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What's Reasonable Now? Sexual Harassment Law after the Norm Cascade

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INTRODUCTION

The first time I remember being sexually harassed at work was at my second job ever, working at a bookstore. There was a man there who always tried to work sexual innuendo into every conversation we had. He’d find excuses to touch my back or arm, and try to give me massages in the breakroom. He was constantly winking at me, licking his lips. He would bring a gym bag to work, and sometimes, when we were in the breakroom together, he’d unpack the bag like he was organizing it. He’d talk to me about his workout routine, how important it was for him to stay in shape so he could maintain his sexual prowess. Then he’d bring out a bottle of KY Jelly, and he’d slowly and deliberately place it on the table. Staring at me.

Sometimes managers would be in the room, pretending not to hear. Occasionally a manager would shake their head at him and tsk tsk, like he was a naughty child. He was not a child. He was 32. I, on the other hand, was a child. I was 17.¹

- Ijeoma Oluo

1. See Ijeoma Oluo, *Due Process Is Needed for Sexual Harassment Accusations—But For Whom?*, MEDIUM (Nov. 30, 2017), <https://medium.com/the-establishment/due-process-is-needed-for-sexual-harassment-accusations-but-for-whom-968e7c81e6d6> [<https://perma.cc/28M4-T9DW>].

Typically social norms change slowly. In the late 1990s, when Ijeoma Oluo was seventeen,² sexual harassment was seen as a “tsking” matter: Only 34% of Americans thought it was a serious problem.³

Then came Alyssa Milano’s #MeToo tweet on October 15, 2017, which was retweeted over a million times across eighty-five countries.⁴ Almost immediately, the percentage of Americans who believe that sexual harassment is a serious problem shot up to 64%.⁵ By late 2017, roughly 75% of Americans believed that sexual harassment and assault were “very important” issues for the country.⁶ That is a norm cascade.

The assumption that sexual harassment reflects nothing more than individual misbehavior is changing as well. Two-thirds (66%) of Americans now say that recent allegations of sexual harassment “mainly reflect widespread problems in society,” with only 28% attributing them mainly to individual misconduct.⁷ The view that sexual harassment results from a climate of permission created or

2. *See id.*

3. Juana Summers & Jennifer Agiesta, *CNN Poll: 7 in 10 Americans Say Sexual Harassment Is a Very Serious Problem*, CNN (Dec. 22, 2017), <https://www.cnn.com/2017/12/22/politics/sexual-harassment-poll/index.html> [<https://perma.cc/8XKW-TN7H>] (presenting information on Americans’ views on sexual harassment with data collected in May 1998 and December 2017). A PDF of full poll results is also available. *See CNN December 2017, SSRS* (Dec. 22, 2017), <http://cdn.cnn.com/cnn/2017/images/12/21/rel12d.-.sexual.harassment.pdf> [<https://perma.cc/8W37-A8PH>].

4. Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017), <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/> [<https://perma.cc/H2JY-NTZT>]. We note that prior to the proliferation of #MeToo tweets, in 2007, Tarana Burke founded her nonprofit, Just Be Inc., for helping victims of sexual violence and coining her movement “Me Too.” *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.amp.html> [<https://perma.cc/4ZTS-9BYX>].

5. Gary Langer, *Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds*, ABC NEWS (Oct. 17, 2017), <https://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721> [<https://perma.cc/9UEY-7N8D>].

6. Baxter Oliphant, *Women and Men in Both Parties Say Sexual Harassment Allegations Reflect ‘Widespread Problems in Society’*, PEW RESEARCH (Dec. 7, 2017), <http://www.pewresearch.org/fact-tank/2017/12/07/americans-views-of-sexual-harassment-allegations/> [<https://perma.cc/4TDS-WG94>].

7. *Id.*

tolerated by an employer, formerly confined to feminist theorists, suddenly seems mainstream.⁸

This Article began in reaction to a panel on sexual harassment presented to federal judges, in which a defense attorney included a squib on *Brooks v. City of San Mateo* from a past continuing legal education program she conducted.⁹ During a call to prepare for the program, which included Professor Joan Williams and other members of the panel, joshing ensued as the employment attorneys kidded each other about what they all called the “one free grab” case. This led Professor Williams to look more closely at the details.

The plaintiff, 911 dispatcher Patricia Brooks, worked out of the police station in a city just south of San Francisco.¹⁰ While Brooks was on a 911 call, a senior dispatcher, Steven Selvaggio, put his hand on her stomach and commented on its softness and sexiness.¹¹ Brooks told Selvaggio to stop touching her and forcefully pushed him away.¹² “Perhaps taking this as encouragement,” wrote Judge Alex Kozinski for the Ninth Circuit, Selvaggio trapped Brooks against her desk while she was on another call and put his hand “underneath her sweater and bra to fondle her bare breast.”¹³ Brooks removed his hand and told him he had “crossed a line,” to which Selvaggio responded that she needn’t worry about cheating on her husband because he would “do everything.”¹⁴ Selvaggio then approached Brooks “as if he would fondle her breasts again.”¹⁵ “Fortunately,” noted the Court, “another dispatcher arrived at this time, and Selvaggio ceased his behavior.”¹⁶ Brooks reported Selvaggio, and the subsequent investigation revealed that “at least” two female coworkers experienced similar treatment.¹⁷ Nonetheless, Judge Kozinski found no sexual harassment on the grounds that the harassment was not severe.¹⁸ This conclusion is hard to understand given that Selvaggio spent 120 days in jail after pleading

8. See generally Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

9. See *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).

10. See *id.* at 921.

11. See *id.*

12. See *id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 922.

18. See *id.* at 926.

no contest to criminal sexual assault for the same incident.¹⁹ How can an incident severe enough to land someone in jail be insufficiently severe to sustain a civil suit for sexual harassment? Is it reasonable to require women to endure criminal sexual assault as a condition of employment?

Relatively little has been written about sexual harassment in law reviews for the past decade.²⁰ Catharine MacKinnon's foundational *Sexual Harassment of Working Women* was published in 1979.²¹ After the Supreme Court's landmark case of *Meritor Savings Banks v. Vinson*²² in 1986, the number of law review articles increased steadily throughout the 1990s.²³ The number of articles peaked in 1999, with 177 published that year.²⁴ The volume of law review writing on sexual harassment began to fall thereafter, declining sharply after 2001, and it has continued to decline until very recently.²⁵

This Article returns to the topic and asks whether *Brooks v. San Mateo* and four other appellate hostile-environment sexual harassment cases that have each been cited more than 500 times remain good

19. See *id.* at 921.

20. To gauge the volume of law review literature on sexual harassment over the years, we ran a search on Westlaw of the term "sexual harassment" and filtered by secondary sources and then "law reviews and journals," and then counted the number of articles per year with sexual harassment as the main topic from 1988 to 2018. Articles counted were those that either had sexual harassment as their main topic or discussed the subject in some significant way; articles that only contained the term "sexual harassment" but that did not discuss the topic were not counted.

21. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (Yale Univ. Press 1979).

22. See *Meritor Savings Banks v. Vinson*, 477 U.S. 57 (1986).

23. Some important articles published during this early period include: Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) (describing early case law); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) (arguing that sexually oriented behavior undercuts women's ability to be seen as credible colleagues); Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997) (finding that sexual harassment is a "technology of sexism" that serves to police men into heteronormative masculinity and women into heteronormative femininity); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (arguing that sexual harassment, particularly in blue-collar jobs, often is not sexual but is designed to drive women out of coveted jobs).

24. See *supra* note 20.

25. The number of articles declined to 106 in the year 2000; eighty in the year 2001; and fifty-seven in 2002. The downward trend continued through the 2000s, with an average of sixty-three articles per year between 2000–2004 and thirty-seven articles per year between 2005–2009. Even less was written in the 2010s, with an average of sixteen articles per year between 2010–2017. Starting in 2018, the number has increased, with fifty-four articles as of December 10, 2018.

precedent in the light of the norm cascade precipitated and represented by #MeToo.²⁶ Our analysis is designed to interrupt what we call the “infinite regression of anachronism,” or 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.²⁷ These anachronistic cases entrench outdated norms, foreclosing an assessment of what is reasonable now. To interrupt this infinite regression, this Article pays close attention to the facts of the cases-in-chief discussed below to enable the reader, and the courts, to reassess whether a reasonable person and a reasonable jury would be likely to find sexual harassment today.

To illustrate this infinite regression, this Article also discusses other cases that cite the five cases-in-chief, which we call the “sub-cases.”²⁸ The sub-cases show how the cases-in-chief use the infinite regression of anachronism to ratchet up the standard for what constitutes a hostile environment in their circuit. Both the cases-in-chief and the sub-cases reflect an era when sexual harassment was not taken seriously. They are no longer valid as precedent in an era in which 86% of Americans endorse a “zero-tolerance” policy toward sexual harassment.²⁹

It goes without saying that changes in public opinion do not automatically change the validity of legal precedent. Yet sexual harassment is a special case because “reasonableness” plays a central

26. On Westlaw, the search term used was the West Key Number 78k1185. On Ravel Law, we searched for the phrase “hostile work environment” within the same paragraph as [severe OR pervasive]. Then we chose the three most cited cases in each circuit, from which we chose five that were most inconsistent with post-#MeToo norms. See *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000); *Bowman v. Shawnee State Univ.*, 220 F.3d 456 (6th Cir. 2000); *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999); *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871 (5th Cir. 1999); *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428 (7th Cir. 1995).

27. See, e.g., Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 817-19 (2002) [hereinafter Beiner 2002].

28. “Sub-cases” were located using the “citing references” function on Westlaw, which provides a list of all cases which cite a case-in-chief. The authors read the cases on these lists and selected as sub-cases those which relied on the cases-in-chief to reach a result which they feel is inconsistent with what a reasonable jury would likely find today.

29. Chris Jackson, *American Attitudes on Sexual Harassment*, IPSOS (Dec. 15, 2017), <https://www.ipsos.com/en-us/news-polls/npr-sexual-harassment-2017-12-14> [<https://perma.cc/7QPv-JST2>].

role in both procedural and substantive ways. Procedurally, the typical sexual harassment case presents as a summary judgment motion by the employer, where the question for the judge is whether a “reasonable” jury could find for the plaintiff after making all factual inferences in the plaintiff’s favor.

Reasonableness is also key in the substantive law. Hostile work environment cases—which constitute the lion’s share of sexual harassment cases—require courts to assess whether the hostility was severe or pervasive enough to create a hostile environment from the viewpoint of a reasonable person in the plaintiff’s position, considering “all the circumstances.”³⁰ The norm cascade around sexual harassment in the wake of #MeToo is relevant both to whether a reasonable jury might find that sexual harassment occurred and regarding what constitutes an objectively hostile work environment from the standpoint of a reasonable person in the plaintiff’s position.

Reasonableness enters into sexual harassment cases in a third way too. Employers long have used non-disclosure agreements (NDAs) to prevent employees from revealing sexual harassment they experienced in the workplace.³¹ Indeed, NDAs kept many harassment survivors silent for years before #MeToo emboldened them to speak out.³² NDAs executed in the employment context are enforceable only to the extent that they are “reasonable”³³ based on a weighing of the employer’s interest in secrecy, the employee’s interest in disclosure, and the public interest in disclosure.³⁴ The norm cascade provides evidence of the strong public interest in the disclosure of sexual harassment and is thus relevant to whether NDAs that prohibit disclosure of sexual harassment can be reasonably enforced.

The central role of reasonableness pivots the norm cascade directly into sexual harassment law. Whereas smoking at work was widely seen as reasonable and unobjectionable several decades ago, a

30. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

31. See Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/> [<https://perma.cc/GQM4-APBP>].

32. See *id.*

33. See, e.g., *CSS, Inc. v. Herrington*, 306 F. Supp. 3d 857, 880 (S.D. W. Va. 2018) (holding a confidentiality agreement as void because it was unreasonable, containing no limitation of time or geographic scope); *Spirax Sarco, Inc. v. SSI Eng’g, Inc.*, 122 F. Supp. 3d 408, 427 (E.D.N.C. 2015) (requiring NDAs to be “reasonable under the circumstances to maintain its secrecy”).

34. See, e.g., *Hammons v. Big Sandy Claims Serv.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

rule allowing on-the-job smoking today is now unthinkable. Just as one would not cite outdated smoking rules to support a conclusion about what's reasonable at work today, it makes little sense to cite outdated sexual harassment rulings that reflect very different notions of reasonable workplace behavior than exist today in the light of #MeToo.

This Article is designed to help judges fulfill their role in a very complex cultural environment. Competently written defense briefs will inevitably characterize the cases-in-chief in ways that sound innocuous. This Article seeks to ensure that judges who might be inclined to rely on these oft-cited cases today are fully aware of the factual contexts in which a prior court held that no reasonable person or jury could find sexual harassment. Even judges who felt confident that they knew what was reasonable in the past should not assume they know what Americans believe is reasonable today. Those judges should be more inclined to let juries decide what's reasonable now.

This Article proceeds as follows. Part I discusses the traditional framework governing sexual harassment law.³⁵ Part II uses polling data to document the norm cascade.³⁶ Part III reassesses five of the most-often cited circuit court sexual harassment cases in the light of the norm cascade and the norm cascade's influence on what a jury would find reasonable today.³⁷ Part IV examines what is reasonable in the context of enforcing NDAs against plaintiffs.³⁸ We conclude by pointing out that judges may soon face an avalanche of opportunities to reflect on the impact of the norm cascade on sexual harassment law.³⁹ This Article is designed to help them navigate that challenge.

I. DOCTRINAL FRAMEWORK GOVERNING SEXUAL HARASSMENT

Sexual harassment was first recognized as a cause of action for illegal workplace discrimination under Title VII of the Civil Rights Act of 1964 in *Meritor v. Vinson*.⁴⁰ The Court held in *Meritor* that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult"⁴¹ and that employers cannot require workers to "run a gauntlet of sexual abuse

35. See *infra* Part I.

36. See *infra* Part II.

37. See *infra* Part III.

38. See *infra* Part IV.

39. See *infra* Part V.

40. See generally *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

41. *Id.* at 65.

in return for the privilege of being allowed to work and make a living.”⁴² The Court continued: “[F]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of . . . employment and create an abusive working environment.’”⁴³

Reasonableness entered the hostile-work-environment equation in the 1993 case *Harris v. Forklift*, where the Supreme Court held that to state a valid claim, a plaintiff needs to prove “an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.”⁴⁴ *Harris* overturned a lower court decision that held that, although an employer’s sexual and sexist statements offended the plaintiff and would offend a reasonable woman, no hostile environment was proven because the statements were not “so severe as to be expected to seriously affect [the plaintiff’s] psychological well-being.”⁴⁵ Noting that the hostile environment test was not “mathematically precise,” the Supreme Court explained that it could be determined “only by looking 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.”⁴⁶ While psychological harm can be taken into account like any other relevant factor, “no single factor is required.”⁴⁷ As we will see below, some courts have inexplicably turned this language into a requirement that no behavior constitutes sexual harassment unless it is physically threatening.⁴⁸

In *Oncale v. Sundowner* in 1998, the Court again held that the environment must be one that “a reasonable person in the plaintiff’s position”⁴⁹ would find hostile in light of all circumstances, including “the social context in which [the] behavior occurs and is experienced by [the] target.”⁵⁰ Thus the plaintiff must prove that the harassing conduct was sufficiently severe or pervasive that a reasonable person

42. *Id.* at 66-67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

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

44. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

45. *Id.* at 20, 23.

46. *Id.* at 22, 23.

47. *Id.*

48. See *infra* Sections III.B, III.C, III.D, III.E.

49. *Oncale v. Sundowner*, 523 U.S. 75, 81 (1998).

50. *Id.*

would feel it altered the conditions of employment, considering the evidence as a whole and with due consideration to social context.⁵¹

Reasonableness also is embedded in the relevant procedural standard, given the typical procedural posture of these cases. In every one of the five cases-in-chief discussed in this Article, judges took the case away from a jury, either by affirming a grant of summary judgment for the employer or by granting judgment as a matter of law after the trial was completed.⁵² In both procedural contexts, judges may exclude the jury only if the evidence is such that a reasonable jury could not find for the plaintiff after making all factual inferences in their favor.⁵³ Thus, in each of the five main cases, as in all hostile environment sexual harassment cases, courts should be deciding whether a reasonable jury could have found that a reasonable person would have considered what happened sexual harassment. We refer to these two standards collectively as the “*Harris* reasonableness standard” or simply the “reasonableness standard.”

Removing cases from juries raises fundamental fairness issues in any context, but these issues are particularly acute in the context of sexual harassment cases. The judges in the cases-in-chief made decisions about what *they* thought a reasonable jury could find at a moment in time when norms about sexual harassment were very different, typically in the late 1990s. Even if they were right then, the recent sharp shift in social norms surrounding sexual harassment provides strong evidence that reasonable juries would think differently today.

II. THE NORM CASCADE

Cass Sunstein coined the term “norm cascade” in 1996.⁵⁴ Sunstein pointed out that norm cascades occur when societies

51. See *id.* (providing that social context is a relevant consideration); *Harris*, 510 U.S. at 21 (defining a hostile work environment as “an environment that a reasonable person would find hostile or abusive”); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”).

52. See generally Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007).

53. *Id.* Given that the overwhelming proportion of sexual harassment cases are brought by women against men, we will use the pronouns “she” and “her” to refer to the person alleging sexual harassment for reasons of grammatical simplicity.

54. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

experience sharp shifts in social norms and cited feminism and the anti-apartheid movements as examples.⁵⁵ The term “norm cascade”—popularized by Martha Finnemore and Kathryn Sikkink in their 1998 Article “International Norm Dynamics and Political Change”—has been most commonly used in the academic field of international relations.⁵⁶ Finnemore and Sikkink describe norms as having a life cycle that consists of “norms emergence” followed by a “norm cascade” and then “internalization.”⁵⁷ The first stage involves “norms entrepreneurs,” who attempt to convince a critical mass of actors to embrace new norms.⁵⁸ The cascade begins following a tipping point where a critical mass adopts the new norm, after which the norm becomes internalized and no longer a matter of broad public debate.⁵⁹

Evidence that #MeToo has prompted a norm cascade comes from three different kinds of polls.⁶⁰ The most compelling kind of data compares polls taken before #MeToo with those taken afterwards. The second kind of data simply reports the overwhelming agreement among the American public that sexual harassment is a serious problem. The third kind of data compares what people believe is the impact of the norm cascade rather than providing direct evidence of what that impact is. Questions in polls of this kind ask people to compare their understanding of what norms were in the recent past with what norms are today. Combining these three types of data provides a vivid picture of the contours of norm cascade. In effect, it represents five related shifts.

55. *See id.* at 912.

56. *See* Martha Finnemore & Katherine Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998).

57. *Id.* at 895.

58. *See id.*

59. *See, e.g.*, Daniel Drezner, *#MeToo and the Trouble with New Norms*, WASH. POST (Feb. 14, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/02/14/metoo-and-the-trouble-with-norms/?noredirect=on&utm_term=.66026cad68f0 [<https://perma.cc/4UKJ-DDL8>] (using the term “norm cascade” to debate #MeToo).

60. The Authors have been able to verify that all polls cited are of nationally representative samples except two: Jackson, *supra* note 29; Summers & Agiesta, *supra* note 3. We were unable to verify that these polls were nationally representative due to lack of available information. We have tried to ascertain via phone calls and will continue trying to establish contact in order to verify that all polls are of nationally representative samples.

A. New Norm #1: Sexual Harassment is a Serious Problem

Widespread agreement exists today that sexual harassment is serious. In the late 1990s, only 34% of Americans believed that sexual harassment was a serious problem,⁶¹ but today, around 75% do.⁶² In 1998, a majority of Americans said that people were too sensitive about sexual harassment; shortly after the #MeToo tweet, a majority said that workplaces are not sensitive enough to sexual harassment.⁶³ Americans also seem to believe others are taking sexual harassment more seriously today.⁶⁴ Two-thirds (66%) of Americans believe that reports of sexual harassment were generally ignored five years ago; only 26% of Americans believe they are ignored now.⁶⁵ Additionally, Americans now recognize that men are sexually harassed too.⁶⁶

The consensus that sexual harassment is a serious problem is strongest among younger people.⁶⁷ Americans under thirty years old are more likely than those fifty or older to view sexual harassment as a serious problem.⁶⁸ Another poll found that two-thirds (66%) of Americans sixty-five or older say that heightened attention to sexual harassment has made navigating workplace interactions more difficult for men.⁶⁹ Only 42% of Americans under age thirty agree.⁷⁰ Judges—who are more likely to be over fifty than under thirty—should keep

61. Summers & Agiesta, *supra* note 3.

62. Oliphant, *supra* note 6.

63. See Lydia Saad, *Concerns About Sexual Harassment Higher Than in 1998*, GALLUP (Nov. 3, 2017), <https://news.gallup.com/poll/221216/concerns-sexual-harassment-higher-1998.aspx> [<https://perma.cc/NX8F-4KLW>].

64. See Jackson, *supra* note 29.

65. *Id.*

66. See Jacob Bernstein, Matthew Schneier & Vanessa Friedman, *Male Models Say Mario Testino and Bruce Weber Sexually Exploited Them*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/style/mario-testino-bruce-weber-harassment.html> [<https://perma.cc/T7MH-KSMX>]; Aja Romano, *Kevin Spacey Has Been Accused of Sexually Assaulting a Minor. He Deflected by Coming Out as Gay*, VOX (Oct. 30, 2017), <https://www.vox.com/culture/2017/10/30/16569228/kevin-spacey-assault-allegations-anthony-rapp> [<https://perma.cc/L5LS-SCAN>].

67. See Oliphant, *supra* note 6.

68. See *id.* (noting that 81% of adults ages eighteen to twenty-nine say the issue of sexual harassment is “very important” issue for the country, compared to 68% of Americans fifty or older).

69. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RESEARCH (Apr. 4, 2018), <http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/> [<https://perma.cc/T3Z7-C6BF>].

70. *Id.*

this in mind when assuming that they know what reasonable Americans believe today.

B. New Norm #2: Broad Agreement Exists About What Behaviors Constitute Sexual Harassment

The traditional assumption was that one should be wary of labeling problematic behavior as “harassment” because different people (particularly people of different genders) interpret the same behaviors differently. What is harassment to one person might just be horseplay or flirting to another. This view was well expressed by Justice Antonin Scalia’s concurrence in *Harris v. Forklift*,⁷¹ which warned that that law “lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough” to be considered sexual harassment.⁷² Scalia’s language likely encouraged federal judges to take summary judgment cases away from these “largely unguided” juries.

If this worry was well justified when Justice Scalia expressed it in 1993, it is no longer so today. Widespread agreement exists (among 96% of women and 86% of men) that touching or groping is sexual harassment.⁷³ There are similar levels of consensus that sexual harassment includes: being forced to do something sexual (91% of women; 83% of men); masturbating in front of someone (89% of women; 76% of men); exposing oneself (89% of women; 76% of men); sharing intimate photos without permission (85% of women; 71% of men); and sending sexually explicit texts or emails (83% of women; 69% of men).⁷⁴ There is even strong agreement that verbal comments alone can constitute harassment: 86% of women and 70% of men believe that making sexual comments about someone’s looks or body is sexual harassment.⁷⁵

These findings highlight not only that strong consensus exists about what kinds of behaviors constitute sexual harassment but also that the consensus cuts across gender lines. Men and women now largely agree that people are entitled to show up to work and be treated as colleagues, not as sexual targets or opportunities. Sexual

71. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993).

72. *Id.*

73. *The Behaviors Americans Count as Sexual Harassment*, BARNA (Nov. 28, 2017) [hereinafter BARNA], <https://www.barna.com/research/behaviors-americans-count-as-harassment/> [<https://perma.cc/U7MJ-8V6W>].

74. *Id.*

75. *Id.*

harassment—certainly if it involves groping, touching, or sexual ridicule—is now viewed as aberrant behavior that most Americans, of all genders, consider inappropriate.

