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Using a “Bystander Bounty” to Encourage the Reporting of Workplace Sexual Harassment

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USING A “BYSTANDER BOUNTY” TO ENCOURAGE THE REPORTING OF WORKPLACE SEXUAL HARASSMENT

Jessica K. Fink*

ABSTRACT

Sexual harassment has become a fact of the modern workplace—something that society laments and regrets, but that rarely shocks the conscience when it comes to light. In fact, both the least and most surprising aspect of workplace sexual harassment is the number of individuals who are aware of it occurring. For every Harvey Weinstein, Matt Lauer, and Louis C.K., there have been countless observers who knew about their depravity and who did nothing to stop their behavior. In this way, one obvious approach for reducing harassment at work seems clearly to involve mobilizing these bystanders—encouraging those who witness this misconduct to come forward and report the wrongdoing. Yet for a variety of reasons, bystanders often (quite rationally) choose to remain silent.

This Article suggests a novel approach to overcome the forces that inhibit bystanders from speaking out. In the context of financial crimes, the law has successfully encouraged bystander reporting by applying a bounty system that provides significant financial rewards to those who report the wrongdoing that they observe. Indeed, those who have observed financial wrongdoing have reaped millions of dollars in rewards, presumably overcoming whatever reluctance they once may have felt about disclosing the misdeeds of colleagues and associates. This Article suggests applying a similar bounty system to workplace sexual harassment; it proposes awarding bystanders a piece of the recovery when their reports of observed workplace sexual harassment culminate into successful lawsuits against the perpetrators of this misconduct.

Blowing the whistle on wrongdoing—harassment or otherwise—comes rife with countless concerns for those who consider speaking out. Giving such bystanders a financial incentive to come forward has worked in other contexts to override this reluctance. Perhaps the same can be true for those who observe sexual harassment at work, providing a much-needed step towards reducing this scourge in the workplace.

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I. INTRODUCTION

COUNTLESS tales of workplace sexual harassment have dominated the headlines in recent years, involving all sorts of perpetrators across all sorts of settings. From the celebrity stage to the factory floor, from the corner office to the employee break room, perhaps the only thing more shocking than the volume and breadth of these incidents is the extent to which they have become almost mundane.¹ While

1. See Rosemary Kim, Note, *Trying Something Old?: Incorporating the Dodd-Frank Act Into Modern Efforts to Eliminate Workplace Sexual Harassment*, 43 SEATTLE U. L. REV. 351, 352 (2019) (recounting the "[h]undreds of household names like Bill Cosby and

many people bemoan the frequency of these incidents, the horror of just a few years ago—when the world discovered the depraved behavior of predators like Harvey Weinstein and Matt Lauer—seems to have abated to a significant degree.² In far too many environments, sexual harassment has become a phenomenon that society laments and regrets, but one that no longer shocks the conscience of those who learn about its incidence.³

Despite any ostensible complacency about this behavior, the mere prevalence of workplace sexual harassment should stop the public in its tracks. According to the Equal Employment Opportunity Commission (EEOC), anywhere between 25% and 85% of women experience sexual harassment at work.⁴ In a 2017 *New York Times* survey, one-third of men questioned said that “they had done something at work within the past year that would qualify as objectionable behavior or sexual harassment.”⁵ In the fiscal year 2020 alone, the EEOC received 6,587 charges of sexual harassment,⁶ representing almost 10% of the 67,448 total charges filed with the agency that year.⁷ Importantly, even these statistics do not tell

Harvey Weinstein [who] have . . . been held responsible for sexual misconduct over the last few years”); *see also* Nancy Leong, *Them Too*, 96 WASH. U. L. REV. 941, 952 (2019) (observing that “[t]he incidence of non-consensual [sexual] behavior persists across industries”—from academia, to construction, to the service industry).

2. *See* Caroline Parrish, *Sexual Harassment is Status Quo for Young Women*, OLD GOLD & BLACK (Mar. 25, 2021), <https://wfuogb.com/12434/opinion/sexual-harassment-is-status-quo-for-young-women> [<https://perma.cc/52YZ-FNQD>]; *see also* Giuliana Gabriel, *Workplace Harassment: Is Cuomo the Exception or Status Quo?*, CAL. EMP. ASS’N (Apr. 1, 2021), <https://www.employers.org/blog/2021/04/01/default/workplace-harassment-is-cuomo-the-exception-or-status-quo> [<https://perma.cc/57HT-Y4R9>]; *Breaking the Status Quo of Gender Harassment in Business*, VAULT PLATFORM (Nov. 13, 2020), <https://vault-platform.com/blog/gender-harassment-in-business> [perma.cc/FKJ5-WVDJ].

3. *See* Laura Bates, *Sexual Harassment in the Workplace is Endemic*, THE GUARDIAN (Oct. 23, 2013, 5:34 AM), <https://www.theguardian.com/lifeandstyle/womens-blog/2013/oct/23/sexual-harassment-workplace-endemic-women> [<https://perma.cc/82F6-Q78V>]; *see also* Meera Senthilingam, *Sexual Harassment: How It Stands Around the Globe*, CNN (Nov. 29, 2017, 6:51 PM), <https://www.cnn.com/2017/11/25/health/sexual-harassment-violence-abuse-global-levels/index.html> [<https://perma.cc/2FYX-9K8T>] (“[S]exual harassment is part and parcel of daily life, particularly in public places . . .”).

4. *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [<https://perma.cc/4NPN-Q6FB>] [hereinafter EEOC TASK FORCE REPORT]; *see also* Nilofer Merchant, *The Insidious Economic Impact of Sexual Harassment*, HARV. BUS. REV. (Nov. 29, 2017), <https://hbr.org/2017/11/the-insidious-economic-impact-of-sexual-harassment> [<https://perma.cc/3LSB-UDVK>]; *cf.* Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [<https://perma.cc/2JAQ-99LR>] (citing survey finding that 81% of women have experienced sexual harassment at work).

5. Leong, *supra* note 1, at 952 (citation and internal quotations omitted).

6. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGES FILED WITH EEOC) FY 2010 – FY 2021, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [<https://perma.cc/3MLH-WLV7>].

7. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2021, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/4CZV-6XH5>] [hereinafter EEOC CHARGE STATISTICS]; U.S. EQUAL EMP. OPPORTUNITY COMM’N, DATA VISUALIZATIONS: SEXUAL HARASSMENT CHARGE DATA, <https://www.eeoc.gov/statistics/data-visualizations-sexual>

the full story since many incidents of harassment go unreported, or even unidentified, by the women targeted.⁸ The EEOC estimates that approximately three out of four individuals who experience harassment in the workplace never report the behavior to a supervisor, manager, or union representative.⁹ Moreover, the agency found that “[t]he *least* common response . . . to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint.”¹⁰

Faced with such jarring data showing the prevalence of sexual harassment at work, virtually no one disputes the importance of reducing this behavior. In fact, well before the #MeToo Movement occupied the headlines, employers, legislators, and members of the public were proclaiming the need to address this scourge in the workplace.¹¹ In June 2016, just months before the Harvey Weinstein scandal broke and opened the floodgates to workplace harassment claims, the EEOC’s Select Task Force on the Study of Harassment in the Workplace issued a lengthy report, in which the authors wondered:

With legal liability long ago established, with reputational harm from harassment well known, with an entire cottage industry of workplace compliance and training adopted and encouraged for [thirty] years, why does so much harassment . . . take place in so many of our workplaces . . . [and] what can be done to prevent it?¹²

More than six years later, however, the legal system, the public, and society as a whole continue to wring their collective hands, searching for a solution to this problem.

harassment-charge-data [https://perma.cc/7C3V-HS9A]; cf. George B. Cunningham, *Why Bystanders Rarely Speak Up When They Witness Sexual Harassment*, THE CONVERSATION (Oct. 19, 2017, 9:15 PM), <https://theconversation.com/why-bystanders-rarely-speak-up-when-they-witness-sexual-harassment-85797> [https://perma.cc/RVE9-U6U2] (noting that sexual harassment accounted for one-third of the employment discrimination charges filed with the EEOC in 2015).

8. See EEOC TASK FORCE REPORT, *supra* note 4, at 16; see also Claudia Benavides Espinoza & George B. Cunningham, *Observers’ Reporting of Sexual Harassment: The Influence of Harassment Type, Organizational Culture, and Political Orientation*, 10 PUB. ORG. REV. 323, 324 (2010) (stating that “only 13% of direct victims report . . . incidents” of sexual harassment) (citation omitted); *id.* at 325 (citing a study indicating that “just over 1 in 10 persons who are harassed report that incident”) (citation omitted); Catherine Houseman, Comment, *A #MeToo Moment: Third Circuit Gives Hope to Victims of Workplace Sexual Harassment*, 92 TEMP. L. REV. 265, 282 (2019) (“The majority of victims simply do not report workplace harassment.”).

9. See EEOC TASK FORCE REPORT, *supra* note 4, at v.

10. *Id.* at 16 (emphasis added); see also Houseman, *supra* note 8, at 283 (“[O]nly one-quarter to one-third of victims report their harassment, and only two to twenty percent of victims actually follow through with filing a formal complaint.”).

11. See Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill*, TIME (Apr. 11, 2016, 9:00 AM), <https://time.com/4286575/sexual-harassment-before-anita-hill> [https://perma.cc/QT43-K5JZ]; cf. Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, HARV. BUS. REV., May–June 2020, at 46 (observing that the incidence of sexual harassment in the workplace “has not changed since the 1980s”).

12. EEOC TASK FORCE REPORT, *supra* note 4, at ii. Notably, the EEOC Task Force Report covered a broader range of harassment than is the focus of this Article, including not only sexual harassment, but also harassment on the basis of race, disability, age, ethnicity, color, and religion. See *id.* at 3.

This Article ponders a new way out of the quagmire that is workplace sexual harassment, presenting an approach for more robustly involving *bystanders* in preventing sexual misconduct at work. The Article draws upon the context of financial crimes, where the law has, through a bounty system, successfully leveraged bystander reporting to unearth wrongdoing. This Article suggests applying a similar bounty system to workplace sexual harassment by awarding bystanders a piece of the recovery when their reports of such harassment culminate in successful lawsuits against the perpetrators of this misconduct. Part II of this Article discusses the unsustainable nature of the current legal regime in which sexual harassment occurs at an alarming frequency, often with a multitude of bystander witnesses, yet where no one speaks up to expose this inappropriate conduct. Part II further explores the extent to which the current system does little to effectively encourage bystanders to come forward. Part III addresses the predicament of the bystander, examining the various reasons why those who observe sexual harassment at work choose (often rationally) not to report this behavior and hypothesizing as to what might alter the mindset of these individuals.

Part IV of this Article proposes a new approach to overcome the barriers that prevent bystanders from reporting harassment. By looking to other examples within the legal system—from the rewards offered to whistleblowers in the financial crime context to more recent examples of “bounties” under laws like Texas Senate Bill 8¹³—Part IV questions whether applying financial incentives to bystanders in this context might encourage them to report sexual harassment at work. Part V considers potential drawbacks to this novel approach, focusing on the extent to which creating this type of bystander bounty might encourage individuals to levy false harassment charges against coworkers, as well as on the extent to which giving bystanders this authority might interfere with the privacy or autonomy of *victims* of harassment. Ultimately, this Article is intended to start a different conversation about ways to eliminate sexual harassment in the workplace. Without question, bystanders will need to be involved in that effort. This Article presents an unconventional—and perhaps more effective—way of encouraging that involvement.

