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Maximizing #MeToo: Intersectionality & the Movement

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Abstract: Although women of color experience high rates of harassment and assault, the #MeToo movement has largely left them on the margins in terms of (1) the online conversation, (2) the traditional social movement activity occurring offline, and (3) the consequential legal activity. This Article analyzes how race shapes experiences of harassment and how seemingly positive legal strides continue to fail women of color thirty years beyond Kimberlé Crenshaw's initial framing of intersectionality theory. I discuss the weaknesses of the reform efforts and argue for more tailored strategies that take into account the ineffectiveness of our current Title VII framework and, more specifically, the continuing failure of the law to properly deal with intersectionality. This analysis and the resulting proposal demonstrate how advocates can leverage #MeToo as an opportunity to reshape law, organizations, and culture in a way that better protects all women, and particularly women of color.

INTRODUCTION

The #MeToo movement prompted millions globally to speak out against sexual harassment, sexual assault, and violence against women, and is now known as the most significant mobilization in the women's movement in decades. Although many theorize that social media activism, like #MeToo, broadens access to movements and builds bridges across demographic groups, women of color are largely left out of the conversation. Offline organizing efforts that pre-dated #MeToo also gained legitimacy and momentum from the hashtag, but women of color again were in the shadows. This is particularly problematic given the unique ways that women of color experience harassment combined with the law's failure to remedy these offenses. In her groundbreak-

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ing work, Kimberlé Crenshaw names this failure of the legal structure as a problem of intersectionality, wherein the discrimination that women of color face strikes at the intersection of multiple marginalized identities.[1] The law often includes gaps that fail to account for intersectionality. For example, Title VII of the Civil Rights Act of 1964 requires claimants to allege that their harassment was *either* "because of . . . race" or "because of . . . sex."[2]

Although some are hopeful that the #MeToo movement has helped fill these gaps through seemingly positive legal strides, such as stronger enforcement by the Equal Employment Opportunity Commission (EEOC), increased lawsuits, and new legislation, I argue that the law is less than promising for women of color seeking justice. Numerous legal, organizational, and cultural barriers make it nearly impossible for women of color to exercise their civil rights. In addition to reforming law, to remedy this failure through litigation and compliance, we must also focus more on social and cultural reform to end harassment. Here, I emphasize reforms that will protect the most disadvantaged and marginalized individuals in our society. Although some may argue that centering the reform on women of color is divisive, I argue that it is the most inclusive because addressing the concerns of the least privileged necessarily also addresses the concerns of those who are more advantaged without the same risk of leaving some segments behind.[3]

This comprehensive approach must include *legal reform*, such as expanding the scope of anti-discrimination law to cover all workers (many of those left unprotected are women of color), ending mandatory arbitration, and altering how courts analyze actionable harassment. The #MeToo movement has already prompted legislators at the state and federal level to introduce numer-

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[1] 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.

[2] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (rendering it illegal for employers to discriminate "because of such individual's race, color, religion, sex, or national origin").

[3] *See* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 66 (2019) (discussing how "without the early black women plaintiffs' intersectional understandings . . . courts may never have adjudicated any claims that recognize sexual harassment as discrimination"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (noting that "those who have experienced discrimination speak with a special voice to which we should listen"). Moreover, civil rights advocate Kimberlé Crenshaw echoes the importance of emphasizing with those with the least privilege. *See* Crenshaw, *supra* note 1, at 167 (noting that those who are "singularly disadvantaged" would benefit from alleviating "needs and problems" of the "most disadvantaged"). Crenshaw also directly supports the concept of emphasizing reform around the most marginalized as "the most effective way to resist efforts to compartmentalize experiences and undermine potential collective action." *Id.*

ous bills aimed at tackling workplace sexual harassment.[4] Although these reforms attempt to create stronger protections against sexual harassment, they inadequately deal with racism and the compounded disadvantage of intersectional identities. My proposed approach couples legal reform with *organizational reform,* such as greater transparency and more accessible reporting, as well as *cultural reform,* such as changed norms around sexual misconduct, more women of color in leadership, and broader acceptance of collective action.

#MeToo has made clear the prevalence of workplace sexual harassment. Although elite white women in the Hollywood spotlight are the face of the highly visible and popularized #MeToo movement, harassment and assault haunt women of all races across the socioeconomic spectrum. Even though women of color were not at the forefront of the movement, there is reason to believe that they experience harassment and assault at rates higher than white women. Despite the fact that this area of the law is plagued by underreporting,[5] available statistics indicate that the majority of harassment claims happen outside of elite spaces, where there is significantly less scrutiny and attention.[6] Additionally, studies suggest that racial identity affects who is more likely to

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[4] *See* Dataset, Jamillah B. Williams, Assoc. Professor of L., Georgetown L., Sexual Harassment (2020) (on file with the author) (tracking bills that have been introduced over the past few years to address sexual harassment).

[5] Ashleigh Shelby Rosette et al., *Intersectionality: Connecting Experiences of Gender with Race at Work*, 38 RSCH. ORGANIZATIONAL BEHAV. 1, 13 (2018). *See generally* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686297 [https://perma.cc/6JQ6-B9GE]. Researchers Ashleigh Shelby Rosette, Rebecca Ponce de Leon, Christy Zhou Koval, and David A. Harrison (Rosette et al.) explain based on their research:

> The EEOC received 6696 claims of sexual harassment in 2017, over 80% of which were filed by women. However, a breadth of evidence suggests that most experiences of sexual harassment go unreported, for a variety of reasons, complicating estimates of its frequency in organizations. A recent nationally representative study conducted by the organization Stop Street Harassment (2018) found that 38% of women reported experiencing some form of sexual harassment in the workplace, while the latest findings from Pew Research Center report that 55% of women polled said they had experienced sexual harassment both in and outside of the workplace. Because women often fail to formally report sexual harassment and because admitting victimization can be stigmatizing, true estimates of the rates of sexual harassment remain largely unknown. Regardless, the widespread nature of this form of discrimination is evident.

Rosette et al., *supra*, at 13 (citations omitted); *see also* AMANDA ROSSIE ET AL., NAT'L WOMEN'S L. CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 2 (2018), https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf [https://perma.cc/JD3F-VLRL] (noting that most sexual harassment in the workplaces goes unreported).

[6] Jocelyn Frye, *Not Just the Rich and Famous*, 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/Y29P-L5ZB].

experience harassment, the type of harassment, the likelihood of someone reporting the harassment, and the chances that the report will be investigated.[7]

For example, EEOC data reflect that women of color, especially Black women, are disproportionately subject to workplace sexual harassment.[8] Of all EEOC charges that women file, women of color file 56% of claims, despite representing only 37% of working women.[9] Further, harassment in the workplace seems to be declining over time for white women but not for Black women. Although claims of harassment filed by white women dropped by about 30% between 1997 and 2017, claims filed by Black women remained stagnant over the same time period.[10] This racial disparity may be partially explained by the fact that sexual harassment is most pervasive in low-wage industries where women of color are overrepresented and often overlooked.[11] For example, the workforce areas with the highest number of charges include food services, accommodation, retail, health care, and social assistance—each of which have seen the highest number of claims filed by Black women.[12] These women tend to be particularly vulnerable because low-wage industries are characterized by extreme power imbalances, which can spark intimidation and heighten the threat of retaliation and termination.[13] Notably, social class is

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[7] Cantalupo, *supra* note 3, at 24–26; *see* Katherine E. Leung, *Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color*, 23 TEX. J. ON C.L. & C.R. 79, 85–86 (2017) (discussing how women of color often experience sexual harassment rooted in sexualized racial stereotypes).

[8] Rosette et al., *supra* note 5, at 13. Union-specific studies showed women of color experience more overall workplace harassment than any other group, and they demonstrated that it was compounded by racial and sexual harassment (for example, one study showed 20% of white women but 35% of non-white women face workplace harassment). *Id.*

[9] ROSSIE ET AL., *supra* note 5, at 4.

[10] *See* Rosette et al., *supra* note 5, at 13 (noting that this drop in claims filed by white women has occurred over the past twenty years).

[11] *See id.* (pointing out that sexual harassment occurs with the greatest frequency among low-wage workers, of which half are women of color).

[12] ROSSIE ET AL., *supra* note 5, at 5.

[13] *See* Nicole Buonocore Porter, Essay, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Porter-1.pdf [https://perma.cc/82MY-D6EF] (arguing that a large part of the problem with fighting harassment in the workplace is the retaliation women fear); Rosette et al., *supra* note 5, at 14 (explaining that the risk of retaliation is common for women who report harassment); Frye, *supra* note 6 (noting that in low-wage industries, "power imbalances are often more pronounced and . . . fears of reprisals or losing their jobs can deter victims from coming forward"). Mary Thierry Texeira notes:

> [I]n the sexual harassment studies that have included African American women, they report experiencing sexual discrimination and other forms of harassment at higher rates than women of other ethnic groups. Fain and Anderton's study of federal employees also found that "minority individuals are more likely to be sexually harassed." Finally, research on the Los Angeles Police Department, while not focusing specifically on sexual harassment, did find that "non-white women officers experienced a greater degree

a key intersectional identity in the context of harassment, yet it is not the basis of a claim under anti-discrimination law. Despite the importance of class, the effects of racism are ubiquitous and experienced across class lines.[14] Just as women of color are disproportionately targeted for sexual harassment, women of color are also frequently the subjects of other types of harassment, discrimination, and bullying based on their race and sex, which may also lead to the higher rate of claims.[15]

In addition to claims filed, numerous research studies demonstrate how race impacts the severity and frequency of the sexual harassment women encounter.[16] In one of the first quantitative studies examining harassment at the intersection of race and sex, 35% of women of color reported workplace sexual harassment experiences, in contrast to 20% of white women.[17] Additionally, a longitudinal study found that women of color in non-supervisory roles suffered more sexual harassment than their white counterparts with similar positions.[18] Women of color face the combination of ethnic, racial, gender, and class dy-

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> of social discrimination than the white women or non-white men did." As Martin observed, qualitative differences in the treatment of Black women "reflect differences in the cultural images and employment experiences of black and white women."

Mary Thierry Texeira, *"Who Protects and Serves Me?" A Case Study of Sexual Harassment of African American Women in One U.S. Law Enforcement Agency*, 16 GENDER & SOC'Y 524, 528 (2002) (footnotes omitted) (first quoting Terri C. Fain & Doulas L. Anderton, *Sexual Harassment: Organizational Context and Diffuse Status*, 17 SEX ROLES 291, 302 (1987); then quoting George T. Felkenes & Jean R. Schroedel, *A Case Study of Minority Women in Policing*, 4 WOMEN & CRIM. JUST. 65, 84 (1993); and then quoting Susan E. Martin, *"Outsider Within" the Station House: The Impact of Race and Gender on Black Women Police*, 41 SOC. PROBS. 383, 390 (1994)).

[14] *See* Matsuda, *supra* note 3, at 361 ("There is something about color that doesn't wash off as easily as class. The experience of racism, it seems, causes the normative choices of black capitalists to diverge from the choices of others in their class.").

[15] Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 60 (2006); Tanya Kateri Hernandez, *A Critical Race Feminism* Empirical *Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1239 (2006).

[16] Rosette et al., *supra* note 5, at 13; *see* Dan Cassino, *Sexual Harassment Claims Have Fallen Among Young White Women, but Not Older Women or Black Women*, HARV. BUS. REV. (Feb. 21, 2018), https://hbr.org/2018/02/sexual-harassment-claims-have-fallen-among-young-white-women-but-not-older-women-or-black-women [https://perma.cc/22L7-VLMY] (discussing the racial disparity in sexual harassment claims).

[17] Rosette et al., *supra* note 5, at 13; *see also* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1007–08 (2006) (arguing that behavioral realism and other ideas from the social sciences are important to consider when applying the law to instances of discrimination).

[18] Rosette et al., *supra* note 5, at 13 (explaining that overall people of color experience harassment at a higher rate than white people); *see* Brian K. Richardson & Juandalynn Taylor, *Sexual Harassment at the Intersection of Race and Gender: A Theoretical Model of the Sexual Harassment Experiences of Women of Color*, 73 W.J. COMMC'N 248, 258 (2009) (discussing the results of a study in which 91.6% of women of color who participated had experienced sexual harassment).

namics that lead to harmful stereotypes about their sexuality, sexual availability, and expendability, all of which contribute to a higher incidence of harassment.[19] Among women of color who experience sexual harassment, racialized sexual harassment is common, particularly when their harasser is of a different race.[20]

Undocumented women, including Latinx, Asian, and Black immigrants, face especially high rates of harassment and assault in the workplace. Not only are undocumented women overrepresented in low-wage work, many are particularly vulnerable because they face language and cultural barriers while on the job.[21] For example, a 2010 study surveyed Mexican immigrant farmworkers in California, where approximately 78% of farmworkers were Latinx and 28% were women.[22] Out of the 150 Mexican women surveyed, 97% had encountered sexual and gender harassment from both coworkers and supervisors.[23] The harassment they described ranged from jokes and insults to physical touching.[24] In these gender-integrated workplace settings, the interplay of

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[19] Frye, *supra* note 6. Research has also explored the nuances in the ways women of color react and respond to harassment and how these behaviors are influenced by race, sex, and class dynamics. *See* Richardson & Taylor, *supra* note 18, at 260, 265 (discussing examples that "demonstrate the link between the social construction of race and gender . . . and sensemaking efforts about behaviors that could be recognized as sexual harassment"). Rosette et al. explain, "While focused on gender bias broadly, Williams' (2014) interviews with women in science revealed that Asian and Black women reported that the harassment they faced based on their gender was difficult to separate from the bias they experienced due to race." Rosette et al., *supra* note 5, at 13.

[20] *See* NiCole T. Buchanan et al., *Comparing Sexual Harassment Subtypes Among Black and White Women by Military Rank: Double Jeopardy, the Jezebel, and the Cult of True Womanhood*, 32 PSYCH. WOMEN Q. 347, 355 (2008) (detailing the results of a research study in which Black women in the military "reported higher rates of unwanted sexual attention and sexual coercion" than white women reported). *See generally* NiCole T. Buchanan, *The Nexus of Race and Gender Domination: The Racialized Sexual Harassment of African American Women*, *in* IN THE COMPANY OF MEN: MALE DOMINANCE AND SEXUAL HARASSMENT 294 (James E. Gruber & Phoebe Morgan eds., 2005) (discussing the racialized sexual harassment that Black women experience from white males).

[21] Clare Malone, *Will Women in Low-Wage Jobs Get Their #MeToo Moment?*, FIVETHIRTYEIGHT (Dec. 14, 2017), https://fivethirtyeight.com/features/the-metoo-moment-hasnt-reached-women-in-low-wage-jobs-will-it/ [https://web.archive.org/web/20210309044402/https://fivethirtyeight.com/features/the-metoo-moment-hasnt-reached-women-in-low-wage-jobs-will-it/]. In particular, "[f]or many immigrant women who fill low-wage jobs, their immigration status can weigh heavily as they consider whether to lodge a complaint." *Id.* Moreover, "[f]or women who don't speak English and who work in temp jobs . . . it can be challenging to know how to report something up the chain of command." *Id.*

[22] Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 237 (2010).

[23] *Id.* at 237, 247.

[24] *Id.* at 247. Irma Morales Waugh explains:

> For example, one single 29-year-old mother of two children who worked in the grape harvest stated, "There are always these jokes. They make sexual jokes or insults saying, 'women aren't worth anything except for having children and cleaning the home.'" Another 21-year-old married strawberry picker with three children described feeling anger and indignation at the comments a coworker made to her and her female workmates,

gender, race, and class is on high display due to the demographics and nature of the physically demanding, low-paying work.

Although these studies and statistics give some indication of the high rates at which women of color experience harassment, many existing statistics underestimate the true figures due to consistent underreporting.[25] Women of all races underreport because they fear the threat of retaliation, the possibility that no one will believe them, and the stigma of victimization.[26] These fears are often heightened for women of color who already face racial stigma, who tend to receive less empathy, and who are more likely to be breadwinners—therefore unable to bear the risk of losing their jobs.

Given the strong anti-immigration sentiments and policy in the current political climate, undocumented workers experience heightened fears of speaking up.[27] Beyond typical concerns of retaliation, they also face the harsh reality that immigration authorities may knock on their door and that they might face deportation as a result. This threat of losing one's livelihood and being stripped from family and community makes undocumented women of color highly unlikely to report harassment.[28] Perpetrators may even directly threaten them

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> "You are all prostitutes. Women don't have morals so you don't deserve respect . . . that's why you are alone."

Id.

[25] Porter, *supra* note 13, at 51; Rosette et al., *supra* note 5, at 12–13.

[26] Porter, *supra* note 13, at 51; Rosette et al., *supra* note 5, at 13–14. Being the "only one" can also exacerbate experiences of harassment. Emerald-Jane Hunter, thirty-seven and a founder of a personal relations firm, states:

> Working in media, I was often the token. You just smile it off and laugh it off. It's a tough industry to work in. There was a director when I first started out as a producer who harassed my coworker and me. He touched us inappropriately and often harassed us. . . .
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> But you still just see more white women speaking about it. I don't think black women are equally as empowered yet.

Jessica Prois & Carolina Moreno, *The #MeToo Movement Looks Different for Women of Color. Here Are 10 Stories.*, HUFFPOST NEWS, https://www.huffingtonpost.com/entry/women-of-color-me-too_us_5a442d73e4b0b0e5a7a4992c [https://perma.cc/AT8Y-JUPW] (Jan. 2, 2018).

[27] *See* Grace Meng, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, HUM. RTS. WATCH (May 15, 2012), https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and [https://perma.cc/2QZK-62QP] (discussing the fears victims experience and the hurdles they face when dealing with sexual harassment and assault on farms).

[28] Rosette et al., *supra* note 5, at 14; *see* NEUSA GAYTAN & MARALÁ GOODE, MUJERES LATINAS EN ACCIÓN, LATINAS AND SEXUAL ASSAULT 8 (2013) (discussing the reasons why Spanish-speaking immigrants might be unlikely to report sexual assault); Waugh, *supra* note 22, at 242 (noting that female farmworkers subject to a California study on sexual harassment were interviewed at flea markets because they could not speak freely at work); Amanda Clark, Note, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 HASTINGS WOMEN'S L.J. 139, 146 (2004) (discussing why the holding in *Hoffman Plastic*

with exposure to further exacerbate the power dynamic and get away with the abuse.[29] As a result, low-wage immigrant women of color face steep roadblocks to benefitting from the kind of #MeToo revolution that has heralded higher accountability for men who harass upper-class white women.[30]

In fact, throughout history, America has not treated alleged violations against white women and women of color the same. Although intersectional discrimination claims have become more common since Crenshaw's pioneering work, women of color remain half as likely to prevail on their claims as white plaintiffs.[31] For example, race and sex discrimination or harassment are only half as likely to survive summary judgement as claims alleging a viola-

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Compounds, Inc. v. NLRB makes it difficult for undocumented workers who fear deportation to report sexual harassment in meatpacking plants).

[29] Relatedly, the 2002 holding in *Hoffman Plastic Compounds, Inc. v. NLRB*, arguably created an environment that incentivized employers to assert that the National Labor Relations Board (NLRB) does not afford protection to undocumented workers, "thus chilling workers' attempts at enforcement of those rights." Clark, *supra* note 28, at 156 (citing Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002)) (explaining how the U.S. Supreme Court in *Hoffman Plastic Compounds, Inc.* arrived at its conclusion that the NLRB may not award backpay to undocumented workers).

[30] Malone, *supra* note 21. Clare Malone notes:

> An accountability revolution of the sort we've seen in Hollywood might never come in the same way for low-wage workers. In part that's because what gives women the power to speak out against harassers is, to a certain extent, economic autonomy and a safety net. . . .
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> Women in low-wage jobs, often immigrants, usually can't afford to call harassment out.

Id.

[31] Rosette et al., *supra* note 5, at 14. *E.g.*, Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) (explaining that "[r]ather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences"); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir.1980) (holding that "when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant"); Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 992 (2011) (discussing the findings of an empirical study of intersectional litigation, in which "antidiscrimination lawsuits provide the least protection for those who already suffer multiple social disadvantages"); Yvette N.A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 9 (2019) (pointing out that plaintiffs who file claims based on intersectional identities are less successful than plaintiffs who only bring a claim based on one identity). *See generally* Rosalio Castro & Lucia Corral, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J.159 (1993) (discussing the difficulties women of color face when bringing Title VII claims based on both race and sex); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing the idea of intersectionality as applied to women of color); Since Crenshaw's 1991 research, not only has there been a rise in intersectional discrimination claims, but courts have begun to recognize the unique nature of harassment women of color encounter due to "their dual-subordinate racial and gender identities." Rosette et al., *supra* note 5, at 14.

tion based on a single trait—that is, only race or only sex.[32] A review of the case law across the federal circuit courts demonstrates that many courts have not recognized the importance of intersectionality, nor have they learned how to analyze this multifaceted issue. Although there are some circuits that have adopted frameworks for analyzing and understanding intersectional claims, others appear flummoxed at how to handle simultaneous race and gender discrimination allegations.[33]

Courts at every level fail to comprehend that women of colors' workplace harassment claims have long-lasting effects, even beyond their professional settings. There is ample evidence that harassment and assault are associated with negative mental health outcomes for all victims and this evidence suggests it is most salient for women of color.[34] These women suffer higher rates of post-traumatic stress disorder (PTSD), depression, and psychological distress.[35] Harassment also affects the victims' professional growth potential by causing lower levels of job satisfaction, less commitment to their organization, increased turnover, and disengagement from work and colleagues.[36] Black women have been found to display high levels of resilience when dealing with infrequent sexual harassment, but the same resilience affords them less protection from deeper psychological harm when the harassment is experienced on a regular basis.[37]

I now turn to some personal narratives to illustrate how race harassment often compounds sex harassment for women of color.[38] Even without naming

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[32] Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1440 (2009) (noting that "[a] sample of summary judgment decisions reveals that employers prevail on multiple claims at a rate of 96 percent, as compared to 73 percent on employment discrimination claims in general" (emphasis omitted)); Emma Reece Denny, Note, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339, 340 (2012) (explaining that intersectional claims likewise fare poorly beyond the summary judgement stage).