C. New Norm #3: Employers Should Not Tolerate Sexual Harassment

The old norm was that employers should not be held responsible for the sexual antics of their employees and that women should “suck it up” if they felt they had been harassed and should not go running to Human Resources for help.⁷⁶ When Professor Williams entered the workforce in the 1980s, she was told that sexual harassment was something that any woman worth her salt could handle on her own and that if she could not, she did not belong in the workforce. This is the norm that has perhaps changed most dramatically. 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.⁷⁷

D. New Norm #4: Sexual Harassment Accusers Are Credible

Before #MeToo, women who complained about sexual harassment were often stereotyped as vengeful, lying sluts.⁷⁸ Thus in 1992, one senator asked Anita Hill, “Aren’t you just a scorned woman?” and she was famously called “a little bit nutty and a little bit slutty” by David Brock.⁷⁹ This stereotype was used to compromise Anita Hill’s credibility, career, and dignity after she testified at the confirmation hearings of now-Supreme Court Justice Clarence Thomas.⁸⁰

In a stunning reversal, less than a third (31%) of Americans now think that false accusations of sexual harassment are a major

76. This “old norm” is based on the authors’ own workplace experiences. Such experiences were representative of commonly held beliefs.

77. Jackson, *supra* note 29.

78. See Joan C. Williams & Suzanne Lebsack, *Now What?*, HARV. BUS. REV. (Apr. 22, 2019), <https://hbr.org/cover-story/2018/01/now-what> [<https://perma.cc/RWD5-AUWE>].

79. Margaret Carlson, *Smearing Anita Hill: A Writer Confesses*, TIME (July 9, 2001), <http://content.time.com/time/nation/article/0,8599,167355,00.html> [<https://perma.cc/E2GQ-LQ68>]; Williams & Lebsack, *supra* note 78. David Brock later recanted.

80. See Carlson, *supra* note 79.

problem.⁸¹ Sixty-four percent of American workers say the accuser is more likely than the accused to be believed at their workplaces—69% of women and 60% of men.⁸² At the same time, judges worried about false accusations can take comfort in the fact that 77% of Americans believe that *both* the accuser and the accused should get the benefit of the doubt until proven otherwise in sexual harassment cases.⁸³

III. FIVE OFT-CITED CIRCUIT COURT CASES DO NOT REFLECT WHAT REASONABLE PEOPLE AND JURIES WOULD LIKELY BELIEVE TODAY ABOUT SEXUAL HARASSMENT

The norm cascade has obvious implications for sexual harassment law. As discussed above, sexual harassment is grounded in reasonableness, both substantively and procedurally.⁸⁴ In *Harris v. Forklift*, the Court clarified that the “severe or pervasive” requirement in *Meritor* must be assessed from the perspective of a reasonable person: “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”⁸⁵

Reasonableness standards are meant to build flexibility and continuous updating into the law, not to entrench norms from another time. Yet many courts have failed to update their understandings of reasonableness and instead rely on cases reflecting standards of reasonableness from the last century. To provide a corrective, this Article highlights aspects of widely cited cases that are substantially out of step with prevailing, widely held norms about sexual harassment—for instance, the finding that a reasonable person would not find conduct amounting to criminal sexual assault sufficiently severe to constitute a hostile work environment. We also pay close attention to whether courts create heightened standards for sexual

81. Graf, *supra* note 69.

82. *11/22: More Than One in Three Women Report Sexual Harassment in the Workplace*, MARIST (Nov. 22, 2017), <http://maristpoll.marist.edu/1122-more-than-one-in-three-women-report-sexual-harassment-in-the-workplace/#sthash.iq5z0jER.dpbs> [<https://perma.cc/P49N-XES5>] [hereinafter Marist Poll].

83. Jackson, *supra* note 29. Judges who keep the hostile environment cases from juries, either by upholding a grant of summary judgment for the employer, or by directing a verdict for the employer, typically are very careful not to make open judgments about credibility—that would be to admit that the case needs to go to a jury.

84. *See supra* notes 41–44.

85. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

harassment that reflect the outdated norm that run-of-the-mill sexual harassment is just not that serious. Our findings, presented below, will help to ensure that judges are equipped to properly apply sexual harassment law in a changed and rapidly evolving social and cultural environment.

A. The Ninth Circuit: *Brooks v. San Mateo* and its Progeny

1. *Brooks v. San Mateo*

The 2000 case *Brooks v. San Mateo* has been cited 1,296 times.⁸⁶ *Brooks* was an appeal from a summary judgment for the city of San Mateo, so the relevant standard was whether a reasonable jury, taking all inferences in favor of the plaintiff, could find that Brooks had reasonably perceived her work environment to be hostile.⁸⁷ As summarized above, *Brooks* involved a 911 dispatcher whose coworker cornered her, groped her stomach, put his hand up her dress, and “fondled” (the court’s word) her bare breast—all against her protestations and while she was attempting to handle emergency calls.⁸⁸

Judge Kozinski conceded that Brooks herself perceived her work environment to be hostile, but he found that she failed to fulfill the additional requirement that the environment be seen as hostile to a reasonable person.⁸⁹ He did not mention the relevant standard for granting the employer’s summary judgment motion: that no reasonable jury could find for the plaintiff.⁹⁰ His opinion in *Brooks* reflects three outdated norms: (1) that groping is not necessarily sexual harassment; (2) that workplace sexual harassment is not serious, even up to and including sexual assault; and (3) that employers should not

86. *Citing References: Brooks v. City of San Mateo*, WESTLAW EDGE, <https://1.next.westlaw.com/> (search in search bar for “229 F.3d 917”; then follow the “citing references” hyperlink) (last visited May 10, 2019). Only thirty of the citing cases disagreed with, declined to extend, or distinguished its case from *Brooks*. *Negative Treatment: Brooks v. City of San Mateo*, WESTLAW EDGE, <https://1.next.westlaw.com/> (search in search bar for “229 F.3d 917”; then follow the “negative treatment” hyperlink) (last visited May 10, 2019).

87. *See Brooks v. San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000) (“To hold her employer liable for sexual harassment under Title VII, Brooks must show that she reasonably feared she would be subject to such misconduct in the future because the city encouraged or tolerated Selvaggio’s harassment.”).

88. *See id.* at 921.

89. *See id.* at 925.

90. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

be held responsible for the sexual antics of their employees and women should just “suck it up” and learn to handle the harassment (as at least two women had done before Brooks complained, as noted in the Introduction).

Under *Oncale*, reasonableness is judged from the viewpoint of a reasonable person in the plaintiff’s position.⁹¹ Given that 96% of American women and 86% of men consider “touching or groping” to be sexual harassment, the reasonable person and jury today would be highly likely to see stomach stroking and breast fondling as sexual harassment.⁹²

Another quirky aspect of *Brooks* is the extraordinarily high bar it sets for demonstrating “severe” harassment.⁹³ Recall that the alleged harasser, Selvaggio, was convicted of criminal sexual assault for his conduct and spent 120 days in jail.⁹⁴ *Brooks* holds, in effect, that a reasonable person would not consider criminal sexual assault at work severe enough conduct to sustain a claim for sexual harassment.⁹⁵ This seems a strange proposition.

Even stranger is Judge Kozinski’s discussion in *Brooks* of *Al-Dabbagh v. Greenpeace*,⁹⁶ which involved a violent rape in which a coworker detained the plaintiff overnight, “slapped her, tore off her shirt, beat her, hit her on the head with a radio, choked her with a phone cord and ultimately forced her to have sex with him.”⁹⁷ Judge Kozinski’s discussion of this case suggests that sexually unwelcome conduct in the workplace that falls short of violent rape is not “severe” enough to “create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”⁹⁸

In fact, *Brooks* goes even further, suggesting that even rape on the job might not support a hostile environment claim: “If the incident here were as severe as that in *Al-Dabbagh*, we would have to grapple with the difficult question of whether a single incident *can so permeate* the workplace as to support a hostile work environment claim.”⁹⁹ Few judges have been so bold as to claim that even violent

91. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998).

92. BARN, *supra* note 73.

93. See *Brooks*, 229 F.3d at 930.

94. See *id.* at 922.

95. See *id.* at 930.

96. See *id.* at 925.

97. *Al-Dabbagh v. Greenpeace, Inc.*, 873 F.Supp. 1105, 1108 (N.D. Ill. 1994).

98. *Harassment*, U.S. EEOC, <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/AJG7-SPCR>] (last visited May 10, 2019).

99. *Brooks*, 229 F.3d at 926 (emphasis added).

rape could not support a sexual harassment case, but a considerable number of judges belittle what happened to plaintiffs in sexual harassment cases by pointing out that it was not sexual assault or rape.¹⁰⁰

The *Brooks* court's suggestion that even the most severe sexual violence must "permeate" the workplace in order to constitute harassment is a flagrant misreading of Supreme Court precedent, which makes sexual harassment actionable if it is "sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'"¹⁰¹ The "permeate" language comes from *Harris v. Forklift*, the landmark case that involved allegations that harassment was *pervasive* not *severe*.¹⁰² It makes sense to require pervasive sexual harassment "permeate" a workplace, but it is unclear what it might mean for a single instance of severe sexual harassment to do so. The Supreme Court has held that sometimes harassment is so serious that it need not be pervasive and therefore need not "permeate" the environment.¹⁰³

Recall that even after Brooks pushed Selvaggio away, he came at her again and fondled her breast and then attempted to approach her a third time.¹⁰⁴ "Fortunately, another dispatcher arrived," notes Judge Kozinski.¹⁰⁵ What if the other dispatcher had not arrived? A reasonable jury might find that Brooks, after having been groped and propositioned, found the situation hostile, indeed frightening, as Selvaggio repeatedly came at her when she was in a vulnerable situation. Brooks could not simply hang up on 911 calls and run. Courts sometimes do not recognize the anxiety that may pervade the workplace for victims who do not know how far a harasser will go when he or she follows them into the bathroom, grabs their breasts or

100. See, e.g., *Morris v. City of Colorado Springs*, 666 F.3d 654, 667 (10th Cir. 2012) (using a line of cases where plaintiffs were raped or sexually assaulted to distinguish the conduct in the present case and hold it did not constitute a hostile work environment); *LeGrand v. Area Resources for Cmty. & Human Servs.*, 394 F.3d 1098, 1102 (8th Cir. 2005) (holding that where plaintiff's supervisor made unwelcome sexual advances, kissing plaintiff's mouth, gripping her thigh, and grabbing her buttocks and reaching for her genitals, the behavior did not rise to the level of actionable sexual harassment as "[n]one of the incidents was physically violent or overtly threatening").

101. *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1996) (emphasis added) (quoting *Hensen v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

102. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

103. See *Meritor*, 477 U.S. at 67.

104. See *Brooks*, 229 F.3d at 921.

105. *Id.*

buttocks, or exposes him or herself and tells the victim that he or she has no self control.¹⁰⁶ A reasonable jury today might well find that Selvaggio's behavior made the 911 dispatch office a hostile environment for Brooks.

Brooks offered a muddled legal analysis in its consideration of whether Brooks's employer could be held liable for Selvaggio's conduct. Given that Selvaggio was not Brooks's supervisor, a negligence standard applied: The city would be liable for Selvaggio's conduct only if it knew or should have known of Selvaggio's conduct.¹⁰⁷ Judge Kozinski mentioned this in a footnote, but he never mentioned or applied this standard in the text.¹⁰⁸ If the negligence standard had been applied, the facts of *Brooks* suggest that a reasonable jury might have concluded that the city should have known of Selvaggio's behavior for a simple reason: It had happened at least twice before.¹⁰⁹ Judge Kozinski asserted that Selvaggio's conduct toward Brooks was an isolated incident,¹¹⁰ but his own recitation of the facts shows that that was flatly untrue: Judge Kozinski admitted that Selvaggio had made similar advances to at least two other female coworkers.¹¹¹ The court also noted that Brooks "cannot rely on Selvaggio's misconduct with other female employees because she did not know about it at the time of Selvaggio's attack."¹¹² The fact that *Brooks did not know* about the prior assaults does not establish that the employer should not have known about them. A reasonable jury could have found that Selvaggio's behavior altered the conditions of Brooks's employment by making it necessary to fend off sexual advances while fielding emergency calls and then to keep quiet about it. Making reasonable inferences in favor of the plaintiff, a jury could have found that the employer had created a climate of permission in which Selvaggio felt free to assault his colleagues and where women were silenced because they believed that they would suffer retaliation if they complained—a prediction that proved true in Brooks's case, as discussed below.¹¹³ While Judge Kozinski's opinion only considers

106. See *Anderson v. CRST Int'l., Inc.*, No. CV 14-368 DSF (MANx), 2015 WL 1487074, at *1 (C.D. Cal. Apr. 1, 2015), *aff'd in part, rev'd in part*, 685 F. App'x 524 (9th Cir. 2017).

107. See *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (quoting *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991)).

108. See *Brooks*, 229 F.3d at 927 n.10.

109. See *id.* at 922.

110. See *id.* at 927.

111. See *id.* at 922.

112. *Id.* at 924.

113. See *id.* at 930.

this evidence in the context of the plaintiff's retaliation claim, the same evidence is relevant to the issue of whether the employer should have known about Selvaggio's on-the-job assaults.

Turning to Brooks's retaliation claim, Brooks needed to prove that her employer took an adverse employment action against her in response to her sexual harassment complaint.¹¹⁴ When Brooks returned to her post after reporting the incident, she was denied her prior shift and given a less desirable one; she was denied her desired vacation schedule; her male coworkers ostracized her; the city was slow to process her workers' compensation claim; and ultimately, she received a "needs improvement" performance evaluation, a downgrade from her prior "satisfactory" rating.¹¹⁵ The city introduced no evidence to contradict any of this—or at least no evidence the Ninth Circuit considered compelling enough to mention.¹¹⁶ These facts lend understanding to why at least two other women who were assaulted by Selvaggio before Brooks said nothing.¹¹⁷ Despite Brooks's extensive evidence of retaliation, instead of sending the claim to a jury to decide whether the city retaliated against Brooks, Judge Kozinski decided the issue himself.¹¹⁸ In doing so, he discounted the negative performance evaluation, which is considered an adverse employment action under clear Ninth Circuit precedent.¹¹⁹ He likewise discounted the vacation denial and the unfavorable shift on the grounds that they were "subject to modification" because Brooks "abandoned her job" while appeals were pending.¹²⁰ This put Brooks in a position where, to preserve her legal rights, she would have had to continue to work in an environment so upsetting that it had already driven her to take a disability leave.¹²¹ This approach is inconsistent with the Supreme Court's assurance in *Harris v. Forklift* that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."¹²²

114. See *id.* at 928 (citing *Payne v. Nw. Corp.*, 113 F.3d 1079, 1080 (9th Cir. 1997)).

115. *Id.* at 928-29.

116. See generally *id.*

117. See *id.* at 922.

118. See *id.* at 930.

119. See *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).

120. *Brooks*, 229 F.3d at 929-30.

121. See *id.* at 922. We infer that Brooks's leave was a disability leave from the Court's statement that "Brooks had trouble recovering from the incident. She took a leave of absence immediately afterward and began seeing a psychologist. She returned to work six months later." *Id.*

122. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

Judge Kozinski achieved this result by disaggregating the evidence of retaliation and discounting each piece of evidence one by one.¹²³ He discounted the ostracism on the grounds that “an employer cannot force employees to socialize with one another.”¹²⁴ As noted, he discounted the unfavorable shift, the denial of Brooks’s desired vacation time, and the negative evaluation on the grounds that the decisions were not final.¹²⁵ This approach is what another commentator has called the “divide-and-conquer strategy.”¹²⁶ It is a common defense strategy often used in criminal cases in which one “isolate[s] each piece [of evidence] . . . and then attempts to trivialize it by taking it out of context.”¹²⁷ The divide-and-conquer strategy is inconsistent with Supreme Court precedent that has repeatedly instructed lower courts to consider whether a hostile environment existed using a totality-of-the-circumstances test that considers the evidence as a whole in its social context.¹²⁸ Considering each piece of evidence in isolation is the opposite of considering the totality of the circumstances, which focuses on the cumulative effect.

As is commonplace in the cases-in-chief discussed in this Article, the divide-and-conquer strategy is used to support the decision to prevent the case from going to a jury.¹²⁹ As is again commonplace, *Brooks* does so by ignoring the totality-of-the-circumstances test as articulated by the Supreme Court and instead tuning out virtually

123. See *Brooks*, 229 F.3d at 929.

124. *Id.*

125. See *id.* at 929-30.

126. Beiner 2002, *supra* note 27, at 814; Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 104 (1999) [hereinafter Beiner 1999]; see also M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 314-15 (1999); Eric Schnapper, *Some of Them Still Don’t Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 280 (1999); Schneider, *supra* note 52, at 744 (“[A] slice and dice approach to summary judgment . . . [that] does not look at the evidence in a holistic way.”).

127. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1262 (11th Cir. 1999) (Tjoflat, J., concurring in part and dissenting in part).

128. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

129. See Beiner 2002, *supra* note 27, at 793; Beiner 1999, *supra* note 126, at 71; Medina, *supra* note 126, at 316; Ann Juliano and Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 582 (2001); Schneider, *supra* note 52, at 706-07; see also Megan E. Wooster, *Sexual Harassment Law—The Jury Is Wrong as a Matter of Law*, 32 U. ARK. LITTLE ROCK L. REV. 215, 216 (2010).

everything except the “severe or pervasive” language, holding that what happened to Brooks was not severe as a matter of law.¹³⁰

What is the significance of the fact that this extraordinarily influential opinion was written by Judge Kozinski? In 2008, Judge Kozinski was admonished for posting on a publicly accessible website sexually explicit and degrading images of women, including one where naked women were painted to look like cows.¹³¹ He was admonished for embarrassing the judiciary.¹³²

Kozinski was unrepentant, just as he was more recently when allegations emerged that he had sexually harassed interns and clerks since the 1980s.¹³³ Ultimately, at least fifteen women publicly accused Judge Kozinski of groping their breasts and legs, showing them pornography in chambers asking if they found it sexually arousing, giving them prolonged kisses on the cheek, and soliciting sex.¹³⁴ “If

130. See James Concannon, *Actionable Acts: “Severe” Conduct in Hostile Work Environment Sexual Harassment Cases*, 20 *BUFF. J. GENDER L. & SOC. POL’Y* 1, 8 (2012); V. Blair Druhan, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 *VAND. L. REV.* 355, 356 (2013); Judith J. Johnson, *License to Harass Women: Requiring Hostile Environmental Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 *MD. L. REV.* 85, 85 (2003); Schnapper, *supra* note 126, at 326.

131. See Maura Dolan, *9th Circuit Judge Alex Kozinski Is Accused by Former Clerks of Making Sexual Comments*, *L.A. TIMES* (Dec. 8, 2017), <http://www.latimes.com/local/lanow/la-me-ln-kozinski-sexual-misconduct-20171208-story.html> [<https://perma.cc/9APW-WA9L>].

132. See *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 284 (3rd Cir. 2009); see also Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, *WASH. POST* (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.2677321b1d21 [<https://perma.cc/PFS5-MURQ>].

133. See Scott Glover, *9th Circuit’s Chief Judge Posted Sexually Explicit Matter on His Website*, *L.A. TIMES* (June 11, 2008), <https://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html> [<https://perma.cc/U5PN-HU6E>]; Leah Litman, Emily Murphy & Katherine H. Ku, *A Comeback but No Reckoning*, *N.Y. TIMES* (Aug. 2, 2018) <https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html> [<https://perma.cc/K7G8-9F6V>].

134. Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, *WASH. POST* (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html?utm_term=.42442b3f3334 [<https://perma.cc/3LR5-B9C8>].

this is all they are able to dredge up after thirty-five years, I am not too worried,” commented the judge after the initial allegations first became public.¹³⁵ Chief Justice Roberts disagreed.¹³⁶ He appointed the Judicial Council of the Second Circuit to lead an investigation, whereupon Judge Kozinski resigned.¹³⁷

Thus, the judge who wrote one of the most cited sexual harassment opinions in the country was deeply out of sync with what his colleagues felt was reasonable behavior at work. *Brooks v. San Mateo* is equally out of sync with what a reasonable jury would find today, when groping is nigh-universally seen as sexual harassment, and 86% of Americans believe in zero tolerance for sexual harassment.¹³⁸

2. *Subsequent Cases Have Used Brooks as the Standard for Sexual Harassment in the Ninth Circuit and Elsewhere*

Notwithstanding the poor analyses and inaccurate application of Supreme Court precedent, *Brooks* continues to be cited by courts. The current use of *Brooks* keeps sexual harassment cases away from juries and dismisses plaintiffs’ claims of sexual harassment in cases involving groping and sexual assaults. One such case involved the plaintiff’s alleged post-traumatic stress disorder as the result of sexual assault.¹³⁹

In the 2008 case of *Dolan v. United States*, the plaintiff was a student firefighter at the Department of Land Services.¹⁴⁰ She was harassed and assaulted by her mentor.¹⁴¹ While she was on a business trip, her mentor asked the plaintiff if she had a place to stay and offered to let her stay at his place; the plaintiff trusted him, viewed him as a mentor, and did not think he was sexually interested in her.¹⁴² When she arrived, he had been drinking, but the plaintiff had seen him drink

135. Dolan, *supra* note 131.

136. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [https://perma.cc/T2XC-UR8U].

137. *See id.*

138. Jackson, *supra* note 29.

139. *See Dolan v. U.S.*, No. 05-3062-CL, 2008 WL 362556, at *16 (D. Or. Feb. 8, 2008).

140. *Id.* at *3.

141. *See id.* at *5-6.

142. *See id.* at *5.

in past without incident and was not concerned.¹⁴³ However, she became uncomfortable when he started to slur his speech and was relieved when he went to bed.¹⁴⁴ Ten to fifteen minutes later, he returned wearing only boxer shorts, straddled her while she was sitting in a chair, rubbed his genitals against her, and tried to kiss her.¹⁴⁵ He held her in the chair for about ten minutes before she pushed him off.¹⁴⁶ She thought he was trying to rape her, ran to the bathroom and locked herself inside; he banged on the door and shouted at her to open it.¹⁴⁷ Eventually, she fled the scene.¹⁴⁸ The court cited *Brooks* and said this case was similar: “Although the conduct by [the mentor] [was] certainly egregious and totally unacceptable, it was an isolated incident and it was never repeated.”¹⁴⁹ The court cited *Brooks* to support its conclusion that the plaintiff failed to produce evidence to show that a reasonable person would find the environment hostile and granted summary judgment for the employer.¹⁵⁰

In the 2011 case of *Sanders v. Mohtheshum*, the plaintiff worked at a Pizza Hut.¹⁵¹ She was harassed by her manager, who groped her buttocks with two hands in front of other employees.¹⁵² He was charged with a misdemeanor after the plaintiff reported the incident to local police who came and removed the manager from the store.¹⁵³ The court cited *Brooks* for the proposition that a reasonable woman in the plaintiff's position would not have believed the terms and conditions of employment had been altered by the incident and granted summary judgment for the employer.¹⁵⁴

In the 2014 case of *Ludovico v. Kaiser Permanente*, the plaintiff was a nurse whose coworker grabbed her by her shoulder, pulled her in so that she was not free to leave, and said he would “take his big wet tongue and shove it into [her] mouth a few times and he was sure

143. *See id.*

144. *See id.*

145. *See id.* at *6.

146. *See id.*

147. *See id.*

148. *See id.*

149. *Id.* at *20.

150. *See id.*

151. *See Sanders v. Mohtheshum*, No. 10-CV-02897-KLM-DW, 2011 WL 6329866, at *1 (D. Colo. Dec. 19, 2011).

152. *See id.*

153. *See id.*

154. *See id.* at *5.

