

# Stein Scholars Symposium



## Law & The #MeToo Movement

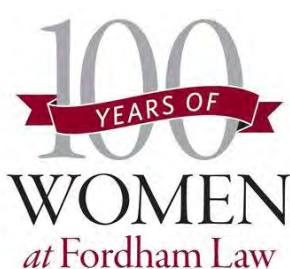
**Friday, April 5, 2019**

**10 a.m.-5 p.m.**

**Costantino Room  
(Second Floor)**

## CLE COURSE MATERIALS

This event is presented in conjunction with 100 Years of Women, Fordham Law Women, National Lawyers Guild, Advocates for Sexual Health and Rights, and American Constitution Society for Law and Policy.



Advocates for  
Sexual Health  
and Rights



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## **Law & The #MeToo Movement Speaker Bios**

### **Michelle Anderson**

Michelle J. Anderson is the 10<sup>th</sup> president of Brooklyn College. She is a leading scholar on the law of rape and sexual assault, an adviser to the American Law Institute's project to reform the Model Penal Code on sexual offenses, and a consultant to its project on campus sexual misconduct.

Anderson is a graduate of the University of California, Santa Cruz and Yale Law School, where she was Notes Editor of the *Yale Law Journal*. Following law school, she clerked on the United States Court of Appeals for the Ninth Circuit for Judge William A. Norris. Her scholarly research on rape and sexual assault has been published in the *Yale Law Journal*, *Boston University Law Review*, *George Washington Law Review*, *Rutgers Law Review*, and *Southern California Law Review*, among others. Prior to becoming President of Brooklyn College, Anderson was the Dean at CUNY School of Law for a decade. She previously served as a Professor of Law at Villanova University School of Law, as well as a Visiting Professor at Yale Law School, the University of Pittsburgh School of Law, and Georgetown University Law Center.

### **Alex Baptiste**

Alex Baptiste is policy counsel for workplace programs at the National Partnership for Women & Families, where she focuses on state and local paid sick days campaigns, sexual harassment and pregnancy discrimination and accommodations.

Prior to her work at the National Partnership, Alex practiced real estate law in the real estate department of Duane Morris LLP in Philadelphia, PA. While there, she also participated in pro bono work, handling asylum, clemency and domestic violence matters. Previously, Alex worked at an immigration non-profit, coordinating their J-1 visa program, assisting applicants and sponsoring companies navigate the application process. Later she worked as an intern in the Obama White House Counsel's Office and the Securities and Exchange Commission while in law school. Alex graduated from Georgetown University with a bachelor's major in English and a minor in political science. She later received her law degree from American University Washington College of Law.

### **Paul Bland**

F. Paul Bland, Jr. is Executive Director of Public Justice, overseeing its advocacy and litigation of consumer, environmental and civil rights cases, and other operations. He has argued and won more than 40 reported decisions from federal and state courts across the nation, including cases in six of the federal Circuit Courts of Appeal and at least one victory in ten different state high courts. He has been counsel in cases which have obtained injunctive and/or cash relief of more than \$1 billion for consumers. He has testified a number of times in both houses of Congress and many state legislatures, has appeared in hundreds of media stories and presented at more than 100 Continuing Legal Education programs throughout the country. He has received a number of honors and awards, including the "Vern Countryman" Award winner in 2006 by the National Consumer Law Center, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers." In the late 1980s, he was Chief Nominations Counsel to the U.S. Senate Judiciary Committee. He graduated from Harvard Law School in 1986, and Georgetown University in 1983.

### **Bennett Capers**

Professor Bennett Capers is the Stanley A. August Professor of Law at Brooklyn Law School, where he teaches Evidence, Criminal Procedure, and Criminal Law. His academic interests include the relationship between race, gender, and criminal justice, and he is a prolific writer on these topics. His articles and essays have been published or are forthcoming in the *California Law Review* (twice), *Columbia Law*

*Review*, *Fordham Law Review*, *Harvard Civil Rights-Civil Liberties Law Review* (twice), *NYU Law Review*, *North Carolina Law Review*, *Notre Dame Law Review*, *Michigan Law Review*, *U.C. Davis Law Review*, *UCLA Law Review*, *Washington University Law Review*, and *William & Mary Law Review*, among others, and he is co-editing the forthcoming book *Critical Race Judgments: Rewritten U.S. Court Opinions on Race and Law* (Cambridge University Press) (with Devon Carbado, Robin Lenhardt, and Angela Onwuachi-Willig). His commentary and op-eds have appeared in the *New York Times* and other journals. He has been a visiting professor at Fordham Law School, University of Texas Law School, and Boston University Law School.

Prior to teaching, he spent nearly ten years as an Assistant U.S. Attorney in the Southern District of New York. His work trying several federal racketeering cases earned him a nomination for the Department of Justice's Director's Award in 2004. He also practiced with the firms of Cleary, Gottlieb, Steen & Hamilton and Willkie Farr & Gallagher. He clerked for the Hon. John S. Martin, Jr. of the Southern District of New York. He is a graduate of Princeton University, where he graduated *cum laude* and was awarded the Class of 1983 Prize, and of Columbia University School of Law, where he was a Harlan Fiske Stone Scholar.

### **Irin Carmon**

Irin Carmon is a senior correspondent at New York magazine, a CNN contributor, and New York Times bestselling co-author of *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* which spent three months on the Times' bestseller list. In 2017-8, Carmon teamed up with the Washington Post and reporter Amy Brittain to break the news of sexual harassment and assault allegations against Charlie Rose, as well as CBS's knowledge of his conduct. That work won a 2018 Mirror Award from the Newhouse School at Syracuse University.

Previously, she was a national reporter at MSNBC and NBC News, reporting on gender, politics, and the law, and a staff writer at Salon and at Jezebel. Her reporting and commentary has appeared across print, radio, television, and digital platforms. She speaks frequently across the country on women's leadership and rights. She graduated from Harvard, magna cum laude with highest honors in literature, in 2005.

### **Sunu Chandy**

Sunu P. Chandy is the Legal Director of the National Women's Law Center. She oversees the Center's litigation efforts, providing strategy across the NWLC to create better outcomes for women and girls at school, the workplace, and the healthcare sector. She helped to create the Center's Legal Network for Gender Equity and build the policies and procedures guiding the TIME'S UP Legal Defense Fund. Until August 2017, Sunu served as the Deputy Director for the Civil Rights Division with the U.S. Department of Health and Human Services, where she led civil rights enforcement including in the areas of language access, auxiliary aids and services for individuals with disabilities and sex discrimination cases under Section 1557 of the Affordable Care Act. Before that, Sunu was the General Counsel of the DC Office of Human Rights (OHR) and in that role oversaw the agency's legal decisions following civil rights investigations of discrimination in employment, education, housing and public accommodation matters.

Previously, Sunu was a federal attorney with the U.S. Employment Opportunity Commission (EEOC) for 15 years and litigated cases including based on sexual harassment and other forms of sex discrimination, as well as race, national origin, disability, age and religion based discrimination cases. Sunu began her legal career as a law firm associate representing unions and individual workers in New York City at Gladstein, Reif and Megginniss, LLP. Sunu earned her B.A. in Peace and Global Studies/Women's Studies from Earlham College in Richmond, Indiana, her law degree from Northeastern University School of Law in Boston and more recently, she completed her MFA in Creative Writing (Poetry) from CUNY/Queens College.

**Sophie Ellman-Golan**

Sophie Ellman-Golan is the Director of Communications and Digital Outreach at Women's March and the co-creator of the Confront White Womanhood workshop. An activist with a background in racial and gender justice, and anti-police violence organizing, she is a member leader of the Campaign for Police Accountability and Anti-Jewish Oppression Working Group, and a Strategic Messaging Consultant at Jews for Racial & Economic Justice (JFREJ). As one of the National Organizers of the Women's March on Washington, Sophie was named one of Glamour Magazine's 2017 Women of the Year. Prior to joining the Women's March team, Sophie worked at Everytown for Gun Safety, the nation's largest gun violence prevention organization. She holds a Bachelor's Degree from Barnard College in Africana Studies and Human Rights.

**Julie Fink**

Julie Fink is the Managing Partner at Kaplan Hecker & Fink LLP. Before joining the firm, Julie worked as in-house counsel at Pfizer Inc. and as an attorney at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Throughout her career, Ms. Fink has successfully represented companies and individuals in a range of litigation matters at both the trial and appellate level across a range of industries, from manufacturing companies to financial institutions. She received the Legal Aid Society's Pro Bono Publico Award and Immigration Equality's Safe Haven Award for Excellence in Pro Bono Representation. She has co-authored numerous articles and amicus briefs on reproductive rights and LGBTQ+ rights issues. Ms. Fink also serves on the board of the Gay Men's Health Crisis and is a member of the Pro Bono Advisory Council for New York Lawyers for the Public Interest.

Ms. Fink clerked for the Honorable Eric N. Vitaliano in the United States District Court for the Eastern District of New York. She received her law degree, magna cum laude, from New York University School of Law, where she was a Florence Allen Scholar and a member of the Order of the Coif. She received her B.A. in Economics from Emory University.

**Rachel Ferrari**

Rachel Ferrari began in the Bronx District Attorney's Office as Chief of the Child Abuse/Sex Crimes Bureau in May 2017. Prior to that, she spent fifteen years at the Manhattan District Attorney's Office investigating and prosecuting a variety of cases, including assault, narcotics, grand larceny, robbery, weapons possession and burglary. While there, she served in the Domestic Violence Unit and the Sex Crimes Unit. In 2007, Rachel joined the Child Abuse Unit where she investigated and prosecuted felony cases of physical and sexual abuse of children. In 2013, she became Deputy Chief of the Child Abuse Unit. Rachel received her undergraduate degree from Northwestern University and her law degree from Fordham Law School.

**Carrie Goldberg**

Carrie Goldberg is a victims' rights attorney and founder of C.A. Goldberg, PLLC. Her Brooklyn-based law firm fights for victims of online harassment, sexual assault, and stalking—online and offline—and fights against those who think they can get away with it, as well as institutions that facilitate harm. Her work has put her up against the NYC Department of Education for punishing young girls of color for reporting their sexual assault, and she recently obtained a near \$1 million settlement from the DOE for the firm's underage client. She is also a vocal advocate for holding tech companies accountable for the rampant abuse that occurs on their platforms; her client's case *Matthew Herrick v. Grindr LLC*, currently in the Second Circuit, strongly challenges Section 230 of the Communications Decency Act, a 1995 law that immunizes tech from liability. Prior to opening her firm in 2014, Carrie was the Associate Director of

Legal Services at The Vera Institute of Justice, Inc. Guardianship Project and was a case manager for Nazi victims and Holocaust survivors with Selfhelp Community Services in Manhattan. She holds a JD from Brooklyn Law School, an MBA from Bucerius International Business Law Program and a BA from Vassar College.

### **Suzanne Goldberg**

Suzanne Goldberg is the Herbert and Doris Wechsler Clinical Professor of Law and the Director of the Center for Gender and Sexuality Law. She also serves as Executive Vice President for University Life at Columbia University. As Columbia University's first executive vice president for university life, she works on sexual assault prevention and response and an array of other issues related to inclusion, belonging and ethical leadership. Goldberg is a frequent commentator and analyst for news media on sexuality and gender law and on discrimination law and litigation issues. Her commentary has been featured on 20/20, CNN, and other national television networks, as well as on radio and news outlets around the world.

Professor Goldberg's scholarship, which focuses on procedural and substantive barriers to equality, has won several national awards. Prior to joining Columbia, Professor Goldberg was a faculty member at Rutgers School of Law-Newark. During the 1990s, she served as a staff attorney with Lambda Legal, the national LGBT/HIV legal advocacy group, where she was co-counsel on two cases that became landmark gay rights victories before the U.S. Supreme Court. She graduated with honors from Brown University and went on to serve as a Fulbright Fellow at the National University of Singapore. She earned her J.D. at Harvard Law School.

### **Nadia Hewka**

Nadia Hewka started at Community Legal Services (CLS) in Philadelphia in 1997 as a Staff Attorney in the Employment Law Project, where she currently works as a Senior Attorney. Ms. Hewka represents low-income workers in a wide variety of matters including wage and hour violations, discrimination claims, and Family Medical Leave Act violations. Ms. Hewka has developed specializations in representation of immigrant workers and particularly undocumented workers, the rights of people with criminal records, and tax issues affecting low wage workers. Prior to joining CLS, she served as a law clerk to the Hon. Albert Snite of the Philadelphia Court of Common Pleas. She received her J.D. from Temple University and her B.A. from the University of Pennsylvania.

### **Kalpana Kotagal**

Kalpana Kotagal is a Partner at Cohen Milstein, a member of the firm's Civil Rights & Employment practice group, and Chair of the firm's Hiring and Diversity Committee. Ms. Kotagal is co-author of the "Inclusion Rider," and sits on the American Constitution Society's task force on sexual harassment in the legal profession. Ms. Kotagal is working on this project in collaboration with Dr. Stacy Smith of the Annenberg Inclusion Initiative and Fanshen Cox DiGiovanni of Pearl Street Film. Ms. Kotagal is also currently serving as an advisor to noted filmmakers on a film addressing issues of gender pay disparities.

Currently, Ms. Kotagal represents female sales employees in a Title VII and Equal Pay Act case against one of the nation's largest jewelry chains in *Jock, et al. v Sterling Jewelers Inc.* Her clients have alleged a pattern of sex discrimination in compensation and promotions. Ms. Kotagal also represents female sales employees in a putative class action against AT&T, alleging violations of the Title VII, the Americans with Disabilities Act and the Family Medical Leave Act, as well as transgender beneficiaries of federal and private health insurance who have challenged the denial of transition-related care as discriminatory.

### **Emily Martin**

Emily Martin is the Vice President for Education & Workplace Justice, at the National Women's Law Center (NWLC). She oversees the advocacy, policy, and education efforts to ensure fair treatment and

equal opportunity for women and girls at work and at school and to forward policy frameworks that allow them to achieve and succeed, with a particular focus on the obstacles that confront women and girls of color and women in low-wage jobs. Prior to joining NWLC, Ms. Martin served as Deputy Director of the Women's Rights Project at the American Civil Liberties Union, where she spearheaded litigation, policy, and public education initiatives to advance the rights of women and girls, with a particular emphasis on the needs of low-income women and women of color. She also served as a law clerk for Senior Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit and Judge T.S. Ellis, III, of the Eastern District of Virginia; as Vice President and President of the Fair Housing Justice Center in New York City; and previously worked for NWLC as a recipient of the Georgetown Women's Law and Public Policy Fellowship. Ms. Martin is a graduate of the University of Virginia and Yale Law School.

### **Christelle Onwu**

Christelle N. Onwu is the Lead Advisor for African Communities and an Equal Employment Opportunity Recruitment Strategist at the New York City Commission on Human Rights. She is a 2017 graduate of the Coro Immigrant Civic Leadership Program (ICLP), and serves as an Adjunct Professor at John Jay College of Criminal Justice, where she teaches a course on Justice in the Africana World in the Africana Department. She is a Board Member at the Historical Memory Project, CUNY John Jay College.

She is a fierce advocate for under-served populations with a focus on African communities in New York City. Prior to the Commission, Christelle served as a Social Worker Supervisor at Sauti Yetu Center for African Women and Families. There she provided bilingual (French and English) counseling and case management to survivors of gender-based violence. She also served as a Policy Analyst at Safe Passage Project, New York Law School. Christelle earned her Bachelor degree at John Jay College of Criminal Justice and a Master of Science in Social Work Policy at Columbia University School of Social Work, where she was published in the *Social Work Review*. She is a proud New Yorker, lives in the Bronx with her family, and hails from Cameroon. She is fluent in French, pidgin, and Eton.

### **Meredith Talusan**

Meredith Talusan is the executive editor of *them.*, Condé Nast's first-ever platform devoted to the queer community. Her memoir, *Fairest*, is forthcoming from Viking Press. An award-winning journalist and author, Meredith has written features, essays, and opinion pieces for many publications including *The Guardian*, *The New York Times*, *The Atlantic*, *VICE Magazine*, *WIRED*, *The Nation*, *Mic*, *BuzzFeed News*, and *The American Prospect*. She is the recipient of the 2017 GLAAD Media Award for Outstanding Digital Journalism, and has contributed to several books, including *Nasty Women: Feminism, Resistance, and Revolution in Trump's America*.

Meredith has written several articles on the #MeToo movement especially in relation to transgender issues, and has contributed to several volumes on intersectional feminism, including *Not That Bad: Dispatches from Rape Culture* and *Nasty Women: Feminism, Resistance, and Revolution in Trump's America* as well as the forthcoming *Burn It Down* and Amber Tamblyn's *Era of Ignition*. Meredith graduated from Cornell University with an MA in Comparative Literature and an MFA in Creative Writing; from California College of the Arts with an MFA in Visual Art; and earned a BA in English and American Literature from Harvard University.

### **Elizabeth Tang**

Elizabeth Tang is an Equal Justice Works Fellow at the National Women's Law Center, where she focuses on combating sexual harassment of girls of color in K-12 schools. Before joining NWLC, she advocated for gender justice at the American Civil Liberties Union, the United States Senate, and Apne Aap Women's Collective, a nonprofit serving sex workers in Mumbai, India. Elizabeth received a JD/MBA from the University of Pennsylvania and a B.A. from Harvard College.

# #MeToo was started for black and brown women and girls. They're still being ignored.

By Tarana Burke  
November 9, 2017

*About US is a new initiative by The Washington Post to cover issues of identity in the United States. Look for the About US newsletter launching this winter.*

My favorite diner is in Montgomery, Ala. When I lived there more than 10 years ago, as often as I could, I ate there. The staff was super friendly; the eating area was clean enough and the food was delicious. The servers were mostly black women; the main cook was a black man. I liked to sit at the counter and order my food and talk to the servers. When I did, I'd often see the same disgusting behavior on the part of the cook toward various waitresses. She would shout out the order to him, and if she was not within his reach, he would say something like, "Bring your tail down here — you know I can't hear you!" And if the waitress complied, at least 50 percent of the time, he would stand directly in front of her, practically close enough to plant a kiss on her lips and say something like, "What you gonna do for it?"

Over time I watched this routine play out in different ways. Arms slinked around waists, rear ends tapped, shoulders rubbed. Sometimes the waitresses pushed back — but only a little. Mostly, they learned to navigate the narrow space behind the counter and figure out ways to save one another from his vile, undesired advances. I was so outraged that I once got into a screaming match with the cook. I told him if he wouldn't respect the waitresses, he would respect me as a customer and not openly sexually harass these women in front of me. In between admonishments to mind my "saddity" New York business, he told me that this was the way he and the women "played around" at work. He was so mad at me confronting him that he had to take a smoke break. While he was outside, the woman who I defended tried to reassure me that it was okay. When I asked her how she could put up with his gross behavior, she said simply, "He's the boss."

These last few weeks have been a whirlwind. Actually, they have been more like a floating sidewalk scene from a Spike Lee movie. From the start of #MeToo going viral and the recognition of my years of work preceding it, I have been happily allowing this wave of attention to shine a much-needed light on the fight to end gender-based violence. I founded the "[me too](#)" movement in 2006 because I wanted to find a way to connect with the



black and brown girls in the program I ran. But if I am being honest with myself, and you, I often wonder if that sister in the diner has even heard of #MeToo, and if she has, does she know it's for #UsToo?

Black women have been screaming about famous predators like R&B singer R. Kelly, who allegedly preys on black girls, for well over a decade to no avail. Anita Hill, thanklessly, put herself and her career as a law professor on the line more than 25 years ago to publicly name Clarence Thomas for sexually harassing her at work.

Actress Jane Fonda acknowledged this fact during [a recent interview](#) about the public reaction to allegations of sexual harassment and assault from multiple women against movie producer Harvey Weinstein. “It feels like something has shifted. It’s too bad that it’s probably because so many of the women that were assaulted by Harvey Weinstein are famous and white and everybody knows them. This has been going on a long time to black women and other women of color and it doesn’t get out quite the same.”

Native American women have the highest rate of sexual assault in the country. According to the [Department of Justice](#), American Indians are 2.5 times more likely to experience sexual assault crimes compared to all other races, and one in three Indian women reports having been raped in her lifetime. Yet they are never named in the national conversation about sexual violence.

Statistics from the Centers for Disease Control and Prevention show that [women of color experience a higher rate of sexual violence](#). In a survey of adult women in 2010, 22 percent of non-Hispanic blacks, 18.8 percent of non-Hispanic whites, 14.6 percent of Hispanics and 35.5 percent of women of multiple races said they had experienced an attempted or a completed rape at some time in their lives. The Bureau of Justice Statistics also reports that [lower income women experience some of the highest rates of sexual violence](#).

Even in high school, students of color report higher rates of sexual violence: 12.5 percent of American Indian/Alaska Natives, 10.5 percent of Native Hawaiian/ Pacific Islander students, 8.6 percent of black students, 8.2 percent of Hispanic students, 7.4 percent of white students and 13.5 percent of multiple-race students reported that they were forced to have sexual intercourse at some time in their lives.

The young girls of color that first encountered the “me too.” movement in community centers and classrooms and church basements were there not only because they needed a safe space, but because they needed their own space. They needed to find spaces where they could focus on their healing without having to be performative or guarded and “me too.” gave them that space.

As I watch the allegations spill forward about one Hollywood honcho to the next — comedian Louis C.K. was [added to the list Thursday](#) — it is painful to hear the stories of what these women have endured at the hands of these predatory men. One of the most powerful things about #MeToo has been its ability to allow people to expand the conversation beyond celebrity. The reality of seeing everyday people — friends, neighbors, co-workers, family — disclosing their various experiences with sexual violence has been jarring for many and enlightening for most. I started this work with the intention of reaching young Black and Brown girls, but fully

believing in its potential to move the world. Some people call it a watershed moment, and there definitely feels like a shift is happening, but it feels incomplete.

What history has shown us time and again is that if marginalized voices — those of people of color, queer people, disabled people, poor people — aren't centered in our movements then they tend to become no more than a footnote. I often say that sexual violence knows no race, class or gender, but the response to it does. “Me too.” is a response to the spectrum of gender-based sexual violence that comes directly from survivors — all survivors. We can't afford a racialized, gendered or classist response. Ending sexual violence will require every voice from every corner of the world and it will require those whose voices are most often heard to find ways to amplify those voices that often go unheard.

The waitress in the diner may never stand up and say #MeToo — and that's fine. But I want her to know that the global ‘me too.’ community we have created has space for her too.

*Tarana Burke is senior director of programs at girls for Gender Equity in Brooklyn. Follow her work at @metooMVMT.*

### More from About US:

[‘I’m not black’: When a child rejects his racial identity, is homeschooling the answer?](#)

[I’m the descendant of a founding father and I have two black daughters — and I am racist](#)

[Wave of warnings to travelers of color harks back to Jim Crow-era ‘Green Book’](#)

[These white Americans say they’re already having frank conversations about racism with African Americans](#)

 **11 Comments**

# The marginalized voices of the #MeToo movement

By [Eugene Scott](#)

When Time magazine recognized the #MeToo movement as its Person of the Year, it solidified just how much of a cultural moment we are in when dealing with sexual harassment and assault allegations against powerful men.

In its article on the movement, [Time said](#):

This reckoning appears to have sprung up overnight. But it has actually been simmering for years, decades, centuries. Women have had it with bosses and co-workers who not only cross boundaries but don't even seem to know that boundaries exist. They've had it with the fear of retaliation, of being blackballed, of being fired from a job they can't afford to lose. They've had it with the code of going along to get along. They've had it with men who use their power to take what they want from women. These silence breakers have started a revolution of refusal, gathering strength by the day, and in the past two months alone, their collective anger has spurred immediate and shocking results: nearly every day, CEOs have been fired, moguls toppled, icons disgraced. In some cases, criminal charges have been brought.

The #MeToo movement gained global attention when actress Alyssa Milano tweeted #MeToo after reading about influential Hollywood producer Harvey Weinstein's history of abuse of women.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."



**Alyssa Milano**

@Alyssa\_Milano

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

52.1K 4:21 PM - Oct 15, 2017

[89.1K people are talking about this](#)



As conversations turn into policy, the next phase of the #MeToo movement appears to be giving a voice to the all of the women suffering in silence — without the platform of the silver screen, millions of social media followers and allies in the halls of Congress.

Eugene Scott writes about identity politics for The Fix. He was previously a breaking news reporter at CNN Politics. Follow [Twitter](#)

## What About #UsToo?: The Invisibility of Race in the #MeToo Movement

Angela Onwuachi-Willig

**ABSTRACT.** Women involved in the most recent wave of the #MeToo movement have rightly received praise for breaking long-held silences about harassment in the workplace. The movement, however, has also rightly received criticism for both initially ignoring the role that a woman of color played in founding the movement ten years earlier and in failing to recognize the unique forms of harassment and the heightened vulnerability to harassment that women of color frequently face in the workplace. This Essay highlights and analyzes critical points at which the contributions and experiences of women of color, particularly black women, were ignored in the moments preceding and following #MeToo's resurgence. Ultimately, this Essay argues that the persistent racial biases reflected in the #MeToo movement illustrate precisely why sexual harassment doctrine must employ a reasonable person standard that accounts for complainants' different intersectional and multidimensional identities.

What history has shown us time and again is that if marginalized voices—those of people of color, queer people, disabled people, poor people—aren't centered in our movements then they tend to become no more than a footnote. I often say that sexual violence knows no race, class or gender, but the response to it does . . . . Ending sexual violence [and harassment] will require every voice from every corner of the world and it will require those whose voices are most often heard to find ways to amplify those voices that often go unheard.

— Tarana Burke<sup>1</sup>

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1. Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored*, WASH. POST (Nov. 9, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too> [<https://perma.cc/22XR-GUEJ>].

## INTRODUCTION

On October 15, 2017, the #MeToo movement exploded onto the popular media stage after actress Alyssa Milano asked Twitter users to “write ‘me too’ as a reply to [her] tweet” if they had “been sexually harassed or assaulted.”<sup>2</sup> Milano’s request brought on an avalanche of stories concerning sexual harassment. Combined, more than twelve million users of Twitter, Facebook, Snapchat, and other social media platforms offered posts and reactions to Milano’s #MeToo challenge.<sup>3</sup>

Along with millions of affirming responses to Milano’s tweet, there were also critiques of her request, namely from women of color who were upset that – yet again – a white woman was receiving credit for an idea originated by a woman of color.<sup>4</sup> In their responses to Milano’s call for “me too” tweets, these women highlighted not only that the phrase “me too” was originally coined by a black woman, Tarana Burke, more than ten years prior, but also that Burke had never received anywhere near the same level of support that white feminists like Milano received from the general public.<sup>5</sup> For example, Alicia Garza, one of the co-founders of Black Lives Matter, tweeted the following message to Burke the very

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2. See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RG8R-LKNN>].
  3. *Id.* (“The hashtag was widely used on Twitter, Facebook, Snapchat and other platforms; on Facebook, it was shared in more than 12 million posts and reactions in the first 24 hours.”).
  4. See *id.* (noting that “when Ms. Milano tweeted out the #metoo hashtag without crediting Ms. [Tarana] Burke, some noted that black women had again been left out of the story”).
  5. See *id.* Although the #MeToo movement began to gain widespread media attention in October 2017 after journalists Jodi Kantor and Megan Twohey broke the story about Harvey Weinstein’s sexual harassment of women in the *New York Times*, Tarana Burke, a black woman who founded Just Be Inc., a nonprofit organization that helps victims of sexual harassment and assault, actually started the #MeToo movement in 2007. See *id.* (describing how and why Burke began the “Me Too” movement); Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <http://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/TD-P8-SFLJ>] (reporting in detail the results of a breakthrough “investigation by *The New York Times*,” which “found previously undisclosed allegations against Mr. Weinstein stretching over nearly three decades” and uncovered “at least eight settlements” that Weinstein made with women at Miramax and the Weinstein Company). This series of events “highlights a common problem: Feminist movements are often whitewashed when they’re brought into mainstream conversations. Women of color are often overlooked and left out of the very conversations they create.” Alanna Vagianos, *The “Me Too” Campaign Was Created By a Black Woman 10 Years Ago*, HUFFINGTON POST (Oct. 17, 2017, 1:44 PM), [http://www.huffingtonpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago\\_us\\_59e61a7fe4b02a215b336fee](http://www.huffingtonpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago_us_59e61a7fe4b02a215b336fee) [<https://perma.cc/NZ7F-T8FS>].

next morning: “Thank you @TaranaBurke for bringing us this gift of #MeToo almost 10 years ago. Still powerful today.”<sup>6</sup> Others like Aura Bogado, a Latina blogger and a writer for *The Nation*, and Bevy Smith, a television personality best known for her work as a cohost on the show *Fashion Queens*, offered more direct critiques of the erasure of Burke from the #MeToo narrative.<sup>7</sup> For instance, Bogado tweeted, “#MeToo was started by Tarana Burke. Stop erasing black women.”<sup>8</sup>

The recent resurgence of the #MeToo movement reflects the longstanding marginalization and exclusion that women of color experience within the larger feminist movement in U.S. society.<sup>9</sup> This marginalization of women of color has occurred within the #MeToo movement despite the fact that a black woman, Mechelle Vinson, was the plaintiff in the very first Supreme Court case to recognize a cause of action under Title VII for a hostile work environment created by sexual harassment;<sup>10</sup> despite the fact that #MeToo began with a woman of color; and despite the fact that women of color are more vulnerable to sexual harassment than white women and are less likely to be believed when they report harassment, assault, and rape.<sup>11</sup>

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6. Vagianos, *supra* note 5.

7. *Id.*

8. *Id.*

9. See generally Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010) (noting that the marginalization of black women in feminist legal theory as well as the common misunderstandings about intersectionality necessitate a black feminist particularism); Preston D. Mitchum, *Screaming To Be Heard: Black Feminism and the Fight for a Voice from the 1950s-1970s*, 4 GEO. J. L. & MOD. CRITICAL RACE PERSP. 151, 154 (2012) (discussing “the sexist attitudes during civil rights demonstrations, such as the 1963 March on Washington, and the racist sentiments of women’s rights organizations in the nineteenth century”).

10. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); DeNeen L. Brown, *She Said Her Boss Raped Her in a Bank Vault. Her Sexual Harassment Case Would Make Legal History*, WASH. POST (Oct. 13, 2017), [http://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history/?utm\\_term=.fe2532cc7d5d](http://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history/?utm_term=.fe2532cc7d5d) [<https://perma.cc/NBQ6-JD4J>].

11. Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST (Feb. 13, 2018), <http://www.catalyst.org/blog/catalyzing/sexual-harassment-and-women-color> [<https://perma.cc/NBQ6-JD4J>] (noting that “the penalties [that women of color’s] assailants suffer are less severe than those of people who sexually assault White women” and citing to “[a] Brandeis University study [that] found disparities in [the] treatment of sexual assault cases that correspond with the race of the victim,” with prosecutors filing “charges in 75% of the cases in which a White woman was attacked, but” only 34% of the cases “when the victim was a Black woman”).



Yet this marginalization within a greater feminist movement should not be surprising given the way privilege and subordination interact with race, sex, and other characteristics. In 1991, Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, created the framework of “intersectionality” to explain how people who share one identity characteristic, such as race, may experience discrimination and subordination differently based on divergent intersecting identity categories, such as being black and female as compared to being black and male or white and female.<sup>12</sup> In other words, Crenshaw revealed how “the intersection of racism and sexism [may] factor[] into [women of color’s] lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.”<sup>13</sup> A few years later, other academics like queer theorist Darren Hutchinson and masculinities scholar Athena Mutua built on Crenshaw’s work to develop the concepts of gendered racism and multidimensionality, both of which recognize how individuals whose identities meet at the intersection of privilege and disadvantage—for example, male and black—may encounter unique forms of discrimination and subordination, depending upon context.<sup>14</sup> For instance, although being male is generally viewed as a privilege in our society, within the context of police brutality and racial profiling, black maleness, for example, is far from a privileged identity.<sup>15</sup> As Hutchinson explained, recognizing the multidimensional nature of discrimination and subordination is critical because solutions to one form of subordination cannot be

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12. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

13. *Id.* Legal scholar Frank Rudy Cooper explains that intersectionality “provides the ‘insight that identities are always formed at the place where categories of identities meet.’” Frank Rudy Cooper, “Who’s The Man?”: Masculinities Studies, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 680 (2009).

14. Darren Lenard Hutchinson, *Identity Crisis: ‘Intersectionality,’ ‘Multidimensionality,’ and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 312 (2001) [hereinafter Hutchinson, *Identity Crisis*]; Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Queer Theory and Political Discourse*, 29 CONN. L. REV. 561, 641 (1997) [hereinafter Hutchinson, *Out Yet Unseen*]; see also Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. L. REV. 1409, 1415 (1998).

15. See Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 344-59 (2013). According to Hutchinson, multidimensionality “more effectively captures the inherent complexity and irreversibly multilayered nature of everyone’s identities” because it, unlike intersectionality, does not focus solely on intersecting subordinations, but rather on intersecting privilege and subordination based on context. Hutchinson, *Out Yet Unseen*, *supra* note 14.

provided “without analyzing how [the subordination] is affected and shaped by other systems of domination.”<sup>16</sup>

In this Essay, I argue that the persistent racial biases reflected in the #MeToo movement illustrate precisely why sexual harassment law must adopt a reasonable person standard that accounts for these different intersectional and multidimensional identities. In other words, they show why courts should employ a standard based on a reasonable person *in the complainant’s intersectional and multidimensional shoes*, rather than the ostensibly objective reasonable person standard—which some courts have declared to be male biased<sup>17</sup>—when evaluating sexual harassment claims.<sup>18</sup> Although many authors have argued for adopting a reasonable woman standard in harassment law, none have taken the further step of contending that the standard must also be rooted in an intersectional and multidimensional lens in order to capture the different ways that women across

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16. Hutchinson, *Identity Crisis*, *supra* note 14, at 308.

17. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (“We therefore prefer to analyze harassment from the victim’s perspective. A complete understanding of the victim’s view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.”); see also *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) (“A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a ‘great figure’ or ‘nice legs.’ The female subordinate, however, may find such comments offensive.”); cf. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (asserting that one characteristically male view depicts what many women would view as sexual harassment as harmless amusement); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207 (1990) (arguing that men frequently consider some forms of sexual harassment as “harmless social interactions to which only overly-sensitive women would object”). Indeed, Professor Ehrenreich has argued that socialization processes for men and women result in broad commonalities of perspective for each group. She explains that “how one perceives a particular social situation or interaction . . . will be a function both of one’s personal psychological makeup and of social factors, such as one’s race, sex, class, etc.” Ehrenreich, *supra*, at 1194.

18. See, e.g., David Schultz, *From Reasonable Man to Unreasonable Victim?: Assessing Harris v. Forklift Systems and Shifting Standards of Proof and Perspective in Title VII Sexual Harassment Law*, 27 SUFFOLK U. L. REV. 717, 717-18 (1993) (noting that some courts have “reasoned that the reasonable person standard is not neutral but male-biased and patriarchal, that it tends to validate the aggressor’s perspective and not the victim’s, and that it fails to appreciate the perspective of women, which clearly differs from men”); see also Kamla Alexander, Note, *A Modest Proposal: The “Reasonable Victim” Standard and Alaska Employers’ Affirmative Defense to Vicarious Liability for Sexual Harassment*, 17 ALASKA L. REV. 297, 298 (2000) (arguing in favor of a reasonable woman standard); Christopher Yeh, *Workplace Stereotypes*, HAW. B.J., May 2002, at 13-14 (discussing the arguments for and against the adoption of a reasonable woman standard in sexual harassment cases); cf. *Harris v. Int’l Paper*, 765 F. Supp. 1509 (D. Me. 1991) (applying an objective “reasonable black person” standard in a racial harassment case).

intersectional categories may experience any particular event or events. This Essay contends that such a lens is a necessary component to achieving equality and inclusion in harassment law.

Currently, antidiscrimination law employs what courts deem an objective victim standard to analyze sexual harassment claims. In so doing, the law ignores the complexities of how gender and racial subordination, stereotype, and bias can shape a victim's vulnerability to harassment, her credibility in the eyes of factfinders, and others' perceptions about whether she is harmed by the undesired conduct.<sup>19</sup> It also disregards how a complainant's own understanding of others' perceptions about her group or groups, whether based on race, sex, or other identity factors like religion and age, can shape her own response to the harassment she is enduring.<sup>20</sup> By adopting a standard based on a reasonable person with the complainant's intersectional and multidimensional identity, courts can acknowledge how the current standard, though allegedly objective, is actually rooted in the experiences of white men, particularly because the case law has largely been developed by white male judges.<sup>21</sup> Indeed, one can see not only male biases in favor of those alleged to be the aggressors in the application of sexual harassment doctrine to the facts of sexual harassment cases, but also biases in the application at the intersection of gender, race, socioeconomic class, gender identity, disability, citizenship status, and other identity categories.<sup>22</sup> For instance, courts have reified class bias, inequities, and stereotyped perceptions of blue-collar workers in sexual harassment law by insisting that the bar for proving sexual harassment is higher in blue-collar work environments because crass and crude language are common in such environments.<sup>23</sup> In so doing, courts

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19. See Angela Onwuachi-Willig, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 303, 309-12 (Kathryn M. Stanchi et al. eds. 2016).

20. See *id.* at 309-12, 315.

21. See SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 20-21 (2017) (arguing that because "federal judges are overwhelmingly white and male, and have elite backgrounds and credentials," employment discrimination law is rooted in their experiences rather in those of the more diverse populace).

22. See, e.g., Rie Ohta, *Can U.S. Immigrant Detainees Have a #MeToo Movement?*, HUM. RTS. WATCH (Feb. 15, 2018, 4:49PM), <http://www.hrw.org/news/2018/02/15/can-us-immigrant-detainees-have-metoo-movement> [<http://perma.cc/KYZ5-QKLE>]; S.E. Smith, *Disability Should Be Integral to the #MeToo Conversation*, REWIRE.NEWS (Nov. 1, 2017, 5:54 PM), <http://rewire.news/article/2017/11/01/disability-integral-metoo-conversation> [<http://perma.cc/7HVW-DDFE>]; Meredith Talusan, *Trans Women and Femmes Are Shouting #MeToo — But Are You Listening?*, THEM (Mar. 2, 2018), <http://www.them.us/story/trans-women-me-too> [<https://perma.cc/K3YX-Q8CQ>].

23. See generally Rebecca K. Lee, *Pink, White, and Blue*, 70 BROOK. L. REV. 677 (2005) (describing and analyzing this effect).

have made women in blue-collar jobs more vulnerable to sexual harassment, pushing them into unequal positions that their white-collar counterparts are not expected to endure.<sup>24</sup>

In arguing for a standard based on a reasonable person with the complainant's intersectional and multidimensional identity, I first briefly highlight the ways in which intersectional and multidimensional race, gender, and sexual orientation biases were invisible before the most recent wave of the #MeToo movement. I then use those examples to illustrate why the objective standard in sexual harassment cases must center on broader intersectional and multidimensional identities of complainants.

### **#METOO AND THE NEED FOR AN INTERSECTIONAL AND MULTIDIMENSIONAL LENS**

Women involved in the most recent wave of the #MeToo movement have rightly received praise for breaking long-held silences about harassment in the workplace, but the movement itself has also rightfully earned criticism from women of color. Specifically, the movement has merited criticism not only for initially ignoring the contributions of women of color to the creation of the movement, but even more, for ignoring the unique forms of harassment and the heightened vulnerability that women of color frequently face in the workplace.<sup>25</sup>

Even before Milano's clarion call, some black women had criticized the disparity in white feminists' responses to harassment when it was perpetrated against white female actresses as opposed to black female actresses. Public mobilization on Twitter in the #MeToo movement exemplifies this problem. Just months before the October 2017 resurgence of the #MeToo movement, black women criticized what they viewed as a double standard: white women responded strongly when white actress Rose McGowan was engaged in a fight with Twitter, but were relatively silent when black actress Leslie Jones and black female journalist and sportscaster Jemele Hill encountered problems with Twitter and ESPN, respectively.<sup>26</sup> Specifically, black women were angered to see

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24. See Lee, *supra* note 23, at 678 (highlighting "court rulings that suggest that harassment law cannot pierce the cultural exterior of the blue-collar workplace, where crude and offensive behavior is allowed to reign").

25. See Garcia, *supra* note 2.

26. See *id.* (noting the widespread support of a Twitter boycott after McGowan's tweet, and relative lack of support for black actresses). Arguably, Twitter users may not have called for a boycott based on the harassment of Jones because Twitter permanently banned Milo Yiannopoulos, Jones's most outspoken harasser, from its site within two days. See *infra* notes 30-32 and accompanying text. Still, as I explain later in this Essay, this reasoning does not explain

white women immediately organize a boycott of Twitter after the social media platform suspended McGowan for tweeting the personal cellphone number of an alleged harasser in violation of the company's privacy policies, when no such boycott was called when Jones was viciously harassed following the release of her all-female remake of *Ghostbusters* or when ESPN suspended Hill after she called President Donald Trump a "white supremacist" for attacking NFL players who were protesting police brutality and racial profiling at the beginning of football games.<sup>27</sup> As one black female Twitter user stated in response to the call for boycotting Twitter until McGowan was able to regain access to her own account, "I'm wary of #WomenBoycottTwitter. Folks looking funny in the light. *Picking when we stand up for the silencing of women. #iStandwithJemele.*"<sup>28</sup> Similarly, Kimberly Bryant, the founder of the nonprofit Black Girls Code, tweeted, "Intersectionality = when you really want to support #WomenBoycottTwitter but you're conflicted bec[ause] Black women never get the same support."<sup>29</sup>

What was even more troubling about the reactions to Jones's and Hill's harassment on Twitter was the failure of many reporters and commentators to see that harassment as related not only to their race, but also to their sex. Instead, reporters mostly attributed the problems that the two black women faced to race, as opposed to both race and sex intersectionally. For instance, although some reporters referred to the harassment that Jones faced on Twitter as both racist and sexist, many simply depicted the harassment as racist.<sup>30</sup> Yet as I explain below, a close analysis of the harassment Jones and Hill endured reveals that the conduct was both racialized and gendered.

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why many failed even to acknowledge how the harassment of Jones constituted intersectional race and sex harassment. See *infra* notes 39-48 and accompanying text.

27. See Garcia, *supra* note 2; see also Michelle Castillo, *Some Women Call for a Boycott of Twitter After Actress Rose McGowan is Partially Suspended*, CNBC (Oct. 12, 2017, 2:39 PM), <http://www.cnbc.com/2017/10/12/some-call-for-twitter-boycott-after-rose-mcgowan-is-partially-suspended.html> [<https://perma.cc/8L72-PVY3>] (describing McGowan's troubles with Twitter); Charlie Warzel, *Twitter Permanently Suspends Conservative Writer Milo Yiannopoulos*, BUZZFEEDNEWS (July 19, 2016, 7:09 PM), <http://www.buzzfeed.com/charliewarzel/twitter-just-permanently-suspended-conservative-writer-milo> [<http://perma.cc/LA6K-SX8Z>] (describing the harassment Jones faced on Twitter).

28. Garcia, *supra* note 2 (emphasis added).

29. *Id.*

30. See, e.g., Abby Ohlheiser, *Just How Offensive Did Milo Yiannopoulos Have to Be to Get Banned From Twitter?*, WASH. POST (July 16, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/07/21/what-it-takes-to-get-banned-from-twitter> [<https://perma.cc/3B4X-2QTK>] (noting that "Twitter permanently banned the conservative writer Milo Yiannopoulos as it cracked down on a wave of racist abuse targeting the 'Ghostbusters' actor Leslie Jones," referring to Yiannopoulos's tweets as "a racist abuse campaign against Jones," and asserting that the "media gave significant coverage to the onslaught of racism Jones was enduring," but

Describing some of the harassment that she endured on Twitter, Jones stated, “I have been called Apes, sent pics of their asses, even got a pic[ture] with semen on my face. I’m tryin[g] to figure out what human means. I’m out.”<sup>31</sup> From Milo Yiannopoulos, a famous and controversial white supremacist alt-right personality, Jones also received insulting comments like “[a]t least the new *Ghostbusters* has a hot black guy in it.”<sup>32</sup> After Jones blocked him from her account, Yiannopoulos continued harassing her, tweeting that he had been “rejected by yet another black dude.”<sup>33</sup> Despite the fact that the harassment Jones endured included clear references to gender and sex, the racialized nature of the harassment seemingly made it difficult for white women to see themselves in Jones, and accordingly, to see her experiences as related to sex. When coupled with the fact that Jones’s harassment did not involve sexual advances – the very type of harassment that Professor Vicki Schultz has long argued serves as the primary basis for courts’ far-too-narrow understanding of sexual harassment<sup>34</sup> – one can more readily see how a failure to examine Jones’s experience

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not referring to any of the harassment as related to sex or sexism) (emphasis added); Aja Romano, *Milo Yiannopoulos’s Twitter Ban, Explained*, VOX (July 20, 2016, 2:00 P.M. EST), <http://www.vox.com/2016/7/20/12226070/milo-yiannopoulos-twitter-ban-explained> [<https://perma.cc/LNQ2-TUQX>] (arguing that, “[t]hough multiple attempts have been made to paint the *Ghostbusters* backlash as a product of what is perceived (largely inaccurately) as a more general trend of fan entitlement, the nature of Jones’s harassment is very clearly and overwhelmingly a product of *extreme racism* that has nothing to do with the *Ghostbusters* franchise”) (emphasis added); see also Jamie Altman, *The Whole Leslie Jones Twitter Feud, Explained*, USA TODAY: COLLEGE (July 25, 2016 5:40 P.M. EST), <http://college.usatoday.com/2016/07/25/the-whole-leslie-jones-twitter-feud-explained> [<https://perma.cc/7MGS-XHW5>] (referring to the tweets Jones received as “racist comments” even while mentioning sexism-related acts by users who “sent the actress pornographic images” and describing how “Jones, along with her fellow cast mates in the new all-female remake of *Ghostbusters*, [had] endured criticism over the last few months”).

31. Kate Conger, *Harassment of Ghostbusters’ Leslie Jones Shows Twitter Needs to Change*, TECHCRUNCH (July 19, 2016), <http://techcrunch.com/2016/07/19/leslie-jones-twitter-harassment> [<https://perma.cc/ZBZ2-UGY8>].
32. Suzanne Zuppello, *Why We Let Famous Women Get Bullied Online*, ROLLING STONE (July 20, 2016), <https://www.rollingstone.com/culture/features/why-we-let-famous-women-get-bullied-online-w429954> [<https://perma.cc/9BPP-PKBF>].
33. Altman, *supra* note 30.
34. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687–89 (1998) (arguing that the sexual desire paradigm in sexual harassment law is underinclusive because it excludes “many of the most prevalent forms of harassment” and that the paradigm is also overinclusive because it may work to “prohibit some forms of sexual expression that do not promote gender hierarchy at work”). Professor Schultz criticized the way that paradigms for evaluating sex harassment focused too narrowly on sexual acts and sexuality, “obscuring a full view of the culture and conditions of the workplace” that can result in the denigration and subordination of women and nonconforming men in the workplace. *Id.* at 1689, 1720–21.

through an intersectional and multidimensional lens led to an equally narrow understanding of her experiences as solely racial harassment by some writers and pundits.

Yet the type of harassment that Jones experienced very much was sexual harassment. In her seminal article, *Reconceptualizing Sexual Harassment*, Schultz explained that hostile environment sexual harassment is based on “a drive to maintain the most highly rewarded forms of work as domains of masculine competence,” and detailed the various forms of gender harassment that fall within this “competence-centered” paradigm for understanding and evaluating sexual harassment claims.<sup>35</sup> In so doing, she first highlighted and explained the “gender-guarding” aspects of sexual harassment. These aspects of harassment are linked to job segregation based on sex and work and “reinforce[] the idea that women are inferior workers who cannot meet the demands of a ‘man’s’ job,” “preserve the image of [certain] jobs as masculine work that no real women can do,” and discourage women from entering masculine spheres of work.<sup>36</sup> Schultz then explained the “competence-undermining” functions of hostile work environment sexual harassment, which have “the purpose or effect of undermining the perceived or actual competence of women (and some men) who threaten the idealized masculinity of those who do the work.”<sup>37</sup> This form of sexual harassment, Schultz asserted, involves not only communicating to women that they have no place holding the job or jobs in question, but also denigrating their very ability to perform the job’s duties and deliberately sabotaging their work and career advancement.<sup>38</sup>

Notwithstanding commenters’ characterization of the abuse Jones suffered as purely racial, Jones endured both gender-guarding and competence-undermining forms of harassment. Indeed, she faced demeaning behavior that was specifically designed to emphasize her differences as a woman, and particularly as a black woman. Using Schultz’s framing, we can see that the harassment Jones faced was designed to signal to her that she was unequal to the men her harassers believed should have been in her movie role, and to undermine her actual performance of her job – here, the promotion of her movie.<sup>39</sup>

To begin, the harassment was gender-guarding in that it was partially related to some movie watchers’ anger that the *Ghostbusters* movie remake starred all female Ghostbusters, instead of all male characters as the original had. Moreover,

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35. *Id.* at 1755.

36. *Id.* at 1692, 1760.

37. *Id.* at 1762.

38. *Id.* at 1762–69.

39. *Id.* at 1691.

the harassment reinforced the view that Jones's movie role belonged to a man when Yiannopoulos proclaimed that the only good thing about the new, female-centered *Ghostbusters* was that it starred a "hot man," purportedly Jones.<sup>40</sup> The insults that Jones received on her Twitter account from Yiannopoulos were intended to undermine her sense of belonging, not only in the *Ghostbusters* movie, but in Hollywood in general.

Additionally, the Twitter harassment that Jones endured was also "competence-undermining" because it questioned her very ability to perform the role she took on in the *Ghostbusters* remake.<sup>41</sup> Indeed, the harassment centered on denigrating Jones for what Yiannopoulos viewed as her failure to conform to a longstanding idealized image of femininity in our society—that of a physically delicate and demure (white) woman—by insinuating that Jones was not a woman at all.<sup>42</sup> Yiannopoulos did so both by referring to Jones as a male and by releasing nude pictures of Jones to highlight ways in which she, as a black woman, did not satisfy the ideal of True Womanhood.<sup>43</sup> In this way, the harassment had the effect of undermining Jones's sense that she was properly performing both the role of a woman playing a Ghostbuster character and the role of a woman in society. This latter notion is a familiar one for black women who have never been viewed as "true" women.<sup>44</sup> Indeed, the perception and identification of Jones as a "man" comports with the research of psychologists Phillip Atiba Goff, Margaret Thomas, and Matthew Christian Jackson. They found in a recent study that their subjects, 292 white undergraduates from Pennsylvania State University, made significantly more errors when categorizing black women by sex than they did for any other race or gender group, and that associations of

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40. *Id.* at 1689, 1759–60 ("More subtly, for women who stay in nontraditional jobs, harassment exaggerates gender differences to remind them that they are 'out of place' in a 'man's world.'"). Actress Alyssa Milano has made a similar point, calling for "companies to create a code of conduct and hire more women." Melissa Chan, 'Now the Work Really Begins,' *Alyssa Milano and Tarana Burke on What's Next for the #MeToo Movement*, TIME (Dec. 6, 2017), <http://time.com/5051822/time-person-year-alyssa-milano-tarana-burke> [https://perma.cc/KD2C-NEJW].

41. Schultz, *supra* note 34, at 1762 (noting that "the central function of such harassment is to preserve the masculine image and male-dominated composition of favored types of work").

42. Cf. Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 2 (1993) (defining the ideal of True Womanhood, which applied only to white woman, and "defined women as by nature physically delicate, intellectually weak and spiritually pure, thus making them naturally designed for a sheltered life outside the public sphere" and that demanded that women be pure, pious, and deferential to men).

43. See *supra* notes 31–33 and accompanying text.

44. See Barnard, *supra* note 42.



black women with “maleness” resulted in black women being rated as less attractive.<sup>45</sup>

Finally, the harassment that Jones faced also fit within more traditional notions of crude, sexualized harassing behavior, as it included images of her with semen on her face.<sup>46</sup> As Andrea Dworkin once explained, this image “is a way of saying (through showing) that [a woman] is contaminated with [a man’s] dirt; that she is dirty.”<sup>47</sup> While the negative conduct that Jones endured did not consist of sexual advances, it constituted sexual harassment because it embodied the everyday forms of gender hostility that women and men who do not conform to white- and male-dominated understandings of masculinity and femininity encounter in society.<sup>48</sup> To be exact, it constituted intersectional race and sex harassment because it relied on both racial and gendered stereotypes of black women and involved racialized sexism against a black woman.

Relatedly, reporters also failed to recognize that the harassment Jemele Hill experienced after tweeting that Trump was a “white supremacist,” including Trump’s personal demands that ESPN fire her, was related not only to her race but also to her sex. Indeed, whereas at least some reporters acknowledged the racism and sexism underlying the harassment Jones faced, few, if any, reporters or pundits labeled Hill’s troubles with ESPN as gender-related.<sup>49</sup> Yet Hill was silenced in a competence-undermining way because she spoke out on an issue, police brutality, which black women have long viewed as a feminist issue, but which white women have rarely viewed as a women’s issue. Commenters likely

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45. Phillip Atiba Goff, Margaret A. Thomas & Matthew Christian Jackson, “Ain’t I a Woman?”: Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 *SEX ROLES* 392, 397-98 (2008).

46. See Conger, *supra* note 31.

47. Andrea Dworkin, *Pornography Happens to Women*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 182-83 (Laura J. Lederer and Richard Delgado, eds. 1995); cf. Meghan Murphy, *Facials, Feminism, and Performance: On F\*\*king Men in a Patriarchy*, *FEMINIST CURRENT* (Aug. 29, 2012), <http://www.feministcurrent.com/2012/08/29/facials-feminism-performance-on-fking-men-in-a-patriarchy> [<https://perma.cc/M54L-P4FP>] (“It’s more than likely that women learned this was hot from porn. And that is troubling. Because I think emulating porn doesn’t help us enjoy our bodies or sex . . .”). But see Barbie Davenport, *Are Facials Demeaning: Feminists Didn’t Really Respond . . . But L.A.’s Experts Did*, *L.A. WKLY.*, (May 24, 2011, 9:02 A.M.), <http://www.laweekly.com/news/are-facials-demeaning-feminists-didnt-really-respondbut-las-experts-did-2529161> [<https://perma.cc/22KX-VD5N>] (arguing that this conduct is demeaning only when it is unwanted).

48. See Schultz, *supra* note 34, at 1710.

49. C.f. P.R. Lockhart, *Jemele Hill, Known for Anti-Trump Tweets, Is Leaving ESPN’s SportsCenter*, *VOX* (Jan. 26, 2018, 5:08pm EST), <https://www.vox.com/2018/1/26/16936812/jemele-hill-espn-sportscenter-departure-trump-tweets> [<https://perma.cc/5XBM-G86J>] (interpreting the harassment of Hill narrowly and failing to see its relationship to sex discrimination).

missed the feminist aspect of Hill's message largely because the "essential" woman in the feminist movement has traditionally been and continues to be a white woman.<sup>50</sup> The fact is that black women's lives are routinely affected by police brutality, as black women are frequent victims of such brutality, which includes sexualized violence by the police.<sup>51</sup> In fact, in many instances, offending police officers have specifically targeted black women, trans women, and other marginalized women, because they are less likely to be believed.<sup>52</sup> Consider, for example, the case of former Oklahoma City police officer Daniel Holtzclaw, who purposefully targeted black women with blemished records and forced them to perform sex acts for him because he knew no one would believe them.<sup>53</sup> Additionally, black and brown women are heavily affected by the loss of sons, daughters, husbands, and partners who disproportionately die at the hands of the police. Consider, for example, the women whom former Secretary of State and former presidential candidate Hillary Clinton called the Mothers of the Movement – mothers like the mothers of Trayvon Martin, Eric Garner, Sandra Bland, all of whom have not only lost their children but sacrificed their lives and time to make sure their children did not lose their lives in vain.<sup>54</sup> Yet reporters overlooked this feminist dimension to Hill's message.

Commenters also neglected that the harassment Hill faced in response was gender-based as well as racial. For one thing, the racial stereotype of the "angry black woman"<sup>55</sup> was utilized against Hill throughout the controversial episode with Trump as a means of portraying her as not professional enough to serve as

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50. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586–90 (1990) (asserting that feminist legal theorists generally conceive of the essential woman as a white, heterosexual, middle-class woman, and highlighting how this assumption obscures the diverse array of experiences of women who are not white, who are gay, and who are poor or working class); see also #SayHerName, AF. AM. POL'Y F., <http://www.aapf.org/sayhername> [https://perma.cc/Q53Z-CVZU].

51. Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. POST (Jan. 12, 2018), [https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842\\_story.html](https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html) [https://perma.cc/D8JN-QSLL] (referring to a "2000 survey of nearly 1,000 New York City youth that found that 2 in 5 young women – almost half of whom were black, Latina or Asian – reported sexual harassment by officers") (emphasis added).

52. *Id.*

53. *Id.*

54. Michael Sebastian, *Who Are the 'Mothers of the Movement' Speaking at the Democratic National Convention?*, ELLE (July 26, 2016), <https://www.elle.com/culture/career-politics/news/a38111/who-are-mothers-of-the-movement-dnc/> [https://perma.cc/M6AC-4PR4].

55. See generally Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Sociates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53 (1999) (analyzing stereotypes about black women, including that of the angry black woman).

an ESPN sportscaster. This negative portrayal of Hill occurred even though other public figures had been and were currently engaged in similar critiques of the President.<sup>56</sup>

What's more, reporters failed to recognize the ways in which the harassment Hill faced on Twitter was rooted in gender-guarding conduct, as the attacks focused on Hill's status as a woman and as a black woman in a white and male-dominated field. Specifically, the attacks were linked to the view that women, especially women of color, should keep quiet and should not openly challenge male authority.<sup>57</sup> Indeed, while speaking about persistent notions that women journalists are out of place at ESPN, Hill described how women, particularly women in sports, are targeted with both sexist and racist comments like "Get back in the kitchen" and "Go back to Africa."<sup>58</sup>

Finally, many reporters failed to acknowledge that Trump may have attacked Hill with such force because of her identity as a black woman. Although Trump routinely attacks people who have insulted him, he reserves many of his most demeaning attacks for black women.<sup>59</sup> Conversely, Trump has remained silent in instances where white men, such as the rapper Eminem, have challenged him even more harshly than Hill did.<sup>60</sup>

In all, the failure to recognize the harassment of Jones and Hill as gendered reveals how the unique form of racialized sexism that women of color face routinely gets marked as outside of the female experience. These examples demon-

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56. See Ameer Hasan Loggins, *ESPN's Jemele Hill Is Being Reduced to an "Angry Black Woman,"* GUARDIAN (Oct. 12, 2017, 11:02 AM EST), <https://www.theguardian.com/commentisfree/2017/oct/12/espn-jemele-hill-angry-black-woman-suspension-nfl> [<https://perma.cc/2J4B-FJAU>].

57. See Andrea González-Ramírez, *No, ESPN Shouldn't Fire Jemele Hill over Her Tweets*, REFINERY29: STRONG OPINIONS (Oct. 10, 2017, 11:20 AM), <https://www.refinery29.com/2017/09/172078/jemele-hill-trump-objectivity-media> [<https://perma.cc/HJ65-SWUM>] (questioning why Hill suffered repercussions for calling Trump a white supremacist when she was just one of many public figures who had labelled Trump a white supremacist).

58. See *Jemele Hill: "I'll Never Get Used to Online Harassment,"* ESPN W, <http://www.espn.com/espnw/video/15411943/never-get-used-online-harassment> [<https://perma.cc/KXN9-F8KR>].

59. See Sophia A. Nelson, *What's Trump's Problem with Black Women?*, POLITICO (Oct. 26, 2017), <https://www.politico.com/magazine/story/2017/10/26/trump-black-women-gop-215751> [<https://perma.cc/D9BW-MQTX>]; Heather Timmons, *The Dangerous Way the Trump Administration Talks About Black Women*, QUARTZ (Oct. 23, 2017), <https://qz.com/1107990/trumps-attacks-on-frederica-wilson-myeshia-johnson-and-other-black-women-make-them-targets-for-abuse> [<https://perma.cc/RYX6-WRWK>].

60. See, e.g., Emily Gaudette, *Eminem Is 'Extremely Angry' at Trump for Not Tweeting about His Freestyle Diss*, NEWSWEEK (Nov. 24, 2017, 11:56 AM) <http://www.newsweek.com/eminem-freestyle-donald-trump-bet-awards-721667> [<https://perma.cc/YD3L-WXP3>].

strate that the realities of white women's lives, as opposed to the distinctive harassment employed against black women and other women of color, still define the female experience. Thus, moving to a reasonable woman standard alone is unlikely to be inclusive of the experiences of women of color. To ensure that judicial analyses of sexual harassment claims leave room for the experiences of women of color, courts should adopt a standard based on a reasonable person with the complainant's intersectional and multidimensional identity, rather than the ostensibly objective reasonable person standard, or even the presumably more inclusive reasonable women's standard.

## CONCLUSION

In conclusion, there is much to praise about the resurgence of the #MeToo movement after October 15, 2017. We have, at least for now, shifted from a society in which women did not feel empowered to report harassment—either out of fear of being disbelieved or out of a fear of being believed but ignored—to one where many women now feel they may both be heard and believed by those with the power to effect change. Even Anita Hill, who famously testified that Justice Clarence Thomas sexually harassed her when they both worked at the Equal Employment Opportunity Commission as lawyers, has noted the major shift in societal responses to claims of harassment. Hill explained, “In today's atmosphere, there would be more people who would understand my story, who would believe my story, and I think the numbers have changed over the year in terms of people who believe me and support me.”<sup>61</sup>

And yet, while much has changed in society about how we respond to claims of sexual harassment, much has also remained the same. Specifically, some women, particularly white women, within the feminist movement, still barely acknowledge or understand the unique, racialized and gendered harassment experiences that women of color face. One of the best means for ensuring that this racialized sexism is seen, understood, and acknowledged within the justice system is to develop and apply a doctrinal framework that rejects false notions of objectivity and facilitates the use of a particularized objective standard. Here, that means a standard that examines the facts of each case from the lens of a reasonable person in the complainant's intersectional and multidimensional shoes. Although support has long existed for a reasonable woman standard in harassment law, the standard must also be rooted in an intersectional and mul-

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61. Ricardo Lopez, *Anita Hill on Sexual Harassment: 'Today, More People Would Believe My Story,'* VARIETY (Dec. 8, 2017, 5:54 PM), <http://variety.com/2017/biz/news/anita-hill-uta-sexual-harassment-1202634689/> [<http://perma.cc/WA2V-2C66>].

tidimensional lens in order to capture the different ways that women across intersectional categories may experience any particular event or events. This is a necessary step to achieving equality and inclusion in harassment law.

Like Tarana Burke, the founder of the #MeToo campaign, this Essay calls for both the #MeToo and #TimesUp movements to embrace intersectional and multidimensional understandings of sexual harassment and sexual harassment law. After all, as Burke has made clear,

This work can't grow unless it's intersectional. We [women of color] can't do it alone and they [white women] can't do it alone . . . . Until we change [how we interact], any advancement that we make in addressing this issue is going to be scarred by the fact that it wasn't across the board.<sup>62</sup>

It's time for all our voices to be heard.

*Chancellor's Professor of Law, University of California, Berkeley. Thank you to Dean Erwin Chemerinsky for his research support. My research assistants Trevor Kosmo and Monica Ramsy provided invaluable assistance. Finally, I give special thanks to my husband, Jacob Willig-Onwuachi, and our children, Elijah, Bethany, and Solomon for their constant love and support.*

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62. Samantha Cooney, *Meet the Woman Who Started #MeToo 10 Years Ago*, TIME (Oct. 19, 2017), <http://time.com/4988282/me-too-tarana-burke-interview/> [http://perma.cc/7BJG-XYP3].

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## BETSY DEVOS, TITLE IX, AND THE “BOTH SIDES” APPROACH TO SEXUAL ASSAULT



By Jeannie Suk Gersen September 8, 2017



*If another official in another Administration had made the same statements as the Education Secretary, Betsy DeVos, they would be seen as reasonable, even banal.*

Photograph by Jacquelyn Martin / AP

Over the summer, anticipation over what the Education Department might do about campus sexual assault heightened as the Education Secretary, Betsy DeVos, held high-profile meetings with groups advocating for the interests of universities, sexual-assault victims, and accused students—including one men’s-rights group accused of harassing women online. DeVos’s civil-rights head, Candace Jackson, alarmingly, told the *Times* that “90 percent” of campus accusations are over drunk or breakup sex.

As the new school year began in earnest, widespread fears of a “rollback” of Title IX enforcement accompanied DeVos’s long-awaited policy speech, which was delivered on Thursday, at George Mason University. Promising to continue to enforce Title IX and saying that “campus sexual misconduct must continue to be confronted head-on,” DeVos announced the launch of “a transparent notice-and-comment” process wherein the Education Department will receive comments from the public, “to incorporate the insights of all parties.” (This is the standard legal process for agencies making binding legal rules.) After the speech, DeVos explicitly told CBS News that, while the Obama Administration’s policies on sexual misconduct are not now being rescinded, the current process—which will take months, if not years—will eventually lead to legal rules that are intended to replace them.

Title IX requires schools that receive federal funds not to discriminate on the basis of sex. The law itself does not mention sexual violence, but its interpretation by courts and by the Education Department since the law’s passage, in 1972, has led to the common understanding that Title IX’s ban on sex discrimination requires schools to address sexual violence among students.

Criticizing the previous Administration’s enforcement methods, DeVos said that “rather than engage the public on controversial issues, the Department’s Office for Civil Rights has issued letters from the desks of un-elected and un-accountable political appointees.” She was primarily referring to the “Dear Colleague Letter” issued by the Obama Administration in 2011, which provided instructions on how schools must investigate and adjudicate accusations of sexual violence. The letter itself stated that it could not create any new legal obligations, because it was issued without the process of public comment that is required to make an agency’s pronouncements legally binding. Yet the Education Department seemed to treat the letter as if it were law in investigations and enforcement proceedings against schools. The Dear Colleague Letter has also become a powerful dual symbol: of support for sexual assault victims on the one hand, and of failures of campus due process on the other.

The non-binding status of the Dear Colleague Letter meant that a new Administration could easily retract it with another letter, much in the same way that the Trump Administration retracted the guidance on transgender students earlier this year. But DeVos pointedly did not do this, declaring, “The era of ‘rule by letter’ is over.” Instead, she announced that the agency would engage in precisely the notice-and-comment rulemaking process that the Obama Administration chose to skip.

Judging by DeVos’s speech, what has been portrayed as a rollback of Title IX is really an embrace of a framework of compatibility: one in which Title IX seriously addresses sexual violence and also requires fairness to the accuser and the accused. (Disclosure: Last month, I joined three feminist law faculty at Harvard in submitting a comment to the Education Department urging policy revisions along these lines. I was also a signatory to an open letter from twenty-eight members of Harvard’s Law School faculty, published in 2014, that DeVos approvingly cited in Thursday’s speech.) DeVos drew on the stories of victims and accused students to reject the idea that the system could serve only one or the other. “Any school that refuses to take seriously a student who reports sexual misconduct is one that discriminates. And any school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination.” Since 2011, dozens of courts have made clear that schools that do not give accused students a fair process may also be committing sex discrimination under Title IX.

The rejection of an either/or mentality—one in which the education system is either “for” or “against” victims of sexual violence—was striking also in DeVos’s nod to the growing phenomenon of female students who are accused of sexual misconduct on campus, underscoring that a respect for basic fairness and due process benefits both women and men. She pointed to a recent case in which the University of Southern California disbelieved a female student’s insistence that she had merely “roughhoused” with her boyfriend, and expelled him for his alleged abuse over her objection. Calling the “current reality” a “failed system” in which “everyone loses,” DeVos noted, “Survivors aren’t well-served when they are re-traumatized with appeal after appeal because the failed system failed the accused.” When schools use an unfair process to discipline students, she suggested, even guilty parties can be vindicated later in lawsuits in court. Sloppy campus processes lead to general lack of confidence in the results, and further undermine the interests of sexual-assault victims.

In short, DeVos appears to be proceeding exactly as an agency head should: give notice, take comments, and explain why a given policy is being adopted. But the intent to depart from an Obama-era policy, which itself did not go through those steps, will undoubtedly garner outrage and dismay. “We must continue to condemn the scourge of sexual misconduct on our campuses,” she said. “We can do a better job of making sure the handling of complaints is fair and accurate,” she also said. If these statements were made by a different official in a different Administration, they would seem rational, uncontroversial, and even banal. The idea that an adjudicatory process should be fair to both sides is about as basic as any facet of American law can be, even when it is articulated by an individual who is noncommittal on the basic educational rights of L.G.B.T.Q. students and students with disabilities, and who believes that guns belong in schools to protect against grizzly bears. But in these times, especially following the equivocal statements made by President Trump on the violence in Charlottesville, the very concept of “both sides” may approach moral peril (to say nothing of the fact that Trump himself has boasted of sexual assault).

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VIDEO FROM THE NEW YORKER

Unearthing Black History at the Freedom Lots

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In the period since the Obama Administration first brought sexual assault to the foreground of Title IX enforcement, the courts’ and the public’s views have developed to crystallize around the idea that Title IX protects the fair treatment of accusers and accused, women and men. What promises to emerge from the new rulemaking process—which will generate mountains of public input—is more, rather than less, regulation and enforcement of schools’ obligations to all parties under Title IX.



*Jeannie Suk Gersen is a contributing writer to The New Yorker and a professor at Harvard Law School. [Read more »](#)*

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# College Groups Blast DeVos Title IX Proposal

Higher ed lobby says new regulations governing campus handling of sexual misconduct complaints would create a quasi-legal system that would burden colleges and infringe on the rights of students.

By [Andrew Kreighbaum](#) // January 31, 2019

[104 COMMENTS \(/NEWS/2019/01/31/HIGHER-ED-GROUPS-CALL-MAJOR-CHANGES-DEVOS-TITLE-IX-RULE#DISQUS\\_THREAD\)](#)

[Education Secretary Betsy DeVos](#)

Top higher education groups are lodging major criticisms of new regulations proposed by Education Secretary Betsy DeVos dealing with campuses' handling of sexual misconduct allegations. The DeVos Title IX rule, those groups say in comments submitted by Wednesday's deadline for feedback on the new rules, would impose a quasi-legal system on colleges that would raise new issues involving fairness, cost and liability for institutions.

Many college officials had welcomed a reset by the Education Department's Office for Civil Rights under President Trump after years of complaints about overreach by the office under President Obama. And for the past two years, the office has narrowed its approach to overseeing investigations of civil rights violations on campuses.

But college groups say the Title IX sexual misconduct rule released by DeVos late last year would prescribe their responses to complaints at a level of detail never before attempted by the department.

Survivor advocates and other activists have been critical of the secretary's approach to Title IX from the beginning and blasted details of the proposed rule after they leaked last year.

Now the associations representing colleges and universities, which have so far remained quiet, have also come out hard against the new regulations and urged DeVos to make serious changes.

Most organizations submitted detailed feedback only in the last week ahead of Wednesday's deadline. The department will be tasked with reviewing tens of thousands of those submissions before issuing a final rule.

More than 96,000 comments were submitted by the deadline -- many of them from advocacy groups long critical of DeVos. But the position from the higher ed lobby could be especially influential in the shaping of a final rule.

DeVos embarked on the process of writing the rule in 2017 after declaring that previous guidance from the Obama administration had resulted in a failed system for students, particularly those accused of misconduct.

"We need to move to a place where we are educating and ensuring those horrible situations don't occur," DeVos said Wednesday. "But when they do, we need to have a process and a framework that is fair for everyone and results that can be counted on by everyone involved."

The proposed rule she released in November would add new requirements designed to protect the rights of accused students, including a right to a live hearing with the ability to cross-examine accusers -- a major demand for groups that pushed for more protections for accused students.

Language in the proposal also would limit the types of cases colleges would be required to investigate. They would be responsible only for misconduct that occurred within campus programs and only when officials at an institution had received a formal complaint, a significant departure from guidance under the Obama administration.

The rule would also allow colleges to set their own standard of evidence for findings of misconduct -- as long as it is consistent with standards used for other kinds of campus-based misconduct. The Obama administration had recommended colleges use a standard known as "preponderance of evidence," while its critics argued a tougher "clear and convincing" standard was more appropriate for findings of serious misconduct.

Activists have said the rule would weaken protections for victims of sexual assault or harassment. The college groups say that it would also infringe on institutions' expertise and create new potential liabilities while conflicting with existing state laws.

Ted Mitchell, president of the American Council on Education, wrote in [a letter \(https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf\)](https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf), signed by 60 organizations that the rule makes the faulty assumption that colleges are a reasonable substitute for the criminal and civil legal systems.

The rule, Mitchell wrote, "consistently relies on formal legal procedures and concepts, and imports courtroom terminology and procedures, to impose an approach that all schools -- large and small, public and private -- must follow, even if these procedures, concepts, and terms are wildly inappropriate and infeasible in an educational setting."

The imposition of live hearings for all misconduct cases, ACE argued, would significantly draw out the time to complete investigations. And the requirement for cross-examination would create a "trial" atmosphere that could potentially violate procedural fairness for accused students as well as deterring survivors from pursuing complaints, the group said.

Current federal guidance allows colleges to use multiple models to adjudicate misconduct complaints, including the use of outside investigators who interview both parties and any witnesses before making a recommendation to campus decision makers. That kind of model would be banned under the proposed DeVos rule, but ACE and other college groups urged the department to maintain that flexibility for campuses.

The proposal, [said \(https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf\)](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf), Mary Sue Coleman, president of the Association of American Universities, "subjects universities to an unprecedented amount of federal control when it comes to how to investigate and adjudicate allegations of sexual harassment. This approach stems from a faulty premise: that the entire existing adjudication system has failed students."

Eloy Oakley, chancellor of the California Community Colleges system, said in [a letter \(http://file:///Users/akreighbaum/Downloads/CCCCO%20Title%20IX%20comments.pdf\)](http://file:///Users/akreighbaum/Downloads/CCCCO%20Title%20IX%20comments.pdf) to the department that the proposed rule would create new barriers for victims and make campuses less safe.

"Taken together, they will have a significant chilling effect on sexual harassment victims' ability and willingness to bring forward allegations of sexual harassment," he wrote.

### What Colleges Say the Rule Gets Right

Higher ed groups didn't entirely pan the proposed rule. ACE praised the proposed removal of a requirement in previous federal guidance that institutions resolve Title IX complaints within 60 days. Colleges rarely complete investigations that quickly anyway, but the higher ed group called the timeline "arbitrary and inflexible."

And the group said language stating that a college is required to investigate only complaints where it has "actual knowledge" of alleged misconduct would provide more clarity about when institutions are required to act.

Those are major points of disagreements with survivor advocates, who say those changes would slow down resolutions for students and make the campus process more difficult to navigate.

Sage Carson, executive director of Know Your IX, said an investigative process that takes many months to reach a conclusion is detrimental to both survivors and respondents.

"I understand the colleges feeling pressed by the need to wrap things up within 60 days. What is problematic to me is there is no alternative timeline," she said. "Just removing it altogether is not good for anyone involved in this process."

And Know Your IX said the "actual knowledge" standard could allow colleges to dodge liability by making the reporting process more burdensome for students. Carson said that oftentimes the first person a student tells about an assault is a teacher, coach or resident assistant. And those officials should take action to report misconduct.

But Carson said it was a positive development to have college groups push back on other major provisions of the proposal.

"The higher education lobby, colleges, students, survivors and their families are all aligned in saying this isn't appropriate," she said.

DeVos will need to make major changes to the rule to win over higher ed organizations. But groups that had pushed for more protections for accused students argued the regulation hit the mark in balancing the rights of survivors and respondents.

The Foundation for Individual Rights in Education had pushed for tougher evidentiary standards for misconduct findings and for the inclusion of cross-examination rights. Joe Cohn, FIRE's legislative and policy director, and Tyler Coward, the group's legislative counsel, argued in [public comments \(https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/01/30164648/FIREs-Comment-in-Support-of-the-Department-of-Education%E2%80%99s-Proposed-Regulations-on-Title-IX-Enforcement.pdf\)](https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/01/30164648/FIREs-Comment-in-Support-of-the-Department-of-Education%E2%80%99s-Proposed-Regulations-on-Title-IX-Enforcement.pdf) that those changes made the rule a marked improvement over previous federal guidance.

"The proposed rules take the rights of both complainants and accused students seriously, and they make important strides toward ensuring that complaints of sexual misconduct will be neither ignored nor prejudged," they wrote. "Though not perfect, the proposed regulations will go a long way towards restoring meaningful due process protections to campuses -- to the ultimate benefit of both complainants and respondents alike."

Read more by [Andrew Kreighbaum](#)

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([/print/news/2019/01/31/higher-ed-groups-call-major-changes-devos-title-ix-rule](#))  
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GENDER &amp; SEXUALITY

# Will Feminism's Past Mistakes Haunt #MeToo?

DECEMBER 8, 2017

JUDITH LEVINE

Image: [Seth Page](#)

Women's fight for the right to work free of sexual insult or molestation has been a long, long one. For nearly two centuries, in [labor strikes](#) and broadsides, speak-outs, marches, and now in social media, women have protested the ubiquity of sexual harassment and the impunity of its perpetrators.

But the #MeToo moment is also unprecedented. It signals the arrival of feminism from the margins to the center of political discourse. For the first time, men are not laughing. They are looking seriously, almost abjectly, at their own privilege and complicity.

**We are not witnessing the omens of a looming sex panic; these are the symptoms of the one we are already in, and have been in for forty years.**

The last couple of months also echo a troublesome history, however, whose legacy persists in the law and the Zeitgeist. "When does a watershed become a sex panic?" Masha Gessen asked recently in [the New Yorker](#). The answer: what we are witnessing are not the omens of a looming sex panic; they are the symptoms of the one we are already in, and have been in for forty years.

It is unlikely we will be able to walk back the sex-crimes statutes we already have, but we may be able not to worsen them if we can avoid repeating the mistakes of the past. I will focus on three: first, conflating a wide range of behaviors as equally harmful; second, broadening the definitions of illegal acts and hardening their punishment, when the laws we already have are good—they just need to be enforced; and third, yielding to the desire for retribution, which only perpetuates brutality, rather than working for restorative justice, which holds the potential for genuine accountability and lasting change.



Four decades ago, feminists revealed another sexual scourge: child sexual abuse. Like sexual harassment, child sexual abuse happens in the dark—usually at home or with people the child knows. And as with workplace harassers, abusers choose victims who are vulnerable, dependent, or unable to escape. They deploy flattery and shame, bribes and threats to ensure silence.

Few victims mustered the courage to tell. But when they did, they were often met with disbelief. Even people who were aware of the abuse turned their backs; those who were supposed to protect the victims defended the victimizers instead.

Suddenly, though, revelations proliferated. A movement gathered, an analysis coalesced: child sexual abuse was not just personal, it was structural, a function of a system in which male prerogative erased the rights of women and children. Feminist activists, victims, anti-rape

activists, psychologists, and child protective and legal professionals worked to make the law take child sexual abuse seriously. They also sought to change the culture and the family to end the sexual coercion of children.

But because this was about sex and children, hysteria was not far behind. Before long, an industry of feminist and Christian therapists and self-help writers were claiming that virtually every behavioral quirk or emotional trouble could be traced to sexual abuse, even if—especially if—the alleged victim did not remember it. “If you think you were abused and your life shows the symptoms, then you were,” wrote poet Ellen Bass and journalist Laura Davis in their massive bestseller *The Courage to Heal* (1988). The symptom checklists in **it and similar books** include everything from arthritis to feeling ugly. Bass's book launched a battery of unscientific “therapeutic” and forensic interviewing techniques to extract false and “recovered” memories of sexual depredation. Ambiguous or affectionate touch—a kid poking another kid's genitals, parents bathing with their kids, teachers hugging students—came under suspicion as molestation.

## **Over the last half-century, the solutions conceived for social problems have diminished to one: punishment. Because millennial feminists grew up in this environment, it has narrowed their vision too.**

Estimates of how many women are sexually abused as children rose to as high as 62 percent, 2.5 times the **most cited, and most inclusive**, current statistic for girls and 12 times that for boys (these numbers—1 in 4 and 1 in 20, respectively—are likely still high because they lump together sexual harm that occurs from early childhood through late adolescence).

If psychologists had once dismissed reports of sexual abuse as fantasy, in the early 1980s a new crusade marched under the banner “Believe the Children.” With the sketchiest of evidence or none at all, child protective agencies removed kids from their parents. Credulous juries sent daycare workers to prison on charges of “Satanic ritual abuse.” Adults denounced their aging parents, guilty of nothing more than imperfect love, as sadistic rapists. It took only one accusation to ruin a person's life. Bus drivers, babysitters, divorcing fathers, and boyfriends at the wrong end of a grudge lost jobs, families, and reputations with one accusation, one newspaper item. In its review of exonerations from 1989 to 2012, the **National Registry of Exonerations** reported that among convictions for crimes that never occurred, over half involved child sexual abuse. “Two-thirds of these cases were generated in a wave of child sexual abuse hysteria that swept the country three decades ago,” wrote the authors.

Along with this mania came a turn toward harsher treatment of the accused and convicted. In the name of “victims' rights,” lawmakers of both parties hacked away at defendants' rights. Eroding along with the constitutional protections of individuals facing the awesome power of the state was the bedrock principle of U.S. jurisprudence: innocent until proven guilty.

For feminists fighting sexual intrusions on children and women, grassroots activism took a back seat to providing services. Radical critiques were supplanted by faith in policing, prosecution, and prisons. It is no accident that the Violence Against Women Act (VAWA), the crowning achievement of what critics call this “carceral” feminist movement, was a section of the omnibus **Violent Crime Control and Law Enforcement Act of 1994**. While the crime bill shoveled money to the states to hire police and build prisons, VAWA married white anti-violence feminists to the violent state.

As panic over “sex offenders”—a category comprising more than a million Americans, from consensual teen lovers to armed rapists, public urinators to incestuous fathers—settled into everyday life, it was also inscribed in statute from small-town ordinances to federal law. The results: today about **170,000** Americans are in prison and juvenile detention on sex-related charges; another **6,400**, having served their sentences, continue to be locked up indefinitely in “civil commitment” for crimes they might commit in the future; nearly 850,000 are listed on public sex offender registries.

Registered sex offenders are restricted in where they may live, work, or just be. Many are forbidden to live with their own children, even if their offense did not involve children. In some jurisdictions they may not volunteer as a poll watcher or put up Halloween decorations. Under **federal law**, the lowest-risk offenders must register for fifteen years, the highest for life.

To be a “sex offender”—a population with **low rates of recidivism**—is to **face** hatred, rejection, depression, penury, homelessness, and hopelessness. It is to expect discovery and fear violence against yourself or **your family**. It is to be a member of what George Mason University professor Roger Lancaster calls “a pariah class of unemployable, uprooted criminal outcasts . . . marked, registered, and transferred to a space outside society but within the law”—forever. To describe this existence, many have used the term sociologist Orlando Patterson coined for slavery: “social death.”



Knowing all of this makes me fearful today. We are still flattening distinctions. Garrison Keillor's unintentional **touch** on a bare back is met with equal severity as Harvey Weinstein's alleged decades of serial sexual assault. **Alternet's** "17 Warning Signs" in Matt Lauer's history include both blatant harassment, such as pinching Katie Couric's ass, and inoffensive comments, including calling Pippa Middleton's dress at her sister's wedding "flattering." To Believe Women—an ominous reprise of Believe the Children—is to disbelieve, and deny due process to, the accused.

Feminist civil attorneys have been parsing sexual interactions for bad acts that might be litigable; it's not unlikely they will try to broaden the definitions of sexual harassment. Sexually demeaning words might be prosecuted as hate speech. Already, in the wake of #MeToo, a committee of France's National Assembly is considering **levying fines for catcalling**. And as the creepy or rude becomes actionable, the actionable may become criminal. Many current felony sex offenses used to be misdemeanors, or not illegal at all. Driving a sex worker to a date, even if she asks for a ride, can be prosecuted as trafficking. Having sex without disclosing that one is HIV positive, even absent transmission, is a **crime** in thirty-two states punishable by up to thirty years in prison.

## **The more we entrust the state to mete out justice for sexual infractions, including harassment, the more we collude in the manner in which it administers "justice."**

Over the last half-century in the United States, the solutions conceived for social problems, from poor school performance to the global refugee crisis—to sexual disrespect—have diminished to one: punishment. Because millennial feminists grew up in this environment, it has narrowed their vision too. This was evident in the response to Secretary of Education Betsy DeVos's **amendments** to the 2011 Department of Education **directive** that stepped up investigations and penalties for sexual misconduct under Title IX. The original rules mandated investigations, even if the purported victim did not desire one. They also prohibited the use of mediation to resolve sex-related cases. DeVos allowed voluntary resolution without investigation. Some, including representatives of the rights of the accused, welcomed the change. Face-to-face resolution offers an opportunity for the parties to understand "each other's perspectives concerning the event in question, as well as their own shortcomings in communicating their own or tuning in to their partner's wants and needs," one organization's director told **Time**. But the feminists who fought for the original policy denounced the move toward reconciliation as "a huge step back." In fact, some hardliners have argued that the campus tribunals will never have enough clout; women should be encouraged to go directly to the police.

There are costs to this approach. First, the more we entrust the state to mete out justice for sexual infractions, including harassment, the more we collude in the manner in which it administers "justice." You may be titillated by the idea of Charlie Rose in a jail cell. But it will not be the Charlie Roses who end up behind bars. Their lawyers will get them off with suspended sentences. The African American night manager at McDonald's will go to prison. **One in every 119** African American men is a registered sex offender—twice the rate of white men. Civil court, where there is no constitutional right to defense, is no fairer. County jails are packed with people who, for example, cannot pay their parking tickets or child support. If this seems just, it is also counterproductive. You cannot earn money in jail.

If the system is biased toward defendants, it serves victims differentially too. Under VAWA, with its mandatory domestic violence arrests and sexual assault prosecutions, some women are safer—the "credible" victims who are white, educated, middle-class, employed, and cisgendered. But according to scholars **such as Beth E. Richie**, Professor of African American Studies & Criminology, Law and Justice at the University of Illinois at Chicago, it has left behind poor women of color, single mothers, sex workers, undocumented immigrants, transwomen, and the incarcerated. These women are as likely to be harmed as helped by the state—they can be arrested themselves for fighting back, be evicted, or lose custody of their children. Gender justice is not justice if racial and economic justice are sacrificed for it.

## **Gender justice is not justice if racial and economic justice are sacrificed for it.**

The other, incalculable cost is that we do not get closer to ending sexual violence. The criminal proceeding—in which the perpetrator's job is to deny acts even if he did them and the victim's is to shut up and let the prosecutor speak for her—both defeats accountability and disempowers the harmed. A brutal state makes men more brutal. The threat of retribution does not make people nicer or communities safer. Even the death penalty does not deter crime.

But intentionally or not, DeVos's Title IX directive points in a more promising direction, away from the strictly punitive. Restorative justice, which is sometimes mandated by the courts, sometimes initiated outside it, is a philosophy and a repertoire of practices that seeks to make whole both the harmed person or people and the community whose values have been transgressed. In a restorative conference or "circle," the victim communicates to the offender the emotional and material impact of the crime, he is compelled to hear and understand, and participants, including family or volunteers as well as the parties to the offense, together craft ways to make it right—apology, work, training. Critical in this process is the community, which, when it is ready, takes the transgressor back free of stigma.

Research in the **British Commonwealth** has found that restorative justice leaves victims feeling more satisfied than the conventional criminal justice process and reduces recidivism by more than 25 percent—a better rate than prison. Interestingly, restorative justice has also



been found to be more effective for dealing with violent crime than with property crimes. In **Canada** and the **United States**, a restorative justice practice called Circles of Support and Accountability (COSAs)—in which volunteers offer substantial time in helping a released inmate acclimatize to life on the outside and stay straight—has been found particularly effective with high-risk sex offenders, reducing their commission of new sex crimes by 83 percent and other violent crimes by 73 percent, according to Canadian researchers.

Transformative justice comprises similar practices to restorative justice, but it eschews the involvement of the state and seeks to dismantle the systematic oppressions that feed violence both official and criminal. Not surprisingly, transformative justice was born in communities of color that had had enough of state punishment. Inspiringly, its leaders are women of color who have experienced sexual harm. Transformative justice is more than a practice of healing; it is a social justice movement. “It is critical that we develop responses to gender violence that do not depend on a sexist, racist, classist, and homophobic criminal justice system,” reads the manifesto **“Gender Violence and the Prison Industrial Complex,”** circulated in 2001 by Critical Resistance and INCITE!, two organizations of mostly young, mostly queer women of color. Signed by almost 150 social justice activist organizations and individuals, the statement calls on progressive movements to develop, document, and share “community-based responses to violence that do not rely on the criminal justice system AND which have mechanisms that ensure safety and accountability for survivors of sexual and domestic violence.” In answer to this call sprang many grassroots groups that are trying to do just that.

## **The *longue durée* of mass incarceration and punitive surveillance teaches us that state violence is no answer to interpersonal violence.**

At the other end of the spectrum is restorative justice writ immense: truth and reconciliation commissions, such as those convened in the 1990s after the defeat of apartheid in **South Africa**, Augusto Pinochet’s military dictatorship in **Chile**, and the genocide and mass rapes in **Rwanda**. These countries had undergone unimaginable atrocities and human rights violations on a massive scale, at the hands of both state officers and ordinary people. At those commissions, thousands of victims faced their persecutors and testified to the harrowing harm they had inflicted. Aside from the architects of the crimes—who have been tried in international criminal courts and national tribunals—the proceedings did not for the most part trigger criminal penalty. Rwanda augmented its commission with a network of local traditional **“Gacaca”** courts, which gave victims the opportunity to learn the truth of what happened to their loved ones and perpetrators to express remorse and ask forgiveness of their communities. A few perpetrators were given hard labor, but many were sent home without penalty.

Truth and reconciliation commissions aim to balance the need to expiate personal and social trauma with the imperative to build systems and policies that will prevent violence in the future. They, like other restorative and transformative justice practices, are far from perfect. Transformative justice is still young and unruly. In one of its manifestations, a Chicago mother plastered a warning poster, with the photo of an ex-boyfriend who had abused her daughter, all over his neighborhood. Is guerrilla public shaming better than the sex offender registry? The vaunted “community” may wreak vigilante vengeance for the rape of a friend or relative. Is this more just than state-administered penalty constrained by the rule of law? **After the Gacaca courts closed** in 2004, fear and suspicion remained high for Rwandans living side by side with the people who had raped and murdered their families. In South Africa, twenty years after truth and some reconciliation, economic and racial justice have yet to be attained.

All that said, restorative justice offers a response to harassment and sexual violence that does not risk repeating the mistakes of the past. #MeToo is a kind of spontaneous truth and reconciliation commission. Its greatest power is political—the revelation of systematic oppression, rather than the rendering of personal payback. Might feminists resist the thrill of Jacobin purges and instead organize truth and reconciliation commissions in Hollywood, Wall Street, or the halls of the construction trade unions?

The *longue durée* of mass incarceration and punitive surveillance teaches us that state violence is no answer to interpersonal violence. Vengeance may satisfy for the moment, but it does not create a nonviolent, egalitarian, and just culture.

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THE  
NEW YORKERWHEN DOES A WATERSHED BECOME A SEX  
PANIC?

By Masha Gessen November 14, 2017



*A moral panic is always a reaction to something that has been there all along but has evaded attention—until a particular crime captures the public imagination.*

Photograph by Rosalind O'Connor / NBC / Getty

I dols are falling so fast that it's hard to keep track. The *Times* has produced a growing tally of twenty-three men who have lost jobs, deals, film roles, and more in the last five weeks as a result of sexual-assault or harassment accusations. Most of these men worked in the entertainment industry or the media. Many more names are on a widely circulated list of “shitty media men,” which has compiled anonymous accusations ranging from the shocking to the exceedingly trivial. Two women have gone public with allegations of rape by two prominent academics. (One died in 2007, and the other said the sex was consensual.) Politicians across the country are also facing repercussions from sexual behavior that apparently went unreported for years, although they do not seem to be falling as far or as fast as the men of media and entertainment. In fact, Roy Moore, the Alabama Senate candidate and former judge who stands accused of having sexual relationships with teen-age girls, may still be headed for election. (Moore has fervently denied the allegations.)

Earlier this year, I had a chance to hear a prominent Democratic Party activist reevaluate what had seemed like a pivotal point in

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unelectable. The activist explained the problem with that assumption: to vote against Trump on the basis of the “Access Hollywood” tape, many women would have had to repudiate their husbands, brothers, uncles, and cousins—their entire lives. In other words, we should not have been surprised that some fifty-three per cent of white women voted for Trump; it had been naïve and foolhardy to expect them to defect. Roy Moore’s apparent staying power serves to affirm the hypothesis.

Perhaps the swift execution of entertainment and media careers can be seen as an attempt to build a wall of sorts—a clear division between people who felt that the “Access Hollywood” recording rendered Trump unfit for office and those who did not. It is troubling to have a chasm this wide between two cultures in one country—although it could be argued that the chasm has been there for a long time, and that the current streak of scandals has merely illuminated it. In any case, it is particularly troubling that the frenzied sequence of accusations and punishments is focussed on sex.

I am not trying to straddle the divide between cultures: I fall squarely on one side of the chasm. I have written “me too,” because I have been raped by a man (a stranger), coerced into sex by a man (a friend), and held hostage by a man’s (my boss’s) compulsion to talk about sex and take—and exhibit—pictures of sex. I am also queer, and I panic when I sniff sex panic.

Over the last three decades, as American society has apparently accepted more open expression of different kinds of sexuality, it has also invented new ways and reasons to police sex. David Halperin, a historian and gender theorist at the University of Michigan, has called this “the war on sex.” In the introduction to a new essay collection with that title, which he co-edited, he describes some of the weapons in this war, including the sex-offender registry, which extends punishment indefinitely, and civil commitment, which amounts to preventive custody. In her contribution to the book, the lawyer and journalist Laura Mansnerus writes that about five thousand people are currently confined in twenty states, “involuntarily and indefinitely,” under so-called sexually violent predator acts, without a jail sentence or after having served jail time. “These men,” she writes, “are confined because of what they might do someday, exactly the kind of preventive detention that seems like an obvious constitutional problem.”

On college campuses, sex is also policed outside the normal mechanisms of law enforcement. Under President Barack Obama, the Justice Department directed campuses to adjudicate cases of sexual assault under the provisions of Title IX, which bans sex discrimination. In cases of sexual assaults, victims—both women and men—are often either reluctant or downright frightened to go to the police, and the courts are terrible at prosecuting sexual assault. Not only is the experience painful for the victim but the standard of proof for intimate violence tends to be de-facto higher than for other kinds of violence. On campus, the Justice Department ordered that a different standard be used: a preponderance of the evidence, rather than “beyond a reasonable doubt.” Long before these guidelines arrived, campuses had begun instituting rules of “affirmative consent.” Halperin reminds his readers that when Antioch College introduced this standard—which requires explicit verbal affirmation of the desire to take every sexual step—it was “widely ridiculed.” That was in 1991. Now, the principle of affirmative consent has not only been adopted by countless colleges but has become the law for colleges in New York and California.

The affirmative-consent and preponderance-of-the-evidence regimes shift the burden of proof from the accuser to the accused, eliminating the presumption of innocence. If the presumption of innocence is rooted in the idea that it is better to let ten guilty people go free than risk jailing one innocent person, then the policing of sex seems to assume that it’s better to have ten times less sex than to risk having a nonconsensual sexual experience. The problem is not just that this reduces the amount of sex people are likely to be having; it also serves to blur the boundaries between rape, nonviolent sexual coercion, and bad, fumbling, drunken sex. The effect is both to criminalize bad sex and trivialize rape.

The Trump Administration has rescinded the Obama-era interpretation of Title IX, but at the country’s more liberal colleges and universities, the culture of policing sex will almost certainly persist. The sexual culture wall that is going up may be the first big sign of how this culture is expanding. If the entertainment and media industries are becoming a hostile environment for violent, predatory, and rude men, that will certainly be a good thing. But the boundaries are already blurring. The perpetrators who have suffered consequences now range from Harvey Weinstein, who allegedly committed multiple assaults and deployed an army of agents to keep women silent, to Matt Taibbi, the journalist, who co-edited an aggressively misogynistic newspaper in Russia and co-wrote a fictionalized memoir which contained bragging about feats of sexual coercion. No woman has accused Taibbi of actual

names on the supposedly secret list of “shitty media men,” which everyone in the media world has seen, are of men who appear to be merely awkward, unskilled communicators, while others are alleged to have committed actual acts of violence and coercion.

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After the Report, Sudden Resolutions: A Tragedy

By Masha Gessen

A moral panic is always a reaction to something that has been there all along but has evaded attention—until a particular crime captures the public imagination. Sex panics in the past have begun with actual crimes but led to outsize penalties and, more importantly, to a generalized sense of danger. The object of fear in America's recent sex panics is the sexual predator, a concept that took hold in the nineteen-nineties. The sexual predator is characterized by his qualities perhaps more than his actions—hence the need for preventive detention and sex-offender registries. The word “predator” is once again, unnervingly, becoming central to the conversation.

Of course, the balance of power favors men so much that it's more likely that the guilty will get away with it than that the innocent will suffer. Still, we would do well to be aware of the risks to our perception of sex, and to this culture, as it grows ever more divided.



*Masha Gessen, a staff writer at The New Yorker, is the author of ten books, including, most recently, “The Future Is History: How Totalitarianism Reclaimed Russia,” which won the National Book Award in 2017. [Read more »](#)*

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THE  
NEW YORKER

# ONE YEAR OF #METOO: PUNISHING INDIVIDUAL ABUSERS IS NOT THE SAME AS JUSTICE



By Masha Gessen October 10, 2018

It began with the mesmerizing spectacle of dominoes falling: Harvey Weinstein, Kevin Spacey, Louis C.K., Charlie Rose, Matt Lauer, Russell Simmons, and so on, name after famous face, all disgraced by the end of November, 2017. An autumn later, #MeToo is undergoing a shift. Perhaps this is the moment that #MeToo stops being a movement aimed primarily at punishing individuals and starts to do its work on the institutions that have enabled them. The institutions do not collapse into non-presence, the way some of the men have seemed to. But with the curtain pulled back they stand exposed, demystified, and, inevitably, delegitimized.

To take a few examples: the hearings on Brett Kavanaugh's Supreme Court nomination culminated with an accusation of sexual assault and ended with the confirmation of a man who had ranted, raged, cried, and apparently lied while testifying; his confirmation will permanently change how we view the Supreme Court itself. Halfway across the world, no winner of the Nobel Prize for Literature is being announced this month, and it's possible none will be announced next year—the Swedish Academy is mired in a scandal that began with accusations of sexual assault and later exposed corruption, self-dealing, and a general sense of moral rot that has likely altered public perception of this institution forever. Something similar, albeit on a different scale, is happening in New York: after *The New York Review of Books* published an essay by Jian Ghomeshi, a former Canadian radio host who has been accused of sexual violence by numerous women, Ian Buruma, that magazine's editor, was forced to resign, and a window opened on the sometimes unsavory internal workings of an influential publication. And on a far larger scale, what has happened at CBS goes beyond the deposing of the chairman and C.E.O. Leslie Moonves: producers and showrunners have been falling, too, making the entire edifice tremble.

The earlier #MeToo negotiations were focussed closely on individual cases. Did #MeToo apply to men accused of certain types of "sexual misconduct"—behavior that may not have violated the law or written policy? Did it cover men who simply acted like jerks on dates? The next logical question was, When is it all right for some of these deposed men to come back into the world? Did Louis C.K., for example, push it too far when he performed in public less than a year after he first admitted to masturbating in front of women colleagues? Ghomeshi's controversial *New York Review of Books* piece implicitly posed the same question: Have I been punished enough? Can I come back now? Ghomeshi detailed how much he had suffered since being cast out, and aimed to demonstrate that he had been humbled by the experience. He described sharing a train compartment in Europe with a young woman, flirting with her but not following up—and not even telling her his name and situating himself as a celebrity, which would have helpfully impressed the woman in the past. There was a certain sociopathic naïveté to the piece, a transparent desire to show that Ghomeshi had conformed to what society had apparently wanted from him—he had become a no one. Hadn't that been the point?

There are many things Ghomeshi cannot be forgiven for, but he might be forgiven for misunderstanding the meaning and objective of #MeToo. For much of the past year, it did look as though the movement's primary goal was to reduce men who had once been Somebodies to the status of Nobody. If there is anything the past year has taught us, though, it's that it is impossible to punish all the powerful men (and a handful of women) who abuse women (and some men). This game of dominoes will never end.

Nor does the deposing of offenders constitute justice. In the best-case scenario, their victims get to savor a moment of vengeance,

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effect on preventing crime, more than the punishment itself. The larger culture is increasingly intolerant of behavior that would have seemed normal a few years ago, and individual men are scrambling their brains trying to figure out what is, was, or will be allowed, but none of them expects an inevitable #MeToo punishment.

A year in, it's a good moment to ask what a post-#MeToo world looks like in the United States. It doesn't look like our contemporary society but with all the bad-acting men knocked out, like so many rotten teeth. Nor does it look like every corrupted institution rendered dysfunctional—lying in shambles like the Swedish Academy, or even like the Supreme Court, legally powerful but socially lacking in legitimacy. Perhaps the post-#MeToo world is one where victims and perpetrators of sexual assault and harassment have addressed one another through a form of truth-and-reconciliation commission. Perhaps the length, breadth, and civility of these hearings will have created an understanding of the scale of the problem. Perhaps the post-#MeToo world is one in which a fund has been created to compensate the myriad women who have been subjected to sexual harassment and abuse. Perhaps the financial and emotional cost of attempting to right past wrongs will make the institutions reconstitute themselves with a degree of transparency that we cannot imagine now, and based on an entirely different structure of power.

None of these things seems imaginable now. But, then again, a year ago, none of us could have imagined how long this game of dominoes would go on, how much would become public, and how many idols would fall.



*Masha Gessen, a staff writer at The New Yorker, is the author of ten books, including, most recently, “The Future Is History: How Totalitarianism Reclaimed Russia,” which won the National Book Award in 2017. [Read more »](#)*

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*The Challenges of Reporting #MeToo*  
Ronan Farrow discusses the process of investigating sexual-assault allegations.

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On Leadership Analysis

# Google and Facebook ended forced arbitration for sexual harassment claims. Why more companies could follow.

By Jena McGregor

Last week, two of Silicon Valley's biggest tech heavyweights said they were ending their policy of forcing workers to settle sexual harassment claims through private arbitration, allowing employees to pursue those claims in court. [Google's announcement](#) came Thursday, following pressure from 20,000 employees who staged a walkout to protest the company's handling of sexual misconduct allegations, and [Facebook's](#) came just a day later.

They weren't the first to take the leap away from a controversial tactic that critics say can, in some cases, protect serial harassers and silence victims who might not come forward, unaware of other claims that may be shielded from public view. In December 2017, [Microsoft](#) said it had eliminated forced arbitration for employees who had sexual harassment claims. [Several big law firms](#), including [Munger Tolles & Olson](#), said in March they would end the practice after complaints by law students. And in May, [Uber](#) and [Lyft](#) said they would no longer require victims of sexual assault or sexual harassment to pursue allegations through arbitration.

"It's taken a little bit of time for other tech companies to follow [Microsoft's] lead, but I think it does point out the importance of corporate leadership on this issue," said Maya Raghu, director of workplace equality and senior counsel at the National Women's Law Center. At the very least, "it does show the importance of its impact on peers," or competitive firms.

Still, whether more corporations will jump in line — reversing an approach that has been scrutinized in the #MeToo era — is not yet clear. Even if they do, the new policies apply only to individual sexual harassment or assault claims — not other discrimination or harassment complaints — and come at a time when, because of a recent U.S. Supreme Court [ruling](#), companies may be even more motivated to add arbitration agreements to the documents they have workers sign.

Mandatory or forced arbitration is made possible when workers, often at the time they are hired, sign documents in which they agree to settle disputes out of court, where an arbitrator rather than a judge and jury decides a case on its merit. [Research](#) has found that employers win more often when they use the same arbitrator repeatedly, [suggesting](#) companies may return to arbitrators who do not rule in favor of employees, [as well as that employees](#) tend to see much lower damage awards in arbitration than they do in outcomes decided by federal or state courts.

"I do think you're going to see more of it," said Debra Katz, a Washington-based lawyer who frequently represents plaintiffs in harassment and discrimination cases. "If you want to have as a principle of your company that you care about sexual harassment, this is a minimal gesture."

The prevalence of such arbitration agreements can be hard to pin down precisely because of their private nature, but [one study](#) by the Economic Policy Institute, a left-leaning think tank, found that more than 60 million workers may have signed such an agreement. Terry O'Neill, executive director of the National Employment Lawyers Association, a trade group of lawyers who represent workers, said her organization believes that 80 of the companies in the Fortune 100 utilize arbitration and at least 52 use forced arbitration.

"It's remarkably difficult to find that out," she said, "because these are secret employment agreements."

An email to Facebook's media address seeking further information about its policy change, which was [reported](#) by the Wall Street Journal on Friday, was not immediately returned. In an email, a Google spokeswoman said arbitration would now be optional for sexual harassment and sexual assault claims and noted that Google "has never required confidentiality in the arbitration process."

Some lawyers who represent employers say it's too early to tell how many companies will follow suit.

"Our clients are evaluating what is the best course of action given their strong support for the benefits of arbitration and their respect for the goals of the #MeToo movement," Margaret Rosenthal, a partner at BakerHostetler, said in an email.

Others think it could spread to industries such as Hollywood or entertainment that have come under fire amid the #MeToo movement or that are more competitive when it comes to recruiting and retaining top employees.

"Certain industries like high tech are probably more receptive to that because of the competitiveness of their job market," said Benjamin Ebbink, a lawyer with Fisher Phillips in Sacramento. Tech "has been a very high-profile industry for many years now about their employment practices, and I think they're uniquely receptive to these issues in that industry."

Ebbink said that he hasn't yet seen companies act out of political considerations, even if there have been state and federal efforts to ban forced arbitration for sexual harassment claims. [New York state's](#) budget for fiscal year 2019, signed into law this spring, included a provision that said employment agreements could no longer include mandatory arbitration clauses for sexual harassment claims. [A few other states](#) have proposed or enacted related laws, which could prompt large national employers to want to set similar standards across state lines.



**The New York Times**

# End Forced Arbitration for Sexual Harassment. Then Do More.

If tech companies really want to be cutting-edge, they should get rid of the policy in all employment-related disputes.

