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Institutional Responses to #MeToo Claims: #VaticanToo, #KavanaughToo, and the Stumbling Block of Scandal

Mary Anne Case[†]

INTRODUCTION

The #MeToo movement has led institutions of all sorts to take more seriously than heretofore claims that powerful men, in time frames ranging from decades ago to very recently, have engaged in sexual imposition ranging from rape to crude suggestiveness. What the movement has not resolved is what is to be done going forward with the men against whom such claims are credibly asserted. The hope that they would voluntarily and permanently step aside was, of course, overoptimistic. Even those men whose advanced age would suggest the possibility of a graceful step into retirement, such as TV personality Charlie Rose, have already attempted a comeback.¹ Yet, the possibility that no avenue for redemption seems open may have led many of the accused to make the rational calculation that anything short of categorical denial would be career ending.

The calculation for the institutions involved is also difficult, as an analogy might help illustrate. After World War II, the victorious Allies ultimately refrained from imposing widespread de-Nazification on Germany, and Germany rapidly became one of the world's most stable constitutional democracies. After invading Iraq, the United States

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¹ Laura Bradley, *Someone Is Reportedly Plotting Charlie Rose's TV Comeback—But Who?*, VANITY FAIR (April 26, 2018), <https://www.vanityfair.com/hollywood/2018/04/charlie-rose-tv-series-me-too-scandal-matt-lauer-louis-ck-tina-brown> [<https://perma.cc/93CU-GXYW>] (describing proposal for a show in which Rose would interview other men caught up in #MeToo scandals and mentioning comeback efforts of other such men).

promptly dissolved both the Ba'ath Party and the Iraqi Army, resulting in continuing horrendous violence and instability.² Among those interested in applying the tools of transitional justice in the #MeToo context, some have suggested that the approach of truth and reconciliation, pioneered in Latin America but most famously applied in post-apartheid South Africa, could be a fruitful one because it offers a path to the reintegration of offenders; others have looked to the example of lustration³ in recommending a “career death penalty”⁴ for particularly egregious, high-profile offenders.

This paper will center on another kind of institutional response, actually though disastrously used by the Catholic Church in its response over time to allegations of clerical sexual abuse, a response the Church saw as dictated by the canon law doctrine of scandal.⁵ As the Catholic Church saw it, even worse than the sexual sins committed by its clergy would be public acknowledgement of them in such a way as to present a stumbling block (“σκάνδαλον” or “skandalon” in Greek) to the faith of believers. Thus, secrecy to the point of cover-up could be seen, not as a problem, but as an imperative, a contribution to the greater good. The hierarchy’s response to sexual abuse by clergy was for decades focused first and foremost on reputation management.

Though the specifics of the Catholic response are rooted in its canon law and theological commitments, as this paper will show, the general approach of above all avoiding scandal so as to preserve institutional reputation has many diverse parallels in the #MeToo era. The paper will briefly consider two of them. The first, closely analogous, concerns the mobilization of halachic (Jewish law) equivalents of the doctrine of scandal to respond to sex abuse allegations in the Haredi, or ultra-orthodox, Jewish community. The second, less directly analogous but also potentially instructive, concerns the interplay of institutional reputational concerns in the procedures and the rhetoric used to deal with

² For an overview and comparison of the processes in post-war Germany and Iraq, see generally Aysegül Keskin Zeren, *From De-Nazification of Germany to De-Baathification of Iraq*, 132 POL. SCI. Q. 259 (2017).

³ For a discussion of these and other transitional and restorative justice strategies as applied in the #MeToo context, see generally Lesley Wexler, Jennifer K. Robbennolt, & Colleen Murphy, *#MeToo, Time’s Up, and Theories of Justice*, 19 U. ILL. L. REV. 47 (2019).

⁴ See Lesley Wexler, *#MeToo: Not Decapitation, but Possibly Lustration*, VERDICT (April 27, 2018), <https://verdict.justia.com/2018/04/27/metoo-not-decapitation-possibly-lustration> [https://perma.cc/M5E9-3QZM].

⁵ Although, as this paper will show, specifics of Catholic doctrine and structure shaped much of the response, it might be worth noting that each of the recent popes most directly confronted by the problem had experience in his country of origin with institutional responses to those involved in systemic institutional evil—Francis lived through the Argentine junta and its aftermath, Benedict through Nazi Germany and de-Nazification, John Paul II through both the Nazi and the Soviet Communist regimes in his native Poland.

sexual assault allegations against Supreme Court nominee Brett Kavanaugh.

Many have argued that the doctrine of scandal, inasmuch as it prioritizes a concern for institutional reputation, is per se misguided and should be abandoned in favor of a more victim-centered approach.⁶ This paper will take a different tack: conceding that there is validity to the idea behind the doctrine of scandal, to wit that the effect of allegations of wrongdoing by those in power on the people's faith in institutions needs to be an important consideration in responding to those allegations, it will argue that the doctrine itself needs to be reformed because it is the conventional operation of the doctrine, as it motivates and justifies cover up of wrongdoing, that has become a stumbling block to faith in the institutions affected.

This revisionist point of view, that avoidance of scandal requires not secrecy, but openness and disclosure, has gradually seeped into the rhetoric of the Catholic Church. After decades of being told it was their duty to keep silent, sex abuse survivors finally heard Pope Francis say to his bishops in 2015 that “the crimes and sins of sexual abuse of minors cannot be kept secret any longer” and heard him acknowledge that the Church “owe[s] each of [the survivors of abuse] and their families gratitude for their immense courage in making Christ's light to shine upon the evil of sexual abuse of children.”⁷ Nearly three years later, in a June 5, 2018 letter to the Chilean people, Francis spoke for the first time and repeatedly of “a culture of abuse and cover up” and acknowledged with “shame . . . that we did not know how to listen and react in time.”⁸ He declared it “urgent to create spaces where the culture of abuse and cover up is not the dominant scheme, where a critical and questioning attitude is not confused with betrayal”⁹ and to “promote communities capable of fighting against abusive situations, communities where exchanges, debate and confrontation are welcome.”¹⁰

As the paper will discuss, the evolution of Pope Francis's rhetoric and his position in the intervening years, like that of the Catholic

⁶ See, e.g., Cathleen Kaveny, *What Benedict's Letter on Sex Abuse Gets Wrong*, COMMONWEAL (May 20, 2019), <https://www.commonwealmagazine.org/putting-justice-first> [<https://perma.cc/R6KT-G9AD>].

⁷ See Joshua McElwee, *For Only Second Time, Francis Meets Abuse Survivors, Says 'God Weeps'*, NAT'L. CATH. REP. (Sep. 27, 2015), <https://www.ncronline.org/news/vatican/only-second-time-francis-meets-abuse-survivors-says-god-weeps> [<https://perma.cc/XS8D-623H>]. These off-the-cuff remarks to bishops came immediately after Francis's second meeting ever, more than two years into his papacy, with abuse survivors.

⁸ Letter from Pope Francis to the Pilgrim People of God in Chile, ¶ 3 (Jun. 5, 2018) (Catholic News Agency trans.), <https://www.catholicnewsagency.com/news/full-text-of-pope-francis-letter-to-the-church-in-chile-35580> [<https://perma.cc/ZGD4-H443>].

⁹ *Id.* at ¶ 4.

¹⁰ *Id.* at ¶ 5.

Church more generally, is not a straightforward progress narrative, but rather each step forward is in turn provoked by and then regrettably followed by a step back. Among the latest attempts at a step forward was an extraordinary meeting of the heads of bishops' conferences called in late February 2019 at the Vatican on "The Protection of Minors in the Church." Francis's explanation of the reason for this summit already exemplified the shift in the discourse of scandal. "As you know," he said,

the issue of the sexual abuse of minors by members of the clergy has for some time given rise to a serious scandal in the Church and in public opinion, both for the tragic suffering of the victims and due to the unjustifiable lack of attention given to them and to covering for the guilty by people with responsibility in the Church.¹¹

The three days of the summit were dedicated respectively to three overarching themes, responsibility, accountability, and transparency, which in themselves are indicative of a desire to shift the terms of the discourse. What concrete changes in laws, policies, or attitudes will follow remain to be seen.¹² But it is noteworthy that among the best received speakers at the summit were the three women: Nigerian Sister Veronika Openibo, who asked, "Is it possible for us to move from fear of scandal to truth?" and answered that "openness to the world" and "transparency should be the hallmark of mission as followers of Jesus Christ;"¹³ Mexican journalist Valentina Alazraki, who warned that, "the more you cover up, the more you play ostrich, fail to inform the mass media and thus, the faithful and public opinion, the greater the scandal will be;"¹⁴ and Italian canon lawyer Linda Ghisoni, who called for the active participation of lay people in diocesan supervisory commissions and for changes in the "current legislation on pontifical secrecy. . . ."¹⁵

¹¹ Pope Francis, *Angelus* in Saint Peter's Square (Feb. 24, 2019), http://w2.vatican.va/content/francesco/en/angelus/2019/documents/papa-francesco_angelus_20190224.html [https://perma.cc/2A43-C4MW].

¹² A few, and the absence to date of others, are discussed below.

¹³ Sr. Veronica Openibo, Society of the Holy Child Jesus, *Openness to the World as a Consequence of the Ecclesial Mission*, Presentation at "The Protection of Minors in the Church" Meeting (Feb. 23, 2019), http://www.vatican.va/resources/resources_suoropenibo-protezioneminori_20190223_en.html [https://perma.cc/CFW9-L32Z].

¹⁴ *Journalist Valentina Alazraki Urges Bishops to Reject Secrecy*, ZENIT (Feb. 23, 2019), <https://zenit.org/articles/jouanalist-valentina-alazraki-urges-bishops-to-reject-secrecy/> [https://perma.cc/7R6Z-PQXB].

¹⁵ Gerard O'Connell, *Vatican Official Urges Revision on Pontifical Secret and Role of Laity in Abuse Crisis*, AMERICA MAGAZINE (Feb. 22, 2019), <https://www.americamagazine.org/faith/2019/02/22/vatican-official-urgues-revision-pontifical-secret-and-role-laity-abuse-crisis> [https://perma.cc/F5S6-PYJM]. In addition to Alazraki, powerful cardinals Reinhard Marx of Germany and Blase Cupich of Chicago also called for revision of pontifical secrecy mandates. See, e.g., John L. Allen,

I. “SCANDAL” AS A TERM OF ART

“In Biblical language, scandal signifies a trap, that which causes a fall, therefore something which causes one to falter, which endangers faith.”¹⁶ Thomas Aquinas, who crystallized the doctrine already developed by Peter the Chanter and his followers around 1200, defined scandal as “something less rightly done or said, that occasions another’s spiritual downfall.”¹⁷ The early theorists of scandal had already been careful to subordinate the need to avoid scandal to concern for the three-fold “truth of life, doctrine, [and] justice,”¹⁸ taking their cue from Gregory the Great, who had declared:

As much as we can without sin, we ought to avoid scandal to our neighbors. But if scandal is taken from truth, it is better that scandal be allowed to arise than that truth be relinquished.¹⁹

In recent years, the doctrine’s use has not been limited to questions of covering up clergy sex abuse, it has more generally been used to ground something approximating an all-purpose don’t-ask-don’t-tell approach to violations of Church norms on sexual conduct. Thus, for example, both in vitro fertilization and same-sex marriage have led to firings of Catholic school teachers at the point that conduct previously tolerated by Catholic institutional employers became widely known and was therefore seen as giving rise to scandal.²⁰ As explained in one of the earliest archdiocesan reports on clergy sex abuse, the 1990 Winter report from St. John’s Newfoundland,

The traditional cultural and ecclesiastical concern for avoiding the spread of scandal is based on the view that if people see their leaders and those they admire doing evil things the tendency

Jr., *No Secret that ‘Pontifical Secrecy’ is Taking a Beating at Pope’s Summit*, CRUX (Feb. 24, 2019), http://www.bishop-accountability.org/news2019/01_02/2019_02_24_John_Crux_No_rsquo.htm [https://perma.cc/47TV-8SVU].

¹⁶ Georges Cottier, *Counter-Witness and Scandal* (1996), https://www.vatican.va/jubilee_2000/magazine/documents/ju_mag_june-sept-1996_cottier_en.html [http://perma.cc/6XH4-ZFL2].

¹⁷ 3 THOMAS AQUINAS, *SUMMA THEOLOGICA*, § 2.2 Q. 12, A. 43 (Benziger Bros. ed., 1947); see also 3 THE CATECHISM OF THE CATHOLIC CHURCH § 2.2 A. 5,2284-87 (“Scandal is an attitude or behavior which leads another to do evil . . . the person who gives scandal . . . damages virtue and integrity; he may even draw his brother into spiritual death”).

¹⁸ See Lyndsey Bryan, *Periculum animarum: Bishops, Gender, and Scandal*, 19 FLORILEGIUM 49 n.1 (2002) (citing texts).

¹⁹ *Id.* (quoting Gregory’s *Homiliarum in Ezechielem*, lib. I, Horn. VII, PL 76, col. 842).

²⁰ See, e.g., MailOnline Reporter and Associated Press, *Roman Catholic Schoolteacher Who Says She Was Fired by Diocese for Trying to Get Pregnant through In Vitro Fertilization Will Take Case to Court*, DAILY MAIL (Sep. 5, 2014), <https://www.dailymail.co.uk/news/article-2745396/Suit-vitro-fertilization-trial.html> [https://perma.cc/8UTZ-6S5J].

will be “to stumble” either by direct imitation of those evil actions or by being shocked into turning away from the good that may be associated even with those who do evil.²¹

Two scriptural references to scandal are particularly important in the context of clergy sex abuse. The first, Romans 14:13, enjoins, “Let us not therefore judge one another any more. But judge this rather, that you put not a stumbling block or a scandal in your brother’s way.”²² The second, which appears with slight variants in the gospels of Matthew and Mark, reads in Matthew:

Whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea. Woe to the world because of scandals! For it is necessary that scandals come, but woe to the man by whom the scandal comes!²³

Many commentators on the clergy sex abuse scandals have interpreted this passage literally, seeing “little ones” as the young children on whom clergy have imposed themselves sexually.²⁴ But, in his recent controversial intervention into the sex abuse debate, emeritus Pope Benedict XVI insists that “[t]he modern use of the sentence is not in itself wrong, but it must not obscure the original meaning.”²⁵ According to Benedict XVI, “the little ones’ in the language of Jesus means the common believers who can be confounded in their faith” and Jesus in this passage “protects the deposit of the faith with an emphatic threat

²¹ 1 GORDON WINTER ET AL., REPORT OF THE ARCHDIOCESAN COMMISSION OF ENQUIRY INTO THE SEXUAL ABUSE OF CHILDREN BY MEMBERS OF THE CLERGY, Vol. 1, 112 (1990), http://bishop-accountability.org/reports/1990_06_Winter_St_Johns/1990_Winter_Volume_1.pdf [<https://perma.cc/WHH4-9ZZ4>].

²² *Romans* 14:3 (Douay-Rheims).

²³ *Matthew* 18:6–7, as quoted by Pope Francis, Address at the End of the Eucharistic Concelebration at “The Protection of Minors in the Church” Meeting (Feb. 24, 2019), http://w2.vatican.va/content/francesco/en/speeches/2019/february/documents/papa-francesco_20190224_incontro-protezioneminori-chiusura.html [<https://perma.cc/XJ2K-K9CG>].

²⁴ See, e.g., Pope Francis, Address at the End of the Eucharistic Concelebration at “The Protection of Minors in the Church” Meeting (Feb. 24, 2019), http://w2.vatican.va/content/francesco/en/speeches/2019/february/documents/papa-francesco_20190224_incontro-protezioneminori-chiusura.html [<https://perma.cc/XJ2K-K9CG>].

²⁵ Pope Benedict XVI, *The Church and the Scandal of Sexual Abuse* (Apr. 10, 2019) (unpublished essay), <https://www.catholicnewsagency.com/news/full-text-of-benedict-xvi-the-church-and-the-scandal-of-sexual-abuse-59639> [<https://perma.cc/P2UK-VTUN>]. Among the many oddities of this essay is that, although rapidly translated and widely disseminated, it was originally scheduled for publication only in *Klerusblatt*, an obscure journal directed at the Bavarian clergy.

of punishment to those who do it harm.”²⁶ Benedict sees it as “an alarming situation” that in “the general awareness of the law, the Faith no longer appears to have the rank of a good requiring protection.”²⁷

Catholic theologian and law professor Cathleen Kaveny is scandalized by the fact that Benedict here “presents the major victim as the Faith itself—not the children whose integrity was violated.”²⁸ I share Kaveny’s distaste for Benedict’s general tendency to focus on lofty theological abstractions at the expense of vulnerable human beings. In other work, I have observed that his theological anthropology resembles what Carol Gilligan has called “doing math problems with humans.”²⁹ But, in this particular context, I think there is much to be said for Benedict’s approach. Consider the one concrete abuse victim Benedict does discuss in his essay, a former altar server whose abuser regularly used the words of consecration, “This is my body which will be given up for you,” in the course of pedophilic abuse. To Benedict, it “is obvious that this woman can no longer hear the very words of consecration without experiencing again all the horrific distress of her abuse.”³⁰ To Kaveny, this indicates that Benedict has mistakenly recharacterized the all too human horror of child rape as an abstract sacrilege. But, if one is a believer who values belief, loss of faith and of the ability to derive comfort from the trappings of faith can indeed be the most profound of harms.

Kaveny is also, in my view, wrong about the conclusions she assumes follow ineluctably from Benedict’s tendency to see the “worst consequence of the crisis [a]s the widespread loss of faith in the church’s credibility.”³¹ It does not necessarily follow that it is therefore “better to handle specific instances quietly, so as not to scandalize the faithful” or that “victims should be encouraged to remain quiet, perhaps with a legally binding confidentiality agreement” and with no monetary damages so as to safeguard the Church.³² While the actions Kaveny criticizes are indeed the ones the Catholic Church historically has taken to avoid scandal from sex abuse, this only reveals that church officials have been mistaken in the means they used to combat this scandal. Their approach to avoiding scandal may have been in practice worse

²⁶ Francis has expressed similar sentiments. See Pope Francis, Homily at the Closing Mass of the Eighth World Meeting of Families (Sep. 27, 2015), https://w2.vatican.va/content/francesco/en/homilies/2015/documents/papa-francesco_20150927_usa-omelia-famiglie.html [<https://perma.cc/R63H-TEXV>] (“For Jesus, the truly ‘intolerable’ scandal is everything that breaks down and destroys our trust in the working of the Spirit!”).

²⁷ Benedict XVI, *supra* note 25.

²⁸ Kaveny, *supra* note 6.

²⁹ See Mary Anne Case, *The Role of the Popes in the Invention of Complementarity and the Vatican’s Anathematization of Gender*, 6 RELIGION AND GENDER 155–172 (2016).

³⁰ Benedict XVI, *supra* note 25.

³¹ Kaveny, *supra* note 6.

³² *Id.*

than ineffectual, indeed counterproductive, but this does not mean their end is not a valuable one, which should still be pursued if more effective, less damaging means can be identified.

While I realize that the line may often be hard to draw and may be controversial even in principle, I would contend that there is an important difference between attempts at reputation management by institutions acting only in narrow self-interest and those for which a greater good is at stake. Only the latter are concerned in the technical sense with avoiding scandal. Consider a corporate analogy. Cigarette manufacturers who seek to hush up links between smoking and cancer may be protecting nothing more noble or valuable than their sales figures and their corporate profits, but vaccine manufacturers who seek to avoid publicity about rare adverse side effects may in fact be concerned about a greater good—a decline in the use of vaccines has negative externalities that a decline in cigarette consumption does not.³³ If one believes, as orthodox Catholics do, that “outside the Church there is no salvation,”³⁴ an abuse-provoked decline in Church membership means that more people are damned. Even absent this sort of theological commitment, individual victims and their families have convincingly spoken about the loss of their ability to trust in the persons in whom they had previously reposed the greatest trust of all, and of the severe psychological damage they suffered as a result. Publicizing this scandal without a good way of making amends for it or preventing it from recurring in future can spread these adverse consequences.

By contrast to Kaveny, and with Benedict XVI, I am therefore willing to consider the possibility that “the major victim [i]s the Faith itself,” but I would insist that secrecy to the point of cover up, far from protecting the faith or having a hope of doing so, is what has injured it. This can consistently be seen in the findings of decades worth of reports from multiple jurisdictions that have examined the Catholic Church’s response to clergy sexual abuse.

³³ Other public institutions from the U.S. Military to the police have long had comparable reputation management concerns and comparable difficulties addressing them. *See generally* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFFALO L. REV. 1275 (1999) (analyzing the tendency to anecdotalize and to resist seeing systemic patterns in police misconduct).

³⁴ 1 THE CATECHISM OF THE CATHOLIC CHURCH, § 2.3 A. 9, ¶ 3, 845, http://www.vatican.va/archive/ENG0015/_P29.HTM [<https://perma.cc/P8YR-5Y9C>].

II. THE CATHOLIC CHURCH'S FAILED EXERCISE OF REPUTATION MANAGEMENT

If there is a single conclusion common to reports from all corners of the globe examining sex abuse in the Catholic Church, whether produced last month or more than thirty years ago, whether by the Church itself, independent commissions, or law enforcement agencies, it is that a major obstacle to putting an effective stop to the abuse was the Catholic Church's obsession with protecting its own reputation and avoiding scandal. Consider the numbing sameness of the following representative findings, taken in chronological order.³⁵

As early as 1990, the Winter Commission, examining sex abuse in the Archdiocese of St. John's Newfoundland, observed that "the need to avoid scandal has played a part in the thinking of senior Archdiocesan administrators. . . . While such a policy may not be always and everywhere inappropriate it can lead to serious abuse."³⁶ Archbishop Alphonus Liguori Penney, who had commissioned the Winter Report and who was blamed in it for tolerating and covering up abuse, resigned on the day the report became public, becoming one of the first bishops in the world to accept responsibility, even though Vatican representatives sent to investigate did not think his resignation was warranted.³⁷ Twenty years later, commission member and pediatrician Sr. Nuala Kenny, insisted, "[W]e understood that there were deeper systemic issues that allowed it to happen If there's one thing I want to do, [it] is to help our bishops to understand that head down, avoiding scandal has resulted in the greatest scandal in the modern church."³⁸

Oklahoma Governor Frank Keating wanted to send a similar message, when, in 2003, as head of a lay National Review Board appointed by the United States Conference of Catholic Bishops ("USCCB"), he declared at a press conference, "To act like La Cosa Nostra and hide and suppress, I think, is very unhealthy, Eventually it will all come out."³⁹ Although an uproar over his remarks led to his resignation from

³⁵ That the examples included here are, as a matter of convenience, taken from reports published in English concerning English speaking countries, is no indication that the problem is in any way limited to such countries.

³⁶ WINTER ET AL., *supra* note 21, at 112.

³⁷ See *Abuse-Enabling Bishops Who Resigned or Were Removed*, BISHOPACCOUNTABILITY.ORG, <http://www.bishop-accountability.org/bishops/removed/> [<https://perma.cc/A22G-642G>].

³⁸ Canadian Broadcast System, *Betrayal: Abuse in the Catholic Church in Nova Scotia (2010)—The Fifth Estate*, YOUTUBE, min. 31:00–32:45 (Oct. 3, 2016), https://www.youtube.com/watch?v=_jmpu3TopHc [<https://perma.cc/6AQL-VQRH>] (originally aired on CBC, Oct. 1, 2010).

³⁹ Larry B. Stammer, *Mahony Resisted Abuse Inquiry, Panelist Says*, L.A. TIMES (June 12, 2003), <http://www.latimes.com/news/printedition/la-me-keatingnu12jun12,1,6706831.story> [<https://perma.cc/H7UW-3F7J>].

the USCCB Review Board,⁴⁰ its ultimate conclusions in 2004 were in line with his:

Faced with serious and potentially inflammatory abuses, Church leaders placed too great an emphasis on the avoidance of scandal in order to protect the reputation of the Church, which ultimately bred far greater scandal and reputational injury. . . . At heart, this was a failure of Church leadership, which lacked the vision to recognize that, unless nipped in the bud, the problems would only grow until they no longer could be contained, and that then the problems would have an even greater propensity to undermine the faith of the laity.

The impulse to avoid scandal at all costs manifested itself in several ways. First, Church leaders kept information from parishioners and other dioceses that should have been provided to them. Some also pressured victims not to inform the authorities or the public of abuse. . . . Bishops and other Church leaders often did not tell their brethren the full story when a priest took up residence in a new dioceses. . . . This lack of candor—with parishioners, with civil authorities, with fellow bishops—avoided scandal in the short term while sowing seeds for greater upheaval in the long term.⁴¹

It took another decade for a principal target of Keating's criticism, Los Angeles Cardinal Roger Mahony, to be barred by his successor from further public ministry in Los Angeles on account of his failures to protect young people from sexually abusive priests.⁴² Among Mahony's

⁴⁰ In his resignation letter, Keating again deplored the Church's "code of silence" and insisted, "I make no apology. To resist grand jury subpoenas, to suppress the names of offending clerics, to deny, to obfuscate, to explain away; that is the model of a criminal organization, not my church." See *Head of Abuse Panel Blasts Church's 'Code of Silence'*, BELIEFNET (2003), <https://www.beliefnet.com/news/2001/05/head-of-abuse-panel-blasts-churchs-code-of-silence.aspx> [<https://perma.cc/M5LW-HZJV>] (setting forth the full text of Keating's resignation letter).

⁴¹ ROBERT S. BENNETT ET AL., A REPORT ON THE CRISIS IN THE CATHOLIC CHURCH IN THE UNITED STATES PREPARED BY THE NATIONAL REVIEW BOARD FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 108 (Feb. 27, 2004). Bennett, Keating's replacement as head of the Review Board, drew an analogy only slightly less devastating to the bishops than Keating's to the Mafia. Bennett declared the bishops must "start acting like pastors and shepherds of their flock, and stop acting like risk assessment officers of insurance companies." He went on to explain, "In the church there has been a culture of secrecy, and it has gotten them in a lot of trouble. . . . [T]hey must be open, they must be transparent and they must be accountable." See Laurie Goodstein, *Bishops Uneasy on Whom to Protect*, N.Y. TIMES (June 13, 2003), <https://www.nytimes.com/2003/06/13/us/bishops-uneasy-on-whom-to-protect.html> [<https://perma.cc/S6L6-HE4F>] (quoting Bennett's reaction to bishops, including Roger Mahony of Los Angeles, who resisted providing information to the Review Board).

⁴² Jerry Filteau, *Cardinal Mahony Barred from Public Ministry in Los Angeles*, NAT'L CATH. REP. (Feb. 1, 2013), <http://ncronline.org/news/accountability/la-cardinal-mahony-barred-public-ministry> [<https://perma.cc/LBP2-RLR3>].

failed efforts at cover up was the assertion, ultimately rejected by the courts and having no discernible basis in either canon or secular law, that all of his communications about abuse allegations with affected priests were covered by what he called a “formation privilege,” and thereby shielded from disclosure even in a criminal case.⁴³ Unfortunately, to this day Keating has yet to be vindicated in the overoptimistic conclusion with which he began his 2003 resignation letter: “Never again will any bishop be able to hide or avoid the scandal of sex abuse in his diocese.”⁴⁴

Five years after the USCCB report, the 2009 *Murphy Report* into sex abuse in the Dublin archdiocese reached a by now familiar conclusion:

The Dublin Archdiocese’s pre-occupations in dealing with cases of child sexual abuse, at least until the mid 1990s, were the maintenance of secrecy, the avoidance of scandal, the protection of the reputation of the Church, and the preservation of its assets. All other considerations, including the welfare of children and justice for victims, were subordinated to these priorities.⁴⁵

Responding to the Murphy report and the companion Ryan report, which examined abuse in Irish Catholic schools, Benedict XVI, in his 2010 Pastoral Letter to the Catholics of Ireland, agreed that among the factors “that gave rise to the present crisis” were “a misplaced concern for the reputation of the Church and the avoidance of scandal . . . which have had such tragic consequences in the lives of victims and their families, and have obscured the light of the Gospel to a degree that not even centuries of persecution succeeded in doing.”⁴⁶

Nearly a decade after the Irish reports, an Australian government report repeated: “The response of various Catholic Church authorities to complaints and concerns about its priests and religious was remarkably and disturbingly similar. . . . [T]he avoidance of public scandal, the maintenance of the reputation of the Catholic Church and loyalty to

⁴³ See William Lobdell & Jean Guccione, *A Novel Tack by Cardinal*, L.A. TIMES (Mar. 14, 2004), <https://www.latimes.com/archives/la-xpm-2004-mar-14-me-priest14-story.html> [<https://perma.cc/5ZRY-S6PK>] (describing this claim); Roman Catholic Archbishop of Los Angeles v. Superior Court, 131 Cal. App. 4th 417 (2005) (rejecting this claim).

⁴⁴ See BELIEFNET, *supra* note 40.

⁴⁵ Yvonne Murphy et. al, *Commission of Investigation Report into the Catholic Archdiocese of Dublin*, § 1.15, 4 (2009), http://www.bishop-accountability.org/reports/2009_11_26_Murphy_Report/01_Overview.pdf [<https://perma.cc/46X4-3WBL>] [hereinafter *Murphy Report*].

⁴⁶ Pastoral Letter from Pope Benedict XVI to the Catholics of Ireland (Mar. 19, 2010), http://w2.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html [<https://perma.cc/HA54-Z5FY>].

priests and religious largely determined the responses of Catholic Church authorities.”⁴⁷

In 2018, the Grand Jury report on sex abuse and its cover-up in a number of Pennsylvania dioceses began by observing, “While each church district had its idiosyncrasies, the pattern was pretty much the same. The main thing was not to help children, but to avoid ‘scandal.’” Finally, most recently, an investigation into the Archdiocese of Birmingham, England concluded in June 2019, “The sexual abuse perpetrated . . . could have been stopped much earlier if the Archdiocese had not been driven by a determination to protect the reputation of the Church.”⁴⁸

Ironically, even those members of the hierarchy alive to its problems with reputation management seem powerless to improve it. Consider Archbishop Wilton Gregory, who quoted Machiavelli to a reporter to explain the Church’s problems as follows:

If a prince, if a leader is going to give away a thousand ducats, he should do it one ducat at a time because people forget, but if he has to slay a thousand soldiers, he should do it in one night because people forget. The constant revelation, the continual disclosure of bad, criminal behavior keeps this issue alive. And it’s as though it’s a never-ending drama.⁴⁹

Gregory has himself been a major player in this never-ending drama for decades. He was president of the U.S. Conference of Catholic Bishops in 2002 when it prepared its first Charter for the Protection of Children and Young People (the “Dallas Charter”) in response to the scandal caused by the Boston Globe’s Spotlight team’s exposé of priest sexual abuse and episcopal cover-up.⁵⁰ During his presidential term, he was held in contempt of an Illinois court for failing to release the files of a suspended predator priest in his diocese.⁵¹ Most recently, in the

⁴⁷ 16 AUSTRALIAN ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, FINAL REPORT: RELIGIOUS INSTITUTIONS, Bk. 2, § 13.5.9, 278 (2017), https://www.childabuse.royalcommission.gov.au/sites/default/files/final_report_-_volume_16_religious_institutions_book_2.pdf [<https://perma.cc/N829-GLSY>].

⁴⁸ ALEXIS JAY ET AL., THE ROMAN CATHOLIC CHURCH CASE STUDY: ARCHDIOCESE OF BIRMINGHAM INVESTIGATION REPORT ii (2019), <https://www.iicsa.org.uk/document/roman-catholic-church-archdiocese-birmingham-case-study-investigation-report> [<https://perma.cc/Q7TG-37ER>].

⁴⁹ See *The Shame of the Church*, RETRO REP. (Mar. 31, 2014), <https://www.retroreport.org/transcript/the-shame-of-the-church/> [<https://perma.cc/E6C2-M8BH>] (transcript).

⁵⁰ The movie *Spotlight* is an account of the Globe’s work. See generally SPOTLIGHT (Open Road Films 2015).

⁵¹ See Laurie Goodstein, *Bishops’ Leader Resists Releasing Priest’s Records in His Own Diocese*, N.Y. TIMES (May 2, 2004), <https://www.nytimes.com/2004/05/02/us/bishops-leader-resists-releasing-priest-s-records-in-his-own-diocese.html> [<https://perma.cc/78RF-2BJV>].

spring of 2019, he was appointed Archbishop of Washington D.C.,⁵² replacing two immediate predecessors caught up in the abuse scandals after themselves earlier cultivating reputations as leading opponents of abuse: Donald Wuerl, who resigned in 2018 after being described in the Pennsylvania grand jury report as covering up abuse while bishop of Pittsburgh;⁵³ and Theodore McCarrick, who was laicized in 2019 after a canonical trial for sex abuse of seminarians.⁵⁴

III. SOME EXAMPLES OF LEGAL AND POLICY APPROACHES USED BY THE CATHOLIC CHURCH IN ATTEMPTS TO AVOID SCANDAL BY MANAGING REPUTATION

The imperative of avoiding scandal was ingrained in the Church hierarchy at every level from the pastors in the parishes to the cardinals in the Curia. While a systematic exploration of the canon law, secular law, and policy commitments they used to justify and to attempt to implement scandal avoidance through reputation management is well beyond the scope of this paper, a small handful of examples may give a sense of the relevant complexities.⁵⁵

At one extreme of legal intricacy, consider the interlocking series of canon law mandates now encompassed by the term of art “pontifical secrecy,” which for nearly a century have imposed a requirement of strict confidentiality, enforced through threat of excommunication, on all allegations and proceedings relating to child sexual abuse by clergy.⁵⁶ These mandates begin with the 1922 *Crimen Sollicitationis*,

⁵² Joshua J. McElwee & Heidi Schlumpf, *Pope Names Gregory, Designer of US Bishops’ Abuse Procedures, as Washington Archbishop*, NAT’L. CATH. REP. (Apr. 4, 2019), <https://www.ncronline.org/news/people/pope-names-gregory-designer-us-bishops-abuse-procedures-washington-archbishop> [<https://perma.cc/GWB5-3Y46>].

⁵³ See John L. Allen Jr., *Abuse Scandal Isn’t the Only Chapter in Donald Wuerl’s Story*, CRUX (Oct. 12, 2018), <https://cruxnow.com/new-analysis/2018/10/12/abuse-scandal-isnt-the-only-chapter-in-donald-wuerls-story/> [<https://perma.cc/86ST-NU8N>] (describing Wuerl as a proponent of zero tolerance for abuse who had opposed Vatican leniency with abusive priests since the 1980s).

⁵⁴ See Part IV.A *infra* for further discussion of McCarrick.

⁵⁵ For some additional details, see generally, Gerald E. Kochanskya & Frank Herrmann, *Shame and Scandal: Clinical and Canon Law Perspectives on the Crisis in the Priesthood*, 27 INT. J. OF L. AND PSYCHIATRY 299 (2004); KIERAN J. TAPSELL, POTIPHAR’S WIFE: THE VATICAN’S SECRET AND CHILD SEXUAL ABUSE (2017) (focusing mostly on the pontifical secret, but including much additional historical and legal analysis of the Church’s approach to sex abuse over time).

⁵⁶ A leading expert on the pontifical secret as it applies to clerical sexual abuse is Australian lawyer Kieran J. Tapsell. Among his publications on the subject are, in addition to the book *Potiphar’s Wife*, cited *supra* note 55, a detailed submission to the AUSTRALIAN ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, CANON LAW AS A SYSTEMATIC FACTOR IN CHILD SEXUAL ABUSE IN THE CATHOLIC CHURCH (2015). The extremely abbreviated summary of the complexities in text, *supra*, relies chiefly on his most recent publication: Kieran J. Tapsell, *Civil and Canon Law on Reporting Child Sexual Abuse to the Civil Authorities*, 31 J. OF THE ACADEMIC STUDY OF RELIGION No. 3 (2018).

itself a secret law to be “kept carefully in the secret archive of the Curia for internal use, not to be published or augmented with commentaries,”⁵⁷ which bound to permanent silence victims, witnesses, the bishop, and all others involved in canonical inquiries and trials concerning soliciting sex in the confessional, homosexual sex, and the sexual abuse of minors. In a 1974 Instruction, *Secreta Continere*,⁵⁸ Pope Paul VI expanded the secrecy requirement by imposing it on the very allegation itself, and not just the information obtained through canonical proceedings. Although the 1983 revision of the canon law threw the status of *Crimen Sollicitationis* into some doubt, the continuing requirement of secrecy was confirmed by Article 25 of Pope John Paul II’s 2001 motu proprio *Sacramentorum Sanctitatis Tutela*⁵⁹ which again imposes the pontifical secret on all allegations and proceedings relating to child sexual abuse by clerics. A dispensation to allow reporting to the police where the local secular law requires it was granted to the United States in 2002 and to the rest of the world in 2010, but where reporting is not required (that is, in most of the world), it is still prohibited. The justifications for this level of secrecy with respect to these crimes was, of course, the prevention of scandal. But, while it might have once been seen as scandalous to turn a priest over to the secular authorities,⁶⁰ it is now clearly causing scandal when it is observed that officials of the Catholic Church do not do so.⁶¹

⁵⁷ Instruction from the Supreme Sacred Congregation of the Holy Office to All Patriarchs, Archbishops, Bishops and Other Local Ordinaries, On the Manner of Proceeding in Causes Involving the Crime of Solicitation (Mar. 16, 1962), http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html [<https://perma.cc/BH2X-KUQ8>].

⁵⁸ Instruction from Pope Paul VI, *Secreta Continere* (Feb. 4, 1974), http://www.vatican.va/roman_curia/secretariat_state/card-villot/documents/rc_seg-st_19740204_secreta-continere_lt.html [<https://perma.cc/Y6SU-H4UP>] (inter alia changing the name of what had previously been called the secret of the Holy Office to the pontifical secret).

⁵⁹ Apostolic Letter from Pope John Paul II to The Congregation for the Doctrine of Faith, *Sacramentorum Sanctitatis Tutela* (Apr. 30, 2001) (Punderson & Scicluna Translation), https://w2.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_20020110_sacramentorum-sanctitatis-tutela.html [<https://perma.cc/L6LB-PH7Q>] (*Issued Motu Proprio*). The title of this motu proprio makes the church’s priorities perfectly clear: the primary concern is “Safeguarding the Holy Sacraments,” not the children; stricter penalties were imposed for advocating the ordination of women than for abusing children. For the Vatican’s own explanation for the changes over time, see *The Norms of the Motu Proprio “Sacramentorum Sanctitatis Tutela,”* CONGREGATION FOR THE DOCTRINE OF THE FAITH (2001), http://www.vatican.va/resources/resoures_introd-storica_en.html [<https://perma.cc/6993-4L9B>].

⁶⁰ For example, in 2001, the prefect of the Vatican’s Congregation for Clergy wrote a letter, approved by John Paul II and sent to all the bishops of the world, congratulating a French bishop for failing to inform the secular authorities about a pedophile priest in his diocese, for which cover up the bishop had been found criminally guilty and sentenced to a suspended jail sentence by a French court. See, e.g., Kieran Tapsell, *Church Laws May Justify Calls for French Cardinal’s Resignation*, BISHOPACCOUNTABILITY.ORG (May 4, 2014), http://www.bishop-accountability.org/news2016/05_06/2016_05_04_Kieran_Reporter_Church_resignation.htm [<https://perma.cc/68JT-72JY>].

⁶¹ Another fascinating aspect of the evolution of canon law on clerical sexual abuse is the way it de facto reinstates the medieval legal doctrine of benefit of clergy (i.e. the notion that clerics

At the other extreme from these strict legal requirements, consider that, as journalist Celia Wexler put it at a gathering of Catholic women to discuss the abuse crisis, “The American Catholic Church has a ‘bro-culture’ stronger than every fraternity.”⁶² At the U.S. Bishops’ 2018 General Assembly, Cardinal Roger Mahony, sanctioned in 2013 for his role in covering up abuse, sought to reinforce this culture, urging his fellow bishops, as they sought an “‘effective’ response to the crisis” “not [to] allow outside groups of any kind, in this country or anywhere else, to interfere with, or attempt to break the bonds of our collegial union.”⁶³ Another name for this particular bro-culture is clericalism, a favorite target of Pope Francis, but one whose clutches he has not fully escaped.

When it comes to its substantive treatment of offenders, the Catholic Church has cycled through the trilogy of sin, crime, and disease in its approach to sex abuse, but in each case in a manner that led to leniency—forgiving sin, attempting to cure the disease of pedophilia despite being told as early as the 1980s by its own psychiatric experts that the disease was incurable,⁶⁴ and demanding “moral certainty,” the canon law equivalent of proof beyond a reasonable doubt, before imposing penal sanctions. What it failed to do was to treat clerics the way secular law treats employees, allowing them to be removed from positions in which they can endanger young people or bring scandal on the institution even if there is merely a preponderance of evidence against them.

IV. POPE FRANCIS AS EXEMPLIFICATION OF THE PROBLEMS ON THE PATH TO A SOLUTION TO THE SCANDAL OF CLERICAL SEX ABUSE

Because there has been a widespread tendency on the part of both Catholics and non-Catholics to view Pope Francis as a sort of caped cru-

should not be tried by the secular courts, but only by the Church, whose punishments were often less harsh). As Kieran Tapsell points out, however, medieval clerics found guilty of sex crimes by the Church were defrocked and turned over to the secular authorities for punishment, including execution. But by the late nineteenth century, “the canon law and practice of handing over the cleric for punishment in accordance with the civil law even for the most serious offences was officially abandoned everywhere,” and this, combined with secrecy whose effect was to prevent secular authorities from ever learning of clerical sex crimes and a more lenient approach to dealing with such crimes within the canon law system, effectively protected clergy from any meaningful punishment. See Tapsell, *supra* note 56, at 70.

⁶² See Claire Giangravè, *As Bishops’ Summit Opens, Catholic Women Say: ‘Let’s Be A Nuisance!’*, CRUX (Oct. 2, 2018), <https://cruxnow.com/synod-of-bishops-on-youth/2018/10/02/as-bishops-summit-opens-catholic-women-say-lets-be-a-nuisance/> [<https://perma.cc/73ZH-MSMW>].

⁶³ *Cardinal Guilty of Covering Up Sex Abuse Addresses US Bishops Conference*, LIFE SITE NEWS (Nov. 14, 2018), <https://www.lifesitenews.com/news/cardinal-found-guilty-of-covering-up-sex-abuse-addresses-us-bishops-confere> [<https://perma.cc/5WHA-FNGG>].

⁶⁴ See, e.g., A.W. RICHARD SIPE, THOMAS P. DOYLE, & PATRICK J. WALL, *SEX, PRIESTS AND SECRET CODES: THE CATHOLIC CHURCH’S 2000 YEAR PAPER TRAIL OF SEXUAL ABUSE* (Kindle ed. 2006) (discussing the Mouton-Doyle-Peterson report presented to the USSCB in 1985).

sader, swooping in to reform the attitudes and practices of Church officials,⁶⁵ it may be instructive to examine the way his own actions and statements exemplify rather than definitively break with the two steps forward, one step back approach that has left the Catholic Church mired in sex abuse scandals for decades. Even with respect only to events in the papacy of Francis, it would be beyond the scope of this paper systematically to set forth all the steps the Catholic Church has taken on the lurching path toward finally dealing with the scandal of sex abuse. Below are just a few bullet points of concern, on which Francis has not yet unequivocally made progress.

A. Acknowledging That “Repairing Scandal” May Now Require Harsher Penalties and Close to Zero Tolerance

Canon 1341 of the Code of Canon Law requires Church officials to “take care to initiate a judicial or administrative process to impose or declare penalties only after . . . ascertain[ing] that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, [or] reform the offender.”⁶⁶ For decades this provision has been used as a justification by bishops for the forgiving approach and repeated second chances they gave sex abuser priests. But, in addition to arguing that avoiding scandal now requires transparency, not secrecy, one might also argue that it now requires swift, certain, and harsh imposition of penalties through canonical process, because “fraternal correction” and “other means of pastoral solicitude” have scandalously been revealed systematically to have failed to achieve any one of the three stated objectives.

“Zero tolerance” has been the catch phrase most closely associated with the move toward imposition of penalties and away from fraternal correction. The USCCB sought to adopt what it called a zero-tolerance policy in its 2002 Dallas Charter. Pope John Paul II appeared categorically to endorse such an approach when he declared in a message to the

⁶⁵ Even those who do not support him seem to impose such expectations on him. Thus, for example, the Church was roiled over the past year by a series of open letters published by Archbishop Viganò, former Papal Nuncio to the United States and a theological conservative who lost his position in part because of his decision to invite Rowan County clerk and same-sex marriage resister Kim Davis to a reception for the Pope in Washington. See, Jason Horowitz, *The Man Who Took on Pope Francis: The Story Behind the Viganò Letter*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/world/europe/archbishop-carlo-maria-vigano-pope-francis.html> [<https://perma.cc/W9TD-S7ZL>]. In his widely-publicized letters, Viganò accused Francis, inter alia, of knowing about and tolerating the decades long pattern of sexual imposition by now defrocked Cardinal Theodore McCarrick on seminarians whom he forced to share his bed and otherwise molested. For the first of these letters, see Testimony of Carlo Maria Viganò, Archbishop of Ulpiana (Aug. 22, 2018), <https://assets.documentcloud.org/documents/4786599/Testimony-by-Archbishop-Carlo-Maria-Vigan%C3%B2.pdf> [<https://perma.cc/562F-4EQQ>].

⁶⁶ CODE OF CANON LAW (1983), http://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib6-cann1311-1363_en.html#TITLE_V [<https://perma.cc/STS7-U8H8>].

U.S. Bishops, “People need to know that there is no place in the priesthood and religious life for those who would harm the young.”⁶⁷ Taken at face value, this would suggest the “career death penalty” of dismissal from the clerical state after even one act by a cleric of sexual imposition on a minor.⁶⁸ But the USCCB’s attempt at zero tolerance was watered down from the start. The text as finally approved in 2006 read:

When even a single act of sexual abuse of a minor by a priest or deacon is admitted or is established after an appropriate process in accordance with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants.⁶⁹

Notably, the provision covers only priests and deacons, not all “clerics,” as originally proposed, and therefore notably not bishops, even though in 1998 Austrian Cardinal Hans Hermann Groer already had to relinquish his archiepiscopal duties as a result of credible allegations that he had molested boys.⁷⁰ Bishops centrally involved in the drafting had a clear conflict of interest. One, Cardinal Theodore McCarrick, was laicized in early 2019 for his decades of sexual imposition on seminarians and others;⁷¹ as early as 2005, allegations about his conduct were sufficiently credible as to have forced the Diocese of Metuchen to enter into financial settlements with priests he had abused.⁷² Requiring that the abuse be “of a minor” (a limitation now removed) again limited the

⁶⁷ Pope John Paul II, Address to the Cardinals of the United States (Apr. 23, 2002), http://www.vatican.va/resources/resources_american-cardinals-2002_en.html [https://perma.cc/NE5H-9K].

⁶⁸ Of course, to the extent that a canonical penal trial rather than the administrative laicization of a guilty cleric at his request is necessary, the canon law statute of limitations might make this difficult, given that under canon law it could be as short as five years, albeit Benedict XVI’s 2010 revisions to *Sacramentorum Sanctitatis Tutela* extended it to twenty years from a victim’s eighteenth birthday. See Benedict, *supra* note 59. It does often take traumatized victims decades to file a report.

⁶⁹ See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 23-24 (rev. Jun. 2018), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/Charter-for-the-Protection-of-Children-and-Young-People-2018-final.pdf> [https://perma.cc/89QB-BWXR].

⁷⁰ See, e.g., Dennis Coday, *A Cardinal Is Accused: The Groer Case*, NCR ONLINE (Apr. 4, 2014), <https://www.ncronline.org/blogs/ncr-today/cardinal-accused-groer-case> [https://perma.cc/TGM6-MDLC] (detailing the charges and the hierarchy’s response to them).

⁷¹ Chico Harlan, *Ex-Cardinal McCarrick Defrocked by Vatican for Sexual Abuse*, WASH. POST (Feb. 16, 2019), https://www.washingtonpost.com/world/europe/ex-cardinal-mccarrick-defrocked-by-vatican-for-sexual-abuse/2019/02/16/0aa365d4-2e2c-11e9-8ad3-9a5b113ecd3c_story.html?utm_term=.a7c1e7fd736 [https://perma.cc/6VJG-R6L5].

⁷² JD Flynn, *McCarrick, the Bishops, and Unanswered Questions*, CATH. NEWS AGENCY (Jul. 23, 2018), <https://www.catholicnewsagency.com/news/mccarrick-the-bishops-and-unanswered-questions-87927> [https://perma.cc/YZ53-XQAH] (reporting on this and a similar 2007 settlement by the Archdiocese of Newark).

regulatory purview to the benefit of clerics like McCarrick, whose abuse largely targeted young adults, not minors. Additionally, the high level of process required⁷³ meant that few of those credibly accused could be promptly removed.⁷⁴

Pope Francis himself declared in 2017 that “the Church irrevocably and at all levels intends to apply the zero-tolerance principle against the sexual abuse of minors.”⁷⁵ He did close a major loophole by issuing a *motu proprio*, or decree, specifying that bishops could be removed from office if they were “negligent . . . in relation to cases of sexual abuse inflicted on minors.”⁷⁶ But in dealing with individual cases he has shown far more leniency,⁷⁷ leading Marie Collins, one of only two survivors of clergy sexual abuse appointed in 2014 to the Pontifical Commission for the Protection of Minors established by Pope Francis, to say in her 2017 resignation letter that Francis “does not appreciate how his actions of clemency undermine everything else he does in this area. . . .”⁷⁸

⁷³ In addition to the Manual for Canonical Processes for the Resolution of Complaints of Clerical Sexual Abuse of Minors prepared in 2003 by then Monsignor Charles J. Scicluna on behalf of the Congregation for the Doctrine of the Faith, the USCCB prepared Diocesan Review Board Resource Booklets. See, *Manual for Canonical Processes for the Resolution of Complaints of Clerical Sexual Abuse of Minors* (2003), <https://www.bishop-accountability.org/resources/resource-files/churchdocs/ManualForCanonicalProcesses.pdf> [<https://perma.cc/CXA6-Q7GL>]. For the 2012 version of the resource book, see U.S. CONFERENCE OF CATH. BISHOPS, DIOCESAN REVIEW BOARD RESOURCE BOOKLET (2003), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2012-Diocesan-Review-Board-Resource.pdf> [<https://perma.cc/44GE-SS4M>].

⁷⁴ See, e.g., *Zero Tolerance, Allegations, and Reinstatements Policy and Practice Since the 2002 Dallas Charter and Norms*, BISHOPACCOUNTABILITY.ORG (Oct. 12, 2010), http://www.bishop-accountability.org/White_Paper/2010_10_12_Zero_Tolerance_and_Reinstatements.htm [<https://perma.cc/K5EV-HYQ4>] (detailing problems with the process).

⁷⁵ Address from Pope Francis to the Members of the Pontifical Commission for the Protection of Minors (Sept. 21, 2017), http://www.vatican.va/resources/resources_american-cardinals-2002_en.html [<https://perma.cc/PB7Z-H37A>].

⁷⁶ Apostolic Letter Issued *Motu Proprio* from Pope Francis, As a Loving Mother (June 4, 2016), http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html [<https://perma.cc/UHX4-VJBE>].

⁷⁷ See, e.g., Nicole Winfield, *Pope Quietly Trims Sanctions for Sex Abusers Seeking Mercy*, ASSOCIATED PRESS (Feb. 25, 2017), <https://www.apnews.com/64e1fc2312764a24bf1b2d6ec3bf4caf> [<https://perma.cc/W7YE-WHC2>] (giving examples and explanations). In fact, at no time before or during the papacy of Francis has anything like zero tolerance been achieved, even with respect to credible claims of abuse sent to and adjudicated by the Congregation for the Doctrine of the Faith (“CDF”). See, e.g., Kieran Tapsell, *Zero Tolerance? The Facts Don’t Support the Pope’s Claims on Child Abuse*, THE GUARDIAN (Jan. 31, 2018), <https://www.theguardian.com/commentisfree/2018/jan/31/zero-tolerance-the-facts-dont-support-the-popes-claims-on-child-abuse> [<https://perma.cc/YG93-JJHJ>] (analyzing statistics worldwide between 2004 and 2014 and, with respect to Australian referrals to the CDF in 2017, to show that, based on the percentage of priests who were dismissed rather than given lesser penalties, the tolerance rate exceeded 75%).

⁷⁸ Marie Collins, *Exclusive: Survivor Explains Decision to Leave Vatican’s Abuse Commission*, NAT’L CATH. REP. (Mar. 1, 2017), <https://www.ncronline.org/news/people/exclusive-survivor-explains-decision-leave-vaticans-abuse-commission> [<https://perma.cc/39AU-MM8C>].

Of course, to expect zero tolerance from the Catholic Church, and especially from Pope Francis,⁷⁹ is to ignore some basic theological commitments.⁸⁰ More than a crime or a psychological pathology, child sex abuse is for the Catholic Church a sin, and the Church and particularly Pope Francis are in the business of forgiving sin. One of Francis's favorite metaphors for this forgiving approach is of the church as a field hospital for sinners.⁸¹ There is no reason to think there isn't a bed in the field hospital for sex abuser priests, just as Francis has made clear there is for the divorced and remarried, gays and lesbians, and women who have procured abortions. Moreover, the twenty-one reflection points distributed by Francis at the commencement of the summit veered far from zero tolerance, in the direction of rights for the accused, stressing, inter alia, "the right to defen[s]e," the necessity because of the "presumption of innocence . . . to prevent the lists of the accused being published . . . until after the preliminary investigation and the definitive condemnation," and the requirement to "[o]bserve the traditional principle of proportionality of punishment with respect to the crime committed."⁸² Francis ended his recent sex abuse summit speaking no more

⁷⁹ Unfortunately, in addition to his general commitment to mercy, Francis has given evidence of particularly lenient treatment of accused persons with whom he has a personal relationship. The most recent instance of this tendency leading to scandal is the case of Argentine Bishop Gustavo Zanchetta, now facing both a criminal trial in his home country and a trial before the CDF in the Vatican on charges of abusing seminarians. When pornographic images of young men were first discovered on Zanchetta's phone in 2015, Francis initially accepted Zanchetta's explanation that his phone had been hacked, then sent him for counseling, and, even after causing him to resign from his bishopric in 2017, created a position for him in Rome, claiming to be unaware of abuse allegations until 2018. See Inés San Martín, *Argentine Bishop at Heart of Phone Porn Scandal Charged with Abusing Seminarians*, CRUX (June 10, 2019), <https://cruxnow.com/church-in-the-americas/2019/06/10/argentine-bishop-at-heart-of-phone-porn-scandal-charged-with-abusing-seminarians/> [https://perma.cc/58TS-DCZA].

⁸⁰ Additionally, there are practical reasons not to expect zero tolerance, given the growing worldwide shortage of priests and the comparatively high percentage of them against whom credible allegations of either abuse or cover-up have been made. Moreover, one advantage of the system as it has historically been practiced is that offenders often had little hesitation about confessing, secure in the hope that they would be forgiven. A zero tolerance policy, whatever its other merits, incentivizes persistent denial.

⁸¹ See, e.g., Antonio Spadaro, S.J., *A Big Heart Open to God: An Interview with Pope Francis*, AMERICA (Sept. 30, 2013), <https://www.americamagazine.org/faith/2013/09/30/big-heart-open-god-interview-pope-francis> [https://perma.cc/APG5-EH8X] ("I see the church as a field hospital after battle. It is useless to ask a seriously injured person if he has high cholesterol and about the level of his blood sugars! You have to heal his wounds.").

⁸² Reflection Points for "The Protection of Minors in The Church" Meeting (Feb. 21, 2019), http://www.vatican.va/resources/resources_puntidirflessione-protezioneminori_20190221_en.html [https://perma.cc/7AYD-LL7G]. The second sentence of Reflection Item 15, whose first sentence speaks of proportionality, introduces even further ambiguity. It reads in its entirety "To decide that priests and bishops guilty of sexual abuse of minors leave the public ministry." Does this suggest that removal from "public ministry" is a proportional response to every proven act of sexual abuse? And, even if it does, does removal from "public ministry" (emphasis added) mean that the guilty man, rather than be defrocked, will simply be sent, as McCarrick initially was, into a private retreat?

of “zero tolerance” but of “the mystery of evil” and of the need “to find a correct equilibrium of all values in play and to provide uniform directives for the Church, avoiding the two extremes of a ‘*justicialism*’ provoked by guilt for past errors and media pressure, and a *defensiveness* that fails to confront the causes and effects of these grave crimes.”⁸³ It is not clear which is worse, to promise “zero tolerance” and fail to deliver, as the Catholic Church has done up to now, or, having once promised “zero tolerance,” to retreat from that promise, as Francis now seems to be doing. What is clear is that both give rise to scandal.

B. Treating Accusers at Least as Well as the Accused

In no small part because of the reputational harm they can do to both the accused individual and the institution, the Church has long treated false accusations more harshly than proven abuse or cover up, in both the Code of Canon Law and in everyday practice.⁸⁴ This attitude has complicated the ability of Pope Francis to deal with the abuse crisis. When Chileans, including victims of abuse, other parishioners, and even bishops, protested the promotion to a bishopric of Juan Barros Madrid, seen as complicit in the crimes of a notorious abuser, Fernando Karadima, Francis initially insisted the accusers were “dumb” and “led by the nose by the leftists who orchestrated all this”⁸⁵ and “there is not one single piece of evidence. It is all slander. Is that clear?”⁸⁶ Surprised by a firestorm of response,⁸⁷ Francis finally met with survivors, as he had initially declined to do, and commissioned a report from Archbishop Charles Scicluna of Malta, formerly the Vatican’s top prosecutor for sex

⁸³ Francis, *supra* note 24 (emphasis in original).

⁸⁴ See SIPE ET AL., *supra* note 64, at 595 (comparing the canon law penalties for these offenses).

⁸⁵ Catholic League, *Pope Says “Leftists” Exploit Abuse Issue*, BISHOPACCOUNTABILITY.ORG (Oct. 8, 2015), http://www.bishop-accountability.org/news2015/09_10/2015_10_08_CatholicLeague_PopeSays.htm [<https://perma.cc/YXS4-T244>]. See also, e.g., *Francis Becomes First Pope to Condemn Church’s ‘Culture Of Abuse And Cover-Up’*, ASSOCIATED PRESS (May 31, 2018), <https://www.theguardian.com/world/2018/may/31/pope-francis-catholic-church-culture-abuse-chile> [<https://perma.cc/F5MA-MQJS>]; Jason Horowitz, *Pope Apologizes to Abuse Victims but Again Doubts Them*, N.Y. TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/world/europe/pope-francis-sex-abuse.html> [<https://perma.cc/PYB8-KFJN>].

⁸⁶ See, e.g., Siobhán O’Grady, *Chilean Church Apologizes after Issuing Guidelines Saying Priests Shouldn’t Touch Kids’ Genitals*, WASH. POST (October 4, 2018), https://www.washingtonpost.com/world/2018/10/04/chilean-church-apologizes-after-issuing-guidelines-saying-priests-shouldnt-touch-kids-genitals/?utm_term=.94a02e45db85gg [<https://perma.cc/EBQ5-Z5NM>].

⁸⁷ Even Cardinal Seán O’Malley of Boston, President of the Pontifical Commission for the Protection of Minors, rebuked Francis for his apparent callousness. See Statement of Cardinal Seán O’Malley, President of the Commission for the Protection of Minors (Jan. 20, 2018), <https://www.bostoncatholic.org/utility/news-and-press/content.aspx?id=34264> [<https://perma.cc/53X8-GBPE>] (“Pope Francis’ statements . . . in . . . Chile were a source of great pain for survivors of sexual abuse by clergy . . . Words that convey the message ‘if you cannot prove your claims then you will not be believed’ abandon those who have suffered reprehensible criminal violations of their human dignity and relegate survivors to discredited exile.”).

abuse crimes, that led to a mass offer of resignation on the part of the Chilean bishops. In a June 5, 2018 letter to the Chilean people, quoted above, Francis spoke for the first time and repeatedly of a “culture of abuse and cover up”⁸⁸ which he urged be ended. Nevertheless, he has continued to be less than fully receptive to the demands of victims. Just one day before the beginning of the summit on sex abuse, he insisted, “one cannot live an entire life accusing, accusing, accusing the Church. Whose is the office of the accuser! The devil! And those who spend their life accusing, accusing, accusing, are—I will not say children, because the devil does not have any—but friends, cousins, relatives of the devil.”⁸⁹

After the summit, when asked why he had not accepted the resignation of French Cardinal Barbarin, who had offered it after having been convicted by a French court of the crime of covering up child abuse and whose local diocesan council had voted almost unanimously in favor of his retirement, Francis noted that Barbarin was appealing his criminal conviction and therefore remained entitled to the presumption of innocence; he did not explain why the standards of the secular criminal law should apply to the administrative question of Barbarin’s resignation, other than to say it was “important because it goes against the superficial condemnation of the media.”⁹⁰

C. Ending Mandated Secrecy

Francis has been repeatedly asked by national and international bodies to abolish the pontifical secret with respect to sexual abuse and to mandate reporting by Church officials to state authorities, but has thus far refused to do so in any categorical way. In 2014, early in his papacy, the United Nations committee investigating the failure of the Holy See to live up to its commitments under the U.N. Convention on the Rights of the Child identified as particularly problematic the fact that “[d]ue to a code of silence imposed on all members of the clergy under penalty of excommunication, cases of child sexual abuse have hardly ever been reported to the law enforcement authorities in the countries where the crimes were committed.”⁹¹ The U.N. Committee

⁸⁸ Letter from Pope Francis to the Pilgrim People of God in Chile, ¶ 3 (Cath. News Agency trans. June 5, 2018), <https://www.catholicnewsagency.com/news/full-text-of-pope-francis-letter-to-the-church-in-chile-35580> [<https://perma.cc/V8SF-EW9F>].

⁸⁹ Pope Francis, Greeting to the Archdiocese of Benevento (Feb. 20, 2019), http://w2.vatican.va/content/francesco/en/speeches/2019/february/documents/papa-francesco_20190220_diocesi-benevento.html [<https://perma.cc/M5FR-3KSN>].

⁹⁰ Pope Francis, Remarks during the Press Conference on the Return Flight from Rabat to Rome (Mar. 31, 2019), http://w2.vatican.va/content/francesco/en/speeches/2019/march/documents/papa-francesco_20190331_marocco-voloritorno.html [<https://perma.cc/7LHW-WEG8>].

⁹¹ UNITED NATIONS, COMMITTEE ON THE RIGHTS OF THE CHILD, CONCLUDING OBSERVATIONS

Against Torture similarly recommended “that the Holy See take effective measures to ensure that allegations received by its officials concerning violations of the Convention are communicated to the proper civil authorities to facilitate their investigation and prosecution of alleged perpetrators.”⁹² The Vatican had responded that its treaty obligations only extended to the territory of Vatican City and to the conduct of its ambassadors, that it did “not have the capacity or legal obligation to impose the abovementioned principles upon the local Catholic churches and institutions present on the territory of other States and whose activities abide with national laws” and that to attempt to impose them “could constitute a violation of the principle of non-interference in the internal affairs of States.”⁹³ As a general matter, the Catholic Church’s resort to legalisms has not served its reputational interests well, whether before the U.N. or in national courts; this has in itself been a source of scandal. More specifically, as commentators observed, this particular legalistic response was more than slightly disingenuous given that a) the Pope as a virtual absolute monarch could single-handedly and at will alter the legal obligations under canon law of the clergy throughout the world, and b) no other state prohibits, and all would likely welcome, greater reporting of child sexual abuse by clergy.⁹⁴ The Vatican did grant a dispensation to allow reporting to the police “where the civil law requires to the United States in 2002 and to the rest of the world in 2010, but where there are no such civil laws, the pontifical secret” continued to apply.⁹⁵

At the February 2019 Vatican summit, not only canon lawyer Linda Ghisoni,⁹⁶ but Cardinal Reinhard Marx, a member of the C9 Council of Cardinals who are Francis’s closest advisors, called for the abolition of

ON THE SECOND PERIODIC REPORT OF THE HOLY SEE 10 (Feb. 25, 2014), <https://www.ref-world.org/docid/52f8a1544.html> [<https://perma.cc/6ZRH-NBHN>].

⁹² UNITED NATIONS, COMMITTEE AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE INITIAL REPORT OF THE HOLY SEE (June 17, 2014), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsvx%2Fbav9tzuiLzWMki9HuriG09wXrXL8ISVBIURGiyoQJufkQRPqfVLKDX%2FHV7mkON0g2ZsvH%2FJYEgKuR6VKntJ4dpXoRoAgGA5ioyLNLNJJY> [<https://perma.cc/ZYX9-DJA6>].

⁹³ Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child, ¶ 5 (Feb. 5, 2014), http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html [<https://perma.cc/7T2J-JJAW>].

⁹⁴ See, e.g., Kieran Tapsell, *The Strange Disconnect Between Pope Francis’ Words and Actions About Sex Abuse*, NAT’L CATH. REP. (Oct. 1, 2015), <https://www.ncronline.org/news/accountability/strange-disconnect-between-pope-francis-words-and-actions-about-sex-abuse> [<https://perma.cc/7HLA-Z8VA>].

⁹⁵ *Id.*; see also Guide to Understanding Basic CDF Procedures Concerning Sexual Abuse Allegations, http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html [<https://perma.cc/C7XA-GZG9>] (“Civil law concerning reporting of crimes to the appropriate authorities should always be followed.”).

⁹⁶ See O’Connell, *supra* note 15.

the pontifical secret as applied “to the prosecution of criminal offences concerning the abuse of minors.”⁹⁷ Archbishop Scicluna, one of the organizers of the summit, suggested in a press conference that legislation might be prepared to accomplish this,⁹⁸ but it has not yet clearly emerged.⁹⁹

D. Carrying through on Commitments

Increasingly, the response of the Vatican under Pope Francis to the sex abuse crisis has come to resemble that of a typical business corporation in the throes of crisis management. It issues the equivalent of a press release when particularly bad news hits the headlines, promises action after a committee studies the matter, and then fails to follow through even on explicitly promised reforms. The 2017 resignation letter of abuse survivor Marie Collins from the Pontifical Commission for the Protection of Minors illustrates this problem, describing as “stumbling blocks” what might properly be called scandals, chief of which is the “reluctance of some members of the Vatican Curia to implement the recommendations of the Commission despite their approval by the pope.”¹⁰⁰ Among the papally approved but unimplemented recommendations Collins lists are major structural ones, such as “a tribunal in which negligent bishops could be held accountable,” announced in 2015, but then “found by the Congregation for the Doctrine of the Faith . . . to have unspecified ‘legal’ difficulties” and vetoed.¹⁰¹ Collins also recounts that despite explicit papal instructions “to ensure all correspondence from victims/survivors receives a response,” some Vatican departments were categorically refusing to comply, a more minor but still meaningful

⁹⁷ Reinhard Cardinal Marx, Second Presentation at “The Protection of Minors in the Church” Meeting (Feb. 23, 2019), http://www.vatican.va/resources/resources_card-marx-protezioneminori_20190223_en.html [<https://perma.cc/TU4G-LPB9>].

⁹⁸ Gerard O’Connell, *The Vatican Summit on the Protection of Minors Is Over. What’s Next?*, AMERICA (Mar. 1, 2019), <https://www.americamagazine.org/politics-society/2019/03/01/vatican-summit-protection-minors-over-whats-next> [<https://perma.cc/6HVM-EZR8>] (quoting Scicluna as acknowledging “a growing feeling that these cases should not be subjected to the pontifical secret,” and suggesting that after discussions among the relevant congregations in Rome “the vademecum can be finalized”).

⁹⁹ See Kieran Tapsell, *Has the Pontifical Secret Been Secretly Buried?*, PEARLS AND IRRITATIONS (June 12, 2019), <https://johnmenadue.com/kieran-tapsell-has-the-pontifical-secret-be-en-secretly-buried/> [<https://perma.cc/AD6S-LVUA>] (analyzing recent developments).

¹⁰⁰ Collins, *supra* note 78.

¹⁰¹ *Id.* When Collins subsequently asked Francis why he had allowed the CDF to block the tribunal, he “told [her] that bishops could not all be held to the same standard. Allowances had to be made for their cultural difference.” She responded that “Canon law is universal—Catholic Doctrine is universal – safeguarding should be universal.” See Press Release, We Are Church Ireland, Marie Collins puts it up to Pope Francis (Jan. 14, 2019), <http://wearechurchireland.ie/marie-collins-puts-it-up-to-pope-francis/> [<https://perma.cc/AW4F-22X6>].

failure.¹⁰² When the 2019 summit was announced, Collins pointed out that a similar meeting with a similar purpose organized by many of the same Church leaders has been held at the Vatican in 2012, and that meeting, titled *Towards Healing and Renewal*, had yet to yield concrete results.¹⁰³

Rather than marking an end to these failures to follow through, the 2019 Vatican summit simply intensified the scandalous impression that words would not be followed by meaningful and effective action. Even before it began, it was seen as needlessly impeding meaningful progress, when, in November, the Vatican asked the USCCB to delay a vote on proposed standards of episcopal conduct and on the formation of a special commission for review of complaints against bishops for violations of the standards until after the summit.¹⁰⁴ This delay would have been bad enough if, at the summit, comparable proposals on these issues had been presented and made applicable to the worldwide Church. But no concrete proposals of any kind on any issue were put on the table for resolution at the summit, which seemed more of a consciousness raising session than a venue for decision-making, its goal a “change of mentality”¹⁰⁵ more than a change of policy. Instead, of acting, or even being given specific directions for acting, the bishops were sent home to discuss amongst themselves and to await a promised vademecum whose contents and delivery date remained unspecified. In the months since the summit, Francis has issued two relevant pieces of legislation, one establishing reporting requirements within the clerical hierarchy for those with notice of child sex abuse or its cover up,¹⁰⁶ the other governing child sex abuse and related crimes in the territory of Vatican City.¹⁰⁷ Francis has always been clear that “[l]oss of credibility . . . cannot be regained by issuing stern decrees or by simply creating new committees

¹⁰² Collins, *supra* note 78.

¹⁰³ See *We Are Church Ireland*, *supra* note 101.

¹⁰⁴ See, e.g., Christopher White, *Vatican Asks US Bishops for Delay in Responding to Sex Abuse Crisis*, CRUX (Nov. 12, 2018), <https://cruxnow.com/church-in-the-usa/2018/11/12/24vatican-asks-us-bishops-for-delay-in-responding-to-sex-abuse-crisis/> [<https://perma.cc/MSQ8-FLH9>] (describing the USCCB’s head Cardinal DiNardo decrying “victimizing survivors all over again by demanding they heal on our timeline”).

¹⁰⁵ See Pope Francis, Address at the end of the Eucharistic Concelebration at “The Protection Of Minors In The Church” Meeting (Feb. 24, 2019), http://w2.vatican.va/content/24atican24o/en/speeches/2019/24atican24/documents/papa-francesco_20190224_incontro-protezioneminori-chiusura.html [<https://perma.cc/8CSL-XSG2>] (“a change of mentality is needed to combat a defensive and reactive approach to protecting the institution and to pursue, wholeheartedly and decisively, the good of the community by giving priority to the victims of abuse”).

¹⁰⁶ Apostolic Letter from Pope Francis, *Vos Estis Lux Mundi* (May 7, 2019), http://w2.vatican.va/content/24atican24o/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_-estis-lux-mundi.html [<https://perma.cc/KHS3-B4NY>] (*Issued Motu Proprio*).

¹⁰⁷ LAW NO. CCXCVII. ON THE PROTECTION OF MINORS AND VULNERABLE PERSONS (Mar. 26, 2019), http://www.vatican.va/resources/resources_protezioneminori-legge297_20190326_en.html [<https://perma.cc/RQY4-FXMB>].

or improving flow charts, as if we were in charge of a department of human resources.”¹⁰⁸ But, at least when it comes to the scandal of clerical sexual abuse, Francis has been no more effective at implementing a “change in [the hierarchy’s] mind-set (metanoia)”¹⁰⁹ than he has been at effecting systemic organizational change.

E. Engaging in Meaningful Atonement

In an August 2018 Letter to the People of God provoked by the release of the extremely graphic and detailed Pennsylvania grand jury report on clergy sex abuse, Pope Francis acknowledged that “no effort to beg pardon and to seek to repair the harm done will ever be sufficient.”¹¹⁰ He is right about that, but survivors and other critics are also right that there have been to date no meaningful efforts at atonement by responsible persons in the hierarchy of the Church. Later in the same letter, Francis acknowledged that “prayer and penance will help” to achieve “a conversion of heart” but then “invite[d] the entire holy faithful People of God to a penitential exercise of prayer and fasting.”¹¹¹ This aroused justifiable indignation among faithful Catholics, who correctly insisted it was not the people, who had been excluded from all relevant decision making, but the hierarchy of the Catholic Church who needed to do penance for the scandal of sex abuse.¹¹² Since the beginning of the sex abuse crisis, a standard punishment for guilty clerics was to be sentenced to prayer and repentance in seclusion. Before the process against him escalated to his laicization, for example, McCarrick was “ordered last year to a friary in a remote Kansas town to live in seclusion, prayer and penance.”¹¹³ While sufficient seclusion might isolate such penitents

¹⁰⁸ Letter from Pope Francis to the Bishops of the United States Conference of Catholic Bishops (Jan. 1, 2019), http://w2.vatican.va/content/25atican25o/en/letters/2019/documents/papa-francesco_20190101_lettera-vescovi-usa.html [<https://perma.cc/K5CS-QT2K>].

¹⁰⁹ *Id.* He hasn’t even settled on a set of slogans. His latest effort, five months after the summit was to call for an “apostolate of prevention” in a video message to Mexican clerics at a workshop on sexual abuse. What exactly this might be was left unclear. *See, e.g.,* Claire Lesegretain, *Pope Calls for “Apostolate Of Prevention” in Sexual Abuse*, LE CROIX INT’L (July 24, 2019), https://international.la-croix.com/news/pope-calls-for-apostolate-of-prevention-in-sexual-abuse/10583?utm_source=Newsletter&utm_medium=e-mail&utm_content=24-07-2019&utm_campaign=newsletter_crx_lci&PMID=8fc2396ebc21ea5c95eb22efe7dc8fda [<https://perma.cc/9FBM-C2FS>].

¹¹⁰ Letter from Pope Francis to the People of God (Aug. 20, 2018), http://w2.vatican.va/content/25atican25o/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html [<https://perma.cc/LR9M-V9YW>].

¹¹¹ *Id.*

¹¹² *See, e.g.,* Joanna Moorhead, *How Dare the Pope Ask Ordinary Catholics to Atone for Child Abuse?*, THE GUARDIAN (Aug. 21, 2018), <https://www.theguardian.com/commentisfree/2018/aug/21/pope-catholic-church-child-abuse-letter-atone> [<https://perma.cc/AA97-X8TX>].

¹¹³ Michelle Boorstein, Julie Zauzmer, & Chico Harlan, *The Vatican Moves Quickly Toward Punishing Ex-Cardinal McCarrick For Sexual Abuse*, WASH. POST (Jan. 9, 2019), https://www.washingtonpost.com/religion/2019/01/09/25atican-moves-quickly-toward-punishing-ex-cardinal-mccarrick-sexual-abuse/?utm_term=.1c4de112c9be [<https://perma.cc/PAL6-CWGP>].

from access to further abuse victims, critics view them as still being in too comfortable surroundings supported by the Church.¹¹⁴ Occasionally, bishops have engaged in symbolic public acts of penance, such as prostrating themselves before the altar or washing the feet of abuse victims as part of the traditional Holy Thursday service commemorating Jesus's washing of his apostles' feet at the Last Supper.¹¹⁵ This latter act may have given victims some comfort and sense of acknowledgment, but, when compared with historical examples of public penance,¹¹⁶ it is far too easy. King Henry II of England, for example, walked barefoot to Canterbury, where, stripped to the waist, he allowed himself to be scourged by the monks to atone for the public scandal of the murder of Thomas Becket.¹¹⁷ Public penance by authority figures historically also involved some concessions of money and power. Henry II, for example, as part of his public penance, contributed to a Crusade and to the Church and committed to abolish all customs prejudicial to the Church.¹¹⁸ Instead of mobilizing expensive lawyers to fight abuse claims in court and to lobby against extensions of the statute of limitations for tort cases involving clergy sex abuse, the Catholic Church might have opened its coffers, if not for prompt and generous payments directly to the victims, then at least to fund, for example, victim-oriented services. To avoid the financial cost of atonement falling on the faithful people, the hierarchy might have begun, not by cutting programs or seeking contributions, but by selling off assets like their rectories and episcopal residences¹¹⁹ and their precious jewels, living like penitents in sackcloth on the ash heap.

¹¹⁴ Support by the Church in a controlled environment has practical advantages as well as symbolic costs, however, because it makes it less likely that predators will seek secular employment in which they can abuse again.

¹¹⁵ See, e.g., James Martin, S.J., *Cardinal and Archbishop Wash the Feet of Abuse Victims*, HUFFPOST (May 21, 2011), https://www.huffpost.com/entry/cardinal-and-archbishop-w_b_826083 [<https://perma.cc/N8E9-E4EK>] (distinguishing between public confession, involuntary punishment, such as imprisonment in a penitentiary, and the sort of penance he sees as necessary in the wake of the sex abuse crisis, in which "it is the layperson who must grant absolution to those clergy who are seeking forgiveness.").

¹¹⁶ Eve Tushnet, *The Value of Public Penance in the Age of Clerical Abuse, Mass Incarceration and #Metoo*, AMERICA (Feb. 22, 2019), <https://www.americamagazine.org/faith/2019/02/22/value-public-penance-age-clerical-abuse-mass-incarceration-and-metoo> [<https://perma.cc/88XF-5N7K>] (summarizing scholarly work on the medieval history of public penance, which could involve "anything from whipping to reciting psalms, from pilgrimage to fasting to public humiliations, like standing outside the church doors in sackcloth and ashes").

¹¹⁷ See Mike Ibeji, *Becket, the Church and Henry II*, BBC (updated Feb. 11, 2017), http://www.bbc.co.uk/history/british/middle_ages/becket_01.shtml [<https://perma.cc/ZQ36-HR8U>].

¹¹⁸ *Id.*

¹¹⁹ Under financial pressure from abuse settlements, this has occasionally occurred, most notably in the Archdiocese of Boston following the Spotlight revelations. See, e.g., Pam Belluck, *Boston Archbishop Will Sell Residence for Abuse Payout*, N.Y. TIMES (Dec. 4, 2003), <https://www.nytimes.com/2003/12/04/us/boston-archbishop-will-sell-residence-for-abuse-payout.html> [<https://perma.cc/SA83-8UE6>].

Even now, however, offers of compensation from the Church have obviously mixed motives. Consider, for example, New York Cardinal Timothy Dolan's hiring of Kenneth Feinberg, made famous through his handling of the September 11th Victim Compensation Fund, to apply a similar methodology to an Archdiocesan Independent Reconciliation and Compensation Program, which reviews the claims of abuse victims and offers compensation without resort to formal court process and notwithstanding the statute of limitations.¹²⁰ Although touted as a model other dioceses might follow, it was clearly developed in the shadow of the New York legislature's plan to pass a Child Victims Act with an extended statute of limitations and a one year lookback during which victims of any age or time of offense could bring their claims to court, a provision Dolan claimed would be "toxic to the Church."¹²¹

F. Acknowledging That the Abuse of Minors Is Only a Small Fraction of Clerical Sexual Abuse, Albeit the Only One the Catholic Church Has Thusfar Made Any Serious Effort to Address

One of the many respects in which the summit on the "The Protection of Minors in the Church" can be seen as too little, too late was its narrow focus on the sexual abuse of minors¹²² in a year in which there was more scandalous publicity than ever before concerning diverse other forms of sexual abuse by members of the clergy. For example, although Theodore McCarrick had been credibly accused of abuse of minors, the bulk of his sexual imposition was on seminarians who were legal adults but subject to his power; his treatment of them played a major role in the canonical proceedings leading to his laicization. And, immediately before the summit, Tom Doyle, an Irish activist on behalf of the children of priests, of which he himself is one, announced to the *New York Times* that this would be "the next scandal," revealing that an archbishop had showed him internal Vatican guidelines for how to

¹²⁰ See, e.g., Paul Elie, *What Do the Church's Victims Deserve?*, NEW YORKER (Apr. 15, 2019), www.newyorker.com/magazine/2019/04/15/what-do-the-churchs-victims-deserve [https://perma.cc/RK6B-CDUK] (describing Feinberg's New York program in the context of the history of claims against the Catholic Church).

¹²¹ Karen DeWitt, *Cardinal Dolan Says Key Provision in Child Victims Act Would Be 'Toxic' for the Church*, WNYC (Mar. 21, 2018), <https://www.wnyc.org/story/cardinal-dolan-says-key-provision-child-victims-act-would-be-toxic-church/> [https://perma.cc/44M9-93E6].

¹²² The emphasis on minors also led to problems in another direction, perhaps exacerbated by Francis's insistence that it was in families, not in the Church where most abuse occurs. See Francis, *supra* note 24. Some African and Asian prelates wondered why only sexual abuse was being discussed, when, in their countries child soldiers and child enslavement were also prevalent. See Jamie Manson, *Why the Sex Abuse Summit Accomplished Nothing*, NAT'L CATH. REP. (Mar. 6, 2019), https://www.ncronline.org/news/accountability/grace-margins/why-sex-abuse-summit-accomplished-nothing?fbclid=IwAR0rmJWTLvEvQ-jcSGc2wYX7ROL3_L99MABhwRGi17qIpdzWyB6FzXjl8Kg [https://perma.cc/9B3T-GKNU] (quoting Archbishop Mark Coleridge).

deal with priests who father children.¹²³ Summit organizer Scicluna met with Doyle the next day, and appeared to endorse Doyle's position, previously endorsed by the Irish bishops, that "the interest of the child should be paramount," rather than enforced secrecy to protect the Church's reputation, or even enforced laicization, which might leave the father without the financial means to provide for his child.¹²⁴

The sexual exploitation of nuns by clergy was also prominently in the news, with both breaking news stories and investigative journalism bringing it to Pope Francis's direct attention immediately before the summit on minors. Among the breaking news stories were the resignation of a CDF official for alleged sexual imposition on a German nun in the confessional¹²⁵ and protests in India following accusations by a nun in Kerala that a bishop had repeatedly raped her.¹²⁶ The supplement *Woman Church World* in the Vatican's own newspaper, *L'Osservatore Romano*, included in February 2019, the month of the summit, an article by editor Lucetta Scaraffia on the sexual abuse of nuns by clergy,¹²⁷ following up on an article in the same magazine the previous year on the slave like conditions under which nuns in Rome and elsewhere were forced to perform menial labor for priests.¹²⁸ "If eyes continue to be closed to this scandal—rendered even more serious by the fact that the abuse of women entails procreation and is thus at the root of the scandal of imposed abortions and of the children not recognized by priests," Scaraffia wrote, "the condition of oppression of women in the Church will never change."¹²⁹ The hashtag #NunsToo had begun trending in 2018, when Nicole Winfield of the Associated Press reported that

¹²³ Jason Horowitz & Elisabetta Povoledo, *Vatican's Secret Rules for Catholic Priests Who Have Children*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/world/europe/priests-children-vatican-rules-celibacy.html> [<https://perma.cc/BGR6-F269>].

¹²⁴ *Priest's Son Demands Vatican Attention for Clergy's Children*, CRUX (Feb. 21, 2019), <https://cruknow.com/church-in-uk-and-ireland/2019/02/21/priests-son-demands-vatican-attention-for-clergys-children/> [<https://perma.cc/RCF5-LAHS>].

¹²⁵ *See Conservative Priest Resigns from CDF Under Liberal Media Pressure Ahead of Vatican Sex Abuse Summit*, LIFESITE (Jan. 29, 2019), <https://www.lifesitenews.com/news/vatican-official-resigns-after-ex-consecrated-woman-accuses-him-of-advances> [<https://perma.cc/WAR9-CX29>].

¹²⁶ *See, e.g.*, Agence France-press, *India: Police Charge Catholic Bishop with Raping Nun*, THE GUARDIAN (Apr. 9, 2019), <https://www.theguardian.com/world/2019/apr/10/india-police-charge-catholic-bishop-with-raping-nun> [<https://perma.cc/DXK6-R8Z6>] (describing months of protests by nuns that preceded the eventual police arrest of the bishop).

¹²⁷ Lucetta Scaraffia, *Without Any Touching*, L'OSSERVATORE ROMANO: WOMEN CHURCH WORLD (Feb. 1, 2019), <http://www.osservatoreromano.va/en/news/without-any-touching> [<https://perma.cc/5CG7-PMCQ>] (citing inter alia path-breaking reports from the 1990s by Sr. Maura O'Donohue and Sr. Marie McDonald concerning the impregnation and forced abortions imposed by priests on nuns in Africa).

¹²⁸ Marie-Lucile Kubacki, *The (Almost) Free Work of Sisters*, L'OSSERVATORE ROMANO: WOMEN CHURCH WORLD (Mar. 1, 2018), <http://www.osservatoreromano.va/en/news/almost-free-work-sisters> [<https://perma.cc/C6H3-YUKM>].

¹²⁹ Scaraffia, *supra* note 127.

“[a]fter decades of silence, nuns talk about abuse by priests.”¹³⁰ Winfield’s article cited both specific very recent examples and a report covering the sexual abuse of nuns in nearly two-dozen countries that had been prepared for the Vatican by Sr. Maura O’ Donaghue in 1994 but had only first been publicly acknowledged in 2001.¹³¹ When Winfield took the occasion of Scaraffia’s article to ask Pope Francis himself at a press conference whether the abuse summit would also address “the sexual abuse of consecrated women in the Church,” Pope Francis acknowledged that this was a longstanding, not yet solved problem about which “something more [should] be done.” Describing an instance where John Paul II, presented by the future Benedict XVI with documentary evidence of such sexual abuse, had refused to take action, Francis insisted, “We should not be scandalized by this—it’s part of a process.” He credited Benedict XVI with later bringing the documents out of the archive, and dissolving a particular order of nuns “because a certain slavery of women had crept in, slavery to the point of sexual slavery on the part of clergy.”¹³² After this admission made headlines, the Pope’s spokesman promptly walked it back saying, “When the Holy Father . . . spoke of ‘sexual slavery’ he meant ‘manipulation.’”¹³³ Shortly thereafter, Scaraffia and the bulk of her team tendered their resignations, claiming they felt surrounded by an atmosphere of distrust and progressive delegitimation.¹³⁴

In recent legislation, the Vatican has expanded its angle of vision to encompass clerical sexual abuse not only of minors but of “vulnerable” persons, but its definition of vulnerability appears to be a narrow

¹³⁰ See Nicole Winfield & Rodney Muhumuza, *After Decades of Silence, Nuns Talk about Abuse by Priests*, ASSOCIATED PRESS (Jul. 27, 2018), <https://www.apnews.com/5ef7c4d017784093992929314fd87621> [<https://perma.cc/CBA6-T9P3>.] Among the recent cases Winfield mentioned were allegations of sexual imposition by confessors (the original target of Crimen Sollicitationis), and examples from convents in Chile and Uganda.

¹³¹ *Id.*; see also, e.g., Patsy McGarry, *The Irish Woman Who Exposed Abuse of Nuns by Priests 25 Years Ago*, IRISH TIMES (Feb. 10, 2019), <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/the-irish-woman-who-exposed-abuse-of-nuns-by-priests-25-years-ago-1.3788555> [<https://perma.cc/JQK9-P3EM>].

¹³² Pope Francis, Remarks during the Press Conference on the Return Flight from Rabat to Rome (Feb. 5, 2019), http://w2.vatican.va/content/francesco/en/speeches/2019/february/documents/papa-francesco_20190205_emiratarabi-voloritorno.html [<https://perma.cc/8GJF-TLQG>] (transcript corrected as described in following footnote); Jason Horowitz & Elizabeth Dias, *Pope Acknowledges Nuns Were Sexually Abused by Priests and Bishops*, N.Y. TIMES (Feb. 5, 2019), <https://www.nytimes.com/2019/02/05/world/europe/pope-nuns-sexual-abuse.html> [<https://perma.cc/DY9D-2UP8>] (quoting Pope’s remarks as originally delivered).

¹³³ See Jason Horowitz, *Sexual Abuse of Nuns: Longstanding Church Scandal Emerges from Shadows*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/world/europe/pope-francis-sexual-abuse-nuns.html> [<https://perma.cc/ZG3W-CME3>] (quoting papal spokesperson Alesandro Gisotti).

¹³⁴ The reasons for the group resignation were complicated, including claims that changes in the editorial structure of the paper had put the women under greater control by men.

one¹³⁵ whereas, when it comes to sexual imposition by clergy, adult seminarians, nuns, even congregants are all vulnerable; the children of priests, whatever the circumstances of their conception, are per se vulnerable; and the Catholic Church itself is most vulnerable to the scandal of all such sexual imposition. To date no legislation, no concrete plans, not even any overarching rhetoric, has emerged to address the sum total of these scandals.

V. CODA: SCANDAL AS STUMBLING BLOCK IN OTHER INSTITUTIONS

In my view, the central problem of scandal at the core of this paper is not limited either to the Catholic Church or to the problem of sex abuse. The need, in the technical sense, to avoid scandal arises any time it is important for the sake of the public good that people have faith in an institution and in the particular persons in charge of running that institution. It should not be surprising that other religions now faced with their own long hidden sex abuse problems have doctrines akin to the Catholic doctrine of scandal to which institutional actors can appeal in calibrating their response. I will briefly discuss one set of such doctrines, those deriving from halakha or Jewish law, as they are applied to concerns about sex abuse of minors among the Haredim, or ultra-orthodox Jews.

Religions are, however, not the only institutions that require faith. So, at least in the United States, do the institutions of government. One recent #MeToo scandal, the process by which Brett Kavanaugh was confirmed to a seat on the Supreme Court, has shaken the faith of many in each of the three main branches of the federal government. This paper will conclude by drawing some very brief analogies between the Kavanaugh hearings and the Catholic Church's failed approach to the scandal of sex abuse.

A. Child Sex Abuse among the Haredim, or Ultra-Orthodox Jews

Consider the case of Rabbi Nuchem Rosenberg, described as “the lone whistleblower among the Satmar, a powerful Hasidic sect.” After he personally observed the anal rape of a boy in a Jerusalem Mikvah, or ritual bath, in 2005, “he started blogging about sex abuse in his community and opened a New York City hotline to field sex abuse complaints,” concluding from the evidence he gathered that about half of all

¹³⁵ See, e.g., Pope Francis, *supra* note 106, A. I, § 2 (b) (“vulnerable person’ means: any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offence”).

young Hasidic males are victims of sex abuse by adults in their community. His reward has been ostracism, as, for example, advertisements taken out by the self-described “great rabbis and rabbinical judges of the city of New York” have denounced him as “a stumbling block for the House of Israel.” As in the Catholic Church, victims’ advocates among the Haredim claim that in their community, the “greatest sin is not the abuse, but talking about the abuse.” The Haredi leadership, like that of the Catholic Church, can invoke religious doctrine and religious law in support of secrecy. The halakhic (Jewish law) equivalent of the doctrine of scandal is the prohibition of “lashon hara” or “evil speech,” a prohibition on the spreading of derogatory albeit true information about another. And, as in the Catholic Church, some religious leaders have been arguing for decades that, not only does the prohibition on such speech not apply when the purpose of speaking is to prevent further harm, but also “a conspiracy to conceal information about abuse will ultimately be made public, creating an even greater hillul Hashem” or desecration.

B. The Kavanaugh Hearings as a Scandal¹³⁶

Like the Congregation for the Doctrine of the Faith (“CDF”), the Senate Judiciary Committee, when it comes to advising and consenting to judicial nomination, sees its chief task as investigation of doctrinal matters, from original intent to stare decisis, even though it may not have as clear a sense as the CDF as to what constitutes orthodoxy or heresy.¹³⁷ Like the CDF, it has also long needed to involve itself in at least some examination of the alleged sins and crimes of candidates for office, something it has generally done in executive session, to protect

¹³⁶ At least two op-eds, one from a priest, the other from a law professor active in clergy sex abuse cases, apply lessons learned in the clergy sex abuse scandal to the charges against Kavanaugh. See Thomas Reese, *Father Brett Kavanaugh Would Be Suspended and Investigated*, RELIGION NEWS SERV. (Sep. 21, 2018), <https://www.ncronline.org/news/opinion/signs-times/father-brett-kavanaugh-would-be-suspended-and-investigated> [<https://perma.cc/4WWJ-2CM5>] (suggesting that the procedures used by the N.Y. Archdiocese to investigate claims against McCarrick would be a good model for addressing claims against Kavanaugh); Marci A. Hamilton, *The Response to the Kavanaugh Allegations Exposes the Lessons We Failed to Learn from the Catholic Clergy’s Abuse*, TIME (Oct. 4, 2018), <https://time.com/5415241/brett-kavanaugh-catholic-church-abuse/> [<https://perma.cc/CNE9-B58P>] (noting that, unlike in the Kavanaugh case, with respect to clergy sex abuse, no one any longer agonizes over “the possibility of falsely maligning ‘good men,’” in part because so many allegations initially deemed “not credible” have been proven true). At the other extreme was the criticism that the Pennsylvania grand jury report had failed to accord accused priests the presumption of innocence and ability to defend themselves the nomination process had granted Kavanaugh. See Peter Steinfelds, *The PA Grand-Jury Report: Not What It Seems*, COMMONWEAL (Mar. 21, 2019), <https://www.commonwealmagazine.org/pa-grand-jury-report-not-what-it-seems> [<https://perma.cc/MM7S-3Z5P>].

¹³⁷ Compare the first part of the Clarence Thomas hearings, which focused on his endorsement of natural law, with the second part, which focused on charges of sexual harassment. See, e.g. Senate Judiciary Committee, *Justice Thomas on Natural Law*, CSPAN (Sept. 13, 1991), <https://www.c-span.org/video/?c4474100/justice-thomas-natural-law> [<https://perma.cc/93TG-CREC>].

the privacy of the nominee and avoid scandal. Well before any allegations of sexual assault were put on the agenda in connection with Brett Kavanaugh's nomination, the committee was already investigating everything from whether he had lied in previous testimony before Congress to whether he had a gambling addiction to where he had obtained the funds to pay off his considerable debts.¹³⁸

Every major institutional and individual actor in the Kavanaugh hearing process seemed to have had a concern with scandal that the Catholic Church would recognize as familiar. In part, this may be related to the very high number of Catholics involved, from White House Counsel Don McGahn, an old friend of Kavanaugh's who shepherded his nomination through the Senate with an unprecedented level of secrecy when it came to potentially damaging documentary evidence; to Justice Kennedy, who may have resigned with an explicit understanding that his former clerk would be nominated to replace him¹³⁹ (a sort of nepotism of the spirit rather than the flesh familiar in the Catholic hierarchy); to Kavanaugh himself and his classmates at Georgetown Prep. I could draw a lot of fairly superficial parallels,¹⁴⁰ but there are, I would argue, also deeper analogies. Kavanaugh's classmate and witness Mark Judge includes in his memoir of their days at Georgetown Prep a quote from the Baltimore Catechism he said Republican strategist Pat Buchanan particularly valued: "The Eighth Commandment forbids lies, rash judgment, detraction, calumny, and telling of secrets we are bound to keep. When does a person commit the sin of detraction? A person commits the sin of detraction when, without a good reason, he makes known the hidden faults of another."¹⁴¹ This quotation sets forth exactly the sort of justification that might lead a Catholic through, for example, the technique of mental reservation, to be less than fully forthcoming when asked about another's sexual misconduct, as Judge and generations of clerics were.¹⁴² It, together with the Catholic bro culture

¹³⁸ See, e.g., Debra Cassens Weiss, *Kavanaugh Responds to Gambling Questions, Explains Rebuffed Handshake*, ABA J. (Sept. 13, 2018), http://www.abajournal.com/news/article/kavanaugh_says_he_occasionally_gambled_while_a_student_but_did_not_accrue_g [<https://perma.cc/Q3JD-YPQ5>].

¹³⁹ Christopher Cadelago, Nancy Cook, & Andrew Restuccia, *How A Private Meeting with Kennedy Helped Trump Get to 'Yes' on Kavanaugh*, POLITICO (July 9, 2018), <https://www.politico.com/story/2018/07/09/brett-kavanaugh-trump-private-meeting-706137> [<https://perma.cc/75RC-7X5M>].

¹⁴⁰ For example, the use of alcohol as a disinhibitor and memory solvent was endemic among pedophile priests, whose retreat houses routinely treated alcoholism together with sexual pathologies. Priests regularly took their victims in groups to beach houses allegedly to combine recreation with spiritual retreat; Mark Judge, Kavanaugh's drinking buddy, describes the infamous Beach Week as "a perverse Liturgy of the Hours," the beginning of "something sacred." See MARK GAUVREAU JUDGE, *GOD AND MAN AT GEORGETOWN PREP: HOW I BECAME A CATHOLIC DESPITE 20 YEARS OF CATHOLIC SCHOOLING* 70, 75 (2005).

¹⁴¹ *Id.* at 16.

¹⁴² See, e.g., SIPE ET AL., *supra* note 64, at 3847 (describing this tactic of using misleading words

in which it was applied, grounds Kavanaugh's central assurance that "What happens at Georgetown Prep, stays at Georgetown Prep. That's been a good thing for all of us."¹⁴³ Like bed-hopping seminarians, the boys of Georgetown Prep, well into adulthood, could feel free to misbehave secure in the knowledge that a culture of omertà would preserve both personal and institutional reputations from scandal.¹⁴⁴

The analogies are even stronger when one focuses on the behavior of and arguments made concerning the Judiciary Committee. As with investigations into sex abuse, there were both sincere and somewhat disingenuous expressions of concern about the victim, claims that it was in her best interests that allegations not be made public, either by not being pursued at all or being pursued only in executive session. With respect to both the accuser's choice to testify and the committee's choice to hear her, there were claims that this would ruin the glorious future of a good man of hitherto blameless life for whom probity was an essential part of his job description. For the accusers this meant not only that the risk of not being believed was high, but also that they would be blamed for needlessly tarnishing reputations even if they were believed. There was the same feeling that to vindicate the accuser would be to take something infinitely precious from the accused, so that even if we do believe her, we should refrain from punishing him. The question was asked in both cases, do you really want to ruin this man's life? The judiciary, like the priesthood, was seen as an ontologically transformative status as to which, on the one hand personal rectitude was important, but on the other, depriving of it those who had worked hard to attain it was a loss more devastating than that of an ordinary job.¹⁴⁵ Not just the

but avoiding an outright lie as permissible in Catholic moral theology when telling the full truth would violate an obligation to keep a secret or otherwise cause a greater harm).

¹⁴³ See, e.g., Moriah Balingit, *What Happens at Georgetown Prep Stays at Georgetown Prep: Kavanaugh Remarks in 2015 Speech Get Renewed Scrutiny*, WASH. POST (Sept. 19, 2018), https://www.washingtonpost.com/education/2018/09/19/what-happens-georgetown-prep-stays-georgetown-prep-kavanaugh-remarks-speech-get-renewed-scrutiny/?utm_term=.5754a758fd66 [<https://perma.cc/EGY9-5LM7>].

¹⁴⁴ Forensic psychologist Lisa Rocchio characterized this as "the institutional response of protection" for the "young men [who] have their lives ahead of them" and "[l]ike in the Catholic Church . . . for the institution itself" with the result of "sacrificing the victim to their priorities and goals." See Susan Zalkin, *Kavanaugh Shows the Disgusting Underbelly of America's Elite Schools*, VICE (Sept. 24, 2018), https://www.vice.com/en_us/article/4383bd/kavanaugh-shows-the-disgusting-underbelly-of-americas-elite-schools [<https://perma.cc/HT8W-8ZQN>] (describing, inter alia, Georgetown Prep's cover up of abusive priests on its faculty and a more widespread "deny till you die culture").

¹⁴⁵ On the other hand, those with knowledge of abusing priests who could "lovingly administer . . . mass on Sunday after having raped . . . the night before" could bring to their evaluation of Kavanaugh the conviction "that people are in fact capable of being more than one type of person." See Heather Stinson, *Inadvertent Lessons from Judge Kavanaugh's Confirmation Hearing*, WAKE FOREST J. OF L. & POL'Y (2018), <https://wfulawpolicyjournal.com/2018/09/27/inadvertent-lessons-from-judge-kavanaughs-confirmation-hearing/> [<https://perma.cc/F37F-FDH3>] (drawing on her ex-

individual candidate, but the pipeline was seen to be at risk. As Senator Lindsey Graham put it, “This is going to destroy the ability of good people to come forward.”¹⁴⁶ There was the same argument that, to preserve the accused’s reputation and ability to continue in his noble profession, allegations should be kept secret until proven. And there was the same difficulty with that policy, that others with similar allegations were much more likely to come forward only once they knew they were not alone. For both Clarence Thomas and Brett Kavanaugh, as with so many predator priests, the notion that the initial allegations were uniquely aberrational accusations in an otherwise blameless life, was increasingly undercut the more time went by from the publication of the initial accusation. But, as with investigations into predator priests, the results of the FBI investigation of Kavanaugh were put into a secret archive, with senators only allowed to view it a few at a time over very limited time periods and forbidden from copying or disclosing the contents.¹⁴⁷ For both accused clergy and accused judicial candidates, there was an institutional apparatus behind the accused, but not the accuser. In both cases although the central question was whether the candidate was suitable for a job, not whether he was deserving of a penal sanction, the standard imposed was “moral certainty,” or guilt beyond a reasonable doubt.

Perhaps most devastatingly for institutional reputations in both the Catholic clerical and U.S. judicial sex abuse investigations, there was the sense of *déjà vu* all over again. Just as each decade from the 1980s to the present has produced a new iteration of the clerical sex abuse scandals, without the sense that anything had been learned, substantively or procedurally, from the last major iteration, so the Senate, the Executive Branch, the Supreme Court, and the nation each found itself facing in the Kavanaugh hearings exactly the same procedural lapses and moral challenges it had faced in the 1991 Clarence Thomas-Anita Hill hearings, without the sense that lessons had been learned or much progress made.

periences hearing claims against priests for the Independent Reconciliation Compensation Program (IRCP) in evaluating Kavanaugh).

¹⁴⁶ Lindsey Graham, Statement during the Senate Judiciary Committee hearing on the nomination of Brett M. Kavanaugh to be an Associate Justice of The Supreme Court (Wash. Post Transcript Sept. 27, 2018).

¹⁴⁷ See Greg Sargent, *Opinion: Elizabeth Warren’s New, Tantalizing Claim About Kavanaugh Shows What Utter Madness This Is*, S. F. GATE (Oct. 5, 2018), <https://www.sfgate.com/opinion/article/Sen-Elizabeth-Warren-s-new-tantalizing-claim-13284601.php> [<https://perma.cc/FF6W-PHAX>] (noting that although Senator Warren was correct to say “Senators have been muzzled. . . . Republicans have locked the documents behind closed doors,” the 2009 memorandum of understanding between the Judiciary Committee and the White House counsel concerning the confidentiality of FBI background checks into nominees could be renegotiated).

There is a numbing sameness to the stories, both substantively and procedurally. There is also a grinding disillusionment that comes with the awareness that multiple times over decades an institution has promised it now has recognized the problem and will deal appropriately with it, only to leave compromised actors and flawed procedures in place essentially unchanged. This, in the end, rather than individual bad acts by institutional actors, is what causes scandal that destroys necessary faith in institutions and eventually, can destroy the institutions themselves.



The Rules of #MeToo

Jessica A. Clarke[†]

ABSTRACT

Two revelations are central to the meaning of the #MeToo movement. First, sexual harassment and assault are ubiquitous. And second, traditional legal procedures have failed to redress these problems. In the absence of effective formal legal procedures, a set of ad hoc processes have emerged for managing claims of sexual harassment and assault against persons in high-level positions in business, media, and government. This Article sketches out the features of this informal process, in which journalists expose misconduct and employers, voters, audiences, consumers, or professional organizations are called upon to remove the accused from a position of power. Although this process exists largely in the shadow of the law, it has attracted criticisms in a legal register. President Trump tapped into a vein of popular backlash against the #MeToo movement in arguing that it is “a very scary time for young men in America” because “somebody could accuse you of something and you’re automatically guilty.” Yet this is not an apt characterization of #MeToo’s paradigm cases. In these cases, investigative journalists have carefully vetted allegations; the accused have had opportunities to comment and respond; further investigation occurred when necessary; and the employment consequences, if there were any at all, were proportional to the severity of the misconduct. This Article offers a partial defense of the #MeToo movement against the argument that it offends procedural justice. Rather than flouting due process values, #MeToo’s informal procedures have a number of advantages in addressing sexual misconduct while providing fair process when the accused person is a prominent figure.

INTRODUCTION

The #MeToo movement has exposed that sexual harassment and assault remain commonplace and that traditional legal procedures have failed for survivors.¹ The civil and criminal law impose high costs on

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¹ Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [https://perma.cc/J7QL-BZD2].

those who come forward while offering little in the way of benefits.² Confidential settlements and mandatory arbitration isolate survivors and cloak legal claims in secrecy, impairing the law's ability to promote social change.³ In the absence of effective formal legal procedures, an ad hoc process⁴ has emerged for managing claims of sexual harassment and assault against persons in high-level positions in business, media, and government.⁵ In this ad hoc process, journalists expose misconduct and employers, voters, audiences, consumers, or professional organizations are called upon to remove the accused from a position of power. Since the fall of 2017, a number of survivors have used this informal process to report abuse, and, as a result, over two hundred accused individuals have lost high-profile jobs, roles, or positions.⁶

The backlash came swiftly, invoking concerns of false allegations,⁷ due process,⁸ and overreach.⁹ In September 2018, the Supreme Court confirmation hearings for Justice Brett Kavanaugh inspired the use of the social media hashtag #HimToo to complain about the mistreatment of accused men.¹⁰ President Trump tapped into this vein of popular

² See *infra* notes 31–58, 219–228 and accompanying text.

³ See *infra* notes 49–58 and accompanying text.

⁴ Cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 774 (2017) (“Ad hoc procedure overcomes problems that cannot be solved using the existing procedural structures, and may be necessary to ensure that the civil justice system is able to provide the ordinary desiderata of civil litigation in cases that defy customary judicial management.”).

⁵ See Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. L. REV. 825, 833 (2019) (“#MeToo and its efforts respond directly to the view that the state has failed to impose appropriate consequences on those who commit sexual harassment and sexual assault.”). Cf. Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. 273, 276 (2019) (discussing how “#MeToo has catalyzed the creation of new channels for reporting sexual misconduct without directly invoking the legal system or law-adjacent institutional structures”).

⁶ 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> [<https://perma.cc/VTM3-KDJJ>].

⁷ See *Measuring the #MeToo Backlash*, THE ECONOMIST (Oct. 20, 2018), <https://www.economist.com/united-states/2018/10/20/measuring-the-metoo-backlash> [<https://perma.cc/65LW-CAF7>] (reporting that “18% of Americans now think that false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished, compared with 13% in November last year” based on YouGov polls of 1500 Americans).

⁸ See Emily Stewart, *Trump Wants “Due Process” for Abuse Allegations. I Asked 8 Legal Experts What That Means*, VOX (Feb. 12, 2018), <https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump> (“[A]s more and more figures face consequences—financial, political, professional, and legal—for their bad behavior, one term that comes up over and over again is ‘due process.’”).

⁹ See Masha Gessen, *Sex, Consent, and the Dangers of ‘Misplaced Scale,’* NEW YORKER (Nov. 27, 2017), <https://www.newyorker.com/news/our-columnists/sex-consent-dangers-of-misplaced-scale> [<https://perma.cc/MN3F-PWMM>]; Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash> [<https://perma.cc/CVW7-8329>].

¹⁰ Emma Grey Ellis, *How #HimToo Became the Anti #MeToo of the Kavanaugh Hearings*, WIRED (Sept. 27, 2018), <https://www.wired.com/story/brett-kavanaugh-hearings-himtoo-metoo-chr>

backlash in arguing that it is “a very scary time for young men in America” because “somebody could accuse you of something and you’re automatically guilty.”¹¹ With this comment, he connected the allegations against older, powerful men with those against younger ones, perhaps on college campuses. At rallies, the President trivialized the #MeToo movement, joking that “the rules of MeToo” amount to a code of political correctness.¹² Hyperbolic commentators have called the movement a “witch hunt,” “McCarthyism,” and “Soviet Union-style erasure” of accused men.¹³ More temperate observers have expressed the concerns that “trial by media” is “often a hindrance to truth-finding”¹⁴ and that decisions have been made in a “rush to judgment.”¹⁵

In large part, the response to this backlash has been to argue that it is off the mark as a matter of law because the court of public opinion is not constrained by procedural rules.¹⁶ This Article takes a different tack. It identifies a set of emerging procedural norms for making and

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¹¹ Dara Lind, *Trump: “It’s a Very Scary Time for Young Men in America,”* VOX (Oct. 2, 2018), <https://www.vox.com/2018/10/2/17928800/trump-women-doing-great-kavanaugh> [http://perma.cc/EUX8-NGN5].

¹² Betsy Klein, Allie Malloy, & Kate Sullivan, *Trump Mocks the #MeToo Movement at a Rally, Again*, CNN (Oct. 10, 2018), <https://www.cnn.com/2018/10/10/politics/trump-rally-mocks-me-too/index.html> [https://perma.cc/9T9E-863E].

¹³ See, e.g., David M. Perry, *No, #MeToo Is Not a Witch Hunt*, PAC. STANDARD (Jan. 9, 2018), <https://psmag.com/social-justice/no-metoo-is-not-a-witch-hunt> [https://perma.cc/4M7H-LFG5].

¹⁴ Shira A. Scheindlin & Joel Cohen, *After #MeToo, We Can’t Ditch Due Process*, GUARDIAN (Jan. 8, 2018), <https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televictions> [https://perma.cc/QV5P-F5VG].

¹⁵ Elizabeth Bartholet, *#MeToo Excesses*, HARV. CRIMSON, (Jan. 16, 2018) <https://www.thecrimson.com/article/2018/1/16/bartholet-metoo-excesses/> [https://perma.cc/Q453-HHU5].

¹⁶ See, e.g., Ana Marie Cox, *Al Franken Isn’t Being Denied Due Process. None of These Famous Men Are*, WASH. POST (Dec. 7, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/07/al-franken-isnt-being-denied-due-process-none-of-these-famous-men-are/?utm_term=.49f4dfa95a51 [https://perma.cc/9B5B-LNYY] (“But the courts aren’t where our national conversation is taking place, so let’s not dither about the dangers of proclaiming guilt or innocence.”); Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, 7 LAWS 21 (2018) (“Critics who contend ‘due process is better than mob rule’ miss the point. The aim, and point, is not (or is not always) criminal prosecution.” (citation omitted)).

evaluating public reports¹⁷ of sexual assault, harassment, and misconduct¹⁸ against high-profile leaders in business, media, and government.¹⁹ It defends these norms against the charge that they violate principles of procedural justice in their treatment of the accused.²⁰ In #MeToo's paradigm cases—reporting on Harvey Weinstein, Bill O'Reilly, Eric Schneiderman, Louis C.K., and others by *The New York Times* and *The New Yorker*—journalists have carefully vetted allegations; the accused have had opportunities to comment and respond; skeptical commentators have scrutinized accusations; decision makers have required corroborative evidence and conducted follow-up investigations when necessary; and the employment consequences, if any, were proportional to the severity and likelihood of the misconduct.²¹ This Article does not argue that every decision in the #MeToo era has been procedurally sound.²² Rather, it argues that in most instances in which high-profile leaders have lost positions, the allegations have been

¹⁷ This Article is interested in the public nature of reports as a characteristic feature of the #MeToo era. It is not focused on the procedures for handling complaints against students under Title IX or against employees under Title VII. The due process implications of these processes, which are often confidential, have been analyzed elsewhere.

¹⁸ This Article uses “sexual misconduct” as a provisional term to describe the broader set of harms illuminated by #MeToo. One controversial feature of #MeToo is that it has contested the legal and social boundaries separating various forms of harm, including, but not limited to: rape, sexual assault, unwanted and coercive sex, child sex abuse, nonsexual but gender-based harassment, harassment inside and outside the workplace, intimate partner violence, homophobic and transphobic harassment, claims against women, claims by men and nonbinary survivors, and claims about the erasure of people of color and other groups. This Article is not the place to resolve these controversies, although it addresses the question of whether the consequences are proportional to the severity of the misconduct in Part IV.E. Where appropriate, this Article refers specifically to certain of these forms of harm.

¹⁹ I am concerned with high-profile abusers who occupy positions that afford them great fame, power, or wealth and whose misconduct therefore counts as newsworthy. See, e.g., Poynter Staff, *Which Sexual Harassment and Assault Stories Should You Cover? Here Are Some Guidelines*, POYNTER (Nov. 29, 2017), <https://www.poynter.org/ethics-trust/2017/which-sexual-harassment-and-assault-stories-should-you-cover-here-are-some-guidelines/> [<https://perma.cc/XR4Y-TN3L>]. Accusations against rank-and-file workers raise different concerns. See Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 95–99 (2018). While the boundaries of the category of high-profile employees can be disputed, core cases are easy to identify.

²⁰ This Article does not advance any particular theory of what procedural justice requires. Rather, it responds to specific procedural objections to the #MeToo movement by examining the set of cases of individuals who lost prominent positions in the year after the Weinstein story and evaluating the procedures those individuals were afforded based on principles from due process precedents. This Article does not argue that extralegal processes are ideal for survivors or are a satisfactory alternative to legal reform.

²¹ These Pulitzer Prize winning stories are collected at THE PULITZER PRIZES, THE 2018 PULITZER PRIZE WINNER IN PUBLIC SERVICE (2018), <https://www.pulitzer.org/winners/new-york-times-reporting-led-jodi-kantor-and-megan-twohey-and-new-yorker-reporting-ronan> [<https://perma.cc/3VWQ-SZYL>].

²² I do not defend employment decisions based on anonymous public reports or sparse allegations against high-level leaders; rather, I argue that any such cases are exceptional deviations from emerging procedural norms. See *infra* Part III.

vetted and scrutinized by media, and decision makers have required some form of corroborative evidence or conducted their own investigations before taking action. This set of extralegal norms provides prominent figures accused of sexual misconduct with fair procedural safeguards.

This Article proceeds in four parts. Part I explains the advantages of #MeToo's extralegal procedures over traditional legal procedures, such as those provided by the criminal justice system and workplace sexual harassment law. Part II argues that, even though private actors are not bound by procedural rules outside of legal proceedings, #MeToo's advocates should be concerned with procedural justice for the accused because it is important to the legitimacy of the movement's goals. Part III argues that a set of procedural norms for evaluating extralegal claims of sexual harassment and assault against persons in positions of power is emerging. Part IV defends these emerging norms against various procedural objections: that they are not enforceable; that survivors who failed to pursue formal legal remedies should be barred from pursuing extralegal ones; that #MeToo fails to give the accused a fair hearing; and that it imposes disproportionate consequences. Close examination reveals that the rules of #MeToo, as applied, do not violate basic procedural principles in terms of the rights of the accused.

I. ADVANTAGES OF #METOO'S EXTRALEGAL PROCEDURES

The originators of the #MeToo movement conceived of their project as a "therapeutic, restorative, and educational" effort aimed at structural change and solidarity for survivors.²³ Although the movement's leaders did not envision its aims as identifying individual perpetrators, #MeToo gained national prominence as a result of the Harvey Weinstein story.²⁴ It is now associated with an extralegal process for removing high-level perpetrators from positions of power.²⁵ In this extralegal process, journalists first publicly expose sexual misconduct and then private actors, such as employers, voters, audiences, consumers, or professional organizations, determine whether the accusations warrant removal of the accused. This process enforces an evolving social norm: that sexual misconduct disqualifies a person from holding a position of

²³ See, e.g., Lesley Wexler, *#MeToo and Law Talk*, 2019 U. CHI. LEGAL F. 343, 343 (discussing "Alyssa Milano's informative, hand raising oriented #MeToo hashtag and its intersection with Tarana Burke's victim-centered, empathy-generating and restorative-justice focused Me Too").

²⁴ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/K45D-2XH3].

²⁵ See Carlsen et al., *supra* note 6.

power.²⁶ The process itself is a set of evolving, decentralized, and informal norms, with specific features that are described in detail in Part III. It is not a rights-claiming system in which survivors make demands for justice,²⁷ because the pressure generated by news coverage is the key feature of the system,²⁸ and the only available remedy is removal of the perpetrator. The process is private in the sense that it is not enforced by state actors, but unlike many other forms of private administration, it is public in the sense that it is driven by and occurs in the spotlight of media coverage.

This process has a number of significant limitations, and fails to achieve many of the #MeToo movement's goals. Nonetheless, removing perpetrators from power is an essential component of the reckoning occasioned by the #MeToo movement.²⁹ In this regard, #MeToo's extralegal procedures have a number of important advantages over traditional legal ones in terms of transparency, collective action, and institutional change.³⁰

Legal processes have been largely ineffective in removing high-profile perpetrators. The criminal law is a blunt and unwieldy tool. Sexual offenses are defined narrowly³¹ and are difficult to prove.³² Some research suggests only 5 to 20% of rapes are reported to law enforcement, only 7 to 27% of rapes that are reported to law enforcement are prosecuted, and only 3 to 26% of those that are prosecuted result in conviction.³³ One reason is that the criminal justice system imposes a "credibility discount" on victims.³⁴ On surveys, law enforcement officers

²⁶ See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350 (1997) (discussing definitions of norms by contrast to legal rules).

²⁷ Compare Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 863 (2008) (explaining how employment discrimination law, including sexual harassment law, is a flawed rights-claiming system).

²⁸ Compare William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–36 (1980) (describing a process of "naming, blaming, and claiming" in which an aggrieved individual seeks justice).

²⁹ See, e.g., Lesley Wexler, Jennifer K. Robbennolt, & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 68–81 (discussing principles of restorative justice, which require backward-looking efforts to ensure offender accountability as well as forward-looking efforts to ensure meaningful change).

³⁰ My argument is not that these extralegal processes should supplant legal ones or substitute for legal reform. It is that they serve purposes current legal processes do not.

³¹ For a survey of state laws and discussion of reform efforts, see MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Am. Law Inst., Tentative Draft No. 1, 2014).

³² See, e.g., Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 971 (2008) (discussing research showing "jury reluctance to convict men accused of raping women who have violated traditional sexual mores").

³³ Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 156 (2012).

³⁴ Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166

report that they believe rape claims are far more likely to be false than reports of other crimes, despite the lack of empirical support for this assumption.³⁵ The penalties for sexual offenses—such as harsh prison sentences and lifelong sex offender registration requirements—are so draconian that some survivors may not wish to involve the criminal justice system at all.³⁶

As for workplace sexual harassment law, it is riddled with loopholes and limitations.³⁷ For example, independent contractors, like many of the Hollywood actors who sought opportunities with Weinstein, are not protected by federal law.³⁸ Additionally, federal courts have ratcheted up the standard for how bad harassment must be to violate the law.³⁹ Some courts have held that even repeated instances of unwanted sexual touching do not count as harassment.⁴⁰

Sexual harassment law is particularly ineffective at stopping high-level harassers. In its 2016 study of harassment in the workplace, an Equal Employment Opportunity Commission (EEOC) task force found that workplaces that anoint some employees as “superstar[s]” tend to be “breeding ground[s]” for harassment.⁴¹ When some employees “are privileged with higher income, better accommodations, and different expectations,” they may begin to think “they are above the rules.”⁴² Victims may believe they have nothing to gain but everything to lose from

U. PA. L. REV. 1, 2 (2017); see also Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 209 (2017) (“Unlike people who have been robbed, beaten, or defrauded, rape victims must bypass a series of gatekeepers that, beginning with the police, impede the criminal justice system from vindicating victims’ allegations.”).

³⁵ Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers’ Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008) (discussing a survey of 891 police officers, in which 53% believed that 11 to 50% of rape reports by women were false, and 10% believed that between 50 and 100% were false).

³⁶ See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1953 (2016).

³⁷ For summaries of some of Title VII’s shortcomings, see, e.g., Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1603–10 (2018); Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014 (2018). Tort law is no answer; sexual harassment law was meant to address the many limitations of tort law. See generally Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39 (2018).

³⁸ Title VII applies only to employer/employee relationships. 42 U.S.C. § 2000e-2(a)(1).

³⁹ See, e.g., SANDRA SPERINO & SUJA THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 33–38 (2017) (discussing the requirement that harassment be “severe or pervasive” to violate the law).

⁴⁰ *Id.*

⁴¹ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [<https://perma.cc/AH2R-93VQ>].

⁴² *Id.* Additionally, “power can make an individual feel uninhibited and thus more likely to engage in inappropriate behaviors.” *Id.* (citing Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265 (2003)).

reporting misconduct by chief executives, rainmakers, and moguls.⁴³ Institutions have incentives to shield their anointed ones from scandal.⁴⁴ Those institutions may conclude that the benefits of retaining a superstar are worth the costs of misconduct.⁴⁵ High-level employees are more likely to have contracted for protection against termination, meaning their institutions realize that actions against them will be drawn-out and expensive.⁴⁶

The legal rules for reporting sexual harassment allow institutions to sweep it under the rug. In order to prevail in a sexual harassment case, most employees must first attempt to make use of their employer's internal complaint process.⁴⁷ Yet research has found only 30% of victims do so.⁴⁸ When victims do report, internal processes may result in confidential settlements that allow serial harassers to continue.⁴⁹ For example, Fox News host Bill O'Reilly was accused of a series of incidents of sexual harassment and other misconduct, but his accusers received payouts, totaling \$45 million, in exchange for their silence.⁵⁰ Fox News hired private investigators to seek out damaging information about one victim, and then agreed to destroy the materials the investigators had found as part of a settlement.⁵¹ In other cases, employees are required, as a condition of the job, to sign away their rights to public litigation by

⁴³ See, e.g., 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?login=smartlock&auth=login-smartlock> [https://perma.cc/D79H-48C8] (quoting a memo from a former assistant of Harvey Weinstein: "I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. The balance of power is me: 0, Harvey Weinstein: 10."); MEGAN KELLY, *SETTLE FOR MORE 302* (2016) (Explaining that she did not report Roger Ailes because, "if I caused a stink, my career would likely be over. Sure they might investigate, but I felt certain there was no way they would get rid of him, and I would be left on the wrong side of the one man who had power at Fox.").

⁴⁴ Arnow-Richman, *supra* note 19, at 87.

⁴⁵ FELDBLUM & LIPNIC, *supra* note 41; see also, e.g., 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?module=inline> [https://perma.cc/VU7R-VBT4].

⁴⁶ Arnow-Richman, *supra* note 19, at 92–95.

⁴⁷ This rule generally applies when the harasser is a supervisor. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

⁴⁸ Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469–96 (J. Barling & C. L. Cooper eds., 2008).

⁴⁹ See, e.g., Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [https://perma.cc/R7M-MNCV].

⁵⁰ 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/P86H-7TPR].

⁵¹ *Id.*

agreeing that any claims be settled in confidential arbitral proceedings.⁵²

Moreover, it is administratively difficult and time consuming for individual survivors to invoke legal remedies. Class action lawsuits could minimize these burdens, helping plaintiffs to attract higher-quality lawyers and offering them more leverage against the economic power of their employers.⁵³ Yet there have been relatively few sexual harassment class actions.⁵⁴ Courts regard sexual harassment as “more individualized than many types of employment discrimination claims” because each plaintiff must prove the harassment was “unwelcome” as a subjective matter.⁵⁵ In recent years, the Supreme Court has made the requirements of class certification more stringent.⁵⁶ Additionally, many employers require their workforces to sign away their rights to class proceedings along with their rights to litigation.⁵⁷ In a series of recent decisions, the Supreme Court has made “class arbitration waivers nearly bulletproof.”⁵⁸

By contrast, #MeToo’s procedures are open, relatively simple, collective, and effective in removing high-level perpetrators. It is one of #MeToo’s distinctive features that accusations are public.⁵⁹ #MeToo

⁵² See, e.g., Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, DEALB%K (July 15, 2014), <https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/> [<https://perma.cc/VQ2M-2LU4>]. One study found mandatory arbitration clauses cover 56% of non-union private-sector workers. ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION 1* (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf> [<https://perma.cc/L9AD-X3C7>]. For a discussion of how forced arbitration deters claims, see Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Toward Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 201–05 (2019).

⁵³ See, e.g., Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 484 (1992).

⁵⁴ Melissa Hart, *Litigation Narratives: Why Jensen v. Ellerth Didn’t Change Sexual Harassment Law, But Still Has a Story Worth Telling*, 18 BERKELEY WOMEN’S L.J. 282, 288 (2003) (“There appear to have been only ten reported cases between 1995 and 2002 in which courts considered sexual harassment claims as part of a federal class action suit.”).

⁵⁵ *Id.* at 293; Tristin K. Green, *Was Sexual Harassment Law A Mistake? The Stories We Tell*, 128 YALE L.J.F. 152, 166 (2018) (“Judges have constructed an individualized harassment law that revolves around stories of ‘personal advances,’ even though in most cases harassment is not an individualized problem.”).

⁵⁶ See, e.g., Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 153, 176–77 (2015) (discussing challenges for plaintiffs bringing civil rights class actions after the Supreme Court’s 2011 decision in *Wal-Mart v. Dukes*).

⁵⁷ COLVIN, *supra* note 52, at 2 (reporting that 30.1% of employers that require mandatory arbitration also require class waivers).

⁵⁸ Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 5 n.27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238460 [<https://perma.cc/Z2DX-UXVR>].

⁵⁹ See, e.g., Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/P7NS-U728>].

claimants have been lauded as “silence breakers.”⁶⁰ The public pressure generated by #MeToo has overcome legal barriers to speaking out. #MeToo allows survivors to band together—creating networks of support, lending credibility to one another’s claims, and exposing that problems are systemic rather than isolated occurrences or the fault of individual victims. Journalists have reported a snowball effect: a source who would otherwise have stayed silent might go on the record if she could be told she was the third, fourth, or fifth named source for an article.⁶¹ Some of the numbers are staggering—after journalist Glenn Whipp wrote about allegations by thirty-eight women against filmmaker James Toback, he was contacted by two hundred additional accusers.⁶² Sources may resist coming forward out of “self-blame, guilt, and complicity,” but when informed about additional victims, they realize, “It can’t be 30 or 40 women’s fault.”⁶³

The #MeToo movement has been stunningly effective in removing perpetrators from positions of power. In the year prior to the Weinstein news stories, fewer than thirty prominent people lost positions due to public accusations of sexual misconduct.⁶⁴ In the year after, over two hundred did.⁶⁵ By incapacitating offenders, #MeToo has prevented them from further abusing their positions of power to harm others. The threat of public exposure may also deter other leaders, and those who aspire to leadership, from engaging in misconduct. It is important to note, of course, that incapacitating and deterring high-level harassers only assists a privileged pool of potential victims, and only in a limited set of circumstances.⁶⁶ Most perpetrators are not high-level leaders or

⁶⁰ *Id.*

⁶¹ *8 Reporters Reflect on the Challenges of Covering Sexual Harassment*, NIEMAN REPS. (Nov. 13, 2017), <https://niemanreports.org/articles/reporters-on-their-stories-about-male-abuses-of-power/> [<https://perma.cc/RE3U-DA3C>] (quoting restaurant critic Brett Anderson on his reporting on celebrity chef John Besh). For example, Leigh Corfman, who reported that Roy Moore had sexually abused her when she was fourteen years old, was at first reluctant to come forward, but told *The Washington Post* that “If they found additional people, I would tell my story.” Adam Edelman, *Roy Moore Accuser Leigh Corfman: I Didn’t Deserve to Be Preyed Upon*, NBC NEWS (Nov. 20, 2017), <https://www.nbcnews.com/politics/politics-news/roy-moore-accuser-leigh-corfman-i-didn-t-deserve-be-n822416> [<https://perma.cc/U7QB-23KL>].

⁶² Glenn Whipp, *200 More Women Share Their James Toback Stories after 38 Accuse Director of Sexual Harassment*, L.A. TIMES (Oct. 23, 2017), <https://www.latimes.com/entertainment/movies/la-et-mn-toback-follow-up-20171023-story.html> [<https://perma.cc/2N97-BQGG>].

⁶³ *8 Reporters Reflect*, *supra* note 61 (quoting editor Michelle Cottle).

⁶⁴ Carlsen et al., *supra* note 6.

⁶⁵ *Id.*

⁶⁶ See Rebecca Traister, *Your Reckoning. And Mine.*, THE CUT (Nov. 2017), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html>? [<https://perma.cc/NDZ7-P6U9>] (“There are also women who do want to go on the record, women who’ve summoned armies of brave colleagues ready to finally out their repellent bosses. To many of them I must say that their guy isn’t well known enough, that the stories are now so plentiful that offenders must meet a certain bar of notoriety, or power, or villainy, before they’re considered newsworthy.”).

celebrities.⁶⁷ Survivors without fame and fortune are less likely to find investigative journalists eager to tell their stories. The media has focused on white women, even though women of color experience higher rates of sexual violence.⁶⁸ Even when their stories are covered, “[b]lack victims of sexual abuse are often disregarded.”⁶⁹ Low-wage,⁷⁰ blue collar,⁷¹ and immigrant workers⁷² are particularly vulnerable to abuse, but are less able to speak out and less likely to be heard when they do.⁷³ Transgender and nonbinary survivors have received little coverage,⁷⁴ despite the fact that they are at higher risk of sexual assault.⁷⁵ Popular attention has focused on a stock narrative involving an older man who

⁶⁷ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 19 n.4 (2018) (collecting studies showing coworker harassment is more prevalent).

⁶⁸ Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored*, WASH. POST (Nov. 9, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/?utm_term=.358786061779 [<https://perma.cc/M9DQ-TRPL>]. See also Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 107 (2018) (“The recent resurgence of the #MeToo movement reflects the longstanding marginalization and exclusion that women of color experience within the larger feminist movement in U.S. society.”).

⁶⁹ Kimberlé Williams Crenshaw, *I Believe I Can Lie*, BAFFLER (Jan. 17, 2019), <https://thebaffler.com/latest/i-believe-i-can-lie-crenshaw> [<https://perma.cc/XY5K-WX9V>]; see also Jemele Hill, *R. Kelly and the Cost of Black Protectionism*, ATLANTIC (Jan. 11, 2019), <https://www.theatlantic.com/entertainment/archive/2019/01/r-kelly-and-cost-black-protectionism/580150/> [<https://perma.cc/Q4JX-A2LU>] (discussing the “prolonged indifference” to claims by black girls and women against musician R. Kelly).

⁷⁰ Lia Russell, *Saying #MeToo Is Harder for Low-Wage Workers*, AM. PROSPECT (May 3, 2018), <https://prospect.org/article/saying-metoo-harder-low-wage-workers> [<https://perma.cc/U8V9-NR7X>].

⁷¹ See, e.g., Susan Chira & Catrin Einhorn, *Decades after the Company Tried to Tackle Sexual Misconduct at Two Chicago Plants, Continued Abuse Raises Questions about the Possibility of Change*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/UW8J-7UNW>] (discussing racial and gender dynamics that contributed to sexual harassment of blue-collar workers at Ford’s Chicago plants).

⁷² See generally BERNICE YEUNG, IN A DAY’S WORK: THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA’S MOST VULNERABLE WORKERS (2018).

⁷³ Stories have not focused on how dynamics like class can make certain women more vulnerable to abuse. Josephine Livingstone, *The Task Ahead for Feminism*, NEW REPUBLIC (Nov. 17, 2017), <https://newrepublic.com/article/145850/task-ahead-feminism> [<https://perma.cc/UV65-HEHX>] (“Important contextual information—that Roy Moore allegedly chose working-class women and children to abuse, for example—has been lost.”).

⁷⁴ See, e.g., Ebony Miranda, *Did #MeToo Forget About Me?*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/smarter-living/the-edit-me-too.html> [<https://perma.cc/YAE7-TKGX>].

⁷⁵ SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 15 (Dec. 2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/A8A2-WTTK>] (reporting that 47% of transgender survey respondents had been “sexually assaulted at some point in their lifetime,” and 10% “were sexually assaulted in the past year”).

demands sexual favors from a younger, less-powerful woman, or occasionally a man.⁷⁶ Sexist but non-sexual forms of workplace harassment have often been overlooked, as have the connections between sexual abuse and broader patterns of gender-based inequality, power dynamics, and institutional dysfunction.⁷⁷

Yet all these criticisms—the failure to address harassment by low-level employees, the failure to attend to intersectional dynamics involving race, class, LGBTQ, and immigration status, and the failure to address non-sexual forms of harassment—are commonly made of legal processes. What is interesting about #MeToo is how, in many cases, it has achieved what the law could not.⁷⁸ #MeToo's procedures are distinctive in specifically asking whether sexual assault, harassment, or misconduct should disqualify an individual from important office. This is not the question asked by the criminal or civil justice systems, although loss of employment is sometimes a collateral consequence of a conviction or judgment.

Despite the limits of the strategy, the #MeToo movement's ability to remove abusive leaders is an accomplishment because of what it says about gender and power. The movement has the potential to redefine the conditions for holding power, celebrity, and wealth in our society. The Weinstein story came one year after a presidential election in which the winning candidate had bragged on video that being famous meant he could grope women without first asking for their consent.⁷⁹ Prior to

⁷⁶ For stories involving male perpetrators and male victims, see, e.g., Laura Bradley, "I Was Terrified, and I Was Humiliated": #MeToo's Male Accusers, One Year Later, VANITY FAIR (Oct. 4, 2018), <https://www.vanityfair.com/hollywood/2018/10/metoo-male-accusers-terry-crews-alex-winter-michael-gaston-interview> [<https://perma.cc/5QNH-HXC2>]; Adam B. Vary, *Actor Anthony Rapp: Kevin Spacey Made A Sexual Advance Toward Me When I Was 14*, BUZZFEED NEWS (Oct. 30, 2017, 12:37 AM), <https://www.buzzfeednews.com/article/adambvary/anthony-rapp-kevin-spacey-made-sexual-advance-when-i-was-14> [<https://perma.cc/D5LW-FU5L>]. When women abuse men, the story is told as if it were "man bites dog." Headlines insinuate that such cases somehow undermine the movement, rather than demonstrating the problems with unconstrained power. See, e.g., Kim Severson, *Asia Argento, a #MeToo Leader, Made a 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/Y6MP-WTW6>]; 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/E6ZA-ZUJG>].

⁷⁷ See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 24 (2018); Rebecca Traister, *This Moment Isn't (Just) About Sex. It's Really About Work*, THE CUT (Dec. 10, 2017), <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html> [<https://perma.cc/8TML-UYNG>].

⁷⁸ See MacKinnon, *supra* note 1.

⁷⁹ David A. Fahrenthold, *Trump Recorded Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.4c56ec64c6e1 [<https://perma.cc/7P4J-ZAJK>] ("You know I'm automatically attracted to beautiful—I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything . . . Grab them by the p---y.")

October 2017, reports of sexual assault, harassment, and misconduct by powerful men were “an almost wholly open secret, sometimes even having been reported in major outlets, and yet somehow ignored, allowed to pass, unconsidered.”⁸⁰ What has changed is that some of these reports are being taken seriously “and treated as disgraceful and outrageous misconduct with which no self-respecting company or university can afford to be associated.”⁸¹ In asking whether sexual assault, harassment, and misconduct are disqualifying, voters, corporate boards, consumers, and other decision makers have made clear that survivors matter, that sexual assault and harassment are unacceptable, and that those who fail to treat all people as equals, regardless of sex, are unfit to hold high office.

It is true that removing harassers from high places will not resolve all harassment.⁸² As Professor Vicki Schultz has written, “sooner or later, other harassers will take their place—unless the underlying conditions that foster harassment in the first place are addressed.”⁸³ However, there are some positive signs here. Many of the institutions that have undergone leadership transitions in the wake of #MeToo reports have taken the opportunity to consider gender diversity. Out of 201 male leaders who lost their positions due to sexual harassment, almost half were replaced by women.⁸⁴ Nonetheless, removing perpetrators does not provide restitution to victims. To truly address sexual assault, harassment, and misconduct, comprehensive legal, public health, and education strategies are required. But in the course of calls for comprehensive change, it is important not to diminish the #MeToo movement’s accomplishments in ending high-level impunity.

II. WHY PROCEDURAL JUSTICE MATTERS

Because of their employment consequences for accused individuals, #MeToo’s informal procedures are controversial.⁸⁵ Calls for due process

⁸⁰ Rebecca Traister, *Why the Harvey Weinstein Sexual-Harassment Allegations Didn’t Come Out Until Now*, THE CUT (Oct. 5, 2017), https://www.thecut.com/2017/10/why-the-weinstein-sexual-harassment-allegations-came-out-now.html?utm_source=tw&utm_medium=s3&utm_campaign=sharebutton-t [https://perma.cc/3YG7-M8WV].

⁸¹ Catharine A. MacKinnon, *This Moment Turned Out to Be Fleeting’ Nine Reflections on #MeToo, One Year On*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/opinion/me-too-weinstein-one-year.html> [https://perma.cc/DQU4-LYF8].

⁸² For a discussion of the goals of the #MeToo and Times Up movements, see Murray, *supra* note 5, at 867. For more comprehensive suggestions on reform, see Schultz, *supra* note 67.

⁸³ Schultz, *supra* note 77, at 26. These underlying conditions include sex segregation and unstructured authority. *Id.* at 48–53.

⁸⁴ See Carlsen, *supra* note 6; Schultz, *supra* note 67, at 22–25 (discussing the links between sex segregation and harassment).

⁸⁵ See *supra* notes 10–12 and accompanying text.

have taken various forms, from exhortations not to rush to judgment,⁸⁶ to arguments that those making employment decisions should adopt procedural safeguards applicable to criminal, civil, or administrative proceedings,⁸⁷ to the insistence that only criminal courts can hear claims.⁸⁸ Many of these arguments rest on mistaken assumptions about the law and the troubling suggestion that high-profile men, most of them white, deserve exceptional protections against false allegations. But #MeToo advocates should still be concerned about the charge of a rush to judgment.

One response to the due process backlash is that technically, procedural requirements do not apply to most employment decisions. Criminal penalties like incarceration cannot be imposed outside of the criminal justice system, and so the rules of criminal justice, such as the requirement that proof be established beyond a reasonable doubt, do not apply outside of that system. The Constitution's Due Process Clause seldom applies to employment decisions. The main reason is that it does not generally bind non-state actors—such as private employers, voters, consumers, and shareholders.⁸⁹ The Due Process Clause only protects a subset of public employees, such as those with a recognized property interest in continued employment, for example, because of a collective bargaining agreement, state statute, employer policy, or contract that only allows discharge for cause.⁹⁰ Job applicants do not have any such

⁸⁶ See, e.g., Barholet, *supra* note 15.

⁸⁷ See, e.g., Editorial Board, *The Presumption of Guilt*, WALL ST. J. (Sept. 21, 2018), <https://www.wsj.com/articles/the-presumption-of-guilt-1537570627> [<https://perma.cc/54A8-C4ZY>] (arguing that “the set of facts [Christine Blasey Ford] currently provides wouldn’t pass even the ‘preponderance of evidence’—or 50.01% evidence of guilt—test that prevails today on college campuses”).

⁸⁸ See, e.g., Mollie Hemmingway, *The Kavanaugh Allegation Process Is a Miscarriage of Justice for Everyone*, FEDERALIST (Sept. 19, 2018), <https://thefederalist.com/2018/09/19/the-kavanaugh-allegation-process-is-a-miscarriage-of-justice-for-everyone/> [<https://perma.cc/E4JT-DN9Z>] (“[T]he Senate is still an inappropriate place to litigate claims of sexual assault. Since Maryland apparently doesn’t have a statute of limitations on felony sex assault, charges could still be filed there if the case is strong enough to do so.”).

⁸⁹ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982) (discussing the “state action” requirement for certain constitutional claims, which requires that “the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State”). Even a scholar making the unlikely argument (rejected by every court to consider it) that due process applies to Title IX proceedings by private universities against students, see Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEXAS L. REV. 15, 26 (2017), recognizes that due process does not apply to private employers in their proceedings against employees, *id.* at 48.

⁹⁰ See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

entitlements.⁹¹ Individuals who choose to resign rather than face further scrutiny waive any rights to due process.⁹² Due process also protects a public employee's liberty interest in their professional reputation, but only if the government falsely claims that an employee engaged in misconduct.⁹³ This right does not apply if it was the media that disclosed the information.⁹⁴

It is a widely-accepted myth that U.S. workers have automatic job protection.⁹⁵ In many U.S. jurisdictions, private employers are permitted to consider any entanglement by a worker with the criminal justice system as a ground for firing—even one resulting in an acquittal.⁹⁶ The reason most employers created internal complaint processes to resolve sexual harassment claims was to avoid lawsuits from victims, not to protect the interests of accused employees.⁹⁷ The Fair Credit Reporting Act was amended in 2003 to allow employers to conduct investigations

⁹¹ *Id.* (“To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”).

⁹² *See, e.g., Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 173–75 (4th Cir. 1988) (holding that “the mere fact that the choice is between comparably unpleasant alternatives—e.g., resignation or facing disciplinary charges—does not of itself establish that a resignation was induced by duress or coercion, hence was involuntary”).

⁹³ *See, e.g., Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam) (where the constitutional deprivation consists of a false and stigmatizing report about a public employee, due process requires the employee be given “an opportunity to clear his name” (quoting *Roth*, 408 U.S. at 573)). This right applies even if the employee has no property interest in continued employment. *Owen v. City of Independence*, 445 U.S. 622, 630 n.10 (1979). But a liberty interest alone is not sufficient for a claim; there must also be some sort of employment action, such as a termination. *See Paul v. Davis*, 424 U.S. 693, 709 (1976). The employee must also show the disclosure caused a stigma that harmed their future prospects for employment. *See, e.g., Cannon v. Vill. of Bald Head Island, N. Carolina*, 891 F.3d 489, 502–05 (4th Cir. 2018). Nonetheless, a name-clearing hearing does not result in reinstatement. *Codd*, 429 U.S. at 628.

⁹⁴ *Wojcik v. Massachusetts State Lottery Comm’n*, 300 F.3d 92, 103–04 (1st Cir. 2002).

⁹⁵ Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997) (reporting on survey results demonstrating that workers “consistently overestimate the degree of job protection afforded by law, believing that employees have far greater rights not to be fired without good cause than they in fact have”).

⁹⁶ Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 88–89 (2017) (“There is no comprehensive federal law safeguarding the employment rights of people without convictions, although Title VII and the Fair Credit Reporting Act (“FCRA”) extend protections in certain situations. A handful of state and local laws grant strong, enforceable rights, but most jurisdictions offer none.”). While some states have “ban-the-box” laws that forbid employers from asking about criminal records on job applications, those laws do not forbid employers from considering an applicant’s criminal history after making a provisional employment offer. Shelle Shimizu, *Beyond the Box: Safeguarding Employment for Arrested Employees*, 128 YALE L.J.F. 226, 233–35 (2018) (surveying employment protections based on criminal records).

⁹⁷ Arnow-Richman, *supra* note 19, at 97.

of employment-related misconduct or legal violations without any notice to the accused.⁹⁸ If an outside investigation results in some type of adverse employment action, an employer is only required to provide the accused with “a summary containing the nature and substance” of the investigator’s report.⁹⁹ The accused is not entitled to the names of any sources.¹⁰⁰ Union employees may have contractual rights to challenge their employers’ decisions through grievance processes, but these arrangements are diminishing in frequency.¹⁰¹ Employees with unusual bargaining power, such as ousted CBS chief Les Moonves, may be able to negotiate for the right to be terminated only under certain conditions, and may therefore avail themselves of formal legal procedures to challenge an employer’s finding of misconduct.¹⁰² This group of sheltered high-level employees cannot complain about lack of process.

The argument that those accused of sexual misconduct should receive special procedural protection, while those accused of other forms of misconduct do not, is a troubling form of exceptionalism. It “harken[s] back to a time when rape victims faced unique hurdles in criminal prosecution”¹⁰³ based on widespread beliefs “that women have a tendency to lie about rape and sexual assault.”¹⁰⁴ Exceptional procedural protections may also be rooted in a sexist view of gender roles that presupposes that accused men have special entitlements to their careers, professional reputations, and future prospects because they are men, while women whose careers are derailed by harassment have not lost anything of value because they are women.¹⁰⁵ Many commentators argue it is hypocritical to insist on due process for the accused but not access to justice for survivors.¹⁰⁶ This exceptionalism also raises questions about

⁹⁸ 15 U.S.C. § 1681a(y)(1)(B). This exemption does not apply under certain conditions, including if the employer discloses the results of an external investigation to the public. *Id.* § 1681a(y)(1)(D).

⁹⁹ *Id.* § 1681a(y)(2).

¹⁰⁰ *Id.*

¹⁰¹ Arnow-Richman, *supra* note 19, at 97.

¹⁰² See, e.g., Elizabeth Tippet, *CBS’ Moonves Scandal Shows Why Corporate America Needs Tougher CEO Pay Contracts*, CONVERSATION (Dec. 19, 2018), <https://theconversation.com/cbs-moonves-scandal-shows-why-corporate-america-needs-tougher-ceo-pay-contracts-109050> [<https://perma.cc/266J-3NJ7>].

¹⁰³ Anderson, *supra* note 36, at 2000 (discussing “rape or sexual assault exceptionalism”).

¹⁰⁴ *Id.* A 1940 treatise on evidence described “errant young girls and women coming before the courts in all sorts of cases” with “psychic complexes” that take the form of “contriving false charges of sexual offenses by men.” 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 459 (3d ed. 1940). The treatise warned: “On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.” *Id.*

¹⁰⁵ See KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 218 (2018).

¹⁰⁶ Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo>

racism—why are #HimToo advocates not concerned with procedural defects of the criminal justice system that disadvantage racial minorities?¹⁰⁷

Nonetheless, it is worthwhile to confront procedural objections on their own terms. To say that prominent people accused of sexual assault, harassment, and misconduct should not be permitted exceptional protections is not to say that normal principles of procedural fairness should be suspended.¹⁰⁸

If the #MeToo movement is to maintain its moral authority as a mechanism for disqualifying those who have committed serious forms of sexual misconduct from high-level positions of power, it must attend to principles of procedural justice.¹⁰⁹ Research from social psychology demonstrates that whether an authority is considered legitimate depends on whether people think its procedures are fair.¹¹⁰ With respect to legitimacy, fair procedures are more important than favorable outcomes.¹¹¹ Procedure may be particularly important when the “correct” outcome is not objectively clear.¹¹² Much of the debate over the Kavanaugh nomination was trained on procedural disputes, such as the propriety of raising an allegation at a late stage, the thoroughness of the FBI’s investigation, and the appropriate burdens and standards of proof.¹¹³ People care about being treated fairly because it expresses

/553427/ [https://perma.cc/ECY2-A33N] (“[F]airness also requires that those reporting violence and harassment be fully heard.”).

¹⁰⁷ See, e.g., Ayesha Rascoe, *Trump Pushes Due Process for Some, ‘Lock’ Them Up for Others*, NPR (Oct. 5, 2018), <https://www.npr.org/2018/10/05/654347194/trump-pushes-due-process-for-some-for-others-lock-them-up> [https://perma.cc/F7L7-9HB2] (discussing President Trump’s commitment to due process for his Supreme Court nominee but not the five black and Latino teenagers who were wrongfully convicted in New York’s “Central Park Five” rape case).

¹⁰⁸ Nor does the goal of ending sexual assault, harassment, and misconduct justify an “at will” employment regime that allows arbitrary terminations and is unfair to low-level workers accused of any type of misconduct. See Arnov-Richman, *supra* note 19, at 99–103.

¹⁰⁹ Cf. Murray, *supra* note 5, at 874–75 (“[A]t some point, the criticisms of #MeToo—concerns about due process and vigilantism—may make this kind of extralegal regulation unsustainable in the long term.”); Wexler, *supra* note 23, at 14 (“If the #MeToo Movement is perceived as deeply unfair, much of society is unlikely to willingly participate in its call for a social reckoning”).

¹¹⁰ Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 115, 133 (1992) (discussing research showing “a key factor affecting legitimacy across a variety of settings is the person’s evaluation of the fairness of the procedures used by the authority in question”); see also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). This research pertains to whether particular authorities are considered legitimate. Tyler & Lind, *supra* at 117. It suggests the legitimacy of the #MeToo movement may be in question to the extent that the public regards it as an authority in motivating decision makers such as boards, employers, voters, or consumers to remove accused leaders without fair process.

¹¹¹ Tyler & Lind, *supra* note 110, at 133.

¹¹² *Id.* at 134.

¹¹³ See, e.g., Abigail Abrams, *Here’s Sen. Susan Collins’ Full Speech about Voting to Confirm Kavanaugh*, TIME (Oct. 5, 2018), <http://time.com/5417444/susan-collins-kavanaugh-vote-transcript/> [https://perma.cc/SN5G-VRWA].

their equal status as group members.¹¹⁴ Thus, critics of the #MeToo movement have seized on slogans like “believe all women” as evidence of the movement’s aspirations to “mob rule.”¹¹⁵ Such slogans frame #MeToo as a battle of the sexes, inviting men to imagine themselves as falsely accused, rather than as potential victims themselves, or as people who share a stake in gender equality and the elimination of sexual abuse.¹¹⁶ If #MeToo’s extralegal procedures do not appear to adhere to basic procedural standards, those procedures will lose the persuasive force on which they depend, and the reckoning occasioned by the movement will prove to have been a fleeting one.

III. #METOO’S PROCEDURAL NORMS

An examination of high-profile cases in the #MeToo era reveals that rather than ignoring procedural justice, decisionmakers have relied on a set of evolving procedural norms for resolving these claims. One norm is that allegations are vetted by journalists according to the standards of that profession. Once aired publicly, allegations are scrutinized by skeptical commentators and other journalists. In the #MeToo era, allegations are unlikely to result in formal employment consequences unless they are “corroborated” in a colloquial sense of that term, or confirmed by follow-up investigations.

A. Vetting and Scrutiny

Journalistic standards require that reporters verify facts, seek both sides, and attribute information to its sources.¹¹⁷ The profession regards

¹¹⁴ Tyler & Lind, *supra* note 110, at 140 (“To the extent that a procedure is seen as indicating a positive, full-status relationship, it is judged to be fair, and to the extent that a procedure appears to imply that one’s relationship with the authority or institution is negative or that one occupies a low-status position, the procedure is viewed as unfair.”).

¹¹⁵ See, e.g., Bari Weiss, *The Limits of ‘Believe All Women,’* N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html> [<https://perma.cc/598H-YSBK>]. For a thoughtful response, see Sady Doyle, *Despite What You May Have Heard, “Believe Women” Has Never Meant “Ignore Facts”*, ELLE (Nov. 29, 2017), <https://www.elle.com/culture/career-politics/a13977980/me-too-movement-false-accusations-believe-women/> [<https://perma.cc/S9Y7-SLCE>].

¹¹⁶ Cf. Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENGLAND L. REV. 1309, 1311 (1992) (“Men’s fear of being victimized [by unfair enforcement of rules against sexual abuse] is only indirectly and ambiguously related to whatever the reality might turn out to be. The fear varies from man to man, but there is still an unmistakable group interest in avoiding having to worry about enforcement excesses; it is in direct conflict with women’s interest in not having to worry about being abused.”).

¹¹⁷ SOC’Y PROF’L JOURNALISTS, CODE OF ETHICS (2014), <https://www.spj.org/pdf/spj-code-of-ethics.pdf> [<https://perma.cc/GG2G-D2KM>]. The Society for Professional Journalists is “the largest voluntary association of news reporters and editors in the United States” and its Code of Ethics is widely cited. Jane E. Kirtley, *Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case*, in INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM 145 (Howard M. Wasserman ed., 2011).

its “core function” as “getting the facts right.”¹¹⁸ Journalists are advised to employ “verification routines” to avoid errors before publication,¹¹⁹ and issue corrections of errors caught by readers after publication.¹²⁰ High-profile magazines employ independent research editors to confirm the factual details of their print stories.¹²¹ While many outlets do not have regular fact-checking processes for online content, they focus scrutiny on investigative pieces and those that could give rise to liability.¹²² Ethical journalism also requires consideration of both sides, which means reporters must “[d]iligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing.”¹²³ Another principle of ethical journalism is transparency: journalists should explain their methods and sources to readers, so readers themselves can assess the potential for errors and bias.¹²⁴ This requires that stories identify the sources for particular pieces of information,¹²⁵ and explain any decisions to allow sources to remain anonymous.¹²⁶ Journalists in the #MeToo era recognize that these rules cannot be suspended in reporting on sexual assault.

Before the #MeToo movement, there were two notorious instances of misreporting on campus sexual assault: (1) the 2006 news coverage of accusations of sexual assault by members of the Duke Lacrosse team;¹²⁷ and (2) a retracted 2014 article in *Rolling Stone Magazine* about an alleged rape at a fraternity party at the University of Virginia.¹²⁸ In the Duke case, a prosecutor who was up for re-election fed falsehoods and sound bites to uncritical reporters.¹²⁹ Ultimately, other

¹¹⁸ Kelly McBride & Tom Rosenstiel, *Introduction*, *THE NEW ETHICS OF JOURNALISM: PRINCIPLES FOR THE 21ST CENTURY* 5, 5 (Kelly McBride & Tom Rosenstiel, eds., 2013).

¹¹⁹ Lucas Graves & Michelle A. Amazeen, *Fact-Checking as Idea and Practice in Journalism*, in *OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION* (2019).

¹²⁰ See, e.g., Margaret Sullivan, *Make No Mistake, but if You Do, Here's How to Correct It*, N.Y. TIMES PUBLIC EDITOR'S BLOG (Jan. 16, 2013, 5:45 PM), <https://publiceditor.blogs.nytimes.com/2013/01/16/make-no-mistake-but-if-you-do-heres-how-to-correct-it/> [<https://perma.cc/737M-EPRF>].

¹²¹ Stephanie Fairington, *In the Era of Fake News, Where Have All the Fact-Checkers Gone?*, COLUM. JOURNALISM REV. (Feb. 23, 2018), https://www.cjr.org/business_of_news/fact-checking.php [<https://perma.cc/2YDG-YCZ6>]; Susan Sivek & Sharon Boyd-Peshkin, *Where Do Facts Matter? The Digital Paradox in Magazines' Fact Checking Practices*, 12 JOURNALISM PRACTICE 400 (2018).

¹²² See Fairington, *supra* note 121; Sivek & Boyd-Peshkin, *supra* note 121.

¹²³ SOC'Y PROF'L JOURNALISTS, *supra* note 117.

¹²⁴ BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 114 (3rd ed. 2013).

¹²⁵ *Id.*

¹²⁶ *Id.* at 117.

¹²⁷ Kirtley, *supra* note 117, at 146–52; Rachel Smolkin, *Justice Delayed*, AM. JOURNALISM REV. (Aug./Sept. 2007).

¹²⁸ Sheila Coronel, Steve Coll, & Derek Kravitz, *Rolling Stone's Investigation: 'A Failure that Was Avoidable,'* COLUM. REV. JOURNALISM (Apr. 5, 2015), http://www.cjr.org/investigation/rolling_stone_investigation.php [<https://perma.cc/HA2L-S23V>].

¹²⁹ See, e.g., Kirtley, *supra* note 117, at 158–59 (“[M]any in the media, by accepting the ‘official

journalists helped to uncover information that undermined the prosecutor's case against the accused players and led to his disbarment.¹³⁰ In the University of Virginia case, the *Rolling Stone* reporter failed to verify basic facts told to her by the accuser, failed to speak with the friends the accuser identified as being present on the night in question, failed to give the accused fraternity enough details about the incident to enable a response, and failed to make clear that the article's only source for certain information was the accuser, despite the contrary advice of a fact checker.¹³¹ At *Rolling Stone's* request, *The Columbia Journalism Review* issued a report on what went wrong, concluding that "[t]he magazine set aside or rationalized as unnecessary essential practices of reporting" and that the magazine's "failure . . . need not have happened, even accounting for the magazine's sensitivity to [the accuser]'s position."¹³²

Investigative journalists have heeded the lessons of these incidents in reporting on #MeToo.¹³³ *The New York Times* reporters verified the accuracy of their story about Harvey Weinstein "through interviews with current and former employees and film industry workers, as well as legal records, emails and internal documents from the businesses he has run, Miramax and the Weinstein Company."¹³⁴ They interviewed people that Weinstein's victims had confided in about his abuse at the time, such as friends and relatives.¹³⁵ They gave Weinstein an opportunity to comment on the story and printed his statement as well as quotations from his lawyer.¹³⁶ They attributed the facts they reported to specific sources, or explained why sources wished to remain anonymous.¹³⁷ In the #MeToo era, some journalists have established their own standards as to what sort of corroborative evidence is required for

version' of the alleged crime without question, effectively became mouthpieces of the government (or of other powerful institutions, such as Duke University), largely ignoring other voices. They accepted the prosecution's version of events, taking officials' words at face value and reporting them without challenge.").

¹³⁰ *Id.* at 144; *see also id.* at 154.

¹³¹ Coronel, Coll, & Kravitz, *supra* note 128.

¹³² *Id.*

¹³³ *See* Poynter Staff, *supra* note 19 (discussing standards for sourcing and verification, including the caution that "While it is often impossible to verify specific claims of sexual harassment or assault, it is important to verify as much as possible about the story including: If the source says she shared her story with friends or family, can you confirm that?. Can other facts around the story be checked, including employment dates and times, travel events, emails or text messages? Are there any documents or evidence that support the general story?"); Sivek & Bloyd-Peshkin, *supra* note 121, at 15 (quoting magazine editors about their reactions to the *Rolling Stone* case).

¹³⁴ Kantor & Twohey, *supra* note 43.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* One source, for example, "who asked not to be identified to protect her privacy, said a nondisclosure agreement prevented her from commenting." *Id.*

a newsworthy story.¹³⁸ For example, they ask accusers, “Who did you tell after this happened?” so that they may confirm the story with the people the accuser confided in.¹³⁹

It is true that not every example of #MeToo reporting has been Pulitzer-prize winning journalism, but even stories that have received criticism have met basic standards. In a controversial story posted on Babe.net, an anonymous 23-year-old photographer, referred to as “Grace,” accused 34-year-old comedian Aziz Ansari of pressuring her into sexual activity while the two were on a date.¹⁴⁰ The story was criticized for its “execution”: it was told in a tone befitting a tabloid, it included details best described as gossip, and it failed to address its subject with “range or depth.”¹⁴¹ But the story was not criticized for reporting falsehoods, misattributing information, or failing to seek both sides. It attributed the facts to Grace and confirmed her story with text message records and the friends she had confided in.¹⁴² It posted a text message in which Ansari told Grace, “Clearly, I misread things in the moment and I’m truly sorry,” as well as a statement in which Ansari admitted to sexual activity, but disputed whether there was any indication that it was other than consensual.¹⁴³ Some journalists have criticized the story for its haste, which could make it appear as though the editors did not conduct “due diligence.”¹⁴⁴ But Babe.net conducted sev-

¹³⁸ Jessica Bennett, gender editor for *The New York Times*, has refused to publish reports of sexual assault unless there are two other individuals to attest that the victim reported the assault to them at the time. Alexandra Botti & T.J. Raphael, *How Journalists Corroborate Sexual Harassment and Assault Claims*, PRI (Dec. 18, 2017), <https://www.pri.org/stories/2017-12-18/how-journalists-corroborate-sexual-harassment-and-assault-claims> [<https://perma.cc/HKG5-JYYV>].

¹³⁹ *Id.*

¹⁴⁰ Katie Way, *I Went on a Date With Aziz Ansari. It Turned Into the Worst Night of my Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355> [<https://perma.cc/GZ29-NVL5>]. Grace stated that Ansari aggressively pressured her into performing oral sex and engaging in other sexual activity, despite her “non-verbal cues,” such as “pulling away,” and her “verbal cues,” such as telling him “next time” and stating that she did not want to “feel forced.” *Id.*

¹⁴¹ Julianne Escobedo Shepherd, *Babe, What Are You Doing?*, JEZEBEL (Jan. 16, 2018), <https://jezebel.com/babe-what-are-you-doing-1822114753?rev=1516127284762> [<https://perma.cc/WN5U-DTY7>].

¹⁴² Way, *supra* note 140.

¹⁴³ *Id.*

¹⁴⁴ Caroline Franke, *The Controversy Around Babe.net’s Aziz Ansari Story, Explained*, VOX (Jan. 18, 2018), <https://www.vox.com/culture/2018/1/17/16897440/aziz-ansari-allegations-babe-me-too> [<https://perma.cc/35XL-N6WB>] (“Is it possible to do your due diligence on a story in [one week] given the space and resources? Sure. Does it leave you and your subject vulnerable to probing criticism about whether you did your due diligence? Absolutely.”).

eral interviews, fact-checked the story, and sought the advice of a lawyer.¹⁴⁵ The story did not end Ansari's career; rather, Ansari "mostly disappeared from public life" for a few months before resuming his stand-up comedy.¹⁴⁶

In a few instances, allegations of sexual assault against particular individuals have been aired without vetting by journalists. Some people have posted specific accusations on social media sites such as Twitter.¹⁴⁷ Others have authored blog posts and essays.¹⁴⁸ There are also examples of crowdsourced lists,¹⁴⁹ such as the "Shitty Media Men List," a google document circulated in October 2017 that allowed anonymous users to collect "rumors and allegations of sexual misconduct, much of it violent, by men in magazines and publishing."¹⁵⁰ Journalists are particularly wary of crowdsourced allegations.¹⁵¹ It is difficult to find examples of instances in which employment actions were taken against high-profile individuals based solely on anonymous allegations that were not vetted by journalists.¹⁵² In a few cases, allegations on anonymous lists resulted

¹⁴⁵ Kerry Flynn, *What is Babe? Meet the Site that Published the Aziz Ansari Allegation*, MASHABLE (Jan. 15, 2018), <https://mashable.com/2018/01/15/what-is-babe-aziz-ansari-sexual-misconduct-allegation/#hroXzRfCVmqQ> [<https://perma.cc/9CP2-KU9Y>].

¹⁴⁶ Sopan Deb, *Aziz Ansari, Sidelined by Accusation, Plays to a Big Crowd Back Home*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/arts/television/aziz-ansari-standup-charleston.html> [<https://perma.cc/YPM9-WV5P>].

¹⁴⁷ See, e.g., Travis M. Andrews, *CBS Is Dropping Jeremy Piven's Show Amid Sexual Misconduct Allegations Against the Actor*, WASH. POST (Nov. 27, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2017/11/28/cbs-is-dropping-jeremy-piven-drama-amid-sexual-misconduct-allegations-against-the-actor/?utm_term=.ae2384bb5c8e [<https://perma.cc/YXE5-CTDZ>] (discussing allegations against actor Jeremy Piven, including one posted on Twitter).

¹⁴⁸ See, e.g., Chloe Dykstra, *Rose-Colored Glasses: A Confession*, MEDIUM (June 14, 2018), <https://medium.com/@skydart/rose-colored-glasses-6be0594970ca> [<https://perma.cc/2GMF-YGG2>]; Leann Tweeden, *Senator Al Franken Kissed and Groped Me Without My Consent, and There's Nothing Funny About It*, 790KABC (Nov. 16, 2017), <http://www.kabc.com/2017/11/16/leann-tweeden-on-senator-al-franken/> [<https://perma.cc/Q2VH-BPA7>].

¹⁴⁹ See, e.g., Murray, *supra* note 5, at 869 (discussing anonymous "crowdsourced registries" and their critics); Tuerkheimer, *supra* note 5, at 9–13 (discussing anonymous accusations).

¹⁵⁰ Moira Donegan, *I Started the Media Men List; My Name is Moira Donegan*, THE CUT (Jan. 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [<https://perma.cc/D3F6-4UBV>]. Donegan's purpose was not to subject accused men to consequences; rather, it was to open up the traditional whisper networks that warn women of danger. *Id.*

¹⁵¹ One journalism professor has advised reporters to "[t]hink of an anonymous crowdsourced list as Wikipedia wrapped in razor blades. By all means examine it—but do so carefully or there may be a lot of blood on your hands." James Warren, *A Word of Caution: Documents Like that Media Men List Are Like Wikipedia Wrapped in Razor Blades*, POYNTER (Jan. 12, 2018), <https://www.poynter.org/ethics-trust/2018/a-word-of-caution-documents-like-that-media-men-list-are-like-wikipedia-wrapped-in-razor-blades/> [<https://perma.cc/4QTK-PATJ>] (quoting Jill Geisler, the Bill Plante Chair in Leadership and Media Integrity at Loyola University Chicago). When reporting on allegations of sexual misconduct that have become public through, for example, Twitter, experts on journalistic ethics advise that reporters should question the sources of the allegation, look for corroborating evidence, explain the context of the allegation and whether there is any supporting evidence, and inform readers of all the relevant information so that they are able to assess the facts for themselves. KOVACH & ROSENSTIEL, *supra* note 124, at 124–25.

¹⁵² *But see* Bari Weiss, *What Do You Do When You Are Anonymously Accused of Rape*, N.Y.

in internal investigations that led to resignations.¹⁵³ A number of the claims that came to light during the #MeToo movement—including those against Harvey Weinstein, Kevin Spacey, and Matt Lauer—had been the subjects of “blind items” and gossip columns for years.¹⁵⁴ But those allegations did not have employment consequences for these accused celebrities until after they had received attention from investigative journalists.¹⁵⁵

Moreover, even after a story appears, journalists subject high-profile allegations to critical scrutiny, and different media outlets report on alternative perspectives and updated information.¹⁵⁶ The Shitty Media Men list’s allegations against one individual received critical coverage in *The New York Times*.¹⁵⁷ Commentators rushed to the defense of Aziz

TIMES (Oct. 13, 2018), <https://www.nytimes.com/2018/10/13/opinion/stephen-elliott-moira-donegan-media-men.html> [<https://perma.cc/A38F-TDQU>] (discussing the defamation suit brought by writer Stephen Elliott based on an anonymous assertion on the Shitty Media Men list that he had been the subject of “rape accusations”). Elliott claims that the false rape allegation harmed his professional reputation, causing him to be disinvited from events and reducing his opportunities to publicize a new book. Stephen Elliott, *How an Anonymous Accusation Derailed My Life*, QUILLETTE (Sept. 25, 2018), <https://quillette.com/2018/09/25/how-an-anonymous-accusation-derailed-my-life/> [<https://perma.cc/5LX9-2LHB>]. Others question whether “What happened is that years of behaving badly (not criminally) caught up to him.” Marisa Siegel, *Firsthand*, RUMPUS (Sept. 26, 2018), <https://therumpus.net/2018/09/firsthand/> [<https://perma.cc/53YV-SHS8>] (accusing Elliott of sexist behavior in the workplace).

¹⁵³ See, e.g., Alexandra Alter & Sydney Ember, *Paris Review Editor Resigns Amid Inquiry into His Conduct with Women*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/books/lorin-stein-resigns-the-paris-review.html> [<https://perma.cc/3SM9-GGK9>]; A.J. Chavar, *Exclusive: National Geographic Investigated a Top Photo Editor for Sexual Misconduct. He Left Quietly, but Women Are Speaking Out*, VOX (Jan. 31, 2018, 12:33 PM), <https://www.vox.com/2018/1/29/16934552/exclusive-national-geographic-sexual-misconduct> [<https://perma.cc/MRS2-LPDC>].

¹⁵⁴ Alyssa Berezna, *Blind Item Revealed: How a Scorned Form of Gossip Changed Hollywood*, RINGER (Dec. 13, 2018), <https://www.theringer.com/2018/12/13/18138512/blind-item-revealed-how-a-scorned-form-of-gossip-changed-hollywood> [<https://perma.cc/C95D-FUAX>]. “Blind items” are “anonymous snippets of gossip that require readers to guess the parties involved.” *Id.* They are left “intentionally vague” so that “only the publication’s savviest readers” know who they refer to. *Id.* For one example, see, e.g., Ramin Setoodeh, *Ashley Judd Reveals Sexual Harassment by Studio Mogul*, VARIETY (Oct. 6, 2015), <https://variety.com/2015/film/news/ashley-judd-sexual-harassment-studio-mogul-shower-1201610666/> [<https://perma.cc/N3BK-93RQ>].

¹⁵⁵ See, e.g., *supra* note 21; Vary, *supra* note 76. The immediate cause of Matt Lauer’s termination was an internal complaint, but at the time he was fired, journalists had been investigating allegations against him for months. Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017), <https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/> [<https://perma.cc/QKB8-WQNQ>].

¹⁵⁶ More than a year after allegations against former Senator Al Franken led to his resignation, commentators continue to critically question the evidence against him. See, e.g., Jane Mayer, *The Case Against Al Franken*, NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> [<https://perma.cc/ZLZ3-N4YE>]; Emily Yoffee, *Democrats Need to Learn From Their Al Franken Mistake*, ATLANTIC (Mar. 26, 2019), <https://www.theatlantic.com/idea/as/archive/2019/03/democrats-shouldnt-have-pressured-al-franken-resign/585739/> [<https://perma.cc/TV9D-R4MT>].

¹⁵⁷ Weiss, *supra* note 115.

Ansari, taking issue with Grace's characterization of what had happened to her as "sexual assault"¹⁵⁸ and arguing that Ansari's conduct had been unfairly equated to worse behavior.¹⁵⁹ There was a swift and critical response to allegations by Julie Swetnick that Supreme Court nominee Brett Kavanaugh may have participated in a gang rape in the 1980s.¹⁶⁰ The reaction to this allegation demonstrates the vetting norm: commentators criticized Michael Avenatti, Swetnick's lawyer, for submitting an affidavit containing Swetnick's statement rather than allowing journalists to first investigate the claim.¹⁶¹ Media reports questioned Swetnick's account, character, and credibility.¹⁶² Rather than having an adverse impact on Kavanaugh's confirmation prospects, many commentators believe that the weakness of Swetnick's allegation cast more credible allegations in a negative light.¹⁶³

B. Investigation and Corroboration

Another informal norm is that allegations do not generally result in specific employment consequences unless they are borne out through formal investigation, corroborated, or both. Corroboration is not a formal legal requirement. Historically, a claim of rape required "corroborative evidence," such as physical injuries, because rape allegations were treated with exceptional skepticism.¹⁶⁴ But today, credible evidence could be a single victim's testimony, depending on the circumstances.¹⁶⁵ The corroboration requirement has come to have a specific meaning in #MeToo discussions: that in the very least, an accusation

¹⁵⁸ Way, *supra* note 140.

¹⁵⁹ For a summary of just some of the critical reaction, see Franke, *supra* note 144.

¹⁶⁰ Aaron Blake, *Did Michael Avenatti Help Doom the Case Against Brett Kavanaugh?*, WASH. POST (Oct. 5, 2018), <https://www.washingtonpost.com/politics/2018/10/05/did-michael-avenatti-hel-p-doom-case-against-brett-kavanaugh/> [<https://perma.cc/9P4X-5GZM>]. See also Mayer, *supra* note 156 (critically assessing the decision of a radio station website to post an essay by Leeann Tweeden accusing Al Franken of sexual misconduct without first requesting comment from Franken or fact checking Tweeden's statements).

¹⁶¹ *Id.*; Jackie Kucinich et al., *Democrats to Michael Avenatti: You're Not Helping in the Kavanaugh Fight*, DAILY BEAST (Sept. 24, 2018), <https://www.thedailybeast.com/democrats-to-avenatti-youre-not-helping-in-the-kavanaugh-fight> [<https://perma.cc/5H4S-6B34>] (stating that Senator Chris Coons (D-DE), "suggested Avenatti should have followed in the footsteps of [Dr. Christine Blasey] Ford, who 'attempted to contact news outlets and the committee before Judge Kavanaugh was confirmed as being the nominee'" and another "Democratic source" as saying, "If he had vetted it through a media outlet and had journalists represent it in a well-reported way or have the committee introduce it, it would have been better").

¹⁶² Blake, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ Anderson, *supra* note 36, at 2000.

¹⁶⁵ Tuerkheimer, *supra* note 34, at 2.

must be supported by more evidence than a single victim's statements.¹⁶⁶ Accusations by multiple victims qualify.¹⁶⁷ *The New York Times* made a list of “prominent people who lost their main jobs, significant leadership positions or major contracts, and whose ousters were publicly covered in news reports” as a result of sexual misconduct allegations in the year following the Weinstein story.¹⁶⁸ By my count, out of the 202 cases listed by the *New York Times*, only fifty involved a single accuser, and in ten of those instances, the accused person admitted to some form of wrongdoing.¹⁶⁹ Out of the forty remaining cases, in all but five, the media reported there was some type of investigation.¹⁷⁰

¹⁶⁶ Whether this is a fair rule for survivors is a different question. Cf. MacKinnon, *supra* note 1 (“[I]n cases of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.”).

¹⁶⁷ This is not the legal meaning of corroboration. Legal rules sometimes limit “me too” evidence. See, e.g., Jeannie Suk Gerson, *Bill Cosby’s Crimes and the Impact of #MeToo on the American Legal System*, NEW YORKER (Apr. 27, 2018), <https://www.newyorker.com/news/news-desk/bill-cosbys-crimes-and-the-impact-of-metoo-on-the-american-legal-system> [<https://perma.cc/2M4R-WFSZ>]. It may be akin to the legal requirement of “numerosity” for a class action lawsuit. See FED R. CIV. P. 23. I am grateful to Lesley Wexler for pointing out this analogy.

¹⁶⁸ Carlsen et al., *supra* note 6. I do not claim that this is a comprehensive set of cases. This list reflects the judgments of *New York Times* reporters about what qualifies as “prominent.” It includes only men, although there are at least three women—Asia Argento, Andrea Ramsey, and Avital Ronnell—who lost opportunities on account of reports of sexual misconduct. One consulting firm claims to have compiled its own proprietary list of over 900 people, including twenty-nine women, whose names have appeared in “at least seven news articles as accused of behavior that includes sexual harassment, assault, abuse or rape and condoning and/or helping to hide such behavior” since December 2015. See Jessica Brice & Jeff Green, *Woman Compiling MeToo Names Says They’re the Tip of the Iceberg*, BLOOMBERG (Oct. 17, 2018), <https://www.bloomberg.com/news/articles/2018-10-17/woman-compiling-metoo-names-says-they-re-tip-of-the-iceberg> [<https://perma.cc/KW6Z-FAHN>].

¹⁶⁹ This count is based on news stories in addition to the *New York Times* article. A chart describing those sources is on file with the author.

¹⁷⁰ One of the five exceptions involved allegations detailed in a sexual harassment lawsuit. Jessica Sidman & Anna Spiegel, *The Inside Story of Mike Isabella’s Fallen Empire*, WASHINGTONIAN (Nov. 26, 2018), <https://www.washingtonian.com/2018/11/26/the-inside-story-of-mike-isabellas-fallen-empire/> [<https://perma.cc/3ZYH-VUHK>]. Two involved allegations of criminal conduct. Anita Busch, *Tom Sizemore Dropped From Thriller ‘The Door’ After Sexual Misconduct Allegations*, DEADLINE HOLLYWOOD (Nov. 15, 2017), <https://deadline.com/2017/11/tom-sizemore-sexual-misconduct-allegations-dropped-from-horror-film-the-door-1202208846/> [<https://perma.cc/A6GU-YFG5>]; Michael Schneider, *T.J. Miller Replaced as Mucinex Spokesman, Coinciding With Sexual Assault Allegations*, INDIEWIRE (Feb. 6, 2018), <https://www.indiewire.com/2018/02/tj-miller-mucinex-jason-mantzoukas-super-bowl-ad-1201925909/> [<https://perma.cc/QXT3-4SAT>]. In one case, there was evidence in the form of text messages that a lawmaker had communicated with a teenage girl in ways legislative leaders regarded as inappropriate. Keith M. Phaneuf, *Angel Arce to Resign From General Assembly*, CT MIRROR (Mar. 7, 2018), <https://www.courant.com/politics/hc-pol-arce-texts-whats-next-20180327-story.html> [<https://perma.cc/W4WQ-6DY5>]. And in one case, the accused and his employer denied that the allegations of harassment were related to his decision to resign. Rachel Monahan, *Former Portland Mayor Sam Adams Has Abruptly Left his Job at a D.C. Think Tank*, WILLAMETTE WEEK (Dec. 6, 2017), <https://www.wweek.com/news/city/2017/12/06/former-portland-mayor-sam-adams-has-abruptly-left-his-job-at-a-d-c-think-tank/> [<https://perma.cc/6AJ2-W96A>].

One evolving norm in the #MeToo era is that institutions generally conduct investigations. Out of the 95 cases in which the accused individual did not admit to wrongdoing or resign,¹⁷¹ there were reports of investigations in all but 27.¹⁷² Sexual harassment investigations are a commonplace function of human resources departments.¹⁷³ Institutions often hire outside counsel for high-profile or sensitive investigations.¹⁷⁴ When a corporation conducts an internal investigation into sexual harassment by an existing employee, it is advised to apply the “preponderance of the evidence standard,” which means deciding whether misconduct was more likely than not to have occurred.¹⁷⁵ This is because sexual harassment is a civil matter, and the preponderance of the evidence standard is commonly used in civil cases, rather than the higher “beyond a reasonable doubt” standard used in criminal matters.¹⁷⁶ As in criminal cases, a survivor’s credible testimony alone may be sufficient evidence.¹⁷⁷ Nonetheless, “[m]any employers falsely believe that if there are no independent witnesses, there can be no finding of harassment,” while others “balk[] at making a finding that conduct occurred” because of concerns about the impact on the accused person’s career.¹⁷⁸

The details of most internal investigations are confidential. But a number of these investigations have come out in favor of the accused.¹⁷⁹ The Ford-Kavanaugh controversy—in which the FBI investigated Dr. Christine Blasey Ford’s allegation that she had been sexually assaulted by Kavanaugh when they were teenagers before the Senate voted to confirm Kavanaugh to the Supreme Court—is a notable example, but

¹⁷¹ Those who resign rather than face an investigation cannot complain about lack of process. See *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 173–75 (4th Cir. 1988).

¹⁷² Many of the cases in which there was no employer investigation involved investigative journalism that uncovered corroborating evidence, such as the reporting on Harvey Weinstein. See *supra* note 21.

¹⁷³ See, e.g., AMY OPPENHEIMER & CRAIG PRATT, INVESTIGATING WORKPLACE HARASSMENT: HOW TO BE FAIR, THOROUGH, AND LEGAL 50 (2002).

¹⁷⁴ *Id.* at 62.

¹⁷⁵ *Id.* at 108–09; see also Dori Meinert, *How to Investigate Sexual Harassment Allegations*, SHRM (Jan. 8, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/how-to-investigate-sexual-harassment-allegations.aspx> [<https://perma.cc/R9DP-SH4D>].

¹⁷⁶ OPPENHEIMER & PRATT, *supra* note at 109 (explaining that if an employer applies the “beyond a reasonable doubt” standard and finds no harassment occurred, but then a civil jury finds that harassment did occur based on a “preponderance of the evidence,” there is a risk that the jury will “question the employer’s good faith and may award significant damages to the complainant.”).

¹⁷⁷ *Id.* at 110.

¹⁷⁸ *Id.*

¹⁷⁹ My focus is not the fairness of these investigations, because they are not unique features of the #MeToo moment, and they are not extralegal in the same sense; rather, they have insinuated themselves into the fabric of sexual harassment law. See, e.g., LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 183–88 (2016).

there are also others.¹⁸⁰ For example, after actor Chloe Dykstra published an essay accusing her ex-boyfriend, television host Chris Hardwick, of emotional abuse and sexual assault, Hardwick's employer AMC suspended him and conducted an internal investigation with the assistance of an outside law firm.¹⁸¹ After the investigation, Hardwick was reinstated.¹⁸² After eight women accused actor Morgan Freeman of harassment in forms such as "demeaning comments" and "unwanted touching,"¹⁸³ the National Geographic network, which was producing a series by Freeman, and SAG-AFTRA, which had awarded Freeman a SAG Life Achievement Award, both conducted investigations and decided not to take any adverse action against Freeman.¹⁸⁴ After Pulitzer-prize winning author Junot Díaz was accused of misconduct, including an incident of forcible kissing, three institutions—the Pulitzer Prize board, M.I.T., where he teaches, and the *Boston Review*, where he is a fiction editor—each conducted investigations and decided to take no action against him.¹⁸⁵

In other contexts, how strong the evidence must be to justify an employment decision and what type of evidence counts as corroborative has been the subject of debate. During the Kavanaugh confirmation hearings, some commentators argued that because of the importance of a Supreme Court appointment, the Senate should disqualify the nominee if there were "credible" evidence of sexual misconduct—a lower

¹⁸⁰ See, e.g., German Lopez, *The FBI Investigation of Kavanaugh Was Doomed from the Start*, VOX (Oct. 5, 2018), <https://www.vox.com/policy-and-politics/2018/10/5/17940738/fbi-investigation-kavanaugh-thorough-limits> [<https://perma.cc/V7P7-Z32Y>].

¹⁸¹ Dykstra, *supra* note 148. With respect to sexual assault, Dykstra stated that "I let him sexually assault me." *Id.* While Dykstra did not identify Hardwick by name, she included enough details to allow readers to identify him. Corinne Heller, *Chris Hardwick Returning to AMC After Sexual Assault Investigation*, E! NEWS (Jul. 25, 2018, 2:28 PM), <https://www.eonline.com/news/944736/chris-hardwick-s-talk-show-pulled-by-amc-amid-sexual-assault-claims> [<https://perma.cc/CRV7-PZMF>].

¹⁸² Heller, *supra* note 181 (reporting that AMC released the following statement: "We take these matters very seriously and given the information available to us after a very careful review, including interviews with numerous individuals, we believe returning Chris to work is the appropriate step").

¹⁸³ An Phung & Chloe Melas, *Women Accuse Morgan Freeman of Inappropriate Behavior, Harassment*, CNN (May 28, 2018, 11:56 PM), <https://www.cnn.com/2018/05/24/entertainment/morgan-freeman-accusations/index.html> [<https://perma.cc/EM26-A27S>].

¹⁸⁴ David Robb, *Morgan Freeman to Keep SAG Lifetime Achievement Award Following Harassment Probe*, FOX NEWS (Sept. 7, 2018), <https://www.foxnews.com/entertainment/morgan-freeman-to-keep-sag-lifetime-achievement-award-following-harassment-probe> [<https://perma.cc/FXP6-GTDC>].

¹⁸⁵ Julia Jacobs, *Junot Díaz Welcomed Back by Pulitzer Prize After Review into Sexual Misconduct Claims*, GUARDIAN (Nov. 19, 2018), <https://www.theguardian.com/books/2018/nov/19/junot-diaz-welcomed-back-by-pulitzer-prize-after-review-into-sexual-misconduct-claims> [<https://perma.cc/ASL6-CQ3Z>].

standard than the preponderance of the evidence.¹⁸⁶ Senator Susan Collins, however, one of the last senators to announce her vote in favor of Justice Kavanaugh's confirmation, stated that a preponderance of the evidence standard should apply.¹⁸⁷ While Collins found Dr. Ford's testimony to be "sincere, painful, and compelling," she concluded that Ford's allegations were insufficient due to the lack of "corroborating evidence."¹⁸⁸ This was despite the fact that Ford had confided in her husband and a counselor about her sexual assault in 2012.¹⁸⁹

Thus, when public allegations of sexual assault, harassment, or misconduct are raised against high-level leaders, a set of informal norms has developed for evaluating whether those allegations warrant dismissal. These norms require that public allegations be vetted according to journalistic standards of verification, attribution, and seeking both sides. The allegations should be specific enough to permit the accused person to respond meaningfully and to allow for further scrutiny by the media and the public. Before action is taken, decision makers require an admission of misconduct by the accused, corroborative evidence, or a formal investigation. Terminations of high-level employees based on single accusations alone are deviations from these norms. Critics of #MeToo have brought to light few, if any, such cases.¹⁹⁰

IV. RESPONDING TO PROCEDURAL OBJECTIONS

This Part defends #MeToo's informal procedural system against the charge that it is unfair to the accused on procedural grounds. Overlooking the fact that legal procedures are not required in extralegal contexts, this Part addresses the fairness concerns that underlie the procedural justice critique. Specifically, it responds to the objections that

¹⁸⁶ See, e.g., Kate Shaw, *How Strong Does the Evidence Against Kavanaugh Need to Be?*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/opinion/kavanaugh-blasey-allegation-disqualify.html> [<https://perma.cc/SG8P-5QBX>].

¹⁸⁷ David A. Graham, *Susan Collins Says She Believes Survivors—Just Not Ford*, ATLANTIC (Oct. 5, 2018), <https://www.theatlantic.com/politics/archive/2018/10/susan-collinss-kavanaugh-sexual-assault/572347/> [<https://perma.cc/3YP7-7E8U>] ("This is not a criminal trial, and I do not believe that claims such as these need to be proved beyond a reasonable doubt. Nevertheless, fairness would dictate that the claims at least should meet a threshold of more likely than not as our standard." (quoting Senator Collins)).

¹⁸⁸ Abrams, *supra* note 113 (quoting Senator Collins). Later, Senator Collins stated that she thought Dr. Ford was mistaken about the identity of her assailant. Caroline Kelly, *Collins: 'I Do Not Believe That Brett Kavanaugh Was' Ford's Assailant*, CNN (Oct. 7, 2018), <https://www.cnn.com/2018/10/06/politics/collins-sotu-kavanaugh-cnntv/index.html> [<https://perma.cc/3G2W-KNDX>].

¹⁸⁹ *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.b9d91041e335 [<https://perma.cc/653E-77AT>] (testimony of Christine Blasey Ford that "My husband recalls that I named my attacker as Brett Kavanaugh.").

¹⁹⁰ See *supra* notes 152 & 170 (collecting news stories on cases that might arguably fit into this category); *infra* notes 289–293 (discussing Andrea Ramsay).

#MeToo's procedural norms are unenforceable; that survivors have waived their rights to complain informally by failing to use legal procedures; that only formal legal tribunals are equipped to handle claims; that #MeToo's procedures fail to provide the accused with notice of the claims against them, a fair opportunity to respond, or the right to confront their accusers; and that consequences have been disproportionate to the severity of the misconduct. A close examination of cases in the #MeToo era demonstrates these complaints lack basis in fact or are not supported by principles of procedural fairness.

A. Unenforceability

One criticism of the rules of #MeToo, as I have described them, is that they are not “rules” at all; they are a loose set of informal standards without enforcement mechanisms. There is no guarantee that these norms will be applied consistently or apolitically. Opponents make slippery slope arguments about what might result from the lack of hard-and-fast rules to screen out frivolous or abusive allegations.¹⁹¹ They express the concern that enforceable standards are required when the accused lacks power, money, or fame.¹⁹² However, defamation law and an aggressive media have provided checks on abusive allegations, and there are principled reasons for treating for high- and low-level employees differently.

While journalistic standards such as accuracy, seeking both sides, and attribution are not legally enforceable on their own, investigative journalists operate in the shadow of defamation law.¹⁹³ Defamation law casts a longer shadow over extralegal processes of the sort I am describing as characteristic of the #MeToo era, because journalists are unlikely to be liable for reporting the statements of law enforcement officials, as

¹⁹¹ See, e.g., Hemmingway, *supra* note 88 (“You can’t establish a precedent where anyone can make an unverifiable and murky claim against another person to kill his nomination and career.”); Benjamin Wittes, *I Know Brett Kavanaugh, But I Wouldn’t Confirm Him*, ATLANTIC (Oct. 2, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/why-i-wouldnt-confirm-brett-kavanaugh/571936/> [<https://perma.cc/SK9Z-P3CP>] (“Even assuming that Christine Blasey Ford’s allegations are entirely accurate, rejecting him on the current record could incentivize not merely other sexual-assault victims to come forward—which would be a salutary thing—but also other late-stage allegations of a non-falsifiable nature by people who are not acting in good faith.”).

¹⁹² Emily Yoffee, *Why the #MeToo Movement Should Be Ready for a Backlash*, POLITICO (Dec. 10, 2017), <https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057> [<https://perma.cc/PT3X-3K5N>].

¹⁹³ Kirtley, *supra* note 117, at 144–45. Libel, for example, is a tort that allows a plaintiff to sue a defendant who has made a false claim that damaged their reputation. In New York, to prove a claim of libel, a plaintiff must show: “(1) a written defamatory factual statement concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special damages or per se actionability.” *Chau v. Lewis*, 771 F.3d 118, 126–27 (2d Cir. 2014). Allegations of sexual misconduct may qualify as per se actionable. RESTATEMENT (SECOND) OF TORTS, § 574 (1977).

they did in the Duke Lacrosse case.¹⁹⁴ In the University of Virginia case, by contrast, the *Rolling Stone* article was not based on any legal filings or statements by law enforcement.¹⁹⁵ The author of the *Rolling Stone* story lost her job.¹⁹⁶ Nicole Eramo, a university administrator accused of mishandling sexual assault complaints in the article, won a \$3 million defamation verdict.¹⁹⁷ Because Eramo was a public figure, she had the heavy burden to convince the jury, by “clear and convincing evidence,” that *Rolling Stone* reported the story with “actual malice.”¹⁹⁸ This standard requires that the defendant made a defamatory statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁹⁹ In the *Eramo* case, the court noted that “departure from journalistic standards is not a determinant of actual malice, but such action might serve as supportive evidence.”²⁰⁰ The jury’s verdict made clear it believed the recklessness standard was met.

Like journalists, individual bloggers and social media users can be sued for libel for making accusations of sexual assault, harassment, and misconduct.²⁰¹ Some accusers have been persuaded to take down social media posts based on the mere threat of legal action.²⁰² While the burden lies with the defamed person to demonstrate the accusation was false, many accusers do not have the resources or wherewithal to defend

¹⁹⁴ Kirtley, *supra* note 117, at 153 (explaining that “it is both easier and legally safer for journalists to rely on official sources. Conducting parallel and independent investigations exposes journalists to a greater risk of legal liability for inaccurate, incorrect, or defamatory statements, while relying on official sources protects them in their ‘fair reports’ of government documents and actions”).

¹⁹⁵ Coronel, Coll, & Kravitz, *supra* note 128.

¹⁹⁶ T. Rees Shapiro & Emma Brown, *Rolling Stone Settles With Former U-Va. Dean in Defamation Case*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/local/education/rolling-stone-settles-with-u-va-dean-in-defamation-case/2017/04/11/5a564532-1f02-11e7-be2a-3a1fb24d4671_story.html [<https://perma.cc/39FG-Z27X>].

¹⁹⁷ *Id.* The defendants filed a motion to vacate the judgment, but the case settled before it was resolved. *Id.*

¹⁹⁸ *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 869 (W.D. Va. 2016).

¹⁹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). “Reckless disregard” means that the defendants “entertained serious doubts as to the truth of [their] publication.” *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). Victims who are not public figures may generally prevail on the lesser showing that the defendant was negligent. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 3:30 (2d ed. 2018).

²⁰⁰ *Eramo*, 209 F. Supp. 3d at 871.

²⁰¹ Tyler Kingkade, *As More College Students Say “MeToo,” Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing#.r1W1WVZPE> [<https://perma.cc/7W7U-TJTW>].

²⁰² Susan Seager, *#MeToo Stories Can Lead to Libel Suits*, THE WRAP (Nov. 4, 2017), <https://www.thewrap.com/brett-ratner-melanie-kohlier-sexual-assault-rape-hollywood-harvey-weinstein/> [<https://perma.cc/7SA6-6SQB>] (discussing how an accuser was persuaded to remove a Facebook post by the threat of a libel suit).

against a lawsuit.²⁰³ Thus, the threat of defamation liability may squelch even true allegations.

One concern with respect to the Ford-Kavanaugh hearings was that taking Dr. Ford's allegations seriously would incentivize future accusers to invent stories against their political enemies that are non-falsifiable, and so cannot be disproven or deterred with defamation law.²⁰⁴ For example, Senator Collins stated that the fact that the "outlandish allegation" of gang rape by Julie Swetnick "was put forth without any credible supporting evidence and simply parroted public statements of others" had underscored the importance of "the presumption of innocence."²⁰⁵ Yet aggressive and skeptical reporting serves as a check on such accusations. By the time of Senator Collins's statement the media had already subjected Swetnick's allegation to extensive scrutiny.²⁰⁶ That allegation was regarded as so improbable that it was not even investigated,²⁰⁷ and Swetnick and Avenatti were referred to the Justice Department for criminal investigation for making false statements.²⁰⁸ Journalists also corrected other false reports, as with the allegations, later recanted, that Kavanaugh had committed sexual assault on a boat in Rhode Island.²⁰⁹ It is true that outright hoaxes have been attempted.²¹⁰ But they are not easy to pull off because of the media's vigilance in verifying facts and skepticism about partisan motives.²¹¹ Journalists have succeeded in uncovering bad faith allegations, as in one

²⁰³ *Id.*

²⁰⁴ *See supra* note 191.

²⁰⁵ Abrams, *supra* note 113 (quoting Senator Collins).

²⁰⁶ *See, e.g.,* David Bauder, *NBC Faces Scrutiny for Interview with Kavanaugh Accuser*, AP NEWS (Oct. 3, 2018), <https://www.apnews.com/c5ecf76c62ec4c398e35020b5df01061> [<https://perma.cc/G84H-HRJB>]; Michael E. Miller et al., *Who is Julie Swetnick, the Third Kavanaugh Accuser?*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/local/who-is-julie-swetnick-the-third-kavanaugh-accuser/2018/09/26/91e16ed8-c1bc-11e8-97a5-ab1e46bb3bc7_story.html [<https://perma.cc/LFW9-848E>].

²⁰⁷ *See Lopez, supra* note 180.

²⁰⁸ SENATE COMM. ON THE JUDICIARY, *Swetnick, Avenatti Referred for Criminal Investigation* (Oct. 25, 2018), <https://www.judiciary.senate.gov/press/rep/releases/swetnick-avenatti-referred-for-criminal-investigation> [<https://perma.cc/H9U3-KTL2>].

²⁰⁹ Nicholas Fandos & Michael D. Shear, *Before Kavanaugh Hearing, New Accusations and Doubts Emerge*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/kavanaugh-calendar.html> [<https://perma.cc/G3X4-84NB>] (discussing an individual from Rhode Island "who charged—and then recanted Wednesday night—that Judge Kavanaugh had raped a woman on a boat in 1985 in Newport, R.I.).

²¹⁰ *See, e.g.,* Natasha Bertrand, *Mueller Wants the FBI to Look at a Scheme to Discredit Him*, ATLANTIC (Oct. 30, 2018), <https://www.theatlantic.com/politics/archive/2018/10/special-counsel-refers-scheme-targeting-mueller-to-fbi/574411/> [<https://perma.cc/QCJ2-JV39>].

²¹¹ *See, e.g.,* Jill Abramson, *The GOP Thinks #MeToo Is a Chance to Exploit the 'Biased' Press*, INTELLIGENCER (Nov. 19, 2018), <http://nymag.com/intelligencer/2018/11/gop-thinks-metoo-is-a-chance-to-exploit-the-biased-press.html>.

instance in which the nonprofit group Project Veritas attempted to embarrass *The Washington Post* by planting a false story of sexual abuse about then-Senate candidate Roy Moore.²¹²

Another concern is that the news media will not provide “due diligence” when accusations are brought against workers who do not possess fame, power, or prestige.²¹³ Rank-and-file workers may then find themselves terminated based on mere reports of harassment or jokes and banter that are sexualized but inoffensive. But this problem is already occurring, and it is one that long predates the #MeToo movement.²¹⁴ Many employers believe there are economic reasons to suppress all sexuality in the workplace, not just harmful forms of harassment.²¹⁵ While highly-paid executives often have contracts that provide them with the assurance that they will not be terminated without cause, most lower-level employees can be fired at will.²¹⁶ The solution, for those concerned about due process, is to extend some form of protection against arbitrary terminations to all employees.²¹⁷ It would be perverse to respond to this concern by carving out special protections against allegations of a sexual nature, or to refrain from holding those at high levels accountable when careful journalism exposes sexual misconduct.

B. Waiver, Timeliness, and Jurisdiction

Another procedural argument is that victims who failed to pursue relief through legal channels—like the civil and criminal law—should not be able to raise claims informally. This argument may be about waiver: that it is unfair for survivors who chose not to exercise their rights to legal relief to raise claims outside legal processes, especially after the lapse of time. Or it may be a jurisdictional point: that formal legal fora should have exclusive jurisdiction over claims of sexual assault and harassment, as informal processes are incompetent to handle such issues. This genre of argument rests on a number of false premises.

²¹² Beth Reinhard et al., *Woman’s Effort to Infiltrate The Washington Post Dated Back Months*, WASH. POST (Nov. 29, 2017), https://www.washingtonpost.com/investigations/womans-effort-to-infiltrate-the-washington-post-dates-back-months/2017/11/29/ce95e01a-d51e-11e7-b62dd9345ced896d_story.html [<https://perma.cc/T252-G5E6>].

²¹³ Yoffee, *supra* note 192 (expressing the worry that the #MeToo movement “will eventually move past this moment of shocking allegations against famous men, and should soon focus on the many nonfamous people in quotidian circumstances. But top news organizations are not likely to provide as much due diligence about those cases”).

²¹⁴ See generally Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

²¹⁵ *Id.*

²¹⁶ Arnow-Richman, *supra* note 19, at 89.

²¹⁷ See, e.g., *id.* at 101–02.

The “waiver” version of this argument rests on false premises regarding the availability of legal recourse. “Waiver” is a procedural doctrine that prevents a party from raising an issue when they had an opportunity to bring it up at some earlier point, but failed to do so. A key premise here is that a person had a fair opportunity and the incentive to raise an issue at an earlier point.²¹⁸ But the law fails to prohibit much conduct widely regarded as sexual abuse, and those prohibitions that do exist are systematically underenforced.²¹⁹ Survivors understand this.²²⁰ In response to the question why she didn’t report, Actor Ashley Judd asked, “Were we supposed to call some fantasy attorney general of moviedom?”²²¹

Those recent cases in which the law has achieved ostensible successes only go to show the law’s abject failure. Twenty-years of complaints against USA Gymnastics doctor Larry Nassar by young gymnasts were not taken seriously until the police found child pornography on his hard drive.²²² For decades before his conviction for sexual assault, Bill Cosby’s accusers “were met, mostly, with skepticism, threats, and attacks on their character.”²²³ Recording artist Taylor Swift, who reported that she was groped by a radio host while posing for a photograph, did not attempt to avail herself of any legal remedies until two years later, when she found herself a defendant in a suit brought by the radio host claiming that Swift had lied about the assault and caused him to be fired from his job.²²⁴ He lost his case, and the jury granted

²¹⁸ See, e.g., *United States v. Ticchiarelli*, 171 F.3d 24, 32–33 (1st Cir. 1999) (“Whether there is a waiver depends not, . . . on counting the number of missed opportunities (hearings, motions, etc.) to raise an issue, but on whether the party had sufficient incentive to raise the issue in the prior proceedings.”).

²¹⁹ See *supra* notes 33–58 and accompanying text. Professor Duncan Kennedy has called this the “tolerated residuum” of sexual abuse. Kennedy, *supra* note 116, at 1320. It serves not only the interests of abusers, but also the individual interests of those men who imagine themselves more likely to be falsely accused than sexually abused, and who wish to avoid the burden of worrying about “excess or inaccurate enforcement” of the law. *Id.*

²²⁰ See, e.g., #WhyIDidntReport, TWITTER, <https://twitter.com/hashtag/WhyIDidntReport> [http://perma.cc/FCG7-JBGS].

²²¹ Zacharek, *supra* note 59.

²²² Kerry Howley, *Everyone Believed Larry Nassar. The Predatory Trainer May Have Just Taken Down USA Gymnastics. How Did He Deceive So Many For So Long?*, THE CUT (Nov. 19, 2018), <https://www.thecut.com/2018/11/how-did-larry-nassar-deceive-so-many-for-so-long.html> [http://perma.cc/C4W6-3BQA] (“Over the course of at least 20 years of consistent abuse, women and girls reported to every proximate authority.”).

²²³ Noreen Malone & Amanda Demme, *I’m No Longer Afraid’: 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture that Wouldn’t Listen*, THE CUT (July 26, 2015), <https://www.thecut.com/2015/07/bill-cosbys-accusers-speak-out.html#barbara-bowman> [http://perma.cc/PAY5-BHR2].

²²⁴ Eliana Dockterman, *‘I Was Angry.’ Taylor Swift on What Powered her Sexual Assault Testimony*, TIME (Dec. 6, 2017), <http://time.com/5049659/taylor-swift-interview-person-of-the-year-2017/> [https://perma.cc/3767-N3Y2].

Swift the \$1 she had requested in symbolic damages.²²⁵ Despite being one of the best-selling recording artists of all time, Swift found herself blamed for what had happened.²²⁶ Her experience with the legal process was “demoralizing.”²²⁷ Swift said, “Going to court to confront this type of behavior is a lonely and draining experience, even when you win, even when you have the financial ability to defend yourself.”²²⁸ The #MeToo movement has demonstrated that survivors might now be taken seriously. Survivors should not be faulted for waiting until the time when they might be heard to come forward.

Another version of this argument is about timeliness—that victims are using the court of public opinion to circumvent the statutes of limitations that apply to civil and criminal cases, long after evidence has gone stale, memories have faded, and social norms about appropriate conduct have changed.²²⁹ But an unfortunate feature of sexual abuse is that it causes delayed reporting by intimidating survivors through threats of shaming and retaliation, and by convincing survivors that they were to blame, that they overreacted, or that they misinterpreted what happened.²³⁰ Moreover, legal deadlines for bringing claims are too short. Title VII sexual harassment claims must be brought within an exceptionally short timeframe, generally less than a year.²³¹ While reformers have succeeded in eliminating or expanding statutes of limitations for rape in many states, in others the time limit may be as short as six years.²³² These sharp deadlines should not be applied by decision

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* (“When I testified, I had already been in court all week and had to watch this man’s attorney bully, badger and harass my team including my mother over inane details and ridiculous minutiae, accusing them, and me, of lying.”).

²²⁸ *Id.*

²²⁹ See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (explaining that statutes of limitations provide defendants with “repose,” “encourage the prompt presentation of claims,” and “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”).

²³⁰ Cf. Jessica Henderson Daniel, *Statement of APA President Regarding the Science behind Why Women May Not Report Sexual Assault*, AM. PSYCHOL. ASS’N (Sept. 24, 2018), <https://www.apa.org/news/press/releases/2018/09/report-sexual-assault.aspx> [<https://perma.cc/N8NW-3FYK>] (explaining that survivors may not report for any number of reasons, including “fear for their safety, being in shock, fear of not being believed, feeling embarrassed or ashamed, or expecting to be blamed.”).

