

2019 Currie-Kenan Distinguished Lecture

#METOO: WHY NOW? WHAT NEXT?

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ABSTRACT

This Essay explores the evolution, implications, and potential of #MeToo. It begins by reviewing the inadequacies of sexual harassment law and policies that have permitted continuing abuse and that prompted the outrage that erupted in 2017. Discussion then turns to the origins of the #MeToo movement and assesses the changes that it has propelled. Analysis centers on which changes are likely to last and the concerns of fairness and inclusion that they raise. A final section considers strategies for sustaining the positive momentum of the movement and directing its efforts toward fundamental reform.

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“The truth will set you free,” claimed Gloria Steinem. “[B]ut first it will piss you off.”¹ The activism loosely labeled #MeToo makes clear that millions of women around the world are in the pissed-off stage. The movement began in the fall of 2017, after publication of a series of stories involving alleged sexual abuse by prominent American men—including legendary Hollywood producer Harvey Weinstein.² Actress Alyssa Milano posted the first tweet, suggesting: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”³ The concept was not new; it had been coined by Tarana Burke a decade earlier to assist “survivors, particularly young women in marginalized communities.”⁴ What was new was the response: the sheer volume of posts, the publicity they attracted, the proportion of viewers who believed them, and the concrete responses that followed.⁵ Milano’s

1. Steinem reportedly first made this comment in a 1998 address at Stanford University. Ruth Graham, *Why the Internet is Full of Feminist Quotes Falsely Attributed to Gloria Steinem*, SLATE: XX FACTOR (Oct. 5, 2017, 11:26 AM), <https://slate.com/human-interest/2017/10/the-internet-is-full-of-feminist-quotes-falsely-attributed-to-gloria-steinem.html> [<https://perma.cc/APC7-TFJM>].

2. Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017, 12:43 PM), <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets> [<https://perma.cc/A3Y4-E63H>] (explaining that the #MeToo “hashtag quickly went viral in the wake of dozens of sexual harassment and assault accusations against Hollywood mogul Harvey Weinstein”); see 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/Y292-AL85>] (describing the sexual harassment allegations against Harvey Weinstein and the subsequent scandal). For other individuals accused of harassment, see *infra* note 7 and accompanying text.

3. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [<https://perma.cc/YF9V-3M6C>]; see also Park, *supra* note 2 (explaining the impact of Milano’s tweet on the #MeToo movement).

4. Abby Ohlheiser, *How #MeToo Really Was Different, According to Data*, WASH. POST (Jan. 22, 2018), https://www.washingtonpost.com/news/the-intersect/wp/2018/01/22/how-metoo-really-was-different-according-to-data/?noredirect=on&utm_term=.fcafd6216d61 [<https://perma.cc/R8XZ-XAXD>].

5. *Id.*; see *infra* text accompanying notes 6–7, 99–121, 128–132, 142–170.

invitation triggered 1.7 million tweets with the “#MeToo” hashtag in eighty-five countries.⁶

The consequences in the United States have been unprecedented in the number of careers toppled, investigations launched, media stories published, legislation proposed, policies changed, and political campaigns launched.⁷ But if history is any guide, this level of public attention and outrage is unlikely to be sustained. The news cycle moves on, backlash sets in, and some measure of inertia takes over. What remains to be seen is what will be left. How lasting will be the effects of this extraordinary moment of cultural-consciousness raising? What can we do to continue the progress?

Pessimists point out that we have, in some ways, been here before, with disappointing results.⁸ In the aftermath of the hearings over Clarence Thomas’s nomination to the Supreme Court—in which Anita Hill testified about his alleged sexual harassment—Equal Employment Opportunity Commission (“EEOC”) harassment complaints doubled, and a record number of female political candidates ran for office.⁹ But after the “Year of the Woman” passed, the activism withered and the

6. Park, *supra* note 2; see also Linda Burstyn, *The Weinstein Effect*, MS. (Jan. 4, 2018), <https://msmagazine.com/2018/01/04/the-weinstein-effect> [<https://perma.cc/S4D9-E9A8>] (describing the global use of the hashtag #MeToo).

7. For examples of men who lost jobs due to alleged sexual misconduct in the early aftermath of #MeToo, see Stephanie Zacharek, *First, the Movies Now, the World*, TIME, Mar. 12, 2018, at 36; 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> [<https://perma.cc/5P2V-6NCK>]; Doug Criss, *The (Incomplete) List of Powerful Men Accused of Sexual Harassment After Harvey Weinstein*, CNN (Nov. 1, 2017, 2:05 PM), <http://www.cnn.com/2017/10/25/us/list-of-accused-after-weinstein-scandal-trnd/index.html> [<https://perma.cc/9ADD-J6JP>]; and Anna North, Constance Grady, Laura McGann & Aja Romano, *Tavis Smiley Is One of 263 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX (Jan. 9, 2019), <https://www.vox.com/a/sexual-harassment-assault-allegations-list/tavis-smiley> [<https://perma.cc/H94A-LLWB>]. For the increase in media coverage, see Eliza Ennis & Lauren Wolfe, *Media and #MeToo: The Women’s Media Center Report*, WOMEN’S MEDIA CTR. (Oct. 5, 2018), <http://www.womensmediacenter.com/about/press/press-releases/media-and-metoo-wmc-report> [<https://perma.cc/UH9G-HS3Q>]. For other activism, see Burstyn, *supra* note 6.

8. See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 65–66 (2018) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*], <https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again> [<https://perma.cc/4AZS-P5HU>] (suggesting how the #MeToo movement can avoid the mistakes of past movements for “equal, inclusive workplaces”).

9. Burstyn, *supra* note 6; Jill Smolowe, *Anita Hill’s Legacy*, TIME (Oct. 19, 1992), <http://content.time.com/time/magazine/article/0,9171,976770,00.html> [<https://perma.cc/Z5TX-R99N>].

abuse persisted. In the era of #MeToo, after major publications such as *Forbes* declared that we were seeing “the end of patriarchy,” feminist commentator Susan Faludi responded dryly: “Look around.”¹⁰ The structures of patriarchy, she noted, were doing fine.¹¹ And as others have pointed out, the self-confessed “pussy grabber” now serving as commander in chief has hardly been hobbled by accusations of sexual misconduct by at least nineteen women.¹²

My argument here, however, suggests grounds for at least cautious optimism. In the thirty-five years I have spent studying gender issues, this moment seems to me unique in its potential for lasting change. The discussion below explores why and suggests how the women’s movement should capitalize on the current momentum in pursuit of social justice.

The analysis proceeds in three parts. Part I reviews the inadequacies of sexual harassment law and policies that have permitted continuing abuse and prompted the outrage that erupted in 2017. Part II summarizes the evolution of the #MeToo movement and assesses the changes that it has propelled, which ones are likely to last, and the concerns of fairness and inclusion they raise. Part III looks forward and considers how to sustain the positive momentum of the movement and channel its efforts toward fundamental reform.

I. THE LIMITATIONS OF SEXUAL HARASSMENT LAW AND POLICIES

#MeToo is the outgrowth of long-standing inadequacies in the way that American organizations and legal institutions responded, or failed to respond, to claims of sexual harassment. The following discussion begins with a brief historical overview of the origins of sexual harassment law, then explores its current statutory and doctrinal limitations, and concludes by reviewing the limitations of internal workplace responses to abuse.

10. Susan Faludi, Opinion, *The Patriarchs Are Falling. The Patriarchy Is Stronger Than Ever*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/opinion/sunday/patriarchy-feminism-metoo.html> [https://perma.cc/PA9U-33GQ].

11. *Id.*

12. Jessica Estepa, *Meet 19 Women Who Claim Affairs with Trump or Accuse Him of Unwanted Advances*, USA TODAY (Mar. 20, 2018, 6:01 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/03/20/meet-19-women-who-claim-affairs-trump-accuse-him-unwanted-advances/443685002> [https://perma.cc/XS2H-PB92].

A. *The Historical Backdrop*

Women have always been subject to sexual harassment, but until relatively recently, they have had neither a name nor a remedy for the abuse. When I was in college and law school, we spoke of “having a problem with a professor,” and the problem was always ours, never his. Not until the 1970s did an alliance of legal scholars, attorneys, and working-women’s organizations begin identifying sexual harassment as a form of discrimination.¹³ And not until the 1980s did the EEOC and the Supreme Court interpret Title VII of federal civil rights law to prohibit sexual harassment.¹⁴

The initial reception to such claims was often less than enthusiastic. Gloria Steinem recalls that when *Ms.* ran a cover story on sexual harassment in 1977, “we used puppets, because we didn’t want to be too shocking. So we had a male puppet with his hand down a female puppet’s shirt—and they still took us off newsstands.”¹⁵ In a 1980s survey, one participating executive responded, “I have never been harassed but I would welcome the opportunity.”¹⁶ One federal judge summarized common views: “So, we will have to hear [your complaint], but the Court doesn’t think too much of it.”¹⁷

The issue, however, gained traction in the 1990s, partly in response to the Hill–Thomas congressional hearings. As complaints escalated, Congress expanded the remedies available to victims of workplace discrimination.¹⁸ Increased awareness of the problem and risks of legal liability encouraged companies to establish policies, complaint channels, and training programs. But these initiatives did little to reduce the frequency of abuse.¹⁹ Diversity fatigue and backlash set in.

13. DEBORAH L. RHODE, *JUSTICE AND GENDER* 231–32 (1989). For the early argument that sex harassment constitutes sex discrimination, see generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

14. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–66 (1986); see 29 C.F.R. § 1604.11 (1980) (codifying the prohibition of “harassment on the basis of sex” as “a violation of section 703 of title VII”).

15. Rebecca Traister, *Gloria Steinem Had to Convince Her Male Editors That Women Want Power*, in *WOMEN AND POWER*, CUT (Oct. 14, 2018), <https://www.thecut.com/2018/10/women-and-power-chapter-one.html> [<https://perma.cc/GKX4-7VAK>].

16. Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment. . .Some See It. . .Some Won’t*, *HARV. BUS. REV.*, Mar.–Apr. 1981, at 76, 92.

17. *Henson v. City of Dundee*, 682 F.2d 897, 900 n.2 (11th Cir. 1982).

18. Burstyn, *supra* note 6.

19. For information on the ineffectiveness of complaint channels, see Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 *STAN. L. REV. ONLINE* 17, 42 (2018) [hereinafter Schultz, *Open Statement*] and *infra* note 52 and

Women subjected to unwelcome sexual contact and overtures were told that they should be “flattered.”²⁰ Complainants were often dismissed as unstable, humorless whiners who were overreacting or fabricating misconduct. Variations ran on one of the common characterizations of Hill herself: “a little bit nutty and a little bit slutty.”²¹

As a consequence, sexual harassment has remained persistent and pervasive. According to a recent EEOC task force, estimates of the number of women who have experienced sexual harassment have ranged from 25 to 85 percent, depending on who is asked and how the term is defined.²² In surveys using randomly selected and representative samples, almost 60 percent of women report experiencing unwanted sexual attention, sexual coercion, or “sexist or crude/offensive behavior.”²³ Some research suggests that women of color and LGBTQ workers are particularly at risk.²⁴ Ninety percent of

accompanying text. For training initiatives, see CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 44–45 (2016) and Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN L. REV. ONLINE 62, 68–70 (2018) [hereinafter Bisom-Rapp, *Sex Harassment Training Must Change*].

20. 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> [https://perma.cc/QX9P-GHL2] (describing the unwanted experience of a female Ford plant worker).

21. Margaret Carlson, *Smearing Anita Hill: A Writer Confesses*, TIME (July 9, 2001), <http://content.time.com/time/nation/article/0,8599,167355,00.html> [https://perma.cc/96CT-JA3K] (quoting David Brock’s characterization of Hill, which he later recanted). For other characterizations of Hill as a hysterical feminist launching pit-bull attacks, see Ellen Goodman, *Anita Hill – The Untrue Story*, BOSTON GLOBE, May 20, 1993, at 15 and Wesley Pruden, *Feminist Hysteria and Sex-Baiting*, WASH. TIMES, Oct. 9, 1991, at A4.

22. FELDBLUM & LIPNIC, *supra* note 19, at 8. For other recent polls finding between 22 and 35 percent of women reporting sexual harassment and abuse in the workplace, see Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today’s Working Women*, PEW RESEARCH CTR. (Dec. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women> [https://perma.cc/45VJ-A47T].

23. FELDBLUM & LIPNIC, *supra* note 19, at 9.

24. For research suggesting that women of color are more vulnerable to sexual harassment than white women and are less likely to be believed, see generally Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105 (2018), <https://www.yalelawjournal.org/forum/what-about-ustoo> [https://perma.cc/399L-AY2W]. For research on sexual harassment against sexual minorities, see generally Julie Konik & Lilia M. Cortina, *Policing Gender at Work: Intersections of Harassment Based on Sex and Sexuality*, 21 SOC. JUST. RES. 313 (2008). For findings of significant disparities in risk for sexual harassment based on group membership, see generally Parker & Funk, *supra* note 22 and STOP STREET HARASSMENT, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 18–20 (2018), <http://www.stopstreetharassment.org/wp->

individuals who say that they have experienced harassment never take any formal action, such as filing a charge or complaint, and 70 percent never tell their supervisors or managers at work.²⁵

The costs of this silence are substantial. For victims, the psychological, physical, financial, and career consequences can be significant and sometimes permanent.²⁶ For organizations, the price includes legal expenses, increased turnover, decreased morale and productivity, and reputational damage.²⁷ Given these costs, both employers and workers have a major stake in addressing the legal and organizational structures that have enabled abuse.

B. Statutory and Doctrinal Constraints

The limitations in current legal responses to sexual harassment have been explored with such frequency that only a brief summary is necessary here.²⁸ Federal law has multiple restrictions that are often replicated in analogous state statutes. For example, Title VII and most state law does not protect many low-wage workers, including independent contractors—such as home healthcare and domestic workers—and individuals in workplaces with fewer than fifteen

content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf [https://perma.cc/938F-6V68]. For conflicting studies, see generally NiCole T. Buchanan, Isis H. Settles & Krystle C. Woods, *Comparing Sexual Harassment Subtypes Among Black and White Women by Military Rank: Double Jeopardy, the Jezebel, and the Cult of True Womanhood*, 32 PSYCHOL. WOMEN Q. 347 (2008).

25. For discussion about taking formal action, see FELDBLUM & LIPNIC, *supra* note 19, at 8. For discussion about telling supervisors, see *id.* at 16.

26. *Id.* at 17, 20; LILIA M. CORTINA & JENNIFER L. BERDAHL, *Sexual Harassment in Organizations: A Decade of Research in Review*, in THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 477–81 (J. Barling & C.L. Cooper eds., 2008); LILIA M. CORTINA & EMILY A. LESKINEN, *Workplace Harassment Based On Sex: A Risk Factor For Women's Mental Health Problems*, in VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 139, 141–45 (C. García-Moreno C & A. Riecher-Rössler eds., 2013).

27. CORTINA & BERDAHL, *supra* note 26, at 481; FELDBLUM & LIPNIC, *supra* note 19, at 22; Rebecca S. Merkin & Muhammad Kamal Shah, *The Impact of Sexual Harassment on Job Satisfaction, Turnover Intentions, and Absenteeism: Findings from Pakistan Compared to the United States*, 3 SPRINGERPLUS, 2014, at 1, 4; see Donald G. Zauderer, *Workplace Incivility and the Management of Human Capital*, PUB. MANAGER, Spring 2002, at 36, 38 (describing how a general culture of incivility in the workplace can create “distrust, low morale, and limited commitment to organizational goals”).

28. My own discussions include DEBORAH L. RHODE, WHAT WOMEN WANT: AN AGENDA FOR THE WOMEN'S MOVEMENT 104–11 (2014) [hereinafter RHODE, WHAT WOMEN WANT], and a coauthored casebook, KATHARINE T. BARTLETT, DEBORAH L. RHODE & JOANNA L. GROSSMAN, EDS., GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 378–439 (Katharine T. Bartlett et al., 7th ed. 2017).

employees.²⁹ Neither federal nor state harassment law generally allows suits against individual perpetrators. Only employers are liable, which enables abusers who are on good terms with management to escape personal accountability.³⁰ Title VII also imposes relatively low damage caps depending on the size of the employer, which severely reduce incentives for victims to sue, for lawyers to take such cases, and for management to prevent and remedy harassment.³¹ Immigrant workers face additional barriers in finding affordable legal representation because federally funded legal-service organizations are generally prohibited from assisting undocumented individuals.³² These individuals may also lack the English proficiency or the financial resources necessary either to handle their suits themselves or find a private attorney.

Another problem involves short statutes of limitation. Victims must file a complaint with the EEOC before bringing a federal lawsuit and must do so within a relatively brief period following the abuse—180 or 300 days depending on the jurisdiction.³³ “This requirement creates a stark dilemma for victims: They must report acts of harassment to their employers within a short time frame in order [to] preserve the right to sue, but they must not report before the acts have become sufficiently severe or pervasive to be deemed legally actionable.”³⁴ Once victims file a complaint, they often face extended delays. In 2017, the EEOC had a backlog of over sixty thousand

29. 42 U.S.C. § 2000e (2018); see SARAH LEBERSTEIN & CATHERINE RUCKELSHAUS, NAT’L EMPLOYMENT LAW PROJECT, INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT (2016); MAY RAGHU & JOANNA SURIANI, NAT’L WOMEN’S LAW CTR., #METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY 2 (2017).

