

Judges, Juries, and Sexual Harassment

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Sexual harassment jurisprudence in its current state is both tremendously important and profoundly ambiguous. Its importance derives from the principles of equality and fairness it seeks to promote, the redress it promises to victims of harassment, and, not least, from the loose but omnipresent regulatory structure it imposes on the daily interactions of most American workers. Those occupying positions of power are most obviously affected by the latter consideration—as a quick scan of the headlines often reveals—resulting in rules of conduct that govern the behavior of all workers, from janitors to CEOs.¹

The ambiguity of the current law arises from how the law defines—or fails to define—“hostile work environment” sexual harassment. Behavior now crosses the line from merely obnoxious to actionable when it “permeate[s the workplace] with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”² While the Supreme Court appears to be satisfied with, or at least resigned to, this definition,³ it is apparent both to the bar and the public at large that the term “hostile work environment” cannot be adequately defined by a mere string of adjectives.⁴

Given the sweep and uncertainty of current law, it is not surprising that many feel the need for clearer guidance from the courts, to better educate employees as to their rights and to provide fair notice to employ-

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1. *See infra* Section I.A.

2. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted).

3. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283-84 (1998) (The Court’s previous decisions have set a standard “sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, [this standard] will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” (citations and internal quotation marks omitted)).

4. The definition of sexual harassment is a frequently addressed issue not only in the news media but in popular culture generally. *See, e.g., DAVID MAMET, OLEANNA* (1992); John Simon, *Disclosure*, NAT’L REV., Dec. 31, 1994, at 62 (movie review).

ers of the scope of their responsibilities.⁵ Without a better definition of sexual harassment, we risk encouraging employers to adopt overbroad and overly intrusive rules that may trivialize genuine harassment, and, ironically, harm the cause of workplace equality.⁶

For those of us who toil in the federal trial courts, however, a different issue may be even more pressing: We must first ask not "What is sexual harassment?" but "Who gets to decide?" Before we can reach the definitional issue, we must determine how decisionmaking power is to be allocated among juries, trial judges, and appellate courts. This is not as simple a task as it might first appear to be. Such decisions are generally made with reference to the time-honored distinction courts draw between "questions of fact" and "questions of law": Issues of fact are decided by juries and reviewed deferentially on appeal, while legal questions are decided by judges and subjected to independent review.⁷ As we shall see, however, this framework provides little guidance to courts in sexual harassment cases, as the crucial question of whether a given work-

5. See John Cloud, *Sex and the Law*, TIME, Mar. 23, 1998, at 48; Karen Donovan, *Avoiding a Time Bomb*, BUS. WK., Oct. 13, 1997; Martin Flumenbaum & Brad S. Karp, *Summary Judgment in Sexual Harassment Cases*, N.Y. L.J., Apr. 22, 1998, at 3 (discussing the apparently contradictory results reached in *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998), and *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998), and concluding that "with the proliferation of sexual harassment claims and an increasing split among the lower courts and among the circuits, the Supreme Court will need to step in to clarify this ever more muddled area of law."); John Leo, *Every Man a Harasser?*, U.S. NEWS & WORLD REP., Feb. 16, 1998, at 18; Joann S. Lublin & Timothy D. Schellhardt, *High Court's Harassment Rulings Confuse Employers*, WALL ST. J., June 30, 1998, at B1 (quoting harassment consultant Freada Klein, who responded to the Supreme Court's decisions in *Faragher* and *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), as follows: "I see complete murkiness. This is a heyday for lawyers."); Patricia Pollack, *Think You Know What Constitutes Sexual Harassment?* BUS. J., July 7, 1997; Jeffrey Rosen, *Laws That Run Amuck: Two Ill-Conceived Laws That Are To Blame for the Current Crisis in American Politics*, TIME, Feb. 9, 1998, at 48; *Secretary's Day: Flowers, No Flowers?*, PAC. BUS. NEWS, Apr. 20, 1998, at 10. Employers have perhaps the greatest need for a better definition of sexual harassment: Companies that promptly fire alleged harassers to avert Title VII suits are increasingly the targets of wrongful termination suits. See Ruth Shalit, *Sexual Healing*, NEW REPUBLIC, Oct. 27, 1997, at 18 ("[I]f [employers] don't act aggressively on sexual harassment charges, they may commit a civil rights violation; if they do move swiftly to discipline the alleged harasser, they may find themselves defending a wrongful discharge suit."). Judge Claudia Wilkinson has put the issue somewhat differently:

To protect itself as a matter of law against a claim of constructive discharge an employer may now be prompted to immediately dismiss any employee against whom a complaint of harassment is lodged. Whether this rule comports with any basic sense of personal fairness or due process, the majority neglects to ask. The workplace is to become the world of the accuser, where the slightest hesitancy in discharging the target of an accusation may lead the accuser to quit and later hold the company liable for constructive discharge.

Paroline v. Unisys Corp., 879 F.2d 100, 115 (4th Cir. 1989) (Wilkinson, J., dissenting in part). The problem is particularly acute for public employers, who must walk a sometimes nonexistent path between their Title VII and First Amendment obligations. See, e.g., *Henderson v. City of Murfreesboro*, 960 F. Supp. 1292 (M.D. Tenn. 1997).

6. See *infra* Section III.B.

7. See *infra* Part II.

place is “hostile” within the meaning of Title VII is a so-called “mixed question of law and fact.” If courts are to make a reasoned determination as to how decisionmaking responsibility should be allocated in harassment cases, therefore, they must rely on the policy considerations that underlie the fact/law distinction.

In this Article, we engage in an examination of these considerations and conclude that the definitional problem is integrally related to the allocative one: Unless judges take a more active role in deciding harassment cases, there is little possibility that an adequate definition of “hostile work environment” will develop. Although juries undoubtedly have an important part to play, allowing them the authority to define the term on a case-by-case basis, as some recommend, will guarantee continued confusion. Specifically, we argue that appellate judges should review *de novo* a jury’s conclusion that a hostile environment pervades a workplace and that trial judges should decide summary judgment motions with a critical eye on the quality and quantity of the proffered evidence. We also suggest that the statute governing interlocutory appeals, 28 U.S.C. § 1292(b), be amended to permit an interlocutory appeal of a denial of summary judgment in a harassment case as a means of clarifying the governing standard. None of these steps would be a panacea; each, however, would contribute significantly to a clearer and fairer law of harassment.

Part I of this Article briefly describes the current legal framework governing sexual harassment claims. Part II discusses the traditional distinction between fact and law. Part III discusses the policies underlying the usual allocation of decisionmaking power between judges and juries and evaluates the allocation used in sexual harassment cases in light of those policies. Part IV suggests an additional reason why summary judgment should not be considered a disfavored way of resolving harassment cases. Part V outlines our interlocutory appeal proposal.

I. THE CURRENT RULES GOVERNING SEXUAL HARASSMENT CLAIMS

Under Title VII of the Civil Rights Act of 1964, an employer may not “discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁸ The proposition that racial harassment unlawfully alters the “terms, conditions, or privileges” of a victim’s employment was established in the early 1970s.⁹ This con-

8. 42 U.S.C. § 2000e-2(a)(1) (1994).

9. *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); *see also* *Firefighters Inst. for Racial Equal v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976). The *Rogers* court noted:

cept was quickly extended to include harassment based on religion and national origin.¹⁰ Many courts, however, were initially reluctant to place sexual harassment on the same footing, regarding unwelcome sexual advances and the like as merely "personal" issues.¹¹ The sexual harassment claims that did gain judicial acceptance generally involved allegations of unfavorable treatment in retaliation for refusing a supervisor's advances—so-called "quid pro quo" harassment claims.¹²

This situation changed in 1980, when the Equal Employment Opportunity Commission (EEOC) issued guidelines under which victims of sexual harassment could recover under either a quid pro quo or a "hostile environment" theory.¹³ The latter did not require a plaintiff to show that the receipt of an employment benefit was conditioned on submission to a supervisor's sexual advances; rather, the mere existence of a hostile working environment was considered sufficient to implicate Title VII.¹⁴ The new theory won quick judicial acceptance in the lower courts,¹⁵ and was adopted unanimously by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*.¹⁶ In this Part, we provide an overview of the substantive and procedural rules applicable to hostile work environment suits decided since *Meritor*.

A. Defining "Hostile Environment"

According to the *Meritor* Court, "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual

[T]he phrase "terms, conditions, or privileges of employment" . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers

Rogers, 454 F.2d at 238.

10. See *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87 (8th Cir. 1977) (national origin); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religion).

11. See *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *rev'd on other grounds*, 562 F.2d 55 (9th Cir.); see also *Shanks v. Harrington*, 21 Fair Empl. Prac. Cas. (BNA) 590 (N.D. Iowa 1979); *Tomkins v. Public Serv. Elec. & Gas*, 422 F. Supp. 553, 556 (D.N.J. 1976); *Miller v. Bank of America*, 418 F. Supp. 233, 234 (N.D. Cal. 1976); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974). But see *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976).

12. See, e.g., *Barnes*, 13 Fair Empl. Prac. Cas. (BNA) 123; see also 2 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 46.02[2] (3d ed. 1997).

13. See 29 C.F.R. § 1604.11 (1998).

14. See *id.*

15. See *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 941-42 (D.C. Cir. 1981).

16. 477 U.S. 57, 64 (1986). The Court considered the viability of the theory too obvious to merit serious discussion. The entirety of its discussion of the issue reads as follows: "Since the [EEOC] Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66.

nature” create a hostile work environment in violation of Title VII when such behavior “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”¹⁷ Not all arguably harassing conduct meets this standard: “For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment’”¹⁸ As the Supreme Court’s subsequent decision in *Harris v. Forklift Systems, Inc.*,¹⁹ makes clear, the question of whether a working environment has become “intimidating, hostile or offensive” is decided with reference to all the circumstances surrounding the events in question: “These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance [However], no single factor is required.”²⁰

To prevail under this standard, an employee is required to show that the complained-of harassment was both “subjectively” and “objectively” offensive, i.e., that it (1) actually offended the plaintiff and (2) would have similarly offended a “reasonable” employee.²¹ In practice, only the objective offensiveness requirement is a real obstacle to recovery—an affidavit from a plaintiff stating that she was offended by the behavior at issue is more or less conclusive on the issue of subjective offensiveness.²²

17. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(3)).

18. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904).

19. 510 U.S. 17 (1993).

20. *Id.* at 23; see also *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1003 (1998). Citing *Harris*, the Court held that analysis of a hostile environment claim requires careful consideration of the social context in which particular behavior occurs and is experienced by its target The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

Id.

21. See *Harris*, 510 U.S. at 21-22 (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”). The Third Circuit has discussed these requirements:

The subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief. . . . The objective factor, however, is the more crucial for it is here that the finder of fact must actually determine whether the work environment is sexually hostile. The objective standard protects the employer from the “hypersensitive” employee, but still serves the goal of equal opportunity by removing the walls of discrimination that deprive women of self-respecting employment.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990).

22. Courts have not found it easy to weigh the subjective offensiveness requirement. See, e.g., *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1325 (8th Cir. 1994) (holding that

Focusing on *Meritor's* "severe or pervasive" language, some courts also require proof of harassment that consisted of more than isolated or sporadic incidents.²³ Finally, a plaintiff must show that the harassment was "unwelcome,"²⁴ and that her disapproval had been communicated in some way to her harasser.²⁵

On the other hand, a plaintiff need not prove that she suffered either economic²⁶ or psychological²⁷ injury as a result of the harassing behavior.

the district court erred in finding that, because the plaintiff had had an extramarital affair with a co-worker, she was not offended by sexually-explicit behavior of her colleague); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 963 (8th Cir. 1993) (holding that the district court erred in basing its finding that plaintiff was not subjectively offended by harassing behavior of her supervisor on evidence that she had appeared nude in two motorcycle magazines during the course of her employment).