²³¹ Anne Lawton, *Tipping the Scales of Justice in Sexual Harassment Law*, 27 OHIO N.U. L. REV. 517, 519–22 (2001) (criticizing the short statute of limitations for sexual harassment claims, and pointing out that, for example, under Ohio law there is a four-year statute of limitations for breach of a sales contract).

²³² See Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 769–70 (2018).

makers asking whether an accused person is fit to hold high office. Decision makers may appropriately consider the passage of time and resulting lack of evidence as a factor in assessing the likelihood of the misconduct.

Yet another variation on this argument is that the court of public opinion is ill-suited for truth-finding, so real courts should have exclusive jurisdiction. This argument overestimates the truth-finding capacity of the criminal justice system, which is focused on plea bargaining,²³³ and the civil justice system, which is directed at settlement.²³⁴ It underestimates the independent media, which has long served as a check on arbitrary and unfair legal proceedings, monitoring and exposing miscarriages of justice.²³⁵ While it is true that the public may rush to judgment rather than examining whether media reports adhere to basic journalist standards, public judgments tend to be ephemeral rather than having any lasting career consequences for celebrities.²³⁶ Institutions have acted with more care, often engaging their own investigators.²³⁷ Moreover, the argument that any given dispute can only be tried in one tribunal is inconsistent with the practice of U.S. courts. O.J. Simpson's acquittal in the criminal case against him for the murders of Nicole Brown Simpson and Ronald Goldman did not bar the victim's families from relitigating the matter in a civil suit alleging wrongful death or a custody proceeding to terminate his parental rights.²³⁸ In

²³³ See, e.g., George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (discussing how the criminal justice system is dominated by plea bargaining); Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019) (discussing "fictional pleas" in which offenders plead guilty to crimes they did not commit to avoid trials that place them at risk of extreme consequences).

²³⁴ See, e.g., Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925 (2000).

²³⁵ As the Supreme Court has reflected:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). The Duke Lacrosse incident provides one example of how the press can serve as a check on irresponsible prosecutors. See, e.g., *supra* note 130 and accompanying text.

²³⁶ See, e.g., Joanna Piacenza, *How #MeToo Impacts Viewers' Decisions on What to Watch*, MORNING CONSULT (May 28, 2018), <https://morningconsult.com/2018/05/28/how-metoo-impacts-viewers-decisions-what-watch/> [https://perma.cc/TJ8S-A7FK] (surveying 2202 U.S. adults about whether allegations of misconduct against twenty performers would affect their viewership, and finding that "allegations against only two — Kevin Spacey and Louis C.K. — spurred more people to say their viewership habits would change as a result").

²³⁷ See *supra* Section III.B.

²³⁸ STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 1024–25 (4th ed. 2012).

each of these cases, there was something different at stake, and so a different standard of proof was appropriate.²³⁹

What standard of proof ought to apply when a person holding or seeking high office is publicly accused of sexual misconduct has appropriately been the subject of public debate.²⁴⁰ The standard should be calibrated by balancing the risks of a “false negative (i.e., failing to impose consequences when the allegation is in fact true)” against the risks of a “false positive (i.e., imposing consequences when the accused is in fact innocent).”²⁴¹ In the context of the Ford-Kavanaugh hearings, for example, the risk of a false negative was that a person who had committed sexual assault would be confirmed to a lifetime Supreme Court appointment where he would “cast the deciding vote on matters of women’s liberty and equality.”²⁴² The risk of a false positive was that Kavanaugh would have remained a judge on a lower court, and another “highly qualified jurist” would have taken his place on the Supreme Court.²⁴³ Thus, a “substantial” or “credible” evidence standard might be more appropriate for nominations to high-profile positions, rather than the higher preponderance of the evidence standard that is commonly applied by investigators.²⁴⁴ The risk that accused individuals will continue to abuse their power is also a relevant consideration in this calculation.²⁴⁵

Career consequences and reputational harms for the accused are relevant but too often overvalued. The decisions of any particular institutional decisionmaker, consumer, or audience member on the merits of a #MeToo claim do not bind all others.²⁴⁶ For example, while it is true that Justice Kavanaugh might have suffered some further degree of reputational harm if he had not been confirmed, the Senate’s ultimate vote did not “absolve Judge Kavanaugh in the court of public opinion.”²⁴⁷ A finding of “credible” or “substantial” evidence is just that; it is

²³⁹ *Id.*

²⁴⁰ See *supra* notes 186–189 and accompanying text.

²⁴¹ See, e.g., Daniel Hemel, *Burdens of Proof for Sexual Misconduct Claims in Senate Confirmations and on College Campuses*, MEDIUM (Sept. 23, 2018), <https://medium.com/whatever-source-derived/burdens-of-proof-for-sexual-misconduct-claims-in-senate-confirmations-and-on-college-campuses-ed6347713674> [<https://perma.cc/3BYD-NTU9>].

²⁴² See Shaw, *supra* note 186.

²⁴³ See Hemel, *supra* note 241.

²⁴⁴ See *id.* (discussing the substantial evidence standard); Shaw, *supra* note 186 (arguing for a “credible accusation” standard).

²⁴⁵ See Hemel, *supra* note 241.

²⁴⁶ Different employers may conduct their own investigations, see, e.g., Jacobs, *supra* note 185, and may sometimes reach different conclusions, see, e.g., Erik Wemple, *CNN Reinstates Ryan Lizza*, WASH. POST (Jan. 25, 2018), https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/01/25/cnn-reinstates-ryan-lizza/?utm_term=.afb7cd3dd9b4 [<https://perma.cc/YU3G-2RMD>].

²⁴⁷ See Hemel, *supra* note 241.

not any sort of final determination.²⁴⁸ The lack of finality in the court of public opinion may work to the advantage of the accused, who can re-litigate his case as long as the media remains interested in the story.²⁴⁹ And in discussions of reputational harm to the accused, it is important to recognize there is an inverse and corresponding risk of reputational harm to accusers whose claims are determined to be without merit.²⁵⁰

C. Notice and Hearing

Another set of concerns relates to the basic due process principle that “a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.”²⁵¹ Assuming due process applies, it requires “some kind of hearing.”²⁵² But the Supreme Court has held that the particular requirements for that hearing depend on the circumstances.²⁵³ Under the circumstances, #MeToo’s informal procedural norms provide high-profile individuals with all process that is due.

Lack of notice does not seem to be the main due process complaint in the #MeToo era. Unlike some Title IX proceedings and workplace investigations, the defining feature of #MeToo reporting is that allegations are made publicly, with detailed news coverage. Before a story is even published, journalistic standards require that a person accused of serious misconduct be given an opportunity to respond, along with enough information about the story to make that response meaningful.²⁵⁴ Journalists include these responses in their stories and publish new stories when accused persons or their lawyers wish to add to the response.²⁵⁵

²⁴⁸ *Id.*

²⁴⁹ See *supra* note 156 (citing sources re-evaluating of the accusations against former Senator Al Franken over a year after his resignation).

²⁵⁰ See Hemel, *supra* note 241 (discussing the consequences of the allegation for Christine Blasey Ford, who went into hiding with her family to avoid harassment).

²⁵¹ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (alteration in original) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

²⁵² Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1267 (1975) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974)).

²⁵³ *Mathews*, 424 U.S. at 335 (setting forth an inquiry that considers three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”).

²⁵⁴ This was a failing of the reporting by *Rolling Stone* on rape at the University of Virginia. Coronel, Coll, & Kravitz, *supra* note 128 (“If both the reporter and checker had understood that by policy they should routinely share specific, derogatory details with the subjects of their reporting, *Rolling Stone* might have veered in a different direction.”).

²⁵⁵ See *supra* Section III.A.

The objection might be that there is no trial-like procedure with a neutral adjudicator that would allow individuals accused of sexual misconduct to clear their names. However, in many cases, employers hire outside investigators to conduct formal investigations and announce the results publicly.²⁵⁶ The more highly-paid the accused, the more likely it is that they are protected by a contract that gives them the right to contest the factual basis for any termination in court or arbitration.²⁵⁷

Even when the accused person does not have contractual protections, principles of due process do not require a formal trial. Cases in which a public employee is entitled to a “name clearing hearing” to rebut a public charge of misconduct made by a government employer are instructive here.²⁵⁸ No particular procedures are prescribed for every such hearing.²⁵⁹ Rather, courts engage in a functional inquiry, balancing the costs and benefits of additional procedure in each case.²⁶⁰ Due process does not necessarily require an adjudicator who is independent of the employer.²⁶¹ Some courts have held that no oral hearing is required in cases in which the employee had a “high degree of access to the news media.”²⁶² This is because, as a public figure, the dismissed employee is unlikely to “need a formal hearing as a forum in which to repeat his side of the story.”²⁶³ The cost of requiring a trial-like procedure in this context is that government employers would never disclose

²⁵⁶ See *supra* notes 173–185 and accompanying text.

²⁵⁷ See Arnow-Richman, *supra* note 19, at 92.

²⁵⁸ For more discussion of “name clearing hearings,” see *supra* notes 93–94 and accompanying text.

²⁵⁹ See, e.g., *Wojcik v. Massachusetts State Lottery Comm’n*, 300 F.3d 92, 103 (1st Cir. 2002) (“The purpose of the hearing is only to allow the employee to clear his name of the false charges; compliance with formal procedures is not necessarily required.”); *Moody v. Cty. of Santa Clara*, No. 5:15-CV-04378-EJD, 2018 WL 2267662, at *4 (N.D. Cal. May 17, 2018) (“Due process imposes no hard and fast requirements on what constitutes an adequate ‘name-clearing’ hearing, including, for example, whether it must be public, evidentiary in nature, or held prior to deprivation of the liberty or property interest.”).

²⁶⁰ See, e.g., *Gunasekera v. Irwin*, 551 F.3d 461, 469–71 (6th Cir. 2009) (applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)).

²⁶¹ See, e.g., *Harrell v. Cty. of Gastonia*, 392 Fed. App’x 197, 205 (4th Cir. 2010) (“[G]overnmental officials conducting such hearings will often be employed by the same governmental entity that made the decision being challenged, and those officials are still presumed to be fair and impartial in conducting proceedings.”).

²⁶² See, e.g., *Baden v. Koch*, 799 F.2d 825, 832 (2d Cir. 1986) (holding that the plaintiff “could presumably have called a press conference and provided any further defense of his record or explanation of his removal from office that he desired to give”); see also *Moody*, 2018 WL 2267662, at *4.

²⁶³ *Baden*, 799 F.2d at 832; see also *Esposito v. Metro-N. Commuter R. Co.*, 856 F. Supp. 799, 807–08 (S.D.N.Y. 1994) (“[A]s plaintiff concedes, because media interest in his story was so intense, he had, and took advantage of, ready and pervasive access to the public to refute the allegations against him. Indeed, as the plethora of newspaper articles contained in the record demonstrates, plaintiff was not shy about publishing his version of events, and the media was more than willing to report it”).

high-level misconduct,²⁶⁴ a result that would allow serial harassers to move to their next high-level job without accountability.

Another variation on this complaint is that the decision makers under the rules of #MeToo—such as boards of directors, corporate officers, voters, political party leaders, consumers, or audiences—are prone to conflicts of interest and motivated reasoning.²⁶⁵ The argument may be that decision makers are under undue pressure from the #MeToo movement to act decisively,²⁶⁶ or that politicians and businesspeople will weaponize accusations to embarrass and distract their opponents.²⁶⁷ This may be an argument for shifting factfinding responsibilities to outside investigators. But it is not a reason for decision makers to altogether abdicate responsibility for evaluating allegations of sexual misconduct against their leaders. Just as with other serious allegations, it is incumbent on those with decision-making authority to evaluate facts critically, exercise independent judgment, and attempt to remain fair-minded and neutral.

D. Confrontation

Another complaint might be that there is no opportunity to confront the accuser, to cross-examine them, or to otherwise scrutinize their account. But, for the most part, decision makers have not acted on disputed allegations against high-level perpetrators unless accusers have been willing to come forward and respond to scrutiny.

The complaint about the right to confrontation may overstate what the law requires. In criminal cases, the Sixth Amendment affords a right of confrontation;²⁶⁸ and in civil cases, rules of evidence prohibit certain forms of hearsay.²⁶⁹ But what rights apply outside these contexts is controversial. In name-clearing hearings for public employees,

²⁶⁴ Cf. *Baden*, 799 F.2d at 833 (“If we were to hold that a government executive’s public statement of reasons for a discretionary personnel decision automatically triggered a requirement for a formal trial-type hearing, executives would be tempted to refrain from explaining their personnel actions in public, a result contrary to the strong policy of maintaining an informed electorate.”).

²⁶⁵ It is not clear which direction biases will point in. For example, some survey evidence suggests that sexual misconduct allegations have little effect on film and television audiences, with some audience members reporting they are more likely to watch a performer after accusations emerge. *Piacenza*, *supra* note 236.

²⁶⁶ See *Arnow-Richman*, *supra* note 19, at 86 (“With harassment in the spotlight, many [employers] are likely to conclude that a swift and severe response to any allegation of misconduct is the only way to avoid a public relations nightmare.”). With respect to high level employees, institutions may have countervailing incentives to protect incumbent leadership. *Id.* at 87.

²⁶⁷ Cf. *Hemmingway*, *supra* note 88 (describing the Ford-Kavanaugh hearings as “[a] Senate star chamber full of grandstanding senators on both sides”).

²⁶⁸ U.S. CONST. amend. VI.

²⁶⁹ See FED. R. EVID. 801–07.

some courts have approved procedures that did not allow any cross-examination.²⁷⁰ Some courts have even approved procedures in which the accusers were not named.²⁷¹ With respect to campus sexual assault hearings under Title IX, the Sixth Circuit has held that “some form of cross-examination” is required when the resolution of a claim turns on credibility.²⁷² The court reasoned that cross-examination “takes aim at credibility like no other procedural device . . . to test [a witness’s] memory, intelligence, or potential ulterior motives.”²⁷³ Yet empirical research suggests reasons to doubt the utility of cross-examination as a truth-seeking device.²⁷⁴ Cross-examination also has the potential to subject victims to trauma and deter reporting.²⁷⁵ Thus, a number of courts have held that questioning by a neutral college administrator suffices to ensure fair process in the Title IX context.²⁷⁶

In the #MeToo context, reporters are wary of coming forward with stories in which accusers refuse to be named publicly.²⁷⁷ Journalistic

²⁷⁰ See, e.g., *Miller v. Metrocare Servs.*, 809 F.3d 827, 834 (5th Cir. 2016) (“[W]e decline Miller’s invitation to make confrontation of witnesses a mandatory requirement for an adequate name-clearing hearing.”); *Chilingirian v. Boris*, 882 F.2d 200, 206 (6th Cir. 1989) (holding that a name-clearing hearing did not violate due process even though the plaintiff was not permitted to cross-examine city council members who had voted for his termination or to require that they answer questions he had submitted).

²⁷¹ See, e.g., *Feterle v. Chowdhury*, 148 F. App’x 524, 532 (6th Cir. 2005) (holding that due process was satisfied even though an employee accused of discriminatory misconduct was not provided the names of witnesses who had contributed to a report that was part of the basis for terminating him).

²⁷² *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (“[I]f a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.”).

²⁷³ *Id.* at 582.

²⁷⁴ H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the “Greatest Legal Engine Ever Invented”*, 27 CORNELL J.L. & PUB. POL’Y 145 (2017) (collecting and assessing empirical research). Cross-examination may suggest that the key to the truth is a witness’s demeanor, but “scientific evidence proves that most, if not all, readily observable behavioral cues assumed to indicate deceit do not actually do so.” *Id.* at 155–56. Under the stress of cross-examination, “many cope by simply changing their story regardless of their original answers’ veracity,” particularly victims of sexual abuse. *Id.* at 165. While cross-examination allows lawyers to point out inconsistencies, even truthful witnesses are sometimes unable to recall precise details, and so the technique “highlights the errors of well-intentioned and deceptive witnesses alike.” *Id.* at 158.

²⁷⁵ See Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases*, CHRONICLE OF HIGHER ED. (Jan. 10, 2019), https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448?cid=wcontentlist_hp_5 [<https://perma.cc/5DM2-ZHXH>].

²⁷⁶ See, e.g., *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 252 (E.D. Pa. 2012) (holding that prohibiting the student-plaintiff from personally cross-examining the witnesses did not violate due process because the student “was able to cross examine the witnesses by posing questions through the [panel’s] Chair”).

²⁷⁷ SPJ ETHICS COMM., POSITION PAPERS, ANONYMOUS SOURCES, <https://www.spj.org/ethics-papers-anonymity.asp> [<https://perma.cc/AV6S-KVBD>] (last visited Jan. 15, 2019) (discussing the principles that sources should be identified “whenever feasible” and journalists should “[a]lways question sources’ motives before promising anonymity”). The use of an anonymous source should require a supervisor’s approval, and many news organizations have policies on the question. *Id.*;

standards only allow the use of anonymous sources for allegations of sexual assault or harassment if the story is credible, considering factors such as whether there are “multiple, independent anonymous sources making similar claims.”²⁷⁸ In a few stories, multiple anonymous accusers have described a pattern of misconduct, but were unwilling to be named due to fear of reprisals.²⁷⁹ But even if sources go unnamed in a story, journalistic standards require that the accused person receive enough details about the misconduct so as to have a meaningful opportunity to respond.²⁸⁰ For example, in response to anonymous allegations of “inappropriate touching,” restaurateur Mario Batali stated, “Although the identities of most of the individuals mentioned in these stories have not been revealed to me, much of the behavior described does, in fact, match up with ways I have acted.”²⁸¹

Employers are wary of acting on anonymous allegations. During the confirmation hearings for Justice Kavanaugh, for example, the Senate did not act on leaked information about Dr. Ford’s allegations until she came forward.²⁸² In other cases, anonymous allegations prompted employers to conduct investigations.²⁸³ In only two of the 202 cases

see also ANONYMOUS SOURCING, NPR ETHICS HANDBOOK (accessed Jan. 15, 2019), <http://ethics.npr.org/tag/anonymity/> [<https://perma.cc/2B4Z-TSU9>].

²⁷⁸ Poynter Staff, *supra* note 19.

²⁷⁹ See, e.g., Oliver Darcy, *Five Women Accuse Journalist and ‘Game Change’ Co-Author Mark Halperin of Sexual Harassment*, CNN (Oct. 27, 2017), <https://money.cnn.com/2017/10/25/media/mark-halperin-sexual-harassment-allegations/index.html> [<https://perma.cc/8L3B-EV3S>]; Irene Plagianos & Kitty Greenwald, *Mario Batali Steps Away From Restaurant Empire Following Sexual Misconduct Allegations*, EATER (Dec. 11, 2017, 8:01 AM), <https://ny.eater.com/2017/12/11/16759540/mario-batali-sexual-misconduct-allegations> [<https://perma.cc/3X4B-C2PM>]; Jenn Ableson & Sacha Pfeiffer, *Modeling’s Glamour Hides Web of Abuse*, BOSTON GLOBE (Feb. 16, 2018), <https://www.bostonglobe.com/metro/2018/02/16/beauty-and-ugly-truth/c7r0WVsf5cib1pLWXJe9dP/story.html> [<https://perma.cc/WTH7-PT98>] (reporting that three anonymous models accused “Karl Templer, a top stylist, of yanking their breasts, touching their crotches, or aggressively pulling down their underwear without asking them during shoots,” which Templer denied).

²⁸⁰ See Coronel, Coll, & Kravitz, *supra* note 128; Poynter Staff, *supra* note 19 (“Although you may not be naming a source in a story, in most cases it is appropriate to reveal accusers’ names to the accused.”).

²⁸¹ Plagianos & Greenwald, *supra* note 279 (quoting a statement from Mario Batali); see also Darcy, *supra* note 279 (quoting a statement in which Halperin apologized for pursuing relationships with junior colleagues).

²⁸² Eli Watkins, *Timeline: How the Kavanaugh Accusations Have Unfolded*, CNN (Sept. 17, 2018), <https://www.cnn.com/2018/09/17/politics/kavanaugh-ford-timeline/index.html> [<https://perma.cc/4NST-TDLH>].

²⁸³ See, e.g., Frank Pallotta, *John Lasseter Joins Skydance Media After Leaving Disney Following Misconduct Allegations*, CNN Business (Jan. 9, 2019), <https://www.cnn.com/2019/01/09/media/john-lasseter-skydance/index.html> [<https://perma.cc/5UBT-G53G>] (discussing an investigation conducted after unnamed sources alleged sexual harassment); Maureen Ryan, ‘Supergirl,’ ‘Arrow’ Producer Suspended Amid Sexual Harassment Allegations by Warner Bros., VARIETY (Nov. 10, 2017), <https://variety.com/2017/tv/news/warner-bros-sexual-harassment-andrew-kreisberg-1202612522/> [<https://perma.cc/DKX4-XYPR>] (discussing how inquiries by *Variety* about anonymous allegations of harassment prompted an investigation by the Warner Brothers’ human resources department).

listed by the *New York Times* did decision makers appear to act based on only news stories with a single anonymous accuser.²⁸⁴

When victims do come forward, their accounts do not evade scrutiny. The prospect of this public scrutiny is a factor that deters reporting.²⁸⁵ For example, the media was skeptical of Julie Swetnick's accusations against Kavanaugh from the outset, reporting on her financial troubles and history of litigation.²⁸⁶ The media has covered the specifics of defamation and wrongful termination cases brought against various accusers.²⁸⁷ While there is no cross-examination in the court of public opinion, there are on-camera interviews. In interviews, journalists can ask questions that might expose inconsistencies in an accuser's story and audiences can assess the accuser's credibility for themselves. NBC Nightly News aired an interview of Swetnick by Kate Snow, in which Snow pointed out discrepancies between Swetnick's answers and an affidavit she had signed under penalty of perjury.²⁸⁸

One exception to the norm that victims come forward involves a woman accused of sexual harassment, Andrea Ramsay, who dropped out of her race to become the democratic nominee for a congressional seat in Kansas in December 2017.²⁸⁹ The Democratic Congressional Campaign Committee (DCCC) had withdrawn its support for Ramsay, seemingly on account of tersely worded allegations that she had sexually harassed a male subordinate in 2005.²⁹⁰ The allegation was made in a Title VII complaint, which means the defendant was the company, not Ramsay herself. Ramsay denied the allegations and stated that she would have opposed the settlement the company ultimately reached

²⁸⁴ See Busch, *supra* note 170; Schneider, *supra* note 170. In another case, an employer acted on the report of a source who was known to it and the accused but whose story was not disclosed to the public. See, e.g., Liam Stack, *Ryan Lizza Fired by The New Yorker over Sexual Misconduct Allegation*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/business/ryan-lizza-sexual-misconduct.html> [<https://perma.cc/T4XT-82W5>]. There may be cases in which employers acted on anonymous reports that were not included in the New York Times' list. See *supra* note 152.

²⁸⁵ See, e.g., Steel, *supra* note 38 (discussing how Bill O'Reilly hired a private investigator to find damaging information about one accuser).

²⁸⁶ Miller et al., *supra* note 206.

²⁸⁷ See, e.g., Maria Halkias, *Scandal Surrounding Alleged Extramarital Affair of Former U.S. Hispanic Chamber Leaders from Dallas Moves into Court*, DALLAS NEWS (July 17, 2018), <https://www.dallasnews.com/business/business/2018/07/17/charges-surrounding-extramarital-affair-former-us-hispanic-chamber-leaders-dallas-moves-court> [<https://perma.cc/X2RU-MUU2>]; Weiss, *supra* note 152.

²⁸⁸ Bauder, *supra* note 206.

²⁸⁹ Lindsay Wise & Bryan Lowry, *Kansas Dem Andrea Ramsey, Accused of Sexual Harassment, Will Drop Out of U.S. House Race*, KAN. CITY STAR (Dec. 15, 2017), <https://www.kansascity.com/news/politics-government/article189931704.html>.

²⁹⁰ *Id.* Court documents include very few details about the incident. An EEOC charge attached to the complaint states: "In late March 2005, [Ramsay] made sexual advances toward [the plaintiff] on a business trip," and that after the plaintiff told Ramsay he was not interested in her, she terminated him. Complaint, *Funkhouser v. LabOne, Inc.*, No. 05-cv-02458 (D. Kan. Oct. 25, 2005).

with her accuser.²⁹¹ Ramsay's accuser refused to give his side of the story to the press, perhaps because his settlement included a confidentiality agreement.²⁹² Thus, there was no opportunity for the media to probe the details of the matter. This example is atypical, and the controversy around it demonstrates evolving norms that require accusers to stand by their allegations.²⁹³

E. Proportionality

Another criticism is that the consequences for the accused are not proportional to the severity and likelihood of the accusations. Commentators fear false equivalences and extreme penalties. For example, talk show host Gayle King has said, "I think when a woman makes an accusation, the man instantly gets the death penalty. There has to be some sort of due process here. All of these inappropriate behaviors are not all the same."²⁹⁴ The principle that responses should be proportionate is an important one.²⁹⁵ But #MeToo's critics have overestimated the consequences high-profile men have faced, and underestimated the harms of sexual assault, harassment, and misconduct to its victims.

With respect to high-profile cases, it is not true that consequences have been either automatic or terminal. The public cannot keep track of accusations against celebrities, and it tends to forgive and forget.²⁹⁶ After being fired by Fox News, Bill O'Reilly was hired to host a new show on Newsmax TV.²⁹⁷ As a result of allegations of sexual misconduct

²⁹¹ *Andrea Ramsey Letter: 'I Never Engaged in Any of the Alleged Behavior,'* KAN. CITY STAR (Dec. 15, 2017), <https://www.kansascity.com/news/politics-government/article189934114.html>.

²⁹² Wise & Lowry, *supra* note 289 (Ramsay is quoted as saying "All I can say is the matter has been resolved.").

²⁹³ Two democratic representatives have publicly questioned the DCCC's decision to withdraw its support for Ramsay. Maggie Severns & Marianne Levine, *Both Parties Face Dissent over Handling of #MeToo*, POLITICO (Jan. 29, 2018, 5:01 AM), <https://www.politico.com/story/2018/01/29/congress-sexual-harassment-metoo-372855> [<https://perma.cc/F7Y2-KA6K>].

²⁹⁴ Audie Cornish, *Gayle King Thinks #MeToo Needs Due Process*, N.Y. TIMES MAG. (June 12, 2018), <https://www.nytimes.com/2018/06/12/magazine/gayle-king-thinks-metoo-needs-due-process.html> [<https://perma.cc/HUW9-BH7G>]; see also Traister, *supra* note 66 ("MSNBC's Mike Barnicle, himself once having been returned to power after a plagiarism scandal, has mourned publicly for the injury done to his friend and former colleague Mark Halperin, who got canned after being accused of pushing his penis against younger female subordinates: 'He deserves to have what he did deplored,' Barnicle declared. 'But does he deserve to die? How many times can you kill a guy?'").

²⁹⁵ Not only do disproportionate penalties offend basic fairness, but treating all instances of sexual misconduct with "zero-tolerance" can make rules against misconduct less effective. FELDBLUM & LIPNIC, *supra* note 41 (explaining that "zero tolerance" rules "may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior—they simply want the harassment to stop").

²⁹⁶ Piacenza, *supra* note 265 (discussing polling data and quoting public relations executives).

²⁹⁷ *Don't Miss Bill O'Reilly's 'No Spin News' on Newsmax TV*, NEWSMAX (Nov. 20, 2018), <https://www.newsmax.com/newsmax-tv/bill-oreilly-no-spin-news-newsmaxtv/2018/03/28/id/851260/> [<https://perma.cc/6XR6-SG6T>].

that were not disclosed to the public, reporter Ryan Lizza lost his job at *The New Yorker* but was retained by CNN.²⁹⁸ After an investigation into misconduct, *New York Times* reporter Glenn Thrush was removed from his prestigious post at the White House but permitted to return to the newsroom.²⁹⁹ After resigning from the Senate, Al Franken continues to be involved in public life.³⁰⁰ Some celebrities have worked allegations into their performances. In the midst of publicity regarding allegations of his sexual misconduct, musician R. Kelly released a nineteen-minute song titled “I Admit.”³⁰¹ After a documentary aired in which R. Kelly’s accusers were interviewed, “daily streams of his songs in the United States more than doubled, according to Nielsen, from 1.9 million the day before the series began to 4.3 million on its last day.”³⁰² Comedian Louis C.K., who admitted that he abused his position of power to get female comedians into situations where he could masturbate in front of them, is back to performing standup less than one year later, joking that, as a result of the news story, “I lost \$35 million in an hour.”³⁰³ Aziz Ansari is also still performing, but rather than using his platform to make light of the Babe.net story, he has said that “if other men learned from the allegation against him, ‘that’s a good thing.’”³⁰⁴

²⁹⁸ See Wemple, *supra* note 246.

²⁹⁹ Adrienne LaFrance, *The New York Times’s Glenn Thrush Dilemma*, ATLANTIC (Jan. 9, 2018), <https://www.theatlantic.com/business/archive/2018/01/american-newsrooms-are-covering-sexual-harassment-but-whats-happening-inside-the-newsrooms-themselves/550058/> [https://perma.cc/8S5V-96TS].

³⁰⁰ See, e.g., Al Franken, <https://soundcloud.com/user-490403240> [https://perma.cc/AER9-JP4Y] (podcast hosted by Franken with guests including Norm Ornstein, E.J. Dionne, Michael Lewis, and Dana Carvey); Dahlia Lithwick, *How Would Al Franken Question Attorney General Nominee William Barr?*, SLATE (Jan. 15, 2019), <https://slate.com/news-and-politics/2019/01/how-al-franken-would-question-william-barr.html> [https://perma.cc/W7HH-BA2K] (interviewing Franken); Al Franken, *Kavanaugh Supreme Court Hearings Showcase Republican Partisanship, Hypocrisy: Al Franken*, USA TODAY (Sept. 7, 2018), <https://www.usatoday.com/story/opinion/2018/09/07/brett-kavanaugh-supreme-court-hearings-showcase-republican-hypocrisy-column/1215578002/> [https://perma.cc/5P3Y-VQ9Q]. But see Mayer, *supra* note 156 (observing that the level of public interest in Franken is a shadow in comparison to his past celebrity as “the most recognizable figure in the Senate”).

³⁰¹ Crenshaw, *supra* note 69 (“A crass effort to marshal his considerable talent to sing his way to clemency, ‘I Admit’ is a coyly titled work of audience-trolling in the vein of O.J. Simpson’s memoir of his ex-wife’s murder case, *If I Did It.*”).

³⁰² Elizabeth A. Harris & Ben Sisario, *Why It Could be Hard to Mute R. Kelly*, N.Y. TIMES (Jan. 13, 2019), <https://www.nytimes.com/2019/01/13/arts/music/mute-r-kelly.html> [https://perma.cc/6P9W-8FAH].

³⁰³ *Louis CK: I’ve Been ‘to Hell and Back’ and Lost \$35 Million*, LAUGHSPIN (Oct. 12, 2018), <https://laughspin.com/louis-ck-west-side-comedy-club-sexual-misconduct/> [https://perma.cc/ZY8E-58AB]. C.K. is one of the world’s highest paid comedians, reportedly earning \$52 million in the twelve months prior to June 2017. Madeline Berg, *Louis C.K.’s Losses: How Much the Sexual Misconduct Scandal May Cost the Comedian*, FORBES (Nov. 10, 2017), <https://www.forbes.com/sites/maddieberg/2017/11/10/louis-c-k-s-losses-how-much-the-sexual-misconduct-scandal-may-cost-the-comedian/#2051da615801> [https://perma.cc/H8FL-A9EA].

³⁰⁴ Anna North, *Aziz Ansari’s New Standup Set, and its Complicated, Necessary Role in #Me-Too*, VOX (Mar. 20, 2019), <https://www.vox.com/2019/3/20/18263783/aziz-ansari-tour-2019-sexual->

This is not to diminish the lost opportunities and career consequences these men have faced. Nor is it to condone mobbing behaviors such as online insults, threats, trolling, or doxing, whether that mobbing is aimed at the accuser or the accused.³⁰⁵ Rather, it is to argue accusations alone have not forced prominent men into professional exile.

The “disproportionality” argument may misunderstand the severity of sexual assault, harassment, and misconduct. It may be based on an all-or-nothing view—long reflected in criminal law—that the problem is an exceptional phenomenon perpetrated by a small number of predators.³⁰⁶ But the problem is not limited to rape, and the harms are not sexual violation alone — the harms are also in how sexual assault, harassment, and misconduct contribute to systemic gender-based inequality.³⁰⁷ For example, the harm of harassment of the sort Louis C.K. perpetrated is in diminishing women’s equal employment opportunities. After complaining about C.K., comedians Dana Min Goodman and Julia Wolov found their opportunities in Hollywood limited because they had to maneuver to avoid his manager.³⁰⁸ As one female stand-up comic put it: “We are all avoiding someone who could help us make money. Female comics do a lot of calculating, finding alternate routes to a career.”³⁰⁹ Another potential comic, Abby Schachner, decided to pursue a different career, in part because of C.K.’s harassment.³¹⁰ Harms to women’s careers may be discounted because of victim-blaming, particularly when the survivors are people of color.³¹¹ Another harm may be in treating women like objects, the butt of the joke, or making light of sexual assault, as when Al Franken posed for a picture placing his hands over the breasts of a sleeping woman as if to sexually

misconduct-allegations [<https://perma.cc/2FCV-KVWJ>] (describing the themes of a recent comedy performance by Ansari as “personal growth and political progress”). See also Doreen St. Félix, *The Productive Ambivalence of Aziz Ansari in his Comeback Netflix Special*, NEW YORKER (July 13, 2019), <https://www.newyorker.com/culture/cultural-comment/the-productive-ambivalence-of-aziz-ansari-in-his-comeback-netflix-special> [<https://perma.cc/N3PH-257F>].

³⁰⁵ “Doxing” is the spread of personal information about an individual in an effort to facilitate harassment. See Leigh Honeywell, *Staying Safe When You Say #MeToo*, ACLU (Feb. 12, 2018), <https://www.aclu.org/blog/privacy-technology/internet-privacy/staying-safe-when-you-say-metoo> [<https://perma.cc/P4W3-8S7V>]. Unfortunately, online mobbing is a risk for accusers. *Id.*

³⁰⁶ See Anderson, *supra* note 36, at 1953.

³⁰⁷ See Schultz, *supra* note 67.

³⁰⁸ Melena Ryzik et al., *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/PM3E-H5QZ>].

³⁰⁹ Laurie Kilmartin, *Being a Female Comic in Louis C.K.’s World*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/opinion/sunday/louis-ck-harassment.html> [<https://perma.cc/FPE4-RR4A>].

³¹⁰ Ryzik et al., *supra* note 308.

³¹¹ See, e.g., MANNE, *supra* note 105, at 225–38.

assault her.³¹² United States Senators should be held to higher standards when it comes to treating all people with dignity and respect.³¹³

Another version of the “death penalty” argument is that there is no path to redemption. Yet there are few examples of attempts at meaningful amends.³¹⁴ Principles of restorative justice require that an apology include acknowledgment of the victim’s experience, responsibility-taking, repair of the harm, and steps to avoid repeating the misconduct.³¹⁵ Rather than attempting amends, many high-profile men who have lost their positions due to credible and severe accusations have sought unproven medical treatments, sometimes in expensive, resort-style residential facilities.³¹⁶ In other cases, they have apologized and received second chances.³¹⁷

³¹² See Dartunorro Clark, *Al Franken Accused of Forcibly Kissing, Groping Leeann Tweeden*, NBC NEWS (Nov. 16, 2017), <https://www.nbcnews.com/politics/congress/sen-al-franken-accused-forcibly-kissing-groping-woman-n821381> [<https://perma.cc/GL9H-BM8U>]. One commentator has said about this photo: “I found it an inoffensive burlesque of a burlesque—they were, after all, on a USO tour, which is a raunchy vaudeville throwback.” Yoffe, *supra* note 156. Cf. Mayer, *supra* note 156 (quoting an individual who was present when the photo was taken as explaining that the picture was a reference to a skit in which Franken’s character attempted to grope Tweeden’s character on the pretense of performing a breast examination). Modern day burlesque might be a sexually liberatory form of feminist camp, but only if all the performers are in on the joke. At best, the picture shows Franken treating Tweeden like a prop, not a performer. About the picture, Franken himself said:

It’s obvious how Leeann would feel violated by that picture. And, what’s more, I can see how millions of other women would feel violated by it—women who have had similar experiences in their own lives, women who fear having those experiences, women who look up to me, women who have counted on me.

Associated Press, *Statement by Sen. Al Franken on Sexual Harassment Allegation*, AP (Nov. 16, 2017), <https://www.apnews.com/3adcb145c40341c384208dcc036d2429> [<https://perma.cc/L6QB-K4EP>].

³¹³ Kirsten Gillibrand, *Senator Franken Should Step Aside*, FACEBOOK (Dec. 6, 2017), <https://www.facebook.com/KirstenGillibrand/posts/senator-franken-should-step-aside-i-have-been-shocked-and-disappointed-to-learn-o/10155471770513411/> [<https://perma.cc/W48V-B6HW>] (“We should demand the highest standards, not the lowest, from our leaders, and we should fundamentally value and respect women.”).

³¹⁴ Wexler, Robbenolt, & Murphy, *supra* note 29, at 31 (discussing NFL player Ray Rice’s meaningful efforts at redemption after being caught on video assaulting his then-girlfriend).

³¹⁵ *Id.* at 22–33.

³¹⁶ Benedict Carey, *Therapy for Sexual Misconduct? It’s Mostly Unproven*, N.Y. TIMES (Nov. 27, 2017), <https://www.nytimes.com/2017/11/27/health/sexual-harassment-addiction-treatment.html> [<https://perma.cc/4A52-BYUM>]; Amy Chozick, *Where’s Harvey?*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/style/harvey-weinstein-in-arizona.html> [<https://perma.cc/8BBJ-EZPR>].

³¹⁷ See, e.g., Sean O’Neal, *The Tortured Mind of Dan Harmon*, GQ (May 30, 2018), <https://www.gq.com/story/dan-harmon-rick-and-morty-profile> [<https://perma.cc/489Q-8QKL>] (describing the successful career of Dan Harmon, who apologized for harassment in January 2018); Stacy Perman, *John Lasseter is Attempting Hollywood’s Biggest #MeToo Comeback. How’s that Going?*, L.A. TIMES (Jan. 27, 2019), <https://www.latimes.com/business/hollywood/la-fi-ct-lasseter-skydance-test-case-20190124-story.html> [<https://perma.cc/2C43-F75K>] (discussing controversy over the hiring of John Lasseter to run the animation division of Skydance Media after he had apologized for “misteps” at his previous job).

A more general problem with the disproportionality argument is that it frames the goals of #MeToo's procedures as "retribution" rather than "replacement."³¹⁸ Unlike rank-and-file workers, those at the upper-echelons represent their enterprise and chart its course. Such individuals have lost their positions for making racist³¹⁹ and anti-Semitic³²⁰ remarks, for telling lies,³²¹ and for marital infidelity.³²² As the public faces of businesses, communities, or organizations, these individuals represent their entities' brands, values, or priorities. Their individual misconduct, and how it is managed, sends a message about the larger whole. Moreover, these are the people who make the decisions about what news stories are worth covering, what movies are worth making, what startups are worth funding, and what laws are worth passing, upholding, and enforcing. It should be beyond cavil that those who hold such power should be held to higher standards of accountability. If they are not held accountable for their own wrongdoing, they are unlikely to have the will or the moral authority to hold others accountable.

CONCLUSION

Under the rules of #MeToo, anyone could one day be in the position of evaluating public accusations of sexual misconduct against political figures, entertainers, or executives. Although we may not be state actors, we should take due process seriously. We should consider the source of information and critically evaluate media based on whether it conforms to journalistic standards such as seeking both sides, attribution, and verification. We should not act based on allegations that have not been vetted or are not sufficiently specific to enable the accused to respond meaningfully. We should insist on independent investigations

³¹⁸ See Traister, *supra* note 66.

³¹⁹ See, e.g., Judy Faber, *CBS Fires Don Imus over Racial Slur*, CBS NEWS (July 16, 2007), <https://www.cbsnews.com/news/cbs-fires-don-imus-over-racial-slur/> [<https://perma.cc/9462-V2PD>]; John Koblin, *After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html> [<https://perma.cc/CUP9-3CYP>].

³²⁰ See, e.g., John Patterson, *Is All Forgiven? The Strange, Troubling Resurgence of Mel Gibson*, GUARDIAN (Nov. 23, 2017), <https://www.theguardian.com/film/2017/nov/23/mel-gibson-hollywood-road-rehabilitation> [<https://perma.cc/S79M-LUBS>].

³²¹ See, e.g., John Koblin & Emily Steel, *Brian Williams Gets New Role at Lower Salary*, N.Y. TIMES (June 18, 2015), <https://www.nytimes.com/2015/06/19/business/media/brian-williams-nbc-lester-holt.html> [<https://perma.cc/64BT-MAT8>] (lies about a helicopter incident in Iraq); James B. Stewart, *In the Undoing of a CEO, a Puzzle*, N.Y. TIMES (May 18, 2012), <https://www.nytimes.com/2012/05/19/business/the-undoing-of-scott-thompson-at-yahoo-common-sense.html> [<https://perma.cc/L8EA-XZZ4>] (fabricating a college degree to embellish a resume).

³²² See, e.g., Chris Tognotti, *Whatever Happened to John Edwards? The North Carolina Senator's Fall from Grace Was Quick & Absolute*, BUSTLE (Nov. 5, 2015), <https://www.bustle.com/article/s/121572-whatever-happened-to-john-edwards-the-north-carolina-senators-fall-from-grace-was-quick-absolute> [<https://perma.cc/G62N-KNBK>].

where appropriate. We should apply different considerations to those seeking high office, fame, and fortune and those just seeking to make a living. We should recognize that not all sexual misconduct is equally harmful. But we should not carve out exceptional protections for those accused of sexual forms of misconduct. The #MeToo movement has accomplished something unprecedented in removing abusive leaders from positions of power. The movement should continue to reflect critically on procedural justice if it hopes to achieve a future in which sexual harassment and assault disqualify a person from holding immense power.

Beyond the Bad Apple—Transforming the American Workplace for Women after #MeToo

Claudia Flores[†]

INTRODUCTION

This recent era of the #MeToo Movement has caused many to question whether U.S. sexual harassment laws and policies are responsive to workplace realities. Complaint-based employer policies, contractually-mandated arbitration agreements, time-limited administrative exhaustion requirements, and narrow judicial interpretations of actionable conduct have created a myriad of barriers to workers seeking enforcement. For women (and some men) targeted by harassing behavior it has often been too costly—financially, professionally, and personally—to navigate a system that depends almost exclusively on individual complainants to prompt social reform.

U.S. law has largely relied on the “bad apple” theory of harassment.¹ The harasser is a wayward employee and the employer an innocent third party to interpersonal relations and relation(ship)s that have gone awry. Though courts have found Title VII to provide a legal remedy for sexual harassment, they have struggled to define this form of gender discrimination, instead developing complex tests that rely on prevailing opinions of gendered interactions, sometimes reproducing the very sexism Title VII sought to correct.

Meanwhile, numerous studies have found that sexual harassment is best understood not as isolated occurrences between individuals but as patterns of behavior that are prominent in certain workplaces and correlated with workplace features within an employer’s control. Moreover, research indicates that sexual harassment is both impacted by the work environment and alters that environment by reducing employee

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¹ See Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817 (2004).

satisfaction, productivity and efficacy, and, unsurprisingly, discouraging women from entering and staying, as well as hampering their rise to positions of influence.

Congress sought to transform the American workplace with Title VII, but the implementation of the statute has failed to do so. In this Article, I will explore how we might move past the “bad apple” theory of sexual harassment to better change the workplace for women. I will argue that our current legal framework cannot provide the necessary shift in workplace practices. Instead, we need a transformation of both our understanding of sexual harassment and our approach to eradicating it. We need to focus less on sex and more on harassment and less on liability and more on prevention to move towards gender equality in employment.

In Part One, I will begin by summarizing U.S. law on sexual harassment and the legal standard that has emerged. I will discuss how our aversion to regulating workplace behavior, narrow judicial interpretations, and reliance on existing social norms has led to an impoverished enforcement system. In Part Two, I will explore Title VII’s transformative purpose in the context of what research and scholarly work have concluded about the nature, purpose, and impact of harassment. In Part Three, I will review international standards and comparative jurisdictions that have taken an alternative approach to sexual harassment that positions it as one form of workplace abuse, among others. I will discuss how this alternative approach, which is grounded in the dual concepts of human dignity and equality, has allowed for greater emphasis on prevention of the conditions that enable sexual harassment. In Part Four, I will explore the possibility and advantages of engaging with this approach in the U.S. context, and our need to develop a standard of workplace behavior against which to measure the inequality harassment engenders. Finally, in Part Five, I will discuss the importance and possibility of developing a positive vision of the workplace, grounded in women’s dignity and equality, in order to build an American workplace that fulfills the original vision of Title VII.

I. U.S. LEGAL FRAMEWORK

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination in hiring, firing, and compensation, and terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.² Congress intended Title VII to transform the American workplace by “improv[ing] the economic and social conditions of minorities and women by providing equality of opportunity in

² Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e *et seq.* (1964).

the work place,” recognizing that “[t]hese conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.”³ Congress also understood that the liability mechanism created in Title VII could only be a component of a broader effort to move towards equality in the workplace, and “strongly encouraged employers, labor organizations, and other persons subject to title VII . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action.”⁴

In the mid-80s, courts began to recognize workplace sexual harassment as a form of gender discrimination under Title VII.⁵ As courts developed jurisprudence around harassment claims, they acknowledged Title VII’s reformative aim: “[t]he purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.”⁶ Yet, courts often struggled to implement these goals in a manner that captured the social transformation Title VII envisioned,⁷ instead often relying on the very societal prejudices Title VII sought to eradicate.⁸ Consequently, over time, Title VII’s goal of redefining the workplace against cultural norms of inequality was lost.

³ 29 C.F.R. § 1608.1 (1979).

⁴ *Id.*

⁵ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986); Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1267 (1994) (“The victim of sexual harassment is a vulnerable player within the courts. Sexual harassment protections in America are almost completely the product of the judiciary; as a statute, Title VII gives virtually no guidance about this type of sex discrimination.”).

⁶ *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998); *Meritor*, 477 U.S. at 64; *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)) (“The language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment”); *Ellison v. Brady*, 924 F.2d 872, 879, 880 (9th Cir. 1991) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (“By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to “run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.”“)

⁷ *Ellison*, 924 F.2d at 881 (quoting *Andrews v. Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)) (“Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, “Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.”)

⁸ See e.g., *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017, 1018 (8th Cir. 1988): (“Title VII does not mandate an employment environment worthy of a Victorian salon. Nor do we expect that our holding today will displace all ribaldry on the roadway. One may well expect that in the heat and dust of the construction site language of the barracks will always predominate over that of the ballroom. What occurred in this case, however, went well beyond the bounds of what any person should have to tolerate.”); See *Gallagher*, 139 F.3d at 338, 342 (“Today, while gender relations in

Courts have more or less divided sexual harassment claims into two categories—quid pro quo harassment and harassment that creates a “hostile work environment.”⁹ Quid pro quo means “something for something” and involves claims where submission to or rejection of unwelcome sexual conduct results in a tangible employment action that adversely impacts the complainant. The classic example is when a supervisor offers a promotion in exchange for sex. Courts have found these sorts of claims to be straightforward—achieving consensus on the fact that women (and men) should not be required to provide sexual favors or attention in exchange for workplace benefits or concessions.¹⁰

Hostile work environment claims have proven to be the more difficult category. These claims involve harassment that result in no clear adverse employment action other than the impact of the harassment on the employee and her or his work experience. In order to make out a claim for a hostile work environment, a complainant must prove that the conduct was severe or pervasive.¹¹ The “employment action” in a hostile work environment case must come in the form of some alteration of the workplace. The employee must demonstrate that (1) the employee was subjected to unwelcome harassment, (2) the harassment was based on sex, (3) the harassment was sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment (judged by both an objective and subjective standard), and (4) that the employer knew or should have known of the harassment.¹² This analysis requires a mixed inquiry of law and fact by judges and juries.¹³

the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation.”). For an explanation for why juries are not well situated to make sexual harassment determinations and often reflect community prejudices in their assessments of workplace hostility see Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL’Y REV. 813 (1998).

⁹ *Meritor*, 477 U.S. at 65.

¹⁰ See, e.g., *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); see also EEOC, *Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism*, No. 915.048 (Jan. 12, 1990), https://www.eeoc.gov/policy/docs/sexu_alfavor.html [<https://perma.cc/R8QU-Z5P7>].

¹¹ See generally, *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004) (to be actionable under Title VII, plaintiffs must show “harassing behavior ‘sufficiently severe or pervasive to alter the conditions of [their] employment’”) (quoting *Meritor*, 477 U.S. at 67).

¹² See *Henson v. City of Dundee*, 682 F.2d 891, 903–05 (11th Cir. 1982) (identifying elements of a sexual harassment claim).

¹³ See Scheindlin & Eloffson, *supra* note 8, at 815 (discussing allocation of sexual harassment determinations between judges and juries).

The first step is determining whether the harassment occurred because of the plaintiffs' sex.¹⁴ The harassing conduct need not be motivated by sexual desire but only general hostility to the presence of a certain sex in the workplace.¹⁵ While this standard appears to address a broad category of gender-motivated harassment, courts have repeatedly rejected claims in which general hostility to women is evident but not made explicit in sexualized comments.¹⁶ Claims based on behavior that side-lines, humiliates, excludes, demeans, or otherwise treats women in a hostile manner in the workplace are not necessarily considered by courts to be "because of sex."¹⁷

The second requirement—that the harassment is sufficiently severe and pervasive—is a threshold-setting standard for the behavior in question. Courts have looked at the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."¹⁸ The Supreme Court has differentiated between the workplace (1) that is "permeated with 'discriminatory intimidation, ridicule, and insult,'" and (2) where there is the "mere utterance of an . . . epithet which engenders offensive feelings in an employee."¹⁹ In general, relatively isolated instances of non-severe misconduct will not support a hostile work environment claim.²⁰ "A recurring point in [our] opinions," the Court stated in *Faragher v. City of Boca Raton*,²¹ "is that 'simple teasing,' offhand comments, and

¹⁴ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex.'").

¹⁵ *Id.* ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

¹⁶ *See Williams v. General Motors Corp.*, 187 F.3d 553, 572 (6th Cir. 1999) (Ryan, J., dissenting) ("The majority's artificial construct—that non-sexual harassment of a female in the workplace can give rise to Title VII sex discrimination liability if it evinces 'anti-female animus' is a radical rewriting of settled Title VII sex discrimination jurisprudence."); *see also Faragher vs. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' A recurring point in [our] opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. These standards for judging hostility are sufficiently demanding to ensure the Title VII does not become a 'general civility code.'").

¹⁷ Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. FORUM 22 (2018).

¹⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

¹⁹ *Id.* at 21.

²⁰ The Supreme Court has distinguished between a workplace that is "permeated with 'discriminatory' intimidation, ridicule, and insult" and one where there is the "mere utterance" of an offense. *Harris*, 510 U.S. 17 at 21 (quoting *Meritor*, 477 U.S. at 65, 67); *see also Young v. Phila. Police Dep't*, 94 F. Supp. 3d 683, 700 (E.D. Pa. 2015), *aff'd* 651 F. App'x 90 (3d Cir. 2016).

²¹ *Faragher*, 524 U.S. at 788.

isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”²²

The third element of the claim is whether the behavior created an abusive work environment, an assessment involving an objective and subjective determination. In *Harris v. Forklift Sys., Inc.*,²³ the Supreme Court rejected the approach taken by three circuits which had required a “serious effect” since “concrete psychological harm [is] an element Title VII does not require.”²⁴ Instead, the *Harris* Court adopted a requirement that the plaintiff must show that the defendant’s conduct was both objectively and subjectively hostile or abusive. To meet the objective standard, conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment.²⁵ To meet the subjective standard, the plaintiff needs to prove that she or he perceived the environment to be abusive.²⁶

Both the subjective and objective determination of what constitutes an abusive work environment have significantly limited the anti-discriminatory impact of Title VII, circumscribing the universe of abusive treatment that the statute deters. The objective standard, which requires courts to determine how a reasonable person would receive the harassment, has, unsurprisingly, led to complexities around the vantage point of the “reasonable person.” Some courts experimented with adding specific attributes to the reasonable person, asking whether a reasonable African American woman would find the harassment offensive, or whether a reasonable person in plaintiff’s position would find the behavior offensive.²⁷ To resolve this, in 1998, the Supreme Court attempted to offer some clarification in *Oncale v. Sundowner Offshore Services, Inc.*,²⁸ questioning whether “the objective severity of harassment should be judged from the perspective of a reasonable person in

²² *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75, 81 (1998)).

²³ 510 U.S. 17 (1993).

²⁴ *Id.* at 22.

²⁵ *Id.* (“So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious.”).

²⁶ *Id.* at 21–22 (“If the victim does not subjectively perceive the environmental to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.” However, “Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing their careers.”).

²⁷ Compare *Watkins v. Bowden*, 105 F. 3d 1344, 1356 (11th Cir. 1997) (upholding reasonable person jury instruction as opposed to “reasonable African American or women” jury instruction) with *West v. Phila. Elec. Co.* 45 F.3d 744, 753 (3d Cir. 1995) (where the objective standard was reviewed as “reasonable person of the same protected class in that position.”).

²⁸ 523 U.S. 75 (1998).

the plaintiff's position."²⁹ The Supreme Court set forth an analysis based upon the objective reasonable person standard that looked at "the social context in which particular behavior occurs and is experienced by its target" which inevitably "depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."³⁰ While this standard attempted to provide more nuance, it also yielded more discretion to draw upon problematic societal norms.³¹

The subjective test, which essentially asks whether the conduct was unwelcome, is a complicity test of whether or not the plaintiff welcomed the behavior.³² Conduct is unwelcome if the plaintiff did not solicit or incite it and if the plaintiff regarded the conduct as undesirable or offensive.³³ Courts have held that certain conduct, particularly rape, is unwelcome by definition.³⁴ However, determinations of whether conduct was welcome have sent courts down the rabbit hole of assessing a plaintiff's behavior to determine if the alleged harassment was a component of acceptable gendered interactions or not.³⁵

The final question is whether employer liability is triggered or whether the employer knew or should have known the harassment occurred. For claims related to a supervisor, the employer is vicariously liable but may utilize an affirmative defense. The employer may avoid liability by demonstrating that (1) the employer exercised reasonable

²⁹ *Id.* at 81–82.

³⁰ *Id.*; see also *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 460 (5th Cir. 2013), (citing *Oncale*, 523 U.S. at 80, 118 (1998) ("We view the alleged harassment with '[c]ommon sense, and an appropriate sensitivity to social context' to determine whether it constitutes 'conduct which a reasonable person in the plaintiff's position would find severely hostile.'").

³¹ For example, there is some indication in psychological research that juries are resistant or unable to apply reasonable person standards from particular perspectives in discrimination cases. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1332–33 (2011).

³² See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (for conduct to constitute sexual harassment, it must be unwelcome to the victim).

³³ See *Frensley v. N. Miss. Med. Ctr., Inc.*, 440 F. App'x 383, 386 (5th Cir. 2011); *Burnes v. McGregor Electr. Indus., Inc.*, 989 F.2d 959, 962 (8th Cir. 1993); *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

³⁴ See, e.g., *Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008) ("It goes without saying that forcible rape is 'unwelcome physical conduct of a sexual nature.'") (citing *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002)).

³⁵ *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) (Similarly, a plaintiff's participation in foul language or sexual innuendo in a consensual setting outside the workplace "does not waive her legal protections against unwelcome harassment."); *E.E.O.C. v. Wal-Mart Stores, Inc.*, Nos. 97-02229, 97-02252, 1999 WL 1032963 (10th Cir. 1999) (Evidence that a plaintiff had consensual sexual relationships with other co-workers outside of work "is not relevant to [plaintiff's] claims of harassment at work."); see also *Wilson v. City of Des Moines*, 442 F.3d 637 (8th Cir. 2006) (evidence of female employee's sexual behavior and comments in the workplace was "highly probative of issue of whether the alleged harassment was unwelcomed."); *Excel Corp. v. Bosley*, 165 F.3d 635, 641 (8th Cir. 1999) (evidence of alleged sexual relations between employee and ex-husband outside the workplace during period when harassment occurred should be excluded).

care to prevent and correct sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of this protection.³⁶ The employer is liable for harassment by non-supervisory employees or non-employees over whom it has control, if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.³⁷ An employer is merely required to be responsive—having an available anti-harassment policy with a complaint procedure which the employee unreasonably failed to use would defeat the claim.³⁸

Overall, this complex test has created barriers to claimants³⁹ and failed to provide effective guidance to employers and employees.⁴⁰ The core legal concepts the test relies on—“severe and pervasive”, “unwelcome” and “offensive”—remain vague and have often resulted in inconsistent and narrow assessments of sexual harassment claims.⁴¹ Scholars have proposed various reforms that seek to alter the allocation of fact-finding determinations between judges and juries in hopes of better capturing the reformatory aims of Title VII. Some have proposed that the judiciary should exercise greater influence in factual determinations as it has done in other contexts in which uniformity and predictability are paramount.⁴² Excessive reliance on juries to assess the severity and offensive nature of harassment, scholars have argued, yields inconsistent decisions without precedential value, often reflecting the predominating prejudices Title VII seeks to transform.⁴³ In contrast, some researchers have found that judges consistently downplay and minimize instances of harassment to the detriment of litigants.⁴⁴ The current composition of the judiciary, it is argued, is far too disconnected

³⁶ See *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); see also *Faragher vs. City of Boca Raton*, 524 U.S. 775, 788 (1998).

³⁷ EEOC, *Harassment; Employer Liability for Harassment*, <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/A9RD-84AY>].

³⁸ *Id.*

³⁹ Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST COMPANY, (July 31, 2017), <http://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits> [<https://perma.cc/4J5A-U5VZ>] (finding that, of the cases filed in court that are not settled or voluntarily dismissed, less than 1 percent result in a favorable outcome); Eyer, *supra* note 31 at 1299 (exploring the reasons for the low success rates of discrimination lawsuits).

⁴⁰ See generally SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (Oxford University Press, 2017); Scheindlin & Eloffson, *supra* note 8; U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, 115TH CONG., *So I Tolerated It—How Work Places Are Responding to Harassment and the Clear Need for Federal Action: Minority Staff Report* (December 2018) [henceforth *Minority Staff Report*] [<https://www.help.senate.gov/imo/media/doc/Senator%20Murray%20Harassment%20Report%20Final.pdf>].

⁴¹ Scheindlin & Eloffson, *supra* note 8; U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, *Minority Staff Report*, *supra* note 40 at 31–33.

⁴² Scheindlin & Eloffson, *supra* note 8 at 834–37.

⁴³ *Id.*

⁴⁴ Theresa M. Beiner, *Let the Jury Decide: The Gap between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 809–17 (May 2002).

from the realities of the workplace to effectively assess harassment claims.⁴⁵

Both perspectives reflect a similar concern that the legal framework developed by the courts impedes the policy goals of Title VII. Without a path towards the social reform Title VII seeks, sexual harassment determinations in our courts are bound to be vague and regressive.⁴⁶ As one commentator noted, “[s]ociety can hardly be expected to reform itself without notice as to what title VII requires.”⁴⁷ That this problematic adjudicative process is placed within an administrative process that most agree also limits the reform aims of Title VII is even more concerning. In hostile work environment claims, employees must first file with their employer’s internal complaint process. Then they must file their claims through the Equal Employment Opportunity Commission’s (EEOC) administrative process and must do so within 180 to 300 days of the offense.⁴⁸ Due to limited resources, the EEOC only pursues a small portion of reported claims, often issuing right to sue letters for complainants to pursue private litigation, a costly undertaking which is prohibitive to many.⁴⁹ Thus, the cases that make it to court already represent a small portion of the claims filed with the EEOC.⁵⁰

The result of these administrative process hurdles and our legal determination of harassment is that few instances of gender-motivated abusive workplace behavior are held to account under Title VII.⁵¹ Ultimately, the costs of litigation, both financial and otherwise, are rarely worth it to the aggrieved party. Loss of career status, pursuit of claims

⁴⁵ 33.3 percent of Supreme Court justices are women, 36.8 percent of Circuit Court of Appeals judges are women, and 34 percent of Federal District Court judges are women. AM. BAR ASS’N, *A Current Glance at Women in the Law*, at 5 (Jan. 2018), <https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.pdf> [<https://perma.cc/2KHX-XPAC>].

⁴⁶ Researchers have concluded that features of American culture create reluctance by any fact-finder (judge or jury) to attribute workplace wrongs to status discrimination. Eyer, *supra* note 31, at 1299.

⁴⁷ Scheindlin and Eloffson, *supra* note 8, at 834.

⁴⁸ EEOC, *Time Limits for Filing a Charge*, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/CHE6-6D7Q>].

⁴⁹ EEOC, *What You Can Expect After You File A Charge*, <https://www.eeoc.gov/employees/process.cfm> [<https://perma.cc/LWA9-N225>].

⁵⁰ EEOC, *All Charges Alleging Harassment (Charges Filed with the EEOC) FY 2010-FY2018*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm [<https://perma.cc/N535-9W WF>].

⁵¹ U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, *Minority Staff Report*, *supra* note 40, at 10–15 (discussing EEOC charge data and lack of reliable data on sexual harassment charge success).

resulting in job losses, personal investments, cost of legal representation, and the emotional drain of the process all make harassment claims a burdensome pursuit.⁵²

II. RECONSIDERING THE U.S. APPROACH

Half a century later, Title VII's original transformative goals appear to have been, at best, curtailed and, at worst, rendered ineffectual, by a complaint-dependent, liability-focused process, saddled with under-resourced administrative hurdles and courts that have narrowed the statute's potential. Our unwillingness to address the misogyny and sexism that underpins harassment—maintaining instead a focus on its individual and inter-personal nature—has undermined Title VII's impact on women in employment, undercutting its original aim to “liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.”⁵³ The question is now whether we can reorient our approach to sexual harassment and fulfill Title VII's transformative intention.

A return to the goals of Title VII and the intention of Congress to “liberate the workplace” from gender inequality requires a more forward-looking approach than the one we have employed thus far. Like the Civil Rights Act of 1964, which sought to end segregation in schools, Title VII sought to fundamentally alter the workplace, a task its implementation has not achieved.⁵⁴ A transformative approach to discrimination is one that understands that inequalities are rooted in history, and that divisions are not arbitrary or irrational but often deliberately preserve current structures.⁵⁵ This approach requires an inquiry into the values, behaviors, institutions, and power relations that maintain women's inequality through sexual harassment.⁵⁶

By this measure, determinations ungrounded in policy goals or reliance on dominant cultural norms and public opinion is misguided. A legal assessment of sexual harassment that seeks transformation would not aim to reflect social norms but instead would pursue an assessment

⁵² Christine O. Merriman and Cora G. Yang, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 84 note 6 (1985) (citing an unpublished 1979 Working Women's Institute Study (WWI)).

⁵³ *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

⁵⁴ Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).

⁵⁵ The Constitutional Court in South Africa provides a good example of a transformative approach to discrimination claims. See Catherine Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. AFR. J. ON HUM. RTS. 253 (2007).

⁵⁶ *Id.*

of harassment that advances women's workplace equality and recognizes the barriers to that equality. In other words, our laws on sexual harassment and their implementation should move us forward rather than merely reflect our discriminatory surroundings.

A. Sexual Harassment and the Structure of the Workplace

As discussed, our legal conception of sexual harassment focuses primarily on ensuring those with authority in the workplace do not use it to elicit sexual services, favors, and interactions, and that extreme sexually degrading and/or intrusive behavior is punished.⁵⁷ While these are important features of sexual harassment, they do not address the broader context and elements of the American workplace that make harassment possible and advantageous. By focusing on the bad actors/rotten apples that abuse their authority or openly degrade their female coworkers, our legal approach to sexual harassment misses and renders acceptable many other forms of sexual harassment that impede women from attaining their full economic potential through employment.

The last decade of research has painted an increasingly clear picture of sexual harassment—its nature, benefit and impact—which differs from the one reflected in our jurisprudence. Research indicates that sexual harassment is often not an isolated event nor one disconnected from other features of a workplace, but a tactic that defines certain workplaces and is a critical component of them. Sexual harassment is not merely the experience of a few unlucky women but a practice that advances, entrenches, and preserves workplace inequalities, discouraging women from pursuing higher-level positions or even entering certain industries. This more complex understanding of harassment puts into question the judicial approach of requiring “a showing of tremendous harm done to a flawless plaintiff.”⁵⁸

Studies have identified various predictors of harassment, including particular workplace practices and industries prone to high levels of harassment. Male-dominated workplaces (e.g., construction),⁵⁹ low-wage workplaces populated by women (e.g., retail and care providers),⁶⁰

⁵⁷ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> [<https://perma.cc/6CAK-UW65>].

⁵⁸ See Bernstein, *supra* note 5, at 1271.

⁵⁹ Kim Parker, *Women in Majority-Male Workplaces Report Higher Rates of Gender Discrimination*, PEW RESEARCH CENTER (Mar. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/> [<https://perma.cc/47DZ-6TMJ>].

⁶⁰ Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment*

and industries where workers are excluded from labor law protections (e.g., domestic work and farm labor)⁶¹ are all associated with higher levels of sexual harassment. Poorly structured work environments (e.g., laborer working in isolation, poor management structures, excessive supervisory discretion, lack of clear rule making and enforcement) and workplaces with inadequate complaint systems also evidence higher levels of harassment.⁶²

Male-dominated workplaces have consistently been found to have higher rates of harassment of female workers than gender-balanced workplaces.⁶³ For example, a study relying on charge data from the EEOC found that, in a male majority industry like construction (91% male workers), women were 27 times more likely than men to report sexual harassment. In comparison, in health care and social assistance industries, where 21% of workers are male, women were only 1.2 times more likely to report sexual harassment than men.⁶⁴ In male-majority industries, female supervisors are also more likely to experience harassing behaviors than in predominately female industries.⁶⁵

Women in female-dominated workplaces where women are in low-wage positions with high levels of turnover, such as retail and elder or child care, also report high levels of sexual harassment. EEOC charge data, again, revealed that the largest number of claims were filed in the accommodation and food services industry followed by retail trade. Both industries are dominated by women and pay low-wages at high turnover rates.⁶⁶ Domestic (household) workers have long been subjected to harassment and abuse in isolated and unregulated workplaces, many instances even rising to the level of human trafficking and servitude.⁶⁷

The infrastructure of the work environment has also been found to impact the prevalence of sexual harassment. For example, an Institute for Women's Policy Research study identified several work-related features associated with increased risk of sexual harassment and assault

across Industries Affects All Workers, CTR. FOR AM. PROGRESS (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/> [<https://perma.cc/WF4U-H6AY>].

⁶¹ *Id.*

⁶² Elyse Shaw, Ariane Hegewisch & Cynthia Hess, *Sexual Harassment & Assault at Work: Understanding the Costs*, B376 IWPR 1–12 (Oct. 2018), https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf [<https://perma.cc/X58H-9CWT>].

⁶³ See Parker, *supra* note 59.

⁶⁴ Women's Initiative, *Women Disproportionately Report Sexual Harassment in Male-Dominated Industries*, CTR. FOR AM. PROGRESS (Aug. 6, 2018), <https://www.americanprogress.org/issues/women/news/2018/08/06/454376/gender-matters/> [<https://perma.cc/JR4J-AQD2>].

⁶⁵ Heather McLaughlin, Christopher Uggen & Amy Blackstone, *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77(4) AMERICAN SOCIOLOGICAL REV. 625, 634 (2012), <http://journals.sagepub.com/doi/pdf/10.1177/0003122412451728> [<https://perma.cc/MWE7-WCCN>].

⁶⁶ See Frye, *supra* note 60.

⁶⁷ See Shaw et al., *supra* note 62, at 3.

in the workplace, including: compensation mechanisms that relied on tips; work environments in which workers labored in isolation; employment of workers with irregular immigration status (or where their status was dependent on their jobs); and work settings with employees with significant power differentials.⁶⁸

Other elements of the workplace—e.g., lines of management, supervisory discretion, mechanisms for employee well-being and retention—can all impact the prevalence of sexual harassment.⁶⁹ A committee of experts analyzing the agricultural industry in an International Labor Organization (ILO) report, for example, found that the prevalence of sexual harassment was impacted by unequal power relations, discriminatory work practices, the precariousness of the workers' employment, frustration of the right to association and collective bargaining,⁷⁰ poor working conditions, work intensity or unrealistic production goals, the prevalence of informal work,⁷¹ and weak enforcement mechanisms.⁷²

Many of these factors, if not all, are features of a workplace within the employer's design and control. Who employers hire, how they treat their employees, how they expose them to customers, what forms of safety mechanisms are in place, and employee job security all appear to have some impact on the prevalence of sexual harassment in the workplace and are all decisions employers make in designing and maintaining a workplace. While an employer may not have absolute control over

⁶⁸ *Id.* at 4. The last example has been highly publicized in this past year through articles by women harassed in the entertainment industry, as well as law clerks and in academia, and, in general all professions that instill certain individuals with high levels of unchecked authority. *See, e.g.,* Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 17 (2018) <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Gertner-1.pdf> [<https://perma.cc/TY5Z-YKAS>]; *see also* Katie Benner, *Women in Start-Up World Speak Up About Harassment*, N.Y. TIMES, July 4, 2017, <https://www.nytimes.com/2017/07/04/insider/technology-sexual-harassment.html> [<https://perma.cc/K7AQ-BSQK>]; Pamela Hutchinson, *#MeToo and Hollywood: What's Changed in the Industry a Year On?* THE GUARDIAN, Oct. 8, 2018, <https://www.theguardian.com/world/2018/oct/08/metoo-one-year-on-hollywood-reaction> [<https://perma.cc/A5YY-AAQT>].

⁶⁹ Int'l Labor Org., Conditions of Work and Equality Dept. [ILO], *Final Report*, at ¶ 62, 105, 110, Meeting of Experts on Violence against Women and Men in the World of Work, MEVWM/2016/7 (Geneva, 3–6 October 2016), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/meetingdocument/wcms_546303.pdf [<https://perma.cc/9QGE-BYVH>].

⁷⁰ *Id.* at ¶ 12, 13, 101; *see also* Int'l Labour Office, *Ending Violence and Harassment Against Women and Men in the World of Work*, ILC.107/N/1 29, 70 (2018), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf [<https://perma.cc/B38L-VA6J>].

⁷¹ *Id.* at ¶ 12, 101.

⁷² *Id.*

whether harassment occurs, the employer is clearly in a position to significantly reduce the opportunity, motivation, and reward systems that enable and promote it.⁷³

Finally, the negative impact of harassment, both on the intended victims and the workplace more generally, is clear. Studies have identified a variety of negative consequences on the health and well-being of workers, including increased stress for victims (which can lead to a variety of physical ailments), inability of victims to focus on doing their tasks correctly and safely, inability of co-workers and managers to effectively respond to or deal with sexual harassment, intimidation that causes victims to be reluctant to raise legitimate safety issues for fear of being ridiculed, and workplace violence.⁷⁴

B. Redefining Sexual Harassment

When placed in the context of this research, our legal definition of and policy approach to harassment appears badly in need of updating. While research has made it evident that harassment is an institutional and societal problem, Title VII's implementation continues to focus on isolated inter-personal issues among individuals, such as badly worded jokes and inappropriate sexual pursuits of aberrant actors.⁷⁵ For more than a decade now, scholars and advocates have urged lawmakers, courts, and employers, with little success, to treat sexual harassment claims as part of a larger pattern of workplace discrimination and inequality, consistent with the spirit of Title VII.⁷⁶ Our current approach has not only failed to capture the nature and full range of behavior that causes inequality of women in the workplace, but it has undermined Title VII's ability to eradicate gendered employment discrimination, at the significant cost of many women and men.

Vicki Schultz and others⁷⁷ have proposed the adoption of an approach to harassment that more comprehensively captures the nature of the problematic behavior. Schultz has argued that the sexual comments and behavior courts focus on ignores many of the sex-based words and actions in the workplace that are aimed at and succeed in

⁷³ Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183 (2006).

⁷⁴ See, e.g., ILO, *Final Report*, *supra* note 69, at ¶ 49; Shaw et al., *supra* note 62, at 4–6; see also Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOLOGY 127 (2007); Morton Nielsen, et al., *Prospective Relationships between Workplace Sexual Harassment and Psychological Distress*, 62(3) OCCUP. MED. (LOND) 226 (Mar. 2012).

⁷⁵ Lawton, *supra* note 1.

⁷⁶ *Id.* at 820–21.

⁷⁷ See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 17.

undermining women and limiting their achievements.⁷⁸ As Schultz has explained, even traditional forms of sexual harassment are not, as was previously understood, power used to gain access to sex but sexualized behavior used to maintain or attain power.⁷⁹ This understanding builds off of Catharine McKinnon's original framing of sexual harassment as domination of one sex over another.⁸⁰

Under this framework, sexual harassment is a tool of male workers to maintain their status in the workplace and limit economic advancement and opportunities for women (and men who do not meet accepted standards of masculinity).⁸¹ When understood as a systematic form of workplace advantage-seeking behavior, an institutional response by the employer seems called for. As discussed in Section II(A), studies show that such interventions are impactful.⁸² Moreover, if this behavior is aimed at and succeeds in preserving the very gender inequality our policies seek to eradicate, interventions that go beyond merely adjudicating employee complaints through litigation also seem advisable. Our failure to do any of this begs the question of whether we seek to eradicate sexual harassment or merely regulate it to a socially acceptable degree. And, if the latter, isn't the tolerance for sexual harassment a symptom of the very sexism Title VII was intended to address?⁸³ Are we resigned to the contention that sex-based harassment and abuse are simply a part of women's working life even if such behavior leads to perpetuating the exclusion of women from the workplace and creating barriers to their economic equality?

III. INTERNATIONAL AND COMPARATIVE APPROACHES

The ILO standard setting process, "Ending Violence and Harassment Against Women and Men in the World of Work," began at its 325th Session in November of 2015 and provides some insight into alternative

⁷⁸ *Id.* at 26.

⁷⁹ *Id.* at 27.

⁸⁰ See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 27–28 & n. 13 (1979).

⁸¹ McLaughlin et al., *supra* note 65 (explaining that sexual harassment is used to counterbalance women in positions of power and might be motivated more by desire for control and domination than sexual desire).

⁸² Ryan K. Jacobson and Asia A. Eaton, *How Organizational Policies Influenced Bystander Likelihood of Reporting Moderate and Severe Harassment at Work*, 30:1 *EMPLOY. RESPONSE RIGHTS J.* 37 (2018) (Participants in zero-tolerance policy condition were more likely to intend to formally report the harassment to their organization).

⁸³ Brenda L. Russell and Kristin Y. Trigg, *Tolerance of Sexual Harassment: An Examination of Gender Differences, Ambivalent Sexism, Social Dominance, and Gender Roles*, 50(7–8) *SEX ROLES* 565 (2004) (explaining that ambivalence and hostility toward women are much greater predictors of tolerance of sexual harassment than is gender alone).

ways to address sexual harassment in the workplace.⁸⁴ The ILO initiated this process with the goal of achieving a consensus among its 187 member states on the nature of violence and harassment in the workplace and developing a framework for prevention and response.⁸⁵ Through this process, the ILO has consolidated national laws and explored the policy approaches to sexual harassment that have emerged through international agreements and within member states.

As captured in the ILO's report, the international human rights legal system, as well as some of our peer countries, address sexual harassment within the larger context of workplace rights and standard violations. Sexual harassment is treated as a form of violence and abuse that burdens the workplace.⁸⁶ It is considered to be rooted in gender discrimination that results in violations of human dignity and equality, two historically core principles of the international human rights legal system.⁸⁷ Human dignity is the fundamental principle that an individual should be treated as an end rather than a means and is considered the basis for all human rights.⁸⁸ The concept of equality requires some equal distribution of rights, benefits and opportunities, and ensures that any distinctions made among groups that create any disparate enjoyment of the above is justified. Without a foundation, equality alone does not determine what rights, benefits, and privileges must be redistributed.⁸⁹ Human dignity provides that guide and allows an assessment of whether group distinctions are justified, serving as the basis upon which they can be judged as permissible or impermissible.⁹⁰

⁸⁴ ILO, *Ending Violence and Harassment Against Women and Men in the World of Work, Report* [henceforth *Ending Violence and Harassment*] V(1), ILC. 107/V/1, 1–31, 45–59, 77–83 (May 12, 2017), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf [<https://perma.cc/BW68-KCRF>].

⁸⁵ *Id.* at 33–44, 63–75.

⁸⁶ ILO, *Ending Violence and Harassment*, *supra* note 84, at 6, 9, 14–16, 34, 41, 76, 97.

⁸⁷ The Universal Declaration of Human Rights (UDHR), the foundation of the human rights system, begins with an assertion of the “inherent dignity and of the equal and inalienable rights of all members of the human family.” G.A. Res. 217 (III) A, Pmbl., Universal Declaration of Human Rights (Dec. 10, 1948). Similarly, the International Covenant on Civil and Political Rights (1966), one of the system's first and still most widely recognized treaties, asserts that basic human rights “derive from the inherent dignity of the human person” and that the animating principle of the covenant is the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world.” G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966).

⁸⁸ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) EUR. J. INT'L L. 655, 689–92 (2008).

⁸⁹ Susie Cowen, *Can Dignity Guide South Africa's Equality Jurisprudence*, 17 S. AFR. J. ON HUM. RTS. 34, 48 (2001).

⁹⁰ McCrudden, *supra* note 88; Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 Jan. 1986 (Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica requested by the Government of Costa Rica), at ¶¶ 55–56 (“notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.”).

Various international human rights treaties explicitly protect the right to dignity and equality in the workplace. The Universal Declaration of Human Rights (UDHR) recognizes that “everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity.”⁹¹ ILO conventions have been interpreted to prohibit sexual harassment as a form of physiological coercion, sex discrimination, and violation of workplace health and safety, among other grounds.⁹² Under the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), sexual harassment is not only a direct violation of dignity, but a form of inequality that interferes with women’s ability to enjoy other basic human rights, such as the right to work, safety, and health in the workplace, and equal conditions of employment.⁹³ Under other treaties, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), sexual harassment interferes with women’s right to just and favorable conditions of work on par with men.⁹⁴ Sexual harassment in the workplace is understood to undermine basic tenets of human dignity—self-respect, self-worth, physical and psychological integrity, and autonomy.⁹⁵

Against this background, a state duty to exercise due diligence in preventing and protecting individuals from sexual harassment violations in the workplace has emerged.⁹⁶ State parties to the relevant trea-

⁹¹ G.A. Res. 217 (III), *supra* note 87, art. 23.

⁹² ILO, *ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration*, at 9 (2006).

⁹³ Though the text of CEDAW is silent on sexual harassment, in 1992, the CEDAW Committee issued a comment on gender-based violence, explaining that the state duty to eradicate all forms of gender-based violence, including sexual harassment and domestic violence, was implied under the treaty obligations to eliminate all forms of gender discrimination. UN Comm. on the Elimination of Discrimination Against Women (CEDAW) on its Eleventh Session, G. Rec. No. 19 (1992).

⁹⁴ G.A. Res. 2200 (XXI) A *supra* note 87, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, (Dec. 16, 1966) at 2–3, ¶ 7, (“rights of everyone to the enjoyment of just and favourable conditions of work” with regard to fair wages and “equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”).

⁹⁵ McCrudden, *supra* note 88, at 689–92; The importance of providing economic justice was understood as a crucial part of this international movement to secure peace and stability. Article 23 of the League of Nations Covenant included the “fair and humane conditions of labour for men, women, and children” and envisioned the establishment of international organizations to realize this objective. This goal was the focus of the International Labour Organization (ILO) established in 1919 in Paris to promote fair and humane conditions for workers through legal mechanisms and monitoring procedures.

⁹⁶ CEDAW, *supra* note 93; *Jessica Lenahan (Gonzales) et al. v. United States*, Merits Report, Inter-Am. Commission on H.R., No.80/11 (July 21, 2011) (explaining that states must exercise due diligence to protect women from all forms of gender-based violence).

ties are required to put in place legal and policy mechanisms that prevent harassment rather than merely responding to it once it has occurred.⁹⁷ One such mechanism has been imposition of a duty of care on employers that requires them to address, investigate, and respond to harassment as a workplace well-being matter.⁹⁸ This duty requires not only an effective and responsive complaint mechanism, but also a searching assessment of workplace conditions that cause and enable harassment.⁹⁹ An employer must ensure, as far as is practicable, the health and safety of its employees, including protection from harassment. Employers must address badly structured workplace mechanisms that facilitate or enable bullying and abusing of women. According to the ILO, which reviewed the sexual harassment laws and policies of 80 countries, 18 countries in Europe and Central Asia, seven countries in Asia and the Pacific, six countries in the Americas, and one country in Africa (none in the Arab States) required employers to take some preventative steps to eliminate harassment.¹⁰⁰

The European Union has issued directives on sexual harassment that frame it as a discriminatory violation of dignity and requires state

⁹⁷ For instance, Article 26(1) and (2) of the Council of Europe European Social Charter (Revised) of 1996 requires states to adopt rules on violence and harassment, which include requiring state parties to work with employers and workers to promote awareness, provide information and prevent both sexual and moral harassment in the workplace (although a third of the states who have ratified do not consider one or both of these paragraphs of the Charter to be binding); the 2011 Council of Europe Convention (Istanbul Convention) obligates ratifying members to “prohibit, prevent, prosecute and eliminate violence against women, including sexual harassment, and all forms of domestic violence, including economic violence,” ILO, *Ending Violence and Harassment*, *supra* note 84, at 41, § 3.5, ¶ 174 and ¶ 175.

⁹⁸ *Id.* at 56, ¶ 221, p. 65, § 5.3, ¶ 249 and ¶ 251. *See also* McAleenon v. Autism Initiatives NI [2013] NIIT 815/12 [¶ 65] (N. Ir.) (explaining the “danger of an employer not being proactive in circumstances where members of staff are known to engage in physical contact”); Grobler v. Naspers 2004(4) SA 220(C) (South Africa Labor Court) (finding the employer liable where harassment was a foreseeable risk); Cour de Cassation [Cass.] [supreme court for judicial matters] soc., Jan. 30, 2019, Bull. Civ. V, No. 17-28905 (Fr.) (finding obligation of the employer to take effective measures to protect their employees when it is in a situation to exert de facto authority on non-salaried persons who are responsible for the sexist harassing behavior.)

⁹⁹ EEOC, *Enforcement Guide on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, (April 6, 2010), <https://www.eeoc.gov/policy/docs/harassment.html> [<https://perma.cc/XJ4N-6HDC>]. *See also* Hurley v. Atlantic City Police Dept., 174 F.3d 95, 118 (3d Cir. 1999) (“*Ellerth* and *Faragher* do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort;” defendant failed to prove affirmative defense where it issued written policies without enforcing them, painted over offensive graffiti every few months only to see it go up again in minutes, and failed to investigate sexual harassment as it investigated and punished other forms of misconduct.); *see also* Dees v. Johnson Controls World Services, Inc., 168 F.3d 417, 422 (11th Cir. 1999) (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action).

¹⁰⁰ ILO, *Ending Violence and Harassment*, *supra* note 84, at 63–64, § 35.1, ¶¶ 244–47.

members and employers to enact policies aimed at prevention.¹⁰¹ In the United Kingdom, for example, sexual harassment is considered a “health and safety problem” that an employer has a duty to address, ensuring, as far as is practicable, that employees are protected from it.¹⁰² Employers must conduct risk assessments to identify groups and individuals who may be vulnerable to sexual harassment and take action.¹⁰³ Fulfilment of the duty can include, among other things, encouraging access to counseling services for sexual harassment victims, for example. Employers generally have a full legal defense if they can demonstrate they have taken all practicable steps to prevent sexual harassment by active workplace policies and awareness strategies.¹⁰⁴

Other countries have focused more broadly on systemic work environment management which includes taking measures that reduce opportunities for sexual harassment and other forms of “bullying.” The Swedish Work Environment Authority (SWEA) conducts inspections that are aimed at “strengthening the workplace’s own ability to prevent risks.”¹⁰⁵ The investigations conducted are corrective and restorative in nature. Investigators are instructed to “carr[y] out [inspections] with a preventative purpose in mind” and that they “[s]hould not dwell on the

¹⁰¹ EP Committee on Women’s Rights and Gender Equality (FEMM), Article 31 of EU Resolution on Measures to Prevent and Combat Mobbing and Sexual Harassment at Workplace, in Public Spaces, and Political Life in the EU (2018) calls on Member States and social partners to ensure that employers organize “mandatory training on sexual harassment and bullying”; Article 33 “stresses that companies should have a zero tolerance approach to sexual harassment. Resolution on Measures to Prevent and Combat Mobbing and Sexual Harassment at Workplace, in Public Spaces, and Political Life in the EU, Eur. Parl. Doc. P8_TA-PROV(2018)0331; see also Article 26 of the European Directive on Sexual Harassment “Prevention of discrimination[.] Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast), 2006 O.J. (L 204) 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0054&from=EN> [<https://perma.cc/5S26-2Q5S>]; Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination versus Dignity*, 9 COLUM. J. EUR. L. 241 (2002).

¹⁰² Part I, Section 2 of the Health & Safety at Work Act 1974 “It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health safety and welfare at work of his employees,” Health and Safety at Work etc. Act 1974, 1, § 2, (Eng.).

¹⁰³ The Management of Health and Safety at Work Regulations 1999 were introduced to reinforce the Health and Safety at Work Act 1974. Regulation 3 states that employers “shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work,” The Management of Health and Safety at Work Regulations 1999, SI 1999/3242, art. 3, ¶ 1 (Eng.).

¹⁰⁴ *Id.* at sec. 7, ¶ 1–5., generally a defense to an alleged breach of sexual discrimination legislation by employers.

¹⁰⁵ Swedish Work Env’t Auth., *Inspections, Investigations and Checks*, <https://www.av.se/en/work-environment-work-and-inspections/inspections-investigations-and-checks/inspection/> [[http://perma.cc/PB9J-T4TH](https://perma.cc/PB9J-T4TH)].

question of blame.”¹⁰⁶ In determining whether harassment may be altering work conditions impermissibly or creating a hostile work environment, the SWEA follows an ordinance on violence and menaces in the working environment that identifies several signs of victimization, bullying, and harassment among individuals and groups.¹⁰⁷ Signs of victimization in an individual employee can include, reduced performance, high stress, physical illness, and suicidal thoughts.¹⁰⁸ Victimization among a group of workers can include reduced efficiency and productivity, erosion of existing rules or freezing of rules, criticism of the employer, increased friction, and high sickness absenteeism.¹⁰⁹

In Finland, the Occupational Safety and Health Administration (OSH) sends out a survey to all employees before periodic inspections which include questions on harassment and workplace bullying and then target those issues.¹¹⁰ The OSH Administration defines harassment as a psychosocial workload factor—“properties related to work content, work organization and social interaction in the work community” that can cause “harmful work-related strain.” These factors cause harmful work-related strain if they are not appropriately managed or if workplace conditions are poor.¹¹¹ In reference to violence and harassment, the Finnish Occupational Safety and Health Act No. 738/2002 includes specific sections both on the threat of violence and on harassment, requiring employers to prevent any harassment or inappropriate behavior towards employees.¹¹² In courts, the same conduct can be recognized as a work-safety offense and work discrimination.¹¹³

Canadian provinces have incorporated violence and sexual harassment in their occupational health and safety laws as well.¹¹⁴ In Ontario,

¹⁰⁶ *Id.*

¹⁰⁷ Ordinance on Violence and Menaces in the Working Environment (Swedish Work Environment Authority’s Statute Book [AFS] 1993:17) (Swed.).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Psychosocial Workload*, Occupational Safety and Health Administration Finland, 2 (2017) TYOSUOUJELU.FI WEBSITE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION IN FINLAND, <https://www.tyosuojelu.fi/web/en/about-us/publications> [<https://perma.cc/J2WT-4YXR>].

¹¹¹ *Id.*

¹¹² Malgorzata Milczarek, *Workplace Violence and Harassment: A European Picture*, Eur. Agency for Health and Safety at Work, EU-OSHA, 29 (2010), <https://osha.europa.eu/en/tools-and-publications/publications/reports/violence-harassment-TERO09010ENC> [<https://perma.cc/TK3U-9LE7>].

¹¹³ Riitta Sedig, *Hidden Issue Brought to Daylight*, Labor & Employment Law Strategic Global Topics: Sexual Harassment Law in the Workplace Around the World, 1 (2018).

¹¹⁴ For example, New Brunswick has amended the *General Regulation—Occupational Health and Safety Act NB Reg 91-191 [General Regulation] Amendment*, (2019) (“OHSA”) in order to protect employees from violence and harassment (other jurisdictions in Canada have already enacted this kind of legislation).

for example, the Workplace Violence & Harassment under the Occupational Health and Safety Act¹¹⁵ gives inspectors from Ministry of Labour broad powers to investigate complaints, enter workplaces without notice or warrants, make orders requiring the employer to make changes to the workplace, and compel them to investigate workplace harassment.¹¹⁶ According to the Ministry of Labor, “[w]orkplace harassment includes, but is not limited to: offensive comments or jokes; bullying or aggressive behavior; inappropriate staring; sexual harassment; isolating or making fun of a worker because of their gender identity.”¹¹⁷ These are just a few examples of the sorts of mechanisms that attempt to address harassment in a more systemic manner with emphasis on prevention.

IV. DIGNITY AND EQUALITY IN THE AMERICAN CONTEXT

Some U.S. scholars have viewed the dignity-based approach that places sexual harassment in the context of other workplace abuses with skepticism. In particular, scholars engaged with women’s equality have been concerned that it lacks a focus on the gendered elements of sexual harassment to its detriment.¹¹⁸ U.S. scholars argue that sexual harassment benefits from its special status, and that a generalized legal obligation aimed at reducing workplace abuse would redirect resources for sex-based sexual harassment as well as undermine the gravity with which the law approaches it.¹¹⁹

Similarly, U.S. scholars have viewed the focus on dignity, particularly in Europe, as a preoccupation with civility, inappropriate for the American social context and meriting a far lower place on the scale of legal importance than status discrimination.¹²⁰ America’s history of racism, the mobility of its workforce, and cultural ethos of unregulated

¹¹⁵ Ontario Women’s Justice Network, *Workplace Violence and Harassment – Occupational Health and Safety Act*, OWJN, (August 1, 2016), owjn.org/2016/08/workplace-violence-and-harassment-occupational-health-and-safety-act/ [<https://perma.cc/3474-7553>].

¹¹⁶ HR Proactive Inc., *An Employer’s Guide to Conducting Harassment Investigations*, https://harassmentinvestigation.ca/employer_guide_harass_invest.pdf [<https://perma.cc/Z9KS-G2C> N]; Crisis Prevention Institute, *Nonviolent Crisis Prevention*, CPI, <http://educate.crisisprevention.com/OntarioBill168NowKnownAsSection32OntarioOHS.html?code=ITG081PSRW&src=Pay-Per-Click> [<https://perma.cc/6EHC-GCRL>].

¹¹⁷ *Being Harassed at Work? Information for Workers*, ONTARIO MINISTRY OF LABOR (May 2017), https://www.labour.gov.on.ca/english/hs/pubs/fs_vvh_atwork.php [<https://perma.cc/645H-8NCH>].

¹¹⁸ Jessica A. Clarke, *Beyond Equality—Against the Universal Turn in Workplace Protections*, 86 IND. L. J. 1219 (Fall 2011); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment* 83 CORNELL L. REV. 1169 (1998); Friedman and Whitman, *supra* note 101, at 273.

¹¹⁹ Abrams, *supra* note 118, at 1249.

¹²⁰ Friedman and Whitman, *supra* note 101, at 264–65.

speech are thought to make the focus on workplace dignity and regulation of workplace behavior ill-suited to the U.S. context.¹²¹

These objections raise a number of questions. The first is whether women have really experienced gains through the separation of sexual harassment from general workplace protections.¹²² Second is whether our aversion to dignity-focused protections has deprived us of meaningfully assessing what we have, implicitly, already recognized as violations of dignity—behavior that offends, humiliates and abuses. The third is whether the competing values we seek to protect (speech and authenticity in the workplace, prioritization of status discrimination, and dogged deterrence through liability) are being served or would be at risk were reforms to involve increased workplace interventions.

Alternatively, embracing a dignity-based approach could provide us with a positive vision of the workplace, which we currently lack. Without a positive vision for the workplace, it is difficult for us to determine what it should look like for women, and consequently it is difficult to discern our policy goals for gender equality in the workplace. Jurisdictions that address harmful workplace dynamics and dignitary issues necessarily proceed with an understanding of how employees should relate to one another in the workplace and what workers may expect in terms of standards and norms in their place of employment.¹²³ Our reluctance to recognize social patterns of harassment and aversion to regulating private conduct has caused us to struggle to develop a conception of a sexual harassment free work environment.

Moreover, we have missed out on the practical and policy-oriented advantages of an approach that prioritizes prevention of workplace practices that promote or facilitate harassing behavior. Systems that focus on prevention avoid complaint dependence, an approach that burdens women and produces irregular and ineffective deterrence.¹²⁴ A focus on prevention, along with involvement of both the state and employer, would better position us to make systemic change and ultimately alter the incentive system that rewards harassment with gains in benefits and power.¹²⁵ Conceiving of harassment as a workplace wellbeing issue would also more effectively compel employer responsibility for crafting responsive workplaces,¹²⁶ as harassment would not be

¹²¹ Friedman & Whitman, *supra* note 101, at 269–71.

¹²² At various points, scholars and commentators have seen the advantages of an approach that conceives of harassment as a dignitary workplace safety and wellbeing issue. Anita Bernstein and Catherine McKinnon have both noted the regulatory and preventative advantages. See MACKINNON, *supra* note 80, at 159; Bernstein, *supra* note 5 at 1256–1311.

¹²³ ILO, *Ending Violence and Harassment*, *supra* note 84, at ¶ 12, 13, 29, 70, 101.

¹²⁴ See, e.g., SPERINO & THOMAS, *supra* note 40, at 177.

¹²⁵ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 17, at 30, 59–66.

¹²⁶ ILO, *Ending Violence and Harassment*, *supra* note 84, at ¶ 25 and 44.

conceived as an inevitable feature of work itself (which studies suggest it is not), but an element specific to particular workplaces that facilitate or promote it.¹²⁷ Conceiving of sexual harassment as an occupational health and safety issue, for example, has allowed other jurisdictions to focus on the psychological well-being and safety of employees in an affirmative sense. Contrast this with our approach that asks just how abusive the harassment must be before we allow legal action against the harasser.

Finally, and perhaps key, this approach allows us to better understand how harassment works and how to address it. Sexual harassment as a manifestation of gender discrimination is both unique (in the sense that it is rooted in and seeks to preserve gender inequality) and not unique in the sense that workplace harassment can also be rooted in and seek to preserve other forms of inequality (based in race, caste, disabilities, economic status, ideology).¹²⁸ By placing sexual harassment in context to focus more on the bullying and abuse and less on sex, we can begin to understand harassment as a tool for workplace (and economic) benefits and craft a better strategy to eradicate it.

Pursuing an approach that considers dignity and equality, as intertwined, does not mean we must abandon prioritizing gender discrimination. A focus on dignity does not mean a failure to focus on equality; dignity provides content to anchor the goals of equality. We can draw from the concept of substantive equality under CEDAW which understands gender discrimination as a barrier that impedes women's enjoyment of their fundamental rights.¹²⁹ Here, dignity has long been the complementary foundation for equality, as women's inequality is understood as policies and practices that deprive women of their human dignity and other basic rights.¹³⁰ Jurisdictions, like South Africa, that have prioritized addressing matters of non-discrimination have long approached equality determinations with an implicit foundation of human

¹²⁷ Arianna Rossi, *Ending Violence at the Workplace*, WORLD OF WORK MAGAZINE OF ILO (2017) at 37–40.

¹²⁸ Workers in poor working conditions, atypical employment (particularly temporary jobs), women entering industries traditionally dominated by men, and self-employed or low-hours workers who are outside the scope of labor law are particularly vulnerable to violence. ILO, *Ending Violence and Harassment*, *supra* note 84, at ¶ 108. *See also* Article 35 of EU Measures to Prevent and Combat Mobbing and Sexual Harassment at Workplace, in Public Spaces, and Political Life in the EU which “calls on Member States to take measures to ensure equal pay between women and men . . . as a means of promoting gender equality and respect for human dignity, which is fundamental to combating VAW. EU Measures, *supra* note 101.

¹²⁹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, A/RES/34/180, Art. 11, ¶ 18; G.A. Res. 1325, Convention on the Elimination of Discrimination Against Women (1979); UN Comm. on the Elimination of Discrimination Against Women on its Thirtieth Session, G. Rec. No. 25 (2004).

¹³⁰ *Id.*

dignity.¹³¹ An approach rooted in human dignity would both preserve our focus on eradicating status discrimination while also providing a touchpoint for workplace rights and standards that comport with our sense of what human dignity requires.

The balance between general workplace rights and a focus on status discrimination has been described as a targeted universalist approach—an approach which identifies a basic standard and analyzes how groups are being deprived of that standard.¹³² As an example, a goal set for a population could be access to health care and groups would be evaluated for their access to that goal.¹³³ While this may move us in the right direction, the additional challenge in this context is that we lack an actual standard. Including more groups into those with access to rights, benefits, or resources is necessary, but not sufficient to address harassment in our workplaces.¹³⁴ We need first a concept, and I have suggested human dignity, around which to orient workplace norms and standards.

The better conceptual model for addressing sexual harassment in the U.S. is that of transformation, which goes beyond ensuring that more groups are brought into the fold of existing circumstances and benefits. As Catherine Albertyn has explained, in reference to the jurisprudence of the South African Constitutional Court, inclusivity often struggles with fundamental transformation—inclusive approaches resist altering basic structures, seeking instead to preserve the status quo but with a broader base of beneficiaries. An inclusive approach may focus on hiring more women in a particular workplace, whereas a transformative approach may ask what policies and practices were excluding them in the first place (e.g., lack of maternity leave or comprehensive health insurance), whether skills and talents valued rely on gender stereotypes (e.g., approaches to marketing or making sales that reward stereotypical gendered behavior), or whether the women who are hired are being hampered in some way that is encouraging turn over or limiting their advancement. A transformative approach would then ask whether these conditions are necessary features of the work being performed and how they can be altered so as to create a workplace that equally incorporates and supports women. A transformative approach to equality demands an analysis of fundamental social and institutional structures, what they prioritize, who they exclude, and the values they

¹³¹ For an example of how dignity and equality interact in other jurisdictions, see Cowen, *supra* note 89, at 34–58.

¹³² John A. Powell, *Post-Racialism or Targeted Universalism*, 86 DENV. U. L. REV. 785, 802–03 (2008).

¹³³ *Id.*

¹³⁴ See, e.g., Clarke, *supra* note 118, at 1281–84.

are based on. This approach identifies the why and how with the goal of reconceiving the system so as to alter its present dynamics.¹³⁵

The creation of a standard that provides content to human dignity in the workplace along with a re-evaluation of existing inequalities would provide a more robust strategy for addressing sexual harassment. It would require development of a policy goal—a model of the workplace as a healthy, productive, and safe environment that nurtures all worker capacity and discourages and addresses abuses, humiliations, and avoidable burdens.

Such a conception or model for the workplace would give us a better sense of the goals in eradicating harassment as well as a yardstick by which to measure the progress towards ensuring all enjoy and have full access to the workplace and the economic benefits it provides. An approach based in equality and dignity with a positive vision of the workplace would also be responsive to our major jurisprudential challenge—the difficulty courts have had in extracting a norm against which sexual harassment is measured due to significant elements of sexism and misogyny that dominate our culture. Without a marker of what is and is not permissible in the workplace, courts cast about for intuition of what is a bridge too far when it comes to humiliation and objectification of women.

Ultimately, a standard for the workplace would elevate judicial inquiries (and that of juries under judicial guidance) from a realm of arbitrating disputes in personal relationships to one with institutional import. This kind of standard would also engage employers in the work of prevention. To build a better workplace for women, we need to simply build a better workplace—one that, at the outset, understands the social inequality it seeks to correct.

V. A POSITIVE VISION OF THE WORKPLACE

The task is now to cultivate a positive vision of the workplace in which to root a legal and policy framework that addresses workplace sexual harassment. To transform the American workplace, a positive vision must express value for the worker generally and for the female worker specifically, addressing both notions of human dignity and equality. With a positive vision of the workplace, our society can define the workplace more clearly, including what conditions of employment workers can expect and the role of the employer in providing them. With this vision, we can better gauge when humiliations, abuses, and other tactics are employed by individuals in the workplace to discriminate

¹³⁵ Albertyn, *supra* note 55.

against women and gain advantage from gender inequality. We can establish what constitutes discrimination, not by measuring behavior against social norms that may be discriminatory themselves, but by measuring against standards of human dignity and equality. Our assessment of sexual harassment can be grounded in an understanding of its role in exploiting and reinforcing “socially constructed power imbalances”¹³⁶ to the benefit of harassers, the ill Title VII sought to remedy.

We are not entirely without a positive vision of the American workplace. For example, some American companies have stepped forward to craft better workplaces for their female employees.¹³⁷ Though now outdated and significantly weakened, we once enacted a legislative scheme, the Fair Labor Standards Act, aimed at protecting the American workforce and respecting the dignity of the worker that set basic wages and some conditions for employment.¹³⁸ We have recognized the importance of sexual harassment prohibitions in implementing “the goals of human dignity and economic equality in employment”¹³⁹ but we lack a contemporary vision in which to ground a renewed effort to transform the workplace.¹⁴⁰

¹³⁶ Eric Stener Carlson, *The ILO's Innovative Approach to Ending Gender-Based Violence and Harassment: Towards a New International Framework for the World of Work*, ABA (2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/11/conference/papers/CARLSON-The%20ILOs-Innovative-Approach-to-Ending-Gender-based-Violence-and-Harassment.pdf [https://perma.cc/X5UV-GQYQ].

¹³⁷ As of 2017, 14 percent of the US workforce was offered an employer-sponsored paid family leave program. See Trish Stroman et al., *Why Paid Family Leave Is Good Business*, BOSTON CONSULTING GROUP (February 2017) at 3–4, 17; Microsoft and Uber have eliminated forced arbitration agreements for employees or customers who make sexual harassment claims. See Nick Wingfield and Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html> [https://perma.cc/2H8P-TCTT]; Sarah Ashley O'Brian, *Uber Will No longer Force Victims of Sexual Assault into Arbitration*, CNN BUSINESS (May 15, 2018), <https://money.cnn.com/2018/05/15/technology/uber-eliminates-forced-arbitration/index.html> [https://perma.cc/85KC-PFHE].

¹³⁸ As President Franklin Roosevelt stated when he sent the FLSA bill to Congress on May 24, 1937, “a self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling worker’s wages or stretching worker’ hours . . . conditions that do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.” See Jonathan Grossman, *US Dept. of Labor, Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, (quoting Franklin Roosevelt, Public Papers VI (May 24, 1937) at 209–14).

¹³⁹ *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

¹⁴⁰ The primary federal employment and labor legislation are the Fair Labor Standards Act, 29 U.S.C. § 203, that sets a national minimum wage and requires overtime for hours worked over 40 per week for qualifying workplaces; the National Labor Relations Act, 29 U.S.C. §§ 151–169, that provides protections for workplace organizing and the formation of unions; the Occupations Health and Safety Act, 29 U.S.C. § 651, that provides basic standards of health and safety in U.S. workplaces; the Family Medical Leave Act, 29 U.S.C. § 2601, which guarantees basic unpaid leave for pregnancy, illness and caretaking; the Agricultural Workers Protection Act (AWPA), 29 U.S.C. § 1801, that provides some basic protections to farmworkers in contracting and recruitment, wages, working conditions, and compliance; the Uniformed Services Employment and Reemployment Rights Act (USERRA) 38 U.S.C. §§ 4301–35 ensures that workers who enter the military for

For numerous reasons commented on by many—the U.S. individualistic culture, the mobility of our population and workforce, commitment to free market principles, corporate influence and flexible communities—we have never fully developed robust labor and employment legal protections.¹⁴¹ In comparison to similar economies and societies with our institutional capacity, the American worker labors at the will and whims of an employer, under terms set almost exclusively by that employer with little intervention by the government.¹⁴² Thus, our workers rely on a minimum wage that has not been updated in nearly a decade¹⁴³ (that many argue has increased poverty levels in the U.S.);¹⁴⁴ overtime pay that excludes a large and vulnerable sector of the labor market (including farmworkers and domestic workers, among others);¹⁴⁵ the absence of pension requirements or other retirement guarantees provided as par for the course in many other jurisdictions;¹⁴⁶ and at-will employment arrangements that create insecurity.¹⁴⁷ Similarly,

short periods can return to their private sector job without loss of seniority or benefits, and the statutes that prohibit status discrimination such as Title VII, 42 U.S.C. § 2000e, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 1801.

¹⁴¹ Friedman & Whitman, *supra* note 101, at 265–70; see also, Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L. J. 84, 84–86 (2007); see also generally, Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3:1 U. PA. J. LAB. & EMP. L. 65 (Fall 2000).

¹⁴² See Jean R. Sternlight, *Is the U.S. out on a Limb – Comparing the U.S. Approach to Mandatory Consumer and Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002) (Though widespread in the U.S., mandatory arbitration policies are rarely employed in other countries); see also Carol Daugherty Rasnic, *Balancing Respective Rights in the Employment Contract: Contrasting the U.S. “Employment-At-Will” Rule with the Worker Statutory Protections against Dismissal in European Community Countries*, 4 J. INT’L L. & PRAC. 441, 442 (1995) (Benefits required by European domestic statutes include a guaranteed paid vacation time of four weeks or longer and an average of fourteen to sixteen weeks of paid maternity leave. By contrast in the U.S. vacation time “is a privilege rather than a right” and the Family and Medical Leave Act only mandates twelve weeks of unpaid leave per year for family-related medical needs).

¹⁴³ The minimum wage in the U.S. is \$7.29 an hour and was last updated in 2009, see U.S. DEPT OF LABOR, *Minimum Wage*, <https://www.dol.gov/general/topic/wages/minimumwage> [<https://perma.cc/SSL9-7M98>]. In comparison, as of 2013, Australia had the highest minimum wage of \$9.54 an hour, followed by Luxembourg at \$9.24. See Paul Muggerridge, *This Is What the Minimum Wage Looks Like Around the World*, WORLD ECONOMIC FORUM (June 30, 2015), <https://www.weforum.org/agenda/2015/06/this-is-what-the-minimum-wage-looks-like-around-the-world/> [<https://perma.cc/W7SU-WZQR>].

¹⁴⁴ Ben Zipperer, *The Erosion of the Federal Minimum Wage Has Increased Poverty, Especially for Black and Hispanic Families*, ECONOMIC POLICY INSTITUTE (June 13, 2018), <https://www.epi.org/publication/the-erosion-of-the-federal-minimum-wage-has-increased-poverty-especially-for-black-and-hispanic-families/> [<https://perma.cc/RRQ7-4JWH>].

¹⁴⁵ For a complete list see U.S. DEPT OF LABOR, *Exemptions*, ELAWS Fair Labor Standards Act Advisor, <https://webapps.dol.gov/elaws/whd/flsa/screen75.asp> [<https://perma.cc/46FL-P8KL>].

¹⁴⁶ *Pensions at a Glance in 2017: How Does the United States Compare?*, ORG. FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) (Dec. 5, 2017), <https://www.oecd.org/unitedstates/PAG2017-USA.pdf> [<https://perma.cc/NHK3-PLYH>].

¹⁴⁷ Stone, *supra* note 141, at 84.

sick pay, unemployment benefits, and annual leave are far less generous in the U.S. in comparison to our peers. In a recent study of 14 European countries and the U.S., we fared worse than all comparators.¹⁴⁸ For example, unemployment compensation in our peer countries is often provided at a rate of 90% of previous earnings for an approximate 100 weeks. We provide between 40% and 50% of earnings for up to 26 weeks, depending on the individual state.¹⁴⁹

Even those protections we do grant by virtue of the employer and employee relationship do not extend to all American workers. One in ten workers in the US labor market is in a “contingent and alternative employment arrangement.”¹⁵⁰ Nearly 7% of these workers are classified as independent contractors.¹⁵¹ These designations, though often arranged very similarly to an employee and employer relationship, liberate the employer from paying the minimum wage and overtime under the Fair Labor Standards Act, paying for unemployment and compensation benefits, as well as from providing accommodations under the Americans with Disabilities Act.¹⁵² Employers have become wise to this option and have increasingly classified their employees as independent contractors, which has led to a rash of litigation.¹⁵³

Thus, we have primarily left it to the employer to craft a just and functional workplace. Workers are expected to either accept the terms set by the employer or leave. Members of our workforce have few legal rights and employers have few restrictions or obligations to ensure worker well-being. Time and again courts have defended the principle of at-will unregulated employment, resisting contractual obligations

¹⁴⁸ The report, conducted in cooperation with Llewellyn Consulting, reveals that the countries offering the most generous workplace and welfare benefits overall are Denmark, France and Spain, with Denmark and Belgium in particular offering the best unemployment benefits (pay and eligibility period). See Llewellyn Consulting, *Which Countries in Europe Offer Fairest Paid Leave and Unemployment Benefits*, GLASSDOOR at 12 (2016), https://www.glassdoor.com/research/app/upload/sites/2/2016/02/GD_FairestPaidLeave_Final.pdf [<https://perma.cc/LP9K-E2Z5>].

¹⁴⁹ *Id.* at 11.

¹⁵⁰ U.S. Dep’t of Labor, *Contingent and Alternative Employment Arrangements*, BUREAU OF LABOR STATISTICS (June 7, 2018), <https://www.bls.gov/news.release/conemp.nr0.htm> [<https://perma.cc/388N-RY6V>].

¹⁵¹ *Id.*

¹⁵² U.S. DEP’T OF LABOR, *Wage and Hour Division (WHD)*, <https://www.dol.gov/whd/workers/misclassification/> [<https://perma.cc/4PUZ-347F>].

¹⁵³ See, e.g., *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1, 42 (Cal. 2018), (where the California Supreme Court held that delivery drivers were employees rather than independent contractors and announced a new test for establishing independent contractor status that considers franchise or licensing relationships); see also, *Simpkins v. DuPage Housing Authority*, 893 F.3d 962 (7th Cir. 2018) (reversing a district court’s grant of summary judgment and holding that the plaintiff was an independent contractor, as opposed to an employee); *Thornton v. Mainline Commc’s. LLC*, 157 F. Supp. 3d 844 (E.D. Mo. 2016) (where the district court found that cable repair and installation technicians were misclassified as independent contractors).

and, time and again, any effort to demand workplace security or minimal terms has been struck down.¹⁵⁴ Even in situations where workers are under the control and behest of their employers (such as temporary foreign labor programs, where the worker's presence in this country is subject to their employment), courts have rarely and reluctantly found any entitlements or obligations.¹⁵⁵

These conditions have meant that particularly vulnerable populations, such as our low-wage sector, which is populated by many immigrants with irregular immigration status,¹⁵⁶ has been marred by wage violations and abuses.¹⁵⁷ The limited capacity of the Department of Labor,¹⁵⁸ as well as the weakening of our unions, has made the workplace a difficult place for low-wage workers.¹⁵⁹ Anti-immigrant messaging has created even greater room for exploitation of the low-wage sector. Immigrant workers labor in industries often excluded from our already

¹⁵⁴ See, e.g., *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (upholding the validity of employer requirement that employees submit to individual arbitration of wage-and-hour and other work place conditions claims).

¹⁵⁵ See, e.g., *Hoffman Plastic Compound v. NLRB*, 535 U.S. 137 (2002) (holding that an undocumented worker who was not authorized to legally work in the U.S. was not eligible to receive back pay under the NLRA); for an example of recent acknowledgments by courts that some contractual obligation may exist for temporary foreign laborers see, *Jimenez v. GLK Foods LLC*, No. 12-CV-00209, Dkt. 50 (E.D. Wis. 2013) (finding contractual obligations for H2-B workers).

¹⁵⁶ See Miriam Jordan, *8 Million People are Working Illegally in the U.S. Here's Why That's Unlikely to Change*, THE NEW YORK TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html> [<https://perma.cc/Y33B-LT4H>]; Lisa Rapaport, *U.S. Relies Heavily on Foreign-Born Healthcare Workers*, THOMPSON REUTERS (Dec. 4, 2018), <https://www.reuters.com/article/us-health-professions-us-noncitizens/u-s-relies-heavily-on-foreign-born-healthcare-workers-idUSKBN1O32FR> [<https://perma.cc/8V5K-LEJD>].

¹⁵⁷ In 2016, research from Oxfam found that one in four low-wage workers in the US did not have a single day of earned sick time, see OXFAM, *Millions of Low-Wage Workers in the US Are Struggling to Survive*, (June 21, 2016), <https://www.oxfamamerica.org/explore/stories/millions-of-low-wage-workers-in-the-us-are-struggling-to-survive/> [<https://perma.cc/Z9VC-A2L4>].

¹⁵⁸ During the last three decades, funding levels for agencies that enforce laws against workplace violations have declined precipitously despite the fact that the labor force has grown. For instance, the number of inspectors enforcing minimum wage and overtime laws declined by 31%, while the labor force increased by 52% between 1980 and 2007. See Annette Bernhardt, et al., *Broken Law, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NATIONAL EMPLOYMENT LAW PROJECT at 52 (2009).

¹⁵⁹ In 2017, only 10.7% of wage and salaried workers in the U.S. were members of labor unions, while in 1983, 20.1% of wage and salaried workers were members of labor unions, see, Hanna Fingerhut, *More Americans View Long-Term Decline in Union Membership Negatively than Positively*, PEW RES. CENTER (June 5, 2018), <http://www.pewresearch.org/fact-tank/2018/06/05/more-americans-view-long-term-decline-in-union-membership-negatively-than-positively/> [<https://perma.cc/7L6N-2MK5>].

thin employment protections.¹⁶⁰ These industries, unsurprisingly, have reported high levels of sexual harassment.¹⁶¹

The low value we place on the worker is then compounded by our even lower estimation of the woman worker, a consequence of which is the dearth of women in decision-making positions in most fields.¹⁶² On all protections and benefits aimed at facilitating women's participation in the workforce, we provide little. The U.S. is one of the few countries (and alone among its economic peers) that does not provide paid maternity leave.¹⁶³ In addition, the lack of any real child care alternatives for women, certainly none that are legally mandated, makes child care a nearly prohibitive cost for many working women.¹⁶⁴ In contrast, flexible working practices that benefit employees with childcare responsibilities are common in countries like Denmark, Germany, and the Netherlands.¹⁶⁵ In the Netherlands, the Dutch government has developed

¹⁶⁰ Domestic workers are not covered by the NLRA ("the term "employee" . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home"); farmworkers are not covered by the NLRA ("the term "employee" . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home"). See 29 U.S.C. § 152 (1935). See also U.S. DEP'T OF LABOR, *Handy Reference Guide to the Fair Labor Standards Act*, <https://www.dol.gov/whd/regs/compliance/hrg.htm#2> [<https://perma.cc/SM4T-FED9>]. Farmworkers, with few exceptions, are not covered by the FLSA's minimum wage and maximum hour requirements. See 29 U.S.C. § 213 (1938) at ¶ 6 ("Minimum wage and maximum hour requirements . . . shall not apply with respect to . . . any employee employed in agriculture . . .").

¹⁶¹ *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME MAGAZINE (November 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [<https://perma.cc/98NN-GFKU>].

¹⁶² Our lack of prioritization of the woman worker is reflected in women's workplace participation. In most industries, women are absent in management and supervisory positions, longevity in employment and other positions of influence. Women make up 44 percent of the S&P 500 labor force, and 36 percent of first or mid-level officials and managers in those companies, however only 25 percent of executive and senior level officials and managers are women; only 20 percent of board seats are held by women; and only 6 percent of CEOs are women. Women make up 54 percent of the workforce in the financial services industry, but only 29 percent of executive and senior level managers and 2 percent of CEOs are women. In the legal field, 45 percent of associates are women, but only 22 percent of partners are women and 18 percent of equity partners. In the medical field, 37 percent of all physicians and surgeons are women, but only 16 percent of permanent medical school deans are women. Judith Warner and Danielle Corley, *The Women's Leadership Gap: Women's Leadership by the Numbers*, CENTER FOR AMERICAN PROGRESS (May 21, 2017).

¹⁶³ The United States and Mexico are the only two OECD countries that do not guarantee at least 14 weeks of paid leave to mothers of infants, see Amy Raub et al., *Paid Parental Leave: A Detailed Look at Approaches across OECD Countries*, WORLD POLICY ANALYSIS CENTER (2018). Data from the Organization for Economic Cooperation and Development (OECD) shows that among 41 nations, the U.S. is the only country that does not mandate any paid leave for new parents. See Gretchen Livingston, *Among 41 Nations, U.S. is the Outlier When it Comes to Paid Parental Leave*, PEW RESEARCH CENTER, (September 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/> [<https://perma.cc/HD5K-ABWR>].

¹⁶⁴ Drew Desilver, *Rising Cost of Child Care May Help Explain Recent Increase in Stay-at-Home Moms*, THE PEW RESEARCH CENTER, (April 8, 2014), <http://www.pewresearch.org/fact-tank/2014/04/08/rising-cost-of-child-care-may-help-explain-increase-in-stay-at-home-moms/> [<https://perma.cc/4XPZ-GUPR>].

¹⁶⁵ Lisa Harker, *The Family-Friendly Employer in Europe*, in THE WORK-FAMILY CHALLENGE:

childcare centers that are partly funded by the government and partly by employers.¹⁶⁶ This, combined with the unwillingness of employers to provide access to health insurance plans that cover women's reproductive health,¹⁶⁷ mean women's career choices and experiences at work are impacted heavily by their reproductive choices.¹⁶⁸

Our employer policies to keep compensation private also make it difficult for women to determine whether (or more realistically to what extent) they are being compensated at lower rates than their male peers. As of 2019, the Institute for Women's Policy Research reported a 20 percent gender wage gap between men and women in the U.S., with female full-time, year-round workers making 80.5 cents for every dollar earned by men.¹⁶⁹ The gender wage gap in the U.S. is higher than that of France, Ireland, Spain, Mexico, Switzerland, Germany, and the UK.¹⁷⁰

Why does this matter? As the research discussed earlier suggests, sexual harassment is likely to thrive in environments where workers are not valued, where women workers are particularly undervalued, and where employers have not provided a functional environment that discourages exploitation of existing societal status-based hierarchies

RETHINKING EMPLOYMENT 49 (Suzan Lewis & Jeremy Lewis eds., 1996).

¹⁶⁶ *Id.*, at 54. Publicly funded or employer sponsored childcare provisions have also become popular in countries like the UK, where the percentage of parents receiving support for childcare from their employer is rising. Dep't of Education, *Childcare and Early Years Survey of Parents in Education*, (Dec. 2017) at 11, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669857/SFR73_2017_Text.pdf [<https://perma.cc/HT66-N4ZP>].

¹⁶⁷ *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014); *Wheaton Coll. v. Burwell*, 574 U.S. 958 (2014) (holding that the college was not required to follow the mandate under Patient Protection and Affordable Care Act (ACA) and related regulations that it provide its employees and students with health insurance coverage for contraceptive services). *See also* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 26 CFR 54, 147, 2590 (2015); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 26 CFR 54, 147, 2590 (2015).

¹⁶⁸ In October of 2017, the Trump administration issued rules that provide exceptions to the Affordable Care Act's contraceptive coverage, allowing employers to cite religious or moral beliefs to avoid ACA requirements. Amy Goldstein, Juliet Eilperin and William Wan, *Trump Administration Narrows Affordable Care Act's Contraception Mandate*, WASH. POST, (Oct. 6, 2017), https://www.washingtonpost.com/national/health-science/trump-administration-could-narrow-affordable-care-acts-contraception-mandate/2017/10/05/16139400-a9f0-11e7-92d1-58c702d2d975_story.html?noredirect=on&utm_term=.316e32c6961d [<https://perma.cc/PYM9-MUJ6>]. At the same time, women continue to suffer career consequences as a result of childbearing, in part because gender roles are "lagging behind labor force trends," and because of the way that society views the "bond between mothers and their children." *See* Kim Parker, *Women More than Men Adjust Their Careers for Family Life*, PEW RESEARCH CENTER, (Oct. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/> [<https://perma.cc/N3FT-LV8Q>].

¹⁶⁹ *Pay Equity Discrimination*, INST. FOR WOMEN'S POL'Y RES., <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/> [<https://perma.cc/Q4ZC-XQBC>].

¹⁷⁰ *Gender Wage Gap*, ORG. FOR ECON. CO-OPERATION AND DEV., <https://data.oecd.org/earnwage/gender-wage-gap> [<https://perma.cc/PJ4G-MPGF>].

and inequalities. As discussed above, job insecurity, excessive discretion, workforce turn-over, ineffective management practices, inadequate reporting mechanisms, uneven workload distribution, and the absence of messaging around employer values and priorities can all enable environments in which sexual harassment will thrive. #MeToo reports circulated in the media this year were filled with examples of workplaces with no regulation, little worker value, and the absence of working systems of accountability. Law clerks to the judiciary,¹⁷¹ seasonal farmworkers,¹⁷² interns for star record producers,¹⁷³ and graduate students¹⁷⁴ all emerged as examples of workers left by their institutional employers to labor at the mercy of their supervisors in environments where the female worker was clearly not the employers' priority.

We cannot disassociate the general workplace environment from sexual harassment practices, nor should we try. Women work in contexts where harassment persists because that is what is available to them. Workplaces fail to correct this behavior because they do not have to. In this context, it is simply unrealistic to expect that we would target sexual harassment in a culture of workplace neglect and unrealistic to think courts should reach for larger themes of employee and worker protection and rights when few currently exist. The message of the workplace is already that workers are not priorities, and women workers even less. To change this approach, we must change how the workplace values the woman worker and set standards and practices that facilitate women's presence, prioritize their equality and human dignity, and remove any reward systems that encourage sexual harassment and abuse.

As discussed above, research and comparative country examples provide some guidance for how to address dynamics in the workplace that are promoting a culture of gender-motivated abuse. A case study from within the U.S. also illustrates what a transformation could look like, courtesy of the very group of workers provided with the least protections and often subject to the highest levels of abuse—low-wage immigrant farmworkers.¹⁷⁵ The Coalition of Immokalee Workers (CIW),

¹⁷¹ See Vanessa Romo, *Federal Judge Kozinski Retires Following Sexual Harassment Allegations*, NPR, (Dec. 18, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/18/571677955/federal-judge-retires-in-the-wake-of-sexual-harassment-allegations> [<https://perma.cc/3EZW-BZVJ>].

¹⁷² The Farmworker Sexual Violence Technical Assistance Project, *Sexual Violence Against Farmworkers: A Guidebook for Legal Providers*, https://www.victimrights.org/sites/default/files/Farmworkers%20Legal%20Providers_0.pdf [<https://perma.cc/HHT6-SYE4>].

¹⁷³ See, e.g., Shelley Cobb and Tanya Horeck, *Post Weinstein: Gendered Power and Harassment in the Media Industries*, 18:3 FEMINIST MEDIA STUDIES 489–91 (2018).

¹⁷⁴ Alexandra Witze, *Sexual Harassment Is Rife in the Sciences, Finds Landmark US Study*, 558 NATURE INT'L J. OF SCI. 352–53 (June 12, 2018).

¹⁷⁵ Tracie Cone, *Report: Sexual Abuse of Female Farmworkers Common*, WASH. POST, (May 16,

recent recipients of the MacArthur Genius grant, in an effort to sidestep our broken labor enforcement system, have created a private regulation program based on worker dignity and equality that has drastically reduced sexual harassment in agriculture.¹⁷⁶ Through an innovative organizing campaign that received much acclaim, CIW managed to compel the U.S. tomato-growing industry (which amounts to 50%–90% of U.S. tomato consumption) to agree to transform their workplaces into ones grounded in concepts of dignity and equality committed to providing fair wages and conditions of employment and environments free of sexual harassment and abuse.¹⁷⁷

This private regulation system, known as the Fair Food Program (FFP), consists of a complex system of education, prevention, enforcement, and accountability that involves the employer, supervisors, and workers in a collaborative process to jointly transform their work environments.¹⁷⁸ The program was formed by leveraging consumer influence over tomato buyers (fast food restaurants, grocery chains, and restaurants suppliers) to compel tomato farms to participate in a joint program to regulate and improve worker conditions.¹⁷⁹ To date, 90% of tomato growers in Florida, approximately 12 growers and over 30,000 workers, participate in FFP, along with major tomato buyers such as McDonalds, Whole Foods, Walmart, Burger King, Subway, and Taco Bell.¹⁸⁰ The program, which is designed around the concept of human dignity in the workplace (both as a right and expectation) has, after six years, reported virtual elimination of repeat sexual harassment incidents in participating workplaces in an industry previously known for abuses.¹⁸¹

2012), https://www.washingtonpost.com/politics/report-sexual-abuse-of-female-farmworkers-common/2012/05/15/gIQA7sfWTU_story.html?utm_term=.bfd1f60d2dbf [<https://perma.cc/3GW7-Q8F> F].

¹⁷⁶ Bernice Yeung, *What Hollywood Can Learn From Farmworkers*, SLATE (Sept. 19, 2018), <https://slate.com/human-interest/2018/09/farmworkers-janitors-sexual-harassment-training.html> [<https://perma.cc/623B-6GWL>]; Joann Lo and Ariel Jacobson, *Human Rights from Field to Fork: Improving Labor Conditions for Food-Sector Workers by Organizing across Boundaries*, 5:1 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 61 (2011); Greg Asbed and Sean Sellers, *The Fair Food Program: Comprehensive, verifiable and sustainable change for farmworkers*, 16 U. PA. J. L. & SOC. CHANGE 39 (2013).

¹⁷⁷ FAIR FOOD PROGRAM, *2017 Annual Report*, <http://www.fairfoodprogram.org/wp-content/uploads/2018/06/Fair-Food-Program-2017-Annual-Report-Web.pdf> [<https://perma.cc/9C68-BT7T>].

¹⁷⁸ FAIR FOOD PROGRAM, *About the Fair Food Program*, <http://www.fairfoodprogram.org> [<https://perma.cc/5P2A-H9AE>].

¹⁷⁹ Michael Sainato, *Farmworker Campaign Heads to Wendy's Headquarters: Will the Fast Food Giant Finally Listen?*, THE NATION (June 4, 2018), <https://www.thenation.com/article/farmworker-campaign-heads-wendys-headquarters-will-fast-food-giant-finally-listen/> [<https://perma.cc/7BAE-FXXS>].

¹⁸⁰ Fair Foods Standards Council, *Partners*, FAIR FOOD PROGRAM, <http://www.fairfoodprogram.org/partners/> [<https://perma.cc/C2JJ-QE5A>].

¹⁸¹ FAIR FOOD PROGRAM, *2017 Annual Report*, *supra* note 177.

The program consists of four components: a workplace code of conduct, worker to worker education, external auditing, and a complaint resolution mechanism that prioritizes timely resolution and immediate consequences along a graduated system that has, to date with one exception, avoided recourse to arbitration. The code of conduct is built around the concepts of fair and just conditions and worker dignity. It was developed by the workforce to address practical challenges of agricultural employment. It sets employment practices along with a tiered system of violations and consequences for employees and employers. It regulates wages, health and safety (e.g., shaded structures, protective gear, rest breaks, availability of medical treatment), conditions of termination, workplace violence, sexual harassment, and anti-discrimination.¹⁸²

The worker education component involves yearly on-site and interactive training sessions (for workers and supervisors), focused on the right to be safe, secure, and respected in the workplace; scenarios on sexual harassment are debated through group discussions and workshop breakouts. It discusses, among other things, power dynamics and what abuse of power means, societal discrimination based on gender, race, and ethnicity, and sexual harassment in various forms and its consequences for women workers and the workplace more generally.¹⁸³ Participating employers agree to pay worker representatives to be trained and facilitate sessions.

The Fair Food Standards Council (FFSC), which consists of 15 employees under the direction of retired New York State Judge Laura Safer Ezpinoza, monitors workplaces through yearly audits (and sometimes unannounced audits). These audits involve interviews with at least 50% of workers on each farm with employer cooperation, including open access to records. In 2017, the FFSC conducted approximately 200 field and financial audits.¹⁸⁴

Finally, the program contains an independent complaint mechanism that includes a 24-hour hotline for worker reports, which has addressed 1800 complaints since 2011, or approximately 400 a year. An investigation is conducted and findings are issued, often within weeks. There are three levels of violations around workplace violence and abuse within the system. Tier 1 is forced labor or the repeated use of child labor; Tier 2 is status discrimination, abuse, sexual harassment, or the systemic failure to pay wages; and Tier 3 is the failure to afford

¹⁸² FAIR FOOD STANDARDS COUNCIL, *Fair Food Code of Conduct*, <http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct/> [<https://perma.cc/JT9P-M7DQ>].

¹⁸³ FAIR FOOD PROGRAM, *Worker Education Modules 1–4*.

¹⁸⁴ FAIR FOODS STANDARDS COUNCIL, *About*, <http://www.fairfoodstandards.org/about/> [<https://perma.cc/WEU5-T8UJ>].

rest breaks or adequate drinking water. The required employer responses to abuse and harassment vary depending on its severity. Sexual harassment that involves physical contact, for example, requires immediate termination upon issuance of a finding, or the participating employer is suspended from the program. Harassment that did not include physical contact requires specified remedial action to avoid suspension or probation, which can include progressive discipline (a written warning and second time termination) and a corrective action plan for hostile work environment. Finally, the program contains sanctions for non-compliant employers which can include suspension, probation, and elimination from the program.

The FFP aptly illustrates several features fundamental to transformation of any workplace. It is based on a positive vision of the workplace that is grounded in human dignity—respect, security, and valuation of the worker—and places sexual harassment in this context, while still acknowledging its roots in gender inequality. It builds employee consciousness through worker to worker trainings and sets clear expectations for workplace behavior in an effort to define workplace culture. More broadly, it creates a dialogue in the workplace community about sexual harassment and gender discrimination which itself, over time, can serve to transform the culture. It supports women workers specifically by developing women's leadership through trainings and monitoring, increasing women's power and leverage in the workplace. It is structured so as to create workforce buy-in at all levels with low and mid-level supervisor training and peer-to-peer engagements, better ensuring that messaging and direction is consistent at all levels of management. Finally, it has robust but graduated consequences that allow for correction and adaptation before concerns about liability and damage awards begin to disincentivize the employer from acknowledging the existence of harmful workplace dynamics. The goals of the corrective consequences are at once restorative and prompt, allowing the workplace to transform while maintaining its integrity.

These approaches could be applied to workplaces more broadly with employer engagement. For example, workers could be invited to participate in creating dignity-based workplaces. Women workers could be encouraged to take leadership roles in defining what such a workplace would look like. Corrective mechanisms could be, at least in initial stages, aimed at improving workplace dynamics through restorative justice and other means rather than focusing on punishment and legal consequences. The FFP model, coupled with a legal framework that involves employers in preventing and addressing dynamics that facilitate harassment, could be more effective in sustainably combatting workplace sexual harassment.

VI. CONCLUSION

It is a unique moment for the issue of sexual harassment, which often struggles to gain the attention of policy makers and the public. Following #MeToo reports, stars pledged to add inclusion riders to their contracts, corporations declared they would abandon practices of mandating arbitration agreements, and coalitions of powerful female influencers called for action. These are all encouraging developments, but, beneath these efforts, we are left with a policy approach and legal mechanism that do not effectively address the workplace violations they seek to target.

The ILO has tried to provide a framework for conceiving of sexual harassment within a larger vision of a just workplace, one rooted in respect for human dignity and correction of inequalities that violate that dignity. The framework acknowledges that women are deprived of their basic human rights because of the “socially constructed power imbalances”¹⁸⁵ which society at large and workplaces, in particular, exploit and further entrench. The Coalition of Immokalee Workers’ Fair Food Program provides a worker-run private sector model for self-regulation in an industry attempting to change workplace culture and values. The program targets sexual harassment while addressing workplace dignity violations in a holistic manner.

Both approaches recognize the inefficacy of any attempt to address inequality without a foundation of rights and expectations. Our current approach to sexual harassment (and gender discrimination more generally) falls into this very trap. We ask only whether a claimant was treated with sex-based hostility against some unidentified social norm left to the discretion of a judge or jury. Our legal framework has yet to make explicit norms or expectations on the treatment of individuals in the workplace, which would allow us to determine whether the treatment in question violated these expectations. We need to understand not only that gender discrimination in the workplace is prohibited, but what rights, benefits, and privileges the workplace affords that require equal distribution and access between the genders. For this, we need a positive vision of a just and functional workplace to guide expectations and then determine how to ensure it is realized for all workers.

Various reforms would move us in the right direction. Legislation and policy reforms aimed at better protecting worker’s rights (job security, benefits, limitations of independent contractor classifications, wage violations), the passage of healthy workplace legislation¹⁸⁶ establishing a duty of care for employers (that addresses harassment and

¹⁸⁵ Carlson, *supra* note 136.

¹⁸⁶ One example for such legislation (albeit status-blind) has been proposed by David Yamada.

other forms of abuse), and extra-discrimination remedies¹⁸⁷ (that assist in ensuring available benefits are accessible to all) would provide a foundation for workplace standards and expectations. Supplementing this, reforms that target harassment, such as congressional clarification of Title VII's intent and definition of sexual harassment, promulgation of industry-specific recommendations on harassment,¹⁸⁸ and incorporation of harassment into Occupational Safety and Health Administration's preventative mandate¹⁸⁹ would assist in addressing sexual harassment directly. Finally, policies that accommodate women in the workplace, such as paid maternity leave and comprehensive health insurance, make women more secure and communicate their value to the workplace. These policy changes could, in turn, decrease opportunities for harassment by lessening women's vulnerability to abuses of power. Reforms such as these would provide our judiciary and juries with a standard against which to measure liability for sexual harassment cases and employers and employees direction on expectations and duties. As the Court recognized in *Obergefell v. Hodges*,¹⁹⁰ the recognition of women's dignity and equality is a process of evolution, as "women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity."¹⁹¹ To move forward towards recognition of women's equal dignity, we must protect and identify workplace rights and benefits as well as ensure that women are afforded their equal enjoyment.

See e.g., David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000).

¹⁸⁷ Eyer, *supra* note 31, at 1341–1360.

¹⁸⁸ U.S. SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE, *Minority Staff Report*, *supra* note 40, at 38–40.

¹⁸⁹ The Occupational Safety and Health Administration is the only agency besides the EEOC responsible for regulating the workplace and, unlike the EEOC, OSHA engages in preventative activities and general mandate inspections. OSHA has jurisdiction over about 7 million worksites where it conducts inspections of workplaces in order to investigate (in the following order of priority): imminent danger situations; severe injuries and illnesses; worker complaints; referrals from other government bodies or individuals; high hazard industries or workplaces that have experienced high rates of injuries or illnesses, and past violations. See U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., *About Inspections*, https://www.osha.gov/Osh-Doc/data_General_Facts/factsheet-inspections.pdf [<https://perma.cc/CH6E-ZAZ8>]; while there are no current OSHA standards that specifically address workplace violence, courts have understood OSHA's general duty clause as a legal obligation for employers to provide workplaces free of conditions that could result in serious physical harm. OSHA has developed enforcement procedures to address occupational exposure to workplace violence, which include inspections related to workplace violence, see U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMIN., *Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence CPL 02-010-058*, (Jan. 10, 2017), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-058.pdf [<https://perma.cc/7RR6-ELBZ>]. Thus, regulating employer duty of care to prevent sexual harassment would be a natural extension of OSHA's mandate.

¹⁹⁰ 135 S. Ct. 2584 (2015)

¹⁹¹ *Id.* at 2597.



Witch Hunts: Free Speech, #MeToo, and the Fear of Women's Words

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“What would happen if one woman told the truth about her life? The world would split open.”

– Muriel Rukeyser, *Käthe Kollwitz* (1968)

INTRODUCTION

Perhaps the most seductive truism of free speech jurisprudence is that the First Amendment protects, in Justice Oliver Wendell Holmes's words, “the thought we hate.”¹ The sentiment dominates both the formal doctrine and informal public understanding of free speech. The concept of offensive speech in the United States was associated for some time with marginalized speakers, such as Communists, civil rights activists, and union workers. However, it has over the last few decades become increasingly identified with speakers more closely tied to power and privilege, such as white supremacists, corporations, and members of mainstream religions. Public discourse on free speech has been dominated in the last few years by far-right figures such as Milo Yiannopoulos and Richard Spencer, whose speech tend to denigrate women, racial minorities, and the LGBTQ community.² Some of the fiercest defenders of this speech are self-identified civil libertarians, who claim to hate what such speakers are saying but who will “defend to the death their right to say it.”³ These defenders do not dismiss the idea that such speech causes harm but maintain that it is this very characteristic that compels its protection.

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¹ *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

² Talib Kwali Greene, *Free Speech or Die?*, MEDIUM (Feb. 26, 2018), <https://medium.com/s/story/free-speech-or-die-53a206027143> [<https://perma.cc/4YMH-2D8L>].

³ A cliché frequently but erroneously attributed to Voltaire.

It is clear, then, that classification as “the speech we hate” confers a great deal of power within free speech jurisprudence. While the determination of what is offensive or injurious is often presented as neutral and objective, it is in reality anything but. This is most clearly illustrated by comparing the treatment of men’s speech versus women’s speech throughout American history. While the politics of the most favored speech has shifted over time, what has remained largely constant is that free speech theory and practice has focused on men’s speech. There is a great irony here, as it is *women’s* speech that has been most feared, and thus extensively regulated, criticized, and prohibited throughout American history.

One of the only acknowledgments of the widespread and longstanding legal, political, and cultural efforts to silence women appears in Justice Louis Brandeis’s concurring opinion in *Whitney v. California* (1927): “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”⁴ Justice Brandeis’s invocation of witch hunts and the burning of women to underscore this point is more illuminating than he may have intended. It points towards the historical attempts to suppress women’s speech, exemplified not only by witch hunts, but also by a wide range of legal, political, and cultural deprivations.

If it were actually true that the animating principle of free speech theory and practice is that the most feared speech is that most deserving of protection, then it is women’s speech that should be valorized as free speech par excellence, and attempts to suppress it should be condemned as censorship. A mass movement of women speaking out about experiences and abuses that have long been suppressed, such as the #MeToo movement, should be praised as the quintessential exercise of free speech. And yet, nearly as soon as it began, the movement was condemned for being so offensive and injurious to men that demands were made to curtail it. It is debatable in the first instance whether the characterization of #MeToo as harmful to men is accurate, but the more relevant point here is that to the extent that it is harmful to men, this should mean that women’s #MeToo speech is *more*, not less, deserving of protection. The efforts to silence these women should be seen as modern-day witch hunts, carried out by men in “the bondage of irrational fears”⁵ that the mere word of a woman has the power to destroy men’s lives.

Instead, the very term “witch hunt” has been energetically and ironically repurposed to convey the persecution and silencing *of men by*

⁴ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

⁵ *Id.*

women. In this Orwellian inversion, women's speech about men's abuses is characterized as a dangerous form of censorship, while men's criticism of that speech is characterized as a brave refusal to be silenced. This development makes clear that despite Justice Brandeis's fine words, offensive and injurious speech seems to be far less valued as "free speech" when it is spoken by women about men. Whether women are cast as witches who must be burnt or witch hunters who must be stopped, their speech continues to be feared and repressed rather than celebrated and protected.

This article argues that this unbroken history of suppressing women's speech demonstrates that the supposed American commitment to free speech is a seductive fraud. What is truly valorized in American free speech doctrine and practice is not free speech as such, but speech that advances or at least does not directly challenge white men's monopoly on power. Part I examines the claim that offensive and injurious speech should receive the greatest degree of protection under the First Amendment. It reveals that this claim, which purports to be the product of a neutral commitment to the rights of the vulnerable, masks a preference for the speech of the powerful. Free speech doctrine blurs the line between the merely offensive and the truly injurious, at least with regard to *men's* offensive and injurious speech, and particularly when that speech advances white male supremacy. Part II demonstrates that if we are to take the insistence on protection for "offensive and injurious speech" by vulnerable groups seriously, then a quick survey of history makes clear that it is women's speech, particularly women's speech perceived as offensive or injurious to men, that should take pride of place. Part III describes how women's speech that inspires fear in men is not only under-protected, but is, in an Orwellian twist, increasingly denounced as censorship. The whiplash-inducing critique of the #MeToo movement as a "witch hunt" dramatically illustrates this point, revealing the hollowness of our supposed commitment to "freedom for the thought we hate."

I. THE SPEECH WE HATE

The American commitment to free speech is often described in terms of "freedom for the thought we hate."⁶ This phrase comes from Justice Holmes's dissenting opinion in the 1929 case *United States v. Schwimmer*:

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of

⁶ See, e.g., Anthony Lewis's influential book on the First Amendment. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE (2007).

free thought—not free thought for those who agree with us but freedom for the thought that we hate.⁷

The case often cited as the clearest illustration of the radical American commitment to freedom of speech for even the most hateful ideas is *Collin v. Smith*, which involved a proposed Nazi march in Skokie, Illinois, in 1976. Members of the National Socialist Party of America (NSPA) announced their intention to march in Skokie, a Chicago suburb, wearing Nazi-style uniforms and displaying banners with swastikas on them. Members distributed flyers and made unsolicited phone calls to Skokie residents with Jewish-sounding names promoting the march. At the time, around half of Skokie's population was Jewish, including hundreds of Holocaust survivors. The town of Skokie passed a series of ordinances to prevent the march from happening, which the NSPA, represented by the ACLU, challenged in court. Eventually, the ordinances were found to violate the First Amendment, and the NSPA was given permission to march.

In striking down Skokie's efforts to prevent the march, the Illinois Supreme Court analogized the case to the 1971 Supreme Court case *Cohen v. California*.⁸ In that case, the Court reversed the conviction of Robert Cohen, who had been charged with disturbing the peace for wearing a jacket displaying the words "Fuck the Draft" inside a courthouse.⁹ The Court rejected the argument that speech could be restricted on the basis of its offensiveness.¹⁰ The Illinois Supreme Court reasoned that if it is not permissible under the First Amendment to punish Cohen for a profane phrase on his jacket, then it is equally impermissible to prohibit neo-Nazis from displaying swastikas.¹¹ The court asked,

How is one to distinguish [the swastika] from any other offensive word (emblem)? . . . [W]hile the particular four-letter word (emblem) being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.¹²

⁷ *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

⁸ *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 23 (Ill. 1978).

⁹ *Cohen v. California*, 403 U.S. 15 (1971).

¹⁰ *Id.* at 23.

¹¹ *Skokie*, 373 N.E.2d at 24 (decided on remand from the Supreme Court).

¹² *Id.*

Though the court described itself as simply following the insights of *Cohen*, the speech at issue in the two cases differed in several substantive ways. Cohen wore on his clothing a profane phrase expressing an undeniably political statement against the war while in a courthouse. Defendant Collin and his neo-Nazi confederates, however, intended to wave the most immediately recognizable symbol of the Holocaust in the faces of people who had escaped genocide, while marching through their streets dressed in SS uniforms. Cohen's speech was addressed to no one in particular at the courthouse, and the term he used, while crude, did not suggest violence. Collin, on the other hand, chose Skokie precisely because of its Jewish population, and the swastika conveys a far more specific and ominous meaning than a general profanity. As one expert involved in the Skokie case testified,

[T]he words of any Nazi to any Jew have, by definition, lost the usual intent and limitation of words: they are symbolic continuations of the Holocaust, literal perpetuations of the climate of the Holocaust, and preparations for a new Holocaust. No matter what words their placards bear, when Nazis march in Skokie, their presence and their regalia says to Jews: "You thought you escaped. You did not. We know where you are. When our strength is sufficient and when the time is ripe, we will come and get you."¹³

An expression of profanity with political import and a deliberate attempt to terrorize a particular group were both, according to the court, simply "matters of taste and style." In essence, the court found that "offense" and "injury" were the same for the purposes of the First Amendment. This elision of offense and injury is a profoundly depoliticizing move. In *Cohen*, the speaker was a lone citizen criticizing an official governmental policy; his speech could accurately be described as "speaking truth to power." The greatest harm his act could inflict was inspiring offended reactions in those around him. In *Collin*, a group of speakers of a privileged race and gender sought to terrorize a vulnerable minority—the very antithesis of speaking truth to power. The harm that this act was likely to inflict was not of causing potential offense but of inspiring terror and trauma in people who had escaped mass extermination. The obfuscation of the power dynamics in the two cases has contributed greatly to the modern-day understanding of "freedom for the thought we hate."

¹³ Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DEPAUL L. REV. 259, 281 n.143 (1979).

The ACLU has become perhaps the most visible and vocal advocate for the principle of freedom of speech for the thought we hate, and it has fully embraced the depoliticizing approach of *Collin*. The ACLU calls itself the “largest and oldest civil liberties organization” in the U.S. It was the ACLU that won the NSPA’s right to march in Skokie in 1978, and it was the ACLU that secured the right for the extremist organizers to hold their white supremacist rally in Emancipation Park in Charlottesville, Virginia in 2017. Aryeh Neier, who was the ACLU’s executive director at the time of *Collin*, stated that the lesson to be learned from the case is that “[i]n a country where free speech generally prevails, it is best to take hate speech in stride. Ignoring it sometimes works, as does overwhelming it with the peaceful expression of contrary views.”¹⁴

This casual attitude to injurious speech is much easier to maintain when the event in question never takes place. Frank Collin never held his march in Skokie, having secured the right to rally in Marquette Park.¹⁵ But, in contrast to Neier’s assertion, there is good reason to conclude that Collin’s decision not to march in Skokie was as likely due to concerns of violent counter-demonstrations by members of the Jewish community as by the “peaceful expression of contrary views.” The bloodless outcome of Skokie stands in sharp contrast to the white supremacist rally in Charlottesville, Virginia, where multiple violent confrontations broke out. One of the far-right demonstrators drove his car into a crowd of unarmed counter-protesters, injuring thirty-five people and killing a thirty-two-year-old woman named Heather Heyer. Two state troopers died when their helicopter crashed while monitoring the demonstration from the air. Among the other violent incidents were a man firing a gun into a crowd of people and six men beating a young black man in a parking garage.

The Skokie and Charlottesville incidents are only two of the many controversial cases the ACLU has taken on throughout its history, helping to cement its reputation as an organization willing to do the right thing even at great cost. In explaining its solicitude toward hateful speech and why it so often defends “controversial and unpopular entities” such as neo-Nazis and the KKK, the organization has stated,

¹⁴ Aryeh Neier, *Lessons in Free Speech 40 Years after Nazis Planned Skokie March*, CHI. SUN TIMES (Apr. 15, 2017), <https://chicago.suntimes.com/columnists/lessons-in-free-speech-40-years-after-nazis-planned-skokie-march/> [<https://perma.cc/Y7NU-EEGT>].

¹⁵ Douglas E. Kneeland, *Nazis Backed on Rally in Chicago; Move Could Avert Skokie March*, NEW YORK TIMES (June 21, 1978), <https://www.nytimes.com/1978/06/21/archives/new-jersey-pages-nazis-backed-on-rally-in-chicago-move-could-avert.html> [<https://perma.cc/UD4Q-5FYJ>].

We do not defend them because we agree with them; rather, we defend their right to free expression and free assembly. Historically, the people whose opinions are the most controversial or extreme are the people whose rights are most often threatened. Once the government has the power to violate one person's rights, it can use that power against everyone. [W]e subscribe to the principle that if the rights of society's most vulnerable members are denied, everybody's rights are imperiled.¹⁶

The principle described in this passage, that the rights of the vulnerable should be protected not only for their sake but for the sake of the general welfare, is admirable. It echoes the social justice insights of Kimberlé Crenshaw's intersectional scholarship¹⁷ and Mari Matsuda's concept of "looking to the bottom."¹⁸ Indeed, for some time, civil liberties groups did devote considerable effort to securing the free speech rights of vulnerable populations.¹⁹ Much of the ACLU's early free speech advocacy was devoted to protecting political dissidents and advocates for gender and racial equality. But contemporary First Amendment theory and practice has shifted to further shoring up powerful white men's freedom of speech. As Lincoln Caplan observed in 2015, free speech advocates today "are not standing up for mistrusted outliers . . . or for the dispossessed and powerless," but instead advocate on behalf of "the super-rich and the ultra-powerful, the airline, drug, petroleum, and tobacco industries, all the winners in America's winner-take-all society."²⁰ John Coates notes that "corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights," as almost "half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals."²¹

¹⁶ ACLU History, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/about/aclu-history> [<https://perma.cc/GP9R-5E33>] (last visited Mar. 2, 2019).

¹⁷ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

¹⁸ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

¹⁹ Mary E. Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1020 (1993) ("Initially, free speech claims were brought by draft resisters, labor organizers, civil rights activists, pacifists, communists, and similar progressive or left groups with less than their share of power and all too easily silenced by a hostile majority.")

²⁰ Lincoln Caplan, *The Embattled First Amendment*, THE AMERICAN SCHOLAR (Mar. 4, 2015), <https://theamericanscholar.org/the-embattled-first-amendment/#.V7toqI5eyVp> [<https://perma.cc/WBB2-6PXP>].

²¹ John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015).

Like the court's decision in *Collin*, the ACLU's defense of its choice of the cases and clients it represents deliberately obscures the power dynamics at work. The ACLU makes the empirical claim that "[h]istorically, the people whose opinions are the most controversial or extreme are the people whose rights are most often threatened."²² But as the passage does not define the vague terms "controversial" or "extreme," it is all but impossible to verify the claim that people with such views are more vulnerable than others. What is more, there is simply no evidence to support the claim that "unpopular entities" like neo-Nazis, KKK members, and pornographers are the "most vulnerable members" of society. While these groups may be disliked by some, they are clearly neither universally disliked nor singled out for official discrimination. Indeed, what these groups tend to have in common is that they target truly vulnerable groups, such as women and minorities.

This can be stated even more strongly: many of the groups that the ACLU spends enormous amounts of resources to protect promote white male supremacy. One of the lesser-known details about the neo-Nazis' planned march in Skokie is that they planned to carry placards stating "Free Speech for the White Man."²³ The sign was probably intended as a crude provocation, but it is also an inadvertently apt description of the state of free speech in the United States, before and after 1976.²⁴

I use the term "white male supremacy" here to refer not only to the:

ideology of violent extremists who openly call for the exclusion or elimination of women and nonwhite men, but also to that of groups and individuals who express "softer" forms of racial and gender superiority, including members of the so-called alt-right as well as more mainstream conservatives. It also includes the ideology of many self-described liberals who espouse commitment to racial and gender equality in theory but reinforce existing hierarchies of power in practice. White male supremacy can be subtle and even seemingly benevolent as well as overt and violent. And because white male supremacy is an ideology, not an identity, its adherents are not limited to people who are white or male.

²² ACLU History, *supra* note 16.

²³ *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 366 N.E.2d 347, 352 (Ill. 1977), *aff'd in part, rev'd in part*, 373 N.E.2d 21 (Ill. 1978)

²⁴ See Mary Anne Franks, *Beyond 'Free Speech for the White Man': Feminism and the First Amendment*, RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 366 (Robin West & Cynthia Grant Bowman eds., 2019).

White male supremacy demands, in essence, that the interests of white men *take priority* over those of all others.²⁵

So defined, white male supremacy is essentially America's founding ideology, not some marginal and repressed viewpoint. The First Amendment, like the rest of the Constitution, was written and enacted by a group of white men, who deliberately excluded all women and people of color from participation in the political process. White male supremacy has been defended throughout America's history, through slavery, lynching, segregation, police brutality, domestic violence, rape, and sexual harassment. Members of the Ku Klux Klan have served in law enforcement²⁶ and on the Supreme Court;²⁷ wife beaters and sexual abusers have sat in the Oval Office.²⁸ Donald Trump was elected President on a platform of misogyny,²⁹ racism,³⁰ and xenophobia;³¹ the KKK and the extreme right³² consider him a champion of their world view.³³ A 2017 poll found that nearly one-third of respondents "strongly or somewhat agreed that the country needs to 'protect and preserve its White European heritage,'" and nearly 40% agreed or somewhat agreed with the statement that "white people are currently under attack in this

²⁵ MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH* 6 (2019).

²⁶ *The Ku Klux Klan and the End of Reconstruction*, HISTORY CHANNEL (Apr. 15, 2019), <https://www.history.com/topics/reconstruction/ku-klux-klan> [<https://perma.cc/V7EY-Y4T2>].

²⁷ Thad Morgan, *How an Ex-KKK Member Made His Way Onto the U.S. Supreme Court*, HISTORY CHANNEL (Oct. 28, 2018), <https://www.history.com/news/kkk-supreme-court-hugo-black-fdr> [<https://perma.cc/7BF6-PK8W>].

²⁸ Jack Bernhardt, *Why Lyndon Johnson, a Truly Awful man, Is My Political Hero*, GUARDIAN (Jan. 22, 2018), <https://www.theguardian.com/commentisfree/2018/jan/22/lyndon-johnson-anniversary-death-awful-man-my-political-hero> [<https://perma.cc/E3XG-3DHN>]; Becky Little, *Richard Nixon's Wife Alleged That He Hit Her, Says Memoir*, HISTORY CHANNEL (Aug. 31, 2018), <https://www.history.com/news/pat-nixon-abuse-allegations-richard-nixon-seymour-hersh-memoir> [<https://perma.cc/YB3G-3HD8>].

²⁹ Nadia Khomani, *Donald's Misogyny Problem: How Trump Has Repeatedly Targeted Women*, GUARDIAN, (Oct. 8, 2016), <https://www.theguardian.com/us-news/2016/oct/08/trumps-misogyny-problem-how-donald-has-repeatedly-targeted-women> [<https://perma.cc/446L-C4FE>].

³⁰ Paul Waldman, *Donald Trump Is Running the Most Explicitly Racist Campaign since 1968*, THE WEEK (Nov. 25, 2015), <https://theweek.com/articles/590711/donald-trump-running-most-explicitly-racist-campaign-since-1968> [<https://perma.cc/K4EN-2F6F>].

³¹ Greg Sargent, *Trump Returns to His Old Standbys: Xenophobia, Hate, Lies, and Yes, Mass Deportations*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/blogs/plum-line/wp/2016/09/01/trump-returns-to-his-old-standbys-xenophobia-hate-lies-and-yes-mass-deportations/?utm_term=.301d1bac2a09 [<https://perma.cc/NG6Q-GYUD>].

³² "The term extreme right is used to describe right-wing political, social and religious movements that exist outside of and are more radical than mainstream conservatism." *Extreme Right / Radical Right / Far Right*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/extreme-right-radical-right-far-right> [<https://perma.cc/5CAF-ALZL>] (last visited Aug. 7, 2019) (internal quotation marks omitted).

³³ Tom Jacobs, *Research Finds That Racism, Sexism, and Status Fears Drove Trump Voters*, PACIFIC STANDARD (Apr. 24, 2018), <https://psmag.com/news/research-finds-that-racism-sexism-and-status-fears-drove-trump-voters> [<https://perma.cc/55LJ-VHV3>].

country.”³⁴ One-in-ten Americans believe that the country has “gone too far” to bring about gender equality;³⁵ nearly 40% believe that women should be forced to carry pregnancies to term against their will in at least some cases.³⁶ Less than half of Americans believe that having committed sexual assault should disqualify a person from becoming a Supreme Court Justice.³⁷ Racist and sexist views are openly and routinely articulated by public officials, broadcast by traditional and social media outlets, and invoked in outbreaks of physical violence against women and minorities.³⁸ The Supreme Court, the final arbiter of who and what the First Amendment protects, was composed entirely of white men until 1967 and entirely of men until 1981; of the 113 Supreme Court Justices that have served in its 228-year history, all but six have been white men. Of the roughly 500 First Amendment freedom of expression cases the Supreme Court has heard, 89% were brought by men,³⁹ and 93% were litigated by men.⁴⁰ Of the top twenty most-cited constitutional law scholars from 2013 to 2017, nineteen are male.

Simply put, free speech in the United States has never truly been about “freedom for the thought we hate,” or protecting the speech of the vulnerable. Free speech doctrine and practice has instead been dominated by the interests of powerful groups, even when their speech causes injury rather than mere offense.

³⁴ *New Poll: Some Americans Express Troubling Racial Attitudes Even as Majority Oppose White Supremacists*, U. VA. CTR. FOR POLITICS (Sept. 14, 2017), <http://www.centerforpolitics.org/crystalball/articles/new-poll-some-americans-express-troubling-racial-attitudes-even-as-majority-oppose-white-supremacists/> [https://perma.cc/RXQ9-YBJE].

³⁵ Juliana Menasce Horowitz, Kim Parker & Renee Stepler, *Wide Partisan Gaps in U.S. Over How Far the Country Has Come on Gender Equality*, PEW RESEARCH CTR.: SOCIAL & DEMOGRAPHIC TRENDS (Oct. 18, 2017), <http://www.pewsocialtrends.org/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality/> [https://perma.cc/6UFA-LLND].

³⁶ *Public Opinion on Abortion*, PEW RESEARCH CTR.: RELIGION & PUBLIC LIFE (Oct. 15, 2018), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/> [https://perma.cc/27EE-VXM6].

³⁷ A majority of Republicans—55%—felt that it should not. Tim Marcin, *Sexual Assault Should Not Disqualify Kavanaugh if Proven, Majority of Republicans Believe: Poll*, NEWSWEEK (Sept. 27, 2018), <https://www.newsweek.com/sexual-assault-should-not-disqualify-kavanaugh-pr-oven-majority-republicans-1141877> [https://perma.cc/WG7V-TVMD].

³⁸ Max Boot, *Fox News and the Rest of the Right-Wing Media Can't Escape Responsibility*, WASH. POST (Oct. 28, 2018), https://www.washingtonpost.com/opinions/ask-the-questions-about-right-wing-terrorists-that-we-ask-about-islamist-militants/2018/10/28/64403b32-daec-11e8-b3f0-62607289efee_story.html?utm_term=.2b7ffcdae5cc [https://perma.cc/TAH4-DYMQ].

³⁹ Research compiled from Westlaw searches, finding 515 cases involving First Amendment freedom of expression, of which 59 were brought by women.

⁴⁰ Ronald K. L. Collins, *FAN 199 (First Amendment News) SPECIAL ISSUE: 38 Women Who Argued First Amendment Free Expression Cases in the Supreme Court: 1880 -2018*, CONCURRING OPINIONS (Aug. 7, 2018), <https://concurringopinions.com/archives/2018/08/fan-199-first-amendment-news-special-issue-38-women-who-argued-first-amendment-free-expression-cases-in-the-supreme-court-1880-2018.html> [https://perma.cc/7UBX-2WHH].

II. WITCH HUNTS

If a commitment to free speech truly entails, as the ACLU describes it, protecting the speech of “the people whose opinions are the most controversial or extreme . . . [whose] rights are most often threatened,” then it is women’s speech that should be the most protected. Women’s speech, particularly when it challenges the power and authority of men, has been prohibited, regulated, and punished from ancient times to the present.

A. A Brief History of Silencing Women

In a 2015 article in the *Telegraph*, historian Amanda Foreman writes,

[T]he silencing of women is as old as civilization itself. Two thousand years before Homer labeled speech as “the business of men” and Sophocles wrote that “silence is a woman’s garment,” the first laws to have come down to us included a speech code for women. The people responsible for these laws were the Sumerians of Mesopotamia, in now modern Iraq.⁴¹

Foreman notes that Sumerian law codes dating back four thousand years include a specific provision regarding women’s speech: “a woman who speaks out of turn to a man will have her teeth smashed by a burnt brick.”⁴² This ancient legal restriction on women’s speech confirms, concludes Foreman, that “freedom of speech is the ultimate power struggle.”⁴³

Historian Mary Beard concurs, observing that one of the opening scenes of the *Odyssey*, the foundational text of Western literature written almost 3000 years ago, is of young Telemachus telling his mother Penelope to “go back up into your quarters, and take up your own work, the loom and the distaff . . . speech will be the business of men, all men, and of me most of all; for mine is the power in this household.”⁴⁴ Beard notes that “Telemachus’ outburst was just the first case in a long line of largely successful attempts stretching throughout Greek and Roman

⁴¹ Amanda Foreman, *Why I’m Shouting about the 4,000 Year Campaign to Gag Women in Our History Books*, TELEGRAPH (Sept. 1, 2015), <https://www.telegraph.co.uk/women/womens-life/11837025/BBC-documentary-Amanda-Foreman-on-silent-womens-history.html> [<https://perma.cc/VH2Z-MT8Y>].

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Mary Beard, ‘Mansplaining’ and Silencing of Women a Problem That Goes Back to Ancient Times, SYDNEY MORNING HERALD (Jan. 27, 2018), <https://www.smh.com.au/opinion/mansplaining-and-silencing-of-women-a-problem-that-goes-back-to-ancient-times-20180123-h0n0uj.html> [<https://perma.cc/ZF6V-WFMW>].

antiquity, not only to exclude women from public speech but also to parade that exclusion.”⁴⁵ While women were permitted to speak in limited circumstances, such as in defense of their families, a woman was generally expected to “as modestly guard against exposing her voice to outsiders as she would guard against stripping off her clothes.”⁴⁶ Examples of silencing women are particularly abundant in Greek mythology, from Tereus cutting out Philomela’s tongue after he rapes her, to Apollo cursing Cassandra so that her truthful prophecies will never be believed after she rejects his sexual advances.⁴⁷

Roberta Magnani details the longstanding prohibition and punishment of women’s speech in the Christian tradition, noting St. Paul’s admonition that women must not be permitted to teach “because of their inherent sinfulness and moral corruption:” in his words, “[l]et the woman learn in silence, with all subjection. But I suffer not a woman to teach, nor to use authority over the man: but to be in silence. For Adam was first formed; then Eve.”⁴⁸ Magnani suggests that men’s need to silence women stemmed from their desire to reduce women to “disposable commodities, a mirror reflecting back the predator’s own sense of dominance and superiority.”⁴⁹ She recounts the grisly fates of the virgin martyrs who resisted sexual assault, including the story of St. Agnes, who was stabbed in the throat and then thrown into a fire for rejecting the sexual advances of a Roman official’s son; St. Petronilla, tortured on the rack for refusing to marry the pagan king Flaccus; and St. Agatha, whose breasts were cut off after she resisted a Roman prefect’s sexual overtures, concluding, “this brutality was done to silence them. Much like they are now, women’s voices were seen as troubling.”⁵⁰

In Blackstone’s *Commentaries on the Laws of England*, the offense of being a “common scold” (*communis rixatrix*) was punishable by being “placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool, which in the Saxon language signifies the scolding stool; though now it is frequently corrupted into *ducking* stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment.”⁵¹ The offense,

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Mary Anne Franks, *A Thousand and One Stories: Mythology and the #MeToo Movement IN #METOO AND THE POLITICS OF SOCIAL CHANGE* 85, 85–95 (Bianca Fileborn & Rachel Loney-Howes eds., 2019).

⁴⁸ Roberta Magnani, *Powerful Men Have Tried to Silence Abused Women since Medieval Times*, THE CONVERSATION (Oct. 27, 2017), <https://theconversation.com/powerful-men-have-tried-to-silence-abused-women-since-medieval-times-86117> [<https://perma.cc/GHT8-8PUV>].

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 13.5.8 111 (Wilfrid Prest, ed.) (2016).

which involves arguing noisily with one's neighbors, was understood to be almost exclusively committed by women.⁵²

And then, of course, there were the witch hunts. Author Stacy Schiff explains that while "witches and wizards extend as far back as recorded history," the figure conjured up by the Salem trials married general superstition with specific fear of women.

The witch as Salem conceived her materialized in the thirteenth century, when sorcery and heresy moved closer together. She came into her own with the Inquisition, as a popular myth yielded to a popular madness. The western Alps introduced her to lurid orgies. Germany launched her into the air. As the magician molted into the witch, she also became predominately female, inherently more wicked and more susceptible to satanic overtures. An influential fifteenth-century text compressed a shelf of classical sources to make its point: "When a woman thinks alone, she thinks evil." As is often the case with questions of women and power, elucidations here verged on the paranormal. Though weak willed, women could emerge as dangerously, insatiably commanding.⁵³

Women were considered so dangerous, in fact, that they could be hanged for offenses such as "having more wit than their neighbors" as one "witch" was in Massachusetts in 1656.⁵⁴ What are now known as the "Salem Witch Trials" began in Salem, Massachusetts, some decades later in 1692.⁵⁵ Events were set in motion by the strange behavior of several school-aged girls, who claimed that their fits of screaming and contortions were being caused by forces pinching and attacking them with pins. Serious investigations began after a sermon by the Reverend Deodat Lawson was interrupted by the girls' outbursts.⁵⁶

The first woman to be accused of causing the girls' afflictions was a South American Indian slave from the West Indies named Tituba. Tituba fell under suspicion because of her tendency to regale the girls

⁵² *Id.* ("our law-latin confines it to the feminine gender"); See also SANDY BARDSLEY, VENOMOUS TONGUES: SPEECH AND GENDER IN LATE MEDIEVAL ENGLAND 109–10, 122–25 (2006).

⁵³ Stacy Schiff, *The Witches of Salem*, NEW YORKER (Sept. 7, 2015), <https://www.newyorker.com/magazine/2015/09/07/the-witches-of-salem> [<https://perma.cc/2ECG-WJTG>].

⁵⁴ *Id.*

⁵⁵ Jess Blumber, *A Brief History of the Salem Witch Trials*, SMITHSONIAN (Oct. 23, 2007), <https://www.smithsonianmag.com/history/a-brief-history-of-the-salem-witch-trials-175162489/> [<https://perma.cc/ZM4W-ZQFA>].

⁵⁶ DEODAT LAWSON, *A BRIEF AND TRUE NARRATIVE OF SOME REMARKABLE PASSAGES RELATING TO SUNDRY PERSONS AFFLICTED BY WITCHCRAFT, AT SALEM VILLAGE: WHICH HAPPENED FROM THE NINETEENTH OF MARCH, TO THE FIFTH OF APRIL, 1692* 3 (1692).

with fantastical and often sexual stories from the *Malleus Maleficarum*.⁵⁷ Accusations against two other women soon followed: Sarah Good, who was homeless and despised by the community for begging for food and shelter; and Sarah Osborne, who had engendered suspicion among her neighbors by only rarely attending church and having intimate relations with a servant.⁵⁸ The list of the accused soon expanded beyond the community's outcasts, however, and the upstanding character of some of the alleged witches only served to fan the flames of the hysteria: if seemingly God-fearing, churchgoing pillars of the community could be revealed to be witches, then truly anyone could be.

A pair of father and son ministers, Increase and Cotton Mather, were influential figures in the progression of the witch trials. The two disagreed initially about what constituted sufficient evidence for determining the presence of witchcraft. Increase Mather maintained "that a 'free and voluntary confession' remained the gold standard . . . 'I would rather . . . judge a witch to be an honest woman than judge an honest woman as a witch.'"⁵⁹ His son Cotton "worried less about condemning an innocent than about allowing a witch to walk free,"⁶⁰ but as the list of the condemned and accused continued to grow, he eventually came around to his father's view. Cotton Mather submitted a letter requesting the court to no longer allow "spectral evidence" (i.e., "testimony about dreams and visions"),⁶¹ a request that went largely ignored until the intervention of Governor Phipps.

On October 29, 1692, Governor Phipps dissolved the court that had been set up to prosecute the witchcraft accusations, released many of those accused, and prohibited further arrests. Phipps was apparently responding both to Mather's request and "his own wife being questioned for witchcraft."⁶² He set up a new court to handle the witchcraft prosecutions that barred the use of spectral evidence and eventually pardoned many of the individuals accused of witchcraft still living in 1693. By this time, however, "the damage had been done": nineteen people were hanged on Gallows Hill, a seventy-one-year-old man was pressed to death with heavy stones, several people died in jail and nearly 200 people, overall, had been accused of practicing "the Devil's magic." In

⁵⁷ See Matt Markgraf & Kala Dunn, *Datebook: March 1 - Salem Witch Trials Begin 320 Years Ago*, WKMS (Mar. 2, 2012), <https://www.wkms.org/post/datebook-march-1-salem-witch-trials-begin-320-years-ago#stream/0> [<https://perma.cc/5G4U-BVCM>].

⁵⁸ BRIAN ALEXANDER PAVLAC, *WITCH HUNTS IN THE WESTERN WORLD: PERSECUTION AND PUNISHMENT FROM THE INQUISITION THROUGH THE SALEM TRIALS* 139 (2009).

⁵⁹ Schiff, *supra* note 53; see also, Blumber, *supra* note 55 ("It were better that ten suspected witches should escape than one innocent person be condemned.").

⁶⁰ Schiff, *supra* note 53.

⁶¹ Blumber, *supra* note 55.

⁶² *Id.*

Salem and elsewhere in New England, more than two-thirds of the individuals who were accused and found guilty of witchcraft were women.⁶³

B. Justice Brandeis's "Curious Concurrence" in *Whitney v. California*

When Justice Brandeis invoked the fear of women and the burning of witches in *Whitney*, he was perhaps not aware of just how apt the reference truly was: for witch hunts reveal something extremely powerful about speech, namely, the intense fear men have of women's speech. Why do men fear witches? Because *they can wreak havoc through mere words*: their incantations make milk spoil, crops fail, children corrupt, men impotent. Of course, women's words cannot actually do any of these things. The speech of women was blamed for consequences that were either a product of natural forces or, in many cases, of men's own actions. The vilification of women's speech was not just an attempt at suppression, but of inversion: to portray men as helpless victims of women, as though men did not maintain a monopoly on legal, political, and cultural power. Throughout Western history, women have been denied the right to own property, the right to vote, the right to enter contracts, the right to be educated, the right to hold public office, the right to speak in public, the right of independent legal status from their spouses, the right to serve on juries, the right to have their testimony be given the same weight as men's, and the right to refuse consent to sexual relations. All of these denials have reduced women's ability to speak to a paltry shadow of men's right to speech. And yet that shadow has been more feared than men's full-throated dominance of every form of speech.

Whitney is one of the rare Supreme Court cases involving a female petitioner. Fifty-two-year-old Anita Whitney, a member of the Communist Labor Party of California was charged with aiding and abetting criminal syndicalism after she gave a speech to the Women's Civic Center of Oakland on "the economic and political disenfranchisement of African-Americans and the nation's abhorrent practices of lynching."⁶⁴ Her speech was titled "The Negro Problem in America," and as Ronald K. Collins and David M. Skover detail, it included "shocking statistics on and descriptions of the abhorrent practice of lynching."⁶⁵ Whitney concluded her speech with an appeal to patriotism:

⁶³ ELIZABETH REIS, DAMNED WOMEN: SINNERS AND WITCHES IN PURITAN NEW ENGLAND xvi (1997) (noting that "approximately 78 percent" of accused witches were women).

⁶⁴ Ronald K. L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in Whitney v. California*, 2005 SUP. CT. REV. 333, 337.

⁶⁵ *Id.* at 344–45.

It is not alone for the Negro man and woman that I plead, but for the fair name of America that this terrible blot on our national escutcheon may be wiped away. . . . Let us then both work and fight to make and keep her right so that the flag that we love may truly wave "O'er the land of the free / And the home of the brave."⁶⁶

Whitney was convicted and given an indeterminate sentence of one to fourteen years. Her case generated significant public sympathy, and an "Anita Whitney Committee" was soon formed to prevail upon the governor to pardon her.⁶⁷ Whitney, however, insisted that she had "done nothing to be pardoned for."⁶⁸ Moreover, she told a reporter, "If the Governor is disposed to pardon anyone, let him liberate the poor men who are now imprisoned for violation of this same law and whose guilt may be less than mine."⁶⁹

The press response to Whitney's conviction was divided. While one newspaper "censured her for betraying her social and cultural status to consort with outlaws,"⁷⁰ the *San Francisco Call* situated her sentence within the history of repressive attempts to throttle dissent: "The colonists were wrong when they burned witches; the people were wrong when they spat upon the abolitionists. And the people of California may be equally wrong when they send Anita Whitney to prison."⁷¹

In 1927, two years before the *Schwimmer* case, the Supreme Court ruled against Anita Whitney and upheld her conviction. Perhaps picking up the thread that the *San Francisco Call* had dropped, Justice Brandeis penned the famous passage, "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."⁷² Justice Brandeis's opinion reads so much like a defense of Whitney that it is easy to overlook the fact that he concurred, not dissented, in the Court's judgment. Indeed, more than one free speech advocate has erroneously referred to Justice Brandeis's concurrence in *Whitney* as a dissent, including Anthony Lewis in his influential book *Freedom for the Thought That We Hate: A Biography of the First Amendment*⁷³ and Nadine Strossen in a 2007 law review article

⁶⁶ *Id.* at 345.

⁶⁷ *Id.* at 363.

⁶⁸ *Id.* at 377.

⁶⁹ *Id.* at 363.

⁷⁰ *Id.* at 349.

⁷¹ *Id.*

⁷² *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

⁷³ See LEWIS, *supra* note 6, at 36–37 ("Brandeis's opinion did not then represent the law, but it helped Anita Whitney. A month after the Supreme Court turned down her appeal, the governor

warning that the United States might again be “fearing witches and burning women” in the wake of the terror attacks of 9/11.⁷⁴

Justice Brandeis’s opinion in *Whitney* was indeed a “curious concurrence,” as Collins and Skover call it,⁷⁵ in that Brandeis simultaneously championed the right to engage in injurious speech, while agreeing that Whitney should be punished for hers. It is also telling that the gulf between the theoretical commitment to protecting injurious speech and its practical application should be so vividly exposed in a case about a woman’s words—words that directly challenged white male supremacy. It is almost as though Justice Brandeis invoked the idea of the “witch hunt,” a historical phenomenon that targeted women’s speech in particular, only to strip it of its specific lessons of gender and power.

III. #METOO & THE INVERSION OF THE WITCH HUNT

While Justice Brandeis’s rhetorical invocation of the witch hunt may have failed to fully reckon with its gender and power dynamics, this pales in comparison to the grotesque repurposing of the concept in modern times to portray women’s very speech as censorship. This is the gist of the critique of the #MeToo movement. The labeling of the #MeToo movement as a “witch hunt” perversely appropriates a phrase used to describe men’s actual persecution of women and applies it to the imaginary persecution of men by women. This contemporary usage of the term does not merely erase the gendered history of violence, but inverts it.

The #MeToo movement is many things. It is an attempt to grapple with the reality of men’s systematic sexual abuse of women, as well as other forms of sexual abuse. It is an outpouring of previously silenced or disregarded personal stories. It is a political and cultural framework for understanding the relationship between sexual objectification and gender inequality. But at its most fundamental, it is speech by women that frightens men. As such, it is exactly the kind of offensive and injurious speech by a vulnerable group that should earn it the attention and protection of free speech defenders. And yet #MeToo is not only *not* generally framed as a free speech issue, but it is instead, in true Orwellian fashion, characterized as censorship.

of California, C. C. Young, pardoned her, quoting the Brandeis dissent at length in his pardon message”).

⁷⁴ Nadine Strossen, *Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?*, 31 NOVA L. REV. 279, 311 (2007) (“This anti-immigrant tradition also infused the World War I era ‘Red Scare’ atmosphere that fueled the law under which Anita Whitney was convicted, leading to Justice Brandeis’s eloquent dissent”).

⁷⁵ Collins, *supra* note 64, at 335.

Before “Me Too” went viral as #MeToo, it was a phrase used by Tarana Burke, an American social activist and community organizer.⁷⁶ Around 2006, Burke began using the phrase on the social network MySpace as part of a campaign to promote “empowerment through empathy” among victims of sexual abuse, especially women of color within underprivileged communities.⁷⁷ Following the disclosure of multiple sexual abuse allegations against Hollywood producer Harvey Weinstein in October 2017, the actress Alyssa Milano encouraged Twitter users to reply with the hashtag #MeToo if they had experienced sexual harassment or abuse. Within a few hours of her original post, the phrase had been used more than 200,000 times, and tweeted more than half a million times by the following day. On Facebook, the hashtag had been used more than 4.7 million times in over 12 million posts during the first 24 hours. Thousands of individuals, mostly women, shared #MeToo stories, including many celebrities.

The #MeToo movement is notable because it emerged in spite of, or because of, the longstanding censorship of women’s speech described briefly in the previous section. The movement emerged on the heels of months-long media attention to far-right provocateurs such as Milo Yiannopoulos and Richard Spencer, whose racist and sexist tirades against women, minorities, LGBTQ individuals, and immigrants were fiercely defended as free speech not only by their ideological supporters, but by many civil libertarians and liberals.⁷⁸

Yet even as Yiannopoulos and Spencer were being hailed as free speech martyrs, the women speaking out as part of the #MeToo movement quickly encountered backlash from influential individuals from across the political spectrum.⁷⁹ The #MeToo movement has been criticized for “going too far,” for not being subtle or careful enough, for punishing innocent behavior; in short, for being harmful to men.⁸⁰ This is

⁷⁶ Leah Fessler, *Tarana Burke, Creator of Me Too, Believes You Don’t Have to Sacrifice Everything for a Cause*, QUARTZ (Feb. 6, 2018), <https://qz.com/work/1193569/me-too-movement-creator-tarana-burke-says-you-dont-have-to-sacrifice-everything-for-a-cause/> [https://perma.cc/2N3Q-DF2M].

⁷⁷ Abby Ohlheiser, *The Woman behind ‘Me Too’ Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.22b83af69ff6 [https://perma.cc/RUY9-8RG5].

⁷⁸ See Katie Herzog, *Counterpoint: Yes, There’s a Free Speech Crisis and No, I Won’t Shut Up About It*, THE STRANGER (Mar 15, 2018), <https://www.thestranger.com/slog/2018/03/15/25912839/counterpoint-yes-theres-a-free-speech-crisis-and-no-i-wont-shut-up-about-it> [https://perma.cc/HC M6-LPS8].

⁷⁹ See Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash> [https://perma.cc/XBH7-78Y8].

⁸⁰ See, e.g., Agence France-Presse, *Catherine Deneuve Says Men Should Be ‘Free to Hit on’ Women*, GUARDIAN (Jan. 9, 2018), <https://www.theguardian.com/film/2018/jan/09/catherine-deneuve>

despite the fact that the #MeToo movement, unlike the alt-right movement, has not inspired or advocated violence. For that matter, many within the #MeToo movement have refrained from even specifying precisely what consequences should obtain for egregious conduct. Most #MeToo stories have neither been intended to, nor have in fact had legal repercussions; only a handful have resulted in reputational or financial consequences for the alleged perpetrators, all of which may prove to be short-lived. For better or worse, the #MeToo movement has, to date, been almost exclusively pure speech, not action. And yet it is already too much for the many high-profile individuals who have referred to #MeToo as a “witch hunt.”⁸¹

The first notable characterization of the #MeToo movement as a witch hunt came from the director Woody Allen, who told the BBC in October 2017 that while he was glad that the allegations against Weinstein had led to criminal investigations, “You also don’t want it to lead to a witch hunt atmosphere, a Salem atmosphere, where every guy in an office who winks at a woman is suddenly having to call a lawyer to defend himself. That’s not right either.”⁸² In January 2018, the actor Liam Neeson similarly expressed support for the #MeToo movement but stated that it has created “a bit of a witch hunt.”⁸³ Neeson went on to say, “There’s some people, famous people, being suddenly accused of touching some girl’s knee or something and suddenly they’re being dropped from their program.”⁸⁴ This comment was apparently referring to Minnesota Public Radio personality Garrison Keillor, whom MPR

ve-men-should-be-free-hit-on-women-harvey-weinstein-scandal [https://perma.cc/38KP-ZQPT]; Laura Kipnis, *Has #MeToo Gone Too Far, or Not Far Enough?*, GUARDIAN (Jan. 13, 2018), https://www.theguardian.com/commentisfree/2018/jan/13/has-me-too-catherine-deneuve-laura-kipnis [https://perma.cc/5Y5X-CYUC]; Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N. Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-me-too.html [https://perma.cc/DM6S-YLRC].

⁸¹ These include the film director Woody Allen, actress Catherine Deneuve, director Michael Haneke, and actor Liam Neeson. See discussion *infra*.

⁸² Emma Stefansky, *Woody Allen Warns of “Witch Hunt Atmosphere” Following Weinstein Scandal*, VANITY FAIR (Oct. 15, 2017), https://www.vanityfair.com/hollywood/2017/10/woody-allen-harvey-weinstein-witch-hunt-atmosphere [https://perma.cc/HM6X-RXNG] (“Allen himself has been accused of abusing his daughter, Ronan [sic—Allen’s daughter’s name is Dylan] Farrow, and the BBC notes that Weinstein has been credited with ‘reviving Allen’s career’ after that scandal broke in the 1990s.”).

⁸³ *Liam Neeson: “Bit of a Witch Hunt” Over Sex Allegations*, ASSOCIATED PRESS (Jan. 13, 2018), https://apnews.com/4ac64c7334db423f842692587c011974 [https://perma.cc/6EQF-WLB9]. Actress Catherine Deneuve joined in signing a letter by one hundred women that expressed similar sentiments. Paul Pradier and Lesley Messer, *Catherine Deneuve: #MeToo Movement Is a ‘Witch Hunt’ That Has ‘Punished’ Men*, ABC NEWS (Jan. 9, 2018), https://abcnews.go.com/Entertainment/catherine-deneuve-slams-metoo-movement-witch-hunt-punished/story?id=52243767 [https://perma.cc/FW3M-G3E6].

⁸⁴ *Id.*

says it fired after receiving multiple allegations over an extended period. Neeson also dismissed allegations against Dustin Hoffman, including that he “touched some girls’ breasts” as “childhood stuff.”⁸⁵

In February 2018, Austrian filmmaker Michael Haneke, two-time winner of the Cannes Palme d’Or, bemoaned

This new puritanism coloured by a hatred of men, arriving on the heels of the #MeToo movement . . . this hysterical pre-judgment which is spreading now, I find absolutely disgusting . . . This has nothing to do with the fact that every sexual assault and all violence—whether against women or men—should be condemned and punished. But the witch hunt should be left in the Middle Ages.⁸⁶

The import of the label “witch hunt” is clear, though often not directly expressed: women’s speech is so dangerous that it should not be considered merely speech, but violence, and as such must be stopped. This backlash against #MeToo has not simply been on the level of rhetoric. Women who have accused men of sexual misconduct, or provided channels of communications to disseminate warnings about predatory men, face threats, harassment, and defamation lawsuits, all aimed at silencing their speech.⁸⁷

In Dr. Christine Blasey Ford’s account of how now-Supreme Court Justice Brett Kavanaugh had attempted to rape her at a party when the two were both teenagers, one detail in particular stood out: her description of Kavanaugh’s hand over her mouth. Her testimony so many years later, in an open Senate hearing on September 27, 2018, seemed like a long-delayed breaking away from that silencing grip. But Dr. Ford faced many more attempts at silencing before she stood before the Senate on that day. After she went public as the source of the allegations that had been anonymously reported by the *Washington Post*, Dr. Ford’s private information was posted online, and she received death

⁸⁵ Roisin O’Connor, *Liam Neeson Calls Allegations against Dustin Hoffman ‘Childhood Stuff’*, INDEPENDENT (Jan. 13, 2018), <https://www.independent.co.uk/arts-entertainment/liam-neeson-hollywood-sex-scandal-dustin-hoffman-childhood-stuff-weinstein-spacey-behaviour-late-a8157411.html> [<https://perma.cc/4XAU-JLRA>].

⁸⁶ Gwilym Mumford, *Michael Haneke: #MeToo Has Led to a Witch Hunt ‘Coloured by a Hatred of Men’*, GUARDIAN (Feb. 12, 2018), <https://www.theguardian.com/film/2018/feb/12/michael-haneke-metoo-witch-hunt-coloured-hatred-men> [<https://perma.cc/3JRT-UGM4>].

⁸⁷ See, e.g., Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 5, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [<https://perma.cc/3BLX-F55E>]; Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts> [<https://perma.cc/X8DV-86DZ>].

threats that forced her and her husband and sons to leave their home.⁸⁸ In addition, someone hacked her email account and sent out messages recanting the allegations.⁸⁹ Her credibility and character were impugned by multiple Republican members of Congress and by President Donald Trump.⁹⁰ Her lawyers stated that Dr. Ford had made the decision to testify “[d]espite actual threats to her safety and her life.”⁹¹

Olympic medalist Jamie Dantzscher was the first victim to report being sexually assaulted by USA Gymnastics team doctor Larry Nassar. After a newspaper article disclosed details of her anonymous 2016 lawsuit against Nassar and USA Gymnastics without identifying her, Dantzscher was outed by coaches and friends on social media.⁹² Attorneys for USA Gymnastics called her former boyfriends, making inquiries about her sexual past. Dantzscher became worried about her safety and “wondered if people who wanted to protect Nassar were ‘going to send somebody after me.’”⁹³

When Moira Donegan created the “Shitty Media Men List,” a crowdsourced Google spreadsheet that allowed women to anonymously communicate with each other about predatory behavior by men in the media industry in October 2017, she had no idea that the list would go viral within hours.⁹⁴ When Donegan realized this, and learned that BuzzFeed was planning to publish an article about the list, she took the spreadsheet down. The list had been captured in screen shots before she did so, however, and these shots were posted to various online sites. One of the men whose name was added to the list, Stephen Elliott, the founder and former editor-in-chief of the literary website “the Rumpus,”

⁸⁸ Jessica Contrera et al., *Kavanaugh Accuser Christine Blasey Ford Moved 3,000 Miles to Reinvent Her Life. It Wasn't Far Enough*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/local/christine-blasey-ford-wanted-to-flee-the-us-to-avoid-brett-kavanaugh-now-she-may-testify-against-him/2018/09/22/db942340-bdb1-11e8-8792-78719177250f_story.html?utm_term=.f68b19835d29 [https://perma.cc/5Z62-9YKD].

⁸⁹ Bryan Logan, *'My Greatest Fears Have Been Realized': Christine Blasey Ford Reveals 'Constant Harassment and Death Threats' Have Turned Her Family's Lives Upside-Down*, BUS. INSIDER (Sept. 26, 2018), <https://www.businessinsider.com/christine-blasey-ford-testimony-threats-brett-kavanaugh-sexual-assault-2018-9> [https://perma.cc/6EWE-TBNH].

⁹⁰ Peter Baker, *In Risky Shift, Trump and G.O.P. Directly Assail Christine Blasey Ford*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/us/politics/blasey-ford-trump-republicans.html> [https://perma.cc/ZU6F-V9YW].

⁹¹ Oliver Laughland, *Brett Kavanaugh Accuser Will Testify before Congress on Thursday*, GUARDIAN (Sept. 23, 2018), <https://www.theguardian.com/us-news/2018/sep/23/brett-kavanaugh-accuser-set-to-testify-before-congress> [https://perma.cc/H93Z-4ACZ].

⁹² Ashley May, *Sexual Assault Survivors Risk Lives, Reputations to Stand Up To Powerful Men*, USA TODAY (Sept. 21, 2018), <https://www.usatoday.com/story/news/nation-now/2018/09/21/christine-blasey-ford-kavanaugh-death-threats-reporting-sexual-assault/1355798002/> [https://perma.cc/65YF-Z5TF].

⁹³ *Id.*

⁹⁴ Moira Donegan, *I Started the Media Men List-My name is Moira Donegan*, THE CUT (Jan. 10, 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [https://perma.cc/6SAP-T3ZW].

sued Donegan for \$1.5 million in damages for what he characterized as malicious actions “taken solely to damage [his] reputation and career.”⁹⁵ Elliot intends to subpoena Google to determine the identities of all individuals who submitted his name to the list and has stated his plans to sue them, as well as Donegan.⁹⁶

The stories of Ford, Danztscher, and Donegan represent only three examples of the physical, professional, financial, psychological, and other risks women face when they speak out about sexual assault, especially against powerful and influential men. Their speech is treated as so frightening and offensive as to inspire threats, harassment, and litigation, all aimed at silencing them. And yet they are not the names associated with free speech martyrdom in popular discourse, or the figures championed as bravely resisting censorship, or cited as examples of mavericks whose “tell-it-like-it-is” attitudes inspire respect even in their detractors. Instead, these women are vilified as censors, witch hunters, and a lynch mob.

The figures who do get celebrated as free speech martyrs are very often high-profile “alt-right” provocateurs. This is despite the fact that, unlike the women of the #MeToo movement, these figures say very little that can be characterized as brave; have been known to engage in direct and personal attacks on vulnerable individuals; and attract followers who exhibit violent tendencies. Take, for example, Milo Yiannopoulos. Yiannopoulos is a senior editor for the far-right publication *Breitbart* and an enthusiastic Donald Trump supporter who is notorious for racist, misogynist, homophobic (despite being gay himself), and Islamophobic diatribes.⁹⁷ Yiannopoulos helped facilitate an online harassment campaign against Leslie Jones, an African American actress who starred in the 2016 reboot of *Ghostbusters*, which temporarily drove the actress off Twitter. During an appearance at the University of Wisconsin-Milwaukee, Yiannopoulos named and ridiculed a transgender student by name.⁹⁸ During a protest of Yiannopoulos’s speech at the University of Washington, a Yiannopoulos supporter shot a demonstrator in the stomach, critically wounding him.⁹⁹ Or consider Richard Spencer,

⁹⁵ Christina Cauterucci, *Does Stephen Elliott’s Lawsuit Against Moira Donegan Have a Chance to Succeed?*, SLATE (Oct. 12, 2018), <https://slate.com/news-and-politics/2018/10/stephen-elliott-moira-donegan-lawsuit-analysis.html> [<https://perma.cc/6YMF-QM9Z>].

⁹⁶ *Id.*

⁹⁷ Lloyd Grove, *How Breitbart Fell Back in Love With Alt-Right Troll Milo Yiannopolous*, DAILY BEAST (July 13, 2017), <https://www.thedailybeast.com/how-breitbart-fell-back-in-love-with-alt-right-troll-milo-yiannopolous> [<https://perma.cc/99ZH-URLY>].

⁹⁸ Claire Landsbaum, *Alt-Right Troll Milo Yiannopoulos Uses Campus Visit to Openly Mock a Transgender Student*, THE CUT (Dec. 15, 2016), <https://www.thecut.com/2016/12/milo-yiannopoulos-harassed-a-trans-student-at-uw-milwaukee.html> [<https://perma.cc/7ZRD-5GXQ>].

⁹⁹ See Mike Carter & Steve Miletich, *Couple Charged with Assault in Shooting, Melee during UW Speech by Milo Yiannopoulos*, SEATTLE TIMES (April 24, 2017), <https://www.seattletimes.com/>

who was an organizer of the 2017 Unite the Right rally in Charlottesville, Virginia, which left a female counter-protester dead. Following a speech Spencer gave at the University of Florida in October 2017, three men allegedly made Nazi salutes, chanted slogans involving Hitler, and fired at a group of protesters, narrowly missing them.¹⁰⁰

Both Yiannopoulos and Spencer received an extraordinary amount of news coverage and attention from free speech advocates as their scheduled appearances on college campuses were rocked by protests. According to the civil libertarian narrative, their speech should be protected precisely because of, not in spite of, the serious offense it causes, because that is what the First Amendment is intended to protect.¹⁰¹ Those who attempted to protest their events were ridiculed as “snowflakes” and denounced as anti-civil liberties. Speech is, after all, only speech, not violence.¹⁰²

#MeToo allegations, on the other hand, are widely treated as violence, instead of speech. Dr. Ford’s testimony was characterized as depriving Justice Kavanaugh of his good name, and of endangering his rightful entitlement to a seat on the Supreme Court; Jamie Danzschler’s accusations against Larry Nassar were viewed as destroying his professional reputation; Stephen Elliott complained that the allegations against him within the Media Men spreadsheet “caused him to become depressed, get disinvited from multiple book readings, be defriended or blocked on social media by several people, and lose the opportunity to sell his book for film or television adaptation.”¹⁰³ While these supposed injuries pale in comparison to targeted harassment campaigns and physical violence, they have been used to justify the suppression and backlash against women who speak out about men’s sexual abuses. Even if the offenses supposedly inflicted by women’s speech were as significant as #MeToo’s detractors make them out to be, this should only serve as more reason to protect women’s speech, not suppress it.

But there has been no attempt by the ACLU or prominent civil libertarians to champion the women of the #MeToo movement as free speech heroes or to denounce the aggressive attempts to censor them. There was no similar national handwringing over the free speech crisis

seattle-news/crime/couple-charged-with-assault-in-shooting-melee-during-uw-speech-by-milo-yiannopoulos/ [https://perma.cc/J3WW-7UJ9].

¹⁰⁰ Eric Levenson, *Police: 3 Men Made Nazi Salutes, Shot at Protesters after Richard Spencer Event*, CNN (Oct. 21, 2017), <https://www.cnn.com/2017/10/20/us/richard-spencer-florida-speech-ar-rest-shooting/index.html> [https://perma.cc/3Z7Z-9VWE].

¹⁰¹ See, e.g., Nathan Kreider, *Free Speech: No Exceptions*, BEING LIBERTARIAN (July 6, 2018), <https://beinglibertarian.com/free-speech-no-exceptions/> [https://perma.cc/Q6DE-Y4MC].

¹⁰² *Id.*

¹⁰³ Cauterucci, *supra* note 95.

created by the threats, harassment, and lawsuits against women who spoke out about male sexual abuse as there was over the supposed free speech crisis on college campuses when students protested appearances by white male supremacists.

The reaction to speech supporting white male supremacy and the speech challenging it could not be more different. Speech that comports with or at least refrains from threatening white male supremacy is regarded as mere speech: it is at most offensive, and offensive speech must be given the maximum amount of breathing room possible. At the same time, speech that challenges white male supremacy is treated as not speech, but as violence that must be stamped out.

CONCLUSION

The case that led to Justice Holmes's ringing defense of "freedom for the thought we hate" was, like *Whitney*, one of the few Supreme Court free speech cases that involved a female petitioner. It was also one of the few First Amendment cases that involved a female lawyer.¹⁰⁴ Olive H. Rabe represented Rosika Schwimmer, a Hungarian-born pacifist, whose citizenship application was denied due to her stated refusal to take up arms to defend the country.¹⁰⁵ The majority held that this refusal indicated that Schwimmer was "not well bound or held by the ties of affection to any nation or government," and thus "liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization."¹⁰⁶

In dissent, Justice Holmes wrote that while Schwimmer's position "might excite popular prejudice," this was not an adequate basis for punishing it.¹⁰⁷ The principle of "freedom for the thought we hate" was inspired by an immigrant woman refusing to commit violence in the name of patriotism.

For all of Justice Brandeis's eloquence regarding fearing witches and burning women, it is perhaps Justice Holmes in *Schwimmer* who came closest to understanding what a true commitment to the principle of free speech demands: an examination of gender and power. If American commitment to free speech is ever to be more than a seductive fraud, it must grapple with the history of gender inequality and the reality of power.

¹⁰⁴ See Mary Anne Franks, *FAN 200 (First Amendment News) Mary Anne Franks, "The Free Speech Fraternity,"* CONCURRING OPINIONS (Sept. 20, 2018), <https://concurringopinions.com/archives/2018/09/fan-200-first-amendment-news-mary-anne-franks-the-free-speech-fraternity.html> [https://perma.cc/LC6P-AYNM].

¹⁰⁵ United States v. Schwimmer, 279 U.S. 644, 646–47 (1929).

¹⁰⁶ *Id.* at 652.

¹⁰⁷ *Id.* at 654.

Efficient Deterrence of Workplace Sexual Harassment

Joni Hersch[†]

ABSTRACT

Although sexual harassment imposes costs on both victims and organizations, it is also costly for organizations to reduce sexual harassment. Legislation, education, training, and litigation have all been unsuccessful in eradicating workplace sexual harassment. My proposal is to establish financial incentives of sufficient magnitude to incentivize organizations to eliminate sexual harassment. The key challenge is in monetizing the harm caused by sexual harassment. I propose a new approach that draws on my research, which calculated the risk of sexual harassment by gender, industry, and age based on charges filed with the Equal Employment Opportunity Commission. Using these risk measures, I established that workers receive a hazard pay premium for exposure to risk of sexual harassment. This premium reflects the higher pay workers need to work in a more hostile work environment and monetizes the aggregate societal evaluation of exposure to risk of an abhorred workplace behavior. Using my estimates of the pay premium, I calculate a value that I refer to as the “value of statistical harassment” (VSH). This amount is \$7.6 million, far greater than the current federal cap of \$300,000 for the largest firms. Raising the damages cap on awards to this level would provide organizations with the necessary financial incentive for efficient deterrence.

INTRODUCTION

The #MeToo movement has graphically revealed the widespread decades-long practices of unwelcome and often criminal sexual acts perpetrated by men at the top of their industries. The acts described in mainstream media go well beyond misaimed courting overtures. The treatment by these harassers has been career destroying for victims.

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Meanwhile, the harassers continued to victimize subordinates with impunity, often with tacit assent of numerous observers and colleagues who were in the position to stop their behavior.¹

Although the #MeToo movement has raised awareness of sexual harassment² and has been costly to some individual harassers that have lost jobs and suffered reputational harm, the bulk of the cost continues to be borne by victims. The continued prevalence of sexual harassment does not merely reflect the harasser's or their organization's failure to consider the consequences that may result from such behavior but rather that the expected consequences have been largely inconsequential. Low reporting, an even lower probability of a successful lawsuit, and a low federal cap on damages awards combine to create a situation in which organizations rarely suffer substantial financial consequences from tolerating workplace sexual harassment. In contrast, there are countervailing costs associated with monitoring workplace behavior and sanctioning or removing from their positions some of the most valued or highly-placed employees.

Damages awards can be used to deter risky or illegal workplace behavior in an efficient manner. Currently, however, damages awards in employment discrimination cases are not structured to provide a deterrence function. A fundamental problem can be traced to the federal cap on damages awards in employment discrimination cases, which, based on my analysis reported in this Article, is currently set at a level far short of that required for efficient deterrence.³

To address this shortfall, I propose that there be statutory changes to increase the cap to a more effective level. To establish the efficient deterrence level for sexual harassment, I follow the same economic principles used to establish efficient deterrence values for workplace mortality risks. The deterrence values for mortality risks is based on the pay that workers require to face mortality risks; I correspondingly derive the deterrence value for sexual harassment based on the pay that workers require for such hostile work environments. This value is about \$7.6 million (in 2017 dollars) per sexual harassment claim filed with

¹ Many examples have been described in the media. See, e.g., the highly detailed *New York Times* article reporting on Harvey Weinstein's "complicity machine." Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. TIMES, Dec. 5, 2017, <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html> [<https://perma.cc/9AM8-9ZAH>].

² A note on terminology: Sex-based harassment is a term used to describe behavior that includes sexual harassment among other forms of gender-based harassment. The legal issue in my empirical analysis described in Part IV is recorded as "sexual harassment" in the EEOC charge data. I therefore use the term "sexual harassment" throughout this Article, but note that the term "sex-based harassment" is commonly used to characterize the broader workplace issues associated with workplace harassment. See Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 641–42 (2007).

³ See 42 U.S.C. § 1981a(b)(3) (2012).

the EEOC, far above the current maximum damages award under Title VII of \$300,000 for the largest firms.⁴

This Article will proceed as follows: Part I summarizes the costs of sexually harassing behavior to victims and to organizations. These costs are disproportionately borne by the victims; indeed, sanctioning sexual harassers can be costly to the organization. Part II summarizes survey evidence that demonstrates that sexual harassment is still common in the workplace. Part III provides an overview of possible approaches to deterring sexual harassment. The continuing high prevalence of sexual harassment confirms that current approaches provide inadequate incentives for deterrence.

In light of the inadequacy of current approaches, Part IV describes how damages awards can serve a deterrence function by analogy to the approach government agencies use to set efficient deterrence amounts for mortality risks. The key challenge to using damages awards as a deterrent is monetizing the harm caused by sexual harassment. I describe my approach, which is based on recognizing sexual harassment as a job risk. I discuss the tradeoffs for individuals working in jobs with high levels of sexual harassment, provide measures of the risk of sexual harassment, and summarize my research that demonstrates that women receive a hazard pay premium for exposure to the risk of workplace sexual harassment. This hazard pay premium serves as the basic building block for establishing the amount that firms should be penalized for sexual harassment. In Part V, I argue that the compensation of victims of sexual harassment should be based on what I term the Value of Statistical Harassment (VSH) derived from the hazard pay premium and provide the calculations of this measure. The VSH is the sexual harassment risk counterpart to the commonly used value of a statistical life (VSL), which is generally used to establish optimal deterrence levels for morality risks. Part VI describes how the VSH can be used for efficient deterrence by setting damages awards to the level of the VSH. Doing so will raise both the costs to organizations of tolerating workplace sexual harassment and the benefits to victims of filing an EEOC claim. The greater potential benefits to victims will bolster the incentive to file suits, thereby raising the probability of detection for sexual harassers and remedying the failure of Title VII to appropriately address the systemic issue of sexual harassment.

⁴ See *id.*

I. SEXUAL HARASSMENT IS COSTLY TO VICTIMS AND ORGANIZATIONS—BUT MOSTLY COSTLY TO VICTIMS

Organizational tolerance of sexual harassment has been identified as the most important influence on whether sexual harassment occurs in a workplace.⁵ It is more prevalent in traditionally male occupations and in organizations with large power differences within a hierarchical structure,⁶ such as the military.⁷

There is extensive evidence that victims of sexual harassment suffer a range of physical, psychological, and career consequences. These costs include lower job satisfaction, worse psychological and physical health, higher absenteeism, less commitment to their organizations, and higher quit rates.⁸ Workers who report sexual harassment are more likely to face retaliation, which is associated with even greater loss of job satisfaction and worse health outcomes than those arising from the harassment alone.⁹ The risk of retaliation is higher if the harasser is a supervisor.¹⁰

The costs to workplaces are the flip side of the costs to victims. Substantial empirical evidence shows that workplaces in which sexual harassment is tolerated are subject to inefficient turnover, increasing absenteeism, and generally wasted work time as workers attempt to avoid interaction with harassers.¹¹ Furthermore, the threat of litigation

⁵ Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCHOL. 578, 583–86 (1997); Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 135–39 (2007). A list of additional risk factors is provided in CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL OPPORTUNITY EMPLOYMENT COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS 25–30 (2016) [hereinafter EEOC TASK FORCE REPORT].

