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BACKLASH AND WORKPLACE ANIMUS  
TOWARDS WOMEN AFTER THE #METOO  
MOVEMENT

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# IT'S THE CIRCLE OF STRIFE: COMBATING BACKLASH AND WORKPLACE ANIMUS TOWARDS WOMEN AFTER THE #METOO MOVEMENT

Kate M. Fox\*

## INTRODUCTION

The #MeToo Movement has exposed the failure of the legal system to adequately respond to the pervasive problem of sexual harassment and its impact on women.<sup>1</sup> While the legal claim was first recognized by lower courts in the late 1970s<sup>2</sup> and later confirmed by the Supreme Court in 1986,<sup>3</sup> women have yet to see a real change in the conduct they face throughout the workday.<sup>4</sup> Not only have harassers<sup>5</sup>

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<sup>1</sup> Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV. (Sept.–Oct. 2019), <https://hbr.org/2019/09/the-metoo-backlash>. It is worth noting that victims of sexual harassment are not always women and harassers are not always men. However, as this Note focuses specifically on legal protections available to women in the workplace, examples and hypotheticals will be framed with female victims in mind.

<sup>2</sup> Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill*, TIME (Apr. 11, 2016), <http://time.com/4286575/sexual-harassment-before-anita-hill/> (“By 1977, three court cases confirmed that a woman could sue her employer for harassment under Title VII of the 1964 Civil Rights Act, using the EEOC as the vehicle for redress.”).

<sup>3</sup> See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>4</sup> Anita Raj, *Worried About Sexual Harassment—or False Allegations? Our Team Asked Americans About Their Experiences and Beliefs*, CONVERSATION (May 13, 2019, 6:41 AM), <http://theconversation.com/worried-about-sexual-harassment-or-false-allegations-our-team-asked-americans-about-their-experiences-and-beliefs-116715>.

<sup>5</sup> For the purposes of this Note, the term “harasser” will be used to refer to those who harass others in the workplace in accordance with the guidelines set by the Equal Employment Opportunity Commission.

continued to exert power over women through their illegal harassment, but the legal environment in which victims<sup>6</sup> are supposed to find relief is flawed. Women seeking redress are sent through various levels of disclosure and notice between their employers, administrative agencies, and the courts.<sup>7</sup> When the system fails a victim at each step, she is forced to rectify the situation another way. The #MeToo Movement has sparked much attention in recent years—particularly in the news and on social media—and has highlighted the sexual harassment women face.<sup>8</sup> But, as if being subjected to sexual harassment is not enough, backlash and animus have additionally been reported towards women for their united attack on the inappropriate behavior.<sup>9</sup>

Women have been blamed for calling out harassment, whether it is because critics believe that some behavior does not rise to the level of harassment, that the victims' claims are false, or that victims simply want attention or money.<sup>10</sup> These attitudes then manifest into a real animus towards all women, resulting in both conscious and unintentional actions against individuals.<sup>11</sup> There is no single solution to fix this tangled web, but certain aspects of the legal system should be reconstructed to remedy the blunders of past decisions and actions against women.

In this Note, I demonstrate how particular legal practices affect a woman's ability to prevail in a sexual harassment claim. First, I will show how nondisclosure agreements ("NDAs") used in court orders and settlements to force victims into

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*Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last visited Sept. 24, 2020) [hereinafter *Facts About Sexual Harassment*].

<sup>6</sup> For the purposes of this Note, the term "victim" will be used to reference those people, specifically women, who have been subjected to sexual harassment in the workplace. While "victim" is not the most desirable way to describe these individuals, it is the most effective in distinguishing from the popular term "survivor," which tends to be used for victims of rape.

<sup>7</sup> *Sexual Harassment: Actions You Can Take*, FINDLAW, <https://employment.findlaw.com/employment-discrimination/sexual-harassment-actions-you-can-take.html> [hereinafter *Actions*].

<sup>8</sup> Bower, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> Raj, *supra* note 4.

<sup>11</sup> Kim Elssesser, *The Latest Consequence of #MeToo: Not Hiring Women*, FORBES (Sept. 5, 2019, 3:30 PM), <https://www.forbes.com/sites/kimelsesser/2019/09/05/the-latest-consequence-of-metoo-not-hiring-women/#64235fad280b> ("Initially, there was evidence that men were shying away from one-on-one interactions with women at work, including mentoring, one-on-one work meetings and socializing. Now, new research reveals women may be less likely to be hired for jobs where they are required to interact with men.").

silence are harmful. Second, I will demonstrate that the doctrinal elements of a sexual harassment claim, namely “unwelcomeness” and “severe and pervasive conduct,” are interpreted by courts in such a way that plaintiffs cannot effectively prove their case based on available evidence. Third, I will explain how the exclusion of character evidence and Federal Rules of Evidence 412 and 415 allow a judge to preclude valuable evidence proffered by plaintiffs. Preclusion of this evidence favors the harasser, even though evidentiary rules allow inferences of the plaintiff’s character based on sexual history. Finally, with these legal failures in mind, I will argue that repairing the system and thus legitimizing these claims can provide a route for justice, noting that the extra-legal path of #MeToo has not produced better outcomes. This Note will not discuss the very real and important topic of retaliation for reports of sexual harassment.

## I. BACKGROUND

### A. *The Life Cycle of Sexual Harassment Claims*

To discourage the extensive bias and prejudice in workplaces across the country, Congress enacted the Civil Rights Act of 1964 which provides individuals with a cause of action for discrimination by employers based on race, color, gender, religion, and national origin.<sup>12</sup> The Supreme Court held the provision prohibiting discrimination on the basis of “sex” to recognize and prohibit sexual harassment, though Title VII has never explicitly stated its coverage.<sup>13</sup> Historically, women have faced unwelcome sexual advances in various situations, but this treatment has been especially ubiquitous in the workplace.<sup>14</sup>

A hostile work environment claim was first recognized as a valid cause of action by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson* when a young woman was sexually harassed by the Vice President of the bank for four years preceding her termination.<sup>15</sup> To prove a sexual harassment case under Title VII of the Civil Rights Act, a plaintiff-victim must prove: (1) he or she was a victim of

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<sup>12</sup> 42 U.S.C. § 2000e-2 (2018).

<sup>13</sup> See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); 42 U.S.C. § 2000e-2 (2018).

<sup>14</sup> Reva B. Siegel, *Introduction: A Short History of Sexual Harassment* to *SEXUAL HARASSMENT LAW* 1, 3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

<sup>15</sup> *Meritor*, 477 U.S. at 59–60.

unwelcomed conduct; (2) the conduct was severe or pervasive; (3) the harassment was due to plaintiff's sex; and (4) the employer is liable for the misconduct.<sup>16</sup>

Because this cause of action has been available for over 30 years and throughout the most empowering time for women in America to date, one would think that its enforcement at law would force businesses and employees to be more vigilant of sexual harassment in the workplace. However, *Meritor* progeny tell a different story. In reality, both Congress and the judiciary have taken steps to restrict the utility of this claim by employing tough standards to plead a *prima facie* case and promoting the use of outdated precedent to dictate the outcome of a harassment case.<sup>17</sup>

Before a sexual harassment claim becomes a case, it starts with an interaction at work.<sup>18</sup> Practitioners and employers, knowing the state of the law, advise that a victim make her harasser aware that the conduct is unwelcome.<sup>19</sup> Not only is that uncomfortable for the victim, but it presents a situation where an employee may need to speak out against her supervisor or coworkers.<sup>20</sup> Next, if the conduct does not stop, she is expected to report the harassment to the employer, typically through the human resources department.<sup>21</sup> When the conduct still does not stop, she is expected to file her complaint with the Equal Employment Opportunity Commission ("EEOC") to exhaust administrative remedies.<sup>22</sup> After the EEOC issues a letter to the victim about its investigation, the victim can file a lawsuit in court against the employer to receive damages.<sup>23</sup>

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<sup>16</sup> *See id.* at 57.

<sup>17</sup> Alexia Fernández Campbell, *How the Federal Courts Have Failed Victims of Sexual Harassment*, VOX, <https://www.vox.com/policy-and-politics/2017/12/24/16807950/sexual-harassment-courts-lawsuit> (last updated Dec. 14, 2018 10:22 AM).

<sup>18</sup> *Actions*, *supra* note 7.

<sup>19</sup> *Id.*

<sup>20</sup> *See Facts About Sexual Harassment*, *supra* note 5.

<sup>21</sup> *Actions*, *supra* note 7.

<sup>22</sup> *Id.* It is mandatory for all victims of sexual harassment to exhaust their administrative remedies with the EEOC before bringing a Title VII claim. *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1004 (7th Cir. 2019). Thus, to bring a Title VII claim, a complainant is required to file a charge with the EEOC and then the EEOC will determine if the issuance of a "right to sue" letter is justified. *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019); 42 U.S.C. § 2000e-5(e)(1), (f)(1).

<sup>23</sup> *Actions*, *supra* note 7.