23. One well-known example is the court's grant of summary judgment to President Clinton in Paula Jones's Title VII lawsuit on the ground that the incident at issue—in which the President allegedly exposed himself while making a pass at Jones—was not sufficiently severe, standing alone, to state a hostile environment claim. See *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998). According to the court, while Clinton's alleged behavior was "certainly boorish and offensive," it did not "constitute the kind of sustained and nontrivial conduct necessary for a claim of hostile work environment." *Id.* at 675. Numerous other courts have made similar rulings. See LARSON, *supra* note 12, § 46.05[4][b] (citing relevant cases); Jeffrey S. Klein & Nicholas J. Pappas, "Jones v. Clinton": An Emerging Trend in Title VII Law, N.Y. L.J., June 1, 1998, at 3 (citing relevant cases). When more than one arguably non-trivial episode is alleged, however, the difficult question of when harassment stops being "sporadic" and starts being "pervasive" arises. For cases in which this issue is addressed, see, for example, *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997); *Saxton v. AT&T*, 10 F.3d 526, 534 (7th Cir. 1993); *Downes v. FAA*, 775 F.2d 288, 293-94 (Fed. Cir. 1985); *Reynolds v. Atlantic City Convention Ctr. Auth.*, 53 Fair Empl. Prac. Cas. (BNA) 1852 (D.N.J. 1990), *aff'd*, 925 F.2d 419 (3d Cir. 1991). Moreover, some courts have minimized the significance of a plaintiff's failure to show a pattern of offensive conduct. See, e.g., *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII. It is not how long the sexual innuendos, slurs, verbal assaults, or obnoxious course of conduct lasts . . . [that alone] determin[es] whether such actions are pervasive."); see also *Torres v. Pisano*, 116 F.3d 625, 630-31 & n.4 (2d Cir. 1997) ("[E]ven a single episode of harassment, if severe enough, can establish a hostile work environment.").

24. *Meritor*, 477 U.S. at 68 ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" (quoting 29 C.F.R. § 1604.11(a) (1985))); see also *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986); *Henson*, 682 F.2d at 903.

25. See, e.g., *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 784 & n.9 (1st Cir. 1990) ("[T]he man must be sensitive to signals from the woman that his comments are unwelcome, and the woman, conversely, must take responsibility for making those signals clear." (quoting *Lipsett v. University of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988))). Of course, the plaintiff's responsibility for signaling unwelcomeness decreases as the egregiousness of the harassment increases. See, e.g., *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1010 (7th Cir. 1994) (holding that, although a female tinsmith in an otherwise all-male shop regularly used sexually suggestive language and obscenities, her colleagues' barrage of sexually derogatory comments and conduct targeted toward her "crossed the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing"); *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 285 (8th Cir. 1993) (choosing not to discuss unwelcomeness where "the district court's finding that a reasonable person in [the plaintiff's] position would have felt compelled to quit is equivalent" to finding that the plaintiff's resignation was a reasonably foreseeable consequence of her harasser's conduct).

26. See *Meritor*, 477 U.S. at 64 (holding that the plaintiff was not required to show a "tangible loss" of an "economic character").

Sexual Harassment

Nor must the harassment have included overtly sexual connotations; nonsexual conduct may be actionable if it would not have occurred but for the victim's sex.²⁸

B. Employer Liability

The rules governing an employer's liability for harassing conduct committed by its employees also deserve mention. The question of liability was raised, but only partially resolved, by the *Meritor* decision. The *Meritor* Court declined to adopt either a strict liability or a negligence rule;²⁹ instead it suggested that the rule should be chosen with reference to traditional principles of agency law. It conceded, however, that "such common law principles may not be transferable in all their particulars to Title VII."³⁰ Lower courts responded to this somewhat vague ruling by adopting one of two standards. All agreed that strict liability was appropriate in cases of quid pro quo harassment, where the harassing supervisor used his actual authority to make employment decisions as a means of extorting sexual favors.³¹ However, when the employee complained of a hostile work environment, unanimity disappeared. Some courts held that employers were only liable if they were negligent in failing to prevent or remedy harassment.³² Other courts agreed that negligence was the correct standard when the harassers were non-supervisory co-workers, but con-

27. See *Harris*, 510 U.S. at 22 ("We therefore believe the District Court erred in relying on whether the conduct 'seriously affect[ed] plaintiff's psychological well-being' or led her to 'suffe[r] injury.' Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require.").

28. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1471-75 (3d Cir. 1990) (upholding a sexual harassment claim where female police officers' case files, investigation journals, and photography film were either lost or stolen, where their property was vandalized, and where they themselves were physically injured); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012-14 (8th Cir. 1988) (holding that calling a female employee "Herpes," urinating in her gas tank and water bottle, and failing to repair a truck emitting noxious fumes when a female was driving but repairing it immediately for a male driver, constitutes sexual harassment); *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C. Cir. 1985) ("A pattern of threatened force or verbal abuse, if based on the employee's sex, may be legally discriminatory. In fact, any disparate treatment, even if not facially objectionable, may violate Title VII.").

29. See *Meritor*, 477 U.S. at 69-72.

30. *Id.* at 72.

31. See, e.g., *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989); *Craig v. Y & Y Snacks*, 721 F.2d 77, 80 (3d Cir. 1983); *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983).

32. See, e.g., *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995); *Bouton v. BMW of North America*, 29 F.3d 103, 109 (3d Cir. 1994); *Paroline v. Unisys Corp.*, 879 F.2d 100, 107-08 (4th Cir. 1989).

cluded that a lesser showing of fault was necessary when the workplace had been rendered hostile by the transgressions of a supervisor.³³

The Supreme Court attempted to resolve this debate in *Burlington Industries v. Ellerth*³⁴ and *Faragher v. City of Boca Raton*.³⁵ These decisions are critical of the distinction drawn between quid pro quo and hostile work environment suits and attempt to craft a rule that minimizes its importance.³⁶ In effect, however, the Court simply ratified the consensus that had already emerged—that employers are vicariously liable for quid pro quo harassment³⁷ but are liable only for their negligence when a non-supervisor creates a hostile work environment³⁸—and adopted a compromise rule for supervisor-created hostile work environment claims. Under the new rule, an employer in such a case is automatically subject to liability, but it may raise its lack of negligence, coupled with the plaintiff's unreasonable failure to report harassing behavior, as an affirmative defense.³⁹ The Court's discussion of this defense was quite cursory, however, leaving its scope and requirements uncertain.⁴⁰

C. The Current Allocation of Decisionmaking Authority

Not surprisingly, the above outlined rules—particularly those purporting to define hostile-work-environment sexual harassment—have inspired a vast body of popular and academic commentary.⁴¹ The practices by which courts distribute decisionmaking authority in harassment cases, however, are less well understood. There are a large number of such practices. The allocation of power between judges and juries is affected not only by formal rules like those applicable to motions for a judgment

33. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987).

34. 118 S. Ct. 2257 (1998).

35. 118 S. Ct. 2275 (1998).

36. See *Burlington*, 118 S. Ct. at 2265.

37. See *id.* at 2266, 2270; *Faragher*, 118 S. Ct. at 2284. Quid pro quo claims are now to be referred to as those involving "tangible employment action[s]" such as "hiring, firing, failing to promote [or] reassignment with significantly different responsibilities." *Burlington*, 118 S. Ct. at 2268.

38. See *Burlington*, 118 S. Ct. at 2268, 2270; *Faragher*, 118 S. Ct. at 2285-86.

39. See *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999).

40. See *Burlington*, 118 S. Ct. at 2274 (Thomas, J., dissenting) ("[T]he Court . . . provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issues only Delphic pronouncements and leaves the dirty work to the lower courts.").

41. For examples of academic articles in just the last few years, see Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

as a matter of law,⁴² but also by less formal practices such as those used in jury selection. We will focus on two examples from the more formal category: rules governing summary judgment and the standard of review applied by Courts of Appeals.

1. *Summary Judgment*

One obvious means by which courts allocate decisionmaking authority is by deciding motions for summary judgment: When such motions are granted, the jury is denied any role in the decisionmaking process.⁴³ The standard courts apply to determine whether a case is sufficiently supported by the evidence to reach a jury is well established. Under Federal Rule of Civil Procedure 56, a motion for summary judgment must be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."⁴⁴ The moving party has the initial burden of demonstrating the absence of any evidence supporting the nonmovant's case.⁴⁵ Once this burden is met, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial."⁴⁶ If there is any evidence in the record from which a reasonable juror could find in favor of the nonmovant, summary judgment is improper.⁴⁷ In determining whether summary judgment should be granted, the court resolves all ambiguities and draws all reasonable inferences against the moving party.⁴⁸ For present purposes, however, the important issue is not what the general summary judgment standard is, but how it is applied in harassment cases.

A number of courts have suggested that summary judgment for defendants in Title VII cases should be granted with extra caution, if at all.⁴⁹

42. See, e.g., FED. R. CIV. P. 50 (setting forth rules under which the court, during a jury trial, may pronounce judgment as a matter of law).

43. This can occur even where one or both of the parties is specifically empowered to demand a jury trial. For example, even though any party in a Title VII case can demand a jury trial so long as the plaintiff can and does seek compensatory or punitive damages, see 42 U.S.C. § 1981a(c) (1994), summary judgment under Federal Rule of Civil Procedure 56 is still available in such suits.

44. FED. R. CIV. P. 56(c).

45. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

46. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)).

47. See *Hetchkop v. Woodlawn at Grassmere*, 116 F.3d 28, 33 (2d Cir. 1997).

48. See *Anderson*, 477 U.S. at 248.

49. See, e.g., *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 722 (7th Cir. 1998); *Gill v. Reorganized Sch. Dist. R-6*, 32 F.3d 376, 378 (8th Cir. 1994); *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994). Courts have also recognized, of course, that the exercise of caution should not foreclose the possibility of summary judgment in Title VII cases. See, e.g., *Plair v. E.J. Brach & Sons*, 105 F.3d 343, 346-47 (7th Cir. 1997); *Krenik v. County of Le Sueur*, 47 F.3d 953, 959 (8th Cir. 1995). At least one court, in fact, has indicated

This admonition does not appear to be based on policy considerations peculiar to Title VII. Rather, it is merely a pragmatic recognition that a defendant's intent to discriminate is, like any other subjective state of mind, difficult to prove directly. In light of this difficulty, courts must remain open to circumstantial proof of discrimination.⁵⁰

Some courts go further when harassment, rather than "simple" discrimination, is at issue. The Second Circuit's decision in *Gallagher v. Delaney*,⁵¹ for example, suggests that defendants should rarely prevail on summary judgment motions in sexual harassment cases. The *Gallagher* court reviewed a fact pattern any trial judge would recognize as typical of sexual harassment claims. The plaintiff's supervisor had given her a number of gifts, some of which were accompanied by sexually suggestive comments.⁵² He had not explicitly conditioned any employment benefit on the plaintiff's reaction to his conduct, nor had he made any explicit sexual advances.⁵³ He had, however, reminded her from time to time of his control over her career.⁵⁴ After complaining to supervisors regarding the alleged advances (and taking leave for a substance abuse problem), the plaintiff was transferred to a less prestigious position and then terminated.⁵⁵

The district court granted the defendant's motion for summary judgment, finding it "doubtful that [the plaintiff], or a reasonable woman of her generation would find [the supervisor's] conduct sexually harassing."⁵⁶ Though it found "much merit" in this view of the evidence, the Second Circuit reversed.⁵⁷ Citing authorities ranging from federal statutes and case law to scientific articles and department store catalogs,⁵⁸ the court reasoned that juries, not judges, are generally better situated to decide whether sexually-tinged conduct is sufficiently severe or pervasive to violate Title VII: "Today, while gender relations in the workplace are

that granting summary judgment on frivolous claims serves the public interest by eliminating cases that bring Title VII into public disrepute. See *Blistein v. St. John's College*, 74 F.3d 1459, 1473 (4th Cir. 1996).

50. See *Gallo*, 22 F.3d at 1224.

51. 139 F.3d 338 (2d Cir. 1998) (Weinstein, D.J.).

52. For example, he allegedly told her that he had a dream in which she had kissed him and that she brought out feelings in him that he had not had since he was sixteen. He also invited her to lunch on numerous occasions, complimented her on her appearance, and gave her jewelry, a teddy bear, a rose, and a book about angels. See *id.* at 343-44.

