

# ALEXANDER V. YALE: THE TRANSFORMATIVE POWER OF SOCIAL FORCES TO BEND LEGAL DOCTRINE

ERIC T. BUTLER\*

## *Abstract*

*In 1977, five plaintiffs filed a lawsuit against Yale University alleging that the sexual misconduct of the university's employees constituted discrimination on the basis of sex. While the university prevailed on the claims, the court endorsed the plaintiffs' novel application of Title IX of the Education Amendments of 1972 despite a wave of recent rulings in other circuits rejecting the same theory under analogous civil rights laws. This judicial endorsement of the plaintiffs' theory would ultimately reshape the legal landscape of higher education for decades to come. Careful examination of the contemporary events enveloping the case suggests that this inflection point was more likely a product of the social context that compelled the plaintiffs to seek remedy from a unique interpretation of the law than it was from the application of settled legal doctrine by the court. The present article examines this historical context undergirding *Alexander v. Yale* for the purpose of offering practical insights to education administrators, lawyers, and policy makers.*

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\* Dr. Eric T. Butler is a higher education lawyer whose practice and scholarship have predominantly focused on civil rights in education. His professional experience also includes work in student retention, campus housing, and student conduct. Eric earned his B.A. *summa cum laude* from the University of Akron, his J.D. with honors from Northern Kentucky University, and his Ph.D. in Higher Education from Texas Tech University. The present article derives from the first of three essays originally published in his Ph.D. dissertation (2022). The author extends his gratitude to Dr. Valerie Paton, Dr. Jon McNaughtan, Professor Peter F. Lake, Dr. Barbara A. Lee, and Mr. Frederick M. Lawrence for their invaluable insight and support in the development of this work. The views contained in this article are those of the author's and do not represent the position or policy of any current or former employer.

## TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	<b>51</b>
<b>I. THE CASE OF <i>ALEXANDER V. YALE UNIVERSITY</i></b> .....	<b>53</b>
<b>II. THE EARLY LEGAL LANDSCAPE OF SEXUAL HARASSMENT</b> .....	<b>58</b>
<b>II. THE SOCIAL CONTEXT</b> .....	<b>63</b>
A. MICRO SOCIAL CONTEXT: THE SQUEAKY WHEEL ON CAMPUS. ....	64
B. MACRO SOCIAL CONTEXT: FILLING A LEGAL VOID .....	69
<b>IV. LESSONS FROM THE SOCIAL CONTEXT</b> .....	<b>73</b>
<b>V. CONCLUSION</b> .....	<b>75</b>

## INTRODUCTION

The story of Title IX is well recounted in legal scholarship.<sup>2</sup> In 1972, Congress bridged a crucial gap that remained in the wake of the Civil Rights Act of 1964. While the Civil Rights Act prohibited sex discrimination in employment, and prohibited discrimination on the basis of race, color, or national origin in any program receiving federal funding (including most higher education institutions), the legislative developments of the era did nothing to expressly prohibit sex discrimination in education.<sup>3</sup> Title IX of the Education Amendments of 1972—later renamed the Patsy Takemoto Mink Equal Opportunity in Education Act—prohibited educational programs that accept federal funds from discriminating on the basis of sex.<sup>4</sup> The U.S. Department of Health, Education, and Welfare (HEW) then codified Title IX's first regulations in 1975.<sup>5</sup> The regulations required recipients to have a grievance procedure in place for the resolution of discrimination complaints but failed to articulate any other expectations for such a procedure.

But as with many laws, the scope of Title IX's impact has been only minimally defined by the text of the statute or the contemplations of the legislators who wrote it. The new law sparked early battles over whether it should govern intercollegiate athletics or employment in education.<sup>6</sup> It was the legal tool that a rising feminist movement used to combat sexual harassment of female students by faculty members.<sup>7</sup> It later served as the foundation for a new movement calling on schools to both prevent and adjudicate acts of sexual violence between students.<sup>8</sup> And it

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2 See Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 Cleve. St. L. Rev. 473 (2007); Iram Valentin, *Title IX: A Brief History*, 2 Holy Cross J.L. & Pub. Pol'y 123 (1997); Maggie Jo Poertner Buchanan, *Title IX Turns 40: A Brief History and Look Forward*, 14 Tex. Rev. Ent. & Sports L. 91 (2012); Peter Lake, *The Four Corners of Title IX Regulatory Compliance: A Primer for American Colleges and Universities* (2017).

3 Lydia Guild Simpson, *Sex Discrimination in Employment Under Title IX*, 48 U. Chi. L. Rev. 462 (1981).

4 Pub. L. No. 92-318, §§ 901-907, 96 Stat. 235, 373 (codified as amended at 20 U.S.C. §§ 1681-1689).

5 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 40 Fed. Reg. 24137 (June 4, 1975) (originally codified at 45 C.F.R. pt. 86 and subsequently codified at 34 C.F.R. pt. 106).

6 Janet Lammersen Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49 (1976); Fred C. Davison, *Carrying Title IX Too Far*, N.Y. Times (Dec. 3, 1978), <https://timesmachine.nytimes.com/timesmachine/1978/12/03/112818493.html?pageNumber=444>; Terrence P. Collingsworth, *Title IX Applies to Employment Discrimination*, 1981 Duke L.J., 588 (1981); Bernard H. Friedman, *Title IX Does Not Apply to Faculty Employment*, 1981 Duke L.J. 566 (1981).

7 *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

8 U.S. Dep't of Educ., *Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; U.S. Dep't of Educ., *Sexual Harassment: It's Not Academic* (Sept. 2008), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>; U.S. Dep't of Educ., *Dear Colleague Letter: Sexual Violence* (Ap. 14, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, later withdrawn by, U.S. Dep't of Educ., *Dear Colleague Letter* (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

would ultimately play a pivotal role in the federal judiciary's reexamination of constitutional due process in education, which had remained relatively stagnant for decades.<sup>9</sup> All of this unfolded while the hallmark text of the statute and regulations remained unchanged.

Fifty years later, the story of Title IX illustrates the legacy of legal realism in the U.S. justice system. While debates still rage about which descendant school of thought should control judicial interpretation of a statute that defines its mandate in the vaguest of terms, the current scholarly commentary on both purposivism and textualism gives too little attention to an axiomatic concept: judges can only interpret the law for the particular cases that come before the court. Long before the fact pattern reaches the bench, parties and their legal counsel are conducting their own analyses of whether and how the law should apply to their lived experiences. They conduct cost-benefit analyses to determine whether the time, money, and emotional hardship that litigation requires is worthwhile; the most vulnerable often choose not to seek any remedy at all.<sup>10</sup> Those who do seek remedy frame their interpretations of the law in a way that they believe is most likely to achieve their desired outcomes, which might require innovative interpretations of the law. In this respect, the parties themselves arguably play a far more influential role in our modern jurisprudence than the presiding judges.

It naturally follows that the social forces influencing the parties' decisions before and during litigation also make an undeniable contribution to our body of case law. The author therefore argues here that the social context of the parties is inextricable from the interpretations of law that they present to the court. As a result, the broader social context engrained within the plaintiffs' claims before they even make it onto the docket is an inevitable component of any court's ultimate interpretation of the law.

The author uses this article to offer one particularly illuminating case in support of this argument by examining the social context that propelled the plaintiffs' claims in *Alexander v. Yale University*,<sup>11</sup> which was the first case to treat the sexual harassment of students by faculty members as a prohibited form of sex discrimination.<sup>12</sup> While the present argument might pave the way for others who wish to critique judicial philosophies that claim to be strictly doctrinal, the author's present aim is to offer practical insights to educational administrators, lawyers, and policy makers. Those insights include the identification of recurring themes in the social context that might precede plaintiffs' novel and innovative

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9 See *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

10 Louise Fitzgerald, *Unseen: The Sexual Harassment of Low-income Women in America*, 39 *Equality, Diversity & Inclusion: An Int'l J.* 5 (2020).

11 631 F.2d 178 (2d Cir. 1980).

12 The present article is confined to an examination of *Alexander v. Yale* as one example of the way in which social context can drive innovative interpretations of the law. Additional support for the argument is presented in a legal historiography on the burgeoning contours of Title IX, which was originally published in the author's 2022 Ph.D. dissertation. Eric T. Butler, *The Political Implementation of Title IX: How the Social Context Crafted by Title IX is Shaping Due Process in U.S. Higher Education* (2022) (Ph.D. dissertation, Texas Tech University), <https://ttu-ir.tdl.org/items/50989519-60d3-41cc-98b8-ca6fa02cb617>.

interpretations of law such as those that expanded Title IX's reach over the course of five decades. Early identification of these recurring themes in the social context can allow stakeholders to proactively craft practical solutions that might make novel and unexpected applications of law unnecessary for would-be plaintiffs to achieve their ends.

This article relies on William Clune's political model of policy implementation to examine the outsized role that actors outside of the formal public policy process (e.g., students, schools, and interest groups) play in shaping public policy through their interactions with actors that operate within the formal process (e.g., legislators, administrative enforcement agencies, courts).<sup>13</sup> Guided by that theoretical architecture, the author offers a theory regarding the role that *de jure* and *de facto* voids in available legal remedies can play in shaping interpretations of the law by aggrieved parties. The author uses the analysis of *Alexander* to illustrate the ways in which the absence of a clear legal remedy—whether *de jure* or *de facto*—invites impacted parties to craft solutions that are shaped more by the contemporary social context than by established legal doctrine.

