 U.S. 228, 234-35 (1979) (finding a federal constitutional right to be free from gender discrimination).

146. This proposition is reflected in one of the very first cases to accept that sexual harassment is in fact discrimination based on sex. *See* Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (reasoning that "but for her womanhood, . . . her participation in sexual activity would never have been solicited").

147. The "under color of law" requirement as a general rule limits the statute's application to those individuals who are employed by a state or local government or an agency thereof or to the local

framework stem immunity restrictions and the rationale of a number of courts that sexual harassment by a co-worker is a "personal" pursuit not subject to liability under the statute.[148] Because of these limitations, § 1983 will most often afford relief to only one narrow group of victims, those who are subjected to harassment by a supervisor who relies on the power to hire or fire as a means to effectuate the harassment.[149]

A. Qualified Immunity

Individuals sued for sexual harassment in their personal capacity under federal law have had surprising success in asserting qualified immunity from suit. The concept of immunity is based on a policy judgment that those performing public duties should be protected from litigation.[150] State actors may be entitled to good faith or qualified immunity for actions based on objectively reasonable reliance on existing law.[151]

The relevant inquiry is whether the defendant's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[152] The rights must "be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[153] The very action in question need not have been previously held unlawful, but in light of pre-existing law, the unlawfulness must be apparent.[154] As articulated in the lower courts, the question is whether a "reasonable official would be left uncertain of the application of the standard to the

government entity itself. Monroe v. Pape, 365 U.S. 167 (1961) *overruled by* Monell v. Department of Soc. Serv., 436 U.S. 658, 663 (1978) (overruling *Monroe* only "insofar as it holds that local governments are wholly immune from suit under § 1983"); *see also* Ascolese v. Southeastern Pa. Transp. Auth., 902 F. Supp. 533, 547 (E.D. Pa. 1995) (public employee acting in official capacity was state actor acting under color of state law for purposes of § 1983). While § 1983 may reach private entities in some situations, the Supreme Court has narrowed the reach of this rule to such an extent that it is unlikely to have any real force in the employment discrimination context. *Cf.* Levit, *supra* note 44, at 269-70 & n.29. Levitt asserts that the Supreme Court has restrictively construed the state action requirement, substantially limiting the availability of that statute as a remedy to only those situations in which a private entity exercises a function traditionally reserved exclusively to the state or in which the state compels the private action. *See id.*

Employment of individuals is clearly not a function reserved exclusively to the state, and the case in which the government *compels* an entity to engage in intentional discriminatory employment practices such as sexual or racial harassment is not likely to arise. Thus, while the "under color of state law" requirement is the most easily negotiated hurdle for legal analysis, it is also the hurdle that most substantially limits the use of § 1983.

148. *See infra* notes 220, 246-47 and accompanying text.

149. *See infra* notes 210 and accompanying text.

150. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). In *Harlow*, the Supreme Court reasoned that when "an official could be expected to know certain conduct would violate statutory or constitutional rights, he should be made to hesitate" but that when the official's duties "legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.* at 819 (citation omitted).

151. *See id.* at 818.

152. *Id.*

153. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

154. *Id.* at 640.

facts confronting him."[155] Put another way, "[i]f reasonable public officials differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity."[156] This will often require an examination of the information the individual defendant had at the time of his or her actions, to determine if a reasonable official could have believed those actions were lawful under then-existing law.[157]

This standard breaks down into two inquiries: were the rights the defendant allegedly violated by the defendant clearly established, and were the defendant's acts objectively reasonable in light of those established rights?[158] Both inquiries are by design intended to be addressed early in the litigation on a defense motion for summary judgment.[159] Although qualified immunity has been described as a "courthouse door-closing device,"[160] the Supreme Court has also recently emphasized that the standards do not require that the specific acts in question be declared unlawful.[161]

There is little room for dispute that the law prohibiting discrimination based on sex is clearly established in equal protection jurisprudence.[162] When the claim is based on acts amounting to sexual harassment, however, the issue has not been so easily resolved for a number of courts. Most circuit courts have recognized that sexual harassment violates the equal protection clause.[163] Most circuit courts which have directly faced the issue have also concluded that the law on this subject is clearly established.[164]

155. Hopkins v. Stice, 916 F.2d 1029, 1031 (5th Cir. 1990).

156. Pfannstiel v. Marion, 918 F.2d 1178, 1183 (5th Cir. 1990) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

157. *Anderson*, 483 U.S. at 641.

158. *See id.* at 640-41; *see also* Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 780 (1992).

159. The Supreme Court has repeatedly expressed the view that qualified immunity is intended to "quickly dismiss" those cases that are "insubstantial" and should not proceed to litigation. *See* Butz v. Economou, 438 U.S. 478, 507-08 (1978); *see also Anderson*, 483 U.S. at 646 n.6 (noting that it has "emphasized" that qualified immunity questions should be resolved at the "earliest possible" stage in the litigation (citations omitted)).

160. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 27 (1989).

161. *See* United States v. Lanier, 117 S. Ct. 1219, 1227-28 (1997) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The Court in *Lanier* reasoned that general statements of law are capable of giving fair and clear warning, and a general constitutional rule identified in case law may apply with obvious clarity to the specific conduct in question, even where that very conduct has not previously been held unlawful. *Id.* at 1227. In support of this proposition, the Court quoted with approval one of the dissenting opinions in the lower court, which stated that "[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from . . . liability." *Id.* (quoting *Lanier*, 73 F.3d at 1410 (Daughtrey, J., dissenting) (citations omitted)).

162. *See* Davis v. Passman, 442 U.S. 228, 234-35 (1979) (finding the constitutional right under Equal Protection clause to be free from sexual discrimination).

163. *See supra* note 3.

164. *See* Bator v. Hawaii, 39 F.3d 1021, 1028-29 (9th Cir. 1994); Woodward v. City of Worland, 977 F.2d 1392, 1397-98 (10th Cir. 1992); Andrews v. City of Philadelphia, 895 F.2d 1469, 1479 (3d Cir. 1990); Poe v. Haydon, 853 F.2d 418, 429 (6th Cir. 1988).

The process followed by these courts, however, is not uniform, and the method chosen may affect whether a plaintiff in a given case can overcome the immunity defense.

As an initial matter, the courts disagree over when the law became "clearly established." The Supreme Court has not ruled directly on this issue. Some courts, such as the Third Circuit, look to the general law on discrimination and harassment, and have concluded that the general principles defining sex discrimination and sexual harassment are sufficient to inform a "reasonable official" that his or her actions are in violation of clearly established laws.[165] Other courts, such as the Tenth Circuit, were not convinced the law was clearly established until the Supreme Court or that cir-

165. *See Andrews*, 895 F.2d at 1479-80. In *Andrews*, the Third Circuit cited *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986), as establishing the general rule that sexual discrimination violates equal protection. *Andrews*, 895 F.2d at 1478. The court then articulated the relevant analysis of what the defendants should have known as "clearly established" as follows:

> The general right which the jury found [the defendants] to have violated, the right to be free from discrimination based upon sex in the workplace, was well grounded in law and widely known to the public by 1986. By finding against [the defendants], the jury found that they had either intentionally or recklessly violated that right.
>
> Given this state of mind requirement and the well known underlying general legal principle, it is evident that the defendants knew that tolerating or engaging in disparate treatment of plaintiffs in the workplace on the basis of their sex was a violation of plaintiffs' rights. Although there may not have been any precedents with precisely analogous facts it is sufficiently clear that by allowing the harassment of [the plaintiffs] to continue, and possibly even participating directly in that harassment, a "reasonable official would understand that what he is doing violates their rights."

Id. at 1479-80 (citations omitted).

