

## **#MeToo Backlash or Simply Common Sense?: It's Complicated**

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# I. INTRODUCTION: RECONCILING EQUALITY AND THE “BILLY GRAHAM RULE”

At a recent district conference of federal court judges and attorneys who practice in the federal courts, I gave a presentation about employment discrimination law and the #MeToo movement.<sup>1</sup> The group wrestled with a number of fact scenarios. Not surprisingly, the audience was well-informed about the law of sexual harassment, but there was one red flag. Among the hypotheticals was the situation of a male law firm partner who, when traveling to take depositions, regularly goes out to dinner the night before the depositions with male associates to discuss strategy for the upcoming deposition but refuses to go out to dinner with female associates because of his fear of sexual harassment accusations.<sup>2</sup>

This seemed to be a clear-cut case to most of the women in the audience. Basically, the women argued, you can't treat male and female associates differently. To do so is to deprive the female associates of the same mentoring, training, and sponsorship opportunities as the male associates. Of course, the same analysis would apply to a female partner and a male associate. But differential treatment of female associates is especially problematic because the number of male partners and potential mentors and sponsors far exceeds the number of female partners.<sup>3</sup> Even if female partners were proportionate to the percentage of women in the associate ranks, it would be odd and likely illegal to segregate the firm with female associates working exclusively with female partners.<sup>4</sup> And, given that even female equity partners have not achieved equality in law firms

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<sup>1</sup> See Ann C. McGinley, *The Masculinity Motivation*, 71 STANFORD L. REV. ONLINE 99, 99 n.4 (2018) for a short description of the origins of the #MeToo Movement.

<sup>2</sup> The hypothetical, which I have titled, “The Cautious Boss,” states:  
Henry, a lawyer, takes his female associate, Sara, to the East Coast to take depositions. Henry won't have dinner with Sara because he's afraid that she'll accuse him of sexual harassment. When Henry travels with male associates, he has dinner with them so they can prepare for the depositions. Is it a good practice of Henry's to exclude Sara? Why? Why not? Is it discriminatory?

<sup>3</sup> ABA Commission on Women in the Legal Profession, *A Current Glance at Women in the Law* 2 (April 2019) (showing that while female lawyers represent 45.9% of associates in U.S. private law firms, they represent only 22.7% of the partners and 19% of equity partners).

<sup>4</sup> Title VII of the 1964 Civil Rights Act states in part:  
It shall be an unlawful employment practice for an employer-  
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

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and other businesses, such segregation would likely create disparate results for their female subordinates.<sup>5</sup> Moreover, a lack of male sponsors would be problematic for women who are partners, but not equal, in law firms.

Something needs to be done about these problems, but refusing to mentor and sponsor female lawyers isn't the way to go. Nonetheless, many of the men in the district conference audience argued that given the focus on sexual harassment in the media and elsewhere it is dangerous for them to dine with female lawyers. One attendee suggested using a conference room instead of going to dinner. Another advocated conducting the meeting in the lobby. Women in the audience, including state and federal judges and partners at prestigious law firms, disagreed. It would be much "ickier" to meet in a windowless conference room than a public restaurant, and of course, meeting in a hotel lobby isn't ideal for anyone who is trying to discuss confidential matters. It would be surprising if the male partners met exclusively in these locations with male associates.

What is commonly known as the "Billy Graham rule"—a vow never to be alone with a woman who is not your wife—was made famous by Vice President Pence, who apparently had adopted this practice even before the #MeToo movement went viral.<sup>6</sup> The rule has earned a loyal following since the #MeToo movement.<sup>7</sup> In response to #MeToo and, particularly, the Brett Kavanaugh hearings, numerous articles, authored by men and women, urge men to adopt the rule as a way to protect themselves.<sup>8</sup>

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<sup>5</sup> See ABA Commission, *supra* note 3, at 6 (noting that globally, male equity partners earn 27% more than their female counterparts); see generally LIEBENBERG & SCHARF, *infra* note 71.

<sup>6</sup> See, e.g., W. Brad Johnson & David G. Smith, *Men Shouldn't Refuse to Be Alone with Female Colleagues*, HARV. BUS. REV. (May 5, 2017), <https://hbr.org/2017/05/men-shouldnt-refuse-to-be-alone-with-female-colleagues> (noting that Pence follows the "Billy Graham rule," named after the evangelist who recommended that men not spend time with women alone in order to avoid temptation and false accusations). See also, Debra Malina, *Men's Fear of Mentoring in the #MeToo Era What's at Stake for Academic Medicine?*, 379 NEW ENG. J. MED. 2270, 2270 (2018) (noting that although the #MeToo movement existed for a dozen years, it went viral after women in Hollywood accused Harvey Weinstein of assaulting them).

<sup>7</sup> See, e.g., Malina, *supra* note 6, at 2270.

<sup>8</sup> See Gillian Tan & Katia Porzecanski, *A Wall Street Rule for the #MeToo Era: Avoid Women at All Cost*, BLOOMBERG NEWS (Dec. 3, 2018, 2:00 AM), <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost> (explaining that men on Wall Street are seriously stating that they are avoiding women, especially young and attractive women); Collin Garbarino, *If Men Don't Want to Get Kavanaughed, They Should Follow the Pence Rule*, FEDERALIST (Oct. 3, 2018), <https://thefederalist.com/2018/10/03/men-dont-want-get-kavanaughed-start-following-pence-rule/>; Kemberlee Kaye, *Study: Most Americans Leery of Being Alone with Opposite Sex*, LEGAL INSURRECTION (July 3, 2017, 6:00 PM), <https://legalinsurrection.com/2017/07/study-most-americans-leery-of-being-alone-with-opposite-sex/>; Claire Cain Miller, *It's Not Just Mike Pence. Americans Are Wary of Being Alone with The Opposite Sex*, N. Y. TIMES,

Simultaneously, there are many articles condemning men for adopting this posture.<sup>9</sup> Interestingly, there seems to be almost nothing written about the dangers to female partners and their male subordinates. In essence, the entire concern seems to be based in stereotypes—the types of stereotypes that the Supreme Court has concluded cannot legally support workplace decisions:<sup>10</sup> women (especially younger ones) are dangerous temptresses or liars (or both). A complementary stereotype is that men cannot control their sexual urges when faced with temptation.

There are serious concerns, however, with this advice that go beyond the issue of male mentoring and sponsorship of female subordinates. Although I use the example of law firm partners above, the rule has been recommended to men working in all fields: business, journalism, medicine, education, etc.<sup>11</sup> It is premised on a heterosexual world where gay, lesbian, bisexual, and transgender individuals are either non-existent or so far in the closet that they cannot find their way out. And, because straight white men are still the majority at the top of these professions, it operates to hinder the careers of a more diverse group of people who are just now beginning to make inroads into the predominantly-male and white executive suite.<sup>12</sup> Moreover, it is commonly known that women of color are more vulnerable to sexual harassment because of the stereotype that they are hypersexual.<sup>13</sup> And men who do not conform to expected stereotypes of masculinity suffer at work in the hands of sexual harassers.<sup>14</sup> Additionally, gays, lesbians, bisexuals and non-cisgender individuals also suffer violence and

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July 1, 2017, Factiva, Doc. No. NYTFEED020170702ed72000jh.

<sup>9</sup> See, e.g., Johnson & Smith, *supra* note 6; Seth S. Leopold, *Fears About #MeToo are No Excuse to Deny Mentorship to Women in Orthopaedic Surgery*, 477 CLINICAL ORTHOPAEDICS RELATED RES. 473 (2019).

<sup>10</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 250–52 (1989) (concluding that it is illegal discrimination based on sex to refuse to promote a woman to the partnership because she is “too masculine” and fails to live up to societal norms and stereotypes that femininity is appropriate for women).

<sup>11</sup> See, e.g., Malina, *supra* note 6 (medicine); Johnson & Smith, *supra* note 6 (business; politics); see generally also articles listed *supra* in notes 6, 7, 8, and 9.

<sup>12</sup> See, e.g., Johnson & Smith, *supra* note 6; Malina, *supra* note 6, at 2270–71 (noting that women represent nearly half of all in academic medicine but only 16% of deans, and that in 2017 more women than men enrolled in medical schools in the U.S.).

<sup>13</sup> See, e.g., Carla D. Pratt, *Sisters in Law: Black Women Lawyer’s Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1785 (stating that a primary stereotype about black women is of “the hypersexual promiscuous Jezebel who uses her sexual prowess to seduce unsuspecting men, particularly white men, in a plot to extract some benefit from the man”); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 569–70 (stating that Jezebel is a construct that justifies enslavement and sexual assault of black women by white men).

<sup>14</sup> ANN C. MCGINLEY, *MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* 4–6, 67–68 (2016).

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harassment at work, school, and in public spaces.<sup>15</sup> In schools, and perhaps in workplaces, individuals with disabilities are more frequently the victims of sex-based and gender-based harassment.<sup>16</sup>

Frankly, if this justification can be used to avoid having dinner with women, why not justify the failure to hire and promote women and protected minorities in order to avoid false accusations and lawsuits? Why not refuse to hire individuals with disabilities because they may be more vulnerable to co-worker and customer harassment?