⁶ Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607, 609 (2003).

⁷ Heather Antecol & Deborah Cobb-Clark, *The Sexual Harassment of Female Active-Duty Personnel: Effects on Job Satisfaction and Intentions to Remain in the Military*, 61 J. ECON. BEHAV. & ORG. 55, 59 (2006).

⁸ See EUROPEAN COMM'N. DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUS. RELATIONS, & SOC. AFFAIRS, *SEXUAL HARASSMENT IN THE WORKPLACE IN THE EUROPEAN UNION* 5 (1998); U.S. MERIT SYS. PROTECTION BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS: PROGRESS, AND CONTINUING CHALLENGES* 24 (1995), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=253661&version=253948&application=ACROBAT> [<https://perma.cc/EX8C-JATZ>] [hereinafter USMSPB REPORT]; Darius K-S. Chan et al., *Examining the Job-Related, Psychological and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review*, 32 PSYCHOL. OF WOMEN Q. 362, 362–64 (2008); Fitzgerald et al., *supra* note 5, at 583–86; Willness et al., *supra* note 5, 135–39.

⁹ Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 231 (2002).

¹⁰ Blair Druhan Bullock, *Judicial and Agency Enforcement of Nondiscrimination Laws* (May 2015) (unpublished Ph.D. dissertation, Vanderbilt University) (on file at <https://law.vanderbilt.edu/phd/students/files/Bullock.pdf>) [<https://perma.cc/PKH9-XJUW>].

¹¹ See USMSPB REPORT, *supra* note 8, at 23–27; Fitzgerald et al., *supra* note 5, at 586; Willness

looms, which may involve costly legal defenses as well as any payment to victims.¹² Firms may suffer reputational harm, which may lead to difficulty in hiring or to lower firm profitability.¹³

However, comparing the costs of sexual harassment to the overall monetary scale of organizations suggests that the costs to organizations are relatively small. The costs of workplace sexual harassment in the U.S. federal government over the two-year period from 1992 to 1994 were estimated to be \$327.1 million.¹⁴ This takes into account lost productivity due to job turnover, sick leave, individual productivity, and workgroup productivity, with the loss to workplace productivity accounting for 61 percent of the total.¹⁵ However, compared to the federal budget, this cost represents rounding error, if that.¹⁶

A 1988 report estimated the costs to a typical Fortune 500 firm were \$6.7 million annually.¹⁷ These costs came from absenteeism, lower productivity, increased health care costs, poor morale, and employee turnover (but excluding litigation costs and damages awards).¹⁸ A different study reports an average sexual harassment liability loss estimate of \$600,000 in 1994 including legal fees.¹⁹ However, compared to the value of a Fortune 500 firm in 1988 dollars, such costs are minor. Take Ford Motor with 2017 revenues of \$151.8 billion. In 1988 dollars, this is \$75.325 billion, making the average sexual harassment liability loss equal to about 0.09 percent of revenues.²⁰ Awards resulting from EEOC litigation similarly show that liability loss is small. For example,

et al., *supra* note 5, at 136–37; Jana L. Raver & Michele J. Gelfand, *Beyond The Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 ACAD. MGMT. J. 387, 392–94 (2005).

¹² See Alexis Christoforou, *The Cost of Sexual Harassment in the Workplace*, YAHOO FIN. (Dec. 5, 2017), <https://finance.yahoo.com/news/cost-sexual-harassment-workplace-190250229.html> [https://perma.cc/MGJ3-B7NK].

¹³ Joni Hersch, *Equal Employment Opportunity Law and Firm Profitability*, 26 J. HUM. RESOURCES 139, 151–53 (1991) (showing that firms involved in employment discrimination litigation suffer substantial loss in the value of these firms). Studies showing costs due to reputation are summarized in EEOC TASK FORCE REPORT, *supra* note 5, at 22–23.

¹⁴ USMSPB REPORT, *supra* note 8, at 26.

¹⁵ *Id.*

¹⁶ In 1993 and 1994 combined, federal outlays totaled \$2.87 trillion. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT 27 (2016).

¹⁷ Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN 68–73 (Dec. 1988).

¹⁸ *Id.* at 71.

¹⁹ FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW: PRINCIPLES, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT 157 (1999).

²⁰ *The Top 10*, FORTUNE 500, <http://fortune.com/fortune500/2017/> [https://perma.cc/G8RV-UF T2] (last visited Jan. 15, 2019).

the EEOC recovered \$164.5 million in 2015 for workers alleging harassment.²¹ But this too is a trivial share of the economy.²²

In sum, although one might expect that profit-maximizing firms would have an incentive to eliminate unproductive behavior, because sexual harassment is costly for firms to monitor and eliminate, sexual harassment clearly occurs in some workplace environments. The point is not that sexual harassment isn't costly to organizations—it is, and it is clearly costly to victims—but that it is not costly enough for adequate deterrence.

II. PREVALENCE OF SEXUAL HARASSMENT

Although recent media coverage may seem to suggest that sexual harassment is overwhelmingly common, reliable data on the prevalence of sexual harassment, and especially data on harassment that would meet the legal definition, is lacking. Because the bulk of sexual harassment events goes unreported, most of our knowledge of its prevalence is from surveys.²³ Surveys utilize different definitions of sexually harassing behavior and also differ widely on time periods covered (requesting reports of sexual harassment from as little as three months to any past experience with no time limit) and differ by population surveyed.²⁴ Most surveys do not sample from a nationally representative population but instead are based on specific groups (by occupation, industry, or within a single workplace).²⁵

Researchers primarily use two methods to elicit experiences of sexual harassment.²⁶ In the direct query approach, respondents are asked to report whether they have been sexually harassed according to their own definition of harassment.²⁷ The second method is a behavioral experiences approach in which respondents are asked to indicate whether they have experienced any of the behaviors, such as sexual teasing, looks, or gestures, on a provided list. Incidence rates based on a behavioral experiences survey are higher than when based on direct query. A meta-analysis using fifty-five probability samples from the U.S. finds

²¹ EEOC TASK FORCE REPORT, *supra* note 5, at v. This value includes recovery for any type of workplace harassment, not only harassment on the basis of sex.

²² See OFFICE OF MGMT. & BUDGET, *supra* note 16, at 26–28.

²³ Joni Hersch, *Sexual Harassment in the Workplace*, IZA WORLD OF LABOR 3–3 (Oct. 2015), <https://wol.iza.org/articles/sexual-harassment-in-workplace/long> [<https://perma.cc/4SK4-99XZ>].

²⁴ Hersch, *supra* note 23, at 2.

²⁵ See, e.g., EUROPEAN COMM'N, *supra* note 8.

²⁶ Hersch, *supra* note 23, at 2.

²⁷ *Id.* at 2; see also, e.g., Joni Hersch, Valuing the Risk of Workplace Sexual Harassment, 57 J. RISK & UNCERTAINTY 111, 116 n.11 (2018). For an example of a direct query question, the General Social Survey asks respondents: “In the last 12 months, were you sexually harassed by anyone while you were on the job?”

that the incidence rate is about double when based on the behavioral survey than on direct query, with an incidence rate of 24 percent based on direct query and 58 percent based on behavioral experiences.²⁸

The Sexual Experiences Questionnaire (SEQ) developed by Louise Fitzgerald and co-authors is the survey most commonly used to record individual perceptions of whether they have been sexually harassed at work.²⁹ The authors intended the survey to measure psychological sexual harassment, although they claim that the survey parallels the definition of illegal sexual harassment.³⁰ The survey has been revised by Fitzgerald and colleagues over time, and various modifications have been used in sexual harassment surveys, but the essential form is a series of questions that are grouped into three categories: gender harassment, unwanted sexual attention, and sexual coercion.³¹

An insight into the potential disconnect between survey-based evidence on sexual harassment and the legal definition is provided in *Equal Employment Opportunity Commission v. Dial Corporation*.³² Challenging expert evidence, Dial claimed that the SEQ did not measure sexual harassment within the meaning of Title VII.³³ The EEOC's expert, Louise Fitzgerald, argued that what it measures is "sexual harassment under the social science definition" in the "commonly understood sense of sex-related behavior that is unwanted and unreciprocated by the recipient."³⁴ The trial judge did not consider this point alone to invalidate the SEQ for legal purposes.³⁵ However, he did find that the SEQ did not truly measure what it purports to measure; that is, truly offensive sex-related experiences at work during the time frame alleged by the plaintiffs.³⁶ The judge expressed further concerns over

²⁸ Ilies et al., *supra* note 6, at 619–23.

²⁹ See Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 157–59 (1988); Maria Rotundo et al., *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, J. APPLIED PSYCHOL. 914, 915 (2001).

³⁰ See Fitzgerald, *supra* note 29, at 155. The relevance of the SEQ to the legal definition of sexual harassment has been questioned in the academic literature. See Barbara A. Gutek et al., *A Review and Critique of the Sexual Experiences Questionnaire (SEQ)*, 28 L. & HUM. BEHAV. 457, 459 (2004).

³¹ See Gutek, *supra* note 30, at 461.

³² No. 99 C 3356, 2002 U.S. Dist. LEXIS 17543 (N.D. Ill. Sept. 17, 2002).

³³ *Id.* at *9.

³⁴ *Id.*

³⁵ *Id.* at *9–10.

³⁶ The survey requested reports of experiences during the time the respondent was employed by Dial and not restricted to the time period at question in litigation. The survey requested frequency of experiences without any indication of whether respondents found the experiences offensive or unwelcome. *Id.* at *12–13.

bias introduced by self-selection of respondents.³⁷ Fitzgerald's report was excluded from evidence.³⁸

Although survey evidence may not reach legal standards, most of our evidence on the prevalence of sexual harassment continues to be derived from surveys. Perhaps the most reliable trend evidence on sexual harassment is derived from the U.S. Merit Systems Protection Board (USMSPB) survey, "Sexual Harassment in the Federal Workplace." This is a behavioral experiences survey of federal employees conducted in 1980, 1987, 1994, and 2016.³⁹ Among other questions, these surveys asked respondents to report whether they had experienced any of a series of the following unwanted or uninvited behaviors in the past two years: sexual teasing, jokes, remarks, questions; sexual looks or gestures; invasion of personal space by deliberate touching, leaning, cornering; pressure for dates; communication of a sexual nature by letters, calls, or sexual materials; stalking; pressure for sexual favors; and actual or attempted rape or assault.⁴⁰

Table 1 provides the summary of sexually harassing behaviors reported in the USMSPB surveys in 1980, 1987, 1994, and 2016.⁴¹ As Table 1 shows, a large share of workers, both male and female, report that they have been sexually harassed, with women far more likely than men to report that they have been sexually harassed. In 1994, the survey shows that 44 percent of women and 19 percent of men had experienced unwanted sexual attention on the job in the preceding two years. The values are fairly similar to the percent reporting unwanted sexual attention in the 1980 and 1987 waves of the survey. Encouragingly, by 2016, the share of workers reporting that they had been sexually harassed in the past two years dropped considerably, to 6 percent for men and 18 percent for women.

The trends provide some comfort and some concern. That actual or attempted rape or sexual assault reported by 1 percent of both men and women in 2016 is clearly concerning, and the rate has not consistently diminished over the time period. But it is more comforting that most of the harassment is not assault or rape and has diminished over time. Note also that in the 1980 survey, 26 percent of women reported that

³⁷ *Id.* at *31.

³⁸ *Id.* at *33–34.

³⁹ See USMSPB REPORT, *supra* note 8; U.S. MERIT SYS. PROTECTION BD., ISSUES OF MERIT 1–5 (2017), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1442317&version=1447804&application=ACROBAT> [<https://perma.cc/5WAC-4BAF>] [hereinafter USMSPB ISSUES OF MERIT] (providing highlights “[i]n advance of an upcoming report that provides a full analysis of our research findings . . .”).

⁴⁰ USMSPB REPORT, *supra* note 8, at 7; USMSPB ISSUES OF MERIT, *supra* note 39, at 2.

⁴¹ USMSPB REPORT, *supra* note 8, at 58–62 apps. 2, 3, 4, 5 & 6; see also USMSPB ISSUES OF MERIT, *supra* note 39, at 1–2 (providing highlights in “advance of an upcoming report that provides a full analysis of our research findings . . .”).

they had been pressured for dates, and that the proportion dropped to 13 percent by 1994, and dropped further to 3 percent in 2016. There is also a large share of women who reported that they had been pressured for sexual favors—9 percent in 1980 and 1987 and 7 percent in 1994, but that too dropped to 3 percent in 2016. What is not ascertainable from the survey is whether these requests for dates or pressure for sexual favors were quid pro quo in nature.

TABLE 1. U.S. MERIT SYSTEMS PROTECTION BOARD SEXUAL HARASSMENT SURVEY

	Men				Women			
	1980	1987	1994	2016	1980	1987	1994	2016
Unwelcome sexual teasing, jokes, remarks, questions	10	12	14	3	33	35	37	9
Unwelcome sexually suggestive looks or gestures	8	9	9	1	28	28	29	9
Unwelcome invasion of personal space	3	8	8	3	15	26	24	12
Pressure for dates	7	4	4	1	26	15	13	3
Unwelcome communication of a sexual nature	3	4	4	1	9	12	10	6
Stalking	NA	NA	2	1	NA	NA	7	2
Pressure for sexual favors	2	3	2	1	9	9	7	1
Actual or attempted rape or sexual assault	0.3	0.3	2	1	1	0.8	4	1
Any behavior reported	15	14	19	6	42	42	44	18

Note: Percent experiencing unwanted behaviors in previous 2 years. For statistics for 1980, 1987, and 1994 see USMSPB REPORT, *supra* note 8. For statistics for 2016, see USMSPB ISSUES OF MERIT, *supra* note 37. “NA” indicates not available. Table rows report category labels used in Fall 2017 report. These differ slightly from the category labels used in the 1995 report as follows (numbered in order of rows in table):

1. 1995 report did not include the word “Unwelcome”
2. 1995 report used the phrase “Sexual looks, gestures”
3. 1995 report used the phrase “Deliberate touching, leaning, cornering”
4. No difference
5. 1995 report used the phrase “Letters, calls, sexual materials”
6. No difference
7. No difference
8. 1995 report used the phrase “Actual/attempted rape, assault”

Like almost all surveys that elicit information on sexual harassment, the focus in the USMSPB survey is on sexual behavior and does not request respondents to indicate whether they have been subjected to other behaviors that are based on gender hostility. Furthermore, and typical of such surveys, there is no indication recorded in the USMSPB survey of the severity of the harassment.

III. WHAT DOESN'T WORK: CURRENT APPROACHES TO DETERRENCE

Currently, three mechanisms show potential to deter or prevent sexual harassment to varying degrees of success. Training attempts to change the preferences of harassers *ex ante*. In contrast, both legal consequences under Title VII and market incentives act to impose an *ex post* cost on sexual harassers. I next discuss the shortcomings of each of these schemes in their ability to alter the behavior of sexual harassers.

A. Policies and Training

It is routine for large companies to have policies, workplace training, and reporting procedures to prevent sexual harassment.⁴² Workplace training has been shown to raise awareness of what constitutes sexual harassment,⁴³ although there is little evidence that such training is effective in reducing sexual harassment in the workplace. However, the consensus in the literature is that best practices for organizations are to have in place strong policies and a reporting procedure.⁴⁴ This would also be the guidance of lawyers responsible for protecting employers, as these policies and procedures may serve as a legal defense against liability.⁴⁵ Availability of confidential counselors is another procedural tool utilized to encourage reporting. But studies confirm that this too fails to be effective.⁴⁶

Furthermore, as the litany of harassers shows, it is quite clear that these organizational efforts have been insufficient to prevent workplace sexual harassment or costly settlements to victims who were not protected by the organization's structure. Before the #MeToo movement gained momentum, in 2016, Fox News CEO and chairman Roger Ailes was ousted in light of a barrage of evidence of longstanding sexual har-

⁴² *Id.*

⁴³ See Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826, 838–40 (2003).

⁴⁴ See, e.g., Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears: Companies Review Policies to Avoid 'Ellerth' Liability*, 21 NAT'L L.J. (Nov. 9, 1998), at A1; David Rubenstein, *Harassment Prevention is Now a Must for U.S. Companies*, 93 CORP. LEGAL TIMES 31 (Aug. 1999).

⁴⁵ See *Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, https://www.eeo.gov/laws/types/sexual_harassment.cfm [<https://perma.cc/4H6N-GTP5>] (last visited Jan. 16, 2019).

⁴⁶ See EUROPEAN COMM'N, *supra* note 8, at 17 (“The functioning of the *confidential counsellor* is unsatisfactory. Few of the harassed employees contacted a confidential counsellor. From the studies reviewed it appears that confidential counsellors often lack the necessary facilities to do their work, are too close to management, and are relatively unknown or not trusted. It is also difficult for confidential counsellors to work in organisations that lack an awareness of the problem.”).

assessment against many female Fox News employees, despite formal policies, workplace training, and reporting procedures.⁴⁷ Ultimately this behavior proved costly to the organization: A lawsuit filed by former Fox News host Gretchen Carlson resulted in a \$20 million settlement.⁴⁸

The failure of established procedures to deter harassment is not limited to the top of the corporate structure: Despite a successful lawsuit for sexual and racial harassment by blue-collar workers at Ford plants in Chicago in the 1990s, and established procedures to deter harassment as well as union representation, workers continued to be sexually harassed.⁴⁹

B. Legal Ramifications under Title VII

The EEOC characterizes sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.”⁵⁰ Employers have a possible defense against liability if (1) the employer takes reasonable care to prevent harassment (such as disseminating a policy against harassment and establishing reporting procedures), (2) the employer promptly corrects any sexually harassing behavior, and (3) the employee unreasonably fails to take advantage of the employer’s preventive or corrective opportunities.⁵¹ In such cases, the employee is only entitled to relief if she takes advantage of the employer’s procedures and remedies, which generally means that the employee must report sexual harassing behavior to their employer.⁵²

Title VII allows for the award of both compensatory and punitive damages. However, the total damage award is capped and determined

⁴⁷ John Koblin et al., *Roger Ailes Leaves Fox News, and Rupert Murdoch Steps In*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html> [https://perma.cc/U4BQ-2E7V].

⁴⁸ Sarah Ellison, *Fox Settles with Gretchen Carlson for \$20 Million—and Offers an Unprecedented Apology*, VANITY FAIR (Sep. 6, 2016), <https://www.vanityfair.com/news/2016/09/fox-news-settles-with-gretchen-carlson-for-20-million> [https://perma.cc/639J-JJVE].

⁴⁹ See Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES, Dec. 19, 2017, <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html?module=inline> [https://perma.cc/X4FF-TCTG]; Susan Chira & Catrin Einhorn, *Ford Apologizes for Sexual Harassment at Chicago Factories*, N.Y. TIMES, Dec. 21, 2017, <https://www.nytimes.com/2017/12/21/us/ford-apology-sexual-harassment.html> [https://perma.cc/QK6Y-RBP6].

⁵⁰ *Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 45.

⁵¹ *Id.*

⁵² An exception to the requirement to report sexual harassment to the employer would arise if the employee is being harassed by a supervisor, and there is no one else to whom to report the harassment. See *Monteagudo v. Asociación de Empleados del Estado Libre Asociado de P.R.*, 554 F.3d 164, 171–72 (1st Cir. 2009). In addition, a jury may find that “a failure to file a complaint [was not] unreasonable . . .” *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 35 (1st Cir. 2003).

by the number of employees of the defendant firm, with the total award capped at a maximum of \$300,000 (excluding back pay) if the employer has 500 or more employees.⁵³

These compensatory damages can be fairly low, especially with respect to back pay, which is directly connected to the victim's pay. The Supreme Court decision *State Farm Mutual Automobile Insurance Co. v. Campbell*⁵⁴ usually limits punitive damages to less than a ten to one ratio to compensatory damages.⁵⁵ Subject to this punitive to compensatory damages ratio constraint, the current limit on the sum of compensatory and punitive damages in employment discrimination cases of \$300,000 for the largest firms implies that any individual with compensatory damages of more than \$27,273 is eligible for less than the maximum punitive damages award that would be available without the Title VII caps. Raising the current cap on damages awards to my proposed \$7.6 million would mean that compensatory damages of up to \$690,972 would be eligible for the maximum punitive damages award.

It should be clear that there are steep barriers to launching a successful lawsuit against an employer for sexual harassment. Most employers have policies prohibiting sexual harassment and typically provide training of some kind.⁵⁶ Because claimants usually need to report the harassing behavior to their employer before filing a charge with the EEOC, they risk retaliation within their current employment.⁵⁷ Furthermore, even when plaintiffs jump through the hurdles that Title VII provides to both bring suit against their harassers and prove that the sexual harassment occurs, their ultimate reward is not significant enough to deter sexual harassment in the future.

⁵³ 42 U.S.C. § 1981a(b) (2012). The maximum total damages award for employers with 15 to 100 employees is \$50,000; for those with 101 to 200 employees, \$100,000; for 201 to 500 employees, \$200,000. These limits have not been raised since 1991. Damages awards may differ by state; for example, \$500,000 in punitive damages was awarded in *Gyulakian v. Lexus of Watertown Inc.*, 56 N.E.3d 785, 799 (Mass. 2016).

⁵⁴ 538 U.S. 408 (2003).

⁵⁵ *Id.* at 425–26; see also Alison F. Del Rossi and W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 AM. L. & ECON. REV. 116, 120 (2010) (the authors found “after the *State Farm* decision there has been a statistically significant drop in the number of blockbuster punitive damages awards, their amount, and the ratio of punitive damages to compensatory damages”); Benjamin J. McMichael and W. Kip Viscusi, *Shifting the Fat-Tailed Distribution of Blockbuster Punitive Damages Awards*, 11 J. EMPIRICAL LEGAL STUD. 350, 350 (June 2014) (the authors found “*State Farm* shifts the fat tail of the distribution of blockbuster awards down (or ‘thins’ the tail), which is consistent with a constraining effect on award size,” and that “*State Farm* also has a negative influence on the probability of exceeding a single-digit ratio between punitive and compensatory damages”).

⁵⁶ Megan Cole, *71 Percent of Organizations Offer Sexual Harassment Prevention Training*, ASS'N TALENT DEV. (Nov. 13, 2017), <https://www.td.org/insights/71-percent-of-organizations-offer-sexual-harassment-prevention-training> [<https://perma.cc/CL6K-D46V>].

⁵⁷ See Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018).

C. Corporate Oversight

There are a staggering number of examples of sexual misconduct that appeared to be known by industry insiders but largely concealed until publicly revealed by the #MeToo movement.⁵⁸ But in situations in which sexual harassers are considered essential to an organization's success, organizations have often been slow to respond to complaints. Below are some prominent examples that highlight the tension between protection of victims and corporate priorities.

The situation facing the Wynn Resorts board of directors is one such example of this tension. On Friday, January 26, 2018, the *Wall Street Journal* reported on decades-long practices of sexual harassment by Steve Wynn, founder and billionaire owner of landmark Las Vegas hotels and casinos.⁵⁹ Wynn Resorts stock fell 10 percent on that Friday and an additional 9 percent the following Monday.⁶⁰

As a publicly traded company, the board of directors has a duty to shareholders to protect their interests.⁶¹ The stock market hit clearly reflected shareholder angst over the future of the company. But the board debated whether to oust Wynn. Few companies are as closely identified with their founder and chief executive as is Wynn Resorts.⁶² Although a number of the largest and most successful companies are closely identified with their founder—think of Microsoft, Apple, Amazon, and Facebook—few companies actually bear the founder's name. The Wynn brand is integrally entwined with Steve Wynn, his flagship

⁵⁸ Perhaps the starkest example is provided by Harvey Weinstein, whose exposure as a serial sexual predator is credited with invigorating the #MeToo movement. 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/JAL6-HU3W]. Weinstein's reputation within the film industry was so widely known that *Family Guy* creator Seth MacFarlane could joke about Weinstein's sexual conduct at the 2013 Oscar ceremony, announcing the five nominees for best actress by saying, "Congratulations, you five ladies no longer have to pretend to be attracted to Harvey Weinstein," which elicited a sustained laugh from the audience." Maya Oppenheim, *Seth MacFarlane Made Joke about Harvey Weinstein and Women at 2013 Oscars*, INDEPENDENT (Oct. 11, 2017), <http://www.independent.co.uk/arts-entertainment/films/news/seth-macfarlane-harvey-weinstein-joke-oscars-2013-women-sexual-harassment-allegations-a7994506.html> [https://perma.cc/RDW8-G2QY].

⁵⁹ Alexandra Berzon et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL STREET J., Jan. 27, 2018, <https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953> [https://perma.cc/BEH3-9C7P].

⁶⁰ Bill Peters, *Could Wynn Resorts Be Sold in Wake of CEO's Sexual-Misconduct Allegations?*, INV. BUS. DAILY NEWS (Jan. 29, 2018), <https://www.investors.com/news/wynn-keeps-diving-as-fall-out-grows-over-ceo-steve-wynn-sexual-misconduct-allegations/> [https://perma.cc/V738-2TTL].

⁶¹ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179–80 (Del. 1986) (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

⁶² Elizabeth Winkler, *Wynn Resorts Is the Biggest Test for Investors' Tolerance*, WALL STREET J. (Jan. 29, 2018), <https://www.wsj.com/articles/wynn-resorts-is-the-biggest-test-for-investors-1517248977> [https://perma.cc/H447-R2XB].

properties bear his name, and as founder, chief executive, and largest stockholder of Wynn Resorts, he was considered essential to the brand identity and success of the firm.⁶³

Therein lay the board's dilemma as to whether to oust Wynn from his position. Removing Wynn may have salved short run stock price concerns, but such removal may have longer run negative consequences if Wynn was indeed essential to the firm's success, which would make retaining Wynn the preferred option. Wynn resigned as CEO of Wynn Resorts following the media coverage.⁶⁴

Not only may corporate boards fail to take action to oust leaders when they have information about allegations of sexual misconduct and settlement payouts, but information about sexual misconduct and payouts can also be cleverly concealed. Again, Steve Wynn provides a model. As public records from Wynn's prior divorce litigation revealed, he created a limited-liability company in 2005 for the sole purpose of paying \$7.5 million to the manicurist employed by Wynn Resorts who had accused Wynn of forcing her to have sex with him.⁶⁵

Moreover, prior allegations of sexual harassment do not seem to provide sufficient deterrence to future employers. For example, Ross Levinsohn, who has now been ousted as CEO and publisher of the *Los Angeles Times*, had been a defendant in two sexual harassment lawsuits while in positions he held prior to the *Los Angeles Times*.⁶⁶ And harassers often ride out even highly publicized sexual harassment charges and apparently suffer little long-term consequences. For example, in 2007, a jury awarded \$11.6 million to a woman in a sexual harassment suit against Isiah Thomas, President of the New York Knicks, for behavior that began in 2004.⁶⁷ During and after the suit, he was not fired from his post at the Knicks.⁶⁸ He served as head coach for the Florida International University men's basketball program from 2009–2012

⁶³ *Id.*

⁶⁴ See Everett Rosenfeld, *Steve Wynn is Out as CEO of Wynn Resorts*, CNBC (Feb. 6, 2018), <https://www.cnbc.com/2018/02/06/steve-wynn-is-out-as-ceo-of-wynn-resorts.html> [<https://perma.cc/8KCW-MTDY>].

⁶⁵ Kate O'Keefe, *Steve Wynn Set Up LLC to Pay His Accuser*, WALL STREET J. (Feb. 5, 2018), <https://www.wsj.com/articles/steve-wynn-set-up-llc-to-pay-his-accuser-1517858826> [<https://perma.cc/PM34-834Q>].

⁶⁶ Lydia O'Connor, *L.A. Times Publisher Accused of Sexual Misconduct, 'Frat House' Behavior*, HUFFPOST (Jan. 18, 2018), https://www.huffingtonpost.com/entry/ross-levinsohn-la-times-sexual-misconduct_us_5a60ecc3e4b01767e3d18eac [<https://perma.cc/UAZ4-767J>].

⁶⁷ See Jonathan Abrams & Lynn Zinser, *Thomas Returns to Knicks as Part-Time Consultant*, N.Y. TIMES (Aug. 6, 2010), http://www.nytimes.com/2010/08/07/sports/basketball/07knick.html?mt_rref=www.google.com&gwh=459376E6E8BBC677AD2CBDA7CEC54DA0&gwt=pay [<https://perma.cc/3Q5N-EHGT>]; Michael S. Schmidt & Maria Newman, *Jury Awards \$11.6 Million to Former Knicks Executive*, N.Y. TIMES (Oct. 2, 2007), <https://www.nytimes.com/2007/10/02/sports/basketball/03garden-cnd.html> [<https://perma.cc/D922-EU5Q>].

⁶⁸ See Abrams & Zinser, *supra* 67.

and became president and part-owner of the Knick's WNBA sister team, the New York Liberty.⁶⁹

Furthermore, it is not necessarily to a firm's benefit to take a hard line on sexual harassment. One visible example is that of Mark Hurd, former CEO of Hewlett-Packard (HP), who was accused of sexual harassment by Jodie Fisher, a former contractor to HP. Although HP did not find that Hurd had violated the company sexual harassment policy, HP board members considered his behavior to demonstrate a lack of judgment that undermined his effectiveness, and he was forced to resign. It is notable that the stock market and market for executives displayed a more favorable response to Hurd's leadership of HP: HP's stock price dropped by 8.3 percent on the first day of trading following Hurd's forced resignation, and Hurd was quickly hired by Oracle as co-president.⁷⁰

And even when an organization successfully ousts an executive for sexual misconduct, the organization may be responsible for paying legal fees for any ensuing arbitration over the termination. These legal fees can be substantial, as indicated in the termination of Leslie Moonves as CEO of CBS, with a reported estimate of \$50 million in legal costs to be paid by CBS to represent CBS, its board, and Moonves.⁷¹

Settlements such as the \$20 million awarded to Gretchen Carlson would also seemingly provide a market incentive to corporations to deter sexual harassment. However, what is perhaps most notable is that the existence of and amount of this settlement was publicly reported rather than concealed through a nondisclosure agreement. Any deterrence effects of even large settlements is reduced if information about the prevalence and size of settlements is concealed. Furthermore, even the higher pay workers receive as a compensating differential will be insufficient to deter sexual harassment if the true risk is unrecognized by workers because of low reporting, high turnover, and confidential settlements.

As these examples indicate, despite market pressures to eliminate unprofitable corporate activities, under the current legal regime, there

⁶⁹ Ben Golliver, *Former Knicks Executive Isiah Thomas Fired by FIU*, CBS SPORTS (Apr. 6, 2012), <https://www.cbssports.com/nba/news/former-knicks-executive-isiah-thomas-fired-by-fiu/> [https://perma.cc/D36U-ZTNJ?type=image]; Ben Mathis-Lilley, *Knicks Hire Executive Who Lost \$11 Million Sexual Harassment Suit to Run WNBA Team*, SLATE (May 25, 2015), http://www.slate.com/blogs/the_slatest/2015/05/05/certified_sexual_harasser_isiah_thomas_hired_to_run_women_s_basketball_team.html [https://perma.cc/A6UK-MY34].

⁷⁰ See Ben Worthen & Pui-Wing Tam, *H-P Chief Quits in Scandal*, WALL STREET J. (Aug. 7, 2010), <https://www.wsj.com/articles/SB10001424052748703309704575413663370670900> [https://perma.cc/XXT2-9KCL].

⁷¹ James B. Stewart, *CBS Is Footing Moonves's Legal Bills, Giving Him an Incentive to Fight*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/business/cbs-les-moonves-legal-fight.html> [https://perma.cc/K765-UPZN?type=image].

are clear limits to the ability of the market to deter sexual harassment. Markets cannot work to eliminate illegal and violent sexually predatory behavior in the presence of misinformation and deceit and in the absence of meaningful sanctions or consequences.

IV. DAMAGE AWARDS AS A DETERRENT TO SEXUAL HARASSMENT

A. Compensating Differentials for Job Risks

Title VII provides for compensatory as well as punitive damages awards for workplace discrimination. Such damages awards serve the dual purposes of compensating victims and providing an incentive to firms to not discriminate. Damages caused by discrimination in pay, promotion, and hiring are fairly easily monetized, for example, by comparing pay between those in a protected class to similar workers not in a protected class. Although the exact estimate of damages may differ, forensic economists routinely calculate compensatory damages in employment discrimination cases, and there is considerable agreement over accepted methodology.⁷²

The harm caused by sexual harassment is not so easily monetized. In part, a large share of the harm caused by sexual harassment is psychological, which would be difficult to quantify, and victims are unlikely to be made whole with money. Another, more subtle problem with quantifying the harm caused by sexual harassment is that an individual victim's pay may actually be enhanced, possibly as a means to obtain complicity or silence. Despite inherent measurement problems, sexual harassment harm clearly is monetized in the form of financial settlements paid to victims, with the few values that have been publicly reported showing a substantial range.⁷³

My approach to monetizing the harm caused by sexual harassment starts by recognizing that sexual harassment is a job risk. It is by no means a risk that is a necessary part of the workplace, but, as survey

⁷² See Michael R. Luthy et al., *A 2015 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, 26 J. FORENSIC ECON. 53–83 (2015).

⁷³ For example, former Fox News host Gretchen Carlson received a \$20 million settlement; five sexually harassed Guess employees received a total \$500,000 settlement; and two women who alleged they were sexually harassed by former presidential candidate Herman Cain when he was CEO of the National Restaurant Association received settlements of \$45,000 and \$35,000 (which Cain described as severance payments). See Michael M. Grynbaum & John Koblin, *Fox Settles with Gretchen Carlson over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html> [<https://perma.cc/P7DS-AWAV>]; Valeriya Safronova, *Paul Marciano Will Leave Guess after Sexual Harassment Settlements*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/style/guess-harassment-resignation.html> [<https://perma.cc/4WVP-73XT>]; Michael D. Shear et al., *Cain Accuser Tells of Pattern of Behavior, Lawyer Attests*, N.Y. TIMES (Nov. 4, 2011), <https://www.nytimes.com/2011/11/05/us/politics/cain-accuser-tells-of-harassment-pattern-lawyer-attests.html> [<https://perma.cc/G2S9-WRKG>].

evidence reviewed in Part II documents, it nonetheless is common. Most activities involve tradeoffs, and often the tradeoff is between money or time and safety. It is costly for firms to eliminate job risks such as risks of fatality and injury—and of sexual harassment. It is also costly to firms to not strive to eliminate these risks. Employers need to pay a wage premium—referred to as a “compensating differential”—to attract workers to risky jobs.⁷⁴ A massive literature documents that workers in jobs at greater risk of fatality are paid a premium for bearing greater risk, and indeed, this premium pay forms the basis for calculating the value of statistical life.⁷⁵ Furthermore, in setting regulatory safety standards, most federal agencies require comparison of the costs of implementing safety improvements to the value of lives saved from improved safety.⁷⁶

It is not mere speculation that firms might pay a premium for exposure to risk of sexual harassment. As coverage of Steve Wynn’s pattern of sexually harassing employees made clear, the high pay at Wynn casinos relative to alternative jobs in Las Vegas served to reduce turnover and attract employees despite widespread risk of sexual harassment. Ex-employees reported to the *Wall Street Journal* that they tolerated workplace harassment because jobs at Wynn were among the highest paying in Las Vegas.⁷⁷

Despite a large literature investigating whether workers are paid compensating differentials for a variety of working conditions, the economics literature had only consistently established compensating differentials for workplace risk of fatality or injury.⁷⁸ My research, described below, is the first to consider the possibility of compensating differentials for risk of sexual harassment. To briefly summarize my methodology and primary result, I created the first measures in the literature of risk of sexual harassment, estimated wage equations controlling for this risk, and identified that workers in industries at greater

⁷⁴ The “theory of compensating differentials” originated with Adam Smith and is a standard topic in economics textbooks. A review of the literature and discussion of the underlying theory is W. Kip Viscusi, *The Value of Risks to Life and Health*, 31 J. ECON. LIT. 1912 (1993). See also Robert S. Smith, *Compensating Wage Differentials and Public Policy: A Review*, 32 INDUS. AND LAB. RELATIONS REV. 339, 339–40 (1979).

⁷⁵ See Joseph E. Aldy & W. Kip Viscusi, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5, 5 (2003).

⁷⁶ See *id.* at 40–42; W. Kip Viscusi, *Mortality Effects of Regulatory Costs and Policy Evaluation Criteria*, 25 RAND J. ECON. 94, 94–95 (1994); W. Kip Viscusi, *The Devaluation of Life*, 3 REG. & GOVERNANCE 103, 105 (2009); U.S. OFFICE OF MANAGEMENT & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, *INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES* 94 (2003).

⁷⁷ Berzon et al., *supra* note 59.

⁷⁸ Joni Hersch, *Compensating Differentials for Sexual Harassment*, 101 AM. ECON. REV.: PAPERS & PROC. 630, 630 (2011).

risk of sexual harassment received a pay premium for exposure to a working condition that workers found so heinous.⁷⁹ It is worth noting that my approach, which takes into account the risk of sexual harassment, obviates concerns of reverse causality in which workers who are at lower pay are more likely to be targets of harassment.⁸⁰

B. Sexual Harassment Risks

The first step in examining the labor market implications of sexual harassment claims requires calculation of sexual harassment risk.⁸¹ To do so, I used data I obtained from the EEOC through a FOIA request. I calculated gender-specific estimates of the risk of sexual harassment by industry and age group,⁸² by dividing the number of individual charges that include sexual harassment within each industry and age group by the corresponding levels of employment in the same industry and age group from the Current Population Survey (CPS).⁸³ In contrast to survey evidence of sexual harassment prevalence, my methodology provides a well-defined measure of the risk of sexual harassment that allows comparison across sectors of the economy.

Table 2 reports sexual harassment claim rates per 100,000 workers by gender and major industry as well as the percent female in the industry based on the construction of sexual harassment risk described above. Clearly women are far more likely to file a claim of sexual harassment than are men. The pattern across industries indicates that women are at a greater risk of sexual harassment in male-dominated

⁷⁹ *Id.* at 633–35.

⁸⁰ If we observe that harassed workers have lower pay, we cannot be sure whether the harassment caused the individual worker to have lower pay, or if the worker is harassed specifically because they are lower paid and potentially more vulnerable. Because any individual's experience of sexual harassment will have only a small effect on the risk measure for that industry and age group, we can largely rule out the possibility that the individual's pay level influenced the risk measure for that industry and age group.

⁸¹ For more information, see Joni Hersch, *Valuing the Risk of Workplace Sexual Harassment*, 57 J. RISK & UNCERTAINTY 111, 117–19 (2018). See also *Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 45.

⁸² Specifically, the numerators in this risk measure are the number of sexual harassment charges by 2-digit industry (52 industries), six age groups (15–24, 25–34, 35–44, 45–54, 55–64, and ages 65 and older), and gender. The denominators are the corresponding levels of industry employment by age group and gender from the Current Population Survey (excluding self-employed workers who would generally not be able to claim sexual harassment against an employer). This follows the methodology to construct fatality rates by industry, age, and gender in W. Kip Viscusi and Joni Hersch, *The Mortality Cost to Smokers*, 27 J. HEALTH ECON. 943, 944–48 (2008). See Joni Hersch, *supra* note 811 (providing information on the construction of the risk measures and a table that lists the risk values for women by detailed industry and age group).

⁸³ The CPS is a monthly survey of households conducted by the Bureau of Census for the Bureau of Labor Statistics. It provides comprehensive data on the labor force, employment, and other demographic and labor force characteristics. See Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/cps/> [<https://perma.cc/H3L4-G8V9>] (last visited Jan. 16, 2019).

industries, with the pairwise correlation between the female rate and percent female equal to -0.68 ($p=0.01$). The male sexual harassment claim rate is not correlated with the female rate nor is the male rate correlated with percent female.

TABLE 2: SEXUAL HARASSMENT RATES BY MAJOR INDUSTRY⁸⁴

	Female	Male	Percent Female
Agriculture, forestry, fishing, and hunting	18.10	0.72	25.21
Mining	72.02	2.31	9.71
Construction	20.28	0.48	9.58
Manufacturing	15.88	1.28	30.86
Wholesale and retail trade	10.21	1.33	45.46
Transportation and utilities	17.50	1.22	24.48
Information	19.35	2.73	43.40
Financial activities	6.98	1.49	57.58
Professional and business services	14.35	1.89	43.16
Educational and health services	3.71	1.66	75.13
Leisure and hospitality	14.53	2.15	51.55
Other services	6.64	1.29	52.70
Public administration	16.67	2.20	45.94
Labor market overall	8.61	1.35	

Notes: Per 100,000 workers. Rates are calculated by the author from EEOC Charge Data FY2000–FY2004 based on claims by individuals in which at least one issue was sexual harassment and in which industry is reported. Employment data calculated using 2004 Current Population Survey.

For the labor market sample that I analyze, the overall sexual harassment rate is 8.61 per 100,000 workers for females, and 1.35 per 100,000 workers for males. Female employees are consequently 6.4 times more likely to file a sexual harassment claim. Because of the small number of sexual harassment claims brought by men, the ensuing analysis focuses on sexual harassment rates based on claims brought by women, as these rates are more reliable. The overall rates of sexual harassment claims are in the same general range as the frequency of workplace fatality rates, of about 4 in 100,000,⁸⁵ which is about half the sexual harassment claim rate for female employees.

⁸⁴ This table appears in Hersch, *supra* note 78, at 632.

⁸⁵ See *Census of Fatal Occupational Injuries Summary, 2017*, U.S. DEP'T OF LAB. (Dec. 18, 2018, 10:00AM), <https://www.bls.gov/news.release/cfoi.nr0.htm> [<https://perma.cc/T7B8-DLMA>].

C. Wage Equations

The next step is to merge the sexual harassment risk measures with data that includes wage information and detailed information on other characteristics associated with wage in order to isolate the influence of sexual harassment risk on wage.⁸⁶ In particular, I take into account detailed information on education, race, ethnicity, type of employer, union status, marital status, location, and potential work experience. Importantly, I also take into account the percent female in detailed industry and occupation; doing so accounts for the higher risk of fatality and injury in male-dominated industries and occupation.

Using these data, I then estimate conventional log wage regressions. These wage equation estimates are reported in my earlier work.⁸⁷ The incremental effect on wage of a 1-in-100,000 increase in risk is 0.18 percent.⁸⁸ For women, the log wage difference between a job with zero sexual harassment risk and a job with the gender-specific mean sexual harassment risk is 0.0155, or about 25 cents per hour for women. With annual work hours of 2,000, this rate of compensation would be \$500 annually for women. This value represents the average hazard pay premium for being in a job with average risk of sexual harassment relative to a risk-free job.⁸⁹ Importantly, because this estimated risk premium is derived from labor market information on individual workers, this pay premium reflects the value that the workers themselves place on the risk of sexual harassment at their workplace that is severe enough to result in an EEOC claim.

V. THE VALUE OF STATISTICAL HARASSMENT (VSH)

To date, the only mechanism employed by organizations in efforts to deter workplace sexual harassment is education and reporting and mediating systems. When these approaches fail, the remaining recourse for victims is to file a charge with the EEOC. Although the EEOC can, and does, litigate some claims, this is quite rare, and most claims will be filed and litigated privately.

There is no apparent connection between damages awards at their current level and efficient deterrence, and in fact, to my knowledge, no

⁸⁶ The standard wage equation specification used in the hedonic wage literature is of the following form:

$$\ln(\text{wage}) = \alpha + \beta \text{Risk} + X\gamma + \varepsilon$$

where *wage* is the hourly wage rate; *Risk* is a measure of job risk (in this case the risk of sexual harassment); *X* is a vector of explanatory variables such as years of education; α , β , and γ are parameters to be estimated; and ε is a random error term.

⁸⁷ Hersch, *supra* note 78; Hersch, *supra* note 81.

⁸⁸ Hersch, *supra* note 81, at 124–25.

⁸⁹ Hersch, *supra* note 78, at 633.

one has suggested using damages awards for the purpose of efficient deterrence of sexual harassment.⁹⁰ But thwarting the current approaches to curb sexual harassment is the lack of any monetary basis for setting awards for efficient deterrence.

My proposal is to use the hazard pay premium described in Section IV for sexual harassment risks to establish the efficient deterrence value of awards. Specifically, following the same rationale by which the value of a statistical life can serve as the appropriate deterrence measure for fatality risks, I propose using a measure that I term “the value of statistical harassment,” (VSH) to set the total damages amount in sexual harassment cases in order to provide optimal deterrence.

This hazard pay premium has an important implication in terms of the rate at which workers are compensated for the risk. To provide a numerical illustration, suppose that a group of 100,000 workers each receive an extra \$50 to incur a sexual harassment risk of 1/100,000. Then together this group will experience one expected case of sexual harassment (i.e., 100,000 workers \times 1/100,000 risk) and will receive \$5 million in compensation (i.e., 100,000 workers \times \$50 per worker). In this example, \$5 million is the amount of money that workers receive for facing risks that lead to one expected case of sexual harassment to the group. By analogy to the approach in the economics literature for the value of a statistical life, this amount represents the value of statistical harassment (VSH).⁹¹

The procedure for calculating the VSH directly from the empirical estimates requires information on the effect of the sexual harassment risk on the log of wages (0.0018), the average hourly wage rate (\$16.33 for women), the number of hours in a full-time work year (based on the assumption of 50 weeks per year at 40 hours per week), and any adjustment for units (in this case the risk is per 100,000 workers).

If we denote the effect of fatality rates on the log of wages by b , then parallel to the calculation of the VSL,⁹² the VSH is calculated as

$$VSH = b \times \text{average wage} \times 2000 \times 100000.$$

Following this procedure yields VSH estimates of \$5.88 million in 2005 dollars. Converted to 2017 dollars, the VSH is equal to \$7.6 mil-

⁹⁰ See, e.g., Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249 (2014) (making it clear that the cap was not intended for deterrence and citing in her footnote 342 some articles critiquing the cap because of inadequate deterrence).

⁹¹ See Elissa Philip Gentry & W. Kip Viscusi, *The Fatality and Morbidity Components of the Value of Statistical Life*, 46 J. HEALTH ECON. 90, 93 (2016) (Equation 10).

⁹² See *id.*

lion. This value reflects the additional amount that is generated by sexual harassment claims filed with the EEOC. It will consequently capture both the effect of the harassment claim itself but will also embody the influence of all harassment incidents in that industry that are correlated with the claim.

VI. USING THE VALUE OF STATISTICAL HARASSMENT FOR EFFICIENT DETERRENCE

To understand how the VSH can be used to set damages for efficient deterrence of sexual harassment, it is useful to review the role of the VSL in promoting deterrence of workplace fatalities. As noted above, government agencies use the VSL to establish the value of preventing one expected death, which corresponds to the value of deterring behavior that leads to one expected death. By providing a measure of the extra compensation workers receive for fatality risk, the VSL derived from the labor market establishes both the value of safety to the worker and the price of safety for the injurer. Specifically, it represents the amount of money a firm should be willing to spend to reduce the risk of fatality. This tradeoff between safety and money is common to many other market contexts. Consumers choose between cars with more or less safety equipment, with prices reflecting the higher costs to manufacturers of greater safety equipment as well as how much consumers value the safety improvement. Manufacturers respond to workers' tradeoffs by producing cars with less safety equipment that sell at lower prices and with more safety equipment that sell at higher prices. If car manufacturers find no market for their cars at a particular safety-price combination, they will alter the mix to meet consumer demand.

Continuing the analogy of the value of a statistical life to the sexual harassment situation, the VSH establishes the value of avoiding harassment to female workers and the price of reducing harassment to employers. Setting damages in EEOC claim cases equal to the VSH will send the appropriate price signal to firms of the economic value of harassment risks to workers; such damages would represent the amount of money employers should be willing to spend to reduce the risk of sexual harassment at their organization. As noted above, the VSH corresponds to the value of all sexual harassment incidents that women experience or are aware of at their workplace so that it will have a broad deterrent effect and is not limited to the single case in which the claim has been brought. My proposal is that for efficient deterrence, the sum of compensatory and punitive damages should equal the VSH. Unfortunately, damages are capped at a level that bears no relation to the value of VSH so that the statutory cap would need to be removed or at least increased to \$7.6 million.

This proposal also implicitly embodies the key concepts of the economic theory of deterrence. It not only recognizes the fact that sexual harassment involves irreplaceable nonmonetary harms, but it also embodies the broader incidence of sexual harassment at the workplace.

The advantage of the VSH approach is that it implicitly incorporates aspects of the probability of detection in that an entire toxic work environment will affect the VSH to the extent that the employees are aware of this environment. While the risk measure pertains to the risk of EEOC charges, this measure will likely be correlated with cases of sexual harassment that do not lead to charges. The VSH measure consequently captures both the value attached to the risk of an EEOC charge and will also capture the valuation of other harassment incidents that are known to workers but which do not lead to an EEOC claim.

CONCLUSION

Workplace sexual harassment is a widespread problem that has proven immune to legislation and workplace policies designed to prevent such behavior. It is costly to victims. And, although it is also costly to organizations, I demonstrate in this Article that it is not costly enough to deter workplace sexual harassment: The substantial market pressures that organizations currently face have proven inadequate as a deterrence. My policy proposal is to raise damages awards to a level that will properly incentivize organizations to eliminate sexual harassment. To establish the necessary award amount, I draw on labor market data documenting the premium workers receive for bearing the risk of sexual harassment. Using this pay premium, I calculate the value of statistical harassment, which establishes the award level that will correctly provide incentives to organizations to deter workplace sexual harassment. To implement this proposal, the statutory cap on damages must be removed so that the penalties can reach a level sufficient to deter sexual harassment and to reflect the value of a reduction in harassment to the women who are being protected. The recent #MeToo movement has raised visibility about the prevalence and severity of sexual harassment and may lead to further deterrence by raising the probability that sexually harassing behavior will be reported and lead to pertinent legal sanctions.



Schools as Training Grounds for Harassment

Ann C. McGinley[†]

INTRODUCTION

The #MeToo movement, which burgeoned in response to allegations of Harvey Weinstein's and others' harassment of women who sought careers in Hollywood and elsewhere, has led to increasing concern about sexual harassment in workplaces and other venues.¹ Significant online movements engage in naming and shaming alleged perpetrators, and workplaces are rewriting their policies in an attempt to prevent and remedy harassment to escape liability for harassers' conduct.² News reports and op-ed articles focus on the prevalence of sexual harassment and harm to women, but, as Professors Vicki Schultz and Brian Soucek explain, media reports are limited to a narrow understanding of one type of harassment: harassment that is sexual (rather than gendered) in nature and suffered predominantly by women at the hands of more powerful men.³ By "sexual" harassment, I use the common term here to refer to unwelcome behavior that is expressed by sexual means: groping, asking for sexual favors, sexual assault, and even rape. The motive may be sexual desire, as the #MeToo movement seems

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¹ Actor Alyssa Milano borrowed the term from an earlier group started by Tarana Burke and posted it online. Emma Brockes, *#MeToo Founder Tarana Burke: "You Have to Use Your Privilege to Serve Other People,"* GUARDIAN (Jan. 15, 2018), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault> [<https://perma.cc/4NXH-6JAA>].

² *Mira Sorvino: Me Too Can't Just Be Naming and Shaming*, USA TODAY (Nov. 13, 2018), <https://www.usatoday.com/story/life/people/2018/11/13/mira-sorvino-me-too-cant-just-naming-and-shaming/1985971002/> [<http://perma.cc/E9WJ-TBG2>]; Nicole Lyn Pesce, *The #MeToo Movement Has Changed Policies Across Industries, But There's Still Work to Be Done*, MARKET WATCH (Oct. 4, 2018), <https://www.marketwatch.com/story/the-metoo-movement-has-changed-policies-across-industries-but-theres-still-work-to-be-done-2018-10-04> [<https://perma.cc/KU9N-X82W>].

³ See Vicki Schultz & Brian Soucek, 2019 U. CHI. LEGAL F. 227, 227–59 (2019).

to emphasize, but it may also be a desire to police gender expectations of individuals in the workplace. Where there is an employment relationship and a covered employer, this type of harassment is prohibited by Title VII of the 1964 Civil Rights Act,⁴ if sufficiently severe or pervasive. It is also prohibited in schools, whether the harassment be perpetrated by other students or teachers, by Title IX of the Education Amendments of 1972.⁵

A less common but more accurate term that I use throughout this paper is “sex- or gender-based harassment.” This term is much broader than “sexual harassment” in that it refers to unwelcome behavior that occurs because of the sex (biological sex) or gender (social stereotypes and expectations that are related to a person of a particular biological sex) of the victim that can be but is not necessarily sexual in nature: derogatory comments or yelling, physically blocking a person’s way, severe or pervasive treatment because of the victim’s failure to conform to gender stereotypes or with an interest in maintaining the gendered order of the workplace. These latter versions of harassment can be either facially sex- or gender-based or can be neutral in their presentation while still occurring because of the sex or gender of the victim.

As Schultz and Soucek explain, “sexual harassment” that the #Me-Too movement generally targets may merely be the tip of the iceberg. Harassment that is gendered but not necessarily sexual in nature, and harassment, whether sexual or gendered, that is perpetrated by groups of men (and sometimes women) on both male and female victims have been virtually ignored by the movement and the media.⁶

Moreover, the link between sex-segregated workplaces, both horizontally and vertically,⁷ and sex- and gender-based harassment is often overlooked.⁸ In fact, much (if not most) of harassing behavior in workplaces occurs because of gender—the patriarchal structure that promotes the superiority of masculine men over women and gender non-conforming men.⁹

And, while there is considerable discussion about sexual violence on college campuses (a form of “sexual harassment”)—how institutions

⁴ 42 U.S.C. § 2000e, *et seq.*

⁵ Pub. L. No. 92-318 tit. IX, 86 Stat. 235, 373–75 (codified as 20 U.S.C. §§ 1681–88).

⁶ See Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 135 (2018).

⁷ Philip Cohen, *The Problem with Mostly Male (and Mostly Female) Workplaces*, THE ATLANTIC (Mar. 20, 2013), <https://www.theatlantic.com/sexes/archive/2013/03/the-problem-with-mostly-male-and-mostly-female-workplaces/274208/> [http://perma.cc/895U-4RNY].

⁸ Schultz & Soucek, *supra* note 3.

⁹ See ANN C. MCGINLEY, MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS 58–82 (2016) (offering a number of scenarios in which harassment occurs and demonstrating that, in most of these scenarios, the motivation is gender—both of the victim and of the perpetrators).

should respond, what their investigations and hearings should look like, and how to protect both the accuser and the accused¹⁰—there is little or no public discussion of sex- and gender-based harassment that occurs in elementary, middle, and high schools.¹¹ The behaviors involved can be sexual, gendered, or neither; the common thread is the motive of the harassers—it is based on the sex or gender of the victim (as well as the harasser).

Even though few discuss the problem of sex- or gender-based harassment in pre-college schools, the reality is that elementary, middle, and high schools serve as training grounds for sex- and gender-based harassment later on in life, and the law is not providing an effective remedy. Title IX of the Education Act Amendments¹² forbids sex- and gender-based harassment at all levels from kindergarten through college, but private causes of action brought under Title IX do little to deter school administrators from tolerating serious peer sex- and gender-based harassment or to compensate victims. This is because the Supreme Court has established extremely difficult proof requirements, and many lower courts have applied these standards strictly.¹³ While investigations by the Office of Civil Rights of the Department of Education (“OCR”) have historically done a better job of punishing schools for permitting peer sex- and gender-based harassment and requiring improved policies and procedures, the OCR may not have the capacity to investigate the vast majority of incidents occurring in schools. Moreover, given the new regulations proposed by the Department of Education under Secretary Betsy DeVos, which adopt the rigid court standards, there is serious concern that useful OCR investigations may not continue.¹⁴

¹⁰ ADVOCATES FOR YOUTH, 9 THINGS TO KNOW ABOUT BETSY DEVOS’ PROPOSED TITLE IX RULE, https://actionnetwork.org/user_files/user_files/000/028/107/original/Two_pager_on_proposed_rule.pdf [<http://perma.cc/79GA-TLHV>]; Victoria Yuen & Osob Ahmed, *4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault*, CENTER FOR AMERICAN PROGRESS (Nov. 16, 2018), <https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/> [<https://perma.cc/SL3T-AX9D>].

¹¹ Throughout this article, I use the term sex- and gender-based harassment in its broadest sense to mean harassment in workplaces or schools that occurs because of the victim’s sex or gender. There is a debate whether we should merely call this “sexual harassment,” or “sex harassment,” but both seem to be under-inclusive so in the interest of being clear that I am talking about illegal harassment that occurs because of sex or gender and may or may not be sexual or gendered in nature, I use the more comprehensive term. This behavior, if sufficiently severe or pervasive, violates Title VII in the workplace and Title IX in schools.

¹² Pub. L. No. 92-318 tit. IX, 86 Stat. 235, 373–75 (codified as 20 U.S.C. §§ 1681–88).

¹³ See Part III *infra*.

¹⁴ See Part III.B. *infra*.

The fact is that peer¹⁵ sex- and gender-based harassment of both boys and girls in schools is rampant, and administrators are either unable or unwilling to curb it. One problem is adults' normalization of sex- and gender-based harassment by preteens and teens. When girls are victims of harassment by boys, school administrators and teachers interpret the behavior as age-appropriate interest in the "opposite sex." When boys are victims of harassment by other boys, administrators and teachers call it normal "horseplay." In both situations, teachers can exacerbate the problem, often blaming the victims for causing trouble by reporting the behavior to authorities, and thereby incurring the wrath of fellow students.¹⁶ Teachers and administrators fail to understand the role toxic masculinity plays in harassment, and they often fan the flames by encouraging sex stereotyping and gender conformity of both boys and girls by both boys and girls. The resulting peer harassment is neither normal courting behavior, nor normal roughhousing.¹⁷

This article deals with the schools' role in permitting and encouraging peer sex- and gender-based harassment of children and the law's role in failing to hold schools accountable for their negligent and intentional behavior in sanctioning it. Part I discusses the evidence of rampant sex- and gender-based harassment in schools. Part II analyzes the problem through the lens of masculinities theory and explains how cultural notions of masculinity create incentives for boys¹⁸ (and some girls) to engage in peer sex- and gender-based harassment.

Part III analyzes court cases and OCR decisions and explains the serious disconnect between the two; it demonstrates the proof difficulties that victims experience when filing suit under Title IX and the resulting lack of incentives for schools to correct the problems. It also shows that, while the OCR has traditionally held schools to more exacting scrutiny than courts, the new Secretary of Education has proposed new regulations that would align its standards with those of the courts. Ironically, if the proposed regulations are promulgated, the result in the era of #MeToo will be to promote even more sex- and gender-based harassment in our schools.

Part IV proposes new legal standards and interpretations of existing standards for the courts that would hold schools more accountable

¹⁵ I limit this article to the discussion of illegal harassment by peers of other peers in the school context—in other words, student-on-student harassment that occurs because of sex or gender.

¹⁶ See, e.g., *Patterson v. Hudson Area Schools*, 551 F.3d 438, 440 (6th Cir. 2009).

¹⁷ I have dubbed this reason for sex harassment as the "masculinity motivation." See McGinley, *The Masculinity Motivation*, *supra* note 6.

¹⁸ I call this the "masculinity mandate." See Ann C. McGinley, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMPLOYEE RIGHTS AND EMPLOYMENT POL'Y J. __ (forthcoming 2019).

for allowing and condoning peer harassment and argues that the courts' standards should be more similar to those applied by those historically applied by the OCR. To accomplish prevention, educators must understand the role that toxic masculinity plays in peer sex- and gender-based harassment while at the same time be aware of the potential unequal application of school rules to children of different races and classes. Finally, this article concludes that the law should create incentives for schools to fulfill their responsibility to educate themselves and their students to prevent and remedy peer sex- and gender-based harassment. When schools ignore their responsibilities in this area, they become important training grounds for future harassers, a role that the #MeToo movement should not tolerate.

I. EMPIRICAL AND QUALITATIVE EVIDENCE OF PEER SEXUAL HARASSMENT IN SCHOOLS

A. Empirical and Qualitative Studies on Peer Sexual Harassment

1. Definitions: legal vs. social science terminology

Social science data are crucial to the understanding of sex- and gender-based harassment in the schools. But there is one caveat. Social science studies can be confusing to lawyers and judges because of the different terms social scientists and lawyers use to describe behaviors. Moreover, social scientists and lawyers at times use the same terms but define them differently. Social scientists' definitions consider *behaviors* while the law considers *not only behaviors but also motive or intent*. For example, under Title IX, behavior that is sexual, non-sexual, gendered, or non-gendered in nature that is *motivated by* the victim's sex or gender and is severe, pervasive, and objectively offensive is illegal harassment.¹⁹ This legal definition may encompass many different behaviors

¹⁹ See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1207–32 (2008) (explaining different scenarios that constitute illegal sex- or gender-based harassment).

identified by social scientists, including bullying,²⁰ harassment, mobbing, sexual harassment, and physical, verbal, and relational aggression.²¹

When scientific surveys ask children whether they have suffered from sexual harassment, they do not focus on the legal requirement that the behavior be severe or pervasive. They merely ask if the child has suffered a particular type of sex- or gender-based behavior over a particular period of time.²² This means that the survey results can be both over-inclusive and under-inclusive by legal standards: over-inclusive because the behavior may not be sufficiently severe or pervasive to qualify as illegal; under-inclusive because behavior that is not sexual or gendered in nature but whose motive is sex or gender will not be included in the results. Thus, legal scholars, lawyers, and the courts must acknowledge these weaknesses in translation between social science and law when they predict the frequency of sex- and gender-based harassment. With this caveat in mind, however, below is a short summary of some of the social science quantitative and qualitative evidence of sex- and gender-based harassment in the schools as well as a description of facts from court and OCR cases to demonstrate the quality of alleged harassment that occurs.

2. Social science and other evidence of sex- and gender-based harassment

Recent surveys by the American Association of University Women (“AAUW”) concerning sexual harassment in schools reveal that nearly half of school children in grades seven through twelve (48%) report having been subject to sexual harassment,²³ and that 87% of those reporting that they suffered harassment also state that they have suffered

²⁰ Traditionally, psychologists defined bullying, harassment, and mobbing as gender-neutral because both victims and perpetrators can be male and female. Given the thin reed supporting the conclusion that these behaviors are sex-neutral, feminists questioned this view and other social scientists followed. Today, social scientists may disagree about the use of the term “bullying,” but many agree that gender is often a cause of or motivation for these bullying behaviors. Moreover, while the original psychologists who studied bullying believed it resulted from individual personality traits that disposed perpetrators toward bullying (and perhaps victims toward victimhood), social scientists, feminists, and sociologists see bullying as resulting from systemic gender and other inequalities. *See id.* at 1169–80.

²¹ “Physical aggression” is physical but not sexual; “verbal aggression” comprises harmful words and statements that are not physical or sexual; “relational aggression” describes behaviors employed by children such as excluding others and passing rumors that are harmful to the child’s relationship with others.

²² *See, e.g.*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, QUICK FACTS: SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN SCHOOLS (January 2017).

²³ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 11 (2011) [hereinafter “CROSSING THE LINE”]. This survey asks questions about whether the respondent suffered sexual (or gender-based) harassment within the past school year

harm as a result.²⁴ While a few students said that it did not bother them, many described emotional, physical, and educational responses—not wanting to go to school, feeling sick to their stomach, having trouble sleeping, altering the path they took to school, behavior problems at school, and quitting activities at school.²⁵ Half of those stating they were harassed to the AAUW said that they had not reported the harassment at the time it occurred.²⁶ And, despite this evidence that harassment and assault occur on school campuses, schools are drastically underreporting the incidences of sexual harassment.²⁷ School information is gleaned from data reported by schools receiving federal financial aid under Title IX (98,000 schools, nearly half of them with students in seventh through twelfth grades), as part of the Civil Rights Data Collection (“CRDC”).²⁸ Of schools with grades seven through twelve, for example, 79% reported that they had zero reports of sexual harassment or bullying based on sex during the 2015–16 school year; 99% reported that they had zero reports of rape during the same time frame; and 94% reported that they had zero reports of sexual assault other than rape in school during the same time period.²⁹

In some schools, sexual harassment is the norm.³⁰ Studies demonstrate, moreover, that much sexual harassment (physical and verbal) occurs in the open, with teachers looking on but doing nothing.³¹ When teachers are not trained about what is sexual harassment and how to

but does not require severity or pervasiveness for the respondent to answer in the affirmative. Neither does it require that the perpetrators be motivated by gender or sex. Nor does it include sex- and gender-based harassment that is not sexual or gendered in nature but that is motivated by sex or gender. Thus, this survey is both over-inclusive and under-inclusive when it comes to the legal definition under Title IX. See notes 19–22 *supra* & accompanying text.

²⁴ KEVIN MILLER, SCHOOLS ARE STILL UNDERREPORTING SEXUAL HARASSMENT AND ASSAULT (Nov. 2, 2018), <https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/> [<http://perma.cc/NU93-M5XZ>] [hereinafter “SCHOOLS ARE STILL UNDERREPORTING”].

²⁵ CROSSING THE LINE, *supra* note 23, at 22. Cases document other serious harms resulting from sex- and gender-based harassment in schools. See *infra* note 94. *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 267 (E.D.N.Y. 2009) (reporting harms such as inability to go to school, self-cutting, PTSD, attempted suicide, and, ultimately, in the most severe cases, suicide).

²⁶ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, QUICK FACTS: SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN SCHOOLS (January 2017) [hereinafter “QUICK FACTS”].

²⁷ *Id.*; MILLER, *supra* note 24.

²⁸ QUICK FACTS, *supra* note 26.

²⁹ MILLER, *supra* note 24.

³⁰ See J. Forber Pratt et al., *A Qualitative Investigation of Gang Presence and Sexual Harassment in a Middle School*, 27 J. CHILD & FAM. STUD. 1929, 1935–36 (2018) (concluding that while most of the sexual harassment seemed to be initiated by gang members, it was not all related to gang membership; sexual harassment was the norm, and a failure of adults to respond to open sexual harassment reinforced it as normal).

³¹ *Id.* The cases confirm this finding. See, e.g., *S.K. v. North Allegheny Sch. Dist.*, 168 F. Supp. 3d 786, 796–99 (W.D. Pa. 2016).

respond to it, they may validate the behaviors that constitute sexual harassment as normal.³²

Studies demonstrate that although girls and women tend to suffer more adverse effects than boys and men from harassment, boys and men do experience emotional damage, especially when sexual harassment is used as a method of performing hegemonic masculinity, harassing someone for the purpose of reinforcing the masculinity of the harassers, ridiculing the gender performance (either too masculine or too feminine of male and female victims), or drawing acceptable boundaries of how victims should perform their gender.³³ Especially LGBTQ+ students have “poorer mental and physical health, less engagement with school, and higher suicide rates than their heterosexual peers.”³⁴ Straight boys and men also suffer from homophobic slurs, which cause increased anxiety and depression as well as alienation among middle school children, especially boys.³⁵ One study found that there existed ample evidence of verbal harassment of LGBTQ+ students by both students and educators.³⁶ Approximately 90% of study participants had heard a student verbally harass another because of bias against LGBTQ+ individuals, whereas 44% had heard school staff engaging in the same verbal harassment.³⁷

Much harassment occurs in the open with victims and perpetrators who are both boys and girls and with victims of different races. Studies in middle schools confirm, however, that the perpetrators of sex- and gender-based harassment against both girls and boys are most frequently boys.³⁸ One study found that the highest rate of physical sexual assault was of African-American girls, followed by African-American boys.³⁹ And students reporting sexual harassment stated that it occurred most frequently in hallways, followed by classrooms.⁴⁰

³² Forber-Pratt, *supra* note 30, at 1936 (citing L. Charmaraman et al., *Is It Bullying or Is It Sexual Harassment? Knowledge, Attitudes and Professional Development Experiences of Middle School Staff*, 83 J. SCH. HEALTH 438 (2013)).

³³ See James Gruber & Susan Fineran, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 22 VIOLENCE AGAINST WOMEN 112, 117 (2016).

³⁴ *Id.*; see also Tyler Hatchel et al., *Sexual Harassment Victimization, School Belonging, and Depressive Symptoms among LGBTQ Adolescents: Temporal Insights*, 88 AMER. J. ORTHOPSYCH. 422 (2018) (finding that middle and high school LGBTQ+ victims of sexual harassment suffer increased depressive symptoms over a period of time).

³⁵ Gruber & Fineran, *supra* note 33, at 117.

³⁶ Eliza Dragowski et al., *Educators' Reports on Incidence of Harassment and Advocacy Toward LGBTQ Students*, 53 PSYCH. IN THE SCH. 127 (2016).

³⁷ *Id.* at 137.

³⁸ See Dorothy L. Espelage et al., *Understanding Types, Locations, & Perpetrators of Peer-Peer Harassment in U.S. Middle Schools: A Focus on Sex, Racial, and Grade Differences*, 71 CHILDREN & YOUTH SERV. REV. 174, 180 (2016).

³⁹ *Id.*

⁴⁰ *Id.* at 181.

Although social scientists traditionally have seen bullying and sexual harassment as two separate phenomena and have thought of bullying as gender-neutral, recently, social scientists have begun to question the bullying paradigm that is both gender-neutral and based on individual personalities rather than systemic causes.⁴¹ One problem with the bullying literature is that it defines bullying as neutral and not gender-based and thereby underestimates important injuries caused by gender-based harassment.⁴² This is particularly important when it comes to the law for two reasons: 1) anti-bullying efforts often ignore gender-based harms, many of which are intentional, and 2) Title IX forbids sex- or gender-based discrimination and not bullying that does not occur because of sex or gender of the victim. Schools do two contradictory things that allow them to escape responsibility: they engage in anti-bullying campaigns and, at other times, hide behind bullying (which does not occur because of sex and is not illegal) in order to defend Title IX claims. Some newer social science research demonstrates that girls suffer from gender-based harms caused by sex-based peer aggression, and this research argues that bullying scholars should recognize the gendered nature of much bullying.⁴³ In fact, at least one study finds that gender-based sexual harassment that employs stereotypes, both sexist and anti-heterosexist, causes greater harm to victims' school outcomes than gender-neutral bullying does.⁴⁴ Those harms include erosion of victims' school engagement, alienation of victims from teachers, and decreased academic achievement of victims.⁴⁵ It is important to understand that much of what some social scientists may label "bullying" by looking at the behaviors alone is actually illegal harassment under federal civil rights laws that occurs because of the victim's sex or gender nonconformity. Thus, although it is not possible to conclude that all bullying behavior has a sex- or gender-based motive, especially in the school context much of it does. Therefore, these behaviors can constitute both bullying in the traditional social science definition and sex- or gender-based harassment in the legal context.⁴⁶

⁴¹ *Id.*

⁴² For an explanation of the bullying research and whether it is gender-neutral or gender-based, see McGinley, *supra* note 19, at 1191–92 (explaining that many of the behaviors categorized by social scientists as bullying also occur because of the victim's sex, which would make them illegal under Title VII).

⁴³ See generally Rosalyn Shute et al., *High School Girls' Experience of Victimization by Boys: Where Sexual Harassment Meets Aggression*, 25 J. AGGRESSION, MALTREATMENT & TRAUMA 269 (2016); McGinley, *supra* note 19, at 1174–82 (arguing that bullying often does have a gendered aspect to it and collecting feminist literature that agrees with this proposition).

⁴⁴ James Gruber & Susan Fineran, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 22 VIOLENCE AGAINST WOMEN 112 (2016).

⁴⁵ *Id.* at 112–13.

⁴⁶ See generally McGinley, *supra* note 19.

Even social scientists are beginning to understand that their original conclusion that bullying is not related to gender is likely erroneous. Studies demonstrate that for boys and girls there is a positive correlation between being perpetrators of bullying behaviors in middle school, such as homophobic name-calling, and engaging in sexual violence later on.⁴⁷ A recent study found that both boys and girls who reported that they engaged in bullying and homophobic name-calling during middle school were more likely to be perpetrators of sexual violence in high school.⁴⁸ But the correlation between students who are victims of bullying in middle school and their tendency to commit sexual violence in high schools is gender dependent. Boys who are victims of homophobic name-calling react by engaging in more sexual violence against others, whereas girls who are victims of homophobic name-calling in middle school are not more likely to perpetrate sexual violence in high school.⁴⁹

Given that homophobic name-calling in middle schools (which seems to be largely ignored by teachers) seems to increase the perpetration of sexual violence in high school, the authors of the study recommended interventions and education of children that would occur before middle school, in the later elementary school years, that would prevent homophobic name-calling.⁵⁰ Prevention of homophobic name-calling seems to be important not only to reduce the stress of children but also to reduce increased sexual violence in high school. The authors pointed to social emotional learning (“SEL”), a system that enhances communication and empathy of middle school children that has proven successful in reducing homophobic name-calling and sexual violence.⁵¹

⁴⁷ See generally Dorothy L. Espelage, et. al, *Longitudinal Examination of the Bullying-Sexual Violence Pathway across Early to Late Adolescence: Implicating Homophobic Name-Calling*, 47 J. YOUTH & ADOLESCENCE 1880 (2018).

⁴⁸ *Id.* at 1880–81, 1888. According to the authors of the study, bullying is engaging in recurrent aggressive acts that are physical, verbal, or relational; homophobic name-calling is gender-based harassment using derogatory terms that indicate that the object is a member of a sexual minority, but it is often directed at members of sexual majorities as well; sexual violence comprises nonconsensual physical sexual acts as well as verbal harassment. The authors include both sexual harassment in the legal sense and physical and verbal harassment in the definition of sexual violence. Of course, under Title IX, homophobic name calling itself could be a form of gender-based harassment if it is severe, pervasive, and objectively offensive and denies the victim equal access to educational opportunities.

⁴⁹ *Id.* at 1889–90.

⁵⁰ *Id.* at 1889.

⁵¹ *Id.* at 1890.

B. Case Studies of Sex-Based Harassment

Fact patterns alleged in cases and OCR complaints under Title IX provide a qualitative view of the type of sex- and gender-based harassment that occurs in schools.⁵² Court cases reveal allegations of egregious harassment against girls and boys perpetrated by individuals and groups of boys and girls. School officials react by neglecting the behavior and even by hostile actions toward the victim. One case that demonstrates the destructive behavior and the school's failure to protect the victims is *Wells v. Hense*⁵³ where the plaintiffs alleged⁵⁴ that two tenth-grade boys sexually assaulted two tenth-grade girls in a math classroom with the shades drawn and the doors locked while other students looked on.⁵⁵ Afterwards, other students gossiped and harassed the victims verbally. The plaintiffs alleged that the school assured them that they would investigate and take prompt remedial action but that the school did not do either. As a result, the girls were forced to leave school and finish out the school year by studying at home.⁵⁶

Severe sex- and gender-based harassment occurred in *Thomas v. Town of Chelmsford*⁵⁷ where a ninth-grade boy was harassed repeatedly and ultimately raped with a broomstick by fellow players at football camp.⁵⁸ The next day, the coach told the victim, Matthew, "This is part of growing up."⁵⁹ As a result of the school district's failure to take the victim's report seriously, male athletes began to bully and harass Matthew, calling him "Broomstick," making derogatory sexual comments about him in school and social media postings, and threatening violence against him.⁶⁰ Teachers singled Matthew out in front of other children in class, ridiculing him, and accusing him of being an "instigator."⁶¹ One teacher failed to discipline a student who hit Matthew with a shoe in class; another did not comply with Matthew's Individual Education

⁵² Depending on the procedural posture of the cases described in this subsection, the facts in court cases are as alleged or taken in the light most favorable to the plaintiff; the facts in OCR investigation reports have been found by a preponderance of the evidence to support a finding of a school's liability.

⁵³ 235 F. Supp. 3d 1 (D.D.C. 2017).

⁵⁴ *Id.* at 6 (the allegations in this case are taken as true because the court is deciding the defendant's motion to dismiss under Rule 12(b)(6)).

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 8–9. The court properly refused to grant the motion to dismiss because the complaint plausibly alleged deliberate indifference when it alleged that the school did not do an adequate investigation or punish the boys who were allegedly responsible for the sexual assaults, thus making it impossible for the victims to continue in the school.

⁵⁷ 267 F. Supp. 3d 279 (D. Mass. 2017).

⁵⁸ *Id.* at 290.

⁵⁹ *Id.*

⁶⁰ *Id.* at 290–91.

⁶¹ *Id.* at 292–93.

Plan (“IEP”);⁶² another told the class, “[C]hildren who report something are snitches and are the worst type of person.”⁶³ The athletic director swore at Matthew and told Matthew’s parents that the school had found no wrongdoing by the alleged rapists.⁶⁴ The harassment escalated for months, lasting for the entire school year, with mocking and ridicule at lacrosse tryouts, sexually explicit threats by one of the alleged rapists toward Matthew, and a dean’s instruction to Matthew to “man up,” because the behavior was “boys just being boys.”⁶⁵ The captain of the lacrosse team yanked Matthew’s facemask and yelled in his face that he “was going to f . . . ing kill” Matthew if he did not quit the team.⁶⁶ Graffiti appeared on the bathroom walls that stated, “Matt Thomas likes it in the ass.”⁶⁷ Ultimately, Matthew and his family reported twenty-four incidents to the school during the school year.⁶⁸

A female student entering the ninth grade alleged egregious harassment in *S.K. v. North Allegheny School District*.⁶⁹ Even before the school year began, the plaintiff received a text message from a tenth-grade girl stating, “You f . . . ing bitch, I’m going to cut your f . . . ing face.”⁷⁰ After the plaintiff told her sister, the plaintiff received another text message from a second girl stating, “You just dug your grave deeper.”⁷¹ Many harassing posts on the plaintiff’s Facebook page followed. This was just the beginning.

Continuous harassment included texts and oral threats from girls such as “I am going to slit your (and your friend’s) throats, that’s a promise, not a threat,”⁷² daily verbal insults in the school halls that the plaintiff was a “slut” and a “c . . . t;” the altering of a photograph to show the plaintiff with a banana in her mouth;⁷³ football players throwing bananas at her and proclaiming loudly that the plaintiff had herpes; pushing, shoving, and touching by male students; football players pinning the plaintiff against the lockers and groping her sexually; and escalating abuse during lunch period so that the plaintiff ultimately had

⁶² *Id.* at 293 (the Individuals with Disabilities Education Act requires schools to create IEPs for students with disabilities who are covered by the Act. Pub. L. 101-476; 20 U.S.C. 1414).

⁶³ *Id.* at 294.

⁶⁴ *Id.* at 293–94.

⁶⁵ *Id.* at 294.

⁶⁶ *Id.*

⁶⁷ *Id.* at 295.

⁶⁸ *Id.*

⁶⁹ 168 F. Supp. 3d 786, 796 (W.D. Pa. 2016) (describing egregious harassment of a ninth-grade girl by boys and girls at her school).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

to eat lunch alone in a classroom. Things got so bad that the harassment spilled into the plaintiff's employment, and her employer became alarmed and warned the principal.⁷⁴

The plaintiff repeatedly reported these events to the principal. Her parents filed a police report against a female student who had threatened her.⁷⁵ In response, the student escalated the harassment, physically assaulting the plaintiff on many occasions. Despite the relentless harassment that the plaintiff reported, much of which was witnessed by faculty members, male athletes who were perpetrators were never punished. Female harassers and other male harassers were merely talked to, but school authorities did nothing even remotely effective to stop the harassment.⁷⁶ In fact, the plaintiff tried to commit suicide after more than six months of continuous harassment, but even that act led to increased harassment.⁷⁷ The school officials literally gave up; they told the plaintiff that they could not stop the harassment and encouraged her to attend another school. Ultimately, the plaintiff transferred for the rest of the school year, but she returned to the school the following year, and the harassment continued so that the plaintiff was forced to leave a second time.⁷⁸

In *Haines v. Metropolitan Government of Davidson County*,⁷⁹ an eleven-year-old girl was subjected to more than twenty sexual assaults at school by two eleven-year-old boys.⁸⁰ The complaint alleged that the boys threw the girl, Jessica, to the ground, laid on top of her in a sexual manner, fondled her buttocks, breasts, and genitals, and verbally assaulted her. They told her that they were going to have sex with her, and they asked her if she was a virgin and if she had been raped before.⁸¹ When Jessica tried to send a note to her teacher to tell her of the abuse, her teacher tore up the note and told Jessica not to be a "tattle tale."⁸² Jessica also told the principal, and school authorities did virtually nothing to stop the harassment. The boys finally admitted to the harassment, and they were given only one-day in-school suspensions.⁸³

⁷⁴ *Id.* at 797.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 799.

⁷⁸ *Id.* at 798. Fortunately, the court denied the defendant's motion to dismiss the Title IX claim, which was supposedly based on an argument that there were insufficient allegations of facts constituting deliberate indifference. It is difficult to imagine that a court would ever dismiss a case with these facts.

⁷⁹ *Haines v. Metro. Govern. Of Davidson Cty.*, 32 F. Supp. 2d 991 (M.D. Tenn. 1998).

⁸⁰ *Id.* at 995.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 996.

The assaults continued even though Jessica's psychiatrist warned the principal about the serious effect of the assaults.⁸⁴

Besides the cases decided by the courts, OCR case resolutions also document severe harassment that occurs in schools. One OCR case resolution⁸⁵ revealed that the complaining student had received a series of private electronic messages attempting to extort nude photos of her, and the school told her to report it to the police but took no further action.⁸⁶

In the West Contra Costal Unified School District, a spate of harassing and criminal behaviors was documented by the OCR. The resolution described severe sexually harassing behavior that permeated the education environments at school sites.⁸⁷ The OCR found that a female student was raped in a high school classroom by two male students in 2008.⁸⁸ A year later, several men raped another female high school student on school property; some of the perpetrators were current or former students in the district. A male girls' basketball coach in the district was accused the same year of watching female students change clothes and inappropriate touching and sexual comments in the locker room in the presence of the entire team.⁸⁹ The OCR described frequent nonconsensual sexual touching among students between classes and during lunch periods. The behavior included groping, grabbing, forced kisses and hugs, and "grinding."⁹⁰ A health center employee admitted to counseling female students in the West Contra Coastal District every year because they complained about forced oral sex, being grabbed and held against their will, and being groped. While most of this behavior was initiated by male students on female students, sometimes female students initiated the behavior on male students or the behavior occurred between students of the same sex. Female students sometimes submitted to unwanted touching because they feared that if they resisted, the behavior would escalate.⁹¹ Students often called each other

⁸⁴ *Id.*

⁸⁵ The OCR provides access through its website to case resolution letters and agreements that were reached after October 1, 2013. These OCR case resolutions are particularly helpful in furthering our understanding of how the OCR interprets the law and applies it to facts on the ground. See U.S. DEPT OF JUSTICE, <https://www.ed.gov/ocr-search-resolutions-letters-and-agreements> (last visited Feb. 5, 2019) [<https://perma.cc/379J-LDBZ>].

⁸⁶ See Perris Union High Sch. Dist., U.S. DEPT OF EDUC., OCR No. 09-15-1263, 10 (Apr. 21, 2016).

⁸⁷ West Contra Costal Unified Sch. Dist., U.S. DEPT OF EDUC., OCR No. 09-10-5002, 7 (Nov. 6, 2013) (this description gives only some of the facts concerning harassment in this district because harassment was so pervasive).

⁸⁸ *Id.* at 6.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.*

⁹¹ *Id.*

sexually derogatory names, and slang about female anatomy was frequent. Rumors circulated concerning female students' sexual reputations.

Similar behaviors occurred in the middle and elementary schools in the same school district, including a female middle school student who was sexually assaulted by another girl in the restroom.⁹² There was pervasive graffiti throughout the district; male students who appeared feminine were labeled "faggot[s]."⁹³ These student victims were, according to a middle school principal, not necessarily gay but were perceived as such because they did not participate in sports or had mostly female friends.⁹⁴

Many of these behaviors that took place in the West Contra Coastal Unified School District were criminal in nature, and criminal authorities should have investigated and prosecuted where necessary. But because criminal sanctions take place after the fact, it is crucial for school authorities who are often present and aware of much of the behavior to control the behavior before it reaches the criminal level. School administrators and teachers need to be taught how to recognize and deal with these situations so they can prevent physical, emotional, and educational harm to students. Only risk of significant liability or OCR penalties will be sufficient to create the proper incentives to train educators to take action before the behavior gets out of control.

The empirical and qualitative studies and the cases alleging Title IX violations demonstrate that sex- and gender-based harassment is common and that it has severe effects. Children's responses to peer harassment, as is obvious from the cases, include crying, inability to go to school, self-cutting, PTSD, attempted suicide, and ultimately, in the most severe cases, suicide.⁹⁵

Cases and OCR complaints and investigation victims seem to be disproportionately children with disabilities, even if there is no allegation of disability-based discrimination. This finding is consistent with the studies that demonstrate that children with disabilities are more vulnerable to harassment than children who do not have disabilities.⁹⁶

⁹² *Id.* at 10.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See, e.g., *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 267 (E.D.N.Y. 2009) (cutting, difficulty sleeping, PTSD).

⁹⁶ See Jesse Krohn, *Sexual Harassment, Sexual Assault, and Students with Special Needs: Crafting an Effective Response for Schools*, 17 U. PENN. J. L. & SOC. CHANGE 29, 31–33 (2014).

Moreover, many complainants in the OCR process allege race or national origin (as well as disability) and sex- or gender-based harassment. Studies show that girls of color are more often victims of sex- or gender-based harassment.⁹⁷ A number of cases also arise in the setting of very young children. Children as young as five years old are telling their parents about sexual harassment and their parents are filing complaints.⁹⁸

One specific concern that arises in the complaints is the possibility of racial motives for the complaints. While most of the cases do not discuss race unless the complainant files a race-based claim, race is often erased from the picture. A proper response to the problem of sex- and gender-based harassment in school should avoid creating additional problems by listening to victims or disciplining perpetrators unequally depending on their racial identities. All schools and OCR officials must be aware: differential treatment of children based not only on their gender but also on their race must be avoided.⁹⁹

II. MASCULINITIES, MEAN GIRLS, AND PEER SEX HARASSMENT

As noted above, most peer sex- and gender-based harassment in schools is perpetrated by boys (often in groups), some of it on boys and some of it on girls. Peer sex- and gender-based harassment stems from a desire for status by performing masculinity in prescribed ways, and it often not only solidifies the perpetrator's place in the group, but also adds to the group's status. This article explains that masculinity is a powerful motivation for sex- and gender-based harassment. While masculinities theory may not completely explain all different types of harassment and bullying that occur in school, many cases, when examined through the lens of masculinities theory, reveal that societal notions of masculinity underlie a very large percentage of the harassment that occurs.

Masculinities theory explains that masculinity is not a biological imperative, but instead is a performance that is socially constructed.

⁹⁷ See Espelage et al., *Understanding*, *supra* note 38.

⁹⁸ See Amy B. Cyphert, *Objectively Offensive: The Problem of Applying Title IX to Very Young Children*, 51 FAM. L. QUART. 325 (2017) (discussing cases of very small children accused of sexual harassment); *Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255 (D. Mass. 2006) (alleging that kindergartner was coerced by a third-grade male student into lifting up her dress, pulling down her underwear, and spreading her legs every time she wore a dress on the school bus).

⁹⁹ At the time I was writing this, a woman who was a high school and middle school principal informed me that in the middle school in which she worked, a school of lower income families, parents of white girls would frequently complain that black boys were harassing the girls. The difficulties associated with these types of reports, given the historical context in the U.S. are obvious, and OCR workers and educators must be trained to handle these types of cases with sensitivity.

Boys are encouraged to perform a particular type of masculinity. Masculinity is defined by what one is not, not by what one is. That is, masculine boys must constantly prove that they are not girls (or effeminate) and not gay.¹⁰⁰ Boys should be tough, not weak. A showing of emotion—especially crying or tenderness—makes a boy weak. Boys are particularly vulnerable to these messages and bullying from a failure to comply with the masculinity code in their pre-teen years. As a result, as they approach puberty, it is not uncommon for boys to engage in masculinity-enhancing performances, including sex- and gender-based harassment and violence against boys and girls in order to prove their masculinity to themselves and to the boys surrounding them.¹⁰¹

Depending on the individual's intersectional identities, there are numerous ways to perform masculinity.¹⁰² Boys of different social classes and races tend to perform masculinity in different ways. Among adults, the most powerful masculinity is that of the hegemonic masculinity—the type of masculinity associated with upper-middle class white men who are wealthy professionals. But, even in the adult world, different groups in society approve of different types of performances,

¹⁰⁰ See NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 36 (2010). There is a strong current among progressive young adults that resists the binary classification of sex as male and female. I recognize and applaud this movement and understand that not all persons fit into the binary that society has established. Clearly, persons are born intersex as well as male and female; moreover, trans and other non-cisgender persons may live on a gender spectrum and perform their genders in different ways depending on their preferences or needs. See, e.g., Amanda Montañez, *Visualizing Sex as a Spectrum*, SCIENTIFIC AMERICAN (Aug. 29, 2017), <https://blogs.scientificamerican.com/sa-visual/visualizing-sex-as-a-spectrum/> [<http://perma.cc/46LQ-57QP>]; Ritch C. Savin-Williams, *What Everyone Should Know About Genderqueer and Nonbinary*, PSYCHOLOGY TODAY (July 29, 2018), <https://www.psychologytoday.com/us/blog/sex-sexuality-and-romance/201807/what-everyone-should-know-about-genderqueer-and-non-binary> [<https://perma.cc/3YT6-KTUY>]. The gender regime that I describe—an imposition of masculinity on boys—is particularly harmful to those individuals who do not wish to, or who cannot, alter their bodies or genders to perform as society expects. It is difficult to explain gender theory given that much of it—at least the language used—relies in large part on the binary that has previously been accepted, but I hope to avoid essentialism in my analysis. The binary itself is essentialist, and to some extent, so is much of masculinities theory. But this theory is receptive to all persons, whether cisgender or not, and should be supportive if we can find a language that works to describe the reality that is society's pressure on persons who are perceived to be men and boys to perform masculinity in particular ways given their particular identities (racial, age-based, sexual orientation, etc.) in certain contexts. I will leave for another day the effort to create a language that is more inclusive should this essay fail to be so.

¹⁰¹ See McGinley, *supra* note 6; Beth A. Quinn, *Sexual Harassment and Masculinity: The Power and Meaning of "Girl Watching,"* 16 GENDER & SOC'Y 386 (2002).

¹⁰² See MCGINLEY, *supra* note 9.

and individuals tend to perform the masculine identities that are favored by the groups to which they belong.¹⁰³ These performances, too, often take a toll on the individual.¹⁰⁴

While different socio-economic groups express preferred masculinity in different ways,¹⁰⁵ common among all socio-economic groups is the use of sex- and gender-based harassment of women and men (girls and boys) as a means of proving their masculinity to themselves and others.¹⁰⁶ The victims are male and female, straight, gay, and trans. Workplaces are key locations for proving masculinity because men's sense of identity often derives from the work they do.¹⁰⁷ But these behaviors appear much sooner in boys' lives. Gender norms are ubiquitous in our culture, and young children are aware of gendered expectations long before they attend school. Once in school, boys from all social and racial backgrounds feel pressure to prove their masculinity. Boys are admonished not to be a "girl," in other words, not to be weak.¹⁰⁸ In schools, sex- and gender-based harassment is rampant, both at the college and university levels and from kindergarten through high school.¹⁰⁹

In schools, boys are encouraged to demonstrate their masculinity and to hide their feminine characteristics. One way of doing this at the middle and high school levels is through sex- and gender-based harassment.¹¹⁰ Groups of boys join to harass both girls and other boys. The goal of harassing boys and girls is to elevate the masculinity of the harassers and to set group gender rules. Harassing both boys and girls establishes the superiority of masculinity over femininity.¹¹¹ Boys who do not conform their gender performances to accepted forms of masculinity

¹⁰³ See Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L. REV. 221, 242–47, 256–59 (2015) (examining the different forms of masculinity performed by male police officers and young black men living in neighborhoods targeted by the police).

¹⁰⁴ See DOWD, *supra* note 100, at 58–60.

¹⁰⁵ See MCGINLEY, *supra* note 9, at 24–25; McGinley, *Policing*, *supra* note 103 (explaining that men are responsible for more than 90% of violence internationally, compared to their female counterparts who commit only about 10% of violent acts; that engaging in crime is a masculine performance; that a large percentage of young men of all classes commit crimes, but the types of crimes men commit vary depending on their class status, and middle and upper class young men tend to "age out" of crime sooner because of the availability of paid work).

¹⁰⁶ See McGinley, *The Masculinity Motivation*, *supra* note 6.

¹⁰⁷ MCGINLEY, *supra* note 9, at 29–32.

¹⁰⁸ See PLAN INTERNATIONAL, *THE STATE OF GENDER EQUALITY FOR U.S. ADOLESCENTS 4–5* (2018) (finding in a 2018 survey of 1,000 children ages 10–19 that 82% of boys surveyed had heard someone tell a boy that he was acting like a girl, which they interpret to mean that the boy is "emotional, crying, sensitive, weak, feminine, and moody/dramatic—and implicitly unbecoming.").

¹⁰⁹ See *supra* Part I, at 4–7. RAINN, *CAMPUS SEXUAL VIOLENCE: STATISTICS* (2019), <https://www.rainn.org/statistics/campus-sexual-violence> [<https://perma.cc/BV9J-9DUK>].

¹¹⁰ See generally, McGinley, *supra* note 6.

¹¹¹ *Id.* at 104.

are frequently the victims of this harassment. Moreover, boys, especially in segregated spaces such as sports teams, tend to harass other boys who are new to the program in order to assure understanding of and compliance with the rules of masculinity.¹¹² In schools, some of the cases reveal, coaches either join in or look the other way when this boy-on-boy harassment is occurring.¹¹³

When girls join groups of boys to harass boys, they may do so in large part in order to “fit in” with the most powerful group of boys who perform their masculinity in a socially acceptable manner.¹¹⁴ At the middle school level this type of harassment increases substantially,¹¹⁵ at a time when children are encountering their own gender and sexual identities. The harassment serves to establish and preserve the society’s gender hierarchy. Girls, as well as boys, police the gender performances of boys by, for example, homophobic name-calling.¹¹⁶ This behavior is directed not only at boys who are gay but also at boys who identify as straight.¹¹⁷ Thus, although the language used often refers to the supposed sexual orientations of the victims, the behavior is used not only to punish outsiders because of their sexual orientations but also because their gender identities do not conform to the expected roles. One purpose of the harassment is to assure the power of the binary gender roles that the boys and girls play. The harassment not only confirms the power of the masculine boys and feminine girls but also denigrates the victims for their failure to perform their masculinity in socially acceptable ways.¹¹⁸

We often hear of “mean girls,”¹¹⁹ popular girls who engage in competitive mistreatment of other girls, especially during middle and high

¹¹² *Id.* at 106.

¹¹³ See Perris Union High Sch. Dist., U.S. DEP’T OF EDUC., OCR No. 09-15-1263, 10 (Apr. 21, 2016).

¹¹⁴ There is some emerging research that shows that at least some girls use forms of relational aggressive behavior as well as physical and verbal aggression toward boys as well. See, e.g., Sibohan Dytham, *The Role of Popular Girls in Bullying and Intimidating Boys and Other Popular Girls in Secondary School*, 44 BRIT. EDUC. RES. J. 212 (2018) (describing aggression of popular girls toward other girls and boys in a white working-class school in England).

¹¹⁵ See, e.g., S.K. North Allegheny Sch. Dist., 168 F. Supp. 3d 786 (W.D. Pa. 2016) (sexually, physically and verbally harassing behaviors against a ninth-grade girl).

¹¹⁶ See Espelage, *supra* note 47, at 1880–81.

¹¹⁷ *Id.*

¹¹⁸ See, McGinley, *The Masculinity Motivation*, *supra* note 6.

¹¹⁹ “Mean Girls” was a movie starring Lindsey Lohan produced by Paramount Pictures in 2004. The plot focuses on a clique of popular high school girls, known as “the Plastics” who mistreat other girls in the school. See MEAN GIRLS (Paramount Pictures 2004). “Mean Girls” is also currently a Broadway musical. Both the movie and the play were inspired by *Queen Bees and Wannabes* by Rosalind Wiseman. See ROSALINE WISEMAN, QUEEN BEES AND WANNABES: HELPING YOUR DAUGHTER SURVIVE CLIQUES, GOSSIP, BOYS, AND THE NEW REALITIES OF GIRL WORLD (2002). See Esther Zuckerman, *Revisiting ‘Mean Girls’ with Rosalind Wiseman* (Apr. 28, 2014), <https://www.theatlantic.com/entertainment/archive/2014/04/revisiting-mean-girls-with-rosalind-wiseman/3>

school years.¹²⁰ Many of these behaviors, too, are likely attributable to maintaining gender hierarchies in schools. The “mean girls” are aligned with the popular boys who perform the most powerful form of masculinity, and, generally, the girls’ power comes from their relationship with these boys. Girls may use harassment of other girls to maintain their competitive edge with the most powerful boys—the masculine boys—and to assure that the hierarchy of the masculine over the feminine continues to thrive.¹²¹ The relationships between gender dynamics and bullying and harassment in schools are very complicated, but there is no question that gender is involved.

Gendered behaviors are difficult to recognize because gender is often invisible. That is, because gender is embedded in our society, we interpret learned gender behaviors as biological imperatives, and we see the behavior as normal. But much learned behavior that is destructive of children, both boys and girls, does not result from biology but from societal pressures to conform to certain gender norms. The cases discussed below give a glimpse into the types of behaviors that children are perpetrating on other children and the failure of adults to recognize the seriousness of the behaviors and to respond to them appropriately. The cases demonstrate that some teachers and administrators stand by as sex- and gender-based harassment occurs between peers without disciplining the perpetrators. Even worse, other teachers, coaches, and administrators join in verbal sex- or gender-based harassment of victims, in essence demonstrating by their actions that this behavior is acceptable and even condoned. As a result, schools have become training grounds for sex- and gender-based harassment in the workplace and other locations in society.¹²² But the research shows that it is not only

61283/ [http://perma.cc/R6HT-KPRA].

¹²⁰ For a real-life example, see *North Allegheny Sch. Dist.*, 168 F. Supp. 3d at 796–99 (describing harassment inflicted by groups of girls and boys and by individual boys and girls).

¹²¹ Feminist writers have criticized the “mean girls” trope. See, e.g., Jennifer Bethune and Marnina Gonick, *Schooling the Mean Girl: A Critical Discourse Analysis of Teacher Resource Materials*, 29 GENDER AND EDUCATION 389 (2017). Feminist writers consider the “mean girls” literature to be anti-girl and responsible for creating and maintaining social stereotypes about girls and boys and the gender-binary. *Id.* at 389–91. “Mean girls” texts also focus on individual behavior and choice as a response but ignore systemic inequality of girls in our society while perceiving girls’ aggressive behavior as aberrant, but biological, and boys’ aggressive behaviors as normal. *Id.* at 392. Moreover, critics of the “mean girls” literature point out that it is class-based in that it sees upper middle-class white girls as performing relational aggression and working-class girls who are white or of other races as more physically and verbally aggressive. While a complete analysis of girls and the “mean girls” phenomenon is beyond the scope of this article, it is important not to accept the “mean girls” literature as merely a description of reality and to recognize that it may be a discourse that is responsible for creating gender differences and expectations. *Id.* at 393.

¹²² I am not taking the position that schools are the only training grounds for this type of harassment. Harassment is pervasive both in the family and throughout society as well, but schools have a unique role in their ability to take a stand to influence children’s views about sex and gender, and they participate in the harassment by either standing by or outwardly condoning it.

the schools where children are educated. Gender messages are ubiquitous in our families and other institutions, but a reversal of the damaging effects of gender in schools will only come once administrators and teachers are educated about gender, educate their students and their parents, and refuse to allow sex- and gender-based harassment to continue in the schools. Exposing schools to legal liability and penalties imposed by the OCR should create the proper incentives for administrators and teachers to take this education seriously.

III. THE LAW'S RESPONSE TO PEER SEX- AND GENDER-BASED HARASSMENT IN SCHOOLS

A. The Courts' Extreme Deference to School Authorities

1. The Supreme Court

Title IX of the Education Amendments of 1972 prohibits a student from being excluded from participation in, denied the benefits of, or subjected to discrimination under any educational program or activity that receives federal financial assistance.¹²³ The Act authorizes an administrative enforcement scheme for Title IX; federal agencies with authority to provide financial assistance may promulgate rules, regulations, and orders that enforce Title IX's objectives of assuring equal access to educational opportunities for all students, no matter their sex or gender.¹²⁴ Although the Act does not explicitly grant a private right of action for damages against school boards, the Supreme Court has implied a cause of action for damages where there is teacher-on-student harassment,¹²⁵ or student-on-student harassment.¹²⁶

Although the statute does not state standards for holding a school authority liable for damages, the Supreme Court adopted stringent standards for liability when it implied a cause of action for damages.¹²⁷ These standards have made it extremely difficult for plaintiffs to prevail in cases against school districts. Additionally, although the standards set forth in *Davis v. Monroe County Board of Education*¹²⁸ for peer harassment are very exacting, many lower courts, when applying the Supreme Court standards to the facts before them, have interpreted these standards to be even more difficult to meet than the original Su-

¹²³ 20 U.S.C. § 1681(a).

¹²⁴ 20 U.S.C. § 1682.

¹²⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

¹²⁶ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 635 (1999).

¹²⁷ *Id.*; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

¹²⁸ *Davis*, 526 U.S. 635.

preme Court case appears to require. Thus, very few cases brought under Title IX for sex- or gender-based harassment survive motions to dismiss or for summary judgment.

In *Gebser v. Lago Vista Independent School District*,¹²⁹ which was decided the year before *Davis*, the Court had authorized liability of a school district for a teacher's sexual harassment of a student only if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to the teacher's misconduct."¹³⁰

A year later, in *Davis*, the Court held that a school board may face liability for third-party harassment of its students only where it has "substantial control" over both the harasser and the context in which the harassment occurs.¹³¹ A school board will be liable for peer sex- and gender-based harassment if the plaintiff proves that: 1) the school administration had actual knowledge of the behavior; 2) exhibited deliberate indifference to the harassment; and 3) the harassment was so severe, pervasive, and objectively offensive that it denied the victim equal access to educational opportunities.¹³² A plaintiff need not show physical exclusion from the educational opportunity in order to prove a denial of equal access.¹³³ Rather, a plaintiff must establish that the harassment undermined and detracted from the victim's educational experience so that she or he was effectively denied equal access to the institution's resources and opportunities.¹³⁴ In determining whether the behavior itself is sufficiently severe and pervasive,¹³⁵ *Davis* cited an employment discrimination case brought under Title VII of the 1964 Civil Rights Act, concluding that context matters. The "constellation of surrounding circumstances, expectations and relationships" including, but not limited, to the ages of the harasser and the victim and the number of individuals involved must be considered.¹³⁶

Moreover, the Supreme Court counseled that schools are different from workplaces in that children regularly interact in ways that would

¹²⁹ 524 U.S. 274.

¹³⁰ *Id.* at 277.

¹³¹ *Davis*, 526 U.S. at 645.

¹³² *Id.* at 651–52.

¹³³ *Id.* at 651.

¹³⁴ *Id.* at 651.

¹³⁵ Under Title VII, the plaintiff must show either that the behavior is severe *or* that it is pervasive, which appears to be a lower standard than that applied in Title IX, which requires a showing that the behavior is severe *and* pervasive. By the same token, as mentioned above, the Court cited to a Title VII case, *Oncale v. Sundowner Offshore Service, Inc.*, 523 U.S. 75, 82 (1998) when it analyzed the standard.

¹³⁶ *Davis*, 523 U.S. at 651, citing *Oncale*, 523 U.S. at 82.

be unacceptable for adults.¹³⁷ Thus, school students engage in “insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.”¹³⁸ Damages are not available to victims of “simple acts of teasing and name calling among school children” even if the comments are gendered.¹³⁹ The Court also noted that it is possible but unlikely that a single incident of harassment would deny equal access to educational opportunities, and that damages should be limited to situations where the harassing behavior and the school’s indifference to it have a systemic effect on educational programs or activities.¹⁴⁰ Finally, the Court explained that it should be easier to recover damages against a school board based on teacher-on-student harassment than peer harassment among students.¹⁴¹

Despite these rigid standards, the Court refused to affirm the lower court’s dismissal of the plaintiff’s case. The complaint alleged that LaShonda Davis, a fifth-grade girl, suffered repeated sex-based physical and verbal harassment over a five month period by a boy in her class who ultimately pleaded guilty to sexual battery for his conduct.¹⁴² Both LaShonda and her mother told a number of teachers of the incidents, and one teacher told her mother that the principal had been informed.¹⁴³ The complaint also alleged that a group of girls (along with LaShonda) who were sexually harassed by the same boy attempted to speak to the principal, but a teacher told them that the principal would call them if he wanted to speak to them.¹⁴⁴ No call was made to the girls.¹⁴⁵ La Shonda’s mother, however, finally spoke to the principal who never took disciplinary action against the boy.¹⁴⁶ The complaint also alleged that LaShonda’s grades dropped because she could not concentrate, and, ultimately, she wrote a suicide note.¹⁴⁷ Finally, the complaint alleged that the Board of Education had not established a policy on peer sexual harassment or instructed its personnel on how to respond to student-on-student harassment.¹⁴⁸

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 652.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 653.

¹⁴² *Id.* at 633.

¹⁴³ *Id.* at 633–34.

¹⁴⁴ *Id.* at 635.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 634.

¹⁴⁸ *Id.*

A majority of the Supreme Court concluded that the allegations were sufficient to state a cause of action under Title IX because LaShonda was a victim of repeated verbal and physical acts of sexual harassment over a five-month period, and the alleged behavior was severe, pervasive, and objectively offensive.¹⁴⁹ The allegations suggest that the harassment had a concrete negative effect on LaShonda, and that the Board had actual knowledge and responded with deliberate indifference when it made no effort to investigate or correct the harassment.¹⁵⁰

2. The lower courts' response to *Davis*

Many of the lower courts have interpreted *Gebser* and *Davis* in the strictest fashion, concluding in subsequent cases with egregious facts that the plaintiff did not, *as a matter of law*, meet the Supreme Court's standards. But a few other courts have taken a more measured approach to these standards. The following section analyzes cases with reference to individual requirements of the Supreme Court's standard, and also as a whole.

a. *Actual notice*

Davis requires that school authorities have actual notice of the harassment before the school has a responsibility to correct the situation. There are a number of questions concerning what this requirement means in the peer harassment cases. First, it is unclear, because of conflicting and insufficient caselaw, whether notice to a supervising teacher is sufficient to give the district actual notice. Second, it has not been resolved whether notice of a perpetrator's prior harassment of the individual in question or of others is sufficient notice to constitute actual knowledge that would trigger the school's responsibility to act to prevent more harassment. Third, where the victims are very vulnerable because of young age or intellectual disabilities, and therefore unable to communicate to school authorities in a sex-specific way, it is unclear what type of communication is sufficient to satisfy the actual knowledge requirement.

i. Sufficiency of notice to supervising teacher

There remains a question as to who should have actual notice in the peer harassment cases. *Gebser* states that actual notice exists only if an official who has the authority to take corrective action has notice

¹⁴⁹ *Id.* at 653–54.

¹⁵⁰ *Id.*

of the harassment in the teacher-on-student cases.¹⁵¹ Given that in teacher-instituted harassment an administrator may be the lowest level person with authority to take corrective action, a number of courts of appeals have held that knowledge of a fellow teacher or guidance counselor of ongoing sexual harassment of a student by a teacher is insufficient to constitute actual notice for purposes of a school district's Title IX liability.¹⁵² *Davis* does not discuss this issue with reference to peer harassment, but there is a non-trivial argument that notice to a teacher who supervises both the perpetrator and the victim would be sufficient to satisfy the actual notice requirement.¹⁵³

Nevertheless, the Eleventh Circuit declined to decide this question, stating that it would be necessary to study how Florida organizes its public schools and grants authority and responsibility by state law to administrators and teachers, the school district's discrimination policies and procedures, and the facts of the particular case.¹⁵⁴ Other courts have not yet decided the issue.

ii. Notice of perpetrator's prior harassment

A second issue is whether school authorities' knowledge of past harassment by the perpetrator is sufficient to fulfill the actual notice requirement of Title IX regarding a new harassing event. The question is whether a victim of a perpetrator's harassment can point to school authorities' knowledge that the perpetrator had harassed this same victim or a different victim in the past sufficient to constitute actual knowledge. If so, the question would arise as to whether school authorities were under a duty to remedy the past harassment and to prevent future harassment.

Courts in a number of circuits conclude that notice of prior sexual harassment in a teacher-on-student harassment Title IX case is sufficient to constitute actual notice in a subsequent case with the same teacher and a finding of deliberate indifference follows if the prior harassment is not distant in time or type from the current harassment.¹⁵⁵

¹⁵¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

¹⁵² *See, e.g., Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, 520 U.S. 1265 (1997).

¹⁵³ The regulations proposed by the Department of Education actually conclude that knowledge of a teacher in elementary and secondary school is sufficient to constitute actual knowledge of the school. This is because the teacher has a duty to report and correct harassing behavior. *See* 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt.106).

¹⁵⁴ *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1286–87 (11th Cir. 2003).

¹⁵⁵ *See, e.g., J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist.*, No. 1-29, 2010 WL 3516730 (10th Cir. Sept. 10, 2010) (upholding a jury verdict holding school district liable and finding actual knowledge and deliberate indifference toward an inappropriate sexual relationship between a student and teacher where another student reported to the school principal that he saw the student lying on the teacher's bed in a hotel room with the door closed on a band trip); *see also*

These courts state that knowledge of prior acts of harassment is sufficient to constitute actual notice to the school administration that a teacher is a substantial risk to the students.¹⁵⁶ But prior notice of a university administration of a professor's relationships with two older non-traditional students, ten year-old accusations of inappropriate comments, and one touching incident were not sufficiently similar or close in time to the repeated groping and touching alleged in the later case before the court to constitute actual notice that would trigger the university's responsibility to prevent injury to the current plaintiff.¹⁵⁷

A lower court in the Second Circuit has concluded that, "In the context of deliberate indifference, the actual notice standard may be satisfied by knowledge of a 'substantial risk of serious harm' where there have been multiple prior allegations of the same or similar conduct that is at issue."¹⁵⁸ And some courts hold that there is actual knowledge when there is a substantial risk created by a person whom the authorities know has engaged in abuse of other students.¹⁵⁹ This reading of actual knowledge is more consistent with the goals of Title IX to prevent unequal access based on gender or sex than requiring a showing that school authorities had actual knowledge of the abuser's behavior in the particular case. Permitting schools to wait until the harm occurs before they react gives schools near immunity from damages.

iii. Actual notice when vulnerable victim unable to communicate in sex-specific terms

A third related question arises as to the specificity necessary of the student complaint to school authorities, especially when the student victim is particularly vulnerable because of young age or intellectual disability and is unable to communicate in sex-specific terms. In a number of cases, young students and those with intellectual disabilities have reported to school officials in general terms that they were being

Escue v. N. Okla. College, 450 F.3d 1146 (10th Cir. 2006) (holding that even under the more liberal reading of Title IX that would permit a finding of actual knowledge based on prior incidents, two consensual relationships with non-traditional students and a ten-year old report of repeated inappropriate comments and one touching were not sufficiently close-in-time or similar to the type of non-consensual groping alleged by the plaintiff and therefore were insufficient to provide actual notice to the university administration); *Doe A. v. Green*, 298 F. Supp. 2d 1025 (D. Nev. 2004) (holding that reports to a principal that a fourteen year old girl was uncomfortable with attention from a coach, and subsequent partial admission and denials by the girl were sufficient to trigger a more rigorous investigation and to demonstrate actual notice by the school of the inappropriate relationship).

¹⁵⁶ See, e.g., *Green*, 298 F. Supp. 2d at 1033–34.

¹⁵⁷ *Escue*, 450 F.3d at 1153.

¹⁵⁸ *Carabello v. New York City Dept. of Educ.*, 928 F. Supp. 2d 627, 638 (E.D.N.Y. 2013) (quoting *Zamora v. N. Salem Cent. Sch. Dist.*, 414 F. Supp. 2d 418, 424 (S.D.N.Y. 2006)).

¹⁵⁹ *Id.*

bothered or that their perpetrators were acting “nasty.”¹⁶⁰ Courts have generally held that under these circumstances there is no actual notice even if the victims are very young or intellectually disabled.¹⁶¹

For example, in *Rost ex rel. K.C. v. Steamboat Springs Re-2 Sch. Dist.*,¹⁶² a seventh-grade female student who was intellectually disabled was repeatedly coerced into performing sexual acts on a number of boys for a number of years. A few years into the coercive behavior, the victim’s mother asked the school psychologist to find out why the victim did not wish to go to school. The victim testified in her deposition that she told the school counselor that the boys were “bothering” her, but that she did not know the word “assault” at that time.¹⁶³ Her personal therapist testified that the victim told him that she had told the counselor at school about the coerced sexual behavior with the boys.¹⁶⁴ The court concluded, however, that the information given to the counselor was insufficient to give the school actual notice that the child was being harassed and assaulted.¹⁶⁵ And, the knowledge the school did have created no responsibility to investigate further.¹⁶⁶

Similarly, in *Hawkins v. Sarasota County School Board*,¹⁶⁷ three eight-year-old girls (Jane Does I, II, and III) were allegedly harassed repeatedly over several months by an eight-year-old boy in their class in a series of gestures; obscene comments, such as telling them he wanted to “suck” their breasts, he wanted them to “suck the juice from his penis,” and he wanted them to “have sex with him;” and actions such as chasing them and touching them on their breasts and groin, attempting to kiss them, grabbing one of them and looking up her skirt, and rubbing his body on hers.¹⁶⁸ The girls cried frequently, were anxious about going to school, and at least two of them pretended that they were sick on four or five occasions so they would not have to go to school.¹⁶⁹ Both boys and girls in the class had complained to the teacher that this boy was bothering them, was disruptive, and that he had pushed children on the playground.¹⁷⁰ At one point, Jane Doe II and two other girls told the teacher that he was being “disgusting.” The teacher testified,

¹⁶⁰ See *Rost ex rel. K.C. v. Steamboat Springs Re-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008).

¹⁶¹ *Id.* at 1119.

¹⁶² *Id.*

¹⁶³ *Id.* at 1119–20.

¹⁶⁴ *Id.* at 1120.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 322 F.3d 1279 (11th Cir. 2003).

¹⁶⁸ *Id.* at 1281.

¹⁶⁹ *Id.* at 1281–82.

¹⁷⁰ *Id.* at 1282.

however, that it was not until she spoke with Jane Doe III's mother a number of months later that she heard of the explicit things John Doe had said and done.¹⁷¹ The girls testified, however, that they had repeatedly and persistently described his behavior to the teacher, and the teacher had ignored their complaints.¹⁷²

These persistent complaints of three eight-year-old girls to their teacher should be sufficient to create a responsibility on the teacher's part to investigate the issue further. Had she investigated (or even listened to Jane Doe III), she would have found out the explicit facts of the boy's behavior toward the girls. This is particularly troubling in this situation, as in *Rost*, because these victims were vulnerable due to their youth and may have been unable to describe the boy's behavior explicitly without prompting. Clearly, these holdings protect school districts from liability, but they do not encourage schools to act proactively when they have sufficient information that should lead to a duty to investigate more thoroughly general complaints from young or intellectually disabled children who may be incapable of explaining the assaults or harassment.

b. Deliberate indifference

In Title IX cases, the issue of deliberate indifference is linked to actual knowledge.¹⁷³ If there is no knowledge, it is impossible to show deliberate indifference. Assuming that there is actual knowledge, however, the courts have applied the deliberate indifference standard very strictly. Courts require that the school administration's response to known harassment be clearly unreasonable. Given this standard, some courts have found almost any response short of ignoring the harassment sufficient. At least some courts conclude that the school does not have to stop the harassment, nor is it clearly unreasonable if it institutes a remedy but does not meet again to decide whether to continue with the remedy.¹⁷⁴ Other courts hold that if the school authorities learn that their remedy has been ineffective in that the remedy did not stop the harassment, the school can be deliberately indifferent.¹⁷⁵

¹⁷¹ *Id.*

¹⁷² *Id.* (the court ducked the issue of whether notice to the teacher alone would be sufficient under Title IX, concluding that even if there was actual notice and deliberate indifference, the girls had not been denied access to an education opportunity as a matter of law because the behavior was not sufficiently severe, pervasive, and objectively offensive and because the girls' grades in school did not suffer); *see also id.* at 1288.

¹⁷³ *See, e.g.,* Gant ex rel. Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 141 (2d. Cir. 1999).

¹⁷⁴ *See, e.g.,* Pahssen v. Merrill Community Sch. Dist., 668 F.3d 356 (6th Cir. 2012).

¹⁷⁵ *See, e.g.,* Hunter ex rel. Hunter v. Barnstable Sch. Committee, 456 F. Supp. 2d 255, 265 (D. Mass. 2006) (stating that there is a split in the circuits as to this issue); *Wills v. Brown University*, 184, F.3d 20, 26 (1st Cir. 1999) (stating that once school authorities find out that their remedy—

A good example of the former is *Pahssen v. Merrill Community School District*.¹⁷⁶ In *Pahssen*, John Doe, a ninth grader, committed three fairly serious acts of sexual harassment against Jane Doe, an eighth-grade girl, and ultimately raped her at school.¹⁷⁷ When notified of the three incidents (before the rape), school officials met to discuss an Individual Education Plan (IEP) for John, who was in special education, to determine what to do about the boy's aggressiveness.¹⁷⁸ The team decided to place John under constant adult supervision for thirty days, but the team never met again to decide whether to lift the supervision; it was automatically lifted at the expiration of thirty days.¹⁷⁹ Less than two months later, the boy raped the girl at school.¹⁸⁰ Although both the Justice Department, which joined as an *amicus*, and the girls' father argued in briefs that the school had shown deliberate indifference when it failed to continue to supervise the boy after thirty days elapsed, the Sixth Circuit upheld the lower court's grant of summary judgment of the Title IX claim, holding that the school did not demonstrate deliberate indifference.¹⁸¹

In this case and others, courts repeatedly emphasize that courts should defer to school administrators, that schools have limited resources, and that children are often cruel to each other in determining that the school did not act in a clearly unreasonable manner and therefore did not display deliberate indifference.¹⁸² The courts require that the harassing behavior against a particular individual reach the level of severe, pervasive, and objectively offensive and that the school know about it before a responsibility to react is triggered.¹⁸³ But as the cases demonstrate, harassing behavior escalates.¹⁸⁴ It starts as bothersome pushing and name calling, but soon it moves to punching and shoving, obscene comments and gestures, demands for oral sex, and sexual assault. A school district should not escape liability for the ultimate severe behavior when it knows in advance that some of these behaviors are occurring and does nothing about it.

in a professor-on-student harassment case—has not worked “it may be required to take further steps to avoid new liability.”).

¹⁷⁶ 668 F.3d 356 (6th Cir. 2012).

¹⁷⁷ *Id.* at 360.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 363.

¹⁸² *Id.* at 363, 365.

¹⁸³ *See, e.g., Pahssen*, 668 F.3d 356.

¹⁸⁴ *See, e.g., Patterson v. Hudson Area Schools*, 551 F.3d at 439–42 (describing homophobic name-calling, pushing, shoving, destruction of property, and ultimately sexual assault).

In *Stiles ex rel. D.S. v. Grainger County*,¹⁸⁵ a boy who weighed less than eighty pounds in the seventh grade was continuously harassed, bullied, and battered; he was punched in the face and in the stomach, thrown to the floor, and kicked while he was on the floor.¹⁸⁶ On at least two occasions, D.S. was pushed, and he fell and hit his head.¹⁸⁷ On another, D.S. had his face slammed into a locker and had gum put in his hair.¹⁸⁸ As he was physically assaulted, D.S. was frequently called “fag-got,” “pussy,” “pedophile,” and other insulting slurs regarding his gender, sexual orientation and proclivities.¹⁸⁹ Affidavits by third parties stated that a friend of D.S. witnessed students ramming D.S.’s head into a locker, another student threatened to kill D.S., and a third student told D.S. to kill himself.¹⁹⁰ This behavior occurred continuously for two school years, and D.S. and his mother complained after many of the assaults and batteries occurred.¹⁹¹ Despite that D.S.’s mother complained repeatedly to the principal and the principal met with them a number of times, the situation was never cured. D.S. testified that the disciplinary supervisor for the county schools, Coombs, stated that he could not keep D.S. safe, but Coombs denied making this statement.¹⁹² A number of investigations took place, and the instigators were punished, but to no avail.¹⁹³

The court held that as a matter of law the school district did not show deliberate indifference because it engaged in a number of investigations, gave in-school suspensions to some of the harassers, and changed class scheduling to separate D.S. from his harassers.¹⁹⁴ The Sixth Circuit had held earlier in *Vance v. Spencer County*¹⁹⁵ that there was a jury question of deliberate indifference when school officials had actual knowledge that its efforts to cure the problem did not work and continued to use those same efforts unsuccessfully.¹⁹⁶ However, in *Stiles*, it distinguished *Vance*, stating that the school had made many

¹⁸⁵ 819 F.3d 834 (6th Cir. 2016).

¹⁸⁶ *Id.* at 834–46.

¹⁸⁷ *Id.* at 842.

¹⁸⁸ *Id.* at 846.

¹⁸⁹ *Id.* at 845.

¹⁹⁰ *Id.* at 846 n.7. These statements contained hearsay and therefore the court refused to consider them on the motion for summary judgment. *But see* *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (evidence creating issue of fact for nonmoving party need not be in admissible form).

¹⁹¹ *Stiles*, 819 F.3d at 834–46.

¹⁹² *Id.* at 845.

¹⁹³ *Id.* at 850.

¹⁹⁴ *Id.*

¹⁹⁵ 231 F.3d 253 (6th Cir. 2000).

¹⁹⁶ *See Stiles*, 819 F.3d at 849–50, citing *Vance*, 231 F.3d at 261.

efforts and there were almost no repeat offenders in the *Stiles* case, unlike in *Vance*.¹⁹⁷

The court in *Stiles* also distinguished *Patterson v. Hudson Area Schools*¹⁹⁸ largely because school officials had reason to believe in *Stiles* that D.S. was “at least an occasional instigator” of some of the physical confrontations.¹⁹⁹ The court’s adoption of this “defense” to a possible finding of deliberate indifference appears to add an “unwelcomeness” requirement into Title IX’s already stringent standards.²⁰⁰ This is an inappropriate standard to graft onto the situation of a middle school boy who suffers serious physical and verbal harassment, much of which, if reported to the police, would constitute crimes against him. Grafting an unwelcomeness requirement in this situation only serves to reward the true perpetrators and to let the school off the hook for its failures to control the situation.

Clearly, these are very complicated situations, and there was some attempt by school officials in *Stiles* to remedy the situation, but a reasonable jury could conclude that at some point during the two-year period of harassment it became obvious that the school’s efforts to stop the harassment were not working. At that point, a jury could conclude that the school operated with deliberate indifference when it did not report the abusers to the police and did not suspend or expel the abusers or engage in any other disciplinary measure designed to stop the harassment. This case demonstrates the difficulty of meeting the deliberate indifference standard. While this standard was intentionally set by the Supreme Court so as not to permit undue interference with the educational prerogatives of school officials, this case demonstrates that, at least as it was interpreted in this case, it does not serve to protect school children from gender-based discrimination. Even given allegations of grossly dangerous harassment and bullying that rises to the level of encouraging suicide, criminal batteries, and other severe behaviors, the court concluded as a matter of law that the school’s knowing ineffective response was not deliberate indifference.

¹⁹⁷ *Id.* at 850.

¹⁹⁸ 551 F.3d 438 (6th Cir. 2009).

¹⁹⁹ *Stiles*, 819 F.3d at 851.

²⁰⁰ In Title VII sexual harassment cases, the plaintiff must prove that the harassing behavior was unwelcome. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The original reason for this requirement was related to the question of consent in a sexual harassment case of a supervisor who imposed himself sexually on a subordinate. Although the Court made clear in *Meritor Savings Bank* that the unwelcomeness requirement does not mean that the plaintiff must show that she did not consent to the behavior because of the differential power between a supervisor and subordinate, the plaintiff still had to demonstrate that she did not wish to engage in the behavior. *Id.* at 68.

c. *Severe, pervasive, and objectively offensive sufficient to deny equal access to educational opportunities*

The severe, pervasive, and objectively offensive standard is linked to whether the behavior is serious enough to deny equal access to school opportunities because of the individual's sex or gender. In determining whether illegal harassment occurred, it would make sense, then, to take into account the ages of victims and the victims' subjective reaction to the harassment as well as to its objective severity, but courts do not always do so. In *Hawkins v. Sarasota County School Board*,²⁰¹ for example, the court concluded that the behavior was "not so severe, pervasive, and objectively offensive that it had the systemic effect of denying the [three eight-year-old girl victims] equal access to education."²⁰² The court stated that the effect must be systemic, which means that a single instance of one-on-one peer harassment would be insufficient, and "the effects of the harassment [must] touch the whole or entirety of an educational program or activity."²⁰³ This standard is incorrect. Other courts have held that one single incident, if sufficiently severe, can deprive an individual victim of access to equal educational opportunities.²⁰⁴

Moreover, in *Hawkins*, the victims alleged ongoing, repeated verbal and physical harassment of a sexual nature. But the court noted that the girls did not suffer sufficiently. The court stated:

None of the girls suffered a decline in grades and none of their teachers observed any change in their demeanor in classroom participation. The girls simply testify that they were upset about the harassment, although not enough to tell their parents until months after it began. Two of the girls say they faked being sick four or five times in order not to go to school. This falls short of demonstrating a systemic effect of denying equal access to an educational program or activity.²⁰⁵

How should a victim prove that there has been a systemic effect on the entire educational program? It seems odd that a statute that was intended to protect women and girls from unequal educations would require them to suffer in the extreme in order to get their education. As Justice O'Connor stated for the Court in the Title VII context in *Harris v. Forklift Systems*:²⁰⁶

²⁰¹ 322 F.3d 1279 (11th Cir. 2003).

²⁰² *Id.* at 1288 (emphasis added).

²⁰³ *Id.* at 1289.

²⁰⁴ See, e.g., *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).

²⁰⁵ *Hawkins*, 332 F.3d at 1289.

²⁰⁶ 510 U.S. 17 (1993).

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.²⁰⁷

The behavior in question in *Hawkins* certainly created an unequal educational environment for the girls who were harassed. It would make little sense to assume that denial of equal access depends merely on the subjective emotional strength or weakness of the victim or on the systemic effect of the harassment. As in Title VII coverage, Title IX should protect victims before they have psychological breakdowns.²⁰⁸

A number of other courts have concluded that harassing behavior is not sufficiently severe, pervasive, and objectively offensive as a matter of law. For example, in *Pahssen*, the court concluded that three acts of harassment by a ninth-grade boy—smashing the eighth-grade female victim up against her locker, telling her that if she did not perform oral sex on the perpetrator that he would no longer hang out with her, and making obscene gestures at the victim as she was playing basketball in a public arena at school—were insufficient to create a genuine issue of fact as to severity, pervasiveness, and objective offensiveness sufficient to trigger the school's responsibility to protect the victim who was later raped by the same boy.²⁰⁹

In contrast, *T.Z. v. City of New York*²¹⁰ concluded that one serious episode of sexual harassment was sufficiently severe that it may have had the effect of denying a student's access to equal educational benefits. Even though the language uses the terms "severe and pervasive," the court concluded that the "severe and pervasive and objectively offensive" standard's purpose was to predict whether the plaintiff would

²⁰⁷ *Id.* at 22.

²⁰⁸ Judge Illana Rovner would likely agree. See *Gabrielle M. v. Park Forrest-Chicago Heights, Illinois Sch. Dist.* 163, 315 F.3d 817, 827–28 (7th Cir. 2003) (Rovner, J., concurring) (concluding that a female five year-old kindergartener can suffer even if the perpetrator, also a kindergartener, may not be able to form the intent to harass; it is the *school's* intent and response, not that of the young perpetrator, that matters; Gabrielle's sleepless nights, bed wetting, loss of appetite, and emotional distress were sufficient to find unequal access to educational opportunities).

²⁰⁹ *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356, 365 (6th Cir. 2012).

²¹⁰ 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).

suffer unequal access.²¹¹ Given the serious sexual assaults that the plaintiff suffered in a classroom with the teacher present, and the serious effects on the plaintiff's mental health that included sleeplessness, panic attacks, PTSD, and self-cutting, the court held that this single instance of sexual assault (perpetrated by a number of boys) was sufficient to rise to the level of "pervasiveness;" therefore, there was a question for the jury.²¹² Unlike many of the other cases decided above, I submit, this case was correctly decided.

d. Because of sex

Under Title IX in schools and Title VII in workplaces, sex- or gender-based harassment is illegal only if it occurs because of the victim's sex.²¹³ Many courts deciding Title VII cases have trouble recognizing that harassment occurs because of sex in the same-sex environment.²¹⁴ This problem occurs most frequently under two circumstances. First, although same-sex harassment is illegal under Title VII,²¹⁵ up until very recently all federal courts had held that discrimination based on sexual orientation was not prohibited sex discrimination.²¹⁶ Thus, these courts concluded that as a matter of law, based on language used in the workplace, the discrimination occurred because of the victim's sexual orientation, not his sex, and was therefore not illegal.²¹⁷ Fortunately, the Equal Employment Opportunity Commission and a number of courts of appeals have recently concluded that discrimination based on sexual orientation is discrimination based on sex.²¹⁸ But there is a serious question whether the U.S. Supreme Court, considering its current composition, will agree with these decisions, and a number of cases dealing with this issue are currently before the Supreme Court.²¹⁹

²¹¹ *Id.* at 269.

²¹² *Id.* at 271.

²¹³ Of course, Title VII also forbids discrimination in workplaces that occur because of race, color, national origin, or religion. *See* 42 U.S.C. § 2000e-2.

²¹⁴ *See* MCGINLEY, *supra* note 9, at 46–48.

²¹⁵ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

²¹⁶ *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 713, 714 n.3, 732 (2010).

²¹⁷ This distinction would be very difficult to make. *See id.* at 738–44.

²¹⁸ *See, e.g.*, *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc) (cause of action exists under Title VII for sex discrimination); *Baldwin*, 2012-24738-FAA-03 (2015) (concluding that sexual orientation discrimination prohibited by Title VII); *compare*, *Macy v. Dep't of Justice*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (concluding that transgender status protected under Title VII prohibition of sex discrimination).

²¹⁹ *Bostock v. Clayton Cty, Georgia*, 723 Fed. App'x. 964 (11th Cir. 2018) (sexual orientation is not covered by Title VII); *cert. granted*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (April 22, 2019) (No. 17-1618); *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (en banc) (a cause of action exists under Title VII for sexual orientation discrimination), *cert. granted*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (April 22, 2019) (No. 17-1623). *Compare*, *Equal Employment Opportunity Commission v. R.G.*

The second issue that arises in Title VII cases regarding “because of sex” results from *Price Waterhouse v. Hopkins*’s²²⁰ holding that the statute prohibits discrimination based on an individual’s failure to conform (or hyper-conformity)²²¹ to gender stereotypes. In other words, discrimination “because of sex” also includes discrimination because of gender. Even if the Supreme Court holds that sexual orientation discrimination is not prohibited by Title VII, the sex stereotyping doctrine allows causes of action for harassment that results from an individual’s failure to conform (or hyper-conformity) to gender stereotypes, whether the plaintiff is LGBTQ+ or straight.

Even in cases brought under *Oncale v. Sundowner Offshore Services, Inc.*²²² and the sex stereotyping theory of *Price Waterhouse*, however, some lower courts have had trouble concluding, especially when men harass other men, that the behavior occurred because of sex. They conclude, instead, that the behavior is merely normal “roughhousing” or “hazing.”²²³ This error results from a misreading of *Oncale*. The Court mentions in *Oncale* that there is no Title VII cause of action for roughhousing or hazing that is not sufficiently severe or pervasive. But the *Oncale* court never held that roughhousing behavior that is severe and/or pervasive is not actionable. Lower courts, without focusing closely on *Oncale*, use this statement to hold that the behavior is roughhousing, and, therefore, it did not occur because of sex. These decisions are wrong because they distort *Oncale*’s language and meaning.

Masculinities theory also proves them to be wrong. Masculinities theory explains that severe or pervasive harassment of men by men often occurs because of sex because the harassers are motivated by the victim’s failure to conform to gender stereotypes and/or they harass the victim in order to enhance their own masculinity, to buttress the masculinity of their group, and to police the masculine norms of the workplace.²²⁴

& G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (a cause of action exists under Title VII for discrimination based on transgender status), *pet. cert. filed* (No. 18-107), June 24, 2018. The petitions for certiorari were granted on April 22, 2019 in all three of these cases. See Amy Howe, *Court to Take Up LGBT Rights in the Workplace*, available at <https://www.sco-tusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/>.

²²⁰ 490 U.S. 228 (1989).

²²¹ By “hyper-conformity,” I refer to discrimination or harassment motivated by the female victim’s extreme performance of femininity or the male victim’s extreme performance of masculinity.

²²² 523 U.S. 75 (1998).

²²³ See, e.g., *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179 (D. Conn. 2016).

²²⁴ See, McGinley, *The Masculinity Motivation*, *supra* note 6.

While less frequently, some courts deciding Title IX same-sex cases also conclude that harassment does not occur because of sex either because the behavior occurred because of the victim's sexual orientation²²⁵ or because the behavior is normal roughhousing or hazing among boys. The mantra "boys will be boys" excuses the behavior as normal and not occurring because of sex.

In *Doe v. Torrington Bd. of Educ.*,²²⁶ for example, the plaintiff, John Doe, attended high school from Fall 2011 until Spring 2013, and was regularly brutalized, bullied, and harassed by his classmates and his teachers, coaches, and a paraprofessional working in the school.²²⁷ His physical and verbal harassment culminated in a number of physical and sexual assaults, including a rape at summer camp; after the rape, students repeatedly harassed him in class, calling him a "faggot" and a "fat ass."²²⁸ Doe's special education teacher characterized the assaults as "everyday banter between boys" and did not take action.²²⁹ Finally, Doe's mother withdrew him from school when a State Trooper informed her that that Doe had been sexually assaulted and that the police would be filing a report on a second incident.²³⁰ The court dismissed the Title IX claim because it did not "sufficiently allege that he was bullied, harassed and assaulted because of his gender" and, because the sexual assault took place in the summer off school grounds, the school would not be liable.²³¹ This case employs a piecemeal approach to analyzing the evidence, refusing to recognize the severely hostile educational environment that was tolerated and created by school officials as well as the

²²⁵ See, e.g., *Tumminello v. Father Ryan High School*, No. 3:15-cv-00684, 2015 WL 13215456 (6th Cir. Dec. 7, 2015) (granting defendant's motion to dismiss where the victim's mother alleged that her freshman son committed suicide after he was targeted with belts used as whips by other students who called him "faggot," and "gay" and told him to "go home and kill himself," holding that the Sixth Circuit had rejected the sex stereotyping theory and the theory that harassment based on sexual harassment occurred because of sex); *Eilenfeldt ex rel. J.M. v. United C.U.S.D. #304 Bd. of Educ.*, 84 F. Supp. 3d 834, 838–42 (C.D. Ill. 2015) (holding that merely using sexual behavior or language does not necessarily show the behavior occurred because of male seventh grade victim's sex, and refusing to recognize at least in this case that the behavior may have occurred for the victim's failure to conform to gender norms even though the complaint alleged that the harassment included inappropriate touching by other boys and students verbally taunting the victim that he was a "rapist," "pedophile," and a child molester, saying he was attracted to young boys, and physically bullying him by kicking, punching, pushing him, and threatening him with a knife).

²²⁶ 179 F. Supp. 3d 179 (D. Conn. 2016).

²²⁷ *Id.* at 184–88.

²²⁸ *Id.*

²²⁹ *Id.* at 186.

²³⁰ *Id.* at 187. The athletes in this school were engaged in other allegedly criminal behavior against girls and boys. Two football players were charged and arrested for rape of minor girls; another football player was charged with felony robbery related to jumping three fourteen-year-old boys. Another football player was later arrested for the second assault of two thirteen-year-old girls. *Id.* at 188.

²³¹ *Id.* at 197–98.

acts of physical, verbal, and sexual assaults directed at the plaintiff, who regularly reported his attacks to school officials. Even the off-campus assault likely had its origins in school-based hostilities.

Another related barrier to liability for damages is the courts' willingness to accept a school's defense that it knew about some behaviors but did not know the behaviors had occurred on the basis of sex.²³² Courts erroneously conceive of behaviors as simple bullying and ignore gender-based motives.²³³ Simple bullying without a gender motive is not illegal under Title IX. But behaviors that courts dismiss as simple "bullying" are often the same as those that meet the definition of "sexual" or "gender-based" harassment under the law.²³⁴ Moreover, if we look closely at the behavior, we can recognize a gender motive in most of these cases.

For example, in *K.S. v. Northwest Independent School District*,²³⁵ classmates ridiculed a sixth-grade boy because he had large breasts, calling him "titty boy" and "Teddy titty baby."²³⁶ Students touched and twisted his breasts in the locker room, hallways, and other parts of the school.²³⁷ According to the court, however, this behavior was insufficient to notify the school of "anything more than middle-school bullying."²³⁸ These "bullying" behaviors, however, should constitute illegal sexual

²³² The next three paragraphs are largely derived from McGinley, *Masculinity Motivation*, *supra* note 6.

²³³ See *N.K. v. St. Mary's Springs Acad. Of Fond Du Lac*, 965 F. Supp. 2d 1025, 1033 (E.D. Wis. 2013) (citing to cases that hold that the harassment occurred because of personal animus rather than sex, gender, or race).

²³⁴ See McGinley, *supra* note 19, at 1191–92 (concluding that the behaviors involved in male-on-male bullying and harassment are the same); Dorothy L. Espelage et al., *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 J. INTERPERSONAL VIOLENCE 2541, 2544, 2554 (2015) (concluding that "[b]ullying is in many ways a gendered phenomenon" and finding that male behavior characterized as bullying escalates to sexual harassment later on). Although social scientists distinguish between bullying and sexual harassment, the gendered bullying they describe meets Title VII's and Title IX's definition of behavior occurring "because of sex." Although it may prove too much to consider all bullying to be masculinities-based, a full appreciation of the animating forces behind bullying suggests that most of it results from the Masculinity Motivation and, if properly understood, would be actionable pursuant to Titles VII and IX.

²³⁵ 689 F. App'x 780 (5th Cir. 2017).

²³⁶ *Id.* at 781.

²³⁷ *Id.*

²³⁸ *Id.* at 787 n.8; see also *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179, 185, 197–98 (D. Conn. 2016) (finding taunting and comments such as "faggot," "fat ass," "pussy," "bitch," and "baby," insufficient to conclude that the behavior occurred because of sex); *J.H. v. Sch. Town of Munster*, 160 F. Supp. 3d 1079, 1092–93 (N.D. Ind. 2016) (calling a male high school student names such as "cunt," "pussy," and "bitch" is insufficient evidence to show it occurred because of sex); *Eilenfeldt ex rel. J.M. v. United C.U.S.D. #304 Bd. of Educ.*, 84 F. Supp. 3d 834, 838, 842 (C.D. Ill. 2015) (dismissing complaint where harassers called junior high student "rapist," "pedophile," and "child molester" and concluding that the victim was not harassed for being male or insufficiently masculine and that it was "nothing more nor less than schoolyard cruelty and near-arbitrary animosity").

and gender-based harassment. They are severe, pervasive, and objectively offensive, and they occur because of the plaintiff's failure to comply with expectations and stereotypes of how a boy should look and act. In other words, they occur because of the victim's perceived failed masculinity. "Harassing those who violate prescribed gender norms helps to sustain male privilege and power and serves to preserve the status quo while maintaining the division of labor among the sexes."²³⁹

Masculinities theory posits that perpetrators seek to enhance their own power in school—to make the boys more masculine and, when girls are involved in this type of harassment, to uphold the gender hierarchy of how boys and girls should look, act, and interact. Masculinities studies explain that boys and men symbolically turn other boys and men into girls or women by harassing and assaulting them sexually. By converting male victims into symbolic females, the harassers denigrate the victims and demonstrate their superiority to each other and the victims.²⁴⁰

Finally, some courts hold that using sex- or gender-based language or behavior is insufficient to prove that the behavior occurred because of sex or gender, especially where the student has another reason for ridicule—in this case, a disability.²⁴¹ Most problematic, most of these cases are either dismissed in response to a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment. Failing to understand these intersectional claims and to recognize that a reasonable jury could conclude that the behavior constituted illegal sex discrimination under Title IX, these courts deny children who suffer from serious harassment their days in court.

²³⁹ Brenda L. Russell & Debra Oswald, *When Sexism Cuts Both Ways: Predictors of Tolerance of Sexual Harassment of Men*, 19 MEN & MASCULINITIES 524, 528 (2016).

²⁴⁰ See Paula McDonald & Sara Charlesworth, *Workplace Sexual Harassment at the Margins*, 30 WORK, EMP. & SOC'Y 118, 129 (2016) (noting that findings of male-on-male sexual harassment supported the view that the purpose of such harassment is to enforce traditional heterosexual male gender roles and that complaints by men in the study included taunts about "apparently unmasculine" conduct and "insinuations" that victims were gay); cf. Kathryn J. Holland et al., *Sexual Harassment Against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context*, 17 PSYCHOL. MEN & MASCULINITY 17, 18 (2016) (citing Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641 (2007)).

²⁴¹ See, e.g., *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 238–40 (W.D.N.Y. 2012) (holding that victim who had Asperger's Syndrome could not make out a cause of action for gender discrimination even though he was called "gay," "homo," "bitch," and "faggot," and was constantly subjected to vulgar and offensive language such as being asked whether he watched pornography, was gay, or masturbated, and whether he would perform oral sex on another male student, and once a male student asked if he could "put [his] dick in [the victim's] ass" because the plaintiff could not prove it was the victim's gender and not his disability that caused the behavior).

e. How the standard operates as a whole

While each of these parts of the *Davis* standard individually may appear to balance the interests of the potential victims against those of school districts to avoid expensive judgments, the way many courts interpret and apply these standards as a whole creates a nearly impossible barrier to school district liability for damages when cases are brought against them. Plaintiffs walk a virtual gauntlet of barriers to a Title IX victory. This application of the legal standards does little to encourage schools to be aware of the risks presented by particular students and to try to avoid the risks of harm to the other children in the school. In fact, given the discomfort that courts of appeals appear to have with lawsuits against school authorities, it may be that legal interpretation actually serves to discourage school authorities from acting responsibly in the face of known risks. The result: young children in schools (who are required to be there) have much less protection from sex- and gender-based harassment and assault than their adult counterparts in workplaces. In fact, the school authorities whom we must trust to care for and educate our children are held to a much lower standard than employers who permit hostile work environments to occur. The policy behind Title IX makes clear that unequal access to educational opportunities based on sex or gender is illegal. While schools have important and expensive educational programs, those programs cannot be allocated on the basis of sex and school districts should be held to an equal grant of opportunities to its children. Given the little success that Title IX cases have, it appears that this standard does little to assure equal access to school programs.

Under Title VII, employers are liable for their negligence when they have knowledge or constructive knowledge of a sexually harassing environment created by peers and do not respond promptly and adequately to correct the problem.²⁴² Thus, if an adult at work is harassed by a co-worker or a group of coworkers or if there is a sexually harassing environment in the workplace caused by peers, the employer will be liable for money damages caused by the harassment if it acts negligently by failing to investigate the situation and failing to take prompt remedial action. While this standard, given the courts' interpretation, is often not sufficient in the workplace to protect plaintiffs from having their cases dismissed improvidently, the Title IX standard, as interpreted, requires young children to negotiate extremely hostile conditions without holding schools responsible.

²⁴² *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998); *Vance v. Ball State Univ.*, 570 U.S. 421 (2013).

Consider *Pahssen v. Merrill Community School District*—the facts and risks known to the school, the school’s response, and the predictable harm that eventually took place.²⁴³ In *Pahssen*,²⁴⁴ John Doe, the ninth-grade perpetrator of numerous violent acts, including the rape of Jane Doe, an eighth-grade student, had been in trouble regularly for years: suspended for sexual harassment²⁴⁵ and for physically attacking other students, and arrested twice for sexual assault.²⁴⁶

During the first few weeks back after a year’s suspension, John Doe committed three acts of sexual harassment against Jane Doe.²⁴⁷ The victim’s stepfather wrote a letter to the school administration demanding that something be done about this boy whom he correctly believed was a “volcano” ready to erupt.²⁴⁸ At that point, John Doe was placed on thirty days of adult supervision. Less than two months later, John Doe raped Jane Doe on school property.²⁴⁹ The School Board expelled John Doe forty days later upon the recommendation of the Superintendent.

Jane Doe’s mother filed suit against the school, and the federal district judge granted summary judgment in favor of the defendants on all causes of action, including a Title IX count for sex discrimination.²⁵⁰ The Sixth Circuit Court of Appeals affirmed the summary judgment, concluding that three incidents of harassment of Jane Doe that preceded the rape were not severe, pervasive, and objectively offensive as a matter of law; the incidents of sexual harassment against other individuals of which Merrill should have been on notice could not be considered in determining whether John Doe posed a risk to Jane Doe,²⁵¹ and the court could not take into account those other incidents of which the defendant had notice in determining whether the three incidents against Jane Doe were severe, pervasive, and objectively offensive.²⁵²

Second, the court held that even if the three incidents triggered the school’s responsibility to act, it did act by holding the IEP meeting and determining to have constant adult supervision of John Doe for thirty days. The school, therefore, did not act with deliberate indifference at that point.²⁵³

²⁴³ *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356 (6th Cir. 2012).

²⁴⁴ These facts are taken in the light most favorable to the plaintiff as this case was decided on a motion for summary judgment.

²⁴⁵ *Id.* at 361.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 360.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 359.

²⁵¹ *See id.*

²⁵² *Id.* at 363.

²⁵³ *Id.* at 364.

While the court's analysis appears to track the requirements set forth in *Davis*, a closer look at the court's conclusions demonstrates that it interprets *Davis*'s strict standards in a way that makes it impossible for an injured plaintiff to recover in a Title IX case against the school district. First, at the very least, the three sexually harassing incidents suffered by Jane Doe before the rape should be sufficient to go to a jury to determine whether the behavior was severe, pervasive, and objectively offensive. This case deals with a girl in the beginning of eighth grade—likely thirteen years old—whose “boyfriend” commits a physical assault on her, threatens her with a demand of oral sex, and makes obscene gestures toward her in public. Clearly, a reasonable jury could conclude that this behavior was sufficient to deny the victim equal access to educational opportunities. Instead, the court held that as a matter of law the sexually harassing behavior was not sufficiently severe, pervasive, and objectively offensive. And, the court concluded, even if it were, the school authorities reacted sufficiently when they became aware of these behaviors by calling an IEP meeting to discuss John Doe and subjecting him to adult supervision for thirty days. Once again, the court decides a factual question as a matter of law: according to the court, school authorities did not act with deliberate indifference when they discontinued adult supervision of John Doe even though they did not even meet again to assure that the thirty-day adult supervision was adequate.

Moreover, in determining that the school did not act with deliberate indifference as a matter of law, the court refused to permit consideration of the school's prior experience with John Doe and actual knowledge of his misbehavior. The rape confirms the danger that John Doe posed both to Jane Doe and to other children at school, and, fortunately, the school expelled John Doe forty days later. But its inadequate discipline of a child who was clearly about to erupt and failure to protect Jane Doe should be sufficient to send the issue of deliberate indifference of school authorities at Merrill to the jury. There is no question that Jane Doe suffered severe, pervasive, and objectively offensive behavior that denied her access to educational opportunities because of her sex and that the school authorities had actual knowledge of John Doe's criminal behavior toward both Jane Doe and others but made little attempt to protect his most likely target from him. In slavishly applying the deliberate indifference standard, the court not only refused to hold the school accountable, but also refused to permit a jury to do so.

Pahssen is not an outlier among the cases decided under Title IX. In most of the reported cases the courts of appeal hold that there is no liability under Title IX as a matter of law without allowing a jury to determine what seem to be genuine issues of material fact, even in the

face of severe gender- and/or sex-based harassment that the school officials either knew about and ignored or participated in.

As we shall see in the next subsection, this has not been the case with the administrative investigations of complaints by the OCR, but things might soon change to the detriment of claimants.

B. Office of Civil Rights of the Department of Education: Changing Norms

The other important enforcement arm of Title IX is the Office of Civil Rights of the Department of Education (“OCR”). The OCR issues rules, guidance, and interpretations, including “Dear Colleague” letters and “Questions and Answers” that explain and interpret the law. It also investigates complaints by students (and their parents) alleging that their schools have discriminated against them under Title IX based on their sex or gender, under Title VI based on their race, color, or national origin, and under Section 504 of the Rehabilitation Act based on their disability.

Once the OCR determines that a complaint is timely and within its jurisdiction, it decides whether an investigation is necessary.²⁵⁴ Upon opening an investigation, it requests documents from the alleged victim and the accused school district and interviews the claimants (who in the pre-college context are usually the parents of the students who have allegedly been subject to harassment), the student victim, and school officials.²⁵⁵ The OCR determines whether there is sufficient evidence (using the preponderance of the evidence standard) that the alleged victim suffered harassment and, as a result, a denial of access to equal educational opportunities.²⁵⁶ While the investigation proceeds, the OCR considers whether the school district policies, training programs for administrators and teachers, and reporting mechanisms are adequate. Eventually, if the OCR concludes that the recipient has not complied with the law, it attempts to reach a Resolution Agreement with the school district that sets out requirements for compliance.²⁵⁷ If the school district refuses, the OCR has the power to begin the very rare process to cease federal funding of the institution.

After *Gebser* and *Davis* were decided, the Department of Education issued its permanent revised Title IX guidance on sexual harassment

²⁵⁴ See U.S. DEPT OF EDUC., OFFICE FOR C. R., COMPLAINT PROCESSING PROCEDURES (Nov. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> [<https://perma.cc/W5BV-SLQF>].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See OCR Complaint Processing Procedures, *supra* note 254.

in 2001.²⁵⁸ The 2001 Revised Guidance replaced the 1997 guidance.²⁵⁹ All administrations subsequent to the 2001 Revised Guidance—both Republican and Democratic (including the Trump Administration)—have followed the 2001 Revised Guidance. The 2001 Revised Guidance explained that the Supreme Court limited the actual knowledge and deliberate indifference standards used in *Gebser* and *Davis* to court cases of private parties seeking monetary damages only and did not apply to OCR investigations.²⁶⁰ Nor would the courts' stringent standards apply, the 2001 Revised Guidance opines, to plaintiffs in court cases seeking injunctions and equitable relief and no monetary damages.²⁶¹ Moreover, the Revised Guidance states that the Supreme Court acknowledged the power of the Department of Education to enforce Title IX even in cases where there would not be money damages.²⁶² Because there are no money damages resulting from the OCR's finding of noncompliance, the 2001 Revised Guidance stated that the OCR would continue to use a negligence standard (like that used before *Gebser* and *Davis*, under the 1997 Guidance)—schools' *knowledge or reason to know* about harassment would trigger a responsibility to investigate and promptly remedy the issue.²⁶³ The next subsection analyzes the differences between the courts' and the OCR's standards in deciding Title IX cases.

1. Courts' vs. the OCR's legal interpretations

The 2001 Revised Guidance interpretations vigorously protect the rights of children who are abused in pre-college and college settings,²⁶⁴ and they stand in stark contrast to the meager protections provided by the courts in litigation brought for peer-harassment in schools under Title IX. Many (likely, the majority) of the OCR investigations in pre-college cases result in findings that the school discriminated against the alleged victim and in Resolution Agreements between the OCR and the accused school districts.

In contrast to the courts' legal standards and requirements under Title IX, unlike the courts' requirement of actual knowledge, OCR requires that the school district have knowledge or *reason to know* that

²⁵⁸ See Notice of availability, 66 Fed. Reg. 5512 (Jan. 19, 2001) (hereinafter "2001 Revised Guidance").

²⁵⁹ See Final Policy Guidance, 62 Fed. Reg. 49 (Mar. 13, 1997).

²⁶⁰ See 2001 Revised Guidance, *supra* note 258, Preamble, at ii-iv.

²⁶¹ *Id.* at iv n.2.

²⁶² *Id.*

²⁶³ See 2001 Revised Guidance, *supra* note 258.

²⁶⁴ It also protected the interests of victims of sexual violence in colleges and universities, but I am focusing in this article on harassment occurring in pre-college situations.

the harassing behavior was occurring or had occurred.²⁶⁵ Once school authorities have *reason to know* about harassment, they have a responsibility to investigate and engage in a prompt remedial response if harassment has occurred. If the initial remedy is not effective, schools have an ongoing obligation to assure that the victim does not continue to experience harassment from the harasser(s).²⁶⁶ This obligation contrasts with the courts' requirement that the school with actual knowledge act with deliberate indifference to the harassment in order to be liable under Title IX. As explained above, the deliberate indifference standard, as interpreted by at least some of the courts, requires only minimal action from the school.²⁶⁷ Literally, so long as the schools engage in half-baked efforts to stop the harassing, they are safe in the courts. The courts require a showing that the school's response be "clearly unreasonable" for a finding of deliberate indifference, a far greater showing than the OCR requires in order to find the school district noncompliant.²⁶⁸

There are other important differences between how the OCR investigators have interpreted Title IX when investigating a complaint and how courts interpret Title IX when deciding a case. The OCR investigations and resolutions evidence an approach that is considerably more demanding of schools and, consequently, more protective of students who are harassed by peers. OCR investigations have concluded:

- A police investigation does not relieve schools of continuing obligations to investigate and remedy discrimination under Title IX;²⁶⁹
- Schools must take interim steps to protect the alleged victims before the final outcome of the investigation;²⁷⁰
- Schools should not generally remove the complainant from classes while allowing the alleged perpetrator to remain;²⁷¹
- It is improper to require the complainant to work out the problem directly with the alleged perpetrator;²⁷²

²⁶⁵ See 2001 Revised Guidance, *supra* note 258.

²⁶⁶ *Id.*

²⁶⁷ See, e.g., *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356 (6th Cir. 2012).

²⁶⁸ See, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 635 (1999).

²⁶⁹ See *Perris Union*, *supra* note 86.

²⁷⁰ See *West Contra Costal*, *supra* note 87.

²⁷¹ *Id.*

²⁷² *Id.*

- A recipient of federal funds must process all complaints of sexual violence or assault (even if the allegations indicate that the behavior occurred off campus) to determine whether the conduct occurred in an off-campus education program or if not, had continuing effects on campus.²⁷³
2. Procedural differences between courts' and the OCR's determinations

To make matters worse for victims who sue in court, most of the cases are decided for the defendants on motions to dismiss or for summary judgment.²⁷⁴ The strict application of the substantive legal standard, combined with the federal courts' proclivity to dispose of the cases procedurally, allows for an emotional distance between the decision makers (the judges) and the plaintiffs. When there is no trial, neither judges nor juries must face the victim's pain as he or she relates the story from the witness box. It's more efficient this way, especially in the context of the federal judiciary that considers itself overburdened and works to dispose of cases quickly. Contrast the judges' lack of connection to the victims with the relationship that OCR investigators have with the victims based on interviewing the witnesses—the parents of the victim, and, depending on the victim's age, the victim as well, and the school authorities. The OCR investigator is likely to experience the emotional power of the plaintiff's situation as no federal judge will do so if the case in court is decided on the papers using strict substantive standards. Although some would say that legal decision makers should be emotionally distant from the subjects whose fate they decide, a purely rational approach to the law that shields the decision maker from empathy may not yield the best result.²⁷⁵ The OCR investigator, therefore, because of his or her personal connection to the complainant and school officials, is more likely to understand the dynamics of the situation that happened in the school. This leads us to an analysis of the changes the Obama OCR made in its 2011 and 2014 "Dear Colleague" letter and "Questions and Answers," the Trump Administration's rescission of these interpretations, and the proposed new regulations by the Trump Administration.

²⁷³ See *Greenup Cty. Sch. Dist.*, U.S. DEP'T OF EDUC., OCR No. 03141163, (Mar. 18, 2015).

²⁷⁴ I have read all peer harassment cases decided under Title IX and published or available online through Westlaw since 2012, and the vast majority are decided for the defendants on procedural motions.

²⁷⁵ See Lynne N. Henderson, *Legality and Empathy*, 85 MICH L. REV. 1574, 1576–77 (1987) (explaining that better legal decisions are made when empathy, which includes both emotion and cognition, is present).

3. Obama Administration's OCR: new interpretations

While honoring the 2001 Revised Guidance, the Obama Administration's OCR issued a number of "Dear Colleague" letters and "Questions and Answers" with added interpretations of Title IX. These Obama Administration interpretations (April 4, 2011 "Dear Colleague" letter, and April 29, 2014 "Questions and Answers") required, among other things, that schools' and colleges' grievance processes use the preponderance of the evidence standard to determine whether the accused was responsible; they also banned use of mediation to resolve a conflict between the accuser and the accused when sexual assault is alleged.²⁷⁶ On September 22, 2017, the Trump Administration rescinded the Obama Administration's April 4, 2011 "Dear Colleague" letter and the April 29, 2014 "Questions and Answers"²⁷⁷ and issued a "Dear Colleague" letter and "Questions and Answers" of its own.²⁷⁸ While some provisions in both the Obama and Trump Administrations' documents may apply universally to elementary and secondary schools, both focus on college processes in sexual assault proceedings. The Trump rescission permits colleges to use either the "preponderance of the evidence" or "clear and convincing evidence" standard, permits voluntary mediation, and clarifies that cross examination is permitted.²⁷⁹ The Trump Administration "Dear Colleague" letter also states that it will issue proposed regulations and use the notice and comment process to promulgate new regulations.²⁸⁰

²⁷⁶ See U.S. DEP'T OF EDUC., OFFICE FOR C.R., DEAR COLLEAGUE LETTER ON TITLE IX, SEXUAL VIOLENCE AND HARASSMENT (Apr. 4, 2011); U.S. DEP'T OF EDUC., OFFICE FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2011).

²⁷⁷ Rescinded Obama Administration interpretations include: U.S. Dep't of Educ., U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13, 2016) (granting transgender students the right to use bathrooms and locker rooms that accord with their gender identity); U.S. DEP'T OF EDUC., OFFICE FOR C.R., DEAR COLLEAGUE LETTER ON TITLE IX, SEXUAL VIOLENCE AND HARASSMENT (Apr. 4, 2011). (requiring, among other things, that the school's grievance procedure use a "preponderance of the evidence" standard and forbidding use of mediation in sexual assault cases); U.S. DEP'T OF EDUC., OFFICE FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014); see also U.S. DEP'T OF EDUC., U.S. DEP'T OF JUSTICE., DEAR COLLEAGUE LETTER RESCINDING PREVIOUS GUIDANCE ON TRANSGENDER STUDENTS (Feb. 22, 2017); U.S. DEP'T OF EDUC., OFFICE FOR C.R., DEAR COLLEAGUE LETTER ON TITLE IX, SEXUAL VIOLENCE AND HARASSMENT (Sep. 22, 2017) [hereinafter DEP'T OF EDUC. DEAR COLLEAGUE LETTER (2017)]; U.S. DEP'T OF EDUC., OFFICE FOR C.R., QUESTIONS AND ANSWERS ON CAMPUS SEXUAL MISCONDUCT (2017) [hereinafter Q&A ON CAMPUS SEXUAL MISCONDUCT (2017)]. For a list of Guidances, Dear Colleague letters, etc., in force and rescinded, see CARNEGIE MELLON, OFFICE OF TITLE IX INITIATIVES (Feb. 7, 2019), <https://www.cmu.edu/title-ix/law-and-guidance/index.html> [<https://penna.ca/GV7Z-KRJV>].

²⁷⁸ DEP'T OF EDUC. DEAR COLLEAGUE LETTER (2017), *supra* note 277; Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 277.

²⁷⁹ Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 277, at 4–5.

²⁸⁰ DEP'T OF EDUC. DEAR COLLEAGUE LETTER (2017), *supra* note 277, at 2.

4. Trump Administration's OCR: proposed regulations

On November 29, 2018, the Secretary of Education issued proposed regulations that would govern the OCR decision making process.²⁸¹ The focus of the proposed regulations is post-secondary enforcement of Title IX; the proposed regulations address concerns about colleges' and universities' investigations and grievance proceedings resulting from claims of sexual violence on campus. A discussion of the proposed rules' effects on college campuses, however, is beyond the scope of this article.²⁸²

This article deals with Title IX's effectiveness in eliminating peer sex- and gender-based harassment in elementary, middle, and secondary schools; viewing the proposed regulations through this lens reveals a serious likelihood that sex- and gender-based harassment would increase if the new regulations become law. The proposed regulations *would radically change the law as it applies to elementary, middle, and secondary schools and the procedures that the OCR uses to enforce Title IX in those institutions*. They would not only reverse Obama Administration 2011 guidance, which has already been rescinded, but, more importantly, would also overturn the 2001 Revised Guidance that has been followed by all of the presidential administrations for the past eighteen years. The new law would adopt new stringent standards for finding a school district noncompliant. If these stringent standards become law, they will seriously harm the rights of children to equal access to education based on their sex and gender. Particularly at a time when law and institutions are responding to the #MeToo movement, this change would represent a serious setback that may affect generations to come. In essence, the proposed regulations create disincentives for schools to educate themselves and their students about the causes of illegal sex- and gender-based harassment, the importance of avoiding these behaviors, and of acting promptly when the behaviors occur. Schools will solidify their roles as training grounds for future generations of harassers.

²⁸¹ As I write this article, the notice and comment period has still not elapsed. It is unclear whether the proposed regulations will be adopted, and if so, whether there will be changes made to them. I focus here on the most problematic ones for pre-college students.

²⁸² For analysis of the proposed regulations with reference to colleges and universities, see NATIONAL WOMEN'S LAW CENTER, DEVOS' PROPOSED CHANGES TO TITLE IX EXPLAINED (Feb. 7, 2018), <https://nwlc.org/resources/devos-proposed-changes-to-title-ix-explained/> [https://perma.cc/6SD3-CQ9H].

5. Analysis of proposed regulations: back to the courts

The most problematic changes proposed in the new regulations for pre-college institutions deal with definitions and legal standards that the OCR would apply to complaints filed with the Department of Education. Section 106.44 of the proposed regulations requires that the recipient of federal funds have *actual knowledge of sexual harassment* and respond in a manner that is *deliberately indifferent* in order for a violation to occur.²⁸³ Section 106.44(a) defines “deliberately indifferent” as a response that is “clearly unreasonable.”²⁸⁴ Section 106.30 defines “sexual harassment” as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [recipient’s] education program or activity.”²⁸⁵ Actual knowledge includes knowledge of the Title IX Coordinator or of “an official of the recipient who has ‘the authority to institute corrective measures on behalf of the recipient’” or in elementary and secondary schools, a teacher in the context of peer harassment.²⁸⁶

These proposed standards would largely adopt for the OCR the most stringent interpretations of the Supreme Court’s rigid standards for monetary damages in Title IX cases.²⁸⁷ These new OCR standards would require actual knowledge that the conduct described in the complaint already be sufficiently severe, pervasive, and objectively offensive to deny equal access to educational opportunities *in order to trigger a school district’s response* to the behavior. And, once triggered, if that response is not “clearly unreasonable,” the school district would be considered compliant.

As demonstrated above in Part III.A.1, the Supreme Court’s rigid standards in private parties’ damages actions relieve school authorities (even in some of the most egregious cases) of investigating and responding to ongoing sex- and gender-based harassment. Moreover, a number of lower courts have interpreted the “deliberately indifferent” standard very strictly, permitting a school to exonerate itself by responding only once to the harassment, even if the response is not effective.²⁸⁸ These

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ One positive difference from the Supreme Court standards is the recognition that if a teacher has knowledge of peer harassment in the elementary and secondary school context, that knowledge is actual knowledge for purposes of triggering a duty on the school’s part to respond. See NATIONAL WOMEN’S LAW CENTER, § 106.30; *supra* Part III.A.2.a.i (discussing lower courts’ uneven reading of whether a teacher would constitute a person with authority to take corrective measures for purposes of fulfilling the actual knowledge requirement).

²⁸⁸ See *e.g.*, *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356 (6th Cir. 2012) and the discussion, *supra* Part III.A.2.e.

standards as applied by the courts differ drastically from the more reasonable standards used traditionally by OCR of both Democratic and Republican Departments of Education. As explained in Part III.B.1–2 above, the OCR has traditionally used a standard that requires a school to respond when it believes or has reason to believe that the harassment is occurring, and once the response takes place, to monitor it for effectiveness. If the response is not effective, schools must attempt different remedies until they have eliminated the problem.²⁸⁹ Consider again the *Pahssen* case. If this case were investigated by the OCR using the 2001 guidance, there is no question that the OCR would have found the school district was noncompliant when it failed to respond initially to three incidents of sexual harassment by a student who had a history of sexual assault and harassment and when it stopped monitoring John Doe’s behavior after thirty days of surveillance. In contrast, under the proposed rules, the OCR’s ability to find noncompliance by the school would likely be hampered, which would prevent the OCR from entering into a resolution with the school district requiring it to adopt new training, reporting, and investigatory methods. The same would be true if the *Stiles* case, discussed in Part III.A. above, had been investigated by the OCR. Using the 2001 standards, the OCR would certainly have found that the school district was not in compliance with Title IX because the alleged victim in the case, a middle-school boy, was repeatedly harassed verbally and physically over a two-year period and his mother frequently reported the egregious harassment to school authorities. Although the court concluded that the school did not act with deliberate indifference because it had taken some steps to punish the harassers, the OCR would have likely concluded that because school authorities knew about the harassment, it had a responsibility to investigate and engage in a prompt remedial response. If the initial remedy was not effective, the OCR would have held the school to its ongoing obligation to assure that the victim would not continue to experience harassment from the harasser(s). If the proposed OCR amendments becomes law, however, it is very likely that the OCR would follow the courts’ standards and conclude that the school was not deliberately indifferent because it took some minimal steps to punish the harassers.

Besides differing standards, the nature of the courts and the OCR has influenced how Title IX has traditionally been enforced. Historically, the OCR process has permitted a back-and-forth between the OCR and the school district that is under investigation.²⁹⁰ There are no monetary damages, unlike in federal court, and the OCR investigators

²⁸⁹ See 2001 Revised Guidance, *supra* note 258.

²⁹⁰ See generally, The TEXAS BAR ASSOCIATION, OCR BASICS: UNDERSTANDING AND SURVIVING A CIVIL RIGHTS INVESTIGATION (2018) (“OCR BASICS”).

can survey the policies and procedures in place and their implementation. This traditional structure permits the OCR and the recipients to enter into Resolution Agreements that detail how the schools are expected to improve and, by doing so, avoid a loss of funding for the schools. This structure encourages better future enforcement of Title IX.

If the proposed regulations become law, the OCR will likely decline to investigate many valid complaints and will abdicate its role of educating the educators about Title IX law. In essence, the administrative oversight contemplated by the statute will be upended, and the preventive and educative roles of the OCR will be eliminated. It is highly unlikely that the drafters of the progressive legislation of Title IX, given an understanding of changing cultural mores surrounding sex- and gender-based harassment, would agree to interpret legislation to have such a limited effect as that contemplated by the proposed regulations.

Moreover, as the notice of the proposed regulations acknowledges, the *Davis* case does not apply to the Department of Education OCR standards, and the OCR is free to follow its own standards in applying Title VII. The *Davis* standards, the Court makes clear, are applied because the Court *implied* a private right of action in *Davis* for *monetary damages*.²⁹¹ The Court, in essence, was conscious of its responsibility not to overstep Congressional authorization. As noted above, the statute authorizes the Department of Education explicitly to deal with Title IX violations but does not explicitly create a cause of action in the courts. It is clear that the Court concludes that the OCR may apply its own standards, and the OCR has always done so. But the irony is this: despite the possible justification for the strict standards that may exist in lawsuits for damages against the school districts, no such justification exists in an OCR investigation. The original statute²⁹² sets out the Department of Education as the enforcer of the statute, and the OCR does not impose monetary damages. In the case of a recalcitrant school district that refuses to comply or resolve a complaint with the OCR, the OCR has the additional and scarcely-used remedy of denying federal funding to the school district in the future, but this remedy is not applied without notice to the school district and an opportunity to engage in negotiation and to resolve their differences with the OCR through a Resolution Agreement.²⁹³

The drafters of the proposed regulations defend their choice to adopt the Supreme Court standards by arguing that uniformity will

²⁹¹ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 635, 651 (1999).

²⁹² 20 U.S.C. §§ 1681–1688.

²⁹³ See OCR BASICS, *supra* note 290.

make compliance easier and that schools should have flexibility to determine how to further their disciplinary processes. Furthermore, they argue that the misconduct Title IX forbids is that of the educational institution, not the underlying sex- or gender-based conduct. First, it seems that the flexibility arguments may be more directed at colleges and universities than at elementary and secondary schools because institutions of higher education have more developed grievance procedures for all types of wrongdoing than do pre-college institutions. Secondly, while uniformity is one potential goal, my discussion above of the poor results in cases following the Supreme Court standards suggests strongly that if uniformity is such an important goal, the Supreme Court should adopt the OCR standards, and not vice versa.

Finally, there is no reason to believe that use of a negligence standard—the standard applied in Title VII cases of peer harassment—is too harsh on elementary and secondary schools that have control over our children and all of the responsibilities to protect them that accompany that control. The data show that children are suffering in schools from sex- and gender-based harassment of not only their peers, but also from the “loading-on” that teachers and coaches engage in after a child reports harassment. While the Supreme Court standards do not always rectify these situations, traditional OCR standards have worked to eliminate this behavior.

IV. HOLDING SCHOOLS ACCOUNTABLE TO PREVENT SCHOOLS’ ROLE AS TRAINING GROUNDS

Parts I–III raise questions about what the law can do to resolve the many problems I have identified in this article. We must recognize that no matter what the condition of the law is, it is not sufficient to correct all or even most of these problems. Despite the good work of the OCR in previous administrations and Title VII law that forbids sex- and gender-based harassment in workplaces, illegal discriminatory harassment is still pervasive in schools and workplaces. Much of this harassment will not disappear until there is social change, and changes in society do not normally progress constantly on an upward trajectory. Change moves forward; then, there is backlash, and change moves forward again. But the law can play some role in effecting change: it can create incentives and disincentives, and it can tailor remedies to improve behaviors (and perhaps, attitudes) in schools and workplaces. If the law does not move forward to effect positive change, it will become a protector of those who harass and those who tolerate the harassment.

Masculinities theory sees gender as a structure that is constructed upon and actively constructs inequalities. It is not men or women who are the problem. It is the structure that dictates how men, women, boys,

and girls should act and the roles they should play. Until very recently in the U.S., gender has been considered a binary structure that denies the possibility of anything other than man (masculine) and woman (feminine). While there seems to be a marked change in attitudes among young Americans about the inevitability of binary gender identities, there is also a group of young folks that resists such change. Masculinities theory posits that it is the gendered constructions—such as masculinity, especially those forms of masculinity that are forced and exaggerated—that create incentives to harass others. Often, however, because gendered behaviors are considered the norm—in fact, are considered by many to be dictated by biological sex—gender is invisible to many of us. So, in schools, even adults such as administrators, teachers, and coaches reinforce gender norms that, in turn, motivate students to harass others. Without an understanding of this dynamic, schools and teachers will not be able to teach children not to harass, or even to recognize all of the illegal harassment that takes place.

Moreover, multidimensional masculinities theory encourages us all to consider not only gender, but also all of the other co-existing identities of the parties in context of the situation.²⁹⁴ So, besides sex, sexual orientation, and gender identity of the different participants when harassment takes place, we should consider the race, class, national origin, and other identities as well as whether the alleged victims and perpetrators are persons with disabilities. A significant percentage of children who have disabilities are victims of sex-or gender-based harassment, and a significant number of OCR Title IX complaints also allege intersectional claims, including racial, national origin, and disability-based harassment. In formulating solutions, all of these facts must be taken into account. Furthermore, research demonstrates that racial inequalities exist in schools, especially in the ways that discipline is meted out.²⁹⁵ In formulating a solution, it is important that school authorities understand the implicit biases that cause these differential disciplinary measures and that they take actions to counteract them.

To complicate matters, schools are often large, overcrowded, and lacking in resources, and their teachers are underpaid. It may create a huge burden to ask schools to serve as the focal points to change gender norms in society. By the same token, we cannot sacrifice our children

²⁹⁴ See Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* (Frank Rudy Cooper & Ann C. McGinley, eds. 2012) (explaining that it is important to consider not only the gender or sex of the victim but also the victim's other identities in the context of the situation).

²⁹⁵ Moriah Balingt, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST, Apr. 26, 2018, at A.2.

by allowing schools to ignore their responsibility to control the harassing behaviors taking place under their noses. Reforms need to include funding for education of teachers and children about the evils of sex- and gender-based harassment and its causes.

A. Necessary Law Reform

First, it is clear that the regulations proposed by the Department of Education should not become law. As the analysis of the court cases in Part III.A. above demonstrates, the standards employed by the courts permit school districts to escape monetary damages for their failure to control serious harassment in their midst. These standards should not replace the standards successfully used by the OCR for more than eighteen years to resolve complaints and assure ongoing compliance.

Second, when Congress has the political will, it should pass amendments to Title IX to assure better compliance. Those amendments should include an express authorization of private lawsuits for damages against school districts that would overrule *Davis*. Amendments to Title IX should set negligence standards for both the court cases and the complaints investigated and resolved by the OCR, thereby overturning the proposed regulations should they become law.

Third, even in the absence of political power to make these changes, the lower courts can interpret *Gebser* and *Davis* in a way that avoids the harsh results and at the same time faithfully follows the Supreme Court's standards. First, in the context of peer harassment in elementary and secondary schools, a teacher, counselor, or other professional who observes or hears about behavior that is either already severe or appears to be escalating should have the responsibility to report and/or correct the behavior. The professional's knowledge should be sufficient to constitute actual knowledge by school authorities and should trigger a responsibility to investigate and take remedial measures. Where children are very young or the victim has an intellectual disability, the professional's responsibilities to investigate should be triggered sooner if a victim attempts to communicate with the professional but the victim is not capable of communicating the details of the harassment. Second, once there is actual knowledge, the professional, along with other school authorities, must investigate the situation and promptly remedy it. A finding of deliberate indifference can occur if school authorities' remedy is not effective, and the authorities do nothing more to correct the situation. As some courts conclude now, knowledge that the perpetrator has a history of harassment of either the alleged victim or another victim should constitute actual knowledge for the purposes of triggering a duty to take a more cautious approach to the perpetrator, such as more adult

supervision. Finally, lower courts should be more cautious in granting dispositive motions in these cases. Many motions for summary judgment, for example, are granted where there are genuine issues of material facts for the juries to decide. These material facts include who had knowledge, and when, the severity of the behaviors, and whether the victim suffered a denial of access to educational programs as a result, and whether the school's response was deliberately indifferent. The difference between "unreasonable" (which is legal) and "clearly unreasonable" (which is not) is something that a jury of the parties' peers should ordinarily decide based on the facts found at trial.

Fourth, if the proposed regulations become law, OCR investigators should interpret the regulations in a way that comports with the law but simultaneously holds schools responsible for ignoring damaging harassment in the schools. Because of the different posture of the OCR investigations from court cases, the OCR has the ability to continue to use its investigations as a means of educating recipients concerning how to assure compliance and avoid problems in the future. Continued use of voluntary resolution agreements should help. Even if the OCR finds that there is insufficient evidence of noncompliance in the particular case, the OCR should use its investigation to encourage procedural compliance if the recipient, for example, has not appointed a Title IX Coordinator,²⁹⁶ has not notified all students and teachers of its policies and practices, etc. If this type of noncompliance exists, OCR investigators should encourage schools to sign agreements to resolve those issues. The OCR should encourage educational institutions to offer educational and training programs for students and teachers that deal with issues of harassment, and its causes, and how to respond. This training, in accordance with the sophistication of the audience, should include instruction on concepts of gender and masculinity.

B. Schools as Training Grounds for Eliminating Harassment

Finally, no matter what standards the OCR and the courts use, educational institutions should be encouraged to adopt educational programming for administrators and teachers that explains implicit bias, masculinity, gender stereotyping, and other phenomena that can lead

²⁹⁶ A recent study of California and Colorado schools found that many school districts have failed to appoint a Title IX coordinator, contrary to their legal responsibilities. See Elizabeth J. Meyer & Andrea Somoza-Norton, *Addressing Sex Discrimination with Title IX Coordinators in the #MeToo Era*, 100 PHI DELTA KAPPAN 8 (Oct. 2018). Even when they have appointed Title IX coordinators, most of the Title IX coordinators are not very knowledgeable about the law and their responsibilities, have infrequently or never conducted trainings for the faculty and staff in their district, have many other responsibilities that overwhelm those as Title IX coordinator, and are often ignorant of their responsibilities especially with reference to transgender students. *Id.*

to toleration of illegal harassment.²⁹⁷ Without understanding that much of the behavior described is caused by what many think is normal behavior of children, school officials will not be able to curb their own behaviors that encourage harassment or fail to recognize it in the school children. Merely because the behaviors are common does not make them normal in an egalitarian society. Thus, schools need educational reform programs directed at all levels: administrators, teachers, coaches, and students. Of course, the training of children must be age appropriate.²⁹⁸ Only by educating school authorities, teachers, and children can we avoid schools as training grounds for harassment and move toward schools as training grounds for respect, citizenship, and eliminating harassment. In the age of the #MeToo Movement, our society deserves no less.

²⁹⁷ See, e.g., D.K. Whitford, et. al., *Empathy Intervention to Reduce Implicit Bias in Pre-Service Teachers*, 122 PSYCH. REP. 670 (2019) (demonstrating reduced implicit bias in teachers who were given training on empathy); P.G. Devine, et.al., *A Gender Bias Habit-Breaking Intervention Led to Increased Hiring of Female Faculty in STEM Departments*, 73 J. EXPERIMENTAL SOC. PSYCH, 211 (2017) (demonstrating anti-bias training increased hiring of female faculty in STEM); L. A. Rudman, et. al., “*Unlearning*” *Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCH, 856 (2001) (demonstrating that prejudice and bias seminar reduced stereotypes and bias in college students).

²⁹⁸ One concern when engaging in Title IX training and monitoring is what I would call the “hyper-responsive” reports of very young children as sexual harassers. A response to sexual harassment in the schools needs to be aware that very young children often are not capable of sexual harassment and attempting to enforce the “rules” against them can be devastating. See Amy B. Cyphert, *Objectively Offensive: The Problem of Applying Title IX to Very Young Children*, 51 FAM. L. QUART. 325 (2017) (discussing cases of very small children accused of sexual harassment).



Sexual Harassment by Any Other Name

Brian Soucek[†] and Vicki Schultz^{††}

INTRODUCTION

Last year, the *New York Times* won a Pulitzer for its reporting on sexual harassment.¹ Yet the *Times* does not seem to understand what “sexual harassment” actually means. In both the definition it employs and its choices of what stories to cover, the nation’s newspaper of record continues to spread an overtly sexualized conception of sexual harassment that, from a legal and social sciences perspective, is twenty years out of date.

This Essay’s goal is, first, to call attention to this misdirection and its harms. By defining away and often failing to report on the endless ways employees are undermined, excluded, sabotaged, ridiculed, or assaulted because of their sex—even if not through words or actions that are “sexual” in nature—the *Times* neglects the forms of sexual harassment at work that researchers repeatedly find most pervasive.²

In this, the *New York Times* is hardly alone. However legally outdated it may be, the sexualized conception of sexual harassment—the view that equates sexual harassment with unwanted sexualized advances, remarks, and misconduct—is so widespread that even agencies charged with protecting against sexual harassment sometimes fail to

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¹ *The 2018 Pulitzer Prize Winner in Public Service: The New York Times, for Reporting Led by Jody Kantor and Megan Twohey, and The New Yorker, for Reporting by Ronan Farrow*, PULITZER (last visited Jan. 18, 2019), <https://www.pulitzer.org/winners/new-york-times-reporting-led-jodi-kantor-and-megan-twohey-and-new-yorker-reporting-ronan> [<https://perma.cc/HS8E-ESQ9>].

² See *infra* text accompanying notes 32–47.

define it clearly in their public pronouncements.³ Indeed, the sexualized conception is so tenacious that scholars and legislators sometimes feel the need to coin a different name for harassment that lacks sexualized content.⁴ Phrases like “gender harassment” get used to distinguish sexist comments and actions from the sexualized come-ons and assaults that many, like the *Times*, still exclusively associate with the term “sexual harassment.”⁵

Readers might wonder, what difference does it make? This Essay’s second aim is to show how much is at stake in what might otherwise seem like an academic debate over words. The news media may have its own reasons for clinging to the sexualized view of harassment, but reporters who are serious about exposing sexual harassment (and reformers who are serious about eliminating it) cannot afford to cling to a narrow sexualized definition. Rather, overcoming harassment and related injustices at work requires a reconceptualized account of sexual harassment—something Vicki Schultz first offered fully two decades ago.⁶ In the current #MeToo era, more than ever, we must rethink and reinvigorate the term “sexual harassment,” not some new term put in place of, or alongside, the one that is finally getting the public attention it has long deserved. To do otherwise risks disaggregating sexual and non-sexual forms of harassment, thus obscuring the larger patterns of hostility and exclusion that include both forms.

Instead of trying to change the subject, this Essay aims to guide the contemporary conversation unleashed by activists and media to bring it in line with insights gained in the law, in social science, and in the everyday experience of workers. Amidst all the attention the #Me Too movement has generated, too many women and men are facing forms of sexual harassment that the media still ignores.

I. “AGREE ON DEFINITIONS”

A. The *New York Times*’s Definition

In April 2018, the *New York Times* won a Public Service Pulitzer for reporting that “uncovered the secret histories of prominent men across industries who were accused of sexual harassment and misconduct that affected women ranging from actresses to factory workers to

³ See *infra* text accompanying notes 65–75.

⁴ See *infra* note 38.

⁵ See *infra* text accompanying notes 11–15.

⁶ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). For an updated account that discusses recent developments, see Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 24 (2018), <https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again> [<https://perma.cc/2ZLB-LU8S>].

food servers.” According to the *Times*: “These articles . . . set off workplace investigations, criminal inquiries—and the #MeToo movement.”⁷

Powerful and influential, these articles were largely limited to one common narrative: a prominent man (like Harvey Weinstein) is revealed to have made unwanted sexual advances, or even committed sexual assaults, against women who worked for him or depended on him for career advancement. The reported harassment is almost always male-to-female, top-down, and sexualized in nature; it occurs in influential industries that receive heavy media coverage.⁸ The stories were mostly exposés about powerful bosses or benefactors in prominent companies preying on female subordinates for sex. Thus, a year into its reporting, a headline in the *Times* could trumpet, “#MeToo Brought Down 201 Powerful Men,” before going on to encapsulate the facts of each downfall.⁹

More than just a theme that emerges in its selection of stories, the *New York Times*’s sexualized conception of sexual harassment is literally definitional.¹⁰ In a January 2018 article containing a lesson plan to help teachers use the paper’s #MeToo coverage to educate students

⁷ *Harassed*, N.Y. TIMES (last visited Jan. 18, 2019), <https://www.nytimes.com/spotlight/harass> [<https://perma.cc/4Z2Q-F9HC>].

⁸ Among the fourteen articles that the *Times* identifies as connected to its Pulitzer, the subjects are Harvey Weinstein (four articles), Bill O’Reilly of Fox News (two articles), the comedian Louis C.K., the “power restaurateur” Ken Friedman, the “top-down ethos of male entitlement” at Vice Media, and the “lopsided” relationship between largely male venture capitalists and female entrepreneurs in the tech industry. Daniel Victor, *The Times Just Won 3 Pulitzers. Read the Winning Work*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/business/media/new-york-times-pulitzers.html> [<https://perma.cc/5ANJ-83XF>]; Emily Steel, *At Vice, Cutting-Edge Media and Allegations of Old-School Sexual Harassment*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/business/media/vice-sexual-harassment.html> [<https://perma.cc/XW4F-6Q2U>]; Katie Brenner, *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/A35G-NFC9>]. One article that does not fit the pattern is Susan Chira and Catrin Einhorn’s powerful investigation of sexual harassment at two Chicago Ford plants. *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/EZ8J-BWAR>]. Alongside the stories of sexualized harassment told in that article are others about the non-sexualized harassment female workers faced by fellow (male) workers who thought women “belonged at home in the kitchen.” Female workers were physically blocked from doing their jobs, had their tires slashed, and were denied bathroom breaks. *Id.*; cf. Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J. F. 67 (2018), <https://www.yalelawjournal.org/forum/queering-sexual-harassment-law> [<https://perma.cc/DH8R-NPDL>] (describing how harassment of women in largely male workplaces often takes both sexualized and non-sexualized forms); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6. Notably, complaints against Ford, settled for over \$10 million in August 2017, included both sexual and racial harassment allegations. See *Ford Motor Company to Pay up to \$10.125 Million to Settle EEOC Harassment Investigation*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Aug. 15, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/8-15-17.cfm> [<https://perma.cc/Q78Y-LGHZ>].

⁹ 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> [<https://perma.cc/98NM-FGUJ>].

¹⁰ See Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 3132.

about sexual harassment, the *Times* adopted an official definition of sexual harassment that limits it to sexual conduct. In a section near the start, entitled “Agree on Definitions,” the country’s paper of record says:

The *Times* defines sexual harassment in the workplace this way:

‘Sexual harassment in the workplace is an umbrella term that encompasses a range of unwanted behaviors. This includes non-physical harassment, including suggestive remarks and gestures, or requests for sexual favors. Physical harassment includes touches, hugs, kisses and coerced sex acts.’¹¹

In a later section styled a note to teachers, the article clarifies: “The *Times* uses the terms ‘sexual harassment’ and ‘sexual misconduct’ to refer to a range of behaviors that are sexual in nature and nonconsensual. The term ‘sexual assault’ usually signifies a felony sexual offense, like rape.”¹² This is not the only time the *New York Times* has adopted a sexual definition of harassment. A November 10, 2017 *New York Times* article used the same definition.¹³

The *Times* thus limits “sexual harassment” to nonconsensual behaviors “that are sexual in nature”¹⁴—not to all harassment “based on sex,” as the legal definition does. This limitation is all the more surprising because the *Times* supports it with a cite to the broader legal definition. The 2018 article sends those seeking “more information” to an Equal Employment Opportunity Commission (EEOC) website on “Sexual Harassment,” which broadly prohibits all harassment based on sex, regardless of whether it is sexual in nature.¹⁵ After noting in the first paragraph that harassment *can* include unwanted sexual conduct, the EEOC’s second paragraph explicitly provides: “Harassment does not

¹¹ Natalie Proulx, Christopher Pepper & Katherine Schulten, *The Reckoning: Teaching About the #MeToo Moment and Sexual Harassment with Resources from the New York Times*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/learning/lesson-plans/the-reckoning-teaching-about-the-metoo-moment-and-sexual-harassment-with-resources-from-the-new-york-times.html> [<https://perma.cc/NR78-UL5Y>].

¹² *Id.*

¹³ Valeriya Safronoya, *When You Experience Sexual Harassment at Work*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/style/sexual-harassment-work-advice-lawyers.html> [<https://perma.cc/5745-4NSM>] (adopting the same narrow sexual definition in an earlier piece).

¹⁴ Proulx et al., *supra* note 11.

¹⁵ *Id.* (linking to *Laws, Regulations and Guidance: Sexual Harassment*, U.S. EQUAL OPPORTUNITY EMP. COMM’N, https://www.eeoc.gov/laws/types/sexual_harassment.cfm [<https://perma.cc/DJM7-69PW>] (“It is unlawful to harass a person (an applicant or employee) because of that person’s sex.”)).

have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general."¹⁶

Last year, we asked about the discrepancy between the *Times's* definition and the legal definition the *Times* itself references. A staff member responded that, according to its Standards Editor, the *Times* "defers to the dictionary definition of sexual harassment."¹⁷ "[W]e don't see it as our role to define sexual harassment for the world," she added.¹⁸

There is an irony in the *New York Times* disclaiming any role in defining sexual harassment even as the paper itself publishes lesson plans that include (and promote) an official *Times* definition of sexual harassment. And there is some circularity in deferring to the dictionary definition of "sexual harassment" when descriptive dictionaries look to authoritative cultural sources like the *Times* when tracing such terms' usage and meaning.¹⁹

Whatever the *Times* might say, its definition and use of the term "sexual harassment" matters. And today's almost unprecedented focus on sexual harassment by the *Times*, among other media sources, makes it crucial to ask, perhaps now more than ever, whether they are focused on the right thing.

B. The Broader Definition

Over twenty years ago, Vicki Schultz began challenging what was then—and in the *New York Times*, apparently still is—the prevailing view of sexual harassment. Schultz explained that, according to what she called the "sexual desire paradigm," the quintessential case of harassment "involves a more powerful, typically older, male supervisor, who uses his superior organizational position to demand sexual favors from a less powerful, typically younger, female subordinate."²⁰ She documented the way this prevailing sexualized view of harassment had shaped, and adversely affected, legal and cultural responses.

¹⁶ *Laws, Regulations and Guidance: Sexual Harassment*, U.S. EQUAL OPPORTUNITY EMP. COMM'N, *supra* note 15.

¹⁷ Email from Lara Takenaga, Reader Center, N.Y. TIMES, to Brian Soucek (May 14, 2018, 09:17 EST) (on file with authors).

¹⁸ *Id.*

¹⁹ For example, the *Oxford English Dictionary* cites to a 2002 *New York Times Magazine* usage in its entry defining "quid pro quo." *Quid pro quo*, *Oxford English Dictionary* (3d ed. 2007) (citing Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES (Oct. 13, 2002), ("A lot of workplace harassment consisted not of bluntly quid pro quo sexual solicitations . . . but of sexual jokes and vulgarity."))

²⁰ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1692; *see also id.* ("This sexual desire-dominance paradigm governs our understanding of harassment. Its influence is reflected in the very fact that the category is referred to as 'sexual' harassment rather than, for example, 'gender-based' or 'sex-based' harassment.").

Schultz offered a broader understanding of harassment as a means of undermining the competence, authority, and inclusion of women, and some “lesser” men, in favored, male-dominated jobs and spaces. Harassment of this sort serves to “reinforce gender difference and to claim work competence and authority as masculine preserves.”²¹ By driving away women and gender-nonconforming men, or labeling them as “different” and inferior, Schultz theorized, dominants could shore up their superior economic position, social status, and sense of masculine identity. On this conception, sexual harassment is both a consequence and further cause of sex-segregated or gender-unbalanced workplaces.²²

Schultz’s theory was one of the first to characterize sexual harassment as primarily a means of policing gender boundaries, not securing sexual liaisons.²³ In this new approach, law and policy should focus on eliminating gender hierarchies and discrimination, not on prohibiting sexuality *per se*. For this reason, the reconceptualized view defines sexual harassment both more broadly and in some respects more narrowly than the traditional sexualized paradigm. “Sexual harassment,” reconceptualized, includes derogatory comments and actions that are directed at people because of their sex or gender but have no sexualized content; yet it does *not* extend to benign sexual remarks and actions that have no harmful gender-based motivations or effects, but which many employers are nonetheless often eager to ban.²⁴ Trying to suppress all hints of sexuality risks reinforcing dominant but unacknowledged sexual hierarchies, thus punishing people of color, lesbians and gay men, and others stereotyped as sexual deviants.²⁵

In the reconceptualized view, then, sexual harassment law should aim at gender hierarchy, not sexuality alone. But, of course, sexual behavior can be used to foster gender disadvantage. Schultz noted that, particularly in traditionally male-dominated settings, sexual assault and ridicule are often used as weapons to exaggerate women’s or gay men’s difference and reinforce the dominants’ superiority. She argued that “nonsexual forms of harassment frequently are accompanied by more sexual ones, such as crude sexual overtures, or sexual taunting

²¹ *Id.* at 1755, 1759.

²² *See id.* at 1760.

²³ *Id.* at 1762 (describing harassment as “conduct that is rooted in gender-based expectations—not simply conduct that is sexual in nature”); *see also* Katherine M. Franke, *What’s Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997) (characterizing sexual harassment as a “technology of sexism”).

²⁴ *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003); *see also* Vicki Schultz, *Open Statement on Sexual Harassment on Behalf of Employment Discrimination Law Scholars*, STANFORD L. REV. ONLINE (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> [<https://perma.cc/9RF7-FFNU>].

²⁵ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1729, 1784–85, 1789 n.540.

and mockery.”²⁶ Sexual misconduct is often a telltale sign of a larger pattern of gender-based hostilities.²⁷

Writing two decades apart, each of us has described in disturbing and depressingly similar detail the varied ways both sexual and non-sexual behaviors have been used to harass women in East Coast fire departments.²⁸ Lawsuits against New York City and Providence, Rhode Island, revealed sexually crude comments, sexual advances, invasions of privacy, and sexual assaults that were inflicted by male firefighters on their female colleagues.²⁹ But equally pervasive and pernicious were the non-sexualized ways in which men tried to undermine female firefighters and drive them out of their departments. In New York City in the early 1980s, female firefighters were denied the training given to men and were then blamed for their lesser ability to perform the tasks for which they had been denied training. Equally humiliatingly, male firefighters deprived the women of meals, cooperation, and “the unique forms of communal living that are characteristic of the firefighters’ workplace.”³⁰ In Providence, twenty years later, a lesbian lieutenant in the fire department was actually poisoned during the communal meals. More than one male subordinate flicked the pin signifying her rank and said they would never take an order from her. One man under her command so resented the lieutenant’s orders that he snapped off his rubber gloves in the back of a rescue vehicle, flinging a patient’s blood and brain matter onto his superior’s face.³¹

All of this is sexual harassment. Regardless of whether the harassment involved sexual advances or taunts, gender-specific slurs, or acts of hostility and exclusion, the antagonistic actions, assaults, ridicule, ostracism, marginalization, and sabotage these women endured all served the same aim: policing gender boundaries and preserving the gendered character of firefighting. All of this was done to shore up the men’s gendered—which is to say heterosexual and stereotypically masculine—position, status, image, and sense of identity.

²⁶ *Id.* at 1766.

²⁷ *See id.* at 1755–62, 1764–66; *see also* Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at n.32 and accompanying text.

²⁸ *See* Soucek, *Queering Sexual Harassment*, *supra* note 8; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1769–73.

²⁹ *See Berkman v. City of New York*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff’d*, 755 F.2d 913 (2d Cir. 1985) (described in Schultz, *Reconceptualizing Sexual Harassment Law*, *supra* note 6, *passim*); *see also Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018) (described in Soucek, *Queering Sexual Harassment*, *supra* note 8, *passim*).

³⁰ Schultz, *Reconceptualizing Sexual Harassment Law*, *supra* note 6, at 1771 (quoting *Berkman v. City of New York*, 580 F. Supp. at 232).

³¹ Soucek, *Queering Sexual Harassment*, *supra* note 8, at 71–72.

These women, these types of stories, are hardly unique. Research has repeatedly found that the most pervasive forms of workplace harassment are not sexual advances and attention, but rather non-sexual hostile or offensive behaviors directed at women (and gender-nonconforming men) because of their sex or gender performance.³² In light of these findings, today, many social scientists have moved away from the older sexual desire paradigm in favor of a broader gender-policing theory like the one proposed by Schultz.³³ In this view, harassment is more about gender-based put-downs than about sexual come-ons.³⁴ Evidence suggests that unwanted sexual attention and advances typically do not occur in isolation, but instead co-occur with broader gender-based or other hostilities.³⁵ Thus, even the come-ons often prove to be less about sexual desire than a desire to “devalue women or punish those who violate gender norms.”³⁶

Reviewing recent research, a 2016 report by an EEOC task force concluded that “sexist or crude/offensive behaviors” that are “devoid of

³² See Jennifer Berdahl & Jana L Raver, *Sexual Harassment*, 3 AM. PSYCHOLOGICAL ASS'N HANDBOOK OF INDUS. & ORGANIZATIONAL PSYCHOL. 641, 646 (2011); EEOC REP., *infra note 37* (collecting recent studies). See also Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra note 6*, at 33–42 (discussing recent research and examples involving women); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 731–738, 744–760 (2014); Schultz, *Reconceptualizing Sexual Harassment*, *supra note 6* (discussing early research and examples).

³³ See George Akerlof & Rachel Kranton, *Economics and Identity*, 3 Q. J. ECON. 715, 733 & n.37 (2000); Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641 (2007); Emily A. Leskinen, Lilia M. Cortina & Dana B. Kabat, *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 J. L. & HUM. BEHAV. 25, 36 (2010); Sandy Welsh, *Gender and Sexual Harassment*, 25 ANN. REV. SOC. 169, 175 (1999) (citing Schultz, *Reconceptualizing Sexual Harassment*, *supra note 6*, to acknowledge broader, nonsexual forms of harassment, and calling on social science researchers to take account of harassment that does not fit the “top-down, male-female sexual come-on image of harassment” paradigm).

³⁴ See Emily A. Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, *supra note 33*, at 36 (“Taken together, our empirical results support the legal theory that ‘much of the time, harassment assumes a form that has little or nothing to do with sexuality but everything to do with gender’”) (citing Schultz, *Reconceptualizing Sexual Harassment*, *supra note 6*, at 1687). For the origin of the “put downs” versus “come ons” distinction, see Louise F. Fitzgerald, Michele J. Gelfand & Fritz Drasgow, *Measuring Sexual Harassment: Theoretical and Psychometric Advances*, 17 BASIC & APPLIED SOC. PSYCHOL. 425, 431–32 (1995) (“[I]t is sometimes difficult to determine whether a sexualized conversation is a come on or a put down (the essential distinction between unwanted sexual attention and gender harassment.”).

³⁵ See, e.g., Berdahl & Raver, *Sexual Harassment*, *supra note 32* (collecting studies showing that unwanted sexual attention and sexual coercion co-occurs with gender-based harassment, as well with other types of harassment); Sandy Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCHOL. 483, 487, 490 (2005); see also Louise F. Fitzgerald et al., *Measuring Sexual Harassment: Theoretical and Psychometric Advances*, *supra note 34*, at 438.

³⁶ Paula A. Johnson et al., *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*, NAT'L ACADS. OF SCI., ENG'G, MED. 49 (2018) (hereinafter “NAT'L ACADS. REP.”).

sexual interest”³⁷—behaviors the literature sometimes refers to as “gender harassment”³⁸—are far more common than acts of unwanted sexual attention and sexual coercion.³⁹ In surveys based on probability samples, the report notes, 25 percent of women say they have experienced “sexual harassment” at work,⁴⁰ and 40 percent say they have experienced one or more specific sexual behaviors.⁴¹ But in similar surveys asking about broader forms of gender-based hostility and harassment toward women, a much higher 60 percent of women report experiencing such harassment.⁴² The figures are even higher for some women in male-dominated settings. Large-scale studies of women working in the military and in law firms reported, for example, that nine in ten harassment victims had experienced sex-based or gender-harassment “in the absence of unwanted sexual attention or coercion.”⁴³

A 2018 report from the National Academies of Sciences, Engineering, and Medicine similarly found that “gender harassment ([defined as] behaviors that communicate that women do not belong or do not merit respect) is by far the most common type of sexual harassment.”⁴⁴ Indeed, according to this report, “unwanted sexual attention and sexual

³⁷ *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 9, 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686302 [<https://perma.cc/Z2KP-77CZ>] (hereinafter “EEOC REP.”).

³⁸ *Id.* at 9. The widely used Sexual Experiences Questionnaire developed by psychologist Louise Fitzgerald and her colleagues coined the term “gender harassment” to refer to hostile or offensive behaviors conveying negative attitudes toward women but devoid of sexual interest. Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOC. BEHAV. 152, 157 (1988). Many social scientists have adopted this term, treating it as a subset of a larger body of sexual or sex-based harassment that includes gender harassment, sexual coercion, and unwanted sexual attention. *See, e.g.*, Emily A. Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, *supra* note 33.

³⁹ *Id.*

⁴⁰ *Id.* at 8 & n.15.

⁴¹ *Id.* at 8 & n.16.

⁴² *Id.* at 8–9 & n.21. *See also* NAT’L ACADS. REP., *supra* note 44, at 31 (“[W]omen who experience the gender harassment type of sexual harassment are more than 7 times less likely to label their experiences as ‘sexual harassment’ than women who experience unwanted sexual attention or sexual coercion. This illustrates what other research has shown: that in both the law and the lay public, the dominant understandings of sexual harassment overemphasize two forms of sexual harassment, sexual coercion and unwanted sexual attention, while downplaying the third (most common) type—gender harassment.”).

⁴³ Emily A. Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, *supra* note 33, at 36.

⁴⁴ NAT’L ACADS. REP., *supra* note 36.

coercion are almost never experienced by women without simultaneously experiencing gender harassment.”⁴⁵ Notably, gender harassment more commonly comes from peers than superiors.⁴⁶

Despite the greater prevalence of these non-sexual acts of sexism and hostility, many women do not understand them to be actionable sexual harassment. The public conversation that highlights sexual advances, while neglecting less salacious forms of sexism, undoubtedly limits employees’ understanding of what counts as sexual harassment. Disturbingly, the National Academies Report also found that:

Women who experience the gender harassment type of sexual harassment are more than 7 times less likely to label their experiences as ‘sexual harassment’ than women who experience unwanted sexual attention or sexual coercion. This illustrates what other research has shown: that in both the law and the lay public, the dominant understandings of sexual harassment overemphasize two forms of sexual harassment, sexual coercion and unwanted sexual attention, while downplaying the third (most common) type—gender harassment.⁴⁷

The *New York Times* is surely a contributor to this limited lay understanding, given the paper’s narrow sexual definition and coverage. But the *Times* would not have to look far to broaden its horizons. Ironically, the paper’s own recent survey of full-time male workers revealed a greater prevalence of sexual harassment that lacks sexual designs. In December 2017, the *Times* asked 615 men whether they had engaged in any sort of sexist “objectionable behavior or sexual harassment” at work during the previous year.⁴⁸ Of the ten behaviors listed in the survey, the two that are most consistent with what the literature terms “gender harassment” received the highest responses. One—“[t]old sexual stories or jokes that some might consider offensive”—got the highest response, at 19%. The second highest response came from the 16% of men who admitted to making “remarks that some might consider sexist or offensive.” The options more clearly involving sexual advances, assaults, or coercion—those involving dates, sexual discussions, gestures or body language “of a sexual nature,” uncomfortable touching, uninvited fondling or kissing, and sexual quid pro quo offers—all received

⁴⁵ *Id.* at 171.