[33] *See* Rocha Vigil v. City of Las Cruces, 119 F.3d 871, 874–45 (10th Cir. 1997) (Lucero, J., dissenting) (disaggregating a Hispanic woman's sex and race discrimination claims for evaluating her hostile work environment claim); Clay v. BPS Guard Servs., No. 92 C 2127, 1993 WL 222380, at *3–4 (N.D. Ill. June 22, 1993) (finding that a Black woman's proof of her race discrimination claim—that the defendant employed a white female—clearly contradicted the plaintiff's claim of sex discrimination). *See generally* Curtis v. First Watch of Ariz., Inc., C.A. No. 04-0909, 2006 WL 726883 (D. Ariz. Mar. 20, 2006) (failing to analyze a Black woman's sex and race discrimination claims together for evaluating a hostile work environment claim).

[34] Rosette et al., *supra* note 5, at 13–14.

[35] *Id.*

[36] *Id.* at 13.

[37] *Id.*

[38] *See* Matsuda, *supra* note 3, at 325–26 (explaining the importance of using personal narratives). Professor Mari J. Matsuda notes:

> The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those

Crenshaw's intersectionality phenomenon directly, women's first-hand accounts of their experiences identify the difficulty of trying to parse out and draw boundaries between the racial and gender bias they experience. Take the case of Emerald-Jane Hunter, a thirty-seven-year-old African immigrant who started a public relations firm in Illinois:

> Being black and also from Africa, I would get a lot of "I want to get a little piece of chocolate" or "dark chocolate" references—which is not flattering, because you're being objectified. These terms stem from a white man in power being curious and never having been with a black woman—and there is an undertone of subordination. . . .
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> . . . .
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> So white-on-black and black-on-black harassment all have different undertones, but it's all harassment.[39]

Women of color are often keenly aware of the cultural and historical factors that contribute to their harassment. For example, Dominican-American artist Zahira Kelly-Cabrera, thirty-four, of Massachusetts states:

> [T]he Dominican Republic is where some of the early slave ships arrived in the Americas; it was the place of some of the early indigenous massacres. Colonists thought, "You're wearing a little bit less than the women where we're from, so you deserve to be sexually assaulted." And that's applied to both native and African women. . . .
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> . . . .
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> Certain bodies are just not as protected as others, and that's a historical thing dating back to slavery. Right now, the people that have come to the forefront of the "MeToo" movement have been cis white women in Hollywood. It kind of ignores the fact that the people who are assaulted and harassed the most are women of color, and we have no recourse. . . .

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who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge. This article, then, suggests a new epistemological source for critical scholars: the actual experience, history, culture, and intellectual tradition of people of color in America. Looking to the bottom for ideas about law will tap a valuable source previously overlooked by legal philosophers.

Id. (footnotes omitted).

[39] Prois & Moreno, *supra* note 26.

> In general, I think we are seen as hypersexed and not assaultable because we are here to be assaulted, kind of. I've had people take way too many liberties with me, groping or whatever, and other people be shocked, and I'm like, "Really? Because it happens to be everyday [sic]."[40]

Even in highly visible multinational corporations with powerful unions and human resources departments that implement harassment policies, women of color remain vulnerable and afraid to speak out. Shirley Thomas-Moore, who has worked at Ford Motor Company since the 1980's, describes the threats associated with reporting harassment:

> It's hard when every day you come in and if you say something and something is done, it gets worse. So that's why a lot of women do not complain, they don't say anything. There was one particular situation where this young lady, she finally got enough guts to go up there and report it. But before she could get down to the line, it was already known what she went upstairs for. So who's telling them? She was taken off that job and put on a harder job.[41]

Harassers often take advantage of low-wage workers' roles as mother and breadwinner as well as their precarious financial states. Miyoshi Morris, another Black woman at Ford, recalls the painful decision she was forced to make:

> I was propositioned. I slept with him because I needed my job. I had small children. The mindset and the mentality of that environment is that this is the best thing you'll have, the best thing you gonna [sic] get, you don't want to lose it. Where else are you gonna [sic] go and make this kind of money?[42]

Morris has since left Ford for a job that pays significantly less than her Ford salary because "[n]o person should have to endure that" and explains that "[y]ou have to force yourself into a place of not feeling anything, of not having any emotion, to exist."[43]

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[40] *Id.*

[41] 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/QEC8-M2NQ] (including the audio recordings of several women interviewed about their experiences of sexual harassment while working at Ford Motor Company).

[42] *Id.*

[43] *Id.*

Immigrant women are particularly vulnerable because of the language, educational, and cultural barriers that they often face as well as the drastic threat of deportation. One respondent in the aforementioned study of Mexican farmworkers in California, a thirty-three-year-old single mother with four children recalls one such incident:

> The foreman "checked" my work and got really close to me, pulled down my face scarf and tried to kiss me. He always asks me out and says I will really enjoy having sex with him, and that I would not regret it. . . . He has done so many things, I can't even remember them all . . . once, I was bending down and he said, "Hey, I'm going to insert a very pleasurable stick into you." This has been happening since last year. He's married, too. He knows that I'm divorced, and so he thinks I will go out with any *baboso* [drooling pervert].[44]

Given the high rate at which women of color experience harassment and assault, the unique types of racialized sex harassment they experience, and the compounded forms of structural disadvantage they face in a range of domains, it is particularly important for anti-discrimination law to address their concerns. This Article is organized into three main parts. In Part I of this Article, I provide an overview of intersectionality and establish the numerous ways anti-discrimination law continues to fail women of color experiencing harassment.[45] In Part II, I discuss how intersectionality shapes activism to help us better understand why #MeToo has largely left women of color at the margins of the #MeToo movement.[46] And, finally, in Part III, I discuss the weaknesses of the current reform efforts growing out of the #MeToo movement and propose comprehensive legal, organizational, and cultural reform that will better protect all women, and particularly women of color.[47]

I. The Law Continues to Fail Women of Color Thirty Years After Kimberlé Crenshaw's Intersectionality Insights

The EEOC, the government agency responsible for enforcing workplace discrimination law, reported in 2018 that sexual harassment charges are up nationwide—the first increase observed this decade. The agency capitalized on #MeToo momentum by increasing lawsuits to enforce sexual harassment law and hold employers accountable. The EEOC has filed fifty percent more of these lawsuits than it did during 2017 and recovered $70 million for sexual

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[44] Waugh, *supra* note 22, at 248 (alterations in original).
[45] *See* discussion *infra* Part I.
[46] *See* discussion *infra* Part II.
[47] *See* discussion *infra* Part III.

harassment victims in Fiscal Year (FY) 2018, compared to the $47.5 million it recovered during FY 2017.[48] In terms of outcomes, the EEOC reported an increase in cause findings from 970 in FY 2017, to 1,199 in FY 2018.[49] The agency also facilitated more successful conciliations, with almost 500 in FY 2018, compared to about 350 in 2017.[50] Within the first two years after #MeToo went viral, the advocacy organization the TIME'S UP Legal Defense Fund (TULDF) was established and fielded 4,646 requests for assistance from all fifty states and raised $24 million for victims seeking justice.[51] Although this and the increased EEOC efforts are impressive, the potential is limited due to the shortcomings of our current legal framework, which inadequately protects all women, but particularly women of color.

Section A discusses Crenshaw's intersectionality theory.[52] Section B details the failure of federal anti-discrimination laws to protect women of color.[53] Section C explains how mandatory arbitration agreements for harassment claims protect harassers at the expense of those who experience harassment.[54] Section D discusses the false dichotomy in American law that forces women of color who experience racialized harassment to choose whether the harassment was because of their race or because of their sex.[55] Section E discusses why this false dichotomy makes it very difficult for women who experience racialized sexual harassment to succeed in court.[56] Finally, Section F details the role

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[48] U.S. EQUAL EMP. OPPORTUNITY COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2018 (2018), https://www.eeoc.gov/performance-and-accountability-report-fiscal-year-2018 [https://perma.cc/N55D-EUWZ]; Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), https://www.eeoc.gov/newsroom/eeoc-releases-preliminary-fy-2018-sexual-harassment-data [https://perma.cc/BM2Q-EVTE].

[49] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 48; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-21, WHAT YOU SHOULD KNOW: THE EEOC, CONCILIATION, AND LITIGATION (2015), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation [https://perma.cc/SJN5-PKQQ] (explaining that "[i]f the EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a 'Letter of Determination' telling them that there is reason to believe that discrimination occurred").

[50] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 48; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 49 (explaining that "[t]he Letter of Determination invites the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation. Conciliation is a voluntary process, and the parties must agree to the resolution—neither the EEOC nor the employer can be forced to accept particular terms").

[51] *TIME'S UP Legal Defense Fund*, NAT'L WOMEN'S L. CTR., https://nwlc.org/wp-content/uploads/2018/10/2019.09.20-Final_nwlc_TimesUpOneSheetENG.pdf [https://perma.cc/Z6SH-3D5M] (Sept. 20, 2019).

[52] *See* discussion *infra* Part I.A.

[53] *See* discussion *infra* Part I.B.

[54] *See* discussion *infra* Part I.C.

[55] *See* discussion *infra* Part I.D.

[56] *See* discussion *infra* Part I.E.

that a predominately white male judiciary plays squashing claims of racial and sexual harassment.[57]

A. Intersectionality Theory

In her landmark work, Crenshaw established a theory of *intersectionality* to explain how women of color have unique experiences shaped by race and sex and how the law marginalizes them.[58] She explains:

> [T]he concept of intersectionality . . . denote[s] the various ways in which race and gender interact to shape the multiple dimensions of Black women's . . . experiences. . . . [T]he intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.[59]

Crenshaw's theory illuminates the importance of recognizing multiple intersecting identity traits when developing frameworks for anti-discrimination law.[60] "Because the intersectional experience is greater than the sum of racism and sexism," she writes, "any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated."[61] Crenshaw identifies how critical it is to acknowledge women of color's experiences with harassment, particularly Black women's, because this harassment poses personal risks to Black women and additionally threatens Black families, many of whom depend on a woman's earnings to survive.[62]

Intersectionality theory also critiques the law's image of discrimination as stemming from discrete claims that require plaintiffs to prove that they were discriminated against or suffered harassment because of race or because of sex.[63] This framework fails to acknowledge the complex and overlapping web of racism and sexism, especially as it affects Black women whose experiences of discrimination tend not to operate one-dimensionally, but rather in the shadow of both their race and gender identities. First, as dual minorities, they experience "double-discrimination," the cumulative effect of facing racial and gen-

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[57] *See* discussion *infra* Part I.F.

[58] *See generally* Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992).

[59] Crenshaw, *supra* note 31, at 1244 (footnotes omitted).

[60] *See* Crenshaw, *supra* note 1, at 140 (explaining that Black women are often left out of anti-harassment protections because the law is not designed to recognize their intersectional identities).

[61] *Id.*

[62] Crenshaw, *supra* note 58, at 1473.

[63] Crenshaw, *supra* note 1, at 140, 149.

der discrimination.[64] Second, Black women also tend to suffer discrimination that is not just the "sum of race and sex," but rather discrimination for being Black women and facing marginalization for that identity.[65] In short, our legal structure's focus on discrete claims that are connected to individual identity traits makes anti-discrimination law ill-equipped to tackle intersectional discrimination in its true form.

In the context of workplace sexual harassment, Title VII fails to properly address intersectional claims because filing a "because of sex" claim requires a woman of color to erase her race.[66] Black women report that their most significant identity is neither their race nor gender on their own, but rather the combination of their "gendered racial identity."[67] The normative sex harassment claimant, however, is not just a woman but a *white* woman, which in the United States is commonly seen as *absent of race*, and, therefore, her experience of *sex* only establishes the benchmark against which Black women's claims are analyzed.[68] As a result, the baseline sexual harassment experience is considered from a white woman's perspective, effectively erasing Black women's identities as *women*, whereas prototypical racial harassment is considered from the normative Black male perspective, erasing Black women's identities as *Black*.[69]

It is no surprise then that intersectionality figures prominently in women of colors' experiences of sexual harassment. Harassment and assault are often layered with complexities of segregation, stereotypes, racial subordination, and low-wage work, related to both their race *and* sex.[70] For example, women of color are often targets of sexual harassment because of racialized stereotypes about their sexuality. Although the specific stereotypes vary among women from different racial and ethnic backgrounds, many of these stereotypes are sexual in nature. These biases may influence the perception of women of color's claims because they tend to normalize sexual harassment.[71] False percep-

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[64] *Id.* at 149.

[65] *Id.*

[66] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (prohibiting employers from discriminating against an employee "because of . . . sex").

[67] Martinique K. Jones & Susan X. Day, *An Exploration of Black Women's Gendered Racial Identity Using a Multidimensional and Intersectional Approach*, 79 SEX ROLES 1, 2 (2017) (explaining how Black women's "two oppressed identities," race and gender, inform a nuanced sense of self and a meaning for the identity, such as "resilience and strength").

[68] *See* Devon W. Carbado & Cheryl I. Harris, Essay, *Intersectionality at 30: Mapping the Margins of Anti-essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2201, 2230 (2019) (discussing attempts to discount the essentialist idea that "white women can stand in for all women").

[69] *Id.* at 2201–02.

[70] Rosette et al., *supra* note 5, at 12.

[71] Leung, *supra* note 7, at 94.

tions about the sexual behavior of women in particular racial groups affect how women of color are discussed in organizational and legal structures, and as a result affect how anti-discrimination laws treat their claims.[72]

For example, the Jezebel stereotype considers Black women to be highly sexual, seductive, and promiscuous.[73] Asian women also suffer from sexual and fetishistic stereotypes that factor into the type of workplace harassment they endure.[74] Although sometimes blatant and clearly inappropriate, these racialized stereotypes often emerge in the form of microaggressions. For example, women of color may be referred to in passing as "exotic, oriental, spicy or salty," seemingly innocuous words, but ones which have specific sexual connotations, especially for the subjects who are often familiar with the historical objectification and oppression associated with these words.[75] Women of color also report the complexity of reconciling these stereotypes with the cultural expectations that some races assume—that a woman will be a quiet, yielding, or even "demure and sexy" presence—resulting in feeling that their own bodies are not under their control.[76]

In addition to the specific racial tropes that factor into their harassment experiences, women of color are often not viewed with compassion. Racialized stereotypes not only lead to victim-blaming, but also cause the experiences of Black women and other women of color to be downplayed and not perceived as requiring a protective response.[77] Stereotypical perceptions of their gendered racial identity means that employers see women of color not only as more dispensable, but they also see them as less sympathetic or trustworthy when they do report harassment.[78] This lack of empathy, along with racism and other social factors, causes harassment to take a unique emotional toll on women of color. For example, studies of women in the military have found that

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[72] *Id.* at 85–86.

[73] Rosette et al., *supra* note 5, at 12.

[74] *Id.*

[75] Leung, *supra* note 7, at 98–99 (internal quotation marks omitted).

[76] Prois & Moreno, *supra* note 26.

[77] *See* Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST: BLOG (Feb. 13, 2018), http://www.catalyst.org/blog/catalyzing/sexual-harassment-and-women-color [https://perma.cc/ZJ2C-GP2C] (discussing the racialized stereotypes that lead to different perceptions of women of color and their experiences with harassment). The literature from police brutality to the medical system ignoring Black women's health claims supports this idea that dehumanizing has led to ignoring claims of pain and harm made by people of color and women of color, in particular. *See generally* Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT'L ACAD. SCIS. U.S. 4296 (2016) (discussing the harm that racial bias poses for pain management in healthcare).

[78] *See* Rosette et al., *supra* note 5, at 12 (noting that gendered racial stereotypes of women of color "influence how people view sexual harassment of them").

long-term PTSD effects vary by race.[79] The compound effects of sexual and racial harassment increase PTSD symptoms as compared to white women's single-dimensional experience of sexual harassment.[80] These outcomes not only reflect the distinct challenges of facing harassment as a woman of color, but they also confirm that intersectional harassment is a unique form of discrimination, with some unique responses and consequences.

The complex web of intersectional discrimination is not confined to majority-white workplaces. Although all women experience both inter-race and intra-race harassment, women of color may experience particularly challenging cultural dynamics when experiencing harassment and assault within their own communities. As described earlier, Black women tend to identify with their gendered racial identity in more salient ways than their race or gender alone. Yet as members of the Black community, they face implicit (and sometimes explicit) pressures to protect the normative Black American. Scholars have described this choice as a "double-edged sword," with women of color effectively forced to decide whether to align their experience with their normative gender and speak out against harassment or to protect a member of their racial community from being attacked by the dominant culture.[81] Intersectionality provides a useful theoretical framework to better understand how current anti-discrimination law continues to leave women of color excluded, silenced, marginalized, dehumanized, and blocked.

B. Federal Protection Disproportionately Excludes Women of Color

Federal and state legal gaps in protection against discrimination and harassment have placed many women of color in particularly precarious situations. Federal anti-discrimination laws, including Title VII, generally only cover employers with fifteen or more employees. Under Title VII, domestic workers, temporary workers, independent contractors, farmworkers, interns, and those working for small employers are not legally protected, despite their vulnerability as targets.[82] These workers are disproportionately women of color

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[79] *Id.* at 13. *See generally* NiCole T. Buchanan et al., *Black Women's Coping Styles, Psychological Well-Being, and Work-Related Outcomes Following Sexual Harassment*, BLACK WOMEN GENDER & FAMS., Fall 2007, at 100 (discussing the different strategies Black women harassed in the military use to cope with the harassment).

[80] Rosette et al., *supra* note 5, at 13. Moreover, "[r]elationships between racial and sexual harassment may also affect the reduced job satisfaction, lower organizational commitment, and increased turnover intentions that are commonly observed among sexual harassment victims." *Id.*

[81] Rebecca Leung & Robert Williams, *#MeToo and Intersectionality: An Examination of the #MeToo Movement Through the R. Kelly Scandal*, 43 J. COMMC'N INQUIRY 349, 363 (2019).

[82] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (defining an "employer" as covered by the Act to be person with "fifteen or more employees"); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Em-*

and the failure of the law to protect them is no accidental "blind spot." Throughout history, employers have simultaneously treated women of color in these positions as both invisible and as the personal property of their employers. Moreover, employers have historically used women's race to explain poor wages and unsafe working conditions.[83]

For example, domestic workers such as nannies, maids, and home healthcare aides who work in private homes are disproportionately women of color and immigrants.[84] In 2017, there was a conservative estimate of 7.6 million undocumented migrant workers in the United States.[85] These workers face

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ployers, 27 BERKELEY J. EMP. & LAB. L. 251, 251, 263 (2006) (discussing the hurdles temporary employees face when attempting to claim protection under various federal labor and employment laws). According to Heidi Shierholz, "In-home workers are more than 90 percent female, and are disproportionately immigrants. One out of every nine foreign-born female workers with a high school degree or less works in an in-home occupation." HEIDI SHIERHOLZ, ECON. POL'Y INST., BRIEFING PAPER NO. 369, LOW WAGES AND SCANT BENEFITS LEAVE MANY IN-HOME WORKERS UNABLE TO MAKE ENDS MEET 2 (2013), https://files.epi.org/2013/bp369-in-home-workers-shierholz.pdf [https://perma.cc/6QWW-3H89]; *see also* Tara Kpere-Daibo, Note, *Employment Law—Antidiscrimination—Unpaid and Unprotected: Protecting Our Nation's Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135, 136 (2009) (noting that "[c]ourts have not applied the statutory protections that exist for paid employees to unpaid workers, and legislatures have failed to increase protections for volunteers as well"). Furthermore:

> Arguably, volunteers and unpaid workers are *more* susceptible to harassment and discrimination *because of* their status as "nonemployees." One possible reason is that supervisors and coworkers may see volunteers as a temporary workforce—more susceptible to harassment because they will soon leave. Similarly, particularly in intern situations, there is often a large imbalance of power between the worker and the supervisor. This position of power is often abused. . . .
>
> [I]n addition to these factors, with the current status of the laws, unscrupulous employers or supervisors may exploit the fact that the law provides no recourse for unpaid workers; they are ineligible for damages, reinstatement, or even injunctive relief under the current employment laws.
>
> These results are contrary to public policy.

Kpere-Daibo, *supra*, at 149–50 (footnotes omitted) (quoting James J. LaRocca, Note, Lowery v. Klemm: *A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131, 140 (2006)).

[83] Trena Easley Armstrong, The Hidden Help: Black Domestic Workers in the Civil Rights Movement 47 (Dec. 2012) (M.A. thesis, University of Louisville) (ThinkIR), https://ir.library.louisville.edu/cgi/viewcontent.cgi?article=1045&context=etd [https://perma.cc/GWG6-RWBX]. *See generally* REBECCA SHARPLESS, COOKING IN OTHER WOMEN'S KITCHENS: DOMESTIC WORKERS IN THE SOUTH, 1865–1960 (2010).

[84] SHIERHOLZ, *supra* note 82, at 2; Terri Nilliasca, Note, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 388 (2011) (noting that 95% of domestic workers were women in 2000). In sum, "[t]he United States rel[ies] on a steady supply of immigrant women workers who labor with little to no protections under the law." *Id.* at 380.