While these concerns are real and potentially could flow from permitting powerful men to treat their female and minority colleagues and subordinates differentially, this Essay focuses on the skittishness that men express about being accused of sexual harassment. Part II explains the prevalence of sexual harassment and the response to this problem, giving both empirical and anecdotal evidence of male professionals' refusals to spend time with female subordinates. Part III discusses the already-present inequalities in the legal profession, particularly in law firms and raises concerns about how lack of mentoring and sponsorship of women by male supervisors could create an even greater disparity. Part IV analyzes the disparate legal, business, and cultural definitions of sexual harassment, and given the disparities in understandings, raises the question of whether the male supervisor's reaction may be a reasonable one. Part V of this Essay concludes with an outline of potential solutions that would make the law more responsive to reality and would accord society (including lawyers) a better understanding of harassment.

## II. PREVALENCE OF SEXUAL HARASSMENT, MEN'S REACTIONS TO FEARS OF FALSE ACCUSATIONS, AND IMPORTANCE OF MENTORS AND SPONSORS

### A. *Prevalence of Sexual Misconduct at Work and Employers' Responsiveness*

Recent studies show that sexual harassment is prevalent at work, and men and women have somewhat different interpretations about its prevalence and seriousness. One study found that a significant percentage of women have been sexually harassed or assaulted by a colleague.<sup>17</sup>

<sup>15</sup> See *Sexual Assault and the LGBTQ Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community> (last visited Mar. 29, 2020); *Alarming CDC Data Show LGBTQ Youth Face High Rates of Violence and Bullying*, HUM. RTS. CAMPAIGN (Aug. 11, 2016), <https://www.hrc.org/press/alarming-cdc-data-show-lgbtq-youth-face-high-rates-of-violence-and-bullying>.

<sup>16</sup> See Ann C. McGinley, *Schools as Training Grounds for Sexual Harassment*, 2019 U. CHI. L. F. 171, 185 (2019).

<sup>17</sup> SYLVIA ANN HEWLETT, *THE SPONSOR EFFECT: HOW TO BE A BETTER LEADER BY INVESTING IN OTHERS* 148 (2019).

Depending on the industry, this study found in 2018 that from 41% of women in media, to 22% of women in law, suffered sexual harassment by a colleague.<sup>18</sup> Another survey of nearly 3,000 men and women in law and business conducted by the ABA and Working Mother Research Institute in February and March of 2018 found that 68% of women and 19% of men had experienced sexual harassment in the workplace.<sup>19</sup> In this study, 30% of women and 22% of men who had been harassed reported the incident to their organizations.<sup>20</sup> Only 27% of the women but 42% of the men who reported sexual harassment believed that their claims had been taken seriously by the organization.<sup>21</sup> Of those who failed to report their claims, 52% of women and 27% of men believed that it would negatively impact their jobs if they reported the claims; 47% of the women and 30% of the men stated that the behavior was tolerated in their organization; and 45% of the women and 24% of the men had no confidence that leadership would address the issue if they reported it.<sup>22</sup> While 61% of women believed that men held disproportionate power in their workplace, only 37% of the men agreed.<sup>23</sup> Moreover, while 54% of the men stated that men and women are allies in their organization in reaching gender equity, only 31% of the women thought the same.<sup>24</sup>

Another study demonstrated that the perception is that the #MeToo movement has led to increased employer response, including updating of sexual harassment policies, providing guidance about appropriate work behavior, providing information about reporting harassment, and stopping or removing problematic employees. Surveyed employees believed that

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<sup>18</sup> *Id.* The other industries came out as follows: Technology and Communications (37%); Business/Consulting (36%); Healthcare and social assistance (35%); Architecture, engineering and aerospace (32%); Scientific research and pharma (27%); Finance, banking, and insurance (26%). The study also found that men were victims of sexual misconduct at work. Men reported sexual harassment by a colleague (13%); men also reported sexual assault (5%). Black men reported a higher rate than men of other races (21% sexual harassment; 7% sexual assault). Of these men, 57% said that they had been harassed or assaulted by another man. *Id.* at 149. See also LIEBENBERG & SCHARF, *infra* note 71, at 8 (finding that 50% of experienced female attorneys surveyed had experienced sexual harassment).

<sup>19</sup> Working Mother Res. Inst. & ABA J., *#MeToo Workplace Study*, [https://www.workingmother.com/sites/workingmother.com/files/attachments/2018/07/meto\\_o\\_snapshot\\_final\\_revised\\_7-18.mb\\_.pdf](https://www.workingmother.com/sites/workingmother.com/files/attachments/2018/07/meto_o_snapshot_final_revised_7-18.mb_.pdf), at 6. See also, Barbara Frankel & Stephanie Francis Ward, *Little Agreement Between the Sexes on Tackling Harassment*, *Working Mother/ABA Journal Survey Finds*, ABA J. (July 24, 2018) [http://www.abajournal.com/news/article/tackling\\_harassment\\_survey\\_women\\_men](http://www.abajournal.com/news/article/tackling_harassment_survey_women_men).

<sup>20</sup> *#MeToo Workplace Study*, *supra* note 19, at 6.

<sup>21</sup> *#MeToo Workplace Study*, *supra* note 19, at 7.

<sup>22</sup> *#MeToo Workplace Study*, *supra* note 19, at 8.

<sup>23</sup> *#MeToo Workplace Study*, *supra* note 19, at 10.

<sup>24</sup> See *#MeToo Workplace Study*, *supra* note 19, at 11.

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these actions are helping to reduce the likelihood of sexual harassment.<sup>25</sup> Nonetheless, the same study showed that 50% of men believed that the consequences of harassment are more damaging to the harassers' careers than to the victims' careers, whereas 64% of women believed that the victims' careers suffer more from harassment than do careers of the perpetrators.<sup>26</sup> Moreover, responses to the ABA study demonstrate that 62% of women and 61% of men agreed that some negative effects have resulted from society's widespread focus on #MeToo sexual harassment issues.<sup>27</sup>

*B. Avoiding False Claims: Men's Changing Sensibilities and Behaviors*

Despite a lack of evidence that false claims of sexual misconduct are prevalent,<sup>28</sup> the studies prove that men, particularly those in leadership positions in the U.S., are increasingly concerned about the possibility of false accusations of sexual harassment by female subordinates. And, there are significant numbers of opinion pieces urging men not to spend any time alone with female subordinates.

A recent study that surveyed more than 10,000 employees, roughly half in the United Kingdom and half in the U.S., found that 60% of male managers in the U.S. and 40% of their cohorts in the United Kingdom were

<sup>25</sup> Jillesa Gebhardt, *How #MeToo Has Impacted Mentorship for Women*, SURVEYMONKEY, <https://www.surveymonkey.com/curiosity/mentor-her-2019/> (last visited June 5, 2019).

<sup>26</sup> *Id.*

<sup>27</sup> *#MeToo Workplace Study*, *supra* note 19, at 24.

<sup>28</sup> See, e.g., Emily Moon, *False Report of Sexual Assault Are Rare. But Why Is There So Little Reliable Data About Them*, PAC. STANDARD (Oct. 7, 2018), <https://psmag.com/news/false-reports-of-sexual-assault-are-rare-but-why-is-there-so-little-reliable-data-about-them> (discussing criminal sexual assault); Jackie Fielding, Note, *Men Fear False Accusations. Women Fear Sexual Misconduct, Assault, and Rape*, 103 MINN. L. REV. DE NOVO (2018) (explaining that of reported rapes and incidents of sexual assault, only two to eight percent are false, but of all sexual assault and rapes (reported and unreported) the number is closer to .002 to .008%). See also Katie Heaney, *Almost No One is Falsely Accused of Rape*, N.Y. MAG.: THE CUT (Oct. 5, 2018), <https://www.thecut.com/article/false-rape-accusations.html> (stating that the actual false accusation rate is approximately 0.5%); Anita Raj, *Worried About Sexual Harassment—or False Allegations? Our Team Asked Americans About Their Experiences and Beliefs*, THE CONVERSATION (May 13, 2019, 6:41 AM), <https://theconversation.com/worried-about-sexual-harassment-or-false-allegations-our-team-asked-americans-about-their-experiences-and-beliefs-116715> (finding that interviewees believed that sexual harassment actually happened in only 12% of the cases reported before the survey). The view that many false accusations of sexual harassment occur is prevalent, but unsupported by the research. See Lisa Lazard, *Here's the Truth About False Accusations of Sexual Violence*, THE CONVERSATION (Nov. 24, 2017, 9:55 AM), <https://theconversation.com/heres-the-truth-about-false-accusations-of-sexual-violence-88049> (concluding that beliefs that false reports are prevalent are incorrect).

uncomfortable engaging in common work activities such as “mentoring, socializing, and one-on-one meetings with women.”<sup>29</sup> This response increased by 14% among male managers in the U.S. from 2017 to 2018, after the #MeToo movement went viral.<sup>30</sup> Senior level male managers are, according to the U.S. study, twelve times more likely to hesitate before having a one-on-one meeting with a female junior colleague than with a male junior colleague, nine times more likely to hesitate before traveling for work with a female junior colleague than with a male junior colleague, and six times more likely to hesitate before having a work dinner with a female junior colleague than with a male junior colleague.<sup>31</sup> Thirty-six percent of male respondents answered that they avoided socializing with or mentoring a female subordinate because they were afraid of how it would look.<sup>32</sup>

Moreover, when asked in 2019 what activities make the responder uncomfortable, 20% of men were uncomfortable working alone with a woman in a private office or conference room, 40% said they were uncomfortable socializing outside of work with a female work colleague, and 26% said they were uncomfortable traveling with a woman for work. This discomfort clearly has risen since before #MeToo—the percentages of men uncomfortable with these activities two years before in 2017 were 15%, 28%, and 20%, respectively.<sup>33</sup> While 56% of the men responded that none of these activities would have made them uncomfortable in 2017, by 2019, this number had dropped by ten points to 46%.<sup>34</sup>

Women also noted a difference in the two years between 2017 and 2019. When asked whether they believed that senior men they work with have become more hesitant to relate to them, women responded that men were less likely to mentor a woman at work (12%), work alone with a woman (20%), socialize outside of work with a female work colleague (30%), and travel with a woman from work (21%).<sup>35</sup>

Another survey of 5,282 registered voters conducted by The New York Times’ Morning Consult found that women ranked behaviors as inappropriate at a higher rate than men did. While 60% of women

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<sup>29</sup> Gebhardt, *supra* note 25.

