BACKDATING #METOO

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The #MeToo movement radically altered the way that people think about workplace sexual harassment. For decades, women were expected to tolerate a broad range of sexualized conduct at work. However, the revelation of Harvey Weinstein's misdeeds in late 2017, followed by the exposure of countless other bad actors, dramatically shifted the social narrative regarding appropriate workplace behavior. Conduct that employees once ignored or overlooked suddenly became the basis for vociferous objection; the perfunctory responses to harassment that many employers once adopted suddenly stood out as glaringly deficient.

While society has undergone great shifts in its understanding of and response to workplace harassment, the courts have been slow to respond to these changing views. Various academics and other commentators have argued that sexual harassment law must evolve to catch up to these social changes, but few courts have embraced (or even acknowledged) this new reality. More importantly, virtually no one has addressed how courts should treat cases that span the progression of these norm shifts—cases that may have arisen prior to the upheaval caused by the #MeToo movement, but which are being litigated in the aftermath of these new social standards. This seems particularly striking given the extent to which the legal framework for resolving harassment claims explicitly involves an understanding of broader norms. In an area of the law that turns so significantly on "reasonableness"—whether a "reasonable" plaintiff would have perceived a sexually hostile environment; how a "reasonable" employer or employee should respond in such circumstances—what happens when reasonableness becomes a moving target, even within the duration of a single case?

This Article examines the extent to which current, more stringent social standards regarding workplace sexual harassment should be applied retroactively to

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cases that may have arisen before those standards came into being. Specifically, it examines what should happen when a court is faced with workplace behavior that would not have constituted actionable harassment at the time that such conduct occurred, but which likely would create liability for the employer under today's expectations. *Should courts "backdate" the new norms created by the #MeToo movement? This Article discusses the ramifications for women—and for society at large—of engaging in such a retroactive application of these evolving standards.*

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INTRODUCTION

It seems almost too trite to mention that the law often lags behind social change—that technological, scientific, and even moral developments consistently outpace those within the legal system.[1] On topics spanning privacy, innovation, and fairness and equality, society's understanding of the "correct" path frequently deviates from that set forth within the law. So too when it comes to how the law treats workplace sexual harassment: the standards for what society deems to be unlawful harassment, as well as society's expectations regarding how employers should respond to such behavior, have changed dramatically in recent years. The law, however, has largely failed to keep up.

Concerns about sexual harassment at work have existed for as long as women have been at work.[2] For decades, women were expected to simply put up with this behavior—to avoid it on their own when possible, and to keep quiet when they couldn't.[3] Much changed, however, in late 2017, when Harvey Weinstein's decades of workplace sexual misdeeds became public,[4] followed by the exposure of countless other workplace wrongdoers.[5] As the #MeToo movement overtook the headlines, and as

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1 *See, e.g.*, Daniel Malan, *The Law Can't Keep Up with New Tech. Here's How to Close the Gap*, WORLD ECON. F. (June 21, 2018), https://www.weforum.org/agenda/2018/06/law-too-slow-for-new-tech-how-keep-up [https://perma.cc/7RMH-FWJA]; Julia Griffith, *A Losing Game: The Law Is Struggling to Keep Up with Technology*, J. OF HIGH TECH. L. (Apr. 12, 2019), https://sites.suffolk.edu/jhtl/2019/04/12/a-losing-game-the-law-is-struggling-to-keep-up-with-technology [https://perma.cc/2HVW-P7PP]; Clare Watson, *Patent Battles*, COSMOS (Apr. 22, 2022), https://cosmosmagazine.com/technology/ai/patent-law-keep-up-science [https://perma.cc/P59S-B2Q4]; Peter Koch, *How Should We Balance Morality and the Law?*, BAYLOR COLL. OF MED. (Dec. 20, 2019), https://blogs.bcm.edu/2019/12/20/how-should-we-balance-morality-and-the-law [https://perma.cc/A63K-F5TS].

2 *See* Emily Crockett, *The History of Sexual Harassment Explains Why Many Women Wait So Long to Come Forward*, VOX (July 14, 2016, 1:30 PM), https://www.vox.com/2016/7/14/12178412/roger-ailes-sexual-harassment-history-women-wait [https://perma.cc/5FEG-J7EX] ("Sexual harassment itself is not new; unwanted and unwelcome sexual advances are probably as old as sex itself."); *see also* Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 956 (2021) ("Sexual harassment has been a persistent plague on working women.").

3 *See* Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 153 (2019).

4 *See* Jessica Fink, *Disgorging Harvey Weinstein's Salary*, 41 BERKELEY J. EMP. & LAB. L. 285, 291 (2020) [hereinafter Fink, *Weinstein*]; *see also* Jessica Fink, *Using a "Bystander Bounty" to Encourage the Reporting of Workplace Sexual Harassment*, 76 SMU L. REV. 165, 168 (2023) [hereinafter Fink, *Bystander*].

5 *See* Fink, *Bystander*, *supra* note 4, at 172–74; *see also* Grossman, *supra* note 2, at 946–49 ("After Weinstein was outed, hardly a day went by over many months without news of another powerful man's downfall—and a trail of victims telling their long-hidden stories of working for these men under conditions that were, at best, discriminatory and oppressive, and, at worst, downright dangerous.").

the public observed one once-respected public figure after another be accused of workplace sexual misconduct, the norms regarding what constituted appropriate workplace behavior underwent an upheaval: Conduct that once may have been regarded as bothersome but ultimately unsurprising (or even expected)—such as an off-color joke, a bawdy comment, a wandering eye or even hand—suddenly seemed infused with more toxic and malicious intent.[6] Likewise, some of the perfunctory and halfhearted responses that employers may have made in the past when confronted with evidence of workplace harassment suddenly stood out as glaringly insufficient.[7] In the span of just a few years, social views regarding what should be tolerated (or not) when it comes to sex in the workplace were turned on their head.

Interestingly, the courts have been sluggish in responding to these changing views. While various academics and other commentators have explicitly called for updating the legal understanding of workplace sexual harassment to catch up to these social changes, few actual adjustments within the legal system have taken place.[8] More importantly, virtually no one has addressed how courts should treat cases that *span* the evolution of these social changes—cases that arose prior to the upheaval caused by the #MeToo movement, but which make it into court after these new social perspectives on workplace sexual misconduct have taken hold.[9] This Article explores that precise predicament: it examines the extent to which current, more stringent social standards regarding workplace sexual harassment should be applied to cases that arose *before* those standards came into place. Specifically, it explores how a court should

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6 *See infra* Section II.A.

7 *See infra* Section II.B.

8 *See infra* Part III.

9 This Article frequently refers to shifts in social attitudes and legal rules surrounding sexual harassment as being the result of "the #MeToo movement," and refers to the recent "resurgence" or recent "prominence" of the #MeToo movement. In doing so, this Article generally examines changes that arose after the widespread exposure of sexual misconduct across various industries beginning with Harvey Weinstein in fall 2017, followed by countless others in the months and years that followed. *See supra* notes 36–43. However, the true genesis of the #MeToo movement dates back to more than a decade before these more recent revelations, when an activist named Tarana Burke first coined the phrase "#MeToo" in 2006. *See* Elena Nicolaou & Courtney E. Smith, *A #MeToo Timeline to Show How Far We've Come—& How Far We Need to Go*, REFINERY29 (Oct. 5, 2019, 4:55 PM), https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein [https://perma.cc/N7RD-35LQ] (describing the origins of #MeToo and subsequent popularization of the phrase following Twitter posting by actress Alyssa Milano); *see also* Brianna Messina, Comment, *Redefining Reasonableness: Supervisory Harassment Claims in the Era of #MeToo*, 168 U. PA. L. REV. 1061, 1063 (2020); Natalie Pedersen & Christine Cross, *#MeToo and the Courts: An Analysis of the Movement's Effect on Workplace Sexual Harassment Law*, 53 U. TOL. L. REV. 71, 72–73 (2021). While this Article primarily discusses social and legal changes growing out of this later iteration of the #MeToo movement, it recognizes the significance of the movement's origins in the broader context of these changes.

handle workplace behavior (and an employer's response to that behavior) that would not have constituted actionable harassment at the time that the incident arose, but which likely would create liability for an employer today. Should the court apply today's more stringent standards in adjudicating such behavior, or should a court adopt the previous, more lenient mindset that existed at the time of the misconduct? In other words, should courts "backdate" the new norms created by the #MeToo movement?

Other scholars have written extensively about the ways in which the #MeToo movement has altered social norms regarding appropriate workplace behavior and have discussed the extent to which the legal system should embrace those new norms.[10] Many of these scholars advocate applying the norms created by the #MeToo movement to *new* cases that arise in the wake of that movement[11]—a position with which this author wholeheartedly agrees. Workplace interactions that arise after the evolution of these new norms *should* be viewed in light of these changes. This Article, however, addresses a different issue, asking whether the new social norms that have arisen as a result of the #MeToo movement should apply retroactively to cases that arose prior to this movement gaining prominence. If an employer who faced allegations of harassment *prior* to late 2017 handled those allegations in a manner that would have been deemed legally acceptable at that time, but in a manner that might *not* comport with today's more stringent expectations for employers, how should a court litigating that case now treat that employer?[12]

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10 *See, e.g.*, Williams et al., *supra* note 3; Grossman, *supra* note 2; Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives*, 23 EMP. RTS. & EMP. POL'Y J. 115 (2019); Deborah L. Brake, *Coworker Retaliation in the #MeToo Era*, 49 U. BALT. L. REV. 1, 1–8 (2020); Diane Y. Byun, *Reexamining Reasonableness: Modernizing the* Ellerth*/*Faragher *Defense*, 28 UCLA WOMEN'S L.J. 371, 395–97 (2021); Danielle A. Bernstein, Comment, *Reasonableness in Hostile Work Environment Cases After #MeToo*, 28 MICH. J. GENDER & L. 119, 120–23 (2021); *cf.* Rachel Arnow-Richman, James Hicks & Steven Davidoff Solomon, *Do Social Movements Spur Corporate Change? The Rise of "MeToo Termination Rights" in CEO Contracts*, 98 IND. L.J. 125 (2022).

11 *See, e.g.*, Williams et al., *supra* note 3; Bernstein, *supra* note 10.

12 In many ways, this Article largely represents a thought experiment. Most claims of sexual harassment must make their way into court within a fairly short time of the alleged harassment occurring. Alleged victims of harassment generally must file a charge of discrimination with the relevant state or federal agency within either 180 days or 300 days of the discrimination taking place, depending on the specific jurisdiction. *See Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/time-limits-filing-charge [https://perma.cc/JKF3-5JDN]; *see also* 21 AM. JUR. TRIALS 1 § 79 (2023). When harassment is ongoing, a complainant must file their charge within 180 days or 300 days of the *last incident* of harassment. *See Time Limits for Filing a Charge*, *supra*.) After the relevant agency has processed the charge within its statutory time period, the complainant will receive a "right to sue" letter, which entitles the complainant to file

Part I of this Article sets forth the legal framework for asserting a claim of workplace sexual harassment under Title VII of the Civil Rights Act of 1964,[13] particularly noting the extent to which flexible notions of "reasonableness" infuse various aspects of this framework. Part II moves away from the legal framework, examining how *social* perspectives regarding sexual harassment have evolved in recent years, in the wake of the #MeToo movement gaining prominence. Part III of this Article returns to the law, examining the degree to which the legal framework for evaluating harassment claims has (or has not) responded to this social upheaval. Specifically, Part III explores whether changing societal ideas regarding what is "reasonable" in the workplace—both in terms of the behavior that workers should be willing to tolerate and in terms of the preventative and remedial measures that employers should be required to implement—are altering how the law applies in new harassment cases.

Part IV of this Article extends this discussion about changing legal standards for new cases into an even more uncertain realm, asking whether such changes should apply retroactively: even if the law can evolve with respect to how it treats *newly* arising cases by applying contemporary social standards to those controversies, Part IV questions the extent to which these new standards should "backdate" themselves into cases that arose in a different time, under less stringent views regarding what was "reasonable" at work. This Part explores the potential ramifications of backdating social norms in this way, looking both at the benefits and drawbacks for harassment victims and for the public at large if courts were to apply these new standards for "reasonableness" to cases that predate these changing social views.

Few (if any) courts or scholars have addressed this issue directly. Yet as social views continue to evolve—both in the area of sexual harassment and in other areas as well—courts are likely to be faced with these questions: Where a legal test depends on something as context dependent

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suit in federal court, and the complainant must sue within 90 days of receiving this right to sue letter. *See* 21 AM. JUR. TRIALS 1 § 83. As noted above, the exposure of Weinstein's misdeeds in late 2017, followed by similar allegations about others, were what led to broader societal conversations regarding workplace harassment. *See* Nicolaou & Smith, *supra* note 9. Thus, the "turning point" for this change in social norms—and for any possible changes in the law—would fall in or around late 2017. Yet under the time limits just noted, most cases arising prior to late 2017 would have to have already been litigated or would be time-barred by now. Setting these complications of timing aside, however, this recent interrogation of workplace norms regarding sexual harassment surely will not be the last time that perspectives about appropriate workplace conduct will evolve in real time. Employers and employees in the future may once again find that social expectations regarding appropriate workplace conduct differ from what is required by the law. Thus, future cases may arise in which the courts are asked to import—or "backdate" —more evolved workplace standards into behavior that occurred prior to such changes arising.

13 Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

as "reasonableness," and where notions of reasonableness rapidly change, to what extent should courts not only be forced to "keep up," but also to examine *older* cases in light of new, more evolved standards? And is backdating these evolving social standards a means for expanding the scope of justice, or is it unfairly forcing employers and others to predict future changes that they perhaps could never have envisioned?