53. See *id.* at 344.

54. See *id.*

55. See *id.* at 344-45.

56. *Id.* at 346.

57. See *id.*

58. See *id.* at 343 (citing two articles from *Scientific American* and the JC Penney Spring & Summer '98 Catalog, as well as stories from *The New Yorker*, *Newsday*, and *The New York Times*).

rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment”⁵⁹

According to the court, because Article III judges tend to live in a “narrow segment of the enormously broad American socio-economic spectrum,” they lack the concrete experience jurors can be expected to have with the realities of subtle sexual interaction in the workplace.⁶⁰ This experience, it suggests, is crucial in distinguishing permissible from impermissible behavior.⁶¹ Given the comparative advantage of jurors over judges in this area, the court concluded, disposition of hostile work environment claims through summary judgment is disfavored.⁶²

Gallagher has potentially important ramifications. If juries are better than judges at determining whether conduct of debatable propriety creates a hostile work environment, summary judgment will diminish in importance as a screening device in such cases: As a practical matter, it is not difficult to allege and produce some evidence of questionable behavior in the workplace. It is true that *Gallagher* ostensibly limits itself to “borderline situations”⁶³ and district courts may treat it as just another reminder to exercise caution in granting summary judgment in Title VII cases.⁶⁴ Given the opinion’s broad language, however, the uncertainty inherent in the determination of what cases are on the “borderline,” and judges’ aversion to reversal,⁶⁵ it seems likely that *Gallagher* will become a significant obstacle for defendants seeking summary judgment in hostile work environment cases.⁶⁶

The Third Circuit has also expressed a distaste for summary judgment in the harassment context. In *Aman v. Cort Furniture Rental Corp.*,⁶⁷ for example, it reversed a district court’s grant of summary judgment on a racial harassment claim, explaining that:

Anti-discrimination laws and lawsuits have “educated” would-be violators such that extreme manifestations of discrimination are thankfully rare

59. *Id.* at 342.

60. *Id.*

61. *See id.*

62. *See id.* at 343 (“The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases.”).

63. *Id.* at 342.

64. *See* text accompanying *supra* notes 49-50.

65. It is axiomatic that absent certification pursuant to 28 U.S.C. § 1292(b), denial of a summary judgment motion is not dispositive and is therefore not appealable. *See infra* Part V.

66. *See* Bertrand C. Sellier, *Summary Judgment in Sexual Harassment Cases*, N.Y. L.J., April 29, 1998, at 1 (“Must the line between actionable discriminatory conduct and merely vulgar behavior always be drawn by a jury . . . [*Gallagher*] has much to say in response, little of which will be comforting to defendants.”).

67. 85 F.3d 1074 (3d Cir. 1996).

Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. . . .

The sophisticated would-be violator has made our job a little more difficult. Courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct, and "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled . . . because of crabbed notions of relevance or excessive mistrust of juries."⁶⁸

The result reached in *Aman* seems unobjectionable: Although the black plaintiffs reported few openly racist slurs, they alleged they were subjected to a course of uncivil treatment from which their white colleagues were apparently exempt.⁶⁹ Moreover, the court was certainly correct in its observation that racism and sexism often manifest themselves in subtle ways. On the other hand, the reasoning espoused in *Aman* can be dangerous. If the weakness of a plaintiff's evidence of discrimination is equated with the subtlety of the employer's racism rather than its non-existence, few, if any, harassment claims will be amenable to summary judgment. At some point, a court's "increasing vigilance" regarding evidence of hidden discrimination will amount to unreasonable suspicion and conjecture—neither of which is acceptable.⁷⁰

Gallagher and *Aman* notwithstanding, of course, defendants continue to prevail on summary judgment in some harassment actions. The Fourth Circuit has suggested that summary judgment is necessary in weak cases to prevent the public from perceiving Title VII as merely a means by which disgruntled ex-employees visit revenge upon their erstwhile employers.⁷¹ Commentators have noticed that some courts, relying on *Meritor*'s "severe or pervasive" requirement, simply grant summary judgment without discussing the issues raised in *Gallagher* or *Aman*.⁷² Moreover,

68. *Id.* at 1081-82 (quoting *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987)) (final alteration in original).

69. *See id.* at 1082

70. *See* 4 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS § 75-01, at 75-2 ("An inference is not a suspicion or a guess.").

71. *See Williams v. Westwood One Radio Networks*, 1997 WL 90656, No. 96-1666, at *3 (4th Cir. Mar. 4, 1997).

72. *See Klein & Pappas, supra* note 23, at 7 (arguing that "there seems to be a growing trend, at least among district courts, that a single instance of hostile environment sexual harassment is insufficiently severe to sustain a Title VII claim if it does not involve an assault"). The *Jones v. Clinton* of the title, of course, refers to Paula Jones's sexual harassment lawsuit against President Clinton, and the Eastern District of Arkansas decision granting summary judgment for the President. The court there reasoned that, because the sexual advance Jones alleged the President to have made did not constitute conduct sufficiently severe or pervasive to

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the Supreme Court has lent at least rhetorical support to defendants, noting recently that harassment law is not meant to impose a “general civility code” upon the American workplace.⁷³ Such statements may lead courts to give *Gallagher* and *Aman* a relatively narrow reading.

2. Standard of Appellate Review

Another important factor in the allocation of decisionmaking authority in hostile work environment cases is the standard under which findings on the “hostility” issue are reviewed by the appellate courts. This issue has received almost no attention from academic commentators, nor has it been thoroughly addressed by the appellate courts themselves. As discussed below, however, significant consequences flow from the scope of this review.

Most courts assert, without analysis, that the question of whether a given working environment was “hostile” for Title VII purposes is one of fact.⁷⁴ Indeed, a few go so far as to say the question is “quintessentially” factual.⁷⁵ Classification of the issue as one of fact leads these courts to apply a deferential standard of review. Thus, a jury’s verdict on the hostility issue will be set aside only if “there is no legally sufficient evidentiary basis” to support it.⁷⁶ Similarly, when a district judge acts as the finder of fact, her decision regarding hostility will be reversed only if it is “clearly

have created a hostile work environment and resulted in no tangible job detriment or adverse employment action, summary judgment was appropriate. *See Jones v. Clinton*, 990 F. Supp. 657, 674-76 (E.D. Ark. 1998).

73. *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1002 (1998).

74. *See, e.g., Morrison v. Carleton Woolen Mills*, 108 F.3d 429, 436 (1st Cir. 1997) (assuming that the trial court’s findings of fact are subject to clearly erroneous review); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997); *Faragher v. City of Boca Raton*, 76 F.3d 1155, 1161 (11th Cir. 1996), *rev’d on other grounds*, 118 S. Ct. 2275 (1998); *Hixson v. Norfolk S. Ry. Co.*, No. 94-5832, 1996 WL 316505, at *4 (6th Cir. June 10, 1996); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1126 (10th Cir. 1993); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 198 (5th Cir. 1992); *Buskus v. Southwestern Bell Yellow Pages*, 951 F.2d 946, 947 (8th Cir. 1991); *Ways v. City of Lincoln*, 871 F.2d 750, 753-54 (8th Cir. 1989).

75. This conclusion is sometimes supported by a citation to *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), in which the Supreme Court held the existence of “intentional discrimination” in a (non-harassment) Title VII case to be a fact issue. *See also, e.g., Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 835-36 (6th Cir. 1996) (quoting *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1130-31 (4th Cir. 1995)); *Spicer v. Virginia Dep’t of Corrections*, 44 F.3d 218, 224 (4th Cir. 1995) (quoting *Beardsly v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994)).

76. FED. R. CIV. P. 50 (governing motions for judgment as a matter of law in jury trials). The First Circuit has described the standard as follows:

A federal district court may not set aside a jury verdict and direct the entry of a contrary verdict, unless no reasonable jury could have returned a verdict adverse to the moving party. In making this determination, the court examines the evidence adduced at trial in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor. On appeal, we review the district court’s determination de novo, applying the same standards.

Morrison, 108 F.3d at 436 (citations omitted).

erroneous," that is, only if a review of the record leaves the court of appeals with "the definite and firm conviction" that it was made in error.⁷⁷ Other courts conclude that, because the existence of a hostile work environment can be determined only with reference to a "reasonableness" standard,⁷⁸ the issue cannot be classified as a pure question of fact.⁷⁹ Within this group, however, some courts hold that a deferential review is appropriate,⁸⁰ while others freely substitute their judgment for that of the trial court.⁸¹ Finally, at least one circuit court has concluded that, while the purely historical aspects of a hostile work environment claim—who said and did what to whom—are questions of fact, the question of whether a work environment is hostile is one of law to be reviewed de novo.⁸²

In sum, confusion reigns. The current state of the law is perhaps best illustrated by the views of the Ninth Circuit, which has variously held the existence of a hostile work environment to be a question of fact,⁸³ a question of law,⁸⁴ and a mixed question of law and fact.⁸⁵ Perhaps still more striking is the fact that no decision in any circuit has engaged in anything like a thorough discussion of the issue, nor even acknowledged the existence of opposing views.

II. THE QUESTION-OF-LAW/QUESTION-OF-FACT DICHOTOMY

As the previous section suggests, many questions regarding the distribution of judicial decisionmaking authority are resolved with reference to the distinction between questions of law and questions of fact. Whatever

77. See *City of Bessemer City*, 470 U.S. at 573-74 (describing the "clearly erroneous" standard of review under FED. R. CIV. P. 52(a)); see also *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1008 (7th Cir. 1994) (describing the clearly erroneous standard of review as "deferential" but not "abject"). It should be noted that, although the standards for judgment as a matter of law under Rule 50 and the clearly erroneous standard of Rule 52 are both deferential, the latter is less so than the former. See Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1001 (1986). Thus, an appellate court would not overturn a jury verdict that could have been reached rationally, even if the court had the "definite and firm conviction" that the verdict was erroneous.

78. See *supra* Section I.A. (describing the reasonableness elements of the hostile work environment standard).

79. See *Carr*, 32 F.3d at 1009; *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993).

80. See *Carr*, 32 F.3d at 1009 (deferential review applied); *Rodgers*, 12 F.3d at 674 (same).

81. *Love v. California*, 95-15032, 1996 WL 157513, at *1 (9th Cir. April 4, 1996) ("The district court's ruling on the existence of a hostile work environment is a mixed question of law and fact subject to de novo review."); *Jordan v. Clark*, 847 F.2d 1368, 1375 n.7 (9th Cir. 1988).

82. See *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

83. See *Darby v. Kimberly-Clark Corp.*, 1996 WL 65259, at *1 (9th Cir. Feb. 14, 1996).

84. See *Fuller*, 47 F.3d at 1527.

85. See *Love*, 1996 WL 157513, at *1 (citing *Jordan*, 847 F.2d at 1375 n.7).

the cause of action, questions of law are decided in the first instance by the trial judge and then are reviewed de novo by appellate courts. Questions of fact are resolved by the jury—except in non-jury trials, where the trial judge assumes the jury’s factfinding role⁸⁶—and are reviewed deferentially on appeal.⁸⁷ This framework has roots dating back over four hundred years,⁸⁸ though it did not become firmly established in the United States until the second half of the nineteenth century.⁸⁹ Its venerability suggests that it has some deep-seated appeal but does not mean that it is free of ambiguity. This Part describes the problematic nature of the fact/law dichotomy and then discusses how recognition of those problems should affect the allocation of decision-making authority.

We begin by noting that the distinction between law and fact is incapable of precise application. The law has no independent existence outside a system of language, and findings of fact can only be expressed within such a system. Therefore, all statements of fact relevant to a legal proceeding are, at least technically, statements of law as well.⁹⁰ Even questions that appear at first blush to be purely factual—for example, did it rain in Kansas City on the night of June 12?—may require some legal analysis: How much precipitation is required before one can say that it was “raining” within the meaning of the contractual provision at issue? Does “Kansas City” mean only the area within the city limits, or does it include the surrounding suburbs as well?⁹¹

86. Title VII was amended in 1991 to allow jury trials in cases where the plaintiff seeks compensatory or punitive damages. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a(c) (1994)).