<sup>30</sup> *See id.*

<sup>31</sup> *Working Relationships in the #MeToo Era: Key Findings*, LEANIN.ORG, <https://leanin.org/sexual-harassment-backlash-survey-results> (last visited June 5, 2019). *See also* John Banzhaf, *#MeToo Movement Triggering a Serious Backlash Hurting Women*, PRLOG (May 18, 2019), <https://www.prlog.org/12770491-metoo-movement-triggering-serious-backlash-hurting-women.html>.

<sup>32</sup> *Working Relationships in the #MeToo Era*, *supra* note 31.

<sup>33</sup> Gebhardt, *supra* note 25.

<sup>34</sup> *Id.*

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



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answered that it was inappropriate to have a drink alone with a man who was not one's spouse, 48% of men said it was inappropriate.<sup>36</sup> Women and men respectively rated dining alone with a person of the opposite sex inappropriate at a rate of 53% versus 45% (dinner) and 44% versus 36% (lunch).<sup>37</sup> Even driving alone in a car with a member of the opposite sex and having a work meeting alone with a member of the opposite sex were rated inappropriate by a significant percentage, but not a majority, of men and women.<sup>38</sup> The survey, which was conducted in May 2017 before the #MeToo went viral, also found that there was a cultural divide in the answers: Republicans, those living in rural areas or in the South or Midwest, those with less than a college degree, and those who were very religious, particularly Evangelical Christians, were more likely to say that one-on-one interactions were inappropriate.<sup>39</sup>

Although opinion pieces published since #MeToo note the importance to women's careers of finding mentors and sponsors and a few encourage men to mentor and sponsor women properly, a large percentage of opinion pieces published since #MeToo counsel men not to mentor younger women for fear of accusations of sexual harassment.<sup>40</sup> As the next subsection demonstrates, mentoring and sponsorship of female associates and partners by senior men is crucial for women to have equal opportunities to promotion.

### C. Importance of Mentoring and Sponsorship to Women's Careers

Unfortunately, a refusal to spend time alone with a female work colleague adversely affects the ability of women to find mentors and sponsors in the workplace. Significant research demonstrates the importance of mentors and sponsors to the career development of their mentees and protégées. The term "mentor" refers to a person who gives information, advice, feedback and support, but may not have the clout or ability to influence decision-making or open doors for the mentee.<sup>41</sup> The term "sponsor" describes a person who goes beyond mentoring and engages in activities such as directly using "their influence and networks to connect" the protégé to "high profile assignments, people, pay increases,

<sup>36</sup> Kemberlee Kaye, *Study: Most Americans Leery of Being Alone with Opposite Sex*, LEGAL INSURRECTION (July 3, 2017, 6:00 PM), <https://legalinsurrection.com/2017/07/study-most-americans-leery-of-being-alone-with-opposite-sex/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (driving alone is inappropriate said 38% of women and 29% of men; attending work meetings alone is inappropriate stated 25% of women and 22% of men). *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *supra* notes 8, 99; *infra* note 50.

<sup>41</sup> SYLVIA ANN HEWLETT, FORGET A MENTOR, FIND A SPONSOR: THE NEW WAY TO FAST-TRACK YOUR CAREER 11–12 (2013).

and promotions.”<sup>42</sup> While mentors are there for support of the mentee, a sponsor not only supports the protégé but also actively propels that protégé into better positions, salaries, etc.<sup>43</sup> Moreover, a sponsor, unlike a mentor, may have an incentive to sponsor the individual because unlike the mentor, the sponsor also benefits from the relationship.<sup>44</sup>

Author Sylvia Ann Hewlett describes a lawyer’s role as sponsor:

One tax attorney described how he supported his protégé all the way to partnership, having hired her in the first place. He was confident of her ability to deliver and when long-term clients demurred at liaising primarily with a junior person, this attorney vouched for her expertise. When she became the target of unfair criticism by another partner, he intervened, extorting from that partner an apology and a promise to look at the evidence and be less judgmental. In subtle and overt ways, he ensured that she was able to thrive, which indeed she did, making partner in four years.<sup>45</sup>

Research demonstrates the importance of sponsorship, particularly for women and people of color. One study found that although women had 15% more mentors than their male cohorts, the men received more promotions than the women.<sup>46</sup> So, mentoring alone may be insufficient. But women as well as men who have sponsors are more satisfied with their career progression, experiencing a positive sponsorship effect of 19% and 23%, respectively.<sup>47</sup> There is an even greater effect for women who give birth: 85% of those with sponsors vs. only 58% of those without sponsors continue to have a good career trajectory.<sup>48</sup> Professionals of color with sponsors enjoy 85% satisfaction with their career movement, a positive sponsor effect of 65%.<sup>49</sup>

The literature demonstrates that merely failing to harass is not sufficient. In order for women to succeed, men must actively mentor and sponsor them. As Sheryl Sandberg and Marc Pritchard state:

The vast majority of managers and senior leaders are men. They have a huge role to play in supporting women’s advancement at work—or hindering it. If they’re reluctant even to meet one-on-

<sup>42</sup> See *The Key Role of Sponsorship*, SLAC: STAN. U., [https://inclusion.slac.stanford.edu/sites/inclusion.slac.stanford.edu/files/The\\_Key\\_Role\\_of\\_a\\_Sponsorship\\_for\\_Diverse\\_Talent.pdf](https://inclusion.slac.stanford.edu/sites/inclusion.slac.stanford.edu/files/The_Key_Role_of_a_Sponsorship_for_Diverse_Talent.pdf) (last visited Feb. 22, 2020); see also HEWLETT, *supra* note 41, at 11–12.

<sup>43</sup> HEWLETT, *supra* note 41, at 22.

<sup>44</sup> HEWLETT, *supra* note 41, at 20–21.

<sup>45</sup> HEWLETT, *supra* note 41, at 32–33.

<sup>46</sup> HEWLETT, *supra* note 41, at 23.

<sup>47</sup> *Id.*

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

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

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one with women, there's no way women can get an equal shot at proving themselves. Instead, women will be overlooked and excluded, which is a terrible waste of talent, creativity, and productivity. It's not good for business or for anyone.<sup>50</sup>

In fact, research by Lean In, in conjunction with McKinsey, demonstrates that workers with mentors are more likely to be promoted,<sup>51</sup> women are twenty-four percent less likely to get advice from senior men,<sup>52</sup> and sixty-two percent of women of color report that they have been held back by the lack of a senior mentor.<sup>53</sup> Even when they receive feedback, women's feedback tends to be more critical and directed to their personal style and less about how they can improve their work performance.<sup>54</sup>

In a study of mostly positive reviews of men and women in technology, the author found that the language and criticisms in the reviews of men and women differed considerably.<sup>55</sup> Women received much more negative feedback than men did: 58.9% of the men's reviews contained critical feedback, whereas 87.9% of the reviews received by women contained critical feedback, and the type of criticism differs.<sup>56</sup> The author of the study states, "This kind of negative personality criticism—watch your tone! step back! stop being so judgmental!—shows up *twice in the 83 critical reviews received by men. It shows up in 71 of the 94 critical reviews received by women.*"<sup>57</sup>

The author states:

There's a common perception that women in technology endure

<sup>50</sup> Sheryl Sandberg & Marc Pritchard, *The Number of Men Who Are Uncomfortable Mentoring Women Is Growing*, FORTUNE (May 17, 2019, 7:50 AM), <https://fortune.com/2019/05/17/sheryl-sandberg-lean-in-me-too/>.

<sup>51</sup> See Men, *Commit to Mentor Women: Not Harassing Women Is Not Enough*, LEAN IN, <https://leanin.org/mentor-her> (last visited Mar. 29, 2020).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Kieran Snyder, *The Abrasiveness Trap: High-Achieving Men and Women Are Described Differently in Reviews*, FORTUNE (Aug. 26, 2014, 5:00 AM), <https://fortune.com/2014/08/26/performance-review-gender-bias/>. Remember the damning testimony that the mentor gave to Ann Hopkins in *Price Waterhouse v. Hopkins*, advising her, in order to make her candidacy more palatable to the male partners, to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. 228, 235 (1989). The Supreme Court recognized, even in 1989, that this advice constituted sex stereotyping and was evidence of sex discrimination in the process. *Id.* at 235, 256. Even the progressive federal district court judge deciding *Price Waterhouse* found that there were two reasons why Hopkins was denied partnership. First, she was too abrasive and second, she was discriminated against because of her sex. *Id.* at 234–37. The former, which could very well have resulted from her gender, was considered a legitimate reason not to promote her. *Id.*

<sup>55</sup> Snyder, *supra* note 54.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (emphasis added).

personality feedback that their male peers just don't receive. Words like *bossy*, *abrasive*, *strident*, and *aggressive* are used to describe women's behaviors when they lead; words like *emotional* and *irrational* describe their behaviors when they object. All of these words show up at least twice in the women's review text I reviewed, some much more often. *Abrasive* alone is used 17 times to describe 13 different women. Among these words, only *aggressive* shows up in men's reviews at all. It shows up three times, twice with an exhortation to be more of it.<sup>58</sup>