⁴⁶ *Id.*

⁴⁷ *Id.* at 31.

⁴⁸ Jugal K. Patel, Troy Griggs & Claire Cain Miller, *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html> [<https://perma.cc/BS2Z-M5YS>].

lower responses in the range of one to four percent.⁴⁹ According to the *Times's* official definition, however, the sexist and offensive remarks to which more men admitted would count only as objectionable behavior—not sexual harassment.

C. The Law's Definition

The law prohibits all harassment based on sex, regardless of whether it is sexual in motivation or means. Authoritative judicial decisions have made this clear for twenty years. Writing for the Supreme Court in 1998, Justice Scalia emphasized both that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex,”⁵⁰ and that workplace behavior is not “automatically discrimination because of sex merely because the words used have sexual content or connotations.”⁵¹ What matters, the Court said in *Oncale v. Sundowner Offshore Services*, is not the sexualized nature of certain words or actions, but the way words and actions affect working conditions for some people because of their sex or gender.⁵² *Oncale* and other decisions clarify that sexual harassment is actionable whenever it amounts to sex discrimination in the terms and conditions of employment—not under some special offshoot of Title VII that pertains specifically to sexual conduct.

U.S. law did not always take this clear stance. Feminist scholars and lawyers had to fight for judicial recognition of non-sexual but still sex-based forms of sexual harassment.⁵³ Since *Oncale*, however, nearly all the federal courts of appeals have similarly clarified that “sexual harassment” encompasses actions that are, in the Seventh Circuit’s words, “sexist rather than sexual.”⁵⁴ Increasingly—and crucially for claims brought by LGBT workers—the courts of appeals have also

⁴⁹ *Id.*

⁵⁰ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

⁵¹ *Id.*

⁵² *Id.* *Oncale* also clarified that same-sex sexual harassment is fully actionable under Title VII, regardless of the sexual orientation of the harasser.

⁵³ See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at nn.81, 82; Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at nn.194–199, and accompanying text.

⁵⁴ *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788 (7th Cir. 2007). See also *O'Rourke v. City of Providence*, 235 F.3d 713, 730 & n.5 (1st Cir. 2001); *Howley v. Town of Stratford*, 217 F.3d 141, 154–55 (2d Cir. 2000); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 (3d Cir. 1999); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 327 (4th Cir. 2003); *Beard v. Southern Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999). But see *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 & n.3 (9th Cir. 2002) (relying on fact that the alleged misconduct was sexual in nature to hold same-sex harassment actionable). The D.C. Circuit was the first to hold that actionable harassment need not be sexual in nature, see *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985), but the decision was widely ignored, as Schultz demonstrated. *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1732–38.

acknowledged in recent years that workers harassed for deviating from gender-based stereotypes and expectations have an actionable sexual harassment claim under Title VII.⁵⁵ These cases show the continuity between claims rooted in gender stereotyping and those sounding in sexual orientation or gender identity.⁵⁶ LGBT employees who are harassed because of their partners' sex or gender or their display of gender-atypical interests or clothing,⁵⁷ like women who dare to invade fields dominated by men,⁵⁸ or men who openly use wet wipes on a construction site⁵⁹—all face hostility because they have violated their employers' or coworkers' views of how "real" men and women should behave.⁶⁰ They have run afoul of the gender police at work. Protecting them from such gender policing, at least when it becomes severe or pervasive, is among Title VII's aims—as most courts now recognize.⁶¹ This is true regardless of whether the harassment is predominantly "sexual."

Despite the formal judicial consensus on this question, however, some confusion over whether sexual harassment refers only to sexual conduct still appears in certain public pronouncements by the EEOC and the Department of Justice (DOJ), the two leading agencies charged with enforcing federal employment discrimination law.

⁵⁵ Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VI*, *supra* note 32, at 748–760.

⁵⁶ See Brief of Anti-Discrimination Scholars as Amici Curiae in Support of the Employees, *Bostock v. Clayton Cnty., Ga.*, No. 17-1618 (U.S., July 3, 2019), at 8–16; Soucek, *Queering Sexual Harassment Law*, *supra* note 8, at 72–75. *But see* Brief of U.S. as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. Jul. 26, 2017) (ECF No. 281) (arguing that a gay plaintiff's Title VII discrimination claim is impermissibly based on his sexual orientation, rather than his sex); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 154 (2d Cir. 2018), (Lynch, J., dissenting) (acknowledging the government's *amicus* argument, and concluding similarly), *cert. granted*, 2019 WL 1756678 (2019) (consolidated with *Bostock v. Clayton Cnty. Ga.*, *cert. granted*, 2019 WL 1756677 (2019)); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 361 (7th Cir. 2017) (Sykes, J., dissenting) (arguing that discrimination on the basis of sexual orientation is not discrimination "because of sex" under Title VII); *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1254–5 (11th Cir. 2017) ("[T]he lower court erred because a gender non-conformity claim is not 'just another way to claim discrimination based on sexual orientation,' but instead, constitutes a separate, distinct avenue for relief under Title VII.")

⁵⁷ *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006) (where plaintiff's friendship with a gay man sparked harassment); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (where plaintiff's "effeminate" style of dress and mannerisms made him a target for harassment). See also Soucek, *Perceived Homosexuals*, *supra* note 32; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1777–89.

⁵⁸ *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018); Soucek, *Queering Sexual Harassment Law*, *supra* note 8, at 75.

⁵⁹ *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 450 (5th Cir. 2013).

⁶⁰ See Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L.J. F. 115, 123 (2017), <https://www.yalelawjournal.org/forum/hivelys-self-induced-blindness> [<https://perma.cc/6D8Z-7C36>].

⁶¹ *Supra* notes 54–56.

A search for “sexual harassment” on the EEOC’s website points in different directions. A page on “Types of Discrimination”⁶² links to an excellent page titled simply “Harassment.”⁶³ Commendably, the latter page treats harassment as something that can be based on sex, race, religion, or any of the other protected categories; all are treated as equivalent. As a result, the examples given are, by necessity, not sexualized; they include “offensive jokes, slurs, . . . physical assaults or threats, intimidation, ridicule . . . , insults or put-downs, offensive objects or pictures, and interference with work performance.”⁶⁴ Further, the website makes clear that harassment need not be top-down. Harassers can be co-workers or even non-employees, too.

By contrast, the EEOC devotes a separate link on the “Types of Discrimination” page to a page on “Sexual Harassment”—the site to which the *Times* linked in its lesson plan.⁶⁵ That page makes clear that harassment may include but “does not need to be of a sexual nature,” as discussed above. Yet, it confusingly also seems to limit “sexual harassment” to sexualized conduct, stating that “[h]arassment can include ‘sexual harassment’ or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.”⁶⁶ Put in quotes and defined in overtly sexualized terms, “sexual harassment” is presented as a subset of the sex-based harassment that is the subject of the page as a whole. Worse, links on the side direct readers to pages offering “Facts about Sexual Harassment,”⁶⁷ a March 1990 “Policy Guidance on Current Issues of Sexual Harassment,”⁶⁸ and the Code of Federal Regulations section on sexual harassment.⁶⁹ All three use now-obsolete language from 1980 that says: “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment. . . .”⁷⁰

⁶² *Discrimination by Type*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Jan. 20, 2019), <https://www.eeoc.gov/laws/types/> [<https://perma.cc/RC28-DC5M>].

⁶³ *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Mar. 8, 2019), <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/PTP8-MM6R>].

⁶⁴ *Id.*

⁶⁵ *See Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Jan. 20, 2019), https://www.eeoc.gov/laws/types/sexual_harassment.cfm [<https://perma.cc/8SNB-9LA9>].

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.* (linking to *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Jan. 20, 2019), <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> [<https://perma.cc/8JHR-WG4W>]).

⁶⁸ *Id.* (linking to *EEOC-N-915-050 Policy Guidance on Current Issues of Sexual Harassment*, U.S. Equal Emp. Opportunity Comm’n (Mar. 19, 1990), <https://www.eeoc.gov/policy/docs/currentissues.html> [<https://perma.cc/8ZLA-MEZC>]).

⁶⁹ *See Sexual Harassment*, 29 C.F.R. § 1604.11 (2018).

⁷⁰ *Id.* § 1604.11(a).

This narrow description comes from the EEOC's 1980 Guidelines on Discrimination Because of Sex,⁷¹ which codified the sexualized definition that some feminist theorists, and eventually most courts, reacted against in the following two decades. The law has since moved on, but the original guideline and the Code of Federal Regulations remains unchanged. The EEOC has not updated either, but only issued policy pronouncements reflecting the broader understanding. In a Policy Guidance released in March 1990, for example, the agency took note of a 1985 D.C. Circuit decision and acknowledged that “[a]lthough the Guidelines specifically address conduct that is sexual in nature, sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability.”⁷²

This lack of clarity creates an opening that those who wish to return to the older, sexualized definition of harassment can exploit. Indeed, it is the language of the 1980 Guidelines that officials and managers often import into policy statements. Take, for example, the DOJ's latest memorandum on sexual harassment, released in April 2018 after an internal investigation by the DOJ's Inspector General led to a department-wide working group, convened to address the problem.⁷³ Not only does DOJ's memo adhere to the 1980 Guidelines in defining sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,”⁷⁴ it goes on to illustrate the targeted misconduct through a series of exclusively sexualized examples, which include: “displaying ‘pinup’ calendars or sexually demeaning pictures, telling sexually oriented jokes, making sexually offensive remarks, engaging in unwanted sexual teasing, subjecting another employee to pressure for dates, sexual advances, or unwelcome touching.”⁷⁵ The DOJ's important, newly implemented reporting and tracking procedures thus get triggered only by actions that fit the now obsolete, sexualized conception of sexual harassment.

⁷¹ *Guidelines on Discrimination Because of Sex*, 45 Fed. Reg. 74, 677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11) (“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment . . .”).

⁷² EEOC-N-915-050, *supra* note 68, at § C.4.

⁷³ Rod Rosenstein, *Memorandum on Sexual Harassment and Sexual Misconduct* (Apr. 30, 2018), <https://www.justice.gov/jmd/page/file/1059401/download> [<https://perma.cc/7H2Y-KADG>]. See also Katie Benner, *Justice Department Releases New Sexual Harassment Guidelines*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/us/politics/justice-department-sexual-harassment.html> [<https://perma.cc/7788-CKUP>].

⁷⁴ *Id.* In fact, the DOJ goes further than the 1980 Guidelines in sexualizing “sexual harassment”: where the Guidelines said verbal or physical conduct of a sexual nature et cetera constitute sexual harassment—at least leaving open the possibility that other non-sexualized activity might also constitute sexual harassment—the DOJ says that “sexual harassment” refers to verbal or physical conduct of a sexual nature (et cetera).

⁷⁵ *Id.*; see also *Prevention of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Jan. 24, 2019), <https://www.justice.gov/jmd/eos/sexual-harassment> [<https://p>

Notably, the definition of “sexual harassment” in these internal policies that the DOJ applies to its own employees is narrower than the definition the agency uses in litigation efforts on behalf of employees generally. DOJ’s Civil Rights Division recently launched a major initiative against “Sexual Harassment in the Workplace,” focusing on public sector employers.⁷⁶ The initiative began with a lawsuit against the Houston Fire Department, alleging that male firefighters had engaged in hostile work environment harassment by directing brutal insults, threats, pranks, property damage, and sabotage—but no sexual advances—against the only two female firefighters at Houston’s Station 54.⁷⁷ The men made the workplace hellish for the two women who dared to enter their domain.⁷⁸ Though no sexual activity was involved, the harassment was surely based on sex. The federal courts should have no difficulty condemning their behavior as unlawful sexual harassment; they have long done so in other cases, as discussed above.⁷⁹ But fact patterns like these would not qualify as sexual harassment under the DOJ’s own new internal policies, under the EEOC’s old 1980 guideline, or under language on some of the governmental websites meant to instruct the public on the meaning of sexual harassment.

There is, in sum, a split in the way sexual harassment is defined and understood. On one side is a broad gender-based conception reflected in federal caselaw and the extensive social science documenting the varied forms of workplace harassment experienced by both women and men, especially those who deviate from dominant gender stereotypes. On the other side is the exclusively sexualized, implicitly male-to-female notion of sexual harassment offered by the 1980 EEOC Guidelines, the DOJ’s internal policy, and the *New York Times*.

erma.cc/3EFM-KLKL]. The examples are derived from a June 1993 memorandum from then-Attorney General Janet Reno on the “Prevention of Sexual Harassment in the Workplace.” Memorandum to Dep’t of Just. Emps. (June 29, 1993). A follow-up memo released after *Oncala* noted that DOJ had reviewed that case and found its policies “consistent” with it. Janet Reno, *Memorandum on the Prevention of Sexual Harassment* (Dec. 14, 1998).

⁷⁶ *Justice Department Launches Initiative to Fight Sexual Harassment in the Workplace*, U.S. DEPT OF JUSTICE (Feb. 28, 2018), <https://www.justice.gov/opa/pr/justice-department-launches-initiative-fight-sexual-harassment-workplace> [https://perma.cc/5GSZ-XEEJ].

⁷⁷ *U.S. v. City of Houston*, No. 4:18-cv-00644 (S.D. Tex. Feb. 28, 2018) (ECF No. 1), <https://www.justice.gov/opa/press-release/file/1040081/download> [https://perma.cc/5JQ8-JDGN].

⁷⁸ *Id.* at 3–14.

⁷⁹ Numerous courts have condemned similar patterns of behavior as hostile work environment harassment that violates Title VII, as discussed above. *See supra* note 29 and accompanying text; *see also supra* note 54.

II. WHY THE DEFINITION MATTERS

It matters which conception of sexual harassment the *New York Times* and other media adopt—especially now, as the #MeToo movement itself teeters between the two conceptions. The movement’s name derives from an earlier effort to combat sexual abuse.⁸⁰ Its resurgence was spawned by a tweet that gave voice to millions who have been “sexually harassed or assaulted.”⁸¹ Yet, after the initial emphasis on sexualized harms, the movement began to focus attention on wider forms of workplace sexism. For example, #MeToo activists helped create “Time’s Up,” an initiative designed to address “the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential.”⁸² And some prominent supporters urged a broad gender lens for analyzing sexual violations, in line with the reconceived view of harassment.⁸³ Thus, #MeToo encompasses *both* the older sexual desire paradigm that emphasizes male-to-female sexual misconduct predation as the quintessential problem *and* the reconceived view that focuses more broadly on gender-based harassment and discrimination against women, LGBT people, and others who challenge gender norms.

The question is which version will—or more importantly, should—capture the public imagination going forward. Are there good reasons for re-embracing the older sexualized view in the current era?

To answer this question, we first speculate on why the *New York Times* might have adopted an exclusively sexual definition and view of harassment. The point is not to figure out the *Times*’s actual motiva-

⁸⁰ See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/ULT8-MD4J] (describing activist Tarana Burke’s efforts to create the #MeToo campaign).

⁸¹ “Me too. Suggested by a friend: ‘If all the women who have been sexually harassed or assaulted wrote ‘Me too.’ as a status, we might give people a sense of the magnitude of the problem.” Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetebd%7Ctwtterm%5E919659438700670976&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F10%2F20%2Fus%2Fme-too-movement-tarana-burke.html [https://perma.cc/48KW-BP22] (emphasis added).

⁸² *About TIME’S Up*, TIME’S UP, https://www.timesupnow.com/about_times_up [https://perma.cc/B49D-C4K2] (last visited Feb. 1, 2019). For discussion of similar reform efforts generated by #MeToo, see Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 61.

⁸³ Melissa Gira Grant, *The Unsexy Truth About Harassment*, N.Y. REV. BOOKS DAILY (Dec. 8, 2017), <http://www.nybooks.com/daily/2017/12/08/the-unsexy-truth-about-harassment> [https://perma.cc/FN8U-86LZ]; Anna North, *What I’ve Learned Covering Sexual Misconduct This Year*, VOX (Dec. 27, 2017), <https://www.vox.com/identities/2017/12/27/16803610/sexual-misconduct-harassment-reckoning-metoo> [https://perma.cc/2DKA-2P7N]; Rebecca Traister, *This Moment Isn’t (Just) About Sex. It’s Really About Work*, CUT (Dec. 10, 2017), <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html> [https://perma.cc/FEC9-GPRH].

tions, but rather to ask why any responsible media outlet that is apparently committed to exposing workplace harms against women would adopt such a view. We then discuss some of the harms of the sexualized view.

A. Reasons for Adopting a Sexual Definition

1. Publicity. Perhaps part of the answer has to do with the fact that salacious stories generate publicity. Sex sells.⁸⁴ Stories like those told about movie mogul Harvey Weinstein are the stuff of tabloids. Searingly personal, and painful as they are to read, the revelations made by actors such as Ashley Judd,⁸⁵ Gwyneth Paltrow,⁸⁶ Salma Hayek,⁸⁷ and Lupita Nyong'o⁸⁸ are also stories of sex, stars, and movie deals, set in exotic locations from Hollywood to Cannes. These stories are destined to find a wide audience that similarly disturbing descriptions of harassment on Ford's factory line⁸⁹ likely never will.⁹⁰

2. Effectiveness. A more charitable explanation may lie in a belief that reporting on the wrongs committed by powerful figures like Harvey Weinstein, Matt Lauer,⁹¹ and Louis C.K.,⁹² can lead to greater change than stories about more entrenched cultures of harassment, often carried out by coworkers or subordinates. After all, Harvey Weinstein's sexual demands and assaults stopped when the *New York Times* exposed them.⁹³ The top-down, sexualized paradigm of harassment allows

⁸⁴ See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1693–96 (describing outside media focus on the sexualized details of harassment cases).

⁸⁵ Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://nyti.ms/2xVPfVW> [<https://perma.cc/3Y4H-GFTB>].

⁸⁶ Jodi Kantor & Rachel Abrams, *Gwyneth Paltrow, Angelina Jolie and Others Say Weinstein Harassed Them*, N.Y. TIMES (Oct. 10, 2017), <https://nyti.ms/2gapaOJ> [<https://perma.cc/4BJ8-22L3>].

⁸⁷ Salma Hayek, *Harvey Weinstein Is My Monster, Too*, N.Y. TIMES (Dec. 12, 2017), <https://nyti.ms/2nXntXL> [<https://perma.cc/F346-E68T>].

⁸⁸ Lupita Nyong'o, *Speaking Out About Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), <https://nyti.ms/2l0MXCm> [<https://perma.cc/AL2F-X28N>].

⁸⁹ Chira & Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, *supra* note 7.

⁹⁰ Maggie Adams, Ari Isaacman Bevacqua & Anna Dubenko, *The Most-Read New York Times Stories of 2017*, N.Y. TIMES (Dec. 8, 2017), <https://nyti.ms/2BNssfH> [<https://perma.cc/9H74-J2GH>] (noting that the stories cited in the previous four footnotes were, respectively, the 10th, 45th, 9th, and 80th most-read *New York Times* stories in 2017).

⁹¹ Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of 'Today'*, N.Y. TIMES (Nov. 29, 2017), <https://nyti.ms/2k93ZOw> [<https://perma.cc/C8D8-VR8W>] (this was the 7th most read *New York Times* article of 2017, Adams, Bevacqua & Dubenko, *supra* note 90).

⁹² Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://nyti.ms/2ho0aE0> [<https://perma.cc/S3E2-CXA6>] (this was the 16th most read *New York Times* article of 2017, Adams, Bevacqua & Dubenko, *supra* note 90).

⁹³ *Supra* notes 85–88.

for this kind of immediate, dramatic resolution: the guy at the top gets fired (an event which is often itself an important news story that generates more publicity).

Collecting such stories, the *Times's* infographic about the “201 Powerful Men” brought down by #MeToo in its first year⁹⁴ stands as a symbol of the movement’s—and reporters’—effectiveness. A similar follow-up to the *Times's* reporting about the sexually and racially hostile work environment at Ford plants is harder to imagine. Indeed, the 2017 reporting on Ford was itself a follow-up to stories (and lawsuits) that emerged from the same Chicago-area plants in the 1990s.⁹⁵ Depressingly little had changed in twenty years. The problem could not be fixed with a single well-publicized personnel change.

But it remains to be seen whether the harassment problems in industries such as Hollywood and Silicon Valley can be fixed by firing individual harassers. In industries and workplaces plagued by harassment, deeper structural problems, such as entrenched sex segregation, unchecked supervisory authority, and informal “who-you-know” hiring, give dominants the upper hand.⁹⁶ As Schultz wrote recently after surveying these entrenched problems in both industries: “Sooner or later, other harassers will take their place—unless the underlying conditions that foster harassment in the first place are addressed.”⁹⁷ In other words, focusing on the traditional, sexualized, male boss/female subordinate(s) vision of sexual harassment may not end up being as effective in the long run as it is dramatic in the short term.

3. Pervasiveness or Seriousness. Perhaps, however, the *Times* and other media focus on workplace sexual abuse out of a belief that that it is more pervasive, or its harms more serious, than other types of sexist misconduct. Such a view has long been promoted by some strands of feminism.⁹⁸ Early in the development of sexual harassment law, for example, some feminists argued that “harassment is problematic precisely *because* it is sexual in nature—and because heterosexual sexual relations are the primary mechanism through which male dominance and female subordination are maintained.”⁹⁹ Early sexual

⁹⁴ 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> [https://perma.cc/4C3D-Z4KA].

⁹⁵ *U.S. and Ford Settle Harassment Case*, N.Y. TIMES (Sept. 8, 1999), <https://nyti.ms/2IYFTgw> [https://perma.cc/83GA-AYQY].

⁹⁶ Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 48–53.

⁹⁷ *Id.* at 26.

⁹⁸ For a discussion of such feminist thought and its influence on the development of sexual harassment law, see Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1697–1705.

⁹⁹ *Id.* at 1705 (discussing Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 59–77 (1979); Kathleen Barry, *Female Sexual Slavery* 164–65 (1979); Andrea Dworkin, *Intercourse* 126 (1987)).

harassment cases challenged “precisely the sort of top-down, supervisor-subordinate, male-female sexual extortion” decried by these feminists.”¹⁰⁰

Some journalists may simply take this point of view for granted, but this is not the only feminist perspective on sexual harassment law. Members of the media should educate themselves and the public about the rich variety of feminist and progressive thought on the subject. Many writers reject the notion that sexuality is uniquely harmful, or that heterosexuality itself somehow generates harmful structures of gender, race, class, and homophobia in the workplace and other social realms.¹⁰¹

Theoretical debate aside, it turns out that some key factual assumptions used to defend the sexualized view of harassment are not well grounded. We discuss some of these inaccuracies, and associated harms, below.

B. Counterarguments: The Harms of a Sexualized Definition.

1. Pervasiveness. First of all, it is simply wrong to think that sexualized forms of harassment are more pervasive than the types of sexual harassment sometimes referred to as “gender harassment.” (More on this term in Part III.) To the contrary, non-sexual, sex-based harassment is far more common than sexual advances and attention, as discussed above.¹⁰² Defining it out of existence vastly underestimates the amount of harassment and discrimination facing working women, and many men, and leaves them ill-informed about their rights.

2. Harmfulness. There is little if any evidence that overtly sexual harassment is more harmful than other forms. To the contrary, research suggests that non-sexual harassment causes harm similar to that caused by more sexual forms.¹⁰³ Indeed, in the workplace, the former may be even *more* harmful, precisely because it is not widely

¹⁰⁰ *Id.* at 1705.

¹⁰¹ See e.g., Schultz, *The Sanitized Workplace*, *supra* note 24, at 2136–2139 (arguing that sexuality is not inherently subordinating or degrading, but rather sexualized behavior is used as only one tool among many for maintaining masculine superior status and identity); Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-McGinley.pdf> [<https://perma.cc/JJ7H-9ET9>] (extending the analysis of the pervasiveness of non-sexual, sex-based harassment to school settings); 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/68N6-4N8C>] (discussing the often overlooked racialized dimensions of sexual harassment and sex-based harassment); Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85 (2018), <https://www.yalelawjournal.org/forum/of-power-and-process> [<https://perma.cc/5RNW-RA7C>] (discussing class-based dimensions of sexual harassment law).

¹⁰² *Supra* notes 39–46, and accompanying text.

¹⁰³ See Leskinen et al., *supra* note 34, at 37; M. Sandy Hersheovis & Julian Barling, *Comparing*

acknowledged as a social problem. Thus, “unlike with overtly sexual harassment, women and other victims may also be more likely to internalize and blame themselves for nonsexual harassment, rather than attributing it to sexism and gender bias for which they are not responsible.”¹⁰⁴

3. Skewed Focus. Focusing solely on sexualized forms of harassment not only underestimates the incidence and harm of sexual harassment generally: it also disproportionately neglects the types most often faced by women in supervisory positions and male-dominated job settings,¹⁰⁵ and by LGBT workers.¹⁰⁶ According to the National Academies’ study, LGBT employees working in higher education report experiencing “gender harassment” at two-and-a-half times the rate reported by heterosexual employees.¹⁰⁷ These are people who by definition are crossing traditional gender boundaries about their “proper place” or defying gender stereotypes about how proper “women” and “men” should behave. Harassment is a way of punishing them for gender non-conformity.¹⁰⁸

Indeed, neglecting non-sexualized harassment and ignoring harassment against people who violate gender norms are dynamics that reinforce each other in a self-perpetuating cycle. Focusing only on *New York Times*-type stories in which a powerful heterosexual man makes sexual advances on the beautiful women who work for him makes a desire-based account of sexual harassment all too easy to accept. After all, readers may think, what man wouldn’t want these women? Foregrounding less visible stories in which the person harassed is not a beautiful ingenue but a butch lesbian, harassed because she is the

Victim Attributions and Outcomes for Workplace Aggression and Sexual Harassment, 95 J. APPLIED PSYCH. 874, 875 (2010).

¹⁰⁴ Schultz, *Reconceptualizing Sexual Harassment Again*, *supra* note 6, at 43 & n.101 (citing sources).

¹⁰⁵ Heather McLaughlin et al., *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77 AM. SOC. REV. 625, 634 (2012) (finding that female supervisors “report a rate of harassment 73 percent greater than that of nonsupervisors”); *see also* Jennifer Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPL. PSYCH. 425, 425 (2007) (finding that women with more “masculine” personality traits like aggressiveness are sexually harassed more than “women who meet feminine ideals.”).

¹⁰⁶ *See generally* Soucek, *Queering Sexual Harassment Law*, *supra* note 8.

¹⁰⁷ In a study of 629 employees in higher education, nearly 76.9 percent of sexual minorities (of both genders) experienced gender harassment, whereas only 30 percent of heterosexuals (of both genders) experienced gender harassment. Julie Konik & Lilia M. Cortina, *Policing Gender at Work: Intersections of Harassment Based on Sex and Sexuality*, 21 SOC. JUSTICE RESEARCH 313, 324 (2008).

¹⁰⁸ Schultz, *Open Statement*, *supra* note 24, at 19; Soucek, *Queering Sexual Harassment Law*, *supra* note 7, at 72–72; Soucek, *Perceived Homosexuals*, *supra* note 32, at 748–760; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1774–1777.

boss,¹⁰⁹ makes it easier to see something other than sexual interest and opportunism as harassment's cause.¹¹⁰

At the same time, rooting sexual harassment in sexual desire rather than gender policing makes it much more difficult to see the harassment of LGBT and other gender non-conforming people as a form of sex discrimination.¹¹¹ By focusing only on sexual desire, we miss the common thread linking a male boss's sexual advances, a co-worker's homophobic slurs, and the insubordination faced by a female authority figure from the men who work for her: All are attempts to police gender and reinforce gendered spaces, professions, and prerogatives. Disrupting such gender boundaries has *always* been part of the contested meaning of Title VII.¹¹²

4. Misunderstood Motivations. This last observation suggests another cost of ignoring non-sexualized forms and causes of sexual harassment: Doing so can lead observers to misunderstand and downplay even the sexualized forms.¹¹³

Consider, for example, one of Donald Trump's standard defenses against allegations of predatory sexual advances and assaults: "She's not my type."¹¹⁴ Or, as his then-lawyer Michael Cohen said of the accusers, "they're not somebody that he would be attracted to, and therefore,

¹⁰⁹ *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018); Soucek, *Queering Sexual Harassment Law*, *supra* note 8.

¹¹⁰ As commentators have recognized, expanding the stories that are told about sexual harassment helps shift social and legal understanding of its causes and effects. See, e.g., Tristin K. Green, *Was Sexual Harassment Law A Mistake? The Stories We Tell*, 128 YALE L.J. F. 152 (2018), <https://www.yalelawjournal.org/forum/was-sexual-harassment-law-mistake> [<https://perma.cc/DW2U-AW C9>].

¹¹¹ See Soucek, *Queering Sexual Harassment Law*, *supra* note 8.

¹¹² Soucek, *Hively's Self-Induced Blindness*, *supra* note 60, at 125 (citing Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1328, 1331, 1377–80 (2012); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENVER U. L. REV. 995, 1014–46 (2015)). This insight is especially crucial now that the Supreme Court has taken up the question of whether Title VII prohibits discrimination based on sexual orientation and gender identity. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 2019 WL 1756678 (2019); *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App'x 964 (11th Cir. 2018), *cert. granted*, 2019 WL 1756677 (2019) (consolidated with *Zarda*); *R.G. & G.R. Harris Funeral Homes Inc. v. E.E.O.C.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 2019 WL 1756679 (2019); Brief of Anti-Discrimination Scholars, *supra* note 56.

¹¹³ For an example in addition to those that follow, see Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 46–47 (discussing this point and supporting research). In this piece, Schultz shows how even famed sexual predator Harvey Weinstein engaged in a pattern of non-sexual misogyny and homophobic insults against female and male employees, in addition to his sexual assaults and advances. Despite the lack of media attention to these broader forms of sexual harassment and discrimination, Schultz argues, analyzing them helps illuminate Weinstein's motivations and reveals that he wasn't just a sex-crazed pervert, but an industry kingpin bent on displaying a variety of gendered prerogatives. *Id.* at 34–38.

¹¹⁴ Peter Baker & Neil Vigdor, *'She's Not My Type': Accused Again of Sexual Assault, Trump Resorts to Old Insult*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/us/politics/jean-carroll-trump.html> [<https://perma.cc/FGK8-G5FR>]; see also Ryan Teague Beckwith, *Read Donald Trump's Speech Attacking His Accusers*, TIME (Oct. 14, 2016), <http://time.com/4532181/do>

the whole thing is nonsense.”¹¹⁵ This defense only makes sense if misplaced sexual desire is the sole reason men sexually harass women. But it is not. Unwanted sexual advances can also serve to maintain masculine status in the eyes of other men—not just by carrying them out, but also, often, by boasting about them, lording them over other men, or using them as a means of bonding.¹¹⁶

This point helps explain a crucial but unappreciated moment in the recent confirmation hearings of now-Justice Brett Kavanaugh. Senator Patrick Leahy asked Dr. Christine Blasey Ford about her strongest memory from the day she was attacked. Her answer is now famous:

FORD: Indelible in the hippocampus is the laughter, the laugh—the uproarious laughter between the two, and their having fun at my expense.

Senator Leahy continued:

LEAHY: You’ve never forgotten that laughter. You’ve never forgotten them laughing *at you*.

FORD: They were laughing *with each other*.

LEAHY: And you were the object of the laughter?

FORD: I was, you know, underneath one of them while the two laughed, two friend[s]—*two friends having a really good time with one another*.¹¹⁷

Despite his sympathetic questioning, Senator Leahy was unable to see what Dr. Ford instantly realized. The laughter was not at her or about her, just as the attack she described was not about sexual gratification. Before all else, the whole thing was a form of homosocial bonding: two privileged boys from an all-male school showing off for each

nald-trump-north-carolina-accusers-speech-transcript/ [https://perma.cc/JX6Y-DNBU] (“Believe me, she would not be my first choice.”).

¹¹⁵ See also Bryan Logan, *Donald Trump’s Attorney: Trump’s Sexual-Assault Accusers “Aren’t Even Women He’d Be Attracted to,”* BUSINESS INSIDER (Oct. 18, 2016), <https://www.businessinsider.com/michael-cohen-donald-trump-accusers-sexual-assault-trump-lawyer-2016-10> [https://perma.cc/HWF5-NECM].

¹¹⁶ See *Transcript: Donald Trump’s Taped Comments about Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> [https://perma.cc/B3PR-WTTC].

¹¹⁷ *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.102e203ecf30 [https://perma.cc/JY6P-T66T] (emphases added).

other, abusing alcohol and a young woman in order to “hav[e] a really good time.”¹¹⁸

Dr. Ford’s insight into what she endured helps explain the relevance of other stories told about Brett Kavanaugh around the same time—ones typically dismissed as irrelevant because they did not involve sexual misconduct. The stories of aggression and blackout-level drinking at his all-male high school and his notorious all-male fraternity at Yale College all fit the pattern.¹¹⁹ They illustrate the antics men often use to compete, bond, and prove themselves to each other, especially in sex-segregated settings. These stories in no way contradict the counternarrative of ambition and success that Kavanaugh himself told. Instead, demonstrative masculinity—the beer and sports and yearbook jokes about girls—provided the path to success in the single-sex environments where Kavanaugh thrived.¹²⁰

Thus, any alleged misconduct by Kavanaugh toward Dr. Ford was in service of his social ambition among other young men, not just teenage lust. Kavanaugh distanced himself from the latter explanation, perhaps truthfully, claiming that he remained a virgin until well after college.¹²¹ But he doubled down on his embrace of the male-dominated institutions where he came of age. Focusing on solely his sexual intentions obscures just how aggressively gendered those institutions were and are. To deny sexual intent is *not* to deny sexual harassment. Even sexual misconduct and assault can be motivated by things other than, or in addition to, a desire for sexual contact.

The selective focus of Kavanaugh’s denials at the hearings was mirrored in written answers to questions Senator Chris Coons asked about another important homosocial relationship in Kavanaugh’s life: his clerkship and later friendship with Alex Kozinski, former judge on the Ninth Circuit. When asked whether he had ever witnessed Kozinski behaving badly toward a law clerk, Kavanaugh understood each question and framed each answer to refer only to *conduct of a sexual nature*.¹²²

¹¹⁸ *Id.*

¹¹⁹ See Stephanie Saul et al., *In a Culture of Privilege and Alcohol at Yale, Her World Converged with Kavanaugh’s*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/us/politics/dborah-ramirez-brett-kavanaugh-allegations.html> [<https://perma.cc/E7KJ-C2HK>]; Eren Orbey, *The Long Decline of DKE, Brett Kavanaugh’s Fraternity at Yale*, THE NEW YORKER (Sept. 25, 2018), <https://www.newyorker.com/culture/culture-desk/the-long-decline-of-dke-brett-kavanaughs-fraternity-at-yale> [<https://perma.cc/MU9U-TQNV>].

¹²⁰ For discussions of the important role of such sex-segregated, mostly-male environments as both a cause and consequence of sexual harassment, see Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 49–50.

¹²¹ Emily Birnbaum, *Kavanaugh: I Was a Virgin Through High School and College*, THE HILL (Sept. 24, 2018), <https://thehill.com/homenews/senate/408172-kavanaugh-i-was-a-virgin-through-high-school-and-college> [<https://perma.cc/AHH7-UVSW>].

¹²² See text accompanying note 70.

Asked whether he had ever witnessed Kozinaki “engaging in inappropriate behavior,” for example, Kavanaugh replied, “Judge Kozinski was known to be a tough boss, but I did not witness him engaging in inappropriate behavior of a sexual nature.”¹²³

COONS: Did you ever see Judge Kozinski mistreat a law clerk or law clerk candidate? Please explain any such incident(s).

KAVANAUGH: Over the course of my relationship with Judge Kozinski, I never saw him *sexually harass* a law clerk or law clerk candidate.

COONS: Did Judge Kozinski ever use demeaning language when discussing women?

KAVANAUGH: I do not remember hearing Judge Kozinski use demeaning language of a sexual nature when discussing women.

COONS: Did anyone ever raise concerns with you about Judge Kozinski’s behavior? Who? When?

KAVANAUGH: To the best of my memory, no one ever raised concerns with me regarding *inappropriate behavior of a sexual nature* on the part of Judge Kozinski.¹²⁴

Even assuming that Kavanaugh never observed any sexualized behavior by Kozinski, as others claim to have done,¹²⁵ Kavanaugh’s answers are still remarkably unresponsive.¹²⁶ They evade the questions

¹²³ *Responses of J. Brett Kavanaugh, Nominee, Associate Justice of the Supreme Court of the United States, to Questions for the Record from Sen. Christopher Coons, Senate Judiciary Committee*, 115th Cong. 157–58 (Sept. 10, 2018), <https://www.judiciary.senate.gov/download/kavanaugh-responses-to-questions-for-the-record> [<https://perma.cc/VK3W-5WF5>] (emphases added).

¹²⁴ *Id.*

¹²⁵ See Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.ed3e9e8ebdb7 [<https://perma.cc/D3TD-2885>]; Heidi Bond, *I Received Some of Kozinski’s Infamous Gag List Emails. I’m Baffled by Kavanaugh’s Responses to Questions About Them*, SLATE (Sept. 14, 2018), <https://slate.com/news-and-politics/2018/09/kavanaugh-kozinski-gag-list-emails-senate-hearings.html> [<https://perma.cc/M6A4-WKZF>]; Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017), <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> [<https://perma.cc/2BKJ-JEJT>].

¹²⁶ The worst instance: asked if he had received emails from Judge Kozinski’s sexually explicit email list, Kavanaugh said he didn’t “remember receiving inappropriate emails of a sexual nature from Judge Kozinski.” Then asked, “[h]ave you conducted a search of your email accounts and/or correspondence with Judge Kozinski in an effort to provide an accurate response to the preceding question? If not, why not?,” Kavanaugh just repeated: “I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.” *Responses of J. Brett Kavanaugh to Sen. Patrick Leahy’s Questions for the Record*, *supra* note 124, at 73.

by reducing all mistreatment to sexual harassment, and all sexual harassment to language and behavior “of a sexual nature.”

Yet, a superior or peer can demean women, mistreat them, undermine their work or reputations, and even drive them from a workplace, job, or social space through harassing conduct and language *not* “of a sexual nature.” To leave this kind of harassment or motive out of the discussion is to ignore a major part of the sexual harassment clerks like Kozinski’s have said they endured. Indeed, it is to misunderstand the broader underlying harms of even the sexualized forms of harassment. Furthermore, it minimizes the problem of sexual harassment by limiting it to a few sex-crazed bad apples.

In the wake of the Kozinski scandal, a working group appointed by Chief Justice Roberts to help “protect all court employees from inappropriate conduct in the workplace,” largely avoided this trap. The group’s June 2018 report focused on harassment in all its forms, with the goal of promoting “an inclusive and respectful workplace.”¹²⁷ It recommended that the Judicial Conference issue clearer proscriptions on sex-based harassment, including harassment based on sexual orientation and gender identity,¹²⁸ and similarly clarify its Model Employment Dispute Resolution Plan.¹²⁹ Commentary to subsequently enacted amendments to the Judicial Code of Conduct make clear that “harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct.”¹³⁰

Yet even in this admirable report and the reforms it spurred, the sexualized conception of sexual harassment retains a foothold. Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings enacted in March 2019 identify and address “unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault” separately from what Rules refer to as “intentional discrimination on the basis of race, sex, gender, gender identity, pregnancy, sexual

¹²⁷ *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* 1–2 (June 1, 2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [<https://perma.cc/PWA7-XZXX>] [hereinafter WORKING GROUP REPORT]. See also *id.* at n.15 (“[H]arassment for any reason is problematic, and the Working Group’s references to harassment are therefore not limited to harassment of a sexual nature”); *id.* at 27 (“[N]or should [confidentiality requirements] discourage[] an employee from revealing abuse or reporting misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person . . .”).

¹²⁸ *Id.* at 24, 30.

¹²⁹ *Id.* at 34.

¹³⁰ *Guide to Judiciary Policy, Vol. 2: Ethics and Judicial Conduct, Pt. A: Codes of Conduct, Ch. 2: Code of Conduct for United States Judges*, Canon 3(B)(4) 11 (Mar. 2019), <https://www.uscourts.gov/file/document/code-conduct-us-judges-effective-march-12-2019> [<https://perma.cc/3D29-L429>].

orientation, religion, national origin, age, or disability.”¹³¹ The concern here is that decision makers might limit sex- or gender-based “discrimination” to tangible employment decisions, while limiting broader concerns about hostile workplaces to complaints about “sexual conduct.” Such a process of disaggregation would limit responsibility for both, and allow non-sexual but still sex-based harassment to evade scrutiny altogether.¹³²

III. WHY THE NAME MATTERS

Even if we all agreed that non-sexual but still gendered forms of harassment are harmful and should be eliminated, the question remains: What is at stake in calling them “sexual harassment”? Must we insist on reconceptualizing the very term “sexual harassment,” instead of replacing it with another overarching term that includes both sexual and non-sexual misconduct—perhaps “sex-based harassment,” as some have proposed?¹³³ Or alternatively, could we preserve the sexualized definition of “sexual harassment” but add to it another term, such as “gender harassment,” to capture all the sexism and abuse that the sexualized notion of sexual harassment leaves out?¹³⁴

Were we writing on a blank slate, substituting an umbrella term like “sex-based harassment” might well be better: more accurate, less easily misleading than the term “sexual harassment.” But the slate isn’t blank; it bears the marks of one of the most widespread popular legal education efforts in the country. Aside from traffic laws and drivers’ education, perhaps no topic is the subject of more mandatory legal trainings than sexual harassment. Furthermore, in major media outlets like the *New York Times*, as well as on social media, “sexual harassment” is

¹³¹ *Guide to Judiciary Policy, Vol. 2: Ethics and Judicial Conduct, Pt. E: Judicial Conduct and Disability Act and Related Materials, Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings*, Rule 4(a)(2)(A) and 4(a)(3) (Mar. 2019), <https://www.uscourts.gov/file/document/judicial-conduct-and-disability-rules-effective-march-12-2019> [<https://perma.cc/YW79-NTPW>]. For criticism of this aspect of the reforms, see Comment of Yale Law Student Working Group, *Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules* 11–12, (Nov. 13, 2018), <https://www.uscourts.gov/file/24922/download> [<https://perma.cc/4Q3C-FEHE>].

¹³² See *infra* notes 156–158 and accompanying text.

¹³³ See, e.g., Berdahl, *The Sexual Harassment of Uppity Women*, *supra* note 105, at 435 (using “sex-based harassment”). When we, alongside other antidiscrimination scholars, circulated an Open Statement on Sexual Harassment, see Schultz, *supra* note 24, one thoughtful response we received from a potential signatory asked “why the choice was made to call this a statement on ‘sexual harassment,’ rather than a statement on ‘sex-based harassment’? It seems to be in tension with many of the points in the statement itself,” she continued, “which make clear that sexualized harassment is just one type of sex-based harassment, and that all forms of sex-based harassment work together to create barriers in the work place.” This Part can be understood as a response to her question—an explanation of why we use a term that has so often been misunderstood.

¹³⁴ *Supra* note 38.

the term most often deployed. The terminological train having left the station, the best we can do is to guide its tracks.

To step back a moment: there are three possibilities for describing the varieties of harassment described in the previous two parts. First, we could take the route offered by the *New York Times*, defining “sexual harassment” to encompass only behaviors “of a sexual nature,” and using another term such as “gender harassment” to cover everything else that is sex-based but not sexualized. Second, we could follow the recent EEOC task force, whose 2016 report follows many social scientists in relying on “sex-based harassment” or “harassment based on sex” as its descriptively accurate umbrella term, and then uses “unwanted sexual attention,” “sexual coercion,” and “gender harassment” as sub-categories under that umbrella.¹³⁵ Third, we could follow the National Academies report, which adopts the same three sub-categories, but treats them all as types of sexual harassment.¹³⁶

To see all three of these approaches in action, we can look to the biggest economy and labor pool in the country: California, whose non-discrimination laws, although progressive, still hedge on the meaning of “sexual harassment.” That ambiguity creates an opening for those who, for their own purposes, may prefer to limit the term to its narrower sexualized meaning, as shown below.

Overall, California law contains a broad definition of sexual harassment, much like the one for which we advocate. California courts, like their federal counterparts, have long recognized that “[s]exual harassment does not necessarily involve sexual conduct. It need not have anything to do with lewd acts, double entendres or sexual advances.”¹³⁷ In addition, the dozen or so bills recently enacted in California in response to the #MeToo movement have largely avoided singling out sexual harassment for special treatment in comparison to other forms of sex discrimination—though media reporting on those bills often misses this fact. The *Sacramento Bee*, for example, has described Senate Bill 820 as “prohibit[ing] secret settlements and non-disclosure agreements in sexual harassment cases.”¹³⁸ In fact, the bill, which became law in September 2018, applies not only to sexual harassment in professional relationships outside the workplace (those defined in Civil Code § 51.9),

¹³⁵ EEOC REP., *supra* note 37, at 10. *See also supra* note 38.

¹³⁶ NAT'L ACADS. REP., *supra* note 44, at 28–29.

¹³⁷ *Accardi v. Superior Court*, 17 Cal. App. 4th 341, 345 (1993); *see also* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 123–124 (2018), <https://www.yalelawjournal.org/forum/sexual-harassment-law-after-metoo> [<https://perma.cc/XA8K-S63F>].

¹³⁸ *See, e.g.*, Alexei Koseff, *California Bans Secret Settlements in Sexual Harassment Cases*, SACRAMENTO BEE (Sept. 30, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article218830265.html> [<https://perma.cc/YPE6-9GSW>].

but also to harassment *or discrimination based on sex* in workplaces and housing as defined in Government Code Sections 12940 and 12955.¹³⁹ Confidential settlements are thus banned in *all* cases involving sex discrimination. Newly enacted bills banning retaliation against whistleblowers,¹⁴⁰ and bonuses or raises contingent on liability waivers,¹⁴¹ have a similarly broad sweep. The latter bill also expands liability for harassment, formerly just sexual harassment, by non-employees.¹⁴²

Civil Code § 51.9, the California state law that provides a cause of action for people sexually harassed by their teachers, accountants, lawyers, directors, and others with whom they have a professional relationship, defines sexual harassment capaciously to include “sexual advances, solicitations, sexual requests, demands for sexual compliance . . . or . . . other verbal, visual, or physical conduct of a sexual nature *or of a hostile nature based on gender*.”¹⁴³

But California’s employment discrimination law terms things differently. The statute defines the umbrella term as “‘harassment’ because of sex,” which, it says, “includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.”¹⁴⁴ In 1993, when this language was added, the Legislature noted that the state’s “prohibitions against harassment because of sex *have always included* sexual harassment, gender harassment, and pregnancy harassment.”¹⁴⁵ The Legislature only made the subcategories explicit, it said, “to more clearly identify them, for purposes of education and training, as harassment because of sex.”¹⁴⁶ This approach is thus similar to the one employed by the EEOC task force which uses sex-based harassment as the overarching term and enumerates specific subsets of conduct within it.

¹³⁹ See Settlement Agreements, Confidentiality, S.B. 820 2017–2018 Leg. Sess. (CA 2018), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820 [<https://perma.cc/RVR4-GJPD>].

¹⁴⁰ See Whistleblowers, S.B. 419, 2017–2018 Leg. Sess. (CA 2018), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB419 [<https://perma.cc/9VHY-FEBS>], (defining “discriminatory harassment” as “harassment based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status” and protecting those who report it from retaliation by state legislators).

¹⁴¹ See Unlawful Employment Practices, S.B.1300, 2017–2018 Leg. Sess. (CA 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1300 [<https://perma.cc/G7UN-FQXY>] (protecting the right to “right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment”).

¹⁴² *Id.*

¹⁴³ CAL. CIV. CODE § 51.9(a)(2)–(3) (West 2018).

¹⁴⁴ CAL. GOV. CODE § 12940(j)(4)(C) (West 2018).

¹⁴⁵ CAL. ASSEMB. BILL 675 § 1(c) (1993) (emphasis added).

¹⁴⁶ *Id.*, at § 1(d).

Despite the progressive intent of this final approach, the California example shows how it can be unduly limited. For even though the overarching definition of harassment is broad, California's increasingly robust education and training requirements do *not* mandate training about "harassment because of sex." What California law actually requires is that employers display posters and offer training on *sexual harassment*.¹⁴⁷

The California example illustrates a key danger of placing "sexual harassment" alongside "gender harassment" (and other terms). Treating sexual harassment and gender harassment as subsets of some larger category with a different name, even an accurate name like "harassment because of sex," creates ambiguity that can prove harmful. The danger is that the awareness built up around sexual harassment—through media coverage, through the #MeToo movement, and not least, through employers' practices under laws like those in California, which mandate legal training for nearly every employee in the state—will focus on a narrow sexualized conception of sexual harassment that distinguishes it from gender harassment, instead of threatening them together.

This is not merely a theoretical concern. There is evidence that California employment discrimination law, the language of which was drafted to clarify the many forms sex-based harassment can take, instead ends up not only separating the terms, but devoting vastly more attention to one form of harassment—the sexualized variety, termed "sexual harassment"—over the others. Consider, for example, the sexual harassment posters and brochures distributed by the California Department of Fair Employment and Housing. They lead with a list of six "behaviors that may be sexual harassment," all of which reinforce a sexualized definition.¹⁴⁸

- 1) Unwanted sexual advances
- 2) Offering employment benefits in exchange for sexual favors

¹⁴⁷ See CAL. GOV. CODE §§ 12950, 12950.1 (West 2018). Senate Bill 1343 expanded the training requirement to employers with five or more employees rather than fifty or more, as before. The Bill also instructs the state's Department of Fair Employment and Housing to develop its own online training courses "on the prevention of sexual harassment in the workplace." S.B. 1343, 2017–2018 Leg. Sess. (CA 2018). Notably, the law requires that sexual harassment training include coverage of "harassment based on gender identity, gender expression, and sexual orientation." See CAL. GOV. CODE § 12950.1(c).

¹⁴⁸ *Sexual Harassment*, CAL. DEP'T OF FAIR EMPL. & HOUSING (Dec. 2018), https://www.dfeh.ca.gov/wpcontent/uploads/sites/32/2018/12/DFEH_SexualHarassmentPoster.pdf [<https://perma.cc/Y8YC-ZEVW>]; *Behaviors That May Be Sexual Harassment*, CAL. DEP'T OF FAIR EMPL. & HOUSING (Dec. 2018), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/12/DFEH_SexualHarassmentPamphlet.pdf [<https://perma.cc/UPJ8-K5XE>].

- 3) Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters
- 4) Derogatory comments, epithets, slurs, or jokes
- 5) Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations
- 6) Physical touching or assault, as well as impeding or blocking movements.

The fourth and sixth of these behaviors *could* be interpreted to extend beyond sexualized content. But the Department’s online “Sexual Harassment FAQs” page, which expands on some of the categories, emphasizes that they refer to “[v]erbal abuse of a sexual nature, graphic verbal commentaries about an individual’s body, [and] sexually degrading words used to describe an individual.”¹⁴⁹ The Department goes on to emphasize: “State regulations define sexual harassment as unwanted sexual advances, or visual, verbal or physical conduct of a sexual nature,” removing any lingering doubt about what kinds of behavior the Department seeks to target under its training requirements.¹⁵⁰

Thus, the regulatory approach uses, and encourages California employers to use, an explicitly sexualized definition of harassment in their policies and training programs, notwithstanding the broader reach of California law.

Insofar as California employers are adopting and promulgating a sexualized notion of sexual harassment in their policies and trainings, they are not alone. Sixteen years ago, Schultz comprehensively analyzed the content of employers’ sexual harassment policies reported in research surveys or otherwise publicly available.¹⁵¹ She found that U.S. companies had almost universally adopted policies prohibiting sexual harassment and that these policies “define harassment exclusively in terms of sexual conduct (as opposed to conduct that discriminates on the basis of sex more generally).”¹⁵² At that time, “most of the . . . policies track[ed] the language of the EEOC guidelines, which, as we saw earlier, define harassment in terms of “[u]nwelcome sexual advances,

¹⁴⁹ *Sexual Harassment FAQs*, CAL. DEP’T OF FAIR EMPL. & HOUSING (last visited Feb. 12, 2019), <https://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/sexual-harassment-faqs/> [https://perma.cc/2TJ9-G558].

¹⁵⁰ *Id.*

¹⁵¹ Schultz, *The Sanitized Workplace*, *supra* note 24, at 2094 & n.96 (citing policies reflected in surveys); *id.* at 2098 (discussing other published policies).

¹⁵² *Id.* at 2094 & n.97 (noting that, in those days, employers and the researchers who surveyed them defined sexual harassment exclusively in sexual terms).

requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁵³ The policies proscribed a wide range of sexual talk and behavior, and referred to sexualized examples¹⁵⁴ that would not necessarily amount to legally actionable harassment.

This analysis is not obsolete; a similar finding emerges in a recent study also. In an extensive content analysis of sexual harassment trainings offered by employers between 1980 and 2016, Elizabeth Tippett found that even after the Supreme Court’s 1998 decision in *Oncale*, 59 percent of the sampled training programs continued to define sexual harassment in sexual terms, often including among their examples of prohibited harassment sexual jokes, flirting, relationships, and comments about appearance that would not be counted as sexual harassment in any court.¹⁵⁵ Only half of these trainings even mention discrimination. Reiterating a point made earlier by Schultz,¹⁵⁶ Professor Tippett writes, “harassment has become unmoored from its larger purpose of ensuring access to equal workplace opportunity.”¹⁵⁷

Recent research also confirms newer iterations of another problem documented years ago by Schultz: “disaggregation” of evidence of sexual and non-sexual forms of misconduct.¹⁵⁸ In a perceptive student note, Eleanor Frisch demonstrates that this problem arises when state laws separately identify sexual harassment as something distinct from non-sexualized harassment on the basis of sex.¹⁵⁹ Looking to cases in Massachusetts, Michigan, and Minnesota, Frisch shows how courts have created entirely bifurcated pleading and evidentiary regimes for the two types of harassment. “[M]erely mentioning ‘sexual harassment’ in pleadings can be fatal to” a case involving non-sexualized harassment, she argues.¹⁶⁰

These examples show only a couple of the pitfalls that may arise when “sexual harassment” is conceptualized exclusively in sexual

¹⁵³ *Id.* at 2094 & n.98 (discussing policies reported in research surveys and citing 1980 EEOC guidelines); *id.* at 2098–2099 (reporting same finding about other reviewed policies).

¹⁵⁴ *Id.* at 2095–2099.

¹⁵⁵ Elizabeth Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 511 (2018) (“Even in current trainings, the large majority of examples are devoted to sexual conduct, equally divided between severe forms of sexual harassment—like physical harassment, or quid pro quo harassment—and relatively less severe conduct—like suggestive jokes, comments about appearance, and inappropriate emails.”).

¹⁵⁶ Schultz, *The Sanitized Workplace*, *supra* note 24, at 2119 (noting that “sexual harassment law has taken on a life of its own, uprooted from the larger project of gender equality that animates Title VII”).

¹⁵⁷ Tippett, *Harassment Trainings*, *supra* note 155, at 511.

¹⁵⁸ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1711 (demonstrating how such disaggregation works to plaintiffs’ disadvantage in the federal courts).

¹⁵⁹ Eleanor Frisch, *State Sexual Harassment Definitions and Disaggregation of Sex Discrimination Claims*, 98 MINN. L. REV. 1943 (2014) (showing the disaggregation problem in state courts).

¹⁶⁰ *Id.* at 1962.

terms. Nice as it might be to use a more generic overarching term like “sex-based harassment” to refer to the full panoply of harassment that occurs because of sex, or to use a parallel term like “gender harassment” to describe certain non-sexual forms, there is no denying that the term “sexual harassment” has achieved a place in legal and popular culture that is unlikely to be rivaled. By now, “sexual harassment” is a familiar category of antidiscrimination law at both the federal and state levels. “Sexual harassment” is what most workers in the country are now trained to avoid and prevent.¹⁶¹ Thanks to #MeToo, “sexual harassment” is part of the national conversation like never before. The important thing, then, is to make sure that within this conversation, within the law, and within the policies and trainings so common in nearly every workplace (and campus), people are talking about the right thing: the entire spectrum of ways that gender is policed through harassment that sometimes is sexualized, but even more often is not.

These days, both the #MeToo movement and major media outlets like the *New York Times* can take credit for shining a spotlight on sexual harassment. People are talking about the problem again, and rightly so. A time when everyone is talking about sexual harassment is not the best time to change the term being used. But it is a crucial time to make sure the term is properly understood, so the problem of sexual harassment can be properly confronted.

CONCLUSION

Two decades ago, *Reconceptualizing Sexual Harassment* prompted scores of women to write letters and emails describing how they recognized in their own lives the range of gendered harassment the article described. The authors were grateful that someone had acknowledged their lived experience—and had called out the harassment they faced as something harmful, and illegal.

In the age of #MeToo, people remain hungry for media representations that accurately reflect their everyday realities. The attention the #MeToo movement has given to sexual assault is necessary and valuable. But to collapse sexual harassment into sexualized advances and assaults is to ignore many of the ways that most women, and many men, experience hostility in the workplace (and beyond). To ignore those stories is to fail to recognize and understand the variety of ways in which gender gets policed, and gendered spaces get maintained.

¹⁶¹ Similar issues are presented under Title IX. See Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at n.19.

This is why what gets named as “sexual harassment” matters, whether it be in the *New York Times* or in mandated workplace trainings. Both help shape popular understanding. Thus, choices about how to define and talk about sexual harassment end up affecting what ordinary employees and others feel they can and should report. And since popular understanding in turn seeps back and shapes the law, media reports and workplace policies on sexual harassment end up affecting the actions bystanders, employers, agencies, and courts feel compelled to stop.

By adopting an outdated conception of sexual harassment—one that most of the legal system and social science have moved beyond—the media misses a chance to educate the public and policy makers about the real scope and causes of sexual harassment. The *New York Times* may be right in urging its readers to engage in discussion about sexual harassment and “agree on definitions.” But when it comes to sexual harassment, the definition shouldn’t be the one used by the *Times* itself.



#MeToo as a Revolutionary Cascade

Cass R. Sunstein[†]

ABSTRACT

Why do revolutions happen? Why are they so difficult to anticipate? Some of the most instructive answers point to three factors: (1) preference falsification on the part of rebels or revolutionaries, (2) diverse thresholds for revolutionary activity, and (3) social interactions that either do or do not trigger the relevant thresholds. Under conditions of actual or perceived injustice or oppression, true preferences and thresholds are probably impossible to observe; social interactions are impossible to anticipate. Even if we could observe factors (1) and (2), the challenge of anticipating factor (3) would make it essentially impossible to foresee revolutions. For all their differences, and with appropriate qualifications, the French Revolution, the Russian Revolution, the fall of Communism, and the Arab Spring were unanticipated largely for these reasons. And in light of factors (1), (2), and (3), it is hazardous to think that the success of successful revolutions is essentially inevitable. (The same is true for the failure of unsuccessful revolutions.) History is only run once, so we will never know, but small or serendipitous factors might have initiated (or stopped) a revolutionary cascade. The #MeToo movement can be seen as such a cascade, marked by factors (1), (2), and (3). For that movement, as for successful revolutions, we might be able to point to some factors as necessary conditions, but hindsight is hazardous. It is also important to note that in revolutions, as in #MeToo, preferences and beliefs are not merely revealed; they are also transformed. Revolutionary activity, large or small, puts issues about preference falsification, experience falsification, and adaptive preferences in a new light.

I. UNPREDICTABLE REVOLUTIONS

Why do revolutions happen? Why are they so hard to anticipate? Why do they seem to come out of nowhere? My aim here is to cast some light on these questions and, in the process, to help explain #MeToo. I shall begin with some general remarks on revolutions and their genesis

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and then turn to #MeToo—which is not quite a revolution, of course, but which has something in common with one.

To vindicate the premise of my opening questions: Lenin was stunned by the success and speed of the Russian Revolution.¹ Tocqueville reported that no one foresaw the French Revolution.² The Iranian Revolution of 1789 was unanticipated.³ More recently, the Arab Spring was unanticipated by many of the best analysts in the United States, the United Kingdom, and elsewhere.⁴ Puzzlingly, revolutions seem to come in waves; they spread rapidly within countries and across countries, for reasons that remain unclear.⁵ It is tempting, and not unhelpful, to speak of demonstration and contagion effects. But what exactly do those terms mean?⁶ In what sense is revolution, or some kind of revolt, “contagious”?

A. Three Factors

Some of the most illuminating explanatory work on this subject points to three factors: (a) preference falsification, (b) diverse thresholds, and (c) interdependencies.⁷ When the three are taken together, the difficulty of anticipating such movements, or revolutions in particular, becomes less puzzling. I will introduce complications in due course, but these three factors tell us much that we need to know.

1. Preference falsification

Preference falsification exists when people conceal, or do not reveal, what they actually prefer.⁸ They might say they like the existing regime

¹ Asef Bayat, *The Arab Spring and its Surprises*, 44 DEV. & CHANGE 587, 587–88 (2013).

² *Id.* at 587.

³ *Id.* at 588.

⁴ *Id.* at 587.

⁵ KURT WEYLAND, MAKING WAVES: DEMOCRATIC CONTENTION IN EUROPE AND LATIN AMERICA SINCE THE REVOLUTIONS OF 1848, 1–7 (2014).

⁶ *See id.* at 7–11, for valuable discussion, emphasizing the availability and representativeness heuristics. Weyland’s exploration of availability and representativeness has implications for rebellions of many kinds, and not merely revolutions; #MeToo could easily be studied with reference to those heuristics. I offer some brief remarks at various points below.

⁷ *See generally* Timur Kuran, *The Inevitability of Future Revolutionary Surprises*, 100 AM. J. SOC. 1528 (1995); Timur Kuran & Diego Romero, *The Logic of Revolutions*, in 2 THE OXFORD HANDBOOK OF PUBLIC CHOICE (Roger D. Congleton et al. eds., 2018); MEROUAN MEKOUAR, PROTECT AND MASS MOBILIZATION: AUTHORITARIAN COLLAPSE AND POLITICAL CHANGE IN NORTH AFRICA (1st ed. 2016); Muzammil Hussain & Philip Howard, *What Best Explains Successful Protest Cascades? ICTs and the Fuzzy Causes of the Arab Spring*, 15 INT’L STUD. REV. 48 (2013) (emphasizing the importance of communications technologies).

⁸ TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 4–5 (1995). The literature on “informational cascades” is also relevant, but revolutions go well beyond those. *See generally* Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change in Informational Cascades*, 100 J. POL. ECON. 992 (1992); Susanne

when they despise it. They might silence themselves. Their friends and neighbors might have no idea what they actually think. To that extent, people live in a world of *pluralistic ignorance*, in which they do not know about the preferences of others.⁹ Under regimes that are oppressive (in one or another respect), preference falsification is common. Because of oppression, it is difficult to learn what people actually think.¹⁰

For those who want to predict revolution or revolt, the problem is that the law, or social norms, can draw a wedge between private preferences and public preferences.¹¹ The law matters if citizens lack freedom of speech and if dissent is punished. Social norms matter if people will be ostracized, in some sense, if they reveal their distress, anger, indignation, or dissatisfaction. Perhaps they will be shunned; perhaps powerful people will punish them in one or another way; perhaps their employment prospects will be compromised. In any of these cases, people might not merely silence themselves; they might say that they are happy with the status quo when they are not. Consider some chilling words from a computer programmer from Syria:

When you meet somebody coming out of Syria for the first time, you start to hear the same sentences. That everything is okay inside Syria, Syria is a great country, the economy is doing great . . . It'll take him like six months, up to one year, to become a normal human being, to say what he thinks, what he feels. Then they might start . . . whispering. They won't speak loudly. That is too scary. After all that time, even outside Syria you feel that someone is listening, someone is recording.¹²

2. Diverse thresholds

Different people will require different levels of social support before they will rebel or say what they actually think.¹³ Some people might require no support at all; they are rebels by nature. They might be courageous, committed, or foolhardy. Call them the “zeroes.” They might

Lohmann, *I Know You Know He or She Knows We Know You Know They Know: Common Knowledge and the Unpredictability of Informational Cascades*, in *POLITICAL COMPLEXITY: NONLINEAR MODELS OF POLITICS* (Diana Richards ed., 2000).

⁹ See, e.g., Kuran, *supra* note 8, for an especially good account see also D. Garth Taylor, *Pluralistic Ignorance and the Spiral of Silence: A Formal Analysis*, 46 *PUB. OPINION Q.* 311 (1982); For a valuable account with special reference to law, see RICHARD MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS*, 136–62 (2015).

¹⁰ See generally WENDY PEARLMAN, *WE CROSSED A BRIDGE AND IT TREMBLED: VOICES FROM SYRIA* (2017), for first-hand reports.

¹¹ See Kuran, *supra* note 8, at 84–102.

¹² Pearlman, *supra* note 10, at 4.

¹³ See, e.g., Mark Granovetter, *Threshold Models of Collective Behavior*, 83 *AM. J. SOC.* 1420 (1978), for the classic account; Kuran, *supra* note 8, at 60–83.

well turn out to be isolated; no one may join them, in which case they might look radical, foolhardy, or even crazy. Other people might require a little support; they will not move unless someone else does, but if someone does, they are prepared to rebel as well. Call them the “ones.” Others might require more than a little; they are the “twos.” The twos will do nothing unless they see the zeroes and the ones, but if they do, they will rebel as well. The twos are followed by the threes, and the fours, and the tens, and the hundreds, and the thousands, all the way up to the infinites (defined as people who will not oppose the regime, no matter what).¹⁴

Outside of science fiction, it is not possible to see people’s thresholds. People may not quite know whether they themselves are threes, fours, or tens. They might turn out to be surprised. Consider the relevant words of John Adams, writing with evident amazement about the American Revolution: “Idolatry to Monarchs, and servility to Aristocratical Pride . . . was never so totally eradicated from so many Minds in so short a Time.”¹⁵

3. Interdependencies

Interdependencies point to the fact that the behavior of the ones, the twos, the threes, and so forth will depend crucially on *who, if anyone, is seen to have done what*. Suppose that the various citizens are in a kind of temporal queue. The zeroes go first, then the ones, then the twos, then the threes, and so forth. (Or perhaps vice-versa. Or perhaps it is all random.) Under imaginable assumptions, a rebellion will occur, but *only given the right distribution of thresholds and the right kind of visibility*.¹⁶ If the ones see the zeroes, they will rebel, and if the twos see the ones, they, too, will rebel, and if the threes see the twos, they will join them.¹⁷ If the conditions are just right, almost everyone will rebel.¹⁸

But it is important to see that the conditions have to be just right. Suppose that there are no zeroes, or that no one sees any zeroes. If so, no rebellion will occur. If there are few ones, the regime is likely to be safe. If most people are tens or hundreds or thousands, the same is true, even if there are some ones, twos, three, fours, and so forth.

¹⁴ The infinites deserve some attention. Their motivations are undoubtedly varied; they may involve identity, habit, fear, loyalty, or something else.

¹⁵ GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 169 (1993).

¹⁶ See generally Granovetter, *supra* note 13, for the clearest explanation.

¹⁷ *Id.* at 1424–25.

¹⁸ See *id.* at 1431. See also Heng Chen & Wing Suen, *Falling Dominoes: A Theory of Rare Events and Crisis Contagion*, 8 AM. ECON. J.: MICROECON. 228, 239 (2016), for an emphasis on the importance of beliefs and on their fragility.

4. Unpredictability

We should now be able to see three reasons why revolutions may be impossible to predict. First, we do not know what people's preferences are. By hypothesis, they cannot be observed. Second, we do not know what people's thresholds are. They too are unobservable. Third, we cannot anticipate social interactions—who will say or do what and exactly when. It is important to emphasize the third point.¹⁹ Even if we could identify people's preferences and specify their thresholds, we would not be able to know, in advance, the nature of social interactions. The point bears on revolutions in general and on #MeToo in particular. In the case of oppressive societies, it may be possible to know that people are widely miserable or dissatisfied. In the context of sexual assault and sexual harassment, it is reasonable to assume that dissatisfaction is widespread. But that is not enough.

These points suggest that even if new technologies make it increasingly possible to identify private preferences—for example, by exploring people's online behavior—we will still not be able to predict revolutions.²⁰ To be sure, we would know something important: a revolution is more likely if people secretly hate the regime. We could certainly learn from that fact. Secret opposition may be necessary for revolution, but it is not sufficient. To know what will happen, we would need to know about people's thresholds as well. As I have noted, obtaining that knowledge will inevitably be difficult; it might be impossible. And even if we overcome that challenge, we would need to know who interacts with whom, and who sees whom, and when. No one has that kind of prescience. But the answers to those questions may well determine outcomes.²¹

These points help explain not only why revolutions are unpredictable but also why they are often a product of seemingly small, random, or serendipitous factors—of who did what when, or who heard what when, or whether some kind of butterfly flapped its wings at the right moment.²² We might think that Regime “A” was bound to fall, but it

¹⁹ See generally Matthew Salganik, Peter Sheridan Dodds & Duncan J. Watts, *Experimental Study of Inequality and Unpredictability in an Artificial Cultural Market*, 311 SCI. 854, 854–56 (2006), emphasizing the unpredictability of social exchange.

²⁰ See generally SETH STEPHENS-DAVIDOWITZ, EVERYBODY LIES: BIG DATA, NEW DATA, AND WHAT THE INTERNET CAN TELL US ABOUT WHO WE REALLY ARE (2017).

²¹ See Salganik, *supra* note 19, at 854–56, for relevant findings. See also Matthew Salganik & Duncan Watts, *Leading the Herd Astray: An Experimental Study of Self-fulfilling Prophecies in an Artificial Cultural Market*, 71 SOC. PSYCHOL. Q. 338, 338–55 (2008); Matthew Salganik & Duncan Watts, *Web-Based Experiments for the Study of Collective Social Dynamics in Cultural Markets*, 1 TOPICS IN COGNITIVE SCI. 439, 439–68 (2009).

²² See generally CATHARINE MACKINNON, BUTTERFLY POLITICS (2017); PAUL ORMEROD, BUTTERFLY ECONOMICS: A NEW GENERAL THEORY OF SOCIAL AND ECONOMIC BEHAVIOR (1998).

really was not. It *happened* to fall. The same is true if it does not fall. It *happened* not to fall.²³ Counterfactual histories can be illuminating insofar as they illustrate this point.²⁴

B. Complications

This is a very simple account, of course, and it needs to be complicated in multiple ways. For present purposes, consider these points.

First, people's preferences may be adaptive to the status quo.²⁵ People might not have to work hard to shut themselves up. They might not even think that the status quo is bad. Consider these words from a woman in North Korea: "It never occurred to me that I could or would want to do anything about it. It was just how things are."²⁶ The most important word here is "want." To be sure, fully adaptive preferences are an extreme case, even under conditions of real fear.²⁷ It might be better to speak of *partially adaptive preferences*, in which people are aware that something is wrong, or bad, or horrific, but the awareness takes the form of a small voice in the head, to which people do not pay a great deal of attention. But the idea of preference *falsification* is too simple when people's preferences are an artifact of the status quo. Whether we are dealing with preference falsification, adaptive preferences, or partially adaptive preferences cannot be answered in the abstract.

Second, the very word "preferences" is under-descriptive or perhaps misleading. It might be better to speak of people's beliefs, experiences, or values. Under an oppressive regime, people might believe that terrible injustices are committed or that their values are being violated. To be sure, they are also concealing or falsifying what they prefer, but that is hardly an adequate account of what is happening. They are concealing or falsifying their deepest convictions. They are concealing or falsifying *what actually happened to them*. (Talk about fake news).

Third, and crucially, rebels are not doing a full analysis of the costs and benefits of rebellion. They rely on mental shortcuts, or heuristics, in deciding what to do and when.²⁸ For that reason, available incidents

²³ To be sure, the factors that underlie any fall, or failure to fall, deserve close attention.

²⁴ See generally Cass R. Sunstein, *Historical Explanations Always Involve Counterfactual History*, 10 J. PHIL. HIST. 433 (Issue 3, 2016).

²⁵ See JON ELSTER, *SOUR GRAPES: STUDIES IN SUBVERSION OF RATIONALITY*, 25 (1983).

²⁶ Choe Sang-Hun, *North Korea #MeToo Voices: 'They Consider Us Toys,'* N.Y. TIMES (Oct. 31, 2018), <https://www.nytimes.com/2018/10/31/world/asia/north-korea-women-metoo.html> [<https://perma.cc/VLP5-CES3>].

²⁷ Cf. SERENE KHADER, *ADAPTIVE PREFERENCES AND WOMEN'S EMPOWERMENT (STUDIES IN FEMINIST PHILOSOPHY)* (2011) (discussing the complexity of the idea of adaptive preferences in the face of personal agency).

²⁸ See Weyland, *supra* note 5, at 35–38.

or outcomes might affect probability judgments.²⁹ If a town suddenly falls to rebels, or if a government collapses, other rebels might believe that the probability of success is high.³⁰ The availability heuristic, as it is called, works with emphatically social forces, producing *availability cascades*, as specific incidents or results move rapidly from one person to another, altering judgments about what is likely to happen.³¹ A revolutionary movement might be fueled or halted by an availability cascade.

Fourth, fate is not only in the hands of revolutionaries. There is also the regime, and there are also counterrevolutionaries, and there may well be counterrevolution. As a revolutionary cascade starts to develop, the regime is likely to do something. For example, it might try to entrench pluralistic ignorance by hiding or preventing visible rebellion or mass demonstrations.³² It might allow dissent and disagreement—until they become too visible.³³ It might make concessions, hoping to retain power. It might try to dissuade the hundreds and the thousands. It might bring out its guns. It might kill people.³⁴ If the goal of the regime is to maintain power, the choice among these options can be very difficult. For example, violence might be effective in quelling revolution, but it might also foment more of it.³⁵

II. #METOO

Turn to #MeToo in this light. All three conditions are met. The qualifications are relevant as well.

First, with respect to sexual assault and sexual harassment, preference falsification has run rampant.³⁶ Victims have silenced themselves.³⁷ In some cases, they have said that all is or was well, when it is

²⁹ Kurt Weyland, *The Arab Spring: Why the Surprising Similarities with the Revolutionary Wave of 1848?*, 10 PERSP. ON POL. 917, 921 (2012).

³⁰ *See id.*

³¹ *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999).

³² Gary King, Jennifer Pan & Margaret E. Roberts, *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 11 AM. POL. SCI. REV. 484, 496 (2017).

³³ *Id.*

³⁴ *See generally* Pearlman, *supra* note 10.

³⁵ *See* Edward L. Glaeser & Cass R. Sunstein, *A Theory of Civil Disobedience*, NAT'L BUREAU OF ECON., 2–3, 13–17 (2015), <https://www.nber.org/papers/w21338> [<https://perma.cc/8N4R-339M>].

³⁶ *But see* Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/NQ78-LWD7>] (“Women have been saying these things forever. It is the response to them that has changed.”). MacKinnon is surely right on this point. It is also true that some women said these things privately rather than publicly—and some spoke to no one at all.

³⁷ Timur Kuran, who introduced the concept of preference falsification, has used the concept to explain the pre-#MeToo silence around sexual harassment and assault, drawing comparisons to

or was anything but that.³⁸ These points are true and important, but they are inadequate and under-descriptive. What many women (and many, but fewer, men) did not reveal—what they kept private—was a set of experiences, alongside evaluative judgments about those experiences. We might want to speak, in the case of #MeToo, of *experience falsification*. Self-silencing has been important, of course, but actual falsification of experience—with an employer, for example—might be more searing.³⁹

Experience falsification or self-silencing can be a product of many different factors. With respect to sexual violence or sexual harassment, it may be a product of a rational calculation of likely costs and benefits, given the risks of disclosure. Some women who *did* come forward with accusations of assault and harassment pre-#MeToo have been ridiculed or disparaged, or worse, providing a signal to other victims about what might happen if they spoke out and thus tilting the cost-benefit analysis in favor of staying silent.⁴⁰ If cases of this kind were highly visible and thus cognitively “available,” the availability heuristic would lead people to think that probability of damage or harm from disclosure could be quite high. But we need not invoke the availability heuristic. A 2003 study, cited by the EEOC in 2016, indicated that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation.⁴¹ To the extent that victims of sexual harassment were aware of the risk of retaliation, that awareness provided a reason to falsify their experiences or at least not to speak about them.

Second, different women had and have different thresholds for disclosing their experiences and their judgments. Some women are ones, others are twos, others are tens, and others are hundreds or thousands.

the fear-induced preference falsification that preserved communist rule for decades. Shankar Vedantam, *The Psychological Forces Behind a Cultural Reckoning: Understanding #MeToo*, (NPR: Hidden Brain Radio Broadcast Feb. 5, 2018) (in conversation with Princeton psychologist Betsy Paluck), <https://www.npr.org/templates/transcript/transcript.php?storyId=582698111> [<https://perma.cc/933R-WW23>] (“KURAN: For decades, communism survived by making the populations it ruled afraid to express opposition to the principles of communism and express opposition to the dictatorships that were running the Soviet bloc countries. VEDANTAM: The silence around Harvey Weinstein’s sexual misconduct operated in the same way. KURAN: It was an open secret for decades, we’ve learned, in Hollywood and in circles that Harvey Weinstein traveled in, that he was a predator of young women, but also, that if anybody called him out on this, he would ruin their careers.”)

³⁸ See, e.g., Cass R. Sunstein, *Unleashed*, 85 SOC. RES.: AN INT’L Q. 73, 73–92 (2018).

³⁹ A vivid treatment of experience falsification is THE TALE (Gamechanger Films et al. 2018), https://www.amazon.com/gp/product/B07D8MCN2B/ref=atv_feed_catalog [<https://perma.cc/MPR5-C8DZ>].

⁴⁰ Vedantam, *supra* note 37.

⁴¹ U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC, 16 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [<https://perma.cc/CJ8B-TE3G>].

For one reason or another, some may be infinites.⁴² (They might be frightened; they might have some kind of loyalty to the perpetrator; they might not want their lives to be disrupted; they might cherish their privacy.) Some might not have clarity on what their thresholds are. They, and we, learn about that only *ex post*. Consider the following words from Beverly Young Nelson, who accused Republican Senate candidate Roy Moore of having sexually assaulted her in 1977:

I thought that I was Mr. Moore's only victim. I would probably have taken what Mr. Moore did to me to my grave, had it not been for the courage of four other women that were willing to speak out about their experiences with Mr. Moore. Their courage has inspired me to overcome my fear.⁴³

Third, social interactions are, and continue to be, crucial to #MeToo. Under certain conditions, the threes and the fours would silence themselves, because the ones and the twos were silent too. But #MeToo has benefited from the visibility of those who spoke out and the multiple interactions made possible by social media. Within 24 hours of Alyssa Milano's initial tweet, 45% of all U.S. Facebook users had friends in their networks who had posted with #MeToo.⁴⁴ Once the ones and the twos spoke out, the threes and the fours felt safer or emboldened.

It is important to say that this account is barebones and highly stylized, and that it misses a great deal. I emphasize five points here. First, the #MeToo movement is not opposing a regime, at least not in the usual sense.⁴⁵ Rather than rebelling against a government, the women (and men) of #MeToo are uniting around a similar or common experience and rebelling against a practice and also against institutions (some of which may be in government). While cascading accusations against individual perpetrators have been crucial—for example, more

⁴² See Lisa Bonos, *Not Everyone with a #MeToo is Posting Their Story. Here's Why Some Are Refraining*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/soloish/wp/2017/10/19/not-everyone-with-a-metoo-is-posting-their-story-heres-why-some-are-refraining/?noredirect=on&utm_term=.502bb45e04b7 [https://perma.cc/23KN-RBSA], for insights from the “infinities.”

⁴³ See *Text of Beverly Young Nelson's Accusation against Roy Moore*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/us/politics/text-beverly-young-nelson-statement.html> [https://perma.cc/6X4F-FZAD] (last visited Jan. 25, 2019).

⁴⁴ See *More than 12M “Me Too” Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours> [https://perma.cc/P33G-HKUZ]. Note also that it might be easier to use Twitter, to reveal an experience or to state agreement, than to speak offline, or to attempt to show support or to attract attention that way.

⁴⁵ But see Ella Nilsen, *More than 100 Members of Congress Want the Oversight Committee to Investigate Trump*, VOX (Dec. 12, 2017), <https://www.vox.com/policy-and-politics/2017/12/12/16766800/democratic-congress-members-trump-investigation-women> [https://perma.cc/3VYD-GCSR] (suggesting that, for some, #MeToo may be viewed as a tool to oust President Trump, who has been accused of sexual assault by multiple women).

than two dozen women spoke out against Roger Ailes before he was ousted at Fox News—the larger movement might be understood as a challenge to a system of sex discrimination and to institutions that engage in or perpetuate it.⁴⁶ To the extent that we are speaking of institutions, it is not so much of a stretch to say that regime change, at least of a sort, is involved.

Second, there is the question of granularity—of exactly what happened, and when, and why. Answering that question would reveal not only informative detail but also conceptual surprises.

Third, there is the crucial role of *salience* in the #MeToo movement.⁴⁷ Some twos are different from other twos, and the same is true for threes and fours, for one reason: their own statements and actions are especially salient. In the context of #MeToo, Ashley Judd might have made all the difference.⁴⁸ Catharine MacKinnon has suggested that Judd's celebrity and salience were not the only thing that made her an ideal first-mover; she was also, importantly, “somebody whose credibility is not readily attackable and who wasn't suing at the time.”⁴⁹ In revolutionary movements in general, what is salient, and what is cognitively available, greatly matters. As I have suggested, rebels do not make elaborate cost-benefit analyses. They use mental short-cuts, and availability is especially important.⁵⁰

Fourth, *descriptive social norms*, which capture what people actually do, greatly matter. Other things being equal, people are more likely to change their behavior to comply with a norm if they believe that most other people are compliant, and less likely to do so if they believe that most other people are noncompliant. A prominent study found that visitors to a national park who saw signs informing them that many past visitors had stolen petrified wood from the park became *more* likely to steal petrified wood—and that visitors who saw signs informing them that the vast majority of visitors had left the wood in the park became *less* likely to steal petrified wood.⁵¹ The #MeToo movement appears to

⁴⁶ See Gabriel Sherman, *The Revenge of Roger's Angels*, N.Y. MAG. (Sept. 5, 2016), <http://nymag.com/intelligencer/2016/09/how-fox-news-women-took-down-roger-ailles.html> [<https://perma.cc/4FP4-RLLS>].

⁴⁷ See generally Weyland, *supra* note 29 (emphasizing availability); see also Margaret E. Tankard & Elizabeth Levy Paluck, *Norm Perception as a Vehicle for Social Change*, 10 SOC. ISSUES & POL. REV. 181, 185 (2016).

⁴⁸ See, e.g., Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME (Dec. 6, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/7PWN-6AY4>] (noting Judd's importance).

⁴⁹ Brock Colyar, *The Ms. Q&A: Catharine MacKinnon Weighs in on the #MeToo Movement*, MS. MAG. BLOG (July 30, 2018), <http://msmagazine.com/blog/2018/07/30/ms-qa-catharine-mackinnon-weighs-metoo-movement/> [<https://perma.cc/53QS-PSKN>].

⁵⁰ See Weyland, *supra* note 29, at 35–38.

⁵¹ See Robert B. Cialdini et al., *Managing Social Norms for Persuasive Impact*, 1 SOC. INFLUE-

have benefited from a shift in descriptive norms, suggesting that speaking out or objecting is not inconsistent with usual behavior.

While it seems highly unlikely, we cannot rule out the possibility that attention to widespread harassment will serve to inform (some) male perpetrators that they are simply behaving like many other men, thus reducing their incentive to behave differently.⁵² But it is also true that, to the extent #MeToo succeeds in changing norms, a new (and beneficial) wave of preference falsification may lead potential harassers to condemn the behavior rather than to support it.⁵³ There is much to be learned about this topic.⁵⁴

Finally, #MeToo is not simply about the *revelation* of preferences, experiences, beliefs, and values. It is also about the *transformation* of preferences, beliefs, and values—most obviously on the part of perpetrators, but equally relevantly on the part of victims. Any social movement helps to alter preferences, beliefs, and values. It casts a new light on past experiences. It does not merely elicit preexisting judgments. It produces fresh ones.⁵⁵ Part of the point of #MeToo, and one of its achievements, is to turn a sense of embarrassment and shame into a sense of dignity.

Recall the statement from a computer programmer from Syria:

When you meet somebody coming out of Syria for the first time, you start to hear the same sentences. That everything is okay . . . It'll take like six months, up to one year, to become a normal human being, to say what he thinks, what he feels. Then they might start . . . whispering. They won't speak loudly.⁵⁶

But eventually they might.

NCE 3, 7–8 (2006).

⁵² See Siri Uotila, *Could the #MeToo Movement Inadvertently Lead to More Sexual Harassment?*, BEHAV. SCIENTIST (Apr. 16, 2018), <http://behavioralscientist.org/ask-a-behavioral-scientist-could-the-metoo-movement-inadvertently-lead-to-more-sexual-harassment/> [<https://perma.cc/GW6A-C59N>].

⁵³ See *id.*

⁵⁴ It is important to note that populations are heterogeneous. Some people will be very glad to deviate from a new or emerging norm; they are defiant. Robert Kagan & Jerome Skolnick, *Banning Smoking: Compliance Without Enforcement*, in SMOKING POLY: LAW, POL., & CULTURE 78, 78–81 (Robert Rabin & Stephen Sugarman eds., 1993), for relevant discussion.

⁵⁵ On the difference between the two, see CASS R. SUNSTEIN, HOW CHANGE HAPPENS (2019).

⁵⁶ Pearlman, *supra* note 10, at 4.



Unofficial Reporting in the #MeToo Era

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ABSTRACT

In the age of #MeToo, victims of sexual misconduct are coming forward en masse to allege abuse, finding strength in numbers and a growing cultural responsiveness to their claims. Facilitated by innovative technologies, #MeToo is sparking the creation of new channels for reporting abuse—channels intended to bypass the laws and rules that prohibit sexual misconduct. To make sense of this unexamined development, a proposed taxonomy classifies informal avenues of complaint into four distinct categories: the Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. While unofficial reporting can advance important ends, the rise of informal accusation also raises concerns that bear directly on the need to enhance formalized accountability for sexual assault and harassment.

I. INTRODUCTION

The contemporary movement known as #MeToo emerged in early October 2017 when allegations of sexual assault and harassment against Harvey Weinstein were reported by the *New York Times* and the *New Yorker*.¹ As the Weinstein story developed in the coming weeks and months, the number of allegations publicly leveled against him

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¹ Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, *NEW YORKER* (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [https://perma.cc/HHY8-4Q59]; 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/5LSZ-3SUC]. The first “Me Too” campaign originated in 2007, when activist Tarana Burke began a nonprofit to assist victims of sexual harassment and assault. See, e.g., Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, *N.Y. TIMES* (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/GD7A-UC99].

multiplied.² The media quickly intensified reporting on a range of sexual misconduct³ by other high profile men.⁴ Soon the coverage grew to encompass sexual harassment and assault across disparate industries and institutions, including publishing, fashion, music, sports, entertainment, architecture, advertising, comedy, philanthropy, hospitality, retail, farm, factory, academia, technology, media, church, and politics.⁵

² See Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> [<https://perma.cc/8HG7-KRTR>].

³ “Sexual misconduct” encompasses sexual assault, sexual harassment, and non-actionable sexual abuse. See Kathryn Casteel & Andrea Jones-Rooy, *We Need a Better Way to Talk about ‘Sexual Misconduct’*, FIVETHIRTYEIGHT (Apr. 17, 2018), <https://fivethirtyeight.com/features/we-need-a-better-way-to-talk-about-sexual-misconduct/> [<https://perma.cc/MN25-JUZ>] (explaining the importance of distinguishing between types of sexual misconduct). Although the existence of different subordinate categories complicates use of the umbrella term, “sexual misconduct” highlights connections between the various behaviors that fall under the rubric.

⁴ See Swetha Kannan & Priya Krishnakumar, *A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein*, L.A. TIMES (Dec. 29, 2017), <https://www.latimes.com/projects/la-na-sexual-harassment-fallout/> [<https://perma.cc/A26H-C9BK>]. Over the course of several years preceding the Weinstein story, clusters of high-profile sexual misconduct accusations surfaced against Bill Cosby, Roger Ailes, and Donald Trump, among others, likely seeding the ground for #MeToo. For one pre-Weinstein perspective, see Lani Seelinger, *Trump, Cosby, and Why Being a Woman in 2017 Feels Harder than Ever*, BUSTLE (June 17, 2017), <https://www.bustle.com/p/trump-cosby-why-being-a-woman-in-2017-feels-harder-than-ever-65066> [<https://perma.cc/F5CQ-H9CA>].

⁵ See, e.g., Nick Anderson, *Academia’s #MeToo Moment: Women Accuse Professors of Sexual Misconduct*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/local/education/academia-misconduct-moment-women-accuse-professors-of-sexual-misconduct/2018/05/10/474102de-2631-11e8-874b-d517e912f125_story.html?utm_term=.d76b3ad5d2f9 [<https://perma.cc/W3AQ-A58G>]; Harry Bruinius, *Churches Struggle with Their #MeToo Moment*, CHRISTIAN SCI. MONITOR (Apr. 20, 2018), <https://www.csmonitor.com/USA/Politics/2018/0420/Churches-struggle-with-their-MeToo-moment> [<https://perma.cc/XMZ6-D7L2>]; 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/FJ4W-RUT6>]; Patricia Cohen & Tiffany Hsu, *Children’s Book Industry Has Its #MeToo Moment*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/business/childrens-publishing-sexual-harassment.html> [<https://perma.cc/WJ6L-E4N9>]; Dan Corey, *Here’s a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 19, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821> [<https://perma.cc/JP85-FBDD>]; Jill Disis, *The Media Men Who Have Been Accused of Sexual Misconduct*, CNN (Nov. 30, 2017), <https://money.cnn.com/2017/11/29/media/media-men-accused-of-sexual-misconduct/index.html> [<https://perma.cc/PSV4-5TS5>]; Stassa Edwards, *Women in Architecture Have Their Own Shitty Men List*, JEZEBEL (Mar. 16, 2018), <https://jezebel.com/women-in-architecture-have-their-own-shitty-men-list-1823844222> [<https://perma.cc/6A3R-5HU9>]; Amelia Harnish, *Advertising’s #MeToo Movement Picks up Speed*, REFINERY29 (Mar. 13, 2018), <https://www.refinery29.com/en-us/2018/03/193440/times-up-advertising-female-advertising-executives-sexual-harassment> [<https://perma.cc/CG5G-TL9K>]; Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why is the Restaurant Industry So Terrible For Women?*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html?noredirect=on&utm_term=.fd2c12410c67 [<https://perma.cc/LQ9B-NHB6>]; Juliet Macur, *The “Me Too” Movement Inevitably Spills into Sports*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/sports/olympics/mckayla-maroney-me-too.html> [<https://perma.cc/W6WB-UMBS>]; *#MeToo Hits the Nonprofit World*, CHRON. OF PHILANTHROPY (Apr. 5, 2018), <https://www.philanthropy.com/specialreport/metoo-hits-the-nonprofit-wor/167> [<https://perma.cc/F542-ATFK>]; Aly-

By the close of the year, #MeToo had touched off a widespread reckoning with a vast continuum of sexual abuse.⁶

To much of the general public, the realities of sexual violation—mostly experienced by women⁷—was news. It was hardly news, however, to members of the impacted communities. Rather, survivors and those vulnerable to abuse were sharing information all along. Harvey Weinstein’s decades of predation were an “open secret” in Hollywood well before the *New York Times* broke the story,⁸ and the same can be said for many, even most, of the scandals that have erupted since.⁹ It turns out that women were indeed reporting their abuse; they were

ssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017), <https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271> [<https://perma.cc/UAB5-8UQK>]; Yuki Noguchi, *Low-Wage Workers Say #MeToo Movement is Chance for Change*, NPR (Feb. 6, 2018), <https://www.npr.org/2018/02/06/583428098/low-wage-workers-say-metoo-movement-is-a-chance-for-change> [<https://perma.cc/V98X-WTUQ>]; Emilia Petrarca, *Fashion’s #MeToo Movement is Loudest on Instagram*, CUT (Apr. 5, 2018), <https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html> [<https://perma.cc/G4EM-S424>]; David Sims, *Louis C.K. and Abuse of Power in the Comedy World*, ATLANTIC (Nov. 9, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/louis-ck-sexual-misconduct-allegations/545489/> [<https://perma.cc/L8GS-VKDL>]; Marlow Stern, “*Russell Simmons Is Just the Beginning*”: *Music Industry Braces for #MeToo Impact*, DAILY BEAST (Dec. 15, 2017), <https://www.thedailybeast.com/russell-simmons-is-just-the-beginning-music-industry-braces-for-metoo-impact> [<https://perma.cc/X3CG-AREW>]; THR Staff, *Notable Entertainment Figures Accused of Sexual Misconduct in Wake of Harvey Weinstein*, HOLLYWOOD REPORTER (Nov. 30, 2017), <https://www.hollywoodreporter.com/lists/hollywood-media-men-accused-of-sexual-misconduct-and-harassment-post-weinstein-1057193> [<https://perma.cc/8CPU-XUMA>].

⁶ See Edward Felsenthal, *The Choice*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers-choice/> [<https://perma.cc/4SM4-P5VG>] (explaining why the magazine selected for its “Person of the Year” the women who catapulted the #MeToo movement).

⁷ At the most extreme end of the sexual abuse spectrum, nationwide survey data suggest that nearly one in five women have been raped at some point in their lives. MICHELLE C. BLACK ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.cc/4R8E-CTC>]. For men, the number is one in seventy-one. *Id.* Transgender people experience sexual violence at rates of nearly one in two. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/M9XF-F8FT>] (in the largest survey of transgender people in the United States, forty-seven percent of respondents reported having been sexually assaulted). Data on sexual harassment, while sparse, also shows a steep gender disparity. See Rihitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [<https://perma.cc/6BL2-B22Y>].

⁸ See Kantor and Twohey, *supra note 1*.

⁹ See, e.g., Reah Bravo, *The Open Secret of Charlie Rose*, N.Y. REV. OF BOOKS (May 4, 2018), <https://www.nybooks.com/daily/2018/05/04/the-open-secret-of-charlie-rose/> [<https://perma.cc/TB6Z-55CV>]; *Food Writer Allison Robicelli Calls Mario Batali Allegations an ‘Open Secret’*, BALTIMORE SUN (Dec. 12, 2017), <https://www.baltimoresun.com/features/baltimore-insider-blog/bs-fe-robicelli-responds-20171212-story.html> [<https://perma.cc/6AM9-ZYW6>]. See generally Sarah Hanson-Young, *The ‘Open Secret’ of Sexual Harassment in the Media is Staggering. There’s Plenty Yet to Come*, GUARDIAN (Dec. 3, 2017), <https://www.theguardian.com/world/commentisfree/2017/dec/04/the-open-secret-of-sexual-harassment-in-the-media-is-staggering-theres-plenty-yet-to-come> [<https://perma.cc/N3G2-SZY9>]; Amanda Hess, *Hollywood Harassment Was an Open Secret. But TV Comedies Took It On*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/arts/sexual-harassment-tv-bystander-aziz-ansari-lena-dunham-tig-notaro.html> [<https://perma.cc/978Y-RBQJ>].

simply doing so in uncharted ways. #MeToo has exposed a large decentralized network of information exchange.

At the same time, facilitated by expanding technologies,¹⁰ #MeToo has catalyzed the creation of new channels for reporting sexual misconduct without directly invoking the legal system or law-adjacent institutional structures.¹¹ I will call these mechanisms for reporting sexual misconduct¹² that bypass formalized mechanisms of accountability “unofficial reporting channels” or “informal reporting channels.”¹³

After mapping the unofficial pathways for complaints that have emerged in the #MeToo era, I consider the normative implications of the new sexual misconduct reporting. My focus here is not on the woeful inadequacies of formal mechanisms for addressing sexual assault and harassment—inadequacies that prompt women to relay their abuse through back channels.¹⁴ Instead, without minimizing the importance of functions served by informal reporting,¹⁵ I argue that its proliferation should raise concerns for those committed to improving our societal response to allegations of sexual assault and harassment. By crystallizing these concerns, my hope is to advance a conversation about how best to facilitate lasting change.

This Article proceeds as follows. Part I proposes a taxonomy that classifies informal avenues of complaint into four distinct categories: the Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. Part II identifies a trio of dangers that surround the emergence of an informal complaint system. These hazards include a lack of accountability for those who perpetrate abuse, the absence of process and the strategic deployment of that absence by defenders of the status quo, and the weaponization of defamation law in service of silencing would-be accusers. By surfacing significant limitations of an unofficial reporting regime, this discussion underscores the need for reform to activate a largely forsaken law of sexual misconduct.

¹⁰ Technology is powering the evolution of whisper networks as it is simultaneously facilitating the #MeToo movement. For purposes of my argument, it is unnecessary to disentangle the impact of technological innovation from the cultural causes and effects of #MeToo.

¹¹ Sexual misconduct may be regulated by criminal law, by tort law, by Title IX, and by Title VII, depending on where the misconduct occurs and what it comprises.

¹² Unless otherwise specified, my use of “reporting” throughout this discussion includes not just formal complaints, but informal or unofficial disclosures of misconduct as well.

¹³ Informal and unofficial reporting channels (used interchangeably throughout the discussion) are pathways for complaint other than those established by an institution with authority to process an allegation of misconduct under the applicable legal or administrative framework. *See supra* note 11. At times, I will also refer to these channels as informal avenues of complaint.

¹⁴ For a discussion of the inadequacies of formal systems, *see generally* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 101 (2019).

¹⁵ I identify and explore these various functions in separate work. *Id.*

II. A TAXONOMY OF INFORMAL REPORTING CHANNELS

Women have long chosen to share their accounts of sexual abuse with one another rather than report through formal channels.¹⁶ Over time, “whisper networks” have operated in a largely clandestine manner; the communications shared within them, in addition to the networks themselves,¹⁷ have been hidden from the view of all except intended recipients. But the secrecy of a network’s very existence, and even the content of information exchanged, is not an inevitable feature of unofficial reporting channels. One significant feature of the #MeToo era is that whisper networks have exposed themselves to outsiders for the first time.¹⁸

As important, #MeToo has spawned the creation of new kinds of informal reporting channels that are conceptually distinct from whisper networks. These channels amplify accusations of abuse by reaching wider communities and aiming for more ambitious ends—a development that has been greatly facilitated by technology.¹⁹ As new reporting pathways emerge, it is clear that innovation along these lines will continue in the #MeToo era.

Now is an opportune moment to consider how informal reporting channels operate.

A. Variables

On close inspection, unofficial conduits for reporting sexual misconduct vary along three key dimensions. First, can the accuser report

¹⁶ See *infra* note 23. Informal reporting of sexual misconduct can be a form of consciousness-raising. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–64 (1990) (explaining that “[c]onsciousness-raising is an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences”). On the centrality of consciousness-raising practices to feminism, see Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 519 (1982). For historical context, see CAROL HYMOWITZ & MICHAEL WEISSMAN, A HISTORY OF WOMEN IN AMERICA 351–55 (1978).

¹⁷ I am using “network” to describe a group of interconnected people who disseminate information, receive information, or both.

¹⁸ See Summer Meza, *What Is a Whisper Network? How Women Are Taking Down Bad Men in the #MeToo Age*, NEWSWEEK (Nov. 22, 2017), <https://www.newsweek.com/what-whisper-network-sexual-misconduct-allegations-719009> [<https://perma.cc/8ZQD-3BF3>] (“This is the year the whisper network went viral, with women sharing their allegations and experiences in forums, spreadsheets, private groups and all over social media.”).

¹⁹ See generally Elizabeth Dwoskin & Jena McGregor, *Sexual Harassment Inc: How the #MeToo Movement Is Sparking a Wave of Start-ups*, WASH. POST (Jan. 5, 2018), https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups/?noredirect=on&utm_term=.3c7ec0e49aad [<https://perma.cc/YJ7D-ZRE6>]; see also *supra* note 10.

anonymously or must the accuser identify herself?²⁰ Second, is the accused named or does the accused remain unidentified?²¹ Third, is access to the channel restricted or is it open to all?²² After discussing each variable in turn, I introduce a taxonomy of informal reporting that uncovers several instructive patterns. This analysis suggests that whisper networks are evolving in ways that are significant, especially from the vantage of law.

1. Accuser anonymity

The oldest and most familiar form of a whisper network features face-to-face information exchange.²³ Women share their accounts of sexual violation with one another in person (and did so well before there was an internet); these reports of abuse can then be further disseminated to other members of the networked group.²⁴

Until the #MeToo era, group outsiders were generally not privy to the existence of whisper networks. This may be changing, however, as victims begin to perceive a greater societal willingness to believe allegations of sexual misconduct and to condemn it. Increasingly, members of traditional whisper networks—some of which have been in operation for decades—are revealing how and why they channeled accounts of abuse.

The Glass Ceiling Club, for instance, was a group of female investment bankers who began convening in the 1990s to talk about “how to make the workplace more female friendly.”²⁵ As one participant recently explained, “our conversations would revert to sharing facts we knew about the men we worked with, [and] yes, it was mostly the same men who preyed on young women.”²⁶ Among the reasons for Glass Ceiling Club members to divulge their experiences with sexual harassment

²⁰ See *infra* notes 23–47 and accompanying text. Given that sexual misconduct is experienced disproportionately by women, I will at times use female pronouns to describe victims and accusers while recognizing that men are also victims and accusers. See *supra* note 7.

²¹ See *infra* notes 48–52 and accompanying text.

²² See *infra* notes 53–62 and accompanying text.

²³ See Julie Creswell & Tiffany Hsu, *Women’s Whisper Network Raises Its Voice*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/04/business/sexual-harassment-whisper-network.html> [<https://perma.cc/E898-AJFT>] (“For as long as women have been in the labor force,” they have gathered to “clue each other into a spectrum of behavior that was often unseen or ignored by their employers,” including sexual misconduct.).

²⁴ See *infra* notes 48–52 and accompanying text (discussing open and restricted networks).

²⁵ Creswell & Hsu, *supra* note 23.

²⁶ *Id.*

was to help protect other women. “Survival hints”—strategies like staying on the public trading floor when engaging with a known harasser—“were shared pretty freely.”²⁷

Another decades-old, person-to-person whisper network centered on Richard Meier, who stands among the world’s most prominent architects.²⁸ In April 2018, multiple allegations of sexual misconduct against Meier were publicly reported, along with details about a decades old whisper network that enabled women to share information about his abuse.²⁹ Beginning in the 1990s, female employees created “a kind of underground in the office that functioned to warn people about what they could expect,”³⁰ as well as to offer safety in numbers.³¹ When one woman alleged that Meier sexually assaulted her, she disclosed this to other women at the firm; “it turned out that everybody had a story.”³² Yet most victims of Meier’s abuse did not report the abuse through formal channels.³³

The classic version of the whisper network exists across a wide swath of workplaces and other contained settings.³⁴ But alongside it, a different model—one that features an anonymous accuser—is becoming

²⁷ *Id.*

²⁸ See, e.g., Robin Pogrebin, *Women Say Richard Meier’s Conduct Was Widely Known Yet Went Unchecked*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/arts/design/richard-meier-sexual-misconduct-allegations.html> [<https://perma.cc/WL4B-VCFJ>].

²⁹ *Id.*

³⁰ *Id.* (quoting Adam Eli Clem, an assistant archivist in Meier’s firm in the mid-1990s). To further protect one another, women “knew to wait for one another at the end of the day to avoid leaving a female colleague alone [with Meier].” *Id.*

³¹ *Id.*

³² *Id.* (quoting Karin Bruckner, who started at Meier’s architecture firm in 1989 and was groped by him against a copy machine.).

³³ *Id.*

³⁴ See, e.g., Emily Alford, *Former NBC News Anchor Linda Vestor on Matt Lauer Allegations: ‘Every-body Knew,’* JEZEBEL (Oct. 17, 2019), <https://jezebel.com/former-nbc-news-anchor-linda-vestor-on-matt-lauer-alleg-1839150737> [<https://perma.cc/6L3G-7M2P>] (reporting that Vestor had been warned by her co-workers to stay away from Lauer because he was “dangerous”); Catherine Crump, *Clerkships Are Invaluable to Young Lawyers. They Can Also Be a Setup for Abuse*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/15/when-women-law-clerks-are-harassed-they-often-have-nowhere-to-turn/?utm_term=.38012bd5914a [<https://perma.cc/S34L-CWBP>] (describing ways in which female clerks were warned to “stay away” from then-Ninth Circuit Judge Alex Kozinski); Wendy Lu, *What #MeToo Means to Teenagers*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/well/family/metoo-me-too-teenagers-teens-adolescents-high-school.html> [<https://perma.cc/VFK4-D8ML>] (According to one high school senior, “[a] lot of female friend groups have a list of—or know about—high school boys who they know have been treating women in a gross way, and make sure their friends stay away from them.”). Anecdotal evidence suggests that similar networks exist in many law schools and law firms. See also An Phung & Chloe Melas, *Women Accuse Morgan Freeman of Inappropriate Behavior, Harassment*, CNN (May 28, 2018), <https://www.cnn.com/2018/05/24/entertainment/morgan-freeman-accusations/index.html> [<https://perma.cc/9FZJ-B83Q>] (explaining that, because staffers at Freeman’s production company “did not feel comfortable talking to senior personnel about their workplace grievances,” some women formed a “survivors club” where they gathered to vent about their experiences . . .).

more commonplace. To be sure, the anonymous accuser model is not entirely without precedent.³⁵ In 1990, for example, female students at Brown University generated a list on several bathroom walls of men who allegedly raped them;³⁶ the same tactic has been used on college campuses periodically since then (including at Brown in April 2017).³⁷ But technology has enabled the anonymous accuser version of the whisper network to spread well beyond the confines of universities, making it more ubiquitous than ever before.³⁸

A recent example to have publicly materialized, albeit not by design,³⁹ is the Media Men List (or “Shitty Media Men List,” as it was originally conceived).⁴⁰ According to its creator, former *New Republic* editor Moira Donegan, the “anonymous, crowdsourced document was a first attempt at solving what has seemed like an intractable problem: how women can protect [them]selves from sexual harassment and assault.”⁴¹ Donegan used a Google spreadsheet to collect “a range of rumors and allegations of sexual misconduct, much of it violent, by men in magazines and publishing.”⁴² Although the document was meant to

³⁵ “People have been writing rape lists since the ‘80s and ‘90s, passing out fliers, writing names on doors.” Jenny Kutner, *Sexual Assault Survivors Are Outing Their Rapists on the Anonymous Corners of the Internet*, MIC (Apr. 13, 2016), <https://mic.com/articles/140607/sexual-assault-survivors-are-outing-their-rapists-on-the-anonymous-corners-of-the-internet#.J2yzTJB9i> [https://perma.cc/2UZQ-LRPX] (quoting Annie Clark, executive director and co-founder of End Rape on Campus).

³⁶ See, e.g., William Celis, *Date Rape and a List at Brown*, N.Y. TIMES (Nov. 18, 1990), <https://www.nytimes.com/1990/11/18/us/date-rape-and-a-list-at-brown.html> [https://perma.cc/R9HA-MW8R].

³⁷ See, e.g., Gwen Everett, *List Alleging Names of Sexual Assaulters Appears on Campus Bathrooms*, BROWN DAILY HERALD (Apr. 27, 2017), <http://www.browndailyherald.com/2017/04/27/list-alleging-names-sexual-assaulters-appears-campus-bathrooms/> [https://perma.cc/FCN2-R2PH]. As one former student explained, “students then and now would not write the names of their alleged sexual assailants on bathroom walls if they felt they had a more legitimate avenue to adjudicate campus assault” *Id.* See also George Joseph & Jon Swaine, *Behind Columbia’s ‘Rape Lists’: ‘When Existing Systems Fail, What Then?’*, GUARDIAN (June 26, 2014), <https://www.theguardian.com/education/2014/jun/26/columbia-university-students-rape-list-mishandle-sexual-assault> [https://perma.cc/8TWD-P7X6].

³⁸ See *infra* notes 56–61 and accompanying text (describing widened dissemination of misconduct allegations).

³⁹ See *infra* note 43.

⁴⁰ See, e.g., Moira Donegan, *I Started the Media Men List*, CUT (Jan. 10, 2018), <https://www.the-cut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [https://perma.cc/QD5S-U5DG]. The Media Men List was controversial and covered widely by the mainstream press. See, e.g., Jaclyn Peiser, *How a Crowdsourced List Set Off Months of #MeToo Debate*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/business/media/media-men-list.html> [https://perma.cc/ED4L-VXMT]. See *infra* notes 134–138 and accompanying text (describing the defamation complaint recently filed against Donegan by an individual accused on the list).

⁴¹ Donegan, *supra* note 40.

⁴² *Id.*

be private in the sense that intended recipients were women in the industry⁴³—that is, women in a position to warn or be warned about their predatory colleagues—it quickly went viral and was then made public.⁴⁴ Before Donegan removed the document from the web, more than seventy men had been anonymously named as perpetrators of sexual misconduct, ranging from inappropriate behavior to criminal acts.⁴⁵

In sum, networks featuring anonymous accusers are proliferating in the age of #MeToo.⁴⁶ With the help of technology, women are increasingly able to share accounts of sexual violation without divulging their identities.⁴⁷

2. Identification of accused

Unofficial reporting channels are meant to create safe spaces for women to relate their experiences of sexual misconduct. For the most part, these channels allow participants to identify the accused by name; indeed, the need for a safe space is intricately connected to this very function.

The notable exception is a publicly available spreadsheet that collects accounts of sexual misconduct in academia while expressly prohibiting the naming of an accused.⁴⁸ The creator of the spreadsheet, Karen Kelsky, is a former professor who decided in the wake of the Harvey Weinstein scandal, “somebody needs to do this in the academy.”⁴⁹ Although the spreadsheet does not allow identification of either alleged victims or alleged perpetrators,⁵⁰ it was designed to include the names

⁴³ *Id.* See *infra* notes 48–52 and accompanying text (discussing open and restricted networks).

⁴⁴ *Id.* See also Doree Shafrir, *What to Do with “Shitty Media Men”?*, BUZZFEED (Oct. 11, 2017), <https://www.buzzfeednews.com/article/doree/what-to-do-with-shitty-media-men> [https://perma.cc/ZUP3-38CD].

⁴⁵ Donegan, *supra* note 40. The spreadsheet contained a disclaimer noting, “This document is only a collection of misconduct allegations and rumors. Take everything with a grain of salt.” *Id.* Donegan highlighted in red the names of men who were accused of physical sexual assault by more than one woman. *Id.*

⁴⁶ See, e.g., Sapna Maheshwari, *Ad Agencies’ Reckoning on Sexual Harassment Comes on Instagram, Anonymously*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/business/media/diet-madison-avenue-instagram.html> [https://perma.cc/UH4R-A9UH]; Kutner, *supra* note 35; Petrarca, *supra* note 5.

⁴⁷ In the course of litigation, it is possible for a court to require the unmasking of an anonymous accuser’s identity. See *infra* note 147 and accompanying text. Doxxing is also a threat to anonymity. (Other encryption related concerns lie beyond the scope of this discussion.)

⁴⁸ Karen Kelsky, *When Will We Stop Elevating Predators*, CHRON. HIGHER ED. (Jan. 1, 2018), <https://www.chronicle.com/article/The-Professor-Is-In-When-Will/242110> [https://perma.cc/4TE2-MGZ2]. As the author, who is also the spreadsheet’s creator, explained, she “intentionally left the definition of ‘sexual harassment’ open; contributors may share anything that they feel merits inclusion.” *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* Although some people identified the accused despite instructions to the contrary, Kelsky explained that, “[f]or legal reasons, I removed the names from the Google doc as quickly as I saw

of universities and departments, along with other pertinent information.⁵¹

The spreadsheet was published in December 2017; it quickly went viral and now contains nearly 2500 entries.⁵²

3. Channel access

As whisper networks evolve from the “face-to-face” sharing model,⁵³ important questions of access are arising. In their traditional incarnation, whisper networks are only open to a select group of insiders,⁵⁴ resulting in the exclusion of those who might have equal or greater need for the intelligence, including members of marginalized groups.⁵⁵

This dynamic is beginning to change as technology facilitates the wider dissemination of victims’ accounts.⁵⁶ Information can now be readily shared with a larger group of recipients who satisfy delineated criteria.⁵⁷ Informal reporting has moved beyond the in-person paradigm, granting access to a range of intended recipients, including company co-workers,⁵⁸ industry employees,⁵⁹ and sorority sisters.⁶⁰

them.” *Id.* Kelsky added that some of the men named privately are “still receiving promotions, accolades, chairs, and deanships.” *Id.*

⁵¹ The crowdsourced survey asks participants “what happened and when, what the harasser’s gender and position relative to the victim were at the time (professor, etc.), institution type and field, institutional responses and career consequences for the harasser (if any), and the impact of harassment on the career and health of the person who experienced it.” Colleen Flaherty, *‘Holding Space’ for Victims of Harassment*, INSIDE HIGHER ED. (Dec. 8, 2017), <https://www.insidehighered.com/news/2017/12/08/what-can-crowdsourced-survey-sexual-harassment-academia-tell-us-about-problem> [<https://perma.cc/6AZ5-FEQD>].

⁵² Karen Kelsky, *Sexual Harassment in the Academy: A Crowdsourced Survey*, <https://docs.google.com/spreadsheets/d/1S9KShDLvU7C-KkgEevYTHXr3F6InTennrBsS9yk-8C5M/htmlview?slide#gid=15300773521> [<https://perma.cc/H6SC-3PFQ>].

⁵³ See *supra* notes 25–34 and accompanying text.

⁵⁴ The size of the “insider” group may vary considerably, from small face-to-face gatherings to large technology-facilitated workplace or industry wide chats. See *infra* notes 57–59 and accompanying text.

⁵⁵ Whisper networks are generally “based on trust, and any social hierarchy is rife with the privilege of deciding who gets access to information.” Jenna Wortham, *We Were Left Out*, N.Y. TIMES MAG., Dec. 2017, at 42.

⁵⁶ After the Media Men list circulated, Jenna Wortham, a woman of color, wrote: “Despite my working in New York media for [ten] years, [the Media Men List] was my first ‘whisper’ of any kind, a realization that felt almost as hurtful as reading the acts described on the list itself.” *Id.* Wortham posited that women of color working in media may have been “perceived as outsiders, or maybe [they] weren’t seen as vulnerable. [They] hadn’t been invited to the happy hours or chats or email threads where such information is presumably shared.” *Id.*

⁵⁷ For instance, closed and secret Facebook groups provide private spaces for sharing allegations of misconduct. See *infra* note 71 and accompanying text.

⁵⁸ See *infra* note 76 and accompanying text.

⁵⁹ *Id.*

⁶⁰ See *infra* note 74.

Accusations are even being disclosed to the public writ large—in other words, informal complaint channels can allow unrestricted access.⁶¹ As the #MeToo movement reshapes societal responses to allegations of sexual misconduct,⁶² channels for informal reporting are becoming almost unrecognizable from the whisper networks of old. These new channels are entirely open and increasingly commonplace.

B. Whisper Networks and Courts of Public Opinion

Unofficial channels for reporting sexual misconduct can best be categorized along two key dimensions: one is whether the accuser is anonymous; the other is whether access to the channel is restricted (or open to the public).

The resulting classification is depicted as follows:

		Accuser	
		Anonymous	Named
Channel	Restricted Access	Double Secret Whisper Network	Traditional Whisper Network
	Open Access	Shadow Court of Public Opinion	New Court of Public Opinion

To understand the unofficial reporting regime that has taken shape in the #MeToo era, it is useful to begin with the Traditional Whisper Network. We then turn to the remaining matrixes, which I call the Double Secret Whisper Network;⁶³ the Shadow Court of Public Opinion;⁶⁴ and the New Court of Public Opinion.⁶⁵

⁶¹ See *infra* notes 80–96 and accompanying text. Unrestricted access (open) channels will be referred to as courts of public opinion; restricted access (closed) channels will be deemed variations of whisper networks. See *infra* notes 62–65 and accompanying text (depicting and explaining two-by-two matrix).

⁶² See *supra* notes 1–6 and accompanying text.

⁶³ See *infra* notes 72–78 and accompanying text.

⁶⁴ See *infra* notes 80–90 and accompanying text.

⁶⁵ See *infra* notes 92–96 and accompanying text.

1. Traditional Whisper Network

Whisper networks enable women to share their accounts of sexual violation with select insiders.⁶⁶ The content of the information (and often, the existence of the network itself) remains secret—at least to the extent outsiders are not privy to it, as is generally the intent of those within the network.⁶⁷ But, in contrast to the Double Secret Whisper Network, which allows for anonymous reports, networks in this category feature a known source of the accusation.⁶⁸

The classic version of the Traditional Whisper Network entails face-to-face information exchange.⁶⁹ This in-person sharing of allegations is hardly obsolete; anecdotal evidence suggests that whisper networks continue to thrive in many, perhaps even most, workplaces and educational settings.⁷⁰

But because technology has enabled a more robust dissemination of information, no longer must the Traditional Whisper Network rely on face-to-face encounters. Where large or dispersed populations wish to report sexual misconduct within a select community—a particular challenge given changes in workplaces and on college campuses—technology can serve an important function in enhancing the adequacy of distribution channels. Updated formulations of the Traditional Whisper

⁶⁶ See *supra* note 54.

⁶⁷ In their classic formulation, whisper networks allow women to “share secret warnings via word of mouth . . .” Wortham, *supra* note 55. Whisper networks can, of course, be leaky.

⁶⁸ Especially in larger groups of insiders, information may be passed along a chain of network members—in effect, generating hearsay. At some point, if an accusation becomes sufficiently attenuated from the original source, it might be considered “rumor” or “gossip.” Nevertheless, insiders tend to perceive whisper networks as sources of useful information. See Jia Tolentino, *The Whisper Network after Harvey Weinstein and “Shitty Media Men,”* NEW YORKER (Oct. 14, 2017), <https://www.newyorker.com/news/news-desk/the-whisper-network-after-harvey-weinstein-and-shitty-media-men> [<https://perma.cc/RH8U-TKV3>] (“Over time, in my experience, the whisper network always proves reasonably accurate: firings and settlements and investigations accrue to the names you’ve been hearing in different anecdotes for years. Gossip distorts details, but there are ways to test the information. Women ask for and examine sourcing; you know whether the story is firsthand or thirdhand. ‘I’ve heard he gets grabby’ is one type of information, and ‘this guy physically hurt one of my best friends’ is another.”).

⁶⁹ One commentator provided this description: “Hey, just so you know, don’t be alone with X.’ ‘I know you’re new here. In case nobody has mentioned it, Y has raped women. That’s a fact.’ ‘I’d call Z a creep, but I don’t think he’s dangerous in the way W is. I don’t know, I could be wrong.’ These are the kinds of warnings whispered in private among women in work spaces.” Alex Press, *It’s Time to Weaponize the “Whisper Network,”* VOX (Oct. 17, 2017), <https://www.vox.com/first-person/2017/10/16/16482800/harvey-weinstein-sexual-harassment-workplace> [<https://perma.cc/8M2F-DED9>].

⁷⁰ See Tolentino, *supra* note 68 (“Three years ago, shortly after I moved to the city, I was introduced to the whisper network—the unofficial channel that women use to warn each other about men whose sexual behavior falls on the spectrum from creepy to criminal—for New York media. I had encountered these networks before, in college and grad school and in the Peace Corps.”). See, e.g., Crump, *supra* note 34.

network (for instance, invitation-only Facebook groups)⁷¹ enable women identified by name to share their accounts across geographic distance but still within the confines of a private space.

2. Double Secret Whisper Network

The Double Secret Whisper Network relies on technological innovation to anonymize the accuser.⁷² Not only is the content of the information kept secret from network outsiders; the identity of the reporter is also kept secret from network insiders.

This type of network is becoming more commonplace. The Media Men List, which was intended only for women in media,⁷³ is just one example of how Google Docs is being used to facilitate the spread of anonymous allegations within a closed network.⁷⁴

Sparked by the #MeToo movement, a wave of startups is creating apps to assist with anonymous information distribution on campus and in the workplace.⁷⁵ This next generation of the Double Secret Whisper Network allows users to share their accounts of abuse with select audiences but in more technologically sophisticated ways. For instance, Blind enables employees at more than one hundred companies, including Amazon, Microsoft, and Google, to chat anonymously about workplace issues, including, often, sexual harassment and assault.⁷⁶

⁷¹ See Creswell & Hsu, *supra* note 23 (noting that through invitation-only Facebook groups, among other technologies, “women—and some men—are seeking catharsis and validation by sharing their stories”); Press, *supra* note 69 (mentioning email and Twitter Direct Messages as conduits for allegations). See also Tyler Kingkade, *Why Female Comedians Have a Secret World of Facebook Groups*, HUFFPOST (Aug. 31, 2016), https://www.huffingtonpost.com/entry/women-in-comedy-facebook-groups_us_57c5e82be4b078581f0fe6ba [<https://perma.cc/5A4N-5Y3B>] (discussing female comedians’ use of private Facebook groups to exchange information about sexual harassment and assault, among other topics).

⁷² The bathroom list is a non-technological analogue. See *supra* notes 36–37 and accompanying text.

⁷³ See *supra* note 43.

⁷⁴ See *supra* notes 39–45 and accompanying text. Sorority women at Yale University have used Google Docs in similar fashion. See, e.g., Abby Jackson, *Women at Yale Say They Developed a Secret Way to Protect Themselves from Dangerous Men Because the School Keeps Failing Them*, BUSINESS INSIDER (Jan. 23, 2018), <https://www.businessinsider.com/yale-sexual-assault-allegations-2018-1> [<https://perma.cc/5N27-ZWYJ>] (describing a system that uses “anonymous Google forms to compile the names of men who women say are dangerous, and then prohibit them from attending certain social events”).

⁷⁵ See Dvoskin & McGregor, *supra* note 19 (discussing “a wave of businesses emerging in the wake of widespread revelations of sexual misconduct in workplaces,” and observing that “[t]he startups, many of which have female founders or co-founders, want to disrupt a costly and persistent problem”); Kari Paul, *New Apps Help Victims of Sexual Assault and Harassment File Anonymous Reports*, MARKETWATCH (June 5, 2018), <https://www.marketwatch.com/story/post-weinstein-new-apps-aim-to-out-predators-before-they-become-serial-abusers-2018-01-24> [<https://perma.cc/VZ2K-AYS4>] (“Against the #MeToo movement backdrop, a new crop of apps and secure social networks are emerging to help victims report and address sexual harassment and assault. They aim to put the power in women’s hands—and on their phones.”).

⁷⁶ See Sarah Buhr, *Uber Employees Are Chatting with Each Other about Uber’s Leadership on*

A somewhat different iteration of the Double Secret Whisper Network—one designed as an information escrow⁷⁷—narrows the intended audience of an anonymous report to victims of the same perpetrator. Rather than share their accounts with would-be targets (that is, designated group members), users disseminate their information even more selectively.⁷⁸

3. Shadow Court of Public Opinion

Open access channels for reporting abuse are an alternative to the network model. As with restricted access channels, publicly available channels can allow allegations to be made anonymously,⁷⁹ which places them in the rather cloaked domain of the Shadow Court of Public Opinion. Although anyone can access these forums—indeed, far-flung distribution is intended—the accuser remains unidentified, making the information more nebulous.⁸⁰

Anonymous Workplace App Blind, TECHCRUNCH (Feb. 25, 2017), <https://techcrunch.com/2017/02/25/ubersecret/> [<https://perma.cc/RSC7-YU87>] (“[Blind] works by only allowing those within the same company to chat anonymously with each other.”).

⁷⁷ Emerging platforms like Callisto facilitate the “matching” of accusations in order to connect victims of the same perpetrator. See Anjana Rajan et al., *Callisto: A Cryptographic Approach to Detect Serial Predators of Sexual Misconduct*, PROJECT CALLISTO (Mar. 29, 2018), <https://www.projectcallisto.org/callisto-cryptographic-approach.pdf> [<https://perma.cc/A23U-Q6UP>]. See generally Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145 (2012) (arguing that information escrows can be deployed as an alternative method for both deterring and punishing repeat sexual violations).

⁷⁸ *Id.*

⁷⁹ Accusers may wish to remain anonymous to avoid the common repercussions of identifying themselves with a sexual misconduct allegation. See Itay Hod & Sharon Waxman, *After #MeToo: 12 Accusers Share What Happened Next, From Firing to More Trauma*, WRAP (Oct. 16, 2018), <https://www.thewrap.com/aftermetoo-12-accusers-what-happened-next-firing-more-trauma-harvey-weinstein/> [<https://perma.cc/39EZ-VYPE>]; see also *infra* note 81 and accompanying text.

⁸⁰ See Kutner, *supra* note 35 (“These apps and sites are typically viewed as backwaters of the internet, defined by seedy rumors and anonymous backbiting. However, many survivors of sexual assault use them to expose their attackers, allowing victims to take control of their experiences. This shift has led to questions about the degree to which school administrations should be paying attention to what’s said on these platforms, and what they can—and should—do about it.”).

Such avenues for sharing accounts of sexual misconduct are seemingly widespread.⁸¹ Of late, with #MeToo's focus on workplace harassment,⁸² allegations often cluster around particular industries.⁸³ In comment threads⁸⁴ and Instagram posts,⁸⁵ both of which allow public access to anonymous accusations, unnamed women have recently exposed alleged predators in children's literature,⁸⁶ advertising,⁸⁷ and fashion.⁸⁸ Notwithstanding the controversial nature of these platforms⁸⁹ and questions of legal liability that surround them,⁹⁰ for accusers intent on publicly exposing their abuser without identifying themselves, the Shadow Court of Public Opinion beckons.

4. New Court of Public Opinion

In the past two years, the #MeToo movement has made significant inroads in attacking longstanding societal dismissal of sexual misconduct claims.⁹¹ One way to understand this dynamic is that it is at once fueled by, and fueling, public allegations of sexual violation. What catapulted #MeToo was blockbuster reporting on the Harvey Weinstein story.⁹² The women in those accounts, many of whom were willing to speak on the record, came forward after years, even decades, to report

⁸¹ See *id.* ("Due to the stigma associated with sexual assault and the fear of being victim-blamed by the police or their university's administration, many survivors feel uncomfortable coming forward with their stories. That's given rise to reports of rape on anonymous online forums like Yik Yak, Whisper, College Confessions and campus-specific confessional Facebook groups.").

⁸² See *supra* notes 1–6 and accompanying text.

⁸³ For a campus-based Shadow Court of Public Opinion, see Chris Quintana, *Anonymous Website Aims to Out Sexual Assaulters at U. of Washington*, CHRON. HIGHER ED. (Oct. 9, 2018), <https://www.chronicle.com/article/Anonymous-Website-Aims-to-Out/244755> [<https://perma.cc/68A7-TKL7>] (describing "Make Them Scared" as a "wiki dedicated to exposing the names of sexual harassers /attackers created in the University of Washington Seattle area").

⁸⁴ See *infra* note 86 and accompanying text.

⁸⁵ See Maheshwari, *supra* note 46 (describing allegations in the advertising industry); Petrarca, *supra* note 5 (describing allegations in the fashion industry).

⁸⁶ See Cohen & Hsu, *supra* note 5.

⁸⁷ See Maheshwari, *supra* note 46.

⁸⁸ See Petrarca, *supra* note 5.

⁸⁹ See, e.g., Patrick Coffee, *'Diet Madison Avenue' Goes Dark on Instagram as Female Agency Veterans Publish Oppositional Letter*, ADWEEK (Mar. 5, 2018), <https://www.adweek.com/agencies/diet-madison-avenue-goes-dark-on-instagram-as-female-agency-veterans-publish-oppositional-letter/> [<https://perma.cc/VNS6-7NUR>]; Petrarca, *supra* note 5; Kutner, *supra* note 35.

⁹⁰ See *infra* notes 128–147 and accompanying text (discussing accusers' vulnerability to defamation claims).

⁹¹ See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 20–41 (2017) (identifying and documenting the phenomenon of "credibility discounting" in sexual violence cases).

⁹² See *supra* note 1 and accompanying text. For thorough accountings of these extraordinary reporting feats, see JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019); RONAN FARROW, *CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS* (2019).

their abuse unofficially. Since then, many women with allegations against high-profile men—women who, for myriad reasons, chose not to report through formal legal channels⁹³—have done the very same, forsaking anonymity (unlike those who make public accusations in the Shadow Court of Public Opinion) in the New Court of Public Opinion.⁹⁴

Twitter—with its use of a hashtag that gave the #MeToo movement its name—is also emerging as a repository for sexual misconduct accusations.⁹⁵ As the movement advances, we can expect that survivors will

⁹³ See Hod & Waxman, *supra* note 79. After reporting unofficially, several accusers then opted to cooperate with official investigations. See, e.g., Ronan Farrow, *Behind the Scenes of Harvey Weinstein's Arrest*, NEW YORKER (May 24, 2018), <https://www.newyorker.com/news/news-desk/behind-the-scenes-of-harvey-weinsteins-impending-arrest> [<https://perma.cc/6WDU-VDWB>] (explaining that, the day after her allegations of sexual assault by Harvey Weinstein were publicly reported in the *New Yorker*, one accuser was contacted by New York Police Department detectives and agreed to cooperate with Weinstein's prosecution); Associated Press, *Special Prosecutor Interviewing Women who Accused Eric Schneiderman of Abuse*, N.Y. L. J. (May 23, 2018), <https://www.law.com/newyorklawjournal/2018/05/23/special-prosecutor-interviewing-women-who-accused-eric-schneiderman-of-abuse/> [<https://perma.cc/SZT5-4KUS>] (describing prosecutor's ongoing interviews with women who first disclosed allegations of abuse by Attorney General Eric Schneiderman in the *New Yorker*).

⁹⁴ See *supra* note 5. See also Anderson Cooper, *Mario Batali and the Spotted Pig*, CBS 60 MINS. (May 20, 2018), <https://www.cbsnews.com/news/mario-batali-and-the-spotted-pig-ny/> [<https://perma.cc/D6JN-4EYA>]; Jim DeRogatis & Marisa Carroll, "He's A Predator": Two More Women Speak Out About R. Kelly's Alleged Sexual Abuse, BUZZFEED (May 4, 2018), <https://www.buzzfeednews.com/article/jimderogatis/r-kelly-sexual-abuse-allegations-lizzette-martinez-times-up> [<https://perma.cc/298D-SQPU>]; Jane Mayer & Ronan Farrow, *Four Women Accuse New York's Attorney General of Physical Abuse*, NEW YORKER (May 7, 2018), <https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse> [<https://perma.cc/5258-P2F8>]. Given the professional training of, and constraints on, reporters, stories of sexual misconduct that appear in the mainstream media are typically well corroborated. See, e.g., Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—with Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.201fe12ef99a [<https://perma.cc/G2BM-J5ZB>]; Kantor & Twohey, *supra* note 1; Mayer & Farrow, *supra* note 94. Although the term "credibly accused" has become a staple of secondary reporting on #MeToo allegations, not all reporting on sexual misconduct allegations is immune from criticism. For one #MeToo era story that was widely perceived as falling short of journalistic standards, see Katie Way, *I Went on a Date with Aziz Ansari. It Turned Into the Worst Night of My Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355> [<https://perma.cc/X8SS-M5Z3>].

⁹⁵ See, e.g., Alison Flood, *Three Women Go Public with Sherman Alexie Sexual Harassment Allegations*, GUARDIAN (Mar. 7, 2018), <https://www.theguardian.com/books/2018/mar/07/three-women-go-public-with-sherman-alexie-sexual-harassment-allegations> [<https://perma.cc/X3XJ-FEHU>] (describing accusations that first surfaced on Twitter); Molly Olmstead, *A Woman Accused a Prominent State Senator of Raping Her. She Says She Was Inspired by Christine Blasey Ford's Testimony*, SLATE, Sept. 28 2018, <https://slate.com/news-and-politics/2018/09/joe-fain-washington-state-senator-rape-investigation.html> [<https://perma.cc/PF6Z-5LL5>]; Kristine Phillips, *Pulitzer Prize-Winning Author Junot Diaz Accused of Sexual Misconduct, Misogynistic Behavior*, WASH. POST (May 6, 2018), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/05/05/pulitzer-prize-winning-author-junot-diaz-accused-of-sexual-misconduct-misogynistic-behavior/?utm_term=.45b050865128 [<https://perma.cc/NM4X-R65Z>].

more routinely bring their allegations to the New Court of Public Opinion.⁹⁶

III. INFORMAL REPORTING DANGERS

The sudden ascendance of an unofficial reporting regime is, in many ways, a mark of progress. Newfound willingness on the part of countless women and men to complain about sexual misconduct indicates that the benefits of informally reporting abuse—anonously or not—are increasingly perceived as outweighing the costs. Nothing that follows is meant to deny the functionality of unofficial reporting channels in a world where official systems for redressing sexual misconduct are largely ineffectual.⁹⁷ But there are risks associated with the rise of informal accusation, particularly if official mechanisms for processing allegations of abuse do not simultaneously evolve so as to become, sooner or later, the primary repositories for these allegations.

The dominance of unofficial reporting is best understood as a problem of transition.⁹⁸ Rather than remain a dominant feature of our societal approach to sexual assault and harassment, the proliferation of informal complaints should underscore the need to invigorate our systems of formalized redress.⁹⁹ The alternative scenario—perpetual lopsidedness in the official/unofficial response ratio¹⁰⁰—raises several sets of concerns.

A. Limited Accountability

Whisper networks sacrifice the pursuit of offender accountability in the interest of achieving other benefits. For women who report through restricted access channels, regardless of whether they did so anonymously, this tradeoff is generally accepted as an inherent feature

⁹⁶ See Kate Thayer, *Sexual Assault Survivors Are Publicly Accusing Attackers on Social Media. But at What Cost?*, CHI. TRIB. (Dec. 14, 2018), <https://www.chicagotribune.com/lifestyles/ct-life-facebook-sex-assault-allegations-20181212-story.html> [<https://perma.cc/8WCU-ZYL5>] (“A Chicago woman took to Facebook last week to describe, in graphic detail, how a man she knows tried to rape her, naming him and including his photo in a post that was shared more than [a thousand] times in a matter of days.”).

⁹⁷ For a thorough analysis, see Tuerkheimer, *supra* note 14.

⁹⁸ See Lesley Wexler, Jennifer Robbenolt & Colleen Murphy, *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 90–107 (2019) (applying theories and practices of transitional justice to the #MeToo movement).

⁹⁹ See Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 880 (2019) (noting that the current “colonization” of the state’s regulatory space by the #MeToo movement appears to be temporary).

¹⁰⁰ To be clear, I am not arguing that informal reporting should entirely disappear as an option but rather that the frequency of formal reporting should increase in both relative and absolute terms.

of the network model.¹⁰¹ Since the recipients of the report are members of the vulnerable community, rather than those in positions of power over the abuser, it is highly unlikely that any mechanisms of accountability will be triggered by a victim's unofficial complaint.

The growing use of open access channels complicates this account. When named women come forward in the New Court of Public Opinion, consequences may result.¹⁰² Relatedly, when anonymous women make accusations in the Shadow Court of Public Opinion, these accusations can launch formal processes that may also lead to consequences.¹⁰³ In the age of #MeToo, men initially accused of misconduct in the Courts of Public Opinion (which include both the Shadow Court of Public Opinion¹⁰⁴ and the New Court of Public Opinion)¹⁰⁵ have faced job loss,¹⁰⁶ suspension,¹⁰⁷ revocation of honors,¹⁰⁸ and economic penalties imposed by businesses and consumers alike.¹⁰⁹ They have also been disgraced in

¹⁰¹ Indeed, for some women, the lack of accountability is a chief benefit. See Donegan, *supra* note 40 (“[T]he value of the spreadsheet was that it had no enforcement mechanisms: Without legal or professional power, it offered an impartial, rather than adversarial, tool to those who used it. It was intended specifically not to inflict consequences, not to be a weapon . . .”).

¹⁰² For a discussion of the process concerns raised, see *infra* notes 116–127 and accompanying text.

¹⁰³ As a general proposition, formal processes move forward only if an accuser is identified and willing to cooperate with investigators. While the contours of these processes are varied and often opaque, sanctioning bodies are unlikely to impose a penalty based only on an anonymous accusation. The scenario change may change, of course, where an anonymous accusation triggers an investigation that generates corroboration of the account—for instance, a third-party witness, electronic evidence, or an admission by the accused.

¹⁰⁴ See *supra* notes 71–90 and accompanying text.

¹⁰⁵ See *supra* notes 91–96 and accompanying text.

¹⁰⁶ See Sarah Almukhtar et al., *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/JVX9-DUKD>] (listing men “fired or forced to resign after accusations of sexual misconduct that ranged from inappropriate comments to rape”).

¹⁰⁷ See *id.* (listing men who have faced “suspensions and other fallout”).

¹⁰⁸ See Susan Adams, *Steve Wynn Loses Naming Rights at U Penn after Sexual Misconduct Allegations*, FORBES (Feb. 1, 2018), <https://www.forbes.com/sites/susanadams/2018/02/01/the-university-of-pennsylvania-is-stripping-steve-wynns-name-from-a-campus-plaza/#2add4767df5> [<https://perma.cc/EL7G-TZ2K>]; Louis Lucero II, *Charlie Rose Has Honors from Two Journalism Schools Rescinded*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/us/charlie-rose-awards.html> [<https://perma.cc/CZ7Z-SPUA>]; Jane C. Hu, *In the Aftermath of #MeToo, Which Names in Science Should be Replaced?* QUARTZY (Sept. 19, 2018), <https://qz.com/quartzzy/1394785/replacing-names-in-science-after-metoo/> [<https://perma.cc/JFJ9-AXK9>].

¹⁰⁹ See, e.g., DeRogatis & Carroll, *supra* note 94 (describing post-#MeToo responses to longtime sexual misconduct allegations against R. Kelly). In the wake of the #MuteRKelly campaign and the release of *Surviving R. Kelly*, a documentary series first aired in early 2019, Kelly was indicted on a range of sex offenses by multiple prosecutor's offices. See Jason Meisner, Madeline Buckley, & Megan Crepeau, *R. Kelly Hit with Federal Indictments in New York, Chicago; Faces New Racketeering, Sex Crime Charges, Allegations He Paid to Recover Sex Tapes and Cover Up Conduct*, CHI. TRIB. (Jul. 12, 2019), <https://www.chicagotribune.com/news/criminal-justice/ct-r-kelly-arrested-federal-charges-20190712-6ghntysw3zf3lpncn4owcfzyje-story.html> [<https://perma.cc/VU2J-ZAQ>] (summarizing the criminal charges pending against Kelly).

the eyes of family, friends, and the general public, although the sustained effects of sexual abuse-based stigma remain to be seen.¹¹⁰

Momentarily bracketing concerns related to process,¹¹¹ it is useful to observe that the consequences stemming from the Court of Public Opinion may qualify as only partial accountability. One precondition for full accountability might be a degree of proportionality between the infraction and the attendant repercussion. Another might entail a level of transparency that enables those harmed by the misconduct to feel vested in the abuser's penance. Perhaps accountability requires a mechanism for conveying collective condemnation of the transgression. And so on.

My aim here is not to elaborate a thick meaning of accountability but to gesture at the kinds of considerations that might come into play when we assess what is missing even when unofficial reporting yields consequences.¹¹² Further to this concern, many commentators have presupposed that individual accountability can be analyzed without regard to the relevant legal framework. In my view, it cannot. Although not all sexual misconduct is regulated by law, much of the misconduct being disclosed in the #MeToo era *is* prohibited by criminal law, tort law, Title IX, Title VII, or some combination. When this conduct results in only extra-legal consequences, there is a troubling gap between the available formal remedy and the outcome imposed instead. In other words, the measure of accountability cannot be abstracted from what is dictated by our system of laws.

In the Courts of Public Opinion, the limits of accountability are compounded by the problem of inequity. Access to channels that hold the greatest promise of generating some consequence, however inadequate, is markedly unequal. Most victims of sexual assault and harassment do not have connections to mainstream media reporters. Moreover, for women whose abusers are not the subject of intense public

¹¹⁰ See Amanda Arnold, *The Men Who Are Plotting Their Post-#MeToo Comebacks*, CUT (Apr. 19, 2018), <https://www.thecut.com/2018/04/comeback-men-sexual-harassment-me-too.html> [<https://perma.cc/KBA6-G274>] (describing comeback efforts on the part of Charlie Rose, Mario Batali, Matt Lauer, Lorin Stein, Garrison Keiller, Louis C.K., and Al Franken); Stassa Edwards, *Redemption Is Inevitable for Powerful Men*, JEZEBEL (Apr. 20, 2018), <https://jezebel.com/redemption-is-inevitable-for-powerful-men-1825364533> [<https://perma.cc/A3T3-ZKHV>]; Rebecca Traister, *Too Much, Too Soon*, CUT (Aug. 28, 2018), <https://www.thecut.com/2018/08/louis-c-k-and-matt-lauer-what-do-their-comebacks-mean.html> [<https://perma.cc/L5Y4-UDFC>].

¹¹¹ See *infra* notes 116–127 and accompanying text.

¹¹² For a discussion of the tenets of accountability in the restorative justice context, see Wexler et al., *supra* note 98, at 68–81 (discussing the importance of responsibility taking, harm repair, redemption and reintegration).

interest,¹¹³ resort to traditional media outlets is typically not an option.¹¹⁴ In short, those especially vulnerable to workplace sexual misconduct—women of color and women in low-wage jobs—are cut off from mechanisms of informal reporting that, among the unofficial options, may offer the greatest hope of prompting offender accountability, however meager.¹¹⁵

B. Process Void (and Its Strategic Deployment)

Alongside the resurgence of the #MeToo movement, unmistakable signs of resistance or “backlash” have emerged.¹¹⁶ Among the primary drivers of this opposition is a concern for innocent men tarnished without the benefit of a fair process. This fear of false allegations has become

¹¹³ #MeToo’s attention to allegations of sexual misconduct by prominent men has unleashed a torrent of disclosures that never generate public attention. About a month after allegations against Harvey Weinstein were reported in the *New York Times*, Rebecca Traister wrote:

Since the reports of Weinstein’s malevolence began to gush, I’ve received somewhere between five and [twenty] emails every day from women wanting to tell me their experiences: of being groped or leered at or rubbed up against in their workplaces. They tell me about all kinds of men—actors and publishers; judges and philanthropists; store managers and social-justice advocates; my own colleagues, past and present—who’ve hurt them or someone they know. It happened yesterday or two years ago or [twenty]. Few can speak on the record, but they all want to recount how the events changed their lives, shaped their careers; some wish to confess their guilt for not reporting the behavior and thus endangering those who came after them. There are also women who *do* want to go on the record, women who’ve summoned armies of brave colleagues ready to finally out their repellent bosses. To many of them I must say that their guy isn’t well known enough, that the stories are now so plentiful that offenders must meet a certain bar of notoriety, or power, or villainy, before they’re considered newsworthy.

Rebecca Traister, *Your Reckoning. And Mine.*, CUT (Nov. 12, 2017), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html> [<https://perma.cc/P6SU-B7TF>].

¹¹⁴ See *id.* To be sure, even if were an option, not all women would want their allegations of misconduct publicly reported. See Michelle Togliola, *Why Did Some Women Choose Not to Post a “Me Too” Story? Women Share Why They Didn’t Participate in the Movement*, BUSTLE (Oct. 20, 2017), <https://www.bustle.com/p/why-did-some-women-choose-not-to-post-a-me-too-story-women-share-why-they-didnt-participate-in-the-movement-2961946> [<https://perma.cc/S9EY-JVKE>]. See also Laura Gianino, *I Went Public with My Sexual Assault. and Then the Trolls Came for Me.*, WASH. POST (Oct. 18, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/18/i-went-public-with-my-sexual-assault-and-then-the-trolls-came-for-me/?noredirect=on&utm_term=.19586c035348 [<https://perma.cc/P7QR-SP6V>].

¹¹⁵ Even social media, which is more accessible than mainstream media to victims of sexual misconduct, may be effectively off-limits to many members of marginalized communities. See generally Jamillah Bowman Williams, *Big Data Insights: #MeToo, Law, and Social Change*, 2019 U. CHI. LEGAL F. 371 (2019). As California Assemblywoman Lorena Gonzalez put it, “The MeToo movement . . . can’t just be for women who have a Twitter account.” Charisse Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY (Oct. 9, 2018), <https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/> [<https://perma.cc/9VLX-DMHY>].

¹¹⁶ See, e.g., Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash> [<https://perma.cc/S9HW-68SV>].

more widespread in the time of #MeToo;¹¹⁷ increasingly, it is deployed to discredit the movement as a whole.¹¹⁸

It is not only politicians and commentators on the right who have expressed a concern for the lack of process that attends informal reporting.¹¹⁹ Many progressives worry about a world in which established procedures for investigating and adjudicating allegations of abuse are supplanted by pervasive public shaming and vigilantism.¹²⁰

In evaluating the strength of process related arguments, it is important to carve out the category of cases where an informal report initiates a formal investigative process, which then results in a meaningful sanction. Even when official procedures are triggered in this arguably unorthodox manner—that is, through unofficial complaint—process norms have been vindicated.¹²¹

Those who decry the absence of process in the Courts of Public Opinion might remain concerned about cases that bypass entirely mechanisms of formal investigation. As I have discussed, these cases tend to yield a limited set of consequences for the accused abuser.¹²²

¹¹⁷ According to a survey of 1500 Americans after one year of the #MeToo movement, 18% of respondents believe that “false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished,” as compared to 13% in November 2017. *Measuring the #MeToo Backlash*, ECONOMIST (Oct. 20, 2018), <https://www.economist.com/united-states/2018/10/20/measuring-the-metoo-backlash> [<https://perma.cc/KZV5-432S>]. The proportion of respondents who think that “women who complain about sexual harassment cause more problems than they solve” grew slightly from 29 to 31%. *Id.* A separate survey of more than a thousand Americans reported that more than 40% of respondents believe that the #MeToo movement has “gone too far.” Tovia Smith, *On #MeToo, Americans More Divided by Party than Gender*, NPR (Oct. 31, 2018), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender> [<https://perma.cc/TM85-NLV8>]. The problem of false allegations is perceived to be widespread by members of both parties, although the effects of party affiliation are pronounced (more so than the effects of gender): 77% of Republicans characterize false allegations of sexual assault as common while 37% of Democrats do so. *Id.*

¹¹⁸ Around the time of then-Judge Kavanaugh’s confirmation hearing, President Trump captured and advanced this line of thinking as follows: “[I]t’s a very scary time for young men in America when you can be guilty of something you might not be guilty of. This is a very difficult time . . . somebody could accuse you of something and you’re automatically guilty.” Dara Lind, *Trump: “It’s a Very Scary Time for Men in America,”* VOX (Oct. 2, 2018), <https://www.vox.com/2018/10/2/17928800/trump-women-doing-great-kavanaugh> [<https://perma.cc/M3NY-N8AH>]. Trump then added, “Women are doing great.” *Id.* For a contextual analysis, see generally Mary Anne Franks, *Witch Hunts: Free Speech, the First Amendment, and the Fear of Women’s Words*, 2019 U. CHI. LEGAL F. 123, 123–46 (2019).

¹¹⁹ See, e.g., Masha Gessen, *When Does a Watershed Become a Sex Panic?*, NEW YORKER (Nov. 17, 2018), <https://www.newyorker.com/news/our-columnists/when-does-a-watershed-become-a-sex-panic> [<https://perma.cc/9488-WA97>]; Shira Sheindlin & Joel Cohen, *After #MeToo, We Can’t Ditch Due Process*, GUARDIAN (May 8, 2018), <https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televisions> [<https://perma.cc/6Q7W-QZ9T>].

¹²⁰ See 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/88A4-BRQB>]. See, e.g., Gessen, *supra* note 119.

¹²¹ There is considerable variation in the process that is required, if any, before an adverse action can be taken in the employment and educational contexts.

¹²² See *supra* notes 101–115 and accompanying text.

And many, if not most, of these consequences have followed some acknowledgement of wrongdoing on the part of the man accused. Yet when it comes to men who do profess their innocence, the shaming function potentially served by informal reporting in the Courts of Public Opinion is itself a source of considerable angst.¹²³

As a normative matter, the extent to which men should be shielded from public accusations of sexual misconduct (and the stigma that may result) is subject to debate.¹²⁴ Unless the status quo changes, recognition of this entitlement would exist in deep tension with not only free speech norms but also the reality that formal complaint processes are often stacked against the accuser.¹²⁵

At the same time, the procedural void that characterizes unofficial reporting matters. It matters strategically insofar as it powers opposition to #MeToo. It also matters substantively, since neutral investigative procedures are of independent value.¹²⁶ Moving forward, efforts should increase official reporting in relation to unofficial complaint, answering legitimate process concerns.¹²⁷ So too might this blunt the #MeToo backlash that is driven by incipient panic over mobs of angry, lying women eviscerating innocent men.

C. Weaponization of Defamation Law

When a person makes an unofficial allegation of sexual misconduct, she or he becomes the potential target of a defamation claim by the individual accused.¹²⁸ With the ascendance of complaint in the Courts of

¹²³ For those whose livelihood depends on consumer popularity, the stigma associated with sexual misconduct can have market related implications. See, e.g., Gabrielle Bluestone, *Louis CK Cancelled by Everyone*, VICE NEWS (Nov. 10, 2017), https://news.vice.com/en_us/article/pazz9g/louis-ck-cancelled-by-everyone [<https://perma.cc/N28P-E2F7>]. But see Marina Fang, *Louis C. K. Jokes About Sexual Harassment In New Set, Appears To Have Learned Nothing Again*, HUFFPOST (Jan. 17, 2019), https://www.huffpost.com/entry/louis-ck-comeback_n_5c4096bbe4b041e98ffb7333 [<https://perma.cc/D6WC-WQ6T>] (describing sold-out shows in the comedian's "comeback tour").

¹²⁴ There is no legal entitlement to such a shield. Indeed, the First Amendment generally protects the right of an accuser to level truthful accusations in the Courts of Public Opinion. For a discussion of the law of defamation, which regulates the publication of false statements, see *infra* notes 128–148 and accompanying text.

¹²⁵ See Tuerkheimer, *supra* note 14.

¹²⁶ A vast literature describes the virtues of procedural justice. See ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 10, 30–34 (1988).

¹²⁷ In a separate project, I propose ways of redesigning formal complaint channels to more effectively incentivize official reporting. See Tuerkheimer, *supra* note 14.

¹²⁸ Accusers may also be sued for statements made in the course of campus disciplinary proceedings. See Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 15, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [<https://perma.cc/D2W3-EAPN>]. While most states grant speakers a privilege (a defense to defamation liability) for statements made to law enforcement officials, application of the privilege to Title IX proceedings remains a more open question. See *infra* note 145.

Public Opinion, this threat has grown far more significant. To be sure, if an allegation of abuse is truthful,¹²⁹ a defamation defendant should ultimately prevail.¹³⁰ Even so, the prospect of being sued for libel is—or should be—a meaningful deterrent to publicly accusing one’s abuser. Most sexual misconduct victims cannot afford the financial cost of defending a lawsuit, even apart from the psychic toll this effort exacts. Moreover, the confused state of defamation law means that litigation costs in this area are relatively uncertain.¹³¹

In the face of this uncertainty, the fact that so many women are using social media to name their alleged abuser is, on first glance, puzzling.¹³² One simple explanation for the ubiquity of informal reporting is that its benefits¹³³ are perceived as sufficient to outweigh the prospect of litigation and its attendant costs. It is not clear, however, that the risk of legal liability is typically included in accusers’ calculus.

This may change with the filing of the first high-profile defamation suit in the #MeToo era.¹³⁴ In October 2018, Stephen Elliott, a writer accused of sexual assault and harassment in multiple entries on the Media Men List, sued Moira Donegan, creator of the list, and thirty

¹²⁹ See Tuerkheimer, *supra* note 91 (analyzing the available research on false sexual assault reporting to police). I am aware of no studies specifically examining the veracity of extra-legal accusations (including anonymous accusations) of sexual misconduct.

¹³⁰ Defamation is a common law tort consisting of a false statement of fact that injures the subject’s reputation. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

¹³¹ See *infra* notes 142–147 and accompanying text.

¹³² Perhaps in part because the early high-profile #MeToo accusations did not generate lawsuits, the legal risks associated with Courts of Public Opinion reports are just beginning to enter the public discourse. See, e.g., Andreas Redd et al., *Student-Created Website Allowing for Anonymous Sexual Assault Allegations Vulnerable to Defamation Charges*, DAILY U. WASH. (Oct. 1, 2018), http://www.dailyuw.com/news/article_dd14bf34-c5f6-11e8-a705-cf14683d53a3.html [<https://perma.cc/5T2W-YAL7>]; Thayer, *supra* note 96.

¹³³ See Tuerkheimer, *supra* note 14 (cataloguing multiple functions served by informal reporting channels).

¹³⁴ Stephen Elliott’s not the only high-profile defamation suit filed since October 2017. See, e.g., Ben Paviour, *Virginia Lt. Gov. Justin Fairfax Files \$400 Million Lawsuit Against CBS*, NPR (Sept. 12, 2019), <https://www.npr.org/2019/09/12/760291624/virginia-lt-gov-justin-fairfax-files-400-million-lawsuit-against-cbs> [<https://perma.cc/XN5S-LAM3>]; Megan Graham, *Anonymous Instagram Account Diet Madison Avenue Sued for Defamation*, ADAGE (May 24, 2018), <https://adage.com/article/agency-news/anonymous-instagram-account-diet-madison-avenue-sued-defamation/313645/> [<https://perma.cc/32QG-C9TL>]; Randall Roberts, *Electronic Producer and DJ William “the Gaslamp Killer” Bensussen Files Defamation Lawsuit against Accusers*, LA TIMES (Nov. 14, 2017), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-electronic-producer-and-dj-william-the-1510687064-htlmstory.html> [<https://perma.cc/88A6-UDFV>]; Claudia Rosenbaum, *Crystal Castles Singer Ethan Kath Sues Alice Glass over Rape and Abuse Claims*, BUZZFEED (Nov. 3, 2017), <https://www.buzzfeednews.com/article/claudiarosenbaum/crystal-castles-singer-ethan-kath-sues-alice-glass-over> [<https://perma.cc/M5T8-MTD4>]; *But see* Nardine Saad & Amy Kaufman, *Brett Ratner Drops Defamation Lawsuit against Rape Accuser Melanie Kohler*, LA TIMES (Oct. 2, 2018), <https://www.latimes.com/entertainment/la-et-entertainment-news-updates-2018-brett-ratner-drops-defamation-lawsuit-1538511141-htlmstory.html> [<https://perma.cc/T2QL-BWP3>].

Jane Does for \$1.5 million.¹³⁵ Elliott's complaint alleges that he was defamed by the knowing and malicious publication and circulation of false allegations.¹³⁶ The lawsuit immediately garnered national media attention.¹³⁷

Whether Elliott ultimately prevails—or even survives a motion to dismiss¹³⁸—his complaint spotlights the jeopardy that attends unofficial reporting. With the ascendance of the Shadow Court of Public Opinion and the New Court of Public Opinion, allegations that once were confined within restricted access channels (the Traditional Whisper Network and the Double Secret Whisper Network) can be disseminated in ways that make accusers especially ripe targets for libel actions. Elliott's lawsuit not only impacts Donegan,¹³⁹ but also the Jane Does who may now be “unmasked.”¹⁴⁰ Importantly, the suit has the potential to deter accusers around the country who may be contemplating a public accusation of sexual misconduct.¹⁴¹ In essence, the defamation claim targets the very engine of #MeToo—unofficial reporting channels.

Compounding the chilling effects of being named as a defamation defendant¹⁴² is an unsettled doctrinal landscape that complicates efforts to predict a legal outcome or even whether litigation will reach the expensive and often grueling discovery stage.¹⁴³ Apart from ambiguities surrounding the law of defamation,¹⁴⁴ a suit like Elliott's—that is, one

¹³⁵ Complaint at iv, *Elliott v. Donegan*, 2018 WL 4940326 (E.D.N.Y. Oct. 10, 2018) (No. 18 Civ. 5680). See also *supra* notes 39–45 and accompanying text (discussing Media Men List).

¹³⁶ Although Elliott asserts that he is a “private citizen who is neither a politician nor a celebrity,” he also alleges that the defendants acted with malice. *Id.* at 3. See *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

¹³⁷ See, e.g., Jonah Engel Bromwich, *Writer Who Appeared on ‘Media Men’ List Sues Its Creators*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/style/stephen-elliott-moira-donegan-media-men-list.html> [<https://perma.cc/RM9D-WEGG>].

¹³⁸ See Ruth Spencer, *Robbie Kaplan Sees Right through Stephen Elliott’s Lawsuit*, CUT (Oct. 19, 2018), <https://www.thecut.com/2018/10/robbie-kaplan-moira-donegan-stephen-elliott-lawsuit.html> [<https://perma.cc/29Q9-3XSF>].

¹³⁹ See *infra* note 147 and accompanying text. Even scholars who argue that courts have interpreted § 230 too broadly would likely view the creator of a spreadsheet (like Donegan) as immune from liability for its content. See, e.g., Danielle Citron Keats & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

¹⁴⁰ See *infra* note 147 and accompanying text.

¹⁴¹ As Donegan's attorney Robbie Kaplan has suggested, “the point of the case is not actually to succeed against [Donegan], or maybe not even to go forward with the case at all, but to file it to send a strong message to other women that if [they] do this [they] will be sued.” Spencer, *supra* note 138.

¹⁴² See *supra* notes 130–131 and accompanying text (observing that the costs of defending against a defamation claim may itself serve as a powerful deterrent to speech).

¹⁴³ See Christina Cauterucci, *Does Stephen Elliott’s Lawsuit against Moira Donegan Have a Chance to Succeed?*, SLATE (Oct. 12, 2018), <https://slate.com/news-and-politics/2018/10/stephen-elliott-moira-donegan-lawsuit-analysis.html> [<https://perma.cc/QF3X-82CG>] (discussing a divergencence of practitioners' views).

¹⁴⁴ See, e.g., *supra* note 136.

that involves anonymous allegations, or allegations aggregated online by a third party, or both—raises at least two questions that continue to vex courts.¹⁴⁵ First, when can a defendant claim immunity under Section 230 of the Communications Decency Act, which generally protects an entity from liability for third-party content, provided the entity does not at least, in part, develop or create the allegedly defamatory content?¹⁴⁶ And, second, when can anonymous speakers who are sued prevent their identities from disclosure, thereby protecting accusers' independent interests in preserving anonymity and foreclosing legal liability?¹⁴⁷

For the anonymous sexual abuse complainant¹⁴⁸ whose identity is revealed in the course of defending a defamation claim—as well as for the accuser named from the outset—the defense of truth may allow for ultimate vindication. Even so, the promise of a defamation verdict for the defendant hardly seems satisfying. In an ironic twist, a survivor who eschewed formal reporting channels may ultimately find herself in a courtroom, telling her story under the most formal conditions possible, having expended enormous resources along the way in exclusive service of beating back a claim that she lied about her abuse. With defamation law looming in the background, no survivor could be faulted for deciding to forsake unofficial reporting altogether and simply keep silent about her abuse.

IV. CONCLUSION

The costs and benefits of divulging abuse have begun to shift in appreciable ways. Assuming this trajectory continues, we will surely see greater activity in the matrixes that extend beyond the confines of the Traditional Whisper Network: the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. The proliferation of unofficial reporting in the #MeToo era reflects and portends progress. Yet the continued rise of informal reporting against

¹⁴⁵ More than half the states have passed some form of Anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation, which further complicates this terrain.

¹⁴⁶ For a summary of competing judicial approaches to the interpretation of Section 230, see Yaffa A. Meeran, *As Justice So Requires: Making the Case for a Limited Reading of § 230 of the Communications Decency Act*, 86 GEO. WASH. L. REV. 257, 267–74 (2018).

¹⁴⁷ For an overview of judicial unmasking standards, see Matthew Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 847–60 (2010); Ethan B. Siler, *Yelping the Way to a National Statutory Standard for Unmasking Internet Anonymity*, 51 WAKE FOREST L. REV. 189, 194–202 (2016). For a litigator's guide to unmasking, see Paul Alan Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*, 37 LITIG. 27 (2011).

¹⁴⁸ See *supra* notes 79–81 and accompanying text (describing the rise of the Shadow Court of Public Opinion and explaining why accusers may wish to remain anonymous).

the backdrop of a mostly dormant law of sexual misconduct is of concern. A meaningful societal response to sexual misconduct must entail a commitment to activating formal mechanisms of accountability.

Sexual Harms without Misogyny

Deborah M. Weiss[†]

Claims of sexual injury are always viewed through the twin lenses of sexual morality and sexual politics. Central to each is a narrative of what constitutes a sexual harm.

Traditional society assigned to women the unenviable role of policing sexuality. To this end, its legal system assessed sexual harm from the perspective of the double standard, which admired men and stigmatized women for engaging readily in sex. Sexual harm was thus a wrong against a woman's chastity and rape was the only recognized sexual injury. A rape conviction required showing not that a man's motives were blameworthy but that a woman's virtue was beyond reproach, her lack of consent demonstrated by her sexual history and by a display of the "utmost" resistance.¹

First-wave feminists of the Victorian and Progressive eras rejected the double standard and its inevitable division of women into two classes, "the protected and refined ladies . . . and those poor outcast daughters of the people whom [men] purchase with money."² While accepting the notion of sexual harm as an injury to chastity, they advocated a sex-neutral standard of sexual restraint grounded in Christian doctrine. The next wave of sex law reform began during the 1950s and was grounded in a sex-neutral standard of sexual autonomy that freed women from the constraints of the double standard but failed to provide a compelling secular narrative of sexual harm to replace religious doctrines justifying sexual restraint.³

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¹ STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17–47 (1988). See also Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L. J. 1372, 1391–92 (2013).

² Josephine Butler, *Social Purity*, in THE SEXUALITY DEBATES 170 (Sheila Jeffreys ed., 1987).

³ Martin S. Weinberg, Rochelle Ganz Swensson & Sue Kiefer Hammersmith, *Sexual Autonomy and the Status of Women: Models of Female Sexuality in U.S. Sex Manuals from 1950 to 1980*, 30 SOC. PROBLEMS. 312, 312–13 (1983).

First-wave feminism and sexual autonomy theory achieved some important sex law reforms, notably the raising of the age of consent from its appalling historical norm of ten or twelve. Still, the law of rape, with its focus on the victim's behavior, proved hard to change. Courts began in theory to recognize civil actions for sexual harassment, but so grudgingly that recovery was virtually impossible.

In response to these failures, feminists in the seventies argued that sex-neutral theories of sexual autonomy failed to identify the critical role of sexuality in the subjugation of women. Male sexual advances, they argued, were often or even always motivated not by sexual passion but by a desire to humiliate and subordinate women. This dominance framework supplied a secular theory of sexual *harm*, an element critically missing from early discussions of sexual autonomy. The source of sexual harm, from this perspective, was located in the intent of the male actor, shifting inquiry from female to male motives.

The prevailing public narrative of sexual harm became an odd synthesis of themes from dominance theory and sexual autonomy theory. That narrative accepted one key principle from the most radical dominance model, the strong misogyny narrative: *all* sexual harm resulted from men's generalized desire to degrade and exert power over *all* women. However, public opinion rejected the idea that such motives pervaded heterosexual interaction. Thus, men were divided into two groups: good actors conformed to the norms of the sexual autonomy model, while bad actors fit the model of strong misogyny theory and were driven by an all-encompassing animus towards women as a group.

By providing a model of sexual harm, this hybrid misogyny model succeeded where autonomy theories had failed and produced a seismic shift in both public and judicial attitudes. Under its influence, the law of rape finally began to undergo a period of significant reform, with changes such as rape shield laws that shifted legal inquiry away from the character of the victim. Perhaps most dramatically, courts began to increase substantially the scope of liability for sexual harassment, authorizing recovery for non-economic harm through hostile environment theory.

However compelling, I argue, the hybrid misogyny narrative is incomplete. By locating the problem of sexual harm solely in the actions of deviant misogynists, it impeded recognition of the damage that can be done by flawed but not evil men, especially in situations of power created by the workplace. When applied to workplace settings,⁴ the hybrid misogyny narrative paved the way to judicial expansion of sexual harassment liability, but also to some deeply misguided doctrines.

⁴ In this Article, I focus on the limits of the misogyny paradigm in sexual harassment law. Katharine Baker has similarly argued that even rape law has been distorted by overstating the

In this article I will discuss three of these distortions. First, the focus on misogynistic motive led courts to overlook the importance of objective power differentials and thus failed to distinguish adequately between supervisor and coworker cases. Early sexual harassment cases imposed liability only in cases of *quid pro quo*, where benefits or detriments of the job were explicitly conditioned on submission to sexual demands. In extending this doctrine, the Supreme Court might well have preserved a distinction between the acts of supervisors and those of coworkers, but it did not, instead providing a single doctrine, hostile environment theory, that was applicable to both supervisors and coworkers.⁵ Judicial deprecation of the importance of implied coercion worsened when the Court handed down rules governing agency liability that made recovery for supervisory conduct only slightly easier than for coworker conduct.

Second, the notion that all harm results from misogynistic animus has prevented recovery in cases in which the defendant's actions, however harmful, were motivated not by animus but by a genuine romantic interest in the plaintiff that was ultimately rejected, sometimes after a consensual affair. At that point, the defendant began to engage in workplace behavior that was harmful to the plaintiff, but that was not, viewed in isolation from the sexual rejection, hostile or misogynistic. Courts typically reject liability in these cases, reasoning that thwarted affection rather than generalized animus towards women motivated the defendant. Yet Title VII does not itself contain any requirement that the plaintiff prove animus but rests liability on a showing that a defendant acted "because of" sex.⁶ The strong misogyny narrative in effect adds to the plaintiff's burden by requiring her to prove an element that is not to be found in Title VII or Supreme Court opinions.

Finally, the picture of a unitary sexualized misogyny, directed against all women, has obstructed efforts to develop defensible doctrines governing admission of "me-too" evidence from women other than the plaintiff, which exponentially improve the chances of success by a harassment plaintiff. The law disfavors but does not wholly disallow evidence of prior bad acts, and such evidence has been increasingly allowed in the past ten years under a variety of theories. In response, defendants have recently begun to produce rebuttal witnesses who testify to the defendant's respectful treatment of women. A strong misogyny theory that treats sexual harassment merely as a specific manifestation of more generalized misogyny cannot justify the exclusion of

malignancy of rapists' motives. Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harvard Law Review 563 (1997).

⁵ Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

⁶ Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998).

defendant me-too evidence, since it has tremendous difficulty explaining why a man would single out some women while leaving others alone.

As a purely legal matter, these issues might be handled by carefully targeted doctrinal arguments. Even judges, however, are influenced by narratives. Moreover, public reaction to the #MeToo movement suggests that the misogyny model may be engendering a worrisome backlash. Some of this may be dismissed as the inevitable opposition that reform movements always encounter, but some concerns seem legitimate. The double standard and traditional legal doctrine focused almost entirely on the blameworthiness of the victim's conduct. Misogyny theory turns the tables too completely, assimilating all sexual harm to the paradigm of rape, a crime of the most profound blameworthiness. Though it effectively blocks attacks on victims, it encourages a moralizing stance towards the conduct of even those defendants whose behavior, though an appropriate basis for legal liability, falls far short of rape. And moral opprobrium in excess of what is warranted erodes public support and invites resistance.

The history of the law of sexual harm suggests that narratives matter, and new narratives are needed. In highly charged areas of law, judges will have difficulty applying doctrines without support from a moral framework that makes sense to them and fits the facts of the case before them. If #MeToo is to usher in a new phase of sex law reform, it must construct new and more nuanced narratives of sexual harm that go beyond misogyny and sexual autonomy.

One central priority is the development of a narrative about what situations are sufficiently coercive to require state supervision through legal intervention. Past waves of legal reform have had great success in passing laws that single out statuses and contexts that are unacceptably coercive. Liberal theorists have labored mightily to provide a more cohesive account of coercion without complete success.⁷ If the ball cannot be moved on theory, perhaps at least more compelling stories can be constructed.

A second priority is to resurrect what the Victorians knew: most misogynists construct two kinds of girls, the pure and the sullied. Misogyny is not simply about hating women, it is about *dividing* them.

⁷ See, e.g., Kimberly Kessler Ferzan, *Consent and Coercion*, 50 Ariz. St. L.J. 951, 951–92 (2018) (proposing a “normative impairment” definition of coercion that focuses on both the “blameworthiness of the coercer” and the “involuntariness of the consenter’s choice”); Rubinfeld, *supra* note 1, at 1412 (pointing out the incomplete definition of coercion and suggesting supplementing it with consideration of whether sexual activity involved “deception”); Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 Colum. J. Gender & L. 409, 437–38, 442 (2010) (advocating for a model of sexual coercion that considers a variety of factors, i.e., economic inequality).

Finally, and perhaps most importantly, the hybrid misogyny narrative does not advance the extraordinarily challenging cause of providing a secular morality that acknowledges the emotional dangerousness of sex not only when it is casual but even more so when it is not. Sex has consequences, both for men and for women, and a society that fails to provide a moral framework for sexual behavior does so at its peril.

I. NARRATIVES MATTER

Title VII prohibits employers from adversely affecting the terms, conditions, or privileges of employment because of sex.⁸ A sexual harassment complainant must allege and prove behavior that caused harm to the terms or conditions of employment; was attributable to the employer; and had a causal nexus to her sex. In practice, the theory of harm has proven to be the most important of these elements and exerts a kind of halo effect on the theoretically distinct elements of causation, agency, and proof. Courts that find harm seem willing to stretch to find other elements satisfied. Courts that find no harm seem to set impossibly high standards for other elements.

Sexual harm is unavoidably viewed against the background of views about sexuality and relationships between men and women. Over the last two centuries a series of legal efforts have attempted to control sexual harms,⁹ each responding to the dominant moral framework of its time with a narrative on the nature and causes of these harms.

The overwhelming majority of human societies have imposed a double standard on the sexual behavior of males and females, with males invariably the beneficiary of the more permissive norm.¹⁰ Nonetheless, the degree of inequity as well as numerous other details of the double standard has varied widely among societies. For present purposes, the relevant double standard is that of the Anglo-American world prior to the mid-twentieth century, to which I refer as traditional, although it is not in all respects a universal tradition.

Traditional Anglo-American sexual mores reflect a tension between two perspectives, the Christian and that of popular mores. Both were united in assigning importance to the regulation of sexual behavior but they differed in their demands on men's self-control and in turn in the

⁸ Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a) (1964).

⁹ I speak in this article primarily of sexual harms to women. This focus is not to minimize the importance of protections against sexual harms to others, including men and gender nonconformists. However, the relation of these to harms to women is complex and beyond the scope of this article.

¹⁰ Gwen J. Broude, *Extramarital Sex Norms in Cross-Cultural Perspective*, 3 BEHAVIOR SCIENCE RESEARCH 181, 182 (1980).

burdens they placed on women. Christianity rejected the double standard, preaching chastity, in the sense of abstinence from non-marital sex, for both men and women. Social norms likewise restricted female sexuality to marriage but leant strongly towards the double standard. Men were expected, permitted, and encouraged to pursue with vigor every opportunity for sexual activity, while women were correspondingly expected to resist these efforts.¹¹ In the public's mind, this double standard was simply an entitlement of masculinity,¹² while intellectual and religious perspectives generally saw sexual restraint as a requisite of family stability.¹³

The balance between Christianity and the double standard vacillated over the years, but before the Victorian era the double standard dominated both public opinion and the law. Males were assigned virtually no responsibility for controlling their own sexuality, and social norms accepted the existence of a class of vilified prostitutes¹⁴ to satisfy male lust in order to protect the virtue of good women. The burden was placed on individual women to demonstrate that they belonged to the protected class of ladies rather than among the fallen.

Sex law reflected the tensions between these frameworks. Under the influence of Christianity, traditional Anglo-American law nominally placed stringent limits on sexual activity by both sexes, prohibiting fornication, adultery, bigamy, and contraception. However, these laws operated more harshly against women than men both by their terms and by custom.¹⁵ Other laws forthrightly buttressed the double standard and protected the right of males, especially wealthy ones, to wide sexual access to females. Laws against prostitution fell far more harshly on sex workers than on their clients.¹⁶ For hundreds of years, the Anglo-American age of consent was ten or twelve.¹⁷

¹¹ See generally Keith Thomas, *The Double Standard*, 20 J. OF THE HIST. OF IDEAS 195 (Apr. 1959) (examining the evolution of the double standard).

¹² *Id.*

¹³ At a minimum, female chastity was needed to ensure certainty of paternity, a condition of inducing men to care for their children. DAVID HUME, A TREATISE OF ON HUMAN NATURE 331–32 (T.H. Green & T.H. Grose eds., Longmans, Green & Co. 1874) (1738). Hume, who is sometimes regarded as a protofeminist, seems to have regarded the double standard as necessary but unfair.

¹⁴ The choice between the terms “prostitute” and “sex worker” is a difficult one. The former carries strong and undesirable connotations of disgrace and moral blame, and to avoid these some Victorian reformers substituted the term Magdalenism. However, the generally preferable “sex worker” is anachronistic in contexts that describe the attitudes of earlier periods. My choice of terminology reflects this tradeoff.

¹⁵ Adultery, for example, was typically grounds for divorce for the wronged husband but not the wronged wife, and in some circles the failure of a married man to keep a mistress was regarded as unmanly. Thomas, *supra* note 11, at 195, 199.

¹⁶ *Id.* at 198.

¹⁷ MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920 (University of North Carolina Press, 2d ed.

The law of rape reflected the wholly male concerns that women were inclined to make false charges of rape that were hard to rebut.¹⁸ The core definition of rape was sexual intercourse that was both forcible and without consent.¹⁹ Victims were, as is well known, required to resist strenuously, often to the utmost, a condition not always met even in instances of submission to credible threats of deadly force.²⁰ Many jurisdictions imposed further requirements unique to rape cases: immediate complaints; eyewitnesses or physical evidence; and cautionary instructions to the jury.²¹ The victim's prior behavior, both sexual and otherwise, was open to virtually every possible type of prejudicial questioning at trial.²²

The balance began to shift with the Victorians, who stressed the critical role that women played in the social order. The image of the angel in the house²³ whose domestic virtues civilized men²⁴ has been much mocked by later feminists as a cult of domesticity that fetishized female submissiveness. Compared with what came decades later, these early forms of separate spheres ideology had elements that were cramped and confining. Compared, however, with what came before, its vision of women's moral superiority was a radical step toward improving the status of women. Nineteenth century reformers such as Frances Willard, Josephine Butler and Jane Addams broadened the notion of woman's sphere to include public reform efforts, to which Addams referred as "public housekeeping."²⁵ These reformers argued passionately for a single standard of sexual behavior:

[N]umbers even of moral and religious people have permitted themselves to accept and condone in man what is fiercely condemned in woman. And do you see the logical necessity in this? It is that a large section of female society has to be told off—set aside, so to speak, to minister to the irregularities of the excusable man. That section is doomed to death, hurled to despair; while another section of womanhood is kept strictly and almost forcibly guarded in domestic purity. . . . [P]ublic opinion [must],

1995).

¹⁸ SCHULHOFER, *supra* note 1, 1917 (1988).

¹⁹ *Id.* at 18.

²⁰ *Id.* at 18–20.

²¹ *Id.* at 18–19.

²² Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 13–18 (Jan. 1977).

²³ COVENTRY PATMORE, *THE ANGEL IN THE HOUSE* (1854).

²⁴ John Ruskin, *Of Queens' Gardens*, in *SESAME AND LILIES* (H. Bloom ed. 1983) (1910).

²⁵ JANE ADDAMS, *WOMEN AND PUBLIC HOUSEKEEPING* (1910). In this view, virtually all of domestic policy, in the sense of non-foreign policy, was in fact domestic, in the sense of women's work.

both in theory and practice, . . . shall recognize the fundamental truth that the essence of right and wrong is in no way dependent upon sex, and shall demand of men precisely the same chastity as it demands of women.²⁶

These thinkers were the first to see the link between sexual and economic oppression. Women's rights activists condemned wealthy men who regarded access to working women as a class privilege. The continuum between the exploitation intrinsic to prostitution and the sexual exploitation of women outside sex work was widely noted and understood as the result of an economic system that denied women access to economic opportunities.²⁷

A movement to reform sex law was an important part of the agenda of the first-wave women's movement. The durability of the traditional doctrine of consent made the generally applicable law of rape impervious to these Victorian efforts: if consent could be contested at trial, prosecution was seldom possible. Reformers therefore targeted a narrower set of cases, combining their larger narrative attacking sexual exploitation with carefully crafted legal arguments applicable to particular contexts in which consent could be said to be wanting as a matter of law.

A central achievement was the expansion of the law of statutory rape.²⁸ Between 1885 and 1920, all US states raised the age of consent from between seven and twelve to between sixteen and eighteen.²⁹ Though situating this campaign in the context of larger moral issues, reformers repeatedly stressed a central inconsistency in the legal system's treatment of youth and incapacity. Boys and young men were protected until age twenty-one from an imprudent decision to enter even a trivial contract, while a girl over the age of ten who had even coerced

²⁶ Butler, *supra* note 2, at 172-74. Jane Larson observed that these reformers "saw sexuality as a vehicle of power that in complex ways kept women subordinated in society. In response, they created a vigorous sexual politics that challenged not just private, but also public power. Ultimately, they questioned the state's conferral of privilege in law of male sexual interests to the detriment of women and girls; they thus exposed the state's complicity in what otherwise appeared to be wholly private acts of sexual oppression." Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE L.J. & HUMAN. 1, 4 (1997).

²⁷ *Id.* at 27; Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 12-13 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004); Emma Goldman, *The Traffic in Women*, in ANARCHISM AND OTHER ESSAYS 177 (1910).

²⁸ Suffrage is often seen as the first step in the emancipation of women when it was in fact as much the culmination of a broad variety of reform efforts undertaken by a women's movement comprised of coalition of diverse views. Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & THE HUMAN. 1, 3 (1997) ("[F]eminism, evangelism, maternalism, domesticity, and moral reform . . . energized the mainstream of the woman movement."). See also SHEILA JEFFREYS, *THE SPINSTER AND HER ENEMIES: FEMINISM AND SEXUALITY 1880-1930* chs. 3-4 (London: Pandora, 1985).

²⁹ ODEM, *supra* note 17, at 37.

sex was forced to bear life-altering consequences, such as pregnancy and unmarriagability, without legal protection.³⁰

A second and more complex set of legal protections consisted of civil and criminal actions for seduction. The early civil actions were compromised by patriarchal attitudes, since only the victim's male guardian had standing to sue, but over time both the defensibility and the efficacy of these laws increased as women obtained the right to represent themselves.³¹ Seduction theories were somewhat varied in their requirements, but many were dependent on the existence of misrepresentation. Thus, like statutory rape law, they could be defended as consistent with the rules governing non-sexual offenses. Relatively few doctrines specifically addressed the coercive nature of the workplace, but most in practice developed into a tool that protected young working women, and one interesting Missouri statute criminalized sexual relations between employers and young women employed in domestic service.³² Women's rights groups pressed for the passage of criminal seduction laws,³³ which were widespread by the late nineteenth century, though later repealed for supposedly exposing men to female exploitation.³⁴

The last cohort of first-wave feminists in the early twentieth century placed more emphasis than their predecessors on sexual freedom, advocating a range of views from the mildly permissive³⁵ to the radical support of free love.³⁶ After the passage in 1920 of the Nineteenth Amendment, feminism entered a quiescent period, but public sexual norms gradually relaxed, in part because of improvements in the quality and availability of reliable contraception.³⁷ A wide variety of thinkers including academics like Alfred Kinsey³⁸ and Wilhelm Reich,³⁹ the

³⁰ Larson, *supra* note 26, at 1, 8–10.

³¹ Brian Donovan, *Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-20th Century*, 30 LAW AND SOC. INQUIRY 61, 66 (2005). See generally H. W. Humble, *Seduction as a Crime*, 21 COLUM. L. REV. 144 (1921); Jane E. Larson, "Women Understand so Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction", 93 COLUM. L. REV. 374 (1993); Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996); Sara McLean, *Confided to His Care or Protection: The Late Nineteenth-Century Crime of Workplace Sexual Harassment*, 9 COLUM. J. GENDER & L. 47 (1999).

³² Mo. Rev. Stat. § 1260 (1879).

³³ Siegel, *supra* note 27, at 11–12.

³⁴ D. R. N. Blackburn, *Criminal Seduction*, 31 CENT. L.J. 44, 44–50 (1890).

³⁵ See, e.g., MARGARET SANGER, WOMEN AND THE NEW RACE 226, 229 (1920).

³⁶ Emma Goldman, *The Traffic in Women*, in ANARCHISM AND OTHER ESSAYS (1910).

³⁷ Latex was invented in 1916, greatly improving both the reliability and the experience of using barrier methods such as condoms and diaphragms. See Hallie Lieberman, *A Short History of the Condom*, JSTOR DAILY (June 8, 2017), <https://daily.jstor.org/short-history-of-the-condom/> [http://perma.cc/Q3CR-JJXP].

³⁸ ALFRED KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); ALFRED KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

³⁹ WILHELM REICH, THE SEXUAL REVOLUTION (1936).

writers of marriage manuals,⁴⁰ and public figures like Hugh Hefner⁴¹ and Helen Gurley Brown⁴² advocated increasingly permissive norms of sexual behavior. Like their Victorian-progressive predecessors, they endorsed a sex-neutral standard. However, rather than extend the obligation of chastity to men, they hoped to provide women with the sexual freedoms traditionally reserved to males. Their perspective, now referred to as the sexual autonomy model, made fundamental the right of all individuals to decide for themselves with whom and under what circumstances to have sex.

In the late 1950s, a new wave of sex law reformers began their work, this time based on the norm of sexual autonomy. The expansion of autonomy-based rights began with reforms in the law of rape⁴³ and led to groundbreaking protections of women's right to sexual pleasure, notably in cases Constitutionally protecting access to contraception and abortion.⁴⁴ But the liberal alternative to religious sexual morality gave primacy to freedom of choice and provided no alternative narrative of sexual harm or voluntary restraint. In consequence, though women gained much needed freedom to engage in desired sex, far less progress was made in protecting them from undesired sex. Without such a narrative, the scales were inevitably tipped against doctrines that could be seen as restricting the freedom to have sex. Some progress was made in the expansion of statutory status-based offenses that involved the abuse of positions of power.⁴⁵ But the law of rape, with its focus on the victim's behavior, proved hard to reform, and the sexual double standard continued to infect the application of even revised doctrine.

The first sexual harassment cases were brought in the early 1970s and met a mixed reaction from courts. Virtually all involved the quid pro quo conduct of a supervisor who conditioned the terms of employment on the toleration of sexual advances, often quite degrading in nature. Cases rejecting liability typically expressed the same concern for

⁴⁰ See, e.g., THEODOOR HENDRIK VAN DE VELDE & MARGARET SMYTH, *IDEAL MARRIAGE, ITS PHYSIOLOGY AND TECHNIQUE* (1928).

⁴¹ See *The Playboy Philosophy*, Part I, Installments 1–7 (1962), <https://books.google.com/books?id=akprmQEACAAJ&dq=playboy+philosophy&hl=en&sa=X&ved=0ahUKEwjsnsGhlsjhAhVDXK0KHeoRARIQ6AEIKzAA> [<https://perma.cc/EZ5X-FYE4>].

⁴² See HELEN GURLEY BROWN, *SEX AND THE SINGLE GIRL* (1962).

⁴³ Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *LAW & PHIL.* 35, 92–93 (1992).

⁴⁴ Rubinfeld, *supra* note 1, at 1342.

⁴⁵ See, e.g., WASH. REV. CODE § 18.130.180(24) (1984) (prohibiting any licensed health professionals from engaging in “sexual contact with a client or patient”); Cal. Bus. & Prof. Code § 6106.9 (1993) (prohibiting sexual relationships between lawyers and clients under various circumstances); see also *Cotton v. Kambly*, 300 N.W.2d 627, 629 (Mich. App. 1981) (sexual relationship between psychiatrist and patient constitutes malpractice); *McDaniel v. Gile*, 230 Cal. App. 3d 363, 376 (1991) (describing a lawyer's threat to withhold legal services if client did not comply with sexual demand constitutes malpractice).

preserving male sexual opportunities that animated the worst aspects of rape law, and suggested that liability for even quite egregious behavior would foreclose all sexual activity in the workplace.⁴⁶ These courts seem to have concluded that the defendant caused no harm to the plaintiff beyond the inconvenience that sometimes attended normal heterosexual interaction. This skepticism about the gravity of injury spilled over into unrelated elements of the cause of action: these cases found that plaintiffs had failed to prove not only the elements of harm but causation and agency liability.

Those early courts that accepted sexual harassment as a ground of recovery appear to have done so from a different perspective on the calculus of harm. They did not assess the *sexual* harm to women as more serious but rather saw the problem of *economic* discrimination as of greater importance. Their conception of injury evidently colored their analysis of the superficially unrelated requirements of causation and agency, which they were more likely to find satisfied.⁴⁷ But even these courts imposed a requirement of tangible economic harm or at least the explicit threat of such harm. Abusive sexual behavior by supervisors without explicit threat or actual retaliation was without remedy. Sexual autonomy theory could, on a purely theoretical level and with some struggle, justify legal recognition of highly limited claims of sexual harassment, but it could not help judges see cases through the eyes of victims. Its sex-neutral picture of equal sexual agency focused primary on increasing freedom, leaving too many wondering why the work environment transformed sexual behavior that was acceptable in most spheres into a legal harm.

⁴⁶ *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) ("If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400."); *Miller v. Bank of America*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) ("It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group"); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) ("[A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.").

⁴⁷ See *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (explaining that the Restatement imposes a narrow test for vicarious liability—"The tort must be one accomplished by an instrumentality, or through conduct associated with the agency status"); *Williams v. Saxbe*, 413 F. Supp. 654, 656-61 (D.D.C. 1976).

The watershed change in the law of sexual harm began in 1975. In *Against Our Will*, Susan Brownmiller argued that men did not rape because they wanted sex, but rather used rape as a means to humiliate and subordinate women.⁴⁸ Indeed, much or even all of what passed for consensual sex was in fact subtly disguised rape, a tool of oppression rather than an expression of desire. The new paradigm in rape law laid the ground work for Catherine MacKinnon to refocus the sexual harassment debate from formal equality to the power structures underlying sex at work. Her 1979 landmark book, *Sexual Harassment of Working Women*, had been influential in draft form even before its publication. Her theory had two distinct components. The first concerned the victim's experience: the existence of the workplace power relationship could make otherwise non-problematic sexual behavior coercive.⁴⁹ At the same time she began to advance the thesis that Brownmiller had developed in her work on criminal rape: Men did not seek sex and incidentally dominate women. They sought sex *in order* to dominate women.⁵⁰ The inherently coercive nature of the workplace was simply a useful tool to effectuate the underlying goal of dominance. In her early work, MacKinnon focused more or less equally on the harasser's impulse to subordinate and the role of the coercive environment in the experience of the powerless. In her later work, her focus shifted to the desire to dominate, and the institutional setting became unimportant:

The uncoerced context for sexual expression becomes as elusive as the physical acts [of sexuality and violence] come to feel indistinguishable. . . . [R]ape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.⁵¹

From this perspective, the coercive nature of the workplace was almost irrelevant, since harm resulted from the fact that men's motives were so pernicious and their power so omnipresent.

Some feminist writers on sexual harassment accepted only elements of the dominance model, notably the view that sexual harm is motivated by misogyny. However, the greatest influence on the public narrative came from MacKinnon and her sometime co-author Andrea

⁴⁸ SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 377–78 (1975).

⁴⁹ “Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one sphere to lever benefits or impose deprivations in another.” CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1 (1979).

⁵⁰ BROWNMILLER, *supra* note 46.

⁵¹ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 174, 175 (1989).

Dworkin. MacKinnon and Dworkin did not stop simply at the observation that sexual harm *can* be the result of a defendant's urge to oppress, but argued instead that it *must* be the source of all sexual harm. Moreover, the desire to subordinate was inevitably a *generalized* desire to degrade and humiliate *all* women and such motives were pervasive in heterosexual relationships.⁵² I will call the view that both of these hypotheses are true the strong misogyny narrative of sexual harm.

Dominance theories captured a fundamental truth: sexual harm can result from sexual advances motivated not by erotic desire but by dominance and misogyny. The dominance model received widespread and generally respectful public attention. The idea that dominance rather than desire motivated sexual advances in the workplace was quickly accepted by observers across the political spectrum.⁵³ It thus supplied the secular theory of harm that sexual autonomy models had failed to provide. This new narrative provided public discussion with a powerful way of rethinking sexual misconduct that was acceptable even to those who did wholly abandon the double standard. The double standard absolved men from any responsibility to control their sexual impulses—that task was left to women, who were assigned the unappealing role of sex police. But every society expects men as well as women to control their *violent* impulses, and if rape was a crime of violence its perpetrator had breached the most central of societal norms. Similarly, society expects its members to keep their nonviolent but aggressive impulses in check, so that sexual behavior short of rape is more easily seen as misconduct if motivated by hostility rather than erotic passion.

The focus on motive also placed the issue of consent in a new light. Men might argue that women desired (and consented to) sex more often than they would admit, but few were willing to claim publicly that women desired victimization. If sexual harms were the result of misogyny, the questions of consent and unwelcomeness receded in importance, since the wrong inhered in the accused's intent rather than the victim's failure to resist. By persuading the public that at least some rape cases were motivated by hatred rather than lust, the dominance thesis paved the way for crucial rape law reforms like victim shield statutes. Similarly, a focus on animus in workplace harassment blunted the impulse to ask whether the victim had encouraged the behavior at issue.

⁵² MACKINNON, *supra* note 49, at 1; ANDREA DWORKIN, *INTERCOURSE* (1987).

⁵³ Louise Thistle, *Sexual Harassment in the Workplace: A Struggle for Dominance*, SAN DIEGO UNION, Apr. 20, 1980, at 58; Karen Kirk, *Fighting Abuse at Work*, COLUMBUS DISPATCH, Oct. 10, 1980, at 46.

The dominance theory in general and MacKinnon's work in particular received widespread and generally supportive coverage in the popular press. At the same time, even sympathetic observers seldom accepted MacKinnon's general view of relations between men and women.⁵⁴ In the words of one, "what McKinnon represents is the embattled, bleak, martyred side of feminism . . . [H]er view is so narrow and her attitude so wound-licking that we tend to get awfully weary of her version of "unmodified feminism" early on."⁵⁵ Her dark picture of sex between men and women was often criticized as a step backwards for women's efforts to achieve sexual pleasure on the same terms as men.⁵⁶ Public opinion thus accepted a circumscribed version of dominance theory, which was understood to describe the conduct and motives of a subset of men, and this picture was helicopter dropped into the otherwise prevailing model of sexual autonomy. The next section examines how this ambivalent acceptance of the misogyny model played out in the case law.

II. SUPERVISORS, COERCION AND HOSTILITY: THE WRONG TURN

The idea that sexual misconduct is about power rather than sex is compelling and easily understood, and it is now a commonplace of public discussion. This simple thesis did nothing short of revolutionize sex law. But its simplicity obscured several very real complexities, such as the possibility of harm without misogyny and the relevance of coercion to alternative conceptions of harm. To further complicate matters, few academics, much less the courts and the public, accept the strong misogyny model in its entirety, and the sexual autonomy model remains important. Examining the evolution of the core doctrines of sexual harassment reveals how the new narrative developed an awkward combination of autonomy and misogyny principles. The resulting hybrid misogyny model recognized sexual harassment in theory while providing little relief in practice.

By the end of the 1970s, courts had come to accept as a form of sex discrimination the explicit conditioning of job benefits on toleration of sexual conduct. Title VII's prohibition of this scenario was put on a sound doctrinal footing by *Barnes v. Costle*,⁵⁷ which stressed the critical

⁵⁴ Patricia Holt, *MacKinnon's Feminist View: Embattled and Unmodified*, SAN FRANCISCO CHRONICLE, July 2, 1987, at 70.

⁵⁵ *Id.*

⁵⁶ See, e.g., Jerry Barnett, *Is Anti-Sex Feminism a Step Backwards for Women's Rights?*, FWSA BLOG (Dec. 6, 2013), <http://fwsablog.org.uk/2013/12/06/is-anti-sex-feminism-a-step-backwards-for-womens-rights/> [<https://perma.cc/DSA9-MGYG>].

⁵⁷ 561 F.2d 983 (D.C. Cir. 1977).

role of but-for causation. Discrimination occurred because the plaintiff would not have suffered the disadvantageous outcome but for her sex.⁵⁸

After *Barnes*, the next critical question was the proper treatment of cases without an explicit quid pro quo that caused tangible economic injury. In *Sexual Harassment of Working Women*, MacKinnon had proposed a model of non-quid pro quo cases⁵⁹ which she later called environmental harassment and described as “sexual insult and aggression.”⁶⁰ MacKinnon did not entirely ignore the issue of coercion in environmental discrimination, but she identified as the coercive element not the supervisory relationship, but women’s generally poor labor market prospects.⁶¹ In 1980,⁶² the EEOC issued Guidelines that followed MacKinnon’s distinction, defining sexual harassment as unwelcome sexual conduct that either contained a quid pro quo, whether implicit or explicit,⁶³ or that had “the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁶⁴

A number of lower courts soon adopted hostile-environment theory, and the Supreme Court endorsed it in the 1986 case *Meritor Savings Bank v. Vinson*,⁶⁵ in which the plaintiff’s legal team included MacKinnon.⁶⁶ The plaintiff, Mechelle Vinson, testified that she had been intimidated into a sexual relationship with her supervisor, Sidney Taylor, that had included rape. However, there had been no concrete retaliation or explicit threat of such,⁶⁷ and the defendant argued that lack of economic injury precluded liability.

⁵⁸ *Id.* at 990. The critical role of but-for causation has since been reaffirmed by the Supreme Court in *Oncale*, 118 S. Ct. at 1002.

⁵⁹ MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 49, at Ch. 3–4.

⁶⁰ Brief of Respondent, at 30, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), 1986 U.S. S. Ct. Briefs LEXIS 102.

⁶¹ MACKINNON, *supra* note 49, at 40–41.

⁶² Intent to Conduct Public Scoping Meeting in Compliance with the National Environmental Policy Act, 45 Fed. Reg. 74, 676 (1980).

⁶³ “Harassment on the basis of sex is a violation of section 703 of title VII. □ Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . .” 29 C.F.R. § 1604.11 (1980).

⁶⁴ *Id.*

⁶⁵ 477 U.S. 57 (1986).

⁶⁶ Brief of Respondent, *supra* note 60, at 1.

⁶⁷ In particular, Vinson claimed that shortly after she was hired, Taylor:

invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and

The central holding of *Meritor* is that discrimination with respect to the terms and privileges of employment includes not only “tangible loss” of “economic character,” but also “psychological aspects of workplace environment.” The Court’s opinion, however, goes further than this by following the plaintiff’s brief, adopting the misogyny model’s emphasis on motive, and changing the narrative of workplace sex. Where unsympathetic courts had seen sex, the *Meritor* Court saw sexual abuse: “Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”⁶⁸ If defendants were motivated by the desire to abuse rather than the desire for sex, their needs no longer deserved weight in the social calculus, and thus the scope of liability could be enlarged.

Meritor and subsequent cases reflected the emerging understanding that sexual advances can be sex discrimination, but they did so by a route that embodies several troublesome premises. First, they suggested that an abusive motive is a key element of the cause of action, in stark contrast to non-sexual Title VII doctrine, in which only but-for causation rather than hostility is required. Second, the animus-based theory of harm seriously deprecates the importance, from the employee’s perspective, of supervisory authority. *Quid pro quo* doctrine is based on the significance of the power relationship, and the *Meritor* Court might have chosen to expand existing *quid pro quo* doctrine, as the EEOC Guidelines suggested, to acknowledge the *implicitly* coercive nature of any supervisory relationship.⁶⁹ Vinson testified that she reluctantly acquiesced to Taylor’s demands and did not report him for fear of losing her job: had Taylor been a coworker instead of a supervisor, Vinson would have been far more likely to resist. Instead the Court chose to apply hostile environment doctrine, which focuses not on the context but on “hostile” motivation of the harasser.

The Court solidified the doctrinal emphasis on the defendant’s motivation in *Harris v. Forklift*, which held that to be actionable under

after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

Vinson, 477 U.S. at 60.

⁶⁸ *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

⁶⁹ For criticism of this approach see Lynn T. Dickinson, *Quid Pro Quo Sexual Harassment: A New Standard*, 2 WM. & MARY J. WOMEN & L. 107 (1995); Marlissa Vinciguerra, Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1718–19 (1989).

hostile environment theory, an environment must be one “that a reasonable person would find hostile or abusive.”⁷⁰ The court imposed a totality of the circumstances test whose four factors made no reference, direct or indirect, to the existence of supervisory authority.⁷¹ Hostile work environment theory thus applied in an identical fashion to the behavior of coworker and supervisors, and the special role of the supervisory relationship was limited to cases of explicit quid pro quo. This was a striking shift, since even earlier courts that rejected liability were remarkably candid in noting the coercive nature of the supervisory relationship.⁷²

This sole focus on the motives of the harasser, to the exclusion of circumstantial factors creating coercion, might have had done little harm to future plaintiffs had the Court accepted the strong misogyny model’s view that malign motives were pervasive. But the Court, like most Americans, rejected this view and repeatedly indicated that it did not intend to provide recovery for all sexualized behavior⁷³ or even some mildly offensive behavior.⁷⁴ In effect the Court adopted a sexual autonomy model that permitted adults to engage in sexually tinged conduct as long as that behavior was kept within an acceptable range.

This doctrinal narrative, which probably tracked public sentiment as well, might thus be called a hybrid misogyny model. It took one key principle from the strong misogyny narrative: *all* sexual harm resulted from the desire to degrade and exert power over *all* women. At the same time, it assumed that respect was the norm in sexual relations between men and women. Thus, the judicial narrative distinguished two types of men. Good men, the majority, conformed to the norms of the sexual autonomy model and its consent-based morality. Only a relatively small

⁷⁰ *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993).

⁷¹ 1) the frequency of the discriminatory conduct, 2) its severity, 3) whether it is physically threatening or humiliating or a mere offensive utterance; and 4) whether it unreasonably interferes with an employee’s work performance. *Harris*, 510 U.S. at 23.

⁷² “The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience. . . . [P]laintiff’s theory rests on the proposition, with which this Court concurs, that the power inherent in a position of authority is necessarily coercive. . . . Any subordinate knows that the boss is the boss whether a file folder or a dinner is at issue. . . . If the plaintiff’s view were to prevail. . . . An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time.” *Tomkins*, 422 F. Supp. at 557.

⁷³ Harassment does not include “ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation.” *Oncale*, 118 S. Ct. at 1003.

⁷⁴ “This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, “mere utterance of an . . . epithet which engenders offensive feelings in an employee,” *ibid* . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” *Harris*, 510 U.S. at 21.

group of bad men were motivated by animosity towards women, and it was this group only with whom the law was concerned. The malign motives of these bad actors were the source of sexual harm, without regard to contextual factors creating coercion.

The problems of the hybrid model can be seen when the current standard is applied to specific facts. In *Baskerville v. Culligan Int'l Co.*,⁷⁵ the plaintiff, Valerie Baskerville, had been subjected to a constant stream of sexual speech and indications of sexual interest by her supervisor, Michael Hall.⁷⁶ For example, at one point, he told her that “his wife had told him he had ‘better clean up my act’ and ‘better think of you as Ms. Anita Hill.’”⁷⁷ On another occasion, the announcement “May I have your attention, please” was broadcast over the public address system. Hall stopped at Baskerville’s desk and said, “You know what that means, don’t you? All pretty girls run around naked.”⁷⁸

The Seventh Circuit, in an opinion by Judge Posner, took the unusual step of overturning a jury verdict for plaintiff.⁷⁹ It reasoned that the defendant was “not a sexual harasser” but merely “not a man of refinement” and “a man whose sense of humor took final shape in adolescence.”⁸⁰ Moreover, Posner stated, “[t]he comment about Anita Hill was the opposite of solicitation, the implication being that he would get into trouble if he didn’t keep his distance.”⁸¹ Noting that context might change the effect of the remarks, the opinion nonetheless concludes “there is no suggestion of any other contextual feature of their conversations that might make [the defendant] a harasser.”⁸² Commenting that Hall “never said anything to her that could not be repeated on primetime television,”⁸³ Posner concluded, “only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the defendant’s] patter substantially . . . distressing.”⁸⁴

In some sense, Posner was correct. The defendant was not clearly a misogynist and quite possibly simply an immature and silly man. But this fact does not deserve the importance he gives it unless existing hostile environment doctrine adds to Title VII a requirement of animus

⁷⁵ 50 F.3d 428 (7th Cir. 1995).

⁷⁶ *Id.* at 430.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 431.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

that has been rejected in other contexts.⁸⁵ What should have been critical was whether the conduct would not have been directed to her but for her sex (and it clearly would not have been) and whether she suffered harm sufficient to trigger Title VII. The latter question can only be answered the context of the fact that Hall was Baskerville's supervisor and that the comments were explicitly directed to her—*she was not watching a TV show*. Most women, I will venture, find the behavior of Michael Scott in *The Office* hilarious rather than offensive, in part because the show mocks rather than condones his behavior.⁸⁶ The same behavior by an actual supervisor would provoke a very different reaction. Hall in effect told Baskerville that he might have propositioned her had it not been for his wife's warning, a comment that would have been unsettling even in a social setting and was downright scary coming from a supervisor. Posner argued that Hall's implication that he would not harass Baskerville eliminated any sexual threat from the situation. How far would Posner take this reasoning: would he be similarly dismissive of the statement "I've fantasized about forcing myself on you, but don't worry, I won't"? The opinion is all the more remarkable because Posner has elsewhere shown great insight into the humiliating nature of similar interactions.⁸⁷

Baskerville illustrates the pitfalls of emphasizing motive but might be dismissed as a singular opinion. The next Section considers three areas in which the problem of the strong misogyny theory have or are threatening to create broader doctrinal problems.

III. THREE DOCTRINAL PROBLEMS

A. Agency Liability

The Supreme Court missed another opportunity to draw a bright line between supervisor and coworker harassment when it considered the rules governing employer liability. Greater liability for supervisor than coworker conduct would not have erased the problems caused by *Meritor*, but it would have focused employer attention on the main problem. Instead, the court chose blur further the boundaries between supervisory and coworker conduct in the twin 1998 cases of *Burlington*

⁸⁵ Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 501 (2001) ("For years, it has (or should have) been clear that discriminatory intent or motive is not coextensive with hostile animus").

