

## Article

### Retaliation

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## I. INTRODUCTION

In the wealth of scholarship about discrimination and inequality, retaliation is an understudied phenomenon. The vast majority of legal scholars who write about discrimination focus their energies on the important work of enriching prevailing understandings of bias and how law regulates it. Legal scholarship has not paid sufficient attention to the ways people are punished for challenging inequality and the law's response to these challenges. Retaliation, in particular, is typically regarded as an afterthought, a relatively small part of a larger scheme for enforcing substantive legal protections. This Article develops a broader theory of retaliation and its place in the antidiscrimination project. By shining a spotlight on retaliation and its relationship to discrimination law, it seeks to develop a better understanding of both retaliation and discrimination and the legal principles that govern them.

Retaliation is an important social phenomenon, deserving of study for several reasons. First, it is prevalent. Although it is impossible to know how often retaliation follows challenges to discrimination within institutions, the evidence suggests it is far from uncommon. Retaliation claims make up a significant portion of the claims asserted in discrimination cases.<sup>1</sup> Social

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1. See, e.g., Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKLEY J. EMP. & LAB. L. (forthcoming 2006) (manuscript at 41, on file with author) (describing their empirical study of racial harass-

dynamics within institutions make retaliation a likely response to charges of discrimination. Recent social science research shows that women and persons of color are perceived negatively and are disliked by majority group members when they step forward to challenge discrimination.<sup>2</sup> By challenging discrimination and unjust social privilege, they are perceived as transgressing the social order, creating prime conditions for retaliation. Because retaliation can occur in any institution and in response to any type of discrimination challenge, the problem of retaliation cuts across discrimination law broadly and is not limited to any one legal context.

Second, retaliation is powerful medicine, functioning to suppress discrimination claims and preserve the social order.<sup>3</sup> Fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination. When challengers are brave enough to overcome their fears of speaking out, retaliation often steps in to punish the challenger and restore the social norms in question. To a large extent, the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation. The recent trend towards legally enforced privatization in the assertion and resolution of discrimination complaints gives added importance to the law's treatment of retaliation. As legal doctrine increasingly channels dis-

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ment cases and noting that nearly half of the racial harassment cases in a random sample of all racial harassment cases through 2002 included claims for retaliation); *Sex Discrimination Cases Predominate in Recent Class Actions Filed by EEOC*, 71 U.S.L.W. 2158 (Sept. 10, 2002) (reporting that, of the fifty-two class action cases filed by the EEOC between October 1, 2001 and June 30, 2002, twenty-five of the cases included claims of retaliation); Wendy Parker, *Lessons in Losing: Race and National Origin Employment Discrimination Litigation in Federal District Courts* 19, (Wake Forest Univ. Legal Studies Research Paper Series, Paper No. 05-09, 2005), available at <http://ssrn.com/abstract=678082> (finding, in her empirical study of race and national origin discrimination litigation in district courts, that the most common type of claim was for retaliation, at 51 percent); NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *WOMEN AT WORK: LOOKING BEHIND THE NUMBERS* 12 (2004), <http://app.nationalpartnership.org/docs/CRA%2040th%20Ann%20Report.pdf> (analyzing data on workplace discrimination claims and observing that in fiscal year 2003, retaliation charges comprised 27.9 percent of the total charges filed with the EEOC).

2. See *infra* Part II.B.

3. The social dynamics of retaliation are discussed at length, *infra*, Part III.C.

crimination complaints through internal institutional processes, the need for strong legal protection from retaliation becomes all the more urgent.<sup>4</sup>

Third and finally, the extent of protection from retaliation found in discrimination law tells us a great deal about the scope of discrimination law and the values it protects. The nature of the relationship between discrimination and retaliation was the subject of a recent case in the United States Supreme Court, *Jackson v. Birmingham Board of Education*.<sup>5</sup> This case required the Court to decide whether a broad proscription against sex discrimination, Title IX of the Education Amendments of 1972,<sup>6</sup> necessarily includes protection from retaliation for challenging discrimination under the statute.<sup>7</sup> The contours of this relationship are as important for what they reveal about the scope of discrimination law as the treatment of retaliation in particular. This Article contends that a careful study of retaliation and its relationship to discrimination raises pressing questions about the scope of the antidiscrimination principle and the law's animating values.

Recognizing retaliation as a form of discrimination, one that is implicitly banned by general proscriptions of discrimination, pushes the boundaries of dominant understandings of discrimination in useful and productive ways. Theorizing retaliation as a form of discrimination requires moving beyond discrimination law's current dominant framework of status-based differential treatment and toward a broader conception that views discrimination as the maintenance of race and gender privilege. Retaliation, functioning as it does to maintain social hierarchies and punish outliers, fits well within such a framework. Conceptualizing retaliation as proposed in this Ar-

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4. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (describing legal doctrines and trends promoting the privatization of information gathering and dispute resolution for claims of bias and discrimination in the workplace). Legal doctrine has begun to encourage a similar trend in schools, by requiring certain claimants to provide prior notice through school grievance procedures before gaining legal protection from discrimination. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (requiring prior notice to school officials followed by deliberate indifference to establish school liability for teacher-student sexual harassment); see also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) (adopting the same standard for sexual harassment by students).

5. 125 S. Ct. 1497 (2005).

6. 20 U.S.C. § 1681 (2000).

7. *Jackson*, 125 S. Ct. at 1502.

ticle offers a number of advantages for discrimination law. By shifting the focus from the status-based treatment of individuals to larger questions of illegitimate privilege and the importance of contesting inequality, the retaliation claim permits a more fluid conception of social identity than that offered by the traditional anti-differentiation model. The retaliation claimant need not establish that she was treated worse “as a woman,” but rather that she was penalized for challenging sexist practices. Thus, this approach avoids the problem with traditional discrimination claims of unintentionally reinforcing an essentialist view of what it means to be “a woman” through the assertion of a sex-equality right. In addition, by valuing and protecting the claimant’s choices and actions in challenging inequality, the retaliation claim is less vulnerable than other types of discrimination claims to criticisms that it turns claimants into passive victims of an oppressive social structure. Finally, the retaliation claim shifts the focus from an individual’s prejudicial intent to his or her actions in shutting down opposition to inequality. In each of these respects, the retaliation claim offers important insights about how discrimination law can best disrupt social and institutional inequality.

In addition to these benefits, theorizing retaliation as a form of discrimination adds an important dimension to current understandings of the democratic underpinnings of discrimination law. Recognizing protection from retaliation as implicit in a legal ban on discrimination furthers the democratic values at the foundation of the law’s nondiscrimination guarantee. Discrimination law is often understood as promoting the ideal of equal citizenship as necessary to a fully functioning democracy. However, the components of equal citizenship and the social practices that promote equal citizenship are rarely examined. Studying the retaliation claim generates new insights into these questions. By protecting practices that challenge racism and sexism, the retaliation claim promotes the elimination of illegitimate racist and sexist preferences that taint democratic outcomes. In addition, by protecting challengers of discrimination regardless of their social group membership, the retaliation claim enables coalition building and collective opposition to racism and sexism that often cuts across social groups. In the process, it protects the construction of equal citizens who work together in the pursuit of social change and the social bonds that develop through such alliances.

However, in the final analysis, the retaliation claim is only as promising as its defining doctrines allow. The retaliation claim's potential to push discrimination law in progressive directions depends on the calibration of legal rules that set its limits. One of the most restrictive and damaging doctrinal limits that has emerged in recent years is the requirement that the plaintiff demonstrate a reasonable belief that the underlying conduct at the source of her complaint amounts to unlawful discrimination. This doctrine has not received scholarly attention commensurate with its importance. As applied by courts, the reasonable belief doctrine severely undercuts the law's protection of persons who challenge inequality. This Article advocates revisiting this doctrinal limit in order to realize the full potential of the retaliation claim.

Finally, a note is in order about the focus of this Article. This discussion of retaliation focuses primarily on challenges to race and gender inequality. Challenges to inequality and discrimination on any grounds risk triggering retaliation, and much of the analysis of this Article applies to institutional and legal responses to discrimination claims more generally. While emphasizing only two aspects of identity and bias risks oversimplifying both the complexity of subjects and the complexity of bias,<sup>8</sup> this Article focuses primarily on challenges to race and gender inequality for two reasons. First, legal protections from retaliation are tied to nondiscrimination guarantees that single out race and gender, along with other protected class statuses, and treat them as single-axis forms of bias. Although race and gender bias are complex in their similarities and differences, the legal standards for retaliation treat challenges to race and gender bias the same. The analysis here draws substantially on case law addressing protection from retaliation for challenging race and gender discrimination. Second, the social science literature surveyed for this Article focuses primarily on race and gender bias, and reveals a similar dynamic with respect to retaliation as punishment for challenging race and gender inequality. I do not suggest that race and gender are fungible. Rather, they share important commonalities in how retaliation punishes "outsiders" who challenge systemic privilege, and it is

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8. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

useful to examine race and gender bias as interlocking systems of subordination.<sup>9</sup> Finally, the focus on race and gender in this discussion should not be read to imply that retaliation for challenging other kinds of inequality, such as sexual orientation discrimination, does not raise similar concerns. Indeed, the commonalities with respect to race and gender bias claimants, and the role of social power in the dynamics of retaliation, suggest that the analysis offered here applies to challenges to other forms of bias as well.

This Article proceeds in four parts. Part II examines social science literature regarding retaliation in response to complaints about discrimination. This section examines a number of questions, including why retaliation happens and what functions it performs within institutions. This literature paints a picture of retaliation as a social dynamic that punishes transgressions against the social order and silences challengers. The understanding of retaliation that emerges from this literature sets the stage for an exploration of the legal and theoretical questions about the proper treatment of retaliation under discrimination law.

Part III turns to legal understandings of retaliation and its relationship to nondiscrimination guarantees. This section examines the recent controversy over implying a private right of action against retaliation in a nondiscrimination statute that is silent about retaliation claims. After explaining this doctrinal controversy and its culmination in the *Jackson* case, this section contends that the issue of whether to recognize such an implied private right of action is a tougher question than is commonly assumed. The current dominant interpretation limits discrimination to the status-based differential treatment of individuals. Recognizing retaliation as a form of intentional discrimination, as the Court did in *Jackson*,<sup>10</sup> requires pushing the scope of discrimination law beyond the current dominant understanding. The remainder of this section offers a theoretical approach that reconciles discrimination law with implicit protection from retaliation by conceptualizing discrimination as encompassing systemic race and gender privilege and the pun-

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9. Cf. Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002) (analyzing the interlocking and symbiotic nature of systems of subordination and advocating strategies for change that emphasize the overlaps and connections between social groups).

10. 125 S. Ct. at 1509–10.

ishment of persons who contest it. Finally, this section elaborates the many advantages such an understanding holds for discrimination law, including the furtherance of the law's democracy-enhancing values.

Part IV turns from the promise of the retaliation claim to the reality of restrictive doctrinal limits that currently undermine its potential. This section discusses the reasonable belief doctrine in retaliation claims and criticizes its current application in the courts. In the final analysis, the reasonable belief doctrine requires reconsideration in order to avoid turning the retaliation claim into a vehicle that legitimates privilege and inequality instead of undermining them. The Article concludes that, like much discrimination law, the retaliation claim, as currently constructed, simultaneously tantalizes and then retreats in its promise to disrupt entrenched systems of privilege and inequality.

## II. THE NEED TO PROTECT DISCRIMINATION CLAIMANTS: LESSONS FROM SOCIAL SCIENCE

The social science literature on bias and the dynamics of challenging discrimination shows retaliation to be a powerful weapon of punishment for persons who challenge the hierarchies of race and gender. The research discussed in this section reveals three main points. First, retaliation operates against a backdrop of widespread reluctance to acknowledge and report discrimination. This reluctance reflects an acute understanding of the social costs of identifying and challenging discrimination. Second, persons who challenge discrimination are often disliked by the beneficiaries of the social structure. This dislike creates prime conditions for retaliation. Third, the threat of retaliation functions as a powerful silencer. It suppresses challenges to race and gender bias, thereby functioning to preserve the social order. The understanding of retaliation that emerges from this literature demonstrates the need for strong legal protection from retaliation against persons who identify and challenge inequality.

### A. THE BACKGROUND: THE RELUCTANCE TO ACKNOWLEDGE AND REPORT DISCRIMINATION

As anyone who has experienced bias or prejudice knows, naming and challenging discrimination is socially and psychologically difficult. By the time retaliation intervenes to punish someone for alleging discrimination, that person has already

overcome a myriad of psychological and social forces operating to suppress that claim. Research in social psychology has documented a marked reluctance among the targets of discrimination to label and confront their experiences as such. It is worth discussing this phenomenon at the outset, as it is an important piece of the social fabric suppressing claims of bias, and provides the background against which retaliation performs its work.

Persons subjected to unfairness have a widely shared reluctance to see themselves as victims.<sup>11</sup> This general disinclination becomes particularly salient in the context of acknowledging one's own experiences with discrimination. Persons who acknowledge that discrimination disadvantages their social group as a whole nonetheless tend to see themselves as the lucky exceptions, even when confronted with reason to believe that they themselves have experienced discrimination.<sup>12</sup>

Recent studies in this area have continued to show a general reluctance on the part of women and persons of color to perceive themselves as targets of discrimination, notwithstanding evidence that discrimination has occurred. One recent series of studies using women to test perceptions of sex bias and African Americans and Asian Americans to test perceptions of race bias found a shared tendency to resist interpretations of discrimination in situations where it was ambiguous, but likely to have occurred.<sup>13</sup> Employing a model often used in this literature, the subjects were given a series of written aptitude tests and then presented with poor test results, along with information suggesting some chance, in varying degrees of likelihood, that their test had been evaluated by a grader who was biased against their social group.<sup>14</sup> The subjects then answered ques-

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11. The research discussed here specifically focuses on the reluctance of individuals to acknowledge race and/or gender bias, but it is consistent with other general psychological phenomena, including the tendency to underestimate the occurrence of negative events, the illusion of unique invulnerability, and the better-than-average effect. See, e.g., Karen M. Ruggiero & Donald M. Taylor, *Why Minority Group Members Perceive or Do Not Perceive the Discrimination That Confronts Them: The Role of Self-Esteem and Perceived Control*, 72 J. PERSONALITY & SOC. PSYCHOL. 373, 386 (1997).

12. See, e.g., Faye J. Crosby, *Why Complain?*, 49 J. SOC. ISSUES 169, 174 (1993); Elizabeth H. Dodd et al., *Respected or Rejected: Perceptions of Women Who Confront Sexist Remarks*, 45 SEX ROLES 567, 568–69 (2001) (summarizing research showing that women tend to explain away sexism, despite evidence that it has occurred).

13. See Ruggiero & Taylor, *supra* note 11, at 376, 385.

14. *Id.* at 377, 381. The subjects in both groups were undergraduate stu-

tions about their test-taking experience, including questions designed to elicit their perceptions of why they performed poorly on the test.<sup>15</sup> The researchers found that the subjects consistently blamed the poor test results on themselves rather than on discrimination, except for those who had learned with certainty that their judge had been biased.<sup>16</sup> Interestingly, the rate of self-blaming, as opposed to discrimination claiming, was nearly identical when there was any ambiguity about discrimination by the graders, regardless of whether the information suggested a high or low likelihood of such discrimination.<sup>17</sup>

In examining the reasons for this phenomenon, researchers found that the subjects who attributed their poor test results to personal failings were able to preserve their self-esteem as social actors, albeit at the expense of their self-esteem in the performance domain.<sup>18</sup> Avoiding attributions of discrimination enabled the subjects to preserve their socially oriented self-esteem and their feelings of control over their destiny.<sup>19</sup>

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dents who were recruited to participate in the study from an introductory psychology course. *Id.* at 376, 381. The study was closely modeled on an earlier study using women as subjects, where women were told, after receiving negative test results, that 100 percent, 75 percent, 50 percent, 25 percent, or 0 percent of the judges discriminated against women. *Id.* at 374 (explaining earlier research). In all but the 100 percent group, the women consistently blamed themselves rather than discrimination for the poor results. *Id.* Perhaps most strikingly, they were equally likely to blame themselves given a 75 percent likelihood of discrimination as they were when given a 25 percent likelihood. *Id.* The follow-up study discussed in the text sought to replicate these results using two subject groups, one examining gender and the other examining race, and sought to probe more deeply the reasons for the reluctance to blame discrimination. *Id.* at 376.

15. *Id.* at 377, 381.

16. *Id.* at 378, 382. In the experiment with Asian-American and African-American subjects, the researchers found that the Asian-American subjects exhibited a slightly greater tendency to blame the test results on personal failings. *Id.* at 382. Interestingly, in an identical study done earlier, white and male subjects in control groups did not minimize perceived discrimination, but were highly vigilant in perceiving discrimination against themselves, suggesting the importance of social group membership in explaining the reluctance to make attributions to discrimination. *Id.* at 386.

17. *Id.* at 378, 382.

18. *Id.* at 379, 383.

19. *Id.* at 384–85. The efforts of the subjects to manage their identity, and its attendant costs, remind me of Pat Williams's work discussing her own efforts to construct something positive from that part of her that is shaped by racial oppression. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 216 (1991). She discussed her conflicting feelings about her mother's statement when she got in to Harvard Law School, that she had it "in [her] blood" because the slave owner who raped her great-

These findings support prior research documenting the threat that acknowledging discrimination poses to an individual's sense of control and invulnerability.<sup>20</sup> The widely shared "just world" hypothesis, which posits a common desire to believe that the world is a just place, encourages such cognitive distortions to enable people to attribute negative outcomes to factors within their individual control.<sup>21</sup> Since perceiving and acknowledging discrimination is a prerequisite for engaging in any form of considered resistance to it, one unfortunate implication of these findings is that members of stigmatized social groups are less inclined to challenge systemic discrimination, thereby silently facilitating it.<sup>22</sup>

For those targets of discrimination who overcome their own psychological resistance to perceiving themselves as victims of discrimination, additional obstacles suppress publicly confronting and reporting it. Social psychologists have noted a striking gap between recognizing an experience as discrimination and publicly naming it as such.<sup>23</sup> Most of the research on the low level of reporting discrimination has been done in the area of sexual harassment. Social science literature on sexual harassment abounds with findings showing that sexually harassed women most often choose coping strategies of avoidance or denial and that the least likely response is to report the harassment to someone in a position of authority.<sup>24</sup> The low likelihood

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grandmother was a lawyer. *Id.* Among Williams's mixed emotions was a feeling of pride of ownership of her abilities. *Id.*

20. See Crosby, *supra* note 12, at 174.

21. *Cf. id.* (discussing cognitive distortions).

22. See, e.g., Cheryl R. Kaiser & Carol T. Miller, *A Stress and Coping Perspective on Confronting Sexism*, 28 *PSYCHOL. WOMEN Q.* 168, 175 (2004) ("[A]cknowledging prejudice and discrimination is an essential precursor to efforts aimed at mitigating the injustices that might otherwise continue to exist . . . . [W]hen groups of disenfranchised individuals come together with a common goal, such as reducing sexism, this can result in social movements that bring about changes that actually affect how the group is treated.").

23. See *id.* at 168; Charles Stangor et al., *Reporting Discrimination in Public and Private Contexts*, 82 *J. PERSONALITY & SOC. PSYCHOL.* 69, 69 (2002) ("[P]rior research has shown that members of stigmatized groups are in many cases unlikely to report that negative events that occur to them are due to discrimination, even when this is a valid attribution for the event.").

24. See, e.g., Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 *J. APPLIED PSYCHOL.* 230, 230 (2002); Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 *SEX ROLES* 239, 240, 247-48 (1993); Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of*

of reporting sexual harassment cuts across differences in racial, cultural, and professional backgrounds.<sup>25</sup>

The robustness of social science findings on the reluctance of women to publicly confront sexist behavior is all the more significant in that it defies expectations about how women believe they would behave if confronted with discrimination. In one important study of women's responses to sexism, the vast majority of the women subjects predicted that they would challenge certain sexist remarks when asked how they would respond to a specific scenario involving blatantly sexist comments.<sup>26</sup> However, in another part of the same study, a

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*Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 120–21 (1995); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 37–39 (1993); Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 690–93 (1997); Laurie A. Rudman et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization in University Sexual Harassment Grievance Procedures*, 9 BASIC & APPLIED SOC. PSYCHOL. 519, 520 (1995); see also David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1280 (2001) (reporting the results of a study finding that among women who ultimately sued their employers for sexual harassment, nearly half, 42 percent, did not report the harassment prior to suing and only 15 percent did so in a timely manner).

25. See, e.g., Knapp et al., *supra* note 24, at 687, 693–94 (citing research showing no relationship between women's race and their responses to sexual harassment); S. Arzu Wasti & Lilia M. Cortina, *Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment*, 83 J. PERSONALITY & SOC. PSYCHOL. 394, 402 (2002) (reporting the results of a study comparing responses to sexual harassment by professional women in Turkey, professional and working class Anglo-American women in the United States, and professional and working class Hispanic women in the United States, and finding that women from all of these backgrounds resorted to "advocacy-seeking," such as reporting, complaining or speaking with management, the least frequently in responding to sexual harassment). Even women attorneys, a group one might expect to be especially confident in asserting their rights, exhibit a reluctance to publicly claim bias. See Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 L. & SOC. INQUIRY 235, 259–60 (2002) (describing a study of female attorneys' responses to incivility in legal practice, a phenomenon with a gender-based dimension); cf. Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254, 255 (2001) (describing a study of female attorneys' responses to sex discrimination in the workplace).

26. Janet K. Swim & Lauri L. Hyers, *"Excuse Me—What Did You Just Say?!" Women's Public and Private Responses to Sexist Remarks*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 68, 68–88 (1999). The scenario involved a conversation in which a male colleague made three remarks with overtly sexist over-

majority of female subjects did not in fact challenge the same sexist remarks when actually faced with such a scenario.<sup>27</sup> The women's silence in the face of sexist behaviors reflected the influence of social constraints and the fear of negative judgments if they confronted the offender, rather than an acceptance of, or acquiescence in, the situation.<sup>28</sup>

This striking gap between expected and actual responses to bias was confirmed in a subsequent study designed to more closely replicate an employment setting.<sup>29</sup> In this study, college-age women were asked to predict how they would respond to three sexist questions in a job interview. A different group of subjects, also college-age women, were then placed in a simu-

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tones: (1) openly endorsing traditional gender roles, (2) seeing women as sex objects, and (3) expressing the view that women are responsible for domestic chores. *See id.* at 73. The researchers counted a subject's response as a confrontation if she confronted one or more of these three comments. *See id.* at 75–76.

27. *Id.* at 79. Although very few women predicted that they would *not* respond to the sexist comments, *id.* at 81–83, in fact, only 45 percent confronted the remarks in some way, most frequently using indirect strategies such as asking the commentator to repeat himself or asking a rhetorical question. *Id.* at 75–76. Only 16 percent of the women directly challenged any of the remarks, *id.* at 79, despite the fact that the women in the first part of the study had overwhelmingly predicted that they would directly challenge the sexist remarks. *Id.* at 81–83. Among the variables correlated with a confrontation response, one of the highest was a predisposition to a feminist and activist orientation. *Id.* at 78–79. The researchers concluded that it takes a person particularly committed to resisting sexism to overcome the social influences constraining confrontation. *Id.* at 85. Interestingly, the women were somewhat *less* likely to confront the remarks when there was another woman present in the group when the incident occurred, as opposed to when they were the only woman in the group. *Id.* at 79–80. Apparently, the presence of another woman who was silent reinforced the subject's own inclination to remain silent, while the absence of another woman placed the sole moral responsibility on the subject to confront the sexist comments. *See id.* at 80.

28. *Id.* at 79 (reporting that, among the women who did not engage in confrontation, three-quarters judged the commentator as prejudiced and 91 percent held negative views toward him); *see also* Dodd et al., *supra* note 12, at 567, 569 (discussing women's fears of how others would perceive them if they confronted sexism).