87. See Louis, *supra* note 77, at 993-94.

88. See R.J. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 198-99 (1932). The foremost early expositor of the dichotomy was Chief Justice Edward Coke, who contended that *ad quaestionem facti non respondent iudices* [i.e., judges do not answer a question of fact] and that *ad quaestionem juris non respondent juratores* [i.e., juries do not answer a question of law]. 3 EDWARD COKE, SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF THE LAWS OF ENGLAND 460 (J.H. Thomas ed., 1818).

89. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 902-11 (1994). Compare *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (“[I]t must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, [the jury has] nevertheless a right to take upon [itself] to judge of both, and to determine the law as well as the fact in controversy.”), with *Hickman v. Jones*, 76 U.S. (9 Wall.) 197, 201 (1869) (“It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect.”).

90. Cf. Walter Cook, “Facts” and “Statements of Fact”, 4 U. CHI. L. REV. 233, 239 (1937).

91. The Supreme Court implicitly acknowledged the deep ambiguity of the law-fact distinction in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), where it noted that:

A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is “found” crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.

Id. at 501 n.17.

Such questions can often, of course, be dealt with in a common sense manner. Few parties, for instance, would argue that six inches of precipitation is not sufficient to qualify as "rain."⁹² The problem becomes worse, however, when the issue under consideration is one with immediately apparent factual and legal elements. The question of whether a given workplace was "hostile" for Title VII purposes, for example, cannot be determined exclusively with reference to common sense: Implicit in any finding on the subject is a normative judgment regarding the level of abusive behavior that an employee should be expected to tolerate. On the other hand, a resolution of the hostility issue will often be so dependent on the particular facts of the case as to lack any general applicability.⁹³ It can therefore hardly be considered a question of law in the same sense that, say, the proper interpretation of a statute is. Issues like this—ones that require the application of particular facts to a broad legal standard—are often referred to as "mixed questions of law and fact."⁹⁴ This characterization, of course, is not helpful in determining whether such issues should be decided by a judge or a jury.⁹⁵

Another puzzle is presented by the availability of summary judgment. The law-fact framework outlined above appears to suggest that all questions relating to the strength of the parties' evidence must be submitted to the trier of fact. Whether there is sufficient evidence to support a rational jury verdict, however, is considered a question of law, and therefore within the jurisdiction of the court.⁹⁶ This assignment is defended on the ground that a judge deciding a motion for summary judgment does

92. The limits of common sense are often reached more quickly than one might expect. To take one notorious example, most people would assume that oral sex would be included in any definition of "sexual relations." President Clinton's characterization of his deposition statements in the Paula Jones case as "legally accurate," however, demonstrate that the popular view is not universally accepted. See, e.g., *In His Own Words*, N.Y. TIMES, Aug. 18, 1998, at A12; cf. Francis X. Clines, *Tape Shows Nation a Clinton Irrate and Sad*, N.Y. TIMES, Sept. 22, 1998, at A1; *Excerpts from Clinton's Grand Jury Testimony as Quoted in Starr's Report to Congress*, N.Y. TIMES, Sept. 17, 1998, at A28; *The President's Testimony*, N.Y. TIMES, Sept. 22, 1998, at B1.

93. In the words of one commentator, the application of law to a particular fact situation will be "a ticket good for a specific trip only." Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 236 (1985).

94. See Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1874-75 (1966). They are also sometimes referred to as "ultimate facts" because their resolution can determine the outcome of a suit. See *Bose Corp.*, 466 U.S. at 500 n.16.

95. See *Ornelas v. United States*, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) ("While it is well settled that appellate courts 'accep[t] findings of fact that are not 'clearly erroneous' but decid[e] questions of law de novo,' there is no rigid rule with respect to mixed questions [of law and fact]." (citation omitted) (quoting *First Options v. Kaplan*, 514 U.S. 938, 948 (1995)) (first and second alterations in original)).

96. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (noting that when the nonmovant "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," the movant "is entitled to judgment as a matter of law" (internal quotation marks omitted)).

not herself weigh the evidence presented, but merely determines the existence of “genuine” issues for trial.⁹⁷ Again, at least at the margins, this distinction is difficult to defend.

Consider, for instance, cases holding that evidence of an employment decisionmaker’s biased comment, standing alone, is insufficient to defeat a motion for summary judgment if the comment was remote in time to the challenged decision.⁹⁸ Using this principle to resolve some cases as a matter of law may be uncontroversial. If a plaintiff’s only evidence of discrimination is that his supervisor uttered a single racial slur thirty years earlier, it seems reasonable to say that he has effectively presented no evidence of discrimination at all. What if, however, the slur was used five years ago? One year ago? Six months ago? As it becomes more difficult to say whether or not a biased comment was “remote” to the decision in question, it also becomes more difficult to call the judge’s function a purely legal one. At some point, the judge inevitably becomes involved in weighing the strength of the proffered evidence.⁹⁹

The Supreme Court’s antitrust jurisprudence provides a particularly striking example of this phenomenon. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹⁰⁰ the Supreme Court upheld the district court’s grant of summary judgment against a group of American television set manufacturers who had brought a massive antitrust conspiracy claim against their Japanese competitors. The plaintiffs claimed that the defendants had conspired over a twenty-year period to drive American manufacturers out of business by selling televisions in the United States below cost.¹⁰¹ The defendants planned to recoup their losses, according to the plaintiffs, by charging supracompetitive prices for an extended period once their American competitors were eliminated.¹⁰² Though these alle-

97. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).

98. See, e.g., *Ray v. Tandem Computers*, 63 F.3d 429, 434 (5th Cir. 1995) (slur uttered four years prior to the challenged decision too remote to support an inference of sex discrimination); cf. *Mulero-Rodríguez v. Ponte, Inc.*, 98 F.3d 670, 676 (1st Cir. 1996) (same rule applied to ADEA claim; eight months too remote); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir. 1994) (same; two years); *Phelps v. Yale Security*, 986 F.2d 1020, 1025-26 (6th Cir. 1993) (same; almost one year). But see *Danzer v. Norden Systems*, 151 F.3d 50 (2d Cir. 1998) (holding that comments made “over a year” before plaintiff terminated not too remote to constitute valid evidence of age discrimination).

99. This is particularly true where the statement at issue is arguably both remote and non-discriminatory. See, e.g., *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378-79 (5th Cir. 1991) (holding an outgoing president’s comment that the new president would “need to surround himself with people his age” made a year before the challenged decision did not raise a genuine issue of age discrimination). For a discussion of the larger point that summary judgment analysis at least sometimes involves an implicit weighing of the strength of the parties’ evidence, see Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 84-91 (1990).

100. 475 U.S. 574 (1986).

101. See *id.* at 577-78.

102. See *id.* at 584.

gations were supported by a number of expert witness reports, at least one of which was quite detailed,¹⁰³ the district court found that any inference of conspiracy would be unreasonable. The Supreme Court agreed, noting that predatory pricing schemes are rarely successful, particularly when they require the predator to sustain self-inflicted losses for an extended period.¹⁰⁴ Because the plaintiffs' theory of the case was therefore implausible—it made no economic sense for the defendants to conspire as alleged—the plaintiff was obliged to produce more supporting evidence than would otherwise be necessary to survive summary judgment.¹⁰⁵

In most cases, the fact that a plaintiff's claims are "implausible" does not render them amenable to summary dismissal. An argument can be implausible and yet win the endorsement of a rational juror.¹⁰⁶ The *Matsushita* Court, however, feared that if weak predatory pricing claims were put before juries, inefficient market participants would use the threat of lawsuits to chill price competition—exactly the result our antitrust law was designed to avoid.¹⁰⁷ In effect, the Court was willing to overlook the otherwise impermissible weighing of evidence in order to protect the goal of a competitive marketplace.

To observe that the law-fact dichotomy is theoretically problematic is not to say that it is unusable. In practice, issues of fact and issues of law can often be distinguished with little controversy.¹⁰⁸ Most of the time, moreover, this process leads to an entirely acceptable distribution of decisionmaking responsibility.¹⁰⁹ The theoretical problems do suggest, though, that blind reliance on the dichotomy is unwise. In some situations, at least, the law-fact distinction will lead to conclusions that are at best logically suspect and at worst destructive of important values. This is especially true where—as in the case of the "hostility" issue in harassment cases—courts show little appetite for reasoned analysis.¹¹⁰ While the dichotomy is useful, therefore, it should be applied not in a summary fashion or with the aim of achieving an unreachable goal of total theoretical consistency, but instead with a view towards an acceptable alloca-

103. See Issacharoff & Loewenstein, *supra* note 99, at 86 n.68.

104. See *Matsushita*, 475 U.S. at 589.

105. See *id.* at 587-88.

106. See *supra* text accompanying notes 43-47.

107. See *Matsushita*, 475 U.S. at 593-94.

108. One commentator has praised the fact/law distinction in terms that admirably describe both its practical function and its slippery nature: "No two terms of legal science have rendered better service than 'law' and 'fact.' . . . They readily accommodate themselves to any meaning we desire to give them What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy." LEON GREEN, *JUDGE AND JURY* 270 (1930).

109. See *infra* Section III.A.

110. See *supra* Subsection I.C.2.

tion of decisionmaking responsibility among trial judges, appellate judges, and juries.¹¹¹

III. CRITERIA USED IN DISTRIBUTING DECISIONMAKING POWER

How are we to decide what allocation of authority would be most acceptable? In a workplace regulated by the protean contours of Title VII, is a sigh still just a sigh? Is a kiss still just a kiss?¹¹² More to the point, who gets to decide what constitutes hostile work environment sexual harassment? And how do we decide who gets to decide? We believe the allocation of authority to define and interpret Title VII standards turns on the application of the following factors: (1) the relative competence of the participants in the decisionmaking process; (2) the importance of establishing clear rules of conduct; (3) constitutional considerations; and (4) the conservation of the resources of courts and litigants.

A. Competence

The traditional law-fact dichotomy probably originated from an intuitive assessment of the relative competence of judges and juries. There are, most would agree, certain tasks best performed by those with legal training and experience. Statutory interpretation, for instance, is a skill that requires both knowledge of legal jargon and considerable practice. To ask a jury of laymen, sitting for a limited period, to divine the meaning of a complex and ambiguous statute would not be sensible.¹¹³ Not surprisingly, then, such matters are invariably considered questions of law and are resolved by judges.¹¹⁴

Most questions that can be decided without legal expertise, however, are considered "factual" and are best resolved by juries. There are two equally important reasons for this.¹¹⁵ First, there is strength in numbers. Even the most principled and conscientious among us are prone to err occasionally due to inattentiveness or unconscious bias. When a judge, acting as a lone finder of fact, commits such an error, there is no remedy

111. See Weiner, *supra* note 94.

112. See HERMAN HUPFELD (music and lyrics), *As Time Goes By* (Warner Bros., Inc.-ASCAP 1931).

113. As Weiner points out, however, the application of a statute may stand on a different footing than its interpretation. The application of a statutory "reasonableness" standard, for example, will generally not require any legal expertise and can therefore be performed in most cases by a jury. See Weiner, *supra* note 94, at 1933-34.

114. The fact that this was not the case in America until well into the nineteenth century probably results from the fact that few American judges before the middle of that century had more legal training than the average juror. See Alschuler & Deiss, *supra* note 89, at 903-04.

115. A third reason may be that, for political reasons, it is preferable to have juries resolve factual questions. See *infra* Section III.C.

for it other than an appeal. When an individual juror errs, however, there is at least a reasonable chance that the error will be caught and corrected by her more attentive and/or fair-minded colleagues.¹¹⁶ Second, juries comprise a cross-section of the community and can therefore bring a variety of views and experiences to bear upon a disputed issue. This diversity reduces the risk of bias and increases the pool of knowledge available when difficult decisions must be made.¹¹⁷ As skeptical commentators point out, these advantages can seem idealized and theoretical when compared to the occasionally discouraging reality of jury selection and deliberations.¹¹⁸ While juries are certainly capable of error, however, there is little reason to believe that judges would do an appreciably better job at deciding issues outside their special sphere of competence.¹¹⁹

Considerations of relative competence affect the allocation of power between trial and appellate judges as well. For example, appellate courts defer to district court findings on mixed questions of law and fact whenever "it appears that the district court is 'better positioned' than the appellate court to decide the issue in question. . . ."¹²⁰ Even as to questions of historical fact, moreover, appellate courts give deference to trial judges' findings regarding witness credibility than they do to findings

116. Furthermore, a remedy is sometimes available even if all twelve jurors err: If a jury verdict is irrational, a trial judge or appellate court may set it aside. See FED. R. CIV. P. 50.