[she] would like that.”¹⁵⁵ The court cited *Brooks* to hold that the harassment was not pervasive because it was only a single incident and was not severe enough to alter conditions of employment.¹⁵⁶ The court concluded that the plaintiff had not proved a reasonable person would find the environment hostile.¹⁵⁷ The court granted the employer’s motion for summary judgment and cited *Brooks* to defeat the plaintiff’s retaliation claim.¹⁵⁸

Nelson v. Zinke is a 2018 case in which the plaintiff was a toxicologist at the Department of the Interior.¹⁵⁹ During a scuba diving mission, the plaintiff and a fellow scientist slept in a small one-room cabin with two bunk beds.¹⁶⁰ On the night of the incident, they had dinner and drank wine before the plaintiff took a sleeping pill and went to bed.¹⁶¹ The plaintiff recalled that her coworker told her he snored, and she teased him by saying she had earplugs and had taken a sleeping pill.¹⁶² During the night, the plaintiff became aware that someone was in her bed but was still not awake enough to be aware of what was happening.¹⁶³ The plaintiff could feel that the person had lifted her top, was fondling her breasts, and pulled her long underwear bottoms down.¹⁶⁴ She was still groggy, wondered where she was, and thought that her husband was with her.¹⁶⁵ When she became more aware and knew something was not right, she stood up from her bunk, and her coworker quickly moved back to his own.¹⁶⁶ The next day during a hike, her coworker told her he only realized she was asleep once she got up from the bunk.¹⁶⁷ He made comments including describing sliding his hand up her leg to “hit her where it counts” and his attempt to remove her long underwear to “go down on her,” claiming he thought she was receptive.¹⁶⁸ The plaintiff alleged she

155. See *Ludovico v. Kaiser Permanente*, 57 F.Supp.3d 1176, 1180 (N.D. Cal. 2014).

156. See *id.* at 1196.

157. See *id.*

158. See *id.*

159. See *Nelson v. Zinke*, No. CV 16-135-M-DWM, 2018 WL 1083032, at *1 (D. Mont. Feb. 27, 2018).

160. See *id.* at *2.

161. See *id.*

162. See *id.*

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.*

167. See *id.*

168. *Id.*

suffered from post-traumatic stress disorder, and after this incident, work became a daily trigger.¹⁶⁹

The court cited *Brooks* for the proposition that “no reasonable woman in [the plaintiff’s] position would believe” that this isolated incident permanently altered the terms or conditions of her employment.¹⁷⁰ The court granted summary judgment for the employer for both this claim and the plaintiff’s retaliation claim, again citing *Brooks*.¹⁷¹

3. Ninth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today

The prior Subsection described just a few of the over 1,200 cases citing *Brooks*. Many repeat its conclusion that women who were groped and assaulted were not sexually harassed. Instead of further entrenching the infinite regression of anachronism, courts in the Ninth Circuit should turn to two other oft-cited cases, *Ellison v. Brady*¹⁷² and *Fuller v. Oakland*, to support allowing juries to decide what’s reasonable now.¹⁷³

a. *Ellison v. Brady*

Ellison also took place in San Mateo.¹⁷⁴ The case involved an Internal Revenue Service agent, Sterling Gray, who became obsessed with the plaintiff.¹⁷⁵ First he asked her to lunch, and she accepted.¹⁷⁶ Then he asked her for a drink after work, and she declined, suggesting lunch instead, although then she tried to stay away from the office during lunchtime to avoid his invitation.¹⁷⁷ When he finally caught up to her, she declined him outright when he showed up in a three-piece suit and asked her out again.¹⁷⁸ Gray then wrote the plaintiff a bizarre note telling her he cried over her the night before and professing his love.¹⁷⁹ The plaintiff became “shocked and frightened” and left their

169. *See id.* at *6.

170. *Id.*

171. *See id.* at *15.

172. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

173. *See, e.g., Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995).

174. *See Ellison*, 924 F.2d at 873.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.* at 874.

179. *See id.*

common workspace, but Gray followed her and demanded they talk.¹⁸⁰ The plaintiff left the building and showed the note to her supervisor who remarked, “this is sexual harassment.”¹⁸¹ The plaintiff asked her supervisor to let her handle it, which she did by asking a male coworker to talk to Gray and tell him that the plaintiff was not interested and that he should leave her alone.¹⁸² The plaintiff then relocated for four weeks of training in a different city, only to receive a three-page, single-spaced letter from Gray professing his love in unhinged terms.¹⁸³

Importantly, the court considered the experience from the perspective of a reasonable person in the plaintiff’s situation in real time:

We cannot say as a matter of law that Ellison’s reaction was idiosyncratic or hyper-sensitive. . . . [Gray] told her that he had been “watching” her and “experiencing” her; he made repeated references to sex; he said he would write again. Ellison had no way of knowing what Gray would do next. A reasonable woman could consider Gray’s conduct, as alleged by Ellison, sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment.”¹⁸⁴

The court noted: “Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser’s conduct is merely a prelude to violent sexual assault.”¹⁸⁵ The court went on to hold that “Title VII’s protection of employees from sex discrimination comes into play long before the point where victims” experience psychological harm,¹⁸⁶ a holding subsequently adopted by the Supreme Court in *Harris v. Forklift*.¹⁸⁷

b. *Fuller v. Oakland*

Fuller v. Oakland, which has been cited 683 times, is another case that is in sync with contemporary understandings of sexual harassment.¹⁸⁸ The plaintiff, Patricia Fuller, was a former police officer who had a romantic relationship with a fellow officer, Antonio

180. *Id.*

181. *Id.*

182. *See id.*

183. *See id.*

184. *Id.* at 880.

185. *Id.* at 879.

186. *Id.* at 878.

187. *See Harris v. Forklift*, 510 U.S. 17, 22 (1993).

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

Romero.¹⁸⁹ After Fuller broke up with Romero, he repeatedly phoned Fuller and hung up.¹⁹⁰ Romero retrieved her changed and unlisted phone number from personnel records and continued this behavior.¹⁹¹ After Romero called her at work and threatened to kill himself, Fuller again changed her home number.¹⁹² Romero confronted Fuller in the police parking lot, blocked her exit, and made it clear that he would not let her leave until she gave him her unlisted number once again.¹⁹³ Fuller again changed her phone number.¹⁹⁴ Yet again, Romero retrieved it from her personnel files.¹⁹⁵

Close to a year after her breakup with Romero, Fuller was driving with her new boyfriend when Romero came speeding at them in an unmarked police car.¹⁹⁶ Romero forced Fuller to swerve to avoid head-on collision.¹⁹⁷ Romero continued his harassment, conducting an investigation of arrest rates that Fuller said focused solely on herself and her allies.¹⁹⁸ Romero also allegedly delayed action on Fuller's requests at work, gave her poor quality work assignments, and asked her for an alibi when his car was stolen.¹⁹⁹ Fuller reported "feeling ostracized and afraid for her safety, because visible isolation on the beat endangers an officer's safety."²⁰⁰ She developed a severe stress disorder, went on disability leave, and ultimately resigned.²⁰¹

The Ninth Circuit overturned the trial court's holding that the alleged conduct was insufficiently severe and pervasive and held that a hostile environment existed.²⁰² The court enumerated the long list of Romero's actions, focusing on the time he called her and threatened to kill himself and when he ran her and her new boyfriend off the road.²⁰³ These two "incidents, while only single incidents, [were] sufficiently extreme such that Fuller would no longer know what to expect next from Romero, and reasonably [would] be concerned that

189. *See id.* at 1525.

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.* at 1525-26.

197. *See id.* at 1526.

198. *See id.*

199. *See id.* at 1526.

200. *Id.*

201. *See id.*

202. *See id.* at 1527.

203. *See id.* at 1527-28.

he might do anything at any time.”²⁰⁴ The court then focused on Romero’s persistence in obtaining her unlisted phone number, which “would reasonably lead Fuller to believe that, no matter how much she tried, she couldn’t escape Romero. Taken together, the fear that Romero might do anything and the fact that she couldn’t escape would lead a reasonable woman to feel her working environment had been altered.”²⁰⁵ Like *Ellison*, *Fuller* considered what a reasonable person in the plaintiff’s position would consider frightening and inappropriate.²⁰⁶

Ellison v. Brady and *Fuller v. Oakland* are more consistent than *Brooks v. San Mateo*,²⁰⁷ both with Supreme Court precedent mandating courts consider the totality of the circumstances and with what reasonable people and juries would likely believe constitutes sexual harassment today.²⁰⁸

B. The Eleventh Circuit: *Mendoza v. Borden* and Its Progeny

1. *Mendoza v. Borden*

In the 1999 case of *Mendoza v. Borden*, the Eleventh Circuit upheld a trial court’s directed verdict, again taking the case away from a jury.²⁰⁹ *Mendoza*, though cited in 1,180 other cases, was controversial when decided—there was an en banc rehearing, and the eleven judges who decided it wrote five different opinions.²¹⁰

Mendoza was an accounting clerk who alleged sexual harassment by Daniel Page, the plant controller and highest-ranking executive at her work site.²¹¹ *Mendoza* testified that Page followed her around not only when she was working but also during lunch when she went outside to eat at a picnic table.²¹² *Mendoza* testified that “[Page] would look me up and down, very, in an obvious fashion.”²¹³ Three times he “looked at [her] up and down, and stopped in [her]

204. *Id.* at 1528.

205. *Id.*

206. *See id.*

207. *See generally* *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).

208. *See generally* *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Fuller*, 47 F.3d 1522.

209. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1241 (11th Cir. 1999).

210. *See id.*; *see also supra* note 26.

211. *See Mendoza*, 195 F.3d at 1242.

212. *See id.*

213. *Id.* at 1242-43.

groin area and made a . . . sniffing motion.”²¹⁴ One day while Mendoza was at a fax machine, Page came up and “rubbed his right hip up against [Mendoza’s] left hip” while grabbing her shoulders; “he had a smile on his face . . . like he was enjoying himself.”²¹⁵ This is not a form of physical contact that happens inadvertently. When Mendoza went into Page’s office, angry, and said, “I came in here to work, period,” he replied, “[Y]eah, I’m getting all fired up, too.”²¹⁶

Mendoza reflects three outdated norms: (1) sexual harassment is not actionable unless it consists of “uninhibited sexual threats”²¹⁷ or the like; (2) it is difficult to figure out what constitutes harassment because men and women perceive sexual behaviors very differently;²¹⁸ and (3) “mere” comments, looks, and physical contact are not severe enough to be considered sexual harassment.²¹⁹

The *Mendoza* majority correctly stated that the *Oncale* test requires that “the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”²²⁰ However, instead of examining what a reasonable person in Mendoza’s position would think, the court veered into a long string of earlier cases in which courts found no sexual harassment in the context of egregious behavior such as groping of breasts and buttocks, simulated masturbation, and comments such as calling one plaintiff a “sick bitch,” telling another “you have the sleekest ass” and inquiring about the color of a coworker’s nipples.²²¹ This infinite regression of

214. *Id.* at 1243.

215. *Id.* at 1243, 1272.

216. *Id.* at 1243.

217. *Id.* at 1247 (quoting *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir. 1999)).

218. *See id.* at 1256.

219. *Id.* at 1257.

220. *Id.* at 1246 (citing *Oncale v. Sundowner Offshore Services Inc.*, 118 S. Ct. 998, 1003 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993))).

221. *See Adusumilli v. City of Chicago*, 164 F.3d 353, 357, 361 (7th Cir. 1998) (describing “four isolated incidents in which a co-worker briefly touched her arm, fingers, and buttocks” and coworkers who made the plaintiff the butt of sexual jokes and repeatedly stared at her breasts); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) (describing a situation where a plaintiff’s supervisor touched plaintiff’s breasts (but only once, we’re reassured) and was told she had the “sleekest ass”); *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 747 (4th Cir. 1996) (describing how a male plaintiff’s supervisor stared at his crotch with a magnifying glass, stared at him in the bathroom, and touched his clothing); *Shepherd v. Comptroller of Public Accounts of State of Texas*, 168 F.3d 871, 872 (5th Cir. 1999)

anachronism ended with the court citing a 1999 Fifth Circuit case that mischaracterized Supreme Court precedent: “All of the sexual hostile environment cases decided by the Supreme Court have involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs’ work environment.”²²² This is very different from the *Harris* reasonableness standard. The court seemed to be saying that no reasonable person or jury could find a hostile atmosphere in a wide variety of contexts, which most Americans consider sexual harassment today.²²³ At a deeper level, the view that only an extensive pattern of uninhibited threats can sustain a cause of action for sexual harassment clearly signals the belief that sexual harassment is not serious unless it is downright frightening.

The five different opinions in *Mendoza* give dramatically different interpretations of the evidence.²²⁴ Judge Tjoflat’s dissenting opinion described Page’s behavior as “stalking and leering” that continued for at least four months until Mendoza quit her job.²²⁵ “Page stared at Mendoza’s groin on at least three occasions and made a loud, sniffing sound. For unexplained reasons, Mendoza failed to become enraptured. In fact, she became rather terrified.”²²⁶ Mendoza complained to one coworker that Page harassed her at least twelve different times.²²⁷ “She had been stalked, leered at, touched on her hips and shoulders, and her groin area had been made the object of a sniffing ritual so bizarre that only Page could understand its true import.”²²⁸ Judge Tjoflat concluded that “Mendoza’s whole employment experience at Borden’s may have been pervaded by overt and highly offensive acts of sexual aggression.”²²⁹

(describing incidents where the plaintiff’s coworker told her “your elbows are the same color as your nipples,” touched her arm, looked down her dress, and usefully informed her that she had big thighs).

222. *Mendoza*, 195 F.3d at 1247 (quoting *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir. 1999)).

223. See *BARNA*, *supra* note 73 (finding that virtually all Americans believe that groping is sexual harassment, and 86% of women and 70% of men believe that making sexual comments about someone’s body is sexual harassment).

224. See *Mendoza*, 195 F.3d at 1253, 1255, 1257, 1262, 1270.

225. *Id.* at 1259 (Tjoflat, J., concurring in part, and dissenting in part).

226. *Id.* at 1259-60.

227. See *id.* at 1260.

228. *Id.*

229. *Id.* at 1263.

The majority took a very different view of the evidence.²³⁰ The statement about being fired up did not, as a matter of law, “objectively indicate . . . a sexual or other gender-related connotation.”²³¹ The “‘following and staring’ may betray a romantic or sexual attraction,” the majority noted, but it was also “a natural and unavoidable occurrence when people work together in close quarters or when a supervisor keeps an eye on employees.”²³² Which was it in this context? Didn’t that determination involve a finding of fact? This court did not think so.²³³ The incident at the fax machine was dismissed as “one slight touching,” ignoring the fact that to grasp both someone’s shoulders while at the same time touching his or her hip with one’s own hip could reasonably be interpreted as miming of sex rather than a run-of-the-mill office ricochet.²³⁴

And that is the point. Assuming (as we do) that these five judges were reasonable people, this was a case in which reasonable people not only *could* but actually *did* disagree.²³⁵ That makes it an inappropriate case for a directed verdict. In a directed verdict situation, the court must assume that all of the evidence of the nonmoving party is true and draw all inferences in favor of the nonmoving party.²³⁶ The case “may be taken from the jury only if no rational jury could find against the [plaintiff].”²³⁷ To quote Judge Barkett, “assuming there are reasonable people who, while crediting Mendoza’s version of the fact, would not think that staring at a woman’s groin area while making sexually suggestive sniffing noises is degrading, humiliating, and/or intimidating, it seems beyond peradventure that many reasonable people would indeed find it to be so.”²³⁸

Why, then, did the majority take the case away from the jury? “In its zeal to discourage the filing of frivolous lawsuits,” wrote Judge Tjoflat, “the court today hands down an opinion that will certainly be used by other courts as a model of how *not* to reason in hostile environment sexual harassment cases.”²³⁹ Judge Tjoflat was presumably disappointed by *Mendoza*’s continued influence.

230. *See id.* at 1248.

231. *Id.* at 1248 (majority opinion).

232. *Id.*

233. *See id.*

234. *Id.* at 1249.

235. *See id.* at 1253, 1255, 1257, 1262, 1270.

236. *See id.* at 1269 (Barkett, J., concurring in part, and dissenting in part).

237. *Id.* at 1270 (citing *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949)).

238. *Id.* at 1275.

239. *Id.* at 1257 (Tjoflat, J., concurring in part, and dissenting in part).

One judge who sided with the majority attributed his decision to “the reluctant courts should have about permitting plaintiffs who claim sexual harassment to rely on their subjective impressions of ambiguous conduct.”²⁴⁰ This comment shows a lack of command of sexual harassment law. As the court itself noted in the majority opinion, the hostile environment test requires plaintiffs to prove that the environment would be seen as hostile *by a reasonable person*—an objective test.²⁴¹ This is the classic legal mechanism for protecting against a hypersensitive plaintiff.

Judge Tjoflat’s opinion also pointed out how the majority misapplied Supreme Court precedent that requires courts to judge the objective severity of an alleged harasser’s conduct from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances” (to quote *Oncale v. Sundowner*)²⁴² or by “looking at all the circumstances” (to quote *Harris v. Forklift*).²⁴³ Instead, the *Mendoza* majority did what “every defense attorney” does when faced with circumstantial evidence: “[I]solate each piece that the other side puts into evidence and then attempt to trivialize it by taking it out of context.”²⁴⁴ Judge Tjoflat continued, “[B]y examining each of *Mendoza*’s allegations of harassment in isolation from one another, the majority concludes that *Mendoza* does not have enough evidence to reach the jury because each allegation is individually insufficient.”²⁴⁵

A final limitation of the *Mendoza* majority opinion is its excessive focus on whether the conduct involved was physically threatening or humiliating. The majority contrasted the facts in *Mendoza* with those in a case where female employees were held down so that other employees could touch their breasts and legs.²⁴⁶ While that behavior is certainly physically threatening and intimidating, the lack of similar behavior in *Mendoza* is irrelevant: *Harris v. Forklift* did not require that conduct be physically intimidating in order to constitute sexual harassment.²⁴⁷ As will be

240. *Id.* at 1255 (Carnes, J., concurring).

241. *See id.* at 1245-46 (majority opinion).

242. *Id.* at 1258 (Tjofalt, J., dissenting) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998)).

243. *Mendoza*, 195 F.3d at 1258 (Tjofalt, J., dissenting) (quoting *Harris v. Forklift*, 510 U.S. 17, 23 (1993)).

244. *Id.* at 1262.

245. *Id.*

246. *See id.* at 1248 (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988)).

247. *See Harris*, 510 U.S. at 23.

discussed in more detail below, these words appeared only as part of a non-inclusive list of factors that “may” exist, in the context of an exhortation by the Supreme Court that lower courts should look at the totality of the circumstances.²⁴⁸

2. *Subsequent Courts Have Used Mendoza to Ratchet Up the Standard for Sexual Harassment in the Eleventh Circuit*

Despite deep disagreement on the panel that decided it, numerous sub-cases cite *Mendoza* to ratchet up the standard for what constitutes sexual harassment. In the 2010 case of *Wallace v. Baker Beauty, Inc.*, two plaintiffs were harassed by the head of their company.²⁴⁹ The head of the company looked at his female sales representatives and said: “I’ll tell you how I make my money off y’all: I pimp out all my hoes”; commented that a stylist had a “nice ass”; bragged about having sex with a particular woman and the types of things he would do with her; called one plaintiff a “stupid bitch” during a sales meeting; recited the phrase “jack each other off”; made comments about a customer “looking sexy with those ta-tas hanging out”; and laid on a hotel bed in front of one plaintiff and a customer, unzipped his pants, and said to the plaintiff, “you know if you ever get any fake boobs, you’re going to have to let me see and feel them.”²⁵⁰ The court used *Mendoza* to support its conclusion that the conduct was not sufficiently severe or pervasive, neglecting to mention the controlling reasonableness standard.²⁵¹ The court granted summary judgment for the employer.²⁵²

The 2010 case of *Lindquist v. Fulton County* involved a detention officer harassed by her supervisor.²⁵³ The supervisor said “Hon, I’ve got to do this,” and kissed her buttocks; grabbed her finger as she wrote in a log book and said “Damn, you are so beautiful, why don’t you come over here and sit on my lap?”; told her he wished he was the chair she was sitting on so that she would be sitting on him; commented he “wanted to make passionate love to her”; and asked

248. See *id.* at 23; see also *supra* notes 212-213.

249. See *Wallace v. Baker Beauty, Inc.*, No. 6:09-CV-0290-JEO, 2010 WL 11565358, at *2 (N.D. Ala. Oct. 5, 2010).

250. *Id.* at *2-4.

251. See *id.* at *10 (N.D. Ala. Oct. 5, 2010).

252. See *Id.* at *12.

253. See generally *Lindquist v. Fulton Cty.*, No. 1:09-CV-1102-RWS-WEJ, 2010 WL 11493834 (N.D. Ga. Nov. 23, 2010) report and recommendation adopted, No. 1:09-CV-1102-RWS, 2011 WL 13175953 (N.D. Ga. Jan. 14, 2011).

“what she would do if he just leaned over and kissed her.”²⁵⁴ The court cited *Mendoza* to support its conclusion that the facts “d[id] not satisfy the severe or pervasive harassment requirement,” characterizing the facts as “inappropriate comments and one isolated incident.”²⁵⁵ The court once again ignored controlling precedent on reasonableness and granted summary judgment for the employer.²⁵⁶

In the 2016 case of *Baldelamar v. Jefferson Southern Corporation*, the plaintiff’s coworker harassed her by telling her that Mexicans shouldn’t shave their genitals, touching her buttocks, hugging her from behind and pulling her close to his belly, using a measuring tape to simulate his penis and telling her he had a big one, standing behind her while she was working and making gestures as if he was having sex with her, sticking his tongue out at her while looking at her genitals, inviting her to a hotel to have sex, soliciting her to accompany him into a tunnel at the workplace so he could have sex with her, and more.²⁵⁷ The court cited *Mendoza* to once again consider the “severe or pervasive” issue without considering whether a reasonable jury could find an objectively hostile work environment.²⁵⁸ The court noted only that the harassment “f[ell] far short of the threshold level of ‘severe or pervasive’ conduct established by Eleventh Circuit precedent” and adopted the recommendation of the magistrate judge that summary judgment be granted for the employer.²⁵⁹

These cases, and others among the over 1,100 cases that have cited *Mendoza*, have ratcheted up the standard for what constitutes a hostile environment in the Eleventh Circuit in ways that are inconsistent with what reasonable people and juries would find today.

3. Eleventh Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today

Another oft-cited Eleventh Circuit case deserves more attention, not only because it is more consonant with what reasonable people would consider sexual harassment today, but also because it provides

254. *Id.* at *5-6.

255. *Id.* at *12.

256. *See id.*

257. *See* *Baldelamar v. Jefferson S. Corp.*, No. 415CV00209HLMWEJ, 2016 WL 9330869, at *6-9 (N.D. Ga. Oct. 13, 2016) report and recommendation adopted, No. 415CV00209HLMWEJ, 2016 WL 9331114 (N.D. Ga. Dec. 5, 2016).

258. *See id.*

259. *Id.* at *13.

an important corrective to a common misinterpretation of *Harris v. Forklift*.²⁶⁰

Allen v. Tyson Foods has been cited 2,651 times, yet the vast majority of those citations use *Allen* to discuss civil procedure standards for summary judgment.²⁶¹ Only 165 cases cite *Allen* on the issue of hostile work environment sexual harassment, and this aspect of the case deserves to be cited more. *Allen* involved a poultry processing plant in Alabama that was “engulfed by an atmosphere of improper sexuality” involving sexual intercourse at the plant, sexually graphic jokes, vulgar and sexually demeaning language, groping, exhibiting of genitalia and buttocks, and using chicken parts to mimic sexual organs and activities.²⁶² The plaintiff’s supervisor wrote her at least five sexually explicit notes, and the plaintiff claimed she was “intimidated and harassed” by her supervisor and other employees.²⁶³ The Eleventh Circuit properly referred to the Supreme Court’s “totality of the circumstances” test; but even more important is the court’s language about whether sexual harassment needs to be “physically threatening or humiliating” in order to constitute a hostile work environment.²⁶⁴

That language comes from the Supreme Court’s *Harris v. Forklift*, which says that the factors for assessing whether an environment is hostile “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.”²⁶⁵ The *Allen* court correctly noted that the “Supreme Court has provided a non-exclusive set of factors to consider.”²⁶⁶ Too often, as in *Mendoza*, courts act inconsistent with controlling Supreme Court precedent and with what most reasonable people believe today by treating the plaintiff’s failure to prove that the harassing behavior was physically threatening as per se proof that what occurred was not serious enough to constitute sexual harassment.²⁶⁷

260. See generally *Harris v. Forklift*, 510 U.S. 17 (1993).

261. See generally *Allen v. Tyson Foods, Inc.*, 121 F.3d 642 (1997); see also *supra* note 86.

262. *Id.* at 645.

