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The Sexual Harassment Loophole

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Abstract

Employers rarely pay for sexual harassment. The #MeToo movement has not changed this legal reality. Title VII of the Civil Rights Act of 1964—the nation's primary workplace antidiscrimination law—contains a harassment loophole. Harassment is the only kind of Title VII violation that allows employers to avoid liability if they offer training and reporting opportunities to workers. In contrast, employers must automatically pay for all other Title VII claims such as discriminatory firings, even when firms have trained their employees not to discriminate. This Article makes the case for closing the loophole by aligning harassment liability with other Title VII offenses and holding employers automatically responsible for all proven incidents of workplace harassment.

When the Supreme Court created the harassment loophole years ago, it assumed that employers would enact workplace measures to effectively deter harassment. Unfortunately, the #MeToo movement has convincingly demonstrated that the problem of workplace harassment remains widespread despite decades of harassment training. Even though firms express a rhetorical commitment to antiharassment values, many employers engage only in cosmetic compliance and fail to take meaningful steps to actually curb harassment. Closing the harassment loophole would not only represent a tangible legal

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solution to the ongoing problem of harassment, it would also advance the goals of compensation, deterrence, and cost-spreading that lie at the core of Title VII. Just as companies must pay for all other Title VII violations—regardless of formal policies that prohibit misconduct—courts should hold firms strictly accountable for sexual harassment.

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INTRODUCTION

Employers rarely pay for sexual harassment.[1] The #MeToo movement has not changed this legal reality.[2] Since #MeToo began several years ago, the movement has raised awareness about sexual misconduct and empowered victims to come forward.[3] Survivors have told their stories about workplace abuse, and employers have fired many high-profile men.[4] But despite #MeToo's initial wave of consciousness-raising, the movement has said very little about the actual law that governs workplace harassment: Title VII of the Civil Rights Act of 1964.[5] In light of this vacuum, a vital question still looms over the movement: Will #MeToo continue to operate primarily as a social movement, or will it transform into a legal movement that effectively combats sexual harassment?[6]

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1. *See infra* Part III.A.

2. *See infra* Part I.B.

3. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 25 (2018) (discussing how the #MeToo movement has facilitated solidarity among victims).

4. *See* Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 832–33 (2019) (explaining how #MeToo advocates criticize the state for failing to adequately combat harassment).

5. 42 U.S.C. §§ 2000e–2000e-17; *see* Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 53 (discussing the need for deeper cultural and structural changes in the wake of #MeToo); Rafia Zakaria, *The Legal System Needs to Catch Up with the #MeToo Movement*, NATION (Apr. 18, 2018), https://perma.cc/U76J-XAR7 (calling for a broader discussion of legal reforms within the #MeToo movement).

6. *See* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 324 (2018) (examining unanswered questions about #MeToo's impact); *see also* Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152, 167 (2018) (discussing the need for legal reforms to combat workplace harassment); Deborah L. Rhode, *#MeToo: Why Not? What Next*, 69 DUKE L.J.

Despite the harrowing stories of many #MeToo victims, the unfortunate truth is that most of their claims would fail in court because federal law largely immunizes employers from sexual harassment liability.[7] Even when plaintiffs can prove that they were sexually assaulted or harassed at work, companies can avoid paying for this misconduct if they implemented antiharassment training and corrective procedures.[8] This defense—that firms can escape liability by instituting internal reporting schemes—is unique to harassment law and does not apply to other Title VII violations such as discriminatory discharges.[9]

In contrast to the law's take on sexual harassment—where victims must first utilize their employers' reporting systems to obtain relief—Title VII holds firms automatically responsible for all other claims, regardless of an employer's internal

377, 379–80 (2019) (examining the #MeToo movement's ability to catalyze "lasting change").

7. *See* Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 49–50 (2018) (examining various reasons why most #MeToo harassment claims would fail in court); Julia Jacobs, *#MeToo Cases' New Legal Battleground: Defamation Lawsuits*, N.Y. TIMES (Jan. 12, 2020), https://perma.cc/UCL3-WS2M (describing common law claims that plaintiffs bring in lieu of harassment and other time-barred claims); Jodi Kantor, *#MeToo Called for an Overhaul. Are Workplaces Really Changing?*, N.Y. TIMES (Mar. 23, 2018), https://perma.cc/YVE3-PXHN (discussing the "giant holes in the federal laws meant to protect women from harassment").

8. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998) (stating that the failure by an employee to comply with a company's antiharassment procedures "will normally suffice to satisfy the employer's burden"); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (noting that basing employer liability on a company's efforts to create antiharassment policies would advance Title VII's goals); *see also* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 66–67 (2018) (examining vicarious liability rules for hostile work environment claims).

9. *See* Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 809–11 (2002) (noting that harassment constitutes the sole exception to the rule that holds employers vicariously liable for antidiscrimination violations).

procedures or fault.[10] For example, if a supervisor violates Title VII by refusing to hire a non-white applicant, a rule of strict vicarious liability[11] would hold the employer responsible for the supervisor's racist act, regardless of the employer's fault.[12] Even if the company had explicitly prohibited race-based decision-making and had no knowledge of the supervisor's misconduct, the company would still have to pay.[13] Likewise, if a bigoted manager fires an employee because of her religion or sex in violation of Title VII, courts would hold the company automatically responsible.[14] For liability purposes, it would not matter whether the company offered anti-bias training or whether the victim reported the violation to her employer.[15]

Title VII contains a sexual harassment loophole. By "loophole," I mean that there is only one type of Title VII

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10. *See* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 280–82 (1995) (contrasting Title VII's rule of strict employer liability for discrimination with the rule of notice-based liability for harassment).

11. "Vicarious liability" imposes legal responsibility on one party for the wrongful acts of another. *See* Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1988). In the workplace context, if courts hold employers vicariously liable for employees' unlawful behavior, the liability is "strict" or "automatic" in the sense that employers cannot escape legal responsibility for the employees' acts by proving that employers exercised reasonable care to prevent the unlawful behavior. *Id.* at 577 (discussing the relationship between "strict" and "vicarious" liability for sexual harassment claims); *see infra* Part III.A.

12. *See* Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 144 (2001) (questioning the value of giving employers an affirmative defense to harassment claims based on training and reporting procedures).

13. *See* Verkerke, *supra* note 10, at 280–82 (describing the different metrics used to evaluate employer liability for discrimination and harassment).

14. *See id.* at 281–82 (outlining liability standards for workplace discrimination).

15. *See* Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 74–75 (1992) (criticizing the differential treatment of harassment liability versus other forms of Title VII liability).

violation—harassment[16]—that allows employers to avoid liability by offering training and reporting opportunities to their workers.[17] This Article makes the case for closing the loophole by aligning harassment liability with other antidiscrimination offenses and holding employers automatically responsible for all proven incidents of sexual harassment.

The Supreme Court created the harassment loophole in 1998 by announcing two landmark decisions that functionally granted immunity to employers with antiharassment policies and reactive procedures.[18] Since then, consultants and human resources departments have bombarded firms with advice on how to reduce their legal exposure to harassment claims, even though there is very little social science data to prove that these policies actually reduce harassment.[19] Nevertheless, the Court assumed that reporting schemes would effectively curb harassment.[20] Scholars have criticized the Court's holdings on

16. This Article addresses harassment based on sex and gender only. Title VII also prohibits harassment based on other protected categories such as race, religion, and national origin. 42 U.S.C. § 2000e-2. The judicial development of these other forms of harassment took different trajectories during the 1970s. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 951–92 (1993) (discussing the early history of harassment claims under Title VII). More recently, courts have applied identical rules of vicarious liability to all forms of harassment. *See* L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 849 (1997) (outlining the legal parallels between sexual and racial harassment claims).

17. *See supra* notes 9–15 and accompanying text.

18. *See Faragher*, 524 U.S. at 807 (announcing the standard for employer liability in sexual harassment cases); *Ellerth*, 524 U.S. at 764 (same).

19. *See* ANNA-MARIA MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE 15 (2016) (examining the proliferation of antiharassment consulting firms).

20. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (discussing Title VII's objectives of "promo[ting] conciliation rather than litigation" and "encourag[ing] employees to report harassing conduct"); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 787–88 (1999) (analyzing incentives related to antiharassment policies).

both empirical and doctrinal grounds.[21] This Article advances these critiques in light of #MeToo and explains how the movement underscores the ineffectiveness of current antiharassment procedures. Over two decades after the Court bet that reporting systems would limit harassment, the sheer number of #MeToo stories shows that sexual misconduct continues to proliferate throughout American workplaces *despite* years of antiharassment education and internal reporting schemes.[22] Today, the unfortunate reality is that too many companies engage in performative acts of "cosmetic compliance" that formally adhere to the Court's mandate without meaningfully reducing harassment.[23]

Courts defend the harassment loophole by pointing to Title VII's language, which extends liability only to "employers" based on the acts of their "agents."[24] Interpreting this text, the

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21. *See, e.g.*, Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1324–25 (2014) (asserting that vicarious liability for harassment applies to only a small set of cases); Fisk & Chemerinsky, *supra* note 20, at 787–88 (questioning whether harassment victims would be more likely to raise complaints based on changes to vicarious liability rules); Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 860 (2005) [hereinafter Lawton, *Bad Apple Theory*] (critiquing Title VII's liability framework for misapplying agency principles); Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 206–10 (2004) [hereinafter Lawton, *Operating in an Empirical Vacuum*] (arguing that the Supreme Court's vicarious liability rules have not reduced supervisory harassment).

22. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 3 (2003) (asserting that many employers implement antiharassment trainings to avoid liability, rather than to reduce harassment).

23. *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 243 (2018) (discussing how the #MeToo movement has shed light on the failures of internal reporting systems).

24. *See* 42 U.S.C. § 2000e ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."); *see also* Chamallas, *supra* note 21, at 1318–19 (discussing the statutory justifications for the harassment loophole). Courts have largely declined to hold individuals personally liable for Title VII harassment claims. *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1606–07 (2018) ("[I]ndividuals

Supreme Court has held that only supervisors are "agents" for Title VII purposes and that supervisory misconduct attaches to firms only when supervisors take "tangible employment actions" such as hiring and firing.[25] But these holdings reflect an outdated view of agency law. In fact, outside the harassment context, courts often hold employers vicariously liable (i.e., legally responsible regardless of company fault) for the misconduct of ordinary employees as agents (i.e., not just supervisors) for all sorts of misconduct (i.e., not just firings).[26] To use a classic example, if a delivery driver runs a red light and injures a pedestrian, the driver's employer must pay for the damages, even if the employee was not a supervisor and even if the employee broke a workplace rule that explicitly prohibited bad driving.[27] Beyond mere negligence, many jurisdictions require employers to pay even for some acts of intentional employee misconduct.[28] Employers must compensate victims for these harms not because the employers engaged in wrongdoing but because the employee's misconduct relates to work activities and foreseeable wrongs.[29]

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who commit sexual harassment generally will be immune from personal liability under Title VII.").

25. *See* Vance v. Ball State Univ., 570 U.S. 421, 431–32 (2013).

26. *See* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 136 (2013) (noting that courts can hold employers vicariously liable for employee misconduct even when employees break work rules); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229, 1244–45 (1991) (noting that workers who are labeled "employees," "supervisors," or "managers" can expose their employers to vicarious liability).

27. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 138–39 (1995) (discussing various common law scenarios involving vicarious liability).

28. *See* Verkerke, *supra* note 10, at 292–93 (examining situations in which courts hold defendants vicariously responsible for intentional misconduct).

29. *See* David B. Oppenheimer, *Employer Liability for Sexual Harassment by Supervisors*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 272, 274 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing

Just as courts hold employers strictly liable for careless delivery drivers under agency law and racist hiring managers under Title VII, they should hold companies strictly liable for sexual harassment as well. Although some legal scholars have proposed expanding this type of vicarious responsibility when *supervisors* commit sexual harassment,[30] this Article goes further and argues that today's workplace realities, as revealed by #MeToo, justify requiring employers to pay for *all* forms of employee harassment, both coworker harassment and supervisory harassment alike.[31] The #MeToo movement has shown that harassment by fellow employees remains an unacceptably common event.[32] Given the breadth of the problem, employers should bear the costs of this frequent, predictable form of employee mistreatment.

Requiring employers to pay for all instances of employee harassment—whether committed by supervisors or coworkers—would advance the goals of compensation, deterrence, and cost-spreading that lie at the core of Title VII

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rationales for holding employers strictly liable for intentional employee misconduct).

30. *See, e.g.*, Carrillo, *supra* note 15, at 52 (emphasizing the need for courts to treat the harms caused by sexual harassment as seriously as other forms of discrimination); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 735–36 (2000) (arguing for strict employer liability for supervisory harassment, but for limiting damages when plaintiffs fail to mitigate); Phillips, *supra* note 26, at 1268–69 (asserting that strict employer liability for supervisory harassment provides the greatest incentive for employers to implement effective antiharassment programs).

31. For pre-#MeToo scholarship that argued in favor of establishing vicarious liability for supervisory and coworker harassment, *see, e.g.*, Chamallas, *supra* note 21, at 1343–44 (arguing for new legislation to expand employer liability to all discriminatory acts that employees commit); Fisk & Chemerinsky, *supra* note 20, at 789 (describing the prevention of harassment as a non-delegable employer duty); Oppenheimer, *supra* note 27, at 107–18 (advocating for strict employer liability for coworker harassment based on agency principles).

32. *See* Anita Hill, *Let's Talk About How to End Sexual Violence*, N.Y. TIMES (May 9, 2019), https://perma.cc/Q7DQ-TD65 (explaining how #MeToo highlighted the experience of millions of sexual abuse survivors).

and agency law.[33] For instance, a rule of strict employer liability would increase the chances that #MeToo victims would receive payment for their injuries, thus advancing Title VII's compensation objective.[34] Automatic liability would also serve Title VII's deterrence goal by creating additional incentives for employers to implement tailored preventative measures that actually curb sexual misconduct rather than engaging in cosmetic compliance.[35] As to the issue of cost-spreading, it might seem unfair to force employers to assume the risks and losses associated with all forms of employee harassment, especially when firms take genuine steps to reduce harassment by implementing training and reporting systems. But as courts have decided in other vicarious liability contexts, when companies reap the economic benefits of their activities, society expects them to pay for the foreseeable costs of employee misbehavior, even when that misconduct violates explicit workplace rules.[36]

Critics could raise several objections to this proposal. For example, expanded employer liability might cause male managers to avoid interacting with female subordinates, limit

33. *See* Carrillo, *supra* note 15, at 85–86 (discussing the relationship between vicarious liability and Title VII's core objectives); Chamallas, *supra* note 26, at 150–51 (outlining the role vicarious liability plays in distributing losses); Grossman, *supra* note 30, at 721–22 (examining Title VII's twin goals of compensation and deterrence).

34. *See* Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 58–59 (1999) (discussing Title VII's twin objectives of compensating victims and preventing future acts of discrimination).

35. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (emphasizing the importance of prevention in Title VII's statutory scheme); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (expressing hope that the harassment loophole would further Title VII's "deterrent purpose"); *see also* Lawton, *Operating in an Empirical Vacuum*, *supra* note 21, at 200 (noting that the Supreme Court emphasized Title VII's deterrence objective when it created the harassment loophole).

36. *See* Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 196 (2001) (discussing situations where employers must pay for employee misconduct).

the due process rights of accused harassers, or force firms to pay for minor misconduct, all while failing to address Title VII's other structural deficiencies.[37] Despite the facial appeal of these concerns, however, closing the harassment loophole represents a vastly preferable alternative to the status quo.

First, if strict vicarious liability caused some employees to avoid accusations of harassment by limiting their contact with female coworkers, this marginalization would constitute a separate Title VII violation.[38] Although such claims of exclusion are notoriously difficult to prove, if closing the harassment loophole actually caused more supervisors to block women from networking and advancement opportunities, the chances of highlighting these violations would increase as unlawful occurrences became more prevalent.[39] To the extent that Title VII might fail to correct informal or opaque exclusionary practices, such an outcome would simply highlight the existing limitations of antidiscrimination law—it would not provide a rationale for continuing to limit employers' exposure to harassment claims.

Second, as to the rights of accused harassers, heightened liability would actually *increase* the likelihood of a fair investigation.[40] Today, firms often take advantage of the harassment loophole by summarily firing alleged perpetrators to publicly exhibit their commitment to antiharassment

37. *See* Bisom-Rapp, *supra* note 8, at 69–70 (examining the possible unintended consequences of uncritically embracing proposals for expanded harassment training); Hemel & Lund, *supra* note 24, at 1592 (outlining certain backlash concerns with expanding corporate liability for sexual misconduct).

38. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 817 (1991) (discussing the evolution of sex discrimination and harassment claims under Title VII); Joan C. Williams & Suzanne Lebsock, *Now What?*, HARV. BUS. REV. (Jan. 25, 2018), https://perma.cc/JT9Q-XJU5 (noting that a manager's refusal to hold closed-door meetings with women would violate Title VII if the same manager held such meetings with men).

39. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 805 (2011) (discussing the difficulty of combating subtle acts of discrimination); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001) (explaining how antidiscrimination law frequently fails to combat patterns of interaction that exclude nondominant groups over time).

40. *See infra* Part I.A.1.

values.[41] But if courts were to hold companies automatically liable for all employee harassment, regardless of subsequent disciplinary measures, then employers would actually have fewer incentives to arbitrarily discharge accused harassers until such allegations were proven.[42] At the same time, victims and firms would still retain incentives to participate in investigations because, although courts would hold firms automatically responsible for damages regardless of notice, the amount of those damages would depend on site-specific facts, such as whether the company effectively reduced harassment-related harms after they were unearthed.[43] Finally, even with strict liability in place, harassment law would still retain many doctrinal safeguards to limit frivolous claims.[44]

The Article proceeds as follows: Part I critically evaluates the #MeToo movement's legal impact by assessing several post-#MeToo judicial opinions that have dismissed plaintiffs' allegations of sexual harassment. These very recent federal decisions show how employers continue to rely on the harassment loophole to avoid Title VII liability, even in the wake of #MeToo. Part II explains how the Supreme Court first created the harassment loophole by embracing the assumption that limited liability would prompt employers to adopt effective reporting schemes. But given that #MeToo has undermined this assumption, Part III explains why a scheme that holds employers strictly liable for employee harassment would better comport with the text, purpose, and structure of Title VII, as well as underlying agency rationales. The Article concludes by responding to several possible objections.

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41. *See* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 133–34 (2018) (explaining how employers often take immediate corrective action against harassers who are viewed as "fungible").

42. *Cf.* Porter, *supra* note 7, at 60 (noting that the harassment loophole can incentivize sudden employee terminations).

43. *See* Grossman, *supra* note 30, at 735–36 (arguing for a strict liability approach to supervisory harassment that would allow for reduced damages when firms respond effectively to complaints).

44. Chamallas, *supra* note 21, at 1344.

Even when employees repeatedly grope, ridicule, or demean coworkers because of their gender, employers nearly always avoid liability.[45] The #MeToo movement has convincingly demonstrated that despite firms' rhetorical commitment to antiharassment values, the problem of workplace harassment remains widespread.[46] Closing the harassment loophole represents a tangible legal solution to this problem. Just as companies must pay for all other Title VII violations—regardless of formal policies that prohibit misconduct—courts should hold firms strictly accountable for sexual harassment.

I. THE #METOO MOVEMENT'S EFFECT ON HARASSMENT LAW

The #MeToo movement has revealed two stubborn realities about sexual harassment in American workplaces. First, despite a decades-long federal prohibition against harassment, many women and a significant number of men[47] still experience high levels of gender-based harassment at work.[48] Second, the movement has given victims an opportunity to end years of silence and openly share harrowing stories of sexual

45. *See* Estrich, *supra* note 38, at 844 (noting that courts have limited Title VII's reach "to only the most extreme cases of sexual harassment"); Grover, *supra* note 9, at 824–25 (summarizing studies that show how employers win when they utilize the harassment loophole).

46. *See* Hill, *supra* note 32 (discussing the prevalence of sexual harassment in the wake of #MeToo).

47. *See* Bisom-Rapp, *supra* note 8, at 62–63 (questioning the effectiveness of antiharassment trainings standing alone); Vicki Schultz et al., *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 25–26 (2018) (explaining that male harassment victims are typically harassed by other men).

48. *See* EQUAL EMP'T OPPORTUNITY COMM'N, CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGES FILED WITH EEOC) FY 2010–FY 2019 (2019), https://perma.cc/498R-5G2X (reporting that nearly 85 percent of harassment charges were filed by women in fiscal year 2018); *see also* MAYA RAGHU & JOANNA SURIANI, #METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY 1 (2017), https://perma.cc/6W9Z-BM72 (PDF) (summarizing sexual harassment charge statistics).

mistreatment.[49] This section considers how the two realities revealed by the movement—prevalent harassment and prevalent silence—relate to the current legal regulation of sexual harassment at work. In short, #MeToo has uncovered a fundamental mismatch between the requirements of Title VII and the reality of ongoing sexual harassment. Whereas Title VII rewards employers that provide antiharassment training to their workers, harassment remains widespread even with anti-bias schemes in place.[50] Likewise, the #MeToo movement has explained why credible fears of retaliation cause many victims to stay silent.[51] And yet the law of sexual harassment still requires victims to quickly speak out about their harassment experiences or risk losing in court.[52] To illustrate how the #MeToo movement has failed to disrupt these dynamics, this section concludes by critically evaluating several post-#MeToo judicial decisions that have utilized the harassment loophole to dismiss Title VII complaints.

A. *#MeToo, Backlash, and Calls for More Training*

Although sexual assault survivors used the phrase "me too" as early as 2006,[53] the modern iteration of the #MeToo

49. *See* Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://perma.cc/SX29-L83N (concluding that "[m]any survivors realistically judged reporting pointless").

50. *See* Robin West, *Manufacturing Consent*, BAFFLER (May 15, 2018), https://perma.cc/62TA-SYKW (questioning why a legal norm does not yet exist to effectively curb harassment).

51. *See* Mizrahi, *supra* note 41, at 125 (reporting data on retaliation against harassment complainants).

52. *See* Grossman, *supra* note 30, at 700–03 (discussing how silence or delayed reporting can defeat plaintiffs' sexual harassment claims).

53. *See* Mimi A. Akel, Note, *The Good, the Bad, and the Evils of the #MeToo Movement's Sexual Harassment Allegations in Today's Society: A Cautionary Tale Regarding the Cost of These Claims to the Victims, the Accused, and Beyond*, 49 CAL. W. INT'L. L.J. 103, 107 (2018) (noting that Tarana Burke used the term "me too" in 2006 to connect survivors of sexual abuse).

movement began in 2017.[54] On October 5, 2017, numerous women publicly accused movie producer Harvey Weinstein of sexual violence or harassment.[55] Ten days later, the actress Alyssa Milano sent the following tweet: "If you've ever been sexually harassed or assaulted write 'me too' as a reply to this tweet."[56] Within weeks, millions of people across the country utilized the hashtag "#MeToo" to share their own stories of sexual abuse.[57] Although not all of these claims involved workplace harassment, the range of contexts, locales, and types of abuse alleged in these stories demonstrated the myriad ways in which sexual misconduct reinforced gender-based power dynamics in both work- and non-work settings.[58]

Throughout the months and years that followed, scores of individuals publicly brought allegations of misconduct against prominent men in entertainment, the media, the arts, the restaurant business, and law, among other industries.[59] Many well-known men in these sectors either quit or were fired, including Weinstein, Matt Lauer, Charlie Rose, Leslie Moonves,

54. *See State Regulation of Sexual Harassment*, 20 GEO. J. GENDER & L. 421, 422 (2019) (describing the unprecedented attention that harassment allegations received during the early days of the #MeToo movement).

55. *See* Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 99–100 (2018) (summarizing the early history of the #MeToo movement); Tippett, *supra* note 23, at 230 (same).

56. *See* Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39, 67 (2018) (discussing the initial history of the #MeToo movement); Hébert, *supra* note 6, at 321–22 (examining the evolution of the #MeToo movement).

57. *See State Regulation of Sexual Harassment*, *supra* note 54, at 422–23 (noting that the allegations of sexual misconduct against Weinstein ranged in severity from off-color comments to rape); *The Harvey Weinstein Story: From Studio to Courtroom in 40 Years*, REUTERS (Jan. 7, 2020), https://perma.cc/E5J4-7ZQP (summarizing the timeline of key events from the #MeToo movement).

58. *See* Schultz, *supra* note 3, at 24–25 (discussing the importance of addressing institutional forms of harassment); Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 69–70 (2018) (explaining how #MeToo stories revealed underlying gender-based power structures).

59. *See* Bisom-Rapp, *supra* note 8, at 73–74 (describing the cascade of accusations that the Weinstein case triggered); Tippett, *supra* note 23, at 231–32 (outlining the breadth and depth of #MeToo accusations).

Mario Batali, Garrison Keillor, and Ninth Circuit Judge Alex Kozinski.[60] At the same time that these high-profile falls from grace occurred in rapid succession, the larger issue of sexual harassment shot to the forefront of national news and popular attention.[61] Focusing on the connection between famous #MeToo stories and larger employment structures, advocates explained how the problem of sexual harassment persisted even in ordinary workplaces.[62] In the course of exposing these various iterations of sexual misconduct—both in popular media stories and in less-publicized settings—the #MeToo movement highlighted the dispiriting reality that harassment remains far too common, despite decades of advocacy and legal reforms to combat the problem.[63]

1. Questioning #MeToo's Fairness and Lasting Impact

As with many social movements, #MeToo has triggered a backlash, with critics charging that the movement undermines due process protections for the accused.[64] Characterizing #MeToo as a "naming and shaming" campaign, skeptics argue that the movement leaves little time for fair investigations.[65] According to this critique, statements like "#BelieveWomen"

60. *See* Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 85–86 (2018); Chamallas, *supra* note 56, at 67–68 (analyzing third-party responsibility for sexual violence); Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057, 1058 (2018) (explaining how the #MeToo movement highlighted widespread instances of harassment).

61. *See* Tippett, *supra* note 23, at 230–34 (outlining the connection between publicized #MeToo stories and the limitations of antidiscrimination law).

62. *See* Murray, *supra* note 4, at 833–34 (examining #MeToo's broader critique of the state's failure to impose appropriate consequences on sexual harassers).

63. *See* Schultz, *supra* note 3, at 24–25 (highlighting the need for a theoretical framework to address harassment).

64. *See* Emily Yoffee, *Why the #MeToo Movement Should Be Ready for a Backlash*, POLITICO (Dec. 10, 2017), https://perma.cc/F9KH-DQMC (outlining possible unintended consequences of #MeToo).

65. *See* Wexler et al., *supra* note 5, at 51 (summarizing critiques of the movement).

only exacerbate the problem by encouraging a rush to judgment.[66]

Another line of critique asserts that #MeToo proponents fail to gauge the relative wrongdoing of various forms of misconduct.[67] For example, within weeks of the Weinstein allegations, the names of many alleged perpetrators appeared on a so-called "Shitty Media Men" list.[68] The author of the list invited others to lodge anonymous accusations, which ranged in severity from "weird lunch dates" and "creepy [direct message]s" to sexual assault and brutal rape.[69] Yet, despite the huge variation in these allegations, the proposed punishments for such transgressions usually involved some form of career destruction or social ostracism.[70] Such calls for banishment, regardless of relative wrongdoing, have prompted cynics to analogize #MeToo to a "witch hunt" or "sex panic."[71]

Even #MeToo backers have questioned the movement's long-term ability to bring lasting change to American workplaces.[72] The movement has undoubtedly raised social awareness about harassment and caused some state

66. *See* Yoffee, *supra* note 64 (arguing that the strength of the accusations against Harvey Weinstein derived partly from corroboration).

67. *See* Murray, *supra* note 4, at 867–70 (summarizing the due process concerns created by crowdsourced registries of alleged harassers).

68. *See* Masha Gessen, *When Does a Watershed Become a Sex Panic*, NEW YORKER (Nov. 14, 2017), https://perma.cc/KGW9-V7LM (critiquing the #MeToo movement for failing to afford due process to the accused and for failing to differentiate among various acts of alleged misconduct).

69. *See* Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, N.Y. MAG. (Jan. 12, 2018), https://perma.cc/9FYQ-668G (calling for greater distinctions between different types of sexual misconduct).

70. *See id.* (critiquing #MeToo advocates for the limited range of penalties that they propose).

71. *See* Nora Stewart, Note, *The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgment of Those #MeToo Leaves in the Dark*, 87 FORDHAM L. REV. 1693, 1703–04 (2019) (discussing charges that #MeToo has failed to differentiate between various forms of sexual misconduct).

72. *See, e.g.*, Schultz, *supra* note 3, at 25 (arguing for tangible actions in the wake of #MeToo); Wexler et al., *supra* note 5, at 53 (discussing the need to enact deeper cultural and structural changes following #MeToo).

legislatures to revisit their antiharassment laws.[73] But the most visible, tangible responses to #MeToo have focused on the discharges of high-profile men.[74] These firings, while often justified, do not necessarily change the environments that allowed harassment to flourish.[75] Likewise, discharging harassers one-by-one does not repair the reputational damage that victims suffered or necessarily disrupt the underlying institutional conditions that fostered harassment in the first place.[76] In fact, publicly discharging notable men may give the appearance of effective corporate responses, while actually reducing public pressure to bring about more robust, structural reforms.[77] Beyond high-profile media firings, another practical impact of the #MeToo movement has involved the far more mundane exercise of expanding reporting systems at ordinary workplaces.[78]

2. Expansion of Training and Reporting Schemes in the Wake of #MeToo

Even though the #MeToo movement has highlighted the prevalence of sexual harassment, employers have not fundamentally altered their methods for dealing with this ongoing problem.[79] While some employers have reaffirmed the

73. *See* RAGHU & SURIANI, *supra* note 48, at 2–7 (summarizing several state-based actions and recommendations for combating harassment); JoAnna Suriani, Note, *"Reasonable Care to Prevent and Correct": Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 814–15 (2018) (examining mandatory training laws that states have enacted since 2018).

74. *See* Murray, *supra* note 4, at 833–34 (outlining common corporate responses to revelations of harassment).

75. *See* Schultz, *supra* note 3, at 26 (arguing for structural changes that go beyond merely discharging accused harassers).

76. *See id.* (discussing the need to take action beyond mass firings in response to #MeToo).

77. *See* Wexler et al., *supra* note 5, at 54 (examining how public firings can crowd out other antiharassment efforts).

78. *See* Suriani, *supra* note 73, at 803 (discussing corporate responses to #MeToo).

79. *See* Erin M. Morrissey, Comment, *#MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TUL. L. REV.

strength of their existing train-and-report mechanisms, others have expanded these systems following #MeToo.[80] For example, when asked if they had taken any new steps in reaction to the movement, employers such as Wal-Mart, Target, Sears Holdings, Subway, Costco, and Aramark simply expressed commitment to their existing internal systems.[81] Other firms have expanded their employee instructional materials or reevaluated their reporting methods.[82] Reflecting these developments, the demand for antiharassment trainings has skyrocketed since the #MeToo movement began.[83]

Employers have doubled-down on train-and-report systems at a time when their legal exposure to harassment claims has increased.[84] The United States Equal Employment Opportunity Commission ("EEOC")—the federal agency charged with enforcing Title VII—reported a 50 percent jump in sexual harassment lawsuits between 2017 and 2018, and most human resource professionals expect that the #MeToo movement will trigger a flood of litigation.[85]

177, 199–200 (2018) (questioning whether #MeToo has brought about meaningful reforms to American workplaces).

80. *See* Bisom-Rapp, *supra* note 8, at 63 (examining the effectiveness of antiharassment trainings); Rebecca Greenfield, *Powerful Men Have Changed Their Behavior at Work Since #MeToo*, BLOOMBERG (Oct. 4, 2018, 10:54 AM), https://perma.cc/HSH8-AZN9 (discussing the recent rise of harassment trainings and complaints).

81. *See* Kantor, *supra* note 7 (surveying employer responses to #MeToo).

82. *See id.* (contrasting #MeToo advocates' call for greater accountability with the ineffectiveness of existing legal protections).

83. *See* Suriani, *supra* note 73, at 803–04 (noting the increased emphasis on train-and-report systems following #MeToo).

84. *See id.* ("The perceived threat of increasing litigation and the exposing of entrenched toxic workplace culture have caused demand for anti-harassment trainings to skyrocket as employers seek out training opportunities for their employees.").

85. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW: EEOC LEADS THE WAY IN PREVENTING WORKPLACE HARASSMENT (2018), https://perma.cc/F6HT-T5W9 [hereinafter EEOC, WHAT YOU SHOULD KNOW]; Pamela M. Harper, *The Anniversary of #MeToo: A Time of Reckoning for Law Firms*, BUS. L. TODAY (Oct. 19, 2018), https://perma.cc/C8S6-GZQE (summarizing emerging reporting data following #MeToo); Morrissey, *supra*

Despite the increased number of harassment charges, however, when these future plaintiffs try to sue in court, they will encounter a legal system that regularly dismisses harassment claims.[86] As explained in greater detail below, the harassment loophole immunizes employers from liability by taking advantage of in-house reporting schemes in two distinct ways.[87] First, harassment victims who neglect to file internal complaints typically cannot sue because courts require them to "take advantage of any preventative or corrective opportunities" that their employers offer.[88] For the vast majority of harassment victims, the chance to obtain relief ends at this point because very few individuals who experience harassment ever utilize their employers' reporting systems.[89] In addition, plaintiffs who officially inform their employers of harassing behaviors also lose in court if their employers "correct promptly any sexually harassing behavior" after a complaint is filed.[90] As such, the harassment loophole allows victims to obtain relief only if individuals file in-house complaints and their employers fail to adequately address the problem.[91]

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note 79, at 201–02 (discussing various predictions about #MeToo's effect on victim reporting).