30. For a list of states where victims can sue individual harassers, see RAGHU & SURIANI, *supra* note 29, at 3–4.

31. The caps are \$50,000 for employers with fifteen to one hundred employees and \$300,000 for employers with more than five hundred employees. 42 U.S.C. § 1981a(b)(3).

32. See Matt Ford, *What Will Happen to Americans Who Can’t Afford an Attorney?*, ATLANTIC (Mar. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/03/legal-services-corporation/520083> [<https://perma.cc/2BZ6-WX75>] (noting that recipients of funds from the Legal Services Corporation, which provides most low-cost legal help in civil cases to Americans, may not assist undocumented immigrants).

33. 42 U.S.C. § 2000e-5(e)(1); see #MeToo Meets the Law: A Discussion of Sexual Harassment Law, LAW TALK WITH BJ (Feb. 22, 2018), <https://lawtalkwithbj.com/podcast/metoo-meets-the-law-a-discussion-of-sexual-harassment-law> [<https://perma.cc/7RG6-3KKV>] (discussing limitations in sexual harassment law).

34. Schultz, *Open Statement*, *supra* note 19, at 39.

complaints, and wait times for processing them averaged 295 days.³⁵ Getting a trial date in federal or state court can take years. For someone who simply wants the harassment or retaliation to stop, this is hardly an effective process.

Restrictive definitions of sexual harassment pose further barriers. The law generally prohibits two forms of misconduct: (1) quid pro quo harassment, in which the harasser requires sexual contact or favors as a condition of employment, and (2) hostile-environment harassment, in which victims experience unwelcome, severe, and pervasive sexual conduct that has the purpose or effect of interfering with their performance or creating an intimidating, hostile, or offensive work environment.³⁶ The severe-and-pervasive requirement is a hard standard to meet. Although conservative critics have long argued that men are being punished for a “wink or a leer,” surveys of reported cases find otherwise.³⁷ A wide gap has often been apparent between what judges and women find tolerable. Courts have routinely dismissed complaints without trial where workers claim supervisors propositioned or groped them.³⁸ A typical case involved an assistant manager who had touched the plaintiff’s breasts while making suggestive comments, offered to take her to a local hotel to have a “good time,” and patted her buttocks.³⁹ In the court’s view, although

35. Bryce Covert, *When Harassment Is the Price of a Job*, NATION (Feb. 7, 2017), <https://www.thenation.com/article/when-harassment-is-the-price-of-a-job> [<https://perma.cc/DZG3-AR8K>].

36. 29 C.F.R. § 1604.11(a) (1980); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”(quotations omitted)).

37. RONNEE SCHREIBER, *RIGHTING FEMINISM: CONSERVATIVE WOMEN AND AMERICAN POLITICS* 75 (2008) (quoting Elizabeth Larson).

38. See RHODE, *WHAT WOMEN WANT*, *supra* note 28, at 106 (citing cases “that have fallen short” and thus “suggest the gap between what judges and women find tolerable” including, among others, *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), *Lissau v. Southern Food Services, Inc.*, 159 F.3d 177, 180 (4th Cir. 1998), *Saidu-Kamara v. Parkway Corp.*, 155 F. Supp. 2d 436, 439 (E.D. Pa. 2001), *EEOC v. Champion International Corp.*, No. 93 C 20,279, 1995 WL 488333, at *8 (N.D. Ill. 1995)); Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 96 (2018) (describing how “[a]nti-women comments are dismissed as ‘stray remarks,’ a doctrine that discounts explicitly discriminatory statements” and citing cases to this effect (footnote omitted)); Sandra F. Sperino & Suja A. Thomas, Opinion, *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> [<https://perma.cc/KQ83-GZLB>].

39. *Saidu-Kamara*, 155 F. Supp. 2d 436, 439–40 (E.D. Pa. 2001).

the behavior was “loathsome and inappropriate,” it was too “sporadic and isolated” to justify liability.⁴⁰

Another obstacle for victims of harassment involves internal complaint requirements. In cases where employers take no “adverse action,” such as firing the complainant, they have an affirmative defense to liability if they can establish that they “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that the complainant “unreasonably failed to take advantage of any preventive or corrective opportunities.”⁴¹ Surveys of lawsuits raising such a defense find that virtually all an employer needs to do to avoid liability is promulgate a policy banning sexual harassment and establish a viable grievance procedure.⁴² Most courts treat an employee’s failure to use such a procedure promptly as unreasonable and as a bar to liability.⁴³ “[G]eneralized fears” of retaliation are no excuse.⁴⁴ Such legal decisions are out of touch with the realities of workers’ lives. “Major barriers to reporting include guilt, shame, fears of retaliation . . . an unwillingness to jeopardize working relationships . . . concerns about loss of privacy, and doubts that an effective response to a complaint will be forthcoming.”⁴⁵

The result is that relatively few sex harassment victims are able to obtain adequate legal remedies. Their experience is similar to other employment discrimination litigants who—according to one recent,

40. *Id.* at 440. The court did, however, allow the plaintiff to proceed to trial on a sex discrimination claim based on allegations that she was disciplined more severely than a similarly situated male employee. *Id.* at 441.

41. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998). For “adverse action,” see *id.* at 770 n.3 (Ginsburg, J., concurring).

42. Anne Lawton, *Operating in an Empirical Vacuum, The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 210 (2004); David Sherwyn, Michael Heise & Zev J. Eigen, *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, 1294, 1301, 1304 (2001).

43. See Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 120 (1995) (discussing women’s hesitancy to complain); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 881 (2008) (describing how women’s reluctance to complain is treated under law); Sherwyn, Heise & Eigen, *supra* note 42, at 1286, 1299.

44. *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 700 (2000).

45. BARTLETT, RHODE & GROSSMAN, *supra* note 28, at 333; Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 51–52 (2003).

large empirical study—generally lose or gain only small settlements.⁴⁶ The median recovery is about \$30,000.⁴⁷ Although the study included but did not break out harassment claims, its narrative accounts of those claims suggest they have traditionally done no better, a finding consistent with EEOC data.⁴⁸ In one all-too-typical case, a woman subjected to repeated abuse, including false references to her poses in pornographic pictures, settled her claim for one dollar and a public apology; she could not afford to lose a job with health insurance that covered her ailing husband.⁴⁹ Even the small minority of complainants who win in court may lose in life. They are often victimized twice: once by the abuse and again by the process of proving it. Their relatively small settlements or judgments are inadequate to compensate for the vilification, humiliation, and informal blacklisting that plagues even nominally successful claimants.⁵⁰

C. *Limitations in Internal Remedies*

Victims' reservations about bringing either internal or formal legal claims are well founded. As noted earlier, 90 percent of those who say they have experienced harassment never file formal complaints, and much of the reason involves the punitive consequences they anticipate from doing so.⁵¹ Surveys suggest that most complainants experience retaliation.⁵² Women are shunned, demeaned, and demoted; they lose

46. ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* 19, 63–67 (2017).

47. *Id.* at 55.

48. *See id.* at 6–9; *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010-FY 2018*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [<https://perma.cc/6Z3L-4WWY>] (breaking down resolutions of sexual harassment complaints). In FY 2018, the percentage of complaints resulting in settlements was 8.7 percent, the percentage resulting in an administrative finding of reasonable cause was 5.4 percent, and the number of successful conciliations was 1.8 percent. *Id.*

49. BERREY, NELSON & NIELSEN, *supra* note 46, at 6–9.

50. *See id.* at 19 (stating that “[m]ost plaintiffs not only lose or gain small settlements in the process of litigation, they are vilified by their employer (or former employer) during . . . the complaint process and litigation” which shows how tools of the law which “appear bias neutral actually function to obfuscate bias themselves”); RHODE, *WHAT WOMEN WANT*, *supra* note 28, at 106–07 (describing reports of offensive behavior by male employees and the resulting humiliation of female employees, explaining the failure of sexual harassment law to address these situations, and ultimately concluding that “current harassment law asks too much of complainants and too little of perpetrators or their employers”).

51. *See supra* note 45 and accompanying text.

52. *See, e.g.*, BERREY, NELSON & NIELSEN, *supra* note 46, at 19 (“Most plaintiffs . . . are vilified by their employer (or former employer) during the EEOC complaint process and litigation.”); Mindy E. Bergman, Regina Day Langhout, Patrick A. Palmieri, Lilia M. Cortina &

promotions, jobs, funding, clients, and career opportunities of all sorts.⁵³ Those who sue often become pariahs, and the repercussions can be permanent.⁵⁴ As one woman noted, “No one says I filed a complaint—they can’t. But they’ll say, ‘Oh, she’s not a team player’ or ‘She’s difficult.’”⁵⁵ Low-wage workers are particularly vulnerable. They are threatened, shunned, dismissed, and denied favorable shifts or tips.⁵⁶ “[S]nitch bitch[es]” at Ford’s Chicago plants had their tires slashed or were physically obstructed from doing their jobs.⁵⁷ Low-wage workers who lose their positions due to retaliation generally have no economic cushion to fall back on, and their damages are too small to justify paying lawyers or to attract lawyers working for contingent

Louise F. Fitzgerald, *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230, 237 (2002) (“[T]he most ‘reasonable’ course of action for the victim is to avoid reporting.”); Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation; Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003) (finding social retaliation for 30 percent of respondents and work as well as social retaliation for 36 percent of respondents).

53. See FELDBLUM & LIPNIC, *supra* note 19, at 16–17 (citing studies and testimony); Bergman et al., *supra* note 52, at 230 (referencing a study that found “women who responded assertively to sexual harassment experienced worsened job outcomes above and beyond the effects of the sexual harassment itself”); Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html> [https://perma.cc/HD9T-RSDV] (discussing repercussions for women in tech who speak out about harassment); Caitlin Dickerson, *Hazing, Humiliation, Terror: Working While Female in Federal Prison*, N.Y. TIMES (Nov. 17, 2018), <https://www.nytimes.com/2018/11/17/us/prison-sexual-harassment-women.html> [https://perma.cc/Z2N4-ZM6B] (discussing humiliation in the context of prisons); Trip Gabriel & Julie Bosman, *For Female Lobbyists, Harassment Often Accompanies Access*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/us/lobbyists-sexual-harassment.html> [https://perma.cc/24MQ-N998] (discussing reporting by female lobbyists); Bethany McLean, “*We All Wear Black Every Day*”: *Inside Wall Street’s Complex, Shameful, and Often Confidential Battle with #MeToo*, VANITY FAIR (Feb. 27, 2018), <https://www.vanityfair.com/news/2018/02/inside-wall-street-complex-shameful-and-often-confidential-battle-with-metoo> [https://perma.cc/3FWS-VGVJ] (discussing harassment of women working in finance); David Streitfeld, *Lurid Lawsuit’s Quiet End Leaves Silicon Valley Start-Up Barely Dented*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/technology/lurid-lawsuits-quiet-end-leaves-silicon-valley-start-up-barely-dented.html> [https://perma.cc/EP75-N7EF] (discussing the reaction to harassment at a tech startup).

54. Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It’s Time To Make it Stop*, N.Y. L.J. (Mar. 4, 2016, 3:00 AM), <https://www.law.com/newyorklawjournal/almID/1202751285096/Sexual-Harassment-in-the-Legal-Profession-Its-Time-to-Make-It-Stop/?sreturn=20190527173136> [https://perma.cc/7M6P-7DZ5]; McLean, *supra* note 53.

55. McLean, *supra* note 53.

56. See Chira & Einhorn, *supra* note 20 (describing retaliation against plant workers); Covert, *supra* note 35 (discussing the relationship between tips and harassment).

57. Chira & Einhorn, *supra* note 20.

fees.⁵⁸ As one harassment victim at McDonald's recently explained, with her family relying on her income, "I didn't want to be the person making noise."⁵⁹

Part of the reason that abuse persists is that managers and human-relations professionals often face pressure to resolve complaints with as little disruption to the organization as possible.⁶⁰ An employment lawyer who handles grievances involving Wall Street firms notes, "If someone calls me and says they have gone to H.R., my advice is always that your future with the company is imperiled The idea that you are staying there and living happily ever after is now unlikely. You are a complainer."⁶¹ When an actress told her producer about being harassed and stalked by a crew member, he responded, "Well, there are two sides to every story," and declined to investigate hers.⁶² A woman who claimed that she was groped by her anesthesiologist during childbirth complained dozens of times to the hospital, police, state medical-licensing authorities, a lawyer, and anyone else who would listen.⁶³ She was told that because she had no hard evidence substantiating the abuse, she should just move on with her life. Not until five years later, when another woman came forward with an identical claim, did the state medical board initiate an investigation that led to disciplinary proceedings and license suspension.⁶⁴ In another recent case that the EEOC brought against United Airlines, a pilot who repeatedly posted sexually explicit photos of a flight attendant

58. For a discussion regarding the lack of a cushion, see a 2018 survey by the Federal Reserve System, finding that 40 percent of adults would not be able to cover an unexpected four-hundred dollar emergency expense and that the percentages were substantially higher for those with little education. *BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017*, at 21–22 (May 2018). For a case of unequivocal abuse resulting in only a one dollar recovery, see *BERREY, NELSON & NIELSEN, supra* note 46, at 6–9. For the financial vulnerability of fast-food workers suffering sexual harassment, see Melena Ryzik, *In a Test of Their Power, #MeToo's Legal Forces Take on McDonald's*, *N.Y. TIMES* (May 21, 2019), <https://www.nytimes.com/2019/05/21/business/mcdonalds-female-employees-sexual-harassment.html> [<https://perma.cc/E26W-KUFU>].

59. Ryzik, *supra* note 58 (quoting Brittany Hoyos).

60. See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS AND SYMBOLIC CIVIL RIGHTS* 124–33 (2016) (describing the ambiguity of antidiscrimination policies, and the way that their enforcement is often symbolic and ineffective).

61. McLean, *supra* note 53 (quoting Dan Kaiser).

62. Amber Tamblyn, Opinion, *I'm Done with Not Being Believed*, *N.Y. TIMES* (Sept. 16, 2017), <https://www.nytimes.com/2017/09/16/opinion/sunday/amber-tamblyn-james-woods.html> [<https://perma.cc/D6SH-UGJR>].

63. *This American Life: Going Under*, NPR (Mar. 1, 2019), <https://www.thisamericanlife.org/669/scrambling-to-get-off-the-ice> [<https://perma.cc/JMX9-L3DB>].

64. *Id.* (noting that an appeal was pending when the NPR account aired).

online was never disciplined, even though he was convicted of internet stalking.⁶⁵ The complainant was told that the conduct did not constitute sexual harassment.⁶⁶

For the most vulnerable employees—those with little education, little understanding of the law, or limited English-language skills—there are inadequate checks on misinformation. For example, one Human Rights Watch study of migrant farm workers found that many employers “ignored their complaints or retaliated against them, including with threats of deportation,” which further deterred reporting.⁶⁷

The more powerful the abuser, the more willing organizations have been to forgive and forget. The highly successful Weinstein Company, founded by Harvey Weinstein and his brother in 2005, was known for making award-winning films under a dictatorial management structure. Employees viewed the human resources department as utterly ineffective; one described it as “a place where you went to when you didn’t want anything to get done. . . . Because everything funneled back to Harvey.”⁶⁸ The typical response to complaints was: “This is his company. If you don’t like it, you can leave.”⁶⁹ The result was to allow Weinstein’s harassment and assault to go unchecked for decades.⁷⁰ So too, more than twenty-seven women reported harassment by Charlie Rose, dating back forty years, before he was terminated.⁷¹ At the New York City Ballet, allegations that leading male dancers and choreographers had engaged in sexual

65. Lori Aratani, *Lawsuit: A United Airlines Pilot Repeatedly Posted Sexually Explicit Images of a United Flight Attendant on Various Websites*, WASH. POST (Aug. 10, 2018), https://www.washingtonpost.com/news/dr-gridlock/wp/2018/08/10/eeoc-lawsuit-claims-united-airlines-did-not-intervene-in-pilots-sexual-harassment-of-flight-attendant/?utm_term=.89201bf5e2cb [<https://perma.cc/FKH8-7ALT>].

66. *Id.*

67. *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence and Sexual Harassment*, HUMAN RIGHTS WATCH (May 15, 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual> [<https://perma.cc/EU27-EK83>].

68. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017) [hereinafter Farrow, *Weinstein’s Accusers Tell Their Stories*], <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/QN88-6WK5>] (quoting one former female employee).