This article adopts a legal realist framework to illustrate this theory, with an article structure that examines both the micro and macro social context and legal landscape enveloping the lawsuit against Yale University. The micro and macro social context is reconstructed predominantly from contemporary press coverage, archive materials, and records of prior interviews or statements offered by the parties to the public.

Adhering to that framework, this article on *Alexander v. Yale* presents the case in four substantive parts. The first part will offer a brief recitation of the facts of the case, legal arguments advanced by the parties, and procedural chronology of the lawsuit. The second part will describe the legal landscape of sexual harassment lawsuits at the time that *Alexander v. Yale* commenced. The third part will present the micro and macro social context that enveloped the lawsuit. The final part will identify features of the social context that might allow future policy makers and education administrators and legal counsel to preemptively address social problems that would otherwise invite new (and creative) applications of law by aggrieved parties. The article will conclude with a summary of the practical lessons to be learned from *Alexander v. Yale*.

## I. THE CASE OF ALEXANDER V. YALE UNIVERSITY

In 1977, five plaintiffs filed a lawsuit against Yale University in the U.S. District Court for the District of Connecticut. Plaintiffs later amended their complaint to add two additional plaintiffs.<sup>14</sup> The six principal plaintiffs in the final operative

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13 See William H. Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 Iowa L. Rev. 47 (1983), <https://repository.law.wisc.edu/s/uwlaw/media/23907>.

14 One original plaintiff withdrew because she was uncertain that she could contribute effectively during a leave of absence and was concerned about her vulnerable position as an undergraduate student. Yale Undergraduate Women's Caucus, *Alexander v. Yale* [Informational Pamphlet], December 1, 1977, <https://clearinghouse.net/doc/80478/>.

complaint included three female students, two recent alumna, and one male faculty member.<sup>15</sup> On the whole, the plaintiffs alleged that they were each deprived of access to their respective educational programs as a result of pervasive sexual harassment at Yale and that the university failed to offer a formal grievance procedure for resolving complaints of sex discrimination as required by Title IX's federal regulations.

The factual allegations by the six named plaintiffs varied in their descriptions of the ways in which they were harmed by pervasive sexual harassment. Faculty member John Winkler alleged that his ability to teach effectively was obstructed by a widespread mistrust of male faculty as a result of unchecked harassment by male colleagues.<sup>16</sup> Student Lisa Stone alleged emotional distress resulting from her knowledge of another female student's experiences of sexual harassment by a male university employee without any available recourse.<sup>17</sup> Recent alumna Ann Olivarius alleged that she received complaints of harassment from other women as an officer of the Undergraduate Women's Caucus and that her complaints to the administration on behalf of these women were disregarded.<sup>18</sup> Recent alumna Ronni Alexander alleged that she experienced unwanted sexual advances—including coerced sexual intercourse—during private lessons with her flute instructor, prompting her to withdraw from the program and pursue a different course of study.<sup>19</sup> Student Margery Reifler alleged that she endured sexual harassment by a male coach of an athletic team during her time as the team manager and felt that she was unable to file a complaint due to the absence of clear procedures.<sup>20</sup> Student Pamela Price alleged that a male faculty member offered her an "A" on her term paper, in exchange for compliance with his sexual demands, and undeservingly received a "C" when she rebuffed him. Price submitted complaints to the administration on multiple occasions.<sup>21</sup>

Despite the fact that three of the plaintiffs described specific acts of sexual misconduct by particular individuals, the plaintiffs collectively proceeded against only the university in claims under Title IX rather than naming the individual employees as defendants.<sup>22</sup> Further, the plaintiffs collectively sought only declaratory and injunctive relief to compel the university to institute a grievance process

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15 Alexander v. Yale Univ., Second Amended Complaint, Civ. No. N77-277 (D. Conn. 1977).

16 *Id.* at Count VI.

17 *Id.* at Count IV.

18 *Id.* at Count V.

19 *Id.* at Count I.

20 *Id.* at Count II.

21 *Id.* at Count III.

22 Although the private right of action under Title IX was not yet clearly established at the time—nor the scope of viable defendants—present interpretations of Title IX preclude an action against individuals. Rather, the plaintiff may bring a claim against the institution receiving the federal funding. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 641 (1999). But both then and now, individual employees may be subject to other tort claims. Plaintiffs in *Alexander* chose not to pursue such remedies, opting instead to maintain their focus on the institutional policies.

for allegations of sexual harassment.<sup>23</sup> Only Olivarius requested damages in the amount of \$500.00. Price requested injunctive relief that would require Yale to instruct any recipient of her transcripts to disregard her grade in the disputed course.

The lawsuit—crafted by Catharine “Kitty” MacKinnon, Anne Simon, Judith Berkan, Kent Harvey, and Rosemary Johnson of the New Haven Law Collective—was bold in proceeding on three unsettled legal theories.<sup>24</sup> First, Title IX offered no express private right of action. The only available precedent—a recent ruling in the Seventh Circuit Court of Appeals—held that no such right of action was available to aggrieved students.<sup>25</sup> Second, it was unclear whether plaintiffs were first required to seek any administrative resolution through HEW, and none of the plaintiffs had done so.<sup>26</sup> Third, it was not established that sexual acts constituted discrimination on the basis of sex.<sup>27</sup> The plaintiffs also understood that they would be litigating against a defendant institution with untold resources and that it would come at considerable expense to the plaintiffs and their allies.<sup>28</sup> Plaintiffs proceeded nonetheless.

All three of these uncertainties were the focus of Yale University’s motion to dismiss. From the outset, the presiding magistrate judge found that four of the named plaintiffs failed to allege a cognizable harm under Title IX.<sup>29</sup> In brief, the magistrate opined that plaintiffs Winkler, Stone, and Olivarius failed to allege that they were personally targeted by any behavior that would have deprived them of access to the educational program or activity.<sup>30</sup> The magistrate further opined that plaintiffs Olivarius and Alexander were not deprived of access to their educational programs because they successfully graduated.<sup>31</sup> The magistrate also dismissed Reifler, who did not bring any formal complaint to the administration.<sup>32</sup> This left only the claim of Pamela Price, who remained a student and reported the behavior to the administration on more than one occasion.<sup>33</sup>

Despite this early blow to plaintiffs’ collective case, the adequacy of Price’s allegations compelled the magistrate to consider the three threshold questions of

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23 *Alexander*, Second Amended Complaint at Prayer for Relief, Civ. No. N77-277 (D. Conn. 1977).

24 Anne E. Simon, *Alexander v. Yale University: An Informal History*, in *Directions in Sexual Harassment Law* 51–59 (Catharine A. MacKinnon and Reva B. Siegel eds. 2004).

25 *Cannon v. Univ. of Chicago*, 559 F.2d 1063, 1082 (7th Cir. 1977). However, the U.S. Supreme Court would ultimately overrule the Seventh Circuit in holding that an implied right of action existed. *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979).

26 *Alexander v. Yale Univ.*, 459 F. Supp. 1, 2 (D. Conn. 1977).

27 *See infra* Part II.

28 Yale Undergraduate Women’s Caucus, *Alexander v. Yale* [Informational Pamphlet], December 1, 1977, <https://clearinghouse.net/doc/80478/>.

29 *Alexander*, 459 F. Supp. at 3–4.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*; Pamela Price, *Statement by Pamela Price* [Press Release], December 21, 1977, <https://clearinghouse.net/doc/80386/>.

law targeted by the university's motion to dismiss. The magistrate ruled in favor of Price on all three questions, allowing her claim to proceed. Although the plaintiffs' claims posed a completely novel question under Title IX, the magistrate opined in a nearly conclusory fashion that acts of sexual harassment toward female students clearly constituted a deprivation of educational access on the basis of sex.<sup>34</sup> Instead of spending any significant time on this particular question of first impression, the magistrate directed considerable attention to the question of whether an implied right of action existed under Title IX. The magistrate acknowledged the adverse precedent in the Seventh Circuit but felt compelled to disagree. In finding that an implied right of action was appropriate, the magistrate took a purposive approach to analyzing congressional intent in accordance with the dictates of *Cort v. Ash*.<sup>35</sup> Faced with an ambiguous legislative history on the question of whether a right of action was intended, the magistrate relied on the legislation that served as a model for Title IX—Title VI of the Civil Rights Act of 1964—in finding that such an implied right of action was appropriate.<sup>36</sup> The magistrate also resolved the question of whether there should be an exhaustion of administrative remedies with an unflattering assessment of whether HEW was likely to provide such an effective remedy. The magistrate opined that the plaintiffs should not be required to wade through such uncertainty.<sup>37</sup> The court ultimately adopted the rationale of the magistrate in a summary order.<sup>38</sup>

As the sole surviving plaintiff in the district court proceedings, Price amended the complaint to request class certification on behalf of

... those at Yale University who are disadvantaged and obstructed in their educational relations by the policies, practices, acts and omissions of the University with respect to the sexual harassment of women students by men in positions of authority, specifically by having to choose between toleration of, or compliance with, sexual demands and pressures by such men and any educational opportunity, benefit or chance to grow or advance educationally.<sup>39</sup>

The magistrate denied Price's request for class certification in an unpublished opinion.<sup>40</sup> With the focus of the proceedings essentially narrowed to a single tort claim rather than a case about Yale's inadequate response to pervasive harassment, Judge Ellen Burns ruled in a bench trial that the alleged proposition did not occur and found that the grade that Price received was not attributable to anything other than academic merit.<sup>41</sup>

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34 *Alexander*, 459 F. Supp. at 4.