**By Terri Gerstein**

Ms. Gerstein is the director of the Project on State and Local Enforcement at the Harvard Law School Labor and Worklife Program.

Nov. 14, 2018

On Nov. 1, more than 20,000 Google employees walked off the job in protest of the company's handling of sexual misconduct. A week later, Google capitulated to some of the protesters' key demands and announced the end to forced arbitration for its employees in relation to sexual harassment and assault claims. The very next day, Facebook followed suit with regard to sexual harassment claims. Microsoft, Uber and Lyft have taken similar steps in the past year.

Technology companies pride themselves on their cutting-edge, visionary nature. Now that they've taken the first step, here's an opportunity for them to be early adopters, and national leaders, by making an even more impactful move: ending forced arbitration in relation to all employment-related disputes, not just sexual harassment. And given the extensive reach of these companies through their multitude of contractors, they should prohibit their contractors from forcing employees into arbitration, as well.

A quick refresher on why forced arbitration is so unfair to workers: Workers win less often in arbitration than in court, and when they do win, they get less money than they would in court. Arbitration is secret and shields wrongdoing from public view. There's no right to appeal. Forced-arbitration provisions also usually bar class actions, which the Supreme Court blessed in a recent ruling allowing employers to force workers to waive their right to bring a group lawsuit, making it more daunting and difficult for people to sue their employers. And workers don't genuinely agree to arbitration; they're typically presented with a take-it-or-leave-it contract to sign if they want to put food on the table.

These problems with forced arbitration make it especially abhorrent in cases of sexual harassment. Being objectified, degraded or groped — these are violations of a highly personal and particular nature. But race discrimination and wage theft are pretty bad, too. It's also degrading to be told to "go back to Africa," which is what a former Tesla employee says happened to him. It's also offensive to be made to work dozens of weekly overtime hours for no pay.

Of course, workplace violations of different types are often intertwined: The same employers that permit or perpetrate sexual harassment also commit a host of other violations — underpaying workers, discriminating in other ways or preventing workers from organizing. A case I handled long ago captures this. A group of women who worked for a dry cleaner came to our office because they were underpaid, working 56 hours a week for subminimum wages and no overtime.

As I investigated, I quickly learned how interrelated their problems were. The women, who were Latina, were paid less than their male co-workers. All of the Latino workers, male and female, made less than their non-Latino counterparts. No one made enough to live on, and everyone there was surely exposed to highly toxic chemicals. Over repeated meetings, another story also emerged: The boss routinely made leering comments to the women workers, told them to wear short skirts and, as I later learned, had sex with one of them in a La Guardia Airport hotel — consensually, he insisted. When I questioned him in sworn testimony about his behavior toward his female employees, he said, "Spanish women like it."

How do you tease apart the sexism, racism and economic exploitation in this situation? You can't. They're inseparable. What brought the women to our office was their unlawfully low pay. But this was partly a result of discrimination against them based on their sex and national origin, and from an even broader viewpoint, it was a result of their lack of power or a voice on the job.

So why would it make sense to end forced arbitration in cases of sexual harassment only? Why should any company still block people from filing in court when they're racially harassed or underpaid or paid less because of their national origin? All are offenses against human dignity, and in all of these cases, there is the same tremendous power differential that makes it so hard for people to speak up.

The workers who walked out at Google have lives very distinct from the immigrant women who spend their days pressing clothes. But at the root of sexual harassment, or any kind of workplace abuse, is abuse of power. Even a Hollywood legend like Gwyneth Paltrow didn't speak up about Harvey Weinstein because she thought she would be fired.

Even if these companies stop using forced arbitration, their workers will still have plenty of reasons not to speak up: fear of retaliation (even though it's illegal), fear of being blacklisted, difficulty finding a lawyer to take the case. And with President Trump remaking the judiciary in his image, federal court may soon not be such a great option, either. But at the very least, working people should have the chance to have their day, together, in court.

By ending forced arbitration only in cases of sexual harassment, Google, Facebook and their fellow technology companies have responded to public pressure, to the day's news cycle. But it's time to be proactive, not just reactive. There's no logic to ending forced arbitration for sexual harassment only and leaving it intact for so much else.

In the end, the most compelling reason for a company to foist arbitration on its work force is to avoid liability and public exposure that might result from a court case. But if a company wants to avoid liability, blocking workers from court isn't the best way to do that. The answer is to create a fair and lawful workplace, the best possible workplace, for everyone who contributes to a company's success and to give workers a voice. That, and not a new phone or new app, is the kind of vision and disruption we need more of.

Terri Gerstein is the director of the Project on State and Local Enforcement at the Harvard Law School Labor and Worklife Program.

A version of this article appears in print on Nov. 17, 2018, on Page A27 of the New York edition with the headline: No More Forced Arbitration

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# Working for Justice

## New York Prohibits Mandatory Arbitration of Sexual Harassment Claims

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Posted July 20th, 2018 by [Sanford Heisler Sharp, LLP](#) in [Gender Discrimination and Harassment](#).

The #MeToo movement has shined an unflattering light on employer-mandated arbitration agreements, which commonly prevent victims of sexual harassment from speaking publicly about their experiences. Mandatory and confidential arbitration has the effect of forcing women into silence, while allowing perpetrators to continue to harass and assault other employees. With the rise of the #MeToo movement, states have begun to enact laws that prohibit mandatory arbitration of sexual harassment cases.

In April, New York Governor Andrew Cuomo signed into law an Executive Budget with several provisions targeting workplace sexual harassment, including a new ban on mandatory arbitration of sexual harassment claims. This prohibition applies to contracts entered into on or after July 11, 2018 and also declares “null and void” “any cause or provision in *any contract* which requires . . . the parties submit to mandatory arbitration to resolve any allegation or claim of . . . sexual harassment.” N.Y.C.P.L.R. 7515(a)(2), 7515(a)(4)(b)(i)-(iii) (emphasis added). The new law does not apply to collective bargaining agreements or affect the arbitrability of claims unrelated to sexual harassment, such as pay discrimination lawsuits. Nevertheless, it is a step in the right direction.

And it is part of a nationwide trend. This past March, Washington enacted a law that severely restricts mandatory arbitration with respect to all forms of employment discrimination. Specifically, the law prohibits an employment contract from “requir[ing] an employee to waive the employee’s right to publicly pursue a cause of action . . . or [from] requir[ing] an employee to resolve claims of discrimination in a dispute resolution process that is confidential.” S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash 2018). A new law in Maryland—The Disclosing Sexual Harassment in the Workplace Act of 2018—precludes mandatory arbitration of sexual harassment claims by invalidating any “provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment.” 2018 Maryland Laws Ch. 739 (S.B. 1010). Other states, from South Carolina to California, are considering similar legislation and may soon follow suit.

One question that looms over such state laws is whether they are preempted, and thus nullified, by the Federal Arbitration Act (FAA). In a nod to this possibility, the New York statute states that it applies “except where inconsistent with federal law.” N.Y.C.P.L.R. 7515(a)(4)(b) (i). In recent years, the Supreme Court has treated the FAA as sacrosanct and interpreted it to mean that courts must “rigorously []

enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

Congress could resolve this problem by amending the FAA to outlaw mandatory arbitration of workplace sexual harassment claims. <sup>[1]</sup> If Congress fails to act, then, over the next couple of years, courts will determine the validity of state laws that prohibit mandatory arbitration of sexual harassment claims.

In the meantime, employees in New York, Washington, Maryland and states that follow their lead cannot be forced to sign away their right to bring sexual harassment claims in the courts. Moreover, employees in these states may have some basis for voiding past agreements to arbitrate sexual harassment claims.

<sup>[1]</sup> In February 2018, every single state attorney general signed onto a letter in support of such legislation to “help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.” The letter is available at: [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf).



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## #METOO, TIME'S UP, AND THEORIES OF JUSTICE

*Lesley Wexler\**

*Jennifer K. Robbennolt\*\**

*Colleen Murphy\*\*\**

*Allegations against movie mogul Harvey Weinstein and the ensuing #MeToo movement opened the floodgates to a modern-day reckoning with sex discrimination in the workplace. High-level and high-profile individuals across industries have been fired, been suspended, or resigned, while others accused of wrongdoing have faced no consequences, gotten slaps on the wrists, or ascended to the highest levels of power. At the same time, serious concerns have been raised about useful processes by which nonprivileged women and men can address harassment, due process for those accused of misconduct, and the need for proportionate consequences. And there have been calls for both restorative and transformative justice in addressing this problem. But these calls have not been explicit about what sort of restoration or transformation is envisioned.*

*This Article explores the meaning, utility, and complexities of restorative justice and the insights of transitional justice for dealing with sexual misconduct in the workplace. We begin by documenting the restorative origins of #MeToo as well as exploring steps taken, most prominently by Time's Up, to amplify and credit survivors' voices, seek accountability, change workplace practices, and encourage access to the legal system. We then take up the call for restorative justice by exploring its key components—including acknowledgement, responsibility-taking, harm repair, nonrepetition, and reintegration—with an eye toward how these*

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components might apply in the context of addressing sexual assault and harassment in the workplace and in the world at large.

We then turn to the insights of transitional justice. We identify several characteristics of transitional societies that are shared with the #MeToo setting, including widespread patterns of misconduct, structural inequalities, a history of denial, the normalization of wrongful behavior, and uncertainty about the way forward. We use these insights to provide guidance for ongoing reform efforts. First, we highlight the importance of including both forward-looking and backward-looking approaches to addressing wrongful behavior. Second, we emphasize the vital importance of including and addressing the interests of marginalized groups within the larger movement. Inclusion facilitates knowing about and acknowledging specific intersectional harms, and also models the kinds of equal relationships that individuals in marginalized groups seek. Third, we emphasize the need for holism in responses that attempt to spur societal change. #MeToo reformers must diversify their strategies and not over-rely on the promise of any particular form of justice.

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## I. INTRODUCTION

A growing number of high-profile incidents have recently drawn attention to sex discrimination in the workplace. Allegations against movie mogul Harvey Weinstein and the ensuing #MeToo movement opened the floodgates to a modern-day reckoning with sexist behavior. High-level and high-profile individuals across industries have been fired, been suspended, and resigned over their misdeeds,<sup>1</sup> while others accused of wrongdoing have faced no consequences, gotten slaps on the wrists, or ascended to the highest levels of power.<sup>2</sup> At the same time, serious concerns have been raised about realistic opportunities for nonprivileged women to address harassment, due process for those accused of misconduct, and the need for proportionate consequences. And there have been calls, most notably from actress Laura Dern in her acceptance speech at the Golden Globes, for the use of “restorative justice” as well as calls, most prominently from actress Minnie Driver, for a transformative justice process to address this problem.<sup>3</sup> But these calls have not been explicit about what sort of restoration or transformation is envisioned. This Article explores the meaning, utility, and complexities of restorative justice for dealing with sexual misconduct in the workplace. In addition, we draw on the insights of transitional jus-

1. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

2. Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html>; see also Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/>; Jenna Marotta, *Beyond Chris Hardwick and James Franco: 12 More Men Back at Work Following Their #MeToo Accusations*, INDIEWIRE (July 27, 2018, 9:00 AM), <https://www.indiewire.com/2018/07/chris-hardwick-james-franco-metoo-men-back-at-work-metoo-1201988069/>. Those allowed to retain their jobs with minor sanctions include our own colleague Jay Kesan. Julie Wurth, *Accusers: Sanctions Against UI Law Professor Fall Short*, CHAMPAIGN NEWS-GAZETTE (Oct. 19, 2018, 6:00 AM), <http://www.news-gazette.com/news/local/2018-10-19/accusers-sanctions-against-ui-law-professor-fall-short.html>.

3. Laura Bradley, *Golden Globes 2018: See Laura Dern’s Inspiring Acceptance Speech*, VANITY FAIR (Jan. 7, 2018, 9:38 PM), <https://www.vanityfair.com/hollywood/2018/01/golden-globes-2018-laura-dern-speech>; Kimiko de Freytas-Tamura, *Minnie Driver Calls for ‘Truth and Reconciliation’ Model to Combat Sexual Assault*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/world/europe/minnie-driver-metoo.html>.

tice to link the victim and perpetrator-oriented concerns of restorative justice with a broader aim of transformation.

In Part II, we document the mechanisms by which #MeToo has ignited a cultural reckoning and identify its restorative and transformative origins. We explore the steps that have been taken in the wake of the #MeToo naming and shaming campaign, most prominently by the Time's Up movement, to amplify and credit survivors' voices, seek accountability, change workplace practices, and encourage access to the legal system. We also note due process concerns about these efforts, including a particular concern with proportionate consequences for varied wrongdoing.

In Part III, we take up the call for restorative justice by exploring its key components—including acknowledgement, responsibility-taking, harm repair, nonrepetition, and reintegration—with an eye toward how these components might apply in the context of addressing sexual harassment in the workplace. In doing so, we examine several high-profile apologies and other responses to accusations of misconduct, consider the ways in which these responses succeed or fail on these restorative dimensions, and illustrate some of the potential and limits of offender reintegration.

In Part IV, we turn more broadly to a set of insights that come from the transitional justice literature which examines how nations respond to wrongdoing as they transition away from extended periods of conflict or oppression toward systems of democracy. By exploring this literature, we glean some lessons for the current societal transformation associated with the #MeToo movement. We explain why the settings of postconflict societies are appropriate places to look for lessons and warnings, noting that these transitions share some key features of the context of #MeToo. Such features include prevalent wrongdoing, structural inequalities, a history of denial, the normalization of wrongful behavior, and uncertainty about the way forward. In particular, we use Part IV as an opportunity to explain the importance of linking the sorts of individual responses to past wrongs detailed in Part III to the broader institutional reforms articulated in Part II.

We conclude with some guidance for ongoing reform efforts. First, we highlight the importance of incorporating both forward-looking and backward-looking approaches to addressing wrongdoing. Past #MeToo victims deserve justice, accountability, and attention to their harms just as reformers must set their sights on transforming society going forward. Second, we emphasize the vital importance of including and addressing the interests of marginalized groups within the larger movement for workplace and societal sex equality. An inclusive approach is necessary because it is important to know about, acknowledge, and address specific intersectional harms. Taking an inclusive approach also models the kinds of equal relationships that are appropriate across other dimensions such as race, sexual orientation, gender orientation, and disability. Third, we emphasize the need for holism and a range of different strategies in trying to spur societal change. A focus on a singular strategy—such as one rooted in access to litigation and prosecutions—may obscure larger

institutional and societal issues. But an approach that tries to bypass that strategy may miss the essential ways in which law structures interactions as well as the roadblocks and protections it offers to survivors, alleged perpetrators, and those found to be wrongdoers.

## II. A MODERN-DAY RECKONING

Several high-profile, pre-#MeToo incidents raised the profile of sex discrimination in the workplace. These include: the revelation of the toxic culture at Uber and the toppling of its CEO Travis Kalanick;<sup>4</sup> accusations by journalists Megyn Kelly and Gretchen Carlson of harassment by network head Roger Ailes and subsequent settlements with Fox News;<sup>5</sup> Bill O'Reilly's \$32 million sexual harassment settlement and Fox's subsequent decision to renew his contract;<sup>6</sup> the revelation that thousands of Marines used a private Facebook group to solicit and share naked photographs of servicewomen;<sup>7</sup> and Taylor Swift's countersuit against a DJ who grabbed her during a meet and greet.<sup>8</sup> Pay discrimination also captured the public's attention. Examples include: open discussion of the extreme pay gap on the movie *American Hustle*<sup>9</sup> and actress Jennifer Lawrence's subsequent essay about gendered negotiating in Hollywood;<sup>10</sup> tennis champion Serena Williams' essay on the pay gap for women of color across industries;<sup>11</sup> and actresses Robin Wright's and Emmy Rossum's highly publicized demands for pay equity on their hit television shows.<sup>12</sup>

Other instance of wrongdoing in the headlines pre-#MeToo involved sexual misconduct outside the workplace. Nineteen women have raised allegations

4. Editorial Board, *Uber's Sexism Lesson: How Not to Build a Tech Company*, CHI. TRIB. (June 16, 2017, 11:48 AM), <http://www.chicagotribune.com/news/opinion/editorials/ct-uber-tech-culture-sexism-edit-0618-md-20170616-story.html>; Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN J. FOWLER (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>.

5. Michael M. Grynbaum & John Koblin, *Fox Settles with Gretchen Carlson over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html>.

6. Paul Farhi, *Report: Bill O'Reilly Settled Sexual Harassment Claim from Fox News Contributor for \$32 Million*, WASH. POST (Oct. 21, 2017), [https://www.washingtonpost.com/lifestyle/style/bill-oreilly-settled-sixth-sexual-harassment-claim-for-32-million/2017/10/21/ff34b24c-b68c-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.eb9411ba80b3](https://www.washingtonpost.com/lifestyle/style/bill-oreilly-settled-sixth-sexual-harassment-claim-for-32-million/2017/10/21/ff34b24c-b68c-11e7-9e58-e6288544af98_story.html?utm_term=.eb9411ba80b3).

7. Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL NEWS (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/>.

8. Lesley Wexler, *Ideal Victims and the Damage of a Damage Free Victory*, VERDICT (Sept. 29, 2017), <https://verdict.justia.com/2017/09/29/ideal-victims-damage-damage-free-victory>.

9. This pay gap was exposed by the Korean hack of the Sony corporation. The issue dominated a Hollywood Roundtable among top executives. Pamela McClintock & Kim Masters, *Studio Chiefs Unleashed: 6 Top Execs Spar over Gender Pay, Sony Hack and 'Star Wars' Box Office*, HOLLYWOOD REP. (Nov. 4, 2015, 10:00 AM), <https://www.hollywoodreporter.com/features/studio-chiefs-unleashed-6-top-836272>.

10. Jennifer Lawrence, *Jennifer Lawrence: "Why Do I Make Less than My Co-Stars?"*, LENNY (Oct. 13, 2015), <https://www.lennyletter.com/story/jennifer-lawrence-why-do-i-make-less-than-my-male-costars>.

11. Serena Williams, *Serena Williams: How Black Women Can Close the Pay Gap*, FORTUNE (July 31, 2017), <http://fortune.com/2017/07/31/serena-williams-black-women-equal-pay/>.

12. L.V. Anderson, *Emmy Rossum Reportedly Got the Equal Pay She Asked for on Shameless*, SLATE (Dec. 15, 2016, 3:37 PM), [http://www.slate.com/blogs/xx\\_factor/2016/12/15/emmy-rossum\\_reportedly\\_got\\_the\\_equal\\_pay\\_she\\_asked\\_for\\_on\\_shameless.html](http://www.slate.com/blogs/xx_factor/2016/12/15/emmy-rossum_reportedly_got_the_equal_pay_she_asked_for_on_shameless.html).



of sexual misconduct against candidate and now-President Trump.<sup>13</sup> More than fifty women had accused comedian Bill Cosby of sexual misconduct;<sup>14</sup> and his former mentee, Andrea Constad, had brought a sexual assault case.<sup>15</sup> The criminal and civil cases against sports physician Larry Nassar for the sexual abuse of numerous gymnasts and other athletes at Michigan State University and USA Gymnastics were already drawing national attention.<sup>16</sup> The victim impact statement of one anonymous rape victim, Emily Doe, went viral, generating a public backlash against the six-month prison sentence given to her rapist, Brock Turner.<sup>17</sup>

While all of these events, along with countless other lower profile incidents, set the stage, the efforts of victims like actresses Ashley Judd and Rose McGowan and the related *New York Times* and *New Yorker* exposés<sup>18</sup> on Harvey Weinstein opened the floodgates to the modern-day reckoning with sexual and sexist abuse in the workplace as well as questions of workplace consequences for sexist nonworkplace behavior.

#### A. #MeToo: Naming and Shaming

Shortly after the Weinstein story broke, actress Alyssa Milano asked Twitter users to respond using the hashtag #MeToo if they had been sexually harassed or assaulted.<sup>19</sup> Reports flowed in of the all-too-common harassment and physical abuse many experience in the workplace.<sup>20</sup> Some of the reports tagged with #MeToo included workplace behavior that would not violate

13. Matt Ford, *The 19 Women Who Accused President Trump of Sexual Misconduct*, ATLANTIC (Dec. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/12/what-about-the-19-women-who-accused-trump/547724/>.

14. Carly Mallenbaum, Patrick Ryan & Maria Puente, *A Complete List of the 60 Bill Cosby Accusers and Their Reactions to His Prison Sentence*, USA TODAY (Sept. 26, 2018, 11:27 AM), <https://www.usatoday.com/story/life/people/2018/04/27/bill-cosby-full-list-accusers/555144002/>.

15. Manuel Roig-Franzia, *Bill Cosby Convicted on Three Counts of Sexual Assault*, WASH. POST (Apr. 26, 2018), [https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1f1ee\\_story.html?noredirect=on&utm\\_term=.232e7e32e422](https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1f1ee_story.html?noredirect=on&utm_term=.232e7e32e422). Cosby's first trial had ended with a hung jury. Hannah Rappleye & Tracy Connor, *Bill Cosby Sexual Assault Trial Ends in Mistrial*, NBC (June 17, 2017, 9:22 AM), <https://www.nbcnews.com/storyline/bill-cosby-scandal/hung-jury-bill-cosby-sexual-assault-trial-ends-mistrial-n772106>.

16. Alice Park, *Who Is Larry Nassar, the Former USA Gymnastics Doctor Aly Raisman Accuses of Sexual Abuse?*, TIME (Nov. 10, 2017, 9:14 AM), <http://time.com/4988116/larry-nassar-mckayla-maroney-sexual-abuse-doctor-usa-gymnastics/>.

17. Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.njPPvEmgN#.unedmWwQy](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.njPPvEmgN#.unedmWwQy).

18. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

19. Sophie Gilbert, *The Movement of #MeToo: How a Hashtag Got Its Power*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>.

20. *Id.*

criminal or civil laws, workplace conduct that was abusive but not sexual or sexist in nature, and sexually violative or sexist behavior in nonworkplace settings.<sup>21</sup> Within twenty-four hours, the hashtag had been posted over half a million times and people started sharing details of their abuse across social media platforms.<sup>22</sup> Alyssa Milano's #MeToo was not styled as a social movement and "[wa]sn't a call to action or the beginning of a campaign, culminating in a series of protests and speeches and events. It [wa]s simply an attempt to get people to understand the prevalence of sexual harassment and assault in society. To get women, and men, to raise their hands."<sup>23</sup> In other words, it was intended to be informative and perhaps enhance the believability of victims.

The seeming apoliticism of #MeToo collided almost immediately with activist Tarana Burke's pre-existing "Me Too" social movement which focuses on women of color and people in marginalized communities and uses self-identification as a way to build bridges among survivors.<sup>24</sup> Burke quickly tied the two MeToo's together, tweeting, "It's beyond a hashtag. It's the start of a larger conversation and a movement for radical community healing. Join us. #metoo."<sup>25</sup> Even as she used #MeToo to gain visibility, Burke views her Me Too work as inherently different from the hashtag campaign and focused on distinct goals.<sup>26</sup> Burke's vision of #MeToo is not about "taking down powerful white men and tearing down their name"<sup>27</sup> but is instead focused on the survivors<sup>28</sup> and on community healing.<sup>29</sup> Even as she emphasizes the role of and focus on survivors, she also recognizes the value of addressing the systems and structures that allow harassment and sexual violence to flourish.<sup>30</sup> Such a vision

21. See, e.g., Emma Gray, *On Aziz Ansari and Sex that Feels Violating Even When It's Not Criminal*, HUFF. POST (Jan. 16, 2018, 2:37 PM), [https://www.huffingtonpost.com/entry/aziz-ansari-sex-violating-but-not-criminal\\_us\\_5a5e445de4b0106b7f65b346](https://www.huffingtonpost.com/entry/aziz-ansari-sex-violating-but-not-criminal_us_5a5e445de4b0106b7f65b346).

22. Gilbert, *supra* note 19.

23. *Id.*

24. Zenobia Jeffries, *Me Too Creator Tarana Burke Reminds Us This Is About Black and Brown Survivors*, YES! MAG. (Jan. 4, 2018), <https://www.yesmagazine.org/people-power/me-too-creator-tarana-burke-reminds-us-this-is-about-black-and-brown-survivors-20180104>.

25. Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It 10 Years Ago*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm\\_term=.951364a29166](https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.951364a29166).

26. Jeffries, *supra* note 24.

27. Erica Carter, *#MeToo Founder Tarana Burke Speaks at Kent State*, KENTWIRED (Apr. 17, 2018), [http://www.kentwired.com/latest\\_updates/article\\_519dcd3a-4250-11e8-9349-cfd9e886110a.html](http://www.kentwired.com/latest_updates/article_519dcd3a-4250-11e8-9349-cfd9e886110a.html).

28. Annie Sciacca, *#MeToo Founder Tarana Burke in East Bay: It's Not About Taking Down Powerful Men*, EAST BAY TIMES (Apr. 15, 2018, 7:08 PM), <https://www.eastbaytimes.com/2018/02/28/me-too-founder-tarana-burke-speaks-to-bay-area-crowd-at-saint-marys-college/>.

29. Alex Tsai, *'Me Too' Activist Uses Social Justice as a Path to Healing*, STANFORD DAILY (May 30, 2018), <https://www.stanforddaily.com/2018/05/30/me-too-activist-uses-social-justice-as-a-path-to-healing/>.

30. Jennifer Smola, *Founder of 'Me Too' Movement Fears Narrative Being Hijacked from Helping Survivors Heal*, COLUMBUS DISPATCH (Apr. 23, 2018, 8:26 PM), <http://www.dispatch.com/news/20180423/founder-of-me-too-movement-fears-narrative-being-hijacked-from-helping-survivors-heal> ("This is about systems. There were systems in place that allowed [perpetrators of sexu-

does not preclude individual accountability, but recenters such efforts as part of survivors' agency and healing.<sup>31</sup> Thus, Burke's vision of healing seems to include: creating connections and sharing empathy among survivors; external recognition of victims by the community; discussions of accountability, transparency, and vulnerability by perpetrators; and considerations of how "collectively, to start dismantling these systems that uphold and make space for sexual violence."<sup>32</sup>

The combination of #MeToo's shift to the outing of specific wrongdoers,<sup>33</sup> investigative journalism,<sup>34</sup> and enhanced public scrutiny has led to the firing, suspension, or resignation of high-level and high-profile individuals across industries, including government and politics,<sup>35</sup> acting and producing,<sup>36</sup> comedy,<sup>37</sup> media,<sup>38</sup> food,<sup>39</sup> music,<sup>40</sup> photography,<sup>41</sup> and venture capital.<sup>42</sup> Even a few

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al violence] to behave the way they behaved . . . It has to be a movement about how we dismantle the systems, not the individuals.").

31. For instance, in discussing Harvey Weinstein's arrest, she emphasized that "[t]his is not a moment to revel in how the mighty have fallen but instead in how the silenced have spoken up, stood together and survived." *Reaction to Criminal Charges Filed in New York Against Harvey Weinstein*, ASSOC. PRESS (May 25, 2018), <https://apnews.com/a38564e509e24909b3bcc0c24cc706b4>.

32. Daisy Murray, 'Empowerment Through Empathy'—We Spoke to Tarana Burke, the Woman Who Really Started the 'Me Too' Movement, ELLE (Oct. 23, 2017), <https://www.elle.com/uk/life-and-culture/culture/news/a39429/empowerment-through-empathy-tarana-burke-me-too/>.

33. Jessica Valenti, *#MeToo Named the Victims. Now, Let's List the Perpetrators*, GUARDIAN (Oct. 17, 2017, 2:00 PM), <https://www.theguardian.com/commentisfree/2017/oct/16/me-too-victims-perpetrators-sexual-assault>.

34. Mike Dang, *Longreads Best of 2017: Investigative Reporting on Sexual Misconduct*, LONGREADS (Dec. 15, 2017), <https://longreads.com/2017/12/15/longreads-best-of-2017-investigations-sexual-misconduct/>.

35. Katie Bender, *At the Justice Dept.'s Death Penalty Unit, Accusations of Favoritism, Gender Bias, and Unwanted Groping*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/politics/justice-department-harassment-bias.html>; Maggie Haberman, Julie Hirschfield Davis & Michael S. Schmidt, *Kelly Says He's Willing to Resign as Abuse Scandal Roils White House*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/us/politics/trump-porter-abuse.html> (mentioning Rob Porter and David Sorensen); *Sexual Abusers of 2017*, ULTRAVIOLET (Dec. 29, 2017), <https://weareultraviolet.org/men-accused-sexual-abuse-2017/> (mentioning Al Franken, John Conyers, Trent Franks, and Tony Cornish).

36. Consequence of Sound Staff, *A Running List of All the Dudes Accused of Sexual Misconduct Since Harvey Weinstein*, CONSEQUENCE OF SOUND (Jan. 27, 2018, 10:40 PM), <https://consequenceofsound.net/2018/01/a-running-list-of-all-the-dudes-accused-of-sexual-misconduct-since-harvey-weinstein/> (including Kevin Spacey, Jeffrey Tambor, James Toback, Roy Price, John Lasseter, and Mark Schwan).

37. In addition to Louis C.K., comedian T.J. Miller is facing employment consequences. Chris Pleasance, *TJ Miller Is Replaced as the Spokesman for Mucinex After Being Accused of Hitting and Sexually Assaulting an Ex-Girlfriend*, DAILY MAIL (Feb. 7, 2018, 7:03 AM), <https://www.dailymail.co.uk/news/article-5362259/TJ-Miller-replaced-Mucinex-spokesman-sex-claims.html>.

38. Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC (Nov. 8, 2017, 3:50 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> (including Matt Lauer, Charlie Rose, Mark Halperin, Leon Wisetler, Glenn Thrush, Tavis Smiley, and Ryan Lizza); Ben Sisario, *What Makes Public Radio 'Very Personal' Magnifies Its #MeToo Cases*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/business/media/public-radio-metoo-harassment.html> (including Garrison Keillor, Leonard Lopate, Jonathan Schwartz, John Hockenberry, Michael Oreskes, David Sweeney, Daniel Zwerdling, Charlie Rose, and Tom Ashbrook).

39. Kim Severson, *After Apologies, Restaurants Struggle to Change*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/dining/restaurants-sexual-harassment.html> (including John Besh, Charlie Halliwell, Ken Friedman and Mario Batali). For a scathing takedown of Mario Batali's apology, see Geraldine DeRuiter, *I Made the Pizza Cinnamon Rolls from Mario Batali's Sexual Misconduct Apology Letter*, MEDIUM

individuals in fields with extensive workplace protections such as academia<sup>43</sup> and the judiciary<sup>44</sup> have been brought low.

Even as a house cleaning is necessary, many worry that #MeToo's victories will be short-lived in the absence of deeper structural and cultural changes.<sup>45</sup> Public shaming, for example, may not be a robust option for most employees because of the low profile of those involved.<sup>46</sup> Highlighting this point, Alianza Nacional de Campesinas, representing 700,000 farmworkers, penned a public letter of solidarity to Hollywood women that noted the additional difficulties that nonprivileged women face in choosing to name their abusers.<sup>47</sup> In addition, the naming and shaming campaign does not solve ongo-

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(Jan. 10, 2018), <https://medium.com/@everywhereist/i-made-the-pizza-cinnamon-rolls-from-mario-batalis-sexual-misconduct-apology-letter-ef927659cab6>; see also Helen Rosner, *The Moral Responsibility of Restaurant Critics in the Age of #MeToo*, NEW YORKER (Feb. 15, 2018), <https://www.newyorker.com/culture/annals-of-gastronomy/the-role-of-the-restaurant-critic-in-the-age-of-metoo>; Julia Moskin & Kim Severson, *Ken Friedman, Power Restaurateur, Is Accused of Sexual Harassment*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/dining/ken-friedman-sexual-harassment.html?module=inline>.

40. Chloe Cornish & Lauren Leatherby, *Who Are the Men Accused of Sexual Harassment?*, FIN. TIMES (Dec. 8, 2017), <https://www.ft.com/content/204ab48c-d54f-11e7-a303-9060cb1e5f44> (discussing Russell Simmons and James Levine).

41. Vanessa Friedman & Elizabeth Paton, *Terry Richardson Is Just the Tip of the Iceberg*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/style/terry-richardson-sexual-harassment-fashion-photographers.html>.

42. Cornish & Leatherby, *supra* note 40.

43. Associated Press, *Dean Accused of Misconduct Gets New NKU Job After Resigning*, U.S. NEWS & WORLD REPORT (Feb. 22, 2018, 3:48 AM), <https://www.usnews.com/news/best-states/kentucky/articles/2018-02-22/dean-accused-of-misconduct-gets-new-nku-job-after-resigning> (discussing resignation of a Law Dean in the wake of a University finding of "sufficient evidence to support a finding of unhealthy culture of fear, intimidation and bullying" but insufficient evidence for a sexual misconduct complaint); Vivian Wang, *At Columbia, Three Women, 30 Years and a Pattern of Harassment*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/nyregion/columbia-university-sexual-harassment-three-decades.html>. But, for a more typical case, see Tom Bartlett & Nell Gluckman, *She Left Harvard. He Got to Stay.*, CHRON. HIGHER EDUC. (Feb. 27, 2018), <https://www.chronicle.com/interactives/harvard-harassment.include>; see also Wurth, *supra* note 2. See generally Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671 (2018).

44. Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.203c36f41f26](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.203c36f41f26).

45. Take, for example, the difficulties of overhauling sexist workplace culture at blue collar mainstays like Ford even in the wake of successful lawsuits and Ford's subsequent apology. Susan Chira & Catrin Einhorn, *Ford Apologizes for Sexual Harassment at Chicago Factories*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/ford-apology-sexual-harassment.html>; Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>.

46. Amelia Harnish, *The Post-Weinstein Reckoning: What Do We Do Now?*, REFINERY29 (Nov. 29, 2017, 4:20 PM), <https://www.refinery29.com/en-gb/2017/11/183159/after-me-too-punishment-accountability-what-to-do-next>; see also Nathan Heller, *The Gig Economy Is Especially Susceptible to Sexual Harassment*, NEW YORKER (Jan. 25, 2018), <https://www.newyorker.com/culture/cultural-comment/the-gig-economy-is-especially-susceptible-to-sexual-harassment>.

47. Alianza Nacional de Campesinas, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/>; see also *The Silence Breakers: The Voices that Launched a Movement*, TIME (Dec.

ing proximity and safety concerns or address questions of workplace protections for the accusers.<sup>48</sup> Scholars have voiced further concern that the naming, shaming, and firing cycle could crowd out less visible efforts focused on structural changes.<sup>49</sup>

A related, but distinct, criticism about privilege suggests that #MeToo mostly benefits heterosexual, cisgender, white women.<sup>50</sup> When #MeToo first went viral, the call for women to name their experiences was thought to exclude men, and gay men in particular; trans and nonbinary persons; as well as lesbians and other individuals who suffered abuse at the hands of women.<sup>51</sup> This led to calls for more inclusive language and a more inclusive campaign generally.<sup>52</sup>

Even as some men have felt comfortable sharing their stories,<sup>53</sup> some have also suggested that trans, nonbinary persons, and women of color should be foregrounded as they are more likely to be abused, less likely to be believed,

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18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> (depicting on its cover, the elbow of a symbolic silence breaker who wished to remain anonymous).

48. MAYA RAGHU & JOANNA SURIANI, NAT'L WOMEN'S LAW CTR., #METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY 1–2 (Dec. 2017). Some international settings magnify such concerns where outing a harasser could lead to retaliation and even honor killings. Alice Rowsome, *Why the #MeToo Movement Has Failed to Take off in Afghanistan*, VICE IMPACT (Jan. 17, 2018, 1:15 PM), [https://impact.vice.com/en\\_us/article/qvwmz5/why-the-metoo-movement-has-failed-to-take-off-in-afghanistan](https://impact.vice.com/en_us/article/qvwmz5/why-the-metoo-movement-has-failed-to-take-off-in-afghanistan).

49. Rebecca Hamilton, *No, Naming and Shaming Sexual Offenders Doesn't Always Help*, WASH. POST (Dec. 21, 2017), [https://www.washingtonpost.com/outlook/no-naming-and-shaming-sexual-offenders-doesnt-always-help/2017/12/21/4210486c-e5bb-11e7-ab50-621fe0588340\\_story.html?utm\\_term=.71fc065240ba](https://www.washingtonpost.com/outlook/no-naming-and-shaming-sexual-offenders-doesnt-always-help/2017/12/21/4210486c-e5bb-11e7-ab50-621fe0588340_story.html?utm_term=.71fc065240ba) (such efforts might include reshaping HR departments so as to avoid a conflict of interest, enhancing access to legal services, and increasing the ranks of women in leadership roles).

50. See generally Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105 (2018). Some women of color have been reluctant to support MeToo campaigns when they feel insufficiently supported by white women allies. *Id.* at 106.

51. Sam Hope, *Me Too: LGBTQ+ People and Sexual Assault*, THE QUEERNESS (Oct. 17, 2017, 4:39 PM), <https://thequeerness.com/2017/10/17/me-too-lgbtq-people-and-sexual-assault/>.

52. Kyli Rodriguez-Cayro, *Some Members of the LGBTQ Community Feel Excluded by the Me Too Hashtag, & It's a Reminder of How Important Inclusive Language Is*, BUSTLE (Oct. 19, 2017), <https://www.bustle.com/p/some-members-of-the-lgbtq-community-feel-excluded-by-the-me-too-hashtag-its-a-reminder-of-how-important-inclusive-language-is-2953162>.

53. Actor Anthony Rapp led the charge on Kevin Spacey's predatory behavior and inspired Terry Crews to come forward and to file a lawsuit against agent Adam Venit. *Star Trek's Anthony Rapp Reveals What Drove Him to Go Public with Kevin Spacey Allegation*, ATTITUDE (Jan. 8, 2018), <https://attitude.co.uk/article/star-treks-anthony-rapp-reveals-what-drove-him-to-go-public-with-kevin-spacey-allegation/16724/>; Michel Martin, *Terry Crews on His Sexual Assault Lawsuit: This Is About Accountability*, NPR (Dec. 10, 2017, 6:43 PM), <https://www.npr.org/2017/12/10/569682236/terry-crews-on-his-sexual-assault-lawsuit-this-is-about-accountability>;

see also Zach Baron, *What Ever Happened to Brendan Fraser?*, GQ (Feb. 22, 2018), <https://www.gq.com/story/what-ever-happened-to-brendan-fraser>; Anthony Edwards, *Yes Mom, There Is Something Wrong*, MEDIUM (Nov. 10, 2017), <https://medium.com/@anthonyedwards/yes-mom-there-is-something-wrong-f2bcf56434b9>; Johnathon Schaech, *Actor Johnathon Schaech: I Was Molested by Director Franco Zeffirelli*, PEOPLE (Jan. 11, 2018, 8:30 AM), <https://people.com/movies/johnathon-schaech-molested-franco-zeffirelli/>; James Van Der Beek, *James Van Der Beek on Twitter Backlash: "Should I Have Just Shut Up?"*, GLAMOUR (Jan. 23, 2018, 8:00 AM), <https://www.glamour.com/story/james-van-der-beek-me-too-movement>.

and less likely to garner media or social attention.<sup>54</sup> Even for cisgender women of color who seem to fall squarely within the MeToo ambit, their access to “believability, sympathy and public rage” seems much more limited.<sup>55</sup> MeToo creator Tarana Burke contends that too often black women and girls are viewed as inherently sexual and so are both more likely to be harassed and less likely to be heard.<sup>56</sup> In addition, they may fear contributing to racial stereotyping and face pressure not to name same-race aggressors lest the community be further marginalized.<sup>57</sup> Consider, for example, the absence of strong public support for musician R. Kelly’s alleged victims;<sup>58</sup> the relative lack of outrage at hip hop mogul Russell Simmons—who has been accused of multiple rapes;<sup>59</sup> avowed feminist Lena Dunham’s initial defense of a white producer against minority actress Aurora Perrineau’s rape accusations;<sup>60</sup> and scholars’ defense of academic Avital Ronell, contending that Title IX ought not be deployed against a woman and engaging in victim-blaming of queer male graduate student Nimrod Reitman.<sup>61</sup>

Society has also grappled with how to define and limit the appropriate scope of this transitional movement. For instance, should the #MeToo conversation and attendant reforms include nonworkplace-related sexual or sexist encounters? While most accept domestic violence as within #MeToo’s purview,

54. Susan Cheng, *Asian-American Women in Hollywood Say It's Twice as Hard for Them to Say #MeToo*, BUZZFEED NEWS (Feb. 24, 2018, 7:28 AM), [https://www.buzzfeed.com/susancheng/what-metoo-means-for-asian-american-women-in-hollywood?utm\\_term=.frXQYP48A#fgB19ojJ4](https://www.buzzfeed.com/susancheng/what-metoo-means-for-asian-american-women-in-hollywood?utm_term=.frXQYP48A#fgB19ojJ4); Meredith Talusan, *How #MeToo Stands to Marginalize Trans and Gender-Nonconforming People*, THEM (Oct. 27, 2017), <https://www.them.us/story/how-metoo-stands-to-marginalize>.

55. Gillian B. White, *The Glaring Blind Spot of the 'Me Too' Movement*, ATLANTIC (Nov. 22, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/the-glaring-blind-spot-of-the-me-too-movement/546458/>.

56. *The Founder of #MeToo Doesn't Want Us to Forget Victims of Color*, PBS NEWSHOUR (Nov. 15, 2017, 6:35 PM), <https://www.pbs.org/newshour/show/the-founder-of-metoo-doesnt-want-us-to-forget-victims-of-color>.

57. Shree Paradkar, *#MeToo Opens Door to Voices of Women of Colour: Paradkar*, STAR (Oct. 21, 2017), <https://www.thestar.com/news/gta/2017/10/21/metoo-opens-door-to-voices-of-women-of-colour-paradkar.html>.

58. Danielle Jackson, *In the Wake of Weinstein and #MeToo, Why Does R. Kelly Still Have an Audience?*, LONGREADS (Nov. 8, 2017), <https://longreads.com/2017/11/08/in-the-wake-of-weinstein-and-metoo-why-does-r-kelly-still-have-an-audience/>; Jason Newman, *Surviving R. Kelly*, ROLLING STONE (Oct. 23, 2017, 5:49 PM), <https://www.rollingstone.com/culture/culture-features/surviving-r-kelly-118608/>.

59. Shanita Hubbard, *Russell Simmons, R. Kelly, and Why Black Women Can't Say #MeToo*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/opinion/russell-simmons-black-women-metoo.html>.

60. Christie D’Zurilla, *Lena Dunham Accused of 'Hipster Racism' After She Initially Defended 'Girls' Writer*, L.A. TIMES (Nov. 20, 2017, 10:38 AM), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-lena-dunham-accused-of-hipster-racism-1511203068-htmlstory.html>; Whitney Kimball, *Zinzi Clemmons: 'It's Time for Women of Color...to Divest from Lena Dunham'*, JEZEBEL (Nov. 19, 2017, 1:41 PM), <https://jezebel.com/zinzi-clemmons-its-time-for-women-of-color-to-divest-1820587768>.

61. Zoe Greenberg, *What Happens to #MeToo When a Feminist Is the Accused?*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>. Professor and Modern Language Association President Judith Butler has since partially apologized for the letter she wrote in support of Ronell. *Judith Butler Explains Letter in Support of Avital Ronell*, CHRON. HIGHER ED. (Aug. 20, 2018), <https://www.chronicle.com/blogs/letters/judith-butler-explains-letter-in-support-of-avital-ronell/>.

fierce national public debate ensued<sup>62</sup> when *Babe* magazine detailed a woman's description of her nonwork-related date with actor Aziz Ansari as a sexual assault.<sup>63</sup> Critics characterized the account as "revenge porn" with Ansari as the victim<sup>64</sup> and as a setback for #MeToo by characterizing women as helpless and disempowered.<sup>65</sup> Some celebrated the inclusion of lawful but awful sex,<sup>66</sup> and the need for affirmative, enthusiastic consent as part of the #MeToo public discourse,<sup>67</sup> while others wanted to police the line between #MeToo victims of sexual predators and those subject to seeming miscommunications about sexual expectations.<sup>68</sup> Other questions of scope include questions of which workplaces matter, with sex workers<sup>69</sup> and victims of prison rape<sup>70</sup> questioning whether their narratives are welcomed. There are also questions of whether abusive but nonsexual encounters in the workplace count<sup>71</sup> and whether harassment and violence condoned but not caused by employers or employees, such as customer

62. See, e.g., *The Fine Line Between a Bad Date and Sexual Assault: 2 Views on Aziz Ansari*, NPR (Jan. 16, 2018, 4:34 PM), <https://www.npr.org/2018/01/16/578422491/the-fine-line-between-a-bad-date-and-sexual-assault-two-views-on-aziz-ansari>.

63. Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, *BABE* (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>.

64. Caitlin Flanagan, *The Humiliation of Aziz Ansari*, *ATLANTIC* (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>.

65. Bari Weiss, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader.*, *N.Y. TIMES* (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>.

66. Lexy Perez, *Amy Schumer Talks Friend Aziz Ansari's Sexual Misconduct Claim*, *HOLLYWOOD REP.* (Feb. 1, 2018, 8:50 AM), <https://www.hollywoodreporter.com/news/amy-schumer-talks-friend-aziz-ansari-sexual-misconduct-claim-1080874> (Schumer described Aziz's behavior as, "It's not a crime, but it's not cool.").

67. Fiona Chen, *Why the Aziz Ansari Story and Discussions of Grey Areas Are Central to the #MeToo Movement*, *THE TECH* (Jan. 25, 2018), <https://thetech.com/2018/01/25/me-too-aziz-ansari>; Jessica Valenti (@JessicaValenti), *TWITTER* (Jan. 14, 2018, 9:50 AM), <https://mobile.twitter.com/JessicaValenti/status/952568652066443264>; Lindy West, *Aziz, We Tried to Warn You*, *N.Y. TIMES* (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/opinion/aziz-ansari-metoo-sex.html>; Brittany Wong, *What Therapists Want Us to Know About Aziz Ansari, 'Bad Sex' and #MeToo*, *HUFF. POST: LIFE* (Feb. 2, 2018), [https://www.huffpost.com/entry/therapists-on-aziz-ansari-me-too\\_n\\_5a6f6ed3e4b01fbbe4b934](https://www.huffpost.com/entry/therapists-on-aziz-ansari-me-too_n_5a6f6ed3e4b01fbbe4b934).

68. Justin Duyao, *Different Perspectives: Aziz Ansari: He Is Not a Predator*, *BISON* (Feb. 15, 2018), <https://thelink.harding.edu/the-bison/2018/02/15/different-perspectives-aziz-ansari-he-is-not-a-predator/>. Some have suggested that rather than limiting #MeToo to sexual violence and misconduct or even to questions of legal permission, #MeToo is well positioned to open the frontier on the societal need for mutual pleasure in sexual contact. Zosia Bielski, *The Next Frontier in Consent: Better Sex*, *GLOBE & MAIL* (Jan. 22, 2018), <https://www.theglobeandmail.com/life/relationships/the-next-frontier-in-consent-better-sex/article37681221/>.

69. Samantha Cooney, *Sex Workers Say They're Being Left Out of the #MeToo Movement*, *TIME* (Feb. 13, 2018), <http://time.com/5104951/sex-workers-me-too-movement/>; Kyli Rodriguez-Cayro, *Sex Workers Can Be Sexually Assaulted Too, and We Need to Talk About It*, *BUSTLE* (Apr. 24, 2018), <https://www.bustle.com/p/sex-workers-can-be-sexually-assaulted-too-we-need-to-talk-about-it-7551815>.

70. Natasha Lennard, *Will the Prison Rape Epidemic Ever Have Its Weinstein Moment*, *INTERCEPT* (Nov. 21, 2017, 3:08 PM), <https://theintercept.com/2017/11/21/prison-rape-sexual-assault-violence/>.

71. Take, for example, actor Jeffrey Tambor's angry explosion at colleague Jessica Walters on the set of *Arrested Development*. Lili Loofbourow, *The Boys of Arrested Development*, *SLATE* (May 25, 2018, 9:06 PM), <https://slate.com/culture/2018/05/arrested-development-interview-the-cast-is-a-boys-club.html>.

harassment in hotels or harassment within church youth groups, is included.<sup>72</sup> As #MeToo is a diffuse, bottom-up movement, it seems likely that people in varied circumstances will continue to name and shame their #MeToo perpetrators, but it is too early to tell whether those outside the mainstream ideal victim will get equivalent public traction.

We turn next to a case study of Hollywood to get a sense of developing legal, structural, and cultural reforms designed to fundamentally alter working conditions for women.

### B. *An Industry Case Study: Hollywood*

The Time's Up Initiative, created by female Hollywood insiders,<sup>73</sup> offers one path for building on this momentum and moving beyond the limitations of naming and shaming. The focus of Time's Up is on "sexual assault, harassment and inequality in the workplace."<sup>74</sup> Its aims include the amplification and believability of survivors' voices, the conclusion that "accountability is possible," and access to justice and support for victims.<sup>75</sup> Rather than rely solely on social denunciation, this collective has decided to "partner with leading advocates for equality and safety to improve laws, employment agreements, and corporate policies; help change the face of corporate boardrooms and the C-suite; and enable more women and men<sup>76</sup> to access our legal system to hold wrongdoers accountable."<sup>77</sup> The organization has multiple working groups, including one designed to amplify the voices of "minorities and gays, lesbians, bisexuals and transgender people."<sup>78</sup> In the subsections below, we survey some of their early efforts.

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72. Becca Andrews, *As a Teen, Emily Joy Was Abused by a Church Youth Leader. Now She's Leading a Movement to Change Evangelical America.*, MOTHER JONES (May 25, 2018, 6:00 AM), <https://www.motherjones.com/crime-justice/2018/05/evangelical-church-metoo-movement-abuse/>.

73. Brittany Martin, *Here's the Story Behind Time's Up, Hollywood's Anti-Sexual Harassment Movement*, L.A. MAG. (Jan. 8, 2018), <http://www.lamag.com/culturefiles/times-up-golden-globes/> (noting that the efforts were spurred by a solidarity letter from blue collar working women).

74. *Our Letter of Solidarity*, TIME'S UP (Jan. 1, 2018), <https://www.timesupnow.com/>.

75. *Id.*

76. While Time's Up advocates focus on women, their materials include references to assaults on men and include men as survivors. See, e.g., TIME'S UP, <https://www.timesupnow.com/> (last visited Dec. 7, 2018). Although the website is centered on women's experiences and needs, it also notes that its funds "enable more women and men to access our legal system to hold wrongdoers accountable." *Id.*; see also Lena Wilson, *Ashley Judd Addresses Sexual Misconduct Survivors at Tribeca Film Festival for Time's Up*, SLATE (Apr. 28, 2018, 7:02 PM), <https://slate.com/culture/2018/04/at-tribeca-film-festival-ashley-judd-reads-a-letter-to-sexual-misconduct-survivors-for-times-up.html>.

77. TIME'S UP, *supra* note 74.

78. Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html>.



## I. Law

### a. Enhancing Access

To achieve these various goals, Time's Up is delivering information on sexual harassment and how to address it, raising money to subsidize legal support for affected individuals, and providing access to additional resources. For instance, hundreds of lawyers have offered support to Time's Up in the form of pro bono assistance to help victims pursue claims.<sup>79</sup> Because many victims face additional hurdles in their pursuit of litigation,<sup>80</sup> Time's Up may also attempt to prevent companies from drafting contracts that force harassment and discrimination claims into arbitration.<sup>81</sup>

Since its founding, Time's Up has raised \$22 million dollars for its Legal Defense fund, coordinated 700 volunteer attorneys, and begun the disbursement of funds to over 2,500 people.<sup>82</sup> Most of those requesting assistance are low income wage earners,<sup>83</sup> including plaintiffs at Wal-Mart and McDonalds,<sup>84</sup> but Time's Up has also financed some higher profile individuals, such as Moira Donegan, the compiler and disseminator of the Google document "Shitty Media Men," to enable her to defend herself against a defamation suit brought by a man who contests his appearance on the list.<sup>85</sup>

79. For instance, hundreds of lawyers have offered support in the form of pro bono assistance to help victims pursue claims. Stephanie Russell-Kraft, *Hundreds of Attorneys Join Time's Up Legal Defense Fund*, U.S.L.W. (Jan. 29, 2018, 6:46 PM), <https://news.bloomberglaw.com/us-law-week/hundreds-of-attorneys-join-times-up-legal-defense-fund>.

80. Amanda Arnold, *How the Supreme Court's Ruling on Arbitration Hurts the #MeToo Movement*, CUT (May 21, 2018), <https://www.thecut.com/2018/05/supreme-court-decision-workers-arbitration-hurts-metoo-sexual-harassment.html>; Porter Wells, *Time Isn't Up on #TimesUp After Supreme Court Class Action Ruling*, U.S.L.W. (May 24, 2018, 5:30 AM), <https://news.bloomberglaw.com/us-law-week/time-isnt-up-on-timesup-after-supreme-court-class-action-ruling>. At the same time, litigation as it currently functions is far from a perfect solution for dealing with sexual harassment claims. See generally ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NEILSEN, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* (2017); SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Toward Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. (forthcoming 2018).

81. See, e.g., Marie Solis, *Hollywood's Time's Up Campaign Still Must Defeat Forced Arbitration, a Sexual Harasser's 'Best Friend'*, NEWSWEEK (Jan. 2, 2018, 5:03 PM), <http://www.newsweek.com/hollywoods-times-campaign-forced-arbitration-non-disclosure-agreements-768539>.

82. Jocelyn Noveck, *Ashley Judd to Assault Survivors: Healing Is Our Birthright*, U.S. NEWS & WORLD REP. (Apr. 28, 2018, 10:46 PM), <https://www.usnews.com/news/entertainment/articles/2018-04-28/ashley-judd-to-assault-survivors-healing-is-our-birthright>.

83. Meera Jagannathan, *Time's Up Leader Tina Tchen Talks What's Next for the \$21M Legal Defense Fund and How Celebs Powered a Movement*, MONEYISH (May 22, 2018, 12:09 AM), <https://moneyish.com/heart/times-up-leader-tina-tchen-talks-whats-next-for-the-21m-legal-defense-fund-and-how-celebs-powered-a-movement/>.

84. See Amanda Arnold, *Time's Up Is Helping McDonalds and Walmart Employees File Sexual-Harassment Claims*, CUT (May 23, 2018), <https://www.thecut.com/2018/05/times-up-fights-sexual-harassment-at-mcdonalds-and-walmart.html>; Michael Corkery, *Low-Paid Women Get Hollywood Money to File Harassment Suits*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/business/hollywood-times-up-harassment.html>.

85. Jonah Engel Bromwich & Jaclyn Peiser, *Time's Up Cofounder to Represent 'Media Men' List Creator*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/style/media-men-list-lawsuit.html>.

## b. Preventing Nondisclosure Agreements

Time's Up is also lobbying for legislation that would prohibit companies from forcing employees to sign nondisclosure agreements which forbid them from speaking publicly about workplace wrongs.<sup>86</sup> Nondisclosure agreements have been deployed by Hollywood employers like Harvey Weinstein and the Weinstein Company as a precondition to settlement.<sup>87</sup> They preclude women who sign them from warning other women<sup>88</sup> and shield the accused from public and criminal scrutiny.<sup>89</sup> So far, at least sixteen states have introduced bills on this issue with six states adopting restrictions.<sup>90</sup>

## 2. Workplace Structures

### a. Anita Hill Commission

In the wake of the Weinstein scandal, Time's Up member and Lucasfilm president Kathleen Kennedy proposed an industrywide commission focused on Hollywood culture with "zero-tolerance policies for abusive behavior and a secure, reliable, unimpeachable system in which victims of abuse can report what's happening to them with a confident expectation that action will be taken without placing their employment, reputation or career at risk."<sup>91</sup> It is envisioned that the commission will include labor specialists, lawyers, legal scholars, sociologists, and feminist activists as well as representatives of studios, unions, guilds, and talent agencies.<sup>92</sup> Anita Hill will chair the commission which seeks to reach broadly to address "power disparity, equity and fairness, safety,

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86. Buckley, *supra* note 78.

87. Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>. They were also used by Herman Cain, Bill O'Reilly, Roger Ailes, and President Trump. James Rufus Koren, *Weinstein Scandal Puts Nondisclosure Agreements in the Spotlight*, L.A. TIMES (Oct. 23, 2017, 6:15 PM), <http://www.latimes.com/business/la-fi-weinstein-nondisclosure-agreements-20171023-story.html#>; Janell Ross, *An Infrastructure of Silence*, WASH. POST (Oct. 12, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/\\_trashed/?utm\\_term=.8d7b2a3c1217](https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/_trashed/?utm_term=.8d7b2a3c1217).

88. Nicole Karlis, *How Non-Disclosure Agreements Silence Victims*, SALON (Dec. 10, 2017, 4:00 PM), <https://www.salon.com/2017/12/10/how-non-disclosure-agreements-silence-victims/>.

89. See Elizabeth Chika Tippet, *The Legal Implications of the MeToo Movement*, MINN. L. REV. (forthcoming) (discussing nondisclosure agreements). See generally Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 74 (2018). On confidential settlements, see generally Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457 (2006); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115 (1999).

90. *States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), <https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/>.

91. THR Staff, *Kathleen Kennedy Proposes Industry Commission and "Zero Tolerance" in Wake of Weinstein Claims*, HOLLYWOOD REP. (Oct. 16, 2017, 9:21 PM), <https://www.hollywoodreporter.com/news/kathleen-kennedy-demands-zero-tolerance-policies-wake-weinstein-allegations-1049421>.

92. *Id.*

sexual harassment guidelines, education and training, reporting and enforcement, ongoing research and data collection.”<sup>93</sup> It seeks to “adopt best practices and create institutional change that fosters a culture of respect and human dignity. . . .”<sup>94</sup>

#### b. Unions and Guilds

While they have not traditionally led on this issue,<sup>95</sup> Hollywood guilds are now developing sexual harassment guidelines, initiatives, and codes of conduct.<sup>96</sup> SAG-AFTRA president Gabrielle Carteris, for example, has made addressing sex discrimination a cornerstone of her administration.<sup>97</sup> She was early to condemn Harvey Weinstein, led panel discussions on the issue, persuaded the AFL-CIO executive council and the International Federation of Actors to increase their efforts to deal with the problem, joined the Anita Hill Commission,<sup>98</sup> and is exploring technological innovations to improve the tracking of reports and enhance training programs for union representatives.<sup>99</sup> The Academy of Motion Picture Arts and Science and the Producers Guild of America have also adopted codes of conduct emphasizing the “values of respect for human dignity, inclusion” and “categorical[] oppos[ition] to any form of abuse, harassment, or discrimination on the basis of gender, sexual orientation, race, ethnicity, disability, age, religion, or nationality.”<sup>100</sup>

93. Rebecca Sun, *Top Hollywood Execs Unveil Anti-Sexual Harassment Commission Chaired by Anita Hill*, HOLLYWOOD REP. (Dec. 15, 2017, 6:15 PM), <https://www.hollywoodreporter.com/news/top-hollywood-exec-unveil-anti-sexual-harassment-commission-chaired-by-anita-hill-1068646>.

94. Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/movies/anita-hill-hollywood-commission-sexual-harassment.html>. While the Commission is still in the early stages, it is looking at technology systems to gather information on abusers and harassers. David Robb, *Anita Hill-Led Anti-Harassment Commission Looking at Technology to Identify Abusers in Entertainment Industry*, DEADLINE (Feb. 28, 2018, 5:45 PM), <https://deadline.com/2018/02/anita-hills-sexual-harassment-commission-technology-identify-abusers-in-hollywood-1202306476/>.

95. See Ian Kullgren, *Why Didn't Unions Stop Sexual Harassment?*, POLITICO (Nov. 14, 2017, 10:58 AM), <https://www.politico.com/story/2017/11/14/why-didnt-unions-stop-sexual-harassment-244883>; Morgan Spector, *Harvey Weinstein's Crimes and SAG's Failure*, JACOBIN (Oct. 17, 2017), <https://www.jacobinmag.com/2017/10/harvey-weinstein-union-sag-aftra-hollywood>.

96. See David Robb, *Hollywood's Guilds Developing Anti-Harassment Initiatives*, DEADLINE (Jan. 26, 2018, 3:24 PM), <https://deadline.com/2018/01/sexual-harassment-hollywood-guilds-fight-abuse-1202270685/>.

97. Dave McNary, *SAG-AFTRA President Gabrielle Carteris Talks State of the Union*, VARIETY (Jan. 18, 2017 10:00 AM), <https://variety.com/2018/tv/news/gabrielle-carteris-talks-state-of-the-union-1202665637/>.

98. *Id.*

99. David Robb, *SAG-AFTRA Developing Sexual Harassment Code of Conduct*, DEADLINE (Jan. 19, 2018, 12:33 PM), <https://deadline.com/2018/01/sag-aftra-sexual-harassment-code-of-conduct-hollywood-actors-metoo-1202263094/>.

100. Pete Hammond, *Motion Picture Academy Moves Forward with Details on Standards of Conduct Initiative—Sends Instructions to Members*, DEADLINE (Jan. 27, 2018, 3:41 PM), <https://deadline.com/2018/01/motion-picture-academy-moves-forward-with-details-on-standards-of-conduct-initiative-sends-instructions-to-members-1202271320/>.

### 3. *Culture: Workplace and Otherwise*

In addition to supporting access to law, working on legal reform, and creating workplace codes, Time's Up and others are crafting and supporting a variety of initiatives to change workplace culture as well as the culture at large. Efforts to shift the culture involve a variety of practices designed to recognize the value of women.<sup>101</sup> Some focus on creating gender equity in the hope that women in power and the involvement of women in discussions in which decisions are made will prompt more sensitivity to issues of inequality.<sup>102</sup> In April 2018, for example, Time's Up announced the "+1/3x initiative," which encourages women to bring another woman to work meetings or events to improve their networking and to make at least three other meaningful connections to help women that they mentor.<sup>103</sup> Other efforts reach more broadly, suggesting that the workplace is an appropriate site of consequence for nonworkplace sexist behavior.<sup>104</sup> While the descriptions below are not comprehensive, they offer a representative flavor of the post-#MeToo Hollywood activity.

#### a. 50-50 by 2020

One Hollywood initiative to change workplace culture is the adoption of the pre-existing "50-50 by 2020 campaign."<sup>105</sup> For instance, ICM, a talent agency, "has pledged to reach full 50-50 gender parity by 2020 with a special focus on leadership roles."<sup>106</sup> TV mogul and ICM client Shonda Rhimes suggested the benchmark, used in other industries, to change workplace culture into one that is less tolerant of harassment and abuse.<sup>107</sup> She suggests that the primary way to meet the goal is by rethinking workplace mentorship and team building so women are not "shut out of the ways that bonding happens in the workplace."<sup>108</sup>

To meet its goals, ICM may build on the pre-existing work done by Hollywood organizations devoted to gender equity on-screen and throughout Hol-

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101. See discussion *infra* Subsection II.B.3.

102. See *infra* Subsection II.B.3.a.

103. Amanda Holpuch, *Celebrities and Activists on Time's Up at Tribeca Festival: 'This Moment Is Here,'* GUARDIAN (Apr. 29, 2018, 11:57 AM), <https://www.theguardian.com/film/2018/apr/29/times-up-tribeca-film-festival>.

104. See *infra* Subsection IV.A.1.

105. *Equity in Hollywood. By the Year 2020, 5050BY2020*, <https://5050by2020.com> (last visited Dec. 7, 2018).

106. Rebecca Sun, *ICM Partners Pledges to Reach 50-50 Gender Parity by 2020*, HOLLYWOOD REP. (Dec. 6, 2017, 6:30 AM), <https://www.hollywoodreporter.com/news/icm-partners-pledges-reach-50-50-gender-parity-by-2020-1064634>.

107. *Id.*

108. *Id.* This might help counter the offsetting risk that men will refuse to mentor women or otherwise be alone with them, following the "Pence Rule," to avoid harassment and thus deny women opportunities to build essential relationships. Jenny Proudfoot, *Saying #Metoo Could Cost You Your Dream Job Says Sheryl Sandberg*, MARIE CLAIRE (Dec. 4, 2017, 9:36 AM), <https://www.marieclaire.co.uk/entertainment/people/sheryl-sandberg-metoo-backlash-554561>.

lywood more generally.<sup>109</sup> Making the pledge visible creates a mechanism for public accountability. Other major talent agencies, such as CAA and UTA, as well as Vice Media<sup>110</sup> are joining these efforts, and it will be interesting to see if such undertakings spread throughout the industry.<sup>111</sup> It is also worth noting that while some agencies are focused on gender equity,<sup>112</sup> 50-50 by 2020 actually has a more inclusive focus, including equity for people with disabilities, LGBTQIA, and people of color.<sup>113</sup>

Another mechanism for achieving parity relies on the use of contractual “inclusion riders.”<sup>114</sup> Developed by Dr. Stacy Smith and the Annenberg Inclusion Initiative, the inclusion rider seeks to

counter bias in interviewing/auditioning and hiring/casting in specific employment positions in the entertainment industry. . . . The inclusion rider is a flexible and adaptable framework that actors/content creators should consider together with counsel prior to signing on to their next project. The inclusion rider does not provide for quotas. It simply stipulates consideration of the deep bench of talented professionals from historically underrepresented groups and strongly encourages hiring and casting of qualified individuals from under-represented backgrounds.<sup>115</sup>

While a few high-profile individuals have taken up the call for inclusion riders, most studios, talent agencies, and guilds have not yet made commitments.<sup>116</sup> That might be changing, as Warner Brothers recently announced a company-wide policy to increase diversity both on and off screen.<sup>117</sup>

The call for gender parity and diversity has expanded beyond the films themselves. The 50-50 by 2020 initiative has gotten film festivals, such as the Cannes Film Festival, to sign equality pledges for their executive boards and commit to making their selection processes more transparent.<sup>118</sup> Similarly,

109. *Hollywood Agency Promises 50/50 Gender Parity Inspired by Shonda Rhimes*, GIRLTALKHQ (Dec. 18, 2017, 10:05 AM), <http://girltalkhq.com/hollywood-agency-pledges-50-50-gender-parity-2020-inspired-client-shonda-rhimes/>.

110. 50/50 BY 2020, *supra* note 105.

111. Rebecca Sun, *CAA Cancels Pre-Golden Globes Party, Will Help Start Legal Fund for Sex Harassment Victims*, HOLLYWOOD REP. (Dec. 11, 2017, 3:26 PM), <https://www.hollywoodreporter.com/news/caa-cancels-golden-globes-party-will-start-legal-defense-fund-sex-harassment-cases-1066558>.

112. Hollywood insiders have lauded 50-50 as the first real effort to address the systemic nature of the problem, but given that ICM was already performing well in this area compared to its peers, some fear that others will prefer to retain the status quo after they have cleaned house rather than follow suit. *Id.*

113. 50/50 BY 2020, *supra* note 105.

114. *See Annenberg Inclusion Initiative*, USC ANNENBERG SCH. FOR COMM'C'N & JOURNALISM, <https://annenberg.usc.edu/research/aii> (last visited Dec. 7, 2018).

115. *Id.*

116. Ricardo Lopez, *Inclusion Riders Boast High Profile Support, but Lack Commitment from Most Studios*, VARIETY (Apr. 11, 2018, 9:45 AM), <https://variety.com/2018/biz/news/inclusion-riders-1202749738/>.

117. Sam Levin, *Warner Bros. to Launch Inclusion Rider Diversity Policy with Michael B. Jordan Film*, GUARDIAN (Sept. 5, 2018, 5:56 PM), <https://www.theguardian.com/film/2018/sep/05/warner-bros-adopts-company-wide-inclusion-policy-to-boost-diversity>.

118. Jake Coyle, *Cannes Leaders Sign Pledge to Improve Gender Equality*, INDEPENDENT (May 14, 2018, 12:55 PM), <https://www.independent.ie/entertainment/movies/cannes-leaders-sign-pledge-to-improve-gender-equality-36904963.html>.

drawing on statistics from the USC Annenberg's Inclusion Initiative, actress Brie Larson has called for more diversity in film criticism.<sup>119</sup>

#### b. Pay Equality and Negotiation

While some might view pay discrimination as distinct from the #MeToo movement, activists see it as essential to addressing the core problem raised by #MeToo: the devaluation of women.<sup>120</sup> In addition to the Time's Up fund, which would be available to facilitate pay discrimination claims, a variety of piecemeal actions to equalize pay are underway. For instance, actresses Debra Messing, Eva Longoria, Laura Dern, and Sarah Jessica Parker shamed the E! Network on live television for underpaying female anchor Catt Sadler,<sup>121</sup> and Carrie Gracie resigned from her position as the China editor of the BBC after learning of pay disparities.<sup>122</sup> Numerous commentators shamed actor Mark Wahlberg and his agents for demanding \$1.5 million to do reshoots necessitated by actor Kevin Spacey's erasure from the film *All the Money in the World*, after co-star Michelle Williams volunteered to do the reshoots for free.<sup>123</sup>

119. Cady Lang, 'Reviews Matter.' Brie Larson Calls for More Diversity in Movie Reviews with Speech, TIME (June 14, 2018), <http://time.com/5312618/brie-larson-women-in-film/>.

120. Tarana Burke, Ai-jen Poo & Monica Ramirez, *Golden Globes Time's Up Activists to Hollywood: "Failure to Pay Women Fairly Is Another Way of Exacting Violence"*, HOLLYWOOD REP. (Jan. 15, 2018, 5:45 AM), <https://www.hollywoodreporter.com/news/golden-globes-times-up-activists-hollywood-failure-pay-women-is-way-exacting-violence-guest-column-1074683>. As Me Too founder Tarana Burke explains:

Gender-based injustice is pervasive, and comes in all forms and sizes. At the heart of the matter is the reality that women's lives, and our work, are valued less than men's, and this power imbalance is expressed in a plethora of ways: from pay disparity, to limited opportunities for promotion, to failure to recognize our work and contributions, to sexual harassment, abuse and violence. In the words of Audre Lorde, "[t]here is no such thing as a single-issue struggle, because we do not live single-issue lives." As activists who have dedicated our lives to justice and healing, we understand that to achieve equity and help our communities have a shot at our best lives, we must tackle and confront all of the issues that prevent us from reaching our full potential. This includes, but is not limited to, workplace sexual violence, unequal benefits, and pay disparities . . . . While Hollywood is trying to address its problem with sexual violence, we want to underscore that the failure to pay women fairly is another way of exacting violence on women workers by devaluing their worth and contributions.

*Id.*

121. Judd Legum, *4 Actresses Call Out E! for Gender Discrimination—While Live on E!*, THINKPROGRESS (Jan. 7, 2018, 7:06 PM), <https://thinkprogress.org/debra-messing-calls-out-e-for-gender-discrimination-while-live-on-e-3c7487978d37/>; see also Chris Gardner & Sam Reed, *Jennifer Lawrence, Catt Sadler Prepping #MeToo, Time's Up Movement TV Docuseries*, HOLLYWOOD REP. (Feb. 23, 2018, 7:29 PM), <https://www.hollywoodreporter.com/live-feed/jennifer-lawrence-catt-sadler-prepping-metoo-times-up-movement-tv-docuseries-1088150>.

122. Valeriya Safronova, *What We Talk About When We Talk About Pay Inequity*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/business/wage-gap-gender-discrimination.html>. The BBC ultimately apologized to Gracie and provided backpay. *BBC Apologises to Carrie Gracie Over Pay*, BBC NEWS (June 29, 2018), <https://www.bbc.com/news/entertainment-arts-44655335>.

123. The shame seemed to be compelling enough that Wahlberg and his agency donated \$2 million to Time's Up in actress Michelle Williams's name. Jeffery C. Mays, *Mark Wahlberg and Agency Will Donate \$2 Million to Time's Up After Outcry Over Pay*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/arts/mark-wahlberg-michelle-williams.html>.

Early stages of more systematic efforts may also be underway. For example, Hollywood women are cooperating with one another formally and informally to enhance their negotiating positions.<sup>124</sup> That cooperative ethos may also spill over to begin to address intersectional disparities.<sup>125</sup> Actress Jessica Chastain, for example, recently tied her salary to Octavia Spencer's in order to guarantee racial pay equity.<sup>126</sup> The most highly paid dramatic TV actress, Ellen Pompeo, revealed her negotiating difficulties and strategies in a widely read industry publication in the hope of "setting an example for others."<sup>127</sup> An industry roundtable also saw high-profile actresses sharing negotiating strategies such as refusing to allow male actor's deals to be made first, calling on industry leaders to stop the practice of differential pay, and challenging the normalization of lower actress pay.<sup>128</sup>

#### 4. *Male Allies*

Women have been at the forefront of Time's Up, with many Hollywood men reluctant to add their voices.<sup>129</sup> Some male advocates, however, are doing the work of allies by speaking out and initiating reforms. Most prominently, the late Anthony Bourdain vocally and unwaveringly supported the #MeToo movement, calling on everyone to engage in serious self-reflection about both their past and future behavior.<sup>130</sup> A few high-profile African American men

124. For instance, Tracee Ellis Ross consulted with other Time's Up actresses about how to address her pay disparity with co-star Anthony Anderson. Elaine Lainey Lui, *Intro for January 19, 2018*, LAINEY GOSSIP (Jan. 19, 2018, 8:44 AM), <http://www.laineygossip.com/tracee-ellis-ross-reveals-pay-gap-with-anthony-anderson-and-intro-for-january-19-2018/48931>.

125. See, e.g., Sydney Scott, *Viola Davis Is Demanding Hollywood Do Better: 'Pay Me What I'm Worth'*, ESSENCE (Feb. 15, 2018), <https://www.essence.com/celebrity/viola-davis-equal-pay-hollywood/> (noting that despite her high acclaim, she has received neither the pay nor the opportunities of similarly situated actresses).

126. Rachel Leah, *How Jessica Chastain Helped Octavia Spencer Get Equal Pay Was Great and Sadly Necessary*, SALON (Jan. 25, 2018, 5:45 PM), <https://www.salon.com/2018/01/25/how-jessica-chastain-helped-octavia-spencer-get-equal-pay-was-great-and-sadly-necessary/>.

127. Lacey Rose, *Ellen Pompeo, TV's \$20 Million Woman, Reveals Her Behind-the-Scenes Fight for "What I Deserve"*, HOLLYWOOD REP. (Jan. 17, 2017, 5:00 AM), <https://www.hollywoodreporter.com/features/ellen-pompeo-tvs-20-million-woman-reveals-her-behind-scenes-fight-what-i-deserve-1074978> (including outing her former co-star Patrick Dempsey's disinterest in joint negotiation to maintain pay equity and her decision to take ownership of the show by producing).

128. Laura Berger, *Jennifer Lawrence, Emma Stone, Jessica Chastain, & More Talk Equal Pay and Abuse in THR Roundtable*, WOMEN & HOLLYWOOD (Nov. 16, 2017), <https://womenandhollywood.com/jennifer-lawrence-emma-stone-jessica-chastain-more-talk-equal-pay-and-abuse-in-thr-roundtable-4ce0871deea8/>.

129. See, e.g., Cristina Escobar, *Men's Silence at the Golden Globes, Don't Worry We Fixed It for You*, REPRESENTATION PROJECT (Jan. 8, 2018), <http://therepresentationproject.org/mens-silence-at-the-golden-globes-dont-worry-we-fixed-it-for-you/>; David Marchese, *In Conversation: Seth Rogen*, VULTURE (Apr. 30, 2018), <http://www.vulture.com/2018/04/seth-rogen-in-conversation.html> ("There are so many people with real things to contribute to the #MeToo discussion that anything I say is not going to add anything useful.").

130. Anthony Bourdain, *On Reacting to Bad News*, MEDIUM (Dec. 12, 2017), <https://medium.com/@Bourdain/on-reacting-to-bad-news-28bc2c4b9adc>. Take, for instance, his response to allegations against his friends in the restaurant industry:

In these current circumstances, one must pick a side. I stand unhesitatingly and unwaveringly with the women. . . . Right now, nothing else matters but women's stories of what it's like in the industry I have loved and celebrated for nearly 30 years—and our willingness, as human beings, citizens, men and women alike, to hear them out, fully, and in a way that other women can feel secure enough, and have faith

such as John Legend supported Time's Up's efforts to "MuteRKelly."<sup>131</sup> On a more systematic level, the #AskMoreofHim campaign, crafted by a small group of Hollywood males, encourages men to do the work of changing cultural attitudes, beliefs, and behaviors.<sup>132</sup> The campaign details ways in which men can do this, including "approaching gender violence as a men's issue," questioning their own attitudes, and engaging in bystander intervention<sup>133</sup> "for everything from sexist and degrading comments, right up to domestic violence and sexual assault."<sup>134</sup> One founding member, actor David Schwimmer, helped launch a #ThatsHarassment campaign which uses public service announcements to help viewers identify the pervasiveness of workplace abuse.<sup>135</sup>

### C. Due Process Concerns

While this cultural, legal, and structural reckoning has been welcomed by many, serious concerns have also dominated the recent public conversation. Those skeptical of #MeToo have emphasized the lack of due process in the naming and shaming campaign. Perhaps the most high-profile articulation of this position comes from President Donald J. Trump's Twitter feed.<sup>136</sup> In particular, skeptics emphasize the lack of a clear path and procedures by which an

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enough that they, too, can tell their stories. We are clearly at a long overdue moment in history where everyone, good hearted or not, will HAVE to look at themselves, the part they played in the past, the things they've seen, ignored, accepted as normal, or simply missed—and consider what side of history they want to be on in the future.

*Id.* Bourdain's role as an advocate has been complicated by posthumous allegations that he paid hush money to silence a male actor with a #MeToo claim against Bourdain's then girlfriend Asia Argento. Hannah Giorgis, *Asia Argento, #MeToo and the Complicated Question of Power*, ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/entertainment/archive/2018/08/asia-argento-allegations/568018/>.

131. Britni Danielle, *Black Women Have Been Speaking Up About R. Kelly for Years, Where Are the Men?*, CHI. TRIB. (May 8, 2018, 3:10 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-rkelly-allegations-sex-cult-0508-20180507-story.html#>.

132. Jackson Katz & Jennifer Siebel Newsom, *How Hollywood Men Can Lead #AskMoreofHim Campaign*, HOLLYWOOD REP. (Mar. 2, 2018, 6:20 AM), <https://www.hollywoodreporter.com/news/how-hollywood-men-can-lead-askmoreofhim-campaign-guest-column-1090128>.

133. See generally REPRESENTATION PROJECT, <http://therepresentationproject.org/> (last visited Dec. 7, 2018).

134. See THR Staff, *David Arquette, David Schwimmer Join Hollywood Men and Activists to Launch AskMoreOfHim Campaign*, HOLLYWOOD REP. (Mar. 2, 2018, 6:05 AM), <https://www.hollywoodreporter.com/news/david-arquette-david-schwimmer-join-hollywood-men-activists-launch-askmoreofhim-campaign-1090121>; see also REPRESENTATION PROJECT, *supra* note 133.

135. Darcel Rockett, *#MeToo Gets Some Help from David Schwimmer with Chicago's New #ThatsHarassment Campaign*, CHI. TRIB. (Apr. 23, 2018, 12:40 PM), <http://www.chicagotribune.com/lifestyles/ct-life-thats-harassment-campaign-metoo-20180423-story.html>.

136. "Peoples [sic] lives are being shattered and destroyed by a mere allegation. Some are true and some are false. Some are old and some are new. There is no recovery for someone falsely accused - life and career are gone. Is there no such thing any longer as Due Process?" Donald J. Trump (@realdonaldtrump), TWITTER (Feb. 10, 2018, 7:33 AM), <https://twitter.com/realdonaldtrump/status/962348831789797381?lang=en>. He doubled down on this argument during the Kavanaugh confirmation hearings. Meagan Vazquez & Kate Sullivan, *Trump Apologizes to Kavanaugh for Sexual Misconduct Allegations During Confirmation*, CNN (Oct. 9, 2018, 6:52 AM), <https://www.cnn.com/2018/10/08/politics/brett-kavanaugh-swearing-in-donald-trump-white-house/index.html>.



accused can successfully contest allegations,<sup>137</sup> judgment by the public rather than by a jury or other independent decision-maker,<sup>138</sup> the risk of false positives, and the potential for disproportionate consequences that are often framed as punishments.<sup>139</sup> While the U.S. Constitution does not generally require due process in nongovernment employment settings,<sup>140</sup> the desire for a fair hearing by an independent arbiter with proportionate consequences for violations of workplace policies is pervasive.<sup>141</sup> Nearly a year after the emergence of #MeToo, the Senate confirmation for now-Supreme Court Justice Brett Kavanaugh raised nearly every variation of these due process concerns and sparked the emergence of the #HimToo movement.<sup>142</sup>

Relatedly, serious disagreement exists over what the appropriate consequences should be for many of the acts identified as part of #MeToo. One might think of it like a Goldilocks problem: some bemoan the “professional death penalty,”<sup>143</sup> while others argue, that in many instances, the loss of a job falls far short of a needed criminal or civil remedy for the victims.<sup>144</sup> For instance, what are the appropriate consequences for someone like former Senator Al Franken, who was accused of groping and forcibly kissing a number of women?<sup>145</sup> Was a public apology sufficient? An ethics investigation? Resignation? Is accountability through acknowledgement by the wrongdoer sufficient, or do employers, voters, or members of the public need to demand criminal or civil penalties or job loss in order to deter or to punish?<sup>146</sup> The conduct identi-

137. Jonathan Kay, *Post-Weinstein, We Must Reform Due Process, Not Abandon It*, NAT'L POST (Nov. 14, 2017, 12:24 PM), <https://nationalpost.com/opinion/jonathan-kay-post-weinstein-we-must-reform-due-process-not-abandon-it> (decrying an age “when a single career can be destroyed with a Tweet”).

138. Newt Gingrich has suggested those calling for Franken's resignation were motivated by “this weird puritanism which feels a compulsion to go out and lynch people without a trial.” Ana Marie Cox, *Al Franken Isn't Being Denied Due Process. None of These Famous Men Are*, WASH. POST (Dec. 7, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/12/07/al-franken-isnt-being-denied-due-process-none-of-these-famous-men-are/?utm\\_term=.54a07cb878e7](https://www.washingtonpost.com/news/posteverything/wp/2017/12/07/al-franken-isnt-being-denied-due-process-none-of-these-famous-men-are/?utm_term=.54a07cb878e7).

139. Emily Yoffe, *Why the #MeToo Movement Should Be Ready for a Backlash*, POLITICO MAG. (Dec. 10, 2017), <https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057>. To take a specific example, see Jacinda Barrett's defense of Chris Hardwick. Hilary Lewis, *Jacinda Barrett Defends Ex-Boyfriend Chris Hardwick Amid Misconduct Scandal*, HOLLYWOOD REP. (June 26, 2018, 8:40 AM), <https://www.hollywoodreporter.com/news/jacinda-barrett-defends-boyfriend-chris-hardwick-1123318>.

140. Christine Emba, *The 'Due Process' Assault Freak-Out Is a Fever Dream*, WASH. POST (Dec. 1, 2017), [https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e\\_story.html?utm\\_term=.5d1f2188fff1](https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e_story.html?utm_term=.5d1f2188fff1).

141. See generally E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

142. See generally Lesley Wexler, *#MeToo and Colloquial Due Process*, 22 RICHMOND PUB. INT. L. REV. (forthcoming 2019) (article on file with the author); see also Anna North, *#HimToo, the Online Movement Spreading Myths about False Rape Allegations, Explained*, VOX (Oct. 10, 2018, 3:50 PM) <https://www.vox.com/policy-and-politics/2018/10/10/17957126/himtoo-movement-pieter-hanson-tweet-me-too>.

143. Yoffe, *supra* note 139.

144. Cox, *supra* note 138.

145. Jacob Pramuk, *Here Are All the Sexual Misconduct Accusations Against Sen. Al Franken*, CNBC (Dec. 7, 2017, 12:22 PM), <https://www.cnbc.com/2017/12/07/al-franken-news-list-of-sexual-misconduct-allegations.html>.

146. Harnish, *supra* note 46.

fied via #MeToo, moreover, encompasses a range of behaviors that fall along a spectrum and merit a range of different consequences.

MeToo founder Tarana Burke has panned the moral flattening<sup>147</sup> that has occurred, suggesting that while every instance of harassment should be investigated and dealt with, not all must result in firing or banishment. She contends that just as “sexual violence occurs on a spectrum so accountability has to happen on a spectrum.”<sup>148</sup> Other advocates have also emphasized the need for nuance in meting out punishments,<sup>149</sup> and even some #MeToo supporters worry about the difficulties of redemption for those outed under #MeToo and suggest the movement needs to turn to restorative justice as a way to address the needs of both victims and oppressors.<sup>150</sup> But what that restorative justice might look like remains uncertain. Certain high-profile cases—including discussion of the victim impact statements and judge’s commentary in the sentencing of Larry Nassar for the sexual abuse of gymnasts<sup>151</sup>—have used the language of restorative justice, but advocates have been moving forward without a more systematic exploration of the foundational practices and premises of restorative justice.

147. Bari Weiss (@bariweiss), TWITTER (Nov. 21, 2017, 9:05 AM), <https://twitter.com/bariweiss/status/933018615347073029> (“Are others disturbed by the moral flattening going on? Glenn Thrush/Al Franken should not be mentioned in the same breath as Harvey Weinstein/Kevin Spacey.”).

148. Emma Brockes, *MeToo Founder Tarana Burke: ‘You Have to Use Your Privilege to Serve Other People,’* GUARDIAN (Jan. 15, 2018, 12:57 AM), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>.

149. Nellie Bowles, *A Reckoning on Sexual Misconduct? Absolutely. But How Harsh, Women Ask*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/business/sexual-harassment-debates.html>; see also Barbara Kingsolver, *#MeToo Isn’t Enough, Now Women Need to Get Ugly*, GUARDIAN (Jan. 16, 2018, 2:00 PM), <https://www.theguardian.com/commentisfree/2018/jan/16/metoo-women-daughters-harassment-powerful-men> (“Raped is not groped is not catcalled on the street: all these are vile and have to stop, but the damages are different.”).

150. Elizabeth Blair, *For the Men #MeToo Has Toppled, Redemption Will Take More Than an Apology*, NPR ALL THINGS CONSIDERED (Jan. 9, 2018, 4:52 PM), <https://www.npr.org/2018/01/09/576798813/for-the-men-metoo-has-toppled-redemption-will-take-more-than-an-apology>.

151. Jonathan Capehart, Christine Emba, Stephen Stromberg & Ruth Marcus, *USA Gymnastics Sex Abuse Victims Deserve Restorative Justice, and Other Victims Do, Too*, WASH. POST ROUNDTABLE (Jan. 25, 2018, 4:01 PM), [https://www.washingtonpost.com/video/editorial/opinion—usa-gymnastics-sex-abuse-victims-deserve-restorative-justice-and-other-victims-do-too/2018/01/25/c0ff929a-021c-11e8-86b9-8908743c79dd\\_video.html?utm\\_term=.51ec81c17147](https://www.washingtonpost.com/video/editorial/opinion—usa-gymnastics-sex-abuse-victims-deserve-restorative-justice-and-other-victims-do-too/2018/01/25/c0ff929a-021c-11e8-86b9-8908743c79dd_video.html?utm_term=.51ec81c17147); Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not ‘Transformative Justice.’ Here’s Why.*, APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/>; Jenny Hollander, *Larry Nassar Hated Listening to His Victims: Every Predator Should Have to*, BUSTLE (Jan. 24, 2018), <https://www.bustle.com/p/larry-nassar-hated-listening-to-the-women-he-abused-every-predator-should-have-to-8008006>.

## III. RESTORATIVE JUSTICE

As responses to and discussions of #MeToo—initially ad hoc and now more organized—have advanced in Hollywood and other arenas, scholars and other theorists should help offer frameworks through which these efforts can be assessed and guided. The #MeToo movement has generated public discussion and spurred concrete actions but has also engendered concern about the recognition and recovery of survivors as well as questions about due process and moral flattening. It has also spawned hope for far-reaching change to harmful practices and behavior. How might different approaches to justice inform these possibilities?

One obvious possibility is that of restorative justice.<sup>152</sup> At the 2018 Golden Globes Awards, Laura Dern used her acceptance speech for best actress to highlight the goals of the Time's Up movement. She included this emphatic plea:

I urge all of us to not only support survivors and bystanders who are brave enough to tell their truth, but to promote *restorative justice*. May we also please protect and employ them. May we teach our children that speaking out without fear of retribution is our culture's new North Star.<sup>153</sup>

But this plea leaves ambiguous what restorative justice encompasses in this setting.

Given the rest of Dern's speech, one possible reading speaks directly and exclusively to the restoration and reintegration of women who have suffered employment setbacks at the hands of their harasser and assaulters. Take, for ex-

152. Avary, *The Responsibility of Conveners in Light of the #Metoo Movement*, CONVENERS.ORG (Jan. 31, 2018), <http://conveners.org/the-responsibility-of-conveners-in-light-of-the-metoo-movement>; Danielle Berrin, *Should We Forgive the Men Who Assaulted Us*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/opinion/metoo-sexual-assault-forgiveness.html>; Blair, *supra* note 150; Kai Cheng Thom, *#NotYet: Why I Won't Publicly Name Abusers*, GUTS (Nov. 30, 2017), <http://gutsmagazine.ca/notyet/>; Emma Coleman, *Restorative Justice for the #MeToo Movement?*, NEW AMERICA (Feb. 20, 2018), <https://www.newamerica.org/millennials/dm/restorative-justice-metoo-movement/>; Melissa Harris-Perry, *The #MeToo Backlash Is Already Here. This Is How We Stop It*, ELLE (Dec. 15, 2017), <https://www.elle.com/culture/career-politics/a14437760/the-metoo-backlash-how-to-stop-it/>; Ann Hornaday, *Enough with Naming and Shaming: It's Time for Restorative Justice in Hollywood*, WASH. POST (Feb. 1, 2018), [https://www.washingtonpost.com/lifestyle/style/enough-with-naming-and-shaming-its-time-for-restorative-justice-in-hollywood/2018/02/01/416ccf80-0518-11e8-b48c-b07fea957bd5\\_story.html?noredirect=on&utm\\_term=.4866f2c33e89](https://www.washingtonpost.com/lifestyle/style/enough-with-naming-and-shaming-its-time-for-restorative-justice-in-hollywood/2018/02/01/416ccf80-0518-11e8-b48c-b07fea957bd5_story.html?noredirect=on&utm_term=.4866f2c33e89); Judith Levine, *Will Feminism's Past Mistakes Haunt #MeToo*, BOS. REV. (Dec. 8, 2017), <http://bostonreview.net/gender-sexuality/judith-levine-will-feminisms-past-mistakes-haunt-metoo>; Brooke Lober, *(Re)thinking Sex Positivity, Abolition Feminism and the #MeToo Movement: Opportunity for a New Synthesis*, ABOLITION J. (Jan. 26, 2018), <https://abolitionjournal.org/rethinking-sex-positivity-abolition-feminism-metoo-movement-opportunity-new-synthesis/>; Kim Tran, *5 Transformative Justice Experts on What We Should Do with 'Sexual Predators' in Our Communities*, EVERYDAY FEMINISM (Nov. 16, 2017), <https://everydayfeminism.com/2017/11/me-too-transformative-justice/>; Lesley Wexler, *#MeToo, Time's Up, and Restorative Justice*, VERDICT (Jan. 23, 2018), <https://verdict.justia.com/2018/01/23/metoo-times-restorative-justice>.

153. Laura Bradley, *Golden Globes 2018: See Laura Dern's Inspiring Acceptance Speech*, VANITY FAIR (Jan. 7, 2018, 9:38 PM), <https://www.vanityfair.com/hollywood/2018/01/golden-globes-2018-laura-dern-speech>  
-big-little-lies (emphasis added).

amples, actress Rose McGowan, who says she was blacklisted in Hollywood after making internal complaints about her rape at the hands of Harvey Weinstein,<sup>154</sup> Annabella Sciorra, who suspects Weinstein had maligned her as a difficult actress,<sup>155</sup> and comedians Dana Min Goodman and Julia Wolov, who experienced career backlash after they complained about Louis C.K.'s masturbation.<sup>156</sup> In addition to direct retaliation, harassment and assault can make it difficult to continue to excel in one's chosen profession because of lingering mistrust and emotional trauma. For instance, actress Hilarie Burton described how she "has refused to audition and refused to work for showrunners she does not already know."<sup>157</sup> She explained that "[t]he fear of being forced into another one of these situations was crippling. I never wanted to be the lead female on any show ever, ever, ever again."<sup>158</sup> Under this interpretation, justice is victim-focused and concerned with repairing and restoring the victim.

But Dern might also have been speaking about the broader understanding of restorative justice as it is used in criminal justice circles. This fuller vision of restorative justice focuses on not only the restoration and reintegration of victims but also of wrongdoers, and it addresses the implications of the wrongdoing for the community as a whole.<sup>159</sup> Many modern restorative justice practices—such as victim-offender mediation—developed in response to criminal wrongdoing and grew out of dissatisfaction with traditional criminal law processes that marginalized the role of victims, focused on punishment instead of transformation, and provided limited remedies for addressing harm.<sup>160</sup> Restorative justice practices have also influenced dispute resolution processes in other settings such as schools,<sup>161</sup> and have played a role in international dispute resolution and approaches to transitional justice.<sup>162</sup> While a re-

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154. Mark Townsend, *Rose McGowan: 'Hollywood Blacklisted Me Because I Got Raped'*, *GUARDIAN* (Oct. 14, 2017, 7:05 PM), <https://www.theguardian.com/film/2017/oct/14/harvey-weinstein-rose-mcgowan-rape-film>.

155. Ronan Farrow, *Weighing the Costs of Speaking Out Against Harvey Weinstein*, *NEW YORKER* (Oct. 27, 2017), <https://www.newyorker.com/news/news-desk/weighing-the-costs-of-speaking-out-about-harvey-weinstein>.

156. Madeleine Aggeler, *What Happened to the Women Louis C.K. Harassed?*, *CUT* (Aug. 30, 2018), <https://www.thecut.com/2018/08/what-about-the-careers-of-louis-ck-victims.html>.

157. Daniel Holloway, *'One Tree Hill' Cast, Crew Detail Assault, Harassment Claims Against Mark Schwahn*, *VARIETY* (Nov. 17, 2017, 3:38 PM), <http://variety.com/2017/tv/news/one-tree-hill-mark-schwahn-harassment-assault-1202617918/>.

158. *Id.*

159. Michael Wenzel, Tyler G. Okimoto, Norman T. Feather & Michael J. Platow, *Retributive and Restorative Justice*, 32 *LAW & HUM. BEHAV.* 375, 376 (2008).

160. *Id.* at 377; see also Clare McGlynn, Julia Downes & Nicole Westmarland, *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences*, in *RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS* 179, 184 (Marie Keenan & Estelle Zinsstag eds., 2017) (describing the peripheral role and lack of control experienced by victims of sexual violence). See generally Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 *NW. U. L. REV.* 1693, 1703 (2018) (calling for restorative justice as part of a democratized criminal justice system).

161. See, e.g., Brenda Morrison, *Schools and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* 325 (Gerry Johnstone & Daniel Van Ness eds., 2013).

162. Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 *INT'L J. TRANSITIONAL JUST.* 339 (2014). More recently, scholars have begun exploring the role of

storative justice approach is most commonly thought of as appropriate for low-level or less-severe offenses or for juvenile offenders,<sup>163</sup> it has also been used in more severe cases, including cases of sexual violence.<sup>164</sup>

Restorative justice, then, refers to a loose collection of practices or mechanisms that share a number of core commitments, including: direct participation of offenders and victims in the process along with representatives of the relevant community; narration of the wrongful behavior and its effects; acknowledgement of the offense and acceptance of responsibility for it by the offender; joint efforts to find appropriate ways to repair the harm done; and reintegration of the offender into the broader community.<sup>165</sup> These processes may provide opportunities for apology, restitution, forgiveness of the offender, an improved understanding of the underlying reasons for the harmful behavior, reconciliation, and new understandings of or renewed commitments to standards for appropriate behavior—though these are not all necessary or guaranteed.<sup>166</sup>

Restorative justice highlights the importance of victim participation, offender accountability, harm repair, and reintegration.<sup>167</sup> Thus, we explore the key components of restorative justice with an eye toward how they might apply in the context of addressing sexual harassment in the workplace. In doing so, we examine several high-profile apologies and other responses to miscon-

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restorative justice in organizational and workplace settings. See, e.g., Laurie J. Barclay & Maria Francisca Saldanha, *Recovering from Organizational Injustice: New Directions in Theory and Research*, in THE OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE 497 (Russell S. Cropanzano & Maureen L. Ambrose eds., 2015); Jerry Goodstein et al., *Individual and Organizational Reintegration After Ethical or Legal Transgressions: Challenges and Opportunities*, 24 BUS. ETHICS Q. 315 (2014).

163. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 163 (2007); see also Dena M. Gromet & John M. Darley, *Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures*, 19 SOC. JUST. RES. 395, 405–07 (2006) (finding that research participants preferred to send cases of lower severity to purely restorative processes but were less inclined to choose purely restorative processes for more severe cases).

164. Scholars have debated the appropriateness of restorative practices for cases involving sexual violence. For a set of current views, see RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL, AND THERAPEUTIC DIMENSIONS (Estelle Zinsstag & Marie Keenan eds., 2017).

165. Menkel-Meadow, *supra* note 163, at 164. Restorative justice encompasses a whole host of specific practices, including victim-offender mediation or victim-offender reconciliation programs, family conferencing, truth and reconciliation commissions, and peace circles. *Id.*

166. *Id.* at 162. “In its most idealized form, there are four Rs of restorative justice: repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared community.” *Id.*

Restorative justice hopes to harness the commission of wrongful acts to the making of new opportunities for personal, communal, and societal growth and transformation through empowerment of both victims and offenders in direct and authentic dialogue and recognition. It also hopes practically to reduce recidivism and reintegrate wrongdoers into more positive roles and relationships.

*Id.* at 164.

167. Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 AM. BEHAV. SCI. 768, 771–72 (1998).

duct<sup>168</sup> and consider the ways in which they succeed or fail on these dimensions of restorative justice.<sup>169</sup>

### A. Acknowledgement

Those who are injured by another—including those injured by sexual harassment and other forms of sexual violence—desire acknowledgment.<sup>170</sup> In particular, victims desire acknowledgement of their experiences, the specifics of the wrongful behavior, and how they were affected by the behavior.<sup>171</sup> Many victims value the chance to tell their own stories.<sup>172</sup> Acknowledgement by the offender—but also from friends, family, and other members of their broader community—confirms their experience.<sup>173</sup> Because women have often not been believed,<sup>174</sup> acknowledgement serves the important purpose of recognizing the

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

169. The satirical celebrity apology generator deftly highlights the rote nature and significant shortcomings of these apologies. Dana Schwartz, CELEBRITY PERV APOLOGY GENERATOR, <https://apologygenerator.com> (last visited Oct. 23, 2018).

170. Nathalie Des Rosiers, Bruce Feldthusen & Oleana A. R. Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 440 (1998); see also Leah Litman, Emily Murphy, & Katherine H. Ku, *A Comeback but No Reckoning*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html> (criticizing the closing of an investigation into allegations against former Ninth Circuit Judge Alex Kozinski without “validated, agreed-upon hard truths of what happened”).

171. Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (finding that a common reason for pursuing a claim is “public affirmation of the wrong”); Bruce Feldthusen, Oleana A. R. Hankivsky & Lorraine Greaves, *Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse*, 12 CAN. J. WOMEN & L. 66, 75 (2000); Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 585 (2005) (“[Survivors'] most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgement of harm.”); Gijs van Dijck, *Victim-Oriented Tort Law in Action: An Empirical Examination of Catholic Church Sexual Abuse Cases*, 15 J. EMPIRICAL LEGAL STUD. 126, 128 (2018) (finding that recognition or validation was a primary goal). See generally AARON LAZARE, ON APOLOGY 75 (2004) (identifying four aspects of acknowledgement: the responsible party, the offending behavior “in adequate detail,” the impact of the behavior, and that the behavior violated social norms); NICK SMITH, I WAS WRONG: THE MEANINGS OF APOLOGIES 28–33 (2008) (describing the importance of a corroborated factual record); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 13 (1991) (“[W]e not only apologize to someone but also for something.”).

172. Kathleen Daly, *Sexual Violence and Victims' Justice Interests*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 108, 116 (Estelle Zinsstag & Marie Keenan eds., 2017); Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1643 (2014) (reporting that most survivors of sexual violence who chose to participate in a restorative justice process took part so that they could “say how I was affected”).

173. McGlynn, Downes & Westmarland, *supra* note 160, at 182.

174. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017); Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (“Many survivors realistically judged reporting pointless. Complaints were routinely passed off with some version of ‘she wasn’t credible’ or ‘she wanted it.’”).

truth of their experiences and the consequences of the mistreatment.<sup>175</sup> In acknowledging the offense, the offender “says or affirms ‘Yes, this is what happened. I agree with the wronged party (and others) as to the facts of the case and how they are being interpreted.’”<sup>176</sup> Acknowledgement can also provide confirmation that the victim was not overreacting or to blame.<sup>177</sup> And acknowledgement of the victim’s experience can also signal community support for the victim.<sup>178</sup>

Part of acknowledging is listening. In fact, research has found that apologies can be more effective when the injured party has been heard and the offender has had time to express understanding of the wrong that was done and how it affected the victim.<sup>179</sup>

Failure to acknowledge the wrongful behavior is not only dissatisfying but can also result in further offense. Consider, for example, snowboarder Shaun White’s initial response to questions about a settled sexual harassment lawsuit, including a disparaging characterization of the event as “gossip.”<sup>180</sup> His statement that “I am who I am and I’m proud of who I am. And my friends . . . love me and vouch for me. And I think that stands on its own,” did

175. Daly, *supra* note 172, at 116 (noting that validation involves “affirming that the victim is believed (i.e. acknowledging that offending occurred and the victim was harmed) and is not blamed for what happened”). McGlynn, Downes, and Westmarland note the importance to survivors of a “shared perception of something as existing or true . . . . Recognition encompasses the significance of the experience being acknowledged.” McGlynn, Downes & Westmarland, *supra* note 160, at 182. Louis C.K. acknowledged that “[t]hese stories are true.” Chloe Melas, *Louis C.K.: ‘These Stories Are True,’* CNN (Nov. 10, 2017, 9:54 PM), <https://www.cnn.com/2017/11/10/entertainment/louis-ck-apology/index.html>.

176. TAVUCHIS, *supra* note 171, at 57. See generally William L. Benoit, *Crisis and Image Repair at United Airlines: Fly the Unfriendly Skies*, 1 J. INT’L CRISIS & RISK COMM. RES. 11, 22 (2018) (“[I]t is not enough to apologize for *something*—one must apologize for the perceived offense.”).

177. Feldthusen, Hankivsky & Greaves, *supra* note 171, at 76 (“*I needed to feel that I had done nothing wrong.*”); Caroline Vaile Wright & Louise F. Fitzgerald, *Angry and Afraid: Women’s Appraisal of Sexual Harassment During Litigation*, 31 PSYCHOL. WOMEN Q. 73, 77–79 (2007) (finding self-blame to be one dimension of appraisal); see also Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/> (“[M]any of Nassar’s accusers spoke of the doubts they experienced about what happened to them, and of wondering whether they could trust their instincts.”); Litman, Murphy & Ku, *supra* note 174 (describing how Kozinski’s response to the allegations against him suggested oversensitivity and lack of humor). See generally LAZARE, *supra* note 171, at 78 (“[B]y acknowledging the offense, the offender says, in effect, ‘it was not your fault.’”).

178. McGlynn, Downes & Westmarland, *supra* note 160, at 182 (noting a “form of acknowledgement conveying support”).

179. Cynthia McPherson Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201, 202, 206 (2005); see also Amy S. Ebesu Hubbard et al., *Effects of Timing and Sincerity of an Apology on Satisfaction and Changes in Negative Feelings During Conflict*, 77 W. J. COMM. 305, 308, 317 (2013); Aili Peyton & Ryan Goei, *The Effectiveness of Explicit Demand and Emotional Expression Apology Cues in Predicting Victim Readiness to Accept an Apology*, 64 COMM. STUD. 411, 426–29 (2013); Michael Wenzel, Ellie Lawrence-Wood, Tyler G. Okimoto & Matthew J. Hornsey, *A Long Time Coming: Delays in Collective Apologies and Their Effects on Sincerity and Forgiveness*, 39 POL. PSYCHOL. 649, 651 (2018).

180. Rich Juziak, *Shaun White Apologizes After Referring to Sexual Harassment Allegations Against Him as ‘Gossip,’* JEZEDEL (Feb. 14, 2018, 11:05 AM), <https://jezebel.com/shaun-white-apologizes-after-referring-to-sexual-harass-1822993076>.

not acknowledge either the harm or the victim.<sup>181</sup> He was promptly criticized for further insulting the woman he had harassed.<sup>182</sup>

In similar ways, apologies that are conditional (“if I . . .”), cast doubt on the consequences (“if anyone was offended”), or refer only generally to “actions” or “behavior” do not acknowledge the harmful behavior or demonstrate an understanding of its wrongfulness or its effects. Consider actor Jeffrey Tambor’s apology: “I am deeply sorry if any action of mine was ever misinterpreted by anyone as being sexually aggressive or if I ever offended or hurt anyone.”<sup>183</sup> This sort of vague apology not only fails to acknowledge the underlying behavior but it also appears to place fault on the victim for misinterpreting or being overly sensitive.<sup>184</sup>

In contrast, consider the recent interaction of Megan Ganz, a television show writer, and her former boss Dan Harmon. After Ganz called Harmon out on Twitter, a virtual community of millions, for his harassment and abuse of her, Harmon offered a lengthy apology on his podcast which included a very specific acknowledgment of the variety of ways in which he had created a toxic work environment, including gaslighting and retaliation, and the ways in which it had affected Ganz.<sup>185</sup>

181. *Id.*

182. Christine Brennan, *As Shaun White Cements Legacy, Why So Little Attention Paid to Sexual Harassment Allegations?*, USA TODAY (Feb. 13, 2018, 10:49 PM), <https://www.usatoday.com/story/sports/columnist/brennan/2018/02/13/shaun-white-gold-medal-sexual-harassment-allegations/335956002/>; Errin Haines Whack, *Hero, Harasser, or Both? Shaun White’s Newly Complex Legacy*, WASH. POST (Feb. 19, 2018), [https://www.washingtonpost.com/sports/olympics/hero-harasser-or-both-shaun-whites-newly-complex-legacy/2018/02/19/05250b6c-155a-11e8-930c-45838ad0d77a\\_story.html](https://www.washingtonpost.com/sports/olympics/hero-harasser-or-both-shaun-whites-newly-complex-legacy/2018/02/19/05250b6c-155a-11e8-930c-45838ad0d77a_story.html).