263. *Id.*

264. *Id.* at 647.

265. *Harris*, 510 U.S. at 23.

266. *Allen*, 121 F.3d at 647 (holding simply that genuine issues of material fact existed on the issue of whether the environment was sufficiently hostile to constitute actionable harassment).

267. See *Mendoza v. Borden, Inc.*, 195 F.3d at 1238, 1246 (11th Cir. 1999).

Accordingly, courts in the Eleventh Circuit should look to *Allen* as an important corrective to cases that use the factors listed in *Harris v. Forklift* to ratchet up the standard, in effect holding that sexual harassment exists only when the behavior involved is truly threatening or intimidating.²⁶⁸ This misinterpretation of the plain language of *Harris v. Forklift* clearly reflects the now-outdated view that sexual harassment is not serious unless it contains an element of threats or violence. Recall that violence is no longer required even for proof of rape.²⁶⁹

C. The Seventh Circuit: *Baskerville v. Culligan* and Its Progeny

1. *Baskerville v. Culligan*

A third commonly cited case is *Baskerville v. Culligan International Company*, which has been cited 852 times since it was decided in 1995.²⁷⁰ This Seventh Circuit opinion was written by Judge Richard Posner, who announced himself “reluctant to upset a jury verdict challenged only for resting on insufficient evidence” yet managed to soldier on and do so.²⁷¹ Judge Posner found for the employer as a matter of law on the following facts.²⁷²

Valerie Baskerville was a secretary in the marketing department of a Chicago manufacturer of products for treating water.²⁷³ Her manager was Michael Hall who, Judge Posner said, “we assume truthfully” engaged in an unending series of puerile attempts at sexual humor.²⁷⁴ When Baskerville asked if he had gotten a Valentine’s Day card for his wife (who had not yet moved to Chicago), he responded by miming masturbation.²⁷⁵ Once when Baskerville wore a leather skirt, Hall grunted “um um um” in a way she interpreted as sexual.²⁷⁶ When the public address system began, “May I have your attention please,” Hall went to Baskerville’s desk and said, “You know what

268. See *Harris*, 510 U.S. at 23.

269. See JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 871, 887 (7th ed. 2012).

270. See generally *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428 (7th Cir. 1995); see also *supra* note 26.

271. *Id.* at 430.

272. See *id.*

273. See *id.*

274. *Id.*

275. See *id.*

276. *Id.*

that means, don't you? All pretty girls run around naked."²⁷⁷ When Baskerville commented that Hall's office was hot, Hall raised his eyebrows and said, "Not until you stepped your foot in here."²⁷⁸ When she brought him a document to sign, instead of treating her as a colleague with a job to do, he said: "There's always a pretty girl giving me something to sign off on."²⁷⁹ He told her his wife had told him that he had better clean up his act and "better think of you as Ms. Anita Hill," an evident admission that Hall's wife believed he was sexually harassing Baskerville (and he didn't seem to disagree).²⁸⁰ Hall told Baskerville that he had left the Christmas party early because he "didn't want to lose control" with so many pretty girls there.²⁸¹

The jury thought that a reasonable person would find this environment hostile and found for Baskerville.²⁸² Judge Posner overturned the jury verdict in an opinion that reflected three outdated norms: (1) that sexual harassment is not serious or that it can be taken seriously only when the behaviors complained of make the workplace "hellish"; (2) that women who accuse men of sexual harassment are not credible; and (3) 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.²⁸³

Judge Posner wrote off Hall's sexual comments as merely "boorish" and asserted that the "concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish."²⁸⁴ Judge Posner continued, "He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him . . . He made no threats. He did not expose himself, or show her dirty pictures."²⁸⁵ This entirely misses the #MeToo point: When women show up for work, they are entitled to be treated as colleagues, not sexual opportunities.

Judge Posner diminished the harassment experienced by Baskerville by comparing it to sexual assault: "On the one side lie sexual assaults . . . on the other side lies the occasional vulgar banter,

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *See id.*

283. *Id.*

284. *Id.*

285. *Id.* at 431.

tinged with sexual innuendo, of coarse or boorish workers.”²⁸⁶ “It is difficult to imagine a context that would render Hall’s sallies threatening or otherwise deeply disturbing.”²⁸⁷ Once again, a court misread *Harris v. Forklift* to support the view that inappropriate workplace behavior is not sexual harassment unless it is truly threatening, and once again, a court ignored the *Harris* reasonableness standard.²⁸⁸

Judge Posner’s characterization of Hall’s behavior as “boorish,” often repeated by the courts, comes close to the “boys will be boys” attitude that long has been used to excuse male misbehavior.²⁸⁹ The *Baskerville* jury rejected this even in the early 1990s, and it is even more unlikely that a contemporary jury would accept it today.²⁹⁰

Also intriguing is Judge Posner’s aside, “we assume truthfully” when reciting the plaintiff’s allegations.²⁹¹ The opinion contains no reference to an allegation by the employer that the plaintiff was lying.²⁹² It is true that the relevant procedural standard is that a judge overturning a jury verdict must take all inferences in favor of the nonmoving party, but that is different from having a judge, *sua sponte* and without evidence, raise questions about a plaintiff’s truthfulness.²⁹³ Did Posner’s aside reflect the stereotype, still common in 1995, that women who complained of sexual harassment cannot be trusted?²⁹⁴ If so, this is another way in which *Baskerville* is inconsistent with what a reasonable jury would likely believe today.²⁹⁵

Judge Posner made much of the fact that Hall was “a man whose sense of humor took final shape in adolescence.”²⁹⁶ But a lame sense of humor is not a defense in a sexual harassment case. Even if Judge Posner’s views reflected what a reasonable person and jury might

286. *Id.* at 430.

287. *Baskerville*, 50 F.3d at 430-31.

288. *See Harris v. Forklift*, 510 U.S. 17, 21-22 (1993) (discussing the reasonableness standard used to evaluate whether words or conduct constitutes sexual harassment).

289. *Baskerville*, 50 F.3d at 430.

290. *See id.*

291. *Id.* at 430.

292. *See id.*

293. *See id.*

294. *See Williams & Lebsack, supra* note 78 (noting that women have long been stereotyped as making false reports of sexual harassment in the workplace).

295. *See Graf, supra* note 69 (asserting that less than a third of Americans think that false accusations of sexual harassment are a major problem); *see also* Marist Poll, *supra* note 82 (finding that nearly two-thirds of individuals polled say that the accuser is more likely than the accused to be believed).

296. *Baskerville*, 50 F.3d at 431.

think in 1995—though they appear not to—they clearly do not reflect what a jury would likely believe now that 96% of women and 86% of men believe that touching or groping constitutes sexual harassment, and 86% of women and 70% of men now feel that making sexual comments about someone's body is sexual harassment.²⁹⁷

2. *Subsequent Courts Have Used Baskerville to Ratchet Up the Standard for Sexual Harassment in the Seventh Circuit*

Baskerville has been widely cited to heighten the standard for what constitutes an actionable hostile work environment in the Seventh Circuit. In the 2007 case of *Britz v. White*, a female plaintiff was harassed by a female supervisor who, when she was standing at her desk leaning over to write something, slapped her on the buttocks.²⁹⁸ When the plaintiff said, “Hey, that was my butt,” the supervisor responded, “[O]h, I know. It was just sticking out there, though.”²⁹⁹ Once, when the plaintiff was standing in her cubicle wearing a skirt, the supervisor grabbed the bottom of her skirt and tugged it.³⁰⁰ The supervisor also came up behind the plaintiff and tugged her hair, poked her in the side, and told her “I love you so much.”³⁰¹ The court cited *Baskerville* to support the contention that “the concept of sexual harassment is designed to protect working women from the kind of . . . attentions that can make the workplace hellish.”³⁰² Relying on *Baskerville*'s proposition that on one side is sexual assaults, nonconsensual physical contact, and uninvited solicitations, while on the other side is vulgar banter, the court concluded that the plaintiff had failed to present evidence that a reasonable jury could find that the conduct was objectively severe or pervasive and granted summary judgment for the employer.³⁰³

In the 2008 case of *Enriquez v. United States Cellular Corporation*, four plaintiffs were harassed by their manager.³⁰⁴ The manager asked the first to lie across his desk in lingerie; told her

297. BARN, *supra* note 73.

298. See *Britz v. White*, No. 06-3210, 2007 WL 4556700, at *1 (C.D. Ill. Dec. 21, 2007).

299. *Id.*

300. See *id.*

301. *Id.*

302. *Id.* at *3 (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1994)).

303. See *id.* at *3, *5.

304. See *Enriquez v. United States Cellular Corp.*, No. 06 C 3135, 2008 WL 4925012, at *1 (N.D. Ill. Nov. 14, 2008).

“those . . . pants look good on your ass”; “you have a nice body”; “[your] tits are going to look nice in that shirt”; and attempted to kiss her.³⁰⁵ He told the second plaintiff “you’ve got a nice ass”; asked to see her breasts several times; and asked “when are you going to let me lick your tits?”³⁰⁶ The third plaintiff he approached at a Christmas party, “pushed her legs open, and picked her up to dance, holding her with her legs around his waist for [about] thirty seconds.”³⁰⁷ The manager also sent her text messages, including one that said that she “had a bad boy for a boss and she didn’t know the things he could do with her,” told her he wanted to go out for drinks and “get her drunk so he could take advantage of her and have her do things that would probably cause trouble for him,” and told her “you look good enough to eat right now.”³⁰⁸ He called the fourth plaintiff and asked when they were going to “hook up,” twice lifted her up by grasping the outside of her thighs and called her “juicy,” and twice tried to kiss her.³⁰⁹ The court cited *Baskerville* to hold that “a few advances,” comments, and “one . . . brief contact” did not create an objectively hostile work environment, and the court granted summary judgment for the employer.³¹⁰

These cases show the way courts have cited *Baskerville* to preclude a finding of sexual harassment in the context of facts that are even more egregious than those involved *Baskerville*. If *Baskerville* itself is inconsistent with what a reasonable person or jury would find today, its progeny are even more so.

3. Seventh Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today

Two often-cited Seventh Circuit cases are more consistent than *Baskerville* with Supreme Court precedent and with what reasonable people believe today.

305. *Id.* at *1.

306. *Id.* at *2.

307. *Id.* at *3.

308. *Id.* at *2-3.

309. *Id.* at *3.

310. *Id.* at *10-15 (discussing each plaintiff’s case under the *Baskerville* objective standard).

a. *Hostetler v. Quality Dining*

Hostetler v. Quality Dining, which has been cited 312 times, involved the assistant manager of a restaurant whose fellow assistant manager “grabbed her face one day at work and stuck his tongue down her throat.”³¹¹ The next day when he tried again, she put her head between her knees, at which point he started unfastening her bra.³¹² During the same week, he approached her while she was serving customers at the counter and told her, “in crude terms, that he could perform oral sex on her so effectively that ‘[she] would do cartwheels.’”³¹³ When she reported him, she was transferred to another restaurant that required a long commute and a redeye shift that got her home most nights at 4:00 a.m.³¹⁴ She received counseling for the trauma and was taking Prozac at the time of her deposition.³¹⁵ The trial court granted summary judgment for the employer on the grounds that what happened was not severe.³¹⁶

The Fifth Circuit noted that, while Title VII is not a “general civility code,”³¹⁷

We have no doubt that the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive. . . . Having a coworker insert his tongue into one’s mouth without invitation and having one’s brassiere nearly removed is not conduct that would be anticipated in the workplace, and certainly not in a family restaurant. A reasonable person in Hostetler’s position might well experience that type of behavior as humiliating, and quite possibly threatening. . . . Even the lewd remark . . . was more than a casual obscenity. . . . These were not, in sum, petty vulgarities with the potential to annoy but not to objectively transform the workplace to a degree that implicates Title VII.³¹⁸

The Seventh Circuit reversed the trial court’s grant of summary judgment: “Holding such acts not to be severe as a matter of law is another way of saying that no reasonable person could think them serious enough to alter the plaintiff’s work environment.”³¹⁹ In the case at hand, “[a] factfinder reasonably could interpret the alleged course

311. *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 801 (7th Cir. 2000); *see also supra* note 86.

312. *See id.* at 802.

313. *Id.*

314. *Id.* at 804.

315. *See id.* at 805.

316. *See id.*

317. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

318. *Hostetler*, 218 F.3d at 807-08.

319. *Id.* at 808-09.

of conduct as sufficiently invasive, humiliating, and threatening to poison Hostetler's working environment."³²⁰ *Hostetler* is an admirably clear and thoughtful application of the reasonable person standard articulated by the Supreme Court in *Harris v. Forklift*.³²¹

b. *Smith v. Sheahan*

Smith v. Sheahan, which has been cited 204 times, involved a prison guard in the Cook County Jail, Ronald Gamble, who violently assaulted a fellow guard, Valeria Smith, calling her a "bitch," threatening to "fuck [her] up," and pinning her against a wall while twisting her wrist so severely she needed corrective surgery to repair her ligaments.³²² Gamble was convicted of criminal battery and placed under court supervision, but when Smith complained to her employer, she was advised to "kiss and make up."³²³ The trial court awarded summary judgment for the employer on the grounds that the incidents were "too isolated to be actionable."³²⁴ Smith provided affidavits from six other female guards recounting a total of seven incidents where Gamble was verbally abusive or physically threatening of female colleagues.³²⁵ After Gamble's conviction, he was promoted, and Smith received a transfer she considered "tantamount to a demotion."³²⁶ The trial court granted summary judgment for Gamble, "partially discount[ing] the seriousness of Gamble's misconduct because Smith 'voluntarily' stepped into the 'aggressive setting' of the jail."³²⁷

The Seventh Circuit reversed, holding that a "jury would also be entitled to conclude that the assault Smith suffered was severe enough to alter the terms of her employment even though it was a single incident."³²⁸ The court noted that jurors are expected to bring their common sense to assess what behavior is appropriate in a given social setting.³²⁹ The court rejected the defendant's contention that an assault must be sexual to qualify as sexual harassment, pointing out that hostile behavior based on sex is prohibited by Title VII even when the

320. *Id.* at 809.

321. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

322. *Smith v. Sheahan*, 189 F.3d 529, 531 (7th Cir. 1999); *see also supra* note 86.

323. *Id.*

324. *Id.* at 530.

325. *Id.* at 531.

326. *See id.* at 532.

327. *Id.* at 534.

328. *Id.* at 533.

329. *See id.* at 535.

behavior is not sexual. The court also rejected the employer's contention that Smith consented to violence by choosing to work in the "aggressive setting" of a jail.³³⁰

While both *Hostetler* and *Smith* involve extreme behavior—far beyond what occurs in most sexual harassment cases or what Supreme Court precedent requires to sustain a case—both signal a healthy respect for the role of the jury in cases where the touchstone is what a reasonable person would consider inappropriate workplace behavior.

D. The Sixth Circuit: *Bowman v. Shawnee State University* and Its Progeny

1. *Bowman v. Shawnee State University*

Bowman v. Shawnee State University is a Sixth Circuit opinion involving sexual harassment of a man by a woman that has been cited 712 times.³³¹ As in many of the other cases-in-chief, the judges did not allow a jury to decide this case.³³² The Sixth Circuit opinion affirmed a grant of summary judgment to the employer.³³³

Thomas E. Bowman, a part-time instructor teaching health and physical education courses, filed sexual harassment claims against Shawnee State University and Dr. Jessica J. Jahnke, the then Dean of Education.³³⁴ At a Christmas party, Jahnke grabbed Bowman's buttocks.³³⁵ He said that if someone were to do that to her, she would fire him or her, to which she responded that "she controlled his ass and she would do whatever she wanted with it."³³⁶ At work, Jahnke rubbed his shoulder; he jerked away and said, "No."³³⁷ Jahnke kept calling him at home and twice invited Bowman to her house to go with her into her whirlpool and her swimming pool; she propositioned him repeatedly, ignoring his clear statements that he was not interested.³³⁸ When Bowman confronted Jahnke, she accused him of lying, put her finger on his chest, and pushed him towards the door; he responded,

330. *Id.* at 534-35.

331. *See* *Bowman v. Shawnee State University*, 220 F.3d 456 (6th Cir. 2000); *see also supra* note 86.

332. *See* *Bowman*, 220 F.3d at 456.

333. *See id.* at 465.

334. *See id.* at 456, 458.

335. *See id.* at 459.

336. *Id.*

337. *Id.* at 458-59.

338. *See id.* at 459.

“This is the last time you’re ever going to touch me.”³³⁹ In addition to the sexual harassment allegations, Bowman also alleged that she treated him differently because of his sex, imposing requirements on him that she did not impose on women.³⁴⁰

Bowman reflects three outdated norms: (1) that groping and persistent sexual comments and propositions do not necessarily constitute sexual harassment; (2) that (instead of zero tolerance) employers are free to allow supervisors to grope and proposition those they supervise; and (3) that only women can be sexually harassed.

Like *Mendoza*, *Bowman* involved sexual harassment with a strong undercurrent of abusive bullying. In addition to the sexual harassment, Bowman alleged that Jahnke: wrote a memorandum chastising Bowman for missing a class when he had not done so; chastised him for missing a meeting that was not required and was scheduled at a time he was teaching; and asked him to come over to her house and repair her deck.³⁴¹ The court acknowledged that the defendant “tormented” the plaintiff, but it treated this as irrelevant to his sexual harassment claim.³⁴² But researchers in sociology, management science, psychology, and human resources journals have documented that sometimes sexual harassment is part and parcel of a pattern of aggression and bullying.³⁴³ The #MeToo movement and

339. *Id.*

340. *See id.*

341. *See id.*

342. *Id.* at 464.

343. *See generally* JEFF HEARN & WENDY PARKIN, GENDER, SEXUALITY AND VIOLENCE IN ORGANIZATIONS: THE UNSPOKEN FORCES OF ORGANIZATION VIOLATIONS (2001). *See generally* Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOLOGIST 1070 (1993) (identifying sexual harassment as a form of violence against women); Carol Jones, *Drawing Boundaries: Exploring the Relationship Between Sexual Harassment, Gender and Bullying*, 29 WOMEN’S STUD. INT’L F. 147 (2006); Anne M. O’Leary-Kelly et al., *Sexual Harassment as Aggressive Behavior: An Actor-Based Perspective*, 25 ACAD. MGMT. REV. 372 (2000) (asserting that sexual harassment is one form of aggressive behavior); Rebecca A. Thacker & Gerald R. Ferris, *Understanding Sexual Harassment in the Workplace: The Influence of Power and Politics within the Dyadic Interaction of Harasser and Target*, 1 HUM. RESOURCE MGMT. REV. 23 (1991) (asserting sexual harassment as a power dynamic); Christopher Uggen & Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, 69 AM. SOC. REV. 64 (2004) (noting sexual harassment as a gendered expression of power); Dacher Keltner, *Sex, Power, and the Systems That Enable Men Like Harvey Weinstein*, HARV. BUS. REV. (Oct. 13, 2017), <https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein> [<https://perma.cc/WNN8-24SY>]; Zoe Williams, *Sexual harassment 101: what everyone needs to know*, GUARDIAN (Oct. 16, 2017), <https://www.theguardian.com/world/2017/oct/16/facts-sexual-harassment->

some courts have added an important dimension, highlighting that sexual harassment is, at its core, about the abuse of power.³⁴⁴ All this should inform courts' discussions of bullying as part of a pattern of sexual harassment in the future.

The *Bowman* court discounted much of the evidence presented on the grounds that Bowman had not shown that the non-sexual conduct he complains of had anything to do with his gender.³⁴⁵ While he may have been subject to intimidation, ridicule, and mistreatment, he did not show that he was treated in a discriminatory manner because he was male.³⁴⁶

In cases involving women, plaintiffs have not been required to prove that the reason for sexual behavior toward them was that they were women, and it is not clear what such proof would look like.³⁴⁷ Does a boss have to announce, "I am grabbing your butt (or making you fix my deck) because you are a woman/man"?

The *Bowman* court's incredulity in the face of the argument that a man could be the subject of sexual harassment and its consequent imposition of a double standard are both inconsistent with newer understandings of sexual harassment incident to #MeToo. While most of the early highly publicized cases of sexual harassment involved women, more recent stories have highlighted that people of all genders encounter sexual harassment.³⁴⁸ The belief that sexually harassed men just "got lucky" perpetuates harmful stereotypes of men as always ready for sex and women as always coy. The Supreme Court has

workplace-harvey-weinstein [<https://perma.cc/3D4Y-E92H>]; Raj Persaud & Peter Bruggen, *What Is the Link Between Sex and Power in Sexual Harassment?*, PSYCHOL. TODAY (Nov. 08, 2017), <https://www.psychologytoday.com/us/blog/slightly-blightly/201711/what-is-the-link-between-sex-and-power-in-sexual-harassment> [<https://perma.cc/QFV3-JBD9>].

344. See Grace Donnelly, *Anita Hill: Companies Should Treat Sexual Harassment as an Abuse of Power*, FORTUNE (Dec. 13, 2018), <http://fortune.com/2018/12/12/anita-hill-sexual-harassment/> [<https://perma.cc/K4EY-A97F>]. See, e.g., *Smith v. Sheahan*, 189 F.3d 529, 533 (1999) ("It makes no difference that the assaults and the epithets sounded more like expressions of sex-based animus rather than misdirected sexual desire (although power plays may lie just below the surface of much of the latter behavior as well).").

345. See *Bowman*, 220 F.3d at 464.

346. See *id.* at 464.

347. See, e.g., *Harris v. Forklift*, 510 U.S. 17 (1993).

348. See, e.g., Bernstein et al., *supra* note 66; Michael Paulson, *Kevin Spacey Issues Apology to Actor After Sexual Accusation*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/theater/kevin-spacey-gay-anthony-rapp.html> [<https://perma.cc/98DP-FBPX>].

decried this kind of gender stereotyping since the 1970s—for men as well as women.³⁴⁹

The trial court found that the Christmas party incident, the whirlpool incident, and the swimming pool incident were sufficiently imbued with a sexual flavor to be sexual harassment, but that the harassment was “not nearly as severe or pervasive” as in earlier cases where no sexual harassment had been found, including one case that involved battery.³⁵⁰ This is a classic example of the infinite regression of anachronism where, again, the court relied on past cases without making the core reasonableness inquiry required by the Supreme Court.³⁵¹

2. *Subsequent Courts Have Used Bowman to Ratchet Up the Standard for Sexual Harassment in the Sixth Circuit*

Subsequent cases have cited *Bowman* to deprive plaintiffs of their right to have a jury assess whether a reasonable person in the plaintiff’s shoes would find an environment hostile. In the 2003 case of *Hudson v. M.S. Carriers, Inc.*, the plaintiff was harassed by her supervisor’s boss.³⁵² He asked her what kind of panties she was wearing; told her about going to a strip club and swiping the stripper’s rear end with his credit card; and called her into his office to show her his “fake penis,” which was a pencil which he put close to his genitals.³⁵³ Twice, he took off his shoes and touched the plaintiff with his feet, and once, he wetted his finger and stuck it in her ear, saying he wanted to “make Oreo cookies,” which she understood to mean he desired sex.³⁵⁴ On numerous other occasions, he touched her in an “offensive and unwanted manner.”³⁵⁵

The court cited *Bowman* for the proposition that a hostile work environment exists when the workplace is “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment

349. See generally Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267 (2012) (noting that under the influence of Ruth Bader Ginsberg, the Supreme Court has decried gender stereotypes since the 1970s).