However, victims rarely make it to court, let alone to trial.<sup>24</sup> Harassment charges account for approximately one-third of the total complaints to the EEOC,<sup>25</sup> but these complaints are not being heard in a court of law.<sup>26</sup> Generally, only 5% of discrimination cases reach litigation, as most (approximately 86%) are dismissed prior to trial.<sup>27</sup>

Katie Eyer, a gender and law scholar, proposes psychological reasons for the discrepancy between discrimination cases and other litigation areas where an observer—a person unrelated to the discriminatory incident viewing the conduct or environment—is unable to “see” the discrimination.<sup>28</sup> Essentially, the observer is biased in thinking that discrimination only occurs explicitly.<sup>29</sup> Most notably, Professor Eyer states that studies show judges and juries are not immune to these biases, making it even more difficult to prove discrimination cases.<sup>30</sup>

Logically, if judges and juries involved in deciding the outcome of a sexual harassment case are biased, the relief is less likely to be achieved. Thus, the principal threat to a sexual harassment case could ultimately be the judge. In making judicial decisions, a judge may use discretion in applying a rule or a matter of law.<sup>31</sup> However, where that discretion systemically favors one viewpoint, it raises the concern of implicit bias. Supporting this inference is an empirical study of the

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<sup>24</sup> Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012).

<sup>25</sup> *See id.*

<sup>26</sup> *See Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Sept. 17, 2020) (showing statistical figures on the outcomes of sexual harassment charges).

<sup>27</sup> Eyer, *supra* note 24, at 1276.

<sup>28</sup> *Id.* at 1278.

<sup>29</sup> *Id.* at 1279.

<sup>30</sup> *Id.*

<sup>31</sup> Judicial discretion is “the realm of reasoned decisions within which a judge decides questions not expressly controlled by fixed rules of law.” *Cook v. City of Bella Villa*, 582 F.3d 840, 857 (8th Cir. 2009). When a judge applies discretion, it should be “sound discretion.” *Rogers v. Andrus Transp. Serv.*, 502 F.3d 1147, 1152 (10th Cir. 2007). That is, it should be applied “not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.” *Id.* (citing *Joplin v. Sw. Bell Tel. Co.*, 671 F.2d 1274, 1276 (10th Cir. 1982)).

judiciary.<sup>32</sup> Of the Article III judges in 2017, 987 were male and only 354 were female.<sup>33</sup> It would be difficult to show that gender disparity in the judiciary accounts for the lack of success for female complainants in sexual harassment cases because only one judge presides over the case at a trial court level. However, at the appellate level, three judges (or more if the case is heard *en banc*) would have the opportunity to hear the case.

A 2005 study analyzing Title VII cases and the results of their appeals showed that a plaintiff was more than twice as likely to succeed when at least one female judge sat on the panel.<sup>34</sup> A plaintiff's case was somewhat reliant upon the genders of the panel judges. More than half of the cases in this study were decided by an all-male panel.<sup>35</sup> In those cases, the plaintiffs were unable to prevail 83% of the time.<sup>36</sup> It would be an oversimplification to say that the ratio of male to female federal judges accounts for the lack of success for these claims, but it is interesting to note the empirical data proving that these women stood a better chance if their claims were heard by female judges.

Nevertheless, this Note does not simply advocate that women should represent a larger portion of the federal bench. That solution would not resolve the forty-plus years of law riddled with misunderstandings of sexual harassment since *Meritor*. The underrepresentation of women judges on the federal bench is but one example of how judicial determinations of sexual harassment cases could have been influenced by bias, and it does not account for any other factors that could have prejudiced the development of harassment doctrine, such as a misunderstanding of power dynamics or a lack of contemporaneous scholarly comment. Besides, the issues affecting sexual harassment claims are even more pervasive than the failures of judges. These issues extend from harassers to employers, and from counsel to legislatures. There is no single solution.

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<sup>32</sup> *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/gender> (last visited Sept. 24, 2020).

<sup>33</sup> *Id.*

<sup>34</sup> Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005).

<sup>35</sup> *Id.* at 1768.

<sup>36</sup> *Id.*

### B. *The #MeToo Movement and Subsequent Backlash*

Women have revolted throughout history to gain freedoms and rights withheld by society and the government.<sup>37</sup> While sexual harassment in the workplace is not a new phenomenon,<sup>38</sup> it has been one of the most prominent issues taken up by feminist activists in recent years.<sup>39</sup> The “Me Too” movement began with Tarana Burke, a woman of color who advocates for female civil rights and promotes awareness of sexual harassment, assault, and abuse.<sup>40</sup> In 2006, Burke started using the Internet to spread awareness about workplace sexual harassment to help women who had experienced it understand that they were not alone.<sup>41</sup> The cause was furthered through social media in 2017 when the hashtag “#MeToo” was popularized after television actress and women’s activist Alyssa Milano used Twitter to inspire others to come forward about their experiences with sexual violence, assault, and harassment.<sup>42</sup> The hashtag became so popular that it caught the media’s attention, leading to investigations of claims against prominent celebrities, high-ranking officials, and other powerful men who then faced serious allegations of sexual assault and harassment, even though most were not brought into court to refute the claims.<sup>43</sup>

This created a divide in the country between those who believed in and supported women breaking their silence and those who did not believe these men

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<sup>37</sup> See Alana Jeydel, *Me Too Movement: A History of Women Taking Charge*, FAIR OBSERVER (Nov. 15, 2019), <https://www.fairobserver.com/culture/me-too-history-womens-movements-feminism-culture-16612/>.

<sup>38</sup> Siegel, *supra* note 14.

<sup>39</sup> See Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME, <https://time.com/time-person-of-the-year-2017-silence-breakers/> (last visited Sept. 24, 2020).

<sup>40</sup> *Tarana Burke Biography*, BIOGRAPHY, <https://www.biography.com/activist/tarana-burke> (last updated Apr. 15, 2019). Tarana Burke is credited with promoting the health and well-being of young women of color through her organization Just Be Inc. and the use of the comforting “me too” in response to stories of harassment and abuse. *Id.* Like so many instances in history, women of color have been discounted in their roles in sexual harassment movements. See Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105 (2018), <https://www.yalelawjournal.org/forum/what-about-ustoo>. This is both troubling and confusing, given that the first Supreme Court sexual harassment case involved Mechelle Vinson, a Black woman, who was sexually assaulted by her boss. *Id.* at 107.

<sup>41</sup> *Tarana Burke Biography*, *supra* note 40.

<sup>42</sup> Nadja Sayej, *Alyssa Milano on the #MeToo Movement: ‘We’re Not Going to Stand For It Any More,’* GUARDIAN (Dec. 1, 2017), <https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse>.



should be facing scrutiny in the court of public opinion.<sup>44</sup> The gap only grew after extremely controversial men were faced with sexual assault and harassment allegations, such as Donald Trump and Brett Kavanaugh.<sup>45</sup> And while women still face issues with reporting harassment in their place of work,<sup>46</sup> an additional burden has been placed on women due to the fear of publicly released harassment claims.

Although most people know what constitutes sexual harassment and employers have attempted to curb inappropriate behavior by implementing training programs, fifty-eight percent of men surveyed indicated that men are still fearful of false or exaggerated accusations of harassment in the workplace.<sup>47</sup> The fear manifests into a bias that makes men reluctant to give women the same opportunities they give to men.<sup>48</sup> For example, forty-one percent of men admitted that they are reluctant or would refuse to meet one-on-one with a woman.<sup>49</sup> Twenty-two percent of men say they are less willing to invite women to social interactions outside of work.<sup>50</sup> Additionally, thirty percent of men agreed that an increase in sexual harassment claims would result in men blaming women for the whole problem.<sup>51</sup>

Due to such backlash, the legal process through which sexual harassment claims move must be fixed in order to provide relief to victims. Otherwise, women will continue to face difficulty in pursuit of justice while the workplace remains a battlefield. Justice is rarely granted to victims via the legal system because at each phase, the scales tip against the plaintiff.<sup>52</sup> These legal failures show the lack of confidence the government has in sexual harassment cases. Employers strong-arm

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<sup>43</sup> Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM) <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts>.

<sup>44</sup> Meredith Conroy, *Are Americans More Divided on #MeToo Issues?*, FIVETHIRTYEIGHT (Apr. 16, 2019, 6:01 AM), <https://fivethirtyeight.com/features/are-americans-more-divided-on-metoo-issues/>.

<sup>45</sup> *Id.*

<sup>46</sup> Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017, 9:00 AM), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts>.

<sup>47</sup> Bower, *supra* note 1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See supra* Section I.A.

victims into contracts to keep them quiet about the incidents, making it difficult for outsiders to see the pervasive issue.<sup>53</sup> Courts issue decisions against real harassment victims at the summary judgment phase, making claims seem illegitimate.<sup>54</sup> The federal and state legislatures fail to amend laws and abrogate court decisions that hinder claims of harassment.<sup>55</sup> So why would the public see the harmful impact of harassment if the government refuses to recognize it? Is harassment not something the public values seeking justice for? Due to the impact of #MeToo, our society knows that to be untrue. To stop the backlash against women for speaking out, the government must step up to legitimize these claims by fixing the failures it created.