117. This theory was rather eloquently described by the Supreme Court in *Sioux City & Pacific Railroad Company v. Stout*, 84 U.S. (17 Wall.) 657 (1873), where the Court held that the question of whether an alleged tortfeasor was negligent was one for the jury, even when the historical facts of the case were undisputed:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

Id. at 664.

118. See, e.g., Louis, *supra* note 77, at 1012. Mark Twain is reported to have quipped that "[w]e have a jury system that is superior to any in the world, and its efficiency is only marred by the difficulty of finding twelve men everyday who don't know anything and can't read." See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 154 (1989).

119. It is generally true that judges are better educated than the average juror. But it is far from certain that this advantage translates into a superior ability to resolve even complex factual issues. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY 1066-67* (1966) (concluding, on the basis of a broad empirical study, that jurors' supposed inability to understand difficult issues is greatly exaggerated); see also Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 853-61 (1998) (presenting empirical data that demonstrates that juries have an adequate grasp of evidentiary issues in "ordinary" cases and indicating that evidence with regard to complex cases was mixed).

120. *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991).

based on documentary evidence.¹²¹ This arrangement doubtless results from the fact that trial judges, unlike their appellate counterparts, have both the opportunity to observe the demeanor of witnesses during testimony and extensive experience in making credibility determinations, but have no comparable advantages with regard to the review of documents.¹²²

Applying these principles to sexual harassment cases yields indeterminate results. As *Gallagher* notes, juries arguably should play an expanded role in deciding harassment cases because they represent a broader spectrum of society than do judges. A judge's status is particularly relevant to his or her role in deciding sexual harassment cases. One necessary predicate to victimization through sexual harassment is job insecurity.¹²³ A woman who can easily obtain another, equivalent job is likely to quit rather than tolerate seriously abusive treatment. Having constitutionally-protected job security, however, a federal judge may find it difficult to understand on an intuitive level the plight of a victim of harassment. Moreover, because judges act as employers themselves, they are very aware of the minefield that Title VII can be even for well intentioned employers.¹²⁴

Interestingly, though, both of the cases the *Gallagher* court cites in support of its competence argument highlight the dangers, rather than the benefits, of expansive jury authority in harassment cases. It quotes the Federal Circuit's decision in *King v. Hillen*¹²⁵ for the proposition that:

[N]o principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.¹²⁶

121. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-500 (1984); FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

122. *Bose* also suggests that review under Rule 52(a) should be marginally less stringent in long and complex trials in deference to a trial judge's greater experience with the facts of that particular case. See *Bose*, 466 U.S. at 500.

123. See, e.g., Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 517-18 (1995).

124. Federal judges are more or less always in the process of hiring law clerks and interns and are therefore constantly faced with the kind of difficult employment decisions that often spawn Title VII lawsuits. Federal judges, however, are exempt from Title VII restrictions. See 42 U.S.C. § 2000e-16 (1994).

125. 21 F.3d 1572 (Fed. Cir. 1994).

126. See *Gallagher*, 139 F.3d at 342 (quoting *King*, 21 F.3d at 1582).

The court follows this with a similar passage from *Torres v. Pisano*,¹²⁷ a recent Second Circuit case: “[J]udges should be careful to remember that American popular culture can, on occasion, be highly sexist and offensive. What is, is not always what is right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable.”¹²⁸

These passages make the point that current societal values—what *King* refers to as “the prejudices of the community”—should not be considered dispositive on the subject of whether a given workplace was “hostile” for Title VII purposes. Instead, they suggest, Title VII is intended to insure that the American workplace is free of discrimination, even though society itself is not. If this is true, of course, jurors’ greater knowledge of societal mores would appear to be of limited utility in the proper resolution of a Title VII case; indeed, it is likely to be a significant hindrance.¹²⁹ Instead, a judge’s ability to announce publicly the real-life application of the dry language of the statute would appear to be the paramount concern. Society can hardly be expected to reform itself without notice of what Title VII requires. Unwittingly, then, *Gallagher* points out the double-edged nature of deference to jury authority on competence grounds.

B. Rules of Conduct: The Need for Certainty

Another factor to be considered is the relative importance of a definitive resolution of the issue in question. One weakness inherent in decisions made by juries is that they lack any precedential authority.¹³⁰ This creates two problems. First, juries may treat similarly situated parties differently and thereby violate a basic principle of fairness.¹³¹ Second, a jury verdict does not inform non-parties of the boundaries of lawful conduct. When an issue is decided by a judge and the decision is memorialized in a written opinion, in contrast, these problems are, at least to some degree,

127. 116 F.3d 625 (2d Cir. 1997).

128. *Gallagher*, 139 F.3d at 342 (quoting *Torres*, 116 F.3d at 633 n.7).

129. Given the vagueness inherent in the definition of a “hostile work environment,” see *supra* Part I, a jury deciding a hostile work environment case would have little choice but to refer to community standards of workplace decency.

130. While this is true in the legal sense, it may not be entirely accurate in practical terms. Lawyers advising clients are acutely aware of jury verdicts, discuss such verdicts with their clients, and explain the risk that they too may suffer a similar fate, either by sustaining economic or reputational harm, or both.

131. The Supreme Court has observed in the Fourth Amendment context that “[a] policy of sweeping deference would permit, ‘[i]n the absence of any significant difference in the facts, the Fourth Amendment’s incidence [to] turn[] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.’ Such varied results would be inconsistent with the idea of a unitary system of law.” *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

ameliorated. Because other courts will generally view the opinion as persuasive authority, litigants in similar cases are more likely to receive comparable treatment. Moreover, a written opinion affords those not involved in the litigation notice of the legal consequences of the behavior at issue.¹³² For these reasons, judges often take a more active role in the decisionmaking process when consistency and predictability are particularly important—for instance, in certain areas of commercial and intellectual property law.¹³³

On the other hand, some legal issues are so fact-specific that the goals of consistency and predictability are not materially advanced when they are resolved by written opinion. It has been said of negligence cases, for instance, that “no two . . . have been alike or ever will be alike.”¹³⁴ When a judge finds that an alleged tortfeasor was or was not negligent in the circumstances of a particular case, therefore, this finding will have only minimal precedential value. It is probably for this reason that most judicial attempts to set specific legal standards in negligence cases have ended unhappily.¹³⁵ An enhanced judicial role, therefore, will be most appropriate when there is an understood need for a definitive resolution of an issue that arises frequently and without significant factual variation.¹³⁶

Again, application of this factor to sexual harassment law presents a close question. As discussed above, the ambiguity created by the law in its current state is palpable. Neither judges, juries, litigants, employees, employers, nor the public at large have definitive guidance as to where the line between acceptable and unacceptable behavior is, or should be, drawn.¹³⁷ It is becoming clear, moreover, that this uncertainty is having

132. It is true that in many instances this notice will be more constructive than actual. Large employers, however, often retain employment law consultants to keep their managers abreast of significant new developments. Media coverage of important cases can also contribute to employers' awareness of the law's outer boundaries.

133. See Louis, *supra* note 77, at 1036; Weiner, *supra* note 94, at 1932.

134. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 71 (rev. ed. 1954).

135. See Louis, *supra* note 77, at 1021-22 (discussing the Supreme Court's rejection of Oliver Wendell Holmes's short-lived 'stop, look and listen' rule in railroad crossing cases).

136. See *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960). The Supreme Court, in declining to apply de novo review to an IRS determination that a payment was a “gift” for tax purposes, noted:

Decision of the issue presented . . . must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the . . . standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

Id.

137. We do not wish to overstate the point. Everyone can identify workplace behavior that is unacceptable. And most people know what behavior is acceptable or expected. What is diffi-

pernicious effects in the workplace. Tales of patently inoffensive or even salutary forms of self-expression being repressed with puritanical zeal are becoming dreadfully familiar: a professor is formally reprimanded for reciting a sexually-tinged story from the Talmud in a religion class;¹³⁸ a man is fired for relating the plot of a sitcom to a female co-worker;¹³⁹ a famous painting of a nude is removed from a college classroom.¹⁴⁰ The problem is not, of course, that Title VII actually prohibits such innocuous behavior. Rather, it is that employers, being unsure of the limits of their potential liability, have a powerful incentive to impose upon their employees overly restrictive rules of interpersonal conduct.¹⁴¹ In view of the Supreme Court's new, ambiguous rules regarding employer liability in harassment cases, this incentive may grow even stronger.¹⁴²

It also appears likely that the uncertain state of the law is doing real harm to the cause of workplace equality. Professor Schultz reports that, in response to the threat of harassment suits, some companies now prohibit men and women from traveling together on business, while others prevent male supervisors from giving performance evaluations to female employees except in the presence of a lawyer.¹⁴³ As she notes, such rules can only have a destructive effect on women's careers: Not only do they raise the cost of hiring and training women dramatically, they also deny women the opportunity to interact with co-workers and supervisors in informal settings.¹⁴⁴ It is difficult, if not impossible, to quantify either the extent of employer overreaction to the threat of sexual harassment litigation or the effect it has on the careers of female employees. The risk of significant harm nevertheless appears to be high enough to warrant at least an attempt to clarify the law. Absent congressional action, only judges are in a position to make that attempt.

Of course, if "hostility" in the Title VII context is inherently undefinable, a more active judicial role will be of little help. The issue can easily be analogized to the question of negligence, which is usually thought to be so fact-specific that judicial decisions have little precedential value.¹⁴⁵

cult is the point on the continuum where behavior crosses the line and becomes unacceptable. Our point is directed at this gray area.

138. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1793 (1998).

139. See *id.* at 1790-92.

140. See Nat Hentoff, *Trivializing Sexual Harassment*, WASH. POST, Jan. 11, 1992, at A19.

141. See Cloud, *supra* note 5, at 49, 52 (describing some major corporations' "zero-tolerance" sexual harassment policies: "Consultants' on-site training is usually straightforward: if what you're thinking even vaguely involves sex, keep it to yourself.").

142. See Lublin & Schellhardt, *supra* note 5, at B1; *supra* Section I.B.

143. See Vicki Schultz, *Sex is the Least of It: Let's Focus Harassment Law on Work, Not Sex*, THE NATION, May 25, 1998, at 14.

144. See *id.*

145. See *supra* text accompanying notes 134-136.

As with negligence, then, one could contend that judicial efforts to clarify the definition of sexual harassment will be fruitless.

There is no doubt that this argument has considerable force. Harassment cases are not merely fact-specific; they can stand or fall on evidence relating to the minutiae of human behavior, down to the look in a supervisor's eye or the tone of his voice. Using common law adjudication to create workable rules for such cases would therefore be extremely difficult. In our view, however, it would not be impossible, at least if it is recognized that even a marginal improvement in the clarity of the law would be likely to yield significant benefits, as the gray area between the acceptable and the unacceptable shrinks.

Courts have not always shied away from taking an assertive role in highly fact-dependent areas of the law. In *Ornelas v. United States*,¹⁴⁶ for instance, the Supreme Court held that the question of whether the police had probable cause to search a defendant is subject to de novo appellate review. The Court acknowledged that findings on the subject of probable cause are "multifaceted," and thus that "one determination will seldom be useful 'precedent' for another."¹⁴⁷ It also pointed out, however, that "seldom" is not the same as "never." On several previous occasions, the Court had been able to resolve probable cause cases on the authority of factually indistinguishable precedents.¹⁴⁸ The Court did not hold out the hope that one day the common law process would produce rules by which the probable cause issue could be resolved with mechanical certitude; rather, it suggested, an incremental improvement in predictability and fairness was worth the added costs of independent review.¹⁴⁹

Precisely the same argument, we believe, can be made in the sexual harassment context.¹⁵⁰ Though every harassment case is unique, many involve a familiar litany of complaints—offensive comments, unwelcome but harmless physical contact, and inappropriate gifts or invitations. With regard to such issues, courts should at least be able to define as a matter of law some outer boundaries beyond which behavior is not actionable

146. 517 U.S. 690 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983)).