350. *Bowman*, 220 F.3d at 464.

351. See *id.*

352. See *Hudson v. M.S. Carriers, Inc.*, 335 F. Supp.2d 853, 856 (W.D. Tenn. 2003), *aff’d*, 126 F. App’x 297 (6th Cir. 2005).

353. *Id.* at 857.

354. *Id.*

355. *Id.*

and create an abusive working environment.”³⁵⁶ Relaying the facts of *Bowman*, the court stated that the behavior was “boorish” but not sufficiently severe or pervasive to survive summary judgment.³⁵⁷ The court went on to state that just because some of the incidents involved physical invasion, that “[did] not in and of itself militate a finding of hostile environment.”³⁵⁸ Consequently, the court granted summary judgment for the employer.³⁵⁹

In the 2009 case of *Talley v. United Parcel Service*, the plaintiff’s coworker harassed her.³⁶⁰ Once he “look[ed] at her private area” and asked her “when you going to leave that old man and get some of this sexy bowleggedness?”³⁶¹ Twice he rubbed the plaintiff’s arm, once while looking at her private parts and saying “you know you got some money.”³⁶² An unspecified number of times, he looked at the plaintiff’s “private area” and said inappropriate things and was generally flirtatious.³⁶³ The court cited *Bowman* and stated that in the present case, the conduct was comparable or less frequent and severe than in *Bowman*.³⁶⁴ The court said that “[a]lthough it appear[ed] [the] flirtatious or inappropriate behavior occurred more frequently than the three instances of harassment th[e] Plaintiff specifically allege[d], this behavior also appear[ed] to be less severe.”³⁶⁵ Furthermore, the plaintiff did not allege that any of the behavior was physically threatening.³⁶⁶ Thus, the conduct did not rise to the level of severe or pervasive harassment sufficient to sustain a hostile work environment claim. Once again, the court’s analysis failed to conduct the required reasonableness analyses. The court granted the employer’s motion for summary judgment.³⁶⁷

356. *Id.* at 859 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

357. *Id.* at 862.

358. *Id.*

359. *See id.*

360. *Talley v. United Parcel Serv.*, No. 08-2282, 2009 WL 10698644, at *1 (W.D. Tenn. May 26, 2009).

361. *Id.*

362. *Id.*

363. *Id.*

364. *See id.* at *4.

365. *Id.*

366. *See id.*

367. *See id.*

3. *Sixth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*

A case that deserves to be cited more frequently is *Williams v. General Motors*.³⁶⁸ It is already influential, as it has been cited 833 times.³⁶⁹ Marilyn Williams, who worked for General Motors for more than thirty years, alleged that she encountered comments such as “hey slut,” “I’m sick and tired of these fucking women,” and “[y]ou left the dick out of the hand,” and propositions to “rub up against me anytime” and “back right up to me.”³⁷⁰ Williams said she also was subjected to constant hazing, such as having a room padlocked while she was inside it, having forms glued to the top of her desk, and having equipment moved to block entrances she needed to use.³⁷¹

Williams points out that after *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*, employers have a duty to take reasonable care to prevent and promptly correct sexually harassing behavior.³⁷² The Sixth Circuit criticized the lower court for dismissing the incidents as “infrequent, not severe, not threatening or humiliating, but merely offensive.”³⁷³ The court also stressed that the “*subjective test must not be construed as requiring that a plaintiff feel physically threatened.*”³⁷⁴ This is an important corrective to some courts’ misuse of oft-quoted language in *Harris v. Forklift* listing factors that “may” occur in sexual harassment cases.³⁷⁵ The *Williams* court also correctly identified that the comments about sluts and fucking women “could be viewed by a jury as humiliating and fundamentally offensive to any woman” and “go[t] to the core of Williams’s entitlement to a workplace free of discriminatory animus.”³⁷⁶

Williams also astutely recognized that the hazing behavior dismissed by the district court as “pranks” “could well be viewed as work-sabotaging behavior that creates a hostile work environment,” particularly when accompanied by “threatening language and sexually

368. See generally *Williams v. Gen. Motors Corp.*, 187 F.3d 553 (6th Cir. 1999).

369. See *id.*; see also *supra* note 86.

370. *Williams*, 187 F.3d at 559.

371. *Id.*

372. See *id.* at 567. See generally *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

373. *Williams*, 187 F.3d at 561.

374. *Id.* at 566 (emphasis in original).

375. See *Harris v. Forklift*, 510 U.S. 17, 23 (1993).

376. *Williams*, 187 F.3d at 563.

aggressive innuendo.”³⁷⁷ Studies of sexual harassment in blue-collar jobs report that razzing and hazing is commonplace in such jobs (often, but not always, accompanied by inappropriate sexual behavior) that can create a hostile work environment.³⁷⁸

Williams criticized the lower court for having “disaggregated the plaintiff’s claims contrary to the Supreme Court’s ‘totality of circumstances’ directives, which robbed the incidents of their cumulative effect.”³⁷⁹ The issue, said the court, “is not whether each incident of harassment *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether—taken together—the reported incidents make out such a case.”³⁸⁰ “This totality-of-circumstances examination should be viewed as the most basic tenet of the hostile-work-environment cause of action.”³⁸¹

Williams deserves to be even more widely cited than it is. It is more consistent than *Bowman* with Supreme Court precedent and with what a reasonable person and jury today would believe constitutes sexual harassment.

E. The Fifth Circuit: *Shepherd v. Comptroller* and Its Progeny

1. *Shepherd v. Comptroller*

The final case-in-chief is *Shepherd v. Comptroller of Public Accounts*, a Fifth Circuit opinion that has been cited 584 times.³⁸² *Shepherd* reflects four outdated norms: (1) that sexualized touching is not sexual harassment; (2) that comments, up to and including “your elbows are the color of your nipples,” are “mere utterance[s]” that women need to take in stride; (3) that sexual harassment is not serious unless it is physically threatening; and (4) that (instead of zero tolerance) employers are free to tolerate sexual harassment so long as it does not “destroy . . . [women’s] opportunity to succeed in the workplace.”³⁸³

377. *Id.* at 564.

378. *See generally* JAMES E. GRUBER & PHOEBE MORGAN, IN THE COMPANY OF MEN: MALE DOMINANCE AND SEXUAL HARASSMENT (2005) (exploring the ways sexual harassment affects blue-collar women).

379. *Williams*, 187 F.3d at 561.

380. *Id.* at 562 (emphasis in original).

381. *Id.* at 563.

382. *See generally* *Shepherd v. Comptroller of Pub. Accountants*, 168 F.3d 871 (5th Cir. 1999); *see also supra* note 86.

383. *Id.* at 872.

Plaintiff's coworker, Jodie Moore, assaulted Debra Jean Shepherd for two years after she got engaged to Moore's brother-in-law.³⁸⁴ Moore patted his lap and told Shepherd, "[h]ere's your seat," and announced, "your elbows are the same color as your nipples."³⁸⁵ Moore told Shepherd she had big thighs and "simulated looking under her dress."³⁸⁶ He also tried repeatedly to look down her top and stroked her arm in an apparently sexual way, rubbing a hand from her shoulder down to her wrist.³⁸⁷

The court noted that "Shepherd testified that Moore never propositioned her, asked her out on a date, or suggested that he would like to sleep with her."³⁸⁸ But of course that is irrelevant: Shepherd alleged a hostile work environment, not *quid pro quo* harassment.³⁸⁹ Irrelevant, too, is that Moore "had a friendly relation" with Shepherd outside of work.³⁹⁰ Because Moore was engaged to Shepherd's brother-in-law, Moore could have been under family pressures to keep up appearances.³⁹¹

Because the employer took prompt and effective remedial action, the plaintiff lost.³⁹² But what is troubling—and influential—is the court's holding that Moore's behavior did not create a hostile environment because it was not something a reasonable person might find to be sexual harassment.³⁹³ "We agree with Shepherd that the comments made by Moore were boorish and offensive. The comments, however, were not severe."³⁹⁴ The court wrote off the "nipples" comment as a "mere utterance of an epithet that engender[s] offensive feelings."³⁹⁵ The court thereby communicated that women should just take such comments in stride.³⁹⁶

384. *See id.*

385. *Id.*

386. *Id.*

387. *See id.* The Authors have made reasonable inferences in favor of the plaintiff (namely that the stroking could be read as sexual) given that this case involved a summary judgment motion brought by the employer.

388. *Id.*

389. *See id.* *Quid pro quo* sexual harassment is "sleep with me or you're fired" sexual harassment. The legal test requires the plaintiff to prove that the harassment related to sex, was unwelcome, and adversely affected a term or condition of employment. *See, e.g., Jones v. Flagship Int'l.*, 793 F.2d 714, 721 (5th Cir. 1986).

390. *Shepherd*, 168 F.3d at 872.

391. *See id.*

392. *See id.* at 875.

393. *See id.* at 874.

394. *Id.*

395. *Id.* at 872, 874.

396. *See id.* at 874.

However, it wasn't just the comment. The court wrote off the physical touching as "too tepid" on the grounds it was not "physically threatening."³⁹⁷ This court, too, misused the language from *Harris v. Forklift*, which merely listed physically threatening conduct as a factor that "may" (or may not) exist in sexual harassment cases.³⁹⁸ Again, the court relied on the outdated understanding that sexual harassment is not serious unless it is downright frightening.³⁹⁹ This is a far cry from the controlling standard, as articulated by the Supreme Court, that sexual harassment is triggered long before a plaintiff suffers from psychological harm.⁴⁰⁰

Recall that the "tepid" conduct was a coworker running his hand down Shepherd's arm from her shoulder to her wrist, making comments about her nipples, repeatedly trying or miming looking up her skirt and down her shirt.⁴⁰¹ It is not clear how any of this conduct could be read as anything other than sexually aggressive.⁴⁰² It is highly unlikely that a reasonable person or jury would agree with the *Shepherd* court's conclusion today.

In a classic example of the infinite regression of anachronism, the court compares what happened to Shepherd as "far less objectionable" than cases of true and actionable sexual harassment involving a female employee who was "sexually groped repeatedly"⁴⁰³ and an "environment where male coworkers cornered women and rubbed their thighs, grabbed their breasts, and held a woman so that a man could touch her."⁴⁰⁴ This again reflects an era when garden-variety sexual harassment was viewed as not serious—as something any woman worth her salt could and should deal with on her own. Assuming that sentiment reflected what a reasonable person or jury would have believed in the late 1990s, it does not reflect what they likely would believe today.⁴⁰⁵

397. *Id.*

398. *Harris v. Forklift*, 510 U.S. 17, 17 (1993).

399. *See generally id.*

400. *See id.* at 22.

401. *Shepherd*, 168 F.3d at 874.

402. *See* BARNA, *supra* note 73 (finding that 86% of women and 70% of men believe that making sexual comments about someone's body is sexual harassment).

403. *Shepherd*, 168 F.3d at 874-875 (citing *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989)).

404. *Id.* at 875 (citing *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988)).

405. *See* Jackson, *supra* note 29.

2. *Subsequent Courts Have Used Shepherd to Ratchet Up the Standard for Sexual Harassment in the Fifth Circuit*

Shepherd has been widely cited to heighten the standard for hostile environment in the Fifth Circuit, which one commentator called “perhaps the most aggressive circuit affirming grants of summary judgments” in hostile environment cases.⁴⁰⁶ *Shepherd* is cited in cases that involve threats and sexual assaults far in excess of what occurred in *Shepherd*.⁴⁰⁷

In 2004, the Eastern District of Louisiana relied on *Shepherd* to grant summary judgment for the employer in *Equal Employment Opportunity Commission v. Rite Aid Corporation*, which involved a plaintiff harassed by two co-workers.⁴⁰⁸ One cupped her breast and backed her into a corner of the store three times; asked for her phone number and threatened to come to her house (which might well make a reasonable woman fear for her safety); commented on her body; and told her numerous times that she better not gain weight.⁴⁰⁹ A second coworker also threatened to come to her house and rubbed his finger across the back of her neck, causing her to jump.⁴¹⁰ He pinched her thigh, tried to kiss her, and twice brushed up against her and said, “I wonder what it feel [sic] like.”⁴¹¹ He also walked close to her, looked her up and down and made remarks under his breath, commented how fine and pretty she was, commented how nice her chest was, and asked her what she slept in at night.⁴¹²

The court, which also had evidence of inappropriate conduct towards other female employees, cited *Shepherd* to say that totality of circumstances did not add up to sexual harassment because Title VII only bars conduct so severe or pervasive it “destroys . . . [the] opportunity to succeed in the workplace.”⁴¹³ The court excused the conduct as merely “offensive and sophomoric” but not severe or pervasive enough to alter the terms or conditions of employment.⁴¹⁴

406. Medina, *supra* note 126, at 351.

407. See generally *E.E.O.C. v. Rite Aid Corp.*, No. CIV.A. 03-2079, 2004 WL 1488578 (E.D. La. June 30, 2004).

408. *E.E.O.C. v. Rite Aid Corp.*, No. CIV.A. 03-2079, 2004 WL 1488578 (E.D. La. June 30, 2004).

409. See *id.* at *1-2.

410. See *id.*

411. *Id.* (implying that the plaintiff believed this to be a reference to what it would feel like to have sex with her).

412. See *id.* at *1-2.

413. *Id.* at *6.

414. *Id.* at *5.

Despite the sexual assaults by two colleagues, the court said the coworker's conduct was the equivalent to the "mere utterance of an epithet that engender[s] offensive feelings."⁴¹⁵ The court admitted that the conduct was "quite unwelcome" but not severe or physically threatening, despite the assaults and threats to come to the plaintiff's house.⁴¹⁶ This was not the kind of "extreme conduct" that would render a work environment objectively hostile or abusive.⁴¹⁷ Despite acknowledging that the issue was whether a reasonable jury could find a hostile environment, the court inexplicably prevented the extreme facts of this case from reaching a jury based on its reading of *Shepherd*.⁴¹⁸

In the 2006 case of *Chelette v. State Farm Mutual Automobile Insurance Co.*, yet another plaintiff was harassed by a supervisor, who twice tried to kiss the plaintiff when they were alone together in a car for business reasons, after she had clearly indicated her lack of interest.⁴¹⁹ He also talked about his lack of a sex life and asked whether she had ever thought about having an affair; commented that another co-worker was lucky because he had affairs with young college women; brought her a sheer swimsuit as a gift after a trip to Hawaii; and kept touching her, including trying to kiss her, massaging her shoulder repeatedly, brushing his arm against her breast perhaps more than ten times.⁴²⁰ He stared at her breasts; commented that "she was proportioned nicely" and her husband was lucky; and "commented about her body and how he liked to watch her walk away."⁴²¹ The court relayed the facts of *Shepherd* as one of several comparison cases and said the allegations in the present case "simply do not rise to the level of severe or pervasive conduct required for recovery."⁴²² The court granted summary judgment for the employer.⁴²³

One year later, *Hancock v. Barron Builders & Management Company, Inc.* involved three plaintiffs alleging harassment by the

415. *Id.* (quoting *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999)).

416. *Id.* at *6.

417. *Id.*

418. *See id.* at *6-7.

419. *See Chelette v. State Farm Mut. Auto. Ins. Co.*, No. CIV 04-2440, 2006 WL 2513918, at *2 (W.D. La. Aug. 29, 2006).

420. *See id.* at *9.

421. *Id.*

422. *Id.*

423. *See id.* at 12.

company president.⁴²⁴ The president described his use of sex toys and demonstrated which positions he preferred; discussed having sex with his wife, referring to her in terms too “demeaning” to be repeated by the court; talked about videotaping his sexual encounters; talked about the number of sex partners he had; graphically described situations where he date-raped women in college; asked for an opinion on Hispanics as sexual partners; requested one plaintiff come to his house in a bikini; and once entered the plaintiff’s office and began to take off his shirt.⁴²⁵ The court cited *Shepherd* to write off this conduct as “[o]ccasional comments, discourtesy, rudeness, or isolated incidents” that, “unless extremely serious,” were insufficient to establish sexual harassment.⁴²⁶ “Title VII is intended only to prohibit . . . conduct . . . ’ so severe or pervasive that it destroys . . . opportunity to succeed in the workplace,” asserted the court—a standard inconsistent with the Supreme Court standard of reasonableness.⁴²⁷ The president’s comments were “boorish and offensive” but “not so severe or pervasive as to affect a term, condition, or privilege of the plaintiffs’ employment,” said the court, granting summary judgment for the employer.⁴²⁸

Another 2007 case, *Combs v. Exxon Mobile Corporation*, involved a plaintiff harassed by a co-worker who pressed his genitals against her buttocks, touched her breasts, and tried to hug her.⁴²⁹ He also asked “do you want me?” more than three times; asked why the plaintiff didn’t find him attractive; told her he “wanted her” and that she aroused him; told her that he dreamt about her at night; said, “I wish I was the sweat that rolls down your neck between your breasts”; told her frequently, “I don’t know why I want to have sex with you”; told her he could wear down her determination to have a platonic relationship; and told her, “that sweat looks so good, I can lick the sweat off of you.”⁴³⁰ The court admitted that the conduct was “sophomoric” and “to a reasonable person the conduct would be quite unwelcome” but cited *Shepherd* to support its conclusion that it was

424. *Hancock v. Barron Builders & Mgmt. Co.*, 523 F. Supp.2d 571, 572 (S.D. Tex. 2007).

425. *Id.* at 574.

426. *Id.* at 575.

427. *Id.* (quoting *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999)).

428. *Id.* at 576-77.

429. *See Combs v. Exxon Mobile Corp.*, No. 04-151-C, 2007 WL 3353504, at *3 (M.D. La. Nov. 7, 2007).

430. *Id.*

not sufficiently severe, pervasive, or physically threatening enough to alter the conditions of employment.⁴³¹ This both ratchets up the “severe or pervasive” inquiry to “threatening” and ignores the *Harris* reasonableness requirement.⁴³² The court granted summary judgment to the employer.⁴³³

3. *Fifth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*

A Fifth Circuit case, cited 637 times, that is more in tune with what reasonable people and juries would likely find today is *Harvill v. Westward Communications*.⁴³⁴ The plaintiff, Harvill, was the office manager at a newspaper who alleged sexual harassment by Oscar Rogers, who operated a commercial printing press at the newspaper's offices.⁴³⁵ The plaintiff alleged that Rogers had “grabbed her and kissed her on the cheek, popped rubber bands at her breasts, fondled her breasts ‘numerous times,’ patted her . . . buttocks ‘numerous times,’ [had] c[o]me [up] behind her and rubbed his body against her” and had “made comments . . . about her sex life and her abilities in bed.”⁴³⁶ “Undoubtedly, the deliberate and unwanted touching of Harvill's intimate body parts [could] constitute severe sexual harassment,” noted the court, rejecting the trial court's finding that Harvill's allegations were “too conclusory” because she could not name the precise number of times she had been touched, fondled, and grabbed.⁴³⁷

This is a welcome contrast to *Brooks v. City of San Mateo*.⁴³⁸ “The Supreme Court,” continued the Fifth Circuit, “has stated that isolated incidents, if egregious, can alter the terms and conditions of employment.”⁴³⁹ The *Harvill* court corrected the district court's mistake of requiring that the harassing conduct alleged to be both severe *and* pervasive, which is a clear misreading of Supreme Court

431. *Id.* at *3-4 (concluding that she did not sufficiently establish that the conduct was unwelcome).

432. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-22 (1993).

433. *See Combs*, 2007 WL 3353504, at *6.

434. *See generally Harvill v. Westward Commc'ns*, 433 F.3d 428 (5th Cir. 2005); *see also supra* note 86.

435. *See id.* at 435.

436. *Id.*

437. *Id.* at 436.

438. *See generally Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).

439. *Harvill*, 433 F.3d at 435 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

precedent.⁴⁴⁰ The court also held that a reasonable jury might find the conduct sufficiently pervasive, noting that “Harvill estimated that Rogers touched her breasts or her buttocks perhaps as often as once a week—although she later stated that it may not have been as often as once a week.”⁴⁴¹

The *Harvill* court also was clear about the role of the judge and jury: “Viewing the evidence in the light most favorable to Harvill, the non-movant, we conclude that a reasonable jury could find that Rogers’[s] conduct was sufficiently severe or pervasive to alter a term or condition of Harvill’s employment.”⁴⁴²

Harvill provides an important tool that judges in the Fifth Circuit can use to forge a new path in cases that involve employees subjected to unwanted sexual comments and behavior at work.

F. Conclusion

These five cases-in-chief are nineteen to twenty-four years old, yet they have been very influential in ratcheting up the standards for what constitutes a hostile work environment. This ratcheting-up effect becomes particularly obvious when one sees how the sub-cases have used the cases-in-chief to keep hostile environment cases away from juries and substitute judges’ own opinions about what a reasonable person would consider a hostile work environment. Each of the cases-in-chief no longer reflects what most Americans believe today. Judges should step out of the way and let the jury system do its work, updating the law on sexual harassment in the light of the norm cascade represented by #MeToo.

IV. THE “REASONABLENESS” OF NDAS THAT BAR SURVIVORS FROM DISCLOSING SEXUAL HARASSMENT

As demonstrated in Parts II and III above, the norm cascade prompted by #MeToo has fundamentally altered what’s reasonable now in sexual harassment cases.⁴⁴³ New norms about what’s reasonable also have implications for nondisclosure agreements

440. *See id.* at 43

441. *Id.* at 435.

442. *Id.* at 436.

443. *See supra* Parts II-III (discussing the norm cascade and reasonableness standard).

(NDAs) that affect whether plaintiffs can bring their claims forward.⁴⁴⁴ NDAs (or confidentiality agreements) are contractual agreements to keep certain specified information secret.⁴⁴⁵ NDAs executed in the employment context are enforceable only to the extent that they are “reasonable”⁴⁴⁶ based on a weighing of factors discussed below.⁴⁴⁷ In this Part, we propose a framework for evaluating the “reasonableness” of sexual harassment NDAs, and we explain how the norm cascade should influence courts’ analyses of whether they can be reasonably enforced.

A. The “Reasonableness” Standard

It is a “bedrock” principle of contract law that a promise is unenforceable if important public policy interests outweigh the interest in enforcing the agreement.⁴⁴⁸ While the law generally permits employers and employees to agree to contractual constraints on their own speech,⁴⁴⁹ courts have recognized that restricting the free flow of information in this way potentially implicates a number of public policy concerns.⁴⁵⁰ Consequently, employment-related NDAs are typically enforced only to the extent that they are “reasonable.”⁴⁵¹

444. See, e.g., *Equal Emp’t Opportunity Comm’n v. Astra USA, Inc.*, 94 F.3d 732, 741 (1st Cir. 1996).

445. See *NDA 101: What Is a Non-Disclosure Agreement?*, ROCKET LAWYER, <https://www.rocketlawyer.com/article/nda-101:-what-is-a-non-disclosure-agreement.r1> [<https://perma.cc/4WFD-SQZL>] (last visited May 10, 2019).

446. See, e.g., *CSS, Inc. v. Herrington*, 306 F. Supp. 3d 857, 880 (S.D. W. Va. 2018) (holding a confidentiality agreement as void because it was unreasonable, containing no limitation of time or geographic scope); *Spirax Sarco, Inc. v. SSI Eng’g, Inc.*, 122 F. Supp. 3d 408, 425 (E.D.N.C. 2015) (requiring NDAs to be “reasonable under the circumstances to maintain its secrecy”).

447. See, e.g., *Hammons v. Big Sandy Claims Serv.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

448. *Astra USA, Inc.*, 94 F.3d at 744.

449. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (discussing that private parties may voluntarily enter into an agreement to restrict their own speech, and in doing so they waive their ability to assert First Amendment claims against courts asked to enforce such agreements).