[85] Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR.: FACT TANK (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/ [https://perma.cc/5M4F-5KZJ]

barriers because of their intersectional identities, as they tend to be situated at the nexus of immigration status, gendered caretaking work, private home worksites that lack transparency or objective oversight, and legacies of racism.[86] At the same time, their largely white middle- and upper-class employers benefit from this lack of regulation and the privacy of the home sphere, allowing them "unfettered access and power" over their employees' work and bodies.[87] As a result, studies show that one third of these workers report that they have faced gender, race, language, or immigration-based abuse.[88] Yet federal law fails to provide redress in many of these cases because private employers often have at most a handful of paid workers, falling short of the fifteen-person threshold for the relevant legal protections.[89]

Similarly, the vast majority of farmworkers are women of color. There are approximately two to three million people employed as farmworkers, many from Mexico, with women making up approximately thirty-two percent of that workforce.[90] In one study, roughly eighty percent of women farmworkers said they have experienced some form of sexual violence on the job.[91] Compounding on the frequent harassment they face, farmworkers often are unable to file EEOC harassment charges because Title VII only applies to larger businesses, offering no safety protections for individuals working outside of those parameters.[92] Further, undocumented workers are particularly vulnerable to illegal

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[86] *See* Nilliasca, *supra* note 84, at 403 ("As previously discussed, the private nature of the worksite, the immigration status of the worker, the gendered nature of the work, and the legacies of slavery and White supremacy are all vectors of oppression that come to bear on domestic workers.").

[87] *Id.* at 390.

[88] *Id.* at 403 ("[O]ne-third of domestic workers report abuse from their employer based on race, language, or immigration status." (footnote omitted)). This abuse is further exacerbated by domestic workers' heightened vulnerability to gender-motivated sexual harassment by virtue of working inside the employer's house. *Id.*

[89] *Id.* ("Under federal law, most domestic workers are not covered under Title VII protection, as it is only extended to employees of enterprises with at least fifteen employees. . . . [D]omestic workers are effectively excluded, as the majority of employers only employ one or two domestic workers in their household." (footnotes omitted)).

[90] TRISH HERNANDEZ & SUSAN GABBARD, JBS INT'L, RSCH. REP. NO. 13, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016, at 1, 7 (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf [https://perma.cc/MD42-WYZ2]; NAT'L CTR. FOR FARMWORKER HEALTH, INC., FACTS ABOUT AGRICULTURAL WORKERS 1 (2020), http://www.ncfh.org/uploads/3/8/6/8/38685499/facts_about_farmworkers__12.17.20.pdf [https://perma.cc/Y4M5-6TM3].

[91] Ariel Ramchandani, *There's a Sexual-Harassment Epidemic on America's Farms*, THE ATLANTIC (Jan. 29, 2018), https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/ [https://perma.cc/9L8S-FTZA] (explaining that "a study found that of 150 Mexican women working in the Central Valley in California, 80 percent had experienced sexual harassment" (citing Waugh, *supra* note 22)).

[92] *See 1. Do the Federal Employment Discrimination Laws Enforced by the EEOC Apply to My Business?*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/small-business/1-do-federal-employment-discrimination-laws-enforced-eeoc-apply-my [https://perma.cc/HSY7-2XUC]

harassment, discrimination, and other workplace violations because it is known that they are not entitled to legal remedies on account of their immigration status.[93] Thus, undocumented immigrants lack protection under federal and state law, even though they make up a large proportion of the workforce in specific industries, including agricultural work.[94]

Over a third of the nation's workforce are independent contractors, who similarly have little protection from discrimination and harassment.[95] Almost half of these unprotected independent contractors are women.[96] Many of these positions are low-paid jobs in industries such as personal services, transportation, and educational services. Women of color frequently land in these jobs due to the low barriers to entry, discrimination in other parts of the labor market, and the need for supplemental income.[97] Research has shown that women and/or people of color are also overrepresented in most of the industries that

(noting that while employers with "at least one employee" are covered by equal pay legislation, they are not required to follow the anti-discrimination standards enforced by Title VII).

[93] These arguments often cite a 2002 U.S. Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*, in which the Court held that the NLRB did not have the authority to award the remedy of back pay to undocumented workers who were illegally fired for engaging in a protected labor organizing activity because they were not legally present in the United States. 535 U.S. 137, 151 (2002). Although this decision was limited to collective bargaining rights and back pay, employers have attempted to extend this ruling to impair other fundamental rights and remedies undocumented workers are entitled to under labor and employment laws, including freedom from sexual harassment. *See* Mariel Martinez, Comment, *The* Hoffman *Aftermath: Analyzing the Plight of the Undocumented Worker Through a "Wider Lens*," 7 U. PA. J. LAB. & EMP. L. 661, 611 (2005) (noting that employees leverage the *Hoffman* holding to avoid legal liability for illegal discrimination against unauthorized workers). For example, Washington expressly includes "immigration status" in the language of its anti-discrimination law. WASH. REV. CODE. § 49.60.030(1) (2020).

[94] *See* Dan Kosten, *Immigrants as Economic Contributors: They Are the New American Workforce,* NAT'L IMMIGR. F. (June 5, 2018), https://immigrationforum.org/article/immigrants-as-economic-contributors-they-are-the-new-american-workforce/ [https://perma.cc/V33Q-VFLF] (noting that "according to a report by the Department of Labor based on a survey of agricultural workers in 2013–2014, nearly half (47%) of farmworkers had no work authorization").

[95] *See Contingent Workers Now Make Up 34% of the US Labor Force*, QUARTZ (Nov. 24, 2015), https://qz.com/472248/contingent-workers-now-make-up-34-of-the-us-labor-force/ [https://perma.cc/2MZK-YV2V] (noting that 34% of the American workforce is comprised of independent contractors, gig workers, freelancers, moonlighters, which all constitute a "contingent workforce").

[96] Economic News Release, U.S. Bureau of Lab. Stat., U.S. Dep't of Lab., Contingent and Alternative Employment Arrangements—May 2017, USDL-18-0942, at 4 (June 7, 2018), https://www.bls.gov/news.release/pdf/conemp.pdf [https://perma.cc/YG4B-BF65].

[97] *See* Katharine G. Abraham & Susan N. Houseman, *Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income*, RSF, Dec. 1, 2019, at 110, 112 (explaining that "[a] disproportionate share of [people doing informal work] who are less educated, minority, low-income, unemployed, or financially distressed report working in informal jobs to earn money").

tend to misclassify their workers as independent contractors, despite the underlying facts suggesting that they fit the legal definition of employees.[98]

Even when workers do surpass these basic barriers and are covered under the existing laws, the "bottom-up" nature of the system specifically harms marginalized populations.[99] Alleging a claim of workplace harassment under Title VII requires the worker herself to identify the violation and come forward formally.[100] Rigid statutes of limitations have inhibited many victims' ability to file claims. The statute of limitations to 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.[101]

The most vulnerable workers, including women, low-wage, under-educated, and undocumented workers, often lack the requisite legal knowledge or awareness of the structures they must navigate.[102] The incentives for coming forward may also be outweighed by the threats of retaliation, loss of income, and even deportation, especially when they lack faith in their employer's response to the complaint.[103] As a result, women of color, who are already vulnerable, also face significant hurdles to accessing adequate protection from workplace misconduct.[104] Although some state and federal legislatures have introduced laws seeking to remedy these barriers, they do not sufficiently address these gaps in protection.[105]

C. Mandatory Arbitration Silences Women of Color

Another prominent legal issue raised throughout the #MeToo movement is mandatory arbitration, which denies victims of harassment access to the courts and shields problematic employers from public exposure. All too often,

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[98] *See* Charlotte S. Alexander & Arthi Prasad, *Bottom-up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1071–72 (2014) (noting that women and undocumented workers have the least access to protections against violations in the workplace).

[99] *Id.* at 1071.

[100] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice").

[101] NAT'L WOMEN'S L. CTR. & DLA PIPER, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX AND ATHLETIC OPPORTUNITIES 91 (2007); Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1043 (2015) (explaining that the statute of limitations is "180 or 300 days, depending on the level of coordination between the federal and state anti-discrimination agencies").

[102] Alexander & Prasad, *supra* note 98, at 1071–73.

[103] *Id.*

[104] *See id.* at 1073 (noting that those who are the most likely to experience harassment at work are also the least able and least likely to report the abuse, due to the fear of retaliation and other impediments).

[105] *See* discussion *infra* Part III.A.

employers unilaterally impose mandatory arbitration clauses to ensure that all sexual harassment allegations remain confidential, thereby protecting both the individual harasser and the company.[106]

Since the early 2000s, employers' use of mandatory arbitration has more than doubled, with over fifty-five percent of employers currently requiring these agreements.[107] Research shows that women of color are more likely to be denied access to courts due to mandatory arbitration because these clauses are particularly prevalent in low-wage industries.[108] Thus, low-wage workers, who are already uniquely vulnerable to workplace violations, including harassment, also suffer the most from these clauses restricting their ability to access a court of law.[109] Although harmful for all workers, mandatory arbitration can be particularly detrimental for women of color suffering harassment. On a practical level, it can be hardest for these workers to obtain legal representation for their claims, especially when the opaque nature of arbitration leads to a lack of precedent to support their claims.[110] Many plaintiff's attorneys see private arbitration as a dead end because of the extremely low odds of prevailing.[111]

Unlike the judicial system, arbitration also limits transparency for victims of harassment because it limits access to class action claims, it does not offer an appeals process and the opinions are kept private, so there is often no public

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[106] M. Isabelle Chaudry, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims*, 43 SETON HALL LEGIS. J. 215, 227 (2019) (noting that alternative dispute resolution can be effective in some circumstances "because of the speediness, the cost, and the parties' ability to control the process").

[107] ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 1 (2018), https://files.epi.org/pdf/135056.pdf [https://perma.cc/2U7W-RGWK]. One report explains, "Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures." *Id.* at 2.

[108] *Id.* at 9.

[109] *See id.* (noting that women, Blacks, and low-wage workers are among the groups most likely to have mandatory arbitration agreements).

[110] *See* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 183–84 (2019) (noting that mandatory arbitration makes it very difficult for employees to bring their claims successfully).

[111] *See* Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled?*, 2014 U. CHI. LEGAL F. 19, 24–25 (pointing out that the statistics of winning U.S. Equal Employment Opportunity Commission (EEOC) claims do not favor plaintiffs). The nonpublic nature of arbitration makes employment discrimination arbitration data difficult to ascertain. *Id.* at 25. Fortunately, the American Arbitration Association (AAA) must make data about employment arbitration available because California requires it. *See id.* (noting that the AAA is one of the primary providers of arbitration services). This data demonstrated that employees won approximately 21% of cases the AAA heard during a four-year period and received a "median award amount of $36,500, which was much less than the average award in court decisions." *Id.* (citing Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011)).

record of the claims filed nor the outcome of the hearings.[112] This not only shields employers from accountability, but it also does not establish precedent to help shape the law and inform future cases.[113] The dearth of precedent is particularly problematic for legal issues like intersectional race and sex claims, for which the law is evolving and courts are grappling with how to properly analyze the claims. Since arbitration sidesteps the EEOC or formal administrative agencies, this substantially limits public awareness of harassment claims and proceedings, which is one reason that the EEOC announced opposition to arbitration in 1997.[114]

Compounding on the secrecy inherent in mandatory arbitration, nondisclosure agreements (NDAs) in employment contracts and confidential settlement agreements also frequently silence victims and shield harassers.[115] The

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[112] *See* COLVIN, *supra* note 107, at 2 (explaining that mandatory arbitration agreements often prevent class actions and other access to the courts). According to Alexander J.S. Colvin's report, "Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures—meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through collective legal action." *Id.*; *see also* Chaudry, *supra* note 106, at 228. M. Isabell Chaudry notes, "It has been argued that this lack of judicial review undermines the public function of litigation: '[b]y closing off access to proceedings, eliminating judicial precedent, and allowing parties to write their own laws, we compromise society's role in setting the terms of justice.'" Chaudry, *supra* note 106, at 228 (alteration in original) (quoting Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 695 (1996)).

[113] Chaudry, *supra* note 106, at 217–18 (juxtaposing the nonpublic nature of arbitration proceedings with the benefits of court proceedings, such as the opportunity for appeal and the reveal of the perpetrator in the public record).

[114] Sternlight, *supra* note 110, at 190.

[115] Chaudry, *supra* note 106, at 234. Only four states—Illinois, New Jersey, New York, and Oregon—passed bills in 2018, 2019, and 2020 prohibiting NDAs as a condition of employment for all types of harassment and discrimination. *See* Anne R. Dana & Gena B. Usenheimer, *New York State Division of Human Rights Issues Further Guidance on the Recent Amendments to Anti-discrimination and Anti-harassment Laws*, SEYFARTH SHAW LLP (Nov. 12, 2019), https://www.seyfarth.com/news-insights/new-york-state-division-of-human-rights-issues-further-guidance-on-the-recent-amendments-to-anti-discrimination-and-anti-harassment-laws.html#:~:text=Non%2DDisclosure%20Agreements%20(%E2%80%9CNDAs%E2%80%9D)&text=The%20law%20only%20prohibits%20NDAs,or%20of%20the%20settlement%20amount [https://perma.cc/L34S-BZLY] (discussing changes to the New York NDA laws); John MacDonald & Robin E. Shea, *NJ Ban on Nondisclosure Agreements: What Does It Mean for Employers?*, JD SUPRA (Apr. 11, 2019), https://www.jdsupra.com/legalnews/nj-ban-on-nondisclosure-agreements-what-55560/#:~:text=New%20Jersey%20Governor%20Phil%20Murphy,that%20those%20provisions%20are%20unenforceable [https://perma.cc/8RE7-GB84] (outlining changes to New Jersey's NDA laws); Chrys Martin & Christie Totten, *OWFA Requires New Policies and Practices for All Oregon Employers Starting October 1*, JD SUPRA (Sept. 30, 2020), https://www.jdsupra.com/legalnews/owfa-requires-new-policies-and-14882/ [https://perma.cc/767G-LJ9Q] (discussing the changes made to NDA laws in Oregon); Susan Gross Sholinsky et al., *Sweeping New Illinois Law Mandates Sex Harassment Training, Restricts Use of Arbitration and Non-Disclosure Agreements, and Much More*, EPSTEIN BECKER & GREEN, P.C. (Aug. 16, 2019), https://www.ebglaw.com/news/sweeping-new-illinois-law-mandates-sex-harassment-training-restricts-use-of-arbitration-and-non-disclosure-agreements-and-much-more/ [https://perma.cc/R9BG-EFM2] (discuss-

consequence for disclosure is often that the employee must pay liquidated damages, which can be even greater than the amount received in the settlement itself.[116] This monetary consequence has a disproportionate impact on low-wage workers, whose hands are tied by their inability to pay the steep fee.[117] For more marginalized victims, these NDAs ultimately allow the harassment to continue while protecting the perpetrators from facing public professional ramifications. Victims with more resources are also silenced by NDAs, but they tend to be better equipped to speak out, including speaking to other employees about the problems, discussing the problem of sexual harassment with the media, or engaging in political activism.[118]

It is important to note the counterargument, however, that low-wage women of color and immigrant workers are particularly harmed by bills that eliminate confidentiality agreements wholesale.[119] Although these critics do

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ing the new NDA laws in Illinois). From 2018 to 2019, only New Jersey, New York, and Illinois passed laws prohibiting nondisclosure provisions in settlement agreements for all types of harassment and discrimination. ANDREA JOHNSON ET AL., NAT'L WOMEN'S L. CTR., PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020, at 7 (2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/final_2020States_Report-9.4.19-v.pdf [https://perma.cc/4MEU-HFHX].

[116] Chaudry, *supra* note 106, at 234.

[117] *See* Vasundhara Prasad, Note, *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, 2515 (2018) (discussing the "financial risk" for victims seeking to break NDAs in pursuit of harassment claims); *see also* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 249–51 (2019) (discussing "[r]estrictions on an employee's ability to publicly disclose harassment"). Scholars have also argued that these agreements actually constitute impermissible retaliation against the accuser by imposing a financial penalty if they choose to speak about the experience. Prasad, *supra*, at 2515. Courts, however, are reluctant to take this position regarding NDAs in a settlement because they profess to encourage settlements in the interest of case resolution. *See id.* at 2513–14 (explaining that courts are hesitant to impinge on the traditional freedom to contract between parties).

[118] For example:

> [Gretchen] Carlson, who has testified before Congress in support of a bill that would ban NDAs in sexual harassment settlements, cites her own when asked about the movie [*Bombshell*, based on her experience at Fox News]. "It's really frustrating that because of my NDA, I can't participate in any of these projects," she says. "It's why I'm working so hard on the Hill to change that."

Rebecca Keegan, *The Secret Sources for 'Bombshell': Why Ex-Fox News Staffers Broke Their NDAs for Filmmakers*, HOLLYWOOD REP. (Oct. 29, 2019), https://www.hollywoodreporter.com/news/secret-sources-bombshell-why-fox-news-staffers-broke-ndas-filmmakers-1250668 [https://perma.cc/FAN8-Z7JU].

[119] *See* Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, THE NATION (Jan. 12, 2018), https://www.thenation.com/article/archive/how-to-end-the-silence-around-sexual-harassment-settlements/ [https://web.archive.org/web/20210301192944/https://www.thenation.com/article/archive/how-to-end-the-silence-around-sexual-harassment-settlements/] (explaining that some victims actually prefer confidential settlement agreements).

not favor the overly restrictive NDAs that are common practice today, they report that many women fear the consequences of public exposure both in terms of their future professional prospects and their employers' ability to publicly counter the accusation.[120] Still, these critics acknowledge the need for reforming the current landscape of NDAs for a more balanced approach.[121] As discussed below, many of the #MeToo bills proposed at the state level seek to eliminate these secrecy provisions in cases of sexual harassment and sexual assault. These reforms, however, fail to address racial or other harassment or discrimination claims, which limits protection for women of color.[122]

D. Women of Color Are Marginalized Due to False Dichotomy

Not only are women of color excluded and silenced due to the core challenges of lack of coverage, lack of due process, and lack of transparency in the current legal landscape, but they also face weak enforcement when they do land in state or federal court.[123] For example, women of color pursuing litigation are marginalized when courts separate out experiences of harassment into the false dichotomy of "because of race" or "because of sex."

Claim intersectionality describes lawsuits where plaintiffs allege discrimination based on at least two protected categories (for example, "because of race" and "because of sex").[124] Empirical research has found that plaintiffs bringing intersectional claims are less than half as likely as plaintiffs bringing single claims to win their cases.[125] Even within those statistics, Black women are more likely to lose their cases than are Black men who bring intersectional claims (for example, because of race and because of age).[126] One potential rea-

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[120] *Id.*

[121] *See* Prasad, *supra* note 117, at 2536–42 (discussing reforms of NDAs in which courts would more actively analyze NDAs to make sure they are a voluntary agreement between the parties and based on appropriate consideration).

[122] *See* discussion *infra* Part III.A.

[123] For a discussion of enforcement issues, see generally ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005) (discussing issues with current anti-discrimination laws and suggesting solutions); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (discussing the issues with the traditional judicially centered approach to addressing employment discrimination).

[124] Best et al., *supra* note 31, at 994–95; *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (providing that an employer may not discriminate against an employee "because of such individual's race, . . . [or] sex").

[125] Best et al., *supra* note 31, at 1009; *see also* Kotkin, *supra* note 32, at 1440 (explaining that "[a] sample of summary judgment decisions reveals that employers prevail on multiple claims at a rate of 96 percent, as compared to 73 percent on employment discrimination claims in general" (emphasis omitted)).

[126] Best et al., *supra* note 31, at 1009.

son for these dismal rates is judges' lack of understanding of the nuanced types of discrimination and harassment that plaintiffs at the intersection of multiple marginalized groups face.[127] Rather than taking account of the intertwined and compounded nature of the racialized and sexualized abuses, courts often treat each claim separately and distinctly. After disaggregating, the court then finds each claim insufficiently severe or pervasive on its own to survive summary judgment.[128]

For example, in *EEOC v. Champion International Corp*., a 1995 case heard in the U.S. District Court for the Northern District of Illinois, a Black female plaintiff alleged both racial and sexual harassment.[129] The one incident of harassment included the perpetrator threatening her after she observed sexual harassment of co-workers, including him telling her to "[s]uck my d[**]k, you black bi[***]" while he exposed himself and held his penis.[130] There were also several substantial references to lynching and the Ku Klux Klan.[131] Although the court called the racial incidents "deplorable" and "offensive," it held that the treatment did not rise to meet a Title VII violation.[132] Again, by disaggregating the incidents, the court failed to recognize the cumulative effect of the environment on the plaintiff's working conditions.[133] These cases reflect not only the trouble that courts have with understanding intersectional claims, but they also demonstrate the restrictive lens through which they consider how offensive behavior must be to violate civil rights law.

In 1997, in *Vigil v. City of Las Cruces*, a Hispanic female plaintiff alleged a hostile work environment based on both sex and race.[134] The discrimination she faced was a product of her situation at the intersection of both protected categories. The plaintiff alleged that her supervisor offered her "X-rated soft-

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[127] *Id.* at 1018; Kotkin, *supra* note 32, at 1442 (noting that judges struggle to understand or are frustrated by claims that allege multiple traits in employment discrimination cases). Professor Minna J. Kotkin suggests that judges dismiss intersectional claims at higher rates because analyzing intersectional claims requires a more complex analysis into the kind of proof that would make out a violation. *See id.* at 1473 (pointing out that courts "fail to indicate what kind of proof would make out a violation, and are dismissive of evidence that is introduced").

[128] *See* Kotkin, *supra* note 32, at 1461 (explaining that judges tend to disaggregate multiple claims at the summary judgement level). According to Professor Theresa M. Beiner, "One is at a loss to determine what sort of single incident would be severe enough if this incident, as described by Jackson, is not even sufficient to get to the jury." Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 112 (1999).

[129] No. 93-CV-20279, 1995 WL 488333, at *1 (N.D. Ill. 1995).

[130] *Id.* at *2.

[131] *Id.* at *4; Beiner, *supra* note 128, at 111–12.

[132] *Champion Int'l Corp.*, 1995 WL 488333, at *8; Beiner, *supra* note 128, at 111–12.

[133] *See* Beiner, *supra* note 128, at 111–12 (discussing the racial and sexual harassment as separate incidents).