86. *See* Chamallas, *supra* note 56, at 57–58 (discussing the connection between the harassment loophole and the high loss rate that harassment plaintiffs experience in court).

87. *See infra* Part II.A.

88. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (applying the harassment loophole to instances of supervisory harassment); *see* Vance v. Ball State Univ., 570 U.S. 421, 429–30 (2013) (applying the harassment loophole to instances of coworker harassment).

89. *See* RAGHU & SURIANI, *supra* note 48, at 1 (estimating that 70 percent of victims fail to report harassment); Porter, *supra* note 7, at 51–52 (summarizing data on the reporting rates of harassment victims).

90. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

91. *See* Oppenheimer, *supra* note 29, at 285 (discussing the fear that courts will not compensate victims who fail to inform their employers about harassment); E. Jacob Lindstrom, Note, *All Carrots and No Sticks: Moving Beyond the Misapplication of* Burlington Industries, Inc. v. Ellerth, 21 HASTINGS WOMEN'S L.J. 111, 124–25 (2010) (explaining how many courts have allowed firms to utilize their reporting systems to completely avoid harassment liability).

In light of the safe harbor that this liability rule provides to firms, it is no coincidence that companies have reacted to #MeToo by pointing to their robust internal systems.[92] This combination of silence, liability reduction, and harassment can be seen in several legal opinions that courts have issued in the wake of #MeToo.[93] These cases demonstrate that the movement has done very little to change the existing legal dynamic that punishes silent victims and rewards employers that adopt train-and-report systems.[94]

B. *Judicial Treatment of Harassment Claims Following #MeToo*

Even after #MeToo, courts still frequently absolve employers of legal responsibility for workplace harassment. Take the case of Tristana Hunt.[95] A sales associate in the electronics department of a Wal-Mart store in Crestwood, Illinois, Hunt worked the overnight shift with her supervisor, Daniel Watson.[96] Prior to working with the plaintiff, Watson had been accused of grabbing a female subordinate's arm in a closed office and refusing to let go until the woman screamed.[97] The supervisor received "coaching" from Wal-Mart for the incident.[98]

According to the plaintiff, shortly after Watson began supervising her, Watson told Hunt that "he did not understand

92. *See* Chamallas, *supra* note 21, at 1322 (examining how training and reporting systems tend to insulate most employers from liability); Zev J. Eigen et al., *When Rules Are Made to Be Broken*, 109 NW. U. L. REV. 109, 118–19 (2014) (discussing the incentives employers have to implement policies that are "good enough to meet the minimum standard of reasonableness but not so good that they encourage prompt reporting of harassment in all cases").

93. *See infra* Part I.B.

94. *See* Suriani, *supra* note 73, at 803–04 (addressing the increased demand for antiharassment trainings following #MeToo).

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

96. *Id.*; Brief and Required Short Appendix of Plaintiff-Appellant, Tristana Hunt at 5, Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624 (7th Cir. 2019) (No. 18-3403), 2019 WL 1224347.

97. *Hunt*, 931 F.3d at 626.

98. *Id.*

how a woman could have breasts so large despite having a small body."[99] One month later, Watson said to Hunt that "he wanted to shower with her and feel her breasts."[100] Following that incident, Hunt took Watson's phone from her hand and said that he wanted to find naked pictures of her and "again asked when he could see her breasts."[101] Recounting these incidents, the Seventh Circuit commented, "Watson asked to see Hunt's breasts several times within a few days."[102] After enduring these harassing comments, Hunt formally complained to Wal-Mart.[103] Given that only Hunt and Watson witnessed the alleged harassment, however, Wal-Mart could not substantiate Hunt's claims.[104] Nevertheless, Wal-Mart reminded Watson of its "zero-tolerance policy" against harassment and required Watson to attend antiharassment training.[105] Hunt reported no further incidents of harassment after she filed her internal complaint with Wal-Mart.[106]

Reviewing the facts in the light most favorable to Hunt and writing in the post-#MeToo era, the Seventh Circuit characterized Watson's multiple requests to see Hunt's breasts as "offensive," "sexually suggestive," "unprofessional," "unacceptable," and "inappropriate."[107] Despite acknowledging the "inappropriate" nature of a male supervisor's multiple requests to see his subordinate's breasts, the Seventh Circuit nevertheless utilized the harassment loophole to absolve Wal-Mart of responsibility.[108] In doing so, the court noted that "Wal-Mart had a comprehensive policy that explicitly prohibited

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 627.

103. *Id.* ("Immediately following this formal discipline, Hunt decided to report Watson's harassment to the store manager . . . at the end of her shift.").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 626–28.

108. *Id.* at 627–28 ("An employer may escape liability if it can show the hostile work environment was not accompanied by an adverse employment action and prove an affirmative defense.").

sexual harassment" and provided employees with "robust" reporting opportunities.[109] Pointing to Hunt's delayed reporting, the Seventh Circuit summarized the timeline as follows: Watson's harassment occurred over the course of five months, and Hunt filed an internal complaint roughly two weeks after the supervisor made his last request to see her breasts.[110] According to the Seventh Circuit's interpretation of the harassment loophole, Hunt waited too long to complain.[111] Even though Hunt explained that she did not immediately go to Wal-Mart's human resources department because she feared retaliation, the court held that "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty to alert the employer to the allegedly hostile environment."[112] Utilizing the harassment loophole to dismiss Hunt's harassment complaint, the court held that Hunt had "unreasonably delayed" notifying Wal-Mart of the problem.[113]

Turning from supervisory harassment to coworker harassment, the Eleventh Circuit recently issued a post-#MeToo decision that also utilized the harassment loophole.[114] Nicole Patsalides worked as a law enforcement officer in Fort Pierce, Florida.[115] According to Patsalides, a male patrol officer inappropriately touched various parts of her body at least ten times over the course of two weeks.[116] On one occasion, the coworker rubbed his hand down Patsalides's thigh, from her service belt to her knee.[117] Unlike other harassment

109. *Id.* at 630.

110. *Id.* at 626–27.

111. *Id.* at 631 ("Hunt failed to take advantage of any reporting mechanisms for four months and thereby prevented Wal-Mart from taking corrective measures.").

112. *Id.* (citation omitted) (crediting Wal-Mart for retraining Watson, even though the company's internal investigation did not substantiate the harassment allegations against him).

113. *See id.*

114. *See* Patsalides v. City of Fort Pierce, 724 F. App'x 749, 752 (11th Cir. 2018).

115. *Id.* at 750.

116. *Id.* at 751.

117. *Id.*

victims, however, Patsalides did not remain silent.[118] Instead, she promptly complained to the police department, and her employer fired the male officer following an investigation.[119] After the discharge, Patsalides's coworkers allegedly ridiculed her for "snitching" on a fellow police officer.[120]

Praising the swiftness of the employer's response, the Eleventh Circuit stated that "the [c]ity's actions following the complaint were a model of proper employer responsiveness under Title VII."[121] It would be hard to disagree with this conclusion, except for the fact that the city had already verified numerous other incidents of sexual misconduct involving the same male patrol officer long before he touched Patsalides.[122] In fact, the city had concluded that the officer had committed sexual misconduct on four separate occasions against various victims over the course of sixteen years.[123] In response to these other incidents, the city had counseled the officer on proper behavior, issued written warnings, and suspended the officer without pay.[124] Thus, Patsalides's complaint of thigh-rubbing represented at least the fifth accusation against the same male patrol officer. Commenting on the male officer's repeated transgressions, the Eleventh Circuit found that his employer had engaged in appropriate progressive discipline over sixteen years and that there was "no basis to hold the [c]ity liable for the male officer's actions toward Patsalides."[125]

Like the Eleventh Circuit, the Fourth Circuit also issued a post-#MeToo decision that relied on the harassment loophole to

118. *See id.* ("After two weeks of this sort of behavior, Patsalides reported the male officer to a superior in the police department.").

119. *See id.* (crediting the employer for responding effectively to harassment allegations).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 752.

124. *See id.* (concluding that the employer's reaction to the harassment charges was "entirely consistent with the [c]ity's obligations under Title VII").

125. *Id.*

absolve an employer of liability for coworker harassment.[126] Carla Clehm, an ammunition plant employee in western Virginia, was sexually assaulted twice by her coworker, Joshua Linkous.[127] A subsequent investigation revealed that Linkous had sexually assaulted at least three other female coworkers over the course of several years.[128] According to the plaintiff, after Linkous was discharged and imprisoned, several coworkers sided with Linkous and began to harass Clehm for revealing the assault.[129]

Writing its opinion roughly two years after the #MeToo movement began, and construing the facts in the plaintiff's favor, the Fourth Circuit described how viciously Clehm's coworkers treated her after she exposed Linkous's sexual assaults. The court stated that "Clehm has experienced various incidents of harassment by co-workers who have grabbed her, subjected her to sexual and profane comments, berated her for 'putting a man in prison and taking him away from his family,' . . . and objected to working alongside her."[130] But despite these repeated attacks on Clehm for coming forward, the Fourth Circuit still utilized the harassment loophole to dismiss her sexual harassment complaint. According to the court, "Clehm has not made the showing—required because she was sexually assaulted and harassed by her co-workers, rather than supervisors—that [the employer] 'knew or should have known about the harassment and failed to take effective action to stop it.'"[131] In light of Clehm's initial silence about the sexual assault and her employer's response thereafter, the Fourth Circuit

126. *See* Clehm v. BAE Sys. Ordnance Sys., Inc., 786 F. App'x 391, 394 (4th Cir. 2019) ("Clehm has not demonstrated that her co-workers' retaliatory harassment is imputable to BAE, nor has Clehm established that BAE subjected her to any other adverse employment action.").

127. *Id.* at 392.

128. *Id.*

129. *See id.* at 392–93.

130. *Id.* at 393.

131. *Id.* at 393–94 (quoting Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 333–34 (4th Cir. 2003)).

determined that Clehm's employer was not responsible for the harassment.[132]

In each of the foregoing cases, federal appellate courts issued opinions in the wake of #MeToo that utilized the harassment loophole to dismiss plaintiffs' Title VII complaints. Even though the plaintiffs in these cases almost certainly alleged sufficient facts to constitute severe and pervasive harassment—breast gawking, thigh rubbing, victim blaming—it was not enough for courts to accept the truth of these allegations.[133] In other words, the call by #MeToo advocates to "#BelieveWomen" did not matter in court because the harassment loophole enabled employers to escape liability, even if courts assumed the truth of the plaintiffs' allegations.[134]

The employers in these cases did not necessarily do anything wrong. Indeed, the courts in each decision specifically found that the firms responded appropriately once victims complained. But faced with the choice between forcing defendants to pay for harassment beyond their control or with leaving harassment victims uncompensated, each court utilized the harassment loophole to dismiss the plaintiffs' Title VII claims. This outcome remains the rule, not the exception, even in the wake of #MeToo.[135] Indeed, beyond the three federal appellate decisions discussed here, numerous other federal courts have relied on the harassment loophole to dismiss sexual harassment complaints during the months and years following #MeToo.[136] Thus, despite the demand from #MeToo advocates

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132. *Id.*

133. *See* Kate Webber Nuñez, *Toxic Cultures Require A Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PA. ST. L. REV. 463, 492–93 (2018) (discussing the standards for proving harassment under Title VII).

134. *See* Yoffee, *supra* note 64 (criticizing the call by some #MeToo proponents to "just believe" accusers).

135. *See State Regulation of Sexual Harassment*, *supra* note 54, at 465 (discussing the judicial reluctance to alter the legal framework for analyzing harassment claims).

136. *See, e.g.*, Cooper v. Smithfield Packing Co., Inc., 724 F. App'x 197, 203 (4th Cir. 2018) (dismissing harassment complaint based on the harassment loophole); Tucker v. United Parcel Serv., Inc., 734 F. App'x 937, 942–43 (5th Cir. 2017) (same); Ferencin v. Lehigh Univ., No. 18-1469, 2019 WL 7282503,

for legal systems that compensate victims and hold employers accountable for workplace wrongs, the harassment loophole remains firmly in place. To understand why, the following section examines the origins of the harassment loophole and the empirical assumptions that the Supreme Court relied upon to create this safe harbor from employer liability.

II. DEVELOPING THE HARASSMENT LOOPHOLE

The Supreme Court created the legal rules that govern sexual harassment long before the #MeToo movement. In 1986, the Court first declared that federal antidiscrimination law prohibited sexual harassment.[137] A product of focused advocacy by legal feminists, the decision, *Meritor Savings Bank v. Vinson*,[138] was a historic victory for working women who had endured decades of gender-based mistreatment.[139] Yet despite this extraordinary legal development, the Supreme Court blunted much of its effect over a decade later when, in 1998, the Court extended immunity to employers that adopted

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at *1 (E.D. Pa. Dec. 27, 2019) (same); Elkins v. Miller County., No. 18-cv-4115, 2019 WL 5399516, at *6 (W.D. Ark. Oct. 22, 2019) (same); Opper v. Fred Beans Motors of Doylestown, Inc., No. 18-CV-4230, 2019 WL 4242627, at *8 (E.D. Pa. Sept. 6, 2019) (same); Holland v. NTP Marble, Inc., No. 17-cv-2909, 2019 WL 2059966, at *9 (E.D. Pa. May 8, 2019) (same); Strozyk v. Phoenixville Hosp., 357 F. Supp. 3d 485, 493 (E.D. Pa. 2019) (same); Payne v. Great Plains Coca-Cola Bottling Co., 348 F. Supp. 3d 1194, 1204 (N.D. Okla. 2018) (same); Berger v. Pa. Dep't of Transp., 16-cv-06557, 2018 WL 2943963, at *10 (E.D. Pa. June 13, 2018) (same). *But see, e.g.*, Minarsky v. Susquehanna County, 895 F.3d 303, 313 (3d Cir. 2018) (finding sufficient facts to question the effectiveness of an employer's antiharassment policy); Wilson v. New Jersey, No. 16-7915, 2019 WL 5485395, at *13 (D.N.J. Oct. 25, 2019) (same); Mercado v. Sugarhouse HSP Gaming, L.P., No. 18-3641, 2019 WL 3318355, at *8 (E.D. Pa. July 23, 2019) (same); Rorke v. Toyota, 399 F. Supp. 3d 258, 280 (M.D. Pa. 2019) (same); Grooms v. City of Phila., No. 17-2696, 2018 WL 4698856, at *8 (E.D. Pa. Sept. 28, 2018) (same).

137. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (holding that "a claim of 'hostile environment' sex discrimination is actionable under Title VII" (citation omitted)).

138. *Id.*

139. *See* Green, *supra* note 6, at 152–53 (summarizing the general view that *Meritor* represented a "victory for workplace equality").

train-and-report systems.[140] Declining to hold companies strictly liable for sexual harassment, the Court opted instead for a notice-based system of liability that protected employers from most harassment claims.[141]

This Part evaluates the history of the harassment loophole considering #MeToo. It explains how the Court embraced notice-based liability based on two flawed empirical assumptions that the #MeToo movement has now refuted.[142] First, the Court assumed that limiting employer liability would induce a large share of victims to bring their harassment allegations to employers.[143] Second, the Court assumed that the loophole would significantly reduce incidents of harassment by inducing firms to adopt effective train-and-report schemes.[144] Unfortunately, decades after the Court first made this empirical wager, ongoing high levels of harassment undermine the basis for the Court's faith in these systems.

A. *Embracing Notice-Based Harassment Liability*

The Supreme Court began to form the harassment loophole when it first recognized sexual harassment as a legal claim. In

140. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998) (stating that an employer may raise an affirmative defense to a sexual harassment claim by "provid[ing] a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense"); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (stating that an employer may raise an affirmative defense by showing that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer").

141. *See Faragher*, 524 U.S. at 807–08 (explaining that an employer may satisfy its burden under the second element of its defense by "showing an unreasonable failure to use any complaint procedure provided by the employer"); *Ellerth*, 524 U.S. at 765–66 (same).

142. *See infra* notes 191–224 and accompanying text.

143. *See Faragher*, 524 U.S. at 806–07 (discussing administrative incentives to "encourage victims of harassment to come forward" (citation omitted)).

144. *See id.* at 807 (anticipating that the harassment loophole would "encourag[e] forethought by employers").

a stunning and now widely celebrated ruling, the Court held in *Meritor* that sexual harassment constituted a form of prohibited sex discrimination under Title VII.[145] The decision relied heavily on Catharine MacKinnon's foundational book, *Sexual Harassment of Working Women*.[146] In it, MacKinnon explained how unwanted sexual attention constituted an additional condition of work that women had to endure.[147] For example, the first national survey on harassment at the time reported that 92 percent of women described sexual harassment as a problem and one-third of women believed that their appearance was among their most important job qualifications.[148] According to MacKinnon, federal antidiscrimination law prohibited employers from requiring women to work under these circumstances.[149] By barring employers from imposing sex-based "conditions" of employment, Title VII also prohibited "sexual harassment," even though the statute did not explicitly use the term "harassment."[150]

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145. *Meritor*, 477 U.S. at 66 (concluding that a sex-based "hostile or abusive work environment" constitutes a violation of Title VII); *see* West, *supra* note 50 (discussing the historic nature of the *Meritor* ruling).