29. *See* Julie A. Woodzicka & Marianne LaFrance, *Real Versus Imagined Gender Harassment*, 57 J. SOC. ISSUES 15 (2001). In the first part of the study, 197 college-age female respondents read a written scenario describing the job interview and were asked how they would respond. *Id.* at 20–21. The study was designed to further test and explore findings from prior research, including the Swim and Hyers study discussed above, *supra* note 26, showing a large gap between women's expectations that they would confront or report sexism compared to their actual non-confrontational responses. *See* Woodzicka & LaFrance, *supra*, at 15–19 (discussing problems with prior studies and research methods).

lated job interview, allegedly to qualify for a research assistant position, and were asked the same three sexist questions.<sup>30</sup> Again, women's actual responses were dramatically less confrontational than predicted, with very few women confronting the questioner in any way.<sup>31</sup> Once again, the tepid responses reflected an acute awareness of the social costs of confronting discrimination, rather than an acceptance of the situation.<sup>32</sup>

This research reveals a world in which even seemingly passive targets of discrimination respond as active agents who make choices about when to confront, challenge, or ignore prejudice. Most significantly for our purposes, the research demonstrates that the widespread failure to confront discrimination publicly, contrary to expectations, is largely shaped by

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30. See Woodzicka & LaFrance, *supra* note 29, at 21–22. The offending questions were asked by a male interviewer and were interspersed with more normal interview questions. *Id.* at 22. The three questions were: (1) do you have a boyfriend?, (2) do people find you desirable?, and (3) do you think it is important for women to wear bras in the workplace? *Id.* Each of these questions was pretested, using a different set of subjects, to confirm that it was perceived by women to be sexually harassing. *See id.*

31. *See id.* at 23–24. A strong majority of the women in the first group, 68 percent, had predicted they would refuse to answer at least one of the questions, with 62 percent saying they would ask the interviewer why he had asked the question or tell him the question was inappropriate and 28 percent saying they would take more drastic measures such as abruptly leaving the room or rudely confronting the interviewer. *Id.* at 21. Of the women actually on the receiving end of the questions, over half ignored the sexist nature of the questions altogether, responding literally to the question asked, and slightly over one-third politely asked the interviewer why he asked the question, but then proceeded to answer it anyway. *Id.* at 23–24. Of the subjects who asked why the interviewer had asked the question, 80 percent did so after the interview was over, while at the moment the question was asked, they simply responded. *Id.* at 24. None of the women refused to answer any of the questions, directly challenged the interviewer, left the interview, or reported the interviewer to an authority figure. *See id.*

32. Most of the women in the first part of the study predicted that they would feel angry if they were asked such questions, but among the women actually in the interview setting, the predominant emotional response was fear: 40 percent of the women reported feeling fear and only 16 percent reported feeling angry at the time. *Id.* at 25. Fear was more salient than anger in predicting the subject's response. *See id.* at 26; *cf. id.* at 18 (explaining that “[t]argets of sexual harassment fear retaliation, reprisals, and even physical harm” and citing literature interpreting sexual harassment as a manifestation of intimidation rather than sexuality). Interestingly, the researchers who observed the interviews noted that the most common physical response to the harassing questions was to smile, but that the smile represented the type of smile identified by prior psychological research to signal appeasement and accommodation rather than enjoyment. *See id.* at 26–27.

an acute perception of the social costs of doing so.<sup>33</sup> The next section addresses these social costs, and the conditions that give rise to them.

#### B. WHY RETALIATE? PERSONS WHO CLAIM DISCRIMINATION ARE DISLIKED FOR TRANSGRESSING THE SOCIAL ORDER

A disturbing body of research demonstrates a high propensity for men and white persons to dislike women and people of color when they claim discrimination, even when the claim is meritorious. The social penalty for transgressing social roles and challenging perceived inequality sets the stage for retaliation.

Social psychologists have found that women and racial minorities are perceived as troublemakers and hypersensitive when they confront discrimination.<sup>34</sup> One of the path-breaking studies of its kind, conducted in 2001 by social psychologists Cheryl Kaiser and Carol Miller, found that African Americans who blamed discrimination for a poor performance rating on a test were viewed more negatively than African Americans who blamed themselves.<sup>35</sup> The predominantly white evaluators consistently rated an African-American student more negatively—as a complainer, a troublemaker, hypersensitive, emotional, argumentative, and irritating—when he attributed his poor test

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33. Cf. Bergman et al., *supra* note 24, at 237 (“[O]ur results and others . . . also show that reporting can harm the victim in terms of lowered job satisfaction and greater psychological distress. Such results suggest that, at least in certain work environments, the most ‘reasonable’ course of action for the victim is to avoid reporting.” (citations omitted)).

34. See Stangor et al., *supra* note 23, at 70 (citing research demonstrating the social costs of reporting discrimination). See generally Crosby, *supra* note 12, at 170–71 (discussing social norms that depict people who complain as unattractive whiners and malingerers, while promoting the ideal of suffering uncomplainingly as noble); Kaiser & Miller, *supra* note 22, at 168, 175 (explaining their own work and citing other studies).

35. Kaiser & Miller, *supra* note 25, at 261. The study involved predominantly white male subjects who read a written scenario describing an African-American college student who completes a test and is then informed that there is some chance, of varying degrees, that the test will be evaluated by a racist judge. See *id.* at 256–57. The accounts varied, with the student being told that one, four, or all of the eight judges (all of whom were white) discriminated against African Americans. See *id.* at 257. In the scenario, the African-American student then learns that he received a failing grade, after which he completes a survey evaluating the experience and rating the factors he believed affected his performance. See *id.* The subjects of the study read this account and responded to questions designed to reveal their reactions to the African-American student. See *id.*

performance to discrimination rather than to his own ability, regardless of the objective likelihood that the student actually experienced discrimination.<sup>36</sup> A follow-up experiment by the same researchers examined whether external attributions more generally, and not necessarily attributions to discrimination, might explain the negative reactions.<sup>37</sup> The results of this experiment confirmed that attributions of discrimination by an African-American student triggered negative reactions towards him, while another external attribution, blaming the test, did not.<sup>38</sup> This research adds to the body of work documenting the social costs incurred by members of stigmatized groups when they assert claims of discrimination.<sup>39</sup>

A 2003 follow-up study by the same researchers found that the social penalty persists even when the subjects are exposed to persuasive evidence that discrimination actually had occurred.<sup>40</sup> These results were strikingly similar to the earlier study: subjects viewed the African-American interviewee more negatively, as a “troublemaker,” hypersensitive and irritating, when he blamed racism for his failure to get the job, even when the subjects were exposed to direct evidence of the interviewer’s prejudice and discrimination.<sup>41</sup> The authors concluded that social and interpersonal costs continue to penalize members of

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36. *See id.* at 261. Interestingly, at the same time that subjects rated the student negatively for claiming discrimination, they also rated the student as more “true to self” when he attributed the poor results to discrimination—suggesting that the subjects might have recognized that discrimination had occurred and gave the student some credit for standing up for himself, but devalued him nonetheless for claiming discrimination. *See id.* at 262.

37. *See id.* at 259.

38. *See id.* at 261.

39. *See id.* at 255–56 (describing research documenting the high costs imposed on members of stigmatized groups when they report discrimination).

40. Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227 (2003). As with their 2001 study, the subjects were predominantly white undergraduates who agreed to participate in the study. *Id.* at 229, 234. The earlier experiment design was modified to have the subjects read a portfolio of a job interview with the reactions and comments of both the interviewer, who was white, and the interviewee, who was African American. *Id.* at 230. The subjects read the interviewer’s comments, explaining why the interviewee did not get the job, which reflected a range of subtle to blatant racial prejudice. *Id.* at 230–31. The subjects then read the interviewee’s reactions to the interview, including his perceptions about why he did not get the job, which varied from blaming his own interviewing skills and job competition to blaming discrimination. *Id.* at 231.

41. *See id.* at 234–35.

stigmatized groups who report discrimination, and that even direct exposure to evidence of prejudice does not temper the negative reactions to persons who claim discrimination.<sup>42</sup>

Social scientists likewise have documented negative reactions to women who confront sexism. One recent study found that women's confrontations of sexism typically generated feelings of hostility or amusement rather than guilt or remorse.<sup>43</sup> Another recent study examining men's and women's reactions to a woman's response to sexist comments found that men liked the woman less when she confronted sexist remarks than when she ignored them.<sup>44</sup> The male subjects in the study reserved their harshest disapproval for women who confronted comments that were blatantly sexist; women who confronted more ambiguous remarks as sexist did not trigger the same degree of dislike.<sup>45</sup> The researchers accounted for this surprising finding by explaining that the women who confronted the more blatant sexism represented a more clear challenge to the social order and transgressed traditional gender-role expectations.<sup>46</sup> They explained the social penalty as part of a social dynamic of punishing role transgressions that occurs when a member of a stigmatized group challenges the social hierarchy.<sup>47</sup>

The greatest social penalty imposed on persons who claim discrimination is inflicted by social groups in a position of privi-

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42. See *id.* at 234; see also *id.* at 228–29 (describing the implications of their own work and citing other research demonstrating that African Americans anticipate social backlash if they confront discrimination). The authors speculated that the social costs of claiming discrimination may result in part from the desire to see oneself, and one's social group, as egalitarian. *Id.* at 235.

43. Alexander M. Czopp & Margo J. Monteith, *Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 532, 541 (2003) (stating that “the predominant evaluative sentiment resulting from confrontations about gender-biased behavior was amusement”).

44. Dodd et al., *supra* note 12, at 574–75.

45. See *id.* at 575.

46. See *id.* (explaining the more tepid reaction to the ambiguous remarks); *id.* (“[P]erhaps [it was] because her unprovoked remark was dismissed as without legitimate cause. On the other hand, the target woman's response to the clearly sexist remark was legitimate, and as a consequence perhaps made especially salient the fact that she was transgressing her gender role by standing up to a man in that situation.”).

47. *Id.* at 568–69 (explaining that when women challenge sexism, the “confrontation goes against the more passive, ‘proper’ female gender role prescribed by society”); cf. Swim & Hyers, *supra* note 26, at 69 (explaining that the dynamic of punishment in response to transgressing gender roles contributes to the social constraints that suppress women's confrontations of sexism).

lege with respect to the discrimination in question. In the study just described of men's and women's reactions to a woman's responses to sexism, the female subjects in the study, in sharp contrast to the male subjects, responded more favorably to the woman when she confronted the sexist remarks than when she ignored them.<sup>48</sup> The researchers explained that the gender difference in reactions reflects men's greater inclination to punish transgressions from expected gender roles, and the greater tendency of women to respond more positively to departures from gender roles.<sup>49</sup> Other research confirms that social group membership significantly influences reactions to persons who claim discrimination.<sup>50</sup> For example, one study found that women and African Americans were more likely to claim discrimination privately and anonymously or in the presence of a member of their same social group, and less likely to do so publicly and in the presence of men or white persons, respectively.<sup>51</sup> The researchers attributed the different responses to the subjects'

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48. See Dodd et al., *supra* note 12, at 574–75. The authors noted the Catch-22 this creates for women in mixed-sex settings, forcing women faced with sexism to choose between being better liked by men or better liked and respected by other women. *Id.*

49. See *id.* at 575.

50. Cf. Kaiser & Miller, *supra* note 22, at 168 (explaining research finding that women are reluctant to tell members of high-status groups that they have been discriminated against).

51. See Stangor et al., *supra* note 23, at 73. The women and African-American subjects in this study were told that they had received a failing grade on a test, and then provided with facts suggesting a varying likelihood that discrimination, rather than ability, accounted for the negative results. *Id.* at 71–72. The subjects were told that the test measured creativity, and were informed that the grader was male or female or European American or African American, whichever was the opposite of the subject's own sex or ethnicity. *Id.* at 71. Subjects were then given the grader's written comments, which disclosed bias towards the subject's social group. *Id.* The subjects were then asked to rate the degree to which certain possible reasons, including ability and discrimination, explained their failing score. *Id.* The subjects were told in advance that they would have to make the rating anonymously or out loud in front of an interviewer. *Id.* at 71–72. The study format was similar to that used by Ruggiero and Taylor, *supra* notes 13–19, with the primary difference being the manipulability of the situation in which the subjects were asked to explain the negative test results. Stangor et al., *supra* note 23, at 71–72. The female and African-American subjects were much more likely to make attributions of discrimination either privately or in the presence of a member of their same social group, and much less likely to do so in the presence of a male or white person. *Id.* at 73; cf. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 7–8 (1989) (describing multiple consciousness, and posing the hypothetical example of a woman of color who shapes her responses in a first year criminal law class on rape, depending on the race and gender of the professor).

acute awareness of the different levels of social costs. This literature strongly suggests that the beneficiaries of the social order are the most likely to resent and punish its challengers.

Finally, the social costs of claiming discrimination are primarily reserved for low-power or stigmatized social groups. White persons and men are less susceptible to social costs when they publicly portray themselves as victims of race or sex discrimination.<sup>52</sup> When women and persons of color identify and object to discrimination, however, they are perceived as transgressing the social order, setting in motion a dynamic that sets the stage for retaliation.

### C. THE FUNCTION OF RETALIATION: SILENCING CHALLENGERS AND PRESERVING EXISTING POWER STRUCTURES

Retaliation performs important work in institutions. One of the most palpable functions of retaliation is to suppress challenges to perceived inequality. Retaliation performs much of this work without ever actually being inflicted on the potential challenger. Decisions about whether to challenge discrimination rest on a careful balancing of the costs and benefits of doing so.<sup>53</sup> The failure to report or confront discrimination often reflects expected social costs rather than an individual's private, benign interpretation of an event.<sup>54</sup> For example, women

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52. See, e.g., Ruggiero & Taylor, *supra* note 11, at 386 (explaining the results of an earlier study in which male subjects did not minimize perceived discrimination, but were highly vigilant in perceiving discrimination against themselves); Stangor et al., *supra* note 23, at 72–73 (discussing the results of control groups using men and white persons as discrimination claimants, and showing little evidence of high social costs when men and white persons attribute their own negative outcomes to discrimination); cf. MICHELLE FINE, *DISRUPTIVE VOICES: THE POSSIBILITIES OF FEMINIST RESEARCH* 64 (1992) (discussing the importance of relative social power as an influence on women's reactions to discrimination, and noting that persons of relatively high social power are more likely to succeed when they assert a single act of "taking control," such as filing a complaint or voicing a grievance).

53. See, e.g., Bergman et al., *supra* note 24, at 230–42 (discussing research on whistleblowing generally, and sexual harassment specifically, finding that persons engage in cost-benefit analysis to decide how to respond to wrongdoing).

54. See Czopp & Monteith, *supra* note 43, at 541 ("If confrontations against sexism are perceived as likely to yield aversive and unsuccessful results, a potential confronter may refrain from challenging future sexist acts, unintentionally conveying passive acceptance of such behavior."); Stangor et al., *supra* note 23, at 73 (describing research showing that even when persons accurately perceive discrimination, they often choose not to report it because of the social costs of doing so); Swim & Hyers, *supra* note 26, at 68 (describing research on the influence of social context on confronting discrimination and

who choose not to confront discrimination typically do so because they believe that the costs of confrontation outweigh the benefits, while women who report discrimination tend to be more optimistic about the likely benefits and costs of doing so.<sup>55</sup> An analysis of the costs and benefits of reporting discrimination, rather than an “ethic of caretaking” or an aversion to conflict, best explains women’s decisions not to report discrimination.<sup>56</sup> In this cost-benefit analysis, reporting discrimination is perceived to entail high costs.<sup>57</sup> Fear of provoking retaliation, in particular, drives many persons to choose not to report or challenge discrimination.<sup>58</sup>

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concluding that women who choose not to confront sexism act as “strategic negotiators of threatening situations”).

55. See Kaiser & Miller, *supra* note 22; cf. Knapp et al., *supra* note 24, at 703 (observing that younger workers are more likely to make formal complaints than older workers because younger workers have more positive expectations about the reporting process).

56. See Rudman et al., *supra* note 24, at 519, 534–38 (describing the results of their study on the comparative impact of “procedural justice” and a “caring perspective” as causative factors in the failure to report sexual harassment, and finding the former to be more responsible for the underreporting of sexual harassment). The picture that emerges of women in this literature resonates with Professor Kathryn Abrams’s theory of partial agency, in which women are constrained by their circumstances, but act as strategic social actors nonetheless. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

57. See, e.g., Kaiser & Miller, *supra* note 22, at 169 (describing one study finding that women perceive confronting sexist remarks to be equally risky to responding with physical aggression against the perpetrator); *id.* at 168, 175 (concluding that fear of the consequences explains much of the gap between labeling a behavior as discrimination and confronting those responsible or reporting it to others).

58. See, e.g., Dodd et al., *supra* note 12, at 569 (explaining that fears of not being believed, being retaliated against, being humiliated or of having one’s job negatively affected all contribute to the reluctance of women to confront sexism); Fitzgerald et al., *supra* note 24, at 127 (“Studies of victims consistently report that fear of personal or organizational retaliation is the major constraint on assertive responding.”); Gutek & Koss, *supra* note 24, at 39 (explaining that women rarely confront or report sexual harassment because they fear that it won’t accomplish anything and fear retaliation); Kaiser & Miller, *supra* note 22, at 169 (“The most commonly documented barrier to confronting discrimination is interpersonal costs, such as being perceived as a troublemaker or experiencing retaliation.”); Knapp et al., *supra* note 24, at 702 (identifying fear of retaliation or isolation and not wanting to be labeled a troublemaker or victim as primary reasons for not reporting sexual harassment); cf. Crosby, *supra* note 12, at 174 (“It is . . . widely known that to speak out against injustice is to invite condemnation, and this knowledge, added to the other disincentives, can be enough to assure at least temporary silence.”).

Fears of retaliation turn out to be well-founded. Retaliation occurs with sufficient frequency to justify perceptions of the high costs of reporting discrimination and support the rationality of decisions not to do so.<sup>59</sup> However, it is not the potential for retaliation in the abstract that effectively silences challenges. Retaliation occurs within an institutional context, and institutions retain a great degree of control over the extent to which fears of retaliation silence potential claims of discrimination. The organizational climate, including institutional norms and the organization's tolerance for discrimination and retaliation, has a profound influence on how persons choose to re-

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59. See, e.g., Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. ORG. BEHAV. 329, 334 (1998) (describing a study finding that women who reported sexual harassment through formal organizational channels experienced more negative outcomes than those who did nothing); Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 124–25 (2001) (“[M]any plaintiffs’ lawyers would tell you that once an employee complains about discrimination on the job, he or she can usually consider that employment relationship over.”); Donna J. Benson & Gregg E. Thomson, *Sexual Harassment on a University Campus: The Confluence of Authority Relations, Sexual Interest and Gender Stratification*, 29 SOC. PROBS. 236, 244–45 (1982) (discussing the results of a study of university students finding that female students who confronted their professors about harassment were more likely to experience retaliation than to reestablish a mutually satisfying teacher-student relationship); Bergman et al., *supra* note 24, at 230 (describing the results of a study finding that even in those situations where women believed that confronting the harassment “made things better,” empirical outcomes actually demonstrated the opposite); Bingham & Scherer, *supra* note 24, at 247–48 (describing the results of a study showing that making a formal or informal complaint produced worse outcomes than alternative responses, such as doing nothing, talking to the harasser, or seeking social support); Fitzgerald et al., *supra* note 24, at 122 (describing the results of a study of state employees finding that 62 percent of the women who reported sexual harassment experienced retaliation, with the most assertive responses often triggering the harshest response); *id.* at 123 (describing the results of another study finding that one-third of the persons who filed formal harassment claims said that it “made things worse,” and still another study finding that assertive responses were associated with more negative outcomes of every type, even after controlling for the severity of the harassment); Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED PSYCHOL. 877, 896 (1997) (“Contrary to conventional wisdom, assertive and formal responses were actually associated with more negative outcomes of every sort.”); Knapp et al., *supra* note 24, at 711 (“[A] very common negative reaction experienced by women who officially complain is public humiliation.”); Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983) (describing the results of their study on women who filed sex discrimination complaints against their employer with the Wisconsin Equal Rights Division, finding that 40 percent of the women reported experiencing retaliation).

spond to perceived discrimination.<sup>60</sup> If a target believes, based on past observations, that confronting or reporting discrimination is likely to trigger retaliation, she will be much less inclined to engage in such a response.<sup>61</sup> Retaliation has heightened power to silence discrimination claims within institutions that have a high tolerance for discrimination and retaliation.<sup>62</sup>

The other important work performed by retaliation is to preserve institutional power structures in the process of fending off challenges to them. Retaliation performs this function both when it is actually inflicted and when the threat of retaliation disproportionately chills complaints by persons with relatively lower social and institutional power. As a social and institutional practice, retaliation is fueled by and magnifies existing power disparities between the challengers and the beneficiaries of discrimination.

Retaliation is more likely to occur against vulnerable employees who lack the support of organizational powerbrokers.<sup>63</sup> Conversely, the more support a target receives from important persons within the organization, the less likely the target will be subjected to retaliation.<sup>64</sup> Because low-power persons are particularly susceptible to retaliation, the fear of retaliation is especially chilling and all the more effective in silencing their

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60. See, e.g., Knapp et al., *supra* note 24, at 712; see also *id.* at 707–08 (discussing literature on whistleblowing showing that organizations that are more hierarchical, bureaucratic, and authoritarian are also more likely to ignore dissent and suppress whistleblowing).

61. See *id.* at 711 (discussing research showing that beliefs about the potential efficacy of reporting and the likelihood of retaliation shape the formation of targets' responses); *id.* at 699–700 (discussing research showing a "feedback loop" where past outcomes of responses to harassment influence expectancies for future outcomes, and thus shape present responses).

62. See, e.g., Bingham & Scherer, *supra* note 24, at 245 (observing that the likelihood of individuals complaining to organizational authorities depends on their perception of whether the organization will take the complaint seriously and assist in resolving the situation); Fitzgerald et al., *supra* note 24, at 122 (discussing research showing that when the severity of the harassment was controlled for, the most powerful predictor of reporting was organizational context and the organizational norms and culture that also correlate with the likelihood of sexual harassment).

63. See Near & Jensen, *supra* note 59, at 21, 23 (reporting the results of a study of women who filed sex discrimination complaints against their employers with the Equal Rights Division of Wisconsin finding perceived support of top management to be inversely related to the comprehensiveness of retaliation).

64. See, e.g., Bergman et al., *supra* note 24, at 232, 236.

opposition.<sup>65</sup> The fear of retaliation is particularly debilitating for persons with low-institutional power across multiple dimensions. For example, women who are especially isolated and tokens in their jobs, women in nontraditional employment, and women who are especially vulnerable in their jobs are more likely to be silenced by the threat or fear of retaliation.<sup>66</sup>

At the same time that retaliation preys on the most vulnerable persons in institutions, it simultaneously magnifies the power of high-status persons to engage in discrimination. Power relations between the perpetrator and target greatly influence how the organization responds to reports of discrimination. Organizations are more likely to remedy discrimination when the targets of discrimination are higher-status, and least likely to do so where a lower-status target complains of discrimination by a higher-status perpetrator.<sup>67</sup> As the perpetrator's power increases relative to the target, reporting discrimination is less likely to lead to a positive outcome for the target.<sup>68</sup> The potential for retaliation increases as the power disparity widens between a low-status target and a higher-status perpetrator.<sup>69</sup> Perhaps not surprisingly, then, women and men of color tend to file a disproportionate number of re-

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65. See, e.g., Knapp et al., *supra* note 24, at 694 (explaining research showing that targets of sexual harassment are least likely to report or confront the harassment when the perpetrator is a supervisor or other person with higher organizational power); *cf. id.* at 704–05 (explaining converse finding that persons of higher occupational status who wield more power within the organization are more likely to report the harassment because they are better positioned to avoid retaliation).

66. *Id.* at 704 (noting that “gender pioneers do not expect that they will be supported,” and are more isolated, and “under great pressure to ‘fit in’”).

67. See Bergman et al., *supra* note 24, at 239 (“Organizations are less likely to take action against high-status perpetrators, and as the organizational power and status of the perpetrator increase, the likelihood of organizational action decreases.”).

68. See Bingham & Scherer, *supra* note 24, at 244, 260. Not surprisingly, employees also reported lower levels of satisfaction with the outcome of reporting harassment when they perceived their work climate as tending to encourage sexual harassment. *Id.* at 261.