Similarly, the Ninth Circuit looked to general Title VII principles regarding sexual harassment as a form of sex discrimination to conclude that the plaintiff has a clearly established constitutional right to be free from sexual harassment in the workplace. *Bator*, 39 F.3d at 1028-29.

cuit itself had addressed the issue.[166] The obvious parsimony of this latter approach has been appropriately criticized.[167]

While not all situations in which a duty arises are clearly established, when the conduct clearly implicates an established rule, that should be sufficient. Any other rule would allow a defendant immunity simply because the same set of facts had not been addressed by a previous court. Such a situation would also ignores growing public awareness of discrimination issues and the rise in anti-discrimination training conducted by employers.[168] Further, it would lead to circular reasoning and ultimately perpetual immunity. If the court does not have to address the substantive basis of the

166. *See Woodward*, 977 F.2d 1392, 1397 (10th Cir. 1992) (finding that law regarding sexual harassment as a violation of equal protection was not clearly established in Tenth Circuit before it decided Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989); *see also* Flores v. Ramirez, 1996 WL 162054 (S.D. Tex. Feb. 26, 1996) (granting qualified immunity because neither Supreme Court nor Fifth Circuit has addressed issue, and law at time of defendants' alleged actions was not otherwise clearly established). In *Woodward*, the Tenth Circuit interpreted "clearly established" as requiring either a Supreme Court decision or Tenth Circuit decision on point. *Id.* at 1397. The court rejected *Andrews* on the grounds that the Third Circuit in that case cited only the *Bohen* case, and Tenth Circuit precedent prevented the court from accepting that a single circuit case could clearly establish the law. *Id.* (citing Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)). However, the Tenth Circuit had squarely held in *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989) that sexual harassment can violate the Equal Protection Clause, and the court in *Woodward* granted qualified immunity for acts of sexual harassment occurring before the date of that decision. *Woodward*, 977 F.2d at 1397, 1398.

The viability of the Tenth Circuit formulation is questionable in light of a case recently decided by the Supreme Court, interpreting 18 U.S.C. § 242 (1994), the criminal equivalent of § 1983. United States v. Lanier, 117 S. Ct. 1219 (1997). In *Lanier*, the Court rejected a Sixth Circuit formulation of the "fair warning" standard for prosecution for a constitutional crime under 18 U.S.C. § 242, analogizing to the "clearly established" standard under § 1983. *Id.* at 1226-27. The Sixth Circuit would have allowed criminal claims against state officials only if the Supreme Court itself had previously ruled that their alleged activity deprived the victim of a constitutional right in a case "fundamentally similar" to the case at bar. *See* United States v. Lanier, 73 F.3d 1380, 1392-93 (6th Cir. 1996), *rev'd*, 117 S. Ct. 1219 (1997). The Supreme Court rejected the notion that only its decisions could provide the required fair warning. *Lanier*, 117 S. Ct. at 1226. The Court noted that in the past it has referred to Court of Appeals decisions in defining the established scope of a constitutional right). *Id.*

It is not clear whether the Supreme Court's reasoning extends to the second part of the Tenth Circuit standard, which would require a decision of that circuit itself in the absence of a Supreme Court decision on point. The Court acknowledged that disparate decisions in various circuits might leave the law insufficiently certain. *Id.* at 1226-27. This is not the same, however, as stating that the law is not clearly established until the circuit in question has spoken on the issue. *See id.* at 1227 (concluding that such circumstances may be taken into account in deciding whether the warning was fair enough, rather than adopting a categorical rule).

167. *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1566 n.3 (S.D. Fla. 1994). The court in *Faragher* noted that if it were to follow this reasoning, "it would have to find that the law will not be clearly established in [its circuit] until [its circuit] addresses this issue. The Court finds such an approach toward the advance of the law too parsimonious." *Id.* at 1566 n. 3. This criticism seems in line with the Supreme Court's recent interpretation of 18 U.S.C. § 242 (1994). *See* United States v. Lanier, 117 S. Ct. 1219 (1997); *see supra* note 166.

168. The existence of training programs should also preclude reliance on the "extraordinary circumstances" defense of Harlow v. Fitzgerald, which lets a government defendant off the hook for violating clearly established rights if that defendant can prove "he neither knew nor should have known of the relevant legal standard." *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (suggesting that the immunity defense should fail if the law violated is clearly established except in those "extraordinary circumstances" when the defendant can prove he neither knew or should have known of those legal standards).

claim because it can grant summary judgment based on lack of established law, the law will never be established.[169]

The level of specificity the courts use to assess whether a right is clearly established determines how "established" that right is. This is illustrated by a district court opinion out of the Tenth Circuit, decided after that jurisdiction found the right to be free from sexual harassment under the Equal Protection Clause a clearly established right.[170] In that opinion, the court acknowledged that the law had been clear since May of 1989 that there is a right to be free from sexual harassment under color of law under the Equal Protection Clause.[171] Despite this, the court was not satisfied that the immunity inquiry ended there. The court went on to state that "what is not at all clear, however, is what constitutes a hostile work environment in the context of § 1983."[172] The court was able to resolve the question by concluding that the standards would be "no less exacting than that employed under Title VII," and on that basis, the defendants could not complain that the law did not clearly establish their conduct as unlawful.[173]

The Tenth Circuit's reasoning reflects two things. First, once again, not all courts are comfortable with the concept of sexual harassment as discrimination based on sex. Second, they also do not quite accept that the contours of sexual harassment law are sufficiently well defined in general. Quid pro quo harassment standards are probably clear enough, but, because hostile work environment standards are seen as still evolving, their parameters are still too vague.[174]

Sexual harassment as a form of sex discrimination is clearly established, and has been at least since the Supreme Court decided *Meritor Sav-*

169. The reasoning in *Woodward v. City of Worland*, 977 F.2d 1392 (10th Cir. 1992) reflects the circular nature of this analysis. In *Woodward*, the court was asked to impose liability for sexual harassment on two of the plaintiff's coworkers who did not have supervisory authority over her. *Id.* at 1401. The court declined, finding the coworkers qualifiedly immune because the law was not clearly established that non-supervisory employees could be subject to such liability. *Id.* In the process, the court specifically declined to decide whether such liability was ever appropriate, for the reason that it need not go beyond a finding of immunity. *See id.* at 1401. As a result, all non-supervisory employees will be able to claim qualified immunity in the Tenth Circuit unless and until the case is presented to it in which the coemployee's attorney fails to raise the immunity issue. To rest the advance of the law on such a contingency is highly questionable.

170. *See* Redpath v. City of Overland Park, 857 F. Supp. 1448 (D. Kan. 1994).

171. *Id.* at 1461.

172. *Id.*

173. *Id.* at 1462, 1462 n.19.

174. The Second Circuit's opinion in *Annis*, although not on the issue of immunity, reflects this belief that the parameters of hostile environment discrimination have yet to be adequately defined. Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994). The court disavowed any "categorical view that sexual harassment equals sex discrimination," and suggested that harassment that was merely "coarse, hostile and boorish" would not rise to the level necessary to support an equal protection claim. *Id.* at 254 The court was willing to go only so far as to say that when the alleged is "calculated to drive [the plaintiff] out of the workplace," it will support an equal protection claim.
Id. at 254.

ings Bank, FSB v. Vinson[175] in 1986. In *Meritor*, the Court stated that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[176] The Court had little difficulty concluding that such situations encompassed claims of a hostile work environment.[177]

Although the Supreme Court has not spoken directly to this issue in the context of § 1983, it has used Title VII standards as established in *Meritor* in interpreting other statutes. Its language suggests the Court itself sees discrimination law clearly connecting sexual harassment to sex discrimination. In a recent case interpreting Title IX of the Education Amendments Act of 1972,[178] for instance, the Court analogized that statute to Title VII, quoting *Meritor* in rejecting an argument that a Title IX defendant did not have notice that it would be held liable for intentional sexual harassment:

> This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the [defendant school district] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student.[179]

As noted above, most courts have looked to Title VII standards to define the "contours" of a sexual harassment claim under § 1983.[180] Admittedly, harassment standards under Title VII are not impervious to criticisms regarding clarity.[181] Nonetheless, the "contours" of sexual harassment law are well enough established by Title VII statute, regulation, and case law as to be sufficient to defeat most qualified immunity claims.[182] The issue is

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175. 477 U.S. 57, 64 (1985).

176. *Id.*

177. *See id.* at 66.

178. 20 U.S.C. § 1681(a) (1994).

179. Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028, 1037 (1992).

180. *See supra* note 49.

181. *See generally* Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789 (1995) (arguing that application of Title VII's hostile environment standards to harassment based solely on statements of opinion in the workplace are vague, overbroad, and impermissibly infringe on First Amendment rights to free speech).