146. *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). *See also* Linda Hirshman, *How the Supreme Court Made Sexual Harassment Cases More Difficult to Win*, WASH. POST (June 19, 2019, 6:00 AM), https://perma.cc/ZKV9-DYCB (referencing MacKinnon's role in the *Meritor* case).

147. MACKINNON, *supra* note 146, at 40–41 ("Unwanted sexual advances . . . can be a daily part of a woman's work life" and contribute to "the woman's insecurity about her work competence.").

148. *See* Kaitlin Menza, *You Have to See Redbook's Shocking 1976 Sexual Harassment Survey*, REDBOOK MAG. (Nov. 28, 2016), https://perma.cc/ZYG3-5BML (summarizing early survey data on sexual harassment); Ginia Bellafante, *Before #MeToo, There Was Catharine A. MacKinnon and Her Book 'Sexual Harassment of Working Women'*, N.Y. TIMES (Mar. 19, 2018), https://perma.cc/P3DM-XFXB (discussing the early history of harassment litigation).

149. *See* MACKINNON, *supra* note 146, at 208 (stating that when sexual harassment "has an impact upon fundamental employment decisions and upon the workplace atmosphere, sexual harassment is discrimination in employment" prohibited by Title VII).

150. 42 U.S.C. § 2000e(a)(1); *see* Eigen et al., *supra* note 92, at 120 (examining the *Meritor* decision).

Against this backdrop of commonplace harassment and generalized sexism, the *Meritor* decision marked a momentous shift in the law's treatment of gender-based discrimination.[151] Holding that Title VII prohibited "hostile environment" harassment, the *Meritor* Court stated that this antidiscrimination violation occurred when unwelcome sex-based mistreatment was sufficiently "severe or pervasive" so as "to alter the conditions of [the plaintiff's] employment."[152] Monumental, yet vague, the decision left for other courts the daunting task of defining terms like "unwelcome" and "severe or pervasive."[153] Notwithstanding these ambiguities, however, the decision undoubtedly triggered a tectonic shift in Title VII jurisprudence.[154] In addition to its legal significance, the *Meritor* decision also prompted genuine change in norms and behaviors at many American workplaces by abating some of the most egregious forms of harassment that were commonplace at the time.[155]

Despite *Meritor*'s important advancement of antidiscrimination norms, however, the decision also marked the initial formulation of the harassment loophole. After announcing that Title VII prohibited harassment, a majority of the Justices in *Meritor* explained that they would treat this type

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151. *See* Noa Ben-Asher, *How Is Sex Harassment Discriminatory?*, 94 NOTRE DAME L. REV. ONLINE 25, 25–26 (2018) (discussing the historic significance of *Meritor*).

152. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (citations omitted); *see* David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1271–72 (2001) (discussing *Meritor* and examining the legal development of sexual harassment law).

153. *See* Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213, 220–21 (1995) (examining the judicial application of *Meritor* to different types of harassment claims).

154. *See generally* West, *supra* note 50 (characterizing the *Meritor* decision as "stunning and much-celebrated").

155. *See* Judith Resnik, *The Rights of Remedies*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 247, 252 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003) (discussing the impact of *Meritor*).

of Title VII violation differently than all others.[156] The *Meritor* Court acknowledged that under Title VII "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions."[157] Rejecting this long line of cases that had attached strict vicarious liability to all other Title VII violations, the *Meritor* Court concluded that agency considerations required it to treat hostile work environment claims differently.[158] Accordingly, over the objection of a vigorous dissent, a five-Justice majority in *Meritor* stated that employers were "not always automatically liable for sexual harassment by their supervisors."[159] This conclusion stood in stark contrast to the D.C. Circuit's earlier decision in *Meritor*, which had held that any rule other than strict liability would "create an enormous loophole in the statute . . . ."[160] Disagreeing with the D.C. Circuit, the *Meritor* Court directed lower courts to consider underlying agency principles when determining the extent of an employer's responsibility for supervisory harassment.[161]

Meritor marked the Supreme Court's first major development of the harassment loophole.[162] The Court's distinction between supervisory harassment and other forms of harassment confirmed the widely held view that employers would never pay for non-supervisory harassment unless firms

156. *See Meritor Sav. Bank*, 477 U.S. at 72 (explaining that Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible").

157. *Id.* at 70–71 (citation omitted).

158. *See id.* at 72 (explaining that the legislative "decision to define 'employer' to include any 'agent' of an employer" calls on courts "to look to agency principles for guidance").

159. *Id.*; *see* Hemel & Lund, *supra* note 24, at 1601 (discussing the Supreme Court's jurisprudence on harassment and vicarious employer liability).

160. Vinson v. Taylor, 753 F.2d 141, 151 (D.C. Cir. 1985) (citing Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979)).

161. *Meritor Sav. Bank*, 477 U.S. at 72.

162. *See* Chamallas, *supra* note 21, at 1321 (observing that *Meritor* was "the first Supreme Court case to address sexual harassment as a form of sex discrimination").

themselves acted negligently.[163] As to supervisors, however, *Meritor*'s vague reference to "agency principles" left lower courts scrambling to determine the extent of a firm's legal responsibility for supervisory misconduct.[164] Reacting to this ambiguity, lower courts reached widely divergent conclusions on the question.[165] Judges in these cases could not agree on which "agency principles" to apply or the circumstances, if any, that would give rise to strict employer liability for supervisory misconduct.[166]

After thirteen years of disagreement among the lower courts, the Supreme Court returned to the issue of vicarious liability in two companion decisions. In *Burlington Industries, Inc. v. Ellerth*[167] and *Faragher v. City of Boca Raton*,[168] the Supreme Court announced a new standard for evaluating an employer's obligations to pay for supervisory harassment. Adhering to its previous directive in *Meritor* that courts should not hold companies "automatically liable," the *Faragher* and *Ellerth* decisions crafted an entirely new affirmative defense that did not previously exist under Title VII.[169] According to the Court, in cases where plaintiffs experienced supervisory harassment without suffering tangible employment actions, employers enjoyed a defense with two necessary elements: "(a) that the employer exercised reasonable care to prevent and

163. *See id*. at 1320–21 (noting that the EEOC's approach prior to *Meritor* "imposed strict liability for the actions of supervisors and negligence liability for all others").

164. *See* Hemel & Lund, *supra* note 24, at 1601–02 (examining the fallout from *Meritor*).

165. *See* Oppenheimer, *supra* note 29, at 273 (asserting that lower courts "were in disarray" over the issue of vicarious liability for over a decade following *Meritor*).

166. *See* William R. Corbett, Faragher*,* Ellerth*, and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against*, 7 WM. & MARY BILL RTS. J. 801, 808–09 (1999) (discussing the "diversity of approaches" that lower courts took on the question of vicarious liability).

167. 524 U.S. 742 (1998).

168. 524 U.S. 775 (1998).

169. *Id.* at 807–08 (offering an affirmative defense to employers when no tangible employment action is taken).

correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[170]

Although *Faragher* and *Ellerth* said that this new rule imposed "vicarious liability" on employers,[171] the defense was actually a modified form of negligence liability. A feature of agency law, vicarious liability holds employers responsible for employees' bad acts, even when employers exercise all reasonable care to prevent misconduct, such as training employees and enforcing rules against misbehavior.[172] In contrast to the no-fault nature of genuine vicarious liability, the *Faragher-Ellerth* defense allowed employers to escape liability altogether if they could prove that they acted reasonably and that plaintiffs did not.[173] The Court customized this negligence-based affirmative defense specifically for harassment claims, but did not apply it to other Title VII violations.[174] Although *Faragher* and *Ellerth* placed the burden of proving a lack of fault on employers, the decisions nevertheless announced a fault-based standard through which employers could avoid legal exposure to harassment claims by

170. *Id.* at 807; *Ellerth*, 524 U.S. at 765; *see* Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 554–55 (2006) (examining the Court's development of the harassment loophole).

171. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

172. *See* Oppenheimer, *supra* note 27, at 132–33 (criticizing courts for failing to distinguish between concepts of direct and vicarious liability in the harassment context).

173. *See* Chamallas, *supra* note 26, at 177–78 (describing the *Faragher* Court's "special affirmative defense" that allowed an employer to "escape liability if it proved both that it had acted reasonably in taking steps to prevent and correct harassment *and* that the plaintiff had acted unreasonably in failing to use the employer's internal grievance procedure").

174. *See id.* at 178 (describing the *Faragher-Ellerth* defense as a "strange animal" that was rooted in the Court's desire to effectuate Title VII policies).

focusing on the reasonableness of their responses to victim complaints.[175]

Fifteen years after *Faragher* and *Ellerth*, the Supreme Court completed the harassment loophole in a decision that shifted the judicial focus away from supervisory harassment to coworker harassment. In *Vance v. Ball State University*,[176] the Court narrowly defined the meaning of "supervisor" for purposes of harassment litigation.[177] The *Vance* Court acknowledged that *Meritor*, *Faragher*, and *Ellerth* endorsed distinctions between supervisors and non-supervisors.[178] Whereas the *Faragher-Ellerth* defense required employers to prove a lack of negligence for supervisory harassment, the rule for coworker harassment required plaintiffs to affirmatively establish their employer's negligence.[179] Centering its decision on this distinction, the *Vance* court defined supervisors as employees who possess the power to "take tangible employment actions against the victim."[180] Under this test, the *Vance* Court suggested that ordinary managers should be treated as "coworkers" if they controlled the day-to-day activities of subordinates without possessing the power to fire or discipline them.[181] Applying the "coworker" label to a broader range of employees, the *Vance* Court effectively expanded the harassment loophole by requiring more plaintiffs to directly prove their employers' negligence in handling harassment complaints.[182]

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175. *See* Fisk & Chemerinsky, *supra* note 20, at 766–77 (explaining how the *Faragher-Ellerth* defense focused on employer fault).

176. 570 U.S. 421 (2013).

177. *See id.* at 424 ("An employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.").

178. *See id.* (summarizing different liability rules based on the harasser's identity).

179. *See id.* at 427–28 (stating that liability for coworker harassment requires a showing of employer negligence).

180. *Id.* at 450.

181. *See id.* at 434–35 ("[T]he law often contemplates that the ability to supervise includes the ability to take tangible employment actions.").

182. *Id.* at 429–30.

Put together, the four major Supreme Court decisions that created the harassment loophole—*Meritor*, *Ellerth*, *Faragher*, and *Vance*—all exhibited a remarkable faith in train-and-report systems. Whether a plaintiff alleged coworker harassment (thus requiring proof of employer negligence) or supervisory harassment (thus enabling employers to eliminate liability by proving a lack of negligence), the Supreme Court repeatedly anchored the harassment loophole in its belief that internal reporting systems would effectively prevent and correct harassment.[183]

For example, the *Meritor* decision referred positively to employer "procedure[s] specifically designed to resolve sexual harassment claims."[184] Although *Meritor* did not specifically demarcate the legal effect that these procedures would have on harassment claims, the Court fully endorsed train-and-report systems in *Faragher* and *Ellerth*.[185] Both decisions predicted that internal schemes would encourage "forethought by employers and saving action by objecting employees."[186] In essence, the Justices in these cases assumed that by limiting employer liability, the Court would encourage victims to come forward and employers to thwart harassment.[187]

More recently, the *Vance* Court emphasized the importance of train-and-report systems in combating coworker harassment.[188] Anticipating criticism that its decision would

183. *See* Schultz et al., *supra* note 47, at 42 (arguing that under *Faragher* and *Ellerth*, "victims of hostile work environment harassment . . . must first report the harassment to the employer through its internal complaint process or else risk losing later in court").

184. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 71 (1986) (citations omitted).

185. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 804 (1998) (explaining that employers will "have greater opportunity and incentive to screen" supervisors, "train them, and monitor their performance").

186. *Id*. at 807; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

187. *See* Fisk & Chemerinsky, *supra* note 20, at 786–87 (questioning the Supreme Court's empirical assumptions in *Faragher* and *Ellerth*).

188. *See* Vance v. Ball State Univ., 570 U.S. 421, 449 (2013) (stating that negligence liability for coworker harassment would not "'relieve[] scores of employers of responsibility' for the behavior of workers they employ"(citations omitted)).

expose workers to managerial harassment, the *Vance* Court wrote:

> A plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place. Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant.[189]

Thus, just as the Court spoke to the power of internal reporting schemes to address supervisory harassment in *Faragher* and *Ellerth*, the *Vance* Court approved of these same systems to combat coworker harassment.[190] This prediction of harassment prevention—embedded in each holding—assumed that the harassment loophole would prompt victims to come forward and share their harassment stories with employers.

B. *Contesting the Loophole: Enduring Harassment Despite Internal Reporting Systems*

Over thirty years have passed since the Supreme Court first recognized sexual harassment as a Title VII violation.[191] Over twenty years have passed since the Court defined the contours of the harassment loophole by assuming that train-and-report systems would curb sexual harassment.[192] Since that time, employers have offered their workers numerous trainings, handbooks, and other mechanisms to address workplace sexual misconduct.[193] As noted above, #MeToo has only intensified this trend, with employers expanding their internal antiharassment

189. *Id.* at 448–49.

190. *See id.* (asserting that a negligence-based liability standard for coworker harassment still holds employers responsible for monitoring workplace interactions).

191. *See Meritor Sav. Bank*, 477 U.S. at 67.

192. *See Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765–66.

193. *See* Zakaria, *supra* note 5 ("[T]he incentive behind creating an anti-sexual-harassment policy, having trainings, and even instituting an in-house reporting mechanism, became . . . more about evading liability by meeting the criteria of the 'affirmative defense . . . .'").

schemes in response to the movement.[194] Yet today, after decades of experience with train-and-report systems, the #MeToo movement has shown how harassers often operate with impunity even at workplaces with robust internal reporting systems.[195] The fact that harassment endures despite decades of training suggests that today's renewed corporate calls for more reporting schemes will reduce employer liability, without necessarily reducing harassment itself.

1. High Rates of Harassment in the Wake of #MeToo

Even though the Supreme Court predicted that the harassment loophole would combat harassment by incentivizing victim reporting and employer policing, evidence from the #MeToo movement has challenged these assumptions. The "too" of "#MeToo" not only signaled a shared solidarity among victims, it also emphasized the ongoing commonness of harassment.[196] Emerging statistics from #MeToo point to the breadth of the problem. For example, between 2017 and 2018, the EEOC reported a 13 percent increase in sexual harassment charges and a 23 percent increase in the agency's finding of reasonable cause to believe accusers who filed claims.[197]

Although the uptick in sexual harassment filings provides tangible evidence that #MeToo has raised awareness about the problem, it is difficult to estimate the precise rate of sexual harassment at worksites.[198] For instance, the EEOC's comprehensive study on the subject concluded that anywhere from 25 percent to 85 percent of women "report having

194. *See supra* Part I.A.2 (discussing corporate reaction to the #MeToo movement).

195. *See* West, *supra* note 50 (contrasting the historic nature of the *Meritor* decision with the modern workplace realities that #MeToo has revealed).

196. *See* Soucek, *supra* note 58, at 72 (characterizing #MeToo as "a movement built on repetition").

197. *See* EEOC, WHAT YOU SHOULD KNOW, *supra* note 85 (summarizing reporting and enforcement statistics).

198. *See* Bisom-Rapp, *supra* note 8, at 70 (discussing unreported incidents of harassment).

experienced sexual harassment in the workplace."[199] The agency attributes this wide range in estimates to differences in survey methodologies.[200] But despite the variance in these numbers, nearly all estimates indicate that harassment remains a widespread problem and that harassers often work at companies with well-developed train-and-report systems.[201]

Of course, today's high rate of harassment does not necessarily mean that training and reporting have failed altogether. It is possible that the problem of sexual harassment would be worse if such systems were not in place. But there is virtually no social science data to support this proposition.[202] For example, the EEOC recently reviewed a number of studies on sexual harassment trainings and found insufficient evidence to substantiate the use of these systems standing alone.[203] Similarly, other studies have also failed to show a demonstrable decline in sexual harassment, even as more employers have adopted antiharassment policies.[204] Given the lack of empirical justification for these schemes, it is quite remarkable that harassment liability and a multibillion-dollar training industry all hinge on the presumption that train-and-report systems effectively prevent harassment.[205] In addition, the reluctance of victims to come forward has cast doubt on the Supreme Court's

199. *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016), https://perma.cc/67XA-K3EJ (offering recommendations to stop and prevent workplace harassment).