Given these stereotypes and implicit biases and the judgments that result from them, it is crucial that male sponsors and mentors act affirmatively to promote opportunities for women who work with them. Only through senior men's willingness to work with women and to step up rather than back off from those sponsor/protégé and mentor/mentee relationships will women progress in the same way as their male counterparts do.<sup>59</sup>

### III. INEQUALITIES IN THE LEGAL PROFESSION: EXACERBATED BY LOSS OF SPONSORS AND MENTORS

As in business and technology, in the legal field, barriers to men's mentoring and sponsorship of women would create significant harm. Contrast the paltry percentage of female law partners to the near equal representation of women and men at the associate level.<sup>60</sup> More than thirty years after law school graduation rates of male and female lawyers became substantially equal, male lawyers represent a disproportionately higher

<sup>58</sup> *Id.*

<sup>59</sup> See Julie Story Byerley, *Mentoring in the Era of #MeToo*, 319 JAMA 1199, 1199–1200 (2018) (discussing the importance of mentoring). Good male mentors are advised to do the following: (1) Demonstrate professional behavior inside and outside of work and never compromise it with too much alcohol or flirtation; (2) Behave comfortably, and with integrity as if others are watching; (3) Even if warm and friendly, don't touch, except, perhaps, in large groups when giving a hug to greet a colleague; (4) Avoid making comments that generalize based on gender; (5) Refrain from talking about the appearance of others; (6) Don't text anything that the recipient wouldn't share with their spouse; (7) Speak up to support women when other men either sit quietly or do or say something offensive; (8) Actively sponsor women for leadership roles; (9) Speak up about the importance of diversity to the institution; (10) Respond when you see sexist behavior; (11) Men with power must name sexual harassment and make it clear that this behavior is unacceptable; (12) Invite your mentee to call out any behavior that makes her uncomfortable; and (13) Men should spark the discussion in groups of men about sexist behavior. *Id.* See also Jane M. Grant-Kels, *Can Men Mentor Women in the #MeToo Era?*, 4 INT'L J. WOMEN'S DERMATOLOGY 179 (2018) (stating that it is important that we make good men feel comfortable so that they can mentor women. In many professions men still predominate at the top, and women need their mentorship).

<sup>60</sup> See ABA Commission, *supra* note 3, at 2

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percentage of those in the partnership ranks of law firms, especially among equity partners.<sup>61</sup> The common defense has historically been twofold: first, it's just a matter of time: that the smaller percentage of women partners can be attributed to a "pipeline issue," and as the number of women entering law school increases, women will effectively catch up to men;<sup>62</sup> second, women don't want to be partners in law firms, and they leave firms for personal reasons.<sup>63</sup>

These defenses are inadequate. More than sufficient time has passed to permit women to move up the ranks and equalize the percentages of law firm partners. Women have represented a large percentage of law school graduates since the early 1980's—nearly forty years ago.<sup>64</sup> Had these women been hired and promoted to partnership (and retained) in law firms proportionately to their numbers, there would be a much larger percentage of female partners in law firms today. In fact, the first large group of female partners would be approaching retirement.<sup>65</sup>

<sup>61</sup> In 2017, more women than men were enrolled in law schools in the U.S. *See* ABA Commission, *supra* note 3, at 2, 4 (representing 51.27% versus 48.69%).

<sup>62</sup> *See* Mark D. Killian, *Why Are Women Lawyers Leaving the Profession?* (July 15, 2018), <https://www.floridabar.org/the-florida-bar-news/why-are-women-lawyers-leaving-the-profession/> (noting that people used to argue that there were insufficient women in the pipeline because of the low numbers of women attending law school, but stating that this reason is not valid today, given that women have been graduating from law school in roughly equal numbers as men for the past thirty years).

<sup>63</sup> There is no question that women do leave law firms due to a conflict between family and work obligations, but not all women who leave do so for this reason. In fact, there are significant cultural reasons, including the network of male attorneys that benefit male associates and create headwinds for female lawyers. *See id.* (noting that women leave because of sexual harassment, implicit bias, and "success fatigue" — the concept that women lawyers have to perform better than their male counterparts to succeed). *See also* Anusia Gillespie, *The Horrible Conflict Between Biology and Women Attorneys*, ABA CAREER CENTER BLOG (Nov. 2016), <https://www.americanbar.org/careercenter/blog/the-horrible-conflict-between-biology-and-women-attorneys/> (concluding that female attorneys suffer because if they hope to have children this plan is in direct conflict with the years when they have to work the hardest to become partners, that some who are not planning on having children give preference to a lifestyle that does not require them to work all the time, and that female attorneys suffer from cultural headwinds in law firms and lack of role models); LIEBENBERG & SCHARF, *infra* note 71, at 8 (finding that 50% of experienced female lawyers in large law firms responded that they had experienced unwanted sexual conduct).

<sup>64</sup> *See* Killian, *supra* note 62.

<sup>65</sup> This is equally true about racial and sexual minorities: to date these groups are underrepresented in the most powerful positions in law firms and business, even though they also represent a significant proportion of law school graduates. *See* NAT'L ASS'N FOR LAW PLACEMENT, 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 3, 30 (2019) (lawyers who are of color represented only 7.6% of equity partners in 2019; women of color are the most dramatically underrepresented group of all partners, representing only 3.45% in 2019; LGBT lawyers are only 2.07% of lawyers in all firms, but there has been an increase in the percentage of LGBT summer associates to 6.86%).

Second, the “lack of interest” defense does not take into account the employer’s role in dampening the interest of female lawyers in remaining in law firms.<sup>66</sup> Much of the “lack of interest” comes from structural discrimination,<sup>67</sup> microaggressions,<sup>68</sup> and unequal treatment in a male-dominated world that often demands unquestioning loyalty to the client and the firm and uncompromising dedication to working inhumane hours.<sup>69</sup> Add to these problems sex- or gender-based harassment<sup>70</sup> (combined with racial harassment) and the employer has created or at least tolerated an environment that encourages women to leave *en masse*.

<sup>66</sup> See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation on the Job in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1769–99, 1815–39 (1990).

<sup>67</sup> According to Professor Tristin Green, The term ‘structural discrimination,’ brings . . . critical insights on the operation of discriminatory bias together and identifies a form of discrimination that involves the interplay between individuals and the larger organizational environments in which they work. Discrimination under this view becomes more than a problem of bias in isolation at discrete moments of formal decisionmaking; it becomes a problem of the workplace structures and environments that facilitate bias in the workplace on a day-to-day basis.

See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VANDERBILT L. REV. 849, 857 (2007) (footnotes omitted). These “critical insights” that Professor Green refers to include the prevalence of implicit bias, demographic composition of the workplace and work groups, distribution of power at work, salience of in-groups and out-group boundaries at work, institutional culture, and availability of information. *Id.* at 856–57.

<sup>68</sup> See Claire E. Parsons, *How to Deal with Microaggressions as a Female Attorney*, Ms. JD (Oct. 15, 2018), <https://ms-jd.org/blog/article/how-to-deal-with-microaggressions-as-a-female-attorney> (cataloging microaggressions endured by female lawyers regularly); Andrew Messios, ‘Complacent’ Law Firm Leaders Accused of Not Calling Out ‘Microaggressions’, (Oct. 2, 2018, 10:33 AM), <https://www.law.com/legal-week/2018/10/02/complacent-law-firm-leaders-accused-of-not-calling-out-micro-aggressions/> (explaining that a study of major law firms found that microaggressions caused discomfort for diverse lawyers based on gender, ethnicity and socioeconomic backgrounds).

<sup>69</sup> See Ann C. McGinley, *Masculine Law Firms*, 8 FIU L. REV. 423 (2013); Richard Collier, *Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities, and Work-Life Balance in Large Law Firms*, 13 NEV. L. J. 410, 426–35 (2013) (explaining that in large law firms, a new entrepreneurial masculinity has arisen that has caused hyper-competitiveness and an increasing gendered polarization, a “regressive retrenchment and masculinization of the law” that occurs simultaneously as a societal rise of concepts of gender equality and the importance of fatherhood; while law firms engage in the discourse of equality and the importance of fatherhood, they place pressure on male lawyers not to work flexible schedules while relegating many female lawyers to part-time). See also Joan C. Williams, et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393, 410, n.125 (2007); Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L. J. 573, 574 (2007).

<sup>70</sup> I use the term “sex- or gender-based harassment” to include all harassment that occurs because of sex whether it be sexual, gendered, or neutral in nature.