147. *Id.* at 698.

148. *See id.*

149. *See id.* at 699.

150. One could argue that probable cause determinations are more readily subject to de novo review than findings in sexual harassment cases because the former are made in the first instance by judges, not juries, and are therefore not subject to the Reexamination Clause of the Seventh Amendment. As we discuss in the next Section, however, the Seventh Amendment does not prohibit de novo review of jury findings on mixed questions of law and fact. *See infra* Section III.C; *see also* *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (permitting de novo review of jury findings on issue of First Amendment "obscenity," a mixed question of law and fact).

for Title VII purposes.¹⁵¹ That an attempt to better define sexual harassment would not be doomed to utter futility is demonstrated by the fact that progress has already been made in clarifying *Meritor's* "severe or pervasive" requirement.¹⁵² While the common law process will never create workable rules to cover every harassment case, it seems likely that some of the worst side effects of the current morass can be alleviated. In terms of the desire for greater certainty, the need to define the parameters of a "hostile" workplace is at least equivalent to the continuing need to refine the definition of probable cause. This analysis indicates that the *de novo* standard of appellate review of a jury's determination that a particular work environment is hostile would be preferable to more deferential alternatives.¹⁵³ It also suggests that the active use of summary judgment would have value, but only if courts use summary judgment motions as an opportunity to explicate the applicable legal standard.

C. Constitutional Considerations

A number of constitutional provisions are germane to the issue of how decisionmaking authority is to be allocated. Of these, the Seventh Amendment is the most directly applicable, if not always the most important. It provides that "[i]n suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, other than according to the rules of the common law."¹⁵⁴ Despite the Framers' view of the jury as an indispensable bulwark against tyranny,¹⁵⁵ the Supreme Court has interpreted the Seventh Amendment rather narrowly. Its first clause has been held to require jury trials only for those causes of action that were tried at law under the rules of the English common law as it existed in 1791, and even then only insofar as jury participation is necessary to preserve the

151. See, e.g., *Norton v. Sam's Club*, 145 F.3d 114, 119 (2d Cir. 1998) (jury verdict for plaintiff reversed because "[plaintiff's] very weak prima facie case, combined with an at best highly dubious showing of pretext, that in itself does not implicate discrimination, is simply not enough to support the jury's conclusion that [plaintiff] was fired because of his age.>").

152. See *supra* notes 23 and accompanying text.

153. See *supra* Section I.C. One could object to our conclusion on the ground that appellate courts may find it difficult to separate a jury's findings on questions of historical fact from its conclusion on the mixed question of unreasonable workplace "hostility." In other situations calling for independent review, an appellate court will presume that the jury found all the historical facts in favor of the party that prevailed at trial. See *Gasparini v. Center for Humanities*, 518 U.S. 415, 442-43 (1996) (independent review of mixed questions "require[s] courts to construe all record inferences in favor of the factfinder's decision and then to determine whether, on the facts as found below, the legal standard has been met"). This strikes us as the appropriate method for solving the problem in sexual harassment cases as well.

154. U.S. CONST. amend. VII.

155. See generally Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

common law right as it then existed.¹⁵⁶ As to the second, it would appear to limit severely judicial reconsideration of facts found by a jury. The Supreme Court has held, however, that the clause forecloses neither motions for summary judgment,¹⁵⁷ motions for judgment as a matter of law,¹⁵⁸ motions for a new trial,¹⁵⁹ nor remittitur,¹⁶⁰ even though all of these invite federal judges to take even issues of historical fact out of juries' hands. Furthermore, the re-examination clause does not require appellate courts to grant jury findings on mixed questions of law and fact any deference at all.¹⁶¹ The Seventh Amendment therefore imposes only a limited restraint on the judiciary's ability to assign itself decisionmaking authority at juries' expense. This does not mean that it is without effect. For instance, it is doubtful whether a court could constitutionally grant a motion for summary judgment based on its resolution of a disputed issue of witness credibility.¹⁶² It is similarly open to question whether an appellate court could review de novo a jury's findings on a question of historical fact.¹⁶³ Perhaps more importantly, the Supreme Court has suggested that the policies underlying the Seventh Amendment favor broad jury authority over factual issues even where the Amendment does not command judicial deference.¹⁶⁴

In some cases, the influence of other constitutional provisions outweighs that of the Seventh Amendment. When the cause of action being tried implicates First Amendment principles, for instance, appellate courts sometimes conduct an independent review of the record to ensure that jury resolution of a mixed question of law and fact does not amount to a "forbidden intrusion on the field of free expression."¹⁶⁵ Although the scope of this power of independent review is not entirely clear,¹⁶⁶ the Supreme Court has suggested that it applies with particular force when a defendant's speech is alleged to fall outside the protection of the First

156. See *Markman v. Westview Instruments*, 517 U.S. 370, 376 (1996).

157. See *Fidelity & Deposit Co. v. Smoot*, 187 U.S. 315, 319-20 (1902).

158. See *Galloway v. United States*, 319 U.S. 372, 389-90 (1943).

159. See *Gasperini v. Center for the Humanities*, 518 U.S. 415, 431 (1996).

160. See *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935).

161. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964).

162. Even assuming, that is, that Rule 56 were amended to permit such a result. See *FED. R. CIV. P.* 56.

163. See *Lisenba v. California*, 314 U.S. 219, 237-38 (1941). Professor Monaghan suggests that courts may be able to evade this limitation by recasting factual questions as legal ones. See Monaghan, *supra* note 93, at 261 n.181.

164. See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) ("An essential characteristic of the [federal judicial] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." (citation omitted)).

165. *Sullivan*, 376 U.S. at 285.

166. See Monaghan, *supra* note 93, at 268-70.

Amendment.¹⁶⁷ Thus, the Court has reviewed *de novo* trial-level findings that a defendant's speech was obscene,¹⁶⁸ libelous,¹⁶⁹ or consisted of constitutionally proscribable child pornography¹⁷⁰ or "fighting words."¹⁷¹ Independent review is necessary in such cases, the Court has held, both because the erroneous deprivation of First Amendment rights is thought to be particularly harmful and because the boundaries of the First Amendment would otherwise be intolerably vague:

When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance. . . .

...

... Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.¹⁷²

Because it is difficult to define the categories of speech that are not protected by the First Amendment, the judiciary must actively guard against curtailment of protected speech, whether it be direct, through erroneous judgments entered against speakers, or indirect, through deterrence of speech that may approach unprotected status.

Independent review of mixed questions of law and fact is sometimes applied to constitutional issues outside the First Amendment area as well.¹⁷³ The question of whether a police officer had probable cause to conduct a search, for example, is subject to *de novo* appellate review,¹⁷⁴ as is the reasonableness of a search¹⁷⁵ and the voluntariness of a confes-

167. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984); *cf. Nor-West Cable Communications Partnership v. City of St. Paul*, 924 F.2d 741, 746 (8th Cir. 1991); *Duffy v. Sarault*, 892 F.2d 139, 143 (1st Cir. 1989); *Levine v. CMP Publications*, 738 F.2d 660, 684 (5th Cir. 1984) (Tate, J., dissenting).

168. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); *cf. Penthouse Int'l v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980); *United States v. Cutting*, 538 F.2d 835, 839 (9th Cir. 1976).

169. See *Sullivan*, 376 U.S. at 285; see also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038 (1991); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989); *Newton v. National Broadcasting Co.*, 930 F.2d 662, 670-71 (9th Cir. 1990).

170. See *New York v. Ferber*, 458 U.S. 747, 774 n.28 (1982); *cf. United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987).

171. See *Street v. New York*, 394 U.S. 576, 592 (1969).

172. *Bose*, 466 U.S. at 503-05.

173. See Monaghan, *supra* note 93, at 270-71.

174. See *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

175. See *United States v. Proctor*, 148 F.3d 39, 42 (1st Cir. 1998); *United States v. Moser*, 123 F.3d 813, 823 (5th Cir. 1997). Like findings on the issue of probable cause, the reasonableness of a search is determined in the first instance by a judge, not a jury. As noted earlier, however, this does not substantially affect the question of whether *de novo* appellate review is appropriate. See *supra* note 150.

sion.¹⁷⁶ In such cases, of course, the First Amendment “chilling effect” rationale is inapplicable; yet the need for the consistency and predictability that independent review can provide is thought to be acute.¹⁷⁷

Application of these principles again suggests, we believe, that de novo appellate review of findings on the hostility issue would be appropriate. Although the Seventh Amendment could be said to encourage broad deference to jury findings in general, it clearly does not prohibit de novo review of mixed questions of law and fact. Furthermore, First Amendment considerations may demand de novo appellate review. There is currently a vigorous debate in the academy regarding the degree to which the developing law of workplace harassment conflicts with established First Amendment principles.¹⁷⁸ We have no intention of entering this debate, except to point out that there is at least some tension between harassment law and the First Amendment. When a male supervisor tells a female subordinate that society would be better off if women were more submissive to men, for example, both the subordinate’s right to a workplace free of discrimination and the supervisor’s right to free speech are implicated.¹⁷⁹ Many harassment cases, in fact, raise concerns strikingly similar to those identified by the Court in its First Amendment decisions on the scope of review. Like laws prohibiting libel and obscenity, therefore, sexual harassment law threatens to chill at least some activity protected under the First Amendment if Title VII is not adequately defined.¹⁸⁰ Whether verbal sexual harassment can be said to fit within current categories of unprotected speech,¹⁸¹ or whether a new category must be created to encompass harassing speech,¹⁸² it is beyond dispute that the current boundary between acceptable and unacceptable speech is profoundly uncertain.¹⁸³ Consequently, the chilling effect on speech caused by allowing the hostility issue to be decided by juries and

176. See *Brooks v. Florida*, 389 U.S. 413, 414-15 (1967).

177. See *Ornelas*, 517 U.S. at 697-98.

178. See, e.g., Becker, *supra* note 41; Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Epstein, *supra* note 41, at 451; Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729, 735-40 (1995); David Benjamin Oppenheimer, *Workplace Harassment and the First Amendment: A Reply to Professor Volokh*, 17 BERKELEY J. EMP. & LAB. L. 321, 326 (1996); Sangree, *supra* note 123; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. REV. 1791 (1992).

179. See Sangree, *supra* note 123, at 546-47 (conceding that current harassment law threatens to chill at least some protected speech).

180. See *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596-97 (5th Cir. 1995).

181. See *id.*

182. See, e.g., Browne, *supra* note 178, at 510-30.

183. See *supra* Part I.

reviewed deferentially on appeal appears to be at least as great in harassment cases as it is in other First Amendment contexts.

Furthermore, like other regulations of speech, harassment law creates a substantial risk that protected speech will not only be deterred, but punished.¹⁸⁴ Defendants in sexual harassment cases are sometimes accused of espousing deeply (and justifiably) unpopular views.¹⁸⁵ Leaving to juries alone the task of protecting the First Amendment rights of such unattractive figures does not seem adequate. In other First Amendment contexts, de novo review is used to reduce the risk of majoritarian repression of unpopular ideas.¹⁸⁶ Given the impact of harassment law on free (though sexist) speech in the workplace, the authority of the jury should be no greater in harassment cases.

De novo appellate review does not necessarily mean that juries are pushed to the sidelines. In obscenity cases, for instance, a jury may decide the question of whether the expression at issue is constitutionally protected in the first instance by applying the three-part test established in *Miller v. California*.¹⁸⁷ Similarly, the Ninth Circuit has held that the First Amendment does not prevent critical issues in an invasion of privacy case from going to a jury so long as de novo appellate review is available.¹⁸⁸ In these cases, the jury has the opportunity to express its views, but the risk that a defendant will be deprived erroneously of First Amendment rights is diminished. This strikes us as a sensible balance in the sexual harassment context as well. Appellate judges reviewing a finding of "hostility" may consider a jury's views helpful even if that view is owed no deference.¹⁸⁹ When First Amendment rights are potentially at stake, however, a jury should not speak with unreviewable finality.¹⁹⁰

184. See, e.g., *Lipsett v. University of P.R.*, 864 F.2d 881, 906 (1st Cir. 1988); *Robinson v. Jacksonville Shipyards*, No. 86-927-Civ-J-12, 1991 U.S. Dist. LEXIS 794 (M.D. Fla. Jan. 18, 1991).