[134] 113 F.3d 1247, No. 96-2059, 1997 WL 265095, at *1–2 (10th Cir. May 20, 1997) (unpublished table decision); Beiner, *supra* note 128, at 108–09 (discussing *Vigil v. City of Las Cruces*).

ware," placed pornography in the drawer of her desk, and continually pressed her to go on a flying trip with him.[135] Plaintiff also alleged that her "supervisor frequently referred to Hispanic individuals in derogatory terms such as 'wetbacks.' . . . [W]hen she complained to her supervisor about his discrimination against Hispanic customers, he responded, 'I didn't know that Mexicans had rights.'"[136] Rather than analyzing these claims together to determine whether the plaintiff, a Hispanic woman, was subject to a hostile work environment, the U.S. Court of Appeals for the Tenth Circuit analyzed the sexual harassment and racial discrimination claims separately.[137] The court determined that "her supervisor's single attempt to give her pornographic software [was] not reasonably regarded as giving rise to an abusive environment" and that she did not offer specific enough allegations regarding her supervisor's request to go flying to prevail at summary judgment for her sexual harassment claim.[138] For the racial discrimination claim, the court concluded that summary judgment was appropriate because the harassment had not occurred frequently enough to result in a change in working conditions.[139] By disaggregating the two claims at issue, the court ignored the extent to which these incidents in the aggregate resulted in a hostile work environment for a Hispanic woman.[140] Despite the lack of requirement to do so in either the text or case law of Title VII, courts appear to be unable to figure out how to mesh the two types of discrimination and instead consider each separately, making each claim appear weaker than reality would otherwise suggest.[141]

Some have also argued that, due to the lack of a coherent doctrinal framework, judges generally view intersectional plaintiffs as less credible.[142] They believe that if a person alleges too many discrimination claims based on multiple characteristics, it is more likely that the claims lack merit.[143] As a result, many plaintiffs face pressure to choose one claim or the other to improve

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[135] *Vigil*, 1997 WL 265095, at *1–2; Beiner, *supra* note 128, at 108.

[136] *Vigil*, 1997 WL 265095, at *2; Beiner, *supra* note 128, at 108.

[137] *Vigil*, 1997 WL 265095, at *1–3 (footnotes omitted) (citations omitted) (first quoting Draft Affidavit of Appellant ¶ 5, *Vigil*, 1997 WL 265095 (No. 96-2059); and then quoting *id.* ¶ 7); Beiner, *supra* note 128, at 109.

[138] *Vigil*, 1997 WL 265095, at *2; Beiner, *supra* note 128, at 108.

[139] *Vigil*, 1997 WL 265095, at *2–3; Beiner, *supra* note 128, at 109.

[140] Beiner, *supra* note 128, at 109.

[141] *Id.*

[142] Kotkin, *supra* note 32, at 1442 (noting that judges struggle to understand or are frustrated by claims that allege multiple traits in employment discrimination cases). Professor Kotkin explains, "[W]ithout a doctrinal structure from which to analyze complaints of this sort, judges seem to treat them as the child who cried wolf: If a person asserts so many grounds for discrimination, it is unlikely that any of them are grounded in fact." *Id.* at 1458 (footnote omitted).

[143] *Id.* at 1458.

their chances of success.[144] As long as this difficult choice remains, intersectional victims' claims will be unable to capture the nefarious nature of the racially and sexually stereotyped discrimination they face.[145] Instead, if a plaintiff of color chooses to bring a claim solely based on sexual harassment, to minimize the impact of racial stereotypes on outcomes in the courtroom, they may try to strategically minimize the racial nature of the harassment and instead emphasize the ways that their experience resembles normative sexual harassment.[146] Although this strategy may help to simplify the individual claim to better connect with white judges or jurors, in the long run, this approach masks the intersectionality of the harassment, failing to create precedent for future similarly situated claimants.[147]

E. The Severe or Pervasive Threshold Dehumanizes Women of Color

Although harassment is considered a form of discrimination under Title VII of the Civil Rights Act of 1964, the plaintiff must show that the harassment consisted of "*severe* or *pervasive*" conduct so offensive as to change the terms or conditions of the plaintiff's employment.[148] The conduct also must *objectively* and *subjectively* meet this standard.[149] The plaintiff must therefore show that a reasonable person would believe that the conduct was sufficiently severe or pervasive to create a hostile or abusive work environment, as well as that this particular plaintiff experienced it as such.[150] Only then will the court deem

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[144] Leung, s*upra* note 7, at 97. The reality is that "attorneys working to combat systemic discrimination and harassment in the workplace are faced with the decision of whether to address sex discrimination with intersectional legal theories." *Id.*

[145] *Id.* at 93.

[146] *Id.* at 97.

[147] *Id*. at 96–97. Attorney Katherine E. Leung explains:

> This does not create law that is the most protective of women with intersectional identities, nor does it focus on a narrower construction of the issue that would allow women to raise a broader class of potential claimants. . . . [I]n *Dukes v. Wal-Mart*, . . . plaintiffs took a race-blind approach to fighting discrimination, instead pursuing a claim based on the amount of discretion given to managers, which resulted in shockingly low promotion rates for women employees. While this resulted in one of the largest proposed classes in American litigation, it also neglected to address experiences of women of color specifically or to explore possible racial disparities in the hiring and promotions at Wal-Mart.

Id. at 97 (footnotes omitted).

[148] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (emphasis added) (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[149] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993).

[150] *See id.* (explaining the standard, but noting that the plaintiff need not necessarily demonstrate psychological harm, just that the plaintiff must show that she "actually found the environment abusive").

the abusive conduct to have violated federal law. Unfortunately, lower courts have misinterpreted the standard to be higher than the U.S. Supreme Court intended, rejecting claims for conduct that may be egregious, offensive to a reasonable person, and in some cases even criminal.[151] Not only does this standard place a high burden of proof on the victim, it also has led to ambiguity in federal courts, which have inconsistently interpreted the type of conduct necessary for a violation.[152] Although in 1993, in *Harris v. Forklift Systems, Inc.*, the U.S. Supreme Court listed several non-exhaustive factors to be considered in the severe or pervasive analysis, many courts have misinterpreted the opinion to require that conduct be severe, frequent *and* physically threatening, effectively requiring severe *and* pervasive conduct.[153]

Some courts have set the bar so high for Title VII workplace harassment claims that they permit conduct that simultaneously qualifies as sexual assault

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[151] Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be Severe or Pervasive Discriminates Among Terms and Conditions of Employment*, 62 MD. L. REV. 85, 85–86 (2003).

[152] In 2005, in *LeGrand v. Area Resources for Community & Human Services*, the U.S. Court of Appeals for the Eighth Circuit interpreted the severe or pervasive standard to be a "demanding" one, and it concluded that cases in which a victim was subject to demeaning remarks and even the touching of intimate body parts were inadequate to meet the "severe or pervasive" standard. 394 F.3d 1098, 1102–03 (8th Cir. 2005) (quoting Duncan v. Gen. Motors Corp., 300 F.3d 928, 935 (8th Cir. 2002)). Additionally, in 2012, the Tenth Circuit held in *Morris v. City of Colorado Springs* that a surgeon's inappropriate comments towards the plaintiff, a female nurse, were insufficiently severe or pervasive enough to constitute a Title VII hostile work environment. 666 F.3d 654, 664–66 (10th Cir. 2012). Although she subjectively felt uncomfortable, the court reasoned that in light of the totality of the facts at hand, the workplace was not a hostile environment from an objective point of view. *Id.* On the other hand, in 2000, the U.S. Court of Appeals for the Second Circuit held in *Howley v. Town of Stratford* that a single instance of a supervisor's particularly offensive and extended remarks was sufficient to create a hostile work environment when considered in the specific professional context at hand. 217 F.3d 141, 156 (2d Cir. 2000). For further contrast to each of those cases, in 2000, the U.S. Court of Appeals for the Ninth Circuit held in *Brooks v. City of San Mateo* that in light of particular circumstances, even a one-time breast fondling did not meet its "extremely severe" standard for one-time physical incidents. 229 F.3d 917, 922, 926–27 (9th Cir. 2000).

[153] *Harris*, 510 U.S. at 21–23; *see* Mendoza v. Borden, Inc., 195 F.3d 1238, 1243, 1248–49 (11th Cir. 1999) (en banc) (holding that where the plaintiff's supervisor followed her, stared at her, and made sniffing motions while looking at her groin, but noting that the conduct did not interfere with her work, was not severe, and was not frequent); Kenyon v. W. Extrusions Corp., C.A. No. 98CV2431, 2000 WL 12902, at *6–7 (N.D. Tex. Jan. 6, 2000) (holding that although the fifty incidents the plaintiff alleged constituted severe and pervasive conduct, she did not show that the "harassment affected or altered a term or condition of [her] employment"); McGraw v. Wyeth-Ayerst Lab'ys, Inc., C.A. No. 96-5780, 1997 WL 799437, at *1–6 (E.D. Pa. Dec. 30, 1997) (holding that where a supervisor continually asked an employee, kissed her without her consent, and screamed at her, the conduct was not sufficient to turn her workplace into a hostile environment or alter the terms of her employment); Johnson, *supra* note 151, at 85–86, 111 (discussing the persistence of the severe and pervasive standard in courts). *See generally Morris*, 666 F.3d at 664–66 (analyzing the plaintiff's claim against standards of severity, pervasiveness, and threats of physical harm).

under criminal law.[154] For example, in *Garcia v. ANR Freight System, Inc.*, a 1996 case in the U.S. District Court for the Northern District of Ohio, the plaintiff, Florence Rose Garcia, alleged that a supervisor during a training program grabbed her, asked to spend the night together, and brushed against her breast.[155] The plaintiff left the job within only a few months, due to headaches and general nervousness caused by the incident and the environment.[156] The court held that the three incidents did not meet the severe or pervasive standard, because they were "random, isolated, and brief."[157] In the court's opinion, even though the alleged harassment interfered with the plaintiff's ability to perform certain tasks at work, it did not change the overall conditions of her job or subject her to an abusive working environment.[158] This type of analysis relegates women of color, like the plaintiff, to a property-like state in which they are harassed at the discretion of supervisors with no legal recourse, because in the court's view, this harassment does not alter the "terms and conditions" of their employment. This disturbingly suggests that the terms and conditions an employee signs up for may include enduring this type of treatment from her employer.

The objective component of the severe or pervasive analysis is a particular issue for women of color, as the standard assesses whether a "reasonable person" in that context would consider the harassment hostile, intimidating, and threatening.[159] Although this standard is said to be objective, in reality, it is judged by a predominantly white male judiciary and thus based on their experiences and perspectives. These judges may not only have difficulty understanding how it feels to be in the position of facing multiple forms of discrimination and harassment, but they also may have biases that operate to favor the

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[154] Johnson, *supra* note 151, at 111; *see, e.g.*, Blough v. Hawkins Mkt., Inc., 51 F. Supp. 2d 858, 864 (N.D. Ohio 1999) (involving several incidents over a nine-month period, including co-workers patting the plaintiff's behind, grabbing her crotch, trying to kiss her, and engaging in self-stimulation in front of her, which did not amount to frequent, severe, or pervasive conduct); Hannigan-Haas v. Bankers Life & Cas. Co., No. 95 C 7408, 1996 WL 139402, at *3 (N.D. Ill. Mar. 26, 1996) (granting the defendant's motion to dismiss in a case where a superior forcibly grabbed, kissed, and reached up the skirt of the plaintiff in a locked office).

[155] 942 F. Supp. 351, 354 (N.D. Ohio 1996).

[156] *Id.* at 355.

[157] *Id.* at 356.

[158] *Id.* ("Even if alleged incidents interfered with her ability to meet contacts, observe procedures, and absorb information . . . . [t]he alleged incidents of harassment did not alter the conditions of plaintiff's employment . . . . [or] create[] an abusive environment . . . ." (internal quotation marks omitted)).

[159] *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 109 (2018), https://www.yalelawjournal.org/pdf/Onwuachi-Willig_v3bzpvpm.pdf [https://perma.cc/6XPY-CJ9T] (discussing why it is important that the typical, biased, reasonable person standard be revised instead to the standard "of a reasonable person *in the complaint's intersectional and multidimensional shoes*" (emphasis added)).

male perpetrators.[160] For example, this standard does not take into account the complexities of intersectional identities, where gender and racial subordination may be compounded to create particular vulnerabilities to harassment.[161] Racialized sex stereotypes can also color perceptions of witnesses, fact finders and others, including whether the plaintiff contributed to the harassment, the extent to which she is harmed by the perpetrator, and whether enduring the conduct is within the realm of her role as worker.[162]

Problems also arise when an outsider, a judge, carrying their own biases and perceptions, tries to assess what is objectively hostile in a particular work context. The baseline workplace is inherently one created and governed by white men, thus establishing the normative work environment from a white male-centric perspective to the disadvantage of female complainants, including women of color.[163] For example, several circuit courts will identify the so-called "social context" of the workplace in evaluating motivation, objective and subjective severity, and the welcomeness of the conduct.[164] In this analysis, courts make rampant assumptions about crude language and behavior as typical and therefore acceptable in a particular workplace, and thus not rising to an offensive level within that context.[165]

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[160] *Id.* at 110. For example, men and women characterize sexual harassment differently. Leung, *supra* note 7, at 83 (explaining that "men struggle to define what crosses the line between flirtation or rudeness and sexual harassment").

[161] Onwuachi-Willig, *supra* note 159, at 110. Professor Angela Onwuachi-Willig notes, "It also disregards how a complainant's own understanding of others' perceptions about her group or groups, whether based on race, sex, or other identity factors like religion and age, can shape her own response to the harassment she is enduring." *Id.*

[162] *Id.* at 110–11 (discussing the biases and stereotypes, such as the idea that more harassment is okay in blue-collar workplaces, affect victims of harassment). "Resilience" can be a harmful stereotype; Black women are perceived to have higher pain tolerance in medical studies, which may be similar here in harassment context. *See generally* Hoffman et al., *supra* 77 (discussing racial biases behind why trained medical individuals fail to treat Black patients for pain as frequently as white patients).

[163] *See* Leung, *supra* note 7, at 82 (pointing out that "the laws governing our workplaces were created by men and are most often measured by men").

[164] *See, e.g.*, Barbour v. Browner, 181 F.3d 1342, 1348–49 (D.C. Cir.1999) (determining that the alleged harassment was ordinary behavior in a specific work environment); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010–11 (7th Cir. 1999) (holding that because the alleged harassment did not relate to the plaintiff's gender, it was not sex discrimination); Montandon v. Farmland Indus., Inc., 116 F.3d 355, 358 (8th Cir. 1997) (discussing the particular workplace context in which the alleged harassment occurred to determine whether it constituted sex-based harassment); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537–38 (10th Cir. 1995) (analyzing the alleged harassment within the specific "blue collar environment" of construction work); Vaughn v. Pool Offshore Co., 683 F.2d 922, 924–25 (5th Cir. 1982) (holding that where vulgar jokes were an expected component of a particular workplace, there was no discrimination).

[165] *See* Leung, *supra* note 7, at 82 (explaining that "[i]n determining whether or not conduct was so severe or pervasive as to alter the terms or conditions of employment, fact finders essentially evaluate what norms apply in that workplace").

In 1995, in *Gross v. Burggraf Construction Co.*, the Tenth Circuit held that a claim of sex discrimination must be evaluated "in the context of a blue collar environment where crude language is commonly used by male and female employees."[166] After taking into account the nature of the plaintiff's workplace, apart from the harassment she faced, the court concluded that the conduct the plaintiff alleged was insufficiently severe or pervasive in light of the context.[167] Courts' tolerance for a certain level of sexual misconduct has the effect of making women in these environments *more* vulnerable to harassment than their counterparts in the white-collar workforce by forcing them to demonstrate a higher level of harassment to advance their claims.[168] Ultimately, this dynamic subjects low-wage women of color to court-sanctioned harassment, and it reinforces the power imbalances and inequities that already exist in these spheres.[169]

Some courts have altered their approach to instead consider the harassment from the perspective of a "reasonable *woman*."[170] Scholars have argued, however, that moving to this standard alone is unlikely to be inclusive of the experiences of women of color.[171] The racialized sexism routinely faced by women of color is often marked as racial and therefore outside of the typical female experience, which is judged by the standard of a white woman.[172] Professor Angela Onwuachi-Willig, therefore, argues that courts should go further and adopt a standard that takes into account not only the complainant's gender, but the standard should also identify any other traits that add dimension to her

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[166] 53 F.3d at 1538. In 1995, in *Gross v. Burggraf Construction Co.*, the Tenth Circuit determined that the plaintiff being referred to as a "c[*]nt," "dumb," and with other profanity was not hostile or abusive in the construction industry. *Id.* at 1535, 1539–40 (noting further that the plaintiff was referred to over the company radio with the statement, "Mark, sometimes, don't you just want to smash a woman in the face?" (statement of George Randall Anderson)).

[167] *Id.* at 1547.

[168] Onwuachi-Willig, *supra* note 159, at 110–11.

[169] *See id.* (pointing out that the high bar for courts to find harassment in blue-collar workplaces makes women working in these settings more vulnerable than women working in other settings).

[170] *Id.* at 109 (emphasis added).

[171] *Id.* at 119; *see also* Saba Ashraf, Note, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483, 499 (1992) (arguing that courts' usage of a "reasonable woman" standard in cases of sexual harassment "suggests that the only subjective characteristic to be ascribed to the reasonable person is the characteristic of the plaintiff on the basis of which the harassment is being claimed. . . . If the very reason put forth for the allowance of a gender-specific reasonable person standard is that men and women have widely divergent perceptions of conduct which constitutes sexual harassment, then any time a group to which the plaintiff belongs, and the group to which s/he does not belong (based on a certain characteristic) have widely divergent perceptions of such conduct, the standard used should account for the difference in perceptions").

[172] Onwuachi-Willig, *supra* note 159, at 118–19.

workplace experience.[173] Yet that approach may also negatively draw on courts' implicit biases and internalized stereotypes, which may undermine the inclusive goal by raising judges' thresholds for the alleged behavior.[174]

F. An Overwhelmingly White Male Judiciary Blocks Claims of Women of Color

Courts are increasingly granting summary judgment in Title VII cases even when unresolved issues of fact exist, which compounds each of the aforementioned problems with enforcement, and when it may be very reasonable to rule in the plaintiff's favor. This has substantially weakened harassment law because it fails to create opportunities for further exploration of the issues as well as precluding substantive precedent for future cases.[175] The Supreme Court has held that whether summary judgment is appropriate is determined by the underlying substantive law of the claim and whether there is a genuine issue of fact depends on whether a reasonable jury could find for the nonmoving party.[176] The Court has also cautioned that summary judgment should not be overused so as to "denigrate" the jury's role.[177] In theory, this means that Title VII harassment claims, which are considered under the totality of the circumstances, are generally "improper" for resolution under summary judgment because at that stage the court is unable to adequately consider the extensive evidence involved in the assessment.[178]

In practice, however, courts are increasingly deciding issues, like the fact-intensive severe or pervasive standard, at the summary judgment phase, without allowing the jury to weigh in on what they find to be objectively reasonable.[179] This is troublesome because a jury of peers has traditionally been the

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[173] *Id.* at 119 (arguing that "courts should adopt a standard based on a reasonable person with the complainant's intersectional and multidimensional identity, rather than the ostensibly objective reasonable person standard, or even the presumably more inclusive reasonable women's standard").

[174] Leung, *supra* note 7, at 93 ("Courts have historically placed a lot of weight on how women are treated in relation to other women of their racial or ethnic background. . . . Because people frequently accept the stereotypes they see in popular culture or other visual mediums as truth, they have a higher tolerance for such conduct." (footnotes omitted)).

[175] *See* Beiner, *supra* note 128, at 72–73 (noting that courts may use summary judgement as a way for them to deal with increased Title VII dockets after the Justice Clarence Thomas hearings).

[176] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Beiner, *supra* note 128, at 88.

[177] *Anderson*, 477 U.S. 242 at 255; Beiner, supra note 128, at 90.

[178] Beiner, *supra* note 128, at 91. Even further, the standard is improperly applied. In 1993, in *Harris v. Forklift Systems, Inc.*, the U.S. Supreme Court emphasized that under the totality of circumstances analysis, "no single factor is required" to assert a hostile environment case; some courts, however, grant summary judgment in the absence of *all* factors being met, but many others require at least a majority of the factors to be satisfied. *Id.* at 81 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

[179] *Id.* at 97–98.

primary venue for analyzing the human behavior and cultural attitudes that are inextricable from Title VII hostile work environment inquiries.[180] The nature of the "reasonable person standard" necessarily involves these types of assessments, considering both local and professional norms as perceived by a jury of one's peers.[181] Additionally, plaintiffs are unable to present the way that they experienced the harassment subjectively before a jury, leaving a single elite judge to determine whether the nature of the plaintiff's experience aligns with their own assumptions about tolerable behavior.[182] Whether or not the plaintiff would ultimately win, she is entitled to present her case to a reasonable jury rather than rely on a single judge's perspective, which typically involves a judge imposing perspectives of both white and male privilege.[183]

There are situations, however, where courts demonstrate proper understanding of the summary judgment standard in relation to totality of the circumstances analyses. For example, in 1997, in *Smith v. St. Louis University*, the U.S. Court of Appeals for the Eighth Circuit overruled the trial court's grant of summary judgment, which had improperly required a "tangible psychological injury" and rejected other conduct that presented genuine issues of material fact that should have been presented to a jury for their consideration.[184] The court acknowledged that whether or not the plaintiff would have ultimately succeeded, she had presented triable issues of fact that should have gone before a jury.[185] In light of the increasingly conservative judiciary hostile to civil rights, however, the majority of courts do not seem likely to improve upon this problem in the near future.[186]

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[180] *Id.* at 102.

[181] *Id.* at 133–34 (internal quotation marks omitted).

[182] *See id.* at 102 (explaining that it is often inappropriate for a single judge to determine appropriate workplace behavior).

[183] *See id.* at 133–34 (noting that the jury might still not decide in the plaintiff's favor, but explaining that the jury might be a better gauge of appropriateness than the judge).