182. *See* Andrews v. City of Philadelphia, 895 F.2d 1469, 1479-80 (3d Cir. 1990) (concluding that although there was no precedent with precisely analogous facts, the law was sufficiently clear that a reasonable official would understand that allowing harassment of an employee based on sex and possibly even participating in it violated the employee's rights). The Court's recent decision in *United States v. Lanier*, 117 S. Ct. 1219 (1997) suggests that law which is established as to its general rules can be sufficient to be clearly established. In rejecting a defense argument that law cannot give "fair warning" for purposes of criminal prosecution under 42 U.S.C. § 242 (1994), the Court analogized to § 1983's "clearly established" law standards:

> In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to a particular type of conduct at issue, a very high degree of prior factual particularity

more properly addressed to the second part of the immunity test, namely whether the actions of the defendants were objectively reasonable in light of clearly established law.[183] A recent Ninth Circuit opinion reflects this distinction in the context of supervisor liability.[184]

In *Bator v. Hawaii*,[185] the Ninth Circuit rejected the defendants' argument that they were entitled to qualified immunity because "the contours of a supervisor's responsibility to investigate harassment are uncertain."[186] Even accepting the defendants' premise that the contours remained uncertain, the court looked at the specific conduct alleged of the defendants, and found there was no uncertainty in that regard.[187] The defendants failed to take any action in response to the plaintiff's complaints of harassment.[188] The law clearly established that a failure to act constituted a violation of Title VII.[189] Thus, even if the ultimate parameters of the duty to investigate had not yet been established, there was no question that there was a duty to take some action, and these defendants had no basis to argue that their conduct was objectively reasonable in light of that law.[190]

Here, again, the treatment of "intent" becomes relevant. If the plaintiff in fact proves intent, that should resolve the "objectively reasonable" issue once and for all.[191] Since "intent" as interpreted in discrimination law means conscious choice, not mere awareness of potential impact,[192] the defendant must necessarily have acted with knowledge of, or at least reckless

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> may be necessary. (citations omitted.) But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful. (citation omitted.)

Id. at 1227; *see also supra* notes 163 and 164. The effect, if any, of this decision on prior qualified immunity doctrine is beyond the scope of this article, but the Court's language supports the argument that an area of law that has developed operational rules, such as the law of sexual harassment, will generally support a finding that the law is sufficiently established to allow suit against the individual defendant.

183. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

184. Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994).

185. *Id.*

186. *Id.* at 1029.

187. *See id.*

188. *See id.*

189. The court in *Bator* cited Title VII case law from the 9th Circuit which held that an employer is liable for harassment when the employer knows of harassment but takes no action. *Id.* (citing EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989)).

190. *See id.*

191. *See* Poe v. Haydon, 853 F.2d 418, 432 (6th Cir. 1988) (concluding in a sex discrimination suit that if there is direct evidence that the defendant was motivated by the plaintiff's gender, summary judgment based on qualified immunity must be denied).

192. *See* Krieger, *supra* note 128, at 1168-77. This "conscious choice" is essentially what the Supreme Court was referring to in *Feeney* when it said the act must be taken" 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

disregard of, the fact that he or she is subjecting an individual to disparate treatment based on a protected class.[193]

On the other hand, by separately articulating an intent requirement in equal protection cases, courts may be laying the groundwork for defendants to avoid claims on summary judgment through assertions of immunity. At least as interpreted by courts like the Seventh Circuit,[194] an equal protection hostile environment claim is arguably not established by pleading the Title VII prima facie case, because Title VII hostile environment standards do not require intent as a separate element of the claim.[195] Intent is generally not relevant to qualified immunity inquiries.[196] Nevertheless, when intent is an underlying element of the constitutional violation, courts require the plaintiff to provide evidence of such intent.[197] The failure to allege direct evidence of intent in a § 1983 action may thus result, and indeed has already resulted, in the grant of qualified immunity and dismissal of the claim, which would not happen in a Title VII case.[198]

This has been interpreted to require the plaintiff in a harassment case to produce direct evidence that the defendant's actions were motivated by

193. *See* Andrews v. City of Philadelphia, 895 F.2d 1469, 1479 (3d Cir. 1990) (concluding that a jury finding of liability indicated defendants intentionally or recklessly violated the plaintiff's rights to be free from discrimination based upon sex and that defendants could not have been acting as objectively reasonable officials).

194. *See supra* notes 71-73 and accompanying text.

195. *See, e.g.*, Howard v. Board of Educ., 876 F. Supp. 959, 969 (N.D. Ill. 1995) (dismissing with leave to amend an equal protection hostile environment claim because the plaintiff failed to allege separate and specific evidence of intent, despite the fact that plaintiff's Title VII claims against employer were sufficiently pled).

196. *See* Harlow v. Fitzgerald, 457 U.S. 800, 816-18 (1982).

197. *See* Hull v. Cuyahoga Valley Joint Voc. Sch. Dist. Bd. of Educ., 926 F.2d 505, 512 (6th Cir. 1991) (concluding that plaintiff must present direct evidence of improper motivation when individual defendants assert qualified immunity in race discrimination case); Poe v. Haydon, 853 F.2d 418, 430-31 (2d Cir. 1988) (concluding that *Harlow* permits inquiry into official's motive or intent in carrying out challenged conduct where it is a critical element of the substantive claim); *cf.* Board of County Comm'rs v. Brown, 117 S. Ct. 1382, 1389 (1997) (reasoning in claim against government entity that, because § 1983 plaintiff must prove the state of mind necessary to prove the underlying violation, proof of intentional deprivation of plaintiff's rights by a legislative body or authorized decisionmaker necessarily establishes the municipality acted culpably). Currently, there is a debate among lower courts regarding whether courts can and should require a "heightened pleading" standard when an individual defendant claims qualified immunity. *See* Eric Kugler, *A § 1983 Hurdle: Filtering Meritless Civil Rights Litigation at the Pleading Stage*, 15 REV. LITIG. 551 (Summer, 1996); Hon. Harvey Brown & Sarah V. Kerrigan, *42 U.S.C. § 1983: The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619, 629-31 (1995). The specifics of this debate are beyond the scope of this article, but those courts requiring an additional showing of intent in harassment cases are either explicitly or implicitly adopting the heightened pleading requirement.

198. *See* Edwards v. Wallace Community College, 49 F.3d 1517, 1524 (11th Cir. 1995); *Poe*, 853 F.2d at 432. In *Edwards*, the Eleventh Circuit concluded that an individual defendant was entitled to qualified immunity when the plaintiff failed to present any concrete evidence of discriminatory intent on that individual's part. *Edwards* 49 F.3d at 1524. The Sixth Circuit in *Poe* held that the intent-based standard in equal protection cases requires the plaintiff to "come forward with something more than inferential or circumstantial support for [her] allegation of unconstitutional motive." *Poe*, 853 F.2d at 432 (quoting Martin v. Municipal Court, 853 F.2d 1031, 1045 (D.C. Cir. 1987).

gender-based animus. In other words, the "objectively reasonable" standard produces the same basic effect as the intent requirement. If intent standards are as narrowly cast as the Seventh Circuit interprets them,[199] there will be very few cases in which the plaintiff will be able to produce sufficient evidence to withstand the immunity claim.[200]

As outlined in the prior discussion, however, if the plaintiff alleges facts indicating the harassment was "because of sex" under Title VII standards, the plaintiff has met the intent requirement of the equal protection clause as well. The inquiry as to qualified immunity should be based on the nature of the defendant's activity in objective terms: could a reasonable state official have believed that the conduct did not amount to sexual harassment?[201] If the analysis using Title VII standards sufficiently identifies the general conduct prohibited, the immunity inquiry should end there.

B. "Personal" Actions

In addition to qualified immunity, defendants in a number of cases have been successful in raising the defense that the actions they were alleged to have taken were "personal," rather than based on authority granted under color of state law.[202] Once again, courts are perpetuating the idea that sexual harassment is not necessarily discrimination based on sex.

Section 1983 imposes liability on any person who acts under the color of state law.[203] Employment by the state, while sufficient to deem the defendant a "state actor," is not in and of itself determinative of whether the defendant acted under color of state law.[204] The defendant must also "[act] in his official capacity or . . . exercis[e] his responsibilities pursuant to state law."[205] In other words, the defendant must "exercis[e] power 'possessed

199. *See supra* note 110 and accompanying text.

200. *Poe* illustrates this proposition, through its insistence that only direct evidence, not "inferential or circumstantial" evidence, will suffice to avoid summary judgment on qualified immunity grounds. *See Poe*, 853 F.2d at 432. *Poe* remanded the case to the district court to consider whether there was any genuine issue of material fact regarding the defendants' motivations for their decisions. *Id.* If the plaintiff was unable to provide direct evidence of gender-based animus, the district court was directed to enter summary judgment in the defendants' favor. *Id.* at 432-33.

201. Here, the court in *King* was correct in making a distinction among perspectives. *See* King v. Board of Regents of Univ. of Wisc. Sys., 898 F.2d 533, 537-38 (7th Cir. 1990); *see also supra* note 88 and accompanying text. The qualified immunity inquiry looks to the defendant's perspective, but, by employing "objective" terminology, directs attention to the status of the law rather than the defendant's subjective intentions. *But cf.* Lewis & Blumoff, *supra* note 155, at 783 (criticizing the objective standard as a fiction that "rests on the fragile belief that the relatively low level employee . . . appreciates the current state of constitutional law").