## II. SYSTEMIC LEGAL FAILURES THAT UNDERMINE LEGITIMATE CLAIMS

Regardless of the causation, the current legal environment surrounding Title VII sexual harassment fails to give victims a proper setting to obtain redress. “[T]he high dismissal rate of sexual harassment cases . . . has a chilling effect,” meaning women are ashamed to speak out about their experiences knowing that no justice will come of it.<sup>56</sup> But, for those who do speak out, their claim may be thwarted by the employer’s choice to settle with an accompanying non-disclosure agreement.<sup>57</sup> If the case proceeds to court, a judge may very well dismiss the case as a matter of law due to the high hurdles the plaintiff faces in establishing her *prima facie* case.<sup>58</sup> In the unlikely case that the claim makes it to trial, the plaintiff may find it difficult to prove her case without violating certain Rules of Evidence.<sup>59</sup>

Perhaps the greatest surprise to plaintiffs in Title VII harassment claims is the actual defendant in the claim—the employer. The harasser is not a party to a Title VII claim,<sup>60</sup> meaning he or she is virtually unaffected by the initiation of the lawsuit. Under this framework, harassers never see the legal consequences of their actions in a Title VII lawsuit, so the plaintiff does not realize justice against her harasser when

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<sup>53</sup> See *infra* Section II.A.

<sup>54</sup> See *infra* Section II.B.

<sup>55</sup> See *infra* Section II.C.

<sup>56</sup> Noguchi, *supra* note 43.

<sup>57</sup> See *infra* Section II.A.

<sup>58</sup> See *infra* Section II.B.

<sup>59</sup> See *infra* Section II.C.

<sup>60</sup> See 42 U.S.C. § 2000e-2 (2018).

facing the corporate defendant. While corporate policies may encourage the company to reprimand or terminate the harasser, this is not a requirement enforced through the legal process.<sup>61</sup> This could and has allowed harassers to be re-hired or to move on to new gainful employment and continue to perpetrate harassment.<sup>62</sup>

### A. *Settlements and Accompanying Non-Disclosure Agreements*

Employers often use nondisclosure agreements (“NDAs”) as a tool to silence the parties—particularly the plaintiff in this instance—from speaking about the alleged harassment to a third party.<sup>63</sup> Typically, the NDA would be presented during a settlement negotiation because the plaintiff would otherwise be free to speak of the harassment, but it could also have been signed at the time of hiring before the incident ever occurred.<sup>64</sup> Generally, these legal agreements prohibit parties from releasing information regarding a settlement or the underlying incident that gave rise to the dispute,<sup>65</sup> but provisions can vary depending on the employer’s concern with the details of the harassment.<sup>66</sup> It has been argued that harassers are not deterred and are, in a way, encouraged to continue their conduct because NDAs protect them from persecution by the public.<sup>67</sup> NDAs also allow serial harassers to buy silence from

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<sup>61</sup> Lauren B. Edelman, *How HR and Judges Made it Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), <https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court> (“The [Civil Rights Act of 1964] did not specify precisely what constituted discrimination or what employers were expected to do. HR professionals and management consultants jumped into the vacuum, promoting a variety of new antidiscrimination policies, complaint procedures, affirmative-action officer positions, and other structures as mechanisms for compliance with civil rights law.”).

<sup>62</sup> Caroline Brooks, *Nearly Half of Sexual Harassers Can Go Back to Work*, GOV’T EXECUTIVE: WORKFORCE (Nov. 14, 2019), <https://www.govexec.com/workforce/2019/11/nearly-half-sexual-harassers-can-go-back-work/161300/>.

<sup>63</sup> Bradford J. Kelley & Chase J. Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, BUS. L. TODAY (Oct. 17, 2018), <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/>.

<sup>64</sup> Elizabeth Tippett, *Non-Disclosure Agreements and the #MeToo Movement*, AM. BAR. ASS’N (Winter 2019), [https://www.americanbar.org/groups/dispute\\_resolution/publications/dispute\\_resolution\\_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/](https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/).

<sup>65</sup> Susan M. Heathfield, *How Employers Use Nondisclosure Agreements*, BALANCE CAREERS, <https://www.thebalancecareers.com/non-disclosure-agreement-1918197> (last updated July 25, 2019); Kelley & Edwards, *supra* note 63.

<sup>66</sup> Tippett, *supra* note 64.

<sup>67</sup> Kelley & Edwards, *supra* note 63.

victims, knowing that no one will divulge information for fear of paying exorbitant damages.<sup>68</sup>

Without disclosure or punishment, harassers lack an incentive to cease their conduct.<sup>69</sup> The consequences of perpetrating sexual harassment are legally insignificant for the harasser under Title VII because the plaintiff seeks damages against the employer rather than the harasser in his individual capacity.<sup>70</sup> The harasser is free to engage in sexual harassment while the costs of litigation are shifted to the complainant and the employer.<sup>71</sup> The added layer of an NDA gives protection to the harasser beyond financial obligation.<sup>72</sup> Meanwhile, the complainants are subjected to high fines if they choose to release any information about the harassment.<sup>73</sup>

Allowing NDAs in these cases is detrimental because it allows harassers to continue their conduct with several victims over long periods of time.<sup>74</sup> The Catholic Church, Harvey Weinstein, Bill Cosby, and Donald Trump each illustrate instances where the use of NDAs silenced victims and enabled harassers to injure more victims.<sup>75</sup> As seen in some cases, the harasser may be fired or forced to resign from

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<sup>68</sup> *Id.* (“Olympic champion gymnast McKayla Maroney had entered a nondisclosure agreement with USA Gymnastics that, if enforced, would have resulted in a \$100,000 penalty if she spoke about her abuse by Dr. Nassar or the settlement.”).

<sup>69</sup> Vasundhara Prasad, *If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2517 (2018).

<sup>70</sup> See Grant B. Osborne, *The Blind Side: EEOC's "Proposed Enforcement Guidance on Harassment,"* WARD AND SMITH, P.A. (Feb. 1, 2017), <https://www.wardandsmith.com/articles/eec-proposed-enforcement-guidance-on-harassment>.

<sup>71</sup> *Id.* (“[A]n employee aggrieved . . . by an act of unlawful workplace harassment can sue his or her employer for violation of applicable employment discrimination laws and, if warranted, recover remedies such as back pay; front pay; compensatory damages for emotional distress, pain and suffering and harm to reputation; punitive damages; expenses of litigation; and even attorneys’ fees.”)

<sup>72</sup> See Prasad, *supra* note 69, at 2515–16.

<sup>73</sup> *Id.* at 1515.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2517–20; Jessica Levinson, *Non-Disclosure Agreements Can Enable Abusers. Should We Get Rid of NDAs For Sexual Harassment?*, NBC NEWS (Jan. 24, 2018), <https://www.nbcnews.com/think/opinion/non-disclosure-agreements-can-enable-abusers-should-we-get-rid-ncna840371>.

his job, which could serve as a deterrent.<sup>76</sup> But this would not stop a harasser from obtaining a new job and continuing his behavior there. Without any form of public record or ability to obtain information about past conduct, employers are unaware of the harasser's predisposition to harass, and potential victims cannot adequately protect themselves.

Among the most prominently displayed #MeToo Movement stories is the experience of Zelda Perkins, former secretary to Harvey Weinstein at Miramax.<sup>77</sup> Ms. Perkins spoke out after nineteen years of suppression and silence despite being bound by an NDA.<sup>78</sup> Her story involved a rich and powerful predator who had the ability to use the law against her, which resulted in an agreement that she did not want.<sup>79</sup> After nearly two decades of silence, she opened up about the process and how much duress she was under to sign away her right to tell her story.<sup>80</sup> She was told repeatedly that Weinstein denied her allegations and that no one would believe her without physical evidence.<sup>81</sup> Lawyers told Ms. Perkins that her credibility would be severely damaged by going to court and that telling the parent company would not help the situation.<sup>82</sup> Consequently, she was pushed into a settlement which included an NDA.<sup>83</sup> As with most NDAs there would be a penalty for breaking that silence, but after nineteen years Ms. Perkins thought the importance of disclosing her experience with the predator weighed greater than the penalty.<sup>84</sup> While Weinstein has yet to file suit to enforce the penalty fee for impermissible disclosure, this story

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<sup>76</sup> Sarah Almkhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall From Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>.

<sup>77</sup> Michelle Kaminsky, *The Harvey Weinstein Effect: The End Of Nondisclosure Agreements In Sexual Assault Cases?*, FORBES (Oct. 26, 2017), <https://www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/#5c8b4eec2c11>.

<sup>78</sup> *Id.*

<sup>79</sup> Matthew Garrahan, *Harvey Weinstein: How Employers Kept a Lid on Sexual Harassment Claims*, FINANCIAL TIMES (Oct. 23, 2017), <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

has brought to light the real deterrent NDAs pose to victims.<sup>85</sup> Additionally, this story brought attention to the fact that Weinstein has been using these restrictive agreements to perpetuate his predatory behavior for decades.<sup>86</sup>

However, an NDA is not always entered into under duress or forced upon the victim. Some advocates for victims posit that the contractual obligation of silence for all parties provides peace of mind that the incident will remain confidential, thus hiding any shame or humiliation on the victim's part.<sup>87</sup> It also preempts discussion in the public purview as to whether the victim was telling the truth, exaggerating, or falsely accusing the harasser because the victim did not and could not legally speak out.<sup>88</sup> This means that a total ban on NDAs would be an overreaction.