I. THE LEGAL FRAMEWORK FOR ASSERTING A CLAIM OF WORKPLACE SEXUAL HARASSMENT

To understand the extent to which views of workplace sexual harassment have (or have not) evolved in recent years, one must understand the framework traditionally used for evaluating such claims. The concept of sexual harassment is actually relatively new: while Congress outlawed sex discrimination in the workplace in 1964 with its passage of Title VII of the Civil Rights Act,[14] the Supreme Court did not recognize sexual harassment as a version of sex discrimination until more than twenty years later, in a case called *Meritor Savings Bank, FSB v. Vinson*.[15] In *Meritor*, the Court observed that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult"[16] and held that employers cannot require their employees to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."[17] The Court recognized that workplace sexual harassment can take one of two forms—either *quid pro quo* harassment, where an employer explicitly conditions an employment consequence on an employee's sexual submission,[18] or hostile environment sexual harassment, where unwelcome sexual conduct in the workplace creates an "intimidating, hostile, or offensive work environment."[19] While examples of both types of sexual harassment

14 42 U.S.C. § 2000e-2(a).

15 477 U.S. 57 (1986); *see also* Williams et al., *supra* note 3, at 147–48; Grossman, *supra* note 2, at 963; Bernstein, *supra* note 10, at 123–24.

16 *Meritor*, 477 U.S. at 65; *see also* Williams et al., *supra* note 3, at 147–48.

17 *Meritor*, 477 U.S. at 67 (first quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982); then citing Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); then citing Bundy v. Jackson, 641 F.2d 934, 934–44 (D.C. Cir. 1981); and then citing Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wis. 1984)); *see also* Williams et al., *supra* note 3, at 147–48.

18 *See Meritor*, 477 U.S. at 65; *see also* Grossman, *supra* note 2, at 963.

19 *See Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)); *see also* Grossman, *supra* note 2, at 963.

abound throughout the post–Harvey Weinstein #MeToo era,[20] this Article focuses primarily on the changing views regarding hostile environment harassment, both inside and outside of the courts.

In its modern incarnation, a claim of hostile environment sexual harassment requires a plaintiff to establish five elements: (1) the plaintiff must be a member of a protected group;[21] (2) the plaintiff must be the subject of unwelcome sexual harassment; (3) there must be a causal connection between the harassment and the plaintiff's protected status; (4) the harassment must affect a term, condition, or privilege of employment; and (5) the employer must have known (or should have known) about the harassment and must have failed to take prompt and effective remedial action in response to it.[22] In the years that followed *Meritor*, the Supreme Court gradually added substance to many of these elements, clarifying their meaning.

For example, in *Harris v. Forklift Systems, Inc.*, decided in 1993, the Court explicitly injected a notion of "reasonable[ness]" into the above analysis, observing that while a "mere utterance of an . . . epithet" will not subject an employer to liability in this realm, liability arises "before the harassing conduct leads to a nervous breakdown."[23] In this vein, the Court adopted a middle ground, holding that to state a claim for sexual harassment under Title VII, a plaintiff must demonstrate that she was subjected to conduct "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."[24] In articulating this framework, the Court specifically directed courts to examine what "a *reasonable person* would find hostile or abusive."[25] Just a few years later, in *Oncale v. Sundower Offshore Services, Inc.*, decided in 1998, the Court further emphasized the

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20 Notably, Weinstein himself not only repeatedly conditioned employees' and potential employees' success in the industry on their willingness to engage with him sexually, but he also created a working environment that was notoriously and oppressively charged with sexuality and sexual abuse. *See* Fink, *Weinstein*, *supra* note 4, at 291–92; *see also* Fink, *Bystander*, *supra* note 4, at 171, 180.

21 While Title VII explicitly protects employees on the basis of race, color, religion, sex, and national origin, *see* 42 U.S.C. § 2000e-2, this Article focuses only on claims of sexual harassment, which would implicate employees' protection on the basis of "sex" articulated in Title VII. *Id.*

22 *See* Andrew Murphy & Terran Chambers, *Litigating Harassment in the #MeToo Era*, 76 BENCH & B. MINN., Oct. 2019, at 12, 13; *see also* 1 CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS § 1:59 (2023).

23 510 U.S. 17, 21–22 (1993) (alteration in original) (quoting *Meritor*, 477 U.S. at 67).

24 *Id.* at 21 (quoting *Meritor*, 477 U.S. at 67); *see also* Williams et al., *supra* note 3, at 147–48; Murphy & Chambers, *supra* note 22, at 13. Notably, in conducting this analysis, the factfinder must determine not only whether an objectively reasonable plaintiff would find a working environment to be hostile and abusive, but also must determine whether the plaintiff *subjectively* found her working environment to be hostile and abusive. *See* Bernstein, *supra* note 10, at 124.

25 *Harris*, 510 U.S. at 21 (emphasis added).

importance of reasonableness in this test, directing that for liability to arise, a work environment must be "judged from the perspective of a *reasonable person* in the plaintiff's position, considering 'all the circumstances' . . . [including] careful consideration of the social context in which particular behavior occurs and is experienced by its target."[26]

Finally, also in 1998, the Court decided a pair of cases, *Faragher v. City of Boca Raton*[27] and *Burlington Industries, Inc. v. Ellerth*,[28] that set forth an affirmative defense for employers to assert in response to claims of hostile environment sexual harassment. Under the *Faragher/Ellerth* defense, if there has been no tangible adverse employment action against a plaintiff, an employer will not be liable for creating a sexually hostile environment if it can establish *both* that (1) it exercised reasonable care to prevent and correct harassing behavior in the workplace, *and* (2) the plaintiff unreasonably failed to take advantage of these corrective opportunities.[29]

Thus, an examination of the *context* in which harassment occurs will play a significant role in these cases, in large part due to the role that "reasonableness" plays in various stages of the analysis: the factfinder will have to determine not only whether a plaintiff subjectively found herself in an environment that she deemed to be hostile or oppressive, but also whether a reasonable worker under the circumstances would have reached the same conclusion.[30] Moreover, under the *Faragher/Ellerth* defense, the factfinder will examine both the reasonableness of an employer's efforts to prevent or correct workplace harassment and the reasonableness of an employee's decision not to avail herself of those preventative or corrective measures.[31] Context matters in these cases in other ways as well. Even as early as in the *Harris* case, the Court recognized that determining liability in this area was far from an exact science[32]—holding instead that it could be determined "only by looking

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26 523 U.S. 75, 81 (1998) (emphasis added) (quoting *Harris*, 510 U.S. at 23); *see also* Williams et al., *supra* note 3, at 148–49.

27 524 U.S. 775 (1998).

28 524 U.S. 742 (1998).

29 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 745; *see also* Bernstein, *supra* note 10, at 129–30; Byun, *supra* note 10, at 373–74; Messina, *supra* note 9, at 1068–69.

30 *See supra* notes 21–26 and accompanying text. In 1991, the Ninth Circuit Court of Appeals added a further gloss to this analysis, directing that courts should ask not just whether any objectively reasonable person in the plaintiff's position would deem a working environment to be sufficiently hostile, but rather whether a *reasonable woman* in the plaintiff's position would reach this conclusion. *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

31 *See supra* notes 27–29 and accompanying text; *see also* Bernstein, *supra* note 10, at 129–31, 147–49; Byun, *supra* note 10, at 377–85.

32 Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (observing that the analysis set forth in that case "is not, and by its nature cannot be, a mathematically precise test").

at all the circumstances . . . [which] may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[33] By establishing such a context-dependent framework, the Court directed courts to analyze hostile environment claims according to the specific facts of each particular situation.

Many observers have noted that the flexibility and context-specific nature of this hostile environment framework allows for it to be applied in various workplaces and across various time periods, taking into account the particular characteristics and realities of each workplace and of those who work there.[34] The framework itself has changed little since its inception and early refinement more than two decades ago.[35] Yet against the backdrop of this fairly stable test, astronomical change has occurred in workplaces across the country (and, indeed, around the world), complicating the way in which this seemingly straightforward test will play out from one situation to the next. When a court is faced with a legal test in which context is paramount, what happens when that context is rapidly changing?

II. A SOCIAL WAKEUP CALL: TECTONIC SHIFTS IN SOCIETY'S VIEWS REGARDING (IN)APPROPRIATE WORKPLACE CONDUCT

In late 2017, the public's perception of and attention to workplace sexual harassment dramatically shifted. Beginning with the exposure of Harvey Weinstein's decades of sexual misdeeds in the fall of that year[36] and continuing with additional wrongdoers coming to light at a shockingly persistent pace,[37] the public became aware of the extent to which sexual harassment pervades virtually every workplace setting, from the factory floor to the C-suite, from the Hollywood set to the office break

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33 *Id.* at 23; *see also* Williams et al., *supra* note 3, at 148.

34 *See, e.g.*, Williams et al., *supra* note 3, at 154 ("Reasonableness standards are meant to build flexibility and continuous updating into the law . . . ."); Messina, *supra* note 9, at 1100 ("[T]he benefits of adopting an approach that centers around reasonableness outweighs the potential negatives."); *cf.* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 239–40 (2018) (asserting that "[t]he flexible nature of the Supreme Court standard for harassment has given lower courts considerable latitude," but that "[s]cholars have . . . criticiz[ed these lower courts] for framing harassment primarily, or solely, in terms of sexual conduct").

35 *But see Ellison*, 924 F.2d at 879 (articulating "reasonable woman" standard for evaluating hostile environment sexual harassment claims).

36 *See* Fink, *Weinstein*, *supra* note 4, at 291; *see also* Fink, *Bystander*, *supra* note 4, at 171–72.

37 *See* Fink, *Weinstein*, *supra* note 4, at 295; *see also* Fink, *Bystander*, *supra* note 4, at 166–67.

room.[38] While the idea of #MeToo may not have been new,[39] the movement's social impact and its effect on public consciousness has been magnified exponentially in recent years.[40] To some extent, the numbers help to tell the story here: In the late 1990s, only thirty-four percent of Americans believed that sexual harassment was a serious problem.[41] By late 2017, roughly seventy-five percent of Americans indicated that sexual harassment and sexual assault were "very important" issues for the country to address.[42] Likewise, the vast majority of Americans have come to view sexual harassment as a societal, systemic problem, as opposed to something that stems merely from individual poor choices.[43]

In their paper, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, Professor Joan Williams and her colleagues refer to this massive shift in understanding as a "norm cascade."[44] Building on the prior work of Professor Cass Sunstein, Williams and her coauthors explain that a "norm cascade" arises "when societies experience sharp shifts in social norms."[45] New norms around an idea or belief system will emerge and then take on steam as a critical mass of the population adopts these new viewpoints, culminating in an internalization of these new norms across the population.[46]

According to Williams and her colleagues, the #MeToo movement created its own norm cascade with respect to society's views regarding workplace sexual harassment. As evidence, they point to emerging agreements regarding the seriousness of sexual harassment as a problem in the workplace,[47] and to agreements regarding the types of behaviors that constitute sexual harassment.[48] They note a profound shift from previous norms, under which employers often shirked responsibility for harassment at work, to the more recent prevailing view that such behavior

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38 *See* Fink, *Bystander*, *supra* note 4, at 166.

39 *See supra* note 9.

40 *See* Brake, *supra* note 10, at 1 (observing, in fall 2019, that "the growing strength of #MeToo suggests that social norms tolerating sexual harassment may be changing").

41 *See* Williams et al., *supra* note 3, at 142 (citing Juana Summers & Jennifer Agiesta, *CNN Poll: 7 in 10 Americans Say Sexual Harassment Is a Very Serious Problem*, CNN (Dec. 22, 2017, 6:31 AM), https://www.cnn.com/2017/12/22/politics/sexual-harassment-poll/index.html [https://perma.cc/4LBP-TA63]).

42 *See id.* (quoting J. Baxter Oliphant, *Women and Men in Both Parties Say Sexual Harassment Allegations Reflect 'Widespread Problems in Society,'* PEW RSCH. CTR. (Dec. 7, 2017), https://www.pewresearch.org/fact-tank/2017/12/07/americans-views-of-sexual-harassment-allegations [https://perma.cc/WBD9-QXW7]).

43 *See id.*

44 *Id.* at 149–50.

45 *Id.*

46 *Id.* at 150.

47 *Id.* at 151–52.

48 *Id.* at 152–53.

cannot be tolerated, and cite new norms supporting the credibility of sexual harassment accusers.[49] Collectively, they argue, these changes constitute a norm cascade both with respect to what constitutes "harassment" from a social point of view, and with respect to how employers and employees should respond to this behavior.

A. *Changing Social Norms Regarding What Will Constitute "Harassment"*

As noted above, one significant aspect of this norm cascade regarding workplace sexual harassment involves how society defines workplace sexual harassment. Not only do surveys indicate that a significantly greater percentage of the population now considers sexual harassment to be a serious problem,[50] but broader agreement has emerged with respect to what should (or should not) fall into this category.[51] In the past, quite a bit of unwelcome sexual behavior at work may have been excused as horseplay or harmless flirting,[52] or may have been written off as evidence of a colleague's juvenile sense of humor.[53] Now, however, broad consensus has emerged that certain types of behavior rise to the level of unlawful harassment, from touching or groping, to exposing oneself, to masturbating in front of a coworker, to sending sexually explicit emails or texts.[54]

Specific examples of these changing views abound: Just a year prior to the norm cascade that Williams and her coauthors describe, then–presidential candidate Donald Trump was caught on tape talking about forcibly kissing and groping women,[55] describing how he would "grab 'em by the pussy."[56] At the time, Trump was able to excuse his denigrating comments as mere "'locker-room' talk."[57] Today, many in the electorate

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49 *Id.* at 153–54.

50 *See supra* notes 41–42 and accompanying text; *see also* Williams et al., *supra* note 3, at 151.

51 *See* Williams et al., *supra* note 3, at 152–53.

52 *See id.* at 152.

53 *See id.* at 176–78.

54 *See id.* at 178–79.

55 *See* Bernstein, *supra* note 10, at 122.