35 422 U.S. 66 (1975).

36 *Alexander*, 459 F. Supp. at 4–5.

37 *Id.* at 6.

38 *Id.* at 2.

39 *Alexander v. Yale Univ.*, Second Amended Complaint at para. 2, Civ. No. N77-277 (D. Conn. 1977).

40 *Alexander v. Yale Univ.*, 631 F.2d 178, 183 (2d Cir. 1980).

41 *Id.*; *Price v. Yale Univ.*, Memorandum of Judgment, Civ. No. N77-277 (D. Conn. 1979). *See also* Simon, *supra* note 23.



The five female plaintiffs appealed the dismissal of their claims, the denial of class certification, and the district court's findings of fact to the U.S. Court of Appeals for the Second Circuit.<sup>42</sup> The court succinctly affirmed the district court's dismissal of the claims brought by all plaintiffs except for Price. The court held that Olivarius's decision to investigate and bring complaints to the administration on behalf of other students did not afford her any claim for which relief could be granted and that the successful graduation of all other female plaintiffs seemingly mooted their claims.<sup>43</sup> In affirming the dismissal of these claims, the court also questioned whether access to extracurricular activities constituted the deprivation of access to "educational" programs contemplated by Title IX.<sup>44</sup> Most notably, the court found that the relief sought was also mooted by Yale's newly created grievance procedures.<sup>45</sup>

Price further contended on appeal that the crux of her complaint was that the university lacked the grievance procedure required by the federal regulations and that the absence of such a procedure was grounds for injunctive relief even if her allegation was ultimately deemed unfounded.<sup>46</sup> Price also appealed the district court's decision not to certify the class, and the court's denial of a posttrial motion by Price to open the record to a new witness who could corroborate her allegations. The Second Circuit rejected all three arguments on the basis that Price simply failed to prove her case when given the opportunity to do so at trial.<sup>47</sup> In turn, the court held that Price was not an appropriate member of the class that she sought to certify and was not harmed by the absence of a grievance process.<sup>48</sup> The court of appeals also summarily ruled that the district court's decision not to open the record to a new witness was not an abuse of discretion.<sup>49</sup>

Though all of the plaintiffs' claims were ultimately disposed of unfavorably by the court, the lawsuit itself is widely credited with turning the tide of sexual harassment adjudication under Title IX.<sup>50</sup> In the midst of the proceedings, Yale adopted the grievance procedures that plaintiffs had been seeking from the outset.<sup>51</sup> By 1981, the newly established U.S. Department of Education was communicating internally to its investigators in the Office for Civil Rights that sexual harassment

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42 The male faculty member did not appeal. *Alexander*, 631 F.2d 178.

43 *Id.* at 183–84.

44 *Id.* at 184–85.

45 *Id.* at 184.

46 *Id.* at 185.

47 *Id.* at 185–86.

48 *Id.*

49 *Id.*

50 Emily Suran, *Title IX and Social Media: Going beyond the Law*, 21 Mich. J. Gender & L. 273 (2014); Michele Landis Dauber & Meghan O Warner, *Legal and Political Responses to Campus Sexual Assault*, 15 Ann. Rev. L. & Soc. Sci. 311 (2019); Elizabeth A. Armstrong et al., *Silence, Power, and Inequality: An Intersectional Approach to Sexual Violence*, 44 Ann. Rev. Soc. 99 (2018).

51 *Alexander*, 631 F.2d at 184.

was to be deemed a form of prohibited sex discrimination.<sup>52</sup> Within five years of the Second Circuit's decision, hundreds of universities across the country had adopted formal procedures for resolving reports of sexual harassment.<sup>53</sup>

## II. THE EARLY LEGAL LANDSCAPE OF SEXUAL HARASSMENT

While the Plaintiffs in *Alexander v. Yale* were the first to argue that sexual harassment constituted prohibited sex discrimination under Title IX, their theory was not altogether original. The lawsuit came on the heels of an ongoing effort to interpret Title VII of the Civil Rights Act of 1964 to prohibit sexual harassment in employment. At the time of the *Alexander* lawsuit, the outlook for this theory was less than promising.

Though the term “sexual harassment” had not yet been coined, the first case to consider the question of whether such sexual conduct should be prohibited as sex discrimination under Title VII came in 1974 in *Barnes v. Train*.<sup>54</sup> Barnes was a Black woman working as an administrative assistant for the Environmental Protection Agency (EPA). After rebuffing several sexual advances by her supervisor—a Black man—she was tormented and stripped of responsibility until her job was eventually eliminated. She proceeded pro se in an administrative complaint within the agency. On the advice of EPA personnel, she framed her administrative complaint as one of racial discrimination rather than sex discrimination.<sup>55</sup> The agency's examiner excluded evidence of sex discrimination in concluding that no racial discrimination was present.<sup>56</sup> The agency adopted the findings of the examiner. Barnes retained counsel and appealed to the Civil Service Commission, which upheld the EPA's finding.<sup>57</sup>

Barnes then filed her lawsuit in the U.S. District Court for the District of Columbia asserting that the agency's finding violated her rights under the Fifth Amendment and Title VII, as amended by the Equal Employment Opportunity Act of 1972.<sup>58</sup> On the agency's motion for summary judgment, the court recognized that “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” but concluded that “the instant actions which plaintiff complains of, plainly fall wide of the mark.”<sup>59</sup> In granting the agency's motion for summary judgment in 1974, the court reasoned,

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52 U.S. Dep't of Educ., *Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service. OCR, to Regional Civil Rights Directors, Title IX and Sexual Harassment Complaints*. 2 (Aug. 31, 1981). Obtained through a Freedom of Information Act request to the U.S. Department of Education on Sept. 10, 2021, <https://drive.google.com/file/d/1FWp9A-Xsk3ySMdeJ2y5vfaGqmpsK-Sdv/view?usp=sharing>.

53 Simon, *supra* note 23, at 56.

54 No. 1828-73., 1974 U.S. Dist. LEXIS 7212 (Aug. 9, 1974).

55 See *Barnes v. Costle*, 561 F.2d 983, 985 (D.C. Cir. 1977).

56 *Barnes v. Train*, No. 1828-73., 1974 U.S. Dist. LEXIS 7212 (1974).

57 *Id.*

58 *Id.*

59 *Id.* at 2–3 (citing *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971)).

The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.<sup>60</sup>

The same theory met even greater resistance a year later in the U.S. District of Arizona in *Corne v. Bausch and Lomb*.<sup>61</sup> Two female former employees filed suit against the employer after resigning their positions as a result of persistent and unbearable sexual advances by their male supervisor. On the company's motion to dismiss, the court acknowledged a slew of recent federal court opinions finding that various terms and conditions of employment amounted to illegal sex discrimination under Title VII.<sup>62</sup> But the court distinguished the present theory of sex discrimination by attributing the actions to the individual supervisor, rather than to any policy by the company.<sup>63</sup> The court went further to proclaim that holding the employer liable for such actions by an individual employee would be impractical:

[A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.<sup>64</sup>

The U.S. District Court for the District of Columbia offered a glimpse of reprieve to sexual harassment plaintiffs the following year by denying a motion to dismiss in *Williams v. Saxbe* in April 1976.<sup>65</sup> Faced with a similar fact pattern in which the female plaintiff at the Department of Justice endured retaliation for rebuffing her supervisor's sexual advances, the department made the same argument as other defendants that any employee, regardless of gender, could be subject to retaliation for rebuffing a supervisor's sexual advances. While the court found this argument persuasive in principle, it held that the plaintiff did in fact allege that such artificial

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60 *Id.* at 3.

61 390 F. Supp. 161 (D. Ariz. 1975).

62 *Id.* at 163 ("it has been held an unlawful employment practice for an employer to discriminate against individuals with respect to job assignment or transfer", *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); hours of employment, *Ridinger v. General Motors, Corp.*, 325 F.Supp. 1089 (D. Ohio 1971); or "fringe benefits" such as retirement, pension, and death benefits, *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971). Employers have been found to have discriminated against female employees because of their sex where they maintained policies which discriminated against females because they were married, *Jurinko v. Edwin L. Wiegand Co.*, 331 F.Supp. 1184 (D.Pa.1971) or pregnant, *Schattman v. Texas Employment Co.*, 330 F.Supp. 328 (D.Tex.1971). In addition, it has been held that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII. *Sprogis v. United Airlines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971).").