In response, state legislatures are taking the initiative to combat the practical issues with NDAs.<sup>89</sup> While no state has absolutely banned the use of NDAs for sexual harassment cases, states are finding creative ways to limit the use and negative effect on victims.<sup>90</sup> Some states will not enforce an NDA that bars the victim from speaking out in a criminal proceeding.<sup>91</sup> Other states bar the employer from requiring an NDA to be signed at the time of hiring.<sup>92</sup> However, states are still having trouble finding the balance between the harsh and oppressive use of NDAs by employers and the advantages of allowing victims to utilize them.<sup>93</sup> While no state law has addressed the duress applied to victims, the common law of contracts supplies tools that could also combat an NDA: the unconscionability doctrine and the public policy doctrine.<sup>94</sup>

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<sup>85</sup> Kaminsky, *supra* note 77.

<sup>86</sup> Emma Roth, *Is a Nondisclosure Agreement Silencing You From Sharing Your 'Me Too' Story? 4 Reasons It Might Be Illegal*, ACLU (Jan. 24, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too>.

<sup>87</sup> Levinson, *supra* note 75.

<sup>88</sup> *Id.*

<sup>89</sup> Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, PEW TRUSTS (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws>.

<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See* Fernández Campbell, *supra* note 17.

<sup>94</sup> Roth, *supra* note 86. Courts may find an NDA unconscionable when there is unequal bargaining power between the parties—such as when a low-wage employee is harassed by an executive—or where there will be professional repercussions for the employee. *Id.* The agreement can also be so one-sided by its

Whether or not states choose to enact laws limiting the scope or use of NDAs, victims should still have a meaningful choice in whether they want to take advantage of confidentiality in exchange for their indefinite silence. However, critics claim that denying employers the ability to implement and enforce NDAs will reduce the amount of money offered in settlement or completely impede negotiations because silence is no longer guaranteed.<sup>95</sup> In turn, plaintiffs' attorneys may use financially-motivated criteria in determining which cases to take on and could turn down victims based on the low rate of settlement and the high hurdle of recovery in court.<sup>96</sup> This argument could continue to spiral, but essentially, any hefty ban on the use of NDAs that is intended to ameliorate duress could also result in further burdens on victims.

NDAs are just another tool in the kit used to oppress victims of sexual harassment. Their use by harassers and employers promotes secrecy and silence, thus preventing the public from learning about the real climate of the workplace for women. This leads to continued harassment with a by-product of silence while failing to impose real consequences on the complicit parties.

### B. *Doctrinal Elements of the Prima Facie Case*

Generally, sexual harassment cases are dismissed or decided by a judge before trial where the plaintiff is unable to proffer a *prima facie* case satisfying each element as to her particular experience.<sup>97</sup> In sexual harassment cases, the court is especially concerned with ensuring the plaintiff has satisfied the first two elements—"unwelcomeness" and "severe or pervasive conduct"—in order to survive the

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terms—such as where the employee must be silent but the employer is free to speak and slander the employee—that the court cannot in good conscience enforce it. *Id.* It can also be against public policy to enforce an agreement that suppresses reporting sexual harassment and allows harassers to continue their conduct. *Id.*

<sup>95</sup> Maya Rhodan, *Does Sexual Harassment Training Work? Here's What the Research Shows*, TIME (Nov. 21, 2017), <http://time.com/5032074/does-sexual-harassment-training-work-heres-what-the-research-shows/>.

<sup>96</sup> *Id.*

<sup>97</sup> Alisa D. Shudofsky, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553, 553 (1982).

procedural steps preceding a trial.<sup>98</sup> For a judge to dismiss a case, the plaintiff must fail to plead the case sufficiently.<sup>99</sup>

In addition to the *prima facie* case, the plaintiff will also face perhaps the most difficult barrier at this stage of litigation—the affirmative defense of employer liability.<sup>100</sup> The legal framework established by Supreme Court precedent allows for a reduction in damages, and sometimes total release of liability, where adequate procedures for grievances are in place.<sup>101</sup> The holdings in the *Ellerth* and *Faragher* cases created a loophole where the employer must show (1) that it exercised reasonable care to prevent and promptly correct issues of harassment and (2) that the employee-victim unreasonably failed to report the harassment or otherwise take advantage of an employer's preventative measures.<sup>102</sup>

This defense can and often does exculpate the employer entirely, thus killing the plaintiff's claim even if she proves her *prima facie* case.<sup>103</sup> The defense does not require the workplace reporting system to actually work, meaning that the relevant policies often have little effect in the workplace.<sup>104</sup> The onus for this defense rests on the employer, but scholars have criticized how low the bar has been set by the courts to establish a viable policy.<sup>105</sup> Because this is not an element of the plaintiff's case in chief, it is not discussed here in full. Yet, it is still a significant challenge that further inhibits victims' access to justice.

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<sup>98</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). The other two elements—that it is based on sex and that there is employer liability—are also important in individual cases, but do not raise as much concern systemically as the other two elements. *See id.*

<sup>99</sup> *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>100</sup> Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 197–98 (2004).

<sup>101</sup> *See* Natalie S. Neals, *Flirting with the Law: An Analysis of the Ellerth/Faragher Circuit Split and a Prediction of the Seventh Circuit's Stance*, 97 MARQ. L. REV. 167, 180 (2013).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 195.

<sup>104</sup> *Id.* at 209–10; Lawton, *supra* note 100, at 198.

<sup>105</sup> *See, e.g.*, Lawton, *supra* note 100, at 198–200 (The Court required employers only to “promulgate an anti-harassment policy that specifically addresses sexual harassment and a grievance procedure that allows an employee to bypass a harassing supervisor. As a practical matter, the Court's decisions in *Ellerth* and *Faragher* did little to change employer incentives to reduce the incidence of sexual harassment by supervisors in the workplace.”).



### 1. “Unwelcome” Conduct

Title VII does not prohibit all sexual conduct; it only prohibits such conduct that is unwelcome by the recipient.<sup>106</sup> This is premised on the idea that not all sex-based comments cause harm because the recipient can welcome conduct that is sexual in nature or generally inappropriate, which should not create employer liability.<sup>107</sup> Unlike other types of harassment under Title VII, sexual harassment is especially susceptible to criticism where outsiders are compelled to question the “unwelcomeness” of the conduct.<sup>108</sup> The plaintiff bears the burden of proving that the conduct was unwelcome because, according to the courts, sex-based conduct in the workplace does not carry a presumption that it is generally unwelcome.<sup>109</sup>

Welcome conduct is defined differently by courts across the country.<sup>110</sup> Some courts have defined it as anything expressly welcome, while others consider it to be anything except conduct that has been expressly objected to.<sup>111</sup> Some courts with a restrictive view will consider the conduct to be welcome if it could potentially be welcomed by a reasonable person, meaning the conduct would have to be extreme to be considered not welcome.<sup>112</sup> Even at the lowest threshold, a plaintiff must still show that their reaction was a reasonable one under the circumstances,<sup>113</sup> putting the onus on the victim to prevent and reject sexual advances and later prove that in court.

Courts are just as varied in the viewpoint they use to evaluate the conduct. Courts can choose to assess unwelcome conduct from the perspective of an observer, the victim, or the harasser.<sup>114</sup> In the two latter standards, a judge puts themselves into the mind of the harasser or the victim to decide whether the conduct could be

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<sup>106</sup> Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2084–85 (2003).

<sup>107</sup> Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 734 (2002).

<sup>108</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

<sup>109</sup> Chambers, *supra* note 107, at 763.

<sup>110</sup> *Id.* at 752.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 756.

<sup>114</sup> *Id.* at 757.

perceived as unwelcome or if it was reasonable to engage in the behavior.<sup>115</sup> Where a court chooses to apply the perspective of the harasser, it is essentially requiring that the harasser recognize the harm he inflicted and *intend* to cause such harm, even though that is not an actual element of the claim.<sup>116</sup>

In addition to the perspective paradigm, putting the onus on the plaintiff to not only prove that the conduct was unwelcome but to make that unwelcomeness apparent in real time flies in the face of the psychological understanding of sexual harassment. Studies have shown that sexual harassment is not always about desire; in fact, it is about power and masculinity more often than not.<sup>117</sup> Psychologists state that not standing up or coming forward about sexual harassment can rest on as many as eight unique factors including shame, fear, and helplessness.<sup>118</sup> It seems both logically flawed and nonsensical to require that the person being attacked, abused, or harassed should have to speak out to stop sexual behavior in the workplace; it is even more confusing as to why she must do so in order to later win her case. Courts do not require a victim of attempted murder to thwart their attacker. Courts do not require a victim of theft to post signs saying they do not wish to have their belongings stolen. Why then would courts require a victim of sexual harassment to mitigate her situation?