69. *Id.*

70. Kantor & Twohey, *supra* note 2.

71. SORAYA CHEMALY, RAGE BECOMES HER: THE POWER OF WOMEN’S ANGER 194 (2018).

harassment, assault, and exchange of sex for roles had been common knowledge for decades, but until #MeToo the complaints had been ignored or trivialized.⁷² Morris Dees, the celebrated cofounder and chief litigator of the Southern Poverty Law Center, was not removed from office until 2019, despite a long history of staff complaints to Center leadership about his harassment and retaliation against female complainants.⁷³

Another prominent example involves Fox News, which for a quarter century ignored reports that its chair, Roger Ailes, abused and propositioned subordinates and retaliated against those who refused his advances.⁷⁴ When one anchor, Gretchen Carlson, finally went public with a lawsuit, the network portrayed her as someone “with an ax to grind.”⁷⁵ Only after two dozen women came forward, including the prominent anchor Megyn Kelly, did Fox force Ailes to step down.⁷⁶ But in many cases, management’s unwillingness to investigate complaints or widespread rumors of misconduct discourages other victims from coming forward.⁷⁷ Even distinguished and legally sophisticated professional women have been unwilling to report harassment by powerful men because, as one lawyer put it, those who

72. Joan Acocella, *What Went Wrong at New York City Ballet*, NEW YORKER (Feb. 11, 2019), <https://www.newyorker.com/magazine/2019/02/18/what-went-wrong-at-new-york-city-ballet> [<https://perma.cc/Q4J4-8BPF>].

73. Bob Moser, *The Reckoning of Morris Dees and the Southern Poverty Law Center*, NEW YORKER (Mar. 21, 2019), <https://www.newyorker.com/news/news-desk/the-reckoning-of-morris-dees-and-the-southern-poverty-law-center> [<https://perma.cc/6MKM-ECTF>].

74. Deborah L. Rhode, *How Unusual Is the Roger Ailes Sexual Harassment Case?*, HARV. BUS. REV. (Aug. 10, 2016) [hereinafter Rhode, *How Unusual*], <https://hbr.org/2016/08/how-unusual-is-the-roger-ailes-sexual-harassment-case> [<https://perma.cc/NJL6-KZRP>].

75. Jim Rutenberg, *Gretchen Carlson Suit Against Fox News Head Forces Network To Face Changing Mores*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/business/media/gretchen-carlson-suit-against-fox-news-head-forces-network-to-face-changing-mores.html> [<https://perma.cc/KYT7-756K>].

76. Rhode, *How Unusual*, *supra* note 74; Manuel Roig-Franzia, Scott Higham, Paul Farhi & Krissah Thompson, *The Fall of Roger Ailes: He Made Fox News His “Locker Room”—and Now Women are Telling Their Stories*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/lifestyle/style/the-fall-of-roger-ailes-he-made-fox-his-locker-room—and-now-women-are-telling-their-stories/2016/07/22/5eff9024-5014-11e6-aa14-e0c1087f7583_story.html?utm_term=.fc47a5b02006 [<https://perma.cc/B8NY-77HX>]; *see also* MEGYN KELLY, *SETTLE FOR MORE* 309 (2016) (discussing how Kelly’s story encouraged other women to come forward).

77. *See, e.g.*, Megan Garber, *The Inevitability of NPR’s Meltdown*, ATLANTIC (Nov. 2, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/whats-happening-at-npr/544808/> [<https://perma.cc/ETU6-9YRP>] (discussing women’s hesitation to report harassment to leadership at NPR); Daniel Victor, *NPR Executive Was Warned Repeatedly About Sexual Harassment, Report Finds*, N.Y. TIMES (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/business/media/npr-michael-oreskes.html> [<https://perma.cc/PP46-V6U4>].

complained “were no longer employed there and these men were. Is there anything more to be said?”⁷⁸ Another attorney added, “[I]f one of us had to go[,] it would have been me.”⁷⁹

Even in the face of incontrovertible evidence of repeated abuse, sanctions have often been inadequate. Roger Ailes left with a \$40 million severance package.⁸⁰ Fox host Bill O’Reilly, whose sexual harassment settlements cost upwards of \$40 million, exited with \$25 million.⁸¹ Google software creator Andy Rubin, when fired for sexual misconduct, received \$90 million.⁸² Academic institutions have also failed to impose adequate sanctions on serial harassment.⁸³ A prominent example involved the assistant to Berkeley Law School’s dean who, in 2016, complained of routine hugging and kissing, which left her feeling “violated and humiliated” and concerned that her

78. LAUREN STILLER RIKLEEN, WOMEN’S BAR ASS’N OF MASS., SURVEY OF WORKPLACE CONDUCT AND BEHAVIORS IN LAW FIRMS 10 (2018) (quoting a survey respondent).

79. *Id.* at 12.

80. Joe Flint, *Roger Ailes Resigns from Fox News; Rupert Murdoch to Take Over*, WALL ST. J. (July 22, 2016, 12:01 AM), <https://www.wsj.com/articles/roger-ailes-resigns-from-fox-news-rupert-murdoch-to-take-over-1469132116> [<https://perma.cc/ZC7P-LNBF>].

81. Paul Farhi, *Bill O’Reilly’s Gone—With \$25 million in Severance. Now the Hard Work Really Starts for Fox News.*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/lifestyle/style/bill-oreillys-gone-now-the-hard-work-really-starts-for-fox-news/2017/04/20/3ddc8f1c-25d6-11e7-b503-9d616bd5a305_story.html?noredirect=on&utm_term=.f95b4c21d183 [<https://perma.cc/AJ97-WJCW>]; Emily Steel & Michael S. Schmidt, *Bill O’Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html> [<https://perma.cc/4ZSW-6UJU>]. O’Reilly paid some settlements from his personal funds. 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 [<https://perma.cc/7K7M-9HXX>].

82. Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the ‘Father of Android’*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html> [<https://perma.cc/35E2-GLDM>].

83. See, e.g., Tom Bartlett & Nell Gluckman, *She Left Harvard. He Got to Stay.*, CHRON. OF HIGHER EDUC. (Feb. 27, 2018), <https://www.chronicle.com/interactives/harvard-harassment> [<https://perma.cc/H33R-8JBP>] (discussing sexual harassment at Harvard); Farah Stockman, *Harvard Harassment Case Brings Calls for External Review and Cultural Change*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/us/harvard-harassment-dominguez.html> [<https://perma.cc/38A6-VSGE>] (same). For an example of inadequate investigative procedures, see John A. Byrne, *Columbia Probed Four Separate Harassment Cases at its B-School in One Year*, POETS & QUANTS (July 17, 2018), <https://poetsandquants.com/2018/07/17/columbia-probed-four-separate-harassment-cases-at-its-b-school-in-one-year/> [<https://perma.cc/8B43-SDDP>].

reputation was being threatened.⁸⁴ The dean acknowledged such conduct with other employees as well.⁸⁵ Nonetheless, the provost was reluctant to “ruin [the man’s] career,” and simply reduced his salary by 10 percent for one year, ordered him to write a letter of apology, and required him to undergo counseling.⁸⁶ Only after widespread public outcry did the dean resign and the university undertake a review of its sexual harassment policies and practices.⁸⁷

A further problem involves arbitration requirements. Employers are increasingly requiring employees to agree to arbitration of harassment complaints in a private process skewed heavily in management’s favor.⁸⁸ Over half of private-sector, nonunion employees are subject to mandatory arbitration, up from 2 percent in 1992.⁸⁹ This process leads to less favorable outcomes than litigation.⁹⁰ The Supreme Court has upheld such arbitration requirements—even those barring class-wide claims and collective actions, which necessitate often prohibitively expensive trials for each individual case.⁹¹ Moreover, arbitration processes require secrecy and focus solely on resolving individual disputes, not addressing systemic failures.⁹²

84. Lindsey Bever, *U.C. Berkeley Law Dean on ‘Indefinite Leave of Absence’ After Sexual Harassment Suit*, WASH. POST (Mar. 10, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/09/dean-of-uc-berkeley-school-of-law-sued-for-sexual-harassment/?utm_term=.6e971bbeab93 [<https://perma.cc/RBG9-DK5H>].

85. *Id.*

86. *Id.*; Katy Murphy, *UC Berkeley Draws Fire Over Sex Harassment Case, Law School Dean Steps Down*, MERCURY NEWS (Mar. 9, 2016, 4:06 AM), <https://www.mercurynews.com/2016/03/09/uc-berkeley-draws-fire-over-sex-harassment-case-law-school-dean-steps-down> [<https://perma.cc/8BK8-QY6A>].

87. Susan Svrluga, *Berkeley Law School Dean Resigns After Sexual Harassment Complaint*, WASH. POST (Mar. 10, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/10/berkeley-law-school-dean-resigns-after-sexual-harassment-complaint> [<https://perma.cc/2MXA-XE44>].

88. Schultz, *Open Statement*, *supra* note 19, at 45.

89. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. 1, 1 (2017), <https://www.epi.org/files/pdf/135056.pdf> [<https://perma.cc/G2GY-NPTR>] (discussing the number of employees subject to mandatory arbitration).

90. Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 4–7 (2011) (discussing arbitration outcomes).

91. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (upholding an arbitration agreement).

92. Schultz, *Open Statement*, *supra* note 19, at 46. For a discussion of typical arbitration requirements, see Burstyn, *supra* note 6 and McLean, *supra* note 53. Gretchen Carlson got around this requirement by suing Ailes in his personal capacity. Nitasha Tikku, *How to Pierce the Secrecy Around Sexual Harassment Cases*, WIRED (Dec. 4, 2017, 7:00 AM), <https://www.wired.com/story/how-to-pierce-the-secrecy-around-sexual-harassment-cases> [<https://perma.cc/VM7A-LSJ2>].

A related concern involves mandatory nondisclosure agreements prohibiting workers from saying or revealing anything that would portray the organization and its employees in an unfavorable light.⁹³ Weinstein's company imposed such requirements, and women who signed them were warned that violations could subject them to hundreds of thousands of dollars in damages.⁹⁴ Settlement agreements typically include these types of nondisclosure provisions and require violators to return or forfeit any payments and to pay their adversaries' legal fees. These secrecy requirements enable serial abuse. Harvey Weinstein had several such settlements.⁹⁵ Bill O'Reilly had six, totaling \$45 million.⁹⁶ A gymnast who reached an agreement with USA Gymnastics based on abuse by the organization's former doctor, Larry Nassar, even faced a \$100,000 penalty if she spoke at his sentencing hearing—until the association waived the provision.⁹⁷ However, what has become abundantly clear during the #MeToo moment is that these secrecy agreements are much less likely to remain secret in the new climate of accountability.⁹⁸

II. THE EVOLUTION OF #METOO

A. *The Growth of Activism*

The long-standing inadequacies in sexual harassment law and enforcement practices set the stage for the activism that followed. A week after Alyssa Milano's post went viral, the *New Yorker* ran a widely discussed article revealing accusations by thirteen women claiming that Weinstein had sexually harassed, assaulted, or raped them, along with corroboration by sixteen Weinstein company executives.⁹⁹ In the months that followed, a cascade of complaints

93. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 76–77 (2018); Schultz, *Open Statement*, *supra* note 19, at 46.

94. Farrow, *Weinstein's Accusers Tell Their Stories*, *supra* note 68.

95. Kantor & Twohey, *supra* note 2.

96. Steel & Schmidt, *supra* note 81; Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html> [https://perma.cc/NT43-MHBM].

97. Jessica Levinson, *Non-Disclosure Agreements Can Enable Users. Should We Get Rid of NDAs for Sexual Harassment?*, NBC NEWS (Jan. 24, 2018, 4:19 AM), <https://www.nbcnews.com/think/opinion/non-disclosure-agreements-can-enable-abusers-should-get-rid-ncna840371> [https://perma.cc/S38E-Z94M].

98. See *infra* text accompanying notes 117–21 (discussing the media's investigative efforts).

99. Farrow, *Weinstein's Accusers Tell Their Stories*, *supra* note 68.

surfaced, involving prominent leaders in virtually every field.¹⁰⁰ According to a database by Temin and Company, between October 2017 and April 2019, over 1,200 high-profile figures have been publicly accused of sexual harassment, assault, and other related workplace misconduct, and half are known to have lost their jobs.¹⁰¹

As men came forward with their own accounts of sexual abuse, it became clear that this was not only a “women’s issue.”¹⁰² However, although men accounted for a significant percentage of complainants, only 3 percent of the alleged perpetrators were female.¹⁰³ The rare exceptions attracted considerable notice. The most prominent involved Asia Argento, an Italian actress and director, who was among the first celebrities to publicly accuse Harvey Weinstein of assault. In the months following her accusation, she quietly arranged to pay \$380,000 to Jimmy Bennett, a former child actor and costar, who claimed that she had assaulted him when he was seventeen—which is under the age of consent in California.¹⁰⁴ Another widely discussed case involved a

100. See Almukhtar, Gold & Buchanan, *supra* note 7; Ronan Farrow, *As Leslie Moonves Negotiates His Exit From CBS, Six Women Raise New Assault and Harassment Claims*, NEW YORKER (Sept. 9, 2018), <https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims> [<https://perma.cc/AEA3-RZGJ>]; #MeToo: A Timeline of Events, CHI. TRIB. (July 19, 2019, 7:12 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlstory.html> [<https://perma.cc/F39P-6GB9>].

101. Email from Davia B. Temin, CEO of Temin and Company Incorporated, to Deborah L. Rhode, Professor of Law, Stanford University (Apr. 29, 2019) [hereinafter Email from Davia Temin] (on file with the *Duke Law Journal*).

102. Among the most prominent examples were accusations by men against actor Kevin Spacey and fashion designer Mario Testino. Jacob Bernstein, Vanessa Friedman & Matthew Schneier, *Many Accusations, Few Apologies*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/style/sexual-harassment-in-fashion.html> [<https://perma.cc/N25P-PTGB>].

103. Email from Davia Temin, *supra* note 101.

104. Kim Severson, *Asia Argento, a #MeToo Leader, Made Deal with Her Own Accuser*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/asia-argento-assault-jimmy-bennett.html> [<https://perma.cc/7HD8-YEH5>]. Argento initially denied having any sexual relationship with Bennett and claimed that her partner, celebrity chef Anthony Bourdain, had paid the accuser to avoid negative publicity. Yohana Desta, *Asia Argento Denies Assault Claim, Says Anthony Bourdain Paid Off Her Accuser*, VANITY FAIR (Aug. 21, 2018). However, other evidence, including a selfie photo of Argento and Bennett lying in bed, seems inconsistent with that denial. See Severson, *supra*; Beatrice Verhoeven, *Asia Argento Scandal: 5 Things We Still Need to Know*, WRAP (Aug. 21, 2018), <https://www.thewrap.com/asia-argento-curveball-5-things-we-still-need-to-know> [<https://perma.cc/MLP6-DHVE>].

female New York University professor accused of retaliation against a former graduate student with whom she had a sexual relationship.¹⁰⁵

What initially attracted public attention to #MeToo claims were the celebrities who figured both as victims and supporters.¹⁰⁶ Many actresses who came forward were prominent, credible public figures, even more well known than their harassers. Those who accused Weinstein included Ashley Judd, Gwyneth Paltrow, and Angelina Jolie. What sustained outrage, however, was a constellation of factors, including the pervasiveness of abuse, the strategies that enabled it, the availability of platforms in social and mainstream media, and the commitment of women and men in positions to respond.

B. *Why Now?*

Among the most common questions raised by #MeToo were “why now?” and “why Weinstein?” He did not initially appear to be the nation’s most notorious abuser. None of the *New York Times* reporters or editors who broke the story anticipated such a reaction. Hollywood insiders told them that Weinstein was not a household name and that his behavior had been an “open secret for years Everyone knew and no one cared.”¹⁰⁷ So what changed?

Part of the answer lies in timing. Weinstein’s abuses surfaced against a backdrop of pent-up frustration.¹⁰⁸ The election of Donald Trump, after his widely publicized comments about grabbing women by their pussies, had galvanized millions of women. The 2017 Women’s March was the largest demonstration in U.S. history and the largest globally coordinated public gathering; it involved an estimated 653 marches with some four million participants in the United States, and some 260 marches with over three hundred thousand activists abroad.¹⁰⁹ The growing number of women who had accused Trump of

105. See 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> [https://perma.cc/SJ7T-EJBH].

106. Ohlheiser, *supra* note 4.

107. Paul Farhi, *Why Weinstein? How a Powerful But Obscure Figure Touched Off a Social Movement*, WASH. POST (Dec. 25, 2017), https://www.washingtonpost.com/lifestyle/style/why-weinstein-how-a-powerful-but-obscure-figure-touched-off-a-social-movement/2017/12/25/37898278-e746-11e7-ab50-621fe0588340_story.html [https://perma.cc/V8YN-AGEP].

108. Jessica Bennett, *The ‘Click’ Moment: How the Weinstein Scandal Unleashed a Tsunami*, N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/us/sexual-harrasment-weinstein-trump.html> [https://perma.cc/J9PS-6X4M]; Farhi, *supra* note 107.