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And, it is not only female *associates* who are “walking out the door.” A groundbreaking November 2019 report by the ABA and ALM Intelligence, *Walking Out the Door: The Facts, Figures, and Future of Women Lawyers in Private Practice*<sup>71</sup> (*Walking Out the Door* or Report) focuses on why women who have attained partnership leave law firms in unequal numbers to men. The authors reported the results of surveys of experienced male and female lawyers and managing partners in top law firms across the country. The report found that there is a wide gap among men’s and women’s beliefs about their firms’ dedication to diversity. Although 91% of male lawyers responded that firm leaders were “active advocates of gender diversity,” only 62% of female lawyers agreed.<sup>72</sup> While 84% of male lawyers responded that their firms had succeeded in promoting women into leadership positions, only 55% of female lawyers agreed.<sup>73</sup> While 79% of the male respondents believed that their firms had succeeded in promoting women into equity partnership positions, only 48% of female lawyers surveyed agreed.<sup>74</sup> And although 74% of the male lawyers surveyed thought that the firm had successfully retained experienced female lawyers, only 47% of the female lawyers agreed.<sup>75</sup> Although there was not a wide distance between male and female lawyers in their satisfaction of the work they did as lawyers, there was a wide gap between male and female lawyers in what the authors termed the “access to success” factors,<sup>76</sup> defined as “factors that speak to how women generally are perceived and what opportunities they are given to climb up the ladder within their firm.”<sup>77</sup>

The survey found examples of negative experiences of female lawyers. These negative experiences that occurred *simply because they are women* include:

- Being mistaken for a lower level employee (experienced by 0% of male vs. 82% of female lawyers)
- Experiencing demeaning comments, stories, jokes (experienced by 8% of male vs. 75% of female lawyers)
- Having a lack of access to business development opportunities (experienced by 10% of male vs. 67% of female lawyers)

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<sup>71</sup> ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURES OF WOMEN LAWYERS IN PRIVATE PRACTICE, AM. BAR. ASS’N (2019), <https://www.alm.com/intelligence/wp-content/uploads/2019/11/WALKING-OUT-THE-DOOR-FINAL-AS-OF-NOV-14-2019-pm.pdf>.

<sup>72</sup> *Id.* at 14.

<sup>73</sup> *Id.* at 15.

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 4.

<sup>77</sup> LIEBENBERG & SCHARF, *supra* note 71, at 4.

- Being perceived as less committed to their career (experienced by 2% of male vs. 63% of female lawyers)
- Being denied or overlooked for advancement or promotion (experienced by 7% of male vs. 53% of female lawyers)
- Being denied a salary increase or bonus (experienced by 4% of male vs. 54% of female lawyers)
- Being treated as a token representative for diversity (experienced by 1% of male vs. 53% of female lawyers)
- *Having a lack of access to sponsors (experienced by 3% of male vs. 46% of female lawyers)*
- Missing out on a desirable assignment (experienced by 11% of male vs. 48% of female lawyers)
- Having a client ask for a different lawyer (experienced by 7% of male vs. 28% of female lawyers)
- Having a colleague or supervisor ask someone else to handle a matter (experienced by 6% of male vs. 21% of female lawyers)<sup>78</sup>

When it came to sexual harassment, the results of interviews of more than 1,200 lawyers were even more shocking: 50% of women compared to only 6% of men had suffered unwanted sexual conduct at work; 16% of women and 1% of men answered that they had lost work opportunities for rebuffing sexual advances; but 28% of women and only 1% of the men suffering harassment avoided reporting sexual harassment due to fear of retaliation.<sup>79</sup>

The study's authors concluded that a gender gap in achievement in law firms occurs not only at the associate level or when associates are promoted to partnership, but that the gap continues even after women become partners, which contributes to female partners' early exit from law firms.<sup>80</sup> Many firms hire partners laterally, but 70% of those hires are men as well.<sup>81</sup>

The authors concluded that law firms have inadequately dealt with two important barriers for women: (1) unequal access to experiences that are building blocks to success; and (2) implicit bias and gender-based stereotypes.<sup>82</sup> Concluding that women experience gender bias, and "death by a thousand cuts,"<sup>83</sup> the authors state:

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<sup>78</sup> LIEBENBERG & SCHARF, *supra* note 71, at 7–8 (emphasis added).

<sup>79</sup> LIEBENBERG & SCHARF, *supra* note 71, at 8.

<sup>80</sup> LIEBENBERG & SCHARF, *supra* note 71, at 2.

<sup>81</sup> LIEBENBERG & SCHARF, *supra* note 71, at i.

<sup>82</sup> LIEBENBERG & SCHARF, *supra* note 71, at 8.

<sup>83</sup> LIEBENBERG & SCHARF, *supra* note 71, at 9.



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It is undeniable and unfortunate that experienced women lawyers are simply not moving up the ladder to senior levels at the same rate as men. Moreover, experienced women lawyers are leaving their firms at a greater rate than men for reasons that firms are able to address, even if they have not yet done so. What is holding senior women lawyers back is not a lack of drive or commitment, a failure to promote themselves, or an unwillingness to work hard or to make substantial sacrifices. Simply put, women lawyers don't need to "lean in" any more than they have already done. What needs fixing is the structure and culture of law firms, so firms can better address the needs of the many women they recruit and seek to retain.<sup>84</sup>

The *Walking Out the Door* report found that 46% of experienced female lawyers (as opposed to only 3% of experienced male lawyers) were unable to find sponsors to ease their way in the law firm's hierarchy.<sup>85</sup> While this finding is not explicitly linked to the #MeToo movement or to a decision by potential sponsors not to spend time alone with female lawyers, it is logical that such a decision would make it even more difficult for female attorneys to find mentors and sponsors. Even before #MeToo, women in business reported experiencing more barriers than men to finding mentors and sponsors.<sup>86</sup> In a study conducted in 1991, women said they had greater barriers to mentoring than men did; the researchers attributed those barriers (perceived and real) to the fact that women had to cross the gender barrier to acquire mentors because of the differential positions that women and men held in employment,<sup>87</sup> and they hypothesized that women had less access to formal and informal ways of finding male mentors such as participation in sports and memberships in clubs that catered to men.<sup>88</sup> Although this study found that women appeared to find mentors at an equal rate to men, their perceptions of the difficulty of doing so endured even after the study controlled for experience as a protégé, age, rank, and tenure.<sup>89</sup>

Women who have experienced mentoring and sponsorship by men in their fields have seen their careers advance with help of savvy men who not only respect the women's work but also work to give women equal opportunities for advancement; moreover, these men speak up when other men either sit silently or engage in behaviors that are harmful to the

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<sup>84</sup> LIEBENBERG & SCHARF, *supra* note 71, at 17.

<sup>85</sup> LIEBENBERG & SCHARF, *supra* note 71, at 8.

<sup>86</sup> Belle R. Ragins & John L. Cotton, *Easier Said Than Done: Gender Differences in Perceived Barriers to Gaining a Mentor*, 34 ACAD. MGMT. J. 939, 948 (1991).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 940.

<sup>89</sup> *Id.* at 948.

women's careers.<sup>90</sup>

This research demonstrates that women are not doing as well as they should be, at least in private law practice. The *Walking Out the Door* report makes many suggestions for change that require cultural changes to law firms, opening up opportunities for female partners that give them access to success, placing women on key committees, and making decisions concerning pay more visible and open.<sup>91</sup> Given the state of inequality in the legal profession, it is imperative that men step up to mentor and sponsor women, not move in the opposite direction. We cannot let the fears of the #MeToo movement and false claims override the important findings of the report or lead to an intrenchment that would deprive female attorneys of rights. Instead, men must respond not only by being "not sexist" or "not harassers." They should be "Anti-Sexist."<sup>92</sup> In other words, men need to act affirmatively to correct the wrongs that female attorneys suffer by following the recommendations of the Report and also personally by acting as sponsors and mentors of female attorneys in their midst.

But what about the men's concerns that they will be falsely accused of sexual harassment to the detriment of their reputations? Are these concerns simply a backlash, a power play, or are the men's concerns legitimate? That men have the opportunity to avoid working with female lawyers without harming their own career trajectories demonstrates that men, not their female counterparts, have significantly more power than the women have. But, nonetheless, it appears that these men do not feel powerful. Because of popular perceptions, many are concerned that they will be falsely accused.<sup>93</sup> The evidence of false accusations is sparse, and the rate of false accusations versus the sexual misconduct women bear make the latter by far the greater evil.

Men who fear false reports may be reacting to a confusion concerning what is sexual harassment. The next section discusses the disconnect among the various definitions of sexual harassment, a disconnect that may be partially responsible for the fear the male attorneys at my talk expressed.

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<sup>90</sup> Julie Story Byerley, *Mentoring in the Era of #MeToo*, 319 JAMA 1199, 1199 (Mar. 27, 2018).

<sup>91</sup> LIEBENBERG & SCHARF, *supra* note 71, at 17–20.

<sup>92</sup> This concept of being "anti-sexist" was inspired in part by a book written by Ibram X. Kendi that advocated not merely being "not racist" but affirmatively being "anti-racist." See generally IBRAM X. KENDI, *HOW TO BE AN ANTI-RACIST* (2019). It was also inspired by Sheryl Sandberg's view that merely failing to harass is not sufficient. See Sandberg & Pritchard, *supra* note 50. We need to sponsor and mentor in order to foster and grow women's careers.

<sup>93</sup> See *supra* notes 6, 7, 8, and 9.

#### IV. DISCONNECT: THE LAW AND SOCIAL SCIENCE, EMPLOYER SELF-REGULATION, AND CULTURAL MESSAGES

Sexual harassment is a cultural and legal phenomenon, whose definition depends on the interrelationship of law, social science, business self-regulation, and cultural understandings. This interrelationship makes the subject a complicated topic because there is no single, accepted definition of sexual harassment.

Social science studies define sexual harassment much differently than the law does.<sup>94</sup> In fact, social scientists define harassment based on behavior, rather than the intent or motive, whereas the law looks to behaviors, their effects, and the intent or motive of the actor.<sup>95</sup> This different definition may be misleading to legal scholars, activists, and judges in determining the prevalence and types of behaviors that the law would (or would not) deem to be sexual harassment.