450. See, e.g., *Astra USA, Inc.*, 94 F.3d at 744.

451. *Herrington*, 306 F. Supp. 3d at 880 (holding a confidentiality agreement as void because it was unreasonable, containing no limitation of time or geographic scope). See *Spirax Sarco, Inc.*, 122 F. Supp. 3d at 427 (requiring NDAs to be “reasonable under the circumstances to maintain its secrecy”); *PC Connection, Inc. v. Price*, 2015 WL 654546, at *4 (D.N.H. Oct. 29, 2015) (applying the reasonableness standard to an NDA and non-compete agreement, and holding that “[a] covenant is unreasonable if it is (1) broader than needed to guard the employer’s legitimate

There is “no mathematical formula” for ascertaining reasonableness.⁴⁵² “Ultimately, the task of determining reasonableness is one of balancing competing interests Each case must be determined on its own particular facts”⁴⁵³ Factors courts commonly considered in determining whether an NDA is “reasonable” include: the extent of

interests, (2) imposes an undue hardship on the employee; or (3) harms the public interest” (citing *Merrimack Valley Wood Prods. v. Near*, 876 A.2d 757, 762 (N.H. 2005)); *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 174 (S.D.N.Y. 2006) (requiring nondisclosure and noncompete agreements to be reasonable in time and scope); *AmeriGas Propane, L.P. v. T-Bo Propane, Inc.*, 972 F. Supp. 685, 692 (S.D. Ga. 1997) (“In determining the enforceability of specific nondisclosure clauses, courts must be satisfied with the reasonableness of the clauses.”); *see also* *Snepp v. U.S.*, 444 U.S. 507, 519 (1980) (Stevens, J., dissenting) (stating that nondisclosure agreements “are enforceable only if they can survive scrutiny under the ‘rule of reason’”); *Henry Hope X-Ray Prods. v. Marron Carrel, Inc.*, 674 F.2d 1336, 1342 (9th Cir. 1982) (applying the relevant state law that nondisclosure agreements must be reasonable); *Bodemer v. Swanel Beverage, Inc.*, 884 F. Supp. 2d 717, 734 (N.D. Ind. 2012) (“[C]onfidentiality agreements ‘must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest.’”); *Prudential Ins. Co. Am. v. Baum*, 629 F.Supp. 466, 468 (N.D. Ga. 1986); *Tower Oil & Tech. Co. v. Buckley*, 425 N.E.2d 1060, 1065 (Ill. App. Ct. 1981) (holding that the reasonableness of a NDA depends on “whether enforcement of the covenant will injure the public, whether enforcement will cause undue hardship to the promisor and whether the restraint imposed by the covenant is greater than is necessary to protect the interests of the employer”); *Newinno, Inc. v. Peregrin Dev., Inc.*, 2003 WL 21493838, at *2 (Conn. Super. Ct. June 3, 2003) (holding that an NDA, like a non-compete agreement, is valid and enforceable only if it is reasonable); *Follmer, Rudzewics & Co. v. Kosco*, 362 N.W.2d 676, 683 (Mich. 1984) (holding that courts must “scrutinize” an NDA to determine whether “it goes beyond what is reasonably necessary for the protection of confidential information”); *1st Am. Sys., Inc. v. Rezatto*, 311 N.W.2d 51, 57 (S.D. 1981) (holding that NDAs “are strictly construed and enforced only to the extent reasonably necessary to protect the employer’s interest in confidential information”).

452. *Cent. Monitoring Serv., Inc. v. Zakinski*, 553 N.W.2d 513, 521 (S.D. 1996); *accord* *Ellis v. James V. Hurson Assocs.*, 565 A.2d 615, 618 (D.C. 1989) (“[T]he court adopted the Restatement’s approach that reasonableness was determined by balancing the employer’s need to protect a legitimate interest with the hardship to the employee and injury to the public.”).

453. *Zakinski*, 553 N.W.2d at 521.

the restraint,⁴⁵⁴ the employer's interest in maintaining secrecy,⁴⁵⁵ the employee's interest in disclosure,⁴⁵⁶ and the public's interest in disclosure.⁴⁵⁷

The flexibility and factual sensitivity of the "reasonableness" test is well suited to address the different, commonly used types of sexual harassment NDAs and the different contexts in which they are adopted and invoked to prevent disclosures.⁴⁵⁸ NDAs differ along three key dimensions: (1) their breadth of coverage;⁴⁵⁹ (2) the extent to which they are adopted voluntarily;⁴⁶⁰ and (3) the legal context in which they are adopted.⁴⁶¹ First, NDAs differ in their breadth or

454. See *Eden Hannon & Co. v. Sumitomo Tr. & Banking Co.*, 914 F.2d 556, 563 (4th Cir. 1990) (considering whether constraint is "no broader than is necessary" to protect the employer); *Layne Christensen Co. v. Bro-Tech Corp.*, 836 F.Supp.2d 1203, 1223 (D. Kan. 2011) (considering geographic restrictions on NDAs); *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (considering duration and geographic restrictions on NDAs); *Equifax Servs., Inc. v. Examination Mgmt. Servs., Inc.*, 453 S.E.2d 488, 491 (Ga. Ct. App. 1994) (considering geographic restrictions on NDAs); *Prudential Ins.*, 629 F.Supp. at 471 (finding that a non-disclosure agreement was overbroad).

455. See *Shepherd*, 25 A.3d at 1244 (considering employer's need for protection from covered disclosures); *Tower Oil & Tech. Co. v. Buckley*, 425 N.E.2d 1060, 1065 (Ill. App. Ct. 1981) (considering the employer's need for an NDA).

456. See, e.g., *Shepherd*, 25 A.3d at 1247 (considering impact of NDA on employee's ability to earn a living); *Eden Hannon*, 914 F.2d at 563 (considering whether restraint is "unduly harsh and oppressive in curtailing the legitimate efforts of th[e] [promisor] to conduct its business"); *Buckley*, 425 N.E.2d at 1065 (considering whether the NDA will cause "undue hardship" on the employee/promisor).

457. See, e.g., *Shepherd*, 25 A.3d 1233, 1233 (holding that the employee would suffer if the agreement is enforced); *Eden Hannon*, 914 F.2d at 563 (considering whether the restraint is "reasonable from the standpoint of sound public policy"); *Buckley*, 425 N.E.2d at 1065 (considering whether enforcement of the NDA "will injure the public").

458. See *supra* notes 448-457 and accompanying text (discussing the flexibility of the "reasonableness" standard).

459. See generally Maxwell S. Kennerly, *Sexual Harassment and the Enforcement of Non-Disclosure Agreements*, LITIG. & TRIAL BLOG (Jan. 16, 2018), <https://www.litigationandtrial.com/2018/01/articles/attorney/sexual-harassment-nda/> [<https://perma.cc/LRR7-RSC5>].

460. See 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, 2524-25 (2018) (discussing that voluntariness is a limited concept with various limitations).

461. See Elizabeth C. Tippet, *Blame Nondisparagement Clauses, Not Settlements for Concealing the Most Sexual Misconduct*, MARKET WATCH (Dec. 6, 2017), <https://www.marketwatch.com/story/blame-nondisparagement-clauses-not-settlements-for-concealing-the-most-sexual-misconduct-2017-12-06> [<https://perma.cc/JG4G-KF34>] (reporting that non-disparagement agreements—not

specificity of coverage.⁴⁶² For instance, some employers require employees to sign broad anti-disparagement NDAs that do not mention sexual harassment explicitly but forbid employees from making any statement that could harm the employer's reputation.⁴⁶³ Some have interpreted such anti-disparagement NDAs to encompass disclosures about sexual harassment.⁴⁶⁴ Indeed, this was long the position of the Weinstein Company, which forced employees to sign broad anti-disparagement agreements and used them for many years to silence Harvey Weinstein's accusers.⁴⁶⁵ By contrast, some NDAs are more narrowly tailored to forbid disclosures about specific instances of harassment.⁴⁶⁶ Such distinctions may bear on their reasonableness.⁴⁶⁷

Second, NDAs vary in the extent to which they are adopted voluntarily by the signing employee.⁴⁶⁸ Some are negotiated explicitly between the employer and the signing employee, while others are imposed by the employer as a condition of employment or a condition of resolving any sexual harassment claim.⁴⁶⁹ As a general matter, employees negotiating explicitly for confidentiality terms are likely to have more power and agency than those on whom terms are imposed as a condition of employment.⁴⁷⁰ However, negotiating employees differ radically in their income, education, and job security, all of which affect their ability to bargain meaningfully for silence about

settlement agreements—were the greatest impediment to revealing sexual harassment by Weinstein).

462. See Kennerly, *supra* note 459.

463. See *id.* (reporting that the Weinstein Company required employees to sign broad waivers forbidding critical comments that could damage the company's "business reputation").

464. See *id.*

465. See Elizabeth C. Tippet, *Blame Nondisparagement Clauses, Not Settlements for Concealing the Most Sexual Misconduct*, MARKETWATCH, (Dec. 6, 2017), <https://www.marketwatch.com/story/blame-nondisparagement-clauses-not-settlements-for-concealing-the-most-sexual-misconduct-2017-12-06> <https://perma.cc/M7X5-U63E> (reporting that non-disparagement agreements—not settlement agreements—were the greatest impediment to revealing sexual harassment by Weinstein).

466. See *generally id.* (explaining that some non-disparagement clauses may be narrow).

467. See *id.* (stating that the specificity of a non-disparagement agreement turns on its reasonableness).

468. See Prasad, *supra* note 460, at 2524-25 (discussing that voluntariness is a limited concept with various limitations).

469. See *id.* at 2521.

470. See *id.* (noting the unequal power dynamic between an employee and potential employee in the context of an NDA).

sexual harassment. Such distinctions may be relevant to their reasonableness.⁴⁷¹

Third, NDAs are adopted against different legal backdrops.⁴⁷² Some are adopted to resolve pending or threatened litigation, while others are adopted outside the litigation context to resolve sexual harassment complaints raised informally through an employer's internal channels.⁴⁷³ Whether an NDA is reasonable may depend, in part, on what it contains and how it was adopted.

In addition, the reasonableness of enforcing a particular NDA might also depend on the context in which a potentially covered disclosure occurs. For instance, existing case law treats disclosures made to a court or regulatory agency differently than disclosures made to the general public outside these legal fora.⁴⁷⁴ Below we outline the legal framework for evaluating the "reasonableness" of NDAs and discuss how it is likely to apply in cases where employers attempt to use them to prevent public disclosures by survivors of sexual harassment.

B. NDAs that Forbid Disclosure in Court or to Regulators Are Not Reasonable

In the context of legal proceedings, courts have definitively struck the "reasonableness" balance to allow disclosures of sexual harassment that would otherwise be covered by an NDA.⁴⁷⁵ Case law clearly establishes that NDAs cannot be enforced to bar individuals from disclosing information about harassment in judicial proceedings or to regulators at the Equal Employment Opportunity Commission (EEOC).⁴⁷⁶ Longstanding common law doctrine holds that agreements to suppress evidence in judicial proceedings are void as contrary to

471. See Tippet, *supra* note 461.

472. See *id.* (discussing how some NDAs are entered while litigation is ongoing and some are entered into as a common place procedure in the workplace).

473. See *id.*

474. See *infra* Section IV.B (discussing that NDA's cannot be enforced to bar individuals from disclosing information about harassment in judicial proceedings or to regulators at the EEOC).

475. See, e.g., Kennerly, *supra* note 459 (stating that NDAs that prohibit disclosure of sexual harassment have been found to violate federal law).

476. See Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017) ("NDAs cannot lawfully prevent people from reporting claims to law enforcement and government agencies, such as the Equal Employment Opportunity Commission in the US.").

public policy.⁴⁷⁷ Consistent with this principle, courts have held that an NDA cannot be enforced to prevent individuals from providing evidence about sexual harassment in judicial proceedings.⁴⁷⁸ As one court explained, evidence about prior sexual harassment claims settled by an employer is “highly relevant” to resolving hostile environment claims, since hostile environment plaintiffs must establish the severity or pervasiveness of the conduct and the employer’s knowledge and handling of it.⁴⁷⁹ Public policy strongly favors allowing such probative evidence into judicial proceedings.⁴⁸⁰ In weighing competing interests, the court opined that the “plaintiff’s interest in being free from unlawful discrimination in the workplace, coupled with the public’s interest in the eradication of discrimination, outweighs [the employer’s] interest in maintaining the confidentiality of the . . . settlement agreement.”⁴⁸¹

Another court that allowed testimony of prior sexual harassment in spite of an NDA prohibiting it observed that the public’s “concern grows more pressing as additional individuals are harmed by identical or similar action.”⁴⁸² In light of these concerns, courts have concluded that enforcing sexual harassment NDAs in the context of judicial

477. See, e.g., *Harris v. Gulf Ins. Co.*, 297 F. Supp. 2d 1220, 1226 (N.D. Ca. 2003) (“Agreements to suppress evidence have been held void as against public policy.” (quoting *Williamson v. Super. Ct.*, 582 P.2d 126, 131 (Cal. 1978))).

478. See *Kalinauskas v. Wong*, 151 F.R.D. 363, 365 (D. Nev. 1993) (refusing to enforce an NDA to prevent previous victims of sexual harassment at defendant company from providing evidence in current sexual harassment lawsuit because it “would condone the practice of ‘buy[ing] the silence of a witness with a settlement agreement”); *Denise Rich Songs, Inc. v. Hester*, 2004 WL 2563702, at *5 (N. Y. Sup. Ct. Oct. 4, 2004) (finding that employer had no cause of action for breach of a confidentiality agreement by a former employee who had disclosed information in violation of that agreement in connection with an employment discrimination lawsuit); *Llerena v. J.B. Hanauer & Co.*, 845 A.2d 732, 732 (N.J. Super. Ct. Law Div. 2002) (refusing to enforce an NDA to prevent previous victims of sexual harassment at defendant company from providing evidence in current sexual harassment lawsuit); *Farmers Group, Inc. v. Lee*, 28 P.3d 413, 419 (Kan. App. 2001) (refusing to enforce an NDA signed by a former employee to settle an employment discrimination claim in a subsequent case, allowing the former employee to present “nonconfidential, truthful information . . . in connection with a claim against his former employer”). See also *Waterson v. Plank Road Motel Corp.*, 43 F. Supp. 2d 284, 284 (N.D.N.Y. 1999) (allowing testimony by a former employee who settled a harassment complaint against the same employer because the probative value of the testimony outweighed the employer’s interest in secrecy).

479. *Llerena*, 845 A.2d at 739.

480. See *id.* (stating that the judiciary’s role includes preventing exclusion of probative evidence in the interest of discovering the truth).

481. *Id.* at 739.

482. *Kalinauskas*, 151 F.R.D. at 366.

proceedings would “undermine[] not only individual third-party plaintiffs’ ability to vindicate their rights but the judicial system itself.”⁴⁸³ Consequently, they have consistently ordered that plaintiffs be provided with information about prior instances of sexual harassment at the defendant company, even when such instances are covered by NDAs.⁴⁸⁴

Courts similarly have held that NDAs cannot be enforced to bar the provision of information about sexual harassment to the EEOC in the context of an investigation.⁴⁸⁵ In *EEOC v. Astra USA*, the court explained that Congress had statutorily commanded the EEOC “to vindicate the public interest in preventing employment discrimination” and allowing employers to prohibit communications with the agency would hobble its ability to investigate discrimination complaints and harm the public interest.⁴⁸⁶ The court rejected the employer’s argument that the strong public policy interest in settlement supported the full enforcement of settlement agreements, including non-disclosure terms.⁴⁸⁷ The court found this interest insignificant when weighed against “public policy [that] so clearly favors the free flow of information between victims of harassment and the agency entrusted with righting the wrongs inflicted upon them.”⁴⁸⁸ Accordingly, the court held that employees who had signed NDAs with the employer being investigated could nonetheless respond to questions from EEOC investigators and volunteer information concerning sexual harassment at their employer to the EEOC.⁴⁸⁹

483. *Lee*, 28 P.3d at 420.

484. *See Meena Yoo, SEC Disclosures: Balancing Investor Rights with Privacy Rights*, FORDHAM J. CORP. & FIN. L. (May 7, 2018), https://news.law.fordham.edu/jcfl/2018/05/07/sec-disclosures-balancing-investor-rights-with-privacy-rights/#_edn6 [<https://perma.cc/V6MY-GMPX>] (stating that courts have generally found that companies have an affirmative duty to disclose sexual harassment allegations).

485. *See, e.g., Equal Emp’t Opportunity Comm’n v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996) (stating the Congress’s investigatory powers would be seriously curtailed if victims of sexual harassment cannot approach the EEOC). In another context, a federal district court suggested that there is a constitutional right to inform the government of violations of federal laws, and that under the Supremacy Clause, U.S. Constitution Art. VI, this right supersedes local tort or contract rights. *See Maddox v. Williams*, 855 F. Supp. 406, 415 (D.D.C. 1994).

486. *Astra USA, Inc.* at 744 (quoting *General Tel. Co. v. Equal Emp’t Opportunity Comm’n*, 446 U.S. 318, 326 (1980)).

487. *See id.* at 745.

488. *Id.*

489. *See id.*

While the existing case law holding NDAs unenforceable in judicial and regulatory fora covers many of the disclosures likely to be made by survivors who sign sexual harassment-related NDAs, other types of disclosures do not fit squarely within this case law. For a variety of reasons, many survivors choose not to pursue legal action.⁴⁹⁰ Sexual harassment lawsuits are costly, lengthy, uncertain, and emotionally grueling for plaintiffs.⁴⁹¹ There is a pervasive sense that “the law often fails to prevent and correct sexual harassment.”⁴⁹² Indeed, the revelations of #MeToo suggest that a generation of sexual harassment lawsuits failed to produce meaningful social change in workplace norms and behaviors. Thus, many survivors may look to channels outside of formal legal institutions to air grievances, including friends and family, “whisper networks” of other survivors and potential targets of harassment, social media, conventional media, or other public fora.⁴⁹³

Case law on disclosures to courts and regulators does not squarely address these kinds of public disclosures. Public disclosures differ from disclosures before judicial and administrative bodies in important ways. Disclosures made outside of legal institutions do not implicate the fundamental fairness and integrity of those institutions, nor can they be shielded from widespread public dissemination by protective orders guarding parties and third parties from unnecessary publicity and embarrassment, as often occurs in legal proceedings.⁴⁹⁴ While these distinctions suggest that case law on legal disclosures cannot be applied directly to extralegal public disclosures, Section C below explains that they do not necessarily tip the balance in favor of enforcing sexual harassment NDAs against survivors who wish to

490. See, e.g., Annie Hill, *Nondisclosure Agreements: Sexual Harassment and the Contract of Silence*, GENDER POL’Y REP. (Nov. 14, 2017), <http://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/> [<https://perma.cc/J96A-YL8L>] (noting that NDAs may, in some instances, help survivors of sexual harassment).

491. See *id.*

492. *Id.*

493. See Hill, *supra* note 490.

494. See, e.g., *Dunn v. Warhol*, No. 91-4169, 1992 WL 102744, at *1-2 (E.D. Pa. May 8, 1992) (holding that the plaintiff had “articulated persuasive reasons why the dissemination of this highly personal information could cause not only serious embarrassment but also severe emotional damage to her and her family” thereby justifying a protective order); *Llerena v. J.B. Hanauer & Co.*, 845 A.2d 732, 739 (N.J. Super. Law Div. 2002) (refusing to enforce NDA to prevent employee who had settled a harassment claim from providing testimony for plaintiff in a harassment suit against their mutual employer but granting a protective order to protect the testifying employee’s privacy).

speak.⁴⁹⁵ Instead, courts must inquire into the reasonableness of enforcing sexual harassment NDAs to prevent extra-legal disclosures on a case-by-case basis.

C. A Framework for Evaluating the Reasonableness of NDAs to Forbid Extralegal Disclosures of Sexual Harassment

As laid out above, the reasonableness of an employment-related NDA depends on a balancing of factors, including: the extent of the restraint,⁴⁹⁶ the employer's interest in maintaining secrecy,⁴⁹⁷ the employee's interest in disclosure,⁴⁹⁸ and the public's interest in disclosure.⁴⁹⁹ To our knowledge, no existing case has applied this framework to a sexual harassment NDA. Drawing on case law in analogous contexts, this Section discusses how each factor should be analyzed to determine the reasonableness of sexual harassment NDAs.⁵⁰⁰ Based on a balancing of the relevant interests, we argue that NDAs generally should not be enforced to silence survivors who wish to publicly discuss their harassment outside of legal proceedings. However, we acknowledge that there are legitimate countervailing

495. See *infra* Section IV.C (explaining that courts have been using a balancing approach to enforcing NDAs by looking at factors such as the interests of the employer, employee, and the general public).

496. See *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556, 563 (4th Cir. 1990) (considering whether constraint is “no broader than is necessary” to protect the employer); *Layne Christensen Co. v. Bro-Tech Corp.*, 836 F. Supp. 2d 1203, 1231 (D. Kan. 2011); *Prudential Ins. V. Baum*, 629 F. Supp. 466, 471 (N.D. Ga. 1986) (finding that an NDA was overbroad and unenforceable); *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (considering duration and geographic restrictions in determining reasonableness of an NDA); *Equifax Servs., Inc. v. Examination Mgmt. Servs., Inc.*, 453 S.E.2d 488, 491 (Ga. Ct. App. 1994).

497. See, e.g., *Tower Oil & Tech. Co. v. Buckley*, 425 N.E.2d 1060, 1065 (Ill. App. Ct. 1981); *Shepherd*, 25 A.3d at 1244 (considering employer's need for protection from covered disclosures).

498. See, e.g., *Eden Hannon & Co.*, 914 F.2d at 563 (considering whether restraint is “unduly harsh and oppressive in curtailing the legitimate efforts of th[e] [promisor] to conduct its business”); *Tower Oil*, 425 N.E.2d at 1065 (considering whether the NDA will cause “undue hardship” on the employee/promisor); *Shepherd*, 25 A.3d at 1247 (considering impact of NDA on employee's ability to earn a living).

499. See, e.g., *Eden Hannon & Co.*, 914 F.2d at 563 (considering whether the restraint is “reasonable from the standpoint of sound public policy”); *Tower Oil & Tech. Co.*, 425 N.E.2d at 1065 (considering whether enforcement of the NDA “will injure the public”); *Shepherd*, 25 A.3d at 1247.

500. See *infra* Section IV.C (discussing the extent of restraint, interests of the employer in protecting business secrets, interests of the discloser, and interests of the general public).

interests that should be taken into account, including the interests that many survivors have in confidentiality. We argue that the “reasonableness” test provides courts with the flexibility to accommodate competing interests and to adapt to changed circumstances over time as the law and the facts on the ground develop in this nascent area.

1. *Extent of Restraint*

Courts do not favor enforcing broad, undifferentiated restrictions contained in NDAs, confidentiality agreements, or restraints on trade more generally.⁵⁰¹ The general rule is that “covenants that are functionally overbroad are unreasonable and void as a matter of law.”⁵⁰² Courts typically require NDAs to identify with specificity the type of information the employee may not disclose.⁵⁰³ Courts will refuse to enforce overbroad NDAs or will narrowly tailor such covenants if they choose to enforce them.⁵⁰⁴ For instance, courts have refused to enforce a non-solicitation clause that contained “no additional limiting language or circumstances in the case that otherwise would limit the scope of the restriction.”⁵⁰⁵ Courts also commonly read temporal or geographic limitations into agreements lacking them.⁵⁰⁶ This standard of narrow tailoring should bar the use

501. See, e.g., *AMP Inc. v. Fleischhacker*, 823 F.2d 1199, 1202 (7th Cir. 1987) (recognizing that broad confidentiality agreements constitute unreasonable restraints on trade), *superseded by statute*, 765 ILL. COMP. STAT. 1065/8 (1999); *Prudential Ins. Co. Am. v. Baum*, 629 F. Supp. 466, 471 (N.D. Ga. 1986) (“Nondisclosure covenants adjudged overbroad are considered an unfair restraint upon competition.”); *SI Handling Sys., Inc. v. Heisley*, 658 F. Supp. 362, 372 (E.D. Pa. 1986) (“[A]ny agreement which seeks to restrict post-employment activities is subject to the same standards [as noncompetition clauses].”); *Whelan Security Co. v. Kennebrew*, 379 S.W.3d 835, 843 (Mo. 2012) (citing the proposition that restrictive covenants must be narrowly tailored to be enforceable); *Puritan-Bennett Corp. v. Richter*, 679 P.2d 206, 211 (Kan. 1984) (stating that enforcement of a nondisclosure agreement “would unreasonably infringe upon appellant’s right to earn a living”).