185. See, e.g., *DeAngelis*, 51 F.3d at 597.

186. See J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 527-30 (1985).

187. 413 U.S. 15, 24 (1973) ("The basic guidelines for a trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.").

188. See *Virgil v. Time*, 527 F.2d 1122, 1130 (9th Cir. 1975).

189. The concept of de novo review may suggest that the views of the initial fact-finder should not be taken into account at all. The Supreme Court, however, has taken a pragmatic view towards de novo review of mixed questions of law and fact, suggesting that a reviewing court may consider the findings below probative. See *Ornelas v. United States*, 517 U.S. 690, 700 (1996) (In reviewing de novo a finding that probable cause existed, "[a]n appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.").

190. Even without de novo review, an appellate court can review a jury's findings when a motion for judgment as a matter of law is made and denied by the trial court. Because review

D. Conservation of Resources

Finally, courts consider how the allocation of decisionmaking authority will affect the efficiency of the litigation process generally. For instance, even when de novo review of an issue could aid significantly in its resolution or further some constitutionally-endorsed policy, an appellate court may nevertheless choose to defer to a trial-level determination on the ground that the benefit provided by de novo review would be outweighed by the added burden to the court of providing closer scrutiny.¹⁹¹

Considerations of efficiency are also relevant to the question of summary judgment. Whatever the logical difficulties involved in classifying the appropriateness of summary judgment as a question of law,¹⁹² the practical benefits of doing so are clear. Summary judgment facilitates settlement, protects defendants from harassing litigation,¹⁹³ eliminates the cost of empaneling a jury to hear groundless suits, and allows meritorious claims to be tried more promptly by relieving congestion on crowded trial calendars. Summary judgment can be granted improperly, to be sure.¹⁹⁴ This does not mean, however, that it is an undesirable part of the legal landscape.

It may be helpful at this point to discuss the practical impact of a summary judgment motion on the litigation process. First, a trial judge will use a proposed motion as an opportunity to settle the case by attempting to convince the parties that having the motion decided is not in either party's interest.¹⁹⁵ Rather, a settlement reached through a consensus-building process will be far more productive for the litigants. Litigation costs will be drastically reduced, unfavorable precedents will not issue, negative publicity in the form of a written opinion will be avoided and the risk of a devastating verdict will be eliminated. Summary judgment motions are always expensive, but are still more so in Title VII

under this standard is highly deferential, however, it may not be adequate to protect First Amendment values.

191. See, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985) ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

192. See *supra* Part II.

193. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593-94 (1986); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985).

194. See *Issacharoff & Loewenstein*, *supra* note 99, at 87-91 (discussing cases in which courts have disregarded admissible evidence submitted by nonmovants in granting summary judgment).

195. As some commentators have argued, of course, settlement of lawsuits is not always and everywhere an absolute good. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 677-78 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). We believe, however, that anyone familiar with the realities of current court dockets must recognize that settlements based on rational assessments of the facts and the law benefit both the litigants and the judicial system.

cases due to the statute's fee-shifting provisions.¹⁹⁶ If the plaintiff successfully resists the motion, the defendant not only incurs its costs in making the motion, but also will be responsible for the plaintiff's fees if the plaintiff prevails at trial. On the other hand, if the defendant prevails on the motion, the plaintiff's attorney will have conducted discovery and opposed the motion without any fee whatsoever, assuming the attorney took the case on a contingency basis. Furthermore, an appeal is another significant expense, and it is likely that neither the plaintiff nor her attorney can afford to press the appeal. Given these economic realities, the cost of the motion should be a major stimulus to settlement—particularly if a judge takes the opportunity to play an active role in the settlement effort.

While summary judgment will usually pose greater economic risks for a plaintiff, it will often create greater reputational risks for a defendant. A defendant facing a strong claim risks having its motion denied in a written opinion that provides the world with an intimate and unflattering description of what goes on in its workplace. Such negative publicity may have a real impact on the person or entity whose conduct is thus publicly exposed.¹⁹⁷ Even defendants who prevail on summary judgment may prefer settlement to such exposure. The best example, of course, is President Clinton's initial failure to settle the Paula Jones case, which resulted in devastating consequences for the President.¹⁹⁸ By forcing parties to count the costs—economic and otherwise—of continuing their dispute, the availability of summary judgment provides an impetus for settlement.

Settlement is also encouraged when the parties are forced by a summary judgment motion to research the merits of their positions and those of their adversary. Plaintiffs, who often appear *pro se*, or who cannot authorize counsel to engage in expensive research, are often woefully un-

196. See 42 U.S.C. § 2000e-5(k) (providing that the court, at its discretion, may allow a prevailing party, other than the EEOC or the United States, reasonable attorney's fee (including expert fees) as part of costs and that the EEOC and the United States are liable for costs to the same extent as other parties).

197. See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, 71-72 (1984); *Roberts v. Texaco*, 979 F. Supp. 185, 189-93 (S.D.N.Y. 1997); *Kohn v. Royal, Koegel & Wells*, 59 F.R.D. 515, 520 (S.D.N.Y. 1973). In each case the defendant is or was a well-known and respected business (Texaco) or law firm (King & Spalding and Royal, Koegel & Wells, now Rogers & Wells). Press attention to courts' opinions may subject corporate defendants to public humiliation. See, e.g., E.J. Holland, Jr. & L. Camille Hebert, *The Law Firm as an Employer*, A.B.A. L. PRAC. MGMT., Mar.-Apr. 1982, at 12 (mentioning *Kohn v. Royal* and other lengthy, expensive, and potentially embarrassing law firm discrimination cases); Steven M.H. Wallman, *Equality Is More than Ordinary Business*, N.Y. TIMES, Mar. 30, 1997, at F12 (discussing the costs of negative publicity to Texaco due to allegations of racial discrimination in *Roberts v. Texaco*).

198. See, e.g., Neil Lewis, *Clinton Settles Jones Lawsuit with a \$850,000 Check*, N.Y. TIMES, Jan. 13, 1999, at A14.

aware of the legal requirements of their claims.¹⁹⁹ Defendants, too, often fail to evaluate their position adequately and underestimate the factual allegations proffered by plaintiffs. This creates a problem for the court in that both plaintiffs and defendants have unrealistic expectations as to the likelihood that they will prevail, either at the motion stage or at trial.

A motion for summary judgment quickly remedies this problem. The parties are forced to forego posturing in favor of concentrating on the development of convincing legal arguments. Courts can make this educational process particularly efficient by requiring pre-motion conferences.²⁰⁰ Obvious flaws in either side's legal theory can be exposed at the conference, eliminating the need for the motion. Once both parties are confronted with the court's assessment of the prevailing law as applied to their case, settlement is more likely.²⁰¹ While parties often have a better grasp of the facts than the law, forcing them to marshal their evidence has a similar tendency to reduce uncertainty.²⁰²

Another benefit of the availability of summary judgment is that it allows the court to eliminate frivolous cases—those in which there is simply no evidence of discrimination.²⁰³ It should come as no surprise that disgruntled employees sometimes claim that they suffered an adverse employment action due to their race, sex, or national origin, when, in fact, there is no proof in the record of any discrimination or hostile environment other than the fact that the plaintiff falls into a protected category. Suffering an adverse employment decision can be a devastating experi-

199. In our experience, however, plaintiffs are often quite aware of a claim's practical merits: Because courts are reluctant to grant summary judgment in harassment cases, sizable settlements are often won by plaintiffs with weak claims.

200. For example, my individual rules require that before bringing a motion, a party must write to chambers to request a pre-motion conference. The letter must be submitted at least seven days before the proposed conference, it must explain the grounds for the motion, and it may not be longer than three pages. An adversary who wishes to oppose the motion must respond, in less than three pages, within three business days. Finally, motions are resolved at the pre-motion conference to the extent possible. If full briefing is necessary, the issues to be considered will be pinpointed and a briefing schedule will be set. See Judge Shira A. Scheindlin, *INDIVIDUAL RULES AND PROCEDURES 3* (1999) (on file with the *Yale Law & Policy Review*).

201. Two commentators argue that the cost of summary judgment motions has an indeterminate effect on the likelihood of settlement. See Issacharoff & Loewenstein, *supra* note 99, at 97-103. Issacharoff and Loewenstein point out that a plaintiff who successfully resists a summary judgment motion can be expected to raise her settlement demand, and they conclude from this that the availability of summary judgment may actually reduce settlement rates. See *id.* at 102-03. Their analysis, however, ignores the pro-settlement effect of educating the parties about the relative strength of their positions.

202. Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-20 (1973).

203. There is no objective way to determine the percentage of meritless Title VII cases filed in the federal district courts every year. In our experience, the number is significant—perhaps as high as 25 percent. While admittedly subjective, this estimate appears to be at least roughly in line with the views of the EEOC. See Donovan, *supra* note 5 (noting that the EEOC found “no reasonable cause for action” in 38.8% of sexual harassment cases in 1996).

ence, and it not infrequently results in a natural desire to visit revenge on the decisionmaker. When this desire leads to a lawsuit that is unaccompanied by substantiating evidence, however, no legitimate purpose is served by allowing the suit to proceed. Moreover, any district judge can attest to the fact that finding time to try potentially meritorious cases is no easy task. While summary judgment should never be viewed as simply a docket-clearing device,²⁰⁴ courts cannot ignore the fact that the delay caused by the trial of a meritless claim works an injustice upon other parties awaiting a trial date.

The benefits of summary judgment would seldom be available in harassment cases, of course, if courts were to conclude that such cases are inherently inappropriate for resolution through summary judgment.²⁰⁵ Given the inference-laden nature of harassment claims, this view would be understandable and, in fact, theoretically consistent with the summary judgment standard.²⁰⁶ Suppose, for instance, that a sexual harassment plaintiff's sole evidence of a hostile working environment were her testimony that a supervisor had, on five occasions, looked at her in a way she perceived to be sexually suggestive. No comments were made by this supervisor or any of the plaintiff's other colleagues; with the exception of the five suggestive looks—each of which was quite brief—everyone in the workplace had acted with consummate professionalism. Resolving every ambiguity and drawing every rational inference in favor of the plaintiff,²⁰⁷ must a court conclude that a rational juror could find from this that the plaintiff's workplace was unreasonably hostile? Certainly the alleged conduct could not be considered "severe," but might it be "pervasive"?²⁰⁸ As a pure question of logic, the answers to these questions would have to be yes. There is no "rational" way to determine how free from sexual stares a workplace should be—the question is a bald policy judgment. A jury verdict in favor of the plaintiff on these facts therefore could not be considered irrational from a theoretical point of view. We suggest, however, that the better approach here would be for a district judge to grant summary judgment to the defendant and issue a strong opinion holding

204. See *Gallagher v. Delaney*, 139 F.3d 338, 343 (2d Cir. 1998).

205. See, e.g., *DiLaurenzio v. Atlantic Paratrans*, 926 F. Supp. 310, 314 (E.D.N.Y. 1996) ("[W]hether there is 'hostility' or 'abuse' in the workplace [is left] in the hands of juries As a result, it is the sort of issue that is often not susceptible of summary resolution.").