56 *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html [https://perma.cc/7STU-XW4V].

57 Bernstein, *supra* note 10, at 122 (quoting David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016, 12:44 AM), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html [https://perma.cc/6PDS-HE57]).

would feel far less comfortable hiring someone for any job (let alone one of the most powerful jobs in the world) after making such comments.[58] The public's view of another former president, Bill Clinton, has also undergone a shift with respect to his past sexual affairs. While President Clinton faced impeachment proceedings in January 1999 after the exposure of his sexual affair with intern Monica Lewinsky,[59] public support for him remained high, even in the midst of this scandal: he was more popular than any modern President had ever been at the start of his sixth year of the presidency.[60] Yet amidst the resurgence of the #MeToo movement, many began to characterize Clinton's past conduct in a profoundly different light. Senator Kirsten Gillibrand, who as recently as 2016 had expressed being "truly honored" that President Clinton had campaigned for her a decade earlier, more recently agreed with the notion that Clinton should have resigned as a result of the Lewinsky affair.[61] Political reporter Matt Yglesias, in 2007, referred to the charges against former President Clinton as "very trumped-up and trivial," but likewise changed his tune in late 2017, publishing an article entitled *Bill Clinton Should Have Resigned*.[62]

Notably, even within academic writing in this area, views about what constitutes "acceptable" workplace conduct seem to have shifted significantly in the wake of the #MeToo movement. Two decades ago, Professor Vicki Schultz published her groundbreaking article, *The*

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58 *See id.* (arguing that "[s]ince then, the cultural definition [of sexual harassment] has broadened to encompass a range of conduct, including lewd comments or suggestive emails . . . which were easier for the public to treat as insignificant"). *But see* Kabir Khanna, Anthony Salvanto, Jennifer De Pinto & Fred Backus, *Trump Maintains Dominant Lead Among 2024 Republican Candidates as GOP Field Narrows: CBS News Poll*, CBSNEWS (Nov. 6, 2023, 5:00 PM), https://www.cbsnews.com/news/poll-trump-leads-republican-field-gop-2023-11-06 [https://perma.cc/8T8V-MM9P] (noting that, as of November 2023, Trump is leading the 2024 Republican presidential field).

59 *See* Molly W. Sonner & Clyde Wilcox, *Forgiving and Forgetting: Public Support for Bill Clinton During the Lewinsky Scandal*, 32 PS: POL. SCI. & POL. 554, 554 (1999).

60 *See id.*

61 Alex Lockie, *Liberals Retroactively Turn on Bill Clinton Amid Wide Reckoning on the Sexual Misconduct of Powerful Men*, BUS. INSIDER (Nov. 17, 2017, 8:01 AM), https://www.businessinsider.com/liberals-retroactively-turn-bill-clinton-gillibrand-metoo-sexual-misconduct-2017-11 [https://perma.cc/B4CZ-6TY4]. Senator Gillibrand later clarified that "she meant Clinton's affair should have resulted in a resignation specifically when judged by today's standards." *Id.*

62 *Id.* (quoting Matthew Yglesias, *The Impeachment Option*, THE ATLANTIC (July 7, 2007), https://www.theatlantic.com/politics/archive/2007/07/the-impeachment-option/43076 [https://web.archive.org/web/20221208125842/https://www.theatlantic.com/politics/archive/2007/07/the-impeachment-option/43076]; *see also* Matthew Yglesias, *Bill Clinton Should Have Resigned*, VOX (Nov. 15, 2017, 9:15 AM), https://www.vox.com/policy-and-politics/2017/11/15/16634776/clinton-lewinsky-resigned [https://perma.cc/CK7V-PK3U].

Sanitized Workplace.[63] In that article, Professor Schultz argued that focusing on sexuality and sexual desire in attempting to rid the workplace of harassment ignored the broader, structural underpinnings of this behavior.[64] In many ways, by shining a light on these broader and more entrenched barriers to women's advancement in the workplace, Professor Schultz was ahead of her time in 2003;[65] she was correct that harassment is "an expression of workplace sexism, not sexuality or sexual desire."[66] What is fascinating about reading Schultz's twenty-year-old article now, however, are some of the examples that she cites as support for the claim that some employers had gone too far in attempting to "rid[] the workplace of sexual conduct"[67]: She critiques a practitioner article that had cautioned employers not to allow sexual joking, flirting, or pin-ups in the workplace, and that advised against "staring suggestively at a co-worker."[68] She seems perplexed that companies would discourage consensual sexual relationships between employees, including those between supervisors and subordinates.[69] She questions whether sexual banter or other sexual innuendo might be acceptable in certain types of workplaces, such as an operating room where sexual repartee may serve as a way for employees to blow off steam in a high-stress situation.[70]

Again, this is no quarrel with Schultz's overriding theory—that eliminating sexual harassment at work must involve more than just penalizing those who engage in sexualized behavior, and that workplace harassment is about more than just rooting out unwanted sexual advances at work.[71] She was and is correct that focusing *solely* on the sexually motivated acts committed by a wrongdoer can discount other

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63 Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) [hereinafter Schultz, *Sanitized*].

64 *Id.* at 2064–65; *see* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 24 (2018) [hereinafter Schultz, *Reconceptualizing*] (reflecting on previous work and stating that her theory "sees harassment as an expression of workplace sexism, not sexuality or sexual desire"); *see also id.* ("Harassment is a way for dominant men to label women (and perceived 'lesser' men) as inferior . . . .").

65 Schultz, *Sanitized*, *supra* note 63, at 2152–58.

66 Schultz, *Reconceptualizing*, *supra* note 64, at 24.

67 Schultz, *Sanitized*, *supra* note 63, at 2087.

68 *Id.* at 2091–92 (quoting Phillip M. Perry, *Avoid Costly Lawsuits for Sexual Harassment*, LAW PRAC. MGMT., Apr. 1992, at 18, 18).

69 *See id.* at 2091–92.

70 *See id.* at 2149–50; *see also* Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 90 (arguing that finding employer liability for all sexual speech in the workplace "defies the reality of American workplaces today").

71 *See* Schultz, *Reconceptualizing*, *supra* note 64, at 26 (observing that firing those who engage in sexual harassment "does nothing to repair the severe professional and personal setbacks suffered by victims," nor to "ensure that similar conduct does not recur in the future").

forms of destructive (but nonsexual) workplace harassment.[72] But some of the *evidence* that she cites in support of this argument demonstrates the extent to which social views in this area have evolved; the examples that she cites in her earlier work of employers going too far in this area seem hard to reconcile with modern notions of acceptable workplace behavior.[73] In the post-#MeToo world, sexual jokes, flirting, and sexualized banter all seem a part of the very types of structural barriers to women about which Schultz was (and is) so concerned.[74]

Thus, social views regarding what constitutes "harassment" have evolved significantly in the wake of the #MeToo movement's resurgence. Ironically, many recent perpetrators of harassment have tried to use this change in norms to their advantage in defending their inappropriate workplace conduct. Harvey Weinstein's lawyer referred to him as "an old dinosaur learning new ways."[75] Disgraced judge Alex Kozinski explained his workplace misconduct—which included allegations of squeezing the breasts of a fellow judge after she declined his proposition to visit a motel to have sex with him, and of showing pornography to one of his law clerks and asking if it "turned her on"[76]—by claiming that he "may not have been mindful enough of the special challenges and pressures that women face in the workplace."[77] Former President Trump's justification of his lewd comments as "'locker-room' talk"[78] ignores the reality that individuals presumably would not be able to speak about women in such a disrespectful manner (in a locker room or elsewhere) under today's standards. For all of these men, these changing views regarding what constitutes harassment—and their failure to keep up with these

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72 *See id.* at 27 ("[S]exual harassment is a means of maintaining masculine work status and identity, not expressing sexuality or sexual desire.").

73 *See supra* notes 68–70 and accompanying text.

74 *See, e.g.*, Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC. 333 (2017); *see also* Schultz, *Reconceptualizing*, *supra* note 64, at 24–26; *cf.* Rachel Muller-Heyndyk, *Workplace Banter Undermining Women's Mental Health*, HR (June 7, 2018), https://www.hrmagazine.co.uk/content/news/workplace-banter-undermining-womens-mental-health [https://perma.cc/JVK8-3PL7].

75 Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://web.archive.org/web/20231221074236/https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html].

76 Patricia Barnes, *He's Back. After Resigning, Federal Judge Accused of Sexual Harassment Returns as a Practitioner*, FORBES (Dec. 6, 2019, 11:23 PM), https://www.forbes.com/sites/patriciagbarnes/2019/12/06/hes-back-after-resigning-federal-judge-accused-of-sexual-harassment-returns-as-a-practitioner/?sh=2425c3d75388 [https://perma.cc/NQU8-JW8K].

77 Dan Berman & Laura Jarrett, *Judge Alex Kozinski, Accused of Sexual Misconduct, Resigns*, CNN (Dec. 18, 2017, 9:57 AM), https://www.cnn.com/2017/12/18/politics/alex-kozinski-resigns/index.html [https://perma.cc/7TWA-XCMA].

78 *See supra* note 57 and accompanying text.

changes—has done little to excuse the wrongfulness of their conduct from a current perspective.

B. *Changing Social Norms Regarding How Employers and Employees Should Respond to Harassment*

Not only have society's views regarding what constitutes harassment changed significantly in recent years, but there have also been significant changes in employers' reactions to and (in)tolerance of sexual misbehavior at work. In the past, female workers were expected to tolerate harassment, to "suck it up" when faced with a sexually hostile working environment.[79] Now, however, eighty-six percent of Americans support a "zero-tolerance" policy in the workplace when it comes to workplace harassment, no longer allowing employers to make excuses for, or to ignore, this misconduct.[80] In addition, many companies now feel pressure to "rid themselves of predators,"[81] and many more women (and men) have felt empowered to speak out against such misconduct.[82]

For many years, employers were able to treat workplace harassment as a routine and relatively inconsequential matter, going through the motions of drafting harassment policies and conducting workplace trainings without any real sense of urgency.[83] The courts historically have held employers to a fairly low standard when it came to their efforts to root out harassment at work, and employers showed little inclination to rise above this low bar.[84] Almost immediately upon the exposure of Weinstein and others, however, changes emerged in many workplaces: Companies quickly beefed up their training for employees regarding workplace sexual harassment, and they updated (or in some cases newly implemented) policies regarding appropriate workplace behavior.[85] They reexamined everything from their rules on workplace dating,[86] to their

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79 Williams et al., *supra* note 3, at 153.

80 *Id.*

81 Bernstein, *supra* note **Error! Bookmark not defined.**, at 121.

82 *See* Brake, *supra* note **Error! Bookmark not defined.**, at 5 ("#MeToo has sparked a cultural reckoning with sexual harassment that promises to spur more outspoken opposition to sexual harassment in the workplace . . . .").

83 *See infra* notes **Error! Bookmark not defined.**–22 and accompanying text.

84 *See infra* Section III.A.2.

85 *See* Fink, *Weinstein*, *supra* note 4, at 295; *see also* Fink, *Bystander*, *supra* note 4, at 175.

86 *See* Susan Matthews, *The Quiet Radicalism of Facebook and Google's Dating Policy*, SLATE (Feb. 6, 2018, 4:48 PM), https://slate.com/technology/2018/02/google-and-facebooks-dating-policies-are-quietly-radical.html [https://perma.cc/YG58-FMCV].

views on social events held outside of work,[87] to their guidelines regarding the structure of seemingly ordinary workplace meetings and other interactions.[88] Employees also have begun to think more deeply about their workplace dynamics, examining the propriety of everything from workplace flirting to attending social engagements with coworkers.[89] Workplace behavior that once was accepted as a given—however uncomfortable it might have made some workers feel—has suddenly begun to face far greater scrutiny.[90]

For some employers, this norm cascade regarding workplace harassment has altered the way in which they engage and negotiate at the highest levels of their organizations. A recent study conducted by Professors Rachel Arnow-Richman, James Hicks, and Steven Davidoff Solomon found that, in the wake of #MeToo, corporate boards have begun reserving greater power to terminate CEOs for sex-based misconduct, including in their CEO contracts definitions of "cause" that would permit termination without severance in situations involving harassment, discrimination, or violations of company policy.[91] Such

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87 *See* Nellie Bowles, *Men at Work Wonder If They Overstepped with Women, Too*, N.Y. TIMES (Nov. 10, 2017), https://www.nytimes.com/2017/11/10/business/men-at-work-wonder-sexual-harassment.html [https://web.archive.org/web/20231116235016/https://www.nytimes.com/2017/11/10/business/men-at-work-wonder-sexual-harassment.html] (discussing whether to cancel holiday parties).

88 *See, e.g.*, Maria LaMagna, *Could Recent Sexual Harassment Cases Change Office Design?*, MARKETWATCH (Dec. 4, 2017, 9:07 AM), https://www.marketwatch.com/story/could-recent-sexual-harassment-cases-change-office-design-2017-12-03 [https://perma.cc/3M9C-GMMR] (noting trend toward having more open workspaces where "[e]ven shared spaces, including conference rooms, often have glass windows or walls, which could help with efforts to cut down on harassment"); Bowles, *supra* note 87 (discussing some men's concerns about dining alone with female colleagues); Claire Cain Miller, *Unintended Consequences of Sexual Harassment Scandals*, N.Y. TIMES: THE UPSHOT (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html [https://web.archive.org/web/20231006205249/https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html] (noting that "certain senior men have tried to avoid closed-door meetings with junior women"). Of course, even in this post-#MeToo environment, many of these changes may have been performative at best, motivated not only (or at all) by a desire to minimize workplace harassment, but also by a desire to avoid any allegations of or liability for workplace harassment. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964, 980–88 (1999) (describing the "litigation avoidance strategies" engaged in by employers and noting that "the recommended strategies teach managers to bulletproof their decisions but may do nothing to alter the conscious and subconscious discriminatory impulses that can drive decision making"). *See generally* Fink, *Weinstein*, *supra* note 4, at 296–97.