202. This is contrary to the other "personal" concept that was analyzed in the earlier discussion on intent. In that context, the defendant argues that the actions were not based on an intent to discriminate against the plaintiff because of his or her status as a member of a protected class, but rather were based on some "personal" attribute of the plaintiff such as physical attractiveness.

203. 42 U.S.C. § 1983 (1994).

204. *See* Polk County v. Dodson, 454 U.S. 312, 321 (1981).

205. West v. Atkins, 487 U.S. 42, 50 (1988).

by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[206] The function in the government fulfilled by the defendant, and the relationship between the defendant, the government entity employing him or her, and the plaintiff, is dispositive of whether the defendant acted under color of state law.[207] Conduct that amounts to the mere personal pursuits of a state actor falls outside the purview of § 1983.[208]

These basic rules can be, and in some instances have been, translated into a deceptively broad and flexible standard, one which focuses on the nature of the conduct involved as well as the surrounding circumstances.[209] As one court has put it, the inquiry requires examination of the relationship of the wrongful act to the duties and powers incidental to the state actor's position.[210] This relationship test allows courts to find even off-duty police officers to have been acting under color of state law in some circumstances.[211]

In most cases alleging sexual harassment under color of law, however, this standard has in practice been replaced by a proxy, namely supervisory authority. Color of state law can be found only if the alleged harasser has some type of supervisory authority over the plaintiff and uses that authority as a basis for or to facilitate the harassment.[212]

As a result, a number of courts have ruled in favor of co-worker defendants whose alleged conduct clearly amounted to sexual harassment, on the grounds that the conduct did not relate to the nature of their job.[213] One

206. *Id.* at 49 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

207. *See id.* at 55-56.

208. *See* Screws v. United States, 325 U.S. 91, 111 (1945) ("Thus, acts of officers in the ambit of their personal pursuits are plainly excluded" from the concept of "color of law"). The Supreme Court subsequently qualified this rule, noting that if a person possessing state authority purports to act under that authority, it is state action even if the person might have taken the same action in a purely private capacity. *See* Griffin v. Maryland, 378 U.S. 130, 135 (1964).

209. *See* Anthony v. County of Sacramento, Sheriff's Dept., 845 F. Supp. 1396, 1400 (E.D. Cal. 1994).

210. *See id.* at 1400 (citing Dang Vang v. Vang Xiong X Toyed, 944 F.2d 476, 480 (9th Cir. 1991)).

211. *See generally* Steve Libby, Note, *When Off-Duty State Officials Act under Color of State Law for the Purposes of Section 1983*, 22 MEM. ST. L. REV. 725 (1992).

212. *See, e.g.*, Woodward v. City of Worland, 977 F.2d 1392, 1400-01 (10th Cir. 1992) (granting summary judgment on qualified immunity to two of plaintiff's co-workers because they were "not in a position of authority over the [plaintiff]"); Poulsen v. City of North Tonawanda, 811 F. Supp. 884, 895 (W.D.N.Y. 1993) (finding factual issue whether harasser had sufficient "authority over his female victim" to amount to sexual harassment under color of state law when the harasser had power to make daily work assignments and evaluate the victim's performance).

213. *See, e.g.*, Rouse v. City of Milwaukee, 921 F. Supp. 583, 588 (E.D. Wis. 1996) (finding co-worker defendant who had pattern of harassment of plaintiffs and others not to have acted under color of state law because there was nothing specific or unique in his assigned duties that brought him into contact with the plaintiffs); Murphy v. Chicago Transit Auth., 638 F. Supp. 464 (N.D. Ill. 1986) (finding defendants' "tortious" actions in harassing the plaintiff not related to their positions as staff attorney co-workers of plaintiff).

case so far stands out in this regard. In *Murphy v. Chicago Transit Authority*,[214] the plaintiff, a staff attorney with the Chicago Transit Authority, was subjected to five months of constant degrading and humiliating sexual comments by her fellow staff attorneys.[215] The comments included requests that she lift her skirt and suggestions that she give opposing counsel in pending case a "blow job."[216] The comments often took place in public and in front of witnesses.[217] When she complained, she was disproportionately assigned menial, demeaning tasks which were generally rotated among all of the staff attorneys.[218]

The federal district court hearing the matter granted summary judgment to the defendant co-employees, none of whom had any supervisory authority over plaintiff, on the grounds that their actions were not taken under color of state law.[219] The court applied the relationship test, to reason as follows:

> Here, however, the abusive conduct was not in any way related to the duties and powers incidental to the job of CTA staff attorney. That the conduct occurred on the CTA work premises is not enough to render it "related to" the state authority conferred on the defendants. For conduct to relate to state authority, it must bear some similarity to the nature of the powers and duties assigned to the defendants. (citations omitted) Here, the humiliating comments and harassing behavior had nothing to do with, and bore no similarity to, the nature of the staff attorney job. The CTA job, limited as it was to representing the CTA in legal matters, did not and could not give the illusion that sexual harassment, albeit during work hours, somehow related to the nature of that job.[220]

The result in the case was foreordained by the court's selection of the relevant context, that is, the nature of the job being "limited . . . to representing the CTA in legal matters." The court articulated an exceptionally narrow construct of what can amount to sexual harassment under color of state law. Under this approach, a court could find such a connection only if the defendant's job included hiring and job assignment responsibilities *and* the harassment related to those responsibilities.[221] Any other form of har-

214. Murphy v. Chicago Transit Auth., 638 F. Supp. 464 (N.D. Ill. 1986).

215. *Id.* at 468.

216. *Id.*

217. *Id.*

218. *Id.* at 466.

219. *Id.* at 468.

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

221. In contrast to its ruling on the co-employee harassment, the court in *Murphy* did allow a claim to proceed against the plaintiff's supervisors. *Id.* at 470. The court found that the supervisors themselves intended to discriminate against the plaintiff when they failed to respond to the plaintiff's complaints about harassment and then assigned her demeaning tasks. *Id.* Because the court earlier held that the supervisor's knowledge and "reckless disregard" of the harassment itself was not enough to establish a constitutional claim, the plaintiff's complaint had to be construed to find some form of active participation. That "participation" was "intentionally avoid[ing]" taking any action to rectify the situation and issuing the demeaning job assignments. *See id.*

assment, by a supervisor or any other government employee, no matter how pervasive or egregious, would simply be a "personal" or "private" matter.[222]

This analysis harkens back to the early days of sexual harassment litigation, when courts were willing to find actionable sexual harassment only if there was some policy of the employer that permitted the harasser's actions,[223] or if the harassment itself involved some quid pro quo element.[224] In the absence of such evidence, these courts assert, "it is difficult to establish that the abusive action was perpetuated 'under color of state law' rather than as an essentially private act of sexual harassment."[225] The distinction is, however, as illogical in a § 1983 action as it was in a Title VII action.[226]

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222. *See* Redpath v. City of Overland Park, 857 F. Supp. 1448, 1462 (D. Kan. 1994) (finding that without supervisory authority, the defendants' acts were merely acts of "private persons"); *see also* Rembert v. Holland, 735 F. Supp. 733, 736 (W.D. Mich. 1990) (finding acts of off-duty police officer who came to inmate's cell and demanded sexual favors and then engaged in physical retaliation for inmate's refusal to have been made "in pursuit of personal, not governmental, interests").

The practical consequences of the *Murphy* approach are twofold. First, it has led to the creation of a "de facto" authority rule. If the defendant lacked actual supervisory authority, but can be found to have exercised some form of such authority in a given situation, the plaintiff may be entitled to proceed on a § 1983 claim. *See* David v. City and County of Denver, 101 F.3d 1344, 1354 (10th Cir. 1996) (identifying without specifically defining "de facto" authority as basis for color of state law finding).