63 *Corne*, 390 F. Supp. at 163-64.

64 *Id.*

65 413 F. Supp. 654 (D.D.C. 1976).

barriers to employment and promotion created by that particular supervisor's conduct were only directed at women.<sup>66</sup> The court further rebutted the agency's argument that there could be no cause of action where the conduct complained of constituted the interpersonal actions and choices of an individual employee and not a policy of the employer. The court disagreed, finding that the policies or practices adopted by a supervisor on a subordinate constituted the actions of the agency.<sup>67</sup>

But later that same year, the U.S. Northern District of California targeted this distinction in holding that a former bank teller failed to state a claim in *Miller v. Bank of America*.<sup>68</sup> In one respect, the court bridged the gap between *Corne* and *Williams* in finding that where the company had a clear policy prohibiting such behavior and where the plaintiff failed to bring the matter to the attention of the company's employee relations department, the company could not be liable for sex discrimination based on the actions of an individual supervisor.<sup>69</sup> But the court concluded its analysis by concurring with *Corne* that holding employers liable for the interpersonal interactions between individual employees would subject Title VII to abuse, spawning a lawsuit with nearly every flirtation.<sup>70</sup>

In November of 1976, the U.S. District of New Jersey was called to consider not only the actions of a supervisor, but a company's subsequent retaliation against a female employee in *Tomkins v. Public Service Electric & Gas Co.*<sup>71</sup> Adrienne Tomkins was promoted frequently in her entry-level clerical positions when she was assigned to a new supervisor. The supervisor purportedly took her out to lunch to discuss her prospects of promotion to secretary when he sexually propositioned her. After Tomkins denied him, she filed a complaint with the company. She was reassigned to a less desirable position, her salary was cut, and she was later terminated. After receiving a right to sue letter from the Equal Employment Opportunity Commission, Tomkins brought her civil action in federal court under Title VII against both the company and the individual supervisor. Offering an affirmative nod to the rationale offered by the other district courts in *Corne*, *Miller*, and *Barnes*, the district court agreed that the gender of the supervisor and employee was not of consequence.<sup>72</sup> The court expressed that an employee of any gender could be propositioned by a supervisor of any gender, rendering the law against sex discrimination irrelevant.<sup>73</sup> But seemingly contrary to that logic, the court also opined that attraction between men and women is natural, and that companies could certainly not be liable for every such instance of attraction that

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66 *Id.* at 662.

67 *Id.* at 662–63.

68 418 F. Supp. 233 (N.D. Cal. 1976).

69 *Id.* at 236.

70 *Id.*

71 422 F. Supp. 553 (D.N.J. 1976).

72 *Id.* at 556.

73 *Id.*

manifested between male supervisors and female employees.<sup>74</sup> Building on this premise, the court cautioned that allowing a cause of action for the behavior of a supervisor would create an imminent lawsuit every time that a supervisor tried to engage socially with an employee.<sup>75</sup> The court also questioned whether such a cause of action would be a slippery slope to claims based on interactions between employees.<sup>76</sup>

But the court's adherence to the rationale of the other districts played to plaintiff's favor in her retaliation claim against the company. In maintaining the distinction between the actions of an individual and the actions of an employee, the court did find that retaliatory action by a company against an employee who files a complaint of sex discrimination was actionable under Title VII:

It matters not whether the basis for the discriminatory treatment is a previous sexual assault or a matter related to salary or promotion. When a female employee registers a complaint and the grievance is not only not adequately processed, but the complainant is persecuted for having the temerity to advance it at all, the Act is violated to the extent that such a corporate posture is sex-based. If a company decides that, whatever the merits of the underlying controversy, the female will be terminated because she is female, that is sex discrimination.<sup>77</sup>

As a result, the plaintiff's claims against the company survived the motion to dismiss. However, liability for sexual harassment by a supervisor remained elusive. Liability for sexual harassment by a peer seemingly remained off the table altogether.

Those odds shifted slightly in July 1977, when the Court of Appeals for the D.C. Circuit ruled on the appeal by Barnes (which had then been restyled *Barnes v. Costle* to reflect a change in leadership at the EPA).<sup>78</sup> The opinion by the court of appeals represented the first major victory for plaintiffs in sexual harassment litigation. In reversing and remanding the case, the court rejected the notion that an act of sexual harassment was inextricable from sex:

But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. The circumstance imparting high visibility to the role of gender in the affair is that no male employee was susceptible to such an approach by appellant's supervisor. Thus gender cannot be eliminated from the formulation which

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74 *Id.* at 556–57.

75 *Id.* at 557.

76 *Id.*

77 *Id.*

78 561 F.2d 983 (D.C. Cir. 1977).

appellant advocates, and that formulation advances a prima facie case of sex discrimination within the purview of Title VII.<sup>79</sup>

The court went even further in holding that a company was complicit—and therefore liable—in the known harassment by a supervisor unless it took affirmative steps to eliminate the harassment.<sup>80</sup>

The Eastern District of Michigan entertained the final sexual harassment case to precede the inaugural Title IX action. In *Munford v. James*,<sup>81</sup> plaintiff Maxine Munford was employed for mere hours before her male supervisor propositioned her in the office supply room.<sup>82</sup> After rebuffing his advance, she endured repeated harassment, including lewd cartoon sketches left on her desk. Only a couple of weeks later, the supervisor informed her that she would accompany him on a business trip to Grand Rapids, and that they would stay in the same hotel room and have sex on the trip. When she informed him that she would refuse to stay in the same room, she threatened to report his conduct. She was summarily terminated. When she reported his conduct immediately after the termination, the company's leadership declined to investigate and informed her that they would uphold the supervisor's decision to terminate.<sup>83</sup>

After examining the only five sexual harassment cases that preceded it, the court determined that it was charged with deciding two questions: (1) whether acts of sexual harassment were within the purview of Title VII and (2) which acts constituted employment practices for which the employer might be liable.<sup>84</sup> On the first, the court adopted the rationale of *Barnes* and *Williams* in holding that sexual harassment was within the purview of Title VII as sex discrimination.<sup>85</sup> On the second, the court declined to adopt the broad holding by *Barnes v. Costle* that an employer might be vicariously liable for any harassment by a supervisor. Rather, the court found that an employer would be liable where it knew of the harassment and failed to investigate.<sup>86</sup>

Although *Barnes v. Costle* and *Munford* propped open the door of feasibility for the plaintiffs in *Alexander v. Yale*, the legal viability of plaintiffs' theory under Title IX remained dubious when they filed their action in 1977. No similar finding had yet been made regarding a school's responsibility to respond to the harassment of students under Title IX. The heavy emphasis on the distinction between individual and corporate liability under Title VII also did not favor the plaintiffs at the time that they filed their action. Before the court could even answer the second question of whether an implied right of action was appropriate, the plaintiffs needed the

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79 *Id.* at 990.

80 *Id.* at 1000.

81 441 F. Supp. 459 (E.D. Mich. 1977).

82 *Id.* at 460.

83 *Id.*

84 *Id.* at 465.

85 *Id.* at 465–66.

86 *Id.* at 466.

court to accept as a threshold issue that sexual harassment by individual faculty members—or the institution’s inadequate response to it—constituted a form of sex discrimination prohibited by Title IX. Attorney Anne Simon conceded after the fact that the prospects for their theory under Title IX were bleak at the outset.<sup>87</sup>

Their decision to proceed paid off. Despite the unfavorable legal landscape at the time of filing, their legal theory of sexual harassment as sex discrimination (as it applied to Price) was practically treated as a foregone conclusion by the magistrate who initially ruled on the motion to dismiss. Relying exclusively on the appellate decision in *Costle*, the magistrate held

it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII’s ban against sex discrimination in employment, see, e. g., *Barnes v. Costle*, 183 U.S.App.D.C. 90, 561 F.2d 983, 988-992 (1977). When a complaint of such an incident is made, university inaction then does assume significance, for on refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee’s invidiously discriminatory conduct.<sup>88</sup>

The court’s cursory treatment of this groundbreaking moment raises questions about the forces that were shaping the law of the era. While many likely agree with the court’s holding regarding the applicability of Title IX, the court’s citation to a single nonbinding appellate decision on Title VII—with no mention of the other district courts whose lengthy legal analyses resulted in other conclusions—suggests that the law in this watershed moment was shaped by more than black letter doctrine.

### III. THE SOCIAL CONTEXT

Some view *Alexander v. Yale* as shifting the law on sexual harassment practically overnight.<sup>89</sup> But with the benefit of macrohistorical hindsight, the lawsuit was arguably more so a culmination of social change that had long been building momentum, rather than the unforeseen beginning of a new era. The social context in which the lawsuit was cultivated—both locally at Yale and nationally in the United States—broadcast strong signals that drastic change of some kind was on the horizon. While it was far from certain that *Alexander v. Yale* would yield any particular outcome, observant policy makers and higher education administrators should have been on notice that a shift in the legal obligations of colleges and universities was imminent.

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87 Simon, *supra* note 23.

88 *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977).