Moreover, many businesses have an interest in avoiding liability for sexual harassment and have created policies and training that define sexual harassment in ways that fall short of what the law would recognize as illegal sex- or gender-based harassment.<sup>96</sup> In essence, businesses seek to avoid liability. The Supreme Court in *Ellerth* and *Faragher* have created incentives to avoid liability by encouraging businesses to establish policies, training programs, and investigation procedures, which, often shield employers from liability.<sup>97</sup> Because most employees are hired at-will, businesses have freedom to prohibit many behaviors that would not constitute illegal harassment under the federal law's severe or pervasive standard.<sup>98</sup> This means that there is a gap between what businesses are

<sup>94</sup> For a discussion of how social science and law define the same terms differently, see McGinley, *Schools as Training Grounds*, *supra* note 16, at 175–76 (explaining that the social science definitions are both overinclusive and underinclusive when it comes to legal standards). Cf. Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 793–95 (2002) (arguing that social scientists have identified what sexual harassment is but that the courts often grant summary judgment for defendants in cases where social scientists and the general public would consider to be sexual harassment).

<sup>95</sup> See McGinley, *supra* note 16, at 175–76.

<sup>96</sup> That is, employer policies tend to restrict employee behavior more than the law would require. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061, 2088–2101 (2002).

<sup>97</sup> See *Burlington Industries, v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (both cases creating affirmative defenses for employers who prove that they worked to prevent harassment (by, for example, creating policies, trainings, and investigations) and whose employees had unreasonably failed to take advantage of the employers' policies, reporting and investigation procedures).

<sup>98</sup> See, e.g., Hannah Katherine Vorwerk, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment*, 48 VANDERBILT L. REV. 1019, 1044–48 (1995).

telling their employees is prohibited sexual harassment at work and what the courts would recognize as sexual harassment in a lawsuit.

Finally, there has been a cultural explosion ever since the #MeToo movement went viral. This explosion includes varying definitions and disagreements about definitions of what constitutes sexual harassment, but according to a recent law review article by Joan Williams and a number of practitioners, a “norm cascade” has occurred.<sup>99</sup> This means that norms around the social acceptability of certain behaviors at work have changed, and consensus has been reached at least about major issues concerning what behaviors are unacceptable in the workplace.<sup>100</sup>

Cultural definitions are still both underinclusive and overinclusive compared to the law. They are underinclusive because cultural definitions of harassment often do not include gender-based but non-sexual behaviors; nor do they include gender-neutral behaviors that occur because of the gender or sex of the victim.<sup>101</sup> The law, however, does recognize these behaviors as illegal if sufficiently severe or pervasive to create a hostile work environment.<sup>102</sup> Cultural definitions are overinclusive because the culture often finds harassment even though the law would say the behavior is not sufficiently severe or pervasive or does not occur because of sex.<sup>103</sup>

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<sup>99</sup> See Joan C. Williams, et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 144–47, 151–54 (2019) (arguing that precedent that is twenty years old and has been used by different circuits to make proving sexual harassment more difficult does not reflect what society thinks should be illegal sexual harassment, and, therefore, in determining what is “reasonable” behavior of both victims and perpetrators, judges should not follow this outdated precedent and should take into account the “norm cascade”—a significant change in attitudes about what behaviors are reasonable—when determining how to decide the cases before them).

<sup>100</sup> See Williams, et al. *supra* note 99, at 151.

<sup>101</sup> See Brian Soucek and Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. L. F. 227, 231–41 (explaining that “sexual harassment” prohibited by Title VII includes behaviors that are not sexual in nature but that are harassing and discriminating and occur because of sex).

<sup>102</sup> See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (holding that gender-based and sexually harassing behaviors are actionable if they are sufficiently severe or pervasive to alter the terms or conditions of employment); Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22 (2018) (reconfirming that Title VII violations do not depend on the behavior as sexual in nature but rather on mistreatment of individuals because of their gender or sex); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683 (1998) (noting that sexual harassment as a violation of Title VII is rooted in sex discrimination, and often caused by sex segregation in employment); *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 78–80 (1998) (concluding that the plaintiff had a cause of action for sex discrimination even though he and his harassers were male and there was no evidence that the harassers were interested in him sexually).

<sup>103</sup> One example of a cultural definition that varies significantly from the legal one occurred as I spoke on a panel at a university. Members of the art department took the position that merely commenting on a person’s clothing (e.g. “I like your tie”) is sexual harassment. I suspect that not all members of the culture would agree, but this example

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Although a comprehensive analysis is beyond the scope of this essay, this section explains briefly the gap among legal, scientific, business, and cultural understandings of what behaviors constitute sexual harassment. Without common understandings and terminology, it will be difficult to move forward to analyze and remedy sexual harassment. Men in business, law, politics, and other industries may be unable to understand what behaviors constitute sexual harassment and evaluate the presumed dangers associated with working with female subordinates. I am giving men the benefit of the doubt here because women are fairly clear about what behavior they find unacceptable at work, even if courts determine that the behaviors are insufficient to create a cause of action. But it is true that there is a serious disconnect among the law, social science literature, popular culture, and employers' understanding of what behaviors constitute sexual harassment, and at least a recognition of these differences may help to further the dialogue.

*A. The Law of Sex- and Gender-Based Harassment*

The law of sex- and gender-based harassment is fairly clear to the lawyers who practice in this area, but it is obscured to the general culture. To review shortly, the U.S. Supreme Court held in 1986 in *Meritor Savings Bank, FSB v. Vinson*<sup>104</sup> that Title VII prohibits a sexually hostile working environment that alters the terms or conditions of an individual's employment. The Court relied heavily on, and approved of, the 1980 EEOC guidelines, which state that there are two types of illegal harassment: quid pro quo and hostile work environment.<sup>105</sup> Quid pro quo sexual harassment occurs when an employer makes job decisions based on an employee's willingness or unwillingness to engage in sexual behaviors.<sup>106</sup> To prevail in a suit for an illegal hostile working environment, the plaintiff must prove that the behavior occurred because of sex, was severe or pervasive, and was unwelcome.<sup>107</sup> In a quid pro quo suit, the employee need not meet the severe or pervasive requirement but must prove that the behavior was unwelcome and occurred because of the individual's sex.

The early cases did not deal with the issue of employer liability but noted that the courts should use agency principles. In 1998, the Supreme

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demonstrates not only how cultural definitions can vary but also how far some of these definitions are from the legal severe or pervasive requirement.

<sup>104</sup> 477 U.S. 57 (1986).

<sup>105</sup> *Id.* at 65.

<sup>106</sup> 29 C.F.R. Sec. 1604.11 (a).

<sup>107</sup> 477 U.S. at 67.

Court decided *Burlington Industries, Inc. v. Ellerth*<sup>108</sup> and *Faragher v. City of Boca Raton*,<sup>109</sup> which defined when an employer is liable for sexual harassment of its employees. An employer is strictly liable for the harassment by a supervisor of a subordinate within the line of command if there is a tangible employment action resulting from the harassment.<sup>110</sup> *Ellerth* and *Faragher* combined defined tangible employment action as a significant change in employment status, such as failure to hire, discharge, failure to promote, a demotion, a reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.<sup>111</sup> If there is no tangible employment action, the employer may prevail by proving the affirmative defense that it “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 or to avoid harm otherwise.”<sup>112</sup> Where the harassers are co-workers, clients, customers and other third parties, the employer is liable for its negligence in failing to prevent and/or remedy harassment.<sup>113</sup> After *Ellerth* and *Faragher*, in *Vance v. Ball State University*,<sup>114</sup> the Court limited the definition of “supervisor” to an employee who has the power to hire and fire the subordinate claiming the harassment. Even a middle manager who has significant control but no ultimate power to hire or fire will not be considered a supervisor.<sup>115</sup> This means that the affirmative defense should not be available in those cases, and the plaintiff must show the employer’s negligence in order to prevail.

At the same time that the Court has cut back on strict liability by redefining what a supervisor is, harassment law has evolved to reflect contemporary reality. For example, when the EEOC originally drafted its 1980 guidelines it focused on sexual behavior that was apparently caused by the supervisor’s romantic or sexual desire.<sup>116</sup> When sexual behavior was directed at an employee, it was presumed that the supervisor was heterosexual and since the behavior ordinarily was directed by a man at a

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<sup>108</sup> 524 U.S. 742 (1998).

<sup>109</sup> 524 U.S. 775 (1998).

<sup>110</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>111</sup> *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 808.

<sup>112</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>113</sup> *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

<sup>114</sup> *Id.* at 431.

<sup>115</sup> *Id.*

<sup>116</sup> “The EEOC Guidelines on Sexual Harassment defined unlawful sexual harassment as unwelcome ‘verbal or physical conduct of a sexual nature’ that unreasonably interferes with an employee’s work or creates an ‘intimidating, hostile, or offensive working environment.’” See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1453 (1984) (quoting 29 C.F.R. § 1604.11(a) (1983)).

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woman, it occurred because of sex. In essence, the concept was that heterosexual male supervisors used their power at work over female subordinates to gain sexual advantage or to create hostile work environments.<sup>117</sup> But soon, sexual harassment law, which is grounded in Title VII's prohibition of sex *discrimination* in employment and not on *sexuality*,<sup>118</sup> expanded to recognize that illegal sexual harassment can also be perpetrated by members of the same sex as the victims and occur for reasons other than sexual interest.<sup>119</sup> If the behavior occurred because of the sex (or gender expression) of the victim, and the other requirements were fulfilled (unwelcomeness and severity or pervasiveness of the behavior in a hostile work environment case), the behavior is illegal.<sup>120</sup> In other words, illegal discriminatory harassment can be sexual, gender-based, or gender- and sex-neutral in content so long as it occurs because of the sex or the gender expression of the alleged victim. And, motivations such as hostility to the victim because of how she expresses her gender or because of a general dislike for men in particular jobs, etc., are sufficient to occur because of sex.<sup>121</sup> In fact, what many term "bullying" often is harassment

<sup>117</sup> See CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979).