89 *See* Bowles, *supra* note 87.

90 *See id.*; *see also* Michelle R. Smith & Hannah Fingerhut, *Poll Shows #MeToo Movement Is Changing Workplace Conversations, Behavior*, INS. J. (Oct. 28, 2019), https://www.insurancejournal.com/news/national/2019/10/28/546751.htm [https://perma.cc/W23C-YWDM] (discussing a decrease in sexual banter among employees at work).

91 *See generally* Arnow-Richman, Hicks & Solomon, *supra* note 10.

contracts have traditionally included fairly narrow language in defining the circumstances that would justify termination without severance.[92] These scholars, however, found that in the wake of the #MeToo movement, companies have begun including broader definitions of "cause" within their CEO contract provisions to more easily allow companies to trigger uncompensated termination when a CEO has engaged in workplace sexual misconduct.[93]

The recent norm cascade also dramatically altered social expectations regarding how victims should respond to workplace harassment. With the exposure of Harvey Weinstein and others, members of the public quickly came to comprehend not only the number of women who for years had been targeted by this type of behavior but also the power dynamics that likely prevented many of them from coming forward. As discussed in greater detail below, the public gained a rapid education regarding the psychological trauma that often accompanies harassment,[94] and regarding the credible fears harbored by many victims that they would face retaliation if they came forward.[95] Rather than denigrating women for keeping silent or citing such silence to undermine their claims, members of the media began writing sympathetic stories with headlines justifying "*Why Many Women Wait So Long to Come Forward*."[96] From the way in which society defines harassment to the responses that it expects from employers and employees in the face of such misconduct, the norms surrounding workplace sexual harassment have shifted dramatically in recent years.

III. LEGAL STAGNANCY AND THE PUSH FOR THE LAW TO CATCH UP TO SOCIAL CHANGE

While much has changed in recent years both with respect to how society defines workplace sexual harassment and with respect to how it assumes that employers and employees should respond to this behavior,

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92 *See id.* at 133–35.

93 *See id.*

94 *See infra* notes 129, 193 and accompanying text.

95 *See infra* notes 128, 130 and accompanying text.

96 Crockett, *supra* note 2. Importantly, even amidst this changing social environment in which disclosure of workplace sexual misdeeds has become more common, victims of workplace sexual harassment—and bystanders who observe such harassment—still face tremendous barriers to coming forward to disclose their experiences and observations. *See* Fink, *Bystander*, *supra* note 4, at 178–86. Women still face retaliation in the form of tangible negative ramifications for speaking out, hostility from coworkers or allies of the accused, as well as psychological trauma tied to their disclosure. *See id.* at 178–79, 183–86. *See generally* Brake, *supra* note 10 (discussing coworker retaliation in the wake of the #MeToo movement).

virtually all of this change is occurring *outside* of the law—or, at best, at the fringes of the law. Indeed, it is not that headline-grabbing legal cases or astronomical verdicts against aggressors have somehow awakened a sleeping public to the problem of workplace sexual harassment;[97] the law did not bring this issue to the forefront of the public's consciousness. The direction of influence here is clear: While these changes in society's views may eventually lead to legal changes (something that various academics and activists have argued for),[98] the law has largely remained stagnant in the face of this social upheaval, with any alterations in the legal scheme following—and not preceding—the changes in public consciousness. If anything, it will be the rising public consciousness in this area that may finally bring this issue to the attention of our lawmakers and our legal system—but such legal change has been slow to occur.

Although the primary focus of this Article involves whether new social standards regarding workplace sexual harassment can and should be backdated into *earlier* cases—cases that arose prior to these social shifts—one first must determine whether the law has incorporated these new views at all in *new* cases of harassment, where alleged wrongdoing takes place under these new standards. To what extent *has* the law evolved to recognize new notions of reasonableness when it comes to *new* cases of workplace harassment? Surprisingly, the answer is far from clear.[99]

A. *How the Law Stands Still Amidst Changing Social Norms*

In theory, it should be quite easy for the law to adapt to this new consciousness regarding sexual harassment at work. As noted above, the concept of "reasonableness" plays an important role in several stages of a sexual harassment claim: First, the factfinder has to determine whether a

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97 While legal proceedings involving a few well-known perpetrators have grabbed the headlines, many of the harassment allegations against such (in)famous individuals have not resulted in public legal disputes or have been settled out of court. *See, e.g.*, Maya Yang, *Celebrity Chef Mario Batali Settles Sexual Assault Lawsuits with Two Women*, THE GUARDIAN (Aug. 24, 2022, 10:45 AM), https://www.theguardian.com/us-news/2022/aug/24/mario-batali-settles-sexual-assault-lawsuits [https://perma.cc/3XE2-WM2W]; Matt Gonzales, *CBS to Pay Millions to Settle Sexual Harassment Investigation*, SHRM (Nov. 3, 2022), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/cbs-pays-millions-to-settle-sexual-harassment-investigation.aspx [https://perma.cc/GH9V-V33A] (discussing settlement of claims against former CBS President and CEO Les Moonves); Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary [https://archive.is/MmB2A].

98 *See supra* note 10 and accompanying text.

99 *See* Bernstein, *supra* note 10, at 123 (observing that "while the court of public opinion has shifted" with respect to views regarding workplace sexual harassment, it remains unclear "whether the courts themselves will shift with it").

reasonable employee under the plaintiff's circumstances would have deemed the working environment to be hostile or oppressive—whether they would have found any alleged unwelcome conduct to be "sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive and that actually altered the conditions of the victim's employment."[100] In addition, in evaluating an employer's affirmative defense, the factfinder will have to examine both the "reasonableness" of an employer's attempts to prevent and correct workplace harassment, as well as the "reasonableness" of an employee's decision not to avail herself of these preventative and corrective measures.[101] So, as *social* notions of reasonableness change, those changes could be incorporated rather easily into this legal analysis. Somewhat surprisingly, however, this shift has been slow to take hold.

1. Legal Stagnancy Regarding What "Reasonably" Constitutes Harassment

The law has been conspicuously sluggish in embracing modern notions regarding what reasonably constitutes workplace harassment. Indeed, particularly given the role that reasonableness plays in the analysis[102] and the importance of examining the defendant's conduct "from the viewpoint of a reasonable person in the plaintiff's position, considering 'all the circumstances,'"[103] one would expect the law to rather readily incorporate these new norms. Yet while the inclusion of a reasonableness standard into the legal framework was "meant to build flexibility and continuous updating into the law, not to entrench norms from another time,"[104] the courts have been slow to adopt these new social norms into their analysis of sexual harassment claims.[105] As Williams and

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100 Murphy & Chambers, *supra* note 22, at 13 (quoting Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111 (8th Cir. 1997)).

101 *See supra* notes 27–31 and accompanying text.

102 *See* Williams et al., *supra* note 3, at 145–46 ("[C]hanges in public opinion do not automatically change the validity of legal precedent. Yet sexual harassment is a special case because 'reasonableness' plays a central role . . . .").

103 *Id.* at 146 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)); *see also supra* notes 23–26 and accompanying text.

104 Williams et al., *supra* note 3, at 154; *see also* Bernstein, *supra* note 10, at 154 ("Theoretically, 'reasonableness' is an elastic enough standard to shift with evolving perceptions of acceptable workplace behavior and to incorporate modern understandings of what may constitute victims' responsive behaviors.").

105 *See* Williams et al., *supra* note 3, at 154; *see also* Murphy & Chambers, *supra* note 22, at 13 (noting that while "physical touching, lewd comments and propositions for sex . . . are now culturally perceived as highly inappropriate," such behavior often still remains "not sufficient to constitute an actionable [sexual harassment] claim").

her colleagues have observed, "[M]any courts have failed to update their understandings of reasonableness and instead rely on cases reflecting standards of reasonableness from the last century."[106]

Throughout their article, Williams and her colleagues identify a series of cases, all of which arose prior to the resurgence of the #MeToo movement, in which judges, after hearing evidence of workplace conduct that almost surely would be deemed actionable sexual harassment according to today's social norms, directed verdicts in favor of defendants.[107] In one case, for example, the plaintiff's coworker had "cornered her, groped her stomach, put his hand up her dress, and 'fondled' . . . her bare breast—all against her protestations."[108] In another, the plaintiff's colleague mimicked masturbation in the workplace, grunted at her sexually, instructed her that "[a]ll pretty girls run around naked" at work, made reference to the plaintiff as "Ms. Anita Hill," and claimed to have left a holiday party early because he "'didn't want to lose control' with so many pretty girls there."[109] In still another, the plaintiff's coworker made comments including "your elbows are the same color as your nipples," tried to encourage the plaintiff to sit on his lap, repeatedly stroked her arm, and tried to look down her shirt.[110]

Although reasonable juries might come to varying conclusions in the cases cited by Williams and her colleagues, these cases remain good law and continue to garner current citations, thus calcifying these seemingly long-abandoned norms into existing law and creating what these scholars call an "infinite regression of anachronism."[111] Moreover, it seems hard to reconcile a court directing a verdict finding that *no reasonable jury* could possibly find liability for these defendants in light of today's standards.[112] While Williams and her colleagues identify some cases that have rejected these outdated holdings,[113] they worry about the extent to which many courts have failed to embrace the new norms

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106 Williams et al., *supra* note 3, at 154.

107 *See id.* at 154–97.

108 *Id.* at 155 (quoting Brooks v. City of San Mateo, 229 F.3d 917, 921 (9th Cir. 2000)).

109 *Id.* at 176–77 (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)).

110 *Id.* at 190 (quoting Shepherd v. Comptroller of Pub. Accts., 168 F.3d 871, 872 (5th Cir. 1999)).

111 *See* Williams et al., *supra* note 3, at 145 (criticizing "the tendency of courts to rely on cases that reflect what was thought to be reasonable ten or twenty years ago, forgetting that what was reasonable then might be different from what a reasonable person or jury would likely think today").

112 In *Brooks*, the district court granted summary judgment for the employer, and the Ninth Circuit later affirmed. *Brooks*, 229 F.3d at 922, 927. In *Baskerville*, a jury found in favor of the plaintiff, and the Seventh Circuit later overturned. *Baskerville*, 50 F.3d at 430. In *Shepherd*, the district court granted summary judgment for the employer, and the Fifth Circuit affirmed. *Shepherd*, 168 F.3d at 872.

113 *See* Williams et al., *supra* note 3, at 165–68, 174–76, 180–83, 188–89, 195–96.

reflected in the post-#MeToo world.[114] They argue that "[j]udges should step out of the way and let the jury system do its work, updating the law on sexual harassment in light of the norm cascade represented by #MeToo."[115] Other observers have joined in expressing this concern, pointing to the dire stakes that arise when courts ignore modern notions in deciding what is "reasonable" in this context.[116] As one scholar in this area has observed, "[A] court that maintains the status quo of reasonableness—one in which only the most egregious or repetitive behaviors rise to the level of a hostile work environment—is effectively making a statement against the turning tides outside the courtroom."[117]

2. Legal Stagnancy Regarding What Employers "Reasonably" Should Do to Prevent or Correct Workplace Harassment and Regarding What Employees "Reasonably" Must Do to Avail Themselves of These Tools

This shift in the social understanding of "reasonableness" when it comes to sexual behavior at work not only impacts what courts will deem to create a "hostile environment" (or not); it also affects the obligations that the law places on employers and employees when faced with workplace sexual misconduct. As noted above, under the *Faragher*/*Ellerth* test, employers who would otherwise be liable for creating or permitting a sexually hostile working environment can avoid liability by showing both that they exercised reasonable care to prevent and correct the harassment, and that the plaintiff unreasonably failed to take advantage of these preventative or remedial measures.[118] As at least one court has observed, the "cornerstone of [the *Faragher*/*Ellerth* defense] is reasonableness."[119] Yet here too, many courts' notions of reasonableness seem to lag behind those of society at large, in various ways.

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114 *See id.* at 196; *see also id.* at 223–24 (asserting that the new norms regarding workplace sexual harassment "define what it means to be a 'reasonable jury' or a 'reasonable person in the plaintiff's position' . . . [and] define what's 'reasonable' now" (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998))).

115 *Id.* at 196.

116 *See, e.g.*, Bernstein, *supra* note 10, at 132; Murphy & Chambers, *supra* note 22, at 13 (explaining that "the largest disconnect between the #MeToo movement and the law" is the fact that "physical touching, lewd comments, and propositions for sex—which are culturally perceived as highly inappropriate and lie at the core of the #MeToo movement—are often not sufficient to constitute an actionable claim").

117 Bernstein, *supra* note 10, at 132.

118 *See supra* notes 27–29 and accompanying text.

119 Minarsky v. Susquehanna Cnty., 895 F.3d 303, 310–11 (3d Cir. 2018).

With respect to employers' obligations under the first prong of the *Faragher*/*Ellerth* test to prevent and correct workplace harassment, while many companies may appear to have devoted a wealth of time, energy, and resources to sexual harassment training, for many of these employers, actually "reducing workplace harassment may not be the only (or even the primary) goal."[120] Instead, the focus is on corporate self-protection—on "reduc[ing] the[] likelihood of being named in harassment suits or . . . check[ing] a box for [Equal Employment Opportunity Commission] purposes."[121] Yet, courts often allow employers to satisfy the first prong of this defense through these merely symbolic efforts and actions.[122] Such a rote response to preventing harassment may have seemed socially acceptable a decade ago, but in recent years will likely fall short of the greater expectations for employers to take *real*, *meaningful* action in this area.