200. *See id.* (explaining that reporting results depend on whether researchers use convenience samples or probability samples).

201. *See* Zakaria, *supra* note 5 (questioning the effectiveness of antiharassment systems).

202. *See* Schultz et al., *supra* note 47, at 42–43 (stating that the lack of evidence in support of reporting schemes is "unsurprising").

203. *See* FELDBLUM & LIPNIC, *supra* note 199 (discussing the limitations of harassment training, standing alone); Bisom-Rapp, *supra* note 8, at 63–64 (reporting on the significance of the EEOC's findings).

204. *See* Nuñez, *supra* note 133, at 487–88 (summarizing analyses on the effectiveness of internal reporting systems).

205. *See* Krieger, *supra* note 36, at 174–75 (critiquing the harassment loophole for ignoring studies on victim behavior).

prediction that the harassment loophole would trigger widespread reporting.[206]

2. Ongoing Victim Silence and Retaliation

In addition to exposing the continuing reality of harassment in American workplaces, the #MeToo movement also has helped explain why victims endure workplace harassment rather than utilize their employers' internal systems. Common victim responses to harassment include downplaying the gravity of the situation, enduring the behavior, or avoiding the harasser.[207] In fact, studies on this issue indicate that filing an internal report remains the *least* likely response of harassment victims.[208] Thus, even though the Supreme Court crafted the harassment loophole with the hope that encouraging internal reporting would lead to meaningful change, the reality is that victims rarely seek any kind of formal, organizational relief.[209]

As a threshold matter, it is unclear why the Supreme Court ever assumed that limiting liability would influence victim behavior in this way. After all, most workers have never heard of the harassment loophole, so they are unlikely to know that they must first utilize their employers' reporting systems to preserve their harassment claims in court.[210] Beyond simply not knowing about the legal consequences of failing to report, however, there are many other compelling reasons why

206. *See* Schultz et al., *supra* note 47, at 42–43 ("[R]equiring victims to report sexual harassment through internal complaint processes discourages them from challenging harassment at all.").

207. *See* FELDBLUM & LIPNIC, *supra* note 199 (reporting that roughly three-quarters of individuals who experience harassment never talk to a supervisor, manager, or union representative about the harassment).

208. *See* Grossman, *supra* note 22, at 23 (summarizing studies on the responses of harassment victims); Krieger, *supra* note 36, at 181–82 ("By far, across a variety of studies spanning a number of years and a range of occupations, the least frequent response to sexualized workplace conduct involves . . . bringing a formal complaint against the harasser.").

209. *See* Krieger, *supra* note 36, at 182–83 (examining reporting rates of harassment victims).

210. *See* Fisk & Chemerinsky, *supra* note 20, at 787–88 (criticizing the Supreme Court's assumptions about victim-reporting incentives).

harassment victims do not come forward. Research increasingly shows that training systems can generate backlash, without necessarily combating gender-based mistreatment at work.[211] In the worst case scenarios, internal reporting schemes can actually facilitate misconduct.[212] Take, for instance, many prominent #MeToo stories in which complaint procedures and confidential settlement agreements helped conceal problems, while enabling high-level harassers to keep their jobs.[213] Likewise, the results of internal investigations often characterize disputes as "personal conflicts" between individuals, while absolving employers of responsibility for any broader systemic shortcomings.[214] Beyond failing to substantiate victims' claims, internal investigations can turn the tables on victims and lead to punishment.[215] Studies on the issue show that victims who report misconduct frequently experience retaliation, both in overt ways such as discharge and in more subtle forms such as receiving negative performance evaluations.[216]

Given these dynamics, it is unsurprising that victims rarely come forward to officially report harassment. Today, an estimated 87 to 94 percent of individuals who experience harassment never file formal complaints.[217] Because the

211. *See* Green, *supra* note 6, at 166–67 (discussing the risk of focusing exclusively on train-and-report systems in response to the #MeToo movement).

212. *See* Beiner, *supra* note 12, at 117 (asserting that the harassment loophole, "rather than tending to eliminate harassment in the workplace, tend[s] to let it flourish").

213. *See* Tippett, *supra* note 23, at 243–44 (examining how the #MeToo movement has highlighted the failure of certain internal complaint procedures to sufficiently curb harassment).

214. *See* Green, *supra* note 6, at 166–67 (noting that internal investigations may result in firings that fail to lead to broader reforms within the organization).

215. *See* Hébert, *supra* note 6, at 322–23 (asserting that filing an internal report often results in retaliation against the complaining party).

216. *See* Mizrahi, *supra* note 41, at 125–26 (summarizing studies on retaliation against harassment victims who complain).

217. *See* FELDBLUM & LIPNIC, *supra* note 199, at 16; *see also* RAGHU & SURIANI, *supra* note 48, at 1 (examining the relationship between charge

harassment loophole requires employers to address only *reported* instances of misconduct, notice-based liability automatically relieves firms of legal responsibility in the vast majority of cases.

For the small percentage of harassment victims who actually utilize their employers' formal systems, courts still absolve firms of liability if employers resolve disputes after victims complain.[218] The Supreme Court never intended for courts to apply the harassment loophole so broadly. The *Faragher-Ellerth* defense described "two necessary elements" that required employers to prove *both* that they exercised due care *and* that the victim unreasonably failed to complain.[219] According to a straightforward application of this test, courts should hold employers automatically liable for all verified complaints about supervisory harassment because, under such circumstances, employers cannot satisfy the second element of the defense that requires proof of employee silence.[220] Likewise, a true application of the first element would lead courts to scrutinize the effectiveness of an employer's policy to determine whether a firm's internal system actually prevented harassment. In practice, however, courts frequently decline to adhere to these mandates.[221] Instead, judges often accept a company's antiharassment policy on paper or decline to punish employers that respond to complaints, even though defendants in such circumstances cannot prove that victims unreasonably

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statistics and the reporting rates of individuals who experience harassment); Porter, *supra* note 7, at 51–52 (summarizing recent data on victim reporting).

218. *See* Eigen et al., *supra* note 92, at 133–34 (explaining how courts absolve "well-behaved employers" of liability even when victims reasonably report harassment).

219. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (detailing the two elements that compromise the affirmative defense); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Murr, *supra* note 170, at 554–55 (examining the Court's development of the *Faragher-Ellerth* defense).

220. *See* MARSHALL, *supra* note 19, at 48 (asserting that many courts have misapplied the *Faragher-Ellerth* defense).

221. *See* Sherwyn et al., *supra* note 152, at 1296–1301 (discussing cases in which judges avoided a stringent application of the affirmative defense).

stayed silent.[222] The net result of this dynamic is that employers can adopt cosmetic policies that prohibit harassment, without taking more meaningful actions to deter it.[223]

In sum, the Supreme Court developed the harassment loophole by making numerous empirical suppositions that the #MeToo movement has undercut. By requiring employees to process their harassment complaints through a firm's internal system, the Court tried to incentivize cooperative behavior between victims and employers. Pointing to the enduring nature of harassment, however, #MeToo has demonstrated that many employers technically adhere to the letter of the Court's mandate, while still tolerating high levels of harassment at their worksites.[224] In light of these outcomes, a new rule of liability should increase employers' incentives for actually curbing workplace harassment, thereby advancing one of the Court's primary goals when it first created the harassment loophole.

III. STRICT EMPLOYER LIABILITY FOR HARASSMENT

Employers should pay for all forms of employee harassment, regardless of company fault. Given the harassment loophole's failure to effectively curtail harassment, businesses should not escape liability simply by enacting train-and-report systems. At first glance, such a shift in liability rules—from the status quo of limited employer responsibility to a requirement of strict liability—might seem unfair to employers that reasonably attempt to prevent and correct misconduct.[225] For

222. *See id.* at 1266–67 (explaining how the affirmative defense may create incentives for employers to "exercise just enough reasonable care to satisfy a court, but not enough to make it easy or comfortable for employees to complain of workplace harassment").

223. *See* Oppenheimer, *supra* note 27, at 133 (critiquing judicial decisions that absolve employers of vicarious responsibility for supervisory harassment).

224. *See* Grossman, *supra* note 22, at 70–71 (explaining how parties have responded to the incentives created by the harassment loophole).

225. *See* Ben-Asher, *supra* note 151, at 27 (discussing how a rule of automatic liability would hold "perfectly vigilant" employers liable for harassment).

instance, ever since the Supreme Court created the harassment loophole, firms have publicized "zero tolerance" policies, provided victims with reporting opportunities, and punished harassers in response to complaints.[226] Although many of these efforts constitute forms of cosmetic compliance,[227] even when firms make genuine attempts to correct misconduct, this Part explains why they should still pay for harassment.

A rule of strict employer liability would better comport with the goals and doctrinal underpinnings of agency law and Title VII. When the Supreme Court announced the core components of the harassment loophole in 1998, it based much of its opinion on a specific provision of agency law that was abandoned eight years later when the Restatement of Agency was updated.[228] In addition, many courts that apply agency rules require employers to pay for intentional employee misconduct, even when firms have done nothing wrong and even when employees violate explicit work prohibitions.[229]

Just as the law of agency has changed since the Supreme Court created the harassment loophole, so too have social judgments about a firm's responsibility to prevent harassment. When the Court created the loophole, it acknowledged that social attitudes about an employer's responsibility for employee transgressions might evolve. As an example, the *Faragher* Court cited the shift in views about employees who smoke: "We simply understand smoking differently now and have revised the old judgments about what ought to be done about it."[230]

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226. *See* MARSHALL, *supra* note 19, at 47 (describing a "feeding frenzy among human resources professionals" to offer employers antiharassment policies and procedures).

227. *See* Bisom-Rapp, *supra* note 8, at 74 (criticizing the standalone use of antiharassment training and policies).

228. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759–61 (1998). *Compare* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. L. INST. 1957) (articulating the "aided in accomplishing" standard), *with* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. c (AM. L. INST. 2006) (explaining the reasons why the American Law Institute later rejected the "aided in accomplishing" standard).

229. *See* Oppenheimer, *supra* note 29, at 272 (examining the no-fault nature of vicarious employer liability).

230. Faragher v. City of Boca Raton, 524 U.S. 775, 797 (1998).

Analogizing this example to harassment, the Court recognized that agency law could theoretically characterize harassment "as one of the costs of doing business."[231] Although the Court declined to hold employers responsible for harassment in 1998, the force behind the #MeToo movement demonstrates that society has "revised the old judgments about what ought to be done about it."[232]

A shift to strict employer liability would not only reflect changes in agency law and on-the-ground realities, it would also harmonize harassment jurisprudence with the rest of Title VII. Courts hold employers strictly liable for all Title VII violations, except for harassment.[233] For example, employers must pay for discriminatory hirings, firings, promotions, and demotions, even when firms have trained employees not to discriminate, enacted antidiscrimination rules, and taken reasonable steps to prevent these unlawful acts.[234] Companies remain liable in these circumstances not because they bear any direct blame for the discrimination but because automatic liability ensures that victims will receive compensation, while providing greater incentives for firms to enact genuine prophylactic measures.[235] These goals of compensation and deterrence—rooted in both Title VII and agency law—are best served when courts require employers to pay for predictable employee misconduct, even when firms try to prevent these bad acts. Just as blameless employers must pay for discriminatory discharges, so too should firms pay for the far-reaching forms of employee harassment that #MeToo has revealed.

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231. *Id.* at 798.

232. *Id.* at 797.

233. *See* Grover, *supra* note 9, at 810–11 (outlining Title VII's vicarious liability distinctions).

234. *See* Fisk & Chemerinsky, *supra* note 20, at 761–62 (contrasting the vicarious liability rules of tort law with the vicarious liability rules of harassment law).

235. *See* Beiner, *supra* note 12, at 144 (examining the legal and policy-based justifications for a rule of strict employer liability for harassment claims).

A. *The Supreme Court, Title VII, and Agency Law*

A product of agency law, "vicarious liability" requires defendants to pay for the wrongful acts of others.[236] In the employment context, the most common form of vicarious liability is known as "*respondeat superior*," which holds employers liable for torts that employees commit in the scope of their employment.[237] As a *vicarious* form of responsibility, *respondeat superior* does not depend on employer fault.[238] Thus, businesses often must pay for employee misconduct even when employers properly supervise workers, issue warnings, and enact rules against misconduct.[239]

When the Supreme Court announced the core components of the harassment loophole in *Faragher* and *Ellerth*, it turned to the Restatement (Second) of Agency—written in 1957—for guidance.[240] The *Ellerth* Court analogized sexual harassment to an intentional tort and observed that under limited circumstances agency law holds masters responsible for their servants' intentional torts.[241] For example, employers must pay for harms caused by employees who engage in intentional misconduct "to serve the employer."[242] Applying this principle to Title VII, the *Ellerth* Court found that the "serve the employer" test did not apply to harassment claims because sexual harassers rarely act to promote the interests of their firms.[243]

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236. *See* Sykes, *supra* note 11, at 563 (defining the boundaries of vicarious employer liability).

237. *See* Chamallas, *supra* note 26, at 136–37 (outlining the components of *respondeat superior* liability).

238. *See* Oppenheimer, *supra* note 29, at 274 (examining rationales for holding employers vicariously responsible for the tortious behavior of employees).

239. *See* Chamallas, *supra* note 26, at 136–37 (explaining how courts have narrowly construed vicarious liability in sexual abuse cases).

240. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998) (citing RESTATEMENT (SECOND) OF AGENCY § 219(2) (AM. L. INST. 1957)).

241. *Id.* at 756 (citing F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 394 (4th ed. 1952)).

242. *Id.* at 756–59.

243. *Id.* at 756–57.

Instead, the *Ellerth* Court found that harassers act on "personal motives" or "sexual urges."[244]

But the *Faragher* opinion—issued on the same day as *Ellerth*—acknowledged that courts do not always use the "serve the employer" test to make vicarious liability determinations.[245] In fact, the *Faragher* Court recognized a broad split in agency law on the question of a firm's vicarious responsibility for intentional employee misconduct. For example, the opinion highlighted a string of cases that extended employer liability to "intentional torts that were in no sense inspired by any purpose to serve the employer."[246] To illustrate this point, the Court cited a famous Second Circuit opinion that attached vicarious liability to the Coast Guard for a drunken sailor's intentional flooding of a drydock.[247] Even though the sailor acted without any motivation to serve his employer, the Second Circuit held that the Coast Guard should nevertheless pay for the resulting damages because "a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities."[248]

Declining to reconcile these apparently conflicting agency decisions, the *Faragher* Court observed that, at its core, agency law reflected societal views about the costs that employers should fairly bear for employee transgressions.[249] The Court stated that expanding these costs to new activities depended on whether "the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."[250] Applying the standard to sexual harassment, the

244. *Id.* at 756–59.

245. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 795–96 (1998) (listing other tests courts have used to resolve vicarious liability cases).

246. *Id.* at 794.

247. *See id.* at 795 (citing Ira S. Bushey & Sons v. United States, 398 F.2d 167 (2d Cir. 1968)).

248. *Id.*

249. *Id.* at 796.

250. *Id.* at 797 (citing RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (AM. L. INST. 1957)).

Faragher Court determined that society did *not* yet characterize supervisory harassment as such a cost.[251]

Critically, both the *Faragher* and *Ellerth* opinions left open the possibility that shifts in agency law could eventually expand the limits of an employer's vicarious responsibility for harassment.[252] The *Ellerth* Court noted that the vicarious liability rule that it relied upon was "a developing feature of agency law."[253] Likewise, although it declined to adopt a rule of strict liability for supervisory harassment, the *Faragher* Court recognized that courts could characterize this type of harassment "as one of the costs of doing business" and that "developments like this occur from time to time in the law of agency."[254] As the next section demonstrates, agency law has evolved since the Court decided *Faragher* and *Ellerth*, with courts increasingly holding employers responsible for various forms of intentional employee misconduct. This "developing feature of agency law" should extend to sexual harassment as well.[255]

B. *Broadening Vicarious Liability Based on Agency Developments*

The Supreme Court anchored the harassment loophole in a provision of agency law that no longer exists. Both the *Faragher* and *Ellerth* Courts cited extensively to the Restatement (Second) of Agency § 219(2)(d), which asked whether a servant was "aided in accomplishing the tort by the existence of the agency relation."[256] Relying on this provision, the *Faragher* Court held that supervisors were most clearly aided by their supervisory relationship when they took adverse job actions against subordinates.[257] Conversely, the Court held that if

251. *See id.* at 798.

252. *See infra* notes 268–270 and accompanying text.

253. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998).

254. *Faragher*, 524 U.S. at 798.

255. *Ellerth*, 524 U.S. at 763.

256. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. L. INST. 1957).

257. Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998) (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. L. INST. 1957)).

supervisors took no such action, then companies could escape liability through train-and-report systems.[258]

But as the *Faragher* Court predicted, this standard of agency law has evolved since the Court created the harassment loophole.[259] Eight years after the *Faragher* Court made the "aided in accomplishing" test the centerpiece of the harassment loophole, the American Law Institute (ALI) abandoned the standard altogether.[260] According to the ALI, the original drafters of the Second Restatement likely intended the "aided in accomplishing" language to apply only to instances of apparent authority.[261] If true, such a change in the meaning of "aided in accomplishing" would dramatically affect harassment jurisprudence. If limited only to circumstances in which supervisors have apparent authority to harass, then the "aided in accomplishing" test would rarely apply to Title VII cases. Apparent authority exists when plaintiffs reasonably believe that agents possess authority to engage in certain acts.[262] Given the prevalence of antiharassment policies in contemporary workplaces, plaintiffs today would seldom possess any sort of reasonable belief that their employers authorized their supervisors to harass them.

The Restatement of Employment Law recently confirmed this shift in modern agency law.[263] The Restatement explained that the "aided in accomplishing" test should not apply to employment settings because "[a]lmost all torts in the employment relationship are 'aided' by the existence of that

258. *See id.* at 808.

259. *See infra* notes 260–265 and accompanying text.

260. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. c (AM. L. INST. 2006) ("This Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's . . . vicarious liability.").

261. *See id.* ("The purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority . . . .").

262. *See* Brian C. Baldrate, Note, *Agency Law and the Supreme Court's Compromise on "Hostile Environment" Sexual Harassment in* Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton, 31 CONN. L. REV. 1149, 1158–59 (1999) (explaining why the apparent authority doctrine does not apply to most hostile work environment claims).

263. RESTATEMENT OF EMPLOYMENT LAW § 4.03 cmt. f (AM. L. INST. 2015).

relationship."[264] Given the apparent boundlessness of the "aided in accomplishing" standard and the fact that the Restatement of Agency discarded the test, the Restatement of Employment Law now directs courts to ask simply whether workers commit torts within the scope of their employment.[265]

Many courts today still hold that intentional torts occur outside the scope of employment.[266] But even the *Faragher* Court recognized the sharp division in agency law on this question.[267] Competing with the traditional approach that declines to apply vicarious liability to intentional employee offenses, many contemporary agency decisions hold employers responsible for intentional employee wrongdoing.[268] Courts offer varying rationales for this shift, but many simply utilize a broader definition of "scope of employment" and hold that firms must pay even for their employees' intentional acts.[269]

Consider a hypothetical example of strict employer liability for intentional employee wrongdoing: A fast food restaurant instructs its employee to mop the floor before the end of her shift.[270] The restaurant trained the employee on safe mopping techniques, directed her to warn customers about wet floors, and punished employees who broke these rules. If the employee uses too much water or otherwise mops negligently, nearly all courts would require her employer to compensate customers for their injuries.[271] But assume that a customer is injured not

264. *Id.*

265. *Id.*

266. Sykes, *supra* note 11, at 589–90 (examining the split of authority on the question of vicarious employer liability for intentional torts).

267. *See Faragher*, 524 U.S. at 794 (highlighting the different approaches to vicarious liability taken by the Second Circuit and the Eleventh Circuit).

268. *See* Fisk & Chemerinsky, *supra* note 20, at 760–61 (discussing a trend among certain courts to expand vicarious employer liability); Sykes, *supra* note 11, at 589 (summarizing cases that have taken a "more flexible approach" to vicarious liability).

269. Verkerke, *supra* note 10, at 311–12 ("The present trend is toward more expansive interpretations of the scope of employment.").

270. *See id.* at 292–94 (providing a similar example to explain the relationship between intentional torts and vicarious liability).

271. *See* Krieger, *supra* note 36, at 196–97 (examining *respondeat superior* liability for intentional misconduct).

because of the employee's negligence, but because she intentionally strikes a customer. For instance, imagine that a customer makes a snarky remark after the mopper's warning. In response, the employee hits the impolite customer over the head with her mop.[272] In many jurisdictions, the restaurant would still have to pay for the assault even though the assault certainly did not serve the employer's interests.[273] Courts applying strict vicarious liability under such circumstances would note that the assault occurred on company time, on company property, and while the employee performed job duties (i.e., mopping and warning).[274] Although employees certainly are not hired to harm third parties, agency law frequently requires firms to pay for such damages anyway.

In the Title VII context, courts consistently hold employers strictly liable for discriminatory acts other than harassment, despite the fact that such intentional employee misconduct does not advance the firm's interests.[275] For example, if a supervisor engages in race-based hiring or a religious-based firing, the fact that a company has instituted policies that prohibit this illegal behavior does not immunize the firm from liability.[276] The discriminating employee acts within the scope of employment, even though these acts do not serve the employer's interests, but actually *harm* them.[277] Antidiscrimination law holds firms vicariously responsible in these circumstances when supervisors mingle authorized conduct (i.e., their hire-fire

272. *See* Verkerke, *supra* note 10, at 293 (comparing intentional torts to employment discrimination).

273. *See id.* (discussing examples in which vicarious employer liability applies even when workers do not advance employers' interests).

274. *See* Oppenheimer, *supra* note 29, at 274 (examining the basis for holding employers automatically liable for intentional employee misconduct).

275. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971) (holding an employer strictly liable for racial discrimination).

276. *See* Carrillo, *supra* note 15, at 54 n.73 (discussing an employer's responsibility for supervisory harassment).

277. *See* Oppenheimer, *supra* note 27, at 91 (examining contemporary justifications for *respondeat superior* liability).

power) with prohibited conduct (i.e., discrimination).[278] Under this view, it is not the discriminatory act that serves the employer's purpose, but instead the work duty that accompanies the bad act.[279] As long as the supervisor performs work functions that serve the employer's interests, the employer is liable even if the supervisor performs those functions in a discriminatory manner.

Applying the foregoing principles to harassment, the test for employer liability should consider the relationship between a wrongdoer's job-related acts and the wrong itself.[280] Under this framework, the question is not whether a firm specifically hired an individual to harass employees.[281] Instead, the question is whether the harasser engaged in harassing behaviors while simultaneously performing job duties.[282] The Restatement of Employment Law refers to "unratified acts committed within, or incident to, work that the employer assigned . . . ."[283] The same query applies to sexual harassment. Courts should conclude that harassment falls within the scope of employment when a harasser entwines his job performance with harassing acts. Consider, for example, a supervisor who emails an agenda for an upcoming company meeting to his female coworker. The male employee has specific job responsibilities that include drafting the agenda, sending the email, and attending the meeting itself. In the course of performing these job duties, the male employee also emails dirty jokes, makes sexual propositions, or physically grabs the female coworker during the company meeting. Each of these actions

278. *See id.* at 78 (outlining various rationales for holding masters vicariously liable for their servants' wrongful acts).

279. *See id.* at 86 (discussing scenarios in which "sexual harassment is incidental to the performance of the job").

280. *See id.* at 71 (examining rationales for finding that harassment occurs within the scope of employment).

281. *See id.* at 82 ("[E]mployers typically do not employ supervisors to sexually harass employees.").

282. *See id.* at 85–86 (asserting that a vicarious liability analysis should ask whether a supervisor "mixes work-related and non-work-related functions").

283. RESTATEMENT OF EMPLOYMENT LAW § 4.03 cmt. f (AM. L. INST. 2015).

mixes the supervisor's authorized functions with harassing behavior.[284]

Beyond examining the connection between job duties and committed wrongs, many courts also hold firms vicariously responsible for employee misconduct when the employment relationship increases the risk of harm or if the harm is a predictable hazard of work.[285] Some courts have adopted this alternative approach to vicarious liability by asking whether "in the context of the employer's particular enterprise, the employee's conduct is not so unusual or startling that it seems unfair to include the loss resulting from it in the employer's business costs."[286] According to this view, questions of vicarious liability should focus on the broad issues of risk-creation and foreseeability.[287] The more that an endeavor enhances certain risks, the more likely that the firm should pay for the foreseeable costs generated by those risks.[288] As the Restatement of Employment Law says, "[b]ecause the employer generally benefits from the employee's actions taken within the scope of employment, the employer should bear the costs that the actions wrongly impose on third parties."[289]

Companies pay damages in these circumstances not because they can always prevent misconduct, but because society expects firms that reap economic benefits from their activities to assume responsibility for the predictable costs of those activities.[290] The firm does not assume responsibility for

284. *See* Verkerke, *supra* note 10, at 298 (examining different ways that an employee's bad act could nevertheless advance an employer's interests).

285. *See* Chamallas, *supra* note 26, at 144–46 (discussing foreseeability and "enterprise" risk theories of vicarious liability).

286. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (AM. L. INST. 2006) (acknowledging that some courts utilize this alternative formulation of vicarious liability but criticizing the standard's breadth).

287. *See* Chamallas, *supra* note 26, at 144–46 (examining the relationship between vicarious liability, foreseeability, and the creation of risk).

288. *See id*. at 157–58 (contrasting enterprise risk theory with the more "antiquated" standard that bases vicarious employer liability on the tortfeasor's motives).

289. RESTATEMENT OF EMPLOYMENT LAW § 4.03 cmt. f (AM. L. INST. 2015).

290. *See* Krieger, *supra* note 36, at 196–97 (considering the normative rationales for vicarious employer liability).

all theoretical costs, but only for foreseeable categories of harm that courts can fairly attribute to the workplace.[291] Applied to sexual harassment claims, the #MeToo movement has drawn critical public attention to rampant levels of harassment across many industries.[292] Considering this reality, courts can fairly characterize sexual harassment as a category of harm that typically arises out of workplace dynamics and work-specific settings.[293] Supervisors and coworkers frequently harass one another in company spaces (e.g., offices, cubicles, break rooms, etc.) using company venues (e.g., interviews, meetings, email servers, etc.) on company time (e.g., during business hours, work trips, etc.). Although employers may not always foresee specific incidents of harassment and may take reasonable steps to prevent harassment, the prevalence and work-specific setting of harassing acts enable employers to predict these harms and, accordingly, justify requiring firms to compensate victims when they occur.

C. *Extending Liability to Coworker Harassment*

Most discussions of vicarious employer liability have focused exclusively on supervisory harassment. Indeed, the Supreme Court's core decisions that formulated the harassment loophole—*Meritor*, *Faragher*, and *Ellerth*—all involved sexual harassment by supervisors.[294] Only the most recent addition to

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291. *See* Verkerke, *supra* note 10, at 301 (discussing the concepts of foreseeability and enterprise causation in relation to vicarious liability).

292. *See supra* Part I.A.

293. *See* Chamallas, *supra* note 26, at 140 ("[P]ower dynamics and structural features of the workplace . . . facilitate sexual abuse . . . .").

294. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (stating that two of Faragher's supervisors allegedly subjected Faragher and other females to unwanted touching and lewd remarks); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 747 (1998) ("During [Ellerth's] employment, she alleges, she was subjected to constant sexual harassment by her supervisor."); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59–60 (1986) (summarizing Vinson's allegations that she was continually subjected to sexual harassment by the vice president).

the canon—*Vance*—involved coworker harassment.[295] Mirroring the disproportionate attention that courts have paid to supervisory harassment, legal scholarship on the issue has concentrated on the misconduct of supervisors, as opposed to coworkers.[296] This lack of attention paid to coworker harassment is understandable given the widely held presumption that only supervisors who fire or take other tangible actions against workers can expose companies to vicarious liability.[297]

Despite the dearth of analysis on this issue, however, closing the harassment loophole should include holding businesses liable for all forms of employee harassment, whether committed by supervisors or coworkers. The doctrinal underpinnings of Title VII and agency law support this broader approach to vicarious liability.[298] Courts presently apply a negligence standard when analyzing employer responsibility for coworker harassment.[299] According to this liability test, firms become liable for coworker harassment only if employers knew or should have known about the harassment and acted unreasonably in response.[300] This standard, of course, is a form

295. Vance v. Ball State Univ., 570 U.S. 421, 424–25 (2013) (explaining that a fellow employee continually harassed Vance despite University efforts to address the situation).

296. *See, e.g.*, Carrillo, *supra* note 15, at 53–54; Grossman, *supra* note 30, at 735–36 (proposing a rule of strict employer liability for supervisory harassment); Phillips, *supra* note 26, at 1268–69 (same). *But see* Fisk & Chemerinsky, *supra* note 20, at 788–89 (discussing coworker harassment and vicarious liability); Oppenheimer, *supra* note 27, at 107–08 (same).

297. *See* Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1261–62 (1987) (noting that courts have never held firms vicariously liable for coworker harassment).

298. *See, e.g.*, Oppenheimer, *supra* note 27, at 107–08 ("Limiting vicarious liability to incidents of supervisorial harassment is an improper application of the law of agency.").

299. *See* Grossman, *supra* note 30, at 689–90 (discussing the difference between direct and vicarious liability).

300. *See* Corbett, *supra* note 166, at 811–12 (summarizing the standard of liability for coworker harassment).

of direct liability, not vicarious liability.[301] The firm becomes liable through its own unreasonable response to harassment, as opposed to becoming automatically liable for coworker conduct, regardless of company fault.[302]

If a broader approach to agency law places supervisory harassment within the scope of employment, then the same rationale logically applies to coworker harassment as well.[303] Nothing in agency law limits vicarious liability only to official supervisory acts. After all, in the tort context, courts regularly hold companies responsible for the misconduct of their nonsupervisory personnel. For example, the waiter who intentionally pours coffee on a customer can trigger automatic liability for his employer, regardless of his nonsupervisory status and regardless of the employer's response.[304] The same is true if a school janitor attacks a member of the public.[305] The janitor's lack of supervisory functions would have little bearing on the school's responsibility to pay for damages that the janitor causes.[306] Many courts would apply vicarious liability in these circumstances because agency law covers all employees—supervisors, high-level managers, and ordinary employees—who commit torts within the scope of their employment.[307]

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301. *See* Sykes, *supra* note 11, at 578 (asserting that a liability standard based on an employer's negligence "is not really vicarious at all").

302. *See id.* at 577 (noting that a true form of "strict" liability prohibits employers from defending against actions based on the reasonableness of their responses).

303. *See* Oppenheimer, *supra* note 27, at 108 (outlining situations in which employers should pay for employees' intentional misconduct).

304. *See* Oppenheimer, *supra* note 29, at 274 (explaining that many courts hold employers vicariously liable for intentional employee torts).

305. *See* Verkerke, *supra* note 10, at 292–93 (using the hypothetical example of a violent employee to illustrate certain rules of vicarious liability).

306. *See id.* at 293–94 (discussing employer liability for intentional torts of employees).

307. *See* Phillips, *supra* note 26, at 1244–46 (examining the application of agency law to different categories of workers); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006) (defining employer-employee relationships).

The Supreme Court has already stated that if supervisory harassment falls within the scope of employment, then coworker harassment should as well. For example, the *Faragher* Court explicitly found that the "rationale for placing harassment within the scope of supervisory authority . . . would apply when the behavior was that of coemployees."[308] Likewise, the *Ellerth* Court observed that a broad view of vicarious liability would extend to coworkers because the employment relationship provides coworkers with "[p]roximity," "regular contact" and "a captive pool of potential victims."[309] Of course, the *Faragher* and *Ellerth* opinions concluded that harassing behavior—whether committed by supervisors or coworkers—generally did *not* fall within the scope of employment.[310] But as explained above, changes in agency law and in societal perceptions of harassment have altered this calculus.

Like supervisors who harass subordinates while exercising their hire-fire authority, coworkers frequently interweave job duties with gender-based harassment.[311] Harassers often behave opportunistically, and the workplace can help facilitate this misconduct.[312] Coworkers operate in the same physical space, collaborate with fellow employees, and share repeated encounters.[313] As the entity that benefits from these interactions, employers should pay for the harassment-related costs that arise from them, even if the firm has acted reasonably to prevent misconduct.[314] Coworkers are as much a part of the productive process as supervisors.[315] Whereas, the Supreme

308. Faragher v. City of Boca Raton, 524 U.S. 775, 800 (1998).

309. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998).

310. *See supra* notes 166–170 and accompanying text.

311. *See* Oppenheimer, *supra* note 27, at 107–08 (examining the relationship between harassment, job performance, and agency law).

312. *See* Chamallas, *supra* note 26, at 159 (discussing certain reasons why harassment is "job-related").

313. *See* Jane E. Larson, *Sexual Labor*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 129, 132 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003) (discussing repeat interactions between workers).

314. *See* Chamallas, *supra* note 26, at 186 (outlining the relationship between vicarious liability and risk-creation).

315. *See* Verkerke, *supra* note 10, at 304–05 (examining how rationales based on causation and foreseeability support a broad application of vicarious liability).

Court determined in 1998 that harassment falls outside the scope of employment, the #MeToo movement has shown how harassers today regularly fuse harassing behaviors with normal job activities. The predictability and frequency of harassment mean that this form of misbehavior often falls within the scope of employment for supervisors and coworkers alike. Just as firms must pay for harms when supervisors perform job functions in a discriminatory way—regardless of company-specific preventative measures—firms should also absorb the costs that coworkers generate when they perform job functions in a harassing manner.