89 Simon, *supra* note 23.

### A. *Micro Social Context: The Squeaky Wheel on Campus*

Contemporary archive materials—including those published as essays, press releases, and op-ed columns in the school newspaper—suggest that pervasive sexual misconduct by men in power was not merely a poorly kept secret at Yale. Rather, it was ingrained in the reputation of the institution at the time. They also suggest that factions of the university community were dismissive of the problem.

The undergraduate school, Yale College, opened its doors to women for enrollment in all programs in 1969.<sup>90</sup> The sexual violence and coercion experienced by the women of Yale was a problem known to the university from the beginning of full-time coeducation. In his address to the inaugural coeducational undergraduate class, President Kingman Brewster Jr. stated unequivocally that “[the] two things most obviously on everyone’s minds on this opening day are women and campus violence.”<sup>91</sup> Three of the women’s colleges began installing locks on the bathroom doors because of intrusions by men, including one who was found in the bathroom with a knife.<sup>92</sup> The colleges also discussed strategically dispersing floors for women throughout the campus in order to make them more difficult to find.<sup>93</sup>

A review of contemporary Yale archive materials from 1969 to 1973 by Dr. Anne G. Perkins revealed that the heads of all twelve residential colleges were apprised in a council meeting of at least one instance of rape.<sup>94</sup> There is also evidence that the New Haven Police received at least six reports of rape from Yale women during the second and third academic years of coeducation.<sup>95</sup> The university’s own student newspaper, *The Yale Daily News*, reported repeatedly on the sexual assaults of Yale women through the first decade of coeducation.<sup>96</sup> Public debate

90 Yale Univ. Libr., *History of Coeducation in Yale College: Introduction* (n.d.), <https://guides.library.yale.edu/c.php?g=871411&p=6256097>. However, the first female students in the history of the institution were admitted to the Yale School of Fine Arts in 1896 at the insistence of the school’s benefactors. Other graduate programs began admitting women in the decades leading up to the coeducational admissions policy of Yale College. See Yale Univ., *A Timeline of Women at Yale* (2022), <https://celebratwomen.yale.edu/history/timeline-women-yale>.

91 Yale Univ., *A Timeline of Women at Yale*, *supra* note 89.

92 *Colleges Put Locks on Girls’ Bathrooms*, *Yale Daily News* (Dec. 9, 1969), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19691209-01.2.3&srpos=1&e=-----en-20--1--txt-txIN-colleges+put+locks+on+girls+bathrooms----->. <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19691209-01.2.3&srpos=1&e=en-20--1--txt-txIN-Colleges+Put+Locks+on+Girls%27+Bathrooms>.

93 Yale Univ., *supra* note 89.

94 Anne G. Perkins, *Unescorted Guests: Yale’s First Women Undergraduates and the Quest for Equity, 1969–1973* (2018) (Ph.D. dissertation, University of Massachusetts), [https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1388&context=doctoral\\_dissertations](https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1388&context=doctoral_dissertations).

95 *Id.*

96 Thomas Kent, *Rape, 2 Attempts Reported; Police Urge New Alertness*, *Yale Daily News* (Dec. 10, 1970), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19701210-01.2.5&srpos=1&e=-----en-20--1--txt-txIN-rape+2+attempts+reported----->; Ernest Tucker, *Rapist Attacks: Still at Large*, *Yale Daily News* (Oct. 13, 1972), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19721013-01.2.4&srpos=1&e=-----en-20--1--txt-txIN-rapist+attacks+still+at+large----->; Robert Rosenthal, *Female Student Sexually Attacked*, *Yale Daily News* (Sept. 19, 1972), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19720919-01.2.8&srpos=2&e=-----en-20--1--txt-txIN-female+student+sexually+attacked----->; J. Harris, *2nd Rape Startles Branford*, *Yale Daily News* (Dec. 17, 1975), <https://ydnhistorical.library.yale.edu/?a=d&d=>



raged about whether the responsibility for the safety and security of women at Yale fell on the institution or on the women themselves.<sup>97</sup> The security measures considered by the institution included locking bathrooms, locking exterior gates, hiring guards, instructing students to lock their doors, installing peepholes, and disseminating pamphlets to women with information on how to avoid becoming a “tempting target.”<sup>98</sup>

While these sexual assaults were typically attributed to the nefarious locals of New Haven who were otherwise unaffiliated with the institution,<sup>99</sup> students put the institution on notice of the sexual misconduct happening within its own ranks long before the plaintiffs proceeded with their lawsuit in 1977. In 1971, two student organizations—the predecessors to the Women’s Caucus and the Women’s Forum—produced a report to the university detailing the experiences of sexual harassment endured by women students at the hands of faculty.<sup>100</sup> One woman

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YDN19751217-01.2.4&srpos=1&e=-----en-20--1--txt-txIN-second+rape+startles+branford----- ; Randy Mastro, *Med Student Raped in Year’s Fifth Attack*, Yale Daily News (Feb. 11, 1976), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760211-01.2.3&srpos=1&e=-----en-20--1--txt-txIN-med+student+raped+in+year%27s+fifth+attack-----> ;

97 Barry Coburn & Jim Graham, *Letters to the Editor*, Yale Daily News (Mar. 25, 1974), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740325-01.2.10&srpos=1&e=-----en-20--1--txt-txIN-Barry+Coburn+%26+Jim+Graham%2C+Letters+to+the+Editor----->; Andy Chapman, *Letters to the Editor*, Yale Daily News (Mar. 25, 1974), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740325-01.2.10&srpos=1&e=-----en-20--1--txt-txIN-Barry+Coburn+%26+Jim+Graham%2C+Letters+to+the+Editor-----> ; Kitty Tyson, *Letter to the Editor: Rape*, Yale Daily News (Oct. 20, 1975), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19751020-01.2.7&srpos=1&e=-----en-20--1--txt-txIN-Kitty+Tyson%2C+Letters+to+the+Editor-----> ; Wendy Reuther, *Feeling Helpless*, Yale Daily News (Jan. 24, 1976), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760124-01.2.5&srpos=2&e=-----en-20--1--txt-txIN-Wendy+Feeling+Helpless-----> ; Rosemary Bray, *Letter to the Editor: Helplessness*, Yale Daily News (Jan. 27, 1976), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760127-01.2.12&srpos=4&e=-----en-20--1--txt-txIN-Helplessness-----> ; Shari Loe, *Letter to the Editor: Helpless*, Yale Daily News (Jan. 28, 1976), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740116-01.2.9&srpos=1&e=-----en-20--1--txt-txIN-shari+loe+letter+to+the+editor-----> ; Anonymous Member of Yale Class of 1979, *Assault and Rape: An Open Letter*, Yale Daily News (Apr. 19, 1978), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19780419-01.2.5&srpos=4&e=-----en-20--1--txt-txIN-assault+and+rape+an+open+letter-----> .

98 Barry Coburn & Jim Graham, *Letters to the Editor*, Yale Daily News (Mar. 25, 1974), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740325-01.2.10&srpos=1&e=-----en-20--1--txt-txIN-jim+graham+letters+to+the+editor-----> ; Mindy Beck, *University Locks Bathrooms, Initiates Old Campus Patrol*, Yale Daily News (Sept. 22, 1975), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19750922-01.2.1&srpos=1&e=-----en-20--1--txt-txIN-mindy+beck+university+locks+bathrooms-----> ; Barry Coburn, *Council Discusses Safety Precautions*, Yale Daily News (Sept. 25, 1975), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19750925-01.2.5&srpos=1&e=-----en-20--1--txt-txIN-council+discusses+safety+precautions-----> ; John Harris & Randy Mastro, *Chauncey Reveals Tighter Security Plan*, Yale Daily News (Jan. 15, 1976), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760115-01.2.1&srpos=1&e=-----en-20--1--txt-txIN-chauncey+reveals+tighter+security+plan-----> ; Jane Fincke, *Panel Advises Common Sense Precaution in Rape Prevention*, Yale Daily News (Feb. 2, 1976), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760202-01.2.2&srpos=1&e=-----en-20--1--txt-txIN-panel+advises+common+sense+precaution-----> .

99 With a disproportionate attribution to Black men in the New Haven community. See Perkins, *supra* note 93; Miles Leverett, *Letter to the Editor: Harassment*, Yale Daily News (Jan. 27, 1976), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760127-01.2.10&srpos=1&e=-----197-en-20--1--txt-txIN-miles+leverett---1976--> .