II. A BROKEN SYSTEM: HARASSMENT SEEN BY MANY AND HALTED BY FEW

Sexual harassment not only pervades the modern workplace,¹⁴ it does so in a manner that is anything but private. As noted above, as many as three-quarters of working women claim to have experienced harassment at work.¹⁵ And significant numbers of men admit to having engaged in

13. See Tex. S.B. 8, 87th Leg., R.S., ch. 62, 2021 Tex. Sess. Law Serv. 125 (West) (codified at TEX. HEALTH & SAFETY CODE §§ 171.201–171.212).

14. See sources cited *supra* notes 4–7 and accompanying text.

15. See EEOC TASK FORCE REPORT, *supra* note 4, at 8–9.

sexually inappropriate workplace conduct.¹⁶ Thousands of sexual harassment claims flood the EEOC each year, with thousands more incidents remaining unreported.¹⁷ None of this is secret; none of this is a surprise; one need only barely pay attention to understand the degree to which workplace sexual harassment remains an ongoing problem.

Sexual harassment creates dire consequences for those who endure it. Victims suffer physical health consequences, including nausea, headaches, and exhaustion.¹⁸ They may also experience psychological distress, including depression, anxiety, and post-traumatic stress disorder.¹⁹ The harassment can take a toll on victims' work performance, decreasing their job satisfaction, their productivity, and their organizational attachment.²⁰ In some cases, the harassment can derail a woman's career, creating lasting professional consequences.²¹ Research indicates that experiencing workplace sexual harassment "can damage women's prospects for gaining employment, advancing in their careers, and attaining higher wages, while also potentially creating an offensive work environment that interferes with job performance."²² It can also sideline female employees' broader professional aspirations, making them "more fearful of diminished promotional opportunities, being fired from the organization, and experiencing an unfriendly work environment that may obstruct their capacity to perform essential job functions."²³

Organizations likewise feel the impact of any harassment that occurs within them in the form of "lost productivity, wasted talent, . . . [litigation], and insurance costs."²⁴ The legal system that adjudicates harassment claims bears further consequences by increasing its already overwhelming caseload.²⁵ Finally, those who witness this behavior in the

16. See Leong, *supra* note 1, at 952.

17. See sources cited *supra* notes 6–10 and accompanying text.

18. See Espinoza & Cunningham, *supra* note 8, at 324; see also EEOC TASK FORCE REPORT, *supra* note 4, at 20–21 (discussing the physical ramifications of sexual harassment, which include "headaches, exhaustion, sleep problems, gastric problems, nausea, weight loss or gain, and respiratory, musculoskeletal, and cardiovascular issues").

19. See EEOC TASK FORCE REPORT, *supra* note 4, at 20.

20. See Espinoza & Cunningham, *supra* note 8, at 323.

21. See *Protecting Federal Judiciary Employees from Sexual Harassment Discrimination and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter *Hearing*] (statement of Dahlia H. Lithwick) ("[T]he abuse can do horrific damage, careers can be short-circuited, and trauma can be lasting.").

22. Ryan K. Jacobson & Asia A. Eaton, *How Organizational Policies Influence Bystander Likelihood of Reporting Moderate and Severe Sexual Harassment at Work*, 30 EMP. RESPS. & RTS. J. 37, 38 (2018).

23. *Id.*; see also Brigid Schulte, *To Combat Harassment, More Companies Should Try Bystander Training*, HARV. BUS. REV. (Oct. 31, 2018), <https://hbr.org/2018/10/to-combat-harassment-more-companies-should-try-bystander-training> [<https://perma.cc/DM8H-WE35>] (observing that sexual harassment "wreaks financial, physical, and psychological damage, keeping women and other targets out of power or out of professions entirely").

24. See Schulte, *supra* note 23, at 2.

25. See EEOC CHARGE STATISTICS, *supra* note 7; see also Maygen Martinez, *Seeking Justice: Reform to the Resolution of Sexual Harassment Workplace Claims 5* (2020) (honor's thesis, Georgia Southern University) ("The . . . flood of employment discrimination suits filed in federal courts could act to overload an already saturated system.").

workplace—those who are not immediate targets of the harassment but who are forced to navigate this sexually charged work environment—may also suffer harm, experiencing their own set of professional and psychological ramifications.²⁶ One might think that misconduct that often is so blatant and that carries with it such profound negative ramifications would spur a public outcry whenever it occurs. On the contrary, however, most observers of workplace sexual harassment choose to remain silent.

A. SEXUAL HARASSMENT AS THE MODERN WORKPLACE’S WORST-KEPT SECRET

The #MeToo Movement shook American society to its core. As countless celebrities and public figures became the target of egregious allegations, many Americans found themselves experiencing a degree of cognitive dissonance: How could these trusted (and in many cases beloved) individuals be capable of such horrific acts?²⁷ Yet more than the horror involved with any specific allegation, more than the disappointment felt when once-admired individuals were revealed to be monsters, by far the most jarring aspect of this experience was the realization that these atrocities did not take place in secret. What quickly became clear as these tales of harassment unfolded was that, in many of these cases, *everyone knew*.

The exposure of Harvey Weinstein’s sexual misconduct represents perhaps the most prominent example of harassment that was known by many but discussed openly by few. Weinstein reportedly “ke[pt] his despicable behavior an open secret for decades.”²⁸ Women within the entertainment industry had warned each other for years to avoid certain types of interactions with Weinstein,²⁹ and members of the media had been induced to refrain from publishing stories about his behavior.³⁰ As one victim of Weinstein’s misconduct observed, “I know that everybody—I mean *everybody*—in Hollywood knows that it’s happening

26. See *infra* Part III.A.

27. Cf. Sarah Banet-Weiser, *Commentary: When “Nice Guys” Turn Out to Be Sexual Predators*, FORTUNE (Nov. 30, 2017, 3:39 PM), <https://fortune.com/2017/11/30/matt-lauer-sexual-harassment-nice-guys> [<https://perma.cc/4RQ3-KYW4>] (“Profiling the celebrity men who have been recently accused of sexual predation in a way that contrasts their behavior with their professional achievements, families, and contributions to society personalizes their behavior as if it was an aberration rather than the norm.”).

28. Cunningham, *supra* note 7; see also Jessica Fink, *Disgorging Harvey Weinstein’s Salary*, 41 BERKELEY J. EMP. & LAB. L. 285, 290–91, 321 (2020).

29. See Fink, *supra* note 28, at 287; see also Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/2V3A-XGM4>] (relaying one woman’s advice to a peer that she “wear a parka when summoned for duty [by Weinstein] as a layer of protection against unwelcome advances”).

30. See Fink, *supra* note 28, at 287; see also Zoe Williams, *Why Did No One Speak Out About Harvey Weinstein?*, THE GUARDIAN (Oct. 10, 2017, 2:20 PM), <https://www.theguardian.com/film/2017/oct/10/why-did-no-one-speak-out-about-harvey-weinstein> [<https://perma.cc/9A3R-FM7N>] (citing allegation that “Matt Damon and Russell Crowe worked actively to suppress one story in 2004”).

He's not even really hiding. . . . [T]he way he does it, so many people are involved and see what's happening. But everyone's too scared to say anything."³¹ A "joke" regarding Weinstein's behavior even garnered laughs during the opening monologue of the 2013 Academy Awards; host Seth MacFarlane assured the female best supporting actress nominees, "Congratulations You five ladies no longer have to pretend to be attracted to Harvey Weinstein"³² As screenwriter, producer, and actor Scott Rudin bluntly put it in a private Facebook post (which later was published): "Let's be perfectly clear about one thing Everybody-f-ing-knew."³³

Disgraced, former *Today* show host Matt Lauer likewise engaged in his own lengthy and flagrant campaign of workplace sexual misconduct without any ramifications. Indeed, if even *some* of the allegations against Lauer are true, it defies credulity that his behavior would not have been broadly known. Multiple women complained about Lauer's behavior over the years—including one of his co-hosts on the *Today* show.³⁴ Lauer reportedly "once dropped his pants in front of a female employee" and gave one of his co-hosts a sex toy as a gift, accompanied by a note describing how he might use the toy on a female colleague.³⁵ He asked female producers to name their sex partners and "would openly discuss which [of his] female co-hosts . . . he would like to have sex with."³⁶ Individuals within the news industry have reported that Lauer, despite being married, "was fixated on women, especially their bodies and looks," and

31. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/V3SA-QQ72>]; see also Kantor & Twohey, *supra* note 29 ("Women have been talking about Harvey amongst ourselves for a long time, and it's simply beyond time to have the conversation publicly.").

32. Libby Hill, *Seth MacFarlane Reveals Truth About His 2013 Harvey Weinstein Joke*, L.A. TIMES (Oct. 11, 2017, 3:51 PM), <https://www.latimes.com/entertainment/la-et-entertainment-news-updates-seth-macfarlane-reveals-truth-about-his-1507755303-html-story.html> [<https://perma.cc/R2CN-YECW>]. MacFarlane's joke received a "considerable response from the room," *id.*, which consisted of "relatively raucous laughter." Maya Oppenheim, *Seth MacFarlane Made Joke About Harvey Weinstein and Women at 2013 Oscars*, THE INDEPENDENT (Oct. 11, 2017, 12:08 PM), <https://www.independent.co.uk/arts-entertainment/films/news/seth-macfarlane-harvey-weinstein-joke-oscars-2013-women-sexual-harassment-allegations-a7994506.html> [<https://perma.cc/QEA5-H9BZ>]. MacFarlane has since explained that he made the joke approximately two years after a female friend and colleague confided in him regarding an inappropriate sexual advance that she received from Weinstein. See Hill, *supra*.

33. Cunningham, *supra* note 7.

34. See Stephan Battaglio, *Internal Review Says NBC News Didn't Know of Any Sexual Harassment Involving Matt Lauer Before His Firing*, L.A. TIMES (May 9, 2018, 12:15 PM), <https://www.latimes.com/business/hollywood/la-fi-ct-nbc-lauer-20180509-story.html> [<https://perma.cc/FH7V-CXVM>] (discussing the number of women who complained about Lauer's behavior); see also *id.* (noting that Lauer's former *Today* show co-anchor, Ann Curry, "alerted NBC News management in 2012 that it should be concerned about Lauer's behavior toward women").

35. Tom Huddleston Jr., *NBC's Matt Lauer Allegedly Dropped His Pants in Front of a Female Employee: Report*, YAHOO! NEWS (Nov. 29, 2017), <https://www.yahoo.com/news/nbc-apos-matt-lauer-allegedly-223713314.html> [<https://perma.cc/2HSS-8Z85>].

36. *Id.*

that “[h]e was known for making lewd comments verbally or over text messages.”³⁷ It apparently did not raise any concerns when Lauer asked NBC management to install a button in his office that would allow him to discreetly lock his door from the inside without him having to get up.³⁸

The brazen (yet unreported) nature of Lauer’s conduct even shocked sophisticated industry insiders. NBC Morning Show host Joe Scarborough recalled attending events where Lauer’s misdeeds were discussed as “common knowledge,” including a roast that was held in Lauer’s honor.³⁹ Scarborough recounted that “[t]here were a thousand people in the audience, like the most powerful people in media, and everybody that came up was making fun of Matt Lauer, about [him] pushing himself on people.”⁴⁰ Importantly, however, even Scarborough does *not* claim to have reported Lauer’s behavior to NBC or otherwise taken steps to intervene, instead simply noting that he and his fiancée and co-anchor Mika Brzezinski “le[ft] early from the uncomfortable event.”⁴¹

Further examples of this type of “open secret” abound. The comedian Louis C.K. was notorious for cornering women and then asking to masturbate in front of them,⁴² behavior that one of his accusers called “common knowledge in the comedy world.”⁴³ Mirroring the experiences of women who moved through Harvey Weinstein’s circles, “younger female comics [had] warn[ed] each other about C.K.’s alleged behavior” for years.⁴⁴ Outside of the entertainment industry as well, prominent public figures seem to have felt no compunction about blatantly and repeatedly engaging in workplace harassment. Former New York Governor Andrew Cuomo reportedly “fostered a culture of open secrets” for decades before allegations of his harassment of multiple women became public.⁴⁵ And

37. Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017, 12:34 PM), <https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959> [https://perma.cc/T62X-X9TB].