⁸⁶ My personal favorite is the *Sexual Harassment* episode. *The Office US: Sexual Harassment* (NBC television broadcast Sept. 27, 2005), part of which can be seen at, *Michael Scott Fights Corporate – The Office US*, YOUTUBE (Jan. 30, 2015), <https://www.youtube.com/watch?v=DX5G47mhM28> [<https://perma.cc/8RHA-HLGL>].

⁸⁷ See generally *Baskerville*, 50 F.3d 428.

*Industries, Inc. v. Ellerth*⁸⁸ (Kennedy) and *Faragher v. City of Boca Raton*⁸⁹ (Souter).

Justice Kennedy's *Burlington* opinion began well, rejecting the use of the categories quid pro quo and hostile work environment in determining vicarious liability, holding that courts should instead look to agency law and the purpose of Title VII.⁹⁰ Agency law, as summarized in the Restatement (Second) of Agency § 219, provides strict employer liability for the acts of employees "committed while acting in the scope of their employment."⁹¹ Although the question was somewhat closer than the opinion suggested,⁹² the Court was not clearly wrong in holding that sexual harassment by a supervisor was not conduct within the scope of employment.

The opinion then examined the distinction between coworker and supervisor conduct under the Restatement's provision for liability when the employee "was aided in accomplishing" the wrongdoing by the existence of agency relation, even where the acts were outside the scope of employment.⁹³ The opinion noted that a generous interpretation of this rule would imply strict liability for all coworker harassment and declined to adopt this view, noting that neither the EEOC nor other courts had advocated this approach.⁹⁴ The Court acknowledged that supervisors who take tangible employment actions are more clearly aided by the agency relationship than are coworkers: "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character."⁹⁵ The Court declined, however, to find that all harassing supervisors were "aided" by the supervisory relationship on the grounds that "there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference."⁹⁶

⁸⁸ 524 U.S. 742 (1998).

⁸⁹ 524 U.S. 775 (1998).

⁹⁰ *Burlington*, 524 U.S. at 751–53.

⁹¹ RESTATEMENT (SECOND) OF AGENCY § 219(1).

⁹² The Restatement is not entirely consistent in its definition of scope of employment, at one point appearing to require that action be motivated in part by a desire to serve the master (§ 228) and at another simply that it be authorized or incidental to authorized conduct (§ 229). *Id.* §§ 228–29. Some employers seemed to regard sexual access to subordinates as a perquisite of status. JULIE BEREBITSKY, *SEX AND THE OFFICE: A HISTORY OF GENDER, POWER, AND DESIRE* 144 (2012). At such employers, harassment might be said to be authorized.

⁹³ *Burlington*, 524 U.S. at 758–59.

⁹⁴ *Id.* at 760.

⁹⁵ *Id.* at 763.

⁹⁶ *Id.*

The Court concluded that agency law was insufficiently clear to provide a rule governing the proper scope of employer liability, and instead looked to the policies underlying Title VII.⁹⁷ It stated that the central such policy was conciliation and the avoidance of lawsuits,⁹⁸ and therefore imposed a kind of negligence standard in cases in which a supervisor had not taken tangible job action.⁹⁹ Employers would not be liable if (i) they exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (ii) the plaintiff-employee unreasonably failed to take advantage of any preventive mechanisms the employer provided.¹⁰⁰

These agency rules have proven nothing short of catastrophic for sexual harassment victims. Survey evidence shows that victims believe that their reports will be at best ignored and will more likely subject them to retaliation.¹⁰¹ One study found that more than 75% of complainants encountered retaliation.¹⁰² Victims are caught in a double bind. Even short delays in reporting will be found unreasonable, providing the employer with a complete defense.¹⁰³ However, employees forfeit Title VII's provisions against retaliation if they make complaints of sexual

⁹⁷ *Id.* at 763–64.

⁹⁸ “For example, Title VII is designed to encourage the creation of antiharassment [sic] policies and effective grievance mechanisms. Were employer liability to depend in part on an employer’s effort to create such procedures, it would effect [sic] Congress’ intention to promote conciliation rather than litigation in the Title VII context.” *Id.* at 764.

⁹⁹ *Id.* at 765.

¹⁰⁰ *Id.*

¹⁰¹ 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, 127 (1995) (60% of non-reporters believed they would be blamed for the incident if they made a formal complaint; 60% believed complaints would be ineffective because nothing would be done); Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127 (2007); 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, 1290–92 (2001).

¹⁰² Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003).

¹⁰³ *See Jackson v. Arkansas Dep’t of Educ., Vocational & Technical Div.*, 272 F.3d 1020, 1026 (8th Cir. 2001) (finding nine-month delay in reporting sexual harassment to be unreasonable); *Shaba v. IntraAction Corp.*, No. 02 C 5173, 2004 U.S. Dist. LEXIS 78, at *16 (N.D. Ill. Jan. 5, 2004) (finding two-month delay in reporting sexually harassing conduct of supervisor—during which time employee recorded events in a log and talked to coworkers about the harassment—to be unreasonable); *Dedner v. Oklahoma*, 42 F. Supp. 2d 1254, 1260 (E.D. Okla. 1999) (finding three-month delay in reporting sexual harassment by supervisor, who had previously been fired for sexually harassing behavior and then reinstated, to be unreasonable); *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029 (E.D. Mo. 2000) (holding that plaintiff’s delay in reporting for three months after the first incident made her behavior unreasonable, even though she reported once behavior escalated); *Kohler v. Inter-Tel Tech.*, No. C98-0378, 1999 U.S. Dist. LEXIS 5425, at *15–16 (N.D. Cal. Apr. 13, 1999) (finding that employees who do not report are almost always found to have acted unreasonably).

harassment before the conduct rises to a level at which it becomes actionable.¹⁰⁴ Courts have insisted on prompt reporting of incidents even when the employer has actual notice of egregious public conduct prior to formal reporting.¹⁰⁵ Although courts typically impose stringent timeliness requirements on plaintiffs, they are tolerant of significant delays in response by defendants.¹⁰⁶ Courts generally reject employee claims that they failed to report because of concerns about futility or retaliation,¹⁰⁷ even when these concerns can be substantiated¹⁰⁸ or even when a direct threat has been made.¹⁰⁹

The *Burlington/Faragher* rule thus places a burden on sexual harassment plaintiffs utterly unlike any other in Title VII jurisprudence. Title VII's policy of conciliation is, as a general matter, implemented by requiring plaintiffs to file a complaint with the EEOC and to attempt to reach an administrative settlement before going to court. *Burlington/Faragher* inexplicably adds a new layer to this process, one which is extremely prejudicial to victims. The employer-procedures defense encourages employers to devise a reporting system that satisfies the courts but discourages complaints.¹¹⁰ It is hard to think of any other area of law in which potential plaintiffs are required to report their concerns and lay out their entire case to a potentially adverse party without the benefit of a neutral intermediary.

At the time of *Burlington/Faragher*, the Court was far from unsympathetic to sexual harassment complainants. How could it have created such a mess? The misogyny narrative encouraged it to view harassment as an offense of moral turpitude, approaching rape in its seriousness. Had the Court taken this further, adopting a strong misogyny perspective, it would have regarded harassment as part of a larger

¹⁰⁴ Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270–71 (2001) (per curiam).

¹⁰⁵ Conatzer v. Med. Prof'l. Bldg. Serv., Inc., 255 F. Supp. 2d 1259, 1264–71 (N.D. Okla. 2003) (Plaintiff's supervisor rubbed against the side of plaintiff's chest on Sept. 28 and then placed her head in a headlock between his knees on October 11 or 12. On October 15, the plaintiff made a formal complaint under the employer's sexual harassment policy. Even though the first incident occurred in front of another supervisor, the district court held that the employer's failure to take any action until after the plaintiff made a formal complaint to be reasonable, because that single incident did not give the employer notice of the existence of a hostile environment requiring correction. However, the district court concluded that plaintiff's failure to make a formal report immediately after that incident, despite a formal incident 3–4 days after the second incident, constituted an unreasonable failure to take advantage of preventative or corrective opportunities provided by the employer).

¹⁰⁶ Anderson v. Leigh, No. 98 C 50169, 2000 U.S. Dist. LEXIS 1584, at *17–19 (N.D. Ill. Feb. 10, 2000).

¹⁰⁷ *Id.* at *3–4, *22.

¹⁰⁸ Childress v. PetsMart, Inc., 104 F. Supp. 2d 705, 707–09 (W.D. Tex. 2000).

¹⁰⁹ Sconce v. Tandy Corp., 9 F. Supp. 2d 773, 775–76 (W.D. Ky 1998).

¹¹⁰ See Sherwyn, *supra* note 101.

system of pervasive oppression, and would never have entrusted employers and their agents with the job of protecting women from harassment. But the Court, like the public, rejected the strong dominance theory in favor of a dichotomized picture of a few bad apples in a barrel of good actors. This hybrid view provided no way of thinking about the complex problems that result not from misogyny but from the combination of power imbalance and economic self-interest. Sexual harassment persists because of the misconduct of a few but just as much from the inaction of others. Supervisors are almost by definition more valued by an organization than those they supervise. An employer may fail to act against a supervisor not because it condones his actions but simply because intervention is more costly than looking the other way.

B. Disappointed Affections

Genuine and lasting love can arise at work.¹¹¹ Public opinion seems solidly supportive of office romance: one survey found that only 4% believe that work relationships are wrong under all circumstances.¹¹² Indeed, between a third and a half of respondents report having had sexual or romantic involvement at work.¹¹³ Yet surveys also suggest that attraction and relationships between supervisor and subordinate can

¹¹¹ Good data on sex and love at work is surprisingly hard to find. Most surveys that directly examine the topic appear to be done by commercial vendors of human resource related services such as Vault and CareerBuilder. The sample sizes are typically under 1000, which is problematic for phenomena that might well vary widely among sectors and regions. Academic studies on larger samples that consider adjacent topics, such as marital happiness, sometimes shed light on office relationships. Taken together, this body of research, however incomplete, does seem to provide relatively consistent results, at least as to the order of magnitude of various phenomenon. One survey found that 31 percent of workers who started dating at work eventually married. This survey was conducted online by The Harris Poll from November 28 and December 20, 2017 and included a representative sample of 809 full-time workers across industries and company sizes in the U.S. private sector. Rachel Nauen, *Office Romance Hits 10-Year Low, According to Career Builder's Annual Valentine's Day Survey*, CAREERBUILDER (Feb. 1, 2018), <http://press.careerbuilder.com/2018-02-01-Office-Romance-Hits-10-Year-Low-According-to-CareerBuilders-Annual-Valentine-s-Day-Survey> [<https://perma.cc/7AK8-9R4P>]. A representative sample of 19,131 individuals married between 2005 and 2012 found that 65.05% of relationships began offline and of those 21.66% began at work, implying that about 14% began at work. John T. Cacioppo et al., *Marital Satisfaction and Break-ups Differ across On-line and Off-line Meeting Venues*, 110 PROCS. NAT'L ACAD. SCI. U.S. (PNAS) 10135 (June 18, 2013). The marital satisfaction level of work relationships was somewhat lower at a significant level, though to my eye the effect size does not seem particularly large. *Id.* at 101373.

¹¹² *The 2018 Vault Office Romance Survey Results*, VAULT CAREERS (Feb. 12, 2018), <http://www.vault.com/blog/workplace-issues/2018-vault-office-romance-survey-results/> [<https://perma.cc/E44D-Z42Q>].

¹¹³ CareerBuilder surveys find over the years that between 36 and 41% of workers have ever dated a co-worker. Nauen, *supra* note 103. The Vault 2018 survey found 52% had participated in an office romance. *Id.*

be problematic even when genuinely motivated by affection. These relationships account for just under 10% of office relationships,¹¹⁴ are disproportionately dangerous,¹¹⁵ probably account for most of the 6% of workers who have left a job because a romantic relationship with someone at work went sour, and hurt women more than men.¹¹⁶ Public opinion is less approving of relationships between co-workers and subordinates, though only a minority (43%) feel that relationships between supervisors and subordinates are never appropriate.¹¹⁷ These relationships are not uncommon: 22% of workers have dated someone who was their supervisor at the time.¹¹⁸

The perils of romance in the supervisory setting are attested by the significant number of sexual harassment cases involving a defendant whose feelings about the plaintiff seem, on any reasonable interpretation, to have been sincere and respectful romantic interest. In some cases, the plaintiff had initially engaged in a consensual affair. In others the defendant's interest in the plaintiff was never reciprocated. In either situation, the plaintiff eventually rejected the defendant. At that point, the defendant began to engage in workplace behavior that was harmful to the plaintiff. Sometimes the behavior in these cases is merely wounded—such as avoidance of direct contact that led to less favorable work assignments.¹¹⁹ In other cases the behavior was more antagonistic but would not in itself have risen to the threshold needed for a hostile environment claim.

The adverse consequences of romantic rejection are illustrated by *Novak v. Waterfront Comm'n of N.Y. Harbor*.¹²⁰ The plaintiff, Shanti Novak, was a detective with the Waterfront Commission of N.Y. Harbor.¹²¹ She became romantically involved with Scott Politano at a time when both held the same rank, in different locations. Eventually the

¹¹⁴ Dana Wilkie, *Forbidden Love: Workplace-Romance Policies Now Stricter*, SHRM (Sept. 24, 2013), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/forbidden-love-workplace-romance-policies-stricter.aspx> [<https://perma.cc/4ACE-MFQC>].

¹¹⁵ James Lardner, et al., *Cupid's Cubicles: Office Romance Is Alive and Well, Despite a Barrage of Corporate Countermeasures*, U.S. NEWS & WORLD REP., Dec. 14, 1998, at 44, 47.

¹¹⁶ 9% of women have left work because of failed romance compared to 3% of men. *The 2018 Vault Office Romance Survey Results*, *supra* note 112.

¹¹⁷ *Id.*

¹¹⁸ Nauen, *supra* note 103 (finding that 27% of women reporting they have dated at work say they have dated their supervisor compared with 16% of men. The survey suggests that an additional 8% have been higher ranking people not their supervisor. 30% total—35% of women and 25% of men—have dated someone at a higher level in the organization).

¹¹⁹ *Novak v. Waterfront Comm'n of N.Y. Harbor*, 928 F. Supp. 2d 723, 731 (S.D.N.Y. 2013).

¹²⁰ *Id.* at 726.

¹²¹ *Id.*

two became live-in partners,¹²² and during this time, Politano was promoted to Lieutenant and was transferred to Novak's office, consequently becoming her supervisor.¹²³ Novak terminated her relationship with Politano shortly thereafter.¹²⁴ After her breakup with Politano, Novak was singled out for unfavorable treatment even after Politano was replaced as Novak's supervisor.¹²⁵ Novak was given unfavorable work and shift assignments; was subjected to heightened scrutiny with respect to her work and her requests for overtime pay and sick leave; was the only detective not to receive further formal detective training; was excluded from an email regarding a shooting range schedule; and was the only detective to whom newly hired detectives were not assigned, which was both humiliating and deprived her of the opportunity to learn from the new assignees, who were seasoned detectives from other agencies.¹²⁶ The situation became worse after she complained to the human resources department.¹²⁷ Politano refused to communicate with Novak and gave her orders only indirectly through detectives junior to her, and escalated minor work failings into formal written memoranda of counseling.¹²⁸ Without questioning that Novak was mistreated by Politano or that Politano's attitude affected the way other supervisors treated Novak, the court concluded that "such mistreatment, while unfair and unfortunate, does not constitute Title VII sex discrimination under existing law."¹²⁹

Faced with similar cases, other courts likewise typically reject liability in these cases, reasoning that thwarted affection rather than generalized animus towards women motivated the defendant.¹³⁰ Yet Title VII does not contain any requirement that plaintiff prove animus, but rests liability on a showing that the defendants acted "because of sex."¹³¹ In principle, the Supreme Court has applied this principle to

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 726–27.

¹²⁷ *Id.*

¹²⁸ *Id.* at 727.

¹²⁹ *Id.* at 731. The case seems somewhat confused about the elements of a hostile environment claim: "At no point during the relevant period was Novak terminated or suspended, nor did she suffer a loss of pay or other compensation, such as sick time or vacation time. Novak was never demoted or denied an opportunity for promotion, and she was never formally disciplined during her employment at the Commission." *Id.* at 727.

¹³⁰ *Kepler v. Hinsdale Township High Sch. Dist.*, 715 F. Supp. 862, 871–72 (N.D. Ill. 1989); see generally *Huebschen v. Dep't of Health and Social Servs.*, 716 F.2d 1167 (7th Cir. 1983) (Equal Protection clause applied to public employer). To be fair, the *Kepler* court acknowledged that an explicit quid pro quo ("resume sleeping with me or else") could violate Title VII, but held that even egregious retaliation based on hurt feelings could not. *Kepler*, 715 F. Supp. at 870 n.7.

¹³¹ Cary Franklin, *Discriminatory Animus, in A NATION OF WIDENING OPPORTUNITIES? THE*

sexual harassment doctrine: “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹³² A woman who is denied job opportunities because she has rejected a supervisor romantically is close to the paradigm of quid pro quo harassment. She cannot help but feel pressured to enter or resume a sexual relationship, and such situations clearly pose a serious threat to equal opportunity for women in the workplace. In practice, though, many courts have still viewed these cases through the lens of dominance doctrine, denying recovery on the grounds that the defendant’s conduct was motivated by “personal animosity” rather than sexist animus¹³³ and was thus outside of Title VII’s prohibition on altering the terms and conditions of employment because of sex.¹³⁴ The misogyny narrative in effect adds to Title VII a requirement that is absent from the statute and Supreme Court opinions.

C. Me-Too Evidence

In the extrajudicial sphere, the #MeToo movement has strikingly demonstrated the power of multiple charges against an individual to succeed where a series of isolated complaints had previously failed. At the same time, a chorus of charges invites a chorus of rebuttals. The defenders of individuals accused of misconduct, such as Brett Kavanaugh and Bill Clinton, often stress evidence that the accused has treated other women well.¹³⁵ Unfortunately, the strong misogyny theory supports the admissibility of this not-me-too evidence, which is obviously relevant to a charge of generalized animus towards women though less clearly germane to a specific charge of misconduct towards one woman.

CIVIL RIGHTS ACT AT FIFTY (Samuel Bagenstos & Ellen Katz eds., 2014).

¹³² *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

¹³³ See, e.g., *Succar v. Dade Cnty Sch. Bd.*, 229 F.3d 1343, 1345 (11th Cir. 2000) (holding that misconduct does not constitute sexual harassment if based on a “personal feud,” not gender).

¹³⁴ The only exception occurs if the supervisor engages in behavior that would, standing alone and without reference to the past rejection, constitute sexual harassment, such as explicitly conditioning better treatment at work on future romantic or sexual involvement.

¹³⁵ Kelsey Bolar, *Why His Female Law Clerks Are among Brett Kavanaugh’s Biggest Advocates*, THE DAILY SIGNAL (July 11, 2018), <https://www.dailysignal.com/2018/07/11/why-his-female-law-clerks-are-among-brett-kavanaughs-biggest-advocates/> [https://perma.cc/JYQ3-FUXP]; Gloria Steinem, *Feminists and the Clinton Question*, N.Y. TIMES (Mar. 22, 1998); Callum Borchers, *Bill Clinton’s Very Trump-Like Response to Questions about Sexual Misconduct*, WASHINGTON POST (June 4, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/06/04/bill-clintons-very-trump-like-response-to-questions-about-sexual-misconduct/> [https://perma.cc/S9GU-RT29]; USA TODAY (Jan. 12, 2018), <https://www.usatoday.com/story/life/2018/01/12/sexual-harassment-reckoning-2018-more-backlash-and-pushback/880479001/> [https://perma.cc/Z76L-7L4A]. (“Three-dozen female former Saturday Night Live employees publicly defended former SNL comic-turned Franken by declaring he never did anything to them.”)

This undesirable consequence of generalized misogyny theory has played out in the courts as well. The expression “me-too” evidence predates the #MeToo movement, and refers to evidence of discriminatory behavior, not necessarily sexual, towards an individual not a party to the suit. Its admissibility follows the general rules of evidence: although evidence of prior acts may not be introduced “for the purpose of proving action in conformity therewith,”¹³⁶ it may be offered for other purposes such as proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹³⁷ The strongest basis for the introduction of me-too evidence is generally thought to be proof of intent or motive.¹³⁸

In the 2008 *Sprint/United Mgmt. Co. v. Mendelsohn* case, the Supreme Court held that the admissibility of me-too evidence “depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case”¹³⁹ by virtue of factors such as similarities in the treatment of other employees and the plaintiff.¹⁴⁰ Lower courts have treated *Sprint* as creating a narrow exception to the presumption that prior act evidence is inadmissible, and have sometimes excluded even me-too evidence that meets the *Sprint* criteria on other grounds, finding that the probative value of such evidence is outweighed by unfair prejudice¹⁴¹ or where it poses a danger of creating a “trial within a trial.”¹⁴² One court stated that “more often than not, ‘me too’ evidence is not admitted at trial . . .”¹⁴³

In response to me-too evidence, defendants have increasingly produced rebuttal witnesses to testify to the defendant’s respectful treatment of women. In theory, the same principles guide the admissibility of me-too and not-me-too evidence. In the non-sex harassment discrimination cases, this equivalence might make sense, since me-too and not-

¹³⁶ FED. R. EVID. 404(b).

¹³⁷ FED. R. EVID. 404(b)(2).

¹³⁸ *Johnson v. United Cerebral Palsy/Spastic Children’s Found.*, 93 Cal. Rptr. 3d 198, 213 (2009); *Soza v. William Ziering, Inc.*, F035182, 2002 Cal. App. Unpub. LEXIS 6398, at *27–29 (July 11, 2002).

¹³⁹ 552 U.S. 379, 388 (2008).

¹⁴⁰ *See, e.g., Bennett v. Nucor Corp.*, 656 F.3d 802, 809–10 (8th Cir. 2011); *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008).

¹⁴¹ *See, e.g., Johnson v. Interstate Brands Corp.*, 351 F. App’x, 36, 41 (6th Cir. 2009); *Jones v. St. Jude Med. S.C.*, 823 F. Supp. 2d 699, 734–35 (S.D. Ohio 2011); *Lewis v. City of Chicago*, 563 F. Supp. 2d 905, 922 (N.D. Ill. 2008); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1258 (11th Cir. 2014).

¹⁴² *See, e.g., Lawson-Brewster v. River Valley Sch. Dist.*, 617 F. Supp. 2d 589, 595 (W.D. Mich. 2008); *Hall v. Mid-State Mach. Prods.*, 895 F. Supp. 2d 243, 272 (D. Me. 2012); *McClendon v. Dougherty*, No. 2:10-cv-1339, 2011 WL 4345901, at *4 (W.D. Pa. Sept. 15, 2011).

¹⁴³ *Andazola v. Logan’s Roadhouse, Inc.*, No. CV-10-S-316-NW, 2013 U.S. Dist. LEXIS 73775, at *7 (N.D. Ala. May 24, 2013).

me-too evidence could plausibly deserve equal weight. If a plaintiff produces examples of other women paid less than they deserve, a defendant should surely be permitted to show that women on average are paid as well as men. Pay discrimination might not be universal, but is generally directed towards a group. In contrast, a sex harasser might plausibly treat women generally well but single out a small set of victims, such as those who seem easier prey by virtue of circumstance or temperament. To compound the problem, courts seem to apply the *Sprint* rules more leniently to not-me-too evidence, virtually always holding it admissible,¹⁴⁴ while sometimes excluding me-too evidence.¹⁴⁵

Judicial preference for not-me-too evidence poses a looming threat to sex harassment plaintiffs, and it demands a strong narrative in response. The strong misogyny theory cannot supply that narrative. A theory of sexual harassment that treats sexual behavior as a specific manifestation of generalized animus has tremendous difficulty explaining why a man who treats women generally well should single out a specific woman for misogynistic abuse in the form of sexual behavior. What is needed is a new narrative that can treat sex harassment as a gender-based wrong without characterizing it as a form of indiscriminate misogyny. The next Section outlines how such a new narrative might be constructed.

IV. NEW NORMS OF SEXUAL HARM

Propelled by dominance theory, the American law of sexual harassment took the momentous step of recognizing nonviolent sexual harm to adult women without invoking the norm of chastity. At the same time, the hybrid misogyny narrative behind those legal rules views harassment as the conduct of a small group of toxic misogynists, a deeply flawed picture that has produced deeply flawed doctrine.

Sexual misconduct is regarded by traditional sexual morality and first-wave feminism as an offense against chastity; by sexual autonomy theory as an offense against consent; and by dominance theory as an offense against women's equality. Better legal doctrines require new

¹⁴⁴ See, e.g., *Elion*, 544 F. Supp. 2d at 8; *Howard v. D.C. Pub. Sch.*, 561 F. Supp. 2d 53, 5553 (D.D.C. 2008); *Rodriguez v. Chertoff*, No. CIV 05-546-TUC-CKJ, 2008 WL 5087209, at *1 (D. Ariz. Nov. 26, 2008); *Pantoja v. Anton*, 198 Cal. App. 4th 87, 87 (2011); *United Cerebral Palsy/Spastic Children's Found.*, 173 Cal. App. 4th at 759; *Johnson v. Big Lots Stores, Inc.*, 253 F.R.D. 381, 386–87 (E.D. La. 2008); *Soza*, 2002 Cal. App. Unpub. LEXIS 6398.

¹⁴⁵ See, e.g., *Elion*, 544 F. Supp. 2d at 8; *Howard v. D.C. Pub. Sch.*, 561 F. Supp. 2d 53, 55 (D.D.C. 2008); *Rodriguez v. Chertoff*, No. CIV 05-546-TUC-CKJ, 2008 WL 5087209, at *1 (D. Ariz. Nov. 26, 2008); *Johnson v. Big Lots Stores, Inc.*, 253 F.R.D. 381, 386–87 (E.D. La. 2008). See generally Emma Pelkey, *The "Not Me Too" Evidence Doctrine in Employment Law: Courts' Disparate Treatment of "Me Too" Versus "Not Me Too" Evidence in Employment Discrimination Cases*, 92 OR. L. REV. 545 (2013).

narratives that build on the strengths of each of these models while learning from their limitations.

A. Consent and Its Limits

American society places tremendous value on individual autonomy and freedom of choice. A central premise of our moral thinking is the harm principle: only harm to third parties justifies interference with individual decisions and interactions between consenting adults. The traditional law of sex deviated from these core principles by scrutinizing consent far less in sexual settings than in other settings and by placing little value on women's sexual autonomy. But in the past half century, sex law has become more consistent with these other broadly-held values.

Consent has thus become the touchstone of the American approach to the legal regulation of sex. By the later twentieth century, the resulting laws and norms had improved women's sexual and economic freedom but left many women feeling unprotected from sexual predation. Many felt abandoned not only by the society against whose unequal institutions they struggled but also by liberal feminism, which sometimes viewed complaints about sexual harm as a step backwards from hard-won sexual freedom and towards a new neediness, suffused with a neo-Victorian rejection of female sexual pleasure.

Into this vacuum came dominance theory, which allowed women to protest sexual imposition without appearing querulous and wounded. Its rapid success in driving reform, however, had costs. It did to some extent revive stereotypes of female sexual coldness. It painted far too bleak a picture of male psychology and of a society that was rapidly improving its treatment of women. It is now a half century later, and a new theory of harm is needed, one that extends earlier autonomy models without the drawbacks of dominance theory.

The legal system's notion of autonomy is primarily "thin." Thin autonomy requires only that agents be free from wrongful interference with choice, without consideration of their actual capacity to act on this freedom.¹⁴⁶ Autonomy theory becomes "thicker" as it builds in more requirements that consent be meaningful, and these extensions are an inherently value-laden exercise in defining new entitlements.¹⁴⁷ Correspondingly, the concept of coercion (a violation of autonomy) expands as

¹⁴⁶ Rubinfeld, *supra* note 1, at 1422 n.199 (citing ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 15 (2009)).

¹⁴⁷ See SCHULHOFER, *supra* note 1, at ch. 4.

entitlements increase—coercion cannot be understood except against the background of entitlements.

The two major reform movements before dominance theory relied in part on autonomy arguments, wholly in the case of rape law reform and partly in the case of age of consent reform. In both instances, they required an autonomy theory that, if not maximally thin, was at least no thicker than that embodied in other areas of law. Age of consent reformers placed great weight on the comparison between sex law and the law of contracts and property. If minors could not enter into a valid sale of personal property, it seemed only reasonable to limit their capacity to consent to sexual relations. More recently, autonomy theorists have made a compelling case that sex law provides less protection than analogous law governing theft or professional conduct.¹⁴⁸ For present purposes I will equate thin sexual autonomy with sexual autonomy based on entitlements found in non-sex areas of the legal system, although that is not entirely accurate, since those areas may already embody some thickness.

Thin sexual autonomy does not support extending the law of sexual harassment, because the American legal system simply does not provide enough legal protection to employees upon which to build. Employers are relatively free to mistreat employees, whose main redress is to leave, an option facilitated by the relative mobility of the American labor market. The tort of intentional infliction of emotional distress is available to employees only in the most extreme cases. The supervisor-employee relationship is not subject to even remotely the level of scrutiny applied to relationships such as therapists and patients or adults and minors. Any new narrative of sexual harm must capture how sex differs from property, contracts, and other areas in which the law supervises exchange relations.

To see how the model of thin autonomy plays out, consider the following hypothetical. A male supervisor, J, conducts the onboarding process for each new employee. After filling out paperwork, J provides an overview of company procedures. At the end, he tells many of the female new hires that he enjoys a quick hook-up after work, and that if she ever feels so inclined she should come to his office at the end of the day and they can repair to his place for the evening. He adds that this is completely voluntary and won't affect her job. He does not ask for a response, never mentions the subject again unless the employee does, and neither rewards those who accept his offer nor sanctions those who do not.

¹⁴⁸ *Id.* at ch. 6.

Not everyone will characterize this scenario, by itself, as sexual harassment, though I would, but it surely at least provides evidence that could be part of a hostile environment case. But the thin autonomy model cannot easily even support its use as evidence. From its perspective, all that matters is that consent has been requested and any refusal honored. J has wholly met these requirements—his acts are not even a step in a troublesome direction. Professor Stephen Schulhofer, the author of a fascinating and important application of the autonomy paradigm to sexual harm,¹⁴⁹ suggests that autonomy theory can be modified to acknowledge the problematic nature of J's behavior.¹⁵⁰ He proposes extending the unwelcomeness requirement of current hostile environment doctrine to allow for more consideration of circumstances, noting that that in "many of the reported cases, a supervisor confronted his female subordinate with a crude, impersonal sexual proposal. It seldom seems plausible to think that the woman was delighted by the idea or that only reticence prevented her from suggesting such an encounter herself."¹⁵¹ In such circumstances, courts should presume unwelcomeness. In other words, unless the subordinate's actions had somehow rebutted the presumption, the conduct would be evidence of harassment. In contrast, courteous advances of a personal or romantic character should not be presumed unwelcome, although a single gentle refusal should be sufficient to indicate that any future advances are unwelcome.¹⁵²

The distinction between crude impersonal advances and romantic personal ones is onto something critically important that is not part of current doctrine and that goes a long way to describing why most people would consider J's behavior disturbing. Precisely why this distinction is important demands further explanation. Autonomy theory typically honors the freedom to make offers. Schulhofer constructs an important new category in autonomy theory: lack of consent even to *receive* an offer.¹⁵³ To this point his account is consistent with autonomy theory, which would typically honor an individual's *explicit* refusal to entertain offers. But his next move is more complex: he suggests that the nature of a crude impersonal offer constitutes a *proxy* for lack of consent. Autonomy models generally disallow offers only if the counterparty is not legally competent to accept because, for example, she is a minor. Schulhofer does not advocate the complete legal incapacitation of sub-

¹⁴⁹ See generally *id.*

¹⁵⁰ The example of J is not Schulhofer's but is designed to explore his theory.

¹⁵¹ SCHULHOFER, *supra* note 1, at 186–87.

¹⁵² *Id.* at 187.

¹⁵³ *Id.* at ch. 9.

ordinates, suggesting that a complete ban on relationships between supervisors and subordinates would intrude too much on the freedom of mature adults, who not infrequently choose to enter such relationships.¹⁵⁴ And the special status that Schulhofer rightly accords to personal and romantic offers is not a pure proxy for welcomeness, as autonomy theory would require. An indication of interest from a physically attractive supervisor is more likely to be welcome than one from a less fortunate colleague, but neither Schulhofer nor anyone else would suggest that that should be legally relevant.

Not only the nature of the offer but the existence of a supervisory relationship clearly affects our view of J, but again thin autonomy theory cannot clearly explain why. Much of sex law reform has focused on instances in which victims of sexual harms received *less* protection than victims of harms to other interests such as property. But treating J's proposal as presumptively unwelcome would extend the protection of sexual autonomy past the protection of property or other rights. Suppose J had told new employees that he was an Amway distributor and they should consider him for their wellness and cleaning product needs. This would be distasteful, and a corporate employer might well prohibit such behavior in the event that it became common. Yet no court would invalidate such a purchase by a subordinate on grounds of duress. By regarding J's behavior as legally suspect, Schulhofer (and I and others) are proposing to extend the protection of sex law *beyond that* provided by the law governing other areas.¹⁵⁵

Sex is different. Something about sex makes the supervisory setting more problematic for a request for sexual interaction than for a request for a financial transaction or for non-sexual social engagement. Something about sex gives special valence to the respectful or crude quality of the request, making even certain *offers* presumptively objectionable. But what is different?

B. Beyond Thin Autonomy

Autonomy theory is the dominant American approach to moral questions, but thin autonomy does not protect women from second-generation sexual harassment. What thicker model of autonomy, enriched by appeal to other values and entitlements, can do better? The first-wave feminist attack on the double standard ultimately rested too directly on Christian ideals of chastity to be straightforwardly imported into today's secular legal system. Dominance theory's powerful narrative was too dark to have broad public appeal, and from a theoretical

¹⁵⁴ *Id.* at ch. 8.

¹⁵⁵ *Id.* at 164–67.

point of view it contained no explanation of why men would seek to dominate women or why they might choose sex as their means to this end.

The harm principle upon which autonomy theory rests is ultimately empirical in implementation. Whether given actions cause harm, and of what kind, is a question on which evidence can be brought to bear, and I will now sketch out some possible approaches to developing an empirically grounded theory of sexual harm that might augment autonomy theory.

1. Sex is dangerous: a sex-neutral norm

Sex and the activities that surround it have consequences that extend far beyond erotic desire and satisfaction. To start the journey to thicker autonomy with this observation is to acknowledge that sexual harm is not always about misogynistic abuse, though it may be, and that fact is important. But sexual harm may also be about sex, or even about love, and is no less dangerous in these instances.

The sexual autonomy model seldom acknowledges the power of sexual emotions, and does so almost always outside the context of legal harms. Advocates of stronger norms against casual sex often note that sex can lead to strong feelings of emotional attachment. These feelings of attachment could be relevant in a number of ways to the law of sexual harassment,¹⁵⁶ but I will focus on the three fact patterns identified earlier, which seem most likely to command a consensus in favor of extending the law. All three raise issues that touch on the many emotions besides desire that can arise in sexual settings.

When sexual advances are rejected or relationships are ended, the rejected party may experience pain, shame, anger, resentment, or feelings of inadequacy. A rejected supervisor may thus have difficulty treating a subordinate fairly. Fearing this, a subordinate who wishes to reject or end sexual contact may suffer great anxiety and or feel intimidated into sex even where there is no direct threat of harm. Rejected parties may feel this full range of emotions regardless of their initial intent: rejection is not fun whether advances were motivated by love, lust, or animus. Essentially the same emotions may be triggered when the problematic behavior is not a sexual advance but more indirect behavior of the kind described in *Baskerville*.

¹⁵⁶ For example, a number of cases address the issue of preferential treatment of sexual romantic partners. See generally, e.g., *Miller v. Dept. of Corrections*, 36 Cal. 4th 446 (Cal. 2005); *Sherk v. Adesa Atlanta, LLC*, 432 F. Supp. 2d 1358 (N.D. Ga. 2006); *Stewart v. SBE Entertainment Group, LLC*, 239 F. Supp. 3d 1235 (D. Nev. 2017). At some point, the law might well want to concern itself with these, but this extension would be more controversial than those proposed in this article.

Equally serious though less obvious problems can arise when the supervisor is the rejecting party. The rejector may wish to avoid the emotions of the rejected; fear awkward situations; have a jealous spouse; or simply want a clean break. For any of these reasons, a supervisor who terminates a relationship may feel unable to return to a normal supervisory relationship, with detrimental effects to the subordinate's career.

That love sometimes hurts is hardly a new insight—it's hard to imagine popular music without it—but it has been curiously absent from discussions of sexual harassment. Perhaps the focus on misogynistic animus has been so single-minded that other types of danger have been ignored. Or perhaps the ethos of sexual freedom has made any allusion to the emotional dimension of sex seem vaguely old fashioned and puritanical. Over fifty years have passed since the advent of the sexual revolution, and it is now time to discuss these issues more honestly, with assistance from the growing body of empirical research on the emotional consequences of sex.

The strength of sexual emotions implies that truly free sexual choice requires more safeguards than truly free economic choice, especially in situations of unequal power such as the workplace. This observation, which I will call the dangerous-sex model, leads to a thicker autonomy model, which, unlike the misogyny model, supports protection even from harms not motivated by animus.

The dangerous-sex approach addresses some of the problem cases discussed earlier. Certainly it suggests that supervisory status be given much greater significance than it receives at present, in turn suggesting a different result in the jilted lover cases. Indeed, it identifies the problems in those cases as central to the understanding of the harm in sexual harassment: any of the formidable emotions surrounding sex, not just the malign ones, render the supervisory relationship dangerous. It refocuses the issue in the me-too evidence cases. The plaintiff is not trying to prove a general disposition to misogynistic behavior but to show a pattern of sexual behavior that is not necessarily manifested towards all women. The agency liability cases are more of a puzzle, since they make little sense even on their own terms. Of all three anomalies, they are most open to the complaint that they protect plaintiffs less from sexual harm than from other harms. In no other situation, including racial harassment, has Title VII's policy of reconciliation been used to require internal reporting. Still, the misogyny narrative may have contributed to this wrong turn by creating an image of sex harassers as so anomalously malevolent, so outside the normal range of behavior, that their peers could be relied on to recognize and respond appropriately to their offenses. The dangerous-sex model instead emphasizes that essentially ordinary feelings and behavior become menacing when introduced

into an environment of power. From this perspective it is unrealistic to expect self-policing by employers. Supervisors are, almost by definition, worth more to employers than those they supervise, since they are paid more, and employers have an incentive to favor supervisors over their subordinates in disputes between the two. This favoritism may be reinforced by the stronger social and collegial ties that exist between people at the same hierarchical level. The current agency liability rules seem to assume that harassers are so seriously pathological that their colleagues can overcome the strong forces that make people reluctant to find against valued colleagues and friends. But if sexual harm can result from normal behavior at the wrong time and place, the insistence on internal dispute resolution seems wholly misguided.

2. Developing new feminist norms

The dangerous-sex model is sex-neutral not only in terms of the legal rules it suggests, which do not differentiate between men and women, but in its assumptions about male and female sexuality. In American law and society, neutral legal rules are the preferred approach to promoting sex equality, and American feminists have attempted to avoid building assumptions about sex differences into their policy analysis.

At some point, however, it may be worthwhile to consider differences between men and women in the consequences of sexual activity, and even to entertain the possibility that these differences are not entirely environmental in origin. Neither the autonomy nor dangerous-sex models make it easy to claim sexual misconduct as inherently a feminist concern, since both take fundamentally sex-neutral perspectives on sexuality. Only the historically contingent fact of male economic power, itself unexplained, makes harassment of more importance to women than men. Both the autonomy and dangerous-sex models avoid the excessive pessimism of the dominance model but both have the opposite flaw. They do not explain why women are more likely to be disturbed than men by sexual harassment, and they answer the question of why sexual harassment is sex discrimination with only the wholly formal answer that the plaintiff would not have been treated as she was were it not for her sex.

A number of theories might provide an account of difference. I discuss only one that has recently not received the attention it deserves. This approach focuses on differences in male and female reproductive

roles, and is not new to feminist theory. It can be found as early as Friedrich Engels¹⁵⁷ and in several important second-wave feminists including Simone de Beauvoir,¹⁵⁸ Gerda Lerner,¹⁵⁹ and Shulamith Firestone.¹⁶⁰ It is an approach that, though value-laden, is based on empirical observations about human behavior, as I believe future theories should be. This approach might be called the means of reproduction model, an allusion to the idea that patriarchies oppress women in order to give men control of the means of reproduction.

Women get pregnant and men do not. The shadow of forced pregnancy falls across all potentially coercive heterosexual interaction even in a post-contraceptive era. Such fears explain in part why rape is traumatic in a way that other assaults are not. Perhaps it is less obvious why such intense fears can be triggered by situations in which the possibility of coerced intercourse is not imminent. Consider the case of Valerie Baskerville, discussed earlier, whose supervisor told her, inter alia, that an announcement over the work PA system meant “all pretty girls run around naked,” and who indicated that his wife told him that his sexual interest in Baskerville was becoming too serious.¹⁶¹ The threat of sexual coercion was in the air, but surely it was not an immediate possibility. Why was her situation more deserving of legal protection than that of an employee who suffers non-sexual abuse?

To say that the threat of forced pregnancy drives women’s sexual fear does not require that that fear result from careful calculation of the likelihood of pregnancy. Evolutionary psychologists suggest that we have two distinct mental tracks.¹⁶² Domain-general mechanisms give humans some capacity to respond to novel situations. These work alongside domain-specific mechanisms that have evolved by natural selection to respond to recurring adaptive problems of the environment inhabited by early humans. These domain-specific mechanisms operate not simply by telling us what to do, but by filling us with powerful emotions.¹⁶³ Though we are capable of fearing things for which no domain-specific mechanism exists, our most primal reactions are ancient and

¹⁵⁷ FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* (1884).

¹⁵⁸ SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans. 1968) (1949).

¹⁵⁹ GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986).

¹⁶⁰ SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970).

¹⁶¹ *Baskerville*, 50 F.3d at 430.

¹⁶² John Tooby & Leda Cosmides, *Conceptual Foundations of Evolutionary Psychology*, in *THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY* (David M. Buss ed., John Wiley & Sons 2005). Some evolutionary psychologists regard the emphasis on domain specific mechanisms to be the field’s single most revolutionary contribution to psychology.

¹⁶³ Leda Cosmides & John Tooby, *Evolutionary Psychology and the Emotions*, in *HANDBOOK OF EMOTIONS* (M. Lewis & J.M. Haviland Jones, eds., 2d ed. 2000).

domain-specific. Children instinctively fear snakes but not cars, although in modern life cars pose an incomparably greater risk to their safety. Domain-specific mechanisms are not finely calibrated to actual risk, and once triggered they are strong. Snakes in a glass cage or even in a photograph can inspire visceral fear, while cars do not. Similarly, the threat of sexual coercion is frightening even when victims know that the chances of actual coerced sex are small and the chances of resulting pregnancy are smaller.

Feminists become understandably nervous at this point. The suggestion that evolved dispositions play a role in sexual behavior conjures up the views of an early school of evolutionary psychology that might be called traditionalist, because it scientizes the traditionalist view of sex roles and it takes a restrictive view of female sexuality, grounded in part on empirical claims about women's lower interest in sex.¹⁶⁴ Later researchers such as Sarah Blaffer Hrdy,¹⁶⁵ Jane Lancaster,¹⁶⁶ and Barbara Smuts¹⁶⁷ have presented a very different picture of human sexual predispositions that allows for far more variation between societies and a much more expansive and complex view of female sexuality. This sophisticated theory is consistent with, and even helpful to, a feminist perspective on sexual harassment.

All evolutionary psychologists agree on one foundational principle of sexual behavior, the theory of parental investment. Through pregnancy and its corollaries such as breastfeeding, human females have a much higher level of obligatory investment in each offspring. Women should be more discriminating in selecting sex partners, since the possibility of pregnancy makes each copulation a greater potential commitment of resources for a female than for a male.¹⁶⁸ Early evolutionary psychologists took this to mean that women were interested only in long-term relationships in which they traded sexual fidelity for male provisioning.¹⁶⁹ Later researchers pointed out the errors in this last leap. The possibility of pregnancy means only that females should be more sexually selective than males and prefer partners of high genetic quality. It does not imply a female taste for monogamy or long-term

¹⁶⁴ See generally DONALD SYMONS, *THE EVOLUTION OF HUM. SEXUALITY* (1981).

¹⁶⁵ Sarah Blaffer Hrdy, *Raising Darwin's Consciousness: Female Sexuality and the Prehominid Origins of Patriarchy*, 8 *HUM. NATURE* 1 (March 1997).

¹⁶⁶ Jane Lancaster, *A Feminist and Evolutionary Biologist Looks at Women*, 34 *Y.B. OF PHYSICAL ANTHROPOLOGY* 1 (1991).

¹⁶⁷ Barbara Smuts, *The Evolutionary Origins Of Patriarchy*, 6 *HUMAN NATURE* 1 (1995); Barbara Smuts, *Feminism, the Naturalistic Fallacy, and Evolutionary Biology*, 11 *POL. AND THE LIFE SCI.* 174–76 (1992).

¹⁶⁸ Robert L. Trivers, *Parental Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN* 136–179 (Bernard Campbell ed. 1972).

¹⁶⁹ Symons, *supra* note 162.

relationships. Few mammal species are monogamous or have significant paternal provisioning, yet in all females are more sexually selective. High status males tend to pursue numerous partners, while high status females tend to seek better partners, though sometimes quite a few of them.¹⁷⁰ Sharon Stone once remarked that one advantage of being famous was that “I find I get to torture a higher class of men.”¹⁷¹

The selectivity principle helps explain why coercive sex is more frightening to women than to men. Any act of coerced sex is potentially an act of coerced reproduction that could create an indestructible link between the victim and the coercer. Because sexual choice is of overwhelming importance to females, powerful fear can be triggered by non-copulatory sexual coercion, unexecuted threats of sexual coercion, intercourse without risk of pregnancy because of age or contraception, and situations in which the threat of coercion is not immediate.¹⁷² Just as in any other aspect of human behavior and physiology, there is a wide range of individual difference, but for the average woman, the possibility of sex is more fraught than for the average man not because of lack of sexual desire but because the potential consequences of sex are far more significant. The reproductive component of sex can provide an explanation for why sex is different and why we might protect sexual autonomy more than other autonomy interests. At the deepest emotional level, unwanted sex can never be just sex or just violence but is an act of reproductive coercion that simply has no analogue in any non-sexual behavior. Pressure to buy Amway products from a supervisor is uncomfortable, but pressure to have sex is terrifying.

Traditionalist evolutionary psychologists were wrong to leap from parental investment theory to the view that women seek only monogamous long-term relationships, but their account of male psychology provides a new perspective that can bridge traditionalist and feminist accounts of male domination. All evolutionary psychologists note that the long dependency of human infants means that paternal provisioning increases the likelihood of a child’s survival; that men are reluctant to support their children unless they can be certain about paternity; and that men highly value chastity in long term mates.¹⁷³ Traditionalists

¹⁷⁰ Sarah Blaffer Hrdy, “7 Empathy, Polyandry, and the Myth of the Coy Female,” *Conceptual Issues in Evolutionary Biology*, n.d., 131.

¹⁷¹ Lois Romano, *The Reliable Source*, WASHINGTON POST (May 13, 1993), https://www.washingtonpost.com/archive/lifestyle/1993/05/13/the-reliable-source/30d0cb6b-9ca9-4f73-bb56-de2111592bbb/?utm_term=.4940de1ebb66 [<https://perma.cc/Y2W4-AH8M>].

¹⁷² Gerd Bohner & Norbert Schwarz, *The Threat of Rape: Its Psychological Consequences on Non-Victimized Women*, in *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSP.* 162–75 (D. Buss and N. Malamuth, eds. 1996).

¹⁷³ This observation, as noted earlier, has a long and distinguished lineage. *See, e.g.*, HUME, *supra* note 13, at 331–32. More recently it has been made by both the early evolutionary psychologists and their feminist critics. For the early evolutionary psychology perspective, see Symons,

and others mistakenly assumed that extensive male provisioning was a universal—in fact, the relative economic contribution of men and women varies greatly between societies. They were correct, however, that the sexual division of labor leaves most reproductive tasks to women; that on average men make a higher contribution to subsistence; and that societies in which men make a large contribution to subsistence are often organized to restrain female sexuality to ensure paternity certainty through a sexual double standard.¹⁷⁴ Societies with a double standard vary in their requirements of female virtue, running the range from strict chastity requirements, often brutally enforced, to a looser expectation that women require men to display respect and seriousness before becoming sexually intimate. But even in relatively permissive societies, women are strongly stigmatized for crossing the elusive line between desirable hotness and repellent sluttiness, and the pain of this stigma is keenly felt.¹⁷⁵

The consequences of being labelled a slut are serious. Women categorized as sluts occupy an exceedingly low rung on the social scale. Many men regard them as outside the class of women eligible for long-term serious relationships, and they are at much greater risk of sexual imposition—recall that until recently evidence of a women's prior sexual experience was considered compelling evidence against a rape charge. Often the suggestion of sexual experience in a woman is understood to imply other negative personal traits. Thus, a supervisor who engages in a "crude, impersonal" sexual conduct towards an employee is indicating that she is a low status person who can be taken advantage of sexually and in other ways as well.¹⁷⁶

supra note 164. For their feminist critics, see Lancaster, *supra* note 166.

¹⁷⁴ In some societies, women contribute more than men to economic subsistence, and in some the kin of the mother rather than the father play the dominant role in supporting child-rearing. Societies in which paternal support is not important are typically not monogamous, the sexual double standard is relatively relaxed, and women find a diversified portfolio of genetically high-quality partners at least as good as just one. Hrdy, *supra* note 163; Lancaster, *supra* note 164. F. W. Marlowe, "The Mating System of Foragers in the Standard Cross-Cultural Sample," *Cross-Cultural Research* 37, no. 3 (2003): 282; Marlowe.; Alice Schlegel and H.B. Barry III, "The Cultural Consequences of Female Contribution to Subsistence," *American Anthropologist* 88, no. 1 (1986): 142–50.

¹⁷⁵ Leora Tanenbaum, *The Truth about Slut Shaming*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/leora-tanenbaum/the-truth-about-slut-shaming_b_7054162.html [http://perma.cc/BF5P-JTMQ].

¹⁷⁶ Judge Posner, a complex thinker who on the whole adopts the early sociobiology approach, observed in an article that "solicitations by a supervisor . . . may be resented as signaling the offender's unwillingness to recognize that the woman is of high rather than low status." Richard A. Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment*, 19 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 421, 437 (1999). This insight seems wholly lost in the *Baskerville* opinion. Thought the reasons for this are not clear, Posner is generally unsympathetic to the regulation of sexual harassment, and one commentator has suggested that he operates from the assumption that male sexuality is essentially ungovernable, and that women must bear the burden of regulating sex. *Id.* See also Jane E. Larson, *The New Home Economics: A Review of Sex*

The means-of-reproduction framework therefore provides a view of sexual harassment not just as a wrong but as a *discriminatory* wrong. It fills a key gap in the autonomy model by providing a reason for extending protection to sexual harms past the level provided to property wrongs. Like dominance feminism and first-wave feminism, means-of-reproduction feminism stresses role of sex in the social and economic control of women. Unlike these alternatives, it does so without resorting to norms of female chastity or assumptions about female sexual coldness. Women are more sexually vulnerable not because of their fragility or lack of desire but because the possibility of pregnancy makes coercive sex frightening and makes the suggestion of sexual promiscuity degrading in ways it would not be to a man. The means-of-reproduction approach provides an account of why men might wish to subordinate women that is both more empirically satisfying than prior theories and less gloomy, acknowledging the variation among societies and individuals and the possibility of movement towards more just social arrangements.

In the context of sexual harms, the means-of-reproduction model enlarges the perspective of the dangerous-sex model to clarify the special emotional consequences of sex for women. Women are more sexually vulnerable not because they are prudish or coy, but because sex has potentially far more significant consequences for them than it does for men. Society may help reduce that differential by expanding women's reproductive rights, but human emotional responses are to some extent those of our ancestors in the environment of evolutionary adaptation. American law and norms favor formal equality, and the mean of reproduction perspective probably does not change the policy prescriptions of the dangerous-sex model. From a purely formal point of view, sex harassment is probably best thought of as a sex-neutral offense, a wrong because it would not have occurred but for the plaintiff's sex. Sex differences are relevant because they inform the application of the *Harris* factors: whether a reasonable person *in the plaintiff's position* would have found the behavior sufficiently severe, threatening, or humiliating to constitute a hostile environment.¹⁷⁷

But narratives matter. Sexual neutral models perform important functions, but a complete picture requires something more. In practice, adopting a neutral perspective means a male perspective will determine the governing legal structures, and that has historically failed to protect women. Judge Posner could not imagine that he would have been upset by Hall's behavior, and no doubt few men would have been. Narratives

and Reason, 10 CONST. COMMENTARY 443, 467 (1993).

¹⁷⁷ The only place that sex harassment doctrine has even fitfully considered sex differences is the reasonableness standard. See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

are needed not so much to provide doctrinal arguments as to enhance our ability to understand experiences beyond our own.

V. CONCLUSION

Subordination theory transformed the public and judicial view of sexual misconduct. Because its dark picture of pervasive misogyny was never broadly accepted, it metamorphosed into a meme of a small class of misogynists, driven by the need to dominate and control women, and deserving of both ostracism and legal sanctions.

This powerful image of harassers enabled the law to expand liability for sexual harassment past the narrow confines of explicit *quid pro quo*, but at the price of distorting the doctrinal elaboration that followed. Sexual harassment came to be seen as essentially a form of rape. Sometimes, as in *Meritor*, it was. But serious sexual harm can also result from motives and behavior much closer to normal sexual conduct, a possibility obscured by the conflation of harassment and rape. If harassers were rapists, the coercive nature of the supervisory relationship needed no special recognition; most organizations could be counted on to self-police; defendants should be able to defend their character; and retaliation motivated by hurt feelings should be not actionable. All sexual harm was rape, committed by rapists.

Of course, not all sexual harm is the equivalent of rape, and not all men who cause sexual harm are the moral equivalent of rapists. The challenge now facing public policy is the regulation, whether by law or norms, of a vast gray area of motive and behavior. What kinds of harm short of that suffered in a violent assault should the law remedy? What is the relevance of motive? Some sexual harms will be unavoidably outside the law, but some intermediate harms are deserving of legal relief, especially those that occur in environments of unequal power. A female employee may be seriously injured by the behavior of a supervisor who is immature or wounded but not malicious. As long as the misogyny narrative prevails, nuanced discussion of intermediate sexual harm is impossible. New narratives, such as those that stress the emotional dangerousness of sex, and perhaps even its special risks for women, are needed.

New norms, however, require a shift in the rhetoric of culpability. If women are to be protected from sexual harm that is significantly short of rape, they cannot claim that that harm is equivalent to that of rape, or that it is inflicted by men who are essentially rapists. In a path-breaking article twenty-five years ago, Professor Linda Krieger argued that discrimination, in the most general sense, was frequently motivated not by animus but by a variety of unconscious biases. The resulting discrimination, she noted, was “unintended and, for many people,

earnestly undesired.”¹⁷⁸ While arguing that the law should provide remedies for unconscious discrimination, she cautioned against applying the same level of moral condemnation to those who committed unconscious discrimination as to those who engaged in the paradigmatic deliberate variety. Inappropriate levels of censure, she predicted, would backfire, heightening tension and creating resistance.¹⁷⁹

New narratives of sexual harm require similar modulation in the rhetoric of blame. The dangers of overstating culpability can be seen all too clearly in the #MeToo moment. Astonishingly to many (or at least to many men), the #MeToo moment showed the ineffectiveness of the current legal system. At the same time, the dangers of a dichotomized view of male behavior were far more evident in the Twittersphere than they had been in the courtroom. In court, narratives of sexual harm are a subtle influence on the logic of the law, always present but not easily detected. In social media and on the Internet more generally, moral narratives are always front and center. The initial wave of allegations against individuals such as Harvey Weinstein involved behavior that was either rape or an extreme abuse of power whose immorality few questioned. The narrative of misogyny was rightly used in this setting. As the #MeToo movement progressed, new charges continued to raise issues central to the protection of women’s equality, but the conduct described became less extreme and fit less readily into the models of rape and misogyny. The behavior in question often involved suggestive language or touching. Some of the accused, like Garrison Keillor, may have been impelled, as Judge Posner said of Michael Hall, by immaturity rather than by animus. The discussion shifted from professional settings, where the element of power transformed the creepy into the coercive, to the purely social, culminating in the claims made against Aziz Ansari involving callous but lawful conduct during a date. Yet these men received the same heavy artillery accusations of misogyny as did Weinstein.¹⁸⁰

Some commentators, including some feminists, noted that #MeToo disregarded crucial distinctions between widely differing behavior. Some critics went further, suggesting that concerns about anything

¹⁷⁸ Linda Hamilton Krieger, *Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1244 (1995).

¹⁷⁹ Krieger and others have gone further, suggesting that the remedies appropriate for unconscious bias are more limited than those appropriate for conscious bias. While I support this position, the analogy between non-misogynistic harassment and unconscious bias do not seem perfect. Full compensatory damages in harassment or any other sex discrimination case should not require proof of misogyny, but there may be some point at which culpability is low enough to justify limitations on damages.

¹⁸⁰ Alicia Eler, *No, Garrison Keillor, Women Who Take Selfies Aren’t “Asking For It”*, HARPER’S BAZAAR (Dec. 4, 2017), <https://www.harpersbazaar.com/culture/politics/a14030260/garrison-keillo-r-women-who-take-selfies/> [https://perma.cc/N9TZ-XKMP].

short of the most egregious conduct would rob women of their agency and even “strip sex of eros.”¹⁸¹ The view that the line must be drawn narrowly, to encompass only the most egregious behavior, was explicitly tied to the misogyny theory: “Shouldn’t sexual harassment . . . imply a degree of hostility?”¹⁸²

#MeToo supporters responded that no-one was actually equating leering sexual advances with rape. In some sense this response was correct. If pressed, most #MeToo advocates would no doubt agree that not all charges were equally serious. Yet there has been no sustained discussion of the many gradations of undesirable sexual conduct. And as Krieger predicted, condemnation in excess of what is warranted has contributed to backlash. Some contend that #MeToo is an effort to create division between men and women,¹⁸³ while others insist that if they must worry about being accused they will simply avoid women professionally.¹⁸⁴ Not all of these reactions deserve sympathy, but some seem to me the result of genuine confusion and resentment of a world in which the rules seem unclear and the penalties for transgression arbitrary.

I have done little here to provide a practical guide for the perplexed on the specific categories of intermediate sexual harm. My more modest goals have been to make the case for moving away from the strong misogyny model and to suggest some paths that journey might take. Without new and less morally charged narratives of harm, there can be no discussion of how the law and social norms can make modulated assessments of the culpability of those who cause sexual harm, and provide protection against significant sexual harms that are not motivated by misogyny.

¹⁸¹ Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings.*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html> [<https://perma.cc/JK9L-FVWV>].

¹⁸² *Id.*

¹⁸³ David Walsh, *Ronan Farrow’s Latest #MeToo “Bombshell,” Directed Against Leslie Moonves of CBS*, WORLD SOCIALIST WEBSITE (Aug. 1, 2018), <https://www.wsws.org/en/articles/2018/08/01/moon-a01.html> [<https://perma.cc/AY2T-2RW5>].

¹⁸⁴ 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/XH29-WD4Z>].



#MeToo and Law Talk

Lesley Wexler[†]

How Americans talk when they talk about #MeToo is often deeply rooted in the law—even in non-legal settings, participants in the #MeToo conversation often deploy legal definitions of victims and perpetrators, reference legal standards of proof and the role of legal forums, draw explicit or implicit comparisons to legal punishments, and derive meaning from legal metaphors and legal myths. In this essay, I identify and assess the deployment of such law talk to help understand both how legal rhetoric may facilitate the national #MeToo conversation and related legal reforms, but may also simultaneously limit and obscure some of the #MeToo's more transformative possibilities. Such critical engagement seeks to open space for selective pushback, including initial thoughts on the possibilities of reclaiming colloquial law talk to better match the interests at stake in non-legal settings as well as bringing to the forefront the therapeutic, informative, and structural issues law talk might crowd out.

In Part I, I briefly discuss the emergence of two distinct MeToo movements to understand both the non-legal and legal origins of the #MeToo conversation. I begin with Alyssa Milano's informative, hand-raising oriented #MeToo hashtag and its intersection with Tarana Burke's victim-centered, empathy-generating, and restorative-justice focused Me Too. Even as these two approaches joined to form the original basis of the #MeToo conversation, I note how law talk was implicitly embedded in #MeToo from the very beginning. I then highlight four ways in which law talk is now shaping much of the public discourse in regards to: (1) who may claim #MeToo status; (2) how commentators use the existence of legal forums to serve a gatekeeping function to #MeToo conversation; (3) what process is demanded in non-legal settings for

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assessment and response to #MeToo claimants; and (4) what consequences are appropriate for #MeToo perpetrators based on legal analogies.

In Part II, I identify some possible benefits to the increasingly dominant law talk. Because America is a highly legalistic country, law may provide an accessible language for a diverse group of people to learn about, think through, and discuss #MeToo related issues. Relatedly, law talk facilitates the borrowing of well-considered legal rules and processes for non-legal settings, rather than forcing participants to construct a wholly new approach. In addition, law talk might help generate or maintain a floor for potential #MeToo claimants, precluding roll-backs of who may persuasively claim to be a victim and what events and perpetrators might be viewed as inherently problematic. Lastly, when individuals approach #MeToo as a fundamentally legal conversation, it might provide a natural feedback loop for legal reform. #MeToo conversations steeped in the law can lay bare the need for procedural reforms on issues such as statutes of limitations or evidentiary standards or substantive reforms regarding definitions of rape, sexual assault, consent, or sexual harassment, so as to change the approach in both legal and non-legal settings. The prevalence of law talk might also provide an obvious entrée into conversations regarding law's creation and enforcement of barriers to transparency and thus facilitate fuller debates about the potential hazards of such barriers as exemplified by non-disclosure agreements or mandatory arbitration.

In Part III, I discuss my increasing concern with law talk's expanding role in the #MeToo conversation. While law might sometimes be an appropriate starting point, as for those claimants who seek formal, legal accountability, the dominance of law talk may sometimes act as a sticky baseline limiting meaningful engagement with those #MeToo claims and claimants whose facts do not easily fit within the bounds of legal impermissibility or whose interests are not served by a legal approach. This stickiness can occur when #MeToo conversation participants: hold mistaken beliefs that specific law governs a situation when in fact it does not; maintain an understanding that the same concerns that inform and create law are coextensive with the concerns implicated by situations not governed by the law's baseline; or use unjustifiably high thresholds to overcome law's baseline as a strong default even in settings where other approaches might better serve welfare or other aims. I also suggest that the dominance of law talk may obscure or crowd out non-legal conversations and concerns. These include attention to structures that create the underlying conditions ripe for abuse; emphasis on victim support rather than perpetrator punishment; and pathways for amends, redemption, and reintegration.

I conclude with three preliminary suggestions in Part III to push back against some perils of law talk in the #MeToo setting. The first is to take up the work of exposing and contesting the inappropriate application of legal baselines in #MeToo conversations. The second is to reclaim colloquial law talk to include victim concerns. Lastly, I urge a reframing of the national conversation to center therapeutic, informative, and structural concerns.

I. BACKGROUND

#MeToo is often characterized as a bottom-up moral reckoning with the pervasiveness of sexual harassment and sexual assault in modern society. But even if its origins were therapeutic, restorative, and educational in origin, I suggest in this section that the American #MeToo conversation has always been steeped in the law. Legal definitions, legal rules, legal processes, and legal metaphors pervade the everyday conversations taking place at office coolers,¹ on social media,² and in news commentary.³ In this section, after identifying the presence of law talk, I offer a brief taxonomy of the ways in which law talk is currently shaping the #MeToo conversation to more easily facilitate observation of its beneficial and pernicious effects.

A. MeToo's Educational, Therapeutic, and Structural Roots

In 2017, New York Times and New Yorker reporters broke the story of Harvey Weinstein's pervasive and horrifying sexual assaults against Hollywood actresses.⁴ A few days later, Alyssa Milano posted the tweet heard around the world:

Me too.

¹ Lynda Tran, *Addressing this #MeToo Moment*, CBS NEWS (July 31, 2018), <https://www.cbsnews.com/news/commentary-addressing-this-metoo-moment/> [<https://perma.cc/LS85-ZNCR>].

² See generally Jamillah Bowman Williams, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 373 (2019).

³ Eliza Ennis & Lauren Wolfe, *#MeToo: The Women's Media Center Report*, THE WOMEN'S MEDIA CENTER (2018), <http://www.womensmediacenter.com/reports/media-and-metoo-how-a-move-ent-affected-press-coverage-of-sexual-assault> [<https://perma.cc/429D-TSBJ>].

⁴ 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/T5SY-3SCL>]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/9VMZ-GAJ5>].

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

If you’ve been sexually harassed or assaulted, write ‘metoo’ as a reply to this tweet.⁵

The #MeToo hashtag quickly went global with over 2 million #MeToo tweets spanning 85 countries in less than a month.⁶ When asked about the tweet and the ensuing response, Milano commented that “[t]he most important thing that it did was to shift the conversation away from the predator [Harvey Weinstein] and to the victim.”⁷ It was not styled as a legal reform effort and “[wa]sn’t a call to action or the beginning of a campaign, culminating in a series of protests and speeches and events. It [wa]s simply an attempt to get people to understand the prevalence of sexual harassment and assault in society. To get women, and men, to raise their hands.”⁸ In other words, #MeToo was intended to dismantle the preexisting belief that harassment and assault is exceptional.

#MeToo quickly collided with Tarana Burke’s “Me Too,” a ten-year effort to “help survivors of sexual violence, particularly. . . young women of color from low wealth communities, find pathways to healing.”⁹ Burke’s Me Too focuses on victims’ needs for empathy, to be understood by normalizing speaking out, taking the focus off the accuser, providing community, and dispelling isolation.¹⁰ At the heart of Burke’s Me Too is the idea of solidarity: “Survivors reaching out to those who don’t understand they are survivors – and helping them to feel whole again.”¹¹

⁵ Alyssa Milano @Alyssa_Milano, TWITTER (Oct. 15, 2017, 1:21PM), https://twitter.com/Alyssa_Milano/status/919659438700670976 [<https://perma.cc/7WF5-RRLL>].

⁶ Kara Fox & Jan Diehm, *#MeToo’s Global Moment: The Anatomy of a Viral Campaign*, CNN (Nov. 9, 2017), <http://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html> [<https://perma.cc/HQ7B-77NH>].

⁷ Joyce Chen, *Alyssa Milano Wants Her ‘Me Too’ Campaign to Elevate Harvey Weinstein Discussion*, ROLLING STONE (Oct. 17, 2017), <https://www.rollingstone.com/movies/movie-news/alyssa-milano-wants-her-me-too-campaign-to-elevate-harvey-weinstein-discussion-123610/> [<https://perma.cc/7P5D-7QAB>].

⁸ Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [<https://perma.cc/YV83-BT7U>].

⁹ ME TOO, *History and Vision*, <https://metoomvmt.org/about/> [<https://perma.cc/W5PX-DMR5>] (last visited Jan. 13, 2019).

¹⁰ Daisy Murray, *‘Empowerment Through Empathy’ - We Spoke to Tarana Burke, the Woman Who Really Started the ‘Me Too’ Movement*, ELLE (Oct. 23, 2017), <https://www.elle.com/uk/life-and-culture/culture/news/a39429/empowerment-through-empathy-tarana-burke-me-too/> [<https://perma.cc/8VX9-UKZC>].

¹¹ JUST BE INC., *The Movement*, <http://justbeinc.wixsite.com/justbeinc/the-me-too-movement->

Such solidarity facilitates¹² the way in which Burke's Me Too also takes on larger structural considerations of how "collectively, to start dismantling these systems that uphold and make space for sexual violence."¹³ For Burke, the conversation should not focus on individual perpetrators, but instead on "power and privilege."¹⁴ As part of this transformative vision, she deemphasizes individual guilt, and her version of restorative justice facilitates the healing of both victims and perpetrators.¹⁵

#MeToo and Tarana Burke's "Me Too" were quickly tied together, with Burke tweeting, "It's beyond a hashtag. It's the start of a larger conversation and a movement for radical community healing. Join us. #metoo."¹⁶ The two efforts seemed to merge, if a bit uneasily,¹⁷ and have prompted extensive dialogue online and off about specific incidents as well as about sexual assault and harassment more generally.

B. Law as Emerging Background

Despite this initial seemingly non-legal focus of #MeToo founders, the conversation about #MeToo has and is being deeply shaped by law and legal discourse.¹⁸ In this subsection, I briefly introduce four different ways in which law and law talk is now embedded in the #MeToo conversation: (a) scope of #MeToo claims and claimants; (b) forum arguments demanding prior or exclusive engagement with a legal forum in order to participate as a claimant in the #MeToo conversation; (c) process arguments for resolution of #MeToo claims; and (d) concern about proportionate punishment for #MeToo perpetrators.

c7ef [https://perma.cc/RXQ6-22RM] (last visited Jan. 13, 2019).

¹² Kaitlynn Mendes et al., *#MeToo and the Promise and Pitfalls of Challenging Rape Culture through Digital Feminist Activism*, 25 *EURO. J. WOMEN'S STUD.* 236, 238 (2018).

¹³ Murray, *supra* note 10.

¹⁴ Tarana Burke (@TaranaBurke), TWITTER (Aug. 20, 2018, 4:08AM), <https://twitter.com/TaranaBurke/status/1031498206260150272> [https://perma.cc/B4QP-F89N].

¹⁵ Michelle Rodino-Colocino, *Me Too, #MeToo: Countering Cruelty with Empathy*, 15 *COMM. & CRITICAL/CULTURAL STUD.* 96, 98 (2018).

¹⁶ Abby Ohlheiser, *The Woman behind 'Me Too' Knew the Power of the Phrase When She Created It 10 Years Ago*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.a6673cec1967 [https://perma.cc/JB7M-RXS9].

¹⁷ Burke has been vocal about her dissatisfaction with the focus on high profile predators against white women and suggested changing the narrative. Elizabeth Wagmeister, *How Me Too Founder Tarana Burke Wants to Shift the Movement's Narrative*, VARIETY (Apr. 10, 2018), <https://variety.com/2018/biz/news/tarana-burke-me-too-founder-sexual-violence-1202748012/> [https://perma.cc/A34C-548R].

¹⁸ Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, 7 *LAWS (SPECIAL ISSUE)*, May 21, 2018, art. 21 at 22.

1. Scope

The first use of law talk relates to what actions or events, and relatedly which participants, might have engaged in or been subject to behavior properly considered within the purview of #MeToo.¹⁹ In theory, the question of who may or who should feel entitled to say “#MeToo” need not bear any particular relation to law. But law has informed #MeToo membership from the very beginning. The initial #MeToo hashtag includes two legal terms of art: “sexual harassment” and “[sexual] assault.”²⁰ While it is unclear whether Alyssa Milano intended to reference the formal legal definition of such concepts or instead gave voice to a more colloquial understanding, she used legally freighted terms. As lawyers and legal scholars, this might seem hard to avoid or inevitable, but one can imagine other ways of expressing the initial call and its scope, such as “survivors of sexual violence or sexist behavior.”²¹

This initial rhetorical grounding of #MeToo in legal terminology and its massive replication through all those that answered and repeated the call matters because law formally defines sexual harassment and assault. As part of the enterprise of determining criminal and civil offenses, the law also creates a dividing line between criminal and tortious behavior on one side and legally permissible on the other. While the law does not explicitly endorse or authorize behavior that might still be morally objectionable, it also does not speak to the non-legal scope of and sanctions for what might be considered lawful, but awful behavior.²² In other words, the law provides a forum, a set of rules, and a range of consequences for unlawful behavior, but it is largely silent as to lawful behavior. So, for example, if we look to the law for answers, it tells us that, if the alleged facts are true, actress Gabrielle Union or actor Anthony Rapp can lay claim to #MeToo, but probably not Aziz Ansari’s unnamed date;²³ Chloe Dykstra, who detailed being subject to sexist sexual and emotional behavior that many people believe falls

¹⁹ Such exclusion need not happen via law talk—as arguments that men and marginalized groups had been explicitly excluded or voices were not heard.

²⁰ See Milano, *supra* note 5.

²¹ For instance, she could have posted “If all the women who have been subject to sexist behavior or physically violated in a sexual way wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem.”

²² See, e.g., Vicki Shultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22 (2018) (discussing how much inappropriate workplace behavior is not deemed “because of sex”).

²³ Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355> [<https://perma.cc/UZW6-TW6C>].

short of criminality;²⁴ or women and men made deeply uncomfortable by Joe Biden's non-sexual but overly intimate touching.²⁵

2. Forum

The second use of law talk relates to how individuals reference the role of legal forums in defining entrance to or participation in the #MeToo conversation. This form of law talk builds upon the scope argument, that only those meeting legal definitions of assault or harassment can participate, by adding another condition, that only those who were willing to engage legal mechanisms may now share their accounts or seek justice. A stronger version of this argument suggests not only that victims must have engaged legal mechanisms to participate, but that the only appropriate forums in which to discuss their claims are in sites of formal accountability such as courtrooms or an employer's dispute resolution mechanisms.

One might view this forum policing as a variant of Mary Ann Glendon's *Rights Talk*, which documented Americans' tendencies to frame political preferences as instead inviolable individual rights.²⁶ It emphasizes the rights of perpetrators as holders of due process and such due process as absolute and only vindicated in legal settings. Take, for example, the position of this National Review piece:

If a person is the victim of a crime, that crime should be reported and the accused should have a right to face his or her accuser. This to avoid a trial-by-mob, and to keep people from losing their jobs and having their reputations ruined by a hashtag rather than proof and due process. . . . If sexual harassment is a crime, it should be fought not with hashtags but with the full force of the law. . . . We should criticize the justice system when it fails, but we must follow due process when it comes to crimes, because if we don't, everyone will suffer.²⁷

²⁴ Chloe Dykstra, *Rose-Colored Glasses: A Confession*, MEDIUM (June 14, 2018), <https://medium.com/@skydart/rose-colored-glasses-6be0594970ca> [<https://perma.cc/W5JB-3KP8>].

²⁵ David Oskar Marcus, *#MeToo Has Lost Its Way: In Defense of Joe Biden*, THE HILL (Apr. 2, 2019), <https://thehill.com/opinion/campaign/436862-metoo-has-lost-its-way-in-defense-of-joe-biden> [<https://perma.cc/HL74-ZAXS>]; EJ Dickson, *Joe Biden and the #MeToo Generation Gap*, ROLLING STONE (Apr. 3, 2019), <https://www.rollingstone.com/culture/culture-features/biden-metoo-generation-gap-817133/> [<https://perma.cc/978Y-5F3G>] (noting a generational divide in women's response to #MeToo allegations against Joe Biden).

²⁶ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). For another modern-day example of this, see Joseph Blocher, *Guns Rights Talk*, 94 BOSTON U. L. REV. 813 (2014).

²⁷ Annika Hernroth-Rothstein, *#MeToo and Trial by Mob*, NAT'L REV. (Oct. 20, 2017), <https://www.nationalreview.com/2017/10/metoo-meeting-trial-mob/> [<https://perma.cc/973T-52FN>].

The exclusive legitimacy of legal forums is often implicitly or explicitly contrasted with the “court of public opinion,” in which non-legal airings and/or resolutions of claims are derided as witch-hunts, or vigilantism, mob justice,²⁸ or lynch mobs.²⁹ To take a few examples, one reporter noted, “[#MeToo once] seemed refreshingly nonpartisan. . . . If there was to be a witch hunt, better that it seek out all the witches, not just those from a particular coven;”³⁰ lawyer Wendy Kaminer wrote, “Categorically believing accusers turns a mere accusation of wrongdoing into proof that it occurred. Women who cheer this virtually irrefutable presumption of guilt, considering due process for alleged harassers a component of rape culture, are cheering a thoughtless, treacherous form of vigilante feminism;”³¹ and commentator Adriana Cohen exhorted, “Those in the #MeToo mob. . . insist we must believe all women who make sexual assault allegations against men, regardless of the facts involved or the evidence.”³²

3. Process

The third form of law talk subjects #MeToo claimants to legal process arguments regardless of whether the claimants have invoked or are participating in a legal proceeding. By legal process, I mean those rules that guide the adjudication of civil or criminal claims, rather than those legal rules and definitions that determine the substantive scope of offenses. So, for instance, many believe individual, non-legal judgments or responses to a #MeToo account are or should be limited by whether an alleged event occurred within a criminal or civil statute of limitations. Those who come forward in present with accounts of events that could no longer be litigated ought to be barred not just from a legal finding of fault or crime but also any such supportive social judgment or collateral consequences for the alleged perpetrator.

²⁸ See generally Mary Anne Franks, *Witch Hunts: Free Speech, #MeToo, and the Fear of Women's Words*, 2019 U. CHI. LEGAL. F. 123, 123–147 (2019).

²⁹ David Hendershot & Janet Weaver, Opinion, *#MeToo is Mob Justice, Not Social Justice*, L.A. TIMES (Sept. 26, 2018), <https://www.latimes.com/opinion/readersreact/la-ol-le-metoo-mob-justice-20180926-story.html> [<https://perma.cc/R6HQ-NLHD>].

³⁰ Grayson Quay, *#MeToo Falls to Tribalism*, AM. CONSERVATIVE (Sept. 25, 2018), <https://www.theamericanconservative.com/articles/metoo-falls-to-tribalism-kavanaugh-ellison-trump/> [<https://perma.cc/22YY-FXG4>].

³¹ Interestingly, unlike many, Kaminer is careful to distinguish the settings or goals of therapy and justice. Wendy Kaminer, Opinion, *Beware Vigilante Feminism*, BOSTON GLOBE (Oct. 27, 2017), <https://www.bostonglobe.com/opinion/2017/10/27/beware-vigilante-feminism/> Qix5RT3jJo VIAzh9Zt9aM/story.html [<https://perma.cc/47NS-8QKU>].

³² Adriana Cohen, *The #MeToo Mob and Our Judicial System*, REAL CLEAR POL. (Oct. 5, 2018), https://www.realclearpolitics.com/articles/2018/10/05/the_metoo_mob_and_our_judicial_system_138258.html [<https://perma.cc/L2SJ-GC2Z>].

Relatedly, when assessing the validity of a #MeToo narrative or account, many turn to legal processes to guide their decision-making. Take for instance the public commentary surrounding questions regarding Justice Kavanaugh's fitness for the Supreme Court. Legal questions dominated the public conversations: such as whether Dr. Ford and other alleged victims such as Deborah Ramirez and Julie Swetnik offered up corroborating witnesses or legally admissible evidence; whether Justice Kavanaugh or others "tamper[ed]" with witnesses;³³ whether the evidence offered up satisfy a criminal or civil standard of proof;³⁴ and whether the presumption of innocence was properly respected.³⁵

4. Consequences

The final form of law talk I identify here relates to the consequences for alleged #MeToo perpetrators. Legal analogies and metaphors often pervade the discussion of consequences, with the term "death penalty" frequently used to voice the concern that those found or even simply alleged to be involved in wrongdoing will become unemployable or experience a social death. Take, for example, Gayle King's observation that "I think when a woman makes an accusation, the man instantly gets the death penalty,"³⁶ or Senator Dick Durbin's comment in the wake of Al Franken's resignation, "there's only one penalty, and it's the death penalty,"³⁷ or this news commentary, "When the [#MeToo] mob descends on a target of prominence, it's as good as a death sentence, socially and professionally."³⁸ Others have invoked the Eighth Amendment prohibition against "cruel and unusual punishment."³⁹

³³ Alexandra Hutzler, *Death Threats against Kavanaugh Accuser Christine Blasey Ford Are 'Witness Tampering,' Senator Says*, NEWSWEEK (Sept. 20, 2018), <https://www.newsweek.com/senator-death-threats-kavanaugh-accuser-witness-tampering-1130571> [<https://perma.cc/ZPQ5-G75X>].

³⁴ David A. Graham, *Susan Collins Says She Believes Survivors—Just Not Ford*, ATLANTIC (Oct. 5, 2018), <https://www.theatlantic.com/politics/archive/2018/10/susan-collins-kavanaugh-sexual-assault/572347/> [<https://perma.cc/XWE2-HBV7?type=image>] (discussing how most of the GOP seemed to follow a criminal standard of proof and how Susan Collins followed the civil standard of proof).

³⁵ Thomas Jipping, *Losing the Presumption of Innocence*, NAT'L REV. (Sept. 25, 2018), <https://www.nationalreview.com/bench-memos/brett-kavanaugh-presumption-of-innocence/> [<https://perma.cc/VGK8-WSRR>].

³⁶ Audie Cornish, *Gayle King Thinks #MeToo Needs Due Process Talk*, N.Y. TIMES (June 12, 2018) (Magazine), <https://www.nytimes.com/2018/06/12/magazine/gayle-king-thinks-metoo-needs-due-process.html> [<https://perma.cc/KC27-BHCS>].

³⁷ *#MeToo's Penalty: Your Job*, WTAX NEWS RADIO, <https://wtax.com/news/101101-metoo-side-penalty-your-job/> [<https://perma.cc/499S-5TF6>] (last visited Jan. 13, 2019).

³⁸ Claire Berlinski, *The Warlock Hunt*, AM. INT. (Dec. 6, 2017), <https://www.the-american-interest.com/2017/12/06/the-warlock-hunt/> [<https://perma.cc/899N-JCAL>].

³⁹ Lionel Shriver, *What's Wrong with Hearing #MeToo Men's Side of the Story?*, SPECTATOR (Sept. 29, 2018), <https://www.spectator.co.uk/2018/09/whats-wrong-with-hearing-metoo-mens-side>

#MeToo conversations often include related concerns that any sanctions be time bound and that #MeToo perpetrators be able to move on with their lives just as other criminals completing state-ordered punishment.⁴⁰ Think of Norm MacDonald's comment that

[i]t's weird that you can commit murder and go to prison and do your time and then everybody goes, 'He's done his time, he deserves to work, how dare you treat him as less than you just because he murdered a guy,' because he did his penance for it. And yet the Twitter mob, there is no sentence for it. But I think we're going to return to reason and realize you shouldn't ban a person for life for doing something that you couldn't even put him in prison for.⁴¹

Or consider this online commentator referencing alleged #MeToo perpetrators speaking out to defend themselves, "Yet even worse is the increasing frequency and severity of punishment for anyone attempting to commute this career death sentence by daring to give voice to the possibility of innocence or mitigating circumstances."⁴²

II. BENEFITS

Given that so much of the #MeToo conversation is steeped in and policed by law talk, I use Part II to discuss some potential benefits to such rhetorical moves, before explaining in Part III why such benefits might not materialize or be experienced by all or even most participants in the conversation. I begin here by identifying here four possible positive features of law talk. First, law talk is familiar and pervasive in American culture. Even those without law degrees or legal expertise are generally comfortable engaging in conversations using the language of the law to order their judgments and opinions. Second, law and related law talk can provide off-the-rack defaults in non-legal settings, allowing participants in #MeToo conversations to easily systematize their understandings of events rather than needing to reinvent the wheel for governing concepts. It offers a preexisting system to determine who is a

-of-the-story [<https://perma.cc/6EY4-S9YT>].

⁴⁰ Opinion, *What to Do with the 'Bad Men' of the #MeToo Movement*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/opinion/bad-men-metoo-movement.html> [<https://perma.cc/ENC7-ABN2>].

⁴¹ Scott King, *Norm Macdonald on New Show, Burt Reynolds, Dirty Work 2? And Louis C.K.*, FORBES (Sept. 10, 2018), <https://www.forbes.com/sites/scottking/2018/09/10/norm-macdonald-on-new-show-burt-reynolds-dirty-work-2-and-louis-c-k/#9af433c2ca9d> [<https://perma.cc/7HSD-HSAZ>].

⁴² E. Olson, Comment to *#MeToo Casualty Ian Buruma Was the Editor We Needed*, QUILLETTE (Sept. 26, 2018), <https://quillette.com/2018/09/26/metoo-casualty-ian-buruma-was-the-editor-we-needed/> [<https://perma.cc/U9UP-PMET>].

victim and what is an appropriate punishment. Relatedly, law talk and the underlying law from which it emerges can establish a floor to guard against participants in the #MeToo conversation who wish to exclude potential victims or exonerate potential perpetrators who do satisfy legal definitions. And lastly, the pervasiveness of law talk might help generate a natural feedback loop into legal reform. Since participants are already contemplating and debating legal standards, they might push for reform when those concepts fail them in non-legal settings.

A. Accessible to Americans

One ostensible benefit of rendering #MeToo a legal conversation is that law talk and legal thinking are generally accessible to America's diverse population. While not everyone in the United States is well versed in the law, commentators from de Tocqueville to Mary Ann Glendon have noted that "lawyers' habits of mind, as well as their modes of discourse, 'infiltrate through society right down to the lowest ranks.'"⁴³ Most people living in the United States discussing #MeToo have at least a passing familiarity with concepts and terms embedded in law, such as due process, presumptions of innocence, sexual harassment, and sexual assault.⁴⁴

B. Off-the-Rack Defaults

Second, law talk allows participants to borrow "off-the-rack" legal terms to deploy in non-legal settings.⁴⁵ Just as contract law can provide "off-the-rack" terms and rules to deploy in private settings, the civil and criminal law can supply terms and concepts "for free,"⁴⁶ enabling participants to concentrate on: the application of the law to facts, legal reforms, structural and cultural changes, or even expressions of empathy.⁴⁷ For instance, civil law both defines the term "sexual harassment"

⁴³ GLENDON, *supra* note 26, at 1 (citing de Tocqueville and noting that such patterns continue today).

⁴⁴ This is not to say relevant therapeutic or scientific discourses are necessarily less accessible, though they might be. Rather, the point is that a legally oriented discourse is a familiar one.

⁴⁵ Using a preexisting body of law as an off-the-rack solution in another legal setting is a common strategy. Scholars and legislators often experiment, taking the terms, rules, and/or baselines from one area and arguing for their application or consideration in other settings so as to build upon existing understandings of the world with which people are already familiar. For an intriguing example, see Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (using commercial partnership default rules to contemplate default rules to govern polygamous relationships).

⁴⁶ There's no such thing as free. Nod to STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING TOO* (1994).

⁴⁷ FRANK EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 34 (1991) ("Corporate Law is a set of terms available off the rack so that participants in

and has a body of case law to interpret what set of facts constitute sexual harassment. Thus, for those in the #MeToo conversation who use the term “sexual harassment” as a shorthand rather than describing all of the events they experience, other individuals might already have a basic understanding, informed by the law, as to what that experience might be.⁴⁸ Rather than needing to hash out the facts, they might be able to move past a definition of terms and towards empathy and support. Or for those interested in enhancing civil remedies or reducing barriers for claimants to come forward in non-legal settings, they need not first have a conversation about what constitutes sexual harassment. Similarly, for those concerned about fairness to those outed in a Facebook post or a whisper network as a #MeToo perpetrator, they can use due process protections as understood under the Fifth Amendment as a default for protections to be applied in the workplace or in social settings.

C. Baseline/Floor

Third, law talk can also impose an informal floor in non-legal settings, ensuring that participants in the #MeToo conversation cannot persuasively narrow #MeToo claims, procedures, or punishments beneath what the law would dictate. While many scholars have noted the limitations of Title VII’s definition of harassment and its increasingly narrow interpretation by courts,⁴⁹ it might nevertheless provide a useful floor against those who seek to narrow it even further. For instance,⁵⁰ while some might subjectively or normatively believe that sexist, but not sexual, behavior cannot constitute sexual harassment, and those subject to it ought not claim the mantle of #MeToo, law talk may provide an important check. As Schultz and Soucek nicely illustrate, the law’s understanding of sexual harassment is broad, including “the

corporate ventures can save the cost of contracting . . . Corporate codes and existing judicial decisions supply these terms ‘for free’ to every corporation, enabling the venturers to concentrate on matters that are specific to their undertaking.”)

⁴⁸ Thanks to Jessica Clarke for pointing out that it is not just law, but the related consciousness raising groups that enabled this possibility. And thanks for the hard work of feminists like Catherine MacKinnon and Lin Farley that enabled such a shift. Reva B. Seigel, *Introduction: A Short History of Sexual Harassment*, in CATHERINE A. MACKINNON & REVA B. SIEGEL, *DIRECTIONS IN SEXUAL HARASSMENT LAW* (2003).

⁴⁹ SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

⁵⁰ For another example, though many suggest that one cannot rape one’s wife, the law conclusively states otherwise, and the law can inform social as well as legal understandings. Irin Cormon, *Why Are So Many Men Confused About What Sexual Consent Means*, WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/outlook/what-counts-as-improper-sexual-contact-its-becoming-harder-to-tell/2017/10/13/b15506c6-af8e-11e7-9e58-e6288544af98_story.html?utm_term=.3ff46c7142f5 [<https://perma.cc/C36Q-J37B>]; FED. BUREAU OF INVESTIGATION, *FREQUENTLY ASKED QUESTIONS ABOUT THE CHANGE IN THE UCR DEFINITION OF RAPE* (2014).

endless ways employees are undermined, excluded, sabotaged, ridiculed, or assaulted because of their sex—even if not through words or actions that are ‘sexual’ in nature. . . .”⁵¹ The Supreme Court’s interpretation is broader than many others that have been offered, including the one that the New York Times has employed and everyday linguistic usage, which often focuses on touching.⁵²

By creating a floor that includes some defined set of victims, it also helps rhetorically guard against the discounting or minimization of alleged actions of alleged perpetrators. So, for instance, when people observe that Al Franken’s behavior is not the equivalent of Harvey Weinstein,⁵³ it is helpful to counter that Al Franken’s alleged behavior was at the very least tortious.⁵⁴ One need not be a moral monster to be appropriately considered within #MeToo’s ambit, and the law can helpfully disentangle the confusion.

Law talk can also help protect against related minimization by virtue of elapsed time or the youth of the perpetrator. So, when Harvey Weinstein defends his actions as “com[ing] of age in the 60’s and 70’s, when all the rules about behavior and workplaces were different,”⁵⁵ one can point to the laws against rape and assault that existed at the time. Or for those who try to downplay the allegations against Justice Kavanaugh as a simple example of “boys will be boys,” the law then and

⁵¹ Vicki Schultz & Brian Soucek, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 227 (2019).

⁵² *Id.*

⁵³ Chris Varias, *Rob Schneider: In Showbiz . . . All You Get to Keep Is the Stories*, CINCINNATI ENQUIRER (Jan. 02, 2018), <https://www.cincinnati.com/story/entertainment/2018/01/02/rob-schneider-showbiz-all-you-get-keep-stories/996743001/> [<https://perma.cc/U4BU-85V3>].

⁵⁴ For example, take this paragraph from cultural commentator Masha Gessen:

The case of Franken makes it all that much more clear that this conversation is, in fact, about sex, not about power, violence, or illegal acts. The accusations against him, which involve groping and forcible kissing, arguably fall into the emergent, undefined, and most likely undefinable category of “sexual misconduct.” Put more simply, Franken stands accused of acting repeatedly like a jerk, and he denies that he acted this way. The entire sequence of events, from the initial accusations to Franken’s resignation, is based on the premise that Americans, as a society, or at least half of a society, should be policing non-criminal behavior related to sex.

Masha Gessen, *Al Franken’s Resignation and the Selective Force of #MeToo*, NEW YORKER (Dec. 7, 2017), <https://www.newyorker.com/news/our-columnists/al-franken-resignation-and-the-selective-force-of-metoo> [<https://perma.cc/F9NZ-LUWU>]. Those well versed in the law and willing to engage in law talk might remind Gessen and Gessen’s readers that the law includes civil wrongdoings, like torts, in addition to criminal wrongdoings and that many of the allegations against Franken raise colorable claims of tortious behavior.

⁵⁵ Harvey Weinstein, *Statement from Harvey Weinstein*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/interactive/2017/10/05/us/statement-from-harvey-weinstein.html> [<https://perma.cc/R9CB-2B8X>].

now defines such alleged actions as illegal even if engaged in by a 17-year-old boy.⁵⁶

Law talk and its provision of a protective floor need not and indeed has not been limited to possible #MeToo claimants, but also includes potential #MeToo perpetrators and enablers. Due process defines a minimum set of protections afforded to criminal defendants, and as explained above, many have argued that decision-makers or accusers must provide this level of protections and cannot go below them. Similarly, in assessing the role of enablers and participants, one might use the criminal law to define a minimal level of contribution before one ought to be sanctioned, even if such sanctions are not imposed by the state. For instance, think of William Shatner's comments, "I keep asking who is policing [the #MeToo movement] because there's a lot using it for their own personal vendettas that have nothing to do with the points of the movement."⁵⁷

D. Legal Reform Feedback Loop

Lastly, structuring #MeToo as a legal conversation even in non-legal settings might create a natural feedback loop into legal reforms. By integrating the law into the conversation, the law's limitations are unlikely to be overlooked. To the extent that advocates find that particular legal standards do not match their needs or expectations, they can press for legislative reform. A brief list of possible reforms that are currently being pursued include: altering federal or state definitions for concepts like intent, discrimination, harassment for sex crimes and torts,⁵⁸ expanding workplaces covered by harassment policies;⁵⁹ and using private codes of conduct to offer more expansive definitions than those offered

⁵⁶ Megan Garber, *Brett Kavanaugh and the Revealing Logic of 'Boys Will Be Boys'*, ATLANTIC (Sept. 17, 2018), <https://www.theatlantic.com/entertainment/archive/2018/09/brett-kavanaugh-and-the-revealing-logic-of-boys-will-be-boys/570415/> [<https://perma.cc/9LM3-6Q47>].

⁵⁷ Ryan Parker, *William Shatner Likens #MeToo Movement to French Revolution if Not Policed*, HOLLYWOOD REP. (Dec. 22, 2018), <https://www.hollywoodreporter.com/news/william-shatner-likens-metoo-movement-french-revolution-not-policed-1171559> [<https://perma.cc/7S55-EQVF?ty=pe=image>]; Ryan Parry & Josh Boswell, *William Shatner as He Defends Christmas Classic Baby It's Cold Outside from the Censors and Says He Now Has to Refrain from Complimenting Women on Their 'Great Legs'*, DAILY MAIL (Dec. 18, 2018), <https://www.dailymail.co.uk/news/article-6504445/William-Shatner-says-MeToo-hysterical-like-French-Revolution.html> [<https://perma.cc/68SA-QXWS>].

⁵⁸ Ginia Bellafante, *The #MeToo Movement Changed Everything. Can the Law Catch Up?*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/nyregion/metoo-movement-schnaiderman-prosecution.html> [<https://perma.cc/8C6B-J4Z4>].

⁵⁹ Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW TRUSTS (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws> [<https://perma.cc/9AXK-MN8F>].

in the law.⁶⁰ Other reforms relating to forum access include: lengthening or abolishing statutes of limitations for #MeToo related crimes,⁶¹ pushing against the legality of mandatory pre-dispute arbitration,⁶² and limitations on nondisclosure agreements.⁶³

III. CONCERNS ABOUT LAW TALK'S LEGAL BASELINE AND PRELIMINARY SUGGESTIONS

While law talk might help order and set the floor for the national #MeToo conversation as discussed above, I have deep concerns about the ways in which this legal floor may also act as a ceiling. Those engaged in colloquial law talk often use law as a sticky baseline from which to assess the validity of #MeToo claims, claimants, processes, and responses. This essay's descriptive aim is to help clarify, as with other baselines, how colloquial law talk's legal baseline acts to foreclose some options "not by the logic of the rules, but rather by the terms of the discourse through which arguments are made. These baselines define the normative starting points of . . . analysis,"⁶⁴ and I argue, for too many, the ending point as well. In this section, I identify two ways in which this baseline worrisomely manifests in the #MeToo conversation.

As explained in Part I, colloquial law talk is being deployed in non-legal settings to police the boundaries of #MeToo in numerous ways including but not limited to:

- constraining the conversation to workplace harassment governed by Title VII and thus excluding other settings

⁶⁰ Christine Herman, *U of I Law Faculty & Staff Call for Overhaul of Campus Sexual Misconduct Policies*, WILL ILL. PUB. MEDIA (Oct. 23, 2018), <https://will.illinois.edu/news/story/u-of-i-law-faculty-staff-call-for-overhaul-of-campus-sexual-misconduct-poli> [<https://perma.cc/2RWY-NQ3Z>].

⁶¹ Deborah Tuerkheimer, Opinion, *Let's Ease Statutes of Limitations in Rape Cases*, WASH. POST (May 25, 2018), https://www.washingtonpost.com/opinions/lets-ease-statutes-of-limitations-in-rape-cases/2018/05/25/d21db6c0-6044-11e8-9ee3-49d6d4814c4c_story.html?utm_term=.4a1289faba55 [<https://perma.cc/W563-NGUY>].

⁶² L. Camile Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 333–335 (2018); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (Dec. 6, 2017).

⁶³ Beitsch, *supra* note 59; Bowman Williams, *supra* note 2.

⁶⁴ Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 916 (1989) ("Baselines embody important moral and political choices, but because they are starting points for analysis, they tend to suppress discussion of these choices. They therefore have the effect of masking the political underpinnings of legal rules.").

such as dating and domestic violence,⁶⁵ and excluding lawful, but awful⁶⁶ sexual encounters from the debate⁶⁷

- opposing the inclusion of those who have violated (or are perceived to have violated) the law, such as sex workers,⁶⁸ those in prison,⁶⁹ and those in detention based on their immigration status⁷⁰

⁶⁵ David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, in *LAW IN EVERYDAY LIFE* 123, 129–130 (Austin Sarat & Thomas R. Kearns eds., 1993).

⁶⁶ Lawful, but awful sex is also often coterminous with the terms bad sex Stassa Edwards, *It's Time to Map the Wilderness of Bad Sex*, JEZEBEL (Jan. 19, 2018), <https://jezebel.com/its-time-to-map-the-wilderness-of-bad-sex-1822171954> [<https://perma.cc/HKT9-XLHW>]; Lili Loofbourow, *The Female Price of Male Pleasure*, WEEK (Jan. 25, 2018), <https://theweek.com/articles/749978/female-price-male-pleasure> [<https://perma.cc/UE5X-5A66>]; Collier Meyerson, *#MeToo Is Changing the Definition of 'Bad Sex'*, NATION (Jan. 24, 2018), <https://www.thenation.com/article/metoo-is-changing-the-definition-of-bad-sex/> [<https://perma.cc/V8Z7-S92R>]; grey zone sex, Jessica Bennett, *The #MeToo Moment: Navigating Sex in the 'Gray Zone'*, N.Y. TIMES (Feb. 23, 2018), <https://www.nytimes.com/2018/02/23/us/the-metoo-moment-navigating-sex-in-the-gray-zone.html> [<https://perma.cc/B3N9-PYMK>]; unenthusiastic, Gaby Hinsliff, Opinion, *Consent Is Not Enough: If You Want a Sexual Partner, Look for Enthusiasm*, GUARDIAN (Jan. 29, 2015), <https://www.theguardian.com/commentisfree/2015/jan/29/rape-consent-sexual-partner-enthusiasm> [<https://perma.cc/HZ7C-AYC9>]; or unwanted, Anonymous, *We Need to Talk about Sexual Assault in Marriage*, VOX (Mar. 8, 2018), <https://www.vox.com/first-person/2018/3/8/17087628/sexual-assault-marriage-metoo> [<https://perma.cc/BM2E-GXK5>].

⁶⁷ Justin Duyao, *Aziz Ansari: He Is Not A Predator*, BISON (Feb. 15 2018), <https://thelink.harding.edu/the-bison/2018/02/15/different-perspectives-aziz-ansari-he-is-not-a-predator/> [<https://perma.cc/R3BC-NGTY>]. Some have suggested that rather than limiting #MeToo to sexual violence and misconduct or even to questions of legal permission, that MeToo is well positioned to open the frontier on the societal need for mutual pleasure in sexual contact. Zosia Bielski, *The Next Frontier in Consent: Better Sex*, GLOBE & MAIL (Jan. 23, 2018), <https://www.theglobeandmail.com/life/relationships/the-next-frontier-in-consent-better-sex/article37681221/> [<https://perma.cc/WJ4Y-JN2U>]; See, e.g., *The Fine Line Between a Bad Date and Sexual Assault: 2 Views on Aziz Ansari*, NPR ALL THINGS CONSIDERED (Jan. 16, 2018), <https://www.npr.org/2018/01/16/578422491/the-fine-line-between-a-bad-date-and-sexual-assault-two-views-on-aziz-ansari> [<https://perma.cc/UP2H-HP6Z>]; Way, *supra* note 23; Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/> [<https://perma.cc/G6XS-N45V>]; Bari Weiss, Opinion, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html> [<https://perma.cc/XUN6-L5SR>].

⁶⁸ Samantha Cooney, 'They Don't Want to Include Women Like Me.' *Sex Workers Say They're Being Left Out of the #MeToo Movement*, TIME (Feb. 13, 2018), <http://time.com/5104951/sex-workers-me-too-movement/> [<https://perma.cc/7VPU-WJ9B>]; Kyli Rodriguez-Cayro, *Sex Workers Can Be Sexually Assaulted Too, And We Need To Talk About It*, BUSTLE (Apr. 24, 2018), <https://www.bustle.com/p/sex-workers-can-be-sexually-assaulted-too-we-need-to-talk-about-it-7551815> [<https://perma.cc/75AE-3VQF>].

⁶⁹ Natasha Lennard, *Will the Prison Rape Epidemic Ever Have Its Weinstein Moment?*, INTERCEPT (Nov. 21, 2017), <https://theintercept.com/2017/11/21/prison-rape-sexual-assault-violence/> [<https://perma.cc/K8UM-TZP9>].

⁷⁰ Alfonso Serrano, *Immigration Advocates: Immigrant Detainees Must Be Included in the #MeToo Conversation*, COLORLINES (Jan. 9, 2018), <https://www.colorlines.com/articles/immigration-advocates-immigrant-detainees-must-be-included-metoo-conversation> [<https://perma.cc/4AYH-TNSF>]. While those detained may not have violated the law, some are using their uncertain legal status to try to exclude them from the conversation.

- discounting the accounts of those who failed to engage the relevant criminal or civil machinery
- demanding the application of constitutional due process protections
- using criminal law's standards of evidence and proof

A. Good Faith Mistakes

One worrisome form of colloquial law talk simply reflects a category error. Participants genuinely, but incorrectly, believe that specific substantive or procedural laws apply in settings in which they do not. They apply legal standards because they believe such standards are binding framework rules for assessing substance and providing appropriate procedure. For instance, some Americans might think a criminal statute of limitations governs a confirmation hearing or an employment proceeding. Or an employer might believe he is only entitled to fire someone accused of harassment or assault who has been convicted of crime, engaged in behavior that rises to the level of a crime, or at the very least violated a civil statute. Some might think that the presumption of innocence must apply to social determinations of wrongdoing. These beliefs inform not only an individual's own role when he or she is called upon to make a decision, but might also inform what one thinks others must do.

My suggestions for these types of baseline mistakes are profoundly modest. As colloquial law talk can often inadvertently slip or intentionally move between descriptive claims about what the law demands and normative claims that the law's demands ought to dictate or strongly inform situations that they do not govern, those seeking to unmask the use of the law as a baseline must themselves not fall prey to their own category errors. So, in those instances in which one is appropriately attempting to counter the mistaken application of law as a baseline, one must be humble about the potential of simple error correction, whether in real life social conversations, on social media, via journalism, or other parts of the conversation. While one might initially think legal scholars and lawyers are in the best position to correct such mistakes, the debiasing literature suggests simple information correction, particularly in settings where people's beliefs are deeply held, partisan, or identity constitutive, can sometimes trigger a backfire effect further entrenching the mistaken belief.⁷¹ Much like with the work on vaccines, this is an

⁷¹ Sara Pluviano et al., *Misinformation Lingers in Memory: Failure of Three Pro-Vaccination Strategies*, 12 PLOS ONE (July 27, 2017), <https://doi.org/10.1371/journal.pone.0181640> [<https://perma.cc/4F9X-95YS>].

area that might benefit from further empirical work both to determine whether the backfire effect is likely to be engaged,⁷² and if so, what the most effective method of error correction is, including subsidiary issues such as who ought to engage in error correction and under what conditions.

B. Sticky Default

Law also emerges as a conversational baseline when individuals understand the formal inapplicability of the law, but they use the law as a sticky governing default. In such circumstances, individuals could, at least in theory, be convinced to abandon the law as the appropriate lens, but they would require the satisfaction of a high persuasive threshold to do so. Such a default concerns me for several reasons.

In many #MeToo settings, law may not be an appropriate framing for conversation or for resolution. For instance, if someone like Chloe Dykstra or Aziz Ansari's anonymous date wants to identify herself or himself as a #MeToo survivor on social media, responding with criminal standards to assess such a claim may be both inappropriate and counterproductive. It unnecessarily forecloses an emerging cultural dialogue⁷³ about the harms of coercive and unwanted sex; the uneven burdens regarding the provision of sexual pleasure;⁷⁴ the benefits of seeking affirmative⁷⁵ and enthusiastic consent;⁷⁶ the costs to society when we only account for the harms and benefits of unlawful behavior;⁷⁷ as well as the even larger conversations about gender, sex, power, and equality. An unchallenged legal default in the #MeToo conversation implicitly concludes that law is the only forum and the only language through which we can understand and address such issues. But by definition, such an approach will prevent a better understanding of the true nature of harms for which the law has not accounted or the creation

⁷² Kathryn Haglin, *The Limitations of the Backfire Effect*, RESEARCH & POLITICS (July–Sept., 2017), <https://journals.sagepub.com/doi/pdf/10.1177/2053168017716547> [<https://perma.cc/5MXZ-3MPF>].

⁷³ Constance Grady, *The Uproar over the New Yorker Short Story “Cat Person,” Explained*, VOX (Dec. 12, 2017), <https://www.vox.com/culture/2017/12/12/16762062/cat-person-explained-new-yorker-kristen-roupenian-short-story> [<https://perma.cc/S4ZK-7JCP>].

⁷⁴ Breanne Fahs & Eric Swank, *The Other Third Shift?: Women’s Emotion Work in Their Sexual Relationships*, 28 *Feminist Formations* 46 (2016).

⁷⁵ Samantha Cooney, *The Aziz Ansari Allegation Has People Talking About ‘Affirmative Consent.’ What’s That?*, TIME (Jan. 17, 2018), <http://time.com/5104010/aziz-ansari-affirmative-consent/> [<https://perma.cc/4N8R-CWRX>].

⁷⁶ Maggie Serota, *Aziz Ansari Addresses Sexual Misconduct Allegations in Standup Set*, SPIN (Feb. 12, 2019), <https://www.spin.com/2019/02/aziz-ansari-addresses-sexual-misconduct-standup-ny/> [<https://perma.cc/V52L-KNA3>].

⁷⁷ Robin Kar & Lesley Wexler, *#MeToo: Counting the Collective Harm of Missing Women’s Work*, JUSTIA (Mar. 5, 2019), <https://verdict.justia.com/2019/03/05/metoo-counting-the-collective-harm-of-missing-womens-work> [<https://perma.cc/JHV7-PLM5>].

of a new cultural consensus of a better approach.⁷⁸ In addition, I echo the worries of other scholars who have aptly noted that such policing of #MeToo claims may “dampen [survivors’] ability to seek out or receive support, acceptance and healing through consciousness-raising discourse.”⁷⁹

In addition, law makes the best sense as an “off-the-rack” default when it reflects the consensus that the relevant group would have reached with sufficient time and resources. So, in the contract setting, Fischel and Easterbrook assume off-the-rack rules make sense for contract drafters because there are “lots of terms . . . that almost everyone will want to adopt.”⁸⁰ Of course, borrowing and transplantation can sometimes work in unforeseen conditions and unanticipated domains,⁸¹ but I am concerned about their unthinking adoption in a time and place of significant social contestation.

To be more concrete, much disagreement exists both among scholars and society at large on both the substance and the procedure that governs the law itself. A robust agreement does not exist as to what constitutes or what should constitute rape, sexual harassment, and consent in legal settings. For example, existing state rape laws vary on the definition of the underlying offense as well as to a host of consent issues including the requirement of affirmative consent, the relevant age for consent, the importance of difference in age between the alleged victim and alleged perpetrator, the role and determination of incapacity, and the importance of marital status.⁸² Nor is there widespread agreement among the public as to what ought to constitute sexual assault or sexual harassment.⁸³ Simply importing the legal standards sidesteps the deep divisions related to these definitions and imports them into a new setting. While I noted above that increased use of such definitions might spur legal reform, the significant hurdles to new legislation and the need for concomitant social shifts and structural change create a real

⁷⁸ Julianne Escobedo Shephard, *The Next Step for #MeToo Is Into the Gray Areas*, JEZEBEL (Sept. 24, 2018), <https://jezebel.com/the-next-step-for-metoo-is-into-the-gray-areas-1829269384> [http://perma.cc/GR9P-JAZV].

⁷⁹ Gash & Harding, *supra* note 18.

⁸⁰ EASTERBROOK & FISCHEL, *supra* note 47.

⁸¹ Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 28–30 & nn.14–20 (2014).

⁸² *Laws in Your State*, RAINN (Last visited Aug. 9, 2019), https://apps.rainn.org/policy/?_ga=2.257230472.2042468811.1556473013-624410638.1543422985 [https://perma.cc/K7WR-WMF3].

⁸³ William Cummings, *Americans Agree Sexual Harassment Is a Problem, They Just Don't Always Agree What It Is*, USA TODAY (Nov. 18, 2017), <https://www.usatoday.com/story/news/nation/2017/11/17/americans-agree-sexual-harassment-problem-they-just-dont-always-agree-what/864621001/> [https://perma.cc/7Y5Z-CQM9].

burden on claimants in imposing contested legal standards in non-legal settings.

In addition, even if one thinks the substance and procedure govern legal settings fairly well, the same concerns that inform and create law are rarely coextensive with the concerns implicated by situations not governed by the law's baseline. Colloquial law talk sometimes obscures a real mismatch between law's purposes in legal settings and its application to non-legal settings, where different interests exist or ought to be balanced differently. For instance, under criminal law, given the state's role in imposing a possible deprivation of liberty, it makes sense that the Constitution would offer a fulsome promise of due process with a neutral decision-maker, notice of accusations, and the right to confront an accuser. But even in many legal settings, one can often satisfy due process without providing robust protections.⁸⁴ While reasonable disagreements about how to forge a path forward from #MeToo exist, the unthinking application of strong due process norms to settings that involve no deprivations of constitutionally protected interests is problematic.

Third, and somewhat relatedly, the use of law as a strong default may make it more difficult to deploy other approaches that better serve welfare or goals that are distinct from the law. American law, both criminal and civil, focuses on the provision of justice. In so doing, it attends to individual fault and individual wrongdoing, rather than directly addressing larger structural and cultural issues or even victim needs beyond compensation.⁸⁵ While such a limited approach might be appropriate for the criminal and tort system, this is why societies and particularly those going through moments of social upheaval contemplate using other mechanisms for social change as well. Of course, although the limitations of the law do not per se preclude adopting a therapeutic or structural approach to #MeToo issues, I have shown above how the use of a sticky legal baseline makes that more difficult. Given

⁸⁴ Thanks to Professors Jamelle Sharpe and Arden Rowell for suggestions. *See Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting out the test for what process Due Process requires and concluding that a pre-deprivation hearing was not required in social security disability contexts. *See also* *U.S. v. Reed*, 41 M.J. 449 (C.A.A.F. 1995) (while due process applies to persons before court martial, seventeen-month delay between identification of accused as a suspect and bringing charges did not violate due process); *Ingraham v. Wright*, 430 U.S. 651 (1977) (concluding due process does not require either notice or opportunity for hearing prior to certain forms of corporal punishment) *Schaughnessy v. U.S. ex rel. Mezei* (holding that an alien could be permanently excluded without a hearing), 345 U.S. 206 (1953); *Nielsen v. Preap*, 586 U.S. 139 (2019) (holding that unauthorized immigrants may be detained indefinitely once taken into criminal custody). While I believe more robust protection may be owed in many of these settings, the existing law finds otherwise.

⁸⁵ It is worth noting that the law does serve other functions aside from backward looking justice, such as providing restraining orders and injunctions.

these concerns, I conclude with two preliminary thoughts on paths forward.

1. Reforming colloquial law talk

Any participant in the #MeToo conversation who sees a mismatch between the law as default and the interests at stake may attempt to refashion or reform colloquial law talk.⁸⁶ Some of that work is already occurring. Given the bottom up nature of the #MeToo conversation and its non-legal origins, the turn to the legal baseline has not been unnoticed and has been hotly contested at least by some.⁸⁷ To take one highly salient example, many demanding a discussion about presidential nominee Joe Biden's non-sexual, intimate touching strongly reject the idea that Biden's behavior need be unlawful or sexually motivated to be relevant to the modern reckoning.⁸⁸ But relatedly, the forms of accountability they call for also differ substantially from those requested for criminal sexual assault or tortious sexual harassment.⁸⁹

I suggest here that one mode of contestation would be to better match people's legal intuitions to the actual interests at stake on both sides when the law is invoked in non-legal settings. On the one hand, one might dig into various processes and procedural protections and explain why they ought to be considered satisfied even if the criminal law protections were not applied. Again, to return to the due process example, when invoked it seems to stem from the deeply held intuition in America that people ought to be treated fairly. So, what should fairness look like in non-legal settings? Professor Clarke's piece does a nice job explaining why many settings, such as journalistic reporting and workplace investigations, do in fact comport with our intuitions of fairness.⁹⁰ One might also mine the procedural fairness literature for thoughts on what processes have shown to be acceptable, but, equally important, one also needs to search it for evidence and explanations of processes

⁸⁶ Of course, legal baselines are not always sticky and sometimes people are able to argue persuasively that the wrong baseline is being used in a given setting. For example, Professor Sunstein has compellingly argued that the Supreme Court used the wrong baseline in *Lochner v. New York*, 198 U.S. 45 (1905). Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

⁸⁷ Tarana Burke, @TaranaBurke, TWITTER, (Aug. 20, 2018, 4:14AM), <https://twitter.com/TaranaBurke/status/1031499602623643650> [<https://perma.cc/UQC8-VNWA>].

⁸⁸ Lucy Flores, *Joe Biden and the Apologies that Weren't*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/opinion/joe-biden-lucy-flores-apology.html?searchResultPosition=3> [<https://perma.cc/5JCR-W9AJ>]; Marle Solis, *Reckoning with the Joe Bidens of the #MeToo Movement*, BROADLY (Apr. 11, 2019), https://broadly.vice.com/en_us/article/8xz4nb/joe-biden-allegations-inappropriate-touching-me-too [<https://perma.cc/3AN3-2S98>].

⁸⁹ Jill Filipovic, *Joe Biden Still Has to Answer for Decades of Bad Choices*, VANITY FAIR (Apr. 4, 2019) <https://www.vanityfair.com/style/2019/04/joe-biden-apology-advice> [<https://perma.cc/ZWN N2-FGBE>].

⁹⁰ See generally Jessica Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37 (2019).

that have been considered unfair across various settings. If the #MeToo movement is perceived as deeply unfair, much of society is unlikely to willingly participate in its call for a social reckoning.⁹¹

Second and equally important, colloquial law talk might provide an opening for the salience of the violations of victims' colloquial due process. If we are to account for interests of and burdens on accusers in order to provide fairness, we ought to balance the ledger by also accounting for potential MeToo claimants' interests and burdens.⁹² In the #MeToo era, what does it mean to be fair to accusers? As Professors Gash and Harding have noted, invocations of due process include an "assumption and an expectation that normal legal pathways are clear of obstacles for victims of sexual violence, when in fact these pathways are ridden with obstacles and peril."⁹³ At the very least, I think such due process for all should include: allowing victims to remain a focus of the #MeToo narrative,⁹⁴ dismantling bias against believing them,⁹⁵ rejecting numerosity to take complaints seriously,⁹⁶ taking complaints seriously by initiating investigations, maintaining investigations even if the alleged harasser leaves the workplace,⁹⁷ and providing sanctions proportionate to any findings made. Relatedly, society ought to engage the need for reintegration of victims who were retaliated against for coming forward or for being harassed in the first instance just as seriously as it engages the question of reintegration of the profoundly undeserving.⁹⁸

⁹¹ Tammi Walker, *Fixing What's Wrong with How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation*, 2018 WISC. L. REV 111 (2018).

⁹² While the victims' rights movement has focused generally on the ways in which the criminal justice might be unfair to victims and their families, I want to emphasize instead the way in which unfairness seems to particularly plague those contesting sexual assault, sexual harassment, and related behavior like domestic violence and emotional abuse.

⁹³ Gash & Harding, *supra* note 18, at 22. See also Catharine A. MacKinnon, *Reflections on Law in the Everyday Life of Women*, in *LAW IN EVERYDAY LIFE* 109 (Austin Sarat & Thomas R. Kearns eds., 1993) (suggesting "Either the law does not apply (to women's experiences), is applied to women's detriment, or is not applied at all.").

⁹⁴ Ijeoma Oluo, *Due Process Is Needed For Sexual Harassment Accusations—But for Whom?*, ESTABLISHMENT (Nov. 13, 2017), <https://medium.com/the-establishment/due-process-is-needed-for-sexual-harassment-accusations-but-for-whom-968e7c81e6d6> [<https://perma.cc/KY7G-89E5>].

⁹⁵ Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/due-process-meto/553427/> [<https://perma.cc/2RGM-VXN6>].

⁹⁶ See generally Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL. F. 273 (2019).

⁹⁷ Leah Litman et al., *Opinion, 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/2ETV-DWVE>].

⁹⁸ Megan Garber, *The Leaked Louis. C.K. Set Is Tragedy Masked as Comedy*, ATLANTIC (Dec. 31, 2018), <https://www.theatlantic.com/entertainment/archive/2018/12/louis-ck-leaked-tape/579220/> [<https://perma.cc/S9X4-JV5Q>]; Joe Berkowitz, *The Bad Men of 2017 Have Somehow Gotten Worse*, FAST COMPANY (Dec. 31, 2018), <https://www.fastcompany.com/90286891/the-bad-men-of-2017->

To take a different example, one might push back on the law as providing a floor or a ceiling to #MeToo claiming. Many have celebrated the inclusion of lawful, but awful sex⁹⁹ and the need for affirmative, enthusiastic consent as part of the #MeToo public discourse.¹⁰⁰ Scholars and journalists are now spending intellectual capital to map the terrain of lawful, but awful encounters¹⁰¹ and the unequal burdens they often place on women.¹⁰² A robust defense of the benefits of self-identification and self-definition ought to be offered and defended, particularly when #MeToo claimants are not making a legal claim or seeking legal justice. Contrast Professor MacKinnon's 1993 observation about rape, "Many women, no matter how violated they were, do not call what happened to them rape if they do not think a court would agree with them. In this ultimate triumph of law over life, law tells women what happened to them and many of us believe it,"¹⁰³ with Tarana Burke's embrace of a bottom up approach to #MeToo, noting "It's your movement. It's our movement. It is a survivors' movement. You are in it if you say you're in it."¹⁰⁴

It is important to note that reform of colloquial law talk need not be unidirectional. Given #MeToo's focus on consent and coercion, it should be noted that not all legal violations need give rise to #MeToo claims. For instance, sometimes the state may have an interest in crim-

have-somehow-gotten-worse [https://perma.cc/HH5J-RBF6].

⁹⁹ Lexy Perez, *Amy Schumer Talks Friend Aziz Ansari's Sexual Misconduct Claim*, HOLLYWOOD REP. (Feb. 1, 2018), <https://www.hollywoodreporter.com/news/amy-schumer-talks-friend-aziz-ansaris-sexual-misconduct-claim-1080874> [https://perma.cc/8RWD-SAEW] (Schumer describes Aziz's behavior: "It's not a crime, but it's not cool.").

¹⁰⁰ Lindy West, *Opinion, Aziz, We Tried To Warn You*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/opinion/aziz-ansari-metoo-sex.html> [https://perma.cc/2TKL-A5GE?type=image]; Mariel Cariker, *Sexual Assault Allegations Against Aziz Ansari Spark Twitter Debate*, METIZA (Jan. 14, 2018), <https://metiza.com/need-to-know/sexual-assault-allegations-aziz-ansari-s-park-twitter-debate/> [https://perma.cc/WH5B-6QMG], citing Jessica Valenti, TWITTER (Jan. 14, 2018), https://twitter.com/JessicaValenti?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eeserp%7Ctwtgr%5Eauthor [https://perma.cc/43PY-Y78K]; Brittany Wong, *What Therapists Want Us to Know about Aziz Ansari, 'Bad Sex' and #MeToo*, HUFFPOST (Feb. 2, 2018), https://www.huffpost.com/entry/therapists-on-aziz-ansari-me-too_n_5a6f6ed3e4b01fbbebf4b934 [https://perma.cc/425V-JSJ5]; Fiona Chen, *Opinion, Why the Aziz Ansari Story and Discussions of Grey Areas Are Central to the #MeToo Movement*, TECH (Jan. 25, 2019), <https://thetech.com/2018/01/25/me-too-aziz-ansari> [https://perma.cc/5Z7T-TPU9].

¹⁰¹ See Mendes et al., *supra* note 12; see also Robin West, *Manufacturing Consent*, BAFFLER (2018), <https://thebaffler.com/salvos/manufacturing-consent-west> [https://perma.cc/ZD5Q-URW6]; KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* (2017).

¹⁰² Sara L. Maurer, *The #MeToo Movement Isn't about Women's Frailty. It's about Women's Labor*, CHRON. OF HIGHER ED. (Jan. 7, 2018), <https://www.chronicle.com/article/The-MeToo-Movement-Isn-t242179> [https://perma.cc/9YTF-82XQ].

¹⁰³ MacKinnon, *supra* note 933.

¹⁰⁴ Shia Diefotze, *#MeToo Founder Addresses the Movement*, UAF SUN STAR (Apr. 23, 2018), <http://uafsunstar.com/metoo-founder-addresses-the-movement/> [https://perma.cc/ZT6Z-KG3Y].

inalizing behavior such as incest or statutory rape or sex between a person in power such as a therapist or clergy person and a person in their trust or a state university professor and a student, but it seems at least theoretically possible in some small subset of those cases all parties are truly willing and voluntary participants. The State may legitimately choose to outlaw such behavior, but the statutorily protected person ought not be labelled a #MeToo victim or survivor if she or he does not choose to view her or himself that way.

2. Reframe

In a more radical move, participants in the #MeToo conversation might instead more aggressively challenge legal framing. Many options for reframing exist—I suggest three possibilities here. First, to return to the justification for the original #MeToo tweet, the #MeToo conversation might be recentered on victims and their needs beyond accountability for their perpetrators. Second, to the extent that the conversation is about perpetrators and accountability, society needs to think seriously and creatively about the concept of earned redemption instead of emphasizing carceral analogies of death penalties and time served. In theory, and perhaps in practice, these conversations can occur simultaneously, but both America's historical experience with carceral feminism and my anecdotal observation of the last two years of #MeToo law talk conversations suggests they are far too often mutually exclusive.

To begin, law talk is not a particularly useful vehicle for addressing victim needs such as immediate trauma care, opportunities for long-term healing, and workplace reintegration. A focus on dissecting individual stories for their truth or falsity and subsequent consequences for perpetrators ignores and may even tradeoff with the need for greater awareness of and resources for healing.¹⁰⁵ In my opinion, law talk has helped Times Up raise millions of dollars for litigation so that victims could move from non-legal sites to legal sites to resolve their claims and defend themselves from retaliation and defamation,¹⁰⁶ but where is the parallel financial outpouring to help victims afford therapy, to assist community provision of healing resources, and to get victims fully reintegrated back into the working world?¹⁰⁷ While legal determinations

¹⁰⁵ Aisha Harris, *She Founded Me Too, Now She Wants to Move Past the Trauma*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html> [<https://perma.cc/K54T-XD6S>].

¹⁰⁶ Constance Grady, *Time's Up Was at the Center of the 2018 Golden Globes. One Year Later, What Has Come of It?*, VOX (Jan. 6, 2019) <https://www.vox.com/culture/2019/1/4/18165557/golden-globes-times-up-legal-defense-fund-sharyn-tejani> [<https://perma.cc/R8TP-2C9E>].

¹⁰⁷ Diana Falzone, *You Will Lose Everything?: Inside the Media's #MeToo Blacklist*, VANITY FAIR (Apr. 9, 2019), <https://www.vanityfair.com/news/2019/04/the-metoo-blacklist> [<https://perma.cc/P7TE-DS75>]; Robin Kar & Lesley Wexler, *#MeToo: Counting the Collective Harm of Missing*

can serve important functions, as Professor Aya Gruber notes, carceral feminism with its emphasis on “equaliz[ing] and civiliz[ing] the criminal justice system’s treatment of female victims” has in the past traded off with or made more difficult efforts to “provid[e] access and resources to [female] victims, and creat[e] programs to address the economic and social realities that kept women in abusive relationships or led them to remain silent about rape.”¹⁰⁸ Without a conscious reframing, a law talk centered #MeToo may facilitate these same tradeoffs and unaddressed harms that plagued victims of domestic violence in the 1980s and 1990s. In other words, while victims of unlawful #MeToo behavior should have equal opportunities for criminal and tort justice as victims of other crimes, a single minded focus on such may ignore or even displace what many victims would find most helpful particularly in non-legal settings.

In addition, law talk’s approach also fails to grapple seriously with a meaningful path for perpetrators. As noted above, law talk often frames any mode of accountability as punishment and then assesses its perceived proportionateness in specific cases. Take, for instance, former radio host and #MeToo perpetrator John Hockenberry’s plea for absolution,¹⁰⁹ “Is a life sentence of unemployment without possibility of furlough, the suffering of my children, and financial ruin an appropriate consequence?”¹¹⁰ While I am skeptical that the vast majority of #MeToo perpetrators will serve anything that approaches a non-legal life sentence,¹¹¹ I also worry about the poverty of conceptions of perpetrator accountability and reintegration. In much of the law talk #MeToo conversation, there seems to be no ground other than silent reacceptance after a brief period of social sanction as evidenced by law talk’s “time served” sentiment or banishment reflected in law talk’s “death penalty” analogy. Law, and criminal law in particular, may have little to tell us about imagining a meaningful path back to full participation in society

Women’s Work, JUSTIA (Mar. 5, 2019), <https://verdict.justia.com/2019/03/05/metoo-counting-the-collective-harm-of-missing-womens-work> [<https://perma.cc/5UQZ-UVJ7>].

¹⁰⁸ Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 748–49 (2007). *See also id.* at 801 (“Although there were salient reasons for feminists to reform the criminal justice system, once they engaged state power, it became the primary if not singular focus of the movement.”).

¹⁰⁹ For an excellent piece discussing why absolution is inappropriate in the #MeToo setting, *see* 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/36WT-56UT>].

¹¹⁰ John Hockenberry, *Exile*, HARPER’S (Oct. 2018), <https://harpers.org/archive/2018/10/exile-4/> [<https://perma.cc/G5ZE-EAPZ>].

¹¹¹ For a partial list of high profile individuals accused of #MeToo wrongdoing along with the latest developments, *see Sexual Harassment and Assault Allegations*, VOX (last updated Jan. 9, 2019), <https://www.vox.com/a/sexual-harassment-assault-allegations-list/paul-haggis> [<https://perma.cc/7S8J-7AZM>].

besides simply a passage of time.¹¹² In addition to pressing for legal reforms or expansion of law talk, advocates might highlight the dangers of importing the worst punitive impulses of criminal law and carceral feminism into non-legal settings¹¹³ and instead point participants toward the concept of restorative justice. While some of the most important acts of restorative justice such as apologies, promises of non-repetition, and efforts to prevent others from engaging in #MeToo related acts are not required by the law, they would help serve the interests of the victims and society,¹¹⁴ as well as provide perpetrators a roadmap towards earned redemption and fuller societal reintegration.

CONCLUSION

As we enter the third year of the #MeToo landscape, Americans are properly struggling with this great societal reckoning. While such a transformation will necessarily involve both law and law talk, this essay suggests a deeper understanding of how law talk functions can help participants to push back against its misuses, excesses, and oversights. As lawyers and legal scholars, we are uniquely positioned to point out the ways in which law talk might distort our understandings of victims and perpetrators outside the legal setting. I suggest here that instead of only zooming in on the crime and punishment of individual perpetrators, we ought to consider refocusing on victims' needs as well as on the possibilities for earned redemption of perpetrators. Many have already

¹¹² Moreover, in practice, for many criminals, time served does not reflect a path back to full integration. Between felon disenfranchisement, background checks for employment, housing limitations, and the difficulty of compliance with probation and parole requirement, many criminals never experience something that resembles full participation in society. Brentin Mock, *Released Inmates Will Need More Than a 'Ban the Box' Measure to Rejoin Society*, CITY LAB (Nov. 2, 2015), <https://www.citylab.com/equity/2015/11/obama-ban-the-box-released-inmates-hurdles/413470/> [https://perma.cc/3T9Z-X4FM].

¹¹³ For examples of others worried about the importation of carceral feminism into the #MeToo debate, see Judith Levine, *Will Feminism's Past Mistakes Haunt #MeToo?*, BOSTON REV. (Dec. 8, 2017), <http://bostonreview.net/gender-sexuality/368judith-levine-will-feminisms-past-mistakes-haunt-metoo> [https://perma.cc/6H69-N8CF]; Alex Press, *#MeToo Must Avoid 'Carceral Feminism'*, VOX (Feb. 1, 2018), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> [https://perma.cc/MK86-WVFJ]; OPEN SOC'Y FOUND., *Righting Carceral Feminism's Wrongs in a #MeToo Era*, (Mar. 6, 2018), <https://www.opensocietyfoundations.org/events/righting-carceral-feminism-s-wrongs-metoo-era> [https://perma.cc/C4XQ-RYQV]. For a sample of those discussing the historical harms of carceral feminism, see, e.g., Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 7, 2014), <https://www.jacobinmag.com/2014/10/against-carceral-feminism/> [https://perma.cc/275V-WQHK]; Lise Gotell, *Reassessing the Place of Criminal Law Reform in the Struggle against Sexual Violence*, in RAPE JUSTICE 53, 53–71 (Anastasia Powell ed., 2015); Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365 (2016).

¹¹⁴ Lesley Wexler et al., *#MeToo and Theories of Justice*, 2019 U. ILL. L. REV. 45; Lesley Wexler & Jennifer Robbennolt, *#MeToo and Restorative Justice: Realizing Restoration for Victims and Offenders*, ABA DISPUTE RESOLUTION MAG. (Win. 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/metoo-and-restorative-justice/ [https://perma.cc/WNR9-L44Y].

taken up this call and I am hopeful that scholars, commentators, and members of the public will be more mindful when engaging in law talk in the #MeToo landscape.



#MeToo as Catalyst: A Glimpse into 21st Century Activism

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I. INTRODUCTION

The Twitter hashtag #MeToo has provided an accessible medium for users to share their personal experiences and make public the prevalence of sexual harassment, assault, and violence against women.¹ This online phenomenon, which has largely involved posting on Twitter and “retweeting” to share other’s posts has revealed crucial information about the scope and nature of sexual harassment and misconduct. More specifically, social media has served as a central forum for this unprecedented global conversation, where previously silenced voices have been amplified, supporters around the world have been united, and resistance has gained steam.²

This Essay discusses the #MeToo movement within the broader context of social media activism, explaining how this unique form of collective action is rapidly evolving.³ We offer empirical insights into the

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¹ Although women are the focus of this essay, men, trans, and gender non-binary people are also participants. For example, actor Terry Crews is a male victim who has been vocal in the #MeToo movement.

² See Kara Fox & Jan Diehm, *#MeToo’s Global Moment: The Anatomy of a Viral Campaign*, CNN (Nov. 9, 2017), <https://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html> [<https://perma.cc/M85F-XMTM>].

³ See Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFFAIRS 28, 28–29 (2011).

types of conversations taking place under the hashtag⁴ and the extent to which the movement is leading to broader social change. While it is unclear which changes are sustainable over time, it is clear that the hashtag #MeToo has converted an online phenomenon into tangible change, sparking legal, political, and social changes in the short run. This Essay provides data to illustrate some of these changes, which demonstrate how posting online can serve as an impetus, momentum, and legitimacy for broader movement activity and changes offline more characteristic of traditional movement strategies.

II. WHY A MOVEMENT?

The problem is pervasive—in a recent nationwide survey, 81% of women report experiencing some form of sexual harassment in their lifetime.⁵ More than one in four have survived sexual assault.⁶ The simple hashtag #MeToo has added names, faces, and stories to the statistics in what is arguably the most powerful activism in the women's movement in recent history. The sheer number of women experiencing harassment and assault make these issues ripe for social movements and collective action.⁷ This behavior goes beyond workplace misconduct, with statistics showing that harassment is ubiquitous and difficult to avoid. According to a large scale nationally representative survey, harassment is not something that only happens behind closed doors, with 66% of women reporting that they have experienced harassment in public places.⁸ Many are also vulnerable within their own households, with 35% of women experiencing sexual harassment at home. Workplace harassment is also a common issue, with 38 percent of women experiencing harassment in their workplace.

Harassment has become a part of our culture and everyday norms and takes many forms.⁹ Verbal sexual harassment is the most common

⁴ This Essay does not focus on the computer science or data analytic methods used to extract this information. For a more detailed discussion of that see: Lisa Singh, Linda Li, Laila Wahedi, Yifang, Wei, Jamillah Williams, & Naomi Mezey. *#metoo—An Analytic Framework for Characterizing an Evolving Social Media Movement* (in prep).

⁵ STOP STREET HARASSMENT, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 7 (2018), <http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf> [<https://perma.cc/5HNM-ERMK>].

⁶ *Id.*

⁷ See generally, STOP STREET HARASSMENT, *supra* note 5; Banu Ozkazanc-Pan, *On Agency and Empowerment in a #MeToo World*, GENDER, WORK & ORG., 1–9 (2018), <https://doi.org/10.1111/gwao.12311> [<https://perma.cc/CWD8-ZHY7>]; PAOLO GERBAUDO, TWEETS AND THE STREETS: SOCIAL MEDIA AND CONTEMPORARY ACTIVISM (2012); Alexandra Segerberg & W. Lance Bennett, *Social Media and the Organization of Collective Action: Using Twitter to Explore the Ecologies of Two Climate Change Protests*, 14 COMMUN REV. 197 (2011).

⁸ STOP STREET HARASSMENT, *supra* note 5, at 8.

⁹ *Id.*

form, experienced by 77% of women. An alarming 62% of women report being subjected to physically aggressive forms of sexual harassment, such as indecent exposure, being physically followed, and being groped or touched in a sexual way without consent. The internet, text messages and phone calls are also commonly used to harass, with 41% of women experiencing cyber sexual harassment. Twenty-seven percent of women have survived sexual assault, being forced into sex acts against their will.

Despite the pervasiveness of the problem, sexual harassment and assault commonly go unreported.¹⁰ In fact, sexual assault is the most underreported violent crime in America, with 70% of crimes never reported to police.¹¹ Even after the rise of #MeToo, among survey respondents who said they had experienced workplace harassment in the past year, 76% did not officially report it.¹² Many victims do not report because they fear retaliation, or think that reporting will lead to little or no consequences for the perpetrator.¹³ These concerns may be heightened when the perpetrator holds a position of power.¹⁴ In a sense, the common failure to report is confirmation that harassment is not only a part of the culture, but that the underlying gender inequality is still so accepted that reporting remains either ineffective or entails costs that are too high for victims. The Kavanaugh hearings were a paradigmatic example of both the inequality and the costs.¹⁵ Given the other changes we identify, the obstacles to reporting are a sobering reminder that some aspects of culture are stickier than others.

¹⁰ LYNN LANGTON ET AL., BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, 2006–2010 1 (2012), <https://www.bjs.gov/content/pub/pdf/vnvp0610.pdf> [https://perma.cc/X3D3-RJVJ].

¹¹ *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK (2017), <https://www.rainn.org/statistics/criminal-justice-system> [https://perma.cc/5B26-CGFN].

¹² *Harassment-Free Workplace Series: A Focus on Sexual Harassment*, SOC'Y FOR HUMAN RESOURCE MGMT (Jan. 31, 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/A-Focus-on-Sexual-Harassment.aspx> [https://perma.cc/2XY6-97LR] (last visited Jan. 21, 2019).

¹³ See Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 632 (2007).

¹⁴ *Id.*

¹⁵ See, e.g., Rebecca Solnit, *The Kavanaugh Case Shows We Still Blame Women for the Sins of Men*, GUARDIAN (Sept. 21, 2018), <https://www.theguardian.com/commentisfree/2018/sep/21/brett-kavanaugh-blame-women-anita-hill-cosby-weinstein> (last visited Feb. 25, 2019).

III. ORIGINS OF THE #MeToo HASHTAG

“Me Too” was first coined by Tarana Burke¹⁶ in 2006 to support women and girls, particularly women and girls of color, who had survived sexual violence.¹⁷ The term was popularized on October 15, 2017 when Alyssa Milano¹⁸ invited the Twitter world to use the hashtag to capture experiences of sexual misconduct by tweeting, “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet . . . we might give people a sense of the magnitude of the problem.”¹⁹ Her tweet followed a *New York Times* report published 10 days prior, detailing Harvey Weinstein’s sexual assaults and harassment of numerous women; the hashtag #MeToo gained momentum shortly after.²⁰ In issuing the tweet, Milano was acknowledging that despite the pervasiveness of harassment and assault, many victims have been silenced.²¹ In the next twenty-four hours, there were over 1 million tweets and retweets using the hashtag #MeToo.²²

The hashtag #MeToo has served as a sign of empowerment for victims who may have feared they were alone, who thought they would not

¹⁶ Tarana Burke is currently Senior Director at Girls for Gender Equity, a nonprofit that helps schools, workplaces, and other groups improve policies concerning sexual violence at. In 2003 Burke founded “Just Be,” an all-girls program for young black women that provided assistance to survivors of sexual violence. See Ania Alberski, *Former Phila. Activist Tarana Burke among the ‘Silence Breakers’ Honored by Time Magazine*, THE DAILY PENNSYLVANIAN (Dec. 10, 2017), <https://www.thedp.com/article/2017/12/philly-woman-silence-breakers-metoo-penn-upenn-sexual-assault> [<https://perma.cc/K56A-4KSU>]; Staff, GIRLS FOR GENDER EQUITY, <https://www.ggenyc.org/about/staff/> (last visited Feb. 3, 2019).

¹⁷ See Abby Ohlheiser, *The Woman Behind ‘MeToo’ Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?noredirect=on&utm_term=.4067dc89d58d [<https://perma.cc/H5NH-EELJ>] (last visited Jan. 21, 2019).

¹⁸ Alyssa Milano is an American actress and activist. See Elizabeth Chuck, *Before #MeToo, Before Doug Jones, Alyssa Milano’s Activism Started with a Kiss on TV*, NBC NEWS (Dec. 16, 2017), <https://www.nbcnews.com/news/us-news/metoo-doug-jones-alyssa-milano-s-activism-started-kiss-tv-n829466> [<https://perma.cc/AKU7-YWLX>].

¹⁹ Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [<https://perma.cc/72N3-TJ6W>].

²⁰ Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/5C89-5DTK>].

²¹ Fox & Diehm, *supra* note 2.

²² *The #MeToo Research Collaboration*, MASSIVE DATA INST. & GENDER + JUST. INITIATIVE, <http://metoo.georgetown.domains/> [<https://perma.cc/J6T8-F69V>]; MICHAEL COHEN, THE #MeToo MOVEMENT: FINDINGS FROM THE PEORIA PROJECT, GEO. WASH. U. (2018), <https://gspm.gwu.edu/sites/g/files/zaxdzs2286/f/downloads/2018%20RD18%20MeToo%20Presentation.pdf> [<https://perma.cc/UNH5-5LGR>]; 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=.225aacf76ae2 [<https://perma.cc/8X36-JY3K>].

be believed, or who simply did not think justice was a possibility. Posting on social media has provided a simple and subtle way to speak out and share their experience. Within the first year, the hashtag #MeToo was used 19 million times on Twitter.²³ Tweets in over 46 different languages have used the hashtag, and many new hashtags related to harassment and assault continue to emerge in these different languages.²⁴ The magnitude of the social media response makes it clear that these are not just rare cases of bad behavior, but an all-too-common part of women's experiences in the world. The response also provides a glimpse into the everyday attacks and shaming faced by victims of sexual abuse, and the persistent social acceptance of victim blaming, and its connection to larger, systemic forms of inequality.²⁵

IV. SOCIAL MEDIA ACTIVISM: A NEW PARADIGM

The #MeToo phenomenon represents an example of a new type of collective action that has galvanized rights-based movements in the twenty-first century.²⁶ Social media activism describes the effectiveness and viability of using social media platforms for political engagement in furtherance of social movements.²⁷ Social media activism gained increased attention from scholars after the 2011 Arab Spring, where activists used Twitter to initiate conversations that helped fuel social and political change.²⁸ For example, the hashtag #Egypt was instrumental in disseminating information during this revolutionary social movement.²⁹ Online networks used the Twitter hashtag to help activists organize and share information, push for freer expression, and propel political change in neighboring countries.³⁰

²³ Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (October 11, 2018), <http://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [<https://perma.cc/ZX7J-B5HB>].

²⁴ MDI Research Collaborative finding using tweets collected through the Twitter API.

²⁵ *After a Year of #MeToo, American Opinion Has Shifted against Victims*, THE ECONOMIST (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-metoo-american-opinion-has-shifted-against-victims> [<https://perma.cc/S63X-5YGW>].

²⁶ Shirky, *supra* note 3; Gerbaudo, *supra* note 7; Dhiraj Murthy, *Introduction to Social Media, Activism, and Organizations*, SOC. MEDIA + SOC'Y, 1 (2018). *See generally* CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008).

²⁷ Gerbaudo, *supra* note 7; *see also* SHIRKY, *supra* note 3.

²⁸ Gerbaudo, *supra* note 7; Mary Butler, *Clicktivism, Slacktivism, or "Real" Activism? Cultural Codes of American Activism in the Internet Era*, 20 (graduate thesis, University of Colorado) (on file with University of Colorado, Boulder) (2011) [<https://perma.cc/Y3GX-ZBRP>]; Sam Gustin, *Social Media Sparked, Accelerated Egypt's Revolutionary Fire*, WIRED (Feb. 11, 2011), <https://www.com/2011/02/egypts-revolutionary-fire/> [<https://perma.cc/9LYZ-HQRD>].

²⁹ Gustin, *supra* note 28.

³⁰ Gerbaudo, *supra* note 7.

The current literature on social media activism primarily explores 1) how social media enables connectivity and organizing opportunities for existing political and social movements, and 2) whether social media has led to a new type of collective action, upending the need for organized groups supporting change, and enabling individuals to act.³¹ Classic theories on collective action and the public sphere have been contextualized to account for the new ways in which individuals can communicate via technology.³² For example, incorporating social media into resource mobilization theory, many scholars have argued that social media is an effective tool to recruit participants and organize campaigns, which are the social capital needed to promote the motives of any one movement.³³ Social media helps connect individuals with similar grievances, linking them to groups and organizations that are working to combat parallel grievances.³⁴

In other words, social media provides a crucial consolidating function by giving a common name to a set of concerns and thereby creating a one-issue community. If the community is big enough and the grievance sufficiently widespread, it also creates vital social visibility for injuries that were previously invisible. As Alyssa Milano rightly pointed out, it gives people “a sense of the magnitude of the problem.”³⁵

Since the Arab Spring, a few other highly visible Twitter movements have been successful at propelling social, legal, and political change because they have tapped into injustices of sufficient magnitude.³⁶ For example, #LoveWins began in September 2014 as part of a broad campaign of support for the LGBT community and its efforts to win the right to marry.³⁷ The hashtag went viral on June 26, 2015 after

³¹ Compare Jonathan Obar et al., *Advocacy 2.0: An Analysis of How Advocacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and Collective Action*, 2 J. INFO. POLY 1 (2012); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2007); and MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY (THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE)* (1996); with BRUCE BIMBER, *INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER* (2003). See also W. Lance Bennett, *Communicating Global Activism*, 6 INFO., COMM'N & SOC'Y 143 (2003); Paolo Gerbaudo & Emiliano Trere, *In Search of the “We” of Social Media Activism: Introduction to the Special Issue on Social Media and Protest Identities*, 18 INFO., COMM'N & SOC'Y 865 (2015); Shirky, *supra* note 3.

³² Obar et al., *supra* note 31; Benkler, *supra* note 31.

³³ Jose Ortiz & Arvind Tripathi, *Resource Mobilization in Social Media: The Role of Influential Actors*, 25TH EUR. CONF. ON INFO. SYS., 3049–59 (2017).

³⁴ Gerbaudo, *supra* note 7; Shirky, *supra* note 3; Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED (Nov. 2015), <https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/> [<https://perma.cc/RZ3M-58V5>].

³⁵ Ohlheiser, *supra* note 19.

³⁶ Deen Freelon et al., *Beyond the Hashtags: #Ferguson, #Blacklivesmatter, and the Online Struggle for Offline Justice*, CTR. FOR MEDIA & SOC. IMPACT, 36–70 (2016), http://archive.cmsimpact.org/sites/default/files/beyond_the_hashtags_2016.pdf [<https://perma.cc/5A8X-PH6KJ>].

³⁷ Yasmin Aslam, *#LoveWins on the Internet*, MSNBC (June 27, 2015), <http://www.msnbc.com>

the Supreme Court's decision to legalize same sex marriage, with over 10 million tweets.³⁸ To date, the largest social justice movement to be ignited on Twitter is #BlackLivesMatter.³⁹ The hashtag first appeared in July 2013 after George Zimmerman was acquitted in the killing of an unarmed black teenager, Trayvon Martin.⁴⁰ Since that time, the hashtag has been used in over 30 million Twitter posts.⁴¹ The hashtag continues to thrive in a steady stream of daily tweets, increasing in volume when relevant real world events occur.⁴² The hashtag has also helped to galvanize research and activism about racial bias, law enforcement reform, and the criminal justice system.⁴³

V. HASHTAGS UNITED: #MeToo AND THE POTENTIAL FOR CHANGE

Following in the footsteps of #BlackLivesMatter, #MeToo has helped increase awareness and visibility of a pervasive societal problem, while amplifying the voices of those who have been injured. Optimists have argued that social media has been, essentially, a power equalizer that broadens access to political activism.⁴⁴ Although Twitter is not a representative sample of the U.S. population, some have argued that social media activism has fewer divides along the lines of race, class, and gender than the activism of traditional social movements, due to the Internet's accessibility.⁴⁵ Moreover, social media networks, including Facebook, Twitter, Instagram, and others, have become key parts of global and domestic civil society.⁴⁶ On the one hand, it seems easier to "belong" on social media than it does in physical space. In a

/msnbc/love-wins-the-internet [https://perma.cc/G9ND-QYRX].

³⁸ *Id.*

³⁹ MONICA ANDERSON ET AL., PEW RES. CTR., *ACTIVISM IN THE SOCIAL MEDIA AGE 5* (July 11, 2018).

⁴⁰ *Id.* at 13.

⁴¹ *Id.*

⁴² These surges have occurred, for example, when black men, women, and children have been killed by the police and when officers are not indicted or acquitted of charges.

⁴³ *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, FEDERAL REPORTS ON POLICE KILLINGS: FERGUSON, CLEVELAND, BALTIMORE, AND CHICAGO (2017); Trymaine Lee, *Black Lives Matter Releases Policy Agenda*, NBC NEWS (Aug. 1, 2016), <https://www.nbcnews.com/news/us-news/black-lives-matter-releases-policy-agenda-n620966> [https://perma.cc/9ZQY-RYA9]; German Lopez, *This Moment at the DNC Shows Democrats Have Embraced Black Lives Matter*, VOX (July 26, 2016), <https://www.vox.com/2016/7/26/12291274/democratic-convention-police-violence-mothers-of-the-movement> [https://perma.cc/XB95-S4RH].

⁴⁴ SHAKED SPIER, *COLLECTIVE ACTION 2.0: THE IMPACT OF SOCIAL MEDIA ON COLLECTIVE ACTION 140* (2017); Stephen, *supra* note 34.

⁴⁵ *See generally* Yarimar Bonilla & Jonathan Rosa, *#Ferguson: Digital Protect, Hashtag Ethnography, and the Racial Politics of Social Media in the United States*, 42 J. AM. ETHNOLOGICAL SOC. 4, 8 (2015); Gerbaudo & Trere, *supra* note 31; Stephen, *supra* note 34. Although a digital divide remains along race and socioeconomic lines, the Internet and social media networks are now easy to access across a broad swath of socio-economic and geographic regions.

⁴⁶ Shirky, *supra* note 3.

more practical sense, there are fewer barriers to participation, such as geographic restrictions, scarcity of leisure time, and cost. For example, people may be more willing and able to read 140 character tweets than travel to attend a live political speech. More individuals also get to take the stage, providing a sense of empowerment that everyone has a voice. Given this broader access, knowledge and information is no longer monopolized by political and economic elites and is communicated faster to the public. This allows for rapid mobilization of groups and gives greater opportunities to engage in public speech.⁴⁷ Thus, social media represents a low-cost method through which people are able to organize, connect, and coordinate massive responses to injuries, events, and social change.⁴⁸

However, some skeptics have argued that, rather than enable greater mobilization opportunities or connectivity among like-minded individuals, social media has created the “slacktivist.”⁴⁹ Slacktivist is a pejorative term for an individual who participates in a social movement by liking or sharing social media posts promoting a particular cause.⁵⁰ These individuals participate in a movement in ways that require minimal costs to participants; in a click or retweet, “the slacktivist can feel that he or she has helped to support the cause.”⁵¹ Critics of social media activism argue that, rather than playing a central role in social change, “slacktivists” do very little to produce social change and their participation is a poor substitute for in-person activism.⁵² In fact, they suggest that “slacktivists” may inhibit further engagement by giving “superficial” satisfaction to those sharing a post.⁵³

Advocates for social media activism have argued that liking or sharing a post, even if a small contribution to a particular movement, represents the initial step toward greater engagement by those individuals.⁵⁴ Moreover, this early participation acts to spread knowledge

⁴⁷ Spier, *supra* note 44.

⁴⁸ Shirky, *supra* note 3; Obar et al., *supra* note 31.

⁴⁹ N. L. Cabrera et al., *Activism or Slacktivism? The Potential and Pitfalls of Social Media in Contemporary Student Activism*, J. DIVERSITY IN HIGHER EDUC., 4 (Apr. 2017). See also Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, NEW YORKER (Oct. 4, 2010), <https://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell> [<https://perma.cc/Y6V7-PRYP>].

⁵⁰ Noah Berlatsky, *Hashtag Activism Isn't a Cop-Out*, ATLANTIC (Jan. 7, 2015), <https://www.theatlantic.com/politics/archive/2015/01/not-just-hashtag-activism-why-social-media-matters-to-protestors/384215/> [<https://perma.cc/X38Y-XKHS>].

⁵¹ Laura Seay, *Does Slacktivism Work?*, WASH. POST (March 12, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/12/does-slacktivism-work/?noredirect=on&utm_term=.6ed30ffa845f [<https://perma.cc/89QD-Y2GW>].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Berlatsky, *supra* note 50; Henrik Serup Christensen, *Political Activities on the Internet:*

about a cause or issue that, if widespread, can motivate those with greater power and resources to seek cultural and institutional reform. #MeToo and #BlackLivesMatter provide examples of how initial, rapid fire communication led to consolidation and mobilization, both by organized groups as well as individuals. While the initial contribution costs were minimal (involving shares or retweets), enough participation led to more tangible benefits for the movement, such as organized protests, funding for legal groups, and public awareness of discrete social problems. Eventually, this forced public officials to speak out and address those issues. It is also important to note that while there are no direct monetary costs to tweeting, there can be heavy emotional and reputational costs to participating. This is particularly true for working-class women, breadwinners, and immigrants, who may risk not only losing a job or being shunned, but also may risk deportation and separation from their community for speaking out.⁵⁵

VI. AN EMPIRICAL ANALYSIS: CONVERTING CONVERSATIONS TO CHANGE

In Part A, we discuss our collection and analysis of over 13 million tweets to provide a brief overview of what people are talking about online under the #MeToo hashtag. In Part B, we examine the social, legal, and political changes occurring offline that have been inspired by the online activity.

A. The Conversations Happening Online⁵⁶

First, it is ongoing social and political events that continue to keep the #MeToo hashtag relevant.⁵⁷ An analysis of over 13 million tweets collected by the Massive Data Institute (MDI) at Georgetown University offers insights into the types of conversations taking place under the hashtag.⁵⁸ Data reveal that the volume of tweets using the #MeToo hashtag is heavily correlated with social and political events, reaching

Slacktivism or Political Participation by Other Means?, FIRST MONDAY (Feb. 2011), <https://uncommonculture.org/ojs/index.php/fm/article/view/3336> [<https://perma.cc/8HHR-Y47W>]; Monica Anderson et al., *supra* note 39; Kirk Kristofferson et al., *The Nature of Slacktivism: How the Social Observability of an Initial Act of Token Support Affects Subsequent Prosocial Action*, 40 J. CONSUMER RES. 1149, 1149 (2014).

⁵⁵ Megha Mohan, *Secret World: The Women in the UK Who Cannot Report Sexual Abuse*, BBC NEWS (March 27, 2018), <https://www.bbc.com/news/in-pictures-43499374> [<https://perma.cc/KWF8-JE6H>].

⁵⁶ The #MeToo Research Collaboration *supra* note 22.

⁵⁷ The #MeToo Research Collaboration *supra* note 22; Anderson & Toor, *supra* note 23.

⁵⁸ The #MeToo Research Collaboration *supra* note 22; (we use the Twitter streaming Application Programming Interface (API) to collect tweets; this is an analysis of tweets collected between October 2017 and October 2018).

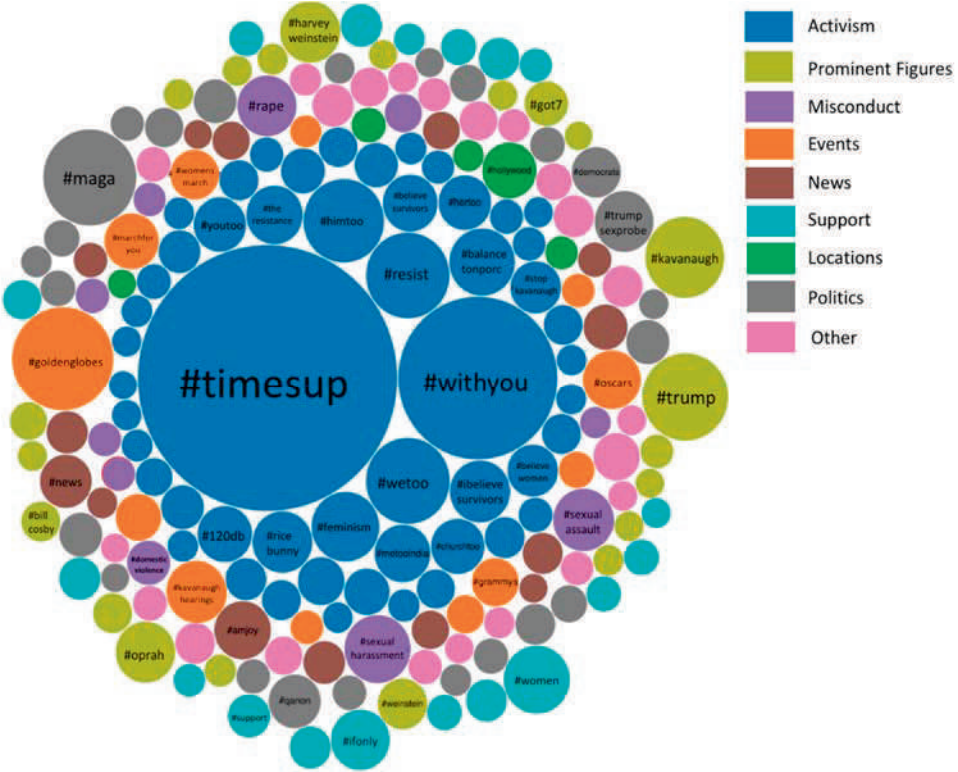
a high point in September 2018 during the Brett Kavanaugh hearings.⁵⁹ This is evidence of increased discussion and sustained momentum, demonstrating that the activism was not simply a fleeting trend from October 2017. The types of events and the volume of #MeToo activity surrounding those events are telling. First, the range of the events—from activism such as International Women’s Day and the Golden Globes, to announcements about perpetrators such as Moonves and Cosby, to achievements of women, such as Time Person of the Year—is a strong indication of the emergence of an online community sharing and commenting on a wide range of activities.

The MDI Research Collaborative also analyzed the content of the conversations. The first content analysis looks only at hashtags that co-occur frequently in the same tweet with #MeToo. Co-occurring hashtags are important because they highlight topics that online users are conversing about. The hashtag that co-occurs most frequently is #TimesUp, which pops up an impressive 310,000 times. #TimesUp, a next-step of #MeToo, was created by women in the entertainment industry on January 1, 2018 to raise money for a legal defense fund.⁶⁰ Other hashtags that co-occur frequently with #MeToo include #withyou, #goldenglobes, #oscars, #rape, #sexualassault, #trump, #kavanaugh, and #resist. Figure 1 groups the most frequently co-occurring hashtags into topic areas. Each bubble in Figure 1 represents a frequent hashtag. The size of the bubble represents the relative frequency of the different co-occurring hashtags. Different colors of bubbles represent different topics. This figure highlights the variation in the types of topics that feature prominently in the conversation. Even with this variation, a large majority of hashtags are about activism (50 out of the top 180), including #TimesUp. This suggests an on-going interest in linking the Twitter conversation to action and social change. The co-occurrence of hashtags used in other countries for their #MeToo tweets—for example, #ricebunnies in China, #metooindia in India, #balancetonporc in France—is a reminder that both the underlying problem and recent discussion of sexual misconduct are global phenomena.

⁵⁹ We do not remove bots because they are engaging in conversation, but we do remove SPAM, i.e. ads and dead hyperlinks. SPAM makes up approximately 7% of the stream.

⁶⁰ Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news&_r=1 [https://perma.cc/T3EJ-L3YL].

FIGURE 1. HASHTAGS THAT FREQUENTLY CO-OCCUR WITH #METOO



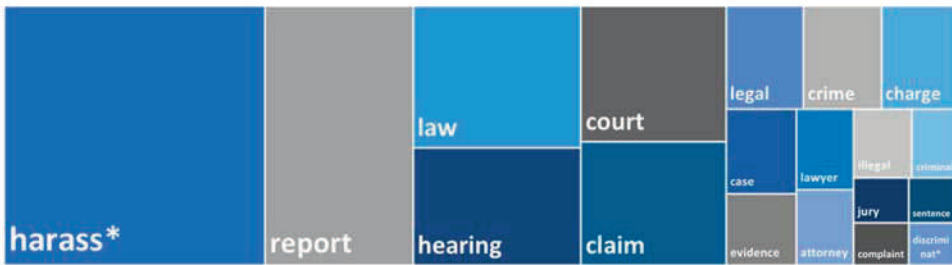
The next content analysis identifies words, excluding hashtags, which are most frequently used in the English tweets with #MeToo. The highest frequency words are shown in Figure 2. The larger words in Figure 2 occur in over 1 million tweets, while the small words occur in over 150,000 tweets. What is telling about these high-use words is the prevalence of misconduct words like *harassment*, *sexual*, and *assault* and activism words like *movement* and *believe*. These words represent further evidence of the personal nature of some of this online discussion and the openness with which people are sharing their stories, discussing them, and showing support for others.

FIGURE 2. COMMON WORDS MENTIONED IN #METOO DISCUSSIONS



While the volume, hashtag topics, and frequently occurring words give us a macro-level view of the Twitter conversation, we are also interested in the more focused legal discussions taking place. As an initial step, we compiled a list of legal terms and determined how frequently they were used in #MeToo tweets. Figure 3 shows the legal terms that occur in at least 15,000 tweets. The most prevalent terms are those that have a root of “harass,” e.g. *harassing*, *harassment*, *harassed*, etc. Other legal terms include *law*, *court*, *case*, *claim*, *report*, and *hearing*. The use of such words suggests that legal action is a clear theme in the #MeToo discussion.

FIGURE 3. FREQUENTLY OCCURRING LEGAL TERMS



B. Social-political and Legal Change Offline Post #MeToo

Popularization of the #MeToo hashtag in October 2017 ignited social media and shook the power structures of media, television, and politics. Questions about the viability of #MeToo have loomed large, in part because of skepticism that the digital activism would translate into offline action,⁶¹ as well as the limitations of the current legal landscape in providing relief for victims of sexual assault and harassment.⁶² However, as the movement continues to be culturally salient, we appear to be entering into a period of change, in the legal landscape as well as in society and politics more broadly. Dissatisfaction with the current status quo, and the strong desire for social and institutional changes in how we deal with sexual assault and harassment, is already leading to change.

⁶¹ Gladwell, *supra* note 49.

⁶² Ginia Bellafante, *The #MeToo Movement Changed Everything. Can the Law Catch Up?*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/nyregion/metoo-movement-schneiderman-prosecution.html> [<https://perma.cc/NP3G-2WPR>]; *2018 Brings #MeToo Laws Nationwide*, WNYC (Dec. 31, 2018), <https://www.wnycstudios.org/story/2018-brings-metoo-laws-nationwide> [<https://perma.cc/M9Z2-QHYL>].

1. Strikes and protests

The high volume of #MeToo tweets does not mean that traditional social movement tactics such as strikes, marches, and legal action are obsolete. The online activity not only serves as a catalyst for action, but also provides greater legitimacy and visibility to the action occurring offline, in some cases leading to rapid change. For example, in the private sector, activists have organized to address policies connected to sexual harassment and workplace safety, garnering media attention and public scrutiny for issues normally dealt with in closed-door conversations. In September 2018, for example, after 10 employees filed sexual harassment complaints with the U.S. Equal Employment Opportunity Commission (EEOC), McDonald's employees organized the first ever multi-state strike against the company's existing sexual harassment policies.⁶³ The workers carried signs that said "#MeToo McDonalds" and wore tape over their mouths that said "#MeToo."⁶⁴ Unite Here, a labor union that works primarily with the hospitality industry, worked in conjunction with union leaders in cities such as Chicago, Seattle, and Washington DC to organize massive campaigns advocating for hotels to provide panic buttons to hotel workers.⁶⁵ Major hotel chains, including Marriott, Hilton, and Hyatt, subsequently introduced policies to provide panic buttons at all their properties by 2020.⁶⁶ In October 2018, 20,000 Google employees walked out of corporate offices in 50 cities after demanding an overhaul of Google's sexual harassment policies, particularly their policy of forced arbitration.⁶⁷ In response, Google CEO Sundar Pichai announced changes to the policies, including optional arbitration. The decision followed in the footsteps of similar

⁶³ Daniella Silva, *McDonald's Workers Go on Strike over Sexual Harassment*, NBC NEWS (Sep. 18, 2018), <https://www.nbcnews.com/news/us-news/mcdonald-s-workers-go-strike-over-sexual-harassment-n910656> [<https://perma.cc/9QZ8-KFKW>].

⁶⁴ Rachel Abrams, *McDonald's Workers Across the U.S. Stage #MeToo Protests*, N.Y. TIMES (Sep. 18, 2018), <https://www.nytimes.com/2018/09/18/business/mcdonalds-strike-metoo.html> [<https://perma.cc/GK64-N7UM>]; Sarah Whitten, *McDonald's Employees Stage First #MeToo Strike in Chicago, Alleging Sexual Harassment*, USA TODAY (Sep. 18, 2018), <https://www.usatoday.com/story/money/food/2018/09/18/mcdonalds-employees-metoo-strike-sexual-harassment/1349981002/> [<https://perma.cc/29KK-PUYP>].

⁶⁵ Seema Mody, *Hotels are Arming Workers with Panic Buttons to Combat Harassment*, CNBC (Sep. 6, 2018), <https://www.cnbc.com/2018/09/06/major-hotels-arm-workers-with-panic-buttons-to-fight-harassment.html> [<https://perma.cc/FHX9-ZJG6>].

⁶⁶ *Id.*

⁶⁷ Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [<https://perma.cc/UFM5-C27B>].

policy changes made by other tech giants, including Microsoft and Uber.⁶⁸ Facebook followed suit soon thereafter.⁶⁹

2. TIME'S UP Legal Defense Fund

As discussed above, the hashtag #TimesUp is a solution-oriented branch of the #MeToo movement that seeks solutions to the problems #MeToo has helped identify. It refers to the TIME'S UP Legal Defense Fund (TULDF), created to support lower income women and women of color who have been sexually assaulted or harassed in the workplace.⁷⁰ TULDF was created by 300 actresses, female agents, writers, directors, producers, and entertainment executives seeking solutions for the systemic sexual harassment revealed by #MeToo.⁷¹ Consistent with resource mobilization theory, this is a clear example of how social media activism both outraged and inspired individuals, motivating them to organize, connect, and coordinate efforts to lead to tangible outcomes. The group's mission, in part, is a response to early critiques that lower income women and women of color were being left out of the #MeToo conversation.⁷² This organization offline has helped provide the social and financial capital necessary to advance the cause. As of February 8, 2019, TULDF has fielded more than 4,000 requests for assistance from all 50 states and has raised \$24 million.⁷³ The funding is used to connect women experiencing workplace harassment and retaliation with attorneys, and in some cases, to media specialists. Legal defense funds like TULDF help victims to get justice. They also have the potential to enhance existing efforts to help working class women claim their rights in ways that generally carry steep financial burdens.

⁶⁸ Jilian D'Onfro, *Google CEO, in Internal Memo, Supports Employee Walkout in the Wake of Report on Sexual Misconduct*, CNBC (Oct. 30, 2018), <https://www.cnbc.com/2018/10/30/google-ceo-sundar-pichai-supports-employee-walk-out-in-memo.html> [<https://perma.cc/L2E8-4XLR>].

⁶⁹ Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html> [<https://perma.cc/B98Y-Z5M9>].

⁷⁰ Buckley, *supra* note 60.

⁷¹ *Id.*

⁷² *The #MeToo Research Collaboration*, *supra* note 22 (Our analysis shows that <1% of those posting #MeToo are black.). See Charisse Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY (Oct. 5, 2018), <https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/> [<https://perma.cc/2KT6-2BRA>]. See generally Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. 105 (2018).

⁷³ See *TIME'S UP Legal Defense Fund—Stats & Numbers*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/resources/times-up-legal-defense-fund-stats-numbers/> [<https://perma.cc/BT8Z-FGJP>] (last visited February 17, 2019).

3. EEOC sexual harassment charges

The frequency of legal words emerging in #MeToo conversations online is consistent with recent reports that more individuals are reporting sexual harassment through legal channels since the start of the movement.⁷⁴ According to the EEOC, the government agency responsible for enforcing workplace discrimination law, sexual harassment charges are up nationwide, the first increase observed this decade. The number of hits to the EEOC website for people searching for information on sexual harassment has also doubled.⁷⁵ The agency has capitalized on #MeToo momentum by increasing lawsuits to enforce sexual harassment law and hold employers accountable.⁷⁶ The EEOC has filed 50% more of these lawsuits than it did during the previous year, and has recovered \$70 million for sexual harassment victims in FY 2018, compared to the \$47 million it recovered during FY 2017.⁷⁷ In terms of outcomes, the EEOC reported an increase in cause findings from 970 in FY 2017, to 1,199 in FY 2018. The agency also facilitated more successful conciliations, with nearly 500 in FY 2018, compared to 350 in 2017.⁷⁸

4. State/Federal legislation

While this increased legal activity may be promising in showing that victims are seeking justice and accountability, long-term results will be limited if the movement does not lead to legal reform in order to enhance and broaden protection under sexual harassment law. Our current laws leave many individuals unprotected. For example, many workers are not protected by federal law, including: domestic workers, temporary workers, independent contractors, farm workers, interns, and those working for small employers.⁷⁹ The statute of limitations to

⁷⁴ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC RELEASES PRELIMINARY FY 2018 SEXUAL HARASSMENT DATA (Oct. 4, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm> [<https://perma.cc/WZ8S-6N8G>].

⁷⁵ Julia Horowitz, *Workplace Sexual Harassment Claims Have Spiked in the #MeToo Era*, CNN (Oct. 5, 2018), <https://www.cnn.com/2018/10/04/business/eeoc-sexual-harassment-reports/index.html> [<https://perma.cc/92RS-JFMG>].

⁷⁶ Eric Bachman, *In Response To #MeToo, EEOC Is Filing More Sexual Harassment Lawsuits and Winning*, FORBES (Oct. 5, 2018), <https://www.forbes.com/sites/ericbachman/2018/10/05/how-has-the-eeoc-responded-to-the-metoo-movement/#33a7edf87475> [<https://perma.cc/U5RC-MDCE>]; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHAT YOU SHOULD KNOW: EEOC LEADS THE WAY IN PREVENTING WORKPLACE HARASSMENT, <https://www.eeoc.gov/eeoc/newsroom/wysk/pr-eventing-workplace-harassment.cfm> [<https://perma.cc/832W-CFVR>] (last visited Feb. 3, 2019).

⁷⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2018 PERFORMANCE REPORT 14 (Nov. 15, 2018), <https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf> [<https://perma.cc/TX3R-3PRU>].

⁷⁸ *Id.* at 32.

⁷⁹ 42 U.S.C. § 2000b. Small employers refer to employers with less than 15 employees. See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers*

file sexual harassment claims under federal law is only 180 or 300 days, which is not enough time for many victims to process, reflect, and decide how to move forward.⁸⁰ Non-disclosure agreements too often silence victims.⁸¹ And crucially, mandatory arbitration agreements increasingly prevent claimants from even accessing a court of law.⁸²

To examine the actual and potential policy changes following #MeToo, we reviewed all passed, proposed, and pending state and federal legislation that explicitly addresses sexual harassment and gender equity from October 2016 to December 2018.⁸³ Legislators in several states have cited the #MeToo movement in discussing passed legislation and California has even coined some of the new laws the “#MeToo Bills.”⁸⁴ In the U.S. Congress, from October 2016 to December 2018, 52 bills were introduced relating to sexual harassment, sexual assault, and gender equity in employment.⁸⁵ This total includes a steep increase after the #MeToo movement took off in October 2017.⁸⁶ While only two federal bills were introduced in 2016, 26 were introduced in 2017, 22 of which were following #MeToo, and 24 bills were introduced in 2018.⁸⁷ Three of these bills have passed.⁸⁸ See Figure 4. Of the three bills passed by Congress, one mandates anti-harassment training for Senators and

without Workplaces and Employees without Employers, 27 BERKELEY J. EMP. & LAB. L. 251, 251, 263 (2006).

⁸⁰ 42 U.S.C. § 2000e-2 (2006); Joanna Grossman, *Moving Forward Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1043 (2015) (explaining that the statute of limitation is “180 or 300 days, depending on the level of coordination between the federal and state anti-discrimination agencies”); NATIONAL WOMEN’S LAW CENTER, SELECTED TITLE IX PRACTICE ISSUES: BREAKING DOWN BARRIERS 91 (2017), https://nwlc.org/wp-content/uploads/2015/08/BDB07_Ch6.pdf [<https://perma.cc/N5AF-7JML>].

⁸¹ Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse through Regulating Non-disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2507 (2018).

⁸² Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 1, 2 (2019).

⁸³ Methodology: using Legiscan, we performed a legislative search for each state for the legislative sessions incorporating bills introduced from October 2016-present (2017 & 2018). Our initial search was: “sexual harassment” OR “equal pay” OR “sexual misconduct” OR “gender equity” OR “gender equality.” From there, we searched each individual bill to see if there were any parts of the bill that applied generally to harassment, equal pay, gender equity, whether it was through increased awareness, mandatory training, or some other expansion or limitation on current law.

⁸⁴ *Governor Signs Jackson’s #MeToo Bills to Combat Sexual Harassment in the Workplace*, (Oct. 01, 2008), <https://sd19.senate.ca.gov/news/2018-10-01-governor-signs-jacksons-metoo-bills-combat-sexual-harassment-workplace> [<https://perma.cc/DLX2-NCRA>]; Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It’s Changing Our Laws*, PEW RES. CTR. (Jul. 31, 2008), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws> [<https://perma.cc/DW3S-QUJD>].

⁸⁵ *Id.*

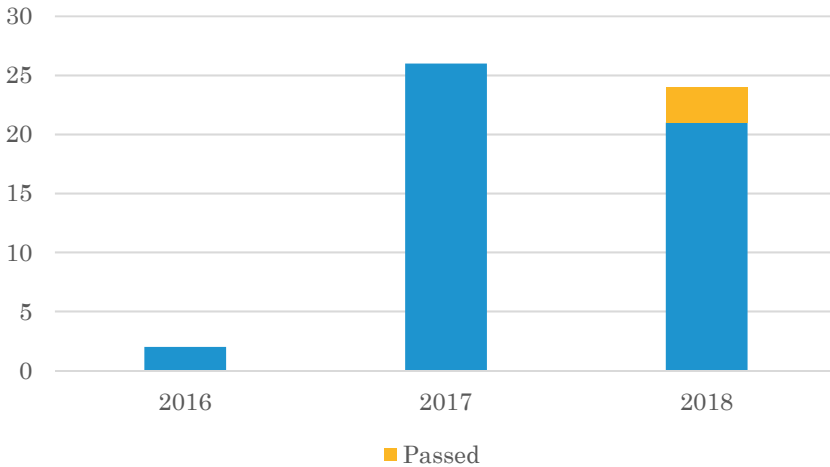
⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Senate employees,⁸⁹ another makes lawmakers financially liable for harassment settlements,⁹⁰ and the third creates additional reporting requirements for sexual harassment in the military.⁹¹ Although a direct causal link cannot be drawn, this timeline suggests a strong correlation.

FIGURE 4. FEDERAL LEGISLATION:
SEX-BASED HARASSMENT AND EQUITY



Even greater legal activity is occurring within the state legislatures. From October 2016 to December 2018, 384 bills were introduced across nearly all 50 states, plus the District of Columbia.⁹² The amount and timing of state legislation also suggests a very close tie with the #MeToo movement. While only 12 bills were introduced in 2016, 91 were proposed in 2017 (19 were introduced following #MeToo), and 281 were proposed in 2018.⁹³ Ninety of these state bills have passed to strengthen the rights and protections of women in a number of states.⁹⁴ Three were passed in 2016, 21 were passed in 2017, and 66 were passed in 2018.⁹⁵ See Figure 5. The states with the highest number of bills introduced in 2018 include California (25), Illinois (17), New York (24), Pennsylvania (20), Tennessee (15), Virginia (12), Minnesota (14), and Connecticut (16). States with the highest number of Bills passed in 2018 include Illinois (8), California (7), Maryland (5) New Jersey (4), New

⁸⁹ S. Res. 330, 115th Cong. (2017) (enacted).

⁹⁰ 132 Stat 5297 (2018).

⁹¹ 131 Stat. 1283 (2017).

⁹² See *supra* note 83.

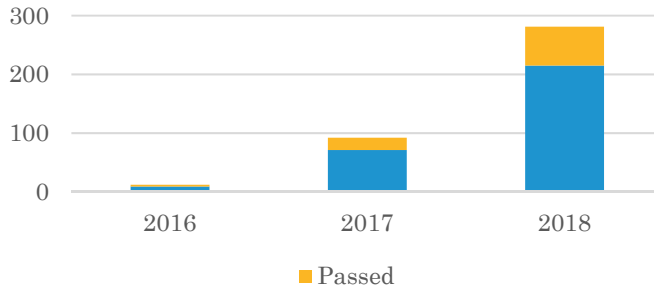
⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

York (3), Washington D.C. (4), Washington State (4), Virginia (3), and Tennessee (3).⁹⁶

FIGURE 5. STATE LEGISLATION: SEX-BASED HARASSMENT AND EQUITY



At both the federal and state level, the legislation proposed represented direct remedies to several institutional and cultural issues at the heart of the #MeToo movement. Almost all states and the federal government introduced legislation addressing pay equity and salary discrimination between male and female government employees.⁹⁷ A majority of states introduced legislation mandating sexual harassment training programs for government employees or introduced legislation improving existing training.⁹⁸ Several states also introduced legislation requiring government contractors or companies that receive federal funds to have harassment-training programs in place.⁹⁹ Numerous states also introduced legislation to end mandatory arbitration in sexual harassment cases, or to extend the statute of limitations for filing sexual harassment claims.¹⁰⁰ Figure 6 outlines these most frequently occurring topics in the state legislatures; pay equity was the most frequently introduced legislation, followed by sexual harassment training, with gender discrimination, statute of limitations, and arbitration also occurring frequently in several states.¹⁰¹

⁹⁶ *Id.*

⁹⁷ *See supra* note 83.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

FIGURE 6. FREQUENTLY OCCURRING TOPICS
OF STATE LEGISLATION, 2016-2018



5. Tort claims

Some scholars also suggest that #MeToo will have an impact on tort law and will lead to more legal actions by victims of gender-related and sexualized injuries such as domestic violence, rape, sexual assault, sexual harassment, and reproductive injuries, particularly against third-party actors and when there are statutory gaps.¹⁰² Torts may sometimes be a better legal avenue than Title VII and Title IX because tort laws often have less strict deadlines for filing a claim. Additionally, plaintiffs who are not official employees of the defendant employer, or who are not students attending a defendant's educational institution, currently have no civil rights claim under these statutes.¹⁰³ In some cases, common law tort claims may provide the only avenue under which they could seek redress. Tort claims also provide recovery or the right to seek damages from the offending individual, whereas Title VII and IX claims can only be directed against the employer or the educational entity itself.¹⁰⁴ The most commonly brought tort actions related to sexual harassment, sexual assault, and rape are intentional or negligent infliction of emotional distress, assault and battery, invasion of privacy, intrusion, as well as employment-related common law torts,

¹⁰² Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 46–47 (2018); Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L. J. ONLINE 1014, 1016 (2018). See generally Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007).

¹⁰³ See White, *supra* note 102, at 1022.

¹⁰⁴ Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L. J. ONLINE 1014, 1024 (2018).

such as failure to maintain a safe workplace and negligent hiring and retention.¹⁰⁵

Spikes in defamation lawsuits against the alleged wrongdoer, as well as retaliatory defamation lawsuits against the victim, have also been reported following #MeToo.¹⁰⁶ These claims are particularly common when the statute of limitations for sexual assault or sexual harassment claims has passed.¹⁰⁷ In addition to extending the ability of victims to bring a claim, defamation lawsuits also provide one of the few ways to address the additional reputational injuries that women often sustain when they accuse a high-profile harasser.¹⁰⁸ For example, high profile defamation lawsuits have been brought against Bill Cosby, Donald Trump, Roy Moore, and Bill O'Reilly.¹⁰⁹ In this sense they might also be thought of as a mechanism for fighting the underlying gender inequality that allows men to take advantage of being more readily believed than women.¹¹⁰

6. Government officials

Our comprehensive analysis of the public record reveals that #MeToo also spurred a series of public accusations of government officials, many of whom are responsible for passing laws on this very issue.¹¹¹

¹⁰⁵ Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55 (2006); White, *supra* note 102, at 1016.

¹⁰⁶ Mark Mulholland & Elizabeth Sy, *Victim Defamation Claims in the Era of #MeToo*, N.Y. L. J. (Aug. 1, 2018).

¹⁰⁷ White, *supra* note 102, at 1022.

¹⁰⁸ See Anna North, *The Summer Zervos Sexual Assault Allegations and Lawsuit against Donald Trump, Explained*, VOX (March 26, 2018), <https://www.vox.com/policy-and-politics/2018/3/26/17151766/summer-zervos-case-trump-lawsuit-sexual-assault-allegations> (last visited February 27, 2019) [<https://perma.cc/XB74-2Z3F>].

¹⁰⁹ Daniel Jackson, *Sex-Assault Accusers Turn to Defamation Lawsuits in #MeToo Era*, COURTHOUSE NEWS SERV. (Jan. 25, 2018), <https://www.courthousenews.com/sex-assault-accusers-turn-to-defamation-lawsuits-in-metoo-era/> [<https://perma.cc/ZVX3-JTBG>].

¹¹⁰ Defamation lawsuits are also a new obstacle for people with fewer resources filing sexual misconduct complaints under Title IX. Tyler Kingkade, *As More College Students Say "MeToo," Accused Men are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [<https://perma.cc/2JHR-N2LZ>]. Even the threat of a lawsuit can chill an alleged victim's plans to speak out. Jackson, *supra* note 109.

¹¹¹ Jamillah Bowman-Williams, *#MeToo and Public Officials: A post-election snapshot of allegations and consequences*, GEO. U. L. CTR. (Nov. 9, 2018), <https://www.law.georgetown.edu/wp-content/uploads/2018/11/MeToo-and-Public-Officials.pdf> [<https://perma.cc/XDQ2-DN6Q>]. Methodology: using LexisNexis, GoogleNews and NewspaperArchive, we performed a series of searches based on a series of key word phrases and indexed subject terms. These included, but were not limited to, words denoting general types of allegations, such as "sexual harassment," "sexual misconduct," "sexual assault," "inappropriate touching," and "abuse," which were searched in association with positions such as "government official," "state senator," "legislative bodies," "local government," "Congress," "assemblymen," "governor," "congressman," and "state representative." The search was limited to online and print newspapers and publications from the United States, and

Those accused include state legislators, members of the U.S. Congress, and other elected and appointed officials.¹¹² All but three of the 138 people accused in our data set are men. Some have been accused by more than a dozen women.¹¹³ Most of the allegations pertain to behavior within the workplace, including unwanted kissing and groping, masturbating in front of others, sending sexually explicit photos, and discussing sexual fantasies.¹¹⁴ Some of the reported misconduct has also occurred outside of official government responsibilities, including domestic violence, sexual misconduct with minors, and sex trafficking.¹¹⁵

Many of these claims have been settled by officials, who pay victims large settlements using taxpayer dollars.¹¹⁶ Other claims have prompted internal investigations into the toxic workplace cultures that feed this type of behavior.¹¹⁷ Republicans and Democrats shared a relatively even distribution of the allegations, constituting about 48.5 percent and 43.5 percent of accusations, respectively.¹¹⁸ Reports are also spread fairly evenly across the country.¹¹⁹ Alleged misconduct was notably high compared to the overall population in Ohio, Kentucky, Alaska, and Washington, D.C.¹²⁰

Most of the accused officials in our findings have since fallen from power.¹²¹ Of the 25 appointed officials, 23 have been fired or resigned.¹²² Of the 111 elected officials, 76 are no longer in office.¹²³ Moreover, some of these officials also face legal action, including at least 7 civil lawsuits and 12 criminal charges. This type of accountability is historically unprecedented.¹²⁴ Nonetheless, of the 27 government officials accused of

looked at reporting conducted from November 2016 to October 2018. Individual behavior is identified, and others accused of enabling or hiding another individual's harassment or misconduct are also accounted for. In some circumstances the incident takes place in earlier years, but the accusation happened or was reported within the November 2016 to October 2018 timeframe.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Peter Henning, *Taxpayers Are Subsidizing Hush Money for Sexual Harassment and Assault*, THE CONVERSATION (Nov. 5, 2017), <https://theconversation.com/taxpayers-are-subsidizing-hush-money-for-sexual-harassment-and-assault-86451> [<https://perma.cc/QF57-AZ59>].

¹¹⁷ See Bowman-Williams, *supra* note 111.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *Id.*

¹²⁴ Nathaniel Rakich, *We've Never Seen Congressional Resignations Like This Before*, FIVETHIRTYEIGHT (Jan. 29, 2018), <https://fivethirtyeight.com/features/more-people-are-resigning-from-congress-than-at-any-time-in-recent-history/> [<https://perma.cc/LLT3-KVYT>].

sexual misconduct who ran for office in the 2018 midterm elections, 23 were re-elected or elected to a new government position.¹²⁵ These statistics are consistent with typical election trends, considering that an average of 92 percent of state legislators are re-elected in any given election year.¹²⁶ So, for those who did not step down and instead, sought reelection, sexual misconduct allegations appeared to have little influence on the outcome.

VII. CONCLUSION

As important as individual stories are for achieving empowerment and justice at the personal level, the magnitude of the social media response reveals something significant about the pervasiveness of, and tolerance for, harassment and abuse in our society. By encouraging women and men to speak out and supporters around the world to act, our analysis suggests that #MeToo is changing our society's collective understanding of sexual harassment and assault, and reducing our collective tolerance for it. Not only are people talking about issues online, but by using a simple, shared phrase they have named and consolidated the conversation and made the injury more visible. There is also evidence that the conversations are sparking broader offline organizing efforts and prompting victims to claim their legal rights, seek protection of the law, and demand better laws when the protection is inadequate.¹²⁷

In this new paradigm of collective action, at least in the context of #MeToo, tweeting has not eclipsed traditional social movement activity, but rather has been a catalyst and communications tool for action offline. While social media allows individuals to disseminate information, organize, and act without dependence on traditional movement institutions, organizations like Time's Up Legal Defense continue to play a central role in pushing for remedies and reform. Legal reform also has not been abandoned within the new paradigm as indicated by the increase in legislative activity around harassment and gender equity following the #MeToo surge online.

Social media activism is powerful when it effectively names a pervasive injury and the inequality that sustains it, when it consolidates communication about the injury, and when it inspires action and reform. Like #BlackLivesMatter, #MeToo has done just this. But both movements seek to address the stickiest kinds of cultural norms, the

¹²⁵ See Bowman-Williams, *supra* note 111.

¹²⁶ Ciara O'Neill, *Money and Incumbency in State Legislative Races, 2015 and 2016*, FOLLOW THE MONEY (Nov. 1, 2017), <https://www.followthemoney.org/research/institute-reports/money-incumbency-in-2015-and-2016-state-legislative-races> [<https://perma.cc/6H2U-WEBH>].

¹²⁷ Beitsch, *supra*, note 84.

ones that are so ingrained that we often do not recognize them; they are the implicit default ideas about race and gender. For this reason, change can be uneven, uncertain, and subject to backlash. What we do not yet know is whether the #MeToo movement will maintain its momentum and whether these changes in the short run will translate to broader and more sustainable cultural, legal, and political change in the long run.



Sexual Harassment Litigation with a Dose of Reality

Diane P. Wood[†]

Title VII of the Civil Rights Act of 1964,¹ which prohibits discrimination on the basis of “race, color, religion, *sex*, or national origin”² has been around for 55 years. One might think that this was long enough to work out the kinks and ensure that its protections are readily available to any covered person who needs them. But at least parts of the statute are still works-in-progress. Prominent among the latter group is the prohibition against “discriminat[ion] against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . *sex*.”³ There is much one could say about this, starting with the question “what does the word ‘sex’ mean here?”⁴ But that topic, important though it is, deserves its own Symposium.⁵ The focus of today’s discussion is the #MeToo Movement. If there is any message to be taken from the explosive growth of that hashtag, it is that there is still a great deal of work to be done if the goal is to eliminate sexual harassment and related abusive behaviors.

Why is that? As I just said, statutory protections against sex discrimination in the workplace have existed for more than half a century,

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¹ 42 U.S.C. § 2000e *et seq.* (2012).

² 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

³ *Id.*

⁴ See *Hively v. Ivy Tech Comm. College of Ind.*, 853 F.3d 339, 340 (7th Cir. 2017) (en banc) (construing the word “sex” to encompass classifications based on sexual orientation); *Whitaker v. Kenosha Unified Schl. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1038 (7th Cir. 2017) (applying Title IX protections to transgender high school student on sex-stereotyping theory).

⁵ See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 121 (2d Cir. 2018) (en banc) (agreeing with *Hively*); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 330 (5th Cir. 2019) (disagreeing with *Hively*).

and there are comparable protections in other specialized settings, including housing,⁶ educational institutions,⁷ and public benefits.⁸ The flood of stories that has emerged in the wake of the #MeToo Movement, however, strongly indicates that those legal rules are not doing the job. The question is why not? And in particular, why have the laws addressing #MeToo in the workplace not been a match for the problem? This inquiry sheds light both on changes that may be especially useful, and on the competing interests that will have to be addressed.

Let's start with the basics: what does *discrimination* on the basis of sex mean? Does it mean classifying one's employees by biological gender and paying the males more money? Certainly yes, but that isn't all it means. Does it mean excluding one sex on the basis of characteristics unique to it—pregnancy for women, susceptibility to prostate cancer for men, and so on? This is a more difficult question in some instances, but Congress has answered it in others. For example, the Pregnancy Discrimination Act of 1978⁹ clarifies that the terms “because of sex” or “on the basis of sex” include actions taken on the basis of pregnancy, childbirth, or related medical conditions.¹⁰ For issues covered by that statute, at least, the answer to the second question is also yes. But what about sexual harassment?

For more than two decades after Title VII was enacted, it seems fair to say that very few people imagined that the statute addressed sexual harassment. Some, however, realized that few things affect a person's “terms and conditions of employment” more than sexual harassment. In 1979, Catharine MacKinnon published her groundbreaking book entitled simply “Sexual Harassment of Working Women: A Case of Sex Discrimination.”¹¹ The book revolutionized thinking in this area. In what must be record time for a legal scholar, MacKinnon's concept made its way up to the Supreme Court in 1986, in a case called *Meritor Savings Bank, FSB v. Vinson*.¹² There, in an opinion by then-Associate

⁶ Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. § 3601 *et seq.*).

⁷ Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 *et seq.*).

⁸ *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (finding that gender-based discrimination in the criteria for awarding social security survivor benefits violated the Constitution's due process and equal protection guarantees); Weinberger v. Wiesenfeld, 420 U.S. 636, 642–44 (1975) (striking down as unlawful sex discrimination in violation of equal protection a provision basing social security benefits based only on the earnings of a deceased husband, and not on earnings of a deceased wife).

⁹ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

¹⁰ 42 U.S.C. § 2000e(k).

¹¹ CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

¹² 477 U.S. 57 (1986).

Justice William Rehnquist, the Court recognized that sexual harassment is covered by Title VII. In so doing, it settled several important questions:

- When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex.¹³
- The language of Title VII is not limited to economic or tangible discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.¹⁴
- Sexual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic quid pro quo, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁵
- A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.¹⁶
- 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.¹⁷
- The fact that sex-related conduct is "voluntary," in the sense that the complainant has not been forced to participate against her will, is not a defense to a sexual-harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."¹⁸

The Supreme Court has reaffirmed these rulings over the years. In 1993, in the case of *Harris v. Forklift Systems, Inc.*,¹⁹ it held that har-

¹³ *Id.* at 64.

¹⁴ *Id.*

¹⁵ *Id.* at 65.

¹⁶ *Id.* at 66.

¹⁷ *Id.* at 67.

¹⁸ *Id.* at 68.

¹⁹ 510 U.S. 17 (1993) (former employee brought suit against her employer, arguing the company president's gender-based insults and innuendos created an abusive work environment. While the lower court held that the comments were not so severe as to affect her psychological well-being nor to cause her injury, the Supreme Court ultimately held "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to

assment need not reach the level of tangible psychological injury in order to be actionable.²⁰ In *Oncala v. Sundowner Offshore Services, Inc.*,²¹ it recognized that harassment at the hands of a person of the same sex as the victim falls within the statute.²² In the twin cases of *Burlington Industries, Inc. v. Ellerth*²³ and *Faragher v. City of Boca Raton*,²⁴ it set forth the rules for linking a supervisor or other actor's conduct to the employer; those rules in turn establish when the employer will be vicariously liable for misconduct. It is worth stressing in this connection that the link to the ultimate employer is critical—indeed, it is outcome-determinative for purposes of a Title VII action. Courts have held that Title VII creates a remedy *only* against the “employer.”²⁵ From that, they infer that the offender, whether a supervisor, a fellow employee, a customer, or another workplace participant, is *not* individually liable under the statute.²⁶ Unless, therefore, a state-law theory exists, or another federal statute is available (often true in racial discrimination and harassment cases),²⁷ the plaintiff can proceed only indirectly against the offending party, by pursuing an action against the employer.

The need to link the offending behavior to the employer is thus one of the hurdles that a victim of sexual harassment must surmount. But it is far from the only one. Most cases do not make it all the way up to the Supreme Court, and the Court chooses only those in which a broader point needs to be made. It is the district courts and the courts of appeals that have the responsibility of sifting through the filed cases and deciding at retail who wins and who loses. At that level, it becomes apparent that even blatant cases of sexual harassment frequently fail.

alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated”).

²⁰ *Id.* at 21–22.

²¹ 523 U.S. 75 (1998) (the male plaintiff quit and brought a sexual harassment claim against his employer after male crewmen on the oil rig where he worked subjected him to sexual humiliation, sexual assault, and threats of rape).

²² *Id.* at 81–82.

²³ 524 U.S. 742, 765 (1998) (holding that an employer is vicariously liable for harassment perpetrated by an employee with higher authority over the victim, and noting that this liability is strict if there are tangible job consequences, but if there are no tangible job consequences, the employer may avail itself of an affirmative defense, which requires a showing that the employer exercised reasonable care to “prevent and correct promptly any sexually harassing behavior” and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided”).

²⁴ 524 U.S. 775, 780 (1998) (holding that, in cases not involving a tangible employment action, an employer may raise an affirmative defense that “looks to the reasonableness of employer's conduct in seeking to prevent and correct harassing conduct and to the reasonableness of employee's conduct in seeking to avoid harm”).

²⁵ *See, e.g., Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Fantini v. Salem State Coll.*, 557 F.3d 22, 29 (1st Cir. 2009).

²⁶ *Id.*

²⁷ *See, e.g., 42 U.S.C. § 1981* (2012).

This paper looks at those cases and asks what went wrong and whether changes in the law are necessary, or if on the other hand the plaintiffs' failures occur as a result of competing policies. Importantly, because more than 98% of all civil litigation is resolved short of a trial, the facts in the cases discussed here are generally not contested: at the motion-to-dismiss stage, the court accepts the facts and inferences in favor of the opponent of the motion;²⁸ at the summary judgment stage, the court reviews the proffered evidence in the light most favorable to the plaintiff (or more accurately, the non-moving party, as plaintiff normally is in an employment-discrimination case).²⁹ Yet even with this thumb on the scale, plaintiffs lose an impressive percentage of cases. Sometimes they lose because the court concludes that the described conduct is not severe enough, or not pervasive enough, to affect the terms and conditions of employment.³⁰ Sometimes, based on the same notion, courts actually overturn jury verdicts for plaintiffs.³¹ In other instances, plaintiffs lose because they do not adequately inform the employer of the abuse that is going on.³² In another line of cases, the court does not see the connection between the harassing acts and the plaintiff's sex.³³ Plaintiffs lose notwithstanding facts that strongly suggest harassment, if they make a mistake and choose the wrong legal theory—for example, if they complain to the Equal Employment Opportunity Commission about sex discrimination, but the facts are later judged to be a better fit for unlawful retaliation.³⁴ In one egregious instance described below, the EEOC took over a complaint and secured a victory on liability, but the battle then shifted to punitive damages. A jury thought that these damages were appropriate, but the court of appeals overturned the

²⁸ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”); *Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1158 (10th Cir. 2018); *Progressive Credit Union v. City of New York*, 889 F.3d 40, 48 (2d Cir. 2018).

²⁹ See *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 588–89 (1986); *Hutchison v. Fitzgerald Equip. Co.*, 910 F.3d 1016, 1021–22 (7th Cir. 2018).

³⁰ See, e.g., *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 528 (7th Cir. 1993) (upper thigh rubbing, unwanted kissing, leaping out from behind bush); *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 463–64 (7th Cir. 2002) (leering, touching); *Bilal v. Rotec Indus.*, 326 Fed. App'x 949, 952–53 (7th Cir. 2009) (inviting sex, sticking chocolate into plaintiff's mouth). *But see* *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 801 (7th Cir. 2000) (overturning a district court that dismissed a case on the ground that the conduct was not sufficiently severe).

³¹ See, e.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432–33 (7th Cir. 1995) (overturning a district court ruling in favor of the plaintiff on the grounds that the plaintiff's alleged harasser neither touch her nor asked her to go on a date or have sex with him).

³² See, e.g., *Zimmerman v. Cook Cty. Sheriff's Dept.*, 96 F.3d 1017, 1019 (7th Cir. 1996); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1014–15 (7th Cir. 1997); *Faragher v. City of Boca Raton*, 524 U.S. 775, 782–83 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 748–49 (1998).

³³ See *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 810–11 (7th Cir. 2001).

³⁴ See, e.g., *id.* at 809–10.

jury's verdict because it found that the instructions did not give the jury enough latitude to take into account the relevant collective bargaining agreement.

Other problems lie behind these observable results. As the law has developed, in all but a small number of cases nothing can or will happen unless the victim reports the abuse or harassment in a timely and complete manner. But reporting is often difficult, both psychologically and practically. Reporting mechanisms and confidentiality measures are notoriously leaky. Victims fear either ineffectual responses or retaliation. Victims also fear, with some warrant, that they will not be believed or that the seriousness of the problem will not be appreciated. In those instances, the victim might wind up as the party paying a price for the offensive conduct, through a transfer to a less desirable location, a move to a different job, or in the most extreme cases, even dismissal. Investigations of complaints may be cursory, and their results may rest on credibility determinations that are themselves questionable.

To address these and related problems, changes in the law may be necessary. One area ripe for re-examination is the distinction the Supreme Court has recognized between supervisory harassment and fellow-employee or customer harassment. Another area where greater scrutiny would help is that of preventive measures and remedies. It is, or at least should be, shocking that 80% of women report that they have experienced sexual harassment, and many men have also been victimized. That must stop.

A closer look at some cases in this area will drive these points home. The specific examples presented here come from the Seventh Circuit; in addition, I discuss the preliminary results of a broader survey of the cases that have reached the federal courts of appeals since *Meritor*.³⁵ One might view the Seventh Circuit examples as the legal version of the popular TV show "Mythbusters." In the spirit of that show, these cases debunk the idea that companies and individuals are routinely found liable for sexual harassment based on innocuous or misunderstood behavior (e.g., "you look nice today," or "let me hold the door for you"). The reality is otherwise: the innocuous actions never get litigated, or if they do, they are quickly thrown out of court, while even truly awful actions frequently fall outside the scope of the law as a result of one or more of the doctrines mentioned earlier. It is worth considering whether those doctrines are performing a valuable function, or if they need to be modified or jettisoned altogether.

The Seventh Circuit cases almost all involve behavior described by the victim of harassment—and accepted by the court because the appeal

³⁵ 477 U.S. 57 (1986).

is from a motion to dismiss or the grant of summary judgment—that was *not* enough to allow the victim to go forward with her case. For want of a better organizational mechanism, they are presented in chronological order.

The first example is the case of *Saxton v. American Telephone & Telegraph Co.*³⁶ Plaintiff Saxton began working for AT&T's Design Engineering Staff in 1986.³⁷ Shortly after she joined the company, she encountered a supervisor in the International Division named Jerome Richardson.³⁸ The two struck up a casual acquaintance and discussed the question whether Saxton might transfer to Richardson's group.³⁹ Richardson boasted that he could bring Saxton into his group with a job classification (called MTS) that typically required a bachelor of science degree in engineering or a related field from a reputable university, even though Saxton had only a bachelor of arts degree in computer science from a lesser-known college.⁴⁰ Saxton's supervisor told her that the supervisor doubted that Saxton could be transferred into the MTS job.⁴¹ Saxton, however, decided to give the transfer a try; she accepted Richardson's offer and joined his group in January 1988.⁴² The former supervisor's qualms were vindicated when, in February or March, Richardson informed Saxton that she actually did not have the MTS job, but instead had a lower classification.⁴³ Richardson assured her that the opportunity for the promotion was still available, if she performed satisfactorily. As far as the record shows, however, "she never received the MTS promotion."⁴⁴

Then matters took a disturbing turn. In April 1988, Richardson suggested that Saxton and he should meet for drinks after work.⁴⁵ Saxton accepted, hoping to discuss her dissatisfaction with her initial lab assignment.⁴⁶ The two spent a couple of hours at a suburban nightclub and then drove to a jazz club in Chicago.⁴⁷ As the court's opinion recounts, "[w]hile they were at the jazz club, Richardson placed his hand on Saxton's leg above the knee several times and once he rubbed his

³⁶ 10 F.3d 526 (7th Cir. 1993).

³⁷ *Id.* at 528.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Saxton v. Am. Tel. & Tel.Co.*, 10 F.3d 526, 528 (7th Cir. 1993).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

hand along her upper thigh.”⁴⁸ Saxton rebuffed his advances and asked him to stop. She warned him that this behavior could lead to trouble.⁴⁹ Richardson, however, was not deterred: on the way out of the club, he pulled Saxton aside and kissed her. She pushed him away after two or three seconds.⁵⁰ Once again, Saxton asked him not to repeat his advances, and he seemingly acquiesced.⁵¹ The next morning at work, Saxton reiterated her request that he cease the sexual advances. At the time, Richardson apologized and assured her that he would respect her wishes.⁵²

Richardson did not keep his word, as one can see from the court’s account of the case:

Approximately three weeks later, Richardson invited Saxton to lunch with the stated purpose of discussing work-related matters. Afterwards, Richardson was driving Saxton back to her car when he took a detour to an arboretum, stopped the car, and got out to take a walk. Saxton decided to follow suit and walk off on her own. As she did so, Richardson suddenly “lurched” at her from behind some bushes, as if to grab her. Saxton ran several feet in order to avoid Richardson’s sudden motion. She again reminded Richardson that his conduct was inappropriate, causing him to become sullen. They then resumed the drive back to Saxton’s car without further incident.⁵³

After the arboretum incident, Richardson ceased any sexual advances toward Saxton.⁵⁴ Saxton then sued for sexual harassment, but her case was dismissed. Here is the court’s explanation for its result: “Although Richardson’s conduct was undoubtedly inappropriate, it was not so severe or pervasive as to create an objectively hostile working environment.”⁵⁵ In addition, the court said, AT&T took adequate remedial steps.⁵⁶

Example number two is *Baskerville v. Culligan International Co.*⁵⁷ This result was, if possible, even less favorable to the claimant, in whose

⁴⁸ *Id.* at 528.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 529.

⁵⁵ *Id.* at 534.

⁵⁶ *Id.* at 535–36.