100 Alice Dembner, *A Case of Sex Discrimination*, 7 Yale Graduate-Professional 28 (Mar. 1, 1978),

described a Director of Graduate Studies “who spends more time patting your thighs and pinching your rear than discussing your academic career.”<sup>101</sup> Another woman openly described an assault by a professor in her admissions interview:

When I came to Yale to show my portfolio, a requirement for admission to the department, I did not realize what was going to happen. When I had finished discussing the final picture with one professor, he asked me, “Now, don’t you have something else to show me?” and with that he grabbed me by the shoulders, as they say in Victorian novels.<sup>102</sup>

A 1971 *Report to the President from the Committee on the Status of Professional Women at Yale* also documented extensive evidence of the sex discrimination endured by female graduate students and faculty members.<sup>103</sup> The report noted that while women received fourteen percent of the doctorates at Yale, they made up only three percent of the faculty.<sup>104</sup> The report also noted experiences of male faculty members recommending men for jobs, only to acknowledge that there were women students who were more qualified.<sup>105</sup>

The founding of the Undergraduate Women’s Caucus in 1974 was also vocal in its intention to address the experiences of women at Yale. One of the organization’s primary aims was to change pervasive attitudes at Yale that objectified women. Organizers Katherine Tyson and Ann Olivarius cited an example in which male senior students voted to determine which undergraduate woman was the prettiest and then collected a pot of money as a prize for the first man to have sex with her.<sup>106</sup> The Committee also openly acknowledged the university’s reputation as a “male chauvinist” institution.<sup>107</sup>

Despite the work of these university committees, task forces, and student activists, a 1977 *Report to the Yale Corporation from the Yale Undergraduate Women’s Caucus* demonstrated that sex discrimination remained pervasive, even if often covert.<sup>108</sup> A Harvard professor at the time recounted that the recommendations that his department received for women from Yale described them as “nice to be around”

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<https://clearinghouse.net/doc/80394/>.

101 *Id.*, 29.

102 *Id.*

103 Burton R. Clark et al., *A Report to the President from the Committee on the Status of Professional Women at Yale* (1971), [https://wff.yale.edu/sites/default/files/files/1971\\_A\\_Report\\_to\\_the\\_PresidentProf Women.pdf](https://wff.yale.edu/sites/default/files/files/1971_A_Report_to_the_PresidentProf%20Women.pdf).

104 *Id.* at 23.

105 *Id.* at 13.

106 Marie Lefton, *Women’s Caucus Fights Oppression*, *Yale Daily News* (Nov. 11, 1974), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19741111-01.2.1&srpos=1&e=-----en-20--1--txt-txIN-womens+caucus+fighters+----->.

107 Clark, *supra* note 102, at 15.

108 Yale Undergraduate Women’s Caucus, *A Report to the Yale Corporation from the Yale Undergraduate Women’s Caucus* (Mar. 1977), [https://wff.yale.edu/sites/default/files/files/1977\\_Report\\_to\\_the\\_Yale\\_Corporation.pdf](https://wff.yale.edu/sites/default/files/files/1977_Report_to_the_Yale_Corporation.pdf).

or “a cute addition to your staff.”<sup>109</sup> Citing a statement by a male undergraduate student about searching for love at Yale, the drafters of the report expressed that it was still a “common view that a woman’s worth seems inextricably bound to her ability to help promote male growth.”<sup>110</sup> The 1977 Report also shared an anecdote about a woman who was not hired for a position that she had been performing on an interim basis because she “could not carry heavy boxes”—the same heavy boxes that she had been carrying all summer.<sup>111</sup> The caucus also highlighted the disproportionately low percentage of female employees in management positions, and miniscule enrollment of women students in administrative science, chemistry, economics, engineering and applied science, mathematics, and physics.<sup>112</sup> And while the university had an Affirmative Action plan in place, which was approved by HEW, contributors to the Report noted that the chairs of all of the Affirmative Action committees were White men.<sup>113</sup> Women on faculty expressed frustration at the fact that their “presence serves the purpose of tokenism rather than representing a genuine effort on the part of Yale to incorporate women scholars and researchers into the university.”<sup>114</sup> The 1977 Report also contained accounts of rape from two unnamed women who both offered to speak further with the Yale Corporation if promised confidentiality.<sup>115</sup>

Despite these very visible experiences of women at Yale in the first decade of full coeducation, the university still lacked a formal grievance procedure for complaints of sex discrimination called for by the 1975 Title IX regulations when the plaintiffs filed their claims in *Alexander v. Yale* in 1977.<sup>116</sup> Setting aside the substance of the factual allegations, the original prayer for relief and the procedural history of the lawsuit reveal much about the pervasive nature of the problem faced by women at the university.

From the outset, the plaintiffs named only the university as defendant. They declined to pursue any course of action against the individual male faculty members who committed the offenses. The plaintiffs’ exclusive focus on the university was reflective of the type of change that they hoped to achieve and that only the university could provide.<sup>117</sup>

That desired change is reiterated several times over in the plaintiffs’ prayer for relief. Collectively, the plaintiffs sought only declaratory and injunctive relief. To that end, they sought a declaration that the university’s policies (or lack thereof)

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109 *Id.*

110 *Id.* at 5.

111 *Id.* at 6.

112 *Id.*

113 *Id.* at 9–10.

114 *Id.* at 10.

115 Yale Undergraduate Women’s Caucus, *A Report to the Yale Corporation from the Yale Undergraduate Women’s Caucus* 19–21 (Mar. 1977).

116 Yale Undergraduate Women’s Caucus, *Fact Sheet on Alexander v. Yale* (Sept. 1, 1977), <https://clearinghouse.net/doc/80476/>.

117 *Id.*

violated Title IX, orders enjoining the university and its officials from continuing the practices that allowed harassment to persist in violation of Title IX, and an order that the university implement a grievance procedure for the resolution of sex discrimination complaints.<sup>118</sup> Price also sought to have her grade changed through further investigation, and/or for the university to instruct recipients of the transcript to disregard the disputed grade.<sup>119</sup> Only Olivarius sought damages in the amount of \$500, which was meant to reimburse her for time and expenses in pursuing complaints on behalf of others.<sup>120</sup>

The amendments to the complaint also offer insight into the scope of the harassment problem on campus. After the original plaintiffs filed the lawsuit and shared their stories, Reifler and Price asked to join the suit as well. Both brought their own egregious experiences of sexual harassment, and neither sought damages or retribution from the individual employees.<sup>121</sup> The discovery of these additional plaintiffs (at least one of whom formally reported her experience to the administration on multiple occasions) suggests that the experiences of harassment alleged in the original complaint offer just a glimpse at the pervasive problem that existed on campus.

The appellate proceedings also offer insight into the broader social context in which the plaintiffs brought their suit. Intervening as amici in support of the plaintiffs on their appeal to the Second Circuit were notable public interest groups. Among them were the American Civil Liberties Union, the Women's Equity Action League Educational and Legal Defense Fund, Working Women's Institute, the National Conference of Black Lawyers and Black Women Organized for Political Action, Equal Rights Advocates, Inc. and Women Organized Against Sexual Harassment.<sup>122</sup>

On its face, the *Alexander* case seems an unusual candidate to attract the support of so many amici of national prominence. The court had declined to certify the class, and the motion to dismiss had managed to whittle the case down to a single claim by a single plaintiff. The remaining claim was treated as a fact-dependent tort case rather than the type of class action with broad systemic implications that plaintiffs sought from the outset.<sup>123</sup> That single remaining plaintiff lost on the merits at trial. The appeal seemed to be an uphill battle. Despite these circumstances, the plaintiffs found broad support from national interest groups. These organizations' interest in the appeal was representative of a larger context that was driving social and legal change outside of Yale's gates.

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118 Alexander v. Yale University, Second Amended Complaint, Prayer for Relief, Civ. No. N77-277 (D. Conn. 1977).

119 *Id.* at paras. 8–9.

120 *Id.* at para. 11. *See also* Alexander v. Yale Univ., 459 F. Supp. 1, 3 (D. Conn. 1977).

121 Yale Undergraduate Women's Caucus, *Alexander v. Yale* [Informational Pamphlet] (Dec. 1, 1977), <https://clearinghouse.net/doc/80478/>.

122 Alexander et v. Yale Univ., 631 F.2d 178 (2d Cir. 1980).

123 Simon, *supra* note 23.

### ***B. Macro Social Context: Filling a Legal Void***

The plaintiffs' struggle to find an adequate legal mechanism for remedy—internally at Yale or externally in the courts—was a striking reflection of the broader war that women were waging in the workplace. As women began to fight for safety and respect at Yale, the national Second Wave movement for women's rights was gaining momentum through the 1970s.<sup>124</sup> In many ways, this Second Wave picked up where the feminist movement at the turn of the twentieth century left off.<sup>125</sup> While the early feminist movement focused enormously on fundamental civil liberties and acknowledgment of basic personhood for women in the United States, the movement did make early strides in highlighting the use of sexual harassment and abuse as both a means and an end to perpetuating the social and economic inferiority of women.<sup>126</sup> The original feminist movement also addressed the intersectionality of race and sexual abuse for Black women in the United States.<sup>127</sup> This latter cause was a point of emphasis for the sole plaintiff who went to trial, Pamela Price, who argued that her vulnerability to objectification and exploitation as a woman was only exacerbated by her presumed inferiority as a Black person.<sup>128</sup>

The national social context of the Second Wave overlapped significantly with the campus context at Yale because of the pioneering work that MacKinnon was doing in New Haven. However, MacKinnon was not leading the charge alone. Attacking from all angles, legislators, lawyers, and activists worked to ignite a national consciousness-raising regarding the inequities that women endured in the workplace.<sup>129</sup>

In Congress, members called attention to the gaps that the legislative solutions of the 1960s civil rights movement left for women. Representative Martha Griffiths (D. Mich.) successfully passed a constitutional amendment in the House of Representatives that would explicitly prohibit sex discrimination.<sup>130</sup> While Griffiths had been advocating for some version of the amendment for over fifteen years, the renewed push to pass the amendment was reportedly prompted by the

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124 Reva B. Siegel, *A Short History of Sexual Harassment*, in *Directions in Sexual Harassment Law* (Catharine A. MacKinnon and Reva B. Siegel eds. 2003); Carrie N. Baker, *The Emergence of Organized Feminist Resistance to Sexual Harassment in the United States in the 1970s*, 19 *J. Women's Hist.* 161 (2007).