38. See Huddleston, *supra* note 35. One amusing exchange on Twitter captured the absurdity of this request—and NBC management’s apparent lack of concern about it: “nbc guy 1: hey matt wants a button at his desk to let him lock his office door without having to get up and make clear he’s locking the door. nbc guy 2: normal. let’s get him one of those asap.” *Id.*

39. See Christabel Duah, *Media Figures Knew the Rumors About Matt Lauer For Years—and Told Some Disgusting Jokes About Him*, RARE (Dec. 6, 2017), <https://rare.us/people/media-figures-knew-the-rumors-about-matt-lauer-for-years-and-told-some-disgusting-jokes-about-him> [https://perma.cc/N93C-AZJX].

40. *Id.*

41. See *id.*

42. See Caroline Framke, *The Sexual Harassment Allegations Against Louis C.K., Explained*, VOX (Nov. 10, 2017, 4:51 PM), <https://www.vox.com/culture/2017/11/9/16629400/louis-ck-allegations-masturbation> [https://perma.cc/9XDE-P2LG].

43. Tony Maglio, *Louis CK Accuser Says Comedian’s Sexual Misconduct Was “Common Knowledge”*, THE WRAP (Nov. 13, 2017, 7:49 AM), <https://www.thewrap.com/louis-ck-accuser-rebecca-corry-video> [https://perma.cc/4CHQ-JT8L]; see also *id.* (quoting the *Good Morning America* anchor who referred to Louis C.K.’s behavior as “the industry’s ‘open secret,’” which “[p]eople made jokes about . . . all the time”).

44. Framke, *supra* note 42.

45. Leah Hebert, Rita Pasarell, Tori Kelly & Chloë Rivera, *Cuomo Moment: We Work in New York Government. Sexual Harassment in Albany is an Open Secret.*, USA TODAY

previously esteemed judge Alex Kozinski “created a world in which everyone knew what was going on, and everyone was complicit: whether they were victims or bystanders.”⁴⁶ According to respected legal reporter Dahlia Lithwick, one of Judge Kozinski’s accusers, “[they] all ended up colluding to pretend that this was all funny or benign, and that, since everyone knew about it, it must be OK.”⁴⁷ Moreover, an investigation into the conduct of formerly renowned Yale Law School Professor Jed Rubinfeld revealed “a pattern of sexual harassment of several students,” which “spanned decades” and “included verbal harassment, unwanted touching, and attempted kissing, both in the classroom and at parties at Rubinfeld’s home”⁴⁸—conduct that apparently (once again) was an “open secret” within the law school community.⁴⁹

Thus, in countless workplaces, researchers find similar results: “everyone” knows about inappropriate conduct, yet no one feels comfortable speaking up. And the more powerful the perpetrator, the more pressured witnesses seem to feel to keep silent.⁵⁰ This silence creates a paradox, which serves only to reinforce the acceptability (or at least, the lack of deplorability) of the harassing conduct. The silence empowers the perpetrator, leading him to believe that his behavior is justified—or, if not justified, at least highly unlikely to incur any punishment. As one researcher in this area observed, “the message the perpetrator gets is, ‘My behavior is normal and natural’ No one’s telling him, ‘I don’t think you should do that.’”⁵¹ So predators like Weinstein, Lauer, and countless others feel free to continue engaging in this misconduct in plain sight, confident in the knowledge that both victims and bystanders will continue to remain silent, thus perpetuating the cycle of workplace harassment.⁵²

(Mar. 11, 2021, 9:59 AM), <https://www.usatoday.com/story/opinion/voices/2021/03/11/andrew-cuomo-sexual-harassment-albany-workplace-safety-column/6940985002> [https://perma.cc/Z2JL-AZ67]; see also Luis Ferré-Sadurní & Mihir Zaveri, *Sexual Harassment Claims Against Cuomo: What We Know So Far*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/article/cuomo-sexual-harassment-nursing-homes-covid-19.html> [https://perma.cc/3ZD4-MRWF].

46. Leong, *supra* note 1, at 963.

47. *Id.* (quoting Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11 PM), <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> [https://perma.cc/P4QJ-BZC7]).

48. Irin Carmon, *Yale Law Professor Jed Rubinfeld Has Been Suspended for Sexual Harassment*, INTELLIGENCER (Aug. 26, 2020), <https://nymag.com/intelligencer/2020/08/yale-professor-jed-rubinfeld-suspended-for-sexual-harassment.html> [https://perma.cc/T3KD-23ZH].

49. Elie Mystal, *Details on the Allegations Against, and Yale Law School Investigation Into, Professor Jed Rubinfeld*, ABOVE THE LAW (Sept. 20, 2018, 1:01 PM), <https://abovethelaw.com/2018/09/details-on-the-allegations-against-and-yale-law-school-investigation-into-professor-jed-rubinfeld> [https://perma.cc/2RD4-JFVP].

50. See Lynn Bowes-Sperry & Anne M. O’Leary-Kelly, *To Act or Not to Act: The Dilemma Faced by Sexual Harassment Observers*, 30 ACAD. MGMT. REV. 288, 300 (2005) (“Particularly in the case of powerful harassers, the costs of high involvement by the observer may be quite severe.”).

51. Schulte, *supra* note 23.

52. See Jordan A. Thomas, *How to Make It Easier for Women to Report Sexual Harassment*, QUARTZ (Jan. 3, 2018), <https://qz.com/work/1170489/how-to-make-it-easier-for-women-to-report-sexual-harassment-according-to-a-lawyer-who-represents-whistleblowers>

B. THE FUTILITY OF CURRENT EFFORTS TO GET BYSTANDERS TO REPORT HARASSMENT

With so much harassment occurring so openly, one would expect that encouraging bystanders to speak up would be a key component to reducing this unacceptable workplace behavior. Sadly, efforts to persuade bystanders to report workplace harassment have enjoyed little success—as have efforts to fight workplace harassment more generally. For decades, employers, the government, and the population as a whole have been searching for ways to reduce sexual harassment at work—these efforts only intensified in the wake of the #MeToo Movement.⁵³ The vast majority of businesses, for example, have adopted policies against sexual harassment,⁵⁴ with most employers likewise conducting some form of sexual harassment training.⁵⁵ Particularly as it relates to anti-harassment training, employers often expend significant resources; they may bring in trained speakers, hold seminars, and require employees to complete on-line training programs.⁵⁶

Yet, for a variety of reasons, this training has been shockingly ineffective.⁵⁷ Financial and practical constraints often necessitate that training sessions take the form of impersonal, online exercises, thereby limiting employee engagement.⁵⁸ Accordingly, many employees treat the training as little more than a nuisance,⁵⁹ “clicking through a PowerPoint, checking a box that you read the employee handbook or attending a mandatory seminar at which someone lectures about harassment while attendees

[<https://perma.cc/73E7-YDHL>] (arguing that “collective silence [regarding harassment allegations] endanger[s] and ultimately create[s] more victims”); *see also* Cunningham, *supra* note 7 (“The usual silence leaves most perpetrators of this toxic behavior free to prey on their co-workers and subordinates.”).

53. *See* Fink, *supra* note 28, at 287–88.

54. *See* Maya Rhodan, *Does Sexual Harassment Training Work? Here’s What the Research Shows*, TIME (Nov. 21, 2017, 11:19 AM), <http://time.com/5032074/does-sexual-harassment-training-work-heres-what-the-research-shows> [<https://perma.cc/ZB76-FLQF>].

55. *See id.* (noting that 71% of respondents to a survey indicated that their employers conducted some form of sexual harassment training).

56. *See* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 65–66 (2018) [hereinafter Bisom-Rapp, *Sex Harassment Training*]; Fink, *supra* note 28, at 293–301.

57. *See* Bisom-Rapp, *Sex Harassment Training*, *supra* note 56, at 63 (citing 2016 study conducted by the EEOC in which the Commission was “not able to determine whether standalone training is or is not an effective tool in preventing harassment”); Dobbin & Kalev, *supra* note 11, at 46 (“Neither the training programs that most companies put all workers through nor the grievance procedures that they have implemented are helping to solve the problem of sexual harassment in the workplace.”).

58. *See* Fink, *supra* note 28, at 294–96; *see also* Jena McGregor, *Why Sexual Harassment Training Doesn’t Stop Harassment*, WASH. POST (Nov. 17, 2017, 2:07 PM), https://www.washingtonpost.com/news/on-leadership/wp/2017/11/17/why-sexual-harassment-training-doesnt-stop-harassment/?utm_term=.5c80671c60a1 [<https://perma.cc/G5NG-EZYU>].

59. *See* McGregor, *supra* note 58 (describing the “disdain” expressed toward sexual harassment training programs—even by the very individuals who develop such programs).

glance at their phones.”⁶⁰ Perhaps most disconcerting, many employers seem to adopt fairly cynical views toward their own harassment training sessions, using them to “promote[] a cosmetic rather than a substantive solution to bias eradication.”⁶¹ Even the EEOC has determined that “training, on its own, is not likely to change participants’ attitudes toward harassment.”⁶²

Faced with the need to do more than follow the traditional steps in order to reduce workplace sexual harassment, some have suggested bystander intervention training as a means of accomplishing this goal. The EEOC has adopted this position, recommending that employers incorporate bystander training into their harassment prevention efforts.⁶³ Social science research is supportive of this position, as at least one study has demonstrated that “organizational efforts to end . . . [sexual harassment] that rely primarily or exclusively on target [as opposed to bystander] reporting are unlikely to be successful.”⁶⁴ Yet to date, there has been only limited success with respect to any implementation of this endeavor.⁶⁵ As it turns out, bystanders are even less likely to report harassment they observe than are the victims of the harassment themselves.⁶⁶ While studies indicate that approximately 70% of women witness sexual harassment in the workplace,⁶⁷ few come forward to report what they have seen.⁶⁸ As

60. Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do.*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html> [<https://perma.cc/5FKV-EPNM>].

61. Bisom-Rapp, *Sex Harassment Training*, *supra* note 56; *see also* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964 (1999) (describing certain litigation avoidance techniques engaged in by employers and noting that “the recommended strategies teach managers to bulletproof their decisions but may do nothing to alter the conscious and subconscious discriminatory impulses that can drive decision making”); Schulte, *supra* note 23 (referring to the “canned webinar training on sexual harassment that checks the legal-liability box”); Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 337 (2008) (arguing that the various strategies used by employers to minimize Title VII liability “ultimately do little to decrease employers’ discriminatory attitudes”).

62. Bisom-Rapp, *Sex Harassment Training*, *supra* note 56, at 71 (discussing the conclusion of EEOC Task Force that “training, on its own, is not likely to change participants’ attitudes towards harassment”).

63. *See id.* at 71–72; EEOC TASK FORCE REPORT, *supra* note 4, at 54, 69; Schulte, *supra* note 23.

64. Espinoza & Cunningham, *supra* note 8, at 334.

65. *See* Dobbin & Kalev, *supra* note 11, at 47 (observing the failure of employers to apply bystander training programs in a sufficiently robust manner).