109. Ashwini Tambe, *Reckoning with the Silences of #MeToo*, 44 FEMINIST ST. 197, 198 (2018); Erica Chenoweth & Jeremy Pressman, *This is What We Learned by Counting the Women’s*

sexual misconduct, together with those who had recently called out Bill Cosby, Bill O'Reilly, and Roger Ailes, had given the issue increasing attention.¹¹⁰

The nature of the abuse and the strategies that enabled many serial abusers further fueled outrage. At current count, over eighty-five women have accused Weinstein, and many have detailed the retaliation and threats that kept them silent.¹¹¹ Weinstein blackballed actresses who refused or disclosed his advances and hired private investigators to dig up dirt on accusers and journalists who exposed the misconduct.¹¹² Similarly disturbing were the accounts of widespread corporate complicity. Even ostensibly progressive organizations, such as National Public Radio and the Nature Conservancy, ignored repeated complaints, failed to conduct unbiased investigations, and removed, impugned, or paid off women rather than confront powerful men.¹¹³ Prominent university officials and athletic leaders resigned in

Marches, WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/?utm_term=.e43bfedad8f3 [https://perma.cc/9479-552Y].

110. For discussion of O'Reilly, see *supra* notes 81, 96 and accompanying text; for Ailes, see *supra* notes 74, 80 and accompanying text; for Cosby, see Manuel Roig-Franzia, *Bill Cosby Sentenced to 3 to 10 Years in State Prison*, WASH. POST (Sept. 25, 2018), https://www.washingtonpost.com/lifestyle/style/bill-cosby-sentenced-to-3-to-10-years-in-state-prison/2018/09/25/9aa620aa-c00d-11e8-90c9-23f963eea204_story.html?utm_term=.dfad7f4bc760 [https://perma.cc/HH27-JSJM]; for Trump, see Clark Mindock, *Trump's Sexual Assault Allegations: The Full List of Women Who Have Accused the President*, INDEPENDENT (Feb. 25, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/trump-sexual-assault-allegation-alva-johnson-claims-women-how-many-accused-kiss-a8796851.html> [https://perma.cc/624D-B35B] and Eliza Relman, *The 23 Women Who Have Accused Trump of Sexual Misconduct*, SFGATE (May 10, 2019), <https://www.sfgate.com/technology/businessinsider/article/The-22-women-who-have-accused-Trump-of-sexual-12447199.php> [https://perma.cc/CKT5-TDHD].

111. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY, (Oct. 27, 2017, 11:27 AM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001> [https://perma.cc/HF58-SE32]. For Weinstein's retaliation, see Farrow, *Weinstein's Accusers Tell Their Stories*, *supra* notes 68–69, Ronan Farrow, *Harvey Weinstein's Army of Spies*, NEW YORKER (Nov. 6, 2017) [hereinafter Farrow, *Army of Spies*], <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies> [https://perma.cc/EU7L-U32N], and Kantor & Twohey, *supra* note 2.

112. Farrow, *Army of Spies*, *supra* note 111; Deborah L. Rhode, *David Boies' Egregious Involvement with Harvey Weinstein*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/opinion/david-boies-harvey-weinstein.html> [https://perma.cc/2WPG-JHSV].

113. See Rebecca K. Lee, *Beyond the Rhetoric: What It Means to Lead in a Diverse and Unequal World*, 71 STAN. L. REV. ONLINE 110, 111–14 (2018) (discussing NPR); Zack Colman, *Two Executives Depart Nature Conservancy After Harassment Probe*, POLITICO (May 29, 2019, 8:49 PM), <https://www.politico.com/story/2019/05/29/the-nature-conservancy-harassment-probe-1488630> [https://perma.cc/3Y9A-YJQM].

the wake of testimony about their failures to protect female students from predators such as Larry Nassar.¹¹⁴

Because legislatures responsible for crafting antidiscrimination protections had long neglected to establish adequate procedures for their own workplaces, #MeToo exposed a widespread problem.¹¹⁵ From the movement's inception, at least ninety state lawmakers and a half a dozen members of Congress have resigned, been removed, or been subject to other adverse consequences due to allegations of sexual misconduct.¹¹⁶

What enabled these stories to emerge was the interlocking dynamic of mainstream and social media. Journalists have, of course, always known that sex sells. What has been different about the #MeToo moment is the media's willingness to dig deep to investigate abuse.¹¹⁷ Their persistent coverage revealed and reinforced the escalating number of victims who wanted, or were at least willing, to be heard. The *Hollywood Reporter* created a sexual misconduct beat and comprehensively covered those facing credible accusations of misconduct.¹¹⁸ Although celebrities were the initial catalysts, the media quickly followed with stories about harassment in politics, technology, law, finance, science, and low-wage factory or service jobs, all contexts where women had long faced retaliation and blacklisting if they spoke publicly.¹¹⁹ Safety came with numbers. As the head of the National

114. Eliana Dockterman, *Survivors Used #MeToo to Speak Up. A Year Later, They're Still Fighting for Meaningful Change*, TIME (Sept. 30, 2018) [hereinafter Dockterman, *Still Fighting for Meaningful Change*], <https://time.com/5401638/silence-breakers-one-year-later-2> [<https://perma.cc/7TSB-BXHK>].

115. See Gabriel & Bosman, *supra* note 53.

116. David A. Lieb, *States Seek Changes Amid Growing Sexual Misconduct Claims*, YORK DISPATCH (Feb. 3, 2019, 8:25 AM), <https://www.yorkdispatch.com/story/news/2019/02/03/states-seek-changes-amid-growing-sexual-misconduct-claims/38998117> [<https://perma.cc/9UH2-WE6A>].

117. *Seven Women Discuss Work Fairness, Sex, and Ambition*, N. Y. TIMES MAG. (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/magazine/the-conversation-seven-women-discuss-work-fairness-sex-and-ambition.html> [<https://perma.cc/X3TW-URCR>] (reporting Anita Hill's opinion that "in addition to the enormity of the revelations, the media's real engagement in covering this issue today from the front page to the style section to the business section to the sports section is probably why we're having such a great consciousness-raising moment").

118. See *Notable Entertainment Figures Accused of Sexual Misconduct in Wake of Harvey Weinstein*, HOLLYWOOD REP. (Nov. 30, 2017, 2:23 PM), <https://www.hollywoodreporter.com/lists/hollywood-media-men-accused-of-sexual-misconduct-and-harassment-post-weinstein-1057193/item/harvey-weinstein-men-accused-sexual-misconduct-1057152> [<https://perma.cc/22H4-GFKY>].

119. For politics, see Adam Nagourney & Jennifer Medina, *Women Denounce Harassment in California's Capital*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/>

Women’s Law Center put it, when only one person comes forward, she becomes a “huge target, . . . but when more people come out, it’s hard to go after all of them.”¹²⁰ Even women with secrecy agreements, including some who had accused Weinstein, chose to run the risk of disclosure on the assumption that perpetrators would be unwilling to incur the reputational damage of enforcement or that courts would find the agreements contrary to the public interest.¹²¹

Social media platforms were also critical in enabling women to share stories and support each other in ways unprecedented in other

us/california-women-sexual-harassment-sacramento.html [https://perma.cc/V9AA-RR9] and Gabriel & Bosman, *supra* note 53. For Hollywood, see Dana Goodyear, *Can Hollywood Change its Ways?*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/08/can-hollywood-change-its-ways> [https://perma.cc/5R8W-4U6S]. For technology, see Benner, *supra* note 53; Emily Chang, *Oh My God, This Is So F---ED Up: Inside Silicon Valley’s Secretive, Orgiastic Dark Side*, VANITY FAIR (Feb. 2018), <https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum> [https://perma.cc/MYK4-9ESD]; Mike Isaac, *Inside Uber’s Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html> [https://perma.cc/H55V-4C8S]; and Thuy Ong, *Google Has Been Hit with a New Lawsuit Claiming its ‘Bro-Culture’ Encouraged Sexual Harassment*, VERGE (Mar. 1, 2018, 7:18 AM), <https://www.theverge.com/2018/3/1/17066256/google-lawsuit-alleging-bro-culture-harassment> [https://perma.cc/7DBQ-VJU6]. For law, see Katie Benner, *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> [https://perma.cc/Z7CW-9FCU]; Young Lawyer Editorial Board, *This Is What Sexual Harassment in the Legal Industry Looks Like*, AM. LAW. (Feb. 28, 2018), <https://www.law.com/americanlawyer/2018/02/28/yl-board-this-is-what-sexual-harassment-in-the-legal-industry-looks-like/?srlreturn=20190528134628> [https://perma.cc/7SJM-VAUU]; and The Times Editorial Board, *Alex Kozinski’s Retirement Doesn’t End the Discussion About Sexual Harassment in the Judiciary*, L.A. TIMES (Dec. 19, 2017) [hereinafter *Alex Kozinski’s Retirement*], <https://www.latimes.com/opinion/editorials/la-ed-kozinski-harass-20171219-story.html> [https://perma.cc/3Z49-FRKP]. For finance, see McLean, *supra* note 53. For science, see Mallory Pickett, *‘We Had No Power,’ N.Y. TIMES MAG.* (Apr. 21, 2019), <https://www.nytimes.com/2019/04/18/magazine/salk-institute-discrimination-science.html> [https://perma.cc/VJ3Z-4W3K]. For low-wage workers, see Covert, *supra* note 35.

120. Julie Creswell & Tiffany Hsu, *Women’s Whisper Network Raises Its Voice*, N.Y. TIMES (Nov. 4, 2017, 4:00 AM), <https://www.nytimes.com/2017/11/04/business/sexual-harassment-whisper-network.html> [https://perma.cc/AE2Y-9ZQZ].

121. Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, TIME (Nov. 28, 2017), <https://time.com/5039246/sexual%20harassment-nda> [https://perma.cc/F8G8-WN7E] (noting that Zelda Perkins, a former assistant to Weinstein, broke her nondisclosure agreement on the assumption that Weinstein would not sue because doing so would only further damage his reputation); Susan Seager, *NDAs Can’t Silence Everyone: Here’s When You Can Safely Break a Nondisclosure Agreement*, WRAP (Oct. 25, 2017), <https://www.thewrap.com/harvey-weinstein-nda-non-disclosure-agreements-sexual-harassment-fox-news-gloria-allred> [https://perma.cc/QQ7Z-CDQN] (quoting an expert’s suggestion that nondisclosure agreements reached by organizations such as the Weinstein Company may be toothless today because they would not want to face the fierce public backlash if they sued accusers, or courts could find such agreements contrary to the public interest).

scandals.¹²² As Monica Lewinsky noted, virtually anyone could post a “#MeToo story and be instantly welcomed into a tribe.”¹²³ Social media sites also help to maintain “institutional memory.”¹²⁴ Once a complaint has been publicly shared, it is easier to pass information along even if the original teller is anonymous, based in another office, or no longer at the organization.

The importance of social media for sexual harassment complaints was becoming apparent in the run up to the #MeToo movement, as the example of Uber engineer Susan Fowler demonstrated. Fowler was propositioned on her first day on the job, and when she presented a screen shot of the offending email to the company’s human-relations officers, they told her to let it pass because this was the perpetrator’s “first offense” and he was a “high performer.”¹²⁵ She subsequently learned that other female engineers had been told the same thing about this harasser, and her other efforts to report up the management chain proved equally fruitless. After hearing that she was “on very thin ice” at the company because of her repeated complaints, she left Uber.¹²⁶ But rather than let the incident pass, she blogged and included other data on women’s underrepresentation and marginalization at the company. Her post went viral and eventually resulted in an investigation by former Attorney General Eric Holder that toppled the careers of twenty executives.¹²⁷

C. *Will It Last?*

Another key question that the #MeToo movement has raised is whether it will last. Are the conditions that fueled it sufficiently different from those underpinning prior scandals to secure enduring

122. Farhi, *supra* note 107 (quoting Yoder).

123. Monica Lewinsky, *Monica Lewinsky: Emerging from ‘The House of Gaslight’ in the Age of #MeToo*, VANITY FAIR (Feb. 25, 2018), <https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo> [<https://perma.cc/Z4M5-Y4C3>].

124. Creswell & Hsu, *supra* note 120 (quoting Fatima Gross Graves).

125. Susan J. Fowler, *Reflecting on One Very, Very Strange Year at Uber* (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber> [<https://perma.cc/23MD-YSD4>].

126. *Id.*

127. Barbara Booth, *A Year Later, What Uber Has Done to Revamp Its Troubled Image*, CNBC (June 20, 2018, 2:45 PM), <https://www.cnbc.com/2018/06/20/a-year-later-what-uber-has-done-to-revamp-its-troubled-image.html> [<https://perma.cc/RR3H-3KP5>]; Maya Kosoff, *Mass Firings at Uber as Sexual Harassment Scandal Grows*, VANITY FAIR (June 6, 2017, 5:22 PM), <https://www.vanityfair.com/news/2017/06/uber-fires-20-employees-harassment-investigation> [<https://perma.cc/XQ4T-V429>].

change? Greater historical distance is necessary to answer that question, but at this juncture, there are some reasons for optimism. They include the credibility of accusers, the critical mass of feminists in positions of power, and the pressure from consumers and employees.

First, the sheer number and credibility of accusers distinguishes this moment from earlier ones in which sexual harassment and abuse attracted national attention. At the time of Anita Hill's testimony, only about a quarter of Americans believed her.¹²⁸ Although the number of believers almost doubled within a year, she had nothing like the instant, widespread credibility that #MeToo complainants have enjoyed.¹²⁹ Polls found that between 59 and 85 percent of Americans believed these recent allegations of harassment.¹³⁰ Equally to the point, two-thirds of Americans—62 percent of men and 71 percent of women—now think that sexual harassment is widespread.¹³¹ Over four-fifths believe that men getting away with such conduct in the workplace is a major (50 percent) or minor (35 percent) problem.¹³² Two-thirds of Americans also believe that women who reported sexual harassment were generally ignored five years ago, but only a quarter think that women are ignored today.¹³³

Such views reflect what social scientists call a “norms cascade,” meaning “a series of long-term trends that produce a sudden shift in

128. Nicole Sperling, *Anita Hill Schools Hollywood on Sexual Harassment*, VANITY FAIR (Dec. 9, 2017, 10:26 AM), <https://www.vanityfair.com/hollywood/2017/12/anita-hill-schools-hollywood-sexual-harassment> [<https://perma.cc/DGR9-WJAJ>].

129. Smolowe, *supra* note 9.

130. Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME (Dec. 17, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers> [<https://perma.cc/B4VX-BAV8>] (reporting 85 percent); *Suffolk University/USA Today Poll: 74 Percent Say Sexual Harassment Must Be Addressed Seriously*, SUFFOLK U.: BOSTON (Dec. 14, 2017), <https://www.suffolk.edu/news-features/news/2018/05/23/17/35/suffolk-university-usa-today-poll-74-percent-say-sexual-harassment-must-be-addressed-seriously> [<https://perma.cc/8J5T-YDHQ>] (reporting 59 percent).

131. Carrie Dann, *NBC/WSJ Poll: Nearly Half of Working Women Say They've Experienced Harassment*, NBC NEWS (Oct. 30, 2017, 6:00 AM), <https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-nearly-half-working-women-say-they-ve-n815376> [<https://perma.cc/9484-GEWG>].

132. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RESEARCH CENTER (Apr. 4, 2018), <https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo> [<https://perma.cc/7L99-9RTF>].

133. Joan C. Williams & Suzanne Lebock, *Now What?*, HARV. BUS. REV., <https://hbr.org/cover-story/2018/01/now-what> [<https://perma.cc/JH6A-GLGV>] (citing Danielle Kurtzleben, *Poll: Americans Overwhelmingly Support 'Zero Tolerance' On Sexual Harassment*, NPR (Dec. 14, 2017, 4:47 PM), <https://www.npr.org/2017/12/14/570601136/poll-sexual-harassment-ipsos> [<https://perma.cc/K4QX-A2ZY>]).

social mores.”¹³⁴ When that happens, “[t]here’s no going back.”¹³⁵ A stunning example of such a shift in norms is the defeat of Roy Moore, the Republican candidate for a vacant Alabama Senate seat in 2017, who was accused of sexual abuse of adolescent women.¹³⁶ Despite the importance of having a Republican in that seat, Senate Majority Leader Mitch McConnell publicly stated, “I believe the women.”¹³⁷ In a *New York Times* op-ed, running under the title “#MeToo Has Done What the Law Could Not,” law professor Catharine MacKinnon noted, “Women have been saying these things forever. It is the response to them that has changed.”¹³⁸ Part of what has made the response different is the number of women concerned with gender issues who are in positions to respond or who are working to increase women’s representation in leadership. One of the most disturbing aspects of Clarence Thomas’s confirmation hearings was the spectacle of an all-male Senate Judiciary Committee grilling Anita Hill in demeaning and intrusive ways. Senators’ questions disclosed no understanding of the costs of sexual harassment and the dynamics that silenced victims like Hill until compelled to testify.¹³⁹ Although that spectacle helped propel an unprecedented number of women into political office, the gains were modest and short lived. By contrast, today, although women remain significantly underrepresented in leadership positions across the public and private sectors, they have a greater presence and are running for office and engaging in political activity in unprecedented numbers.¹⁴⁰ For the first time, they are also filling many powerful

134. Williams & Lebsack, *supra* note 133.

135. *Id.*

136. Ben Jacobs & David Smith, *Alabama Election: Democrats Triumph over Roy Moore in Major Blow to Trump*, *GUARDIAN* (Dec. 13, 2017, 8:35 AM), <https://www.theguardian.com/us-news/2017/dec/12/roy-moore-loses-alabama-senate-race-doug-jones-wins> [<https://perma.cc/AFS7-RDN5>].