⁵⁷ 50 F.3d 428 (7th Cir. 1995), *abrogated by* Gates v. Bd. of Educ. of the City of Chicago, 916 F.3d 631, 640 (7th Cir. 2019).

favor a jury had ruled at the trial level, but who lost in the court of appeals.⁵⁸ Baskerville was hired as a secretary in the marketing department of Culligan, a manufacturer of water-treatment products.⁵⁹ Shortly after she joined the company, she was assigned to work for Michael Hall, who had recently been hired to be the Western Regional Manager.⁶⁰ Here are the acts of sexual harassment about which Baskerville was complaining, some of which may seem trivial, others more serious:

- He would call her “pretty girl.”
- When she was wearing a leather skirt, he made an obnoxious sound as she was leaving his office.
- In response to her comment about how hot his office was, he raised his eyebrows and said, “Not until you stepped your foot in here.”
- When the company was broadcasting an announcement over the public address system, Hall said to Baskerville, “You know what that means, don’t you? All pretty girls run around naked.”⁶¹
- He once called Baskerville a “tilly,” a term that he admitted using for all women.
- He told her that his wife had said that he had “better clean up [his] act” and “better think of [Baskerville] as Ms. Anita Hill.”
- He told Baskerville that he left a Christmas party early because he thought he might “lose control” with “so many pretty girls there.”⁶²
- When she complained about cigarette smoke in Hall’s office, he replied “Oh really? Were we dancing, like in a nightclub?”⁶³
- When Baskerville checked to see if Hall had sent his wife a Valentine’s Day card, he responded that he had not. He continued by saying that it was lonely in his hotel room, where he lived alone while awaiting his wife’s move to Chicago, and he had nothing but his pillow for company. At that point, he made a gesture intended to suggest masturbation.⁶⁴

⁵⁸ *Id.* at 430.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Using a standard that the courts have since rejected, under which actionable harassment occurs only if the workplace becomes “hellish” for the victim,⁶⁵ the court of appeals found as a matter of law that no jury could conclude that these incidents added up to harassment.⁶⁶ In addition, as in *Saxton*, the court was impressed that the company took some steps to protect the victim.⁶⁷ Although one might think that the later disapproval of the “hellish” standard is a step forward, we will see that later cases confirm that it is still necessary to show both subjective and objective offensiveness, and that the latter must be enough to affect terms and conditions of employment.

The facts of the next example, *Zimmerman v. Cook County Sheriff's Department*,⁶⁸ are more graphic. Michelle Zimmerman was employed as a correctional officer by the Cook County Sheriff's Department.⁶⁹ In August of 1992 a fellow officer, Salvatore Terranova, launched a campaign of inappropriate sexual remarks and behavior.⁷⁰ For example, he repeatedly referred to his “big dick.”⁷¹ His worst act, however, took place on August 14, “when he placed a zucchini between his legs and thrust it against [Zimmerman]’s buttocks.”⁷² Three days later, she asked her supervisor for a change in work assignment. She did not tie her request directly to Terranova’s offensive sexual conduct; she complained only of “a severe personality conflict at my present job.”⁷³ Her supervisor turned her down the next day without conducting any investigation.⁷⁴ After a brief time during which the Sheriff’s Office separated the two, Zimmerman was reassigned to Terranova’s area.⁷⁵ He picked up where he had left off.⁷⁶ This time, his behavior was even more offensive: the opinion reports that on one occasion, “he grabbed one of her breasts,

⁶⁵ For instance, in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the Supreme Court confirmed that “Title VII comes into play before the harassing conduct leads to a nervous breakdown.” *Id.* at 22. It continued, “[a] discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing their careers.” *Id.* See also *Swyer v. Fare Foods Corp.*, 911 F.3d 874, 881 (7th Cir. 2018) (“While ‘hellish’ was once the standard, it is no longer. The Supreme Court standard dictates that the discrimination just be only so severe or pervasive so as to affect the terms and conditions of employment. . . . This is a far cry from hellish.”) (citations and quotation marks omitted).

⁶⁶ *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

⁶⁷ *Id.*

⁶⁸ 96 F.3d 1017 (7th Cir. 1996).

⁶⁹ *Id.* at 1018.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

grabbed and rubbed her buttocks, and grabbed her by her wrists and yanked her arms down, injuring one of her arms.”⁷⁷ The next day, she submitted detailed memoranda concerning these incidents to her superiors.⁷⁸ During their investigation, which exonerated Terranova, they separated the two.⁷⁹ Shortly afterward she went on disability leave and did not return to her job for a year.⁸⁰ The one-year hiatus apparently resolved her remaining workplace problems with Terranova, with whom she had no further contact on the job.⁸¹ She did not, however, acquiesce in his behavior. To the contrary, she filed criminal charges against Terranova. Interestingly, even though he had been exonerated by the Sheriff’s Department, he was convicted of sexual assault.⁸² Nevertheless, Zimmerman lost her civil sexual harassment action.⁸³ The problem this time? Insufficient notice to the employer of the nature of the problem she had with Terranova.⁸⁴

The case of *Perry v. Harris Chernin, Inc.*,⁸⁵ also failed for lack of adequate notice to the employer.⁸⁶ This was an example of less intrusive, but persistent, inappropriate remarks. For instance, about six months into plaintiff Perry’s employment, Jackson commented to her, “You know you want me, don’t you?”⁸⁷ It did not take long for Jackson to escalate his advances. He called Perry to his office a couple of months later on the pretext of discussing her performance.⁸⁸ And that is how the conversation began: Jackson commented on Perry’s absenteeism. But he then said, “By the way, [in] your interview, I saw your breasts. I saw your nipples You wore a low-cut blouse, and I could see your breasts, and I knew your nipples were hard.”⁸⁹ On another occasion, Jackson told Perry that he would “beat [her] with the stick [her] husband used.”⁹⁰ She understood him to be referring to his penis and his desire to have sex with her.⁹¹ Other inappropriate remarks followed, including comments about her waking up next to him in bed, about whether she was a “screamer,” and the observation that she “wore her

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1019.

⁸⁵ 126 F.3d 1010 (7th Cir. 1997).

⁹² *Id.* at 1011.

⁸⁷ *Id.* at 1011–12.

⁸⁸ *Id.* at 1012.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹¹ *Id.*

clothes well.”⁹² Perry’s effort to sue was blocked by two facts: she never reported any of these comments to anyone at Chernin’s; and Chernin’s had published policies against sexual harassment in the workplace.⁹³

Hostetler v. Quality Dining, Inc.,⁹⁴ the next example, shows that plaintiffs occasionally win. Although the district court had granted summary judgment for the employer, the Seventh Circuit reversed and remanded to allow the case to go forward.⁹⁵ A quick glimpse of those facts explains that ruling. The plaintiff, Hostetler, worked at a Burger King.⁹⁶ She alleged that a fellow supervisory employee at her restaurant grabbed her face one day at work and stuck his tongue down her throat.⁹⁷ He repeated his effort to kiss her the next day.⁹⁸ When she struggled to evade him, he began to unfasten her brassiere, managing to get four out of five snaps undone and threatening to “undo it all the way.”⁹⁹ On another occasion while Hostetler was working, Payton announced that “he could perform oral sex on her so effectively that [she] would do cartwheels.”¹⁰⁰ When Hostetler reported these incidents to her superiors, her district manager remarked that he dealt with his problems by getting rid of them.¹⁰¹ Days later, Hostetler—not Payton—was transferred to a distant Burger King location.¹⁰² The district court thought that these incidents were not severe enough to amount to harassment and that Burger King had done enough, but the Seventh Circuit saw matters otherwise.¹⁰³ It held that “the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive.”¹⁰⁴ Although the court found it more difficult to say whether Payton’s behavior was so serious that it would allow a finder of fact to label Hostetler’s work environment hostile, since the number of incidents was not high, the court resolved that issue in Hostetler’s favor because the two principal acts were physical, rather than merely verbal.¹⁰⁵ It is hard to say why Hostetler received a more favorable reception by the court, but perhaps

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 218 F.3d 798 (7th Cir. 2000).

⁹⁵ *Id.* at 812.

⁹⁶ *Id.* at 802.

⁹⁷ *Id.* at 801.

⁹⁸ *Id.*

⁹⁹ *Id.* at 801–02.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 804.

¹⁰² *Id.*

¹⁰³ *Id.* at 806–07.

¹⁰⁴ *Id.* at 807.

¹⁰⁵ *Id.* at 808.

the physical dimension of the abuse she experienced made a difference. In any event, the court of appeals remanded the case to a district court for trial.¹⁰⁶

In *Berry v. Delta Airlines, Inc.*,¹⁰⁷ plaintiff Berry complained to her regional manager about incessant harassment from Causevic, her supervisor at Delta Airline's cargo facilities at Chicago's O'Hare Airport.¹⁰⁸ She asserted that Causevic had taken a substantial number of improper and harassing actions: he slid his hand up her shorts to her panty line and told her that he loved her smooth legs; he pulled her blouse away from her chest and tried to look down her shirt at her breasts; he repeatedly asked her if she would take him up on his "proposition" (for sex) and if she would go with him on a "very, very long ride home"; he referred to her as his "girlfriend" in front of others; he asked her on a date; he told her that he thought her "butt" and legs were "sexy"; and he tried to touch or embrace her inappropriately on various occasions.¹⁰⁹ Almost every time Berry sought help from Causevic at work, he would say things such as "give me a kiss first," "what will you do for me," or "only if you go on a long ride with me."¹¹⁰ The district court granted summary judgment for Delta, and the Seventh Circuit affirmed.¹¹¹ It is worth quoting the holding:

"[I]t is clear that the incidents of workplace "harassment" which occurred after Berry complained to [the regional manager] on June 7, 1999, while unfortunate, are not actionable as sexual harassment under Title VII (either collectively or individually) because Berry has presented no evidence suggesting that any of these incidents were motivated by her gender. Even taken in the light most favorable to Berry, the evidence presented suggests that all of the claimed instances of post-complaint harassment were meant as retaliation for Berry's having complained about Causevic's prior sexual harassment, and were not motivated by any anti-female animus."¹¹²

The court added that, insofar as the claimed harassment was motivated by Berry's sex, Delta could not be liable because it did not know what was going on.¹¹³

¹⁰⁶ *Id.* at 812.

¹⁰⁷ 260 F.3d 803 (7th Cir. 2001).

¹⁰⁸ *Id.* at 805.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 804, 814.

¹¹² *Id.* at 808-09.

¹¹³ *Id.* at 811.

The next example is a good-news, bad-news story: the case for liability went to a jury, which ruled in the plaintiff's favor, but the case for punitive damages failed in the court of appeals. It is *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.*¹¹⁴ The legal question, which went all the way to the en banc court of appeals, related to whether evidence about a company's obligations under its collective bargaining agreement (CBA) was admissible to show the reasonableness of its response to known (indeed, very well known) harassment.¹¹⁵ The majority held that the company might be able to escape punitive damages based on its obligations under the CBA, and so it vacated the jury's award of punitive damages and remanded for further proceedings.¹¹⁶

The underlying behavior was appalling. Gary Amos was a long-time employee of Ameritech; he worked in its coin center and its small business unit.¹¹⁷ Most of his fellow employees were women.¹¹⁸ Unfortunately for everyone, he could not seem to resist exposing himself at the workplace. The first glimpse of this behavior dated back to 1975 (and this was a 2002 decision!), when Barbara Huckeba complained to her supervisor that Amos had exposed himself to her three times.¹¹⁹ Ameritech's response—shocking to modern eyes—was to fire *Huckeba*, not to discipline Amos. It justified that action by saying that Huckeba was more likely than Amos to find a good job elsewhere.¹²⁰ And Huckeba was not alone in her complaints. Two other employees also complained in 1975 about sexually offensive conduct; they were luckier than Huckeba only insofar as they did not lose their jobs.¹²¹ But neither did Amos, who both kept his position and avoided discipline.¹²² The record established other misconduct on Amos's part in 1988, 1989, 1990, 1991, 1992, 1993, and 1994. The list of misdeeds is a long one: "telling female co-workers that he was in love with them, flashing them, sending notes with sexual messages or propositions, grabbing them and rubbing their hair or buttocks (sometimes with his hands, sometimes with his erect penis), and allowing himself to be seen masturbating at his desk."¹²³

¹¹⁴ 256 F.3d 516 (7th Cir. 2002) (en banc).

¹¹⁵ *Id.* at 526.

¹¹⁶ *Id.* at 528–29.

¹¹⁷ *Id.* at 519.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

Amos flashed someone in 1989 but was reprimanded only with a warning.¹²⁴ The discipline escalated slightly in 1990, when five women informed Ameritech that Amos had pressed his erect penis against them.¹²⁵ The company suspended Amos for two weeks. It did not choose a more severe sanction, it appears, because the responsible supervisor did not bother to read Amos's personnel file and thus was unaware of his inglorious history.¹²⁶ More complaints followed in 1991 and 1992, but they did not result in discipline.¹²⁷ Other than admonitions to stop the offensive behavior,¹²⁸ Amos ignored the advice. At long last, the company appeared to be on the brink of firing Amos: on December 18, 1992, the equal employment opportunity coordinator recommended this action.¹²⁹ But the coordinator had no power unilaterally to implement that recommendation.¹³⁰ And the responsible person—the labor relations manager—was on vacation on December 18.¹³¹ He did not return and review the file until after the Christmas break. Critically more than 30 days had elapsed since Amos's most recent documented misconduct.¹³² This was important because the CBA said that disciplinary measures had to be taken within 30 days of the misconduct.¹³³ That meant, Ameritech said (and the en banc court accepted) that Ameritech had to wait for yet another incident before firing Amos.¹³⁴ Not surprisingly, more misconduct occurred in 1993 and early 1994, but Ameritech still did nothing. As the majority put it, "Another public-masturbation incident in March 1994 at last produced Amos's removal."¹³⁵ This was enough in the unanimous view of the en banc court to support the jury's verdict on liability for the EEOC; on that point, the court rejected Ameritech's efforts to show why it should not be vicariously liable for Amos's actions.¹³⁶ The court split only on the question of punitive damages.¹³⁷

The majority held that even though the terms of the CBA could not help Ameritech on liability, that evidence was still relevant for punitive

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 519–20.

¹²⁹ *Id.* at 520.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 523.

¹³⁷ *See generally id.*

damages.¹³⁸ In order to win such damages, the court noted, the complaining party (in this case, the EEOC) had to demonstrate that the respondent “engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”¹³⁹ Ameritech, the court held, was entitled to try to persuade the district court that its decision to comply with the letter of the CBA did not “evinced ‘malice’ or ‘reckless indifference’ to the federally protected rights of female employees.”¹⁴⁰ The case was remanded for further proceedings on this point, though the court did note that a jury that was fully aware of the CBA and Ameritech’s explanation for its actions might still return the same \$650,000 punitive damages award.¹⁴¹ Whether this case is a “good news” or a “bad news” story depends on one’s viewpoint. From the negative perspective, it shows a company that repeatedly fails to follow through on the promise of its workplace conduct policies, to the great harm of its employees. And it seizes on the technicality of the CBA’s 30-day rule to take away the EEOC’s punitive damages verdict, despite the overwhelming evidence supporting that remedy. From the positive perspective, the EEOC won the case on liability and, to the extent that victory sent a message to companies not to tolerate this kind of egregious behavior, it may have helped victims of harassment well beyond the Ameritech employees involved.

*Bilal v. Rotec Industries, Inc.*¹⁴² provides the last example. Once again, a defense verdict on summary judgment was upheld by the court of appeals.¹⁴³ The key holding was that the following incidents of harassment, spread over 14 months, were not sufficiently severe or pervasive to create an abusive work environment.¹⁴⁴ Admittedly, the first few do not seem too bad in isolation. They include a statement from Chief Executive Officer Oury that plaintiff Bilal (a receptionist for the company) was a “fox,” and Oury’s invitation to Bilal to join him while watching the Chicago marathon.¹⁴⁵ The remaining three are more troublesome. For example, Bilal alleged that Oury told her pointblank “that her job would be easier if she had sex with him.”¹⁴⁶ On another occasion

¹³⁸ *Id.* at 527–28.

¹³⁹ *Id.* at 527 (quoting 42 U.S.C. § 1981a(b)(1)).

¹⁴⁰ *Id.* at 528.

¹⁴¹ *Id.* at 528–29.

¹⁴² 326 Fed. App’x. 949 (7th Cir. 2009).

¹⁴³ *Id.* at 951.

¹⁴⁴ *Id.* at 956–57.

¹⁴⁵ *Id.* at 957.

¹⁴⁶ *Id.*

he “walked behind her desk and rubbed his genitalia through his clothing against her arm.”¹⁴⁷ In a third incident, Oury “took a piece of chocolate from his mouth and placed it in Bilal’s mouth while she was speaking.”¹⁴⁸ The court of appeals conceded that at least the chocolate incident deserved comment, but it said that “while bizarre and disgusting, [this behavior] was ‘middle-of-the-continuum’ physical contact which, because it occurred in relative isolation, cannot be regarded as severe under the existing case law.”¹⁴⁹ But perhaps the court’s most telling comment came earlier in the opinion, when it had this to say:

[I]t is lamentable that what appears to have been a robust claim for hostile work environment was so significantly weakened by the inadequate response to the summary judgment motion of the defendants. However, we find no error in the district court’s limitation of the analysis and thus proceed to review this claim in light of only the incidents plaintiff presented to the district court.¹⁵⁰

Bilal’s lawyer had failed to support her allegations with evidence admissible at the summary judgment stage, and her complaint failed to alert the company to the precise legal theories she was pursuing.¹⁵¹ She was left with nothing—not even a job, as the company fired her for alleged insubordination before she brought her Title VII case.¹⁵² *Bilal* thus shows that people can lose cases because of bad lawyering, just as they can lose them because of unfavorable legal rules. It can be hard, however, for a lawyer to know exactly what the court will demand at the summary judgment stage to show a *genuine* issue of *material* fact, especially in any case such as employment cases in which motivation or intent plays a major role.

This anecdotal evidence (for that is all it is) from the Seventh Circuit is nonetheless enough to raise serious concerns about the effectiveness of the legal system in addressing claims of sexual harassment in the workplace. There is a great problem of under-reporting, which leads to the problem that many cases never cross the threshold of a courthouse. For those that do, only some go to the federal courts, while others show up in state court as batteries, intentional infliction of emotional distress, violations of state equal employment laws, and similar theories. And in the federal district courts, sexual harassment cases are,

¹⁴⁷ *Id.* at 952

¹⁴⁸ *Id.* at 957.

¹⁴⁹ *Id.* at 958.

¹⁵⁰ *Id.* at 956.

¹⁵¹ *Id.* at 954.

¹⁵² *Id.* at 952.

like almost all other cases, frequently settled. The latter group leave very little in the way of footprints. Finally, even cases that are judicially resolved in the district courts often are not appealed. For the year ending June 30, 2018, 277,000 civil cases were commenced in the district courts, but less than 28,000 civil appeals were commenced over the same period.¹⁵³ On the other hand, it is interesting to see the cases that are appealed because they usually reach the court of appeals on an agreed factual record, and so they allow one to see which kinds of situations pass muster and which do not.

That is why it is interesting (and manageable) to study the cases that reach the courts of appeals. Plaintiffs lose these cases for a variety of reasons, some of which are entirely legitimate. Those reasons include:

- Failure to allege a violation of the law
- Insufficient evidence to support allegations
- Another non-merits factor, such as lack of personal jurisdiction, failure to prosecute, etc., dooms the case
- The employer should not be held liable because it responded appropriately or took appropriate preventive or remedial measures
- The employer did not know about the bad behavior
- The employer's reasons for its action were not pretextual
- The employee failed to take advantage of the employer's workplace conduct policy
- The employee did not complain in a timely way

Studying the reasons why plaintiffs lose sheds some light on possible reforms, if the evidence of the widespread incidence of #MeToo problems points to systematic under-enforcement of the laws forbidding sexual harassment, or if it reveals that those laws are too narrow or technical in their scope. A number of avenues are worth studying. First, the mechanisms for reporting harassment still need improvement. Victims fear that they will be seen as whiners, or worse, and that they may wind up with no job at all if they complain about a co-worker, or worse, a supervisor. Anti-retaliation policies can help in this respect, but they have not been as strong as they should be. Second, the inability to sue the offending person under federal law—or put differently, the need to tie all harassment directly to the employer—has hampered enforcement. Particularly if one is concerned with fellow-employee harassment, or harassment from a line supervisor who does not have the power to hire and fire, it may be both undesirable and difficult to tar the ultimate employer with misbehavior that very likely violates the

¹⁵³ See *Federal Judicial Caseload Statistics 2018*, UNITED STATES COURTS (2018), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> [<https://perma.cc/KAL8-R5UL>].

company's written policies. Informal methods of dispute resolution that are available on a voluntary basis (i.e., not compulsory arbitration) have also proven to be trustworthy and helpful. Finally, a broader re-examination of what ought to be regarded as severe enough to constitute harassment, or pervasive enough, might reveal that even if courts no longer require literal hellishness, the bar may still be too high.

This re-examination will succeed only if it takes all relevant perspectives into account. The courts must be fair arbiters attentive to the positions of all concerned—the victim, the alleged harasser, and the employer. There is much work to be done. But it is important to start from a realistic appraisal of the status quo. We can begin by jettisoning the myth that benign behavior is routinely condemned and getting to work on the serious issues.



Consent behind Bars: Should It Be a Defense against Inmates' Claims of Sexual Assault?

Nika Arzoumanian[†]

I. INTRODUCTION

Understanding what constitutes “consent” sits at the heart of the #MeToo Movement, but consent can take on a variety of meanings depending on the context in which parties give and receive it.¹ The #MeToo Movement gained initial traction when women spoke out against harassment in the workplace and Hollywood, but the questions #MeToo raises apply far beyond those boundaries. Specifically, prison inmates are largely left out of the #MeToo discussion, particularly women and gender minorities.²

Exploring #MeToo in the prison context is critical for two reasons. First, considering whether consent is possible when bodily autonomy is severely restricted will expand our understanding of consent’s outermost bounds. Second, almost 2.2 million American adults were in prison or jail at the end of 2016; the impact of prison on issues relevant to the #MeToo Movement applies to a significant proportion of Americans.³

Startling statistics reflect high and rising numbers of sexual assault allegations in correctional facilities.⁴ In 2011, prisoners made

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¹ See Lee Tunstall, *#MeToo Ushers in the Age of Consent*, THE SEATTLE TIMES (June 7, 2018), <https://www.seattletimes.com/opinion/metoo-ushers-in-the-age-of-consent/> [<https://perma.cc/5XZZ-YTH9>].

² See Marisa Endicott, *‘No Longer Human’: Women’s Prisons Are a Breeding Ground for Sexual Harassment, Abuse*, THINK PROGRESS (Aug. 29, 2018), <https://thinkprogress.org/sexual-harassment-abuse-womens-prisons-me-too-5231b62c1785/> [<https://perma.cc/4GD3-3VVT>].

³ Drew Kann, *5 Facts Behind America’s High Incarceration Rate*, CNN (July 10, 2018), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html> [<https://perma.cc/K2U-U-3K5G>].

⁴ See Alysia Santo, *Prison Rape Allegations Are on the Rise*, THE MARSHALL PROJECT (July 25, 2018), <https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise> [<https://perma.cc/FV2G-4FNV>].

8,768 allegations of sexual assault and harassment across the United States, whereas by the end of 2015, prisoners made 24,661 allegations of sexual assault and harassment.⁵ Yet, the possibility of consensual sexual contact in prison—particularly between inmates and guards—is less often a topic of discussion.

Much of the time, sexual contact between inmates and correctional officers in prison is identified at the time as “consensual” or “appear[ing] to be willing.”⁶ That being said, many scholars and prisoners’ rights advocates argue that a significant proportion, if not all, of seemingly consensual sexual contact between guards and inmates is non-consensual, the product of either physical force or non-physical coercion.⁷ Prisoners are bringing claims of excessive force under the Eighth Amendment on these same grounds. Often characterized by gift-giving and special treatment, the relationships they describe may seem consensual in the outside world. However, the fact that they develop in prison raises a series of unique concerns: specifically, can consent even exist in prison, particularly between guards and inmates?

Uncertainty regarding the definition of consent has given rise to a dispute both within the judiciary and among scholars as to whether consent is or should be a defense to an Eighth Amendment excessive force claim based on sexual acts between inmates and correctional officers. In order to resolve this issue, I will argue in favor of the mixed approach taken by the Ninth Circuit: prisoners are “entitled to a presumption that any relationship with a correctional officer is not consensual,” but the defendant can “rebut this presumption by showing that the relationship ‘involved no coercive factors’” beyond the background coercion that prison already imposes.⁸

This Comment champions a prisoner-centered approach using theories of bodily autonomy and also explores why a *per se* rule is inappropriate in the inmate-guard context, despite being accepted in regulating other forms of sexual contact. I will review the current status of legislation pertaining to prison sexual assault, as well as the general structure under which a prisoner may bring an Eighth Amendment sexual assault claim. I will also explain the various perspectives circuit courts

⁵ *Id.*

⁶ Margaret Penland, *A Constitutional Paradox: Prisoner “Consent” to Sexual Abuse in Prison Under the Eighth Amendment*, 33 LAW & INEQ. 507, 508–09 (2015).

⁷ Merideth J. Hogan, *If Orange is the New Black, is Coercion the New Consent? An Analysis of the Tenth Circuit’s Decision to Allow Guards to Use an Inmate’s Alleged Consent as a Defense to a Sexual Abuse Allegation*, 54 WASHBURN L.J. 425, 425 (2015).

⁸ M. Jackson Jones, *Power, Control, Cigarettes, and Gum: Whether an Inmate’s Consent to Engage in a Relationship with a Correctional Officer Can Be a Defense to the Inmate’s Allegation of a Civil Rights Violation Under the Eighth Amendment*, 19 SUFFOLK J. TRIAL & APP. ADV. 275, 278 (2014) (citing *Wood v. Beauclair*, 692 F.3d 1041, 1049 (9th Cir. 2012)).

and scholars have put forth to determine whether inmate consent should be a defense to prison sexual assault claims and explore the factors that differentiate consent in prison from consent in the outside world. I will then advocate for the Ninth Circuit's mixed approach, focusing on the harms of limiting bodily autonomy in prison, how the mixed approach operates to ensure prisoner safety, and how prisoner-guard relationships differ from other contexts where per se rules against sexual contact are enforced.

II. AN OVERVIEW OF CONSENT IN PRISON

A. Federal and State Legislation

The Prison Litigation Reform Act (PLRA)⁹ and the Prison Rape Elimination Act (PREA)¹⁰ are the two most relevant pieces of federal legislation passed in recent history on the issue of prisoner sexual assault. The PLRA places restrictions on inmates seeking to bring suit in federal court. Most notably, the PLRA requires that inmates must exhaust all available administrative remedies, including internal grievance systems within their prisons before bringing any claim in federal court.¹¹ The Supreme Court has interpreted exhaustion as “proper exhaustion,” requiring that “prisoners must follow all of the procedural rules that detention agencies have developed for internal grievances before suing.”¹² This process often involves very short timelines for filing grievances, a particularly dangerous roadblock in the context of sexual assault where inmates may struggle emotionally to bring claims in a timely manner.¹³

⁹ 42 U.S.C. § 1997e (2012).

¹⁰ 28 C.F.R. § 115 (2012).

¹¹ 42 U.S.C. § 1997e(a) (“[N]o action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

¹² Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 809–10 (2014) (citing *Woodford v. Ngo*, 548 U.S. 81, 94 (2006)).

¹³ *Id.* at 810. Furthermore, since the passage of an amendment to the Violence Against Women Act (VAWA) in February 2013, a “prior showing of physical injury or the commission of a sexual act” is necessary for recovery under the PLRA for mental or emotional injury. The PLRA defines a “sexual act” as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand

The conversation regarding sexual assault in prison would be incomplete without at least a brief discussion of the PREA, which established a “zero tolerance” policy for rape and sexual assault perpetrated by both prisoners and prison staff across various forms of detention.¹⁴ The PREA calls for wide-sweeping data collection about rape in prison, as well as increased surveillance, policing, and criminalization of prison rape.¹⁵ However, the PREA does not create a private right of action or an affirmative defense.¹⁶ For this reason, courts often do not explicitly consider the PREA when adjudicating Eighth Amendment prisoner sexual assault claims.¹⁷ Instead, the penalty is targeted towards state detention agencies: if they fail to comply with the PREA, they will receive a reduction in federal funds.¹⁸

Most states have passed legislation that prohibits sexual relationships between inmates and correctional officers regardless of consent, and many states have passed legislation that prohibits sexual activity between inmates as well.¹⁹ A few states’ statutes even explicitly stipulate that inmates are “incapable of consent to sexual relations with a [correctional employee].”²⁰ In contrast, Arizona, Nevada, and Delaware not only acknowledge inmate consent but also allow for the prosecution of inmates who “willingly” engage in sexual contact with prison staff.²¹

B. Sexual Assault in Prison and the Eighth Amendment

Inmates typically bring claims of sexual abuse in prison through 42 U.S.C. § 1983 on Eighth Amendment grounds, which requires that the

or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

18 U.S.C. § 2246(2)(a)–(d) (2012). Prior to 2013, “the Prison Litigation Reform Act (PLRA) required physical injury before a claim for emotional or mental violation could be heard. This created a loophole for some sexual assault cases in which the victim could not prove physical injury, since the court defined injury not to include penetration, thereby blocking a claim even for emotional or mental damages. An amendment to the Violence Against Women Act (VAWA), however, eventually closed this loophole, barring courts from defining sexual violence as less than physical injury by explicitly listing sexual acts as injury.” Hannah Belitz, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R.-C.L. L. REV. 291, 295 n.29 (2018).

¹⁴ Gabriel Arkles, *supra* note 12, at 804–05 (citing 42 U.S.C. § 15602 (2012)).

¹⁵ *Id.*

¹⁶ *Id.* at 802.

¹⁷ *Id.* at 811.

¹⁸ *Id.* at 806.

¹⁹ Jones, *supra* note 8, at 293.

²⁰ *Id.* (citing Mass. Gen. Laws ch. 268, § 21A (2013)) (emphasis added).

²¹ Hannah Brenner, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 546 n.151 (2016).

inmate meet two prongs.²² First, the abuse must be “objectively harmful enough to establish a constitutional violation” under “societal standards of decency.”²³ Second, the alleged assaulter must have had “actual knowledge of danger to the prisoner and [chose] not to prevent it.”²⁴ However, the test is simplified in the excessive force context. In *Hudson v. McMillian*,²⁵ the Supreme Court decided that if the alleged assaulter had actual knowledge of danger to the prisoner and chose not to prevent it, the court should assume the abuse was objectively harmful enough to establish a constitutional violation under societal standards of decency.²⁶ Essentially, if the second prong is met, the first prong is also met.

In *Hudson*, the Court held in favor of an inmate who brought an Eighth Amendment excessive force claim under 42 U.S.C. § 1983 after he sustained minor injuries from being beaten by guards while handcuffed.²⁷ The Court held that whether the second prong is met in an excessive force analysis hinges on “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”²⁸ If force was applied in order to maliciously and sadistically cause harm, societal standards of decency are always violated, regardless of the severity of the injury.²⁹ The Court explained that if this rule were not established, the Eighth Amendment “would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury”; the significance of the injury does not matter.³⁰

Sexual assault is always sufficient to meet the second prong of the test because courts assume sexual assault is always force applied maliciously and sadistically to cause harm, and therefore violates societal standards of decency, regardless of the assaulter’s actual state of mind or the severity of the injury.³¹ However, this merely shifts the excessive force inquiry when abuse claims are made to whether the guard has in fact sexually abused the inmate, making the uncertainty over whether

²² Gabriel Arkles, *supra* note 12, at 804–05 (2014) (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)).

²³ Hogan, *supra* note 7, at 432–33 (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (emphasis added)).

²⁴ Arkles, *supra* note 12, at 807–08 (2014) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (emphasis added)).

²⁵ 503 U.S. 1 (1992).

²⁶ *Id.* at 9.

²⁷ *Hudson*, 503 U.S. at 12.

²⁸ *Id.* at 6.

²⁹ *Id.* at 9.

³⁰ *Id.*

³¹ *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1290 (10th Cir. 1999) (holding sexual abuse constitutes “conduct which itself establishes . . . sufficient evidence” of malicious intent).

consent is a defense to an inmate-guard sexual assault claim even more critical to address.

C. The Majority Approach: Consent *Is* a Defense to Eighth Amendment Sexual Assault Claims

The Eighth, Sixth, and Tenth Circuits have found that “voluntary” consensual relationships between inmates and correctional officers do not violate the Eighth Amendment.³² In *Freitas v. Ault*,³³ a male inmate entered into a seemingly voluntary intimate relationship with a female correctional officer, during which they would regularly kiss, hug, talk, and write “hot sexy” letters to one another.³⁴ The inmate ended the relationship upon learning the correctional officer was sleeping with another man and subsequently alleged that she had sexually harassed him.³⁵ The Eighth Circuit decided in favor of the correctional officer and held that, “at the very least, welcome and voluntary sexual interactions, no matter how inappropriate, cannot as a matter of law constitute ‘pain’ as contemplated by the Eighth Amendment.”³⁶ Similarly, in *Hall v. Beavin*,³⁷ a male inmate claimed an Eighth Amendment violation after he was disciplined for his sexual relationship with a female correctional officer.³⁸ The Sixth Circuit held in favor of the defendants because the inmate did not prove the correctional officer had sexually assaulted him, but rather that he “voluntarily” engaged in the sexual relationship.³⁹

Initially, the Tenth Circuit’s approach was diametrically opposed to that of the Eighth and Sixth Circuits. Until 2013, the Tenth Circuit had held the Eighth Amendment precludes, as a per se rule, inmates and correctional officers from entering into sexual relationships with one another, regardless of consent.⁴⁰ For example, in *Lobozzo v. Colorado Department of Corrections*,⁴¹ a female inmate entered into a sexual relationship with a male correctional officer that appeared to involve no coercive factors. The Tenth Circuit ruled per se in favor of the inmate.⁴²

³² See *Hall v. Beavin*, No 98-3802, 1999 U.S. App. LEXIS 29700, at *4 (6th Cir. Nov. 8, 1999); *Freitas v. Ault*, 109 F.3d 1335, 1339 (8th Cir. 1997).

³³ 109 F.3d 1335, 1339 (8th Cir. 1997).

³⁴ *Id.* at 1336.

³⁵ *Id.*

³⁶ *Id.* at 1339.

³⁷ No. 98-3802, 1999 U.S. App. LEXIS 29700, at *4 (6th Cir. Nov. 8, 1999).

³⁸ *Hall* at *4.

³⁹ *Id.*

⁴⁰ See *Lobozzo v. Colo. Dep’t of Corr.*, 429 F. App’x. 707, 711 (10th Cir. 1997).

⁴¹ 429 F. App’x. 707, 711 (10th Cir. 1997).

⁴² See *id.* at 711.

However, the Tenth Circuit changed course in *Graham v. Sheriff of Logan County*⁴³ and adopted the standard held by the Sixth and Eighth Circuits.⁴⁴ In *Graham*, an inmate and guard exchanged “sexually explicit notes” and regularly spoke about wanting to have sexual intercourse with one another.⁴⁵ On two occasions, the guard fulfilled the inmate’s requests for a candy bar and a blanket, but the inmate stated at trial that she “did not think that she had received any special treatment from [the guard].”⁴⁶ Ultimately, the inmate engaged in sexual intercourse with the guard she had been speaking with and another male guard after she was placed in solitary confinement for an unrelated offense.⁴⁷ The inmate said the intercourse was consensual as it pertained to the guard she had been speaking with prior to the incident, but “didn’t really want [the other one] there.”⁴⁸ In its opinion, the court emphasized:

[The inmate] did nothing to indicate lack of consent when the guards entered her cell, when they removed her clothing, or when they touched her. She never told either of them that she did not want to have sex. She has stated repeatedly and consistently that almost all the sexual acts that occurred were consensual.⁴⁹

The Tenth Circuit bolstered its departure from its decision in *Lobozzo* by emphasizing that *Lobozzo* was an unpublished opinion and not binding in the Tenth Circuit.⁵⁰ The court also relied on the fact that the judiciary had not reached a consensus as to whether consent is a defense to Eighth Amendment sexual assault claims.⁵¹ The court treated the case as a matter of first impression and held that “absent contrary guidance from the Supreme Court . . . it [is] proper to treat sexual abuse of prisoners as a species of excessive-force claim, requiring at least some

⁴³ 741 F.3d 1118 (10th Cir. 2013).

⁴⁴ *Id.* at 1126.

⁴⁵ *Id.* at 1120–21 (the court included in its opinion the text of a note the inmate had written to the guard: “Hey Sexy, Damn you look good in that uniform. I just want to rip it off of you. I can only imagine what you’ll look like in that deputy uniform. Mmm . . . the state troopers uniforms are real sexy! The hat and all. I look forward to f**king you in, or around your patrol car. Damn, just the thought of that gets my nipples hard. I’m such a nympho! Can you deal with that? Because I want it all the time. Seriously, I think I might be a sex addict. So there’s a little bit more you know about me. Have I freaked you out yet? I hope not cuz that’s not my intention. . . . You haven’t smiled for me. What’s up? You down? Cheer up handsome. Peace.”).

⁴⁶ *Id.* at 1121.

⁴⁷ *Id.* at 1120.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1123.

⁵⁰ *Id.* at 1124.

⁵¹ *Id.*

form of coercion (not necessarily physical) by the prisoner's custodians," adopting the Sixth and Eighth Circuit approach.⁵² Today, under this majority approach, the inmate bears the burden to prove the sexual conduct was not consensual, otherwise known as the "burdened-inmate" rule.⁵³

D. The Proposed Per Se Rule: Consent Is *Never* a Defense to Eighth Amendment Sexual Assault Claims

Although no circuit court has endorsed a per se rule under which prisoners are incapable of consent to sexual relations with a guard, the scholarship on this topic overwhelmingly supports a rule stipulating consent is never a defense to an Eighth Amendment sexual assault claim.⁵⁴ Some district courts have endorsed this view as well. In *Carrigan v. Davis*,⁵⁵ a female inmate alleged she had been raped by a guard, whereas the guard alleged he had been seduced by the inmate and engaged in consensual oral sex with her.⁵⁶ The District Court of Delaware held as a matter of law that "an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment."⁵⁷ The court emphasized that the Delaware legislature had "concluded that such action, whether consensual or not, constitutes a criminal offense,"⁵⁸ and the legislature is the "clearest and most reliable objective evidence of contemporary values."⁵⁹ The court also reaffirmed that sexual conduct between prisoners and guards "destabilizes the prison environment by compromising the control and authority of the guard over the inmate, compromising the inmate's health, security and well-being and creating tensions and conflicts among the inmates themselves."⁶⁰ The Western District of New York took an approach similar to *Carrigan* in *Cash v. County of*

⁵² *Id.* at 1126.

⁵³ Hogan, *supra* note 7, at 426.

⁵⁴ See generally Brenda V. Smith, *Prison and Punishment: Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185 (2006); Hannah Brenner et al., *supra* note 21; M. Jackson Jones, *supra* note 19; Joanna E. Saul, *Of Sexual Bondage: the "Legitimate Penological Interest" in Restricting Sexual Expression in Women's Prisons*, 15 MICH. J. GENDER & L. 349 (2009); Hogan, *supra* note 7; Kristen Seddiqui, *Graham v. Sheriff of Logan County: Coercion in Rape and the Plight of Women Prisoners*, 92 DEV. U.L. REV. 671 (Fall 2015); Megan Coker, *Common Sense About Common Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse Under the Eighth Amendment*, 100 VA. L. REV. 437 (2014).

⁵⁵ 70 F. Supp. 2d 448 (D. Del. 1999).

⁵⁶ *Id.* at 451.

⁵⁷ *Id.* at 452–53.

⁵⁸ *Id.* at 453.

⁵⁹ *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

⁶⁰ *Carrigan*, 70 F. Supp. 2d at 454.

Erie,⁶¹ quickly rejecting the guard's defense that the sexual contact between himself and the inmate had been "physically consensual" on *per se* grounds under New York state law.⁶²

E. The Ninth Circuit's Mixed Approach: Consent *May* Be a Defense to Eighth Amendment Sexual Assault Claims

The Ninth Circuit has taken a mixed approach to resolving this issue: consent may be a defense to an Eighth Amendment sexual assault claim, but an inmate is entitled to a strong presumption that any inmate-guard relationship is non-consensual.⁶³ In *Wood v. Beauclair*,⁶⁴ the Ninth Circuit held "inmates are entitled to a presumption that any relationship with a correctional officer is not consensual," but the defendant can "rebut this presumption by showing that the relationship 'involved no coercive factors.'"⁶⁵ The court did not "attempt to exhaustively describe every factor that could be fairly characterized as coercive."⁶⁶ However, it did state that while "explicit assertions of non-consent indicate coercion," "favors, privileges, or any type of exchange for sex" may also indicate coercion.⁶⁷

In *Wood*, a male inmate entered into an intimate relationship with a female correctional officer that appeared to involve no coercive factors at its onset.⁶⁸ They "conversed often about personal topics" and occasionally hugged, kissed, and touched each other on the arms and legs.⁶⁹ Upon learning that the correctional officer was married, the inmate attempted to end the relationship, but the correctional officer responded by beginning to make explicit sexual advances towards the inmate, including cupping his groin.⁷⁰

The Ninth Circuit held that inmates are entitled to the presumption that any inmate-guard relationship is non-consensual.⁷¹ The defendant, however, may rebut that presumption with evidence that his or her conduct was not coercive.⁷² Under this standard, the correctional officer bears the burden of proving both parties consented to the sexual

⁶¹ No. 04-CV-0182(M), 2009 U.S. Dist. LEXIS 134049 (W.D.N.Y. Sept. 4, 2009).

⁶² *Id.* at *6.

⁶³ *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012).

⁶⁴ 692 F.3d 1041 (9th Cir. 2012).

⁶⁵ *Jones*, *supra* note 19, at 278 (citing *Wood*, 692 F.3d at 1049 (9th Cir. 2012)).

⁶⁶ *Wood*, 692 F.3d at 1049.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1047.

⁶⁹ *Id.* at 1044.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

contact.⁷³ In this case, the state could not show that the guard's behavior was not coercive, so the court ruled in favor of the inmate.⁷⁴ The court was particularly concerned with the fact that "the power dynamics between prisoners and guards make it difficult to discern consent from coercion" and wanted to establish a rule that "explicitly recognize[d] the coercive nature of sexual relations in the prison environment."⁷⁵

Numerous opinions from lower courts in the Ninth Circuit positively cite *Wood*, but they usually do so for its presumption that any inmate-guard relationship is presumptively non-consensual rather than its test for consent.⁷⁶ The exception to this rule is *Manago v. Williams*,⁷⁷ decided in 2013 by the Eastern District of California. An inmate alleged prison guard Mary Brockett had verbally harassed him in a sexual manner.⁷⁸ After the verbal harassment, he agreed to take part in an investigation of her misconduct in compliance with prison officials.⁷⁹ The inmate alleged that Brockett "French kissed' him, touched his genitals, slapped his buttocks, and orally copulated him" without his consent while the investigation was proceeding.⁸⁰ Even though the inmate seemingly consented to the behavior and at times initiated sexual contact, he did so because he was directed by officials to "snar[e] Brockett in official misconduct."⁸¹

The court held that the *Wood* test required a ruling against Brockett because her behavior was coercive.⁸² Further, the court emphasized that "any allegedly personal interest that [the] plaintiff may have had in a consensual sexual relationship with Brockett, which [the] plaintiff denies, is overshadowed by [the investigation's] reliance on [the] plaintiff, underscored by [the] plaintiff's officially facilitated recording of his interactions with Brockett."⁸³ The court did not find compelling the argument that the inmate was discouraged from engaging in sexual conduct.⁸⁴ The inmate also testified that he engaged in sexual activity with

⁷³ Hogan, *supra* note 7, at 426.

⁷⁴ *Id.* at 1049.

⁷⁵ *Id.*

⁷⁶ See, e.g., Cleveland v. Curry, No. 07-cv-02809-NJV, 2014 U.S. Dist. LEXIS 22402, at *49 (N.D. Cal. Feb. 21, 2014) ("under *Wood*, [defendant's] sexual conduct 'itself constitute[d] sufficient evidence that force was used 'maliciously and sadistically' for the very purpose of causing harm'").

⁷⁷ No. 2:07-cv-2290 LKK KJN P, 2013 U.S. Dist. LEXIS 183734 (E.D. Cal. March 13, 2013).

⁷⁸ *Id.* at 57.

⁷⁹ *Id.*

⁸⁰ *Id.* at 59.

⁸¹ *Id.* at 57.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Brockett solely for the purposes of the investigation and took active steps to request the cessation of the investigation.⁸⁵

III. FACTORS WEIGHING AGAINST THE POSSIBILITY OF CONSENT IN THE PRISON ENVIRONMENT

A wealth of scholarship addresses consent from a variety of angles, the breadth of which is impossible to cover comprehensively in a Comment of this scope. I will highlight the arguments flagged by scholars focusing on issues of consent in prison.

A. Power Imbalance and Consent

Most scholars who advocate for a per se rule against consent as a defense to Eighth Amendment sexual assault claims argue an “inherent power imbalance between guard and inmate” exists that is “analogous to the inherent power imbalance between adult and child.”⁸⁶ Prison exerts extreme levels of control over inmates’ day-to-day lives: correctional officers control “every aspect of the inmates whom they supervise, from privacy to opportunities to eat or bathe or interact with others, culminating in the ultimate amount of time the inmates must stay in prison.”⁸⁷ Correctional officers also utilize their authority to “provide goods and privileges as a method of compelling sexual relations or withholding goods and privileges as punishment for not engaging in sexual contact.”⁸⁸ Scholars advocating for the per se rule also worry about the impact of the “social hierarchy” of prison on inmates’ ability to consent.⁸⁹ The pecking order of the inmates, based on the length of time spent in prison and the nature of their criminal history, can increase the likelihood of sexual coercion taking place, though most scholars discussing the social hierarchy are concerned about its effect on relationships between inmates.⁹⁰

Much of the scholarship in favor of a per se rule at least acknowledges that power differentials exist between sexual partners outside of prison as well.⁹¹ One partner may be in a far better financial situation than another or hold a position of social or professional authority over

⁸⁵ *Id.*

⁸⁶ Brenner, *supra* note 21, at 546.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Saul, *supra* note 54, at 381–82.

⁹⁰ *See id.* (“Within this structure, partners of the most powerful inmates rise in social stature. Thus, not only might there be pressure from a more powerful inmate to engage in sex, but there might also be pressure to accede in exchange for the social lift.”).

⁹¹ Saul, *supra* note 54, at 379 (“any power differential, however, has a coercive element that may impair consent”).

the other. That being said, there are compelling arguments as to why the prison context is unique. In prison, inmates lack freedom of association. They must continue to interact with guards based not on their own preferences but on those of the correctional facility.⁹² If a guard is assigned to a particular role that requires him or her to interact with a particular inmate on a regular basis, the inmate has limited means by which to remove him or herself from that situation. In addition, relationships that were once consensual can transform as conditions change, and these changes are almost never subject to the control of the prisoner. As one inmate put it, “sometimes it starts off being consensual, but then later it becomes an abusive situation.”⁹³ Furthermore, some scholars argue that the total deprivation of liberty inherent in imprisonment requires the correctional system to shield inmates from “sexual pressure.”⁹⁴ Because the prison system strips inmates of much of their autonomy, the prison system also has a heightened responsibility to protect them from sexual coercion.

Scholars are also concerned that relationships between inmates and guards can “disrupt the prison environment,” bringing about jealousy from other inmates who believe, whether correctly or incorrectly, that the inmate is receiving extra privileges as a result of a sexual relationship with a correctional officer.⁹⁵ Much of the coercive sexual contact in prison is not characterized by physical force but is rather in exchange for privileges or power.⁹⁶ In fact, “nearly half of the [correctional officers] in . . . sexual abuse cases also smuggled contraband into prisons for the inmates with whom they had sexual relationships.”⁹⁷

Exchanging sex acts for increased privileges is a particularly strong form of coercion in the prison context, where freedoms many take for granted in the outside world become luxuries. Privileges exchanged for sexual contact range from additional phone usage and greater contact with an inmate’s children to desired goods such as cigarettes or gum.⁹⁸ In the often austere prison environment where inmates have little autonomy over their own lives, such privileges are particularly valuable. This reality can lead to a dynamic that is not only coercive in nature but also to significant underreporting of sexual assault, as many in-

⁹² *Id.*

⁹³ Brenner, *supra* note 21, at 569.

⁹⁴ Saul, *supra* note 54, at 379.

⁹⁵ Jones, *supra* note 8, at 306.

⁹⁶ Alice Ristorph, *Prison and Punishment: Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 141 (2006).

⁹⁷ Jones, *supra* note 8, at 307.

⁹⁸ *Id.*

mates believe reporting could result in not “receiving unauthorized privileges or contraband in exchange for the sexual acts [he or she committed].”⁹⁹

Scholars raise other concerns about the prison environment’s impact on consent: for example, overcrowding increases the probability of sexual coercion taking place.¹⁰⁰ At first blush, this concern may seem counter-intuitive: overcrowding means decreased privacy, supposedly leading to more potential witnesses when a sexual assault takes place. However, this reduction of privacy and less supervision can actually make it easier for guards and inmates to commit sexual abuse.¹⁰¹ There are “more bodies in the showers, more eyes of the guards and other inmates, more inmates being strip-searched together after visitation, and greater need to place more inmates together in sleeping arrangements that may increase an inmate’s vulnerability.”¹⁰² Over-crowding leads to a higher inmate-to-guard ratio and greater anonymity within the prison, making it easier for guards and inmates to engage in sex acts without being detected, regardless of consent.

B. The Relationship Between Incarceration and Sexuality

Some scholars argue incarceration is “inherently a sexual punishment” because of the extent to which prisons exercise control over prisoners’ bodily autonomy and integrity, and that sexual coercion is “an inherent aspect of mass confinement.”¹⁰³ Violence and social hierarchies are essential to the functioning of prison, not merely “accidental or superfluous” elements of the prison experience.¹⁰⁴ Therefore, any efforts to increase bodily autonomy of prisoners or legislate to protect them from sexual violence will be incomplete at best.¹⁰⁵ Because the American prison system relies on “total control over the bodies and behaviors of prisoners” and depriving prisoners of any self-determination, incarceration cannot exist without total control over prisoner sexuality and depriving prisoners of any sexual self-determination as well.¹⁰⁶

⁹⁹ *Id.* at 304.

¹⁰⁰ Saul, *supra* note 54, at 380–81.

¹⁰¹ *Id.* at 381.

¹⁰² *Id.*

¹⁰³ See Alice Ristroph, *supra* note 96, at 140.

¹⁰⁴ Arkles, *supra* note 12, at 809–10.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

C. The Impact of Stereotyping on Determining Consent

Some scholars argue stereotyping of correctional officers as “good guys” and of prisoners as “bad guys” more likely to be sexual aggressors negatively impacts prisoners’ likelihood of success in bringing sexual assault claims. Juries and judges tend to favor correctional officers, who, given their position as law enforcement officers, are considered to have a “moral and upstanding character” and are assumed to comply with the rules.¹⁰⁷ In contrast, the benefit of the doubt usually cuts against the claims of prisoners, who—assuming the justice system is working properly—have engaged in at least some criminal behavior in the past and society often deems “inherently deviant.”¹⁰⁸ If they have broken rules in the past, the thought goes, why would they not do so again? Because of inmates’ perceived “deviance,” juries and judges may be subject to implicit bias and more likely to make incorrect judicial decisions by assuming these characters are both more likely to be the sexual aggressor or want to consent to sex.¹⁰⁹

D. Mental Illness, Family History, and Consent

Some scholars emphasize the prevalence of mental illness among inmates and that inmates with mental illness are “at an increased risk of sexual victimization.”¹¹⁰ Furthermore, histories of physical and sexual abuse are common among inmates, particularly women: “of female inmates in state prisons, 57.2% reported being abused prior to admission; 46.5% reported physical abuse, and 39% reported sexual abuse. Of those who reported abuse, 40.1% experienced abuse at the hands of a family member, and 60.1%, by an ‘intimate’ [partner].”¹¹¹ Some argue that “it is possible that these women may transpose their expectations and experiences from their real family onto their prison family and be accepting of abuse as part of the family dynamic.”¹¹²

IV. THE MERITS OF THE NINTH CIRCUIT’S MIXED APPROACH

This Comment will argue the Ninth Circuit’s mixed approach preserves prisoner autonomy as much as possible while maximizing prisoner safety, as well as explain why prisoner autonomy—particularly prisoner bodily autonomy—is so critical for prisoner wellbeing. Prisoner

¹⁰⁷ Brenner, *supra* note 21, at 544.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 382.

¹¹² *Id.*

bodily autonomy is paradoxical by definition. To have autonomy and bodily integrity, prisoners must be free from nonconsensual sex acts. At the same time, prisoners must have the ability to welcome consensual sex acts in order to be autonomous. On one hand, prohibitions on consensual sex devalue consent by restricting an inmate's control of his or her body.¹¹³ Simultaneously, implicitly granting others a sense of entitlement to an inmate's body is also a horrific violation of bodily integrity.¹¹⁴ The Ninth Circuit's mixed approach should be adopted uniformly by the circuit courts because it ensures prisoner autonomy by balancing these factors.

Scholars promoting greater deference to inmate consent generally limit their arguments to relationships between inmates due to the power imbalances addressed earlier in this Comment.¹¹⁵ However, under the dignity and sexual autonomy arguments these scholars support, it seems that consent in the inmate-guard context is indeed possible, though exceptionally rare. While supporting prisoner wellbeing is what motivates most advocates of the per se rule, precluding prisoners from the ability to give consent in any guard-inmate context whatsoever further punishes prisoners by stripping them of some of the deepest layers of their bodily autonomy rather than shifting the focus to keeping guards accountable. To preserve autonomy while keeping inmates safe from sexual violence, the Ninth Circuit's mixed approach strikes the right balance by adopting a strong presumption against consent while still promoting some degree of case-by-case analysis. The focus must be on how the prison context creates conditions that may ultimately be coercive and mask assault under a guise of consent rather than imposing a per se rule.

A. The Harms of Limiting Sexual Autonomy in Prison

The Supreme Court has acknowledged that adults have a right to personal autonomy and their bodily integrity.¹¹⁶ Though the Court has not explicitly addressed whether this right extends to prisoners, numerous lower courts have determined inmates are indeed entitled to such

¹¹³ Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 66, 92 (2015).

¹¹⁴ *Id.*

¹¹⁵ *Prison Reform: Commission on Safety and Abuse in America's Prisons: Confronting Confinement*, 22 WASH. U. J.L. & POL'Y 385, 416 (2006) ("While [prison] plays an undeniable role in creating inequality amongst inmates, just as it creates inequality between inmates and staff, the power differentials are not as stark [as those between inmates and staff] and are therefore less concerning in this context.")

¹¹⁶ See *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992) (citing *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (C.P. 1978) (holding defendant was not required to engage in bone marrow transplant with his cousin despite being the only potential matching donor)).

protection.¹¹⁷ Though courts primarily apply this principle in the context of prisoners' right to refuse medical treatment, the Tenth Circuit has extended it to the prison sexual assault context, holding inmates have "a constitutional right to be secure in [their] bodily integrity and free from attack by prison guards."¹¹⁸ That said, incarceration in reality often strips inmates' of their sexual autonomy by both limiting their ability to welcome wanted sexual interaction and placing them at high risk for sexual assault.

This denial of bodily autonomy has significant negative consequences for inmates. First, some scholars argue that absolving inmates of their sexual autonomy is a missed opportunity: greater sexual autonomy may help inmates achieve better societal integration upon release.¹¹⁹ Decriminalizing sexual interactions and treating truly consensual sex acts as something positive for prisoners can support the development of healthy social skills and help mitigate the often traumatic nature of the current American prison system.¹²⁰ In general, greater prisoner autonomy is linked to greater productivity in society after release.¹²¹ Increased autonomy can be empowering and healing.¹²²

Second, greater prisoner autonomy is linked to reductions in prison violence, particularly sexual violence.¹²³ Some scholars argue bodily integrity in the form of "sexual self-determination"—meaning the ability to say both "no" and "yes" to sexual interactions—is critical to preventing sexual violence in the prison context.¹²⁴ Additionally, prohibiting consensual sex can discourage prisoners from reporting instances of sexual assault.¹²⁵ Instead, they often choose not to report for fear of being punished for engaging in any sexual activity at all.¹²⁶

Third, the mechanisms used to enforce limitations on sexual autonomy often require further infringement on prisoner bodily integrity, and

¹¹⁷ See *Zant v. Prevatte*, 286 S.E. 2d 715, 716–17 (Ga. 1982) (holding the state did not have a compelling interest that overpowered the prisoner-plaintiff's right to reject a medical treatment when he was found to be sane); *Singleton v. Costello*, 665 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1996) (holding state did not have a compelling interest that overpowered the prisoner-plaintiff's right to reject a medical treatment even though the prisoner chose to engage in a hunger strike).

¹¹⁸ *Hovater v. Robinson*, 1 F.3d 1063, 1064–65 (10th Cir. 1993).

¹¹⁹ Michele C. Nielsen, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230, 258 (2017); see also Arkles, *supra* note 113, at 96.

¹²⁰ Nielsen, *supra* note 119, at 258.

¹²¹ Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUMAN RIGHTS L. REV. 167, 212 n.224 (2006); *id.* at 275.

¹²² *Id.*

¹²³ *Id.*; see also *Prison Reform*, *supra* note 115.

¹²⁴ Arkles, *supra* note 113, at 68.

¹²⁵ *Id.*

¹²⁶ *Id.*

the PREA's emphasis on surveillance of prison rape has exacerbated this issue.¹²⁷ Prison surveillance systems are dehumanizing and simultaneously do not correct the problematic reporting mechanisms available to victimized prisoners, nor do they remedy inadequate prison policies on consensual sex and rape.¹²⁸ Surveillance often involves examining, touching, or even penetrating the prisoner's naked body through searches or exams.¹²⁹ After being discovered, prisoners may be placed in solitary confinement or lose "good time credits," forcing them to remain in prison for a longer period of time.¹³⁰ Both solitary confinement and longer prison terms can render prisoners more vulnerable to sexual violence.¹³¹ Increased surveillance and greater restrictions on prisoner autonomy may reduce incidents of violent rape, but these benefits require placing different yet significant limitations on inmate bodily autonomy.¹³²

The need to protect prisoner autonomy as much as possible seems especially relevant in the context of a 2003 program developed by the National Institute of Corrections to provide training to correctional facilities. Throughout the program, only six of fifty-nine problems the participating prison wardens and directors raised were about prisoner behavior, whereas thirty-two were about "staff-related" issues, including "staff sexual misconduct, staff morale, staff assaults on prisoners, confrontational episodes between staff and prisoners, the lack of ethnic diversity among staff, and difficulty recruiting and retaining quality staff."¹³³

Because the party most at issue here is the prison guards, and more broadly the prison system that makes possible the coercive factors at play in guard-inmate relationships, it seems the legal system is responsible for protecting prisoners as fully as possible. What it means to "protect," however, is uncertain. The *per se* rule protects inmate autonomy, if autonomy means freedom from nonconsensual sex acts. The rule followed by the Sixth, Eighth, and Tenth Circuits supposedly also protects

¹²⁷ Nielsen, *supra* note 119, at 262–63.

¹²⁸ *Id.*

¹²⁹ Arkles, *supra* note 113, at 94.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Ristroph, *supra* note 96, at 184.

¹³³ John J. Gibbons, *Confronting Confinement Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 416 (2006).

inmate autonomy,¹³⁴ if autonomy means the ability to welcome consensual sex acts.¹³⁵ Both rules are incomplete and limit prisoner freedom in some way, which seems inappropriate given prisoners' extremely limited role in contributing to the problem of prison sexual assault.

B. How the Ninth Circuit's Mixed Approach Ensures Prisoner Safety

For the compelling reasons enumerated above, this Comment emphasizes the importance of preserving as much prisoner bodily autonomy as possible while ensuring prisoner safety. This Comment also acknowledges that true consent between a correctional officer and a prisoner is rare. If courts were omniscient, they would probably observe that a significant proportion of prisoner-guard relationships that seem consensual at first glance are rooted in promises for prison contraband, protection, or special privileges or influenced by other coercive factors.¹³⁶ However, the Ninth Circuit approach succeeds by acknowledging the serious risks intimate relationships between guards and inmates pose. The mixed approach creates a meaningful mechanism by which prisoners can raise claims of sexual assault and plausibly succeed while cultivating greater respect for their autonomy. The Ninth Circuit's rule encompasses the benefits of the *per se* rule without diminishing the value of inmate consent.

The Ninth Circuit's approach addresses the concerns raised by the most passionate advocates of the *per se* rule. The Ninth Circuit will find coercion occurred between a prisoner and guard if favors, privileges, or any type of exchange for sex is present, encompassing the less tangible factors that could render a seemingly consensual sexual relationship non-consensual.¹³⁷ In addition, the correctional officer bears the burden of proving both parties consented to the sexual contact, reducing the burden on the inmate to gain access to information and representation that is more difficult to obtain in the prison context.¹³⁸

¹³⁴ See *Hall v. Beavin*, No 98-3802, 1999 U.S. App. LEXIS 29700, at *4 (6th Cir. Nov. 8, 1999); *Freitas v. Ault*, 109 F.3d 1335, 1339 (8th Cir. 1997); *Graham v. Sheriff of Logan Cty.*, 741 F.3d 1118, 1126 (10th Cir. 2013).

¹³⁵ That said, the "burdened-inmate" rule the Sixth, Eighth, and Tenth Circuits utilize (the inmate bears the burden to prove the sexual conduct was not consensual) is a significant encumbrance to inmates succeeding in bringing Eighth Amendment excessive force claims given limited access to representation and information, as well as concerns about stereotyping by judges and juries related to inmate credibility.

¹³⁶ Saul, *supra* note 54, at 380 ("[M]ost prison sex, especially with women, comes not from physical force or the threat of physical force, but from a bargain—a bargain made purely in the context of prison conditions.").

¹³⁷ *Wood*, 692 F.3d at 1049.

¹³⁸ Hogan, *supra* note 7, at 426.

Furthermore, inmates are “entitled to a presumption that any relationship with a correctional officer is not consensual.”¹³⁹ The presumption against consent is very strong: though numerous opinions from lower courts in the Ninth Circuit positively cite *Wood*, they do so for its presumption that sexual assault occurred, not its test for determining whether the inmate consented to the sex act in question.¹⁴⁰ Furthermore, the deterrent effect of the Ninth Circuit rule is significant. If correctional facilities are on notice that the presumption in the Ninth Circuit cuts strongly in favor of inmates, they will be incentivized to put in place policies that minimize inappropriate guard behavior.

Furthermore, the court has chosen not to “attempt to exhaustively describe every factor which could be fairly characterized as coercive.”¹⁴¹ This functionalist approach leaves plenty of room for lower courts to assess the facts of each inmate’s situation as a whole and determine whether coercion has taken place. Lower courts are not bound by a specific list of behaviors that constitute coercion, but rather are guided by the example of the short list of behaviors the Ninth Circuit did include in its opinion in *Wood*: “favors, privileges, or any type of exchange for sex,” which is already a very expansive definition of what constitutes coercion.¹⁴² The serious risks posed by inmate-guard relationships demand a rigorous standard for inmate consent. Under the Ninth Circuit’s rule, the facts would have to be overwhelmingly in favor of consent in order for a court to find that the inmate was not influenced by outside factors more than he or she would be beyond the confines of the prison or jail.

The Ninth Circuit’s mixed approach undeniably raises a question about judges’ and juries’ institutional capacity. Can courts effectively weigh competing concerns to determine whether a personal relationship between a guard and an inmate included “coercive factors?” The facts alleged in prison sexual assault cases are often disputed and unclear, making it even more challenging for courts to come to case-by-case conclusions regarding inmate consent. However, the Ninth Circuit’s presumption against consent is helpful in this regard. By requiring that the facts be overwhelmingly in favor of consent in order for a court to find that the inmate was not influenced by coercive factors, the Ninth Circuit’s mixed approach reduces some of the burden on judges

¹³⁹ Jones, *supra* note 19, at 278 (2014) (citing *Wood*, 692 F.3d at 1049).

¹⁴⁰ See, e.g., *Cleveland v. Curry*, No. 07-cv-02809-NJV, 2014 U.S. Dist. LEXIS 22402, at *49 (N.D. Cal. Feb. 21, 2014) (“[U]nder *Wood*, [defendant’s] sexual conduct ‘itself constitute[d] sufficient evidence that force was used ‘maliciously and sadistically’ for the very purpose of causing harm.’”).

¹⁴¹ *Id.*

¹⁴² *Wood*, 692 F.3d at 1049.

and juries to make fine-grain factual determinations to accurately resolve prisoner sexual assault claims.

C. How the Ninth Circuit Rule Increases Prisoner Autonomy: Defining Consent in the Prison Context

The Ninth Circuit's approach effectively achieves the aims of the *per se* rule, yet its greater preservation of prisoner autonomy is what sets it apart. The approach allows for greater inmate autonomy by acknowledging that the fundamental human ability to welcome mutually agreed upon sexual interaction still holds some muster in the prison context, even if that ability is abridged. Whether consent is possible in the prison context is a highly controversial topic, particularly because inmate autonomy is so drastically constrained upon entry into the prison or jail. Inmates' daily activities are constantly monitored and controlled by the prison system: they are told when to work, eat, sleep, and shower.¹⁴³ The state becomes inmates' "landlord, employer, tailor, neighbor, and banker."¹⁴⁴ Prison is by design a harsh environment intended to constrain what inmates can and cannot do. Some scholars describe prisons as "barren landscapes devoid of even the most basic elements of humanity."¹⁴⁵

Given the austerity of the prison environment, every deprivation the prison system inflicts on prisoners is meaningful. One scholar lists seemingly little things like "missing family photos, confiscation of magazines deemed contraband, broken radios, opened mail, and cold meals" as ways prisoners have said they are reminded of their lack of power and dignity.¹⁴⁶ Importantly, it is difficult to determine from beyond prison walls what is most important to each individual prisoner. Poignantly, one inmate has said:

What's small to one man might be great to another. [An officer] goes home every day to his wife, to his mistress, to his boyfriend, to whatever. So, what he might think be small might be major to a guy who's bein' told when to eat, when to go to sleep, when to boo-boo, when not to boo-boo.¹⁴⁷

It is nearly impossible to effectively determine what deprivations of liberty will most dramatically impact a prisoner's sense of dignity.

¹⁴³ Valerie Jenness and Kitty Calavita, "It Depends on the Outcome": Prisoners, Grievances, and Perceptions of Justice, 52 LAW & SOC'Y REV. 41, 62 (2018).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Jenness, *supra* note 143, at 62.

¹⁴⁷ *Id.*

Most decision makers in courts and prisons have not been incarcerated themselves and can only understand to a certain extent what it means to have things that may seem insignificant to others but are important to them taken away. Therefore, minimizing restrictions on prisoner autonomy—even those that seem negligible in their impact—is critical to prioritizing inmate wellbeing.

As previously explained, the extreme power inequality between prisoners and guards is reason for concern when considering prisoners' ability to consent, as well as prisoners' greater susceptibility to stereotyping and physical abuse. Some argue that because the American prison system relies on "total control over the bodies and behaviors of prisoners" and depriving prisoners of any self-determination, incarceration cannot exist without total control over prisoner sexuality and depriving prisoners of any sexual self-determination as well.¹⁴⁸ However, scholar Michele C. Nielsen's analysis of whether consent is possible in constrained circumstances is helpful here. She explains that the claim that when "men construct the meaning of sexuality, they must also construct the meaning of consent and even women's experience of consent" is mistaken.¹⁴⁹ Rather, she argues that "while much of the world is constructed by men, women can still maintain some autonomy within the warped system."¹⁵⁰

Similarly, prisoners are capable of consent in an imperfect, but adequate, matter in some particular circumstances.¹⁵¹ Nielsen argues this imperfect consent is limited to inter-inmate relationships and that inmate-guard relationships are too steeped in power imbalance for even imperfect consent to be possible.¹⁵² However, claiming consent is completely impossible between any guard and any inmate is arbitrarily drawing a line. Although rooted in meaningful concerns about the power imbalance between guards and inmates generally, there are some specific circumstances where the coercive effects advocates of the *per se* rule are worried about are less relevant. For example, a guard may be stationed at a post unrelated to where the prisoner is being held, a situation that is especially possible in some of the country's largest prisons. Alternatively, the guard may not engage in any exchange of special privileges or may not even have the access necessary to provide the inmate with the special privileges he or she desires.

Some scholars argue that the constraints inmates face are more similar to those imposed on free women than they appear: significant

¹⁴⁸ Arkles, *supra* note 12, at 809–10.

¹⁴⁹ Nielsen, *supra* note 119, at 254.

¹⁵⁰ *Id.* at 254–55.

¹⁵¹ *Id.* at 256–57.

¹⁵² *Id.*

economic inequality and a heightened risk of being the victims of violent crime constrain women's autonomy in the outside world.¹⁵³ Though there may be some similarities that connect the experience of some inmates to some free women, they are very general in nature. The vast majority of inmates experience greater constraints on their personal autonomy than most other members of society.¹⁵⁴ Though societal and economic pressures certainly impact how and why women consent in the outside world, their bodily autonomy is not constrained to the same degree as that of the prisoner population: in most typical circumstances, they may decide for themselves when they want to eat, sleep, or shower.

That said, there is a connection between the way inmates and free women consent. For both groups, their environment inherently impacts what constitutes a coercive factor and what consent must look like in order to bring about a truly voluntary—rather than a seemingly voluntary—interaction. In order to be a meaningful term, consent cannot maintain the same definition across circumstances. Rather, it must reflect the constraints the environment imposes on the individual in question. Consensual sex is “life affirming, restorative, and rejuvenating.”¹⁵⁵ Nonconsensual sex is dehumanizing and traumatizing. This distinction is mobile: it changes based on the context in which the individual in question is giving consent.

In order to appropriately define what consent looks like in a particular situation, courts must strive to understand how individuals actually resist sexual advances given the constraints of that situation. In the prison context, sociologists have found that when inmates push back on correctional officers' harassment, they do so in a subtle manner to avoid retaliatory action, either through avoiding the problematic guards or appearing indifferent to their advances.¹⁵⁶ However, under the framework advanced by the Eighth, Sixth, and Tenth Circuits, these subtle methods of resistance are insufficient for a prisoner to show he or she did not consent to the guard's advances.¹⁵⁷

Proponents of the *per se* rule may argue that the Ninth Circuit's approach does not really afford prisoners greater autonomy because it is unlikely a guard-inmate relationship will reach the threshold necessary to be deemed consensual given the rigor of the test. However, prioritizing greater prisoner autonomy does not mean disregarding prisoner safety. Prisoner-guard relationships are at high risk for becoming

¹⁵³ *Id.* at 257.

¹⁵⁴ *Id.* at 255.

¹⁵⁵ Nielsen, *supra* note 119, at 256–57.

¹⁵⁶ Camille Gear Rich, *What Dignity Demands: the Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 41 (2009).

¹⁵⁷ *Id.*

coercive, and this reality must be taken into account when developing legal rules surrounding those relationships. Rather, the legal system must prioritize prisoner autonomy as much as ensuring prisoner safety allows. Here, a rebuttable presumption rule provides for greater—albeit imperfect—prisoner autonomy to welcome consensual sexual relationships while maximizing prisoner autonomy to be free from unwelcome sexual contact.

D. Power Imbalances and Consent Outside the Prison Context

Despite the advantages of the Ninth Circuit rule for prisoner autonomy, advocates of the *per se* rule argue inmates are similar enough to other groups whose sexual autonomy is constrained by the law or private policies to justify a *per se* approach. In order to flesh out this distinction, it is helpful to compare the *per se* rule in the inmate-guard context to more widely accepted *per se* rules against certain forms of sexual contact, such as those against statutory rape of minors under the age of consent, university policies against intimate relationships between students and professors, and workplace policies against intimate relationships between employees and their superiors.

1. Statutory rape

Minors' inability to consent to sexual contact is not a compelling analog to the validity of inmate consent to sexual relations with a guard. This Comment certainly does not purport to argue prisoners are in the same position to consent to sex acts as two fully autonomous adults, but rather that comparing them to children as a means of justifying a *per se* rule is too extreme of an analogy.

Accepting an argument that compares inmates to children, as much of the scholarship on this topic has, is a devastating blow to prisoner autonomy. It is understandably tempting to characterize inmates this way when so much of their lives are dictated by the prison system. However, labeling members of marginalized groups as child-like while stripping them of their autonomy is a familiar tool utilized by oppressors throughout history to demean the disfavored. In addition, labeling prisoners as child-like disregards the reality that prisoners continue to have the normal sexual desires of adulthood upon entering prison, as well as a desire to develop romantic relationships and reap the benefits of connection with others. Prisoners often view prison regulations as

intentionally “diminish[ing] their maturity” by “treating them like children and fostering dependency.”¹⁵⁸ An inmate-centric approach to resolving the epidemic of sexual assault in prison should take into account this concern; the Ninth Circuit does so by weighing prisoner autonomy in the rule-making calculus while accounting for the ways prison gives rise to the power imbalances that make guard-inmate relationships high risk.

2. Student-professor and employee-supervisor relationships

Relationships between students and professors or employees and supervisors are a closer analog to inmate-guard relationships. In these relationships, an imbalance in power exists between two adults, increasing the likelihood of coercive factors making a seemingly consensual relationship more harmful than it first appears. However, some significant differences exist between the position of prisoners and that of students and employees that render the analogy between these groups an incomplete one.

For students and employees, classrooms and workplaces comprise one aspect of their lives. At the end of the day, they are able to go home and have alternative avenues to pursue sexual pleasure completely unrelated to academic or professional life. They have access to dating applications and social events and may come and go as they please. In contrast, inmates do not have the same luxury. Their pool of options is limited to the people who live or work in the prison or jail, and the overwhelming majority of prisons and jails prohibit all inmate sexual activity of any kind anyways, often including self-stimulation.

Furthermore, in the case of minors, university students, and employees, they are unable to consent as a result of either being in a position they have chosen to enter with some degree of control or a position they are in as a virtue of a relatively normal stage of life. This is often not the case with prison. A variety of factors influence an individual’s likelihood of incarceration. For example, people living in rural areas are 50 percent more likely to be incarcerated than city dwellers.¹⁵⁹ In addition, African Americans are “incarcerated at more than five times the rate of whites,” and African American women are incarcerated at two times the rate of white women.¹⁶⁰ In fact, “if African Americans and Hispanics were incarcerated at the same rates as whites, prison and jail

¹⁵⁸ Brenner, *supra* note 21, at 546 (citation omitted).

¹⁵⁹ Eli Hager, *A Mass Incarceration Mystery*, MARSHALL PROJECT (Dec. 15, 2017), <https://www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery> [<https://perma.cc/26XQ-76ZF>].

¹⁶⁰ *Criminal Justice Fact Sheet*, NAACP (last visited Feb. 2, 2019), <https://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/6EBY-SB7D>].

populations would decline by almost forty percent.”¹⁶¹ Moreover, scholars estimate 20,000 American inmates are wrongfully incarcerated, comprising one percent of the American prison population.¹⁶² Though most inmates have made voluntary choices to engage in criminal activity, acknowledging the flaws within the American criminal justice system is critical to developing policies that adequately ensure prisoners’ rights and wellbeing.¹⁶³

It is true some employees may be coerced into sexual activity out of fear of losing their jobs, knowing they need to provide for themselves or for their families. This Comment fully acknowledges the significant power of economic coercion. However, the total loss of control inherent in the prison context is simply greater than it is in universities and most places of work. Though it is by no stretch of the imagination easy to leave one’s job for another or transfer universities, that option is available to students and employees. In contrast, prisoners have *no control* over their conditions and often have no means of changing their circumstances. Particularly for those prisoners serving decades-long sentences, it seems unreasonable to compare restrictions on their sexual activity to those on students and employees.

E. Weighing Other Proposed Solutions in the Context of the Ninth Circuit Rule

At first glance, conjugal visits appear to be a meaningful way to improve prisoner sexual autonomy. However, this system disfavors inmates that enter prison without a long-term partner willing to visit them, especially those inmates serving longer prison terms. Another potential solution is permitting consensual sexual relationships between inmates:¹⁶⁴ decriminalizing inter-inmate sexual contact may decrease incidents of sexual assault by reducing the “ideal victimhood” of inmates starved for physical intimacy.¹⁶⁵

¹⁶¹ *Id.*

¹⁶² *How Many Innocent People are in Prison?*, INNOCENCE PROJECT (Dec. 12, 2011), <https://www.innocenceproject.org/how-many-innocent-people-are-in-prison/> [<https://perma.cc/CU3C-SFRR>].

¹⁶³ These concerns are particularly salient in the context of the #MeToo Movement, where many women are incarcerated for reasons beyond their control. See Helene Ferris, *Female Prisoners and #MeToo*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/opinion/letters/female-prisoners-metoo.html> [<https://perma.cc/R8BF-TL7Q>] (“Many of the women . . . are incarcerated because of what the men in their lives have forced them to do. Some are serving long sentences for defending themselves against abuse and rape; some have agreed to take the rap for their spouses because the spouse is the wage earner; some have been led into drug-dealing and prostitution because they wanted to please their men, or were afraid of them. And some of them were just silent about the men who perpetrated horrible acts against them.”).

¹⁶⁴ Nielsen, *supra* note 119, at 258.

¹⁶⁵ *Id.*

Ultimately, this Comment does not purport to suggest the Ninth Circuit rule alone is sufficient to create an environment where prisoners' bodily and sexual autonomy is honored. If carefully implemented, policies permitting relationships between inmates may be an effective way to balance prisoner protection and autonomy, but determining the legitimacy of that solution is beyond the scope of this Comment. The Ninth Circuit rule does not attempt to resolve the question of inter-inmate relationships' legitimacy. Rather, it specifically addresses the abridged ability to consent that prisoners maintain upon entering the correctional system in the context of inmate-guard relationships. Balancing this autonomy against its risks is an important step towards cultivating greater respect for prisoner bodily integrity.

F. The Discursive Effects of the Ninth Circuit Rule

Courts' decisions as to whether consent is possible in the prison context between inmates and correctional officers have effects far beyond specific Eighth Amendment sexual assault cases that come before the judiciary. In fact, if the Ninth Circuit approach will result in very few cases in which a prison guard may effectively utilize inmate consent as an affirmative defense, the outcomes for prisoners bringing sexual assault claims will be only slightly different than if there were a *per se* rule. As a result, one could argue prisoner autonomy is not really better preserved under the Ninth Circuit's rule than it would be under a *per se* rule against consent.

However, prisoners are not the only population to consider when weighing which legal rule is appropriate in these circumstances. Courts should also consider the rule's impact on judges, policymakers, attorneys, and high-level officials within correctional facilities. These are the individuals who develop the regulations that impact inmates on a daily basis and who are most likely to be aware of changes in the law pertaining to prison issues. If the law dehumanizes prisoners and creates an image of them as incapable of making decisions about their own bodily integrity and autonomy, that image will be reflected in the rules these stakeholders establish. Instead of granting prisoners more control over their lives in prison—a step critical to improving inmate quality of life—imbuing into the law a child-like image of inmates and their capabilities incentivizes stakeholders to enact regulations that further constrain prisoner autonomy, an outcome that will ultimately act as a detriment to prisoner wellbeing.

V. CONCLUSION

Ultimately, the Ninth Circuit rule is a step forward in preserving prisoner autonomy by both protecting inmates from unwanted advances

and allowing them to make decisions core to their bodily integrity for themselves. While a *per se* rule is appropriate in some contexts, it is telling that no circuit court has adopted it to understand how consent operates between inmates and guards in the prison environment. Perhaps most importantly, the Ninth Circuit rule reflects an important reality about the definition of consent. It is fluid and hinges on the situation in which an individual is giving it to another. While the consent between a guard and inmate differs from the consent between individuals elsewhere, the ultimate aim is the same across contexts: to utilize consent as a tool to protect individual autonomy, both to be free from forced sexual advances and to welcome those that are wanted.



Challenging Abortion Informed Consent Regulations through the First Amendment: The Case for Protecting Physicians' Speech

Maia Dunlap[†]

INTRODUCTION

A woman finds out she is pregnant. She makes the choice to terminate her pregnancy. Maybe she decides this instantly. Perhaps she reaches her decision through a series of conversations with her partner, her family, or her friends. Regardless, there is only one person she will *need* to have a conversation with before she can have an abortion: her physician.

Right? Actually, wrong. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ the Supreme Court allowed states to add themselves to the mix. While affirming a woman's right to have an abortion, the *Casey* Court also acknowledged states' rights to regulate and express disapproval of the practice. In so doing, the Court opened the door for states to join the private conversation between a woman and her physician. In the years since *Casey*, states have increasingly used this door to regulate what a physician must do or say to a woman before she can give her "informed consent" to an abortion.

Because of this, obtaining an abortion can be a dramatically different experience depending on where you live.² In some states, abortion is treated like any other medical procedure, can be completed in one day, and only requires the signing of a standard medical consent form.³ In contrast, many others states require all women seeking abortions to

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¹ 505 U.S. 833 (1992).

² *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/V9ED-QU3M>].

³ Audrey Carlsen, Ash Ngu & Sara Simon, *What It Takes to Get an Abortion in the Most Restrictive U.S. State*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/interactive/2018/07/20/us/mississippi-abortion-restrictions.html> [<https://perma.cc/WRA6-NHJ8>].

first receive an ultrasound,⁴ a medically unnecessary procedure for first-trimester abortions (which 89% of abortions are).⁵ Some states further regulate how physicians must narrate these ultrasounds and how women must listen.⁶ Many states require mandatory pre-abortion counseling and a waiting period between receiving counseling and obtaining the procedure.⁷ Women may also hear that personhood begins at conception,⁸ and medically inaccurate claims that medical abortion can be reversed⁹ and increases risk of breast cancer,¹⁰ suicide,¹¹ and future infertility.¹²

Claiming to balance the rights of women with those of the state, the *Casey* court created a new test, dubbed the undue burden standard. Under this test, regulations on abortion are permissible provided they do not impose an undue burden on a woman's choice to have an abortion before the fetus reaches viability (i.e. is potentially able to live outside the woman's body).¹³ Most subsequent challenges to state abortion regulations have thus claimed that the regulations at issue impose an undue burden on a woman's right to choose.¹⁴

However, the undue burden standard poses a low bar that most regulations clear. As an alternative, some challengers have brought their claims as violations of physicians' free speech rights under the First Amendment. Courts review First Amendment challenges under standards ranging from strict scrutiny to rational basis review, "depending on the type of regulation and the justifications and purposes underlying it."¹⁵ In the context of informed consent, First Amendment claims have been subject to an intermediate level of scrutiny that can invalidate regulations which would otherwise likely survive an undue burden challenge.

⁴ *Requirements for Ultrasound*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> [https://perma.cc/XK9E-6KXS].

⁵ *Induced Abortion in the United States*, GUTTMACHER INST. (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [https://perma.cc/QHU5-Z8NM].

⁶ *Requirements for Ultrasound*, *supra* note 4.

⁷ *Counseling and Waiting Periods for Abortion*, *supra* note 2.

⁸ *Id.*

⁹ Rick Rojas, *Arizona Orders Doctors to Say Abortions with Drugs May Be Reversible*, N.Y. TIMES (Mar. 31, 2015), <https://www.nytimes.com/2015/04/01/us/politics/arizona-doctors-must-say-that-abortions-with-drugs-may-be-reversed.html> [https://perma.cc/WAJ3-6HCQ].

¹⁰ *Counseling and Waiting Periods for Abortion*, *supra* note 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Roe v. Wade*, 410 U.S. 113, 160 (1973) (defining viability as "potentially able to live outside the mother's womb, albeit with artificial aid").

¹⁴ See Christine L. Raffaele, Annotation, *Validity of State "Informed Consent" Statutes by Which Providers of Abortions Are Required to Provide Patient Seeking Abortion with Certain Information*, 119 A.L.R. 5th 315 (originally published 2004).

¹⁵ *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014).

The challengers in *Casey* brought precisely such a claim, arguing that the informed consent provisions at issue infringed physicians' First Amendment rights. The Court dismissed this claim in an ambiguous three-sentence paragraph that left open the question of whether such challenges can be sustained in the abortion context.¹⁶ Whether the undue burden test is the exclusive way through which to assess the constitutionality of informed consent measures remains a live issue. A circuit split has developed, with the Eighth, Fifth, and Sixth Circuits disallowing separate First Amendment challenges to "truthful, nonmisleading, and relevant" informed consent disclosures while the Fourth Circuit permits them. This leads to a second open question: if *Casey* does not foreclose physicians' First Amendment challenges to informed consent laws, what standard of review should apply?

This Comment proceeds in four parts. Part I discusses the Supreme Court's abortion jurisprudence with particular emphasis on *Casey*. Part II analyzes the circuit split and the rationales of the Eighth, Fifth, Sixth, and Fourth Circuits. Part III looks closely at the language and reasoning of *Casey* and argues that it supports the view that First Amendment challenges to informed consent measures—even those that are truthful, nonmisleading, and relevant—can exist independently of the undue burden standard. Part IV advocates for intermediate scrutiny as the appropriate standard of review for such challenges.

I. ABORTION AT THE SUPREME COURT

A. Pre-*Casey*

A woman's right to have an abortion has been constitutionally protected since the Supreme Court decided *Roe v. Wade*¹⁷ in 1973. In *Roe*, a pregnant unmarried woman brought suit against Wade, a Texas district attorney, challenging an article of the Texas Penal Code that limited abortions to those done for the purpose of saving the life of the mother.¹⁸ *Roe* raised the question: does the constitutional right to privacy encompass a woman's decision to have an abortion?¹⁹

The Supreme Court answered in the affirmative and struck down the Texas statute.²⁰ However, while acknowledging that the right to personal privacy included a woman's decision to have an abortion, the Court did not leave this right unqualified. Instead, it developed a three-

¹⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

¹⁷ 410 U.S. 113 (1973).

¹⁸ *Id.* at 120.

¹⁹ *Id.* at 153.

²⁰ *Id.* at 166.

part framework roughly aligned with the trimesters of pregnancy, allowing for increased state interference and regulation as pregnancy progresses.²¹ The Court acknowledged states' "important and legitimate interest in potential life,"²² but found this interest compelling only at the point of viability.²³ The framework broke down as follows: 1) until approximately the end of the first trimester, states could not interfere with a woman's right to have an abortion; 2) after the first trimester but before viability, states could regulate abortion only "in ways that are reasonably related to maternal health;"²⁴ 3) after viability, states could freely regulate abortion and even prohibit it, as long as exceptions existed for the health or life of the woman.²⁵

B. *Casey* and the Undue Burden Standard

Roe's trimester framework governed abortion regulations, albeit shakily,²⁶ for nearly two decades. In 1992, however, the Court offered a new approach in *Casey*. In *Casey*, Planned Parenthood brought a suit against Robert Casey, the governor of Pennsylvania, challenging a Pennsylvania law that restricted abortion access by requiring: 1) written informed consent from a woman seeking an abortion; 2) a twenty-four-hour waiting period between providing a woman with the informed consent information and performing an abortion; 3) if the woman was a minor, the informed consent of at least one parent; and 4) if the woman was married, a statement indicating her husband had been notified of the pending abortion.²⁷ The informed consent provisions required physicians to inform women of the nature of the procedure, the health risks of abortion and of childbirth, and the probable gestational age of the "unborn child."²⁸ Women had to be informed of the availability of printed materials published by the state that described fetal development and provided information about medical assistance for childbirth,

²¹ *Id.* at 164–65.

²² *Id.* at 163.

²³ *Id.*

²⁴ *Id.* at 164. The Court listed examples of "permissible state regulation in this area," which included regulating qualifications of the performing physicians and facilities in which abortions occur, including licensure. *Id.* at 163.

²⁵ *Id.* at 164–65.

²⁶ The *Casey* court acknowledged the uncertainty that followed *Roe* in its bold opening: "[l]iberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

²⁷ *Id.* at 844.

²⁸ *Id.* at 881 (quotation marks omitted).

child support, and agencies providing adoption and abortion alternatives.²⁹ If requested, physicians had to provide these materials.³⁰ Under its new undue burden standard, the Court upheld all of the Pennsylvania provisions except for spousal notification.³¹ Specifically, the Court noted that “the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus” did not create an undue burden.³²

While discarding Roe’s trimester framework, the Court claimed to affirm “Roe’s essential holding”³³ through the undue burden standard. This test has three clearly elucidated parts: first, a woman has the right to choose to have an abortion before viability and to obtain it without *undue interference* from the state;³⁴ second, the state has power to restrict abortions after fetal viability (but must allow exceptions for pregnancies endangering the life of the mother); and third, the state has a legitimate interest *from the outset of pregnancy* in protecting the health of women and the life of the fetus.³⁵ This new structure tempered Roe considerably: states could now regulate the procurement of abortions at all stages of pregnancy, provided the regulations did not constitute an undue burden having “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”³⁶ Additionally, in an expression of the extent of its recognition of a state’s interest in “the life of the unborn,”³⁷ the *Casey* court allowed for “state measure[s] designed to persuade [women] to choose childbirth over abortion,”³⁸ provided the measures “reasonably related to that goal.”³⁹

While the petitioners in *Casey* challenged the Pennsylvania statute primarily as a violation of *Roe*, they also brought a First Amendment

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.* at 898.

³² *Id.* at 882.

³³ *Id.* at 846.

³⁴ The Court grounded this right in the Due Process Clause, a departure from *Roe*’s penumbral privacy approach. *See id.* at 846.

³⁵ *Id.*

³⁶ *Id.* at 877.

³⁷ *Id.*

³⁸ *Id.* at 878.

³⁹ *Id.* The measures must still conform to the undue burden standard and cannot create “a substantial obstacle to the woman’s exercise of the right to choose.” *Id.* at 877.

challenge, claiming the informed consent provisions impermissibly controlled physicians' speech.⁴⁰ After assessing the informed consent provisions under the undue burden standard, the Court dismissed this alternative claim in three sentences:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard* [citation omitted], but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe* [citation omitted]. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.⁴¹

Thus, while overall the Court upheld the informed consent requirements under the undue burden standard,⁴² its treatment of the First Amendment claim lacks clarity and does not expressly foreclose independent First Amendment challenges to informed consent provisions.

The undue burden standard remains good law. The Court used it in *Gonzales v. Carhart*,⁴³ and more recently in *Whole Woman's Health v. Hellerstedt*.⁴⁴ While these watershed abortion cases demonstrate the Court's continued commitment to the undue burden test, they did not deal with informed consent provisions or First Amendment claims in the abortion context. Confusion over Casey's framing has created a circuit split regarding the permissibility of First Amendment challenges to abortion informed consent measures, with the Eighth, Fifth, and Sixth Circuits on one side, and the Fourth Circuit on the other.

A recent Supreme Court case also deserves mention. In *National Institute of Family and Life Advocates v. Becerra* ("NIFLA"),⁴⁵ crisis pregnancy centers challenged a California statute that (a) required licensed centers to post notices explaining the existence of publicly funded family-planning services, including abortion, and (b) required

⁴⁰ See *id.* at 881.

⁴¹ *Id.* at 884.

⁴² "[T]he right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State . . . The informed consent requirement is not an undue burden on that right." *Id.* at 887.

⁴³ 550 U.S. 124 (2007) (upholding a federal ban on "partial-birth" abortions under the undue burden standard).

⁴⁴ 136 S. Ct. 2292 (2016) (striking down a Texas regulation on abortion clinics under the undue burden standard).

⁴⁵ 138 S. Ct. 2361 (2018).

unlicensed centers to post notices stating that they were not licensed.⁴⁶ The Court found the fact that the notice requirement for licensed centers was not directly tied to a medical procedure to be dispositive.⁴⁷ Removed from an informed consent context, the licensed requirements were viewed as pure content-based regulations of speech.⁴⁸ Subject to at least intermediate scrutiny, the Court held the licensed notice requirements unconstitutional.⁴⁹ The Court also struck down the unlicensed center requirements as “unjustified and unduly burdensome.”⁵⁰

Relevant here, in its opinion the *NIFLA* Court characterized the informed consent provisions in *Casey* as regulations of professional conduct only incidentally burdening speech, a category subject to a lower standard of review.⁵¹ This indicates a willingness of the current Supreme Court to consider informed consent provisions as regulations of conduct, not speech, thus weakening the case for robust First Amendment review. Respectfully, I do not believe the *NIFLA* Court’s framing conclusively demystifies *Casey*, as it occurs in dicta⁵² and does not engage with alternative explanations for *Casey*’s reasoning. Moreover, even assuming the *NIFLA* court correctly characterized *Casey*, this can be read as limited to *Casey*’s facts. At best, read in conjunction with *Casey*, *NIFLA* “create[s] the guiding principle that reasonable regulations that facilitate informed consent to a medical procedure are exempted from heightened scrutiny”⁵³—an uncontroversial proposition. Notwithstanding *NIFLA*, the scope of permissible First Amendment challenges to abortion informed consent measures remains an open question.

⁴⁶ *Id.* at 2368.

⁴⁷ *Id.* at 2373–74.

⁴⁸ *Id.* at 2375.

⁴⁹ *Id.* The state argued that the requirements should be considered professional speech and therefore receive a lower standard of review. The Court, although highly skeptical of the professional speech doctrine, determined it did not need to answer the professional speech question “because the licensed notice cannot survive even intermediate scrutiny.” *Id.*

⁵⁰ *Id.* at 2378. The State argued that, as commercial speech, the unlicensed requirements should be subject to the more deferential *Zauderer* standard. The Court again did not feel the need to answer whether *Zauderer* applied because it held that the unlicensed center notice requirements could not meet even its lower standard of review.

⁵¹ *Id.* at 2372–73.

⁵² The Court’s characterization of *Casey* provides only an example of a category of speech the Court notes as warranting lower protection. The Court supports this category with citations to many other cases as well. *Id.* at 2373. Defining *Casey* is therefore “not necessary” nor a “necessary antecedent” to the Court’s holding. In re Grand Jury Investigation, 916 F.3d 1047, 1053 (D.C. Cir. 2019).

⁵³ *EMW Women’s Surgical Center, P.S.C. v. Beshar*, 920 F. 3d 421, 449 (6th Cir. 2019) (Donald, J., dissenting).

II. THE CIRCUIT SPLIT: SINGULARITY OF THE UNDUE BURDEN STANDARD?

A. Eighth, Fifth, and Sixth Circuits Dismiss First Amendment Challenges to Informed Consent Laws

The Eighth Circuit has twice upheld the supremacy of the undue burden test when considering First Amendment challenges to informed consent requirements. In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds (Rounds I)*,⁵⁴ the Eighth Circuit, sitting *en banc*, rejected a compelled-speech challenge to a South Dakota law requiring doctors to provide several statements to women seeking abortions as part of obtaining informed consent. These included statements that abortion “will terminate the life of a whole, separate, unique, living human being,” which “the pregnant woman has an existing [constitutionally protected] relationship with,” and “[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.”⁵⁵

Overruling the district court, the Eighth Circuit found the mandated statements well within the state’s regulatory power. The court concluded:

Casey and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.⁵⁶

Therefore, in order to succeed on its compelled speech claim, Planned Parenthood had to show that the mandated disclosures were untruthful, misleading, or irrelevant.⁵⁷ The statute at issue defined “human being,” for the purposes of the informed consent provision, as “including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation,”⁵⁸ and the court held the statutory definition controlling.⁵⁹ Given this, the court found the challenged

⁵⁴ 530 F.3d 724 (8th Cir. 2008).

⁵⁵ *Id.* at 726.

⁵⁶ *Id.* at 734–35.

⁵⁷ *See id.* at 735.

⁵⁸ *Id.* at 727.

⁵⁹ “South Dakota recognizes the well-settled canon of statutory interpretation that ‘[w]here [a term] is defined by statute, the statutory definition is controlling.’” *Id.* at 735 (citing Bruggeman v. S.D. Chem. Dependency Counselor Certification Bd., 571 N.W.2d 851, 853 (S.D. 1997)).

disclosures truthful and relevant.⁶⁰ In sum, the Eighth Circuit held *Casey* and *Gonzales* precluded First Amendment claims to informed consent laws when the speech at issue is truthful, nonmisleading, and relevant.

Four years later, the Eighth Circuit, again sitting *en banc* and again reversing the district court, reaffirmed its reading of *Casey* and upheld another part of the South Dakota statute in *Rounds II*.⁶¹ As part of obtaining informed consent, the statute required physicians to provide a written “description of . . . statistically significant risk factors to which the pregnant woman would be subjected, including . . . [i]ncreased risk of suicide ideation and suicide.”⁶² The Eighth Circuit held that this statement did not imply a causal link between abortion and suicide but rather indicated relative risk, which it found sufficiently supported by the scientific record and therefore truthful.⁶³ The court further held that despite medical and scientific uncertainty, the record did not conclusively rule out abortion as “a causal factor in the observed correlation between abortion and suicide,”⁶⁴ and therefore the required disclosure was not misleading or irrelevant.⁶⁵

The Fifth Circuit held similarly in *Texas Medical Providers Performing Abortion Services v. Lakey*.⁶⁶ In *Lakey*, physicians and abortion providers brought a section 1983 action against the state of Texas, challenging a recently enacted bill that significantly amended Texas’ informed consent laws.⁶⁷ The challenged amendments required physicians performing abortions to “perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus . . . [and] explain . . . the results of each procedure.”⁶⁸ A woman had to certify her physician’s compliance with these measures and wait 24 hours before receiving an abortion.⁶⁹ The statute permitted a woman to decline to view the images or hear the heartbeat, but she could only decline to

⁶⁰ *Id.* at 735. The court did not explicitly discuss why this statement is not misleading, but did note that it would be “incumbent upon one preparing the disclosure form required by [the statute], and upon a physician answering a patient’s questions about it, to account for any applicable statutory definitions.” *Id.*

⁶¹ *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012).

⁶² *Id.* at 894.

⁶³ “[T]he studies submitted by the State are sufficiently reliable to support the truth of the proposition that the relative risk of suicide and suicide ideation is higher for women who abort their pregnancies compared to women who give birth or have not become pregnant.” *Id.* at 898–99.

⁶⁴ *Id.* at 904.

⁶⁵ *Id.* at 905.

⁶⁶ 667 F.3d 570 (5th Cir. 2012).

⁶⁷ *Id.* at 572.

⁶⁸ *Id.* at 573.

⁶⁹ *Id.*

receive an explanation of the sonogram images under three conditions: 1) if her pregnancy resulted from rape or incest, 2) if she was a minor, or 3) if the fetus had a documented irreversible medical condition or abnormality.⁷⁰ The district court granted a preliminary injunction against the disclosure provisions as impermissible compelled speech.⁷¹

The Fifth Circuit reversed, finding that *Casey* precluded the plaintiffs' First Amendment challenge. The *Lakey* court focused on *Casey*'s brief discussion of the First Amendment claim, finding its absence of inquiry into compelling interests or narrow tailoring to be the "antithesis of strict scrutiny."⁷² The Fifth Circuit then turned to *Gonzales*, noting its reaffirmance of *Casey* in upholding states' "significant role . . . in regulating the medical profession" and the government's ability to "use its voice and regulatory authority to show its profound respect for the life within the woman."⁷³ The court found that these two cases clearly established that "informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures," and "are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny."⁷⁴ The court supported this interpretation of the case law by citing the Eighth Circuit in *Rounds I*.⁷⁵

The Fifth Circuit then noted that, unlike the plaintiffs in *Casey* and *Rounds*, the plaintiff-appellees in the case at hand had brought solely a First Amendment claim.⁷⁶ The court found this impermissible:

If the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives. *Casey*, however, rejected any such clash of rights in the informed consent context.⁷⁷

⁷⁰ *Id.* at 578 n.6.

⁷¹ *Id.* at 573. The provisions were also challenged as void for vagueness, outside of the scope of this Comment.

⁷² *Id.* at 575.

⁷³ *Id.* at 575–76 (citing *Gonzales v. Carhart*, 550 U.S. 124, 128 (2007)) (internal quotations omitted).

⁷⁴ *Id.* at 576.

⁷⁵ "Fortifying this reading, the Eighth Circuit sitting en banc construed *Casey* and *Gonzales* in the same way." *Id.* at 576–77 (citing *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008)).

⁷⁶ *Id.* at 577.

⁷⁷ *Id.*

The Fifth Circuit finally denied the contention raised by plaintiff-appellees that the disclosure requirements at issue differed qualitatively from those in *Casey*.⁷⁸ The appellees' argument here focused on two distinctions. First, because the disclosures of the sonogram and fetal heartbeat were "medically unnecessary," they went "beyond the standard practice of medicine within the state's regulatory powers."⁷⁹ Second, requiring the physician to explain the results of the sonogram and fetal heart auscultation verbally "makes the physician the 'mouth-piece' of the state."⁸⁰ The Fifth Circuit dismissed the first point under *Casey* and *Gonzales*.⁸¹ As to the second point, the court held that this "mode of delivery does not make a constitutionally significant difference from the 'availability' provision in *Casey* . . . [t]he mode of compelled expression is not by itself constitutionally relevant, although the context is."⁸² For all these reasons, the court found that the provisions did not violate the First Amendment because they were "sustainable under *Casey* . . . [and] within the State's power to regulate the practice of medicine."⁸³ The Fifth Circuit denied petitioners appeal for en banc review.⁸⁴

The Sixth Circuit recently confronted the issue and aligned in decision with the Eighth and Fifth Circuits. In *EMW Women's Surgical Center, P.S.C. v. Beshar*,⁸⁵ the court overruled the district court and upheld the constitutionality of a Kentucky informed consent statute (H.B.2) against a First Amendment challenge.⁸⁶ Echoing the Texas law at issue in *Lakey*, H.B.2 required that before giving an abortion a physician perform an ultrasound, display and explain the images, and auscultate the fetal heartbeat.⁸⁷ Although any patient could request that

⁷⁸ *Id.* at 578.

⁷⁹ *Id.*

⁸⁰ *Id.* at 579.

⁸¹ "Appellees' argument ignores that *Casey* and *Gonzales* . . . emphasize that the gravity of the decision may be the subject of informed consent through factual, medical detail, that the condition of the fetus is relevant, and that discouraging abortion is an acceptable effect of mandated disclosures." *Id.*

⁸² *Id.* at 579–80.

⁸³ *Id.* at 580.

⁸⁴ Press Release, CENTER FOR REPRODUCTIVE RIGHTS, *Fifth Circuit Court of Appeals Denies Request to Rehear Texas Ultrasound Case* (Feb. 10, 2012), <https://www.reproductiverights.org/press-room/fifth-circuit-court-of-appeals-denies-request-to-rehear-texas-ultrasound-case> [<https://perma.cc/2X5L-7W5Y>].

⁸⁵ 920 F.3d 421 (6th Cir. 2019).

⁸⁶ *Id.* at 446.

⁸⁷ *Id.* at 424.

the physician turn down the volume of the auscultation, the law provided no exemptions from these disclosures except in the case of a medical emergency or a medically necessary abortion.⁸⁸

Relying heavily on its reading of *Casey* and *NIFLA*, the *Beshar* court determined that “First Amendment heightened scrutiny does not apply to incidental regulation of professional speech⁸⁹ that is part of the practice of medicine and . . . such incidental regulation includes mandated informed-consent requirements, provided that the disclosures are truthful, non-misleading, and relevant.”⁹⁰ Characterizing the sonogram provisions as “materially identical”⁹¹ to *Casey*’s requirements and highly relevant,⁹² the court found no constitutional infirmity in H.B.2. The court discussed *Lakey* and *Rounds I* at length, noting their “support [for] our holding today.”⁹³

B. Fourth Circuit Upholds First Amendment Challenge to Informed Consent Law

Two years after the Fifth Circuit’s decision in *Lakey*, but before the Sixth Circuit’s decision in *Beshar*, the Fourth Circuit addressed a compelled speech challenge to a strikingly similar statute. In *Stuart v. Camnitz*,⁹⁴ physicians and abortion providers challenged the Display of Real-Time View Requirement of the North Carolina Woman’s Right to Know Act (“WRKA”).⁹⁵ The requirement mandated ultrasounds for all women seeking abortions and required physicians to display the sonogram and “describe the fetus in detail, ‘includ[ing] the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted,’ . . . as well as ‘the presence of external members and internal organs, if present and viewable.’”⁹⁶ It also required physicians to provide women the option of hearing the fetal heart auscultation.⁹⁷ The WRKA allowed exceptions to these measures only in the case of medical emergency; however, a woman could always “avert[] her eyes from the displayed images’ and ‘refus[e] to hear the

⁸⁸ *Id.* at 424–25.

⁸⁹ The *Beshar* court made *NIFLA*’s characterization of *Casey* central to its analysis and dismissed the Fourth Circuit’s decision in *Stuart* (see part B) because it pre-dated *NIFLA* and therefore gave “insufficient regard” to *NIFLA*’s characterization of *Casey*. *Id.* at 435.

⁹⁰ *Id.* at 429.

⁹¹ *Id.* at 431 (internal citations omitted).

⁹² *Id.* (“one can hardly dispute the relevance of sonogram images for twenty-first-century informed consent.”).

⁹³ *Id.* at 434.

⁹⁴ 774 F. 3d 238 (4th Cir. 2014).

⁹⁵ *Id.* at 242–43.

⁹⁶ *Id.* at 243.

⁹⁷ *Id.*

simultaneous explanation and medical description' by presumably covering her eyes and ears."⁹⁸ The district court, applying heightened, intermediate scrutiny, held that these requirements violated the physicians' First Amendment rights to free speech and entered a permanent injunction.⁹⁹

Unlike in *Lakey* or *Rounds*, here a unanimous Fourth Circuit affirmed.¹⁰⁰ Analyzing the regulations first through a compelled speech lens, the Fourth Circuit held "[t]he Requirement [the regulations described above] is quintessential compelled speech. It forces physicians to say things they otherwise would not say. . . . [T]he statement compelled here is ideological; it conveys a particular opinion."¹⁰¹ Referencing *Lakey*, the court acknowledged that the mandated disclosures at issue were factual but did not find this fact dispositive:

[While] it is true that the words the state puts into the doctor's mouth are factual, that does not divorce the speech from its moral or ideological implications. "[C]ontext matters." . . . [The regulations] explicitly promote[] a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate—and does so shortly before the time of decision when the intended recipient is most vulnerable.¹⁰²

The Fourth Circuit then assessed the requirements as standard medical regulation, acknowledging that states retain rights to regulate professional speech and mandate informed consent to medical procedures.¹⁰³ Despite this, the court held "individuals [do not] simply abandon their First Amendment rights when they commence practicing a profession,"¹⁰⁴ and that "[w]ith all forms of compelled speech, [the court] must look to the context of the regulation to determine when the state's regulatory authority has extended too far."¹⁰⁵ In the context of the WRKA, the court held that "the confluence of these factors points toward borrowing a heightened intermediate scrutiny standard used in certain commercial speech cases."¹⁰⁶

⁹⁸ *Id.*

⁹⁹ *Id.* at 244.

¹⁰⁰ *Id.* at 256.

¹⁰¹ *Id.* at 246. Note that the state freely admitted "the purpose and anticipated effect of the Display of Real-Time View Requirement is to convince women seeking abortions to change their minds or reassess their decisions." *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 247.

¹⁰⁴ *Id.* The court supported this with reference to *Casey* ("[T]he physician's First Amendment rights not to speak are implicated.") *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 248.

The Fourth Circuit explicitly stated its reasons for diverging from the Fifth and Eighth Circuits:

With respect, our sister circuits read too much into *Casey* and *Gonzales*. The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here . . . the plurality simply stated that it saw ‘no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*.’ That particularized finding hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion.¹⁰⁷

The court also held *Gonzales*, an undue burden case raising no First Amendment claim, inapplicable to the issue at hand. The court noted that *Gonzales* “says nothing about the level of scrutiny courts should apply when reviewing a claim that a regulation compelling speech in the abortion context violates physicians’ First Amendment free speech rights.”¹⁰⁸ The Fourth Circuit thus found its First Amendment analysis consistent with *Casey* and *Gonzales*. The State appealed to the Supreme Court, which denied certiorari.¹⁰⁹

III. CASEY DOES NOT FORECLOSE PHYSICIANS’ FIRST AMENDMENT CHALLENGES TO INFORMED CONSENT LAWS

A. *Casey* Does Not Displace First Amendment Protection for Physicians

The Eighth, Fifth, and Sixth Circuits have curtailed First Amendment protection for physicians in the context of abortion informed consent measures. Each circuit held that when mandated informed consent disclosures are truthful, nonmisleading, and relevant to the decision to have an abortion, they are permissible under *Casey* as long as they do not constitute an undue burden. Essentially, these circuits have disallowed independent First Amendment analysis of physicians’ compelled speech claims by collapsing free speech analysis into the undue burden test. This reasoning misinterprets *Casey*. As Nadia Sawicki writes, “it is essential to recognize that the ‘truthful, not misleading, and relevant’ requirement is a condition on the constitutionality of disclosure laws

¹⁰⁷ *Id.* at 249.

¹⁰⁸ *Id.*

¹⁰⁹ Walker-McGill v. Stuart, 135 S. Ct. 2838 (2015).

under the Fourteenth Amendment's 'undue burden' standard, rather than a condition of the First Amendment."¹¹⁰ As recently articulated by Judge Donald in her powerful dissenting opinion in *Beshar*:

The majority relies on *undue burden jurisprudence* to fashion a test that they believe comprehensively captures informed consent. The result is erroneous . . . The three elements the majority identifies—truthful, nonmisleading, and relevant—were drawn from *Casey*, a controlling case that considered *both* an undue burden and a First Amendment challenge. These three elements, however, were central only to *Casey*'s undue burden analysis . . . Nowhere are these elements even mentioned in *Casey*'s discussion of the First Amendment. It is a mistake to transpose *Casey*'s holding on undue burden to the First Amendment challenge here.¹¹¹

In other words, *Casey* holds that truthful, nonmisleading, and relevant informed consent disclosures do not *per se* violate a woman's constitutional right to choose. *Casey* does not, however, indicate that such disclosures can never be subject to First Amendment review.

Common sense indicates that this must be the case. Imagine South Dakota revises its disclosure requirement with the only change being physicians are now required to stand up on a chair and yell at a woman that her abortion will end the life of a unique living human being. While this hypothetical obviously steps outside of the bounds of the regulations considered in *Casey*, the Eighth Circuit does not offer a framework through which to challenge it. The disclosure has already been held truthful, nonmisleading, and relevant, ending the First Amendment inquiry. While the yelling could be challenged as creating an undue burden, the Eighth Circuit would struggle to qualitatively differentiate it from the written statement, especially given the permissibility of regulations designed to dissuade women from choosing abortion.¹¹² Even if the Eighth Circuit invalidated this law under the undue burden standard, the fact remains that it would be impossible, under Eighth Circuit

¹¹⁰ Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 WASH. U. J. L. & POL'Y 11, 24–25 (2016).

¹¹¹ *EMW Women's Surgical Center, P.S.C. v. Beshar*, 920 F.3d 421, 448 (6th Cir. 2019) (Donald, J., dissenting).

¹¹² "*Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (emphasis added).

precedent, for a physician to challenge this law under the First Amendment. This significantly reduces protection of physicians' speech.

It does not seem plausible that the Court would create this large exemption from First Amendment protection in such an ambiguous way. Justice Scalia famously wrote that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."¹¹³ The same reasoning should apply to Supreme Court holdings, particularly in the context of the First Amendment. The Supreme Court has historically been hesitant to create exceptions to free speech protection. As the Court recently stated in *NIFLA*, "[t]his Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection,'"¹¹⁴ and "[we have] been especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions.'"¹¹⁵ In this context, reading the three sentences in *Casey* as creating a new category of lessened speech protection—for truthful, nonmisleading, and relevant informed consent disclosures—seems all the more implausible.¹¹⁶ A simpler, more reasonable reading of *Casey* is that the Court, having already held the informed consent provisions permissible under the undue burden standard, and finding the regulations at issue within the usual confines of a state's regulatory power, did not feel the need to explore the First Amendment issue further.¹¹⁷

B. *Whalen* Does Not Trump *Wooley*

In its discussion of the First Amendment issues in *Casey*, the Court cited to *Wooley v. Maynard*¹¹⁸ and *Whalen v. Roe*,¹¹⁹ two seemingly conflicting cases. In *Wooley*, the Supreme Court applied strict scrutiny to a New Hampshire statute that required residents to display "Live Free

¹¹³ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

¹¹⁴ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (citing *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996)).

¹¹⁵ *Id.* (citing *United States v. Alvarez*, 567 U.S. 709, 722 (2012)).

¹¹⁶ I recognize the irony of using *NIFLA* to support this claim, given its characterization of *Casey*—but disputing that characterization does not rob other portions of the opinion of their persuasiveness.

¹¹⁷ The courts that have found otherwise have arguably fallen prey to a phenomenon recently articulated in a different context by Justice Gorsuch: "treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling." *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

¹¹⁸ 430 U.S. 705 (1977).

¹¹⁹ 429 U.S. 589 (1977).

or Die” on their license plates.¹²⁰ In *Whalen*, the Court upheld, as an appropriate use of state police power, a New York statute requiring physicians to disclose to the government prescription records of certain drugs.¹²¹ As Robert Post writes, “[e]xactly how the strict First Amendment standards of *Wooley* are meant to qualify the broad police power discretion of *Whalen* is left entirely obscure.”¹²² However, a close look at each case shows that *Whalen* should not qualify *Wooley* to the extent of foreclosing a physician’s ability to bring First Amendment challenges to informed consent laws.

The Supreme Court struck down the license plate statute in *Wooley*, recognizing that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”¹²³ In *Lakey*, the Fifth Circuit took up *Wooley* as a defense against the plaintiffs’ contention that requiring physicians to voice the mandated information was constitutionally significant. The *Lakey* court cited *Wooley* as support for the statement that “[t]he mode of compelled expression is not by itself constitutionally relevant, although the context is.”¹²⁴ However, *Wooley* suggests more than that. Comparing the case to *West Virginia State Board of Education v. Barnette*,¹²⁵ the seminal case in which the Supreme Court acknowledged a First Amendment right to be free from compelled speech in the context of the school flag salute, the *Wooley* Court stated that “[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, *but the difference is essentially one of degree.*”¹²⁶ This statement supports two suppositions: first, compelled speech is an infringement, and second, the extent to which it is compelled can affect the analysis. Therefore, the *Lakey* court’s exclusive focus on context is incomplete. *Wooley* indicates that the mode of compelled expression is also relevant insofar as it can heighten the severity of the infringement. A provision demanding that doctors voice the state’s information in their own words requires significantly more affirmative action than merely providing pamphlets. Thus,

¹²⁰ *Wooley*, 430 U.S. at 716 (“We must also determine whether the State’s countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.”).

¹²¹ *Whalen*, 429 U.S. at 598.

¹²² Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, U. ILL. L. REV. 939, 946 (2007).

¹²³ *Wooley*, 430 U.S. at 714.

¹²⁴ *Tex. Medical Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 578, 580 (5th Cir. 2012).

¹²⁵ 319 U.S. 624 (1943).

¹²⁶ *Wooley*, 430 U.S. at 715 (emphasis added).

the provisions at issue in *Lakey* analogize more closely to *Barnette* than to *Wooley*, and *Wooley* suggests that this increases the gravity of the infringement.

Immediately following its reference to *Wooley*, the *Casey* court acknowledges that the medical context tempers its First Amendment analysis, citing to *Whalen*. In *Whalen*, the Court upheld, against a privacy challenge, a New York statute requiring that the state receive a copy of every prescription for a certain class of drugs categorized as highly dangerous.¹²⁷ In *Lakey*, the Fifth Circuit described *Whalen* in one sentence as a case “in which the Court had upheld a regulation of medical practice against a right to privacy challenge.”¹²⁸ Again, their synopsis is imprecise. In analyzing the constitutional validity of the provision, the *Whalen* court considered its effect on the independence of physicians and patients:

Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication . . . the decision to prescribe, or to use, is left entirely to the physician and the patient. We hold that . . . [the] impact of the patient-identification requirements in the [statute] on either the reputation *or the independence* of the patients is [not] sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment (emphasis added).¹²⁹

While the Court did uphold the medical regulation, it clearly weighed, as highly significant, the regulation’s effect on the independence of patients’ and physicians’ decision making. With regards to the independence of patients, *Casey* and *Gonzales* admittedly allow for states to voice their disapproval of abortion even if it results in altering a woman’s choice to have one. Application of the undue burden standard thus encompasses any infringement on patients’ decision making in its calculation. However, while the undue burden standard speaks to the relevance of women’s independence in receiving abortions, it does not speak to that of the physicians offering them.

The *Casey* Court’s citation to *Whalen* indicates that infringements on the independence of doctors should be factored into the permissibility of medical regulations. Excluding First Amendment challenges to informed consent measures, however, removes the only avenue through which such infringements can be considered. Although in *Casey*, like in

¹²⁷ *Whalen*, 429 U.S. at 603–04.

¹²⁸ *Lakey*, 667 F.3d at 575.

¹²⁹ *Whalen*, 429 U.S. at 604 (emphasis added).

Whalen, the extent of infringement on the independence of the physician-patient relationship fell within permissible grounds, that determination was limited to the facts of *Casey*.¹³⁰ The provisions in *Rounds*, *Lakey*, *Beshar*, and *Stuart*, which prescribed descriptive and invasive procedures doctors must follow, intrude on the physician-patient relationship significantly more.

In sum, allowing physicians to bring First Amendment challenges to informed consent provisions does not “trump the balance *Casey* struck between women’s rights and the states’ prerogatives.”¹³¹ *Casey* weighed women’s rights and states’ rights in crafting the undue burden standard, but it did no such careful weighing in regard to physicians’ First Amendment rights. Thus, when the burden on physicians’ speech goes significantly beyond the regulations upheld in *Casey*, *Casey* no longer applies.

IV. ADOPTING INTERMEDIATE SCRUTINY AS THE STANDARD OF REVIEW

A. Competing Interests Clash in the Context of Informed Consent Laws

Assuming that *Casey* does not foreclose physicians from bringing First Amendment challenges to informed consent laws, there remains an open question: what standard should courts use to review these challenges? With First Amendment claims, context drives this inquiry.¹³² As noted by the Fourth Circuit in *Stuart*, informed consent laws lie at a unique intersection between impermissible content-based compelled speech and permissible state regulations of mandated informed consent to a medical procedure.¹³³ The Supreme Court has not conclusively weighed in on this muddled area of First Amendment law; consequently, *Casey*, with all its resulting confusion, offers the Court’s clearest declaration on the issue.

Content-based restrictions on speech are generally assessed under strict scrutiny.¹³⁴ For a law to pass strict scrutiny, it must further a compelling government interest and be narrowly tailored to effectuate

¹³⁰ “We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (emphasis added).

¹³¹ *Lakey*, 667 F.3d at 577.

¹³² “Laws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it.” *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014).

¹³³ *Id.*

¹³⁴ *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

that interest.¹³⁵ Many commenters consider this rigorous standard essentially fatal, as the Supreme Court has upheld only two speech restriction laws under it.¹³⁶ Freedom from compelled speech, or the right not to speak, has long been recognized as protected under the First Amendment. Compelled speech is necessarily content-based and thus also assessed under strict scrutiny.¹³⁷ Viewed purely through this lens, informed consent laws that compel physician speech, like those in *Rounds*, *Lakey*, *Beshar*, and *Stuart*, would be reviewed under strict scrutiny and would almost certainly be stricken down.

However, compelled speech of medical professionals runs up against another line of precedent. States have police powers through which they can regulate medicine and other professions.¹³⁸ Courts generally review regulations of this sort under rational basis review, which merely requires a statute be rationally related to a legitimate government interest.¹³⁹ While not quite a rubber stamp, most laws pass this deferential standard. Additionally, the necessity of informed consent to medical procedures is well established under tort law.¹⁴⁰ Similarly, physicians are routinely held liable for malpractice, even when the harm results from a physician's speech or lack thereof (e.g. failure to inform a patient of a procedure's risks or giving incorrect medical advice).¹⁴¹

In *Casey*, the Court acknowledged both these lines of precedent: "the physician's First Amendment rights not to speak *are* implicated, but only as part of the practice of medicine, *subject to reasonable licensing and regulation* by the State."¹⁴² Beyond this statement and the citations to *Wooley* and *Maynard* discussed in Part III, the *Casey* Court did not offer a precise standard through which to assess infringements on physicians' First Amendment rights.

¹³⁵ *Id.*

¹³⁶ Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, CATO SUP. CT. REV. 197, 205 (2018).

¹³⁷ *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (U.S. 1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

¹³⁸ Police powers come from the Tenth Amendment. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X. *See also* Sawicki, *supra* note 112 at 12 ("States are authorized to regulate medicine and other professions by virtue of their police power, the unenumerated power to protect the health, safety, and welfare of a state's citizenry"). *See also* *Dent v. W. Va.*, 129 U.S. 114, 122 (1889).

¹³⁹ Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016).

¹⁴⁰ *See generally* W.M. Moldoff, *Malpractice: Physician's Duty to Inform Patient of Nature and Hazards of Disease or Treatment*, 79 A.L.R. 2d 1028 (originally published 1961).

¹⁴¹ "Without so much as a nod to the First Amendment, doctors are routinely held liable for malpractice for speaking or for failing to speak." Post, *supra* note 122, at 950.

¹⁴² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (internal citations omitted) (emphasis added).

B. Eliminating the Extremes (Strict Scrutiny and Rational Basis Review)

While the appropriate standard could thus fall anywhere from strict scrutiny to rational basis review, the endpoints of the range can be eliminated from consideration. A standard of strict scrutiny seems hard to reconcile with *Casey*.¹⁴³ As the *Lahey* court rightfully notes, the *Casey* Court's three-sentence First Amendment discussion "is clearly not a strict scrutiny analysis . . . [because] [i]t inquires into neither compelling interests nor narrow tailoring."¹⁴⁴ Moreover, applying strict scrutiny to abortion informed consent laws would run afoul of the Court's historic recognition of state laws regulating the medical profession, a point noted by the *Casey* court itself.¹⁴⁵ Sound policy reasons buoy this recognition. Patients depend on physicians to inform them of their treatment options, but they usually lack the necessary medical background or understanding to validate the information independently. Thus, by necessity, patients place blind trust in the advice they receive from their doctors. This trust is made less blind, however, by two systems working in tandem: indirect regulation through medical malpractice liability, and direct regulation by the state. Reviewing these regulations under strict scrutiny would inappropriately encumber this system, even in the limited context of abortion informed consent measures.

Rational basis review, at first blush, appears better supported by the language used by the *Casey* court in its discussion of the First Amendment claim. The Court's use of the word "reasonable" can be read as synonymous with rational,¹⁴⁶ and its cursory First Amendment analysis could indicate deference to the state's regulatory power. However, as Carl Coleman explains, "the plurality made this statement only after having already determined (in the context of its due process analysis) that the state had a 'substantial' interest in requiring the disclosures and noting 'the ways in which the speech requirement was narrowly

¹⁴³ This statement should not be taken as an endorsement of *Casey*'s holding. However, this Comment seeks to offer a standard that coheres with precedent and could be used with the current state of the law. Consistency with *Casey* is a necessary element of such a standard.

¹⁴⁴ *Tex. Medical Providers Performing Abortion Servs. v. Lahey*, 667 F.3d 570, 575 (5th Cir. 2012). See also Carl H. Coleman, *Regulating Physician Speech*, N.C. L. REV. 9 (forthcoming), available at <https://ssrn.com/abstract=3234300> ("The most that can be said about *Casey* is that the plurality was clearly not applying strict scrutiny in its First Amendment analysis, as it made no effort to determine whether the statute was 'narrowly tailored' or based on a 'compelling state interest.'").

¹⁴⁵ *Casey*, 505 U.S. at 884.

¹⁴⁶ "On the one hand, [the *Casey* plurality's] use of the word 'reasonable' might mean that such laws are permissible as long as they have a rational basis, given that the word 'reasonable' is often used as a synonym for 'rational.'" Coleman, *supra* note 144, at 9.

drawn.”¹⁴⁷ Given this context, the word “reasonable” alone should not determine the standard of review. Moreover, application of rational basis review would render the discussion in Part III largely academic, because all of the informed consent measures mentioned so far would likely survive. This would essentially allow the carve-out of First Amendment protection for informed consent measures functionally claimed by the Eighth, Fifth, and Sixth Circuits. Thus, for the reasons discussed in Part III, rational basis review cannot be the appropriate standard.

In sum, both extremes—strict scrutiny and rational basis review—fail as potential standards of review. Strict scrutiny is incompatible with the language in *Casey* and fails to acknowledge the state’s legitimate regulatory role in the realm of medical disclosures. Rational basis review ignores the context of *Casey* and would, in effect, impermissibly excuse abortion informed consent measures from meaningful review.

C. Searching the Middle for a Standard

Rejecting both strict scrutiny and rational basis review eliminates the clearest available standards, forcing an examination of the mushy middle ground of First Amendment protection. As will be discussed in sub-section D, intermediate scrutiny emerges from this search as the best standard. Reaching that conclusion requires analysis of why other possible intermediate standards fail in the context of informed consent to abortion.¹⁴⁸ In this section, two other potential standards that have been offered as options will be examined: “truthful, nonmisleading, and relevant” (hereinafter “TNR”), and “factual and noncontroversial” (the *Zauderer* standard). Both fail to strike the right balance of protection.

As discussed in section II(a), the Eighth, Fifth, and Sixth circuits used a “truthful, nonmisleading, and relevant” standard to assess the challenged informed consent measures. In so doing, these circuits inappropriately folded First Amendment analysis into the undue burden test (see section III). This does not, however, mean that a TNR standard should be disregarded per se. While the Eighth, Fifth, and Sixth circuits

¹⁴⁷ *Id.*

¹⁴⁸ For the purposes of this Comment I have set aside the concept of professional speech as a framework through which to consider abortion informed consent requirements. Professional speech has received varied and inconsistent treatment in the circuit courts. See Erika Schutzman, *We Need Professional Help: Advocating For a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. Rev. 2019, 2023 (“Courts have provided little clarity as to the extent to which the First Amendment rights of professionals should be protected or balanced against the interests of the state . . . several circuits have tackled the issue of professional speech, with varying results.”). Moreover, the Court’s opinion in *NIFLA* casts doubt on the validity of the professional speech doctrine. See Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (“this Court has not recognized ‘professional speech’ as a separate category of speech.”).

erred in failing to acknowledge the necessity of an independent First Amendment analysis, had they done so, TNR could have been an appropriate standard. Such an approach would uphold informed consent measures that mandate truthful, nonmisleading, and relevant disclosures.

A TNR test has the benefit of seemingly easy compatibility with *Casey*. The *Casey* court held the truthful, nonmisleading, and relevant disclosures at issue in the Pennsylvania law admissible under the undue burden test. It then went on to find no First Amendment issue with the mandated disclosures. It follows that, at a minimum, truthful, nonmisleading, and relevant disclosures similar in kind to those seen in *Casey* pass First Amendment scrutiny.¹⁴⁹

Applied beyond *Casey*, however, TNR offers a slippery standard. The circuit split discussed in Part II illustrates this: in some jurisdictions, information relevant to having an abortion includes an often unnecessary and costly medical procedure, while in others it does not. Laboratories of democracy notwithstanding, a standard does not offer good guidance if speech relating to a medical procedure can be so differently conscripted depending on the state in which it occurs. Pulling a unique First Amendment standard from *Casey* stretches the Court's acknowledgment of abortion exceptionalism beyond recognition.¹⁵⁰

Another midway standard comes from the context of commercial speech. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,¹⁵¹ the Court upheld an Ohio Disciplinary Rule that required attorneys advertising contingent-fee based representation to disclose that clients may have to pay certain costs if they lose.¹⁵² The Court in

¹⁴⁹ However, a reasonableness assessment also seems baked into the *Casey* Court's discussion of the informed consent measures. See *Casey*, 505 U.S. at 884 ("In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a *reasonable* measure to ensure an informed choice") (emphasis added); *id.* at 885 ("Thus, we uphold the provision [requiring a physician as opposed to a qualified assistant to provide information regarding informed consent] as a *reasonable* means to ensure that the woman's consent is informed") (emphasis added). Therefore, truthful, nonmisleading, and *reasonable* (as opposed to or in addition to relevant) could be a more appropriate test to draw from *Casey*. Given that none of the circuits discussed in this Comment offered it as a standard, I am not giving this test full analysis. Moreover, I am not proffering it as an alternative standard because the flexibility of a reasonableness assessment would not adequately safeguard against free speech abuses in the abortion context.

¹⁵⁰ *Id.* at 852 ("Abortion is a unique act . . . the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."). See also Linda Greenhouse, *Why Courts Shouldn't Ignore the Facts About Abortion Rights*, N.Y. TIMES (Feb. 27, 2016), <https://www.nytimes.com/2016/02/28/opinion/sunday/why-courts-shouldnt-ignore-the-facts-about-abortion-rights.html> ("abortion exceptionalism" is the argument "that abortion has a moral valence that makes it different from the many other medical procedures that states subject to less rigorous oversight. The Supreme Court's current abortion jurisprudence recognizes this").

¹⁵¹ 471 U.S. 626 (1985).

¹⁵² *Id.* at 652.

Zauderer indicated that disclosure requirements mandating only “purely factual and uncontroversial information about the terms under which . . . services will be available”¹⁵³ would be upheld if they “reasonably related to the State’s interest in preventing deception of consumers,”¹⁵⁴ and were not “unjustified or unduly burdensome.”¹⁵⁵ From this language the *Zauderer* standard emerged, namely “more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’”¹⁵⁶ Elements of the reach and scope of *Zauderer* remain unclear.¹⁵⁷

Some commentators have suggested that courts could use the *Zauderer* standard to assess regulations relating to abortion, including informed consent measures.¹⁵⁸ Such an approach would uphold the constitutionality of factual and uncontroversial informed consent disclosures. Prior to *NIFLA*, this approach arguably had legs. In the wake of *NIFLA*, however, the use of *Zauderer* in the abortion context cannot stand. In considering the appropriate standard of review for the California notice requirement for licensed clinics, the Court stated: “The *Zauderer* standard does not apply here . . . The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an ‘uncontroversial’ topic. Accordingly, *Zauderer* has no application here.”¹⁵⁹ Arguably, informed consent measures differ qualitatively from the notice provisions in *NIFLA* because they relate more directly to the service being offered (abortion). However, *NIFLA* clearly colors abortion as a controversial topic, sharply circumscribing *Zauderer*’s application. Moreover, even without considering *NIFLA*, *Zauderer* review would likely strike down many of the informed consent measures upheld in *Casey* (while describing the nature of the procedure and associated health risks might pass, requiring notice of

¹⁵³ *Id.* at 651.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018).

¹⁵⁷ Open questions include whether state interests aside from preventing consumer deception can sustain disclosure requirements, and what qualifies as “controversial.” For one circuit’s take, see *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (holding that government interests in addition to correcting deception can be invoked to sustain disclosure mandates under *Zauderer*); *Nat’l Ass’n of Manufacturers v. S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2015) (holding as controversial an S.E.C. requirement that a company that could not determine the origin of its minerals must list its products as not Democratic Republic of the Congo conflict free).

¹⁵⁸ See Coleman, *supra* note 144, at 22 (noting the similarity between the *Rounds I* court’s focus on whether the compelled disclosures were “truthful and not misleading” and the *Zauderer* standard). Interestingly, this was the approach adopted by the Third Circuit in *Casey*. See *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 705–06 (3d Cir. 1991) *aff’d in part, rev’d in part*, 505 U.S. 833 (1992).

¹⁵⁹ *NIFLA*, 138 S. Ct. at 2372.

the probable gestational age of the child as well as state-sponsored materials regarding alternatives seems controversial). Given both this and the framing of abortion in *NIFLA*, it follows that abortion informed consent disclosures do not qualify for *Zauderer* review.

D. Intermediate Scrutiny Is the Appropriate Standard

Intermediate scrutiny (sometimes also referred to as heightened scrutiny) straddles the line between rational basis review and strict scrutiny. It developed as a response to gender discrimination claims under the Fourteenth Amendment¹⁶⁰ and more recently has emerged as the standard for assessing regulations of some commercial speech.¹⁶¹ Intermediate scrutiny requires that the state demonstrate “at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest,”¹⁶² with a “fit between the legislature’s ends and the means chosen to accomplish those ends.”¹⁶³ Courts sometimes define the appropriate fit as one that is not “more extensive than necessary.”¹⁶⁴ Under intermediate scrutiny, “[t]he court can and should take into account the effect of the regulation on the intended recipient of the compelled speech, especially where she is a captive listener.”¹⁶⁵

Intermediate scrutiny appropriately balances the tensions created by informed consent measures. On the one hand, the regulation of private medical decisions falls within the ambit of the state. On the other hand, abortion is a matter of public concern, and many informed consent measures are designed precisely to express the state’s disapproval of the practice *in general*. The Supreme Court has repeatedly noted that “[i]t is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection’ . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.”¹⁶⁶ Governmental regulations of speech on matters of public concern traditionally trigger a higher level of scrutiny.¹⁶⁷ Abortion qualifies as an issue in both realms: private as applied to a woman’s particular circumstances,

¹⁶⁰ See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

¹⁶¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

¹⁶² *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011).

¹⁶³ *Id.* at 572 (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) (internal citations omitted).

¹⁶⁴ *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014) (defining intermediate scrutiny as looking to whether a law is “no more extensive than necessary to serve a substantial governmental interest”).

¹⁶⁵ *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014).

¹⁶⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985).

¹⁶⁷ *Id.* at 759.

which are wholly her own, yet a controversial part of the public forum. In choosing the dialogue between a woman and her physician as a time during which to express disapproval of abortion, states have introduced the public forum into a “deeply personal decision[.]”¹⁶⁸

This raises concerns of government overreach, flagged by Justice Thomas in *NIFLA*. Justice Thomas observed that the Supreme Court “has stressed the danger of content-based regulations ‘in the fields of medicine and public health, where information can save lives.’”¹⁶⁹ Noting that “[d]octors help patients make deeply personal decisions, and their candor is crucial,”¹⁷⁰ Justice Thomas warned that “[t]hroughout history, governments have ‘manipulat[ed] the content of doctor-patient discourse to increase state power and suppress minorities.’”¹⁷¹ Context can either increase or mitigate this concern. State regulations designed to empower personal and *private* decisions by requiring physicians to provide largely uncontroversial information lessen this concern. For example, a law requiring disclosure of specific risks about electroconvulsive treatment mostly affects a private treatment decision and does not implicate a greater public issue. Content-based regulations that touch on issues of public concern, however, increase the fear of government manipulation, and therefore require more protection under the First Amendment. Using intermediate scrutiny for abortion informed consent measures recognizes the state’s regulatory power while ensuring that regulations impacting speech on an issue of public concern receive adequate First Amendment protection.¹⁷²

Moreover, informed consent measures implicate two constitutional guarantees: a woman’s right to terminate her pregnancy, and her physician’s right to be free from compelled speech. As noted, the law handles each separately, under the undue burden test and the First Amendment, respectively. However, a better approach would recognize that each infringement does not occur in a vacuum. In compelling physicians’ speech and conduct, informed consent measures necessarily touch on a woman’s right to an abortion as well. The law should recognize this dual infringement by adopting a higher standard of review in

¹⁶⁸ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2374 (2018) (citing *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc)) (quotations omitted).

¹⁶⁹ *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)).

¹⁷⁰ *Id.* (citing *Wollschlaeger*, 848 F.3d at 1328).

¹⁷¹ *Id.* (citing *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201–202 (1994)).

¹⁷² While this Comment has focused narrowly on abortion informed consent measures, this approach could supply a model for other regulations of physicians’ speech that touch issues of public concern, e.g. informed-consent to vaccinations.

assessing the relevant free speech claim—namely, intermediate scrutiny.¹⁷³ Notably, the Supreme Court has adopted such a hybrid rights approach in regard to one category of free speech claims.¹⁷⁴

Analogous reasoning should apply in the case of abortion informed consent measures. This is not to advocate for a generally more liberal adoption of the hybrid rights approach. However, such an approach would be particularly appropriate in the limited context of abortion informed consent measures, where the relevant harm to women is deemphasized when informed consent measures are challenged under the First Amendment (see part E). A hybrid rights approach would also help insulate informed consent measures from being challenged as regulations of conduct that only incidentally burden speech, thereby ensuring a higher standard of review.

Advocating for intermediate scrutiny as the correct standard for assessing abortion informed consent requirements necessitates addressing its consistency with *Casey*. The Fourth Circuit in *Stuart* offered intermediate scrutiny as consistent with Supreme Court precedent but did not explain its rationale.¹⁷⁵ Examined closely, consistency with *Casey* is the main weakness of intermediate scrutiny. The problem does not stem from the text;¹⁷⁶ rather, one can legitimately argue that the informed consent provisions upheld in *Casey* would flunk intermediate scrutiny. A state's substantial interest in the potentiality of life is clearly supported by *Casey* and *Gonzales*. This leaves only an inquiry into the fit between this end and the means used in *Casey*. It is not clear that requiring physicians to tell a woman the probable gestational age of the fetus, and give her information regarding abortion alternatives, are measures reasonably drawn to achieve that interest. Perhaps an

¹⁷³ Under this reasoning, the reverse, a higher standard of review for assessing the infringement on the constitutional right to an abortion when physicians' First Amendment rights are implicated, would also be true. This argument proves more difficult, given that in the case of abortion rights the Court has codified the standard of review *into* the constitutional test itself. One would have to argue that the threshold of what constitutes an undue burden rises when physicians' First Amendment rights are involved. While not untenable, there is more room to make the argument for a hybrid rights approach on the flip side, where the standard of review has not been set.

¹⁷⁴ *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990) (defining hybrid rights as a Free Exercise Clause claims in conjunction with another constitutional violation).

¹⁷⁵ “[*Casey*] says nothing about the level of scrutiny courts should apply when reviewing a claim that a regulation compelling speech in the abortion context violates physicians' First Amendment free speech rights . . . A heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here.” *Stuart v. Camnitz*, 774 F. 3d 238, 249 (4th Cir. 2014).

¹⁷⁶ As discussed in part B *supra*, while the word “reasonable” could be read to mean “rational,” the Court makes this statement only after having already concluded the existence of a substantial state interest and noting the tailoring of the regulation. Thus, the Court's language in *Casey* does not preclude intermediate scrutiny.

appropriate fit would only require that physicians *offer* to tell the gestational age, and that the state raise awareness about abortion alternatives through a general advertising campaign rather than through doctors. One can thus argue that the *Casey* provisions overstep a state's interest and therefore would fail intermediate scrutiny review.

However, one can also plausibly argue that the *Casey* requirements *would* withstand intermediate scrutiny review. In light of the weight the Supreme Court has given to this particular state interest, the disclosure requirements in *Casey* seem minimally invasive and appropriately tailored. To put it simply, this is a close call. However, given the other reasons weighing in favor of intermediate scrutiny, a slightly precarious relationship with *Casey* should not ultimately be disqualifying. Rather, courts should use *Casey* as a helpful guide for framing their fit inquiry. Regulations similar in kind to those in *Casey*, such as giving the age of the fetus or offering printed materials describing alternative options and support, can be seen as representative of the appropriate balance between a state's interest in potential life and the means it can use to further it.

E. #MeToo Movement Supports Use of Intermediate Scrutiny

The context of #MeToo also supports the use of intermediate scrutiny for assessing informed consent regulations. When *Casey* replaced *Roe's* trimester system, it fundamentally altered the reproductive rights of women. *Casey's* undue burden standard has allowed states to encumber pre-viability abortions through a wide range of regulations. The laxity of the undue burden standard as a tool through which to attack these increasingly severe state regulations has created a special need for First Amendment claims in this context.

First Amendment claims to informed consent measures, however, necessarily shift the focus from women to their doctors. The relevant constitutional harm is no longer the burden on the woman, but rather the infringement on her doctor. Particularly in the context of #MeToo, this should give us pause. The #MeToo movement has shone a bright and harsh light on the prevalence of sexual violence and harassment against women. While sexual harassment is a critical issue, #MeToo also goes beyond this. At its core, it speaks to our culture's historic and deeply-rooted disregard of women's agency in all aspects of life, from the bedroom, to the boardroom, to the street. The Court in *Casey* acknowledged that the right to an abortion is justified in part by "the right to physical autonomy."¹⁷⁷ We should consider the laws discussed earlier in this light. Giving a woman false information that abortion

¹⁷⁷ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

increases her suicide risk tells her that the state knows her better than she knows herself. Forcing her to endure an invasive medical procedure solely to show her images of the pregnancy she came to the doctor to terminate implies that she does not fully know what she is doing.

This harm is lost, though, when framing the legal issue under the First Amendment. This is not to question the exigency of free speech concerns. However, the informed consent laws considered in this Comment were designed, above all, to impact *women* seeking abortions, not their doctors. By focusing on physicians, we surrender the interests of women to those of others.¹⁷⁸ This denies women agency in yet another arena where it has been historically neglected: the courtroom. Particularly in the era of #MeToo, we shouldn't lose sight of this quiet injustice.

The undue burden test does not adequately protect women's agency and autonomy when seeking an abortion. Free speech challenges to abortion informed consent measures offer a second-best tool with which to attack invasive regulations. Assessing these regulations through intermediate scrutiny allows courts to consider how a state has tailored a regulation and its effect on the listener. In this inquiry, there is room to consider a regulation's impact on women. Therefore, adopting intermediate scrutiny as the standard of review for informed consent measures does some work toward remedying the harm done by the First Amendment framing of this issue.

CONCLUSION

In crafting the undue burden standard in *Casey*, the Supreme Court carefully weighed the rights of women and the rights of the state. The rights of physicians, however, received no such measured consideration. Reading *Casey* as exempting abortion informed consent provisions from First Amendment challenge bends reason to the breaking point. *Casey* does not foreclose these challenges, nor does it offer a precise standard with which to review them. Intermediate scrutiny is the only standard that appropriately handles the conflicting interests at the heart of abortion informed consent regulations, particularly in the era of #MeToo.

¹⁷⁸ Admittedly, many physicians are female. However, this does not negate the harm in a shift from an entirely female category—women seeking abortions—to a category that, while inclusive of women, also includes men. Moreover, the necessity of obtaining an abortion for the women seeking them makes them a particularly vulnerable group of women, a fact that does not extend to female physicians.



Breaking the Bank: Split Interpretations of the Bank Acts in the Era of #MeToo

Conor R. Harvey[†]

I. INTRODUCTION TO THE BANK ACTS

Many conflicts exist between state anti-discrimination laws and federal banking statutes. Traditionally, federal law provided certain banks *carte blanche* to terminate qualifying employees at will, or “at pleasure.”¹ But some federal courts now afford state law protections to these discharged employees through a more nuanced interpretation of federal law.² Today, those courts find that banks do not have an absolute right to fire employees “at pleasure” if the firing violates a state anti-discrimination law. Consequently, their interpretations conflict with the interpretations of circuits that hold that federal law provides certain banks the absolute right to dismiss qualifying personnel “at pleasure,” subject only to federal law.³

Three different statutes encompass the “Bank Acts”: the National Bank Act,⁴ the Federal Reserve Act,⁵ and the Federal Home Loan Bank

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¹ This Comment uses the terms “at will” and “at pleasure” synonymously. See *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 492 (11th Cir. 2015) (“At pleasure” was utilized by Congress to mean “only that Bank officers are ‘at will’ employees, as opposed to ‘term’ employees.”).

² See *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274 (3d Cir. 2006); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005); *Morris v. U.S. Bank*, No. 4:12-cv-281-DPM, 2013 U.S. Dist. LEXIS 3950 (E.D. Ark. Jan. 10, 2013); *Risinger v. HNB Corp.*, No. 10-2640-KHV/KMH, 2011 U.S. Dist. LEXIS 148560 (D. Kan. Dec. 21, 2011); *Ewing v. Fed. Home Loan Bank of Des Moines*, 645 F. Supp. 2d 707 (S.D. Iowa 2009); *Crowe v. Fed. Reserve Bank of St. Louis*, No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427 (E.D. Mo. Jan. 20, 2009); *James v. Fed. Reserve Bank of N.Y.*, 471 F. Supp. 2d 226 (E.D.N.Y. 2007); *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995); *Booth v. Old Nat’l Bank*, 900 F. Supp. 836 (N.D. W. Va. 1995); *Moodie v. Fed. Reserve Bank of N.Y.*, 835 F. Supp. 751 (S.D.N.Y. 1993).

³ See *Wiersum*, 785 F.3d 483; *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285 (4th Cir. 2008); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987).

⁴ 12 U.S.C. §§ 21 *et seq.* (2012).

⁵ 12 U.S.C. §§ 221 *et seq.* (2012).

Act.⁶ Each of the Bank Acts contains different requirements for governance. For example, to be governed by the National Bank Act, a bank must include the word “National” in its title and must be certified as a national banking institution by the comptroller of the currency.⁷ The Federal Reserve Act binds all twelve of the United States Federal Reserve Banks.⁸ And the Federal Home Loan Bank Act governs the eleven banks supervised by the Federal Housing Finance Agency.⁹

The Bank Acts all contain similar language within what is known as their “at-pleasure” provisions,¹⁰ and thus, courts often apply jurisprudence regarding one Bank Act’s “at-pleasure” provision interchangeably with the same provision of another Bank Act.¹¹ These provisions allow a bank’s board of directors governed by one of the Bank Acts to dismiss certain personnel for whatever reason the board sees fit,¹² and for the most part, without any legal consequence.¹³ Under the National

⁶ 12 U.S.C. §§ 1421 *et seq.* (2012).

⁷ 12 U.S.C. § 35.

⁸ 12 U.S.C. §§ 221–522.

⁹ 12 U.S.C. § 1442a.

¹⁰ Compare 12 U.S.C. § 24 (A national banking association “shall have power . . . [t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.”) with 12 U.S.C. § 341 (“[A] Federal reserve bank . . . shall have power . . . to appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.”).

¹¹ Schweikert v. Bank of Am., N.A., 521 F.3d 285, 288 (4th Cir. 2008) (“[T]he at-pleasure provisions of the Federal Home Loan Bank Act . . . and the Federal Reserve Act . . . have [been] interpreted [] consistently with each other and with the at pleasure clause of the [National Bank Act].”); Stone v. Nat’l Bank & Trust Co., 92-cv-211, 1996 U.S. Dist. LEXIS 7927, at *18 (N.D.N.Y. June 6, 1996) (“[T]he ‘dismissal at pleasure’ language is nearly identical in all of these federal bank acts. Thus, plaintiff cannot avoid [the application of] other cases . . . [because] the employers therein were not banks organized under the National Bank Act.”); Farmer v. Nat’l City Corp., c-2-94-966, 1995 U.S. Dist. LEXIS 21478, at *20–21 (S.D. Ohio Sept. 12, 1995) (finding the “at pleasure” language of the Federal Home Loan Bank Act, the Federal Reserve Act, and the National Bank Act are identical).

¹² This dismissal power extends to other employees in some contexts. Porter Wright, *Nat’l Bank Act May Preempt Certain Bank Officer Employment Claims*, EMPLOYER LAW REPORT (Nov. 12, 2008), <https://www.employerlawreport.com/2008/11/articles/eeo/national-bank-act-may-preempt-certain-bank-officer-employment-claims/> [<https://perma.cc/L2XT-PVKN>]; see also Schweikert, 521 F.3d at 290 (“We hold that ratification by a board of directors of a termination is sufficient to invoke the preemptive effect of the at-pleasure provision of the [National Bank Act].”). *Contra* Wells Fargo Bank v. Superior Court, 811 P.2d 1025, 1032–33, 1036 (Cal. 1991) (“Board action of many kinds is often ratification of recommendations by senior management. But the board remains responsible for performing its statutory and other functions . . . If [the National Bank Act] unreasonably requires such a function to be carried out by a bank’s board, the remedy lies with Congress, not with this court.”).

¹³ Kemper v. First Nat’l Bank, 418 N.E.2d 819, 821 (Ill. App. Ct. 1981) (“The provision for dismissal of officers at the pleasure of the board of directors has been construed consistently to allow a national bank to discharge an officer without liability.”); see also Mackey v. Pioneer Nat’l Bank, 867 F.2d 520, 524–25 (9th Cir. 1989); Kozlowsky v. Westminster Nat’l Bank, 6 Cal. App. 3d

Bank Act, these employees include presidents, vice presidents, and other officers of qualifying banks.¹⁴ The Federal Reserve Act extends dismissal to additional employees.¹⁵ Moreover, the Federal Home Loan Bank Act allows for the “at-pleasure” dismissal of attorneys and agents.¹⁶ Today, in the era of #MeToo, an interesting question is whether a board’s power to dismiss personnel at will preempts state laws prohibiting discrimination on the basis of sex or other personal characteristics.¹⁷

This Comment argues that the Bank Acts’ “at-pleasure” provisions preempt all contradictory state laws.¹⁸ However, the Bank Acts should be amended to allow plaintiffs to bring state law discrimination claims that parallel—or exactly match—their federal counterparts. Part II of the Comment explores the origin and purpose of the “at-pleasure” provision. Part III provides a quick overview of anti-discrimination provisions and their applications and interactions with at-will employment. Part IV discusses the Supremacy Clause and the preemption doctrine as lenses through which to view this issue. Part V dives into the intersection of state law claims and the supremacy of the Bank Acts. Part VI discusses solutions to discrimination in the era of #MeToo when federalism preempts state law anti-discrimination provisions.

II. THE ORIGIN OF THE “AT-PLEASURE” PROVISION

The “at-pleasure” provision was first introduced in 1863 as part of the National Currency Act.¹⁹ Congress left “no record of any discussion of [the ‘at-pleasure’ provision], or of any specific purpose or motive it

593, 596–97 (Cal. Ct. App. 1970); *First Nat’l Bank of Colquitt v. Miller*, 98 S.E. 402, 404–05 (Ga. Ct. App. 1919); *Copeland v. Melrose Nat’l Bank*, 229 A.D. 311, 313 (N.Y. App. Div. 1930), *aff’d*, 173 N.E. 898 (N.Y. 1930); *Westervelt v. Mohrenstecher*, 76 F. 118, 122–23 (8th Cir. 1896).

¹⁴ 12 U.S.C. § 341.

¹⁵ *See Little v. Fed. Reserve Bank of Cleveland*, 601 F. Supp. 1372, 1375 (N.D. Ohio 1985) (determining the Federal Reserve Bank could fire a security guard at pleasure under the Federal Reserve Act); *Obradovich v. Fed. Reserve Bank of N.Y.*, 569 F. Supp. 785, 790 (S.D.N.Y. 1983) (holding that a painter whose duties did “not seem essential to the Federal Reserve’s discharge of its financial responsibilities” could be dismissed at pleasure).

¹⁶ 12 U.S.C. § 1432(a) (2012).

¹⁷ *See, e.g., Boesch v. Champaign Nat’l Bank*, 2008 Ohio 3282 (Ohio Ct. App. 2008) (finding a bank officer’s gender discrimination claim brought under state law was preempted by the NBA).

¹⁸ Courts interpreting the “at pleasure” language in the Federal Reserve Act and the Federal Home Loan Act look to the interpretation of the National Bank Act’s nearly identical provision to identify the preemptive scope of all three federal banking act provisions. *See, e.g., Fasano*, 457 F.3d at 286–87. This interpretative method is supported by congressional intent. Decades after the National Bank Act, when enacting the Federal Reserve Act, Congress specified that the purpose of the “at-pleasure” provision was “precisely analogous to those of the national banks.” H.R. REP. NO. 63-69 (1913).

¹⁹ Act of Feb. 25, 1863 ch. 58, § 11, 12 Stat. 665, 668 (1863).

might have had in enacting it.”²⁰ Yet as courts²¹ and commentators²² have noted, historical context suggests that the provision served a “quite narrow” purpose.²³ Its purpose is likely derivative of the National Currency Act’s purpose, which some have argued Congress passed to: (1) develop a national currency; (2) create a federal bond market to finance the Civil War; and (3) establish a nationally governed depository for government funds.²⁴ But the oldest commentator argues that the National Currency Act, subsequently the National Bank Act once amended in 1864,²⁵ was passed “to create a market for loans of the general government” and to facilitate the “issu[ance] and circulation of a currency based upon the credit of the government.”²⁶ Although state bank notes are obsolete today—long ago replaced by federal currency—federal banks faced fierce competition from state banks during the second half of the nineteenth century.²⁷ Congress appeared “solicitous of the new national banks, their competitiveness, and ultimately, the system’s survival,”²⁸ going as far as to enact a ten percent tax on all bank notes issued by state-chartered banks in an effort to make national banks competitive.²⁹ The tax proved so successful that it was later considered to have taxed the state banks out of existence.³⁰

Although the congressional record lacks any discussion of the National Bank Act’s “at-pleasure” provision, some courts argue that Congress intended it “to place the fullest responsibility upon the directors

²⁰ *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013) (internal quotation marks omitted).

²¹ *Id.*

²² Miriam Jacks Achtenberg, *Rereading the Nat’l Bank Act’s ‘At Pleasure’ Provision: Preserving the Civil Rights of Thousands of Bank Employees*, 43 HARV. C.R.-C.L. L. REV. 165, 172 (2008).

²³ *Goonan*, 916 F. Supp. 2d at 493 (interpreting the Federal Reserve Act’s identical language).

²⁴ Achtenberg, *supra* note 22, at 176; Geoffrey P. Miller, *The Future of the Dual Banking Sys.*, 53 BROOK. L. REV. 1, 13 (1987); Edward L. Symons, Jr., *The “Business of Banking” in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 699 (1983); CHARLES THEODORE BOONE, *THE LAW OF BANKS AND BANKING* 290 (1892).

²⁵ Act of June 3, 1864, ch. 106, § 8, 13 Stat. 88, 101 (1864) (codified at 12 U.S.C. §§ 21 *et seq.*) (“[A] national banking association . . . shall have power . . . to elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, required bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.”).

²⁶ BOONE, *supra* note 24, at 290.

²⁷ See *Tiffany v. Nat’l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1873) (describing the National Bank Act’s pro-competitive policies); M.B.W. Sinclair, *Employment at Pleasure: An Idea Whose Time Has Passed*, 23 U. TOL. L. REV. 531, 533 (1991).

²⁸ Sinclair, *supra* note 27, at 533.

²⁹ Act of July 13, 1866, ch. 184, § 9, 14 Stat. 93, 146 (1866); see also *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 549 (1869) (upholding the constitutionality of the tax).

³⁰ BOONE, *supra* note 24, at 290 (quoting *Tiffany*, 85 U.S. (18 Wall.) at 413) (“Much has accordingly been done to insure their national banks’ taking the place of state banks. The latter, it is said, ‘have been substantially taxed out of existence.’”).

[of national banks] by giving them the right to discharge [] officers at pleasure.”³¹ Specifically, “the power to dismiss bank officers at will reflects the constitutional mandate to establish an independent national system in order to maintain the stability of, and promote the welfare of, the national banks.”³² Furthermore, it empowers banks to immediately remove questionable individuals on the basis that a strong public image is important to a bank’s prosperity.³³ Although simple,³⁴ this argument is nevertheless valid. Because banks profit by caring for their customers’ money, untrusting customers will withdraw that money, and the banks’ prosperity will leave with it.³⁵ While national banks no longer need a competitive advantage over state banks, customers simply will not deposit money in institutions they do not trust. Whether that trust is lost by a bank officer’s actual misbehavior, mismanagement, or by some fiction, the same result occurs: less money is deposited and less prosperity is achieved. Federal deposit insurance may mitigate the effects of untrusting customers; however, it likely cannot eliminate their fears altogether.³⁶

Their effectiveness aside, the “at-pleasure” provisions remain largely untouched since their enactments and continue to serve their alleged purpose.³⁷ Yet, lacking other evidence and left with this broad purpose, some courts interpret the provisions according to their more tailored views. Until relatively recently, courts truly and consistently upheld a bank’s right to discharge its officers “at pleasure.” But in the

³¹ *Copeland v. Melrose Nat’l Bank*, 229 A.D. 311, 313 (N.Y. Sup. Ct. 1930), *aff’d*, 173 N.E. 898 (N.Y. 1930). *But see* Note, *Statutory Provision for Removal of Corporate Officer “At Pleasure”*, 50 HARV. L. REV. 518, 520 (1937) (characterizing *Westervelt v. Mohrenstecher*, 76 F. 118 (8th Cir. 1896), similar interpretation of the purpose of the “at-pleasure” provision as “conjecture”).

³² *Alegria v. Idaho First Nat’l Bank*, 723 P.2d 858, 860 (Idaho 1986) (citing *Westervelt*, 76 F. at 122).

³³ *See Westervelt*, 76 F. at 122 (“Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are entrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank.”); *Mackey v. Pioneer Nat’l Bank*, 867 F.2d 520, 526 (9th Cir. 1989) (The purpose of the provision is to give national banks “the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.”).

³⁴ *Sinclair*, *supra* note 27, at 534.

³⁵ *Id.*

³⁶ For example, because federal deposit insurance insures up to \$250,000, adjusted for inflation, a person with funds exceeding \$250,000 may choose to place that money elsewhere. 12 U.S.C. § 1821 (2012). Moreover, 27 percent of millennials think Bitcoin is more trustworthy than incumbent banks, such as JPMorgan Chase, Wells Fargo, and Goldman Sachs. *Blockchain Capital, Bitcoin Survey Fall 2017*, <http://www.survey.blockchain.capital/#1509374164943-0459e929-976e> [<https://perma.cc/V2F2-MQWX>].

³⁷ *See Westervelt*, 76 F. at 122 (“to provide for [the lack of public confidence in a bank officer]”). Remember, courts interpret the Bank Acts’ “at-pleasure” provisions analogously. *See Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 286–87 (3d Cir. 2006).

era of #MeToo and other anti-discriminatory movements, courts might view the “at-pleasure” provisions from a different perspective.

III. EMPLOYMENT “AT PLEASURE” AND ANTI-DISCRIMINATION PROVISIONS

Traditionally, at-will,³⁸ or “at-pleasure,”³⁹ employment barred a “claim of entitlement to continued employment enforceable against the employers.”⁴⁰ However, the Supreme Court has upheld some restrictions on these employment relationships.⁴¹ Various state laws have forbidden employment discrimination since the 1940s, and similar federal statutes have done so since the 1960s.⁴² Today, federal statutory restrictions prohibit discrimination on the basis of age,⁴³ physical disability,⁴⁴ “race, color, religion, sex, or national origin,”⁴⁵ wage garnishment,⁴⁶ “pregnancy, childbirth, or related medical conditions,”⁴⁷ military status,⁴⁸ jury duty,⁴⁹ and a myriad of other classifications⁵⁰ that limit an employer’s ability to fire an employee at will. Many of these federal anti-discrimination statutes contain express anti-preemption provisions that preserve parallel state laws and remedies.⁵¹ Yet no such provision exists in any of the three Bank Acts. Consequently, courts often struggle to properly apply the Bank Acts’ “at-pleasure” provisions. While “[a]ll courts recognize that, to the extent that the federal banking

³⁸ *Black’s Law Dictionary*, (11th ed. 2019), available at Westlaw BLACKS (“Employment that is usu. undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.”).

³⁹ “That Congress used the term ‘at pleasure’ instead of ‘at will’ in the National Bank Act is not surprising. The term ‘at will’ would not be employed for more than a decade after Congress passed the National Bank Act.” Achtenberg, *supra* note 22, at 172.

⁴⁰ *Cherin v. Lyng*, 874 F.2d 501, 504 (8th Cir. 1989).

⁴¹ *See generally* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding a federal restriction on employment at will that sought to balance the relationship between employers and employees).

⁴² *See, e.g.*, Act of Mar. 12, 1945, ch. 118, 1945 N.Y. Laws 457; Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241 (1964).

⁴³ 29 U.S.C. §§ 621 *et seq.* (2012).

⁴⁴ 42 U.S.C. §§ 12101 *et seq.* (2012); 29 U.S.C. §§ 701 *et seq.* (2012).

⁴⁵ 42 U.S.C. §§ 2000e *et seq.* (2012).

⁴⁶ 15 U.S.C. §§ 1601 *et seq.* (2012).

⁴⁷ 42 U.S.C. § 2000e(k).

⁴⁸ 38 U.S.C. § 4311 (2012).

⁴⁹ 28 U.S.C. § 1975 (2012).

⁵⁰ 42 U.S.C. § 7622 (2012) (protecting employees under the Clean Air Act); 42 U.S.C. § 3608 (2012) (providing employee protection in asbestos actions); 42 U.S.C. § 1997d (2012) (providing protection to employees reporting the mistreatment of an institutionalized person).

⁵¹ *See, e.g.*, 42 U.S.C. § 2000e-7.

acts conflict with subsequently enacted anti-discrimination laws, subsequent federal anti-discrimination law must prevail,⁵² courts often split with one another when attempting to simultaneously apply the “at-pleasure” provisions and state anti-discrimination statutes.

IV. THE SUPREMACY CLAUSE AND THE PREEMPTION DOCTRINE

*National State Bank v. Long*⁵³ explains that “whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the National Bank Act in 1863.”⁵⁴ Still, since as early as 1819, the Supreme Court has maintained that nationally chartered banks are federal instrumentalities entitled to regulate themselves without state interference.⁵⁵ State laws only apply to a bank governed by the Bank Acts insofar as the laws do not “infringe the national banking laws or impose an undue burden on the performance of the bank’s functions.”⁵⁶ Therefore, otherwise valid state law discrimination claims must be dismissed if they conflict with the Bank Acts’ “at-pleasure” provisions. Nevertheless, because courts exercise substantial discretion in determining whether a state and federal law conflict, and consequently, whether a federal law preempts a state law, some state law discrimination claims proceed despite being barred by the “at-pleasure” provisions.

Federal preemption, read from the Supremacy Clause of the Constitution,⁵⁷ requires reviewing courts to examine congressional intent⁵⁸ and the “purpose of the disputed federal statute.”⁵⁹ Preemption exists in three different forms: (1) express preemption; (2) field preemption; and (3) conflict preemption.⁶⁰ First, express preemption occurs when Congress explicitly defines the “extent to which its enactments preempt state law.”⁶¹ An explicit congressional preemption of state laws

⁵² Achtenberg, *supra* note 22, at 167 (emphasis in original).

⁵³ 630 F.2d 981 (3d Cir. 1980).

⁵⁴ *Id.* at 985.

⁵⁵ *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819).

⁵⁶ *Anderson Nat’l Bank v. Lueckett*, 321 U.S. 233, 248 (1944); *see also* *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (“Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank’s exercise of power.”); *Aalgaard v. Merch. Nat’l Bank, Inc.*, 224 Cal. App. 3d 674, 686 (Cal. Ct. App. 1990).

⁵⁷ U.S. CONST. art. VI, cl. 2. (“[T]he Laws of the United States . . . shall be the supreme Law of the Land.”).

⁵⁸ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990); *Aalgaard*, 224 Cal. App. 3d at 686.

⁵⁹ *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492 (S.D.N.Y. 2013).

⁶⁰ *Peatros v. Bank of Am. NT & SA*, 990 P.2d 539, 542–43 (Cal. 2000).

⁶¹ *Id.*

that regulate banks is a rare occurrence.⁶² The “at-pleasure” provisions do not expressly preempt state anti-discrimination laws and courts are generally left to determine the proper boundaries and application of federal and state laws.⁶³

Second, field preemption occurs when a state law “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.”⁶⁴ Congressional “intent may be inferred from a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ or where an Act of Congress ‘touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”⁶⁵ In 1869, the Supreme Court noted that national banks were “subject to the laws of the State and are governed in their daily course of business far more than the laws of the State than of the Nation.”⁶⁶ Since then, it has generally been accepted that the Bank Acts do not employ field preemption.⁶⁷ Consequently, courts recognize the “historic dual regulation of banks by state and federal law.”⁶⁸

Third, conflict preemption occurs when a state law “actually conflicts” with a federal law.⁶⁹ The Supreme Court recognizes that “federal

⁶² See *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (“In only a few instances has Congress explicitly preempted state regulations of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision.”).

⁶³ See *id.*; *Goonan*, 916 F. Supp. 2d 470, 491 (2013) (“The [Federal Reserve Act] contains no such express preemption clause and does not, by its plain language terms, speak to state-antidiscrimination laws.”); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000); see also, e.g., *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594–95 (2011).

⁶⁴ *Peatros*, 990 P.2d at 542; see also *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

⁶⁵ *English*, 496 U.S. at 79 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁶⁶ *First Nat'l Bank of Louisville v. Kentucky*, 76 U.S. 353, 362 (1869).

⁶⁷ *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, at *3 (N.D. Ill. Mar. 3, 1995) (“[A] state may attempt to affect the conduct of [national] bank officials so long as the exercise of their authority does not conflict with, or frustrate the purposes of federal law or impair the efficiency of banks to perform their statutory duties.”); see also *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005) (“Since shortly after the Bank Act was enacted in 1864, the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive.”).

⁶⁸ *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 982 (9th Cir. 2005); see also *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (“Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act.”); *Idaho v. Sec. Pac. Bank*, 800 F. Supp. 922, 925 (D. Idaho 1992) (“It is clear that Congress has not completely preempted the entire banking field.”).

⁶⁹ *Peatros*, 990 P.2d at 542–43; see also *United States v. Locke*, 529 U.S. 89, 109 (2000) (Conflict preemption “occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.”) (internal quotation marks omitted); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (“In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law[.]”).

law may be in irreconcilable conflict with state law,' such that '[c]ompliance with both statutes' results in a 'physical impossibility,' and caus[es] the state law to stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷⁰ The Bank Acts neither employ express preemption nor exclusively occupy the field of banking regulation; consequently, conflict preemption must apply, voiding state laws "if they conflict with federal law, frustrate the purposes of[,] . . . or impair the efficiency of national banks to discharge their duties."⁷¹

V. THE INTERSECTION OF STATE LAW CLAIMS AND THE SUPREMACY OF THE BANK ACTS

Plaintiffs alleging employment discrimination often pursue claims under both state and federal law. Federal circuit courts—as well as many federal district courts—are split concerning whether the Bank Acts preempt state anti-discrimination laws.⁷² While similarities often exist between federal and state anti-discrimination laws, the laws are not always identical. These differences often result in drastically different outcomes for plaintiffs depending on the location where a cause of action arises. Consequently, if a uniform preemption application is to be applied, the Supreme Court will need to clarify the extent to which the "at-pleasure" provisions preempt contradictory state laws.

If the "at-pleasure" provisions are read according to their plain text,⁷³ then it follows that the Bank Acts preempt all state law discrimination claims. Despite this, not all courts adopt such a textualist

⁷⁰ *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 491 (11th Cir. 2015) (quoting *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996)); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

⁷¹ *Bank of Am. v. San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002); *see also Barnett Bank*, 517 U.S. at 33–37 (holding that a federal statute granting national banks authority to sell insurance conflicts with, and therefore preempts, state laws forbidding national banks from selling insurance); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377–79 (1954) (determining that the power of national banks to receive deposits conflicts with, and therefore preempts, a state statute prohibiting the use of the word "savings" in banking advertisements); *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 248–49 (1944) (holding that a state law allowing the transfer of abandoned bank deposits was not preempted because "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on them").

⁷² *See, e.g., Morris v. U.S. Bank*, No. 4:12-cv-281-DPM, 2013 U.S. Dist. LEXIS 3950 (E.D. Ark. Jan. 10, 2013); *Risinger v. HNB Corp.*, No. 10-2640-KHV/KMH, 2011 U.S. Dist. LEXIS 148560 (D. Kan. Dec. 21, 2011); *Ewing v. Fed. Home Loan Bank of Des Moines*, 645 F. Supp. 2d 707 (S.D. Iowa 2009); *Crowe v. Fed. Reserve Bank of St. Louis*, No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427 (E.D. Mo. Jan. 20, 2009); *James v. Fed. Reserve Bank of N.Y.*, 471 F. Supp. 2d 226 (E.D.N.Y. 2007); *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995); *Booth v. Old Nat'l Bank*, 900 F. Supp. 836 (N.D. W. Va. 1995); *Moodie v. Fed. Reserve Bank of N.Y.*, 835 F. Supp. 751 (S.D.N.Y. 1993).

⁷³ *See Kemper v. First Nat'l Bank in Newton*, 418 N.E.2d 819, 171–72 (Ill. App. Ct. 1981) ("[T]he words "dismiss * * * at pleasure" should be taken to signify exactly that, as courts in many

view.⁷⁴ The circuits take one of three approaches: (1) total preemption; (2) retail preemption; and (3) wholesale preemption.⁷⁵ The Fourth, Sixth, and Eleventh Circuits follow the total preemption approach.⁷⁶ Total preemption requires that the “at-pleasure” provisions preempt contradictory state laws without question, even if the state statutes are consistent with federal law.⁷⁷ The Ninth Circuit follows the retail preemption approach.⁷⁸ Retail preemption requires that a federal law preempt a state law only to “the minimum extent necessary,” as long as the state law “substantively mirrors” the federal law.⁷⁹ Finally, the Third Circuit follows the wholesale preemption approach.⁸⁰ Wholesale preemption requires that federal laws preempt state laws that do not “exactly match” their federal counterparts; that is, the discrimination causes of actions and remedies under state law must be exactly the same as those allowed for under federal law.⁸¹

Moreover, numerous federal district courts in circuits that have not addressed the preemption issues of the Bank Acts fall within those categories. It is important to note these district court rulings because those rulings may indicate which preemption theory a circuit court will employ. For example, in *Fasano v. Federal Reserve Bank of New York*,⁸² the Third Circuit “count[ed] [itself] fortunate to have the benefit of a very well-reasoned opinion of Judge Padova of the Eastern District of Pennsylvania”⁸³ from *Evans v. Federal Reserve Bank of Philadelphia*.⁸⁴

jurisdictions have said for over a century.”).

⁷⁴ See generally *Kroske*, 432 F.3d 976; *Morris*, 2013 U.S. Dist. LEXIS 3950; *Ewing*, 645 F. Supp. 2d 707; *James*, 471 F. Supp. 2d 226; *Lambright v. Fed. Home Loan Bank of S.F.*, No. C074340CW, 2007 U.S. Dist. LEXIS 91075 (N.D. Cal. Dec. 3, 2007); *Moodie*, 835 F. Supp. 751.

⁷⁵ Another approach, proposed by three dissenting justices of the Supreme Court of California, strongly suggests that later-enacted federal anti-discrimination regulations do not impliedly amend the Federal Reserve Act. This would immunize the Federal Reserve Banks from any liability under Title VII, the American with Disabilities Act, the Age Discrimination in Employment Act, and other federal anti-discrimination statutes. No federal courts have adopted this approach. See *Peatros*, 990 P.2d 539, 183–89 (Brown, J., dissenting).

⁷⁶ See *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483 (11th Cir. 2015); *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285 (4th Cir. 2008); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987).

⁷⁷ See *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 286 (3d Cir. 2006) (“[T]otal preemption holdings suggest that *any* state-created limitation on the bank’s power would fundamentally, and irreconcilably, conflict with Congress’s intent to grant total, unlimited discretion.”) (emphasis in original).

⁷⁸ See *Kroske*, 432 F.3d 976 (2005).

⁷⁹ *Id.* at 986–87.

⁸⁰ See *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274 (3d Cir. 2006).

⁸¹ *Id.* at 274.

⁸² 457 F.3d 274 (3d Cir. 2006).

⁸³ *Id.* at 287.

⁸⁴ No. 03-4975, 2004 U.S. Dist. LEXIS 13265 (E.D. Pa. July 8, 2004).

Thus, district court decisions occasionally predict how an undecided circuit might resolve preemption or provide a roadmap for a circuit court that has not considered the issue.

A. Total Preemption (Followed by the Fourth, Sixth, and Eleventh Circuits)

The Fourth, Sixth, and Eleventh Circuits have concluded that the Bank Acts' "at-pleasure" provisions completely forbid state law prohibitions that limit a qualifying bank's ability to discharge certain personnel. In *Ana Leon T. v. Federal Reserve Bank of Chicago*,⁸⁵ one of the older cases concerning the Bank Acts' preemption of state law, the Sixth Circuit determined that the Federal Reserve Act's "at-pleasure" provision preempted state law discrimination claims.⁸⁶ Plaintiff Ana Leon T., a woman of Colombian origin and former employee of the Federal Reserve Bank of Chicago, filed an action under both Title VII and Michigan's Elliott-Larsen Act⁸⁷ for wrongful discharge based on her national origin.⁸⁸ With little analysis, the Sixth Circuit concluded that the Federal Reserve Act's "at-pleasure" provision prevented a bank employee from stating a claim under Michigan's Elliott-Larsen Act, a statute prohibiting employers from discriminating against employees on the basis of national origin.⁸⁹ Despite its lack of analysis, the Sixth Circuit ruled broadly: the Federal Reserve Act's "at-pleasure" provision "preempts any state-created employment right to the contrary."⁹⁰

The *Ana Leon T.* ruling was not met without criticism. For instance, in *Katsiavelos v. Federal Reserve Bank of Chicago*,⁹¹ the Northern District of Illinois criticized "[t]he *Leon* court [for] provid[ing] no reasons or policy for its holding."⁹² The Southern District of New York refused to follow the decision because "the Sixth Circuit's pronouncement [in *Ana Leon T.*] gives no basis for its opinion and sets forth no policy reasons for its holding."⁹³ Moreover, in *White v. Federal Reserve Bank of Cleveland*,⁹⁴ the Ohio Court of Appeals stated that "[t]he Sixth

⁸⁵ 823 F.2d 928 (6th Cir. 1987).

⁸⁶ *Id.* at 931.

⁸⁷ MICH. COMP LAWS ANN. § 37.2202(1)(a) (2018).

⁸⁸ *See generally*, *Ana Leon T.*, 823 F.2d at 928.

⁸⁹ MICH. COMP LAWS ANN. § 37.2202(1)(a); *Ana Leon T.*, 823 F.2d at 929–31.

⁹⁰ *Ana Leon T.*, 823 F.2d at 931 (emphasis added); *accord* *Kispert v. Fed. Home Loan Bank of Cincinnati*, 778 F. Supp. 950, 952–53 (S.D. Ohio 1991) (determining the Federal Home Loan Bank Act's "at-pleasure" provision preempted a state law claim for age discrimination).

⁹¹ No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995).

⁹² *Id.* at *6.

⁹³ *Moodie v. Fed. Reserve Bank of N.Y.*, 831 F. Supp. 333, 336 (S.D.N.Y. 1993).

⁹⁴ 660 N.E.2d 493 (Ohio Ct. App. 1995).

Circuit . . . failed to engage in any analysis or state the basis of its decision.” Thus, the Ohio court “decline[d] to rely upon the holding in *Ana Leon T.*”⁹⁵ Despite these criticisms and the passage of nearly twenty years, the Sixth Circuit has since reiterated its holding in *Ana Leon T.* that the “at-pleasure” provision preempts all state law employment discrimination claims.⁹⁶ Similarly, before *Ana Leon T.*, in *Wiskotoni v. Michigan National Bank-West*,⁹⁷ the Sixth Circuit observed that the National Bank Act’s “at-pleasure” provision “has consistently been construed by both federal and state courts as preempting state law governing employment relations between a national bank and its officers and depriving a national bank of the power to employ its officers other than at pleasure.”⁹⁸

Likewise, in *Schweikert v. Bank of America, N.A.*,⁹⁹ the Fourth Circuit determined that the National Bank Act’s “at-pleasure” provision preempted the state law claims before the court.¹⁰⁰ Plaintiff Schweikert, a bank officer, was terminated by his former employer’s board of directors for failing to cooperate with both internal and external investigations of the bank.¹⁰¹ Schweikert sued the Bank of America, alleging wrongful or abusive discharge.¹⁰² Relying on the National Bank Act’s “at-pleasure” provision, the district court dismissed Schweikert’s action and the Fourth Circuit affirmed.¹⁰³ In its decision, the Fourth Circuit noted that it previously interpreted the analogous “at-pleasure” provision of the Federal Home Loan Bank Act in a wrongful discharge action based on state law.¹⁰⁴ This precedent—*Andrews v. Federal Home Loan Bank of Atlanta*¹⁰⁵—concluded that “Congress intended for federal law to define the discretion which the Bank may exercise in the discharge of employees.”¹⁰⁶ Any wrongful termination claim under state law

⁹⁵ *Id.* at 495.

⁹⁶ See *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004) (“[I]nasmuch as Arrow was an employee of a Federal Reserve Bank, her rights under Kentucky state law were preempted by federal law.”).

⁹⁷ 716 F.2d 378 (6th Cir. 1983).

⁹⁸ *Id.* at 387; accord *Arrow*, 358 F.3d at 394.

⁹⁹ 521 F.3d 285 (4th Cir. 2008).

¹⁰⁰ *Id.* at 288–89; see also *Citizens Nat’l Bank & Trust Co. v. Stockwell*, 675 So. 2d 584, 586 (Fla. 1996) (Prior to the Fourth Circuit’s ruling, the Supreme Court of Florida found that the “at-pleasure” provision precludes any “limitation on the power of a bank to remove its officers” under the National Bank Act).

¹⁰¹ *Schweikert*, 521 F.3d at 287.

¹⁰² *Id.*

¹⁰³ See generally *id.*

¹⁰⁴ *Id.* at 288 (citing *Andrews v. Fed. Home Loan Bank of Atl.*, 998 F.2d 214, 220 (4th Cir. 1993)).

¹⁰⁵ 998 F.2d 214 (4th Cir. 1993).

¹⁰⁶ *Id.* at 220.

“would plainly conflict with the discretion accorded the Bank by Congress.”¹⁰⁷ Consequently, and consistent with *Andrews*,¹⁰⁸ the Fourth Circuit held that “the at-pleasure provision of the National Bank Act preempts state law claims for wrongful discharge.”¹⁰⁹

Finally, in *Wiersum v. U.S. Bank, N.A.*,¹¹⁰ a succinct opinion citing *Wiskotoni*,¹¹¹ the Eleventh Circuit joined the Sixth and Fourth Circuits.¹¹² Plaintiff Wiersum alleged wrongful termination by U.S. Bank, N.A. under the Florida Whistleblower Act¹¹³ for his discharge after he objected to certain activities that he believed were unlawful and refused to participate in them.¹¹⁴ After noting that several circuits, as well as the Supreme Court of Florida, had found conflict preemption between similar state laws and the Bank Acts, the Eleventh Circuit followed suit in finding preemption without providing much reasoning of its own.¹¹⁵

Together, the Fourth, Sixth, and Eleventh Circuits constitute the three circuits that provide for the Bank Acts’ total preemption of state law. The total preemption approach is alive and well, and its position as the approach followed by the most circuits suggests it might be adopted by other courts in the future that have yet to rule upon the proper application of the “at-pleasure” provisions.

B. Retail Preemption (Followed by the Ninth Circuit)

In *Kroske v. U.S. Bank Corp.*,¹¹⁶ the Ninth Circuit considered whether the National Bank Act’s “at-pleasure” provision preempts state law, ultimately rejecting the Sixth Circuit’s “summary conclusion” in *Ana Leon T.*¹¹⁷ Plaintiff Kroske, a bank officer, alleged that the bank terminated her in violation of the Washington Law Against Discrimination, a state law prohibiting age discrimination in employment.¹¹⁸ Although Kroske did not pursue a claim under the Age Discrimination in Employment Act,¹¹⁹ or any federal claim at all,¹²⁰ the court concluded

¹⁰⁷ *Id.*

¹⁰⁸ 998 F.2d 214 (4th Cir. 1993).

¹⁰⁹ *Schweikert*, 521 F.3d at 288–89.

¹¹⁰ 785 F.3d 483 (11th Cir. 2015).

¹¹¹ 716 F.2d 378 (6th Cir. 1983).

¹¹² *Wiersum*, 785 F.3d at 491.

¹¹³ FLA. STAT. ANN. § 448.102(3) (2018).

¹¹⁴ *Wiersum*, 785 F.3d at 486.

¹¹⁵ *Id.* at 489–91.

¹¹⁶ 432 F.3d 976 (9th Cir. 2005).

¹¹⁷ *Id.* at 980–89.

¹¹⁸ *Id.* at 978; WASH. REV. CODE ANN. §§ 49.60.010 *et seq.* (2018).

¹¹⁹ 29 U.S.C. §§ 621 *et seq.* (2012).

¹²⁰ The court had diversity jurisdiction under 28 U.S.C. § 1332 (2012); *Kroske*, 432 F.3d at 979.

that the National Bank Act did not preempt her claim.¹²¹ Instead, the Age Discrimination in Employment Act impliedly amended the National Bank Act's "at-pleasure" provision to "the minimum extent necessary" to resolve contradictory federal laws.¹²² Furthermore, the court reasoned that because Kroske's state law claim under the Washington Law Against Discrimination "substantively mirrored" a federal claim under the Age Discrimination in Employment Act, the National Bank Act did not preempt her state claim.¹²³ Although the Ninth Circuit failed to define its "substantively mirrors" standard, it explained that "state law provisions prohibit[ing] termination on grounds more expansive than the grounds set forth in federal law" remain preempted.¹²⁴

While district courts in the Second Circuit have reached conflicting decisions as to whether the Bank Acts' "at-pleasure" provisions preempt state anti-discrimination law, they have more recently followed the retail preemption approach. For example, in *James v. Federal Reserve Bank of New York*,¹²⁵ the Eastern District of New York adopted the Supreme Court of California's retail preemption approach, concluding that federal law preempts state law to the extent that the laws conflict, but that federal law does not preempt state law to the extent that the laws do not conflict.¹²⁶ And as of yet, the Southern District of New York seems to agree. In *Moodie v. Federal Reserve Bank of New York*,¹²⁷ the court held that the Federal Reserve Act's "at-pleasure" provision did not preempt the New York State Human Rights Law because "Congress did not intend the Federal Reserve Act to preempt state anti-discrimination

¹²¹ *Kroske*, 432 F.3d at 987, 988 (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 102 (1983) (noting that its "conclusion is buttressed by the 'importance of state fair employment laws to the federal enforcing scheme" and that "parallel state anti-discrimination laws are explicitly made part of the enforcement scheme of federal laws"))).

¹²² *Id.* at 986.

¹²³ *Id.* at 987; see also *Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 926 n.1 (9th Cir. 2003) (stating the Washington Law Against Discrimination "tracks federal law"); *Grimwood v. Univ. of Puget Sound, Inc.*, 753 P.2d 517, 520 (Wash. 1988) (holding that because the Washington Law Against Discrimination "does not provide any criteria for establishing an age discrimination case," Washington courts look to federal cases construing the Age Discrimination in Employment Act).

¹²⁴ *Kroske*, 432 F.3d at 989. Beyond the "substantively mirrors" standard, at least one federal district court in a circuit yet to rule on this issue, without citing any other court's opinion on this issue, determined that the "at-pleasure" provision of the National Banking Act does not preempt a retaliatory discharge claim because public policy favors allowing such a claim. See *Ruisinger v. HNB Corp.*, No. 10-2640-KHV/KMH, 2011 U.S. Dist. LEXIS 148560, at *13 (D. Kan. Dec. 21, 2011) (citing *Sargent v. Cent. Nat'l Bank & Trust Co. of Enid*, 809 P.2d 1298, 1301-02 (Okla. 1991)).

¹²⁵ 471 F. Supp. 2d 226, 236 (E.D.N.Y. 2007).

¹²⁶ *James*, 471 F. Supp. 2d at 236; see also *Peatros v. Bank of Am.*, 990 P.2d 539, 553 (Cal. 2000) ("In a preemption case . . . state law is displaced only to the extent that it actually conflicts with federal law. This rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." (citing *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1995) (per curiam))).

¹²⁷ 835 F. Supp. 751 (S.D.N.Y. 1993).

laws that are consistent with federal anti-discrimination legislation.”¹²⁸ Moreover, the court found that Title VII made no mention of exempting qualifying bank personnel from the act’s requirements.¹²⁹ Consequently, the court reasoned that the Federal Reserve Bank of New York is subject to New York anti-discrimination laws to the extent that those laws are analogous to federal law.¹³⁰ The Southern District of New York’s decision in *Moodie* backtracks on *Osei-Bonsu v. Federal Home Loan Bank of New York*,¹³¹ an earlier decision from the same district. There, the court held that a New York state human rights agency could not pursue a state claim against a national bank because the Federal Home Loan Bank Act’s “at-pleasure” provision preempted the cause of action.¹³²

Similarly, the Northern District of California determined that the Ninth Circuit’s decision in *Kroske v. U.S. Bank Corporation*¹³³ allows courts to “limit relief for [a] Plaintiff’s [state law discrimination] claims against Defendant [Federal Home Loan Bank of San Francisco] to that which is available under Title VII.”¹³⁴ When adopting this approach, the Southern District of Iowa described it as the “most consistent with the law of conflict preemption.”¹³⁵ And the Eastern District of Arkansas, following *Ewing v. Federal Home Loan Bank of Des Moines*,¹³⁶ noted that “[t]he relevant inquiry is the variance” between the federal and state anti-discrimination laws at issue, “and whether [the state law] conflicts with [the federal law] such that all or part of [the state law] is preempted.”¹³⁷ To the Eastern District of Arkansas, such a conflict must make a legal difference in the case,¹³⁸ which did not include “differing statutes of limitation, exhaustion requirements, punitive damages caps, and permissible liability against supervisors under Arkansas law [but not federal law].”¹³⁹ Despite such differences, the Eastern District

¹²⁸ *Moodie*, 835 F. Supp. at 753.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 726 F. Supp. 95 (S.D.N.Y. 1989).

¹³² *Id.* at 98.

¹³³ 432 F.3d 976 (9th Cir. 2005).

¹³⁴ *Lambright v. Fed. Home Loan Bank of S.F.*, No. C074340CW, 2007 U.S. Dist. LEXIS 91075, at *5 (N.D. Cal. Dec. 3, 2007).

¹³⁵ *Ewing v. Fed. Home Loan Bank of Des Moines*, 645 F. Supp. 2d 707, 720 (S.D. Iowa 2009).

¹³⁶ 645 F. Supp. 2d 707 (S.D. Iowa 2009).

¹³⁷ *Morris v. U.S. Bank*, No. 4:12-cv-281-DPM, 2013 U.S. Dist. LEXIS 3950, at *5 (E.D. Ark. Jan. 10, 2013).

¹³⁸ *Id.*

¹³⁹ *Id.* at *6.

of Arkansas characterized the state anti-discrimination law as a “mere[] echo[] of Title VII.”¹⁴⁰

In *Katsiavelos v. Federal Reserve Bank of Chicago*,¹⁴¹ the Northern District of Illinois held that the bank was subject to the Illinois Human Rights Act,¹⁴² a statute containing anti-discrimination provisions modeled after federal anti-discrimination law.¹⁴³ The district court disagreed with the Sixth Circuit’s *Ana Leon T.* ruling, finding that the Federal Reserve Act’s “at-pleasure” provision preempts only contractual rights and not other, non-contractual federal or state rights in employment.¹⁴⁴ In fact, the Northern District of Illinois criticized the Sixth Circuit’s *Ana Leon T.* decision, claiming that the ruling “provided no reasons or policy for its holding that all state employment rights were preempted by the dismiss at pleasure language.”¹⁴⁵ In doing so, the Northern District of Illinois determined that “dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee. The right to be free from discrimination is not a contractual right, and therefore is not necessarily embodied in the dismiss at pleasure language.”¹⁴⁶

C. Wholesale Preemption (Followed by the Third Circuit)

In *Fasano v. Federal Reserve Bank of New York*,¹⁴⁷ the Third Circuit reasoned that the Federal Reserve Act’s “at-pleasure” provision entirely¹⁴⁸ preempts state laws that fail to “exactly match” their federal counterparts.¹⁴⁹ Plaintiff Fasano, pursuing claims under New Jersey

¹⁴⁰ *Id.* at *7.

¹⁴¹ No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603 (N.D. Ill. Mar. 3, 1995).

¹⁴² 775 ILL. COMP. STAT. 5/1-101 (LEXIS 2018).

¹⁴³ *Katsiavelos v. Fed. Reserve Bank of Chi.*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, at *1 (N.D. Ill. Mar. 3, 1995).

¹⁴⁴ *Id.* at *2; *accord* *White v. Fed. Reserve Bank of Cleveland*, 660 N.E.2d 493, 495 (Ohio Ct. App. 1995) (agreeing with *Katsiavelos* and holding that plaintiff’s state law claim of handicapped discrimination was not preempted by the Federal Reserve Act).

¹⁴⁵ *Katsiavelos*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, at *2.

¹⁴⁶ *Id. Contra Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 255 (3d Cir. 2004) (“We hold that the Federal Reserve Act precludes enforcement against a federal reserve bank of an employment contract that would compromise its statutory power to dismiss at pleasure, and prevents the development of a reasonable expectation of continued employment.”).

¹⁴⁷ 457 F.3d 274 (3d Cir. 2006).

¹⁴⁸ *Compare id.* at 290 (“There is simply no way to give full effect to [] state laws while picking and choosing which parts of them may apply.”) *with* *Kroske v. U.S. Bank Corp.*, 432 F.2d at 987–88, 989 (holding that only actual inconsistencies in state laws are preempted rather than entire provisions).

¹⁴⁹ *Fasano*, 457 F.3d at 290; *cf. Mele*, 359 F.3d at 255 (previously holding the “at-pleasure” provision of the Federal Reserve Act bars all contractual employment claims against a Federal Reserve Bank; however, leaving unresolved whether preemption extends to statutory employment claims).

law, alleged she was fired by the Federal Reserve Bank of New York in retaliation for complaining about illegal activity and that the bank failed to accommodate her disability.¹⁵⁰ As it “wad[ed] into murky waters,” the Third Circuit explicitly rejected both the Sixth Circuit’s *Ana Leon T.*¹⁵¹ approach and the substantive-mirror approach adopted by the Ninth Circuit in *Kroske*.¹⁵² Developing its own, self-described “partial preemption” approach, the Third Circuit requires that, to avoid preemption, state laws must “exactly match” their federal counterparts because the court will not “pare back” state law to match federal law.¹⁵³ Ultimately, despite the fact that federal law and New Jersey law both covered Fasano’s causes of action, because the courts had not identically interpreted the remedies of Fasano’s state claims, her claims were preempted in their entirety.¹⁵⁴

Similarly, in *Crowe v. Federal Reserve Bank of St. Louis*,¹⁵⁵ the Eastern District of Missouri adopted the Third Circuit’s approach, determining that “broad state employment laws cannot apply to the Federal Reserve Banks when those state laws prohibit those acts that are incident to Federal Reserve Banks dismissing ‘at pleasure’ their employees, within the bounds of the [Americans with Disabilities Act.]”¹⁵⁶ In doing so, the court dismissed a plaintiff’s claim that would have allowed him to seek additional remedies under state law beyond those allowed for under federal law.¹⁵⁷

VI. FEDERALISM IN THE ERA OF #METOO

A “wide split in authority” exists¹⁵⁸ and continues to grow with little evidence that the Supreme Court will enter the fray.¹⁵⁹ At one extreme, the Fourth, Sixth, and Eleventh Circuits hold that personnel dismissed

¹⁵⁰ These claims respectively fall under the New Jersey Conscientious Employee Act, N.J. STAT. ANN. §§ 34:19-1 *et seq.* (2018), and New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 *et seq.* (2018). Federal law prohibits retaliation against bank employees complaining of illegal conduct. 12 U.S.C. § 1831(j) (2012). It also prohibits employers from discrimination on the basis of disability. *See* 42 U.S.C. §§ 12101 *et seq.* (2012).

¹⁵¹ 823 F.2d 928 (6th Cir. 1987).

¹⁵² 432 F.3d 976 (9th Cir. 2005).

¹⁵³ *Fasano*, 457 F.3d at 290.

¹⁵⁴ *Id.*

¹⁵⁵ No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427 (E.D. Mo. Jan. 20, 2009)

¹⁵⁶ *Id.* at *5 (internal quotation marks omitted).

¹⁵⁷ *Id.* at *4.

¹⁵⁸ *Fasano*, 457 F.3d at 279.

¹⁵⁹ *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016); *Fasano*, 457 F.3d 274, *cert. denied*, 127 S. Ct. 977 (2007); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), *cert. denied*, 549 U.S. 822 (2006); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987), *cert. denied*, 484 U.S. 945 (1987).

“at pleasure” may only pursue federal law claims against a bank governed by the Bank Acts.¹⁶⁰ Conversely, the Ninth Circuit holds that a state anti-discrimination statute must “substantively mirror” federal anti-discrimination law to avoid dismissal.¹⁶¹ And the Third Circuit falls somewhere in between, requiring that the state regulation “exactly match” federal law.¹⁶²

The “starting presumption” is that Congress did not intend for federal law to preempt state law.¹⁶³ Instead, any “[c]onsideration of issues arising under the Supremacy Clause ‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [the] Federal Act unless that [is] the clear and manifest purpose of Congress.’”¹⁶⁴ And of course, no provision of the Bank Acts expressly preempts state law. Moreover, courts consistently hold that federal law does not “preempt the field” of state employment law.¹⁶⁵ Consequently, courts must rely on conflict preemption to resolve the preemption question posed by an application of the Bank Acts.

Preemption is “fundamentally a question of congressional intent” that requires statutory interpretation.¹⁶⁶ As commentators have noted, the National Bank Act, which the subsequent Bank Acts’ “at-pleasure” language is modeled from, was passed “to create a market for loans of the general government” and to facilitate the “issu[ance] and circulation of a currency based upon the credit of the government.”¹⁶⁷ But why Congress included the “at-pleasure” provision in the National Bank Act remains a mystery; Congress did not mention the provision in any recorded debates.¹⁶⁸

¹⁶⁰ *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 491 (11th Cir. 2015); *Schweikert v. Bank of Am.*, 521 F.3d 285, 288–89 (4th Cir. 2008); *Ana Leon T.*, 823 F.2d at 931.

¹⁶¹ *Kroske*, 432 F.3d at 987.

¹⁶² *Fasano*, 457 F.3d at 290.

¹⁶³ *N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

¹⁶⁴ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

¹⁶⁵ *See, e.g., Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (“[R]egulation of banking has been one of dual [federal and state] control since the passage of the National Bank Act”).

¹⁶⁶ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“The purpose of Congress is the ultimate touchstone in every pre-emption case.”).

¹⁶⁷ BOONE, *supra* note 24, at 290.

¹⁶⁸ *See Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013) (noting that Congress left no record that it discussed the “at-pleasure” provision). The earliest mention of the provision by courts occurred in 1896, over thirty years after the National Bank Act’s passage. *See generally Westervelt v. Mohrenstecher*, 76 F. 118 (1896).

Considering the National Bank Act's purpose at face value, that purpose, or any other purpose alleged by commentators,¹⁶⁹ does not expressly indicate an intent to preclude a plaintiff's ability to pursue state claims. One early source, written thirty years after the National Bank Act's passage, suggests the "at-pleasure" provision was purposed to prevent banks from entering into fixed-term contracts to preserve their ability to remove qualifying personnel who had lost the public's trust.¹⁷⁰ Assuming the "at-pleasure" provisions' purpose is to protect public trust, as many argue,¹⁷¹ permitting the Bank Acts to prohibit state law sex discrimination claims, especially in the #MeToo era, arguably undermines that purpose. And a bank's ability to fire untrustworthy personnel is unlikely to be greatly inhibited by most state anti-discrimination regulations, as the bank remains subject to federal anti-discrimination law.

Nonetheless, some courts are rightfully reluctant to tinker with the "at-pleasure" provisions' preemptive capabilities. As *Evans* articulated:

subjecting the federal reserve banks to state employment laws and regulations which broaden the rights and remedies available under federal law will subject the federal reserve banks, and possibly their employees, to a myriad of different laws and regulations which vary from jurisdiction to jurisdiction.¹⁷²

Not only would doing so violate the plain text of the "at-pleasure" provisions, but, if the provisions' purpose to maintain public trust is to be believed, it would frustrate the alleged intent of Congress "to allow the [qualifying] banks the 'greatest latitude possible' in terminating employees."¹⁷³ Furthermore, accidental frustration of purpose is not the only reason courts should be reluctant to tinker with the provisions.

¹⁶⁹ See Achtenberg, *supra* note 22, at 176; Geoffrey P. Miller, *The Future of the Dual Banking Sys.*, 53 BROOK. L. REV. 1, 13 (1987); Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 699 (1983).

¹⁷⁰ See *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 526 (9th Cir. 1989) ("[T]he purpose of the [at-pleasure dismissal] provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust."). Compare *Westervelt*, 76 F. at 122 ("High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. . . . In such a case it is necessary . . . that the board of directors should have power to remove [] an officer, and to put in his place another, in whom the community has confidence.") with *Statutory Provision for Removal of Corporate Officer "At Pleasure"*, *supra* note 31, at 520 (criticizing the purpose of the "at-pleasure" provision articulated in *Westervelt* as "conjecture").

¹⁷¹ *Westervelt*, 76 F. 118 at 122; see also *Mackey*, 867 F.2d at 526.

¹⁷² *Evans v. Fed. Reserve Bank of Phila.*, No. 03-4975, 2004 U.S. Dist. LEXIS 13265, at *17 (E.D. Pa. July 8, 2004).

¹⁷³ *Id.* at *17-18 (citing *Mackey*, 867 F.2d at 526); see also *Talbott v. Silver Bow Cty.*, 139 U.S. 438, 35 (1891) (noting Congress designed the National Bank Act to create a national banking system with "uniform operation").

When interpreting a statute, the “starting point must be the language employed by Congress, and [the Court] assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used.”¹⁷⁴ By this canon, “at pleasure,” with no qualifications, speaks for itself. Under the provisions’ “straightforward statutory command, there is no reason to resort to legislative history.”¹⁷⁵ But even disregarding this canon, one can only resort to legislative history to little avail since Congress left no record of the “at-pleasure” provisions’ purpose.¹⁷⁶

No court, and few judges,¹⁷⁷ dispute that banks governed by the Bank Acts are subject to Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other federal anti-discrimination statutes. Preemption only occurs where the federal and state laws conflict so that it is “impossible . . . to comply with both”¹⁷⁸ or where state law stands as “an obstacle to the accomplishment and execution of the full purposes and objectives underlying the federal law.”¹⁷⁹ Yet the Ninth Circuit takes this a step further, stating in *Kroske* that “in the absence of clear congressional intent to the contrary . . . Kroske’s claim of age discrimination under the Washington Law Against Discrimination is not preempted by [the National Bank Act], as limited by the [Age Discrimination in Employment Act].”¹⁸⁰

Surely the last-in-time rule¹⁸¹ amends the Bank Acts to the “minimum extent necessary” to resolve any conflict with federal anti-discrimination laws.¹⁸² However, the “minimum extent necessary” cannot logically include rights and remedies beyond those allowed for by federal law. Repeal or amendment may only occur if “the two acts are in irreconcilable conflict, or [if] the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it.”¹⁸³ The “at-pleasure” provisions provide qualifying banks the absolute, unlimited power to dismiss certain employees. Conversely, Title VII and other federal anti-discrimination laws prohibit such banks from dismissing

¹⁷⁴ *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and internal quotation marks omitted).

¹⁷⁵ *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *see also* *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (Congress “says in a statute what it means and means in a statute what it says there.”).

¹⁷⁶ *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013).

¹⁷⁷ *See Peatros v. Bank of Am.*, 990 P.2d 539, 183–89 (Cal. 2000) (Brown, J., dissenting).

¹⁷⁸ *English v. Gen. Electric Co.*, 496 U.S. 72, 79 (1990).

¹⁷⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁸⁰ 432 F.3d 976, 987–88 (9th Cir. 2005), *cert. denied*, 549 U.S. 822 (2006).

¹⁸¹ *See Doe v. Considine*, 73 U.S. 458, 468 (1868) (“The rule applicable to the construction of conflicting statutory provisions is, that the last in order of time . . . must take effect.”).

¹⁸² *See Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 986 (9th Cir. 2005).

¹⁸³ *Posadas v. Nat’l City Bank*, 296 U.S. 497, 504 (1936).

employees under certain conditions.¹⁸⁴ Therefore, any unconditioned right to dismiss granted by the “at-pleasure” provisions is made illegal. That is, to the extent that federal anti-discrimination laws irreconcilably conflict with the “at-pleasure” provisions, those laws impliedly amend the Bank Acts to grant the qualifying banks “a *limited* power to dismiss [qualifying personnel] at pleasure.”¹⁸⁵

Despite any implied amendments, state causes of action remain barred even though some federal statutes contain provisions known as “saving clauses,” which preserve state laws.¹⁸⁶ The “double saving clause” argument holds that the “at-pleasure” provisions do not preempt federal anti-discrimination laws containing saving provisions, and in turn, those federal anti-discrimination laws do not preempt state anti-discrimination laws.¹⁸⁷ But the Supreme Court has dismissed such reasoning.¹⁸⁸ Federal laws containing a saving clause do not transform state laws into federal laws that are saved from preemption.¹⁸⁹ Furthermore, because Title VII and many other federal laws contain such non-preemption provisions, applied to all state laws with which they do not conflict, and taken to its logical extreme, the double saving clause argument would protect almost all state laws from preemption by the “at-pleasure” provisions.¹⁹⁰

As the Supreme Court explained, “[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.”¹⁹¹ Yet the “at-pleasure” provisions remain plain, blanket prohibitions on state law to the contrary.¹⁹²

¹⁸⁴ See 42 U.S.C. § 2000e (2012) (forbidding certain types of discrimination on the basis of “race, color, religion, sex, or national origin”); see also, e.g., 29 U.S.C. §§ 621 *et seq.* (2012); 42 U.S.C. §§ 12101 *et seq.* (2012); 29 U.S.C. §§ 701 *et seq.* (2012); 15 U.S.C. §§ 1601 *et seq.* (2012); 38 U.S.C. § 4311 (2012).

¹⁸⁵ *Peatros*, 990 P.2d at 549–50.

¹⁸⁶ See, e.g., 42 U.S.C. § 2000e-7; *California Fed. Savings and Loan Ass’n v. Guerra*, 479 U.S. 272, 288 (1964) (Title VII “assert[s] the intention of Congress to preserve existing civil rights laws.” (quoting 110 CONG. REC. 2788 (1964) (statement of Rep. Meader)).

¹⁸⁷ See *Shaw v. Delta Air Lines*, 463 U.S. 85, 101 n.22 (1983).

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ *Id.*; see also 42 U.S.C. § 2000e-7 (“Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.”).

¹⁹¹ *English v. Gen. Elec. Co.*, 496 U.S. 72, 89 (1990).