66. *See* Stefanie K. Johnson, Jessica F. Kirk & Ksenia Keplinger, *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (Oct. 4, 2016), <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment> [<https://perma.cc/3ABV-BVS9>] (“[While] 71% of women do not report sexual harassment, . . . far fewer bystanders report harassment that they have witnessed.”).

67. *See* Espinoza & Cunningham, *supra* note 8, at 324; *see also* PAULA McDONALD & MICHAEL FLOOD, AUSTL. HUM. RTS. COMM’N, ENCOURAGE. SUPPORT. ACT! BYSTANDER APPROACHES TO SEXUAL HARASSMENT IN THE WORKPLACE 15 (2012), <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2968&context=artspapers> [<https://perma.cc/ZR2P-CNNN>].

68. *See* Cunningham, *supra* note 7 (examining the various reasons for “[w]hy bystanders rarely speak up when they witness sexual harassment”).

one pair of researchers has noted, “observer nonintervention in [sexual harassment] represents the status quo in . . . many organizations.”⁶⁹ Only somewhat more optimistically, another set of researchers found that while bystanders do sometimes involve themselves in workplace harassment, “their actions are frequently delayed, temporary or ineffective.”⁷⁰ This research raises questions as to *why* bystanders often remain silent when faced with objectionable workplace behavior and—more importantly—*what can be done* to encourage bystanders to speak up.

III. THE PREDICAMENT OF THE BYSTANDER: WHY THEY STAY SILENT

The benefits of bystander involvement in reducing workplace sexual harassment almost seem too obvious to mention. Involving bystanders bolsters the enforcement of a workplace’s sexual harassment policies by adding additional sets of eyes into the reporting mix.⁷¹ Moreover, encouraging bystanders to speak up upon observing sexual misconduct can significantly interrupt a cycle of harassment, messaging to the broader workplace the unacceptable nature of such behavior and empowering employees to act when they observe it.⁷² Finally, encouraging employees to speak up about what they observe can greatly benefit an organization, potentially limiting employers’ legal liability in the wake of harassment incidents.⁷³ For these reasons, various researchers have opined that organizational efforts to stem harassment without the involvement of bystand-

69. Bowes-Sperry & O’Leary-Kelly, *supra* note 50, at 303.

70. Paula McDonald, Sara Charlesworth & Tina Graham, *Action or Inaction: Bystander Intervention in Workplace Sexual Harassment*, 27 INT’L J. HUM. RES. MGMT. 548, 548 (2016).

71. See Carol T. Kulik, Elissa L. Perry & James M. Schmidtke, *Responses to Sexual Harassment: The Effect of Perspective*, 9 J. MANAGERIAL ISSUES 37, 37 (1997) (“[C]ontrolling harassment may require input from both victims and observers.”); *see also id.* at 38 (“An effective sexual harassment policy should not place a disproportionate amount of responsibility on victims to report harassment.”); EEOC TASK FORCE REPORT, *supra* note 4, at 57 (“[Bystander intervention] training could help employees identify unwelcome and offensive behavior . . . [and] create a sense of responsibility on the part of employees to ‘do something’ and not simply stand by.”).

72. See Schulte, *supra* note 23 (“[T]raining bystanders how to recognize, intervene, and show empathy to targets of assault not only increases awareness and improves attitudes, but also encourages bystanders to disrupt assaults before they happen, and help survivors report and seek support after the fact.”); *see also id.* (“When bystanders remain silent, and targets are the ones expected to shoulder responsibility for avoiding, fending off, or shrugging off offensive behavior, it normalizes sexual harassment and toxic or hostile work environments.”); EEOC TASK FORCE REPORT, *supra* note 4, at 57 (arguing that bystander training “could give employees the skills and confidence to intervene in some manner to stop harassment”).

73. See Kulik, Perry & Schmidtke, *supra* note 71, at 38; *cf.* Robert Towey, *Whistleblowers Ultimately Help Their Companies Perform Better, A New Study Shows*, CNBC (Nov. 30, 2018, 11:31 AM), <https://www.cnbc.com/2018/11/23/whistleblowers-ultimately-help-their-companies-perform-better-study.html> [<https://perma.cc/ME43-BA26>] (discussing organizational benefits of whistleblowing and arguing that “the more employees call out bad corporate behavior, the less likely companies are to face legal action that results in big payouts of settlements and other legal fees”); *see also* EEOC TASK FORCE REPORT, *supra* note 4, at 57 (“[Bystander intervention] training could . . . demonstrate the employer’s commitment to empowering employees to [report harassment].”).

ers are unlikely to see much success,⁷⁴ and the EEOC has recommended that employers incorporate bystander intervention training into their efforts to prevent sexual harassment.⁷⁵

Bystanders can intervene in workplace harassment in a variety of ways—publicly or privately, passively or assertively.⁷⁶ They may disrupt the behavior as it is occurring, actively challenging the perpetrator;⁷⁷ they may provide support to a harassment victim;⁷⁸ or they may decide to report the harassment to someone with authority to take action against the harasser.⁷⁹ But despite the many ways in which bystanders can become involved—and despite the many obvious benefits associated with such involvement—few bystanders choose to speak out or take action.⁸⁰ While surprisingly little attention has been paid to why bystanders remain silent,⁸¹ there are several reasons for this reluctance.

A. BYSTANDERS HESITATE TO SPEAK OUT DUE TO A FEAR OF RETALIATION

One significant reason why many bystanders choose not to speak out or otherwise intervene in sexual harassment at work is because they fear retaliation as a result of their involvement.⁸² Among victims of harassment themselves, fear of retaliation is the most common reason for not reporting workplace sexual misconduct;⁸³ women often experience a broad range of harmful consequences at work if they come forward.⁸⁴

74. See McDonald, Charlesworth & Graham, *supra* note 70, at 549 (“Because responses by targets of [sexual harassment] are often passive, organisational approaches which rely exclusively on . . . targets bringing forward complaints to management are unlikely to be successful.”); Bowes-Sperry & O’Leary-Kelly, *supra* note 50, at 288.

75. See EEOC TASK FORCE REPORT, *supra* note 4, at 57–59; Bisom-Rapp, *Sex Harassment Training*, *supra* note 56, at 72; see also Houseman, *supra* note 8, at 293.

76. See McDonald, Charlesworth & Graham, *supra* note 70, at 550–51, 561–62; see also Espinoza & Cunningham, *supra* note 8, at 325.

77. See McDonald, Charlesworth & Graham, *supra* note 70, at 549–51, 561; see also Espinoza & Cunningham, *supra* note 8, at 325.

78. See McDonald, Charlesworth & Graham, *supra* note 70, at 550–51, 554–55.

79. See *id.* at 550–52, 555–56; see also Espinoza & Cunningham, *supra* note 8, at 325.

80. See *supra* Section II.A.

81. See Kulik, Perry & Schmidtke, *supra* note 71, at 37 (providing that research has devoted “little attention” to the ways in which *non-victim* employees respond to incidents of sexual harassment in the workplace); see also McDonald, Charlesworth & Graham, *supra* note 70, at 548–49 (discussing potential reasons for the lack of research on bystander responses to sexual harassment); Bowes-Sperry & O’Leary-Kelly, *supra* note 50, at 288.

82. See Johnson, Kirk & Keplinger, *supra* note 66; Rashi Aggarwal & Adam M. Brenner, #MeToo: The Role and Power of Bystanders (*aka Us*), 44 ACAD. PSYCHIATRY 5, 7 (2020); cf. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 15–17 (1993) (pointing to fear of retaliation as one reason why individuals who witness crimes fail to intervene).

83. See Houseman, *supra* note 8, at 284.

84. See *id.* at 285; Dobbin & Kalev, *supra* note 11, at 49 (“One survey . . . found that two-thirds of women who . . . reported their harass[ment] were subsequently assaulted, taunted, demoted, or fired by their harassers or friends of their harassers.”); see also Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018) (“[R]eporting harassment is fraught with risk, and often brings very little reward.”); Margaret E. Johnson, *Only 1 in 4 Women Who Have Been Sexually Harassed Tell Their Employers. Here’s Why They’re Afraid.*, THE CONVERSATION (June 5, 2018, 6:45

Accusers may be subject to discipline, negative performance evaluations, demotions, and other detrimental changes in their working conditions.⁸⁵ They may be ostracized from their communities,⁸⁶ and may even face potential legal liability if the person they accuse of harassment files a defamation suit against them.⁸⁷ In some cases, women risk losing their jobs as a result of speaking out.⁸⁸ For those who make accusations against a public figure, the ramifications can be life-altering. For example, since Dr. Christine Blasey Ford came forward with sexual assault allegations against now-Justice Brett Kavanaugh, she has faced continual harassment and has been forced to move numerous times.⁸⁹ Indeed, several of Matt Lauer’s accusers chose “to remain anonymous to avoid shattering their lives.”⁹⁰

These risks play out with equal force for bystanders—those individuals who observe harassment at work. One study compiled by Australian researchers detailed the consequences to whistleblowers in this context, noting that “[t]hey suffer a loss of reputation” and that “[t]heir motives, character, mental stability[,] and trustworthiness become the subject of aspersions.”⁹¹ Moreover, whistleblowers are commonly “described as disgruntled troublemakers, people who make an issue out of nothing, self-serving publicity seekers, or troubled persons who have distorted and misinterpreted situations due to their own psychological imbalance/irrationality.”⁹² They may get “fired, [and] possibly [even] black-listed so that they cannot continue to work in their profession,” and they are likely to have “their professional competence . . . attacked” and “their professional judgment . . . impugned.”⁹³ American researchers have reached similar conclusions, finding that many women fail to “report harassment against themselves or others because of fear of retaliation by the harasser or organization.”⁹⁴ In one study, a woman who witnessed sexual harassment in her workplace declined to report it, reasoning that to do so would have been “political suicide.”⁹⁵

AM), <https://theconversation.com/only-1-in-4-women-who-have-been-sexually-harassed-tell-their-employers-heres-why-theyre-afraid-97436> [<https://perma.cc/NHJ5-ACXX>] (referencing EEOC report finding that 75% of women who “formally complain” about sexual harassment “face retaliation”).

85. See Porter, *supra* note 84, at 50; see also Dobbin & Kalev, *supra* note 11, at 49 (“Women who file harassment complaints end up, on average, in worse jobs and poorer physical and mental health than do women who keep quiet.”).

86. See Porter, *supra* note 84, at 50–51; Kendra Doty, “Girl Riot, Not Gonna Be Quiet”—Riot Grrrl, #MeToo, and the Possibility of Blowing the Whistle on Sexual Harassment, 31 HASTINGS WOMEN’S L.J. 41, 54 (2020).

87. See Doty, *supra* note 86, at 55.

88. See Houseman, *supra* note 8, at 284–85.

89. Doty, *supra* note 86, at 54, 54 n.71.

90. *Id.* at 54.

91. McDONALD & FLOOD, *supra* note 67, at 32 (citation omitted).

92. *Id.* (citation omitted).

93. *Id.* (citation omitted).