502. *Capital One Fin. Corp. v. Kanas*, 871 F. Supp. 2d 520, 535 (E.D. Va. 2012) (reviewing a Separation Agreement for ambiguity to determine if it was overbroad).

503. See *id.*

504. See *Concord Orthopaedics Prof’l Ass’n v. Forbes*, 702 A.2d 1273, 1276 (N.H. 1997) (citing the principle that courts will narrowly tailor covenants not to compete by geographic scope, duration, and regarding only legitimate employer interests).

505. *Whelan Security*, 379 S.W.3d at 843 (finding the non-solicitation clause unenforceable because it was “unreasonably overbroad”).

506. See *Concord Orthopaedics*, 702, A.2d at 1276.

of broad anti-disparagement NDAs that do not contain scope restrictions of any kind against sexual harassment survivors who wish to speak.

2. Employer Interests

The speech restrictions contained in an employment-related NDA are enforceable only to the extent “reasonably necessary for the protection of the employer.”⁵⁰⁷ An employer cannot simply assert a bald preference for secrecy but rather must assert a “legitimate and substantial business justification” for the speech restriction.⁵⁰⁸ “[I]n cases where the employer’s interests do not rise to the level of a proprietary interest deserving of judicial protection, a court will conclude that a restrictive agreement merely stifles competition and therefore is unenforceable.”⁵⁰⁹ Traditionally, courts have found employers’ interests in protecting trade secrets to provide the highest and plainest justification for confidentiality,⁵¹⁰ although even these core interests are not absolute and remain subject to a balance of other

507. *Shepherd*, 25 A.3d at 1244; *see also* *PharMethod, Inc. v. Caserta*, 382 Fed. App’x. 214, 220 (3d Cir. 2010) (“A restrictive covenant is reasonably necessary for the protection of the employer when it is narrowly tailored to protect an employer’s legitimate interests.”); *HR Staffing Consultants, LLC v. Butts*, No. 2:15-3155, 2015 WL 3492609, at *12 (D.N.J. June 2, 2015), *aff’d*, 627 F. App’x 168 (3d Cir. 2015) (holding that a non-compete limiting the defendant’s ability to work in five New Jersey counties only for a period of one year was narrowly tailored to ensure the covenant is no broader than necessary to protect the employer’s interests); *Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 488-89 (D.N.J. 1999) (“Under New Jersey law, . . . [t]o minimize the hardship imposed on the employee, the geographic, temporal and subject-matter restrictions of an otherwise enforceable agreement not to compete will be enforced only to the extent reasonably necessary to protect the employer’s legitimate business interests.”) (citations omitted).

508. *Banner Health Sys. v. Nat’l Labor Relations Bd.*, 851 F.3d 35, 41 (D.C. Cir. 2017); *accord* *Ellis v. James V. Hurson Assocs.*, 565 A.2d 615, 618 (D.C. 1989) (employer must assert a “legitimate interest”).

509. *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 892, 894 (N.J. 1988) (finding that since “[t]he line between [protectable] information, trade secrets, and the general skills and knowledge of a highly sophisticated employee will be very difficult to draw,” courts are expected to “narrowly” construe an employer’s need for protection); *see also* *GPS Indus., LLC v. Lewis*, 691 F. Supp. 2d 1327, 1333 (M.D. Fla. 2010) (citing FLA. STAT. § 542.335(1)(h) (2019) (indicating that Florida courts “construe a restrictive covenant narrowly, against the restraint or against the drafter where legitimate business interests have been established”).

510. *See generally* *Bodemer v. Swanel Beverage*, 884 F. Supp. 2d 717 (N.D. Ind. 2012).

interests.⁵¹¹ Courts also give solicitude to employer interests in the secrecy of confidential business information—for instance, customer lists or business strategy—that may not qualify for trade secret protection.⁵¹²

These core interests do not necessarily exhaust the universe of protectable interests.⁵¹³ Courts will look to the totality of the facts and circumstances of the individual case to assess the legitimacy of the employer's asserted interest.⁵¹⁴ Such ad hoc analysis has not yielded clear rules or bright lines around what constitutes a protected employer interest. However, the logic of the existing case law suggests that employment-related NDAs can be used to protect only the employer's legitimate business interests.⁵¹⁵

The term “business interest” is not well defined in the case law, but the legitimacy of a “business interest” in secrecy often turns on whether the disclosure of covered information would cause the employer “competitive harm.”⁵¹⁶ The prospect of competitive harm is clearly present when an employee threatens to provide a competitor with confidential information about the employer's business strategy,

511. See *Hammons v. Big Sandy Claims Serv. Inc.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978)

512. See, e.g., *Overholt Crop. Ins. Serv. Co. v. Travis*, 941 F.2d 1361, 1361 (8th Cir. 1991); *Roto-Die Co. v. Lesser*, 899 F. Supp. 1515, 1518 (W.D. Va. 1995) (recognizing that information such as customer lists, marketing information, and product development information, “if disclosed to competitors, would destroy a company's ability to compete”); see also *Insulation Corp. of Am. v. Brobston*, 667 A.2d 729, 734 (Pa. Super. 1995) (including “corporate information such as overhead costs, profit margin, dealer discounts, customer pricing, marketing strategy and customer contract terms” in category of non-trade secret information); *Bell Fuel Corp. v. Cattolico*, 544 A.2d 450, 460-61 (Pa. Super. 1988) (discussing customer information); *Durham v. Stand-By Labor of Ga., Inc.*, 198 S.E.2d 145, 150 (Ga. 1973); Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 PITT. L. REV. 1207, 1229 (1999).

513. See, e.g., *Cronimet Holdings, Inc. v. Keywell Metals, LLC*, 73 F. Supp. 3d 907, 915-16 (N.D. Ill. 2014).

514. See, e.g., *id.*; *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 396 (Ill. 2011). Additionally, many courts will not enforce nondisclosure clauses that contain no time limitation. See *McGough v. Nalco Co.*, 496 F. Supp. 2d 729, 756 (N.D. W. Va. 2007); see also *Prudential Ins. Co. Am. v. Baum*, 629 F. Supp. 466, 471 (N.D. Ga. 1986) (“[T]he absence of any restriction upon the duration of the nondisclosure provision renders it unenforceable.”); *Howard Schultz & Assoc. of the Se., Inc. v. Broniec*, 236 S.E.2d 265, 265 (Ga. 1977); *Thomas v. Best Mfg. Corp.*, 218 S.E.2d 68, 68 (Ga. 1975) (holding that contracts limiting the disclosure of “confidential” information in perpetuity are unenforceable).

515. See Short, *supra* note 512, at 1212.

516. *Id.* at 1229.

products, or customers.⁵¹⁷ By contrast, courts have declined to enforce NDAs where there was no evidence that disclosure of the covered information would harm the employer's competitive position.⁵¹⁸ For instance, courts found NDAs unenforceable where the employer sought to protect the stability of its own workforce without respect to its competitors.⁵¹⁹ The threatened disclosure need not be made to a

517. *See, e.g.,* Milliken & Co. v. Morin, 731 S.E.2d 288, 295 (N.C. 2012); Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (holding that legitimate business interests that are protectable under a confidentiality agreement include "trade secrets and confidential information"); *see also* Roto-Die Co. v. Lesser, 899 F. Supp. 1515, 1518 (W.D. Va. 1995) (recognizing that information about customer lists, marketing, and product development "if disclosed to competitors, would destroy a company's ability to compete"); Roberson v. C.P. Allen Const. Co., 50 So. 3d 471, 475 (Ala. Civ. App. 2010) (holding that an employer enjoys a protectable interest if the employee was privy to confidential information, secret lists, or developed close relationship with clients; additionally, employer's investment in the employee can also constitute protectable interest); ACAS Acquisitions (Precitech) Inc. v. Hobert, 923 A.2d 1076, 1084–85 (N.H. 2007) ("Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets[;] . . . confidential information other than trade secrets . . . such as information regarding a unique business method; an employee's special influence over the employer's customers[;] . . . contacts developed during the employment; and the employer's development of goodwill and a positive image.").

518. *See, e.g.,* Slijepcevic v. Caremark, Inc., No. 95C7286, 1996 U.S. Dist. LEXIS 110, at *4 (N.D. Ill. Jan. 4, 1996) ("[C]ourts will enjoin former employees only when there is a threat that they will disclose secret information to a competitor."); Great Lakes Carbon Corp. v. Koch Indus., Inc., 497 F. Supp. 462, 469 (S.D.N.Y. 1980) (noting that the employer did not lose any business due to disclosures and considering this as a factor militating against enforcement of the nondisclosure agreement); Durham v. Stand-By Labor of Ga., Inc., 198 S.E.2d 145, 149 (Ga. 1973) ("Covenants not to disclose and utilize confidential business information are related to general covenants not to compete because of the similar employer interest in maintaining competitive advantage.").

519. *See, e.g.,* GPS Indus., LLC v. Lewis, 691 F. Supp. 2d 1327, 1334 (M.D. Fla. 2010) (holding the company did not have a legitimate business interest in protecting from use or disclosure all prospective or existing customers globally, nor was it able to protect all information obtained in employment); Prudential Ins. Co. Am. v. Baum, 629 F. Supp. 466, 472 (N.D. Ga. 1986) (holding a nondisclosure covenant applicable to "any information whatsoever pertaining to contractholders or [plaintiff's] products" as unenforceable because the information protected did not fall under the plaintiff's legitimate business interests); *see also* Carlson Grp., Inc. v. Davenport, No. 16-CV-10520, 2016 WL 7212522, at *4 (N.D. Ill. Dec. 13, 2016) (holding that a confidentiality clause protecting all information of or concerning its business was unenforceable as not protecting a legitimate business interest); Trailer Leasing Co. v. Assocs. Commercial Corp., No. 96 C 2305, 1996 WL 392135, at *3 (N.D. Ill. July 10, 1996) (holding that "[s]ince TLC cannot possibly have a near-permanent relationship with a prospective customer," the confidentiality agreement covering all prospective customers does not address a legitimate business interest and

competitor in order to constitute competitive harm.⁵²⁰ However, courts enforcing NDAs based on the employer's interest in secrecy have tended to do so when the employer can show that non-enforcement would place it "in imminent peril of suffering significant competitive losses."⁵²¹ Information about sexual harassment in the employer's workplace does not typically harm the employer's ability to compete effectively with other companies.

Rather, the harm presented by disclosures about harassment is more in the nature of reputational harm or embarrassment. Case law explicitly addressing NDAs has not squarely addressed whether protection against such harms could constitute a "legitimate business interest." But cases assessing the salience of such harms in other contexts are instructive and suggest that the bar is very high for these types of claims. Case law on the applicability of the confidential business information exemption from disclosure under the federal Freedom of Information Act (FOIA) has stressed that mere "embarrassment does not rise to the level of substantial competitive harm of the type recognized by the courts" as necessary to abrogate FOIA's disclosure requirements.⁵²² This is true even if the employer can show that the embarrassment attendant to the disclosure of secret information is anticipated to be "so severe that it could indirectly harm the company's bottom line."⁵²³ Case law on protective orders similarly suggests that "where embarrassment is the chief concern, the

is unenforceable); *R.R. Donnelley & Sons Co. v. Fagan*, 767 F. Supp. 1259, 1268 (S.D.N.Y. 1991) (holding plaintiff's noncompete and nondisclosure covenants were unenforceable because plaintiff did not prove that it enjoyed near-permanent customer relationships with its clients and thus did not have protectable, legitimate business interest justifying broad restraint on senior executive's employment); *AssuredPartners, Inc. v. Schmitt*, 44 N.E.3d 463, 475-76 (Ill. App. Dist. 2015) (holding a provision that sought to protect "virtually every fact, plan, proposal, data, and opinion that [the employee] became aware of during the time he was employed," regardless of whether it was in any way proprietary or confidential in nature as unenforceable); *Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 348 (Mo. Ct. App. 2000).

520. See *Uniroyal Goodrich Tire Co. v. Hudson*, 856 F. Supp. 348, 349 (E.D. Mich. 1994), *aff'd*, 97 F.3d 1452, No. 95-1130, 1996 U.S. App. LEXIS 25322 (6th Cir. Sept. 12, 1996).

521. *Uniroyal*, 1996 U.S. App. LEXIS 25322 at *2.

522. *United Techs. Corp. v. U.S. Dept. of Defense*, 601 F.3d 557, 562 (D.C. Cir. 2010). See also *Glickstein v. Neshaminy Sch. Dist.*, No. 96-6236, 1998 WL 83976, at *3 (E.D. Pa. Feb. 26, 1998) (holding that the confidential information covered by the agreement included presumptively public information and the parties reached the agreement to avoid embarrassment. Therefore, the agreement was invalid).

523. Short, *supra* note 512, at 1232.

embarrassment must be ‘particularly serious’ to suffice.”⁵²⁴ In this context—where “embarrassment”⁵²⁵ is an explicit ground for granting a protective order—the asserted harm of disclosure cannot be merely reputational but rather must affect the “competitive and financial position” of the firm.⁵²⁶ It will be difficult for employers to establish this type of interest in preventing disclosures about sexual harassment.⁵²⁷

3. *Discloser Interests*

The reasonableness of a disclosure restriction also depends on the strength of the discloser’s interest in revealing the contested information. Even if the employer can articulate a legitimate business interest in secrecy, the speech restrictions in an NDA cannot be “so large as to . . . impose undue hardship on the [employee].”⁵²⁸ Survivors who wish to disclose their harassment have strong psychological and health interests in doing so.⁵²⁹ As catalogued below, there are many psychological and physical harms associated with sexual harassment.⁵³⁰ Mental health professionals caution that keeping the experience of harassment secret is “literally toxic to [one’s] health” because timely treatment and care is essential for mitigating harm.⁵³¹

Survivors also have economic interests in disclosure that are analogous to the interests that other employees have in escaping more traditional employment-related NDAs barring the disclosure of trade secrets or confidential business information. Courts long have recognized that such speech restrictions can constrain an employee’s

524. *Glickstein*, 1998 WL 83976 at *3 (refusing to grant a protective order for medical and financial materials produced in sexual harassment litigation to prevent embarrassment).

525. FED. R. CIV. P. 26(c)(1).

526. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

527. Employers may have a stronger interest in protecting the confidentiality of settlement terms in NDAs resolving sexual harassment claims than in protecting the underlying facts surrounding the harassment, because the employers’ generosity relative to its competitors could arguably place it at a competitive disadvantage.

528. *Hammons v. Big Sandy Claims Serv. Inc.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978), *accord* *OVRs Acquisition Corp. v. Cmty. Health Servs., Inc.*, 657 N.E.2d 117, 126 (Ind. Ct. App. 1995); *Mountain Comprehensive Health Corp. v. Gibson*, No. 2013-CA-000373-MR, 2015 WL 1194508, at *2 (Ky. Ct. App. Mar. 13, 2015).

529. Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC: BETTER (Oct. 13, 2017, 11:14 AM), <https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416> [<https://perma.cc/SEX9-WHH3>].

530. *See id.*

531. *Id.*

ability to obtain and function successfully in a new job in their field.⁵³² For instance, it would be impossible for an automotive engineer to change jobs within the industry if he or she is forbidden from discussing any and all automotive production processes. Consequently, many courts have characterized employment-related NDAs as restraints on trade viewed with disfavor at common law much like covenants not to compete, and they have narrowed or abrogated them in order to allow employees to pursue employment opportunities.⁵³³

To be sure, harassment NDAs do not restrain trade in the same way as traditional NDAs protecting technical or confidential business information. Nonetheless, the principle underlying the non-harassment cases—that employees should not be inhibited from earning a living in their chosen profession—favors non-enforcement in cases involving sexual harassment disclosures as well. Workplace sexual harassment is an experience that profoundly impacts survivors’ professional lives, and forced silence about that experience can similarly impair survivors’ future employment prospects.⁵³⁴ “[T]he feelings of shame or guilt that a person may feel when sexually harassed at work can devastate their self-esteem and sense of self-

532. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 2 § 186(1) (AM. LAW INST. 1981)

533. See *id.* (“A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade.”); see also *PC Connection, Inc. v. Price*, No. 15-cv-208-PB, 2015 WL 6554546, at *4 (D.N.H. Oct. 29, 2015) (applying the same reasonableness standard to an NDA and non-compete agreements); *Bodemer v. Swanell Beverage*, 884 F. Supp. 2d 717, 733 (N.D. Ind. 2012) (predicting that the Indiana Supreme Court would analyze a confidentiality agreement like a covenant not to compete); *Archer Daniels Midland Co. v. Whitacre*, 60 F. Supp. 2d 819, 825 (C.D. Ill. 1999) (holding that under Illinois law, noncompetition and nondisclosure agreements are considered restrictive covenants, and therefore operate at least as partial restraints of trade requiring careful scrutiny by courts); *Cent. Monitoring Serv., Inc. v. Zakinski*, 553 N.W.2d 513, 521 (S.D. 1996) (equating NDAs with covenants not to compete and applying the American Jurisprudence standard of reasonableness for covenants to compete to an NDA). Many courts similarly find that confidentiality clauses or NDAs operate as noncompete agreements. See, e.g., *Fay v. Total Quality Logistics, LLC*, 799 S.E.2d 318, 323 (Ct. App. 2017), *reh’g denied*, (May 26, 2017), *cert. granted*, (Feb. 1, 2018) (holding a nondisclosure agreement to be so overbroad as to be considered a noncompete agreement).

534. See Hill, *supra* note 490; Jennifer Berdahl & Jana Raver, *Sexual Harassment*, in *APA HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, VOL. 3: MAINTAINING, EXPANDING, AND CONTRACTING THE ORGANIZATION* 641 (Sheldon Zedeck ed., 2011); see generally Afroditi Pina & Theresa A. Gannon, *An Overview of the Literature on Antecedents, Perceptions and Behavioural Consequences of Sexual Harassment*, 18 J. SEXUAL AGGRESSION 209 (2010).

worth as a professional.”⁵³⁵ Harassment may make the target doubt his or her own abilities or wonder if he or she was hired solely for sexual reasons.⁵³⁶ Survivors who are young or new to a field might wonder if this is just the way things are and if they will have to learn to live with the harassment if they wish to continue their employment.⁵³⁷ “If they have nothing to compare it to, they may not have an idea of what is normal”⁵³⁸ Forced silence normalizes harassment and may lead victims to believe that they must leave the workplace or their chosen field to escape it.⁵³⁹ This inhibits their ability to earn a living and restrains trade in violation of well-established public policy interests. Taken together, survivors’ interests in disclosure should weigh heavily in the “reasonableness” balance.

4. *Public Interests*

Courts have recognized that in many contexts secrecy implicates the public interest as well as the interests of the contracting parties.⁵⁴⁰ Thus, courts have admonished that, in addition to balancing the parties’ interests, courts should ensure that NDA restrictions are not “so large as to interfere with the public interests.”⁵⁴¹ Courts have found that the public has interests in: employees’ ability to find work in their chosen field;⁵⁴² the free flow of information in markets;⁵⁴³ integrity in

535. Spector, *supra* note 529.

536. *See id.*

537. *See id.*

538. *Id.*

539. *See id.*

540. *See, e.g.,* Hammons v. Big Sandy Claims Serv. Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

541. *Id.* at 315. *See* Mountain Comprehensive Health Corp. v. Gibson, No. 2013–CA–000373–MR, 2015 WL 1194508, at *2 (Ky. Ct. App. Mar. 13, 2015); OVRs Acquisition Corp. v. Cmty. Health Servs., Inc., 657 N.E.2d 117, 126 (Ind. Ct. App. 1995). Some courts have looked to whether or not the breadth of the restriction is harmful to the public good. *See* Concord Orthopaedics Prof'l Ass'n v. Forbes, 702 A.2d 1273, 1276 (N.H. 1997) (holding that referring physicians are not “actual clients” within the meaning of a non-compete and to hold as such would “not foster the public good”).

542. *See* Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 521 (S.D. 1996).

543. *See* DONALD J. ASPELUND & JOAN E. BECKNEW, EMPLOYEE NONCOMPETITION LAW § 2.1 (2018).

corporate governance;⁵⁴⁴ exposing illegal activity;⁵⁴⁵ revelations implicating public health and safety;⁵⁴⁶ and a discrimination-free workplace.⁵⁴⁷ Disclosures of sexual harassment advance all of these interests. This Subsection focuses on the interests in exposing illegal activity and protecting public health and safety, arguing that these interests should inform decisions about the reasonableness of sexual harassment NDAs.⁵⁴⁸

Courts have been dubious of employer attempts to conceal illegality via NDAs.⁵⁴⁹ Sexual harassment is illegal. As such, courts should be wary of employer attempts to conceal it against the wishes of survivors. In litigation over the tobacco company Brown & Williamson's attempt to recover incriminating documents that were allegedly stolen from it by a former paralegal, the court explained the perverse incentives that would be created if employers were allowed to contract to conceal their illegal behavior:

If the B&W strategy were accepted, those seeking to bury their unlawful or potentially unlawful acts from consumers, from other members of the public, and from law enforcement or regulatory authorities could achieve that objective by a simple yet ingenious strategy: all that would need to be done would be to delay or confuse any charges of health hazard, fraud, corruption, . . . or other misdeeds, by focusing instead on inconvenient documentary evidence and labelling it as the product of . . . interference with contracts The result would be that even the most severe public health and safety dangers would be subordinated . . . in the public mind to the malefactors' . . . contract claims, real or fictitious.⁵⁵⁰

544. See *Espinoza v. Hewlett-Packard Co.*, No. 6000–VCP, 2011 WL 941464, at *10 (Del. Ch. 2011).

545. See *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 667 (Ohio Ct. App. 1988) (refusing to enforce an agreement precluding a school board from disclosing a teacher's history of pedophilia to other school districts); Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When is a "Source" a "Source"?*, 15 HASTINGS COMM. & ENT. L.J. 357, 387 (1992) (observing that "[a]ll sources of trade secret law observe certain limitations, explicitly or implicitly excluding from protection information concerning wrongdoing").

546. See *Bowman*, 542 N.E.2d at 667 (refusing to enforce an agreement precluding a school board from disclosing a teacher's history of pedophilia to other school districts).

547. See *Llerena v. J.B. Hanauer & Co.*, 845 A.2d 732, 737 (N.J. Super. Ct. Law Div. 2002) (holding that there is significant public interest in a discrimination-free workplace) (citing *Dixon v. Rutgers, State Univ. of N.J.*, 541 A.2d 1046, 1063 (1988) (O'Hern, J., concurring)).

548. See *infra* Section IV.C.IV (arguing that courts should be wary of employer attempts to conceal sexual harassment).

549. See, e.g., *Bowman*, 542 N.E.2d at 737.

550. *Maddox v. Williams*, 855 F. Supp. 406, 415 (D.D.C. 1994).