Second, it may lead to a search of the record to find any available evidence of supervisory authority. *See* Lipsett v. University of Puerto Rico (Lipsett II), 759 F. Supp. 40, 50-51 (D.P.R. 1991). In *Lipsett*, the plaintiff, a medical resident, was allegedly subjected to a campaign by a number of fellow residents to drive her out of the program because she was a woman. Lipsett v. Univ. of Puerto Rico (Lipsett I), 864 F.2d 881, 886-890 (1st Cir. 1988). This campaign included sexual advances to the plaintiff made in exchange for protecting her throughout her residency. *Lipsett I*, 864 F.2d at 888. After appeal on other issues, the defendants argued in the district court that they were entitled to summary judgment because their actions were not taken under color of law in that they "were not related to the powers and duties incidental to the position of a resident." *Lipsett II*, 759 F. Supp. at 50. The district court was able to distinguish *Murphy*, but only after it found in the rules governing the residency program that more senior residents were given responsibility to supervise junior residents. *Id.* at 51. The court was satisfied that this supervisory authority was sufficient because the defendants used that authority to abuse the supervisor-underling power relationship, which resulted in the plaintiff being dismissed from the program. *Id.* (citation omitted).

223. *See, e.g.*, Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *rev'd and remanded on other grounds*, 562 F.2d 55 (9th Cir. 1977) (dismissing sexual harassment claim because supervisor's conduct did not arise out of company policy but rather was "nothing more than a personal proclivity, peculiarity or mannerism" of the supervisor). Some commentators might suggest that this is in fact the most appropriate analogy to and appropriate basis for the color of law analysis. *See* Eric H. Zagrans, *Under Color of* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 559 (1985) (arguing that proper construction of § 1983 focuses on what state law authorizes the defendant's actions and if no such law exists, no claim for relief exists under the statute).

224. *See, e.g.*, Reichman v. Bureau of Admin. Action, 536 F. Supp. 1149, 1176 (M. D. Pa. 1982) (noting that courts have distinguished between sexual advances of a personal nature and those related to the continuation or conditions of employment, with only the latter being actionable).

225. Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992).

226. *See* Anthony v. City of Sacramento, 845 F. Supp. 1396, 1401 (E.D. Cal. 1994) (reasoning that the "suggestion that abusive behavior towards a co-worker can never implicate a state power is unfounded in both logic and law"). The court in *Anthony* emphasized that its focus was on the relationship between the defendant's acts and the defendant's powers and duties, rather than on the status of the parties. *Id.*

Apparently, these courts continue to view sexual harassment as an act of sex and sexual desire, rather than as a form of abuse of power and status. Even non-supervisory employees rely on status to perpetuate a hostile work environment—the status of being the favored gender, secure in a workplace hierarchy that deems the female employees inferior. Surely the staff attorneys who harassed the plaintiff in *Murphy* relied on this sense of power and status, which they would not have had absent their official positions with the government agency that employed them.

The relationship test can be applied appropriately without limiting it to supervisory coercion. A California federal district court opinion reflects how this can be done. In *Anthony v. City of Sacramento*,[227] the court adopted a broader view of what the duties and powers of a government position involve and how acts of harassment can have a direct relationship to those powers and duties.

The defendants in *Anthony* were sheriff's deputies, a number of whom had no supervisory authority over the plaintiff.[228] The plaintiff alleged that while she was employed as a corrections officer, she had to work in an environment in which racially and sexually disparaging comments were directed at her and at African-American inmates and officers.[229] When she criticized the treatment of the inmates, her coworkers retaliated against her by intensifying their behavior toward her.[230]

The court rejected a formulation of the relationship test that rested on the formalistic status of the parties.[231] Instead, the court closely examined the nature of the corrections officer position and the duties assigned to it.[232] Protecting inmate rights was one of those duties and responding to complaints regarding inmate treatment was directly related to that.[233] Further, the disparaging conduct which predated the plaintiff's defense of the inmates' rights was also related to the duties of the deputies, in terms of perceived inferiority and criminality of certain groups and the inability to perform law enforcement duties.[234] The court concluded that "the alleged pattern of harassment directly involved the discriminatory assertion of law enforcement authority."[235]

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227. Anthony v. City of Sacramento, 845 F. Supp. 1396 (E.D. Cal. 1994).

228. *See id.* at 1309.

229. *See id.*

230. *See id.*

231. *See id.* at 1401.

232. *See id.*

233. *See id.* at 1401 n.5.

234. *See id.* at 1402.

235. *Id.* The court in *Anthony* referred to the deputies' duty to protect inmates as "unique," in that it gave them the power to retaliate. *See id.* at 1401 n.5. At least one court has distinguished *Anthony* in this regard, finding that there was nothing specific or unique about the defendant police officer's position that brought him into contact with the plaintiffs. Rouse v. City of Milwaukee, 921 F. Supp. 583, 588-89 (E.D. Wis. 1996). The court in *Rouse* did not address *Anthony's* broader finding of color of state law for the harassing environment predating the retaliation allegations.

This version of the relationship test would readily permit a finding in cases such as *Murphy* that the defendants acted under color of state law. In *Murphy*, for example, the defendants were responsible for handling claims, litigating suits, working with opposing counsel and witnesses, and representing the transit authority with the public. Their conduct related to their duties as transit attorneys. The acts of harassment directed at the plaintiff were related to and arose out of this process of representation in the same way that epithets and harassing comments related to and arose out of the process of law enforcement in *Anthony*.

Courts that focus on status seems to take a circuitous approach to looking at authorization to act. These courts perceive an action to be under color of law only if the act is an assertion of the type of authority held by the defendant. Supervisors have authority to hire and fire. Pursuant to this theory, therefore, taking or threatening adverse job action is under color of law because it is within the apparent authority of the state actor.

Color of state law, however, also reaches acts of a state actor that are not authorized but are nonetheless the result of having been granted authority by the state.[236] In this sense, color of state law is "by virtue of office and not simply under law or by authority of law."[237] The traditional doctrinal approach in § 1983 cases understands "color of law" in the broad sense of state action and simple, "but for" causation.[238] Put another way, the question posed by the traditional doctrine is whether the act is "one which there would not be an opportunity to perform but for the possession of some state authority."[239] Courts imposing the supervisory authority requirement in sexual harassment cases are departing from this traditional approach.

One argument in support of the "personal" distinction drawn by courts imposing the supervisory authority requirement might conceivably be that it is related to general concerns about federalizing state tort law claims.[240]

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236. *See* Monroe v. Pape, 365 U.S. 167, 183-87 (1961), *overruled by* Monell v. Dept. of Soc. Services, 436 U.S. 658 (1978) (overruling *Monroe* only "insofar as it holds that local governments are wholly immune from suit under § 1983").

237. Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 403 (1992).

238. *Id.* at 415.

239. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 288-89 (1913) (cited in Winter, *supra* note 237 at 415, n. 453. Winter criticizes this approach, arguing that it "prove[s] either too much or too little." Winter, *supra* note 237, at 415. It leads the court to adopt limiting analysis that excludes cases as not raising constitutional issues, *see* Paul v. Davis, 424 U.S. 693, 713 (1976) (holding that damage to reputation caused by state action does not itself implicate constitutional rights), or allows "every action causally associated with the actor's governmental status" to be covered by the statute. Winter, *supra* note 237, at 415. Winter concludes that the proper conception of "color of" law looks to the fact that the injury was effectuated under the guise of the actor's official status: "The essential element of this type of section 1983 action is abuse of . . . official position." *Id.* at 415-16 (quoting *Paul*, 424 U.S. at 717 (Brennan, J., dissenting) (footnote omitted)).

240. The classic expression of this sentiment is found in *Paul v. Davis*, in which the Court expressed its fear that a broader reading "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already by administered by the States." *Paul*, 424 U.S. at 701.

These courts are not diminishing sexual harassment jurisprudence, the argument would proceed, but rather they are suggesting that state common law claims for battery, infliction of emotional distress, among other claims (and not constitutional doctrine),[241] are the appropriate vehicles for vindicating the victim's rights.

These sexual harassment cases, however, are unlike those cases in which the Court limited the right to sue upon finding insufficient constitutional concerns implicated in the case, such as due process claims based on defamation or negligence by a state actor.[242] The Court has already recognized the constitutional sufficiency of sex discrimination claims.[243] Title VII has already "federalized" the sexual harassment question. Thus, the federalism concerns do not compel a "personal" action distinction.

When state actors use their position with a government employer as an opportunity to engage in severe and pervasive harassment of fellow employees, they act under color of law sufficient to allow a § 1983 action. Otherwise, individuals who are in fact abusing the power granted to them by virtue of their state office will be immunized from liability simply by virtue of the fact that they are not "supervising" the plaintiff.

IV.
PUBLIC INTERESTS AND PRIVATE NEEDS IN CONSTRUING INDIVIDUAL LIABILITY STANDARDS

Having detailed how courts are misconstruing the nature of sexual harassment in their interpretation of equal protection claims, I now turn to the more conceptual issues this topic raises. How does the sexual harassment claim under § 1983 fit into the general body of § 1983 jurisprudence? Perhaps the restrictive view adopted by those lower courts is inconsistent with sexual harassment concepts, but is nonetheless appropriate when placed into the broader context of the function of § 1983 doctrine. In this section, I argue that this restrictive approach is neither appropriate nor mandated by the proper conception of § 1983 doctrine.