¹⁹² The “double saving clause” argument, that the “at-pleasure” provision does not preempt federal anti-discrimination law, and federal anti-discrimination law does not preempt state anti-discrimination laws, has been described a simplistic. See *Shaw v. Delta Air Lines*, 463 U.S. 85, 101 n.22 (1983). For example, Title VII does not transform state laws into federal laws that are saved from preemption. See *id.* Furthermore, because Title VII’s saving clause applies to all state laws with which it is not in conflict, and since many federal laws contain non-preemption provisions, the double saving clause argument, taken to its logical extreme would save almost all state laws

Thus, as observed by the Fourth, Sixth, and Eleventh Circuits, the “at-pleasure” provisions preempt *any* state anti-discrimination law that contradicts them.¹⁹³ Courts should not “rewrite the statute to reflect a meaning” they “deem more desirable.”¹⁹⁴ Under the retail approach, courts fail to “give full effect to . . . state laws [by] picking and choosing which parts of them may apply,”¹⁹⁵ and consequently, courts replace any “absence of legislative intent” with their own.¹⁹⁶ In *Fasano v. Federal Reserve Board of New York*,¹⁹⁷ the Third Circuit demonstrated the problems with such an approach:

For example . . . the [state law] does not require exhaustion of administrative remedies; a plaintiff elects whether to proceed in the administrative arena, or in court, but a final decision in either forum is binding and renders the other forum unavailable. Were we to graft the [Americans with Disabilities Act]’s exhaustion requirement onto the [state law], we would transform formerly final, binding administrative determinations into non-binding preliminaries to litigation. We will not step on the toes of the New Jersey legislature in this or any other like manner.¹⁹⁸

Not only does *Kroske*’s reasoning step on the toes of state legislatures, it also disregards Congress’ intent—whatever it was—when enacting the National Bank Act’s “at-pleasure” provision, and its intent when enacting subsequent Bank Acts that purposely and deliberately borrowed that same language.¹⁹⁹ Instead, by looking to the ordinary meaning, courts can avoid “rewriting” state laws “to parrot Federal anti-discrimination law” as occurs under the retail approach.²⁰⁰ Such reasoning is not only faithful to the plain language, but also to Title VII and other federal anti-discrimination laws, impliedly repealing the Bank Acts only to the extent necessary to give effect to those laws, and no further.

from pre-emption. *Id.*

¹⁹³ See *Crowe v. Fed. Reserve Bank of St. Louis*, No. 4:08CV1057 HEA, 2009 U.S. Dist. LEXIS 3427, at *5 (E.D. Mo. Jan. 20, 2009) (“If preemption only applied to state laws that directly contradict federal laws, federal laws could be effectively nullified by state laws prohibiting those acts that are incident to, but not specifically authorized, by federal law.”) (internal quotations marks omitted).

¹⁹⁴ *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008).

¹⁹⁵ 457 F.3d 274, 290 (3d Cir. 2006).

¹⁹⁶ See *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 987–88 (9th Cir. 2005).

¹⁹⁷ See generally *Fasano*, 457 F.3d 274.

¹⁹⁸ *Id.*

¹⁹⁹ See H.R. REP. NO. 63-69 (1913) (stating the purpose of the Federal Reserve Act’s “at-pleasure” provision is the same as that of the National Bank Act).

²⁰⁰ *Evans v. Fed. Reserve Bank of Phila.*, No. 03-4975, 2004 U.S. Dist. LEXIS 13265, at *21 (E.D. Pa. July 8, 2004).

Moreover, the total preemption approach allows for the efficient administration and governance of qualifying banks because anti-discrimination laws are then applied to them uniformly across the country.²⁰¹ Conferring qualifying personnel different rights and remedies “would frustrate the ability of the national banks to make crucial employment decisions, ultimately undermining confidence in the national banking system.”²⁰² While Congress’ original intent for including the “at-pleasure” provision is unknown and relies on speculation, this efficiency argument furthers the purpose of the National Bank Act, and subsequent acts, as a whole by giving full effect to the language employed by Congress.

Adopting this approach—that the Bank Acts preempt all state laws prohibiting the at-will dismissal of qualifying personnel—still demands congressional action. Although Title VII affords plaintiffs alleging sex discrimination a meaningful remedy, Congress should narrow the “at-pleasure” provisions’ scope. In the era of #MeToo and other anti-discriminatory movements, it would be wise to eliminate barriers to pursuing sex discrimination claims. Congress should proceed cautiously, however, as undesirable consequences may accompany such duplicative claims. For example, allowing for state law remedies to discrimination may “dissuade[] employers from executing lawful and economically necessary terminations” because such terminations might be characterized as discriminatory “and could subject employers to more time-intensive and expensive litigation.”²⁰³ The Third Circuit’s approach, articulated in *Fasano v. Federal Reserve Bank of New York*,²⁰⁴ avoids such problems because entities governed by the Bank Acts, while subject to both state and federal anti-discrimination law, are subject to only one set of claims: those arising under federal anti-discrimination law and state anti-discrimination law to the extent that the state law “exactly match[es]” the federal law.²⁰⁵ By adopting this approach, Congress would neither unknowingly disturb any of the alleged purposes of the Bank Acts’ “at-pleasure” provisions, nor would Congress fail to give state laws their full effect by allowing courts to pick and choose which various provisions of state laws to apply.²⁰⁶ This remains faithful to

Congress’ purpose for including the “at-pleasure” provisions in the Bank Acts, while effectuating the purposes of state anti-discrimination

²⁰¹ See *Peatros v. Bank of Am.*, 990 P.2d 539, 562 (Cal. 2000) (Brown, J., dissenting).

²⁰² *Id.*

²⁰³ Katherine R. Morelli, Note, *A Misguided Reversal: Why the Okla. Supreme Court Should Not Have Interpreted Saint v. Data Exchange, Inc. to Provide a Burk Tort Cause of Action to Plaintiffs Alleging Age Discrimination in Employment*, 62 OKLA. L. REV. 329, 352 (Winter 2010).

²⁰⁴ 457 F.3d 274 (3d Cir. 2006).

²⁰⁵ *Id.* at 290.

²⁰⁶ See *id.*

laws to the extent that they are consistent with federal law. Such an approach bolsters anti-discrimination protections by expanding the number of options²⁰⁷ available to those harmed while protecting Congress' purpose for including the "at-pleasure" provisions in the Bank Acts and without butchering the intent of state legislatures.

VII. CONCLUSION

The Fourth, Sixth, and Ninth Circuits adopt the correct reading and application of the Bank Acts' "at-pleasure" provisions.²⁰⁸ Their approach is not only true to the plain meaning of the provisions' words, but also to Congress' purpose for including the provisions in the acts—whatever that purpose may be.²⁰⁹ Moreover, their approach respects legislative intent by giving full effect to state laws without picking and choosing which portions of those laws should apply.

But in the #MeToo era, Congress need not settle for this interpretation. Instead, Congress can remain faithful to both federal and state legislative intent while strengthening anti-discrimination regulations. To do so, Congress should adopt the Third Circuit's wholesale preemption approach,²¹⁰ providing that the Bank Acts do not preempt state anti-discrimination laws to the extent that the state laws "exactly match" federal laws.²¹¹ Such an approach does not remove the "at-pleasure" provisions from law, leaving them to serve whatever purpose they may. And in preserving the provisions, it bolsters plaintiffs' ability to seek anti-discrimination relief by providing them with matching state law options to pursue. Consequently, the Third Circuit's approach increasingly deters qualifying banks from engaging in discrimination while respecting the "at-pleasure" provisions' purpose.

²⁰⁷ Such as bringing state law claims in state court.

²⁰⁸ See *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483 (11th Cir. 2015); *Schweikert v. Bank of Am., N.A.*, 521 F.3d 285 (4th Cir. 2008); *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928 (6th Cir. 1987).

²⁰⁹ See *Goonan v. Fed. Reserve Bank of N.Y.*, 916 F. Supp. 2d 470, 492–93 (S.D.N.Y. 2013) (finding "at-pleasure" provision is not mentioned in any congressional records).

²¹⁰ See *Fasano*, 457 F.3d at 290.

²¹¹ *Id.*

Antidiscrimination Statutes and Women-Only Spaces in the #MeToo Era

Anna Porter[†]

I. INTRODUCTION

In response to the #MeToo Movement, many organizations began attempting to find creative ways to address the realities people who identify as women face both at work and in public spaces.¹ These organizations often focus on closing the gender pay gap and increasing representation in leadership, both indicators tied to sexual harassment in the workplace.² Although the organizations discussed below are open to female-identifying and non-binary people, they exclude men.³ Organizations argue that providing women-only events “offer forums for discussing discrimination, a haven for people who may feel excluded by the dominant culture of broader professional groups, and career advancement opportunities for demographics at a statistical disadvantage.”⁴ From co-working spaces to empowerment seminars to women-only showings of *Wonder Woman*, the popularity of these spaces suggests that women respond to the idea of having a space where they know they

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¹ Leigh Stringer, *Where is the Demand for Women-Only Co-Working Spaces Coming From?*, SLATE (May 17, 2018), <https://slate.com/human-interest/2018/05/the-wing-demand-for-women-only-co-working-spaces-is-high.html> [<https://perma.cc/S8MZ-H63Q>].

² See Jennifer Calfas, *Inside Sexual Harassment's Hidden Toll on Equal Pay*, TIME (April 9, 2018), <http://time.com/5227742/sexual-harassment-equal-pay-wage-gap>; Karen Higginbottom, *The Link Between Power and Sexual Harassment in the Workplace*, FORBES (June 11, 2018), <https://www.forbes.com/sites/karenhigginbottom/2018/06/11/the-link-between-power-and-sexual-harassment-in-the-workplace/#487cd27b190f> [<https://perma.cc/8R9D-3HA8>].

³ In discussing women-only spaces, this Comment is not referring to events held by Trans-Exclusionary Radical Feminists.

⁴ Christina Cauterucci, *Members of a Men's Rights Group Sued a Women's Networking Group for Sex Discrimination*, SLATE (Jan. 15, 2016), <https://slate.com/human-interest/2016/01/members-of-a-men-s-rights-group-sued-a-women-s-networking-group-for-sex-discrimination.html> [<https://perma.cc/RZZ8-GXFU>].

will only be surrounded by other women.⁵ However, because these initiatives are by nature segregated by gender (excluding men), they risk coming into contact with state antidiscrimination statutes.⁶ For this reason, many of these organizations have recently come under fire by men bringing charges of discrimination.⁷

Title II of the Civil Rights Act of 1964, which addresses discrimination in public accommodations, does not include sex or gender as a protected category.⁸ Because there is no national standard with respect to sex discrimination in public accommodations, plaintiffs rely on state statutes in the majority of these cases.⁹ The amount of protection afforded by various states changes depending upon “legislative definitions and judicial interpretations of what constitutes a public accommodation.”¹⁰ California’s Unruh Civil Rights Act is one example of an expansive antidiscrimination statute.¹¹ Enacted by the California legislature in 1959 as an amendment to the Civil Code, the Unruh Civil Rights Act prohibits California businesses from discriminating based on protected characteristics.¹² Sex was added as a protected characteristic through a 1974 amendment to the law.¹³

While the tension between sex-segregated spaces and laws prohibiting discrimination is not new, in the past the vast majority of these lawsuits targeted men-only organizations (and laws prohibiting it envisioned men-only organizations discriminating against women).¹⁴ Today, male plaintiffs in California suing women’s organizations for sex discrimination argue that these cases should not be treated any differently than other cases of discrimination brought under the Unruh Act.¹⁵ The

⁵ Stringer, *supra* note 1.

⁶ Rebecca Gale, *When Men Sue Women’s Empowerment Orgs for Gender Discrimination*, SLATE (July 3, 2018), <https://slate.com/human-interest/2018/07/men-are-suing-womens-empowerment-organizations-for-gender-discrimination.html> [<https://perma.cc/EGB8-W7VA>].

⁷ *Id.*

⁸ 42 U.S.C. § 2000a.

⁹ Jessica E. Rank, *Is Ladies’ Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 SETON HALL L. REV. 223, 225 (2005). This Comment refers to sex discrimination, rather than gender discrimination, in keeping with the way legislatures and the courts use the term. The statute at issue in California clarifies that “sex” includes gender identity and gender expression. CAL. CIV. CODE § 51(e)(5).

¹⁰ Marissa L. Goodman, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 830 (1999).

¹¹ Cal. Civ. Code § 51.

¹² *Id.*

¹³ Jean Douglas Murphy, *Women’s Rights Legislation—A Vintage Year*, L.A. TIMES, Oct. 3, 1974, at H1.

¹⁴ Deborah Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106, 114 (1986).

¹⁵ Complaint at 3, *Rich Allison v. Red Door Epicurean, LLC*, No. 2017-00036282, Cal. Super. Ct. (2017) (“For a business operating in the progressive state of California, in the year 2017, to provide accommodations, advantages, privileges, or services to only female patrons, is as repugnant and unlawful as businesses being involved in a “Caucasian Night” or a “Heterosexual Night”

extent to which a California court would agree is as yet unclear, as organizations to this point have settled these cases rather than face expensive legal defense fees.¹⁶

This Comment will analyze the application of California's Unruh Civil Rights Act to women-only organizations and events in the #MeToo Era. California provides an especially interesting case study because of the wide protections against discrimination under its civil rights law. In part because discrimination under the law is *per se* injurious, there is a plethora of available cases to review.¹⁷ Further, in the past few years, several California men have brought lawsuits against women's empowerment organizations for hosting women-only events. Given the current appeal of these types of organizations, as well as the media attention on #MeToo, it is an interesting time to engage in a discussion about the scope of state antidiscrimination statutes and the ways courts might or should apply the law to these new organizations. As California has such broad protections, outlining more clearly the scope of the law and providing strategies for ways to defend against allegations is important for organizations seeking to promote women's empowerment. Further, as the statute's protections are broad, it can serve as an example for other state legislatures and courts.

Part II of this Comment will track the jurisprudence surrounding the Unruh Act in order to highlight how California courts have interpreted the law in cases of sex discrimination claims to this point. Part III will look to the purpose of the Unruh Act to analyze whether the California legislature contemplated these types of suits under the law. The law has primarily expanded to protect different identified marginalized groups. The fact that it might be wielded by more privileged groups against organizations seeking to promote gender equality highlights potential inconsistencies with the Unruh Act and its application. Part IV will argue that courts in California should follow Supreme Court jurisprudence in Fourteenth Amendment cases, limiting application to discrimination that perpetuates irrational stereotypes. Finally, Part V will suggest a legislative alternative to judicial action, carving out an exception to the Unruh Act for remedial actions taken by historically marginalized groups.

and denying admission and discounted drinks and other accommodations, advantages, privileges, or services to patrons of color or to gay or lesbian patrons, respectively.”)

¹⁶ Rebecca Gale, *When Men Sue Women's Empowerment Orgs for Gender Discrimination*, SLATE (July 3, 2018), <https://slate.com/human-interest/2018/07/men-are-suing-womens-empowerment-organizations-for-gender-discrimination.html> [<https://perma.cc/EGB8-W7VA>].

¹⁷ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 33 (1985) (“[B]y passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious.”)

II. JURISPRUDENCE SURROUNDING THE UNRUH CIVIL RIGHTS ACT

This section will first consider California courts' interpretation of the Unruh Act and the way that interpretation has been used in the past to combat discrimination against women in places of public accommodation. Most of the early cases of sex discrimination in California involve women seeking access to men-only spaces. This section will show how the courts in California expanded the definition of "business establishments" to include things like a nonprofit Boys' Club¹⁸ and the Rotary Club,¹⁹ but not the Boy Scouts of America²⁰ or a local private high school.²¹ This sometimes-fine line the courts have drawn makes it potentially difficult for defendants to know when they might be subject to provisions of the Unruh Act. The section then turns to cases brought over the past decades by men against businesses offering promotions to women, largely in the form of "Ladies' Night" discounts. Finally, it considers recent examples of men suing organizations that host women's empowerment events.

A. California's Unruh Civil Rights Act and "Business Establishments"

Enacted in 1959, the Unruh Civil Rights Act provides broad protections against discrimination. As most recently amended in 2015, the Unruh Act currently provides:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, privileges, or services in all business establishments of every kind whatsoever.²²

The Unruh Act provides a private cause of action and either a maximum of three times the actual damages or statutory damages of at least

¹⁸ *Ibister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212 (Cal. 1985).

¹⁹ *Rotary Club of Duarte v. Bd. Of Dirs.*, 178 Cal. App. 3d 1035, *aff'd* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

²⁰ *Curran v. Mount Diablo Council of the Boy Scouts*, 952 P.2d 218, 237 (Cal. 1998).

²¹ *Doe v. California Lutheran High Sch. Assn.*, 170 Cal. App. 4th 828, 838 (2009).

²² CAL. CIV. CODE § 51(b); The Act further clarifies that "'Sex' includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. 'Sex' also includes, but is not limited to, a person's gender. 'Gender' means sex, and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." CAL. CIV. CODE § 51(e)(5).

\$4,000 for each violation.²³ It further allows a court to award attorney's fees to prevailing plaintiffs.²⁴

To avoid First Amendment concerns related to the freedom of private association, state statutes follow the Supreme Court in providing exceptions for private clubs.²⁵ They prohibit discrimination only in places of public accommodation, which is defined slightly differently from state to state.²⁶ The Supreme Court has noted that the First Amendment "afford[s] constitutional protection to freedom of association in two distinct senses."²⁷ First, the Court has held that individuals are protected in their intimate or private relationships.²⁸ In order to determine whether a given relationship qualifies for this type of protection, the Court looks to "factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship."²⁹ Second, the Court has defined the rights of individuals to expressive association, "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."³⁰ In attempting to square First Amendment freedom of association concerns with state public accommodation statutes prohibiting discrimination, the Supreme Court uses a balancing test that weighs "the infringement upon a group's right to freedom of expressive association against the state's compelling interest in eradicating and preventing discrimination."³¹

The Unruh Act prohibits discrimination "in all business establishments of any kind whatsoever."³² In interpreting this language, California courts have recognized a legislative "intent to use the term 'business establishments' in the broadest sense reasonably possible."³³ In keeping with First Amendment freedom of association rights, the California Supreme Court has concluded that the provisions of the Unruh Act "do not apply to the membership decisions of a truly private social club."³⁴

Although "truly private" clubs are not subject to the Unruh Act, merely stating that a club is private does not preclude enforcement of

²³ *Id.* at § 52(a).

²⁴ *Id.*

²⁵ Goodman, *supra* note 10.

²⁶ *Id.*

²⁷ Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987).

²⁸ *Id.*

²⁹ *Id.* at 546, citing Roberts v. United States Jaycees, 468 U.S. 609 (1984).

³⁰ *Id.* at 549.

³¹ Goodman, *supra* note 10.

³² CAL. CIV. CODE §51(b).

³³ Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 786 (1995).

³⁴ *Id.* at 791.

the Unruh Act against it.³⁵ The California Supreme Court faced the issue of the application of the Unruh Act to “private” clubs when a woman sued a nonprofit private country club in *Warfield v. Peninsula Golf & Country Club*.³⁶ There, the court discussed the legislative history of the Unruh Act and concluded that the term “business establishment” was designed “to include any entity that would have been considered a ‘place of public accommodation or amusement’ under the pre-1959 version of section 51.”³⁷ As private social clubs were typically excluded from public accommodation statutes based on First Amendment freedom of association rights, the court determined that they would similarly be excluded under the Unruh Act, so long as they “are genuinely selective in their membership and in which the relationship among members is continuous, personal, and social.”³⁸ That is, an entity does not avoid liability under the Unruh Act simply by naming itself a private social club. In *Warfield*, although the nonprofit country club at issue purported to be a private social club, the court determined that it was a “business establishment” subject to the Unruh Act because of its “regular business transactions with nonmembers” that made it the functional equivalent of a commercial enterprise.³⁹

In *Ibister v. Boys’ Club of Santa Cruz, Inc.*,⁴⁰ the California Supreme Court further extended the understanding of what might be considered a business establishment under the Unruh Act. There, girls sued after the Boys’ Club rejected their membership applications based on sex.⁴¹ The Boys’ Club, “a private charitable organization which operates a community recreational facility,”⁴² argued that it was not subject to the Unruh Act. The Club reasoned that, as a non-profit without an economic function, it should not be viewed as a “business establishment” covered by the Unruh Act.⁴³ The court disagreed, finding that the Club was primarily a “place of public accommodation or amusement” under the Unruh Act, as “relations with and among its members are of a kind which take place more or less in ‘public view,’ and are of a ‘relatively nongratuitous, continuous, nonpersonal, and nonsocial sort.’”⁴⁴ For the California Supreme Court, membership in the Boys’ Club was

³⁵ *Id.*

³⁶ 896 P.2d 776 (Cal. 1995).

³⁷ *Id.* at 789.

³⁸ *Id.* at 790.

³⁹ *Id.* at 793.

⁴⁰ *Ibister v. Boys’ Club of Santa Cruz, Inc.*, 707 P.2d 212 (Cal. 1985).

⁴¹ *Id.*

⁴² *Id.* at 214.

⁴³ *Id.* at 218.

⁴⁴ *Id.* at 218.

“equivalent to admission to a place of public amusement,”⁴⁵ which would have been covered by the previous public accommodations statute. A dissenting justice in *Ibister* cautioned that this reasoning would threaten “many traditionally sex-segregated institutions, such as fraternities and sororities, private schools, and scouting organizations.”⁴⁶

The California Supreme Court responded to that dissent in *Curran v. Mount Diablo Council of the Boy Scouts*⁴⁷ by distinguishing those institutions, which it viewed as truly private, from the case in *Ibister*. The Boy Scouts in that case denied a leadership position to a gay man, who sued under the Unruh Act.⁴⁸ Unlike the Boys Club, the California Supreme Court found that the Boy Scouts “is an organization whose primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization’s primary purpose.”⁴⁹ The Court argued that this was distinct from *Ibister*, as membership in the Boy Scouts is more than “simply a ticket of admission to a recreational facility that is open to a large segment of the public and has all the attributes of a place of public amusement.”⁵⁰

Similarly, the California Supreme Court determined in *Doe v. California Lutheran High School Association*⁵¹ that a private all boys high school was not a business establishment for purposes of the Unruh Act as its primary function was not commercial but instead “an expressive social organization whose primary function was the inculcation of values in its youth members.”⁵² In both this case and *Curran*, the court found that some business activities with nonmembers would not make the Boy Scouts or the high school business establishments as under *Warfield* because the transactions with nonmembers “do *not* involve the sale of access to the basic activities or services offered by the organizations.”⁵³ Whereas in *Warfield* the country club sold to nonmembers access to the services provided members, the Boy Scouts or high school sales of goods to nonmembers is distinct. That is, while the Boy Scouts sold goods to nonmembers through its stores, it did not sell “entry to pack or troop meetings, overnight hikes, the national jamboree, or any portion of the Boy Scouts’ extended training and educational process.”⁵⁴

⁴⁵ *Curran v. Mount Diablo Council of the Boy Scouts*, 952 P.2d 218, 237 (Cal. 1998).

⁴⁶ *Ibister*, 707 P.2d at 226 (Mosk, J. dissenting).

⁴⁷ *Curran*, 952 P.2d at 237.

⁴⁸ *Id.*

⁴⁹ *Id.* at 236.

⁵⁰ *Id.*

⁵¹ *Doe v. Cal. Lutheran High Sch. Assn.*, 170 Cal. App. 4th 828, 838 (2009).

⁵² *Id.* at 838 (citing *Curran*, 952 P.2d at 238).

⁵³ *Curran*, 952 P.2d at 238 (emphasis in original).

⁵⁴ *Id.*

The California Supreme Court noted that the nonmember transactions (at sporting events or through the retail stores) would be subject to the Unruh Act.⁵⁵

A California Court of Appeals found a local rotary club to be a business establishment subject to the Unruh Act in *Rotary Club of Duarte v. Board of Directors*.⁵⁶ In that case, two women and a local rotary club charged that the male-only policy of the International Rotary Club violated the Unruh Act after the International Rotary Club revoked the local club's charter for its policy of admitting women.⁵⁷ There, the California Court of Appeals looked to the commercial aspects of the Rotary Club, the business benefits it offered to members, and the public nature of the community services done by Rotary members.⁵⁸ In determining that the Rotary was not a private organization exempt from the Unruh Act, the Court of Appeals concluded that "[t]he relationship among Rotarians is not continuous, personal and social."⁵⁹ The Supreme Court affirmed this decision, finding that "rather than carrying on their activities in an atmosphere of privacy, [Rotary Clubs] seek to keep their windows and doors open to the whole world."⁶⁰

The defendants in that case further alleged that disallowing its male-only policy infringed upon their rights to freedom of expressive association under the Constitution.⁶¹ However, that the "the male-only-membership policy [was] valued by a substantial majority of Rotarians throughout the world and . . . ha[d] enabled the organization to work effectively on a worldwide basis" did not persuade the Court of Appeals.⁶² The United States Supreme Court addressed this question after the California Supreme Court denied the petition for review.⁶³ The United States Supreme Court found that the Unruh Act did not violate the First Amendment rights of the Rotary Club by forcing them to admit women.⁶⁴ The Unruh Act did not violate the Rotary Clubs right to expressive association because admitting women to the Clubs would not "affect in any significant way the existing members' ability to carry out

⁵⁵ *Id.*

⁵⁶ *Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035 (1986), *aff'd* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1058.

⁵⁹ *Id.* at 1059.

⁶⁰ *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 547, quoting 1 Rotary Basic Library, Focus on Rotary 60–61 (1981) (internal quotations omitted).

⁶¹ *Id.* at 1060.

⁶² *Rotary Club of Duarte*, 178 Cal. App. 3d at 1060.

⁶³ *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 543.

⁶⁴ *Id.*

their various purposes.”⁶⁵ Further, the Court found that even should the members suffer a small infringement in their rights to expressive association, it was “justified because it serve[d] the State’s compelling interest in eliminating discrimination against women.”⁶⁶

B. Ladies’ Night Discounts and Men’s Early Claims of Sex Discrimination under the Unruh Act

Whereas in the past women seeking access to establishments that catered to men brought the majority of sex-discrimination claims under the Unruh Act, more recently, men have also brought claims under the Act against businesses or organizations that host women’s only events or provide discounts for women.⁶⁷ Once established that the discrimination takes place in a “business establishment,” the act forbids “all unreasonable, arbitrary, or invidious discrimination.”⁶⁸ California courts have found this discrimination “where the policy or action emphasizes irrelevant difference between men and women or perpetuates any irrational stereotypes.”⁶⁹

In *Koire v. Metro Car Wash*,⁷⁰ the plaintiff successfully brought claims under the Unruh Act against several car washes and nightclubs that offered discounts to women.⁷¹ The defendants in that case tried to argue that the sex-based discount policies were not “arbitrary” in violation of the Act as they were motivated by “substantial business and social purposes.”⁷² Further, one defendant nightclub argued that its Ladies’ Night promotions encouraged more women to come to the bar, “thereby promoting more interaction between the sexes,” which it considered a “socially desirable goal.”⁷³ The California Supreme Court disagreed that this was a sufficient policy interest warranting an exception to the Act, distinguishing it from “the compelling societal interest in ensuring adequate housing for the elderly which justifies differential treatment based on age.”⁷⁴ Instead, it maintained that a business’s economic interest would not be enough to warrant an exception.⁷⁵

⁶⁵ *Id.* at 548.

⁶⁶ *Id.* at 549.

⁶⁷ Gale, *supra* note 6.

⁶⁸ Cohn v. Corinthian Colleges, Inc., 86 Cal. Rptr. 3d 401 (2008).

⁶⁹ *Id.* at 404 (internal quotations omitted).

⁷⁰ 40 Cal. 3d 24 (1985).

⁷¹ *Id.*

⁷² *Id.* at 32.

⁷³ *Id.* at 33.

⁷⁴ *Id.*

⁷⁵ *Id.*

Considering damages, the defendants further raised the argument that the plaintiff was not injured by the price differences.⁷⁶ The court however stated that “by passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious.”⁷⁷ Statutory damages are provided under the Act for each violation “*regardless of the plaintiff’s actual damages.*”⁷⁸ The California Supreme Court cautioned that “differential pricing based on sex may be generally detrimental to both men and women, because it reinforces harmful stereotypes.”⁷⁹ The court was critical of a Washington Supreme Court decision on the same issue.⁸⁰ The Washington Supreme Court had previously ruled that a Ladies’ Night promotion at a basketball game did not violate the state’s antidiscrimination law precisely because the male plaintiff in that case suffered no damages as a result.⁸¹ In *Koire*, the California Supreme Court favorably cited law review articles that discussed the danger in allowing legal systems to treat men and women differently.⁸² The court further chastised the Washington Supreme Court for “succumb[ing] to sexual stereotyping in upholding the Seattle Supersonics’ ‘Ladies’ Night,’” a decision in which it found that discounts for women were reasonable because “women do not manifest the same interest in basketball that men do.”⁸³ According to the California Supreme Court, this kind of sexual stereotyping “is precisely the type of practice prohibited by the Unruh Act.”⁸⁴

The California Supreme Court upheld the understanding that arbitrary discrimination was *per se* injurious under the Unruh Act in *Angelluci v. Supper Club*.⁸⁵ In that case, another situation where a man was charged higher price for admission than women for entry into a nightclub, the court further held that plaintiffs did not have to affirma-

⁷⁶ *Koire*, 40 Cal. 3d at 33.

⁷⁷ *Id.*

⁷⁸ *Id.* (emphasis in original).

⁷⁹ *Id.* at 34.

⁸⁰ *Id.*

⁸¹ *Maclean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 685 (Wash. 1981) (“RCW 49.60.030 authorizes private actions for violations of the chapter, but only for the “actual damages sustained.”).

⁸² *Koire*, 40 Cal. 3d at 34–35 (“As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote.”).

⁸³ *Id.* at 35, citing *MacLean*, 635 P.2d at 684.

⁸⁴ *Id.* at 35.

⁸⁵ 158 P.3d 718 (Cal. 2007).

tively seek nondiscriminatory treatment in order to have standing under the Unruh Act.⁸⁶ In dicta, the court suggested that there may be constitutional or equitable relief available for a business facing abusive litigation under the Unruh Act.⁸⁷ In that case, both the trial and appellate courts expressed concerns about the potential for abusive litigation. In the case, the defendant complained that the “plaintiffs made *repeated* unannounced visits to defendant’s business establishment in order to increase the statutory damages they could seek for multiple violations of the Act.”⁸⁸ However, the court chose to leave it to the legislature to “determine whether to alter the statutory elements of proof to afford business establishments’ protection against abusive private legal actions and settlement tactics.”⁸⁹

A California appeals court similarly raised concerns about the potential for abusive litigation in *Cohn v. Corinthian Colleges, Inc.*⁹⁰ The court expressed a distaste for the repeat-player plaintiffs in the case, who it viewed as being involved in shake-down lawsuits.⁹¹ It upheld a Mother’s Day special at an Angels baseball game that gave away gift bags to all women over age eighteen.⁹² Rather than the kind of “arbitrary discrimination the Unruh Act is meant to protect,” the court found that the promotion was intended to honor mothers.⁹³ Gender was a secondary consideration, as the goal was to provide gifts to mothers.⁹⁴ Providing gifts to all women in attendance, rather than attempting to find out which women at the game were mothers, was an acceptable method of giving gifts to mothers.⁹⁵ Unlike in *Koire*, the promotion here was less egregious as it did not “emphasize an irrelevant difference, nor perpetuate an irrational stereotype.”⁹⁶

⁸⁶ *Id.* at 719.

⁸⁷ *Id.* at 729.

⁸⁸ *Id.* at 728 (emphasis in original).

⁸⁹ *Id.* at 729.

⁹⁰ 86 Cal. Rptr. 3d 401 (Cal. Ct. App. 2008); (“No other fans complained about the giveaway, and Cohn’s complaint only came after he went to the game to deliberately generate his “injury.” Cohn’s complaint gathers further suspicion because Cohn, his friends, and his counsel have been involved in numerous of what have been characterized as “shake down” lawsuits. (E.g., *Angelucci v. Century Supper Club* (2007) 41 Cal. 4th 160, 178 [158 P.3d 718 (Cal. 2007)].) They proclaim themselves equal rights activists, yet repeatedly attempted to glean money from the Angels through the threat of suit. The Act is a valuable tool for protecting our citizens and remedying true injuries. We are not convinced the Angels’ tote bag giveaway was in any way unreasonable, arbitrary, or invidious discrimination.”)

⁹¹ *Id.* at 405.

⁹² *Id.*

⁹³ *Id.* at 404–05.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Cohn*, 86 Cal. Rptr. 3d at 404.

C. Recent Lawsuits Targeting Women-Only Events

In California, several lawsuits in recent years have been brought by male plaintiffs against women's empowerment organizations alleging violations of the Unruh Act. Because these lawsuits have settled without judicial opinion, it is unclear how California courts might deal with these charges. Apart from seeking statutory damages, many of these settlements require the organizations to change their admission policies.⁹⁷

Some of the events describe the need for women-only admission policies in order to provide safe spaces for women. In 2017, two men refused entry to her show "Girls Night In" sued comedian Iliza Shlesinger.⁹⁸ A comedy show at a theater, open to the public, that charges a fee for entry would clearly fall under the Unruh Act. In this case, the only limitation was based on gender. In the wake of breaking allegations against Harvey Weinstein and Louis C.K., the event was marketed as:

[A] hybrid stand up show and interactive discussion between Iliza and the women in the audience aimed at giving women a place to vent in a supportive, fun and inclusive environment.⁹⁹

Shlesinger described the event as an opportunity for "women to get together, talk and laugh about the things we go through."¹⁰⁰ The complaint charges against what it refers to as the defendants' "War on Men," comparing the admission policy "as being akin to the Montgomery City Lines bus company in Montgomery, Alabama circa 1955."¹⁰¹ Although the plaintiff in this case withdrew the complaint without prejudice, the same attorney refiled the case as a putative class action in 2018.¹⁰² The named plaintiff in the first case is named in the second, and the complaint is very similar to the original.¹⁰³

With regards to the alleged Unruh Act violations, the defendants requested that the court dismiss the complaint on the grounds that the

⁹⁷ Iman Hariri-Kia, *Ladies Get Paid Was Sued for Gender Discrimination – But It's Not Giving up Its Mission*, BUSTLE (June 1, 2018), <https://www.bustle.com/p/ladies-get-paid-was-sued-for-gender-discrimination-but-its-not-giving-up-its-mission-9229052> [<https://perma.cc/5H7H-GCKV>].

⁹⁸ *St. George v. Shlesinger*, No. B687568 (Cal. Super. Ct. Dec. 22, 2017).

⁹⁹ Complaint at 16, Exhibit I, *supra* note 98.

¹⁰⁰ Gene Maddaus, *Iliza Shlesinger Sued for Banning Men from Comedy Show*, VARIETY (Dec. 27, 2017), <https://variety.com/2017/biz/news/iliza-shlesinger-girls-night-mens-rights-lawsuit-1202649230/> [<https://perma.cc/HA5M-Z4NV>].

¹⁰¹ Complaint at 3, *supra* note 98.

¹⁰² *Pollister v. Shlesinger*, No. Bc705961 (Cal. Super. Ct. May 14, 2018).

¹⁰³ *Id.*

discrimination was “neither unreasonable nor arbitrary.”¹⁰⁴ The defendant argued that any discrimination did not perpetuate stereotypes or “emphasize irrelevant differences.”¹⁰⁵ Instead, the defendants argued that the admissions policy served to create “a safe space for women to discuss issues uniquely facing this sector of society.”¹⁰⁶ This purpose, the defendants argued, “would be hindered by the presence of men.”¹⁰⁷ The court denied the defendants’ demurrer, finding that it did not have enough information from the complaint to determine whether the admission policy emphasized irrelevant differences or perpetuated irrational stereotypes.¹⁰⁸

Other organizations have focused on women’s networking and providing opportunities for women to meet and discuss realities they face in the workplace. These organizations attempt to address barriers women face, including sexual harassment, in spaces without men. The women’s empowerment organization Ladies Get Paid was sued for violations of Unruh after it held women-only “Ladies Get Drinks” events at California bars, which were also sued.¹⁰⁹ Ladies Get Paid settled the lawsuit rather than risk potential bankruptcy.¹¹⁰ As the attorney representing the organization said, “[i]f you are a young company, you are not going to test the merits. You are going to wind up paying the plaintiff to go away.”¹¹¹ This is especially true because the Unruh Act provides for fee-shifting for prevailing plaintiffs in civil rights cases, creating a greater risk for defendants unsure about their chances in litigation.¹¹² As a part of the settlement, it had to change its policy to allow men to attend their events.¹¹³ Similarly, a women’s networking group that held “Clinics and Cocktails” events to teach women golf was sold after settling a lawsuit alleging Unruh Act violations.¹¹⁴

In 2018, the San Diego Fire Rescue Foundation cancelled a free, city-sponsored Girls’ Empowerment Camp meant to teach girls about firefighting after being threatened with suit for alleged violations of the

¹⁰⁴ Demurrer to First Amended Complaint at 8, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 25.

¹⁰⁸ Pollister v. Shlesinger, No. Bc705961 (Cal. Super. Ct. May 14, 2019).

¹⁰⁹ Allison v. Red Door Epicurean, LLC, No. 2017-00036282 (Cal. Super. Ct. Sept. 28, 2017); St. George v. Ladies Get Paid, LLC, No. Sc128611 (Cal. Super. Ct. Dec. 27, 2017).

¹¹⁰ Judith Ohikuare, “*Ladies Get Sued*”: *How A Civil Rights Law Could End Women-Only Events*, REFINERY 29 (May 25, 2018), <https://www.refinery29.com/en-us/2018/05/199558/ladies-get-paid-unruh-civil-rights-act-lawsuit> [<https://perma.cc/W28P-VVRF>].

¹¹¹ Gale, *supra* note 6.

¹¹² CAL. CIV. CODE § 52.

¹¹³ Hariri-Kia, *supra* note 97.

¹¹⁴ Crouch v. Maderas, No. 37-2013-00060313-CU-CR-CTL (Cal. Super. Ct. July 30, 2013).

Unruh Act.¹¹⁵ The San Diego Fire Rescue Foundation started the camp in efforts to address the gender disparity among firefighters in the city, where women comprise only four percent of the department.¹¹⁶ The city of San Diego pulled funding for the camp after receiving a complaint letter from an attorney representing a man who wanted to enroll his son in the camp.¹¹⁷ Although originally cancelled, the mayor directed city staff to reschedule the event as planned, changing the event to invite both boys and girls to participate in the Girls Empowerment Camp.¹¹⁸

Some challengers have gone beyond events that actually exclude men to raise objections to events designed for or marketed towards women.¹¹⁹ Los Angeles craft beer company Eagle Rock Brewery was sued over their Women's Beer Forum, a monthly event for women who are interested in beer.¹²⁰ The event allowed men to attend, but it aimed to be a "space where the women would outnumber the men while discussing craft beer, a rarity."¹²¹ One man filed a claim with California's Department of Fair Employment and Housing after a staff member mistakenly told him the event was for women only when he emailed requesting a ticket.¹²² The Brewery settled with the man after the Department told the Brewery that it believed the claim had merit.¹²³ Brewery owner Ting Su regretted having to settle and continues to work to "elicit some form of change at the legislative level to minimize the exploitation of the Unruh Act by career plaintiffs."¹²⁴

¹¹⁵ Karen Kucher, *Girls Empowerment Camp Canceled after Attorney Claims It Violates Anti-Discrimination Laws*, SAN DIEGO TRIBUNE (Feb. 27, 2018) <http://www.sandiegouniontribune.com/news/public-safety/sd-me-camp-cancelled-20180226-story.html> [<https://perma.cc/6D4P-3ZGF>].

¹¹⁶ Jade Hindmon, *San Diego Mayor Says Girls Empowerment Camp Will Go on Despite Discrimination Complaint*, KPBS (Mar. 1, 2018), <https://www.kpbs.org/news/2018/mar/01/san-diego-cancels-girls-empowerment-camp-after-dis/> [<https://perma.cc/3HJT-5NB2>].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Farley Elliott, *LA Brewery Owner Fights Men's Rights Activist over Women's Beer Forum*, EATER LOS ANGELES (Oct. 18, 2018), <https://la.eater.com/2018/10/18/17995464/la-brewery-women-beer-forum-mens-rights-activist-eagle-rock> [<https://perma.cc/NC3Z-V6HW>].

¹²⁰ *Id.*

¹²¹ Rebecca Jennings, *A Men's Rights Activist Sued a Women's Beer Event*, VOX (Oct 24, 2018), <https://www.vox.com/the-goods/2018/10/24/18014276/mens-rights-activist-eagle-rock-brewery-law-suit> [<https://perma.cc/8PEE-9JK3>].

¹²² *Id.*

¹²³ Elliott, *supra* note 119.

¹²⁴ *Id.*

III. COURTS SHOULD LOOK TO THE PURPOSE OF THE UNRUH ACT IN DECIDING THESE CASES

When the legislature added sex as a protected category under the Unruh Act in 1974, people understood the move to be aimed at protecting women.¹²⁵ The *Los Angeles Times* ran an article titled “Women’s Rights Legislation—A Vintage Year,” in which it discussed the “landmark legislation in the field of women’s rights” the California legislature passed during the 1973–74 session.¹²⁶ Jan Baran, of the California Commission on the Status of Women, described it as “the most productive and exciting in terms of women’s issues in the history of the state.”¹²⁷ As discussed above, the law has expanded since that time. Still, it is perhaps troubling that groups with the same goals as the Unruh Act are now being targeted by men for lawsuits charging discrimination.

As of September 2019, no sex discrimination case against these women’s empowerment agencies has been decided by a California court. Some recent California cases have settled rather than face expensive litigation, suggesting possibly that the organizations did not feel that their cases were strong enough to prevail under California law. Yet, it is unclear exactly how the courts would apply the law to these cases. As discussed above, the Unruh Act seems pretty clear in its prohibitions against discrimination, and courts apply it liberally. In many respects, women’s empowerment agencies appear different from previous instances of discrimination through “Ladies’ Night” promotions that were motivated purely by business interests. Organizations that seek to provide space for women to address sexual harassment or particular difficulties women face in the workplace seem very different from those promotions. It seems incongruous that courts would find that organizations focused on gender equality have violated antidiscrimination statutes. Indeed, this section argues that the purpose of the Unruh Act weighs against finding violations in these cases.

In *Rotary Club of Duarte*,¹²⁸ the appellate court discussed that the Unruh Act “must be construed in the light of the legislative purpose and design.”¹²⁹ The court there maintained that “[i]n enforcing the command

¹²⁵ Murphy, *supra* note 13.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 178 Cal. App. 3d 1035 (1976).

¹²⁹ *Id.* at 1046, citing *Winchell v. English*, 62 Cal. App.3d 125, 128 (1976).

of a statute both the policy expressed in its terms, and the object implicit in its history and background, should be recognized.”¹³⁰ California’s Unruh Act was drafted to address inequalities in society and the harms of discrimination.¹³¹ The California legislature has discussed how the Unruh Act’s protections go beyond the listed categories, as “the California Supreme Court has consistently interpreted the Unruh Act in an expansive way.”¹³² Rather than limit its application to the categories explicitly in the text, the Legislature recognized that the courts have interpreted it as “cover[ing] all arbitrary and intentional discrimination by business establishments.”¹³³ That said, the legislature has added protected categories through amendments several times throughout the Unruh Act’s history.

The California Supreme Court has stated that the Unruh Act is “clear and unambiguous.”¹³⁴ In *Koire*, the California Supreme Court said that “[t]he express language of the Unruh Act provides a clear and objective standard by which to determine the legality of the practices at issue.”¹³⁵ In that case, the sex-based price differentials clearly violated the “plain language of the Unruh Act.”¹³⁶ However, that court left open that “a compelling social policy” might persuade the court to look beyond the statute’s text.¹³⁷

As seen above, the plain language of the Unruh Act provides extremely broad protections. On its face, the majority of the sex-segregated events and programs mentioned above that have recently been charged with violating the Unruh Act seem to do so. The example of the girls’ empowerment camp might be distinct as it could be compared to sex-segregated schools or the Boy Scouts, which California courts have held not to violate the Unruh Act. Similarly, events like the Women’s Beer Forum that market themselves to women but do not actually exclude anyone also do not violate the text of the Unruh Act. Attempting to create spaces for women, without excluding anyone based on protected characteristics, should not be made to be in conflict with the state’s antidiscrimination statute.

¹³⁰ *Id.*

¹³¹ *Hearing on SB 600 Before the S. Assemb. Comm. On Judiciary* (Ca. 2015) (bill analysis of Mark Stone, Chair) (enacted).

¹³² *Id.* at 6.

¹³³ *Id.*

¹³⁴ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 28 (1985).

¹³⁵ *Id.* at 39.

¹³⁶ *Id.* at 38.

¹³⁷ *Id.*

Beyond the text, the California Supreme Court consistently discusses the purpose of the Unruh Act in its decisions, taking into consideration the legislative intent in drafting the statute.¹³⁸ This interpretation has been used in cases to attempt to define “business establishment” in line with legislative intent. In determining that the Mother’s Day giveaway did not violate the Act, one California appellate court looked to the policy behind the Unruh Act in determining that the giveaway did not “emphasize an irrelevant difference, nor perpetuate an irrational stereotype.”¹³⁹ A willingness to consider the purpose behind the statute might help women’s empowerment organizations convince courts that disallowing men is not “unreasonable, arbitrary, or invidious discrimination.”¹⁴⁰ Organizations aimed at women’s empowerment or helping women get ahead in the work force have the goal of creating equality between men and women, in keeping with the spirit of the Unruh Act. Lawsuits bringing these organizations into conflict with the Unruh Act thus seem in tension with its purpose.

One recent amendment to the Unruh Act, passed in 2005, added “sexual orientation” and “marital status” to the list of protected categories.¹⁴¹ The legislature started the amendment with the recognition that, “[e]ven prior to the passage of the Unruh Civil Rights Act, California law afforded broad protection against arbitrary discrimination by business establishments.”¹⁴² The purpose of the Unruh Act was thus “to provide broader, more effective protection against arbitrary discrimination.”¹⁴³ Legislators discussed how the addition of these protected characteristics did not “break new ground in expanding the scope of protection provided by the Act.”¹⁴⁴ This is because the California Supreme Court “has rejected the argument that the Unruh Act’s ban on discrimination reaches only the classifications specified in the Act’s text.”¹⁴⁵

¹³⁸ *Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035, 1046 (“The Unruh Act is to be liberally construed with a view for effectuating the purposes for which it was enacted and to promote justice); *Cohn v. Corinthian Colleges, Inc.*, 86 Cal. Rptr. 3d 401, 404 (Cal. Ct. App. 2008) (“Cohn’s allegations . . . are not supported by the interpretation of, or policy behind, the Act.”); *Koire*, 40 Cal. 3d at 28 (“The Act is to be given a liberal construction with a view to effectuating its purposes.”).

¹³⁹ *Cohn*, 86 Cal. Rptr. 3d at 405.

¹⁴⁰ *Id.*

¹⁴¹ CAL. CIV. CODE § 51.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ S. RULES COMM., AB-1400 Civil Rights Act (2005), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060AB1400 [<https://perma.cc/8DAJ-ZKPP>].

¹⁴⁵ *Id.*

The purpose in including these explicitly was to avoid litigation and “encourage better compliance with the law.”¹⁴⁶

It is unclear how a California court would view an argument that excluding men from women’s empowerment events is not arbitrary discrimination. In the case *Easebe Enterprises v. Alcoholic Beverage Control Appeals Board*,¹⁴⁷ the defendant tried to argue that excluding men from a show featuring male dancers was not arbitrary discrimination as prohibited by the Unruh Act.¹⁴⁸ The defendant nightclub argued that:

[C]hanging social perspectives recognize that in some situations a policy founded on gender-based discrimination is consistent with everyday realities and in fact inures to the benefit of those who have been the victims of past societal and legal discrimination.¹⁴⁹

The California Court of Appeals ultimately upheld the Department of Alcoholic Beverage Control’s decision to revoke the club’s license for its discriminatory practice.¹⁵⁰ It said that the argument that the practice of excluding men was “benignly inspired” was not enough to create an exception to the Unruh Act as a matter of law in this case.¹⁵¹ It stated that it was not “within the purview of an intermediate appellate court, at this late date, to substitute its perspective for that of the Department.”¹⁵² That said, the court noted that “were we the triers of fact, or were we writing on an entirely clear slate, we might find such theory persuasive.”¹⁵³ However, the court felt restricted by the judgment previously made by the Department. This suggests that, given a clean slate, a court may be willing to accept a women’s empowerment organization’s claim that its policy of excluding men should be exempt from the Unruh Act on these grounds. Or, as discussed below, this logic might be more cleanly adopted through a legislative exemption to the Unruh Act.

¹⁴⁶ *Id.*

¹⁴⁷ 141 Cal. App. 3d 981, 987 (1983).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Easebe*, 141 Cal. App. 3d at 987.

IV. FOURTEENTH AMENDMENT EQUAL PROTECTION AND PERPETUATING GENDER STEREOTYPES

As discussed above, California courts state one purpose of sex-discrimination bans is a concern that they perpetuate irrational stereotypes. This is taken from Supreme Court Fourteenth Amendment equal protection understanding of sex discrimination, which has traditionally focused on eradicating stereotypes. Although these events are held by private actors, the Supreme Court's discussion of sex discrimination by state actors in violation of the Equal Protection Clause of the Fourteenth Amendment can provide some insight into how courts should consider these issues. California courts should follow the Supreme Court in deciding whether discrimination is arbitrary (in violation of the Unruh Act) based on whether the organizations' policies are founded on gender stereotypes.

In *United States v. Virginia*,¹⁵⁴ the Supreme Court held that Virginia Military Institution's (VMI) categorical exclusion of women denied them equal protection in violation of the Fourteenth Amendment.¹⁵⁵ The Supreme Court discussed that, in order to defend gender-based state action, the state would have to show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."¹⁵⁶ The Court said that sex classifications by government actors would be allowed in some cases in order to, for example, "compensate women for particular economic disabilities [they have] suffered . . . promote equal employment opportunity . . . advance full development of the talent and capacities of our Nation's people."¹⁵⁷ They would not be allowed, however, "to create or perpetuate the legal, social, and economic inferiority of women."¹⁵⁸ In both this case and *Mississippi University for Women v. Hogan*,¹⁵⁹ the Court highlighted that single-sex policies may not be based on stereotypes.¹⁶⁰ That is, classifications must avoid "fixed notions concerning the roles and abilities of males and females."¹⁶¹ The Supreme Court highlighted that this distinction is important in order to avoid "perpetuat[ing] historical patterns of discrimination."¹⁶²

¹⁵⁴ 518 U.S. 515 (1996).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 533.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 34.

¹⁵⁹ 458 U.S. 718 (1982).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 725.

¹⁶² *Virginia*, 518 U.S. at 542.

As discussed in the debate between the California and the Washington Supreme Courts, California courts similarly forbid single-sex policies that are based on irrational stereotypes. Unlike older “Ladies’ Night” promotions that California courts have seen as focusing on arbitrary distinctions between men and women and thus advancing irrational stereotypes of women, women’s empowerment organizations do not seem to evoke the same ideas. Instead, organizations that coach women to ask for higher salaries or offer space to discuss experiences with sexual harassment would work to combat stereotypes women face in their workplaces. Under this understanding, the situations in the new cases mentioned above would not violate the Unruh Act.

This can be a complicated argument because, as one California Appeals Court discussed, “few cases have held discriminatory treatment to be nonarbitrary based solely on the special nature of the business establishment.”¹⁶³ The examples the court gave were limited: (1) a gambling club’s exclusion of one individual woman who was found to be a compulsive gambler;¹⁶⁴ and (2) a cemetery’s exclusion of “punk rockers” from a private funeral at the request of the deceased’s family.¹⁶⁵ The court discussed that the exceptions are generally only allowed “when there is a strong public policy in favor of such treatment.”¹⁶⁶ There, the court cited examples of excluding minors from bars and ensuring affordable housing for the elderly.¹⁶⁷

The court left open that there “may also be instances where public policy warrants differential treatment for men and women,” discussing sex-segregated facilities like restrooms justified by a right to personal privacy.¹⁶⁸ The court suggested that even some sex-based price differentials may be warranted by a “compelling social policy.”¹⁶⁹ Further, it stated that public policy can occasionally be gleaned from viewing other statutory enactments.¹⁷⁰ A women’s networking organization may be able to point to statutes like the Equal Pay Act to suggest that public policy supports efforts to close the gender pay gap. Insofar as these organizations seek to equal the playing field between men and women, they do not seem to advance irrational stereotypes against women. The California legislature, spurred by the #MeToo Movement, further passed several laws that took effect January 1, 2019, to combat sexual

¹⁶³ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 30 (1985).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 31.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 33.

¹⁶⁸ *Id.* at 38.

¹⁶⁹ *Koire*, 40 Cal. 3d at 38.

¹⁷⁰ *Id.* at 31.

harassment.¹⁷¹ Jennifer Barrera, executive vice president with the California Chamber of Commerce, recognized this explicitly, stating, “#Me-Too was a dominating topic at the Capitol this year.”¹⁷² These statutory enactments give more weight to women’s empowerment organizations’ claims that their goals are supported by a “compelling social policy.” This distinction would also combat the possibility of historically privileged groups attempting to discriminate against historically marginalized groups, as there will not be the same compelling social policy.

V. LEGISLATIVE ALTERNATIVES: EXCEPTIONS FOR HISTORICALLY MARGINALIZED GROUPS

As it stands, women-only organizations have a difficult time of avoiding the Unruh Act in California. Courts can read the law narrowly to avoid applying the Unruh Act to events that are designed for or marketed towards women, but that do not exclude men. Beyond that, it is not obvious that a solution like the one the Supreme Court in Washington gave in *MacClean*, of requiring the plaintiff to prove damages, would be better. The flexibility of the Unruh Act allowed it to expand to cover protected characteristics (like gender identity or sexual orientation) that were not considered by the legislators drafting it. Allowing that discrimination is per se injurious under California law and having statutory damages encouraged the filing of civil rights lawsuits in order to benefit the society as a whole. Rather than changing that jurisprudence, which could limit the Unruh Act’s application in other situations, the legislature could act to carve out an exception for these organizations.

If legislatures want to leave space for these types of events, they could carve out exceptions in their Civil Rights Laws. One potential way to distinguish between whether groups are in line with the laws or not could be to analyze the power dynamics. As an example, under the Canadian Human Rights Code:

It is not a discriminatory practice for a person to adopt or carry out a special program designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohib-

¹⁷¹ Kathleen Pender, *New California Harassment Laws Take Effect Jan. 1*, S.F. CHRON. (Dec. 31, 2018), <https://www.sfchronicle.com/business/networth/article/New-California-harassment-law-s-take-effect-Jan-1-13499089.php> [<https://perma.cc/5NZU-EZNE>].

¹⁷² *Id.*

ited groups of discrimination by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.¹⁷³

As an example of a “special program” thus protected, the Canadian Human Rights Commission points out that the Convention on the Elimination of All Forms of Discrimination against Women provides for temporary “special measures aimed at accelerating de facto equality between men and women.”¹⁷⁴ Language like this would still prohibit arbitrary discrimination while allowing historically marginalized groups to attempt to reduce disparities. An exception like this would likely protect networking and empowerment groups. It would also prevent historically privileged groups from using the Unruh Act to attack women’s organizations.

VI. CONCLUSION

One California appellate court expressed an aversion to finding violations of the Unruh Civil Rights Act in cases of what it was concerned were men “involved in numerous of what have been characterized as ‘shake down’ lawsuits.”¹⁷⁵ This is especially concerning given that the settlements mentioned above threaten to shut down the organizations completely. To the extent these laws are used as a tool to harass women or attempt to get money through the threat of a lawsuit, their application to these types of organizations seems inherently in conflict with the laws. Especially given recent statutory enactments by the California legislature focused on helping women gain power in the workplace and eliminating sexual harassment, these organizations have a strong argument that they do not arbitrarily discriminate in violation of the Unruh Act. In keeping with the U.S. Supreme Court’s Fourteenth Amendment jurisprudence, the examples given above do not perpetuate stereotypes by excluding men.

It is not clear the extent to which courts might accept an argument that organizations seeking to ameliorate gender inequality should be treated differently under the law than organizations that perpetuate inequality. This space could be filled by legislative efforts to provide exemptions for these organizations, focusing on power dynamics and historically marginalized groups. Given that the majority of these organizations have chosen to settle their cases rather than face potentially devastating legal fees, a legislative carveout might be needed.

¹⁷³ Canadian Human Rights Act, R.S.C., 1985, c. H-6, Section 16(1).

¹⁷⁴ *Policy on Special Programs*, CANADIAN HUMAN RIGHTS COMM’N, https://www.chrc-ccdp.gc.ca/sites/default/files/policyspecialprograms_eng_0.pdf.

¹⁷⁵ *Cohn v. Corinthian Colleges, Inc.*, 86 Cal. Rptr. 3d 401, 405 (Cal. Ct. App. 2008).

As one California court of appeals reasoned, “[t]his important piece of legislation provides a safeguard against the many real harms that so often accompany discrimination. For this reason, it is imperative we not denigrate its power and efficacy by applying it to manufactured injuries. . . .”¹⁷⁶ Limiting its application to cases of arbitrary discrimination that perpetuate stereotypes would serve to better meet the goals of the Unruh Act itself.

¹⁷⁶ *Id.* at 403.



Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection?

Evan Ribot[†]

I. INTRODUCTION

Like many issues related to relationships and sexuality, “revenge porn” has become more complicated—and its consequences more sinister—thanks to twenty-first century technology. Revenge porn, often referred to as nonconsensual pornography, involves the publication or distribution of sexually explicit images without the subject’s consent.¹ This may include images obtained without consent, as well as images initially obtained with consent—often within the context of an intimate relationship—but later shared broadly or used as blackmail.² The issue received increased public attention after a 2014 incident in which a hacker accessed and leaked sexually explicit photos of several celebrities.³ But celebrities are far from the only victims: a 2016 study found that roughly one in twenty-five Americans have been threatened with or been the victim of nonconsensual image sharing.⁴

The impact of revenge porn is deep for its victims because, even if they can bring their attackers to justice, the stain of the images or videos shared—especially if they circulate online—is hard to erase. Victims of revenge porn often face workplace discrimination or cyberstalking,

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¹ Danielle Keats Citron, *Revenge Porn Should be a Crime in the U.S.*, CNN (Jan. 16, 2014), <https://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html> [https://perma.cc/65P5-5RDQ].

² Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

³ Nicole Darrah, *Jennifer Lawrence, Kate Upton’s Nude Photo Hacker Sentenced to Prison*, FOX NEWS (Aug. 30, 2018), <https://www.foxnews.com/entertainment/jennifer-lawrence-kate-upton-s-nude-photo-hacker-sentenced-to-prison> [https://perma.cc/4PL9-SLMY].

⁴ Lori Janjigian, *Nearly 10 Million Americans are Victims of Revenge Porn, Study Finds*, BUS. INSIDER (Dec. 13, 2016), <https://www.businessinsider.com/revenge-porn-study-nearly-10-million-americans-are-victims-2016-12> [https://perma.cc/5RVL-FLPE].

and many victims lose their jobs or struggle to gain employment because their sexually explicit images are readily available online.⁵ As understanding of the negative impacts of revenge porn has deepened, states have rushed to pass laws criminalizing the practice. To date, forty-six states as well as Washington, D.C., have enacted statutes banning the disclosure or distribution of sexually explicit images without the subject's consent.⁶ Activists and scholars alike see the growth of state laws criminalizing revenge porn as healthy progress in addressing a phenomenon that existing laws lack the teeth to curb.⁷

As revenge porn statutes spread, however, they face increasing resistance from critics who claim the new laws run afoul of the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."⁸ Accordingly, the government's ability to restrict speech is limited, and if the government wants to impose a "content-based" restriction on speech, such a restriction must be narrowly tailored to serve a compelling state interest.⁹ Yet, First Amendment doctrine does not provide blanket protections for all speech, and some types of speech "can be regulated due to their propensity to bring about serious harms and only slight contributions to First Amendment values."¹⁰ Thus, proponents of strong criminal statutes against revenge porn seek to argue that nonconsensual pornography falls into one of the categorical exemptions of speech that does not garner the full protection of the First Amendment. Alternatively, drafters of statutes addressing nonconsensual pornography aim to demonstrate that these statutes can be carefully constructed to survive strict scrutiny.

But two recent court decisions evaluating different state revenge porn statutes reveal the potential flaws in those approaches. In April 2018, the Texas Court of Appeals struck down the state's law prohibiting "Unlawful Disclosure or Promotion of Intimate Visual Material" as overbroad under the First Amendment.¹¹ The court reasoned that the law, which did not consider the intent of the person posting or sharing

⁵ Citron, *supra* note 1.

⁶ See *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIV. RTS. INITIATIVE (Aug. 5, 2019), <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/R63K-ZBK3>].

⁷ See Citron & Franks, *supra* note 2, at 349.

⁸ U.S. CONST. amend. I.

⁹ Citron & Franks, *supra* note 2, at 374.

¹⁰ *Id.* at 375.

¹¹ Andrea Zelinski, *Texas "Revenge Porn" Law Struck Down by State Appeals Court*, HOUS. CHRON. (Apr. 23, 2018), <https://www.chron.com/news/politics/texas/article/Texas-revenge-porn-law-struck-down-by-12848920.php> [perma.cc/2TS6-7E44].

the sexually explicit images, was not the least restrictive means of preventing the dissemination of nonconsensual pornography.¹² But in August 2018, the Vermont Supreme Court held that the state's statute banning "Disclosure of Sexually Explicit Images Without Consent" was constitutional.¹³ Although the Vermont Supreme Court declined to place revenge porn into a category of speech exempted from full First Amendment protection, it ruled that the state's law did survive review under strict scrutiny because it was narrowly tailored to advance a compelling state interest.¹⁴

This Comment will argue that revenge porn should be categorically exempt from the full protection of the First Amendment so that statutes restricting it need not withstand strict judicial scrutiny. As states continue to draft and litigate these statutes, it would be prudent for proponents of criminalizing revenge porn to argue for an exemption from First Amendment protection for the distribution of nonconsensual pornography. Such arguments are in line with the historical expansion of Supreme Court jurisprudence in understanding "low-value speech." In fact, the call to exempt revenge porn from garnering constitutional protection mirrors the Supreme Court's embrace of a First Amendment categorical exemption for child pornography in *New York v. Ferber*.¹⁵ Moreover, a categorical exemption for revenge porn from First Amendment protection will prevent proponents from having to define revenge porn under the "obscenity" exemption, which would limit the potency of revenge porn statutes. Finally, a categorical exemption for nonconsensual pornography will prevent these statutes from having to withstand strict scrutiny, a requirement which threatens to derail state efforts at curbing revenge porn.

II. THE LEGAL LANDSCAPE OF REVENGE PORN

A. Defining Revenge Porn and its Harms

Revenge porn refers to the sharing and distribution of sexually explicit images or videos without the subject's consent.¹⁶ This definition may include images obtained without consent, as well as images initially obtained with consent but with the expectation that they would remain private.¹⁷ It is often referred to as nonconsensual pornography

¹² Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *7 (Tex. App. May 16, 2018).

¹³ State v. VanBuren, No. 16-253, 2018 WL 4177776, at *12 (Vt. Aug. 31, 2018).

¹⁴ *Id.*

¹⁵ 458 U.S. 747 (1982).

¹⁶ Citron & Franks, *supra* note 2, at 346.

¹⁷ *Id.*

and is sometimes described as “involuntary porn” or “cyber rape.”¹⁸ That distinction in terminology, of course, “is one of motive, not effect: revenge porn is often intended to harass the victim, while any image that is circulated without the agreement of the subject is nonconsensual porn.”¹⁹ That is, an image or video need not be shared or posted by a former partner to constitute nonconsensual pornography, and the circulation of images posted by hackers or individuals seeking to profit from them lack the “revenge” element that comes to mind in discussions of this issue.

Regardless of whether the images are posted by a scorned ex, a hacker, or someone looking to blackmail the subject, the impact of revenge porn on the victim is deep. Due to the permanence and vastness of the internet, victims often struggle to escape the impact of their sexually explicit images being circulated. Once an image is posted, it can reach hundreds of websites with ease, and even if a victim has “an image scrubbed from one site, there’s no way to guarantee it hasn’t been copied, screenshotted, or stored on a cache somewhere.”²⁰ This means that, at any given moment, a victim’s photos may be “only one email, Facebook post, or Google search away.”²¹ Further, rather than being a rare phenomenon, modern technology has allowed revenge porn to become startlingly common: a 2016 study found that 4 percent of U.S. internet users—roughly 10.4 million people—have either had someone post an intimate image of them without their consent or threaten to do so.²² For women under thirty, that number rose to nearly 10 percent.²³ These images may be posted to websites devoted to revenge porn, but they often hit victims closer to home by being posted on social media and shared with friends and family. In January of 2017 alone, Facebook received more than 51,000 reports of revenge porn and disabled 14,000 accounts in response.²⁴

Unsurprisingly, because revenge porn is fueled by technology, its impact is most deeply felt by younger people. A 2016 study showed that 16 percent of American adults had sent a sexually explicit photo, and more than 20 percent had received one.²⁵ More than 23 percent of those who had received nude photos reported sharing the images, and men

¹⁸ I will use “revenge porn” and “nonconsensual pornography” interchangeably throughout this Comment.

¹⁹ Charlotte Alter, *It’s Like Having an Incurable Disease: Inside the Fight Against Revenge Porn*, TIME (Jun. 13, 2017), <http://time.com/4811561/revenge-porn/> [<https://perma.cc/CE5H-4C9P>].

²⁰ *Id.*

²¹ *Id.*

²² Janjigian, *supra* note 4.

²³ Alter, *supra* note 19.

²⁴ *Id.*

²⁵ *Id.*

were twice as likely as women to do so.²⁶ Young people—the generation most adept at using smartphones and modern technology—are increasingly likely to send and receive sexually explicit texts, photos, or videos by cell phone, practices known as “sexting.”²⁷ A 2015 survey found that nearly 40 percent of teenagers had posted or sent sexually suggestive messages, and that 24 percent of people between the ages of fourteen and seventeen and 33 percent of people between the ages of eighteen and twenty-four engaged in nude sexting.²⁸ Accordingly, revenge porn is a uniquely twenty-first century phenomenon that poses twenty-first century challenges to lawmakers looking to curb it. Stories in recent years of school officials and law enforcement discovering and trying to stomp out “sexting rings”—in publicized incidents in Virginia,²⁹ New York,³⁰ Colorado,³¹ and Connecticut³²—are emblematic of the challenge nonconsensual pornography poses to a generation empowered to upload and share anything from their phone instantaneously.

Older Americans may find the practice of sharing sexual photos within a relationship alarming, and critics sometimes dismiss victims of revenge porn for having created the content in the first place. But MIT professor Sherry Turkle explains that sexting is “embedded in modern relationships” in a way that does not trouble a generation of people who “grew up with a phone in [their] hand.”³³ Although parents are often startled by the idea that their teenagers may be exchanging explicit images and videos, such practices are understood to be common within relationships in the digital age.³⁴ Moreover, Carrie Goldberg, a New York lawyer profiled in *The New Yorker* as “the attorney fighting

²⁶ *Id.*

²⁷ Karen Thalacker, *New “Revenge Porn” Law Could Snag Sexting Teens*, DES MOINES REG. (July 10, 2017), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2017/07/10/new-revenge-porn-law-could-snap-sexting-teens/465718001/> [<https://perma.cc/5B2H-C3HJ>].

²⁸ *Id.*

²⁹ *Sexting Exposes Louisa Teens*, THE CENT. VIRGINIAN (April 2, 2014), <http://www.thecentralvirginian.com/sexting-exposes-louisa-teens/> [<https://perma.cc/PX3J-HKTV>].

³⁰ Kristine Thorne, *Massive Sexting Scandal at Kings Park High School Leads to Dozens of Suspensions, Some Arrests*, ABC7 (Nov. 9, 2015), <https://abc7ny.com/news/massive-sexting-scandal-at-long-island-high-school-leads-to-dozens-of-suspensions/1075927/> [<https://perma.cc/DX53-AM4Z>].

³¹ The Associated Press, *Colorado: No Charges for Students in Sexting Case*, N.Y. TIMES (Dec. 9, 2015), <https://www.nytimes.com/2015/12/10/us/colorado-no-charges-for-students-in-sexting-case.html> [<https://perma.cc/CAU2-8W4P>].

³² Lorenzo Ferrigno, *Newtown High School Students Charged in ‘Sexting’ Ring*, CNN (Jan. 27, 2016), <https://www.cnn.com/2016/01/27/us/connecticut-high-school-sexting-ring/index.html> [<https://perma.cc/XT5Q-RVT6>].

³³ Alter, *supra* note 19.

³⁴ See Thalacker, *supra* note 27.

revenge porn,” suggests that sharing intimate material is “time-honored behavior” that is “often part of intimate communication.”³⁵ The digital exchange of intimate images and videos, Goldberg suggests, resembles the practice of soldiers deploying to war decades ago carrying pinup photographs of their wives and girlfriends.³⁶ Goldberg also cites other invasive practices—such as voyeuristic upskirt videos, peephole videos, and other nonconsensual means of obtaining explicit images—as a reminder that many victims of revenge porn did not consent to the creation of such images in the first place.³⁷ Even when the creation of the image is consensual—as it often is within modern intimate relationships—the nonconsensual distribution of the material harms its victims.

It is also unsurprising that the victims of revenge porn are overwhelmingly female. While women sometimes circulate images of men, studies show that the vast majority of nonconsensual pornography involves images of women posted and shared by men.³⁸ Some men admit to sharing these images out of anger or jealousy toward a former partner, but for others, “[t]he dissemination of images can be as much about impressing other men as it is about humiliating the victim.”³⁹ Additionally, studies suggest that minorities and members of the LGBTQ community are more likely to be threatened with or victimized by revenge porn than the general population.⁴⁰ Because of its disparate impact on women and members of other marginalized communities, activists and legal scholars alike have called for a more serious recognition of the issue within the #MeToo Movement.⁴¹ Undoubtedly, the growth of the #MeToo Movement and heightened scrutiny surrounding sexual misconduct has intensified the spotlight on revenge porn and accelerated legal and political discussions about how to approach the challenge. Now, activists seek to change how people discuss the phenomenon, saying that revenge porn “should be called out for what it is: image-based

³⁵ Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn> [<https://perma.cc/QR4M-PM65>].

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Alter, *supra* note 19.

³⁹ *Id.*

⁴⁰ See Janjigian, *supra* note 4.

⁴¹ See Leah Juliett, *Why Revenge Porn Needs its Own #MeToo Movement*, GLAMOUR (June 4, 2018), <https://www.glamour.com/story/why-revenge-porn-needs-its-own-metoo-movement> [<https://perma.cc/EU67-547L>].

sexual abuse.”⁴² Within abusive relationships, the explicit images themselves can be “a form of domestic violence.”⁴³ Abusers often use the threat of disclosing the material to pressure their victims into staying in a relationship and follow through on the threats when the victims leave.⁴⁴

Revenge porn’s connection to the #MeToo Movement is bolstered by the fact that its impact haunts victims in a way that is similar to sexual assault and other forms of sexual misconduct. Victims of revenge porn suffer professional consequences: once an explicit picture is posted online, a search of the victim’s name will display the image, meaning that many victims either lose their jobs or struggle to find employment.⁴⁵ Especially in an age when employers screen job candidates’ online profiles throughout the hiring process, victims of nonconsensual pornography are deeply disadvantaged—and often permanently.⁴⁶ As victims struggle to remove all traces of their explicit images from the internet, they have limited success in seeking employment because “employers do not want to hire individuals whose search results might reflect poorly on the employer.”⁴⁷ Furthermore, revenge porn raises the risk that its victims will face offline stalking and physical attack, meaning that victims often do not feel safe leaving their homes.⁴⁸ Many victims report withdrawing from social settings, particularly from online engagement, where they shutter their social media profiles and back away from online networking, an essential tool of the internet age.⁴⁹ Revenge porn also leaves its victims with lasting trauma, as many victims suffer from panic attacks, depression, and other symptoms associated with post-traumatic stress disorder.⁵⁰ Research from the End Revenge Porn campaign showed that 51 percent of revenge porn victims have had suicidal thoughts.⁵¹ These studies of victims and their stories paint a picture of revenge porn’s lasting—and often unavoidable—impact.

⁴² Claire McGlynn, *Call “Revenge Porn” What it is: Sexual Abuse*, VOX (July 10, 2017), <https://www.vox.com/first-person/2017/7/8/15934434/rob-kardashian-blac-chyna-revenge-porn-abuse> [https://perma.cc/5NXV-W8E5].

⁴³ Citron & Franks, *supra* note 2, at 351.

⁴⁴ *Id.*

⁴⁵ *See* Citron, *supra* note 1.

⁴⁶ *Id.*

⁴⁷ Citron & Franks, *supra* note 2, at 352.

⁴⁸ *See* Citron, *supra* note 1.

⁴⁹ *Id.*

⁵⁰ *See* Melanie Ehrenkranz, *We Need to Study the Effects of Revenge Porn on Mental Health*, GIZMODO (June 22, 2018), <https://gizmodo.com/we-need-to-study-the-effects-of-revenge-porn-on-mental-1823086576> [https://perma.cc/K5TS-HUNA].

⁵¹ *Id.*

B. The Growth of State Law

As recent studies and news reports began to illuminate the scope of nonconsensual pornography and its harms, activists and legal scholars began to call for states to criminalize the practice. Although countries around the globe—including Australia, Canada, Germany, and Israel—had all passed laws criminalizing revenge porn by 2014, American jurisdictions were slower to approach the issue.⁵² One of the earliest and most significant calls to address the problem came from Danielle Keats Citron and Mary Anne Franks in the *Wake Forest Law Review* in 2014.⁵³ Their article details the revenge porn phenomenon, explains the shortcomings of civil law and the need to invoke criminal law to address it, and offers some guidance for states looking to square their approach in combating revenge porn with the limits of the First Amendment.⁵⁴ This article is highly informative, and it reflects how pervasive the issue of nonconsensual pornography has become. When Citron and Franks first published their article, only six states had laws on the books criminalizing revenge porn.⁵⁵ Today—just five years later—forty-six states as well as Washington, D.C. have passed laws criminalizing the nonconsensual distribution of sexually explicit images.⁵⁶

Citron, Franks, and others who have written on the subject have offered guidelines for states to follow in drafting revenge porn laws that will effectively counter the practice without clashing with the First Amendment. Citron and Franks argue that a “narrowly crafted revenge porn criminal statute that protects the privacy of sexually explicit images can be reconciled with the First Amendment.”⁵⁷ Accordingly, they recommend several careful drafting techniques for state legislators. First, they say revenge porn laws should explicitly clarify the perpetrator’s mental state, possibly to require the defendant’s knowledge that the victim did not consent to the disclosure.⁵⁸ However, Citron and Franks fear that revenge porn statutes that require intent to do harm or inflict emotional distress go too far and are not required by the First Amendment.⁵⁹ Second, they suggest that statutes will better withstand

⁵² See Yifa Yaakov, *Israeli Law Makes Revenge Porn a Sex Crime*, THE TIMES OF ISRAEL (Jan. 6, 2014), <https://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/> [https://perma.cc/Q2GS-B5EF].

⁵³ Citron & Franks, *supra* note 2, at 345.

⁵⁴ *Id.*

⁵⁵ *Id.* at 371.

⁵⁶ *46 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6.

⁵⁷ Citron & Franks, *supra* note 2, at 376.

⁵⁸ *Id.* at 387.

⁵⁹ See *id.* (“Whether the person making the disclosure is motivated by a desire to harm a particular person, as opposed to a desire to entertain or generate profit, should be irrelevant”).

First Amendment challenges if they require proof that the victims suffered harm and contain clear exemptions to protect disclosures regarding matters of public interest.⁶⁰ These suggestions address concerns that the First Amendment limits restrictions on speech that contribute to a matter of public importance without inflicting private harm. Finally, Citron, Franks, and others also note the importance of clearly defining the terms of the crime in state statutes to establish a clear understanding of what exactly a “sexually explicit” image is and what “disclosure” entails.⁶¹ Other authors addressing the subject recommend taking definitions of “intimate material” from existing federal law.⁶²

A survey of state revenge porn laws enacted within the last few years reveals the practical implications of recommendations from scholars like Citron, Franks, and others.⁶³ The enacted state laws reflect a messy legal landscape of nonconsensual pornography laws across the country and demonstrate the extraordinary challenge of defining and addressing the issue. While Citron and Franks argue against an intent requirement, the majority of state revenge porn laws include some “intent to harass”⁶⁴ or “intent to harm”⁶⁵ requirement. Of the forty-seven enacted statutes, only twelve lack any sort of intent requirement. Twenty-seven of the statutes require that the victim have a “reasonable expectation of privacy”⁶⁶ or that the parties “agree or understand”⁶⁷ that the image was to remain private. This requirement is not necessarily the same as having knowledge that the victim has not consented, the mental state that Citron and Franks recommend; twenty-three of the statutes include a requirement that the defendant “knows or should have known”⁶⁸ that the victim did not consent to the distribution of the image. Eight states adopted the recommendation to require that the victim actually suffer harm, while four others require that the action would “cause a reasonable person to suffer harm.”⁶⁹ This haphazard national landscape reflects the difficulty legislators face in assessing the

⁶⁰ *Id.* at 388.

⁶¹ *Id.*

⁶² See Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How A Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 284 (2015).

⁶³ While this Comment is in no way intended to review or evaluate each state law on the books to date, it will discuss some significant laws to show relevant trends and point to potential strengths and shortcomings evident in different statutes.

⁶⁴ See, e.g., OR. REV. STAT. ANN. § 163.472(1)(a) (2017).

⁶⁵ See, e.g., VT. STAT. ANN. TIT. 13, § 2606(b)(1) (2015).

⁶⁶ See, e.g., KAN. STAT. ANN. § 21-6101(a)(8) (2016).

⁶⁷ See, e.g., CAL. PENAL CODE § 647(j)(4) (2019).

⁶⁸ See, e.g., 720 ILCS 5/11-23.5(b)(3) (2015).

⁶⁹ See, e.g., VT. STAT. ANN. TIT. 13, § 2606(b)(1) (2015).

pernicious—but still relatively new—challenges associated with revenge porn. The gaps in state laws create a few notable challenges.

First, two state laws err in requiring some type of romantic relationship for the law to apply. Arkansas law mandates that the victim be “a family or household member of the actor or another person with whom the actor is in a current or former dating relationship.”⁷⁰ Pennsylvania law requires an “intent to harass, annoy or alarm a current or former sexual or intimate partner.”⁷¹ The shortcomings of these two statutes should be evident: a victim need not have been in a sexual relationship with the perpetrator in order to suffer from the lasting impact of nonconsensual pornography. The Pennsylvania law seems to suggest that a victim’s angry ex could provide intimate images to a friend with instructions to share them with intent to cause harm, and the friend—who had never been an “intimate partner” of the victim—could do so without punishment. These laws too narrowly portray the scope of nonconsensual pornography.

Second, perhaps the most significant gray area between different state laws lies between requirements that the victim had an expectation that the image would remain private and that the defendant disseminated the image knowing that the victim did not consent. Citron and Franks focus only on the latter in their recommendations, suggesting that the perpetrator’s knowledge that the victim did not consent is the most effective way for state laws to establish the defendant’s mental state.⁷² There is ostensibly some overlap between knowledge that the victim did not consent to the distribution of sexually explicit images and the reasonable expectation that those images would remain private. Yet several state statutes include both requirements. Observing how those clauses work together as more cases of nonconsensual pornography come to the fore should illuminate the differences between these two requirements.

Statutes that have neither an intent requirement nor a requirement that the defendant know that the victim has not consented might present First Amendment challenges. Georgia’s bizarre statute requires that the dissemination of the image “is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person”⁷³ but also says that a violation only occurs if the defendant, “knowing the content of a transmission or post, knowingly

⁷⁰ ARK. CODE ANN. § 5-26-314(a)(2) (2015).

⁷¹ 18 PA. STAT. AND CONS. STAT. ANN. § 3131(a) (2014).

⁷² Citron & Franks, *supra* note 2, at 387.

⁷³ GA. CODE ANN. § 16-11-90(b) (2015).

and without the consent of the depicted person”⁷⁴ disseminates the image. The defendant need not know that the victim has not consented but rather merely must knowingly post the image and know its content.⁷⁵ First passed in 2015, Texas’s law required only that the defendant disclose material “without the effective consent”⁷⁶ of the victim. Accordingly, anyone who distributed nonconsensual pornography—even without any understanding of the circumstances in which it was created or any intent to do harm to the subject—became liable under the Texas statute. Laws like this are likely too broad to survive First Amendment challenges because they can be more narrowly tailored and because they treat defendants with intent to do harm and knowledge of a victim’s lack of consent no differently than they do defendants who thoughtlessly share an image. It should be no surprise, then, that the Texas revenge porn statute was successfully challenged in court.

C. *Jones, VanBuren*, and Lingering First Amendment Questions

Texas’s law criminalizing revenge porn was passed in 2015, but the state’s Twelfth Court of Appeals struck it down in April 2018 in *Ex Parte Jones*.⁷⁷ The Texas law made a defendant liable for disclosing intimate visual material “without the effective consent of the depicted person” when that material was obtained or created “under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private” and the disclosure both caused harm to and revealed the identity of the victim.⁷⁸ Notably, the statute included no requirement of intent to harm or knowledge that the victim did not consent to disclosure of the material. After being charged with unlawful disclosure of intimate visual material in violation of the statute, defendant Jordan Jones offered a pretrial application for a writ of habeas corpus alleging that the statute was unconstitutional.⁷⁹ Although the trial court denied his application, the Twelfth Court of Appeals reversed, holding that the Texas revenge porn statute was an unconstitutional regulation of free speech that did not survive strict scrutiny review.⁸⁰

⁷⁴ *Id.*

⁷⁵ Georgia’s statute is one of three that alludes to financial hardships of victims, along with Hawaii (HAW. REV. STAT. ANN. § 711-1110.9(b) (2018)) and North Carolina (N.C. GEN. STAT. ANN. § 14-190.5A(b) (2017)).

⁷⁶ TEX. PENAL CODE ANN. § 21.16(b)(1) (2017).

⁷⁷ No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. May 16, 2018).

⁷⁸ TEX. PENAL CODE ANN. § 21.16(b) (2017).

⁷⁹ *Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at *1 (Tex. App. May 16, 2018).

⁸⁰ *Id.* at *8.

The court rebuffed efforts from the Texas Attorney General's office to reconsider its ruling.⁸¹ In an interview following the Twelfth Court of Appeals' decision, Mary Anne Franks said that, even though the Texas statute was "not perfect," the court "delivered a very poorly reasoned opinion that will hopefully be quickly reversed."⁸² Jones's attorney, Houston First Amendment lawyer Mark Bennett, disagreed, arguing that "[i]f a statute restricts a real and substantial amount of protected speech, then it's void."⁸³ But lawyers defending the law for Texas's Office of the State Prosecuting Attorney countered by emphasizing the limited contribution that revenge porn makes to the marketplace of ideas. As Texas attorney John Messinger explained, "[t]here is no 'core political speech' at risk here . . . the conduct prohibited by the statute—violations of privacy of the most intimate kind—is not necessary or even helpful to a vibrant democracy."⁸⁴

The Texas Twelfth Court of Appeals' opinion squares with the notion that a statute must be narrowly tailored in order to survive strict scrutiny analysis. The court described the statute's broad reach in its strict scrutiny review with a hypothetical in which a man shares an explicit photo of an ex taken with the understanding it would remain private; after the vengeful ex shares the photo, it is shared again by others who do not recognize the victim and do not know that it was disseminated without her consent.⁸⁵ In this scenario, the court laments, all parties who share the photo can be charged under the Texas law, "despite . . . having no knowledge of the circumstances surrounding the photograph's creation or the depicted person's privacy expectation."⁸⁶ Thus, the court concluded that the statute created a prohibition of "alarming breadth" and did not survive strict scrutiny.⁸⁷ However, just as Franks suggested that the Texas statute "could have been drafted more carefully," the court here offered suggestions for improving the law.⁸⁸ "At the very least," the court reasoned, the law "could be narrowed by requiring that the disclosing person have knowledge of the

⁸¹ Emma Platoff, *Is "Revenge Porn" Protected Free Speech? Texas Court of Criminal Appeals to Weigh In*, THE TEX. TRIB. (Dec. 12, 2018), <https://www.texastribune.org/2018/12/12/revenge-porn-free-speech-texas-court-criminal-appeals/> [<https://perma.cc/7Z4L-X4XE>].

⁸² Melanie Ehrenkranz, *Texas Court Strikes Down Revenge Porn Law for Being 'Overbroad'*, GIZMODO (Apr. 20, 2018), <https://gizmodo.com/texas-court-strikes-down-revenge-porn-law-for-being-ove-1825429020> [<https://perma.cc/8LJ4-GGG9>].

⁸³ Platoff, *supra* note 81.

⁸⁴ *Id.*

⁸⁵ Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *6 (Tex. App. May 16, 2018).

⁸⁶ *Id.* at *7.

⁸⁷ *Id.*

⁸⁸ Ehrenkranz, *supra* note 82.

circumstances giving rise to the depicted person's privacy expectation."⁸⁹

Following this legal defeat, the Texas House and Senate each voted unanimously to heed the court's advice and revise the state's revenge porn statute. The revised law, signed by Governor Greg Abbott on June 15, 2019, includes a provision requiring the defendant to have intent to harm the victim and that that he or she "knows or has reason to believe that" the victim had a reasonable expectation the material would remain private.⁹⁰ When unveiling the bill, State Rep. Mary Gonzalez said that the revisions were made "in order to make sure that unintended consequences, that people who might've accidentally received [an explicit image] and then continued to send it aren't negatively impacted."⁹¹

On the other hand, Vermont's 2015 revenge porn law was upheld in August 2018 by the Vermont Supreme Court in *State v. VanBuren*.⁹² The Vermont law makes it a crime to "knowingly disclose a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, *with the intent to harm, harass, intimidate, threaten, or coerce the person depicted*, and the disclosure would cause a reasonable person to suffer harm."⁹³ Defendant Rebekah VanBuren was alleged to have accessed the Facebook account of a man she was romantically involved with and discovered messages of nude photos from complainant, an ex-girlfriend.⁹⁴ The defendant told the complainant she was "going to ruin [her] and get revenge," and posted the pictures on Facebook.⁹⁵ The trial court granted the defendant's motion to dismiss on the grounds that the Vermont statute was an unconstitutional prohibition on free speech that did not withstand strict scrutiny, but the state's supreme court reversed and upheld the statute.⁹⁶ Following the case, Defender General Matt Valerio said in an interview that the decision was "bizarre" and that his office is contemplating an appeal to the United States Supreme Court.⁹⁷

⁸⁹ *Ex Parte Jones*, 2018 WL 2228888, at *7.

⁹⁰ Civil and Criminal Liability for the Unlawful Disclosure of Intimate Visual Material, 2019 Tex. Sess. Law Serv. Ch. 1354 (H.B. 98).

⁹¹ Stephen Young, *Texas Fixes Its Revenge Porn Law*, THE DALLAS OBSERVER (May 20, 2019), <https://www.dallasobserver.com/news/texas-passes-revenge-porn-fix-11668838> [<https://perma.cc/34BP-EUYK>].

⁹² No. 16-253, 2018 WL 4177776 (Vt. Aug. 31, 2018).

⁹³ VT. STAT. ANN. TIT. 13, § 2606(b)(1) (2015) (emphasis added).

⁹⁴ *VanBuren*, 2018 WL 4177776, at *2.

⁹⁵ *Id.*

⁹⁶ *Id.* at *4.

⁹⁷ Mark Davis, *Vermont Supreme Court Upholds Revenge Porn Law*, SEVEN DAYS VT. (Aug. 31, 2018), <https://www.sevendaysvt.com/OffMessage/archives/2018/08/31/vermont-supreme-court-upholds-revenge-porn-law> [<https://perma.cc/YT7M-FGZD>].

Unlike the much broader law in Texas, the Vermont revenge porn statute withstood strict scrutiny analysis, as the court concluded that the law was narrowly tailored to serve a compelling state interest. The Vermont court said that the state interest underlying the statute is compelling based on “the relatively low constitutional significance of speech relating to purely private matters, evidence of potentially severe harm to individuals arising from nonconsensual publication of intimate depictions of them, and a litany of analogous restrictions on speech that are generally viewed as uncontroversial and fully consistent with the [First Amendment].”⁹⁸ While not denying that the restriction was “content-based,” the court compared the statute to others that prevent disclosure of private information surrounding health or finances and reasoned that the state’s interest in preventing nonconsensual disclosure of sexually explicit images is “at least as strong as its interest” in other disclosures, restrictions upon which are “uncontroversial and widely accepted as consistent with the First Amendment.”⁹⁹ Said the court:

In the constellation of privacy interests, it is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person’s genitals, anus, or pubic area, that the person has not consented to sharing publicly. The personal consequences of such profound personal violation and humiliation generally include, at a minimum, extreme emotional distress.¹⁰⁰

Further, the court construed the statute’s requirement that the disclosure be made “knowingly” to require knowledge both of the act of disclosing and the absence of consent from the subject.¹⁰¹ By relying on this narrow construction, the court affirmed the statute’s intent while avoiding an interpretation of the law that would force a constitutional clash.

Although the courts in Texas and Vermont performed a strict scrutiny analysis of their state’s respective revenge porn laws, the question of whether strict scrutiny review is unnecessary remains. The Texas court in *Ex Parte Jones* noted that content-based restrictions on speech survive only when confined to some traditional categories of unprotected speech such as obscenity, defamation, fraud, and true threats.¹⁰² Yet the state in *Jones* oddly conceded at oral argument that Texas’s statute was subject to strict scrutiny instead of arguing that it may

⁹⁸ *VanBuren*, 2018 WL 4177776, at *12.

⁹⁹ *Id.* at *15.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *17.

¹⁰² *Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at *4 (Tex. App. May 16, 2018).

cover speech consistently categorized as unprotected.¹⁰³ Then, on rehearing and in subsequent briefs, the State disregarded that concession and argued that the statute should be subject only to “intermediate scrutiny,” which would afford revenge porn less protection than “speech on pressing political questions.”¹⁰⁴ Nonetheless, the court quickly brushed aside the idea that the speech targeted by the Texas law was obscene, saying that the statute “does not include language that would permit a trier of fact to determine that the visual material disclosed is obscene” and, even if it did, the statute would be “wholly redundant in light of Texas’s obscenity statutes.”¹⁰⁵ Thus, the court spent little time on anything other than its strict scrutiny analysis, which it used to invalidate the law.

However, the Vermont court considered in much greater depth the possibility that revenge porn may not get full First Amendment protection, potentially creating an opening for new legal arguments on the issue. In *VanBuren*, the state argued its revenge porn statute could escape strict scrutiny because it “categorically regulates obscenity.”¹⁰⁶ The court was not persuaded because “a state’s interest in regulating obscenity relates to protecting the sensibilities of those exposed to obscene works, as opposed to, for example, protecting the privacy or integrity of the models or actors depicted in obscene images.”¹⁰⁷ In other words, obscenity receives less robust First Amendment protection than other speech because of its ability to offend unwilling recipients of obscene speech, whereas revenge porn laws aim to protect the privacy and safety of unwilling subjects. In dismissing the attempt to label revenge porn as obscenity, the court offered a potentially useful hint: “Vermont’s statute is more analogous to the restrictions on child pornography that the Supreme Court has likewise categorically excluded from full First Amendment protection.”¹⁰⁸

Similarly, the court dismissed Vermont’s argument to carve out a new category of unprotected speech for revenge porn as an extreme invasion of privacy. The court detailed favorably the argument that “non-consensual pornography seems to be a strong candidate for categorical exclusion from full First Amendment protections” based on precedent

¹⁰³ *Id.*

¹⁰⁴ Platoff, *supra* note 81.

¹⁰⁵ *Ex Parte Jones*, 2018 WL 2228888, at *4.

¹⁰⁶ *VanBuren*, 2018 WL 4177776, at *6.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

supporting the government's ability to regulate speech about purely private matters.¹⁰⁹ Nonetheless, the court declined to offer such a categorical rule about nonconsensual pornography based on the Supreme Court's "emphatic rejection of attempts to name previously unrecognized categories, and the oft-repeated reluctance of the Supreme Court to adopt broad rules dealing with state regulations protecting individual privacy as they relate to free speech."¹¹⁰ Ultimately, the court wrote, "we leave it to the Supreme Court in the first instance to designate non-consensual pornography as a new category of speech that falls outside the First Amendment's full protections."¹¹¹

III. CREATING A FIRST AMENDMENT CATEGORICAL EXEMPTION FOR REVENGE PORN

Although they reached different conclusions in assessing their respective states' revenge porn laws, the courts in Texas and Vermont each declined to categorically exempt revenge porn from the protection of the First Amendment. The court in Texas was brief in its assessment of the issue, as the state mostly conceded the point: "[n]ew categories of unprotected speech may not be added to the list based on a conclusion that certain speech is too harmful to be tolerated."¹¹² The Vermont Supreme Court gave more credence to the idea but nonetheless "decline[d] to predict" that the Supreme Court would create a new categorical First Amendment exemption for revenge porn.¹¹³ The court based this decision primarily on *United States v. Stevens*,¹¹⁴ where the Supreme Court decided not to recognize a new category outside the First Amendment's full protection for depictions of animal cruelty. This decision was based largely on the lack of historical regulation of such a category of speech rather than on policy arguments for the proposed category.¹¹⁵

While both courts may have been rightly reluctant to step ahead of the Supreme Court—and while the Vermont Supreme Court explicitly suggested the Supreme Court may take a different approach—revenge porn can and should properly be characterized as low-value speech demanding a categorical First Amendment exemption. If given the opportunity to consider the issue, the Supreme Court should create a categorical exemption for statutes criminalizing revenge pornography. To do so would not depart from the Court's historical approach to First

¹⁰⁹ *Id.* at *11.

¹¹⁰ *Id.* at *12.

¹¹¹ *Id.*

¹¹² Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *4 (Tex. App. May 16, 2018).

¹¹³ *VanBuren*, 2018 WL 4177776, at *12.

¹¹⁴ 130 S. Ct. 1577 (2010).

¹¹⁵ *VanBuren*, 2018 WL 4177776, at *7.

Amendment exemptions—despite its holding in *Stevens*—and would properly categorize revenge porn as low value. Indeed, a First Amendment exemption for nonconsensual pornography could operate like the exemption the Supreme Court created for child pornography in *Ferber*. Without such an exemption, revenge porn statutes will face an uphill battle either to be categorized as obscenity or to survive strict scrutiny when challenged.

A. The History of Categorical Exemptions for Low-Value Speech

While the courts in *Jones* and *VanBuren* treated First Amendment categorical exemptions as stagnant and rooted only in history, a thorough historical analysis reveals this is not the case. In a 2015 article, Genevieve Lakier challenged the prevailing assumption that the existence of the “low-value” categories of speech—such as obscenity, libel, and true threats—have been fixed throughout American history.¹¹⁶ In fact, Lakier noted, from the country’s founding through the nineteenth century, courts extended significant First Amendment protection to many categories of speech that would later be recognized as low value.¹¹⁷ It was not until the 1930s and 1940s that the Supreme Court began to broadly categorize high-value and low-value speech, and even when the court did make such distinctions, it “relied very little on historical precedent to actually define the low-value categories.”¹¹⁸ Nor did the Supreme Court decide whether to identify new categories of low-value speech solely based on historical considerations; its decisions on which categories of speech demand full First Amendment protections have long been “functional, rather than historical.”¹¹⁹

This history makes the Supreme Court’s assertion in *Stevens*, that new categories of low-value speech cannot be created absent a “long-settled tradition of subjecting that speech to regulation,” dubious at best.¹²⁰ The Vermont Supreme Court quoted *Stevens* in “rejecting the notion that the court has ‘freewheeling authority to declare new categories of speech outside the scope of the First Amendment.’”¹²¹ In *Jones*, Texas’s Twelfth Court of Appeals cited the Supreme Court’s reasoning in *Brown v. Entertainment Merchants Association*¹²² to support the idea

¹¹⁶ Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

¹¹⁷ *Id.* at 2182.

¹¹⁸ *Id.* at 2207.

¹¹⁹ *Id.* at 2210.

¹²⁰ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

¹²¹ *State v. VanBuren*, No. 16-253, 2018 WL 4177776, at *12 (Vt. Aug. 31, 2018) (citation omitted).

¹²² 564 U.S. 786 (2011).

that new categories of unprotected speech cannot simply be created because the legislature concludes they are harmful, an idea that *Brown* attributed to *Stevens*.¹²³ Thus, it is clear that the reasoning behind *Stevens* has contributed to courts' reluctance to offer a First Amendment exemption to revenge porn. Nonetheless, the Supreme Court in *Stevens* leaves open the possibility of creating new categories of low-value speech "that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."¹²⁴

Within that framework, *Stevens* is better understood not as foreclosing the possibility of new First Amendment categorical exemptions but instead as suggesting that depictions of animal cruelty do not warrant the creation of one. In *Stevens*, the government sought to defend a statute prohibiting visual and auditory depictions of "conduct in which a living animal is intentionally harmed."¹²⁵ It argued that, because "depictions of illegal acts of animal cruelty . . . necessarily lack expressive value," such speech should be added to the list of categorical exemptions to First Amendment protection.¹²⁶ The Court rejected the government's proposition that categorical exclusions be considered "under a simple balancing test" of whether the value of the speech outweighs its societal costs:

As a free-floating test for First Amendment coverage, that [balancing test] is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.¹²⁷

This passage suggests that balancing tests alone are insufficient grounds for creating First Amendment categorical exemptions because they "allow[] judges to impose their own values onto the Constitution."¹²⁸ While the Court acknowledged that the notion of a balance of harms has "descriptive" value in identifying types of exempt expression,

¹²³ Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *4 (Tex. App. May 16, 2018).

¹²⁴ *Stevens*, 130 S. Ct. at 1586.

¹²⁵ *Id.* at 1584.

¹²⁶ *Id.* at 1585 (internal quotations omitted).

¹²⁷ *Id.*

¹²⁸ Lakier, *supra* note 116, at 2176.

such a balancing test is insufficient on its own to determine such categorical exemptions.¹²⁹ Instead, the Court noted that its exemptions have arisen from “special case[s]” in which the speech was “intrinsically related” to an underlying harm.¹³⁰ Although the Court stressed the lack of historical regulation of speech depicting animal cruelty to reject the government’s proposed balancing test, assessments of categorical exemptions must focus on whether the speech in question is integral to a harm the state seeks to eliminate. In *Stevens*, the Court did not find the link between depictions of animal cruelty and the harms of animal cruelty itself sufficient to warrant a First Amendment categorical exemption.¹³¹ However, it noted that it “need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.”¹³²

Thus, although courts in Vermont and Texas relied on *Stevens* to support the contention that the Supreme Court will not create new First Amendment exemptions without historical precedent, the Court’s reasoning in *Stevens* should be limited to the issue it confronted there. The depiction of animal cruelty is simply not a strong analogue for nonconsensual pornography. The government’s proposition in *Stevens* that depictions of animal cruelty “necessarily lack expressive value” is similar to the claim made by Texas lawyers insisting that revenge porn is not “entitled to the highest level of protection afforded by the First Amendment” because it “is not essential for the marketplace of ideas to function properly.”¹³³ A clear understanding of *Stevens* suggests that this argument is misplaced. Instead of focusing on “expressive value,” the strongest argument to establish a categorical exemption for revenge porn is the intrinsic link between its distribution and the infliction of permanent and repeated harm upon its victims. Because a categorical exemption for revenge porn would look quite different from the one the Supreme Court considered in *Stevens*, the invocation of *Stevens* in *Jones* and *VanBuren* may be misguided. Nonetheless, it is understandable that lower courts would hesitate to create a new First Amendment categorical exemption without Supreme Court guidance, so it is not unreasonable that the Vermont Supreme Court elected to “leave it to the Supreme Court.”¹³⁴

¹²⁹ *Stevens*, 130 S. Ct. at 1586.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Platoff, *supra* note 81.

¹³⁴ *State v. VanBuren*, No. 16-253, 2018 WL 4177776, at *12 (Vt. Aug. 31, 2018) (citation omitted).

B. First Amendment Parallels Between Revenge Porn and Child Pornography

The need to create a First Amendment categorical exemption for revenge porn is similar to the recognized exemption for child pornography. Despite the potential roadblock presented in *Stevens*, the Supreme Court has latitude to identify categories of speech that are newly exempt from First Amendment protection based on the connection between the speech and its underlying harms. Thus, the Supreme Court could carve out an exemption for nonconsensual pornography much like it did for child pornography in *New York v. Ferber*.¹³⁵ In *Ferber*, the proprietor of a bookstore specializing in sexual materials claimed that a statute banning the dissemination of child pornography violated the First Amendment.¹³⁶ The Court wrote that “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.”¹³⁷ Just as Lakier’s article suggests, the Court’s approach in upholding a law criminalizing child pornography was rooted in practical considerations, not entrenched history.¹³⁸ The Court supported this categorical exemption—and could do so again—by noting that “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”¹³⁹ Child pornography does not earn full First Amendment protection because it “bears so heavily and pervasively on the welfare of children engaged in its production,” so “the balance of competing interests is clearly struck.”¹⁴⁰

But *Ferber*’s creation of a categorical exemption for child pornography is rooted not merely in the danger of the speech itself but rather in the relationship between the dissemination of child pornography and its ongoing harms. As the Court explained:

The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the

¹³⁵ 458 U.S. 747 (1982).

¹³⁶ *Id.* at 751.

¹³⁷ *Id.* at 763.

¹³⁸ Lakier, *supra* note 116, at 2218.

¹³⁹ *Ferber*, 458 U.S. at 763–64.

¹⁴⁰ *Id.* at 764.

production of material which requires the sexual exploitation of children is to be effectively controlled.¹⁴¹

Thus, laws prohibiting the distribution of child pornography address two distinct harms of that speech: the harm from creating the video, during which a child is forced to engage in sexual activity, and the harm from the dissemination and the “permanent record” of the material. In that sense, the distribution of images or videos is a part of the abuse itself, which means banning that distribution is essential to curbing child sexual abuse. Notably, the depictions of animal abuse considered in *Stevens* do not present this brand of harm, as the dissemination of images and videos of animal abuse does not “intrinsicly” compound that abuse.¹⁴² In other words, while animal abuse is illegal, the spread of materials documenting that abuse does not impose harm on the animals themselves, whereas the spread of child pornography exacerbates the harm felt by its victims.

However, when the distribution of speech or material is not integral to an underlying harm, that speech is unlikely to garner a categorical exemption from First Amendment protection. This notion is made clear in contrasting *Ferber* and *Ashcroft v. Free Speech Coalition*.¹⁴³ In *Ashcroft*, the government sought to defend provisions of the Child Pornography Prevention Act of 1996 from a First Amendment challenge.¹⁴⁴ Although *Ferber* created a categorical exemption for the dissemination of child pornography, the provisions at issue in *Ashcroft* banned “child pornography that does not depict an actual child,” whether as “virtual child pornography” or as depictions that “appear to be” of minors engaging in sexual conduct.¹⁴⁵ The Court noted that such depictions “do not involve, let alone harm, any children in the production process” and scoffed that the statute’s literal terms could criminalize “a Renaissance painting depicting a scene from classical mythology.”¹⁴⁶ Ultimately, criminalizing speech that merely appears to be child pornography is distinct from *Ferber* because it “records no crime and creates no victims by its production,” thus eliminating the “intrinsic[]” relationship between the distribution of child pornography and its harms.¹⁴⁷ Because

¹⁴¹ *Id.* at 759.

¹⁴² *Stevens*, 130 S. Ct. at 1586.

¹⁴³ 122 S. Ct. 1389 (2002).

¹⁴⁴ *Ashcroft*, 122 S. Ct. at 1396.

¹⁴⁵ *Id.* at 1397.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1402.

the production of child pornography that is not actually child pornography does not in itself harm children, the law challenged in *Ashcroft* was not within the purview of *Ferber*.

This nuanced distinction between the categorical exemption developed in *Ferber* and cases like *Stevens* and *Ashcroft* creates a framework to develop a First Amendment exemption for nonconsensual pornography. Laws prohibiting the dissemination of child pornography in *Ferber* addressed the harms arising both from the creation and distribution of the material. In *Stevens*, the distribution of depictions of animal cruelty did not cause the animals to suffer any additional harm. In *Ashcroft*, there were no real victims harmed by the creation of virtual images who could be further harmed by their distribution. Conversely, the harms of nonconsensual pornography are rooted in its *dissemination*, and statutes prohibiting that dissemination attempt to address the idea that such distribution creates victims. Undoubtedly, the *creation* of child pornography is far more sinister than the creation of sexually explicit images between adults, especially when such images are created consensually within the confines of a romantic relationship. However, when images or videos are obtained without consent—in the form of voyeuristic upskirt videos, peephole videos, or depictions of sexual assaults—the creation of such material is itself a crime, and its dissemination exacerbates the harm to the victim.¹⁴⁸ These cases create the closest analogue to *Ferber* and highlight a clear need for categorically exempting the dissemination of such material from First Amendment protection.

But even when the sexually explicit material is initially created with the victim's consent, the harm resulting from its nonconsensual distribution closely parallels that described in *Ferber*. The Court in *Ferber* emphasized that the “materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.”¹⁴⁹ Additionally, because of that harm, the value of the distribution of the material “is irrelevant to the child who has been abused.”¹⁵⁰ In *Ferber*, the Court deferred to legislative judgment that “the use of children as subjects in pornographic materials is harmful to the physiological, emotional, and mental health of the child,” and that each step in the reproduction and dissemination of the material compounds the trauma of the victim.¹⁵¹ Modern stories and studies about the impacts of revenge porn paint a similar picture: victims cannot escape the presence of their explicit images, struggle to remove them from

¹⁴⁸ See Talbot, *supra* note 36.

¹⁴⁹ *Stevens*, 130 S. Ct. at 759.

¹⁵⁰ *Id.* at 761.

¹⁵¹ *Id.* at 758.

web searches and social media, and find it nearly impossible to outrun their impact in professional and personal settings.¹⁵² Victims whose images are posted on sites catering to revenge porn are often harassed, stalked, and physically threatened.¹⁵³ If anything, the intrinsic distribution harms described in *Ferber*—decided nearly four decades ago—are worsened exponentially by the use of modern technology to fuel revenge porn. Even when there is no harm in the consensual creation of a sexually explicit image, its nonconsensual dissemination online creates permanent repercussions for victims that can be at least as harmful as those associated with child pornography.

Thus, the Supreme Court could craft a categorical First Amendment exemption to revenge porn that mirrors the approach it took toward child pornography in *Ferber*. As the #MeToo Movement grows and stories of revenge porn's harms come to the fore, evidence that the non-consensual distribution of sexually explicit material bears "heavily and pervasively" on victims' welfare is exceedingly strong. Victims of revenge porn are overwhelmingly young, female, LGBTQ, or members of another minority group, and their lives are forever changed by the dissemination of a single sexually explicit image.¹⁵⁴ They suffer physical, financial, and emotional hardship as a result of the distribution of their images—that is, revenge porn attacks the welfare of its victims and often permanently impacts their lives. Moreover, the fear of dissemination of an explicit image is often an intrinsic part of an abusive relationship insofar as the abuser will force the victim to stay in a relationship by threatening to share the material if the victim leaves.¹⁵⁵ By the Supreme Court's reasoning in *Ferber*—and an understanding, rooted in Lakier's arguments, that the Court can and should create First Amendment exemptions by weighing "the expressive value of speech against its social costs"¹⁵⁶—there are strong reasons for the Supreme Court to create a new categorical exemption from First Amendment protection for revenge porn when the Court reviews the constitutionality of the revenge porn statutes.

Finally, the Vermont Supreme Court in *VanBuren* details the compelling argument that extreme invasions of privacy like revenge porn are "historically unprotected, but . . . not yet . . . specifically identified," per *Stevens*.¹⁵⁷ This means that, in addition to the bevy of practical and

¹⁵² See Citron, *supra* note 1.

¹⁵³ *Id.*

¹⁵⁴ See Janjigian, *supra* note 4.

¹⁵⁵ Citron & Franks, *supra* note 2, at 351.

¹⁵⁶ Lakier, *supra* note 116, at 2212.

¹⁵⁷ *State v. VanBuren*, No. 16-253, 2018 WL 4177776, at *7 (Vt. Aug. 31, 2018) (citation omitted).

policy implications that support stamping out revenge porn and curbing its impact on victims, the longstanding legal tradition of safeguarding privacy supports a categorical exemption for revenge porn as well. The Vermont court notes that the “Supreme Court has never struck down a restriction of speech on purely private matters that protected an individual who is not a public figure from an invasion of privacy or similar harms.”¹⁵⁸ Instead, the Supreme Court has considered the private and public interests at stake on a case-by-case basis.¹⁵⁹ Even in cases where the Court upheld the free speech right, it was careful to not diminish privacy interests. For example, the Vermont court in *VanBuren* noted that the Supreme Court had never held “that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion.”¹⁶⁰ The lengthy legal history that supports a right to privacy even against First Amendment considerations thus provides an additional reason for the Supreme Court to draw a categorical exemption from First Amendment protection for nonconsensual pornography. Coupled with the weight of the intrinsic “evil to be restricted” as described in *Ferber*, these clear historical standards create a strong case for the categorical exemption of revenge porn, even under the ostensibly restrictive framework laid out in *Stevens*.

C. Revenge Porn and Modern Conceptions of Consent

Those hesitant to criminalize revenge porn present First Amendment and practical concerns, but a categorical exemption for revenge porn would comport with modern understandings of consent in the #Me-Too era. John Humbach’s 2014 article notes that revenge porn does not fall into the Supreme Court’s delineated categorical exceptions to the First Amendment and far more closely resembles “emotionally distressing speech” that nonetheless receives full constitutional protection.¹⁶¹ Further, Humbach argues that revenge porn laws prevent dissemination of true, albeit harmful, information.¹⁶² Thus, although revenge porn may lead to “definite individualized harm” for victims such as the loss of employment opportunities, the fact that it “conveys information that *matters*, at least to some people” should afford revenge porn First Amendment protection even if that information is harmful.¹⁶³ Essen-

¹⁵⁸ *Id.* at *8.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *9 (citation omitted).

¹⁶¹ John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 237 (2014).

¹⁶² *Id.* at 226.

¹⁶³ *Id.* at 228.

tially, Humbach suggests that an employer evaluating a potential candidate—or anyone evaluating someone in a social setting—may want to know about conduct that reflects the character of that person, and the decision to take and send a nude photo may be useful information even if it harms the victim.

But Humbach's approach understates the harmful impact of revenge porn on its victims and conflates a personal decision to intimately share an explicit image with the experience of seeing one's explicit image disseminated without consent. Perhaps this argument would be stronger if the impacts of revenge porn were solely professional, but victims of revenge porn face stalking, harassment, and physical threats and abuse in addition to lasting economic and professional hardship. Those professional hardships should not be minimized, as women today struggle within the workplace to escape the cultural reach of sex discrimination. Moreover, Humbach's idea that criminalizing revenge porn restricts "the free flow of information concerning the activities that it reveals" narrows the importance of consent by suggesting that a victim's proclivity to share photos within an intimate relationship "reveals" something worth knowing.¹⁶⁴ To the extent that it does, there remains a vital difference between knowing that someone shares explicit photos with an intimate partner and seeing the photos themselves. Citron and Franks aptly state that "[c]onsent to share information in one context does not serve as consent to share this information in another context. . . . Consent is contextual; it is not an on/off switch."¹⁶⁵ The argument for the Supreme Court to classify revenge porn as speech categorically exempt from full First Amendment protection is supported by the Court's precedent and history. That support is not at all eroded by misguided suggestions that laws criminalizing revenge porn halt the free flow of truthful information.

Finally, Humbach's assertion wrongly minimizes the impact of material that was not obtained consensually at all. In addition to conflating consensual creation with consensual distribution, this line of criticism—much like state laws requiring a romantic relationship between the defendant and the victim—presents too narrow a conception of non-consensual pornography. While "revenge porn" conjures up headlines about jilted exes, "[s]ometimes people surreptitiously film consensual sex acts, or even rapes, and make the footage public for reasons other than revenge."¹⁶⁶ Accordingly, the suggestion that revenge porn be categorically exempt from the First Amendment encompasses nonconsen-

¹⁶⁴ *Id.* at 230.

¹⁶⁵ Citron & Franks, *supra* note 2, at 355.

¹⁶⁶ Talbot, *supra* note 36.

sual pornography of all stripes, including voyeuristic recordings, depictions of nonconsensual sexual acts, and sexually explicit material shared coercively within the confines of an abusive relationship. The latter example is particularly confounding to Humbach's conception of consent, since the exchange of sexually explicit materials is "often part of a pattern of coercive domestic abuse."¹⁶⁷ In that context, a victim's choice to create an image may not be much of a choice at all, notwithstanding the fact that such creation does not support dissemination. All told, nonconsensual pornography can have numerous origins and mechanisms of distribution, and material need not be created consensually to fall within the purview of an appropriate First Amendment categorical exemption.

D. The Ill-Fitting Obscenity Exemption

Rather than placing nonconsensual pornography in a new categorical exemption from First Amendment protection, some scholars argue that revenge porn could fit within the obscenity exemption. Citron and Franks gesture toward the idea that "nonconsensual pornography can be seen as part of obscenity's long tradition of proscription."¹⁶⁸ Other authors argue that, because the "Supreme Court respects each state's 'long-recognized legitimate interest in regulating the use of obscene material,'" lawyers defending state revenge porn statutes should try to classify them as obscene to garner an existing categorical exemption.¹⁶⁹ This argument notes that "prurience and patent offensiveness are apparently permissible grounds on which to discriminate," so revenge porn statutes that criminalize sexually explicit material can be construed as criminalizing obscenity and thus avoid the hurdle of strict scrutiny review.¹⁷⁰

The problem with this argument is that the revenge porn statutes in question do not aim to restrain sexually explicit material itself but rather the conduct associated with its dissemination. Nonconsensual pornography is harmful not necessarily because the images exist in the first place, but because those images are disseminated. While an image obtained or created without consent is harmful on its own, many modern couples value the ability to consensually exchange intimate photos.¹⁷¹ Trying to place revenge porn laws under the categorical cover of the obscenity exemption misstates the aim of these statutes, which are

¹⁶⁷ McGlynn, *supra* note 42.

¹⁶⁸ Citron & Franks, *supra* note 2, at 384.

¹⁶⁹ Kitchen, *supra* note 62 at 278 (citation omitted).

¹⁷⁰ *Id.* (citation omitted).

¹⁷¹ See Alter, *supra* note 19.

not geared toward criminalizing images but rather toward prohibiting the conduct associated with their nonconsensual distribution. Thus, this argument conflates the consensual and nonconsensual sharing of explicit images just as Humbach's does and, if carried forward, may threaten the potency of revenge porn laws in addressing the actual harm of dissemination. The Vermont Supreme Court recognized the Supreme Court's unwillingness to "shoehorn speech about violence into obscenity" in rejecting the suggestion in *Brown* that violent video games fit within that categorical exemption.¹⁷² The *VanBuren* Court's observation that the "purposes underlying government regulation of obscenity and of nonconsensual pornography are distinct [and] the defining characteristics of the regulated speech are accordingly quite different" wisely demonstrates that obscenity and revenge porn do not fit together under one First Amendment exemption.¹⁷³

E. Overcoming the Strict Scrutiny Hurdle

Creating a categorical exemption for revenge porn will provide clarity to the messy picture of emerging statutes and protect them from strict scrutiny review. For now, absent word from the Supreme Court or a state court willing to create its own categorical exemption for non-consensual pornography, statutes criminalizing revenge porn have to withstand strict scrutiny analysis if challenged in court. Some observers may argue that this status quo is not problematic. After all, state court decisions in Vermont and Texas—although reaching different conclusions—appear to offer relatively clear guidelines for how a statute can survive a legal challenge. The Texas statute was initially too broad because it did not require knowledge of the victim's lack of consent or intent to do harm, thereby including in its sweep actors who may have shared images without clear criminal elements. The Vermont statute was upheld because it, as construed by the Vermont Supreme Court, required knowledge of the victim's lack of consent as well as intent to do harm in disseminating an image.¹⁷⁴ Thus, a revenge porn statute that simply looks like Vermont's law and avoids the pitfalls of Texas's original law should stand up in court.

But not all legal challenges are so simple, and the forty-seven revenge porn laws enacted to date leave us with more questions than courts in Texas and Vermont may have answered. Although activists have made their case for states to adopt stringent laws prohibiting non-consensual pornography, a survey of the enacted statutes shows a

¹⁷² *State v. VanBuren*, No. 16-253, 2018 WL 4177776, at *7 (Vt. Aug. 31, 2018).

¹⁷³ *Id.* at *6.

¹⁷⁴ *Id.* at *17.

sweepingly incoherent legal landscape. Citron and Franks offered numerous clear and cogent suggestions in their 2014 article. Five years later, dozens of states have developed statutes that jumble intent to harm, knowledge of the lack of consent, actual harm, and the victim's reasonable expectation of privacy. It remains unclear how these various legal thresholds will work together, and no one state law perfectly mirrors any other. Thus, notwithstanding persuasive policy recommendations from Citron, Franks, and other scholars who have tackled the issue, state legislatures have made progress in implementing revenge porn laws but have done little to mitigate confusion surrounding them.

Similarly, despite the ostensibly logical results in *Jones* and *VanBuren*, neither case seems to have resolved the law in its respective state. Instead, these decisions left scholars puzzled and the losing side contemplating appeals, meaning these battles may be far from over.¹⁷⁵ Further, the lack of uniformity of state laws likely means more lawsuits are coming, which will provide additional insight—and doubtless create additional questions—over criminal elements like intent to harm, actual harm, and the violation of a reasonable expectation of privacy. Ultimately, these questions seem destined to be resolved by the Supreme Court, but the wide array of state laws means that the high court's take on revenge porn may depend significantly on the statute it confronts. Given this litany of lingering questions, legal activists should not rest on their laurels and merely hope that the ruling in *VanBuren* offers a blueprint for drafting a constitutional revenge porn law. Instead, they should push for a categorical exemption to full First Amendment protection for these laws in order to increase their impact and limit the legal hurdles to rooting out nonconsensual pornography.

IV. CONCLUSION

Revenge porn is a uniquely twenty-first century phenomenon, exacerbated by the sinister capabilities of modern technology and amplified by the #MeToo Movement's engagement in new dialogues about relationships, consent, and sexual abuse. To curb its harms, states have laudably begun implementing new laws criminalizing the nonconsensual distribution of sexually explicit images. Yet, the most significant legal triumph over revenge porn would be classifying it as categorically exempt from the full protection of the First Amendment. Doing so would match the Supreme Court's historical approach in evaluating low-value speech based on its harmful nature. In fact, the rationale underlying the Supreme Court's decision to exempt the distribution of child por-

¹⁷⁵ See Ehrenkranz, *supra* note 82; Davis, *supra* note 97.

nography from First Amendment protection is echoed in modern discussions of revenge porn. Activists leading the charge against revenge porn should emphasize this connection. The need for a contemporary categorical exemption for revenge porn is bolstered by the pervasive threat to victims from online dissemination as well as modern understandings of consent in the #MeToo era.

Conversely, trying to place nonconsensual pornography within the existing categorical exemption for obscenity or attempting to clarify a messy landscape of state statutes in hopes that they can survive strict scrutiny are unlikely to be successful approaches. The creation of a First Amendment categorical exemption for revenge porn will empower legislators to curb this evil practice without running afoul of longstanding First Amendment jurisprudence.



Patrolling Pregnant Immigrant Detainees' Bodies

Alexa Rollins[†]

INTRODUCTION

E heard, “[we are] not a hospital and [we are not] doctors” as she lay for eight days bleeding out and crying as she miscarried, losing her son during the fourth month of her pregnancy.¹ Emma heard, “No, don’t tell me anything. You all say the same thing,” as she tried to explain that she was a pregnant as a result of rape.² Teresa heard no response as she complained on several different occasions that she was in pain, that she was bleeding profusely despite being four months pregnant, and that she needed to go to a hospital.³

What do E, Emma, and Teresa have in common? They were all pregnant immigrant detainees confined to United States detention centers who were shackled around their hands, legs, and stomach.

In December 2017, the Trump administration instituted a Department of Homeland Security policy allowing for the detention of pregnant women in their first and second trimesters.⁴ The new Immigration

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¹ Ema O’Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn’t Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump> [<https://perma.cc/P8BQ-H7U8>].

² American Civil Liberties Union et al., *Re: U.S. Immigration and Customs Enforcement’s Detention and Treatment of Pregnant Women*, AMERICAN IMMIGRATION COUNCIL, 7–8 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf [<https://perma.cc/W9JP-QPGM>].

³ *Id.* at 8–9.

⁴ *ICE Directive 11032.3: Identification and Monitoring of Pregnant Detainees*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 1 (Dec. 14, 2017), https://www.ice.gov/sites/default/files/documents/Document/2018/11032_3_PregnantDetaineP.pdf [<https://perma.cc/RL3K-5HD4>]. See also Victoria López, *Working to Uncover How ICE Treats Pregnant Women in Detention*, ACLU: AMERICAN CIVIL LIBERTIES UNION (May 3, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/working-uncover-how-ice-treats-pregnant-women> [<https://perma.cc/ZL2E-K>].

and Customs Enforcement (ICE) directive, which failed to be announced until March despite its earlier implementation, ended the Obama administration's August 2016 policy to refrain from detaining pregnant women whose immigration cases are pending except in extreme circumstances.⁵ The 2016 policy change was prompted by ICE's acknowledgment of the larger consensus among humanitarian and medical organizations that shackling and other forms of mistreatment are harmful to the health of expectant women and that its detention centers are not prepared to meet their unique medical needs.⁶ Due to President Trump's executive orders on immigration,⁷ though, this reasonable rationale has been swept aside in favor of incarcerating pregnant women who have yet to reach their third trimester.⁸ The ICE directive has also eliminated reporting procedures that previously allowed outside agencies to monitor ICE's detention facilities and the treatment of women.⁹

Furthermore, despite the new policy's directions not to hold women in their third trimester and to provide appropriate medical care, pregnant detainees' testimonies prove that this portion of the directive is being ignored.¹⁰ In fact, pregnant detainees often are not given proper medical care, are physically and psychologically mistreated, and are shackled around the stomach.¹¹ The treatment within detention centers is often re-traumatizing for these women, especially since many of these women's pregnancies are a result of sexual assaults.¹²

Part I of this Comment describes in more detail the physical and mental suffering inflicted on pregnant detainees during their time in detention centers. It further discusses the ICE detention standards and the 2017 ICE directive's contravention of them. Part II goes on to review 42 U.S.C. § 1983¹³ claims brought forth by past prisoners, alleging vio-

XGN]; Liz Jones, *Pregnant and Detained*, NPR: NATIONAL PUBLIC RADIO (Apr. 6, 2018), <https://www.npr.org/2018/04/05/599802820/pregnant-and-detained> [<https://perma.cc/9E84-377W>]; O'Connor, *supra* note 1.

⁵ ICE Policy 11032.2: Identification and Monitoring of Pregnant Detainee, U.S IMMIGRATION AND CUSTOMS ENFORCEMENT, 1 (Aug. 15, 2016), https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMoIdentificationMonitoringP.pdf [<https://perma.cc/5L4B-VF58>]. *See also* Jones, *supra* note 4; O'Connor, *supra* note 1.

⁶ López, *supra* note 4.

⁷ *See* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

⁸ O'Connor, *supra* note 1.

⁹ López, *supra* note 4.

¹⁰ O'Connor, *supra* note 1.

¹¹ *See e.g., id.*

¹² At least three of the ten women who filed complaints testified to becoming pregnant as a result of sexual assaults, whether in their home country or on their journey into the United States. American Civil Liberties Union et al., *supra* note 2, at 6–9.

¹³ 42 U.S.C. § 1983 (2012).

lations of their Eighth Amendment rights under the deliberate indifference standard. The Comment goes on to recognize that pretrial detainees, though they are non-convicted, have been tried by courts under this same subjective standard. It points out, though, that a recent United States Supreme Court decision, *Kingsley v. Hendrickson*,¹⁴ applied an objective standard to a pretrial detainee's excessive force claims. In turn, it has led to a circuit split in which the Ninth, Second, and Seventh Circuits interpret this objective standard to extend to all Fourteenth Amendment claims while the Fifth, Eleventh, and Eighth Circuits do not. Part III then evaluates how international law, through its conventions and cases, has weighed in on the treatment of detainees and, thus, might affect courts' decision making.

Due to the broad wording of *Kingsley* and the similar injuries, both physical and constitutional, of excessive force and other Fourteenth Amendment claims, this Comment argues in Part IV that courts should interpret *Kingsley* to apply the objective standard to all Fourteenth Amendment, § 1983 claims of pretrial detainees. This reading not only is backed up by the Court's decision in *Kingsley*, but also will provide a more favorable standard for pretrial detainees. Part V further asserts that international law, especially relevant given that pregnant detainees are foreign nationals, supports this assertion and should be used by courts as persuasive authority. Finally, Part VI of this Comment responds to counterarguments by contending that current and pending domestic laws do not apply to or adequately protect pregnant pretrial detainees.

Given the increasing number of pregnant detainees within U.S. detention centers,¹⁵ this inhumane treatment needs to be legally addressed as soon as possible. In fact, the #MeToo Movement demands that this treatment of pregnant women be stopped and that their rights and dignity be acknowledged. This Comment concludes, then, that the best course of action courts can take is to extend the *Kingsley* decision to Fourteenth Amendment claims other than excessive force. Especially in light of the support provided by international law, such an interpretation not only is legally correct but also would provide justice for pregnant immigrant detainees, who should have never been mistreated or shackled in the first place.

¹⁴ 135 S. Ct. 2466 (2015).

¹⁵ By April 2018, 506 pregnant women had already been detained since December's policy reversal. Compare this to 292 pregnant women detained between January and May of 2017. Jones, *supra* note 4.

I. AN OVERVIEW OF ICE DETENTION CONDITIONS, STANDARDS, AND DIRECTIVES

A. Physical and Mental Harms to Pregnant Detainees

Pregnant detainees, who are often asylum seekers fleeing violence in their own countries, have shared similar accounts of inadequate medical attention and mistreatment. They report detention officers ignoring their requests for or delaying medical care, even when they are in severe pain, bleeding out, or miscarrying.¹⁶ Detention staff also failed to refer women with high-risk pregnancies to specialists.¹⁷ When women are given medical attention, their physicians often fail to inquire about their physical or mental state and to provide them with prenatal vitamins.¹⁸ Due to this inadequate health care, pregnant detainees report having headaches, abdominal pain, weakness, nausea, and vomiting.¹⁹

Additionally, women attest that the detention centers are overcrowded, the food makes them nauseous, the mattresses, if any, are thin, and viruses, such those causing the flu and diarrhea, are rampant.²⁰ Emma, mentioned in the introduction, said that she could not sleep at the facility due to the crying of the detained children.²¹

In addition, shackling of pregnant detainees persists despite being a dangerous practice that poses unacceptable health risks to expectant mothers and children.²² Restraints can leave deep gashes on expectant mothers' ankles, bruise their abdomens, and decrease their stability, which increases their likelihood of falling, harming themselves or their child, and miscarrying.²³ During labor, shackling prevents physicians

¹⁶ American Civil Liberties Union et al., *supra* note 2, at 5. For example, Teresa, mentioned in the Introduction, eventually miscarried due to lack of medical attention and was later denied any pain relief medication, causing her to have headaches and dramatically lose weight. *Id.* at 9.

¹⁷ *Id.*

¹⁸ One doctor even failed to give a twenty-four-year-old Honduran her vaccinations; instead, he gave them to her five-year-old daughter who had already received them. *Id.* at 7, 12.

¹⁹ See, e.g., López, *supra* note 4. See also Jones, *supra* note 4 (recounting Jacinta Morales' similar detention conditions that eventually led to her miscarriage). It should be noted that, aside from nausea and vomiting, these are not common pregnancy symptoms. Furthermore, these women reported being nauseous and vomiting after being detained. See *What Are Some Common Signs of Pregnancy?*, NICHD: EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT (2018), <https://www.nichd.nih.gov/health/topics/pregnancy/condition-info/signs> [<https://perma.cc/ZGY6-FQYS>].

²⁰ American Civil Liberties Union et al., *supra* note 2, at 6, 7, 11.

²¹ *Id.* at 8.

²² See O'Connor, *supra* note 1; Hilary Hammell, *The International Human Right to Safe and Humane Treatment During Pregnancy and a Theory for Its Application in U.S. Courts*, 33 WOMEN'S RTS. L. REP. 244, 250 n.49 (2012) (citing a Human Rights Watch report that found pregnant women in immigration detention are routinely shackled.).

²³ See Committee on Health Care for Underserved Women, *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Nov. 2011), <https://www.acog.org/-/media/Committee-Opinions/Committee-Opinion-409.pdf>.

from safely assisting pregnant women, limits women's critical need to move during labor, and causes complications such as hemorrhaging and decreased fetal heart rate.²⁴ It may also delay a woman's caesarian section, which could cause permanent brain damage to the child.²⁵ Postpartum shackling may prevent women from healing properly and breast-feeding.²⁶

Pregnant women's mental health is endangered in detention as well. The lack of access to health care, the physical harms suffered, the separation from their families, and the uncertainty of immigration proceedings leave pregnant detainees severely stressed. Indeed, most women have attested to feeling isolated, depressed, and anxious.²⁷ Many pregnant detainees are also survivors of abuse and are either fleeing their abuser or are pregnant due to sexual assault.²⁸ They often find the mistreatment in the detention facilities and the preparation for a credible fear interview²⁹ with an asylum officer to be re-traumatizing.³⁰ All interviewed pregnant detainees worried that this mental pressure adversely affected their pregnancies; this fear of stress thus causes pregnant detainees to be more stressed.³¹ Acute stress during pregnancy, especially in the final trimester, could then lead to preterm births,³² which often lead to higher rates of child death or disability.³³

tee-on-Health-Care-for-Underserved-Women/co511.pdf?dmc=1&ts=20181030T0057284577 [https://perma.cc/A4SK-XHYM]; The ACLU Reproductive Freedom Project and ACLU National Prison Project, *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, ACLU: AMERICAN CIVIL LIBERTIES UNION, 3 (2018), https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf [https://perma.cc/9GDZ-G265].

²⁴ See Committee on Health Care for Underserved Women, *supra* note 23; United Nations Office on Drugs and Crime, *Handbook on Women and Imprisonment* 20 (2nd ed. 2014). See also The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 4.

²⁵ See Committee on Health Care for Underserved Women, *supra* note 23; United Nations Office on Drugs and Crime, *Handbook on Women and Imprisonment* 20 (2nd ed. 2014); see also The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 4.

²⁶ See Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 225 (2007); The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 3 (citing Dr. Patricia Garcia's statement to the Chicago Legal Aid to Incarcerated Mothers in December 1998).

²⁷ See American Civil Liberties Union et al., *supra* note 2, at 5–12.

²⁸ American Civil Liberties Union et al., *supra* note 2, at 2, 6–9.

²⁹ This is an interview with an asylum officer to establish a credible fear of persecution. American Civil Liberties Union et al., *supra* note 2, at 2.

³⁰ For example, a twenty-eight-year-old from Honduras attested to the traumatic preparation for her credible fear interview in which she was forced to disclose her history of domestic and sexual violence in detail. American Civil Liberties Union et al., *supra* note 2, at 6.

³¹ *Id.* at 5.

³² This is the testimony of Sera Bonds, founder and CEO of Circle of Health International, who has cared pregnant women after they have been released from detention centers. Madhuri Sathish, *Pregnant Immigrants Are Being Shackled at the Border & Lawmakers Want to End That Practice*, BUSTLE (July 26, 2018), <https://www.bustle.com/p/pregnant-immigrants-are-being-shackled-at-the-border-lawmakers-want-to-end-that-practice-9892600> [https://perma.cc/L6RB-HRDY].

³³ Disabilities include “breathing problems, feeding difficulties, cerebral palsy, developmental

B. ICE Standards and Directives

To deter such harms, medical organizations³⁴ have drafted pregnancy-related care standards to guide prisons and jails. In addition to condemning the shackling of pregnant women, they recommend thoroughly documenting all pregnancies and the care provided, screening and counseling women, referring high-risk pregnancies to the appropriate physicians, and providing essential prenatal care.³⁵

ICE adopted the medical organizations' standards in the 2011 ICE Performance Based National Detention Standard (PBNDS) on Medical Care for Women. ICE acknowledges that pregnancy constitutes a special vulnerability and may put detainees at a higher risk for victimization or assault.³⁶ Detention centers must provide prenatal care and counseling "inclusive of, but not limited to: nutrition, exercise, complications of pregnancy, prenatal vitamins, labor and delivery, postpartum care, lactation, family planning, abortion services, and parental skills education."³⁷ Detention centers must also offer pregnant detainees "temperature-appropriate" clothing and blankets, beds in their holding cells, and more food during meals.³⁸ The PBNDS also bars the shackling of women who are pregnant or recovering post-partum, "absent truly extraordinary circumstances."³⁹

Following the PBNDS and recognizing the harms of detaining pregnant women, the Obama administration released a policy in August 2016 barring the detention of pregnant women unless the mandatory detention statute applied or "extraordinary circumstances" existed.⁴⁰ If

delay, vision problems, and hearing problems." *Preterm Birth*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 24, 2018), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pretermbirth.htm> [<https://perma.cc/5VW9-H6A7>].

³⁴ These include the National Commission on Correctional Health Care (NCCHC), American Congress of Obstetricians and Gynecologists (ACOG), and American Public Health Association (APHA).

³⁵ American Civil Liberties Union et al., *supra* note 2, at 4 (citing *Committee Opinion: Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Nov. 2011), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females?IsMobileSet=false> [<https://perma.cc/6JKK-2L9H>]).

³⁶ *ICE Performance Based Detention Standards, 2.2 Custody Classification System*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (rev. Dec. 2016) 62, 70, <https://www.ice.gov/doclib/detention-standards/2011/2-2.pdf> [<https://perma.cc/GA9K-W9Y7>].

³⁷ American Civil Liberties Union et al., *supra* note 2, at 4. See also *ICE Performance Based Detention Standards, 4.4 Medical Care (Women)*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (rev. Dec. 2016) 324–25, <https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf> [<https://perma.cc/SYC8-KM6J>].

³⁸ American Civil Liberties Union et al., *supra* note 2, at 4.

³⁹ *Id.* (citation omitted).

⁴⁰ *ICE Policy 11032.2: Identification and Monitoring of Pregnant Detainee*, *supra* note 5. See also American Civil Liberties Union et al., *supra* note 2, at 3.

a pregnant woman was detained, ICE needed to evaluate each week whether her continued confinement was necessary.⁴¹ In spite of this directive, attorneys and other advocates reported in November 2016 that detention centers and officers continued to detain and shackle pregnant immigrant women.⁴²

A little over a year later, in December 2017, the Trump administration repealed this directive and gave ICE the power to detain pregnant women in their first and second trimesters.⁴³ Its policy also removes the mandated reporting mechanisms through which outside organizations monitored ICE's detention centers and treatment of pregnant detainees.⁴⁴ Given this extension of ICE's abilities and lack of supervision, hundreds—and counting—of pregnant immigrant women have continued to be detained, shackled, and subjected to inhumane conditions.⁴⁵

II. DOMESTIC LAW: THE DELIBERATE INDIFFERENCE STANDARD VS. THE OBJECTIVE STANDARD

When subjected to repeated abuses and mistreatment, pregnant immigrant detainees are afforded avenues to bring forth cases against detention officials, medical staff, detention centers, and the Department of Homeland Security. Historically, pregnant detainees, like convicted prisoners, have brought suits under 42 U.S.C. § 1983⁴⁶ against state actors, claiming violations of their Eighth Amendment⁴⁷ rights, which are extended to pretrial detainees through the Fourteenth Amendment.⁴⁸ But a recent Supreme Court decision, *Kingsley v. Hendrickson*,⁴⁹ suggests that pregnant detainees are entitled to more protection than convicted prisoners and that they should be tried under a different standard, which has led to a circuit split.

⁴¹ ICE Policy 11032.2: *Identification and Monitoring of Pregnant Detainee*, *supra* note 5.

⁴² American Civil Liberties Union et al., *supra* note 2, at 3.

⁴³ ICE Directive 11032.3: *Identification and Monitoring of Pregnant Detainees*, *supra* note 4. See also López, *supra* note 4.

⁴⁴ *Id.*

⁴⁵ López, *supra* note 4.

⁴⁶ 42 U.S.C. § 1983 (2012) (providing the cause of action for a claim that “[a] person . . . under color of any statute, ordinance, regulation, custom, or usage, of any State” violated a federally protected constitutional or statutory right).

⁴⁷ U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁴⁸ U.S. Const. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁴⁹ 135 S. Ct. 2466 (2015).

A. Eighth Amendment Protections Afforded Convicted Pregnant Prisoners (and Extended to Pregnant Detainees)

Given that courts have historically viewed pregnant detainees' cases under the same standard as those of pregnant prisoners, it is worthwhile to explore the history and merits of those cases. This history begins with *Estelle v. Gamble*.⁵⁰

In *Estelle*, the Supreme Court acknowledged prisoners' right to receive adequate medical treatment. The Court held that prison officials' deliberate indifference to incarcerated persons' serious medical needs constitutes the "unnecessary and wanton infliction of pain" and thus violates the Eighth Amendment's protection against cruel and unusual punishment.⁵¹ Indeed, denying prisoners medical care could cause them pain and suffering that does not serve a legitimate penological purpose.⁵² Furthermore, the Court found that prison guards' intentional denial or delay of prisoners' access to medical care constitutes deliberate indifference.⁵³ Thus, the Court in *Estelle* created the deliberate indifference standard, a subjective standard requiring plaintiffs to show that the defendant intended harm and actually believed harm would likely occur.⁵⁴

By 1994, the Supreme Court in *Farmer v. Brennan*⁵⁵ established that two elements must be satisfied to establish that defendants violated the Eighth Amendment. Plaintiffs must show that defendants: (1) exposed them to a substantial risk of serious harm⁵⁶ and (2) were deliberately indifferent to their constitutional rights.⁵⁷ The Court acknowledged that deliberate indifference was a vague phrase and attempted to clarify it as a standard of reckless disregard, though it acknowledged that this explanation was equally vague.⁵⁸ By this time, the Court had

⁵⁰ 429 U.S. 97 (1976).

⁵¹ *Id.* at 104–05 (citing to *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

⁵² *Id.* at 103.

⁵³ *Id.* at 104.

⁵⁴ *See, e.g.*, *Pittman ex rel. Hamilton v. Cty. of Madison*, 746 F.3d 766, 775–76 (7th Cir. 2014).

⁵⁵ 511 U.S. 825 (1994).

⁵⁶ *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) and *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

⁵⁷ *Id.* at 834 (quoting *Wilson*, 501 U.S. at 302–03). *See also* *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016) (stating the two necessary elements).

⁵⁸ *Id.* at 836–37 (concluding that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference).

also extended the deliberate indifference standard to other types of claims such as failure-to-protect⁵⁹ and conditions of confinement.⁶⁰

Pretrial detainees, though, have different standing than prisoners. Detainees, unlike sentenced inmates, have yet to be tried for their crimes.⁶¹ Given this lack of adjudication of guilt, courts must scrutinize pretrial detainees' claims under the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment.⁶² Whereas the Eighth Amendment allows for the punishment of sentenced prisoners so long as it is not cruel and unusual, the Due Process Clause mandates that pretrial detainees not be punished.⁶³

Despite this acknowledged difference, courts have usually examined the claims of pretrial detainees under the Eighth Amendment's standards. This is due to the Supreme Court's vague explanation of what deprivations the state can subject pretrial detainees to short of punishment. Indeed, the Court in *Bell v. Wolfish*⁶⁴ stated that, while a detainee does not have a fundamental liberty interest under the Fourteenth Amendment to be free from discomfort, a condition or restriction of pretrial detention must be "reasonably related to a legitimate governmental objective."⁶⁵ Given this ambiguous and broad definition, courts have relied on the Court's repeated assertion that pretrial detainees' due process rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner"⁶⁶ to extend Eighth Amendment scrutiny to pretrial detainees' claims.

Under these Eighth Amendment standards, both pregnant prisoners and pregnant detainees have brought § 1983 claims alleging deliberate indifference to their serious medical needs. Circuits, though, have interpreted the deliberate indifference standard differently.

⁵⁹ *Id.* at 837.

⁶⁰ *Wilson*, 501 U.S. at 303.

⁶¹ *Bell v. Wolfish*, 441 U.S. 520, 536 (1979).

⁶² *Id.* at 535, 535 n.16.

⁶³ *Id.* See also *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."); *United States v. Lovett*, 328 U.S. 303, 317-18 (1946) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.");

⁶⁴ 441 U.S. 520 (1979) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) and *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

⁶⁵ *Id.* at 539.

⁶⁶ *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). See also *Bell*, 441 U.S. at 545.

1. The Second, Eighth, and Sixth Circuits have found inadequate medical care and shackling to meet the deliberate indifference standard

The Second Circuit heard the case of a pregnant prisoner who claimed that county jail officials intentionally delayed her medical care when she suffered severe pain and subsequently miscarried.⁶⁷ Despite disagreements on the plaintiff's health status and timing of emergency medical care, the Second Circuit stated that "[t]hese assertions, however disputed, do raise material factual issues.⁶⁸ After all, if the defendants did decide to delay emergency medical aid—even for 'only' five hours—in order to make Archer suffer, surely a claim would be stated under *Estelle*."⁶⁹

The Eighth Circuit has also found ignoring pregnant prisoners' bleeding constitutes deliberate indifference and violates their right to medical care. In *Boswell v. Sherburne*,⁷⁰ a pregnant pretrial detainee told the county jail upon her admittance to the county that she was pregnant and experiencing troubling symptoms.⁷¹ Despite being alerted to her medical condition, jailers ignored her constant bleeding, her passage of blood clots, her cramping, and her requests for a physician.⁷² When she was finally transferred to a hospital, she gave birth in the ambulance and lost her newborn son thirty-four minutes later.⁷³ The Eighth Circuit found that officials' denial of her requests violated her right to medical care.⁷⁴

The Eighth Circuit, along with the Sixth Circuit, also found that shackling pregnant women during labor violated their Eighth Amendment rights. In 2009, the Eighth Circuit heard *Nelson v. Correctional Medical Services*,⁷⁵ which involved a former pregnant inmate who was shackled during labor.⁷⁶ As a result of the restraints, Ms. Nelson suffers

⁶⁷ *Archer v. Dutcher*, 733 F.2d 14, 16 (2d Cir. 1984).

⁶⁸ *Id.* at 16.

⁶⁹ *Id.*

⁷⁰ 849 F.2d 1117 (8th Cir. 1988).

⁷¹ *Id.* at 1120.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1123; *see also* *Pool v. Sebastian Cty.*, 418 F.3d 934, 944 (8th Cir. 2005) (stating that it would have been obvious to even a layperson that a pregnant prisoner complaining of bleeding and extreme pain from cramping, which inhibited her ability to eat and shower, indicated that she needed medical attention); *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997) (stating that the nurse on duty's dismissal of the plaintiff's history of premature deliveries and failure to examine the plaintiff when she voiced her concerns showed the nurse's deliberate indifference towards and actual knowledge of the plaintiff's "serious medical need").

⁷⁵ 583 F.3d 522 (8th Cir. 2009).

⁷⁶ *Id.* at 526.

chronic pain in her now-deformed hips, which, according to her orthopedist, refuse to go “back into the place where they need to be.”⁷⁷ She can no longer play with her children, do anything athletic, sleep or lean on her left side, sit or stand for more than a short period of time, or have children.⁷⁸ She was a non-violent offender, imprisoned for writing bad checks.⁷⁹ The Eighth Circuit ultimately denied summary judgment for the defendant-officer, stating that shackling a pregnant inmate during childbirth has clearly been established as a violation of the Eighth Amendment.⁸⁰ The Sixth Circuit in *Villegas v. Metropolitan Government of Davidson County*⁸¹ also found that shackling pregnant detainees in labor substantially endangers the expectant mother’s health and “offends contemporary standards of human decency such that the practice violates the Eighth Amendment’s prohibition against the ‘unnecessary and wanton infliction of pain.’”⁸²

2. D.C. and Ninth Circuits’ have found that inadequate medical care and shackling do not meet the deliberate indifference standard

Unlike the Second, Sixth, and Eighth Circuits, the D.C. and Ninth Circuits have concluded that inadequate medical care and shackling do not meet the deliberate indifference standard and, thus, do not violate detainees’ Eighth Amendment rights. In *Women Prisoners of D.C. v. District of Columbia*,⁸³ female prisoners sued the District of Columbia for violating their Eighth Amendment rights by providing them with inadequate medical care, shackling them, and sexually abusing them.⁸⁴ The trial court had ruled in favor of the female inmates, but the D.C. Circuit reversed it. It rejected the provision in the district court’s order requiring that prisons have written protocols regarding prenatal care, reasoning that the district court lacked supplemental jurisdiction.⁸⁵ It also rejected the district court’s order to hire a midwife to aid prisoners,

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 533. *See also* *Brawley v. State of Wash.*, 712 F. Supp. 2d 1208, 1221 (W.D. Wash. 2010) (denying summary judgment because shackling a prisoner in labor has clearly been established as an Eighth Amendment violation).

⁸¹ 709 F.3d 563 (6th Cir. 2013).

⁸² *Id.* at 574. *See also* *Villegas v. Davidson Cty.*, 789 F. Supp. 2d 895, 919 (M.D. Tenn. 2011) (holding that shackling a pregnant detainee in the final stages of labor shortly before birth and during the post-partum recovery and denying breast-pump post-partum infringes the Eighth Amendment).

⁸³ 93 F.3d 910 (D.C. Cir. 1996).

⁸⁴ *Id.* at 913.

⁸⁵ *Id.* at 932, 944.

to create a pre-natal clinic, and to provide for obstetrical examinations inside the detention facilities.⁸⁶ The D.C. Circuit also refused to declare the use of restraints on pregnant detainees unconstitutional and rejected the district court's standard.⁸⁷ The D.C. Circuit reasoned that courts have no experience running prisons, and, thus, they should defer to prison officials' judgments.⁸⁸

As recently as 2016, the Ninth Circuit has held that lack of prenatal necessities and shackling does not violate a prisoner's Eighth Amendment rights.⁸⁹ Specifically, the Ninth Circuit in *Mendiola-Martinez v. Arpaio*⁹⁰ held that the following did not violate the Eighth Amendment: the county's use of restraints on the prisoner during labor and postpartum recovery after a caesarian section, its failure to provide her with a breast pump, and its nutrition policy for pregnant inmates, even though the prisoner reports of being repeatedly hungry and having to drink water from the sink by her toilet.⁹¹

B. *Kingsley v. Hendrickson*: A Different Standard for Pretrial Detainees?

Despite courts commonly including the Eighth Amendment's deliberate indifference requirement in cases involving pretrial detainees, the Court recently expressed disagreement with this extension of the amendment. In particular, it rejected the idea that there is one deliberate indifference standard that should be applied to all § 1983 claims regardless of whether they are brought by convicted prisoners or pretrial detainees.

In *Kingsley v. Hendrickson*,⁹² a pretrial detainee brought an excessive force claim under the Due Process Clause of the Fourteenth Amendment. He alleged that officers, who had repeatedly asked him to remove the paper covering the light in his cell, used excessive force by handcuffing him, placing a knee in his back, slamming his head on concrete, and using a Taser on him.⁹³

The Court found that confinement conditions of a non-convicted detainee violate the Fifth and Fourteenth Amendments if they (1) impose some harm to [her] that either significantly exceed or are independent of the inherent discomforts of confinement and (2) are not reasonably

⁸⁶ *Id.* at 923.

⁸⁷ *Id.* at 931–32.

⁸⁸ *Id.*

⁸⁹ See generally *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016).

⁹⁰ 836 F.3d 1239 (9th Cir. 2016).

⁹¹ *Id.* at 1239, 1243.

⁹² 135 S. Ct. 2466 (2015).

⁹³ *Id.* at 2470.

related to a legitimate government objective or are excessive in relation to the legitimate governmental objective.⁹⁴ Courts then must objectively assess if there is a reasonable relationship between the government's conduct and a legitimate purpose.⁹⁵ Thus, the Court held that the detainee only needed to prove that the defendant's conduct, used purposely or knowingly against her, was *objectively* unreasonable, not that the defendant subjectively knew that the amount of force used was unreasonable or excessive.⁹⁶

The Court concluded the objective standard was the appropriate standard given its precedent. The Court has held that "pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"⁹⁷ It also has held that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment,"⁹⁸ which can include actions "taken with an 'expressed intent to punish.'"⁹⁹ However, *Bell* further explained that if pretrial detainees cannot show an express intent to punish, they can still win their case by demonstrating that the defendants' acts or omissions are not "rationally related to a legitimate non-punitive governmental purpose" or that the actions "appear excessive in relation to that purpose."¹⁰⁰

Kingsley, though, did not address whether its objective standard applies to only excessive-force claims or to all Fourteenth-Amendment claims made by pretrial detainees. Courts have since debated this question. Thus far, the Ninth, Second, and Seventh Circuits have expressly found that the objective standard set forth in *Kingsley* applies to pretrial detainees' other Fourteenth Amendment claims while the Eighth, Eleventh, and Fifth Circuits have declined to make such an extension.

1. The Ninth, Second, and Seventh Circuits' extension of the *Kingsley* objective standard

The Ninth Circuit was the first court of appeals to review *Kingsley*. In *Castro v. County of Los Angeles*,¹⁰¹ a pretrial detainee banged on his cell's window to alert jail officials that the inmate placed in the same

⁹⁴ *Id.* at 2473–74.

⁹⁵ *Id.* at 2469.

⁹⁶ *Id.* at 2472–73.

⁹⁷ *Id.* at 2475 (internal citations omitted).

⁹⁸ *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

⁹⁹ *Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

¹⁰⁰ *Id.* at 561.

¹⁰¹ *Castro v. Cty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 831 (2017).

cell was combative and would likely harm him.¹⁰² Officials ignored him, though, and his cellmate ultimately beat and severely injured him.¹⁰³ He brought a § 1983 action, alleging violations of his Fourteenth Amendment right to be protected from the harm inflicted by other inmates.¹⁰⁴

The Ninth Circuit held that the objective standard of *Kingsley* was not limited to excessive-force claims, extending it to pretrial detainees' Fourteenth Amendment failure-to-protect claims.¹⁰⁵ It reasoned that the federal right and injuries suffered are the same for excessive force and failure-to-protect claims.¹⁰⁶ It also recognized that both claims arise under the Due Process Clause of the Fourteenth Amendment, not the Cruel and Unusual Punishment Clause of the Eighth Amendment, especially given pretrial detainees' different status than convicted prisoners.¹⁰⁷ In addition, it observed that the Court in *Kingsley* did not confine its holding to "force" but rather stated that a pretrial detainee need only provide objective evidence that "the challenged governmental action" is unreasonably related to a legitimate government goal or is excessive in relation to its objective.¹⁰⁸ Using an objective inquiry to evaluate liability under § 1983, the Ninth Circuit affirmed the jury verdict in favor of the detainee.¹⁰⁹ It found sufficient evidence that the officers and the County knew their actions and policies posed a substantial risk of serious harm to the detainee but were deliberately indifferent to that risk.¹¹⁰

After the *Castro* decision, the Second Circuit also extended *Kingsley*, applying its holding to pretrial detainees' conditions of confinement complaints under the Fourteenth Amendment.¹¹¹ In so doing, the Second Circuit overruled its past decision in *Caiozzo v. Koreman*,¹¹² which used a subjective test when evaluating a medical-care claim, given that the Court in *Wilson*¹¹³ found medical care to be a condition of confinement.¹¹⁴ By the next year, the Second Circuit, like the Ninth Circuit,

¹⁰² *Id.* at 1064.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1060.

¹⁰⁵ *Id.* at 1070–71.

¹⁰⁶ *Id.* at 1069–70.

¹⁰⁷ *Id.* (citing to *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015)).

¹⁰⁸ *Id.* at 1070 (citing to *Kingsley*, 135 S.Ct. at 2473–74).

¹⁰⁹ *Id.* at 1060. The Ninth Circuit has since applied the *Kingsley* holding to a detainee's medical-need claim. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018).

¹¹⁰ *Id.*

¹¹¹ *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2nd Cir. 2017).

¹¹² 581 F.3d 63 (2nd Cir. 2009).

¹¹³ *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

¹¹⁴ *Caiozzo*, 581 F.3d at 66, 68, 70–72.

used the *Kingsley* objective standard in a case involving a claim of deliberate indifference to a serious medical need.¹¹⁵ The Second Circuit specifically asked “whether a ‘reasonable person’ would appreciate the risk to which the detainee was subjected.”¹¹⁶

The Seventh Circuit most recently heard *Miranda v. County of Lake*,¹¹⁷ concerning the death of a pretrial detainee, an Indian national, due to severe dehydration at a county jail and her Estate’s claims under the Fourteenth Amendment’s Due Process Clause for inadequate medical care.¹¹⁸ The Seventh Circuit held that only the objective unreasonableness standard of *Kingsley* applied to pretrial detainees’ medical-care claims brought under the Fourteenth Amendment.¹¹⁹ The Seventh Circuit first reasoned that the Supreme Court has repeatedly instructed courts to recognize pretrial detainees’ different status as compared to convicted prisoners’ status.¹²⁰ Second, it noted that the Court has found that the analysis under the Eighth Amendment is “not coextensive” with that of the Due Process Clause given the different language and nature of the claims.¹²¹ To the Seventh Circuit, the Court’s reasoning in *Kingsley* did not indicate that its holding applied only to excessive-force claims but rather that it included other claims arising under the Fourteenth Amendment.¹²² Thus, the district court improperly instructed the jury on intent; a jury, based on the evidence that the jail doctors knew Gomes was not eating or drinking, could have found that the defendants purposefully, knowingly, or with reckless disregard chose to observe Gomes in jail rather than take her to a hospital.¹²³

2. The Fifth, Eleventh and Eighth Circuits’ refusal to extend the *Kingsley* objective standard

The Fifth, Eleventh, and Eighth Circuits, on the other hand, have held that *Kingsley* applies only to pretrial detainees’ Fourteenth Amendment claims alleging excessive-force. Thus, they have limited the case to its facts.

¹¹⁵ *Bruno v. City of Schenectady*, 727 F. App’x 717, 720 (2d Cir. 2018).

¹¹⁶ *Id.*

¹¹⁷ 900 F.3d 335 (7th Cir. 2018).

¹¹⁸ *Id.* at 335, 346.

¹¹⁹ *Id.* at 352.

¹²⁰ *Id.* at 350, 352–53 (citing to *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2475 (2015)).

¹²¹ *Miranda*, 900 F.3d at 352 (citing *Kingsley*, 135 S.Ct. at 2475 and *Currie v. Chhabra*, 728 F.3d 626, 630 (7th Cir. 2013) (“[D]ifferent constitutional provisions, and thus different standards, govern depending on the relationship between the state and the person in the state’s custody.”)).

¹²² *Id.*

¹²³ *Id.* at 354.

In *Alderson v. Concordia Parish Correctional Facility*,¹²⁴ a pretrial detainee was stabbed and stomped by two inmates.¹²⁵ It took several complaints by the detainee and his family about his safety and medical condition for an officer to acknowledge his attack and take him to the hospital, where he was diagnosed with multiple broken ribs and numerous puncture wounds to his head, face, and body.¹²⁶ The plaintiff brought a § 1983 claim, alleging that the correctional facility provided him with “inadequate security and impermissibly delayed [his] medical care.”¹²⁷ The Fifth Circuit found that court precedent applied the subjective standard in cases decided after *Kingsley*; thus, the circuit’s rule of orderliness mandated that they continue to do so.¹²⁸ The Fifth Circuit next asserted that, at the time, only the Ninth Circuit had extended the objective standard of *Kingsley*.¹²⁹ Finally, it concluded that, even if *Kingsley* mandated the adoption of the objective standard for failure-to-protect claims, the plaintiff did not make such a claim.¹³⁰ Thus, under the subjective standard, the Fifth Circuit found that the detainee did not sufficiently demonstrate that officials acted with deliberate indifference to a substantial risk of serious harm to the detainee when they incorrectly housed him with department of correction inmates, though there was some evidence that the officer acted with deliberate indifference to his serious medical needs.¹³¹

In *Nam Dang, by & through Vina Dang v. Sheriff, Seminole County*,¹³² the Eleventh Circuit heard a case in which a pretrial detainee developed meningitis in jail, which resulted in him having strokes that permanently injured him.¹³³ The plaintiff alleged that he received constitutionally deficient medical care due to deliberate indifference.¹³⁴ He further argued that he need not show deliberate difference due to *Kingsley*.¹³⁵ The Eleventh Circuit, though, held there was no need to decide whether the objective standard applied.¹³⁶ *Kingsley*

¹²⁴ 848 F.3d 415 (5th Cir. 2017).

¹²⁵ *Id.* at 418.

¹²⁶ *Id.*

¹²⁷ *Id.* at 415.

¹²⁸ *Id.* at 419 n.4 (citing *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996)). *See also* *Estate of Henson v. Wichita Cty.*, 795 F.3d 456 (5th Cir. 2015).

¹²⁹ *Alderson*, 848 F.3d at 419 n.4.

¹³⁰ *Id.*

¹³¹ *Id.* at 420–21.

¹³² 871 F.3d 1272 (11th Cir. 2017).

¹³³ *Id.* at 1276–78.

¹³⁴ *Id.* at 1276.

¹³⁵ *Id.* at 1279 n.2.

¹³⁶ *Id.*

only involved an excessive force claim.¹³⁷ Moreover, the decision would not help the detainee even if it could be applied because the Court noted that “liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.”¹³⁸ And, to the Fifth Circuit, the jail nurse’s failure to treat Dang’s symptoms and her misdiagnosis was, at most, negligence.¹³⁹

The Eighth Circuit in *Whitney v. City of St. Louis*¹⁴⁰ stated that *Kingsley* did not apply because the detainee brought a deliberate indifference case rather than excessive force case.¹⁴¹ Under the subjective standard, then, the Eighth Circuit found that the father of a pretrial detainee who hanged himself in a jail cell did not sufficiently allege that the officer knew of the detainee’s suicidal thoughts or that the municipal policy was deliberately indifferent.¹⁴²

Therefore, while the Fifth, Eleventh, and Eighth Circuits refuse to read *Kingsley* as applying to claims other than excessive-force, the Ninth, Second, and Seventh Circuits apply *Kingsley*’s objective standard to other Fourteenth Amendment claims. Given the Fourteenth-Amendment claims likely to be brought by pregnant detainees in light of the mistreatment and inadequate medical attention in detention centers, courts will have to decide which of the circuits to follow.

III. INTERNATIONAL LAW: THE RIGHTS TO DIGNITY AND TO BE FREE FROM CRUEL, INHUMANE PUNISHMENT

International law has also addressed the treatment of prisoners. Most notably, international law bars cruel and inhumane punishment through various treaties and U.N. General Assembly Resolutions. Specifically, the Universal Declaration of Human Rights (“UDHR”),¹⁴³ the International Covenant on Civil and Political Rights (“ICCPR”), the American Convention on Human Rights (“American Convention”), and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) all state that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment.”¹⁴⁴

The CAT defines torture as:

¹³⁷ *Id.*

¹³⁸ *Id.* (citing to *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472 (2015)) (emphasis in original).

¹³⁹ *Dang*, 871 F.3d at 1276–78, 1279 n.2.

¹⁴⁰ 887 F.3d 857 (8th Cir. 2018).

¹⁴¹ *Id.* at 860 n.4.

¹⁴² *Id.* at 857.

¹⁴³ The U.S. is a signatory to the UDHR.

¹⁴⁴ See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171; Organization of American States, American Convention on Human Rights, art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 143.

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁴⁵

The CAT also bars “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁴⁶ The CAT, ratified by the United States in 1994, mandates that all State Parties “shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.”¹⁴⁷

The ICCPR, which the United States signed in 1977 and ratified in 1992, further requires that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹⁴⁸ The American Convention, signed by the United States, similarly mandates that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”¹⁴⁹

The United Nations has also developed rules prohibiting shackling specifically.¹⁵⁰ For example, Rule 24 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, otherwise known as the Bangkok Rules, expressly states that “instruments of restraint shall *never* be used on women during labour, during birth and immediately after birth.”¹⁵¹ The United Nations Standard Minimum Rules for the Treatment of Prisoners, otherwise known as the Mandela Rules, bars the use of restraints as punishment, though it does acknowledge their use for clear, narrow exceptions.¹⁵²

¹⁴⁵ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁴⁶ *Id.* at art. 16(1).

¹⁴⁷ *Id.* at art. 2(1).

¹⁴⁸ International Covenant on Civil and Political Rights, *supra* note 144, at art. 10.

¹⁴⁹ American Convention on Human Rights, *supra* note 144, at art. 5(2).

¹⁵⁰ These rules are included in United Nations General Assembly Resolutions. They are not signed and ratified by each individual Member State but rather are adopted by the General Assembly, which consists of one representative from each Member State. For more information, see *General Assembly of the United Nations*, UNITED NATIONS (2018), <http://www.un.org/en/ga/> [<https://perma.cc/57DC-NRL8>].

¹⁵¹ G.A. Res. 65/229, ¶ 24 (Dec. 21, 2010) (emphasis added).

¹⁵² G.A. Res. 70/175, U.N. Standard Minimum Rules for the Treatment of Prisoners (Dec. 17,

Since the inception of these treaties, the United Nations Human Rights Committee has clarified their meaning. For example, it found the goal of Article 7 of the ICCPR, expressing freedom from torture or inhumane treatment, was to “protect both the dignity and the physical and mental integrity of the individual.”¹⁵³

The United Nations Human Rights Committee further examined Article 7 in *Mellet v. Ireland*.¹⁵⁴ The Committee found that Ireland, by prohibiting and criminalizing abortion and preventing Mellet from accessing medical care, subjected a highly vulnerable pregnant woman to severe physical and mental suffering.¹⁵⁵ The committee pointed out that her anguish could have been avoided if the state had given her proper health care.¹⁵⁶ As a result, the state violated, among other rights, her right to freedom from cruel, inhuman or degrading treatment under Article 7 of the ICCPR.¹⁵⁷ The Committee noted that the fact that an act is legal under domestic law does not stop it from violating Article 7; the article is absolute and without exception, thus leaving no room for any excuses.¹⁵⁸

The United Nations Human Rights Committee, along with the United Nations Committee Against Torture and United Nations Special Rapporteurs on Torture and on Violence against Women, have also advocated for all States to stop using restraints on women during their pregnancy and while they are recovering thereafter.¹⁵⁹ For example, the Committee against Torture expressed concern about the United States’ treatment of female detainees, especially its shackling women detainees during labor and use of “gender-based humiliation,” and requested

2015).

¹⁵³ U.N. Human Rights Comm., General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 2, U.N. Doc. HRI/Gen/1/Rev.1 (1994), <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm> [<https://perma.cc/c362H-PUFT>].

¹⁵⁴ Human Rights Committee, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

¹⁵⁵ *Id.* ¶ 7.4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 7.6.

¹⁵⁸ *Id.* at 7.4, 7.6.

¹⁵⁹ Amnesty International, *Abuse of Women in Custody: Sexual Misconduct and the Shackling of Pregnant Women* at 2 (2001); U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 41, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008); Comm. on Human Rights, *Report of the Mission to the United States of America on the Issue of Violence against Women in State and Federal Prisons*, ¶¶ 53–54, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999); U.N. Human Rights Council, *Report of the Special Rapporteur on Violence against Women, Its Causes, and Consequences: Ms. Rashida Manjoo: Mission to the United States of America*, ¶ C(h), U.N. Doc. A/HRC/17/26/Add.5 (Jun. 6, 2011).

that the State adopt the necessary policies to bring it back into “conformity with international standards.”¹⁶⁰

IV. COURTS SHOULD FOLLOW THE NINTH, SECOND, AND SEVENTH CIRCUITS’ INTERPRETATION OF *KINGSLEY*

In light of the mistreatment of pregnant immigrant detainees, which has been exacerbated due to the new ICE directive allowing for the detainment of pregnant women in their first and second trimesters, pregnant immigrant detainees will most likely bring more § 1983 claims, alleging inadequate conditions of confinement and delayed medical care due to deliberate indifference. When faced with these claims, courts should mirror the Ninth, Second, and Seventh Circuits by applying the objective standard set forth in *Kingsley* to all Fourteenth Amendment claims brought by pretrial detainees, such as failure-to-protect and serious medical needs claims.

First, such a standard acknowledges the different protections that pretrial detainees are afforded. Indeed, the Court has held time and again that pretrial detainees have not been charged with anything and thus cannot be punished.¹⁶¹ Immigrant detainees, such as pregnant women held in detention centers, might be held to an even higher standard than pretrial criminal detainees.¹⁶² Thus, courts around the country should use a standard that does not make it harder for pretrial detainees to receive the protections that the Court has already held they are due. Rather, it should be enough that a reasonable person could find that the conditions or lack of adequate medical care non-convicted person was unreasonable.¹⁶³

In addition, the objective standard might better adhere to constitutional standards given that it does not engage in the subjective deliberate indifference standard of an Eighth Amendment analysis. Indeed,

¹⁶⁰ U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 33, U.N. Doc. CAT/C/USA/CO/2 (2006).

¹⁶¹ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979).

¹⁶² See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Although they have not come to an official consensus, courts have repeatedly held that immigration detainees are afforded at least the same due process protections as pretrial criminal detainees. See *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000); *Dahlan v. Dep’t of Homeland Sec.*, 215 F. App’x 97, 100 (3d Cir. 2007). But see *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004). For more information, see Tom Jawetz, *Litigating Immigration Detention Conditions*, ACLU NATIONAL PRISON PROJECT (2008), https://law.ucdavis.edu/alumni/alumni-events/files/mcle-files/jawetz_detention_conditions.pdf [https://perma.cc/VTY4-TWB2].

¹⁶³ See Kyla Magun, *A Changing Landscape for Pretrial Detainees? The Potential Impact of Kingsley v. Hendrickson on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2085 n.169 (2016) (quoting Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 571 (2008) (“A showing of objective deliberate indifference, combined with some showing of more than de minimis injury, shocks the conscience and thus should sustain a substantive due process claim.”)).

the Court has repeatedly stated that the Eighth Amendment analysis is not the same as the Due Process Clause analysis; they differ in language and in the nature of their claims.¹⁶⁴ Thus, the objective standard could veer courts away from intertwining the analyses of the Eighth Amendment and Due Process Clause, which in some courts has proved detrimental to detainees' cases.¹⁶⁵

The *Kingsley* decision is also broadly worded. As the Ninth Circuit pointed out, *Kingsley*'s holding is not limited to "force."¹⁶⁶ Instead, the Court asserted that pretrial detainees need only provide objective evidence that "the challenged governmental action" is unreasonably related to a legitimate government goal or is excessive in relation to its objective.¹⁶⁷ Thus, this wording indicates that the Court meant for its holding to apply to all Fourteenth Amendment claims brought by detainees. This especially makes sense in light of the fact that the injuries, both physical and constitutional, suffered in excessive force claims and other Fourteenth Amendment claims are the same.¹⁶⁸

Furthermore, evidence exists that another circuit might join the Ninth, Second, and Seventh Circuit interpretation of *Kingsley*—the Sixth Circuit. Despite both parties' failure to raise arguments concerning *Kingsley*, the Sixth Circuit in *Richmond v. Huq*¹⁶⁹ acknowledged the change in Fourteenth Amendment deliberate indifference jurisprudence that "calls into serious doubt" whether detainees such as the plaintiff are required to demonstrate defendants' subjective awareness, and wanton disregard, of detainees' serious medical conditions.¹⁷⁰ This reading of *Kingsley* mirrors the objective, reasonable person standard set forth in the Ninth, Second, and Seventh Circuits and, thus, shows that the Sixth Circuit is inclined to follow their lead.

The Fifth Circuit might also include proponents of the *Kingsley* objective standard. Although Judge Graves in *Alderson* concurred in part, he encouraged the Fifth Circuit to reevaluate applying the subjective standard to pretrial detainees' other Fourteenth Amendment claims given the *Kingsley* holding.¹⁷¹

¹⁶⁴ *Miranda*, 900 F.3d at 352 (citing to *Kingsley*, 135 S.Ct. at 2475 and to *Currie v. Chhabra*, 728 F.3d 626, 630 (7th Cir. 2013) ("[D]ifferent constitutional provisions, and thus different standards, govern depending on the relationship between the state and the person in the state's custody.")).

¹⁶⁵ See *Women Prisoners of D.C. v. District of Columbia*, 93 F.3d at 931–32; *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1243 (9th Cir. 2016).

¹⁶⁶ *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 831 (2017).

¹⁶⁷ *Id.* (citing to *Kingsley*, 135 S.Ct. at 2473–74).

¹⁶⁸ *Id.*

¹⁶⁹ 885 F.3d 928 (6th Cir. 2018).

¹⁷⁰ *Id.* at 938 n.3.

¹⁷¹ *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 424–25 (5th Cir. 2017) (Graves,

A. Counter-Arguments to Emulating the Ninth, Second, and Seventh Circuits

Critics might argue that Fourth Circuit offers support to the Eighth, Eleventh, and Fifth Circuits' interpretation of *Kingsley*. For example, the Fourth Circuit in *Duff v. Potter*¹⁷² still examined a detainee's inadequate medical treatment claim under the deliberate indifference standard while analyzing his excessive-force claim under the objective reasonableness standard. But the Fourth Circuit, unlike the Sixth Circuit, did not expressly contemplate the application of *Kingsley* to other Fourteenth Amendment claims of pretrial detainees. Moreover, after *Kingsley*, the Seventh Circuit still applied the deliberate indifference standard under the Eighth Amendment to inadequate medical care claims before joining the Ninth and Second Circuits with its holding in *Miranda v. County of Lake*, which leaves it open for the Fourth Circuit to follow the same path.¹⁷³ Therefore, it is hard to say that the Fourth Circuit supports the Eighth, Eleventh, and Fifth Circuits' holdings.

In addition, supporters of the Eighth, Eleventh, and Fifth Circuits might contend that the application of *Kingsley* to claims other than those of excessive force is in conflict with the Court's decision in *Daniels v. Williams*.¹⁷⁴ In that case, the Court overruled *Parratt v. Taylor*¹⁷⁵ in part and concluded that negligent conduct does not offend the Due Process Clause.¹⁷⁶ Opponents of the objective-reasonableness standard might be concerned that *Kingsley*'s objective-reasonableness standard will allow negligence to be sufficient for liability and, thus, will conflict with *Daniels* by constitutionalizing medical malpractice claims.

Kingsley, though, does not hold that negligence suffices for liability. Rather it stated that courts must consider two separate state-of-mind questions. First, they must inquire into the defendant's state of mind concerning his physical actions—"i.e., his state of mind with respect to the bringing about of certain physical consequences in the world."¹⁷⁷ Then they must determine the defendant's state of mind "with respect to whether this use of force was 'excessive,'" using an objective standard and thus ensuring the defendant's state of mind is not a matter that a plaintiff has to prove.¹⁷⁸ Unlike the second objective inquiry, then, the

J., specially concurring in part).

¹⁷² 665 F. App'x 242, 244–45 (4th Cir. 2016).

¹⁷³ See, e.g., *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n.31 (7th Cir. 2016).

¹⁷⁴ 474 U.S. 327 (1986).

¹⁷⁵ 451 U.S. 527 (1981).

¹⁷⁶ *Daniels*, 474 U.S. at 330–31. See *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc), cert. denied, 137 S.Ct. 831 (2017).

¹⁷⁷ *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015).

¹⁷⁸ *Id.*

first question asks courts to decipher whether defendants have acted purposefully, knowingly, or recklessly when they thought about the consequences of their actions concerning the pretrial detainee.¹⁷⁹ The Ninth Circuit and other courts of appeals, upon hearing detainees' claims, have acknowledged that *Kingsley* requires a detainee to “prove more than negligence but less than subjective intent—something akin to reckless disregard.”¹⁸⁰

B. The Effect of the Objective Standard on Pregnant Immigrant Detainees

In addition to adopting Ninth, Second, and Seventh Circuit precedent, courts should also interpret *Kingsley* to apply the objective standard to all Fourteenth Amendment, § 1983 claims of pretrial detainees because it will likely allow pregnant immigrant detainees to be more successful in their serious medical need, failure-to-protect, and conditions of confinement claims. Rather than show actual knowledge, pregnant immigrant detainees would only have to show that, under the circumstances, detention officials and staff should have known they needed medical attention. It seems that this standard would prove fruitful in pregnant immigrant detainees' cases given that most, if not all, claim that at least one official was alerted to their condition, their discomfort, or their bleeding and did nothing to alleviate it.¹⁸¹

In fact, under the *Kingsley* holding, courts could find that the inhumane treatment of pregnant detainees violates their Fifth and Fourteenth Amendments. First, these practices of endangering women's health exceeds *and* is independent of the inherent discomforts of confinement.¹⁸² It does not serve a legitimate penological purpose to allow a pregnant woman to miscarry in a jail cell or to provide such poor conditions that she develops depression.¹⁸³ In addition, precautionary measures such as shackling might be related to an often-upheld governmental interest in ensuring safety but ultimately are excessive, especially given that a guard accompanies a detainee everywhere outside her cell, including the delivery room.¹⁸⁴

¹⁷⁹ See *Miranda v. Cty. of Lake*, 900 F.3d 335, 353 (7th Cir. 2018).

¹⁸⁰ *Castro*, 833 F.3d at 1071. See also *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 36, 36 n.16.

¹⁸¹ See generally American Civil Liberties Union et al., *supra* note 2.

¹⁸² *Kingsley*, 135 S.Ct. at 2473–74.

¹⁸³ See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

¹⁸⁴ The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 5.

It will also likely be easier for a detainee to hold officials accountable under the objective deliberate indifference standard given the decisions of the circuit split. Whereas every circuit that heard cases using the objective standard rendered judgment in favor of detainees, the other circuit courts, i.e. the Eleventh, Eighth, and Fifth, did not despite officials knowing about detainees' injuries or illnesses and failing or delaying to give them the treatment they are afforded under the Fourteenth Amendment.¹⁸⁵

Immigrant detainees in particular have already had some success in gaining judgments in their favor. For example, the Ninth Circuit, using the objective deliberate indifference standard, upheld a district court's order to provide clean bedding, personal hygiene accommodations, and medical screenings as well as monitor compliance and ensure implementation.¹⁸⁶

The objective standard would not only provide a more favorable standard for pretrial detainees, but it could also change current policies concerning pregnant detainees. As will be discussed in Section VI below, Congress has left some loopholes in its current and pending legislation that allows for detention officials and medical staff to exercise their discretion when making decisions regarding pregnant detainees' medical treatment or shackling.¹⁸⁷ This discretionary standard has rendered its laws null and void because staff and officials often abuse the standard and have continued to mistreat and shackle pregnant inmates.¹⁸⁸ If courts use the objective standard when evaluating pretrial detainees' claims, they could not only discontinue the deference given to detention officials¹⁸⁹ but also signal to Congress and state legislatures that making allowances for officials' discretion is no longer viable. Detention staff also might refrain from mistreatment or act with more diligence, knowing that the court will look at their actions from the perspective of a reasonable person rather than simply looking at their version of events.

¹⁸⁵ See *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 418 (5th Cir. 2017); *Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1276–78 (11th Cir. 2017); *Whitney v. City of St. Louis*, 887 F.3d 857, 861 (8th Cir. 2018).

¹⁸⁶ *Doe v. Kelly*, 878 F.3d 710, 721–25 (9th Cir. 2017).

¹⁸⁷ See the discussion of the First Step Act and the Stop Shackling Act in Section VI below.

¹⁸⁸ See generally *American Civil Liberties Union et al.*, *supra* note 2.

¹⁸⁹ See *Women Prisoners of D.C. v. District of Columbia*, 93 F.3d 910, 931–32 (D.C. Cir. 1996).

V. COURTS SHOULD USE INTERNATIONAL LAW AS PERSUASIVE AUTHORITY TO SUPPORT THEIR ADOPTION OF THE OBJECTIVE STANDARD

Given the current circuit split, courts should refer to international law as persuasive authority.¹⁹⁰ Upon reviewing international law, they will find that ICE policies and practices violate pregnant detainees' rights to freedom from cruel, inhuman treatment, to dignity, and to be treated with humanity. Given this clear contravention of the ICCPR, the CAT, the American Convention, the UDHR, the Bangkok Rules, and the Mandela Rules, courts might be more persuaded to follow the examples of the Seventh, Ninth, and Second Circuits and extend the *Kingsley* decision given that they are more consistent with the international law approach.

As aforementioned, the ICCPR, the CAT, the American Convention, and the UDHR prohibit cruel, inhuman or degrading treatment or punishment.¹⁹¹ The treatment, especially officials' inadequate attention to pregnant detainees' miscarriages, clearly violates this prohibition. Indeed, like *Mellet*, detention officials have prevented or delayed highly vulnerable pregnant women from receiving medical care and contributed to their mental and physical pain, which could have been avoided if they had chosen to pay attention to detainees' needs.¹⁹² Thus, similar to Ireland, the United States has violated detainees' right to freedom from cruel, inhuman or degrading treatment.

Furthermore, the pain and suffering that pregnant detainees have reported¹⁹³ falls within, at the very least, the CAT definition of "cruel, inhuman or degrading treatment."¹⁹⁴ Specifically, pregnant detainees have suffered both physically, receiving gashes from shackles and enduring miscarriages due to lack of medical attention, and mentally, suffering from stress, anxiety, and depression brought on by detention centers' conditions and re-traumatization.¹⁹⁵ The anguish has also been inflicted and acquiesced by officials given their refusal to acknowledge

¹⁹⁰ See Sichel, *supra* note 26, at 237–239 (describing in detail how international human rights law is persuasive authority and citing to federal cases that have used international law as persuasive authority).

¹⁹¹ See *e.g.*, G.A. Res. 217 (III) A, *supra* note 144; International Covenant on Civil and Political Rights art. 7, *supra* note 144; American Convention on Human Rights, art. 5(2), *supra* note 144.

¹⁹² See Human Rights Committee, *supra* note 154.

¹⁹³ See *generally* O'Connor, *supra* note 1; American Civil Liberties Union et al., *supra* note 2.

¹⁹⁴ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 145, at art. 16(1).

¹⁹⁵ This also contravenes Article 7 of the ICCPR in that it does not "protect both the dignity and the physical and mental integrity of the individual." U.N. Human Rights Committee, *supra* note 153.

or their dismissal of women's cries for help, profuse bleeding, and obvious need for medical treatment.

The continued shackling of pregnant detainees also violates the international prohibitions against torture and inhuman treatment, Rule 24 of the Bangkok Rules,¹⁹⁶ and the Mandela Rules.¹⁹⁷ Indeed, the U.S. has not complied with treaties' requirements that it implement domestic mechanisms to prevent such mistreatment.¹⁹⁸ The UN Human Rights Committee, the UN Committee against Torture, and the UN Special Rapporteurs on Torture and on Violence Against Women¹⁹⁹ have repeatedly denounced this inaction, asserting that the United States has failed to uphold modern standards of decency.²⁰⁰

It is also apparent that detention centers have been violating pregnant detainees' rights to dignity and to be treated with humanity under the ICCPR and the American Convention.²⁰¹ As the Eighth Circuit insinuated, it is quite obvious that a woman bleeding out in her cell is indication that she needs medical attention.²⁰² Yet detention officers and medical staff continue to ignore women's needs, such as when they left E lying in a pool of her blood for eight days or when they fail to inquire about detainees' mental health, especially when their pregnancies are a result of rape.²⁰³ Anyone can observe that such mistreatment of pregnant detainees does not afford them dignity and treats them as less than human.

¹⁹⁶ G.A. Res. 65/229, ¶ 24 (Dec. 21, 2010).

¹⁹⁷ G.A. Res. 70/175, U.N. Standard Minimum Rules for the Treatment of Prisoners (Jan. 8, 2016).

¹⁹⁸ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 145, at art. 2(1).

¹⁹⁹ See U.N. Human Rights Council, *supra* note 159.

²⁰⁰ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

²⁰¹ See International Covenant on Civil and Political Rights, *supra* note 144, at art. 10; American Convention on Human Rights, *supra* note 144, at art. 5(2).

²⁰² See *Pool v. Sebastian Cty.*, 418 F.3d 934, 935 (8th Cir. 2005).

²⁰³ See *O'Connor*, *supra* note 1.

Some critics might be skeptical about the role of international law²⁰⁴ in courts' interpretation of the United States Constitution.²⁰⁵ However, the Court has acknowledged the importance of the international consensus on basic human rights and the value of foreign laws when deciding the constitutionality of certain acts.²⁰⁶ For example, the Court determined that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."²⁰⁷ This interpretation of standards came from reviewing the laws and universal belief of "civilized people" and the "civilized nations of the world."²⁰⁸ *Estelle* further elaborated on "contemporary standards" of decency by asserting that the infliction of unnecessary suffering was inconsistent with them.²⁰⁹

Reviewing international law, then, should sway courts to extend the objective standard to claims beyond excessive-force. Indeed, international law does not review the official actor's intent but rather has

²⁰⁴ Given the universal acceptance that international law exists and the extensive research set forth in other academic articles on international law, this Comment will not spend time arguing that international law exists. Rather it will remind its readers that the United States Supreme Court has acknowledge international law since the 1800s. See *The Nereide*, 13 U.S. 388, 423 (1815) (citing to the "law of nations"); *The Paquete Habana*; *The Lola*, 175 U.S. 677, 700 (1900) ("[I]nternational law is part of our law."). For more on international law, especially in the context of female prisoners and detainees, see generally Sichel, *supra* note 26; Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71 (2000); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on Proportionality, Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 638 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1235 (1999).

²⁰⁵ See *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting) (criticizing the Court's use of international sources when interpreting Constitutional provisions such as the Eighth Amendment.); *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J. dissenting) ("Where there is not first a settled consensus among our own people, the view of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans . . ."). See also Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 301, 301 (1979) (stipulating that U.N. General Assembly Resolutions are not binding); Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 877 (1983) (arguing that General Assembly Resolutions are not "independent, authoritative sources of international law").

²⁰⁶ See e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (using comparative and international law to determine that capital punishment for the mentally ill is unconstitutional); *Lawrence v. Texas*, 539 U.S. 558, 573, 577 (2003) (relying on a European Court of Human Rights decision, *Dudgeon v. United Kingdom*, as guidance to find that a person's choice to engage in consensual homosexual activity is a protected liberty interest).

²⁰⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁰⁸ *Id.* at 101–04.

²⁰⁹ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). See also *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (finding other countries' practices and opinions to be "respected and significant confirmation of [their] own conclusions" and to show the "centrality of those same rights within [the United States'] own heritage of freedom").

made blanket prohibitions on mistreatment, inadequate medical care, and shackling of detainees and prisoners. Thus, courts should be persuaded that extending the objective standard would uphold international law and modern global standards of decency.

VI. CURRENT AND PENDING U.S. LEGISLATION DOES NOT APPLY TO OR PROPERLY PROTECT PREGNANT DETAINEES

Critics could argue that the First Step Act,²¹⁰ signed into law on December 21, 2018 by President Trump, bars shackling of pregnant women in addition to other significant criminal justice reforms.²¹¹ Thus, the Comment's aforementioned arguments are unnecessary.

But this prohibition on the use of restraints applies to prisoners who are pregnant or are recovering postpartum.²¹² For the purposes of the new law, "prisoners" only include people "sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense, or a person in the custody of the Bureau of Prisons (BOP), including a person in a Bureau of Prisons Contracted Facility."²¹³ In theory, this could extend to pregnant detainees given that ICE used five federal prisons to house approximately 1,600 immigrant detainees through temporary interagency agreements with the Bureau of Prisons.²¹⁴ Indeed, such June 2018 agreements, needed to accommodate the overflow of detainees in detention centers, are valid until June 2019.²¹⁵ In practice, however, no immigrant detainees have been put in federal prisons since November 2018.²¹⁶ Using federal prisons to house detainees was unprecedented and highly controversial given that most detainees were asylum seekers yet were treated like criminals.²¹⁷ Some attorneys have expressed doubt that federal prisons will be employed again given that using federal prisons to detain immigrants and asylum seekers violated

²¹⁰ First Step Act, S. 3649, 115th Cong. (2d Sess. 2018).

²¹¹ *Id.*; see also Lauren Kuhlik, *Congress Just Took a Big Step Toward Ending the Shackling of Pregnant Prisoners*, ACLU (Dec. 20, 2018), <https://www.aclu.org/blog/prisoners-rights/women-prison/congress-just-took-big-step-toward-ending-shackling-pregnant> [<https://perma.cc/LV38-K8P8>].

²¹² S. 3649, *supra* note 210.

²¹³ *Id.*

²¹⁴ James Doubek, *ICE to Send 1,600 Detainees to Federal Prisons*, NPR (June 8, 2018), <https://www.npr.org/2018/06/08/618182740/ice-to-send-1-600-detainees-to-federal-prisonsn> [<https://perma.cc/Q8GP-6KMQ>].

²¹⁵ Conrad Wilson, *ICE Appears to End Use of Federal Prisons for Immigrant Detainees*, NPR (Oct. 20, 2018), <https://www.npr.org/2018/10/20/658988420/ice-appears-to-end-use-of-federal-prisons-for-immigrant-detainees> [<https://perma.cc/76X9-HFJ9>].

²¹⁶ Conrad Wilson, *Final ICE Detainees Leave Federal Prison in Oregon*, OPB: OREGON PUBLIC Broadcasting (Nov. 28, 2018), <https://www.opb.org/news/article/ice-detainees-prison-oregon-release-final/> [<https://perma.cc/22XF-QQYB>].

²¹⁷ Conrad Wilson, *ICE Appears to End Use of Federal Prisons*, *supra* note 215.

their constitutional rights and that more facilities are now being built on the southern border.²¹⁸

Critics could also contend that recent legislation specifically bars the mistreatment and shackling of detainees. The first is the twenty-ninth amendment of the Homeland Security Appropriations Bill for Fiscal Year 2019, which limits the use of restraints on detainees who are pregnant or in post-partum recuperation.²¹⁹ The second piece of legislation is Senator Patty Murray's Senate Bill 3225, or the Stop Shackling and Detaining Pregnant Women Act, introduced on July 17, 2018.²²⁰ The Act purports to "ensure the humane treatment of pregnant women by reinstating the presumption of release and prohibiting shackling, restraining, and other inhumane treatment of pregnant detainees."²²¹ The bill, as of January 4, 2019, has made no movement within the Senate since its introduction.²²²

Despite the well-intentioned provisions of the amendment, the First Step Act, and the Stop Shackling Act, the legislation, if passed, will not protect pregnant women due to some very large loopholes: they allow for the detainment and shackling of women in "extraordinary circumstances."²²³ An appropriate official may individually determine that a pregnant detainee is a "serious flight risk" or "poses an immediate and serious threat to herself or others" and "cannot be prevented by other means."²²⁴ A medical or healthcare professional also has the authority to request that pregnant women be restrained in the interest of women's medical safety.²²⁵ These officials are to use the least restrictive restraints possible and may not use shackles during labor.²²⁶

While it may seem that this serves a compelling governmental interest, i.e. protecting others and the detainee from herself, it ends up harming pregnant detainees in practice. Indeed, despite past and current legislation, the discretion allotted to detention officers has allowed for the continuation of mistreatment and shackling of pregnant detainees, including during labor.²²⁷ The "least restrictive means" constraint

²¹⁸ *Id.*

²¹⁹ House Appropriations Committee, *Amendments Adopted to the Homeland Security Appropriations Bill for FY 2019*, HOUSE COMMITTEE ON APPROPRIATIONS, 36–7 (2018), <https://docs.house.gov/meetings/AP/AP00/20180725/108623/HMKP-115-AP00-20180725-SD022.pdf> [<https://perma.cc/DM72-ZQNG>].

²²⁰ Stop Shackling and Detaining Pregnant Women Act, S. 3225, 115th Cong. (2d Sess. 2018).

²²¹ *Id.*

²²² *Id.*

²²³ *See e.g.*, S. 3225, *supra* note 220.

²²⁴ *Id.*; S. 3649, *supra* note 210; House Appropriations Committee, *supra* note 219, at 36.

²²⁵ S. 3225, *supra* note 220; S. 3649, *supra* note 210; House Appropriations Committee, *supra* note 219, at 37.

²²⁶ *Id.*

²²⁷ *See e.g.*, Kuhlik, *supra* note 211; American Civil Liberties Union et al., *supra* note 2, at 3.

is ineffective given how easily officers circumvent, and thus abuse, the requirement; they can simply cite to their determination that the shackling was necessary.²²⁸ Detention staff also often lack proper education about the law and, thus, believe their mistreatment is not illegal.²²⁹ Detention officers and medical professionals' broad discretion and lack of education are compounded by the lack of oversight. The Trump administration's ICE directive disabled the reporting mechanisms that allowed outside organizations to supervise ICE's detention officers, thus ensuring that officials are not held accountable for unreasonable determinations.²³⁰ Therefore, the exceptions essentially nullify the prohibition.

Furthermore, the use of the extraordinary circumstances provision is unjustified given that, thus far, lack of restraints on pregnant women has not jeopardized anyone's safety. Pregnant detainees in civil detention have not been convicted of any crimes, or most notably, any violent crimes.²³¹ Rather they are usually seeking asylum due to violence in their home countries.²³² None of the states where shackling pregnant inmates is barred have reported that women in labor have escaped or

This behavior mirrors the continued shackling and mistreatment in state prisons despite state legislation banning the use of restraints and mistreatment. For example, Illinois, one of the earliest states to adopt anti-shackling laws, discovered rampant non-compliance years after legislation passed. See generally *Zaborowski v. Dart*, No. 08 C 6946, 2011 WL 6660999 (N.D. Ill. Dec. 20, 2011).

²²⁸ See e.g., Chris DiNardo, *Pregnancy in Confinement, Anti-Shackling Laws and the Extraordinary Circumstances Loophole*, 25 DUKE J. GENDER L. & POL'Y 271, 282–83 (2018).

²²⁹ See *id.*; Nina Liss-Schultz, *6 Years Ago, New York Banned the Shackling of Pregnant Inmates. So Why Are These Women Still Being Restrained?*, MOTHER JONES (Oct. 13, 2015), <http://www.motherjones.com/politics/2015/10/new-york-shackling-pregnant-inmates/#> [<https://perma.cc/DK6S-Y7FE>].

²³⁰ ICE Directive 11032.3: *Identification and Monitoring of Pregnant Detainees*, *supra* note 4; see also López, *supra* note 4.

²³¹ In comparison, the majority of imprisoned women have committed non-violent offenses. *Fact Sheet on Justice Involved Women in 2016*, NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN, 2 (2016), <https://cjinvolvedwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf> [<http://perma.cc/NJY9-GWEJ>].

²³² For example, all but one of the women included in the complaint filed by the ACLU *et al* were from the Northern Triangle (namely, El Salvador, Guatemala, and Honduras) and cited violence in their home countries as the reason for fleeing to the United States. American Civil Liberties Union *et al.*, *supra* note 2, at 5–12. Indeed, studies show that the current influx of unauthorized immigrants is mainly from the Northern Triangle, with 1.85 million arriving in 2016 alone due to the rampant homicide and extortion in their home countries. Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RESEARCH CENTER (Nov. 27, 2018), <http://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/> [<https://perma.cc/VF9H-92AU>]. The Northern Triangle countries are some of the most violent countries in the world; El Salvador, for example, is ranked as the world's most violent country not at war due to gang-related activities. Rocio Cara Labrador & Danielle Renwick, *Cen. Am.'s Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle#chapter-title-0-3> [<https://perma.cc/52Q5-X4TF>].

harmed themselves, the public, medical staff, or correctional officers.²³³ Armed officers also usually guard shackled women, staying in or around their delivery room, which many argue is adequate to protect all—doctors, nurses, the mother, and the newborn—involved.²³⁴ Finally, women giving birth are in no condition to flee or strike out in violence. Given the ongoing abuses, detention, and lack of education and oversight, many organizations and individuals who work with and advocate for pregnant detainees doubt that the legislation will actually change officials' behavior, finding the acts to be unsustainable.²³⁵ To create long-term change, lawmakers must work on mechanisms to educate detention officers, enforce these measures, and allow for third-party supervision. Without such measures, legislation like the amendment, the First Step Act, and the Stop Shackling Act will continue to be ignored and, thus, rendered meaningless.

CONCLUSION

In light of the harsh policy the Trump administration had adopted, it will ultimately be up to the courts to ensure that pregnant immigrant detainees are treated humanely and with dignity. They can take a step towards ensuring this by following the example of the Ninth, Second, and Seventh Circuits and interpreting *Kingsley* to extend to Fourteenth Amendment claims other than excessive force. This determination is supported by precedent that bars the punishment of pretrial detainees and calls for scrutiny under the Fourteenth Amendment, not the Eighth Amendment. Furthermore, using international law as persuasive authority should convince courts to favor the Ninth, Second, and Seventh Circuits' interpretation of *Kingsley* given that the mistreatment of pregnant detainees is outlawed by several binding treaties, such as the ICCPR and the CAT, which view these human rights violations objectively, not subjectively.

If courts follow this interpretation of *Kingsley*, it will likely have a positive impact on pregnant detainees, making them more likely to have successful outcomes when bringing § 1983 claims and holding detention officials more accountable for their disregard for pregnant detainees' rights. Moreover, it could alter current policies and legislation by signaling to Congress that it must close the gaps that allow for deference to detention centers and its officers who abuse their discretion.

²³³ See e.g., Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES (Mar. 2, 2006) <http://www.nytimes.com/2006/03/02/national/02shackles.html> [<https://perma.cc/H7SL-EPBG>].

²³⁴ The ACLU Reproductive Freedom Project and ACLU National Prison Project, *supra* note 23, at 5.

²³⁵ *Id.*; Sathish, *supra* note 32.

With these actions, the United States will be closer to ensuring that another pregnant immigrant detainee does not say #MeToo.

Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform.

By D. Andrew Rondeau[†]

I. INTRODUCTION

Among the plethora of pervasive and long-observed women's issues suddenly exposed by the #MeToo Movement, nondisclosure agreements ("NDAs") have taken center stage. Indeed, it was the public revelation of Harvey Weinstein's unchecked behavior and NDA protections that thrust the #MeToo Movement into the national limelight.¹ Both the Weinstein² and Stormy Daniels³ stories perfectly illustrate the reasons behind such intense public concern. Wealthy, sophisticated parties can bind financially vulnerable victims to private avenues of relief that are unlikely to remedy the harm caused and likely to perpetuate patterns of sexual harassment and abuse.⁴ To anyone unfamiliar with American law, the idea that courts enforce these agreements smacks of blatant injustice. Even many familiar with American law strongly believe that something ought to change.

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¹ See Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?utm_term=.49c4af27ba54 [<https://perma.cc/8M5F-HN44>] (detailing the mass proliferation of #MeToo tweets after the Weinstein story broke).

² See Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/XTV5-CX6C>].

³ See Nina Burleigh, *Stormy Daniels Defies Trump to Join Chorus of Women Violating Nondisclosure Agreements about Sex, Abuse and Harassment*, NEWSWEEK (Mar. 8, 2018), <https://www.newsweek.com/stormy-trump-2016-election-sex-hush-money-835646> [<https://perma.cc/2HUB-HK88>].

⁴ For a quick overview of the argument, see Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 79–83 (2018).

The #MeToo Movement has made demand for reform more prevalent than ever. Empowered by their newfound public solidarity, some women have begun to breach the terms of their NDAs for the sake of the Movement and their own reparation.⁵ Legislators have scrambled to introduce new laws that either protect sexual harassment victims seeking to disclose information or prevent employers from hiding these stories from the public eye. As of February 2019, seven states have adopted bills that impose significant restrictions upon NDAs in the context of sexual harassment.⁶ In February 2018, the state attorneys general unanimously submitted a letter to Congress seeking a ban on arbitration agreements as pertained to workplace sexual harassment claims because of the “veil of secrecy” created by private arbitration and their related NDAs.⁷

As for the judiciary, Judge William Young of the District of Massachusetts cited #MeToo while radically rejecting a corporation’s “C” plea—a guilty plea where the prosecutor and the accused agree on punishment and avoid a jury—in favor of a public trial.⁸ He wrote:

Face it, if used in strong cases the “C” plea delegitimizes the central role of the trial judge. Any injustice rankles Americans, systemic injustice rankles them profoundly. Those of us who occupy the constitutional offices of the United States—in whatever branch we serve—must humbly acknowledge that there exists in America today a deep and pervasive sense of injustice.⁹

By 2017, #MeToo was already showing influence upon Judge Young’s decision-making in a case involving the systemic advantages granted to corporate defendants.¹⁰ It seems likely that other judges share his sentiment.¹¹

⁵ See Burleigh, *supra* note 3.

⁶ Antone Melton-Meaux, *Sex Harassment Settlements: A New Scarlet Letter for Employers?*, 75 BENCH & B. MINN. 18, 19 (2018); see also NAVEX Global, *The Sexual Harassment Legislation Watch List (State by State)*, JD SUPRA (Sept. 24, 2018), <https://www.jdsupra.com/legalnews/the-sexual-harassment-legislation-watch-24212/> [<https://perma.cc/3FSQ-8CLP>].

⁷ See Melton-Meaux, *supra* note 6, at 19.

⁸ See FED. R. CIV. P. 11(c)(1)(C).

⁹ *United States v. Aegerion Pharm., Inc.*, 280 F. Supp. 3d 217, 228 (D. Mass. 2017) (citing Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [<https://perma.cc/U4LX-F5LH>]) (other citations omitted).

¹⁰ *Id.*

¹¹ Cf. Linda L. Berger, Bridget J. Crawford & Kathryn M. Stanchi, *Using Feminist Theory to Advance Equal Justice under Law*, 17 NEV. L.J. 539, 539–40 (2017) (noting that judges were among the audience of the *U.S. Feminist Judgments Project: Writing the Law* conference, where experts discussed how “judges applying feminist perspectives could bring about change in the development of the law . . .”).

It is surprising, then, that discussion on this topic has been mostly confined to popular media sources like the *New Yorker*¹² and the *Atlantic*.¹³ Of course, legal scholars have denounced sexual harassment NDAs and proposed some legislative restrictions.¹⁴ However, none have investigated the substantive law that currently applies to NDAs in the context of sexual harassment, nor have they considered what the law implies for future legislation and whether it is likely to change. Part II of this Comment briefly reviews why the current legal regime fails to adequately protect future victims of workplace sexual harassment. Parts III and IV examine the judiciary's present treatment of NDAs and the underlying rationale behind that treatment, respectively. Part V weighs the challenges to reform imposed by current case law against the advantages of new legislation. Ultimately, this Comment argues that the intersection between nondisclosure and workplace sexual harassment presents thorny legal issues that are better resolved by legislation than by judicial reform.

II. THE NEED FOR REFORM

The purpose of this Comment is not to determine what specific NDA regulations will serve the best interests of workplace sexual harassment victims. Other scholars have already taken that question to task, and there is increasing agreement that moderate—but not severe—restrictions should be imposed.¹⁵ On the one hand, NDAs are intuitively favorable for employers, since reputational damage and legal costs could easily outweigh the costs of settlement with the victim.¹⁶ On the other, NDAs may also provide many advantages for victims themselves, such as a greater likelihood of compensation from their employer, a quicker end to the painful ordeal, and greater privacy given lingering stigmas surrounding workplace victims.¹⁷ Therefore, laws

¹² See, e.g., Farrow, *supra* note 2.

¹³ See, e.g., Hiba Hafiz, *How Legal Agreements Can Silence Victims of Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/> [<https://perma.cc/7UU7-U5EB>].

¹⁴ See generally, Ayres, *supra* note 4; Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 46 (2018).

¹⁵ See, e.g., Ayres, *supra* note 3; Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence around Abuse through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2515–16 (2018) (collecting articles).

¹⁶ Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314 (2018).

¹⁷ See Annie Hill, *Nondisclosure Agreements: Sexual Harassment and the Contract of Silence*, GENDER POL'Y REP. (Nov. 14, 2017), <http://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/> [<https://perma.cc/7VVW-LXWV>]; Elizabeth Grace, *Confidentiality of Settlements in Sexual Abuse Cases—Necessary Evil or Positive?*, LERNERS PERS. INJ. GROUP (Jan. 31, 2013), <https://lernerpersonalinjury.ca/articles/confidentiality-of-settlements-in-sexual-abuse-cases-necessary-evil-or-positive/> [<https://perma.cc/AN7Y-VZU3>].

that ban sexual harassment NDAs outright would deny victims a significant opportunity for confidential reparation. The debate continues, however, as to what these regulations should encompass and how far they should go to prevent such cases.¹⁸

Regardless, a majority of scholars have reached a powerful consensus: reform is necessary in order to prevent employers from crafting NDAs that do not amply compensate the victim or that enable perpetrators to continue patterns of sexual harassment and assault.¹⁹ While some settlement agreements boast six to seven-figure payoffs,²⁰ others offer far less for similar harm;²¹ and even for victims who receive large payments, money cannot fix their trauma.²² Meanwhile, the stringent confidentiality of unfettered NDAs has enabled powerful individuals to avoid detection, both by other employees and the Equal Employment Opportunity Commission (the EEOC), thus opening the possibility for decades of abuse across multiple victims.²³ Scholarly consensus and the plethora of victims' jarring stories collectively illustrate the need for change.

III. RELEVANT CASE LAW

Before delving into the law that governs sexual harassment NDAs, it is important to note that provisions that obligate nondisclosure go by a few other names, such as “non-assistance” or “confidentiality” provisions. For the purposes of this Comment, an “NDA” refers to any agreement that prevents one party from disclosing some type of information to a third party. Moreover, NDAs are difficult to examine in a vacuum. This is to say: they rarely come about on their own. As the case law will show, the vast majority of NDAs (or at least the ones that generate litigation) occur as components of three sources: settlements, employment contracts, and arbitration agreements that arise from those contracts.