137. Williams & Lebsack, *supra* note 133 (quoting Senator McConnell).

138. Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, *N.Y. TIMES* (Feb. 4, 2018), <https://hbr.org/cover-story/2018/01/now-what> [<https://perma.cc/JH6A-GLGV>].

139. For accounts of the Hill-Thomas hearings, see generally JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994). For discussion of the demonization of Hill without factual support, see generally DAVID BROCK, *BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE* (2001).

140. For women’s historic underrepresentation in leadership, see DEBORAH L. RHODE, *WOMEN AND LEADERSHIP* 1–3 (2017) [hereinafter RHODE, *WOMEN AND LEADERSHIP*]. However, since the election of Donald Trump and #MeToo, a rapidly increasing number of women are running for office and winning. A record quarter of the United States Senate (25 percent) and House of Representatives (24 percent) are female, as are 29 percent of state legislators. Sarah Kellogg, *The Ripple Effects of the Women’s Wave*, *WASH. LAW.*, Mar. 2019, at 16. For women’s unprecedented political activism, see Katha Pollitt, *We Are Living Through the*

positions vacated by abusive men.¹⁴¹ So too, many women are taking advantage of their power as legislators, voters, consumers, and employees, not only to force removal of harassers but also to change the culture that enabled them.

At the political level, women in Congress, state legislatures, and nonprofits have led campaigns to improve the process for handling sexual harassment complaints. A nonprofit organization, The Purple Campaign, formed in 2017 to work on education, activism, and legislation around these issues.¹⁴² One of its objectives—to amend the Congressional Accountability Act—has already passed with bipartisan support. When it goes into effect, federal lawmakers, including those who have left office, will be personally liable for any settlement they reach in harassment and retaliation cases. They will be unable to use campaign or taxpayer funds to pay those settlements, and terms will need to be public.¹⁴³ Over half of state legislative chambers have similarly reformed their processes since the #MeToo movement began.¹⁴⁴ Half have enhanced protection for whistleblowers and have considered or enacted legislation to limit the use of nondisclosure and mandatory arbitration provisions in employment contracts and settlement agreements.¹⁴⁵ Labor advocates have lobbied, successfully

Moment When Women Release Decades of Pent-Up Anger, NATION (Jan. 11, 2018), <https://www.thenation.com/article/we-are-living-through-the-moment-when-women-unleash-decades-of-pent-up-anger> [https://perma.cc/D73E-8NAC].

141. 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?mtrref=www.google.com&gwh=165F78620AB79C5B1531658C137C2CC4&gwt=pay> [https://perma.cc/EG5B-HJKJ]; Belinda Luscombe, *Women Are Getting Male Harassers' Jobs. But Don't Call it a Coup*, TIME (Jan. 15, 2018), <https://time.com/5087382/women-getting-male-harassers-jobs-dont-call-it-a-coup> [https://perma.cc/J3TC-UB8U].

142. See Alex Gangitano, *Former Staffer's Nonprofit Strives to Combat Sexual Harassment*, ROLL CALL (June 7, 2018), <https://www.rollcall.com/news/hoh/former-staffers-nonprofit-is-making-strides-to-combat-sexual-harassment> [https://perma.cc/9BNA-NWE7]; PURPLE CAMPAIGN, <https://www.purplecampaign.org> [https://perma.cc/GAX6-9CF2].

143. The Congressional Accountability Act of 1995 Reform Act, S. 3749, 115th Cong. (2019) (enacted); see also Brittany Shoot, *Congress Passes Bipartisan Bill Making Lawmakers Personally Liable for Paying Sexual Harassment Settlements*, FORTUNE (Dec. 13, 2018), <https://fortune.com/2018/12/13/congress-sexual-harassment-policies-accountability-act-update-2018/> [https://perma.cc/BM2Q-BRBT].

144. Lieb, *supra* note 116.

145. See, e.g., Alexei Koseff, *After Women Said #MeToo, Here's How California Lawmakers Confronted Sexual Harassment*, SACRAMENTO BEE (Sept. 1, 2018, 12:52 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article217710025.html>; Melanie Mason, *After Years of Delay, California Legislature Approves Whistle-Blower Protections for Its*

in some cases, for hotels to provide emergency-contact devices for workers confronting abusive guests and for legislatures to mandate such protection.¹⁴⁶

Demands for change in other contexts have also begun to produce results. Supreme Court Chief Justice John Roberts's 2017 report on the federal judiciary directed the Administrative Office of the United States Courts to undertake a careful review of sexual harassment procedures and to recommend reforms.¹⁴⁷ After a working group released a report, the Chief Justice endorsed its recommendations, including changing codes of conduct for both judges and employees to make clear that both harassment and retaliation against those who report misconduct are prohibited; strengthening internal procedures for identifying and correcting misconduct; and expanding training programs to prevent inappropriate and uncivil conduct.¹⁴⁸

In Hollywood, within months of #MeToo, the Los Angeles sex crime task force had opened twenty-seven cases.¹⁴⁹ Donations from media celebrities provided \$21 million for the Time's Up Commission to monitor workplace policies and contract conditions.¹⁵⁰ The Commission has also subsidized a legal hotline and defense fund that matches sexual harassment complainants with affordable lawyers.¹⁵¹ Contracts have been canceled and performances canceled or reshot to

Own Staff, L.A. TIMES (Feb. 5, 2018, 2:54 PM), <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-after-years-of-delay-california-1517869395-htmlstory.html> [<https://perma.cc/H6V8-56RY>]; Kathleen Ronayne, *California Legislative Staff Get Whistleblower Protections*, BUS. INSIDER (Feb. 5, 2018), <https://www.businessinsider.com/ap-california-legislative-staff-get-whistleblower-protections-2018-2> [<https://perma.cc/Y5ZA-XPSN>]. By mid-June 2019, lawmakers in more than half of state legislatures had introduced bills to restrict nondisclosure agreements. Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html> [<https://perma.cc/TL5A-7C34>]. Twelve states had passed laws limiting the use of nondisclosure agreements in harassment cases. *Id.*

146. Dockterman, *Still Fighting for Meaningful Change*, *supra* note 114.

147. JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (Dec. 31, 2017), <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf> [<https://perma.cc/7D8U-WPRE>].

148. JOHN G. ROBERTS, JR., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 4-5 (June 1, 2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [<https://perma.cc/AN8U-ZQ3L>].

149. Goodyear, *supra* note 119.

150. Elizabeth Blair, *Here's How the Time's Up Legal Defense Fund Actually Works*, NPR (Mar. 11, 2018, 8:16 AM), <https://www.npr.org/2018/03/11/592307856/heres-how-the-time-s-up-legal-defense-fund-actually-works> [<https://perma.cc/F6DM-CSM5>].

151. *Id.*

exclude abusers. The film *All the Money in the World* went through a complete overhaul to redo scenes with Kevin Spacey after numerous men accused him of sexual assault and harassment. Following the film's release, when it was revealed that actor Mark Wahlberg had earned \$1.5 million to reshoot his scenes while his colead Michelle Williams had been paid less than \$1,000, Wahlberg donated his payment to the Time's Up Commission.¹⁵²

Pressure for reform has also been apparent in other contexts. In publishing, authors facing allegations of sexual misconduct have had contracts denied or canceled and books pulled from store shelves.¹⁵³ Boycotts from consumers and protests from employees have proved similarly effective.¹⁵⁴ In the fall of 2018, McDonald's employees walked out to protest workplace sexual harassment; the company promised significant reforms.¹⁵⁵ When meaningful changes were not forthcoming, groups including the Time's Up Commission and ACLU filed more suits, and activists protested at McDonald's national headquarters in advance of its 2019 shareholder's meeting.¹⁵⁶ To empower victims, the Commission on Eliminating Sexual Harassment and Advancing Equity in the Workplace is exploring software systems that would allow targets of abuse to share information on predators.¹⁵⁷ Frustrated women lawyers also discovered an effective response when prominent law firms continued to hire serial abusers without adequate vetting.¹⁵⁸ In winter of 2018, flowers arrived at one such firm, Mayer

152. Stephanie Zacharek, *Hollywood Is Suddenly Serious. That's Exactly What America Needs Right Now*, TIME (Mar. 1, 2018), <https://time.com/5180705/hollywood-suddenly-serious-thats-what-america-needs-right-now> [<https://perma.cc/PWU4-SC79>].

153. Alexandra Alter & Cara Buckley, *Woody Allen Pitched a Memoir. Publishers Weren't Interested*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/movies/woody-allen-memoir.html> [<https://perma.cc/59W3-UWEC>].

154. Ryzik, *supra* note 58; Hamza Shaban, *McDonald's Employees Say 'Time's Up' in a New Round of Sexual Harassment Complaints*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/business/2019/05/21/mcdonalds-employees-say-times-up-new-round-sexual-harassment-complaints/?noredirect=on&utm_term=.8eb6b5f1314a [<https://perma.cc/A5XY-5C9B>].

155. Ryzik, *supra* note 58.

156. *Id.*

157. Maureen Dowd, *Hooray for Harvey-less Hollywood!*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/opinion/sunday/oscars-harvey-weinstein-hollywood.html> [<https://perma.cc/S68R-LW95>].

158. Sara Randazzo & Nicole Hong, *At Law Firms, Rainmakers Accused of Harassment Can Switch Jobs with Ease*, WALL ST. J. (July 30, 2018, 11:38 AM), <https://www.wsj.com/articles/at-law-firms-rainmakers-accused-of-harassment-can-switch-jobs-with-ease-1532965126> [<https://perma.cc/2ZWF-K4EU>].

Brown, in tandem with a prized new recruit who had left two previous firms after allegations of misconduct. The bouquet came from members of one of those firms with a note reading, “Thanks for taking him,” and signed “The women.”¹⁵⁹ Mayer Brown began an investigation and the lawyer resigned the following week.¹⁶⁰ The firm also learned from the experience. Within a year, it publicly announced the termination of another powerful partner due to “inappropriate personal conduct with a subordinate.”¹⁶¹ Other law firms have followed similarly transparent practices. Around the same time in 2019, Orrick, Herrington & Sutcliffe asked a prominent Paris-based partner to leave based on improper conduct that failed to “uphold [firm] values and culture.”¹⁶²

Women have also used the momentum from #MeToo to insist not just that “[t]ime’s up on sexual harassment,” but that “it’s also up on gender discrimination.”¹⁶³ *New York Times* columnist Lindy West put it this way: “Unseating a couple (or a score, or even a generation) of powerful abusers is a start, but it’s not an end, unless we also radically change the power structure that selects their replacements and the shared values that remain even when the movement wanes.”¹⁶⁴

To make that happen, employees and consumers have become more skilled and strategic in demands for organizational changes. When Fox News was reluctant to fire Bill O’Reilly, organizers forced his termination by putting pressure on network advertisers. Thousands of Google employees staged a worldwide walkout to protest the company’s handling of sexual harassment complaints, and the company’s leadership promised more effective responses.¹⁶⁵ Another

159. *Id.*

160. *Id.*

161. Roy Strom, *Mayer Brown Terminates Partner over ‘Inappropriate Personal Conduct,’* AM. LAW. (Mar. 22, 2019, 4:39 PM), <https://www.law.com/American/lawyer/2019/03/22/mayer-brown-terminates-partner-over-inappropriate-personal-conduct?printer-friendly> [<https://perma.cc/F98G-J9T4>].

162. Meghan Tribe, *Orrick Ousts Practice Leader To ‘Uphold Our Values and Culture,’* AM. LAW. (Mar. 11, 2019, 12:52 PM), <https://www.law.com/2019/03/11/orrick-ousts-practice-leader-to-uphold-our-values-and-culture/?printer-friendly> [<https://perma.cc/FGA6-H9L3>].

163. Minhal Baig, *Making Movies After #MeToo*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/opinion/sunday/making-movies-after-metoo.html> [<https://perma.cc/QSST-7YD8>].

164. Lindy West, *We Got Rid of Some Bad Men. Now Let’s Get Rid of Bad Movies.*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/opinion/sunday/we-got-rid-of-some-bad-men-now-lets-get-rid-of-bad-movies.html> [<https://perma.cc/7XHK-FEXU>].

165. Daisuke Wakabayashi, Erin Griffith, Amie Tsang & Kate Conger, *Google Walkout: Employees Stage Protest over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018),

upheaval occurred at Nike, after women who complained about sexual harassment and discrimination were told “You’re the problem,” or the functional equivalent.¹⁶⁶ Once they conducted their own internal survey and made it public, at least six top male executives announced their departures.¹⁶⁷ The CEO acknowledged that two of these leaders had presented “behavioral issues that are inconsistent with Nike’s values” and announced several gender-equity reforms.¹⁶⁸ Unsatisfied with those initiatives, some former employees followed up with a class action lawsuit claiming the company had engaged in gender discrimination and failed to address sexual harassment.¹⁶⁹ Support in Hollywood is growing for “inclusion riders”—contract provisions requiring diversity in films’ casts and crews.¹⁷⁰

This is not to suggest that all the developments over the last two years have been positive. For many individuals, the 2018 Senate confirmation hearings for Supreme Court Justice Brett Kavanaugh signaled a shocking disrespect for victims of sexual abuse and an equally shocking ignorance of why they might not report it. Psychology professor Christine Blasey Ford testified that Kavanaugh had sexually assaulted her during a party when both were in high school.¹⁷¹ Further evidence included claims that Kavanaugh was a heavy drinker during his high school and college years and had committed other acts of sexual misconduct.¹⁷² He denied the allegations and suggested they were part of an “orchestrated political hit,” despite the absence of any

<https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [<https://perma.cc/R56R-RRZZ>].

166. Julie Creswell, Kevin Draper & Rachel Abrams, *At Nike, Revolt Led by Women Leads to Exodus of Male Executives*, N.Y. TIMES (Apr. 28, 2018), <https://www.nytimes.com/2018/04/28/business/nike-women.html> [<https://perma.cc/AC4E-25U3>].

167. *Id.*

168. Charisse Jones, *Nike Is Hit with Lawsuit by Former Employees Who Say They Faced Gender Discrimination*, USA TODAY (Aug. 10, 2018, 5:12 PM), <https://eu.usatoday.com/story/money/2018/08/10/nike-accused-gender-discrimination-hit-lawsuit/955461002> [<https://perma.cc/5CJS-3B3T>] (quoting Mark Parker).

169. *Id.*

170. David Sims, *Can Inclusion Riders Change Hollywood?*, ATLANTIC (Mar. 15, 2018), <https://www.theatlantic.com/entertainment/archive/2018/03/will-inclusion-riders-actually-change-hollywood/555602> [<https://perma.cc/QS85-8MGM>].

171. *Everything on Brett Kavanaugh, the Senate Vote and the Fallout*, N.Y. TIMES (Oct. 2, 2018) [hereinafter *Everything on Brett Kavanaugh*], <https://www.nytimes.com/2018/10/02/us/politics/kavanaugh-news-fbi-investigation.html> [<https://perma.cc/R32S-8HPW>].

172. *Id.*

evidence that Ford or other potential witnesses had motives to lie.¹⁷³ He also repeatedly interrupted female Senators' questions and responded in belligerent tones.¹⁷⁴ When Senator Amy Klobuchar asked whether his drinking had ever caused memory lapses, he shot back, "You're asking about blackout. I don't know, have you?"—as if she were the one whose fitness was in question.¹⁷⁵ In an open letter to the Senate, women law professors opposing Kavanaugh's nomination wrote: "Judge Kavanaugh has shown that he is unable to respect women in positions of power, manifests bias with respect to gender and political affiliation, does not meet basic standards of professionalism, and lacks independence, impartiality, and judicial temperament."¹⁷⁶

173. *Kavanaugh and Ford Come Before the Senate*, CNN (Sept. 27, 2018), <https://www.cnn.com/videos/politics/2018/09/27/kavanaugh-judiciary-calculated-political-hit-sot-vpx.cnn> [https://perma.cc/J4EZ-QHBF].