206. See *supra* Part II.

207. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

208. See *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII.").

that such conduct cannot, as a matter of law, create a hostile work environment.²⁰⁹

As we have discussed, the allocation of decisionmaking authority between judges and juries is not and could not be determined exclusively with reference to philosophical consistency.²¹⁰ Rigorous adherence to principles of logic is often desirable; given the inherent weakness of the fact-law distinction, however, logic can take one only so far. The Supreme Court recognized this in *Matsushita*, where it passed over the theoretical niceties of the summary judgment standard in order to prevent antitrust law from being used as a means of suppressing, rather than protecting, competition.²¹¹ Similarly, in our hypothetical, a judge addressing a motion for summary judgment should not blind herself to the fact that women's careers will be jeopardized if male supervisors and co-workers are inhibited from even looking at their female colleagues. This does not mean, of course, that a trial judge should approach every claim of harassment with a finger on the summary judgment trigger. It means only that while all permissible inferences should be drawn in favor of plaintiffs in sexual harassment cases, sexual harassment law, like antitrust law, should place some "limits [on] the range of permissible inferences [that can be drawn] from ambiguous evidence."²¹²

209. Some trial courts have been providing precisely this type of guidance. *See, e.g.*, *Grossman v. Gap, Inc.*, No. 96 Civ. 7063, 1998 WL 142143, at *5 (S.D.N.Y. Mar. 25, 1998) (holding a single inappropriate comment insufficient as a matter of law to survive summary judgment); *Polimeni v. American Airlines*, No. CV 92-5702, 1996 WL 743351, at *2 (E.D.N.Y. Dec. 18, 1996) (holding that three incidents of lewd comments and inappropriate touching over two years were insufficient evidence to survive a motion for summary judgment); *Gonzalez v. Kahan*, No. CV 88-922, 1996 WL 705320, at *3-4 (E.D.N.Y. Nov. 25, 1996) (finding that one obscene phone call, a bear hug, several requests for a date, and a marriage proposal were insufficient evidence to establish a hostile work environment claim); *Rivera v. Edenwald Contracting Co.*, No. 93 Civ. 8582, 1996 WL 240003 at *6 (S.D.N.Y. May 9, 1996) (holding that two vulgar comments made by different coworkers were not enough to establish that a workplace was permeated with discrimination); *Ricard v. Kraft Gen. Foods*, No. 92 Civ. 2256, 1993 WL 385129, at *3 (S.D.N.Y. Mar. 16, 1993), *aff'd*, 17 F.3d 1426 (2d Cir. 1994) (finding that four sexually-oriented incidents were insufficient evidence as a matter of law to survive summary judgment).

210. *See supra* Part II.

211. *See supra* text accompanying notes 100-107.

212. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

E. Summary

Our analysis can be summarized briefly as follows:

	Scope of Review	Summary Judgment
Competence	Not applicable	Courts have superior ability to determine statutory standard
Need for Certainty	On balance, favors de novo review	Favors relatively aggressive use of summary judgment
Constitutional considerations	Favors de novo review	Limited relevance; may slightly favor limited use of summary judgment
Conservation of resources	Favors deferential review	Favors relatively aggressive use of summary judgment

IV. SUMMARY JUDGMENT AND SUPREME COURT PRECEDENT

On the question of summary judgment, we believe that our conclusion is supported by an additional, independent argument: A predisposition against granting summary judgment is contrary to a court's duty under Federal Rule of Civil Procedure 56 as explained by the Supreme Court in *Celotex Corp. v. Catrett*²¹³ and *Anderson v. Liberty Lobby*.²¹⁴ Those cases altered summary judgment practice in two major ways.²¹⁵ First, a summary judgment movant need no longer establish the nonexistence of material facts in dispute. Rather, the movant now need only show the district court "that there is an absence of evidence to support the nonmoving party's case."²¹⁶ This can be done by relying solely on the pleadings and the material adduced during the discovery process. The

213. 477 U.S. 317, 323 (1986).

214. 477 U.S. 242, 247-48 (1986).

215. See Issacharoff & Loewenstein, *supra* note 99, at 79-91.

216. See *Celotex*, 477 U.S. at 325.

burden then shifts to the plaintiff to put forth evidence sufficient to establish a genuine issue of material fact. The second major change was to permit courts to evaluate the “sufficiency” of the evidence submitted by the plaintiff. To do this, courts must first determine whether the proffered evidence is admissible.²¹⁷ A court must then evaluate the sufficiency of the admissible evidence presented. As the Court noted in *Anderson*, “The judge’s inquiry . . . unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.”²¹⁸ The Court thus suggested that judges must determine whether the evidence “presents a sufficient disagreement” or “is so one-sided that one party must prevail as a matter of law.”²¹⁹

As we have seen, “one-sidedness” is not something that can always be determined as a pure question of logic. In order to accomplish the tasks outlined in *Celotex* and *Anderson*, a trial judge inevitably must, to some degree, weigh the evidence, if only to determine the presence of more than a mere “scintilla” of evidence.²²⁰ Thus, the court is directed to bridge the law-fact dichotomy by assessing a plaintiff’s evidence to determine if it could support a verdict in her favor. It is at this point that the law-fact dichotomy breaks down. In order to perform the required task, the court must review the admissible evidence and draw its own conclusion as to whether such evidence is sufficient to permit a rational trier of fact to find for the plaintiff. A judge is therefore obligated to make a determination as to the “quantum and the quality” of the evidence—if she is not satisfied with either, it is her duty to grant summary judgment to the moving party.

Insofar as *Gallagher* can be read to minimize this duty, we believe its reasoning is seriously flawed. Judges are required to apply the laws passed by Congress as interpreted by the Supreme Court. The mandate of *Celotex*, *Anderson*, and *Matsushita* compels a judge to assess the evidence in the record and make an evaluation as to its sufficiency to sup-

217. See *id.* at 320-22; see also *Raskin v. Wyatt Co.*, 125 F.3d 55, 65 (2d Cir. 1997); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 525-27 (2d Cir. 1996).

218. *Anderson*, 477 U.S. at 252; see also *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir. 1997) (“In order to defeat summary judgment after such a showing by the defendant [in a Title VII case, of non-discriminatory reasons for employment action], the plaintiff’s admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant’s employment decision was more likely than not based in whole or in part on discrimination.”).

219. *Anderson*, 477 U.S. at 251-52.

220. See FED. R. CIV. P. 56(e) advisory committee note to 1963 Amendment (stating that the purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” (emphasis added)); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” (quoting *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968))).

port a conclusion. The judge cannot decline to do this by deferring, instead, to the judgment of the jury.

In sum, assessing the fact record to determine whether there is sufficient evidence to support the nonmovant's case is the court's job, regardless of the difficult judgments that will sometimes be required. Applying the court's instructions on the law to the facts presented at trial is the jury's only role. Jurors cannot reliably, consistently, or credibly define harassment, and they cannot set standards for conduct in the workplace. Courts can, if only in bits and pieces. Decisions from many trial courts filter up to the courts of appeals and eventually to the Supreme Court. It is this process of appellate review of trial court decisions that eventually creates the legal standards to be applied in these cases—which is one reason why we have “summary” judgment.

V. ALLOWING INTERLOCUTORY REVIEW

One possibility for improvement in the allocation of decisionmaking authority would require the Supreme Court to adopt a new rule permitting interlocutory appeals of the denial of summary judgment motions in certain limited circumstances. The Federal Rules of Civil Procedure do not now address either what decisions can be considered “final”—and hence subject to appeal as of right—or what decisions are appropriate for discretionary “interlocutory” appeal. At present, these matters are addressed only by Congress.²²¹

Under the current statutory scheme, a defendant denied summary judgment in a harassment suit cannot appeal that ruling until after trial, unless the trial court certifies that interlocutory review is warranted.²²² The governing statute allows interlocutory review only when (1) the issue involves a controlling question of law (2) over which there is substantial difference of opinion and (3) immediate appeal may end the litigation.²²³

221. See 28 U.S.C. §§ 1291, 1292 (1994).

222. “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.” 28 U.S.C. § 1291. It is beyond dispute that denial of summary judgment is not a final decision on the merits of the claim.

223. 28 U.S.C. § 1292(b). Courts have given greatest emphasis to the third factor. See *Koeher v. Bank of Bermuda*, 101 F.3d 863, 865-66 (2d Cir. 1996) (“[Section 1292(b)] is a rare exception to the final judgment rule that generally prohibits piecemeal appeals. The use of § 1292(b) is reserved for those cases where an intermediate appeal may avoid protracted litigation.”); see also *Westwood Pharmaceuticals v. National Fuel Gas Distrib. Corp.*, 964 F.2d 85, 88-89 (2d Cir. 1992) (expressing disapproval of a § 1292(b) certification where it was “not clear” that disposition of the certified issues would materially advance the ultimate determination of the case). Other theoretically possible avenues for interlocutory review exist but are generally not applicable to summary judgment denials. These avenues include mandamus petitions brought in the courts of appeals or appeals based on the collateral order doctrine, which allows review of orders where rights would be effectively lost in the absence of immediate review. See

A literal reading of this standard would appear to allow review of a district court's denial of summary judgment, at least in some circumstances. Historically, however, interlocutory review of such decisions has been granted very rarely.²²⁴

Section 315 of the Judicial Improvements Act of 1990 permits the Supreme Court to "define when a ruling of a district court is final for the purposes of appeal under section 1291."²²⁵ Section 101 of the Federal Courts Administration Act of 1992 amended 28 U.S.C. § 1292 to authorize the Supreme Court to adopt rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under section 1292 (a)-(d).²²⁶ We propose a rule that would permit review of certain denials of summary judgment in cases alleging a hostile work environment.

Under our proposal, interlocutory review would be appropriate when a trial judge denies a motion for summary judgment but certifies that a finding for the plaintiff would effectively broaden the "severe or pervasive" standard as it has been applied in that circuit. For example, if a plaintiff's evidence suggests that she was harassed, but that the harassment she suffered was less severe than that described in any decided case finding a hostile work environment, certification would be permitted. Presenting such a case for immediate appellate review would advance many of the goals expressed in this Article, including judicial guidance, clear standards, and appropriate allocation of decisionmaking authority.

Because this procedure would be limited to cases certified by the trial court as departing, in some way, from the current legal standard, it would focus the energies of the appellate courts on the most difficult cases—those that present the greatest opportunity for clarifying the law. Interlocutory review, of course, is expensive and time consuming for both parties and the courts. The suggested procedure, however, could be utilized on an experimental basis for a limited time—perhaps ten years—to see if it contributes materially to the clarification of the law. If it does, then what were once considered "borderline" cases will become amenable to resolution under established standards, and continuing to certify hostile environment cases for interlocutory review may well become unnecessary.

Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 MIL. L. REV. 145, 198-206 (Winter 1995).

224. See *id.* at 196-98; see also *Chappell & Co. v. Frankel*, 367 F.2d 197, 199-200 (2d Cir. 1966).

225. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 2072(c) (1994)).

226. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified at 28 U.S.C. § 1292(e)).

VI. CONCLUSION

The uncertain scope of sexual harassment law as it currently exists creates a host of problems not only for courts and litigants but society at large as well. Some of these problems are widely understood. Less well known is how the allocation of decisionmaking authority in sexual harassment cases among trial judges, appellate judges, and juries can exacerbate these problems. Some recent decisions suggest that courts should take a relatively passive role in deciding harassment cases. Trial courts, it is argued, should rarely grant motions for summary judgment, and appellate courts should review jury findings deferentially. While there is much to be said for this view, we disagree. For all their virtues, juries cannot contribute much to the effort to define sexual harassment better—by granting summary judgment in proper cases and carefully reviewing jury findings, however, judges can. We are aware of the fact that the issues we raise are fraught with political consequences. When an unelected, life-tenured judge makes policy decisions as to what workplace behavior is acceptable, one may question whether the court has acted without a democratic check on judicial authority.²²⁷ Our proposals, however, would not lead to an allocation of responsibility any different than that used without controversy in a number of other contexts. Moreover, we believe that the policy of extreme deference to juries espoused in *Gallagher* amounts to an effective abdication of the proper judicial role. Judges, not juries, traditionally decide questions of law. Consequently, they should not relegate themselves to the role of bystanders when a statute's proper interpretation is effectively at issue.

We also recognize that our proposals may not be warmly received by sexual harassment plaintiffs. Our analysis, however, is not inconsistent with a broad reading of Title VII. What we object to is not an expansive definition of what constitutes sexual harassment but an allocation of decisionmaking authority that forecloses the possibility of ever establishing any definition. In any event, the court's role is not to predict whether its rules or decisions will favor plaintiffs or defendants. By eliminating uncertainty and creating predictability, a more active judicial role should lead to a law that is fairer and clearer—goals that are ultimately beneficial to everyone concerned.

227. See Wolfram, *supra* note 155.