¹⁸ See *id.*

¹⁹ In addition to the many contributions in this volume, see Schultz, *supra* note 14 (writing on behalf of Rachel Arnow-Richman, Ian Ayres, Susan Bisom-Rapp, Tristin Green, Rebecca Lee, Ann McGinley, Angela Onwuachi-Willig, Nicole Porter, and Brian Soucek); see also, Ayres, *supra* note 4; Prasad, *supra* note 14; Margaret Ryznar, #MeToo & Tax, 75 WASH. & LEE L. REV. ONLINE 53, 53–57 (2018); Ramit Mizrahi, *Sexual Harassment Law after #MeToo: Looking to California as a Model*, 128 YALE L. J. FORUM 121, 140–41 (2018); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 976–77 (2006).

²⁰ See Farrow, *supra* note 2.

²¹ This Comment will directly address one such settlement in Part III. See *Bandera v. City of Quincy*, 344 F.3d 47, 49 (1st Cir. 2003) (refusing to invalidate a settlement agreement in which the employer offered to recommend the victim for a substitute teaching position in exchange for dropping her case).

²² See Farrow, *supra* note 2 (detailing the many psychological harms that the settlement process itself caused upon one of Weinstein's victims, Ambra Battilana Gutierrez).

²³ See Ryznar, *supra* note 19, at 54–57.

Legal rules that take aim at these sources will necessarily have an impact on their nondisclosure provisions, and vice versa. This poses a challenge to this Comment's analysis because there are some aspects of the three sources beyond standalone NDAs that are thematically similar to NDAs but outside of the scope of this Comment's inquiry, e.g., arbitration procedures or for-cause termination. For the sake of simplicity, therefore, this Comment will discuss NDAs that emerge from different sources interchangeably. In the rare case where judge-made rules or legislation could have different effects on different forms of NDAs, this Comment will address those differences expressly.

A. Unconscionability and Public Policy Doctrines

Judicial solutions to the threats posed by sexual harassment NDAs rely on two key components of contract law: the "unconscionability" and "public policy" doctrines. The former dictates that a judge may refuse to enforce a contract's terms if she finds them to be "unconscionable" or otherwise modify them in order to prevent such a finding.²⁴ While what constitutes "unconscionable" varies somewhat from state to state, the D.C. Circuit has advanced the most popular definition: the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."²⁵ Some jurisdictions hold that the "procedural" and "substantive" factors of this definition—absence of choice and one-sided terms respectively—must both be present for a court to render a term unconscionable.²⁶ Within this group, some courts apply a "sliding scale:" the more procedurally unconscionable a term is, the less substantive unconscionability is required for a court to rescind that term, and vice versa.²⁷ Other jurisdictions, in contrast, may render a contract term unconscionable even if the plaintiff only alleges procedural or substantive unconscionability.²⁸

²⁴ RESTATEMENT (SECOND) OF CONTRACTS § 208 ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."); *see also* *Hume v. United States*, 132 U.S. 406, 411 (1889).

²⁵ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *see also* SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:9 (4th ed. 1993 & Update 2018) (collecting cases).

²⁶ *See* *Bynum v. Maplebear Inc.*, 160 F. Supp. 3d 527 (E.D.N.Y. 2016); *Summers v. Crestview Apartments*, 236 P.3d 586, 590 (Mont. 2010).

²⁷ *See* *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 736 S.E.2d 91, 102 (W. Va. 2012); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 783 (9th Cir. 2002).

²⁸ *See* *Gandee v. LDL Freedom Enter., Inc.*, 293 P.3d 1197, 1201 (Wash. 2013) (rendering contract terms void because they were substantively unconscionable, without a consideration of procedural unconscionability); *In re Poly-America, L.P.*, 262 S.W.3d 337, 360 (Tex. 2008).

In order to determine whether a contract or term is procedurally unconscionable, a court considers factors such as disparate bargaining power between the parties, differences in business sophistication, representation by counsel, ambiguous or misleading contract language, and economic, social, or practical duress that may have compelled a party to execute the contract against her best interests.²⁹ Contracts of adhesion—the often labyrinthine standard-form contracts typically provided by larger companies—may be procedurally unconscionable *per se* (though many courts must still find substantive unconscionability in the terms themselves).³⁰ A term is substantively unconscionable where it is so “one-sided or overly harsh” or “exceedingly calloused” so as to be “shocking to the conscience.”³¹ Terms are not substantively unconscionable simply because they are much more favorable to one side; their one-sidedness ought to suggest that “the weaker party had no meaningful, no real alternative, or did not in fact assent or appear to assent to the unfair terms.”³² In summary, the unconscionability doctrine is justified by and applied according to the fundamental public policy principle that there could be no real freedom of contract if courts had to enforce contracts that boasted neither mutual interest nor mutual assent.

The public policy doctrine—in many ways the sibling of unconscionability—states that a term of an agreement is unenforceable if either (1) “legislation provides that it is unenforceable” or (2) “the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”³³ Courts consider a variety of factors when weighing enforcement interests, such as the parties’ justified expectations and the negative consequences of non-enforcement.³⁴ As for weighing public policy interests, courts consider factors such as legislative precedent, the relation of the contract to the policy interest, and the seriousness of enforcement’s consequences as they pertain to public policy.³⁵ Accordingly, there is a large variety of terms that a court may render void as against public policy. The most paradigmatic cases involve agreements to commit illegal acts,³⁶ but the implicated action does not need to be explicitly illegal for a court to render it void.³⁷

²⁹ See *Tedesco v. Home Sav. Bancorp, Inc.*, 407 P.3d 289, 298 (Mont. 2017).

³⁰ See *Day v. CTA, Inc.*, 324 P.3d 1205, 1209 (Mont. 2014); see also *Grayiel*, 736 S.E.2d at 104.

³¹ *Gandee*, 293 P.3d at 1999.

³² *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 657 (W. Va. 2012).

³³ RESTATEMENT (SECOND) OF CONTRACTS § 178; see also Williston, *supra* note 25 at §§ 12:1–3 (collecting cases).

³⁴ RESTATEMENT (SECOND) OF CONTRACTS § 178(2).

³⁵ *Id.* at § 178(3). This Comment will examine these factors more fully below.

³⁶ See, e.g., *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) (rendering unenforceable terms of a collective bargaining agreement that violated federal antitrust and labor laws).

³⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 192 (promises to commit torts are also

Exceptions and inconsistencies abound within and between jurisdictions, such that an attempt to map the public policy doctrine could quickly overwhelm the main focus of this Comment. Therefore, it must suffice to say that sexual harassment NDAs may be void as against public policy, but only in the specific circumstances that this Comment is about to address. Perhaps unconscionability plays a role in some of the forthcoming cases, but assuming most legal departments are savvy enough to avoid the “shocking”³⁸ behavior necessary to render a contract unconscionable, it remains a secondary consideration for the purposes of this Comment’s investigation and analysis. The main problem that this Comment seeks to address emerges when the employer’s careful and sophisticated lawyers intervene in order to contain the damage that the perpetrator has already caused.³⁹

B. Voiding NDAs to Report Criminal Conduct

Given the obvious confidentiality of most sexual harassment NDAs and the often-steep penalties imposed for violating them, case law on the topic is quite limited.⁴⁰ However, courts have provided enough for one to determine the extreme ends of whether these NDAs are unenforceable contracts as a matter of public policy. For one, it is clear that courts will not enforce NDAs that bar an individual “from providing relevant evidence regarding past allegations of sexual abuse in a domestic violence proceeding” or from “reporting future criminal behavior to a court.”⁴¹ Indeed, any NDA that “purport[s] to suppress information concerning the commission of felonies” is “illegal *per se*.”⁴² This also includes agreements that create a failure of one’s duty to disclose to a third party, involve a breach of contract with another party, or otherwise cause wrongful non-performance.⁴³ However, “[t]he mere possibility that an employer *could* use a [nondisclosure] clause to hide illegal

unenforceable).

³⁸ See *Gandee*, 293 P.3d at 1999.

³⁹ Granted, some lawyers themselves can be coarse and intimidating, but professional counsels would stay clear of inducing the level of duress necessary for unconscionability.

⁴⁰ This was even more true in 1998, when Terry Dworkin and Elletta Callahan first tackled confidentiality more generally. See Terry Dworkin & Elletta Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 153 (Fall, 1998). Dworkin and Callahan’s work represents the most extensive discussion on the topic to date. New case law since their date of publication and our particular focus on the sexual harassment context distinguishes this Comment from their earlier work.

⁴¹ *Lana C. v. Cameron P.*, 108 P.3d 896, 902 (Alaska 2005).

⁴² *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 667 (Ohio Ct. App. 1988). *Accord* *Perricone v. Perricone*, 972 A.2d 666, 689 (Conn. 2009); *Unami v. Roshan*, 659 S.E.2d 724, 727 (Ct. App. Ga. 2008) (citing 7 WILLISTON ON CONTRACTS § 16:14 (4th ed.)).

⁴³ See *Unami*, 659 S.E.2d at 727 (citing *Lachman v. Sperry-Sun Well Surveying*, 457 F.2d 850, 852–54 (10th Cir. 1972); *S. R. & P. Imp. Co. v. Am. Union Bank*, 204 N.Y.S. 755, 755–56 (N.Y. Sup. Ct. 1924); *Eggleston v. Pantages*, 175 P. 34, 36–37 (Wash. 1918)).

activity is . . . insufficient to void the clause on grounds of public policy.”⁴⁴ Instead, courts “subject” NDA agreements to “implied exceptions for public policy purposes,” so that the agreements are enforceable unless they are used to prevent the disclosure of illegal activity to a court.⁴⁵ As for the prevention of disclosure to non-governmental sources—even if there is potentially unlawful activity involved—such agreements are typically legitimate.⁴⁶ This includes attempts to provide testimony in a third party’s civil claim against one’s employer, even though that disclosure would take place before a judge.⁴⁷

In other words, if a victim has enough evidence that a felony has been committed by her harasser or abuser, she may report the felony, even when an NDA purports to bar her from such a report. However, as the #MeToo Movement has revealed, this is a big “if.” First, as damaging as sexual harassment can be, harassment alone rarely, if ever, qualifies as a felony under state law.⁴⁸ Second, there are many disincentives for a victim to remedy her situation by means of a criminal case. For example, she may fear retaliation from other superiors at her corporation or affiliates of the accused, and criminal law does not necessarily supply her with any monetary remedy.⁴⁹ Third, criminal law’s high standard of guilt—beyond a reasonable doubt—makes it incredibly difficult for a private individual to mount evidence sufficient to prevail at trial. This is especially true for sexual harassment and abuse, where perpetrators can often cover their tracks, and witnesses have personal incentives (including their own settlements) to keep quiet.⁵⁰ Finally, criminal prosecution takes control of the case away from the claimant and places it in the hands of a prosecutor, whose central duty is to pun-

⁴⁴ *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 457 (5th Cir. 2005).

⁴⁵ *Katz v. South Burlington Sch. Dist.*, 970 A.2d 1226, 1229 (Vt. 2009) (citing *Camp v. Eichelkraut*, 539 S.E.2d 588, 598 (2000)).

⁴⁶ *See id.*; *see also Saini v. Int’l Game Tech.*, 434 F. Supp. 2d 913, 922 (D. Nev. 2006).

⁴⁷ *See Saini*, 434 F. Supp. 2d at 922; *Uniroyal Goodrich Tire Co. v. Hudson*, No. 95-1130, 1996 WL 520789, at *10 (6th Cir. Sept. 12, 1996).

⁴⁸ *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-73a (2013) (limiting unwelcomed sexual contact with a non-minor, even if the perpetrator is in a position of power over the victim, to a class A misdemeanor); DEL. CODE ANN. Tit. 11, §§ 763–773 (2018) (limiting sexual contact with non-minors to a misdemeanor offense); D.C. CODE ANN. § 22-3005 (2019) (requiring that a sexual contact felony be brought about by reasonable threat of death, bodily injury, or kidnapping); 720 ILL. COMP. STAT. ANN. 5/11-1.60 (2019) (imposing a requirement for sexual abuse felonies that the perpetrator used or threatened to use a dangerous weapon or caused bodily harm, among others); MINN. STAT. § 609.345 (2019) (requiring a finding that the perpetrator used force or the threat of force in order to charge him with felony).

⁴⁹ *See Schultz, supra* note 14, at 38–39; Nicole Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018).

⁵⁰ *See Rachel Arnow-Richman, Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L. J. F. 85, 93–94 (June 18, 2018).

ish the perpetrator rather than ensure maximum recovery for the victim.⁵¹ In sum, reporting even expressly illegal activity is a difficult hurdle to overcome for an inherently nebulous transgression.

The EEOC works to ameliorate these barriers by institutionalizing some investigations;⁵² whistleblowers who violate their NDAs at the behest of the EEOC are protected.⁵³ And yet, the EEOC cannot be everywhere at once, nor is every employee willing to take on a whistleblowing role, especially when employers compel internal disclosure first.⁵⁴ Moreover, as mentioned above, the EEOC has little justification to launch a full investigation if it has not received any reports because the victims of a serial harasser are unanimously restrained by NDAs.⁵⁵ Therefore, we must consider the options available outside of criminal law to individuals who seek to bypass their NDAs for the sake of obtaining a remedy from a civil suit or retribution by public disclosure.⁵⁶

C. NDAs and Self-Enforcement

*EEOC v. Astra U.S.A., Inc.*⁵⁷ provides the leading case for unenforceability when criminal activity has yet to be established.⁵⁸ In *Astra*, the EEOC brought a preliminary injunction against Astra USA, Inc., in

⁵¹ See Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 312 (Spring, 2017) (“It is well accepted . . . that the prosecutor is a fiduciary who represents the sovereign and must make decisions in the public interest, for society at large—not any individual client.”) (citing Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L. J. 607, 633–34 (1999)).

⁵² The EEOC has endorsed the estimate that one in four women have experienced sexual harassment in the workplace, but that many women do not report it. See EQUAL EMP. OPPORTUNITY COMM’N, WOMEN IN THE AMERICAN WORKFORCE (2015). Even when they do, in any given year, the EEOC resolves roughly 50 percent of their charges under the category of “No Reasonable Cause,” and 20.9 percent under “Administrative Closure” (another form of charge failure). EQUAL EMP’ OPPORTUNITY COMM’N, CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGES FILED WITH EEOC) FY 2010–FY 2018 (2018). Only 22.8 percent of charges resolve with positive outcomes for the victim (as defined by the EEOC, not the victim), so there is no way of knowing whether the victim has truly received adequate reparation. See *id.* The EEOC does not provide data for the number of NDAs it has challenged in court. However, given the meager case law, that number is likely very low compared to the roughly 8,000 charges it resolves each year. See *id.* Indeed, about 9 percent of EEOC charges are resolved via settlement, so filings with the EEOC may be creating more sexual harassment NDAs. *Id.*

⁵³ See, e.g., *Sheets v. Teddy’s Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Shores v. Senior Manor Nursing Center, Inc.*, 518 N.E.2d 471 (Ill. App. Ct. 1988); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985); *McQuary v. Bel Air Convalescent Home, Inc.*, 684 P.2d 21 (Or. Ct. App. 1984); *Harless v. First Nat’l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

⁵⁴ See Dworkin & Callahan, *supra* note 40, at 190.

⁵⁵ See Ryznar, *supra* note 19, at 54–57.

⁵⁶ See Arnov-Richman, *supra* note 50, at 90–92 (discussing the inadequacy of antidiscrimination law to cover all forms of sexually motivated harm); Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. F. 152 (June 18, 2018).

⁵⁷ 94 F.3d 738 (1st Cir. 1996).

⁵⁸ See generally *id.*

order to prevent Astra from entering into or enforcing settlement agreements that prohibited employees from filing sexual harassment claims with the EEOC and assisting the EEOC in its investigation.⁵⁹ Multiple Astra employees had communicated to the EEOC that they could not divulge any information because of such agreements.⁶⁰ Indeed, only twenty-six out of ninety contacted employees even replied to the EEOC's requests.⁶¹ In order to determine whether Astra's NDAs were unenforceable as against public policy, the First Circuit applied a "bed-rock" balancing test: "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."⁶² Specifically, the court weighed the impact of the NDAs on the EEOC's enforcement of Title VII against the impact that outlawing those NDAs would have on private dispute resolution.⁶³

According to this test, *Astra* quickly became an open-and-closed case. The EEOC is a public body empowered by Congress, and "it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired."⁶⁴ Furthermore, as the court found significant, the EEOC does not only benefit private parties; its investigations are designed to advance the public interest first and foremost.⁶⁵ Even a "sprinkling" of prohibitions that "materially interfere[]" with communications between an employee and the Commission harms public interest.⁶⁶ The court did recognize that public policy "strongly favors encouraging voluntary settlement," but it ultimately found that unenforceability would not (1) create a "substantial disincentive" to settlement, (2) promote further litigation, or (3) disturb the finality of already-negotiated settlements.⁶⁷ Read plainly, the First Circuit's finding here is puzzling: confidentiality is a major incentive for corporations to privately resolve employee disputes. While arbitration has other advantages as well, public disclosure was clearly one of Astra, Inc.'s greatest concerns when it wrote the NDAs at issue.⁶⁸ Therefore, it is unclear

⁵⁹ *Id.* at 740–41.

⁶⁰ *Id.* at 741.

⁶¹ *Id.*

⁶² *Id.* at 744 (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)).

⁶³ *Id.* at 744.

⁶⁴ *Id.* (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984)).

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1090 (1987)). It is important to note for later how the court reserves this interference only for communications with the EEOC, not any other party. It does not even suggest that nondisclosure in the sexual harassment setting could be harmful to public interest per se.

⁶⁷ See *id.* (citing *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)).

⁶⁸ See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638 (2005).

why the *Astra* court thought that nullifying a central provision of those agreements would not disincentivize settlement between Astra and its employees; if the nondisclosure provisions were unimportant, why would Astra fight for them in court?

If one were to read *Astra* as saying that any nondisclosure component of an arbitration agreement was non-substantial in terms of incentives for private settlement, one could expect public policy challenges against NDAs to be somewhat successful. However, the case law probably leans in the opposite direction, at least as it applies to private plaintiffs. For example, in *Saini v. International Game Technology*,⁶⁹ the Nevada District Court applied *Astra*'s balancing test and determined that an employee's confidentiality agreement was valid even though it would prevent employees from providing testimony that International Game Technology (IGT) had purposefully sold refurbished and defective gambling machines as new products.⁷⁰ The court distinguished its case from *Astra* on multiple grounds. For one, the protection of trade secrets, which was the supposed purpose of IGT's agreement, was more significant than the concealment of sexual harassment complaints.⁷¹ Second, the court found that "public policy [in uncovering the sale of defective products] is not as high a priority as enforcement of sexual harassment law by the EEOC, at least when, as here, the defect at issue is not a threat to the safety or economic well-being of the public at large."⁷² Third, IGT's terms were part of a "standard agreement;" they were not "specifically designed to stifle evidence of wrongdoing."⁷³ Finally, the court found it significant that the employee—instead of a regulatory agency—had moved to void the NDA and thereby "act as decisionmaker about what information IGT does and does not have a legitimate confidentiality interest in."⁷⁴ An employee's belief that an NDA is concealing illegal activity is not enough.⁷⁵

At first glance, *Saini* appears promising for individual victims attempting to void their employer's NDAs. Indeed, the court asserted that the concealment of workplace sexual harassment in *Astra* was at least more significant than the dangers of concealing product defects. However, a closer reading of the opinion reveals that the court significantly limited its consideration of sexual harassment to the context of EEOC

⁶⁹ 434 F. Supp. 2d 913 (D. Nev. 2006).

⁷⁰ *See id.* at 923.

⁷¹ *See id.* at 923.

⁷² *Id.* at 921.

⁷³ *Id.* This finding is somewhat questionable if IGT was in fact intentionally short-changing its customers.

⁷⁴ *Id.* at 922.

⁷⁵ *Id.*

investigations. Namely, it specified its consideration of public policy concerns in *Astra* as the “enforcement of sexual harassment law by the EEOC.”⁷⁶ It did not weigh a public interest in encouraging enforcement by private individuals—nor, as pertains more closely to #MeToo, the attempts of private individuals to seek better remedies in court or better retribution in the public eye. The court’s reservation is only made clearer by its final distinction that the plaintiff was a private individual and not a regulatory agency.⁷⁷

The *Saini* court’s limitation of *Astra*’s findings to public agency enforcement is consistent with the language and underlying rationale of *Astra* itself. As noted above, the First Circuit considered the NDAs in question to be harmful to the EEOC’s own actions, not unjust to the actual victims involved. Moreover, it felt compelled to expressly recognize the otherwise intuitive notion that the EEOC’s actions benefit the public as a whole, not just “private” victims. That court did not, on the other hand, discuss whether private challenges to unfair NDAs can also similarly benefit the public, especially when harassment is too subtle for the EEOC to root out. Perhaps this explains why the First Circuit found that a preliminary injunction would not undermine prior settlements or discourage future ones: its holding really only applied to *Astra*’s relationship with the EEOC. *Astra* and *Saini* indicate there is a significant public interest in preventing workplace sexual harassment, but on the whole, that interest only overcomes the public’s interest in freedom of contract when it is the government who seeks to advance it.

1. EEOC investigations

Surrounding case law supports the interpretation that government investigation / private dispute is the most significant predictor for determining whether a sexual harassment NDA is void as against public policy. As regards invalidated agreements, there are plenty of cases in which courts have refused to enforce agreements that are likely “to chill employees’ participation in legitimate investigations.”⁷⁸ Given this Comment’s discussion so far, “legitimate” may very well be a stand-in for “government-led.” In *EEOC v. International Profit Associates*,⁷⁹ the Northern District of Illinois invalidated a severance agreement that prohibited an employee from “disclosing anything relating to his employment . . . except as may be necessary in response to lawful process

⁷⁶ *Id.* at 921 (emphasis added).

⁷⁷ *Id.* at 922.

⁷⁸ See, e.g., *EEOC v. Int’l. Profit Assocs.*, No. 01 C 4427, 2003 U.S. Dist. LEXIS 6761, at *3–4 (N.D. Ill. Apr. 21, 2003); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984).

⁷⁹ No. 01 C 4427, 2003 U.S. Dist. LEXIS 6761 (N.D. Ill. Apr. 21, 2003).

of any judicial or adjudicative authority or otherwise allowed by law.”⁸⁰ Here, as in *Astra*, the court narrowly confined its ruling on the contract as “inapplicable to communications with the EEOC.”⁸¹ Such a limitation strongly invokes the “implied” public policy “exceptions” that allow reporting of criminal activity when the reporting party is bound by an NDA.⁸²

In *EEOC v. Morgan Stanley & Co.*,⁸³ the Southern District of New York invalidated a non-assistance agreement that required employees to notify their direct supervisor and the “Law” or “Compliance” departments before communicating with the EEOC.⁸⁴ Even though the contract’s language only threatened the possibility of demotion or termination if an employee failed to notify the appropriate officers, the court found that this language was sufficient to frustrate the EEOC’s investigation.⁸⁵ As in *Astra*, the agreement sported at least a “sprinkling” of prohibitions that “materially interfered” with the EEOC’s efforts.⁸⁶ It seems reasonable that Morgan Stanley would want its Law and Compliance departments to stay well-informed about the EEOC’s interactions with its employees, so perhaps the court erred in denouncing the company’s prudence. Regardless, this court’s decision illustrates the judiciary’s eagerness to protect and advance the government’s own attempts to curb workplace sexual harassment and discrimination. Courts have therefore provided the EEOC with a great boon in enabling it to bypass corporate NDAs for the sake of its investigations. However, and again, the Commission does not have the resources to investigate behind every closed door.

2. Private attempts to invalidate NDAs

The #MeToo Movement has made it clear: private individuals must also come forward with their own stories in order to effect meaningful social change.⁸⁷ And yet, despite the judiciary’s eagerness to assist the EEOC, it has been less charitable with private actors who attempt to invalidate NDAs themselves. As the court proclaimed in *Saini*, it is not

⁸⁰ *Id.* at *2.

⁸¹ *Id.* at *6.

⁸² *Katz v. South Burlington Sch. Dist.*, 970 A.2d 1226, 1229 (Vt. 2009).

⁸³ 01 Civ. 8421 (RMB) (RLE), 2002 U.S. Dist. LEXIS 17484 (S.D.N.Y. Sept. 20, 2002).

⁸⁴ *See id.* at *5–6.

⁸⁵ *See id.*

⁸⁶ *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996).

⁸⁷ *See, e.g.,* Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NAT’L PUB. RADIO, INC. (Feb. 21 2018), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [https://perma.cc/7DY5-7934].

within the individual's "prerogative" to determine for herself what type of information is "legitimately" confidential.⁸⁸

For example, in *Perricone v. Perricone*,⁸⁹ the Supreme Court of Connecticut enforced a divorce settlement NDA that prevented a celebrity-doctor's ex-wife from divulging his purportedly condemnable behavior to popular public media sources.⁹⁰ That court went a little further, interpreting *Astra* as a case purely concerned with communications to public enforcement agencies and thereby writing sexual harassment out of the script.⁹¹ It also limited voidable nondisclosure provisions to five main categories: terms that (1) restrict "the right to speak on matters of public concern" (referring to voting in public elections), (2) restrict communication with a public agency regarding civil rights law enforcement (*Astra*), (3) "require[] the suppression of criminal behavior," (4) suppress information important to public health and safety, or (5) impose confidentiality for the benefit of a "public entity or official."⁹² Taken literally, some of these categories should have helped those seeking to invalidate their NDAs. However, the Connecticut Supreme Court also urged that the public policy doctrine "should be applied with caution and only in cases plainly within the reasons on which that doctrine rests . . ."⁹³ Therefore, a term may be enforced even if it could potentially fall into one or more of these categories.⁹⁴

*Bandera v. City of Quincy*⁹⁵ provides an example of the judiciary's hesitancy to apply the public policy doctrine in private disputes even when multiple *Perricone* categories may be implicated.⁹⁶ In *Bandera*, the former director of Quincy's Community Policing Commission attempted to invalidate a settlement agreement after she was allegedly coerced into it by her previous attorney.⁹⁷ According to her trial testimony, for which the jury awarded her \$135,000 dollars, Bandera had

⁸⁸ *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 922 (D. Nev. 2006). *See also* Dworking & Callahan, *supra* note 40, at 166–68 (discussing other cases supporting the proposition that "the courts seem reluctant to excuse an employee from a confidentiality agreement where breach is motivated by personal gain, even in situations where disclosing information might advance public safety").

⁸⁹ 972 A.2d 666 (Conn. 2009).

⁹⁰ *See id.* at 689.

⁹¹ *See id.* at 688.

⁹² *See id.* at 688 (citing *Leonard v. Clark*, 12 F.3d 885, 891 (5th Cir. 1993); *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996); *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 664 (Ohio 1988); *Pansy v. Stroudsburg*, 23 F.3d 772, 787–88 (3rd Cir. 1994)).

⁹³ *Id.* at 687 (citation omitted).

⁹⁴ *See also* *Katz v. South Burlington School Dist.*, 970 A.2d 1226, 1228 (Vt. 2009).

⁹⁵ 344 F.3d 47 (1st Cir. 2003).

⁹⁶ *See id.* at 50.

⁹⁷ *See id.* at 49.

been excluded from meetings, ridiculed on the basis of her sex, and subjected to graphic stories of the sexual exploits of male officers.⁹⁸ She was fired by the mayor of Quincy soon after bringing her complaint.⁹⁹ Meanwhile, even the plain language of the settlement appeared suspicious. It demanded a general release of all claims and the imposition of non-admission and non-disclosure agreements concerning her claim in exchange for her then-attorney's full compensation and a promise that the mayor would recommend Bandera for a permanent substitute teaching position at the city's public school.¹⁰⁰

The issues of unconscionability in this case are beyond the scope of this Comment.¹⁰¹ Nonetheless, the facts of *Bandera* raise various concerns along the lines provided by *Perricone*. The settlement and its NDA were unduly favorable to the city and its public officials, the potential criminal activities of the city and its officers were probably a matter of public concern, and the settlement was possibly designed around concealing those potentially criminal activities.¹⁰² Despite these potential red flags, the First Circuit found that the settlement's provisions were not void as a matter of public policy, citing *Astra* but refraining from entering into a public policy balancing test.¹⁰³

Whatever the import of the First Circuit's refrain, *Bandera* compellingly illustrates the extra-legal difficulties facing private individuals who pursue litigation. Even if they are not barred by a boilerplate arbitration agreement, their employers typically have ample resources to compel settlement against the victim's best interests and return the transgressions at issue to a state of nondisclosure. Any litigation is exhausting, resource-intensive, and full of uncertainty, especially for non-lawyers.¹⁰⁴ This is doubly so in the case of a sexual harassment claim, which requires that the victim relive her harm at every court proceeding. The same does not apply to the well-informed and well-equipped employer. In *Bandera*, the First Circuit merely stayed the judgment in

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ Even if the harassing employee exerted undue influence on the victim, the NDA is most often between the victim and the employer. Employers, as opposed to individual harassers, often have significant incentives and sufficient legal knowledge to prevent the extra risks that would emerge from soliciting an NDA via undue influence. Therefore, while the unconscionability doctrine is thematically relevant to sexual harassment, courts rarely apply it when the other party of an NDA is an employer (assuming the employer is not the individual harasser).

¹⁰² The public officers involved had likely violated Massachusetts law. See MASS. GEN. LAWS ANN. ch. 151B § 1.18 (2014).

¹⁰³ *Bandera*, 344 F.3d at 55.

¹⁰⁴ See also Arnow-Richman, *supra* note 50, at 95–96; Schultz, *supra* note 14, at 46.

order for the district court to determine whether the settlement agreement had been properly formed.¹⁰⁵ However, the case did not make it that far: Bandera, who then proceeded pro se, capitulated to the earlier settlement agreement, even though the jury's award would have easily covered her legal fees and far exceeded her prospective income as a substitute teacher.¹⁰⁶ Only Bandera's psychological fatigue and lack of trustworthy legal resources could satisfactorily explain why she submitted to such a bad deal.

D. Summary of Findings

This Comment has so far attempted to carve out a body of case law applicable to NDAs that purport to prevent victims of sexual harassment from divulging their stories to the public. Not every case that this Comment has examined is expressly linked by precedent. Nor does each case tackle the problem of sexual harassment NDAs head-on. Nonetheless, they all speak as one in providing the lay of the land: Courts are extremely hesitant to render an NDA unenforceable unless (1) the alleged harasser is under investigation by the EEOC or (2) the victim has strong evidence that the agreement was intended to prevent her from reporting a crime, of which there is also substantial proof.¹⁰⁷ With this review of relevant case law complete, this Comment could conclude. However, in order to understand why courts have decided upon these doctrines and how they may change after #MeToo, one ought to take a closer look at the "bedrock" upon which *Astra* and its sister cases relied.

IV. THE JUDICIARY'S UNDERLYING RATIONALE

The analysis above raises a crucial question: Why do courts draw the line for NDA invalidation between public and private enforcement, when such a line clearly leaves some harassment victims vulnerable to further harm? True, the foremost duty of the courts is to apply the law, not to make ad hoc moral judgments. However, in the case of the common law public policy doctrine, courts have and will continue to actively shape the legal regime that applies to sexual harassment NDAs. Their

¹⁰⁵ *Bandera*, 344 F.3d at 55.

¹⁰⁶ The agreement did not even guarantee a position at the school. Mayor Sheets merely promised to recommend Bandera for a substitute position if she could not secure a full time position herself. *See id.* at 49. Quincy Public Schools currently pays its substitute teachers \$85 per day, or roughly \$15,000 per year if the substitute works every day of the year. *Quincy Pub. Sch. Dist. #172: Internal Postings: Substitute Tchr.*, APPTRACK.COM (Oct. 30, 2018), <https://www.applitrack.com/qps/onlineapp/jobpostings/view.asp?internaltransferform.Url=&internal=internal&district=&category=Substitute+Certified> [<https://perma.cc/834N-TN4S>].

¹⁰⁷ As laid out in section B, such cases exist in the context of other crimes, but there has been no case in which a private plaintiff has succeeded in invalidating an NDA by a showing of clear evidence that she was sexually harassed by the other side of the agreement.

development of that regime can thus be evaluated for the purposes of determining its efficacy and the room it leaves for reform.

Therefore, the following sections of this Comment take a closer look at the underlying principles of the public policy doctrine and the specific factors that courts consider in weighing public policy in the sexual harassment context. Such an examination is an essential foundation for weighing the viability of judicial reform. Ultimately, this part of the Comment will find that even though the current judicial regime does not optimally advance the interests of sexual harassment victims, its approach is motivated by valid concerns for efficiency and accuracy in distributing justice.

A. The Public Policy Doctrine's Underlying Rationale

The line between public and private enforcement can be explained by the judiciary's emphasis on the wrongdoer rather than the victim in public policy cases. Voiding a contract despite the universal public interest in freedom of contract is a significant deployment of a court's authority. Were a court to do so in order to benefit an individual, it would raise major concerns about abusing its discretion, especially if that private benefit imposed a detriment upon the public overall (such as diminishing the binding power of private agreements). Therefore, as Dworkin and Callahan's article, *Buying Silence*, elaborates, courts limit their application of the public policy doctrine to cases in which a bad actor's behavior should not be enforced:

In general, "freedom of contract" is manifested by the courts' disinclination to evaluate the substance of agreements between private parties. There are cases, however, in which this principle is superseded by societal interests, and a court may decline to enforce a contract term on public policy grounds. The introductory note to the Restatement (Second) of Contracts states that "reluctance to aid the promisee rather than solicitude for the promisor" provides the basis for such a determination. Refusals of enforcement on these grounds are designed to deter misconduct and to avoid using the courts as instrumentalities of questionable activity.¹⁰⁸

Voiding a term mainly to benefit a sympathetic individual risks injuring the public by undermining freedom of contract. However, punishing a bad actor by refusing to enforce his term advances public interest overall (whether because the actor was trying to get away with a

¹⁰⁸ Dworkin & Callahan, *supra* note 40, at 162 (citing RESTATEMENT (SECOND) OF CONTRACTS, introductory note (1981)).

crime or because he was clearly abusing contract law, among other reasons). Still, it may be difficult in practice for a court to draw the line between the two—that is, between an employer-favorable contract policy and a behavior so harmful to public policy that it must be rendered void. As suggested Part II, that inquiry becomes easier when other agencies have already addressed it themselves.

As *Buying Silence* points out, *Astra* provides a great example of the courts' emphasis on refraining from assisting the promisee. If a government agency complains that a company is likely concealing unlawful action by means of NDAs, the court has good reason to take that agency at its word and void such agreements. It is not just that the agreements are wrongly concealing unflattering information; they represent a company's unwillingness to submit itself to rule of law. Thus, even though the EEOC brought a civil injunction, the First Circuit's refusal to enforce the NDAs was just a simple extension of the legal rationale that there is no "freedom of contract" interest when contracts are used to break the law.¹⁰⁹

Nonetheless, *Buying Silence* does not address a crucial feature of both the Restatement and *Astra*'s decision: both expressly refuse to consider the "solicitude of the promisor" in determining whether an agreement is unenforceable for the sake of public policy. As already explained, *Astra* emphasized the EEOC's function as "vindicat[ing] the public interest" rather than only serving private parties.¹¹⁰ The matter at hand was not a battle between remedying an employee's sexual harassment and protecting a company's right to enforce its agreements; it was a battle between a company's (unnecessarily strict) private dealings and an agency's enforcement responsibilities as laid down by Congress itself.¹¹¹ What is more, the factors that the First Circuit weighed in its balancing test were even larger than the most basic stakes in the case. Namely, while the court considered individual impact on *Astra* for the sake of the injunction, as for its balancing test, it did not weigh the impact that voiding the NDAs would have on *Astra*'s relationships with its employees. Instead, it weighed "the impact [of its decision] on private dispute resolution" overall.¹¹² In other words, the court did not weigh the impact of enforcement on the EEOC's specific investigation against *Astra*; it weighed the impact that these types of agreements would have on all EEOC efforts if the court decided to enforce them.¹¹³

¹⁰⁹ See, e.g., *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 667 (Ohio Ct. App. 1988). See also, *Katz v. S. Burlington Sch. Dist.*, 970 A.2d 1226, 1228 (Vt. 2009).

¹¹⁰ *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996).

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ See *id.*

Nowhere in the opinion is there a speculation on how a ruling for one side or the other might affect the actual victims in the case.

B. The Courts' Current Approach Is at Odds with #MeToo's Principles

The main thrusts of #MeToo and its sister movements¹¹⁴ urge us to focus on the exact same factors that courts leave out in public policy considerations, such as the harm to the victim, the power dynamics between victim and harasser that exacerbated the harm, and the remedy necessary not only to deter the harasser but more importantly to make the victim whole again.¹¹⁵ With these #MeToo factors in mind, the courts that this Comment examined could have inquired as to whether invalidating the NDA was necessary to ensure that the victim finds adequate relief. Under such a regime, companies could still have faith in the legitimacy of their employment contracts, so long as they provided their employees with generous arbitration terms and a thorough system for deterrence and accountability. However, the regime must be dealt with as it stands, not as how it should be.

This is not to say that there was no room in the doctrine for *Astra* to have considered the position of sexual harassment victims. The *Restatement (Second) of Contracts* provides four factors for a court to consider in determining whether a contract should be void as against public policy:

- (a) the strength of that policy as manifested by legislation or judicial decisions;
- (b) the likelihood that a refusal to enforce the term will further that policy;
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate; and
- (d) the directness of the connection between that misconduct and the term.¹¹⁶

The First Circuit's opinion explicitly involved considerations of factors (a) and (b), but factors (c) and (d) had no explicit role to play. If they

¹¹⁴ For example, #TimesUp has also gained significant traction in the past two years since Weinstein's behavior was revealed. See *About Time's Up*, TIME'S UP, https://www.timesupnow.com/about_times_up [<https://perma.cc/QW5P-E9KX>] (last visited Jan. 28, 2019).

¹¹⁵ See, e.g., Arnow-Richman, *supra* note 50, at 101–02; Green, *supra* note 56, at 166–68.

¹¹⁶ § 178(3)(a)–(d) (1981). Of course, this language was available to the First Circuit by 1996. Dworking and Callahan discuss this in *Buying Silence* but only as it pertains to whistleblowers. See Dworking & Callahan, *supra* note 40, at 179–90.

did, as regards to (c), one might expect the court to have delved into EEOC's investigation to see the degree of potential harassment at Astra. Alternatively, the court could have expressly assumed that (c) was satisfied because the possible activity raised to the level of gravity as to attract EEOC's investigation in the first place. Either way, the stories of individual victims at Astra could have played a role in determining the degree of misconduct. As for (d), plenty in the contract suggested an intention to cover up misconduct. The court even noted (but again did not explicitly weigh) the concerning silence with which the EEOC's investigation was met by numerous Astra employees.

There is evidence that other courts have externally considered factors (c) and (d). For example, in *Saini*, the District of Nevada court noted that IGT's contracts were standard and not designed to cover up consumer fraud.¹¹⁷ Such a particular observation about the case at hand has little connection to the nationwide scope of *Astra's* test, which *Saini* expressly followed. Furthermore, courts may focus on (c) and (d) in refusing to enforce NDAs that conceal illegal activity. However, this is likely because (a) and (b) are already easily satisfied: (a) Enabling crime is certainly against legal precedent and (b) allowing reports of that crime would surely help prevent it.¹¹⁸ This Comment will address whether the weighing of #MeToo factors is actually workable. For now, suffice it to show that the court in *Astra* and other courts have decided to orient their opinions towards broader questions of public interests rather than fact-intensive issues of individual harm.

From this—in addition to the language from other opinions that suggests likewise—one may gather that courts are more than comfortable recognizing the silent plight of workplace sexual harassment victims, but they have clearly delegated to the EEOC the question of how and when to protect those victims. In other words, the judiciary's current approach refrains from determining how to empower those victims to protect themselves.¹¹⁹ One can only speculate as to why each court unanimously adhered to this particular construction of the public policy doctrine. On the one hand, they have a general obligation to follow precedent, but on the other, there was clearly room to branch out without totally diverging from the *Restatement*. Regardless, armed with the findings from Part III of this Comment, some speculation should prove productive.

¹¹⁷ *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 921 (D. Nev. 2006).

¹¹⁸ See, e.g., *Katz v. S. Burlington Sch. Dist.*, 970 A.2d 1226, 1228 (2009).

¹¹⁹ See *Saini*, 434 F. Supp. 2d at 921.

C. The Judiciary's Current Approach Is Justified

As this Comment has argued, the best predictor for determining the validity of an NDA is whether the party that is seeking to invalidate the agreement is a government agency or a private individual. Drawing this line keeps the court's determination simple, because, as in *Astra*, it makes satisfying the Restatement's first two factors easy: (a) Congress clearly supports the EEOC's Title VII investigations as a matter of public policy over a general desire to encourage freedom of contract, and (b) allowing companies to enforce their NDAs despite an EEOC investigation would severely frustrate the EEOC's efforts and therefore Congress's wishes. Again, such a ruling is merely an extension of the fundamental rationale that the public's interest in law enforcement is prime.¹²⁰ And if a court is concerned with factors (c) and (d)—even if they play no explicit part in the balancing test—the EEOC has done much of that consideration for them. From the court's perspective: (c) the misconduct is serious because the EEOC is investigating it, and (d) there is likely a direct connection between the agreements and the misconduct, because the EEOC is asking the court to invalidate them.

Private attempts at invalidating NDAs would require a far more difficult deliberation before a court could justify a decision not to enforce the agreement. There is no universal piece of legislation proving that Congress or state legislatures desire private individuals to violate their NDAs in spite of the freedom of contract interest.¹²¹ Even if courts could comfortably determine that legislative bodies would want the victim to come forward in its case, it would then have to decide whether that coming-forward would actually advance, say, the public's interest in having harassment-free workplaces. By the preliminary injunction stage, the court would have to not only estimate whether the victim's case would be successful, but also whether its success would serve to deter future incidences of sexual harassment. It is far from clear that corporate liability for officer misconduct actually deters those officers from future misconduct.¹²²

Meanwhile, if courts entertained invalidating an NDA at the sole behest of a private plaintiff, they could no longer rely on other agencies' expert judgment—namely, the EEOC or an attorney general—as to whether alleged misconduct was serious and whether the agreements are connected to that misconduct. A court could compare the victim's

¹²⁰ *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 667 (Ohio Ct. App. 1988). *Accord* *Perricone v. Perricone*, 972 A.2d 666, 689 (Conn. 2009); *Unami v. Roshan*, 659 S.E.2d 724, 727 (Ct. App. Ga. 2008) (citing 7 WILLISTON ON CONTRACTS § 16:14 (4th ed.)).

¹²¹ As we will see, this may change in the future.

¹²² Harvey Weinstein is too easy an example. *See also* Arnow-Richman, *supra* note 50, at 95–96.

testimony and evidence with that of the company's own (the dreaded "he-said / she-said" problem). However, as evinced by *Bandera*, courts are rightfully hesitant to conduct a mini-trial on such issues in order to determine whether or not the case can even proceed.¹²³ Instead, it is simpler to adhere to basic contract principles in these cases rather than commit every NDA breach to intensive litigation before liability can even be established.¹²⁴ Again, the hope is that the EEOC will protect these victims for whom arbitration or criminal law is insufficient.

V. STATUTORY REFORM AND ITS ADVANTAGES

A. Existing Case Law Does Not Provide for Effective Reform

A consideration of the many disadvantages posed by reforming the judiciary's approach makes evident that legislative measures are the best option for improving the state of the law surrounding NDAs in the context of sexual harassment. As this Comment has already examined, the current case law fails to address many of the important interests and intricacies that the #MeToo Movement has brought to light. This is indubitably a major concern. First, however, there are the standard criticisms of case law as a platform for social change, both practical, such as its long time-horizon, and political, such as the needed cooperation from other branches of government.¹²⁵ Second, there are problems facing judicial reform unique to the context of NDAs and sexual harassment. Sexual harassment is an extremely divisive issue, and not all

¹²³ *Bandera v. City of Quincy*, 344 F.3d 47, 52 (1st Cir. 2003) ("But by the same token the district court cannot summarily deny enforcement simply because material facts are in dispute: the task is to resolve the dispute. And, in this instance, it is unlikely—though perhaps not impossible—that the matter could be resolved without an evidentiary hearing.").

¹²⁴ Efficiency is an important consideration when courts resolve issues of first impression or demands for reform. For example, the Supreme Court has many times invoked the federal judiciary's limited case capacity in defining the limitation of "Federal Question Jurisdiction"—the ability of federal courts to hear cases involving federal issues. *See, e.g.*, *Grable & Sons Metal Prod. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318–19 (2005) ("For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would [mean] a tremendous number of cases."); *see also* 28 U.S.C. § 1331 (2012). Letting too many cases into federal court would not only create an imbalance between the state and federal systems, it would pose a serious threat to the efficiency of federal courts. *See also* *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 811–12 (1986) (noting the "increased [complexity and] volume of federal litigation" as "considerations that should inform" efficiency decisions in the interpretation of Federal Question). Promptness and accuracy are both essential components in delivering justice, so an inefficient system threatens to become an unjust one. *See* FED. R. CIV. P. 1 advisory committee's note to 1993 amendment ("The purpose of this revision, adding the words 'and administered' to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.").

¹²⁵ *See generally*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed. 2008).

courts are likely to share Judge Young's pro-victim sentiments.¹²⁶ Moreover, a balancing test that considers the victim's harm in every attempt to invalidate an NDA is not a reasonably workable judicial regime.

As mentioned above, courts are hesitant to resolve complex disputes of fact before it is clear that a plaintiff actually has a valid claim.¹²⁷ Determining whether an NDA is invalid because it is being used to cover up sexual harassment would require a court to figure out whether or not the victim was actually sexually harassed. Such a determination could take years, and a regime that requires it would enable complainants to unduly burden their employers and the courts. Moreover, even if the courts had the resources to reasonably allow for these private investigations in every case—and corporations had the resources to tolerate them without seriously affecting employment conditions—it is asking them to make some very difficult determinations in every instance.

Under this alternative regime, courts would have to consider:

- (1) Was there sexual harassment for which the other party is responsible?
- (2) Is an NDA preventing the disclosure of that harassment?
- (3) What is the degree of harm?
- (4) Are the standard remedies currently available to the plaintiff outside of this court sufficient to remedy that harm?
- (5) If not, would invalidating the NDA make a better remedy available—in other words, is the NDA the reason for the victim's lack of recourse?
- (6) If invalidation would aid the victim, and recognizing that there is a default public interest in freedom of contract, would invalidation in this case create a precedent that would advance public interest overall?

Alternatively, courts could abandon the general public policy considerations of the current doctrine, but reinventing the wheel is dangerous when no better framework is apparent.

It is difficult to imagine how requiring these questions would proliferate an efficient legal system. It is even harder to imagine that

¹²⁶ See *United States v. Aegerion Pharm., Inc.*, 280 F. Supp. 3d 217, 228 (D. Mass. 2017); Megan Keller, *Poll: Over 40 Percent Believe #MeToo Movement Has Gone Too Far*, HILL (Oct. 31, 2018) <https://thehill.com/homenews/news/414076-poll-over-40-percent-believe-metoo-movement-has-gone-too-far> [https://perma.cc/J7Q2-TRNR].

¹²⁷ *Bandera*, 344 F.3d at 52.

judges, legal generalists by necessity, are equipped to answer these questions correctly in every case. For these reasons, the status quo is more justified than was first apparent. Namely, it is sound public policy in itself for a court to require that at least some of the questions surrounding a sexual harassment NDA are answered first by agency investigation and criminal prosecution. The tradeoff with this governmental approach, of course, is that it provides limited remedies to victims, even though it is most likely to focus on the most serious incidences of harassment and assault. And as some scholars convincingly argue, the current regulatory scheme may not do enough to affirmatively incentivize victims and witnesses to come forward.¹²⁸ Nonetheless, because case law does not provide room for a compelling judicial alternative, we must look towards other avenues for reform.

B. Advantages of Legislation

Legislation is the best avenue: it will better serve sexual harassment victims by preventing harmful NDAs from the outset rather than trying to strike them down retroactively in court. Some scholars have already put thought into what this legislation should look like. For example, in *Targeting Repeat Offender NDAs*,¹²⁹ Ian Ayres suggests a “middle ground” that would allow for NDAs that could still protect victims who seek confidentiality but would prevent their validity when used to protect “serial offenders.”¹³⁰ In contrast, this Comment does not seek to propose the “right” legislation. Instead, as with its consideration of case law, the Comment seeks to address legislation as it stands in order to determine whether legislatures can ameliorate the #MeToo concerns that have been raised throughout this inquiry.

1. Examples of ongoing statutory reform

California and New York provide instructive case studies, not only because they are influential and commercially powerful states, but also because they are currently leading the way in passing new and ambitious #MeToo laws. Effective as of January 1, 2018, California’s newly amended civil procedure code states:

- (a) Notwithstanding any other law, a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action the

¹²⁸ See Schultz, *supra* note 14, at 39 (citing Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 *STAND L. REV. ONLINE* 49 (2018)); Deborah L. Brake, *Retaliation in an EEO World*, 89 *IND. L.J.* 115, 136–39 (2014).

¹²⁹ Ayres, *supra* note 4, at 79–83.

¹³⁰ See *id.* at 78–79.

factual foundation for which establishes a cause of action for civil damages for any of the following:

(1) An act that may be prosecuted as a felony sex offense. . . .

(4) An act of sexual assault, as defined in paragraphs (1) to (9), inclusive, of subdivision (e) of Section 15610.63 of the Welfare and Institutions Code, against an elder or dependent adult, as defined in Sections 15610.23 and 15610.27 of the Welfare and Institutions Code.

(b) Notwithstanding any other law, in a civil action described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).¹³¹

Were *Saini* a case about sexual misconduct, this code's language may have produced the opposite result. Specifically, the language prohibits the enforcement of any contract that purports to prevent a victim or crucial witness from coming forward in a civil claim. True, the code does not reach so far as sexual harassment, which is not a felony in California, but it would take some clever drafting to somehow specify that an NDA applies to disclosures about sexual harassment but not sexual assault. Bare minimum, such language would put employees and the court on notice that the corporation providing such agreements has sinister intent to conceal its misdeeds.

As discussed above, the connection between the NDA and the harm at bar is at least a tacit consideration during a public policy challenge to a contract provision.¹³² A court would be more comfortable voiding a contract as against public policy when its plain language suggests that the company aims to evade due accountability.¹³³ Finally, and most importantly, this law remedies an essential problem with the judiciary's current reliance on the EEOC and prosecutors to root out sexual assault: it ensures that victims can personally recover damages by means of a civil claim once the sexual misconduct has been established in a criminal proceeding.

New York has taken even greater steps, with an improved attention to the position of employee-victims. Its new legislation (Section 5003-b) says:

¹³¹ CAL. CIV. PROC. CODE § 1002(a)–(b) (2019).

¹³² See RESTATEMENT (SECOND) OF CONTRACTS, § 178(3)(a)–(d) (1981); *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 921 (D. Nev. 2006).

¹³³ See *id.*

Notwithstanding any other law to the contrary, for any claim or cause of action, whether arising under common law, equity, or any provision of law, the factual foundation for which involves sexual harassment, in resolving, by agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance or otherwise, no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference. Any such term or condition must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the plaintiff may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.¹³⁴

Like California's law, Section 5003-b prevents employers from independently establishing NDAs that would prevent their employees from disclosing information about sexual harassment in a civil suit. Inventively, under this statute, an employee can still agree for such a provision to be enforceable, but only after the required deliberation period and in her sole discretion. This certainly ameliorates general concerns about employee bargaining power in the face of corporate giants, while preserving an option for employees who desire confidentiality themselves.¹³⁵ The language is somewhat unclear, but "underlying facts and circumstances to the claim" leaves open the possibility that the law prevents a company from restraining a victim from disclosing her story outside of court.

2. Forecasting the impacts of reform

These statutes may be too recent to produce case law examples of their impact on victims' attempts to invalidate NDAs.¹³⁶ On the other

¹³⁴ N.Y. C.P.L.R. § 5003-b (McKinney 2018).

¹³⁵ See generally Arnow-Richman, *supra* note 50; Ayres, *supra* note 4.

¹³⁶ As of September 13, 2019, no case has cited New York's statute. As for California's statute, no cases have emerged, though it is cited by a series of complaints against USA Gymnastics and Michigan State University for their alleged cover up of Dr. Lawrence Nassar's sexual violations. See, e.g., Complaint at 202, *Davis v. Mich. State Univ.*, No. 1:17-cv-00029, 2018 WL 4329266 (W.D. Mich. Sep. 10, 2018). As one can tell from the complaint's jurisdiction, the California statute is not central to the plaintiff's claim.

hand, more than a year has passed since they both became effective.¹³⁷ Silence itself could speak to their efficacy: a lack of new cases involving sexual harassment NDAs suggests a decrease in frequency for contractual cover-ups that provide insufficient solicitude and reparation for the victim. That is a victory for legislation in itself, even if #MeToo's cultural shift has so far led the charge.¹³⁸

Regardless, the future impact of these laws may be projected by imposing them on the cases examined above. For one, a statute in the style of California's could have deterred the strongly one-sided settlement arrangement that featured prominently in *Bandera*.¹³⁹ First, California only requires an act that "may" be prosecuted as a felony sex offense for its code to apply.¹⁴⁰ Even if *Bandera* did not suffer from such an act—in California, the unwanted touching of an intimate area for the purpose of sexual gratification—the threat of such an allegation and the prolonged litigation required to validate it would have left the City of Quincy far more desperate to resolve the case.¹⁴¹ Second, *Bandera*'s claims would have served as an even stronger warning to the City of Quincy: if any of the City's employee-perpetrators went further in their actions, the City would have to face a claimant whom they could not silence through settlement. California's new law not only preserves disclosures to a court in a criminal case; by proactively preventing certain NDAs from being formed, it empowers a potential felony sex offense victim to share the information of her harm as she sees fit. Thus, the City of Quincy would have had stronger incentives to immediately eliminate any risks among its personnel in order to prevent public outrage after the victim's disclosure, no matter the case's actual outcome.

New York's statute, which includes sexual harassment NDAs, would have prevented *Bandera*'s plight altogether.¹⁴² Because it only allows NDAs when they are the "plaintiff's preference," Quincy would likely have had to offer more money to *Bandera* in exchange for her silence. And even if *Bandera* mistakenly moved to accept the first deal due to bad counsel or ignorance of the law, the court could have invoked the New York code in preventing its signing or invalidating it retroactively. Indeed, the statute might have obliged the court to do so.

¹³⁷ California and New York's laws became effective on January 1, 2018, and July 11, 2018, respectively.

¹³⁸ See Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 242–67 (Eyal Zamir & Doron Teichman eds., 2014) (concluding that law can also play an important role in changing "moral attitudes," especially in the sexual harassment setting).

¹³⁹ *Bandera v. City of Quincy*, 344 F.3d 47, 49 (1st Cir. 2003).

¹⁴⁰ CAL. CIV. PROC. CODE § 1002(a) (2019).

¹⁴¹ See CAL. PENAL CODE § 243.4 (2019).

¹⁴² N.Y. C.P.L.R. § 5003–b (McKinney 2018).

Finally, whatever the concrete impacts of these laws will be, they will likely influence how courts resolve attempts to void sexual harassment on public policy grounds. Returning to the Restatement, “the strength of that policy as manifested by legislation . . .” is one of the four main factors that courts consider in determining whether to enforce a challenged term.¹⁴³ Therefore, a court whose state has a law that restricts sexual harassment NDAs can be more confident in refusing to enforce those agreements than a court whose state lacks them. Moreover, the more states that put such laws in place, the more likely a court will look beyond the laws of its own state when weighing the public policy interest in refusing to enforce an agreement. Were Congress to enact such a law, the effect would be all the more prolific.

C. Counterarguments

The most immediate rebuttal to this Comment’s argument is that courts will have to change too—statutory reform alone will be insufficient. Indeed, it is challenging for legislatures to craft laws that provide answers for every incident. After all, sexual harassment law has not worked so far, and victims are likely to continue to slip through the cracks.¹⁴⁴ However, arguing for an emphasis on legislative reform does not leave court reform by the wayside. In fact, legislative reform is probably the best chance at encouraging the courts to change their own doctrine. As this Comment just observed, the legislative scheme at hand is a primary consideration for courts in determining whether or not a contract is void as a matter of public policy.¹⁴⁵ The more that Congress and state legislatures restrict sexual harassment NDAs generally, the more comfortable a court will be in stretching that law a little further to invalidate a contract in a special case. And as many law and economics experts have argued, the law itself has the capacity to alter cultural attitudes, including those of judges.¹⁴⁶ In making the legal leap smaller for courts seeking to invalidate a sexual harassment NDA, we can expect those leaps to also become more common.

A critic might also argue that the positive influence of statutory reform upon the courts could be nullified—and some new laws preempted—by pre-existing legislation that favors private settlement,

¹⁴³ RESTATEMENT (SECOND) OF CONTRACTS, § 178(3)(a).

¹⁴⁴ See generally Green, *supra* note 56.

¹⁴⁵ See RESTATEMENT (SECOND) OF CONTRACTS, § 178(3)(a).

¹⁴⁶ See Bilz & Nadler, *supra* note 138, at 243 (suggesting that even where judges fail to follow the public trend, public outrage against their decisions as motivated by new laws encourages them towards legal reform) (citing Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903–68 (1996)).

namely, the Federal Arbitration Act (FAA).¹⁴⁷ In *AT&T Mobility LLC v. Concepcion*,¹⁴⁸ the Supreme Court held that state laws and judge-made rules could be preempted by the Federal Arbitration Act when they “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁴⁹ Specifically, the Court invalidated a Californian judge-made rule that rendered a consumer arbitration contract of adhesion unconscionable where disputes involve low damages and the weaker party alleges a scheme to defraud.¹⁵⁰ It found that rule to be in conflict with the FAA, which “reflect[s] . . . a liberal federal policy favoring arbitration.”¹⁵¹ Hence, a skeptical court could invoke *Concepcion* in invalidating aggressive statutory reform by finding that an anti-NDA law is so restrictive that it has a “disproportionate impact” on Congress’s larger goal of encouraging (often confidential) arbitration.¹⁵² Alternatively, during a public policy inquiry, it could consider the FAA and Congress’s interest in encouraging arbitration as outweighing the influence of state laws that restrict certain sexual harassment NDAs.

First, however, the enforcement of arbitration at issue in *Concepcion* and the enforcement of sexual harassment NDAs are not wholly entwined issues. For one, arbitration does not always emerge from a harmful, prolific, and intentional act that is solely the fault of the dominant party. Instead, it is often an alternative approach for both parties in a mutual dispute. Moreover, the restriction of a specific contract term in a specific factual context is unlikely to have a material effect on the rate of arbitration overall. While confidentiality is one major advantage of arbitration, it is not an integral feature of it; courts can also impose confidentiality on their proceedings “for good cause.”¹⁵³ And even if sexual harassment NDA restrictions were sufficient to be materially disruptive, employers still have plenty of incentives to prefer arbitration, including forum consistency, quicker procedure, et cetera.¹⁵⁴

Second, lower courts have significantly limited the potential effect of *Concepcion* by upholding laws that have a far more significant impact on the enforcement of arbitration agreements than restrictions devoted solely to the sexual harassment context. For example, just after the

¹⁴⁷ Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

¹⁴⁸ 563 U.S. 333 (2011).

¹⁴⁹ *Id.* at 352 (quoting *Hines v. Davidowitz* 312 U.S. 52, 67 (1941)).

¹⁵⁰ *Id.* at 338.

¹⁵¹ *Id.* at 339 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

¹⁵² *Id.* at 342.

¹⁵³ *See, e.g.*, FED. R. CIV. P. 5.2, 26.

¹⁵⁴ *See Sternlight*, *supra* note 68, at 1638.

Concepcion decision was handed down, the Massachusetts Supreme Judicial Court upheld an earlier decision that ruled that “an employment contract containing an agreement by the employee to limit or waive any of the rights or remedies conferred by [Massachusetts law] is enforceable only if such an agreement is stated in clear and unmistakable terms.”¹⁵⁵ Most significantly, that court recognized an overriding public policy in preventing gender discrimination, even in light of the FAA and Massachusetts’ own pro-arbitration laws.¹⁵⁶ It ultimately determined that restrictions on arbitration agreements still kept with the “generous spirit” of the FAA, so long as the parties were “free to agree” on arbitration.¹⁵⁷ Such a ruling could save even New York’s strong anti-NDA statute, since that code does not prevent settlement or arbitration of harassment claims outright; the employer merely needs to offer more to the victim in order for her to agree to an NDA.¹⁵⁸

Finally, the FAA itself states that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁵⁹ The unconscionability doctrine was in place by the time the Act was passed in 1925, so it could not be construed to restrain the courts’ capacity to protect exploited victims.¹⁶⁰ Given that the public policy doctrine stems from the same foundational principles as unconscionability, the logic that applies to the FAA and unconscionability should extend in turn.¹⁶¹

In summary, an invalidation of sexual harassment NDA laws via the FAA is unlikely due to their distance from the thrust of *Concepcion* and the current trend among lower courts of preserving judicial and legislative capacity to regulate employer-employee agreements.

VI. CONCLUSION

Sexual harassment is one of the thorniest issues in modern discourse, and every strategy for reform will have its own set of ad-

¹⁵⁵ *Warfield v. Beth Israel Deaconess Medical Center, Inc.* 910 N.E.2d 317, 326 (Mass. 2009); *accord Joule, Inc., v. Simmons*, 944 N.E.2d 143, 149 (Mass. 2011); *see also Harris v. Bingham McCutchen LLP*, 154 Cal.Rptr.3d 843, 849 (Ct. App. Cal. 2013) (following Massachusetts’s approach in determining that the FAA did not preempt the court’s refusal to enforce a certain term).

¹⁵⁶ *See Warfield*, 910 N.E.2d at 325–26.

¹⁵⁷ *Id.* at 327.

¹⁵⁸ *See* N.Y. C.P.L.R. § 5003–b (McKinney 2018).

¹⁵⁹ 9 U.S.C. § 2.

¹⁶⁰ *See Hume v. United States*, 132 U.S. 406, 411 (1889) (embracing the unconscionability doctrine).

¹⁶¹ RESTATEMENT (SECOND) OF CONTRACTS, § 208 (stating that the two doctrines overlap). According to Frank P. Darr, the unconscionability doctrine is a form of public policy, since it enables courts to dictate to society what proper contract behavior ought to be. *See* Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1849 (1994).

vantages, disadvantages, and uncertainties. Nonetheless, as this Comment has argued, legislative reform is the most promising area of focus. Standing on its own, current case law and judicial procedure is too inflexible to incorporate all of victims' best interests without severely clogging the courts—and hurting victims as employees in the long run. The legislative approach, in contrast, can both prevent harmful NDAs from being created in the first place and aid victims when they do seek to invalidate them in court. Moreover, legislation not only reflects a cultural change away from the acceptance of harmful sexual behavior, it has the possibility of spreading that change to judicial attitudes as well.

The Supreme Court's decision in *Concepcion* may or may not serve as an outer limit for just how restrictive anti-NDA law can become. However, whether *Concepcion* applies to such laws is still uncertain, and the Court has let stand judicial embrace of some rules that would likely have a greater impact on arbitration overall. Finally, even if *Concepcion* will curtail some of the most extreme anti-NDA legislation, lesser restrictions can make material contributions to the plights of harassment victims. As this Comment observed in New York's new code, tweaks to tertiary considerations such as a mandatory negotiation period can still provide a serious boon to underpowered plaintiffs, who typically do not have the resources to quickly understand the import of every legal matter.

Whether the reader accepts any of the preceding arguments, this Comment should serve as an accumulation and evaluation of key cases and statutes that will take center stage as sexual harassment NDA law continues to develop. This new "body" of law is in no way comprehensive, since the Comment had to draw on multiple categories of contract law in order to create a satisfactory picture of the legal landscape facing individuals who wish to breach their NDAs. But that legal landscape does exist, and even the most skeptical reader can appreciate the challenges it poses. The ultimate hope of this Comment is that if the reader takes away nothing else, she can agree on the need for reform.



“Whistle Blowers”: To What Extent Does Federal Law Impose Mandatory Reporting Obligations on Collegiate Coaches for Allegations of Sexual Misconduct?

Julia Tabat[†]

I. INTRODUCTION

Sexual violence perpetrated by student athletes or within university athletic programs is a recurring theme in the media. Some statistics even suggest that athletes account for a disproportionate amount of sexual assault on college campuses.¹ Recent scandals involving the Ohio State, Baylor, Penn State, and Colorado athletic departments (to name a few) illustrate varying fact patterns with the same central concern: a coach who knew about ongoing sexual violence, yet failed to act to stop it.² These stories raise questions about the extent to which collegiate coaches are mandatory reporters under federal law, including when they impose legal liability on their schools for failing to comply with their obligations. In the era of #MeToo, clarifying the scope of a coach’s duty to report is critical, both to protect collegiate campuses and

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¹ See Jeremy D. Heacox, *Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes*, 10 WILLAMETTE SPORTS L.J. 48, 50 (2012) (referencing Jenni E. Spies, *Winning at All Costs: An Analysis of a University’s Potential Liability for Sexual Assaults Committed by Its Student Athletes*, 16 MARQ. SPORTS L. REV. 429, 430 (2006)).

² See Michael McCann, *Legal Angles of Ohio State’s Probe into Urban Meyer’s Knowledge of Charges Against Zach Smith*, SPORTS ILLUSTRATED (Aug. 1, 2018), <https://www.si.com/college-football/2018/08/01/urban-meyer-zach-smith-ohio-state-legal-contract-firing-paid-leave> [<https://perma.cc/d2VJ-KPW7>] (discussing the potential liability Ohio State football coach Urban Meyer faced after failing to report a domestic violence allegation). See generally Andrew Solomon, *Preventing Recurrences of the Cover-Ups at Penn State & Baylor (and Now Michigan State): Where Does It End?*, 28 MARQ. SPORTS L. REV. 379 (2018) (detailing the reporting failures of coaches, athletic directors, and university presidents at Penn State and Baylor after learning of ongoing instances of child abuse and sexual assault, respectively).

to ensure that the coach does not overstep a victim's right to privacy or an accused's right to due process.

However, federal laws governing mandatory reporting are scarce and occasionally conflicting, leaving reporting duties unclear. Furthermore, ex post determinations of wrongdoing by a court or federal agency do not provide coaches with clear guidelines regarding their ex ante legal reporting responsibilities. Faced with ambiguity, many universities insert catch-all "sexual misconduct" clauses into their employment contracts, fearing federal liability otherwise.³ While well-meaning, these clauses are often overly broad and ill-defined, leaving a coach wondering whether even a third-party's whisper of a player's sexual activity requires a report.⁴ Coaches are left in a difficult position—over-reporting might overstep a victim's right to privacy and distance the coach from his/her players (thus, deterring future reporting).⁵ On the other hand, under-reporting can exacerbate the harm to current or potential victims, deter survivors from coming forward, and lead to liability for the university under federal or state law.⁶ Recent federal regulations proposed by the Department of Education (DOE) purport to address some of the general issues with reporting sexual misconduct, but they do not speak specifically to coaches' role in the process.⁷

This Comment focuses on the scope of mandatory reporting obligations that coaches⁸ incur under federal law, specifically Title IX⁹ and the Clery Act.¹⁰ It examines whether and how coaches' reporting obligations change depending on: (1) the type of action brought (administrative enforcement actions v. private lawsuits); (2) the substance of the allegation, including the definition of sexual misconduct that coaches must report; (3) the level of authority the coach possesses; and (4) the source of the allegation and the identity of the parties involved. The

³ See Scott Bernstein & Justin Dillon, *Coach Contract Sexual Misconduct Clauses Are Concerning*, LAW 360 (Aug. 13, 2018), <https://www-law360-com.proxy.uchicago.edu/articles/1072401/ach-contract-sexual-misconduct-clauses-are-concerning> [<https://perma.cc/5CE9-97WV>].

⁴ *Id.*

⁵ See, e.g., Jill C. Engle, *Where Do We Go from Here?: Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to a Victim-Centric Protocol That Comports with Federal Law*, 24 TEMP. POL. & CIV. RTS. L. REV. 401 (2015) (arguing that current reporting procedures do not respond adequately to victims' choice on how to proceed and right to privacy).

⁶ *Id.*

⁷ See generally *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

⁸ This Comment uses "coaches" to mean full-time or part-time university employees who serve as a head or assistant coach on one or more of the school's sanctioned athletic teams. It will exclude athletic directors from its consideration (because they are often considered separately under Title IX). See, e.g., *S.S. v. Alexander*, 177 P.3d 724 (Wash. Ct. App. 2008).

⁹ 20 U.S.C. § 1682 (1989).

¹⁰ 20 U.S.C. § 1092 (2013).

Comment concludes by reconciling the substantive and procedural inconsistencies in these four areas and proposing a solution for clearer reporting standards.

Ultimately, this Comment argues that the proposed Title IX DOE regulations should mimic the Clery Act's substantive definitions for sexual misconduct, with a few exceptions regarding the scope of reporting obligations. The Comment also contends that the DOE's informal regulation scheme is the proper procedure for implementing and enforcing Title IX reporting requirements. This "hybrid" solution between Title IX and the Clery Act would provide a uniform substantive standard for reporting sexual misconduct under federal law, which would clarify coaches' and universities' obligations and maximize their incentives to comply with their duties.

II. REPORTING OBLIGATIONS IN TITLE IX AND THE CLERY ACT

Statutory federal law on mandatory reporting is scarce; one of the few examples is the Federal Child Abuse Prevention and Treatment Act (CAPTA).¹¹ CAPTA sets forth the minimum definitions of child abuse and neglect for reporting purposes, but states are left to designate *who* counts as a reporter.¹² Moreover, CAPTA only requires states to have reporting laws for children up to the age of eighteen.¹³ Thus, it generally does not apply to the students and university members with whom collegiate coaches tend to interact.

Nevertheless, two pieces of federal legislation—Title IX and the Clery Act—impose reporting obligations on educational institutions, and, by extension, implicate coaches. Although the two acts serve different purposes, they both inform universities of their reporting duties for allegations of sexual violence.¹⁴ First, Congress enacted Title IX in 1972 in an effort to prevent sex discrimination in education and athletics.¹⁵ Enforced by both administrative agencies and private plaintiffs, Title IX and its corresponding federal regulations provide schools with duties to prevent, report, and investigate sexual misconduct.¹⁶

¹¹ See 42 U.S.C. §§ 5101–06 (2016).

¹² *Id.* at § 5106(g).

¹³ *Id.* at § 5106.

¹⁴ See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011).

¹⁵ See David Lanser, *Title IX and How to Rectify Sexism Entrenched in NCAA Leadership*, 31 WIS. J. L. GENDER & SOC'Y 181, 184 (2016).

¹⁶ See A.J. Bolan, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86 GEO. WASH. L. REV. 804, 810 (2018).

In contrast, the Clery Act arose out of safety concerns after a college student was murdered in her dorm room on campus.¹⁷ Her parents argued that had her university published crime statistics revealing a pattern of violence on campus, she would have chosen to attend a different school.¹⁸ As a result, the Act requires federally funded schools to “notify [their] constituent campus communities . . . when certain crimes are brought to their attention.”¹⁹ Among these crimes are murder, arson, and robbery, as well as sex-based crimes, such as sexual assault, domestic violence, dating violence, and stalking.²⁰ The Act’s purpose is to “aid in the prevention of similar occurrences” and to obligate “campus security authorities” (CSAs) to report crime.²¹

Although Title IX and the Clery Act overlap, they take different approaches to reporting, leaving several ambiguities for collegiate coaches as to their responsibilities. These differences are examined in the following section.

A. Title IX Reporting Obligations

Title IX itself does not impose specific reporting requirements on any university employees, much less athletic staff. Instead, it provides that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.²²

Formerly, the only federal regulations governing Title IX (and its corresponding obligations for universities) were promulgated in 1975 by the DOE’s predecessor, the Department of Health, Education, and Wellness. These regulations were replicated and adopted identically by the DOE after its creation.²³ The 1975 regulations do not address a university’s reporting duties with respect to sexual misconduct because they were created before the Supreme Court held that such harassment constituted discrimination under Title IX.²⁴

¹⁷ See *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 30 (1st Cir. 2007).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See 20 U.S.C. § 1092(f)(1)(F)(i)–(iii).

²¹ *Id.*

²² 20 U.S.C. § 1681(a) (1986).

²³ See *Cohen v. Brown University*, 991 F.2d 888, 895 (1st Cir. 1993).

²⁴ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462, 61463–65 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

In 1982, however, the Supreme Court concluded that an institution's failure to address sexual harassment *can* constitute discrimination on the basis of sex, thereby imposing reporting obligations on schools (and, by extension, their employees) for such conduct.²⁵ The George W. Bush Administration supported this assertion and provided universities with guidelines for defining and investigating sexual misconduct under Title IX ("The 2001 Guidelines").²⁶ The Obama Administration went further, supplementing The 2001 Guidelines with a series of Dear Colleague Letters (DCLs)²⁷ and Title IX "Questions and Answers"²⁸ to clarify and expand the scope of such reporting obligations. Because both the 2001 Guidelines and the subsequent Obama-era guidance documents were not implemented via either a formal or informal process for promulgating federal executive regulations, they were often considered mere "suggestions" for universities.²⁹ This also meant that none of these documents were entitled to the "highest deference" that courts typically allow to executive agencies under the doctrine set forth in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*³⁰

However, in 2018 the DOE withdrew all previous executive documents³¹ and, in their place, issued a set of proposed regulations to govern Title IX compliance.³² These regulations *did* follow informal regulation procedures and will take effect after the DOE reviews and considers the public comments submitted to them regarding the new regime.³³ Until that time, reporting obligations under Title IX remain in flux, and are examined in the next section.

²⁵ See generally *Franklin v. Gwinnett Cty Pub. Sch.*, 503 U.S. 60 (classifying teacher-on-student sexual harassment as actionable under Title IX); *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629 (1999) (extending *Franklin* to cases of peer-on-peer harassment).

²⁶ See Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/JX5H-4XR3>] [hereinafter *2001 Sexual Harassment Guidance*].

²⁷ See generally Office for Civil Rights, *2011 Dear Colleague Letter*, U.S. DEPT. OF EDUC., 1–19 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/7VNJ-GFRD>].

²⁸ See generally Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., 1–53 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-2014-04-title-ix.pdf> [<https://perma.cc/JF9W-R7MX>].

²⁹ Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61463.

³⁰ 467 U.S. 837, 844 (1984) (holding that courts may give "considerable weight" to an administrative agency's construction or interpretation of statutes they enforce).

³¹ See generally Office for Civil Rights, *Dear Colleague Letter*, U.S. DEPT. OF EDUC., 1–3 (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/6UL4-8PAL>] [hereinafter *2017 Dear Colleague Letter*].

³² See generally Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. 61462.

³³ See Tovia Smith, *Trump Administration Gets an Earful on New Campus Sexual Assault Rules*, N.P.R. (Jan. 30, 2019), <https://www.npr.org/2019/01/30/689879689/education-department-gathers-feedback-on-new-campus-sexual-assault-rules> [<https://perma.cc/5HWS-F568>].

1. Public v. private enforcement actions

Viewed as a contract between the federal government and the recipient school,³⁴ Title IX permits regulatory agencies to conduct investigations and withdraw funding from institutions who are guilty of sex discrimination.³⁵ Accordingly, most of the guidance regarding the scope of Title IX comes from federal regulations and guidelines. However, the Supreme Court established in 1979 that private plaintiffs *do* have an implied right-of-action under Title IX.³⁶ In so doing, the Court explained that Congress intended for Title IX to prevent federal agencies from funding discriminatory practices, but also “to provide individual citizens effective protection against those practices.”³⁷ Therefore, private enforcement through an implied right-of-action is necessary to ensure compliance among recipients; after all, federal agencies only have limited funding for investigations.³⁸

In spite of this holding, courts strictly limit plaintiffs’ ability to recover monetary damages under Title IX. For example, in *Gebser v. Lago Vista Independent School District*,³⁹ the Supreme Court held that an institution could not be vicariously liable for the misconduct of its employees under Title IX.⁴⁰ It explained that, because the statute requires administrative agencies to advise a school of its noncompliance before initiating sanctions, private plaintiffs could not recover damages until they proved that a school had *actual* (not constructive) notice of the sexual harassment.⁴¹ One year later, the Court enumerated a four-part test for Title IX liability, which requires the plaintiff to demonstrate:

- (1) the school had actual knowledge of sexual harassment;
- (2) the school was deliberately indifferent to such harassment;
- (3) the harassment was “so severe, pervasive, and objectively offensive,” that it
- (4) deprived the victim of “access to the educational opportunities or benefits provided by the school.”⁴²

³⁴ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998).

³⁵ 20 U.S.C. § 1682 (1989).

³⁶ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

³⁷ *Id.* at 704.

³⁸ See *id.* at 708 n.42.

³⁹ 524 U.S. 274 (1998).

⁴⁰ *Id.* at 285.

⁴¹ *Id.*

⁴² *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

Gebser was a 5–4 decision; in dissent, Justice Stevens urged the Court to consider the implications of imposing such a high threshold for plaintiffs to meet in order to bring a Title IX action.⁴³ He also pointed out that, in *Franklin* (the decision where the Court initially held that sexual harassment could constitute discrimination) the Court permitted the plaintiff to recover damages, despite the fact that the DOE had not withdrawn federal funding from the school for its failure to address the harassment.⁴⁴ *Franklin* suggested that courts are free to follow a less stringent standard than federal agencies do to determine whether a school faces Title IX liability. Nevertheless, in the years since *Gebser*, courts have continued to impose a high barrier to private recovery under Title IX.⁴⁵ The Tenth Circuit even noted that “actual notice [under *Gebser*] requires more than a simple report of inappropriate conduct,”⁴⁶ suggesting that plaintiffs must satisfy additional requirements before they may recover damages.

Administrative proceedings under Title IX, by contrast, generally involve a review of the school’s internal policies and procedures.⁴⁷ They also require the reviewing federal agency to provide the school with notice of its noncompliance and attempt to help it address any of its shortcomings before withdrawing funding.⁴⁸ Previous executive guidance made it unclear exactly when a school failed to comply with the statute, so the DOE’s proposed regulations streamline federal investigations by imposing the same liability standard used in *Davis* and *Gebser*.⁴⁹ Thus, under the new rules, in enforcement proceedings—as well as in private lawsuits—universities are not liable for student-on-student sexual harassment unless they have actual knowledge of severe, pervasive, and objectively offensive sexual misconduct and act with deliberate indifference towards it.⁵⁰

Schools, rather than coaches, face direct liability for reporting failures under Title IX, both in private and public enforcement proceedings. Nonetheless, the structure of the Act and its standard of liability have implications for the extent to which coaches are mandatory reporters. If the standard of institutional liability is too low or too high,

⁴³ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1998) (Stevens, J., dissenting).

⁴⁴ *Id.* at 303.

⁴⁵ See, e.g., *Doe v. Miami Univ.*, 882 F.3d 579, 589 (6th Cir. 2018) (requiring plaintiffs’ specific factual allegations of discrimination in a Title IX complaint).

⁴⁶ *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1153 (10th Cir. 2006).

⁴⁷ See 28 C.F.R. § 42.107 (1973).

⁴⁸ *Id.*

⁴⁹ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61466–68 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

⁵⁰ *Id.*

schools may provide coaches with reporting obligations that are under or overinclusive of what federal law requires.

2. Substance and definitions of reporting obligations (“what and where?”)

Title IX does not define discrimination, so interpretations of what needs to be reported under the statute come from administrative guidance and judicial decisions. For example, in *Davis v. Monroe County Board of Education*,⁵¹ the Supreme Court recognized peer-on-peer sexual harassment as actionable against an institution under Title IX.⁵²

However, courts struggle to provide an adequate definition of actionable sexual misconduct. The *Davis* Court looked to Title VII⁵³ to define harassment, holding that the sexual misconduct must be so “severe, pervasive, and objectively offensive” as to deprive a student of equal educational benefits.⁵⁴ It further explained that whether sexual misconduct is actionable depends on “surrounding circumstances, expectations, and relationships . . . including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.”⁵⁵ Finally, *Davis* also acknowledged that “in theory, a single instance of sufficiently severe one-on-one peer harassment” could suffice to satisfy the severe, pervasive, and objectively offensive standard, but it ultimately concluded that it was “unlikely that Congress would have thought such behavior sufficient to rise to this level.”⁵⁶ However, this case may be distinguishable from collegiate cases, since the Court was considering the conduct of fifth graders, who it expected would resort to frequent immature conduct.⁵⁷

The Bush Administration’s 2001 Guidelines embraced the *Davis* approach, refusing to provide a more specific definition of actionable sexual misconduct.⁵⁸ Courts interpreted the standard narrowly; the Sixth Circuit held that a single incident of alleged non-consensual kissing is insufficient to demonstrate “severe, pervasive, and objectively offensive” behavior depriving a victim of equal opportunities at school.⁵⁹ It also refused to find actionable misconduct when a male student—on

⁵¹ 526 U.S. 629 (1999).

⁵² *Id.* at 650.

⁵³ Title VII prohibits employers from discriminating on the basis of sex.

⁵⁴ *Id.* at 651 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

⁵⁵ *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See generally Office for Civil Rights, *Revised Sexual Harassment Guidance*, *supra* note 26.

⁵⁹ *Doe v. Miami Univ.*, 882 F.3d 579, 591–92 (6th Cir. 2018).

three separate occasions—shoved a female student into a locker, demanded that she perform oral sex on him, and made obscene gestures at her.⁶⁰ In 2014, in response to mounting pressure to provide clearer criteria and definitions, the DOE's Office for Civil Rights (OCR) issued its "Title IX Questions and Answers."⁶¹ These guidelines stressed the need for schools to report all allegations of sexual violence, defined as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent . . . including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion."⁶² However, it left "harassment" intact under *Davis*, noting that schools had the responsibility to provide more coherent definitions themselves.⁶³

Due to the confusion surrounding the substance and scope of reporting obligations under the former guidelines, the Trump Administration's proposed regulations provide a specific definition of actionable sexual harassment.⁶⁴ This definition encompasses three different types of conduct.⁶⁵ First, it includes quid pro quo harassment: when a recipient's employee conditions receipt of a benefit or service upon a student or coworker's participation in unwelcome sexual conduct.⁶⁶ Second, it codifies the standard in *Davis*, and holds actionable sexual harassment that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a recipient's education program or activity."⁶⁷ Third, the new regulations incorporate the definition of sexual assault referred to in the Clery Act regulations ("an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program").⁶⁸ However, the new rule does not include other sex-based Clery Act crimes, because the DOE believes that Title IX's focus is not on "crimes per se," but instead on behavior that deprives university members of equal opportunities based on their sex.⁶⁹

⁶⁰ See *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 360, 363–64 (6th Cir. 2012) (finding no liability because the school instituted a "supervision plan" to prevent future incidents, although the victim argued that this plan led to more abuse off-campus).

⁶¹ See Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, *supra* note 28, at *1.

⁶² See *id.*

⁶³ *Id.* at *13.

⁶⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61466–68 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

⁶⁵ *Id.*

⁶⁶ *Id.* at 61466.

⁶⁷ *Id.*

⁶⁸ *Id.* (citing 34 C.F.R. 668.46 (2015)).

⁶⁹ Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61467–68 proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

Equally challenging to define are the geographical and functional limits to coaches' reporting obligations under Title IX. Originally, some courts insisted that Title IX applied only to "operations of a college or university that are *educational* in nature," thus excluding operations such as university dining services.⁷⁰ However, most courts now agree that Title IX should be read broadly in conjunction with the Civil Rights Restoration Act amendments.⁷¹ Passed in 1987, these amendments sought to clarify Title IX's text—specifically, what it means for sex-based discrimination to occur within an "education program or activity."⁷² They explain that Title IX applies to any university-sponsored program, including "traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities."⁷³ However, in 2014, the Obama Administration changed the analysis by requiring that a school "process all complaints of sexual violence, *regardless of where the conduct occurred*."⁷⁴ For example, reportable misconduct included incidents occurring in fraternities, on field trips ("including athletic team travel"), and during off-campus events for school clubs.⁷⁵

To harmonize the conflicting approaches to Title IX's geographical scope, the proposed regulations clarify what it means for a university activity or program to be within the scope of Title IX.⁷⁶ Schools are responsible for all misconduct occurring within their "operations," including activities encompassing "any academic, extracurricular, research, [or] occupational training."⁷⁷ There are no geographical constraints on these operations, but when determining whether an activity falls within the school's sphere of liability, the DOE will use factors developed by courts in their Title IX jurisprudence.⁷⁸ These factors include: whether the conduct occurred at a location owned by the recipient; whether the recipient exercised oversight, supervision, or discipline over the context in which the misconduct occurred; and whether the recipient funded, sponsored, promoted, or endorsed the event in question.⁷⁹ Thus, coaches

⁷⁰ Preyer v. Dartmouth, 968 F. Supp. 20, 25 (D.N.H. 1997) (emphasis added).

⁷¹ Fox v. Pittsburg St. Univ., 257 F. Supp. 3d 1112, 1124–25 (D. Kan. 2017).

⁷² *Id.* at 1124.

⁷³ *Id.* at 1125 (citing S. Rep. No. 100–64, at 17 (1987)).

⁷⁴ Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, *supra* note 28, at *29.

⁷⁵ *Id.*

⁷⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61468 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

⁷⁷ *Id.*

⁷⁸ Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61468.

⁷⁹ *Id.* (citing *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 646 (1999); *Samuelson v. Or. State Univ.*, 725 Fed. App'x. 598, 599 (9th Cir. 2018); *Farmer v. Kan. State Univ.*, No. 16-CV-2256-

who know of incidents occurring at fraternities housed off-campus or during athletic travel away from the school may still need to report such conduct, since universities often exercise oversight over these activities.⁸⁰

3. Identity and authority of the coach

Although many coaches' contracts designate them as mandatory reporters, Title IX jurisprudence and executive interpretations may impose independent reporting obligations on them. For example, in *Gebser*, the Supreme Court explained that schools have actual notice of sexual misconduct (and thus, incur Title IX liability) when an "appropriate person" knows of the misconduct and fails to report it.⁸¹ An "appropriate person" is "an official who, at minimum, has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf."⁸² Many courts conclude that determining who has such authority is "'necessarily a fact-based inquiry' because of the varying roles of educational officials."⁸³ However, *Gebser* involved sexual harassment by a school *employee*; in *Davis*, the Supreme Court made no mention of an "appropriate person" requirement in cases of *peer-on-peer* sexual harassment.⁸⁴ One legal scholar thus concluded that "when the offending party is a student, virtually any employee can be presumed to have authority to take some corrective action."⁸⁵ In fact, only the Tenth and Eleventh Circuits have ever applied the "appropriate person" test to situations where a *student* (rather than an *employee*) committed the alleged sexual misconduct.⁸⁶

Despite the language in *Davis*, OCR previously required that only "responsible employees" be mandatory reporters of peer-on-peer sexual misconduct.⁸⁷ Federal regulations mandated schools to designate at least one person as such an employee.⁸⁸ Different from an appropriate

JAR-GEB, 2017 WL 980460, at *8 (D. Kan. Mar. 14, 2017)).

⁸⁰ *Id.* (citing Farmer, 2017 WL 9804060, at *8).

⁸¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

⁸² *Id.*

⁸³ *Kinsman v. Florida State Univ. Bd. of Trustees*, No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *2 (N.D. Fla., Aug. 12, 2015) (quoting *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1256 (11th Cir. 2010)).

⁸⁴ See Brian Bardwell, *No One Is an Inappropriate Person: The Mistaken Application of Gebser's Appropriate Person Test to Title IX Peer-Harassment Cases*, 68 CASE W. RES. L. REV. 1343, 1349 (2018).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1349, 1354.

⁸⁷ Office of Civil Rights, *Revised Sexual Harassment Guidance*, *supra* note 26, at *14.

⁸⁸ 34 C.F.R. § 106.8 (1980).

person, a responsible employee is “anyone who has the authority to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to their Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.”⁸⁹ In practice, however, this standard seemed to sweep just as broadly as the “appropriate person” analysis in *Davis*—one study examined the reporting policies of 150 universities and discovered that 69% of them designated *all* of their employees as “responsible employees.”⁹⁰

Unable to reconcile the “responsible employee” and “appropriate person” standards, courts divide as to whether coaches incur Title IX reporting obligations. For example, one court decided that an assistant coach who failed to report the rape of a student equipment manager did not possess sufficient authority to qualify as an “appropriate person.”⁹¹ However, the court determined that the school’s athletic director *was* such a person, but left open whether the head coach would be as well.⁹² On the other hand, coaches of highly successful programs are almost certain to incur reporting responsibilities. The Tenth Circuit, for example, emphasized that the head coach of the University of Colorado football team enjoyed such prestige, influence, and authority that his position within the school “was comparable to that of police chief in a municipal government.”⁹³ Thus, his failure to report and address ongoing sexual violence committed by recruits of the football team was evidence of the entire school’s failure to comply with Title IX.⁹⁴

The DOE’s proposed guidelines attempt to clarify the responsibilities of university employees by retiring the “responsible person” terminology.⁹⁵ Instead, schools must designate a “coordinator,” who is required to inform victims of their right to file a formal sexual misconduct complaint (which triggers the school’s grievance procedures and can be done at any time), to handle and process such reports, and to offer supportive measures (i.e., counseling or housing changes).⁹⁶ In the absence

⁸⁹ Office of Civil Rights, *Revised Sexual Harassment Guidance*, *supra* note 26, at *15.

⁹⁰ See Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 Tenn. L. Rev. 71, 77–78 (2017) (arguing that such “wide-net” reporting policies actually deter victims from coming forward).

⁹¹ See *S.S. v. Alexander*, 177 P.3d 724, 738 (Wash. Ct. App. 2008).

⁹² *Id.*

⁹³ *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184 (10th Cir. 2007).

⁹⁴ *Id.* at 1184–85.

⁹⁵ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61481 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

⁹⁶ *Id.*

of a formal complaint, however, the coordinator does not incur an independent obligation to report sexual misconduct.⁹⁷

Yet the new DOE regulations still adopt the “appropriate person” test from *Gebser* for the purposes of determining whether a school had actual knowledge of sexual misconduct.⁹⁸ They also suggest that this analysis applies regardless of whether the sexual misconduct is perpetrated by a school employee or by a peer.⁹⁹ Under this approach, coaches who have both notice of actionable harassment, as well as the authority to institute corrective measures on the school’s behalf, incur an obligation to report the misconduct. Additionally, although the proposed regulations agree that determining whether an employee possesses such authority is a “fact-specific inquiry,” they also state that “the mere ability or obligation to report sexual harassment” (for example, in an employment contract) is not per se evidence of such authority.¹⁰⁰ This language leaves open the possibility that, even when a coach’s contract designates him or her as a mandatory reporter, there are situations where he or she may not trigger the school’s Title IX liability for failing to report an incident.

4. Identity of the victim and perpetrator

The DOE’s webpage for Title IX Frequently Asked Questions states that Title IX protects, not only students, but “all persons from discrimination, including parents and guardians, students, and employees.”¹⁰¹ Nonetheless, the identity of the victim and the perpetrator, as well as the source of a complaint, *do* seem to matter to a Title IX action. Victims may include, for example, employees of the school,¹⁰² although courts are divided as to whether those employees must first exhaust their remedies under Title VII.¹⁰³

⁹⁷ *Id.*

⁹⁸ *Id.* at 61466–68.

⁹⁹ Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61466–68.

¹⁰⁰ *Id.* at 61467. (citing *Plamp v. Mitchell Sch. Dist. No. 17–2*, 565 F.3d 450, 459 (8th Cir. 2009), *Santiago v. P.R.*, 655 F.3d 61, 75 (1st Cir. 2011)) (emphasis added).

¹⁰¹ *Sex Discrimination Frequently Asked Questions*, U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS (Sept. 25, 2018) (emphasis added), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html#sexdisc4> [<https://perma.cc/YMW9-C8CL>].

¹⁰² *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

¹⁰³ *Compare Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995) (holding that permitting employment claims under Title IX without first exhausting Title VII remedies disrupts federal employment law) *with* *Burton v. Board of Regents of the University of Wisconsin System*, 171 F. Supp. 3d 830, 840 (W.D. Wis. 2016), *reconsideration denied*, No. 14-CV-274-JDP, 2016 WL 3512287, at *1 (W.D. Wis. June 22, 2016) (differentiating *Lakoski* as limited to employment discrimination, and refusing to extend it to retaliation claims, which do not require Title VII exhaustion).

On the other hand, courts are split as to whether Title IX liability attaches when the victim has no affiliation with the recipient university. For instance, in *Simpson*, the Tenth Circuit explained that, even though one of the victims was not a student (and therefore, not protected by Title IX), “that circumstance [was] irrelevant to evaluation of risk to [other University of Colorado] women.”¹⁰⁴ But a recent First Circuit case held that a Providence University student who was assaulted by a student at Brown University could not bring a Title IX suit against Brown.¹⁰⁵ The First Circuit explained that, in order to prove discrimination, the victim “must be a participant, or at least have the intent to participate, in the defendant’s educational program or activity.”¹⁰⁶ These decisions make it ambiguous whether a coach must report, for example, a player who sexually assaults a student from another school.

The source of an allegation also seems to matter to a mandatory reporting analysis under Title IX. For example, the 2001 OCR Guidelines required a report and investigation when a student’s parent reported an incident of sexual misconduct against his or her child.¹⁰⁷ However, they explained that when employees learn about misconduct “through other means . . . [like] a witness to an incident or an anonymous letter or telephone call,” their required response will vary based on several different factors.¹⁰⁸ Among these are: (1) “the source and nature of the information;” (2) “the seriousness of the alleged incident;” (3) “the specificity of the information;” (4) “the objectivity and credibility of the source of the report;” and (5) whether the individuals “who were subjected to the alleged harassment” can be identified and “want to pursue the matter.”¹⁰⁹

The proposed Title IX regulations, however, simplify matters and do not address the source of an allegation; instead, they *only* require schools to instigate grievance procedures when a formal complaint is filed or when a university receives multiple complaints about the same individual.¹¹⁰ Thus, the identity and affiliation of the alleged *perpetrator* may also matter in a Title IX analysis to the extent that the institution has control over the assailant. In fact, the Supreme Court stated in

¹⁰⁴ *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1181 (10th Cir. 2007). *See also* *Kinsman v. Fla. State Univ. Bd. of Tr.*, No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *3 (N.D. Fla., Aug. 12, 2015) (explaining that actual knowledge of an incident “does not require knowing exactly who the victim was and the connection with the funding recipient”).

¹⁰⁵ *See generally* *Doe v. Brown Univ.*, 896 F.3d 127 (1st Cir. 2018).

¹⁰⁶ *Id.* at 131.

¹⁰⁷ *See* Office for Civil Rights, *Revised Sexual Harassment Guidance*, *supra* note 26, at *18.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61469 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

Davis that “the regulatory scheme surrounding Title IX” informs schools that “they may be liable for their failure to respond to discriminatory acts of certain nonagents.”¹¹¹ There are, of course, limitations to this statement. Title IX liability for *damages* is limited to “circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”¹¹² Thus, social-media harassment by third parties against a victim who accused the quarterback on her university’s football team of sexual assault is not actionable, “but can bear on the severity and offensiveness” that the victim suffers.¹¹³

B. Clery Act Reporting Obligations

Unlike Title IX, the Clery Act explicitly imposes reporting obligations on the universities to which it applies.¹¹⁴ Specifically, it requires schools to disclose their campus security policy and statistics of certain crimes occurring in a defined geographical area.¹¹⁵ Additionally, “although the Clery Act generally does not require particular policies or procedures, a more detailed policy statement is necessary with regard to campus sexual assaults.”¹¹⁶ Thus, schools (and by extension, coaches) may face stricter Clery Act obligations for sex-based crimes than for other crimes covered by the act, such as robbery.

1. Private v. public enforcement actions

No private right-of-action is available under the Clery Act.¹¹⁷ The text of the statute provides that it cannot “be construed to . . . [either] create a cause of action” against a university or its employees or to “establish any standard of care.”¹¹⁸ Courts have honored this provision, barring plaintiffs from asserting any sort of liability for a school’s failure to honor its Clery Act duties.¹¹⁹ However, the DOE permits parties to trigger a noncompliance investigation by filing a complaint with its

¹¹¹ *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 643 (1999).

¹¹² *Id.* at 645.

¹¹³ *Kinsman v. Fla. State Univ. Bd. of Tr.*, No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *5 (N.D. Fla., Aug. 12, 2015).

¹¹⁴ See 20 U.S.C. § 1092 (2013).

¹¹⁵ *Id.* at § 1092(f).

¹¹⁶ Heacox, *supra* note 1, at 53.

¹¹⁷ 20 U.S.C. § 1092(f)(14)(A).

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *Moore v. Murray St. Univ.*, No. 5:12-CV-00178, 2013 WL 960320, at *3 (W.D. Ky. 2013). See also *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 31–32 (1st Cir. 2007).

office.¹²⁰ The DOE may also initiate investigations in the following circumstances: (1) after a school conducts an independent audit for compliance, (2) via a review selection process, and (3) “if media attention raises concerns.”¹²¹

DOE Clery Act investigations are extensive and may include: reviews of university publications, policies, and procedures; sampling of crime reports filed and logged on campus; interviews; and attendance at university meetings.¹²² A university who fails to meet its obligations faces fines of up to \$27,500 per violation.¹²³ For example, after Jerry Sandusky (an assistant football coach at Penn State) was arrested for ongoing sexual abuse of young boys attending football camps, the Department imposed a fine of over \$2 million on the university for Clery Act violations.¹²⁴ It noted the failure of the athletic staff, particularly the head coach Joe Paterno, to report allegations of sexual violence to the campus police.¹²⁵ Its findings relied heavily on the investigative procedures, which revealed numerous violations under 34 C.F.R. § 668 (the regulations setting forth the specific requirements and procedures schools must implement to report crime, i.e., keeping records for at least three years).¹²⁶

The Penn State case indicates some of the troubling procedural characteristics of the Clery Act’s mandatory reporting policies. In particular, the Act shields the coaches from personal liability for its violations, as plaintiffs do not have a private right-of-action and the DOE’s only remedy is to fine an *institution* for its failures.¹²⁷ Moreover, the Act does not permit private plaintiffs to seek monetary damages—as discussed later in the Comment, this feature tends to lead the DOE to focus its attention on large-scale violations. Still, the Clery Act “fine” letters issued by the DOE after an investigation *do* provide coaches and universities with an exact discussion about where reporting failures occurred and how to prevent such mishaps in the future.¹²⁸

¹²⁰ Heacox, *supra* note 1, at *55.

¹²¹ *Id.*

¹²² See, e.g., *Penn State Fine Letter*, FEDERAL STUDENT AID: ADMINISTRATIVE AND APPEALS SERVICE GROUP, *3–5 (Nov. 3, 2016), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PennStateFineLetter.pdf>. [<https://perma.cc/6UM2-T7LS>].

¹²³ 34 C.F.R. § 668.84 (2015).

¹²⁴ See *Penn State Fine Letter*, *supra* note 122, at *1.

¹²⁵ See *Penn State Campus Crime Final Program Review Determination*, FEDERAL STUDENT AID: ADMINISTRATIVE AND APPEALS SERVICE GROUP, *24 (Nov. 3, 2016), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PSCFPRD10327991.pdf> [<https://perma.cc/L766-P6E7>].

¹²⁶ See generally *Penn State Fine Letter*, *supra* note 122.

¹²⁷ 20 U.S.C. § 1092(f)(14)(A) (2013); 34 C.F.R. § 668.84.

¹²⁸ See generally *Penn State Campus Crime Final Program Review Determination*, *supra* note 125.

2. Substance and definitions of reporting obligations (“what and where?”)

In comparison to Title IX, the Clery Act provides much more specific definitions for the crimes that it requires coaches to report, often cross-referencing other federal law. For example, it explains that sexual assault is a “forcible or nonforcible sex offense,” as classified by the FBI’s uniform crime reporting system.¹²⁹ This includes “penetration, no matter how slight of the vagina or anus with any body part or object, or oral penetration . . . without the consent of the victim,” as well as attempted penetration.¹³⁰ The Clery Act also requires reports for domestic violence, dating violence, and stalking, which are defined in section 12291(a) of Title 34.¹³¹ This section, known as the Violence Against Women Act (VAWA),¹³² defines domestic violence as “felony or misdemeanor crimes of violence committed by [among other things] a current or former spouse or intimate partner of the victim.”¹³³ Similarly, dating violence is “violence committed by a person who is or has been in a social relationship of romantic or intimate nature with the victim.”¹³⁴ Finally, stalking means “engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or suffer substantial emotional distress.”¹³⁵

Furthermore, unlike Title IX, the Clery Act has specific geographical constraints on reporting. Initially, the Act required universities to report violent crimes occurring: (1) on campus; (2) off-campus in buildings “owned or controlled” by the institution; and (3) on public property within the area “reasonably contiguous to the institution and adjacent to a facility owned or controlled by the institution.”¹³⁶ However, Congress expanded the law to include crimes committed on “non-campus” property “adjacent to a facility owned and controlled by the institution,” so long as such property is used by the institution in some way to further its academic goals.¹³⁷

¹²⁹ 20 U.S.C. § 1092(f)(6)(A)(v).

¹³⁰ Federal Bureau of Investigation, *UCR Offense Definitions*, U.S. DEPT. OF JUST. (Jan. 26, 2017), <https://www.ucrdatatool.gov/offenses.cfm> [<https://perma.cc/XB59-BKN5>].

¹³¹ 20 U.S.C. § 1092(f)(6)(A)(i).

¹³² 34 U.S.C. § 12291 (2006).

¹³³ *Id.* at § 12291(a)(8).

¹³⁴ *Id.* at § 12291(a)(10).

¹³⁵ *Id.* at § 12291(a)(30).

¹³⁶ *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 30 (1st Cir. 2007) (citing 20 U.S.C. § 1092(f)(6)(A)(i)-(iii)).

¹³⁷ *Id.* at 31 (citing Higher Education Amendments of 1998, Pub.L. No. 105–244, 112 Stat. 1581, 1744 (codified as amended at 20 U.S.C. § 1092(f)(6)(A)).

Helpfully, the DOE provides a Handbook with examples to help schools understand the practical meaning of these definitions and boundaries.¹³⁸ For example, it explains that hospitals and medical associations count as institution property for the purposes of the act, as do off-campus buildings that students “consider to be, and treat as” part of the campus, such as art studios.¹³⁹ It also provides detailed scenarios to illustrate the scope of reportable sexual violence, including dating violence, domestic violence, and stalking.¹⁴⁰ For example, a heated argument between a husband and wife on campus is not considered domestic violence if neither party reports physical harm or intimidation.¹⁴¹

3. Identity and authority of the coach

The Clery Act requires university actors to report sexual violence when they are acting as “campus security authorities” (CSAs).¹⁴² The DOE’s Handbook on reporting explains that a CSA is “an official who has significant responsibility for student and campus activities.”¹⁴³ It includes in its examples of CSAs “director[s] of athletics, [and] all athletic coaches (including part-time employees and graduate assistants).”¹⁴⁴ However, reporting is only mandatory when the coach receives the allegation in his or her “capacity as a CSA.”¹⁴⁵ This means that coaches do *not* have the obligation to report incidents that they overhear or learn about indirectly.

During the Penn State Sandusky investigation (discussed in Section II(B)(1)), the DOE used these definitions to determine whether CSAs at the school failed to report the violence.¹⁴⁶ The investigation emphasized the failure of both Penn State’s head football coach (Joe Paterno) and a graduate assistant (Mike McQueary) to report McQueary’s eyewitness account of Sandusky sexual assaulting a child in the locker room to anyone beyond the athletic director.¹⁴⁷ According to the DOE,

¹³⁸ See generally Dept. of Educ. Office of Postsecondary Educ., *The Handbook for Campus Safety and Security Reporting 2016 Edition*, DEPT. OF EDUC. (June 2016), <https://www2.ed.gov/admins/lead/safety/handbook.pdf> [<https://perma.cc/L4XM-3F8G>] [hereinafter *The Handbook for Campus Safety*].

¹³⁹ *Id.* at ch. 2, 3–4.

¹⁴⁰ *Id.* at ch. 3.

¹⁴¹ *Id.* at ch. 3, 37–38.

¹⁴² 20 U.S.C. § 1092(f)(1)(F)(iii).

¹⁴³ *The Handbook for Campus Safety*, *supra* note 137, at ch. 4, 2–3.

¹⁴⁴ *Id.* at ch. 3.

¹⁴⁵ *Id.* at ch. 4, 5.

¹⁴⁶ See *Penn State Campus Crime Final Program Review Determination*, *supra* note 125, at *24.

¹⁴⁷ *Id.*

both McQueary and Paterno were mandatory reporters under the Clery Act, and thus they should have reported the incident to Penn State University Police Department to include in its annual crime statistics.¹⁴⁸ This was true even though Penn State itself did not designate McQueary as a Clery Act reporter and only conceded that Paterno was a reporter after conducting an internal investigation.¹⁴⁹

4. Identity of the victim and perpetrator

The text of the Clery Act itself does not specify whether it applies only to victims and perpetrators who are associated with the university. However, the Campus Crime Reporting Handbook issued by the DOE states that, for reporting purposes, it does not matter “whether or not the individuals involved in the crime, or reporting the crime, are associated with the institution.”¹⁵⁰ Thus, a coach does not need to know much about the victim or perpetrator’s identity—only that the coach learned of the crime while in his or her official capacity as a CSA.¹⁵¹

The official capacity requirement is the greatest limitation on the Clery Act in this sense. Coaches do not need to report, for example, assaults and violence that students mention in settings like “Take Back the Night”¹⁵² events.¹⁵³ They also do not need to report overheard conversations or other indirect ways of learning about an incident.¹⁵⁴ However, if the coach has no reason to believe that a direct allegation was not made in good-faith, he or she must report it, even if it came from a third party.¹⁵⁵ For example, a coach must report a sexual assault that he or she learns about through a local mental health counselor who calls to inform the coach that a student on campus sought treatment for the assault.¹⁵⁶

The Clery Act Handbook makes it much more straightforward for collegiate coaches to understand their reporting obligations. However, because it is merely a handbook, it is not “law.” Furthermore, the Clery Act’s purpose is to require institutions to keep accurate statistical crime

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at *23.

¹⁵⁰ *The Handbook for Campus Safety*, *supra* note 137, at ch. 4, 1.

¹⁵¹ *See id.* at ch. 4, 5.

¹⁵² “Take Back the Night” is a non-profit, international organization whose mission is to end sexual violence by creating “safe communities and respectful relationships through awareness events and initiatives.” *See* Take Back the Night Foundation, <https://takebackthenight.org/about-us/> [<https://perma.cc/QR6U-LYFZ>].

¹⁵³ *Id.* at ch. 4, 6.

¹⁵⁴ *Id.* at ch. 4, 5.

¹⁵⁵ *Id.*

¹⁵⁶ *The Handbook for Campus Safety*, *supra* note 137, at ch. 4, 6.

data; therefore, it only requires university employees to report allegations “to the official or office designated by the institution to collect crime report information.”¹⁵⁷ These reports do not need to include the names or information of the alleged victim or perpetrator and do not require further action on the part of the coach.¹⁵⁸

III. PROPOSAL TO CLARIFY AND HARMONIZE COACHES’ REPORTING OBLIGATIONS

Although sexual misconduct in collegiate athletics is by no means a new problem, the #MeToo Movement highlights the prevalence of sexual violence on college campuses.¹⁵⁹ Unfortunately, ambiguities in federal reporting laws and executive regulations result in a body of inconsistent jurisprudence. Unable to untangle these inconsistencies, universities often attempt to solve the problem and avoid liability by inserting all-encompassing reporting clauses into their employment contracts, requiring coaches to report *all* instances of “sexual misconduct.”¹⁶⁰ Coaches are left to their own devices to understand their reporting obligations under such broad and vague terms. This leads to both under-reporting (and increased sexual violence on campus)¹⁶¹ and over-reporting (and inadequate protection for both victims and alleged assailants).¹⁶² Clarifying the scope of coaches’ reporting obligations under federal law is thus critical and overdue in order to ensure the appropriate balance of safety and confidentiality for victims, as well as due process for the accused.

As the law currently stands, both Title IX and the Clery Act fall short of achieving a consistent standard. Title IX itself is broad, necessitating executive guidance and regulations, as well as adjudication, to guide its interpretation. The Clery Act, on the other hand, contains more specific and extensive reporting regulations within its statute and regulatory scheme. However, its failure to provide for a private right-of-action directs DOE resources towards large-scale violations (like the Penn State scandal), leaving inadequate remedies for individual plaintiffs. Therefore, to maximize the efficacy of federal reporting law, the proper solution is to enact Title IX regulations that mimic the substance

¹⁵⁷ *Id.* at ch. 4, 5.

¹⁵⁸ *Id.*

¹⁵⁹ See Lena Felton, *How Colleges Foretold the #MeToo Movement*, THE ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/> [<https://perma.cc/6M68-PW7M>].

¹⁶⁰ See Bernstein & Dillon, *supra* note 3.

¹⁶¹ See Heacox, *supra* note 1, at 50–51 (discussing how inadequate reporting and grievance procedures deter victims from coming forward).

¹⁶² See Bernstein & Dillon, *supra* note 3.

of the Clery Act and its Handbook. Such a solution would preserve the procedure and structure of Title IX proceedings (including the private right-of-action) and also minimize inconsistency in judicial enforcement of Title IX, since courts would likely defer to DOE interpretations under *Chevron*.¹⁶³

A. Proposed Substance of Reporting Obligations

To harmonize the requirements of these two statutes governing federal reporting obligations, the regulations and jurisprudence guiding Title IX enforcement should mirror the substance of the Clery Act (with a few exceptions). Specifically, Title IX interpretations should include Clery Act sex-based crimes (such as sexual assault, dating violence, and stalking) in their definition of actionable discrimination. They should also clarify the boundaries of the *Davis* sexual harassment standard and the “appropriate person” test by mimicking the Clery Act Handbook. However, Title IX should continue to take its own approach to defining (1) the geographical scope of reporting obligations and (2) which allegations require a report. This approach respects the differing goals of the two statutes while also availing Title IX of the Clery Act’s specificity and clarity.

1. Title IX interpretations should mimic the Clery Act’s substantive definitions of sex-based crimes.

The Trump Administration’s proposed regulations define sexual harassment as (1) conduct that satisfies the *Davis standard* (“severe, pervasive, and objectively offensive” behavior), or (2) conduct that satisfies the standard for quid pro quo sexual harassment and assault, as defined by the Clery Act.¹⁶⁴ However, this definition fails to include other sex-based Clery Act crimes—such as dating violence and stalking—and also does nothing to clarify the *Davis* standard. These deficiencies result in an incomplete understanding of sex-based discrimination, and require coaches to disentangle two different definitions of sexual misconduct in order to determine whether the Clery Act or Title IX requires a report.

To remedy the problem, the Title IX regulations should adopt a definition of actionable sexual misconduct that incorporates not just sexual

¹⁶³ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that courts may give “considerable weight” to an administrative agency’s construction or interpretation of statutes they enforce).

¹⁶⁴ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462, 61466 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

assault, but also the other VAWA crimes listed in the Clery Act (domestic violence, dating violence, and stalking). The DOE explains the omission of these crimes in its proposed regulations by pointing out that Title IX is a contract that requires federally funded universities to comply with anti-discrimination law on the basis of sex—not to prevent all crimes related to sex.¹⁶⁵ However, this interpretation misunderstands Title IX’s text and purpose. Title IX prevents federal funding recipients from discriminating “on the basis of sex” in order to promote equal educational opportunities for university members.¹⁶⁶ Consistent with this language, it follows that if sexual harassment and sexual assault can constitute actionable discrimination, other sex-based crimes (like dating violence) can have a similarly discriminatory effect, discussed in detail later in this section. Thus, the proposed Title IX regulations should expand their definition of actionable sexual misconduct to include domestic violence, dating violence, and stalking as defined by the Clery Act. Doing so would harmonize federal laws for reporting sex-based crimes, minimizing confusion and promoting compliance. Until such amendments are made, however, courts should interpret the *Davis* “severe, pervasive, and objectively offensive” standard of sexual harassment to presumptively include conduct that meets the Clery Act definition of dating violence, domestic violence, or stalking.

The *Davis* standard also requires some clarification, given its inconsistent application by courts. Although it is likely impossible for the DOE to articulate exactly what behavior is “severe, pervasive, and objectively offensive” without being over or under inclusive,¹⁶⁷ the suggested Title IX regulations could benefit from including a few examples of the boundaries of the definition. The best way to do so would be to model the Clery Handbook, providing examples of behavior that must and must not be reported within the federal regulations. For instance, the regulations could clarify whether “severe, pervasive, and objectively offensive” behavior can ever include a single incident of harassment¹⁶⁸ and whether the conduct present in *Pahssen* (three separate incidents of harassment, including pushing a student against a locker, demanding oral sex, and making obscene gestures) would ever be actionable.¹⁶⁹ Setting such limits would not only clarify the scope of coaches’ reporting obligations, but also help universities draft future sexual misconduct

¹⁶⁵ *Id.* at 61467–68.

¹⁶⁶ See Lanser, *supra* note 15, at 184.

¹⁶⁷ Although, helpfully, the *Davis* court suggests a number of factors that will weigh on this consideration, including the ages of the harasser and the victim, as well as the number of individuals involved (see *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998))).

¹⁶⁸ A question raised in *Davis*; see *Davis*, 526 U.S. at 653.

¹⁶⁹ See *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 360, 363–64 (6th Cir. 2012).

clauses in employment contracts. Because schools would be more aware of the limits to their own Title IX obligations, they would have a better sense of how to define any additional reporting obligations that they wish to impose on their staff. Thus, coaches would face fewer all-inclusive “sexual misconduct” clauses, and have a clearer idea of what behavior they need to report.

A potential objection to this expanded Title IX definition might be that it is overly broad, given that domestic violence, dating violence, and stalking do not necessarily have to be motivated by the victim’s sex (and thus are not per se discriminatory). This certainly seems to be one of the DOE’s concerns in excluding such crimes.¹⁷⁰ However, this argument overlooks both the statistics behind these crimes, as well as the potential solutions to limit concerns about Title IX capturing crimes that are not “on the basis of sex.”

First, like sexual assault—which *is* included in the DOE’s definition of actionable misconduct—dating violence, domestic violence, and stalking are empirically sex-based.¹⁷¹ Second, the proposed regulations (or judicial interpretations of them) could remedy the problem by creating a “rebuttable presumption” that these crimes are sex-based. Thus, schools would be allowed to demonstrate that a certain instance of domestic violence, sexual assault, dating violence, or stalking was not in fact based on the victim’s sex.

There may also be concerns that this approach will constrain the flexibility of the *Davis* standard, rendering it unable to respond to varying fact patterns and new forms of sexual harassment (i.e., cyberbullying). Again, this fear is groundless. Providing general limitations as to whether behavior is “severe, pervasive, and objectively offensive” does not preclude courts from exercising discretion and evaluating where specific conduct should fall along the spectrum. Rather, boundaries can serve to harmonize federal law as to broad questions (like whether a single instance of misbehavior can meet the *Davis* standard), while leaving the majority of cases somewhere in the middle. Indeed, courts will still be able to conduct their own case-by-case analysis for

¹⁷⁰ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61467–68 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

¹⁷¹ See Jennifer James, *We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault*, 65 DEPAUL L. REV. 1321, 1331 (2016) (discussing the history of VAWA and explaining that it includes “domestic violence . . . dating violence, sexual assault, and stalking” because they involve higher rates of targeting victims due to their sex than other crimes); Shannon Cleary, *Using Title IX and the Model of Public Housing to Prevent Housing Discrimination Against Survivors of Sexual Assaults on College Campuses*, 30 COLUM. J. GENDER & L. 364, 366 (2016) (explaining that sexual assault, particularly on college campuses, disproportionately affects women and that 19.3% of women have been raped during their lifetime, compared with 1.7% of men).

actionable harassment using the factors that *Davis* suggests they consider—the age of the harasser, the age of the victim, the number of individuals involved—as well as any other unique circumstances they find relevant to the situation at hand.¹⁷² This approach is optimal for coaches and universities; they will understand what conduct definitely is and is not actionable, and be allowed to tailor their contractual policies accordingly.

2. Title IX’s “appropriate person” test requires clarification that parallels the “CSA” examples in the Clery Act Handbook.

Perhaps the most ambiguous element of Title IX guidance and jurisprudence is the “appropriate person” test and its application to university employees, like collegiate coaches. The proposed DOE regulations recognize that categorically designating school employees (like coaches) as “reporters” or “non-reporters” is not optimal, given the varying roles these individuals might play depending on the school.¹⁷³ Nevertheless, the regulations still lack any meaningful criteria or limitations to guide universities, coaches, and courts in interpreting who has the responsibility to report sexual misconduct. Accordingly, Title IX guidance should provide concrete examples of the “appropriate person” test’s boundaries by following the Clery Act Handbook’s format for determining the scope of CSA authority. Additionally, courts applying the “appropriate person” test should enumerate a series of factors to guide their analysis from case to case.

The Clery Act Handbook employs a bright-line rule that says coaches *always* have the duty to report sexual violence when acting in their official capacity as a CSA.¹⁷⁴ While this approach is straightforward, holding coaches to be *per se* appropriate persons under Title IX is inconsistent with *Gebser*, which rejected automatic vicarious liability for schools.¹⁷⁵ On the other hand, the Clery Act Handbook provides examples of the limitations to a coach’s “official capacity” status. The proposed Title IX regulations could implement a similar series of examples that explain, for instance, whether a graduate-student coach can *ever* be an appropriate person with respect to *employee* misconduct (presumably, student coaches do not have the authority to institute corrective measures against their superiors and thus cannot be appropriate persons under *Gebser*). Doing so would provide clearer boundaries for courts to assist their “case-by-case” analyses. Additionally, the judicial

¹⁷² *Davis*, 526 U.S. at 651 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

¹⁷³ See Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61467–68.

¹⁷⁴ See *The Handbook for Campus Safety*, *supra* note 138, at ch. 4, 3.

¹⁷⁵ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998).

branch itself should enumerate a series of factors that weigh on the Title IX appropriate person analysis for coaches. These factors could include the coach's level of authority, employment status at the university (full-time or part-time), and the coach's relationship with the victim and/or alleged assailant.¹⁷⁶

One might argue that the approaches discussed above do not provide coaches or universities with adequate notice *ex ante* about which employees constitute appropriate persons. This might appear particularly concerning because courts sometimes refuse to defer to a school's designation of whether the employee is such a person.¹⁷⁷ This fear is overstated, however, when considered in conjunction with the DOE's other proposed regulations. Specifically, the regulations now require a coach (or other appropriate person) to report misconduct when (1) the victim files a formal report directly or (2) the alleged offender is a repeat perpetrator.¹⁷⁸ If courts interpret these provisions to also apply to private lawsuits, a coach will only be a Title IX mandatory reporter in those two circumstances. Accordingly, universities will understand when crafting their employment contracts which employees (and coaches) are most often in these situations, and thus more likely to be appropriate persons in a judicial analysis.

3. Title IX should maintain its distinct approach to the scope and source of reporting obligations.

Although the Trump Administration's proposed Title IX guidelines would generally benefit from harmonization with the substance of the Clery Act, they should continue to maintain a distinct approach to (1) the geographical scope of educational liability and (2) the source and origin of complaints requiring reports. In particular, Title IX should continue to employ a broader conception of geographical liability than the Clery Act, but require reports from a narrower set of circumstances. Doing so would promote the separate purposes of the two statutes by differentiating them in a way that is easy for coaches and universities to understand and apply.

The Clery Act only requires coaches (in their role as CSAs) to report sexual misconduct on or near campus, but¹⁷⁹ also mandates that they

¹⁷⁶ Universities may already consider some of these factors when writing their reporting policies. For example, the University of Oregon designates "all coaches of any team on which the accused student is a member" as mandatory reporters, "but only the head coaches of any team on which the complainant is a member." See Weiner, *supra* note 90, at 144–45 (emphasis added).

¹⁷⁷ See, e.g., *Kinsman v. Fla. State Univ. Bd. of Tr.*, No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *2 (N.D. Fla., Aug. 12, 2015) (refusing to defer to Florida State's contention that it considered neither its head coach nor athletic director to be appropriate persons under Title IX).

¹⁷⁸ See Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61469.

¹⁷⁹ See *The Handbook for Campus Safety*, *supra* note 138, at ch. 2, 3–4.

report *all* good-faith allegations of such crimes.¹⁸⁰ In contrast, the proposed Title IX regulations do not have any geographical constraints (and, in this sense, are broader than the Clery Act), but they also only require universities to address formal complaints filed directly by victims affiliated with the school, as well as complaints that implicate a repeat offender.¹⁸¹ These differences are appropriate given the distinct purposes of the two laws, and, moreover, they are straightforward for universities, coaches and courts to apply.

The Clery Act serves to provide transparent and accurate statistical data about crimes on college campuses in order to allow prospective students and university members to evaluate the school's safety.¹⁸² It is therefore sensible for the reach of the statute to be limited in its geographical scope (the data would lose its meaning if it extended too far away from the university's boundaries), but broad in its reporting sources (refusing to report a crime because it was filed by the victim's parent, rather than the victim him or herself, would again impede statistical accuracy). On the other hand, Title IX exists to address sex-based discrimination in federally funded universities.¹⁸³ It follows that off-campus programs or activities controlled or funded by the university should trigger liability, but that these reports should come from those directly affected by the discrimination.

Nevertheless, one might contend that imposing two sets of reporting duties based on the source of the complaint and the location of the incident creates undue confusion for coaches. However, the two sets of obligations are actually straightforward for coaches to follow, as well as for the DOE and courts to evaluate. Coaches who receive word of or are witness to sexual misconduct only need to answer two questions to determine whether the Clery Act and/or Title IX requires them to file a report. The first is *where* the conduct took place and the second is *who* filed the allegation (including whether the complaint was filed directly by the victim or whether the complainant is affiliated with the school). If the conduct took place within the boundaries specified by the Clery Act, the coach will know to follow Clery Act procedures regardless of the source of the complaint. On the other hand, the coach need not evaluate whether a program is "university sponsored or affiliated" for Title IX reporting; he or she has the obligation only to address incidents filed directly by victims, or those which he or she knows implicates a repeat offender. This will relieve pressure for coaches to determine whether

¹⁸⁰ *Id.* at ch. 4, 1.

¹⁸¹ *Id.* at 61469.

¹⁸² See 20 U.S.C. § 1092(f)(1)(F)(i)–(iii) (2013).

¹⁸³ See Lanser, *supra* note 15, at 184.

they must file a Title IX report, for example, in the case of an unsubstantiated incident they learned about indirectly or an incident unaffiliated with the university's programs.

Another counterargument to this approach might be that Title IX will deter reporting and lead to increased sexual violence by limiting coaches' responsibilities to only those instances where the victim of sexual misconduct files a formal report. However, this harm is mitigated in a few ways. Most importantly, the formal report only matters for triggering *grievance procedures* against the accused; it does not relieve the university of its obligation under Title IX to provide *supportive measures* to the victim to allow her or him to continue to obtain equal benefits to education.¹⁸⁴ Thus, universities have the incentive to contractually require their coaches not to report all incidents, but rather to refer the victims to the school's coordinator to make sure they receive support and learn of their right to file a complaint. Moreover, the coach must still file a report under his or her Clery Act obligations if the event occurred on or near campus buildings.

Another potential problem with the divergent scopes of the two acts relates instead to Clery Act reporting; coaches may be uneasy about reporting sexual misconduct that they learn about indirectly from a source other than the victim him or herself. However, the Clery Act's Handbook permits—indeed, requires—coaches to file Clery Act reports without giving the name of the victim or the accused.¹⁸⁵ This allows the coach to file a report with less worry about implicating either party's privacy interests and respects the decisions of victims who choose not to file a formal complaint.

B. Proposed Procedure for Reporting Obligations

Although some of the substantive reporting suggestions discussed above could theoretically be incorporated into either Title IX or the Clery Act, they belong under the structure and regime of Title IX, due to its private right-of-action.

The Clery Act's fatal flaw to ensuring sufficient compliance with its reporting laws is its procedural structure—it does not permit individual plaintiffs to bring a private lawsuit. Accordingly, and understandably, administrative enforcement agencies tend to direct resources towards remedying the most egregious violations of the Act, like the Penn State

¹⁸⁴ See Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61469 (“[S]upportive measures may include, among other things, ‘counseling, extension of deadlines . . . campus escort services . . . [and] changes in work or housing locations.’”).

¹⁸⁵ *The Handbook for Campus Safety*, *supra* note 137, at ch. 4, 5.

scandal.¹⁸⁶ Unfortunately, this tendency has the possible unintended consequence of overlooking smaller-scale violations, providing no individual remedy when a coach fails to adhere to his or her reporting duties. This becomes more problematic if the coach does not view him or herself as a campus security authority in settings outside the Clery Act's scope, like during team travel, recruiting trips, or post-game celebrations.

On the other hand, the proposed Title IX regulations purport to remedy the former procedural problems with Title IX enforcement, while avoiding the pitfalls of the Clery Act. Instead of taking the form of a guidance document or a DCL (with no legal effect), the DOE's suggested regulations follow an informal rulemaking procedure, complete with a public notice and comment period.¹⁸⁷ The rationale for departing from the previous approaches taken by other administrations is to legitimize the executive branch's interpretation of Title IX—the new regulations are not meant to be mere suggestions.¹⁸⁸ By developing and adopting informal regulations instead of publishing guidance letters, the hope is that schools will have a better understanding of the standard that they must adhere to in formulating reporting policies.¹⁸⁹ In theory, universities will be less likely to ignore rules than guidelines and will thus follow a uniform standard in Title IX compliance, which provides more consistency and stability for collegiate coaches.

Furthermore, while the DOE does not explicitly mention it, the new regulations may also have the effect of promoting uniform decisions across courts by availing themselves of judicial deference under *Chevron*.¹⁹⁰ Previous courts rarely deferred to or even referenced executive guidance documents and DCLs when interpreting Title IX; they often looked instead to Title IX's text and purpose, as well as the original 1975 federal regulations, even in cases of sexual harassment.¹⁹¹ In some

¹⁸⁶ See, e.g., *Penn State Fine Letter*, *supra* note 122, at *1. (imposing a fine of almost \$2.4 million on Penn State for the university administration's passivity towards the ongoing sexual abuse of young boys by one of its assistant football coaches). See also *University of Montana Fine Action*, FEDERAL STUDENT AID: ADMINISTRATIVE AND APPEALS SERVICE GROUP at 1 (Sept. 25, 2018), available at https://studentaid.ed.gov/sa/sites/default/files/UNIVERSITY_OF_MONTANA_FINE_ACTION_Redacted.pdf [<https://perma.cc/HZS9-HKWZ>] (penalizing Montana's ongoing failures to report violent crimes with a fine of almost \$1 million).

¹⁸⁷ Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61464–65.

¹⁸⁸ *Id.* at 61465 (“[N]otice-and-comment rulemaking [is] [a] transparent, participatory [process] . . . [that results in] procedures with greater legitimacy and buy-in from universities subject to the resulting rules.”).

¹⁸⁹ See *id.* at 61464–65.

¹⁹⁰ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹⁹¹ See, e.g., *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 640–45 (1999) (holding that Title IX permits recipient liability for third-party misconduct in limited circumstances and that such an interpretation is consistent with the contractual nature of Title IX, with the plain language of the statute, and with the 1975 regulatory scheme).

circumstances, they also analogized Title IX to its “model” statute, Title VI.¹⁹² The courts’ failure to cite the previous administrations’ DCLs and guidelines is not conclusive proof that they did not defer at all to their formulations of Title IX. However, it does suggest that the rescinded guidance documents were not entitled to the “highest” deference that is generally afforded to executive interpretations of federal statutes under *Chevron*.¹⁹³ Several Title IX cases unrelated to sexual misconduct support this theory. For example, many courts have held that *Chevron* applies to the original 1975 regulations on athletic and educational discrimination.¹⁹⁴ In contrast, the Supreme Court has held (in a FLSA case) that executive agency letters and guidelines are *not* entitled to *Chevron* deference,¹⁹⁵ a holding which at least one court has extended to the former Title IX interpretations and DCLs.¹⁹⁶

Thus, by transitioning to informal regulations (rather than guidance documents) as the primary means for executive interpretations of Title IX, the Trump Administration’s proposed rules should receive greater deference from future courts who are evaluating a university’s compliance with the statute. This minimizes the risk of inconsistent judgments for Title IX cases across circuits. Accordingly, private plaintiffs will have more reliable expectations for liability and be able to demonstrate a university’s noncompliance using this uniform standard. Coaches will also benefit from the increased transparency and predictability of the standard, because it minimizes the guesswork that they must do to comply with the law. Thus, informal regulations under Title IX will ensure a better balance of the victim’s safety with the need for confidentiality and due process.

There is a caveat, though. Recently, Justice Breyer took the position in a dissent that deference to federal regulations is limited when

¹⁹² *Canon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979) (permitting a private right-of-action under Title IX based in part on its resemblance and relationship to the Title VI regulatory scheme).

¹⁹³ *See Chevron*, 467 U.S. at 844.

¹⁹⁴ *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 895–96 (1st Cir. 1993) (granting the 1975 regulatory scheme of Title IX “considerable deference . . . because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs”); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) (holding that the 1975 Title IX regulations were entitled to deference under *Chevron*). *See also Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 965 n.9 (9th Cir. 2010) (agreeing with the deference granted to the regulations by other circuits).

¹⁹⁵ *See Christensen v. Harris Cty.*, 529 U.S. 576, 586–87 (2000) (“[W]e confront an opinion contained in an opinion letter, not one arrived after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”).

¹⁹⁶ *See Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1166 (D. Kan. 2017) (explaining that the “‘Dear Colleague Letters’ and ‘Questions and Answer’ documents issued by the OCR, which . . . purport to interpret [Title IX] . . . do not carry the force and effect of law are not entitled to *Chevron* deference”).

an executive agency implements an unexplained or poorly explained policy change.¹⁹⁷ This echoes Justice Stevens' dissent in *Gebser* and his concern that unduly high standards for institutional liability (such as requiring a school to have "actual knowledge" of harassment) would deprive plaintiffs of their statutory rights.¹⁹⁸ If courts begin to accept this argument and believe that the proposed Title IX regulations represent a dramatic, politically motivated, or unexplained shift in policy, there is a possibility that the regulations would receive less deference.

However, this outcome is unlikely; Justice Scalia's majority response to Justice Breyer largely dismisses the idea that "unexplained" policy shifts would receive less deference than other regulations.¹⁹⁹ Thus, coaches should expect that, should the proposed Title IX regulations take effect, courts will grant them highest deference, which is the optimal outcome. Future administrations who disagree with the proposed regulations may of course amend them, but will now need to give schools the benefit of a notice and comment period to allow them time to adapt their policies and to voice their opinion on any changes. Thus, even if the *substantive* executive guidelines for mandatory reporting change under Title IX, the *process* of implementing those guidelines will be more stable and slower to change, allowing coaches and universities time to get up to speed. There will also be a more consistent body of law for schools to rely upon when crafting sexual misconduct policies. Courts interpreting the proposed DOE regulations should therefore feel at ease adopting Justice Scalia's position and deferring to the executive's interpretation of Title IX.

IV. CONCLUSION

Sexual violence on college campuses and in collegiate athletics is not a new phenomenon, but the #MeToo Movement helped reveal the extent of the problem and the existence of reporting failures prevalent under the current federal laws, particularly Title IX and the Clery Act. To remedy the problem and to strike the appropriate balance of confidentiality, safety, and due process, the optimal solution is to amend the interpretation of Title IX (in both executive regulations and judicial opinions) to closely parallel the substance of the Clery Act. Doing so would create a consistent standard of liability for universities, allowing

¹⁹⁷ See *FCC v. Fox Television Stations*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting) (arguing that the "law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them . . . to rest them primarily upon unexplained policy preferences").

¹⁹⁸ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 300–01 (1998) (Stevens, J., dissenting).

¹⁹⁹ See *Fox Television Stations*, 556 U.S. at 514–15.

them to understand and predict the types of sexual misconduct for which they may face liability. Title IX's procedural structure would also permit recovery for wronged parties, regardless of whether the university's noncompliance is large enough to trigger a DOE investigation or confined to a single lawsuit.

Accordingly, colleges will be able to write more precise reporting policies for their coaches. The universities will benefit from this by being better able to evaluate whether a coach is failing to comply with his or her duties (thus exposing the school to liability). Coaches, in turn, will benefit by understanding their specific responsibilities *ex ante* and not needing to guess what is expected of them. Most importantly, the substantive changes and the potential for judicial deference will lead to more consistent recovery across courts for survivors in private rights-of-action. With the potential for increased financial liability for noncompliance, schools will have the incentive to hold their coaches accountable and to craft policies that encourage them to comply with reporting obligations.



Speak Now: Results of a One-Year Study of Women's Experiences at the University of Chicago Law School

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The Women's Advocacy Project (WAP) was a research project designed and run by law students at the University of Chicago Law School ("the Law School" or "UChicago Law") during the 2017–2018 academic year—the first study of its kind to be conducted there.¹ WAP collected data in an attempt to accumulate a rich and detailed set of information about women's experiences at the Law School. WAP had four primary research components: classroom observations, achievement data collection, a student survey, and professor interviews. The project represents the efforts of over seventy law students. This article, written in the fall and winter of 2018, is a condensed version of WAP's initial report. Readers interested in more detailed information about WAP's methodology, findings, and recommendations should access the report at https://www.law.uchicago.edu/files/2018-05/wap_final.pdf.

WAP found significant differences between men's and women's experiences at the Law School, many suggesting that women still face considerable roadblocks and hurdles in legal education there. For example, women graduate with honors proportionately less frequently,

† This article represents the views and observations of the authors but not necessarily those of their employers. Throughout this report, the authors refer to their project as "WAP" and use the abbreviation as shorthand in discussing both their views and the views of the research team (to the extent those views usually aligned). The authors had extensive help in conducting the research and revising the original version of their report, most notably from Jenn Beard, Sofie Brooks, Jimmy Frost, Megan Lindgren, Jamie Luguri, Maria Macia, Piper Pehrson, and Andrew Sowle. A full list of other student participants in the study (without whom it would not have been possible) can be found in the full-length report. The graphs in this article were designed by Sean Hernandez of PSD Graphic Arts, who designed and formatted the full-length report.

¹ WAP was unaffiliated with the Law School administration. Although WAP benefitted from the informal advice and guidance of members of the Law School faculty and administration, it was an independent project that defined its own goals, methods, and scope at each step in the process. WAP obtained approval from the University of Chicago's Institutional Review Board (IRB) for each component of the study. WAP received funding from the Office of the Dean of Students, a University of Chicago Diversity and Inclusion Grant, and various law firms. None of the funds were conditioned on the content of WAP's report in any way.

participate voluntarily in class less, and are less likely to be satisfied with their law school experience than men. The data, however, also showed that women have made significant strides at the Law School.

WAP sought primarily to document and describe, but its initial report also offered recommendations responsive to the problems it identified. This article mentions some of those recommendations and suggests areas where further research is warranted.

I. INTRODUCTION

A. The Scope of the Project

The study was a starting point. WAP aimed to give members of the Law School community a wide range of information to spark conversations about gender issues and diversity more broadly and to lead the way for further research as well as reform. Despite WAP's efforts to design a methodologically rigorous study, the information WAP was able to gather was inevitably incomplete in some ways. WAP had just one year to collect most of its data. WAP was only able to observe classes during one academic quarter, and given the subjectivity with which students experience classroom events, no classroom observation is likely to be perfect. In addition, WAP's student survey captured students' perspectives at one moment in time in their Law School careers. Although the participation rate was high, it is likely that some perspectives were not captured, and the information gathered was, of course, limited by the questions that WAP asked and that students were willing to answer. As with any survey, the WAP's was vulnerable to common survey flaws, including selection bias. Professor interviews were similarly limited.

This study focuses on the University of Chicago Law School specifically. WAP endeavored to contextualize some of the findings and analysis throughout the report with available data about other law schools. Nevertheless, findings specific to UChicago Law should be useful regardless of whether identical information is available for other law schools. While many of UChicago's peer schools struggle with similar issues surrounding diversity, WAP believes that the UChicago Law community should strive for gender equity not just comparatively but in absolute terms. In the findings and discussion presented below, WAP claims only to describe the situation at UChicago Law, unless comparative information about other schools is expressly provided.

More broadly, many of the gender disparities described in this report likely result at least in part from more general societal causes. Our primary purpose was not to evaluate whether the Law School is responsible for causing any particular gender disparity observed here; rather,

the project attempted to generate information that might help to remedy those effects in the future.

Despite the fact that this study was a starting point for the UChicago Law community, it built upon an expansive body of research on gender in law school education.² Specifically, the report was modeled on similar studies conducted at Harvard in 2004³ and Yale in 2002 and 2012,⁴ which undertook research of a similar scope and had similar strengths and limitations. By all accounts, the Harvard and Yale studies led to positive impacts at both schools and were widely read. Many UChicago Law professors reported reading Yale's 2012 study and adapting their teaching methods as a result of its findings. This study hopes to augment the contributions made by the earlier reports by shedding light on the current state of affairs at UChicago Law. Its aim was to spark conversations about how to improve the experiences of women at the Law School and how to promote their academic and extracurricular success.⁵

² Likely the most influential initial contribution was Lani Gunier's 1997 book, which argued that traditional legal education, including the Socratic Method, was alienating for women. See generally LANI GUNIER, *BECOMING GENTLEMEN* (Beacon Press 1997); Claire G. Schwab, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J. L. & SOC. PROBS. 299 (2003); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117 (2000). There is also considerable research on women's underrepresentation in the legal profession more broadly. See generally Commission on Women in the Profession, *A Current Glance at Women in the Law*, AMERICAN BAR ASSOCIATION, 2-7 (2017), https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf [<https://perma.cc/ZZ2N-9W2N>]. Recent research has even identified disparities in the frequency with which male and female Supreme Court justices are interrupted by each other and by litigants. See generally Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379 (2017).

³ See generally *Study on Women's Experiences at Harvard Law School*, WORKING GROUP ON STUDENT EXPERIENCES, 3-86 (Feb. 2004), <https://www.americanbar.org/content/dam/aba/administrative/women/study-on-women-s-experiences-at-harvard-law-school.pdf> [<https://perma.cc/ZXH7-462K>]. The results of the study were also published at Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511 (2005). In 2013, the Harvard Crimson published a three-part series on women at Harvard Law School. See Part I (with links to the following parts) at Dev A. Patel, *Once Home to Kagan and Warren, HLS Faculty Still Only 20 Percent Female*, HARVARD CRIMSON (May 6, 2013), <https://www.thecrimson.com/article/2013/5/6/hls-gender-part-one/> [<https://perma.cc/HF25-M8ND>]. The Harvard Law's Women's Law Association recently released updated numbers regarding achievement disparities between women and men at Harvard Law School. Molly Coleman, *Harvard Law School's Glass Ceiling*, HARVARD LAW RECORD (Apr. 24, 2018), <http://hlrecord.org/2018/04/harvard-law-schools-glass-ceilings/> [<https://perma.cc/D825-WDC7>].

⁴ Yale Law Women, *Yale Law Students and Faculty Speak up about Gender: Ten Year Later*, YALE LAW SCHOOL, 3-93 (Apr. 2012), <http://yalelawwomen.org/wp-content/uploads/2013/03/YLW-Speak-Up-Study.pdf> [<https://perma.cc/LX6Y-AJBJ>].

⁵ Note that, from the very beginning of the study, some students made clear to WAP that they did not believe there were any gender disparities at the Law School. The data WAP gathered suggests that this is not the majority of the student body's view, however, or the professors'. Additionally, classroom observations and achievement data point to basic differences in the way that women and men experience the Law School. When discussing the results from qualitative data gathering techniques such as professor interviews and responses to the open-ended questions on

B. Information Limitations

In addition to the predictable methodological limitations described above, this report lacks other important categories of data that might have helped us interpret our primary findings.

First, although WAP requested aggregate grade data in various formats from the Law School administration, these requests were denied. The study therefore discusses different proxies for grades that indicate possible gender-based grade disparities at different points in students' law school careers (such as Law Review membership, honors at graduation, etc.). None of these proxies are perfect, however.⁶ WAP also did not have access to admissions data, such as undergraduate GPA or LSAT scores; the Law School administration declined to share this information as well.

Second, WAP did not have information on the gender breakdown of the graduating classes from 2007–2012. The Law School Dean's Office and Admissions Office provided WAP with the gender breakdown for each class for the 2013–2014 through the 2017–2018 academic years but denied requests to provide information for earlier years. As a result, although WAP was able to calculate the baseline gender composition of the 2014–2018 graduating classes, it was not able to do so for the earlier classes.⁷

Finally, WAP requested, but was not given, baseline data about the gender composition of each Law School course for the Autumn Quarter of 2017. To calculate the baseline gender composition of each class observed in the Classroom Observations component, WAP therefore relied on the class observers to report the gender breakdown of each class.

Though incomplete, WAP believes the findings in this report are a helpful starting point and is confident that they take advantage of all available information.

1. Note on other diverse identities

This study focused narrowly on the experiences of women at UChicago Law. It did not examine the experiences of students of color, LGBTQ students, or other groups of students who are likely to be underrepresented and who may face significant barriers to success at the Law School and in the legal profession (such as first-generation college

the student survey, WAP took care to focus on views that came up repeatedly, and to indicate the frequency with which certain comments were made, so as not to over-represent any one opinion as a consensus view if unwarranted.

⁶ See Appendix K of the full-length report.

⁷ See Appendix L of the full-length report. For more information on how WAP calculated baseline class composition for those years (an important step in many of the statistical significance calculations described below), see *Methodology, Achievement Data* of the full-length report.

students and students with disabilities). WAP acknowledges that there are often powerful intersections between different aspects of students' identities. Many of the issues explored in this report likely impact students differently based on their race, religion, national origin, LGBTQ status, or other aspects of their identity, as well as the intersections of these characteristics. Many students and professors pointed this out in the student survey and during the professor interviews.

There were two primary reasons for WAP's decision to focus almost exclusively on gender and not on the impact of other identity characteristics on student experience at the Law School. First, focusing on women's experiences made the project more feasible in scope. WAP hopes that its methods enable other student groups to do similar research along different demographic lines in the future. Second, because of the small number of students of color at the Law School (and the small size of the school generally), it would have been much more difficult to report on findings based on race in an interesting or helpful way while preserving students' and professors' anonymity.

WAP is aware that most of the references to gender in this article are, unfortunately, binary. Although the goal of this report is not to re-trench binary understandings of gender, almost all of our statistics are broken down with reference to women and men exclusively, and the report as a whole purports to evaluate the experiences of women at the Law School as compared to the experiences of men. Additionally, many of the methodologies employed in this study (described below) involved making assumptions about the gender of individuals that may have varied from those individuals' self-defined identities. Focusing on the experiences of women, as opposed to students who may be trans, gender non-conforming, or who do not otherwise identify within binary understandings of gender was necessary for the purposes of this study because of similar concerns about scope, privacy, and anonymity to those described above.

We sincerely hope that future research will address those shortcomings and that our work will make that research easier.

II. METHODOLOGY

This study included four primary methodological components: classroom observations, professor interviews, a student survey, and analysis of achievement data. First, WAP observed ninety-six Law School class sessions during the Autumn Quarter of 2017. WAP trained student observers to observe, in pairs, their own classes three times each during the Autumn Quarter. The project observed twenty-four upper-level courses and all nine sections of doctrinal 1L courses (1L Legal Research & Writing classes were not observed). Students identified and

recorded cold calls, as well as various types of voluntary participation events, professors' responses to student participation, and the gender of the students participating. Observers also tracked whether students participated multiple times in a class session, allowing WAP to code the gender of students who participated three or more times in a session ("dominant participants"). To analyze the data from classroom observations, WAP averaged (using a simple mean) the number and type of participation events by gender observed by all the observers for a given class session. Statistical significance was calculated using paired samples t-tests. The tests compared the mean of the variable of interest (e.g., the percent of total observations made by women, averaged across classroom observations) with the mean of the class composition (the percent of women enrolled in that class).

Second, WAP interviewed fifty-three professors during the Autumn, Winter, and Spring Quarters of the 2017–2018 school year. WAP reached out to all full-time teaching faculty, Bigelow fellows, clinic directors, and some additional clinical faculty for interviews. WAP trained pairs of students to conduct thirty to sixty minute interviews using a standardized interview script that included questions about pedagogical strategies, mentoring relationships, and other areas of concern for women at the Law School. Professors were also asked to fill out data sheets including quantitative information about the numbers of letters of recommendation and references that they provided within the preceding calendar year as well as the numbers of research assistants they employed. WAP collected these data sheets from thirty-seven professors.

Interview data was analyzed using a qualitative coding software called NVivo. WAP created a list of fourteen thematic codes, and certain portions of the interview notes were assigned to different codes. In drafting the report, the authors counted the number of professors who expressed a given view by relying on the codes thematically closest to each view. Although the interviews varied to some extent in terms of length and content, they provide a useful window into professors' perspectives on gender at the Law School, as well as student life more generally.

Third, WAP conducted a student survey in the Winter Quarter of 2018. The questions were modeled on the student surveys administered at Harvard and Yale, revised and tailored to UChicago. The questions were reviewed and tested multiple times by professors, law students, and a Ph.D. student in the Sociology department. Through a combination of open-ended and multiple-choice questions, the student survey examined students' experiences and views with regard to their decisions to enroll at the Law School, their classroom learning, their partic-

ipation in and satisfaction with student life and extracurricular activities at the Law School, their perceptions of their own successes and failures in terms of traditional markers of academic achievement, their relationships with faculty, and their career goals. Seventy one point eight percent of all J.D. students enrolled at the Law School at the time of the survey's administration completed the survey, creating a unique snapshot of students' interests and experiences at the Law School.

WAP conducted the survey on the Qualtrics platform. WAP then analyzed the data using the Reports function in Qualtrics to generate the percentages and absolute numbers of responses to most of the questions on the survey. Team members used Stata to both double check all the percentages and calculate statistical significance for any possible differences. In cases in which the response solicited in the survey was numerical, WAP tested for statistical significance in any differences between men and women respondents using a two-sided t-test. For the remaining cases in which the response type was categorical, WAP used a Pearson chi-squared test.

Finally, WAP compiled, counted, and analyzed publicly available data on students' academic achievement and career outcomes, including participation in law journals, first-year writing prizes, honors at graduation, clerkships, and moot court participation. WAP worked with a team of statisticians from the University of Chicago's Statistics Department's Consulting Program to analyze the data collected and to perform statistical significance tests. Statistical significance was only calculated for the 2014–2017 period because WAP was only given access to the gender breakdowns at graduation for those classes.

In the following sections, we have used the terms “significant” or “significantly” to denote statistical significance. Where a level of statistical significance is not specified, we are referring to statistical significance at the .05 level.

III. FINDINGS

This study produced broad initial findings on many aspects of women's experiences at UChicago Law. Overall, women have yet to reach parity with men in many indicators of academic achievement and satisfaction with their experiences at the Law School. But there are also many areas in which women are doing well. The main findings are reproduced below.

A. Class Composition

For each of the years 2011 through 2017, UChicago Law's student population had a slightly larger gender disparity than any of the other top five law schools (as ranked by US News and World Report).⁸

TABLE 1:
TOP SIX LAW SCHOOLS COMPARATIVE GENDER CLASS
COMPOSITIONS 2011–2017
(THE SCHOOL WITH THE LOWEST PERCENTAGE OF WOMEN EACH
YEAR IS HIGHLIGHTED IN PURPLE.)

	% Women in Total Law Student Population					
Year	UChicago	Yale	Harvard	Stanford	Columbia	NYU
2017	46.1	47.8	48.9	48.5	48.9	53.4
2016	43.9	47.7	49.3	48.9	48.2	51.4
2015	44.1	46.4	48.7	45.6	47.2	49.
2014	42.9	47.7	49.6	44.7	45.8	46.4
2013	43	46.3	47.8	44.8	46.7	43.7
2012	42.8	47.2	47.2	42.6	46.3	41.7
2011	44.2	49.4	48.2	42.7	48	41.3

For the first time in the history of the Law School, the Class of 2020 entered with an equal proportion of men and women. However, class composition data from the last four years demonstrates that classes tend to gain considerably more men than women between the 1L and 2L years as transfer students, leading to more heavily male class compositions in the remaining two years of law school.

TABLE 2:
CHANGE IN CLASS COMPOSITION BY GENDER FROM 1L TO 2L YEAR

Class Year	Total Students during 1L	Total Students during 2L	Increase in Women students	Increase in Male students	% Women during 1L	% Women during 2L
2016	196	215	3	16	48	45
2017	190	216	9	17	44	43
2018	184	203	5	14	46	44
2019	185	205	5	15	46	44

⁸ *Best Law Schools*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [<https://perma.cc/Q794-YYL8>] (last visited Jan. 21, 2019).

B. Academic Achievement and Outcomes

WAP's findings identify areas of significant progress, as well as serious roadblocks, for women students at UChicago. As discussed below, the p-values for achievement differences in this sub-section reflect the likelihood that the difference between the rate of achievement for each gender (on each metric discussed) and that gender's representation in the average class is due to chance. The p-values for survey results measure the probability that the difference in the responses between the two genders is due to chance.

In terms of academic achievement, women are significantly less likely to receive academic honors at graduation than men. Women are also underrepresented at each specific level of honors, though those results are not significant except for Honors, which is marginally significant.

TABLE 3:
HONORS AWARDED AT GRADUATION, BY GENDER

	2008–2017		2014–2017	
<i>Honors Level</i>	<i>Men</i>	<i>Women</i>	<i>Men</i>	<i>Women</i>
All Honors	65%	35%	63%	37%* (p=.037)
Highest Honors	10 of 15	5 of 15	6 of 10	4 of 10 (p=.578)
High Honors	76%	24%	66%	34% (p=.137)
Honors	62%	38%	62%	38%† (p=.084)

† = Statistically significant at the .10 level

* = Statistically significant at the .05 level

** = Statistically significant at the .01 level⁹

Women are also less likely to clerk in federal courts. Two differences are marginally statistically significant: men are less likely than would be expected based on their representation in the class to clerk for federal district courts, and women are less likely to clerk at federal appellate courts. The other rates of representation below show underrepresentation of women in clerkships, but not at statistically significant rates.

⁹ These symbols are used throughout to denote levels of statistical significance.

TABLE 4:
CLERKSHIPS HELD BY UCHICAGO STUDENTS, BY GENDER

Court	2008–2017		2014–2017	
	Men	Women	Men	Women
All Courts	63%	37%	58.9%	41.4%
Supreme Court	10/15 clerks	5/15 clerks	4/7 clerks	3/7 clerks
Federal Appellate	69%	31%	63%	37%† (p=.099)
Federal District Court	56%	44%	56%† (p=.051)	44% (p=.968)
State Court	59%	41%	57%	43% (p=.555)

Additionally, women are significantly less likely to join the *Law Review*. From 2008 to 2017, *Law Review* staff was composed on average of 67% men and 33% women. These percentages were similar for the 2014 to 2017 period: the staff was composed of 65% men and 35% women. The difference between the percentage of the women in the Law School class from 2014 to 2017 and the percentage of women on the *Law Review*'s 2L class for those years is statistically significant (p=.016). The *Legal Forum*, another UChicago law journal, has historically had much greater gender parity. Its staffers over the last ten years have been 50% men and 50% women. Between 2014 and 2017, women's presence surpassed that of men in the *Legal Forum* staff, with 53% of positions. The difference between the percentage of men in the class in those years and men's representation on the *Legal Forum* staff is highly statistically significant (p=.007). Over the last ten years, the *Chicago Journal of International Law (CJIL)* staffers have been 54% men and 46% women.

Staffers from all three journals are selected through the annual writing competition. Overall, women complete the writing competition at a lower rate than men. Among 2L and 3L women, 50% reported participating in the writing competition, compared to 65.1% of men, a statistically significant difference (p=.013). These numbers likely fluctuate somewhat by year: within the 2L class, 43.3% of women reported participating (p=.038), while in the 3L class 56.5% of women reported participating (p=.130). 1Ls surveyed indicated that they planned to complete the writing competition at rates roughly balanced by gender. 69.1% of 1L women and 70.4% of 1L men surveyed reported that they planned to participate in the journal writing competition (p=.853), and 22.6% of women and 18.3% of men were not sure whether they planned to participate (p=.509). These differences are not statistically significant.

Additionally, survey results indicated that women were significantly less likely than men to report performing academically better

than they thought they would at the Law School. 24.1% of women and 33.0% of men reported that result ($p=.043$). In contrast, 29.1% of women reported doing worse than they expected, as compared to 20.5% of men ($p=.042$).

C. Classroom Dynamics

WAP's classroom observation data indicated that men and women participate roughly equally in UChicago classrooms. Women, however, participate *voluntarily* in class significantly less often than men do. Women's rates of voluntary participation may be affected by the gender of the first person to speak in a class, as well as the gender of the professor. Men are also much more likely than women to enjoy classroom participation. The p-values in this section represent the probability that the differences between the rate of participation for each gender and that gender's representation in each class are due to chance.

1. Summary results

The raw numbers of classes, class sessions, and participation events observed by WAP volunteers are listed below.

TABLE 5:
OBSERVATION SUMMARY STATISTICS

	1L	2L/3L	Total
No. of courses monitored	9	24	33
No. of class meetings	27	69	96
Percentage of women in attendance	49.5	45.1	47.0
No. of cold calls	150	350	500
No. of volunteered comments	367	1100	1467
No. of interruptions/blurts ¹⁰	18	51	69
No. of total participation events	520	1452	1972
No. of students participating at least once in a class	429	764	1193

Overall, men and women participated roughly equally in the classes that WAP observed in the Autumn Quarter of 2017. Although women participated at a rate slightly lower than their rates of attendance, those differences were not statistically significant in any category of class (1L classes, 2L and 3L classes overall, 2L and 3L seminars, or upper-level large classes).

¹⁰ "Blurts" were defined as instances in which a student would begin speaking without having been called on by the professor.

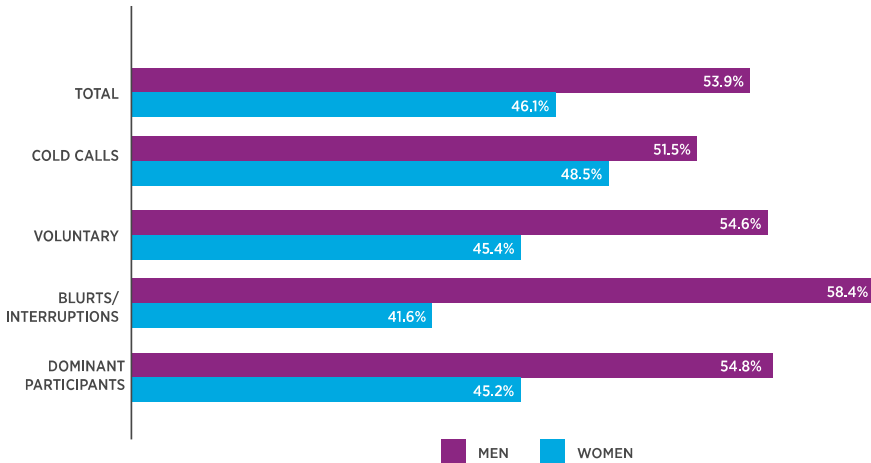
The percentages of each type of participation event by women in different categories of classes are listed below.

TABLE 6:
OBSERVATION SUMMARY RESULTS

	All classes	1L classes	All upper-level classes	Seminars (upper-level)	Large classes (upper-level)
Women in attendance	47.0%	49.5%	45.1%	46%	45.0%
Total participation events by women	46.1% (p=.55)	49.1% (p=.55)	45% (p=.22)	45.9% (p=.92)	44.6% (p=.19)
Cold calls addressed to women	48.5% (p=.50)	53.1% (p=.20)	46.6% (p=.95)	35% (p=.42)	47.9% (p=.53)
All voluntary participation events by women ¹¹	45.4%* (p=.02)	47.5% (p=.59)	44.7%* (p=.03)	46.9% (p=.85)	43.4% * (p=.02)
• Volunteer	45.9%* (p=.02)	43.9%† (p=.07)	46.3% (p=.15)	48.1% (p=.87)	44.9% (p=.15)
• Question	45.7% (p=.37)	51.4% (p=.20)	42.5% (p=.74)	49.7% (p=.44)	39.7% (p=.54)
• Comment	43.1% (p=.15)	49.7% (p=.69)	41.5%* (p=.03)	40.3% (p=.28)	42%† (p=.07)
• Blurts/interruptions	41.6% (p=.03)*	36.7% (p=.22)	43.3% (p=.09)†	19.4% (p=.12)	53.8% (p=.34)

¹¹ Voluntary participation events included all contributions to classroom discussions that were not initiated by a professor's cold call. They included volunteering, asking questions, making comments, and blurting or interrupting.

GRAPH 1:
OBSERVATION SUMMARY RESULTS



2. Voluntary participation

Men and women did participate voluntarily in class at different rates; men participated voluntarily more frequently than women did. These differences are statistically significant at the .05 level in all class sessions observed overall, in upper-level courses in general, and in large upper-level courses. The differences between men's and women's voluntary participation rates were not statistically significant in 1L classes or in 2L and 3L seminars.

TABLE 7:
TOTAL VERSUS VOLUNTARY PARTICIPATION BY WOMEN

	All classes	1L classes	Upper-level classes	Seminars (upper-level)	Large classes (upper-level)
Women in attendance	47.0%	49.5%	45.1%	46%	45.0%
Total participation events by women	46.1%	49.1%	45%	45.9%	44.6%
Voluntary participation events by women	45.4%* (p=.02)	47.5%	44.7%* (p=.03)	46.9%	43.4%* (p=.02)

Table 8 breaks down participation rates by round of observation (“Round”). WAP conducted one Round in late October (near the beginning of the quarter), one in early November, and one in late November (near the end of the quarter). The gap in voluntary participation between women and men seems to have closed as the quarter progressed.

TABLE 8:
PARTICIPATION RATES BY ROUND

	Round 1	Round 2	Round 3
Participation events by women	42.6% (p=.15)	48.7% (p=.63)	47.6% (p=.98)
Unique participants who were women	45% (p=.40)	48% (p=.59)	47.2% (p=.81)
Cold calls addressed to women	41.4% (p=.80)	53.4% (p=.30)	51.9% (p=.98)
Voluntary comments by women	43.2%* (p=.02)	47% (p=.11)	46.3% (p=.84)

a. Professors’ perspectives on student volunteering

Twenty-one professors noticed the small but significant difference in the frequency with which women and men participated voluntarily, but eleven reported that they did not notice a difference or that it did

not occur in their classes. Three professors said that they were not sure about whether men and women participated with different frequency, and one observed that women speak more than men. At least five professors who believed that there was a gendered difference in student participation rates (or were not sure if there was) expressed the belief that the difference is small and does not generally affect the quality of contributions. One professor remarked, for example, that male and female students are “similarly talkative, similarly prepared, similarly strong and informed about what they say.” Still, nine professors observed that outlier students who consistently speak too much are more likely to be men.

Twelve professors also noted that men and women’s styles of participation differ. For example, one professor noted that male students who volunteer are “more often trying to profess a view,” while women are more likely to speak “to clarify a view.”

b. Students’ explanations for gender disparities in participation

Students surveyed offered various possible explanations for why men might volunteer in class more than women. By far, the most common explanation students offered was that they believe men are less likely to be self-conscious about the value of their contributions or sensitive to norms against excessive participation. Many students also commented that male and female students’ styles of participation differ. For example, one student noted that when men speak “they speak more confidently than women.” Another student stated that women “are much more likely to use hedging language.”

3. Cold-Calling

Five hundred of the 1,972 (or 25.4%) participation events that WAP observed were cold calls.

Overall, professors cold called men and women roughly equally. 48.5% of cold calls observed were of women. This number is slightly higher than women’s attendance in the observed class sessions overall (47.0%), but the difference is small and not statistically significant ($p=.500$).

Classes in which there was more cold calling were not observed to have higher rates of female participation overall. In fact, the reverse was true. Women were observed to participate voluntarily slightly less in class sessions in which at least 50% of participation events were cold calls (women accounted for 39.5% of the voluntary participation events

in these classes) than in class sessions in which fewer than 50% of participation events were cold calls (women accounted for 46% of voluntary participation events).¹²

TABLE 9:
PARTICIPATION RATES BY AMOUNT OF COLD CALLING

	Classes where cold calls were more than 50% of participation events	Classes where cold calls were less than 50% of participation events
Total participation events by women	44.7% (p=.53)	46.5% (p=.14)
Unique participants who were women	46.7% (p=.43)	46.7% (p=.28)
Cold calls by women	46.9% (p=.09)†	50.4% (p=.95)
Voluntary comments by women	39.5% (p=.30)	46% (p=.047)*

a. Professors' perspectives on cold calling

Thirty-three professors reported that they cold call regularly, especially in large classes. Professors are largely positive and often enthusiastic about cold calling. Fourteen professors stated that they see cold calling as a good way to help students learn. One professor reported that “outside of clinics,” cold calling is “one of the best forms of preparation for practice we give our students.”

Twenty professors stated that they attempted to ensure that there was gender balance in who they called on, either within a single class session or across several class sessions.

Notwithstanding the generally favorable view professors had of cold calling, some professors noted that it may have drawbacks. One professor remarked that cold calling “sometimes creates a passivity in the classroom that lessens student engagement.” Four professors pointed out that cold calling may make some students uncomfortable in a way that is counter-productive.

¹² Note that the amount of cold calling in a class may be correlated with class size (professors may be likely to cold call more in large classes), which may explain part of this result (given that women participate voluntarily less in upper-level large classes than they do in seminars).

4. First speaker gender

WAP’s findings identified differences in women’s rates of voluntary participation based on the gender of the first speaker in a class. Those results are provided below.¹³ Overall, in the forty-three observed class sessions in which the first speaker was a man, women were responsible for only 40% of total participation events and 39.4% of voluntary participation events. Both those differences were statistically significant. On the other hand, in the forty-seven class sessions in which the first speaker was a woman, women were slightly *more* likely to participate than would be expected based on the class gender composition, though those differences were not statistically significant.

TABLE 10:
PARTICIPATION RATES BY FIRST SPEAKER GENDER

	All classes		1L classes		Upper-level classes	Large classes (upper-level)		
	M	F	M	F	M	F	M	F
Women in attendance	47.0%		49.5%		45.1%	45.0%		
First Speaker Gender	M	F	M	F	M	F	M	F
Total participation events by women	40%* (p=.02)	52.1% (p=.24)	47.3% (p=.99)	50.5% (p=.81)	37.42%* (p=.013)	52.85% (p=.25)	36.2%** (p=.005)	54.3% (p=.23)
Voluntary participation events by women	39.4%** (p=.005)	50.8% (p=.83)	45.2% (p=.44)	49.3% (p=.91)	37.24%** (p=.007)	51.44% (p=.86)	35.4%** (p=.004)	51% (p=.78)

The strength of the relationship between a male first speaker and subsequent female participation also seemed to decrease as Autumn Quarter went on. Overall, the negative correlation of a male first

¹³ Note that whether men speak more in a class is likely a confounding variable with whether the first speaker in that class is a man, given that in a class where men speak more frequently a man is also more likely to be the first speaker. WAP was not able to complete additional testing to tease apart the relationship between these two variables.

speaker with female volunteering was not statistically significant after the first round of observations in late October.

TABLE 11:
PARTICIPATION RATES BY FIRST SPEAKER GENDER AND ROUND

First Speaker Gender	Round 1		Round 2		Round 3	
	M	F	M	F	M	F
Total participation events by women	33.1%** (p=.001)	53.4% (p=.34)	40.4% (p=.24)	54.3% (p=.44)	46.7% (p=.98)	47% (p=.74)
Voluntary participation events by women	35.6%** (p=.001)	52.1% (p=.79)	36.8%† (p=.051)	52.8% (p=.98)	44.7% (p=.94)	45.1% (p=.94)

5. The effect of the professor's gender

Students' course loads tend to include classes taught by fewer female professors than male professors. Overall, 2Ls and 3Ls had a mean of 3.2 male professors and 1.5 female professors in Autumn Quarter 2017. The difference was even starker for 1Ls, who had a mean of 1.2 female professors and 3.8 male professors (including Bigelow fellows) in Autumn Quarter 2017.

In classroom observations, women participated slightly more—but not statistically significantly more—when in class with female professors. The percentage of total participation events by women in a class with a male professor (across all class years) was 45.3%; in classes with female professors it was 49.14%. Women were, however, significantly less likely to participate *voluntarily* in classes with male professors than their attendance in the classes would suggest. In those classes, only 44.9% of voluntary participation events were accounted for by women, a statistically significant difference (p=.03).

TABLE 12:
PARTICIPATION RATES BY PROFESSOR'S GENDER

	Male Professor	Female Professor
Total participation events by women	45.3% (p=.21)	49.14% (p=.98)
Unique participants who are women	45.7% (p=.53)	50.1% (p=.92)
Cold calls by women	46.9% (p=.60)	59.7% (p=.67)
Voluntary participation events by women	44.9%* (p=.03)	47.3% (p=.50)

6. Students' perceptions of class participation

Overall, students expressed considerable satisfaction with their experiences in the classroom at UChicago Law. Forty six point six percent of survey respondents reported that their classroom experience at the Law School has been "somewhat positive," and 38.2% reported that it has been "very positive." These numbers are similar across class years.

Despite their general satisfaction with classroom experiences at the Law School, women and men experience class participation somewhat differently. While 42.5% of male students enjoy participating in class, only 27.3% of female students reported the same (p=.001). Similarly, 22.5% of male students dislike participating in class, and 43.2% of female students dislike it (p<.001).

Men are more likely to report that they themselves participate in class more often than their classmates. Although the gap in male and female answer rates on this question is smaller than the gaps described in the previous paragraph, it is still highly significant: 37.5% of men and 25.0% of women report that they participate either somewhat or far more often than their classmates (p=.006). Similarly, but less significantly, 39.0% of men and 44.1% of women report that they participate either somewhat or much less often than their classmates (p=.291).

D. Faculty Relationships and Mentoring

Women students report outcomes similar to or better than men in most mentorship metrics. Most students at the Law School report having at least one mentor among the faculty, and women reported having slightly more mentors on the faculty than men. Women are significantly more likely than men to serve as research assistants. Professors also write letters of recommendation for similar numbers of women and men, and women and men report having similar numbers of professors they would feel comfortable asking for letters from.

1. Mentorship generally

Five professors reported that they believe that students who actively seek mentors have a more rewarding law school experience than those who do not. Overall, when asked about their interactions with professors outside of class, students across all years responded that they were positive: 47.3% of respondents said they were “very positive,” and 40.2% of respondents said they were “somewhat positive.” The results did not vary significantly by students’ gender. 85.9% of women and 88.5% of men reported that their interactions were somewhat or very positive ($p=.428$).

In interviews, professors were divided in their opinions about what the appropriate or optimal role of a mentor should be. But despite these differences, there was widespread agreement among professors that gender does not make much difference to the mentoring relationship.

On average, most students at UChicago Law have at least one mentor on the faculty, and women have slightly more mentors than men. Women at UChicago Law reported having a mean of 1.8 mentors each, and men reported having a mean of 1.5 mentors. This difference is significant at the .10 level ($p=.086$).

Mentorship seems to increase over time. 3L women and men reported having more mentors on average than members of the 2L class, and 2L students reported having more mentors than 1Ls, suggesting that students gain mentors as they spend more time in law school. However there are differences based on gender within each class. More 1L men feel they do not have a mentor compared to 1L women, though this difference is not statistically significant: 54.9% of men reported not having a mentor compared to 44.0% of women ($p=.179$). Of the 1L survey respondents, the average number of mentors for women was 1.1 and the average number of mentors for men was 0.7 ($p=.023$).

2L and 3L men still reported having fewer mentors than 2L and 3L women: 27.1% of men feel like they do not have a mentor compared to 19.9% of women ($p=.163$). The average count of mentors for women and men:

TABLE 13:
AVERAGE NUMBER OF MENTORS BY GENDER, 2L AND 3L YEARS¹⁴

Average Number of Mentors ¹⁵	2L and 3L Women	2L and 3L Men
Total (p=.212)	2.3	2.0
Non Clinical (p=.346)	1.6	1.4
Clinical (p=.308)	0.7	0.6

The Law School's clinical opportunities are sources of mentorship relationships for many students. One clinical professor stated: "Mentorship is at the core of what we do as clinical faculty." Sixteen students reported that they found mentors through their participation in a clinic. For example, one extolled the benefits of working with clinical professors who "take time to ask about aspects of our lives outside of pure academics and get to know us as people rather than as law students."

2. Letters of recommendation and employer references

According to the data sheets that faculty members submitted, faculty wrote letters of recommendation for clerkships slightly more frequently for men than for women, but the difference was not statistically significant. A total of 44.1% of clerkship letters written in the last year were for women and 55.9% were for men (p=.956).

WAP also asked student survey respondents for the number of faculty members they felt comfortable asking for letters of recommendation. Students' reports of the number of faculty members that they felt comfortable asking for letters of recommendation varied less by gender than they did with regard to mentorship (see above). On average, men and women across all classes have nearly equal numbers of professors they would feel comfortable asking for letters of recommendation.

TABLE 14:
NUMBER OF PROFESSORS STUDENTS FEEL COMFORTABLE ASKING
FOR RECOMMENDATION LETTERS BY GENDER AND YEAR

	1L (p=.700)	2L (p=.089)†	3L (p=.647)
Women	1.7	3.6	4.2
Men	1.8	4.2	4.4

¹⁴ These differences are not statistically significant.

¹⁵ Students who responded that they had more than four mentors were counted as having five mentors for the purposes of this analysis.

Twenty three point eight percent of 1L women and 22.5% of 1L men surveyed did not have a faculty member they felt comfortable asking for a letter of recommendation ($p=.852$). Of 2L women, only 4.5% did not feel comfortable asking for a letter from any professor compared to 6.0% of 2L men ($p=.698$). Of 3Ls, 10.1% of women compared to 1.6% of men did not have any professor from whom they would feel comfortable asking for letters of recommendation ($p=.042$).

3. Research assistantships

In the year covered by the professor data sheets WAP collected, 57.5% of research assistants employed by the professors who submitted such data were women and 42.5% were men, a difference that is statistically significant ($p=.012$). Six professors reported finding their research assistants either by posting the positions on Symplicity (an online job-search database used at the Law School) or by emailing their entire 1L class. Five professors stated that they hire research assistants in other ways, including hiring students who approach them proactively or recruiting students with the top grades in their classes.

4. Office hours

Professors vary in their approaches to office hours. Eleven reported having no scheduled office hours and instead inviting students to stop by at any time. One professor provides scheduled time slots for which students can sign up. Other professors schedule specific office hours but do not require students to sign up for time slots within that window. Professors largely were unsure what approach would be best.

Generally, professors reported that there is no difference in the frequencies with which women and men visit their office. But at least nine noticed differences in the topics men and women visited to discuss. Two professors reported that men were slightly more likely to want to discuss non-specific topics, unrelated to class, while women were more likely to visit with specific class-related questions. Finally, six professors noted that men are more likely to stop by their offices without an appointment.

Student survey responses roughly match what professors reported in their interviews: there is not much difference in the frequency with which women and men attend office hours. Of 2L and 3L survey respondents, men reported attending office hours more than women, but the difference was not statistically significant: 51.9% of men reported attending at least once per quarter, compared with 42.7% of women ($p=.130$). 1L women, on the other hand, attended office hours at a higher rate than 1L men, and this difference was marginally significant: 87%

of 1L women reported attending at least once per quarter, compared to 76% of 1L men ($p=.080$).

E. Faculty Diversity

Although WAP set out to research primarily the student experience at UChicago Law, issues of representation on the faculty, as well as the experiences of current faculty members who are women or minorities, came up with an inescapable frequency in both professor interviews and student survey responses. In the spring of 2018, the Law School had thirty-seven members of the full-time research faculty, of which only ten were women. The clinical faculty was more diverse—of the twenty-one total clinical faculty members, twelve were women. But 1Ls often do not have any interaction with the clinical faculty, and because clinics are optional, many students graduate from the Law School without having any significant interaction with a clinical faculty member.

Students are acutely aware of this gender imbalance and expressed their dissatisfaction with it again and again, some identifying it as a significant failure of the Law School. Generally, students reported that having a diverse faculty is important and that the Law School “would benefit greatly from having more female faculty members.” Professors are also concerned with the negative impact of the lack of diversity. One professor suggested that a more diverse faculty would be attractive to students. Some professors believe that mentorship responsibilities are not distributed evenly between female and male faculty, and that the female faculty bear the responsibilities of acting as mentors more often than men, if only because there are fewer women than men to share the burden. Both the faculty and the administration expressed concerns about the burden it places on female faculty to teach 1L classes.

Some women faculty members shared examples of the challenges they had faced at the Law School during their interviews. Those accounts are explored more fully in the full-length report. Additionally, the full-length report describes some of the difficulties the Law School administration reports facing in hiring a diverse faculty.

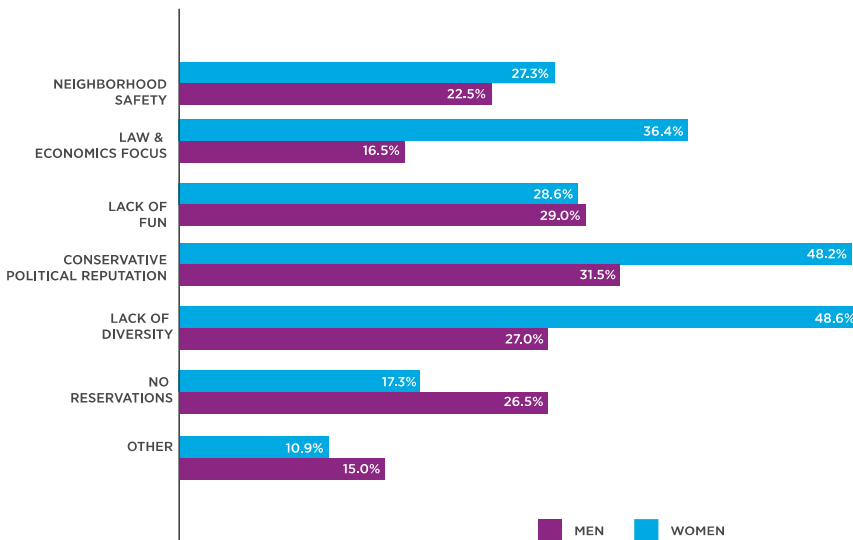
F. Student Experience and Activities

Women’s experiences at UChicago differ from men’s in areas beyond the classroom or their faculty relationships. This section explores trends in student satisfaction overall, students’ decisions to enroll at UChicago, students’ reports of interactions with their classmates, their career preferences and goals, and their participation in organized extracurricular activities. The p -values in this section denote the probability that the difference in response between men and women students on a particular question was due to chance.

1. Perceptions of the law school and matriculation decisions

Survey respondents were asked, “Did you have any reservations about attending the University of Chicago Law School?” They were asked to check all responses that applied out of a set of seven options, which included “neighborhood safety,” “law and economics focus,” “lack of fun,” “conservative political reputation,” “lack of diversity,” “I had no reservations,” and “other.” If a survey respondent selected the “other” option, he or she was given the chance to write in any additional reservations that were not included in the initial set. Fifty-seven survey respondents wrote in additional concerns not listed in the initial set of seven fixed choices. Overall, women were significantly more likely to express the reservations described below, and were significantly less likely than men to report having no reservations about enrolling at UChicago. Seventeen point three percent of women and 26.5% of men reported having no reservations about their decision to enroll at UChicago ($p=.022$). The following responses from students reflect the concerns they remember having when they considered whether to attend UChicago Law (they do not necessarily reflect students’ judgments about whether such concerns were well-founded in reality).¹⁶

GRAPH 2:
MOST COMMON RESERVATIONS ABOUT UCHICAGO BY GENDER



¹⁶ Unfortunately, WAP’s student survey did not include a question about why students chose to enroll. This information would likely also be interesting.

Briefly, the largest differences between men and women students' responses were in the following categories:

- *Lack of Diversity*: Lack of diversity was the most commonly reported reservation for women, with 48.6% of female survey respondents reporting it. In contrast, 27.0% of men were concerned by a perceived lack of diversity ($p < .001$).
- *Law and Economics*: Male students were significantly less likely ($p < .001$) to see the Law and Economics focus of the Law School as a cause for concern when deciding whether to matriculate: 36.4% of female survey respondents reported this concern, versus 16.5% of male survey respondents.
- *Political reputation*: 48.2% of female survey respondents reported that UChicago's conservative political reputation gave them pause when enrolling. In contrast, only 31.5% of men checked this box. Although this was the most commonly reported reservation for men (and the second most commonly reported reservation for women), the difference between men and women's responses was still highly significant ($p < .001$).
 - Ten students made use of the "other" response option to report that the Law School's liberal political reputation or lack of conservative faculty had been a cause for concern for them in their decision to matriculate.
- *Safety*: 27.3% of female respondents and 22.5% of male respondents reported being concerned about neighborhood safety when deciding whether or not to attend UChicago. The difference was not statistically significant ($p = .0259$).
- *Competition, rigor, and intensity*: Women disproportionately made use of the "other" option to write in that they had reservations about UChicago's reputation for competitiveness, although the concern was also voiced by a male student. Three women noted concerns about "academic rigor," "intensity of the quarter system and curriculum," and "stress culture." One professor explained such a concern, noting: "There is an institutional commitment to free exchange of ideas and having hard conversations, but that can give [prospective students] the idea that you have to be really tough to go here."

2. Professional goals and career planning

WAP survey respondents were asked what kind of legal work they hope to do within their first ten years after graduating from the Law

School. Male and female respondents reported significantly different rates of interest in every career area questioned except government work. Women were significantly more likely than men to report an interest in doing public interest work. Men were significantly more likely to be interested in private legal practice, legal academia, clerking, and non-legal work.

TABLE 15:
STUDENTS' INTEREST IN LEGAL AREA OF PRACTICE IN NEXT 10
YEARS BY GENDER (ALL CLASS YEARS)

<i>Legal Area</i>	<i>Men</i>	<i>Women</i>
Private Legal Practice* (p=.022)	82.5%	73.2%
Clerking* (p=.002)	66.5%	51.4%
Government Work (p=.910)	41.0%	40.5%
Public Interest Work* (p=.005)	29.5%	42.7%
Legal Academia* (p=.026)	18.0%	10.5%
Non-Legal Work* (p=.051)	13.0%	7.3%

Women are less likely than men to participate in On-Campus Interviewing (“OCI”). Seventy-four point three percent of 2L and 3L women and 83.7% of 2L and 3L men reported participating in OCI (p=.059).

Women and men who participated in OCI reported getting jobs through the process at roughly similar rates. Eighty-three point nine percent of 2L men and 90.4% of 3L men who participated in OCI reported getting jobs through the process. Eighty-one point six percent of 2L women and 92.3% of 3L women who participated in OCI reported getting jobs through the process.

Significantly higher percentages of women than men reported an interest in doing public interest work at some point during the first ten years of their legal careers (see the table above). Perhaps correspondingly, women were more likely to forgo OCI in order to pursue public interest work during the 2L summer—16.2% of 2L and 3L women reported making that choice, compared to 11.6% of 2L and 3L men—though the difference is not statistically significant (p=.286).

Female students also are historically more likely to participate in more pro bono work during their time at the Law School, earning the Dean’s Certificate of Recognition for completing fifty hours of pro bono service at disproportionately high rates. Fifty-nine point six percent of Certificates given out since the award’s inauguration in 2013 have gone to women.

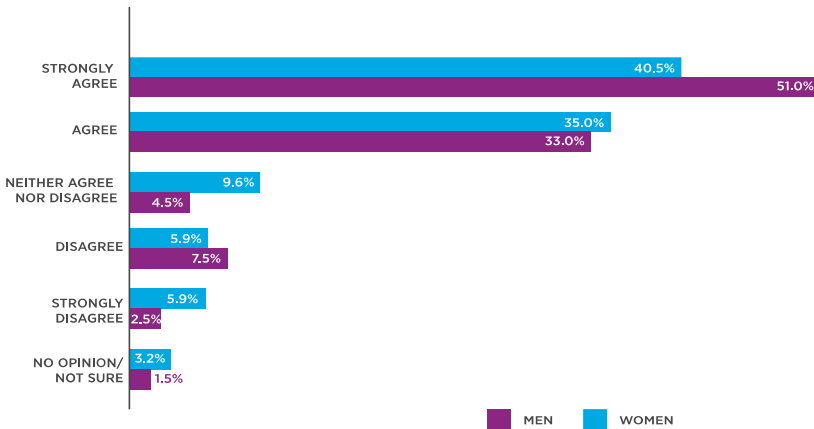
TABLE 16:
2L AND 3L PARTICIPATION IN OCI BY GENDER

	Participated in OCI (p=.059)†	Did not participate because already had an offer (p=.319)	Did not participate because planned to pursue public interest work (p=.286)
Men	83.7%	3.9%	11.6%
Women	74.3%	6.6%	16.2%

3. Student satisfaction and culture

The vast majority of students reported feeling positive about their decision to enroll at UChicago Law. However, men and women did so at significantly different rates. Eighty-four percent of male respondents and 75.5% of women either agreed or strongly agreed with the statement, “[g]iven my experience so far, I would choose to enroll at the University of Chicago Law School again” (p=.030). Male students were more likely than female students to report strong agreement with the statement (p=.030). Women were more likely to report neither agreeing nor disagreeing with the statement (p=.045), and more likely to report strong negative feelings about their decision to enroll (p=.085).

GRAPH 3:
RESPONSES BY GENDER TO “GIVEN MY EXPERIENCE SO FAR, I WOULD CHOOSE TO ENROLL AT THE UNIVERSITY OF CHICAGO LAW SCHOOL AGAIN.”



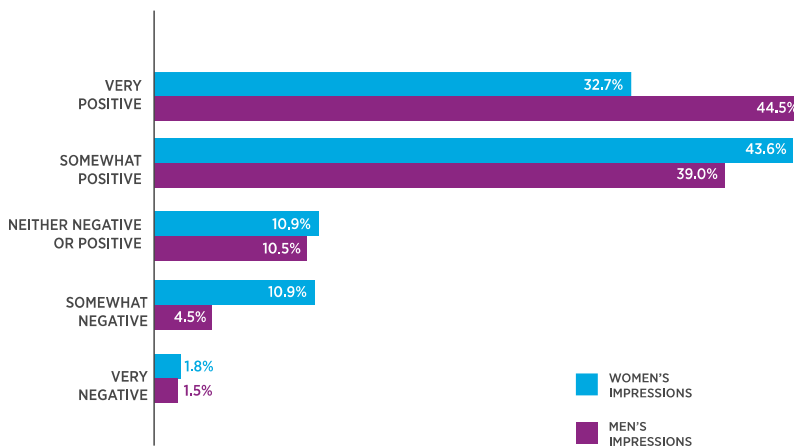
4. Improved satisfaction after 1L

Major gender disparities were not evident in survey respondents' assessment of whether their law school experiences had improved since the end of 1L. The majority of students overall felt that their experiences at the Law School had improved at least somewhat since finishing 1L year. Sixty-two point seven percent of 2L and 3L students either agreed or strongly agreed with the statement "my law school experience has improved since 1L." The less positive view of 1L year compared to later years of law school is significant because, as one professor put it: "A huge component of the Law School culture goes into how we do 1L curriculum. How 1L classes are run makes a big difference, and culture is set very early."

5. Interactions between students

Male students report having positive interactions with their fellow students at higher rates than female students and are also more likely than women to characterize these interactions as "very positive" rather than "somewhat positive."

GRAPH 4:
IMPRESSIONS OF INTERACTIONS WITH FELLOW STUDENTS



Despite the fact that the vast majority of students expressed positive impressions of their interactions with other students, in response

to an open-ended question soliciting “other observations or suggestions . . . about gender dynamics at the Law School,” nine female respondents expressed negative feelings about the way that they were treated by fellow students in the Law School community based on their gender. One such woman remarked: “As a woman, I think the most marginalized I have ever felt is at the Law School.”

6. Confidence

Many students and professors identified a confidence gap as a possible source of some of the gender-based disparities they saw at the Law School. Three female survey respondents reported concerns about their abilities to keep up or “compete with [] peers at U of C” as a reason why they had reservations about deciding to enroll at UChicago Law. One of these students characterized this concern as the work of “imposter syndrome.”

When asked about the most significant gender difference at the Law School, one professor remarked: “In a word, confidence. There are some students who are very accomplished, but are still not confident. Male students tend to seem more confident than female students.” Another professor echoed these sentiments: “In our society, women are raised to settle for something less than they are capable of achieving; that’s a problem that the Law School didn’t cause, but that the Law School can do something to correct.”

Of course, the Law School experience itself can also have an impact on confidence. A student posited one possible explanation: “[A] diversity of experiences and perspectives [among professors] would do a lot to make students feel like they actually deserve to be at the school. It’s hard to feel like . . . you’ve earned your seat in the classroom when most of your professors look the same (i.e., not like you).”

7. Extracurricular activities

a. Moot court

Over the past five years, 71% of moot court semi-finalists, 60% of finalists, and 67% of moot court winners have been men. Unfortunately, WAP was not able to obtain information regarding the gender composition of participants in the first round of competition for those years. Four survey respondents wrote about frustration with the way that the Moot Court competition is run and women’s consistent failure to advance to later rounds in meaningful numbers.

b. Law student organizations

1L men were members of fewer student organizations than 1L women on average, to a statistically significant degree. 1L men belonged to an average of 2.3 student organizations while 1L women were members of an average of 2.8 ($p=.006$). Two point three percent of 1L men who completed the survey were members of more than four student organizations while 9.5% of 1L female survey participants were members of more than four student organizations ($p=0.090$).

IV. DISCUSSION

A. Class Composition

One of the most striking gender disparities the WAP study identified is the demographic makeup of the student population. Class composition helps determine the kinds of voices that will be heard in classroom conversations and in the student body at large. Because WAP does not have access to admissions data, we are unable to answer many questions surrounding the historical imbalance in male and female enrollment at the Law School. The study does shed light, however, on some of the possible causes of the gender imbalance in the student population.

1. Attracting female students

Survey results suggest that women tend to have more reservations about deciding to enroll at UChicago Law than men do. If women are not enrolling because of the Law School's perceived conservative political reputation, regardless of whether the reputation is accurate, then the Law School could be missing out on qualified female students.

The Law School's perceived focus on Law and Economics might be having a similar effect on women's enrollment. Female survey respondents were much more likely than men to choose the Law and Economics focus as a cause for concern when considering enrollment, and male UChicago students are significantly more likely to have majored in Economics as undergraduates than female students.¹⁷

Our study suggests that another reason for the gender imbalance in the student population is the significant gender disparity in *who* transfers into UChicago Law between the 1L and 2L years, as transfer

¹⁷ This characteristic of the Law School's student body reflects the broader trend of more men than women majoring in Economics as undergraduate students. See generally Elizabeth P. Jensen & Ann L. Owen, *Pedagogy, Gender, and Interest in Economics*, 32 J. ECON. EDUC. 323 (2001).

classes appear to be heavily male. The pronounced transfer phenomenon is surprising and warrants further exploration. It is a major accomplishment for the Law School to have matriculated its first gender balanced 1L class, the Class of 2020. However, efforts to achieve equal representation will be incomplete if transfer classes introduce gender imbalances for the remainder of students' law school careers.

B. Achievement Gaps

1. Journals

As is clear from the Academic Achievement and Outcomes section above, there is a significant gender disparity in who attains membership or a board position on the *Law Review*.¹⁸ This is the case notwithstanding the fact that women and men are approximately equally likely to serve on *CJIL*, and women are significantly more likely than men to serve on *Legal Forum*. All three journals use the same writing competition, traditionally held immediately after the 1L year, to select their staffers.

The most obvious reason why *Law Review* may have the highest ratio of men to women among the journals is that there may be a gender disparity in grades, since traditionally, two-thirds of staffer positions (approximately twenty-seven of forty) on the *Law Review* were filled by "grading on" (a process in which the journal accepts the people with the highest grades who completed the writing competition provided their writing competition submissions fulfilled a minimum standard). The *Law Review*'s selection processes changed in 2018, but the impact of those changes has not yet been studied. The remaining one-third of the positions have traditionally been based solely on an evaluation of the candidates' writing competition submissions. *CJIL* and *Legal Forum*, in contrast, do not take grades into account when selecting staff members. Although WAP did not have access to 1L grades, the marginally significant difference in all honors awarded to women versus men from 2014 to 2017 suggests that women may on average receive slightly lower grades than men across their law school careers.

There also appears to be a gender skew in who completes the writing competition in the first place. Significantly more 2L and 3L male survey respondents reported completing the competition than female

¹⁸ Lynne N. Kolodinsky, *The Law Review Divide: A Study of Gender Diversity on the Top Twenty Law Reviews*, CORNELL LAW LIBRARY PRIZE FOR EXEMPLARY STUDENT PAPERS, 24 (2014), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1007&context=ellsrp> [<https://perma.cc/MDC5-36GW>]. Kolodinsky's article includes several hypotheses for why women are underrepresented on many flagship law journals. Another interesting source identified a gender disparity in law journals' publication of student notes. Jennifer C. Mullins & Nancy Leong, *The Persistent Disparity in Student Note Publication*, 23 YALE J. L. & FEMINISM 385, 399 (2011).

survey respondents did. Different rates of writing competition completion do not explain, however, the different degrees of gender disparity among the three journals, so different rates of completion of the writing competition cannot explain the *Law Review's* gender skew entirely.

When it comes to serving on the journals' boards as 3Ls, men and women's behavior is substantially similar, suggesting that any difference in women's representation on the journals' boards is likely due to their different representation in the staffer classes in the first place.

2. Clerkships

Women's rates of earning clerkships have improved somewhat over the past ten years. Overall, however, men are still more likely than women to clerk at the appellate level, and women are slightly more likely than would be expected to clerk at the district court level.¹⁹

The disparity in the ratios of men and women who attained federal appellate clerkships between 2014 and 2017 may be in part the product of a gender skew in grades.

The disparity may also reflect differences in the rates at which male and female students apply for clerkships. Women were significantly less likely to report an interest in clerking in the student survey. Women may also be particularly sensitive to discouragement given their historical underrepresentation in the legal field, at the Law School, on the faculty, and as clerkship and honors recipients and *Law Review* members, as well as their high comparative levels of concern about the Law School coming in. Any comparative lack of confidence on the part of women might make them even less likely to apply than they would be otherwise.²⁰

The gender disparity in *Law Review* membership may also be a factor. In explaining the gender disparities among UChicago students who are hired as clerks, one professor noted, "the clerkship problem could be partially a *Law Review* problem in that judges want students who have had a certain type of writing experience, and they are familiar with the experience the journals provide."

¹⁹ Disparities in the rates at which men and women receive clerkships at the United States Supreme Court extend beyond UChicago. For an interesting examination of the gender disparity in Supreme Court clerkships overall, see Cynthia L. Cooper, *Women Supreme Court Clerks Striving for "Commonplace,"* 17 PERSPECTIVES 1, 18 (2008). WAP was not able to compare UChicago's clerkship gender disparities with those of other schools. The 2012 Yale report included statistics indicating that men were more likely than women to clerk at appellate courts. Yale Law Women, *supra* note 4, at 49. WAP was not able to directly compare the Yale numbers with the results for UChicago students because the years included in each sample were quite different.

²⁰ High achieving women often exhibit the imposter phenomenon or syndrome, lacking confidence despite their successes and doubting their abilities and the legitimacy of their accomplishments. See generally Anna Parkman, *The Imposter Syndrome in Higher Education: Incidence and Impact*, 16 J. HIGHER EDUC. THEORY & PRAC. 51 (2016).

3. Grading and the achievement gaps

Many of the classic markers of academic achievement at the Law School, including *Law Review* membership, clerkships, other prestigious jobs, and academic honors, are determined, in whole or in part, by the same thing: grades. It is impossible for WAP to know definitively whether 1L grades vary based on gender because of the administration's denial of WAP's data requests. However, the significant gender-based disparity in honors awarded at graduation (described above) suggests that women tend to receive lower grades than men at least to some degree.²¹

All required 1L courses are blind graded, as are upper-level exam classes. Upper-level seminar grades are frequently based on reaction papers and research papers, which are not blind graded. Although blind grading may help avoid the effects of certain kinds of gender or other biases, it is not possible to know how that works in practice. There are several hypotheses that might explain the gender disparities in academic achievement:

a. Are female students not as strong academically upon arrival at the Law School?

One possibility is that women who enroll are less academically qualified than their male classmates.²² WAP's lack of access to admissions data meant that we had no way to interrogate this hypothesis. If it is the case that female matriculants at the Law School are not as strong academically, it is unclear why the Law School is not able to attract better-qualified female candidates. It is possible, however, that the Law School is less attractive to women than it is to equally well-qualified men for the various reasons discussed earlier.

²¹ For an exploration of gender-based grade disparities at Harvard Law School, see generally Coleman, *supra* note 3.

²² The most recent report in the LSAT Technical Report Series, published by the Law School Admissions Council, found that men scored slightly higher than women on the LSAT. See Susan P. Dalessandro, Lisa C. Anthony & Lynda M. Reese, *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007–2008 through 2013–2014 Testing Years*, LAW SCHOOL ADMISSION COUNCIL (2014), <https://www.lsac.org/data-research/research/lSAT-performance-regional-gender-and-raciaethnic-breakdowns-2007-2008> [<https://perma.cc/B2P4-FTAH>].

- b. *Does the law school environment disproportionately negatively impact female students' morale or well-being in a way that results in poorer academic performance?*

It could be that male and female students come to the Law School equally qualified and prepared to succeed, but that the Law School environment takes a heavier toll on women that detracts from their ability to achieve. This hypothesis is supported by the findings that women generally report positive feelings about interactions with their fellow students and classroom experiences and their decisions to enroll at the Law School at lower rates than men.

- c. *Do women have a distinctive writing style that professors disfavor, either consciously or subconsciously?*

It is also possible that men and women write differently from one another, and that a stereotypically masculine writing style is favored by law professors grading exams. Some professors suggested that if this were the problem, one solution might be to vary the types of evaluations used in the academic setting. One professor stated: "If women are performing worse in exams . . . if we don't as a school feel that that is representative [of] their mastery of their material, the biggest thing we could do would be to change how we evaluate people, rather than just saying men are better at law. I don't accept that premise."

It is likely that several of these phenomena are working together to cause or exacerbate gender-based achievement disparities. No matter the precise mechanism that produces achievement disparities, their existence is disturbing.

C. Classroom Dynamics

Overall, as described above, women and men participate in class at almost even rates (and rates that were more equal than those reported at Yale in 2012).²³ However, men participate voluntarily significantly more frequently than women do.

1. Cold calling as an equalizer

Cold calling largely drives the almost equal rates of overall participation between men and women, considering the fact that men were significantly more likely to participate voluntarily than women were. Given that UChicago Law professors tend to rely heavily on cold calling in their teaching, it may not be surprising that participation overall is

²³ Yale Law Women, *supra* note 4, at 3.

more gender-balanced at UChicago than at other schools (which some professors reported use cold calling less frequently). This indicates that most professors are likely doing a good job of cold calling men and women equally, and suggests that some form of cold calling is a good idea for many or most classes.

2. Explaining the voluntary participation gap

It is impossible to know all of the root causes behind men's higher rates of voluntary participation in their classes. For example, men were more likely than women to report enjoying participating in class. It is difficult to know whether that is a cause of the voluntary participation gap, or an effect of it, but either or both are possible. Students posited some additional explanations, and there may also be valuable lessons to learn from the types of classes where gender disparities appear to be less pronounced.

First, voluntary participation rates of female students were higher in 1L classes than in upper-level classes. There are several reasons why that might be the case. For example, the Class of 2020, the 1L class at the time of the project, was the first class at the Law School to be 50% women. Women in that class might have felt more comfortable speaking up as a result of the better-balanced gender dynamics. Or, given women's comparatively lower satisfaction with classroom dynamics, it could be that women are discouraged over time. Multiple effects might work together to help 1L women feel more comfortable speaking up in class, both voluntarily and when answering cold calls.

Second, voluntary participation in seminars is roughly equal across genders. Again, there are a few reasons why this might be the case, including that seminars are less formal and potentially less intimidating, and the possibility that men are more likely to have the confidence necessary to speak in large groups. Of course, women could also be more interested in the topics taught in smaller, upper-level seminars.²⁴

D. Female Faculty

WAP's data make clear that students value having female professors teach the 1L curriculum and that many believe that having a diversity of professors is important to their learning experience. The lack

²⁴ See generally Daniel E. Ho & Mark G. Kelman, *Does Class Size Affect the Gender Gap: A Natural Experiment in Law*, 43 J. LEGAL STUD. 291 (2014). From 2001–2011, Stanford Law School randomly assigned first-year students to large and small sections of their courses. From 2008–2011 it also implemented changes in grading protocols. The changes resulted in even academic outcomes for women and men.

of female faculty is likely a factor behind the differences in male and female students' experience at the Law School.

The lack of diversity among the faculty also results in female professors shouldering a larger burden in terms of teaching and mentorship.²⁵ Because of the importance the administration places on having a diverse set of faculty teach 1Ls, women professors may simply have to do more (a result the administration acknowledges and states it is trying to avoid).

The importance the Law School places on teaching evaluations may also make it difficult to permanently hire qualified female professors. If gender biases impact student evaluations,²⁶ equally effective female visiting professors might unfairly receive lower ratings than men.

1. Mentorship

The data collected suggests that women develop slightly more mentoring relationships than men (this result is significant at the .10 level). This may be a consequence of high rates of female participation in clinics. It is also possible that the fact that women are more likely to serve as research assistants accounts for their higher number of mentors, on average, since many professors and students reported developing a mentoring relationship that way.

It is unclear why women would have slightly higher rates of faculty mentorship than men and work as research assistants at significantly higher rates without correspondingly higher rates of comfort asking for letters of recommendation, higher rates of receiving letters of recommendation, or in turn, receiving as many clerkships as men.

E. Student Life and Satisfaction

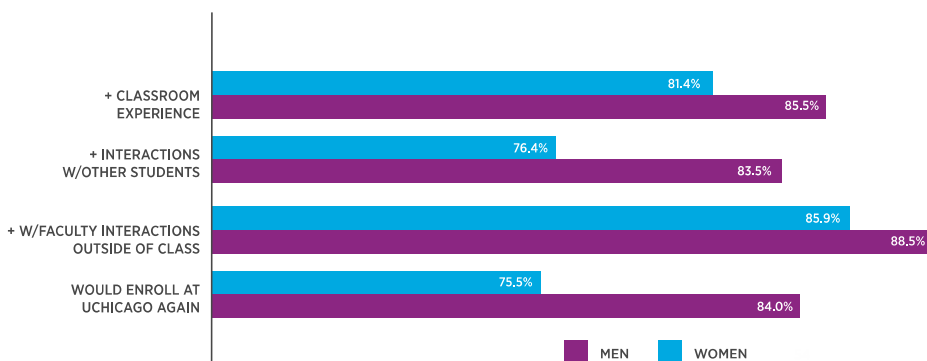
1. Women's satisfaction overall

While men and women both report high levels of satisfaction with various aspects of their life at the Law School, it is important to note that women consistently report satisfaction at rates lower than men do.

²⁵ Some research suggests that female professors are consistently asked for more support and favors from students than male professors are. See Amani El-Alayli, Ashley A. Hansen-Brown & Michelle Ceynar, *Dancing Backwards in High Heels: Female Professors Experience More Work Demands and Special Favor Requests, Particularly from Academically Entitled Students*, 79 SEX ROLES 136, 137–38 (2018).

²⁶ See generally Kristina M. W. Mitchell & Jonathan Martin, *Gender Bias in Student Evaluation*, 51 PS: POL. SCI. & POL. 648 (2018) (suggesting female professors are rated by students on different criteria than male professors, often in a negative way).

GRAPH 5:
WOMEN'S AND MEN'S EXPERIENCE OVERALL²⁷



There are many possible reasons for this lack of satisfaction. Women reported negative gendered interactions with their fellow students, the constant nagging of imposter syndrome, and the frustration of being taught by professors with whom they do not identify. Additionally, if women are less likely than men across the board to earn the classic markers of law school academic success—good grades, *Law Review* membership, appellate clerkships, graduation honors, and moot court prizes—it may not be surprising that they feel less satisfied with their experiences than men.

V. CONCLUSION AND RECOMMENDATIONS

Overall, WAP's findings show significant disparities between men's and women's experiences at the Law School along various axes, despite the real strides that women—and the Law School—have made over the past ten years. In conclusion, WAP offers recommendations for future research, as well as for improving student experiences at the Law School.

WAP's recommendations are targeted to three different audiences: the administration, faculty, and students. WAP recommends that the administration improve its collection, maintenance, and analysis of data. The administration should organize and analyze pre-existing data such as historical grade data and also gather new data by administering

²⁷ Note that the differences in positive interactions with faculty outside of class are not statistically significant.

targeted follow-up surveys to the student body. WAP hopes that the administration will experiment with different class organization and assessment techniques in order to determine if certain class sizes or assessment types augment or decrease gender disparities in grades. WAP believes that the Law School should continue to seek to admit gender-balanced classes and should strive for more gender-balanced transfer classes.

WAP recommends that students think about the ways that gender impacts their classroom participation. All students should ask themselves whether their participation is motivated by a genuine question, desire to have the professor clarify something, or ability to make a previously unstated contribution to the discussion. If it is, they should participate enthusiastically. If a student is merely repeating a point someone else has already made or bringing up a subject that is only tangentially related to the material, the student might consider raising it one-on-one with the professor after class or during office hours.

Students—especially women—should also consider speaking more in class and continue actively seeking mentoring relationships. Both professors and students repeatedly asserted that one possible cause of the gender achievement disparities is a lack of confidence on the part of female students at the Law School. Though this common observation is apt, WAP warns that differences in confidence levels are not necessarily innate or predetermined: the findings of the study as a whole suggest that any gendered confidence gap should be understood to be at least in part a symptom of other gender-based disparities and dynamics occurring at the Law School.

Professors should set fixed office hours and publicize them. They should also make clear to students that office hours are not only for discussing class material, but that they are also happy to discuss students' careers and other interests. WAP recommends that all faculty members affirmatively encourage students who make valuable contributions in class, do exceptionally well on exams, or show promise as future academics. In class, professors should make sure they often call on women first in a given class session, and consider cold-calling more if they can do it in a way that is gender-balanced.

WAP's findings illustrate that while women have made strides at UChicago Law School, they continue to experience law school differently from men in some important ways. The authors hope that this report will continue to inspire conversations between faculty, administrators, and students about new paths forward for women at the Law School.