183. Caitlin Flynn, *Jeffrey Tambor’s Response to New Sexual Misconduct Allegation Is So Offensive to Sexual Violence Victims*, REFINERY29 (Nov. 16, 2017, 10:00 PM), <http://www.refinery29.com/2017/11/181477/jeffrey-tambor-sexual-harassment-response-trace-lysette>. Or, to take an example from an earlier era, consider former Senator Bob Packwood’s repeated refusals to detail the behavior for which he was apologizing in 1992: “I’m apologizing for the conduct that it was alleged that I did.” Martin Tolchin, *Packwood Offers Apology Without Saying for What*, N.Y. TIMES (Dec. 11, 1992), <http://www.nytimes.com/1992/12/11/us/packwood-offers-apology-without-saying-for-what.html>.

184. LAZARE, *supra* note 171, at 92–93 (“[T]he wrongdoer is saying, in effect, ‘Not everyone would be offended by my behavior. If you have a problem with being too thin-skinned, I will apologize to you because of your need (your weakness) and my generosity.’”). Caitlin Flynn criticized Jeffrey Tambor’s apology: “‘I am deeply sorry if any action of mine was ever misinterpreted by anyone as being sexually aggressive or if I ever offended or hurt anyone’”—as sending a “deeply problematic message to *all* sexual violence survivors that we’re overreacting, we ‘misinterpreted’ a man’s intentions, and we should simply give them the benefit of the doubt . . . .” Flynn, *supra* note 183. On evasive, ambiguous, and equivocal apologies, see generally Zohar Kampf, *Public (Non-) Apologies: The Discourse of Minimizing Responsibility*, 41 J. PRAGMATICS 2257, 2258 (2009). These might include expressing willingness to apologize or claiming to have already apologized, without actually apologizing; simultaneously “apologizing” and denying the offense; apologizing for the outcome, but not the act; or using language that “blurs” the offense (*e.g.*, referring generally to an “incident” or “harm”). *Id.* at 2260–66.

185. *Don’t Let Him Wipe or Flush*, HARMONTOWN (Jan. 10, 2018), <http://www.harmontown.com/2018/01/episode-dont-let-him-wipe-or-flush/>. In another case, when film blogger Devin Faraci apologized to his target, Caroline, she noted that “[i]t felt important that he was apologizing, but he was also telling me what he was apologizing for. It didn’t just feel like trying to sweep it under the carpet to me.” *#MeToo, Now What?: The Accuser and the Accused* (PBS television broadcast Feb. 09, 2018), <https://www.pbs.org/video/the-accuser-and-the-accused-fnc15l/>.



In addition to being specific about the behavior and its consequences, it is important to personally address those individuals who suffered harm. For all of its other faults,<sup>186</sup> Louis C.K.'s apology effectively acknowledged "five women named Abby, Rebecca, Dana, Julia who felt able to name themselves and one who did not."<sup>187</sup> Contrast this with Charlie Rose's apology to "these women,"<sup>188</sup> or Jeffrey Tambor's address to "anyone" who he ever offended or hurt.<sup>189</sup> The failure to speak directly to the individuals who were impacted undermines the ability of the statement to recognize the inherent dignity of those individuals and the impact of the wrongful behavior on them.

### B. Responsibility-Taking

Acknowledgement is important. But many victims also desire that offenders will go beyond acknowledgement to accept responsibility or otherwise be held accountable for having caused harm.<sup>190</sup> Responsibility-taking is a central feature of restorative justice.<sup>191</sup> Indeed, most restorative justice programs are specifically designed to be available only in cases in which the offender has acknowledged having engaged in the wrongful acts at issue.<sup>192</sup> Responsibility-taking is also the central feature of apologies—distinguishing apologies from other forms of accounting for wrongful behavior like denial, excuse, or justification<sup>193</sup>—and is central to their potential.<sup>194</sup>

186. Leah Fessler, Annalisa Merelli & Sari Zeidler, *We Edited Louis C.K.'s "Apology" to Make It a Real Apology*, QUARTZ (Nov. 10, 2017), <https://qz.com/1126593/we-edited-louis-cks-statement-on-sexual-misconduct-to-make-it-a-real-apology/>.

187. *Id.*

188. Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—with Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), [https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them—with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d\\_story.html?utm\\_term=.02393cd45f6c](https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them—with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.02393cd45f6c).

189. Almukhtar, Gold & Buchanan, *supra* note 168.

190. Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (describing victim who-pursued claim so that the offender would take responsibility); Koss, *supra* note 172, at 1642 (finding that most victims who chose to participate in restorative justice process did so "to make the responsible person accountable"); McGlynn, Downes & Westmarland, *supra* note 160, at 182, 189.

To have him listen to me was almost the most important thing for me. And it was part of him being accountable and taking responsibility. It was so satisfying . . . to have the person who hurt you sit there and listen to you and not blame you for it and admit to what they did . . . .  
Blair, *supra* note 150 (quoting Attiya Khan).

191. McGlynn, Downes & Westmarland, *supra* note 152, at 182.

192. See Kathleen Daly, *The Limits of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 134, 135 (Dennis Sullivan & Larry Tifft eds., 2006) (Restorative justice "deals with the penalty (or postpenalty) not fact-finding phase of the criminal process."); Koss, *supra* note 164, at 1624; Clare McGlynn, Nicole Westmarland & Nikki Godden, "I Just Wanted Him to Hear Me": *Sexual Violence and the Possibilities of Restorative Justice*, 39 J. L. & SOC'Y 213, 216 (2012) ("[R]estorative justice is predicated on an acknowledgement by the offender that a criminal offence has taken place.").

193. See ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* 113 (1971); TAVUCHIS, *supra* note 171, at 3; Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV. PSYCHOL. 133, 162 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46, 59 (1968). Victims of sexual assault have mixed feelings about apologies—some desire apology, others are more skeptical. Herman, *supra* note 171, at 586; Koss, *supra*

A couple of additional aspects of responsibility-taking are worth noting. First, victims may also want those who *enabled* the wrongful conduct to take responsibility for their part in supporting or failing to prevent or stop the wrongful behavior.<sup>195</sup> Second, responsibility-taking could, but often does not, extend beyond the original harassing behavior to admit responsibility for subsequent denial, deception, or retaliation. These secondary bad acts often result in significant additional harm and are part of the behavior for which victims wish to hold offenders accountable.<sup>196</sup>

Gymnast Rachel Denhollander touched on both of these in her victim impact statement in the Larry Nassar case when she called out Michigan State University:

[Y]ou need to realize that you are greatly compounding the damage done to these abuse victims by the way you are responding. This, what it took to get here, what we had to go through for our voices to be heard because of the responses of the adults in authority, has greatly compounded the damage we suffer. And it matters.<sup>197</sup>

To take another example of the failure to take responsibility for these subsequent wrongful acts, Louis CK's apology did not meaningfully acknowledge his role in costing his victims financial opportunities or the harm imposed by his silence in the face of widespread rumors.<sup>198</sup>

Responsibility-taking can be difficult for those accused of wrongdoing, even under the best of circumstances. It is often difficult to recognize our own misbehavior, and it is embarrassing to admit that we have acted wrongly. Taking responsibility cedes control, creates vulnerability, and can be a hit to

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note 172, at 1642; *see also* Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (finding that only for some was obtaining an apology a reason for pursuing a claim).

194. *See, e.g.*, Kristin M. Pace et al., *The Acceptance of Responsibility and Expressions of Regret in Organizational Apologies After a Transgression*, 15 CORP. COMM. 410, 420 (2010); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 486–89, 495–97 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 359–65 (2006) [hereinafter Robbennolt, *Settlement Levers*]; Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134–36 (1997); Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465, 476 (2004).

195. Herman, *supra* note 171, at 588.

196. On “reactive fault,” *see* Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 931 (2005); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1195–201 (1983); Jeffrey S. Helmreich, *Does “Sorry” Incriminate? Evidence, Harm, and the Protection of Apology*, 21 CORNELL J.L. PUB. POL’Y 567, 583–84 (2012).

197. *Read Rachael Denhollander’s Full Victim Impact Statement About Larry Nassar*, CNN (Jan. 30, 2018, 7:34 AM), <https://www.cnn.com/2018/01/24/us/rachael-denhollander-full-statement/index.html> [hereinafter *Denhollander Victim Impact Statement*].

198. Gabriel Bell, *Louis C.K. Admits to Sexual Misconduct in Ultimately Disingenuous Confession*, SALON (Nov. 10, 2017, 7:29 PM), <https://www.salon.com/2017/11/10/louis-ck-statement-apology/>.

As recently as September 2017, the comedian was framing any suggestions that he had engaged in the actions he admits to above as baseless rumors, unworthy of comment. It is remarkable that the only difference between then and now is that these same once-unworthy rumors surfaced in the paper of record. . . . If he had become aware of the gravity of his actions, why exactly did he wait until after the Times report to discuss them?

*Id.*

self-image.<sup>199</sup> And the potential legal consequences of taking responsibility can loom large in a context like this one in which there is the possibility for civil lawsuits, criminal prosecution, or both.<sup>200</sup> Those accused of wrongdoing are concerned that to acknowledge and take responsibility for wrongful conduct is to admit legal liability.<sup>201</sup> This can make it even harder to admit wrongdoing for those who may already be hesitant to own up to their behavior and a deterrent even for those who do want to apologize and repair the harm.

A number of states have passed legislation to make some forms of apology inadmissible in civil cases.<sup>202</sup> And discussions in other contexts have contemplated that offenders might offer “safe” apologies that merely express sympathy and stop short of taking responsibility.<sup>203</sup> On the other hand, an apology may appropriately imply “agreement to accept all the consequences, social, legal, and otherwise, that flow from having committed the wrongful act.”<sup>204</sup> And, as we will see in the next Section, repair of the harm done is part of a restorative response.

### C. Harm Repair

Restorative justice incorporates the notion that the offender should repair the harm caused by the wrongful behavior.<sup>205</sup> Archbishop Desmond Tutu aptly

199. See, e.g., CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 216–17 (2007); see also Tyler G. Okimoto et al., *Refusing to Apologize Can Have Psychological Benefits (and We Issue No Mea Culpa for this Research Finding)*, 43 EUR. J. SOC. PSYCHOL. 22, 23 (2013); Karina Schumann, *The Psychology of Offering an Apology: Understanding the Barriers to Apologizing and How to Overcome Them*, 27 CURRENT DIRECTIONS PSYCHOL. SCI. 74, 75–76 (2018); Brent T. White, *Saving Face: The Benefits of Not Saying I’m Sorry*, 72 LAW & CONTEMP. PROBS. 261, 264 (2009).

200. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010 (1999); Robbenolt, *Apologies and Legal Settlement*, *supra* note 194, at 462.

201. Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 469 (1997); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 35 (2004).

202. See Robbenolt, *Apologies and Legal Settlement*, *supra* note 194, at 462. Similar reforms have been undertaken in Canada and Australia. See John C. Kleefeld, *Thinking Like a Human: British Columbia’s Apology Act*, 40 U. B.C. L. REV. 769–70 (2007); Prue Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483, 483 (2005); see also Press Release, Scottish Government, *Passage of the Apologies (Scotland) Bill* (Jan. 1, 2016), <https://news.gov.scot/news/passage-of-the-apologies-scotland-bill>; Hong Kong Apology Ordinance, No. 12, (2017) O.H.K., § 1. It is not clear that most of these statutes would protect the kind of robust apologies contemplated here in this context. Many of these statutes apply only to medical malpractice cases; most make inadmissible the expression of sympathy (“I’m sorry”) but not the part of the apology that details the offender’s fault. For empirical examinations, see Benjamin Ho & Elaine Liu, *What’s an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws*, 8 J. EMPIRICAL LEGAL STUD. 179, 179 (2011); Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141 (2011); Benjamin J. McMichael, R. Lawrence Van Horn & W. Kip Viscusi, *Sorry Is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk*, 71 STAN. L. REV. (forthcoming 2018).

203. Cohen, *supra* note 200, at 1010; see generally Robbenolt, *Apologies and Legal Settlement*, *supra* note 194.

204. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1140 (2000).

205. Menkel-Meadow, *supra* note 163, at 162.

illustrates this notion with a simple example: “If you take my pen and say you are sorry, but don’t give me the pen back, nothing has happened.”<sup>206</sup> Moreover, restorative justice contemplates dialogue and joint decision-making about how best to accomplish that repair.<sup>207</sup> There might be a variety of ways to appropriately repair the harm done to individual survivors.<sup>208</sup> As one survivor of domestic sexual violence noted: “[Y]ou need to ask them, like ‘What else is it that you need from me? How can I help you heal after I’ve wronged you?’ That’s the part that’s missing.”<sup>209</sup>

One aspect of this repair is financial compensation,<sup>210</sup> which can be an effective component of making amends.<sup>211</sup> Survivors might desire money damages as concrete compensation for tangible economic losses that occurred as a result of the harassment.<sup>212</sup> These might include lost professional opportunities or assignments, the consequences of career interruption, and expenses for physical and mental health care. Survivors might also see money damages as serving more symbolic purposes.<sup>213</sup> For example, for many, money damages signal that their experience and injuries are acknowledged, serve as evidence that the offender has taken responsibility, or reaffirm their self-worth.<sup>214</sup>

Some survivors might be hesitant to seek individual compensation. For example, some might view money as incommensurate with the harm they have suffered and see offered payments as problematic.<sup>215</sup> “Victims of sexual and other violence have the right to control their cases and deserve to be accorded the agency to decide the” goals of their claims for redress.<sup>216</sup> Indeed, restorative

206. NANCY BERLINGER, *AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS* 61 (2005).

207. Menkel-Meadow, *supra* note 163, at 164.

208. See generally Jennifer K. Robbennolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Legal Decision-Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1128 (2003) (discussing the “principle of equifinality” which “holds that some goals may be alternately satisfied through multiple pathways”).

209. Blair, *supra* note 150 (quoting Attiya Khan, a Toronto-based filmmaker).

210. Financial compensation is an important component of amends. See, e.g., GOFFMAN, *supra* note 186, at 113 (detailing the components of apologies); SMITH, *supra* note 171, at 80–91 (same).

211. See e.g., William P. Bottom et al., *When Talk Is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation*, 13 ORG. SCI. 497, 497 (2002); Scher & Darley, *supra* note 194, at 127; Schmitt et al., *supra* note 194, at 466; Jeanne S. Zechmeister et al., *Don’t Apologize Unless You Mean It: A Laboratory Investigation of Forgiveness and Retaliation*, 23 J. SOC. & CLINICAL PSYCHOL. 532, 536 (2004).

212. Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC’Y 333, 352 (2017).

213. Deborah Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 423 (2003) (discussing the social meaning of tort damages); Herman, *supra* note 163, at 590. For exploration of state-based financial assistance, see Robyn L. Holder & Kathleen Daly, *Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors*, 24 INT’L REV. VICTIMOLOGY 25, 30 (2018). Most said that they would have preferred to receive money from the offender (rather than the state). *Id.* at 40.

214. See Holder & Daly, *supra* note 213, at 35 (financial assistance payment “meant acknowledgement and recognition of what had happened”).

215. Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (One claimant called her payment “dirty money.”).

216. Wexler, *supra* note 8.

justice takes seriously the role of the victim in helping to define the contours of appropriate remedies for herself.<sup>217</sup>

But the community ought to be cognizant of the social pressures on survivors. In particular, some survivors might be hesitant to claim compensation because of concerns about how they will be viewed—and critiqued—by others. Rachel Denhollander, who spoke out about abuse by Larry Nassar, called out those who “claimed that those of us who have filed lawsuits were ambulance chasers who were looking for a payday. . . . [and] specifically called me out by name and said I’m in it for the money.”<sup>218</sup> Similarly, Andrea Constad’s use of her settlement money from a civil case with Bill Cosby was criticized, as she was described as “sett[ing] right into a ritzy Toronto condo after coming to terms with the comedian” and as getting “enough money from the funnyman to score a posh apartment.”<sup>219</sup> This sentiment is consistent with the views of many members of the public who believe that those who seek remuneration for sexual violence are simply gold diggers.<sup>220</sup>

Contrast these sentiments with those expressed about musician Taylor Swift’s countersuit against DJ David Mueller in which she alleged that he sexually assaulted her during a meet and greet.<sup>221</sup> Rather than seek compensatory or punitive damages, Swift sought purely symbolic damages.<sup>222</sup>

217. C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses*, 11 VIOLENCE AGAINST WOMEN 693, 707 (2005) (“[P]roviding multiple options for survivors” is consistent with recognizing women’s different “lived experiences.”). “Whether a response to sexual violence might nonetheless be able to address the individual preferences of women and the larger systemic issues is no small matter.” *Id.*

218. Denhollander Victim Impact Statement, *supra* note 197; see also Debra Cassens Weiss, *How a Gymnast-Turned-Lawyer Helped Bring Larry Nassar to Justice*, ABA JOURNAL (Jan. 29, 2018, 7:00 AM), [http://www.abajournal.com/news/article/how\\_a\\_gymnast\\_turned\\_lawyer\\_helped\\_bring\\_larry\\_nassar\\_to\\_justice/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/how_a_gymnast_turned_lawyer_helped_bring_larry_nassar_to_justice/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email). A claimant to a state-based program is described as reluctant to apply because “I didn’t want anyone to think that I was going for the money” and another because “people could think that the [money] was the only reason why I [applied].” Holder & Daly, *supra* note 213, at 33.

219. Lisa Massarella & Danika Fears, *Cosby Accuser Used Settlement to Buy Ritzy Toronto Condo*, PAGE SIX (Jan. 1, 2016, 6:34 AM), <https://pagesix.com/2016/01/01/cosby-accuser-used-settlement-to-buy-ritzy-toronto-condo/>. At Cosby’s second trial, defense lawyers attempted to “show that Mr. Cosby was the victim of someone who hatched a plot to siphon money from a rich entertainer.” Grahon Bowley & Jon Hurdle, *Bill Cosby by Jury to Hear Account That His Accuser Was Scheming*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/arts/television/bill-cosby-jury-to-hear-account-that-his-accuser-was-scheming.html>.

220. Earl Ofari Hutchinson, *Commentary: Bill Cosby, and How We Dismiss Victims*, CHI. TRIB. (Dec. 31, 2015, 3:01 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-cosby-rape-drugs-court-assault-perspec-0104-20151231-story.html>; Solomon Jones, *The Generational Divide Over Bill Cosby*, INQUIRER (June 13, 2017, 9:25 PM), [http://www.philly.com/philly/columnists/solomon\\_jones/the-generational-divide-over-bill-cosby-20170614.html](http://www.philly.com/philly/columnists/solomon_jones/the-generational-divide-over-bill-cosby-20170614.html).

221. Blair Miller, *Taylor Swift Groping Case: Live Updates From Day 2 in Denver Federal Court*, ABC 7 DENVER (Aug. 8, 2017, 5:38 AM), <https://www.thedenverchannel.com/news/local-news/taylor-swift-groping-case-live-updates-from-day-2-in-denver-federal-court>.

222. Relatedly, in his opening statement, Swift’s lawyer argued:

She’s not trying to bankrupt this man. She’s just trying to tell people out there that you can say no when someone puts their hand on you. . . . Grabbing a woman’s rear end is an assault, and it’s always wrong. Any woman—rich, poor, famous, or not—is entitled to have that not happen.

In his closing argument, Swift's attorney commented on the "immeasurable" value of a symbolic verdict.<sup>223</sup> And an op-ed in the *New York Times* argued that "Taylor Swift's court win may have yielded only a single dollar, but to prove this point was invaluable."<sup>224</sup> But does such a statement also convey that civil liability is not merely immeasurable but also sufficient? Might such sentiments subtly reinforce to victims that they ought not pursue their self-interest in damages so as to better satisfy a societal schema of the "ideal victim"?<sup>225</sup>

Processes to remedy the consequences of sexual assault ought to challenge the taint of monetary damages and the stereotype of the gold digger. Victims deserve to be made whole under the law, and making sexual misconduct expensive for alleged abusers may have a deterrence function. The legal system provides victims of physical assaults with monetary damages for important reasons, and, for many victims, those damages might be just as important as the judicial acknowledgement of wrongdoing by the defendant.

Other forms of repair are also appropriate. Apologies can serve to repair some aspects of the harm.<sup>226</sup> And community service is often mentioned, particularly community service that relates to the underlying harm.<sup>227</sup> For an example in a related context, take Ray Rice, the former NFL star caught on video punching his then-girlfriend, now wife, Janay Rice in an elevator and then dragging her, facedown and unconscious, out into the hall.<sup>228</sup> Rice remains in personal therapy after completing required sessions under his diversion agreement,<sup>229</sup> speaks publicly about his remorse,<sup>230</sup> teaches about domestic violence and decision-making to young men, and volunteers with his old high

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*Id.*

223. Daniel Kreps, *Jury Sides with Taylor Swift in Groping Trial, Orders DJ to Pay \$1*, ROLLING STONE (Aug. 14, 2017), <https://www.rollingstone.com/music/music-news/jury-sides-with-taylor-swift-in-groping-trial-orders-dj-to-pay-1-195885/> ("By returning a verdict on Ms. Swift's counterclaim for a single symbolic dollar, the value of which is immeasurable to all women in this situation. . . You will tell every woman . . . that no means no.").

224. Laura Bates, *A Thank You to Taylor Swift*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2017/08/20/opinion/a-thank-you-to-taylor-swift.html>.

225. Wexler, *supra* note 8.

226. See, e.g., Chloe Dykstra, *Rose-Colored Glasses: A Confession.*, MEDIUM (June 14, 2018), <https://medium.com/@skydart/rose-colored-glasses-6be0594970ca> ("PS: To the man who tried to ruin my future: A sincere and heartfelt apology could have made my last four years a hell of a lot easier."). See generally Heather Strang & Lawrence William Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 22.

227. TONY F. MARSHALL, HOME OFF. RES. DEV. & STAT. DIRECTORATE, RESTORATIVE JUSTICE: AN OVERVIEW 26 (1999).

228. Amy Davidson Sorkin, *What the Ray Rice Video Really Shows*, NEW YORKER (Sept. 8, 2014), <https://www.newyorker.com/news/amy-davidson/ray-rice-video-shows>.

229. Josh Dean, *Ray Rice in Exile*, MEN'S J. (Jan. 30, 2018), <https://www.mensjournal.com/sports/ray-rice-exile>.

230. *Id.* ("Ray Rice is sorry. He'll say it even if you don't ask him about it. Like a 12-stepper at a wedding, Rice openly discusses 'my incident' or 'my awful mistake' to the extent that he may as well wear a sandwich board that reads, 'Hi, my name is Ray, and I hit my wife.'").

school team as a mentor.<sup>231</sup> Most recently, despite ever-diminishing chances of being drafted back into the league, Rice contributed to the NFL's annual social responsibility presentation on healthy choices and healthy masculinity with a video on his decision-making and what led him to domestic violence.<sup>232</sup> By way of contrast, convicted rapist Brock Turner's offer to speak to undergraduates about the hazards of excessive drinking is not a meaningful form of repair as it further injures his victim Emily Doe by shifting the blame away from his personal wrongdoing and suggesting instead they were both irresponsible for overconsuming alcohol.<sup>233</sup>

Finally, as we detail in Part IV, to be truly restorative and even transformative, repair needs to happen at a societal level, with change occurring to institutions, structures, and social norms.<sup>234</sup>

#### D. Nonrepetition

Part of affirming the dignity and status of the harmed individual is taking steps to avoid perpetuating similar wrongdoing in the future. Survivors are often motivated to take action against offenders in the hope that similar harm will not befall others in the future<sup>235</sup> and to regain a sense that they themselves are safe from continuing harassment.<sup>236</sup> The decision to call out a perpetrator is often, at least in part, prompted by a desire to prevent harm to future victims.<sup>237</sup>

231. Jane McManus, *If Not the Player, Ray Rice Asks You to Forgive the Man*, ESPN (Apr. 28, 2017), <http://www.espn.com/espnw/culture/feature/article/19248874/if-not-player-ray-rice-asks-forgive-man>.

232. Jane McManus, *Ray Rice to Contribute to NFL's Annual Social Responsibility Presentation to Players, Staff*, ESPNW (Apr. 18, 2017), [http://www.espn.com/nfl/story/\\_/id/19180539/ray-rice-working-nfl-annual-social-responsibility-presentation](http://www.espn.com/nfl/story/_/id/19180539/ray-rice-working-nfl-annual-social-responsibility-presentation). Though one might view as problematic the emphasis on the singularity of the event as both the video and empirical evidence suggest that is unlikely to be the case. Steve Fishman, *Ray Rice Redemption Campaign*, N.Y. MAG. (Apr. 7, 2015, 8:00 AM), <http://nymag.com/intelligencer/2015/04/ray-rice-redemption-campaign.html>.

233. Liam Stack, *In Stanford Rape Case, Brock Turner Blamed Drinking and Promiscuity*, N.Y. TIMES (June 8, 2016), <https://www.nytimes.com/2016/06/09/us/brock-turner-blamed-drinking-and-promiscuity-in-sexual-assault-at-stanford.html>.

234. See *infra* Part III; Hayes & Kaba, *supra* note 151 ("Transformative justice is . . . a community process . . . [designed to] figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.").

235. GOFFMAN, *supra* note 193, at 113; Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (finding that a key reason for pursuing a claim is "deterring defendant from harming others"); Feldthusen, Hankivsky & Greaves, *supra* note 171, at 76; Koss, *supra* note 172, at 1642 (finding that one reason most victims participated in restorative justice process was "making sure the responsible person doesn't do what he did to anyone else"); see Abigail Abrams, *'I Thought I Was Going to Die': Read McKayla Maroney's Full Victim Impact Statement in Larry Nassar Trial*, TIME (Jan. 19, 2018), <http://time.com/5109011/mckayla-maroney-larry-nassar-victim-impact-statement>. These motives are also seen in the context of tort litigation. See e.g., Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1004 (2003); Hensler, *supra* note 213, at 421; Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 723 (2007).

236. LAZARE, *supra* note 171, at 59–60; Estelle Zinsstag & Marie Keenan, *Restorative Responses to Sexual Violence: An Introduction*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL SOCIAL, AND THERAPEUTIC DIMENSIONS 1, 6 (Estelle Zinsstag & Marie Keenan eds., 2017) ("The difficulty of reimagining a safer and positive future relationship is often one of primary concerns to victims and others indirectly affected by the sexual harm.").

237. Herman, *supra* note 171, at 594.

This desire is also one reason why the acceptance of responsibility matters to victims—it is hoped that responsibility-taking can be the first step in a process of learning that leads to changed behavior.<sup>238</sup>

Many of the statements we have seen from public figures accused of sexual harassment have failed to outline how their behavior will change in the future.<sup>239</sup> Even those who acknowledge their past misdeeds seem to have little concrete to offer on this front. For instance, in discussing his groping of actress Hilary Burton, actor Ben Affleck suggested that “we have to as men . . . be really, really mindful of our behavior and hold ourselves accountable and say ‘If I was ever part of the problem, I want to change. I want to be part of the solution.’”<sup>240</sup> Yet, in addition to making a conditional statement about his past behavior, he failed to outline how he would change himself going forward.<sup>241</sup> Similarly, Dan Harmon’s apology, which was noteworthy for the level of detail it provided about what he did wrong and how he harmed Megan Ganz, lacks specifics when contemplating how to do better in the future.<sup>242</sup>

It is important to note, moreover, that promises to stop engaging in wrongful behavior must be more than promises. One risk is that offenders will be “quick to apologize, slow to change.”<sup>243</sup> Victims emphasize that promises of reform can help repair the harm, but only if the promises are actually carried out.<sup>244</sup> While an apology may happen at a particular moment in time, the larger project of amends-making, in which it is embedded, is often an ongoing endeavor.

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238. Cohen, *supra* note 200, at 1021; Scher & Darley, *supra* note 194, at 129–30.

239. See *Mea Culpa. Kinda Sorta.*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/interactive/2017/12/01/us/harassment-apologies-annotated.html>.

240. Stephanie Eckardt, *Ranking the Absolute Worst Apologies by Men Accused of Sexual Assault Post Harvey Weinstein in 2017*, W MAG. (Nov. 30, 2017, 12:30 PM), <https://www.wmagazine.com/story/worst-apologies-by-men-harvey-weinstein-kevin-spacey-charlie-rose>.

241. *Ben Affleck Dubbed Buttman After More Groping Allegations Emerge*, TELEGRAPH (Oct. 12, 2017, 4:37 PM), <https://www.telegraph.co.uk/films/2017/10/12/ben-affleck-dubbed-buttman-groping-allegations-emerge>.

242. *Don’t Let Him Wipe or Flush*, *supra* note 185 (“The last and most important thing I can say is just: Think about it. No matter who you are at work, no matter where you’re working, no matter what field you’re in, no matter what position you have over or under or side by side with somebody, just think about it. You gotta, because if you don’t think about it, you’re gonna get away with not thinking about it, and you can cause a lot of damage that is technically legal and hurts everybody. And I think that we’re living in a good time right now, because we’re not gonna get away with it anymore. And if we can make it a normal part of our culture that we think about it and possibly talk about it, then maybe we can get to a better place where that stuff doesn’t happen.”).

243. Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 128, 148 (Heather Strang & John Braithwaite eds., 2002).

244. John Paul Catungal, *LGBTQ2 Apology Is Good Start, But It’s Not Enough*, CONVERSATION (Nov. 27, 2017), <http://theconversation.com/lgbtq2-apology-is-a-good-start-but-its-not-enough-88159> (“The apology must be more than a mere symbolic gesture with little real impact.”).



### E. *Redemption and Reintegration*

One of the tenets of restorative justice is the reintegration of the offender back into the relevant community.<sup>245</sup> The restorative justice notion of “earned redemption” anticipates both that offenders will be held accountable for their behavior and that they will be enabled to “earn their way back into the trust of the community.”<sup>246</sup> These dual goals mean that “we face a difficult post-#MeToo conversation, about how we collectively deal with men who have been outed as perpetrators of assault, harassment, and misconduct.”<sup>247</sup>

The reintegration contemplated by restorative justice has been somewhat controversial in the context of sexual violence. Advocates of transformative justice in cases of domestic violence, for example, argue that the reintegration of the offender is “important but secondary to enhancing the victim’s autonomy.”<sup>248</sup> And studies of the preferences of survivors of domestic violence, while reflecting survivors’ desire for many aspects of restorative justice, have suggested that survivors prioritize “their own need for reintegration with their communities, rather than the offenders’ need for reintegration.”<sup>249</sup>

In the wake of #MeToo and Time’s Up, individuals in Hollywood have contemplated what might be necessary for redemption and reintegration. Actor Bryan Cranston, for example, allowed that there was room for second chances for offenders like Weinstein and Spacey, but recognized that

it would take tremendous contrition on their part. And a knowingness that they have a deeply-rooted psychological emotional problem and it takes years to mend that. If they were to show us that they put the work in, and are truly sorry, and making amends, and not defending their actions, but asking for forgiveness, then maybe down the road there is room for that, maybe so. . . . We shouldn’t close it off and say, “To hell with him, rot and go away from us from the rest of your life.” Let’s not do that.<sup>250</sup>

245. Menkel-Meadow, *supra* note 163, at 162.

246. Bazemore, *supra* note 167, at 770.

247. Anna Silman, *7 Actresses on Whether the Men of #MeToo Should Get a Path to Redemption*, CUT (May 1, 2018), <https://www.thecut.com/2018/05/should-metoo-perpetrators-be-allowed-a-path-to-redemption.html>; see also Linda Martin Alcoff, *This Is Not Just About Junot Díaz*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/opinion/junot-diaz-metoo.html> (“[W]e have a responsibility to think about the future—specifically, a future in which repentant sexists might have a place” and calling for society to “think through the important issue of how to demand individual responsibility from abusers while also being vigilant about our collective and institutional responsibility, to develop critiques of the conventions of sexual behavior that produce systemic sexual abuse.”).

248. Coker, *supra* note 243, at 145.

249. Herman, *supra* note 171, at 598 (“The restorative element of the survivors’ vision was most apparent in their focus on the harm of the crime rather than on the abstract violation of the law and in their preference for making things as right as possible in the future, rather than in avenging the past. Their vision was restorative, also, in their emphasis on the importance of community acknowledgement and denunciation of the crime. Their focus, however, was on their own need for reintegration with their communities, rather than the offenders’ need for reintegration.”).

250. Bryan Cranston: *‘There May Be a Way Back for Weinstein,’* BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/av/entertainment-arts-41973917/bryan-cranston-there-may-be-a-way-back-for-weinstein>.

Women involved in the leadership of Time's Up have also grappled with this question. Actress Reese Witherspoon granted that "there's a lot of room for reconciliation. I think there's a time to approach people and tell the truth and have them listen thoughtfully and meaningfully and apologize sincerely."<sup>251</sup> At the same time, actress America Ferrera has noted:

As a culture, we've gone from not listening, hearing, or believing women. And how are we going to skip over the whole part where women get to be heard and go straight to the redemption of the perpetrator. Can't we live in that space where it's OK for perpetrators to be a little bit uncomfortable with what the consequences will be?<sup>252</sup>

Redemption may begin with an apology<sup>253</sup> but may take more than a simple apology.<sup>254</sup> How much more is required for the offender to rebuild his or her moral and social identity depends, in part, on the nature of the offense—for example, its severity, intentionality, and pervasiveness.<sup>255</sup> And attention to the nuances of these factors is important in order to avoid moral flattening. But appropriate consequences are important. Community responses to the wrongdoing and what communities require from an offender communicate

251. *Oprah Winfrey on Time's Up and the Climate of Change*, CBS NEWS (Jan. 13, 2018), <https://www.cbsnews.com/video/oprah-winfrey-on-times-up-and-the-climate-of-change/>.

252. *Id.*

253. Vanessa A. Bee, *Can Penitent Sexual Predators Ever Be Granted Redemption*, CURRENT AFF. (Nov. 30, 2017), <https://www.currentaffairs.org/2017/11/can-penitent-sexual-predators-ever-be-granted-redemption> ("If someone can't bring themselves to make a clear, unequivocal apology . . . that seems to pretty clearly foreclose the possibility of the community choosing to trust them again in the future.").

254. Blair, *supra* note 150; Dena M. Gromet & Tyler G. Okimoto, *Back Into the Fold: The Influence of Offender Amends and Victim Forgiveness on Peer Reintegration*, 24 BUS. ETHICS Q. 411, 411 (2014) (finding that organizational peers were more inclined to reintegrate into the workplace an offender who offered strong amends for the wrongdoing); Herman, *supra* note 71, at 593 ("Rather than moving victims to forgiveness," she stated, "we need to be thinking about moving offenders to contrition and changed behavior. We are looking to get beyond, 'I'm sorry, honey.'"); McGlynn, Downes & Westmarland, *supra* note 160, at 187 ("All survivors spoke of their wish for perpetrators to experience tangible consequences, symbolically and emphatically, to underline the significance and harm of their actions."); see also MARGARET URBAN WALKER, MORAL REPAIR 191 (2006) (describing accepting responsibility and acknowledging harm as the "minimal condition" for "setting things right"); Christopher P. Reinders Folmer, Peter Mascini & Joost M. Leunissen, *Rethinking Apology in Tort Litigation: Deficiencies in Comprehensiveness Undermine Remedial Effectiveness* 2 (Jan. 31, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3113196>.

255. People tend to need more elaborate apologies for more culpable offenses. Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 226 (1989); Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271, 275 (1981); see also Jerry Goodstein & Karl Aquino, *And Restorative Justice for All: Redemption, Forgiveness, and Reintegration in Organizations*, 31 J. ORG. BEHAV. 624, 626 (2009) ("Not all transgressions in the workplace should be addressed through restorative justice. One of the factors organizational actors should consider before using restorative justice to address transgressions is the seriousness of the offense."); Julian V. Roberts & Loretta J. Stalans, *Restorative Sentencing: Exploring the Views of the Public*, 17 SOC. JUST. RES. 315, 319–20 (2004) ("[R]estorative proportionality" requires repair that is "more onerous in relation to the degree of harm inflicted, and . . . related to repairing the harm . . . caused."); L. Walgrave & H. Geudens, *The Restorative Proportionality of Community Service for Juveniles*, 4 EUR. J. CRIME CRIM. L. & CRIM. JUST. 361, 375–76 (1996) (arguing that a proportional or "correct" restoration is "to be determined on the basis of a link between the severity of the material, relational and social harm caused by the offence and the degree of restorative effort required by the offender"); C. Ward Struthers et al., *Interrelationship Among Injured Parties' Attributions of Responsibility, Appraisal of Appropriateness to Forgive the Transgressor, Forgiveness, and Repentance*, 40 J. APPLIED. SOC. PSYCHOL. 970 (2010).

something about the collective's view of the violation, the underlying social norms, and the relative status of the offender and survivor.<sup>256</sup> Censure and meaningful consequences for offenders condemn the offender's treatment of the survivor, confirm the value of the survivor in the community, and reaffirm or (perhaps more appropriately in the case of sexual harassment) recreate a shared set of social norms and values.<sup>257</sup>

Restorative justice approaches contemplate that offenders will engage in all the other aspects of the restoration as the foundation for reintegration.<sup>258</sup> Thus, to be reintegrated into the community, offenders need not become "moral saint[s]"<sup>259</sup> but should make restitution to their victims, engage in service to the relevant community, confront the harm caused by their behavior, and learn from their experience while helping others to do so as well.<sup>260</sup> Insufficient attention to building this foundation for redemption can cause efforts at reintegration or "comebacks" to fall flat.<sup>261</sup> As actress Ashley Judd notes,

256. Wenzel, Okimoto, Feather & Paltow, *supra* note 159, at 385. *See generally* Katie J.M. Baker, *What Do We Do With These Men?*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/sunday/metoo-comebacks-charlie-rose.html> (noting importance of societal grappling with what to require for reintegration).

257. *See, e.g.*, Daly, *supra* note 172, at 118 (describing the importance of "public condemnation and censure"); Herman, *supra* note 163, at 585 (describing the importance of a "clear and unequivocal stand in condemnation of the offense"); Wenzel, Okimoto, Feather & Paltow, *supra* note 159, at 379–80. *See generally* TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997).

258. Menkel-Meadow, *supra* note 163, at 162.

259. Linda Radzik, *Moral Repair and the Moral Saints Problem*, 2 RELIGIOUS INQ. 5, 13 (2013).

260. Bazemore, *supra* note 167, at 771, Table 1; *see also* LINDA RADZIK, *MAKING AMENDS* 5 (2009) ("The sorts of responses that come to mind include feelings of guilt, remorse, or shame; resolutions to behave better in the future; acknowledgements of wrongdoing and blameworthiness; apologies; self-improvement; acts of restitution or reparation; the performance of good deeds that would otherwise be deemed supererogatory; self-punishment; and voluntary submission to punishment at the hands of an authority"); TAVUCHIS, *supra* note 171, at 8 ("[Apologies are] a form of self-punishment that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered out claims to membership in a moral community suspect or defeasible."); Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 LAW & SOC'Y REV. 1, 1 (2009) (finding that people care about simultaneously accomplishing a range of justice goals in responding to wrongdoing); Gromet & Darley, *supra* note 163, at 410, 417 (finding that research participants assigned less punishment (*i.e.*, prison time) to offenders who had gone through processes that involved restorative justice components than to those who did not and that participants preferred greater punishment when restorative procedures were unsuccessful); McGlynn, Downes & Westmarland, *supra* note 160, at 187 ("[Victims want] meaningful consequences. All survivors spoke of their wish for perpetrators to experience tangible consequences, symbolically and emphatically to underline the significance and harm of their actions."); Walgrave & Geudens, *supra* note 255, at 376–77 (discussing the restoration of public losses via service to the community).

261. Cara Buckley, *Tig Notaro Doesn't Want to Hear About Disgraced Men Coming Back*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/arts/television/tig-notaro-louis-ck-metoo.html>; Stassa Edwards, *Redemption Is Inevitable for Powerful Men*, JEZEBEL (Apr. 20, 2018, 1:30 PM), <https://jezebel.com/redemption-is-inevitable-for-powerful-men-1825364533>; Amber Tamblyn, *Amber Tamblyn: I'm Not Ready for the Redemption of Men*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/opinion/im-not-ready-for-the-redemption-of-men.html>; Lindsay Zoladz, *The #MeToo Mudslide*, RINGER (Apr. 19, 2018, 5:40 AM), <https://www.theringer.com/2018/4/19/17254878/metoo-comeback-narrative-louis-ck-mario-batali>; *see also* Roxane Gay, *Louis C.K. and Men Who Think Justice Takes as Long as They Want It To*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/opinion/louis-ck-comeback-justice.html>; Litman, Murphy & Ku, *supra* note 204.

“There’s an appropriate sequence. Accountability, introspection, restitution, then redemption. You don’t get to skip the stages that lead to redemption.”<sup>262</sup>

In a similar vein, consider one reaction to #MeToo offenders’ desire to re-integrate:

It’s one thing to say that people who have harmed others, and feel remorse, deserve an opportunity to make amends, and shouldn’t be pariahs forever. Most people shouldn’t be defined by the worst thing they’ve ever done.

There’s a difference, however, between arguing that someone merits a second chance, and insisting that he didn’t do anything all that wrong in the first place, that his accusers are exaggerating, or that his humiliation makes him the real victim. . . .

. . . .

. . . I feel sorry for a lot of these men, but I don’t think they feel sorry for women, or think about women’s experience much at all. And maybe that’s why the discussion about #MeToo and forgiveness never seems to go anywhere, because men aren’t proposing paths for restitution. They’re asking why women won’t give them absolution.

I’m not interested in seeing these #MeToo castoffs engage in Maoist struggle sessions to purge their patriarchal impulses. But maybe they’d find it easier to resurrect their careers if it seemed like they’d reflected on why women are so furious in the first place, and perhaps even offered ideas to make things better.<sup>263</sup>

Redemption and reintegration takes real work.

The experience of actor Mel Gibson provides a possible example of what exile followed by reintegration might look like when an offender makes personal amends but does not engage in a serious effort to repair the community. After crafting what many view as a deeply anti-Semitic movie (*The Passion of the Christ*) in 2004; getting drunk and calling a police officer “sugar tits” and blaming the Jews for the world’s problems in 2006; and threatening his girlfriend, wishing her rape, and using racist profanity in 2010, Hollywood largely turned its back on Gibson.<sup>264</sup> Gibson offered a public apology to the Jewish community in 2006, asking for the community’s help on his journey through recovery and a “discussion to discern the appropriate path for healing.”<sup>265</sup> For

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262. Quoted in Anna Silman, *7 Actresses on Whether the Men of #MeToo Should Get a Path to Redemption*, CUT (May 1, 2018), <https://www.thecut.com/2018/05/should-metoo-perpetrators-be-allowed-a-path-to-redemption.html>; see also Devin Faraci, *#MeToo, Now What?*, PUB. BROADCASTING SERV. (television broadcast Feb. 9, 2018), <http://www.pbs.org/video/the-accuser-and-the-accused-fnc15l/> (“You don’t just get to show up and say, ‘Hey sorry, my bad’ and then just keep going. That’s not how it works.”).

263. Michelle Goldberg, *The Shame of the MeToo Men*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/opinion/columnists/metoo-movement-franken-hockenberry-macdonald.html>.

264. Sady Doyle, *It Took America Under 10 Years to Forgive Mel Gibson. What Will It Take to Get Rid of Abusers for Good?*, ELLE (Nov. 17, 2017), <https://www.elle.com/culture/a13796102/mel-gibson-redemption-harvey-weinstein-sexual-assault/>.

265. Mel Gibson, *Mel Gibson’s Apology to the Jewish Community*, ANTI-DEFAMATION LEAGUE (Aug. 1, 2006), <https://www.adl.org/news/letters/mel-gibsons-apology-to-the-jewish-community>.

several years, no Hollywood studios directly employed him. High-profile celebrities and writers then lobbied for his return, vouching for his efforts at reform.<sup>266</sup> They pointed to his personal healing,<sup>267</sup> sincere empathy, attendance at bat mitzvahs and Yom Kippur breakfasts, acknowledgement of the Holocaust, a personal but unpublicized apology to one of the sheriffs he insulted, discreet meetings with Jewish leaders to learn about Judaism and apologize, and his donations to charitable Jewish causes.<sup>268</sup> They argued that he was fundamentally changed from who he was.<sup>269</sup>

Not all agree that Gibson has sufficiently atoned to warrant his public reintegration. Detractors observe that Gibson has made comments that demonstrate a refusal to now publicly wrestle with his past,<sup>270</sup> has shown a profound lack of public remorse,<sup>271</sup> and has evinced an unwillingness to engage in ongoing repair.<sup>272</sup> Nonetheless, Gibson has returned to Hollywood. In 2016, he directed *Hacksaw Ridge*, a major motion picture, and in 2017, he starred in the

266. Allison Hope Weiner, *A Journalist's Plea on 10<sup>th</sup> Anniversary of 'The Passion of the Christ': Hollywood, Take Mel Gibson Off your Blacklist*, DEADLINE (Mar. 11, 2014, 2:48 PM), <https://deadline.com/2014/03/mel-gibson-career-hollywood-deserves-chance-697084/>.

267. Billy Nilles, *What Mel Gibson's Rebound Really Says About Hollywood*, E! ONLINE (Nov. 11, 2017, 4:00 AM), <https://www.eonline.com/news/892897/what-mel-gibson-s-rebound-really-says-about-hollywood> (Andrew Garfield said, "I think it's a good sign that the Academy has acknowledged his work. It's utterly deserved, but it's a really good sign that finally the healing he's been doing internally and in his life and with the people in his life can finally be recognized on the outside.").

268. Allison Kaplan Somner, *Should Mel Gibson Be Forgiven Because He Helps Holocaust Survivors?*, HAARETZ (Mar. 21, 2017, 1:15 AM), <https://www.haaretz.com/life/film/premium-should-mel-gibson-be-forgiven-because-he-helps-holocaust-survivors-1.5451320>; Weiner, *supra* note 258.

269. Mike Fleming Jr., *Robert Downey Jr. Q&A: On 'The Judge,' Turning 50 with a New Baby, and Yes to 'Iron Man 4'—If Mel Gibson Directs It*, DEADLINE (Oct. 3, 2014, 8:41 AM), <https://deadline.com/2014/10/robert-downey-jr-qa-the-judge-iron-man-4-mel-gibson-845359/> (Robert Downey Jr. said, "Nobody should make a case for somebody who just wants forgiveness but hasn't changed, but he's a fundamentally different guy.").

270. Megan Garber, *Mel Gibson Is Not Sorry*, ATLANTIC (Nov. 2, 2016), <https://www.theatlantic.com/entertainment/archive/2016/11/mel-gibson-is-not-sorry/506225/> (discussing Gibson's description of his past transgressions as a single "moment in time").

271. Madeleine Davies, *Mel Gibson Is Unworthy of a 'Comeback,' But He's Getting One Anyway*, JEZEBEL (Mar. 1, 2017, 2:20 PM), <https://jezebel.com/mel-gibson-is-unworthy-of-a-comeback-but-hes-getting-o-17928>

28959. Davies describes Gibson's 2006 arrest and subsequent public leak of his comments as "recorded illegally by an unscrupulous police officer who was never prosecuted for that crime. And then it was made public by him . . . So, not fair" and added, "[a]nd for one episode in the back of a police car on eight double tequilas to sort of dictate all the work, life's work and beliefs and everything else that I have and maintain for my life is really unfair. *Id.*

272. Nick Holdsworth, *Why Mel Gibson Won't Finance More of His Own Films: 'I'm Not a Fool' (Q&A)*, HOLLYWOOD REP. (July 5, 2014, 12:28 PM), <https://www.hollywoodreporter.com/news/why-mel-gibson-wont-finance-716811> ("It's behind me; it's an 8-year-old story. It keeps coming up like a rerun, but I've dealt with it and I've dealt with it responsibly and I've worked on myself for anything I am culpable for. All the necessary mea culpas have been made copious times, for this question to keep coming up, it's kind of like . . . I'm sorry they feel that way, but I've done what I need to do."); Ian Phillips, *I'm Jewish, and I'm Not Ready for a Mel Gibson Comeback*, THIS INSIDER (Nov. 3, 2016, 5:32 AM), <https://www.thisinsider.com/why-im-not-ready-to-forgive-mel-gibson-2016-11>.

family-friendly, big-budget movie *Daddy's Home*.<sup>273</sup> As of the writing of this Article, Gibson also stars in three postproduction movies.<sup>274</sup>

While Gibson's advocates may be correct about his personal remorse, he has fallen short with regard to ongoing public acknowledgement and efforts to repair.<sup>275</sup> Even if he has taken the necessary steps with regard to his victims and with himself, public efforts would better allow others to learn from his example, demonstrate his break from the past, and provide the public with better information from which to debate the sufficiency of his efforts and sincerity, which, in turn, could contribute to the ongoing public dialogue about acceptable behavior.

If reintegration is possible, what about forgiveness? There is evidence that forgiveness can benefit both survivors and offenders, that seeking and granting forgiveness can be physiologically and emotionally beneficial to both parties.<sup>276</sup> But it is important to have a nuanced understanding of what forgiveness is (and is not) and how it fits (or does not fit) into restorative justice.

Forgiveness is "a decision to release or forego bitterness and vengeance" that may (or may not) involve a change in emotions or attitudes toward the offender.<sup>277</sup> In this way, forgiveness is about the forgiver and involves an intrapersonal letting go of resentment, rather than necessarily being focused on interaction with the offender.<sup>278</sup>

273. For other examples, see S.E. Cupp, *Is America Too Forgiving? Bill Clinton, Eliot Spitzer, Tiger Woods—All Get Shots at Redemption*, N.Y. DAILY NEWS (July 7, 2010, 4:00 AM), <http://www.nydailynews.com/opinion/america-forgiving-bill-clinton-eliot-spitzer-tiger-woods-shots-redemption-article-1.467596> ("[H]ow readily we forgive says something crucial about our character and our judgment. We don't need to rake our sinners over the coals forever, but perhaps we should be more judicious about rewarding them with million-dollar contracts, as in the case of Woods; positions of influence, as in the case of Spitzer, or blind adoration, as in the case of Clinton. Forgiveness might be good for our souls, but reward does nothing to cleanse theirs.").

274. *Mel Gibson Filmography*, IMDB, <https://www.imdb.com/name/nm0000154/> (last visited Dec. 7, 2018).

275. See SMITH, *supra* note 171, at 81 ("We often judge an offender's commitment to reform and forbearance over their lifetime, and any regression can diminish an apology's significance."); Radzik, *supra* note 259, at 13 (discussing the scope of the obligation to atone).

276. See, e.g., Nathaniel G. Wade et al., *Efficacy of Psychotherapeutic Interventions to Promote Forgiveness: A Meta-Analysis*, 82 J. CONSULTING & CLINICAL PSYCHOL. 154, 167 (2014) (reviewing studies); Everett L. Worthington et al., *Forgiveness, Health, and Well-Being: A Review of Evidence for Emotional Versus Decisional Forgiveness, Dispositional Forgiveness, and Reduced Unforgiveness*, 30 J. BEHAV. MED. 291 (2007) (reviewing studies); see also Harry M. Wallace, Julie Juola Exline & Roy F. Baumeister, *Interpersonal Consequences of Forgiveness: Does Forgiveness Deter or Encourage Repeat Offenses?*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 453 (2008).

277. Julie Juola Exline, *The Thorny Issue of Forgiveness: A Psychological Perspective*, 13 PEPP. DISP. RESOL. L.J. 13, 17 (2013); see also Charlotte vanOyen Witvliet & Lindsey Root Luna, *Forgiveness and Well-Being*, in POSITIVE PSYCHOLOGY: ESTABLISHED AND EMERGING ISSUES 131, 133 (Dana S. Dunn ed., 2018) (Forgiveness is described as "(1) emphasizing the humanity of the offender while holding him or her responsible for the transgression, (2) seeing the transgression as evidence that the offender needs to be transformed by learning, growing, or changing, and (3) desiring that good change for the offender.").

278. See Peter Strelan et al., *For Whom Do We Forgive? A Functional Analysis*, 20 PERS. RELATIONSHIPS 124 (2013). Forgiveness is more likely when the risk of exploitation is low and the value of the relationship with the offender is high. Jeni L. Burnette et al., *Forgiveness Results from Integrating Information About Relationship Value and Exploitation Risk*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 345 (2012). Making amends

Importantly, neither forgiveness nor reintegration should mean that offenders are not to be held accountable, or that they are exempt from punishment or reparations.<sup>279</sup> “Forgiveness is not denying, excusing, minimizing, or tolerating an offense. . . . [F]orgiveness ought to take seriously the safety of the victim (e.g., physically, emotionally, spiritually) and justice oriented responses to the offender.”<sup>280</sup> Thus, forgiveness and accountability can co-exist, and making amends should be a precursor to reintegration. Similarly, forgiveness “is not the same thing as restoring an offender to a prior position,”<sup>281</sup> nor does forgiveness mean that a survivor must reconcile with an offender.<sup>282</sup> And, despite the common refrain “forgive and forget,” forgiveness does not imply forgetting.<sup>283</sup> Indeed, it is important to remember offenses so that offenders can learn from them and others can protect themselves as necessary.<sup>284</sup>

In addition, while the inclusion of reintegration as an element of restorative justice may necessitate some “community capacity” for a sort of forgiveness,<sup>285</sup> it does not require that individual survivors must forgive offenders.<sup>286</sup> Nor does accepting an apology mean that the victim will or must

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can provide information about each of these considerations. Laura B. Luchies et al., *People Feel Worse About Their Forgiveness When Mismatches Between Forgiveness and Amends Create Adaptation Risks*, J. SOC. REL. 2017, at 37. For a review of the factors that contribute to forgiveness, see Ryan Fehn, Michelle Gelfand & Monisha Nag, *The Road to Forgiveness: A Meta-Analytic Synthesis of Its Situational and Dispositional Correlates*, 136 PSYCHOL. BULL. 894, 896 (2010). See generally MICHAEL E. MCCULLOUGH, KENNETH I. PARGAMENT & CARL E. THORESEN (EDS.), FORGIVENESS: THEORY, RESEARCH, AND PRACTICE (2000).

279. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 15 (1998) (“In theory, forgiveness does not and should not take the place of justice or punishment. Forgiveness makes a change in how the offended feels about the person who committed the injury, not a change in the actions to be taken by a justice system.”); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 33 (1988) (“Because I have ceased to hate the person who has wronged me it does not follow that I act inconsistently if I still advocate his being forced to pay compensation for the harm he has done or his being forced to undergo punishment for his wrongdoing.”). See generally, Peter Strelan, *Justice and Forgiveness in Interpersonal Relationships*, 27 CURRENT DIR. PSYCHOL. SCI. 20 (2018); Michael Wenzel & Tyler G. Okimoto, *On the Relationship Between Justice and Forgiveness: Are All Forms of Justice Made Equal?*, 53 BRIT. J. SOC. PSYCHOL. 463 (2014).

280. vanOyen Witvliet & Luna, *supra* note 277, at 132.

281. *Id.*

282. Coker, *supra* note 243, at 143 (“Reintegration does not require that the victim forgive him and certainly does not require that they reconcile, though it does not foreclose the possibility.”); Exline, *supra* note 269, at 20 (“[F]orgiveness does not imply trust of the offender, nor does it require that people form or continue an ongoing relationship with this person.”); vanOyen Witvliet & Luna, *supra* note 277, at 132; see also Joshua N. Hook et al., *Does Forgiveness Require Interpersonal Interactions? Individual Differences in Conceptualization of Forgiveness?*, 53 PERSONALITY & INDIV. DIFF. 687, 687 (2012).

283. Exline, *supra* note 277, at 18.

284. *Id.*

285. Bazemore, *supra* note 167, at 785.

286. Marilyn Peterson Armour & Mark S. Umbreit, *The Paradox of Forgiveness in Restorative Justice*, in HANDBOOK OF FORGIVENESS 491, 492 (Everett L. Worthington, Jr. ed., 2005) (“Restorative justice dialogue fosters the possibility for forgiveness—but only if the victim voluntarily chooses that path.”); Bazemore, *supra* note 167, at 784 (restorative justice does not imply obligation for individual victim to forgive); Coker, *supra* note 243, at 148 (“Reintegration does not require that the victim forgive him and certainly does not require that they reconcile, though it does not foreclose the possibility.”); see also MINOW, *supra* note 279, at 115 (“Equally important is the adoption of a stance that grants power to the victims, power to accept, refuse, or ignore the apology.”).

forgive.<sup>287</sup> While there can be benefits to forgiving,<sup>288</sup> there can also be costs.<sup>289</sup>

Moreover, critics of restorative justice in the context of sexual violence are concerned that survivors will be pressured to forgive.<sup>290</sup> Think, for example, of actress Jessica Walters weeping during a *New York Times* interview as her male colleagues expressed support for co-star Jeffrey Tambor and then granting Tambor forgiveness through tears.<sup>291</sup> Such forgiveness might well have been voluntary and genuine. But it may also have been a recognition that failure to forgive would mean continued diminishment of her harm and a public perception that she was now the one at fault for holding a grudge.<sup>292</sup> Such pressure can be an additional harm experienced by the survivor: “[p]ressure to forgive places the victim in an untenable position of once again subordinating her own needs to those of the abuser.”<sup>293</sup> As Burke has explained, “#MeToo, in a lot of ways, is about agency. It’s not about giving up your agency, it’s about claiming it.”<sup>294</sup> In claiming their agency, victims may choose to forgive or not to forgive. The power, moreover, “to view a violation as beyond forgiveness marks one of

287. See Mandeep Dhami, *Offer and Acceptance of Apology in Victim-Offender Mediation*, 20 CRITICAL CRIMINOLOGY 45, 45 (2012) (finding that victims were much more likely to accept an offender’s apology than to forgive). See generally James Strickland, Alfred Allan & Maria M. Allan, *The Acceptance of Apologies in Corrective Process: Implications for Research and Practice*, 7 ONATI SOCIO-LEGAL SERIES 421 (2017) (discussing the interplay between apologies and forgiveness between victims and offenders).

288. Peter Strelan, Ian McKee & Nicole T. Feather, *When and How Forgiving Benefits Victims: Post-transgression Offender Effort and the Mediating Role of Deservingness Judgements*, 46 EUR. J. SOC. PSYCHOL. 308, 308 (2016).

289. See, e.g., Roy F. Baumeister, Julie Juola Exline & Kristin L. Sommer, *The Victim Role, Grudge Theory, and Two Dimensions of Forgiveness*, in DIMENSIONS OF FORGIVENESS: A RESEARCH APPROACH 79 (Everett L. Worthington ed., 1998); Laura B. Luchies et al., *The Doormat Effect: When Forgiving Erodes Self-Respect and Self-Concept Clarity*, 98 J. PERSONALITY & SOC. PSYCHOL. 734 (2010); Peter Strelan, Shona Crabb, Debbie Chan & Laura Jones, *Lay Perspectives on the Costs and Risks of Forgiving*, 24 PERSONAL RELATIONSHIPS 392, 393 (2017). See generally Jeffrie G. Murphy, *Forgiveness, Self-Respect, and the Value of Resentment*, in HANDBOOK OF FORGIVENESS 33 (Everett L. Worthington, Jr. ed., 2005).

290. Herman, *supra* note 171, at 593 (“She viewed the expectation of forgiveness as an additional injustice on victims for the comfort and convenience of others.”).

291. Sopan Deb, *Jason Bateman Apologizes to Jessica Walter over Jeffrey Tambor Comments*, N.Y. TIMES, (May 24, 2018), <https://www.nytimes.com/2018/05/24/arts/television/arrested-development-jason-bateman-apologizes-jessica-walter-jeffrey-tambor.html>.

292. Claire Fallon, *Who Gets Angry and Who Has to Give It Up*, HUFF. POST (May 27, 2018, 11:00 AM) [https://www.huffingtonpost.com/entry/jessica-walter-arrested-development-anger\\_us\\_5b09a994e4b0568a880bf5c1](https://www.huffingtonpost.com/entry/jessica-walter-arrested-development-anger_us_5b09a994e4b0568a880bf5c1); Melanie McFarland, *Arrested Development Returns and There’s Something Rotten in the Banana Stand*, SALON (May 25, 2018, 7:00 PM) <https://www.salon.com/2018/05/25/arrested-development-returns-theres-something-rotten-in-the-banana-stand/>.

293. Coker, *supra* note 243, at 148; see also Martha Minow, *Forgiveness, Law, and Justice*, 103 CAL. L. REV. 1615, 1617 (2015) (“[P]rivate or public pressure on a victim to forgive can be a new victimization, denying the victim her own choice[.]”).

294. Emma Brockes, *#MeToo Founder Tarana Burke: ‘You Have to Use Your Privilege to Serve Other People’*, GUARDIAN (Jan. 15, 2018, 12:57 AM), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>; see also Elizabeth Wagmeister, *Activist Tarana Burke on How Trump’s Presidency Has Been a Catalyst for Me Too Movement*, VARIETY (Apr. 25, 2018, 1:18 PM) <https://variety.com/2018/politics/news/tarana-burke-president-trump-me-too-movement-1202750465/> (“What the movement does is give people a way forward, it helps people take ownership of their own destiny and say this presidency and this administration is not going to give us what we need, we are the ones that we’ve been waiting for.”).



the survivors' contributions to the community's moral sense."<sup>295</sup> While it is important to avoid pressuring survivors to forgive, preventing such pressure can be difficult, in part because an apology "script" prescribes that an apology is to be followed by an acceptance of that apology and forgiveness of the offender.<sup>296</sup>

Appropriate processes to address #MeToo claims must grapple with these difficult questions of redemption and reintegration, in addition to addressing the acknowledgement and repair of harm.

#### IV. TRANSITIONAL JUSTICE

Restorative justice practices focus on dialogue between the wrongdoer and the person who was wronged, repair of that wrong, and reintegration of the offender into the community.<sup>297</sup> But for restorative practices to be truly transformative, they must also examine the institutions, structures, norms, and practices that contribute to the wrongdoing as part of an appropriate response.<sup>298</sup> Rather than simply restoring an inequitable status quo, it is important to transform the cultures and institutions that enabled the wrongful behavior to occur. For justice to be transformative, we must "figure out how the broader context was set up for this to happen, and how that context can be changed so that this harm is less likely to happen again."<sup>299</sup>

Thus, in addressing the problems of sexual misconduct in the workplace and beyond, many reformers—such as those involved with Time's Up—aspire to more expansive change, including changes in the structures, institutions, and attitudes that have allowed such misconduct to persist.<sup>300</sup> We therefore consider

295. MINOW, *supra* note 279, at 116.

296. See Mark Bennett & Christopher Dewberry, "I've Said I'm Sorry, Haven't I?" A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients, 13 CURRENT PSYCHOL. 10 (1994); Mandeep K. Dhami, *Effects of a Victim's Response to an Offender's Apology: When the Victim Becomes the Bad Guy*, 46 EUR. J. SOC. PSYCHOL. 110 (2016); Gromet & Okimoto, *supra* note 247; Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418 (2007); see also WILLIAM IAN MILLER, FAKING IT 92 (2003) ("The victim is as often forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or he forgives because it is embarrassing not to once the wrongdoer has given a colorable apology.").

297. See generally Wenzel, Okimoto, Feather & Paltow, *supra* note 159.

298. See Coker, *supra* note 243; see also Jelke Boesten & Polly Wilding, *Transformative Gender Justice: Setting an Agenda*, 51 WOMEN'S STUD. INT'L F. 75 (2015); Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. GENDER L. & JUST. 199, 211–12 (2010). Debate exists about whether and how restorative and transformative justice differ. M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 555 (Dennis Sullivan & Larry Tifft eds. 2006) (exploring whether restorative justice and transformative justice are distinct, whether restorative justice processes "create space" for transformative justice, whether they are on a continuum, or whether they are two names for the same thing); see also Howard Zehr, *Restorative or Transformative Justice* (Mar. 10, 2011), <https://emu.edu/now/restorative-justice/2011/03/10/restorative-or-transformative-justice/>.

299. Hayes & Kaba, *supra* note 151. On misogyny specifically, see generally KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY (2018).

300. MANNE, *supra* note 299, at 27.

the link between more individually oriented responses to wrongdoing and this broader institutional reform.

Transitional justice concentrates on responses to wrongdoing in contexts of transitions away from extended periods of conflict or repression toward democracy.<sup>301</sup> Dozens of societies across the globe have pursued transitional justice in recent decades, including South Africa following the end of apartheid<sup>302</sup> and Eastern Europe after the fall of communist regimes.<sup>303</sup> Prominent contemporary examples include Sri Lanka, following the ten-year conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (“LTTE”),<sup>304</sup> as well as Colombia, as it navigates an end to a more than fifty-year conflict between the government and the Revolutionary Armed Forces of Colombia (“FARC”).<sup>305</sup> Transitional justice responses encompass many of the practices of restorative justice outlined above, including apology, reparation, acknowledgement, and commitment to nonrepetition.<sup>306</sup> Under transitional justice, these aims are pursued using a wide range of processes including truth commissions, criminal trials, public memorials, and symbolic reparations. Also used are processes that do not aim at reintegration, such as programs of lustration whereby individuals are barred from serving in specific public roles.<sup>307</sup>

Many within #MeToo and the society-at-large have called for particular responses that are consistent with those used in the context of transitional justice,<sup>308</sup> including truth and reconciliation commissions,<sup>309</sup> reparations,<sup>310</sup> and

301. See generally NOMOS LI, TRANSITIONAL JUSTICE (Melissa S. Williams et al. eds., 2012); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000); David Dyzenhaus, *Judicial Independence, Transitional Justice, and the Rule of Law*, 10 OTAGO L. REV. 345 (2003); David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55 (2010); Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95 (2008); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762 (2004). The discussion in this section draws specifically upon the theory of transitional justice developed in COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017).

302. Colleen Murphy, *The Ethics of Diversity in Transitional Justice*, GEO. J.L. & PUB. POL’Y (forthcoming) (on file with authors).

303. MURPHY, *supra* note 301, at 66.

304. Murphy, *supra* note 302, at 1–2.

305. *Id.* at 1.

306. Leebaw, *supra* note 301, at 101.

307. ROMAN DAVID, LUSTRATION AND TRANSITIONAL JUSTICE: PERSONNEL SYSTEMS IN CZECH REPUBLIC, HUNGARY, AND POLAND 67 (2012).

308. Alex Price, *#MeToo Must Avoid “Carceral Feminism,”* VOX (Feb. 1, 2018, 8:40 AM), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> (arguing against carceral feminism and in favor of distributive economic solutions).

309. Sara Davidson, *My Ex Was Just #MeTooed. He Had It Coming. But It’s Complicated*, L.A. TIMES (Jan. 21, 2018, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-davidson-me-too-ex-20180121-story.html>; Todd Hixon, *Reconciliation Is the Key to Ending Sexual Harassment in the Workplace*, FORBES (Nov. 29, 2017, 6:00 AM), <https://www.forbes.com/sites/toddhixon/2017/11/29/reconciliation-is-the-key-to-ending-sexual-harassment-in-the-workplace/#22e8d4213fda>; Deborah King, *#MeToo 2.0: The Movement’s Painful Next Step*, PSYCHOL. TODAY (Jan. 26, 2018), <https://www.psychologytoday.com/us/blog/mining-the-headlines/201801/metoo-20the-movement-s-painful-next-step-0>; Bill McGarvey, *Dave Chappelle and the ‘Imperfect Allies’ the #MeToo Movement Needs*, AM. MAG. (Jan. 12, 2018), <https://www.americamagazine.org/arts-culture/2018/01/>

public memorials.<sup>311</sup> Thus, we use the theory and practice of transitional justice to conceptualize the link between individually oriented responses and processes of institutional and societal reform. In addition, we explore the lessons that can be gleaned for current movements, like Time's Up, from broader experiences with transitional justice.

#### A. *Transitional Justice and #MeToo*

The current #MeToo moment reflects some analogous features of the paradigm cases of transitional justice. We highlight four such features, while also noting some important disanalogies.

##### 1. *Scale and Scope*

The wrongs on which transitional justice focuses are not isolated criminal acts.<sup>312</sup> Rather, the focus is on *patterns* of wrongdoing.<sup>313</sup> Thus, the wrongs of interest to transitional justice processes are not exceptional in the sense of being uncommon. Victims of the wrongdoing at issue in transitional societies number in the hundreds, tens of thousands, or even hundreds of thousands.<sup>314</sup> Characteristically, wrongdoing on this scale has become normalized; that is, the possibility of being a victim of certain wrongdoing becomes a basic fact of life, and members of targeted groups must adapt their conduct to this reality.<sup>315</sup> The anticipation of being killed, or harassed, or assaulted, or tortured shapes considerations of how to respond to the police, to security forces, or to fellow citizens.<sup>316</sup> The specific nature of the wrongs of interest to transitional justice vary across contexts, though gender-based sexual violence is of recurring concern.<sup>317</sup>

Analogously, the #MeToo movement deals with wrongdoing that has become normalized. One source of the impact of #MeToo is a function of its size and scope. As detailed in Part II, half a million people responded within twen-

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12/dave-chappelle-and-imperfect-allies-metoo-movement-needs; Lissa Rankin, *Are We Ready for Truth and Reconciliation Around Sexual Violence? #MeToo*, WAKE UP WORLD (Dec. 18, 2017), <https://wakeup-world.com/2017/12/18/are-we-ready-truth-reconciliation-around-sexual-violence-metoo/>; Hope Reese, *#MeToo Is Powerful but Will Fail Unless We Do More: Feminist Stephanie Coontz on Backlash*, VOX (Nov. 29, 2017, 11:40 AM), <https://www.vox.com/conversations/2017/11/29/16712514/me-too-feminist-backlash-weinstein-effect>; Kim Samuel, *Why We Need a Truth and Reconciliation Commission on Sexual Violence*, WALRUS (Jan. 24, 2018, 1:31 PM), <https://thewalrus.ca/why-we-need-a-truth-and-reconciliation-commission-on-sexual-violence/>.

310. Sarah Jaffe, *The Collective Power of #MeToo*, DISSENT (Spring 2018), <https://www.dissentmagazine.org/article/collective-power-of-me-too-organizing-justice-patriarchy-class>.

311. Kerri MacDonald, *She Painted Portraits of 'Overlooked' Women. Then She Made a Dress*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/insider/overlooked-women-obits-newspaper-dress-highschool-student-metoo.html>; Amisha Padnani & Jessica Bennett, *Overlooked*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/interactive/2018/obituaries/overlooked.html>.

312. MURPHY, *supra* note 301, at 47.

313. *Id.* at 49–66.

314. See Murphy, *supra* note 302, at 2.

315. MURPHY, *supra* note 301, at 55.

316. *Id.* at 63.

317. See Murphy, *supra* note 302, at 6–10.

ty-four hours to a call on Twitter to articulate past experiences of sexual harassment or assault.<sup>318</sup> The scope of the types of workplaces from which stories have emerged is expansive; few, if any, industries have emerged untouched.<sup>319</sup> This size and scope is a reflection of the normalization of sexual assault and harassment in the workplace.<sup>320</sup> Such wrongdoing has become a basic fact of life for women in the workforce; the expectation of being harassed or assaulted is something women have to take into account when deliberating about which jobs to accept, which actions by employers or coworkers to contest, and how to act in the workplace.<sup>321</sup> Similarly, gendered pay gaps are pervasive and increasingly plague women the longer they stay in the workforce.<sup>322</sup> Women must strategize about how to negotiate for higher pay without prompting workplace backlash for contravening gender stereotypes.<sup>323</sup> Wrongdoing is thus not exceptional and not attributable to a few isolated bad apples.

Given the scale of wrongdoing at issue, a question salient for both #MeToo and transitional justice is how to scope responses. That is, questions arise as to the basis for deciding *which* wrongs, committed *by whom* and *against whom*, and during *what period of time* will be the subject of a response.<sup>324</sup> To see how the scope of responses to wrongdoing becomes the subject of contestation, consider South Africa. The decision to have the South African Truth and Reconciliation Commission focus on the killings, abductions, torture, and severe ill-treatment that were the extraordinary violence of apartheid as opposed to the infrastructure of apartheid itself was the subject of extensive critique.<sup>325</sup> Objectors to the scope of this response noted that its focus rendered pass laws and forced removals, for example, as background context for wrongdoing and not as wrongs themselves.<sup>326</sup> In terms of perpetrators, critics objected to the decision to treat members of the government's security forces and members of rebel groups in the same way, arguing this falsely equated the actions of agents of oppression with the actions of agents of liberation.<sup>327</sup> Finally, some opposed

318. Gilbert, *supra* note 9.

319. Elizabeth Dwoskin & Jena McGregor, *Sexual Harassment Inc: How the #MeToo Movement is Sparking a Wave of Start-Ups*, WASH. POST (Jan. 5, 2017), [https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups/?noredirect=on&utm\\_term=.ea1419548b23](https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups/?noredirect=on&utm_term=.ea1419548b23); see also Emily Stewart, *These Are the Industries with the Most Reported Sexual Harassment Claims*, VOX (Nov. 21, 2017, 1:50 PM), <https://www.vox.com/identities/2017/11/21/16685942/sexual-harassment-industry-service-retail>.

320. ANNA-MARIA MARSHALL, *CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE* 85–86 (2017).

321. *Id.* at 64.

322. KEVIN MILLER & DEBORAH J. VAGINS, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP: FALL 2018 EDITION 7* (2018), <https://www.aaup.org/resource/the-simple-truth-about-the-gender-pay-gap/>.

323. See generally LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003) [hereinafter BABCOCK & LASCHEVER, *NEGOTIATION AND THE GENDER DIVIDE*]; LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION* (2007).

324. Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the South African Truth and Reconciliation Commission of South Africa (TRC)*, 32 *DIACRITICS* 33, 35 (2002).

325. *Id.* at 37, 58.

326. *Id.* at 58.

327. See, e.g., Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 *MOD. L. REV.* 1, 13–14 (2000).

the decision for the mandate to cover abuses that occurred between 1960 and 1994 rather than going back to 1948, when the state began to implement apartheid.<sup>328</sup>

Questions of scope matter because they shape the narrative of wrongdoing that emerges from processes for dealing with wrongdoing. Processes like truth commissions provide in their final reports a narrative summary of who was wronged and who was responsible for victimization.<sup>329</sup> In contexts where wrongdoing becomes normalized, this characteristically means that certain victims and certain perpetrators will not be formally acknowledged.<sup>330</sup> Though no single correct answer to the question of how to delimit the scope of any particular process of transitional justice may exist, it is critical to be aware of the consequences of how the scope is defined. One such consequence is that certain groups of victims of particular wrongs and certain groups of perpetrators may need to be dealt with by future processes.<sup>331</sup> This lesson is salient for #MeToo. Not all who are subject to harassment and assault may be the focus of current responses, and nonworkplace-related sexual harassment may be justifiably set aside by advocates who are focused on countering workplace harassment. As the discussion of scope highlights, however, setting aside such cases does not entail setting aside the legitimate claims that victims of nonworkplace-related wrongdoing have and the requirements for accountability of nonworkplace perpetrators.<sup>332</sup>

To take a specific, and difficult, example of how scope matters, consider that transitional justice must often struggle with how to address those who are both victims and perpetrators.<sup>333</sup> In World War II, for example, many Jews acted as “kapos” (prison functionaries and supervisors) within the concentration camps in order to receive preferential treatment, but they were still themselves imprisoned and under duress.<sup>334</sup> In conflicts in a range of countries, including Colombia, Liberia, and Myanmar, child soldiers who were kidnapped and forced to join the military themselves engaged in horrific acts of violence.<sup>335</sup>

Should they be subject to criminal prosecutions or receive mitigated sentences? How should a public narrative account for their roles as both victims and perpetrators, if at all? Should efforts to provide amends and reparations be different than for other victims and should efforts to reintegrate such offenders be different than for other perpetrators?

328. Mamdani, *supra* note 324, at 35.

329. Luke Moffett, *Reparations for ‘Guilty Victims’: Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms*, 10 INT’L J. TRANSITIONAL JUST. 146, 162 (2016).

330. *Id.* at 155.

331. *Id.* at 167.

332. Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 3 (2009).

333. Tristan Anne Borer, *A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa*, 25 HUM. RTS. Q. 1088, 1091 (2003); Moffett, *supra* note 321.

334. Mark A. Drumbl, *Tragic Perpetrators and Imperfect Victims*, ASSER INST. (Sept. 27, 2017), <http://www.asser.nl/about-the-institute/asser-today/tragic-perpetrators-and-imperfect-victims>.

335. MARK A. DRUMBL, *REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY* 27 (2012).

Similarly, in the #MeToo context, some of those accused of wrongdoing were themselves victims of similar traumas. Take, for example, author Junot Díaz, who published the story of his childhood rape by a male and detailed how it led him to behave toxically in his romantic relationships with women.<sup>336</sup> A few weeks later, female writers revealed that he had harassed and belittled women in the workplace as well.<sup>337</sup> As institutions reviewed their associations with him and considered possible sanctions,<sup>338</sup> how, if at all, should they have accounted for Díaz's revelation that he was a victim and his nonrevelation that he may have been a workplace perpetrator?<sup>339</sup> Or take the example of actress Asia Argento, a leading proponent of the #MeToo movement. How should we understand her accountability for allegedly statutorily raping a male actor after she was allegedly raped by Harvey Weinstein?<sup>340</sup>

The scholarship and practice of transitional justice is just starting to fully address the question of how to justly respond to complex victims. While much remains to be theorized and put into practice, two points of consensus are emerging. The first is that complex victims deserve to be recognized as victims and included in reparations schemes that address the wrongs to which they were subjected.<sup>341</sup> The second is that victimhood does not preclude accountability for wrongdoing for which complex victims are then responsible.<sup>342</sup> As the trial of Dominic Ongwen at the International Criminal Court illustrates, being abducted as a child does not remove liability for wrongdoing committed later as an adult.<sup>343</sup> Given the relative newness of this

336. Junot Díaz, *The Silence: The Legacy of Childhood Trauma*, NEW YORKER (Apr. 16, 2018), <https://www.newyorker.com/magazine/2018/04/16/the-silence-the-legacy-of-childhood-trauma>.

337. Amanda Arnold, *Author Alisa Valdes on Junot Díaz: 'He Mistreated Me, and I Was Severely Punished for It'*, CUT (May 6, 2018), <https://www.thecut.com/2018/05/alisa-valdes-describes-junot-diazs-misogynistic-abuse.html>.

338. Alexander Alter, *Junot Díaz Cleared of Misconduct by M.I.T.*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/books/junot-diaz-cleared-of-misconduct-by-mit.html>; Louis Lucero II, *Junot Díaz Steps Down as Pulitzer Chairman Amid Review of Misconduct Allegations*, N.Y. TIMES (May 10, 2018), <https://www.nytimes.com/2018/05/10/books/junot-diaz-pulitzer-prize.html>; *A Letter from Deborah Chasman and Joshua Cohen*, BOS. REV. (June 5, 2018), <http://bostonreview.net/editors-note/boston-review-letter-deborah-chasman-and-joshua-cohen>.

339. Díaz's response to workplace wrongdoings did not include any recognition of the truth of specific accounts and frustrated many in its vagueness.

I take responsibility for my past . . . That is the reason I made the decision to tell the truth of my rape and its damaging aftermath. This conversation is important and must continue. I am listening to and learning from women's stories in this essential and overdue cultural movement. We must continue to teach all men about consent and boundaries.

Anna Silman, *Junot Díaz Responds to Allegations of Sexual Misconduct and Verbal Abuse*, CUT (May 4, 2018), <https://www.thecut.com/2018/05/author-junot-diaz-accused-of-sexual-misconduct-verbal-abuse.html>.

340. Giorgis, *supra* note 130.

341. Lesley Wexler, *Transitional Justice Lessons Regarding Complex Victims for #MeToo*, VERDICT (Aug. 24, 2018), <https://verdict.justia.com/2018/08/24/transitional-justice-lessons-regarding-complex-victims-for-metoo>.

342. *Id.*

343. *Id.* As Stephen Colbert aptly put it, "accountability is meaningless unless it's for everybody." Emily Zenler, *Watch Stephen Colbert's Plea For 'Accountability' After Les Moonves Allegations*, ROLLING STONE (July 31, 2018), <https://www.rollingstone.com/tv/tv-news/watch-stephen-colberts-plea-for-accountability-after-les-moonves-allegations-705044/>.

discourse and literature, it may be that #MeToo practices can inform transitional justice even as #MeToo may be informed by transitional justice.

## 2. *Pervasive Structural Inequality*

The wrongdoing of interest in transitional settings characteristically occurs against a background of what has been called “pervasive structural inequality.”<sup>344</sup> That is, it occurs against a background of inequality in the institutionally defined terms of interaction among citizens and between citizens and officials.<sup>345</sup> Legal, economic, social, and cultural institutions structure interaction by specifying, through rules and norms, who is permitted to do what to whom, the penalties for violating these rules and norms, and the rewards for meeting or exceeding them.<sup>346</sup> We can see this most easily when we consider legal rules. Legal rules structure interaction among citizens by, for example, outlining conduct that is considered legally criminal and thus impermissible, as well as the penalties for violating such standards.<sup>347</sup> Constitutions articulate the basic structures of government, including the duties and responsibilities of different branches of government, who is eligible to pursue certain government roles, and how such roles may be acquired.<sup>348</sup> Social norms structure interaction in clear, though less formally codified, ways.<sup>349</sup> Gender norms further specify social norms by articulating the proper forms of interaction across and within genders.<sup>350</sup> These norms shape how the law is applied and enforced<sup>351</sup> as well as frame the consequences of being a victim of criminal wrongdoing.<sup>352</sup>

There are two senses in which these institutionally defined terms for interaction can be unequal. They can be unequal in that they generate substantially different opportunities for groups of citizens to do and become things of value, such as being educated, being employed, participating in political institutions, or avoiding prison.<sup>353</sup> Differences in rates of employment, education, participation in political institutions, or incarceration, then, are not substantially a function of the different preferences or choices of those citizens.

344. See MURPHY, *supra* note 301, at 41.

345. See *id.* at 41–43.

346. *Id.* at 41–42.

347. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86(8) VA. L. REV. 1603, 1603 (2000).

348. *Id.* at 1629 n.57.

349. *Id.* at 1601 n.8.

350. *Id.* at 1638.

351. BARRY GOLDSTEIN & ELIZABETH LIU, REPRESENTING THE DOMESTIC VIOLENCE SURVIVOR: CRITICAL LEGAL ISSUES \* EFFECTIVE SAFETY STRATEGIES 1–6 (2013); Amy E. Bonomi et al., “Meet Me at the Hill Where We Used to Park”: Interpersonal Processes Associated with Victim Recantation, 73 SOC. SCI. & MED. 1054, 1054 (2011); Lori L. Heise, Jacqueline Pitanguy & Adrienne Germain, *Violence Against Women: The Hidden Health Burden*, 255 WORLD BANK DISCUSSION PAPERS 1, 14 (1994); Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim’s Right to Counsel*, 34 GONZ. L. REV. 329, 332 (1998–1999).

352. FIONNUALA NÍ AOLÁIN, NAOMI CAHN, DINA FRANCESCA HAYNES & NAHLA VALJI, THE OXFORD HANDBOOK ON GENDER AND CONFLICT XXXVIII (2018).

353. *Id.* at 205.

Rather, these differences are a function of the different constraints on opportunity that exist for different groups of citizens. So, for example, during apartheid in South Africa and under Jim Crow in the United States, black and white citizens had substantially different opportunities for education, financial success through employment, participation in the political process, and protection under the law.<sup>354</sup>

Interaction can also be unequal in the opportunities afforded to different groups of citizens to shape the terms for interaction. During apartheid, black South Africans were denied a right to vote and hold office in the South African government, rendering them unable to have a role in determining who passed laws and unable to assume that role themselves.<sup>355</sup> During Jim Crow, black Americans formally held the right to vote but had serious difficulty exercising that right in practice due to voting restrictions that disproportionately impacted black voters.<sup>356</sup> Inequality can exist along a continuum, from being present in a limited manner to being pervasive.

Similar to periods of transitional justice, #MeToo is occurring against a background of institutional inequality. Women in every society, including the United States, continue to face obstacles to equality vis-à-vis men regarding what genuine opportunities are enjoyed and what power to shape the institutional rules and norms exists.<sup>357</sup> Part II highlighted some of the obstacles facing women wanting to hold harassers and abusers to account, including the absence of a genuine opportunity to name abusers without fear of retaliation and without fear of being disbelieved.<sup>358</sup> It also noted the widespread sense that substantial changes are needed to achieve equal pay for equal work or achieve proportional representation in political offices or in positions of authority in the workplace.<sup>359</sup>

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354. The racial gap in opportunities in both South Africa and the United States remains today, even after the formal end of apartheid and Jim Crow. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 207 (2010); Lynsey Chutel & Dan Kopf, *All the Charts That Show South Africa's Inequality Is Only Getting Worse*, QUARTZ: AFRICA (May 10, 2018), <https://qz.com/africa/1273676/south-africas-inequality-is-getting-worse-as-it-struggle-to-create-jobs-after-apartheid>.

355. Francis X. Clines, *The South African Vote: The Overview; After 300 Years, Blacks Vote in South Africa*, N.Y. TIMES (Apr. 27, 1994), <https://www.nytimes.com/1994/04/27/world/the-south-african-vote-the-overview-after-300-years-blacks-vote-in-south-africa.html>.

356. See ALEXANDER, *supra* note 354, at 187.

357. See BABCOCK & LASCHEVER, *NEGOTIATION AND THE GENDER DIVIDE*, *supra* note 323, at 18; see also Lesley Wexler & Colleen Murphy, *A Beginning, Not an Ending: #MeToo and the Kavanaugh Confirmation*, VERDICT (Oct. 6, 2018), <https://verdict.justia.com/2018/10/06/a-beginning-not-an-ending-metoo-and-the-kavanaugh-confirmation>.

358. See generally MANNE, *supra* note 299.

359. This is not to suggest that the degree of gender inequality is the same across societies; there are important differences in the degree of gender inequality that exists. For an overview of variation in gender inequality see the United Nations Development Programme Gender Inequality Index (GII), which provides data on a range of measures including income, education, employment, and representation in government positions. UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT DATA* (1990–2017), <http://hdr.undp.org/en/data> (select “Dimension” to search for specific data).



### 3. *Institutional Change and Overcoming Denial*

Transitional justice explicitly links responding to particular wrongs with broader institutional change.<sup>360</sup> Doing right by victims and treating perpetrators in a fitting manner is important both for its own sake as well as for instrumental reasons. Victims have claims because they have been wronged, and perpetrators have responsibilities because they have acted wrongly. This is true regardless of the larger societal and structural setting, and such claims and obligations should be satisfied for their own sake. Yet doing so within a larger effort to effect institutional change also lays the foundation for broader societal transformation. Take, for example, an orienting phrase of the first transitional justice movements: “Nunca Mas,” or “Never Again.”<sup>361</sup> This phrase reflects the importance of ensuring that responses to past wrongs establish conditions for non-recurrence in the future. For transitional justice, the prospects for nonrecurrence have increasingly come to be connected to the prospects of enacting broader institutional change, such as promotion of the rule of law and police or security reform.<sup>362</sup> Transitional justice processes which deal with past wrongs are seen as doing so in ways that contribute to this broader change.<sup>363</sup>

We see these same linkages in the #MeToo movement. Efforts to deal with particular cases of harassment and abuse are being framed as important for their own sake but also as helping to enforce the idea that certain conduct tolerated in the past will no longer be tolerated in the future.<sup>364</sup> And efforts to address individual cases are also being complemented by campaigns like Time’s Up that are explicitly focused on broader institutional reform.<sup>365</sup>

Why might we think it reasonable to link responses to past wrongs with broader institutional reform and transformation? One reason is that to change institutions, there must first be recognition that change is needed. Absent such recognition, people will see little reason to devote time and financial resources to changing institutional structures. Moreover, in transitional contexts, there is characteristically a history of denial of wrongdoing.<sup>366</sup> This denial takes different forms.<sup>367</sup> It can be outright denial that any wrong took place. Denials of the existence of political prisoners, or the occurrence of rape, or of a killing or massacre take this form.<sup>368</sup> Frequently, government officials are the ones issuing this sort of denial, which is why uncovering the basic truth about past wrongdoing becomes so urgent in the contexts of transition.<sup>369</sup> A second form

360. See MURPHY, *supra* note 301, at 1.

361. See, e.g., ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED, NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 6 (1986).

362. See MURPHY, *supra* note 301, at 1.

363. *Id.*

364. Wexler & Murphy, *supra* note 357.

365. Solis, *supra* note 81.

366. See Wexler, *supra* note 341.

367. See generally STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

368. *Id.* at 124–25.

369. *Id.* at 10.

of denial is descriptive, concerning how certain actions are characterized and described. Instead of acknowledging torture, for example, there is a discussion of “regrettable excesses.”<sup>370</sup> A third form of denial acknowledges certain factual claims but distances personal or institutional responsibility for such wrongs.<sup>371</sup> There might be, for example, the attribution of responsibility to forces contesting a government rather than to government officials. Or ordinary citizens who benefitted from or supported a regime carrying out atrocities fail to see how they may be complicit in the wrongdoing that occurred. Alternately, this downplaying of responsibility can take the form of pointing to wrongs for which one’s political opponents were implicated instead of acknowledging and assuming responsibility for wrongdoing of one’s own.

These same forms of denial are present in the context of sexual harassment and abuse, though it is not necessarily government officials implicated in such denials. To take a few examples, Michigan State University and USA Gymnastics had long histories of explicitly denying any wrongdoing or abuse by serial predator Larry Nassar.<sup>372</sup> Harvey Weinstein systematically used non-disclosure agreements and private investigations as tools for silencing women who might otherwise speak about harassment and abuse.<sup>373</sup> Partial apologies by Matt Lauer<sup>374</sup> and Al Franken<sup>375</sup> reflect attempts to redescribe actions in ways that minimize their scope and moral import. Framing sex as unwanted but not illegal can sometimes be another tool for denying the egregiousness of behavior that occurred.<sup>376</sup> Characterizing sexual harassment as isolated incidents committed by a few extremely bad apples, rather than acknowledging its pervasiveness, narrows the scope of actors implicated in patterns of abuse.

Each of these forms of denial seeks to minimize or contain the scope of a moral problem. The first seeks to erase the existence of a wrong altogether. The second minimizes the seriousness of the wrong and its consequences. And the third seeks to limit the taint of wrongdoing to a few rotten apples instead of pointing to taint that implicates organizations or groups. Thus, countering denial becomes urgent. Acknowledgement of the existence, seriousness, and widespread net of responsibility for committing, supporting, permitting, or failing to object to wrongdoing of which one knew, suspected, or should have known becomes critical. This net of responsibility includes enablers, whose actions al-

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370. MURPHY, *supra* note 301, at 144.

371. COHEN, *supra* note 367, at 8–11.

372. Nicole Chavez, *What Others Knew: Culture of Denial Protected Nassar For Years*, CNN (Jan. 25, 2018, 11:21 AM), <https://www.cnn.com/2018/01/23/us/nassar-sexual-abuse-who-knew/index.html>; *Denhol-lander Victim Impact Statement*, *supra* note 190; Paula Lavigne & Nicole Noren, *OTL: Michigan State Secrets Extend Far Beyond Larry Nassar Case*, ESPN (Feb. 1, 2018), [http://www.espn.com/espn/story/\\_/id/22214566/pattern-denial-inaction-information-suppression-michigan-state-goes-larry-nassar-case-espn](http://www.espn.com/espn/story/_/id/22214566/pattern-denial-inaction-information-suppression-michigan-state-goes-larry-nassar-case-espn); Eric Levenson, *Did Michigan State Fail to Stop Larry Nassar Like Penn State Did with Jerry Sandusky?*, CNN (Feb. 1, 2018, 2:13 PM), <https://www.cnn.com/2018/02/01/us/larry-nassar-michigan-state-sandusky-penn/index.html>.

373. Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>.

374. Corey, *supra* note 38.

375. *Id.*

376. Perez, *supra* note 66.

lowed abusers and harassers to remain in positions of power and authority even after allegations of wrongdoing were known.

Processes of transitional justice focus precisely on countering these forms of denial and generating this recognition.<sup>377</sup> The mandate of truth commissions, for example, is to document patterns of abuse and, in some cases, the role of institutions (*e.g.*, legal, religious, media, business) in such wrongdoing.<sup>378</sup> Programs of lustration bar individuals from serving in certain official roles, and are predicated on the recognition of the ways in which former officials may have failed to satisfy the responsibilities which their roles demanded.<sup>379</sup> These examples point to the importance of countering denial by directly uncovering and properly characterizing the wrongdoing which took place, as not simply the ordinary misconduct of a few isolated actors in ways that were exceptional, but rather as part of a pattern of behavior that became unexceptional, that targeted groups, and that was committed by groups.

#### 4. *Uncertain Trajectory*

There is, however, an additional link between addressing normalized wrongdoing through processes of transitional justice and pursuing broader societal transformation. This link is a function of the contexts in which transitional justice processes characteristically occur. Processes of transitional justice are characteristically established during periods of serious uncertainty.<sup>380</sup> This uncertainty means that the broader trajectory of a community is unclear, such that a return to war or to repression remains a possibility. In the context of transitional justice, the aim to transition away from conflict and repression is aspirational.<sup>381</sup> Transformative change, therefore, is not a given. It may or may not materialize in any given case. This is, in part, a product of the fact that change is not uniformly welcomed. Parties or groups benefitting from continued conflict or a repressive regime will not welcome change. Those who may be implicated in wrongdoing may object to becoming vulnerable to accountability. Against this background, responses to isolated cases assume a broader symbolic importance.<sup>382</sup> Seeking reasons to predict where the trajectory will ultimately go, towards reform or retrenching the status quo, whether and how past wrongs are handled become indicative of whether and in what manner broader change will occur.

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377. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 8 (2010).

378. *See, e.g.*, TRUTH & RECONCILIATION COMMISSION, *TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT*, vol. 2 (1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%202.pdf>; HAYNER, *supra* note 368, at 13.

379. MONIKA NALEPA, *SKELETONS IN THE CLOSET: TRANSITIONAL JUSTICE IN POST-COMMUNIST EUROPE* 4 (2010).

380. MURPHY, *supra* note 301, at 38–82.

381. *Id.* at 66–70.

382. *Id.* at 83.

The #MeToo movement resembles transitional justice in this way as well—it has generated significant uncertainty. The sheer scale of the stories of sexual assault and harassment have countered longstanding denial<sup>383</sup> of the existence of these wrongs, let alone their pervasiveness.<sup>384</sup> The cases of prominent figures being held to account has led to optimism that the #MeToo moment heralds the beginning of the end of impunity for sexual assault and abuse in the workplace.<sup>385</sup> At the same time, as noted in Part II, there is also worry about a #MeToo backlash.<sup>386</sup> Some of the uneasiness relates to scope. At the same time, as discussions have broadened to encompass dating norms,<sup>387</sup> some revered feminists have criticized #MeToo advocates as overly puritanical.<sup>388</sup> Others, raising concerns about due process norms for addressing accusations, have suggested that #MeToo justice is no justice at all.<sup>389</sup> Individuals might defer to these concerns as reasons not to believe, not to hire, and not to mentor specific women.<sup>390</sup> Such a backlash could also undercut the possibilities for broader societal transformation in the normalization of sexual assault and harassment.<sup>391</sup> As we witness reform efforts and individual gains at the same time

383. Denial refers to information that is known at some level but not acknowledged.

384. SPERINO & THOMAS, *supra* note 80, at 32–33.

385. Corey, *supra* note 38.

386. See *supra* Part II.

387. Aurelien Breeden & Elian Peltier, *Response to French Letter Denouncing #MeToo Shows a Sharp Divide*, N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/world/europe/france-sexual-harassment.html>; Anna Codrea-Rado, *Catherine Deneuve Apologizes to Victims After Denouncing #MeToo*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/arts/catherine-deneuve-me-too.html>; *Nous Défendons une Liberté d'Importuner, Indispensable à la Liberté Sexuelle*, LE MONDE (Jan. 13, 2018, 3:11 PM), [https://www.lemonde.fr/idees/article/2018/01/09/nous-defendons-une-liberte-d-importuner-indispensable-a-la-liberte-sexuelle\\_5239134\\_3232.html](https://www.lemonde.fr/idees/article/2018/01/09/nous-defendons-une-liberte-d-importuner-indispensable-a-la-liberte-sexuelle_5239134_3232.html). On dating, see also Vanessa K. Bohns & Lauren DeVincent, *Rejecting Unwanted Romantic Advances Is More Difficult Than Suitors Realize*, SOC. PSYCHOL. & PERSONALITY SCI. (forthcoming).

388. Margaret Atwood, *Am I a Bad Feminist*, GLOBE & MAIL (Jan. 15, 2018), <https://www.theglobeandmail.com/opinion/am-i-a-bad-feminist/article37591823/>; Flanagan, *supra* note 60.

389. Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo/553427/>; Shira A. Scheindlin & Joel Cohen, *After #MeToo, We Can't Ditch Due Process*, GUARDIAN (Jan. 8, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televictions>; Emily Stewart, *Trump Wants "Due Process" for Abuse Allegations. I Asked 8 Legal Experts What That Means*, VOX (Feb. 12, 2018, 3:08 PM), <https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump>; *What Kind of Due Process Are Those Accused of Sexual Misconduct Entitled To?*, NPR (Dec. 22, 2017), <https://www.npr.org/2017/12/22/573046500/what-kind-of-due-process-are-those-accused-of-sexual-misconduct-entitled-to>. But see Christine Emba, *The 'Due Process' Assault Freak-Out Is a Fever Dream*, WASH. POST (Dec. 1, 2017), <https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/> 2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e\_story.html?noredirect=on&utm\_term=.b0d072d3ea06.

390. Erin Reimel, *Popular Life Coach Tony Robbins Tried to Mansplain #MeToo—and Movement Founder Tarana Burke Responded*, GLAMOUR (Apr. 7, 2018, 1:39 PM), <https://www.glamour.com/story/tony-robbins-metoo-burke-response>; Katherine Tarbox, *Is #MeToo Backlash Hurting Women's Opportunities in Finance?*, HARV. BUS. REV. (Mar. 12, 2018), <https://hbr.org/2018/03/is-metoo-backlash-hurting-womens-opportunities-in-finance>; Stephanie Thomson, *#MeToo Is Having Unexpected Consequences for Working Women*, WORLD ECON. F. (Mar. 7, 2018), <https://www.weforum.org/agenda/2018/03/metoo-campaign-women-isolated-at-work/>.

391. Stassa Edwards, *The Backlash to #MeToo Is Second Wave Feminism*, JEZEBEL (Jan. 11, 2018, 3:15 PM), <https://jezebel.com/the-backlash-to-metoo-is-second-wave-feminism-1821946939>; Megan Garber, *The*

that we observe significant recalcitrance and pushback, we note this is reminiscent of the uncertainty that characterizes political transition. Sustained movement toward democracy is not inevitable and neither is the #MeToo sexual revolution.

### 5. *Utility Despite Disanalogies*

While #MeToo shares these meaningful affinities with the kinds of cases that fall under the purview of transitional justice, some disanalogies also exist. Importantly, though #MeToo has generated uncertainty, it has done so against a background of broader political certainty.<sup>392</sup> Unlike in paradigm transitional justice cases, the entire trajectory of the community (e.g., whether it is heading to a return to war or towards a stable peace) is not in doubt in most contexts where #MeToo conversations are occurring. The scope of wrongdoing is also narrower than what is often found in paradigm transitional contexts. In transitional contexts, wrongdoing that is gender-based but also deeply political, and that encompasses a wide range of types of wrongdoing such as displacement, massacre, and in some cases genocide, is not unusual.<sup>393</sup> This broader wrongdoing is not at issue in the same way in the #MeToo case.<sup>394</sup>

Despite these important differences, the framework of transitional justice is useful for identifying different kinds of responses to wrongdoing. Responses that focus on perpetrators and victims draw upon a wide range of practices such as apology, reparation, and acknowledgement to respond to the claims of victims and demands on perpetrators which wrongdoing generates.<sup>395</sup> From the perspective of transitional justice, these responses may contribute to broader societal transformation.

In addition are those responses that are more directly focused on institutional reform. The direct institutional reform-oriented elements of the #MeToo movement seem to be of two kinds. The first are reforms aimed at making institutions more effective by, for example, addressing obstacles to participation, particularly effective participation, by women.<sup>396</sup> Many of Time's Up's projects

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*Selective Empathy of #MeToo Backlash*, ATLANTIC (Feb. 11, 2014), <https://www.theatlantic.com/entertainment/archive/2018/02/the-selective-empathy-of-metoo-backlash/553022/>; Kathleen Parker, *A #MeToo Backlash Is Inevitable*, WASH. POST (Feb. 2, 2018), [https://www.washingtonpost.com/opinions/a-metoo-backlash-is-inevitable/2018/02/02/51d2d626-0860-11e8-b48c-b07fea957bd5\\_story.html?utm\\_term=.6c2b25aa3f60](https://www.washingtonpost.com/opinions/a-metoo-backlash-is-inevitable/2018/02/02/51d2d626-0860-11e8-b48c-b07fea957bd5_story.html?utm_term=.6c2b25aa3f60); Rebecca Solnit, *Rebecca Solnit on the MeToo Backlash*, LITERARY HUB (Feb. 12, 2018), <https://lithub.com/rebecca-solnit-on-the-metoo-backlash/>; Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, N.Y. MAG. (Jan. 12, 2018), <http://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html?gtm=top&gtm=bottom>; Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash>.

392. Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 12, 17 (2006).

393. *Id.* at 14–15.

394. *But see id.* at 16 (arguing that the scale of violence against women is comparable to conflict and demands an international response to reset the political frameworks that allow it).

395. MURPHY, *supra* note 301, at 84.

396. *See, e.g.,* Martin, *supra* note 73.

are focused on reforms of this kind, including efforts to amplify and enhance the believability of women's stories; to increase the accessibility of the systems for reporting and sanctioning sexual assault, harassment, and inequality in the workplace by increasing the supply of lawyers working pro bono on such cases; and to raise money to cover costs of legal representation.<sup>397</sup> Some of Time's Up's efforts are aimed at all women in need, while others focus on discrete industries such as the newly formed Time's Up Advertising, Time's Up Finance, and Time's Up Venture partnerships.<sup>398</sup> Other efforts for institutional change include legislative efforts to enact prohibitions on companies requiring employees to sign nondisclosure agreements forbidding employees from speaking about wrongdoing in the workplace publicly.<sup>399</sup> Similarly, the focus of the Anita Hill Commission is on policy changes that can be implemented to facilitate the reporting of workplace abuse or harassment without fear or risk of penalty.<sup>400</sup>

### *B. Lessons for #MeToo*

The wisdom acquired through the decades of theory and practice of transitional justice can be useful as we navigate the seemingly new terrain created by the #MeToo movement. We end by highlighting three lessons of particular importance: the need to respond to individual cases, the necessity of paying attention to whose wrongs are addressed, and the importance of a holistic approach to institutional reform.

#### *1. Backward- and Forward-Looking Dimensions of Justice*

Insofar as #MeToo and Time's Up aspire to achieve broader societal change, it is critical not to lose sight of the particularity of victims and the need to respond to what happened to them for its own sake. Justice is not only forward-looking but backward-looking as well.<sup>401</sup> Victims deserve a response to the wrongdoing they experienced intrinsically and not just because or only if a response will facilitate broader societal change.

To take one example, Time's Up has implemented both forward-looking and backward-looking agendas. The 50-50 by 2020 partnership attempts to restructure pay negotiations, and the embracing of inclusion riders all focus on forward-looking social change.<sup>402</sup> At the same time, Time's Up has also championed significant funding for backward-looking litigation efforts.<sup>403</sup>

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397. *Id.*

398. TIME'S UP ADVERTISING, [www.timesupadvertising.com](http://www.timesupadvertising.com) (last visited Dec. 7, 2018); TIMES UP: PRESS FORWARD, [www.timesupnow.com/press](http://www.timesupnow.com/press) (last visited Dec. 7, 2018); TIME'S UP/VENTURE, <https://www.timesupnow.com/venture> (last visited Dec. 7, 2018).

399. Solis, *supra* note 81.

400. See Sun, *supra* note 93.

401. Posner & Vermuele, *supra* note 301, at 766.

402. See *supra* Subsection II.B.3.a.

403. See, e.g., Michael Corkery, *Low-Paid Women Get Hollywood Money to File Harassment Suits*, N.Y. Times (May 22, 2018), <https://www.nytimes.com/2018/05/22/business/hollywood-times-up-harassment.html>.

Time's Up, however, has been reluctant to directly confront how to address art made by perpetrators and how to facilitate other backward-looking aspects of restorative and transitional justice such as reparations or public truth-telling. Of course, as we explain below, no one reform actor need define the reform agenda nor claim responsibility for all efforts. Our point is simply that, at this moment of possible transitional justice, advocates must consider a comprehensive vision of justice that aims to both alter the future and reckon with the past. Transitional justice experiences elsewhere teach us that creation of the new future is inextricably linked with a retelling of the past.<sup>404</sup>

## 2. *Whose Wrongs?*

One criticism of the #MeToo movement is that it has been overly focused on the experiences of heterosexual, white, cis women, and that, consequently, any responses will disproportionately benefit this group of women.<sup>405</sup> The experience with transitional justice underscores the merits of this criticism. Within transitional justice, there is increasing emphasis on paying attention to the gendered impacts of certain wrongs and the gendered obstacles to participation in transitional justice processes.<sup>406</sup> Similarly, there is increasing emphasis on the experiences and obstacles to participation of historically marginalized groups, including, in particular, indigenous communities.<sup>407</sup> Calls for paying greater attention to diversity and intersectionality are found in the choice of transitional justice processes (*e.g.*, whether a criminal trial or truth commission will be established and on which wrongs such processes will concentrate); the functioning of such processes (*e.g.*, who are the commissioners running truth commissions and who are the victims participating); and the evaluation of the impact and thus the success or failure of transitional justice processes.<sup>408</sup> In this latter category, it is common to do analyses of the gendered impact of processes.<sup>409</sup>

Paying attention to whose stories are being told and heard and who is able to participate effectively in transitional justice processes is important.<sup>410</sup> First, the probability of being victimized can vary across members of social groups,

404. See *supra* Part IV.

405. See generally Onwuachi-Willig, *supra* note 50.

406. See generally INT'L CTR. FOR TRANSITIONAL JUST., "WE WANT TO BE HEARD": OBSTACLES TO WOMEN TAKING PART IN PARTICIPATORY MECHANISMS FOR DEALING WITH VICTIMS OF THE INTERNAL ARMED CONFLICT (2016); see also *Gender Justice*, INT'L CTR. FOR TRANSITIONAL JUST. (2018), <https://www.ictj.org/our-work/transitional-justice-issues/gender-justice>.