69. See Cortina et al., *supra* note 25, at 258–59 (citing and explaining their 2001 study of federal court employees, which showed that retaliation increased when employees spoke out against more powerful organizational members). See generally Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247 (2003) (explaining that the relative social positions of the target and the perpetrator affect both the form and likelihood of retaliation).

taliation claims.<sup>70</sup> The greater the power disparity between the wrongdoer and the victim, the greater the extent to which the victim's resistance deviates from prescribed institutional and social positions, and the more likely it is that organizational members will sanction the challenger.<sup>71</sup> Retaliation thus serves as a mechanism to maintain hierarchies within institutions and restore the social norms that are challenged by claims of wrongdoing.<sup>72</sup>

Like discrimination, retaliation is a product of an organization's existing climate and structures.<sup>73</sup> It is more likely to occur in organizations with a high tolerance for, and incidence of, discrimination.<sup>74</sup> The relationship between discrimination and

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70. See NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 1, at 12 (analyzing 2003 EEOC data and reporting that 30 percent of retaliation claims are filed by women of color, 27 percent by men of color, 26 percent by white women, and only 11 percent by white men).

71. See Cortina et al., *supra* note 25, at 259 (explaining that exposing the misbehavior of a highly placed person in an organization questions the hierarchy of the organization, causing the dominant coalition to retaliate in order to restore organizational hierarchy); *id.* (explaining that whistleblowing by a lower status person against higher-status persons is seen as "deviant behavior and a more serious offense in a socially stratified society . . . likely to evoke the greatest sanction").

72. See Cortina & Magley, *supra* note 69, at 260 ("[O]rganizations use retaliation to maintain social control over dissidents and restore group norms."); *cf.* Marcia A. Parmerlee et al., *Correlates of Whistleblowers' Perceptions of Organizational Retaliation*, 27 ADMIN. SCI. Q. 17, 19–20, 30–31 (1982) (discussing research suggesting that retaliation can be used for diverse purposes, including silencing, discrediting and damaging dissidents and punishing vulnerable challengers in order to warn other persons against challenges to authority, and explaining the challenge to organizational authority that whistleblowing presents).

73. Cortina & Magley, *supra* note 69; Near & Jensen, *supra* note 59, at 5–8; *cf.* Bergman et al., *supra* note 24, at 233 ("Organizational responses may function as a continuation of the harassing behaviors, in that negative organizational responses (e.g., retaliation) may further victimize the harassment target. Thus, job-gender context may influence responses to reports in much the same way that it affects sexual harassment."); Parmerlee et al., *supra* note 72, at 30 (suggesting that the acts of individual supervisors are part of an organizational process, and explaining that the support of top management strongly influences retaliation, demonstrating that retaliation is an organizational response, and not the act of lone individuals).

74. See Bergman et al., *supra* note 24, at 236–37 (stating that "[r]etaliation and minimization [of the harassment] were associated with higher perpetrator rank, more negative organizational climates, and greater frequency of sexual harassment[.]" and noting that, as organizational tolerance for sexual harassment increases, so does retaliation for reporting it); *cf.* Czopp & Monteith, *supra* note 43, at 536 (citing research showing that low-prejudice people react to discovering their biases with feelings of guilt, whereas high-prejudice participants were more likely to react with feelings of

retaliation is reciprocal: just as the tolerance for discrimination increases the likelihood of retaliation, retaliation also encourages further discrimination.<sup>75</sup>

### III. THE PROMISE OF THE RETALIATION CLAIM

The realities of retaliation in response to claiming discrimination necessitate strong legal protection from retaliation if the law is to provide meaningful nondiscrimination guarantees. However, despite the connections developed in the social science literature between retaliation and the furtherance of discrimination, current legal understandings of discrimination require some theoretical stretching to encompass retaliation. The disconnect between retaliation and discrimination under existing doctrine recently came to a head in *Jackson v. Birmingham Board of Education*, which required the Court to decide whether Title IX implies a private right of action for retaliation.<sup>76</sup> An appreciation of the complexity of the issue in *Jackson* provides the opening to a broader rethinking of the boundaries of discrimination law and its relationship to retaliation. This section contends that recognizing retaliation as a form of discrimination necessarily pushes the boundaries of current discrimination law in productive ways, both in terms of the scope of the antidiscrimination project and the values underlying discrimination law.

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anger and irritation); Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCHOL. 578, 586 (1997) (explaining that harassment in organizations is a function of organizational climate, including the communicated tolerance for harassment, and structural factors such as the gender ratio of jobs combined with the gendered nature of job responsibilities).

75. Research by social psychologists has shown that the social influence of hearing someone either condemn or condone racism strongly affects subjects' reactions to racism. See Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. APPLIED PSYCHOL. 993, 995 (1994) (reporting the results of campus study exploring the effects of the expression of social opinions on racism, and concluding that hearing statements condoning racism increased the subject's own racist sentiments). The authors found that this phenomenon occurred regardless of the race of the person condoning racism, and concluded that racist sentiment is malleable, and that reducing the social constraints on prejudice has the potential to cause increased racism. *Id.* at 995, 997.

76. 125 S. Ct. 1497, 1502 (2005).

A. *JACKSON* AND THE CONTROVERSY OVER IMPLYING A RETALIATION CLAIM FROM A BAN ON DISCRIMINATION

The *Jackson* case forced the Court to confront the relationship between retaliation and discrimination in order to decide whether retaliation for complaining about a perceived Title IX violation is a form of intentional discrimination on the basis of sex. Although many nondiscrimination statutes, including Title VII,<sup>77</sup> the Age Discrimination in Employment Act,<sup>78</sup> and the Americans with Disabilities Act,<sup>79</sup> explicitly prohibit retaliation, Title IX does not mention retaliation. Because Title IX is interpreted similarly to Title VI of the Civil Rights Act of 1964,<sup>80</sup> which prohibits race discrimination in federally funded programs and which is also silent with respect to retaliation, the Court's ruling in *Jackson* should also decide the fate of retaliation claims under Title VI.<sup>81</sup> Regulations issued by the Department of Education have long prohibited retaliation for asserting rights under both of these statutes,<sup>82</sup> but the statutory silence left lower courts to struggle with whether to recognize an implied private right of action for retaliation under Title VI

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77. 42 U.S.C. § 2000e-3 (2000). In language that serves as a model for other statutory bans on retaliation, Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

*Id.*

78. 29 U.S.C. § 623(d) (2000).

79. 42 U.S.C. § 12203 (2000).

80. 42 U.S.C. § 2000d (2000).

81. See, e.g., *Litman v. George Mason Univ.*, No. 01-2128, 2004 U.S. App. LEXIS 3533, at \*2-3 (4th Cir. Feb. 25, 2004) (vacating and remanding the district court's dismissal of a Title IX retaliation claim in light of a Fourth Circuit decision holding that Title VI includes a private right of action for retaliation, and noting that Title IX and Title VI should be interpreted in the same manner).

82. See 34 C.F.R. § 100.7(e) (2000) ("No recipient [of federal funds] or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title IX or Title VI], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [Title IX or Title VI]."). Both Title VI and Title IX explicitly authorize federal agencies to promulgate regulations interpreting and enforcing the statutory ban on discrimination. 42 U.S.C. § 2000d-1 (2000); 20 U.S.C. § 1682 (2000).

and Title IX.<sup>83</sup> The Court's decision in *Jackson* to imply a retaliation claim from the general prohibition on sex discrimination also has implications for other legal sources of equality rights that are silent with respect to retaliation, including 42 U.S.C. § 1983,<sup>84</sup> the primary vehicle for asserting equal protection, and the Reconstruction statutes, sections 1981,<sup>85</sup> 1982,<sup>86</sup> and 1985.<sup>87</sup>

In *Jackson*, a male teacher and coach of the girls' high school basketball team at Ensley High School in Birmingham, Alabama, alleged retaliation for complaining about the unequal funding and unequal access to athletic facilities and equipment allotted to his team.<sup>88</sup> School officials responded by relieving him of his coaching position.<sup>89</sup> Mr. Jackson sued the Birmingham Board of Education in federal court, alleging retaliation under Title IX and the Department of Education regulation

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83. For a discussion of the split in the courts over whether to recognize implied private rights of action for retaliation under Title IX and Title VI, see Bradford C. Mank, *Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does Sandoval or Sullivan Control This Question?*, 35 SETON HALL L. REV. 47 (2004).

84. 42 U.S.C. § 1983 (2000) (prohibiting deprivations of federal rights under color of state law).

85. 42 U.S.C. § 1981 (2000) (prohibiting race discrimination in the making and enforcing of contracts); cf. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 637 (6th ed. 2003) (observing that, even though recent appellate decisions have found implicit protection from retaliation in § 1981, "this interpretation cannot be considered settled" in light of the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)).

86. 42 U.S.C. § 1982 (2000) (prohibiting race discrimination in property transactions). Although the Supreme Court previously recognized an implied private right of action for retaliation under this statute in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 337 (1969), more recent Supreme Court precedent raised questions about the ongoing validity of *Sullivan*. See, e.g., *Mock v. S.D. Bd. of Regents*, 267 F. Supp. 2d 1017, 1022 (D.S.D. 2003) (ruling that Title IX does not create an implied private right of action for retaliation and questioning whether *Sullivan* survives the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001)). The *Jackson* decision put these doubts to rest, reaffirming *Sullivan* and construing that decision as recognizing implicit protection from retaliation in a broad nondiscrimination guarantee, and not merely allowing third-party standing to assert nondiscrimination rights on behalf of others. *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1505–06 & n.1 (2005).

87. 42 U.S.C. § 1985 (2000) (prohibiting a conspiracy to violate federal civil rights).

88. 125 S. Ct. at 1503.

89. See *id.* Mr. Jackson was not fired outright, since the school district retained him as a teacher, but he lost his supplemental pay for coaching. *Id.*

barring retaliation for assertions of rights under Title IX.<sup>90</sup> The district court dismissed the lawsuit on the ground that Title IX did not include an implied cause of action for retaliation.<sup>91</sup> The Eleventh Circuit affirmed, citing the absence of textual support in Title IX for a retaliation claim and contrasting Title IX's silence with Title VII's express prohibition on retaliation.<sup>92</sup>

While the *Jackson* case worked its way up to the high Court, the Fourth Circuit reached the opposite result in a case decided under Title VI. In *Peters v. Jenney*, a white female teacher and director of the school's gifted program alleged retaliation for her advocacy of changes to the program's selection criteria, which disproportionately excluded African-American students and, she believed, violated Title VI.<sup>93</sup> The school district responded by removing her from her position as director of the program.<sup>94</sup> Her challenge to the school district fared better in the lower courts than the retaliation claim in *Jackson*. The Fourth Circuit disagreed with the Eleventh Circuit's reasoning, finding the absence of statutory language on retaliation less significant and citing earlier precedent recognizing protection from retaliation as implicit in a prohibition on discrimination.<sup>95</sup>

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90. *Id.*

91. *Id.*

92. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344 & n.12 (11th Cir., 2002), *rev'd*, 125 S. Ct. 1497 (2005). The Court granted certiorari on the question, "[d]oes [a] private right of action for violations of Title IX encompass redress for retaliation for complaints about unlawful sex discrimination?" 72 U.S.L.W. 3745 (U.S. June 15, 2004).

93. 327 F.3d 307, 313 (4th Cir. 2003).

94. *See id.* The school district did not remove Peters immediately, but declined to renew her probationary contract. *Id.*

95. *Id.* at 317–18 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (recognizing an implied private right of action for retaliation under 42 U.S.C. § 1982, even though the statute does not mention retaliation)). The *Peters* court also cited circuit court precedent recognizing a private right of action for retaliation under 42 U.S.C. § 1981. *Id.*; *see, e.g.*, *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 258 (4th Cir. 2001) (recognizing a private right of action under § 1981 for a white motel customer evicted due to association with black customers); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000) (permitting a white plaintiff allegedly retaliated against for opposing discrimination to bring suit under § 1981); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1266–67 (10th Cir. 1989) (recognizing standing to sue under § 1981 for a white attorney, who was allegedly subjected to adverse action because of his representation of black clients); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988) (recognizing a § 1981 action by a white employee allegedly terminated for assisting a black employee); *Fiedler v. Marumco Christian Sch.*, 631 F.2d 1144, 1149 n.7 (4th Cir. 1980) (permitting suit under § 1981 for a white plaintiff who was retaliated against

Several district courts weighed in on both sides of the controversy before the Supreme Court took up the *Jackson* case.<sup>96</sup>

The issue before the Court in *Jackson* turned on whether the statutory ban on sex discrimination implicitly encompasses a private right of action for retaliation against persons who complain of discrimination.<sup>97</sup> The Supreme Court ruled that it did, finding Title IX's ban on sex discrimination broad enough to encompass protection from retaliation notwithstanding the statute's silence on this question. The Court's ability to coherently situate retaliation within a ban on discrimination ultimately turned on how broadly or narrowly it construed "discrimination." However, neither the Supreme Court nor the lower courts that recognized retaliation claims fully engaged the complexity of the relationship between retaliation and discrimination under existing law. The question in *Jackson* is a challenging one because current Supreme Court precedent construes discrimination narrowly, thus making it difficult to imply protection from retaliation from a general ban on discrimination.

#### 1. The Disconnect Between Retaliation and Discrimination Under Existing Precedent

One important precedent complicating the issue in *Jackson* is *Alexander v. Sandoval*, in which the Court limited implied

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for opposing discrimination). These decisions, however, stand in some tension with the Supreme Court's reasoning in *Alexander v. Sandoval*, 532 U.S. 275 (2001). See, e.g., *Mock v. S.D. Bd. of Regents*, 267 F. Supp. 2d 1017, 1021 (D.S.D. 2003) (interpreting *Sandoval* as explicitly disavowing the method used in *Sullivan* to find a private right of action based on the usefulness of providing such a remedy).

96. Compare *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 83 (D.D.C. 2003) (siding with the Fourth Circuit and implying a private right of action under Title VI), and *Johnson v. Galen Health Insts., Inc.*, 267 F. Supp. 2d 679, 695 (W.D. Ky. 2003) (holding that a private right of action for retaliation exists under Title IX), with *Mock*, 267 F. Supp. 2d at 1022 (siding with the Eleventh Circuit in refusing to recognize a private right of action for retaliation under Title IX), and *Atkinson v. Lafayette Coll.*, No. 7:01-CV-224-R, 2002 U.S. Dist. LEXIS 1432, at \*33-34 (E.D. Pa. Jan. 29, 2002) (relying on *Sandoval*, discussed *infra*, to dismiss the plaintiff's Title IX retaliation claim alleging that she was removed from her position as athletic director for initiating an open discussion of Title IX athletics compliance issues at the college where she worked).

97. 125 S. Ct. at 1503. The Court chose not to rely on the Department of Education regulation prohibiting retaliation as the source of the retaliation action, forcing it to locate the retaliation claim squarely within the statute's nondiscrimination guarantee. *Id.* at 1506-07.

private rights of action under Title VI to only those actions that allege intentional race discrimination.<sup>98</sup> *Sandoval* involved a Title VI challenge to an Alabama Department of Motor Vehicles rule refusing to offer driver's license tests in Spanish.<sup>99</sup> Relying on an agency regulation interpreting Title VI to prohibit practices that disparately harm a racial group without sufficient justification,<sup>100</sup> the plaintiffs alleged that the practice had a racially disparate impact on Latinos and Latinas.<sup>101</sup> The Court rejected the plaintiffs' claim, ruling that the disparate-impact regulation did not create a private right of action because it exceeded the scope of the statute, which prohibits only intentional discrimination.<sup>102</sup> Because the Court found that the disparate-impact regulation proscribed practices that are permitted by the ban on intentional discrimination, the regulation fell outside of the statute's implied private right of action.<sup>103</sup> As Justice

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98. 532 U.S. 275, 281 (2001).

99. *Id.* at 278–79.

100. See 28 C.F.R. § 42.104(b)(2) (2004) (prohibiting the use of criteria or methods of administration having the effect of discrimination because of race, color, or national origin); 49 C.F.R. § 21.5(b)(2) (2004) (preventing the Department of Transportation from discriminating against the recipients of benefits on the basis of race, color, or national origin). Section 602 of Title VI authorizes federal agencies which are empowered to extend Federal assistance to promulgate regulations to enforce Title VI. 42 U.S.C. § 2000d-1 (2000).

101. *Sandoval*, 532 U.S. at 279.

102. *Id.* at 293. The Court first limited Title VI to intentional discrimination in dicta in *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978). In *Sandoval*, the Court assumed without deciding that the regulations promulgated under § 602 of the statute could validly proscribe disparate impact for the purposes of agency enforcement of the statute, but ruled that they could not do so for the purposes of creating an implied private right of action in court. *Sandoval*, 532 U.S. at 282. The Court first recognized a private right of action to enforce Title IX in *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979), and an implied private right of action for damages under Title IX in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76 (1992). The Court's discussion in *Sandoval* relies on these decisions as the departure point for the Title VI analysis as well. *Sandoval*, 532 U.S. at 280.

103. *Id.* at 285. The Court concluded that unlike § 601, which sets out the core nondiscrimination guarantee, § 602, which authorizes the agency to promulgate regulations, does not create an implied private right of action. *Id.* at 288–89, 293. The Court's analysis reflects its increasingly strict approach, relying primarily on the text and structure of the statute, to decide whether to infer an implied private right of action from a statute that is silent on the question. *Id.* at 287–88. The Court rejected an alternative approach that would interpret statutes to implicitly include such remedies as necessary to give effect to congressional intent. *Id.* at 287 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Four Justices dissented. *Id.* at 293 (Stevens, J., dissenting).

Scalia explained for the five-member majority, “[a]gencies may play the sorcerer’s apprentice but not the sorcerer himself.”<sup>104</sup>

The *Sandoval* decision limited the Court to implying private rights of action only for claims of intentional discrimination under Title VI, and by extension Title IX. Recognizing implicit protection from retaliation under Title IX thus required the Court to situate retaliation within the category of intentional sex discrimination.<sup>105</sup> Doing so, however, puts some pressure on the category of intentional discrimination as it has developed in modern discrimination doctrine. Notwithstanding the interdependence of discrimination and retaliation in the real world, it is not so easy to conceptualize retaliation as a form of intentional discrimination under the current dominant framework.<sup>106</sup>

Intentional discrimination, also known as differential treatment and distinguished from disparate impact, typically denotes unfavorable treatment directed at someone because of his or her race, sex or other protected class status. The touchstone of the retaliation claim, on the other hand, is that the complainant was retaliated against for his or her actions opposing discrimination. The difference is apparent from the *Jackson* case itself. The coach, an African-American male, did not claim that he was fired because of his sex or that a female coach who raised Title IX concerns would have fared better, but that he experienced retaliation for his actions on behalf of his female

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104. *Id.* at 291. The Court’s own absence from the sorcerer/apprentice metaphor promotes the façade that the limits of statutory meaning are set by Congress and that the agency must abide by those limits. The metaphor obscures the Court’s own role in creating meaning, first in limiting the statute to intentional discrimination and then in setting the disparate-impact regulation as too far removed to qualify as a reasonable vindication of that principle. On the legitimating role of metaphor in Supreme Court rhetoric, see generally Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004).

105. Although not every court has decided the retaliation issue under Title VI and Title IX with reference to the space left by *Sandoval*, see, for example, *Frazier v. Fairhaven School Community*, 276 F.3d 52, 67 (1st Cir. 2002) (assuming that Title IX includes an implied private right of action without mentioning or considering *Sandoval*), the meaning and implications of *Sandoval* are central to the analysis, since any congruity between retaliation and intentional discrimination is far from obvious.

106. See, e.g., *Peters v. Jenney*, 327 F.3d 307, 318 (4th Cir. 2003) (asserting a “symbiotic and inseparable relationship” between retaliation and intentional discrimination, but failing to specify the nature or contours of that relationship).

students.<sup>107</sup> Unlike the prototypical intentional discrimination model, the retaliation claim asserts that the harm was inflicted because of the complainant's actions, apart from his or her protected class status.

The Court's intentional discrimination jurisprudence, on the other hand, generally insists on status-based harm to an individual. For example, in *Oncale v. Sundowner Offshore Services, Inc.*, the Court reminded lower courts and litigants that a Title VII sex discrimination plaintiff must always establish that the adverse treatment occurred because of the plaintiff's sex.<sup>108</sup> In *Oncale*, the plaintiff, an employee working on an oil rig, alleged that he was sexually harassed by his male co-workers, who sexually and physically assaulted him and threatened him with rape.<sup>109</sup> The lower courts had rejected the plaintiff's Title VII claim, reasoning that male-to-male harassment can never amount to discrimination based on the plaintiff's sex.<sup>110</sup> The Supreme Court disagreed, ruling that same-sex harassment may amount to sex-based discrimination, as long as the plaintiff proves that he was singled out for the harassment because of his sex.<sup>111</sup> With this understanding, the Court remanded the case to the lower courts for further proceedings.<sup>112</sup> Under the Court's reasoning, if Mr. Oncale had instead claimed that he was harassed because of his opposition to company policy, his claim for sex discrimination would have failed unless he could show that a female worker who engaged in similar activity would have been treated better.<sup>113</sup> A plaintiff

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107. *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1511 (2005).

108. 523 U.S. 75, 81 (1998).

109. *Id.* at 77.

110. *Oncale v. Sundowner Offshore Svcs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

111. *Oncale*, 523 U.S. at 80–81. The Court then listed several ways a plaintiff could prove the because-of-sex element in a same-sex harassment case, such as: by showing that the harasser was homosexual and that the same overtures would not have been made to a person of the other sex; with evidence that the harassment took such a sex-specific and derogatory form that it supports an inference that the harasser was motivated by a general hostility to members of the plaintiff's sex in the workplace; or by comparative evidence showing how the harasser treats members of both sexes in the workplace. *See id.*

112. *Id.* at 82.

113. Some theories of harassment would permit such a claim to succeed, even if the reason for the harassment was the reporting of non-gender related rule violations, because of the sexual and sex-typed nature of the harassment. *See* Deborah Brake, *The Cruellest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J.

who suffers adverse treatment because of something she has or has not done, as opposed to her status, generally cannot succeed on a claim for intentional discrimination.

To give another example, in *Personnel Administrator of Massachusetts v. Feeney*, a woman raised an equal protection challenge to the state's preference for veterans in civil service jobs, claiming that the state's policy discriminated against women by creating an absolute preference for job applicants who had served in the military.<sup>114</sup> The Court rejected this claim because the veteran's preference did not, in the Court's view, treat the plaintiffs differently because they were women, but because of something they had not done—albeit something that many men but very few women had done.<sup>115</sup> Likewise, the much-criticized “Don't ask, don't tell” policy toward gays and lesbians in the military has been salvaged from equal protection challenges by framing it as an act-based, rather than a status-based, ban.<sup>116</sup> While this distinction has been justly criticized for assuming a clear line between actions and status, and for obscuring how acts produce subjects and how status merges with actions,<sup>117</sup> its acceptance by most courts demonstrates the salience of the act/status distinction in discrimination law, casting the Court's contrasting treatment of retaliation claims into stark relief. The Court's Title IX cases have

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GENDER L. 37, 76–82 (1999) (explaining and critiquing a “sexual-in-nature” model of sexual harassment). However, the Court in *Oncale* viewed the sexual nature of the harassment as insufficient by itself to establish the because-of-sex requirement. 523 U.S. at 80.

114. 442 U.S. 256, 259 (1979).

115. The Court in *Feeney* discounted the obvious link between status and acts in this context, refusing to acknowledge how sex constrained military service given the military's significant hurdles to military service for women and its encouragement and enforcement of military service for men. *See id.* at 276–78. By obscuring this connection, the Court was able to pretend that the discrimination at issue was based on past military service without regard to the sex-based status of the persons eligible for the veterans' preference. *See id.* at 278 (“[T]he history of discrimination against women in the military is not on trial in this case.”). The Court's refusal to see the link between status and acts in this case reflects its emphatic adherence to an act/status distinction.

116. *See, e.g.*, *Able v. United States*, 155 F.3d 628, 635 (2d Cir. 1998); *Phillips v. Perry*, 106 F.3d 1420, 1429 (9th Cir. 1997); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1135–36 (9th Cir. 1996); *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996); *Thomason v. Perry*, 80 F.3d 915, 929–30 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 687 (D.C. Cir. 1994) (en banc).