In addition to the general public interest against concealing illegal activity, the investing public has a specific interest in knowing what types of liability risks companies are exposed to in this domain.⁵⁵¹ In fact, investors have begun demanding clauses in merger agreements representing that executives and managers of the target firm have not been accused of sexual harassment, suggesting a strong investor interest in disclosure of harassment.⁵⁵²

Not only is sexual harassment legally prohibited, but it also poses risks to public health and safety.⁵⁵³ Health and safety are arguably paramount in the hierarchy of public interests recognized by courts.⁵⁵⁴ But traditionally, sexual harassment has not been viewed as a public health and safety issue. Rather, it has been viewed as a private harm to an individual who may contract for compensation and silence based on his or her own personal interests.⁵⁵⁵ #MeToo has revealed sexual harassment to be a broader public, social, and economic harm by documenting the sheer pervasiveness of sexual harassment in the workplace and by providing compelling personal narratives illustrating the serious harms it causes. #MeToo vividly reinforced what social science research long has documented: that large numbers of individuals experience sexual harassment at work and that the perpetrators are often serial harassers whose behavior is not isolated to one individual.⁵⁵⁶ The numbers matter for understanding sexual

551. See, e.g., EMPOWER Act, H.R. 3728, 115th Cong. (2018) (requiring public companies to report the number of sexual harassment cases they settled and the presence of employees with repeated settlements in their annual SEC filings); *Espinoza v. Hewlett-Packard Co.*, No. 6000–VCP, 2011 WL 941464, at *10 (Del. Ch. 2011) (finding that disclosure of a letter detailing sexual harassment allegations against the Hewlett-Packard CEO would “be valuable to a society concerned with corporate governance and integrity”).

552. See Nabila Ahmed, *Wall Street is Adding a New ‘Weinstein Clause’ Before Making Deals*, BLOOMBERG NEWS (Aug. 1, 2018, 11:29 AM), <https://www.bloomberg.com/news/articles/2018-08-01/-weinstein-clause-creeps-into-deals-as-wary-buyers-seek-cover> [<https://perma.cc/3QPD-UKT6>] (discussing that these guarantees have come to be known as “#MeToo rep[s]” or “Weinstein clause[s]”).

553. See Spector, *supra* note 529.

554. See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 672 (1999); see also Short, *supra* note 512, at 1212.

555. See MACKINNON, *supra* note 21.

556. See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 6 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [<https://perma.cc/EUM5-P5KL>] (finding that in a survey of U.S. workers, 25% said that they had experienced sexual harassment in the workplace, 40% reported experiencing one or more behaviors that

harassment as a social rather than an individual problem. As one court opined in allowing discovery about prior sexual harassment despite an NDA, the public's "concern [about sexual harassment] grows more pressing as additional individuals are harmed by identical or similar action."⁵⁵⁷ The weight of this interest has also been suggested by recent commentary recommending that sexual harassment NDAs should be kept "in an information escrow that would be released for investigation by the EEOC . . . and other investigative authorities if another complaint is received against the same perpetrator."⁵⁵⁸

In addition, #MeToo stories have made salient the serious harms to health and safety caused by sexual harassment, which have been extensively documented in social science research. Researchers have shown that individuals who experience sexual harassment are at greater risk for a number of health problems, including: increased stress,⁵⁵⁹ depression,⁵⁶⁰ PTSD,⁵⁶¹ and lower reported psychological wellbeing.⁵⁶² These problems can last well beyond the time when the

would constitute sexual harassment, and 60% experienced insults based on their gender); Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERS. PSYCHOL. 607, 607 (2006) (conducting meta-analysis of fifty-five studies of over 86,000 respondents find that 58% of women experienced harassing behaviors in the workplace); Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature* 14 INT'L J. MGMT. REVS. 1 (2012) (estimating based on an overview of then-existing research that between 40–75% of women and 12–31% of men experience workplace sexual harassment).

557. *Kalinauskas v. Wong*, 151 F.R.D. 363, 366 (D. Nev. 1993).

558. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. 76, 76 (2018).

559. See Berdahl & Raver, *supra* note 534; Pina & Gannon, *supra* note 534.

560. See Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89, 89 (2011) (finding significantly higher levels of depression in harassed vs. non-harassed workers controlling for factors like work-related stressors, education, and history of depression); Pina & Gannon, *supra* note 534; Amy E. Street et al., *Gender Differences in Experiences of Sexual Harassment: Data From a Male-Dominated Environment*, 75 J. CONSULTING & CLINICAL PSYCHOL. 464, 464 (2007).

561. See Pina & Gannon, *supra* note 534; Street, *supra* note 560.

562. See Berdahl & Raver, *supra* note 534, at 648-49; M. Sandy Hershcovis & Julian Barling, *Comparing Victim Attributions & Outcomes for Workplace Aggression & Sexual Harassment*, 95 J. APPLIED PSYCHOL. 874, 875 (2010); Liberty J. Munson, Andrew G. Miner & Charles Hulin, *Labeling Sexual Harassment in the Military: An Extension and Replication*, 86 J. APPLIED PSYCHOL. 293, 296 (2001); Morten Birkeland Nielsen et al., *Sexual Harassment: Prevalence, Outcomes, and Gender Differences Assessed by Three Different Estimation Methods*, 19 J. Aggression, Maltreatment & Trauma 252, 253 (2010); Pina & Gannon, *supra* note

harassment occurred,⁵⁶³ and they often manifest as physical symptoms, including pain, nausea, and sleep disorders.⁵⁶⁴ These harms are not only personally devastating to survivors but they also may require costly medical treatment, can negatively impact the survivor's broader circle of family and co-workers, and have measurable negative impacts on the broader economy.⁵⁶⁵ Workers who have experienced harassment are less productive,⁵⁶⁶ have lower levels of organizational commitment⁵⁶⁷ and job satisfaction,⁵⁶⁸ and have increased turnover rates.⁵⁶⁹ Studies have also shown that sexual harassment has negative consequences for bystander witnesses to harassment, who report negative job, health, and psychological outcomes that mirror those experienced by harassment targets.⁵⁷⁰

While the harms of sexual harassment are substantial, they are not always immediately recognized and often remain latent and unaddressed for some period of time, exacerbating the associated health risks.⁵⁷¹ Studies have documented that many victims of behaviors that fit the legal definition of sexual harassment do not identify their experiences as harassment.⁵⁷² However, it has been

534, at 221 (finding that harassment survivors are at greater risk of experiencing anger, fear, sadness, humiliation, and mistrust); Street, *supra* note 560, at 465.

563. See generally Houle et al., *supra* note 560 (finding that early career sexual harassment has long-term effects on depressive symptoms later in life).

564. See Pina & Gannon, *supra* note 534, at 221; Spector, *supra* note 531. Anecdotally, it has been reported that harassed “[e]mployees talk of having a pit in their stomach commuting to work, having anxiety, panic attacks, inexplicable fits of crying and physical manifestations of stress: hair falling out, hives, weight gain or loss, sleeplessness and lethargy.” *Id.*

565. See *infra* notes 566-569.

566. See Berdahl & Raver, *supra* note 534, at 649; Pina & Gannon, *supra* note 534, at 220.

567. See Berdahl & Raver, *supra* note 534, at 649; Munson, Minor, & Hulin, *supra* note 562, at 296; Pina & Gannon, *supra* note 534, at 220 (finding that less attachment to the employer organization leads to costly work withdrawal behaviors, including being late, neglectful, and avoiding work tasks).

568. See Hershcovis & Barling, *supra* note 562, at 874; Nielsen et al., *supra* note 562, at 254; Pina & Gannon, *supra* note 534, at 220.

569. See Berdahl & Raver, *supra* note 534, at 649; Hershcovis & Barling, *supra* note 562, at 886; Pina & Gannon, *supra* note 534, at 220.

570. See Berdahl & Raver, *supra* note 534, at 650; Pina & Gannon, *supra* note 534, at 221.

571. See *infra* notes 572-575.

572. See Ilies et al., *supra* note 556, at 623-24 (finding that less than half of women who reported experiencing harassing behaviors labeled their experience as harassment); Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & Soc’y 333, 345 (2017) (finding that less than one third of both men and women

shown that discussion about incidents of harassment with co-workers, friends, and family can help individuals recognize their own experiences as harassment and seek help.⁵⁷³ Critically, failing to recognize sexual harassment does not insulate victims from the harms associated with it.⁵⁷⁴ Those harms have been found to affect individuals even if they do not label the harassing behavior they experienced as “sexual harassment.”⁵⁷⁵ This latent quality exacerbates the potential harms of harassment and heightens the public interest in open and honest dialogue about it.

In addition to social science research documenting the pervasiveness and the harm of sexual harassment, various state and federal statutes provide evidence of the growing consensus that there is a strong public interest in disclosing sexual harassment.⁵⁷⁶ Section 178 of the Second Restatement of Contracts indicates that in deciding whether a contract violates public policy, courts should consider, among other factors, “the strength of [the] policy as manifested by legislation or judicial decisions.”⁵⁷⁷ While courts do not need statutory authority to invoke the public policy exception to NDA enforceability and may rely solely on adverse third-parties impacts, statutory labor law, open records laws, whistleblower protection laws, and the cascade of legislative activity in the wake of #MeToo provide persuasive evidence of the public interest in bringing harassment to light.⁵⁷⁸

The National Labor Relations Act (NLRA) has long been held to forbid employers’ use of NDAs to prevent employees from discussing workplace sexual harassment with one another on the grounds that this would violate the act’s protections of employees’ right to engage in concerted activities for the purpose of mutual aid or

who experienced harassing behaviors labeled their experience as harassment); Munson, Minor & Hulin, *supra* note 562, at 294.

573. See McLaughlin, Uggen & Blackstone, *supra* note 572, at 337.

574. See Munson, Minor, & Hulin, *supra* note 562, at 300-01.

575. *Id.* at 293, 300-01.

576. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 1, § 178 (AM. LAW INST. 1981).

577. *Id.*

578. See *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 663 (Ohio Ct. App.) (refusing to enforce an agreement precluding a school board from disclosing a teacher’s history of pedophilia to other school districts despite lack of clear statutory authority to do so); Ryan M. Philp, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 860, 876 (2003) (arguing that legislation is not definitive but can serve “as a judicial guidepost”); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1956-60 (1996).

protection.⁵⁷⁹ State open records statutes have provided grounds for some state courts to invalidate NDAs shielding sexual harassment claims settled by government entities.⁵⁸⁰ Most states have enacted statutes affording whistleblowers protection “to expose, deter, and curtail wrongdoing.”⁵⁸¹ These could support non-enforcement of NDAs used to conceal employer wrongdoing.

Finally, in the wake of #MeToo, there has been a wave of legislative activity explicitly addressing sexual harassment NDAs.⁵⁸² New York and Washington have enacted legislation limiting the use of NDAs to conceal harassment or other types of sexual assault.⁵⁸³

579. See Phoenix Transit Sys. & Amalgamated Transit Union, Case 28-CA-15177, 337 NLRB No. 78 (N.L.R.B. 2002) (ordering employer to cease and desist from “[m]aintaining or enforcing a rule which prohibits employees from discussing among themselves their sexual harassment complaints” based on their rights under Section 7 of the National Labor Relations Act to engage in concerted activities for the purpose of mutual aid or protection).

580. See *Pierce v. St. Vrain Valley Sch. Dist.*, 944 P.2d 646, 649-51 (Colo. App. 1997) (concluding based on the existence of state open records laws that the provisions of a settlement agreement “prohibiting discussion or disclosure of the circumstances surrounding plaintiff’s resignation and prohibiting disparaging comments or remarks are void as a violation of public policy”; overturned on the grounds there was no statutory directive guiding that decision); *Asbury Park Press v. Cty. of Monmouth*, 966 A.2d 75, 75, 79 (N.J. Super. Ct. App. Div. 2009) (reversing the trial court and ordering the County to disclose documentation of a sexual harassment settlement with one of its employees to journalists despite a confidentiality agreement: “The trial court found it significant that [the harassment victim] and the County included terms of confidentiality in their settlement agreement. But the parties’ agreement cannot override the public’s right of access under OPRA.”).

581. Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000) (discussing that in 2000, all fifty states had whistleblower protection statutes; in 2010, some states had removed these statutes); 2012 Whistleblowing Legislation, NAT’L CONFERENCE OF STATE LEGISLATURES (Nov. 19, 2012), <http://www.ncsl.org/research/labor-and-employment/2012-whistleblower-legislation.aspx> [<https://perma.cc/QW4B-TEXB>].

582. See, e.g., S.B. S6382A (N.Y. 2018); S.B. 5996 (Wash. 2018); CAL. CODE OF CIV. P. § 1002 (2017).

583. See S.B. S6382A (N.Y. 2018) (prohibits nondisclosure clauses in any settlement, agreement or other resolution of a claim or cause of action, the factual foundation for which involves sexual harassment unless the agreement expressly states that it is the complainant’s preference to include such a confidentiality provision); S.B. 5996 (Wash. 2018) (prohibits employers from requiring employees to sign, as a condition of employment, a NDA preventing them from “disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises” and provides that such agreements—including nondisclosure agreements that predate the new law—will be void and unenforceable); see also CAL. CODE OF CIV. P. § 1002 (2017)

Similar legislation has been introduced in Kansas, New Jersey, and Pennsylvania.⁵⁸⁴ A bipartisan group of U.S. senators introduced the EMPOWER Act, which would prohibit NDAs covering sexual harassment as “a condition of employment, promotion, compensation, benefits or change in employment status”⁵⁸⁵ and render such existing NDAs unenforceable.⁵⁸⁶ This groundswell of legislative activity, viewed against the backdrop of state statutes providing more generalized protections for employees and whistleblowers, provides strong evidence of a public interest in disclosure.

That said, there are public interests in secrecy that should be considered as well. Many survivors of harassment prefer confidentiality to public disclosure.⁵⁸⁷ As one member of the employment defense bar put it, “With the possible exception of Gloria Allred, almost nobody wants attention to be drawn to a sexual harassment case”—including survivors.⁵⁸⁸ This means that there is a public interest in maintaining the option for survivors to negotiate for enforceable confidentiality provisions in agreements settling harassment claims. Some have argued that finding sexual harassment NDAs unenforceable would make them unavailable to the many survivors who want them because employers and accused harassers would either refuse to settle harassment claims or would not be willing to pay significant compensation to a survivor to settle claims that could later be made public with impunity.⁵⁸⁹ These are serious concerns. However, it is not clear that abrogating NDAs to permit public disclosures by the small handful of survivors who decide to go public after signing an NDA would radically alter settlement practices by employers and employees in run-of-the-mill cases. As discussed above, such disclosures are already permitted in court, to regulatory

(prohibiting non-disclosure provisions in cases involving a felony sex offense, childhood sexual abuse, sexual exploitation of a minor, and sexual assault).

584. H.B. 2695 (Kan. 2018) (prohibiting state funds distribution to pay sexual harassment claims and prohibiting non-disclosure agreements for sexual harassment settlements in “certain circumstances”); S.B. No. 121 (N.J. 2018) (barring agreements that conceal details of discrimination claims); S.B. No. 999 (Pa. 2018) (prohibiting NDAs within contracts or secret out-of-court settlements related to sexual harassment or misconduct).

585. EMPOWER Act, S. 2994 (a)(1) 115TH Cong. (2018).

586. See EMPOWER Act, § (a)(2).

587. See Robin Shea, *In Defense of Confidentiality (Yes, Even In Harassment Cases)*, CONSTANGY, BROOKS, SMITH & PROPHETE LLP (Jan. 12, 2018), <https://www.constangy.com/employment-labor-insider/ban-confidentiality-in-sex-harassment-settlements-youll> [<https://perma.cc/9RKF-WZ4R>].

588. *Id.*

589. See *id.*

agencies, and to fellow employees.⁵⁹⁰ Nonetheless, there is no evidence that these broad exceptions have inhibited employers' use of sexual harassment NDAs.⁵⁹¹ The continued availability of NDAs to those survivors who want them is an empirical question that can only be answered in time as law and practices evolve in response to changing norms. The ability of survivors to negotiate meaningfully for confidentiality is an interest that courts should consider as these cases come before them.

D. The "Reasonableness" Standard as a Reasonable Way Forward

As indicated above, rather than wait for common law standards governing sexual harassment NDAs to develop, some states are proceeding with legislation to enact categorical rules that presumably reflect the legislature's view of the appropriate balance of employer, employee, and public interests. For instance, New York's recently enacted statute prohibits nondisclosure clauses in any settlement, agreement, or other resolution of a claim or cause of action, "the factual foundation for which involves sexual harassment," unless the agreement expressly states that it is the "complainant's preference" to include such a confidentiality provision.⁵⁹² Washington state's proposed legislation prohibits employers from requiring employees to sign sexual harassment NDAs as a condition of employment, but it allows employers and employees to negotiate confidentiality provisions as a part of settlement agreements.⁵⁹³

Even if such statutes embody sound policy, they do not diminish the importance of the common law's case-by-case approach to reasonableness assessments. First, most states have not enacted statutes addressing sexual harassment NDAs. The common law is the only avenue for addressing them in these jurisdictions. Second, even in states with statutes governing sexual harassment NDAs, questions are likely to arise over whether agreements reached in compliance with the statute are nonetheless unreasonable. For instance, Washington's statute permits NDAs reached as part of settlement agreements, and these might be unreasonable under common law

590. See *supra* Subsections IV.B.-C.

591. See Ayres, *supra* note 558, at 85 (suggesting that employers continue to draft NDAs that prohibit lawful disclosures and arguing that sexual harassment NDAs should only be enforceable if they explicitly disclose the rights that survivors retain to report the perpetrator's behavior to the EEOC and other investigative authorities).

592. S.B. S6382A (N.Y. 2018).

593. See S. 5996, 65th Leg., Reg. Sess. (Wash. 2018).

standards in some circumstances.⁵⁹⁴ Similarly, some have argued that New York’s requirement that an NDA be the “complainant’s preference” swallows the statute’s prohibition on NDAs because employers will refuse to settle claims without including a boilerplate “complainant’s preference” clause.⁵⁹⁵ Nominally compliant NDAs in which signers are forced to assert an affirmative preference for confidentiality might well be unreasonable under common law standards.⁵⁹⁶ Finally, this is an area where norms, standards, and practices are evolving rapidly; the social ground is shifting beneath our collective feet. The appeal of the “reasonableness” analysis described in this section is that it allows for a different balance to be struck under different factual circumstances and for enforceability standards to evolve with norms and practices.

CONCLUSION

Polling data suggests that judges may soon face an avalanche of opportunities to reflect on the impact of the norm cascade on the law: 38% of Americans in a recent Gallup poll said that recent events have made them more likely to sue.⁵⁹⁷ Plaintiffs’ employment lawyers and human resources professionals report being deluged with sexual harassment complaints.⁵⁹⁸ An NBC–*Wall Street Journal* poll found that 78% of women are now more likely to speak out if they feel they are being treated unfairly due to their gender, and 77% of men say they

594. See Wash. S.B. 5996 (2018).

595. John L. Valentino, *Will N.Y. Law Banning Non-Disclosure Agreements Eliminate Their Use?*, BOUSQUET HOLSTEIN, PLLC (Aug. 16, 2018), <http://bhllawpllc.com/publication/will-n-y-law-banning-non-disclosure-agreements-eliminate-their-use/> [https://perma.cc/2N47-S463].

596. See generally *id.* Indeed, it is particularly important for courts to police the reasonableness of such NDAs, as employers are likely to point to “complainant’s preference” clauses as evidence that an agreement is presumptively valid even if they do not meaningfully reflect the complainant’s preferences. *Id.*

597. Saad, *supra* note 63.

598. See Amelia Gentleman & Joanna Walters, *#MeToo is Raising Awareness, But Taking Sexual Abuse to Court is a Minefield*, GUARDIAN (Oct. 20, 2017, 7:06 PM), <https://www.theguardian.com/world/2017/oct/21/metoo-is-raising-awareness-but-taking-sexual-abuse-to-court-is-a-minefield> [https://perma.cc/AV24-C22Y]; see also Yuki Noguchi, *#MeToo Complaints Swamp Human Resources Departments*, NPR (June 4, 2018, 2:30 PM), <https://www.npr.org/2018/06/04/615783454/-metoo-complaints-swamp-human-resource-departments> [https://perma.cc/CBS6-45QY]; Maya Rhodan, *#MeToo Has ‘Tripled’ Web Traffic for the Federal Agency That Investigates Harassment*, TIME (June 12, 2018), <http://time.com/5308836/sexual-harassment-metoo-eeoc-complaints/> [https://perma.cc/CHE4-UBGD].

are more likely to speak out now if they see a woman being unfairly treated for the same reason.⁵⁹⁹ Perhaps more radically, women who experience sexual harassment are now much more likely to recognize it as such.⁶⁰⁰

This dramatic change in norms around sexual harassment has occurred in a very short period of time. Courts must take these new norms into account in deciding sexual harassment cases today. These new norms define what it means to be a “reasonable jury” or a

599. Carrie Dann, *NBC/WSJ Poll: Nearly Half of Working Women Say They've Experienced Harassment*, NBC NEWS (Oct. 30, 2017, 7:00 AM) <https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-nearly-half-working-women-say-they-ve-n815376> [<https://perma.cc/4USY-6PCG>].

600. See, e.g., CHAI FELDBLUM & VICTORIA LIPNIC, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8-10 (2016) (describing shifts in public perception regarding sexual harassment). Historically, polling questions that asked if respondents had experienced specific behaviors (behavioral questions) found sharply higher levels of sexual harassment than did polling questions that asked simply whether the respondent had experienced sexual harassment (direct inquiries). See, e.g., Berdahl & Raver, *supra* note 534, at 642-43. Today, that gap has largely closed, with roughly 60% of women now reporting sexual harassment in direct-inquiry polling. FELDBLUM & LIPNIC, *supra* note 600, at 9. By comparing rates of harassment measured through direct-inquiry and behavioral questions, research has repeatedly shown that only half of all women who have been sexually harassed identify their experiences as “sexual harassment.” See Iles et al., *supra* note 556, at 607. One meta-analysis of fifty-five studies including over 86,000 respondents found that 58% of women had experienced behaviors that qualified as harassment, but less than half of these women were willing to label them as such. *Id.* This trend is particularly well exemplified in an extensive report released by an EEOC task force in June 2016. See FELDBLUM & LIPNIC, *supra* note 600, at 8-10. According to the report, when asked directly (in surveys) if they had experienced sexual harassment, only 25% of women said yes. *Id.* When respondents were given a list of behaviors considered harassing by researchers and asked what they had personally experienced within a given time frame, the rate of harassment rose to 40%. *Id.* at 8-9. When including questions related to gender harassment (i.e. sex-based put downs rather than come-ons) the rate rose to 60% of women. *Id.* at 9. According to polls conducted post the explosion of the #MeToo movement, now between 42–60% of women report being sexually harassed when asked directly, a dramatic shift from only 25% in 2016. See, e.g., *60% of U.S. Women Say They've Been Sexually Harassed Quinnipiac University National Poll Finds; Trump Job Approval Still Stuck Below 40%*, QUINNIPIAC UNIV. (2017), <https://poll.qu.edu/national/release-detail?ReleaseID=2502> [<https://perma.cc/9JVJ-96WN>]. Given that the rate of workplace sexual harassment has remained relatively stable over time, the dramatic increase in the number of women who say they have been sexually harassed is most likely due to a shift in perception; the #MeToo movement has changed the way women view their workplace interactions and has led many to newly label what they have long experienced as “sexual harassment.” See Iles et al., *supra* note 556, at 625 (finding generally that rates of workplace sexual harassment have remained constant over time).

“reasonable person in the plaintiff’s position.” They define what information an employer may “reasonably” ask an employee to conceal about sexual harassment. In short, they define what’s “reasonable” now.

Our request is modest: Let juries play their proper role in applying the “reasonableness” standards. These standards are designed to allow juries “to make commonsense determinations about human behavior, reasonableness, and state of mind based on objective standards.”⁶⁰¹ They are meant to ensure that sexual harassment law is informed by community standards of appropriate behavior in the workplace.⁶⁰² Federal judges should allow juries to do the difficult work of grappling with facts and establishing norms about what conduct is considered appropriate in the age of #MeToo. If the polls are any indication, most of us already know.

601. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 NYU L. REV. 982, 1134 (2003).

602. See Beiner 1999, *supra* note 126, at 82.