[184] *See* 109 F.3d 1261, 1264, 1266–67 (8th Cir. 1997) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)) (explaining that "tangible psychological injury" is unnecessary and reversing and remanding the lower court's decision (quoting *Harris*, 510 U.S. at 21)), *abrogated by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011) (en banc).

[185] *See id.* at 1264 (explaining that this case should have gone before a jury rather than ending prematurely at the summary judgement stage).

[186] *See* DANIELLE ROOT & SAM BERGER, CTR. FOR AM. PROGRESS, STRUCTURAL REFORMS TO THE FEDERAL JUDICIARY: RESTORING INDEPENDENCE AND FAIRNESS TO THE COURTS 1–2 (2019), https://cdn.americanprogress.org/content/uploads/2019/05/07133754/JudicialReform-report-1.pdf [https://perma.cc/RSQ7-9F3T] (discussing the threat that a highly conservative judiciary with a political agenda poses to protecting vulnerable members of our society). *See generally* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 1, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court [https://perma.cc/4QNE-HT7U] (discussing the role of the Federalist Society in placing conservative judges and justices in the courts).

At the summary judgment stage, courts also analyze whether the plaintiff has *reasonably* reacted to the alleged harassment in terms of reporting the behavior under the *Faragher/Ellerth* affirmative defense.[187] The *Faragher/Ellerth* defense allows employers to escape liability if the court finds: (1) the employer exercised "*reasonable* care to prevent and correct promptly" the harassing behavior (such as having a reporting policy or grievance procedure), and (2) the plaintiff employee "*unreasonably* failed to avail herself" of the measures in place to prevent and correct such behavior.[188] This defense again invites judges to apply their own professional experiences and biases as to whether they would feel comfortable reporting inappropriate behavior, a perspective that is likely very different from that of a female plaintiff, especially that of a woman of color or low-wage worker.[189] In short, potential for biases face women of color at all stages of the litigation process.

II. Intersectionality & Activism

Although the #MeToo movement has presented an opportunity for united activism that could have led to advances for all women, Part II of this Article discusses how it has largely left women of color at the margins, whose plight can be better understood by applying Crenshaw's framework of intersectionality. Section A of this Part discusses how the social media era has increased opportunities for collective activism in response to issues such as sexual and racial harassment.[190] Section B, however, points out that Hollywood actresses and other elites have largely co-opted the original movements, such as "Me Too."[191] Building on this, Section C details how offline #MeToo activity similarly lacks in intersectionality, predominately reflecting the interests of white, educated, and affluent women.[192]

A. Social Media Provides an Opportunity for United Activism

In light of the legal shortcomings and the unique deterrents that women of color face when considering whether to speak out against sexual harassment within their own community, one prominent Black activist identified an open-

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[187] Johnson, *supra* note 151, at 102; *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (defining the standard for employers raising an affirmative defense against employees' sexual harassment claims); Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998) (same).

[188] *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 806–07.

[189] *See* Beiner, *supra* note 128, at 102 (explaining that it is inappropriate for courts to determine what constitutes a reasonable person at the summary judgment stage because a judge must consider too many factors).

[190] *See* discussion *infra* Part II.A.

[191] *See* discussion *infra* Part II.B.

[192] *See* discussion *infra* Part II.C.

ing for a new movement that shed light on this persistent problem. Tarana Burke first coined the phrase "Me Too" in 2006 to support women and girls of color who were sexual violence survivors, encouraging them to come forward with their stories despite the internal racial pressures they faced.[193] Over a decade later, white actress Alyssa Milano took to Twitter following the New York Times story accounting the sexual allegations against Harvey Weinstein, 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."[194] Within the next twenty-four hours, over one million posts included the hashtag #MeToo.[195] This series of events has come to be known as the beginning of the #MeToo movement, a collective action against sexual harassment that has taken shape primarily on social media platforms.[196]

Many advocates of social media activism were optimistic about this movement online, theorizing that organizing and expressing grievances on the internet would beneficially erase identities such as race and gender. They argue that if speakers are not immediately identifiable by those identities, society will instead value them for the substance of their contributions and opinions.[197] This may also contribute to an enhanced sense of belonging, in which one's marginalized identities are not immediately apparent to those with whom one comes into contact. On a practical level, social media activism can be much more accessible than in-person organizing. The internet lacks traditional geographic, time, or financial barriers while also disseminating information on a much faster and broader scale.[198]

Additionally, Twitter usage rates show fewer divides along race, class, and gender lines than traditional social movement activities.[199] One statistic supporting this perspective finds that the percentage of Black Americans who use Twitter is 22%, which is much higher than the 16% of white Americans

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[193] Jamillah Bowman Williams et al., *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 374.

[194] *Id.* (quoting Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017), https://twitter.com/Alyssa_Milano/status/919659438700670976 [https://perma.cc/MR4W-8JYV]).

[195] *Id.*

[196] *Id.* at 375.

[197] *See* ZEYNEP TUFEKCI, TWITTER AND TEARGAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST, at ix (2017) (hoping that "digital connectivity would help change the state of affairs in which the powerful could jet-set and freely connect with one another while also controlling how the rest of us could communicate").

[198] Williams et al., *supra* note 193, at 377–78.

[199] *Id.* at 377. For example, "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." *Id.*

who are on Twitter.[200] Although these numbers do not reflect how each group uses Twitter, what is known as "Black Twitter" is an important phenomenon. In contrast to the marginalization and tokenism that Black activists face in the mainstream media and within broader social movements, channels like Black Twitter allow these groups to reclaim their own narratives both internally and externally.[201]

Social media platforms can also foster broader organizing efforts and access to a variety of related networks. Hashtags that have been used around police brutality protests like #BlackLivesMatter, #Ferguson, and #HandsUpDontShoot provide entry points to related tweets by those users and access to broader audiences.[202] This facilitates rapid mobilization and coordination without tangible barriers to participation.[203] This activism quickly brings visibility and specific attention to racialized forms of police brutality in a way that intersectional victims of racialized violence and harassment can use successfully.

Yet others argue that virtual spaces not only fail to erase cultural identities, but that these platforms are in fact largely shaped by them. On a technological level, there is ample evidence that algorithms that promote new stories are plagued by and perpetuate racism and sexism.[204] Additionally, despite the low access barriers to free online platforms, any form of "speaking out" can impose heavy emotional and reputational costs on participants. This deterrent is especially problematic for immigrants who face the threat of deportation as well as low-wage workers and heads of households whose steady incomes are vital to their and their family's survival.[205]

Despite these barriers, the question remains: will the benefits of social media activism shape an inclusive online movement where all voices are heard? Some refer to the current moment as the "fourth wave" of feminism.[206]

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[200] Yarimar Bonilla & Jonathan Rosa, *#Ferguson: Digital Protest, Hashtag Ethnography, and the Racial Politics of Social Media in the United States*, 42 J. AM. ETHNOLOGICAL SOC'Y 4, 6 (2015) (noting that "the percentage of African Americans who use Twitter (22 percent) is much higher than that of white Americans (16 percent)" (citation omitted)).

[201] *Id.*

[202] *Id.* at 8–9. In police brutality contexts, "social media participation becomes a key site from which to contest mainstream media silences and the long history of state-sanctioned violence against racialized populations." *Id.* at 12.

[203] Williams et al., *supra* note 193, at 378.

[204] *See, e.g.*, TUFEKCI, *supra* note 197, at 154–56 (discussing how opaque algorithms shaped who saw news about the protests in Ferguson and at what point they were made aware of them).

[205] Williams et al., *supra* note 193, at 379 (citing 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/K4NC-CKPE]).

[206] Amanda Elizabeth Vickery, *After the March, What? Rethinking How We Teach the Feminist Movement*, 13 SOC. STUD. RSCH. & PRAC. 402, 407 (2018) (quoting *A Brief History of Civil Rights in the United States: Feminism and Intersectionality*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=592919&p=4172371 [https://perma.cc/V835-G2H8] (Jan. 27, 2021)).

One of the novel aspects of this wave is that women of color have been vocal about the importance of bringing an intersectional lens to the issues at play, rebuking feminist leaders who ignore the diverse experiences of all types of women.[207] Yet divisions continue to persist within the current movement. A study of Black women who attended the Women's March of 2017 found that they felt marginalized and "alone in our pleas and cries for justice" for their specific community.[208] Ultimately, #MeToo activism has largely failed Black women, which reflects the systemic failure of activist and reform movements to account for intersectionality.

B. Divided We Stand: From Support of Black Survivors to Hollywood Hashtag

Given broad access to social media, lower barriers to participation, and increased demands for an intersectional approach to feminism, #MeToo had the potential to have very inclusive participation across demographics, strong alliances, and coalitions, but the movement has fallen short of this opportunity.[209] The experiences of white, affluent, and educated women have dominated the narrative with a focus on bringing down high-profile assailants, which is not how Burke envisioned it.[210] Women of color participated in the online conversation at very low rates, whereas white women ages twenty-five to fifty were vastly overrepresented.[211] Although the hashtag broadened participation significantly, the phrase "Me Too" went from having an intersectional focus on

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[207] *Id.*

[208] Vickery, *supra* note 206, at 407 (quoting S.T. Holloway, *Why This Black Girl Will Not Be Returning to the Women's March*, HUFFPOST: PERS. (Jan. 19, 2018), https://www.huffpost.com/entry/why-this-black-girl-will-not-be-returning-to-the-womens-march_n_5a3c1216e4b0b0e5a7a0bd4b [https://perma.cc/J2N2-BBU8]). Black women who participated in the 2017 Women's March reflect on their experience:

> We found ourselves alone in our pleas and cries for justice, for the end to the killing of our children and husbands and fathers and brothers, for the cessation of the systematic dismantling of our families, and for recognition that our lives and the lives of the ones we love do matter.

E.g., *id.* (quoting Holloway, *supra*).

[209] Some describe the current feminist discourse as the "fourth wave" of feminism. *Id.* (quoting *A Brief History of Civil Rights in the United States: Feminism and Intersectionality*, *supra* note 206). During this version of feminism, women of color insisted on the inclusion of intersectional identities, pointing out that previous feminist movement iterations intentionally avoided how women of color experienced inequality. *Id.*

[210] Gillian B. White, *The Glaring Blind Spot of the "Me Too" Movement*, THE ATLANTIC (Nov. 22, 2017), https://www.theatlantic.com/entertainment/archive/2017/11/the-glaring-blind-spot-of-the-me-too-movement/546458/ [https://perma.cc/NVL3-AVDV].

[211] Sepideh Modrek & Bozhidar Chakalov, *The #MeToo Movement in the United States: Text Analysis of Early Twitter Conversations*, J. MED. INTERNET RSCH., Sept. 2019, at 1, 12.

the unique issues facing women of color to becoming mainstream, more elite, and overwhelmingly white.

Kimberlé Crenshaw's framework set forth in *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women* helps us understand the low participation of women of color in the #MeToo movement.[212] This framework explains how race and gender intersect to shape the *structural*, *political*, and *representational* nature of experiences women have with harassment and assault.[213] Saying #MeToo involves each of these dimensions, which helps us understand why it may be especially difficult for women of color's voices to be heard throughout the movement.

Structural intersectionality refers to how race and gender intersect to make the way women of color experience harassment and the reforms to remedy harassment highly different than the ways in which white women experience harassment.[214] Women of color's experiences are dissimilar from those of the high-status white women who have become the face of the movement, so the movement's resulting reforms do not inherently take their needs into account. Many women of color face poverty, childcare responsibilities, and a lack of social capital and job skills—which are only exacerbated by racial disadvantage. Structural discrimination in housing and employment compound these inequities, which create different realities and needs for women of color than those included in the reforms envisioned by elite white women.[215] For example, compared to their white counterparts, women of color face different concerns and fears of retaliation, different economic realities, and different perspectives of the justice system.

These different structural realities have led many women of color to express feelings of exclusion and disillusionment with white feminism in general and the #MeToo movement more specifically.[216] Their primary concern is that although the mainstream movement professes to value what it means to be a Black female citizen, the historically dominant feminist movement has prioritized salient issues for white women over those of other women, thus failing to

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[212] *See generally* Crenshaw, *supra* note 31 (laying out the framework for her theory of intersectionality).

[213] *Id.* at 1245.

[214] *Id.*

[215] *Id.* at 1245–46. Crenshaw explains, "Women of color are differently situated in the economic, social, and political worlds. When reform efforts undertaken on behalf of women neglect this fact, women of color are less likely to have their needs met than women who are racially privileged." *Id.* at 1250.

[216] Holloway, *supra* note 208.

confront the ways that white supremacy compounds on the injustices that women of color face.[217]

This blind spot relates to "*political intersectionality*," which explores how both feminist and antiracist movements have marginalized the abuses women of color have faced.[218] On the antiracist side, the movement views the Black male as the normative narrative, while on the feminist side, the white woman is considered the prototypical victim. As a result, these efforts have frequently proceeded as if they occur on mutually exclusive terrains. Women of color, therefore, not only experience subordination by each movement, but they are essentially forced to pick a side in the many instances where the two groups pursue conflicting political agendas.[219] As Crenshaw writes:

> The problem is not simply that both discourses fail women of color by not acknowledging the "additional" issue of race or of patriarchy but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.[220]

Thus, as the #MeToo movement leaves women of color at the margins, this limits the potential of the political action that can address their unique challenges. White women striving for change are aware that if the grievances projected are those of women of color, the movement loses some power and perceived legitimacy. For this reason, throughout history Black women have resorted to creating parallel movements that give voice to their experiences.[221] There are signs that this may have been occurring on Black Twitter, with

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[217] Vickery, *supra* note 206, at 407 ("While the very survival of our nation's Black citizens depends on confronting and dismantling white supremacy in public and private spaces, white feminists have been known to turn a blind eye to issues of injustice affecting Black lives.").

[218] *See* Crenshaw, *supra* note 31, at 1242–45, 1251, 1298 (emphasis added) (discussing different political and legislative events in which institutions have employed racial categories to "systematically subordinate[]" Black people, and particularly women of color); *see also* Vickery, *supra* note 206, at 407.

[219] Crenshaw, *supra* note 31, at 1242. "[W]omen of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas." *Id.* at 1251–52. Moreover, "[a]lthough racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices." *Id.* at 1242.

[220] *Id.* at 1252.

[221] Gina Beavers, *#MeToo? Black Women on the Periphery of a Movement*, VALLEY ADVOC. (Jan. 31, 2018), http://valleyadvocate.com/2018/01/31/metoo-black-women-periphery-movement/ [https://perma.cc/8E3P-E8B9]. Gina Beavers explains, "Historically, black women have had to create parallel campaigns, like Black Feminist Theory, to express our unique experiences." *Id.*

hashtags such as #SurvivingLoudly, which a high school senior started who was a victim of assaults by others in the Chicago music scene[222] and #MuteRKelly.[223] Yet historic trends suggest that even when Black women mobilize in these ways, their stories continue to garner less empathy than those of their white peers.[224] White women, on the other hand, benefit from being the "wives, . . . daughters, . . . [and] mothers" that the overwhelmingly white male politicians in all levels of government visualize when they engage in political activities related to women's rights.[225] We can only bridge this divide once white women acknowledge the privileges from which they have benefitted, and even reinforced, and take action to remedy the past with genuine inclusivity rather than token representation.[226]

At the same time, people of color may worry that attempts to bring awareness to sexual harassment and assault may have a correlative negative impact on the Black community by appearing to confirm deleterious stereotypes.[227] Even Black female victims may want to "protect" Black men by not contributing to #MeToo for the benefit of the Black community, a calculation which inherently reflects a male lens of what is good for the "broader" Black community. The history of slavery and Jim Crow, by its very nature, separated Black women from white women and resulted in Black women aligning their experiences and causes more with Black men, despite the different antiracist goals and efforts between those two groups. Thus, many women of color see white women as their political adversaries because of their whiteness and polit-

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[222] Morgan Greene, *The Fallout from 'Surviving R. Kelly' Was Immediate. Will Fans Renounce Him for Good This Time?*, CHI. TRIB. (Jan. 25, 2019), https://www.chicagotribune.com/entertainment/music/ct-met-r-kelly-documentary-fallout-20190124-story.html [https://perma.cc/SW3C-AJ9X].

[223] Jason Parham, *R. Kelly's Empty Confessions, Meet Black Twitter's Wrath*, WIRED (July 24, 2018), https://www.wired.com/story/r-kelly-black-twitter/ [https://perma.cc/KH26-9CPH]; *#MuteRKelly: Twitter Launches Viral Campaign to End the Pied Piper's Career*, BET (Jan. 25, 2018), https://www.bet.com/music/2018/01/25/mute-r-kelly-campaign-twitter-sexual-abuse.html [https://perma.cc/U7EA-65F9].

[224] Beavers, *supra* note 221.

[225] *See* Carbado & Harris, *supra* note 68, at 2236 (pointing out that "[w]hite women have long benefitted from and negotiated their lives in ways that reproduce white in-group favoritism. When white men think about their wives, their daughters, their mothers, their aunts, and their grandmothers, they are thinking about white women" (footnote omitted)).

[226] Vickery, *supra* note 206, at 408 (noting that white people must collaborate with women of color in the feminist movement to break down white supremacy); *id.* ("This means rejecting harmful stereotypes and racist assumptions and unequivocally declaring and embracing the movement that Black lives matter."); *see* BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (Routledge 2d ed. 2015) (1981). bell hooks explains, "Women's liberationists, white and black, will always be at odds with one another as long as our idea of liberation is based on having the power white men have. For that power denies unity, denies common connections, and is inherently divisive." HOOKS, *supra*, at 156.

[227] Crenshaw, *supra* note 31, at 1253.

ical alignment with white men rather than allies because of their femaleness.[228]

Two prominent examples of this complexity are the accusations against Justice Clarence Thomas and R. Kelly. After Anita Hill's testimony about the nature of her allegations during Justice Thomas's confirmation hearings in 1991, Justice Thomas himself invoked racial stereotypes to discredit the hearings by calling them a "high-tech lynching for uppity Blacks."[229] Crenshaw has described Justice Thomas's loaded language as intentionally suggesting that "sexual harassment is a white women's issue," and that when Black women allege abuse, they are doing nothing more than "betraying the interests" of Black communities.[230] According to one source, Black support of Justice Thomas doubled after his provocative comment.[231]

Nearly twenty years later, similar dynamics were on display in the sexual assault allegations against rapper R. Kelly in 2019. Despite years of allegations preceding the #MeToo movement, and even when women began to speak out more forcefully in the post-#MeToo era, Black women had to uniquely consider the "complicated balance" of their gendered racial identity in making allegations against a prominent Black male.[232] Because R. Kelly was a powerful figure in the Black community, there was significant resistance within the community to contributing to persistent stereotypes about violent Black men, despite the victims being Black as well.[233] Rebecca Leung and Robert Williams argue that the turning point was the documentary *Surviving R. Kelly*, making

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[228] Carbado & Harris, *supra* note 68, at 2233–36. The historical alignment between white women and white men informs the significance of choosing to emphasize intersectional identities when considering how power dynamics impact certain identities. *Id.* For example, consider how the majority of white women consistently fail to vote for the Democratic candidate in presidential elections. *Id.* at 2235–36 ("The majority of white women voters in that electoral cycle voted for the Republican candidate, Donald Trump. Which is to say, they voted in line with the majority of white men." (footnote omitted)).

[229] Sarah E. Heck, *From Anita Hill to Christine Blasey Ford: A Reflection on Lessons Learned*, 39 EQUALITY, DIVERSITY & INCLUSION 101, 105 (2020) (quoting *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, pt. 4, 102d Cong. 157 (1991) (statement of J. Clarence Thomas)).

[230] *Id.*

[231] *Id.*

[232] Leung & Williams, *supra* note 81, at 367.

[233] *Id.* at 365. #MuteRKelly hashtag originator, Oronike Odeleye, believed racial progress was central to the division within the Black community. *Id.* Odeleye explains:

> You have this powerful person that is beloved in the African-American community and then you have a victim that no one cares about. And the greater society perpetuates stereotypes about black women that internally you start to believe. We'll believe if it is a convenient excuse not to have to deal with the reality of R. Kelly and how we have been supporting and enabling him for decades.

Id. (quoting *Surviving R. Kelly: Black Girls Matter* (Lifetime docuseries release Jan. 5, 2019)).

the Black female victims visible to a wider audience, putting their emotional trauma and psychological damage on display to gain empathy and legitimacy.[234] This reinforces the idea that Black victims experience lower levels of empathy when they allege harassment, forcing them to put their trauma on public display to work toward recovery from the abuse they have endured.

The cultural portrayal of Black victims intertwines with *representational intersectionality*, a cultural construction of women of color that omits and disempowers them. The ways that cultural imagery represents Black women (or the lack thereof) serves to crystallize the tropes and stereotypes that contribute to this representational imbalance in the first place.[235] The lack of representation was evident in the media's representation of #MeToo victims as famous and predominately white celebrities, which reinforced marginalization of women of color's experiences within the movement. Although optimists argue that social media activism is capable of building bridges across demographic groups with similar grievances, women of color lacked identification with the online #MeToo movement.[236] Many described #MeToo as "too white for me" because it co-opted Burke's work, and Black women were absent from the core voices and leadership.[237] This representation, and invisibility, may have influenced how much traction the movement gained online as well as the publicity,

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[234] *Id.* at 366. *See generally Surviving R. Kelly: Black Girls Matter*, *supra* note 233 (documenting allegations of sexual abuse against R. Kelly, who, prior to the documentary, had been a prominent rapper).