174. See Deborah L. Rhode, *The Public Deserves Better*, in IS BRETT KAVANAUGH DAMAGED GOODS?, POLITICO (Oct. 4, 2018), <https://www.politico.com/magazine/story/2018/10/06/kavanaugh-confirmation-reaction-221087> [https://perma.cc/67HJ-D8RS]; see also Allyson Chiu, *Brett Kavanaugh Likes Beer, but Not Questions About His Drinking Habits*, WASH. POST (Sept. 28, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/28/brett-kavanaugh-likes-beer-but-not-questions-about-his-drinking-habits/> [https://perma.cc/KNG5-MAPS]; Melissa Healy, *Here's What Experts Who Study Sexual Violence Say About the Credibility of Christine Blasey Ford's Testimony*, L.A. TIMES (Sept. 28, 2018, 2:00 AM), <https://www.latimes.com/science/sciencenow/la-sci-sn-ford-testimony-credibility-memory-20180928-story.html> [https://perma.cc/82KF-48ER] (quoting Kevin Swartout's discussion of then-Judge Kavanaugh's repeated midsentence interruptions of Senator Diane Feinstein); Dan Merica, *Kavanaugh Gets Combative With Senator Over Questions About Drinking*, CNN (Sept. 27, 2018), <https://www.cnn.com/2018/09/27/politics/kavanaugh-klobuchar-questions-about-drinking/index.html> [https://perma.cc/S3FC-QFD7]; *Open Letter to the Senate by Women Law Professors*, N.Y. TIMES (Oct. 3, 2018) [hereinafter *Open Letter by Women Law Professors*], <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html> [https://perma.cc/2VVN-82ZJ]; Jeffrey St. Clair, *Roaming Charges: There's a Tear in My Beer*, COUNTERPUNCH (Sept. 28, 2018), <https://www.counterpunch.org/2018/09/28/roaming-charges-theres-a-tear-in-my-beer/> [https://perma.cc/LTG3-2WST]; Gary Tischler, *Political Floodwaters Rise with Kavanaugh Hearing*, GEORGETOWNER (Oct. 1, 2018), <https://georgetowner.com/articles/2018/10/01/political-floodwaters-rise-kavanaugh-hearing> [https://perma.cc/6MGM-LN25]; Meg Wagner, Brian Ries, Sophie Tatum & Paul P. Murphy, *Brett Kavanaugh and Christine Blasey Ford Testify on Sex Assault Allegations*, CNN (Sept. 28, 2018), https://www.cnn.com/politics/live-news/kavanaugh-ford-sexual-assault-hearing/h_f26d460ef42025759033bbccdadcc510 [https://perma.cc/5VGX-NLXW].

175. Antonia Blumberg, *Brett Kavanaugh Dodges Drinking Question, Asks Amy Klobuchar If She's Ever Blacked Out*, HUFF. POST (Sept. 27, 2018), https://www.huffingtonpost.com/entry/brett-kavanaugh-amy-klobuchar-drinking-question_us_5bad485be4b0b4d308d14e10 [https://perma.cc/J47M-3YWY]; see also Gina Martinez, *Kavanaugh Apologizes to Sen. Klobuchar After Asking If She Had Ever Been Blackout Drunk*, TIME (Sept. 27, 2018), <http://time.com/5409176/kavanaugh-apologizes-senator-klobuchar-black-out-drunk> [https://perma.cc/6EFJ-3WKT].

176. *Open Letter by Women Law Professors*, *supra* note 174.

The Senate's refusal to order a full FBI investigation into alleged abuse, together with the vilification and death threats that Ford suffered, all suggested the limits of progress in the #MeToo era.¹⁷⁷

Also disturbing was President Trump's tweet during the hearings insisting Kavanaugh had "an impeccable reputation" and stating, "I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law enforcement Authorities by either her or her loving parents."¹⁷⁸ Within hours, victims of sexual abuse began responding to #WhyIDidntReport, and major media summarized research on the low frequency of reporting.¹⁷⁹ Only about a third of sexual assaults are reported to the police, and only about 12 percent of college sexual assaults or attempted assaults are reported.¹⁸⁰ The reasons for silence are much the same as those identified by sexual harassment victims in their #MeToo posts and accompanying commentary: shame, denial, fear of retaliation, and doubts that they would be believed or that any appropriate response would be forthcoming.¹⁸¹ Many Americans were

177. For the FBI's failure to investigate corroborating evidence, see *Everything on Brett Kavanaugh*, *supra* note 171, Abigail Abrams, *Here Are All the People We Know the FBI Talked to for the Kavanaugh Report*, TIME (Oct. 4, 2018), <https://www.time.com/5415845/kavanaugh-fbi-investigation-witnesses> [<https://perma.cc/673P-NTBP>], and Alice Truong, *What Christine Blasey Ford's Witness Has to Say After Being Left Out of the FBI Probe*, QUARTZ (Oct. 5, 2018), <https://qz.com/1415990/read-letter-of-blasey-fords-witness-after-fbis-kavanaugh-probe> [<https://perma.cc/WZ2N-RUL7>]. For death threats that forced Dr. Ford to move at least four times and retain private security guards for over a month after her testimony, see Anna North, *Christine Blasey Ford Has a Security Detail Because She Still Receives Threats*, VOX (Nov. 8, 2018, 5:40 PM), <https://www.vox.com/2018/11/8/18076154/christine-blasey-ford-threats-kavanaugh-gofundme> [<https://perma.cc/X6LT-JBDU>] and *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR (Nov. 8, 2018, 9:00 AM), <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say> [<https://perma.cc/V33V-E28D>].

178. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 21, 2018), <https://twitter.com/realdonaldtrump/status/1043126336473055235?lang=en> [<https://perma.cc/JLZ7-QSLW>].

179. Lia Bonos, *Trump Asks Why Christine Blasey Ford Didn't Report Her Allegation Sooner. Survivors Answer With #WhyIDidntReport*, WASH. POST (Sept. 24, 2018), https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/?noredirect=on&utm_term=.0dbde97021e2 [<https://perma.cc/Q2MC-HX77>]; Mahita Gajanan, *Trump Attacked Brett Kavanaugh's Accuser. Now People Are Revealing #WhyIDidntReport*, TIME (Sept. 21, 2018), <https://time.com/5403523/trump-ford-tweet-sexual-assault> [<https://perma.cc/7PGK-NN8X>].

180. See Bonos, *supra* note 179 (citing statistics from the Rape, Abuse and Incest National Network); Gajanan, *supra* note 179 (citing statistics from the Washington Post and Kaiser Family Foundation Survey).

181. See Bonos, *supra* note 179 (explaining the phenomena of underreporting of sexual assaults); Gajanan, *supra* note 179 (same).

profoundly dispirited by the need to point this out again so soon after the movement's initial outpouring of survivors' experience.

Yet activists' responses to the Kavanaugh hearings, together with the other #MeToo strategies noted above, also signaled an important evolution in the battle for gender equity. Unlike the "Year of the Woman" following the Hill–Thomas hearings, the #MeToo era is sparking demands for far more than accountability for individual misconduct or modest increases in the number of female political leaders. Today's movement is focusing attention on the underlying causes of inequality and abuse and the structural changes necessary to address it.

D. Concerns

This activism has not come without costs, and not all of these stories have uplifting endings. #MeToo has raised concerns about overreaction, a rush to judgment, backlash for women, insufficient attention to race and class, and inadequate paths to redemption.

1. *Overreaction.* One cluster of concerns involves overreaction. Some observers have viewed the #MeToo movement as what social scientists label a "sex panic" or "moral panic"; such movements typically begin by focusing on real abuses, but then are propelled by exaggerated portrayals that result in draconian responses.¹⁸² In private and online conversations, men have denounced "witch hunt[s]" and "diversity dogma," which they claim have led to false accusations and favoritism toward women.¹⁸³ Following the accusations against then-Judge Kavanaugh, President Trump observed, "It is a very scary time for young men in America, where you can be guilty of something you may not be guilty of."¹⁸⁴ Commentators from both the left and right complain that workplaces "seem to have wound up spending an

182. JoAnn Wypijewski, *What We Don't Talk About When We Talk About #MeToo*, NATION (Feb. 22, 2018), <https://www.thenation.com/article/what-we-dont-talk-about-when-we-talk-about-metoo> [<https://perma.cc/6GCB-L2HH>]. For a general review of sex panics, see generally ROGER LANCASTER, *SEX PANIC AND THE PUNITIVE STATE* (2011).

183. Nellie Bowles, *Push for Gender Equality in Tech? Some Men Say It's Gone Too Far*, N.Y. TIMES (Sept. 23, 2017), <https://www.nytimes.com/2017/09/23/technology/silicon-valley-men-backlash-gender-scandals.html> [<https://perma.cc/K5QT-DDFY>] (quoting James Altizer).

184. David Jackson, *Donald Trump: Kavanaugh Allegations Show It's a "Very Scary Time for Young Men in America,"* USA TODAY (Oct. 2, 2018), <https://www.usatoday.com/story/news/politics/2018/10/02/donald-trump-says-very-scary-time-young-men-america/1498770002> [<https://perma.cc/7U8K-VPX5>] (quoting Donald Trump).

inordinate amount of time parsing the injurious effects of low-level lechery on relatively advantaged women.”¹⁸⁵

2. *Rush to Judgment.* Unsurprisingly, however, the most vehement concerns about #MeToo have generally been raised by men accused of misconduct. Justin Fairfax, the Lieutenant Governor of Virginia, who was asked to resign following accusations of sexual assault by two women, told legislators: “If we go backward and we rush to judgement and we allow for political lynchings without any due process, any facts, any evidence being heard, then I think we do a disservice to this very body in which we all serve.”¹⁸⁶ Tavis Smiley, whose talk show was canceled after allegations of sexual improprieties, issued a similarly defiant denial:

If having a consensual relationship with a colleague years ago is the stuff that leads to this kind of public humiliation and personal destruction, heaven help us. . . . PBS overreacted and conducted a biased and sloppy investigation, which led to a rush to judgment, and trampling on a reputation that I have spent an entire lifetime trying to establish. This has gone too far. And, I, for one, intend to fight back.¹⁸⁷

He did, with a multimillion-dollar lawsuit, which prompted PBS to reveal “multiple credible accusations” of misconduct, including unwanted sexual affairs with subordinates and a “verbally abusive and threatening environment.”¹⁸⁸

185. Zoe Heller, *Know Your Power*, in *THE RECKONING: ON POWER AND SEX IN THE WORKPLACE*, N.Y. TIMES MAG., Dec. 17, 2017, at 46. For criticism of “hypersensitivity” among young women attorneys who complained about trivial conduct such as a compliment about a blouse, see Vivia Chen, *The #MeToo Backlash Is Building*, AM. LAW. (Oct. 26, 2018, 3:44 PM), <https://www.law.com/americanlawyer/2018/10/26/the-metoo-backlash-is-building> [<https://perma.cc/P6XG-LW7J>].

186. Mihir Zaveri, *Justin Fairfax Compares Himself to Lynching Victims in Speech to Virginia Senators*, N.Y. TIMES (Feb. 24, 2019), <https://www.nytimes.com/2019/02/24/us/justin-fairfax-virginia-speech.html> [<https://perma.cc/S2N4-EHES>] (quoting Justin Fairfax).

187. Tolly Wright, *Tavis Smiley Show Suspended by PBS Following Sexual-Misconduct Investigation*, VULTURE (Dec. 13, 2017), <https://www.vulture.com/2017/12/pbs-suspends-tavis-smiley-following-misconduct-investigation.html> [<https://perma.cc/ENS4-U8BV>].

188. Paul Farhi, *Most Famous Men Accused of Sexual Misconduct Have Been Lying Low. Not Tavis Smiley*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/lifestyle/style/most-famous-men-accused-of-sexual-misconduct-have-been-lying-low-not-tavis-smiley/2018/02/01/9c27c3ec-0605-11e8-b48c-b07fea957bd5_story.html?utm_term=.604131864f2f [<https://perma.cc/Y4C7-BSCL>]; Nekea Valentine, *PBS Shows the Receipts on Tavis Smiley Sexual Assault Allegations*, GRIO (Mar. 23, 2018), <https://thegrio.com/2018/03/23/pbs-shows-the-receipts-on-tavis-smiley-sexual-assault-allegations> [<https://perma.cc/Y9H5-498E>].

Federal Judge Alex Kozinski was equally dismissive of accusations of sexual misconduct by former clerks, including claims of inappropriate sexual comments, touching, and requests to watch pornography. His initial response to reporters was: “If this is all they are able to dredge up after 35 years, I am not too worried.”¹⁸⁹ As it happened, however, that was not all “they” managed to unearth. After over a dozen accusations accumulated, Kozinski announced his retirement—but without acknowledging misconduct. He said simply:

I’ve always had a broad sense of humor and a candid way of speaking to both male and female law clerks alike. . . . In doing so I may not have been mindful enough of the special challenges and pressures that women face in the workplace. It grieves me to learn that I caused any of my clerks to feel uncomfortable; this was never my intent. For this I sincerely apologize.¹⁹⁰

Former Vice President Joe Biden was equally unapologetic in his initial response to complaints about inappropriate hugging and touching:

In many years on the campaign trail and in public life, I have offered countless handshakes, hugs, expressions of affection, support and comfort. And not once—never—did I believe I acted inappropriately. If it is suggested I did so, I will listen respectfully. But it was never my intention.¹⁹¹

He later added, “I’m sorry I didn’t understand more. . . . I’m not sorry for anything that I have ever done. I have never been disrespectful intentionally to a man or woman.”¹⁹² But many observers had long found Biden’s behavior problematic. And House Speaker Nancy Pelosi pointed out what should have been obvious: “[P]eople’s space is important to them, and what’s important is how they receive it and not necessarily how you intended it.”¹⁹³

189. *Alex Kozinski’s Retirement*, *supra* note 119.

190. *Id.*

191. Vanessa Romo, *Joe Biden Offered ‘Expressions of Affection’ but Denies Inappropriate Behavior*, NPR (Mar. 31, 2019), <https://www.npr.org/2019/03/31/708537421/joe-biden-offered-expressions-of-affection-but-denies-inappropriate-behavior> [<https://perma.cc/QMU9-BWYG>].

192. Lisa Lerer, *Biden Jokes About Hugging in a Speech, Then Offers a Mixed Apology*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/05/us/politics/joe-biden-controversy.html> [<https://perma.cc/CZ89-UKLW>].

193. Sydney Ember & Jonathan Martin, *Joe Biden, in Video, Says He Will Be ‘More Mindful’ of Personal Space*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/politics/joe-biden-women-video.html> [<https://perma.cc/6HSL-DF5N>].

Many prominent men have also been critical of the way the press handled sexual misconduct allegations. The brother of Mario Testino, a leading fashion photographer accused of abuse, sent out a letter to clients raising that concern: “I am shocked . . . and disturbed by this phenomenon where [the] media has take[n] upon itself to be both judge and jury; where one is guilty until proven innocent based only on accusations.”¹⁹⁴ In Testino’s case, the concerns may have been overstated. A total of eighteen men accused him of unambiguous assaults.¹⁹⁵

Still, there have been cases involving rushed judgments and most Americans, including most women, are appropriately worried about the prospect. In one Vox/Morning Consult poll, almost two-thirds of women were very or somewhat concerned about false accusations.¹⁹⁶ A Pew poll similarly found that over two-thirds of Americans thought that employers firing accused men before finding out all the facts was a major or minor problem.¹⁹⁷ Prominent feminists have also expressed concerns about the lack of procedural safeguards in some instances of public shaming. One example involved a widely circulated list of “Shitty Media Men” that was based on anonymous accusations, with no verification and no opportunity for those named to defend the charges or remove themselves from the list.¹⁹⁸

Of course, female complainants have often been blackballed for years with equally little recourse. But now that the system has turned on powerful men, the blowback has been substantial.¹⁹⁹ Many observers believe the pendulum is swinging too far and causing too much “collateral damage.”²⁰⁰ Others are concerned about the inconsistency and unfairness of results. Over half of Americans worry about perpetrators getting similar punishments for different

194. Bernstein, Friedman & Schneier, *supra* note 102.

195. *Id.*

196. See Anna North, *Why Women Are Worried About #MeToo*, VOX (Apr. 5, 2018), <https://www.vox.com/2018/4/5/17157240/me-too-movement-sexual-harssment-aziz-ansari-accusation> [<https://perma.cc/H3LB-RZ7E>].

197. See Graf, *supra* note 132.

198. Moira Donegan, *I Started the Media Men List—My Name Is Moira Donegan*, CUT (Jan. 10, 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [<https://perma.cc/KC4W-Y846>]; see Creswell & Hsu, *supra* note 120; Katha Pollitt, *Are Sexual Predators in the Workplace Finally Facing Justice?*, NATION, (Nov. 2, 2017), <https://www.thenation.com/article/are-sexual-predators-in-the-workplace-finally-facing-justice/> [<https://perma.cc/RB3K-3E6R>].

199. Goodyear, *supra* note 119.

200. See *id.*

misconduct.²⁰¹ Bill Maher, a supporter of #MeToo, has nonetheless criticized what he called “Distinction Deniers.”²⁰² An example he cited was Senator Kirsten Gillibrand’s explanation of why Al Franken had to resign from the Senate. In her view, when you “start having to talk about the differences between sexual assault and sexual harassment and unwanted groping you are having the wrong conversation. You need to draw a line in the sand and say none of it is O.K. None of it is acceptable.”²⁰³ But if we lose the capacity to draw those distinctions, we risk alienating the constituency that needs convincing. Subsequent reporting about the allegations against Franken raised serious concerns about their credibility and significance, about the lack of vetting by the press, and about the absence of due process in the Senate.²⁰⁴

As Franken’s case illustrates, the rage that is driving #MeToo, if unchecked, could undermine it as well. Maureen Dowd, in a *New York Times* column on “Roadkill on Capitol Hill,” also underscores the concern that progressives could be held to higher standards than conservatives: “Al Franken, who is good on women’s rights, resigns for wet kisses and random squeezes while President Trump, who is awful on women’s rights, skips right past his [brags] on groping.”²⁰⁵ Whether or not Dowd is right that liberals generally face more exacting standards, her disagreement with Gillibrand underscores the divisiveness of the issue. If two strong supporters of #MeToo cannot agree about a case like Franken’s—and, in fact, some of those who called for his resignation have since changed their views—then mixed signals and inconsistent sanctions are bound to persist.²⁰⁶

201. See North, *supra* note 196 (“56 percent were worried about perpetrators getting the same punishment for different misdeeds.”).