117. *See generally* Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology*, 3 GLQ: J. LESBIAN & GAY STUD. 159 (1996).

followed this same model of intentional discrimination, requiring plaintiffs to demonstrate that the adverse treatment occurred because of their sex.<sup>118</sup>

## 2. The Reconciliation of Retaliation and Discrimination in *Jackson*

Justice O'Connor's majority opinion in *Jackson* glossed over these difficulties by repeatedly and insistently asserting that retaliation for complaining about sex discrimination is a form of intentional discrimination on the basis of sex, with little explanation or analysis.<sup>119</sup> In its failure to engage or acknowledge the distance between retaliation for a person's actions and the dominant status-based framework of intentional discrimination, the *Jackson* decision is remarkably undertheorized. Neither the *Jackson* majority nor lower court decisions recognizing an implied right of action for retaliation have satisfactorily explained why retaliation counts as a form of intentional discrimination based on protected class status.

The Court's primary, if not fully articulated, rationale for situating retaliation under the intentional discrimination umbrella rests on the premise that opposition to intentional discrimination triggered the retaliation.<sup>120</sup> This approach treats

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118. See, e.g., *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633–35 (1999); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992).

119. See *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action.”); *id.* (“[R]etaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.”); *id.* (“We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.”); *id.* at 1507 (“As we explained above, . . . the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional ‘discrimination’ ‘on the basis of sex.’”); *id.* (“[W]e hold that Title IX’s private right of action encompasses suits for retaliation, because retaliation falls within the statute’s prohibition of intentional discrimination on the basis of sex.”); *id.* at 1507 n.2 (“We interpret Title IX’s text to clearly prohibit retaliation for complaints about sex discrimination.”); *id.* at 1507 n.3 (“Because, as we explain above, . . . retaliation in response to a complaint about sex discrimination is ‘discrimination’ ‘on the basis of sex,’ the statute clearly protects those who suffer such retaliation.”).

120. The Solicitor General relied on a similar theory in its litigation position as *amicus curiae* in support of the plaintiff. See Brief for the United States as Amicus Curiae Supporting Petitioner at 6, in *Jackson v. Birmingham*

the retaliation as a cover-up for the underlying unlawful discrimination, such that the retaliation is folded into the illegality of the discrimination itself. To return to a variation on the *Oncale* hypothetical from above, the analogy would be if Mr. *Oncale* was targeted for the harassment because he had challenged an employment policy barring the hiring of women on the oil rig. The retaliation would amount to an extension of the unlawful discrimination, an action intentionally taken to continue the company policy of unlawful discrimination against women. The majority opinion in *Jackson* invoked this theory by locating the “on the basis of sex” requirement in the nature of the complaint that triggers the retaliatory action.<sup>121</sup> Under this theory, retaliation is a form of intentional discrimination because it is part of an intentional cover-up and continuation of a policy of intentional discrimination.

The difficulty with this theory is that it turns on the existence of underlying intentional discrimination, which the retaliatory act furthers. Yet, as Justice Thomas correctly pointed out in dissent, courts have never required—nor should they require, for reasons developed at length in the latter part of this Article—retaliation claims to be premised on the existence of actual, unlawful discrimination underlying the oppositional action.<sup>122</sup> It is as well-established as any doctrine in discrimination law that a plaintiff may succeed on a retaliation claim even if the assertion of underlying unlawful discrimination turns out

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ham Bd. of Educ., 125 S. Ct. 1497 (2005) (No. 02-1672) (explaining that the petitioner’s retaliation claim falls within the ban on intentional discrimination “because he claims that respondent engaged in intentional discrimination”); *see also* *Peters v. Jenney*, 327 F.3d 307, 318 (4th Cir. 2003) (describing retaliation as “a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it or refuse to engage in it”).

121. *See Jackson*, 125 S. Ct. at 1504 (“[R]etaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.”); *see also id.* at 1507 (“Where the retaliation occurs because the complainant speaks out about sex discrimination, the ‘on the basis of sex’ requirement is satisfied.”); *id.* at 1507 n.3 (“Because . . . retaliation in response to a complaint about sex discrimination is ‘discrimination’ ‘on the basis of sex,’ the statute clearly protects those who suffer such retaliation.”).

122. *See id.* at 1512 (Thomas, J., dissenting) (“[A] retaliation claimant need not prove that the complained-of sex discrimination happened. Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good faith belief that discrimination occurred to prevail on a retaliation claim. Retaliation therefore cannot be said to be discrimination on the basis of anyone’s sex, because a retaliation claim may succeed where no sex discrimination ever took place.”).

to be incorrect.<sup>123</sup> Of course, there is some limit to how far the challenged conduct may stray from the category of unlawful discrimination, as discussed later in this Article, but no court recognizing a cause of action for retaliation has required proof of underlying unlawful discrimination as a prerequisite for a retaliation claim.

The majority did not disagree with Justice Thomas's statement of the law on this point, nor did it explain how the retaliation claim meets the "on the basis of sex" requirement if it turns out that the underlying conduct did not amount to illegal sex discrimination at all. Given that there is some slippage between the subject of the complaint that provokes the retaliation and the boundaries of unlawful intentional discrimination, the Court's approach runs into the very problem in *Sandoval*: the private right of action would "forbid conduct that [the statute] permits," namely, conduct other than intentional discrimination.<sup>124</sup>

Some lower courts have invoked a similar theory to connect retaliation to intentional discrimination by analogizing to the doctrine of unconstitutional conditions, which protects the decision to exercise a constitutional right from government punishment.<sup>125</sup> The majority in *Jackson* did not resort to this doctrine, and doing so would not have strengthened its effort to fold retaliation into the ban on intentional discrimination. The problem with the analogy to unconstitutional conditions is the same as the problem with the cover-up theory: retaliation claimants need not prove that the conduct they challenged actually amounted to unlawful discrimination. This is a key difference between the retaliation claim and the law of unconstitutional conditions. Government actions discouraging the exercise of constitutional rights cross the line only when there

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123. See *infra* text accompanying notes 193–95.

124. See *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) ("It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.").

125. See, e.g., *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 81–82 (D.D.C. 2003) (drawing on the doctrine of unconstitutional conditions to explain why bans on discrimination must include protection from retaliation); cf. *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) (explaining that retaliation for exercising a constitutional right "offends the Constitution [because] it threatens to inhibit exercise of the protected right," and "is thus akin to an 'unconstitutional condition' demanded for the receipt of a government benefit provided").

is an actual constitutional right at stake. Punishing someone for doing something that does not amount to the exercise of a constitutional right does not trigger the doctrine's protection. For example, the Court has held that depriving women of Medicaid funds for abortion does not place an unconstitutional condition on the exercise of the abortion right because the abortion right includes only the right to freedom from government obstruction, and not a right to equal subsidization or to actually obtain an abortion.<sup>126</sup> Of course, the framing of the right at stake in the doctrine of unconstitutional conditions is famously malleable, as much scholarship demonstrates.<sup>127</sup> Nevertheless, the doctrine of unconstitutional conditions requires an assertion that an actual constitutional right is burdened.<sup>128</sup> The retaliation claim, on the other hand, forbids retaliation for asserting discrimination even if the underlying conduct did not amount to unlawful discrimination. The retaliation right is thus distinct from the right to nondiscrimination in a way that protection from unconstitutional conditions is not distinct from the underlying constitutional right.

The *Jackson* majority's second attempt to reconcile retaliation with intentional discrimination under existing law is no more satisfying. In reasoning that appears to provide an alternative rationale from the cover-up theory criticized above, the majority accepted retaliation as a form of intentional discrimi-

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126. See *Harris v. McRae*, 448 U.S. 297, 318 (1980); *Maher v. Roe*, 432 U.S. 464, 479 (1977).

127. See, e.g., David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 679–80 (1992) (criticizing the doctrine of unconstitutional conditions for its insensitivity to the constitutional values central to the underlying right); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1324–26 (1984) (critiquing the distinction between positive and negative rights as it is used to demarcate unconstitutional conditions); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 155–56 (1996) (explaining the circularity of the unconstitutional conditions doctrine because it does not specify the nature of the rights to be protected and “fails to specify whether the parameters of those rights are contingent upon the granting of the benefit”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416–17 (1989) (summarizing inconsistencies in the Court's application of the doctrine of unconstitutional conditions).

128. See Sullivan, *supra* note 127, at 1427 (explaining that “the constitutional interest at issue must rise to the level of a recognized right” in order to trigger the doctrine of unconstitutional conditions); cf. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990) (arguing for the elimination of the doctrine of unconstitutional conditions altogether because it obscures central questions about the scope of the underlying right).

nation because the retaliation claim is an important remedy to effectuate the statute's ban on intentional discrimination. As the Court observed, Title IX's remedial scheme would greatly suffer without protection from retaliation.<sup>129</sup> The Court is certainly correct that protection from retaliation plays an important remedial role in effectuating a ban on discrimination, and retaliation has often been described as remedial in nature.<sup>130</sup> By invoking the remedial rationale, the Court suggested the possibility that even if retaliation itself is not a species of intentional discrimination, it should still be encompassed by the statute because it is an important part of an effective remedial scheme for eradicating intentional discrimination.<sup>131</sup>

However, this way of relating retaliation to discrimination, as a useful remedy to effectuate the protected right, also runs afoul of *Sandoval*: the same could be said for the regulation covering disparate impact struck down in that case. Because proving intent is difficult, regulating practices that impose dis-

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129. See *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1508 (2005) ("Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel."); *id.* ("Moreover, teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools." (alteration in original) (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969))).

130. See, e.g., *id.* (citing Congress's twin purposes of avoiding federal subsidization of discrimination and providing individuals protection from discrimination, and stating that those objectives "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation" (internal quotation marks omitted) (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 13, *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497 (2005) (No. 02-1672))); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (describing the retaliation right in remedial terms, and stating that the purpose of the retaliation claim is to maintain "unfettered access to statutory remedial mechanisms").

131. Legal scholars have questioned whether there really is a meaningful distinction between rights and remedies, or whether remedial choices merge with, and modify, underlying rights. See, e.g., Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). Without intending to take a position on this larger question, the discussion here, analyzing the implications of *Sandoval*, assumes a separateness between remedy and right, largely because the Supreme Court's decision in *Sandoval* insists on such a distinction. See *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (rejecting the idea that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute" (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964))).

proportionate harm on suspect classes without adequate justification could be rationalized as a useful remedy for addressing intentional discrimination that would otherwise go unchallenged. Indeed, this may be the best explanation for *Griggs v. Duke Power*, which held that Title VII's ban on discrimination includes practices with a discriminatory effect and lacking in business necessity.<sup>132</sup> While surely not every practice struck down as disparate impact serves as a remedy to unlawful intentional discrimination, by the same token, not every successful retaliation claim serves as a remedy for unlawful intentional discrimination. As explained above, a successful retaliation claim may not necessarily stem from opposition to actual discrimination. Moreover, like the disparate impact regulation in *Sandoval*, the retaliation regulation is not strictly necessary as a remedy for intentional discrimination. Not all institutions retaliate and not every individual would be deterred from challenging unlawful discrimination even if they did. Recognizing a private right of action for retaliation merely because it is a useful remedy to effectuate the ban on intentional discrimination cannot be reconciled with *Sandoval's* emphatic refusal to infer that Congress meant to create a private right of action merely because doing so would create necessary and useful remedies for enforcing statutory rights.<sup>133</sup> Perhaps this is why the Court in *Jackson* did not stand on the remedial rationale alone, and instead repeatedly and emphatically returned to its insistence that retaliation is itself a form of intentional discrimination on the basis of sex.<sup>134</sup>

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132. 401 U.S. 424, 431 (1971); *see, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. LAW REV. (forthcoming 2006) (explaining the appeal of disparate impact doctrine as a means of reaching employer practices which serve as a cover for intentional discrimination, and citing sources explaining disparate impact doctrine on this ground); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 466–67 (2001) (“Disparate impact cases of the first generation type also derived their moral bite and legitimacy from the prior era of deliberate exclusion, although they never fit neatly into the dominant antidiscrimination paradigm. Discriminatory application procedures and tests were problematic because they perpetuated patterns of past deliberate, systemic exclusion or reflected ongoing, though unstated, intentional exclusion.”).

133. *See Sandoval*, 532 U.S. at 286–87.

134. *See supra* notes 119–21 and accompanying text.

### 3. The Promise of *Jackson* and the Possibilities for Further Theorizing

The Court's most notable and promising effort to make room for retaliation within the rubric of intentional discrimination appears in its discussion of a further difficulty: the retaliation claimant may not be among the class of persons targeted by the alleged discrimination. The Board of Education in *Jackson* had argued, with success in the Eleventh Circuit, that even if Title IX encompassed protection from retaliation, Mr. Jackson could not invoke it since he was outside the class of persons protected by the statute.<sup>135</sup> As was the case in *Jackson*, retaliation claims are often brought by persons who are not themselves the targets of the alleged discrimination, but who object to perceived discrimination on behalf of others.<sup>136</sup> This complication poses an added difficulty for situating retaliation as a form of intentional discrimination. Even if the retaliation against the target of discrimination counts as intentional discrimination, notwithstanding the difficulties discussed above, there is a further challenge in explaining how a third person, one not subjected to the underlying alleged discriminatory conduct, experiences discrimination on the basis of sex when he or she is punished for complaining of discrimination against someone else.

One possible escape from this difficulty might be to recognize a form of third-party standing in which the target of the retaliation is permitted to assert the nondiscrimination rights of others. However, third-party standing is not an adequate solution. Although some courts have recognized broad third-party standing to challenge discrimination against other persons, these cases differ from retaliation claims in important respects.<sup>137</sup> In the retaliation claim, the retaliation claimant bears the brunt of the retaliatory harm, and the injury is direct

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135. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1346 (11th Cir. 2002), *rev'd*, 125 S. Ct. 1497 (2005).

136. *See, e.g., Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 577 (6th Cir. 2000) (holding that a high-level affirmative action officer had a viable retaliation claim due to his advocacy on behalf of women and minorities); *Eichman v. Ind. State Univ. Bd. of Trs.*, 597 F.2d 1104, 1107 (7th Cir. 1979) (upholding a retaliation claim brought by a university faculty member who alleged that he was fired after aiding a woman "who was trying to exercise her Title VII rights to retain her job").

137. For a discussion of the third-party standing cases, see Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 83–91 (2002).

and palpable. In *Jackson*, for example, the firing of the coach is more than an extension of any sex-based harm to the female students, who may or may not experience harm from the firing of their coach.<sup>138</sup> As the social science literature discussed above demonstrates, persons who challenge inequality face very real and substantial costs for doing so.<sup>139</sup> The problem is not one of standing, but of linking the retaliation back to the ban on intentional discrimination. In the third-party standing cases, on the other hand, the injury stems from the original discrimination, and the doctrine of standing is stretched to allow someone else to assert the injury on behalf of another. Perhaps for this reason, the Court in *Jackson* did not rely on third-party standing to support retaliation claims brought by persons who are not the targets of the underlying discrimination.<sup>140</sup>

Instead, in a tantalizing move that begins to reveal the lengths to which the Court's decision stretches the boundaries of intentional discrimination, the Court suggested that "on the basis of sex" does not necessarily refer to the plaintiff's own sex or require the status-based differential treatment of the individual plaintiff. Distinguishing Title IX from Title VII, the Court noted that it might have reached a different result for retaliation claims brought by persons not themselves subjected to the underlying discrimination if the statute had stated that "no person shall be subjected to discrimination on the basis of *such individual's* sex."<sup>141</sup> The Court's shift to disentangle intentional discrimination from the status-based differential treatment of individuals holds great promise for resting retaliation claims on a more secure foundation in discrimination law, and for reshaping discrimination law itself. However, the Court stopped short of the implications of this opening, resting on a minor linguistic difference between Title IX and other discrimination statutes

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138. It is possible, for example, that the students in a case like *Jackson* might dislike their coach and would not experience injury from the retaliation he experienced. Although relational harms from retaliation probably exist in the vast majority of cases, given the likelihood of some affinity between the targets of discrimination and the persons who take up their cause, such relational harms should not serve as a proxy for the harm to the target of the retaliation.

139. See *supra* notes 34–52 and accompanying text.

140. 125 S. Ct. at 1507 (explaining that "retaliation claims extend to those who oppose discrimination against others"); *id.* at 1505 & n.1 (refusing to limit *Sullivan* to a mere decision about standing and instead reading it to interpret "a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition").

141. *Id.* at 1507 (emphasis in original) (internal quotation marks omitted).

that is weak and ultimately unpersuasive. As Justice Thomas correctly noted in his dissent, the terms, “on the basis of sex,” “because of sex” and “because of such individual’s sex” have long been viewed as interchangeable.<sup>142</sup> Moreover, cases brought under Title IX, no less than other nondiscrimination statutes, have required the plaintiff to prove that she herself was subjected to differential treatment based on her protected class status.<sup>143</sup> The Court’s attempt to stem the broader implications of disentangling the ban on intentional discrimination from status-based differential treatment with the language of Title IX falls far short of a compelling rationale. In the end, the Court simply retreated to its emphatic assertion that the plaintiff in *Jackson* had indeed experienced discrimination on the basis of sex because he was punished for complaining about sex discrimination, without resolving the difficulties with this approach under existing discrimination law, as elaborated above.<sup>144</sup>

Neither the majority opinion in *Jackson* nor the lower court litigation over the private right of action controversy has fully engaged the complexity of situating retaliation as a form of intentional discrimination as currently framed. The better approach is to recognize the malleability of intentional discrimination in legal discourse and to shift the boundaries of that category to make room for retaliation claims. Recognizing retaliation as a species of intentional discrimination has the potential to push the scope and boundaries of discrimination law in constructive directions and to bring the law closer to its animating ideals. Rather than limiting discrimination to the status-based differential treatment of individuals, discrimination law should be understood as aspiring to secure two related objectives: (1) dismantling unjust systems of privilege by protecting outliers and challengers of the gender/racial order; and (2) furthering the democratic values of equal citizenship. Retaliation implicates both of these values and deserves protection under discrimination law on these grounds. As im-

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142. *Id.* at 1511 (Thomas, J., dissenting).

143. *Id.* at 1512 (citing Title IX cases).

144. *Id.* at 1507 (majority opinion) (“Where the retaliation occurs because the complainant speaks out about sex discrimination, the ‘on the basis of sex’ requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint.”).

portantly, recognizing retaliation as a species of discrimination promotes an understanding of discrimination law consistent with these objectives.

#### B. REFOCUSING ON PRIVILEGE AND THE RESISTANCE TO RACIST AND SEXIST NORMS

Situating retaliation as intentional discrimination requires stepping outside the framework of status-based differential treatment and into a broader conception of discrimination as the maintenance of race and gender privilege. Retaliation, functioning as it does to maintain social hierarchies and punish outliers, fits well within such a framework.

The questions raised above concerning retaliation and its relationship to intentional discrimination revisit ongoing debates about the scope and meaning of the antidiscrimination principle. One site in these debates is the contested space left by the Supreme Court's decision in *Hopkins v. Price-Waterhouse*.<sup>145</sup> In that case, the Court ruled that sex stereotyping is a form of sex discrimination, upholding the plaintiff's claim that she was denied partnership in the accounting firm because she defied the firm's expectations of how she should perform her femininity.<sup>146</sup> Writing for a plurality, Justice Brennan wrote, "[w]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."<sup>147</sup> Although Justice Brennan's language suggests little tolerance for sex stereotyping or gender role "policing" of any kind, the decision lends itself to competing interpretations, fueling the controversy over the scope of the antidiscrimination principle.

One of the broader interpretations of this precedent is that gender privilege, and the punishment of persons who challenge the gender order, amounts to unlawful discrimination. This view could potentially unsettle Title VII decisions upholding employer prerogatives to bar employees from dressing in ways that fail to conform to traditional gender roles, such as by firing men who wear earrings or requiring women, but not men, to wear skirts.<sup>148</sup> It also calls into question rules punishing gay

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145. 490 U.S. 228 (1989).

146. *Id.* at 258.

147. *Id.* at 251.

148. *See, e.g.,* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1083 (9th Cir. 2004) (rejecting a Title VII claim by female bartender challenging rule requiring female beverage servers to wear make-up); Baker v. Cal. Land

men and lesbians for defying sex role expectations through their attraction to persons of the same sex, disrupting case law drawing the boundaries of sex discrimination law to exclude sexual orientation bias.<sup>149</sup> Increasingly, a number of recent court decisions have accepted this broad reading of *Hopkins* and have applied the antidiscrimination principle to weed out “gender role policing,” or the punishment of persons for transgressing gender privilege.<sup>150</sup> Applied broadly, this principle has

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Title Co., 507 F.2d 895 (9th Cir. 1974) (upholding different hair-length and grooming requirements for men and women under equal employment opportunity provision of the Civil Rights Act); *Oiler v. Winn Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at \*25–32 (E.D. La. Sept. 16, 2002) (rejecting a male plaintiff’s Title VII allegation that he was fired for failing to conform to gender stereotypes by cross-dressing). *But see* *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (holding that gender-specific weight requirements challenged by female flight attendants violated Title VII); *Fischer v. Portland*, No. CV 02-1728, 2004 U.S. Dist. LEXIS 20453, at \*28 (D. Or. Sept. 27, 2004) (upholding a female plaintiff’s Title VII claim that she was harassed for being a lesbian who wore men’s clothes to work, wore no make-up and wore a short “masculine” hairstyle, finding that plaintiff showed sufficient evidence that she was harassed for not conforming to traditional gender stereotypes, and denying defendant’s motion for summary judgment); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(Sc), 2003 U.S. Dist. LEXIS 23757, at \*12, 15 (W.D.N.Y. Sept. 26, 2003) (upholding a transsexual’s claim of sex discrimination that he was fired for failing to “act like a man”); *Barnes v. City of Cincinnati*, No. C-1-00-780, 2002 U.S. Dist. LEXIS 26207, at \*17 (S.D. Ohio Mar. 8, 2002) (denying an employer’s motion for summary judgment where the male plaintiff was fired for cross-dressing and not conforming to masculine stereotypes).

149. *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (upholding the district court’s grant of summary judgment for the defendant, where the plaintiff’s sex-based harassment claim was based on sexual orientation rather than sex); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (ruling that sexual orientation discrimination is outside the bounds of Title VII), *abrogated by* *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001).

150. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 571–75 (6th Cir. 2004) (relying on *Hopkins* in support of decision reversing grant of summary judgment by the district court in a sex discrimination claim by a transsexual firefighter who alleged harassment and retaliation because of his nonconforming gender identity as a male to female transsexual); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (en banc) (holding that an employee’s sexual orientation neither provides for nor precludes a claim for sexual harassment); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 869 (9th Cir. 2001) (upholding a Title VII claim alleging anti-gay harassment on a gender stereotyping theory); *Kay v. Independence Blue Cross*, No. 02-3157, 2003 U.S. Dist. LEXIS 8521, at \*5–6 (E.D. Pa. May 16, 2003) (accepting a plaintiff’s gender stereotyping theory to support the hostile work environment claim for harassment based on sexual orientation, but ultimately rejecting the claim for lack of severity or pervasiveness); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (rejecting the defendant’s motion for summary judgment on

the potential to challenge systems of gender privilege that elevate traditional versions of masculinity and femininity above alternative nonconformist performances of gender identity.

Numerous legal scholars have pressed the case for reconstructing discrimination law to dismantle systems of race and gender privilege.<sup>151</sup> Professor Stephanie Wildman, a leading theorist who has advocated such a shift, defines privilege as “the systematic conferral of benefit and advantage,” usually referring to the unjust allocation of privilege along historically problematic lines such as race and gender.<sup>152</sup> She advocates a reorientation of discrimination law to spotlight how power systems of race, gender, and sexual orientation regenerate discriminatory patterns that maintain hierarchies of oppression.<sup>153</sup> She is critical of narrow constructions of discrimination law focusing on differential treatment based on specific identity categories, and of the law’s complacency with respect to power systems that operate within and across such categories to sustain unjust privilege. Professor Wildman argues that the language of discrimination law is sufficiently broad to encompass the disruption of systems of privilege, and criticizes courts that decline to take the doctrine in that direction.<sup>154</sup>

This broad conception of the antidiscrimination principle has not gone unchallenged. A narrower view, and still the dominant view in the courts, is that the Court in *Hopkins* merely articulated a variant of the prevailing anti-differentiation principle.<sup>155</sup> Under this interpretation, the prob-

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the plaintiff’s claim that he was harassed for not measuring up to his coworkers’ stereotypes about masculinity); *Montgomery v. Indep. Sch. Dist.* No. 709, 109 F. Supp. 2d 1081, 1089–91 (D. Minn. 2000) (denying the defendant’s motion for summary judgment on the plaintiff’s Title IX claim alleging harassment based on sexual orientation because even though Title IX does not cover sexual orientation discrimination, the plaintiff established that he was harassed for not meeting his peers’ expectations of masculinity).