D. *Achieving Agency and Antidiscrimination Goals*

Adopting the proposal outlined here would not only represent a doctrinally sound application of agency law and Title VII, it would also serve the underlying goals of both bodies of law. In the tort context, vicarious liability incentivizes deterrence measures, helps compensate victims, and shifts losses from plaintiffs to employers and the public.[316] Similarly, Title VII's objectives include providing redress to victims and inducing employers to root out discriminatory actions at their worksites.[317] Just as vicarious liability spreads losses among stakeholders and prompts group investment in underlying problems, Title VII characterizes discrimination as a societal harm that damages the public at large.[318]

In contrast to the harassment loophole, a rule of strict employer liability can effectively promote these objectives. For example, an employer's deterrence incentives would

316. *See* Fisk & Chemerinsky, *supra* note 20, at 786 (comparing the core goals of Title VII and vicarious liability in tort law).

317. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 850 (2001) (discussing Title VII's remedial scheme and purpose); Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 317–18 (1982) (examining Title VII's objectives).

318. *See* David J. Willbrand, *Better Late Than Never? The Function and Role of After-Acquired Evidence in Employment Discrimination Litigation*, 64 U. CIN. L. REV. 617, 622 (1996) (explaining how Title VII helps serve broad public policy objectives).

dramatically change if firms always had to pay for employee harassment. As noted above, the Supreme Court premised much of the harassment loophole on the empirical bet that limiting employer liability would prompt firms to prevent harassment.[319] In reality, though, the harassment loophole has provided employers with the perverse incentive to ignore harassment until it officially comes to their attention.[320] Given that companies currently have no reason to investigate workplace harassment until victims officially object, the loophole encourages firms to make it quite difficult for victims to file complaints, even while publicly taking a "zero tolerance" stance against harassment.[321] In fact, the loophole provides litigation-conscious employers with an incentive to draft minimally-compliant harassment policies that functionally *discourage* employees from actually using them.[322]

In contrast to the status quo, a system that forced employers to absorb the costs of harassment would induce firms to take more meaningful steps to prevent harassment.[323] Attaching liability to a predefined set of harms provides businesses with incentives to prevent those harms.[324] Thus, if employers had to pay for harassment, regardless of whether victims complained, rational firms would attempt to minimize their legal exposure to this category of harm by discovering

319. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (stating that the primary objective of Title VII is "not to provide redress but to avoid harm" (citation omitted)).

320. *See* Carrillo, *supra* note 15, at 85–86 (arguing that strict employer liability would encourage employers to "take the strongest possible affirmative measure to prevent the hiring and retention of sexist supervisors").

321. *See* Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 142–43 (2008) (discussing the ramifications of notice-based harassment liability).

322. *See id*. (examining the incentives created by the harassment loophole).

323. *See* Verkerke, *supra* note 10, at 307–08 (outlining the relationship between enterprise liability and employer incentives).

324. *See id*. at 308 (examining the effect of enhanced liability on deterrence goals).

systems that actually reduce harassment.[325] Although the particular actions that employers might take would vary between workplaces, strict liability would, at a minimum, prompt firms to find out whether their employees are actually harassing one another—an action that today's notice-based approach to liability discourages.[326] Beyond taking steps to detect real-world incidents of harassment, strict liability would also encourage employers to investigate underlying causes of harassment at individual worksites such as sex-stratification, organizational culture, and opportunity structures for abuse within the company.[327] Given that these causes and their associated remedies will inevitably vary by location, automatic liability would motivate firms to develop site-specific diagnoses and plans of action.[328] Companies would be encouraged to take these steps to reduce liability, while recognizing that no system can stop all incidents of harassment.

Closing the harassment loophole would not only advance Title VII's deterrence goal, it would also serve the statute's make-whole purpose. Compensating victims and deterring wrongdoing are central objectives of Title VII.[329] For example, passage of the Civil Rights Act of 1991, which expanded antidiscrimination remedies, emphasized the importance of

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325. *See* Sykes, *supra* note 11, at 569 (explaining that harassment prevention depends in part on whether employers have practical measures for detecting instances of misconduct).

326. *See* Fisk & Chemerinsky, *supra* note 20, at 787–88 (asserting that under current liability rules employers "need not worry" about workplace harassment as long as it does not involve job decisions with economic consequences).

327. *See* Grossman, *supra* note 22, at 35–39 (discussing studies on the effectiveness of harassment prevention); Nuñez, *supra* note 133, at 502–03 (highlighting the need for systemic solutions to harassment).

328. *See* Grossman, *supra* note 22, at 71–72 ("Such an approach will induce employers . . . to adapt standard measures to idiosyncratic problems they may face.").

329. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (discussing the importance of prevention and compensation within Title VII's remedial scheme); Grossman, *supra* note 30, at 720–21 (criticizing the Supreme Court for emphasizing deterrence over compensation when it created the harassment loophole).

victim compensation within Title VII's statutory framework.[330] Even critics of the proposal outlined here would acknowledge that automatic liability would provide more opportunities to compensate plaintiffs.[331] Under the current system of notice-based liability, victims of harassment rarely receive compensation because most of them never formally process their complaints through their employer's internal reporting systems.[332] Because the harassment loophole typically eliminates liability in these circumstances, silent victims must simply bear harassment costs alone. Even individuals who file credible allegations with firms mostly receive nothing if employers end the harassment.[333] Under these circumstances, employers must compensate victims only in the unusual event that individuals formally complain and firms fail to respond appropriately.

Extending strict employer liability to coworker harassment would dramatically advance Title VII's compensatory objectives in a way that merely limiting vicarious liability to supervisory harassment would not. Contrary to the archetypal image of sexual harassment contained in prominent #MeToo stories, most victims are harassed by coworkers, rather than by high-level managers.[334] Thus, if vicarious liability applied only to supervisory harassment, Title VII still would not redress most injuries. As such, to serve the statute's make-whole goal, a revised rule of liability should encompass coworker harassment as well.

A new approach to liability that shifted the costs of harassment from victims to firms would emphasize the shared harms that antidiscrimination violations cause.[335] Both Title

330. *See* 42 U.S.C. § 1981a; *see also* Harper, *supra* note 34, at 58–59 (outlining Title VII's twin aims of prevention and remediation).

331. *See* Chamallas, *supra* note 26, at 150–51 (examining the rationales for vicarious liability).

332. *See supra* Part II.B.2.

333. *See id.*

334. *See* Schultz, *supra* note 47, at 19 (summarizing data on harassment as measured by the harasser's supervisory or non-supervisory status).

335. *See* Oppenheimer, *supra* note 27, at 94 (explaining how increasing employer liability distributes the costs of harassment).

VII and the #MeToo movement have stressed the need for collective investment in the problem of workplace harassment.[336] For example, Title VII underscores the community goal of nondiscrimination and the societal losses that defendants generate when they violate the statue.[337] Likewise, the #MeToo movement has helped explain how sexual harassment causes collective injuries and not merely private harms.[338] At its core, the movement has framed sexual misconduct as a community problem that individual victims should not have to solve alone.[339]

In contrast to the status quo, in which individual victims mostly pay the price of harassment, a rule of expanded liability would recognize the superior ability of firms to absorb and spread these losses as a cost of doing business.[340] Although this rule would hold employers responsible even for unpreventable harassment, firms already absorb similar costs in other antidiscrimination contexts. For example, employers must pay for discriminatory discharges, even when victims do not report the illegal behavior and even when employers have tried to prevent these wrongful acts.[341] Faced with a choice between leaving victims uncompensated or forcing firms to pay for discrimination, courts have identified employers as the superior

336. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (discussing Title VII's preventative aims); Tippett, *supra* note 23, at 252 (asserting that #MeToo represents "a collective cause" that may "serve to mobilize others").

337. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (discussing Title VII's shared project of discrimination eradication); *see also* Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1409 (2009) (discussing Title VII's "collective goal of combating unlawful employment practices").

338. *See* Hill, *supra* note 32 (examining certain cultural misperceptions that the #MeToo movement has highlighted).

339. *See* Resnik, *supra* note 155, at 249 (critiquing the notion that harassment relates only to individual exchanges).

340. *See* Oppenheimer, *supra* note 29, at 276 (examining different justifications for expanding employer liability for harassment).

341. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 70–71 (1986) ("[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions.").

cost-bearers in such scenarios.[342] The same rationale applies to an employer's responsibility to compensate individuals who experience workplace harassment. The law should impose these costs on the entity that can manage risks and spread losses, as opposed to imposing those costs on individual victims.[343] This shift in liability rules would promote Title VII's preventative and remedial goals, while recognizing the community's stake in combating sexual harassment.

IV. OBJECTIONS TO EXPANDED EMPLOYER LIABILITY

Critics could raise several objections to the current proposal. For example, strict employer liability might actually harm employees without reducing harassment. If the law held employers automatically responsible for harassment, some firms might over-monitor their workers, while others might *reduce* their compliance efforts given that liability would apply automatically no matter what they did.[344] On the other hand, victims might not report instances of harassment to management because employer liability would not depend on notice.[345] These dynamics could in turn disproportionately harm female workers because managers and male coworkers might limit their interactions with women to avoid harassment accusations.[346] In addition, a rule of strict employer liability could prompt firms to arbitrarily fire accused harassers based

342. *See* Beiner, *supra* note 12, at 144–45 (addressing potential objections to a rule of strict employer liability for harassment).

343. *See* Chamallas, *supra* note 26, at 157 (outlining the efficiency and fairness rationales for vicarious liability).

344. *See* Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 456–57 (1997) ("Subjecting employers to strict liability when they have clearly attempted to eradicate workplace harassment and taken remedial measures once notified of specific instances of supervisor harassment may deter them from even attempting to prevent or remedy the harassment.").

345. *See id.* (explaining that strict liability may encourage women to stay silent or not report harassment).

346. *See* Arnow-Richman, *supra* note 60, at 88 (discussing fears of "ill-founded accusations of harassment" among certain workers).

on unsubstantiated charges.[347] And even if the current proposal somehow avoided these problems, an expansion of employer liability would not necessarily curb harassment due to other structural deficiencies of federal antidiscrimination law.[348] This section addresses these concerns and explains why, despite the facial appeal of each objection, strict liability represents a far more effective legal rule for combating harassment than the existing system of notice-based liability.

A. *Ineffectiveness, Cosmetic Compliance, and Excessive Workplace Monitoring*

Strict employer liability could potentially lead to heightened workplace monitoring without necessarily reducing harassment.[349] Twenty years ago, legal feminists engaged in a sustained critique of the sanitizing effect that harassment law had on workplace culture.[350] Led by writers such as Vick Shultz and Janet Halley, these scholars explained how the legal test for sexual harassment policed sexual norms at work, while masking underlying forms of exploitation.[351] Contrary to the popular view that harassing incidents always involved a

347. *Id.*

348. *See* Hemel & Lund, *supra* note 24, at 1603–04 (describing Title VII's practical limitations).

349. *See* Dansky, *supra* note 344, at 464 ("[A] strict liability standard may incite employers to make irrational and inefficient decisions to increase monitoring of the workplace beyond a point at which it is cost-justified.").

350. *See* Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 111, 111 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003) (examining early definitions of harassment); Arnow-Richman, *supra* note 60, at 88–89 (summarizing criticisms of standard sexual harassment accounts).

351. *See* Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 183, 197–98 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003); Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551, 552–53 (2009) (discussing feminist scholarship on the effects of harassment law); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 (1998) (describing how the current regulation of workplace harassment fails to address many of the most debilitating forms of sex-based mistreatment); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003) (critiquing the promotion of "workplace asexuality").

male-female, sexual dynamic, Schultz argued that harassment affected all genders, took sexual and nonsexual forms, and involved the assertion of power rather than desire.[352] In addition, Halley explained how employer antiharassment policies that focused exclusively on sex could disproportionately target sexual minorities and punish even innocuous or consensual sexualized behavior.[353] In light of these dynamics, a firm's compliance regime might potentially rid the workplace of references to sex, but allow other forms of gender-based harassment to take place.[354] In other words, the law of sexual harassment could "sanitize" the workplace without necessarily combating many instances of harassment.[355]

At first glance, it might appear that a rule of strict liability would only make matters worse by transforming the sanitized workplace into an "ultra-sanitized" workplace. After all, if the current system of notice-based liability already prompts employers to root out all forms of sexual expression, then a rule of automatic liability might incentivize even more invasive interventions.[356] Although understandable, this fear mistakes the current system of cosmetic compliance with the more

352. *See* Mizrahi, *supra* note 41, at 121–22 (examining the relationship between Schultz's critique and contemporary workplace developments); Schultz, *supra* note 351, at 1686–87 ("Yet much of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content.").

353. *See* Arnow-Richman, *supra* note 60, at 88–89; Schultz, *supra* note 3, at 60 (outlining the unintended consequences of defining harassment in sexual terms); Halley, *supra* note 351, at 197–98 (discussing harassment regulation and queer theory); West, *supra* note 50 (summarizing Halley's contention that sexual harassment law stigmatizes sexual expression).

354. *See* Schultz, *supra* note 3, at 33–34 (["T]argeting *only* sexual misconduct without addressing related patterns of sexism and deeper institutional dynamics has serious shortcomings—shortcomings that risk undermining the broader quest for gender equality."); Soucek, *supra* note 58, at 73–74 (discussing non-sexual forms of gender-based harassment).

355. *See* Schultz, *supra* note 3, at 24 (emphasizing the ongoing importance of identifying different iterations of gender-based harassment).

356. *See* Krieger, *supra* note 36, at 196 (summarizing concerns about antiharassment policies and sexual privacy).

meaningful prophylactic measures that a rule of strict liability would prompt employers to take.[357]

Currently, employers highlight their attention to sexualized behaviors as a way to signal to employees, courts, and the public that they are serious about stopping sexual harassment.[358] In reality, however, the current system of notice-based liability discourages employers from going beyond cosmetic compliance and genuinely scrutinizing their worksites for less obvious signs of gender-based mistreatment.[359] In contrast to the harassment loophole, which requires victims to detect and report harassment themselves, strict employer liability would prompt employers to proactively assess the liability risks associated with existing workplace cultures.[360] For example, firms might survey their workforce to determine if employees are experiencing severe gender-based forms of mistreatment such as social ostracism, sabotage, segregation, or personal mockery.[361] Although workplace monitoring would still occur under a rule of strict liability, the forms and goals of this observation would be quite different from those that occur under the current rule of notice-based liability. In contrast to the existing system that causes many employers to conduct myopic, superficial audits of sexualized behaviors, a rule of strict liability would prompt companies to look more comprehensively at the systems and interactions that give rise to gender-based abuse. Because courts would hold them strictly accountable, firms would scrutinize their worksites to find meaningful ways

357. *See* Bisom-Rapp, *supra* note 8, at 69–70 (explaining how training programs can amount to "nothing more than symbolic or cosmetic gestures").

358. *See* Tippett, *supra* note 23, at 244 (discussing the reasons why firms enact antiharassment systems).

359. *See* Carrillo, *supra* note 15, at 84–85 (explaining how notice-based liability disincentivizes bona fide harassment investigations).

360. *See* Lawton, *Bad Apple Theory*, *supra* note 21, at 867–68 (considering the practical effects of a shift away from notice-based liability).

361. *See* Schultz, *supra* note 3, at 33–34 (2018); Soucek, *supra* note 58, at 73–74 (explaining how gender-based harassment frequently takes non-sexualized forms).

to reduce harassment, rather than to engage in performative acts of compliance.[362]

Beyond monitoring workers, expanded liability would induce employers to examine larger workplace structures that incubate harassing behaviors. For example, employers might identify certain organizational practices that often correlate with harassment such as sex segregation and pay disparities.[363] The point of these interventions would not be to eliminate sexuality from the workplace but to identify underlying systems that foster harassment and, accordingly, increase a firm's exposure to strict Title VII liability. When certain companies today punish minor sexualized behavior, they engage in symbolic acts of compliance.[364] Because a rule of strict employer liability would no longer reward these performative acts, expanded liability would induce firms to adopt systems that actually prevent harassment to avoid the risk of mounting Title VII costs.

Finally, under the proposal outlined here, firms would still retain incentives to detect and correct ongoing harassment at worksites. Even though employers could not escape liability for proven instances of past harassment, they could still reduce the damages that they owe by effectively responding to complaints. The Supreme Court has already ruled that employers' good faith efforts to comply with Title VII prevent plaintiffs from recovering punitive damages.[365] In addition, an employer that effectively responds to reports of harassing behavior would

362. *Cf.* Lawton, *Operating in an Empirical Vacuum*, *supra* note 21, at 210–13 (explaining that federal courts often fail to consider whether an employer's superficial compliance actually resulted in a reduction in harassment at work).

363. Green, *supra* note 6, at 166–67 (examining employer solutions to harassment that go beyond training and complaint processes).

364. *See* Nuñez, *supra* note 133, at 488 (explaining how some "organizations engage in 'symbolic compliance' that leaves in place the practices that promote and maintain discrimination").

365. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545–46 (1999) (asserting that punitive damages are not warranted under Title VII when employers make good faith efforts to stop harassment); *see also* Nuñez, *supra* note 133, at 477 (discussing the relationship between punitive damages and the harassment loophole).

significantly diminish its exposure to compensatory and other damages by ending the harassment.[366] But in contrast to the current state of affairs, in which a firm's effective response to complaints absolves it of responsibility for even past damages, a rule of strict employer liability would allow firms to curtail prospective losses only. This opportunity to avoid responsibility for future harm would provide employers with incentives to stamp out harassment, even though such actions would have no effect on a firm's obligation to pay for injuries that have already occurred.

The effect that strict liability would have on victim reporting is less clear. Theoretically, victims could sit on their harassment claims, decline to inform management of harassment, and still sue. Therefore, it might seem like a rule of strict employer liability would undermine the goal of "encourag[ing] victims of harassment to come forward" that the Supreme Court articulated when it created the harassment loophole.[367] But there are several legal and practical reasons why employees would still retain an incentive to informally resolve harassment complaints.[368] First, as discussed above, the existing system of notice-based liability has not prompted widespread reporting because victims credibly fear that their employers will disbelieve their claims or retaliate against them.[369] Thus, it is not clear how a shift in liability rules would undermine an already-broken reporting model. Second, many victims currently fail to report because they worry about losing their jobs.[370] These individuals simply want the harassment to stop, but they view reporting as an ineffective method for achieving this end.[371] In contrast, if strict employer liability

366. *See* Carrillo, *supra* note 15, at 90–91 (outlining employer incentives for reducing harassment-related damages).

367. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

368. *See* Carrillo, *supra* note 15, at 90–91 (describing incentives for employers to address harassment).

369. *See supra* Part II.B.2.

370. *See* Harper, *supra* note 34, at 78 (discussing the reasons why harassment victims do not utilize internal reporting systems).

371. *See* Porter, *supra* note 7, at 60 (explaining the need for proportionality in employers' responses to harassment).

prompted firms to operationalize fair and proportionate reporting systems, victims would be more willing to come forward.

At a very practical level, even if victims wanted to withhold their harassment reports from employers, Title VII does not afford them much time to do so. The statute of limitations for initiating Title VII proceedings is only 180 to 300 days, depending on the jurisdiction.[372] Once individuals come forward, nothing in federal antidiscrimination law prevents employers from investigating the allegations and enacting appropriate remedial measures to limit future damages.[373] The key difference between this proposal and the status quo, however, is that employers could not escape liability through summary judgment even if plaintiffs failed to file internal complaints.[374] As such, a jury or other fact finder could assess damages based on all harassment-related evidence.[375] Such an outcome would allow plaintiffs to avoid dismissal and tell their stories to a broader legal audience—a central goal of #MeToo.[376] Thus, in contrast to the current state of affairs, closing the harassment loophole would increase the incentives for employees to report misconduct and for employers to redress bona fide instances of harassment.

B. *Due Process for the Accused*

Heightened employer liability could conceivably prompt businesses to fire accused harassers without offering them fair investigations. After all, if firms already engage in unfair or shoddy probes with notice-based liability in place, strict

372. 42 U.S.C. § 2000e-5.

373. *See* Carrillo, *supra* note 15, at 90–91 (indicating that employers can reduce potential exposure through remedial actions).

374. *See State Regulation of Sexual Harassment*, *supra* note 54, at 465 (explaining why Title VII plaintiffs often fail to prevail in court).

375. *See* Lindstrom, *supra* note 91, at 132–33 (discussing the liability-damages distinction in harassment litigation).

376. *See supra* Part I.

employer liability could potentially worsen the situation.[377] But this critique wrongly conflates the performative nature of today's investigations with more effective systems that the current proposal would encourage. The harassment loophole currently provides employers with several perverse incentives. First, as a system of notice-based liability, the loophole encourages employers to ignore harassment until it officially comes to the company's attention.[378] But once victims step forward, separate incentives materialize. To prove publicly that the firm is committed to antiharassment values, the harassment loophole motivates employers to summarily dismiss accused harassers without necessarily conducting fair investigations.[379] The burden of this dynamic falls disproportionately on lower-status employees who the firm views as fungible.[380] Faced with an official complaint, firms often balance the costs of liability against the perceived benefits that the alleged harasser provides to the employer.[381] For lower-status workers, even benign sexualized statements can give rise to arbitrary disciplinary actions, as compared to the more extreme behaviors of certain high-level managers whom the company may nevertheless retain.[382]

A rule of strict employer liability would fundamentally alter an employer's incentives to indiscriminately punish alleged perpetrators.[383] In contrast to the safe harbor provided by the

377. *See* Tippett, *supra* note 23, at 275 (examining the argument that #MeToo fails to afford due process rights to accused harassers).

378. *See* Willbrand, *supra* note 318, at 622 (explaining how the sexual harassment loophole encourages some employers to ignore harassment).

379. *See* Schultz et al., *supra* note 47, at 35–36 (underscoring the importance of contextualizing various forms of sexual expression).

380. *See* Arnow-Richman, *supra* note 60, at 91–92 (examining the effect that different workplace power dynamics have on employers' responses to harassment allegations).

381. *See* Hébert, *supra* note 6, at 324–25 (outlining the "rare instances in which the targets of sexual harassment challenge the harassment by legal action").

382. *See* Arnow-Richman, *supra* note 60, at 90–91 (discussing punishment and workplace hierarchy).

383. *See* Porter, *supra* note 7, at 60–61 (outlining an employer's motivations for arbitrarily dismissing accused harassers).

harassment loophole, the system proposed here would hold firms automatically liable for past harassment, regardless of notice and regardless of any remedial actions that the firm might take in response to complaints.[384] Although putting a stop to harassing behaviors would limit future damages, firms could only achieve this end by first confirming the identities of actual harassers and determining what they did. As such, under the liability regime proposed here, employers would be less motivated to discipline or fire alleged perpetrators until a thorough investigation verified what happened. Even then, strict liability would be more likely to prompt measured responses from employers, given that the harassment loophole would no longer exist to reward firms for summarily firing harassers. Although a company might conclude that the perpetrator's actions warrant discharge, it might also find that less-severe responses could safeguard against future bad acts. In other words, without the benefit of the harassment loophole and the incentive for immediate discharge that it creates, employers would be more likely to take care in ascertaining what actually occurred and how to solve the problem.

C. *Marginalization of Women*

Opponents of expanded liability might fear that such a move could harm women's workplace advancement.[385] For example, the proposal might prompt male coworkers to avoid contact with women to fend off accusations of harassment.[386] Male supervisors in particular might refrain from mentoring women for fear that they could face harassment allegations.[387] Indeed, surveys taken in the wake of #MeToo suggest that a substantial proportion of male managers are reluctant to

384. *See supra* Part III.

385. *See* Bisom-Rapp, *supra* note 8, at 69–70 (examining employee backlash to harassment training); Green, *supra* note 6, at 166–67 (same).

386. *See* Kim Elsesser, *The Latest Consequence of #MeToo: Not Hiring Women*, FORBES (Sept. 5, 2019), https://perma.cc/7UQX-5WJE (summarizing concerns related to sex segregation and the fallout from #MeToo).

387. *See* Grossman, *supra* note 22, at 48–49 (discussing the "unwanted effects" of harassment training).

interact with female subordinates.[388] For example, one post-#MeToo survey reported that a large share of male senior managers said that they would hesitate to hold one-on-one meetings with junior women or conduct work travel with them.[389] If a high number of managers acted on these impulses, this exclusion could significantly hamper employment opportunities for women. After all, a worker's progress at many firms depends on mentorship and social interactions with management.[390] If they were denied these informal modes of networking, victims might have difficulty proving that these exclusionary acts happened, given that this type of discrimination often occurs off the record or without an official act.[391]

Despite these genuine fears of ostracism and professional exclusion, however, such conduct already runs afoul of existing legal prohibitions. Sex-segregation is illegal under Title VII.[392] If male supervisors meet with men behind closed doors but refuse to meet with women, employers face automatic liability for these discriminatory acts.[393] To the extent that less obvious forms of exclusion go undetected, these unremedied outcomes

388. *See Working Relationships in the #MeToo Era*, LEAN IN (2019), https://perma.cc/3P7M-3G8F ("60% of managers who are men are uncomfortable participating in . . . common work activit[ies] with a woman, such as mentoring, working alone, or socializing together. That's a 32% jump from a year ago."); *see also* Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), https://perma.cc/CHJ5-9BE6 (reporting survey data on the public's perception of #MeToo's workplace impacts).

389. *See Working Relationships in the #MeToo Era*, *supra* note 388; *see also* Julie C. Ramirez, *Is #MeToo Harming Women's Careers*, HUMAN RES. EXEC. (Sept. 23, 2019), https://perma.cc/8CVC-NSK7 (stating that one-third of surveyed men were reluctant to conduct one-on-one meetings with women).

390. *See* Hemel & Lund, *supra* note 24, at 1592 (considering the role that corporate law can play in reducing workplace harassment).

391. *See generally* Katherine Tarbox, *Is #MeToo Backlash Hurting Women's Opportunities in Finance?*, HARV. BUS. REV. (Mar. 12, 2018), https://perma.cc/Q232-5T22 (examining subtle forms of exclusion following #MeToo).

392. *See* Williams & Lebsock, *supra* note 38 (explaining how professional exclusion violates federal antidiscrimination law).

393. *See* Hemel & Lund, *supra* note 24, at 1675 (discussing backlash concerns associated with antidiscrimination expansions).

reveal limitations of antidiscrimination law, not with strict liability per se.[394] In addition, a common argument against expanding many antidiscrimination protections has long asserted that increasing protections for various groups will cause employers to exclude those groups.[395] But there is simply no justification in law or policy to avoid enforcing Title VII simply because some actors might engage in additional Title VII violations.[396] The theoretical costs of this proposal (i.e., increased denial of mentorship and advancement opportunities for women) must be weighed against the known costs of the harassment loophole (i.e., widespread, unremedied harassment). Given the recognized harms associated with the status quo, the fear that some managers might engage in additional forms of sex discrimination cannot justify continuing to maintain a legal rule that provides employers with safe harbor from harassment liability.

D. *Policing Minor Transgressions and Ongoing Title VII Limitations*

Critics could argue that the current proposal is both overinclusive and underinclusive. As to the former critique, some observers might disfavor expanded liability because of the burden that it would place on employers to answer for even minor employee transgressions.[397] After all, if courts required employers to pay for every instance of workplace harassment,

394. *See* Goldberg, *supra* note 39, at 805 (examining forms of subtle discrimination); Sturm, *supra* note 39, at 468 (outlining antidiscrimination law's role in perpetuating the exclusion of nondominant groups).

395. *See* Hemel & Lund, *supra* note 24, 1674–75 (discounting the argument that the law should not penalize executives for engaging in illegal behavior because they might engage in other illegal behavior).

396. *See id.* (arguing for enforcement of Title VII despite arguments that enforcement might cause employers to exclude women from the workplace); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 85 (2010) (summarizing the argument that increased employer liability for unconscious bias will harm statutorily protected groups).

397. *See* Bisom-Rapp, *supra* note 8, at 69–70 (examining the consequences of expanding harassment training).

then what would prevent disgruntled workers from suing their firms even for trivial claims? But despite this understandable fear of overreach, several doctrinal features of Title VII would mediate against excessive employer exposure.

Even with automatic liability in place, the law of sexual harassment would still require plaintiffs to prove that their mistreatment was both "unwelcome" and "severe or pervasive."[398] Scholars have criticized these standards for narrowly defining the meaning of harassment and for unfairly focusing on victims' behavior with the "unwelcome" analysis.[399] Without endorsing either proof requirement, this proposal simply acknowledges the widely held view that these rules represent high hurdles to overcome for harassment plaintiffs.[400] In many cases, federal judges have famously concluded that plaintiffs did not experience "severe or pervasive" abuse even when they were threatened, groped, or assaulted.[401] Closing the harassment loophole would not lower this considerable threshold for proving harassment. Thus, even with a rule of strict liability, Title VII would still require employers to answer

398. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("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."); Baker, *supra* note 153, at 220–21 (discussing proof requirements for harassment claims).

399. *See* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 2 (2017) (examining the dismissal of harassment claims that were not "sufficiently serious to be considered discrimination"); Estrich, *supra* note 38, at 827–47 (critiquing both the "unwelcome" and "severe or pervasive" requirement); Larson, *supra* note 313, at 131 (asserting that an analysis of "unwelcomeness" encourages courts to scrutinize victim behavior).

400. *See* Estrich, *supra* note 38, at 843 (discussing the challenge of establishing facts that constitute legally cognizable harassment); *see also* Davis, *supra* note 60, at 1063 (analyzing Title VII's "demanding standard" for proving harassment).

401. *See* SPERINO & THOMAS, *supra* note 399, at 3–9 (summarizing harassment decisions that resulted in dismissal); Hébert, *supra* note 6, at 330 (criticizing courts for "seemingly trying to outdo each other in finding truly awful, demeaning conduct to be insufficiently abusive to be actionable").

only for the most severe forms of gender-based mistreatment at work.[402]

In contrast to the charge that the present proposal is overinclusive, some might claim that it does not go far enough in light of other doctrinal impediments. For example, Title VII has a short statute of limitations, limits victim recovery, and does not even apply to small firms that employ fewer than fifteen people.[403] In addition, many employers force victims to resolve their harassment claims in private arbitration or to sign nondisclosure agreements.[404] A rule of strict employer liability would not change these very real shortcomings of employment law.

But without discounting the practical and legal obstacles that victims currently face, there are several reasons why a shift toward strict employer liability could significantly improve the legal landscape for harassment plaintiffs. First, advocacy groups are currently attempting to parlay the awareness created by #MeToo into broader structural and legal reforms.[405] To the extent that this work prompts changes in state or federal antidiscrimination laws, the proposal outlined here can complement these ongoing reform efforts.[406] Second, plaintiffs currently lose their harassment claims at extremely high rates, with employers receiving full or partial summary judgment in the majority of federal harassment cases.[407] Notice-based liability substantially contributes to these losses because

402. Hébert, *supra* note 6, at 330 (describing the high bar for proving sexual harassment).

403. *See* 42 U.S.C. §§ 2000e, 2000e-5; *see also* Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1378 (1993) (discussing various Title VII limitations).

404. *See* Hemel & Lund, *supra* note 24, at 1608–09 (examining the prevalence of arbitration provisions in employment agreements).

405. *See* Murray, *supra* note 4, at 873–74, 874 n.219 (discussing how advocates have engaged the state on issues related to sexual harassment).

406. *See* Farkas et al., *supra* note 54, at 464 (examining the Time's Up movement and legal responses to #MeToo); Mizrahi, *supra* note 41, at 128–42 (proposing state reforms in the wake of #MeToo).

407. *See* Chamallas, *supra* note 56, at 58 (observing that "very few plaintiffs actually prevail" in court); *State Regulation of Sexual Harassment*, *supra* note 54, at 465 (citing data on harassment litigation outcomes).

employers overwhelmingly win when they deploy the harassment loophole.[408] Over 85 percent of individuals who experience harassment never officially tell their employers about the problem.[409] Combined with the safe harbor provided by notice-based liability, this pervasive silence means that the vast majority of victims cannot obtain legal redress.[410] Even if legislators cured Title VII's other deficiencies, the harassment loophole would still allow courts and arbitrators to dismiss harassment claims when victims fail to file internal complaints. Given these practical and legal realities, closing the harassment loophole represents one of the most impactful Title VII reforms that advocates could advance.

CONCLUSION

What is the lasting impact of the #MeToo movement? Although #MeToo has revealed patterns of widespread harassment and enabled victims to come forward, the movement has not yet altered the legal rules that allow sexual harassment to flourish.[411] In light of these circumstances, #MeToo represents an extraordinary opportunity to listen, but also a chance to initiate legal changes that can meaningfully reduce harassment going forward.[412]

Closing the harassment loophole represents a tangible legal solution to the workplace problems that #MeToo has identified. Just as employers must automatically pay for all other Title VII violations, they should pay for sexual harassment. This development would not only harmonize antidiscrimination law, it would advance the pressing goal of combating sexual harassment in American workplaces.

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408. *See* Grover, *supra* note 9, at 824 (summarizing studies on plaintiff success rates in cases that involve the harassment loophole).

409. *See* FELDBLUM & LIPNIC, *supra* note 199, at 16 (summarizing victim reporting rates).

410. *See* Chamallas, *supra* note 21, at 1322 (discussing embedded structures that largely protect employers from harassment liability).

411. *See* Wexler et al., *supra* note 5, at 52 (examining the antidiscrimination goals of remediation and punishment that advocates can advance in the wake of #MeToo).

412. *See* Green, *supra* note 6, at 167–68 (outlining the need for more effective legal solutions to the problem of harassment).