202. Caitlin Flanagan, *The Conversation #MeToo Needs to Have*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-right-conversation-for-metoo/551732> [https://perma.cc/9DMR-49CN].

203. *Id.* (quoting Senator Kirsten Gillibrand).

204. Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> [https://perma.cc/Q6YB-L5NR].

205. Maureen Dowd, *Roadkill on Capitol Hill*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/09/opinion/sunday/congress-sexual-harassment-dowd.html> [https://perma.cc/LB77-YDF4].

206. Mayer, *supra* note 204 (quoting Senator Jeff Merkley, who deplored the “rush to judgment that didn’t allow” adequate fact-finding; former senator Bill Nelson, “I realized almost right away I’d made a mistake”; and Senator Tom Udall, “I started having second thoughts shortly after he stepped down. He had the right to be heard by an independent investigative body”).

3. *Backlash.* So too, many observers have worried that the costs of #MeToo will be borne not just by abusive men. Women will be among the casualties as well if the movement makes them seem overly sensitive and makes male colleagues more reluctant to engage in mentoring relationships. Former Secretary of State Condoleezza Rice advised, “Let’s not turn women into snowflakes. Let’s not infantilize women.” Rice worried that we might “get to a place that men start to think, ‘Well, maybe it’s just better not to have women around.’”²⁰⁷

Even before #MeToo, a poll conducted for the *New York Times* found that a majority of women and nearly half of men believed it was unacceptable to have dinner or drinks alone with someone of the opposite sex other than their spouse, and a third of Americans said lunch or car rides alone were also inappropriate.²⁰⁸ Many male leaders expressed concerns that even innocent conduct could be misinterpreted and cause legal problems. Maureen Sherry, a managing director at a prominent Wall Street firm, heard “[m]ore than once . . . that it’s just easier to fire a guy or . . . that ‘there’s just less drama with men.’”²⁰⁹

#MeToo has given added force to these concerns. Half of Americans think that the recent increased focus on sexual harassment has made it harder for men to know how to interact with women in the workplace.²¹⁰ Most women are very (26 percent) or somewhat (34 percent) concerned that the #MeToo movement is causing women to lose professional opportunities because men are reluctant to work with them.²¹¹ Large-scale surveys by Lean In and Survey Monkey on the effects of the movement found that almost half of male managers were uncomfortable in common workplace activities with women, such as

207. Alexandra King, *Condoleezza Rice on #MeToo: ‘Let’s Not Turn Women into Snowflakes,’* CNN (Jan. 14, 2018), <https://www.cnn.com/2018/01/13/politics/rice-metoo-axe-files-cnntv/index.html> [<https://perma.cc/U8AX-7TJV>].

208. Claire Cain Miller, *It’s Not Just Mike Pence. Americans Are Wary of Being Alone with the Opposite Sex*, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/01/upshot/members-of-the-opposite-sex-at-work-gender-study.html> [<https://perma.cc/JK6U-B84J>].

209. Maureen Sherry, *A Colleague Drank My Breast Milk and Other Wall Street Tales*, N.Y. TIMES (Jan. 23, 2016), <https://www.nytimes.com/2016/01/24/opinion/a-colleague-drank-my-breast-milk-and-other-wall-street-tales.html> [<https://perma.cc/85U7-N9EH>].

210. Emily Jashinsky, *Poll: 51 Percent of Adults Say #MeToo Has Made Workplace Interactions Harder for Men, Won’t Make Much Difference in Long Run*, WASH. EXAMINER (Apr. 5, 2018), <https://www.washingtonexaminer.com/opinion/poll-51-percent-of-adults-say-metoo-has-made-workplace-interactions-harder-for-men-wont-make-much-difference-in-long-run> [<https://perma.cc/H6RX-UGZC>].

211. North, *supra* note 196.

socializing or working one-on-one.²¹² A study of male lawyers found that most (56 percent) were nervous about one-on-one interactions with female coworkers and the charges of impropriety that might result.²¹³ As a firm leader explained, “One allegation can be a career killer . . . I will not be alone in the office with any female—whether she is a colleague or support staff member. This is to protect myself.”²¹⁴

Diversity consultants and advocacy organizations are finding that more “men are backing away from the role that we try to encourage them to play, which is actively mentoring and sponsoring women in the workplace. . . . There’s apprehension on the part of men that they’re going to be falsely accused of sexual harassment.”²¹⁵ And they “fear what they cannot control.”²¹⁶ More men are reportedly claiming to follow the “Pence Rule,” once known as the “Billy Graham Rule” and now associated with Vice President Mike Pence.²¹⁷ Pence says he does not eat alone with women apart from his wife and does not attend events without her that involve alcohol.²¹⁸ But if men cannot speak comfortably with women in private, it will increase their exclusion from informal networks of advice and support.²¹⁹ An Open Statement on Sexual Harassment from U.S. Law Professors shared with the Senate Judiciary Committee opposed the sweeping prohibitions that some workplaces have implemented, which ban all sexually oriented conversation, behavior, and dating.²²⁰ Such “zero tolerance” policies can undermine workplace solidarity, cause male supervisors to avoid

212. Katrin Bennhold, *Another Side of #MeToo: Male Managers Fearful of Mentoring Women*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/world/europe/metoo-backlash-gender-equality-davos-men.html> [<https://perma.cc/Q88Q-TB4U>].

213. Chen, *supra* note 185.

214. *Id.*

215. Nellie Bowles, *Men at Work Wonder if They Overstepped with Women, Too*, N.Y. TIMES (Nov. 10, 2017) [hereinafter Bowles, *Men at Work Wonder*], <https://www.nytimes.com/2017/11/10/business/men-at-work-wonder-sexual-harassment.html> [<https://perma.cc/8UZX-3UV9>] (quoting Al Harris); see also Dockterman, *Still Fighting for Meaningful Change*, *supra* note 114 (reporting LeanIn.org findings that men report greater reluctance to interact with female subordinates in the wake of #MeToo); McLean, *supra* note 53 (discussing concerns by Catalyst researcher Brande Stelling).

216. Bess Levin, *Wall Street Goes Full Mike Pence to Avoid #MeToo Accusations*, VANITY FAIR (Dec. 3, 2018), <https://www.vanityfair.com/news/2018/12/wall-street-goes-full-mike-pence-to-avoid-metoo-accusations> [<https://perma.cc/Q2R2-BYJM>].

217. Bowles, *Men at Work Wonder*, *supra* note 215.

218. *Id.*; Miller, *supra* note 208.

219. *Id.* For the general problem of women’s exclusion, see RHODE, WOMEN AND LEADERSHIP, *supra* note 140.

220. Schultz, *Open Statement*, *supra* note 19, at 34.

women, and discourage women from reporting offenses that might trigger excessively punitive responses.²²¹

4. *Race and Class.* Another concern is that the costs and benefits of #MeToo will be disproportionately distributed by race and class. This issue reflects long-standing tensions within the American women's movement, which resurfaced when the harassment stories that initially captivated the public were by privileged white women. Black feminists have long complained that charges by women of color attract less popular support than those by white women.²²² And it has not seemed coincidental that the only two accusations that Harvey Weinstein publicly disputed were by women of color.²²³

Activists have not been insensitive to these concerns. The Time's Up Commission, funded primarily by Hollywood celebrities, has focused its legal assistance on low-wage workers—who are disproportionately women of color.²²⁴ The lawsuits targeting McDonald's are a case in point. Major news organizations have also made a point of profiling abuse among the most vulnerable employees.²²⁵ But much greater effort will be necessary to reverse the deep-seated inequalities that have plagued most of the nation's social-justice movements. This is not the only context in which “women with privileges get rights,” and the trickle down to other women is far from adequate.

5. *Redemption.* A final set of concerns involves how long is long enough for the shaming of individuals tried in the court of public opinion. If history is any guide, Americans tend to be forgiving. Bill Clinton left office with record approval ratings; Chris Brown has a hit song that casually refers to his acts of domestic violence as a

221. See *id.* at 34; see also FELDBLUM & LIPNIC, *supra* note 19, at 40.

222. For a representative example, see Onwuachi-Willig, *supra* note 24, at 111 n.26.

223. See Stuart Oldham, *Salma Hayek Says Harvey Weinstein Only Responded to Her and Lupita Nyong'o's Harassment Claims Because Women of Color Are Easier to Discredit*, VARIETY (May 13, 2018), <https://variety.com/2018/film/news/salma-hayek-says-harvey-weinstein-only-responded-to-her-and-lupita-nyongos-harassment-claims-because-women-of-color-are-easier-to-discredit-1202808828> [<https://perma.cc/M56D-37P3>].

224. *TIME'S UP Legal Defense Fund Provides Financial Support for Low-Wage Women Workers Filing Sexual Harassment Charges Against McDonald's*, NAT'L WOMEN'S L. CTR. (May 22, 2018), <https://nwlc.org/press-releases/times-up-legal-defense-fund-provides-financial-support-for-low-wage-women-workers-filing-sexual-harassment-charges-against-mcdonalds> [<https://perma.cc/LV6V-8RZ6>].

225. See *id.*; *supra* note 119.

“controversial past”; Kobe Bryant’s brush with rape allegations was overlooked at the 2018 Oscars ceremony; and the lack of consequences from Donald Trump’s “locker room banter” and alleged abuse speak for themselves.²²⁶ But history may not be a reliable guide in today’s climate. Norms have changed and as Lindy West noted, “We are not done talking about how to decide which abusers deserve a path to redemption and what that path might look like.”²²⁷

Some victims have weighed in about what the path does not look like. Three of Judge Kozinski’s accusers expressed regret in a *New York Times* op-ed that his resignation terminated an inquiry into his misconduct, and that within months he was being given public platforms with no mention of the circumstances surrounding his departure.²²⁸ “Of all the institutions rocked by the #MeToo movement,” they argued, “the legal community can do better, and should.”²²⁹ But what constitutes “better” is not always self-evident. In addressing this question, *Time Magazine* commentator Jill Filipovic suggests that “[i]nstead of strategizing their returns, these famous men should think about what it truly means to make amends.”²³⁰ Except in cases of false allegations, she argues that those accused

can start with an honest public accounting and a sincere apology . . . They could ask . . . How can I right this wrong? . . . They can be open to the answer being “Retreat from the public eye” [and work on private transformation] . . . If someone has paid penance for their

226. For Clinton’s 60 percent approval ratings, see Molly W. Sonner & Clyde Wilcox, *Forgiving and Forgetting: Public Support for Bill Clinton During the Lewinsky Scandal*, 32 PS: POL. SCI. & POL. 554, 556–57 (1999) and *Poll: More Americans Satisfied with Clinton’s Explanation*, CNN (Aug. 17, 1998), <https://www.cnn.com/ALLPOLITICS/1998/08/17/poll> [<https://perma.cc/HGP7-FHME>]. For discussion of Chris Brown, see Jill Filipovic, *It’ll Never Be the Right Time for Famous Sexual Predators to Make Their Comebacks*, TIME (May 10, 2018), <https://time.com/5272331/let-us-now-punish-famous-men> [<https://perma.cc/9N22-FWR5>]. For criticism of the Oscar nomination of Kobe Bryant, see Maeve McDermott, *Oscars 2018: Not Everyone is Thrilled with Kobe Bryant’s Nomination Amid the Me Too Movement*, USA TODAY (Jan. 23, 2018, 2:37 PM), <https://www.usatoday.com/story/life/people/2018/01/23/kobe-bryants-oscar-nomination-recalls-his-sexual-assault-case-wake-metoo/1057909001> [<https://perma.cc/X9HQ-KRMT>].

227. West, *supra* note 164.

228. Leah Litman, Emily Murphy & Katherine H. Ku, *A Comeback but No Reckoning*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html> [<https://perma.cc/GA6Q-4SUE>].

229. *Id.*

230. Filipovic, *supra* note 226.

wrongdoing, they do not deserve to have their lives ruined forever. But losing one's celebrity is not ruination, nor is it penitence.²³¹

But what is it, exactly? For some men, the loss of their position surely feels like ruination. When comedian Louis CK came back on stage after a ten-month absence following allegations of sexual misconduct, he had little to say about the experience except for how bad the ordeal was for him and “how much money he lost.”²³² Other men displaced by scandal feel similarly. Many have a good number of potentially productive years before them. How long should they remain professional pariahs? To *New York Times* columnist Michelle Goldberg, that is the wrong question. “I feel sorry for a lot of these men,” she acknowledges, “but I don’t think they feel sorry for women, or think about women’s experience much at all. . . . [These men] aren’t proposing paths for restitution. They’re asking why women won’t give them absolution.”²³³ They should be proposing “ideas to make things better . . . [now that] they’ve got time on their hands.”²³⁴

But men who have been reflective and have reached out to accusers have not always found that productive. NPR host John Hockenberry, in a much-criticized *Harper’s* article, reported that only one of those who complained about his conduct “reached out or responded to [his] heartfelt queries”; others subjected him to stony, and in his view, “cowardly silence.”²³⁵ Hockenberry’s apparent inability to appreciate why these women may have been reluctant to engage with a former abuser speaks volumes about the gaps in understanding that remain to be bridged. However, his article also raised a critical question about when enough is enough. As he put it, “is a life sentence of unemployment without possibility of furlough, . . . and financial ruin an appropriate consequence? Does my being expunged from the

231. *Id.*

232. Avi Klein, *A Psychotherapist’s Plea to Louis C.K.*, N.Y. TIMES (Jan. 5, 2019), <https://www.nytimes.com/2019/01/05/opinion/sunday/louis-ck-comeback.html> [<https://perma.cc/P649-5V2M>].

233. 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> [<https://perma.cc/BH79-VGKA>].

234. *Id.*

235. John Hockenberry, *Exile: And a Year of Trying to Find a Road Back from Personal and Public Shame*, HARPER’S MAG. (Oct. 2018), <https://harpers.org/archive/2018/10/exile-4> [<https://perma.cc/5HN4-4L6Q>].

profession in which I have worked for decades constitute a step on the road to true gender equality?”²³⁶

Dream Hampton, the executive producer of *Surviving R. Kelly*, reflected on a similar question about what justice should look like in the R. Kelly case.²³⁷ In interviews with accusers for that documentary, Hampton asked them what message they would like to give to him if he were watching. Without exception, they pleaded with him to “get help” and to “just stop” hurting girls and women.²³⁸ They wished for him to heal and never mentioned prison. As Hampton notes, their reaction was consistent with what studies show about “restorative justice” initiatives in the criminal justice system. These initiatives require offenders to accept responsibility for their conduct and make restitution. “Through direct dialogue with victims, [offenders] gain a greater understanding of the consequences of their actions, which can encourage genuine remorse, empathy, and reconciliation, and can [reduce the likelihood of future abuse].”²³⁹ Restorative justice programs have been at least as effective in deterring further offenses as traditional punitive methods and have also given victims a greater sense of justice and closure.²⁴⁰ However, as Hampton noted, R. Kelly’s initial reaction to the documentary suggests that he is currently “no candidate for restorative justice.”²⁴¹ In a televised interview with Gayle King, he “erupted with rage, . . . cast himself as the victim, . . . [and

236. *Id.*

237. Dream Hampton, *R. Kelly’s Accusers Deserve Justice. But What Should That Look Like?*, TIME (Mar. 6, 2019), <https://time.com/5545827/r-kelly-justice-dream-hampton> [<https://perma.cc/7FDX-84KR>].

238. *Id.*

239. DEBORAH L. RHODE, CHARACTER: WHAT IT MEANS AND WHY IT MATTERS 93 (2019); Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. CRIM. L. REV. 353, 401 (2019); see Gabrielle Maxwell & Allison Morris, *Role of Shame, Guilt and Remorse in Restorative Justice Processes for Young People*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 267, 269, 280 (Elmar G. M. Weitekamp & Hans-Jürgen Kerner eds., 2002); Andrew von Hirsch, Andrew Ashworth & Clifford Shearing, *Specifying Aims and Limits for Restorative Justice: A ‘Making Amends’ Model?*, in RESTORATIVE JUSTICE & CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS 211 (Andrew von Hirsch, et al. eds., 2003).

240. LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 88 (2007); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 116–17 (2004). For further discussion of these programs, see generally PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY (Andrew von Hirsch & Andrew Ashworth et al., eds., 2d ed. 1998).