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241. The same argument that common law rights are the proper source of vindication for victims of sexual harassment has been made on a theoretical basis regarding Title VII employer liability, *see* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS at 353-57 (1992), and is no more persuasive there than here. *See* John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1611-12 (1992) (noting that although common law remedies might hypothetically have been available to victims of sexual harassment prior to enactment of Title VII, there is no evidence that they were being successfully prosecuted).

242. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 335-66 (1986) (rejecting claim that negligence by state actor violated plaintiff's federal due process rights); Paul v. Davis, 424 U.S. 693, 713 (1976) (refusing to recognize constitutional claim for defamation by state actor).

243. *See* Davis v. Passman, 442 U.S. 228, 234-35 (1979) (recognizing that sex discrimination violates equal protection rights secured by the United States Constitution).

A. *"Personal" Actions and Overdeterrence*

The lower courts suggest that § 1983 is not a proper vehicle for sexual harassment claims in any instance in which the actions can be perceived as "personal." The idea seems to be that the sanction of § 1983 liability is properly applied only to a limited number of cases in which the harm to the plaintiff is directly connected to some specific authority granted to the individual state actor. An employee who has the power to make job assignments and who directs sexually inappropriate conduct toward the plaintiff is a proper § 1983 defendant.[244] An employee who lacks such authority but who works with the plaintiff and engages in a similar type of conduct while working together is not.[245] The distinction is that the latter employee's actions are merely "personal"[246] whereas the former's are "under color of law" and/or "intentional."[247]

Title VII doctrine long ago rejected the idea that harassment is a "personal" matter that does not subject the employer to liability, even when the harassment occurs after hours and outside of the express or implied authority of the employer's agent.[248] Potentially, then, the employer may be held liable for the individual defendant's "personal" harassment of the plaintiff, but the individual may not. The argument in favor of this disparity might be that it is a "fair" rule because it balances the effects of constitutional liability on the ability of, and need for, the individual defendant to do his or her job.[249]

It is true that in developing § 1983 doctrine, the Supreme Court has clearly been concerned about overdeterrence. As one commentator has described it, the question is "how best to motivate the official to act within constitutional constraints without significant derogation of the interest in vigorous enforcement of governmental policies."[250] Joined with this concern is a desire not to turn § 1983 into a font for federal litigation of state

244. *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1565-66 (S.D. Fla. 1994) (finding defendants liable under § 1983 for verbally and physically harassing female lifeguards under their command); Poulsen v. City of North Tonawanda, New York, 811 F. Supp. 884, 895 (W.D.N.Y. 1993) (finding that factual dispute regarding power to make job assignments warranted denying summary judgment to police lieutenant alleged to have forced plaintiff into a sexual relationship with him).

245. *See* Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992) (granting qualified immunity to defendants who verbally and physically harassed the plaintiff because law was not clearly established that non-supervisors could be liable under 14th Amendment for sexually harassing coworker); Bonenberger v. Plymouth Township, 1996 WL 729034 at *5 (E.D. Pa. Dec. 18, 1996) (granting summary judgment to defendant who had "no authority to hire, fire, or to make any employment decision" regarding the plaintiff).

246. *See Woodward*, 977 F.2d at 1401; *Bonenberger*, 1996 WL 729034 at *5.

247. *See Faragher*, 864 F. Supp. at 1565.

248. *See supra* notes 220-23 and accompanying text.

249. *See* Rudovsky, *supra* note 160, at 75, 76.

250. Rudovsky, *supra* note 160, at 75; *see also* Mitchell v. Forsyth, 472 U.S. 511, 522-23 (1985) (reasoning that purpose of qualified immunity is to allow officials to act without undue fear in the performance of their duties).

tort claims.[251] State actor-oriented immunity concepts, coupled with restrictive interpretation of constitutional rights, are the means to these ends.[252]

A hallmark of many of the cases in which the Supreme Court has developed its state actor-friendly doctrine is that they allege due process or other "rights" that are hard to pin down, such as a duty to protect individuals from harm,[253] or the right to be free from unreasonable searches and seizures.[254] These cases also frequently challenge policy choices in the administration of government, which if allowed to proceed would require scrutiny of government objectives.[255] In these cases, a broad view of immunity, or, alternatively, a narrow view of what rights support a federal forum, may be necessary and proper to respond to concerns that judicial action should not unduly interfere with the effective function of government.

For example, consider warrantless searches or excessive force cases. The government has a legitimate concern about the efficient operation of law enforcement and the public has a legitimate concern that proper police activity not be chilled. Allowing individual liability suits in these cases may cause state actors to think twice about making an arrest, potentially reducing their effectiveness in enforcement of the law.[256]

Sexual harassment cases provide a stark contrast to those concerns. The same issues simply do not arise when the liability attaches for making sexual advances, using sexually derogatory language, making inappropriate

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251. *See* Paul v. Davis, 424 U.S. 693, 701 (1976).

252. *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 750 (1992) (describing concerns regarding intrusion into affairs of state and local government as leading Supreme Court to enact "an entire web of immunities").

253. *See* DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. 189, 196-97 (1989) (holding state's failure to protect an individual from "private violence" does not constitute a violation of the Due Process Clause). Similarly, in formulating its rule of municipality liability, the Court has stated its concern that the rules it adopts not create a general government duty to "keep the peace." *See* Monell v. Department of Soc. Services, 436 U.S. 658, 693 (1978) (rejecting imposition of respondeat superior liability on municipalities for unconstitutional actions of its officers and employees).

254. *See* Anderson v. Creighton, 483 U.S. 635, 640-41 (1987) (remanding case for further consideration because general law clearly established that probable cause and exigent circumstances are required to perform a warrantless search, and findings did not establish that the circumstances confronting these officers were clearly established as violating that law).

255. *See* City of Canton v. Harris, 489 U.S. 378, 390-91 (1989) (recognizing § 1983 claim against municipality for policy of failure to train officers but only when such failure amounts to deliberate indifference to the rights of its citizens); *cf.* Schweiker v. Chilicky, 487 U.S. 412 (1988) (rejecting due process challenge to administration of social security disability benefits program because federal statutory scheme reflected intent of Congress to afford nothing more than administrative remedies for violation of that program).

256. The Court pointed out in *Anderson* that it has "frequently observed, and many of [its] cases on point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *See Anderson*, 483 U.S. at 644. The "objectively reasonable" standard in qualified immunity cases accordingly works to allow officers to make these difficult decisions without undue fear of being held personally liable in damages. *See id.*

physical contact, and other conduct common in sexual harassment cases. Even the Seventh Circuit acknowledges that it will be the extraordinary case in which the government will have any legitimate objective justifying the defendant's actions.[257]

It is, for instance, difficult to conceive how recognition of individual liability in cases such as *Murphy*[258] would potentially deter legitimate operation of government business. Sexual harassment disrupts the very nature of working conditions.[259] In the ordinary case, making the defendant think twice will advance the functioning of government by removing this disruptive force.[260]

Furthermore, as previously mentioned, the government employer is already subject to potential statutory liability for the harassment under Title VII. In the case of quid pro quo harassment, this liability is likely to have a strict application.[261] In the case of hostile work environment harassment, most courts impose liability if the employer "knew or should have known" of the harassment and failed to take remedial action.[262] In either case, the standard of liability is considerably less exacting than entity liability standards under general § 1983 doctrine.

Under general § 1983 doctrine, the Court has restricted entity liability to those situations in which the plaintiff can show a "policy or custom" of violation of the alleged constitutional rights.[263] That policy or custom must be directly attributable to the government entity; the government entity must have been the "motivating force" behind the injury alleged.[264] The plaintiff must show that the entity, through its legislative body or its policy-

257. Bohen v. City of East Chicago, 799 F.2d 1180, 1187 (footnote omitted) (7th Cir. 1986); *see supra* note 65 and accompanying text.

258. Murphy v. Chicago Transit Auth., 638 F. Supp. 464 (N.D. Ill. 1986). *See* discussion *supra* notes 210-23 and accompanying text.