151. See, e.g., BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* 17–18 (1998) (urging a reformulation of discrimination law that acknowledges and renounces white privilege); Ehrenreich, *supra* note 9, at 255, 275 (urging advocacy focused on interlocking systems of oppression); Symposium, *Whiteness: Some Critical Perspectives*, 18 WASH. U. J. L. & POL’Y (forthcoming 2005).

152. STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 29 (Richard Delgado & Jean Stefancic eds., 1996).

153. *Id.* at 5, 27–28.

154. *Id.* at 29–33.

155. See, e.g., *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1062 (7th Cir. 2003) (rejecting application of the *Hopkins* theory to a claim involving

lem in the case was that women, but not men, faced a Catch-22: all employees had to exhibit “masculine” traits to succeed in the partnership, but only women were penalized for doing so.<sup>156</sup> This interpretation would have a narrower scope and would not upset the kinds of practices described above. An anti-differentiation principle would permit institutional practices that privilege traditional forms of masculinity and femininity so long as men and women have an equal opportunity to conform to their respective gender roles without incurring disparate penalties for doing so.

Debates over the scope and limits of discrimination law continue to percolate in a variety of doctrinal areas. The meaning of any legal prohibition against discrimination is contested and unstable, vacillating between formal equality and anti-differentiation and a broader, more far-reaching understanding in which discrimination law functions as a vehicle for interrogating entrenched systems of race and gender privilege. The recognition of retaliation as implicit in the nondiscrimination guarantee bolsters this latter understanding and is best seen as one more push to redefine discrimination to include punishing departures from a social order bounded by race and gender.

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anti-gay harassment); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264–65 (3d Cir. 2001) (rejecting a Title VII harassment case where the harassment occurred because of sexual orientation and not sex); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (granting the defendant’s motion for summary judgment on the plaintiff’s claim of anti-gay harassment by co-workers where there was “no basis in the record to surmise that [the plaintiff] behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation”); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085–86 (7th Cir. 2000) (rejecting the plaintiff’s claim for anti-gay harassment where the unfavorable treatment was because of work conflicts and the plaintiff’s apparent homosexuality and his perceived desire for some sort of physical intimacy with them[.]” and not because of his sex); *Martin v. N.Y. State Dept. of Corr. Servs.*, 224 F. Supp. 2d 434, 446–47 (N.D.N.Y. 2002) (rejecting the plaintiff’s Title VII harassment claim where “[t]he torment endured by [the plaintiff], as reprehensible as it is, relates to his sexual orientation,” and he failed to show that “the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his orientation” (citing *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000))).

156. Justice Brennan’s opinion also might be read to support this view, focusing on the “Catch-22” language instead of the broader antistereotyping language quoted *supra* note 147 and accompanying text. See *Hopkins v. Price-Waterhouse*, 490 U.S. 228, 251 (1989) (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”).

Recognizing retaliation as a species of discrimination helps construct discrimination law to encompass challenges to unjust privilege and to move beyond securing class-neutral treatment of individuals. This understanding best captures what retaliation is about and why it is a form of intentional discrimination. As the earlier discussion of social science literature illustrates, retaliation silences opposition to inequality and punishes persons for challenging racism and sexism. By enforcing silence and acquiescence, retaliation protects privilege and sustains its invisibility.<sup>157</sup> Opposition to discrimination has the potential to disrupt systems of privilege by rendering the privilege visible. When retaliation intervenes to punish such opposition, it preserves privilege by punishing challenges to race and gender hierarchy. By protecting persons who oppose inequality, discrimination law, through the retaliation claim, promotes the construction of antiracist and antisexist identities and facilitates the destabilization of unjust systems of privilege.

Conceptualizing retaliation in this way offers a number of advantages for discrimination law. At the outset, it shifts the focus from neutral, individualistic status-based treatment to questions of illegitimate privilege and the importance of contesting inequality.<sup>158</sup> The retaliation claim recognizes and protects the value of resisting inequality in particular social and institutional settings. By protecting against retaliation, the claim focuses on the discourses that shape social equality, which discourses get protected, and why. It conceives of discrimination as a social practice, rather than an abstract neutral principle of equal treatment. The conception of discrimination that it rests upon is contingent, rather than static, and historically grounded.

Equally important, this understanding of why discrimination law encompasses retaliation claims permits a more fluid conception of social identity than that offered by the anti-differentiation approach. In a retaliation claim, it is not a person's fixed status-based identity that triggers legal protection,

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157. See WILDMAN, *supra* note 152, at 8 (“[S]ilence in the face of privilege sustains its invisibility.”); *id.* at 30 (“[P]erhaps most important, privilege is not visible to the holder of the privilege.”); *id.* at 107 (explaining that “silence about privilege ensures its perpetuation”).

158. See also Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 235–36 (1993) (describing privilege as “unearned power that is systematically conferred” and suggesting an awareness of this privilege is necessary to challenging race and gender hierarchies).

but rather her participation in a discourse that challenges inequality.<sup>159</sup> By encompassing retaliation claims, discrimination law protects the subject's identity-formation instead of taking a passive, preexisting identity as the starting point.<sup>160</sup> So understood, the retaliation claim is less vulnerable to the radical critique of equality rights that requiring subjects to claim a fixed and stable social identity reinforces the very categories that enable systems of race and gender privilege to continue.<sup>161</sup> Because the trigger for protection is the subject's actions and not her status as a member of a social group, the retaliation claim creates the possibility of challenging inequality without further solidifying the categories of race or gender.<sup>162</sup> The retaliation claimant need not establish that she was treated worse "as a woman," but rather that she was penalized for challenging sexist practices, thus avoiding unintentionally reinforcing an essentialist view of what it means to be "a woman" in the course

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159. Of course, the challenger's own racial or gender identity is not completely separate from the challenge to inequality and the resulting punishment. Expectations about proper social roles are certainly shaped by racial, gender, sexuality, and other components of an individual's identity. See Zatz, *supra* note 137, at 108–09 (contending that punishing intergroup solidarity is a form of stereotyping in which institutions monitor and regulate social interactions based on the target's identity status). But the retaliation claim does not depend on any particularized identity status of the target. For example, both a white person and an African American who challenge racism risk punishment for not acting consistent with white privilege, and both would have a retaliation claim for the resulting retribution.

160. Seen in this light, discrimination law's inclusion of the retaliation claim is an example of the potential for law's acceptance of the theoretical turn to performative theories of identity. See, e.g., Devon Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 717 (2001) (explaining that discrimination targets people not just for their "status" but for how they "perform" their identity). Retaliation can be seen as the policing and punishment of antisexist and antiracist identities, or the enforced suppression or "covering" of these identities. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (developing a theory of "covering"—or downplaying one's underlying identity—as an underexamined form of oppression). By embracing the retaliation claim, discrimination law protects performances of identity that challenge the rigidity of status hierarchies.

161. See Wendy Brown, *Suffering the Paradoxes of Rights*, in LEFT LEGALISM/LEFT CRITIQUE 420–34 (Wendy Brown & Janey Halley eds., 2002) (elaborating a critique of identity-based nondiscrimination rights).

162. Cf. WILDMAN, *supra* note 152, at 23 (criticizing categorical thinking for obscuring the complexity of the individual); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1075 (1992) ("Only when sex means more than male or female, only when the word 'woman' cannot be coherently understood, will oppression by sex be fatally undermined.").

of asserting a sex equality right.<sup>163</sup> By leaving more room for the complexity of the subject, the retaliation claim enhances the potential for the subject's role in subverting the categories of race and gender.<sup>164</sup> At the same time, the retaliation claim avoids one of the greatest pitfalls of postmodernism: the move to transcend the reality of social groups by exposing their fluidity.<sup>165</sup> The retaliation claim does not seek to rise above or deny the reality of social groups; rather it protects discourses that challenge the rigidity and status hierarchies of social groups.<sup>166</sup> With such a theoretical grounding, the retaliation claim is well-positioned to prompt a rethinking of the regulation of social identities and how equality law can best disrupt systems of race and gender oppression.<sup>167</sup>

A related advantage to this theorizing of retaliation is that it acknowledges the oppressiveness of systems of subordination while simultaneously recognizing and protecting the agency of persons caught up in those systems.<sup>168</sup> The retaliation claim fo-

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163. See, e.g., Brown, *supra* note 161, at 422 ("To have a right as a woman is not to be free of being designated and subordinated by gender. Rather, though it may entail some protection from the most immobilizing features of that designation, it reinscribes the designation as it protects us, and thus enables our further regulation through that designation.").

164. See generally Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994) (discussing the need for discrimination law to recognize the complexity of subjects in addressing their discrimination claims).

165. See, e.g., Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 22 (1991) (urging the importance of a continued focus on the situation of working women as a social group); Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 694-700 (2000) (criticizing postmodernist critiques of feminism for ignoring social reality); cf. Ehrenreich, *supra* note 9, at 255 ("[I]t is crucial that we retain some method for talking meaningfully about groups, for preserving notions of identity.").

166. Cf. NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* 167 (1997) ("[W]e can accept the critique of essentialism without becoming postfeminists.").

167. Cf. *id.* at 166 ("Complex, shifting, discursively constructed social identities provide an alternative to reified, essentialist conceptions of gender identity, on the one hand, and to simple negations and dispersals of identity, on the other."); WILDMAN, *supra* note 152, at 31-33 (explaining that law entrenches privilege when it allows the punishment of those who refuse to acquiesce in privilege, and emphasizing that the choice of a privileged person in how to respond to privilege is not exercised independent of law).

168. See, e.g., ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 111-14 (1999) (offering a "dynamic yet constrained view of group agency" in which subordinated groups are simultaneously constrained by subordinating systems and actively engag-

cuses on the claimant's choices and actions challenging inequality. For this reason, it is less vulnerable to the criticism of anti-subordination theories for emphasizing seamless structures of inequality that dominate passive victims.<sup>169</sup> By providing space for persons to oppose inequality, discrimination law has the potential to expose the rifts and fissures in systems of dominance and make room for them to be contested, bringing discrimination law closer to realizing its emancipatory potential.<sup>170</sup>

Finally, this understanding of why discrimination law encompasses retaliation shifts the focus from the discriminator's prejudicial intent to his or her actions in shutting down opposition to inequality. Instead of an inquiry into the actor's racist or sexist mindset, the analysis centers on the silencing of discourses that challenge how an institution practices race and gender privilege. This formulation offers a conception of discrimination as premised not on the discriminator's subjective mindset, but on the preservation of race or gender privilege and the suppression of challenges to them.

### C. ADDING CONTENT TO EQUAL CITIZENSHIP

In addition to challenging narrow constructions of discrimination law, recognizing retaliation as a form of discrimination promotes important values and aspirations underlying discrimination law, giving added weight to the reasons why we care about discrimination in the first place. The retaliation claim furthers the democratic values at the foundation of law's nondiscrimination guarantee.

One of the core values underlying discrimination law is the desire to facilitate a system of democratic governance based on an ideal of equal citizenship. The value choices reflected in discrimination law cannot be understood without some appreciation of how they enhance democracy and the legitimacy of democratic outcomes. One of the leading theories for explaining

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ing in resistance against those systems).

169. See, e.g., Harris, *supra* note 8, at 581, 612–13 (criticizing the antistatist focus on female victimhood for being untrue to the experience of black women who have formed their identity largely through “creative action” rather than shared victimhood); Mahoney, *supra* note 158, at 217 (criticizing the antistatist approach for overemphasizing the victimization of women and adopting a view of gender oppression that centers on “what is done to women”).

170. I am loosely borrowing this phrase from Nancy Fraser, who has lauded “the emancipatory potential of oppositional practice.” See FRASER, *supra* note 166, at 162.

the moral force of discrimination law, the process theory advocated by John Hart Ely and others, justifies strictly scrutinizing legislative decisions motivated by racism on the ground that such stigma poisons democratic outcomes by thwarting the legislature's ability to act with due regard for the interests of all citizens.<sup>171</sup> As Andrew Koppelman has explained, under this theory, racist preferences that target a discrete and insular minority are problematic because they undermine the very reason for respecting democratic outcomes in the first place.<sup>172</sup> Our legal system's respect for the outcomes of democratic processes is premised on an equal respect for people and their choices. Certain preferences, such as those based on racism and sexism, are illegitimate because they deny the respect to persons as equal citizens that is at the foundation of democracy.<sup>173</sup>

This understanding of discrimination as poisoning the outcomes of the democratic process is not limited to discrimination by government actors. Similar reasons justify the extension of statutory prohibitions on discrimination to certain non-governmental institutions, such as workplaces and schools.<sup>174</sup> The extension of statutory discrimination law to private actors reflects the recognition that some nongovernmental institutions also serve important functions in sustaining a democracy based on equal citizenship. Workplaces and schools, for example, play an important aspirational role in constructing the norms and preferences necessary for the model of equal citizenship to suc-

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171. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145–57 (1980) (explaining that strictly scrutinizing legislative classifications which disadvantage discrete and insular minorities promotes equal concern and respect for all persons); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* at xii, 272 (1978) (explaining that the right to equality is fundamental); Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976) (explaining that, despite the fact that some race-dependent decisions are rational, many are based on assumptions of the differential worth of racial groups, which must then be protected by antidiscrimination laws).

172. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 38–39 (1996).

173. *Id.* at 39 (arguing that racist preferences must be excluded under both Ely's and Dworkin's theories because allowing racism to influence decision making would contradict the very reasons for valuing a democratic decision-making process).

174. *Id.* at 14 (“Antidiscrimination law reaches private action because some private actors are held to the same obligation not to discriminate that government has (whatever that obligation may be).”).

ceed. Racism and sexism within these institutions undermine their ability to foster the conditions necessary for equal citizenship.

The full extension of discrimination law to certain nongovernmental actors is particularly important and justified in light of the turn toward privatization of formerly public processes for resolving disputes within these institutions. In recent years, legal standards have shifted to favor internal and less formal mechanisms for resolving discrimination complaints, especially in institutions such as workplaces and schools, prior to or instead of litigation and other government-controlled processes.<sup>175</sup> These developments have made equal citizenship guarantees all the more essential within these institutions. The public nature of such dispute resolution processes should not be obscured by the redirection of official responsibility into private hands. Just as fair and unbiased treatment in the judicial process is critical to equal citizenship guarantees, so should the legally sanctioned use of internal grievance procedures be accountable to the demands of equal citizenship.

Discrimination law, as applied to both government actors and nongovernmental institutions, seeks to promote practices conducive to equal citizenship. As Andrew Koppelman has explained, in order to encourage these practices, discrimination law must strive to eliminate the source of illegitimate preferences by eradicating racism and sexism in the broader culture and society, as well as within specific institutions.<sup>176</sup> Only then can the legislative and policy outcomes of the democratic process be free of the taint of illegitimate discriminatory preferences.

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175. See, e.g., Sturm, *supra* note 4 (describing internal mechanisms for resolving discrimination complaints in the workplace); see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (requiring prior notice to school officials followed by deliberate indifference to establish school liability for teacher-student sexual harassment); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (same for student-to-student harassment).

176. KOPPELMAN, *supra* note 172, at 43–44 (arguing that since even unconscious racist preferences can affect the decision-making process, process theory requires cultural transformation to eliminate racist preferences in decision making); *id.* at 17 (“The aspirations of each theorist can only be realized in the context of a larger transformative project—one that seeks to eliminate from ordinary social life the meanings, practices, and institutions that unjustifiably stigmatize and disadvantage some groups.”).

This account of the democratic underpinnings of discrimination law, sketched so briefly here, leaves many unanswered questions about what it means to be an equal citizen and what practices promote the construction of equal citizenship. The retaliation claim offers one set of answers to these questions. By protecting persons who challenge racism and sexism, the retaliation claim furthers equal citizenship in two respects. First, it promotes cultural transformation by protecting practices that challenge racism and sexism, thereby helping to eradicate the roots of the illegitimate preferences that taint democratic outcomes. And second, it enables coalition building and collective opposition to racism and sexism that cuts across social group membership. In the process, it protects the construction of equal citizens who work together in the pursuit of social change and the social bonds that develop through such alliances.

#### 1. Fostering Cultural Transformation

If racism and sexism in the broader culture undermine equal citizenship and interfere with the proper functioning of democracy, then legal protection from retaliation is crucial to fulfilling the goals of discrimination law. In a democracy based on equal citizenship, there must be sufficient room to contest racism and sexism in order to foster cultural transformation and eradicate the illegitimate preferences that undercut equal citizenship. Retaliation silences complaints about inequality and cuts off the deliberation and dissent necessary for cultural transformation. When it occurs within schools and workplaces, it weakens the capacity of these institutions to promote a fully functioning democracy. A deliberative democracy based on equal citizenship requires space for people to contest the power hierarchies that can distort the ability of the less powerful to participate freely in deliberation. Through the retaliation claim, discrimination law recognizes that contesting racism and sexism is a valuable form of civic participation and integral to the values underlying antidiscrimination law.<sup>177</sup>

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177. In elaborating on the contours of democratic process justifications for discrimination law, Professor Koppelman draws on James Liebman's work applying democratic theory to antidiscrimination law. *Id.* at 50. As Professor Liebman's work explains, the premise that all citizens must be accorded equal concern and respect assumes that citizens have an equal capacity to define "the good" for themselves. *Id.* Unlike Professor Ely's theory, which seeks to free representatives' decision making from prejudice, Professor Liebman's approach focuses on citizen participation in the political process. *Id.* The latter approach especially supports an understanding of discrimination law that

The retaliation claim is particularly well-suited to serve the interests of cultural transformation because it focuses on persons who challenge institutional practices from within institutions. Critiques by “insiders” provide an especially promising vehicle for fostering cultural transformation within institutions.<sup>178</sup> Challenges to race and sex bias made by persons outside the relevant community often generate added resistance by virtue of their outsider status, as exemplified by the heightened resistance to the civil rights movement based on the notion, however facetious, that the community was fine until outsiders swooped in to stir up trouble.<sup>179</sup> Persons who are part of the relevant community are often in the best position to raise challenges to that community’s prevailing norms. The value of promoting change from within is reflected in the policies of discrimination law that favor the voluntary resolution and prevention of discrimination claims.<sup>180</sup> By protecting challenges to ra-

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provides strong protection for citizen resistance to racist and sexist norms. *Id.*

178. See, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 40 (1970) (discussing “exit” and “voice” as strategies for prompting organizational change and noting that voice plays an especially important role for organizational change when the person exercising voice is a member of the organization).

179. For an example of a judicial opinion reflecting hostility to “outsiders” from the civil rights movement, see *Clark v. Thompson*, 206 F. Supp. 539, 541–43 (S.D. Miss. 1962), *aff’d*, 313 F.2d 637 (5th Cir.), in which the district court praised the city segregationists and chastised “the self-styled Freedom Riders” who “aroused strained racial feelings” in challenging racial segregation in public facilities in Jackson, Mississippi.

180. Numerous doctrines in discrimination law favor the prevention of discrimination and the voluntary resolution of discrimination claims without resort to formal legal proceedings. See, e.g., *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2347 (2004) (holding that an employer may defend against constructive discharge, absent an official adverse action, by showing “(1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus”); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (barring punitive damages under Title VII where employer had made a good faith effort to prevent discrimination); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (adopting an affirmative defense to vicarious liability for supervisory sexual harassment in which defendant may prevail by showing that it acted reasonably to prevent and address sexual harassment, such as by adopting a sexual harassment policy, and that plaintiff acted unreasonably in failing to prevent or correct the harassment, such as by failing to report it or invoke such a policy); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (limiting school liability for a teacher’s sexual harassment of a student to cases in which school officials had actual notice of the harassment and responded with deliberate indifference); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (adopt-

cism and sexism from within institutions, the retaliation claim serves the same policy objective.

The sweep of retaliation claims to include persons who are not members of the social group targeted by discrimination also furthers the goal of cultural transformation. Persons outside the class of the targets of discrimination are often better positioned to oppose discrimination because they are less likely to be perceived as overreacting or self-interested.<sup>181</sup> Hence it is essential that the retaliation claim protect all persons within institutions who challenge inequality, including persons who are outside of the social group that experiences the discrimination.

The retaliation claim is also well-suited to foster cultural transformation due to the nature of the institutions governed by it. The institutions subject to the prohibition on retaliation are of special importance in the project of cultural transformation. Schools and workplaces in particular play important roles in the construction of citizens. Such institutions must allow space for contesting prevailing race and gender norms if discrimination law is to serve its democracy-enhancing objectives. Few other settings are discrete and manageable enough to promote the kind of frequent human interaction necessary to engage in deliberative practices.

The Supreme Court recognized the role schools play in promoting civic participation in *Brown v. Board of Education*.<sup>182</sup> In explaining why racial segregation violated equal pro-

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ing the same standard of school liability for student-to-student sexual harassment); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (describing “the primary objective” of Title VII as “a prophylactic one” in preventing discrimination); cf. Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 780–87 (2003) (discussing the case law favoring mandatory arbitration of employment discrimination disputes and the role of legal counsel for employers in constructing the arbitration process).

181. See, e.g., FINE, *supra* note 52, at 71–72 (explaining research showing that “victims” who invoke procedures to address inequities that befall them are more likely to appear self-serving and less likely to gain the social support necessary to be effective, while “non-victims” who seek recourse on behalf of others are more likely to appear benevolent and to receive praise and rewards for doing so); Czopp & Monteith, *supra* note 43, at 532, 534, 541 (explaining research showing that “when sources acted in support of their group’s interest (i.e., their position confirmed group-based expectancies), processing decreased among message recipients,” and concluding that “Blacks and women who confronted others were perceived as overreacting to a greater extent than Whites and men even though both the initial biased response and the subsequent confrontation were exactly the same”).

182. 347 U.S. 483 (1954).

tection, the Court emphasized the important role of public schools in providing a foundation for good citizenship by teaching the values and skills necessary for a well-functioning democracy.<sup>183</sup> More recently, the Court acclaimed the democracy-enhancing role of universities in *Grutter v. Bollinger*,<sup>184</sup> in terms that strongly suggest the importance of teaching civic virtue by promoting respect for persons across racial differences and the importance of diversity in interactions with others. Both decisions craft interpretations of equality law based partly on the value of promoting the role of education in teaching antistereotyping, and by extension, good citizenship.

Workplaces too serve as important sites for civic participation and the construction of citizens.<sup>185</sup> In today's society, there is little opportunity, other than at work, for adults to hold sustained, in-person discussions and debates about social values with a relatively diverse group of fellow citizens.<sup>186</sup> The workplace is a major site for the practice and construction of citizenship based on a model of equal respect.<sup>187</sup> Because of the centrality of these institutions to civic engagement, it is especially

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183. *Id.* at 493 (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.”).

184. 539 U.S. 306, 331 (2003) (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society. This Court has long recognized that ‘education . . . is the very foundation of good citizenship.’ For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.” (citations omitted)); *id.* at 333 (crediting the law school’s stated mission of “diminishing the force of . . . stereotypes” by admitting a critical mass of underrepresented minorities).

185. See generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003) (making an excellent case for viewing the workplace as a central site of civic engagement in the democratic process).

186. *Id.* at 12–25, 61–62 (emphasizing the uniqueness of the workplace in today’s society in terms of closeness with others, a high level of diversity in interactions with others, and norms favoring civility in order to work effectively with others).

187. *Id.* at 30 (discussing the workplace as a prominent site of teaching “civic skills”); *id.* at 118–22 (explaining the importance of public discourse in democratic theory and why discourses at work are essential to this type of public deliberation).

important that discrimination law protect persons who participate in discourses challenging racism and sexism in schools and workplaces.