While the plaintiff may in her pleading include how she felt and the circumstances surrounding the harassment, the judge will ultimately decide if the harasser's sexual conduct was welcome.<sup>119</sup> It is virtually impossible to appeal successfully after failing this element as it is subjected to a "clearly erroneous" standard of review.<sup>120</sup> Consequently, after a court has reviewed the totality of the

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<sup>115</sup> See *id.* at 757–60; Margaret Moore Jackson, *A Half-Hearted Invitation: Welcoming Sexual Harassment in Minnesota*, 33 WM. MITCHELL L. REV. 117, 129 (2006).

<sup>116</sup> Chambers, *supra* note 107, at 762.

<sup>117</sup> See generally Christopher Uggen & Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, 69 AM. SOC. REV. 64 (2004).

<sup>118</sup> Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCH. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.

<sup>119</sup> See Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1168 (1995).

<sup>120</sup> *Id.*

circumstances, it is free to exercise judgment on whether the plaintiff was entitled to feel injured by the sexual harassment without meaningful review.<sup>121</sup>

The court essentially blames the victim because she failed to expressly state her discomfort or because she should have been more receptive to the inappropriate conduct. It similarly condones the behavior by stating that harassers are merely insensitive and misunderstand how their intentional or reckless conduct distresses people around them. Ultimately, it is on the victim to shield herself from unwelcome conduct because there is no legal presumption that workplace sex-based harassment is unwelcome.

## 2. “Severe or Pervasive” Conduct

Another element left to the discretion of the court is whether the conduct was severe or pervasive.<sup>122</sup> As a matter of law, conduct that lacks severity or pervasiveness will not be recognized as sexual harassment,<sup>123</sup> even though the societal understanding of harassment has changed drastically in the wake of the #MeToo Movement. Society understands sexual harassment to be a greater issue now than it was in the past, so conduct that was once considered appropriate is now understood as harmful.<sup>124</sup> Past decisions normalized sexual harassment in the workplace, and the reliance on that reasoning is especially flawed now that scientific and psychological studies show that women perceive unwanted sexual attention in the workplace as harassment.<sup>125</sup> The “totality of the circumstances test” is used to evaluate the conduct, and the court must look to the time period in which the alleged conduct occurred and determine whether it was inappropriate and illegal in that

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<sup>121</sup> *Id.*

<sup>122</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>123</sup> Heather L. Kleinschmidt, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1119 (2005).

<sup>124</sup> Cohen, *supra* note 2 (“For decades, there were few significant changes in the ways women were treated at work. Those who complained discovered that sexually predatory behavior on the job was dismissed as trivial and harmless.”).

<sup>125</sup> Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 L. & SOC. INQUIRY 659, 672 (2003) (“The women in this study confronted a variety of experiences with harassing behaviors. They described sexual advances and invitations, sexual joking and banter, and displays of graphic sexual materials in the workplace. While these behaviors may not have been sufficiently severe or pervasive to satisfy the requirements of a legal claim, they fell in the general category of conduct that might constitute a hostile environment.”).

environment.<sup>126</sup> The court is ultimately attempting to figure out if the conduct “amounts to a change in the terms and conditions of employment.”<sup>127</sup>

To sufficiently plead this element in a hostile work environment case, the plaintiff must show both that the environment was hostile from the subjective and the objective perspective.<sup>128</sup> The objective standard begs the question: do women objectively view sexual harassment differently from men?<sup>129</sup> The Ninth Circuit answered in the affirmative, stating that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women,” resulting in a decision to adopt a reasonable *woman* standard.<sup>130</sup> This standard views the conduct from the perspective of women, rather than looking to the gender-neutral perspective.

Evaluating this element with a gender-neutral lens puts female plaintiffs at a disadvantage because men tend to view “‘milder’ forms of harassment, such as suggestive looks, repeated requests for dates, and sexist jokes as harmless social interactions to which only overly-sensitive women would object.”<sup>131</sup> A dissenting judge in the Sixth Circuit *Rabidue* case highlighted the gap between the majority’s opinion and what he believed women would find offensive:

I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery. I conclude that

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<sup>126</sup> Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL’Y 27, 47–48 (1999) (citing *Harris v. Forklift Systems*, 510 U.S. 17, 22–23 (1993)).

<sup>127</sup> *Id.* at 48.

<sup>128</sup> *Id.* at 47, 51.

<sup>129</sup> *Id.*

<sup>130</sup> *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

<sup>131</sup> Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207 (1990).

sexual posters and anti-female language can seriously affect the psychological well being of the reasonable woman and interfere with her ability to perform her job.<sup>132</sup>

In effect, courts that use the reasonable *person* standard demonstrate a male bias that declines to take notice of injurious conduct, even though women may find it offensive.<sup>133</sup>

Regardless of the perspective applied, the fact patterns used by courts to determine if the cases before them are severe or pervasive are outdated. For example, in Georgia, a trial court was tasked with evaluating whether a manager's incessant touching, kissing, and remarks towards the plaintiff were severe or pervasive enough to constitute sexual harassment.<sup>134</sup> It declined to find this conduct severe or pervasive and pointed to the following string cite for support:

*Lockett*, 315 Fed. App. at 866 (alleged sexual remarks, such as **offering to lick plaintiff's private areas**, over the course of four months coupled with two incidents of brief touching fell below the minimum level of severity or humiliation needed to establish sexual harassment); *Mitchell v. Pope*, 189 Fed. App. 911, 913 (11th Cir. 2006) (*per curiam*) (unpublished) (16 specific incidents of offensive conduct, including **touching and attempts to touch plaintiff, trying to kiss her**, and **explicit comments about her anatomy** not severe for liability under Title VII); *Strickland v. First Bancshares, Inc.*, Cause No. 2:06-CV-199, 2008 U.S. Dist. LEXIS 31549, 2008 WL 1776410, at \*10-12 (N.D. Ind. Apr. 15, 2008) (finding conduct running from 1996 until plaintiff's termination in 2005 not severe or pervasive where harasser made **inappropriate, vulgar, humiliating, and embarrassing comments, physically touched plaintiff's breast** on one occasion, **tried to kiss her** on another occasion, and made other gestures toward her); *Evans v. Mobile Infirmary Med. Ctr.*, No. Civ.A. 04-0364-BH-C, 2005 U.S. Dist. LEXIS 48160, 2005 WL 1840235, at \*9, 11 (S.D. Ala. Aug. 2, 2005) (**comments about plaintiff's breasts, grabbing her buttocks** on two occasions, **touching her breast** on one occasion not severe and pervasive); *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 328, 122 Fed. Appx. 734 (5th Cir. 2004) (finding supervisor's **comments to plaintiff about a co-worker's body and asking plaintiff to come to the office early so they could be alone, slapping plaintiff on the buttocks with a newspaper, grabbing or brushing up against**

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<sup>132</sup> Rabidue v. Osceola Ref. Co., 805 F.2d 611, 627 (6th Cir. 1986) (Keith, J., dissenting).

<sup>133</sup> See Weitzman, *supra* note 126, at 52.

<sup>134</sup> Painter v. Fulton Cty., 1:08-CV-1989-TCB-RGV, 2010 U.S. Dist. LEXIS 149316 (N.D. Ga. Aug. 4, 2010).

**plaintiff's breasts and buttocks** an unspecified number of times, **grabbing plaintiff's cheeks and attempting to kiss her once**, and **standing in door of bathroom while plaintiff washed her hands** were not severe as a matter of law); *Willets v. Interstate Hotels, LLC*, 204 F. Supp. 2d 1334, 1337 (M.D. Fla. 2002) (co-worker's **hugging plaintiff in a sexualized manner, rubbing plaintiff's head and shoulders, frequently indicating that he loved plaintiff**, once **kissing plaintiff on the neck**, once **grabbing plaintiff's buttocks**, and once **placing his hand on the inside of plaintiff's thigh near his crotch** over seven-year period of time not severe or frequent enough to constitute actionable harassment); *Davis v. Baroco Elec. Constr. Co.*, No. CIV. A. 99-1055-S, 2000 U.S. Dist. LEXIS 19659, 2000 WL 33156436, at \*1, 6-7 (S.D. Ala. Dec. 15, 2000) (**two or three sexual remarks a day** and four incidents of **physical conduct** not shown to interfere with plaintiff's job fell short of actionable hostile work environment sexual harassment).<sup>135</sup>

Though lengthy, the string cite is worth quoting in its entirety because its use by the Georgia trial court is troubling for many reasons. First, the sexual harassment that occurred in the cited cases happened in the late 1990s and early 2000s meaning the court did not recognize social progress around the understanding of sexual harassment by 2010 but merely adopted the earlier courts' views that these actions were not and could not be illegal harassment. Second, the court did not attempt to draw any distinctions from these cases based on the totality of the circumstances, essentially rendering that test illusory. Third, the court failed to address why this case was different from cases where similar conduct *was* considered severe or pervasive.<sup>136</sup> Fourth, the court deferred to trial courts outside of its Circuit without establishing which perspective standard each court used in its assessment of conduct severity, meaning that the conduct may have appeared severe from a different point

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<sup>135</sup> *Id.* at \*91–92 (emphasis added).