94. Johnson, Kirk & Keplinger, *supra* note 66; see also Schulte, *supra* note 23.

95. See Johnson, Kirk & Keplinger, *supra* note 66; see also *id.* (opining that in some male-dominated workplaces, women may “play along with sexual harassment because they do to want to be further alienated from the high-status group (men)”; Schulte, *supra* note

The fears of retaliation expressed by bystanders for reporting workplace harassment play out in various real-world examples. In the case of Harvey Weinstein, countless assistants and other employees observed Weinstein's misconduct but "felt trapped and unable to intervene . . . because they were afraid that they would be unable to work in the industry or that the restrictive nondisclosure agreements they had signed would be enforced against them."⁹⁶ Those who attempted to report Weinstein's sexual misconduct to the Weinstein Company's human resources department were purportedly told that it was "his company" and if they didn't like it, they could leave.⁹⁷ Employees concerned with Matt Lauer's sexual misbehavior recounted similar fears. An internal review eventually conducted by NBC found that many employees who had observed Lauer's behavior declined to come forward out of "a fear of retaliation and a belief that their complaints would not be kept confidential."⁹⁸ As one former reporter bluntly stated: NBC management "protected the s— out of Matt Lauer."⁹⁹

In less publicized settings as well, severe consequences can arise for bystanders who speak up about workplace sexual harassment. Court dockets contain countless cases involving employees who have allegedly experienced retaliation by their employers for reporting sexual harassment of a coworker.¹⁰⁰ The well-known legal reporter Dahlia Lithwick has described the "secrecy and discretion" within the judicial branch as "the kind of toxic and corrosive secrecy that allows abuse and harassment and bullying to go unaddressed."¹⁰¹ In her testimony before the U.S. House of Representatives Judiciary Committee on the issue of sexual

23 (quoting observation of the supervising attorney for the New York City Commission on Human Rights that "[t]oo often people let things slide, concerned that if they get involved, it might affect their own career aspirations").

96. Leong, *supra* note 1, at 943.

97. See Farrow, *supra* note 31.

98. Battaglio, *supra* note 34.

99. Setoodeh & Wagmeister, *supra* note 37; see also Huddleston, *supra* note 35 ("Because Lauer held a position of great power at NBC, . . . anonymous accusers [reported] that they were torn about coming forward with their claims because of fears about repercussions for their careers."); Battaglio, *supra* note 34 (referring to investigation finding that Lauer had "engaged in sexual banter . . . in the presence of other employees, which created the perception that any inappropriate behavior by him was ignored by management"); cf. Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/4NHS-F3KT>] (recounting the almost-immediate backlash two female comedians faced when they attempted to expose Louis C.K.'s sexual misconduct).

100. See, e.g., *Gantt v. Sentry Ins.*, 824 P.2d 680, 681–83 (Cal. 1992) (finding that male employee stated a cause of action for wrongful termination in violation of public policy based upon his demotion in retaliation for reporting and supporting female coworker's claim of sexual harassment); *Curto v. Med. World Commc'ns, Inc.*, 388 F. Supp. 2d 101, 104–09 (E.D.N.Y. 2005) (declining to dismiss claims against defendants alleged to have discharged plaintiff in retaliation for reporting sexual harassment of a coworker); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 860 (7th Cir. 2001) ("[A] reasonable jury could have concluded that [defendants] . . . must have been aware . . . that demoting [plaintiff] after he had come forward with allegations of harassment would violate Title VII.").

101. *Hearing*, *supra* note 21 (statement of Dahlia H. Lithwick).

harassment in the federal judiciary, Lithwick advocated for “creat[ing] a culture of bystanders willing to step up and report abuse, and to defend victims, even if at some . . . professional cost.”¹⁰² A relatively recent amicus brief filed “in a Fourth Circuit . . . case alleging harassment [in] a federal public defender’s office”¹⁰³ quoted one witness’s observation that she “watched for over [twenty] years . . . the judiciary circling the wagons any time there was a complaint made by an employee,” noting that “[w]hen somebody violates the rules, instead of holding them accountable, the judiciary makes sure nobody comes in and tells them what to do.”¹⁰⁴

Of course, employers taking adverse action against an employee for reporting workplace harassment generally constitutes unlawful retaliation under Title VII of the Civil Rights Act of 1964.¹⁰⁵ Title VII explicitly bars an employer from discriminating against any of its employees “because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”¹⁰⁶ Reporting workplace sexual harassment—whether that harassment was directed toward the reporting employee or toward one of her coworkers—falls squarely within the protections of Title VII’s anti-retaliation provision.¹⁰⁷ Nevertheless, plaintiffs face a host of difficulties in successfully pursuing such retaliation claims,¹⁰⁸ and the mere possibility of prevailing in this type of suit is often insufficient to persuade employees to come forward. In this way, the risk of retaliation as a result of reporting harassment becomes part of the “cost-benefit analysis” that bystanders undertake in deciding whether to get involved in these dicey situations.¹⁰⁹ If bystanders perceive the potential risk of retaliation to be significant—and if they doubt their ability to successfully combat such retaliation in court—they may decide to remain silent.¹¹⁰ Therefore, convincing bystanders to speak out about workplace

102. *Id.*

103. Kathryn Rubino, *Appellate Amicus Brief Details the Sexual Harassment Federal Judiciary Employees Face*, ABOVE THE LAW (Aug. 30, 2021, 5:18 PM), <https://abovethelaw.com/2021/08/appellate-amicus-brief-details-the-sexual-harassment-federal-judiciary-employees-face> [https://perma.cc/4A6F-A5BY].

104. Brief for Named and Unnamed Current and Former Employees of the Federal Judiciary Who Were Subject to or Witnessed Misconduct as Amici Curiae in Support of Appellant Jane Roe at 38, *Jane Roe v. United States*, No. 21-1346 (4th Cir. Aug. 26, 2021).

105. See 42 U.S.C. § 2000e-3(a); see also Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 676 (2021).

106. 42 U.S.C. § 2000e-3(a).

107. See *id.*; Porter, *supra* note 84, at 52–53.

108. See Porter, *supra* note 84, at 52–56; see also Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 76–102 (2005).

109. See Brake, *supra* note 108, at 36–38 (discussing the cost-benefit analysis individuals engage in to decide whether to report workplace harassment); see also Bowes-Sperry & O’Leary-Kelly, *supra* note 50, at 300 (stating that observers of harassment “choose the response that is most effective in dealing with the problem while minimizing net costs”).

110. See Porter, *supra* note 84, at 58 (“[T]he fear of retaliation is often enough to stop an employee from reporting harassment.”); see also *id.* at 52 (“An institutional climate that

harassment will require negating or otherwise overriding this fear of retaliation.

B. BYSTANDERS HESITATE TO SPEAK OUT DUE TO THE “BYSTANDER EFFECT”

In addition to fears of retaliation discouraging bystanders from speaking out, bystanders also often choose to remain silent about workplace harassment due to a phenomenon known as the “bystander effect.”¹¹¹ The bystander effect refers to the idea that “we are less likely to help a victim when others are also present.”¹¹² Oftentimes, the reluctance to take action or speak up stems from a diffused sense of responsibility—from the feeling that *someone else* who is present has the responsibility to intervene.¹¹³ It is easier to refrain from speaking up if one assumes that someone else has a greater obligation to do so. Sometimes, the bystander effect flows from “social influence”—from bystanders observing others declining to intervene and therefore deeming this failure to act the “correct” course of action.¹¹⁴ If no one else is choosing to speak up, perhaps there are good reasons for that bystander to remain silent as well.

Both of these rationales are readily observable in well-publicized cases of harassment in which bystanders failed to speak out. The notion of “diffused responsibility” clearly emerges in stories involving Matt Lauer’s sexual misconduct. Because so many people knew about Lauer’s misbehavior—including (presumably) NBC management¹¹⁵—everyone assumed that *someone else* would act on these concerns. After attending a roast in Lauer’s honor surrounded by thousands of people, including “the most powerful people in media,” where a repeated punchline involved Lauer “pushing himself on people,” one could readily assume that *someone else* would eventually report his misbehavior.¹¹⁶ An example of the “social influence” aspect of the bystander effect emerges from an exami-

fosters the threat of retaliation can deter reports without anyone ever actually retaliating.”).

111. See Houseman, *supra* note 8, at 285–86; see also Asha Santos & Daniel McGinn, “If Something Feels Off, You Need to Speak Up”, HARV. BUS. REV., May–June 2020, at 58.

112. Johnson, Kirk & Keplinger, *supra* note 66; see also Santos & McGinn, *supra* note 111, at 58 (describing the bystander effect as “the tendency to look away or freeze when unexpected or inappropriate conduct is happening in front of you”).

113. See Johnson, Kirk & Keplinger, *supra* note 66; see also Yeager, *supra* note 82, at 16 (“The presence of other bystanders may reduce each potential rescuer’s individual sense of responsibility to the imperiled, and increase the probability of free-riding.”).

114. See Johnson, Kirk & Keplinger, *supra* note 66. Interestingly, one set of researchers found that individuals are more likely to report harassment within a workplace that adheres to a “zero-tolerance” sexual harassment policy. See Jacobson & Eaton, *supra* note 22, at 37. This finding seems consistent with aspects of the bystander effect: A zero-tolerance policy would indicate that speaking up is *everyone’s* responsibility. Cf. Johnson, Kirk & Keplinger, *supra* note 66. Moreover, presumably by fostering a “norm of intervention” (as opposed to a norm of apathy), a zero-tolerance policy creates the type of social influence that encourages reporting. See Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1011–13, 1029–30 (2015).

115. See sources cited *supra* notes 34–41, 99 and accompanying text.

116. See Duah, *supra* note 39.

nation of Harvey Weinstein’s sexual misconduct. A former employee of the Weinstein Company described hearing warnings that would circulate about Weinstein’s antics, but noted that “people were [normally] talking affectionately, if eye-rollingly, about him.”¹¹⁷ And from her perspective, “if everyone else was OK with it, who was I to make a fuss?”¹¹⁸ As noted above, even the human resources department of the Weinstein Company refused to act upon allegations of Weinstein’s harassment.¹¹⁹ Under such circumstances, it would not be unreasonable for a bystander to remain silent and assume that the “correct” response was the one adopted by others in the workplace—namely, that of *inaction*. In this way, the bystander effect represents yet another reason for why observers of harassment choose not to come forward. As such, overcoming bystander silence and encouraging intervention will require the force of the bystander effect to be accounted for as well.

C. BYSTANDERS HESITATE TO SPEAK OUT DUE TO PSYCHOLOGICAL BARRIERS

The third set of reasons bystanders may choose to remain silent when faced with instances of workplace harassment relate to bystanders’ own psychological barriers. Oftentimes, the ways in which bystanders think about the offensive behavior—and even think about themselves—can impact their decision about whether to come forward. With respect to bystanders’ views regarding the offensive behavior itself, studies indicate that bystanders are more likely to intervene when they observe blatant and obvious instances of harassment.¹²⁰ For example, according to one set of researchers, observers of sexual harassment are more likely to intervene in instances of quid pro quo harassment, as compared to hostile environment harassment.¹²¹ Other researchers similarly have found that bystanders are more likely to report misbehavior when it is perceived as

117. See Amelia Gentleman & Holly Watt, “It Was Like Tending to a Disgusting Baby”: Life as a Harvey Weinstein Employee, *THE GUARDIAN* (Sept. 29, 2018, 2:00 AM), <https://www.theguardian.com/film/2018/sep/29/harvey-weinstein-three-former-employees-on-working-for-him> [<https://perma.cc/NUU6-T6L8>].

118. See *id.*

119. See Farrow, *supra* note 31.

120. See Ann Marie Ryan & Jennifer Leah Wessel, *Sexual Orientation Harassment in the Workplace: When Do Observers Intervene?*, 33 *J. ORGANIZATIONAL BEHAV.* 488, 491 (2012); see also Espinoza & Cunningham, *supra* note 8, at 324–25.