[235] Crenshaw, *supra* note 31, at 1282 ("[W]hen one discourse [race or gender] fails to acknowledge the significance of the other, the power relations that each attempts to challenge are strengthened. . . . Perhaps the devaluation of women of color implicit here is linked to how women of color are represented in cultural imagery."). Moreover, "the media are persuasive in focusing public attention on specific events, issues, and persons in determining the importance people attach to public matters." Eugene F. Shaw, *Agenda-setting and Mass Communication Theory*, 25 INT'L COMMC'N GAZETTE 96, 96 (1979). In other words, the media determine what topics are relevant and should be talked about in the public. This theory highlights the media's role in determining what the public should be informed about, but it also occurs as a cumulative effect; the more a topic gains publicity, the more it is repeated in the news. *See id.* (theorizing that the media chooses the news that the public consumes). Repetition of a topic is one way the media chooses which topics to show the public and its effects "are more significant when an issue being covered lasts over a greater time interval, while others maintain that the greatest levels of influence occur when information has recently been assigned priority by the media." Natalia Aruguete, *The Agenda Setting Hypothesis in the New Media Environment*, COMUNICACIÓN Y SOCIEDAD, Enero–Abril 2017, at 35, 39 (Mex.). The media has the potential to shape and influence the way the public perceives and forms opinions about a certain issue. The way the media frames an issue "can have a marked impact on one's overall opinion." Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 106 (2007). In addition, framing theory also involves "the interaction between media frames and individuals' prior knowledge and predispositions" and offers the public "alternative ways of defining issues, endogenous to the political and social world." Claes H. de Vreese, *News Framing: Theory and Typology*, 13 INFO. DESIGN J. 51, 52, 53 (2005).

[236] Beavers, *supra* note 221.

[237] *Id.*

mass outcry, and power gained by anti-harassment efforts occurring offline, but potentially to the detriment of women of color.

Many have also argued that women of color, and Black women in particular, did not participate in the online movement because, throughout history, they have been undervalued and their pain has not been taken seriously, both by white women and others.[238] For example, the only women of color who spoke out against Harvey Weinstein, Lupita Nyong'o and Salma Hayek, were also the only two directly denied and rejected of the forty-some allegations. Despite the opportunities for intersectionality that social media seemed to afford, the movement's offline developments reflect it has not met that potential.

C. Racialized Power Dynamics in Offline #MeToo Activity

While social media has been a prominent tool used throughout the #MeToo movement, the hashtag has also spurred traditional offline movement activity, including walkouts, strikes, marches, and protests. Highly publicized offline activism also helped drive several high-profile resignations and greater accountability connected to sexual assault and workplace safety.[239] Similar to online #MeToo activity, however, offline activity is insufficiently intersectional, with protests often focused on the experiences of white, affluent, and educated women. This has led to inadequate policy responses.

For example, the #MeToo social movement organizations managed predominantly by white women have insufficiently incorporated women of color. Some of these organizations have received criticism for this lack of inclusion and have attempted to address these disparities. These organizations, however, have failed to successfully support or use their platform to lobby for legal or social changes that address specific workplace harassment suffered by women of color. In contrast, #MeToo social movement organizations managed predominantly by women of color have been more successfully intersectional.[240] These organizations, some of which predated the #MeToo online movement, benefitted from the increased media attention garnered from #MeToo online activities and have lobbied for new laws and workplace policies for the types of harassment women of color face.[241]

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[238] *Id.*

[239] Williams et al., *supra* note 193, at 382–92.

[240] *See* Just Lunning, *McDonald's Employees Launch 'MeToo' Movement for the Fast Food Chain*, NEWSWEEK (May 22, 2019), https://www.newsweek.com/mcdonaldss-employees-launch-metoo-movement-fast-food-chain-1433430 [https://perma.cc/5NAD-GFNK] (discussing changes McDonald's made after workers protested sexual abuse in the chain's restaurants).

[241] *See* Samantha Raphelson, *Advocates Push for Stronger Measures to Protect Hotel Workers from Sexual Harassment*, NPR (June 29, 2018), https://www.npr.org/2018/06/29/624373308/advocates-push-for-stronger-measures-to-protect-hotel-workers-from-sexual-harass [https://perma.cc/

Some of the offline #MeToo social movement organizations managed predominantly by white women have attempted to be more intersectional, but they have had varying degrees of success. For example, the hashtag #TimesUp, an offshoot of #MeToo, led to an organization called TIME'S UP Now, created by women in the entertainment industry on January 1, 2018 to raise money for the TIME'S UP Legal Defense Fund (the TULDF).[242] TIME'S UP Now has divided advocacy efforts into specific programs for legislation, litigation, industry-specific parity efforts, and public awareness.[243]

The stated purpose of the TULDF is to support low-income women and women of color who have been sexually assaulted or harassed in the workplace.[244] The TULDF was formed, in part, as a response to early critiques that lower income women and women of color were left out of the #MeToo conversation.[245] A majority of the three hundred actresses, female agents, writers, directors, producers, and entertainment executives that created the fund were white, however.[246] High-profile representatives and funders of TIME'S UP Now include white actresses such as Gwyneth Paltrow, Angelina Jolie, and Ashley Judd.[247] Although there are a number of TIME'S UP Now representa-

7QGK-M8RC] (noting that even prior to #MeToo, hotels were taking measures to protect their employees from sexual harassment while on the job).

[242] 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 [https://perma.cc/C78M-GWEC]; *see also* Sierra Brewer & Lauren Dundes, *Concerned, Meet Terrified: Intersectional Feminism and the Women's March*, 69 WOMEN'S STUD. INT'L F. 49, 54 (2018) (discussing the National Women's Health Network, which advocates for "a more inclusive process designed to improve access to quality health care across racial and social class").

[243] *2020 Year in Review*, TIME'S UP Now (Dec. 2, 2020), https://timesupnow.org/2020-year-in-review [https://perma.cc/DX44-ZBD7]. TIME'S UP Now is a 501(c)(4) organization that engages in political lobbying and other affiliate industry-specific groups such as TIME'S UP Advertising, TIME'S UP Tech, TIME'S UP Health Care, and TIME'S UP Entertainment. Press Release, Nat'l Women's L. Ctr., TIME'S UP Legal Defense Fund Awards $750,000 to Organizations Serving Low-Wage Workers Who Experience Sexual Harassment in the Workplace (Aug. 14, 2018), https://nwlc.org/press-releases/times-up-legal-defense-fund-awards-grants-workers-experience-sexual-harassment/ [https://perma.cc/2NN9-VQML]; *About*, TIME'S UP Now, https://timesupnow.org/about/ [https://perma.cc/ZU7P-E27Q]; *Our Work*, TIME'S UP Now, https://timesupnow.org/work/ [https://perma.cc/5JNZ-C4TG].

[244] Buckley, *supra* note 242.

[245] *See* Onwuachi-Willig, *supra* note 159, at 120 (arguing that #MeToo and #TimesUp must fully incorporate intersectionality); Charisse Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY, https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/ [https://perma.cc/3DGB-2UQZ] (discussing how in response to criticism of the #MeToo movement, TIME'S UP Now appointed Lisa Borders as its first Black president and Chief Executive Officer (CEO)).

[246] *See* Letter from Over 1,000 Women Who Work in Film, Television, and Theater to Sisters 3–8 (Dec. 21, 2017), https://assets.documentcloud.org/documents/4339359/Womenhollywood.pdf [https://perma.cc/YUK7-4T6T] (listing the names of the women who signed onto the letter).

[247] *Id.* (listing the prominent women who signed on the TIME'S UP Now Letter); Riley Griffin et al., *#MeToo's First Year Ends with More Than 425 Accused*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/ [https://perma.cc/77GD-4VM2] (listing

tives who are women of color, including Oprah Winfrey, extensive media coverage of the #MeToo and #TimesUp movement has focused on white leaders of the TULDF movement, providing them with high-profile visibility.[248]

The TULDF is housed and administered by the National Women's Law Center Fund, LLC (NWLC).[249] The NWLC provides funding and referrals for legal and public relations support for individuals who have experienced workplace sexual harassment and related retaliation. The actresses and advocates collaborated with NWLC lawyers Tina Tchen, Robbie Kaplan, and Fatima Goss Graves, two of whom are women of color.[250] The defense fund connects individuals experiencing sex discrimination—including sexual harassment—at school, work, or in accessing health care, with attorneys.[251] Participating lawyers agree to provide a free initial consultation to individuals who contact them through the network, and, in some instances, they can take on sexual harassment or other sex discrimination cases free or for a reduced fee.[252]

Since the beginning of 2018, the TULDF has responded to 4,842 requests for legal assistance. Those reaching out to the fund come from every industry, with three quarters of women seeking assistance identifying as low-wage workers.[253] Although the group declared its mission to "show solidarity with survivors of sexual harassment, assault, abuse and related retaliation in all in-

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Angelina Jolie, Gwyneth Paltrow, and Ashley Judd as among those who accused Harvey Weinstein of sexual assault and harassment); Joi-Marie McKenzie, *Golden Globes 2018: Acceptance Speeches Continue Conversation About Sexual Misconduct*, ABC NEWS (Jan. 8, 2018), https://abcnews.go.com/Entertainment/golden-globes-2018-acceptance-speeches-continue-conversation-sexual/story?id=52198987 [https://perma.cc/EC46-MZU4] (discussing Laura Dern's 2018 Golden Globes acceptance speech and those of other winners, where they spoke out against sexual harassment). Additionally, attendees of the 2018 Golden Globes drew attention to both the #MeToo and #TimesUp movements by wearing pins and referencing the movements in multiple acceptance speeches. Griffin et al., *supra*; McKenzie, *supra*; Valeriya Safronova, *Time's Up Pins Are the Political Accessory at the Golden Globes*, N.Y. TIMES (Jan. 7, 2018), https://www.nytimes.com/2018/01/07/fashion/times-up-pins-golden-globes-2018.html [https://perma.cc/CL7D-8KE4].

[248] *See* discussion *infra* Part I.C.

[249] *TIME'S UP Legal Defense Fund*, NAT'L WOMEN'S L. CTR., https://nwlc.org/times-up-legal-defense-fund/ [https://perma.cc/MLM3-WS9H].

[250] *Our Staff*, TIME'S UP FOUND., https://timesupfoundation.org/about/our-leadership/our-staff/ [https://perma.cc/R7TT-QJ4E]. Fatima Goss Graves is the first Black woman ever elected as President and CEO of the National Women's Law Center. Olivia Pandora Stokes, *Fatima Goss Graves, 1st Black Woman President of the NWLC, Leads the Charge on Women's Issues*, WALKER'S LEGACY (Oct. 26, 2017), https://walkerslegacy.com/fatima-goss-graves-1st-black-woman-president-of-the-nwlc-leads-the-charge-on-womens-issues/ [https://perma.cc/5ZHT-N8M4].

[251] *TIME'S UP Legal Defense Fund*, *supra* note 249.

[252] *Id.*

[253] *TIME'S UP Legal Defense Fund: Our Impact*, NAT'L WOMEN'S L. CTR., https://nwlc.org/wp-content/uploads/2018/10/2020.12.10_Update-Stats-Sheet-English.pdf [https://perma.cc/249U-4QQF] (Dec. 10, 2020).

dustries—especially low-income women and people of color," only one-third of women seeking requests identified as women of color.[254] Although the TULDF has not provided demographic data on the race breakdown of requests that have been successfully connected with legal representation, more white women reach out to the TULDF, thus suggesting that women of color are underrepresented.[255] This may be partly due to the fact that even well-intentioned plaintiff's attorneys realize the difficulty in prevailing with these complex intersectional cases given our current legal landscape, and thus they decline to take the risk.

TIME'S UP Now has also attempted to address intersectional disparities by providing funding to nonprofits that specifically serve low-wage workers and women of color. In August 2018, TIME'S UP Now awarded $750,000 in grants to support eighteen nonprofit organizations, including Alianza Nacional de Campesinas (ANDC), and others across the country serving low-wage workers who have experienced sexual harassment and related retaliation in the workplace.[256] ANDC was founded in 2012 and was the first national organization to represent the seven hundred thousand female farmworkers in the United States.[257] One of ANDC's central goals has been to expose the rampant sexual harassment and exploitation on farms.

Although the fundraising for organizations like ANDC is a positive step, TIME'S UP Now has not introduced any proposals tackling reforms to federal provisions that are likely to substantially assist low-wage workers of color, such as ANDC farmworkers. For example, TIME'S UP Now has supported legislation to remedy the lack of federal safety protections for individuals working for businesses with less than fifteen employees, but it has not made it a key issue in 2019 or 2020.[258] Nor has it offered policies that would protect

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[254] *Frequently Asked Questions About the TIME'S UP Legal Defense Fund and the Legal Network for Gender Equity: What Is the TIME'S UP Legal Defense Fund?*, NAT'L WOMEN'S L. CTR., https://nwlc.org/times-up-legal-defense-fund/frequently-asked-questions-about-the-times-up-legal-defense-fund-and-the-legal-network-for-gender-equity/ [https://perma.cc/GHT7-QGKE]; *TIME'S UP Legal Defense Fund: Our Impact*, *supra* note 253. The racial breakdown of those seeking legal assistance is as follows: 58.51% white, 18.79% Black, 7.89% Hispanic/Latinx, and remainder Asian-American/Pacific Islander and Native American. *TIME'S UP Legal Defense Fund: Our Impact*, *supra* note 253. Of those requesting assistance, 75% identified as low income and approximately 10% identified as being a member of the LGBTQ community. *Id.*

[255] *TIME'S UP Legal Defense Fund: Our Impact*, *supra* note 253. The TIME'S UP Legal Defense Fund (TULDF) has funded 254 cases since its inception in January 2018. *Id.*

[256] Press Release, Nat'l Women's L. Ctr., *supra* note 243.

[257] Héctor Tobar, *The Time's Up Initiative Built Upon the Work Done by These Labor Activists*, SMITHSONIAN MAG. (Dec. 2018), https://www.smithsonianmag.com/innovation/times-upinitiative-built-upon-work-labor-activists-180970720/ [https://perma.cc/SR4S-DJP6].

[258] *See TIME'S UP 2020: The Issues*, TIME'S UP NOW (Oct. 22, 2019), https://timesupnow.org/times-up-2020-issues/ [https://perma.cc/7TJU-VDHC] (listing the issues the organization planned to focus on in 2020). TIME'S UP Now asked all 2020 presidential candidates to present their plans for

immigrant workers—many of whom are uniquely vulnerable to sexual harassment while at work and less likely to report incidents of harassment.[259]

Instead, TIME'S UP Now advocacy has focused on proposals for substantive legal policy changes addressing equal pay and prohibition NDAs.[260] The organization announced that it called on 2020 presidential candidates to support pay equity, end sexual harassment, expand access to child care, and increase paid family and medical leave.[261] Although these proposals would seemingly benefit all women in the workplace, none of these proposals directly address issues that are unique to women of color.

Other social movement organizations led predominantly by white women have also failed to successfully incorporate intersectional voices into their offline activities. The 2017 Women's March (Women's March), the largest single-day protest in U.S. history, took place in January after the inauguration of Donald Trump.[262] The event originated the evening after the November 2016

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addressing the following issues: (1) "[e]nding sexual harassment at work"; (2) "[c]losing the gender and racial pay gap"; (3) "[r]ealizing paid family and medical leave"; and (4) "[e]nsuring access to quality, affordable child care." *Id.*; *see also 2019 Year in Review*, TIME'S UP NOW (Dec. 15, 2019), https://timesupnow.org/2019-year-in-review/ [https://perma.cc/3B8V-WRRL] (discussing some of the main issues that TIME'S UP Now focused on in 2019); *Federal Policy: Safety and Respect at Work Shouldn't Stop at State Lines*, TIME'S UP NOW, https://timesupnow.org/work/federal-policy/safety-and-respect-at-work-shouldnt-stop-at-state-lines/ [https://perma.cc/338G-S6RE] (expressing support for the BE HEARD Act, which would mandate workplace protections for those who work at small businesses). Sharyn Tejani, the TULDF Director, has published work advocating for changes to Title VII and has argued to expand coverage to employers with fifteen or more employees. *See* Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INT. L. REV. 237, 241 (2019), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1454&context=pilr [https://perma.cc/P94V-P5U8] (noting that "[a]lthough not discussed in detail in this article, one of the primary changes necessary in Title VII is an increase in coverage").

[259] TIME'S UP Now has launched initiatives to tackle workplace sexual harassment in different industries and for different groups, including the TULDF, TIME'S UP Entertainment, TIME'S UP Advertising, TIME'S UP UK, TIME'S UP Tech, and TIME'S UP Healthcare. *Our Work*, *supra* note 243. After examining all of the federal, state, and corporate policies available on the TIME'S UP Now website, none of the policies mention immigration or immigrant women, and TIME'S UP NOW does not have a separate initiative for immigrant women. TIME'S UP Now has, however, appeared to launch a separate branch, TIME'S UP Women of Color (WOC), but they do not have a separate website documenting their work. *See Women of Color are Leading the Way*, TIME'S UP NOW, https://timesupnow.org/about/women-of-color-are-leading-the-way-at-times-up/ [https://perma.cc/C4BN-EQA2] (explaining that TIME'S UP WOC consists of "working groups specifically designed to build community and spark critical conversations about race").

[260] *2019 Year in Review*, *supra* note 258; *How NDAs Harm Working Women*, TIME'S UP NOW (Feb. 25, 2020), https://timesupnow.org/how-ndas-harm-working-women/ [https://perma.cc/J8E9-3RPF]; *TIME'S UP 2020: The Issues*, *supra* note 258.

[261] *TIME'S UP 2020: The Issues*, *supra* note 258.

[262] Erica Chenoweth & Jeremy Pressman, *This Is What We Learned by Counting the Women's Marches*, WASH. POST: MONKEY CAGE (Feb. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/ [https://perma.cc/789J-M6M4]; Jia Tolentino, *The Somehow Controversial Women's March on Washington*, NEW

election, when attorney Teresa Shook in Hawaii and New York fashion designer Bob Bland separately called on Facebook for a women's protest.[263] Eventually, Shook and Bland, both white women, combined their events.[264] The Women's March has faced criticism since its inception for being mostly a space for women who identify as white and cisgender.[265] In addressing these criticisms, Bland acknowledged that the women who initially began organizing the march were almost all white.[266] Furthermore, the march was originally named the "Million Woman March," appropriating the name of a historic protest for Black women's unity and self-determination that took place in Philadelphia in 1997.[267]

In response to these early critiques, the Women's March organizers asked prominent non-white activists to get involved, including Linda Sarsour, Tamika Mallory, and Carmen Perez.[268] Although this expanded panel of leaders professed to support an intersectional platform, that position in turn invoked some women's "white fragility" and attendant feelings of exclusion, leading to further tension within the, theoretically inclusive, Women's March.[269] Ultimately, interviews conducted both before and during the Women's March suggested that underrepresented women felt that issues that mattered most to them, including racism, discrimination, police brutality, LGBTQ inclusivity, and immigration were relegated in favor of issues that matter most to straight, white,

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YORKER (Jan. 18, 2017), https://www.newyorker.com/culture/jia-tolentino/the-somehow-controversial-womens-march-on-washington/ [https://perma.cc/FX29-CSJC].

[263] Tolentino, *supra* note 262.

[264] *Id.*

[265] Isabella Gomez Sarmiento, *After Controversial Leaders Step Down, the Women's March Tries Again in 2020*, NPR (Jan. 17, 2020), https://www.npr.org/2020/01/17/797107259/after-controversial-leaders-step-down-the-womens-march-tries-again-in-2020 [https://perma.cc/M48D-E6BT].

[266] Tolentino, *supra* note 262.

[267] Jessica Gantt-Shafer et al., *Intersectionality, (Dis)Unity, and Processes of Becoming at the 2017 Women's March*, 42 WOMEN'S STUD. COMMC'N. 221, 222 (2019).

[268] Tehama Lopez Bunyasi & Candis Watts Smith, *Get in Formation: Black Women's Participation in the Women's March on Washington as an Act of Pragmatic Utopianism*, BLACK SCHOLAR, Fall 2018, at 4, 6.

[269] *Id.* For example:

> While the leaders of the March welcomed an intersectional agenda, many white women felt excluded. In response to what some might characterize as white fragility, several Black women noted that this contemporary reaction of many white liberal women to intersectionality—an aim to understand "not only the lived experiences of black women but also how they can be liberated"—too closely mimicked those of previous iterations of white-centered feminist movements.

Id. (footnotes omitted) (quoting Julia S. Jordan-Zachery, *Am I a Black Woman or a Woman Who Is Black? A Few Thoughts on the Meaning of Intersectionality*, 3 POL. & GENDER 254, 257 (2007)).

middle-class women.[270] In 2018, three of the organization's founders resigned following allegations of anti-Semitism.[271] Although supporters of the Women's March organized them again in January 2018 and 2019, the Women's March has failed to generate ongoing popular support or visibility largely due to these internal tensions.

Unsurprisingly, other protests organized by predominantly white women in predominantly white fields have also failed to be inclusive. In October 2018, twenty thousand Google employees walked out of corporate offices in fifty cities after demanding an overhaul of Google's sexual harassment policies, particularly the company's policy of forced arbitration.[272] Of the seven employees who organized the Google Walkout for Real Change (Google Walkout), five were white women.[273] These organizers demanded an end to forced arbitration for all employees, a commitment to pay equity, data on racial and gendered compensation gaps, sexual harassment transparency reports, clearer policies for reporting sexual misconduct, and employee representation on Google's Board of Directors.[274] In response, Google Chief Executive Officer (CEO) Sundar Pichai announced changes to the policies, including optional arbitration for cases of sexual misconduct.[275] The decision followed in the

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[270] *See generally* Brewer & Dundes, *supra* note 242 (interviewing Black women about their perspectives on the Women's March on January 21, 2017). Interviewees suggested that the 2017 Women's March provided white women with a means to protest the election rather than a way to address social injustice disproportionately affecting lower social classes and people of color. *Id.* at 52. Interviewees believe that a racially inclusive feminist movement would remain elusive without a greater commitment to intersectional feminism. *Id.* at 51.

[271] Sarmiento, *supra* note 265.