<sup>136</sup> *See id.* at \*89–90 (citing to and stating the following cases: “*Bryars v. Kirby’s Spectrum Collision, Inc.*, Civil Action No. 08-283-KD-B, 2009 U.S. Dist. LEXIS 39136, 2009 WL 1286006, at \*13 (S.D. Ala. May 7, 2009) (following conduct by individual defendant was sufficiently severe and pervasive: physically hugging plaintiff on a daily basis, rubbing her shoulders from behind ‘a few times’ (while telling her that she was lucky to have her job), poking her in the stomach once, and kissing her more than five times on the head, as well as once partially on her face, commenting to plaintiff between 5 and 10 times that she was a pretty girl, commenting 5 times that ‘if he were younger’ he would call her all the time, take her out and buy her whatever she wanted, and wear her out, and commenting that he did not want her to be on birth control, that she was lucky to have her job (at least five times), and that they would have to learn to get along); *Spivey v. Akstein*, No. 104CV1003WSDCCH, 2005 U.S. Dist. LEXIS 38845, 2005 WL 3592065, at \*5, 14 (N.D. Ga. Dec. 30, 2005), adopted 2005 U.S. Dist. LEXIS 3884, [WL] at \*1 (countless hugs and kisses, touching plaintiff’s breast, and comments about desire to hold plaintiff, along with frequent ‘seductive looks’ and blown kisses, frequent comments that plaintiff was a ‘very pretty woman,’ and comment during plaintiff’s interview that defendant ‘would always like to have beautiful women at his front desk,’ amounted to severe and pervasive behavior)”).

of view as discussed earlier. Finally, this is the perspective of one judge likening the facts before him to that of the opinions of other single-judge or three-judge panels across the country. The continued reliance on prior failed harassment facts creates a perpetual cycle where new harassment will not be recognized as severe or pervasive simply because similar conduct has not been viewed as severe or pervasive in the past. As demonstrated in this case, at every step of the analysis the court can choose to impose a stricter standard or analogize the fact pattern to an earlier case that denied relief.

In addition to issues with the legal framing of sexual harassment, the understanding here is quite flawed from a psychological standpoint. This shows that judges view sexual harassment as discrete acts that can be counted and separated from each other. Viewing these acts as distinct occurrences does not account for the victim's viewpoint: that the acts are experienced over a period of time that ultimately changes her relationship to her work, colleagues, supervisors, and self. She is victimized in a place where it is imperative to feel comfortable to be productive. Picking out discrete acts and creating some kind of abstract formula does not account for the holistic experience of sexual harassment. Given both the legal and psychological flaws, reliance on past cases should not survive #MeToo.

### C. *Federal Rules of Evidence*

While many sexual harassment cases are dismissed or settled prior to trial, the few that survive are subjected to judicial scrutiny due to the application of evidentiary rules and the inherent discretion granted to the judiciary in applying the Rules of Evidence. This section discusses theory and case law that illustrates how the application of evidence law diminishes the efficacy of a plaintiff's case.

#### 1. Character Propensity and Rule 415

Despite assumptions in the legal community that a propensity for sexual harassment is permissible evidence in sexual harassment cases, the general ban on character evidence has thwarted the admissibility of this type of evidence.<sup>137</sup> No distinct exception has been created to permit plaintiffs to proffer character evidence

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<sup>137</sup> Diane H. Mazur, *Sex and Lies: Rules of Ethics, Rules of Evidence, and our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 679, 713 (2000) ("All were certain that sexual harassment cases were somehow *sui generis*; the usual rules of evidence would not apply.").

to show that the harasser is devious, sexist, or another related quality that would prove he conformed to that behavior and harassed the plaintiff.<sup>138</sup>

A plaintiff might attempt to proffer evidence of encounters between the alleged harasser and other people who are unrelated to the current claim to allow the inference that the alleged harasser had a propensity for harassing. In doing so, the plaintiff is relying on the court or jury to make an impermissible assumption that he did it before, so he must have done it again and to this plaintiff.<sup>139</sup> When a plaintiff attempts to enter this into evidence, she would be denied because “sexual histories of both a non-consensual and a consensual nature are presumptively inadmissible . . . [because] they both generally depend on a prohibited character inference for their relevance to the claim.”<sup>140</sup>

When the Supreme Court handed down its decision in *Sprint/United Management Co. v. Mendelsohn*, it explained that trial courts are in the best position to evaluate the admissibility of evidence, and they can admit or exclude evidence of harassment of “similarly situated” people on a case-by-case basis under Rules 401 and 403.<sup>141</sup> This evidence, popularly referred to as “me too”<sup>142</sup> evidence, is arguably always based on some inference that the actor has a propensity for discrimination.<sup>143</sup> Although courts have ruled that “me too” evidence is admissible in individual cases,

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<sup>138</sup> *McCue v. Kansas Dep’t of Human Res.*, 165 F.3d 784, 790 (10th Cir. 1999) (“It is difficult to imagine a legitimate ground for admitting the evidence. It cannot be admitted for impermissible use of showing action in conformity with other bad acts.”).

<sup>139</sup> Linda J. Kreiger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY J. GEN. L. & JUST. 115, 118 (1985).

<sup>140</sup> Mazur, *supra* note 137.

<sup>141</sup> *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008). Rule 401 provides a test for relevant evidence. It states that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” FED. R. EVID. 401. Rule 403 deals with judicial discretion to exclude relevant evidence under certain circumstances. It provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403.

<sup>142</sup> This is not #MeToo evidence; rather it is evidence to show that similarly situated non-plaintiffs were also affected by the same conduct by the same person or institution. As exhibited in the *Mendelsohn* case, other types of discrimination take advantage of this kind of evidence.

<sup>143</sup> Kingsley R. Browne, *No Bayesian Solution to the Transposition Fallacy: More Reason to be Skeptical of Statistical Proof of Discrimination*, 35 HOFSTRA LAB. & EMP. L.J. 291, 313–14 (2018).



those courts have often neglected to look at the admissibility through a Rule 404 lens.<sup>144</sup>

Admissions of this type of evidence are sometimes predicated on the “other purpose” exception of Rule 404.<sup>145</sup> Like any character evidence, a proponent may proffer the evidence pursuant to Rule 404(b) by showing that the purpose is not for character propensity, but rather something else such as motive, knowledge, or intent.<sup>146</sup> One such permissible purpose would be to show that the employer had notice of the conduct and should have acted upon it before the plaintiff was harassed.<sup>147</sup> Where the plaintiff seeks to introduce evidence under this theory, such evidence should be admitted to prove that the employer knew of the harasser’s bad acts but did not correct them, which the employer is required to do.<sup>148</sup>

Another tactical approach to using prior harassment evidence is to show that the plaintiff was subjected to a hostile work environment.<sup>149</sup> In this case, the evidence would not be proffered to show a propensity for sexual harassment, but rather that the conduct directly violated sexual harassment law and injured the plaintiff.<sup>150</sup> This is not dependent on character propensity because it is not asking the court to infer the alleged harasser committed an act because he had done so in the past; rather, it is asking the court to recognize that the harasser committed those bad acts against the workplace at large, making the environment extremely uncomfortable for all

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<sup>144</sup> *Id.* at 314. Rule 404 prohibits the admission of evidence of a person’s character or character trait “to prove that on a particular occasion the person acted in accordance with the character or trait” as well evidence of a crime, wrong, or other act “to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” FED. R. EVID. 404(a)(1), (b)(1). However, Rule 404 does also provide some exceptions as discussed in this paragraph.

<sup>145</sup> Browne, *supra* note 143, at 314–15; FED. R. EVID. 404(b)(2); *see also* Meeks v. AutoZone, Inc., 235 Cal. Rptr. 3d 161 (Cal. Ct. App. 2018).

<sup>146</sup> Mazur, *supra* note 137.

<sup>147</sup> *Id.* at 716.

<sup>148</sup> *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

<sup>149</sup> Mazur, *supra* note 137.

<sup>150</sup> Kreiger & Fox, *supra* note 139, at 133 (“Under the hostile work environment theory, evidence of a harasser’s conduct toward other female employees is relevant to show that it created a psychologically damaging work atmosphere for the plaintiff.”).

involved.<sup>151</sup> But if the plaintiff was not aware of these bad acts, she could not have been injured and this approach would fail.

For quid pro quo claims, prior bad act evidence may be useful to establish the intent of the alleged harasser where it is at issue.<sup>152</sup> Quid pro quo harassment involving a proposal to exchange something for sexual favors would require an intent analysis because it is necessary to establish that the alleged harasser was seeking to make that proposition clear to the plaintiff.<sup>153</sup> In these cases, the plaintiff will attempt to introduce prior bad act evidence to support the assertion that the accused was aware of his actions and purposefully imposed them on the plaintiff. If it is probative of the intent of the alleged harasser, the evidence should then be admitted, subject to a limiting instruction by the judge.<sup>154</sup>

Scholars disagree that Rule 404 practically bars prior harassment by the alleged harasser due to the amendment of Rule 415.<sup>155</sup> Congress created Rule 415 to establish past sexual misconduct as highly probative of current sexual misconduct, thus escaping the general ban on character evidence.<sup>156</sup> The term “sexual assault” has been construed quite broadly to “encompass the physical intrusions that sometimes accompany verbal sexual harassment, whether in or out of the workplace.”<sup>157</sup> The issue here is that some sexual harassment does not escalate to physical intrusions like touching, but verbal harassment is still very harmful to the plaintiff.<sup>158</sup> Rule 415 does not contemplate situations where a victim is *verbally* harassed without any physical harassment. Therefore those situations would not qualify as a prior sexual *assault* under Rule 415.