121. See Espinoza & Cunningham, *supra* note 8, at 331–32. Courts recognize two different types of sexual harassment: hostile environment harassment and quid pro quo harassment. See *id.* at 324. Hostile environment harassment is generally considered to be less severe, see *id.*, and occurs when the workplace has become so infused with sexual remarks, comments, actions, and advances as to create a hostile or abusive work environment. See U.S. EQUAL EMP. OPPORTUNITY COMM’N, *POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT* (1990), <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment> [<https://perma.cc/E8RN-GLUB>] [hereinafter *EEOC POLICY GUIDANCE*]. Quid pro quo harassment is generally considered the more severe form, and it occurs when an employee’s submission to or rejection of sexual conduct is used as the basis for employment decisions affecting the employee. See Espinoza & Cunningham, *supra* note 8, at 324; *EEOC POLICY GUIDANCE*, *supra*.

low in ambiguity—where the harassment of a coworker is clear.¹²² In other words, bystander intervention is more likely “when there is no doubt in [the bystander’s] mind that a coworker is being badly victimized by her or his harasser.”¹²³ So one barrier to bystander intervention may arise when the bystander simply does not view the harassment as serious or blatant enough to warrant his or her involvement.

An additional psychological barrier that might prevent bystanders from reporting harassment lies in the often-nuanced nature of the harasser and his actions; these scenarios often defy a stark “good and evil” narrative. For example, Harvey Weinstein was undoubtedly a monster in his treatment of women and subordinates, but many would characterize him as a genius in terms of his talent, with countless actors and entertainers praising Weinstein over the years for his assistance to their careers.¹²⁴ According to one report, “at the annual awards ceremonies, [Weinstein] has been thanked more than almost anyone else in movie history, ranking just after Steven Spielberg and right before God.”¹²⁵ Matt Lauer likewise represented a complicated combination of hero and villain to many of his colleagues. For years, he enjoyed a reputation as “America’s Dad,”¹²⁶ as the nice guy who Americans welcomed into their living rooms each morning. Even Lauer’s co-host, Savannah Guthrie, expressed tremendous conflict in the wake of the revelations about his behavior; she praised the bravery of the woman who had come forward to expose Lauer but tearfully proclaimed to be “devastated” at these disclosures and called Lauer a “dear, dear friend.”¹²⁷

In this way, a *bystander* may have more complicated feelings about a harasser than does the target of the harassment herself. For instance, bystanders’ feelings of disgust at observing such misconduct may be tempered by their own positive interactions with the wrongdoer. They may feel torn about coming forward to report abusive behavior that they observe when such behavior is engaged in—not by an individual who they

122. See Bowes-Sperry & O’Leary-Kelly, *supra* note 50, at 293.

123. Espinoza & Cunningham, *supra* note 8, at 325; see also Kulik, Perry & Schmidtke, *supra* note 71, at 43 (citing studies indicating that formal reporting of harassment is “most likely to occur in response to explicit, repeated, and obviously harassing situations”).

124. See Salma Hayek, Opinion, *Harvey Weinstein is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html> [<https://perma.cc/7F9N-YGSK>]; see also Fink, *supra* note 28, at 324 (discussing the extent to which Weinstein’s harassment bolstered his power within entertainment industry).

125. Farrow, *supra* note 31; see also Cunningham, *supra* note 7 (relaying one screenwriter, actor, and producer’s claim that he “kept [his] mouth shut” because Weinstein was “nothing but wonderful” to him).

126. Kathryn Vanarendonk, *It’s Time to Do Away With “America’s Dad” as Our Journalistic Standard*, SLATE (Dec. 1, 2017, 9:33 AM), <https://slate.com/culture/2017/12/matt-lauer-and-the-america-s-dad-image.html> [<https://perma.cc/6SS9-S5VB>]; see also *id.* (“Lauer’s entire persona was an inoffensive, personable, noncontroversial father figure . . .”); Banet-Weiser, *supra* note 27 (describing social media responses to exposure of Lauer’s behavior as including: “But he’s so nice!” and “I grew up watching him—how could this happen?”).

127. Banet-Weiser, *supra* note 27.

can readily and easily characterize as wicked—but rather by someone who they may previously have admired and respected.¹²⁸ The screenwriter, producer, and actor, Scott Rosenberg, captured this tension perfectly in the social media post that he shared in the wake of the Harvey Weinstein scandal breaking. He noted that “[e]verybody-f-ing-knew” about Weinstein’s misconduct, but admitted that “in the end, I was complicit. I didn’t say s—. I didn’t do s—. Harvey was nothing but wonderful to me. So I reaped the rewards and I kept my mouth shut.”¹²⁹

A final internal psychological barrier that may prevent bystanders from reporting harassment relates to a bystander’s (mis)understanding of their *own* inclinations. People often assume that they will act in a particular way when faced with offensive behavior, but “[p]eople don’t always do what they think they will in real-life situations.”¹³⁰ In a 2012 experiment, for example, study participants either read about examples of sexual harassment or observed the harassment in a staged setting.¹³¹ In both cases, the participants overestimated how they would respond to such harassment, anticipating objections or protests that never materialized.¹³² In another study, researchers examined how female participants expected to respond to offensive questions asked during a job interview.¹³³ The participants expected to feel angry or to confront their harassers when faced with the offensive questions (which included, for example, questions about whether the job applicant had a boyfriend, or whether women should be required to wear bras at work),¹³⁴ and most participants expected to refuse to answer such questions.¹³⁵ Yet when they actually experienced these offensive questions as part of mock interviews, *all fifty* of the participants answered the offensive questions.¹³⁶

Notably, this disparity between someone’s anticipated response to harassment and their actual response to the behavior may be even more pronounced when harassment is not directed at the individual in question, but rather at a fellow coworker— as mere *bystanders* to the harassment, they may feel even more psychologically distanced from the misconduct.¹³⁷ But as disconcerting and disappointing as it may be to realize that neither targets of, nor bystanders to, harassment expose that behavior to

128. See Ellen McGirt, *We Need to Do the Math on Sexual Harassment at Work*, *FOR-TUNE* (Nov. 29, 2017, 12:32 PM), <https://fortune.com/2017/11/29/we-need-to-do-the-math-on-sexual-harassment-at-work> [<https://perma.cc/22NL-HB27>] (querying “Can you be a sexual harasser and still be good at your job?”).

129. Cunningham, *supra* note 7.

130. *Id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*; cf. Yeager, *supra* note 82, at 15–16 (asserting that “a bystander’s lack of opportunity for planning and rehearsal and the difficulty of quickly selecting the appropriate type of intervention might make her assistance less likely”).

137. See Bowes-Sperry & O’Leary-Kelly, *supra* note 50, at 295, 298–99; Cunningham, *supra* note 7; Espinoza & Cunningham, *supra* note 8, at 324; Kulik, Perry & Schmidtke, *supra* note 71, at 42–46.

the degree that they expect, the silver lining is that these groups maintain laudable intentions: bystanders do not appear to stay silent out of apathy regarding the wrongful conduct, or out of any malice toward the victim of such conduct. Bystanders seem to *want* to speak up, and in fact approach these fraught situations believing that they will do so.¹³⁸ In the moment, however, other forces act to inhibit this response. Accordingly, one might wonder whether those inhibitions might be overridden—perhaps, whether some *other* force might nudge bystanders back into a position of speaking out.

IV. A BYSTANDER BOUNTY AS A MEANS TO ENCOURAGE REPORTING

If it is clear that we need bystanders to come forward and report the sexual harassment that they observe in the workplace—and if it is equally clear that, under the current system, they decline to do so, often for quite valid reasons¹³⁹—then employers, the government, and the legal system as a whole must adopt a different approach for encouraging these bystanders to speak up. Merely expanding the existing (questionably effective) harassment training tools that employers already use to somehow include bystanders as well cannot be the answer;¹⁴⁰ employees seem no more likely to be engaged in “canned webinar training” regarding bystander intervention than they have been with respect to sexual harassment training more generally.¹⁴¹ Instead, a more novel approach seems to be warranted—an approach that perhaps requires looking outside of the context of workplace sexual harassment entirely. There are other situations in which individuals exhibit reluctance to speak up and report wrongdoing that they observe—but that reluctance can sometimes be overcome through financial incentives. Specifically, under a federal law known as the False Claims Act,¹⁴² private individuals who report and pursue lawsuits against those who have defrauded the government may receive a portion of the money recovered.¹⁴³ Importing aspects of this system into the sexual harassment context could encourage reluctant bystanders to come forward here as well.

138. See Cunningham, *supra* note 7.

139. See *supra* Part III.

140. See *supra* notes 54–62 and accompanying text.

141. See Schulte, *supra* note 23.

142. See False Claims Act, 31 U.S.C. §§ 3729–3733.

143. See Bryan Lemons, *An Overview of “Qui Tam” Actions*, FED. L. ENF’T TRAINING CTR., https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/civil-actions/quitam.pdf [https://perma.cc/3PWD-2JB8]; see also *Qui Tam Actions: Overview*, FINDLAW, <https://www.findlaw.com/employment/whistleblowers/qui-tam-actions-overview.html> [https://perma.cc/NSQ6-J952]; HARLAN GOTTLIEB & KEVIN L. PHELPS, *GOVERNMENT CONTRACT COMPLIANCE HANDBOOK* § 1:17 (5th ed. 2022).

A. THE *QUI TAM* ACTION AS ENCOURAGING THE REPORTING OF FINANCIAL CRIMES

As noted above, the problem of bystanders remaining silent is not unique to workplace sexual harassment.¹⁴⁴ In a host of other contexts—including that of financial wrongdoing at work—misconduct often is observed by many yet disclosed by few.¹⁴⁵ According to one prominent attorney who represents financial whistleblowers, “[h]uge percentages of people know stuff They’re just not speaking up.”¹⁴⁶ One of his clients—a whistleblower who disclosed wrongdoing within the firm JPMorgan Chase, culminating in a \$267 million penalty against the company—echoed this view, stating that “[t]here were a dozen people I worked with who knew the same information I knew and still didn’t report anything.”¹⁴⁷

In the context of financial wrongdoing, the government has deployed a powerful tool to encourage otherwise-reluctant bystanders to step forward. The False Claims Act (FCA)¹⁴⁸ was originally enacted in 1863 as a tool to prevent fraud by defense contractors during the Civil War.¹⁴⁹ In its current form, the FCA allows private citizens who learn of fraud against the United States to bring suit on behalf of the federal government and, under what is known as the FCA’s *qui tam* provisions,¹⁵⁰ potentially share in any financial recovery that results from those suits.¹⁵¹ While the amount of a *qui tam* award varies from case to case, a private citizen bringing one of these claims generally can receive between 15% and 30% of the government’s total recovery.¹⁵²

The mechanics of *qui tam* litigation are fairly straightforward. After a private individual learns about what the individual believes to be a “false claim” against the government—the overcharging for goods or services, charging for services never provided, making false reports about the quality of a product, or another scheme to cheat or defraud the government—that individual may file an action in federal court.¹⁵³ Initially, any action filed by a private individual will remain “under seal” with the court,

144. See *supra* Part II.

145. See, e.g., Patrick Radden Keefe, *Jordan Thomas’s Army of Whistle-Blowers*, *NEW YORKER* (Jan. 17, 2022), <https://www.newyorker.com/magazine/2022/01/24/jordan-thomas-army-of-whistle-blowers> [<https://perma.cc/J6ZF-DQFE>].

146. *Id.*

147. *Id.*

148. See 31 U.S.C. §§ 3729–3733.

149. See Lemons, *supra* note 143.

150. The term *qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means “[he] who sues in this matter for the king as well as himself.” *Qui Tam*, WIKIPEDIA, https://en.wikipedia.org/wiki/Qui_tam [<https://perma.cc/6KBU-LQFP>].

151. See Lemons, *supra* note 143; see also GOTTlieb & PHELPS, *supra* note 143, § 1:17; FINDLAW, *supra* note 143; Doty, *supra* note 86, at 62–63 (“The False Claims Act permits individuals to blow the whistle and pursue fraud claims on behalf of the government in *qui tam* actions in exchange for a cut of the award if the litigation is successful.”).