Rather than simply accepting the existence of an employer's anti-harassment policy as "proof" of its effort to prevent workplace harassment, courts could match heightened social expectations in this area by actually "encourag[ing] consideration of whether the policy the employer put in place to prevent harassment had the means of being effective."[123] Courts also frequently give employers a pass with respect to their response to workplace harassment once such behavior comes to light. While employers traditionally have underreacted to credible evidence of harassment, society now generally expects significant

120 *See* Fink, *Weinstein*, *supra* note 4, at 295–98; *see also* Fink, *Bystander*, *supra* note 4 at 175.

121 Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do.*, N.Y. TIMES: THE UPSHOT (Dec. 11, 2017), https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html [https://web.archive.org/web/20230330093717/https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html] (quoting Eden King, a psychologist at Rice University); Bronfenbrenner Ctr. for Translational Rsch., *Sexual Harassment Training Is Largely Ineffective*, PSYCH. TODAY (Dec. 13, 2017), https://www.psychologytoday.com/us/blog/evidence-based-living/201712/sexual-harassment-training-is-largely-ineffective [https://perma.cc/49FJ-YZQ8]; *see also* Fink, *Weinstein*, *supra* note 4, at 296 (describing the training experience as "clicking through a PowerPoint, checking a box that you read the employee handbook or attending a mandatory seminar at which someone lectures about harassment while attendees glance at their phones" (quoting Miller, *supra*)); Ann C. McGinley, *#MeToo Backlash or Simply Common Sense?: It's Complicated*, 50 SETON HALL L. REV. 1397, 1415 (2020) (observing that sexual harassment jurisprudence has "created incentives to avoid liability by encouraging businesses to establish policies, training programs, and investigation procedures, which, often shield employers from liability").

122 *See* Byun, *supra* note 10, at 385 ("The federal judiciary's current interpretation of what qualifies as reasonable in the first prong of the *Ellerth*/*Faragher* defense . . . incentivizes employers to focus on symbolic compliance and avoidance of liability, rather than genuinely provide effective prevention and correction of sexual harassment.").

123 Messina, *supra* note 9, at 1089.

discipline for those found to have engaged in workplace harassment.[124] Yet courts have been quite lenient in their view regarding what will satisfy this employer duty, failing to penalize employers who decline to take decisive action against workplace harassers.[125] Thus, while what seemed *socially* "reasonable" to expect from employers in preventing and correcting harassment has shifted significantly in the wake of the #MeToo movement, many courts have not kept pace with these changing normative expectations.

Social expectations also have parted ways with the law with respect to the second prong of the *Faragher*/*Ellerth* defense—the requirement that employees not unreasonably fail to take advantage of whatever measures their employers enact to prevent or correct workplace harassment. While social understandings regarding how victims *should* respond to harassment have significantly evolved, here too the courts have been slow to catch up. For example, the #MeToo movement has brought a greater and more nuanced understanding regarding the psychological reactions that victims and bystanders have to this behavior.[126] While many have long suspected that women are reluctant to come forward and report workplace harassment,[127] society has become increasingly cognizant in recent years of the reasons for that reluctance—from realistic fears about retaliation,[128] to the psychological impact of experiencing harassment at work,[129] to organizational factors that deter such reporting.[130] In one interesting set of data, a group of Americans were asked, in December 2017 (i.e., at the height of the #MeToo movement), whether a woman who reported being sexually harassed

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124 *See* Grossman, *supra* note 2, at 953–54; *see also* Williams et al., *supra* note 3, at 153 (citing a December 2017 study indicating that eighty-six percent of Americans "now endorse a 'zero-tolerance' policy, not necessarily meaning that a harasser should be fired but that harassing behavior should not be excused or tolerated").

125 *See* Williams et al., *supra* note 3, at 176–77 (arguing that Judge Posner's opinion in *Baskerville* represented the outdated norm that "instead of having a zero-tolerance policy[] employers are free to tolerate sexual harassment so long as it comes in the form of lame jokes" (citing Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995))); *see also id.* at 189 (arguing that *Shepherd* reflects the outdated norm that "employers are free to tolerate sexual harassment so long as it does not 'destroy . . . [women's] opportunity to succeed in the workplace'" (alteration in original) (quoting Shepherd v. Comptroller of Pub. Accts., 168 F.3d 871, 874 (5th Cir. 1999))).

126 *See* Fink, *Bystander*, *supra* note 4, at 183–84.

127 *See id.* at 178–79; *see also* Byun, *supra* note 10, at 375 (referencing statistics that show "99.8 percent of people who experience sexual harassment at work never file a sexual harassment charge"); *cf.* McGinley, *supra* note 121, at 1402 (referencing study that shows "30% of women and 22% of men who had been harassed reported the incident to their organizations").

128 *See* Fink, *Bystander*, *supra* note 4, at 178–79; *see also* Brake, *supra* note 10, at 8–9 (discussing the impact of coworker retaliation on harassment victims).

129 *See* Byun, *supra* note 10, at 388–90; *see also* Fink, *Bystander*, *supra* note 4, at 183–86.

130 *See* Byun, *supra* note 10, at 392–400; *see also* Fink, *Bystander*, *supra* note 4, at 170.

would be risking her career, and about how those risks have changed over time.[131] Tellingly, while only forty-four percent of those surveyed believed that a woman making such a report in December 2017 would be risking her career, seventy-four percent of that same group believed that a woman would have been risking her career if she had attempted to report sexual harassment a mere five years earlier.[132]

The courts, however, appear to have ignored these important explanations for the behavior of victims in this context. As one scholar in this area has observed, "Despite research indicating the typical behavior of victims, generally speaking, failure to report is fatal to a plaintiff's case unless she can demonstrate a reasonable fear of retaliation or similar consequences."[133] Professor Deborah Brake has echoed this view of a disconnect between how employees actually respond in the wake of harassment and what courts seem to expect of these workers. According to Professor Brake, there is "a gap between what actually deters employees from raising complaints about discrimination and what people, including judges, believe will stop people from complaining."[134] Writing during the beginning months of the #MeToo movement's resurgence, Professor Brake observed that courts faced with a deluge of #MeToo stories—many of which only came out years after the fact—might come to understand how difficult and painful it can be for a woman to share these experiences.[135] According to Professor Brake, such courts might show greater leniency toward plaintiffs in evaluating their responses to workplace harassment and in determining whether they "unreasonably" failed to avail themselves of their employers' reporting mechanisms.[136] The courts, however, have not reflected such tolerance.

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131 IPSOS PUB. AFFS., AMERICAN ATTITUDES ON SEXUAL HARASSMENT (2017), https://www.ipsos.com/sites/default/files/ct/news/documents/2017-12/npr_sexual_harassment_topline_12_2017.pdf [https://perma.cc/DA2Q-Q2UK].

132 *Id.* The gender breakdown of both sets of responses bears mentioning: When asked whether a woman *today* (i.e., in December 2017) would be risking her career by reporting harassment, thirty-six percent of men believed that she would be doing so, while fifty-two percent of women identified such a risk. When asked whether a woman would have been risking her career by making such a report five years earlier, sixty-seven percent of men believed that such a risk would have existed, while eighty percent of women identified that risk. *See id.*

133 Bernstein, *supra* note 10, at 148–49 (citing Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Reponses to Sexual Harassment*, 51 J. SOC. ISSUES 117 (1995)).

134 Brake, *supra* note 10, at 35 ("People are more easily deterred from speaking out than is commonly realized.").

135 *See id.* at 40.

136 Interestingly, Professor Brake also hypothesized about another possible result from this outpouring of women's harassment experiences: she noted that some courts might assume, in the context of such open sharing, that women would feel *more* comfortable stepping forward with their

In one post-#MeToo case, decided in May 2019, the plaintiff alleged that her supervisor (who previously had been disciplined and had his shift changed due to allegations of sexual harassment by a different employee) had over a four-month period made comments about the size of her breasts, told the plaintiff that he wanted to shower with her, purported to search the plaintiff's phone to look for naked pictures, and repeatedly asked to see her breasts.[137] In affirming summary judgment for the employer, the Seventh Circuit noted the four-month delay between the commencement of the plaintiff experiencing workplace harassment and her reporting that harassment to her supervisor.[138] While the court acknowledged that the plaintiff had explained this delay by citing, inter alia, the fear that she would experience retaliation if she reported her concerns,[139] the court cited its own previous holding that "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty to alert the employer to the allegedly hostile environment."[140]

In another case, decided by the Fourth Circuit in 2018, the plaintiff—a twenty-six-year-old woman who suffered from epilepsy and learning disabilities and who worked as a janitor for the defendant—claimed that her workplace "job coach"[141] had cornered her in a supply closet, kissed her, and had pulled down both his and her pants before they were interrupted.[142] This incident took place on a Thursday, and the plaintiff reported the events to a coworker and to another nonemployee at her employer's job site on the following Monday (and those individuals promptly reported the incident to one of the plaintiff's supervisors).[143] In affirming the award of summary judgment to the employer, however, the court found, inter alia, that the plaintiff had unreasonably failed to avail herself of any preventative or corrective opportunities that had been provided by her employer.[144] Without even commenting on the plaintiff's cognitive limitations, or the fear that she may have experienced after being assaulted by the individual intended as her workplace job coach,

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stories, undeterred by fears of workplace retaliation. *See id.* at 39–40. Ironically, this view would place *more* of an onus on employees under the second prong of the *Faragher*/*Ellerth* defense.

137 Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624, 626–27 (7th Cir. 2019).

138 *See id.* at 631.

139 *See id.*

140 *Id.* (quoting Porter v. Erie Foods Int'l, Inc., 576 F.3d 629, 638 (7th Cir. 2009)).

141 As part of the rehabilitation program that the plaintiff was enrolled in due to her disabilities, her employment consisted of a mainstream job which was done with the assistance of an employment specialist, who also was known as the plaintiff's "job coach." Lacasse v. Didlake, Inc., 194 F. Supp. 3d 494, 497 (E.D. Va. 2016), *aff'd*, 712 F. App'x 231 (4th Cir. 2018).

142 *See id.* at 498; *see also* Bernstein, *supra* note 10, at 149.

143 *See Lacasse*, 712 F. App'x at 233; *see also* Bernstein, *supra* note 10, at 149.

144 *See Lacasse*, 712 F. App'x at 238; *see also* Bernstein, *supra* note 10, at 149–50.

the court simply held that the plaintiff had failed to follow her employer's complaint procedure by reporting her experience—mere days after it occurred—to "two non-supervisory individuals, one of whom was not even a Didlake employee, but never with anyone in the official reporting channel."[145]

Thus, even in the purportedly more informed context of the post-#MeToo world, courts will still penalize victims of harassment both for their delays to report their experiences and for their failure to make their reports in whatever the court determines to be "*the right way*."[146] While many outside of the courtroom have come to understand the context in which harassment occurs and the complications that this context can bring to when, whether, and how women choose to convey their experiences—including the many valid reasons why a plaintiff might hesitate to report this behavior at all—the courts themselves have been slow to adopt this new perspective.[147]

B. *The Canaries in the Coal Mine: Courts—and Employees—Pushing for the Law to Evolve*

As noted above, while various academics and other observers have critiqued the courts for not keeping up with society's changing views regarding sexual harassment at work, most courts have remained surprisingly silent regarding how (if at all) courts should account for changing social norms in evaluating questions of reasonableness in a sexual harassment claim.[148] Yet in the years since the reinvigoration of the #MeToo movement, a few courts have commented on this inconsistency.

In *Carvalho v. Santander Bank, N.A.*, for example, a federal district court in Rhode Island presided over a plaintiff's sexual harassment allegations that involved, inter alia, comments about the plaintiff's appearance, graphic questions about the plaintiff's sexual experiences,

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145 *Lacasse*, 712 F. App'x at 238; *see also* Bernstein, *supra* note 10, at 149–50.

146 Bernstein, *supra* note 10, at 149.

147 *See* Brake, *supra* note 10, at 32–33 ("[L]ower courts tend to assume that complainants are resilient enough to hold their own and will tolerate a good bit of pushback from colleagues without it weakening their resolve to complain.").

148 *See* Bernstein, *supra* note 10, at 131 ("In the three years since the #MeToo movement took off, federal courts have primarily only hinted at how their application of the reasonableness standard might change. As of yet, no court has commented expressly on the influence of #MeToo on the reasonableness test." (footnote omitted)). As part of the research for this Article, research assistants conducted a search of all federal cases between January 1, 2018, and December 21, 2021, using the broad search term: ("Title VII" /s "sexual harassment" & "hostile environment"). This search returned 550 cases. Only one case within the pool of search results, *Carvalho v. Santander Bank, N.A.*, discussed *infra* notes 149–51 and accompanying text, explicitly addressed the issue of changing legal standards for hostile environment claims in the wake of the #MeToo movement.

unwanted physical touching by the plaintiff's supervisor, and an alleged sexual proposition.[149] In discussing why it believed that the plaintiff's claim could survive summary judgment, the court explicitly commented upon "[t]he gulf between social standards and the 'severe or pervasive' legal standard,"[150] noting that types of conduct that *society* would likely deem to constitute harassment—such as slapping someone's behind, forcing a coworker to look at pornography, or staring at an employee's breasts—are often dismissed by the courts.[151] The court observed that "[o]ver the past thirty years, while our society has continued to evolve in its recognition of what constitutes inappropriate behavior in the workplace, federal courts have increasingly narrowed the definition of what constitutes 'severe or pervasive' conduct."[152] Instead, the court explained, courts should model their Title VII jurisprudence after the Supreme Court's analysis of the Eighth Amendment's prohibition on cruel and unusual punishment, advising courts to "consider the hostile work environment standards in light of 'the evolving standards of decency that mark the progress of a maturing society.'"[153]

In *Kenneh v. Homeward Bound, Inc.*, a state district court presiding over a harassment claim immediately in the wake of the #MeToo movement's reemergence also commented on the disconnect between

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149 573 F. Supp. 3d 632, 636–37 (D.R.I. 2021). It bears mentioning that *Carvalho*, as one of the few opinions to exhibit explicit awareness of the changing social standards regarding workplace sexual misconduct, did so in the context of a same-sex hostile environment claim in which the alleged harasser was a woman. *See id.* at 636 (setting forth harassment allegations of a female employee against her female supervisor). This itself represents an anomaly in the realm of sexual harassment law. *See* Maria Puente, *Women Are Rarely Accused of Sexual Harassment, and There's a Reason Why*, USA TODAY (Dec. 18, 2017, 3:33 PM), https://www.usatoday.com/story/life/2017/12/18/women-rarely-accused-sexual-harassment-and-theres-reason-why/905288001 [https://perma.cc/K9N2-6KUY] (noting that little data exists regarding the prevalence of women as harassers, but observing that of 6,758 harassment complaints filed with the Equal Employment Opportunity Commission (EEOC) in 2016, a little more than sixteen percent were filed by men); *see also id.* (citing two attorneys' anecdotal estimates that women have been harassers in 0.01% to 10% of cases); Elyse Shaw, Ariane Hegewisch & Cynthia Hess, *Sexual Harassment and Assault at Work: Understanding the Costs*, INST. FOR WOMEN'S POL'Y RSCH. 2 (Oct. 15, 2018), https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf [https://perma.cc/787F-LMPX] (noting that between 2005 and 2015, eight out of ten sexual harassment charges filed with the EEOC came from women, with two out of ten coming from men).