In addition, the defendant in a Title VII sexual harassment claim is not the harasser, so it is also unclear whether Rule 415 is even applicable.<sup>159</sup> It is well

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<sup>151</sup> Mazur, *supra* note 137.

<sup>152</sup> *Id.* at 717.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 718–19. Rule 415 outlines evidentiary rules for similar acts in civil cases involving sexual assault or child molestation. FED. R. EVID. 415.

<sup>155</sup> Mazur, *supra* note 137, at 719.

<sup>156</sup> *Id.* at 719–20.

<sup>157</sup> *Id.* at 720.

<sup>158</sup> *Sexual Harassment*, RAINN, <https://www.rainn.org/articles/sexual-harassment>.

<sup>159</sup> *Cleveland v. KFC Nat'l Mgmt. Co.*, 948 F. Supp. 62, 64 (N.D. Ga. 1996).

established that the plaintiff cannot recover under Title VII from the harasser in his individual capacity, and naming the harasser as a defendant will compel the court to dismiss the case against him as redundant.<sup>160</sup> At least one court has allowed the admission of evidence pursuant to this Rule, but the question has gone unanswered by other courts.<sup>161</sup>

People often face sex stereotyping and harassment in the workplace, and the harasser is not always a first-time offender.<sup>162</sup> However, the Federal Rules of Evidence do not permit a court to consider all past sexual acts to assume he committed the particular harassment at issue.

## 2. Rule 412

While the victim may have a difficult time proving sexual harassment based on the previously mentioned rules, she may be unfairly subjected to attacks on her prior history, should the court find that the balancing test under Rule 412 allows it.<sup>163</sup> The test states:

In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.<sup>164</sup>

While Rule 412 reverses the traditional Rule 403 test for prejudicial evidence, it is still possible to allow the plaintiff's sexual history into evidence where the probative

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<sup>160</sup> See *Cook v. Randolph Cty.*, 573 F.3d 1143, 1149 (11th Cir. 2009) (affirming dismissal of claims against individual defendants where "functionally equivalent" claims remained pending against the employer); *Wheles v. Nelson's Elec. Motor Servs.*, 559 F. Supp. 2d 1260, 1267 (M.D. Ala. 2008) (holding that plaintiff's Title VII and ADEA claims against individual defendants in their official capacities were redundant and due to be dismissed because employer was also named as defendant); *Cleveland*, 948 F. Supp. at 66 ("Where the employer has been sued directly, . . . the naming of individual employees in their official capacity is unnecessary and duplicative.").

<sup>161</sup> *Cleveland*, 948 F. Supp. at 66.

<sup>162</sup> Maria Lamanga, *Why Sexual Harassers Keep Offending*, MARKETWATCH (Dec. 28, 2017), <https://www.marketwatch.com/story/one-major-reason-why-sexual-harassers-can-continue-2017-10-21>.

<sup>163</sup> Monnin, *supra* note 119, at 1203.

<sup>164</sup> FED. R. EVID. 412(b)(2) (2018).

value would be important.<sup>165</sup> Similarly, if the plaintiff puts her reputation at issue, she can be subjected to scrutiny by the defense.<sup>166</sup>

In particular, the element requiring a plaintiff to show that conduct was “unwelcome” can put her in a difficult position. A plaintiff must be careful to not put her reputation at issue when asserting this element because if that is in controversy, the defense may use her sexual history to combat those assertions.<sup>167</sup> Similarly, the conduct covered by this Rule is not limited to sexual encounters, but also includes “behaviors” and “predispositions,” which could amount to any relevant conduct showing the plaintiff’s sexual nature.<sup>168</sup> Before its amendment in 1996, Rule 412 was not a helpful tool in excluding evidence.<sup>169</sup> As exhibited in *Meritor Savings Bank, FSB v. Vinson*, the Court held that the way the plaintiff dressed and spoke was relevant in determining whether the alleged harasser felt his conduct was unwelcome by the plaintiff.<sup>170</sup> In similar cases, the defense attempted to show that the plaintiff’s sexual experience was directly correlated with how offended she could be by any conduct.<sup>171</sup>

After the amendment to Rule 412, many courts began to understand the presumption of inadmissibility for this kind of evidence, but courts can still admit evidence under the balancing test or find that the evidence is not covered by Rule

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Jacqueline H. Sloan, Comment, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines Meritor Savings Bank v. Vinson*, 25 SW. U. L. REV. 363, 376 (1996).

<sup>168</sup> *Id.* (“While the inquiry in cases of sexual harassment remains whether the plaintiff welcomed the overtures in question from this particular individual, the court, in order to determine whether the plaintiff did in fact welcome the advances, might find relevant to its inquiry related indicia in the plaintiff’s past behavior toward the particular defendant. In addition, the court might look to whether the complainant has in the past welcomed sexual advances from others, arguing that the defendant’s knowledge of such ‘past “receptiveness,” even to an entirely different [person] under different circumstances, enters into [the defendant’s] calculation of how welcome current advances are likely to be.’”) (quoting Catherine A. O’Neill, Comment, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U. CHI. LEGAL F. 219, 237 (1989); *Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987)).

<sup>169</sup> See Lauren M. Hilsheimer, *But She Spoke in an Un-ladylike Fashion!: Parsing Through the Standards of Evidentiary Admissibility in Civil Lawsuits After the 1994 Amendments to the Rape Shield Law*, 70 OHIO ST. L.J. 661, 669 (2009).

<sup>170</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986); Sloan, *supra* note 167, at 381.

<sup>171</sup> Sloan, *supra* note 167, at 382.

412 at all.<sup>172</sup> And, where the test has been applied incorrectly, appellate courts have held that the error did not harm the outcome.<sup>173</sup>

Any admission of this kind of evidence necessarily infers that the plaintiff embraced the harassment by being less-than-conservative in other areas of her life. While this Rule has certainly cut back on the amount of evidence admitted into these trials, the possibility remains for a defendant to present evidence on the plaintiff's actions—such as the use of profanities—that makes her unworthy of Title VII protection in the workplace.<sup>174</sup>

### III. REMEDYING THE FAILURES OF LAW IN ORDER TO QUASH BACKLASH

The failure to recognize sexual harassment as a pervasive problem is itself egregious, but the backlash women face as a result of taking matters into their own hands is a uniquely horrific result. However, where the courts and legal system have failed sexual harassment victims, society has forged a way to demand justice from sexual harassers. Through public avenues, abusers and harassers have been called out for their conduct, allowing followers to formulate opinions on the accused persons, thus bypassing the more private procedure of judicial determination.<sup>175</sup> While this has helped many women find their voices while prompting some type of punishment of the accused harassers, it is unclear what effects the public trials such as the #MeToo Movement entail.<sup>176</sup> Using the public as the judge and jury of sexual harassment incidents may have advantages, but the disadvantages create a sort of double-edged sword. Some view the #MeToo Movement as an opportunity for justice for women, but critics find it similarly difficult for women to achieve adequate remedies while creating a hostile environment for both sexes in the workplace.<sup>177</sup>

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<sup>172</sup> See Hilsheimer, *supra* note 169, at 694–98.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 703.

<sup>175</sup> See Diane Dimond, *Due Process in the #MeToo Era*, CREATORS (Oct. 6, 2018), <https://www.creators.com/read/diane-dimond/10/18/due-process-in-the-metoo-era>.

<sup>176</sup> See Heather MacDonald, *The Negative Impact of the #MeToo Movement*, HILLSDALE COLLEGE (Apr. 2018), <https://imprimis.hillsdale.edu/the-negative-impact-of-the-metoo-movement/>.

<sup>177</sup> Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, THE ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo/553427/>.

Therefore, because the public cannot be expected to legitimize sexual harassment claims responsibly and employers have not risen to the challenge of meaningfully eliminating sexual harassment, it is up to our legal system to fix the issues it created. I propose a four-prong approach to substantially improving the legal environment for Title VII sexual harassment plaintiffs.

*A. State Laws and Judicial Determinations Surrounding Settlements and NDAs*

First, states should enact legislation limiting NDAs, as is already the case in Washington and Arizona.<sup>178</sup> For example, in Arizona, the legislature deemed it illegal for an NDA to bar victims from speaking out at a harasser's criminal trial about their experience in the workplace.<sup>179</sup> States have also prohibited NDAs from being a condition of employment signed at hiring, which would prevent people from giving up their rights before any bad conduct has even occurred.<sup>180</sup> Fines for breaking silence can also be limited to not unduly burden victims from speaking out about their situation to the public.