241. Hampton, *supra* note 237.

blamed] the parents begging [him] for contact with their young daughters.”²⁴²

If such examples suggest any generalizable insight, it is the need for deeper reflection about what redemption means for former harassers and what can prevent backlash from antiharassment policies. Experts such as Sister Helen Prejean, a nun who worked with death row inmates, have reminded us that “people are more than the worst thing they have ever done in their life.”²⁴³ So too, many men who have lost positions following #MeToo deserve to be judged not only by their past abuses but also by their efforts to atone and forge a constructive path forward. What concrete actions that involves cannot be resolved in the abstract; it depends on the context of particular cases. But past failures suggest the importance of three strategies: a sincere public apology; a recognition of the harm suffered by victims and the reasons they might not wish to relive it by engaging with perpetrators; and a commitment to concrete actions of atonement, restitution, and personal change. We need to see prominent individuals model that behavior. And we need more candid discussion from stakeholders of both sexes about how to sustain the positive momentum of #MeToo while minimizing any injustices along the way.

III. SUSTAINING THE MOMENTUM

We do not lack for reform strategies. Most follow directly from the critiques of legal and organizational regimes summarized above. In general, the most useful legislative fixes are also the most politically difficult, such as expanding the reach and remedies of relevant statutes. But the discussion below also identifies some narrower “small wins” that could help deter and sanction misconduct, such as curbing the use of mandatory arbitration clauses and secret settlements. Substantial progress is also possible through changes in organizational policies, training, and evaluation. Where workplace leaders are insufficiently proactive, employees, consumers, and oversight agencies can help increase pressure for change.

242. *Id.*

243. Sue Halpern, *Sister Sympathy*, N.Y. TIMES (May 9, 1993), <https://www.nytimes.com/1993/05/09/magazine/sister-sympathy.html> [<https://perma.cc/WY38-P6WN>] (quoting Prejean).

A. *Addressing Limitations in Law and Enforcement*

Activists should take advantage of the momentum created by #MeToo to address the longstanding limitations in harassment and discrimination law discussed in Part I. One priority should be to expand state and federal statutes to cover all workers, extend the time for complaints, allow suits against harassers, and eliminate caps on damages.²⁴⁴ Given that our economy continues to move away from traditional conceptions of an “employee” through the gig economy and the rise of independent contractors, Title VII’s protections should be broadened to encompass nontraditional employment relationships, thus extending such protections to industries that are currently beyond the statute’s reach.²⁴⁵ Also, in interpreting sexual harassment legislation, courts should demand less of complainants and more of employers. Definitions of harassment should include a more expansive understanding, informed by social science research, about what kinds of behavior interfere with workplace performance and when it is reasonable for victims to avoid internal complaint channels.²⁴⁶ In determining what constitutes a hostile or offensive working environment, judges and juries should consider how conduct would affect a reasonable person with the relevant characteristics of the complainant, including race, class, gender, and sexual orientation.²⁴⁷

Legislatures should also consider reforms that address mandatory arbitration clauses and secrecy provisions. One proposal is for Congress to amend Title VII to allow parties alleging discrimination and harassment to bring federal lawsuits, including class actions, regardless of any contract provisions requiring arbitration or barring

244. RAGHU & SURIANI, *supra* note 29, at 3–5; Carrie N. Baker, *Change Is Coming: Nine Ways Feminists Are Fighting Back Against Sexual Harassment and Workplace Discrimination*, MS. (July 2, 2018), <https://msmagazine.com/2018/07/02/change-coming-nine-ways-feminists-fighting-back-sexual-harassment-workplace-discrimination> [<https://perma.cc/B8BG-HCWZ>].

245. Grace Huang, Opinion, *How to Make Sure Immigrant Women Aren’t Left Out of Me Too*, HUFFPOST (June 30, 2018, 8:00 AM), https://www.huffpost.com/entry/opinion-huang-immigrant-women-me-too_n_5b33f9dee4b0b5e692f3f7e6 [<https://perma.cc/LX4P-FXWL>].

246. See Schultz, *Open Statement*, *supra* note 19, at 44 (advocating that reports to internal complaint channels be voluntary not mandatory).

247. Onwuachi-Willig, *supra* note 24. That standard is consistent with the one that the Supreme Court articulated in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which held that the “severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.” *Id.* at 81. The framework advocated here emphasizes that those circumstances should include characteristics central to the plaintiff’s identity.

collective actions.²⁴⁸ State and federal lawmakers could also ban or restrict nondisclosure agreements that prohibit employees from revealing information about discrimination, sexual harassment, and sexual assault.²⁴⁹ The downside of such antisecrecy provisions, of course, is that they would make employers less likely to settle claims and would deny the privacy that many victims as well as employers desire. But the cost of the current regime, vividly demonstrated by Weinstein, O'Reilly, Ailes, et al., is that it too often fails to prevent serial abuse.

A number of compromise proposals are worth considering as ways to balance these competing concerns. One possibility, put forward by Yale Law School Professor Ian Ayers, would be to require that any nondisclosure agreement acknowledge the rights of settling parties to contact and cooperate with agency investigations of misconduct.²⁵⁰ Another possibility would be to allow parties to such agreements to record their allegations in an escrow account operated by the EEOC or its designated representative. If an additional complaint involving the same perpetrator is received, the original complainant could decide whether to go public, or the original complaint could be subject to investigation.²⁵¹ An increasing number of colleges and universities have successfully implemented such systems for campus sexual assault.²⁵² An additional way to increase transparency and employers' accountability would be to require that they disclose to civil rights agencies the number, type, and resolution of any discrimination complaints that they receive. Such information could be publicly available on agency websites, which would increase pressure on management to prevent abuse.²⁵³

Job applicants can also put pressure on employers to disclose their policies and rethink mandatory arbitration requirements. For example, in 2018, the Women's Law Associations at major law schools surveyed

248. Schultz, *Open Statement*, *supra* note 19, at 47.

249. *Id.* at 48. One proposed federal bill, the EMPOWER Act, H.R. 1521, 116th Cong. (2019), would prohibit employers from requiring employees to sign nondisclosure agreements related to sexual harassment. Alexia Fernández Campbell, *A New House Bill Would Bar Companies from Using Nondisclosure Agreements to Hide Harassment*, VOX (July 18, 2018 3:20 PM), <https://www.vox.com/2018/7/18/17586532/sexual-harassment-bill-ban-nondisclosure-agreements-ndas-congress-metoo> [<https://perma.cc/462Y-4F8Y>].

250. Ayres, *supra* note 93, at 79; Schultz, *Open Statement*, *supra* note 19, at 47–48.

251. Schultz, *Open Statement*, *supra* note 19, at 85–86.

252. For an explanation of the Callisto system, see CALLISTO, <https://www.projectcallisto.org> [<https://perma.cc/B2GW-CXZA>].

253. RAGHU & SURIANI, *supra* note 29, at 5.

large law firms about their use of mandatory arbitration policies, posted the results, and began calling on students to avoid taking jobs at firms with such policies. In response to a #DumpKirkland campaign, Kirkland & Ellis announced that it would no longer require arbitration of disputes brought by associates or summer associates.²⁵⁴ A few weeks later, the firm stopped imposing such requirements on nonattorney staff.²⁵⁵

State and federal legislatures should also increase the authority, resources, and sanctions available to enforcement agencies. The EEOC is starved for funding that would increase staff and enable the Commission to reduce backlogs and expand investigations. Lawmakers should also enact requirements, such as those outlined in the recently proposed federal EMPOWER Act, that would authorize a confidential tip line at the EEOC.²⁵⁶ More jurisdictions should follow the lead of California, which has taken additional steps to protect the most vulnerable workers. Recent legislation expands the state labor commissioner's power to investigate retaliation, even without a formal complaint, and raises penalties for employers found guilty.²⁵⁷

B. Improving Internal Practices

A second priority should be reforms designed to promote cultures of respect, accountability, and gender equity.²⁵⁸ Internal organizational policies should ensure multiple reporting channels for complaints, prompt and evenhanded investigations, effective protection from retaliation, and meaningful sanctions for misconduct.²⁵⁹ Employers should also do more to prevent harassing behavior by conducting

254. The Kirkland campaign was organized by the Pipeline Parity Project at Harvard Law School. For details of student efforts and survey results, see *Women's Law Associations Take Action on Mandatory Arbitration*, PIPELINE PARITY PROJECT (Dec. 3, 2018), <https://www.pipelineparityproject.org/wlasdumparbitration> [<https://perma.cc/FB4J-QSWL>].

255. Anna Stolley Persky, *#MeToo and a Time of Reckoning for the Law*, WASH. LAW., Mar. 2019, at 19.

256. H.R. 1521, 116th Cong. (2019). For discussion, see Toni Van Pelt, *#MeToo—Still*, MS., Spring 2019, at 42.

257. Lisa Nagele-Piazza, *Expansive California Workplace Retaliation Law Takes Effect Soon*, SOC'Y FOR HUM. RES. MGMT. (Nov. 13, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/expansive-california-workplace-retaliation-law-takes-effect-soon.aspx> [<https://perma.cc/K5GV-7SFK>].

258. Rhode, *How Unusual*, *supra* note 74.

259. RAGHU & SURIANI, *supra* note 29, at 5; Schultz, *Open Statement*, *supra* note 19, at 37–39.

anonymous workplace-climate surveys and exit interviews with departing employees.²⁶⁰

Managers also need to address conditions that make bias and abuse more likely. As researchers have long noted, and #MeToo revelations confirmed, those with unchecked discretionary authority are more likely to abuse it.²⁶¹ Power often enhances individuals' sense of entitlement and insulation from accountability.²⁶² When organizations refuse to rein in "high performers" who are bullies or dictatorial leaders, the stage is set for serial abuse. As the EEOC task force noted, "superstar status can be a breeding ground for harassment."²⁶³ The cost of these toxic workers far outweighs their profitability.²⁶⁴ Organizations need to be proactive in ensuring that individuals with the most power over hiring, firing, and promotion are subject to checks on authority and requirements that they document reasons for their decisions. When employers fail to take appropriate measures, employees and consumers can put pressure on them to do so. For example, more than two thousand workers signed an open letter to the board of directors of a prominent United Kingdom fashion chain to protest a "culture that leaves harassment unchallenged."²⁶⁵

Workplaces also should devote more effort to designing and evaluating training programs. For the last several decades, such programs have been a centerpiece of employer responses to sexual harassment. The EEOC has recommended training as a strategy for preventing misconduct, and Supreme Court decisions have suggested that it can help employers avoid liability.²⁶⁶ Over half the states require

260. For exit interviews, see Gertner, *supra* note 38, at 28.

261. Schultz, *Open Statement*, *supra* note 19, at 33; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 50–58.

262. DACHER KELTNER, *THE POWER PARADOX: HOW WE GAIN AND LOSE INFLUENCE* 100–03 (2016); Cameron Anderson, Deborah H. Gruenfeld & Dacher Keltner, *Power, Approach, and Inhibition*, 110 *PSYCHOL. REV.* 265, 279 (2003).

263. FELDBLUM & LIPNIC, *supra* note 19, at 24.

264. Michael Housman & Dylan Minor, *Toxic Workers* 22 (Harv. Bus. Sch., Working Paper No. 16-057, 2015).

265. Lianne Kolirin, *Ted Baker Staff Demand End to 'Forced Hugging' at Work*, CNN (Dec. 3, 2018, 8:42 AM), <https://www.cnn.com/2018/12/03/uk/ted-baker-hugs-gbr-scli-intl/index.html> [<https://perma.cc/ZBD6-U29Ts>].

266. The EEOC's 1980 Guidelines suggested that employers should develop "methods to sensitize all concerned." 29 C.F.R. § 1604.11(f) (1980). The Supreme Court discussed employers' need to take preventive action in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In interpreting these decisions, the EEOC suggested that employers should provide training. U.S. Equal Emp. Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment

some sexual harassment training, typically only for public employees.²⁶⁷ Yet, despite the millions of hours and dollars invested in such initiatives, we lack convincing evidence that they significantly reduce abusive behaviors.²⁶⁸ Neither commercial trainers nor the organizations that hire them have sufficient incentive or expertise to objectively evaluate their impact. No one wants to risk a finding that their approach does not demonstrably reduce bias.²⁶⁹ The EEOC task force report found as much and documented the inadequacy and inconsistency of research findings on effectiveness; as it concluded, “[m]uch of the training done over the last 30 years has not worked as a prevention tool.”²⁷⁰ Although programs can have positive effects by increasing understanding of what constitutes offensive, unwelcome, and unacceptable behavior, they do not necessarily change the attitudes and practices that perpetuate it.²⁷¹ Poorly designed training can entrench gender stereotypes, encourage male backlash, and reinforce the very biases that it is designed to confront.²⁷² In evaluating one of Stanford University’s early harassment education programs, a faculty member expressed common views with uncommon candor: “This appears to be a course designed by idiots for idiots.”²⁷³

That is not to suggest that employers should abandon training. Rather, they should restructure its approach and evaluate its effectiveness. Based on the limited information available to date, the EEOC task force and other experts have recommended the use of

by Supervisors V(c)(1) (1999). The EEOC also frequently negotiates conciliation and consent decrees that require training. FELDBLUM & LIPNIC, *supra* note 19, at 44.

267. RAGHU & SURIANI, *supra* note 29, at 6.

268. FELDBLUM & LIPNIC, *supra* note 19, at 47. For a recent large-scale survey finding that diversity training produced no measurable behavioral changes in the target population—groups that were not already strongly supportive of women in the workplace—see Edward H. Chang et al., *The Mixed Effects of Online Diversity Training*, 116 PNAS 7778, 7788 (2019).

269. JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* 280 (2019).

270. FELDBLUM & LIPNIC, *supra* note 19, at 46–48.

271. See studies reviewed in *id.* at 46–47. For an example of research finding men’s increased knowledge but also increased belief that both parties contribute to harassment, see Shereen G. Bingham & Lisa L. Scherer, *The Unexpected Effects of a Sexual Harassment Educational Program*, 37 J. APPLIED BEHAV. SCI. 125, 142–43 (2001).

272. See studies reviewed in Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 163 (2001), Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 37–38 (2001), and Bisom-Rapp, *Sex Harassment Training Must Change*, *supra* note 19, at 69, 73.

273. RHODE, *WHAT WOMEN WANT*, *supra* note 28, at 108.

qualified, interactive, and preferably live trainers who adapt their approaches to the type of workplaces involved.²⁷⁴ Also recommended are programs that include bystander intervention and civility education.²⁷⁵ But whatever approach organizations choose, they should monitor its impact on employee conduct and workplace culture. The EEOC task force also suggested that settlement and consent agreements should require that employers work with researchers to assess organizational climate and educational programs.²⁷⁶ It also urged employers to come together to offer researchers data that could be analyzed—without identifying individual organizations—to evaluate training and other antidiscrimination initiatives.²⁷⁷

C. *Broadening the Agenda*

In short, reforms addressing sexual harassment need to be part of a broader agenda for gender equity. Yale Law School professor Vicki Schultz puts it bluntly: “[E]nding sex-based harassment means ending workplace sex segregation and inequality.”²⁷⁸ That, in turn, will demand a wide array of initiatives aimed at combatting implicit bias, challenging in-group favoritism, and reducing work–life conflicts.²⁷⁹ It will also require paying more attention to intersectional identities and the way that gender interacts with factors such as race, class, ethnicity, and sexual orientation to reinforce patterns of subordination. The goal should be, as a Time’s Up Commission open letter put it, a “significant increase of women in positions of leadership and power across industries[,]” and “equal representation, opportunities, benefits and pay for all women workers.”²⁸⁰

274. *Id.* at 52.

275. *Id.* at 54–56; see also Sabri Ben-Achour, *What Makes Sexual Harassment Training Effective — and Ineffective*, MARKETPLACE (Nov. 9, 2017), <https://www.marketplace.org/2017/11/09/what-makes-sexual-harassment-training-effective> [https://perma.cc/H7CV-HXNJ]; Ron Zamir, *Combating Ineffective Sexual Harassment Training: Creating a Culture of Respect and Empathy*, TRAINING INDUSTRY (Jan. 3, 2018), <https://trainingindustry.com/articles/compliance/combating-ineffective-sexual-harassment-training-creating-a-culture-of-respect-and-empathy> [https://perma.cc/K2AT-UDK7].

276. FELDBLUM & LIPNIC, *supra* note 19, at 53.

277. *Id.* at 54.

278. Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 61.

279. For examples see RHODE, *WOMEN AND LEADERSHIP*, *supra* note 140, at 10–34, 132–34.

280. *Open Letter from Time’s Up*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html> [https://perma.cc/ANS6-T6Z4].

None of this will be easy. In the short term, there will be difficult conversations and unintended consequences. Activists leading the charge need to be mindful of those costs and do their best to minimize the chances of unfair accusations and unjust outcomes. But this is clearly a moment to build on momentum. Well over two-thirds of women support the #MeToo movement.²⁸¹ The challenge remaining is to channel that support toward fundamental and sustainable change.

281. Anna North, *The #MeToo Generation Gap Is a Myth*, VOX (Mar. 20, 2018, 5:45 AM), <https://www.vox.com/2018/3/20/17115620/me-too-sexual-harassment-sex-abuse-poll> [<https://perma.cc/PN3L-8H8V>].