Finally, and also in furtherance of the project of cultural transformation, the retaliation claim allows space for the construction of antiracist and antisexist identities through the practice of opposition to racism and sexism. It values and protects a form of citizenship that is active, participatory, and engaged in cultural transformation. In this way, the retaliation claim protects the practice of equal citizenship. The potential for cultural transformation is two-fold, derived both from resistance to the discrimination, with the chance that the resistance will change institutional practices, and from the construction of the challenger's identity. Even if the opposition does not ultimately result in changing the challenged practice, it may further the challenger's own identity as someone who fights racism or sexism and cares about equality in a wider variety of settings—a citizen who practices equal citizenship and regards others as equals. In this way, the retaliation claim protects the construction of equal citizens through the process of opposition to inequality.

## 2. Collective Engagement and Social Bonds

By protecting against retaliation, discrimination law encourages the development of social bonds that transcend fixed identity categories. The retaliation claim protects oppositional practice, as opposed to status-based identity, thus facilitating alliances and coalitions centered upon collective challenges to inequality.<sup>188</sup> Protection from retaliation provides a necessary foundation for building social movements within institutions to contest racial and sexual hierarchy. By extending protection beyond the immediate targets of discrimination to include protection for any person who opposes it, discrimination law allows

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188. *Id.* at 26 (discussing the connectedness and solidarity that comes from shared opposition to objectionable practices in the workplace); *cf.* WILDMAN, *supra* note 152, at 4–5 (explaining the need for white people to examine and challenge their own race privilege); Ehrenreich, *supra* note 9, at 319–20 (contending that “seeing identity groups as fluid, overlapping and co-constitutive entities, rather than as fixed and discrete, problematizes the notion of intergroup conflict and facilitates the recognition of commonalities”); Harris, *supra* note 8, at 612 (advocating alliances between men and women who share a feminist political vision, and recognizing how black women especially can construct their identities in opposition to race and sex oppression through “creative action”).

the mobilization of collective strategies for opposing inequality instead of seeing discrimination as only the problem of the targeted individual.<sup>189</sup> In the process, it acknowledges the collective responsibility for addressing discrimination and refuses to marginalize sexism and racism as issues belonging exclusively to women and people of color.<sup>190</sup> The social bonds that develop through collective opposition to racism and sexism promote a shared interest in the well-being of fellow citizens that is crucial to the equal citizenship model.<sup>191</sup>

For equal citizenship to be anything but aspirational, discrimination law must provide sufficient space for contesting racist and sexist norms that are inconsistent with equal citizenship. By valuing and protecting a form of civic engagement that is actively involved in the opposition to inequality and that promotes coalition building across social groups, the retaliation

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189. Cf. SHIRLEY CASTELNUOVO & SHARON R. GUTHRIE, *FEMINISM AND THE FEMALE BODY: LIBERATING THE AMAZON WITHIN* 3–6 (1998) (advocating feminist strategies that seek solutions in a cohesive, group setting, and arguing that only collective action can effectively challenge social norms); FINE, *supra* note 52, at 63–64 (criticizing mainstream social psychology literature for emphasizing individualist coping strategies, and arguing that individual responses to injustice often work best for persons in more privileged circumstances and may ultimately reinforce and justify existing power inequalities). For this reason, the retaliation claim is well-suited to avoid the “reverse resistance” problem of subtly reinforcing the dominant discourse. Foucault has argued that “reverse resistance” discourse is just the flip side of the dominant discourse, which it ultimately reinforces. See CASTELNUOVO & GUTHRIE, *supra* at 37. (explaining Foucault’s reverse resistance theory). This theory posits that, for example, a lesbian who advocates gay and lesbian rights engages in reverse resistance by accepting heterosexual power discourse in which sexuality is categorized as normal or abnormal. *Id.* By defending herself as “normal,” she implicitly accepts the psychological, medical, and legal discourses that link sexuality and identity and define heterosexuality as “normal.” *Id.* Opposition to discrimination by nontargets is more likely to escape the reverse resistance problem because it destabilizes the boundaries of protected class status that distinguish victims from oppressors.

190. Cf. WILDMAN, *supra* note 152, at 16 (lamenting the ability of members of privileged groups to “opt out” of struggles against oppression, and noting that it is a privilege that can be exercised by silence); Crosby, *supra* note 12, at 175–76 (“[A] person’s sense of well-being depends not only on his or her personal situation but also on the situations of others in the society. Men’s health, for example, has been found to suffer when they work in environments that discriminate against women.” (citation omitted)).

191. See ESTLUND, *supra* note 185, at 83 (describing “[t]he cultivation of interpersonal ties across racial lines” as a “public good” that enriches civic and social life by promoting a feeling of “being in this together” that is essential in a diverse democracy).

claim can play an important role in effectuating the democracy-enhancing goals of discrimination law.<sup>192</sup> In the process, it helps add content to the ideal of equal citizenship.

#### IV. RECONSIDERING DOCTRINAL LIMITS ON RETALIATION

As with much discrimination law, the promise of the retaliation claim is threatened by the development of restrictive doctrine that undercuts its transformative potential. Despite the potential of the retaliation claim to strengthen and further the antidiscrimination project, courts have imposed doctrinal limits that serve to legitimize inequality rather than interrogate it. One of the most problematic limits is the requirement that the challenger have a reasonable belief that the challenged conduct amounts to unlawful discrimination. Through this doctrine, courts have reinforced selective and narrow interpretations of discrimination, while labeling broader conceptions as unreasonable. In the process, they have left challengers unprotected if their quest for equality goes beyond the narrowest and most minimal of nondiscrimination guarantees.

##### A. THE REASONABLE BELIEF DOCTRINE

To understand how the reasonable belief requirement thwarts the potential of retaliation claims, it is necessary to provide some background on the structure of retaliation claims under Title VII, the original source of the reasonable belief doctrine. Two key principles lay the groundwork for this discussion.

First, and as mentioned earlier, plaintiffs need not prove unlawful discrimination as a prerequisite for succeeding on a retaliation claim.<sup>193</sup> Protection from retaliation would mean little if it were otherwise. Most people lack knowledge about

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192. *Cf. id.* at 103–04 (discussing Alexis de Tocqueville’s argument that the success of democracy hinges on cooperation, empathy, and interdependence among different communities in society).

193. For a sampling of cases explaining the rationale behind this rule, see *Wright v. CompUSA, Inc.*, 352 F.3d 472, 477 (1st Cir. 2003); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. 1981); *Parker v. Baltimore and Ohio Railroad Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *Heath v. Metro. Transit Commission*, 436 F. Supp. 685, 688 (D. Minn. 1977); *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975).

whether what they perceive as discrimination is actually unlawful, and judicial outcomes in discrimination cases frequently depend on the identity of judges and jurors. It would be highly risky to complain of discrimination if protection from subsequent retaliation depended on first proving unlawful discrimination.<sup>194</sup> Moreover, certain discrimination claims require prior notice to succeed, leaving claimants in a Catch-22 if complaints of discrimination did not trigger protection from retaliation unless and until the underlying incidents gave rise to a claim of unlawful discrimination.<sup>195</sup>

A second established principle, also important for understanding Title VII's reasonable belief doctrine in practice, is that protection from retaliation extends to participation in formal legal proceedings under Title VII as well as informal, internal challenges to perceived discrimination. Two separate clauses in Title VII extend protection to persons who complain of discrimination depending on the form their challenge takes. Employees who pursue the redress provided under the statute, such as filing or assisting with an EEOC complaint or a lawsuit, are protected by Title VII's "participation clause," which protects an employee from retaliation if he or she "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."<sup>196</sup> A separate clause, known as "the opposition clause," makes it unlawful "for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]."<sup>197</sup> The opposition clause extends protection from retaliation to persons

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194. See, e.g., *Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1172 (10th Cir. 2003) (rejecting the defendant state's argument that Congress overstepped its power to enforce the Fourteenth Amendment when it created a retaliation action for opposing conduct that falls short of actual unlawful discrimination, and explaining: "The determination of what constitutes prohibited conduct under Title VII continually evolves as 'courts continue to struggle with the question of the types of workplace discrimination and harassment which are prohibited by Title VII.'" (citations omitted)).

195. See, e.g., *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2347 (2004) (constructive discharge); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649-50 (1999) (student-to-student sexual harassment); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (sexual harassment by a supervisor); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (sexual harassment of a student by a teacher); *Blankenship v. Parke Care Ctrs.*, 123 F.3d 868, 873 (6th Cir. 1997) (co-worker sexual harassment).

196. 42 U.S.C. § 2000e-3(a) (2000).

197. *Id.*

who complain informally of discrimination, stopping short of invoking the formal legal machinery of Title VII.<sup>198</sup> Such protection is essential to support Title VII policies favoring the prevention of discrimination and the early, informal resolution of complaints.<sup>199</sup> Charges of discrimination rarely reach the EEOC or the courts without some higher-level person first learning of the complainant's concerns. Without protection from retaliation at the early, less formal stages of complaining, challengers would be chilled from ever complaining or be forced into taking formal legal action when informal action might have been a more appropriate response, at least initially.<sup>200</sup>

As described so far, retaliation law accepts two important principles, both of which are fully consistent with the promise and objectives of the retaliation claim: first, persons are protected from retaliation even if the conduct they challenge does not rise to the level of unlawful discrimination, and second, both formal and informal methods of complaining are protected. A problem arises from an important qualification courts have imposed on these principles which substantially limit the ability of persons who complain informally of inequality to obtain protection from retaliation. Courts require a closer proximity between the underlying conduct and the narrow universe of unlawful discrimination when the challenger raises her con-

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198. There is some uncertainty as to which clause governs participation in an employer's own investigation of discrimination charges. The categorization largely turns on whether the employer's investigation responds to or is independent of the filing of an EEOC charge. *See, e.g.,* EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000) (declining to extend participation clause protection to participation in employer internal investigations conducted prior to receiving notice of an EEOC charge); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) (holding that Title VII's participation clause applies to participation in an employer's internal investigation when it follows notice of an EEOC charge).

199. For early cases citing this rationale to justify protection from retaliation for challenging perceived discrimination under the opposition clause, see *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. 1981); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980); *Hearth v. Metro. Transit Comm'n*, 436 F. Supp. 685, 688-89 (D. Minn. 1977).

200. *See, e.g.,* *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981). For similar reasons, courts have also protected informal opposition under statutes that do not contain an express opposition clause. *See, e.g.,* EEOC v. Romeo Cmty. Schs., 976 F.2d 985, 989 (6th Cir. 1992) (extending protection from retaliation under the Equal Pay Act to a female custodian who informally protested gender-based wage discrimination); *Davis v. Flexman*, 109 F. Supp. 2d 776, 803 (S.D. Ohio 1999) (interpreting § 504 of the Rehabilitation Act to encompass protection from retaliation for informally complaining of discrimination against the disabled).

cerns informally as opposed to participating in formal Title VII proceedings. When the challenge counts as “participation” in formal legal proceedings, the employee is protected regardless of the merits of the underlying assertion of unlawful discrimination.<sup>201</sup> However, when the challenge occurs more informally, outside of an EEOC or judicial proceeding, the claimant must have a reasonable belief that the challenged conduct violated the statute.<sup>202</sup> Because most people informally express their opposition to employer practices before resorting to legal action, the stricter standard imposed under the opposition clause turns out to be a critical gatekeeper.<sup>203</sup> Furthermore, the trend toward privatization of discrimination complaints, enforced by legal doctrines channeling complaints through internal and in-

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201. See, e.g., *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) (protecting the plaintiff from retaliation under the participation clause even though the plaintiff’s testimony was unreasonable). To fail under the participation clause, the merits of the underlying complaint must go well beyond unreasonableness to the point of being false and malicious. See, e.g., *Johnson v. ITT Aerospace*, 272 F.3d 498, 501 (7th Cir. 2001) (emphasizing that the participation clause does not protect plaintiffs who file frivolous charges with the EEOC); *Barnes v. Small*, 840 F.2d 972, 979 (D.C. Cir. 1998) (holding that the participation clause does not protect employees from making false and malicious charges).

202. See, e.g., *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983); *De Anda v. St. Joseph Hosp.*, 671 F.2d 850, 852 (5th Cir. 1982); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982).

203. The added difficulty of proceeding under the opposition clause is not solved by the ability to gain broader legal protection from retaliation by “participating” in formal Title VII proceedings. The participation clause applies only to retaliation that occurs after the initiation of formal proceedings, and not to any retaliatory acts that occurred after the informal opposition to the practices but before the formal filing of a Title VII charge. Moreover, there is some evidence that courts are beginning to import the objective reasonableness requirement to claims brought under the participation clause as well. See *Fine v. Ryan Int’l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002) (stating that it is improper to retaliate against an employee for filing a lawsuit based on a reasonable, good faith belief, as long as the claim is not “completely groundless”); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000) (upholding the plaintiff’s participation clause claim where the “[p]laintiff could have reasonably believed that he was engaging in protected activity when he filed his EEOC complaint”); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998) (stating that courts have not yet resolved whether the participation clause contains a “good faith, reasonable basis requirement”); *Childress v. City of Richmond*, 919 F. Supp. 216, 219 (E.D. Va. 1996) (rejecting a group of white male officers’ participation clause claim where their charge of discrimination against women and African Americans amounted to a charge of “favorable treatment” for white males and was “spurious” under Title VII), *aff’d*, 134 F.3d 1205 (4th Cir. 1998).

formal grievance procedures as a prerequisite to formal legal action, makes the reasonable belief doctrine all the more important.<sup>204</sup>

The Supreme Court recently applied the reasonable belief standard to a retaliation claim under Title VII's opposition clause in *Clark County School District v. Breeden*.<sup>205</sup> In a *per curiam* opinion, the Court ruled that the plaintiff's retaliation claim failed because she lacked a "reasonable, good faith belief" that the conduct she complained of rose to the level of unlawful discrimination.<sup>206</sup> The plaintiff in *Breeden* alleged that during a meeting she attended with a male supervisor and a male co-worker, the two men engaged in sexually explicit dialogue.<sup>207</sup> Specifically, while reviewing psychological evaluation reports of job applicants, the supervisor read aloud a comment disclosing that one of the applicants had said to a co-worker, "I hear making love to you is like making love to the Grand Canyon."<sup>208</sup> After reading the comment aloud, the supervisor looked at the plaintiff and said, "I don't know what that means."<sup>209</sup> The male co-worker answered, "Well, I'll tell you later," and the two men chuckled.<sup>210</sup> The plaintiff complained about this exchange to the co-worker and the supervisor who were in the meeting and to an assistant superintendent who supervised the plaintiff.<sup>211</sup> She alleged that she was assigned less desirable job duties and relieved of her supervisory responsibilities in retaliation for her complaints.<sup>212</sup> She subsequently filed a formal Title VII charge

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204. See *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (holding that the participation clause applies only to Title VII's "machinery," such as "proceedings and activities" connected with a formal EEOC charge, but not to participation in the employer's internal complaint mechanisms); see also Edward A. Marshall, *Title VII's Participation Clause and Circuit City Stores v. Adams: Making the Foxes Guardians of the Chickens*, 24 BERKELEY J. EMP. & LAB. L. 71, 74-75 (2003) (stating that courts' findings that the participation clause's absolute retaliation protection is unavailable to employees who act "outside the 'statutory machinery' of Title VII or file complaints or testify in an employer's own, internal grievance process . . . leaves employees forced into compulsory arbitration . . . without the protections from reprisal that have long been recognized as essential to the effective enforcement of Title VII").

205. 532 U.S. 268 (2001).

206. *Id.* at 270.

207. *Id.* at 269.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. See *Breeden v. Clark County Sch. Dist.*, No. 99-15522, 2000 U.S. App.

based on the same incident, after which she was transferred to a different job location.<sup>213</sup> The claim for retaliation based on the change in job duties was governed by the opposition clause, while the change in job location fell under the participation clause.<sup>214</sup>

Applying the reasonable belief standard to the facts in *Breeden*, the Court quickly dismissed the reasonableness of the plaintiff's belief that the above exchange amounted to unlawful sexual harassment.<sup>215</sup> The Court did not question whether such sexual banter might, as part of a pattern of similar incidents, contribute to the creation of a hostile environment.<sup>216</sup> Rather, the Court found this single incident insufficiently severe or pervasive to rise to the level of a hostile environment.<sup>217</sup> Because the Court determined that the plaintiff lacked a reason-

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LEXIS 17564, at \*5 (9th Cir. July 19, 2000) (describing the factual background of the dispute), *rev'd*, 532 U.S. 268 (2001).

213. *Id.* at \*8.

214. *Id.* at \*2.

215. The Court noted that it had “no occasion to rule on the propriety” of the reasonable belief standard “because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.” 532 U.S. at 270. The Court's decision forecloses a more lenient standard requiring only a subjective good faith belief, and raises a question as to whether the Court intended to suggest that plaintiffs must do more than show a reasonable, good faith belief that the underlying conduct violated Title VII. However, in light of the settled nature of this question in the lower courts, it is unlikely that the Court will require more than this. *Cf.* Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1512 (2005) (Thomas, J., dissenting) (“Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim.”).

216. The Court did not question, for example, whether the conduct occurred because of the plaintiff's sex. *See, e.g.*, Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (“The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” (citation omitted)). The closest the Court came to suggesting this as an issue was its cryptic statement that the plaintiff's “co-workers who participated in the hiring process were subject to the same requirement [to review the sexually explicit statement in the course of screening job applicants].” *Breeden*, 532 U.S. at 271. However, this reference alludes to the requirement of reviewing the comment in the file, to which the plaintiff did not object, as opposed to the discussion of the comment at the meeting. With respect to the comment at the meeting, the Court viewed severity and pervasiveness, and not the “because of sex” requirement, as the real hurdle. *Id.* (concluding that the incident was “at worst an ‘isolated inciden[t]’ that cannot remotely be considered ‘extremely serious,’ as our cases require”).

217. *Id.* at 270–71.

able belief that the offending conduct amounted to illegal sexual harassment, the retaliatory acts she experienced as a result of her informal complaints were not actionable.<sup>218</sup>

My concern with *Breeden* is not the Court's analysis of whether the offending conversation amounted to sexual harassment. The Court was surely right that a Title VII hostile environment claim based on these facts falls well short of what existing precedent requires.<sup>219</sup> However, whether a person could have a reasonable belief that the incident created a hostile environment is a more complicated question. On this issue, the Ninth Circuit's opinion in *Breeden* exhibited a more appropriate measure of caution, emphasizing the need to take into account "the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims."<sup>220</sup> The Ninth Circuit evaluated reasonableness from the perspective of a Title VII plaintiff.<sup>221</sup> The Supreme Court's cursory dis-

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218. The Court's different treatment of the plaintiff's participation clause claim demonstrates the greater difficulty plaintiffs have securing protection against informal opposition. The participation clause claim alleged that the plaintiff was transferred to a different job location as punishment for filing a Title VII charge with the Nevada Equal Rights Commission and the EEOC and, subsequently, a lawsuit based on the same incident. *Id.* at 271-72. Because this claim fell under the participation clause, the "unreasonableness" of the plaintiff's belief that the challenged conduct violated Title VII was not an obstacle. Instead, the Court rejected this claim for lack of causation. *Id.* at 272-74. However, had the Court permitted the opposition claim to proceed, it is not clear that causation would have presented such a problem. Causation failed on the participation claim because the supervisor who decided to transfer the plaintiff did not find out about the lawsuit before announcing that she was considering transferring the plaintiff, and because the notice of the EEOC charge was too remote in time, occurring nearly two years before the transfer. *Id.* at 273-74. However, according to the Ninth Circuit's more detailed description of the facts, the plaintiff's internal complaints to supervisors preceded both the transfer decision and the change in supervisory responsibilities. See *Breeden v. Clark County Sch. Dist.*, 2000 U.S. App. LEXIS 17564, at \*6-9 (9th Cir. July 19, 2000), *rev'd*, 532 U.S. 268 (2001). Had the Court addressed the issue of causation under the opposition claim, it is not clear that it would have reached the same result. The Court's disposition of the participation claim shows that the possibility of asserting a claim under the participation clause for subsequent, formal complaints does not alleviate the hardship imposed by the opposition clause.

219. See generally THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 20-29 (2005) (summarizing case law granting summary judgment to employers for insufficient proof of severity and pervasiveness).

220. *Breeden*, 2000 U.S. App. LEXIS 17564, at \*3-4 (quoting *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994)).

221. *Id.* at \*4 (explaining that "[t]he bar set by the 'reasonable belief' standard . . . is very low" (quoting *Moyo*, 40 F.3d at 985)).

cussion of reasonableness clouded the question of perspective and implicitly adopted the Court's own perspective, shaped by the limits of existing case law.

Since *Breeden*, courts have required plaintiffs bringing retaliation claims under the opposition clause to demonstrate a good faith, reasonable belief that the underlying conduct amounted to unlawful discrimination.<sup>222</sup> Some courts have extended the reasonable belief requirement beyond Title VII to limit retaliation claims brought under other nondiscrimination laws as well. For example, lower courts recognizing retaliation claims under Title IX and Title VI have applied the reasonable belief doctrine as a limitation on the protection afforded under these statutes.<sup>223</sup> They have done this despite the standard's origin in Title VII's unique statutory language, which parses "participation" and "opposition" into distinct clauses, and the absence of similar statutory language in Title IX and Title VI.<sup>224</sup>

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222. See, e.g., *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (holding that a plaintiff must have a reasonable belief that the practices are unlawful in order to satisfy an opposition clause claim); *Little v. United Techs. Carrier Transicold Div.*, 103 F.3d 956 (11th Cir. 1997) (requiring the plaintiff to have both a subjective good faith belief and an objectively reasonable belief that the employer's practices are unlawful). The Tenth Circuit was the last holdout in adopting a reasonable belief requirement. Compare *Crumpacker v. Kansas*, 338 F.3d 1163, 1171 (10th Cir. 2003) (overturning the subjective good faith standard in light of *Breeden*), with *Shinwari v. Raytheon Aircraft Co.*, No. 98-3324, 2000 WL 731782, at \*5-6 (10th Cir. June 8, 2000) ("[O]pposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated." (quotations omitted)), superseded by *Breeden*, 532 U.S. 268, as recognized in *Crumpacker*, 338 F.3d at 1171. If the objective reasonable belief standard is met, the subjective good faith requirement should rarely be an obstacle. But see *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 7 (1st Cir. 1980) (affirming the district court's dismissal of a retaliation claim for lack of a good faith belief that the challenged practices amounted to unlawful discrimination based on its finding that it was "at least as likely" that the plaintiff's accusations were motivated by self-protection).

223. See, e.g., *Preston v. Va. ex rel New River Cmty. Coll.*, 31 F.3d 203, 206-07 (4th Cir. 1994) (applying the same standards for a Title IX retaliation claim as would apply under Title VII); *Howell v. N. Cent. Coll.*, 331 F. Supp.2d 660, 663-66 (N.D. Ill. 2004) (applying a reasonable belief requirement to a Title IX retaliation claim); *Belgrave v. City of N.Y.*, 95-CV-1507 (JG), 1999 U.S. Dist. LEXIS 13622, at \*104, 118-20 (E.D.N.Y. Aug. 31, 1999) (applying the same standards for Title VI retaliation claim as would apply under Title VII); *Nelson v. Univ. of Me. Sys.*, 923 F. Supp. 275, 284 (D. Me. 1996) (applying a reasonable belief requirement to a Title IX retaliation claim); cf. *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155 (2d Cir. 1999) (applying a reasonable belief requirement to an Americans with Disabilities Act retaliation claim).