407. See, *e.g.*, Elizabeth Adetiba, *Tarana Burke Says #MeToo Should Center Marginalized Communities*, NATION (Nov. 17, 2017), <https://www.thenation.com/article/tarana-burke-says-metoo-isnt-just-for-white-people/>; see also *Transitional Justice and the Struggle for Indigenous Rights*, INT'L CTR. FOR TRANSITIONAL JUSTICE (Feb. 8, 2013), <https://www.ictj.org/news/transitional-justice-and-struggle-indigenous-rights>.

408. VASUKI NESIAH ET AL., INT'L CTR. FOR TRANSITIONAL JUSTICE, TRUTH COMMISSIONS AND GENDER: PRINCIPLES, POLICIES, AND PROCEDURES (2006).

409. See, *e.g.*, ROSLYN WARREN ET AL., INCLUSIVE JUSTICE: HOW WOMEN SHAPE TRANSITIONAL JUSTICE IN TUNISIA AND COLOMBIA (2017).

410. For a more extended discussion of these lines of argument, see Colleen Murphy, *The Ethics of Diversity in Transitional Justice*, 18 GEO. J.L. & PUB. POL'Y 822 (2018).

as can the consequences of wrongdoing when it occurs. For example, during the Rwandan genocide, the rates of survival among inter-ethnic Hutu and Tutsi married couples varied depending on whether the husband was a Hutu or Tutsi.<sup>411</sup> Similarly, attention to the inclusion of different voices in the process of choosing and designing processes of transitional justice can increase our knowledge of potential obstacles to participation that may exist, the knowledge of which can lead to the design of more effective processes.<sup>412</sup>

Second, by including women and members of historically marginalized groups in processes of transitional justice and taking seriously their experiences, we avoid duplicating injustice. As mentioned above, the existence, scope, or subjects of responsibility for wrongdoing are often officially denied during conflict and repression.<sup>413</sup> This denial can itself wrong victims as their experiences are not acknowledged and their rights go unvindicated. Marginalizing certain groups of victims in transitional justice processes risks wronging them a second time by mimicking the lack of recognition they experienced the first time. Inclusion of women and members of historically marginalized communities in processes of transitional justice not only avoids injustice but also positively promotes justice by modeling the kinds of relationships processes of transitional justice ultimately hope to foster. Such relationships are predicated on the equality of all citizens and the equal claim to have rights respected and wrongs acknowledged.

The lessons for the #MeToo movement are clear. Disproportionate focus on heterosexual, cis, white women and the consequent marginalization of those not falling into this narrow category has costs. There are costs because limiting the voices that are heard limits our knowledge of the scope, character, and pervasiveness of sexual assault, harassment, and abuse in the workplace. Moreover, we risk designing programs of institutional reform that address obstacles to participation facing some, but not all, of those who are affected. We risk perpetuating injustice, rendering invisible for a second time the abuse suffered by certain groups of women as well as men. We also lose an opportunity for justice, an opportunity to model in the public disclosure of incidents of abuse and harassment as well as the processes of accountability that unfold the kinds of relationships of equality that are the core of democratic practices of citizenship.

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411. Anuradha Chakravarty, *Interethnic Marriages, the Survival of Women, and the Logics of Genocide in Rwanda*, 2 GENOCIDE STUD. & PREVENTION 235, 235 (2007).

412. See generally SUSAN HARRIS RIMMER, GENDER AND TRANSITIONAL JUSTICE: THE WOMEN OF EAST TIMOR (2010); FIONA C. ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA (2003); Fiona C. Ross, *Using Rights to Measure Wrongs: A Case Study of Method and Moral in the Work of the South African Truth and Reconciliation Commission*, in HUMAN RIGHTS IN GLOBAL PERSPECTIVE: ANTHROPOLOGICAL STUDIES OF RIGHTS, CLAIMS AND ENTITLEMENTS 163–82 (Richard Ashby Wilson & Jon. P. Mitchell eds., 2003); Katherine Fobear, *Queering Truth Commissions*, 6 J. HUM. RTS. PRAC. 51 (2014); Katherine M. Franke, *Gendered Subject of Transitional Justice*, 15 COLUM. J. GENDER & L. 813 (2006); Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, 3 INT'L J. TRANSITIONAL JUST. 114 (2009); Lia Kent, *Narratives of Suffering and Endurance: Coercive Sexual Relationships, Truth Commissions and Possibilities for Gender Justice in Timor-Leste*, 8 INT'L J. TRANSITIONAL JUST. 289 (2014).

413. See *supra* Part IV.



#MeToo and Time's Up have made some initial strides toward inclusivity. For instance, Tarana Burke promotes an inclusive #MeToo movement "for both women and men, including transgender men and women."<sup>414</sup> She embraces a bottom-up approach to self-definition, noting that "[#MeToo] isn't a woman's movement. It's your movement. It's our movement. It is a survivors' movement. You are in it if you say you're in it."<sup>415</sup>

Similarly, after early concerns that the movements might fail women of color, Time's Up has begun to emphasize the essential role of women of color in the movement.<sup>416</sup> The women of color of Time's Up joined forces with a grassroots effort<sup>417</sup> to #MuteRKelly. This campaign built on extensive investigative work<sup>418</sup> to call for a criminal investigation and ask corporations and venues to cut ties with R. Kelly.<sup>419</sup> While no music service has banned R. Kelly, Apple, Spotify, and Pandora all stopped promoting his music.<sup>420</sup> Spotify also used this occasion to announce a new policy to police hate on its platform and removed a less high-profile rapper, XXXTentacion, for behavior similar to R. Kelly's.<sup>421</sup> While some expressed concern about Time's Up targeting a high-profile black man,<sup>422</sup> Tarana Burke responded with an emphasis on public ac-

414. Annie Sciacca, *#MeToo Founder Tarana Burke in East Bay: It's Not About 'Taking Down' Powerful Men*, EAST BAY TIMES (Apr. 16, 2018, 5:31 AM), <https://www.eastbaytimes.com/2018/04/15/me-too-founder-tarana-burke-speaks-to-bay-area-crowd-at-saint-marys-college-2/>.

415. Raven Palmer, *#MeToo Founder Addresses the Movement*, SUN STAR (Apr. 23, 2018), <http://uafsunstar.com/metoo-founder-addresses-the-movement/>.

416. Ariana Brockington, *Nina Shaw, Laura Dern Stress Importance of Intersectionality in Time's Up Movement*, VARIETY (May 22, 2018, 10:53 AM), <https://variety.com/2018/scene/news/laura-dern-nina-shaw-intersectionality-times-up-1202818580/> ("Women of color are totally woven into the fabric of Time's Up . . . There is going to be no getting to the finish line without each other; women of color are everywhere in addition to having our own niche within Time's Up, in which we're able to help shed a light on all the issues of culture as they relate to abuse of power.").

417. Danielle, *supra* note 131.

418. Mark Caro, *The Lonely Crusade of Jim DeRogatis*, CHI. MAG. (Oct. 16, 2017), <http://www.chicagomag.com/Chicago-Magazine/November-2017/The-Lonely-Crusade-of-Jim-DeRogatis/>.

419. Time's Up, *Women of Color Within Times Up Join #MuteRKelly Protest*, ROOT (Apr. 30, 2018, 8:00 AM), [https://www.theroot.com/women-of-color-within-times-up-join-muterkelly-protest-1825646793?utm\\_source=theroot\\_twitter&utm\\_medium=socialflow](https://www.theroot.com/women-of-color-within-times-up-join-muterkelly-protest-1825646793?utm_source=theroot_twitter&utm_medium=socialflow).

420. William Lee, *R. Kelly's Fall Comes as Chicago, Black Women Finally Turn Their Back on Star*, CHI. TRIB. (May 23, 2018, 12:25 PM), <http://www.chicagotribune.com/entertainment/music/ct-ae-rkelly-reaches-metoo-moment-0523-story.html>. In addition, several concerts have been cancelled. Morgan Greene, *Is R. Kelly's Time Up? Movement Takes Aim at Chicago-Born R&B Singer*, CHI. TRIB. (May 4, 2018, 11:00 AM), <http://www.chicagotribune.com/entertainment/music/ct-met-rkelly-metoo-career-20180503-story.html>.

421. Andrew Flanagan, *Starting with R. Kelly, Spotify Pulls Artists from Playlists for 'Hateful Conduct'*, NPR (May 10, 2018, 12:31 PM), <https://www.npr.org/sections/therecord/2018/05/10/610051559/starting-with-r-kelly-spotify-pulls-artists-from-playlists-for-hateful-conduct>.

422. *A Shocking Number of Black Women Are Defending R. Kelly on Twitter*, NEWSONE (May 4, 2018), <https://newsone.com/3796805/r-kelly-defending-tweets-black-women/>. Criticism included R. Kelly's own declaration that the letter was a lynching. Anastasia Tsioulcas, *#Metoo Founder Tarana Burke Responds to R. Kelly*, NPR (May 1, 2018, 4:57 PM), <https://www.npr.org/sections/therecord/2018/05/01/607448801/-metoo-founder-tarana-burke-responds-to-r-kelly>.

countability<sup>423</sup> and noted that all of his victims have been black and brown girls.<sup>424</sup>

### 3. *Holism*

A third insight from experiences with transitional justice is the need to pursue transformation holistically. Holism refers to the process of designing, implementing, and evaluating processes of transitional justice as a group, rather than in isolation or discretely.<sup>425</sup> The risks of moral failure in transitions are significant. Criminal trials risk becoming instruments for victor's justice, instead of the impartial practice of holding perpetrators to account.<sup>426</sup> Reparations risk becoming instruments to buy victim's silence, rather than instruments for transformation.<sup>427</sup> One source of such risks is the history of dealing with wrongdoing in such contexts. The typical experience of victims of wrongdoing during periods of conflict and repression was of the absence of meaningful justice in the wake of being victimized. Thus, there is a challenge in transitions of doing justice where justice had not been done in dealing with wrongdoing before. Holism recognizes that the expressive function of any particular response (e.g., reparations or trials) will be affected by whatever else does or does not take place in dealing with past wrongs.<sup>428</sup> That is, whether reparations or compensation expresses recognition of the victim as a rights-bearer and equal member of the community or expresses an effort to buy a victim's silence will

423. See Tsioulcas, *supra* note 422 ("This is not a lynching . . . You know, we are only a week out of the national monument to lynching being opened in Montgomery, Ala. and the history, and the reality of lynching in America is so, so painful and so real. This is not a public lynching. This is a call for public accountability." "So what we've seen in the last six months," Burke continues, "is a wave of accountability happen where corporations have stepped away from men, even if in the short term, to have authentic investigations into allegations. We have seen 24 years of allegations leveled against R. Kelly, and he has gone unscathed. So what the letter does is join the #MuteRKelly campaign, that was well on its way already, and joined the chorus of black women around the country who have been saying we want some accountability. Those things have to be interrogated. And I think at the very least we need to see corporations step away from them until we have satisfactory investigation into these allegations.").

424. Doha Madani, *R. Kelly Says the Time's Up Campaign Against Him Is 'Unjust and Off-Target,'* HUFF. POST (Apr. 30, 2018, 6:21 PM), [https://www.huffingtonpost.com/entry/r-kelly-times-up-me-too\\_us\\_5ae773b3e4b055fd7fceb19](https://www.huffingtonpost.com/entry/r-kelly-times-up-me-too_us_5ae773b3e4b055fd7fceb19).

425. MURPHY, *supra* note 301, at 160–92; TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 24–25 (2010); Pablo de Greiff, *Theorizing Transitional Justice*, in NOMOS LI: TRANSITIONAL JUSTICE 31–77 (Melissa S. Williams, Rosemary Nagy & Jon Elster eds., 2012); U.N. Secretary-General, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (Mar. 2010), [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

426. See Colleen Murphy, *Transitional Justice, Retributive Justice and Accountability for Wrongdoing*, in THEORIZING TRANSITIONAL JUSTICE 59 (Claudio Corradetti, Nir Eiskovits & Jack Rotondi eds., 2015); Gary J. Bass, *Why Not Victor's Justice*, WASH. POST (Feb. 15, 2002), [https://www.washingtonpost.com/archive/opinions/2002/02/15/why-not-victors-justice/b9f4aa5e-ee70-47e9-9942-262d8dc33dcd/?noredirect=on&utm\\_term=.cbbcf66a8797](https://www.washingtonpost.com/archive/opinions/2002/02/15/why-not-victors-justice/b9f4aa5e-ee70-47e9-9942-262d8dc33dcd/?noredirect=on&utm_term=.cbbcf66a8797).

427. On the risks of transitional justice see de Greiff, *supra* note 425. On transformative reparations see Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377 (2006).

428. See MURPHY, *supra* note 301, at 160–92; OLSEN, PAYNE & REITER, *supra* note 416, at 99. See generally de Greiff, *supra* note 416; U.N. Secretary-General, *supra* note 425.

be impacted by whether reparations occur as a one-off, discrete effort for dealing with wrongdoing or are part of a broader effort to deal with past wrongs and pursue institutional reform. The risk of reparations being experienced as an offer to buy silence increases when they are offered in isolation.

Another reason to pursue transitional justice holistically stems from the limits of any particular kind of response to wrongdoing. Reparations, criminal trials, truth commissions, memorials, or direct efforts at institutional reform each have the capacity to deal with some, but not all, of the claims of victims, demands on perpetrators, and broader transformation of relationships needed. Criminal trials hold perpetrators accountable but do not deal with the losses of victims, and victims play an instrumental role.<sup>429</sup> Reparations compensate victims for harms experienced but in many cases do not directly involve perpetrators or hold them to account.<sup>430</sup> Truth commissions document and uncover the truth about patterns of abuse but do not compensate for losses resulting from such abuse.<sup>431</sup>

There is an important dimension of transitional justice that facilitates holistic approaches to dealing with past wrongs. This is the fact that transitional justice efforts are characteristically established by the state.<sup>432</sup> While local and informal processes may also take place, they do so against a background of state efforts to deal with past wrongs.<sup>433</sup> Thus, a main challenge is ensuring that governments pursuing transitional justice recognize the importance of developing an approach to transitional justice that incorporates different kinds of responses. This dimension is disanalogous with the current structure of the #MeToo movement, which is informal and without an overall organizing structure. This diffuse set of efforts to deal with widespread sexual abuse, assault, and harassment in the workplace is challenging to coordinate for a number of reasons. Knowledge about what efforts are underway requires paying attention to media accounts, which in turn relies upon the comprehensiveness and accuracy of those accounts. Institutional reform efforts may be more effective in some domains than others, and where they will be effective depends on where the efforts of particular individuals and informal organizations are directed.

## V. CONCLUSION

Time will tell if the #MeToo moment can spur a successful transformation of American society. We note that with societal revolutions, much like state transitions toward democracy, the work is hard, tangible progress can be slow, and sometimes the end-product does not meaningfully upend the old status quo.

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429. DAVID TAYLOR, IMPUNITY WATCH, VICTIM PARTICIPATION IN TRANSITIONAL JUSTICE MECHANISMS: REAL POWER OR EMPTY RITUAL? 8–12 (2014).

430. See, e.g., Simon Robins, *Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal*, 5 INT'L J. TRANSITIONAL JUST. 75, 91–92 (2011).

431. HAYNER, *supra* note 377, at 76–77.

432. See *Transitional Justice Overview*, U.S. DEP'T OF ST. (May 16, 2016), <https://www.state.gov/j/gcj/transitional/257566.htm>.

433. *Id.*

For #MeToo, the early evidence is mixed. On the one hand, we have documented efforts at backward-looking justice with high-profile criminal indictments, a wave of civil litigation, and a rash of firings as well as forward-looking justice including renewed efforts by the EEOC,<sup>434</sup> the introduction of legislation,<sup>435</sup> and innovative approaches by private actors like Time's Up.<sup>436</sup> On the other hand, we have also observed significant hostility toward the goals of #MeToo and groups like Time's Up as well as deep skepticism about their means.<sup>437</sup> Workplaces, ranging from corporations to religious institutions to universities, still stubbornly protect and enable wrongdoers.

Given the uncertainty of this moment, we have suggested that those designing processes, altering laws, changing social practices, and reforming institutions, including those doing such work at our own institution,<sup>438</sup> do so with an emphasis on the needs of both victims and offenders as well as the larger community. As advocates move forward, they would do well to bear in mind the core principles and lessons of both restorative and transitional justice. The insights of restorative justice give us guidance by which society, communities, and those persons directly involved can assess the efforts of individuals and institutions to respond to wrongdoing. Transitional justice provides a useful touchstone by which advocates and scholars can better understand and theorize some of the vexing questions complicating the #MeToo conversation and the efforts of groups like Time's Up.

But much work remains. Cultural shifts and individual adjustments do not happen overnight, and the changes already wrought by the #MeToo conversation may not yet be deeply embedded. It will likely take a mix of public and private actions, by individuals and collectives, to bridge the gap from a moment and a movement to a transition that is transformative.

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434. Christine McLaughlin, *Is the EEOC #MeToo Guidance Coming?*, NAT'L L.R. (June 20, 2018), <https://www.natlawreview.com/article/eec-metoo-guidance-coming>.

435. See *supra* Subsection II.B.1.b; see also Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW (July 31, 2018), <https://www.pewtrusts.org/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws>.

436. See *supra* Section II.B.

437. See *supra* Section II.C.

438. Julie Wurth *Sexual Misconduct Allegations Have UI's Attention*, NEWS-GAZETTE (Nov. 6, 2018, 7:00 AM), <http://www.news-gazette.com/news/local/2018-11-06/sexual-misconduct-allegations-have-uis-attention>.html; Julie Wurth, *Law Faculty Call on UI to Overhaul Sexual-Misconduct Policies*, NEWS-GAZETTE (Oct. 23, 2018, 9:29 PM) <http://www.news-gazette.com/news/local/2018-10-23/law-faculty-call-ui-overhaul-sexual-misconduct-policies.html>.



# THE LIGHT WE SHINE INTO THE GREY: A RESTORATIVE #METOO SOLUTION AND AN ACKNOWLEDGMENT OF THOSE #METOO LEAVES IN THE DARK

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*In the past year and a half, American women have publicly discussed experiences of sexual assault, harassment, and—notably—grey-area misconduct in an unprecedented manner. The rhetoric of the #MeToo movement is rife with references to “shining a light” on a set of unexplored issues hitherto obscured in cultural darkness, to following women’s experiences into the grey. What is new about #MeToo, and what likely will be the through line that defines its historical importance, has been its sensitivity to nuance. The grey range of #MeToo misconduct is not a new problem. It is emphatically new, however, as a subject of public discourse. As such, and given the unsettled expectations that noncriminal #MeToo accusations have generated, it invites a new legal solution. This Note proposes that solution in the form of a restorative justice response to grey-area #MeToo misconduct, based on indigenous jurisprudential models.*

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## INTRODUCTION

“Bill Cosby is one thing; but many women don’t want the V.P. of sales who got too handsy at the Christmas party to be banished forever, let alone go to prison.”<sup>1</sup> It is not only the internet that makes #MeToo different from prior movements. Though the broader differences between feminism and #feminism could easily fill several volumes,<sup>2</sup> a primary feature separating #MeToo from its predecessors is the conviction that women<sup>3</sup> have a right to talk about the aforementioned V.P. of sales and be heard.

Before #MeToo, the story of women and sexual misconduct centered on victimization, blame, belief, narrative, ambiguity, power—all with respect to a potential *crime*. Though defining rape and sexual assault presents challenges, both legally and colloquially, those challenges previously concerned a known range of permissible accusations. Tacitly, an allegation had to be serious and important enough for a victim to earn the cultural airtime necessary to tell her story. Women understood that a certain threshold of violence or indignity perpetrated against them was a prerequisite to publicly discussing an allegation; the inevitable process of defending their credibility could only begin once their allegation met that initial bar and entered the public sphere.

#MeToo has changed the rules surrounding women’s public discourse. As distinct from historical feminist movements, it has rapidly become a way to

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1. Katie J. M. Baker, *What Do We Do with These Men?*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/sunday/metoo-comebacks-charlie-rose.html> [https://perma.cc/6WQQ-LJRG].

2. #Feminism is used to describe both a class of activist hashtags created to draw attention to women’s issues and foster social media engagement, *see, e.g.*, Jessica Bennett, *Behold the Power of #Hashtag Feminism*, TIME (Sept. 10, 2014), <http://time.com/3319081/whyistayed-hashtag-feminism-activism/> [https://perma.cc/RUN6-8B2T], and as a commentary on the irony or unseriousness of internet culture, occasionally with a nonetheless unironic and serious message about feminism itself, *see, e.g.*, Last Week Tonight (@LastWeekTonight), TWITTER (Mar. 12, 2017, 8:02 PM), <https://twitter.com/lastweektonight/status/841122161045692416> [https://perma.cc/NK9N-LEHQ]. #MeToo is commonly referred to with the “#” symbol as part of the movement’s name, but in common parlance this hashtag generally does not connote irony in the way that the hashtag in #feminism sometimes does. Presumably this is because the #MeToo hashtag highlights the movement’s online origins and serves as an embedded invitation to participate.

3. This Note conceives of #MeToo as a women’s movement for purposes of scope. The words “women” and “female” as used here are intended to encompass both cisgender and transgender women. While such experiences are not the focus of this Note, its delineated scope also is in no way intended to minimize the #MeToo movement’s application to men’s experiences as victims of sexual misconduct.

expose women's realities beyond the confines of the previously acceptable.<sup>4</sup> In 2019, women are "expanding the boundaries of what kinds of stories must be taken seriously—and bringing a much fuller picture of female humanity into view."<sup>5</sup>

As women work to shine a light<sup>6</sup> on subjects previously unfit for public airing, questions about consequences necessarily follow. If the V.P. of sales's "handsiness" is now fair game for public discussion and his behavior fit for public condemnation, what happens next—for him and for the unwilling recipient of his attentions? If #MeToo's legacy is to publicly problematize unacceptable behavior below the threshold of violence and indignity regulated by criminal sanctions, do extant legal models provide a means to adequately respond to that behavior without criminalizing it?

Some recent cultural commentary has suggested that restorative justice models rooted in indigenous<sup>7</sup> jurisprudence<sup>8</sup> are worth exploring as a next phase of the #MeToo movement.<sup>9</sup> This Note takes the position that restorative justice is a legal solution to a specific dimension of #MeToo,

4. See Rebecca Traister, *When the Muzzle Comes Off*, CUT (Sept. 24, 2018), <https://www.thecut.com/2018/09/kavanaugh-sexual-assault-deborah-ramirez-christine-ford.html> [<https://perma.cc/7JZY-UFNE>] ("[W]hat I do know with absolute assurance is that we are living through a period in which women are enacting crucial, swift, large-scale social and political change. That change is happening whether or not Republicans push Kavanaugh through [to the Supreme Court], whether or not Democrats take the House or the Senate. The change is not simply (or perhaps, not yet) about outcomes, but rather about expectations and what it's okay to talk about and when.").

5. *Id.*

6. See, e.g., Chantal Da Silva, *#MeToo Study Finds Nearly All Women and Almost Half of Men in U.S. Have Faced Sexual Harassment or Assault*, NEWSWEEK (Feb. 22, 2018), <https://www.newsweek.com/after-metoo-study-finds-nearly-all-women-and-almost-half-men-us-have-815660> [<https://perma.cc/6B57-33Q7>].

7. This Note uses the terms "Native American" and "indigenous" interchangeably when speaking about the experiences of tribal citizens living on reservations within the geographical boundaries of the United States. It occasionally makes use of the word "Indian" when referring specifically to laws or legal contexts that employ that term (as in the phrase "Indian Law") or to the titles or content of works that either reference those legal contexts or make use of the word "Indian" for their own rhetorical purposes. When referring to the people or jurisprudence of a specific tribal community, this Note uses more specific language.

8. As it advocates the adaptation of that jurisprudence, this Note maintains an awareness of the people from whom it is borrowed. In the period leading up to American women's public exploration of their grey-area #MeToo experiences, the Department of Justice reported that more than one in two Native American and Alaska Native women had experienced sexual violence in their lifetimes. ANDRÉ B. ROSAY, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 13 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> [<https://perma.cc/56U5-FGHF>]. #MeToo does little for these women. In comparison to their unambiguously violent experiences and the blind eye consistently turned to them, grey-area misconduct is not a pressing issue. #MeToo's exposure of nuance is, however, a cultural breakthrough that ultimately will benefit all women if suitable consequences are developed. This Note regards the grey range of #MeToo misconduct as an opportunity not only to develop an appropriate legal response to a newly public set of issues but also to expand the application of a successful and undervalued Native American legal model. In so doing, it does not directly benefit Native American women. It seeks nonetheless to amplify awareness of their experiences.

9. See, e.g., Baker, *supra* note 1.



namely, the part of the movement that spotlights ambiguous behavior beyond the purview of criminal sanctions.

That limited context is essential to this Note's proposed solution. While others<sup>10</sup> have seen a possible place for restorative justice across the full spectrum of behaviors pertinent to #MeToo—from those newly entering the sphere of public discourse to those unambiguously categorized as criminal—this Note advocates its use for the “handsiness” end of the spectrum and emphatically not for the rape and sexual assault end. Implicit in the offered solution is the maintenance of space both for victim-centering<sup>11</sup> practices and to examine the cultural implications<sup>12</sup> of the solution itself.

With those parameters in mind, as this Note develops its proposed solution to #MeToo's dearth of grey-area<sup>13</sup> consequences, it is conscious of the experiences of the people from whose jurisprudence it borrows its solution and remains aware of the legal and practical predicament of Native American women with respect to sexual violence. It is through the use of indigenous jurisprudence that this Note identifies a qualified way forward for #MeToo, but in so doing, it also intentionally identifies a group of people for whom #MeToo has done very little.

This Note nonetheless is wary of the ways in which juxtaposing two forms of cultural silence—the previously unreported instances of grey-area bad behavior that #MeToo spotlights,<sup>14</sup> viewed with reference to cultural and legal failures vis-à-vis Native American women<sup>15</sup>—risks creating a narrative of false equivalence, especially when such a juxtaposition is made by a white woman. Where that juxtaposition is pertinent, this Note highlights the ways in which the two experiences are both valid and important but are unambiguously not the same. In so doing, it strives to tackle issues of cultural appropriation head-on and bake questions about the right of white scholars to comment on the experience of Native American women into its structure.

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10. See *infra* Part III.A.1.

11. Where possible in the context of rape and sexual violence, this Note prefers the term “survivor” to the term “victim.” In legal contexts in which “victim” ordinarily is used (e.g., “victim-centering,” “victims’ rights,” and more general uses of “victim” that extend to areas of criminal law beyond the context of sexual violence) this Note uses “victim” instead of “survivor.” It also uses “victim” in the context of sexual misconduct other than rape and sexual violence.

12. See *infra* Part II.A; see also *infra* Part III.B.

13. As used in this Note, the terms “grey-area” and “grey range” refer to nonassaultive physical contact or physical exposure, patterns of belittling pranks or comments, unwanted attentions, and behaviors taking place in a context of partially granted or unwillingly granted consent. These terms seek to capture the noncriminal conduct that alters the course of women's lives and careers subtly and on terms that women and men routinely accepted prior to #MeToo as the way things are. See *infra* Part I.A.

14. See, e.g., Baker, *supra* note 1.

15. See, e.g., Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 460 (2005). See generally Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997) (fleshing out the connection between legislation and “lawlessness”).

While legal scholarship on the #MeToo movement is in its infancy, there is a large amount of cultural literature on the subject,<sup>16</sup> and this Note relies on that literature where legal scholarship is lacking. Moreover, there is significant legal scholarship relating to restorative justice's theoretical dimensions but relatively little legal scholarship about the more practical dimensions of tribal models and follow-on models in nonindigenous settings. To explicate these practices, this Note relies in part on interviews with Eric Gross, who studied Navajo Peacemaking jurisprudence in situ.<sup>17</sup> This Note's contribution to existing literature stems from its concentration on the category of #MeToo wrongdoing to which restorative justice can offer a solution, noting where pertinent the dearth of overlap between Native American women's experiences and the conditions that have made a restorative justice application to #MeToo possible.

Part I of this Note sketches the origins and early aims of the #MeToo movement, with a focus on the new kinds of narratives that it has enabled women to bring into public discourse alongside more traditionally acceptable or "credible" accusations with a higher bar for damage to the survivor. It then turns to the cultural backlash against #MeToo and the movement's struggle to define a fair and workable set of consequences across the sexual misconduct spectrum. Part II discusses the use of indigenous jurisprudence by nonindigenous people before laying out the legal framework for forms of restorative justice used in both tribal jurisprudences and legal models inspired by them. Part III carefully posits a limited application of restorative justice to the grey category of behavior onto which #MeToo has shone the first public light. It does so by advocating for a Peacemaking docket attached to state trial courts, which should be procedurally administered under the framework of an "Adjournment in Contemplation of Restoration." It then touches on what #MeToo, as well as this proposal, can and cannot do for Native American women.

### I. WHOSE LIGHT IS IT ANYWAY?

This Part examines the early history of #MeToo and its development from a movement catalyzed by the unambiguous predations of powerful men into one that also reckons with the ramifications of grey-area misconduct. It catalogues some paradigmatic examples of the grey-area behavior of public figures: Louis C.K., Al Franken, and Deborah Ramirez's allegations against

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16. Since consensus emerged that #MeToo is a movement of historical importance and not (as was initially assumed) a few days of Twitter traffic, journalists and essayists have devoted considerable space to analyzing its scope and implications. *See, e.g.*, Baker, *supra* note 1; Da Silva, *supra* note 6; Rebecca Traister, *Too Much, Too Soon*, CUT (Aug. 28, 2018), <https://www.thecut.com/2018/08/louis-c-k-and-matt-lauer-what-do-their-comebacks-mean.html> [<https://perma.cc/ST75-D25X>].

17. Interview with Eric Gross, Recipient, Dep't of Justice Fellowship Grant to Evaluate and Assess Navajo Peacemaking, in N.Y.C., N.Y. (Dec. 4, 2018) (notes on file with author) [hereinafter Interview 1 with Eric Gross]; Interview with Eric Gross, Recipient, Dep't of Justice Fellowship Grant to Evaluate and Assess Navajo Peacemaking, in N.Y.C., N.Y. (Dec. 20, 2018) (notes on file with author) [hereinafter Interview 2 with Eric Gross].

Brett Kavanaugh. It then turns to the cultural backlash against #MeToo in the context of the movement's struggle to determine what comes next.

#### A. #MeToo History

On October 15, 2017, in response to the growing scandal around film producer Harvey Weinstein's decades of predatory behavior toward women, actress Alyssa Milano posted the tweet that began the 2017 incarnation<sup>18</sup> of the #MeToo movement: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."<sup>19</sup>

The original *New York Times* story about Mr. Weinstein's trail of misconduct, intimidation, and oppressively wielded power broke on October 5, 2017.<sup>20</sup> The story featured recollections of a hotel room ambush from actress Ashley Judd (it would later emerge that Mr. Weinstein worked to derail Ms. Judd's career after the encounter described in the *Times* article<sup>21</sup>) alongside tepidly apologetic quotes provided to the *Times* by Mr. Weinstein, which implied that he expected the unwelcome publicity to die down quickly.<sup>22</sup> It also catalogued various settlement payments and nondisclosure agreements that Mr. Weinstein and those representing him had engineered over the course of almost three decades.<sup>23</sup> Perhaps most disturbingly, it detailed the strategies regularly employed by women in Mr. Weinstein's orbit to avoid his unwanted advances as they attempted to get on with their careers: one woman advised a colleague to wear a parka in Mr. Weinstein's presence, and female executives frequently "double[d] up" when attending meetings with Mr. Weinstein in order to mitigate the inevitable consequences of being alone with him.<sup>24</sup>

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18. Me Too (as opposed to #MeToo) previously existed as a movement founded in 1997 by Tarana Burke. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/D7TP-XM8A>] (detailing Ms. Burke's initial worry that Ms. Milano would co-opt the #MeToo hashtag in the way that Ms. Burke had previously experienced white feminists to do with the initiatives of feminist women of color; as well as Ms. Milano's subsequent assurances that she was initially unaware of Ms. Burke's work, and her public and private attribution of #MeToo to Ms. Burke upon becoming aware of it).

19. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/4SSW-R4VJ>].

20. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/2CPX-8HLY>].

21. Rebecca Rubin, *Ashley Judd, Mira Sorvino Respond to Peter Jackson's Claims That Weinstein Blacklisted Them*, VARIETY (Dec. 15, 2017), <https://variety.com/2017/film/news/ashley-judd-mira-sorvino-weinstein-blacklist-peter-jackson-1202642211/> [<https://perma.cc/35S6-BWFL>].

22. "I appreciate the way I've behaved with colleagues in the past has caused a lot of pain, and I sincerely apologize for it. Though I'm trying to do better, I know I have a long way to go." Kantor & Twohey, *supra* note 20.

23. *Id.*

24. *Id.*

Five days later, the *New Yorker* published an account of Mr. Weinstein's behavior that was darker yet.<sup>25</sup> This account was not only of prolonged, almost prosaic, abuses of power; or of coercion, fear, and shame (on the survivors' end); but of rapes and assaults as well.<sup>26</sup> The *New Yorker* article was the result of a ten-month investigation and featured interviews with thirteen women who said that Mr. Weinstein had harassed or assaulted them.<sup>27</sup> It noted that various publications had made prior attempts to expose Mr. Weinstein's abuses but that Mr. Weinstein and his associates had employed "nondisclosure agreements, payoffs, and legal threats" to ensure that those attempts consistently "fell short of the demands of journalistic evidence."<sup>28</sup>

The combined effect of the two stories was powerful. Under ordinary circumstances, these articles and the strong but specific outrage that they spawned<sup>29</sup> might have been the end of the conversation. On October 13, 2017, however, an opinion piece by actress Mayim Bialik appeared in the *New York Times*.<sup>30</sup> In this piece, Ms. Bialik framed the "casting couch" encounters that her peers had experienced as connected, in some measure, to their failure to make "conservative choices" and "dress modestly."<sup>31</sup> She also characterized her own lack of firsthand experience with predatory industry giants in hotel rooms as the "upside of not being a 'perfect ten.'"<sup>32</sup>

The social media backlash was swift.<sup>33</sup> Among the responses was a searing tweet on October 15, 2017, from actress Gabrielle Union: "Reminder. I got raped at work at a Payless shoe store. I had on a long tunic & leggings so miss me w/ 'dress modestly' shit."<sup>34</sup> Later that day, Alyssa

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25. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [https://perma.cc/AT8H-99VE].

26. *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., Monica Hesse & Dan Zak, *Violence. Threats. Begging. Harvey Weinstein's 30-Year Pattern of Abuse in Hollywood*, WASH. POST (Oct. 14, 2017), [https://www.washingtonpost.com/lifestyle/style/violence-threats-begging-harvey-weinsteins-30-year-pattern-of-abuse-in-hollywood/2017/10/14/2638b1fc-aeab-11e7-be94-fabb0f1e9ffb\\_story.html](https://www.washingtonpost.com/lifestyle/style/violence-threats-begging-harvey-weinsteins-30-year-pattern-of-abuse-in-hollywood/2017/10/14/2638b1fc-aeab-11e7-be94-fabb0f1e9ffb_story.html) [https://perma.cc/UH6S-378T].

30. Mayim Bialik, Opinion, *Being a Feminist in Harvey Weinstein's World*, N.Y. TIMES (Oct. 13, 2017), <http://www.nytimes.com/2017/10/13/opinion/mayim-bialik-feminist-harvey-weinstein.html> [https://perma.cc/W3YU-4HK3].

31. *Id.*

32. *Id.*

33. See Elahe Izadi, *Mayim Bialik Apologizes for Weinstein Op-Ed: 'I Am Truly Sorry for Causing So Much Pain'*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/10/15/mayim-bialik-fires-back-at-weinstein-op-ed-critics-its-so-sad-how-vicious-people-are-being/> [https://perma.cc/JE63-CNVB].

34. Gabrielle Union (@itsgabrielleu), TWITTER (Oct. 15, 2017, 9:28 AM), <https://twitter.com/itsgabrielleu/status/919600825101705217> [https://perma.cc/9URQ-RRDK]. This tweet, appearing earlier in the same day in which Alyssa Milano sent her #MeToo tweet, is notable for several reasons. Everything about it—its milieu (Twitter), its reference to Payless (woman-of-the-people), its use of profanity (unpretentious)—stands in stark contrast to Ms. Bialik's op-ed. Where Ms. Bialik's piece was othering, Ms. Union's

Milano sent her #MeToo tweet, seemingly in reaction to Ms. Bialik as much as to Mr. Weinstein.<sup>35</sup> By the following morning, nearly 40,000 people had replied.<sup>36</sup> By the forty-eight-hour mark, users had posted the hashtag close to a million times on Twitter alone.<sup>37</sup>

Perhaps because of the inclusive tone that premised Ms. Milano's tweet,<sup>38</sup> or due to years of dormant frustration with Bialik-type responses to Weinstein-type horrors,<sup>39</sup> or because of the nascent movement's timing relative to broader cultural patterns,<sup>40</sup> #MeToo went on to become something far beyond an internet campaign.<sup>41</sup> One year after its inception, #MeToo was

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tweet is universalizing. In describing the horrific experience of a beautiful actress, it makes abundantly clear in fewer than 140 characters that any woman could have been attacked as she was attacked. Though it is difficult to pinpoint precisely what produced the longevity and breadth of the #MeToo movement, the quality of inclusiveness exemplified by this tweet and made explicit in the invitational Alyssa Milano tweet that followed it likely were contributing factors.

35. Heidi Stevens, *#MeToo Campaign Proves Scope of Sexual Harassment, Flaw in Mayim Bialik's Op-Ed*, CHI. TRIB. (Oct. 16, 2017, 11:15 AM), <https://www.chicagotribune.com/lifestyles/stevens/ct-life-stevens-monday-me-too-mayim-bialik-1016-story.html> [https://perma.cc/3SNR-EPWQ]. It is possible that frustration with Ms. Bialik's op-ed (and the broader cultural assumptions of which it was emblematic) was also a contributing factor in #MeToo's strength and duration as a movement. Mr. Weinstein's decades of predation are truly appalling, but it is somewhat difficult to see why he—and not Roman Polanski or Woody Allen, for instance—produced a response that has amounted to a cultural shift. The timing of Ms. Bialik's op-ed might go some way toward explaining this distinction. Tonally, the op-ed was a kind of synecdoche for the typical response that follows revelations of misconduct (inadequate horror, victim-blaming, exhortation that women adapt to their regrettable surroundings instead of seeking to alter them, negligible change), and #MeToo was born in part of a determination that the overall response to the Weinstein scandal would not be business as usual.

36. *Id.*

37. *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017, 6:50 PM), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/> [https://perma.cc/9RB8-GFFE].

38. *See id.* (citing Ms. Milano's premise that her campaign was constructed to demonstrate the magnitude of the issue by shifting the focus "away from the predator and to the victim"); *see also supra* note 34.

39. *See supra* note 35.

40. *See* Jeremy Diamond, *Trump Says It's 'a Very Scary Time for Young Men in America,'* CNN (Oct. 2, 2018), <https://www.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html> [https://perma.cc/LU58-5UEQ] (detailing the progression from the release of the *Access Hollywood* tape of Donald Trump—and the various subsequent accusations of sexual harassment and assault leveled against the then-candidate seemingly without effect—in October 2016, to the beginning of #MeToo in October 2017, to then-nominee Brett Kavanaugh's fraught U.S. Supreme Court confirmation hearings in October 2018). It is also likely that legal developments over a longer arc in some sense prepared the way for the unprecedented features of #MeToo. Broadly, the force requirement that once was a ubiquitous element of proving rape has in recent decades given way to more nuanced understandings of consent. *See, e.g.,* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 959; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 120–21 (1999). This legal shift, both statutory and common law, may well be among the forces making the cultural acknowledgement of nuanced sexual misconduct possible in the #MeToo era.

41. *See* Jia Tolentino, *One Year of #MeToo: What Women's Speech Is Still Not Allowed to Do*, NEW YORKER (Oct. 10, 2018), <https://www.newyorker.com/news/our-columnists/one-year-of-metoo-what-womens-speech-is-still-not-allowed-to-do> [https://perma.cc/8L4N-

producing both grim calls to arms<sup>42</sup> and reflections on the new varieties of discourse that the movement has engendered.<sup>43</sup>

The latter variety of analysis showcases the grey-area behaviors that would have been emphatically categorized as trivial before #MeToo.<sup>44</sup> In September 2018, Rebecca Traister wrote that the story told by Deborah Ramirez when she came forward during Brett Kavanaugh's Supreme Court confirmation hearings was

the kind of encounter most women I know have always assumed they'd never be able to recount in public—least of all in the midst of a highly scrutinized, high-stakes political battle—because it didn't meet the impossibly high standards the world has set for women who've been abused or assaulted and want to be believed.<sup>45</sup>

Ms. Ramirez had described a night of drinking at Yale in which, though she did not remember everything that occurred, she remembered her classmate, Mr. Kavanaugh, “pulling down his pants and thrusting his penis in her face against her will.”<sup>46</sup>

Ms. Traister focused on the “patchiness” of Ms. Ramirez's memory and narrative, namely on her willingness to come forward with an optically imperfect story and society's newfound willingness to listen. While this focus gives due credit to a monumental social development catalyzed by #MeToo,<sup>47</sup> there is an equally important facet of Ms. Ramirez's experience on which the piece does not focus.<sup>48</sup> The act alleged—Mr. Kavanaugh exposed himself to Ms. Ramirez against her will, using enough force to prompt her choice of the word “thrust” in her description of the encounter,<sup>49</sup> but no more—is not necessarily a form of sexual assault or even unambiguously a crime. Depending on jurisdictional norms, it might qualify as indecent exposure, criminalized lewd behavior, or lewd touching,<sup>50</sup> but,

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TK3T] (“Th[e] revanchism is not a sign of #MeToo's overcorrection, or even of its success—it is merely evidence of its existence.”).

42. See, e.g., *id.*

43. See, e.g., Traister, *supra* note 4.

44. See *id.*

45. *Id.* (noting further that the likely lack of legal or political resolution to Ms. Ramirez's allegations was in a sense beside the point when compared to the public airing of the *kind* of narrative presented by Ms. Ramirez).

46. *Id.*

47. See *id.*

48. See *id.* Ms. Traister is admirably focused on Ms. Ramirez's experience and the qualities of *her* narrative: “But part of what #MeToo has always been about—despite the obsessive focus on the consequences faced by men—is what happened to the women . . . . It's been about the exposure of their realities.” *Id.* In a somewhat contrasting approach, this Note posits that the *type* of misconduct experienced is also essential to “what happened to the women,” even though it describes the actions of the perpetrators.

49. Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, from Brett Kavanaugh's College Years*, NEW YORKER (Sept. 23, 2018), <http://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez> [https://perma.cc/RPC7-7C64].

50. Ms. Ramirez said that she touched Mr. Kavanaugh's penis without her consent as she pushed him away. *Id.*

given the ostensibly friendly and relaxed context of a college gathering, it is at best difficult to classify.

Reporting this grey-area bad behavior at all is as new to public discourse as entertaining an imperfect narrative like the one presented by Ms. Ramirez. Prior to #MeToo, women justifiably worried that their actual rapes and assaults would appear insufficiently credible under public scrutiny; behavior outside of those categories, and plenty inside them, fell into the range of stories that women simply were expected not to tell.<sup>51</sup>

Two other examples also typify such grey-area behaviors but occurred too early in the series of #MeToo accusations that began in October 2017 to immediately receive the kind of lensing that Ms. Traister applied to Ms. Ramirez's accusations as they occurred. In November 2017, comedian Louis C.K.<sup>52</sup> and then-Senator Al Franken<sup>53</sup> were accused, respectively, of masturbating in front of female colleagues and forcibly kissing and groping a female colleague. The women involved—a group of women made accusations simultaneously in Louis C.K.'s case, while initially only newscaster Leeann Tweeden came forward in Mr. Franken's case—did not suggest that either man had assaulted them in the traditionally understood sense.

The Louis C.K. accusations in particular were notable in that they did not involve any physical force at all, and at least one of the women concerned had felt obliged to consent to the behavior at the time.<sup>54</sup> Two of Louis C.K.'s accusers, comedians Dana Min Goodman and Julia Wolov, described to the *New York Times* their feeling that he had done something to them that ought to have consequences but seemed unlikely to be criminal.<sup>55</sup> After Louis C.K. took off his clothes and masturbated in front of them in a hotel room in 2002 (at which time their careers were beginning to take off), they attempted to build outrage within their profession by telling colleagues about his behavior.<sup>56</sup> Ms. Wolov and Ms. Goodman felt that those they told were either unreceptive or constrained by Louis C.K.'s power in the industry.<sup>57</sup> The two comedians began avoiding the many projects to which Louis C.K. and his manager Dave Becky were connected after Mr. Becky told the women's managers that he wanted them to stop telling others about the encounter.<sup>58</sup> Fifteen years later, Ms. Wolov and Ms. Goodman felt that #MeToo had provided them with an opportunity, as well as a responsibility,

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51. See Traister, *supra* note 4.

52. See Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/RL9K-QZRP>].

53. See Nicholas Fandos, *Al Franken Issues Apology After Accusation of Forcible Kissing and Groping*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/us/politics/al-franken-sexual-harassment-groping-forcible-kissing.html> [<https://perma.cc/F6XU-9F3U>].

54. See Ryzik et al., *supra* note 52.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

to speak.<sup>59</sup> Their decision to do so helped to change the terms of what constituted an acceptable #MeToo subject. Only a week separated their accusations from Ms. Tweeden's, which itself altered not only the acceptable content but the vocabulary of the movement.<sup>60</sup>

Following numerous additional allegations of groping, Mr. Franken resigned from the Senate.<sup>61</sup> Recriminations were quick to follow his resignation,<sup>62</sup> and Mr. Franken himself did little to afford his departure a sense of finality or fairness.<sup>63</sup> Louis C.K. disappeared from the public stage for approximately ten months before performing a surprise set at the Comedy Cellar in New York City.<sup>64</sup> He was greeted with a standing ovation before the set began.<sup>65</sup> Reportedly, he told a joke about rape whistles.<sup>66</sup> When approached for comment, the club's owner essentially threw up his hands:

This has been very hard for us. We know that it is not right that he shouldn't be able to perform again, but there is no clear time to decide how long is appropriate. He showed up and now we're thrown into it and we hope it turns out OK.<sup>67</sup>

### B. #MeToo Challenges

Because the #MeToo movement strives to hold accountable the perpetrators of noncriminal behaviors, it struggles with a dearth of acceptable consequences.<sup>68</sup> Banishment from public life is a recurring suggestion<sup>69</sup> and arguably is the prevailing thrust of the attempts at "consequences" made thus far in the lifespan of #MeToo. Nevertheless, efforts to banish offenders

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59. *See id.*

60. *See Fandos, supra* note 53. Prior to Ms. Tweeden's accusation, "forcible kissing" was not a phrase in common parlance. After her accusation, it became a subject of public debate. *See, e.g.,* Crystal Marie Fleming (@alwaystheself), TWITTER (May 4, 2018, 6:57 AM), <http://twitter.com/alwaystheself/status/992402778181001217> [<http://perma.cc/X7HZ-D6XK>] ("There needs to be a whole #MeToo conversation that is JUST ABOUT forcible kissing as a form of sexual assault. It's widespread, enraging, disgusting and abusive and doesn't get talked about nearly enough.").

61. Helaine Olen, *Stop Second-Guessing Al Franken's Resignation. He Has to Go*, WASH. POST (Dec. 19, 2017), <https://www.washingtonpost.com/blogs/plum-line/wp/2017/12/19/stop-second-guessing-al-frankens-resignation-he-has-to-go/> [<https://perma.cc/LQ58-WQU4>].

62. *Id.*

63. *See* Molly Ball, *Al Franken Is Not Sorry*, TIME (Dec. 9, 2017), <http://time.com/5057462/al-franken-resignation-sorry/> [<https://perma.cc/SJL7-UFYN>].

64. Clarisse Loughrey, *Louis CK Tells 'Rape Whistle' Joke in First Stand-Up Set Since Sexual Misconduct Admission*, INDEPENDENT (Aug. 30, 2018), <http://www.independent.co.uk/arts-entertainment/comedy/news/louis-ck-rape-whistle-joke-new-york-comedy-cellar-set-sexual-misconduct-a8514031.html> [<http://perma.cc/Y283-92M2>].

65. Traister, *supra* note 16.

66. Loughrey, *supra* note 64.

67. *Id.*

68. *See generally* Baker, *supra* note 1.

69. *Id.*



whose acts do not rise to the level of criminal behavior have tested the collective American<sup>70</sup> attention span and found it wanting.<sup>71</sup>

The movement's struggle with consequences also has alienated some observers. Perceptions of #MeToo as a witch hunt or an indiscriminate panic have run the gamut from the rough-hewn<sup>72</sup> to the relatively rigorous.<sup>73</sup> Tacitly uniting these criticisms is the unsettling idea that any man is vulnerable at any time. If no one knows what will happen to offenders or even what behaviors count as offenses, it becomes easy to dismiss #MeToo—and especially the new grey range that it has exposed—as a “mania.”<sup>74</sup> A Harvey Weinstein's behavior (or some overtly criminal subset of it) is capable of producing a defined resolution if not a fully satisfactory one.<sup>75</sup> At present, a Louis C.K.'s behavior<sup>76</sup> is not.

Tarana Burke<sup>77</sup> has characterized the movement in its present form as “lost.”<sup>78</sup> Her central criticism is that #MeToo has been too focused on perpetrators to the detriment of survivors of sexual violence.<sup>79</sup> As of this writing, she plans to build a three-pronged program geared toward #MeToo's rape and sexual assault survivors.<sup>80</sup> Ms. Burke's solution to the #MeToo lacuna that she identifies is not itself a legal one, but it is one suited to coexist with legal mechanisms already in place<sup>81</sup> and arguably made the more necessary by the adversarial criminal justice system's lack of survivor-centric resources.<sup>82</sup> It is also (rightly, given Ms. Burke's experiences and expertise) a #MeToo response that does not focus on the newly identified

70. #MeToo has an international dimension, but this Note discusses it as a primarily American phenomenon for purposes of scope.

71. See, e.g., Traister, *supra* note 16.

72. See, e.g., *Metoo'd*, URB. DICTIONARY, <https://www.urbandictionary.com/define.php?term=Metoo%27d> [<https://perma.cc/5WD5-QBCY>] (last visited Feb. 12, 2019) (listing, as of this Note's publication, the top definition of the term as, “When a woman Ruins Your Life by accusing you of sexual assault or sexual harassment without any evidence or pass [sic] the time that any evidence could be collected”).

73. See, e.g., Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, INTELLIGENCER (Jan. 12, 2018), <http://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html> [<https://perma.cc/SVY3-FLLQ>].

74. See *id.*

75. See Maria Puente, *Judge Rules Harvey Weinstein Sexual Assault Case Can Move Forward to Trial*, USA TODAY (Dec. 20, 2018), <https://www.usatoday.com/story/life/2018/12/20/harvey-weinstein-court-new-york-sex-crimes-charges-judge/2294182002/> [<https://perma.cc/F8SH-86WD>].

76. See Ryzik et al., *supra* note 52.

77. See Garcia, *supra* note 18.

78. See Liz Rowley, *The Architect of #MeToo Says the Movement Has Lost Its Way*, CUT (Oct. 23, 2018), <https://www.thecut.com/2018/10/tarana-burke-me-too-founder-movement-has-lost-its-way.html> [<https://perma.cc/8YQM-NJ8Z>].

79. Ms. Burke's pre-#MeToo Me Too campaign involved “healing circles” for survivors of sexual violence. The circles were survivor-only support circles based on sharing experiences. See *id.*

80. *Id.*

81. The ethos and to some extent the form of Ms. Burke's response also dovetails well with this Note's proposed grey-area solution despite the latter's legal character. See *infra* Part III.A.2.

82. This is not to imply that the adversarial criminal justice system as it exists ought to be survivor-centric. See *infra* note 104.

grey range of misconduct. Given the ambiguous and uneven consequences currently experienced by grey-area victims and offenders alike, a clear legal solution that incorporates both parties is both more appropriate and more necessary in the grey range than it would be in response to sexual violence.<sup>83</sup>

As #MeToo stands presently, grey-area offenders' return from nebulous banishments—sometimes greeted by apparent acclaim and relief—produces frustration among commentators and observers of the movement.<sup>84</sup> Some have suggested restorative justice as a possible way forward,<sup>85</sup> but the legal contours of that solution thus far have lacked clarity.

## II. ILLUMINATING EXTANT RESTORATIVE MODELS

This Part considers the use of indigenous legal models by outsiders. It then fleshes out current incarnations of some of those models as well as models based on them. In so doing, it lays the jurisprudential foundation for the legal solution to grey-area #MeToo misconduct that Part III advocates.

### A. *Some Thoughts on Outsiders' Use of Restorative Justice*

In her 1997 remarks “Lessons from the Third Sovereign: Indian Tribal Courts,” Justice Sandra Day O'Connor called for the American state and federal court systems to take notice of and draw on the restorative justice practices of tribal court systems.<sup>86</sup> She spoke of “traditional tribal values” in somewhat general terms.<sup>87</sup> She also mentioned that by the 1934 passage of the Indian Reorganization Act, “most tribes had only a dim memory of traditional dispute resolution systems” and therefore had to work to incorporate traditional features into the tribal court systems that they set up following the Act's passage.<sup>88</sup>

Justice O'Connor's commentary is instructive in part because—with great respect for her scholarship and wider aims—it falls into a number of the traps that the work of white scholars tends to fall into when discussing tribal courts and restorative justice. For instance, while it uses specific examples,<sup>89</sup> it treats tribal communities' experiences as largely equivalent to one another.<sup>90</sup>

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83. See *infra* Part III.A.1.

84. See Traister, *supra* note 16.

85. See Baker, *supra* note 1.

86. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 3–6 (1997).

87. *Id.* at 2.

88. *Id.* at 1–2.

89. *Id.* at 4.

90. *Id.* (“[R]elatively few civil disputes were decided [by tribal courts]. This disparity might reflect the time and expense required for civil cases, the courts' reluctance to handle civil cases because of a lack of familiarity or advanced legal training, or perhaps may have arisen because tribal courts serve a less litigious community. Development of alternative methods of dispute resolution allows the tribal courts to take advantage of their strengths in order to provide efficient and fair resolution of such conflicts.”).

And in discussing tribal courts' strengths, it assumes that those strengths and the values underlying them are monolithic.<sup>91</sup>

As this Note turns to a discussion of contemporary indigenous restorative justice practices and restorative justice practices inspired by the work of indigenous people, it does not escape these pitfalls. Like Justice O'Connor's remarks, what follows draws on a combination of specific examples and generalized principles and values.<sup>92</sup> What it can and should also do is pause over the connection between the kitchen-sink qualities of the contemporary restorative justice umbrella<sup>93</sup> and the history of American violence—legislative and literal—against the various communities whose jurisprudence and values present-day outsiders often aggregate by default.

Justice O'Connor mentioned the "enormous disruptions in customary Native American life . . . wrought by factors such as forced migration, settlement on the reservations, the allotment system, and the imposition of unfamiliar Anglo-American institutions," but in the same breath, she discussed the Indian Reorganization Act in a remarkably positive light.<sup>94</sup> While it is accurate that passage of the Act to some degree "allowed the tribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems,"<sup>95</sup> it is also the case that the Act, as ultimately passed, curtailed tribal sovereignty because Congress intended that it should.<sup>96</sup> To the extent that the practices of "traditional Indian fora for dispute resolution" have been lost or homogenized,<sup>97</sup> American legislative and judicial interventions have contributed to that loss and homogenization in what often has been a concerted effort to weaken indigenous culture and erode tribal autonomy.<sup>98</sup>

Of course, Justice O'Connor's position on these broader cultural forces in some sense is not the point. She saw the appeal of various tribal jurisprudences, regarded tribal courts' restorative justice practices with respect, and hoped that the state and federal court systems could learn from

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91. *Id.* at 3 ("To further these traditional Native American values, tribal courts may employ inclusive discussion and creative problem-solving. The focus on traditional values in contemporary circumstances has permitted tribal courts to conceive of alternatives to conventional adversarial processes.").

92. It also draws on them from an unequivocal outsider's perspective. I am a white woman and have no direct experience of the practices outlined here.

93. See Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 326 (2017).

94. O'Connor, *supra* note 86, at 1.

95. *Id.*

96. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 832–33 (1996) ("If anything, the legislative history suggests that Congress specifically considered and rejected a scheme of broad-based tribal sovereignty over territory.").

97. O'Connor, *supra* note 86, at 2.

98. See, e.g., Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 164 (2000) (parsing the extent to which superimposing Anglo-American ideas of land ownership onto disputes involving tribal sovereignty and property can abrogate the rights of tribes to self-determine, even in the name of ostensibly liberal values).

tribal courts and incorporate aspects of their approaches. Similarly, this Note proposes an application of restorative justice to a context outside of indigenous culture. As many nonindigenous practitioners have seen, restorative justice models are effective legal tools; practitioners have every reason to want to borrow and adapt them. But it is this Note's position that in 2019, the context—reflection on what will be borrowed, from whom, and the implications of the borrowing against a backdrop of centuries of cultural assault on indigenous people—ought always to precede the borrowing.

*B. Structures and Applications of Restorative Justice Models  
Based on Indigenous Jurisprudence*

Modern restorative justice models and the terms used to describe them vary, but a set of characteristics is common to many. Typically, they are nonhierarchical.<sup>99</sup> Many of them are circle-based,<sup>100</sup> meaning that a group of participants sits together in a circle, usually with a facilitator, and all parties have opportunities to speak.<sup>101</sup> Values reflected in the use of a circle include equality<sup>102</sup> and a sense that a given proceeding will not be resolved in any predetermined manner.<sup>103</sup>

Contrast with adversarial justice systems is stark. Though attempts have been made to incorporate other perspectives into the American criminal justice system,<sup>104</sup> it is by design a two-power system that pits defendants against the government.<sup>105</sup> Goals in the criminal justice system are largely retributive, and the system is not built to interrogate root causes.<sup>106</sup> In general, repairing relationships and searching for the sources of behavior are

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99. See, e.g., Agnihotri & Veach, *supra* note 93, at 327.

100. Many, but by no means all. Victim-offender mediation and community boards both fall outside of the circle model but are sometimes categorized as restorative justice practices. See *id.* at 328–29 (distinguishing these models from circle-based models for purposes of establishing the authors' working definition of restorative justice).

101. See, e.g., *id.* at 327.

102. Gender equality in particular was reflected in precolonial indigenous jurisprudential models. See SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* 16–17 (2015) (citing a Mvskoke rape law, written down in English in 1825, that makes reference to rape survivors with the phrase “what she say it be law”).

103. See Agnihotri & Veach, *supra* note 93, at 327 (noting the facilitator's lack of predetermined agenda for a given matter's resolution and analogizing the circle to a vessel capable of containing various emotions and modes of discourse).

104. See, e.g., Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612–16 (2009) (detailing the rise of the crime victims' rights movement, the support that the movement garnered for a victims' rights addition to the Sixth Amendment, and the sweeping statutory gains that the movement achieved after that bid failed). Out of concern for defendants' due process rights, this Note does not advocate increasing victims' power in the adversarial system as it presently exists.

105. Agnihotri & Veach, *supra* note 93, at 329.

106. See Susan J. Butterwick et al., *Tribal Court Peacemaking*, 94 MICH. B.J. 34, 36 (2015).

not part of the adversarial process.<sup>107</sup> Rates of recidivism are concomitantly high.<sup>108</sup>

Recidivism rates in the wake of Peacemaking, a form of restorative justice based in Navajo jurisprudence, are shockingly low.<sup>109</sup> During a two-year study focused on domestic violence on the Navajo Reservation, the recidivism rate for Peacemaking participants was between 15 percent and 20 percent.<sup>110</sup> For study participants who went through the adversarial model and served a prison term, it was approximately 70 percent over one year.<sup>111</sup> Other tribes using the Peacemaking model have also experienced excellent outcomes: the Alaskan Kake tribe measured the results of Peacemaking over the course of four years and found a 97.5 percent success rate in sentence fulfillment.<sup>112</sup>

As practiced by Navajos themselves, Peacemaking<sup>113</sup> in particular is diametrically opposed to the American adversarial justice system in both method and ethos.<sup>114</sup> A central tenet underlying the process is that the vast majority of people are not fundamentally evil, no matter the acts that they have committed.<sup>115</sup> According to the Navajo conception of justice, labeling those who have acted wrongly as criminals or abusers—even as defendants—would be needlessly stigmatizing and is irrelevant to the Peacemaking process; there is no word for punishment in the Navajo language.<sup>116</sup>

Labeling is an embedded feature of the American system.<sup>117</sup> In a typical criminal justice context, defendants either experience the nearly ubiquitous plea-bargaining process<sup>118</sup> or opt at trial to exercise their periodically debated privilege against self-incrimination.<sup>119</sup> Thus, people accused of crimes often

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107. *Id.*

108. *Id.*

109. Interview 1 with Eric Gross, *supra* note 17. Mr. Gross's grant funded his work from 1996 to 1998, though his affiliation with the Peacemaking Division of the Navajo Nation Judicial Branch continued for several years thereafter. The purpose of the grant was to assess the effectiveness of Navajo Peacemaking in reducing recidivism in the area of domestic violence specifically. Therefore, the study focused in part on cases that would have gone to family court in the absence of a Peacemaking option. However, Mr. Gross also observed Peacemaking proceedings that took place as an alternative to criminal proceedings, and his study tracked individuals whose cases were adjudicated through the criminal justice system.

110. *Id.*

111. *Id.*

112. Butterwick et al., *supra* note 106, at 35.

113. The process has another name in the Navajo language, but Navajo practitioners prefer not to share it outside of their own people and use the word "Peacemaking" when speaking to non-Navajos. Interview 2 with Eric Gross, *supra* note 17.

114. *Id.*

115. *Id.*

116. *Id.*

117. See Butterwick et al., *supra* note 106, at 36.

118. See, e.g., Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 15, 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [<https://perma.cc/QH9L-RHWZ>] ("The vast majority of felony convictions are now the result of plea bargains—some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher.").

119. See, e.g., Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 285–86

either remain entirely silent in the courtroom or are compelled to verbally admit guilt and say nothing more, in exchange for a reduced sentence.<sup>120</sup> Thereafter, they are assigned a new label: criminal, felon, convict, inmate.<sup>121</sup> The Peacemaking model, by contrast, is constructed around an idea that hearing and validating the experience of the *offender* is an important step on the road to reaching an outcome that restores a positive relationship among the parties involved in a conflict and prevents future offenses.<sup>122</sup>

Though notoriously difficult to describe in detail,<sup>123</sup> a Navajo Peacemaking might go like this<sup>124</sup>: A young man breaks his mother's jaw in a drunken rage. The mother asks for a Peacemaking. The son agrees. Before the Peacemaking, the facilitator asks the mother not to mention her broken jaw. The broken jaw is heavily bandaged; its existence is visible and known. The Peacemaking takes place in a circle. Present are the mother, the son, the son's father, the son's girlfriend, and the facilitator, a traditional counselor. The facilitator asks the mother to speak. She speaks for as long as she wants to. Mostly, she shares memories of her son's childhood. During the time that she speaks, the son covers his face with his hands and sobs. She looks directly at him the whole time. The father speaks next. The girlfriend speaks after the father. This has all taken about two hours. The facilitator tells the son that it is now his turn to speak. The son also speaks for as long as he wants to. Among other things, he tells his mother that the day of the Peacemaking will be his first day as a new person. When he is done speaking, the facilitator asks the mother and son how they would like to resolve their conflict. The son says that he wants his mother to write the Peacemaking agreement and that he will be guided by what she says. She writes an agreement that they both sign. Among its provisions is her hope that he will visit home more. The facilitator concludes the Peacemaking. During the two years that his case is tracked, the son never reoffends.

More broadly, Navajo Peacemaking is built in practice around equal opportunities to speak.<sup>125</sup> A facilitator—typically a traditional counselor or healer—is always present in a nonleadership role to ensure that all parties speak to one another, sometimes for several hours.<sup>126</sup> Participants are encouraged to speak from the heart, but, as in the foregoing example, in some contexts a given participant may be asked before the Peacemaking to refrain from making direct reference to the harm or violent act that necessitated the

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(2010) (advocating alterations to the constitutional rule prohibiting adverse comment by the government on criminal defendants' silence on grounds that it is doctrinally precarious).

120. Interview 2 with Eric Gross, *supra* note 17.

121. See Butterwick et al., *supra* note 106, at 36.

122. Interview 2 with Eric Gross, *supra* note 17.

123. Peacemaking and related jurisprudential models are built to adapt to a given set of circumstances; they are difficult to describe because they are fluid by design. See Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 36 (1999).

124. The following is an anonymized account of a Peacemaking observed during Mr. Gross's study. Interview 2 with Eric Gross, *supra* note 17.

125. *Id.*

126. *Id.*

Peacemaking.<sup>127</sup> Though not ubiquitous, this aspect of Peacemaking is an example of elements that may appear jarring when one's frame of reference is the American criminal justice system.<sup>128</sup> In the criminal justice framework and across the adversarial model in general, accusations are evidence-based, and demonstration of harm to the factfinder is central to any possible resolution.<sup>129</sup> In Peacemaking, the harm is known and visible without having additional attention drawn to it.<sup>130</sup> What is important is creating a forum conducive to mending the relationship among the parties.<sup>131</sup> When an agreement is reached, it is reached by the parties and originates with them in the context of speaking to one another and experiencing one another's emotional responses.<sup>132</sup> It is never superimposed by authorities with an agenda external to the dispute or harm.<sup>133</sup> According to Navajo Peacemaking practitioners, this legal model<sup>134</sup> is based on human nature.<sup>135</sup> Traditional counselors take the position that Peacemaking is not the Navajo way; it is justice.<sup>136</sup>

As such, in the hands of careful practitioners, Peacemaking principles can be adapted for use outside of tribal settings.<sup>137</sup> Washtenaw County, Michigan, for example, has successfully operated a Peacemaking Court on its docket since the fall of 2013.<sup>138</sup> It is the first state court project of its kind and receives funding from the Michigan Supreme Court, premised on the idea that "tribal peacemaking principles [can] be successfully applied in state court proceedings to resolve cases, increase satisfaction of litigants, and

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127. *Id.*

128. *Id.*

129. *Id.*

130. Indeed, from the perspective of the Peacemaking ethos, a legal model that necessitates drawing undue attention to and proving the harm such that the claims of the victim must be put to the test and defended is itself counterproductive because it is revictimizing rather than caring. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Instinctually, those accustomed to adversarial justice sometimes view Peacemaking and other forms of restorative justice as legally illegitimate or incomplete rather than simply as an unfamiliar legal model of conflict resolution and harm amelioration. Compounding the tendency of adversarial practitioners to see nonadversarial models as doctrinally suspect (because they are nonretributive) or lacking in deterrent force (because they are nonpunitive) is the fact that Peacemaking maintains a particularly unfamiliar set of values with respect to outcome: "The goal of Peacemaking is to restore 'good feelings' among disputants. This doesn't necessarily mean to [award] 'damages' or make good on broken promises, although it might mean that. The details are unimportant. What is important is the quality of the interpersonal feelings." *Id.* To the adversarial purist, this framework can be difficult to fathom. Though this Note emphatically regards restorative justice practices as a legitimate alternative legal model (and though these practices are regularly used in contexts where they carry legal force and produce outcomes that surpass the success rates of adversarial practices), its proposal does not require that the adversarial-model-trained skeptic accept restorative justice as a wholesale substitute for the adversarial system but rather as an effective supplement in a limited context.

135. *Id.*

136. *Id.*

137. *Id.*

138. Butterwick et al., *supra* note 106, at 34.

improve public trust in justice.”<sup>139</sup> The Peacemaking Court began by taking referrals, including civil, family, and probate cases, and has since expanded to handle juvenile abuse and neglect dockets and newly filed cases across its purview.<sup>140</sup> In practice, the court makes use of traditional circles,<sup>141</sup> sometimes including family members and other supporters of those directly involved in a dispute.<sup>142</sup> The court also uses circles in pre- and post-proceeding contexts to fortify connections and gains developed during the Peacemaking itself.<sup>143</sup>

Another model using techniques similar<sup>144</sup> to Navajo Peacemaking is the Hollow Water Community Holistic Circle Healing process, begun in the Hollow Water community in Canada in response to rampant sexual abuse and assault.<sup>145</sup> The model is based on Ojibwa jurisprudence and makes use of a multistep process involving a series of Peacemaking-like circles, which take place in the wake of a guilty plea before a judge.<sup>146</sup> The Hollow Water program, especially the initial circle, stresses helping the offender to accept and communicate responsibility for his actions.<sup>147</sup> In subsequent circles, he is able to sit with and hear the survivor of his offense in order to begin to understand his actions in the context of their impact on her life.<sup>148</sup> Later circles can include the families of the offender and of the survivor so that the presence of both communities is incorporated into the offender’s understanding of his actions and acceptance of responsibility, and so that the survivor has a support network present.<sup>149</sup>

By the numbers, the Hollow Water process is successful: in a study by the Native Counseling Service of Alberta, only two offenders out of sixty-five who completed the program were charged with subsequent sexual offenses over a two-year period.<sup>150</sup> This result reflects the degree to which Peacemaking-type models are well suited to offenses involving intimate relationships and emotionally fraught harms.<sup>151</sup> Family conflicts are an ideal

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139. *Id.*

140. *Id.*

141. Mr. Gross noted that right angles are disfavored in Navajo culture because Navajos tend to prefer the nonhierarchal symbolism of circles. Interview 2 with Eric Gross, *supra* note 17.

142. Butterwick et al., *supra* note 106, at 37.

143. *See id.* at 36.

144. Interview 2 with Eric Gross, *supra* note 17.

145. Jessica Metoui, Comment, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 531–32 (“In 1994, the Hollow Water Community Holistic Circle Healing . . . team estimated that three out of four members of the Hollow Water community had been victims of sexual abuse and that one in three members of the community had been an abuser.”).

146. Because it follows a plea, the Hollow Water method demonstrates a version of restorative justice that coexists with some of the familiar features of the adversarial model. *See id.* at 532.

147. *Id.* at 533. This Note, like Ms. Metoui’s Comment, speaks in general terms of male offenders and female survivors, but of course, other gender combinations are possible.

148. *Id.*

149. *Id.*

150. *Id.* at 534.

151. Interview 1 with Eric Gross, *supra* note 17.



construct because of the emotional investment typically present within a family unit, but the Hollow Water program suggests that sexual offenses also fall into the category of intimate wrongs for which Peacemaking is an effective model for redress and resolution.<sup>152</sup> That said, application of Peacemaking methods to *violent* sexual offenses is not without its critics.<sup>153</sup> As this Note discusses in Part III, when searching for solutions and consequences in the aftermath of sexual harms, there is good reason to differentiate between sexual harms at the violent end of the spectrum and harms that instead constitute a grey area of behavior. This latter category encompasses behaviors newly visible under the #MeToo aegis.<sup>154</sup>

### III. LIGHTING THE WAY FORWARD

This Part lays out a proposed legal response to grey-area #MeToo misconduct that uses a modified restorative justice framework based on Peacemaking principles and practices. It then reflects on the limits of what the #MeToo movement, and this Note's proposal, can do for Native American women.

#### *A. Restorative Justice in a Limited #MeToo Context*

Restorative justice models like Peacemaking work—as demonstrated by a sense of resolution, satisfaction, and justice among participants,<sup>155</sup> as well as high rates of sentence fulfillment<sup>156</sup> and low rates of recidivism<sup>157</sup>—because through Peacemaking offenders come to understand their actions in the context of their own lives and the lives of those that they have affected.<sup>158</sup> To the extent that #MeToo is *not* working—to the extent that it has broken new ground in cultural discourse<sup>159</sup> but left those affected searching for consequences and next steps<sup>160</sup>—it has stalled because it lacks a sense of resolution, satisfaction, and justice for those involved as well as any means of assuring that offenders understand their actions and will not continue exactly as before after an indeterminate period of social banishment.<sup>161</sup> Restorative justice provides a workable way forward<sup>162</sup> in the wake of the grey-area misconduct that #MeToo has exposed but to which no uniform solution currently exists.

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152. Interview 2 with Eric Gross, *supra* note 17.

153. *See, e.g.*, DEER, *supra* note 102, at 128–33.

154. *See supra* Part I.A.

155. *See, e.g.*, Butterwick et al., *supra* note 106, at 34.

156. *See, e.g., id.* at 35.

157. Interview 1 with Eric Gross, *supra* note 17.

158. *See, e.g.*, Metoui, *supra* note 145, at 533.

159. *See, e.g.*, Traister, *supra* note 4.

160. *See, e.g.*, Baker, *supra* note 1.

161. *See id.*

162. *See id.*

### 1. Why a Limited Context

There are several reasons that this Note does not propose restorative justice solutions outside of grey-area #MeToo misconduct. First, rape and sexual assault have a defined range of consequences in the criminal justice system. This Note does not take the position that those consequences or that system are perfect in either theory or execution—merely that they already exist. Second, restorative justice models that do not differentiate between sexual violence and other forms of sexual misconduct face justifiable criticism. In her critique of the Hollow Water program,<sup>163</sup> Professor Sarah Deer has argued that for rape survivors in particular, many of the offender-centric practices that characterize the model are potentially revictimizing for survivors.<sup>164</sup> In particular, the degree to which offenders' understanding of their actions' impact is predicated on an exposure of survivors' pain makes survivors responsible for offenders' healing to a troubling extent.<sup>165</sup> Professor Deer suggests that Peacemaking's de-emphasis on fact-finding and lack of mechanism to confront consistent denials run the risk of exposing a rape survivor's pain and producing no accountability to justify the exposure.<sup>166</sup> She also worries that in the limited set of cases in which a perpetrator does reoffend following a Peacemaking, the demoralizing effect on a rape survivor who participated in a failed circle would be acute.<sup>167</sup> These concerns are legitimate. They are also typical of the critique that prevents the widespread use of Peacemaking models notwithstanding their effectiveness. In order both to respect the rights and wishes of rape and assault survivors and to advocate the use of Peacemaking techniques in a context well suited to those techniques' strengths, this Note aligns with Professor Deer's position on violent sexual crimes. It does not suggest restorative justice for the Harvey Weinsteins exposed by the #MeToo movement.

Finally, the very newness<sup>168</sup> of grey-area allegations presents a context in which a novel legal solution is not only warranted but also possible. The hunger for consequences and next steps engendered by #MeToo has not come from a single group or political party. Rather, the commentary from largely progressive-leaning columnists<sup>169</sup> can be read to seek the same thing that President Trump presumably sought when he noted that the fall of 2018 was a "very scary time for young men in America."<sup>170</sup> Both viewpoints express a yearning for stability, for a framework that conveys to men and women that there can be justice and a clearly delineated way forward following

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163. See Metoui, *supra* note 145, at 533.

164. DEER, *supra* note 102, at 130.

165. *Id.* at 129.

166. *Id.* at 133.

167. *Id.* at 132–33.

168. See Traister, *supra* note 4.

169. See, e.g., Jessica Bennett, *The #MeToo Moment: What's Next?*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/us/the-metoo-moment-whats-next.html> [<https://perma.cc/R22H-62NC>].

170. Diamond, *supra* note 40.

potentially career-ending accusations. Hiring fewer women<sup>171</sup> cannot be a long-term solution any more than banishing offenders and hoping that they divine the decent and correct moment to return<sup>172</sup> can be. Frustration and confusion<sup>173</sup> are evident on all sides of the issues.

## 2. #MeToo Peacemakings

There is ample evidence that many #MeToo offenders do not understand why their actions now occasion public censure.<sup>174</sup> To a certain extent, this is to be expected; prior to 2017, the grey range of allegations that some #MeToo offenders face would have been brushed aside as inconsequential by offenders and victims alike.<sup>175</sup> Though it is amply possible to take a blame-sharing perspective on #MeToo misconduct too far,<sup>176</sup> American culture as a whole tolerated subtle bad behavior and abuses of power right up until the moment that it did not. It might be argued then that Al Franken, Louis C.K., fired *Today Show* host Matt Lauer, fired *CBS This Morning* host Charlie Rose, and those whose behavior has been comparable to theirs should be forgiven both for their behavior and for their subsequent consternation because “everybody was doing it.”

The broader cultural explicability of grey-area offenders’ befuddlement, however, renders a legal solution with a focus on understanding one’s actions more—not less—essential. If offenders who demonstrably do not understand their behaviors’ impact on victims’ lives continue to experience indefinite

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171. See, e.g., Jorge L. Ortiz, *Will #MeToo Turn into #NotHer?: Movement May Come with Unintended Workplace Consequences*, USA TODAY (Oct. 4, 2018), <https://www.usatoday.com/story/news/2018/10/04/metoo-movement-unintended-career-consequences-women/1503516002/> [<https://perma.cc/TLE9-GGZM>].

172. See, e.g., Loughrey, *supra* note 64.

173. Unanswered questions in grey-area cases currently include: How bad is the ambiguous behavior? Should it be forgiven? How much public contrition does an offender need to demonstrate? How long is a reasonable banishment? Does the length depend on the behavior? Does it depend on the public trust placed in the offender prior to the accusations? On whom he harmed and how many victims came forward? On the size and devotion of his public fan base before the accusations? Can he return to his career? A similar career?

174. See, e.g., Amanda Arnold, *Charlie Rose Will Reportedly Host a Show About Men Brought Down by #MeToo*, CUT (Apr. 25, 2018), <https://www.thecut.com/2018/04/charlie-rose-has-plans-to-host-a-show-about-metoo-report.html> [<https://perma.cc/FZ74-P9N7>]; Ball, *supra* note 63; Loughrey, *supra* note 64; Emily Zogbi, *Is Matt Lauer Planning His Television Comeback?*, NEWSWEEK (Sept. 1, 2018), <https://www.newsweek.com/matt-lauer-planning-his-television-comeback-1101134> [<https://perma.cc/Y67R-KDWE>]. The behavior described in the foregoing articles suggests, at the very least, that these men expect to be forgiven for their actions and consider their returns to public life likely if not assured. More fundamentally, it suggests that they do not understand why they are being “punished.”

175. The degree to which the kind of grey-area misconduct exposed by #MeToo previously was a largely invisible and thus routinely accepted element of American culture is reflected in vitriolic pop cultural debates like the one occasioned by “Baby, It’s Cold Outside” in 2018. See, e.g., Andrea Peyser, *When They Go After ‘Baby It’s Cold Outside,’ You Know #MeToo Has Gone Mad*, N.Y. POST (Dec. 4, 2018), <http://nypost.com/2018/12/04/when-they-go-after-baby-its-cold-outside-you-know-metoo-has-gone-mad/> [<https://perma.cc/Q7V3-DA8N>].

176. See, e.g., Claire Zillman, *Democratic Congresswoman Says It’s the ‘Responsibility of the Female’ to Prevent Sexual Harassment*, FORTUNE (Oct. 19, 2017), <http://fortune.com/2017/10/19/sexual-harassment-women-to-blame-democrat/> [<https://perma.cc/LE8Z-UPDW>].

banishments enforced on an ad hoc basis, many of them will wait out those banishments and then return to their former careers and, likely, their former proclivities. This is not a doomsday scenario; on the contrary, it would be business as usual. Under this outcome, #MeToo would have been a brief aberration in an ultimately immutable power structure that, though it may newly have condemned subtle and systemic trespasses, simply was not equipped to build long-lasting solutions.

Grey-area misconduct exposed by and following #MeToo should be addressed with Peacemaking. The Peacemaking envisioned here would not be necessarily identical to Navajo Peacemaking or to the Ojibwa-influenced Peacemaking-type model used in the Hollow Water program. It also would not be identical to the Washtenaw County, Michigan, Peacemaking Court's model (which refers to its practice as Peacemaking in part after the Navajo model). Rather, it would be an amalgamation of some of the essential features of each, under a restorative justice umbrella flexible both to local jurisdictional needs and to the needs of individual participants. Ideally, judges would be trained by indigenous practitioners, but they could also be trained by nonindigenous practitioners familiar with Peacemaking-type models in practice, such as Judge Timothy Connors in Michigan.<sup>177</sup>

Peacemaking dockets should be attached to lower-level state courts,<sup>178</sup> as Washtenaw County, Michigan, has done successfully with its Peacemaking docket since 2013.<sup>179</sup> Though state court systems vary, the docket should be attached to whichever trial-level court generally hears civil suits in a given state to avoid any suggestion of criminal liability. Peacemaking training for one judge per state subdivision—likely per county in most states—could be funded either by the state's highest court<sup>180</sup> or by an independent initiative such as Time's Up.<sup>181</sup>

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177. See Butterwick et al., *supra* note 106, at 34.

178. Anchoring the program to state courts would ensure a degree of political diversity among participating judges, as many state court judges are elected. This would maximize the public perception of fairness, given that members of both major political parties have a tendency to look with suspicion on the impartiality of judges appointed by the other party. Compare Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> [<https://perma.cc/8Q4X-FAP3>], with Thomas Jipping, *On the Democrats' Confirmation-Process Report*, NAT'L REV. (June 7, 2018, 11:38 AM), <https://www.nationalreview.com/bench-memos/republicans-stacking-courts-democrats-claims-false/> [<https://perma.cc/32TS-4DWJ>].

179. See Butterwick et al., *supra* note 106, at 34.

180. In Washtenaw County, the Michigan Supreme Court's Court Performance Innovation Fund provides funding for the program. *Id.* A similar ethos of strengthening, among other values, public trust in justice through nontraditional means would be important to the viability of this Note's proposal.

181. See Natalie Robehmed, *With \$20 Million Raised, Time's Up Seeks 'Equity and Safety' in the Workplace*, FORBES (Feb. 6, 2018), <https://www.forbes.com/sites/natalierobehmed/2018/02/06/with-20-million-raised-times-up-seeks-equity-and-safety-in-the-workplace/> [<https://perma.cc/QDA8-CL2E>]. Time's Up bills itself as a coalition committed to change across industries and seeking solutions through diverse channels. If it or an initiative like it were to partially fund a grant, such a grant could in turn fund Peacemaking dockets as a public-private partnership without raising ethical issues.

Only nonviolent misconduct that did not rise to the level of criminal behavior would be eligible for the Peacemaking dockets.<sup>182</sup> Conflicts would reach the dockets in one of two ways. First, the victim of the misconduct could request a Peacemaking. In that situation, the victim would initiate a claim, but the claim would proceed no further if the alleged offender did not agree to the Peacemaking.<sup>183</sup> Alternately, the offender could request a Peacemaking, likely in response to a series of triggering events, such as a victim's accusation followed by a firing or forced resignation.

Offenders would be incentivized to request or agree to Peacemakings because the Peacemakings' outcome would legally restore them to their preaccusation community status. Once a Peacemaking was initiated, the court on whose docket the Peacemaking appeared would formally open and then immediately adjourn a proceeding. Procedurally, this would resemble an Adjournment in Contemplation of Dismissal (ACD).<sup>184</sup> For Peacemaking, the procedure would be termed an "Adjournment in Contemplation of Restoration" (ACR).<sup>185</sup>

The proceeding itself would consist of three circles, taking place over the course of six months.<sup>186</sup> In the first circle, the offender would sit with the facilitator (a judge trained in the Peacemaking model) and, once the program was well established, a small group of former offenders who had already completed Peacemakings.<sup>187</sup> Three months later in the second circle, the offender would sit with the victim or victims<sup>188</sup> and the facilitator and listen

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182. Harassment prohibited or likely prohibited (in the case of especially nebulous misconduct) by the policies of a given workplace would qualify as long as the conduct were not criminal.

183. Navajo Peacemaking requires that all parties to a dispute formally consent to the process; if they do not, it cannot proceed. *See DEER, supra* note 102, at 129. Under this Note's proposed framework, some alleged offenders simply would not agree to a Peacemaking, and they would be free to decline. This voluntary dimension is important for several reasons. First, it maintains fidelity to the scheme's indigenous antecedents. Second, it underscores the scheme's operation separate from criminal process and criminal liability. Lastly, it serves as a bulwark against the perception, otherwise inevitable in any #MeToo context, that it is a mechanism for women to pursue unjustifiable witch hunts. *See supra* Part I.B.

184. *See, e.g.,* N.Y. CRIM. PROC. LAW § 170.55(8) (2018) ("Upon the dismissal of the accusatory instrument . . . the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.").

185. The use of the new procedural term "Adjournment in Contemplation of Restoration" would serve to distinguish ACRs from ACDs and to frame the Peacemaking as a *restorative* proceeding both procedurally and by virtue of jurisprudential lineage and ethos.

186. During the six-month pendency of the process, the offender would be encouraged to avoid unnecessary exposure (if a public figure) or to seek employment outside of his former field (if a private citizen). The #MeToo movement's instinct toward banishment may be merely an unregulated attempt at retribution. On the other hand, however impractical and undefined, it may also typify a societal instinct to send the offender away to think about what he has done and improve himself. The six-month duration of a #MeToo Peacemaking would leave room for the positive implications of this latter impulse without allowing the "banishment" to go on indefinitely.

187. *See* Metoui, *supra* note 145, at 533.

188. Additional victims would be permitted to join a Peacemaking, regardless of whether it was initiated by a victim or by the offender. Before a multivictim Peacemaking, the facilitator would meet with each victim and ask her to agree to present only her own words

to the victim or victims speak. The facilitator would ensure that the offender also used his opportunity to speak. In the final circle six months after the Peacemaking was initiated, a few members of the victim's<sup>189</sup> and the offender's communities (in most cases, their families), would sit with them.<sup>190</sup> The facilitator would again ensure that all parties spoke. Then the parties—guided by the exigencies of their particular circumstances—would draw up and sign a memorandum of understanding, which could take any form that they mutually chose to conclude the Peacemaking. The memorandum of understanding would remain a private document among the parties.

There would exist no explicit benchmark for “success” within the Peacemaking itself. What would matter, as in Navajo Peacemaking, would not be the form of the agreement reached but the effect of the experience as between the parties.<sup>191</sup> However, there would be a mechanism by which success would be publicly communicated. If the facilitator determined that the offender had demonstrated a good-faith effort to participate in the three circles and commit to the outcome chosen by the parties, the court in which the Peacemaking claim was initially filed would produce a “Record of Restoration” document to conclude the ACR. This document would signal to the former offender's community, to future employers, and—in the case of public figures—to the widest community aware of his actions, that he should be deemed eligible for restoration to the community status that he occupied prior to his victim's accusations.

Unlike criminal sanctions, Peacemaking is both nonpunitive and geared to enhance the understanding of the offender; it is in large part for this latter reason that it is successful as an alternative to adversarial criminal justice processes.<sup>192</sup> It is as well suited, if not better suited, to address noncriminal #MeToo behaviors. Their accusers and subsequent public condemnation have communicated to the likes of Louis C.K. and Al Franken that what they did is something we now consider to be wrong. In no meaningful sense have they been told why.

Peacemaking is built on participants listening to one another. In part this is to give all parties a voice and a sense of resolution.<sup>193</sup> In part it is so that the offender can begin to change the way that he views himself.<sup>194</sup> In part the process is built to help each party to gain a heightened understanding of the other; in the case of the offender, change occurs most powerfully when

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and feelings. Such limited, ex parte-type communications have a precedent in Navajo Peacemaking. Interview 2 with Eric Gross, *supra* note 17. Victims would then speak sequentially during the Peacemaking itself. For cases with accusations from more than three victims, additional victims would be required to initiate a separate Peacemaking naming the same offender.

189. In the case of an offender with multiple victims, the final circle could be divided into multiple circles over successive days in order to accommodate the victims' communities.

190. See Metoui, *supra* note 145, at 533.

191. Interview 2 with Eric Gross, *supra* note 17.

192. See, e.g., Butterwick et al., *supra* note 106, at 35.

193. See *id.* at 34.

194. See Coker, *supra* note 123, at 56.

he comes to understand both the roots of his behavior<sup>195</sup> and that behavior's effect on the victim's life.<sup>196</sup> #MeToo Peacemaking not only would provide a venue and process to afford resolution to victims and communicate to offenders the negative effects of their actions. It also would provide a venue and process to satisfactorily *define* grey-area harms that the #MeToo movement has identified but has struggled to delineate and circumscribe.<sup>197</sup>

For grey-area offenders who declined to participate in a Peacemaking, nothing would change.<sup>198</sup> The uncertainty that currently prevails in all grey-area cases simply would linger in their cases. However, the existence of Peacemakings and of Records of Restoration would incentivize participation because participating offenders would opt out of that uncertainty. The Peacemakings' existence also would clarify by accretion<sup>199</sup> the contours of grey-area misconduct itself as well as societal expectations for offenders, even nonparticipating offenders. Finally, the existence of a nonpunitive set of consequences for the grey range of misconduct would benefit victims by providing them with a meaningful resolution; offenders by affording them insight as well as certainty; and the public by grounding the #MeToo movement's way forward in a measured, voluntary, and predictable legal process.

#### *B. What #MeToo Peacemakings Can(not) Do for Native American Women*

The sexual violence experienced by indigenous women is anything but grey. According to Professor Sarah Deer, in its brutality and in the social perceptions that it engenders, sexual violence has not changed much for Native American women in the past five hundred years.<sup>200</sup> It is important to understand that this is so by design.<sup>201</sup> It is also important to understand that

195. See Butterwick et al., *supra* note 106, at 36.

196. See Metoui, *supra* note 145, at 533.

197. This proposition runs the risk of sounding as if #MeToo has decided that certain behaviors are wrong and has not bothered to determine why. In reality, the contours and scope of grey-area misconduct *should* be difficult to pinpoint because no mass movement has ever before succeeded in objecting to that misconduct. Ideally, in a context in which offenders became cognizant through Peacemaking of the harms their behavior had caused, they should be in nearly as good a position as victims to articulate appropriate behavioral boundaries in the grey range. It is my hope that—far from contributing to #MeToo detractors' contention that the movement is panic-based and indiscriminately invested in demonizing all men, see, for example, Sullivan, *supra* note 73—this Note's proposal will appeal to #MeToo proponents and critics alike because it will put grey-area offenders in a position to exercise informed agency as normative boundaries gradually are set.

198. Similarly, for offenders who participated in the process, obtained a Record of Restoration, and then reoffended, the "punishment" would be a return to the limbo currently experienced by all grey-area offenders (albeit with a presumable increase in reputational damage).

199. The Peacemakings would, of course, lack true binding precedential force.

200. Deer, *supra* note 15, at 458–59.

201. Professor Deer has highlighted four systematic developments in American federal law that de jure or de facto have stripped tribal governments of jurisdiction over sexual crimes against Native American women: the Major Crimes Act, Public Law 280, the Indian Civil Rights Act, and *Oliphant v. Suquamish*. *Id.* at 460. The combined effect of these developments

the colonialist underpinnings of this design are reflected not only in the legislative and judicial scheme that has enabled violence against Native American women in record numbers but also in the character of the violence itself.<sup>202</sup>

Following decades of outright legal assault on Native American women's autonomy,<sup>203</sup> the current détente among federal jurisdiction, state jurisdiction, and tribal jurisdiction has largely abandoned them.<sup>204</sup> More than indigenous women “need”<sup>205</sup> #MeToo, they need resources, and they need to live within the borders of a country that both recognizes their people's sovereignty and refuses to look away when—by the numbers<sup>206</sup>—the current systems are not working for them.

It is possible to argue that the #MeToo movement's recognition of new grey forms of sexual misconduct is trivial in comparison to the experiences of many indigenous women. This Note takes the position that it is not trivial; it is different. Further, the identification of a grey range of sexual misconduct and the development of an appropriate legal response thereto ultimately would benefit all women who have survived rape or sexual assault as well as all women who have experienced grey-area misconduct. It would signal that nuanced, targeted legal recourse were available to both groups. It also would signal that the American legal system were prepared to begin the work of validating the experiences and addressing the needs of the full spectrum of survivors.

In its specific mechanics, this Note's proposal also would create a hybrid jurisprudential model that could serve as a template for future collaborations between indigenous jurists and jurists trained in the Anglo-American model. The web of semiconflicting jurisdictions currently operating on tribal land produces an uneasy jurisprudential hybrid born of colonialism, lack of resources, and neglect. The proposal outlined in Part III.A of this Note is an *intentional* jurisprudential hybrid. Though it does not directly ameliorate Native American women's dire situations with respect to sexual violence, it is constructed with an eye to the future. Developing the jurisprudential flexibility inherent in a carefully constructed hybrid system that honors and amplifies tribal values is a small step down a long road. But it is this Note's

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is a jurisdictional scheme that is at best ambiguous and at worst actively contributory to an atmosphere of “lawlessness” in some communities on reservations. *See generally* Goldberg-Ambrose, *supra* note 15 (drawing the direct line from legislation to lawlessness).

202. *See* DEER, *supra* note 102, at x.

203. Cases like *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971), are a grim illustration of the havoc that federal policies regarding Native American children have wreaked in the lives of Native American women in recent history.

204. *See, e.g.*, Rachel Monroe, *The Delay*, ESQUIRE (Apr. 18, 2018), <https://www.esquire.com/news-politics/a19561163/ashlynnemikeamber-alert-navajo-reservation/> [<https://perma.cc/2XEL-2KBB>]; *see also* MaryAnne Golon, *Most Sex Crimes Go Unpunished at this Sioux Reservation. So These Survivors Turn to Traditional Healing*, LILY (Apr. 15, 2018), <https://www.thelily.com/most-sex-crimes-go-unpunished-at-this-sioux-reservation-so-these-survivors-turn-to-traditional-healing/> [<https://perma.cc/VP6T-LEBR>].

205. This Note does not seek, nor can it, to prescribe what Native American women “need” but rather to compare the relative urgency of various problems as externally perceived.

206. *See* ROSAY, *supra* note 8, at 13.



hope that the end of that road holds flexible and nontraditional jurisprudential designs that serve the needs of indigenous women without encroaching on indigenous sovereignty.

#### CONCLUSION

The #MeToo movement has newly publicly identified a grey category of sexual misconduct. Grey-area behavior—paradigmatically, the conduct of an Al Franken or a Louis C.K.—is something that victims have never before been able to talk about without having their experiences trivialized. As #MeToo stands, however, accusations of misconduct in the grey range are tried in the court of public opinion and “punished” by haphazardly banishing offenders for an undefined period. Rather than accept this uncertainty indefinitely, state courts should institute Peacemaking dockets and process voluntary #MeToo claims with Adjournments in Contemplation of Restoration. Victims would find resolution in this process. Former offenders would gain both insight into their actions and a concrete legal channel through which to restore an earned reputational and professional stability. Finally, the use of indigenous jurisprudential techniques for grey-area claims—though it would do nothing for the sexual violence crisis faced by Native American women today—would be a step down the road to smart, hybrid jurisprudential models capable of adaptation to the needs of all three sovereigns.

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## Article

# The Legal Implications of the MeToo Movement

Elizabeth C. Tippet<sup>†</sup>

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## INTRODUCTION

On October 5, 2017, the New York Times broke the Harvey Weinstein story.<sup>1</sup> High profile actresses including Ashley Judd and Rose McGowan accused Weinstein of propositioning and assaulting them while pursuing acting roles.<sup>2</sup> In years past, Weinstein enjoyed a high level of power and prominence as a Hollywood kingmaker, producing blockbusters like *Pulp Fiction*, *Good Will Hunting*, and *Shakespeare in Love*.<sup>3</sup> The Weinstein story kept growing as additional stars described similar experiences.<sup>4</sup> Weinstein was fired by his own company<sup>5</sup> on October 8, 2017,

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

2. *Id.*

3. *Id.*

4. *E.g.*, Jacey Fortin, *The Women Who Have Accused Harvey Weinstein*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/us/harvey-weinstein-accusations.html>; Salma Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html>; Lupita Nyong'o, *Lupita Nyong'o: Speaking Out About Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/opinion/lupita-nyong'o-harvey-weinstein.html>.

5. Megan Twohey, *Harvey Weinstein Is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html>.

which later declared bankruptcy.<sup>6</sup> He has since been arrested on rape charges.<sup>7</sup>

On October 15, 2017, actress Alyssa Milano asked her Twitter followers to reply with the hashtag #metoo if they had experienced harassment or assault.<sup>8</sup> Her tweet went viral, and the #metoo hashtag has since been used over twelve million times.<sup>9</sup> Although Milano's tweet brought global attention to the MeToo movement, it originated from activist Tarana Burke.<sup>10</sup> Burke started the movement in 2007<sup>11</sup> and used the term "metoo" to express solidarity with girls and women who experienced sexual assault.<sup>12</sup>

In the weeks and months following the Weinstein revelations, a number of prominent men in media, journalism, and politics were accused of harassment or assault, often by multiple women.<sup>13</sup> These included television hosts Charlie Rose,<sup>14</sup> Matt

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6. Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html>.

7. Benjamin Mueller & Alan Feuer, *Arrested on Rape Charges, Weinstein Posts \$1 Million Bail*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/nyregion/harvey-weinstein-arrested.html>.

8. Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979>.

9. Emma Brockes, *Me Too Founder Tarana Burke: 'You have to Use Your Privilege to Serve Other People'*, GUARDIAN (Jan. 15, 2018), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>.

10. *Id.*

11. Sandra Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

12. Brockes, *supra* note 9.

13. See, e.g., Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS (Nov. 8, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546>.

14. John Koblin & Michael Grynbaum, *Charlie Rose Fired by CBS and PBS After Harassment Allegations*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/business/media/charlie-rose-fired-cbs.html>.

Lauer,<sup>15</sup> and Tavis Smiley;<sup>16</sup> several high ranking hosts at National Public Radio;<sup>17</sup> and Disney producer John Lasseter.<sup>18</sup> All but Lasseter were fired.<sup>19</sup> Actor Kevin Spacey was accused of assaulting a 14-year-old boy.<sup>20</sup> Comedian Louis CK was accused of lewd conduct by fellow comedians and coworkers.<sup>21</sup> Chefs Mario Batali and John Besh were likewise accused of harassment.<sup>22</sup> Twenty-five women at Besh's company described a hostile work environment where complaints were ignored.<sup>23</sup> Multiple male models accused prominent photographers Mario Testino and Bruce Weber of sexual misconduct.<sup>24</sup>

The MeToo movement also reached politicians in federal and state government. Senator Al Franken, Representative Blake Farenthold, and Representative John Conyers resigned in the wake of harassment allegations.<sup>25</sup> These accusations revealed an arcane system for handling harassment complaints in Congress,

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15. Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of 'Today,'* N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html>.

16. Andrew Dalton, *New Witnesses Allege Sexual Misconduct by Tavis Smiley*, ASSOCIATED PRESS (Mar. 23, 2018), <http://www.chicagotribune.com/entertainment/tv/ct-tavis-smiley-sexual-misconduct-allegations-20180323-story.html>.

17. See Camila Domonoske, *Garrison Keillor Accused of 'Inappropriate Behavior,' Minnesota Public Radio Says*, NPR (Nov. 29, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/29/567241644/garrison-keillor-accused-of-inappropriate-behavior-minnesota-public-radio-says>; Patrick Hipes, *NPR's 'On Point' Radio Host Tom Ashbrook Fired*, DEADLINE HOLLYWOOD (Feb. 14, 2018), <https://deadline.com/2018/02/tom-ashbrook-on-point-host-fired-npr-wbur-boston-university-1202288818>; Mike Snider, *NPR News Chief Michael Oreskes Resigns After Sexual Harassment Accusations*, USA TODAY (Nov. 1, 2017), <https://www.usatoday.com/story/money/media/2017/11/01/npr-news-chief-michael-oreskes-resigns-after-sexual-harassment-accusations/821405001>.

18. Steven Zeitchik, *Disney Animation Guru John Lasseter Takes Leave After Sexual Misconduct Allegations*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/news/business/wp/2017/11/21/disney-animation-guru-john-lasseter-takes-leave-after-sexual-misconduct-allegations>.

19. Dalton, *supra* note 16; Domonoske, *supra* note 17; Gabler, *supra* note 15; Hipes, *supra* note 17; Koblin & Grynbaum, *supra* note 14; Snider, *supra* note 17; Zeitchik, *supra* note 18.

20. Corey, *supra* note 13.

21. *Id.*

22. *Id.*

23. *Id.*

24. Brian Stelter, *Vogue Publisher Drops Bruce Weber and Mario Testino over Misconduct Allegations*, CNN (Jan. 15, 2018), <https://money.cnn.com/2018/01/15/media/mario-testino-bruce-weber-conde-nast/index.html>.

25. Dan Corey, *Here's a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 16, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821>.

where complainants<sup>26</sup> were forced to continue working with the harasser during a thirty-day cooling off period.<sup>27</sup> Former Judge Roy Moore lost a heavily contested Alabama Senate race after several women accused him of aggressively pursuing them as teenagers.<sup>28</sup> Prominent politicians in state politics were likewise accused of harassment.<sup>29</sup>

The MeToo movement galvanized complaints in other industries.<sup>30</sup> Alianza Nacional de Campesinas wrote an open letter of solidarity to women in Hollywood, noting endemic problems of harassment in agriculture.<sup>31</sup> The New York Times published an exposé of decades of harassment and related litigation in an auto plant.<sup>32</sup> MeToo reinvigorated complaints about widespread harassment and assault of hotel workers.<sup>33</sup> It also brought renewed attention to Silicon Valley, where programmer Susan Fowler's accusations of harassment at Uber went viral earlier in 2017.<sup>34</sup>

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26. I generically refer to employees accusing other employees of harassment as "complainants," and on occasion, "plaintiff" in the context of legal disputes. For purposes of reader fluency, I refer to complainants as "victims" in recounting salient events from the MeToo movement or to more clearly distinguish a complainant from the accused employee.

27. Rachael Bade & Elana Schor, *Capitol Hill's Sexual Harrassment Policy 'Toothless,' 'A Joke,'* POLITICO (Oct. 27, 2017), <https://www.politico.com/story/2017/10/27/capitol-hill-sexual-harassment-policies-victims-244224>.

28. Greg Price, *Revenge of #MeToo? How Sexual Assault, Child Molestation Claims Destroyed Roy Moore in Alabama*, NEWSWEEK (Dec. 13, 2017), <https://www.newsweek.com/metoo-alabama-women-vote-jones-746591>.

29. Joel Ebert, *Sexual Harassment Troubles Mount in Statehouses Around the Country*, USA TODAY NETWORK (Nov. 20, 2017), <https://www.usatoday.com/story/news/nation-now/2017/11/20/sexual-harassment-statehouses/882874001>.

30. See, e.g., A. Elaine Lewis, *Who Is at Highest Risk of Sexual Harassment?*, ACLU (Jan. 18, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment>.

31. *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault>.

32. See Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>.

33. See, e.g., Dave Jamieson, *'He Was Masturbating . . . I Felt Like Crying': What Housekeepers Endure to Clean Hotel Rooms*, HUFFINGTON POST (Nov. 18, 2017), [https://www.huffingtonpost.com/entry/housekeeper-hotel-sexual-harassment\\_us\\_5a0f438ce4b0e97dffd3443](https://www.huffingtonpost.com/entry/housekeeper-hotel-sexual-harassment_us_5a0f438ce4b0e97dffd3443).

34. Maya Kosoff, *The Toxic Backlash of Silicon Valley's Boys' Club*, VANITY FAIR (Dec. 7, 2017), <https://www.vanityfair.com/news/2017/12/the-toxic-backlash-of-silicon-valleys-boys-club>.

The MeToo movement also revealed the ways in which the law can be misused to enable and conceal harassment.<sup>35</sup> Weinstein successfully covered his tracks for decades using contracts, threats, and a powerful network.<sup>36</sup> Weinstein entered into multiple settlement agreements containing non-disclosure and non-disparagement provisions.<sup>37</sup> In some cases, these agreements not only prohibited the victim from disparaging Weinstein, but forced her to speak about him in a positive manner if contacted by the press.<sup>38</sup> On other occasions, Weinstein threatened to destroy victims' reputations if they spoke out.<sup>39</sup> One victim called the police and successfully recorded an apparent admission by Weinstein on tape.<sup>40</sup> Nevertheless, Weinstein appears to have successfully used his influence to end the investigation.<sup>41</sup>

Time Magazine declared the MeToo movement its Person of the Year.<sup>42</sup> The movement has continued into 2018 and was featured prominently at the Golden Globe awards, where Oprah Winfrey applauded women for sharing their truth, and promised young girls "that a new day is on the horizon."<sup>43</sup>

Inevitably, the movement leads to the question of what comes next.<sup>44</sup> The Time's Up Initiative, led by prominent lawyers

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35. Kantor & Twohey, *supra* note 1 (providing an example of how Harvey Weinstein misused the law to enable and conceal harassment).

36. *Id.*

37. *Id.*

38. *Times Reporters Describe How a Paper Trail Helped Break the Weinstein Story*, NPR (Nov. 15, 2017), <https://www.npr.org/templates/transcript/transcript.php?storyId=564310240>.

39. Sara Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001>.

40. See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

41. *See id.*

42. Jonah Bromwich, *The Silence Breakers' Named Time's Person of the Year for 2017*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html>.

43. Sophie Gilbert & Tori Latham, *Full Transcript: Oprah Winfrey's Speech at the Golden Globes*, ATLANTIC (Jan. 8, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/full-transcript-oprah-winfreys-speech-at-the-golden-globes/549905>.

44. *See* TIME'S UP, <https://www.timesupnow.com/#ourmission-anchor> (last visited Oct. 22, 2018) (advocating for increased representation of women in positions of power and equal representation, opportunities, benefits, and pay in the wake of the MeToo movement).

and Hollywood power players, including Shonda Rhimes and Eva Longoria, issued a summary of their proposed response.<sup>45</sup> Anita Hill, who famously testified against Clarence Thomas at his Supreme Court confirmation hearing, is chairing a committee on harassment in media.<sup>46</sup> A number of states, including New York, New Jersey, Pennsylvania, and California are considering legislation banning certain types of non-disclosure agreements.<sup>47</sup> Congress is working on changes to its process for handling harassment complaints by congressional employees.<sup>48</sup> Legislators have also introduced bills restricting the use of arbitration agreements in harassment disputes,<sup>49</sup> and separately require employers to disclose settlements of harassment and discrimination claims.<sup>50</sup>

This Article describes the potential legal and practical implications of the MeToo movement and evaluates them within the context of past scholarly commentary.

First, the Article provides a summary of harassment law and the respects in which judicial interpretations of harassment law might change in the wake of MeToo. As Sandra Sperino and Suja Thomas argued, judges may update their application of the “severe or pervasive” standard for harassment to reflect modern

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45. Lorena Blas, *Hollywood's A-list Women Launch Anti-Harassment Initiative Time's Up*, USA TODAY (Jan. 1, 2018), <https://www.usatoday.com/story/life/people/2018/01/01/hollywood-women-times-up-anti-sexual-harassment-project-reese-witherspoon-shonda-rhimes/994268001>.

46. Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/movies/anita-hill-hollywood-commission-sexual-harassment.html>.

47. S. 820, 2017 Leg., Reg. Sess. (Cal. 2017); S. 999, 2017 Leg., 2017 Sess. (P.A. 2017); Assemb. B. 5287, 217th Leg., Reg. Sess. (N.J. 2017); S. 6382, 2017 Leg., 214th Sess. (N.Y. 2017); Ilyse Schuman & Betsy Cammarata, *Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements?*, LITTLER (Jan. 9, 2018), <https://www.littler.com/publication-press/publication/lawmakers-take-aim-will-metoo-curb-nondisclosure-or-arbitration>.

48. See Leigh Ann Caldwell, *House Unveils Landmark Sexual Harassment Overhaul Bill*, NBC NEWS (Jan. 18, 2018), <https://www.nbcnews.com/politics/congress/house-unveils-landmark-sexual-harassment-overhaul-bill-n838436>.

49. See, e.g., H.R. 4734, 115th Cong. § 402 (2017). For a discussion of the proposed arbitration reforms, see *Written Testimony of Elizabeth Tippet, Associate Professor, University of Oregon School of Law*, EQUAL OPPORTUNITY EMP. COMMISSION (June 11, 2018), [https://www.eeoc.gov/eeoc/task\\_force/harassment/6-11-18.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/6-11-18.cfm). See generally Jean Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #Me-Too?*, 53 HARV. C.R. C.L. (forthcoming 2019).

50. H.R. 4729, 115th Cong. § 2 (2017).



norms rather than rely on dated lower court rulings.<sup>51</sup> Courts may also grow more stringent in their application of the *Fara-gher* defense, which relates to the reasonableness of the employer's efforts to prevent and address discrimination. The Me-Too movement revealed defects in employers' internal compliance systems, which may make judges and juries more receptive to arguments that the employer's efforts were unreasonable.

Next, the Article summarizes legal rules relating to the enforceability of non-disclosure provisions. It then examines how the legislation could affect employer contracting practices. Employers are likely to include more carve-outs when they demand secrecy of employees through confidentiality agreements, social media policies, and in settlement agreements. The proposed legislation will also likely limit, or even preclude, related provisions in settlement agreements that restrict employee speech, like non-disparagement provisions, non-cooperation clauses, and provisions relating to affirmative statements. The legislation will also limit employers' ability to promise secrecy to employees accused of misconduct.

The MeToo movement, particularly when combined with shifts in judicial interpretations and legal reforms, stands to have a lasting effect on employer disciplinary practices. Employers are likely to continue to take a more punitive approach to documented harassment. A more punitive approach will encompass a broader range of meaningful discipline than termination alone, and will likely include demotions, promotion denials, pay cuts, or other loss of status. Employers are also likely to alter executive employment contracts and privacy policies to provide themselves with more latitude to discipline employees for documented harassment, and to disclose those decisions if necessary.

The Article concludes by recommending revisions to employer harassment and discrimination policies. Harassment policies should be more transparent and explain the contextual factors that influence the company's assessment of the severity of policy violation. Antidiscrimination policies should explain that supervisors are entrusted with maintaining the integrity of the company's personnel decisions, which includes refraining from conduct or comments that would cast doubt on their ability to maintain the company's commitment to equal opportunity. In

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51. Sandra Sperino & Suja Thomas, *Boss Grab Your Breasts? That's Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html>.

combination, such revisions avoid some of the false dilemmas and confusion that have arisen following the MeToo movement. These changes are also better aligned with the employer's true litigation risks, and basic notions of fairness and trust.

## I. SHIFTS IN INTERPRETATIONS OF EXISTING LAW

This Part provides an overview of harassment law and related scholarly commentary. It then examines how courts might alter their application of existing law in the wake of the MeToo movement. In particular, courts may relax their application of the "severe or pervasive" requirement and impose more exacting standards on employers seeking to establish the *Fara-gher/Ellerth* defense.

### A. CURRENT LAW

Title VII of the Civil Rights Act contains no explicit reference to harassment. However, the Supreme Court recognized harassment as a form of discrimination in the 1986 decision, *Meritor Savings Bank v. Vinson*.<sup>52</sup> The *Meritor* decision defined harassment as severe or pervasive conduct so offensive as to alter the terms or conditions of the plaintiff's employment.<sup>53</sup> *Meritor* was a sexual harassment case, but its ruling applied to harassment on the basis of other protected categories under Title VII, citing a lower court ruling recognizing harassment on the basis of race.<sup>54</sup>

The Supreme Court elaborated on and refined *Meritor's* definition in subsequent rulings. The 1993 decision, *Harris v. Forklift*, declared that harassment must be both subjectively and objectively offensive to qualify as harassment—meaning the complainant must have been offended by the conduct, and the conduct must be offensive to a reasonable person.<sup>55</sup> The 1998 decision, *Oncale v. Sundowner*, included a number of refinements to existing law.<sup>56</sup> It held that harassment must be motivated by the plaintiff's membership in a protected category to qualify as harassment.<sup>57</sup> The Court also clarified that sexual conduct was not required to prove harassment claims, and reinforced the sta-

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52. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

53. *Id.* at 67.

54. *Id.* at 66.

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

56. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–82 (1998).

57. *Id.* at 80.

tus of harassment claims as a variant of other types of discrimination claims.<sup>58</sup> *Oncale* further cautioned courts against enforcing Title VII's anti-harassment mandate as a "civility code."<sup>59</sup> Lastly, it urged courts to consider the context in which the conduct occurred, noting that a "coach smack[ing] [a football player] on the buttocks as he heads onto the field" is different from similar conduct in an office.<sup>60</sup>

Since *Meritor*, the Supreme Court has specified the conditions under which employers will be vicariously liable for harassment. While employers are strictly liable for discrimination and retaliation,<sup>61</sup> harassment claims have produced more uncertainty regarding employer liability. Harassment has been historically viewed as closer to a tort claim, a "frolic or detour" that solely benefits the harasser, rather than employer.<sup>62</sup> Consequently, courts have been reluctant to hold employers strictly liable. At the same time, courts recognize that a supervisor's harassing acts are enabled by the power delegated to him through the employer.<sup>63</sup> This has led courts to develop a complex series of standards governing vicarious liability for harassment.

Vicarious liability for harassment under Title VII depends on whether the putative harasser is a coworker or supervisor.<sup>64</sup> If the harasser is a coworker, the plaintiff must show that the employer was negligent in its handling of harassment: that the employer knew or should have known about the harassment and failed to act.<sup>65</sup> If the harasser is a supervisor, the employer is strictly liable when the supervisor took some form of tangible employment action against the plaintiff, like a demotion, firing, or pay cut.<sup>66</sup> For example, if an employee rebuffs a supervisor's

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58. See Steven Wilborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 678 (1999).

59. *Id.* at 703.

60. *Oncale*, 523 U.S. at 80.

61. Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 PITT. L. REV. 671, 731–32 (2000).

62. *Faragher v. City of Boca Raton*, 524 U.S. 775, 794 (1998).

63. *Id.* at 805.

64. Under the 2013 decision, *Vance v. Ball State University*, 570 U.S. 421, 424–26 (2013), a supervisor is an employee empowered [by the employer] to take tangible employment actions against the victim. Specifically, supervisor status requires "the power to hire, fire, demote, promote, transfer, or discipline an employee." In other words, a supervisor must have formal authority over the harassment victim, not just the informal power to direct their activities.

65. *Faragher*, 524 U.S. at 799 (citing 29 C.F.R. § 1604.11(d) (1997)).

66. *Id.* at 807.

overtures and the supervisor responds by punishing the employee with a demotion, the employer would be strictly liable.

In the absence of a tangible employment action, the employer is presumed liable unless the employer can establish an affirmative defense under the 1998 Supreme Court rulings, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*<sup>67</sup> (*Faragher* defense). Employers can establish the *Faragher* defense if (1) the employer took reasonable measures to prevent or redress the harassment, and (2) the plaintiff unreasonably fails to take advantage of those measures.<sup>68</sup> As originally articulated by the Supreme Court, a plaintiff's claim is preserved if they make a complaint through an employer's proffered internal complaint mechanism. However, some subsequent court of appeals decisions have held that a reasonable response from the employer—even when the employee complains—is sufficient to insulate the employer from liability.<sup>69</sup>

Commentators have criticized harassment law for producing uncertainty over what qualifies as harassment.<sup>70</sup> David Sherwyn, Michael Heise, and Zev Eigen captured this sentiment when they observed that “[d]ifficulties with determining what type of conduct qualifies as unlawful sexual harassment continue to vex academicians, legal scholars, and practitioners.”<sup>71</sup> Michael Frank devoted an entire law review article to figuring out what the Supreme Court might have meant in *Oncale* when it instructed courts to consider the “social context” in evaluating a harassment claim.<sup>72</sup>

The flexible nature of the Supreme Court standard for harassment has given lower courts considerable latitude. Scholars

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67. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751–56 (1998); see also *Faragher*, 524 U.S. at 786–810.

68. *Faragher*, 524 U.S. at 807.

69. *Id.* at 807; *Indest v. Freedom Decorating, Inc.*, 164 F.3d 258, 267 (5th Cir. 1999).

70. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 442 (2002) (noting the complexity of implementing the Supreme Court's instruction to consider the “social context” in evaluating harassment claims); Melissa K. Hughes, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437, 1439 (2003) (describing the standard for harassment as “inherently vague”); David Sherwyn et al., *Don't Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1272 (2001).

71. Sherwyn et al., *supra* note 70, at 1272.

72. Frank, *supra* note 70.

have devoted significant attention to these lower court interpretations, criticizing them for framing harassment primarily, or solely in terms of sexual conduct.<sup>73</sup> One study found that cases involving “sexualized conduct directed at individual victims” are more successful than those “involving differential but nonsexual conduct and conduct demeaning to women in general.”<sup>74</sup> Other scholars observed similar patterns in harassment based on race, religion, and age.<sup>75</sup> Indeed, an empirical study by Pat Chew and Robert Kelley found that judges tended to discount evidence of race-based harassment unless it was “overtly race-linked,” such as a noose or a racial epithet.<sup>76</sup>

Scholars have also criticized the *Faragher* defense. Joanna Grossman argued that strict liability would produce a stronger incentive to prevent harassment claims.<sup>77</sup> Grossman observed that the *Faragher* defense essentially insulates employers from liability following an initial harassment complaint, such that “the first bite is free.”<sup>78</sup> Similarly, an empirical study by David Sherwyn, Michael Heise, and Zev Eigen found that courts tended to apply the *Faragher* defense in a manner that was generally

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73. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 549 (2001) (discussing how cases that involve “sexualized conduct directed at individual victims” are more successful than those “involving differential but nonsexual conduct and conduct demeaning to women in general”); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2061 (2003); Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 5 (2006).

74. Juliano & Schwab, *supra* note 73, at 549; Schultz, *Understanding Sexual Harassment Law*, *supra* note 73, at 16–17.

75. Hughes, *supra* note 70, at 1439 (noting the difficulty of applying harassment standard to race-based context); cf. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85, 119–23 (2003) (arguing that “courts tolerate conduct in sexual harassment cases that would not be tolerated in racial harassment cases that are analogously offensive”); cf. Robert J. Gregory, *You Can Call Me a “Bitch” Just Don’t Use the “N-Word”: Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 742 (1997) (arguing that courts resolve ambiguities in favor of plaintiffs claiming race-based harassment but not sex harassment). See generally Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006) (discussing patterns in harassment related to race).

76. Chew & Kelley, *supra* note 75, at 106.

77. Joanna L. Grossman, *Supra* note 61, at 733; cf. Sherwyn et al., *supra* note 70, at 1267 (recommending that the defense be revised to “focus exclusively on the employer’s actions”).

78. Grossman, *supra* note 61, at 671.

favorable to employers.<sup>79</sup> Courts deemed employees to have “unreasonably failed” to make use of the employer’s complaint system if they waited longer than a few months to complain.<sup>80</sup> Sherwyn, Heise, and Eigen also identified a number of rulings in the employer’s favor even when an employee made a timely complaint.<sup>81</sup> The authors concluded that harassment training had no effect on whether employers successfully asserted the defense.<sup>82</sup>

#### B. RELAXING THE SEVERE OR PERVASIVE REQUIREMENT

MeToo may ultimately influence how courts interpret the “severe or pervasive” requirement in harassment law. In a 2003 law review article, Judith Johnson argued that lower courts misused the “severe or pervasive” requirement to “excuse” “egregious conduct that, in many cases, would be criminal or at least would outrage any reasonable person.”<sup>83</sup> Sperino and Thomas made this case in a 2017 New York Times op-ed, urging lower courts to reject excessively stringent interpretations of the “severe or pervasive standard.”<sup>84</sup> Drawing on their book, *Unequal*,<sup>85</sup> which documented larger trends in the ways courts undermine discrimination law, Sperino and Thomas recounted numerous cases involving highly offensive conduct that the court deemed insufficiently severe or pervasive to proceed to trial.<sup>86</sup>

Sperino and Thomas hypothesized that overly stringent judicial application of the “severe or pervasive” standard may have resulted from outlier decisions in early harassment jurisprudence, written by overwhelmingly older male judges hostile to harassment claims.<sup>87</sup> These decisions had an outsized influence on later jurisprudence: judges disinclined toward a particular case had a substantial body of law to support their own crimped interpretation. Johnson, by contrast, argued that lower courts were misinterpreting Supreme Court jurisprudence in their overemphasis on the severe or pervasive standard.<sup>88</sup> Johnson argued that the focus of the inquiry should instead be on whether

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79. Sherwyn et al., *supra* note 70, at 1272.

80. *Id.* at 1297.

81. *Id.* at 1295.

82. *Id.* at 1300–01.

83. Johnson, *supra* note 75, at 86.

84. Sperino & Thomas, *supra* note 51.

85. SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL* 30–52 (David Kairys ed., 2017).

86. *Id.* at 34–36.

87. *Id.* at 37.

88. Johnson, *supra* note 75, at 86.

the environment is “objectively hostile or abusive.”<sup>89</sup> She also found that lower courts tended to limit the plaintiff’s ability to introduce evidence of harassment through unfavorable rulings on the continuing violations doctrine.<sup>90</sup>

Judges of all stripes may be influenced by MeToo in ways that alter their application of the legal rules.<sup>91</sup> MeToo gave a microphone to victims willing to share their experience of harassment. It showcased the lasting impact an act of groping, for example, had on their well-being. These stories provided context for the severity or pervasiveness of the conduct from the victim’s perspective. Over time, judges may update their application of legal standards for severe or pervasive and objectively hostile behavior accordingly.

This narrative shift could also support an alternate explanation for why some judges previously defined severe or pervasive too narrowly.<sup>92</sup> Supreme Court jurisprudence has emphasized that harassment law is not a civility code, and that harassment should be distinguished from usual workplace interactions.<sup>93</sup> Judges may have been overly fearful of treading into civility code territory, which led to stringent rulings on the severe or pervasive standards.<sup>94</sup> While public debates over MeToo

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89. *Id.*

90. *Id.* at 123–29.

91. As Catharine MacKinnon observed in an op-ed, “[s]exual harassment law can grow with #MeToo” and that “changing norms . . . will . . . transform the law as well.” Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

92. Additionally, the question of whether judges broadly dismiss cases that should have been sent to a jury is an empirical question that has not yet been answered. Sperino and Thomas’s book cited a few dozen cases, but did not assess whether those questions were the exception rather than the rule. SPERINO & THOMAS, *supra* note 85, at 34–36. The cases might, for example, have represented extreme examples within a broader distribution of case law. Similarly, while Johnson leveled a similar critique against judges for crimped interpretations of the “continuing violations” doctrine that resulted in failed claims, the analysis does not necessarily support the empirical conclusion that those cases are representative of all claims. *See* Johnson, *supra* note 75, at 123–29.

93. *See* *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

94. *Blomker v. Jewell*, 831 F.3d 1051, 1056–57 (8th Cir. 2016) (“The Supreme Court has cautioned courts to be alert for workplace behavior that does not rise to the level of actionable harassment.”). *Blomker* describes numerous cases involving offensive behavior that did not meet the legal standard. *Id.* at 1057.

have included some hand wringing over whether ambiguous conduct meets colloquial definitions of harassment,<sup>95</sup> a much larger proportion of high profile MeToo stories involved outrageous conduct that was left unaddressed.<sup>96</sup> The cost of leaving harassment unaddressed may now be more salient for judges, and perhaps make them less likely to rule for defendants on summary judgment.

The uncertain and flexible nature of the legal standard for harassment, which has produced so much scholarly criticism,<sup>97</sup> may also liberate judges to move toward a more lenient standard for what qualifies as harassment. Judges may, for example, focus more heavily on larger questions of whether the conduct is objectively hostile or abusive, as Johnson advocated.<sup>98</sup> Just as courts inclined to rule in the employer's favor have the freedom to rely on cases that take a cramped view of the severe or pervasive standard,<sup>99</sup> so too do they have the freedom to cite more liberal interpretations in their rulings.

#### C. MORE RESTRICTIVE *FARAGHER* DEFENSE

In the same way that the MeToo movement shed light on the severe or pervasive standard, it also exposed problems with the way employers implemented their internal processes.<sup>100</sup> Revelations that high-level employees previously kept their jobs despite multiple harassment complaints suggested that employers failed to meaningfully redress the problem. Weinstein served as the case in point, where legal structures like employment agreements, internal complaints procedures, and contracts were used to further conceal Weinstein's misdeeds, rather than fix the problem.<sup>101</sup>

Both legal scholars and social scientists have devoted considerable attention to evaluating employer practices to prevent and address workplace harassment and discrimination. In a

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95. Doreen McAllister, *#MeToo Movement Has Gone Too Far*, Catharine Deneuve Says, NPR: THE TWO-WAY (Jan. 10, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/10/576986585/-metoo-movement-has-gone-too-far-catherine-deneuve-says>.

96. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (Apr. 27, 2018), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations>.

97. See *supra* notes 70–72.

98. See Johnson, *supra* note 75, at 86.

99. SPERINO & THOMAS, *supra* note 85.

100. See discussion *infra* Part IV.

101. See *supra* notes 36–41.



2001 law review article, Susan Sturm hailed internal employer processes as the preferred approach for advancing employee rights.<sup>102</sup> Sturm's model contrasted what she characterized as "first generation discrimination," involving overt discrimination and workplace segregation, with "second generation discrimination," involving more subtle and complex patterns of exclusion and bias.<sup>103</sup> Sturm argued that courts are good at "elaborat[ing] general legal norms" but employers are best positioned to effectuate those norms through internal processes, organizational change, and flexible implementation.<sup>104</sup> From this vantage point, the *Faragher* decision was a welcome development because it "encourage[d] the development of workplace processes that identify the meaning of and possible solutions to the problem of sexual harassment."<sup>105</sup>

By contrast, sociologists Frank Dobbin, Erin Kelly, and Lauren Edelman took a much more skeptical stance towards internal processes like harassment policies and complaint procedures.<sup>106</sup> These scholars observed that employers adopted internal mechanisms to address discrimination and harassment long before there was a legal justification for doing so.<sup>107</sup> Dobbin and Kelly argued that the expansion of these processes represented an effort by human resource managers to expand their power and influence in the organization.<sup>108</sup> Edelman argued that these internal processes represent a form of "symbolic compliance" intended to signal the employer's "attention to" legal norms.<sup>109</sup> Symbolic compliance signals to employees, courts, regulatory agencies, and the public that the employer cares about compliance.<sup>110</sup> The efficacy of those processes is secondary.

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102. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 564 (2001).

103. *Id.* at 466–69.

104. *Id.* at 522–24.

105. *Id.* at 481.

106. LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 101 (2016); Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1203–05 (2007).

107. Dobbin & Kelly, *supra* note 106, at 1203–04.

108. *Id.*

109. EDELMAN, *supra* note 106, at 100–01.

110. *Id.*

Even as MeToo revealed employers' failures, it also revealed courts' failure to hold employers accountable for ineffective processes.<sup>111</sup> Lauren Edelman and Susan Bisom-Rapp argued that courts have been too lenient with respect to what qualifies as "reasonable measures" to prevent and redress harassment.<sup>112</sup> Edelman identified a number of cases in which courts credited employers for the adoption of "reasonable" processes under the *Faragher* defense, despite evidence that the employer's process was flawed or unfair.<sup>113</sup> The Sherwyn, Heise, and Eigen study likewise found that "reasonable measures" appeared to be limited to whether the employer had adopted a credible policy regarding harassment.<sup>114</sup>

MeToo may also influence how courts and juries evaluate evidence in support of the *Faragher* defense.<sup>115</sup> Like the "severe or pervasive" standard, MeToo also made salient the possibility, and even likelihood, that an employer's processes might be inadequate. Popular attention to these defects will likely embolden plaintiffs' lawyers to obtain discovery on those defects<sup>116</sup> and to argue forcefully for the relevance of such evidence in discovery disputes.

Challenging the employer's internal processes may also take the form of me too evidence. Me too evidence is a term of art in employment disputes, which refers to evidence that other employees have suffered similar harms at the hands of the same supervisor or in the same department. In the 2008 Supreme

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111. *Id.* at 174–77, 180–81.

112. *Id.* at 173; Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 145 (2002); *see also* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 63, 74–75 (2018).

113. EDELMAN, *supra* note 106, at 173–74, 184–88.

114. Sherwyn et al., *supra* note 70, at 1304. That study was completed in the years immediately following the *Faragher* decision. It may have made sense to impose a relatively lenient standard in the early days of the defense, on the notion that employers needed time to ramp up their internal processes (though of course, they had been largely installed years prior). Now, twenty years later, employers have little excuse for problematic internal structures.

115. It may also influence how courts and juries evaluate evidence of negligence, which is relevant for cases involving coworker harassment.

116. For example, plaintiffs' lawyers could seek statistics suggesting the employer's complaint system was biased, that it responded slowly to harassment complaints, or that it failed to discipline employees for harassment. The plaintiff might also present testimony from employees claiming to have been mistreated in the complaint process.

Court decision *Sprint/United Management Co. v. Mendelsohn*,<sup>117</sup> the Supreme Court instructed trial courts to make case-by-case determinations as to the relevance of me too evidence.<sup>118</sup> The years to come may see renewed efforts by plaintiffs to use me too evidence to challenge the reasonableness of the employer's response to a complaint.<sup>119</sup> Me too evidence may reveal, for example, that other employees experienced harassment in the department over a period of years, which the employer failed to remediate.<sup>120</sup>

Courts may become more demanding with respect to disciplinary actions undertaken by an employer following a documented incident of harassment. Previously, courts did not consider an employer's decision to retain a documented harasser to be fatal to the employer's defense.<sup>121</sup> Courts tended to focus less

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117. 552 U.S. 379, 381 (2008).

118. Prior to that decision, some courts recognized a legal doctrine (known as the me too doctrine) categorically barring the use of such evidence. *See generally* Emma Pelkey, *The "Not Me Too" Evidence Doctrine in Employment Law: Courts' Disparate Treatment of "Me Too" Versus "Not Me Too" Evidence in Employment Discrimination Cases*, 92 OR. L. REV. 545 (2013) (discussing how courts analyze and determine the relevance and admissibility of me too evidence compared to not me too evidence in employment discrimination cases).

119. *See, e.g.*, *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 335–36 (6th Cir. 2008) (permitting "other act" evidence); *Waterson v. Plank Rd. Motel Corp.*, 43 F. Supp. 2d 284, 288 (N.D.N.Y. 1999) (introducing "me too" evidence).

120. *See, e.g.*, *Hawkins*, 517 F.3d at 337–38 (discussing evidence of harassment involving other women); *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475–76 (5th Cir. 2002) (noting that four additional employees in the same position testified about early harassment and the company failed to respond); GERALD E. ROSEN ET AL., RUTTER GRP. PRACTICE GUIDE, 5:336, Westlaw (database updated May 2018) ("Employers should consider a possible disadvantage to asserting the *Ellerth/Faragher* defense: It may open the door for plaintiff to introduce evidence of the employer's prior *mishandling of unrelated incidents* of sexual harassment . . .").

121. *See, e.g.*, *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1049 (7th Cir. 2000) (following racial harassment by supervisor, employer merely gave him a written warning, ordered him to participate in an interpersonal skills training, and offered to rearrange schedules to avoid contact between supervisor and victim; court deemed employer's response reasonable); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 260–61, 267 (5th Cir. 1999) (employer responded to harassment complaint by providing a written and verbal reprimand and promising victim she would not need to work at the same trade shows as harasser, response deemed adequate to satisfy *Faragher* defense); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 936 (7th Cir. 1999) (crediting employer response that "made it much more difficult for Popper to oppress Savino without being observed by others"); *cf. McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1120 (9th Cir. 2004) ("Remedial measures must include some form of disciplinary action which must be 'proportionate to the seriousness of the offense.'" (alteration in original) (citation omitted) (quoting *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991))); *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001).

on discipline, and more on whether the employer disseminated a policy and attempted to investigate the complaint.<sup>122</sup> While courts expected employers to undertake some preventative measures, that standard could be satisfied with a stern warning or some effort to separate the complainant from the accused, including offering the complainant a transfer.<sup>123</sup> For example, in a Ninth Circuit opinion written by Judge Kozinski (who himself resigned in 2017 following multiple accusations of harassment),<sup>124</sup> the court noted that an investigation counts as a remedial measure because “[a]n investigation is a warning, not by words but by action.”<sup>125</sup>

Going forward, employers should not expect that superficial disciplinary measures following an investigation will satisfy the *Faragher* defense. First, as I will discuss in greater detail below, employers have already begun taking a more punitive approach with documented harassers, including publicly terminating high level employees and disclosing the reason for the termination. In

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122. The Ninth Circuit’s analysis in *Holly D. v. California Institute of Technology* suggests that it views the defense primarily in terms of whether the employer had a harassment policy that “identified contact personnel” and investigation procedures. 339 F.3d 1158, 1177 (9th Cir. 2003). Arguments about an employer’s failure to respond adequately following a harassment complaint were relevant only insofar as they suggested the policy was “unreasonably implemented.” *Id.* This is consistent with Sherwyn, Heise, and Eigen’s findings that the strongest predictor of whether an employer satisfied the affirmative defense was whether it had a policy that it disseminated to employees with a reporting mechanism available. Sherwyn et al., *supra* note 70, at 1283; *see also* *Brenneman v. Famous Dave’s of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007) (holding whether the employer exercised reasonable care consists of two components, “prevention and correction,” requiring that “the employer must have exercised reasonable care to prevent sexual harassment . . . [and] promptly corrected any sexual harassment that occurred”).

123. *See, e.g., Andreoli v. Gates*, 482 F.3d 641, 644 (3d Cir. 2007) (“[In cases involving co-worker harassment,] [w]e have found an employer’s actions to be adequate, as a matter of law, where management undertook an investigation of the employee’s complaint within a day . . . spoke to the alleged harasser . . . and warned the harasser that the company does not tolerate any sexual comments or actions.”); *Brenneman*, 507 F.3d at 1145 (holding employer responded adequately when it offered to transfer complainant to another restaurant); *Tutman*, 209 F.3d at 1049 (“[T]he question is not whether the punishment was proportionate to [the supervisor’s] offense but whether [the employer] responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring.”); *Indest*, 164 F.3d at 267.

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

125. *Swenson*, 271 F.3d at 1193.

an environment where termination is a common response to substantiated acts of harassment, superficial forms of discipline start to look less reasonable. The MeToo movement has made the costs of ineffective discipline more salient for employers. The continued misconduct of a documented harasser becomes foreseeable, and makes the employer's inaction less reasonable.

Technological changes are likely to accelerate this trend. Previously, notions of "reasonableness" were made in the abstract, without data about how employers made decisions. However, cloud-based ethics and HR management tools are starting to close this information gap.<sup>126</sup> Cloud-based software used by multiple employers enable the software maker to aggregate practices and generate statistics about how other employers have responded in similar situations.<sup>127</sup> This information could provide cover for an employer, or undermine the reasonableness of a decision.<sup>128</sup> If most employers retain an employee after a substantiated complaint of harassment by a subordinate, then the statistics would protect employers by making their decision appear reasonable.<sup>129</sup> However, once employers begin to shift their behavior towards a more punitive approach, employers that depart from the norm appear unreasonable.

In the MeToo era, plaintiffs' lawyers may place greater emphasis on an employer's faulty practices in arguments before judges and juries. One might readily imagine a jury trial where one of the ultimate issues to be decided is whether the employer behaved negligently<sup>130</sup> or reasonably in response to harassment.<sup>131</sup> Because MeToo brought so much attention to the failure of employers' compliance measures, a plaintiff's lawyer might

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126. See CAROLE SWITZER ET AL., BENCHMARKING (2017), <https://www.convercent.com/resource/converge17/Converge17-Benchmarking.pdf>; NAVEX GLOBAL, 2017 ETHICS & COMPLIANCE TRAINING BENCHMARK REPORT, <https://www.navexglobal.com/en-us/resources/benchmarking-reports/2017-ethics-compliance-training-benchmark-report?RCAssetNumber=2427> (last visited Oct. 22, 2018).

127. See *supra* note 126.

128. While this information tends to be limited to the employers that use the platform, that information could be discoverable if the employer used and consulted the benchmarks in making its own decisions. One might also imagine third party companies making aggregate information available publicly on an annual basis to inform industry leaders and attract new business.

129. Elizabeth C. Tippet, *Adapting to the New Risk Landscape*, HARV. BUS. REV., Feb. 1, 2018, <https://hbr.org/2018/02/adapting-to-the-new-risk-landscape>.

130. A negligence standard applies to coworker harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998).

131. This would be in connection with the employer's assertion of the *Faragher* defense, involving supervisor harassment. *Id.* at 807.

play up the holes in the employer's system. The lawyer might present statistics about the number of complaints and the employer's disciplinary track record following substantiated complaints. The lawyer might elicit client testimony about mistreatment during the complaint process. Alternatively, the lawyer could cross-examine human resources or managers to suggest the process was biased against complainants. The lawyer might also show clips of the employer's boring harassment training program,<sup>132</sup> using it to further demonstrate the employer's lack of commitment to addressing harassment. While evidence of this sort was available prior to MeToo, national attention to these issues may make the jury more receptive to them. Judges may also attach more importance to this evidence and be less inclined to grant summary judgment on questions of negligence or reasonableness.

Part IV, below, will return to the question of how employers may alter their disciplinary practices, and related policies, over time. But first, Parts II and III examine the legal tools employers previously used to maintain the secrecy of harassment and discrimination claims, and how legislative reforms may limit their availability.

## II. STATES ADDRESS NON-DISCLOSURE AGREEMENTS

Restrictions on an employee's ability to publicly disclose harassment come in two forms: (1) standard employer policies or agreements intended to protect the company's business secrets and overall reputation; and (2) settlement agreements that resolve an employment-related dispute or lawsuit. These two types of restraints are treated quite differently under existing legal rules.

### A. EXISTING LAW

With respect to the first category, employees arguably have the right to publicly disclose harassment or discrimination under Title VII of the Civil Rights Act and the National Labor Relations Act, regardless of contrary language in a policy or contract. By contrast, courts are more likely to enforce secrecy provisions in a settlement agreement, on the theory that it promotes dispute resolution.

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132. For a content analysis of harassment trainings, see Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. LAB & EMP. L. (forthcoming 2018).

Title VII broadly protects employees from retaliation for “opposition” to harassment or discrimination in the workplace.<sup>133</sup> While such opposition typically consists of internal complaints to the employer, there is some authority for the proposition that more public forms of disclosure are protected. In the Supreme Court decision *Crawford v. Nashville*, an employee sought protection from retaliation after participating in (though not initiating) a company’s internal harassment investigation.<sup>134</sup> Ruling in the employee’s favor, the Court explained that an employee need not go so far as “writing public letters” or “taking to the streets” to qualify as protected “opposition” under the statute.<sup>135</sup> This implied that the Court considered these more public forms of opposition to be protected as well. Similarly, a Fifth Circuit decision from 1981 held that public picketing against an employer’s discriminatory practices could qualify as protected opposition.<sup>136</sup> A 1983 case from the Ninth Circuit held that writing a public letter to the school board complaining about an employer’s practice was also protected under the opposition clause.<sup>137</sup>

However, cases involving public opposition also held that it must be reasonable, and that “excessive” opposition, or opposition that “significantly disrupt[s] the workplace” or the plaintiff’s productivity,<sup>138</sup> is not protected. This means that an employee’s decision to reveal harassment or discrimination on social media, perhaps through a #metoo post, is subject to some but not unlimited protection.<sup>139</sup> If an employer decides to punish a #metoo employee under its social media policy, that employee may have a retaliation claim.<sup>140</sup> But the employer may be able to defend the

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133. 42 U.S.C. § 2000e-3(a) (2012).

134. 555 U.S. 271, 275 (2008).

135. *Id.* at 276–77.

136. *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1146 (5th Cir. 1981).

137. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983).

138. *Id.* at 1015; *Payne*, 654 F.2d at 1143; *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976).

139. *See Payne v. WS Servs., LLC*, 216 F. Supp. 3d 1304, 1319–20 (W.D. Okla. 2016) (holding rejected applicant, who complained in Facebook posts and wore a homemade sandwich board to protest in public, was not protected due to defamatory comments and disparaging comments unrelated to gender discrimination); *Caplan v. L Brands/Victoria’s Secret Stores, LLC*, 210 F. Supp. 3d 744, 754–55 (W.D. Pa. 2016) (rejecting plaintiff’s Section 1981 retaliation claim because Facebook post containing a picture of a “Ku Klux Klan-reminiscent hooded person” did not “objectively complain[] about . . . race discrimination”).

140. *Emmanuel v. Cushman & Wakefield, Inc.*, No. 1:13-CV-2894-GHW, 2015 WL 5036970, at \*2 (S.D.N.Y. Aug. 26, 2015) (considering retaliation claim

case if it can establish the post was unreasonable or excessively disruptive.

An employee's social media posts about harassment or discrimination may be independently protected under Section 7 of the National Labor Relations Act (NLRA). Section 7 protects the right of all employees—even if their workplace is not unionized<sup>141</sup>—to engage in “concerted action for mutual aid or protection.”<sup>142</sup> During the Obama administration, the National Labor Relations Board (NLRB) took an expansive view of concerted activity, asserting that employers violate Section 7 when they punish employees for social media activity.<sup>143</sup> The NLRB also opined that overly restrictive social media policies can violate Section 7.<sup>144</sup>

For example, the NLRB held that an employer violated Section 7 when it fired employees for Facebook posts discussing how to respond to a coworker's gripes about their job performance.<sup>145</sup> The NLRB reasoned that the coworkers “made common cause” in their protest of the coworker's claims, and “were taking a first

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alleging termination a few months after employee complained about pregnancy discrimination on Facebook).

141. Regina Robson, “*Friending*” the NLRB: *The Connection Between Social Media, “Concerted Activities” and Employer Interests*, 31 HOFSTRA LAB. & EMP. L.J. 81, 84 (2013) (noting that almost all of social media policies drawing commentary from the NLRB involved non-union workforces).

142. Murphy Oil USA, Inc., 361 N.L.R.B. 774, 813 (2014); D.R. Horton, Inc., 357 N.L.R.B. 2277, 2277 (2012). However, like in the Title VII context, social media posts can lose protection where their content would raise other legitimate business concerns. For example, in *Richmond District Neighborhood Center*, the Board found that Facebook posts were not protected by Section 7 because they advocated insubordination. 361 N.L.R.B. 833, 834–35 (2014); *see also* Three D, LLC, 361 N.L.R.B. 308, 308 (2014) (“[O]nline employee communications can implicate legitimate employer interests, including the ‘right of employers to maintain discipline in their establishments.’”); Ariana R. Levinson, *Solidarity on Social Media*, 2016 COLUM. BUS. L. REV. 303, 313 (discussing the Board's approach to social media comments); *cf.* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123–25 (2d Cir. 2017) (holding Facebook post was protected despite use of profanity).

143. *The NLRB and Social Media*, NLRB, <https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media> (last visited Oct. 22, 2018); *see, e.g.,* *Three D*, 361 N.L.R.B. at 308 (holding that a Facebook discussion about employer's failure to properly calculate tax withholding was a protected concerted activity). *But see* Levinson, *supra* note 142, at 307, 310 (arguing that the NLRB decisions were in line with precedent and noting that appellate courts have affirmed the Board's decisions).

144. *See* NLRB, MEMORANDUM GC 15-04, at 20–21 (2015), <https://www.nlrb.gov/reports-guidance/general-counsel-memos> (follow “Memo Number” drop down tab; then follow “GC-15xx”; then follow “apply” hyperlink; then follow “GC 15-04” hyperlink).

145. Hispanics United of Buffalo, Inc., 359 N.L.R.B. 368, 369–70 (2012).



step towards taking group action to defend themselves.”<sup>146</sup> The work-related nature of the discussion on matters that affected them jointly brought the activity under the protection of Section 7.<sup>147</sup>

A social media post describing harassment or discrimination arguably falls within this expansive frame of protected Section 7 activity. A MeToo post would clearly qualify as work-related. The “metoo” hashtag has frequently been characterized as an expression of solidarity, and the phrase itself suggests a collective cause.<sup>148</sup> The post might not only serve to mobilize others within a workplace who have experienced similar harassment or discrimination, but it might also mobilize those unaffected but nevertheless outraged by the conduct.<sup>149</sup> #MeToo can also be a starting point for workplace mobilization around questions of employer practices with respect to promotion, compensation, or even safety concerns.<sup>150</sup> However, NLRB protection may be fleeting. The Board consists of political appointees, who serve a five-year term appointed by the President.<sup>151</sup> As terms run out on Obama appointees to the Board, Trump appointees are likely to

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146. *Id.* at 369.

147. *Id.* at 370.

148. See Levinson, *supra* note 142, at 320 (“The fact that posts to social media are intended to be shared by others including coworkers is the underlying rationale for finding that ‘liking’ a coworker’s post is concerted activity. It sets the groundwork for potential future action by raising awareness about the issue and by discussing it . . .”).

149. For example, in one case examined by the NLRB, an employer terminated an employee after she complained about a manager’s sexist remark on Facebook, as well as the treatment of other employees. NLRB, MEMORANDUM OM 12-31, at 19–20 (2012). The NLRB deemed her actions concerted activity, though the reasoning was strongly rooted in her assistance of fellow employees. *Id.*; see Levinson, *supra* note 142, at 319 (“[E]ven in a circumstance where one employee complains to non-coworkers, the employee may be engaging in concerted activity. . . . [T]he employee might post to complain to a government official, a union representative, or the media.”); Robson, *supra* note 141, at 94 (explaining that Board decisions generally “pinned concerted activities, not to the subject matter of the action, but on the existence of affirmative indications of interest from coworkers or a call for group action” (citing *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975))).

150. See Robson, *supra* note 141, at 102 (“Where face-to-face communications are limited or absent, however, the number of co-worker ‘friends’ responding to a post, and the content of their messages, appear to affect the determination of whether the action is concerted.”).

151. 29 U.S.C. § 153 (2012); William B. Gould IV, *Politics and the Effect on the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1506 (2015).

make more conservative rules, and may take a narrower approach to their interpretation of concerted activity.<sup>152</sup>

While Title VII and the NLRA offer some authority for the proposition that employees may speak notwithstanding a confidentiality agreement or social media policy, those rules don't apply in the case of settlement agreements. Settlement agreements are treated quite differently as a matter of law because they waive rights otherwise protected under Title VII or the NLRA. Courts routinely enforce settlement contracts containing provisions restricting an employee from talking about the dispute or making disparaging statements about the employer.<sup>153</sup> These agreements do not offend public policy, in the courts' view.<sup>154</sup>

Rather, courts assume they are promoting settlement, party autonomy, and the possibility of bringing finality to otherwise

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152. See Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223, 284 (2016) (empirical study finding that NLRB "appointees . . . act as partisans once on the Board, and this partisanship appears to be magnified if they . . . sit on a panel with other co-partisans"); Josh Eidelson, *Trump's Labor Board Picks Are Scaring Away Unions*, BLOOMBERG (Feb. 14, 2018), <https://www.bloomberg.com/news/articles/2018-02-14/trump-s-nlrbs-scorned-by-grad-students>.

153. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007).

154. See *Gulliver Schs., Inc. v. Snay*, 137 So. 3d 1045, 1046, 1048 (Fla. Dist. Ct. App. 2014) (finding a breach of the confidentiality provision in settlement agreement where the claimant disclosed the settlement to his daughter, who posted about it on Facebook); *Smelkinson Sysco v. Harrell*, 875 A.2d 188, 194–95, 197–99 (Md. Ct. Spec. App. 2005) (enforcing a stipulated damages provision in finding that the violation of a non-disparagement clause constituted a breach of a settlement agreement); *Mathis v. Controlled Temperature, Inc.*, No. 275323, 2008 WL 782634, at \*7 (Mich. Ct. App. Mar. 25, 2008) (finding a breach of a settlement agreement when an employee disclosed to her future employer that she "won" a legal dispute with her former employer, "a 'little bit' about how she was harassed by the owner, manager, or her boss," and that she "had some problems with her manager treating her badly"); *Carlini v. Gray Television Grp., Inc.*, No. A-15-1239, 2017 WL 1653624 at \*4 (Neb. Ct. App. May 2, 2017), (finding that an employee breached a settlement agreement by violating its non-disclosure provision); cf. *Tujetsch v. Bradley Dental, LLC*, No. 09-C-5568, 2010 WL 5099981, at \*2 (N.D. Ill. Dec. 8, 2010) (noting that a non-disclosure provision in a settlement agreement without an exception for lawful court orders and subpoenas would be unenforceable). But see, e.g., *Robinson v. Harrison Transp. Servs., Inc.*, No. 5:15-CV-298-F, 2016 WL 3647616, at \*4 (E.D.N.C. June 30, 2016) (withholding court approval of a confidentiality provision in a settlement of an FLSA case); *Goldberg v. Egg Harbor Twp. Sch. Dist.*, No. 11-1228-RBK/KMW, 2011 WL 5554501, at \*7 (D.N.J. Nov. 14, 2011) (refusing to enforce a confidentiality provision in a settlement agreement with public employer because public records laws required their disclosure).

rancorous disputes.<sup>155</sup> This line of reasoning accords with a rich body of literature regarding the policy merits of a judicial system that relies heavily on settlements to function. Carrie Menkel-Meadow offers a moral defense of settlement, arguing that settlement better incorporate parties' values and priorities.<sup>156</sup> When parties prefer to settle, the justice system does right by effectuating their intent.<sup>157</sup> Menkel-Meadow supports confidentiality provisions, arguing that parties' preferences should prevail and that it is "antidemocratic and ultimately harmful to our legal and political system to insist that all disputes be publicly aired."<sup>158</sup> Scott Moss evaluates confidential settlements from a law and economics standpoint, observing that confidentiality provisions broadly facilitate settlements by widening the bargaining range.<sup>159</sup> Where employers value confidentiality more than individual employees, their willingness to pay a secrecy premium facilitates settlement where the parties wouldn't otherwise agree.<sup>160</sup>

An opposing body of literature questions the public policy implications of settlement.<sup>161</sup> In the employment context, Minna

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155. See *EEOC v. Northlake Foods, Inc.*, 411 F. Supp. 2d 1366, 1369 (M.D. Fla. 2005) (issuing a protective order precluding the EEOC from disclosing the amount of settlement in a discrimination case); *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 459, 461 (N.D.N.Y. 1999) (in refusing to order disclosure of a confidential settlement of harassment claim, the court noted that "[w]hile protecting the confidentiality of settlement agreements encourages settlement, which is in the public interest, permitting disclosure would discourage settlements, contrary to the public interest," and that "[t]here is a strong public interest in encouraging settlements and in promoting the efficient resolution of conflicts"). But see *Waterson v. Plank Road Motel Corp.*, 43 F. Supp. 2d 284, 288 (N.D.N.Y. 1999) (permitting "Me Too" evidence from an employee who had settled a discrimination and harassment claim, despite the non-disclosure provision in the settlement agreement).

156. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement*, 83 GEO. L.J. 2663, 2669, 2673, 2676–80 (1995).

157. *Id.* at 2692.

158. *Id.* at 2683–84.

159. Moss, *supra* note 153, at 878–79.

160. *Id.* at 879.

161. In *Against Settlement*, Owen M. Fiss argues that settlement undermines the function of the judicial system in a number of respects. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Settlements deprive parties of the fact-finding process of discovery and a judicial decision on the merits. *Id.* at 1085–86. Settlements crimp the development of important precedent. *Id.* at 1087–89. Fiss also argues that settlements exacerbate existing power imbalances, where information asymmetries, resource limitations, and risk aversion lead less powerful parties to settle at a discount. *Id.* at 1076–77. Scholars offer a number of responses to Fiss's claims. See, e.g., Amy J. Cohen, *Revisiting*

Kotkin argues that settlements render discrimination and harassment invisible, because settled claims do not appear on the docket.<sup>162</sup> Kotkin claims that confidentiality provisions are not really a matter of choice for discrimination plaintiffs because “[c]orporate defendants insist on such clauses.”<sup>163</sup> Ultimately, she argues such settlements are problematic because they impair “the right of the public to know.”<sup>164</sup>

#### B. PROPOSED LEGISLATION

Since the MeToo movement, several states, including Pennsylvania, New York, and California, are considering or have passed prohibitions on certain types of non-disclosure agreements.<sup>165</sup> California is considering multiple bills.<sup>166</sup> New York has already passed one law relating to non-disclosure and is considering a second bill.<sup>167</sup>

The proposed bills vary in three important respects. First, they vary in the types of disclosures that cannot be restricted through contract. Second, they vary as to whether they limit all agreements, or only agreements signed under certain conditions. And third, some contain an exception for non-disclosure provisions requested by the victim.

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Against Settlement: *Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1163–68 (2009) (summarizing ADR literature responding to Fiss’s claim). First, as David Luban observes, it is neither feasible nor desirable for courts to adjudicate every case, and an overload of precedent would likely produce substantial inconsistency in legal rules. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2643–44 (1995). Second, the civil justice system tends to do a poor job of addressing power imbalances. Menkel-Meadow, *supra* note 156, at 2688; cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966–68 (1979).

162. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929 (2006).

163. *Id.* at 929.

164. *Id.* at 947.

165. S. 820, 2017–18 Reg. Sess. (Cal. 2018); S. 1300, 2017–18 Reg. Sess. (Cal. 2018); Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2017); S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017). New Jersey considered a bill but it did not pass. S. 5287, 217th Leg., Assemb. (N.J. 2017).

166. Cal. S. 820; Cal. S. 1300; Cal. Assemb. B. 3080.

167. S. 7507-C, 241st Leg., Reg. Sess. (N.Y. 2018); N.Y. S. 6382-A.

Table 1 – Proposed Non-Disclosure Legislation

Bill	Provisions covered	Types of agreements	Exception for victim requests
Cal. S. 820	Provisions that prevent the disclosure of factual information relating to sex-based harassment and sex discrimination claims.	Post-filing settlement agreements	Yes. Settlement amount can also remain confidential.
Cal. Assemb. B. 3080	Prohibitions on disclosing harassment, or opposing any unlawful practice.	Essentially any contracts with contractors or employees	No.
Cal. S. 1300	Non-disparagement provisions that prevent employees from disclosing unlawful conduct, including harassment.	Condition of employment	No.
N.Y. S. 7507-C (KK)(D)	Provisions that prevent the disclosure of the underlying facts and circumstances of a sexual harassment claim.	Settlement agreements	Yes, for mutual non-disclosure, with 21 days to consider, and 7-day revocation period.
N.Y. S. 6382-A	Provisions with the purpose or effect of concealing information relating to a claim of discrimination, non-payment of wages, retaliation, harassment or violation of public policy.	All contracts	No.
Pa. S. 999	Provisions that impair or attempt to impair the ability of a person to report a claim of sexual misconduct.	All contracts	No, but the victim's name and amount of settlement can be confidential.

The two narrowest bills are the proposed California Senate Bill 820, and New York Senate Bill 7507-C, which was passed as part of the state budget.<sup>168</sup> Both are limited to settlement agreements, and, in the case of California Senate Bill 820, only post-filing settlement agreements.<sup>169</sup> Both are also somewhat limited in terms of the claims covered—New York’s is limited to sexual harassment, while California’s is limited to sex-based discrimination and harassment claims.<sup>170</sup> Both also include an exception if the victim requests a secrecy provision.<sup>171</sup> Pennsylvania’s proposed bill is somewhat circumscribed.<sup>172</sup> It is limited to claims involving sexual misconduct, but covers all contracts and does not provide for a procedural exception that would allow the victim to request confidentiality.<sup>173</sup>

Both New York and California are also considering broader statutes.<sup>174</sup> California’s Assembly Bill 3080 would prohibit employers from imposing contracts that prevent employees from disclosing “an instance of sexual harassment” or “opposing any unlawful practice.”<sup>175</sup> California’s Senate Bill 1300 would limit non-disparagement agreements entered into as a condition of employment.<sup>176</sup> Similarly, New York’s proposed Senate Bill 6382-A would render unenforceable any contract “which has the purpose or effect of concealing the details relating to a claim of discrimination, non-payment of wages or benefits, retaliation, harassment, or violation of public policy in employment.”<sup>177</sup> The last of these, “violation of public policy in employment,”<sup>178</sup> refers to a common law whistleblower claim that protects employees from retaliation for disclosures that advance a public policy interest articulated by the state courts or legislatures.<sup>179</sup> This co-

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168. Cal. S. 820 § 1(a); N.Y. S. 7507-C (KK)(D).

169. Cal. S. 820 § 1(a); N.Y. S. 7507-C (KK)(D).

170. Cal. S. 820 § 1(a); N.Y. S. 7507-C (KK)(D).

171. Cal. S. 820 § 1(b).

172. S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

173. *Id.*

174. Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2018).

175. Cal. Assemb. B. 3080 § 3. This bill would not be limited to contracts imposed “as a condition of employment” but also provisions “as a condition of entering into a contractual agreement.” This would seemingly cover any agreement where the disclosure is not optional for the employee. *Id.*

176. S. 1300, 2017–18 Leg. Sess. (Cal. 2018).

177. N.Y. S. 6382-A § 2.

178. *Id.*

179. RESTATEMENT OF EMP’T LAW §§ 5.01–5.03 (AM. LAW INST. 2015).

vers a broad range of whistleblowing, including matters of consumer harm,<sup>180</sup> health and safety,<sup>181</sup> criminal conduct,<sup>182</sup> and even environmental harms.<sup>183</sup> The New York law effectively covers any disclosure an employee might make about unlawful conduct, employment-related or otherwise.

In sum, while Title VII and Section 7 of the NLRA may protect employees who speak out against harassment, those rights can be waived through settlement agreements. A number of states have sought to alter this state of affairs by rendering certain secrecy-related provisions unenforceable. Part III examines how employers are likely to change their practices in response to such legislation.

### III. PRACTICES COMPELLED BY LEGISLATIVE CHANGES

The MeToo movement is broadly moving employment practices to a form of forced transparency. Employees who have experienced harassment or discrimination are more likely to speak publicly, forcing employers to respond. In addition, proposed state legislation seeks to limit employers' ability to use contracts to restrain employees from speaking publicly.

If states pass legislation restricting secrecy for harassment or other employment claims, it will limit, though not eliminate, provisions in employer contracts and policies that restrict employee speech. As explained in greater detail below, employers can continue to use some of their existing contract and policy provisions, provided they contain a carve-out for certain types of disclosures. Other types of provisions will need to be narrowed or removed entirely, especially provisions that promise secrecy to an employee accused of misconduct.

In this Section, the Article examines how proposed legislation will limit employers' ability to demand—and promise—confidentiality through their contracts and policies.

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180. *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1333 (Cal. 1980).

181. *Hobson v. McLean Hosp. Corp.*, 522 N.E.2d 975, 977 (Mass. 1988); *O'Sullivan v. Mallon*, 390 A.2d 149, 150 (N.J. Super. Ct. Law Div. 1978).

182. *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 877 (Ill. 1981).

183. *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 570 (Minn. 1987).

#### A. CARVE-OUTS IN CONFIDENTIALITY AGREEMENTS AND SOCIAL MEDIA POLICIES.

While public debates about secrecy provisions have generally centered on settlement agreements containing non-disclosure provisions, secrecy provisions also appear in standard employee forms and policies, including confidentiality agreements and social media policies.

Employees typically sign some form of confidentiality agreement at the start of their employment.<sup>184</sup> These agreements restrict an employee's ability to disclose the company's confidential information. The term "confidential information" is typically defined as "information related to the company's business," followed by a non-exhaustive list of examples of business information, such as business plans, technical information, and source code.<sup>185</sup> Depending on how the contract is worded,<sup>186</sup> such provisions may not even cover disclosures relating to an employee's experience of harassment or discrimination in the workplace. As a matter of contract interpretation, such experiences may fall outside the definition of confidential information and the employee would be free as a contractual matter to disclose such information.<sup>187</sup>

Employers also use policies to restrict employee speech. The growth of social media has led employers to be especially concerned that employees will use it to disparage the company's products or work environment in ways that will impair their brand.<sup>188</sup> Consequently, employers commonly adopt policies that limit how current employees can use social media, even away

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184. See, e.g., Joshua Mates, *Tips for Onboarding Employees to Early-Stage Companies*, COOLEYGO, <https://www.cooleygo.com/tips-onboarding-employees-early-stage-companies> (last visited Oct. 22, 2018) ("It is essential that every employee (including founders and other executives) sign a confidentiality and inventions assignment agreement.").

185. M. SCOTT McDONALD & JACQUELINE C. JOHNSON, *UNFAIR COMPETITION AND INTELLECTUAL PROPERTY PROTECTION IN EMPLOYMENT LAW: CONTRACT SOLUTIONS AND LITIGATION GUIDE* 180 (2014).

186. *Id.* at 180–81 (describing variants in contract language).

187. *But see* *Coady v. Harpo, Inc.*, 719 N.E.2d 244, 247 (Ill. App. Ct. 1999) (enforcing a confidentiality agreement that prohibited an employee from disclosing any information "related to or concerning: (a) Ms. [Oprah] Winfrey and/or her business or private life . . . and/or (c) Harpo's employment practices or policies").

188. See, e.g., Elizabeth Allen, Note, *You Can't Say That on Facebook: The NLRA's Opprobriousness Standard and Social Media*, 45 WASH. U. J.L. & POL'Y 195, 209 (2014).



from work.<sup>189</sup> These policies vary but generally require that employees disclaim that they are not speaking on the company's behalf.<sup>190</sup> They also remind employees not to disclose the company's confidential information.<sup>191</sup> An aggressive social media policy will attempt to prohibit employees from saying anything disparaging about the company or its product.<sup>192</sup>

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189. WILLIAM H. FRANKEL ET AL., CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE INTELLECTUAL PROPERTY COMPLIANCE PROGRAM § 4:68 (2017–18 ed. 2017); Daniel Oberdorfer et al., *Policy on Blogging, Social Networking, Tweeting, and Other Public Discourse on the Internet*, WEST'S LEGAL FORMS, EMPLOYMENT § 5.92 (2018).

190. See, e.g., Three D, LLC, 361 N.L.R.B. 308, 316 (2014) (describing a social media policy that required employees to “include a disclaimer that the views you share are yours, and not necessarily the views of the Company”); ADIDAS GRP., ADIDAS GROUP SOCIAL MEDIA GUIDELINES 1 (2016), <https://www.gameplan-a.com/wp-content/uploads/2016/04/adidas-Group-Social-Media-Guidelines.pdf> (requiring employees “make clear that [they] are speaking for [themselves] and not for the Group”); FRANKEL ET AL., *supra* note 189 (“Express only your personal opinions . . . Clearly state that your views do not represent the views of the [name of employer], other employees, members, customers, or suppliers.”); Oberdorfer, *supra* note 189 (“You must explicitly and conspicuously state that the views you are articulating are your own and not the views of the Company. You must not state or imply you are speaking for the Company.”); *Best Buy Social Media Policy*, BEST BUY (July 21, 2016), <http://forums.bestbuy.com/t5/Welcome-News/Best-Buy-Social-Media-Policy/td-p/20492> (“[Y]ou must state that the views expressed are your own.”); *Ford Motor Company's Digital Participation Guidelines*, FORD MOTOR CO., (Aug., 2010), <https://www.scribd.com/doc/36127480/Ford-Social-Media-Guidelines>, (“Make it clear that the views expressed are yours.”).

191. See, e.g., FRANKEL ET AL., *supra* note 189, § 4:67 (“I will not disclose, publish or use, directly or indirectly, any information of the [name of employer] or of any person or firm working in conjunction with [name of employer], unless I receive express authorization from the [name of employer].”); *supra* *Best Buy Social Media Policy*, *supra* note 190; *IBM Social Computing Guidelines*, IBM, <https://www.ibm.com/blogs/zz/en/guidelines.html> (last visited Sept. 28, 2018).

192. See, e.g., NLRB, OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) (noting that a company violated Section 7 when employer's handbook prohibited “making disparaging remarks when discussing the company or supervisors, and from depicting the company in any media, including but not limited to the internet,” and also prohibited “posting pictures of themselves in any media, including the internet, which depict the company in any way”); FRANKEL ET AL., *supra* note 189 § 4.68 (“Avoid using statements, photographs, video, or audio . . . that disparage customers, members, employees of [name of employer], suppliers . . .”). *But cf.* Christopher P. Calsyn & Moring, LLP, *Employer Social Media Policies: The “Do’s and Don’ts,”* LEXISNEXIS (May 4, 2013), <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2013/05/04/employer-social-media-policies-the-dos-and-don-ts.aspx> (advising companies not to “include blanket prohibitions on defaming or otherwise damaging the reputation of coworkers, clients or the company”); David Greenhaus, *IT Resources and Communications Systems Policy*, WESTLAW: PRACTICAL LAW (Aug. 28, 2018) (“Re-

Whether employers make changes to these form policies and agreements will depend in part on the breadth of the legislation ultimately passed. Where the law only limits settlement agreements, employers need not make changes to their standard confidentiality agreements and social media policies.<sup>193</sup>

If states pass broader legislation, employers are likely to include carve-outs to their confidentiality agreements and social media policies. The carve-outs might explain, for example, that the term “confidential information” does not include information regarding harassment, discrimination, or other unlawful conduct. Of course, an argument could be made that such carve-outs are not strictly necessary. Depending on the wording of the contract, the term “confidential information” could be interpreted to exclude disclosures of unlawful conduct. Absent state legislation, federal protections essentially create an implied exception to confidentiality agreements and social media policies. Nevertheless, because intellectual property can be so critical to a company’s business, it will not want to risk the enforceability of its confidentiality provision, or the agreement as a whole. Carve-outs will likely be viewed as a prudent measure to ensure the integrity of confidentiality agreements.

Social media policies are likely to include similar carve-outs for provisions in the policy that limit an employee’s speech. However, employers might not want employees to know that they are entirely free to speak out on matters that could be extremely embarrassing to the company or damage their brand. Consequently, employers have an incentive to obscure the nature of the carve-out by using technical language. For example, some employers responded to NLRB decisions regarding concerted activity with vague carve-outs, even as NLRB opinions cautioned that such language would not pass legal muster.<sup>194</sup> Some employers included exceptions in their social media policy for

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member that you are also bound by [EMPLOYER NAME]’s policy against [defamation and/or disparagement].”). As discussed in greater detail below, these broad policies may already violate Section 7 of the National Labor Relations Act.

193. Sometimes settlement agreements incorporate these earlier policies by reference. In those situations, the settlement agreement should contain a carve-out for the types of speech restrictions enumerated in the applicable statute.

194. See also *Three D, LLC*, 361 N.L.R.B. 308, 314 (Aug 22, 2014) (scrutinizing social media policies and finding a Section 7 violation where “employees would reasonably interpret it to encompass protected activities”); *Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. 646, 647 (Nov. 19, 2004) (finding that policies violate Section 7 when “employees would reasonably construe the language to prohibit Section 7 activity”); Levinson, *supra* note 142, at 314, 335 (noting some

“rights under Section 7 of the NLRA,” without explaining what those rights include,<sup>195</sup> or noted that the policy did not apply where prohibited by law.<sup>196</sup> In the context of harassment and discrimination, employers have an incentive to use coded language in their carve-outs, such as exceptions for disclosures “protected by law,” which does not reveal the scope of the carve-out.

#### B. NARROWER LANGUAGE IN SETTLEMENT AGREEMENTS WITH COMPLAINANTS

Settlement agreements with harassment victims will likewise be affected by the proposed legislation, although the precise effect will depend on the structure of the law. Most of the proposed legislation renders certain restraints unenforceable, whether in connection with litigation or not.<sup>197</sup> By contrast, California’s proposed Senate Bill 820 is an amendment to the Code of Civil Procedure, and its scope is limited to “civil actions” where the pleadings allege sexual assault, sex-based harassment, or sex-based discrimination.<sup>198</sup> Because the statute is limited to post-filing settlements, secrecy-related provisions would still be permitted in settlement agreements signed before a case is filed.

Settlement agreements (often labeled “separation agreements” or “separation and release agreements”) can contain several different types of provisions that might limit an employee’s ability to speak out:

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uncertainty over the type of carve-out that would be satisfactory to the NLRB); Robson, *supra* note 141, at 87, 97 (noting Section 7 violations where employers discipline pursuant to an overbroad social media policy).

195. See, e.g., FRANKEL ET AL., *supra* note 189, § 4:67 (providing a form social media policy containing a carve-out: “This provision does not apply to employees’ right to discuss terms and conditions of employment and engage in concerted activities under Section 7 of the National Labor Relations Act . . . .”); Oberdorfer, *supra* note 189 (“Nothing in this policy is intended or will be construed to restrict any of your rights under the National Labor Relations Act . . . or your rights to discuss the terms and conditions of your employment.”). *But see Company Social Media Use Guidelines*, WESTLAW: PRACTICAL LAW (2018) (containing a much more specific carve-out for concerted activity, referencing “discussing wages, benefits, or terms and conditions of employment, forming, joining or supporting labor unions, bargaining collectively through representatives of their choosing, raising complaints about working conditions for their and their fellow employees’ mutual aid or protection, or legally required activities”).

196. See Levinson, *supra* note 142, at 334–35.

197. S. 1300, 2017–18 Reg. Sess. (Cal. 2018); Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2018); S. 7507-C, 241st Leg., Reg. Sess. (KK)(D) (N.Y. 2018); S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

198. S. 820, 2017–18 Reg. Sess. § 1(a) (Cal. 2018).

**Non-disclosure provision.** Non-disclosure provisions can prohibit the employee from revealing the amount of the settlement, discussions leading up to the settlement, the fact of the settlement agreement, or even the facts giving rise to the dispute.<sup>199</sup>

**Non-disparagement provision.** Non-disparagement provisions, in their narrow form, only prohibit the employee from engaging in defamation, slander, or libel.<sup>200</sup> Broader non-disparagement provisions prohibit the employee from making statements that are harmful to the reputation of the other party to the agreement.<sup>201</sup>

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199. See *Voluntary Employment Separation Agreement and Release*, Exhibit 10(u), U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/74303/000119312504036954/dex10u.htm> (last visited Oct. 22, 2018); see also *Gulliver Schs., Inc. v. Snay*, 137 So. 3d 1045, 1046 (Fla. Dist. Ct. App. 2014) (referencing the confidentiality provision of a settlement agreement providing that the “plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this Agreement”); *Wesson v. FMR, LLC*, 34 Mass. L. Rptr. 539, 541 n.4 (Mass. Dist. Ct. 2017) (“The Employee will keep the existence, terms, and amount of this Agreement in strictest confidence and not disclose any information concerning this Agreement to anyone other than her lawyer, her spouse, immediate family members, financial adviser, accountants or as required by law.”); *Mathis v. Controlled Temperature, Inc.*, No. 275323, 2008 WL 782634, at \*6 (Mich. Ct. App. 2014) (quoting a settlement agreement providing that “the fact of and terms of this Agreement are strictly confidential and shall not verbally or through disclosure in writing of any kind be communicated . . . to any person or entity by any means”); *Carlini v. Gray Television Grp., Inc.*, No. A-15-1239, 2017 WL 1653624, at \*1 (Neb. Ct. App. May 2, 2017) (quoting settlement agreement providing that the “existence of this Agreement, the substance of this Agreement, and the terms of this Agreement shall be kept absolutely and forever confidential”).

200. *Separation Agreement and Mutual Release*, Exhibit 10.27, U.S. SEC. & EXCHANGE COMMISSION (Dec. 28, 2004), [https://www.sec.gov/Archives/edgar/data/1096560/000129707705000001/ex10\\_27.htm](https://www.sec.gov/Archives/edgar/data/1096560/000129707705000001/ex10_27.htm).

201. *Mutual Release and Non-Disparagement Agreement*, Exhibit 10.3, U.S. SEC. & EXCHANGE COMMISSION (Jan. 28, 2004), <https://www.sec.gov/Archives/edgar/data/866054/000086605404000014/release.htm>; see also *Smelkinson Sysco v. Harrell*, 875 A.2d 188, 191 (Md. Ct. Spec. App. 2005) (citing a non-disparagement provision stating that “Mr. Harrell agrees not to disparage the Company and the Company agrees not to disparage Mr. Harrell”); *Wesson*, 34 Mass. L. Rptr. at 541 n.3 (noting a non-disparagement provision where an employer promised to deliver signed statements from enumerated managers agreeing “to not make any statements, take any actions, or conduct themselves in any way that adversely affects Employee’s . . . personal or professional reputation or endeavors”); *Mathis*, 2008 WL 782634, at \*6 (discussing an agreement providing that “she shall not verbally or in writing by any means to any other person . . . disparage, criticize, condemn, or impugn the reputation or character of CTI, its shareholders, affiliates, agents, officers, directors and/or employees”); *Carlini*, 2017 WL 1653624, at \*1 (referencing a settlement agreement providing

**Non-cooperation clause.** Non-cooperation clauses prohibit parties from cooperating with others in litigation against the company, although they typically include a carve-out for subpoenas or court orders.<sup>202</sup>

**Affirmative statements.** In its more mundane form, a settlement agreement might contain a promise to provide a neutral recommendation.<sup>203</sup> However, the Harvey Weinstein scandal revealed some instances where settlement agreements required victims to make affirmative statements. In one case, Weinstein required one of his victims to sign an attached statement about her work experience, which could be used to undermine her credibility should she later take a contrary public position.<sup>204</sup> In another contract, Weinstein apparently required a signatory to say “positive things” if she were ever contacted by the media.<sup>205</sup>

The proposed legislation will tend to affect the enforceability of all four types of provisions. These statutes reach provisions that prevent the disclosure of information about certain claims, and all the above-listed provisions could have that effect.<sup>206</sup> For example, when a victim discloses workplace harassment, it will have a detrimental effect on the employer’s reputation, and thereby breach a broad non-disparagement provision. Enforce-

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that the “Employee will not make any disparaging public remarks about the Company or any of its officers, directors, agents, or employees”).

202. See Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 21 (2002); see also *Smelkinson*, 875 A.2d at 191 (enforcing provision that plaintiff would “neither voluntarily aid nor voluntarily assist in any way third party claims made or pursued against the Company”).

203. See, e.g., *Wesson*, 34 Mass. L. Rptr. at 541 n.3 (noting that in its settlement, an employer agreed to sign a reference document attached to the agreement); *Mathis*, 2008 WL 782634, at \*11 (discussing a settlement agreement providing that “upon request, it shall provide a neutral reference for Mathis’ [sic] future employment, confirming the dates and positions of her employment with CTI only”).

204. Terry Gross, *‘Times’ Reporters Describe How a Paper Trail Helped Break the Weinstein Story*, NPR (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564310240/times-reporters-describe-how-a-paper-trail-helped-break-the-weinstein-story>.

205. *Id.*

206. S. 820, 2017–18 Reg. Sess. (Cal. 2018) (“prevents the disclosure of factual information”); Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018) (“prohibiting . . . from disclosing”); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2017) (“purpose or effect of concealing”); S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017) (“suppresses or attempts to suppress”); cf. S. 1300, 2017–18 Reg. Sess. (Cal. 2018) (limited to non-disparagement agreements).

ment of that non-disparagement provision would prevent an employee from disclosing the facts of her case, and would therefore be unenforceable as written.

The legislation may even affect the enforceability of narrow non-disparagement provisions, which prohibit only statements that qualify as defamation, libel, or slander. As a technical matter, these provisions do not restrict a victim from making truthful statements about the company or its employees. An employee who speaks out is subject to liability for defamation, libel, and slander regardless of whether the employee agrees to refrain from doing so in a contract. However, it is not difficult to imagine how such a provision would make an employee fearful of speaking and in that respect, prevent or suppress an employee's disclosure of facts relating to her case. Consequently, it is possible such provisions would likewise be declared unenforceable as written.

Likewise, a non-cooperation agreement could prevent a victim from disclosing harassment to another employee considering suing the employer, which also has the effect of concealing the facts. Compelled statements could also have the effect of concealment, where the victim worries it will be used to impeach her credibility, or where a forced positive statement falsely suggests the absence of misconduct.

Speech-restricting provisions may be salvageable in some states through carve-outs or clarifying language. For example, a non-disparagement provision might be salvageable with a carve-out stating that nothing in the agreement should be interpreted to limit an employee's ability to disclose harassment, or other protected claims enumerated in the statute.

By contrast, non-cooperation clauses and affirmative statement clauses rest on somewhat shakier ground. Even before the MeToo movement, commentators have questioned the legality of such clauses. Although non-cooperation clauses typically contain an exception for subpoenas, critics note that such exceptions nevertheless hamper the civil justice system by making past litigants unavailable as voluntary witnesses. Jon Bauer argues that attorneys should not permit clients to sign such clauses because they violate attorney ethics rules, which prohibit attorneys from actions "prejudicial to the administration of justice."<sup>207</sup> Stephen

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207. Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 481 (2008). But see Smelkinson, 875 A.2d at 191 (enforcing non-cooperation provision).

Gillers went further, arguing that lawyers commit obstruction of justice when they request non-cooperation clauses.<sup>208</sup>

While an employer's promise to provide the victim with a truthful recommendation letter would not necessarily run afoul of the statutory restrictions, provisions requiring victims to make affirmative statements would be problematic. Requiring an employee to make an affirmative statement implies that it is contrary to what the victim would otherwise say, and therefore may be inaccurate or misleading.<sup>209</sup> Such provisions would consequently be suspect under the proposed legislation, with the exception of pre-filing agreements under California's Senate Bill 820.<sup>210</sup>

In summary, while employers will still be able to demand some speech restrictions through settlement agreements, those restrictions will be substantially limited.

The legislation may also have some unintended effects, as it relates to the victim's ability to request secrecy of the employer. For broader legislation without an express exception for victim requests, non-disclosure provisions may need to include a carve out allowing the employer to disclose facts relating to the case. Similarly, broad non-disparagement provisions in the victim's favor may need to include a carve out allowing the employer to disclose truthful facts. By contrast, narrow non-disparagement provisions might be enforceable to protect the victim, since they wouldn't operate to conceal the misconduct.

The possibility that this legislation might restrict a victim's ability to request secrecy from the employer implicates larger policy debates raised in the literature.<sup>211</sup> Prominent plaintiff's

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208. Gillers, *supra* note 202, at 21–22.

209. These provisions are, however, exceptionally rare.

210. It might also be permissible if requested by the victim under California S. 820 and New York S. 7507C, but such statements would likely need to be mutual for them to be credibly interpreted as requested by the victim. *See* S. 820, 1999 Leg. (Cal. 1999); S. 7505-C, 24th Leg., Reg. Sess. (N.Y. 2018).

211. In addition, Scott Moss's analytical framework would predict that the New York, Pennsylvania, and New Jersey approach may have distributive implications for plaintiffs and make such cases more difficult to settle overall. *See* Moss, *supra* note 153, at 880. In a regime where employers value secrecy more than employees, employees are able to extract a higher settlement than they otherwise would as a result of settlement. *Id.* at 879–80. Removing that option may mean lower settlements for plaintiffs, or in some cases no settlement. *Id.* at 889. Nevertheless, lower settlement rates may be preferred as a matter of public policy. The premium plaintiffs have received in the past for confidential settlements could be characterized as a “negative externality” in economic terms, because the promise of confidentiality comes at the expense of future victims who could have benefited from the information. MeToo is a case in point,

lawyer Gloria Allred argued that some plaintiffs prefer secrecy and their preferences should be honored.<sup>212</sup> As Carrie Menkel-Meadow argued, parties should be able choose, since the dispute belongs to them.<sup>213</sup> However, as Minna Kotkin argues, the choice is illusory; if employers are allowed to ask for these provisions, they will.<sup>214</sup> Indeed, the California statute would appear to allow the victim to “request” a mutual non-disclosure provision, which could potentially be susceptible to employer manipulation.

The legislation may also have an unintended effect with respect to parties’ bargaining strategy. Scott Moss’s law and economics analysis is instructive. As he observed, a California rule that restricts secret settlements post-filing, but permits them on a pre-filing basis, would push employers towards early settlement, which would save litigation costs overall.<sup>215</sup> While such an approach would generally promote settlement, it also undermines the transparency-related goals that motivated the legislation in the first place. This approach is also likely to create an adverse selection problem, where employers have an incentive to settle the most egregious cases before they are revealed in litigation.<sup>216</sup> If California legislators intended to expose the worst abuses of settlement agreements, Senate Bill 820 is unlikely to achieve that result. After all, cases that have been filed with a court are already part of the public record, providing some notice to current and future employees about sexual harassment or discrimination. By contrast, Harvey Weinstein was able to conceal his conduct by settling cases as quickly as possible on a pre-filing

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as the high-profile harassers identified in 2017 were revealed to have harassed multiple victims. Corey, *supra* note 13. In this view, prohibitions on pre- or post-filing provisions correct the negative externality, and essentially force employers to address the risk that the accused employee may engage in similar misconduct in the future.

212. James Rufus Koren, *Weinstein Scandal Puts Nondisclosure Agreements in the Spotlight*, L.A. TIMES (Oct. 23, 2017), <http://www.latimes.com/business/la-fi-weinstein-nondisclosure-agreements-20171023-story.html>.

213. See Menkel-Meadow, *supra* note 156, at 2694.

214. See Kotkin, *supra* note 162, at 929–30.

215. Moss, *supra* note 153, at 886, 889.

216. See Zev Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J.L. & POL’Y 217, 261 (2016) (“[E]mployers settle cases with bad facts at early stages.”); Jennifer B. Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1116 (2017) (“[E]mployers have a financial incentive to settle the most egregious discrimination claims before a lawsuit is filed . . .”).



basis.<sup>217</sup> A California SB 820-type rule would enable future Harvey Weinstens to continue in that pattern, unless they happen to encounter a plaintiff who refuses to settle pre-filing.

If the ultimate purpose of legislation is to expose misconduct that had previously been concealed, California would come closer to doing so through a rule that prohibited all such agreements (pre-filing or otherwise), or through a rule that only prohibits secrecy for *pre-filing* settlements. A pre-filing rule would permit secrecy provisions in settlements after a case has been filed. That would enable both parties to use the restrictions to protect their reputations, while satisfying the public interest in having some record of a claim. Indeed, in recent months, victims have used non-disparagement and non-disclosure agreements to their advantage, arguing that harassers violated those provisions when they suggested that the claimant's lawsuit lacked merit.<sup>218</sup> Even before the MeToo movement, victims periodically sued to enforce non-disparagement and non-disclosure provisions.<sup>219</sup>

Another option might be to draft asymmetric legislation that would allow the victim to restrain the employer from discussing her case without her prior consent, but that would prohibit the employer from demanding secrecy from the victim. Such an option would give the victim elective secrecy—the victim need not keep the information secret at a later date but would be assured that the employer would keep such information confidential. If the victim chooses to speak out at a later date, courts could treat

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217. Gross, *supra* note 204.

218. Gene Maddaus, *Two More Accusers Sue Bill O'Reilly for Defamation*, VARIETY (Dec. 20, 2017), <http://variety.com/2017/biz/news/bill-oreilly-defamation-more-accusers-1202646279>.

219. See, e.g., *Tomson v. Stephan*, 696 F. Supp. 1407, 1407 (D. Kan. 1988) (alleging breach of confidentiality provision when defendant asserted publicly that the claim was totally unfounded). In *Tomson*, the claimant ultimately survived summary judgment based on a separate “false light” publicity claim, which challenged the defendant's public assertions that her claim was totally unfounded. *Id.* at 1412–13; see also *Welsh v. City of S.F.*, No. C-93-3722, 1995 WL 714350, at \*1 (N.D. Cal. Nov. 27, 1995) (alleging defamation against police chief for calling her harassment lawsuit “absolutely absurd” and “false and malicious”); *Wesson v. FMR, LLC*, 34 Mass. L. Rptr. 539, 541 (Mass. Dist. Ct. 2017) (employee sued for breach of settlement provisions relating to providing an employment reference); *Halco v. Davey*, 919 A.2d 626, 628 (Me. 2007) (employee stated cognizable breach of contract claim based on non-disclosure and non-disparagement provision when sheriff publicly stated that the county “had a really good case”). But see *Mathis v. Controlled Temperature Inc.*, No. 275323, 2008 WL 782634, at \*6–7 (Mich. Ct. App. Mar. 25, 2008) (finding breach of non-disparagement provision of settlement agreement where the plaintiff told a prospective employer that she had been harassed and that she won her dispute).

such speech as a waiver of the employer's promise of confidentiality, which would enable the company to respond in the event of a public relations crisis.

C. NO MORE PROMISES OF SECRECY TO THE ACCUSED EMPLOYEE

Perhaps the most significant, and underexamined, effect of the legislation will be in limiting employers' ability to make secrecy-related promises to employees accused of harassment. This may result in broader policies where employers refuse to make secrecy-related promises to any departing executive. On those occasions where employers agree to enter into such provisions, they will likely be substantially narrowed or include carve outs commensurate with the scope of the statute.

While media coverage of settlement agreements has focused almost exclusively on harassment victims, it is also quite common for departing executives to enter into settlement agreements with employers. Executives entitled to severance under their executive employment contracts often include provisions requiring them to sign a release to receive that severance.<sup>220</sup> In addition, employees accused of harassment or other misconduct sometimes threaten to sue their employers for claims such as

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220. See, e.g., Richard Harroch, *Negotiating Employment Agreements: Checklist of 14 Key Issues*, FORBES (Nov. 11, 2013), <https://www.forbes.com/sites/allbusiness/2013/11/11/negotiating-employment-agreements-checklist-of-14-key-issues/#667fd60d24c6> (advising that executives should be required to sign a release in order to receive severance); Idexx Laboratories, *Form of Executive Employment Agreement*, U.S. SEC. & EXCHANGE COMMISSION, [https://www.sec.gov/Archives/edgar/data/874716/000087471607000002/exh10\\_5formemploygmt.htm](https://www.sec.gov/Archives/edgar/data/874716/000087471607000002/exh10_5formemploygmt.htm) (last visited Oct. 22, 2018) (requiring executive to sign a release to receive severance); Midstates Petroleum Company, Inc., *Form of Executive Employment Agreement*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1533924/000119312512018816/d248475dex107.htm> (same); Symantec Corp., *Executive Employment Agreement*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/849399/000119312512366711/d394740dex1001.htm> (last visited Oct. 22, 2018) (same).

defamation,<sup>221</sup> privacy violations,<sup>222</sup> or breach of contract.<sup>223</sup> Even if these claims lack merit,<sup>224</sup> the employer may nevertheless enter into some form of settlement agreement in order to eliminate the risk of any subsequent lawsuit.<sup>225</sup>

221. *Meyerson v. Harrah's E. Chi. Casino*, 67 F. App'x 967, 968 (7th Cir. 2003) (affirming summary judgment against defamation claim by accused, because "truth is a complete defense to defamation"); *Welsh*, 1995 WL 714350, at \*9 (statements alleged to be defamatory covered by the litigation privilege); *Rudebeck v. Paulson*, 612 N.W.2d 450, 454 (Minn. Ct. App. 2000) (manager's defamation claim in response to harassment lawsuit unviable due to qualified privilege).

222. *Smith v. Ark. La. Gas Co.*, 645 So. 2d 785, 791 (2d Cir. 1994) (qualified privilege applies to privacy claims, including false light and "unreasonable public disclosure of embarrassing private facts" where "an employer who undertakes an investigation of employee misconduct is protected by a qualified or conditional privilege when making a statement in good faith, on a subject in which the employer has an interest or duty, to persons having a corresponding interest or duty"); *Lloyd v. Quorum Health Res., LLC*, 77 P.3d 993, 1001 (Kan. Ct. App. 2003) (quoting *Dominguez v. Davidson*, 974 P.2d 112 (Kan. 1999) (noting that elements of false light are: "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person)"). The court in *Lloyd* also noted that defamation and false light claims are similar in that "truth and privilege are defenses available in both causes of action." *Id.* at 1002.

223. *Wong v. Digitas Inc.*, No. 3:13-CV-00731, 2015 WL 59188, at \*3, \*7 (D. Conn. Jan. 5, 2015) (harassment procedures in anti-harassment policy did not create an exception to the employment-at-will doctrine that would require the employer to interview the accused before terminating him); *Carlton v. Dr. Pepper Snapple Grp., Inc.*, 228 Cal. App. 4th 1200, 1210–11 (Cal. Ct. App. 2014) (breach of contract claim brought by accused employee properly dismissed because he failed to identify contractual promises that were breached); *see also* *Martin v. Baer*, 928 F.2d 1067, 1072–73 (11th Cir. 1991) (affirming summary judgment claim against accused employee alleging breach of contract and infliction of emotional distress, which were eventually dismissed on the basis that harassment policy did not create an implied duty to those accused of harassment and the absence of intentional conduct on the part of the employer); *Orr v. Meristar Vt. Beverage Corp.*, No. 2003-143, 2003 WL 25745111, at \*2 (Vt. Aug. 2003) (affirming summary judgment on breach of contract claim brought by accused).

224. *See, e.g., Welsh*, 1995 WL, 714350 at \*4 (accused filed counterclaim against harassment plaintiff for defamation, but lost on summary judgment for failing to exhaust administrative remedy); *Rudebeck v. Ford Motor Co.*, 612 N.W.2d 450, 454 (Minn. Ct. App. 2000) (manager sued employer and complainant for defamation in response to employee's harassment lawsuit); *Rausman v. Baugh*, 248 A.D.2d 8, 10 (N.Y. App. Div. 1998) (supervisor terminated for harassment brought defamation claim against complainant and the employer).

225. For example, accused harassers may have valid claims for indemnification under state law. *See, e.g., CAL. LAB. CODE* § 2802(a) (West 2016) (providing for indemnification for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties"); *Rudebeck*, 612 N.W.2d at 455 (quoting Del. Ch. Code § 145(c), noting that Delaware Chancery Code provides for "mandatory indemnification for any person who is a party

While settlement agreements are typically drafted to consist almost exclusively of promises in the employer's favor, attorneys for departing executives commonly request that certain promises be made mutual. These include three of the four types of provisions previously discussed: non-disclosure provisions, non-disparagement provisions, and promises to make affirmative statements.<sup>226</sup>

While employers may have previously been somewhat receptive to such requests, they would no longer be feasible under the proposed legislation. First, a provision where the employer promises not to disclose information about the accused in connection with a harassment claim would not be enforceable under any of the proposed statutes. Such a provision would clearly prevent or suppress disclosures relating to the harassment.

Similarly, a broad non-disparagement provision would prevent or have the effect of concealing the employer's ability to speak about the misconduct, which would violate the statute. Narrow non-disparagement provisions are difficult to assess where they restrain employers. In theory, employers ought to understand that a promise not to defame the employee does not preclude them from disclosing truthful information. Nevertheless, as to accused employees, employers might be fearful that repeating or conveying information from the victim could expose them to liability and therefore restrict them from speaking. If so, such a provision could have the "effect of" concealment, violating the proposed New York law.<sup>227</sup>

Employers are also likely to be reluctant to provide positive recommendation letters as part of a settlement with an accused harasser. A letter that contains positive information about the accused, while omitting information about the accusations, may have the effect of concealing misconduct.

These same factors might limit an employer's willingness to make secrecy-related promises to any executive in the course of negotiating settlement and release agreements upon their departure. Even if an individual has not been accused of misconduct, the employer might later learn of accusations against that employee. At that later point in time, those provisions would

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to a lawsuit by reason of the fact that he is or was a director, officer, employee or agent of the corporation" where the director or officer "has been successful on the merits or otherwise in the defense of any action").

226. Non-cooperation clauses are not something that a company would be willing to make mutual.

227. S. 6382A, 2017 S., Reg. Sess (N.Y. 2017).

serve to prevent disclosures of misconduct, in violation of the rule. To avoid this problem, employers may prefer to avoid secrecy promises in these agreements altogether, or to include carve outs for disclosures relating to claims specified in the statute.

#### IV. VOLUNTARY CHANGES TO DISCIPLINARY PRACTICES

Employers are likely to make substantial changes to their practices beyond those compelled by law. The MeToo movement produced a substantial shift in the risks associated with harassment claims.<sup>228</sup> Before MeToo, harassment was viewed as a risk that employers could largely contain. Harassment is not a new legal risk; employers now have some thirty years of experience in dealing with harassment claims. Consequently,<sup>229</sup> harassment claims were routine enough to be viewed as a cost of doing business, which did not demand substantial scrutiny or revision of their practices. In addition, employers could mitigate the risk of a large lawsuit through Employment Practices Liability Insurance, which can cover both the fees and the settlement or judgment associated with harassment claims.<sup>230</sup>

MeToo altered this calculus considerably because employees suddenly felt free to air their experiences of harassment publicly. This imposed reputational costs overlooked in prior decision making by employers. The risk of bad publicity is less manageable, and potentially far greater, than the risk of litigation. First,

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228. Jena McGregor, *Fear and Panic in the H.R. Department as Sexual Harassment Allegations Multiply*, WASH. POST (Nov. 30, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/11/30/fear-and-panic-in-the-h-r-department-as-sexual-harassment-allegations-multiply> (quoting H.R. consultant, who stated: “The playbook for H.R., when it comes to sexual harassment, is a 25- to 30-year-old playbook,” in which “[e]mployees made a complaint, H.R. took time to investigate, and the matter generally stayed private until it could be resolved”).

229. *Id.*

230. See, e.g., HISCOX LTD., THE 2017 HISCOX GUIDE TO EMPLOYEE LAWSUITS HANDBOOK, 1, 6 (2017), <https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf> (among employment charges that resulted in defense and settlement, average cost was \$160,000; insured company’s out-of-pocket cost in connection with those charges was \$50,000); *EPLI Claims Reach Tipping Point Amid Anti-Sexual Harassment Movement*, MYNEWMARKETS.COM (Feb. 21, 2018), <https://www.mynewmarkets.com/articles/183182/epli-claims-reach-tipping-point-amid-anti-sexual-harassment-movement> (noting “[t]he insurance industry is expecting a wave of employment practices liability insurance (EPLI) claims to roll in following the recent storm of sexual harassment allegations,” and that EPLI policies will most likely cover such claims).

public grievances are not confined to the statute of limitations, which require plaintiffs to file with the EEOC less than a year after the discrimination occurred.<sup>231</sup> Employees might complain publicly about harassment that occurred years or even decades prior. Second, public complaints are not subject to the legal constraints that tend to cabin an employer's liability. The court of public opinion is not so concerned about whether the conduct met the formal legal requirements for severe or pervasive conduct or whether the employer's response was legally reasonable. MeToo revealed the chasm between public expectations and legal realities, portraying employer practices as unfair, and employees' treatment as outrageous.<sup>232</sup>

Social media makes brands precarious at a time when brand and reputation represent a substantial part of a company's value. In some cases, the brand may be most of a company's value. The Weinstein company filed for bankruptcy.<sup>233</sup> Wynn Resorts lost \$2 billion in stock value after its founder and chief executive faced harassment accusations.<sup>234</sup> Venerable media brands, including NBC, PBS, NPR, and CBS have seen their public image tarnished. In recent months, public revelations have shifted from accusations involving celebrities to those involving previously unknown executives at well-known companies and non-profits like Nike, Bank of America, Humane Society, the New York City Ballet, and Monster Energy.<sup>235</sup>

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231. The filing deadline depends on whether a state or local agency enforces a similar law, in which case the usual 180-day deadline is extended to 300 days. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Oct. 22, 2018).

232. MeToo is a variation of what scholars have been saying for some time—albeit in much more theoretical fashion—that employers have not done right by victims, and the law has not done enough to help. Scholars, however, assumed the law would lead in fixing the problem, and there was at least some reason to think that might be the case. Catharine MacKinnon has argued that judicial opinions recognizing harassment predated and indeed altered cultural shifts and changing norms around harassment. See Catharine MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 817 (2002). But MeToo produced a different course of events, where changing cultural norms act directly on employer practices, with or without changing legal rules.

233. Barnes, *supra* note 6.

234. John Foley, *Wynn Resorts' Slide Shows Sexual Misconduct Is a Financial Risk*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/business/dealbook/steve-wynn-sexual-misconduct.html>.

235. Sarah Almukhtar et al., *After Weinstein: 68 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>; Julie Creswell et al., *At Nike, Revolt Led by Women Leads to*

Harassment, previously viewed as a contained liability, has morphed into a bet-the-company risk.<sup>236</sup>

This shift imposes a form of forced transparency on employers, where they must presume that misconduct might make its way to the public stage and they will have to defend their approach to an angry public. Legal reforms will exacerbate concerns about bad publicity as employers can no longer contain victims through contracts and policies.

Within this environment, employers are also likely to face heightened legal risks. The MeToo movement may embolden more complainants to come forward about their experiences of harassment, which increases the number of potential lawsuits employers face. If courts ultimately relax the standard for severe or pervasive harassment and demand more of employers attempting to establish the *Faragher* defense, employers face greater potential liability. These risks put pressure on employers to identify ways to limit their exposure to future claims.

Employers are now changing their practices, and will likely continue to do so, as explained in greater detail below. Employers have already proven more willing to terminate documented harassers.<sup>237</sup> This newfound willingness to terminate will also open up alternate avenues for meaningful discipline that employers previously avoided, such as demotions, promotion denials, and substantial pay cuts. Employers may also revise their privacy policies, and draft broader definitions of “cause” in their executive employment agreements. While investigation processes have been the subject of some criticism during the MeToo movement, those critiques conflate the employer’s processes with the results-oriented approach employers previously took to discipline.

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*Exodus of Male Executives*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/28/business/nike-women.html>; Emily Peck, *Monster Energy Vice President Accused of Sexual Harassment Resigns*, HUFFINGTON POST (Jan. 31, 2018), [https://www.huffingtonpost.com/entry/monster-energy-john-kenneally-resigns\\_us\\_5a722351e4b05253b275370a](https://www.huffingtonpost.com/entry/monster-energy-john-kenneally-resigns_us_5a722351e4b05253b275370a); Jessica Silver-Greenberg & Matthew Goldstein, *Bank of America Executive Departs After Misconduct Claim*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/business/bank-of-america-sexual-misconduct-omeed-malik.html>.

236. McGregor, *supra* note 228 (human resources consultant characterizing employers as “worried these meteorites [complaints] could be coming . . . but they have no idea how to protect their house”).

237. *Id.*; Elisabeth Ponsot, *All the Media Men Held to a Higher Standard than Trump, Starting with Billy Bush*, QZ (Nov. 29, 2017), <https://qz.com/1141014/matt-lauer-to-charlie-rose-all-the-media-men-held-to-a-higher-sexual-misconduct-standard-than-donald-trump>.

## A. INVESTIGATIONS ARE NOT THE PROBLEM

The MeToo crisis subjected employer complaint and investigation processes to scrutiny on several different fronts. One form of scrutiny, generally characterized as the due process critique, worries that employers are rushing to judgment and failing to investigate harassment complaints with sufficient care.<sup>238</sup> This critique was often invoked in connection with the Matt Lauer scandal, where NBC terminated Lauer within a few days of when it first received a formal employee complaint.<sup>239</sup>

A second critique takes the opposite position: that employer investigations serve only to paper over a file by documenting weaknesses in the employee's claim to protect from a future harassment lawsuit.<sup>240</sup> In this view, the employer was not taking an even-handed view of the complainant's allegations, but instead trying to game the facts in its favor. A third line of attack argued that employees don't use internal complaint systems because they don't trust them.<sup>241</sup> Critics thus advocated for processes that employees find more trustworthy.<sup>242</sup>

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238. Constance Grady, *Are Men Accused of Harassment Being Denied Their Due Process? Or Are the Victims?*, VOX (Jan. 8, 2018), <https://www.vox.com/culture/2018/1/6/16855434/weinstein-reckoning-sexual-harassment-due-process-daphne-merkin-keillor-franken>.

239. See Christine Emba, *The Due Process Assault Freak-Out Is a Fever Dream*, WASH. POST (Dec. 1, 2017), [https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e\\_story.html](https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e_story.html).

240. Noam Scheiber & Julie Cresswell, *Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/business/sexual-harassment-human-resources.html>; Tovia Smith, *When It Comes to Sexual Harassment Claims, Whose Side Is HR Really On?*, NPR (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564032999/when-it-comes-to-sexual-harassment-claims-whose-side-is-hr-really-on>.

241. Danny Crichton, *HR Has Lost the Trust of Employees. Here Is Who Has It Now*, TECH CRUNCH (Feb. 10, 2018), <https://techcrunch.com/2018/02/10/hr-has-lost-the-trust-of-employees-here-is-who-has-it-now>.

242. In response, a number of third-party complaint handlers have popped up following MeToo, claiming to provide impartial information collection and investigation for employers. Elizabeth Dwoskin & Jena McGregor, *Sexual Harassment Inc.: How the #MeToo Movement Is Sparking a Wave of Start-ups*, WASH. POST (Jan. 5, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups>. A 2012 proposal by Ian Ayres and Cait Unkovic to use "information escrows" to gather employee complaints has also received considerable attention. Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 147 (2012); see also Conor Friedersdorf, *How to Identify Serial Harassers in the Workplace*, ATLANTIC (Nov. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/11/whisper-networks-20/546311>. Their sys-



Contrary to both the first and second critique, employers are quite capable at getting to the bottom of the factual issues and can do so quite efficiently. It is their refusal to act on what they know that made the process appear flawed, and eroded trust in the system.

Employers have always been quite careful about their investigation practices, and are likely to remain so.<sup>243</sup> The due process critique suggests a lack of familiarity with the speed and efficiency of harassment investigations.<sup>244</sup> Many harassment investigations are relatively straightforward. The employer interviews the complainant and the accused, as well as any other witnesses that either party identifies as having relevant information about the alleged harassment.<sup>245</sup> If any of the interviewees identify relevant written evidence—such as e-mails or text

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tem would involve a third party that promises to maintain the secrecy of information provided unless enumerated conditions have been met, for example, if two or more people complain about the same person. Ayres & Unkovic, *supra*, at 147. An information escrow, they argue, would avoid the “first-mover disadvantage,” a reluctance on the part of harassment victims to be the first person to complain. *Id.*

These technological solutions, however, represent a solution to the wrong problem. They presume the problem is the employers’ failure to conduct a proper investigation (either too favorable to the complainant or to the accused), which then distorts their judgment at the end. But the problem never was the way employers collected information. It was what employers did with the information—or more to the point, failed to do—once it had already been gathered.

243. Employers benefit from a qualified privilege from defamation for statements made in connection with an investigation. However, that privilege may be unavailable if the employer “makes allegations without investigation or identifying the source of complaints.” *Rudebeck v. Paulson*, 612 N.W.2d 450, 454 (Minn. Ct. App. 2000).

244. See Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85, 87 (2018) (observing that “harassers arguably get more due process than at-will employees . . . owing to their employers’ efforts to protect themselves from victims’ lawsuits”).

245. See, e.g., Sabrina Dunlap & Heather Sussman, *Investigating Sexual Harassment Complaints: Procedures and Guidelines*, in DRAFTING EMPLOYMENT DOCUMENTS IN MASSACHUSETTS, at exhibit 15B (Michael Rosen ed., 2016) (“WHO to Interview: [c]omplainant, [a]lleged harasser, [w]itnesses, [a]ny persons whom complainant and/or alleged harasser identify as persons with knowledge, [a]ny persons whom company believes may have knowledge.”); Merrick Rossein, *First Prong of Affirmative Defense: Preventing or Correcting Harassment*, in EMPLOYMENT DISCRIMINATION LAW & LITIGATION § 5:27 (2018) (“Investigations generally are conducted when the target of harassment, the alleged harasser, and any witnesses are interviewed without the presence of a coworker or representative.”).

messages—the employer will collect those as well.<sup>246</sup> The company will then decide which facts are disputed, and if they are disputed, which witness was most credible in their account.<sup>247</sup> If the investigation only involves a few witnesses and a small quantity of documents, an employer could easily get to the bottom of the matter reasonably quickly.

Employers are unlikely to start cutting corners on their investigations in the MeToo era. Conducting a defensible investigation has always formed part of successfully asserting the *Farragher* defense, and therefore will remain part of the playbook for defending against claims brought by the victim. Employers also tend to be thorough in their investigations to protect against claims brought by the accused. A flimsy or incomplete investigation risks producing factual errors. In an environment where employers might feel compelled to disclose the results of their investigation, a diligent process and a high degree of certainty about the accuracy of the results, protects against potential defamation and false light claims.<sup>248</sup> In other words, robust investigation practices will remain a good investment for employers.

The second critique—that employers document the investigation in a way that favors their interests—is accurate, but less consequential than it seems. Employers essentially conduct two investigations at once. One is the documented version that tells a story most favorable to the employer. The second is an unofficial, undocumented, and unflinching assessment of the problem for purpose of accurately gauging potential liability. This is the version that human resources tells to the legal department or outside counsel over the phone. It is also the version upon which the employer makes a decision.<sup>249</sup>

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246. See Dunlap & Sussman, *supra* note 245, at exhibit 15B; McGregor, *supra* note 228 (reporting that “[w]ith clear evidence more often available in the form of e-mails, texts or other electronic posts . . . the days of he-said, she-said have essentially been eliminated by technology” because “somebody’s got a screenshot somewhere”).

247. See David Benck & Tessa Thrasher Hughes, *Employment/Labor Law*, 20 ACCA DOCKET no. 3, 72, 82–83 (Mar. 2002) (“The investigator should review the statements provided by the complainant, the alleged harasser, and the witnesses and assess the veracity of all concerned.”); Buchanan Ingersoll, *How to Conduct a Harassment Investigation*, 9 PA. EMP. L. LETTER, no. 11, 2 (1999).

248. See *infra* notes 252–56.

249. It is true that the paper record does not fairly portray the plaintiff’s claims in the event of subsequent litigation. However, should the case proceed to litigation, the plaintiff can construct their own account through the discovery process, and portray the employer’s records as biased.

Ultimately, the flaw in employer processes has not been the investigation process but results-oriented decision making that tends to favor inaction. Before MeToo, employers had strong business incentives to take nonpunitive responses to harassment, particularly where the harasser was perceived as valuable to the business.<sup>250</sup> This disciplinary failure led victims to lose confidence in the employer's complaint process, and made employees reluctant to complain. By contrast, in an environment where companies hold employees accountable for harassment, complainants are more likely to view the employer as an honest broker and consequently make use of the internal processes available to them.

B. THREAT OF TERMINATION MAKES OTHER TYPES OF DISCIPLINE POSSIBLE

As previously noted, in the MeToo era, employers seem more willing to terminate high-level harassers following an investigation. Terminating the harasser serves several purposes. First, it prevents other employees in the workplace from being affected. Second, it removes constraints on the victim's career, which might otherwise be compromised through a continued reporting relationship to the harasser or a transfer to another department. Third, it mollifies the victim, making them less likely to publicly complain about harassment. Lastly, it provides a defensible story about the employer's response if the harassment is later publicly disclosed.

Once termination becomes a common response to harassment, it also makes other meaningful forms of discipline—like a demotion or promotion denial—possible.

This argument seems counterintuitive, but it aligns with theory and practice from the field of negotiation. In the negotiation context, the value of a proposed agreement is measured in terms of the harasser's best alternative to a negotiated agreement (BATNA).<sup>251</sup> In a pre-MeToo context, executives assumed that their employer would be reluctant to terminate them, and would almost certainly not disclose their termination publicly, because it would be too costly to the employer's reputation. Executives also knew that they might be difficult to replace, and

250. Arnow-Richman, *supra* note 244, at 87 ("We need greater institutional accountability for the conduct of the those at the top of the workplace hierarchy, alongside greater protection for the rank-and-file.").

251. ROGER FISHER & WILLIAM URY, *GETTING TO YES* 99 (Bruce Patton ed., 3d ed. 2011).

that the loss of revenue associated with their talent would be salient. If the company imposed discipline that the executive would find unpalatable, the executive could always leave to work for a competitor. In negotiation terms, the executive's BATNA was quite good. Even though companies did not negotiate explicitly with employees over the terms of their discipline, they would have chosen a form of discipline that was preferable to the executive's BATNA. So, the companies would select superficial forms of discipline, like training, or a letter in the harasser's personnel file.

The MeToo movement altered the balance of power between highly positioned harassers and companies. Executives now know that the employer would seriously consider termination, and may even do so publicly, for all of the reasons previously described. Executives also know that if they quit, their prospects for reemployment may not be as good as they once were, since companies may perform more due diligence regarding whether the executive had been accused of misconduct. The executive's BATNA is substantially worse. This gives the company a lot more latitude to impose serious discipline. The company knows that the executive is unlikely to quit. While the company could simply terminate the employee, it now has the flexibility to impose other forms of meaningful discipline, like a demotion, loss of supervisory responsibility, promotion denial, pay cut, transfer to an undesirable location, or a zero on their annual performance review.

Depending on the context, these intermediate forms of discipline might be appropriate. For example, a demotion or transfer for the accused might make it possible for the victim to continue on the preexisting career path with minimal disruption. It may also reduce the harasser's power and status, which will cabin the harasser's opportunity to harass others. And, depending on the context, an intermediate form of discipline might be proportional to the misconduct and support a defensible narrative should the harassment later become public.

#### C. WARNINGS IN PRIVACY POLICIES THAT DISCIPLINARY DECISIONS MAY BE DISCLOSED

MeToo also altered employers' willingness to publicly disclose a decision to terminate a documented harasser following an investigation. Employers previously treated personnel files as sacrosanct and attempted to avoid public terminations of high-level employees at any cost. High-level executives accused of

misconduct who were effectively terminated were given the option to resign in public. Part of this was in the company's financial interests; revealing employee misconduct would reflect poorly on the company. Employers were also worried about litigious former executives who might threaten a defamation claim<sup>252</sup> or even a "false light" invasion of privacy claim.<sup>253</sup> Me-Too changed this calculus because the allegations of harassment were in many cases already public or soon to be made public. In this context, a public disclosure of employee discipline did not produce a public scandal so much as mitigate it.

Crises have a way of focusing a company's attention on policies and contracts that created risks associated with its preferred course of action. One such source of risk is its policy around privacy. Employee privacy is a flexible concept that derives from a combination of reasonable employee expectations,

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252. For a statement to be defamatory it must be "communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him or her in the estimation of the community." *Lewis v. Equitable Life Assurance, Soc'y*, 389 N.W.2d 876, 886 (Minn. 1986). However, employers can assert a qualified privilege. *Id.* at 889–90. Where an employer can establish qualified privilege, the plaintiff must show "bad faith, actual malice, or abuse of the privilege through excess publication." *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 388 (5th Cir. 1987). Where "management honestly and sincerely believed [the complainant's] allegations of sexual harassment . . . there [was] insufficient evidence in the record to support the allegations of malice or bad faith." *Id.* at 390 (employer's internal bulletin about sexual harassment was subject to a qualified privilege). In that case, the court reasoned that: "Co-workers have a legitimate interest in the reasons a fellow employee was discharged. Of course, employees have a strong interest in not being fired. An employer also has an interest in maintaining employee morale and protecting its business interests." *Id.* at 387 (citations omitted); *see also* *Turner v. Wells*, 198 F. Supp. 3d 1355, 1371–72, 1380 (S.D. Fla. 2016) (holding that a law firm's public investigation findings and conclusions not actionable defamation because statements were not false or were pure opinion); *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 829 (N.D. Ill. 2015) (dismissing false light and defamation claims, because university's statements were "substantially true" or not "highly offensive"); *Bisso v. De Freest*, 251 A.D.2d 953, 953 (N.Y. App. Div. 1998) (qualified privilege protected employer's statement to other employees that accused had been terminated for harassment).

253. "False light" is a related privacy claim—which refers to publicity that places an individual in a false light that "would be highly offensive to a reasonable person" and in "reckless disregard as to the falsity of the publicized matter." *Tomson v. Stephan*, 696 F. Supp. 1407, 1410 (D. Kan. 1988); *see also* *Lloyd v. Quorum Health Res., LLC*, 31 Kan. App. 2d 943, 954 (Kan. Ct. App. 2003) (quoting *Dominguez v. Davidson*, 266 Kan. 926, 937 (1999) (noting that elements of false light are: "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person"))).

and employer behavior and promises that bolster or undermine those expectations.<sup>254</sup>

Employees sometimes assert false light privacy claims, which requires them to prove that the company engaged in publicity that “falsely represent[s] the person” and is “highly offensive to a reasonable person.”<sup>255</sup> However, employers have a qualified privilege if they investigate the claim and the statement was made in good faith to persons with an interest or duty in the subject matter.<sup>256</sup> The best protection against such a claim, as previously noted, is a diligent investigation that produces a high degree of certainty as to the accuracy of the findings. Employers are also likely to remain restrained about public comments because they will need to explain why the public had an interest in the findings to avail themselves of the qualified privilege.

Nevertheless, on the rare occasion where employers decide to make a public disclosure (or even an internal disclosure that may find its way to social media), revisions to the privacy policy provide a marginal benefit. In privacy cases generally, questions of the offensiveness of an intrusion will depend in part on expectations of privacy. These expectations are influenced by the employer’s conduct.<sup>257</sup>

An employer’s policies and practices regarding personnel files and personnel information is somewhat relevant to whether an employee can establish a privacy claim in connection with public disclosure of that personnel information. Historically, employers were extremely reluctant to disclose anything in an employee’s personnel file,<sup>258</sup> particularly findings of misconduct and discipline resulting from those findings. This secrecy extended

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254. See *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621–23 (3d Cir. 1992).

255. See *Lloyd*, 31 Kan. App. 2d at 954; *supra* note 253.

256. *Smith v. Ark. La. Gas Co.*, 645 So. 2d 785, 791 (2d Cir. 1994) (qualified privilege applies to privacy claims, including false light and “unreasonable public disclosure of embarrassing private facts” where “an employer who undertakes an investigation of employee misconduct is protected by a qualified or conditional privilege when making a statement in good faith, on a subject in which the employer has an interest or duty, to persons having a corresponding interest or duty”).