125 Siegel, *supra* note 123.

126 *Id.*

127 *Id.* See also Carrie N. Baker, *Race, Class, and Sexual Harassment in the 1970s*, 30 *Feminist Stud.* 7 (2004), <http://www.jstor.org/stable/3178552>.

128 Pamela Price, *Statement by Pamela Price* [Press Release] (Dec. 21, 1977), <https://clearinghouse.net/doc/80386/>. However, the Second Wave is criticized for placing disproportionate emphasis on the plight of White, middle-class professional women, relegating the discussions of racial intersectionality to the background until Anita Hill's allegations redirected the national narrative in the 1990s. This is despite the fact that many of the groundbreaking plaintiffs of the Second Wave, like Price, were Black women. See, Baker (2007), *supra* note 123. See also Elvia R. Arriola, 'What's the Big Deal?' *Women in the New York City Construction Industry and Sexual Harassment Law, 1970–1985*, 22 *Colum. Hum. Rts. L. Rev.* 21 (1990).

129 Baker, *supra* note 123.

130 H.R.J. Res. 264, 91st Cong. (1970), 116 *Cong. Rec.* 28004, 28036–37 (1970).

U.S. Supreme Court's reluctance to apply the protections of the Civil Rights Act of 1964 to sex in the same way that it had applied the principles to race.<sup>131</sup>

Contemporaneously, Representative Edith Green (D. Oregon) used her role as the Chair of the Special Committee on Education to pursue legislation that would prohibit sex discrimination in education. Discussions in the committee hearings chaired by Green shed light on the pervasive cultural barriers of the era.<sup>132</sup> Committee members and witnesses debated how to handle income-based repayment plans for funding higher education when women borrowed money to attend school and then chose not to enter the workforce upon marrying—an obvious and inevitable outcome in the minds of some members of the committee.<sup>133</sup> The committee addressed heightened admissions standards for women in higher education as being purportedly justified by initiatives to increase access to “minority” students, which lowered standards for admission—omitting any discussion of the possibility of admitting fewer White men.<sup>134</sup> The Assistant Secretary of Labor questioned whether the programs would be “sensitive to the particular needs of women in the labor market,” without discussion of what those “particularized needs” might be.<sup>135</sup> Representative Green addressed other blatant manifestations of sex discrimination in the proceedings, interrogating the Assistant Secretary of Labor about how many women he had in key positions on his staff,<sup>136</sup> addressing jokes made by committee members about the inclusion of women in training for the trades,<sup>137</sup> and calling out the absence of several committee members who chose not to make the hearings a priority.<sup>138</sup> Despite these barriers, a subsequent iteration of Green's bill would later pass in 1972, becoming the law that the Yale plaintiffs would use as the basis of their claims.

These legislative developments seemingly had a reciprocal relationship with the growing sentiments in workplaces across the country, with each lending momentum to the other.<sup>139</sup> Grassroots movements in cities across the country began to leverage local demonstrations and mainstream media to shift public sentiment. One of the most significant consciousness-raising events came on the heels of Representative Griffiths's success in passing the Equal Rights Amendment in the House. On August 26, 1970, a labor demonstration for women's rights organized by Betty Friedan and the National Organization for Women (NOW) drew as many as fifty thousand supporters to the streets of New York City, blocking

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131 *New Victory in an Old Crusade*, Time (Aug. 24, 1970), <https://time.com/vault/issue/1970-08-24/page/14/>.

132 Higher Education Amendments of 1969: Part 1, Hearings before the United States House Committee on Education and Labor, Special Subcommittee on Education, 91st Cong, 1st Sess., and 91st Cong, 2d Sess., Dec. 16–18, 1969, Jan. 29, Feb. 3–6, 17, 25, Mar. 3–6, 9, 11, 12, 1970.

133 *Id.* at 178–81.

134 *Id.* at 463–64.

135 *Id.* at 175.

136 *Id.* at 174–75.

137 *Id.* at 170–72.

138 *Id.* at 315.

139 *See New Victory*, *supra* note 130.

Fifth Avenue during rush hour.<sup>140</sup> The protest was accompanied by several “sister demonstrations” in Detroit, Indianapolis, Boston, Berkeley, New Orleans, and Washington, D.C.<sup>141</sup> The demonstrations—which were intended to highlight the impact that the absence of women would have in the workplace—reportedly exceeded the organizers’ own expectations.<sup>142</sup>

The message continued to resonate with working women of the era. Activists Ellen Cassedy, Karen Nussbaum, and Debbie Schneider began rallying fellow secretaries of Harvard and working women across other industries in Boston to demand equality in the workplace.<sup>143</sup> After meeting informally with a group of ten women over the course of a year to discuss their treatment in university offices, shoe factories, hospitals, and insurance companies, the women began to understand that their experiences of mistreatment on the job were practically universal among working women. The group created the labor rights organization “9to5” to pursue policy solutions to workplace inequities.<sup>144</sup> Over 150 women in Boston joined the organization when it began in 1973.<sup>145</sup> The organization targeted policy solutions to core labor issues like equal pay, promotional opportunities, and maternity rights. The 9to5 collective took a multimodal approach: appearing in public meetings before the local chamber of commerce, meeting directly with employers of their members, and “teetering for women’s rights” while picketing outside of the state capitol building in their high heels on their lunch breaks.<sup>146</sup> By 1978, the group had expanded beyond Boston into other cities across the country.<sup>147</sup>

In Chicago, a similar organization also emerged in 1973. The new collective, known as “Women Employed,” began to lobby the Chicago Association of Commerce for equal pay and professional respect.<sup>148</sup> They made their case to the Association with compelling data. At that time, women made up forty-five percent of the labor force in Chicago but earned only twenty-five percent of the total workforce wages.<sup>149</sup> Nearly half of men also held professional or managerial jobs, while only fourteen percent of women were entrusted with such responsibilities.<sup>150</sup>

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140 SaschaCohen, *The Day Women Went on Strike*, Time (Aug. 26, 2015), <https://time.com/4008060/women-strike-equality-1970/>.

141 *Id.* at para. 6.

142 *Id.*

143 Ann Froines, *Transcript of Interview with Ellen Cassedy, Karen Nussbaum, Debbie Schneider*, Washington, D.C. (Nov. 1, 2005), <https://reuther.wayne.edu/files/LOH000682.07.00.0.00.00.00.pdf>; K. Banks Nutter, *Transcript of Interview with Karen Nussbaum*, Voices of Feminism Oral History Project, Washington, D.C. (Dec. 18–19, 2003), <https://www.smith.edu/libraries/libs/ssc/vof/transcripts/Nussbaum.pdf>.

144 Froines, *supra* note 142.

145 *Id.* at 1.

146 *Id.* at 5–6.

147 *Id.* at 4.

148 Sheila Wolfe, *Job Equality Plea Made*, Chicago Trib., sec. A1 (Apr. 24, 1973), <https://www.newspapers.com/image/377160478/>.

149 *Id.*

150 *Id.*

This was despite the fact that the median number of years of schooling for both sexes in Chicago at that time was nearly identical, with 12.5 for women and 12.8 for men.<sup>151</sup>

While *9to5* and *Women Employed* focused largely on general terms and conditions of women's employment, some activist groups during the Second Wave targeted the explicit sexualization of women. With the benefit of unionizing in the two prior decades, flight attendants were able to move swiftly against the "sexploitation" of women in the profession.<sup>152</sup> Women in the profession created *Stewardesses for Women's Rights* in 1974 as a direct response to the airline industry's portrayal of flight attendants as sexual objects in its advertising (e.g., female attendants featuring buttons that read "fly me").<sup>153</sup> They also fought back against the airlines' cosmetic regulation of the women's weight, makeup, and hair styles.<sup>154</sup>

But in the earliest years of the Second Wave, the lack of a comprehensive name for the act of sexualizing women in the workplace likely kept some of the dialogue at bay. That changed in Ithaca, New York, in 1975. Local activists began to rally around the case of Carnita Wood, an administrative assistant who endured sexual abuse by a prominent scientist at Cornell University.<sup>155</sup> Members of the women's section of Cornell's Human Affairs Program—including Lin Farley, Susan Meyer, and Karen Sauvigné—began to drum up support for Wood's case.<sup>156</sup> Similar to MacKinnon, Lin Farley was gaining momentum as an activist speaking out against the abuse of women in the workplace and would eventually produce her own seminal work on the topic, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (1978).<sup>157</sup>

The women organized an inaugural "speak out" event in Ithaca, New York, in 1975 in response to Wood's case.<sup>158</sup> In preparation for the event, Farley, Meyer, and Sauvigné brainstormed to come up with a single term that would describe the broad spectrum of mistreatment and abuse that women endured in the workplace as a result of their sex. Farley came up with the term "sexual harassment," and the group agreed to adopt it for the event.<sup>159</sup>

Over 275 women attended the speak-out event, with 20 of them offering recounts of their experiences with sexual harassment on the job.<sup>160</sup> The event was responsible

151 *Id.*

152 Priscilla Murolo et al., *From the folks who brought you the weekend: a short, illustrated history of labor in the United States* (2001).