<sup>118</sup> Schultz, *supra* note 102, at 1689–92 (arguing that the prevailing desire-dominance theory did not adequately reflect harassment and discrimination based on sex and gender that was not sexual in nature).

<sup>119</sup> *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 78–80 (1998) (concluding that the plaintiff had a cause of action for sex discrimination even though he and his harassers were male and there was no evidence that the harassers were interested in him sexually).

<sup>120</sup> As I use the term, "sex" equals biological sex and "gender expression" refers to how a person expresses gender. I use this term because it seems to best capture the holding of *Price Waterhouse v. Hopkins*, which concluded that it is illegal under Title VII to discriminate against a person who does not live up to the stereotypical gender expectations of a particular sex. 490 U.S. 228, 237 (1989). In *Price Waterhouse*, Anne Hopkins was criticized for being too masculine, and the Court concluded that discriminating against a woman because she is too masculine is illegal under Title VII. *Id.* at 250–52. Clearly, this decision is outdated in that it seems to assume that gender and sex are binary, an assumption that we know is not accurate. See Jessica A. Clarke, *They, Them, Theirs*, 132 HARV. L. REV. 894, 895–910 (2019) (describing the prevalence of nonbinary gender and importance of legally recognizing it). The "stereotyping doctrine," however, is an important doctrine of Title VII law.

<sup>121</sup> See *Price Waterhouse*, 490 U.S. at 250–52. Although the Court endorsed the "stereotyping doctrine," finding it illegal to discriminate against individuals for failure to conform to gender expectations, historically, the courts have interpreted Title VII's prohibition of sex discrimination not to prohibit discrimination based on sexual orientation or gender identity. See, e.g., *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (holding sexual orientation discrimination is not prohibited by Title VII), *cert. denied*, 138 S. Ct. 557 (2017); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that employer legally fired bus driver because of her transgender status/use of female bathrooms). But, recently, a number of cases in the U.S. Courts of Appeals have challenged this conclusion. See, e.g., *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (holding that Title VII prohibition of sex discrimination prohibits

that occurs because of sex or gender expression and is illegal under both Title VII and Title IX.<sup>122</sup> Because of the expansion of the meaning of what we used to call “sexual harassment” and the common confusion about what it entails,<sup>123</sup> I use the term “sex- or gender-based harassment” to cover the broad categories of harassment that are illegal under Title VII.

Even though the definition of illegal “sexual harassment” under federal law has expanded significantly, the federal courts have aggressively granted summary judgment to defendants in sexual harassment cases, often deciding issues of fact that would be more appropriate for a jury to decide.<sup>124</sup> Taking sexual harassment cases away from the jury is particularly at odds with the purposes of Title VII, given Joan Williams’ explanation that a norm cascade has occurred, and the judgments made by the jury normally involve questions of whether a reasonable jury would conclude that certain behavior was severe or pervasive.<sup>125</sup>

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discrimination based on sexual orientation); *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560, 567 (6th Cir. 2018) (holding that Title VII prohibits discrimination based on gender identity). As of the date of this writing, these issues are currently before the U.S. Supreme Court. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (holding that sexual orientation discrimination is sex discrimination under Title VII), *cert granted*, 139 S. Ct. 1599 (2019); *Bostock v. Clayton Cty. Bd. Comm’rs*, 723 F. App’x 964, 965 (11th Cir. 2018) (holding that discrimination based on sexual orientation is not prohibited by the sex discrimination provision of Title VII), *cert granted*, 139 S. Ct. 1599 (2019); *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 572 (holding that discrimination against a transgender employee is sex discrimination under Title VII), *cert granted*, 139 S. Ct. 1599 (2019).

<sup>122</sup> See McGinley, *supra* note 16, at 179–80 (discussing bullying and sex- or gender-based harassment in schools); Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment Because of Sex*, 79 U. COLO. L. REV. 1151, 1178–82 (2008) (discussing bullying and sex-or gender-based harassment in employment).

<sup>123</sup> See Soucek & Schultz, *supra* note 101, at 227–28 (demonstrating the narrow and outdated focus of the media and the culture that defines “sexual harassment” as having “sexual content”).

<sup>124</sup> See generally SUJA THOMAS & SANDRA SPERINO, *UNEQUAL: HOW AMERICAN COURTS UNDERMINE DISCRIMINATION LAW* 18–23 (2017) (explaining that judges grant motions to dismiss and for summary judgment to defendants in a large percentage of employment discrimination cases, including sexual harassment cases); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST. L. REV. 71, 74–75 (1999) (concluding that federal judges frequently grant summary judgments to defendants in hostile work environment cases determining, often improperly, that as a matter of law, the behavior was not sufficiently severe or pervasive to alter the terms or conditions of the plaintiffs’ working conditions); Beiner, *supra* note 94, at 806–9; M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 313–16 (1999) (concluding that lower courts aggressively grant to defendants summary judgment in hostile work environment cases where questions of fact should have been submitted to the jury); Williams, et al., *supra* note 99, at 144–47, 151–54 (arguing that judges should not follow outdated precedent and should take into account the “norm cascade”—a significant change in attitudes about what behaviors are reasonable—when determining how to decide the cases before them).

<sup>125</sup> See Williams et al., *supra* note 99, at 145–47.



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Thus, in some ways, the federal law is self-contradictory: expanding protection at least theoretically but finding frequently that the plaintiffs in front of them have failed to produce enough evidence to go to trial. Moreover, where the affirmative defense is used in a case where the harasser was a supervisor, even though the defendant has the burden of proving the plaintiff's unreasonableness in failing to report the harassment to the employer, courts regularly conclude as a matter of law that the plaintiffs acted unreasonably for failing to report the harassment to the employer.<sup>126</sup> This response is particularly odd given that research demonstrates that many, if not most, of sexual harassment victims do not report the harassment for a number of reasons including fear of retaliation, shame, and low self-esteem.<sup>127</sup> One study found that 75% of women who suffer harassment do not report it because they "fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation."<sup>128</sup>

#### B. Employer Self-Regulation: Messages at Odds with the Law

Beginning in the 1970s, when the first lower court cases held that harassment constituted sex discrimination, human resources professionals advocated the use of anti-harassment policies and trainings, and employers began to impose them on employees.<sup>129</sup> Two Supreme Court cases decided in 1998, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, created an affirmative defense for employers with policies, investigations of allegations, and training of employees that created powerful incentives for employers that did not yet have policies. Even though a large percentage of employers responded to the law's incentives to create policies, there is little or no evidence that policies and trainings actually deter or prevent sexual harassment.<sup>130</sup> In what Lauren Edelman calls "legal endogeneity," anti-harassment policies have become symbols

<sup>126</sup> See L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 721–29 (2007) (cataloguing the many cases and reasons that courts give for concluding that a victim unreasonably failed to report or delayed reporting).

<sup>127</sup> See Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOLOGY TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner> (explaining eight reasons why women do not report sexual harassment and assault); see also Hébert, *supra* note 126, at 730–34 (explaining reasons why women fail to report).

<sup>128</sup> CHAI R. FELDBLUM & VICTORIA A. LIPNIC, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016) [hereinafter EEOC TASK FORCE REPORT], [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf).

<sup>129</sup> Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1212 (2007).

<sup>130</sup> See EEOC TASK FORCE REPORT, *supra* note 128, at 44.

for compliance; many judges confuse the existence of a policy with compliance itself.<sup>131</sup> Thus, policies serve the employer's purpose of decreasing employer liability for sexual harassment of its employees.

Employers are virtually free to place limits on employee behavior. Thus, in order to avoid getting close to the liability line, employers ban behaviors that do not constitute sexual harassment under the law. Their policies require victims to report behaviors that in themselves would not be sufficiently severe to be illegal and have not yet reached the threshold of pervasiveness. In essence, the law and the employers' policies often conflict. This conflict, combined with the culture's response to the #MeToo movement, has led to an ever-increasing gap in cultural understanding of what exactly constitutes sexual harassment and when that behavior becomes illegal.<sup>132</sup>

C. *#MeToo and the Cultural Message: Consensus and Mixed Messages*

The disconnect between legal and business understandings of what constitutes harassment is not the only one. There may be an even greater disconnect between law and culture. I have personally experienced many situations when I am lecturing to a general audience about illegal harassment, and the audience is shocked that many situations and behaviors would not constitute illegal harassment under the case law. Even within our culture, there is some disagreement. An NBC poll in workplaces found that while 71% of women believed that sexual harassment happens in most workplaces, 62% of the men believed that it does.<sup>133</sup> Surprisingly, the disparity in answers was greater among women, depending on their ages. Only 64% of women ages 50 or over believed that sexual harassment exists

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<sup>131</sup> LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 39–41 (2016).

<sup>132</sup> Even before the #MeToo movement, *Clark County School District v. Breeden* illustrated conflicts among the business, cultural, and legal understandings of what behaviors constitute illegal harassment. *See generally* 532 U.S. 268 (2001). In *Breeden*, the plaintiff alleged illegal sexual harassment and retaliation for reporting harassment to her supervisor, both claims of which were dismissed by the district court. *Id.* at 270–71. The Supreme Court heard the retaliation claim and agreed that there were no genuine issues of material fact. *Id.* at 273. Because of this decision, there is a gap in employee protection. Employers' policies instruct employees to report early. But if employees report too early and are retaliated against because of the report, the employees are not protected by the law. If the employees fail to report or delay reporting, however, and the behavior rises to the level of illegal harassment, the affirmative defense of *Ellerth* and *Faragher* is used against the employees. Defendants claim that the employees acted unreasonably in failing to report or in delaying the report of the alleged harassment.