257. *O’Connor v. Ortega*, 480 U.S. 709, 710 (1987) (where employer provided employee with the only key to certain physical locations, which were not typically accessed by others, employee more likely to have a reasonable expectation of privacy in that location).

258. Thomas Wilson & Corey Devine, *Privacy in the Employment Relationship*, PRACTICAL LAW LABOR & EMPLOYMENT (2018) (“Personnel records should be maintained in a secure location, such as a locked file cabinet or password-protected electronic files. They should be made available only to individuals with a legitimate business need to access the files.”).

even to the victim who complained of harassment in the first place, who might never learn whether the accused employee received any discipline at all. This practice might theoretically bolster an employee's claim that they had a reasonable expectation of privacy in that information, and that disclosing such information was highly offensive.<sup>259</sup>

Employer policies rarely make promises that all personnel information will be kept confidential. They have not, however, sought to disclaim those expectations either. By contrast, employers have been quite thorough in disclaiming employee rights to privacy in several other types of information, which they tend to update as technology develops.<sup>260</sup> For example, employee privacy policies (often called "computer use policies") frequently disclaim any right to privacy of any information on a company-

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259. I use the term "theoretically" because there are very few cases in the private sector alleging pure "invasion of privacy" claims based on disciplinary disclosures, as opposed to claims for defamation or false light publicity, where truth is an absolute defense. *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 622 (3d Cir. 1996) (no invasion of privacy claim where store manager told employee's relatives that the plaintiff resigned because of his health, and where "an unidentified store employee [told a friend of the plaintiff] who already knew that he was HIV-positive"); *Magdaluyo v. MGM Grand Hotel LLC*, Case No. 2:14-cv-01806, 2017 WL 736875, at \*4 (D. Nev. Feb. 24, 2017) (no cognizable invasion of privacy claim based on allegations that employer spread rumors about him); *cf.* *Allen v. Verizon Wireless*, No. 3:12-cv-482, 2013 WL 2467923, at \*8 (D. Conn. June 6, 2013) (cognizable privacy allegations based on unauthorized access to FMLA certification and contact with plaintiff's doctor). The analysis herein draws upon other types of privacy cases from the employment context; public employees have additional privacy-related protections under the Fourth Amendment. *See, e.g., O'Connor*, 480 U.S. at 709; *Borse*, 963 F.2d at 618.

260. *See, e.g., Greenhaus, supra* note 192 (policy prohibiting harassment on computer systems, and disclaiming any expectation of privacy in any "message, file, data, document, facsimile, telephone conversation, social media post, conversation, or any other kind or form of information or communication transmitted to, received, or printed from, or stored or recorded on the company's electronic information and communications systems").

owned computer, on the employee's internet usage on that computer, or on company e-mail.<sup>261</sup> Employers may also reveal various forms of surveillance through their privacy policies.<sup>262</sup> However, employers have not yet included personnel files, misconduct, and discipline in the list of information for which employees should not expect to have a right to privacy.<sup>263</sup>

The strength of privacy claims based on public disclosures of discipline is somewhat unknown, since such practices used to be quite uncommon. However, MeToo revealed that protecting a company's reputation may require it to publicly disclose disciplinary or termination decisions, and investigation results. Employers may also feel greater pressure to disclose such information to others within the organization, for example, to disclose the information to leadership to make them aware of a potential scandal. After MeToo, employers may also decide that it is in their best interests to disclose disciplinary decisions to the victim.<sup>264</sup>

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261. Cecil A. Lynn III, *Enforcement of Employer Computer Privacy Policies*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2008/ac2008/070.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/070.authcheckdam.pdf) (last visited Oct. 22, 2018); Sindy J. Policy, *A Sample Company Policy on E-mail and Internet Usage*, A.B.A., <https://apps.americanbar.org/buslaw/blt/ndpolicy1.html> (last visited Oct. 22, 2018); Jeanne Sahadi, *Can Your Employer See Everything You Do on Your Company Phone?*, CNN MONEY (Aug. 27, 2015), <http://money.cnn.com/2015/08/27/pf/using-smartphones-from-work/index.html>.

262. Stephen P. Pepe et al., *Corporate Policy on Employee Privacy and Electronic Technology*, in CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE FAIR HIRING AND TERMINATION COMPLIANCE PROGRAM § 4:25 (9th ed. 2018) (providing a sample policy that states: "In the past, some employees have assumed that information accessed through or stored on the computer they use at work, or generated as part of [name of corporation]'s electronic mail, instant messaging, text messaging or voice mail systems was private. That assumption is incorrect").

263. See PG&E CODE OF CONDUCT 1, 34 (2018), [http://www.pgecorp.com/aboutus/pdfs/PGE\\_EmployeeCodeConduct\\_MECH\\_Digital\\_AltLinks.pdf](http://www.pgecorp.com/aboutus/pdfs/PGE_EmployeeCodeConduct_MECH_Digital_AltLinks.pdf) (noting that employees have "no expectation of privacy" in using a PG&E work space, computer, telephone, or other system); Greenhaus, *supra* note 192 (containing no reference to personnel files in the IT Resources and Communications Systems Policy); Pepe, *supra* note 262 (containing no disclaimer regarding personnel files).

264. See *Bisso v. De Freest*, 251 A.D.2d 953, 953 (N.Y. App. Div. 1998) (holding that a statement made at a staff meeting was protected by qualified privilege because "employees [had] worked with plaintiff" and "had a legitimate interest in knowing that [a] serious sanction had been imposed for violation of a workplace rule"); RESTATEMENT OF EMP'T. LAW § 6.02, cmt. c (AM. LAW INST. 2014) (stating that qualified privilege applies to statements made to "employer's own employees and agents" and that "not all jurisdictions recognize intra-employer or intra-corporate communications as publications for purposes of defamation law"). For example, in *Smith v. Arkansas Louisiana Gas Co.*, a number



Consequently, employers may add disclaimers in their privacy policies providing that employees do not have a right to privacy based on their own misconduct, and that employers reserve the right to disclose investigation results and discipline.<sup>265</sup>

D. BROADER DEFINITIONS OF “CAUSE” IN EXECUTIVE EMPLOYMENT CONTRACTS

The background rule under American law is employment-at-will, where employees can be terminated at any time for any reason or no reason, with or without notice.<sup>266</sup> Most employees are subject to the at-will rule, and if they have a contract, it incorporates the presumption of at-will employment.<sup>267</sup> However, high level executives are more likely to have employment agreements with individually negotiated terms.<sup>268</sup> These executives in many cases remain at-will, in the sense that employers do not place any restriction on their ability to fire even an executive at

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of employees complained about abusive language and harassing behavior by a mid-level department manager. 645 So.2d 785, 791 (La. Ct. App. 1994). Following an investigation, the manager was demoted. *Id.* A handful of managers were informed of the demotion, as well as thirty to thirty-five other personnel who worked in the accused manager’s facility. *Id.* The court held that the disclosures were made in good faith because the company had “reason to believe they were truthful” as a result of their investigation. *Id.*

265. *But see* Denver Policeman’s Protective Ass’n v. Lichtenstein, 660 F.2d 432, 436 (10th Cir. 1981) (determining that a discovery order for the disclosure of personnel files in litigation did not contravene a right to privacy); Holland, Hart LLP, *Montana Supreme Court Stresses Right of Privacy in Employment Records*, 18 MONT. EMP. L. LETTER no. 11, 4 (Dec. 2013) (“Employees in Montana have a reasonable expectation of privacy in their personnel files.”).

266. *See* RESTATEMENT (THIRD) OF EMP’T. LAW § 2.01 (AM. LAW INST. 2013).

267. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 376 (Cal. 1988).

268. *Arnold-Richman*, *supra* note 244, at 92.

a moment's notice.<sup>269</sup> However, such agreements can impose substantial severance payments for terminations other than for cause.<sup>270</sup>

The combination of stock and severance can cost a company millions of dollars. One famous case involved former Hewlett Packard CEO Mark Hurd, who was terminated in connection with a harassment scandal, and nevertheless walked away with a severance package valued at \$34.5 million.<sup>271</sup> Although shareholders sued over the payout, arguing that the termination met the definition for a "cause" termination, the Board evidently did not feel sufficiently confident in a "cause" finding to send Hurd packing without severance.<sup>272</sup>

"Cause" definitions can vary, depending on past practice and the amount of power wielded by the executive.<sup>273</sup> For those with the most bargaining leverage, cause can be defined quite nar-

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269. This is somewhat equivalent to at-will employment in the sense that the employer can terminate the employee without notice as long as it is willing to provide severance pay in lieu of notice. *Agreement: Executive Employment Agreement*, SOC'Y FOR HUM. RESOURCE MGMT. (May 17, 2016), <https://webcache.googleusercontent.com/search?q=cache:yzj-XCQMwNsJ:https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/executiveemploymentagreement.aspx> (providing a form agreement which contains a three year employment term, subject to a notice period to be specified by contracting parties, and severance pay in lieu of notice provision). *But see Executive Employment Contract Between Geovic, Inc. & Gary Morris* (Apr. 17, 2006), U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1398005/000102189007000084/geovicform10ex1011.htm> (stating that the company must provide thirty days' notice and severance if the executive is terminated for reasons other than cause); *Key Executive Employment Contract: Allen v. Ambrose* (Mar. 10, 2003), U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1030219/000103221003000497/dex1015.htm> (providing for sixty days' notice, approval by a majority of the board, severance, and payment for unexercised stock options in the event of termination without cause).

270. See, e.g., *Executive Employment Contract with Barry Berlin* (Dec. 15, 2011), <https://www.sec.gov/Archives/edgar/data/908311/000119312512501007/d454051dex102.htm> (providing for "termination pay in an amount equal to 2.99 times the average of the last three years compensation" if the agreement is terminated by the company for any reason other than cause); *Form of Executive Employment Agreement - John P. Foley*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1533924/000119312512018816/d248475dex107.htm> (providing for bonus payments and twelve months of severance in the event of termination without cause).

271. Mary Thompson, *HP CEO Hurd's Severance Pay Could Hit \$40 Million: Experts*, CNBC (Aug. 9, 2010), <https://www.cnbc.com/id/38624369>.

272. *Id.*

273. See also Arnow-Richman, *supra* note 244, at 92–93 (noting that "egregious harassment could fall within some" definitions of cause but not others).

rowly, consisting of gross negligence, bankruptcy, death, physical or mental incapacity, *conviction* of a felony or gross misdemeanor, or willful fraud or misconduct that materially damages the company.<sup>274</sup> As applied to a harassment case, a company bound by a contract of this sort would need to show that the harassment resulted in “material damage” to the company in order to qualify as cause. If the harassment hasn’t yet been made public, it may not have yet done material damage, thus giving rise to a dispute over the contract terms. A risk averse company might respond by providing a partial or full severance payout in exchange for a release of all claims under the contract.

Other types of contract provisions can give rise to disputes over whether an executive is entitled to severance. For example, some contract provisions provide that a company may not terminate the executive for a violation of company policy without a certain period of notice and an opportunity for the executive to “cure” the violation, “if curable.”<sup>275</sup> Such language would give rise to a dispute over whether harassing conduct is in fact “curable.”<sup>276</sup> The executive’s lawyer might argue that harassment is curable, through coaching and training, and a promise not to engage in further misconduct. For its part, the company would argue that it is not curable, since the harassment has already occurred and the executive cannot undo or fix the misconduct. However, the question of curability would likely be sufficiently

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274. See, e.g., *Executive Employment Contract between Geovic, Inc. & Gary Morris*, *supra* note 269 (stating that conviction of a crime, among other conditions, is cause for termination); *Key Executive Employment Contract: Allen v. Ambrose*, *supra* note 269 (defining cause to include a willful breach of the agreement and gross negligence); see also Bryan Sullivan, *Kevin Spacey and Harvey Weinstein Employment Agreements Say a Lot About Hollywood*, FORBES (Nov. 15, 2017), <https://www.forbes.com/sites/legalentertainment/2017/11/15/kevin-spacey-and-harvey-weinstein-employment-agreements-say-a-lot-about-hollywood/#4e3ba40f573c> (stating that Weinstein’s contract specified that harassment would trigger a fine).

275. See, e.g., *Executive Employment Contract between Geovic, Inc. & Gary Morris*, *supra* note 269 (stating that the employee has a right to notice and twenty-one days to cure in the event of conduct “that has damaged or will likely damage the reputation or standing of the company”); Erik Sherman, *Harvey Weinstein’s Ultimate Enabler Is His Employment Contract, Says a New Report*, INC. (Oct. 13, 2017), <https://www.inc.com/erik-sherman/harvey-weinsteins-ultimate-enabler-is-his-employment-contract-says-a-new-report.html> (stating that Weinstein’s contract provided that harm which resulted from harassment would be “cured” each time he paid a fine).

276. See Arnow-Richman, *supra* note 244, at 94 (discussing harassment case involving a dispute over curability).

contested that the company may be tempted to settle a dispute of this sort, again in exchange for partial or full severance.<sup>277</sup>

Going forward, companies will likely draft their contracts in a way that avoids these costs in the event of harassment. This could be readily accomplished by defining cause to include “a determination by the company, in its sole discretion, that executive has violated the company’s policy against harassment, discrimination, or retaliation.” Moreover, corporate boards and insurance companies may push for broader definitions of cause to ensure that decisions will not be skewed by the financial penalties of termination.

In summary, employers are likely to take more punitive approaches to harassment, and to alter their policies and contracts to provide them with the latitude to carry out that discipline.

## V. FIXING HARASSMENT & DISCRIMINATION POLICIES

This Part argues that broadly drafted harassment policies contributed to some of the harms revealed by the MeToo movement. Broadly worded policies gave employers the discretion to enforce their policies selectively, in some cases applying it strictly to address the risk of future discrimination claims, and in other cases declining to intervene if the conduct did not meet the legal definition of harassment. Because employees were never informed of the way employers applied the harassment policy, the policies themselves have become suspect, leading some to question whether employers should apply a zero tolerance harassment policy.<sup>278</sup>

This Part recommends that employers revise their harassment and discrimination policies to be more transparent, which will also better align with employers’ true litigation risk, and actual decisionmaking. Harassment policies should be revised to provide more information on the types of factors that influence employer judgments on the severity of the policy violation. Discrimination policies should be revised to explain that supervisors

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277. Even with narrow definitions of cause such as these, companies could still technically fire the executive for harassment without notice. However, doing so could be quite costly.

278. Allen Smith, *#MeToo Postings About Bosses Merit Discussions with HR*, SOC’Y FOR HUM. RESOURCE MGMT. (Nov. 20, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/metoo-postings-about-managers.aspx> (referencing “zero-tolerance sexual harassment policies”).

occupy a position of trust with respect to maintaining and implementing the company's policy of equal employment opportunity. When supervisors make disparaging or harassing comments based on an employee's membership in a protected category, the policy should explain that it is a breach of that duty of trust, which the company takes seriously. This revision aligns with a company's discrimination-related risks, and frames the problem in an intuitive way that parallels company ethics policies.

#### A. THE PROBLEM WITH HARASSMENT POLICIES

Harassment policies may have contributed to the problems that gave rise to the MeToo movement in ways that employers do not recognize. Legal scholar Vicki Schultz has been especially critical of harassment policies. In a famous 2003 article, *The Sanitized Workplace*, Vicki Schultz argued that employers tended to portray and define harassment primarily in terms of sexual conduct.<sup>279</sup> Schultz examined scores of employer harassment policies and found that they relied heavily on the EEOC's 1980 guidelines, which focused on sexual conduct, rather than definitions based on Supreme Court jurisprudence.<sup>280</sup> Schultz also observed that these policies prohibited a wide range of sexual conduct that might not legally qualify as harassment.<sup>281</sup> Schultz argued that employers have an interest in defining harassment as a matter of boorish male behavior<sup>282</sup> to avoid addressing the more challenging question of providing meaningful equal employment opportunity in the workplace.<sup>283</sup>

Broadly worded policies provide a number of benefits for employers. First, they give employers considerable flexibility. Where a broad swath of conduct technically violated the harassment policy, it gave employers the freedom to punish violations depending on the context of the harassment and the employer's willingness to punish or protect the harasser based on business preferences. Second, broad policies also enable employers to intervene before the conduct rises to the level of severe or pervasive conduct.

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279. Vicki Schultz, *The Sanitized Workplace*, *supra* note 73, at 2065.

280. *Id.*

281. *Id.*

282. *Id.* at 2067.

283. *Id.*; see also Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 43 (2018) ("Highlighting sexual harms . . . can also lead victims to underreport nonsexual acts of sex—and gender—based hostility.").

Third, broad harassment policies help to limit the employer's discrimination-related liability. Suppose, for example, that a supervisor makes a derogatory comment about a subordinate's protected status such as their race or gender. Unless the comment is an epithet or slur, it will not give rise to a harassment claim. It also will not give rise to a discrimination claim, because that would require an adverse employment action, like a termination, demotion, or difference in pay.<sup>284</sup> However, the comment could be extremely damaging for the employer if the employee is later fired, demoted, or denied a promotion. A single comment could represent smoking gun evidence of the supervisor's discriminatory intent when they later fire the employee.<sup>285</sup> Thus, broadly worded policies help employers guard against comments that might later get the employer in trouble.

However, broad harassment policies impose hidden costs. Both the policies and related training<sup>286</sup> routinely encourage employees to report any policy violation to the company. Victims then assume that companies would punish all policy violations, when in fact employers discipline selectively and proportionally. This information gap leads victims to feel surprised and be-

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284. See, e.g., *Jones v. Spherion Atl. Enter., LLC* 493 F. App'x 6, 9 (11th Cir. 2012); *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 181 (6th Cir. 2004); *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002).

285. See, e.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (stating that a supervisor's use of the word boy to refer to African American employee could be used as evidence of discriminatory animus); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (noting that employer's statements that plaintiff should act more femininely was evidence of sex stereotyping); *Felix v. Boeing Co.*, 229 F.3d 1157, 1157 (9th Cir. 2000) (stating that a supervisor's past derogatory statements regarding Latinos including saying "why would I want another one of them?" was evidence of discrimination); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189–90 (11th Cir. 1997) (providing several cases containing direct evidence of discrimination); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 874 (11th Cir. 1985) (stating that a plant manager's statement that "half of them weren't worth a shit," with reference to black women, was direct evidence of discriminatory motive); *Lilly v. Flagstar Enter., Inc.*, No. CIV. A. 00-D-1313-E, 2001 WL 849537, at \*2 (M.D. Ala. July 26, 2001) (denying summary judgment in sex discrimination claim where supervisor previously made comments like "pregnant women are lazy" and that he "hates to terminate males" because "they are heads of their household"); see also *Silver v. N. Shore Univ. Hosp.*, 490 F. Supp. 2d 354, 362–63 (S.D.N.Y. 2007) (discussing the case law on stray remarks); *Belgrave v. City of New York*, No. 95-OCV-1507 (JG), 1999 WL 692034, at \*29 (E.D.N.Y. Aug. 31, 1999) ("Even stray remarks in the workplace by persons who are not involved in the pertinent decision making process . . . may suffice to present a prima facie case provided those remarks evidence invidious discrimination.").

286. Tippet, *supra* note 132.

trayed when an apparent violation of the harassment policy produces no discipline. The employer's inaction then erodes the credibility of the employer's system, and makes other victims less likely to complain.

Broad harassment policies are not very persuasive. Beyond the employer's failure to enforce them, policies that prohibit wide swaths of conduct in an undifferentiated manner start to resemble civility codes. Employees know implicitly that not all of the prohibited conduct is equally problematic, which can lead them to bristle at the employer's attempt to control their behavior and question the validity of the legal rules.

In addition, overly broad harassment policies are likely to produce avoidance behaviors that discriminate against underrepresented groups.<sup>287</sup> The supervisor may decide that the best way to avoid inadvertently violating the policy is to avoid contact with those who might accuse them of harassment. For example, a supervisor might exclude female subordinates from business lunches, networking events, or client development opportunities. This then limits the employee's opportunity for advancement—the supervisor is less familiar with her skill and potential and she receives less coaching and advice. The employee's client base may also suffer, which may limit her compensation or prospect for promotion. Consequently, widespread avoidance behaviors could give rise to a class action claim for discrimination.<sup>288</sup>

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287. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. (Apr. 4, 2018), <http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo> (stating that half of respondents believe MeToo has made it more difficult for men to know how to interact with women in the workplace); see also Vicki Schulz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 35 (2018) ("Fear of being accused of harassment for benign comments or interactions can also encourage higher-ups to exclude or avoid women."); Tippet, *supra* note 132 (noting avoidance related risks when harassment trainings make harassment law appear complex and fail to discuss the importance of inclusion).

288. Where avoidance works to the overall disadvantage of employees on the basis of gender, or other protected category, it could serve as the basis for a lucrative class action claim. *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194(CM), 2010 WL 4877852, at \*1 (S.D.N.Y. Nov. 30, 2010) (involving 5,600 female sales employees suing their employer for unequal pay and promotion practices); Grant McCool & Jonathan Stempel, *Novartis in \$175 Million Gender Bias Settlement*, REUTERS (July 14, 2017), <https://www.reuters.com/article/us-novartis-settlement/novartis-in-175-million-gender-bias-settlement-idUSTRE66D57Z20100714> (discussing the same). Although this case did not explicitly involve a failure to mentor female employees, mentorship from men would have been necessary to climb up the ranks of a sales organization that

In the media, harassment and discrimination tend to be placed on opposite sides of a continuum.<sup>289</sup> On one end, sexual harassment rules are underenforced but men are less fearful of interacting with women.<sup>290</sup> On the other end, sexual harassment is strictly enforced and men hide from women.<sup>291</sup> Within this frame, the question becomes where to find the balance between opposing rights. The frame falsely assumes that workplaces unconstrained by harassment rules will do a better job of advancing women and other underrepresented groups.

The other end of this false dichotomy is to double down on preexisting policies by implementing a zero tolerance rule for harassment.<sup>292</sup> Zero tolerance is an ambiguous term. It might mean that employees will not avoid punishment for their first offense. Zero tolerance might also mean that all violations of the harassment policy will be treated as equally severe. However, this will prove extremely difficult to implement over time. The employer will inevitably be confronted with the dilemma of how to respond to relatively mild allegations of harassment. Employers must then choose between an excessively punitive approach—where punishment exceeds even what the victim might have preferred—and unofficial departures from the zero tolerance policy.

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was largely dominated by men. In addition, the same theory and legal claims at issue in the Novartis case could be readily applied to a context where men, especially highly placed men, stop mentoring women.

289. Compare Clare Cain Miller, *Unintended Consequences of Sexual Harassment Scandal*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html> (describing avoidance behaviors as a result of harassment fears), with *223 Women Speak Out Against Sexual Harassment in National Security Field*, CBS NEWS (Jan. 30, 2018), <https://www.cbsnews.com/news/223-women-say-theyre-survivors-of-sexual-harassment-in-national-security-field> (women describe rampant harassment in national security realm).

290. Tolerating harassment does not necessarily work to the advantage of women in the workplace. Many of the industries where harassment was revealed to be most rampant or most tolerated were industries that were male dominated or where men occupied the top rungs of the organization. While male fears around harassment may disadvantage women, tolerating harassment is no fix.

291. Schultz, *supra* note 283, at 60 (noting that “sex segregation is a cause of—and not a solution to—sexual harassment”).

292. Jonathan Brock et al., *What Exactly Is Zero Tolerance on Sexual Harassment?*, BOST. GLOBE (Jan. 2 2018), <https://www.bostonglobe.com/opinion/2018/01/02/what-exactly-zero-tolerance-sexual-harassment/3mKqMjzMD1l3UZqgWoXu7N/story.html>; Erin Gloria Ryan, *When #MeToo Becomes #YouToo*, DAILY BEAST (Dec. 27, 2017), <https://www.thedailybeast.com/when-metoo-becomes-youtoo>.



## B. THE PROBLEM WITH DISCRIMINATION POLICIES

Discrimination policies tend to be drafted to mirror legal rules. They prohibit employment decisions that are based on an employee's membership in a protected category. Unlike harassment policies, they do not provide space for an employer to intervene before an actual discrimination claim arises. This produces two big gaps with respect to advancing equal employment opportunity in the workplace. First, it does not address the denial of smaller workplace opportunities that could add up over time. Consider, for example, the story of Susan Fowler's viral complaints at Uber.<sup>293</sup> Although they included claims of harassment—in particular a proposition from her supervisor—they also included numerous examples of low level discrimination—a leather jacket denied to female engineers, a transfer denial that may have been partly motivated by discrimination.<sup>294</sup> Human resources proved unresponsive, and apparently suggested that Fowler herself may have been the source of the problem.<sup>295</sup> While it might be easy to attribute Fowler's story to the culture at Uber, her experience with human resources may have reflected a crimped discrimination policy that overlooked discrimination that did not yet exceed the legal threshold.

Second, current discrimination policies fail to capture discriminatory comments unaccompanied by an adverse employment action. As previously noted, this leaves the employer exposed if the same supervisor later denies a promotion to the affected employee or terminates their employment.

## C. A BETTER APPROACH

Ultimately, it is a mistake to assume the problem is an inherent conflict between harassment and discrimination law, where one must be chosen at the expense of another. Rather, the problem is the gap between employers' actual practice, and their stated policy. Employers need to be more transparent about how their harassment policies are applied, and the contextual factors that influence their decisionmaking. They should also stop using harassment policies as a pretext to reduce discrimination-related liability, and instead craft broader discrimination policies.

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293. *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber> (discussing harassment and discrimination experienced at Uber).

294. *Id.*

295. *Id.*

This will bring both policies closer to employer practices, and better advance the broader goals of both harassment and discrimination law. These changes will also render the policies more credible and persuasive to employees.

A more transparent harassment policy could still define harassment relatively broadly. (See Appendix.) However, this policy would also explain the contextual factors<sup>296</sup> that influence its judgments when applying the policy and meting out punishment. The company could explain, for example, that harassment by supervisors, and especially high ranking employees, will be treated as proportionally more serious,<sup>297</sup> given the ways in which power differences can limit the victim's ability to engage in self-help measures. It could also explain that violence, assault, and threats of violence will be presumed to be extremely serious as an employment matter,<sup>298</sup> and may result in a call to the police. Serious misconduct should include hostile acts that could be

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296. *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 81–82 (1998) (stating that “the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed” and judging those behaviors requires “common sense, and an appropriate sensitivity to social context”).

297. *Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (accepting argument that supervisor's use of a racial slur along with “explicit, angry threats . . . to terminate [plaintiff's] employment” was especially threatening); *Quantock v. Shared Mktg. Servs., Inc.*, 312 F.3d 899, 904 (7th Cir. 2002) (holding that repeated propositions from boss met the standard for a sexual harassment claim); *Brooks v. City of San Mateo*, 229 F.3d 917, 926 n.9 (9th Cir. 2000) (stating that a coworker groping another coworker is insufficient to satisfy the severe or pervasive standard, but assault by supervisor may well be sufficient); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108, 1111 (9th Cir. 1998) (discussing how repeated comments from a supervisor could satisfy a harassment claim); *Venter v. City of Delphi*, 123 F.3d 956, 976 (7th Cir. 1997) (holding that persistent proselytizing by a supervisor made the working environment hostile and abusive); *Robles v. Agreserves, Inc.*, 158 F. Supp. 3d 952, 984 (E.D. Cal. 2016) (holding that repeated comments denigrating religion by foreman were sufficiently severe and pervasive to constitute harassment).

298. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (opining that the severity or pervasiveness of conduct depend upon “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance”); *Fuller v. Idaho Dept. of Corr.*, 865 F.3d 1154, 1162–64 (9th Cir. 2017) (holding that sexual assault coupled with the agency's internal endorsements of such actions created a hostile work environment); *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 184 (5th Cir. 2012) (“Deliberate and unwanted touching of intimate body parts can constitute severe sexual harassment.”); *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (stating that a gradual escalation of conduct, including increasingly disturbing letters may be considered sexual harassment).

experienced as threatening to employees on the basis of gender, race, religion, national origin, disability, and other protected categories. This might include for example, epithets and slurs, as well as symbolic acts like a noose, blackface, swastikas, vandalism, or maliciously damaging an employee's property or car.<sup>299</sup> The company could also explain factors that may influence its determination of the severity or frequency<sup>300</sup> of the conduct, such as the work environment and surroundings, whether the conduct was humiliating or degrading,<sup>301</sup> and disregarding attempts by the victim or others to stop or avoid the conduct. Employers could reserve the right to terminate employees for serious incidents of misconduct not specifically enumerated in the policy, in their sole discretion. The employer could also consult employees in crafting the language to ensure that it is consistent with their assessments of proportionality.

This approach brings employer policies regarding discipline more in line with the actual legal standards for evaluating harassment claims. The legal standards offer the benefit of being

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299. See, e.g., *Boyer-Liberto*, 786 F.3d at 280 (holding that racial slurs could create a hostile work environment); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 316 (4th Cir. 2008) (referring to coworker as "Taliban," "towel head," and asking "are you on our side or are you on the Taliban's side" constituted harassment); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1132 (10th Cir. 2008) (holding that a noose incident and racial epithets created a hostile work environment); *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (holding that hanging a noose over an employee's workstation created a hostile and abusive work environment); *Snell v. Suffolk County*, 782 F.2d 1094, 1098 (2d Cir. 1986) (finding that posting a photo of a noose, posting KKK information, and locking coworkers out of the bathroom created a hostile work environment); *Collins v. Exec. Airlines, Inc.*, 934 F. Supp. 1378, 1381 (S.D. Fla. 1996) (exposing an employee to a noose and blackface created a hostile work environment); *Garcez v. Freightliner Corp.*, 72 P.3d 78, 85–86 (Or. Ct. App. 2003) (holding that a coworker's use of racial epithets and property destruction created a hostile work environment).

300. *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 417, 422 (4th Cir. 2014) (finding that a coworker's frequent gender-derogatory language, sexual comments, and racial comments constituted harassment); *Reeves v. C.H. Robinson Worldwide*, 594 F.3d 798, 804, 811 (11th Cir. 2010) (holding that a "substantial corpus of gender-derogatory language" used nearly every day by coworkers created an abusive work environment); *Feingold v. New York*, 366 F.3d 138, 150–51 (2d Cir. 2004) (stating that routine anti-Semitic remarks by coworkers created a hostile work environment).

301. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993); *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 146 (2d Cir. 2014) (finding that a "steadily intensifying drumbeat of racial insults, intimidation, and degradation over a period of more than three years" constituted harassment); *Draper*, 147 F.3d at 1105–06 (finding that repeated comments from a supervisor over a two year period, including one over a loudspeaker, created a hostile work environment).

proportional and contextual, and the result of decades of consideration. These contextual factors likely appeal to employees' innate sense of justice and proportionality. Second, it brings the policy closer to how employers actually evaluate harassment complaints.<sup>302</sup> While employers might prohibit everything on paper, and the paper trail might minimize the severity of the conduct, the actual standard they use for imposing discipline looks closer to the legal standard. This will continue to be true even in a broader context where employers take a more punitive approach than in the past. Articulating those standards makes the employer's policy more transparent, which serves the expectations of both victims and the accused.

A more transparent harassment policy will, upon close inspection, reveal that less serious incidents of harassment—like comments about an employee's membership in a protected category—do not represent the most serious forms of harassment. While these comments could be harassment, they should be handled within the context of a broader discrimination policy.

Discrimination policies present an opportunity to explain the significance of such comments in a way that will be meaningful to employees. The policy could explain, for example, that supervisors occupy a position of trust in the organization.<sup>303</sup> (See Appendix.) They are entrusted with providing opportunities for advancement equally among those who report to them, without regard to their membership in a protected category. It is analogous to an employee entrusted to handle large sums of money on

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302. Of course, articulating the circumstances that influence disciplinary decisions is not without risk; specifically mentioning some types of misconduct necessarily leaves others out. While including a disclaimer is helpful, there is nevertheless a risk of a breach of implied-in-fact contract claim if the employer departs from its articulated standard.

303. RESTATEMENT (THIRD) OF EMP'T LAW § 8.01 (AM. LAW INST. 2015) ("Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment."); RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006) ("An agent has a duty to the principal to use care in acting on the principal's behalf."); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1628–30 (discussing the fiduciary duties of corporate officers); Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 333 (2002) ("The fiduciary concept . . . had its origin in the law of trusts, where its literal meaning—faithfulness—correctly described the duty of responsibility owed by one who held title, but not ownership, to property of another.").

the employer's behalf, which imposes special responsibilities regarding how that money should be handled.<sup>304</sup> Part of upholding that trust means devoting care and attention to how they distribute formal and informal opportunities for advancement. It also means refraining from making comments or engaging in conduct that would cast doubt on their impartiality. When a supervisor makes denigrating comments about a subordinate's gender, race, or religion, it suggests they are not giving everyone an equal shot. The same is true if they do nothing to address discriminatory comments on the part of an employee's coworkers. Where a supervisor violates that duty of trust, it is proper for the employer to discipline them, which may even mean removing them from their decisionmaking role.

Framing discrimination as a breach of trust also aligns with the way companies structure their code of ethics and conflict of interest policies.<sup>305</sup> Employees that represent the company with respect to third parties have a special duty of trust to maintain the company's image and project the employer's values with respect to honesty and integrity. Employees intuitively understand that paying a bribe to a government official, no matter how small, could be extremely damaging to the company's legal interests and integrity.<sup>306</sup> Likewise, employees also understand the notion that dishonest conduct, for example a false claim for reimbursement or misuse of the company's credit card, is extremely problematic not just because of the amount of money at

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304. RESTATEMENT (SECOND) OF TRS. § 174 (AM. LAW INST. 1959) ("The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."); John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 656 (1995) (discussing the duty of prudent administration).

305. ORACLE CODE OF ETHICS AND BUSINESS CONDUCT (2017), [www.oracle.com/us/corporate/investor-relations/cebc-176732.pdf](http://www.oracle.com/us/corporate/investor-relations/cebc-176732.pdf) ("The term 'conflict of interest' describes any circumstance that could cast doubt on your ability to act in Oracle's best interests and to exercise sound business judgment unclouded by personal interest or divided loyalties."); *Code of Ethics and Business Conduct*, SOC'Y FOR HUM. RESOURCE MGMT. (Jun. 18, 2018), [https://webcache.googleusercontent.com/search?q=cache:wvBF8ZAmctgJ:https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms\\_014093.aspx](https://webcache.googleusercontent.com/search?q=cache:wvBF8ZAmctgJ:https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_014093.aspx) ("We must avoid any relationship or activity that might impair, or even appear to impair, our ability to make objective and fair decisions when performing our jobs.").

306. *The Kraft Heinz Company Employee Code of Conduct*, KRAFTHEINZ (Aug. 19, 2015), [www.kraftheinzcompany.com/ethics\\_and\\_compliance/code-of-conduct.html](http://www.kraftheinzcompany.com/ethics_and_compliance/code-of-conduct.html) ("We are strictly prohibited from directly or indirectly giving, offering, promising, or authorizing anything of value—no matter how small—to any government official or agency . . . or any other individual to corruptly secure a business advantage.").

issue, but because it raises serious questions about future conduct. The same is true in the discrimination context.

Although codes of conduct often reference discrimination and harassment, they tend not to be framed in terms of integrity and breach of a duty of trust. Instead, discrimination is characterized as something the company “doesn’t” do.<sup>307</sup> Likewise, harassment is framed as disrespectful,<sup>308</sup> or as a productivity drag due to decreased interpersonal trust.<sup>309</sup> Instead, codes of conduct should explain that a supervisor’s discriminatory conduct casts doubt on their ability to make future employment decisions. If that supervisor is later permitted to decide which employees to promote, for example, that comment could qualify as a smoking gun of the supervisor’s discriminatory intent. The policy should explain that it is therefore proper for the employer to intervene before the supervisor’s decision is tainted by the discriminatory comment. That intervention need not necessarily be excessively punitive when compared to the conduct at issue. But it should be adequate to remove any doubt as to the fairness of later employment decisions relating to the employees affected by the comment.

Such a policy would help limit an employer’s liability. But it also places the conduct within its correct context. The employer

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307. ORACLE, *supra* note 305 (“The term ‘conflict of interest’ describes any circumstance that could cast doubt on your ability to act in Oracle’s best interests and to exercise sound business judgment unclouded by personal interest or divided loyalties”); *Code of Ethics and Business Conduct*, SOC’Y FOR HUM. RESOURCE MGMT., *supra* note 305 (“[Company name] is an equal employment/affirmative action employer and is committed to providing a workplace that is free of discrimination of all types from abuse, offensive or harassing behavior.”).

308. PG&E, *supra* note 263 (“Conduct yourself in a professional manner and treat others with respect, fairness and dignity.”); KRAFTHEINZ, *supra* note 306 (“Keep interactions with your fellow employees professional and respectful.”); *Code of Conduct*, VERIZON, <https://www.verizon.com/about/sites/default/files/Verizon-Code-of-Conduct.pdf> (last visited Oct. 22, 2018) (“We know it is critical that we respect everyone at every level of our business. We champion diversity, embrace individuality and listen carefully when others speak.”).

309. *Code of Ethics and Business Conduct*, SOC’Y FOR HUM. RESOURCE MGMT., *supra* note 305 (“We all deserve to work in an environment where we are treated with dignity and respect. [Company name] is committed to creating such an environment because it brings out the full potential in each of us, which, in turn, contributes directly to our business success.”); OWENS CORNING, OWENS CORNING CODE OF CONDUCT, [https://dcpd6wotaa0mb.cloudfront.net/owenscorning.com/assets/sustainability/Owens\\_Corning\\_Code\\_of\\_Conduct-d77192c66ff4c26dd9a5c0de973be65332700c676cb4f9334fc687564f237c34.pdf](https://dcpd6wotaa0mb.cloudfront.net/owenscorning.com/assets/sustainability/Owens_Corning_Code_of_Conduct-d77192c66ff4c26dd9a5c0de973be65332700c676cb4f9334fc687564f237c34.pdf) (“We depend on each other’s knowledge and support, so it is especially important to treat our fellow employees with respect and dignity. Harassing behavior creates an uncomfortable workplace where people don’t trust each other—which keeps us from reaching our goals.”).

is not intervening out of concern for overly sensitive employees, nor is it seeking to regulate speech. Instead, it is protecting the integrity of the decisionmaking process for all employees.

### CONCLUSION

The MeToo movement is still unfolding, and may yet lead to even broader changes than those currently described here. These include examinations of pay equity, paid leave, and discrimination against those with caregiving responsibilities. It may also lead to additional innovations in employee practices, fueled by a tech industry ready to test new approaches with real time analytics.

Employer practices will continue to be negotiated and revised. Because prior systems of interlocking employment policies and practices were so entrenched, changing one policy or practice inevitably affects the implementation of others. Shifting cultural expectations may also produce a backlash, which will likewise demand an employer response.

Legal rules will both lead and follow changes in employer practices. Restrictions on settlement agreements will change contracting practices, employer litigation, and settlement strategies. On the other hand, if legislators fail to act, employers will likely seize the opportunity to expand social media policies and their use of arbitration agreements.

Nevertheless, disruption can be fruitful. Ultimately, the MeToo movement injects democracy into the workplace, by pushing employers toward transparency and accountability. Without secrecy for cover, employers must finally show their work, and figure out what it means in practice to provide everyone with an equal opportunity to succeed.

## APPENDIX – MODEL POLICIES

## HARASSMENT POLICY

Federal and state law protects an employee's right to work in an environment that is free of harassment. Under the law, the term "harassment" means offensive comments or conduct directed at an employee because of their membership in a protected category, like their gender, race, color, religion, national origin, disability, age, or veteran status. State law also protects employees against harassment based on [insert additional state law protections].<sup>310</sup>

To satisfy the legal standard for harassment, the offensive conduct must be so severe or frequent that it has the effect of altering the employee's work environment. In other words, the work environment would need to be very bad for someone to win a court case.

A very bad work environment is a low bar. We hold ourselves—and you—to higher standards. We strive to create a work environment where employees can focus on their job, without being pigeonholed, judged based on stereotypes, or constantly reminded that they are different. Our workplace also prioritizes inclusion, where everyone has a chance to make important work connections, gain valuable experience, and take on challenging opportunities.

Our policy prohibits harassing conduct, even if it is not severe or frequent enough to meet the legal standard. Don't make jokes or comments that mock or denigrate others based on their background or status. Don't post derogatory or demeaning material in your physical workspace, on your computer, or over email (and consider how your behavior online might bleed into the workplace). Offensive physical contact, leering, and blocking other people's movement are also unacceptable.

When assessing your own behavior, consider how your comments—along with comments from others—might add up over time. For example, a few casual comments to a pregnant woman about her size might seem isolated to you. But if everyone does it, that means she's hearing a constant stream of comments, to the exclusion of work-related discussions or enjoyable small talk unrelated to her appearance. The same thing goes for casual comments motivated by someone's religion, race or disability, for

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310. Brackets refer to information for the employer to complete.



example. Constantly reminding someone that you are hyper-focused on how they are different is probably not going to help them succeed in the workplace.

Sexual conduct may violate the harassment policy, especially when it involves employees in authority positions. Employees deserve to be able to focus on their job, without having to fend off the advances of others they can't readily avoid. Employees also shouldn't have to worry about the awkwardness of how their boss will respond to being rebuffed. Or whether their supervisor views them as an object, instead of recognizing their productivity and potential. Sexual conduct can also be a form of harassment where it is used to marginalize or punish others, even those of the same gender.

If you have experienced harassment, please do not suffer in silence. Reporting the behavior enables us to help put a stop to the behavior, and ensure that others are not affected as well. You can report harassment to [your supervisor, human resources . . . insert other reporting options].

We investigate reports of harassment we receive, unless the complainant requests that we do not investigate. (The absence of an investigation may limit our ability to respond. Consequently, we may independently decide to investigate harassment involving allegations of serious or widespread harassment.) Investigations usually consist of interviewing the complainant, the person accused of harassment, and any others identified as witnesses. We may also collect relevant documents, like emails or text messages. In cases involving violence, assault, rape, or threats of violence, we may also contact law enforcement.

If we determine a harassment complaint is substantiated, we will then decide how to stop the conduct, as well as hold the employee who violated the policy accountable. Our disciplinary decisions generally reflect the seriousness of the policy violation.

A minor violation of the harassment policy might mean talking with the employee about his or her behavior and why it is a problem. More serious violations of the policy could mean immediate termination, or other serious forms of discipline that reduce the employee's rank, responsibilities, compensation, or performance evaluation.

Some of the factors that tend to bear upon the seriousness of a harassment claim include: (1) whether the harassment involved physical contact; (2) whether the conduct involved epithets or slurs; (3) whether the conduct involved symbolically offensive or threatening acts, such as swastikas or a noose; (4)

whether the conduct involved vandalism or damage to property; (5) whether the conduct was humiliating or degrading; (6) whether the conduct limited the victim's access to work opportunities or tools needed to perform his/her job; (7) the physical environment in which the harassment occurred; (8) the social context in which the harassment occurred; (9) whether the conduct was repeated.

As with all disciplinary matters, we ultimately reserve the discretion to decide whether and how to discipline employees. Common sense, fairness, and business exigencies may dictate that we make decisions regarding harassment not specifically set forth in this policy.

#### DISCRIMINATION POLICY

Under federal and state law, employees have the right to equal opportunity when it comes to important employment decisions like hiring, promotion, pay, or termination decisions. That means that these decisions cannot be motivated by an employee's gender, race, religion, national origin, age, disability, color or veteran status. State law also protects employees on the basis of [insert state law protections].

However, we hold ourselves to a higher standard than the legal rules require. We expect supervisors to show a high degree of integrity in distributing both formal and informal workplace opportunities. This means taking care to ensure equal opportunity in areas like networking opportunities, challenging assignments, training opportunities, mentoring, client engagement, and other similar opportunities that affect an employee's career trajectory over time.

In our company, supervisors hold a special position of trust to maintain the integrity of these employment decisions. They breach that duty of trust when they engage in conduct or comments that raise serious questions about their ability or willingness to provide opportunities on an equal basis. In particular, derogatory or demeaning comments about an employee's religion, disability, gender, age, race or other legally protected status, suggest that supervisor cannot be trusted to provide a level playing field. Other harassing behavior by a supervisor may raise similar questions about the supervisor's integrity regarding the discrimination policy. In other words, even a minor violation of the company's harassment policy by a supervisor may be a serious violation of the company's discrimination policy.

If you have experienced discrimination, or have questions about the integrity of the decisionmaking process, please let us know. Reporting at an early stage can help us fix the process and restore trust before the stakes get even higher. You can contact human resources [insert any other reporting options].

We will then investigate the situation, which generally consists of interviewing you, interviewing the supervisor, and reviewing relevant documents, including documents bearing on the decision-making process, if any. If a complaint is substantiated, we will then assess how to remediate the situation, address the supervisor's breach of trust (if applicable), and improve the decisionmaking process.

#### RETALIATION POLICY

Employees perform a valuable service to the company by bringing important information to our attention through [their supervisor or to HR].<sup>311</sup> We also recognize that it takes courage to formally report harassment, discrimination or other unlawful conduct.

Encouraging employees to use and trust our complaint system demands that supervisors and coworkers support those who have used the complaint system. Retaliation against another employee for using our complaint system is strictly prohibited.

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311. This language should parallel earlier language about how to report a harassment complaint.

## THE CONVERSATION

Academic rigor, journalistic flair

# #MeToo must also tackle online abuse

March 21, 2018 3.34pm EDT

Sharing experiences of #MeToo can open the flood gates for online abuse and physical threats. from [www.shutterstock.com](http://www.shutterstock.com)

# #MeToo must also tackle online abuse

March 21, 2018 3.34pm EDT

*Six months after the explosive allegations of sexual harassment against Hollywood producer Harvey Weinstein came to light, giving impetus to the #MeToo movement, this series looks at the aftermath of the movement, and if it has brought about lasting change to sexual harassment and gender equality.*

## Authors



### Jennifer Beckett

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Although Tarana Burke's #MeToo movement arose initially as a way to capture and share experiences of abuse and harassment in the physical world, there's another layer we must acknowledge – online abuse. It's real, and it's creating harm.

Women who share experiences of #MeToo, or who write about gender issues and political content more broadly, are frequent targets of one-off and sometimes sustained experiences of online abuse. This includes not only abusive comments and trolling, but also rape threats, death threats and offline stalking.

Any actions that are created as a result of #MeToo must include the online space.

***Read more: #MeToo is not enough: it has yet to shift the power imbalances that would bring about gender equality***

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## Women are targets

Writer Laura Gianino knows only too well what can happen when women speak up. After writing about her own sexual assault, she was viciously attacked online. She describes her concern for women sharing their experiences through the #MeToo hashtag:

*I applaud these women, and I also fear for them. I fear that they will be beaten down by the slut-shamers, and the victim-blamers, by the internet trolls, and the possible real-life trolls.*



**Abeer Hoque**  
@olivewitch

No one but survivors know how difficult [#MeToo](#) is, how brave how dangerous how necessary. [@LMarieGi](#) [@washingtonpost](#) [washingtonpost.com/news/postevery...](https://www.washingtonpost.com/news/posteverybody/perspective-i-went-public-with-my-sexual-assault-and-then-they-attacked-me/2017/10/18/)

1 11:19 AM - Oct 18, 2017

### **Perspective | I went public with my sexual assault. And then t...**

I worry that some women will learn, like I did, that saying #MeToo attracts people determined to discount your assault.

[washingtonpost.com](https://www.washingtonpost.com)


[See Abeer Hoque's other Tweets](#)

The stats back up Gianino's fears. Recent research by the PEW Center for Media in the US shows women are twice as likely to experience abusive and/or harassing behaviours online. This finding is supported by research from Amnesty International UK.

## When your job requires social media

For women working in public-facing roles in politics, business and the media (and even academia) – where social media use is often seen as “part of the job” – the problem is worse. The 2016 Australia’s Women in Media’s (WiM) “Mates over Merit” report noted that “41% of women said they’d been harassed, bullied or trolled on social media, while engaging with audiences”.

In their more recent submission to the ongoing Senate Legal and Constitutional Affairs Inquiry into cyberbullying in Australia, WiM says the problem is getting worse.

**Women in Media**  
@WIM\_Aus

[afr.com/lifestyle/arts...](https://afr.com/lifestyle/arts...)

3 10:30 PM - Feb 18, 2018

**Tracey Spicer: More to come from #MeToo**

Over lunch with AFR Weekend, the face of the #MeToo movement in Australia talks about what has changed and what's to come.

[afr.com](https://afr.com)

[See Women in Media's other Tweets](#)

## Online life is real life

Cyber psychologists report that the psychological harms of online harassment are as severe, and sometimes more severe, as harassment endured in the physical world. Online, victims can feel there’s no escape.

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***Read more: #MeToo exposes legal failures, but ‘trial by Twitter’ isn’t one of them***

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Online abuse also has economic and social impacts, particularly when women choose to quit or avoid work where threats of harm and abuse are not uncommon (such as politics).

For example, WiM reports that some members had left journalism as a result of their experiences online. A communications manager with more than 20 years' experience said:

*It's had a huge impact, including being the cause of changing my career as a journalist.*

## Social media platforms can do more

Unsurprisingly, social media is social – it's people interacting with people. What happens in comments sections, on Facebook posts or Twitter threads is a reflection of the social power structures we all deal with on a daily basis. When social media platforms fail to act in a timely or consistent manner, or at all when users report abuse or harassment online, it reinforces those structures.

Last year, Amnesty International UK pointed to the need for better training for all staff – including developers, researchers, and especially moderators – at social media companies.

In particular, platforms must be proactive rather than reactive in addressing these issues, and conduct public imposition of policies to ensure abusers are held accountable.

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***Read more: Facebook turns to real people to fix its violent video problem***

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## The workplace can step up

In workplaces where social media use is expected or encouraged, the additional dangers women face in this environment need to be acknowledged and acted upon. Adequate training and support for staff members should be provided - including education about available legal options, and the creation of internal reporting mechanisms.

An example to consider is the ABC's Social Media Self Defence course. Started by Rod McGuinness in 2015, its aim is to equip ABC journalists, in particular women, with the skills and knowledge they need to make their experiences on social media less stressful. For McGuinness, this is part of a "duty of care" the ABC has to its employees.

We also need to consider how we support freelance or contract workers, like journalist Ginger Gorman, who has written extensively about her online experiences. Workers like these often don't have access to workplace training and support, and also rely more heavily on their social media presence to generate paid work.



**Ginger Gorman** 🌈  
@GingerGorman

Virtual Trolls Do Real Damage, by Ginger Gorman [#trolls](#)  
[#socialmedia](#) [huffingtonpost.com.au/ginger-gorman/...](https://huffingtonpost.com.au/ginger-gorman/)

6 7:02 PM - Feb 25, 2018

### Virtual Trolls Do Real Damage

They didn't fit into neat ideas of misogyny, racism or any other kind of hate, although a couple of them were happy to claim the label of  
huffingtonpost.com.au

See Ginger Gorman s other Tweets

## Better responses from law enforcement

In 2016, Prime Minister Malcolm Turnbull pledged millions to address online abuse and “revenge porn”. The Senate’s current inquiry into the adequacy of existing law enforcement measures to deal with cyberbullying is a step in the right direction. Hopefully it will lead to the establishment of clearer guidelines around reporting. The committee is due to report on March 28.

Similarly, recent initiatives by state and territory police forces to better educate their officers around the issue are to be praised, as is the establishment of the Australian Cybercrime Online Reporting Network (ACORN).

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### ***Read more: How #MeToo can guide sex education in schools***

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That said, as submissions to the inquiry show, much still needs to be done to ensure that the police and the public are aware not just that cyberharassment or bullying is a crime, but how they might report it. These regulations need to be consistent across the country in recognition of the borderless nature of the online environment.

The #MeToo and #TimesUp movements feel like a great moment of reckoning. As we work through these discussions, we also need to acknowledge that today’s workplace now extends beyond physical spaces. This means recognising the additional dangers women face in online spaces, such as social media, and acting to combat this.

[Psychology](#)[Journalism](#)[Cybersafety](#)[Cyberbullying](#)[Women in media](#)[#metoo](#)[After #MeToo](#)[Metoo](#)





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**OPINION**

## **HOW #METOO HAS SPREAD LIKE WILDFIRE AROUND THE WORLD**

**CATHERINE POWELL**

ON 12/15/17 AT 8:00 AM EST

SHARE



## OPINION

**T** *his article first appeared on the Council on Foreign Relations site.*

The #MeToo campaign continues to rock our world.

It has spread across the globe and crossed racial, economic, and other boundaries.

The digital campaign gained traction on October 15, 2017, when – in response to allegations of sexual harassment against Hollywood film producer Harvey Weinstein – actress Alyssa Milano posted a tweet urging women who have been sexually assaulted or harassed to post a status on social media with the words “Me Too,” to “give people a sense of the magnitude of the problem.”

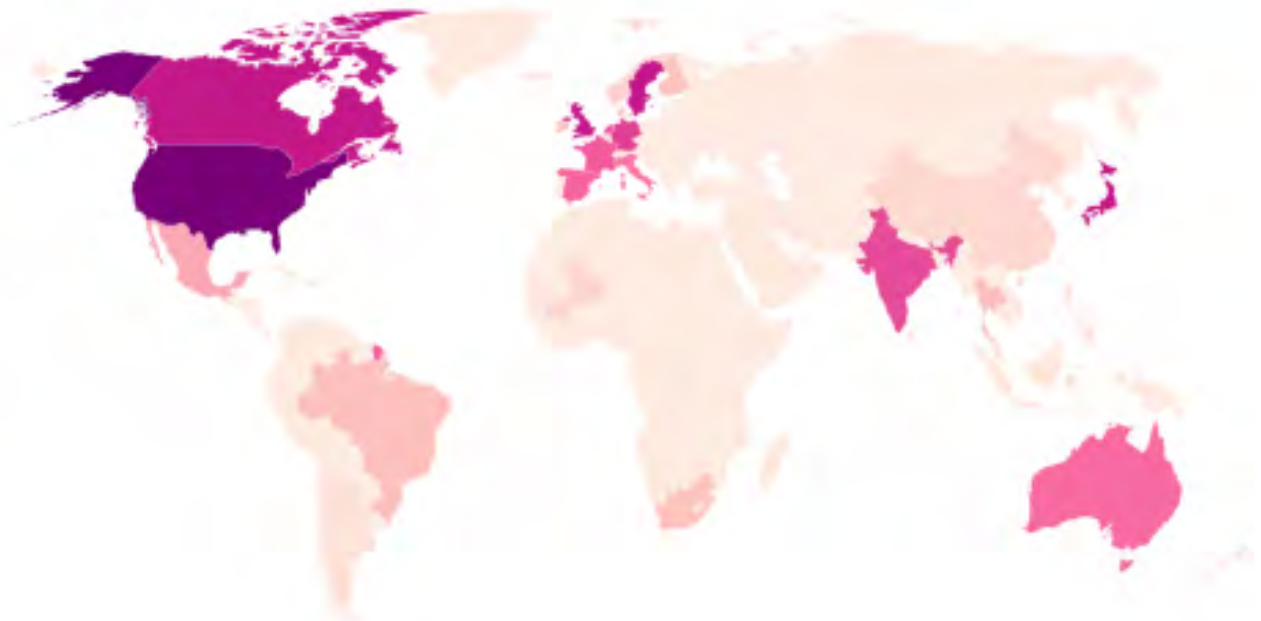
When she awoke the next morning, she found that over 30,000 people had used #MeToo.

#### #MeToo Mentions Around the Globe

Uses of the hashtag #metoo on Facebook and Twitter (as of December 7, 2017)

##### Map key

<500  
<1500  
<5000  
<8000  
<15000  
15001+



#MeToo mentions around the world. This map was created on December 7, 2017, and #MeToo tweets have continued, cracking the 500+ mark in countries such as Russia and Egypt.

## COUNCIL ON FOREIGN RELATIONS

In fact, the MeToo campaign was created by a black woman, Tarana Burke, ten years ago, before hashtags even existed.

Milano eventually tweeted that she was “made aware of an earlier #MeToo movement” – linking to Burke’s story – and the two have reportedly developed a friendship via text messages.

*Time* magazine named these and other such “silence breakers” as their 2017 Person of the Year, profiling not only Milano and Burke, but numerous other women who have spoken out as part of the #MeToo movement.

The *Time* profile included women of diverse backgrounds, among them not only celebrities such as Taylor Swift and Ashley Judd, but also a Latino strawberry picker (identified only by a pseudonym, Isabel Pascual) and others.

*Time* photographed and shared the stories of several women of various racial, ethnic, and socioeconomic backgrounds, as well as of a couple of men – to illustrate the many faces of those who have experienced sexual harassment.

Besides hitting Hollywood, media, politics, national security, and other sectors, the movement has rapidly spread across the world – a mirror of the numerous women’s marches across the globe this past January.

By early November, #MeToo had been tweeted 2.3 million times from eight-five different countries.

According to CNN, 35 percent of women around the world have experience physical or sexual violence, and “120 million girls have experienced forced sex or other sexual acts.”

The digital campaign had real-world results. In the United Kingdom, Britain's Defense Secretary Michael Fallon quit the cabinet, following revelations that he had “lunged” at journalist Jane Merrick when she had been a 29-year-old reporter.

In France, the hashtag #BalanceTonPorc – roughly translated as “snitch out your pig” – was conceived of by French journalist Sandra Muller (also profiled in the *Time* Person of the Year issue). Italians began tweeting #QuellaVoltaChe, or “that time when.”



A picture shows the messages '#Me too' and #Balancetonporc ('Expose your pig') on the hand of a protester during a protest against gender-based and sexual violence called by the Efronte-e-s Collective, on the Place de la Republique square in Paris on October 29, 2017. #MeToo hashtag is the campaign encouraging women to denounce experiences of sexual abuse that has swept across social media in the wake of the wave of allegations targeting Hollywood producer Harvey Weinstein.

BERTRAND GUAY/AFP/GETTY

In Spain, #YoTambien begun trending. And a direct translation of #MeToo into Arabic has caught fire in parts of the Middle East and Africa. Indian tech writer and novelist, Pankaj Mishra, posted on Twitter : “India’s #Weinstein moment happened last year. Just that we choose to bury our head in sand. Heard of a man named Mahesh Murthy? #metoo.”

The social media analytics tool, Talkwalker, tweeted a map illustrating how the hashtag spread across the world – with over a million uses in two days. Twitter data as of early November showed that users in the United States, United Kingdom, India, France, and Canada used the hashtag #MeToo most heavily.

Wow the #MeToo viral campaign spread.

COUNCIL ON FOREIGN RELATIONS

India is still reeling from the 2012 gang rape of Jyoti Singh Pandey, a woman who died after being brutally attacked by a group of men on a bus. In response, the Indian government enhanced punishments for sexual assault, and created a \$480 million fund for women's safety initiatives.

Despite these efforts, reported rapes are up 40 percent from 2012 (though this may reflect that more women are reporting rape – now that there is greater awareness that it's a crime – rather than indicating a higher incidence of rape).

More recently, the #MeToo campaign has been important in increasing public awareness of sexual assault, especially among men, said Namita Bhandare, a writer for the *Hindustan Times* .

"The #MeToo (posts) made it evident how widespread it was, it was different from looking at a statistic or data," she said. "A lot of my (male) friends said 'oh we didn't know, we had no idea it was widespread,' and these are fairly enlightened men."

However, the #MeToo campaign has been somewhat less visible in the Arab world. According to reporting from [CNN](#), "Experts believe that the burden of harassment and abuse there is as rife as in any other region but that the voices heard are few and far between."

Lina Abirafeh, director of the Institute for Women's Studies in the Arab World in Lebanon [suggests](#) that "There are so many reasons behind this silence.... I've heard trickles ... (but) people are scared," in part due to norms that attach stigma and shame to speaking out.

A 2013 UN Women report found that [99 percent](#) of women surveyed across seven regions in Egypt had experienced some form of sexual harassment. These survey results are amplified by a report by [Harassmap](#) —a company whose app allows women to flag unsafe neighborhoods of the Egyptian capital, Cairo—which indicated that "more than 95 percent of women sampled in the city had been harassed."

[In the Czech Republic](#), women's rights activist Andrea Molocea noted, "What's happening now is fantastic and it's for the first time in our history as women that we can speak the same language of sorrow and despair and of subordination."

In Sweden, the [king himself maintained](#) that the campaign was having a positive effect: "It's probably good that you look under old rocks. In the end something good will probably come of this," he told Swedish newspaper, [Kvällsposten](#).

In India, Bani Rachel Bali, who works on gender issues with her organization, Krantikali, [told CNN](#), "I haven't seen a campaign that started in one corner of the world and replicated all across, so to see something like this really blow up and more than this being an online campaign ... I felt the presence of a sisterhood."

At the same time, [as Zephyr Teachout notes](#), the hasty push to force U.S. Senator Al Franken to resign, while other lawmakers remain in power, highlights the need for both due process and proportionality.

Both at home and abroad, greater thought needs to go into developing procedures that are both responsive to survivors of sexual harassment and abuse, while protecting the rights of those accused.

While #MeToo has gone viral, the full legal, political, and cultural consequences have yet to be sorted. Plus, the recent Alabama special election to replace U.S. Attorney General Jeff

Sessions highlighted the #MeToo campaign's potency as well as its limits.

Fifty-seven percent of women voted for Doug Jones. However, sixty-three percent of white women backed Jones' opponent, Roy Moore, despite accusations that he sexually pursued, abused, or assaulted several teenage girls (whereas ninety-eight percent of Black women backed Jones).

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Nonetheless, the broader trajectory of the #MeToo campaign demonstrates the power of women as a group, along with the power of social media in building a global movement.

*Catherine Powell is an adjunct senior fellow in the Women and Foreign Policy program at the Council on Foreign Relations and a professor at Fordham Law School. She served in Secretary of State Hillary Clinton's policy planning office and in the White House National Security Council as director for human rights in the Obama administration. She was founding director of both the Human Rights Institute and the Human Rights Clinic at Columbia Law School.*

*This piece was written with help from Maiya Moncino, CFR research associate for international economics, and James Goebel, CFR intern for economic history.*

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STYLE | SELF | CULTURE | POWER 

# I Started the Media Men List My name is Maira Donegan.

By Maira Donegan

Photo-Illustration: Stevie Remsberg; Photos: Getty Images

In October, I created a Google spreadsheet called “Shitty Media Men” that collected a range of rumors and allegations of sexual misconduct, much of it violent, by men in magazines and publishing. The anonymous, crowdsourced document was a first attempt at solving what has seemed like an intractable problem: how women can protect ourselves from sexual harassment and assault.

One long-standing partial remedy that women have developed is the whisper network, informal alliances that pass on open secrets and warn women away from serial assaulters. Many of these networks have been invaluable in protecting their members. Still, whisper networks are social alliances, and as such, they're unreliable. They can be elitist, or just insular. As Jenna Wortham pointed out in *The New York Times Magazine*, they are also prone to exclude women of color. Fundamentally, a whisper network consists of private conversations, and the document that I created was meant to be private as well. It was active for only a few hours, during which it spread much further and much faster than I ever anticipated, and in the end, the once-private document was made public — first when its existence was revealed in a BuzzFeed article by Doree Shafrir, then when the document itself was posted on Reddit.

A slew of think pieces ensued, with commentators alternately condemning the document as reckless, malicious, or puritanically anti-sex. Many called the document irresponsible, emphasizing that since it was anonymous, false accusations could be added without consequence. Others said that it ignored established channels in favor of what they thought was vigilantism and that they felt uncomfortable that it contained allegations both of violent assaults and inappropriate messages. Still other people just saw it as catty and mean, something like the “Burn Book” from *Mean Girls*. Because the document circulated among writers and journalists, many of the people assigned to write about it had received it from friends. Some faced the difficult experience of seeing other, male friends named. Many commentators expressed sympathy with the aims of the document — women warning women, trying to help one another — but thought that its technique was too radical. They objected to the anonymity, or to the digital format, or to writing these allegations down at all. Eventually, some media companies conducted investigations into employees who appeared on the spreadsheet; some of those men left their jobs or were fired.

None of this was what I thought was going to happen. In the beginning, I only wanted to create a place for women to share their stories of harassment and assault without being needlessly discredited or judged. The hope was to create an alternate avenue to report this kind of behavior and warn others without fear of retaliation. Too often, for someone looking to report an incident or to make habitual behavior stop, all the available options are bad ones. The police are notoriously inept at handling sexual-assault cases. Human-resources departments, in offices that have them, are tasked not with protecting employees but with shielding the company from liability — meaning that in the frequent occasion that the offender is a member of management and the victim is not, HR's priorities lie with the accused. When a reporting channel has enforcement power, like an HR department or the

police, it also has an obligation to presume innocence. In contrast, the value of the spreadsheet was that it had no enforcement mechanisms: Without legal authority or professional power, it offered an impartial, rather than adversarial, tool to those who used it. It was intended specifically not to inflict consequences, not to be a weapon — and yet, once it became public, many people immediately saw it as exactly that.

Recent months have made clear that no amount of power or money can shield a woman from sexual misconduct. But like me, many of the women who used the spreadsheet are particularly vulnerable: We are young, new to the industry, and not yet influential in our fields. As we have seen time after time, there can be great social and professional consequences for women who come forward. For us, the risks of using any of the established means of reporting were especially high and the chance for justice especially slim.

When I began working in magazines as a new college graduate in 2013, I was furtively warned away from several of my industry's most well-known abusers. Over the intervening years, I've met these characters in various guises. There was the hard-drinking editor who had worked in all the most prestigious editorial departments, who would down whiskeys until he was drunk enough to mention that he could help your career if you slept with him. There was the editor who would lean too close but who was funny enough that he would often charm women into consensual encounters that were then rumored to turn abruptly, frighteningly violent. Last summer, I saw two of the most notorious of these men clutching beers and laughing together at a party for a magazine in Brooklyn. "Doesn't everyone know about them?" another woman whispered to me. "I can't believe they're still invited to these things." But of course we could believe it. By then, we'd become resigned to the knowledge that men like them were invited everywhere.

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What does it take to speak out against sexual assault and harassment? On December 12, eight women met in New York for a conversation, led by Rose McGowan, about the challenges of coming forward.

████████████████████

The spreadsheet was intended to circumvent all of this. Anonymous, it would protect its users from retaliation: No one could be fired, harassed, or publicly smeared for telling her story when that story was not attached to her name. Open-sourced, it would theoretically be accessible to women who didn't have the professional or social cachet required for admittance into whisper networks. The spreadsheet did not ask how women responded to men's inappropriate behavior; it did not ask what you were wearing or whether you'd had anything to drink. Instead, the spreadsheet made a presumption that is still seen as radical: That it is men, not women, who are responsible for men's sexual misconduct.

There were pitfalls. The document was indeed vulnerable to false accusations, a concern I took seriously. I added a disclaimer to the top of the spreadsheet: "This document is only a collection of misconduct allegations and rumors. Take everything with a grain of salt." I sympathize with the desire to be careful, even as all available information suggests that false allegations are rare. The spreadsheet only had the power to inform women of allegations that were being made and to trust them to judge the quality of that information for themselves and to make their own choices accordingly. This, too, is still seen as radical: the idea that women are skeptical, that we can think and judge and choose for ourselves what to believe and what not to.

Nevertheless, when I first shared the spreadsheet among my women friends and colleagues, it took on the intense sincerity of our most intimate conversations. Women began to anonymously add their stories of sexual assault; many of the accounts posted there were violent, detailed, and difficult to read. Women recounted being beaten, drugged, and raped. Women recounted being followed into bathrooms or threatened with weapons. Many, many women recounted being groped at work, or shown a colleague's penis. Watching the cells

populate, it rapidly became clear that many of us had weathered more than we had been willing to admit to one another. There was the sense that the capacity for honesty, long suppressed, had finally been unleashed. This solidarity was thrilling, but the stories were devastating. I realized that the behavior of a few men I had wanted women to be warned about was far more common than I had ever imagined. This is what shocked me about the spreadsheet: the realization of how badly it was needed, how much more common the experience of sexual harassment or assault is than the opportunity to speak about it. I am still trying to grapple with this realization.

Over the course of the evening, the spreadsheet expanded further: Many of the incidents reported there were physical, but there were also accounts of repeated sexual remarks, persistent inappropriate passes, unsolicited drunken messages. There was an understanding of the ways that these less-grave incidents can sometimes be harbingers of more aggressive actions to come, and how they can accrue into soured relationships and hostile environments. For clarity, I imposed a system that visibly distinguished violent accusations from others: Once a man had been accused of physical sexual assault by more than one woman, his name was highlighted in red. No one confused a crude remark for a rape, and efforts were made to contextualize the incidents with notes — a spreadsheet allows for all of this information to be organized and included. But the premise was accepted that all of these behaviors were things that might make someone uncomfortable and that individuals should be able to choose for themselves what behavior they could tolerate and what they would rather avoid.

I took the spreadsheet offline after about 12 hours, when a friend alerted me that Shafrir would soon be publishing an article at BuzzFeed making the document's existence public. By then, the spreadsheet had gone viral. I had imagined a document that would assemble the collective, unspoken knowledge of sexual misconduct that was shared by the women in my circles: What I got instead was a much broader reckoning with abuses of power that spanned an industry. By the time I had to take the document down, more than 70 men had been named on the version that I was managing (other versions, assembled after the spreadsheet was taken offline, appeared later). The men ranged in age from their 20s to their 60s, and 14 had been highlighted in red to denote more than one accusation of sexual assault or rape. Some have expressed doubts about the veracity of the claims in the document, but it's impossible to deny the extent and severity of the sexual-harassment problem in media if you believe even a quarter of the claims that were made on the spreadsheet. For my part, I believe significantly more than that.



I can't pretend that the spreadsheet didn't frighten me. As the stories accumulated and it became clear that many, many more women were using the document than I had ever imagined, I realized that I had created something that had grown rapidly beyond my control. I was overwhelmed and scared. That night, I went to a friend's house to make dinner, and while I was there I confided in her about my fears. I worried that managing the document would eventually put me in the uncomfortable position of needing to decide whose stories belonged there and whose didn't. I thought that I would lose my job and the career I'd worked so hard to build. My friend could hear the anxiety in my voice; she urged me to take the document down. But I was conflicted. What was going on there was clearly cathartic for the women who were using it, telling their stories, encouraging one another, saying that it had happened to them too. Many women don't have the privileges that mitigate the risks of doing such a thing — privileges like whiteness, health, education, and class — and I do; it would be easier for me than for other people. I hoped that women reporters who saw the document might use it as a tip sheet and take it upon themselves to do the reporting that the document couldn't do and find evidence, if there was any, of the allegations made there. I began to think that maybe some of the assaults that women were warning one another about on the spreadsheet could be stopped by the power of the spreadsheet itself.

I was incredibly naïve when I made the spreadsheet. I was naïve because I did not understand the forces that would make the document go viral. I was naïve because I thought that the document would not be made public, and when it became clear that it would be, I was naïve because I thought that the focus would be on the behavior described in the document, rather than on the document itself. It is hard to believe, in retrospect, that I really thought this. But I did.

In some ways, though, I think the flaws in the spreadsheet were also a result of my own cynicism. At the time when I made it, I had become so accustomed to hearing about open secrets, to men whose bad behavior was universally known and perpetually immune from consequence, that it seemed like no one in power cared about the women who were most vulnerable to it. Sexual harassment and assault, even when it was violent, had been tolerated for so long that it seemed like much of the world found it acceptable. I thought that women could create a document with the aim of helping one another in part because I assumed that people with authority didn't care about what we had to say there. In this sense, at least, I am glad I was wrong.

In the weeks after the spreadsheet was exposed, my life changed dramatically. I lost friends: some who thought I had been overzealous, others who thought I had not been zealous enough.



I lost my job, too. The fear of being exposed, and of the harassment that will inevitably follow, has dominated my life since. I've learned that protecting women is a position that comes with few protections itself.

This escalated when I learned Katie Roiphe would be publishing my name in a forthcoming piece in *Harper's* magazine. In early December, Roiphe had emailed me to ask if I wanted to comment for a *Harper's* story she was writing on the "feminist moment." She did not say that she knew I had created the spreadsheet. I declined and heard nothing more from Roiphe or *Harper's* until I received an email from a fact checker with questions about Roiphe's piece. "Katie identifies you as a woman widely believed to be one of the creators of the Shitty Men in Media List," the fact checker wrote. "Were you involved in creating the list? If not, how would you respond to this allegation?" The next day, a controversy ensued on Twitter after Roiphe's intention to reveal my identity was made public. People who opposed the decision by *Harper's* speculated about what would happen to me as a result of being identified. They feared that I would be threatened, stalked, raped, or killed. The outrage made it seem inevitable that my identity would be exposed even before the Roiphe piece ran. All of this was terrifying. I still don't know what kind of future awaits me now that I've stopped hiding.

But over the past months I've also had many long, frank conversations with other journalists, men and women, about sexual harassment and assault in our industry. Many came to me with stories of their own abuse, some of which they had been too afraid to add to the spreadsheet, even anonymously. Others told me that they had seen their own attacker or harasser on the document and that they hadn't put him there. That meant that what that person had done to them, he had done to other people, too. In some of these conversations, we spent hours teasing out how these men, many of whom we knew to be intelligent and capable of real kindness, could behave so crudely and cruelly toward us. And this is another toll that sexual harassment can take on women: It can make you spend hours dissecting the psychology of the kind of men who do not think about your interiority much at all.

A lot of us are angry in this moment, not just at what happened to us but at the realization of the depth and frequency of these behaviors and the ways that so many of us have been drafted, wittingly and unwittingly, into complicity. But we're being challenged to imagine how we would prefer things to be. This feat of imagination is about not a prescriptive dictation of acceptable sexual behaviors but the desire for a kinder, more respectful, and more equitable world. There is something that's changed: Suddenly, men have to think about women, our inner lives and experiences of their own behavior, quite a bit. That may be one step in the right direction.

Last year, I wrote that women just recounting their experiences of sexism did not seem like enough. I wanted action, legislation, measurable markers of change. Now I think that the task at hand might be more rudimentary than I assumed: The experience of making the spreadsheet has shown me that it is still explosive, radical, and productively dangerous for women to say what we mean. But this doesn't mean that I've lowered my hopes. Like a lot of feminists, I think about how women can build power, help one another, and work toward justice. But it is less common for us to examine the ways we might wield the power we already have. Among the most potent of these powers is the knowledge of our own experiences. The women who used the spreadsheet, and who spread it to others, used this power in a special way, and I'm thankful to all of them.

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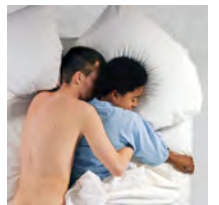
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**Things Couples Do to Keep Their Marriage Going**



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8:00 A.M.

## What It's Like to Finally Find the One, the Third Time Around

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MARRIAGE: AN INVESTIGATION | 8:00 A.M.

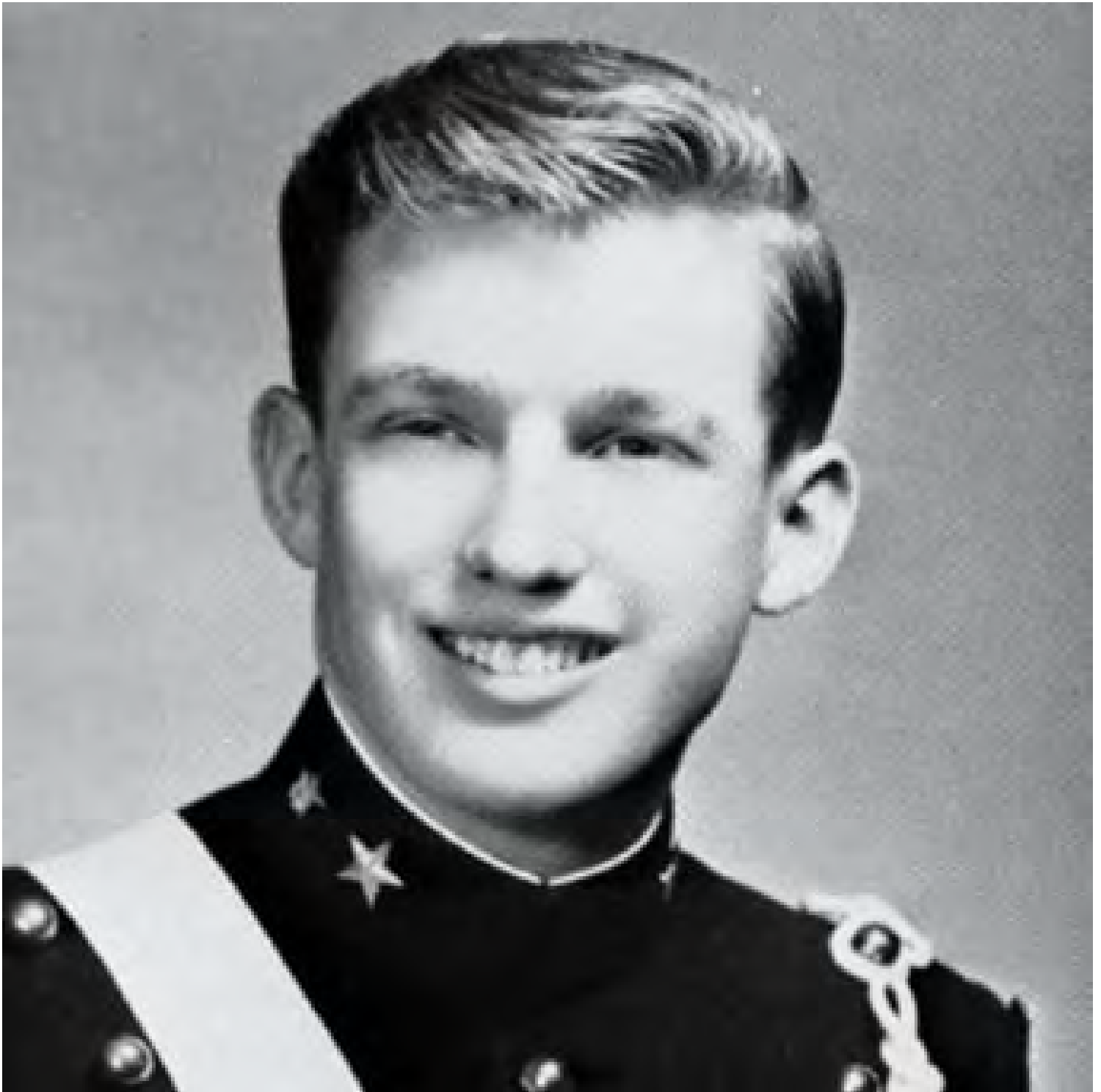
**10 Pictures of What Marriage Is Really Like** Couples reflect on images that capture the most intimate moments in their relationships.

By Rachel Bashein

8:00 A.M.

**When Your Wife Becomes an Anti-Vaxxer**





VISION 2020 | 6:00 A.M.

**A Yearbook of the 2020 Presidential Candidates** Among these major-party contenders, we found a debate champion, varsity athletes, student-government leaders, and a few very enthusiastic music fans.

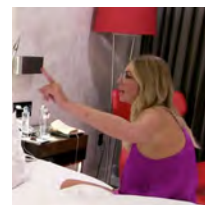
By Yelena Dzhanova and Kelsey Hurwitz

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YESTERDAY AT 10:00 P.M.

## Everybody Lets Loose on

— Finally!



YESTERDAY AT 6:48 P.M.

## Missing College Student Found Dead After Taking Wrong Car



YESTERDAY AT 6:40 P.M.

## Justin Bieber Did a Pregnancy Prank



YESTERDAY AT 5:39 P.M.

## Snacking Inside a \$120 Million Apartment







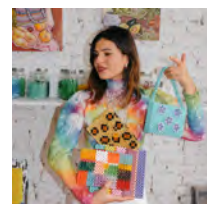
CULTURE | YESTERDAY AT 5:36 P.M.

## An Art Exhibition Designed to Make Us Put Down Our Phones It's okay not to Instagram the art.

By Marjon Carlos

YESTERDAY AT 5:29 P.M.

## The Designer Who Wishes She Kept Her Bat Mitzvah Swag





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YESTERDAY AT 4:57 P.M.

## Legendary Model Has Been Diagnosed With Cancer



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YESTERDAY AT 4:02 P.M.

## Joe Biden Accused of Inappropriately Touching Another Woman



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YESTERDAY AT 3:35 P.M.

## David Blaine Faces Two New Sexual-Assault Accusations



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YESTERDAY AT 3:20 P.M.

## This K-Beauty Brand Is Launching a New Vitamin C Serum at Sephora



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YESTERDAY AT 3:10 P.M.

## How I Get It Done: Esther McGowan, Executive Director of Visual AIDS





CUT COVERS | **YESTERDAY AT 3:01 P.M.**

**Natasha Lyonne Is Our April Cover Woman** She starred in a high-tech shoot.

By Andrew Nguyen

**YESTERDAY AT 2:30 P.M.**

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DANIELLE KEATS CITRON\*

## Sexual Privacy

**ABSTRACT.** *Those who wish to control and expose the identities of women and people from marginalized communities routinely do so by invading their privacy. People are secretly recorded in bedrooms and public bathrooms, and “up their skirts.” They are coerced into sharing nude photographs and filming sex acts under the threat of public disclosure of their nude images. People’s nude images are posted online without permission. Machine-learning technology is used to create digitally manipulated “deep fake” sex videos that swap people’s faces into pornography.*

*At the heart of these abuses is an invasion of sexual privacy – the behaviors and expectations that manage access to, and information about, the human body; gender identity and sexuality; intimate activities; and personal choices. More often, women and marginalized communities shoulder the abuse.*

*Sexual privacy is a distinct privacy interest that warrants recognition and protection. It serves as a cornerstone for sexual autonomy and consent. It is foundational to intimacy. Its recognition would acknowledge the subordinating impact of invasions of sexual privacy. Traditional privacy law’s efficacy, however,*

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*is eroding just as digital technologies magnify the scale and scope of the harm. Comprehensive legislation is essential to address all manner of sexual privacy invasions. This Article proposes a uniform approach to sexual privacy that includes federal and state penalties for privacy invaders, removes the statutory immunity from liability for certain content platforms, and works in tandem with hate crime laws.*

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## INTRODUCTION

The barriers that protect information about our intimate lives are under assault. Networked technologies are being exploited to surveil and expose individuals' naked bodies and intimate activities. Home devices are hijacked to spy on intimates and ex-intimates.<sup>1</sup> Hidden cameras are used to film people in bedrooms and restrooms, and "up their skirts." People are coerced into sharing nude images and making sex videos under threat of public disclosure.<sup>2</sup> They are ordered to tell no one, pairing forced exhibition with coerced silence.<sup>3</sup> Sexually explicit images are posted online without subjects' permission.<sup>4</sup> Technology enables the creation of hyper-realistic "deep fake" sex videos that insert people's faces into pornography.<sup>5</sup>

At the heart of all of these abuses is an invasion of sexual privacy. Sexual privacy involves the social norms that manage access to, and information about, individuals' intimate lives. Far more than sex is involved. Sexual privacy concerns the parts of the human body associated with sex and gender. It involves information about sexual orientation and gender identity. It includes intimate activities and the zones in which those activities occur. It involves personal decisions about one's intimate life. Sexual privacy, as I am using the term, is both descriptive and normative. It concerns how sexual privacy is currently experienced and how it should be experienced.

Sexual privacy is a distinct privacy interest that sits at the apex of the hierarchy of privacy interests.<sup>6</sup> It warrants special protection given its importance to sexual autonomy, self-development, intimacy, and equality. Sexual privacy enables individuals to determine who has access to their bodies and intimate information. It gives them breathing room to experiment with their bodies, sexuality, and gender before going "on stage" with them.<sup>7</sup> It facilitates self-respect and secures the social bases for respect. Sexual privacy allows individuals to see themselves as authors of their

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<sup>1</sup>Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools of Domestic Abuse*, N.Y. TIMES, June 24, 2018, at A1.

<sup>2</sup> BENJAMIN WITTES, CODY POPLIN, QUINTA JURECIC & CLARA SPERA, BROOKINGS INSTITUTE, *SEXTORTION: CYBERSECURITY, TEENAGERS, AND REMOTE SEXUAL ASSAULT* (2016).

<sup>3</sup> *Id.*

<sup>4</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

<sup>5</sup> Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, CALIF. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3213954](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213954).

<sup>6</sup> David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221 (2016) (calling for scholars to distinguish the value of different privacy interests so that policymakers can make meaningful decisions when privacy interests are in conflict).

<sup>7</sup> CHARLES FRIED, *AN ANATOMY OF VALUES* 140 (1970).

intimate lives and for others to see them as human beings rather than as just their genitalia or sexuality.<sup>8</sup>

Intimate relationships have difficulty forming in the absence of sexual privacy. Intimate relationships develop through a process of mutual self-disclosure and mutual vulnerability.<sup>9</sup> Over time, partners grow to trust one another with their innermost thoughts and feelings.<sup>10</sup> If that trust has been betrayed, individuals have difficulty letting their guard down in future relationships.<sup>11</sup>

Equal opportunity is on the line as well. In the present, as in the past, individuals from marginalized communities shoulder the brunt of the abuse.<sup>12</sup> Invasions of sexual privacy make it difficult for targeted individuals to enjoy all of life's crucial opportunities. Victims suffer stigmatization after their naked bodies are exhibited online. They lose their jobs and have difficulty finding new ones. They experience feelings of humiliation and shame.

Despite sexual privacy's importance, reform efforts have proceeded slowly. This is partially because policymakers have dealt with particular invasions of sexual privacy in isolation. One day, they address nonconsensual pornography and the next they tackle sextortion or "up skirt" photos. Because the full breadth of the harm is not in view, any given setback appears to have low stakes.

Social attitudes have stymied reform efforts as well. Some contend that no attention is warranted because invasions of sexual privacy involve problems of victims' making.<sup>13</sup> Some worry that efforts to protect sexual

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<sup>8</sup> See, e.g., JANET MOCK, *REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE* (2014); JENNIFER FINNEY BOYLAN, *SHE'S NOT THERE: A LIFE IN TWO GENDERS* (2003); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J. L. & HUMAN. 195, 241 (1995).

<sup>9</sup> IRWIN ALTMAN & DALMAS TAYLOR, *SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS* (1973).

<sup>10</sup> EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 181 (1978). As Edward Bloustein explains, "[l]overs fashion intimacy by telling each other things about themselves that they would not share with anyone else."

<sup>11</sup> CHARLES FRIED, *THE ANATOMY OF VALUES* 140 (1980).

<sup>12</sup> Scott Skinner-Thompson, *Privacy's Double Standards*, WASH. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3134500](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134500) (explaining that marginalized communities are disproportionately subject to unwanted surveillance); Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673 (2017).

<sup>13</sup> DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014); Citron & Franks, *supra* note, at; Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 392-95 (2009) (exploring recurring patterns animating society's trivialization of harms disproportionately impacting women like domestic abuse, workplace sexual harassment, and cyber gender harassment).



privacy reinforce outmoded views of sexual modesty and shame.<sup>14</sup> Others warn that sexual privacy would simply hide abuse of the vulnerable.<sup>15</sup>

But sexual privacy need not work this way.<sup>16</sup> If we recognized invasions of sexual privacy as a uniform phenomenon, we would be able to see the full breadth of the fallout. Dismissing sexual privacy because victims “asked for it” is just another way to trivialize harms of people from marginalized communities.<sup>17</sup> Rather than re-inscribing shame, the protection of sexual privacy conveys respect for individuals’ sexual autonomy and choices about their intimate lives, and it affirms the importance of trust in intimate relationships. Efforts to hide abuse or coercion under the guise of “privacy” deserve no protection, let alone sexual privacy.

This Article focuses on invasions of sexual privacy at the hands of private individuals, leaving extensive discussion of governmental and

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<sup>14</sup> JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). This critique has early tort bona fides. For instance, late nineteenth-century privacy tort decisions reflected “paternalistic attempts to keep ‘ladies’ out of the public gaze.” JESSICA LAKE, *THE FACE THAT LAUNCHED A THOUSAND LAWSUITS: THE AMERICAN WOMEN WHO FORGED A RIGHT TO PRIVACY* 225, 10 (2016). This argument is one I consistently faced when presenting work on nonconsensual pornography that I coauthored with Mary Anne Franks. Some feminist scholars pushed back on our call to criminalize the nonconsensual posting of a person’s nude images as affirming the view that women should be ashamed of their nude bodies. But the punishment of nonconsensual pornography would not re-inscribe shame. Instead, it would make clear that each and every one of us should be able to decide who gets to view our naked bodies. As Part I argues, sexuality – including our nude bodies – is crucial to human agency and identity development. It is bound up in the ability to forge relationships of love and trust. The nonconsensual posting of people’s nude images undermines respect for their choices about their sexual selves, and it corrodes their sense of trust. It does not say that they ought to be ashamed of their sexuality.

<sup>15</sup> CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND THE LAW* 93, 101–02 (1987); Reva B. Siegel, *‘The Rule of Love’: Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117 (1996). Sexual privacy should not be abandoned for fear of its distortion to hide abuse or coerce silence, whether it is domestic abuse or sexual predation as in the cases of Harvey Weinstein, Charlie Rose, and Matt Lauer. Instead, sexual privacy, understood correctly, should be recognized and protected when it affirms autonomy, enables intimacy, and secures equality.

<sup>16</sup> In this Article, I emulate the spirit of Anita Allen’s scholarship, which has sought to identify beneficial forms of privacy and private choice to which women and minorities can lay claim, see, e.g., ANITA L. ALLEN, *UNEASY ACCESS* (1988); Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 *STAN. L. REV.* 1175 (2000); Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 *N. ILL. U. L. REV.* 441, 442 (1990), as well as Linda McClain’s scholarship, which has called for an “egalitarian, liberal feminist conception of privacy.” See, e.g., Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 *WM. & MARY L. REV.* 759 (1999); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 *YALE J.L. & HUMAN.* 195 (1995).

<sup>17</sup> Citron, *Law’s Expressive Value*, *supra* note, at 392–95.

corporate invasions of sexual privacy for later work.<sup>18</sup> Why concentrate on interpersonal wrongdoing? Law addresses some invasions of sexual privacy, no doubt because the harm suffered is viscerally palpable. This provides a foothold to assess existing law and norms concerning sexual privacy.

Neither tort law nor criminal law has protected sexual privacy as clearly or as comprehensively as it should.<sup>19</sup> Some victims are left with little or no legal redress; some abusers are punished in an inconsistent manner. For instance, neither criminal law nor the privacy torts are likely to cover up-skirt photos, and a grab bag of criminal laws cover sextortion but result in the disparate treatment of perpetrators depending on the victims' age.<sup>20</sup>

This is the time to develop a comprehensive understanding of sexual privacy and to make an explicit commitment to protect it. Traditional privacy law's efficacy is eroding just as digital technologies magnify the scale and scope of the harm. Thanks to networked technologies, sexual privacy can be invaded at scale and from across the globe.<sup>21</sup> Search engines ensure the prominence of posts far into the future.<sup>22</sup> In some cases, the damage can be permanent.<sup>23</sup>

Comprehensive federal and state legislation is essential to address all manner of sexual privacy invasions. It would fill gaps in existing legal frameworks that currently enable a culture of impunity for bigoted abuse. It should be paired with hate crime provisions that enhance penalties for bias-motivated invasions of sexual privacy. Content platforms should not be immune from legal liability if they knowingly enable invasions of sexual privacy. This approach would allow us to take a full account of the structural impact of sexual privacy invasions.

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<sup>18</sup> Although this Article focuses on individual wrongdoing and law's role addressing it, it refers to state action invading sexual privacy to provide context for my piece. My future work will explore governmental and corporate practices impacting sexual privacy. For instance, it will consider governmental outing of people's sexuality, gender identity, and HIV status; state laws requiring that people frequent bathrooms that accord with the sex assigned on their birth certificates; state denial of services to transgender individuals; the mandatory collection of intimate information to obtain government services; the use of automated predictions about our intimate lives among other issues. Scholars have drawn attention to these issues, and my later work will build on their important insights. *See, e.g.*, KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017); Kendra Albert, *The Double Binds of Transgender Privacy* (on file with author); Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015).

<sup>19</sup> *See* Part III.

<sup>20</sup> WITTES ET AL., *supra* note, at.

<sup>21</sup> Brian Krebs, *Sextortion Scam Uses Recipient's Hacked Passwords*, KREBS ON SECURITY (July 18, 2018), <https://krebsonsecurity.com/2018/07/sextortion-scam-uses-recipients-hacked-passwords/>.

<sup>22</sup> DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

<sup>23</sup> Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1804 (2010).

Although it would likely have a modest impact, the privacy torts should be expanded to reflect the lived realities of women and minorities. Meaningful protection for sexual privacy would include tort remedies for certain disclosures of intimate information in violation of another's trust and confidence. Another important task is to identify market efforts that valuably advance the project of sexual project without risking too much of it.

## I. SEXUAL PRIVACY

### A. CONCEPT

In everyday interactions, we erect boundaries around our personal information, bodies, and activities.<sup>24</sup> We seclude some physical spaces and not others; we keep some conversations confidential and share others with third parties.<sup>25</sup> We make social media posts visible to some friends and hide them from others.<sup>26</sup>

Sometimes, law protects the boundaries that free us from scrutiny and exposure. To take a few well-known examples, law restricts the handling of personal data in government databases.<sup>27</sup> It limits the collection, use, and disclosure of financial information,<sup>28</sup> educational records,<sup>29</sup> social security numbers,<sup>30</sup> and driver's license numbers.<sup>31</sup> It protects the privacy of political activities—for instance, our votes are anonymous to prevent retaliation and reduce social pressure.<sup>32</sup> At other times, law does not protect privacy but it should.

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<sup>24</sup> IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, AND CROWDING* 50 (1975); Kirsty Hughes, *A Behavioral Understanding of Privacy and its Implications for Privacy Law*, 75 *MODERN L. REV.* 806, 810–13 (2012).

<sup>25</sup> SOLOVE, *UNDERSTANDING PRIVACY*, *supra* note, at (offering a taxonomy of sixteen types of privacy problems, including intrusion, disclosure, collection, interrogation, use, anonymity, and invasion).

<sup>26</sup> Woodrow Hartzog & Frederic D. Stutzman, *The Case for Online Obscurity*, 101 *CALIF. L. REV.* 1 (2013).

<sup>27</sup> Privacy Act of 1974, 5 U.S.C. § 552(a); see PRISCILLA REGAN, *LEGISLATING PRIVACY* (1995).

<sup>28</sup> Daniel J. Solove & Danielle Keats Citron, *Risk & Anxiety: A Theory of Data Breach Harms*, 96 *TEX. L. REV.* 737 (2018).

<sup>29</sup> Family Educational Rights & Privacy Act, 20 U.S.C. § 1232(g); 34 C.F.R. pt. 99.

<sup>30</sup> Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 *S. CAL. L. REV.* 241 (2007).

<sup>31</sup> Citron, *Mainstreaming Privacy Torts*, *supra* note.

<sup>32</sup> Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, *NEW YORKER* (Oct. 13, 2008). In the landmark decision of *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court struck down an Alabama law requiring the disclosure of members of the civil rights group on First Amendment grounds. Thanks to Nestor Davidson for urging me to include this point.

Whether privacy is warranted depends upon the settings, contexts, and expectations in which those boundaries are erected.<sup>33</sup> Crucial to those settings, contexts, and expectations is *sex*—the human body, gender identity, sexual orientation, intimate activities, and personal decisions.<sup>34</sup>

We have certain expectations about the seclusion of bedrooms, dressing rooms, and public restrooms. We make assumptions about who, if anyone, gets to see us naked, having sex, or taking a shower. We have certain expectations about the knowledge that others have about our sex lives, sexual orientation, or transgender identity.

Consider these examples of the experience of sexual privacy. A man takes off his clothing in a gym locker room assuming that there are no hidden cameras there. Transgender teenagers try on clothing that matches their gender once family members leave their homes—the solitude frees them to be themselves.<sup>35</sup> A couple has sex in their bedroom, believing that no one is watching them there. A man shares nude images with his boyfriend on the understanding that the photos are for their eyes only. A woman walks into a store, assuming that employees cannot see, let alone videotape her, up her skirt.

## B. VALUE

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<sup>33</sup> DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 44-46 (2008). Privacy has been studied from a wide range of perspectives, across disciplines. See, e.g., ARI WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR THE INFORMATION AGE (2018); WOODROW HARTZOG, PRIVACY'S BLUEPRINT (2017); NEIL RICHARDS, INTELLECTUAL PRIVACY (2015); JULIE COHEN, CONFIGURING THE NETWORKED SELF (2010); PRISCILLA REGAN, LEGISLATING PRIVACY (1995); ARTHUR R. MILLER, THE ASSAULT ON PRIVACY (1971); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607 (1999). Some scholars have searched for a common denominator for privacy. See, e.g., ALAN WESTIN, PRIVACY AND FREEDOM (1970). Other scholars reject the notion that privacy has a singular value and instead focus on privacy's operation in context. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008) (arguing that privacy should be understood as a family of interrelated problems); HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2009) (offering a theory of "contextual integrity" in which contextual norms shape privacy protection). I take a "ground up" approach in exploring how sexual privacy is and should be experienced.

<sup>34</sup> PATRICIA BOLING, PRIVACY AND THE POLITICS OF INTIMATE LIFE 57 (1996). In her book *PRIVACY AND THE POLITICS OF INTIMATE LIFE*, published in 1996, Patricia Boling explored how privacy functions, focusing on the Supreme Court's decisional privacy opinions such as *Griswold*, *Roe*, and *Bowers*.

<sup>35</sup> See BOYLAN, *supra* note, at 32 (recalling her teenage years before her transition when she would try on her mother's clothes after everyone left the house); MOCK, *supra* note, at (discussing trying on her best friend's skirts and sweaters in her friend's bedroom). As Jennifer Finney Boylan explains: "Dressing up was a start; it enabled me to use the only external cues I had to mirror how I felt inside. Yet it was the thing inside that I wanted to express. . . . the nights when I was alone . . . 'being female' were always a great relief for me." *Id.* at 31-32.

Sexual privacy should be recognized as a distinct privacy interest that implicates a “different domain of value” than other privacy interests.<sup>36</sup> It sits at the apex of the hierarchy of privacy values and should be protected as such.<sup>37</sup> Scholars have provided important analytical building blocks for recognizing sexual privacy as a category of privacy deserving special protection. Anita Allen has shown the significance of sexual privacy for women and LGBTQ individuals.<sup>38</sup> Linda McClain has highlighted the importance of women’s liberty to make decisions about their bodies.<sup>39</sup> As Khiara Bridges has shown, poor nonwhite mothers need freedom from invasive state interrogations about their intimate histories to protect their dignity and equal citizenship.<sup>40</sup>

The section explains why sexual privacy deserves special protection. It explores sexual privacy’s centrality to sexual autonomy, identity development, and intimacy. It highlights sexual privacy’s significance to anti-subordination efforts.

### 1. *Autonomy Securing*

Sexual privacy provides the foundation for sexual autonomy and consent. It enables individuals to set boundaries around their intimate lives.<sup>41</sup> It lets them determine the contexts in which their naked bodies can be seen, recorded, photographed, or exhibited. It permits them to decide if and to what extent their intimate information will be revealed, shared, or disclosed to others. It allows them to decide if their sexual identities can be used in sex videos.

The consent that sexual privacy facilitates is contextual—it does not operate as an on-off switch.<sup>42</sup> If a person allows an intimate partner to take her nude photograph, sexual privacy enables the person to ask the partner to delete the photograph or not to share it with anyone else. If a person shares her childhood sexual assault with an intimate partner, sexual privacy allows that person to ask the partner to keep the information confidential.

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

<sup>37</sup> Pozen, *supra* note, at 231.

<sup>38</sup> See, e.g., ALLEN, *UNEASY ACCESS*, *supra* note, at. For instance, Allen described workplace sexual harassment as a matter of sexual privacy. When male supervisors stared at female employees’ breasts and tried to grope them at work, they invaded women’s ability to keep their sexual identities in the background. *Id.* They pierced women’s sexual anonymity and forced the exhibition of their sexuality. *Id.*

<sup>39</sup> McClain, *supra* note, at.

<sup>40</sup> Bridges, *supra* note, at.

<sup>41</sup> Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J. L. & HUMAN. 195, 241 (1995).

<sup>42</sup> Citron & Franks, *supra* note, at.

If a person rents an apartment, sexual privacy enables that person to let the handyman into her apartment to fix a leak without suggesting that the handyman has permission to install a coat hook camera in her bathroom.

The autonomy that sexual privacy secures is essential to self-development.<sup>43</sup> The human body serves as a “basic reference” for identity formation.<sup>44</sup> It influences how individuals understand, develop, and construct their gender identity or sexuality.<sup>45</sup> As Julie Cohen thoughtfully explains, one’s sense of self is bound up in “performance and performativity.”<sup>46</sup> Free from the public’s glare and inspection, individuals can experiment with their intimate identities.<sup>47</sup> They can explore their sexual orientation or gender identity before “going on stage” with them.<sup>48</sup> Sexual privacy shapes the performance of “social identity.”<sup>49</sup>

Being able to reveal one’s naked body, gender identity, or sexual orientation at the pace and in the way of one’s choosing is crucial to self-development.<sup>50</sup> When the revelation of one’s sexuality or gender is out of one’s hands at pivotal moments, it can be shattering to identity formation.<sup>51</sup> As Anna Lauren Hoffmann insightfully explains, “being forced to reveal or go by the wrong gender or the wrong name triggers feelings of dysphoria

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<sup>43</sup> Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 40 (1977) (arguing that privacy accorded intimate affairs conveys to individuals that their lives are their own).

<sup>44</sup> MAURICE MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* (2013); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. REV. 233, 266 (1977). The body can be a source of empowerment, but it also can be a source of deep anxiety when it does not match one’s experience of gender. Janet Mock writes movingly about how her genitals taunted her—she felt like a girl from a tender age and her genitals served as a rebuke to that feeling. MOCK, *supra* note, at.

<sup>45</sup> We perform and construct gender identity; gender identity is not fixed or static. Paula Korenhof & Bert-Jaap Koops, *Gender Identity and Privacy: Could a Right to Be Forgotten Help Andrew Agnes Online?* SSRN Electronic Journal (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2304190](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304190). Our gender identity may not match how culture understands our bodies. JUDITH BUTLER, *GENDER TROUBLE* 7 (1990) (explaining that culture and norms link some parts of our bodies—genitalia, female breasts, and buttocks—to our person in a way that other body parts are not); see Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 5, 1257, 1273–77 (2003) (exploring treatment of genitalia and “states of undress” as matter of culture, threat, and risk).

<sup>46</sup> JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 130 (2012).

<sup>47</sup> KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 197 (2017).

<sup>48</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). Irwin Altman explains that “when the permeability of these boundaries [to the self] is under the control of a person a sense of individuality develops.” IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING* 49–50 (1975).

<sup>49</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

<sup>50</sup> McClain, *Reconstructive Tasks*, *supra* note, at 772.

<sup>51</sup> Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, *HYPATIA*, Summer 2007, at 43, 50.

and humiliation.”<sup>52</sup> The psychic trauma produced by the unwanted exposure of one’s gender or sexual orientation can alter a person’s life plans.<sup>53</sup>

Sexual privacy allows individuals to figure out their *future selves*.<sup>54</sup> It secures the ability to make life-defining decisions.<sup>55</sup> It gives individuals “breathing space away from familial or societal censure necessary for decisional privacy—e.g., to choose whether to have an abortion.”<sup>56</sup> As the Court underscored in *Lawrence*, personal decisions related to sexual intimacy permit individuals to define their “concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>57</sup>

Sexual privacy’s importance to sexual autonomy and self-development was at the heart of Samuel Warren and Louis Brandeis’s landmark article *The Right to Privacy*. Although Warren and Brandeis seemed to address a rarified problem—press coverage of upper crust dinner parties<sup>58</sup>—their project had broad implications for sexual privacy.<sup>59</sup> Warren and Brandeis tackled the harm wrought by journalists’ “sordid spying” into the “home of a family.”<sup>60</sup> They warned of “daily papers” broadcasting the “details of

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<sup>52</sup> Anna Lauren Hoffmann, *Data, Technology, and Gender: Thinking About (and From) Trans Lives*, in SPACES FOR THE FUTURE: A COMPANION TO PHILOSOPHY OF TECHNOLOGY (Joseph C. Pitt & Ashley Shew eds., 2017).

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

<sup>54</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>55</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). A robust literature challenges the Court’s decision in *Roe v. Wade* to base the right to make important intimate decisions on privacy. See, e.g., Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 1020 (1984); John Hart Ely, *The Wages for Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 930 (1973). Important scholarship has criticized *Roe* for failing to secure the right to privacy for the poor. See, e.g., Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 123 (1992); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1424 (1991); Anita Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987). I leave these concerns and the relationship between decisional privacy and informational privacy for my book project on sexual privacy.

<sup>56</sup> Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1203–04 (1998). Privacy in reproductive decisions protects an individual from having to tell the state about her reasons for exercising the choice to terminate a pregnancy. *Id.*

<sup>57</sup> *Lawrence*, 539 U.S. at 573–74 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>58</sup> See MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 98 (2009) (explaining how prominent Bostonian Samuel Warren convinced his law school classmate and law firm partner Louis Brandeis to coauthor the *The Right to Privacy* because he was displeased with the attention that the press paid to his social life, in particular the dinner parties hosted by his wife Mabel, the daughter of a U.S. Senator).

<sup>59</sup> A little-known reason behind Samuel Warren’s interest in a right to privacy was his younger brother Ned’s homosexuality. Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128 (2016). As Charles Colman argues, Warren might have viewed the article as a way to protect his family from public scrutiny of his brother’s sexuality. *Id.*

<sup>60</sup> *Id.* at 202 n.1.

sexual relations.”<sup>61</sup> Warren and Brandeis argued that individuals and society suffer when intimacies “whisper[ed] in the closet” are “declared from the rooftops.”<sup>62</sup> In their estimation, exposing the “fact” of a “domestic occurrence” without consent risked “spiritual” harm even greater than “material” harm.<sup>63</sup>

Warren and Brandeis called for tort law to recognize a “right to be let alone” in the “sacred precincts of private and domestic life.”<sup>64</sup> Individuals needed to control how much others knew about the “domestic circle.”<sup>65</sup> They needed to “determine the extent to which [their] thoughts, sentiments, and emotions shall be communicated to others.”<sup>66</sup> As Warren and Brandeis argued, a “right to privacy” was essential to developing the “inviolable personality.”<sup>67</sup>

An aspect of the “inviolable personality” is human dignity—the recognition that individuals determine the arc of their intimate lives.<sup>68</sup> Sexual privacy enables self-respect by affirming that individuals have agency over their intimate identities. Julie Innes described the absence of privacy in this way: “[i]f people can freely go into individuals’ homes” and “learn[] all matters about [them], without saying yes, it is difficult to imagine how [anyone] would ever recognize” themselves as the authors of their intimate lives.<sup>69</sup>

The ability to manage access to one’s naked body and intimate information enables individuals to present themselves as dignified and whole.<sup>70</sup> It is integral to what Leslie Henry calls “dignity as personal integrity”—having the social bases of self-respect.<sup>71</sup> When intimate information is “removed from its original context and revealed to strangers, individuals are vulnerable to being misjudged” on the basis of their tastes,

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<sup>61</sup> Samuel L. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

<sup>62</sup> *Id.* at 197.