150 *Carvalho*, 573 F. Supp. 3d at 642.

151 *See id.* at 642–43 ("[C]ourts continue to dismiss cases involving similar behavior because case law suggests that it constitutes 'run-of-the-mill' behavior."); *see also id.* at 643 ("[M]uch of what courts have historically described as 'mere boorish behavior,' or 'unpleasant vicissitudes of the workplace,' considered insufficient for surviving summary judgment, would be considered sexual harassment by most workers today.").

152 *Id.* at 642 (footnote omitted).

153 *See id.* at 643 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *see also id.* ("To remain fair and just, courts must apply the standard in a manner that reflects such changes in societal attitudes.").

social views of harassment and the law.[154] While granting summary judgment for the employer (apparently feeling bound by precedent which set a "high bar" for a plaintiff to establish a sexually hostile working environment),[155] the court expressed concern that "[c]ases which emanate from the 1980's, 1990's, or even the first decade of the present millennium no longer accurately reflect conduct that . . . creates an abusive working environment. Times change, and with them so too do the standards of conduct."[156] Citing the "sea-change in cultural attitudes toward sexual harassment,"[157] the court implored its fellow courts to "revisit the issue of what facts constitute those 'sufficiently severe or pervasive [acts] to alter the conditions of the victim's employment,'"[158] expressing "doubt[] that anyone would reasonably find some conduct, once found unactionable, [to] still [be] unactionable today."[159]

Finally, in *Minarsky v. Susquehanna County*,[160] the Third Circuit explicitly acknowledged the impact of the #MeToo movement on how courts analyze and apply the *Faragher*/*Ellerth* defense. In *Minarsky*, the plaintiff, who worked as a part-time secretary in the county Department of Veteran Affairs office, endured years of unwanted sexual advances by her supervisor.[161] While the county had a formal anti-harassment policy which described the process for reporting workplace harassment,[162] the plaintiff never reported the harassment that she experienced—purportedly because she feared for her job security, and because she did not trust her employer to take effective action, particularly since her supervisor had previously been reprimanded for his inappropriate behavior to no effect.[163]

Minarsky eventually brought a hostile environment sexual harassment claim (among others) against her employer.[164] The district

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154 No. 27-CV-17-391, 2017 Minn. Dist. LEXIS 96, at *10–12 (Dist. Ct. Dec. 5, 2017); *see also* Murphy & Chambers, *supra* note 22, at 14.

155 *See Kenneh*, 2017 Minn. Dist. LEXIS 96, at *15, *18.

156 *See id.* at *11; *see also* Murphy & Chambers, *supra* note 22, at 14.

157 *Kenneh*, 2017 Minn. Dist. LEXIS 96, at *12; *see also* Murphy & Chambers, *supra* note 22, at 14.

158 *Kenneh*, 2017 Minn. Dist. LEXIS 96, at *11 (alteration in original) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)); *see also* Murphy & Chambers, *supra* note 22, at 14.

159 *Kenneh*, 2017 Minn. Dist. LEXIS 96, at *11.

160 895 F.3d 303 (3d Cir. 2018).

161 *Id.* at 306–07. According to the plaintiff, her supervisor would attempt to kiss her on the lips, would approach her from behind and pull her against his body, would massage her shoulders and touch her face, and would send sexually explicit messages from his work email to the plaintiff's work email, among other objectionable behaviors. *See id.*

162 *Id.* at 308.

163 *Id.*

164 *See id.* at 309.

court initially granted summary judgment to the county, finding that it had satisfied both elements of the *Faragher*/*Ellerth* defense: The county had satisfied the first prong of the defense (i.e., exercising reasonable care to prevent and promptly correct any workplace harassment) by maintaining an anti-harassment policy, by reprimanding Minarsky's supervisor in the past for misconduct, and by eventually terminating the harasser.[165] It had satisfied the second prong of the defense (i.e., showing that the plaintiff unreasonably had failed to avail herself of any preventative or corrective opportunities provided by the employer) because of Minarsky's long delay in reporting the harassment that she experienced, deeming her distrust of the organization to take action, as well as her fears about retaliation, to be "unreasonable" as a matter of law.[166]

On appeal, however, the Third Circuit rejected the district court's analysis, embracing a stance that seemed much more cognizant of the social context in which this case arose: Not only did the Third Circuit find that questions of fact remained regarding both prongs of the *Faragher*/*Ellerth* test,[167] but the court also acknowledged, in a lengthy footnote, the significance of the social framework within which harassment occurs.[168] The court stated that the case "comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims."[169] It noted that "[i]n nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred."[170] Viewing the plaintiff's behavior in that light—and focusing particularly on her delay in reporting the harassment—the court cited multiple reasons why "she did not act unreasonably under the circumstances."[171] It found that "a mere failure to report one's harassment is not *per se* unreasonable,"[172] and advised that "[i]f a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable,"[173] then the court should leave that issue for the jury to decide, rather than automatically

165 *See id.* at 311–12.

166 *See id.*

167 *Id.* at 313–17.

168 *Id.* at 313 n.12.

169 *Id.*

170 *Id.* ("[S]tudies have shown that not only is sex-based harassment in the workplace pervasive, but also the failure to report is widespread.").

171 *Id.* at 313–17.

172 *Id.* at 314.

173 *Id.*

hold that a plaintiff's failure to report harassment leads to a failure under the second prong of the *Faragher*/*Ellerth* test.[174]

In addition to these isolated examples of courts recognizing the new social context in which harassment cases arise, some employers also seem to be cognizant of changing circumstances in addressing how to treat claims of workplace harassment. For example, many employers have gone beyond the contours of the law to craft their own, more restrictive limits on workplace sexual behavior—limits that often exceed what the law might characterize as actionable harassment. In fact, many employers in the wake of the #MeToo movement's resurgence have drafted very broad workplace harassment policies, not simply tailoring such policies to what courts have found Title VII to prohibit, but rather "reflect[ing] a more common-sense approach to unacceptable behavior that reflects the collective moral outrage."[175] Moreover, while courts often have been lenient with respect to their expectations that employers exercise "reasonable care" in preventing and correcting harassment at work,[176] employers often are *choosing* to do more. Compliance organizations and employer-side law firms now advise employers to engage in a broad range of preventative and reactive behavior that often goes beyond what a court would require, such as setting up anonymous hotlines where employees can report harassment concerns, engaging in swift discipline or termination in the case of clear violations of harassment policies, monitoring social media for complaints about the organization, and

174 *Id.*; *see also* Messina, *supra* note 9, at 1090–94 (providing deeper analysis of the *Minarsky* decision); Elizabeth C. Potter, Note, *When Women's Silence Is Reasonable: Reforming the* Faragher*/*Ellerth *Defense in the #MeToo Era*, 85 BROOK. L. REV. 603, 616–22 (2020); Pedersen & Cross, *supra* note 9, at 78–81.

175 Allegra Lawrence-Hardy & Kathy Glennon, *#MeToo Today: The Evolution of the Movement and Practical Tips for Employers*, CORP. COMPLIANCE INSIGHTS (Oct. 10, 2019), https://www.corporatecomplianceinsights.com/metoo-today [https://perma.cc/LX96-HY8S]; *see also* McGinley, *supra* note 121, at 1422 ("[I]n order to avoid getting close to the liability line, employers ban behaviors that do not constitute sexual harassment under the law."); Pedersen & Cross, *supra* note 9, at 88 ("In response to the #MeToo Movement, many employers will likely take some onus on themselves and revisit their sexual harassment policies . . . [and] will likely strengthen their polic[ies] . . . ."); Stefanie K. Johnson, Ksenia Keplinger, Jessica F. Kirk & Liza Barnes, *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo [https://perma.cc/HRG9-W2MK] (relaying view expressed by several women surveyed post-#MeToo that "it is imperative that human resource departments remain vigilant in responding to concerns around harassment"); *cf.* IPSOS PUB. AFFS., *supra* note 131, at 1 (indicating in a December 2017 survey that 86% of Americans believed that "a zero-tolerance policy for sexual harassment is essential to bringing about change in our society").

176 *See supra* note 125 and accompanying text; *cf.* Fink, *Weinstein*, *supra* note 4, at 296–97; Fink, *Bystander*, *supra* note 4, at 175–77.

revising "cause" provisions of employment contracts to financially penalize employees who engage in harassment.[177]

Despite these changes in behavior among employers, and despite a few outlier courts that have acknowledged the need for an altered perspective in these cases, the law largely has remained stagnant in how it treats allegations of sexual harassment at work.[178] What was "reasonable" prior to the resurgence of the #MeToo movement has mostly remained the standard of reasonableness for cases that arise today. Thus, even questioning whether to "backdate" this new consciousness when examining older cases—cases that arose *prior* to late 2017—may seem like an exercise in futility. But given the extent to which norms in this area may continue to change, perhaps the courts soon will catch up. When they do, they will have to determine how far back to apply any legal evolution in this area.[179]

IV. BACKDATING #METOO: WHAT IT MIGHT LOOK LIKE TO

177 *See* Fink, *Weinstein, supra* note 4, at 296–97; *see also* Fink, *Bystander*, *supra* note 4, at 175–77. Employees themselves are also demanding more decisive action from their employers when harassment claims arise, often making their concerns public when their employers fail to satisfy these expectations. *See* Lawrence-Hardy & Glennon, *supra* note 175 (discussing the role of "newly empowered employees" in workplace investigations and advising that "[i]f employees feel they are not being taken seriously, they now feel comfortable taking their concerns to social media").

178 *See supra* Part III; *see also* Pedersen & Cross, *supra* note 9, at 81 ("[I]n surveying federal sexual harassment cases brought since the inception of the #MeToo Movement, we have only found the above two that explicitly seem to recognize the influence of the Movement on the interpretation of plaintiff's reasonableness . . . ."); Lawrence-Hardy & Glennon, *supra* note 175 ("[T]he severe or pervasive standard has simply not kept pace with what is currently happening in the workplace.").

179 Notably, while the majority of courts have not altered their interpretation of Title VII to account for the changing social landscape in this area (and while Title VII itself has not been amended), other changes have occurred around the edges of this area to alter the broader legal landscape in which sexual harassment claims are litigated. *See, e.g.*, Michelle L. Price, *Congress Approves Sex Harassment Bill in #MeToo Milestone*, AP NEWS (Feb. 10, 2022, 4:51 PM), https://apnews.com/article/joe-biden-business-kirsten-gillibrand-arts-and-entertainment-sexual-misconduct-e210bde4bd0efb3cbdb6bf344363d5eb [https://perma.cc/6QC2-UN9X] (discussing federal legislation barring mandatory arbitration of sexual assault and sexual harassment cases); *see also* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended at 9 U.S.C. §§ 401–402) (articulating same); Patrice Apodaca, Opinion, *Statutes of Limitations Warrant Reexamination in the #MeToo Era*, L.A. TIMES (Sept. 17, 2018, 3:10 PM), https://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-patrice-apodaca-20180917-story.html [https://perma.cc/A3M4-X9WX] (discussing move by various states to lengthen or eliminate statutes of limitations in cases involving rape or sex crimes); *cf.* Cara Kelly & Aaron Hegarty, *#MeToo Was a Culture Shock. But Changing Laws Will Take More than a Year.*, USA TODAY (Oct. 5, 2018, 12:28 PM), https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002 [https://perma.cc/7L2P-QNBK] (describing slow movement by Congress and by state legislatures to enact laws related to the #MeToo movement in the year following the exposure of Harvey Weinstein and others).

RETROACTIVELY APPLY CHANGES IN SOCIAL NORMS

As noted above, various scholars have forcefully argued for the law to more quickly adapt to societal norms, particularly in an area that is as rapidly changing as that surrounding workplace sexual harassment.[180] These scholars argue that, as new cases alleging sexual harassment make their way to the courts, the courts should apply standards of reasonableness that reflect *current* norms and standards, rather than continuing to enforce (and thus calcify) ideals that no longer reflect societal notions of right and wrong.[181] While wholeheartedly agreeing with this need for change in new cases, the focus of this Article is somewhat different: this Article asks whether courts should apply these new norms about workplace sexual harassment to cases that arose *before* these changes occurred. How should courts treat an employee who previously behaved in a manner that would have been deemed acceptable at the time—who engaged in workplace conduct that would not at that time have been deemed sufficiently severe or pervasive to create an objectively hostile environment—but whose conduct likely *would not* be acceptable under today's social standards? How should courts approach an employer whose past efforts to prevent or correct harassing behavior would have satisfied the standards of that period, but whose efforts would likely fall short according to today's more exacting expectations? Should courts "backdate" new social notions of reasonableness when examining pre-#MeToo conduct?