For the sexual harassers in office, states—and the federal government—should either prohibit tax dollars from being used to pay victims in settlement entirely or at least bar the NDA portion of the settlement so that public officials cannot hide behind a contract.<sup>181</sup> The fact that public officials can continue to hold office and secretly harass people while using taxpayer money to fund the whole endeavor is despicable.<sup>182</sup> Of course, this would require the people in office to vote on such a law.

In addition to codified state laws, the judiciary should take note of the substantial bargaining power that employers and harassers tend to have. For those cases where it appears the victim was forced into signing an NDA, the court should take notice of the special nature of sexual harassment and conclude that the contract was unconscionable, leaving it void and unenforceable.

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<sup>178</sup> Beitsch, *supra* note 89.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Jamillah Bowman Williams, #Me Too and Public Officials: A post-election snapshot of allegations and consequences, GEO. L. J. 1, 6 (Nov. 9, 2018), <https://www.law.georgetown.edu/wp-content/uploads/2018/11/MeToo-and-Public-Officials.pdf>.

<sup>182</sup> *See id.*

*B. Ameliorating the Approach and Perspectives of Flawed Precedent*

As discussed earlier, one of the reasons our judicial system might be harsher on sexual harassment victims could be that the gender of the judge plays a role. It could also be that in the past sexual harassment was not understood to be as harmful as it is now. For whatever reason, the precedent binding on lower courts and the consensus of past judges has led to an undesirable set of hurdles for a plaintiff to jump. Whether this change comes from an enthusiastic plaintiff appealing to the Supreme Court of the United States or a zealous legislator proposing an amendment to Title VII, it is clear that something must break the cycle of the perpetual denial of relief.

The first issue that should be addressed is the “unwelcomeness” standard. It is absurd that a woman should have to prove that she warded off sexual contact in her workplace, expressly or implicitly, and that a failure to do so would kill her case immediately. The test should be changed so that sexual harassment claims carry a presumption of unwelcomeness. If we as a society are going to promote requiring consent for sexual relations in personal settings, requiring consent for comparable conduct in the workplace seems to be a reasonable and logical corollary.<sup>183</sup> I do not suggest that people should abstain from cursing, joking, or engaging in office romances; however, a victim should not have to prove that she proactively thwarted off sexual harassment to prove her case.

Because most workplaces are already implementing harsher standards for what intolerable conduct is,<sup>184</sup> an employee should expect a co-worker to consent to the conduct, or that employee would otherwise risk harsh repercussions by the employer. This does not ban all sexual conduct from the workplace, but it would put the onus on the would-be-harasser to receive consent for his actions. As the defendant in the action, the employer may already be using a sexual harassment training program that recognizes consent and unwelcomeness from this perspective,<sup>185</sup> so legitimizing that in the legal system would not undermine any party’s expectation.

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<sup>183</sup> This follows recent social developments (although not legal ones) in understanding rape and consent. Scholars following these trends have debated the idea of “affirmative consent,” which carries a presumption that the sexual contact is not welcome until otherwise stated. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441 (2016).

<sup>184</sup> Schultz, *supra* note 106, at 2094–95.

<sup>185</sup> See, e.g., SERVS SAFE, SEXUAL HARASSMENT DISCUSSION GUIDE 5 (2018), [https://www.servsafe.com/ServSafe/media/ServSafe/Documents/ServSafe\\_SHP\\_Restaurant\\_Discussion\\_Guide.pdf](https://www.servsafe.com/ServSafe/media/ServSafe/Documents/ServSafe_SHP_Restaurant_Discussion_Guide.pdf) (“Who decides

The second issue is the “severe or pervasive” standard used, which should be recalibrated to reflect the harmful nature of certain actions taken. The idea that conduct should be severe or pervasive to be recognized in court is well reasoned because it prevents claims by more sensitive plaintiffs and frivolous claims. However, after reading some of the fact patterns described in the earlier string cite, it is safe to assume that the judiciary does not truly understand what actions are actually severe or pervasive in the workplace. The discussion above regarding the differences in perspectives among courts provides a basis for change. Although studies show that there may not be a statistical difference in the implementation of different standards,<sup>186</sup> choosing a standard—such as the “reasonable woman” standard—could be enough to reset flawed precedent and allow courts to start fresh with a new understanding of harassment.

*C. Broadening the “Other Purpose” Standard of Character Evidence*

Of all of the evidentiary issues outlined above, the most serious is that of the character evidence ban for prior sexual harassment by a harasser. In proving that the harassment did occur to this plaintiff, the plaintiff cannot use evidence of prior sexual harassment by the harasser unto other people. However, if it is used for another purpose, the evidence should be allowed.

If a court can see that, in admitting such evidence of prior conduct, a plaintiff seeks to show that the defendant-employer was aware of—or should have been aware of—this harasser’s ability and intent to harass, Rule 404 would not be an issue in sexual harassment litigation. The court should recognize that presumption immediately and require the employer to argue against that presumption. The employer already has the burden of proffering an objection against admission, but the court should require a more robust explanation as to why Rule 404 would apply.

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if something is sexual harassment? The person on the receiving end of the conduct or behavior decides if that conduct was unwelcome or offensive, not the person who initiated the conduct. Supervisors, HR professionals, and legal advisors value impact over intent when evaluating a potential instance of sexual harassment. Saying something like, ‘I didn’t mean any harm,’ ‘That wasn’t my intent,’ ‘I am not sexist,’ and, ‘I am not homophobic,’ does not excuse a person’s actions and the impact they had on the individuals around them. You must think about the way your behavior will be perceived, not whether you intend any offense by your conduct.”).

<sup>186</sup> See Barbara A. Gutek & Maureen O’Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151 (2010).



#### D. State and Federal Laws on Sexual Harassment Training

Finally, as some states and cities have begun requiring, all states—and the federal government—should institute legislation to better police the implementation of sexual harassment training. While most employers already have some training,<sup>187</sup> possibly due to the *Ellerth/Faragher* loophole, the legislatures should continue to push for more effective and comprehensive sexual harassment training provided by employers and encourage companies “to create a culture in which women are treated as equals and employees treat one another with respect.”<sup>188</sup>

Current sexual harassment training programs are not effective,<sup>189</sup> so laws should require employers to retain a more robust program that emphasizes empowering bystanders, encouraging civility, praising good behaviors, promoting more women, and reporting bad behavior.<sup>190</sup> Requiring vigorous training to be conducted often will help to both reduce the occurrence of sexual harassment and foster a safer environment for women to report bad behavior.<sup>191</sup> Because such strong training is not a requirement for employers, many companies resort to minimum requirements set by judicial precedent or their local laws.<sup>192</sup>

The evolution of training must include a control for the success of the programs. Without data to demonstrate that it has a positive effect on employees, training will continue to be ineffective. The courts do not require that training be successful; the judiciary only cares that policies and a reporting structure are in place.<sup>193</sup> With some improvements in place, training could stop harassment from happening in the first place, or it could at least help victims understand that the employer is invested in their safety. The legal system should be prophylactic to help prevent sexual

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<sup>187</sup> Jeff Green, *Sexual Harassment Training Now Required for 20% of U.S. Workers*, BLOOMBERG (Oct. 10, 2019), <https://www.bloomberg.com/news/articles/2019-10-10/sexual-harassment-training-now-required-for-20-of-u-s-workers> (stating that one in five workers lives in a state where sexual harassment training is required by state law).

<sup>188</sup> Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do.*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html>.

<sup>189</sup> See generally Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481 (2018).

<sup>190</sup> Miller, *supra* note 188.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742 (1998).

harassment from happening, but improvements in training procedures should also be demanded by the private sector's employees.

#### IV. CONCLUSION

Sexual harassment is a pervasive issue that has a disparate effect on female employees, and the failure to recognize those claims properly has resulted in stories being brought to the media. With allegations currently being evaluated outside of the legal system, the country has become divided over this issue in a court of public opinion. Those who view these claims as illegitimate are in line with the view of the judiciary and greater legal system, resulting in even more animus towards women. That animus has then been projected onto women in the workplace in the form of reluctance to mentor them, spend time alone with them, promote them, and so on. This backlash, in addition to the continuous impact of sexual harassment, has further injured women in the workplace.

The legal system has failed women at various points in the litigation process, so it should be its responsibility to fix it. To remedy the strong-arm tactics by harasser and employer attorneys, states should limit the use of NDAs and consider the special nature of these claims in duress analyses. To combat outdated precedent, the Supreme Court or Congress should consider abrogating or amending the perspectives used within the sexual harassment framework. To prevent the exclusion of pertinent character evidence of prior sexual harassment, courts should take an expansive view of "other purpose" admissibility and allow it to carry a rebuttable presumption of admissibility. Finally, to better recognize the pervasive issue of sexual harassment and reporting issues, legislatures should enact laws to require better and more comprehensive sexual harassment training.

The judicial and legislative branches cannot resolve sexual harassment alone. We still need people to believe women and call out bad behavior. We still need employers to take responsibility for training and policing behavior. And above all, we need harassers to understand their actions as harmful and stop endangering others without their consent.