<sup>63</sup> *Id.* at 197, 205.

<sup>64</sup> *Id.* at 195.

<sup>65</sup> *Id.* at 205.

<sup>66</sup> *Id.* at 198.

<sup>67</sup> *Id.* at 205.

<sup>68</sup> As Leslie Henry explores in her important scholarship, dignity encompasses pluralistic values in the jurisprudence of the Supreme Court. Leslie Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011). The Court has used the term dignity in five distinct yet complementary ways—institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity. *Id.* at 177. Relying on the Court’s opinions, Henry shows that “each conception of dignity has a judicial function oriented toward safeguarding substantive interests against dignitary harm.” *Id.* I rely on Henry’s insights to underscore dignitary harms that accompany sexual privacy invasions.

<sup>69</sup> INNES, *supra* note, at 109.

<sup>70</sup> *Id.*

<sup>71</sup> Henry, *supra* note.



preferences, or activities.<sup>72</sup> When individuals' private sexual reading material or intimate habits are exposed to strangers, they may be "reduced, in the public eye, to nothing more than the most salacious book [they] once read" or sexual activity.<sup>73</sup>

For instance, when individuals' transgender identity or sexuality is subject to unwanted exposure, they risk being viewed as *just* their transgender identity or sexuality. Janet Mock explained her reluctance to tell colleagues about her trans womanhood in this way: "I felt that if I told people I was trans . . . being trans would become the focus on my existence, and I would be forced to fight the image catalogued in people's minds about trans people."<sup>74</sup>

The unwanted exposure of people's nude bodies can give them a "diminished status," which is often internalized "as a lack of full self-esteem."<sup>75</sup> Of course, undressed bodies appear in advertising, films, and television shows—but what violates human dignity in some contexts is unremarkable in others.<sup>76</sup> As Martha Nussbaum explains, "sexuality is an area of life in which disgust often plays a role."<sup>77</sup> Sex signifies our animal nature because it involves the exchange of bodily fluids.<sup>78</sup> In nearly all societies, "people identify a group of sexual actors as disgusting or pathological, contrasting them with 'normal' or 'pure' sexual actors (prominently including the people themselves and their own group)."<sup>79</sup>

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<sup>72</sup> Rosen, *supra* note, at 9.

<sup>73</sup> *Id.* at 9.

<sup>74</sup> MOCK, *supra* note, at.

<sup>75</sup> See Martha C. Nussbaum, *Objectification and Internet Misogyny*, in THE OFFENSIVE INTERNET 68 (Saul Levmore & Martha C. Nussbaum eds., 2010) (discussing online posters' description of rape fantasies of female law students); see also MARTHA NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 363 (2013).

<sup>76</sup> As Roisin Kiberd noted of celebrities who appeared nude on film but who suffered deep embarrassment after the theft and posting of nude images, "with a stolen image, the value is doubled: The woman is naked and the viewer isn't supposed to be seeing what they are seeing." Roisin Kiberd, *Why the Fappening Keeps Happening*, VICE (Apr. 12, 2017).

<sup>77</sup> MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 17 (2010).

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

<sup>79</sup> *Id.* There is a similar dynamic at work when the State interrogates poor black mothers about their intimate lives when they apply for Medicaid. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017). As Bridges documents in her scholarship, the State demands to know about poor mothers' intimate activities, which have no bearing on their physical health or the well-being of the fetus. Poor mothers are asked whether their pregnancies were planned, how many sexual partners they have had, whether they are sexually adventurous, whether they have experienced sexual assault, and if they have ever exchanged sex for money or gifts. *Id.* at 111. By forcing poor mothers to reveal their histories with abortion, sexual assault, and prostitution, the State reduces them to those experiences. Poor mothers cannot present authentic identities—they are sexual assault victims, prostitutes, or sexual deviants. The State's interrogations violate human dignity by saying that poor mothers are the *type* of people who are unworthy of privacy. See Danielle Keats Citron, *A Poor Mother's*

Those groups often include those who do not fall in line with heteronormativity – women who have had more than one sexual partner, LGBTQ individuals, and individuals in multiple sexual relationships.<sup>80</sup>

None of this is to suggest that sex, gender, or sexuality are the essence of individuals' identities.<sup>81</sup> Other aspects of people's lives are profoundly important to identity formation. As Neil Richards argues, being able to manage boundaries around one's intellectual activities like reading, writing, and speaking is crucial to self-development.<sup>82</sup> Without intellectual privacy, individuals might feel pressured to conform to the bland and uncontroversial.<sup>83</sup> Just as the recognition of intellectual privacy does not mean that reading, writing, and speaking determine individuals' personhood, the recognition of sexual privacy does not mean sex, gender, and sexuality exclusively define who individuals are.

## 2. *Intimacy Enabling*

Another crucial aspect of sexual privacy is its role in fostering intimacy.<sup>84</sup> Intimate interactions need protection from the public glare to flourish.<sup>85</sup> Sexual privacy frees individuals to experience physical intimacy.<sup>86</sup> It lets intimate partners "give themselves over" to each other

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*Right to Privacy: A Review*, 98 B.U. L. REV. (forthcoming 2018) (reviewing *The Poverty of Privacy Rights* and comparing the work of Bridges to that of Charles Reich in providing a theory of privacy for the marginalized).

<sup>80</sup> Nussbaum, *supra* note, at (explaining that the sexuality of women and LGBTQ individuals are often shamed as disgusting); Of course, mutual revelation, so crucial to identity development, is not always egalitarian. Jimmie Manning & Danielle M. Stern, *Heteronormative Bodies, Queer Futures: Toward a Theory of Interpersonal Panopticism*, 21 INFO., COMM. & SOCIETY 208, 219 (2018) (arguing that sexuality is often shamed if it does not fall in line with heteronormativity, including women who are punished for having more than one sex partners whereas men are not).

<sup>81</sup> Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 752 (1989) (contending that conceptions of privacy linked to self-determination risks embracing essentialized identities – women as mothers – and offering a view of privacy based on the prevention of totalitarian state control over citizens).

<sup>82</sup> RICHARDS, *supra* note, at.

<sup>83</sup> *Id.*; Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008); see also Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181 (2008); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1425–26 (2000).

<sup>84</sup> WALDMAN, *supra* note, at; see also Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978) (arguing that intimacy and intimate relationships could not exist without privacy); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1977) (same); James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 326 (1975) (same).

<sup>85</sup> Boling, *supra* note, at 68.

<sup>86</sup> Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3, 20 (1998). Of course, mutual revelation of our bodies is not always egalitarian. Manning & Stern, *supra* note, at 217. Unwanted pressure to reveal one's body to an intimate partner can undermine

physically and “to be who they are—at least as bodies—intensely and together.”<sup>87</sup> When this takes place in the context of caring, physical intimacy is an aspect and expression of love.<sup>88</sup>

Sexual privacy not only enables physical intimacy, but it also provides an essential condition for the formation of intimate relationships.<sup>89</sup> Charles Fried contends that, “[t]o respect, love, trust, or feel affection for others and to regard ourselves as the object of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.”<sup>90</sup> Said another way, love is “inconceivable” without sexual privacy.<sup>91</sup>

Social psychological research shows the importance of sexual privacy to intimate relationships. Intimacy develops through a social process.<sup>92</sup> Crucial to intimate relationships is reciprocal self-disclosure.<sup>93</sup> As relationships develop, intimate partners share “vulnerable, socially undesirable facets of the self” on the expectation that that they will be discreet with each other’s confidences.<sup>94</sup> Intimate partners grow to trust each other with their innermost thoughts and feelings.<sup>95</sup> Intimate relationships deepen as couples continue the process of mutual sharing and mutual discretion.<sup>96</sup>

The Supreme Court has recognized the relationship between privacy and intimacy. In *Roberts v. Jaycees*, the Court acknowledged that people in highly personal relationships share “special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”<sup>97</sup> The Court attributed the constitutional shelter afforded highly personal relationships to the “realization that individuals draw much of

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meaningful identity development and intimacy. See Citron & Franks, *supra* note, at (discussing how domestic abusers pressure partners to reveal intimate images).

<sup>87</sup> Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 35 (1977) (arguing that the context of caring makes the sharing of personal information significant).

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

<sup>89</sup> CHARLES FRIED, AN ANATOMY OF VALUES 137, 140 (1970).

<sup>90</sup> *Id.* at 140.

<sup>91</sup> IRWIN ALTMAN & DALMAS TAYLOR, SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS 6 (1973).

<sup>92</sup> *Id.* at 136.

<sup>93</sup> *Id.* at 150. In *The Art of Loving*, Erich Fromm explains that love relationships allow a person to know himself, the other person, and humanity. ERICH FROMM, THE ART OF LOVING 47 (1956). When people share innermost thoughts, values, and attitudes—what Fromm calls the core—then they perceive their “identity, the fact of [their] brotherhood.” *Id.*

<sup>94</sup> *Id.* at 169.

<sup>95</sup> *Id.* at 77.

<sup>96</sup> See WALDMAN, *supra* note, at 67.

<sup>97</sup> *Id.*

their emotional enrichment from close ties with others.”<sup>98</sup> “Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”<sup>99</sup>

Scholars have argued that “relationships of love, liking, and caring” are the only reason that we should care about privacy.<sup>100</sup> Although sexual privacy is indispensable for intimacy, it matters even when intimate relationships are not involved. We need privacy when we try on clothing in a store, take a shower at the gym, or visit a public restroom. We need to decide for ourselves who knows about our transgender identity or sexual preferences even if such sharing has nothing to do with intimate relationships and even if we are out to certain friends. We need sexual privacy in our nude photos regardless of whether we created them in the context of an intimate relationship. Sexual privacy is indispensable to the development of intimate relationships but it is not the only reason why it deserves protection.

### 3. *Equality Protecting*

The connection between sexual privacy and the quest for gender, racial, sexual, and economic equality is undeniable.<sup>101</sup> Invasions of sexual privacy disproportionately impact individuals from marginalized communities. It

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<sup>98</sup> *Roberts v. United States Jaycees*, 468 U.S. 618 (1984).

<sup>99</sup> *Id.* at 619 (citing dissent of Justice Brandeis in *Olmstead v. United States* and *Stanley v. Georgia*).

<sup>100</sup> See, e.g., JULIE C. INNES, *PRIVACY, INTIMACY, AND ISOLATION* (1992) (contending that privacy only warrants protection if it involves decisions about and access to information about acts or matters that “draw value and meaning” from an agent’s “love, caring, or liking”); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977) (arguing that “intimacy” and the “intimacies of personal identity” are the “chief restricting concept in the definition of privacy”). This literature reinforces my argument that sexual privacy is distinctly worthy of protection, but I am not arguing that sexual privacy is the only kind of privacy that matters. American law rightly protects privacy interests in other arenas, from financial privacy to health privacy to constraints on government surveillance. It is also worth noting that in the age of Big Data, even seemingly innocuous information can reveal much about our intimate lives. As the Supreme Court has underscored in its recent Fourth Amendment decisions, knowing where someone has traveled over the course of a week can reveal information about their intimate lives, including who they love and whether they are seeking the advice of a family planning clinic. See *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Jones*, 565 U.S. 400, 413, 415 (2012) (Sotomayor, J., concurring).

<sup>101</sup> See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 308 (1997) (“Governmental policies that perpetuate . . . subordination through the denial of procreative rights, which threaten both racial equality and privacy at once, should be subject to the most intense scrutiny.”); see also JUDITH W. DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* (1997) (“Protection of privacy enhances and ensures the freedom from such scrutiny, pressure to conform, and exploitation”).

can lead to invidious discrimination.<sup>102</sup> Victims of sexual privacy invasions have lost jobs and have had trouble finding new ones after the nonconsensual posting of their nude images online.<sup>103</sup> They experience humiliation and fear after deep fake sex videos posted online depict them having sex.

As this section explores, the recognition of sexual privacy would acknowledge the devastating impact that sexual privacy invasions have on marginalized communities. It would draw attention to the importance of sexual privacy for the most vulnerable among us. It should not be deterred by a prior era's invocation of privacy to justify subordination.

*a. Expressive Meaning*

The recognition and protection of sexual privacy would reinforce efforts to combat subordination. It would help change the social meaning of practices like video voyeurism, up-skirt photos, nonconsensual pornography, sextortion, and deep fake sex videos, which are more often targeted at women and marginalized communities.<sup>104</sup> It would illuminate the historic realities and lived suffering of women, sexual minorities, and nonwhites.

The harms of sexual privacy invasions cannot be understood without accounting for race, gender, or sexual orientation. Privacy invasions often involve intersecting modes of subordination that compound the harm suffered. The “intersectionality” framework, theorized by Kimberlé Crenshaw, shows that the forces marginalizing individuals operate on multiple levels.<sup>105</sup> People experience subordination differently based on

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<sup>102</sup> Discrimination is a contested term with various meanings. I borrow from Deborah Hellman's account of discrimination unless otherwise noted in this piece. Hellman explains that discrimination is wrongful if it is demeaning, which has two criteria: (1) the conduct shows disrespect for another by debasing or degrading the person, and (2) conduct might be a material put-down, an exercise of power over the person. DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2011).

<sup>103</sup> Franks & Citron, *supra* note, at; Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709 (2017). *See also* Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985) (finding no privacy tort and constitutional law claims where plaintiff's employer Christian Science Monitor demanded to know her sexual orientation and then fired her after learning she was gay because right of religious freedom allowed the defendant to discharge the plaintiff). Transgender people have faced violent attack and lost custody over their children after their transgender identities were revealed. Jennifer Finney Boylan, *Britain's Appalling Transgender 'Debate,'* N.Y. TIMES (May 9, 2018).

<sup>104</sup> DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).

<sup>105</sup> Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991); Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010).

intersecting identities.<sup>106</sup> Race, gender identity, sexual orientation, religion, and class may combine as bases for oppression. The “intersection of racism and sexism factors into [women of color’s] lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experienced separately.”<sup>107</sup> As Dorothy Roberts explains, poor women of color experience various forms of oppression “as a complex interaction of race, gender, and class.”<sup>108</sup>

Mary Anne Franks has insightfully explored what she calls “intersectional surveillance.”<sup>109</sup> As she explains, “Attentiveness to race, class, and gender is vital to understanding the true scope of the surveillance threat. Marginalized populations, especially those who experience the intersection of multiple forms of subordination, also often find themselves at the intersection of multiple forms of surveillance: high-tech and low-tech, virtual and physical.”<sup>110</sup>

Sexual privacy invasions involving intersectional marginalization inflict profound harm. Consider the attacks on black actress Leslie Jones after the release of the movie *Ghostbusters* in which Jones had a starring role.<sup>111</sup> Tweets featured doctored photos of Jones with semen on her face. Harassers compared Jones to an ape with menacing photos to match. Jones’s website was hacked; its contents replaced by photographs of her license and passport, fake nude photographs of Jones, and a video tribute to a dead zoo gorilla.<sup>112</sup> Jones eventually departed Twitter in response to the harassment.

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<sup>106</sup> Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. FORUM 105, 107–08 (2018), <https://www.yalelawjournal.org/forum/what-about-ustoo>. For an early discussion of the intersectional nature of workplace sexual harassment, see LIN FARLEY’S SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 63 (1978).

<sup>107</sup> Crenshaw, *Mapping the Margins*, *supra* note, at 1244.

<sup>108</sup> Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and Privacy*, 104 HARV. L. REV. 1419, 1424 (1991). People with identities that meet at the intersection of privilege and disadvantage face unique forms of discrimination and subordination. Darren Lenard Hutchinson, *Identity Crisis: ‘Intersectionality,’ ‘Multidimensionality,’ and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 312 (2001). Black maleness—in the context of racial profiling, police brutality, and employment—is not a privileged identity, even though being male is generally viewed as a privilege in our society. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Queer Theory and Political Discourse*, 29 CONN. L. REV. 561, 641 (1997); Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 344–58 (2013).

<sup>109</sup> Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 465–64 (2017).

<sup>110</sup> *Id.* at 464.

<sup>111</sup> Adam Howard, *Why Was Leslie Jones Targeted by Trolls?*, NBC NEWS (Aug. 26, 2016), <https://www.nbcnews.com/news/us-news/why-was-leslie-jones-targeted-trolls-n638291>.

<sup>112</sup> Abby Ohlheiser, *The Leslie Jones Hack Used All the Scariest Tactics of Internet Warfare All at Once*, WASH. POST (Aug. 26, 2016) (explaining that women of color are subjected to racism

As Angela Onwuachi-Willig insightfully argues, Jones's experience should be viewed through an intersectional, multidimensional lens.<sup>113</sup> The invasions of Jones's sexual privacy were fraught with racism and misogyny.<sup>114</sup> Tweets exposed her racial and sexual identities in demeaning and humiliating ways. Doctored photographs reduced her to her genitalia and breasts; she was depicted as less than human—a gorilla. Posts revealed Jones's home address and confidential driver's license number and passport number.

We can see the intersectional nature of sexual privacy in the case of an author who I interviewed about her experience being secretly taped while having sex. The author's boyfriend hid a camera in his bedroom. The author discovered the secret sex videos in a computer folder labeled "Indian Research." As the author explained to me, she felt doubly shamed—she was not only reduced to a sex object but she was even more worthless due to her Indian heritage.<sup>115</sup> She felt demeaned as a woman and as an Indian American—an "other" who could be reduced to a sex object, violated, and abused.<sup>116</sup>

*b. Coerced Concealment*

An aspect of subordination involves norms that coerce concealment of people's intimate identities or bodies. Those norms do not involve sexual privacy, at least not in the autonomy-affirming, intimacy-enabling, and equality-protecting way that it should be conceptualized. They involve autonomy violations that demean people and deny them crucial life opportunities.<sup>117</sup>

Consider the pressure to hide one's homosexuality or trans identity to conform to hegemonic heterosexual society.<sup>118</sup> For far too long, sexual minorities could either hide their sexuality and pass as heterosexuals or face discrimination and the loss of jobs, contracts, and other interests.<sup>119</sup> As Kenji

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and sexism online); Sandra Laville et al., *The Women Abandoned to Their Online Abusers*, GUARDIAN (Apr. 11, 2016) (explaining that comments on Black Lives Matter Facebook pages contain "racism, sexism, and homophobia").

<sup>113</sup> Onwuachi-Willig, *supra* note, at 114.

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

<sup>115</sup> Interview with Jane Doe (notes on file with author). The man faced charges under state video voyeurism law for invading the privacy of several women and eventually pleaded guilty.

<sup>116</sup> The woman spoke to me with an understanding that I would keep her name confidential. I am honoring that promise here.

<sup>117</sup> Thanks to Katharine Silbaugh for urging me to make this point explicit.

<sup>118</sup> EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

<sup>119</sup> KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 22, 144 (2006).

Yoshino writes in *Covering: The Hidden Assault on Our Civil Rights*, sexual minorities felt compelled to “cover”—men felt pressure to perform stereotypical heterosexual male attributes, such as aggressiveness, while women felt pressured to perform stereotypically female attributes, such as compassion.<sup>120</sup> LGBTQ individuals continue to hide their sexuality or gender identity to prevent bigoted abuse.<sup>121</sup> Writer Jennifer Boylan kept her female identity a secret until she was forty years old because she feared social rejection, violence, and discrimination.<sup>122</sup>

The pressure to cover or hide one’s sexuality or gender identity stems not just from social norms but from law as well. Today, military recruits are told to hide their trans identities as a condition of service.<sup>123</sup> The Department of Health and Human Services is leading an effort to define sex under federal civil rights law as determined by one’s “immutable biological traits identifiable by birth,” an effort to eradicate the recognition of the gender status of trans individuals.<sup>124</sup> The now-terminated “Don’t Ask, Don’t Tell” policy required gay military members to hide their sexuality from colleagues and superiors.

Being forced to hide one’s sexuality or gender identity undermines sexual privacy. It denies people agency over their intimate identities. It violates a commitment to equality because it tells sexual minorities that they are “others” who should feel ashamed about their sexual orientation or transgender identities.

Along similar lines, nineteenth-century law coerced the concealment of some women’s bodies “at high cost to sexual choice and self-expression.”<sup>125</sup> As I. Bennett Capers explains, “Between 1850 and 1870, just as the abolitionist movement, then the Civil War, and then Reconstruction were disrupting the subordinate/superordinate balance between blacks and white, just as middle class women were demanding social and economic

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

<sup>121</sup> Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Significant Ways*, AMERICAN PROGRESS (May 2, 2017), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

<sup>122</sup> Jennifer Finney Boylan, *How a Sliver of Glass Changed My Life*, N.Y. TIMES (Sept. 4, 2018).

<sup>123</sup> U.S. DEP’T OF DEFENSE, REPORT AND RECOMMENDATION ON SERVICE OF TRANSGENDER PERSONS IN THE MILITARY (Feb. 2018), <https://assets.documentcloud.org/documents/4420622/226-3.pdf> (“Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are qualified for service.”).

<sup>124</sup> Erica L. Green, Katie Benner & Robert Pear, *Trump Administration Eyes Defining Transgender Out of Existence*, N.Y. TIMES (October 21, 2018).

<sup>125</sup> Allen, *Taking Liberties*, *supra* note, at 471.



equality, agitating for the right to vote, and quite literally the right to wear pants, and just as lesbian and gay subcultures were emerging in large cities, jurisdictions began passing sumptuary legislation which had the effect of reifying sex and gender distinctions.”<sup>126</sup> Many sumptuary laws explicitly banned cross dressing.<sup>127</sup> Sumptuary laws were enforced overwhelmingly against white women.<sup>128</sup> Courts treated white women’s bodies differently than white men’s bodies, relying on notions of modesty to deny them sexual autonomy.<sup>129</sup> Sumptuary laws violated sexual privacy, denying white women the ability to manage for themselves the boundaries around their bodies.

Another illustration was society’s treatment of the home as a secluded domain where men were free to batter their wives. Courts invoked the concept of the “private sphere” of family life to justify immunizing spousal abuse from criminal liability.<sup>130</sup> Law, norms, and culture overlooked and trivialized women’s battering because women were perceived as properly subject to their husbands’ discipline in the home.<sup>131</sup> Domestic violence remained hidden until the battered women’s movement gave it a name and worked to ensure its criminalization.<sup>132</sup> Again, law and society condoned violations of sexual privacy under the guise of “privacy.” Women had no ability to draw boundaries around their body—indeed, they could not escape to safety and seclusion, but rather were exhibited and beaten.

Feminist scholars have viewed privacy’s distortion in the service of subordination as warranting its end.<sup>133</sup> In the view of Catharine MacKinnon, privacy is inevitably a one-way ratchet to inequality.<sup>134</sup> For

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<sup>126</sup> I. Bennett Capers, “Cross Dressing and the Criminal,” 20 YALE J. L. & HUMAN. 8 (2008).

<sup>127</sup> *Id.* at 10.

<sup>128</sup> Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1285 (2003).

<sup>129</sup> *Id.* at 1284.

<sup>130</sup> Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2166 (1996) (quoting *Drake v. Drake*, 177 N.W. 624, 625 (Minn. 1920)). In the late twentieth century, battered women’s advocates got the attention of lawmakers, courts, and law enforcement, discrediting the reasons behind society’s protection of domestic violence. Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009). Law and norms have shifted, though not as completely as it was hoped. CITRON, HATE CRIMES, *supra* note, at 98–99. Although domestic violence remains a serious problem, the notion of “family privacy” as a shield to immunize domestic abusers no longer has the persuasive power it once enjoyed.

<sup>131</sup> Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1178 (1990).

<sup>132</sup> *Id.* Leigh Goodmark has explored the downside to this trend in her important work. See, e.g., LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018).

<sup>133</sup> CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 93, 101–02 (1987).

<sup>134</sup> MacKinnon argued that privacy entrenched male hierarchy and power—privacy was a right “for men to be left alone to oppress women.” Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 102 (1987).

other feminist scholars, sexual privacy's historical distortion did not dictate its normativity.<sup>135</sup> As Anita Allen has powerfully explained, while "the traditional predicament was . . . too much of the wrong kind of privacy," subordinated individuals deserved "privacy in the sense of adequate opportunities for privacy and private choice."<sup>136</sup> Just as the harm that results from some exercises of liberty does not lead to the rejection of liberty, the harm that results from the mischaracterization of privacy does not warrant the rejection of privacy.<sup>137</sup>

c. *Beyond Equality*

Would sexual privacy matter if bigoted attitudes and discrimination disappeared? What if naked bodies were no longer viewed with shame so posting someone's nude images or sex videos would not damage reputations and risk unemployment? Would we still need sexual privacy if information about people's sexual orientation or transgender identity would not be held against them? In other words, as Scott Skinner-Thompson asks in *Outing Privacy*, does our interest in sexual privacy have a limited shelf life?

In a sex-positive, bigotry-free world (one can dream!), we would still need sexual privacy. Even if no one cares if people's nude photos are posted online or if they are bisexual, lesbian, trans, or straight, they must retain the ability to manage for themselves how much of their intimate lives are shared with others. The ability to disclose intimate information as individuals wish is crucial to individuality, intimacy, and trust.<sup>138</sup> Whether or not anyone would judge individuals for what they do, each and every one of us needs to manage the boundaries around intimate activities and interactions. Sexual privacy lays the foundation for trust essential for intimacy and intimate relationships.<sup>139</sup>

According to Hannah Arendt, the private world of intimate relationships is crucial to human existence and the ability to participate in public life.<sup>140</sup> She argued that "there are very relevant matters which can survive only in the realm of the private. For instance, love, in distinction

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<sup>135</sup> Judith Wagner Decew, *The Feminist Critique of Privacy: Past Arguments and New Social Understandings*, in *SOCIAL DIMENSIONS OF PRIVACY* 90 (Beate Rosessler & Dorota Mokroskiska eds., 2015).

<sup>136</sup> ALLEN, *UNEASY ACCESS*, *supra* note, at 40.

<sup>137</sup> *Id.*

<sup>138</sup> Waldman, *supra* note, at.

<sup>139</sup> In forthcoming work, I am exploring sexual privacy's role in fostering trust in intimate relationships. See Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, *WASH. U. L. REV.* (forthcoming 2019).

<sup>140</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 51, 73 (1958)

from friendship, is killed, or rather extinguished, the moment it is displayed in public.”<sup>141</sup> In other words, human activities involving love, sex, and intimacy need protection from the public glare if they are to flourish.<sup>142</sup>

The recognition that intimate activity and nudity can be viewed as discrediting and shameful – and result in discrimination – is not to suggest that intimate behaviors are discrediting and shameful. Intimate activities and identities are not dirty. They are not undesirable. Quite the contrary. Because sex, sexuality, and gender are central to identity formation and intimacy, we need to manage the physical and informational boundaries around them.

Individuals must be able to decide for themselves the extent to which aspects of their intimate lives are shared with others. Actress Lena Dunham posted pictures of herself after her hysterectomy to raise awareness about ovarian fibroids and the challenges of reproductive health.<sup>143</sup> Crucial was that she chose to be seen in a hospital gown and to share the fact of her hysterectomy.<sup>144</sup>

Without sexual privacy, individuals may be unable to see themselves as the authors of their identities. They may be unable to forge relationships of love and trust. Sexual privacy matters and will continue to matter even as the forces of discrimination and subordination recede. But for now, because invasions of sexual privacy can lead to marginalization and subordination, we must recognize, understand, and address those harms.

### C. *SEXUAL PRIVACY’S CORE AND POTENTIAL TRADEOFFS*

A meaningful understanding of sexual privacy entails discerning core sexual privacy interests from peripheral ones. Sexual privacy interests are especially strong if they implicate sexual agency and intimacy. Consider the nonconsensual posting of someone’s nude photograph by an ex-partner. The victim has been denied sexual agency and choice as well as self-respect and the social bases of respect. To the public, the victim is just genitalia or breasts. The sexual privacy invasion has also breached the victim’s trust, undermining the possibility of future intimacy.

Imagine that a hotel employee places a hidden camera in a guest bathroom and tapes guests undressing and taking showers. The hotel employee posts videos of a female guest on PornHub along with her names

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<sup>141</sup> *Id.* at 53.

<sup>142</sup> Boling, *supra* note, at 68.

<sup>143</sup> Lena Dunham, *In Her Own Words: Why Lena Dunham Chose to Have a Hysterectomy at 31*, VOGUE (Feb. 14, 2018), <https://www.vogue.com/article/lena-dunham-hysterectomy-vogue-march-2018-issue>.

<sup>144</sup> Thanks to Clare Huntington for discussing this issue with me.

and addresses. The employee contacts the victim to extract more nude photos—the person threatens to keep posting the videos unless the victim agrees to his demands.<sup>145</sup> Here again, the victim was denied autonomy over her naked body. She was deprived of the ability to take a shower without being recorded. The harm compounded when the employee posted the video online. Of course, the victim had no relationship with employee and thus there was no betrayal of trust. Nonetheless, autonomy violation is grave and the harm compounded with its revelation online.

What about a stranger's taking secret photos of someone up their skirt? The victim has been denied sexual agency—she did not permit the stranger to take a photo up her skirt to capture her underwear and possibly a glimpse of her vagina. The stranger, however, did not breach the trust of an intimate partner. The sexual privacy interest is not as strong as the case of nonconsensual pornography or the case of video voyeurism and sextortion.

Once the strength of the sexual privacy interest is assessed, it may be necessary to wrestle with its normative significance in light of competing privacy interests. David Pozen describes this task as a “privacy-privacy tradeoff.”<sup>146</sup> Protecting “privacy along a certain axis may entail compromising privacy along another axis.”<sup>147</sup>

Weighing competing privacy interests requires thoughtful analysis. Policymakers and courts need “guidance on how to weigh—or in cases of incommensurability, how to order—various privacy interests when hard choices must be made among them.”<sup>148</sup> They must wrestle with competing privacy values in a careful and comprehensive way, lest decisions about those conflicts be left to whimsy. Developing an analytical framework for evaluating privacy-privacy tradeoffs is an urgent task.<sup>149</sup>

Consider illustrations of sexual privacy interests that should be prioritized over competing privacy interests.<sup>150</sup> Writing under a

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<sup>145</sup> I am basing this example on a real case on which I am serving as an adviser. I am keeping the victim's name and more specifics confidential.

<sup>146</sup> Pozen, *supra* note, at 224.

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

<sup>148</sup> *Id.* at 243.

<sup>149</sup> *Id.* In his project, Pozen builds a framework for understanding privacy-privacy tradeoffs. *Id.* His insightful work focuses on government surveillance efforts.

<sup>150</sup> *Id.* at 230. Pozen creates an astute typology of privacy-privacy tradeoffs. First, a policy may shift privacy burdens or benefits from one group in the population to another, which Pozen describes as a “distributional tradeoff.” *Id.* at 229. Second, risk may be shifted not only among groups that suffer harm but also on groups that cause harm to a certain privacy interest—among privacy invaders as well as victims, which Pozen describes as a “directional tradeoff.” *Id.* Third, a policy may shift privacy risk across time periods, which Pozen calls a “dynamic tradeoff.” *Id.* at 230. Last, a policy may shift risk across different privacy interests, which Pozen calls a “dimensional tradeoff.” *Id.* In other words, targeting one privacy risk creates a new, countervailing risk. *Id.*

pseudonym, a man posts his ex-girlfriend's nude image on Twitter without permission. The woman wants to sue the man, but she needs to trace the post to him to hold him legally responsible. Her attorney issues a subpoena to Twitter to obtain the pseudonymous poster's IP address. The disclosure of the plaintiff's nude image is at the core of sexual privacy—it involves her nude body and a communication between intimate partners. The plaintiff's sexual privacy interest has greater normative weight than the poster's interest in pseudonymous posting online.

In *The Unwanted Gaze*, Jeffrey Rosen argues that employees have an interest in carving out private spaces where they can joke, let down their hair, and form friendships free from scrutiny.<sup>151</sup> What if employee A shows employee B a nude image of employee C in the break room? Suppose that C shared the photo with A during an intimate relationship. C's interest in sexual privacy should be prioritized over B's interest in the privacy of his backstage conversations with colleagues.<sup>152</sup>

There will be difficult issues to sort out in cases involving competing sexual privacy interests or where sexual privacy clashes with privacy interests with similarly significant normative weight, such as intellectual privacy<sup>153</sup> or children's privacy.<sup>154</sup> In such cases, policymakers and courts should consider weighing the competing interests in a manner that would minimize the overall risks to privacy or advance privacy for the most vulnerable groups.<sup>155</sup>

Some privacy scholars have declined to provide a lexical ordering of privacy values. That task, however, is unavoidable. Daniel Solove argues that privacy encompasses related, overlapping dimensions whose value must be assessed from the ground up.<sup>156</sup> Those ground-up assessments require normative inputs.<sup>157</sup> This Article aims to provide guidance when sexual privacy is at stake.

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<sup>151</sup> Rosen, *supra* note, at 122-25.

<sup>152</sup> Leslie Henry and I discuss this example in our review of Daniel Solove's book *Understanding Privacy*. Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1122 (2010). In our review, we criticized Solove for failing to rank privacy interests. We argued that policymakers need guidance when dealing with competing privacy claims. *Id.*

<sup>153</sup> Richards, *supra* note; Cohen.

<sup>154</sup> ALLEN, UNPOPULAR PRIVACY, *supra* note, at.

<sup>155</sup> See Pozen, *supra* note, at 243.

<sup>156</sup> Daniel Solove has argued that because aggregations of innocuous data may allow inferences about sensitive matters, it is unhelpful to designate particular personal data as worthy of special protection. Recent drafts of the American Law Institute's Information Privacy Principles reflect that view. As an adviser to that project (which Solove and Paul Schwartz serve as the Reporters), I have objected to dropping the notion of sensitive information. Neil Richards joins me in that objection.

<sup>157</sup> Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107 (2010).

## II. INVASIONS OF SEXUAL PRIVACY

This Part explores different types of sexual privacy invasions and the harm that results. It begins with brief historical background and turns its focus to contemporary invasions of sexual privacy.

### A. BRIEF HISTORICAL BACKGROUND

In nineteenth-century America, sexual privacy was denied enslaved individuals.<sup>158</sup> Enslaved men and women had to disrobe on command so white masters could assess their bodies.<sup>159</sup> Enslaved women's bodies were treated as "items of public (indeed pornographic) display."<sup>160</sup> In the days of slavery, "black women were taken into the town square to be sold. They were paraded around naked, to be inspected and critiqued for future sale and sure abuse."<sup>161</sup> White masters sexually assaulted enslaved women and forced them to bear their children.<sup>162</sup>

The situation was hardly better for free black women. In the North, employment agencies pushed black women into prostitution.<sup>163</sup> In *Black Women in White America*, Gerda Lerner notes that, "the free availability [of black women] as sex objects to any white man was enshrined in tradition, upheld by the laws forbidding inter-marriage, enforced by terror against black men and women and . . . tolerated both in its clandestine and open manifestations."<sup>164</sup>

Black men and women, enslaved and free, were denied sexual privacy because they were deemed unworthy of it.<sup>165</sup> Dorothy Roberts explains that black women were "exiled from the norms of true womanhood."<sup>166</sup> Racist mythology labeled the black woman as a "lascivious temptress" and a

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<sup>158</sup> ROBERTS, *KILLING THE BLACK BODY*, *supra* note, at 10.

<sup>159</sup> Franks, *supra* note, at 442.

<sup>160</sup> McClain, *Reconstructive Tasks*, *supra* note, at 770 (citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 163–80 (1991)).

<sup>161</sup> Gabrielle Union, *My Nude Photos Were Stolen, and I'm Fighting Back*, *COSMOPOLITAN* (Nov. 5, 2014), <http://www.cosmopolitan.com/entertainment/celebs/news/a32589/gabrielle-union-my-nude-photos-were-stolen/>.

<sup>162</sup> ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 25–27 (1981).

<sup>163</sup> MARY M. BROWNLEE & W. ELLIOTT BROWNLEE, *WOMEN IN THE AMERICAN ECONOMY* 244 (1976).

<sup>164</sup> GERDA LERNER, *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY* 163–64 (1973).

<sup>165</sup> ROBERTS, *KILLING THE BLACK BODY*, *supra* note, at 10.

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

“degenerate.”<sup>167</sup> Black women could not be trusted with privacy over their intimate affairs.<sup>168</sup>

In the post-slavery era, black women in the segregated South remained “hypervisible and on display.” As Patricia Hill Collins explains in *Fighting Words: Black Women and the Search for Justice*, black women working as domestic laborers in white-controlled private homes were subject to various techniques of surveillance, including close scrutiny, sexual harassment, assault, and violence.<sup>169</sup> In *Dark Matters: On the Surveillance of Blackness*, Simone Browne observes that “within these labor conditions of hypervisibility, black domestic workers needed to assume a certain invisibility” so that they would be perceived as “readily manageable and nonthreatening.”<sup>170</sup>

Conceptions of womanhood that led to the public exposure of black women’s bodies<sup>171</sup> led to the control of upper- and middle-class white women in the “family home” where they enjoyed little sexual privacy.<sup>172</sup> Upper- and middle-class white women had few opportunities to enjoy solitude and repose in the home.<sup>173</sup> As John Stuart Mill observed, husbands colonized wives’ sentiments and bodies.<sup>174</sup> Wives were expected to bear children and care for their families, adhering to a “cult of domesticity.”<sup>175</sup> The bourgeois ideal was the white woman working at home and the white man working in the community.<sup>176</sup> The public-private distinction reflected

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<sup>167</sup> *Id.* (quoting historian Gerda Lerner).

<sup>168</sup> Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in *READING RODNEY KING/READING URBAN UPRISING* 15–22 (Robert Gooding-Williams ed., 1992). Black women were demeaned as unchaste, immodest, and undeserving of protection. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1768 (1993). During slavery, the rape of black women was not viewed as a crime. *Id.*; ANGELA DAVIS, *WOMEN, RACE, AND CLASS* (1981).

<sup>169</sup> PATRICIA HILL COLLINS, *FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE* (1998).

<sup>170</sup> SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 57 (2015). Browne’s book is a tour de force on how contemporary surveillance technologies and practices are informed by the methods of policing black life under slavery.

<sup>171</sup> ROBERTS, *KILLING THE BLACK BODY*, *supra* note, at 11. See also Toni Morrison, *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (1992).

<sup>172</sup> PATRICIA BOLING, *PRIVACY AND THE POLITICS OF INTIMATE LIFE* (1996).

<sup>173</sup> ALLEN, *UNWANTED ACCESS*, *supra* note, at.

<sup>174</sup> JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 26–27 (2d ed. 1869).

<sup>175</sup> CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* (1980). Working class women did not fit this model of domesticity given their need to work. Nineteenth-century feminists held views about social purity that led to concerns about prostitution and the erosion of female virtue. Kathy Peiss, *Charity Girls and City Pleasures: Historical Notes on Working-Class Sexuality, 1880–1920*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* (Ann Barr Snitow, Christine Stansell & Sharon Thompson eds., 1983). Thanks to Linda McClain who helpfully discussed this history of “sex wars” with me.

<sup>176</sup> *Id.* Sarah Joseph Hale, a journalist in the 1830s, described women as “God’s appointed agent of morality” with a responsibility to use their power within the family to refine men’s

the differentiation of the male from the family, family from the state and market, and the superior from the inferior.<sup>177</sup>

As workplaces changed in the twentieth century with white women and women of color working alongside men, sexual harassment was rampant. Until the late 1970s, it was acceptable to gawk at, ogle, and touch women in the workplace.<sup>178</sup> Sexual harassment was viewed as a perk of the workplace rather than invidious, illegal discrimination.<sup>179</sup>

Throughout these periods, sexual minorities were denied seclusion in their intimate affairs. State sodomy laws effectively criminalized their intimate interactions.<sup>180</sup> Until the Supreme Court decision in *Lawrence v. Texas*,<sup>181</sup> the fear of state intrusion hung over intimate interactions of LGBT individuals. As Anita Allen explains, restroom stalls and bedrooms “were not reliably private for the LGBT community.”<sup>182</sup> A gay man was arrested and charged with sodomy after someone spied on him in a store’s bathroom. A court explained that the man had no right to privacy in the bathroom stall, even though he was simply going to the restroom, because the store had an interest in securing restrooms free of crime.<sup>183</sup> Similarly, after a woman’s ex-husband secretly photographed her having sex with her female lover, a court found that the woman had no right to be free from surveillance in her bedroom.<sup>184</sup> According to the court, the man was justified in spying on his ex-wife and her lover because her lesbian affair was relevant to a child custody battle.<sup>185</sup>

These are just a few illustrations of the ways that sexual privacy was invaded and exploited in the past. In the next section, I turn to the focus on

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“human affections and elevate [their] moral feelings.” *Id.* The “True Woman was domestic, docile, and reproductive. The good bourgeois wife was to limit her fertility to symbolize her husband’s affluence.” C. SMITH-ROSENBERG, *DISORDERLY CONDUCT* 225 (1983).

<sup>177</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1873) (explaining that man is, or should be, woman’s protector or defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”). American attitudes reflected Aristotle’s distinction in *The Politics* between the *polis*, the political realm allocated to men, and the *okios*, the domestic realm allocated to women. Aristotle, *The Politics*, in *THE BASIC WORKS OF ARISTOTLE* 1127 (Richard McKeon ed., 1941).

<sup>178</sup> CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note, at.

<sup>179</sup> Citron, *Law’s Expressive Value*, *supra* note, at 392.

<sup>180</sup> JOEY J. MOGUL, ANDREA J. RITCHIE, AND KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 11-16 (2011); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>181</sup> 539 U.S. 558 (2003).

<sup>182</sup> Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1721 (2010).

<sup>183</sup> *Elmore v. Atlantic Zayre, Inc.*, 341 S.E.2d 905, 906 (Ga. Ct. App. 1986).

<sup>184</sup> *Plaxico v. Michael*, 735 So. 2d 1036, 1038 (Miss. 1999).

<sup>185</sup> *Id.*



this Article—contemporary invasions of sexual privacy and the injuries that they inflict.

## B. SEXUAL PRIVACY IN THE DIGITAL AGE

Some of these invasions of sexual privacy persist to this day.<sup>186</sup> Cultural attitudes about women and sexual minorities have not changed as quickly or as profoundly as one might have hoped.<sup>187</sup> For white women, women of color, LBT women, and girls, invasions of sexual privacy persist in different forms.<sup>188</sup> Gay men, trans men, and boys continue to have their intimate activities and identities exposed in unwanted ways.<sup>189</sup> Heterosexual men and men of color do experience invasions of sexual privacy, as this section will highlight, but, according to the most current evidence, individuals from marginalized communities and minors suffer the brunt of invasions of sexual privacy.

This section highlights the ways that sexual privacy is being invaded with the advent of networked technologies, including: (1) digital voyeurism, (2) up-skirt photos, (3) sextortion, (4) nonconsensual pornography, and (5) deep fake sex videos.

### 1. Digital Voyeurism

Observing, tracking, and recording intimate activities and bodies is not new. Individuals have long used technology to watch and record others in places and zones where being watched and recorded is neither welcome nor expected. But digital technologies have extended the voyeur's reach by enabling remote and ubiquitous surveillance.

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<sup>186</sup> Franks, *supra* note, at 441 (explaining how privacy has been unequally distributed in society with the burden borne by traditionally subordinated groups). *See also* CITRON, HATE CRIMES, *supra* note, at (documenting particular targeting of women and minorities and misogynistic, homophobic, racist, and anti-Semitic nature of abuse); Citron & Franks, *supra* note, at; Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

<sup>187</sup> Suffice it to say that the confirmation hearings of Judge Brett Kavanaugh to the Supreme Court have demonstrated the way that sexual assault as well as other gendered harms (including the shaming of women for alleged promiscuity) continues to be trivialized in the offices of some Senators and in our broader public discourse.

<sup>188</sup> As Khiara Bridges's scholarship has shown, poor mothers' privacy is virtually non-existent. *See* BRIDGES, *supra* note, at.

<sup>189</sup> Kendra Albert explains that trans individuals may feel "pressed to perform gender in ultra-feminine or ultra-masculine ways" to be considered feminine or masculine enough to obtain publicly funded hormone therapy or other government services. Albert, *supra* note, at.

Consider the secret audio and video recording of people at home. A considerable market exists for wireless spy cameras. A quick search yields an array of inexpensive coat hooks, clock radios, and smoke detectors with hidden cameras.<sup>190</sup> Perpetrators—often landlords, maintenance workers, roommates, and ex-intimates—place spy cameras in people’s bedrooms and bathrooms.<sup>191</sup> For instance, a professor welcomed LGBT teenagers to live in his house after the teens had been kicked out of their homes for “coming out.”<sup>192</sup> He hid a video camera in the guest bathroom.<sup>193</sup> Rutgers University student Dharun Ravi secretly filmed his roommate Tyler Clementi kissing a man and watched the live feed with six friends.<sup>194</sup>

The home is not the voyeur’s only target. Secret recording devices are placed in public restrooms and locker rooms.<sup>195</sup> A Maryland rabbi used a spy camera clock radio to secretly videotape a hundred women while they undressed for the ritual bath known as the mikvah.<sup>196</sup> In some localities, law enforcement has issued warnings about spy cameras placed in women’s

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<sup>190</sup> Todd Magel, *Man’s Arrest Prompts Hidden Camera Concerns in Iowa*, KCCI (Apr. 6, 2018), <https://www.kcci.com/article/mans-arrest-prompts-hidden-camera-concerns-in-central-iowa/19706016>.

<sup>191</sup> *Welsh v. Martinez*, 114 A.3d 1231 (Conn. App. Ct. 2015) (upholding invasion of privacy claim against man who gave the plaintiffs gifts for her bedroom, including a clock radio, that contained spy cameras). For news accounts, see John Genovese, *Maintenance Man Hid Camera, Spied on Residents at Apartment Complex, Warren County Sheriff Says*, WCPO (May 26, 2016), <https://www.wcpo.com/news/crime/maintenance-man-hid-camera-spied-on-residents-at-apartment-complex-warren-county-sheriff-says>; Robert Hadley, *Chicago Tenant Accuses Landlord of Recording Intimate Moments*, COOK COUNTY RECORD (Dec. 7, 2015), <https://cookcountyrecord.com/stories/510651393-chicago-tenant-accuses-landlord-of-recording-intimate-moments-via-hidden-camera> (reporting on lawsuit filed by tenant against landlord for secretly installing camera in smoke detector above his bed); Michelle Pekarsky, *Landlord Faces 42 Counts of Invasion of Privacy for Cameras found in KC Woman’s Midtown Apartment*, Fox4KC (Aug. 18, 2015, 3:37 PM), <https://fox4kc.com/2015/08/18/landlord-faces-42-counts-of-invasion-of-privacy-for-cameras-found-in-kc-womans-midtown-apartment/> (explaining that landlord was accused of planting hidden video cameras in tenants’ bedrooms and bathrooms); Shelby Brown, *What This Landlord Allegedly Did To Spy on Tenant Will Creep You Out*, WTVR (CBS NEWS) (Jan. 16, 2015, 12:35 PM), <https://wtvr.com/2015/01/16/landlord-sued-over-spy-camera/>; Erica Thompson, *Former Montauk Resident Sentenced After Illegally Spying on Tenants*, SOUTHAMPTON PRESS, Oct. 13, 2014.

<sup>192</sup> Ryan Collingwood, *North Idaho College Professor Charged With Felony Video Voyeurism*, SPOKESMAN-REVIEW, May 31, 2018.

<sup>193</sup> *Id.*

<sup>194</sup> Ian Parker, *The Story of a Suicide*, THE NEW YORKER (Feb. 6, 2012), <https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide>.

<sup>195</sup> *These Women Hunt Hi-Tech Peeping Toms in South Korea Where Secret Camera Porn is Rampant*, AGENCE FRANCE-PRESSE (Oct. 18, 2016).

<sup>196</sup> Keith L. Alexander & Michelle Boorstein, *Prosecutors Seek 17-Year Sentence for D.C. Rabbi Convicted of Voyeurism*, WASH. POST (May 8, 2015).

public restrooms.<sup>197</sup> In countries like South Korea, hidden cameras in women's restrooms are rampant.<sup>198</sup>

Voyeurs trick people into downloading malware (remote access trojans or RAT) onto their laptops, which are often kept in bedrooms. They turn on laptops' cameras and microphones to spy on victims.<sup>199</sup> Online communities known as "Ratters" share images of victims whom they refer to as their "slaves."<sup>200</sup> More often, the victims are young girls and boys.<sup>201</sup> According to the Digital Citizen Alliance, Ratters sell "slaved devices" online—girls' devices sell for more than boys' devices.<sup>202</sup>

Smart-home technology provides another way to spy on, record, and monitor people in intimate spaces.<sup>203</sup> According to Erica Olsen, Director of the National Network to End Domestic Violence's Safety Net Project, domestic abusers are using home technologies to watch, listen to, and torment their exes.<sup>204</sup> Networked home gadgets like Amazon Echo and security cameras are usually installed by men who use cellphone apps to monitor them.<sup>205</sup> The majority of victims are women.<sup>206</sup>

Cyber stalking apps are another spying tool of choice. These apps enable people to monitor everything people do and say with their cellphones.<sup>207</sup> Perpetrators need to have access to victims' phones for just a few minutes to install the spying app, which leaves no trace of its presence.<sup>208</sup> They can then view victims' texts, photos, calendars, contacts,

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<sup>197</sup> "Spy Hooks" Raise Alarm About Secret Filming in Public Toilets, 60 STARTS AT 60 NEWS (Oct. 28, 2017), <https://startsat60.com/news/spy-hooks-raise-alarm-about-secret-filming-in-public-toilets>.

<sup>198</sup> *Id.* In South Korea, the number of such incidents jumped six-fold from 2010 to 2014. *Id.*

<sup>199</sup> David Bisson, *Attackers Using RATs to "Slave" Victims' Computers, Sextort Children*, TRIPWIRE (Aug. 5, 2015), <https://www.tripwire.com/state-of-security/security-data-protection/cyber-security/attackers-using-rats-to-slave-victims-computers-sexort-children/>.

<sup>200</sup> Nate Anderson, *Meet the Men Who Spy on Women Through Their Webcams*, ARS TECHNICA (Mar. 10, 2013, 8:30 PM), <https://arstechnica.com/tech-policy/2013/03/rat-breeders-meet-the-men-who-spy-on-women-through-their-webcams/>.

<sup>201</sup> *Id.*

<sup>202</sup> DIGITAL CITIZENS ALLIANCE, *SELLING "SLAVING:" OUTING THE PRINCIPAL ENABLERS THAT PROFIT FROM PUSHING MALWARE AND PUT YOUR PRIVACY AT RISK* 4 (July 2015), <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/07027202-8151-4903-9c40-b6a8503743aa.pdf>.

<sup>203</sup> See Karen E.C. Levy, *Intimate Surveillance*, 51 IDAHO L. REV. 679 (2015).

<sup>204</sup> Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools of Domestic Abuse*, N.Y. TIMES, June 24, 2018, at A1.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Danielle Keats Citron, *Spying Inc.*, 72 WASH. & LEE L. REV. 1243, 1248 (2015) (exploring the federal and state criminal laws that punish and deter businesses trafficking in cyber stalking apps and devices primarily useful for surreptitious interception of electronic communications).

<sup>208</sup> *Id.*

and browsing habits in real time.<sup>209</sup> Targeted phones can be turned into bugging devices; conversations within a fifteen-foot radius of a phone are recorded and uploaded to the app's portal.<sup>210</sup> As cyberstalking app provider FlexiSPY tells subscribers, "[b]ug their room: listen in on their phone's surroundings and listen in on what is really going on behind closed doors."<sup>211</sup>

It requires very little digging to discover that the goal is stealth surveillance of intimates and ex-intimates. Stalking apps are hailed as the "spy in a [cheating spouse's] pocket."<sup>212</sup> Advertisements prominently feature a photo of a couple next to the message: "many spouses cheat. They all use cell phones. Their phones will tell you what they won't."<sup>213</sup> The advertisement continues, "Women who do cheat usually do so in a well-planned and discrete fashion, making it exceedingly difficult for their man to know they're being cuckolded . . . . Women are much more capable of looking you straight in the eye and lying."

Although video voyeurism targeting women, girls, and boys is more common, men are targeted as well. From 2014 to early 2018, Bryan Deneumostier ran a subscription-based website called "Straightboyz," which showed videos of him having sex with men.<sup>214</sup> The site claimed that the videos involved straight men who had been tricked into sex.<sup>215</sup> Deneumostier posted Craigslist ads posing as a "bored housewife" interested in anonymous sex.<sup>216</sup> Men answering the ad were told to come to Deneumostier's home where he greeted them dressed as a housewife and told them to put on blacked-out goggles or blindfolds.<sup>217</sup> The men were never told that their sexual encounters were being taped and posted online.<sup>218</sup>

Video voyeurism, from hidden cameras in the home and laptop to cyber stalking apps, undermines sexual privacy by taking unwanted dominion over people's bodies, intimate spaces, and intimate information. It hijacks their ability to control access that others have to their intimate

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> FLEXiSPY, <http://www.flexispy.com> (last visited July 29, 2018).

<sup>212</sup> Citron, *Spying Inc.*, *supra* note, at 1249.

<sup>213</sup> *5 Apps for Spying on Your Spouse*, MOBIESPY, <http://www.mobiespy.com/blog/5-apps-for-spying-on-your-spouse/>

<sup>214</sup> Factual Proffer, *United States v. Bryan Deneumostier*, Case No. 18-CR-20522 (D. Fla. Sept. 2018).

<sup>215</sup> *Id.*

<sup>216</sup> <https://gizmodo.com/men-looking-for-anonymous-sex-reportedly-tricked-into-b-1827690421>.

<sup>217</sup> <https://www.miamiherald.com/news/local/community/miami-dade/homestead/article213869259.html>.

<sup>218</sup> *Id.*

environments. In cases of privacy invaders who are former intimates, video voyeurism undermines the trust essential for future relationships.

## 2. Up-Skirt Photos

A related development involves the secret recording of women's breasts and genitals while they are in public spaces. People, usually men, surreptitiously take photographs of women "up their skirts" or "down their blouses."<sup>219</sup> Some perpetrators use shoes with hidden cameras and wrist watches with micro lenses to film women's crotches and breasts.<sup>220</sup>

A famous example involves actress Emma Watson—a member of the paparazzi lay down on the floor and got a photograph up her skirt.<sup>221</sup> After actress Anne Hathaway experienced the same, then-television anchor Matt Lauer shamed her on television about it.<sup>222</sup> Up-skirt photographs are not limited to the well-known. Everyday women are targeted on subways, airplanes, stairs of national monuments, stores, coffee shops, and pools.<sup>223</sup>

Private online forums are dedicated to sharing up-skirt videos. Motherboard accessed one of the private forums and found thousands of up-skirt images of girls and women. One popular private site called *The Candid Forum* contains 4,300 individual threads in a section dedicated to up-skirt videos.<sup>224</sup>

Much like video voyeurism, the practice of "up skirt" and "down blouse" photographs violate sexual privacy in denying victims' autonomy over their sexual anatomy. The privacy invader undermines the victim's

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<sup>219</sup> Clare McGlynn & Julia Downes, *We Need A New Law to Combat 'Upskirting' and 'Downblousing,'* INHERENTLY HUMAN (Apr. 15, 2015), <https://inherentlyhuman.wordpress.com/2015/04/15/we-need-a-new-law-to-combat-upskirting-and-downblousing/>.

<sup>220</sup> Alisdair A. Gillespie, "Up-Skirts" and "Down-Blouses:" *Voyeurism and the Law*, 2008 CRIM. L. REV. 370; Caitlin Dewey, *Even at a National Memorial, No One is Safe from Creepshots*, WASH. POST, Oct. 10, 2014.

<sup>221</sup> Clare McGlynn, *We Need a Law to Combat 'Upskirting' and 'Downblousing,'* INHERENTLY HUMAN (Apr. 15, 2015).

<sup>222</sup> Joshua Gillin, *Anne Hathaway Embarrassed About Upskirt Photo, Slams Door in Matt Lauer's Face*, TAMPA BAY TIMES (Dec. 12, 2012), <https://www.tampabay.com/content/anne-hathaway-embarrassed-about-upskirt-photo-slams-door-matt-lauers-face/2101303>; 'Seen a lot of you lately': Matt Lauer's Crude Quip to Anne Hathaway as He Quizzes Her About Being Pictured Without Her Underwear, DAILY MAIL (Dec. 12, 2012), <http://www.dailymail.co.uk/tvshowbiz/article-2247157/Anne-Hathaway-wardrobe-malfunction-Matt-Lauers-crude-quip-asks-pictured-underwear.html>.

<sup>223</sup> Clare McGlynn & Julia Downes, *We Need a New Law to Combat 'Upskirting' and 'Downblousing,'* INHERENTLY HUMAN (Apr. 15, 2015); see also Clare McGlynn, Erika Rackley & Ruth Houghton, *Beyond Revenge Porn: The Continuum of Image-Based Sexual Abuse*, 25 FEM. LEGAL STUD. 25, 32 (2017).

<sup>224</sup> Joseph Cox, *Inside the Private Forums Where Men Illegally Trade Upskirt Photos*, MOTHERBOARD, May 8, 2018.

decision to shield her genitalia and breasts from the public—consent and sexual autonomy are no longer in the control of the victims. Because strangers are the perpetrators, the “up skirt” and “down blouse” practice does not undermine intimacy.

### 3. *Sextortion*

According to a groundbreaking study by the Brookings Institute, sextortion involves extortion or blackmail carried out online involving a threat to release sexually-explicit images of the victim if the victim does not engage in further sexual activity.<sup>225</sup> The scheme begins when perpetrators obtain victims’ nude images either by tricking them into sharing them<sup>226</sup> or by hacking into their computers.<sup>227</sup> Perpetrators then threaten to distribute the nude photos unless victims send more nude photos or perform degrading sex acts in front of webcams.<sup>228</sup> Benjamin Jenkins demanded that victims—girls between the ages of 12 and 16—record themselves inserting objects into their vaginas, drinking their urine, and licking toilets.<sup>229</sup> He ordered victims to watch him masturbate.<sup>230</sup>

The abuse does not just involve the coerced invasion and exposure of victims’ bodies. Coerced silencing is another aspect of sextortion. Victims are threatened with further harm if they tell anyone. The abuse thrives as victims keep silent.<sup>231</sup> One in three victims tell no one about the sextortion.<sup>232</sup>

Perpetrators, who are universally male, have dozens and even hundreds of victims.<sup>233</sup> The vast majority of victims are female.<sup>234</sup> Of the

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<sup>225</sup> WITTES ET AL., *SEXTORTION*, *supra* note. The Brookings report was the first in the nation to study the phenomenon of sextortion. It has played a crucial role not only in raising awareness about the problem but also in moving policymakers to consider proposals for a federal statute criminalizing sextortion, based on the statute proposed in the report.

<sup>226</sup> *Id.*

<sup>227</sup> Krebs, *supra* note. Jared Abrahams hijacked female victims’ webcams, capturing them undressing in their bedrooms. Digital Citizens Alliance, *supra* note, at 10. One of his victims was Cassidy Wolf, Miss Teen USA 2013. *Id.* Abrahams threatened to post Wolf’s nude photos unless she made sexually explicit videos for him. *Id.*

<sup>228</sup> *What is Sextortion?*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/video-repository/newss-what-is-sextortion/view> (last visited July 29, 2018).

<sup>229</sup> Press Release, U.S. Dep’t of Justice, U.S. Attorney’s Office, Northern District of Georgia, Mableton Man Charged in Sextortion of Young Girls (June 1, 2018).

<sup>230</sup> *Id.*

<sup>231</sup> Quinta Jurecic, *Sextortion, Online Harassment, and Violence Against Women*, LAWFARE (May 17, 2017).

<sup>232</sup> JANIS WOLAK & DAVID FINKELHOR, *SEXTORTION: FINDINGS FROM AN ONLINE SURVEY ABOUT THREATS TO EXPOSE SEXUAL IMAGES* (June 2016), <https://rem.s.ed.gov/Docs/SextortionFindingsSurvey.pdf>.

<sup>233</sup> WITTES ET AL., *supra* note, at. Lucas Michael Chansler sextorted over 350 victims. *Id.*

<sup>234</sup> *Id.*

adult victims, nearly all are female.<sup>235</sup> The majority of underage victims are girls.<sup>236</sup> Boys are also victimized as well. Take Anton Martynenko who tricked 155 boys into sending him nude photos and then extorted more.<sup>237</sup>

To get a sense of the scale and the damage, consider the following cases. Luis Mijangos tricked hundreds of women and teenage girls into downloading malware onto their computers.<sup>238</sup> He turned on victims' webcams to record them undressing. Once Mijangos obtained victims' nude images, he emailed them his demand for more. He coerced 230 women and girls into performing sex acts for him on camera and sending nude images.<sup>239</sup>

Michael Ford followed a similar playbook, hacking into the computers of 75 female college students to obtain sexually-explicit images.<sup>240</sup> Via email, Ford ordered young women, including college students, to take videos of "sexy girls" undressing in changing rooms at pools, gyms, and stores.<sup>241</sup> He threatened to post their nude photos and contact information on "escort/hooker websites" unless they complied with his demands. When victims failed to comply, Ford sent the nude photos to victims' family members and friends.<sup>242</sup>

Sextortion involves the total destruction of sexual privacy. The privacy invader destroys the victim's ability to control her intimate information or body. Perpetrators exercise complete dominion over the victims' bodies, instructing them to commit sexually degrading acts and to exhibit their genitalia on videocam. They effectively extinguish victims' sexual autonomy and deny victims' the ability to go backstage in their bedrooms and experiment with their sexual or gender identities. Although

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<sup>235</sup> Quinta Jurecic, *Sextortion, Online Harassment, and Violence Against Women*, LAWFARE (May 17, 2016), <https://www.lawfareblog.com/sextortion-online-harassment-and-violence-against-women>.

<sup>236</sup> WITTES ET AL., *supra* note, at.

<sup>237</sup> Derek Hawkins, *His Massive Sextortion Scheme Snared 155 Boys*, WASH. POST (Nov. 30, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/30/his-massive-sextortion-scheme-snared-155-teen-boys-now-hes-going-to-prison-for-decades/?utm\\_term=.5876715fede0](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/30/his-massive-sextortion-scheme-snared-155-teen-boys-now-hes-going-to-prison-for-decades/?utm_term=.5876715fede0).

<sup>238</sup> *Id.*

<sup>239</sup> Sara Ashley O'Brien, *Sextortion is Scarily Common, New Study Finds*, CNN TECH (May 11, 2016), <https://money.cnn.com/2016/05/11/technology/brookings-institution-sextortion-study/>; Adam Duvernay, *NY Man Gets 16 Years for Sextortion of Sexual Images from Child in Delaware*, THE NEWS J. (May 30, 2018, 9:36 AM), <https://www.lavozarizona.com/story/news/crime/2018/05/30/ny-man-gets-16-years-coercing-sexual-images-de-child/655772002/>.

<sup>240</sup> Press Release, Department of Justice, *Former U.S. State Department Employee Sentenced to 57 Months in Extensive Computer Hacking, Cyberstalking, an 'Sextortion' Scheme* (Mar. 21, 2016).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

perpetrators have no prior relationship with victims and thus have no intimacy and trust to undermine, they may find it difficult for victims to trust others in the future.

#### 4. *Nonconsensual Pornography*

Nonconsensual pornography involves the distribution of sexually graphic images of individuals without their consent.<sup>243</sup> Sometimes, perpetrators obtain the nude images without subjects' permission.<sup>244</sup> Recall that Ford stole nude images from victims' computers and published the images after the victims refused to share more.<sup>245</sup> To take another example, a college student was secretly taped having sex with her boyfriend.<sup>246</sup> The boyfriend then showed the video at a fraternity meeting and texted it to his friends.<sup>247</sup>

In other cases, perpetrators obtain the nude images with consent, usually in the context of an intimate relationship. Then, the images are distributed without consent.<sup>248</sup> That practice is what is popularly referred to as "revenge porn."<sup>249</sup> For instance, Holly Jacobs shared sexually explicit images and videos with her boyfriend.<sup>250</sup> The images and videos were for their eyes only.<sup>251</sup> After their break up, her ex betrayed her trust, posting the photos and videos on hundreds of revenge porn sites, porn sites, and adult finder sites.<sup>252</sup> Her nude photos were also sent to her boss.<sup>253</sup>

Sometimes, perpetrators distribute nude images obtained with consent and ones obtained without consent. In the college student's case, the boyfriend not only distributed the sex video he made without her permission, but he also distributed nude images she shared with him in confidence.<sup>254</sup> The boyfriend uploaded the nude images on a Facebook page

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<sup>243</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

<sup>244</sup> *Id.*

<sup>245</sup> See *infra* note.

<sup>246</sup> Daniel Victor, *Florida Fraternity Sued Over Intimate Videos Shared on Facebook*, N.Y. TIMES (June 14, 2018).

<sup>247</sup> Complaint at ¶ 19, Kathryn Novak v. Brandon Simpson et al., No. 6:18-cv-00922 (M.D. Fla. filed July 13, 2018).

<sup>248</sup> Citron & Franks, *supra* note, at.

<sup>249</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 145–46.

<sup>250</sup> *Id.* at 45.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 47.

<sup>254</sup> Complaint at ¶ 26, Kathryn Novak v. Brandon Simpson et al., No. 6:18-cv-00922 (M.D. Fla. filed July 13, 2018).



called “Dog Pound” where members of his fraternity posted videos and images of sexual “conquests.”<sup>255</sup>

Nonconsensual porn impacts women and girls far more frequently than men and boys.<sup>256</sup> According to recent studies, the majority of victims are female.<sup>257</sup> Young women are particularly likely to face threats to post their nude images.<sup>258</sup> Men and boys do experience nonconsensual porn. Ari Waldman has conducted empirical studies about the prevalence of nonconsensual pornography among gay men.<sup>259</sup> Also consider the case of the woman who posted a photo of her ex-boyfriend’s penis to insult his masculinity on a revenge porn site.<sup>260</sup>

Individuals who identify as sexual minorities are more likely than individuals who identify as heterosexual to experience threats of, or actual, nonconsensual pornography.<sup>261</sup> Research shows that three percent of Americans who use the internet have had someone threaten to post their nude photos while two percent have had someone do it. Those numbers jumped considerably—to 15 percent and 7 percent respectively—among lesbian, gay, and bisexual individuals.<sup>262</sup>

The perpetrators are often—but not always—male.<sup>263</sup> Women and girls are perpetrators as well. For instance, Dani Mathers, a model for Playboy, secretly took a photograph of a 70-year-old woman while she was taking a

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<sup>255</sup> *Id.*

<sup>256</sup> ASIA EATON ET AL., 2017 NATIONWIDE ONLINE STUDY OF NON-CONSENSUAL PORN VICTIMIZATION AND PERPETRATION 12 (June 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> (“Women were significantly more likely [1.7 times] to have been victims of [non-consensual porn] or to have been threatened with [non-consensual porn]). The study is published by the Cyber Civil Rights Initiative. Other studies confirm these findings. Carolyn A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 FEMINISM & PSYCHOL. 50 (2018) (finding that 93 percent of victims of nonconsensual pornography are female). When it comes to revenge porn sites, women are the majority of people depicted. See Abby Whitmarsh, *Analysis of 28 Days of Data Scraped from a Revenge Pornography Website*, ABBY WHITMARSH (Apr. 13, 2015), <https://everlastingstudent.wordpress.com/2015/04/13/analysis-of-28-days-of-data-scraped-from-a-revenge-pornography-website/> (finding that of 396 posts to a revenge porn website, 378 depicted women versus 18 men); Carolyn A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 FEMINISM & PSYCHOL. 50–68 (2018) (“nearly 92% of victims featured on included websites were women”).

<sup>257</sup> Eaton, *supra* note.

<sup>258</sup> Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of “Revenge Porn,”* DATA AND SOCIETY RESEARCH INSTITUTE (Dec. 13, 2016), [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf).

<sup>259</sup> Ari Waldman, *Law, Privacy, and Online Dating: Nonconsensual Pornography in Queer Online Communities*, L. & SOC. INQUIRY (forthcoming) (on file with author).

<sup>260</sup> Manning & Stern, *supra* note, at 218.

<sup>261</sup> Fifteen percent of LGB internet users in the United States say someone threatened to post their explicit image and seven percent say someone has actually posted such an image. *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

shower in her health club's locker room.<sup>264</sup> She sent the photograph of the nude woman to her Snapchat followers, expressing her disgust for the elderly woman's naked body with the tagline, "If I can't unsee this, then you can't either."<sup>265</sup>

Nonconsensual pornography involves a core sexual privacy invasion. Perpetrators undermine victims' choice about who is permitted to see their nude photos or sex videos. They deny victims the ability to exercise control over their sexual identities. The shame is profound.

### 5. *Deep Fake Sex Videos*

Machine-learning technologies are being used to create "deep fake" sex videos—where people's faces and voices are inserted into real pornography.<sup>266</sup> Deep fake technology enables the creation of impersonations out of digital whole cloth.<sup>267</sup> The end result is realistic-looking video or audio that is increasingly difficult to debunk.<sup>268</sup>

A subreddit (now closed) featured deep fake sex videos of female celebrities, amassing more than 100,000 users.<sup>269</sup> One video featured Gal Gadot having sex with her stepbrother—but of course Gadot never made the video.<sup>270</sup> Deep fake sex videos have featured Scarlett Johansson, Taylor Swift, and Maisie Williams.<sup>271</sup>

The capacity to generate deep fake sex videos is diffusing rapidly.<sup>272</sup> Now available for download is Fake App, a "desktop tool for creating realistic face swapping videos with machine learning."<sup>273</sup> The technology is now in the hands of all manner of people who want to exploit and distort others' sexual identities.

Ex-intimates have seized upon the deep fake trend. As one Reddit user asked, "I want to make a porn video with my ex-girlfriend. But I don't have any high-quality video with her, but I have lots of good photos."<sup>274</sup> A Discord user explained that he made a "pretty good" video of a girl he went

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<sup>264</sup> Rebecca Shapiro, *Former Playmate Dani Mathers Gets 3 Years Probation in Body-Shaming Case*, HUFFINGTON POST (May 25, 2017).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> Chesney & Citron, *supra* note, at. Robert Chesney and I are the first to document the looming threat of deep fakes to privacy, national security, and democracy. *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Dodge & Johnstone, *supra* note, at 7.

<sup>270</sup> Samantha Cole, *AI Assisted Fake Porn Is Here and We're All Fucked*, MOTHERBOARD (Dec. 11, 2017).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> FAKEAPP, <https://www.fakeapp.org> (last visited Aug. 3, 2018).

<sup>274</sup> Dodge & Johnstone, *supra* note, at 7.

to high school with, using around 380 photos scraped from her Instagram and Facebook accounts.<sup>275</sup>

Female journalists have been targeted with deep fake sex videos. A deep fake of Indian investigative journalist Rana Ayyub went viral after she wrote about corruption in Hindu nationalist politics.<sup>276</sup> The abuse began with tweets impersonating Ayyub saying she supported child rape and hates Indians.<sup>277</sup> A two-minute fake pornographic video then appeared with Ayyub's face morphed onto another woman's body.<sup>278</sup> Thousands of people shared the deep sex fake on Twitter, Facebook, and in WhatsApp groups.<sup>279</sup> Ayyub's social media notifications were filled with snippets of the video next to comments demanding sex and threatening gang rape.<sup>280</sup> Tweets with her home address, phone number, and photograph circulated widely.<sup>281</sup> Most of the posters identified themselves as fans of the politicians she discussed in her reporting.<sup>282</sup> As one poster wrote, "See, Rana, what we spread about you; this is what happens when you write lies about Modi and Hindus in India."<sup>283</sup>

These examples highlight the gendered dimension of deep sex fake exploitation. Thus far, most, if not all, victims of deep sex fakes are female. One can imagine deep fake videos featuring someone being raped. For women, the threat of rape is all too real.<sup>284</sup> Deep sex fakes bring that threat alive in a visceral way.

Of course, deep fake sex videos do not actually depict a person's naked body. This distinguishes deep sex fakes from the nonconsensual disclosure of intimate images. Even though deep fake sex videos do not depict featured individuals' actual genitals, breasts, buttocks, and anus, they hijack their sexual and intimate identities. Much like nonconsensual pornography, deep fake sex videos exercise dominion over people's sexuality, exhibiting it to others without consent. They reduce individuals to genitalia, breasts, buttocks, and anus, creating a sexual identity not of

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<sup>275</sup> *Id.*

<sup>276</sup> Rana Ayyub, *In India, Journalists Face Slut-Shaming and Rape Threats*, N.Y. TIMES, May 22, 2018.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> "I Couldn't Talk or Sleep for Three Days:" Journalist Rana Ayyub's Horrific Social Media Ordeal over Fake Tweet, MSN (Apr. 28, 2018), <https://www.msn.com/en-in/news/newsindia/%E2%80%98i-couldn%E2%80%99t-talk-or-sleep-for-three-days%E2%80%99-journalist-rana-ayyub%E2%80%99s-horrific-social-media-ordeal-over-fake-tweet/ar-AAwnGHv>.

<sup>280</sup> Ayyub, *supra* note, at.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Citron, *Cyber Civil Rights*, *supra* note, at.

their own making. They are an affront to the sense that people's intimate lives are their own to share or to keep to themselves.

### C. HARM

The harm of sexual privacy invasions is profound. Consider the way that sexual privacy invasions interfere with identity development. Victims are denied agency over their intimate lives. Sextortion victims are forced to insert objects into their orifices, masturbate on command, and create sexually explicit images.<sup>285</sup> Reminiscent of the silencing that domestic violence victims have long endured, victims are forced to hide the abuse from people who could help them.<sup>286</sup>

Feeling free to develop intimate identities and relationships is difficult after one's sexual privacy is invaded. After realizing that her ex's gifts contained recording devices, a woman had "recurrent and intrusive thoughts of being exposed and violated, interference with her personal relationships, and feelings of vulnerability and mistrust."<sup>287</sup> She explained that she "lives in a perpetual state of fear that someone is watching or spying on her and does not feel safe anywhere."<sup>288</sup> Sports journalist Erin Andrews echoed these sentiments after a stalker secretly taped her undressing in a hotel room and then posted the video online.<sup>289</sup> Jacobs was afraid to date for months after discovering the revenge porn.<sup>290</sup> Sextortion victims experience visceral fear. As one of Mijangos' victims explained, "He haunts me every time I use the computer."<sup>291</sup>

Posting nude images without consent and deep fake sex videos allow a single aspect of one's self to eclipse all other aspects.<sup>292</sup> It reduces people to their genitalia. Sex organs and sexuality stand in for the whole of one's

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<sup>285</sup> Jurecic, *supra* note, at; WITTES ET AL., *supra* note, at.

<sup>286</sup> Jurecic, *supra* note, at.

<sup>287</sup> Welsh v. Martinez, 114 A.3d 1231, 1244 (Conn. App. Ct. 2015).

<sup>288</sup> *Id.* at 1242.

<sup>289</sup> Chad Finn, *No Matter the Verdict, Erin Andrews Cannot Undo the Pain*, BOSTON GLOBE (Mar. 4, 2016), <https://www.bostonglobe.com/sports/2016/03/03/matter-verdict-erin-andrews-living-through-unrelenting-pain-from-stalker-and-skepticism/PTKAHHHmx3fulKlzAZFJJO/story.html>.

<sup>290</sup> CITRON, HATE CRIMES, *supra* note, at. I serve on the Board of Directors of the Cyber Civil Rights Initiative, which Jacobs co-founded with Mary Anne Franks to combat non-consensual pornography.

<sup>291</sup> WITTES ET AL., *supra* note, at.

<sup>292</sup> Rosen, *supra* note, at 20 (arguing that the exposure of the fact that Monica Lewinsky sent President Clinton a book about phone sex allowed her to be defined by a single aspect of herself — her sexuality — and let her be judged out of context, amounting to an invasion of her privacy).

identity.<sup>293</sup> Gone are the boundaries that protect us from being simplified and judged out of context.<sup>294</sup>

Sexual privacy invasions reduce victims to sexual objects that can be exploited and exposed. As Robin West astutely described threats of sexual violence, there is a “literal[], albeit not physical[], penetrat[ion of] women’s bodies.”<sup>295</sup> So it is with some sexual privacy invasions. Sextortion victims have described feeling like they were “virtually raped.”<sup>296</sup>

Sometimes, invasions of sexual privacy are so destructive to identity that individuals have to change their names. After Jacobs’s sexually graphic photos and videos appeared prominently in searches of her name, her supervisor urged her to change her name – and she did.<sup>297</sup>

When the nude images of women and sexual minorities are posted online without consent, they may be stigmatized and treated as “lesser than.” The “universal human discomfort with bodily reality” often works to undermine women and minorities.<sup>298</sup> Martha Nussbaum explains that the “body of the gay man has been the central locus of disgust-anxiety, above all for other men.”<sup>299</sup> The same is often true of displays of women’s nude bodies.<sup>300</sup> Misogyny, racism, and homophobia, often a toxic brew, underlie the stigmatization.<sup>301</sup>

Recall the boyfriend’s nonconsensual taping of his sexual encounter with the novelist—it made her feel deeply ashamed and embarrassed.<sup>302</sup> Ayyub similarly understood the deep sex fake as designed to humiliate, shame, and silence her.<sup>303</sup> She saw it as an effort to “break” her by defining her as a “‘promiscuous,’ ‘immoral’ woman.”<sup>304</sup>

The emotional harm is severe and lasting. Individuals suffer immense psychological distress.<sup>305</sup> They have difficulty concentrating, eating, and working.<sup>306</sup> They experience anxiety and depression. They contemplate suicide. Ayyub described her anxiety as crushing – she could not eat or talk

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<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 20.

<sup>295</sup> ROBIN WEST, CARING FOR JUSTICE 102–03 (1997).

<sup>296</sup> WITTES ET AL., *supra* note, at.

<sup>297</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 48.

<sup>298</sup> MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW, at xv (2010).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 18.

<sup>302</sup> Interview with Jane Doe (notes on file with author).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> McGlynn, *supra* note; WITTES ET AL., *supra* note, at. For instance, data shows that eighty percent of victims of nonconsensual pornography experience severe emotional distress and anxiety.

<sup>306</sup> Interview with Jane Doe, *supra* note.

for days, and she felt numb and traumatized.<sup>307</sup> Sextortion victims live in perpetual anxiety and describe feeling helpless.<sup>308</sup>

Minors are particularly vulnerable to depression and suicide. Two boys killed themselves in the Martynenko sextortion case.<sup>309</sup> Clementi killed himself.<sup>310</sup> Fourteen-year-old Jill Naber hanged herself after a photo of her topless went viral.<sup>311</sup> Fifteen-year-old Amanda Todd took her own life after a stranger convinced her to reveal her breasts on a webcam and created a Facebook page with the picture.<sup>312</sup> Just before killing herself, she posted a video on YouTube explaining her devastation that the photograph is “out there forever” and she can never get it back.<sup>313</sup>

There is a significant risk to victims’ job prospects. Search results matter to employers.<sup>314</sup> According to a Microsoft study, more than 90 percent of employers use search results to make decisions about candidates, and in more than 77 percent of cases, those results have a negative result.<sup>315</sup> As the study explained, employers often decline to interview or hire people because their search results featured “inappropriate photos.”<sup>316</sup> The reason for those results should be obvious. It is less risky and expensive to hire people who do not have the baggage of damaged online reputations.<sup>317</sup> Because employers consult search results in hiring endeavors and because data brokers include online posts in their dossiers, sexual privacy invasions “become the basis for a probabilistic judgment about attributes, abilities, and aptitudes.”<sup>318</sup>

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<sup>307</sup> Ayyub, *supra* note, at.

<sup>308</sup> Wittes, *supra* note, at.

<sup>309</sup> Derek Hawkins, *His Massive Sextortion Scheme Snared 155 Boys*, WASH. POST (Nov. 30, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/30/his-massive-sextortion-scheme-snared-155-teen-boys-now-hes-going-to-prison-for-decades/?utm\\_term=.5876715fede0](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/30/his-massive-sextortion-scheme-snared-155-teen-boys-now-hes-going-to-prison-for-decades/?utm_term=.5876715fede0).

<sup>310</sup> Parker, *supra* note, at.

<sup>311</sup> *Sexting, Shame, and Suicide*, ROLLING STONE (SEPT. 17, 2013), <https://www.rollingstone.com/culture/culture-news/sexting-shame-and-suicide-72148/>

<sup>312</sup> Michelle Dean, *The Story of Amanda Todd*, THE NEW YORKER (Oct. 18, 2012), <https://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd>.

<sup>313</sup> *Id.*

<sup>314</sup> CAREERBUILDER: PRESS ROOM, NUMBER OF EMPLOYERS USING SOCIAL MEDIA TO SCREEN CANDIDATES AT ALL-TIME HIGH, FINDS LATEST CAREERBUILDER STUDY (June 15, 2017); *see also* Erica Swallow, *How Recruiters Use Social Networks to Screen Candidates*, MASHABLE (Oct. 23, 2011), <https://mashable.com/2011/10/23/how-recruiters-use-social-networks-to-screen-candidates-infographic/#p.RPip3oYaqI>.

<sup>315</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 8; *see* Citron & Franks, *supra* note, at 352–53.

<sup>316</sup> CROSS-TAB, ONLINE REPUTATION IN A CONNECTED WORLD 9 (2010), [https://www.job-hunt.org/guides/DPD\\_Online-Reputation-Research\\_overview.pdf](https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf).

<sup>317</sup> *Id.*

<sup>318</sup> Cohen, *supra* note, at 144.

Companies may refuse to interview or hire women and minorities because their search results include nude images or deep sex fakes.<sup>319</sup> Social norms about sexual modesty and gender stereotypes explain why women and minorities are more likely to suffer harm in the job market than heterosexual white men. Women would be seen as immoral sluts for engaging in sexual activity.<sup>320</sup> Exponentially so for nonwhite women. Nude images evoke the pernicious view of black women as sexually deviant.<sup>321</sup> Black men are similarly subject to racist stereotypes about their sexuality. Along these lines, LGBT individuals are subject to the stereotype of being “promiscuous, sex driven, and predatory.”<sup>322</sup> All of this “marginalizes and otherizes” women and minorities and raises the risk of unfair treatment.<sup>323</sup>

Annie Seifullah’s experience is illustrative. Seifullah was a school principal in New York when her ex-boyfriend gave ten-year-old photographs of her having sex to her boss, the superintendent, and the *New York Post*.<sup>324</sup> Her ex obtained the photographs from her work computer.<sup>325</sup> He posted the photographs online next to lies that she had sex at school with parents, educators, and a student.<sup>326</sup> The school district initially demoted her and then suspended her for a year without pay.<sup>327</sup> The explanation was that she brought “widespread negative publicity, ridicule, and notoriety” to the school system and failed to safeguard her work computer from her abusive ex.<sup>328</sup>

### III. LAW AND MARKETS

Law and markets shape, and are shaped by, social norms about sexual privacy. As this Part explores, civil and criminal law address some invasions of sexual privacy. Market efforts have played a role as well, supplementing law and filling in gaps in legal protection. This Part lays out law’s opportunities and challenges. It urges a comprehensive approach that considers the role of perpetrators, platforms, and markets.

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<sup>319</sup> DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

<sup>320</sup> Citron & Franks, *supra* note, at 353.

<sup>321</sup> See BRIDGES, *supra* note, at; Roberts, *supra* note, at.

<sup>322</sup> Ari Waldman, *Law, Privacy, and Online Dating: Nonconsensual Pornography in Queer Online Communities*, L. & SOC. INQUIRY (forthcoming) (on file with author).

<sup>323</sup> *Id.*

<sup>324</sup> Annie Seifullah, *Revenge Porn Took My Career, The Law Couldn’t Get It Back*, JEZEBEL (July 18, 2018).

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

## A. LAW'S ROLE

Traditional privacy law is ill-equipped to address some of today's invasions of sexual privacy. This is hardly surprising. After all, privacy law's roots trace back to the nineteenth century and have been developed in an incremental way.<sup>329</sup> This Part sketches existing legal protections and gaps in the law. It makes the case for a unified legal approach to sexual privacy.

1. *Traditional Law*

Before reviewing the prospects for traditional theories of liability, it is important to acknowledge some threshold problems involving the identification of perpetrators, jurisdiction over foreign defendants, resource constraints of victims, privacy risks of civil suits, and the immunity afforded content platforms.

First, law cannot deter, redress, or punish perpetrators if they cannot be identified.<sup>330</sup> Attribution can be difficult, especially if perpetrators go to lengths to hide their digital tracks.<sup>331</sup> Some perpetrators live outside the United States and thus are beyond the reach of U.S. process. Private plaintiffs will have great difficulty suing foreign defendants.<sup>332</sup> With its investigative capacities and ability to seek extradition, law enforcement has an advantage there.<sup>333</sup>

Even if perpetrators can be identified and live in the U.S., civil suits and criminal prosecutions require significant resources. For victims interested in suing perpetrators, this is frustrating as most cannot afford to hire a lawyer.<sup>334</sup> Law enforcement may be unwilling to expend scarce resources

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<sup>329</sup> Citron, *Mainstreaming Privacy Torts*, *supra* note, at (exploring how privacy torts were stunted by William Prosser's articulation of privacy tort law as four torts and not well designed for data security problems). The privacy torts were conceptualized by nineteenth-century men of wealth and power. Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 442 (1990). Twentieth-century judicial decisions reflected "gendered notions of female modesty that suggested women were vulnerable and in need of protection." Skinner-Thompson, *supra* note.

<sup>330</sup> Citron, *Cyber Civil Rights*, *supra* note, at.

<sup>331</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 165.

<sup>332</sup> Chesney & Citron, *supra* note, at.

<sup>333</sup> *Id.*

<sup>334</sup> There are some bright spots for plaintiffs—law firms like K&L Gates devote significant pro bono resources to seeking redress for victims of nonconsensual pornography. Partners David Bateman and Elisa D'Amico are spearheading this effort. CYBER CIVIL RIGHTS LEGAL PROJECT, <https://www.cybercivilrightsproject.com/>. Then too, there are exceptional lawyers like Carrie Goldberg who specialize in invasions of sexual privacy. Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn>.



on combating sexual privacy invasions. Although some state attorneys general, local district attorneys, and federal prosecutors have devoted resources to prosecuting sexual privacy invasions, far more have not.<sup>335</sup> Only extreme cases are likely to attract the law enforcement's attention.

Another wrinkle is that since plaintiffs in civil court generally have to proceed under their real names, victims may be reluctant to sue for fear of unleashing more unwanted publicity.<sup>336</sup> Generally, courts disfavor pseudonymous litigation because it is assumed to interfere with the transparency of the judicial process.<sup>337</sup> Arguments in favor of Jane Doe lawsuits are considered against the presumption of public openness—a heavy presumption that often works against plaintiffs asserting privacy claims.<sup>338</sup>

Many victims decline to bring civil suits because they do not want to expose their lives to their attackers any more than they already have. As David Bateman and Elisa D'Amico (who represent victims of nonconsensual pornography on a pro bono basis) have explained, victims often dread the exposure that discovery inevitably entails.<sup>339</sup> They do not want their medical records revealed to their attackers.<sup>340</sup> They are anxious about sitting across from their abusers during a deposition.<sup>341</sup> It is not hard to see why individuals do not sue privacy invaders.

Even if victims are not deterred by litigation's privacy risks, they may find it hard to justify spending resources suing someone who is effectively judgment proof. The other logical option for redress is content platforms. Logical, yes, possible, no. Twenty years ago, Congress provided platforms with a broad liability shield for user-generated content in the form of Section 230 of the Communications Decency Act.<sup>342</sup> Thus, the parties in the best position to minimize potential harm—content platforms—have no

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<sup>335</sup> Then-California Attorney General (now U.S. Senator) Kamala Harris is a noted exception, see Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747 (2016), as is the DOJ's Computer Crimes and Intellectual Property Section in Washington, D.C., with Assistant U.S. Attorney Mona Sedky as a shining example. Citron & Wittes, *supra* note, at.

<sup>336</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act permits plaintiffs to bring suits under pseudonyms to protect their identity and privacy from further harm. Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (June 14, 2018).

<sup>339</sup> Remarks at Fordham Law School (Sept. 12, 2018). David Bateman and Elisa D'Amico generously came and spoke to my privacy class at Fordham Law school.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> 47 U.S.C. § 230(c)(1)(2). There are a few exceptions, including federal criminal law, intellectual property law, Electronic Communications Privacy Act, and FOSTA (Fight Online Sex Trafficking Act). 47 U.S.C. § 230(e)(2).

legal incentive to intervene, and for plaintiffs, there is no deep pocket to sue.<sup>343</sup>

These obstacles are significant, but they are not fatal. If someone is able and willing to sue over invasion of sexual privacy or if law enforcement is ready to devote resources to the matter, the next question is whether current laws provide effective causes of action.

*a. Criminal Law*

Criminal law is crucial to preventing and punishing invasions of sexual privacy. Criminal penalties signal the significant individual and societal harm that such invasions inflict.<sup>344</sup> There is a long-standing recognition that the coerced visibility of our bodies can be as destructive as an assault on the body. As Supreme Court Justice Horace Gray wrote in 1891, “The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow.”<sup>345</sup>

Sexual privacy invasions deserve criminal penalties, but state and federal laws tackle only part of the problem. State video voyeurism laws punish the nonconsensual recording of individuals in a state of undress in places where they can reasonably expect privacy.<sup>346</sup> In New York, for example, it is a crime to secretly record a person undressing or having sex if the person has a reasonable expectation of privacy.<sup>347</sup> The federal Video Voyeurism Prevention Act of 2004 penalizes a person who “intentionally captures an image of a private area of an individual without their consent and knowingly do so under circumstances in which an individual has a reasonable expectation of privacy.” The statute, however, only applies to images captured on federal property.<sup>348</sup> Most states and federal law criminalize surreptitious wiretapping of private communications.<sup>349</sup>

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<sup>343</sup> Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 408–10 (2017).

<sup>344</sup> See generally Citron, *Law’s Expressive Value*, *supra* note, at.

<sup>345</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891).

<sup>346</sup> See, e.g., 18 U.S.C. § 1801.

<sup>347</sup> The law is named for Stephanie Fuller whose landlord placed a hidden camera in the smoke detector above her bed. Danielle Keats Citron, *Nonconsensual Taping of Sex Is a Crime*, FORBES (May 15, 2014), <https://www.forbes.com/sites/daniellecitron/2014/05/15/nonconsensual-taping-of-sex-partners-is-a-crime/#7708a2c86ce0>.

<sup>348</sup> See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

<sup>349</sup> Under Title III, it is a felony to intercept electronic communications unless one of the parties to a communication consented to the interception. 18 U.S.C. § 2511 (2012). Most states follow this approach, though twelve states criminalize the interception of electronic communications unless both parties to the communication consent to the interceptions. Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1485.

The nonconsensual disclosure of intimate images has been the subject of recent legislation. Thanks to advocates and policymakers, 40 states and the District of Columbia now ban the nonconsensual distribution of nude images.<sup>350</sup> Both the Senate and the House of Representatives have proposed bills criminalizing the disclosure of someone's intimate images without consent.<sup>351</sup>

Only two states criminalize the taking of up-skirt photos.<sup>352</sup> As the next section shows, state courts have been reluctant to extend video voyeurism laws to up-skirting practices. A few criminal statutes are potentially relevant to deep sex fakes. Several states make it a crime to knowingly and credibly impersonate another person online with intent to "harm, intimidate, threaten, or defraud" the person.<sup>353</sup> In certain jurisdictions, creators of deep sex fakes could face charges for criminal defamation if they posted videos knowing they were fake or if they were reckless as to their truth or falsity.<sup>354</sup>

### *b. Civil Law*

Tort law could provide redress for sexual privacy invasions, particularly if they involve spaces traditionally understood as private like homes. But this may not be the case for up-skirt photos and the disclosure of nude photos to small groups rather than to the public at large.

The most pertinent body of tort law is the privacy torts: intrusion on seclusion; public disclosure of private fact; false light; and appropriation of identity.<sup>355</sup> The intrusion tort applies to invasions into someone's "private place" or private affairs in a manner that is "highly offensive to the

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<sup>350</sup> See Franks, *supra* note, at.

<sup>351</sup> The original House Bill was conceptualized and drafted by Mary Anne Franks, who authored the first model statute and whose tireless work and advocacy has led to the wave of state laws criminalizing the practice and proposed federal laws. For instance, when we first started writing about nonconsensual pornography, there were two or three laws criminalizing the practice. See Citron & Franks, *supra* note, at. Now, thanks to Franks' work, there are forty laws on the books and proposed federal statutes. I have been working with Senator Kamala Harris's office on the Senate version of the bill as well as with Congresswoman Jackie Speier's office on the House version, which Franks authored.

<sup>352</sup> MASS. GEN. LAWS ANN. ch. 272, § 105 (West 2014); VA. CODE ANN. 18.2-386.1 (West 2014). The Texas Court of Appeals struck down a poorly drafted, overbroad up-skirt statute, finding it "paternalistic" and unconstitutional. Callie Beusman, "Paternalistic" Law Banning Upskirt Photos Thrown Out by Texas Court, JEZEBEL (Sept. 18, 2014), <https://jezebel.com/paternalistic-law-banning-upskirt-photos-thrown-out-by-1636505597>.

<sup>353</sup> See, e.g., CAL. PENAL CODE § 528.5 (West 2009).

<sup>354</sup> Eugene Volokh, *One to One Speech Versus One-to-Many Speech*, 107 NW. U. L. REV. 731 (2013).

<sup>355</sup> William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

reasonable person.”<sup>356</sup> In *Hamberger v. Eastman*, the Supreme Court of New Hampshire upheld an intrusion claim against a peeping landlord who spied on a married couple in their bedroom.<sup>357</sup>

The intrusion tort generally applies to secret watching and recording of individuals at home and on their personal devices.<sup>358</sup> It protects against the coerced invasion of people’s bedrooms and bodies, as in the case of sextortion. In both instances, the intrusions involve physical spaces recognized as private and whose invasion would highly offend the reasonable person. The intrusion tort has no application to deep sex fakes and may not be useful in cases involving up-skirt photos, as discussed in the next section.

Now to the disclosure tort, which involves the publication of private, non-newsworthy information that would highly offend the reasonable person. Nude photos published online without consent provide strong grounds for disclosure claims because they are roundly understood as non-newsworthy.<sup>359</sup>

As for deep fake sex videos, the false light tort—recklessly creating a harmful and false implication about someone—and defamation have potential purchase. The appropriation tort also might apply, but many jurisdictions cabin the tort to cases where people’s images are being used for commercial purposes. Most perpetrators earn nothing from deep fake sex videos or nonconsensual pornography.<sup>360</sup>

Intentional infliction of emotional distress tort would be an effective tool against invasions of sexual privacy. The tort requires proof of “extreme and outrageous conduct” by a defendant who intended to cause, or recklessly caused, the plaintiff’s “extreme” emotional distress.<sup>361</sup> Invasions of sexual privacy have supported emotional distress claims—in a recent

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<sup>356</sup> *Id.*

<sup>357</sup> *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964). We saw in the *Plaxico* case that that a man’s desire to show the court proof of his ex-wife’s lesbian affair overcame that default presumption that bedrooms are private spaces. *Plaxico v. Michael*, 735 So. 2d 1036, 1040 (Miss. 1999). The majority went to great pains to say that it would have come to the same conclusion if the ex-wife had been engaged in sex with a man. *Id.* Reading between the lines, however, it was clear that the majority thought that gay sex did not deserve privacy because it could have endangered the child. Allen, *supra* note, at 1725. The private home “is not a sanctuary for intimate sex for LGBT individuals where courts view homosexual relationships as illicit.” Allen, *Unreliable Remedies*, *supra* note, at 1725.

<sup>358</sup> See, e.g., *Welsh v. Martinez*, 114 A.3d 1231 (Conn. App. Ct. 2015) (upholding two million-dollar jury award in privacy tort action where defendant ex-boyfriend planted spying devices in plaintiff’s bedroom, including radio clock and television); *In re Marriage of Tigges*, 758 N.W.2d 824, 829 (Iowa 2008); *Lewis v. LeGrow*, 670 N.W.2d 175 (Mich. Ct. App. 2003) (upholding verdict for plaintiff where ex-boyfriend made secret videos of them having sex).

<sup>359</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 121.

<sup>360</sup> Chesney & Citron, *supra* note.

<sup>361</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 121.

case involving nonconsensual pornography, the plaintiff was awarded 6.4 million dollars, though the defendant is essentially judgment proof.<sup>362</sup>

Copyright law could provide avenues of redress for sexual privacy cases involving the distribution of intimate images created by victims because Section 230 does not immunize websites from federal intellectual property claims.<sup>363</sup> Victims could file a Section 512 notice after registering the copyright. Site owners would have to take down the photographs promptly or face monetary damages under the Digital Millennium Copyright Act.<sup>364</sup>

*c. First Amendment Concerns*

First Amendment objections are most likely to arise in cases involving the nonconsensual disclosure of real or manufactured nude images or sex videos. As my previous scholarship has explored in detail, the criminalization of nonconsensual pornography can be reconciled with the First Amendment.<sup>365</sup> Nude images posted without consent involve the narrow set of circumstances when the publication of truthful information can be proscribed civilly and criminally.<sup>366</sup>

The Vermont Supreme Court recently upheld the state's criminal statute penalizing nonconsensual pornography, finding that the law survived strict scrutiny because the government's interest was compelling and the statute was narrowly tailored.<sup>367</sup> The court emphasized that "[f]rom a

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<sup>362</sup> <https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html>.

<sup>363</sup> Citron & Franks, *supra* note, at 360. Some deep sex fakes exploit copyrighted content that the plaintiff created herself but the harm isn't about property but about sexual privacy. Moreover, the prospects for success are uncertain because defendants will surely argue that the fake is a "fair use" of the copyrighted material and sufficiently transformed from the original so as to elude copyright protection. Chesney & Citron, *supra* note, at.

<sup>364</sup> *Id.*

<sup>365</sup> I—along with my colleague Mary Anne Franks—have written extensively about the First Amendment and free speech values implicated in regulating nonconsensual pornography. See, e.g., *Id.* at 208-212; Mary Anne Franks, 'Revenge Porn' Reform: A View from the Front Lines, 69 FLA. L. REV. 1252, 1308-23 (2017); Citron & Franks, *supra* note, at 374-86; Danielle Citron, More Thoughts on How to Write a Constitutional Revenge Porn Law, FORBES (May 23, 2015), <https://www.forbes.com/sites/daniellecitron/2015/05/23/more-thoughts-on-how-to-write-a-constitutional-revenge-porn-law/#3d7033664a34>.

<sup>366</sup> Mary Anne Franks and I are not alone in this position—we are joined by Erwin Chemerinsky, Neil Richards, and Eugene Volokh in arguing that nonconsensual porn can be proscribed consistent with First Amendment doctrine and free speech values. *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography*, CYBER CIVIL RIGHTS INITIATIVE (Oct. 6, 2017), <https://www.cybercivilrights.org/2017-cybercrime-symposium/>; Eugene Volokh, *Florida Revenge Porn Bill*, THE VOLOKH CONSPIRACY (Apr. 4, 2013), <http://volokh.com/2013/04/10/florida-revenge-porn-bill/>.

<sup>367</sup> *Vermont v. VanBuren*, No. 2016-253, 2018 WL 4177776 (Vt. Aug. 31, 2018).

constitutional perspective, it is hard to see a distinction between laws prohibiting nonconsensual disclosure of personal information comprising images of nudity and sexual conduct and those prohibiting the disclosure of other categories of nonpublic personal information,” such as health data.<sup>368</sup> The court noted that the State’s argument that the statute covered “extreme privacy invasions” that are categorically unprotected speech was persuasive but declined to base its holding on that basis.<sup>369</sup>

Now to the question of deep fake sex videos. Under First Amendment doctrine, private individuals can sue for defamation for falsehoods circulated negligently.<sup>370</sup> Public officials and public figures like Gadot could sue for defamation if clear and convincing evidence exists of actual malice (that is, defendant knew the deep sex fakes were false or recklessly disregarded the possibility that they were false).<sup>371</sup>

As I explore in my work on deep fakes with Robert Chesney, deliberate harm-causing lies have historically been treated as unprotected under the First Amendment.<sup>372</sup> Federal and state laws punish identity theft as well as the deliberate impersonation of government officials. As Helen Norton explains, such lies concern the “source of the speech.”<sup>373</sup> Lies about the source of speech—that is, who is actually speaking—are proscribable because they threaten significant harm to listeners who rely on them as a proxy for reliability and credibility. Such laws “remain largely uncontroversial as a First Amendment matter in great part because they address real (if often tangible) harm to the public as well as to the individual target.”<sup>374</sup> The regulation of deep fake sex videos concerns whether someone actually engaged in pornography, an objectively verifiable determination.<sup>375</sup> This lessens concerns that the regulation of deep fake sex videos will chill valuable speech or invite partisan enforcement.<sup>376</sup>

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<sup>368</sup> *Id.*

<sup>369</sup> *Id.* The court extensively cited the article that Franks and I wrote about the criminalization of revenge porn in its findings. An appellate court in Wisconsin similarly upheld its criminal statute.

<sup>370</sup> RESTATEMENT (SECOND) OF TORTS 559 (1969).

<sup>371</sup> For an overview of the defamation tort, see CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at. Defamation has no application to other sexual privacy invasions because they involve truthful, private intimate information, not falsehoods.

<sup>372</sup> See Chesney & Citron, *supra* note (discussing *United States v. Alvarez*).

<sup>373</sup> Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, in LAW AND LIES 143, 167 (Austin Sarat, ed. 2017); Marc J. Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 110 (2018).

<sup>374</sup> Norton, *supra* note, at 147, 167.

<sup>375</sup> *Id.* at 168-173

<sup>376</sup> *Id.* Helen Norton helpfully talked with me about the First Amendment implications of regulating deep fake sex videos.

## 2. *Shortcomings*

Digital technologies enable invasions of sexual privacy that existing law is ill-suited to address. Sometimes, law's inadequacy stems from the fact that it has been developed in an incremental fashion and thus certain problems fall outside law's reach. At other times, it stems from outmoded assumptions—the misuse of new technologies simply highlights that problem. Both concerns apply to the regulation of sextortion, deep fake sex videos, up-skirt photos, and certain public disclosures of intimate images. When social conditions change in fundamental ways, law must adapt or fade into irrelevance.<sup>377</sup>

For sextortion, the criminal law offers a patchwork of tools, which are insufficient when perpetrators target adults.<sup>378</sup> Different federal and state criminal charges have been used to prosecute sextortion but they produce disparate sentences with “no clear association between prison time meted out and the egregiousness of the crime committed.”<sup>379</sup> The sentence disparity stems from weak state laws and the dramatically different way federal and state law treats minor and adult victims.<sup>380</sup> Under federal law, the sextortion of an adult is usually prosecuted as computer hacking, extortion, or stalking, all have comparatively light sentences compared to the child pornography laws that apply when sextortion involves minors.<sup>381</sup> As the Brookings study explains, the “severity of the sentence is not directly related to either the number of victims or the depravity of the individual crime.”<sup>382</sup>

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<sup>377</sup> For insightful exploration of how new technologies challenge law and legal structures, see the scholarship of Ryan Calo. See, e.g., Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513 (2015). Not all cyber problems require new legal solutions. As Judge Easterbrook argued long ago, existing law can tackle many harms caused by digital technologies. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 206. I have argued that mainstream torts can be adapted to address certain privacy problems, such as leaking databases of sensitive personal information. Citron, *Reservoirs of Danger*, *supra* note, at (analogizing insecure databases of sensitive personal information to reservoirs at the turn of the twentieth century—activity crucial to the economy but also raising significant dangers—and a *Rylands v. Fletcher* strict liability approach); Citron, *Mainstreaming Privacy Torts*, *supra* note, at (exploring enablement tort, confidentiality law, and strict liability to address privacy problems ill-suited to the privacy torts).

<sup>378</sup> *Id.*

<sup>379</sup> BENJAMIN WITTES, CODY POPLIN, QUINTA JURECIC & CLARA SPERA, BROOKINGS INSTITUTE, CLOSING THE SEXTORTION SENTENCING GAP: A LEGISLATIVE PROPOSAL (2016), <https://www.brookings.edu/research/closing-the-sextortion-sentencing-gap-a-legislative-proposal/>.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

There is no federal criminal response to deep fake sex videos, though a smattering of state statutes might cover the practice. The most-recognized privacy torts—intrusion on seclusion and public disclosure of private fact—provide no redress for deep fake sex videos even though they constitute invasions of sexual privacy.<sup>383</sup> Although using a person’s face in a deep fake sex video would highly offend the reasonable person, it would not amount to disclosure of private information if the source image was generated from publicly available content.<sup>384</sup> Nor would it amount to an intrusion on seclusion, since there has been no intrusion into a private space or activity. Although the false light tort would apply to deep fake sex videos, many jurisdictions refuse to recognize it.<sup>385</sup> If one can find the creator of the deep fake sex video, intentional infliction of emotional distress may be the only avenue of civil redress.

Now to discuss up-skirt photos and some disclosures of private intimate facts. Traditional privacy law embraces cramped notions of privacy that leave some sexual privacy invasions without redress or penalty. It does not address certain invasions of sexual privacy because, as Ari Waldman explains, it relies on “under-inclusive bright line rules to determine the difference between public and private.”<sup>386</sup> For instance, privacy law presumes that certain spaces—bedrooms, hotel rooms, and bathrooms—warrant privacy protection.<sup>387</sup> But once people leave those spaces, the presumption flips.<sup>388</sup> On the “street, or in any other public place, the

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<sup>383</sup> Chesney & Citron, *supra* note, at.

<sup>384</sup> The appropriation tort is inapplicable because creators of deep sex fakes likely do not use people’s faces or bodies for a commercial advantage. RESTATEMENT (SECOND) OF TORTS 652C (1977); see DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 218 (5th ed. 2018) (explaining that the appropriation tort protects against the commercial exploitation of one’s name or likeness).

<sup>385</sup> DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 218 (5th ed. 2018).

<sup>386</sup> WALDMAN, PRIVACY AS TRUST, *supra* note, at 72.

<sup>387</sup> See *infra* text and note 300.