259. Disruption of the workplace is, in fact, one of the basic elements of the hostile environment sexual harassment claim. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1996) (defining sexual harassment to include "conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"). The "disruption and inefficiencies caused by a hostile workplace environment" are also what justify an employer's immediate remedial actions to remove the offending employee. *See* Carosella v. United States Postal Serv., 816 F.2d 638, 643 (Fed. Cir. 1987) (rejecting appeal of dismissed employee who argued the charges made against him were not clearly sufficient to impose Title VII liability and therefore did not support his dismissal).

260. *Cf.* Lewis & Blumoff, *supra* note 158, at 794 (asserting that imposing liability on government entity for retaliating against whistleblowing employee who exercised First Amendment rights does not implicate federalism concerns because it is not "meddlesome interference and requires no wholesale reordering of personnel decisionmaking.")

261. *See* Lewis & Henderson, *supra* note 27, at 669.

262. *Id.* at 675-76.

263. *See* Monell v. Department of Soc. Services, 436 U.S. 658, 690 (1978). To impose liability on a government entity it is necessary that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*

264. *See* Board of County Comm'rs v. Brown, 117 S. Ct. 1382, 1388 (1997).

makers, made "a deliberate choice to follow a course of action . . . from among various alternatives."[265] To say that these standards make it difficult to establish entity liability is an understatement. "[I]n practice, the difficulty of demonstrating 'policy' or 'custom' provides the entity an expansive exemption from liability."[266]

Title VII's less exacting standard of liability thus reflects that, at least in the context of employment discrimination, there is less of a concern about intrusion into government policy.[267] Further, it establishes that federal law is the appropriate source of protection of these civil rights.

Moreover, because of this potential liability, government employers have adopted policies and set up training programs designed to deter the behavior alleged. In other words, these state actors are told that their behavior is not consistent with the efficient operation of government. It makes little sense to then use doctrine based on an efficiency rationale to protect these individuals from liability from their actions.

Therefore, courts justifying their consideration of sexual harassment claims under the "personal" rationale are not acting in a manner consistent with the theoretical foundations of § 1983 doctrine. Rather, these decisions reflect an unwarranted, narrow view of the nature of individual sexual harassment claims and their constitutional significance.

B. Individual Liability as a Means to Obtain Complete Justice

Some might argue that the fact that Title VII already imposes liability on the employer actually cuts against imposing the additional burden of individual liability. According to this view, the existence of employer liability is sufficient. The plaintiff's rights are vindicated, and the two general purposes of § 1983, compensation and deterrence, are both achieved.[268]

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265. Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986) (plurality opinion).

266. Lewis & Blumoff, *supra* note 158, at 760. Lewis and Blumoff argue that a revised species of respondeat superior liability, one that allows entity liability whenever a state official acts within the scope of his or her express, implied, or apparent authority, would more fairly attribute responsibility under § 1983. *Id.* at 829-30.

267. The Supreme Court has in fact suggested that in the area of employment relationships, it is willing to treat the government more like a private employer and less like "the government." *Cf.* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 678-79 (1989) (holding that government does not violate the Fourth Amendment by reasonable mandatory drug testing of government employees without warrant and probable cause when government is acting as an employer and not in law enforcement capacity). The trade-off for being given more freedom to operate in the employment context for such things as Fourth Amendment concerns is that operating as an employer also opens the government up to greater scrutiny of its choices and objectives in making employment decisions.

268. *See* Rudovsky, *supra* note 160, at 75. In the Title VII context, at least one commentator has argued that individual liability actually poses a threat to employer liability standards under that statute. *See* Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 561 (1996). The thrust of this argument appears to be that courts may be reluctant to impose vicarious liability on employers if there is an individual defendant in the case who is the truly responsible party. *See id.* This is ultimately harmful to victims of discrimination because the employer is generally the one able to provide the fullest forms of relief to the victim. *See id.* at 541, 543 (reasoning

One response is that limitations on liability which may properly limit the employer's exposure do not warrant the exclusion of individual liability for intentional deprivation of a constitutional right. A second, related response is that concepts of justice require recognition of the legal responsibility of the individual, § 1983 being the appropriate source of that recognition.

As noted above, in most of the courts an employer may avoid liability for hostile environment harassment of the plaintiff by a co-employee if the employer had no reason to know of it, or if the employer took immediate remedial action after the fact.[269] This standard reflects that Title VII's overarching purpose is to remove the arbitrary barriers that discrimination places in the workplace.[270] This standard does not fully account for the rights that were deprived. While after-the-fact actions of an employer might make it "fair" not to impose statutory liability on that employer, they do not negate the constitutional deprivation itself. This would be like saying it is "fair" not to provide legal redress to a motorist beaten by a police officer because the police department subsequently disciplined that police officer.

Some who advocate revision of § 1983 doctrine want to make the outcome on entity liability depend on the outcome on individual liability. Some commentators would make this relationship "direct" while others would make it "inverse."[271] Those who see deterrence as the primary purpose of § 1983 liability argue for a "direct correlation" between individual and entity liability. The entity would be liable only if the individual is not entitled to qualified immunity and, therefore, also liable.[272] These commentators express concern that imposing liability in some cases solely on the individual fails to create real incentives on the part of the entity to prevent constitutional violations by its employees. Further, because individuals may escape personal liability for good faith actions but nonetheless face

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that the employer is the one with control over reinstatement and hiring, and the deep pocket to pay any money damages).

This argument, however, is not strong enough to warrant precluding individual liability of the actual wrongdoer. It presupposes courts are capable of finding only one responsible party. *See id.* at 561 (suggesting that both the actual employer and the individual defendant "cannot be *the* responsible employer"). To the contrary, multiple party litigation raising multiple and distinct concepts of liability is not uncommon, as reflected in cases cited throughout this article. Vicarious responsibility of employers under Title VII is a well-established concept and is unlikely to be substantially impaired by holding the individual state actor responsible for conduct that violates constitutional rights. Further, the argument ignores the concepts of justice that compel recognition of a right to obtain judgment against that individual, which is the subject of this section of this article.

269. *See* Lewis & Henderson, *supra* note 27 at 675-76.

270. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

271. *See* Lewis and Blumoff, *supra* note 158, at 820-27. Lewis and Blumoff contrast those who argue that entity/individual liability standards based on deterrence goals predominate, *see* Larry Kramer and Alan O. Sykes, *Municipal Liability under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, with those who argue that compensation goals predominate, *see* Mark R. Brown, *Correlating Municipal Liability and Official Immunity under Section 1983*, 1989 U. ILL. L. REV. 625.

272. *See* Lewis and Blumoff, *supra* note 158, at 821 (citing Brown, *supra* note 271, at 680).

entity-imposed penalties for those same actions—for which the entity was held liable—those individuals may be chilled in the vigorous execution of their duties. Alternatively, even if the entity is liable, it may not in itself deter good faith action on the part of the state actor, because those actions in fact appear to be legal. Thus entity liability should go hand in hand with individual liability, both existing only where the individual has not acted in good faith.[273]

Those commentators who see compensation of victims as the primary purpose of § 1983 liability argue for an "inverse relation" between individual and entity liability.[274] If the entity can avoid liability under the "policy or custom" standard, then the individual should be liable. If the entity is liable, conversely, then the individual should be immune for actions taken in light of that "policy or custom."[275]

Before addressing whether linking the two forms of liability together is the proper conception of § 1983, the question of whether there is any potential deterrence and/or compensation effect of individual liability must be examined. Individual liability indeed has a potential deterrent effect. It places the individual state actor directly on the firing line. It separates individual responsibility from the employer's compliance with or attitude toward harassment law. Thus, it gives individuals an incentive to comply with the law even when the employer does not.[276] The amount of additional deterrence really is not the relevant question; the existence of potential deterrent effect is.[277]

As for compensation, there are at least two potential cases in which individual liability has the potential to add to the plaintiff's bottom line. The first is the pure § 1983 case in which the plaintiff cannot prove a policy or custom of sexual harassment or sex discrimination sufficient to establish entity liability.[278] The second is the hostile environment case in which the plaintiff cannot establish Title VII employer liability because the government employer did not have reason to know of the harassment when it oc-

273. *See id.* at 821-22 (citing Kramer and Sykes, *supra* note 271 at 284, 290-91, 299).

274. *See id.* at 823 (citing *Brown*, *supra* note 271, at 680).

275. *See id.* at 823-24 (citing *Brown*, *supra* note 272, at 680).

276. In addition, one of the most basic reasons for imposing liability on an individual is the pause given when that person's own assets are on the line. The reasons why this "pause" is appropriate, and not an undue interference with government function, are set out above. *See supra* notes 255-57 accompanying text.