153 Which was met by the attendants' retort on protest signs and buttons that read, "fly yourselves." *Id.*

154 *Id.*

155 Baker, *supra* note 123.

156 *Id.*

157 Lin Farley, *Sexual shakedown: the sexual harassment of women on the job* (1978).

158 Baker, *supra* note 123.

159 *Id.*; *New Mexico in Focus, Episode 1130 | On Coining the Term "Sexual Harassment" - Raw* [interview broadcast] (Jan. 26, 2018), [https://www.youtube.com/watch?v=mymzv2uyf8k&ab\\_channel=PBSNewsHour](https://www.youtube.com/watch?v=mymzv2uyf8k&ab_channel=PBSNewsHour).

160 Baker, *supra* note 123.



for formally launching a new organization sponsored by Farley, Meyer, and Sauvigné named “Working Women United” (WWU) with forty inaugural members. The group—along with their cause and their newly coined term—quickly gained national recognition due in large part to coverage of the speak-out by the *New York Times* that was syndicated in major news outlets across the country.<sup>161</sup> The article by Enid Nemy likely resonated with the masses by laying bare the experiences of women in the workplace that were almost universally understood, but never discussed. Nemy’s article recounted the experiences of sexual harassment shared by five different women at the speak-out event, transcending industries to include academia, health care, food service, and even part-time babysitting.<sup>162</sup>

These grassroots efforts coalesced into a national movement by women in the workplace. By 1977, 9to5 rallied several local organizations to become a national association of ten thousand members.<sup>163</sup> In addition to pursuing policy solutions at the local and state level, the organizations began to lend support to plaintiffs pursuing private causes of action against employers for sex discrimination under Title VII as the most likely legal remedy for sexual harassment in the workplace.

#### IV. LESSONS FROM THE SOCIAL CONTEXT

There is no formula for predicting the outcome of any particular case. Nor can we fully anticipate the impact that each case will have on the long-term trajectory of the law. But notwithstanding the uncertainty of these outcomes, change can only occur where plaintiffs feel compelled to bring the case before the court.

Whether driven by the empowerment of a national movement or by desperation from the lack of a readily available remedy—or perhaps both—the benefit of hindsight makes clear that the social context enveloping *Alexander v. Yale* set the stage for the aggrieved to pursue a change in the law. If not achieved by the plaintiffs in *Alexander*, this new path for Title IX very likely may have been charted by different plaintiffs elsewhere. A careful examination of both the micro and macro social context reveals at least two themes that might aid future policy makers, administrators, and lawyers in anticipating the novel application of education law or policy.

The first theme that emerges from both contexts is the prevalence of the problem at issue. The signal of imminent change was not merely that a social problem existed. Rather, there was a well-known, pervasive problem that systematically and consistently impacted one particular faction of the community. On campus at Yale, administrators knew from the outset that both its campus culture and infrastructure were not adequately prepared to host women safely on campus.<sup>164</sup> When they arrived, women predictably endured discrimination and abuse at disproportionate rates, just as women in the workforce did nationally. While many likely tolerated the

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161 *Id.*; New Mexico in Focus, *supra* note 158. See Enid Nemy, *Women Begin to Speak Out against Sexual Harassment at Work*, N.Y. Times (Aug. 19, 1975), <https://www.nytimes.com/1975/08/19/archives/women-begin-to-speak-out-against-sexual-harassment-at-work.html?smid=url-share>.

162 *Id.*

163 Murolo et al., *supra* note 151.

164 See *supra* Part III.A.

transgressions quietly, enough of the women made their experiences publicly known through such a variety of fora that leaders—both on the Yale campus and in workplaces nationwide—could not reasonably plead ignorance.

The second theme to emerge is the *de jure* absence of an established legal remedy to address the known problem. The law as written offered no clear remedy for aggrieved persons. For women enduring sexual harassment in the workplace, Title VII's prohibition against discrimination on the basis of sex was not an unequivocal mechanism for addressing these harmful acts. It was not until 1986 that the Supreme Court settled the matter by formally interpreting Title VII to preclude sexual harassment.<sup>165</sup> The women studying at Yale were even further removed from a clear legal remedy. Prior to the enactment of Title IX, there was no clear prohibition against sex discrimination in private education under federal law. After Title IX was enacted, it faced the same question of construction as Title VII. Even if the scope of the prohibition was presumed to reach acts of sexual harassment, Title IX failed to offer the victims any clear recourse. The statute threatened the revocation of federal funds from the offending institution but offered no actual path for making the aggrieved person whole. As a result, there was little incentive for employers or education institutions to adopt grievance procedures that would allow victims of sexual harassment to seek recourse internally.

In the face of this *de jure* absence of legal remedy—in both internal corporate policies and externally in the civil justice system—creative and determined plaintiffs and legal advocates will begin to search for any legal tool that might get the job done. Doing so might require the stakeholders to push for alternative interpretations of the law to find redress for injustice. In the *Alexander* case, it meant clinging to a law that had previously been used to address disproportional opportunities for women in admission, athletics, and employment, and redirecting it to combat individual acts of sexual misconduct.

The plaintiffs in *Alexander v. Yale* had just such a creative and determined advocate in Catharine MacKinnon. Though she was still a law student and Ph.D. candidate at the time that the lawsuit was filed, MacKinnon was emerging as a feminist scholar and activist of national importance. She was already constructing the manuscript of her seminal work, *Sexual Harassment of Working Women*, and had already penned an op-ed in the *Yale Daily News* on sexual harassment in the workplace.<sup>166</sup> She is credited as the architect of the application of Title IX to sexual harassment in *Alexander v. Yale*, and portions of her early manuscripts for *Sexual Harassment of Working Women* were used by counsel of record in their advocacy for the theory throughout the litigation.<sup>167</sup> In assessing the lawsuit's difficult prospects prior to filing, attorney Anne Simon shared of MacKinnon,

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165 Meritor Savs. Bank v. Vinson, 477 U.S. 57 (1986).

166 Catharine A. MacKinnon, *Sexual harassment of working women*, (1979); Catharine MacKinnon, *Ending a Pernicious Folklore*, *Yale Daily News* (Feb. 15, 1977), <https://ydnhistorical.library.yale.edu/?a=d&d=YDN19770215-01.2.6&srpos=1&e=-----en-20--1--txt-txIN-Ending+a+Pernicious+Folklore----->.

167 Simon *supra* note 23.

An opposing pitcher once said of Wade Boggs, the third baseman and brilliant hitter for the Boston Red Sox and later the New York Yankees, ‘When you have two strikes on him, he’s got you exactly where he wants you.’ This is also an apt description of the Catharine MacKinnon approach to legal problems. There we were, with no cause of action and no right to sue, and Kitty was convinced we were going to win.<sup>168</sup>

But if the *Alexander* plaintiffs had not been fueled by MacKinnon’s willpower and creativity, it is likely that the national movement underway at that time would have surfaced different plaintiffs and advocates to push Title IX—or some other foothold in the law—forward. Sooner or later, institutional leaders would have been required to reconcile the problem that was known to them from the outset. But what is unclear is whether those other advocates would have bent and shaped the law in a way that led to substantially different long-term outcomes. MacKinnon’s strategy set a trajectory for Title IX that eventually called on institutions to tackle the monumental task of building robust systems to adjudicate cases of sexual violence between students. This outcome, in turn, ultimately led to the reexamination of due process rights for students accused of misconduct.<sup>169</sup> It is worth wondering if this chain of events might have ever unfolded if the institutional leaders had implemented the simple grievance procedure called for by the *Alexander* plaintiffs prior to resorting to litigation or if some other clear legal remedy had been drafted into the law from the very beginning.

## V. CONCLUSION

This examination of the social circumstances undergirding *Alexander v. Yale* offers an opportunity for institutional leaders and educational policy makers to engage in two different policy exercises. First, they can take stock of the current social context surrounding known social problems within their own institutions. They can assess whether the constituents that bear the greatest burden from that problem feel that there is a solution underway. In doing so, they can assess whether there is a clear path for recourse or if the aggrieved will be forced to chart their own course in seeking remedy. Second, institutional leaders and policy makers can measure known problems on campus against the scale to which they exist beyond the campus gates. They might consider whether and how the macro social context for the problem at issue could influence the remedies sought by local constituents.

While these considerations fall far short of comprising a formula for the perfect decision-making process, introducing them into the problem-solving calculus might allow leaders to avoid the need for constituents to bend extant laws and policies in unanticipated ways in order to overcome the absence of a clear remedy.

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168 *Id.* at 53.

169 *See Doe v. Baum et al.*, 903 F.3d 575 (6th Cir. 2018); *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019).