[272] Jillian D'Onfro, *Google Walkouts Showed What the New Tech Resistance Looks Like, with Lots of Cues from Union Organizing*, CNBC, https://www.cnbc.com/2018/11/03/google-employee-protests-as-part-of-new-tech-resistance.html [https://perma.cc/DGL8-YZ4R] (Nov. 8, 2018); 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/JRS5-6KCU].

[273] *See* Claire Stapleton et al., *We're the Organizers of the Google Walkout. Here Are Our Demands*, THE CUT (Nov. 1, 2018), https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html [https://web.archive.org/web/20210312044422/https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html] (listing the walkout organizers as Claire Stapleton, Tanuja Gupta, Meredith Whittaker, Celie O'Neil-Hart, Stephanie Parker, Erica Anderson, and Amr Gaber).

[274] *Id.*

[275] Jillian D'Onfro, *Google CEO, in Internal Memo, Supports Employee Walkout in the Wake of Report on Sexual Misconduct*, CNBC, https://www.cnbc.com/2018/10/30/google-ceo-sundar-pichai-supports-employee-walk-out-in-memo.html [https://perma.cc/FPN7-MFTT] (Oct. 31, 2018); Avery Hartmans & Paige Leskin, *Here's the Memo Google CEO Sundar Pichai Sent to Employees on the Changes to Google's Sexual-Harassment Policy After the Walkout*, BUS. INSIDER (Nov. 8, 2018), https://www.businessinsider.com/google-ceo-sundar-pichai-memo-changes-sexual-harassment-policy-2018-11 [https://perma.cc/2QDR-2H4W].

footsteps of similar policy changes made by other tech giants, including Microsoft and Uber.[276] Facebook followed suit soon thereafter.[277]

The Google Walkout protesters acknowledged the technology industry's issues with racial inequality and advocated for greater transparency on racial compensation gaps.[278] The organizers' demands, however, neglected larger social or workplace issues faced by minority groups. For example, the organizers' demands failed to discuss workplace discrimination faced by racial and ethnic minorities, particularly women of color, beyond pay equity. Although women in every racial and ethnic group are significantly underrepresented in the tech sector relative to men, the gaps for Asian, Black, and Latinx women are staggering. Roughly 49% of the tech sector is represented by white men.[279] 16% of the tech sector is represented by white women, in comparison to only 5% of Asian women, 3% of Black women, and 1% of Latinx women.[280]

Google's responses to the Google Walkout similarly neglect the intersectional challenges faced by women of color. For example, Google's move to end forced arbitration only involved cases of sexual harassment, and it did not include racial harassment or other cases of workplace discrimination.[281] The company also failed to respond to organizers' demand for pay-data transparency that may help identify racial and intersectional compensation gaps.

In sum, the offline protest activity of social movements predominantly organized by white women in the wake of #MeToo suggests that their advocacy has targeted social and legal issues that are particularly important to middle-class or affluent white women. Many of these groups have advocated for pay equity and an end to mandatory arbitration and NDAs in sexual harassment cases. Although other racial and social groups may benefit from these policies,

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[276] 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/X4BH-RUVQ].

[277] *Id.*

[278] Jake Kanter, *The Google Walkout Protesters Are Demanding That the Company Take Action on 'Systemic Racism,'* BUS. INSIDER (Nov. 9, 2018), https://www.businessinsider.com/google-walkout-protestors-demand-action-on-systemic-racism-2018-11 [https://perma.cc/JHV7-5GTY].

[279] MCKINSEY & CO. & PIVOTAL VENTURES, REBOOTING REPRESENTATION: USING CSR AND PHILANTHROPY TO CLOSE THE GENDER GAP IN TECH 20 (2018), https://127j5241bcgw285yu54bgh7m-wpengine.netdna-ssl.com/wp-content/uploads/Rebooting-Representation-Report.pdf [https://perma.cc/3QHQ-6JSA].

[280] *Id.*

[281] *See* Johana Bhuiyan, *The Google Walkout: What Protesters Demanded and What They Got*, L.A. TIMES (Nov. 6, 2019), https://www.latimes.com/business/technology/story/2019-11-06/google-walkout-demands [https://perma.cc/HY2E-L5CC] (noting that in response to the Google Walkout for Real Change, Google ended forced arbitration in cases of sexual harassment). *See generally* CATHERINE D'IGNAZIO & LAUREN F. KLEIN, DATA FEMINISM (2020) (exploring the inherent discrimination in data science and tech through an intersectional feminist lens).

they do not specifically address policies or problems unique to low-wage workers or women of color.

By contrast, social movements organized predominantly by women of color have been more successful in acknowledging and advocating for intersectional social and legal policies. Organizations led by women of color and specific to low-wage workers have a better understanding of these issues. In September 2018, for example, McDonald's employees organized the first ever multi-state strike against the company's existing sexual harassment policies.[282] The workers carried signs that said #MeToo "with the first letter styled to look like the McDonald's golden arches" and wore tape over their mouths.[283] Working class women of color predominately led the strike.[284] By May 2019, over twenty employees had filed legal action against McDonald's claiming that sexual assault occurred while they were on the job.[285] In August 2019, McDonald's announced that it would initiate mandatory training for all employees at U.S. restaurants for workplace anti-harassment.[286] McDonald's CEO resigned a few months later after disclosing his romantic involvement with another employee.[287]

Although the McDonald's protest focused on sexual harassment policies, the organizers also advocated for other social and legal issues indirectly related to harassment that would lead to greater equality and empowerment of low-wage workers and women of color. For example, the strike's organizers also demanded increased union rights and advocated for fifteen-dollar hourly pay.[288] These demands are important because Blacks, Latinxs, and women are

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[282] Jessica Corbett, *#MeToo Movement Takes on McDonald's as Workers Strike Against Sexual Harassment 'Epidemic,'* COMMON DREAMS (Sept. 18, 2018), https://www.commondreams.org/news/2018/09/18/metoo-movement-takes-mcdonalds-workers-strike-against-sexual-harassment-epidemic [https://perma.cc/6PCX-CVQA].

[283] Rachel Abrams, *McDonald's Workers Across the U.S. Stage #MeToo Protests*, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/business/mcdonalds-strike-metoo.html [https://perma.cc/994S-YKUX]; Melena Ryzik, *In a Test of Their Power, #MeToo's Legal Forces Take on McDonald's*, N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/business/mcdonalds-female-employees-sexual-harassment.html [https://perma.cc/F553-7PCE].

[284] Corbett, *supra* note 282.

[285] Lunning, *supra* note 240.

[286] Associated Press, *McDonald's Boss Latest CEO to Be Ousted Over Relationship with Employee*, N.Y. POST (Nov. 5, 2019), https://nypost.com/2019/11/05/mcdonalds-boss-latest-ceo-to-be-ousted-over-relationship-with-employee/ [https://perma.cc/WH2V-PR5L]. The training, however, was only mandatory for McDonald's employees—McDonald's did not allow their franchises to offer the training. *Id.*

[287] *Id.*

[288] Alexia Fernández Campbell, *McDonald's Workers Are Striking and Suing the Company—in the Same Week*, VOX (May 21, 2019), https://www.vox.com/policy-and-politics/2019/5/21/18633995/mcdonalds-workers-strike-sexual-harassment [https://web.archive.org/web/20210301204639/https://www.vox.com/policy-and-politics/2019/5/21/18633995/mcdonalds-workers-strike-sexual-harassment].

overrepresented among those who make less than fifteen dollars an hour,[289] and workers of color, including Native Americans, Blacks, Latinxs, and Pacific Islanders often receive the most benefits from union protection.[290] Unions are shown to better represent low-wage workers' interests through collective bargaining agreements, resulting in better employment and salary agreements, and through advocating for legislative policies that protect workers' rights.[291]

UNITE HERE, a labor union for the hospitality industry employees, teamed up with union leaders in cities such as Chicago, Seattle, and Washington, D.C. to organize massive campaigns advocating for hotels to provide panic buttons to hotel workers.[292] Major hotel chains, including Marriott, Hilton, and Hyatt, subsequently introduced policies to provide panic buttons at all of their properties by 2020.[293] UNITE HERE represents three hundred thousand people working in the United States and Canada.[294] Membership consists mostly of people of color and women.[295] In addition to advocating for panic buttons, UNITE HERE members also protested against hotel chains for subpar wages and inadequate healthcare.[296] As a result, in December 2018, union members' contracts with Marriott incorporated a guarantee of GPS-enabled panic buttons for housekeepers, a ban on guests with a history of sexually harassing workers, and a historic level of wage and benefit increases.[297]

These landmark outcomes reflect the vital importance of including and addressing the interests of marginalized groups within the larger movement for workplace and societal sex equality. An inclusive approach is necessary be-

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[289] LAURA HUIZAR & TSEDEYE GEBRESELASSIE, NAT'L EMP. L. PROJECT, WHAT A $15 MINIMUM WAGE MEANS FOR WOMEN AND WORKERS OF COLOR 2 (2016), https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf [https://perma.cc/SPU6-QJ4M].

[290] Folayemi Agbede, *The Importance of Unions for Workers of Color*, CTR. FOR AM. PROGRESS (Apr. 4, 2011), https://www.americanprogress.org/issues/economy/news/2011/04/04/9402/the-importance-of-unions-for-workers-of-color/ [https://perma.cc/V6FU-8T9B].

[291] In 2020, 7.2 million employees in the public sector belonged to a union, compared with 7.1 million workers in the private sector. Economic News Release, U.S. Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members—2020, USDL-21-0081 (Jan. 22, 2021), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/JJ3G-4HGY]. Among major race and ethnicity groups, Black workers had a higher union membership rate in 2020 (12.3%) than workers who were white (10.7%), Asian (8.9 %), or Hispanic (9.8%). *Id.*

[292] Raphelson, *supra* note 241.

[293] Dee-Ann Durbin, *Major Hotels Giving Panic Buttons to Staff Nationwide*, AP NEWS (Sept. 6, 2018), https://apnews.com/639f2a593016463a978bdf426f4b8307 [https://perma.cc/6L95-4RMR].

[294] *Who We Are*, UNITE HERE!, https://unitehere.org/who-we-are/ [https://perma.cc/9RUZ-FG2U].

[295] *Id.*

[296] *See* Alexia Fernández Campbell, *Marriott Workers Just Ended the Largest Hotel Strike in US History*, VOX (Dec. 4, 2018), https://www.vox.com/policy-and-politics/2018/12/4/18125505/marriott-workers-end-strike-wage-raise [https://web.archive.org/web/20210301205155/https://www.vox.com/policy-and-politics/2018/12/4/18125505/marriott-workers-end-strike-wage-raise] (noting that the strike resulted in workers receiving panic buttons and increased wages).

[297] *Id.*

cause it is important to be aware of, acknowledge, and address specific intersectional harms. Taking an inclusive approach also models the kinds of equal relationships that are appropriate across other dimensions, such as race, sexual orientation, gender orientation, and disability. Moreover, a range of different strategies is necessary to spur societal change. Focusing on a singular strategy, such as legal reform, may obscure larger institutional and societal issues.

III. Reforms Proposed to Protect Women of Color

A multifaceted approach is required to address the complexity of harassment in the workplace and the very real limitations of the law protecting women of color. I propose comprehensive reform that includes legal, organizational, and cultural shifts. This strategy will benefit all victims of harassment and is particularly critical for women of color.

In Section A of this Part, I analyze proposed legal reforms at the federal and state level.[298] Although these reforms attempt to create stronger protections against sexual harassment, they have inadequately dealt with race or intersectional identities. In Sections B and C, I proceed to discuss how it is also important to strive for parallel organizational[299] and cultural[300] changes, respectively.[301] Even if we are able to secure stronger legal remedies that specifically address intersectionality, progress will be limited without broader attitudinal and structural shifts. Many of the organizational and cultural reforms I propose are not new, but they have not been implemented or have faced resistance, which limits the potential of legal change. Nonetheless, I re-introduce them here to emphasize that systemic change that will meaningfully impact the lives of women of color will never occur with policy change alone. The collective voices speaking out against sexism and racism in recent years and months have raised awareness and may provide the momentum and platform to shift attitudes and behavior on a broader scale.

A. Proposed #MeToo Legal Remedies Come Up Short

Although #MeToo may have prompted more victims to seek justice and accountability, our current anti-discrimination laws are weak, which means that long-term change will be limited if the movement does not lead to more significant legal reform. This particularly impacts women of color because, as described above, they are more marginalized and excluded under current anti-

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[298] *See* discussion *infra* Part III.A.

[299] *See* discussion *infra* Part III.B.

[300] *See* discussion *infra* Part III.C.

[301] *See* Matsuda, *supra* note 3, at 326–27 (introducing the main ideas underlying Critical Legal Studies, which "is characterized by skepticism toward the liberal vision of the rule of law").

harassment legal protections than white women.[302] #MeToo, however, has inspired activists to push for legal changes addressing the need for stronger federal and state protections against sexual harassment.

To examine the actual and potential policy changes following #MeToo, my research team reviewed all proposed, passed, and pending state and federal legislation that explicitly addresses sexual harassment and gender equity from October 2016 to January 31, 2020.[303] 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."[304]

Despite the surge in bills, the state and federal remedies proposed thus far in the #MeToo movement have inadequately dealt with race or intersectional identities. For example, few of the proposed bills address the specific issues and legal gaps discussed above that uniquely impact women of color. Rather, a significant number of bills directly address issues that predominantly white female activists of the #MeToo movement have popularized in the media. From October 2016 to January 31, 2020, fewer than 30 of 841 bills introduced in state legislatures dealing with workplace harassment incorporated the words "race," "minority," "minorities," or "ethnicity."[305] Less than ten of the bills introduced included the words "sexual orientation" or "gender identity." None of the bills introduced at the state level used the word "intersectional" or "intersectionality."[306] None of the bills introduced at the state level incorporated the words "immigrant(s)" or "women of color."

Instead, the proposed state and federal remedies primarily address pay equity, sexual harassment training, and prohibitions on mandatory arbitration

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[302] *See* discussion *infra* Part II.

[303] My research team includes research assistant Austin Donohue and librarian Savanna Nolan. Methodology: using Legiscan, we performed a legislative search for each state for the legislative sessions incorporating bills introduced from October 2016 to present (2017, 2018, 2019, and 2020 legislative sessions). 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.

[304] *See* Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, PEW CHARITABLE TRS. (July 31, 2018), https://pew.org/2M66sSP [https://perma.cc/792G-HSAX] (discussing changing state laws in regards to NDAs, rape kits, statutes of limitations, and the sexual misconduct policies of state legislatures); Alisha Haridasani Gupta, *Meet the State Senator Shifting California's Workplace Culture*, N.Y. TIMES, https://www.nytimes.com/2020/09/23/us/california-state-senator-gender-equality-laws.html [https://perma.cc/YWX4-2Q7L] (Nov. 10, 2020) (discussing new bills on sexual assault and harassment).

[305] *See supra* note 303 and accompanying text (discussing my research methodology).

[306] *See supra* note 303 and accompanying text; *see also* Dataset, Jamillah B. Williams, *supra* note 4 (listing recent state legislation that addresses sexual harassment).

and NDAs.[307] Although these remedies seemingly benefit all women, many neglect to identify or adequately address problems that particularly challenge women of color. For example, numerous states have introduced legislation to end mandatory arbitration and NDAs in sexual harassment cases.[308] From October 2016 to January 31, 2020, fifteen states introduced legislation prohibiting employers (or in some cases government officials) from requiring employees to participate in mandatory arbitration.[309] Twenty-one states introduced legislation prohibiting NDAs for employees concerning allegations of sexual harassment.[310] Most of the legislation proposed, however, would only limit mandatory arbitration and NDAs for claims of sexual harassment or assault.[311] As a result, those experiencing intersectional harassment or discrimination based on other protected characteristics, including race, ethnicity, or national origin, may still be vulnerable to these types of agreements.[312]

By attempting to remedy discrimination against women, without considering the reality in which women of color or other groups with intersectional identities, live, legal remedies will ultimately fail to identify and address the discrimination these individuals face.[313] A few states have attempted to offer expanded legal protections that better address intersectional identities. The New York legislature, for example, has passed a series of bills that include sweeping changes aimed at strengthening protections for workers of any protected class who face discriminatory harassment in the workplace.

The most significant changes to New York's new legislation include:

- Eliminating the settled "severe or pervasive" standard from discriminatory and retaliatory harassment cases;
- Prohibiting an employer from relying upon the *Faragher/Ellerth* defense to avoid liability. The fact that an individual did not make a harassment

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[307] JOHNSON ET AL., *supra* note 115, at 2, 4.

[308] In recent years, several state legislatures have sought to reinstate victims' right to share their stories, including those of New York and California. *Id.* at 5, 6. Although these bills vary both substantively and in terms of their success in getting passed, they aim to restore public disclosure and transparency to the process. *Id.* at 6.

[309] Dataset, Jamillah B. Williams, *supra* note 4.

[310] *Id.* (finding that three other jurisdictions, New Mexico, Oregon, and Washington D.C., introduced legislation prohibiting NDAs that was not limited to allegations of sexual harassment).

[311] *Id.*

[312] In 2018 and 2019, only six states—Maryland, New York, Vermont, Washington, Illinois, and New Jersey—passed laws limiting or prohibiting the use of mandatory arbitration agreements. JOHNSON ET AL., *supra* note 115, at 9 (noting that the laws in Maryland and Vermont are specific to sexual harassment claims, while the other state laws cover any claim brought under federal or state antidiscrimination laws).

[313] Leung, *supra* note 7, at 85; Matsuda, *supra* note 3, at 325–26, 331 (explaining that "the actual experience, history, culture, and intellectual tradition of people of color in America" is necessary to incorporate the bottom-up approach to legal reform).

complaint to their employer will not be determinative of whether an employer is liable;
- Extending the statute of limitations to three years for sexual harassment complaints under the New York State Human Rights Law;
- Prohibiting mandatory arbitration of all claims of discrimination—an expansion from existing legislation, which prohibited mandatory arbitration of sexual harassment claims only; and
- Prohibiting employers from including nondisclosure provisions in settlement agreements for all claims of discrimination—not only sexual harassment claims—unless the condition of confidentiality is the plaintiff's preference.[314]

A few other states have enacted similar legislation with strengthened protections.[315] For example, California has begun to make some incremental progress with additional legislation that will specifically reach women of color. In 2017, California passed a bill that added a section to the California Labor Code pertaining to farm labor contractors' requirement to provide sexual harassment trainings to employees.[316] California has the largest number of farmworkers in the United States.[317] California also introduced legislation addressing sexual

[314] Joseph Blalock & Margo Wolf O'Donnell, *New York Harassment Law—A New Frontier?*, JD SUPRA, https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=1f185ef3-b2ce-48ca-b79e-6bd6525e6184 [https://perma.cc/93DM-KSYY]. Plaintiffs will need to meet the lower standard of demonstrating that the alleged harassment rises above the level of "petty slights and trivial inconveniences." *New Workplace Discrimination and Harassment Protections*, N.Y. STATE DIV. OF HUM. RTS., https://dhr.ny.gov/workplaceharassment [https://perma.cc/CR36-FSKW].

[315] For example, Maryland has also introduced legislation that would extend certain protections for all types of harassment, not just sexual- or gender-based. JOHNSON ET AL., *supra* note 115, at 5. States have also sought to cover more workers and smaller employers. *Id.* Since 2018, two states, New York and Maryland, have passed laws extending provisions protecting employees from all types of harassment to all employers regardless of size. *Id.* (noting New York City also enacted a similar law); *see* Alexia Fernández Campbell, *Kamala Harris Just Introduced a Bill to Give Housekeepers Overtime Pay and Meal Breaks*, VOX (July 15, 2019), https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act [https://web.archive.org/web/20210311155318/https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act] (discussing proposed legislation that would extend federal anti-harassment protections to domestic workers). Oregon extended their statute of limitations for filing any discrimination claim to five years. JOHNSON ET AL., *supra* note 115, at 10. Oregon was the only state in 2018 or 2019 to pass a law that also extends the statute of limitations on filing any discrimination claim, not just sexual harassment. *Id.* Connecticut extended the statute of limitations for filing sexual harassment to three hundred days. *Id.* Maryland extended the statute of limitations for filing sexual harassment claims in court to between two and three years. *Id.*

[316] Cal. State S., S.B. 295, 2017–2018 Leg., Reg. Sess. (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB295 [https://perma.cc/R27Q-Q9J6].

[317] AGUIRRE INT'L, THE CALIFORNIA FARM LABOR FORCE: OVERVIEW AND TRENDS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 5 (2005), https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/CalifFarmLaborForceNAWS.pdf [https://perma.cc/7SJT-MWWA] (estimating that over a third of farmworkers in the U.S. work in California); *see* Cal. State S., S.B. 530,

harassment training in other low-wage positions, including janitorial work and construction.[318] This legislation passed after janitors in California, self-identified as predominantly immigrant women of color, organized well-publicized protests targeting workplace sexual harassment beginning in early 2016.[319] California and other states, including Hawaii, Massachusetts, Oregon, Connecticut, Illinois, and Nevada have all passed a domestic workers' bill of rights.[320] The #MeToo movement will be unable to effectuate broader change, however, until more of the state and federal remedies address these intersectional issues. State legislative proposals pushing for prohibitions on mandatory arbitration and NDAs should seek to extend those protections to all forms of harassment and discrimination, including racial and intersectional forms of discrimination. Similarly, states seeking extensions to the statute of limitations should propose laws that extend the statute of limitations for all state-based harassment and discrimination claims. State representatives seeking progress in advancing protections against sexual harassment should also not ignore key issues that have a salient impact on women of color, including protections based on immigration status and higher wages.