224. 20 U.S.C. § 1682 (2000) (Title IX); 42 U.S.C. § 2000d (2000) (Title VI);

The leading example of a court applying the reasonable belief standard to a non-Title VII retaliation claim is *Peters v. Jenney*,<sup>225</sup> the same case that broke from the Eleventh Circuit's ruling in *Jackson* to recognize an implied private right of action under Title VI.<sup>226</sup> Although the Fourth Circuit reversed the district court's dismissal of the retaliation claim under Title VI,<sup>227</sup> the appellate court's reasoning remanding the case made reasonable belief a critical and probably insurmountable hurdle for the plaintiff.<sup>228</sup> The plaintiff in *Peters* claimed that her objections to the selection criteria in the school's gifted program, and her efforts to include more African-American students in the program, triggered retaliatory action by the school district resulting in her termination as director of the program.<sup>229</sup> The Fourth Circuit invoked a purportedly clear-cut distinction between intentional discrimination and disparate impact, explaining that the retaliation claim could succeed only if the conduct alleged by the plaintiff fell within the realm of intentional discrimination, as opposed to mere disparate impact.<sup>230</sup> The court emphasized that, regardless of the plaintiff's subjective belief, it was not reasonable to believe that Title VI encompasses disparate impact discrimination.<sup>231</sup> To succeed on remand, the plaintiff will have to prove that the selection policies she opposed amounted to intentional discrimination and not mere disparate impact. Although the court acknowledged that the plaintiff need not prove that intentional discrimination actually occurred, it required her to show at a minimum that the practices she opposed raised a jury question as to whether the district had engaged in intentional discrimination.<sup>232</sup>

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42 U.S.C. § 2000e-3 (2000) (Title VII).

225. 327 F.3d 307 (4th Cir. 2003).

226. *See id.* at 325–26.

227. *Id.* at 310–11.

228. *See id.* at 320–21, 323.

229. *See id.* at 311–13.

230. *Id.* at 315.

231. *See id.*

232. *See id.* at 319–20. *Peters* suggests that the reasonable belief standard merges into a determination of whether the plaintiff's challenge to the underlying conduct could survive summary judgment in a discrimination claim. *Id.* This standard, equating reasonable belief to the threshold for surviving summary judgment, is exceedingly harsh in light of the high rate of summary judgment in discrimination cases. Other circuits have been careful to clarify, despite their own strict interpretations of reasonable belief, that the standard does not necessarily require proof sufficient to survive summary judgment. *See, e.g.,* *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, 135 (2d Cir.

Against this backdrop, the *Jackson* decision was silent on the question of what standard governs retaliation claims under Title IX. The majority opinion repeatedly tied its protection from retaliation to instances where, as the majority ambiguously phrased it, the plaintiff had complained of or about sex discrimination.<sup>233</sup> The Court offered no guidance in distinguishing which complaints are “about sex discrimination” and which are not. Notably, the majority did not require Mr. Jackson to demonstrate that the school had in fact discriminated against his female basketball players as a prerequisite for his claim to go forward, and it is not clear from the Court’s description of the facts that sex discrimination had indeed occurred.<sup>234</sup> Also of note, the majority did not disagree with Justice Thomas’s accurate statement that existing law does not require retaliation claimants to prove that their underlying discrimination complaints were meritorious.<sup>235</sup> However, the majority also opted not to respond to Justice Thomas’s explicit assumption that the same reasonable belief standard that governs retaliation claims under Title VII’s opposition clause would also apply to retaliation claims under Title IX.<sup>236</sup> For now, at least, the applicability of the reasonable belief standard under Title IX, and by extension Title VI, is an open question. Nevertheless, as evidenced by the *Peters* case, lower courts have already assumed its applicability and, judging from Justice Thomas’s dissent, the major-

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1999) (“[A] plaintiff may state a prima facie case for retaliation even when her primary claim for discrimination is insufficient to survive summary judgment.”).

233. See *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) (“Retaliation against a person because that person has complained of sex discrimination is . . . encompassed by Title IX’s private cause of action.”); *id.* at 1507 (extending protection from retaliation to “a person who speaks out against sex discrimination”); *id.* (“[B]ecause the complainant speaks out about sex discrimination, the ‘on the basis of sex’ requirement is satisfied.”).

234. See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 123–25 (2000–01) (explaining that the standard of Title IX compliance for equal treatment of men’s and women’s sports requires an overall program comparison, not a sport-by-sport comparison, and that equal funding is not necessarily required by Title IX, nor is parity of treatment for individual men’s and women’s sports).

235. *Jackson*, 125 S. Ct. at 1512 (Thomas, J., dissenting).

236. *Id.* at 1512 (“Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim.”); *id.* at 1513 (“For example, if a coach complains to school officials about the dismantling of the men’s swimming team, which he honestly and reasonably, but incorrectly, believes is occurring because of the sex of the team, and he is fired, he may prevail.”).

ity opinion in *Jackson* is unlikely to prompt a change in that assumption. Consequently, the reasonable belief standard has the potential to shape the scope and extent of protection from retaliation well beyond Title VII.

#### B. HOW COURTS USE REASONABLE BELIEF TO REINFORCE NARROW CONSTRUCTIONS OF DISCRIMINATION

The reasonable belief requirement has generated a highly problematic body of case law. The following discussion offers four critiques of how this doctrine thwarts the promise of retaliation claims. First, the reasonable belief doctrine masks the complexity of discrimination and squeezes out broader, competing understandings. Second, it misses the interconnectedness of different types of subordination and too finely parses the categorical bases of discrimination. Third, it obfuscates the interrelated harms to persons exposed to discrimination within institutions and enforces an artificial line between “victims” and “nonvictims.” Finally, it imposes a court-centric and privileged perspective that is concealed by the neutral language of “reasonableness.” The end result is that the reasonable belief doctrine blunts the potential of retaliation claims to realize the progressive possibilities of discrimination law.

##### 1. Masking the Complexity of Discrimination

*Breedon* itself foreshadows the first problem—that the reasonable belief standard masks the complexity of discrimination and suppresses competing understandings. Although the Court correctly gauged the long distance between the sexual banter in *Breedon* and the discrete universe of unlawful sexual harassment under existing case law, it vastly understated the slipperiness of sexual harassment as a legal construct. The Court implicitly assumed a stability and simplicity of sexual harassment law that does not exist in the real world of social and legal conflict. Notwithstanding the Court’s prior insistence that questions of harassment can be answered by resorting to “common sense,”<sup>237</sup> applying sexual harassment law to particular factual scenarios involves a great deal of uncertainty, even for persons who study this area of law.<sup>238</sup> For employees who do

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237. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

238. See, e.g., Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002) (discussing the gap between what judges and reasonable

not specialize in sexual harassment law, the main source of knowledge about what constitutes harassment is likely to come from their interpretation of cultural norms regulating sexual conduct in the workplace, perhaps supplemented by information provided by the employer. Many employee handbooks, including the one allegedly consulted by the plaintiff in *Breeden*, include cryptic examples of behaviors—such as joking, teasing, and staring—that closely resemble the incident that triggered the plaintiff's opposition in *Breeden*.<sup>239</sup> The plaintiff's sexual harassment claim in *Breeden* was indeed highly likely to fail when tested in court. However, by disparaging the “reasonableness” of the plaintiff's view, the Court abruptly halted a possibly productive conversation about what types of sexually offensive behaviors should be regulated and greatly overstated the clarity of the line demarcating *actionable* sexually-tinged exchanges.

An added and related problem with the application of the reasonable belief standard in *Breeden* is the slipperiness of the threshold of harm required in a hostile environment sexual harassment claim. The Court's ruling in *Breeden* might have been less problematic had it concluded that the alleged incident did not come reasonably close to qualifying as the type of sexually harassing behavior that underlies a hostile environment claim.<sup>240</sup> Instead, the Court ruled that, assuming the incident

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people recognize as sexually harassing); Donna Shestowsky, Note, *Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357, 357 (1999) (“[E]mpirical evidence finding that men and women have vastly different perceptions of sexual harassment indicates that a common knowledge base for determining reasonable behavior does not exist.”).

239. See *Breeden v. Clark County Sch. Dist.*, No. 99-15522, 2000 U.S. App. LEXIS 17564, at \*4–5 (9th Cir. July 19, 2000) (noting, in support of the reasonableness of the plaintiff's belief, that she had consulted the school district's regulations, which “state that sexual harassment includes uninvited sexual teasing, jokes, remarks, and questions”), *rev'd*, 532 U.S. 268 (2001); see also Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2095–96 (2003) (discussing a trend toward employer policies broadly defining sexual harassment and listing examples of harassing conduct, including sexual jokes and remarks).

240. For example, it is not obvious why the offending comment disadvantaged the plaintiff on the basis of her sex. See, e.g., BEINER, *supra* note 219, at 106–09 (discussing problems courts have viewing harassing behavior as “because of sex” when it permeates the environment instead of targeting members of one sex exclusively). However, even here, one could elaborate reasonable theories for meeting this requirement, including that the comment is an oblique reference to female anatomy that degrades women's sexuality and undermines their competence at work.

qualified as unwelcome conduct that harmed the plaintiff because of her sex, not enough of it occurred for a reasonable person to believe that it met the severity and pervasiveness threshold for creating a hostile environment.<sup>241</sup> Other courts have followed *Breeden* to block retaliation claims when the underlying harassment was not sufficiently pervasive to support a reasonable belief that it was actionable.<sup>242</sup> Under this rationale, an employee risks *legally permissible* retaliation if she complains of sexually harassing conduct too soon, before it becomes pervasive enough to support a reasonable belief that it amounts to a hostile environment. The double bind created by this standard is obvious: if the employee waits too long to complain, she risks losing a potential harassment claim for not having done enough to demonstrate that the harassment was unwelcome, as well as for failing to meet an affirmative defense if her failure to complain sooner was “unreasonable.”<sup>243</sup> In addition, certain harassment claims require persons to complain internally as a prerequisite for institutional liability, thus putting them in a risky position unless accorded full protection from retaliation.<sup>244</sup>

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241. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001).

242. *See, e.g., Little v. United Techs. Carrier Transcold Div.*, 103 F.3d 956, 959–61 (11th Cir. 1997) (holding that opposition to a single racially offensive remark by a co-worker was not protected); *Holmes v. Long Island R.R. Co.*, No. 96 CV 6196(NG), 2001 WL 797951, at \*6 (E.D.N.Y. June 4, 2001) (rejecting a railroad worker’s retaliation claim on the grounds that her allegations—that the railroad’s physical therapist, whom she was required to see, made sexual comments about her body on three separate occasions and ordered her to disrobe when she believed such an examination was not necessary—were too isolated in nature to support a reasonable belief that the incidents amounted to a hostile environment).

243. *Cf. Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (admonishing that a woman need not wait until she suffers a nervous breakdown before she has a viable hostile environment claim).

244. *See, e.g., Blankenship v. Parke Care Ctrs.*, 123 F.3d 868, 873 (6th Cir. 1997) (requiring notice to establish employer liability for co-worker sexual harassment). For an example of the double bind created by requiring employees to give notice of the harassment to establish liability and yet withholding protection from retaliation when they do, see *Little*, 103 F.3d at 960 (holding that the employee’s opposition to a harassing remark by a co-worker was not protected where the remark could not be attributed to the employer, and that the plaintiff’s belief that the remark in itself violated Title VII must be objectively reasonable). For a pre-*Breeden* case taking a more lenient—and reasonable—approach, see *Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 527 (9th Cir. 1994) (overruling the district court’s rejection of the plaintiff’s retaliation claim, where the plaintiff had opposed sexually offensive comments made by an outside consultant, because the sexually offensive remarks occurred at a mandatory seminar, such that the plaintiff “certainly would be justified in be-

As applied in *Breeden*, the reasonable belief standard obscures the oceans of uncertainty surrounding the precise point at which sexually offensive behavior crosses the line from merely offensive and annoying to become sufficiently pervasive to create a hostile environment. The problem is not simply that most people lack the legal expertise to ascertain where that line begins and ends, but that the uncertainties of litigation prevent such a determination from being made in advance.<sup>245</sup>

If *Breeden* were the only instance of the reasonable belief standard imposing orthodoxy upon competing conceptions of discrimination, we might reserve judgment about whether the standard is well-suited to police the limits of retaliation claims. The incident in *Breeden* is, after all, far removed from the kinds of extreme fact patterns that frequently surface in sexual harassment cases. Unfortunately, however, lower court decisions abound with examples of the reasonable belief standard silencing important conversations about the scope and limits of discrimination law.

The Fourth Circuit's opinion in *Peters v. Jenney* gives a more troubling example of how courts use the reasonable belief standard to enforce a narrow understanding of discrimination and silence alternative perspectives. The court found it *per se* unreasonable to believe that practices with a disparate impact violate Title VI, which is limited to intentional discrimination.<sup>246</sup> The court's ruling implicitly assumed that the Supreme Court's ruling in *Sandoval* corners the market on reasonable interpretations of Title VI.<sup>247</sup> The court's contention that other perspectives are unreasonable belies the reality that lay persons, unfamiliar with *Sandoval*, might well reasonably believe that unnecessary practices with the effect of disproportionately excluding African-American students violate Title VI. Academic commentary on *Sandoval* reveals alternative interpretations of

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lieving that Title VII would protect her from the offensive remarks she endured while attending the meeting").

245. See, e.g., Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) (discussing the difficulty plaintiffs face in winning employment discrimination cases and the biases that affect judicial decision making).

246. 327 F.3d 307, 319–21 (4th Cir. 2003).

247. *Id.* The court framed "the correct inquiry" as "whether the practices which Peters opposed constituted intentional discrimination forbidden by" Title VI. *Id.* at 319.

Title VI that are far from unreasonable.<sup>248</sup> The court's assumption of a bright-line rule between impact and intent obfuscates the fuzziness of this line, both in theory and in practice. Early judicial decisions acknowledged that proof of impact is often the best, and sometimes the only, evidence of discriminatory intent.<sup>249</sup>

The category of "intentional discrimination" is not sufficiently coherent to serve as the dividing line between reasonable and unreasonable interpretations of a legal ban on discrimination. Legal scholars have puzzled for decades over the meaning and legitimacy of the construct of intentional discrimination and have reached widely varying conclusions.<sup>250</sup> By labeling alternative and farther-reaching conceptions of discrimination "unreasonable," the court in *Peters* called for an abrupt halt to critical discourse challenging dominant constructions of equality, on pain of retaliation without legal recourse.<sup>251</sup> The court also disguised its own role in jealously

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248. For a sampling of academic commentary criticizing *Sandoval*, see Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 519–20 (2002); David J. Galalis, Note, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61, 92–101 (2004); Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1781 (2003); see also Mank, *supra* note 83, at 47, 73 ("Every federal court of appeals that addressed [the] question before *Sandoval* concluded that private plaintiffs may bring a private right of action to enforce § 602 disparate impact regulations.").

249. See, e.g., *Washington v. Davis*, 426 U.S. 229, 253–54 (1976) (Stevens, J., concurring) (stating that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor," and suggesting that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume").

250. For a small sampling of such scholarship, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

251. In *Peters*, the Fourth Circuit not only rejected an impact standard as unreasonable, but also adopted a particularly narrow and strict version of the intent requirement, while labeling alternative approaches to intent unreasonable. 327 F.3d at 321 n.18 ("While proof of a disparate impact, in combination with other 'circumstantial and direct evidence of intent,' can sometimes sup-

guarding the knowledge it takes to form a “reasonable” belief, failing to acknowledge that the contrary understanding is only “unreasonable” if one knows of, and accepts, the exclusive legitimacy of the Supreme Court’s ruling in *Sandoval*.

Another example of how the reasonable belief standard bolsters narrow and orthodox understandings of discrimination while silencing competing perspectives comes from a case in the Second Circuit, *Galdieri-Ambrosini v. National Realty & Development Corp.*<sup>252</sup> In this case, the plaintiff, a female secretary, alleged that she was fired in retaliation for complaining about gender stereotyping in the assignment of secretarial duties, which included attending to her boss’s personal matters during work hours.<sup>253</sup> The Second Circuit upheld the dismissal of her retaliation claim on the ground that such a theory of sex discrimination was unreasonable because there were no male secretaries in the firm to use as comparators and no evidence that the plaintiff was given such assignments because she was female.<sup>254</sup> The court rejected a broader interpretation of Title VII that would encompass the assignment of sex-stereotyped duties to persons in female-dominated jobs and the devaluation of traditional women’s work, ruling that Title VII does not prohibit supervisors from giving secretaries “female-gendered” work or

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port an inference of intentional discrimination, a jury issue on intentional discrimination is not created *ipso facto* by pointing to a policy’s disparate effects . . . . Deliberate indifference to a policy’s disparate impacts, as opposed to the purposeful pursuit of those impacts, is not a viable theory under Title VI.” (citations omitted)).

252. 136 F.3d 276 (2d Cir. 1998).

253. *Id.* at 280–83. The plaintiff claimed that she was overworked, given demeaning tasks, and required to assist her supervisor with personal matters. *Id.* at 281–82. She alleged both gender and age discrimination, claiming that her work assignments were “a result of being held to a sexual stereotype of what a female is in our society and in our workplace,” and that her supervisor “had a view of women that led him to overlook performance flaws in ‘young attractive female[s],’ which led to increased burdens for the ‘older less attractive plaintiff.’” *Id.*

254. *Id.* at 291. The court also faulted the plaintiff for not being clearer with her employer in specifying the basis of her complaint as gender discrimination. *Id.* at 292. I limit my critique of this case to its application of the reasonable belief standard, but observe as an aside that this requirement can also impose a hefty burden on plaintiffs to carefully articulate the basis of their opposition. *Id.* at 287–88 (“[I]t also was insufficient to show that [the employer] could reasonably have understood that [the plaintiff’s] complaints about having to do extra work because of the conduct of her two female co-workers, about having to locate Headley for the numerous calls from his girlfriend, and about having to do work on Simon’s personal matters, actually constituted complaints that she was being discriminated against on the basis of gender.”).

requiring them to assist with personal matters.<sup>255</sup> The court's adoption of the narrower differential-treatment perspective and its labeling of the plaintiff's alternative interpretation as unreasonable are particularly noteworthy given that a jury had found in favor of the plaintiff on her sex discrimination claim, presumably finding her theory of discrimination sufficiently reasonable to support its verdict.<sup>256</sup> The court's application of the reasonable belief standard in this case illustrates how courts use this requirement to oversimplify the boundaries of discrimination law by enforcing an artificially narrow and exclusive conception of discrimination.<sup>257</sup>

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255. The court explained its rejection of the plaintiff's challenge to sex-stereotyping in job duties as follows:

[T]he tasks whose nature [plaintiff] argued showed sexual stereotyping were tasks of a kind typically done for an executive by his or her secretary, whether the secretary is female or male. It may be that historically, in most firms, most secretaries have been women. But proof that an employer has assigned to a secretary tasks that are traditionally secretarial tasks—even if related to the employer's personal business—does not suffice to support a verdict of gender discrimination under Title VII.

*Id.* at 290. The court then addressed the plaintiff's argument that she was treated worse than attractive younger secretaries in the office who willingly performed female-gendered duties:

We know of no provision of Title VII, nor any regulation or case construing that statute, that imposes liability on an employer for preferring an employee who chose to "ma[k]e [an executive's] life more pleasant in the workplace, even if it was something as simple as bringing him coffee."

*Id.* at 291.

256. The jury awarded the plaintiff \$12,500 in compensatory damages and \$87,500 in punitive damages, for a total of \$100,000, on her sex discrimination claim. *Id.* at 284. For academic commentary supporting the reasonableness of a theory of discrimination similar to that pressed by the plaintiff, see Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 772–77 (2001) (discussing the devaluation of activities associated with women as a form of gender bias).

257. For a sampling of other court decisions vulnerable to this critique, see *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 748–49 (6th Cir. 1986) (rejecting the plaintiff's claim that she was retaliated against for aggressively implementing an affirmative action plan because Title VII does not require companies to implement any affirmative action plan, must less an aggressive one); *Miller-Calabrese v. Cont'l Grain Co.*, No. 96 C 6626, 1997 WL 392340, at \*3–4 (N.D. Ill. July 8, 1997) (same). These courts' acceptance of the position that it is unreasonable to interpret Title VII to require affirmative action belies credible and reasonable arguments by legal scholars that press the boundaries between discrimination and the failure to implement affirmative action. See, e.g., David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 105–06 (arguing that the principle of nondiscrimination may in some circumstances require affirmative action).

## 2. Ignoring the Interconnectedness Between Different Types of Subordination

A second problem with the reasonable belief doctrine is that courts use it to oversimplify the categorical distinctions separating protected and unprotected classes, thereby ignoring and obfuscating the intersectionality and interdependence of systems of subordination. For example, the reasonable belief standard has been applied to impose orthodoxy in the controversy over the line separating sex from sexual orientation as a basis for discrimination.

In a case representative of this problem, *Hamner v. St. Vincent*, the Seventh Circuit applied such a distinction to reject a retaliation claim brought by a male nurse who claimed that he was terminated for complaining of harassment based on his sexual orientation.<sup>258</sup> The court concluded that because Title VII does not prohibit sexual orientation discrimination, the plaintiff's sincere belief that there was no difference between harassment based on sex and sexual orientation was not "objectively reasonable."<sup>259</sup> The court flippantly dismissed the reasonableness of the plaintiff's belief in the interrelationship between sexual orientation and gender harassment.<sup>260</sup> In doing so, it ignored a wealth of legal scholarship deconstructing such distinctions and marginalized a growing number of court decisions that have begun to carve out room for recognizing sexual orientation harassment as a species of gender stereotyping prohibited by Title VII.<sup>261</sup> Other courts have similarly asserted

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258. 224 F.3d 701, 703, 708 (7th Cir. 2000).

259. *Id.* at 707.

260. *Id.* The court briefly hinted at the possibility of greater complexity in the law's separation of sex and sexual orientation, acknowledging that "the record may have supported Hamner's reasonable belief claim if the record demonstrated that [the supervisor] disapproved of men in the nursing profession, and manifested his disapproval by perceiving all male nurses to be homosexuals, and harassed them accordingly, while female nurses were not subjected to such harassment." *Id.* at 707 n.5. The court also acknowledged the argument, which it viewed as waived, that the "harassment was based on sex because [the harasser's] gestures (lisp[ing] and flip[ping] his wrists) were specifically intimidating to men and their manhood[.]" *Id.* at 707. But no sooner did the court open a window to the possibility that the line dividing sexual orientation discrimination from sex discrimination might be less than crisp than it abruptly slammed it in conclusory fashion. *Id.* at 707-08 ("[T]his argument has no merit" [because] "the conduct that he opposed (harassment because of his sexual orientation) is not, under any circumstances, proscribed by Title VII.").

261. For court decisions that begin to break down a strict dichotomy of sex-based and sexual orientation-based discrimination, see the cases cited *supra*

crisp distinctions between sex and sexual orientation bias to reject retaliation claims for lack of a reasonable belief that a ban on sex discrimination encompasses sexual orientation bias.<sup>262</sup> Through the vehicle of the reasonable belief doctrine, these courts seek to silence ongoing conversations about the meaning and scope of sex equality law, while solidifying a dominant perspective that furthers both male privilege and heterosexual privilege.<sup>263</sup>

### 3. Enforcing Artificial Lines Between Victims and Nonvictims Within Institutions

A third problem with the reasonable belief doctrine is that it has functioned to enforce an artificial divide between persons at different levels and groupings within an organization, strictly separating those who are protected from those who are not. A number of the cases exemplifying this problem involve teachers and other professionals speaking out against per-

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note 116. For a sampling of legal scholarship questioning the coherence of the boundary separating sex from sexual orientation as a basis for discrimination, see Brake, *supra* note 113; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995); cf. Ehrenreich, *supra* note 9, at 280–316 (detailing the mechanisms by which systems of subordination are mutually reinforcing).

262. See *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065–66 (7th Cir. 2003) (rejecting a Title VII retaliation claim because it was not reasonable for the plaintiff, a male employee, to believe that Title VII covered sexual orientation discrimination); *Higgins v. New Balance Athletic*, 194 F.3d 252, 262 (1st Cir. 1999) (rejecting the plaintiff's argument that the inclusion of sexual orientation as a prohibited basis for discrimination in the employer's policies supported a reasonable belief that sexual orientation discrimination violated Title VII); *Howell v. North Cent. Coll.*, 331 F. Supp.2d 660, 663–64 (N.D. Ill. 2004) (rejecting the heterosexual plaintiff's claim of retaliation for complaining about bias against heterosexuals on women's basketball team because it was not reasonable to believe that Title IX covered sexual orientation discrimination). For a contrasting view of the reasonableness of this perspective, see *Martin v. New York State Department of Correctional Services*, 224 F. Supp. 2d 434, 448 (N.D.N.Y. 2002) (refusing to apply the reasonable belief doctrine to reject the plaintiff's claim of retaliation for complaining of sexual orientation discrimination, and explaining that it is not reasonable to presume that a layperson would know the state of the law before complaining, but granting summary judgment for lack of causation).