Much has been written about when, whether, and to what extent changes in the law more generally should be applied retroactively to prior cases.[182] The scenarios pondered by these scholars, however, tend to differ somewhat from the predicament explored by this Article: First, this Article deals not with changes in the law itself, but rather with the *application* of the law—with the social norms that inform the law's *interpretation*. The #MeToo movement has not altered the legal standard for deciding hostile environment claims: courts continue to ask if a "reasonable" person in the plaintiff's position would have found the abuse that she endured sufficiently severe and pervasive to alter the terms and conditions of her employment,[183] and continue to examine as part of the affirmative defense whether an employer exercised "reasonable" care to

180 *See supra* note 10 and accompanying text.

181 *See supra* note 10 and accompanying text.

182 *See, e.g.*, Toby J. Heytens, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595 (2012); David M. Hasen, *Legal Transitions and the Problem of Reliance*, 1 COLUM. J. TAX L. 120 (2010); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

183 *See supra* notes 24–25 and accompanying text.

prevent and correct workplace harassment and whether the plaintiff "unreasonably" failed to take advantage of these corrective opportunities.[184] This Article does not ask how to apply changes in the law itself, but rather focuses on how to interpret *existing* standards in light of their evolving social context.

A second difference between the focus of previous work in this area and that of this Article is that prior scholars have focused on how courts should treat prior, *decided cases* in the wake of emerging legal changes.[185] In other words, these authors have asked whether, and to what extent, newly decided cases should be applied retroactively to prior controversies that have already been resolved by courts.[186] This Article examines how to treat controversies that have *not yet* resulted in any final court decision, but rather span changing standards that may impact their outcome. This Article looks at workplace scenarios that arose prior to the #MeToo movement, but which have only recently come to fruition in court. In other words, there are no prior case decisions to potentially adjust or overturn; the question is simply which standard to apply to a *current* case that may have arisen under a set of norms different from those that exist today.

A. *The Benefits of Backdating: How Retroactive Application of Evolving Social Norms Would Help Victims of Workplace Harassment to Seek Justice*

In the specific context of sexual harassment cases, backdating today's standards of reasonableness into past situations could play out in various ways—some of which could be beneficial to harassment victims. On the one hand, as noted above, society's views regarding what constitutes harassment have shifted considerably in recent years: Sexually-charged behavior that may have been deemed acceptable (or, at least, not illegal) in the past would now strike many observers as beyond the pale.[187] What a "reasonable person" in the plaintiff's position might have been expected to tolerate just a few years ago would, if today's standards were applied, likely be deemed to create a sexually hostile work environment. In this respect, backdating today's standards into prior situations clearly helps victims of harassment by rendering a broader range of behavior to be actionable.

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184 *See supra* notes 27–29 and accompanying text.

185 *See supra* note 182 and accompanying text.

186 *See supra* note 182 and accompanying text.

187 *See supra* Part III.

Backdating also helps victims of harassment with the challenges posed by the first prong of the *Faragher/Ellerth* affirmative defense. As noted above, historically, many employers have responded in rather meager or purely superficial ways with respect to their obligation to take reasonable steps to prevent and correct workplace harassment[188]: They have implemented policies in order to have something to point to should an unfortunate situation arise, but often have seemed to care little about the actual effectiveness of those policies;[189] they may have scolded workers who were accused of harassing behavior, but often imposed few significant consequences for those individuals.[190] In the wake of the #MeToo movement, however, some courts might deem such half-hearted responses to harassment to fall short—to be *less* than what one might expect a "reasonable" employer to do if that employer *truly* wanted to prevent and correct harassment at work.[191] In this way, backdating today's standards into prior harassment situations would benefit the target of the harassment by making it more difficult for her employer to satisfy the first prong of the *Faragher/Ellerth* defense.

Backdating in the context of the second prong of the *Faragher/Ellerth* defense—the requirement that an employee not unreasonably fail to take advantage of her employer's avenues for the prevention and correction of harassment—presents a more complex analysis for victims and for the courts. On the one hand, society has come to possess a greater understanding of why a harassment victim might delay reporting her experience (or why she might decline to report the experience altogether).[192] From overcoming trauma from the harassment itself, to fears of retaliation or pressure from family or coworkers to stay silent, a host of forces often make victims of harassment reluctant to come forward.[193] While some courts have previously allowed any significant delay in reporting to satisfy the second prong of an employer's affirmative defense, thus vitiating an otherwise-valid harassment claim,[194] courts applying a more modern gloss to these facts might excuse such a delay (or at least might not let the passage of time before reporting *alone* satisfy the second prong of this defense).[195] Courts educated by the #MeToo movement about the barriers and fears faced by harassment victims

188 *See supra* notes 83–84, 120–22 and accompanying text.

189 *See supra* notes 83–84, 120–22 and accompanying text.

190 *See infra* note 232 and accompanying text.

191 *See supra* Section III.B.

192 *See supra* notes 95, 128 and accompanying text.

193 *See generally* Brake, *supra* note 10; *see also* Fink, *Bystander*, *supra* note 4, at 178–79.

194 *See supra* Section III.A.2.

195 *See, e.g.*, Minarsky v. Susquehanna County, 895 F.3d 303, 315 (3d Cir. 2018).

might be more understanding about—and more tolerant of—delays in a woman's decision to come forward.

On the other hand, however, the #MeToo movement unquestionably has encouraged more women to come forward and reduced some of the shame associated in reporting this behavior.[196] As one commentator in this area observed, "The #MeToo movement opened an avenue for individuals who endured sexual harassment and continues to encourage people to normalize speaking out about these behaviors."[197] With the #MeToo movement gaining prominence, "[e]mployees who previously stayed silent about sexual harassment suddenly had a discourse that encouraged them to speak about their experiences."[198] If this expectation that women should feel comfortable speaking out were backdated to apply to previous situations—including situations arising even before this deluge of disclosures occurred—then harassment victims could be penalized for not being able to predict their own future support in speaking out. Backdating this evolving social standard—the new expectation that harassment victims can speak out without retribution—would make it easier for employers to satisfy the second prong of the *Faragher*/*Ellerth* defense.[199]

B. *The Pitfalls of Backdating: Stumbling into Liability and the Potential for Backlash*

While backdating new standards regarding workplace sexual harassment into previous controversies might help many victims of harassment to more easily prove their claims, this backdating also could

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196 *See* Johnson, Keplinger, Kirk & Barnes, *supra* note 175 (quoting interview subject who opined that in the wake of #MeToo she "think[s] that it's more and more common for people to say something when they see something"); Daniel Wiessner, *U.S. Agency Saw Sharp Rise in Sexual Harassment Complaints After #MeToo*, REUTERS (Oct. 4, 2018, 4:49 PM), https://www.reuters.com/article/us-usa-harassment/u-s-agency-saw-sharp-rise-in-sexual-harassment-complaints-after-metoo-idUSKCN1ME2LG [https://perma.cc/YM9Y-LGB9]; Anna Brown, *More than Twice as Many Americans Support than Oppose the #MeToo Movement*, PEW RSCH. CTR. (Sept. 29, 2022), https://www.pewresearch.org/social-trends/2022/09/29/more-than-twice-as-many-americans-support-than-oppose-the-metoo-movement [https://perma.cc/2P9Y-77BJ].

197 Katherine E. Johnson, Comment, *Rumor Has It: The Future of Title VII's Inclusion of Sexual Rumors as Sexual Harassment*, 90 UMKC L. REV. 723, 740 (2022).

198 *Id.*

199 To be sure, even under the evolved social standards that have arisen in the wake of the #MeToo movement, women still face tremendous hurdles when it comes to reporting workplace harassment. Indeed, retaliation and backlash remain huge concerns for harassment victims who consider coming forward, even under these post-#MeToo standards. *See, e.g.*, Brake, *supra* note 10, at 31–41.

carry with it some negative ramifications, both for victims of harassment and for women more generally. Not only, as discussed above, might backdating complicate the legal analysis for plaintiffs under the second prong of the *Faragher*/*Ellerth* defense,[200] but more significantly, this retroactive application of modern workplace norms might complicate the working lives for all women. As discussed in greater detail below, this backdating might exacerbate the confusion that many men already feel when it comes to determining what constitutes appropriate workplace conduct and might ultimately promote a backlash against women at work.

1. How Backdating the Law Could Exacerbate "Unintentional" Harassment

One of the more fascinating aspects of workplace sexual harassment is the information gap that accompanies this behavior: the extent to which individuals in the workplace (particularly men) misunderstand what actually constitutes harassment. Despite hours of training, considerable policy guidance, and countless headlines, a surprising number of workers (again, mostly male) continue not to comprehend what constitutes sexually objectionable behavior at work.[201] This misunderstanding is manifested in various ways. First, men dramatically underestimate the amount of sexual harassment against women.[202] One recent study found that while "81% of women [in the United States] had experienced sexual harassment," American men estimated the prevalence of this experience at 44%, almost half of the actual figure.[203] Moreover, many men have erroneously attempted to justify or excuse objectionable behavior, deeming actions such as catcalling women or exposing themselves or even masturbating not to constitute sexual harassment.[204]

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200 *See supra* notes 192–95 and accompanying text.

201 *See* Grossman, *supra* note 2, at 972 (citing complaint from human resources professionals that "the majority of employees are uncertain as to what constitutes sexual harassment" (quoting Gerald L. Blakely, Eleanor H. Blakely & Robert H. Moorman, *The Effects of Training on Perceptions of Sexual Harassment Allegations*, 28 J. APPLIED SOC. PSYCH. 71, 72 (1998))).

202 *See* Pamela Duncan & Alexandra Topping, *Men Underestimate Level of Sexual Harassment Against Women—Survey*, THE GUARDIAN (Dec. 6, 2018, 2:00 AM), https://www.theguardian.com/world/2018/dec/06/men-underestimate-level-of-sexual-harassment-against-women-survey [https://perma.cc/NH3J-YN74].

203 *See id.*

204 *See* Fiza Pirani, *Survey Shows 1 in 3 Men Don't Think Catcalling Is Sexual Harassment*, ATLANTA J.-CONST. (Oct. 5, 2018), https://www.ajc.com/news/national/survey-shows-men-don-think-catcalling-sexual-harassment/3H777fVaWVjSyUtsQU7jNL [https://perma.cc/885S-QTUV]; *see also The Behaviors Americans Count as Sexual Harassment*, BARNA (Nov. 28, 2017),

In this respect, men frequently seem not to understand what sexual harassment even looks like.[205]

Related to (or perhaps because of) this misunderstanding about what constitutes harassment, men who have been identified as having engaged in harassment frequently fail to own up to their wrongdoing. For example, as the #MeToo movement took off in late 2017, countless men found themselves answering for a wide variety of inappropriate workplace conduct.[206] Yet in situation after situation, these alleged wrongdoers often issued little more than mealymouthed non-apologies, claiming ignorance or misunderstanding as an excuse for the conduct: they cited a belief that they were "pursuing shared feelings" in expressing attraction toward female colleagues,[207] or used the changing times as an excuse.[208] If men really are "clueless" about sexual harassment, that inhibits the prevention of this behavior. As research psychologist Peggy Drexler observes, "[I]f there is confusion about those gray areas—that is, what defines harassment at all—it's possible there could be confusion

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https://www.barna.com/research/behaviors-americans-count-as-harassment [https://perma.cc/XAU2-VJU6] (noting that while eighty-nine percent of women deemed masturbation or having someone touch themselves intentionally constituted sexual harassment, only seventy-six percent of men believed that these actions constituted harassment); *see also id.* (indicating that roughly thirty percent of men did not think that being shown sexy pictures against one's wishes or sending sexually explicit emails or texts constituted sexual harassment); *cf.* Beatrice Dupuy, *Men Don't Think Looking at Woman's Breasts Is Sexual Harassment, Poll Finds*, NEWSWEEK (Nov. 10, 2017, 9:35 AM), https://www.newsweek.com/poll-finds-countries-have-differing-views-sexual-harassment-707910 [https://perma.cc/9354-S75G] (citing disparities across Europe regarding which behaviors constitute sexual harassment).

205 *See* McGinley, *supra* note 121, at 1417 ("Men in business, law, politics, and other industries may be unable to understand what behaviors constitute sexual harassment . . . .").

206 *See supra* notes 4–5 and accompanying text.

207 Peggy Drexler, *Are Men Really Clueless About Sexual Harassment?*, CNN (Dec. 11, 2017, 5:58 PM), https://www.cnn.com/2017/11/22/opinions/what-part-of-sexual-harassment-dont-men-understand-drexler/index.html [https://perma.cc/3D8Z-3HSX].

208 *Id.* (quoting Harvey Weinstein's statement that he "came of age in the '60s and '70s, when all the rules about behavior and workplaces were different"); *see also* Kantor & Twohey, *supra* note 75 (quoting Harvey Weinstein's attorney referring to him as "an old dinosaur learning new ways"). One telling anecdote in this area involves actor and comedian Aziz Ansari, who, like many other men, faced his own accusations regarding sexual harassment in early 2018 related to a date that began as a consensual encounter and devolved into a more controversy-laden event. Professor Michael Green details the ambiguous and often conflicting allegations that were leveled at Ansari in 2018: While his accuser compared him to "a horny, rough, entitled 18-year-old," others noted that as "a 34-year-old actor and comedian of global renown who's probably done more thinking about the nuances of dating and sex in the digital age than practically anyone else," he should have known better. Ansari has claimed that he believed that all of the sexual contact on this date was consensual; his accuser has said that she was "debating if this was an awkward sexual experience or sexual assault." Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives*, 23 EMP. RTS. & EMP. POL'Y J. 115, 140–41 (2019) (quoting Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE (Jan. 13, 2018), https://babe.net/2018/01/13/aziz-ansari-28355 [https://perma.cc/X8SS-M5Z3]).

about what is absolutely off-limits, and what is, perhaps, part of some men's archaic or delusional ideal of the male-female mating dance."[209]

The goal, then, is to "do a better job making damn sure every single man—and woman—is clear about what constitutes inappropriate behavior."[210] If both men and women have a clear understanding regarding the boundaries of acceptable workplace interactions, one can assume that most workers will abide by those boundaries—that most workers want to avoid violating their coworkers' rights (and the law). But that task becomes hopelessly complicated when these standards are a moving target: If men are not only expected to understand what constitutes harassment *now*, but also must run the risk that *future* standards may apply to their present behavior, it arguably becomes impossible for men to keep up. Thus, backdating the standards of the #MeToo movement might increase the number of cases of unintentional harassment.