<sup>133</sup> Dante Chinni, *Poll: Views on Sexual Harassment at Work Divide Women by Age*, NBC NEWS (Dec. 3, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/poll-views-sexual-harassment-work-divide-women-age-n826011>.

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in most workplaces, whereas 78% of women ages 18–49 believed that it does.<sup>134</sup>

Although these meaningful differences exist, Professor Joan Williams and her co-authors found that consensus has been reached as to a number of important norms.<sup>135</sup> The research demonstrated that new norms held by our society include: (1) “Sexual harassment is a serious problem”;<sup>136</sup> (2) “Broad [a]greement [e]xists [a]bout [w]hat [b]ehaviors [c]onstitute [s]exual [h]arassment”;<sup>137</sup> (3) “Employers [s]hould [n]ot [t]olerate [s]exual [h]arassment”;<sup>138</sup> and (4) “Sexual [h]arassment [a]ccusers [a]re [c]redible.”<sup>139</sup> Williams’ research demonstrates that there has been a “norm cascade,” a phenomenon in which new norms emerge once society reaches a “tipping point where a critical mass adopts the new norm, after which the norm becomes internalized and no longer [is] a matter of public debate.”<sup>140</sup> This research is extremely important in advocating for fewer grants of summary judgment to employers in these cases; the research considers physical touching and very offensive comments at work. There is a consensus that these behaviors constitute sexual harassment; a consensus that did not exist twenty years ago.<sup>141</sup> Nonetheless, behaviors that fall short of these fairly serious ones may still be considered questionable and there is still room for more research on what some would consider borderline behaviors. Moreover, there may be a lack of consensus as to what creates sexual harassment depending on the type of workplace and the type of work done by the victim.<sup>142</sup>

Even though a norm cascade has occurred as to certain norms, the research demonstrates that men and women disagree about whether harassment is more harmful to male perpetrators or female victims. This lack of consensus, which is very important to the question raised by the Billy Graham rule, demonstrates that there is room for change in the law,

<sup>134</sup> *Id.*

<sup>135</sup> Williams, et al., *supra* note 99, at 149–50.

<sup>136</sup> Williams, et al., *supra* note 99, at 151.

<sup>137</sup> Williams, et al., *supra* note 99, at 152.

<sup>138</sup> Williams, et al., *supra* note 99, at 153.

<sup>139</sup> *Id.*

<sup>140</sup> Williams, et al., *supra* note 99, at 150 (citing Daniel Drezner, *#MeToo and the Trouble with New Norms*, WASH. POST (Feb. 14, 2018), [https://www.washingtonpost.com/news/posteverything/wp/2018/02/14/metoo-and-the-trouble-with-norms/?hpid=hp-posteverything%3Ametoo&utm\\_term=.66026cad68f0](https://www.washingtonpost.com/news/posteverything/wp/2018/02/14/metoo-and-the-trouble-with-norms/?hpid=hp-posteverything%3Ametoo&utm_term=.66026cad68f0)).

<sup>141</sup> Williams, *supra* note 99, at 151–52.

<sup>142</sup> For example, in certain workplaces such as hotels, bars, and casinos, harassment occurs at high rate, and this may happen because of the norms established in those industries that may allow employees to be subject to harassment by other employees and customers. See Ann C. McGinley, *Sex- and Gender-Based Harassment in the Gaming Industry*, 9 UNLV GAMING L.J. 147, 155–60 (2019).

education, and culture. Although it is beyond the scope of this Essay to articulate a comprehensive solution to the problem, the next Part outlines some potential solutions that should go a long way in solving the problem.

#### V. CONCLUSION: OUTLINING POTENTIAL SOLUTIONS

Clearly, there have been serious problems with the law's response to sex- and gender-based harassment in workplaces. The legal response has created a whole industry designed to create policies and engage in training and investigations, but the research raises serious questions about the effectiveness of these policies and trainings. The following solutions, if adopted together, would cure some of the most serious problems in the law's and business's responses to harassment at work. Each one of these suggestions could, in itself, merit a separate law review article, but I offer them as an important beginning to help solve the problems that the 34-year-old Supreme Court law has failed to correct.

- Courts should change their strict interpretation of the sex- and gender-based harassment cases by jettisoning reliance on cases decided before the norm cascade and, in doing so, analyze cases with reference to how reasonable jurors would react today, given the norm cascade.<sup>143</sup>
- Courts should also abolish the affirmative defense established in both *Ellerth* and *Faragher* because it serves as a shield against liability but does not operate to limit or prevent sex- or gender-based harassment.<sup>144</sup>
- Courts should close the gap between retaliation and harassment claims and protect victims who report harassing behavior that occurs before it ripens into a hostile work environment.<sup>145</sup>
- Academics, courts, and businesses should engage in demographic research in different industries that tests different policies, education, and training and their effect in the particular industry in an effort to establish programs that will work to prevent harassment in that industry.<sup>146</sup>
- Men (especially male lawyers and judges) should not avoid working alone with women because doing so would be harmful to women's careers; men should study the law and the "norm

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<sup>143</sup> See *supra* Part IV(C)'s discussion of Williams, et al. and the norm cascade.

<sup>144</sup> See Part IV(A) and (B)'s discussion of the fact that policies alone do not work to prevent harassment. See EEOC TASK FORCE REPORT, *supra* note 128, at 45 (finding that there is inconclusive evidence that training alone and policies actually prevent harassment).

<sup>145</sup> See *supra* note 132 for a discussion of *Breeden*, which caused a gap between retaliation and harassment.

<sup>146</sup> See McGinley, *supra* note 142, at 173–76.

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cascade” to educate themselves about what exactly is offensive behavior at work and make an effort to avoid those behaviors; men should also openly sponsor women at work, not only to avoid being a harasser or a sexist, but to also actually be anti-sexist in order to compensate for the discrimination and structural issues that impede women’s success.<sup>147</sup>

- Workplaces should make structural changes that would not only avoid discrimination but would also break down barriers that harm female employees. Among these barriers are sex-segregated jobs,<sup>148</sup> policies that have the effect of harming women, and masculine environments that create disincentives for women and some men.<sup>149</sup>
- Workplaces should consider using new techniques to avoid, punish, and reconcile harassment. For example, law professors have suggested the use of restorative and transitional justice to assure that victims and perpetrators receive necessary and just treatment and that social structures be reformed to avoid damaging sexual and gender-based harassment, assault, unequal pay, and discrimination in the future.<sup>150</sup>
- Workplaces should consider using informal methods, either in addition to or in replacement of, the existing strict formal policies and reporting procedures as an alternative to permit victims to discuss their concerns and stop harassing behavior before it becomes serious. Many victims avoid reporting harassment or behaviors that are offensive because they do not wish to harm the perpetrators. Instead, they just want the perpetrator to stop. The Ninth Circuit created an ad hoc committee to deal with the issues of illegal harassment of law clerks and other employees. The Report generated by the committee recommended the hiring of a high-level employee to serve as the Director of Workplace Relations. The recommendations permit employees to report harassment informally and the DWR to engage in informal methods to solve the problems of workplace harassment. The use of informal reporting methods would help resolve problems in their infancy, stop harassment early on and thereby avoid injury both to the

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<sup>147</sup> See *supra* Parts II(C) and III.

<sup>148</sup> Sex-segregation is a cause and result of sex discrimination. See Schultz, *supra* note 102, at 1756–61.

<sup>149</sup> See MCGINLEY, *supra* note 14, at 159–71.

<sup>150</sup> See generally Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019).

victim and to the perpetrator.<sup>151</sup>

- Employers should attempt educational programs that work—not those designed to avoid employer liability, but those designed to allow workers to talk to each other about these issues.

## VI. EPILOGUE

I began this article by describing a seminar that I conducted for lawyers and judges and the audience's response to a hypothetical problem about senior male lawyers' refusal to dine with female associates while traveling to take depositions. Three months after the seminar, I participated on a roundtable for state court judges at the American Bar Association convention. That roundtable's purpose was to address the #MeToo movement and judges' concerns about their relationships with their law clerks. The panel included a judge, a practitioner who represents plaintiffs in harassment cases, a former federal law clerk who is very active in a movement to assure that judicial law clerks are treated equally, a lawyer who specializes in judicial ethics, and me. After the panelists gave short presentations, there was ample time for questions from the judges. This conversation was informal, off-the-record, and honest. Everyone listened to one another. Many of the male judges were worried that they might not know when they are doing something offensive, asking about whether certain behaviors are offensive and how they should deal with female (and male) law clerks and other employees in specific situations. The judges spoke out of good faith. The panelists responded with honesty and understanding of the judges' concerns. The discussion was open and respectful. After the program ended, many of the judges approached the panel to rave about the program, to rave about what they had learned, and to express their thanks. These types of honest conversations should happen more frequently. If they do, they should promote true understanding and not fear of the law.

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<sup>151</sup> See *Ninth Circuit Ad Hoc Committee on Workplace Environment Report* (June 18, 2019); <https://www.ca9.uscourts.gov/workplace/committee-report/Ninth-Circuit-Workplace-Environment-Committee-Report.pdf>; *Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace* (Jan. 1, 2019) at 4–7 (detailing responsibilities of the Director of Workplace Relations and the opportunity for informal complaints and remediation).