263. Cf. WILDMAN, *supra* note 152, at 33–34 (discussing the interconnections between sexual orientation and gender oppression, and arguing that heterosexual privilege is inseparable from male privilege).

ceived bias and discrimination toward students or other persons in the communities they serve. In one such case, *Hill v. Chicago Board of Education*, the court dismissed a school teacher's Title VII claim of retaliation for raising complaints on behalf of students about sexual harassment by other students.<sup>264</sup> The court sharply rebuked the teacher for his belief that the school's tolerance of sexual harassment among students violated Title VII, concluding that it is not reasonable to believe that the harassment of students could violate the Title VII rights of employees.<sup>265</sup>

The reasonable belief standard produced a similar result in *Wimmer v. Suffolk County Police Department*, a case involving a nonschool setting where the court drew a sharp line between the rights of employees and the interests of other persons subjected to discrimination.<sup>266</sup> In this case, the plaintiff was a white male police officer who alleged retaliation for speaking out against the department's treatment of minority citizens.<sup>267</sup>

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264. No. 02 C 3534, 2004 U.S. Dist. LEXIS 5703, at \*33 (N.D. Ill. Mar. 31, 2004).

265. *Id.* The teacher had complained that a self-styled group of male students calling themselves "the Posse" was harassing female students and creating a hostile environment. *Id.* at \*5. The court dismissed the teacher's understanding as unreasonable, stating simply that Title VII protects employees and not students. *Id.* at \*33.

266. 176 F.3d 125, 134–36 (2d Cir. 1999).

267. *Id.* at 128. The plaintiff alleged that early on in his police training, as part of a self-introduction statement required for all trainees, he identified himself as an officer in "Humanity against Hatred," a group founded by New York police officers and clergy to oppose discrimination, and expressed his opposition to collusion between police and prosecutors' offices. *Id.* In addition, during field training, he reported overhearing officers using racial slurs and "was dissuaded from asking questions about" two instances when he witnessed an officer stopping minorities without cause. *Id.* at 129. He was fired at the conclusion of training, allegedly for speaking out against racism within the department. *Id.* at 128, 132. The department, however, claimed that he was fired for deficiencies in performance. *Id.* As with many retaliation cases, the factual record is mixed and messy, and it is difficult to separate the performance problems from the hostility toward the plaintiff based on his opposition to racism. For example, one of the supervising officers who rated the plaintiff most negatively was also alleged to have used racial slurs and to have known about the plaintiff's membership in Humanity against Hatred. *Id.* at 130–31 (discussing the plaintiff's interactions with Officer Ferrante); *see also id.* at 131 (describing the plaintiff's allegation that one of the Lieutenants "told him that the 'stop hatred thing didn't go over well with one of my FTOs in particular . . . didn't go over well with people at headquarters"); *id.* at 132 (quoting the same Lieutenant as stating, at the meeting to discuss the plaintiff's performance problems and continued employment, "the words [the plaintiff] select[s] to express his thoughts tend [to] make others feel that he was liberal in

The Second Circuit dismissed the retaliation claim under Title VII, finding that the plaintiff lacked a reasonable belief that the police department's alleged race discrimination against minority citizens could violate an employee's Title VII rights.<sup>268</sup>

Numerous cases similarly refuse to protect employees from retaliation under Title VII when they complain of discrimination against persons who are served by or are otherwise connected with their institutions, ruling that it is not reasonable to believe that Title VII forbids discrimination against nonemployees.<sup>269</sup> Although this blunt statement of the law matches reductionist "hornbook" understandings of Title VII's limits,<sup>270</sup>

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his viewpoint"). My critique here is limited to the court's use of the reasonable belief standard, but I note as an aside that proof of causation, as in disparate treatment cases, is complex and messy, especially where negative reactions to the plaintiff influence perceptions of job deficiencies.

268. *Id.* at 134–36.

269. *See, e.g.,* *Lamb-Bowman v. Del. State Univ.*, 39 F. Appx. 748, 750–51 (3d Cir. 2002) (rejecting a Title VII retaliation claim where the plaintiff, a former women's basketball coach, alleged retaliation for complaining of inequality of female athletes); *Artis v. Francis Howell N. Band Boosters Ass'n*, 161 F.3d 1178, 1183 (8th Cir. 1998) (rejecting the plaintiff's claim that he was fired from the position of marching band instructor for complaining about the principal's disparate treatment of black and white students because "opposing an employer's actions outside the ambit of an employment practice is unprotected by Title VII"); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100–101 (8th Cir. 1995) (overturning the district court's judgment for the plaintiff, a teacher, who alleged retaliation for opposing the principal's plan to increase the nonminority student representation because the plaintiff's opposition did not involve any kind of employment practice); *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989) (rejecting retaliation claim by a white male former police officer because "investigating instances of racial harassment perpetrated by police officers against members of the community" did not involve an unlawful employment practice); *Kunzler v. Canon, USA, Inc.*, 257 F. Supp. 2d 574, 579–82 (E.D.N.Y. 2003) (rejecting the retaliation claim of a salesman who complained of a co-worker's sexual harassment of a customer because the harassment of a customer is not an unlawful employment practice); *Holt v. Lewis*, 955 F. Supp. 1385, 1387–88 (N.D. Ala. 1995) (rejecting a professor's Title VII claim alleging retaliation for assisting a female student with her sex discrimination claim because it was not reasonable for the plaintiff to believe that Title VII covers discrimination against students), *aff'd*, 109 F.3d 771 (11th Cir. 1997). For decisions prior to *Breeden* extending protection to employees who complain of discrimination against nonemployees, see *Moyo v. Gomez*, 40 F.3d 982, 984–85 (9th Cir. 1994) (permitting a Title VII retaliation claim by a prison officer discharged for protesting discrimination against African-American inmates); *Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1353–56 (9th Cir. 1984) (recognizing a retaliation claim by a nurse who complained of racist treatment of patients).

270. *See, e.g.,* MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 95–99, 126–28 (2d ed. 1999) (discussing Title VII's definition of "employee," and summarizing the fundamental legal principles of retaliation under Title VII in the em-

some case law, read more creatively, supports a broader understanding. It is not beyond reason to believe that an institution's treatment of nonemployees can affect the work environment of employees. By tolerating discrimination against students or clients, for example, institutions may exacerbate the work environments of employees in ways that touch on employees' own racial or gender identities. The Supreme Court endorsed just such a rationale in *Meritor Savings Bank v. Vinson*,<sup>271</sup> when it approvingly cited the Fifth Circuit case of *Rogers v. EEOC*.<sup>272</sup> In *Rogers*, the Fifth Circuit accepted the Hispanic plaintiff's claim that requiring African-American patients to sit in a segregated waiting area contributed to a racially hostile work environment for the plaintiff, an employee.<sup>273</sup>

Courts applying the reasonable belief doctrine in this fashion, however, have cut short the implications of this precedent, refusing to acknowledge that discriminatory actions targeting the persons served by an organization may also adversely affect the work environment of the organization's employees. For example, without citing or addressing *Rogers*, the court in *Wimmer* rejected such a hostile environment theory in cursory fashion.<sup>274</sup> In an interesting twist, however, the court faulted the plaintiff, a white male, for failing to introduce evidence from minority employees that they regarded the treatment of African-American citizens as creating a hostile environment for them.<sup>275</sup> This observation hints at the possibility of applying a hostile environment theory to such a situation. However, because such complexity would have undermined the court's position that alternative interpretations are unreasonable, it abruptly resumed the façade of the hopelessness of the plain-

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ployment discrimination context).

271. 477 U.S. 57, 65–66 (1986).

272. 454 F.2d 234 (5th Cir. 1971).

273. Cf. Chew & Kelley, *supra* note 1, at 10 n.37 (observing that most discussions of *Rogers* assume that both the plaintiff and the clients were African American, but noting that the plaintiff actually identified her race as "Hispanic").

274. *Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 136 (2d Cir. 1999) ("It is inherent in the definition of a racially hostile work environment, however, that the person against whom the hostility is directed must be in an employment relationship with the employer.").

275. *Id.* ("Because [plaintiff] did not introduce evidence that minority employees of the Department felt that they worked in a racially hostile environment, [plaintiff] could not reasonably have believed that he was protesting an unlawful hostile work environment.").

tiff's position.<sup>276</sup> The court's flippant dismissal of a hostile environment theory was unpersuasive. As discussed previously, retaliation law should and does protect persons who oppose discrimination even if they are not the targets of the discrimination. Under this precedent, it is not clear why the plaintiff should need to introduce evidence from minority officers that they perceived the environment to be hostile as long as the plaintiff believed that such conduct created a hostile environment. For the same reasons that retaliation law protects persons who oppose discrimination against others, including the difficulty targets face in claiming discrimination, the law should not require the targets of discrimination to come forward and testify to perceived discrimination to save the retaliation claim.

Instead of recognizing the interconnectedness and overlapping harms of discrimination, these courts stifle conversations about the intersection of equality interests among different constituencies within institutions. In so doing, they miss important relational harms of discrimination, which often radiate beyond their immediate targets. Courts applying the reasonable belief doctrine in this fashion treat discrimination as an individualistic problem without appreciating its social dimensions. Furthermore, in failing to protect the construction of antiracist and antisexist identities of persons who are not among the class of persons immediately targeted, courts impair the formation of broad-based coalitions that cut across different constituency groups to promote gender and racial equality within institutions.

#### 4. Imposing a Narrow and Court-Centered Definition of Reasonableness

The fourth and final critique offered here is implicit in each of the above criticisms and applies to all of the cases previously discussed. The reasonable belief standard imposes a court-centric understanding that evaluates reasonableness from the privileged perspective of judges. In this respect, the reasonableness requirement here differs significantly from reasonableness inquiries in other areas of discrimination law, such as judging the reasonableness of perceiving a hostile environ-

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276. *Id.* at 136 n.5 ("Even if [plaintiff] had presented such evidence, it is not clear that he would have standing to bring a Title VII hostile work environment claim.").

ment.<sup>277</sup> The issue of perspective is important in any judicial foray into reasonableness. Unlike harassment law, however, the reasonable belief doctrine in retaliation claims permits no room for variation in the subjective circumstances of the plaintiff to influence the determination of reasonableness.<sup>278</sup> Instead, the perspective is self-consciously narrowed to that of a person with “the” perfect understanding of law and legal reasoning—that is, the judge who applies the reasonable belief standard in that particular case.

In all of the cases discussed above, including *Breeden*, the perspectives of judges set the outer boundaries of reasonableness. Some courts are more forthright about this perspective than others. In the following two cases, courts explicitly rejected the argument that reasonableness should be assessed from the perspective of a reasonable employee or layperson, and instead limited reasonableness to the constraints imposed by the courts’ reading of existing precedent. In each case, the relevant existing precedent was more ambiguous than the court acknowledged. These courts imposed their selective reading of the law as the limit on reasonableness, adopting a singularly narrow and privileged perspective from which to evaluate the reasonableness of the plaintiff’s belief.

In *Talanda v. KFC National Management Co.*, the plaintiff, a store manager, had resisted orders to remove a woman who had “serious dental problems” from a customer service position because her appearance would not be sufficiently pleasing to customers.<sup>279</sup> When the manager continued to resist because he believed it was legally and morally wrong to discriminate against someone for “facial disfigurement,”<sup>280</sup> the employer fired him.<sup>281</sup> The plaintiff claimed that the firing was a retaliatory discharge for opposing what he perceived as a violation of the Americans with Disabilities Act, explaining that he believed that the woman was disabled and that the company re-

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277. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (setting the threshold for actionable sexual harassment as one that is “severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive”).

278. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (“[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”).

279. 140 F.3d 1090, 1092–93 (7th Cir. 1998).

280. *Id.* at 1092.

281. *Id.* at 1094.

garded her as disabled.<sup>282</sup> The Seventh Circuit dismissed this account as unreasonable, explaining that to qualify as an impairment under the ADA, the woman's disfigurement would have to substantially limit one or more major life activities.<sup>283</sup> The missing teeth did not rise to this level, the court explained, despite the fact that her disfigurement kept her from doing otherwise appropriate work for this employer.<sup>284</sup> The court measured the reasonableness of the plaintiff's belief against its own selective reading of existing case law.<sup>285</sup> By labeling com-

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282. *Id.* Courts generally apply the same legal standards to retaliation claims under the ADA as they do under Title VII. *See id.* at 1095–96 (stating that the elements comprising a prima facie case of retaliation under the ADA are the same with respect to Title VII).

283. *Id.* at 1096–97 (citing ADA case law and regulations to show that the facial disfigurement did not substantially limit one or more major life activities). Like many retaliation cases, this case is more factually complicated than this brief summary can convey. The employer alleged that the plaintiff acted inappropriately in a number of respects, including secretly tape recording a conversation with his supervisor in which he was ordered to fire the woman, pressuring the woman to take legal action herself so that “they could make money,” and failing to explain to the employer that he believed that the directive to fire her violated the ADA. *Id.* at 1093–95. If true, these facts might justify rejecting the plaintiff's retaliation claim on other grounds. I limit my critique to the court's application of the reasonable belief standard, which strictly construes existing legal precedent to set the outer limits of reasonable belief.

284. *Id.* at 1097 (citing EEOC regulations stating that the “inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working”).

285. The court's reasoning is subject to questioning even within the framework of the legal precedents that it cited. The court chided the plaintiff for relying on *Johnson v. Am. Chamber of Commerce Publishers*, 108 F.3d 818, 819–20 (7th Cir. 1997), in which the Seventh Circuit reversed the district court's determination that the plaintiff's missing teeth did not rise to the level of a “cosmetic disfigurement.” *Talanda*, 140 F.3d at 1097–98 n.13. The court rebuked the plaintiff's “significant reliance on . . . *Johnson*,” insisting that “[a] precise reading of *Johnson* . . . offers no support for Mr. Talanda's contention,” since the reversal of the district court in *Johnson* “was based on the district court's misapprehension that a person could not be regarded as having a disability unless that person actually had the disability.” *Id.* As the *Talanda* court further explained, “[w]e therefore made clear that a person need not actually have the impairment to be perceived as having it.” *Id.* In other words, Mr. Talanda's reliance on *Johnson* was inapposite because he could not prove that his employer perceived the woman as having an impairment that limits a major life activity, unlike the employer's perception of the disability in *Johnson*. However, given that the employer ordered Mr. Talanda to remove the woman from her position because of what it viewed as a facial disfigurement, the unreasonableness of Mr. Talanda's reading of his employer's perception is far from obvious. The court's convoluted effort to limit its decision in *Johnson* would make for a lively dissection and discussion in a law school class—far from a sufficiently airtight rationale to deem alternative readings unreasonable.

peting legal understandings as unreasonable, the court disguised interpretive choices about the meaning and scope of discrimination law. At the same time, the neutral language of reasonableness obscured the privileged perspective that defined and imposed this dominant understanding.<sup>286</sup>

A second example of a court imposing its selective interpretation of legal precedent as the exclusive standard of reasonableness comes from the Eleventh Circuit's decision in *Harper v. Blockbuster Entertainment Corp.*<sup>287</sup> In *Harper*, the plaintiffs, male employees at Blockbuster, opposed the company's institution of a grooming policy requiring only male employees to maintain short haircuts.<sup>288</sup> The court ruled that the plaintiffs did not engage in protected activity, despite the plaintiffs' belief that the policy amounted to sex discrimination, because every circuit court that has considered sex-specific hairstyle policies has upheld them under Title VII.<sup>289</sup> The court rejected the plaintiffs' request that it judge the reasonableness of their beliefs as laypersons rather than based on the substantive law.<sup>290</sup> By invoking dominant interpretations of existing case law to set the outer boundaries of reasonableness, and marginalizing alternative and broader understandings, the court obfuscated the wide space for interpretive debate within legal interpreta-

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286. At the same time, however, the court's qualification that it did not "mean to imply that facial disfigurement, including facial disfigurement caused by dental problems, can never be a disability for purposes of the ADA," revealed the slipperiness of the legal issue. *Id.* at 1097–98 n.13. The court cited several examples from the EEOC, revealing the complexity and contradictions of the court's legal reasoning. *Id.* (citing the EEOC Appendix to the regulations, stating "that disparate treatment occurs when an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee" and "noting that a prominent facial scar or involuntary head jerk may be perceived as an impairment that substantially limits a major life activity when an employer discriminates against the person because of the complaints of customers" (citations omitted)). As these examples demonstrate, the EEOC regulations and examples leave more room than the court acknowledged for reasoned argument as to whether the woman's facial disfigurement was a disability under the ADA.

287. 139 F.3d 1385 (11th Cir. 1998).

288. *Id.* at 1386.

289. *Id.* at 1388 ("The reasonableness of the plaintiffs' belief in this case is belied by the unanimity with which the courts have declared grooming policies like Blockbuster's non-discriminatory.")

290. *Id.* at 1388 n.2 ("If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their substantive knowledge.")

tion.<sup>291</sup> Used in such a fashion, the reasonable belief doctrine turns the retaliation claim into a device for legitimating inequality and maintaining privilege, rather than an instrument for challenging it.<sup>292</sup>

### C. A CALL FOR REFORMING REASONABLE BELIEF

The reasonable belief doctrine, as applied by the courts, is neither a necessary nor an inevitable limitation on retaliation claims under discrimination law. Having recognized that protection of oppositional activities is not limited to complaints about practices that are actually illegal, there is nothing in the language of Title VII's opposition clause that requires courts to use a reasonable belief standard as the boundary for such claims, and certainly not one bounded to dominant judicial in-

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291. Once again, however, the court's subsequent acknowledgement of some dissension on the issue reveals cracks in the orthodoxy. *See id.* at 1388. ("The EEOC initially took a contrary position, but in the face of the unanimous position of the courts of appeal that have addressed the issue, it finally 'concluded that successful litigation of male hair length cases would be virtually impossible.' . . . Accordingly, the EEOC ran up a white flag on the issue, advising its field offices to administratively close all sex discrimination charges dealing with male hair length." (citation omitted)). The court proceeded to make weakly reasoned arguments distinguishing the precedent upon which plaintiffs relied, recasting *UAW v. Johnson Controls*, 499 U.S. 187 (1991), for example, cited by plaintiffs for the principle that facially sex-based classifications violate Title VII, as a case colored by the fundamental right to bear children. 139 F.3d 1385. As revealed by the court's acknowledgement of early uncertainty and its weak reasoning distinguishing contrary case law, the limits imposed by legal precedent on the "reasonableness" of the plaintiffs' belief have nothing to do with reason and everything to do with power.

292. For another example of an Eleventh Circuit decision that merges the court's selective reading of precedent with the outer boundaries of reasonableness, see *Weeks v. Harden Manufacturing Corp.*, 291 F.3d 1307, 1312–13 (11th Cir. 2002) (rejecting the plaintiff's claim of retaliation for refusing to sign an agreement to arbitrate discrimination claims, notwithstanding the plaintiff's reliance on EEOC and Ninth Circuit authority invalidating such arbitration clauses, and emphasizing the "near universal approval" of arbitration agreements in "[a]lmost every other circuit"). The court viewed the Ninth Circuit decision on which the plaintiff relied as wrongly decided, and the plaintiff's reliance on it and the EEOC guidance as unreasonable. *Id.* at 1315–17. *But see* *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 754 (9th Cir. 2003) (en banc) (remanding to the district court with respect to the issue of whether adverse action against an employee who refuses to sign an agreement to arbitrate discrimination claims gives rise to a retaliation claim). Once again, the "reasonableness" of the plaintiff's belief was determined by judicial power and the court's preferred reading of precedent.

terpretations of current legal precedent.<sup>293</sup> There is even less reason to import a reasonable belief standard into discrimination statutes, such as Title VI and Title IX, which lack any linguistic distinction between participation and opposition. The importation of the reasonable belief standard into these statutes threatens to erase the gains made in *Jackson* from recognizing protection from retaliation under these statutes.

The boundaries of the retaliation claim should be defined with due regard for the social reality that retaliation functions to silence discrimination claims and preserve social inequality, and for the theories elaborated above for why retaliation should be encompassed by prohibitions on discrimination. These reasons counsel for a broader approach to the varied understandings of bias and discrimination that form the basis for protected activity. Although it is true that retaliation for opposing a practice that has “nothing to do with” discrimination is not encompassed by the retaliation claim,<sup>294</sup> a better standard would ask whether the plaintiff can make a reasoned case that the practices opposed interfere with the goals and objectives of discrimination law. Such a standard should leave room for recognizing interpretive ambiguity and different views as to the direction discrimination law should take. The perspective from which reasonableness is measured should not be that of the judge reading and selecting the dominant legal precedents, but the reasonable employee, student, or person in the organization who wishes to further the goals of discrimination law: dismantling unjust privilege and promoting the conditions necessary for equal citizenship.

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293. The standard explanation for the tighter requirement applied to Title VII retaliation claims under the opposition clause is that Congress did not write the opposition clause to encompass as broad a level of protection as afforded under the participation clause. *See, e.g., Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981) (explaining this rationale). However, the use of the reasonable belief doctrine does not follow from any linguistic differences between the two clauses, but rather from a desire to protect employer prerogatives to retaliate against persons who raise complaints in the workplace that stray too far from dominant legal understandings of discrimination. To the extent that this is a valid interest, it can be accommodated with a subjective good faith standard, coupled with the standard advocated here, that the plaintiff make a reasoned argument about how the practices opposed conflict with the goals and objectives of discrimination law.

294. *Cf. Peters v. Jenney*, 327 F.3d 307, 319 n.11 (4th Cir. 2003) (“Terminating an employee because she opposes practices which have nothing to do with Title VI is not Title VI retaliation.”).

## V. CONCLUSION

Much is at stake in the retaliation claim. The fear of retaliation and an awareness of the profound social costs of claiming discrimination are the primary reasons why people stay silent in the face of perceived inequality. For discrimination law to provide meaningful protection, legal standards must protect persons who perceive discrimination and give voice to their concerns. This is a worthy goal for discrimination law to pursue, as giving voice to discrimination produces a myriad of benefits, both personal and societal.<sup>295</sup> Vocalizing opposition to inequality opens the door to important social and institutional change and enables challengers to begin a valuable dialogue within their communities.<sup>296</sup> By fully protecting persons who confront discrimination, the law can provide greater space for contesting and possibly reshaping the social norms that facilitate discrimination in the first place.

The Court's decision in *Jackson v. Birmingham Board of Education* is an important starting point toward further theorizing about the connections between discrimination and retaliation. The recognition of retaliation as a species of discrimination holds great promise for refocusing discrimination law on preserving privilege and reinvigorating its animating value of promoting equal citizenship. Situating the retaliation claim as part of a ban on intentional discrimination breaks down the status/conduct divide in the Court's nondiscrimination jurisprudence and promotes and strengthens the democracy-enhancing ambitions of discrimination law.

However, we should not be too sanguine about the prospects of legal doctrine to secure meaningful social change. The promise of the retaliation claim is undercut by unnecessarily restrictive doctrine that ultimately reinforces selective and narrow understandings of discrimination that do more to legitimate than to disrupt inequality. It would be unfortunate if

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295. For a discussion of the personal benefits of reporting discrimination, see Dodd et al., *supra* note 12, at 568 (citing research showing the “many benefits [of] confronting sexist remarks,” including benefits to self-image, job performance, and physical and emotional health). For a discussion of the societal benefits of challenging discrimination and the potential for reshaping social norms, see Swim & Hyers, *supra* note 26.

296. For an eloquent discourse on the value of complaining, see Crosby, *supra* note 12, at 169–84 (advocating the desirability of complaining as necessary for change and developing a better world, despite the chilling social norms that punish complainers, and urging persons to “rail against false silences”).

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the retaliation claim languished under the burden of this overly restrictive doctrine, particularly in light of its unique potential for disrupting inequality within institutions. This Article's examination of the retaliation claim illustrates how legal doctrine can simultaneously function to challenge and legitimate inequality. It also suggests a need for further attention to the varied ways in which law punishes and renders vulnerable those persons who challenge inequality, particularly when the challenge exceeds the boundaries of dominant discourses about discrimination.