To be sure, any discussion of whether a harasser understands that his behavior is objectionable may not matter: "intent" in the context of sexual harassment is generally irrelevant. Indeed, sexual harassment is a wrong that largely ignores the wrongdoer's intent: while an *employer* must either have known (or should have known) about the workplace harassment and must have failed to take proper action in order for that *employer* to be liable for workplace harassment,[211] knowledge or intent do not play a part in determining whether behavior actually *constitutes* harassment—that is, whether the person engaging in the conduct should bear liability.[212] If a plaintiff is subjected to unwelcome harassment because of her sex, and that harassment impacts a term or condition of employment in what a court finds to be a "severe or pervasive" manner,[213] then the plaintiff should prevail in her harassment claim—at least against the harasser himself. Thus, courts have repeatedly found liability where harassers have protested ignorance—or even shock—at the unwelcomeness of their conduct.[214]

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209 Drexler, *supra* note 207.

210 *Id.*

211 Murphy & Chambers, *supra* note 22, at 13; *see supra* notes 27–33 and accompanying text.

212 Ellison v. Brady, 924 F.2d 872, 880 (9th Cir.) ("Title VII is not a fault-based tort scheme. 'Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation' of co-workers or employers." (alteration in original) (quoting Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971)) (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971))).

213 *See supra* notes 23–24 and accompanying text.

214 *See Ellison*, 924 F.2d at 880 ("[T]he reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment."); *see also* L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 354 (2005) (arguing that sexual

Yet while intent remains relatively insignificant from a legal perspective in these cases, taking steps to exacerbate the unawareness of those who engage in harassment seems likely to have more significant social ramifications. If men who already misunderstand the negative impact of their conduct now must navigate rapidly changing social norms, many may simply throw up their hands and give up.[215] If they are told that they not only must remain cognizant about what constitutes unlawful harassment right now, but that they also must *anticipate* what might constitute harassment in the future—must guess as to what *future* courts will consider to be reasonable workplace behavior—many may deem that effort to be hopelessly unachievable.[216]

2. How Backdating the Law Fosters Backlash Against Women

Retroactively applying today's standards for reasonableness when it comes to workplace harassment could not only increase unintentional wrongdoing if men increasingly feel stymied in their efforts to understand evolving workplace norms; this backdating also could have a more pernicious effect, heightening the backlash against the #MeToo movement and against women more generally.

Coming forward to report workplace sexual harassment has always raised concerns about retribution—backlash against those who rock the

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harassment can be analyzed along a disparate impact framework "because the harm of the conduct is not dependent on the motive or intent of the harasser"); David I. Gedrose, *Workplace Sexual Harassment: The Ninth Circuit's Reasonable Woman Standard and Employer Remedial Actions in Hostile Environment Claims Following* Ellison v. Brady, 28 WILLAMETTE L. REV. 151, 163 (1991) ("If a reasonable woman considers sexual conduct offensive enough to alter working conditions, then sexual harassment has occurred regardless of the harasser's intentions.").

215 *See* David B. Feldman, *Why Giving Up Can Sometimes Be Good*, PSYCH. TODAY (Sept. 25, 2017), https://www.psychologytoday.com/us/blog/supersurvivors/201709/why-giving-can-sometimes-be-good [https://perma.cc/B5KV-DEME] (observing that "[h]olding onto unachievable goals can be depressing" and citing study finding that "[w]hen people find themselves in situations in which they are unlikely to realize a goal, the most adaptive response may be to disengage from it" (quoting Gregory E. Miller & Carsten Wrosch, *You've Gotta Know When to Fold 'Em: Goal Disengagement and Systemic Inflammation in Adolescence*, 18 PSYCH. SCI. 773, 774 (2007))); *cf.* Jon Christiansen, *8 Things Leaders Do That Make Employees Quit*, HARV. BUS. REV. (Sept. 10, 2019), https://hbr.org/2019/09/8-things-leaders-do-that-make-employees-quit [https://perma.cc/V9J6-8HA5] (citing "inconsistent goals or expectations" as a reason why employees quit and advising employers to create stability within their team by being clear and consistent regarding workplace expectations).

216 *See* Johnson, Keplinger, Kirk & Barnes, *supra* note 175 ("[M]en need to hear the message that taking these issues seriously is not an accusation against them, but rather is a mutual effort to create an environment of respect in the workplace."); *see also* Feldman, *supra* note 215; Christiansen, *supra* note 215.

boat in this way.[217] From the moment that the Supreme Court recognized sexual harassment as a viable cause of action under Title VII, individuals who have experienced this behavior have had to engage in a careful calculus in deciding whether to report it, knowing that trying to right this wrong in their workplace might ultimately lead to far more unpleasant ramifications.[218] These concerns about retaliation have remained pronounced in the wake of the #MeToo movement.[219]

In her paper, *Coworker Retaliation in the #MeToo Era*, Professor Deborah Brake notes that, despite the evolving social norms surrounding sexual harassment that have emerged in recent years, women who report harassment at work still likely face a broad range of negative consequences for coming forward, both from supervisors and from coworkers.[220] According to Brake, "[a]lthough the growing strength of #MeToo suggests that social norms tolerating sexual harassment may be changing, the likelihood of negative reactions to sexual harassment disclosures remains high."[221] Dr. Stefanie K. Johnson and her colleagues reach a similar conclusion in their 2019 *Harvard Business Review* article, *Has Sexual Harassment at Work Decreased Since #MeToo?*[222] They cite a study that found that reports of unwanted sexual attention significantly dropped between 2016 and 2018, from sixty-six percent of women reporting such experiences in 2016, to just twenty-five percent of women in 2018.[223] Over the same period, however, Johnson and her colleagues tracked a significant uptick in reports of gender-based harassment, from seventy-six percent of women reporting this in 2016 to ninety-two percent of women in 2018.[224] According to these researchers, "[t]his data suggests that while blatant sexual harassment . . . might be declining, workplaces may still be seeing a 'backlash effect,' or an increase in

217 *See supra* notes 95, 128 and accompanying text.

218 *See supra* notes 95, 128 and accompanying text.

219 *See* Miller, *supra* note 88 (discussing, at the inception of the #MeToo movement's resurgence, the potential for "unintended consequences" resulting from developing sexual harassment scandals); *see also* Spencer Bokat-Lindell, *Is the #MeToo Movement Dying?*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/opinion/depp-heard-me-too.html [https://web.archive.org/web/20230517002703/https://www.nytimes.com/2022/06/08/opinion/depp-heard-me-too.html] (observing that even in the earliest days of the #MeToo movement, "criticism abounded that it was 'excessive and intemperate' or had 'gone too far'" (quoting Moira Donegan, *The Amber Heard-Johnny Depp Trial Was an Orgy of Misogyny*, THE GUARDIAN (June 1, 2022, 4:33 PM), https://www.theguardian.com/commentisfree/2022/jun/01/amber-heard-johnny-depp-trial-metoo-backlash [https://perma.cc/5ZHT-Y7DU]).

220 *See generally* Brake, *supra* note 10.

221 *Id.* at 1.

222 Johnson, Keplinger, Kirk & Barnes, *supra* note 175.

223 *See id.*

224 *See id.*

hostility toward women."[225] In other words, some men finally may be restraining their wrongdoing, but *resentment* seems to linger with respect to these changes.

More specific examples of this backlash abound: Many women have found their professional relationships with men limited as men express heightened caution regarding their interactions with female coworkers.[226] Some "men have begun avoiding solo interactions with women altogether"[227]—in certain cases ceasing to engage in important mentoring activities.[228] Indeed, a host of evidence—both anecdotal and empirical—indicates that, in the wake of the #MeToo movement, men are shying away from engaging in common work activities with their female coworkers, which range from mentoring to socializing to holding one-on-one meetings.[229] One lawyer began running a specialized program called "Safe Mentoring" during this period to teach his male clients "how to mentor younger women without harassing them."[230]

At the same time, while the exposure of sexual harassment in the workplace has led to this backlash for women, the repercussions for men who have been accused of harassment often have dissipated more quickly than one might expect: after half-hearted apologies or a short retreat from the public eye, many alleged wrongdoers have returned to normalcy. Disgraced former judge Alex Kozinski, who resigned in 2017 after at least fifteen female staff members and law clerks accused him of sexual harassment, had by late 2019 resumed practicing law before the Ninth Circuit.[231] Many of the famous names from Hollywood, once shamed by sexual harassment allegations, "have gotten their jobs back, or . . . are doing their comeback tours like nothing really happened."[232] If those who

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225 *Id.*

226 *See* Miller, *supra* note 88 ("In interviews, . . . men describe a heightened caution because of recent sexual harassment cases, and they worry that one accusation, or misunderstood comment, could end their careers."); *see also* Bowles, *supra* note 87 (describing men who "planned to be a lot more careful in interacting with women because they felt that the line between friendliness and sexual harassment was too easy to cross"). *See generally* McGinley, *supra* note 121 (discussing concerns by men in wake of the #MeToo movement about mentoring, sponsoring, and otherwise engaging with female colleagues).

227 Miller, *supra* note 88.

228 *See id.*; *see also* Bowles, *supra* note 87 (citing example of a male supervisor with an extra ticket to a sporting event who "[felt] he could only invite a male colleague" to the event).

229 *See* McGinley, *supra* note 121, at 1403–05 (citing voluminous data documenting this decreased interaction and referencing "opinion pieces urging men not to spend any time alone with female subordinates").

230 Bowles, *supra* note 87.

231 *See* Barnes, *supra* note 76.

232 Bokat-Lindell, *supra* note 219 (quoting Katelyn Fossett, *What Was Really At Stake in the Depp-Heard Trial*, POLITICO (June 3, 2022, 11:02 AM), https://www.politico.com/newsletters/

harass women get to do so with impunity—with minimal or temporary professional negative consequences—many women may decide against undergoing the ramifications that will inevitably flow from coming forward.

The notion of "backdating" these evolving norms into past action carries with it the potential to exacerbate this backlash effect. As discussed at length above, men already report feeling nervous and unsettled about how best to interact with female colleagues in the post-#MeToo workplace.[233] Indeed, it perhaps will be the most conscientious and well-intentioned of male workers who feel the most anxious about properly navigating these new norms; they are the ones who will care the most. Yet if even these thoughtful and honorable male workers fear not getting it right—fear that even if they perfectly adhere to *today's* norms, they may get caught out for not predicting the future, for not anticipating what new norms may be retroactively applied—they too may throw up their hands and give up.[234] It would be unfortunate if, in an effort to provide greater protection against harassment for women at work, courts took steps that discouraged men from trying to adhere to proper workplace boundaries.

CONCLUSION

The tremendous shift in social understandings of sexual harassment brought on by the resurgence of the #MeToo movement represents a worthy and long overdue adjustment to workplace norms. These shifting social standards hopefully will provide much-needed protection to working women and will make the workplace a more comfortable and welcome place for all employees. As noted above, however, the law has been slow to catch up to these shifting social norms: even as to new cases that arise within this evolving social context, many courts have continued

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women-rule/2022/06/03/what-was-really-at-stake-in-the-depp-heard-trial-00036985 [https://perma.cc/C66U-K9S6]); *see also* Cheyenne Roundtree, *Casey Affleck Is Mounting a Comeback Despite Sexual-Harassment Claims*, DAILY BEAST (Apr. 5, 2021, 3:59 AM), https://www.thedailybeast.com/casey-affleck-is-mounting-a-comeback-despite-sexual-harassment-claims [https://perma.cc/MEP7-DHLS]; Ashley Fetters Maloy & Paul Farhi, *Five Years On, What Happened to the Men of #MeToo?*, WASH. POST (Oct. 16, 2022, 3:16 PM), https://www.washingtonpost.com/lifestyle/2022/10/16/metoo-men-what-happened [https://perma.cc/M3PB-YLR4] (discussing men impacted by the #MeToo movement and observing that some "have reclaimed some of their careers and public esteem" but that "outside of a bad news cycle, others haven't really been affected at all"). *But see* Fink, *Weinstein*, *supra* note 4, at 292–94 (discussing long-lasting negative ramifications for Harvey Weinstein); Fetters Maloy & Farhi, *supra* (observing that former *Today* show host Matt Lauer "has barely been seen in public since his 2017 firing").

233 *See supra* notes 227–30 and accompanying text.

234 *See supra* note 215 and accompanying text.

to evaluate the "reasonableness" of both employer and employee behavior through an outdated and anachronistic lens. Moreover, even if courts were to catch up and embrace these social norms in evaluating new sexual harassment claims, one still might question the appropriate temporal scope for applying this change: Should these upheavals in social norms when it comes to workplace harassment apply *retroactively* to previous incidents of wrongdoing—incidents that may have arisen long before these changes occurred? Should courts backdate the changes wrought by the #MeToo movement? This Article discusses some of the considerations that arise when such otherwise-encouraging social changes are applied in this retroactive way. The groundbreaking changes in workplace standards produced by the #MeToo movement will hopefully shape the workplace for years to come—and will hopefully continue to evolve—but with an application that will likely remain forward-looking.