152. See Lemons, *supra* note 143; see also GOTTlieb & PHELPS, *supra* note 143, § 1:17; FINDLAW, *supra* note 143.

153. See Lemons, *supra* note 143; FINDLAW, *supra* note 143.

meaning that the contents of the complaint will be kept confidential and not released to the general public.¹⁵⁴ The complaint will stay under seal for sixty days, during which time it will be served upon the federal government, giving the government the opportunity to investigate the charges and determine whether it wants to intervene in the litigation.¹⁵⁵ If the federal government does intervene, it will take primary responsibility for prosecuting the action; if it does not intervene, the private individual who initially filed the complaint may pursue the action himself.¹⁵⁶

If the plaintiff establishes the defendant's liability in FCA litigation, the government may recover treble damages, as well as impose significant penalties.¹⁵⁷ This structure has resulted in astronomical awards for the government over the years, as well as significant awards for the private individuals who have initiated such suits.¹⁵⁸ Indeed, since 1986, the government has collected more than \$70 billion under the False Claims Act.¹⁵⁹ Just in 2021, among other awards, the government collected a \$50 million payout from Navistar Defense, LLC related to inflated prices for a defense vehicle that the company produced.¹⁶⁰ The whistleblower in that case collected just over \$11 million for their role in exposing the fraud.¹⁶¹ That same year, another defense contractor, Insitu, Inc., settled a *qui tam* suit related to the alleged overcharging of the government for \$25 million, with the whistleblower collecting \$4.62 million as an award.¹⁶²

Following the example of these *qui tam* suits, in 2011, in the wake of the 2008 financial crisis and Bernie Madoff scandal, the U.S. Securities Exchange Commission (SEC) set up its own whistleblower program to encourage individuals to report corporate malfeasance—and likewise gave whistleblowers a “bounty” from any successful claims, ranging from 10% to 30% of the amount collected by the government.¹⁶³ As of January 2022, the SEC had distributed \$1.2 billion in bounty awards.¹⁶⁴ In 2015, the government collected \$267 million from JPMorgan Chase after a whistleblower helped to expose a “pattern of self-dealing” at the bank,

154. See Lemons, *supra* note 143; GOTTLIEB & PHELPS, *supra* note 143, § 1:19; FINDLAW, *supra* note 143.

155. See Lemons, *supra* note 143; see also GOTTLIEB & PHELPS, *supra* note 143, § 1:19; FINDLAW, *supra* note 143.

156. See Lemons, *supra* note 143; see also FINDLAW, *supra* note 143.

157. See FINDLAW, *supra* note 143 (observing that a liable defendant “will be required to pay three times the amount of damages suffered by the government . . . , [and] the court may impose a penalty of \$5,000 to \$10,000 per claim,” as well as punitive damages); see also GOTTLIEB & PHELPS, *supra* note 143, § 1:15.

158. See GOTTLIEB & PHELPS, *supra* note 143, § 1:17; Tycko & Zavareei Whistleblower Practice Group, *Top 5 Notable Qui Tam Lawsuits of 2021*, NAT'L L. REV. (Feb. 16, 2022), <https://www.natlawreview.com/article/top-5-notable-qui-tam-lawsuits-2021> [<https://perma.cc/ZT7L-6DZT>] [hereinafter Tycko & Zavareei].

159. See Tycko & Zavareei, *supra* note 158.

160. See *id.*

161. See *id.*

162. See *id.*

163. See Keefe, *supra* note 145.

164. See *id.*

with the whistleblower receiving a \$13 million award.¹⁶⁵ In 2009, the government collected \$780 million from UBS, awarding the whistleblower in that case \$104 million.¹⁶⁶

Of course, it is possible that these whistleblowers would have chosen to report the financial misconduct that they observed even without this potential financial reward; their consciences and collective sense of morality may have compelled them to speak up without the possibility of compensation. But deciding to come forward and expose wrongdoing can be a difficult decision for many people; it can be “a psychologically fraught, existentially decisive act.”¹⁶⁷ One’s family may not approve of their decision; one’s friends or coworkers may see this exposure as a personal betrayal.¹⁶⁸ In many cases, exposing wrongdoing within an organization where someone works may jeopardize their continued employment.¹⁶⁹ Therefore, “[h]aving statutory protections insulating a whistleblower from some of the associated costs provides a necessary sense of security for individuals contemplating blowing the whistle and encourages them to take the leap and make the information public.”¹⁷⁰ Moreover, regardless of whether the financial reward is the inducement that encourages a bystander to report or whether the reward simply is an extra bonus for someone who was inclined to report wrongdoing anyway, these bounties will attract significant attention—likely resulting in more widespread reporting.¹⁷¹ As one lawyer who has represented multiple whistleblowers

165. *See id.*

166. Notably, the UBS whistleblower, Bradley Birkenfeld, a former UBS employee, was able to collect this award despite having apparently been *complicit* in the wrongdoing that led to the government’s action against his employer. *See* Eamon Javers, *Why Did the US Pay This Former Swiss Banker \$104M?*, CNBC (May 1, 2015, 8:53 AM), <https://www.cnbc.com/2015/04/30/why-did-the-us-pay-this-former-swiss-banker-104m.html> [<https://perma.cc/4K9N-LPNW>]. While Mr. Birkenfeld went to jail for his involvement in UBS’s wrongdoing, pleading guilty to one count of conspiracy, he still was able to collect this financial award. *See id.*

167. Keefe, *supra* note 145.

168. *See id.*; *see also* Doty, *supra* note 86, at 60 (“Laws protecting and incentivizing whistleblowing have been crafted out of a recognition that making information public is important, but that there can be risks associated with speaking up.”).

169. The FCA contains prohibitions on retaliation, including barring an employer from discharging, demoting, suspending, threatening, harassing, or otherwise discriminating against any employee for their part in exposing or cooperating with the exposure of conduct barred by the FCA. *See* 31 U.S.C. § 3730(h); *see also* GOTTSLIEB & PHELPS, *supra* note 143, § 1:20. Yet like many anti-retaliation provisions, the protection provided by this statutory language is often illusory at best. *See generally* Porter, *supra* note 84, at 52–56; Brake, *supra* note 108, at 76–103.

170. Doty, *supra* note 86, at 64. Interestingly, some companies have opted to implement *internal* whistleblowing programs, incentivizing employees to internally report financial or other concerns. *See* Towey, *supra* note 73. Some businesses even offer financial bouses to workers who bring forward issues that may indicate larger problems. *See id.* While such programs show some effectiveness, many companies may mishandle or even ignore complaints that they receive, *id.*, indicating that more guidance may be needed for companies choosing to adopt such an internal system.

171. *See, e.g.*, Javers, *supra* note 166 (containing headline asking “Why Did the US Pay This Former Swiss Banker \$104M?”); *see also* David Kocieniewski, *Whistle-Blower Awarded \$104 Million By I.R.S.*, N.Y. TIMES (Sept. 11, 2012), <https://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html> [<https://perma.cc/>

observed, “[i]f more people know that it can pay to sound the alarm, more people will sound the alarm.”¹⁷² In this way, injecting a financial reward into any system seems quite likely to reduce the degree of wrongdoing within that system.

B. REPLICATING *QUI TAM* IN THE CONTEXT OF HARASSMENT: USING A BYSTANDER BOUNTY TO ENCOURAGE THE REPORTING OF SEXUAL HARASSMENT AT WORK

In the context of financial wrongdoing and other types of fraud against the government, whistleblowing—combined with a financial reward for the whistleblower—has proven to be an effective means for exposing wrongdoing in the workplace.¹⁷³ While whistleblowers often feel torn about whether to report the wrongdoing they observed,¹⁷⁴ the financial incentives that have been put in place—whether through *qui tam* litigation or the SEC’s program—seem to encourage a significant number of bystanders to come forward.¹⁷⁵ As noted above, bystanders to workplace sexual harassment experience much of the same reluctance about reporting wrongdoing as do their counterparts in a financial context.¹⁷⁶ They experience the same deep concerns about the retaliation that might result from disclosing what they have observed, the same pressures to abide by workplace norms, and the same hopes that “someone” (i.e., someone else) will speak up.¹⁷⁷ Perhaps, then, the financial incentives that have been so effective in the financial context also might have a role to play here. Perhaps a bystander bounty might motivate observers of workplace sexual harassment to likewise report this wrongdoing.

Notably, the use of “bounties” to encourage reporting of various types of behavior has received much attention in recent months.¹⁷⁸ In September 2021, Texas Senate Bill 8 (SB8)¹⁷⁹ went into effect, which, among other things, uses a bounty system to encourage private individuals within Texas to report on—and ultimately bring lawsuits against—individuals who perform abortions that are banned under the law, or who “knowingly engage[] in conduct that aids or abets the performance or induce-

2Q2T-XMNA]; Press Release, Securities Exchange Commission, SEC Awards Over \$13 Million to Whistleblower (Jan. 6, 2022), <https://www.sec.gov/news/press-release/2022-2> [<https://perma.cc/ZK8P-EFEY>]; cf. Jason Zuckerman & Matthew Stock, *SEC Whistleblower Program: What Are the Largest SEC Whistleblower Awards?*, ZUCKERMAN LAW (Jan. 24, 2023), https://www.zuckermanlaw.com/sp_faq/largest-sec-whistleblower-awards [<https://perma.cc/LE5T-9EF4>] (listing awards of up to \$114 million).

172. Keefe, *supra* note 145.

173. *See supra* Part IV.A.

174. *See supra* Part III.

175. *See supra* Part IV.A.

176. *See supra* Parts III, IV.A.

177. *See supra* Part III.

178. *See, e.g.*, Amy Davidson Sorkin, *The Supreme Court Wonders Where the Texas Abortion Law Might Lead*, THE NEW YORKER (Nov. 3, 2021), <https://www.newyorker.com/news/daily-comment/the-supreme-court-wonders-where-the-texas-abortion-law-might-lead> [<https://perma.cc/3DE5-Z979>].

179. *See* Tex. S.B. 8, 87th Leg., R.S., ch. 62, 2021 Tex. Sess. Law Serv. 125 (West) (codified at TEX. HEALTH & SAFETY CODE §§ 171.201–171.212).

ment of an abortion.”¹⁸⁰ These lawsuits, which can result in statutory damages of at least \$10,000 plus costs and attorneys’ fees,¹⁸¹ can be brought by “[a]ny person, other than an officer or employee of a state or local governmental entity in this state.”¹⁸² In other words, Texas has foregone having state officials enforce its new abortion restriction and instead has “activated and incentivized this army of private deputies,”¹⁸³ creating a system that even the Chief Justice of the United States Supreme Court referred to as involving a “bounty.”¹⁸⁴ Regardless of what one thinks of such tactics by Texas, there is little doubt about the efficacy of this bounty system. In the wake of the law’s passage, the number of abortions performed in Texas has been dramatically reduced,¹⁸⁵ with reports indicating that abortions may have decreased by as much as 60% in the first month after the law went into effect.¹⁸⁶ Seeing the impact of this system within Texas, jurisdictions outside of Texas have examined the possibility of using bounties to disincentivize other types of conduct.¹⁸⁷

180. TEX. HEALTH & SAFETY CODE § 171.208(a); see also Maggie Astor, *Here’s What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html> [<https://perma.cc/52WE-HMSG>]; see also Sorkin, *supra* note 178.