<sup>388</sup> WILLIAM MCGEVERAN, INFORMATION PRIVACY LAW (2017); DANIEL J. SOLOVE & PAUL SCHWARTZ, INFORMATION PRIVACY LAW (2018 ed.). This presumption extends beyond the privacy torts and criminal law. Under Fourth Amendment doctrine, the general assumption is that we have no reasonable expectation of privacy in our public travels. David Gray & Danielle Keats Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62 (2013). Recent Supreme Court decisions have suggested that digital technologies enabling continuous and indiscriminate surveillance of one’s public travels may amount to a search, thus implicating the crucible of Fourth Amendment protection. *Id.* Five concurring Justices in *United States v. Jones* made that point as to the placement of a GPS tracker on the defendant’s car. *Id.* In *Carpenter v. United States*, the Court held that the government’s access to cell site location data, held by third party provider, amounted to a search requiring a warrant based on probable cause. Chief Justice Roberts, writing for the majority, explained that the Fourth Amendment was implicated because the technology enabled “too permeating police surveillance” and enabled the tracking of the “whole of one’s physical movements.” In *Jones*



plaintiff has no right to be alone.”<sup>389</sup> This is true of criminal and privacy tort law.

Criminal convictions have been struck down in up-skirt cases because the defendants took the photos while in a public place. Consider the case of a Georgia man who took a photograph of a woman up her skirt at a local grocery store.<sup>390</sup> The Georgia statute banned the use of any device, without consent, to photograph or record the activities of another occurring in “any private place and out of public view.”<sup>391</sup> The majority struck down the conviction on the grounds that the law failed to “reach destructive conduct made possible by ever-advancing technology.” Although the case turned on legislative meaning of “private place,” it reflected the fallacy that public spaces and privacy are incompatible.<sup>392</sup>

Up-skirt photos should be actionable as intrusions on seclusion and as public disclosures of private fact if posted online, but the fact that the photos are taken in public may present a problem. Courts routinely find that plaintiffs have no privacy rights in public.<sup>393</sup> For instance, in *Neff v. Time*, a photographer captured a photo of the plaintiff cheering at a football game.<sup>394</sup> The plaintiff’s fly was open and a photograph showing the

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and *Carpenter*, five Justices have signaled that where digital technologies significantly alter the nature of surveillance, the presumption that we have no privacy in public may not apply.

<sup>389</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 391 (1960). Scholars have explored the pitfalls of drawing a sharp line between what is public and what is private. See, e.g., HELEN NISSENBAUM, *PRIVACY IN CONTEXT* (2010); Woodrow Hartzog, *The Public Information Fallacy*, 98 B.U. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3084102](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084102); Skinner-Thompson, *supra* note, at; Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

<sup>390</sup> *Gary v. State*, 790 S.E.2d 150 (Ga. Ct. App. 2016).

<sup>391</sup> *Id.*

<sup>392</sup> The dissent noted that rather than the statute being outpaced by technology, it was an overly narrow interpretation of a “private place.” *Id.* Sexual privacy isn’t an all nothing proposition. At least it should not be. There are degrees and nuances to the sort of privacy that society expects. In her book *Privacy in Context*, Helen Nissenbaum disputes the notion that privacy is a binary concept. HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 144 (2010). Content and social norms determine the question. Daniel Solove’s pragmatic conception of privacy envisions context as central to understanding and addressing contemporary privacy problems. Solove, *supra* note, at. Even in public, there are boundaries—Robert Post calls them “information preserves”—that are integral to individuals and warrant respect. This is so for the parts of our bodies, such as our genitalia and breasts, that we endeavor to conceal in public with shirts, pants, underwear, and bras. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 73 (1995).

<sup>393</sup> See, e.g., *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935 (Mass. App. Ct. 1979). For thoughtful scholarship on the intrusion tort in upskirt cases, see Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory for Intrusions in Public Places*, 73 N.C. L. REV. 990 (1995); Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & LAW 1, 4 (2008).

<sup>394</sup> *Neff v. Time, Inc.*, 406 F. Supp. 858, 860 (W.D Pa. 1976).

plaintiff's exposed underwear appeared in *Sports Illustrated*.<sup>395</sup> In addition to finding that the photograph was newsworthy, the court held that the plaintiff had no expectation of privacy because the photograph was "taken at a public event" with the "knowledge and implied consent of the subject."<sup>396</sup> Similarly, a court found that a high school soccer player had no expectation of privacy (and thus no actionable privacy tort claim) in a photograph of him while his genitalia was exposed because it was taken while he was playing soccer at a public event.<sup>397</sup>

That is not to say that no decisions would support the notion that individuals have privacy up their skirts even though they are in public. *Daily Times Democrat v. Graham*,<sup>398</sup> decided in 1964, points in that direction. The plaintiff took her children to a county fair. Her dress was "blown up by the air jets" and her body was "exposed from the waist down" except for the "portion covered by her panties."<sup>399</sup> A newspaper photographer snapped a picture and put it in on the front page.<sup>400</sup> The court upheld the disclosure claim because being "involuntarily enmeshed in an embarrassing pose" in a "public scene" does not dispel one's privacy interest.<sup>401</sup> Unfortunately for plaintiffs, however, *Graham* is an outlier.

Other aspects of traditional privacy law do not accord with how we experience invasions of sexual privacy. To sue for public disclosure of private fact, the information must be disclosed to a wide audience.<sup>402</sup> This presumes that there is little damage when intimate information is disclosed to a small group of people. But it is often those small groups of people—employers, family, and colleagues—to whom the disclosure is most damaging for victims. When Jacobs' ex-boyfriend revealed her nude photos to her employer, her sense of self-worth and confidence were destroyed.

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<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 861.

<sup>397</sup> *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 904 (Ct. App. Tex. 1991).

<sup>398</sup> *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964). Clay Calvert wisely describes Flora Bell Graham's case as the "original upskirt" litigation. CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 203 (2004).

<sup>399</sup> *Id.* at 381.

<sup>400</sup> *Id.* at 382.

<sup>401</sup> *Id.* at 382–83. The drafters of the *Restatement (Second) of Torts* provide support for the *Graham* decision. A comment to the section on the intrusion tort notes that "even in a public place, however, there may be some matters about the plaintiff, such as his underwear or his lack of it, that are not exhibited to the public gaze; and there may still be an invasion of privacy when there is intrusion upon these matters." RESTATEMENT (SECOND) OF TORTS 652B cmt. c (1977).

<sup>402</sup> Courts refuse to recognize disclosure claims if a private fact is not widely publicized. *Swinton Creek Nursey v. Edisto Farm Credit*, 514 S.E.2d 126, 132 (S.C. 1999). As the *Restatement (Second) of Torts* notes, it is "not an invasion of the right to privacy . . . to communicate a fact concerning a plaintiff's private life to a single person or to even a small group of people." RESTATEMENT (SECOND) OF TORTS 652D cmt. a (1977).

Consider *Bilbrey v. Myers*. There, a court struck down a disclosure claim on the grounds that there was no widespread publicity of the private fact. In that case, a pastor broadcast the plaintiff's homosexuality to a church congregation, which included his fiancée's father. The disclosure undermined the man's ability to construct his sexual identity on his own time; the damage was profound because the audience included his family members.<sup>403</sup> The harm was significant even though the pastor did not disclose the information online.<sup>404</sup> The widespread publicity rule does not accord with how intimate information is shared and can be exploited to people's detriment.

Another shortcoming involves the recently adopted laws criminalizing nonconsensual pornography. Some states have adopted inadequate laws, ignoring the advice of Franks and myself. For instance, Franks and I worked with the Maryland ACLU to draft a state law, but an overly narrow bill emerged from committee. The Maryland revenge porn law only applies to intimate images posted on the "Internet," excluding nude imagery sent to colleagues, friends, and family via email or text. For Franks, this is as unsurprising as it is disappointing. Most of the states with laws criminalizing nonconsensual pornography have worked closely with Franks. Nonetheless, many of those states failed to follow her well-crafted proposed model statute. In Franks's view, some of those laws are so narrow that will do little to combat the problem.<sup>405</sup>

Lastly, a crucial shortcoming in the law is the broad sweeping immunity afforded platforms for user-generated content. Having written about Section 230 elsewhere, I will not belabor the point.<sup>406</sup> It is worth noting that the overbroad interpretation of Section 230 has given content platforms a free pass to ignore destructive invasions of sexual privacy, to deliberately repost illegal material, and to solicit invasions of sexual privacy while ensuring that abusers cannot be identified.<sup>407</sup> The overbroad interpretation of Section 230 makes life even more difficult for victims of sexual privacy invasions.

For instance, Grindr was notified over fifty times that someone was impersonating a man on the app, sharing his nude images, claiming he had

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<sup>403</sup> *Bilbrey v. Myers*, 91 So. 3d 887 (Fla. Dist. Ct. App. 2012).

<sup>404</sup> Victims might be able to sue for intentional infliction of emotional distress because the conduct is severe and outrageous and causes severe emotional distress. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at (exploring intentional infliction of emotional distress in the context of cyber stalking).

<sup>405</sup> Interview with Mary Anne Franks (Sept. 2, 2018) (notes on file with author).

<sup>406</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at; Danielle Keats Citron & Quinta Jurecic, *Platform Justice: Content Moderation at an Inflection Point* (forthcoming Hoover Institution); Citron & Wittes, *supra* note, at; Citron, *Cyber Civil Rights*, *supra* note, at.

<sup>407</sup> Citron & Wittes, *supra* note, at.

rape fantasies, and providing his home address.<sup>408</sup> Over a *thousand* strangers came to his door demanding sex.<sup>409</sup> Grindr ignored the man's complaints and refused to do anything about the imposter.<sup>410</sup> Given the breadth of judicial interpretations of Section 230, law can do little vis-à-vis the app.<sup>411</sup>

### 3. *Unified Approach to Sexual Privacy*

A comprehensive approach to invasions of sexual privacy is warranted.<sup>412</sup> Federal and state law should provide civil and criminal penalties for certain sexual privacy invasions. Individuals should be able to pursue claims against perpetrators and, in some circumstances, platforms. The privacy torts should evolve to reflect an explicit commitment to sexual privacy.

Why not continue along the path of adopting specific statutes and common law rules as problems arise? We could pass legislation as issues arise. Today, it is sextortion, deep fakes, and up skirt photos. Tomorrow, sexual privacy invasions may involve robots and drones.<sup>413</sup> States have criminalized nonconsensual porn, often with separate statutes.<sup>414</sup> Congress is considering a federal statute to do the same.<sup>415</sup>

An incremental approach has merit. It enables an assessment of whether an approach is working and should be extended to other areas. But it would require updating as new invasions of sexual privacy arise.<sup>416</sup> Practically speaking, it is difficult to capture the interest of lawmakers on any given topic. An approach that requires constant updating likely would not be updated in a timely manner.

To be sure, an incremental approach can be precisely the right approach when society is wrestling with changing attitudes. Consider efforts to criminalize nonconsensual pornography. Much as the women's rights movement of the 1960s and 1970s had to first name domestic violence and

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<sup>408</sup> *Herrick v. Grindr*, No. 17-CV-932 (VEC), 2017 WL 744605, at \*1 (S.D.N.Y. Feb. 24, 2017).

<sup>409</sup> Sarah Ashley O'Brien, *1,100 Strangers Showed Up at His Home for Sex. He Blames Grindr*, CNN (Apr. 14, 2017), <https://money.cnn.com/2017/04/14/technology/grindr-lawsuit/index.html>.

<sup>410</sup> *Id.*

<sup>411</sup> *Herrick*, 2017 WL 744605, at \*3.

<sup>412</sup> Sextortion may warrant higher penalties than other invasions of sexual privacy. A federal statute can consider aggravating factors as sentence enhancements.

<sup>413</sup> For all matters involving robots, see the scholarship of Ryan Calo.

<sup>414</sup> Franks, *supra* note, at.

<sup>415</sup> See note 266.

<sup>416</sup> We have seen law struggle in the related area of stalking and harassment, with states passing laws to deal with telephone abuse, others to address email abuse, and still yet others addressing cyber stalking. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.

workplace sexual harassment to capture the public's attention, advocates and scholars had to educate the public about nonconsensual pornography and the harm it inflicted.<sup>417</sup> In 2013, when Mary Anne Franks wrote the first model revenge porn statute,<sup>418</sup> and in 2014, when together we wrote the first law review article on the topic,<sup>419</sup> a crucial part of our task was expressive. We had to convince lawmakers and the public why it was not the fault of victims who trusted exes with their nude photos. Then, calling for law to combat invasions of sexual privacy – with revenge porn as an illustration – might not have captured lawmakers' attention in the way that framing the issue as revenge porn did.

We are at a pivotal moment. Having convinced lawmakers of the seriousness of nonconsensual pornography in just a few short years, we can make the case for seeing the constellation of sexual privacy invasions as a single problem requiring a comprehensive solution. Digital voyeurism, up-skirt photos, sextortion, nonconsensual porn, and deep sex fakes are all invasions of sexual privacy, and they all should be treated as such.

There is much to be said for making an explicit commitment to addressing sexual privacy in a comprehensive way.<sup>420</sup> It would say that improper access to, spying on, and exposure of our intimate lives produces corrosive harm. In protecting sexual privacy, it would make clear that our bodies and intimate lives are our own. The protection of sexual privacy serves a crucial role in facilitating sexual autonomy and consent, enabling intimacy, and securing equality.

A comprehensive approach would not mean that sexual privacy deserves absolute protection. Sexual privacy would be weighed against other competing values depending on the context. For instance, sexual privacy's protection may give way to free speech concerns, such as the

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<sup>417</sup> That work was undertaken by a group of advocates and scholars. *Without My Consent*, founded by Erica Johnstone and Colette Vogel, formed to educate the public about laws that would enable victims of privacy invasions to sue as Jane or John Does and grew to cover nonconsensual pornography. Jacobs co-founded the *Cyber Civil Rights Initiative* (CCRI) with Franks to combat the problem of nonconsensual pornography. They named the organization after my article *Cyber Civil Rights*, which made the case for conceptualizing cyber stalking as a civil rights problem. I serve on CCRI's Board of Directors along with its President, Mary Anne Franks, co-founder Jacobs, Carrie Goldberg, Jason Walta, and Michelle Gonzalez.

<sup>418</sup> Mary Anne Franks, *Why We Need a Federal Criminal Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <https://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html>.

<sup>419</sup> Citron & Franks, *supra* note, at.

<sup>420</sup> In my book *Hate Crimes in Cyberspace* and a law review article entitled *Law's Expressive Value in Combating Cyber Gender Harassment*, I argued that naming cyber gender harassment served a crucial expressive purpose. CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note, at; Citron, *Law's Expressive Value*, *supra* note, at.

posting of a politician's crotch shots sent to strangers.<sup>421</sup> Nonetheless, it would permit a fulsome understanding of the costs to individuals and society before weighing those costs against competing interests.

A comprehensive approach allows us to see the structural impact of these invasions of sexual privacy. The harm inflicted to identity formation is not borne equally. Marginalized and vulnerable communities shoulder a disproportionate amount of the abuse. Given the way that stigma works and its collateral impact on the job market, especially around sex and sexuality, the harm compounds for women and minorities.<sup>422</sup> Another component would be to include certain content platforms into the liability calculus, as explored below.

*a. Statutory Protections*

The drafting of a sexual privacy statute should be informed by First Amendment doctrine, due process concerns, and the goal of encouraging the passage of laws that will deter invasions of sexual privacy.<sup>423</sup> Careful and precise drafting is essential to any effort. Defendants must have clear notice of the precise activity that is prohibited. Not only does legislation have to give fair warning to potential perpetrators, it must not be so broad as to criminalize or accord civil penalties for innocuous behavior.

An invasion of sexual privacy statute should have a number of features. It should require proof that the defendant knowingly engaged in, or knowingly coerced another person to engage in, the photographing, filming, recording, digital fabrication, or disclosure of "intimate information," defined as images of a person whose "private area" is exposed or partially exposed, who is engaged in sexually explicit conduct or "sexual act," or whose nude image is digitally manufactured. Second, it should require proof that the defendant knew the person did not consent to the photographing, filming, recording, digital fabrication, or disclosure of the intimate information and knew that the intimate information was meant

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<sup>421</sup> Consider Anthony Weiner who sent photos of his genitalia to strangers during his New York City mayoral run even though he swore to the public he was no longer engaged in such activity. Citron & Franks, *supra* note, at (discussing the free speech concerns of prosecuting the women who exposed Weiner's texts).

<sup>422</sup> The connection between privacy and equality are at the heart of European data protection law. ALLEN, UNPOPULAR PRIVACY, *supra* note, at. As European lawmakers recognized, Hitler's Final Solution—and the genocide of six million Jews and six million others—was only possible due to the Nazis' access to personal data about people's religion and race. EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001).

<sup>423</sup> See text and footnotes 395-410.

to be private.<sup>424</sup> The statute should include exemptions for disclosures concerning matters of legitimate public concern or pertaining to legitimate law enforcement efforts.<sup>425</sup>

A sexual privacy statute must provide clear and specific definitions of key terms. A crucial task would be defining “intimate information.” Definitions in certain voyeurism and nonconsensual pornography laws are helpful guides. For instance, the model nonconsensual pornography statute drafted by Franks provides well-crafted definitions of terms like “sexual act,” which “includes but is not limited to masturbation; genital, anal, or oral sex; sexual penetration with objects; or the transfer or transmission of semen upon any part of the depicted person’s body.”<sup>426</sup> The federal Video Voyeurism Act defines “private area” as “the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual.”<sup>427</sup> The exemption of matters involving legitimate public concern would help guard against the chilling of protected speech though it would not eliminate those concerns.<sup>428</sup> Where the disclosure involves a private individual, free speech concerns are muted.<sup>429</sup>

Crucially, the uniform statute should be paired with hate crime legislation that increases the sentences of perpetrators with biased motives. Akin to the arguments that I made in my book *Hate Crimes in Cyberspace*, prosecutors should seek to enhance sentences based on bias motivation and acknowledge the compounded harm for intersectional harms.

Because a uniform statute would cover the landscape of sexual privacy invasions, criminal punishment should be calibrated to the wrongful conduct. No doubt, some circumstances deserve higher penalties. Sextortion is particularly harmful and particularly reprehensible conduct—it may warrant stiffer penalties than other sexual privacy invasions. A uniform statute should include aggravating circumstances that would

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<sup>424</sup> For instance, the statute could read, in part: Whoever knowingly [using any means affecting interstate or foreign commerce by any means, including by computer] engaged in, or knowingly coerced another person to engage in, the photographing, filming, recording, digitally fabrication, or disclosure of intimate information:

(1) knowing that person did not consent to the photographing, filming, recording, digital fabrication, or disclosure of intimate information; and  
knowing a reasonable person would have expected privacy in the intimate information

shall be fined under this title or imprisoned for not more than five (or ten) years, or both.

<sup>425</sup> Citron & Franks, *supra* note, at 388.

<sup>426</sup> CCRI Model State Statute, [https://www.cybercivilrights.org/wp-content/uploads/2016/06/CCRI-Model-State-Law-for-NCP\\_6-8-16.pdf](https://www.cybercivilrights.org/wp-content/uploads/2016/06/CCRI-Model-State-Law-for-NCP_6-8-16.pdf); see also Franks, *supra* note, at.

<sup>427</sup> 18 U.S.C. § 1801.

<sup>428</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>429</sup> *Id.*

enhance the penalties, such as where an actor engages in both nonconsensual taping and disclosure or where minors have been targeted.<sup>430</sup>

A uniform statute should include civil penalties. Along these lines, the National Conference of Commissioners on Uniform State Laws, with Franks as the Reporter, recently proposed a statute providing civil remedies for the authorized disclosure of intimate images.<sup>431</sup> The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act permits plaintiffs to bring suits under pseudonyms to protect their identity and privacy from further harm.<sup>432</sup> Plaintiffs are allowed to recover economic and noneconomic damages proximately caused by defendants or statutory damages not to exceed \$10,000 against a defendant.<sup>433</sup> Punitive damages, reasonable attorney's fees and costs, and injunctive relief are also allowed.<sup>434</sup> That statute should extend to all invasions of sexual privacy, not just the disclosure of intimate images without consent.

#### *b. Privacy Torts*

The privacy torts should evolve as well,<sup>435</sup> even though their practical import may be more limited than government funded prosecutions.<sup>436</sup> The origin story of the privacy torts provides interesting insights for a path forward. The majority of the early privacy plaintiffs were women whose images had been used in advertisements and films without permission or whose nude bodies were viewed without consent.<sup>437</sup> In *DeMay v. Roberts*, the first privacy case, a doctor went to the plaintiff's house in the middle of the night to help her deliver her child.<sup>438</sup> The doctor brought a friend with him but never explained that the friend was not a medical professional.<sup>439</sup> The doctor's friend watched the plaintiff as she gave birth. After finding out

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<sup>430</sup> Rod Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA. L. REV. 289, 302 (2002); Neil Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357 (2011) (suggesting that a hybrid intrusion/disclosure tort may help resolve some of the First Amendment problems with disclosure tort).

<sup>431</sup> Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (June 14, 2018).

<sup>432</sup> *Id.*; see CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at (arguing for recognition of pseudonymous litigation on behalf of plaintiffs in privacy suits).

<sup>433</sup> Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (June 14, 2018).

<sup>434</sup> *Id.*

<sup>435</sup> See generally Citron, *Mainstreaming Privacy Torts*, *supra* note, at.

<sup>436</sup> As explored above, individuals are unlikely to have the resources required to sue privacy invaders.

<sup>437</sup> Lake, *supra* note, at 232.

<sup>438</sup> *DeMay v. Roberts*, 46 Mich. 160 (1881).

<sup>439</sup> *Id.*



that the friend was not a doctor, the plaintiff brought a suit.<sup>440</sup> The court recognized that the plaintiff had a “right to privacy,” understood as having the right to decide who sees one’s exposed laboring body.<sup>441</sup>

Historian Jessica Lake unearthed the stories behind those cases and found that female plaintiffs often used privacy tort law to object to unwanted “optical violation of their bodies.”<sup>442</sup> Female plaintiffs sought to “protest” being reduced to “objects of consumption” or shameful “hookers or divorcees.”<sup>443</sup> Although court decisions tended to attribute privacy redress to the preservation of female “modesty” and “reserve,” the plaintiffs themselves did not frame their cases that way.<sup>444</sup> As complaints and litigation documents showed, plaintiffs sought to “claim ownership over their life experiences and to protest against the appropriation and exploitation of those experiences.”<sup>445</sup>

That history is instructive. The privacy torts could have evolved in a way that provided robust protection of sexual privacy—the ability to determine for oneself how much of one’s sexual life is shared with others as the earliest plaintiffs imagined. The privacy torts have ossified into four torts with cramped meanings.<sup>446</sup> But courts can and should protect what the early privacy plaintiffs sought—protection for the “inviolable personality” rather than being hampered by the restrictive elements of the four privacy torts.<sup>447</sup> This goal might enable courts to shed some of the rigidity that has prevented privacy torts from recognizing privacy injuries involving disclosures of intimate information to small groups of people or intrusions of seclusion in public.<sup>448</sup>

The privacy torts should grow to protect sexual privacy.<sup>449</sup> Crucial would be the recognition that privacy harm is as profound when private facts like nude images, sexual orientation, or gender transition are disclosed to smaller groups of people who matter to us—whether it is one’s church congregation or employer—than it is to the broader public. The rigid

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<sup>440</sup> *Id.*

<sup>441</sup> Lake, *supra* note, at 95. Lake studied primary court documents, including affidavits, pleadings, records of testimony, and exhibits of important early cases including *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), *DeMay v. Roberts*, 9 N.W. 146 (Mich. 1881), *Feeny v. Young*, 181 N.Y.S. 481 (App. Div. 1920), and *Kunz v. Allen*, 172 P. 532 (Kan. 1918). See Lake, *supra* note, at.

<sup>442</sup> *Id.* at 227.

<sup>443</sup> Lake, *supra* note, at 106, 221.

<sup>444</sup> Lake, *supra* note, at 224–25.

<sup>445</sup> *Id.* at 222.

<sup>446</sup> Citron, *Mainstreaming Privacy Torts*, *supra* note, at; Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887 (2010).

<sup>447</sup> Prosser, *supra* note, at.

<sup>448</sup> See Lior Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. (2010).

<sup>449</sup> See Citron, *Mainstreaming Privacy Torts*, *supra* note, at 1850–51.

publicity rule does not accord with the lived reality of invasions of sexual privacy. As we saw in *Brilbey v. Myers*, the unauthorized disclosure of information about someone's sexual orientation or gender can be deeply damaging to identity development.<sup>450</sup> Providing redress for the unauthorized disclosure of someone's sex, gender, or sexuality raises free speech concerns, especially if the person is a public figure or public official. Then too, courts should recognize that even if plaintiffs are in public, they have a right to privacy up their skirts.

*c. Section 230 Reform*

Suing perpetrators is insufficient—content platforms are essential to protecting sexual privacy in the digital age. The call for a more regulated internet is no longer considered outlandish.<sup>451</sup> Congress recently amended Section 230 to exempt from the immunity platforms that facilitate online sex trafficking.<sup>452</sup> As one of the drafters of Section 230 (now-U.S. Senator Ron Wyden) recently acknowledged, the law's safe harbor was meant to incentivize efforts to clean up the internet—not to provide a free pass for ignoring or encouraging illegality.<sup>453</sup>

We find ourselves at a very different moment now than we were in five or ten years ago, let alone twenty years ago when Section 230 was passed. The pressing question now is not whether the safe harbor will be altered, but to what extent. That is astounding, to say the least.

Modest adjustments to Section 230 could maintain a robust culture of free speech online without extending the safe harbor to bad actors or, more broadly, to platforms that do not respond to illegality in a reasonable manner. One possibility suggested by noted free speech scholar Geoffrey Stone would be to deny the safe harbor to bad actors. Specifically, that exemption would apply to online service providers that “knowingly and intentionally leave up unambiguously unlawful content that clearly creates a serious harm to others.”<sup>454</sup> This would ensure that bad actors could not claim immunity if they knowingly and intentionally leave up illegality causing serious harm, such as nonconsensual pornography or up-skirt photos.

A variant on this theme would deny the immunity to online service providers that intentionally solicit or induce illegality or unlawful content.

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<sup>450</sup> See *infra* note.

<sup>451</sup> Citron & Jurecic, *supra* note, at.

<sup>452</sup> H.R. 1865, 115th Cong. (2017-2018).

<sup>453</sup> Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018).

<sup>454</sup> Email of Geoffrey Stone, Prof. of Law, U. Chi. School of Law to Danielle Citron, Prof. of Law, U. Md. Carey School of Law (Apr. 8, 2018) (on file with author).

This approach takes a page from trademark intermediary liability rules. As Stacey Dogan urges in that context, the key is the normative values behind the approach.<sup>455</sup> Providers that profit from illegality – which surely can be said of sites that solicit illegality – should not enjoy immunity from liability. It behooves them to keep up harmful, illegal content and risk potential lawsuits. At the same time, other online service providers would not have a reason to broadly block or filter lawful speech in order to preserve the immunity. In other words, the approach provides broad breathing space for protected expression.<sup>456</sup>

Still yet another approach would amend Section 230 in a more comprehensive manner. As Benjamin Wittes and I have argued, platforms should enjoy immunity from liability only if they can show that their response to unlawful uses of their services is reasonable.<sup>457</sup> The immunity would hinge on the reasonableness of providers' (or users') content moderation practices as a whole – rather than whether specific content was removed or allowed to remain in any specific instance. The determination of what constitutes a reasonable standard of care would consider differences among online entities. Internet service providers (ISPs) and social networks with millions of postings a day cannot plausibly respond to complaints of abuse immediately, let alone within a day or two. On the other hand, they may be able to deploy technologies to detect content previously deemed unlawful. The duty of care will evolve as technology improves.

A reasonable standard of care would reduce opportunities for abuses without interfering with the further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites. Approaching the problem as one of setting an appropriate standard of care more readily allows for differentiating among various kinds of online actors, setting different rules for large ISPs linking millions to the internet versus websites designed to facilitate mob attacks or enable illegal discrimination.<sup>458</sup>

## B. MARKETS

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<sup>455</sup> Stacey Dogan, *Principled Standards vs. Boundless Discretion: Two Approaches to Intermediary Trademark Liability Online*, 37 COLUM. J. L. & ARTS 502, 508 (2014).

<sup>456</sup> *Id.*

<sup>457</sup> Citron & Wittes, *supra* note. A better revision to Section 230(c)(1) would read (revised language is italicized): "No provider or user of an interactive computer service that *takes reasonable steps to prevent or address unlawful uses of its services* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider.*" *Id.*

<sup>458</sup> *Id.*

As law has struggled to address invasions of sexual privacy, market forces have endeavored to mitigate some of the harm of invasions of sexual privacy. There may be other efforts on the horizon. Those developments should be viewed through Pozen's typology of privacy-privacy tradeoffs. First, a policy may involve a "distributional tradeoff," that is, it shifts privacy burdens or benefits from one group in the population to another.<sup>459</sup> Second, a policy may involve a "directional tradeoff" in what it shifts the burden not only among groups that suffer harm but also on groups that cause harm to a certain privacy interest—among privacy invaders as well as victims. Third, a policy may involve a "dynamic tradeoff," which shifts the privacy risk across time periods.<sup>460</sup> Last, a policy may shift risk across different privacy interests, which Pozen calls a "dimensional tradeoff."

The privacy-privacy tradeoff calculus is particularly important because whenever a new information technology emerges, the typical reaction is to overestimate the privacy costs of the new technology without taking a meaningful account of its privacy benefits.<sup>461</sup> Debates over privacy "keep score very badly and in a fashion gravely biased towards overstating the negative privacy impacts of new technologies relative to their privacy benefits."<sup>462</sup>

Information technologies are doubled-edged—they collect personal data even as they afford new opportunities for privacy.<sup>463</sup> In the analog age, if people wanted access to racy literature, they had to go into a store and buy it, revealing their reading habits to clerks.<sup>464</sup> Because it was embarrassing to be seen purchasing it, many declined to do so. In the digital age, there are no clerks to give us sideways looks if we purchase *Fifty Shades of Grey*.<sup>465</sup> To be sure, online behavioral advertisers are tracking our purchases as are Amazon and other e-book sellers.<sup>466</sup>

This Part takes a look at emerging trends to ensure that we do not cast aside valuable private efforts without a careful look at the overall impact on sexual privacy and competing privacy interests.

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<sup>459</sup> Pozen, *supra* note, at 229.

<sup>460</sup> *Id.* at 230.

<sup>461</sup> BENJAMIN WITTES & JODIE LIU, BROOKINGS INSTITUTE, THE PRIVACY PARADOX: THE PRIVACY BENEFITS OF PRIVACY THREATS (2015), <https://www.brookings.edu/research/the-privacy-paradox-the-privacy-benefits-of-privacy-threats/>.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> WITTES & LIU, *supra* note.

<sup>465</sup> BENJAMIN WITTES & EMMA KOHSE, BROOKINGS INSTITUTE, PRIVACY PARADOX II: MEASURING THE PRIVACY BENEFITS OF PRIVACY RISKS (2017), <https://www.brookings.edu/research/the-privacy-paradox-ii-measuring-the-privacy-benefits-of-privacy-threats/>.

<sup>466</sup> *Id.*

### 1. Facebook Hashes

Since 2014, Facebook has banned nonconsensual pornography in its terms of service (TOS) agreement. At the start, users would report images as TOS violations, and the company would react to those requests, removing images where appropriate. Yet abusers would routinely repost the material once it had been removed, leading to a game of whack-a-mole.

Facebook has spearheaded technical strategies to address this problem that have garnered very different public reactions. Let's take the effort that has obvious upsides for privacy and little downsides. In April 2017, Facebook announced its adoption of hash techniques to prevent the cycle of reposting: users would report images as nonconsensual pornography as before, but now, the company's "specially trained representative[s]" would determine if the images violate the company's terms of service and then designate the images for hashing.<sup>467</sup> Photo-matching technology would block hashed images from reappearing on any of the platforms owned by Facebook. This strategy is one that Franks, as legislative director of the Cyber Civil Rights Initiative, had long urged tech companies to adopt.<sup>468</sup>

Hashing is "a mathematical operation that takes a long stream of data of arbitrary length, like a video clip or string of DNA, and assigns it a specific value of a fixed length, known as a hash. The same files or DNA strings will be given the same hash, allowing computers to quickly and easily spot duplicates."<sup>469</sup> In essence, hashes are unique digital fingerprints.

This program has great promise to mitigate the damage suffered by victims of nonconsensual pornography. Preventing the reappearance of nonconsensual pornography is a relief to victims, who can rest easy knowing that at least on Facebook and its properties, friends, family, and coworkers will not see their nude images without their consent.<sup>470</sup> Storing the hashed images poses little risk to privacy—since the images have already been posted without consent and removed, the hashes would be the

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<sup>467</sup> Antigone Davis, *The Facts: Non-Consensual Intimate Image Pilot*, FACEBOOK NEWSROOM (Nov. 9, 2017), <https://newsroom.fb.com/news/h/non-consensual-intimate-image-pilot-the-facts/>.

<sup>468</sup> Interview with Mary Anne Franks (Sept. 1, 2018) (on file with author) (explaining that as early as 2014, Franks urged tech companies to adopt hash strategies to filter and block content constituting nonconsensual pornography).

<sup>469</sup> Jamie Condliffe, *Facebook and Google May Be Fighting Terrorist Videos with Algorithms*, MIT TECH. REV. (June 27, 2016), <https://www.technologyreview.com/s/601778/facebook-and-google-may-be-fighting-terrorist-videos-with-algorithms/>. Computer scientist Hany Farid, in conjunction with Microsoft, developed PhotoDNA hash technology that enables the blocking of content before it appears. *Id.*

<sup>470</sup> Of course, this solution is confined to Facebook—but its success might portend wider adoption, as in the case of child pornography moderation efforts.

only remnant of that process and would be difficult to reverse engineer back to the original image.

The next step in Facebook's efforts, however, has garnered significant outrage from privacy advocates and journalists. In November 2017, Facebook announced a pilot program that would allow victims of nonconsensual porn to send to Facebook images that they worried might be posted without their consent.<sup>471</sup> The effort grew out of discussions with Facebook about the concerns of women whose abusers had threatened to post their nude images online. The question posed to Facebook was whether the company could do anything *before* intimate images were posted without their consent. The hashing program was incredibly helpful but it could not prevent the initial publication. There was still harm—mitigated, to be sure, but still significant.

Facebook's technologists and policy leaders partnered with Australia's e-safety commissioner to roll out a program that would enable individuals to send in intimate photos that they feared would be posted on Facebook without their permission.<sup>472</sup> Users have to notify the e-safety commissioner's office about the problem.<sup>473</sup> Once the e-safety office notifies Facebook, individuals are sent a one-time link so that they can send intimate images to Facebook. Facebook's operations access the image and hash it to prevent its future posting on the site.<sup>474</sup> Facebook is extending the program to the United States and the United Kingdom.

The reaction to the proposal was swift, and much of it negative. Some criticism was warranted. Journalists asked why anyone should trust Facebook after the Cambridge Analytica fiasco.<sup>475</sup> Information security experts noted that transmitting intimate images to Facebook entailed

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<sup>471</sup> I am a member of a small group of advisers working with Facebook on the issue. Our Non-Consensual Intimate Image Working Group includes members of CCRI and the National Network to End Domestic Violence. See announcement of working group and effort here. *Facebook Safety*, FACEBOOK, <https://www.facebook.com/fbsafety/posts/1666174480087050>. I am not paid for any of my consulting work with Facebook.

<sup>472</sup> Olivia Solon, *Facebook Asks Users for Nude Photos in Project to Combat Revenge Porn*, GUARDIAN (Nov. 7, 2017), <https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos>.

<sup>473</sup> Louise Matsakis, *To Fight Revenge Porn, Facebook Is Asking to See Your Nudes*, MOTHERBOARD (Nov. 7, 2017).

<sup>474</sup> Davis, *supra* note, at.

<sup>475</sup> David Bloom, *Facebook Wants Your Nude Photos, What Could Possibly Go Wrong?*, FORBES (May 24, 2018), <https://www.forbes.com/sites/dbloom/2018/05/24/facebook-wants-your-nude-photos-what-could-possibly-go-wrong/>.

security risks.<sup>476</sup> Civil liberties groups were quick to criticize the initiative, mocking it as a privacy disaster.<sup>477</sup>

There are indeed risks to sexual privacy—a dynamic one, as Pozen describes it—if Facebook fails to secure the transmission of nude images and does not delete those images after hashing them. All signs suggest that Facebook is immediately deleting the nude images after hashing them and it is difficult to reengineer images from hashes. On the other hand, the hash program offers meaningful upsides for sexual privacy. The pilot program is an experiment, one that could end up protecting far more sexual privacy than it endangers. Crucially, Facebook safety officials, notably Antigone Davis and Karuna Nain, are monitoring the project to ensure that the privacy calculus makes sense. Facebook is hosting in-house training sessions with experts so that staff is attuned to privacy concerns.<sup>478</sup> In short, this is precisely the sort of careful efforts that companies should engage in as they adopt privacy-enhancing technologies that also carry risks.

## 2. *Immutable Life Logs*

The development of hard to debunk deep sex fakes raises the possibility of a market response that would enable people to have credible alibis. As Robert Chesney and I discuss in a project about the national security, privacy, and democracy implications of deep fakes, there may soon emerge a market response that warrants careful study: immutable life logs or authentication trails that make it possible for a victim of a deep fake to produce a certified alibi credibly proving that he or she did not do or say the thing depicted.<sup>479</sup>

From a technical perspective, such services will be made possible by advances in technologies including wearable tech; encryption; remote sensing; data compression, transmission, and storage; and blockchain-based record-keeping. That last element will be particularly important, for a vendor hoping to provide such services could not succeed without earning a strong reputation for the immutability and comprehensiveness of its data.

Obviously, not everyone would want such a service even if it could work reasonably effectively as a deep-fake defense mechanism. But some individuals (politicians, celebrities, and others whose fortunes depend to an

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<sup>476</sup> *Id.*

<sup>477</sup> For a sample, see tweets directed at Facebook's Chief Security Officer Alex Stamos. <https://twitter.com/alexstamos/status/999745140108378112>; <https://twitter.com/fightfortheft/status/999720271484350464>.

<sup>478</sup> I have been speaking at those training sessions.

<sup>479</sup> Chesney & Citron, *supra* note, at.

unusual degree on fragile reputations) will have sufficient fear of suffering irreparable harm from deep fakes that they may be willing to agree to—and pay for—a service that comprehensively tracks and preserves their movements, surrounding visual circumstances, and perhaps in-person and electronic communications (though providers may be reluctant to include audio-recording capacity because some states criminalize the interception of electronic communications unless all parties to a communication consent to the interception).<sup>480</sup>

Should we encourage the emergence of such services? We need to examine the privacy calculus in total. The privacy tradeoff is dimensional—it protects privacy and reputation by giving enormous power over every detail of our lives to lifelogging companies. There are serious social costs should such services emerge and prove popular. Proliferation of comprehensive life logging would have tremendous spillover impacts on privacy in general. It risks what has been called the “unraveling of privacy”<sup>481</sup>—the outright functional collapse of privacy via social consent despite legal protections intended to preserve it. Scott Peppet has warned that, as more people relinquish their privacy voluntarily, the remainder increasingly risks being subject to the inference that they have something to hide.<sup>482</sup> This dynamic might overcome the reluctance of some holdouts. Worse, the holdouts in any event will lose much of their lingering privacy, as they find themselves increasingly surrounded by people engaged in life-logging.

Note the position of power in which this places the supplier of these services. The scale and nature of the data they would host would be extraordinary, both as to individual clients and more broadly across segments of society or even society as a whole. A given company might commit not to exploit that data for commercial or research purposes, hoping instead to draw revenue solely from customer subscriptions. But the temptation to engage in predictive marketing, or to sell access to the various slices of the data, would be considerable. The company would possess a database of human behavior of unprecedented depth and breadth, after all, or what Paul Ohm has called a “database of ruin.”<sup>483</sup> The Cambridge

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<sup>480</sup> See Danielle Keats Citron, *Spying, Inc.*, 72 WASH. & LEE L. REV. 1243, 1262 (2014) (explaining that twelve states criminalize the interception of electronic communications unless all parties to the communication consent to the interception); Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1485. So long as one party to communications consent to interception, the remaining state laws—38—and federal law permit the practice.

<sup>481</sup> Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full Disclosure Future*, 105 NW. U. L. REV. 1153 (2015).

<sup>482</sup> *Id.* at 1181.

<sup>483</sup> Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1748 (2010).



Analytica/Facebook scandal might pale in comparison to the possibilities unleashed by such a database.

At the same time, this would have its upsides in terms of identifying deep sex fakes and all other manner of using video to manufacture the past. Ultimately, a world with widespread lifelogging of this kind might produce more benefits than costs (particularly if there is legislation well-tailored to regulate access to such a new state of affairs). But it might not. Enterprising businesses may seek to meet the pressing demand to counter deep fakes in this way, but it does not follow that society should welcome—or wholly accept—that development. Careful reflection is essential now, before *either* deep fakes *or* responsive services get too far ahead of us.

## CONCLUSION

Digital voyeurism, up-skirt photos, sextortion, deep sex fakes, and nonconsensual porn are all invasions of sexual privacy—and more often, marginalized and subordinated communities shoulder the abuse. Sexual privacy should be understood as a distinct category of privacy interest, one that deserves special recognition and protection. Sexual privacy requires careful assessment and vigorous protection given its importance to sexual autonomy, intimacy, and equal opportunity.

Traditional privacy law's efficacy is eroding just as digital technologies magnify the scale and scope of the harm. We need a comprehensive approach that protects the positive potential of sexual privacy.



# BETTER WORKPLACES BETTER WORLD™

## Social Media Is a Major Consideration in Wave of Sexual Harassment Allegations

Experts say allegations on anonymous apps won't help HR to get in front of the problem

By Dinah Brin | December 11, 2017

**S**ocial media figures prominently in the flood of sexual harassment allegations swamping high-profile political, news, entertainment and tech industry figures—playing a role that employers would be wise to heed.

As blogs and social media platforms ([www.shrm.org/ResourcesAndTools/hr-topics/technology/Pages/Gender-Bias-Scandals-in-Silicon-Valley-Signal-Greater-Need-for-Diversity.aspx?utm\\_source=SHRM+PublishThis\\_HRTechnology\\_7.18.16+%2853%29&utm\\_medium=email&utm\\_content=August+15%2c+2017&SPMID=&SPJD=&SPED=&SPSEG=&spMailingID=30180885&spUserID=MjQyMTg4ODkzNTE4S0&spJobID=1101706930&spReportId=MTEwMTcwNjkzMAS2](http://www.shrm.org/ResourcesAndTools/hr-topics/technology/Pages/Gender-Bias-Scandals-in-Silicon-Valley-Signal-Greater-Need-for-Diversity.aspx?utm_source=SHRM+PublishThis_HRTechnology_7.18.16+%2853%29&utm_medium=email&utm_content=August+15%2c+2017&SPMID=&SPJD=&SPED=&SPSEG=&spMailingID=30180885&spUserID=MjQyMTg4ODkzNTE4S0&spJobID=1101706930&spReportId=MTEwMTcwNjkzMAS2)) expose and amplify employee complaints, HR faces a new frontier—one where some forums, like mobile app Blind (<https://us.teamblind.com/>), even encourage workers to post company complaints anonymously.

"Social media is another way employees complain about harassing behavior. Social media is involved in some aspect of each harassment complaint I've dealt with recently, whether it is the source of the report itself or if it contradicts the employee's claim," said HR consultant Kate Bischoff, who runs tHRive Law & Consulting (<https://thrivelawconsulting.com/>).

"And social media is not going anywhere. It's now a facet of doing business," the Minneapolis employment attorney said.

After more than a year of high-profile sexual harassment scandals, accusers unleashed a raft of severe allegations this fall against film mogul Harvey Weinstein, prompting Weinstein's firing (<https://www.nytimes.com/2017/10/17/business/media/harvey-weinstein-sexual-harassment.html>) from his own company and a deluge of accusations against powerful figures from Hollywood to Washington, D.C.

The latest: On Dec. 5, Rep. John Conyers Jr., D-Mich., announced his resignation, effective immediately, following multiple harassment allegations. That move came exactly two months (<http://www.bbc.com/news/entertainment-arts-41594672>) after *The New York Times* triggered a tsunami of allegations with a story detailing a long trail of accusations against Weinstein.

**"You don't have to monitor social media, but we need to encourage employees to bring things to us, whether it is a co-worker's post or their own report of harassment."**

Weinstein's accusers and their supporters filled social media with stories about the producer, stirring a wave of #MeToo social media posts from women and men from various walks of life who shared their own experiences with alleged sexual predators.

"The #MeToo campaign has resulted in several of my clients investigating possible harassment claims. In each of these situations, my clients were made aware that a post was made that could have involved inappropriate conduct while the poster was employed and could have involved a co-worker. So, they all investigated," said Bischoff. "Some took action and some learned that the post did not involve them."

While the viral nature and swift story arc of recent sexual harassment scandals have played out on Twitter, and Facebook has served as a diary for many sharing their own stories, employees also have access to workplace-focused platforms that allow them to publicize all manner of complaints.

## Blind Sheds Light on Accusations

**T**he Blind app bills itself as "your anonymous workplace community," with "real insight from your peers." The company says its mission is "to flatten professional barriers and bring transparency to the workplace." People register on the app with their work e-mail addresses and can share anonymously with others. They can also conduct polls. Blind says it values what is said over who says it and that it wants to empower everyone in the workplace. "Transparency results in voice, and voice results in change, often for the better," its website states.

Job board and employee forum Glassdoor (<https://www.glassdoor.com/Reviews/index.htm>), meanwhile, provides a searchable database of anonymous employee reviews.

And a new platform coming soon, AllVoices (<https://blog.allvoices.co/speak-up-without-consequences-introducing-allvoices-b3d54e7de1d1>), says it will allow any employee to anonymously report "instances of harassment, discrimination, or bias, either witnessed or experienced firsthand, directly to their CEO and company board," with aggregated reports delivered to the CEO and board without any personally identifiable information.

[SHRM members-only resource: *Sexual Harassment Policy and Complaint/Investigation Procedure*

([www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms\\_000554.aspx](http://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_000554.aspx))]

Platforms like Blind and Glassdoor are the 2017 versions of a whistle-blower hotline, said Jacquelyn Thorp, SHRM-SCP, California HR coach and CEO of Train Me Today (<https://www.trainmetoday.com/>). "Using anonymous sources for reporting bad behavior at work is difficult. You don't always get the information you need to investigate, and there is no one to follow up with," Thorp told *SHRM Online*.

"However, in today's workplace there is a place for [anonymous sources] because employees feel they have nowhere to turn. This is why it is so critical for employers to train their employees about their sexual harassment prevention policy and process if they feel harassed, discriminated against or bullied," she said.

Thorp recently wrote (<https://gem.godaddy.com/s/81ba3b>) about steps employers can take to develop a harassment-free workplace, including instituting a zero-tolerance policy, ensuring full support of top management and the board, training, proper investigations, good enforcement, expert HR people, and a respectful culture. *SHRM Online*, too, has developed a workplace harassment portal ([www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/workplace-harassment-resources.aspx](http://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/workplace-harassment-resources.aspx)) complete with case studies, tools and advice on how to conduct trainings and investigations.

## Anonymous Accusations Can't Facilitate Change

**T**he problem with employees anonymously using social media platforms to report harassment is that the posts need to be directed to someone empowered to investigate and take action, according to David Lewis, president and CEO of OperationsInc (<http://www.operationsinc.com/>), a Norwalk, Conn., HR consulting and outsourcing firm. While more people may come forward if they can speak out anonymously, he said, investigators must know who is complaining to do their jobs.

"Just having the app available for use is not enough. Further, anonymous complaints rarely give HR, or the empowered party, enough to act on," Lewis said. Best practices call for an investigation that includes interviews with the accuser and witnesses, he said. "A system where all [or] much of what is collected is anonymous makes this challenging at best."

If the employee's goal is to get the word out that the environment at a company is toxic, then these platforms that allow employees to vent work well, Lewis said, "but having all of this facilitate real change is a slower process."

Lewis defended the HR profession against the criticism it has received amid the scandals.

"HR is getting crushed right now as being culpable in organizations where harassment was allowed to continue. HR examines issues, draws conclusions, recommends actions and reactions, and then 100 percent operates at the direction of



([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Resources.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Resources.aspx))

### Workplace Harassment Resources

([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Resources.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Resources.aspx))

- Case Studies ([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Case-Studies.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Case-Studies.aspx))
- Compliance Resources ([www.shrm.org/ResourcesAndTools/hr-topics/employee-](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-)

leadership. As such, I take exception to those who point fingers at HR and assume all or most are in management's corner," Lewis said.

relations/Pages/Workplace-Harassment-Compliance.aspx)

- Training Resources  
([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Training.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Training.aspx))
- Tools & Forms ([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Tools-and-Forms.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Tools-and-Forms.aspx))
- Investigation Resources  
([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Investigation.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Investigation.aspx))

**Quiz:** Is It Sexual Harassment? ([www.shrm.org/hr-today/news/hr-news/pages/is-it-sexual-harassment.aspx](http://www.shrm.org/hr-today/news/hr-news/pages/is-it-sexual-harassment.aspx))

## Don't Be Blind: Investigate Harassment Apps

**B**ischoff recommends that HR teams review the information posted on forums like Blind, Bravely (<https://www.workbravely.com/>), Knunu (<https://www.kununu.com/us>), Fairygodboss (<https://fairygodboss.com/about-us>), and Glassdoor, while encouraging workers to report problems in-house.

"Whether it is reputational information or reports of harassment, these are now additional sources of employee concerns. We have to listen to them. If the post is made anonymously, we still have an obligation to do something about it, even if that means we have to investigate. We in HR and employers more generally can't afford to put our fingers in our ears and wait for a more formal, direct complaint," Bischoff said.

"Employers have to keep a keen eye on what is happening in their workplace, be vigilant, [and trust] that employees will bring them reports of harassment," Bischoff said. "You don't have to monitor social media, but we need to encourage employees to bring things to us, whether it is a co-worker's post or their own report of harassment."

*Dinah Wisenberg Brin is a Philadelphia-based freelance writer covering HR, entrepreneurship, small business, personal finance and health care.*

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## THE CONVERSATION

Academic rigor, journalistic flair

# #MeToo is not enough: it has yet to shift the power imbalances that would bring about gender equality

March 18, 2018 2.56pm EDT

Wes Mountain/The Conversation, CC BY-ND

# #MeToo is not enough: it has yet to shift the power imbalances that would bring about gender equality

March 18, 2018 2.56pm EDT

*Six months after the explosive allegations of sexual harassment against Hollywood producer Harvey Weinstein came to light, giving impetus to the #MeToo movement, this series looks at the aftermath of the movement, and if it has brought about lasting change to sexual harassment and gender equality.*

## Author



### Eva Cox

Professorial Fellow, Jumbunna IHL,  
University of Technology Sydney

When news of the allegations against Hollywood producer Harvey Weinstein broke last October, it unleashed a torrent of emotion, especially on social media, offering permission to disclose current and past experiences of sexual harassment and assault. In an unprecedented quantum of use, it offered many angry and upset women accessible ways of venting often long-repressed feelings. It also gave rise to the #MeToo movement.

The volume and breadth of the responses raise many serious questions about the presumed “equality” gains of women. Over the past 70 years, after Simone de Beauvoir, Betty Friedan and Germaine Greer started debates that drove the second-wave feminist movement, we have achieved serious changes to our legal status, paid employment, and roles in public life.

However, the torrents of anger and complaints from #MeToo raise issues of whether gender powers have really been redefined, both locally and in most Western countries. Have we really made the essential cultural shifts that ensure women are no longer the “second sex”, living in worlds devised, defined and controlled by men?

The intentions of the second wave covered more than making women equal to men (in their terms, as were then defined). We intended to create the changes that allowed women and men to redefine what matters, to ensure we were no longer seen as primarily sexual or reproductive objects.

The current debate is just further evidence we failed to make the necessary power shifts. And macho male resistance to women's power may also be increasing.

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***Read more: #MeToo and #TimesUp move off the red carpet and towards activism at 2018 Oscars***

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The evidence online and increasingly in reports and complaints, plus the intransigent domestic violence numbers, suggest current gender power imbalances are creating far too many damaging and unequal male-female relationships. Too many men, including those in power, express their ego, insecurities, problems and frustrations by dominating, bullying, controlling, undermining and embarrassing women.

The public appetite for equitable social changes seems to be receding, replaced with deteriorating social and political trust alongside growing nostalgia and tribalism. So, there appears to be little hope for more progressive power shifts to create more gender fairness.

There has been some optimism that the volume of protests and outpourings would generate public movements for change. But, like most forms of protest, they offer evidence of problems but fail to tackle the broader causes and how to fix them.

Part of the ongoing problem is the lack of serious cultural change programs that shift structures. The emphasis is still on using the law to handle individual complaints via either conciliation or charges.

Conciliation, when it works, does not allocate blame and is usually confidential, so is not a change agent. If charges are laid, the process often damages the complainant, as they are questioned and often shamed, even if they win. Many lose, and the process really becomes a social change deterrent.

There are multiple recorded problems with the individualised complaints model, as those accused seek to crush or shame accusers. A prime recent example of this is the Barnaby Joyce case and allegations of sexual harassment. When this accusation came to light, the personal details of the female complainant were published, and her desire for confidentiality was ignored.

There are many other stories of how those who seek individual complaints are punished: lost jobs, character assassination, being labelled as "difficult", and so on.

While many of the reports are of serious crimes that need to be reported to police, others range from offensive and annoying to bad, crass, stupid behaviour. What they share are macho power assumptions and powerless feminised responses, all of which ensures they are inadequately tackled.

**Onrah Winfrev Receives Cecil B. de Mille Award at the 2018 Gold**





Accusations of crimes create often expensive court cases that cause damage to a complainant even if she wins. So, formal justice may offer little relief.

Yes, the system does punish those convicted as perpetrators, but it deters few, as individualised measures do not affect most of the wider societal groups that misuse their macho power.

Legal processes, even if based on rights, do not really effect the serious social change to attitudes or power that real gender equity will require. We need to address the social mores and related power structures that reinforce male power and support toxic masculinity.

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***Read more: Hazing and sexual violence in Australian universities: we need to address men's cultures***

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How can we use the current explosion of evidence and outrage to trigger the needed changes?

We are still in early days of the “new” media as social change agents. Some positives: celebratory protests at award ceremonies and the wearing of supportive signs and colours have increased media coverage and the visibility of public support. There are discussions of increased resources for legal actions against perpetrators, and for more funding support to care for victims.

But these “solutions” are similar to those being pursued in the many campaigns against domestic violence, helping survivors. While these responses are needed in the short term, we must realise that they will not drive the cultural and gendered power changes we need. If “clicktivism” replaces wider political action and campaigns for change, we go backwards.

If we are serious about the abuse of gender-based power, we must look at its causes and make structural and cultural changes. We must overcome the serious, widespread gender-biased socialisation of boys and girls, in most cases long before they reach puberty.

Basic assumptions about gender roles still create beliefs about being an acceptable boy (stand up for yourself) or girl (be nice and read people's feelings). These offer surefire paths to toxic masculinity and passive femininity.

These emerged in a recent BBC documentary, broadcast on the ABC. It showed seven-year-olds displaying very stereotypical views of preferring male over female when it came to confidence in skills and leadership. It also showed how removing school and home items that reinforced gender roles could reduce the different socialisations – in other words, it's not genetic.

Given all of that, my concern is that #MeToo and related expressions of anger are failing to fix causes that increase macho-driven gender power imbalances. This means we need real, practical solutions to bridge the gender divide and stop supporting toxic masculinity.

[Sexual harassment](#)[gender relations](#)[Toxic masculinity](#)[Harvey Weinstein](#)[After #MeToo](#)

## THE CONVERSATION

Academic rigor, journalistic flair

# Beyond #MeToo, we need bystander action to prevent sexual violence

February 13, 2018 2.07pm EST

Increased awareness of sexual violence is not sufficient to challenge the abuse and stop it at its source. shutterstock

# Beyond #MeToo, we need bystander action to prevent sexual violence

February 13, 2018 2.07pm EST

Something truly powerful happens when victims of sexual violence choose to publicly share their account of harassment and abuse. Some will continue to minimise the violence and blame victims. But movements such as #MeToo and #TimesUp make it difficult to ignore the nature of sexual violence in people's everyday lives.

## Authors



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***Read more: Rape culture: why our community attitudes to sexual violence matter***

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Approximately one in two Australian women and one in four men experience sexual harassment in their lifetime. One in five women and one in 20 men experience sexual assault. But when experiences are shared online it reveals much more about the everyday nature of the abuse.

One such common revelation is that some victims tried to report their experience to someone – a friend, a colleague, a manager – but they were either not believed or their report was dismissed.

Sometimes, in the cases of powerful men, people even responded by saying: “oh yes, he’s just like that”. While we could all use some advice on how to respond when someone discloses an experience of sexual violence, there’s a much larger issue at play when people have an opportunity to do something but instead choose to remain silent.

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***Read more: How to respond to an allegation of sexual assault***

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## **Hashtag activism alone won’t create change**

The #MeToo movement started as a hashtag campaign on social media in response to revelations about Harvey Weinstein and other powerful men using their positions to sexually harass and abuse – primarily, though not always – women in the film industry. But a social media campaign alone is not enough to create lasting social change.

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***Read more: What the Harvey Weinstein case tells us about sexual assault disclosure***

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This is not the first time victims of sexual violence have raised their voices in a form of modern consciousness-raising. But increased awareness of the problem is not sufficient to challenge the abuse and stop it at its source.

Rather, what’s needed is ways to tackle the hidden causes of sexual harassment and abuse in workplaces, in institutions such as the media, and in society more broadly. Violence against women is more likely to occur in societies and settings where sexism, gender discrimination and gender inequality are excused or tolerated.

Australia’s National Plan to Reduce Violence against Women and their Children reflects this. It includes a commitment to change Australia’s attitudes to – and tolerance for – this kind of violence.

Federal, state and territory governments from both sides of politics have endorsed a policy framework for preventing violence before it occurs. But while governments – and indeed employers and other community leaders – have clear obligations to tackle sexual violence in all its forms, there’s something all of us can also do.

## **Bystanders need to take action**

A recent survey of 1,204 Australians reveals how willing some are to take action when they see sexual harassment, sexism, and gender inequality.

The results show a majority of participants thought it was common for women to be treated unfairly and/or without respect in a range of settings. This indicates sexism, gender discrimination and gender inequality are widespread problems in Australia.

Participants thought it was more likely for women to be treated unfairly and/or without respect in male-dominated settings (70% thought common or very common); clubs, pubs and bars (67%); social media (65%); workplaces (65%); and on the street (57%).

A large majority of participants also thought sexism, gender discrimination and gender equality are concerning problems. More specifically, the survey found:

- 82% of people surveyed find “females being paid less than a male colleague for the same work” concerning or very concerning;
- 78% of people surveyed find “a male colleague interrupting and talking over a female colleague” concerning or very concerning;
- 77% of people surveyed find “a friend sharing a sexist joke about an ‘ugly, fat chick’ on social media” concerning or very concerning; and
- 70% of people surveyed find “a male colleague making a comment about one of your female colleague’s sexual attractiveness” concerning or very concerning.

But the good news is people also want advice on how to speak up against these types of situations. The survey showed that 79% want practical tips about ways to safely intervene when witnessing disrespect toward women and girls, and 75% want practical tips about how to respond to casual sexism in a social environment without being a party pooper.

Sexual assault and harassment often happens behind closed doors, where there is little opportunity for bystander intervention. But everyday sexism, disrespect, gender discrimination, and inequality toward women are issues many observe out in the open – in workplaces, in pubs and bars, on social media, and in the street.

If we really want to create lasting change beyond #MeToo, then we all need to start challenging the attitudes and beliefs that demean and disrespect women.

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*If you require support for sexual harassment or assault, contact details for national services are available [here](#).*

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[Sexual violence](#) [#metoo](#)

THE  
NEW YORKER

# ONE YEAR OF #METOO: PUNISHING INDIVIDUAL ABUSERS IS NOT THE SAME AS JUSTICE

By Masha Gessen October 10, 2018

It began with the mesmerizing spectacle of dominoes falling: Harvey Weinstein, Kevin Spacey, Louis C.K., Charlie Rose, Matt Lauer, Russell Simmons, and so on, name after famous face, all disgraced by the end of November, 2017. An autumn later, #MeToo is undergoing a shift. Perhaps this is the moment that #MeToo stops being a movement aimed primarily at punishing individuals and starts to do its work on the institutions that have enabled them. The institutions do not collapse into non-presence, the way some of the men have seemed to. But with the curtain pulled back they stand exposed, demystified, and, inevitably, de-legitimized.

To take a few examples: the hearings on Brett Kavanaugh's Supreme Court nomination culminated with an accusation of sexual assault and ended with the confirmation of a man who had ranted, raged, cried, and apparently lied while testifying; his confirmation will permanently change how we view the Supreme Court itself. Halfway across the world, no winner of the Nobel Prize for Literature is being announced this month, and it's possible none will be announced next year—the Swedish Academy is mired in a scandal that began with accusations of sexual assault and later exposed corruption, self-dealing, and a general sense of moral rot that has likely altered public perception of this institution forever. Something similar, albeit on a different scale, is happening in New York: after *The New York Review of Books* published an essay by Jian Ghomeshi, a former Canadian radio host who has been accused of sexual violence by numerous women, Ian Buruma, that magazine's editor, was forced to resign, and a window opened on the sometimes unsavory internal workings of an influential publication. And on a far larger scale, what has happened at CBS goes beyond the deposing of the chairman and C.E.O. Leslie Moonves: producers and showrunners have been falling, too, making the entire edifice tremble.

The earlier #MeToo negotiations were focussed closely on individual cases. Did #MeToo apply to men accused of certain types of “sexual misconduct”—behavior that may not have violated the law or written policy? Did it cover men who simply acted like jerks on dates? The next logical question was, When is it all right for some of these deposed men to come back into the world? Did Louis C.K., for example, push it too far when he performed in public less than a year after he first admitted to masturbating in front of women colleagues? Ghomeshi’s controversial *New York Review of Books* piece implicitly posed the same question: Have I been punished enough? Can I come back now? Ghomeshi detailed how much he had suffered since being cast out, and aimed to demonstrate that he had been humbled by the experience. He described sharing a train compartment in Europe with a young woman, flirting with her but not following up—and not even telling her his name and situating himself as a celebrity, which would have helpfully impressed the woman in the past. There was a certain sociopathic naïveté to the piece, a transparent desire to show that Ghomeshi had conformed to what society had apparently wanted from him—he had become a no one. Hadn’t that been the point?

There are many things Ghomeshi cannot be forgiven for, but he might be forgiven for misunderstanding the meaning and objective of #MeToo. For much of the past year, it did look as though the movement’s primary goal was to reduce men who had once been Somebodies to the status of Nobody. If there is anything the past year has taught us, though, it’s that it is impossible to punish all the powerful men (and a handful of women) who abuse women (and some men). This game of dominoes will never end.

Nor does the deposing of offenders constitute justice. In the best-case scenario, their victims get to savor a moment of vengeance, though the voice and the face of Christine Blasey Ford testifying in the Senate should now be indelible in the hippocampus as a reminder of the cost of going public. Nor does bringing down some men prevent harassment by others in the future. Research on criminal justice and deterrence has suggested that it is the inevitability of being caught and punished that can have a measurable effect on preventing crime, more than the punishment itself. The larger culture is increasingly intolerant of behavior that would have seemed normal a few years ago, and individual men are scrambling their brains trying to figure out what is, was, or will be allowed, but none of them expects an inevitable #MeToo punishment.

A year in, it's a good moment to ask what a post-#MeToo world looks like in the United States. It doesn't look like our contemporary society but with all the bad-acting men knocked out, like so many rotten teeth. Nor does it look like every corrupted institution rendered dysfunctional—lying in shambles like the Swedish Academy, or even like the Supreme Court, legally powerful but socially lacking in legitimacy. Perhaps the post-#MeToo world is one where victims and perpetrators of sexual assault and harassment have addressed one another through a form of truth-and-reconciliation commission. Perhaps the length, breadth, and civility of these hearings will have created an understanding of the scale of the problem. Perhaps the post-#MeToo world is one in which a fund has been created to compensate the myriad women who have been subjected to sexual harassment and abuse. Perhaps the financial and emotional cost of attempting to right past wrongs will make the institutions reconstitute themselves with a degree of transparency that we cannot imagine now, and based on an entirely different structure of power.

None of these things seems imaginable now. But, then again, a year ago, none of us could have imagined how long this game of dominoes would go on, how much would become public, and how many idols would fall.



*Masha Gessen, a staff writer at The New Yorker, is the author of ten books, including, most recently, “The Future Is History: How Totalitarianism Reclaimed Russia,” which won the National Book Award in 2017. [Read more »](#)*

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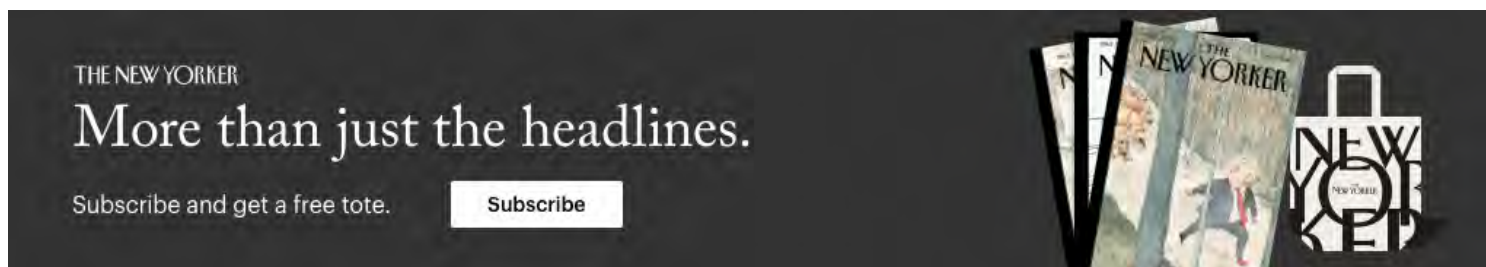
## Video

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### *The Challenges of Reporting #MeToo*

*Ronan Farrow discusses the process of investigating sexual-assault allegations.*



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## The New York Times

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OP-ED CONTRIBUTOR

# I Wrote the Uber Memo. This Is How to End Sexual Harassment.

**By Susan Fowler**

Ms. Fowler is an engineer best known for her blog post about her experiences working at Uber.

April 12, 2018

If the news over the past year has taught us anything, it's that discrimination, sexual harassment and retaliation are pervasive in nearly every industry.

From the systemic culture of sexual harassment and discrimination at Uber to the ubiquitous stories of women taken advantage of at Fox News to the tales of harassment in industries ranging from professional football to restaurants, we've seen one company after another publicly outed and shamed for illegal treatment of employees. The question is no longer whether egregious mistreatment actually occurs, nor whether it is limited to a few bad companies and industries, but what we can do to ensure that it never happens again.

Amid all the questions about where #MeToo goes next, there's at least one answer that everyone should support, one backed by bipartisan legislation currently sitting in Congress, simply awaiting a vote: We need to end the practice of forced arbitration, a legal loophole companies use to cover up their illegal treatment of employees.

Discrimination, harassment and retaliation are illegal under federal and state laws. But they are not criminal offenses, so the process of obtaining justice must go through civil court. If, for example, you found yourself experiencing racial discrimination at your workplace and your workplace did nothing to fix the problem, you could publicly sue your employer in a court of law and — presumably — justice would be carried out.

Not all people want their lawsuit to play out in court. Sometimes victims of harassment and discrimination want privacy; sometimes corporations want to keep the ugly details of workplace disputes out of the public eye. For these cases, there is another avenue for obtaining justice: private arbitration. When the parties to a lawsuit decide to go to arbitration rather than a court of law, they meet with an arbitrator (usually a retired judge, and someone they both have decided to use), present their cases and then accept the judgment handed down. That is, ideally, how arbitration works.

Unfortunately, the reality of how arbitration is used to settle workplace disputes is far from that ideal. In the tech industry, where I work, and where issues of harassment and discrimination remain rampant, nearly every company requires as a condition of employment that its employees sign away their constitutional right to sue it in a court of law and instead agree to take any claims against the company to private arbitration. They are also typically legally bound to keep silent about the illegal treatment they experienced *and* the entire arbitration process — a process that will be handled by an arbitrator who is chosen by the company and has financial incentive to keep the company happy. (Forced arbitration of this sort goes beyond issues of sexual harassment: A recent investigation by ProPublica, for example, showed that I.B.M. employees who experienced age discrimination were bound by forced arbitration and would never be able to sue the company in court.)

Forced arbitration has become a standard practice for a variety of reasons. The dominant view is that it helps manage long-term legal risk, ensuring that companies won't become embroiled in costly, drawn-out lawsuits. The examples of Uber and I.B.M. show that the opposite is true: Forced arbitration leads to long-term operating risk. Forcing legal disputes about discrimination, harassment and retaliation to go through secret arbitration proceedings hides the behavior and allows it to become culturally entrenched.

Before us lie three possible options for putting an end to this practice. The first is to leave it to individual companies and allow them to choose not to force their employees to sign away their constitutional rights. Microsoft has taken the lead on this and has stopped using arbitration agreements in cases of sexual harassment. As hopeful as this option might sound, leaving it up to individual companies is not likely to change the industry: The good companies will elect to ban arbitration agreements, while the bad companies will continue to use them and continue to mistreat their employees.

The second is to leave it to the Supreme Court, which will soon hand down a decision in the case of *Epic Systems Corp. v. Lewis*, a suit filed not over harassment but over unpaid overtime, but that nonetheless has the potential to reshape the way companies can use arbitration agreements, particularly when they are used to ban class-action lawsuits. But it's not clear how the court will rule — some analysis has suggested it is likely to rule in favor of employers — nor is it clear how this decision could shape forced arbitration for individuals.

This leaves us a third and final option: legislation. Promising progress is being made at the state level. Several measures were recently passed in the state of Washington, including one that will prohibit companies from using forced arbitration agreements to keep victims from reporting sexual assault and sexual harassment to authorities; in California, Assemblywoman Lorena Gonzalez Fletcher plans to propose a measure that would prohibit employers from making forced arbitration a condition of employment.

We could be making progress at the federal level, too. Last year, Representative Cheri Bustos of Illinois and Senator Kirsten Gillibrand of New York introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017, which would ban the use of forced arbitration in cases of sexual harassment and discrimination. The bill has bipartisan support. Senators and members of the House are now waiting to vote on it. Even if this bill is passed, it will be only the beginning: We must demand that our federal and state legislatures pass laws that ban forced arbitration in all cases of discrimination and harassment.

There are real questions about where #MeToo goes next — how it maintains momentum, how it can go beyond individuals losing their jobs and companies issuing public statements to create real, lasting change in our workplaces. Not all of them have easy answers. But there is at least one clear, tangible step that everyone who supports ending discrimination, harassment and retaliation in the workplace can take: Support the elimination of forced arbitration.

Susan Fowler is a writer and former engineer at Uber.

*Follow The New York Times Opinion section on Facebook and Twitter (@NYTopinion), and sign up for the Opinion Today newsletter.*

A version of this article appears in print on April 13, 2018, on Page A27 of the New York edition with the headline: Where #MeToo Should Go Next

READ 54 COMMENTS








TIME'S UP





## THE TIME'S UP LEGAL DEFENSE FUND BY THE NUMBERS

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**3,755** People who have sought help

**792** Attorneys in the network

**75** Cases funded so far

**35** Cases receiving media assistance

**\$5 million** Committed so far to cases

**18** Grants awarded for outreach to workers

**\$750,000** In outreach grants

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PERCENTAGE OF PEOPLE WHO IDENTIFY AS LOW INCOME

**68%**

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# A MESSAGE FROM THE TIME'S UP LEGAL DEFENSE FUND CO-FOUNDERS

Dear Friends ~

Few letters have had such an outsized impact.

*"Dear Sisters," it began. "We wish that we could say we're shocked to learn that this is such a pervasive problem in your industry. Sadly, we're not surprised because it's a reality we know far too well. Countless farmworker women across our country suffer in silence because of the widespread sexual harassment and assault that they face at work...please know that you're not alone. We believe and stand with you."*

The letter was written to women survivors in Hollywood in the fall of 2017 by Alianza Nacional de Campesinas (National Farmworkers Women's Alliance), the first national farmworker women's organization in the United States. It was published soon after brave actresses spoke their truth about Harvey Weinstein's abuse, and as women around the world amplified Alyssa Milano's tweet lifting up Tarana Burke's #MeToo framework in solidarity with brave women everywhere.

The farmworkers' support deeply moved the more than 300 women working in film, television, and theater who had been meeting to strategize about how to prevent abuse and ensure equity in their industry. The farmworkers' letter gave them a powerful push to turn those meetings into action—and to ensure their work was felt beyond Hollywood.

They called for change across *all* industries, not just their own.

**Sexual harassment and assault is rampant. So many people need help fighting back** – especially women working at low-wage jobs who can't afford attorneys to represent them. And so many of our workplaces need structural change.

More women at the top. Equal pay. Safety, no matter where you work or live. And so much more.

On January 1, 2018, we announced the creation of TIME'S UP and the TIME'S UP Legal Defense Fund. We had \$13 million in commitments from 200 donors. **Today, more than 21,000 people from around the world have contributed more than \$22 million** to connect women who experience workplace sexual harassment and retaliation with attorneys and, in some cases, media specialists. It is the largest amount of money ever raised on the crowd-funding website GoFundMe. The TIME'S UP Legal Defense Fund has already committed more than \$5 million to defray legal and PR costs in dozens of cases.

So far, the TIME'S UP Legal Defense Fund, administered by the National Women's Law Center Fund LLC, has **responded to more than 3,700 workers — overwhelmingly women — by giving them the names of lawyers who will provide a free initial consultation.** The Fund also provides storytelling and media relations support in select cases. Because while sexual assault and harassment happens in private, bullying often occurs in the open. So, when women choose to, we help them fight back in the media as well as the courts.

This support has been made possible because of the generosity of our donors and volunteers, who are giving selflessly to help so many survivors, and we are so very grateful.

**We believe that we stand on the precipice of profound change for women.** Workers are coming forward and, remarkably, the world is paying attention. Powerful men are being held to account. Women and advocates are linking arms across sectors. We are witnessing a cultural transformation.

And while we are so proud of the progress we've made in our first year, rest assured that **we have only just begun.** With your continued support, we believe that one day sexual harassment will become something we only read about in our history books. ✱

With our deepest thanks,  
**Fatima, Hilary, Roberta, Tina**



**Fatima Goss Graves**  
President & CEO,  
National Women's Law Center



**Roberta Kaplan**  
Founding Partner at  
Kaplan Hecker & Fink



**Hilary Rosen**  
Partner at SKDKnickerbocker



**Tina Tchen**  
Partner & Head of Buckley  
Sandler's Chicago office



# TIME'S UP LEGAL DEFENSE FUND CASES: THE WORKERS

## THE HOTEL COOK

**MALIN DEVOUE**, a Black woman who worked as the head cook at a hotel in Philadelphia, was sexually harassed by the hotel's chief engineer. He repeatedly asked to date her, tried to bribe her with money and gifts to go out with him, and stared at her body. DeVoue rejected his advances and complained to the hotel's general manager. The hotel took no action to discipline the harasser and allowed the harassment to continue. After she complained again, the hotel terminated her while maintaining the harasser's job. After the Fund connected DeVoue to an attorney, she told the *Washington Post*, **"I'm brave now! I'm brave."**

Photo: Dave Moser, davemoser.com

## THE TEACHERS

Annie Delgado, a Latina teacher in Merced, California, was slapped on her buttocks by a boys basketball coach who also made lewd comments to her at a school function in 2017. The school investigated and reprimanded the coach. But after the school district honored the coach to mark his 400th win and a school administrator belittled Delgado for reporting the incident, Delgado decided to find a TIME'S UP attorney.

"I was drowning," she told the *Los Angeles Times*. "One day I sat down and asked for help. I remember thinking that if this doesn't work, then I have nothing."

She and her attorney, Jackie Len, are pushing the district to strengthen its sexual harassment policies. "I just remember crying — I was so grateful," Delgado said about Len. **"In some ways, this has been a life preserver. I felt like I was finally being heard."**

## THE MCDONALD'S WORKERS

Ten women of color working in low-wage jobs at McDonald's restaurants in nine cities recently filed sexual harassment charges against the company. After they reported the harassment to supervisors, several were fired or given fewer work hours, and virtually nothing was done to tackle the abuse. The plaintiffs include a 15-year-old girl in St. Louis who had just finished the 9th grade and was excited to get her first real job. She couldn't wait for school to be over so she could start as a drive-through window worker. She planned to use her paycheck to help support her mother and younger sister and even pay for a few items for herself, such as clothes and a phone. A male grill worker immediately fixated on her, following her around the store and staring at her. He commented about her breasts and what he wanted to do with her. She complained to her supervisor, who told her she would never win this fight.



## THE CANNABIS FACILITY CASHIER

“Carl,” \* a white transgender man, worked as a cashier earning minimum wage at a pot emporium in Washington State. When Carl was hired, his manager was excited to have him and regularly gave him additional assignments. When Carl, who trusted the manager, told her about his gender identity, the manager’s treatment of him changed radically. She belittled his work and criticized him to other employees and customers. She spied on him using the in-store video system. She intentionally referred to him as “she/he” in front of other workers and customers, which led to Carl’s gender identity being shared against his will. He reported this behavior to multiple other managers; eventually the ongoing abusive and hostile behavior forced him to quit.

## THE POSTAL WORKER

“Leticia,” a Black woman in Texarkana, Texas, was harassed based on both sex and disability by various supervisors at the postal facility where she worked. She was pressured to resign after reporting the abuse. She later learned that one person who sexually harassed her was a serial offender who had been reported to agency management numerous times but was only required to apologize to the nine women who had previously complained, rather than being subjected to any effective deterrent, including discipline or removal from supervision. The agency later retaliated against Leticia by rescinding a second job offer after learning about her pending discrimination complaint.

## THE MILITARY CONTRACTOR

“Jessica,” a white woman, was working as a military contractor when she asked her employer for a room to use a breast pump after she had her fourth child. To her horror, her employer initially refused to provide her with a safe and sanitary place to pump, forcing her to pump in her car, before later offering her a dirty office, where employees would jiggle the door to try to enter. Male supervisors asked her for milk for their donuts and coffee, telling her that her breasts looked large, and offering to “do one” while she “did” the other. Jessica was traumatized by the abuse, and just a few months after returning to work, stopped pumping entirely because she could not deal with the incessant degrading remarks. Even after she stopped pumping, the harassment continued and drove Jessica to stop working there altogether.

## THE SUPERMARKET EMPLOYEE

“Alicia,” a white supermarket clerk/cashier in Seattle, was subjected to a year and a half of unwanted sexual advances by a third-party vendor at the store. These advances escalated over time to unwanted physical touching. When she reported the sexual harassment, her supervisor was dismissive of her complaint and blamed her for the harassment. The supervisor also failed to take any action to investigate, remediate, correct, or prevent further harassment. In retaliation, the company moved Alicia to the graveyard shift, which was a significant hardship for her and her family, and later drastically reduced her hours. ***“The fact that this opportunity is out there to help both of us navigate the process and offset the burden of onerous financial commitments is really amazing,”*** said Alicia’s attorney, Natalie Teravainen. “We’re both excited about this possibility.”

# NO MORE SILENCE. NO MORE WAITING.

## THE WALMART WORKER

**GINA PITRE**, a white woman who worked at a Walmart store in D'Iberville, Mississippi fulfilling online orders, was sexually harassed by her manager. He grabbed her breasts, asked what color underwear she was wearing, requested explicit photos, and followed her into break-rooms. After Pitre reported the harassment, the company conducted a cursory investigation and refused her requests to transfer to another store. Pitre's manager retaliated against her by telling other workers not to speak with her and asking them to report if she said anything negative about him. Said Pitre, ***“I don't care who you are – there is no cause for disrespect.”***

# NO MORE TOLERANCE FOR DISCRIMINATION, HARASSMENT OR ABUSE.

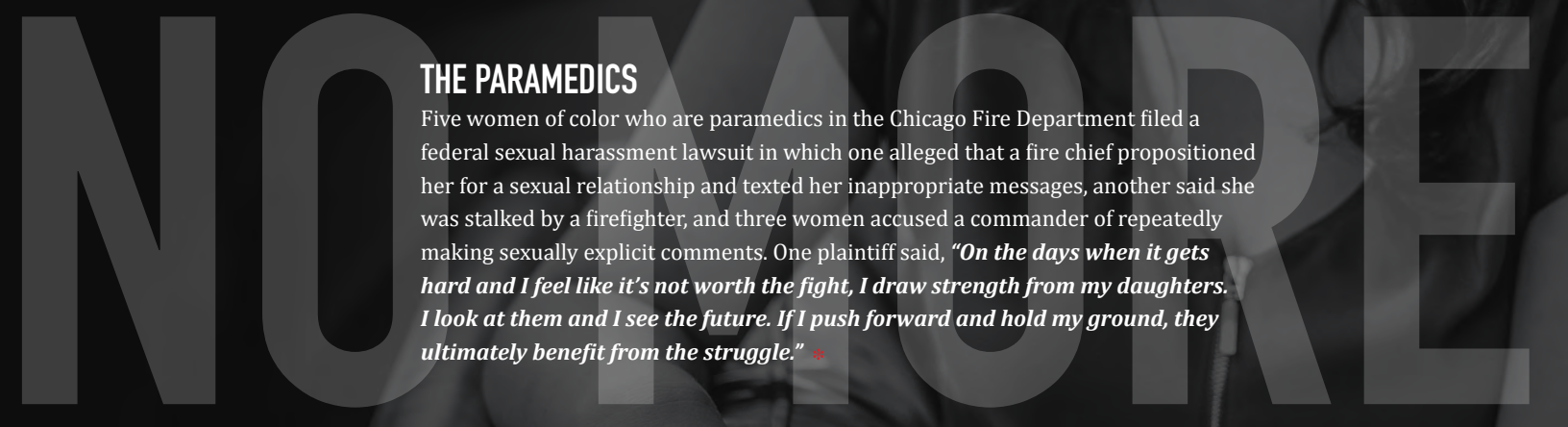
## THE COUNTRY SINGER

**KATIE ARMIGER**, a white country singer in Nashville, spoke out about sexual harassment in the country music industry and believes she is being blacklisted as a result. She said, for example, that she was sexually harassed by radio programmers but when she brought it to her then-record label, she was told to tolerate and even encourage the abuse. The label is suing her for allegedly violating a non-disparagement clause in her contract after speaking out about the abuse; Armiger countersued, arguing that such clauses should not be enforced because of the harm they cause. "I had been exposed to behaviors and expectations that made me uncomfortable," Armiger said at a press conference advocating for the passage of sexual misconduct legislation in Tennessee. ***"It ranged from innuendos and crude comments to outright unwanted touching.*** Not only was it confusing, but it was humiliating. This was happening at the hands of powerful and influential professionals that I was supposed to impress with my music. Like many, I was told that it all was just being part of the business."



## THE PARAMEDICS

Five women of color who are paramedics in the Chicago Fire Department filed a federal sexual harassment lawsuit in which one alleged that a fire chief propositioned her for a sexual relationship and texted her inappropriate messages, another said she was stalked by a firefighter, and three women accused a commander of repeatedly making sexually explicit comments. One plaintiff said, ***"On the days when it gets hard and I feel like it's not worth the fight, I draw strength from my daughters. I look at them and I see the future. If I push forward and hold my ground, they ultimately benefit from the struggle."*** \*



## THE DOLLAR STORE EMPLOYEE

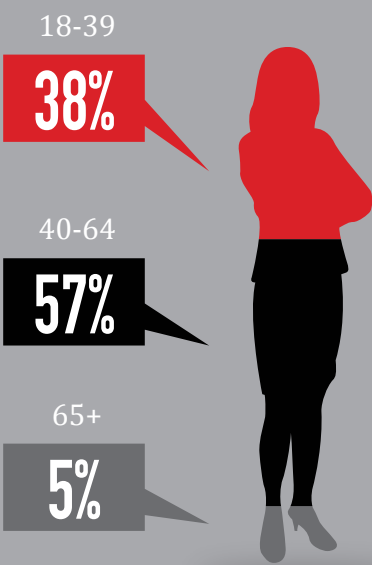
**SATURNINA PLASENCIA**, a Latina single mother of three, took a \$13 per hour job as a cashier at a dollar store in Brooklyn, New York. She endured sustained sexual harassment by her general manager, who insisted that she date him and decreased her hours from 30 to 12 hours a week in retaliation after she spurned his advances and later told him she was pregnant. He said in anger, "The baby could have been mine." After a customer yelled at her and her boss didn't back her up, she quit and has been unemployed ever since.



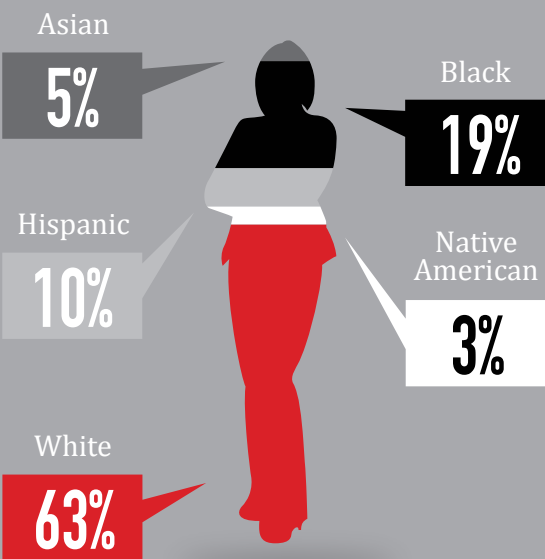
\* All names in quotes are pseudonyms.

# WHO IS REACHING OUT TO US

## AGE



## RACE & NATIONAL ORIGIN



## PERCENTAGE OF PEOPLE WHO IDENTIFY AS LGBTQ

9%

## INDUSTRY

Accommodation/Hospitality	2.61%
Administration/Support Services	1.25%
Agriculture, Forestry, Fishing and Hunting	0.75%
Arts and Entertainment	11.10%
Construction	2.40%
Educational Services	7.98%
Federal Government	7.27%
Finance and Insurance	3.54%
Food Services	4.83%
Health Care	8.16%
Information/Communications	4.80%
Legal Field	2.22%
Local Government	4.87%
Manufacturing	3.22%
Military	2.33%
Non-Profit	0.82%
Other	10.31%
Personal Care Services	0.97%
Professional, Scientific, and Technical Services	4.69%
Real Estate Rental and Leasing	1.43%
Recreation	0.68%
Retail Trade	5.12%
Social Assistance	0.29%
State Government	2.83%
Transportation	3.37%
Utilities	1.15%
Warehousing	0.25%
Wholesale Trade	0.61%





# CHARTING A BOLD COURSE

The TIME'S UP Legal Defense Fund is unprecedented. It's the first-ever network of attorneys stepping up to combat workplace sexual harassment and related retaliation in all industries.

Housed and administered by the National Women's Law Center Fund LLC, the TIME'S UP Legal Defense Fund connects those who experience sexual misconduct including assault, harassment, abuse and related retaliation in the workplace or in trying to advance their careers with legal and media assistance. And it helps defray legal and media relations costs in many of these cases.

In the Fund's first 10 months, **more than 3,700 people from all 50 states and D.C. have sought legal help**, and that number grows every day. **Nearly 800 attorneys have joined the network so far.** Some are taking cases *pro bono* or at a reduced rate and some are receiving TIME'S UP Legal Defense Fund support to help defray some fees and costs. This will enable many people who could not otherwise afford an attorney to get legal help.

**This support is made possible by the 21,000 people (and counting) from every state and more than 80 countries who have donated more than \$22 million**, with donations ranging from \$5 to \$2 million.

## HOW IT WORKS

Survivors who endure workplace sexual harassment, assault or retaliation reach out to the TIME'S UP Legal Defense Fund through an online form. After volunteer attorneys vet the cases, Fund staff members give the individuals contact information for three attorneys who practice in their state. The attorneys in

the Fund's network agree to provide workers with a free initial legal consultation, walking each person through his or her legal options. The Fund also may recommend that workers have a free consultation with a public relations firm if the worker wants it.

Attorneys bringing workplace sexual harassment, retaliation, and defamation cases can apply to the Fund to cover a portion of their costs and fees. The Fund can also help with media relations and storytelling assistance either through *pro bono* arrangements or by helping cover the cost.

**In the first six months that the Fund has been taking applications from attorneys to fund cases and investigations, it has allocated more than \$5 million to 75 cases.**

In addition to legal assistance, in certain cases the Fund provides media assistance. These cases are ones in which the worker wants to share her story, has been contacted by the press, or is trying to keep her name out of the media.

Media experts at SKDKnickerbocker, a public affairs and political consulting firm, conduct brief interviews with the individual and his or her attorney in cases that have been flagged as possibly benefiting from storytelling and media relations support. Criteria for lending this support include whether publicity might deter the abuser from harassing other victims, whether there is a set of facts that journalists would find compelling, whether harassers are using the media against their victims, or whether telling the survivor's

their story is a primary way to seek some form of justice, such as when the law provides for few remedies.

Currently 35 people have been paired with one of the nearly 50 public relations agencies and specialists in the network. The media strategists at the agency assigned to the case develop a media plan, advise the individual and his or her attorney on the pros and cons of speaking publicly, and prepare him or her to do media interviews.

Strategic use of the news media can have positive legal consequences for people who are harassed by high-profile abusers. That's what happened after Melanie Kohler, a former staffer at Endeavor, went public with her allegation that she had been raped by director and producer Brett Ratner. Later six other women accused Ratner of harassment. He filed a defamation lawsuit against Kohler, which he later dropped after much negative publicity about him.

## WHO THE FUND SUPPORTS

**The Fund is helping all types of workers, including fast food workers, farmworkers, retail workers, police officers, paramedics, college professors, and postal service workers.**

Two-thirds of the people who come through the Fund identify as low-income. One-third are people of color. Nine percent are LGBTQ people.

The Fund prioritizes cases involving low-wage workers; people of color; LGBTQ people; individuals with disabilities; people facing legal retaliation because they dared speak out; women in male-dominated occupations; workers facing harassment or threats by especially high-profile individuals; multiple workers within one workplace; novel or precedent-setting areas in the law, and extreme retaliation against those alleging harassment, such as a lawsuit or a media campaign. By financially supporting these cases, the Fund ensures that these workers have the legal and communications support to hold their harassers accountable.

**This summer, the TIME'S UP Legal Defense Fund awarded \$750,000 in outreach grants to 18 organizations that work with low-wage workers, including farmworkers, poultry workers, retail workers, and nail salon workers.** The grants help organizations support survivors of workplace sexual harassment by ensuring that they know how to contact the Fund; are aware of their rights regarding workplace sexual harassment and retaliation, and receive help as they go through the process of finding representation or otherwise seek to enforce their rights to be free from workplace harassment and retaliation. ❄

# TIME'S UP WELCOMES NEW PRESIDENT AND CEO LISA BORDERS



**"TIME'S UP IS A 21ST CENTURY CIVIL RIGHTS MOVEMENT," SAYS  
LISA BORDERS, TIME'S UP'S NEW PRESIDENT AND CEO.**

**"WHEN I THINK BACK TO WHAT I HAVE LIVED THROUGH AS A  
WOMAN AND A PERSON OF COLOR, IT IS ABUNDANTLY CLEAR TO  
ME THAT WHAT HAPPENED IN THE 20TH CENTURY FOR  
AFRICAN-AMERICANS NOW HAS THE PLATFORM AND THE  
SPACE TO DO THE SAME THING FOR WOMEN."**

Assuming the reins of the first-ever presidency of TIME'S UP on November 1st was a natural evolution for Borders, both personally and professionally. She is the granddaughter of the Rev. Dr. William Holmes Borders, who served Atlanta's Wheat Street Baptist Church for more than 50 years. He helped desegregate Atlanta's bus system and city lunch counters and integrate its police department.

Borders says her grandfather "left an indelible fingerprint on my head and especially my heart."

His civil rights legacy and her own painful experiences of harassment, discrimination, and lack of opportunity based on her race and sex led Borders to embrace the civil rights and women's movements and to work on behalf of women, including most recently as president of the Women's National Basketball Association.

"Women are not standing alongside men on equal footing," she says. "TIME'S UP is an opportunity to support, engage, and encourage women's rights and equality, to respect women, and to value their voices and their skillset."

Borders says she is proud of what TIME'S UP has accomplished in less than year. Raising more than \$22 million for the TIME'S UP Legal Defense Fund, which has helped more than 3,700 survivors of sexual harassment and assault. Forming TIME'S UP as a legal entity. The hiring of a CEO. And lifting up women's voices and #MeToo stories to unprecedented levels.

On Borders' plate will be raising even more money for TIME'S UP and its defense fund – "If there is no money, there is no mission," she says – as well as working with organizations like the National Women's Law Center to develop legislation to prevent sexual harassment in the first place and to create more equal workplaces and nurturing and growing the TIME'S UP global brand.

"We want to invite men to the table, too, even men who have transgressed against women – we want them to learn to interact with women in a constructive way.

"What we have today is not working for everyone," she says. "This is not just about women. It's about all of us. We invite folks to join the journey." ❄

*“Women are not  
standing alongside  
men on equal footing.*

*TIME’S UP is an  
opportunity to support,  
engage, and encourage  
women’s rights and  
equality, to respect  
women, and to value  
their voices and  
their skillset.”*

~ Lisa Borders



# MEET **THREE** OF THE FUND'S OUTREACH PARTNERS



## Alianza Nacional de Campesinas

### ALIANZA NACIONAL DE CAMPESINAS

More than 700,000 women in the U.S. plant, pick, and pack the food we eat. Farmworker women face abuse and exploitation, including wage theft, pesticide exposure, difficult working conditions, and sexual harassment and assault perpetrated by bosses, crew leaders, company owners, and co-workers.

In a male-dominated field and with sexual harassment often still a taboo topic, few farmworker women come forward to seek justice for sexual abuse and violence. That's one reason why members of the Alianza Nacional de Campesinas (National Farmworkers Women's Alliance), the first national farmworker women's organization in the United States, wrote the "Dear Sisters" letter described earlier in this report to the women of Hollywood after their devastating stories of sexual abuse and assault by Harvey Weinstein became public. And the farmworkers wanted to voice their support to try to thwart any backlash that would come.

Mónica Ramirez, co-founder of Alianza says, "The real risk was that if there wasn't a show of support, the women in Hollywood could be silenced and retaliated against," Ramirez and Mily Treviño-Sauceda, Alianza

co-founder and director, had some initial calls with members of the entertainment industry and then Ramirez began to work closely with them to provide feedback on the vision and strategy for what would soon become TIME'S UP.

"The stars aligned in a way that we couldn't have imagined," Ramirez says.

Ramirez was in support of Fund leaders' desire to spread the word about its legal resources to hard-to-reach populations, and the Fund's outreach grants are doing just that. Alianza was one of 18 organizations that received a grant, which it will use to reach out to farmworker women, rural service providers, partner organizations, and law enforcement agencies to educate them about the scope, extent, and nature of sexual harassment, survivors' legal rights, and how to access the Fund's resources.

Specific activities made possible by the grant include creating a train-the-trainer curriculum; conducting webinars on sexual harassment for farmworker women; creating and disseminating a brochure about harassment, and encouraging farmworker legal advocates to join the Fund.



### NATIONAL DOMESTIC WORKERS ALLIANCE

Domestic workers – nannies, house cleaners, and home care workers – do the vital work that often makes other work possible. Yet they are excluded from many basic protections guaranteed to most workers – access to health coverage, paid sick days, or paid vacation. Many do not earn a living wage.

Domestic workers also lack legal protections to a workplace free from harassment and discrimination because the federal Title VII law does not cover harassment in workplaces with fewer than 15 employees. Because of domestic workers' unique workplaces – inside other people's homes – the struggles they face are largely hidden.

The National Domestic Workers Alliance (NDWA) has partnered with TIME'S UP and the TIME'S UP Legal Defense Fund since their inception. NDWA members have participated in TIME'S UP listening sessions, and its leaders have met with TIME'S UP to strategize about building the power to win meaningful solutions to end sexual harassment.



HEALING  
TO ACTION





# *The TIME'S UP Legal Defense Fund has given outreach grants to 18 organizations across the country to spread the word about its legal resources and to educate workers about sexual harassment and their rights.*

When the Fund launched earlier this year, says NDWA Director Ai-Jen Poo, “we were thrilled because millions of women, including the women we represent, have so little in the way of legal recourse and resources. It’s incredibly important.”

It’s also critical to support workers as they navigate the difficult but vital process to enforce their rights. The Fund has given NDWA a \$50,000 outreach grant to expand its “Groundbreakers” leadership development program that helps workers with potential claims of labor law violations and trains them to be spokespeople about sexual harassment; conduct know-your-rights trainings about sexual harassment; refer workers to the Fund, and develop protocols to include sexual harassment awareness and support to better serve survivors.



## **RESTAURANT OPPORTUNITIES CENTERS UNITED**

Sexual harassment is baked into the wages of the nearly 13 million restaurant workers in the U.S. – more than two-thirds of whom are women.

A major reason is the federal sub-minimum wage, which has been stuck at a paltry \$2.13 for more than a quarter century. That means that servers, hostesses, and others are forced to rely on their tips to survive. To ensure the goodwill of customers, these low-wage workers suffer sexual harassment day and night.

The Restaurant Opportunities Centers (ROC) United works to improve wages and working conditions for the restaurant workforce and leads efforts to combat pervasive sexual harassment in the industry, including by working closely with TIME’S UP and the TIME’S UP Legal Defense Fund.

“Being forced to live on tips is the source of the worst harassment,” says Saru Jayaraman, president of ROC United, director of the Food Labor Research Center

at the University of California, Berkeley, and author of *Behind the Kitchen Door*.

The Fund helps restaurant workers “elevate their cases and issues, encouraging more women to come forward and make claims,” she says. “I’m seeing more of our members recognizing abusive behavior as sexual harassment and being willing to file charges.”

The Fund has given ROC a \$50,000 outreach grant to conduct “know-your-rights” trainings and workshops on sexual harassment and support survivors seeking justice, a leadership training for workers to become advocates and spokespeople against harassment in the industry, and a national convening of women worker leaders. Jayaraman says it can be a source of resiliency for restaurant workers to find their voice by sharing their stories of sexual harassment. ✱





# THE TIME'S UP LEGAL DEFENSE FUND IN THE NEWS



*Photo: Joy Sharon Yi for Girlgaze*

**TINA TCHEN**  
BLOOMBERG, APRIL 30, 2018

"What's important to emphasize is that sexual harassment is a symptom of more fundamental issues around workplaces that aren't equitable, aren't truly diverse, and aren't providing safe workplaces for employees. The real solution here is to address the many structural barriers that keep women and minorities from advancing."

"TIME'S UP is ...channeling the right kind of energy into actual change. This is work that I have been committed to for my entire adult life, and TIME'S UP is a way for me to get connected, build upon individual work, and move that into a collective force."

**TRACEE ELLIS ROSS**  
INSTYLE, JANUARY 5, 2018

**JANE FONDA**  
HOLLYWOOD REPORTER, JANUARY 17, 2018

"We have arrived at a historic turning point. I don't think we're going to be the same after this. And what I love about the TIME'S UP movement is that they have all been conscious about how we have to reach out our arms to women in other sectors. It's really moving. These are fierce women warriors."

"We want to create this change, cultivate this change, and curate this change. It must be enduring and sustainable."

**LISA BORDERS**  
LOS ANGELES TIMES,  
OCTOBER 10, 2018

**REESE WITHERSPOON**  
THE NEW YORK TIMES, JANUARY 1, 2018

"We have been siloed off from each other. We're finally hearing each other, and seeing each other, and now locking arms in solidarity with each other, and in solidarity for every woman who doesn't feel seen, to be finally heard."

"Every field you can think of — people are finding us and reaching out. There is no question that having the platform of women in Hollywood talking about these issues is extremely helpful in getting the word out and letting people know about their rights."

**FATIMA GOSS GRAVES**  
THE CHRONICLE OF PHILANTHROPY,  
MARCH 2, 2018

**NINA SHAW**  
FORBES, FEBRUARY 6, 2018

"The mission is simple: Equity and safety in the workplace."

"It's very hard for us to speak righteously ... if we haven't cleaned our own house. If this group of women can't fight for a model for other women who don't have as much power and privilege, then who can?"

**SHONDA RHIMES**  
THE NEW YORK TIMES, JANUARY 1, 2018

**NATALIE PORTMAN**  
VARIETY, OCTOBER 2018

"We need to have a larger conversation about the workplace, and about making the workplace fair, safe, equitable for all people. And not just for women, but for people of color, for people with disabilities, for people from the LGBTQ+ community, so that anyone who might be marginalized or harassed for being 'other' feels safe, has an ability to earn a living in an environment that they deserve...All people who have been harassed and abused in the workplace have lost careers, have lost opportunities, and have lost money for years and years and years. Shifting the conversation to that and talking about that is what we're hoping to do."

"This is about power dynamics. It's about imbalance of power that makes people unsafe, and we need to start addressing it much wider than any one perpetrator, any one predator. It's about pay equity, it's about being safe in our jobs, it's about being able to (have) access to opportunity to rise up the ranks so that we're represented in leadership. It's about so much."

**AMERICA FERRERA**  
INSTYLE, JANUARY 4, 2018

**KATIE MCGRATH**  
ENTERTAINMENT WEEKLY, JANUARY 3, 2018

"We didn't want to just put out social-media statements or send our regards. We wanted to back it up with real resources that women and men could access and begin the healing."

"It's time for every workplace to look more like our world, where women have equal representation."

**RASHIDA JONES**  
TODAY, JANUARY 7, 2018

**EVA LONGORIA**  
BUSTLE, MAY 10, 2018

"We got together some really great women, not just famous women...taking the lessons and advice and guidance that we hear...and applying it to the world and applying it to your workplace and your home life."





# TIME'S UP LEGAL DEFENSE FUND

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# THANK YOU FOR JOINING US — FOR YOUR CONTRIBUTION, FOR SHARING THIS CAMPAIGN WITH OTHERS, AND FOR STANDING TOGETHER WITH US, SO THAT ALL PEOPLE CAN LIVE FREE FROM SEXUAL HARASSMENT AND VIOLENCE.

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# Dear Sisters,

We write on behalf of the approximately **700,000** women who work in the agricultural fields and packing sheds across the United States. For the past several weeks we have watched and listened with sadness as we have learned of the actors, models and other individuals who have come forward to speak out about the gender based violence they've experienced at the hands of bosses, coworkers and other powerful people in the entertainment industry. We wish that we could say we're shocked to learn that this is such a pervasive problem in your industry. Sadly, we're not surprised because it's a reality we know far too well. Countless farmworker women across our country suffer in silence because of the widespread sexual harassment and assault that they face at work.

*Even though we work in very different environments, we share a common experience of being preyed upon by individuals who have the power to hire, fire, blacklist and otherwise threaten our economic, physical and emotional security. Like you, there are few positions available to us and reporting any kind of harm or injustice committed against us doesn't seem like a viable option. Complaining about anything — even sexual harassment — seems unthinkable because too much is at risk, including the ability to feed our families and preserve our reputations.*

**WE DO NOT WORK UNDER BRIGHT STAGE LIGHTS OR ON THE BIG SCREEN. WE WORK IN THE SHADOWS OF SOCIETY IN ISOLATED FIELDS AND PACKINGHOUSES THAT ARE OUT OF SIGHT AND OUT OF MIND FOR MOST PEOPLE IN THIS COUNTRY. YOUR JOB FEEDS SOULS, FILLS HEARTS AND SPREADS JOY. OUR JOB NOURISHES THE NATION WITH THE FRUITS, VEGETABLES AND OTHER CROPS THAT WE PLANT, PICK AND PACK.**

We understand the hurt, confusion, isolation and betrayal that you might feel. We also carry shame and fear resulting from this violence. It sits on our backs like oppressive weights. But, deep in our hearts we know that it is not our fault. The only people at fault are the individuals who choose to abuse their power to harass, threaten and harm us, like they have harmed you.

In these moments of despair, and as you cope with scrutiny and criticism because you have bravely chosen to speak out against the harrowing acts that were committed against you, please know that you're not alone. We believe and stand with you.

## In solidarity,



Alianza Nacional de Campesinas

# TIME'S UP DONORS: OVER 80 COUNTRIES



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SHARYN TEJANI, the director of the TIME'S UP Legal Defense Fund and a civil rights and women's rights attorney for two decades, marvels at the changed landscape for survivors of sexual harassment. "If you had told me a few years ago that people would actually care about low-wage workers and the sexual harassment they face, I would have laughed at you," she says. "So the idea that people do care now and that I get to help stop that harassment is unbelievable."

In her new role, Tejani oversees a massive undertaking in which thousands of survivors have sought the TIME'S UP Legal Defense Fund's help in getting legal representation. She oversees a staff of three and numerous volunteer

paralegals and attorneys who vet each intake to ensure that every case meets the criteria to be connected with Fund attorneys.

"I've been awestruck by the number of attorneys coming forward so strongly to support us," she says. "Most saw what happened last year and they really want to help. Lawyers are not frequently the people you think of as raising their hands—but they are."

Before joining the Fund, Tejani served for eight years as a deputy chief at the Employment Litigation Section of the U.S. Department of Justice's Civil Rights Division. In that role, she supervised the investigation and litigation of cases on behalf of workers facing sexual harassment,



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pregnancy discrimination, and employment barriers that unjustly and disproportionately impact women and people of color. She also served as the director of workplace fairness at the National Partnership for Women and Families and legal director at the Feminist Majority Foundation. She previously worked at the Equal Employment Opportunity Commission and began her career as an honors attorney in the Justice Department's Civil Rights Division after attending Yale University and Georgetown University Law Center.

Though there are 792 attorneys in the network, Tejani says more are needed, especially those who are bilingual in Spanish and English and who speak Asian languages. In

addition, the TIME'S UP Legal Defense Fund is looking for attorneys who can take on complex defamation litigation because of the high volume of women who are retaliated against. Women report that their supervisors cut their hours, demote them, fire them, blackball them in their industry, or threaten retaliation.

Retaliation seems to be "the bread and butter" of employers who fail to prevent sexual harassment in their workplaces, Tejani says. "Retaliation is, sadly, prevalent and outrageous. The TIME'S UP Legal Defense Fund is going to cause those employers to think twice before retaliating again." \*



The TIME'S UP Legal Defense Fund is housed & administered by the National Women's Law Center Fund, LLC.

Questions? Contact us at [legalnetwork@nwlc.org](mailto:legalnetwork@nwlc.org).