277. Lewis and Blumoff suggest that intent cases are the exception to the proposition that the "modest and negligible" gain in deterrence does not warrant allowing claims against individual state actors under § 1983. Lewis and Blumoff, *supra* note 158, at 844.

278. *See, e.g.*, Van Domelen v. Menominee County, 935 F. Supp. 918, 923-24 (W.D. Mich. 1996) (dismissing claim against employer county because plaintiff failed to prove policy and custom of discrimination by county or official policy maker).

curred and took remedial action after learning of it.[279] In either of these cases, the individual claim may be the only recourse for compensation.[280]

Thus, there is both a deterrence and a compensation purpose to individual liability. The next question is whether there should be a relationship between entity liability and individual liability, either coextensive or inverse. The answer is that these issues are, and should, remain separate.

The Supreme Court has made it clear that liability of the principal is not dispositive of liability of the individual in § 1983 cases.[281] In other words, whether there was a policy or custom on the part of the entity is not relevant to whether the individual is personally responsible to the plaintiff for his or her actions.[282] The individual liability issue is considered separately, determining whether the individual acted contrary to "clearly established law" and with "intent."[283] Where there is no undue intrusion into the effective functioning of government, which is true for sexual harassment claims, the question of whether the entity is or could be held liable must remain a wholly separate inquiry.

Granted, government employers may well indemnify the individual defendant, thereby creating a form of entity liability where it is not imposed directly on the entity itself.[284] But, "the identity of the defendant may well matter."[285] In other words, there may be a reason, separate from compensa-

279. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 68-71 (profiling several cases in which the employer avoided liability by taking disciplinary action against the harasser after the fact).

280. Admittedly, to say there is a compensatory purpose to individual liability is not to say the Supreme Court would necessarily recognize such liability despite its articulation of the compensation goal of § 1983. Although the Court has arguably made compensation the primary policy of § 1983, it has also placed so many hurdles in the way of civil rights plaintiffs as to make the statute an inefficient vehicle to achieve that goal. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 77 (1989). The Court has also indicated its willingness to leave a victim without a constitutionally adequate means for compensation, as happened in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), in which the Court held there was no right of recourse for alleged due process violations in the administration of the social security disability benefits program. *See* Gene R. Nichol, *Bivens, Chilicky, & Constitutional Damage Claims*, 75 VA. L. REV. 1117, 1148 (1989) (examining *Chilicky*). The point made in this section is that there is no substantial government interest that would support overriding the compensation potential of individual liability in the context of hostile environment sexual harassment claims.

281. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991).

282. *See id.* at 25 (reasoning that the plaintiff need not show that the individual defendant's actions had any connection to a policy or custom of the government entity).

283. *See id.* at 25, 31. (suggesting that individual defendants in personal capacity suits, rather than asserting that they acted within their "official" capacity, should turn to principles of personal immunity including "objectively reasonable reliance on existing law").

284. *See,* John C. Jeffries Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 85 (1989). Professor Jeffries notes the difficulty of holding states and state agencies liable for money damages directly. *Id.* at 85. He suggests that because states must often indemnify the individual, pursuant to state law, liability attaches to the state indirectly. *See id.*

285. *Cf. id.* Jeffries actually makes this argument to support the inverse point that entities should be the primary target of § 1983 actions. *See id.* He reasons that "the identity of the defendant may well

tion, for providing recourse against the individual harasser. This last point can be thought of in terms of corrective justice:

> Persons are ends in themselves; they cannot be expropriated for another's purpose. Therefore, relations among persons are subject to the concept of right. "Right" refers to the "totality of conditions under which the actions of one can be united with the freedom of others in accordance with universal law."[286]

Under this formulation, individual liability must be afforded, not because it allows the plaintiff monetary compensation, but because it acts to require the individual state actor to recognize the rights of the individual victim. Put another way, "[t]he point is not merely that the loss is offset (as a loss in one stock might be offset by a gain in another), but that the loss is rectified by damages from the wrongdoer."[287]

Indirect accountability through disciplinary or other action by the employer does not adequately accomplish this sense of justice. The employee must rely on the employer, whose actions may be influenced by factors extraneous to the constitutional issues.[288] The offending employee may or may not be required to acknowledge the harm to the plaintiff, depending upon the employer's response. The statute creates no real sense of personal responsibility for the deprivation of rights, and accordingly, employer liability is ultimately an insufficient means of vindication of those rights.

Discrimination, in any form violative of the Constitution, requires more. "[T]he inertia of discriminatory traditions . . . can only be curtailed by using a 'full arsenal' of statutory weapons."[289] Given the absence of any real encroachment on government function, the putative reliance on standards favoring the government defendants as evidenced in many of the sexual harassment cases discussed in this article is misplaced.

By connecting immunity to "clearly established rights" and "objectively reasonable actions," the Court has actually adopted a conceptual framework favorable to imposing sexual harassment liability on individual defendants. The subjective basis for the actor's decision is not relevant as a matter of policy; interference with well-settled rights is.[290] Although there may be some nuances to sexual harassment law that are yet to be settled, the

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matter" in the sense that juries may award less money out of sympathy to the individual defendant and attention may be diverted from institutional malfunctions. *Id.* However, identity may well matter in the contrary respect as well. Suing the government may net the plaintiff monetary compensation, but allow his or her harasser to avoid personal responsibility for his or her actions, which is a value important to many victims of discrimination.

286. *Id.* at 94 (adapting Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 449 (1987)).

287. *Id.* at 94.

288. *See supra* note 169-73.

289. Levit, *supra* note 46, at 295 (quoting Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 260 (1977)).

290. *See* Lewis and Blumoff, *supra* note 158, at 778-84 (discussing the development of the *Harlow/Anderson* model of immunity).

operational parameters of the right to be free from such harassment are adequately settled.[291] Imposing liability on individual defendants is thus consistent with § 1983's role as conceived by the Supreme Court. It is, in other words, "fair" to the individual defendant.[292]

V.
CONCLUSION

Responsibility for actions taken with discriminatory intent toward another individual should result in personal liability of state actors. The proper conception of individual liability finds the victim entitled to proceed if he or she alleges the prima facie elements of sexual harassment as developed in Title VII doctrine. The "separate" intent requirement being articulated in the courts reflects a regression in our understanding of the nature of sexual harassment, as well as a misapplication of general § 1983 doctrine.

Because we are not questioning government objectives, we are not imposing personal liability on individuals who are merely trying to carry out those objectives. The reasons for caution found in that type of case do not apply. We are imposing liability for the abuse of the office of government employee and the resultant power to harass afforded by virtue of that office. Liability for the egregious acts of the individual should rest personally with the individual, and a federal forum should be afforded to the victim. Section 1983 is properly conceived as a primary source for placing that liability where it belongs.

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291. *See, e.g.*, Howard v. Board of Educ., 893 F. Supp. 808, 819 (N.D. Ill. 1995) (finding "clearly established law surrounding sexual harassment in the workplace" sufficient to defeat qualified immunity claim despite fact that no specific case had applied standard to context involving school principal raised in that case).

292. Lewis and Blumoff agree that where there is intent, there should be individual liability, even though they generally believe the entity should be primarily liable. Lewis & Blumoff, *supra* note 158, at 838-39. They would make intent an element of the plaintiff's prima facie claim and do away with the qualified immunity inquiry into "settled rights." *Id.* at 844. They "provisionally" define intent to include the Restatement (Second) of Torts § 8A (1965) criteria that either "[(a)] the actor desires to cause [the] consequences of his act, or [(b)] . . . believes that the consequences are substantially certain to result from it" (alterations in original quote), and the class-based discriminatory animus standard applied to 42 U.S.C. § 1985 (1994). *Id.* at 838 n.355. Lewis and Blumoff acknowledge a desire to make the intent to harm standard so difficult, it "should give considerable pause to counsel who contemplate naming individual defendants . . . ." *Id.* at 847. A fault-based standard of individual liability, resting on intent to harm, and a respondeat superior-based standard of entity liability, resting on authorization to act, would in their mind best advance deterrence goals *and* provide compensation to deserving victims.

Sexual harassment, as a form of intentional discrimination, should fit with the Lewis and Blumoff paradigm, without the need to change the prima facie case to insert a new "intent" element. Their suggested revision to prima facie and immunity standards, with its emphasis on holding only "blameworthy" individuals liable, unfortunately presents the opportunity for abuse in much the same manner that courts have abused the "personal" construct to dismiss sexual harassment claims under § 1983. Because intent is a foundational element of disparate treatment discrimination, as addressed in Part II(B) of this article, the proof process meets Lewis and Blumoff's concerns.