Incorporating novel intersectional theories of harassment into legal remedies will also offer broader protections for more women. A doctrinal framework based on a dichotomous "because of race" or "because of sex" analysis fails to address the reality of multifactored categories, such as racialized sex harassment.[321] Thus, these reforms will continue to inadequately address social, structural, and legal factors that perpetuate sexual harassment for women of color. In addition to sex harassment law, intersectional theories are needed to address gaps in protection in a range of other contexts, such as racialized

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2019–2020 Leg., Reg. Sess. (Cal. 2019) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB530 [https://perma.cc/5ARC-Y6W7] (requiring sexual harassment training for "migrant and seasonal agricultural workers"); Cal. State Assemb., A.B. 1978, 2015–2016 Leg., Reg. Sess. (Cal. 2016) https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1978 [https://perma.cc/D6WT-42PK] (providing sexual harassment prevention training for all employers).

[318] A.B. 1978.

[319] Bernice Yeung, *A Group of Janitors Started a Movement to Stop Sexual Abuse*, FRONTLINE (Jan. 16, 2018), https://www.pbs.org/wgbh/frontline/article/a-group-of-janitors-started-a-movement-to-stop-sexual-abuse/ [https://perma.cc/E8JV-XVUS]. Service Employees International Union-United Service Workers West (SEIU-USWW), the union which represents janitors in California, stated that the majority of 225,000 janitors in the union were immigrants, 70% of whom were women. *Janitors: USWW Stands for Family*, SEIU-USWW, https://www.seiu-usww.org/janitors/ [https://perma.cc/2Y6B-PY4H]; Yeung, *supra*.

[320] Campbell, *supra* note 315.

[321] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (forbidding employers to discriminate against employees based on either "race" or "sex").

religious harassment, racialized disability harassment, and gender-based age harassment.[322]

Although state and federal legislatures should continue to pursue reforms, new laws will do little to stop harassment against women of color until there is broad recognition of entrenched racial and economic disparities in the legal system, and society more broadly, and of how those disparities serve to "legitimate existing maldistributions of wealth and power."[323] Just as existing law has failed to address the unique experiences of women of color, proposed reforms will also fail absent significant institutional, cultural, organizational, and social changes.[324]

B. Organizational Reform

In all likelihood, we will not see swift and effective legal reform that is wide-reaching enough to better protect women of color.[325] Even without significant changes in law, employers can take steps to protect women of color from harassment. Although all organizations suffer from structural discrimination and implicit biases, they can institute changes to policies and workplace culture without waiting or relying on state or federal legislatures to act.[326] I propose that employers use their power to create a workplace culture that values women of all races and across the organizational ladder. Specific policy changes include ending mandatory arbitration, ending secrecy around harassment,

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[322] *See* Chew & Kelley, *supra* note 15, at 92–94 (discussing the impact of concurrent race claims with other kinds of intersectional claims).

[323] Matsuda, *supra* note 3, at 325, 327 (expressing that "[w]hen notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge").

[324] *See* discussion *infra* Part II.

[325] Substantive legal reform would require significant changes to how the broader culture views harassment and discrimination. *See* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 40 (2001) (arguing "that our understandings and uses of both law and culture are plastic—they cannot help but change and evolve—and that their evolution is mutually informed").

[326] *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) (explaining that courts and legislatures have failed to adequately address "structural employment inequalities"); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV., 91, 92 (2003) (noting that both structural and unconscious bias play a role in discrimination in the workplace); Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 480 (2000) (pointing out that implicit biases and structural discrimination "cannot be erased without a conscious effort"); Deana A. Pollard, *Unconscious Bias and Self-critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 916 (1999) (indicating that unconscious bias may be a large driving force behind discrimination); Sturm, *supra* note 123, at 460 (noting that "second generation manifestations of workplace bias are structural, relational, and situational"); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005) (explaining that Title VII is not equipped to handle discrimination posed by unconscious bias).

making reporting more accessible, adopting effective anti-harassment policies, and holding those who violate those policies accountable.

1. End Mandatory Arbitration Agreements

Organizations sincerely committed to improving the workplace and ensuring basic dignity for all workers should eliminate mandatory arbitration clauses in employment contracts for all types of harassment and discrimination. As discussed above, women of color are more likely to be denied access to courts due to mandatory arbitration. These agreements favor employers and the confidential proceedings exacerbate information asymmetry by enabling organizations to hide workplace toxicity from other employees and from the public. Without public displays of accountability and a fair process, this arbitration system deters the most vulnerable victims from speaking up, perpetuating and reinforcing the cycle of harassment.[327] Even with needed legislative reforms, courts cannot fulfill their enforcement responsibilities unless workers are able to assert their legal rights, resulting in precedent based on judicial interpretations that appropriately advance the law.[328]

2. End Secrecy

Organizations should not force victims to remain silent on issues of discrimination and harassment. Many organizations force employees to sign employment contracts with secrecy clauses, including NDAs or nondisparagement agreements. Settlement agreements generally include nondisclosure clauses, and the clauses often prohibit the employee from discussing any discrimination or harassment issues that were the subject of the settlement. As discussed above, the consequences for violating these secrecy provisions have a disproportionate impact on low-wage workers, many of whom are women of color who cannot pay the fees associated with disclosure.[329] These provisions allow an employer to conceal a pervasive culture of harassment, preventing workers from knowing about workplace dangers and making them vulnerable to ongoing conduct.

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[327] *See* Tippett, *supra* note 117, at 236–37 (discussing the necessity for fair and transparent anti-discrimination polices).

[328] *See* RAYMOND F. GREGORY, UNWELCOME AND UNLAWFUL: SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE 203, 208 (2004) (discussing how arbitration removes sexual harassment from the judicial process).

[329] *See* Tippett, *supra* note 117, at 249–51 (discussing problems employees face when attempting to reveal harassment to the public); Prasad, *supra* note 117, at 2513–15 (discussing why courts enforce NDAs and the penalties victims of harassment face if they violate their NDAs).

3. Make Reporting More Accessible and Responsive to Challenges Facing Women of Color

Employers with inadequate or confusing reporting procedures make employees vulnerable to ongoing harassment and discrimination.[330] Workplace harassment is prevalent in low-wage work, where there is often no official complaints process.[331] A lack of clear policies may make employees less willing or able to report harassment, particularly if the harassing employee is their manager, in their supervisorial chain, or a senior executive.[332] Language barriers may also prevent non-English speakers from reporting incidents of workplace harassment, making reporting difficult for particularly vulnerable populations.[333] Employers should regularly inform employees that reporting any incident of harassment or discrimination is encouraged and make the reporting policies widely available to all employees, not just managers.[334] Importantly, all employees, should include non-English speakers or employees with disabilities. The reporting process itself should clearly indicate the reporting channels for individual employees and should provide multiple reporting options for employees. For example, some companies are creating confidential reporting channels to the board of directors for sexual harassment allegations against senior management, as often the normal channels lead to those same individuals. Other companies are creating specific reporting email inboxes or hotlines that are monitored by appropriate personnel. Many organizations are also establishing accessible, neutral and confidential ombuds offices to help employees discuss their concerns and navigate various reporting options.[335]

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[330] *See* ELYSE SHAW ET AL., INST. FOR WOMEN'S POL'Y RSCH., BRIEFING PAPER NO. B376, SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS 7 (2018), https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf [https://perma.cc/W544-NURL] (pointing out the costs of sexual harassment to both employees and employers, and recommending that "[e]mployers should adopt and maintain comprehensive anti-harassment policies" as one way to prevent these costs).

[331] *See id.* at 2–3 (noting among the jobs in which workers are most vulnerable to harassment include the tip-based, janitorial, domestic care, hospitality, agricultural, food processing, and garment industries).

[332] *See generally* FELDBLUM & LIPNIC, *supra* note 5.

[333] Malone, *supra* note 21 ("For women who don't speak English . . . it can be challenging to know how to report something up the chain of command.").

[334] For example, companies can prominently display the policy in communal workspaces within the organization and send quarterly emails to all employees reminding them of the reporting process.

[335] *See* Lily Zheng, *Do Your Employees Feel Safe Reporting Abuse and Discrimination?*, HARV. BUS. REV. (Oct. 8, 2020), https://hbr.org/2020/10/do-your-employees-feel-safe-reporting-abuse-and-discrimination [https://perma.cc/Q6MB-W5RF] (noting that 13% of American companies have an ombuds office to provide employees with an "off-the-record" outlet for reporting workplace abuse); *see also Ombudsman*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/ombudsman [https://perma.cc/AV5X-MTBG] (defining an "ombudsman" as "one that investigates, reports on, and helps settle complaints").

4. End Shallow Compliance Mechanisms and Adopt Practices That Work

Employers should develop robust new practices that ensure meaningful compliance with workplace harassment and discrimination policies. Currently, many organizations have harassment and discrimination policies that focus on minimizing employer liability.[336] This focus is misplaced, as it does not serve to educate employees on how they and others experience discrimination in the workplace, at both a micro and macro level, nor does it attempt to resolve those disparities. The focus should be less on employer liabilities and how to avoid them, and it should be more on the behaviors and communications that can create a workplace culture free of harassment and bullying.

To improve workplace practices as a whole, companies can incorporate performance criteria for incentive-based compensation centered on improving workplace practices. In addition, employers should incorporate policies that will encourage bystanders to feel responsible for workplace culture and encourage them to intervene on behalf of victims and report incidents. Employer compliance procedures should provide specific details as to how the company will investigate the complaint and the timeline for the investigation. Each complaint should have robust documentation and tracking of allegations, including maintaining records for a minimum of three to five years after an employee has left the company. Employers must also ensure that perpetrators of workplace harassment and discrimination will suffer consequences. For example, companies can incorporate clear penalties, including termination or reductions in future compensation for perpetrators.

C. Cultural Reform

Lastly, cultural reform is required to ensure that the legal and organizational changes are effective and sustainable over time to make a lasting impact on the lives of women. This includes slowly breaking down both the obvious and subtle forms of racism and sexism that are deeply ingrained into our society and institutions. Equity and spreading resources and dignity will shift the current status hierarchy and disrupt existing privileges (white supremacy and patriarchy) that will no doubt lead to some backlash. We can only attempt to be conscious of this and minimize it to the extent possible. Other concrete steps that will lead to broader cultural change include: (1) having a better representation of women of color in leadership who can identify with intersectional issues; (2) ensuring race and gender pay equity and minimum living standards so women of color are less

[336] Lauren B. Edelman, *What's the Point of Sexual Harassment Training? Often, to Protect Employers.*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/outlook/whats-the-point-of-sexual-harassment-training-often-to-protect-employers/2017/11/17/18cd631e-c97c-11e7-aa96-54417592cf72_story.html [https://perma.cc/DD8X-PLBB].

often in subordinate positions; (3) changing norms around harassment starting with our youth; and (4) strengthening collective efforts so that women of color have more power in the labor market and individual workplaces.

1. Women of Color in Leadership

It is essential that leadership positions include women of color to enact structural change. At the legislative level, although there have been recent changes to the number of women elected to public office, there is still a significant gap in the number of women of color elected as officials.[337] Major executive positions at prominent businesses in the United States continue to be predominantly white- and male-dominated.[338] Women of color are similarly underrepresented in the judiciary.[339] It is unrealistic to expect that individuals with little to no understanding or experience with intersectional identities would be able to resolve these issues or to prioritize them.

Moreover, there is a historically entrenched cultural acceptance of inappropriate sexual behavior by men in power, particularly elected officials and senior executives in multi-million-dollar organizations.[340] This culture of inappropriate behavior has not escaped the judiciary, with evidence to suggest that judges engage in sexually harassing behavior.[341] Therefore, it is unsurprising, that judges would be dismissive or would fundamentally misunderstand claims of sexual harassment, and even more so intersectional harassment, granting

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[337] *See Women of Color in Elective Office 2019*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/women-color-elective-office-2019 [https://perma.cc/J6G7-522E] (noting that in Congress, 38.1% of the women elected to office are women of color, but explaining that in state elective executive offices, only 18.7% of the elected women are women of color).

[338] DELOITTE & ALL. FOR BD. DIVERSITY, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON *FORTUNE* 500 BOARDS 3 (2019), https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/missing-pieces-fortune-500-board-diversity-study-2018.html [https://perma.cc/YW27-UK7X]. Only 5.8% of minority women are board members in Fortune 100 companies, only 4.6% of board members in Fortune 500 companies, and only 4% of women of color have positions as C-suite executives in Fortune 500 companies. *Id.* at 4, 17; MCKINSEY & CO. & LEANIN.ORG, WOMEN IN THE WORKPLACE: 2019, at 9 (2019), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2019.pdf [https://perma.cc/DVQ4-3DXV].

[339] Danielle Root, *Women Judges in the Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 17, 2019), https://cdn.americanprogress.org/content/uploads/2019/10/16123531/JudicialDiversityFactsheet-women.pdf [https://perma.cc/S7PT-88FJ]. For example, "[a]mong all sitting federal judges, only 92—or 6.7 percent—are women of color. Among all active federal judges, only 80—or 10.4 percent—are women of color." *Id.*

[340] Chaudry, *supra* note 106, at 222. *See generally* JAMILLAH BOWMAN WILLIAMS, GEORGETOWN UNIV. L. CTR., #METOO AND PUBLIC OFFICIALS: A POST-ELECTION SNAPSHOT OF ALLEGATIONS AND CONSEQUENCES (2018), https://www.law.georgetown.edu/wp-content/uploads/2018/11/MeToo-and-Public-Officials.pdf [https://perma.cc/T84J-2S4P] (reporting on the numerous governmental officials who have left or been ousted from office since 2016 due to sexual misconduct allegations).

[341] Beiner, *supra* note 128, at 123–29.

summary judgment more frequently in such cases.[342] There is little hope of change without first removing perpetrators of sexual harassment from power. Women of color are uniquely qualified to understand how individuals with intersectional identities experience harassment and discrimination, and so they are better suited to propose intersectional remedies to harassment and discrimination. As such, organizations and institutions must elect, appoint, and hire women of color to public office, as senior executives, and as state and federal judges.

2. Pay Equity and Living Wage

It is also crucial to eliminate the structural issues that contribute to the gender and racial wage gaps, which have a direct effect on harassment and discrimination in the workplace. Women who work in positions making less than fifteen dollars an hour are more likely than any other demographic to suffer from workplace sexual harassment, and women of color are overrepresented in low-wage occupations, such as domestic work, retail, and service work.[343] Equal pay has been one of the most prominent topics of the #MeToo movement, women in Hollywood through #TimesUp have widely publicized it, and the predominantly white organizers of offline activism, including the Google Walkout, have emphasized it.[344]

A significant number of bills introduced since #MeToo have sought to identify gaps in state law that are often barriers to equal pay. Although every state has laws prohibiting pay discrimination, many bills introduced after October 2017 in state legislatures sought to expand the scope of protections by targeting areas of workplace discrimination that are often barriers to equal pay.[345] For example, some states introduced bills that sought to guarantee equal pay for comparable work or sought to prohibit workplace policies that discour-

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[342] *See id.* (discussing judges misunderstanding of sexual harassment claims and inappropriate sexual behavior by judges).

[343] ELYSE SHAW ET AL., INST. FOR WOMEN'S POL'Y RSCH., UNDERVALUED AND UNDERPAID IN AMERICA: WOMEN IN LOW-WAGE, FEMALE-DOMINATED JOBS 1–2 (2016), https://iwpr.org/wp-content/uploads/2020/09/D508-Undervalued-and-Underpaid.pdf [https://perma.cc/KVN4-5YWF].

[344] Yuki Noguchi, *#MeToo Awareness Sharpens Focus on Pay Equity*, NPR (Mar. 8, 2019), https://www.npr.org/2019/03/08/701169339/-metoo-awareness-sharpens-focus-on-pay-equity [https://perma.cc/P8T3-AHKZ]; Emily Sullivan & Laurel Wamsley, *Google Employees Walk Out to Protest Company's Treatment of Women*, NPR (Nov. 1, 2018), https://www.npr.org/2018/11/01/662851489/google-employees-plan-global-walkout-to-protest-companys-treatment-of-women [https://perma.cc/GC8Z-T482].

[345] Jaclyn Diaz, *States Look to Remedy Pay Gap as Federal Legislation Stalls (1)*, BLOOMBERG L., https://news.bloomberglaw.com/business-and-practice/states-look-to-remedy-the-pay-gap-as-federal-legislation-stalls?context=article-related [https://perma.cc/9UH7-DRET] (July 31, 2019); *Pay Equity and State-by-State Laws*, PAYCOR, https://www.paycor.com/resource-center/pay-equity-and-state-by-state-laws [https://perma.cc/W6LZ-6A2V] (Dec. 4, 2020).

age pay discussions in the workplace.[346] Other bills sought to prohibit employers from screening job applicants based on wage or salary history.[347]

Although legislative proposals targeting equal pay would seemingly benefit all women, these bills do not address other wage gaps that have an indirect effect on sexual harassment for women of color, including minimum wage laws. Although forty-three states have introduced legislation discussing equal pay in state legislatures since 2016,[348] only seven states, New York City, and Washington, D.C. have passed fifteen-dollar minimum wage laws.[349] Cultural changes in institutions regarding wage disparities are necessary to reduce workplace harassment and discrimination for women of color. Absent state measures, employers can take action by instituting policies mandating living wages to all employees, and they can also stop requesting prior salary history from prospective employees, which perpetuates gender and racial wage gaps.

3. Change Norms Starting with Youth

To cease the ongoing social tolerance for sexual harassment, the culture and norms around harassment and sexual misconduct must change for people of all ages, but first starting with our youth. Numerous studies have shown that harassment and discrimination for many intersectional identities begin in early childhood.[350] Moreover, the disparity between the rates of sexual harassment for women of color and white women begin in adolescence—by middle school, women of color are already more likely to experience higher rates of sexual har-

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[346] *See* Dataset, Jamillah B. Williams, *supra* note 4 (finding that Alabama, Colorado, Connecticut, Florida, Michigan, Mississippi, and Virginia introduced laws seeking to guarantee equal pay for equal work).

[347] *See id.* (listing Hawaii, Illinois, New Jersey, New York, Virginia, Arizona, California and Oregon as states that introduced bills that would prohibit employees from screening job applicants for past salary history).

[348] *Id.*

[349] *State Minimum Wages*, NCSL (Jan. 8, 2021), https://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [https://perma.cc/9MMR-NYYP].

[350] *See generally* Dorothy L. Espelage et al., *Understanding Types, Locations, & Perpetrators of Peer-to-Peer Sexual Harassment in U.S. Middle Schools: A Focus on Sex, Racial, and Grade Differences*, 71 CHILD. & YOUTH SERVS. REV. 174 (2016) (analyzing and discussing sexual harassment among middle-school aged children); Ann C. McGinley, *Schools as Training Grounds for Harassment*, 2019 U. CHI. LEGAL F. 171 (discussing the harassment that children experience in schools). For example:

> [N]early half of school children in grades seven through twelve (48%) report having been subject to sexual harassment . . . . [M]any 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.

McGinley, *supra*, at 176–77 (footnotes omitted).

assment and more aggressive types of sexual harassment than their white peers.[351] Children may be permitted to engage in harassment and discrimination at school, and teachers and administrators, who are unable or untrained in handling these types of incidents, may fail to punish or adjust those behaviors, allowing the culture to persist.[352]

Parents, educators, and administrators must have real conversations with children about conduct, and they must receive adequate training to deal with incidents of harassment and discrimination among children. They should also implement policies and reporting procedures for students to identify these types of behaviors so that they can be addressed. Children should receive regular education at home and at school about inappropriate conduct, insensitive comments, and intolerance for discrimination for all identities, including race, gender, sexual orientation, and national origin.

4. Strengthen Collective Power

Collective action and unionization are necessary tools for women of color to push for the legal and organizational changes discussed above. By explicitly acting in concert with each other, women of color in specific industries can redistribute power and fight to attain expanded workplace protections and more acceptable terms and conditions of employment. Leadership is needed to coordinate protests to show how race, gender, and economic power intertwine to create the conditions for sexual harassment while also proposing systemic solutions aimed at correcting that power imbalance.[353]

#MeToo has demonstrated how collective action can lead to broader structural change. Some states have already taken steps to address workplace issues in response to offline social movement and protests organized by women of color in these respective states. For example, in 2018, 2019, and 2020 a total of nine states introduced bills in their state legislatures that sought to require hotels to provide panic buttons for hotel workers.[354] In the years between 2005 and 2015, those employed by restaurants and hotels filed approximately five thousand complaints with the EEOC, a number greater than that filed by

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[351] Espelage et al., *supra* note 350, at 177–78.

[352] *See* McGinley, *supra* note 350, at 174 (explaining how teachers and administrators normalize or misinterpret sexual harassment in ways that harms both girls and boys).

[353] *See* Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 64 (2019) (noting that "[s]orely lacking in the #MeToo anti-sexual harassment mobilization effort was leadership by a social justice group that could coordinate protests, explain and translate the daily news blasts to show how gender and economic power intertwine . . . and propose systemic solutions aimed at correcting that power imbalance").

[354] Dataset, Jamillah B. Williams, *supra* note 4 (noting that California, Illinois, New Mexico, New Jersey, and Oklahoma introduced these bills).

workers in other industries.[355] California and Illinois, after mass protests in 2018 and 2019 organized by union workers, predominantly women of color, who represent the hospitality industry, were among those that introduced bills.

CONCLUSION

Title VII prohibits discrimination and harassment in the workplace, yet the existing legal framework has limitations that leave many women, particularly women of color, unprotected. The #MeToo movement brought renewed attention to this issue, demonstrating the high rates of harassment that persist in the workplace; however, women of color were largely left at the margins of the movement. As a consequence, the state and federal remedies proposed post-#MeToo are insufficient, as they fail to address how intersectional identities play a role in harassment. This is a missed opportunity. Although advocates should continue to fight for needed legal reform, making a real and lasting impact on the lives of women of color requires a more comprehensive approach, including organizational reform and broader cultural reform. Absent significant organizational and cultural changes, proposed legal remedies will continue to fail.

[355] Alexia Fernández Campbell, *How a Button Became One of the Greatest #MeToo Victories*, VOX (Oct. 1, 2019), https://www.vox.com/identities/2019/10/1/20876119/panic-buttons-me-too-sexual-harassment [https://perma.cc/PR2J-Q8X6].