181. TEX. HEALTH & SAFETY CODE § 171.208(b)(2); see also Astor, *supra* note 180.

182. TEX. HEALTH & SAFETY CODE § 171.208(a) (emphasis added); see also Sorkin, *supra* note 178 (asserting that SB8 “allows almost anyone anywhere in the United States to pursue a claim of at least [\$10,000] against anyone in Texas who they believe has ‘aided or abetted’ in any abortion performed or induced after 6 weeks of pregnancy”).

183. Sorkin, *supra* note 178.

184. Transcript of Oral Argument at 50, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 222 (2021) (No. 21-463) (Chief Justice Roberts asking the Texas Solicitor General to “assume that the bounty is not \$10,000 but a million dollars”); see also Sorkin, *supra* note 178.

185. See Sorkin *supra* note 178; see also Lizzie Widdicombe, *How Texas Abortion Volunteers Are Adapting After S.B. 8*, NEW YORKER (Oct. 6, 2021), <https://www.newyorker.com/news/annals-of-activism/how-texas-abortion-volunteers-are-adapting-after-sb-8> [<https://perma.cc/YT3F-XN2Z>] (observing that, in the wake of the Supreme Court’s refusal to strike down SB8, “getting an abortion in Texas, which was already extremely difficult, became almost impossible”).

186. See BeLynn Hollers, *Abortions in Texas Dropped Almost 60% in the First Month After New SB 8 Restrictions Were Imposed*, DALL. MORNING NEWS (Feb. 8, 2022), <https://www.dallasnews.com/news/politics/2022/02/07/abortions-in-texas-dropped-almost-60-in-the-first-month-after-new-sb-8-restrictions-were-imposed> [<https://perma.cc/86D8-4V95>]; see also Jordan Williams, *Texas Abortion Numbers Dropped 50 Percent Following Ban*, THE HILL (Oct. 30, 2021, 3:10 PM), <https://thehill.com/policy/healthcare/abortion/579251-texas-abortion-numbers-dropped-50-percent-following-ban> [<https://perma.cc/4MMK-HLJE>].

187. Indeed, prior to the Supreme Court hearing argument in the case challenging SB8, gun rights groups filed an amicus brief worrying that “copycat laws” might use a bounty system to threaten the rights of gun owners. See Sorkin, *supra* note 178; see also Brief of Firearms Policy Coalition as Amicus Curiae in Support of Petitioners at 1, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 222 (2021) (No. 21-463) [hereinafter Brief of Firearms Policy Coalition] (citing concern that laws applying bounties “could just as easily be used by other States to restrict First and Second Amendment rights or, indeed, virtually any settled or debated constitutional right”). In fact, California Governor Gavin Newsom recently signed legislation that will allow private citizens to sue anyone who “imports, distributes, manufactures or sells illegal firearms in California,” and which provides \$10,000 in damages for each weapon involved in any alleged violation. See Hannah Wiley, *Newsom Signs Gun Law Modeled After Texas Abortion Ban, Setting Up Supreme Court Fight*, L.A. TIMES (July 22, 2022), <https://www.latimes.com/california/story/2022-07-22/newsom-signs-gun-bill-modeled-after-texas-abortion-ban-setting-up> [<https://perma.cc/W4JA-X2SS>]; see also Lawrence Hurley, *Analysis: Texas Abortion Law Opens Door to Copycat Curbs on Guns*,

This recognition that, across many contexts, bounties have created a powerful incentive to motivate reluctant observers to report on the (mis)behavior of others indicates that a “bystander bounty” in the context of workplace sexual harassment could serve as a powerful tool for exposing and reducing this workplace conduct. To a certain extent, the notion of whistleblowing already has played a role in the revealing of workplace sexual harassment. The #MeToo Movement can be seen as “a form of whistleblowing, or even ‘mass whistleblowing,’”¹⁸⁸ and in the wake of #MeToo, many employers moved to enhance their whistleblowing resources more generally.¹⁸⁹ Other commentators have explicitly discussed the need to “incentivize making these accusations [of sexual harassment] in the public discourse.”¹⁹⁰ Incorporating a bounty system into the existing legal framework for reporting and prosecuting harassment might provide precisely this type of incentive.

Under this proposed bystander bounty system, *if* a bystander came forward to disclose workplace sexual harassment, and *if* that support ultimately manifested in a successful civil lawsuit against the perpetrator of the harassment, the bystander would receive a share of any recovery from the lawsuit. Just like in the context of financial whistleblowing, the bystander would serve as the ignitor that could set the wheels of justice in motion, but the ability to collect a financial award would depend on the success of the ensuing litigation. Moreover, following the *qui tam* model,¹⁹¹ any suit filed in this context could be kept under seal while the claims were investigated. This investigation most significantly would include discussions with the “direct” victim of the harassment to determine their willingness to support the litigation: if the direct victim of the harassment chose not to proceed, either as a plaintiff in the suit or even as a witness, then it is likely that the suit would be unsuccessful and perhaps dismissed.¹⁹²

Other Rights, REUTERS (Dec. 15, 2021, 12:41 PM), <https://www.reuters.com/world/us/texas-abortion-law-opens-door-copycat-curbs-guns-other-rights-2021-12-15> [<https://perma.cc/Y4M3-DXEG>] (noting that other states may pass similar legislation). Relatedly, during the oral arguments of the same SB8 challenge, Justice Sotomayor expressed concern about a similar bounty system being used to penalize other types of conduct, such as same-sex marriage or consensual sexual conduct. Sorkin, *supra* note 178; *see also* Brief of Firearms Policy Coalition, *supra*, at 11 (“Similar tactics, could, of course, be applied to deter the exercise of many other constitutional rights or, indeed, any form of disfavored behavior . . .”).

188. Doty, *supra* note 86, at 63–64.

189. *See* Kayleena Makortoff, *How Whistleblowing Became an Industry in the Wake of #MeToo*, THE GUARDIAN (Dec. 25, 2019), <https://www.theguardian.com/world/2019/dec/25/how-whistleblowing-became-an-industry-in-the-wake-of-metoo> [<https://perma.cc/D46L-PWP5>] (observing that one law firm that specialized in whistleblower cases described the aftermath of #MeToo as a “‘feeding frenzy’ among companies keen to put stronger safeguards and structures in place for staff seeking to flag illegal or concerning behaviour”).

190. Doty, *supra* note 86, at 58; *see generally* Porter, *supra* note 84 (discussing need to revise retaliation laws to encourage reporting of sexual harassment).

191. *See supra* Part IV.A.

192. In this manner, these bystander bounty suits share characteristics with charges brought by the state against alleged perpetrators of domestic violence and sexual assault,

To be sure, courts would have to establish clear parameters for these claims, including clearly articulating the type of disclosure and degree of support that would be required of the bystander to trigger their entitlement to a bounty. For example, this “bystander bounty” system should demand more than mere internal reporting of the harassment in question, but rather should require the bystander to take part in actual *litigation* of a claim related to the harassment—perhaps mandating that the bystander file an actual lawsuit with respect to the observed harassment.¹⁹³ Moreover, as in other whistleblower cases, courts would have to establish the amount of the appropriate bounty—along with the appropriate share of a damage award that a bystander could collect after bringing one of these suits.¹⁹⁴ In SEC whistleblower claims, the whistleblower generally collects between 10% and 30% of any amount recovered by the government.¹⁹⁵ While those claims often involve tens of millions of dollars recovered by the government (meaning that even 10% of the award can create a huge recovery for the whistleblower), sexual harassment suits generally involve more modest payouts.¹⁹⁶ On the one hand, this favors allowing bystanders to collect a *greater* percentage of the award as a bounty in order to properly incentivize them to come forward; a bystander may not be willing to risk the social, professional, and psychological ramifications of disclosure for 30% of a fairly modest award.¹⁹⁷ On the other hand, the bystander bounty should not be used to significantly detract from the relief owed to the direct victim of the harassment; the victim should not be “penalized” by having their recovery substantially reduced due to the bystander’s participation in the claim.

One solution to this predicament could be to have this bounty *added on* to, as opposed to *subtracted from*, any recovery for the victim. For example, if a harassment victim was awarded \$100,000 in damages as part of a harassment claim that was brought as a bystander suit, perhaps a 30% bystander bounty could be *added* to the recovery as an *additional* part of the remedy. In this way, the bystander bounty might function in a manner similar to punitive damages, which are calculated separately from the compensatory damages owed to a plaintiff.¹⁹⁸ Just as punitive dam-

where the ability to pursue charges against an alleged perpetrator will depend in large part on the cooperation of the alleged victim. *See infra* Part V.B.

193. Because the harms associated with workplace sexual harassment may accrue both to the direct victim of the harassment *and* to any bystanders, see *infra* Part V.B, this suit presumably could be brought in the victim’s name, in the bystander’s name, or in both of their names jointly, depending on the degree of participation desired by the direct victim.

194. *See generally* FINDLAW, *supra* note 143 (discussing how the court sets the exact bounty in the context of FCA claims).

195. *See* Keefe, *supra* note 145.

196. *See, e.g.*, Case Evaluator Report, WESTLAW, [https://1.next.westlaw.com/CaseEvaluatorWln/Report/SPA/b827b519cd7149f2a68467d7865468b2?transitionType=category&contextData=\(Sc.Default\)#/Report](https://1.next.westlaw.com/CaseEvaluatorWln/Report/SPA/b827b519cd7149f2a68467d7865468b2?transitionType=category&contextData=(Sc.Default)#/Report) [https://perma.cc/AV8W-NYRA]. While this report discloses multimillion dollar awards for cases in some jurisdictions, the average award in most jurisdictions is less than (and often significantly less than) \$500,000. *See id.*

197. *See supra* Part III.

198. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 3–4, 223 (A. James Casner et al. eds., 5th ed. 1985).

ages serve a separate purpose than compensatory damages—with punitive damages intended to punish and deter undesirable behavior, as opposed to merely “compensating” the plaintiff for the harm that they have suffered¹⁹⁹—so too would this bystander bounty serve a separate purpose than any damages paid to a direct harassment victim; while compensatory damages to the *direct victim* are intended to make the victim whole,²⁰⁰ the bystander’s bounty is intended to send a message, both to this particular bystander and to other bystanders who might be thinking about speaking out, regarding the need for everyone to play a role in eliminating this behavior.²⁰¹

Implementing a bystander bounty system of this kind has the potential to counteract many of the forces that currently deter bystanders from coming forward. First, offering a financial incentive to bystanders for reporting the wrongdoing that they observe can at least partially counteract the fears of retaliation that many bystanders expect might result from their speaking up.²⁰² Presumably, a significant financial award could at least soften the blow of any professional repercussions that might result from their speaking out. Moreover, providing for a bystander bounty in this context might counteract the “bystander effect” discussed above—it might counteract the notion that “someone else” will take responsibility for speaking out about workplace sexual misconduct.²⁰³ Indeed, with a significant enough bounty, bystanders may be quite eager to take the lead in initiating these actions.²⁰⁴ Finally, this bystander bounty system eventually could help to diminish some of the internal psychological barriers that often prevent observers of harassment from speaking up.²⁰⁵ The more common these suits become—the more publicized and accepted it seems to report this type of workplace misconduct—the more likely observers will be able to act upon their *natural* inclination to report this wrongdoing,²⁰⁶ rather than having fears and concerns hold them back.

To be sure, many questions remain for a bystander bounty system of this kind. Some of the most significant concerns about this framework are addressed in the following section. Other details need to be fleshed out. For example, if a bystander bounty case settles prior to it going to trial, should the bystander receive a portion of that settlement?²⁰⁷ What if multiple bystanders step forward to report workplace harassment, either as part of a single suit or in separate actions? Should they all receive a

199. *See id.*

200. *See id.* at 3.

201. *See infra* Part V.B.

202. *See supra* Part III.A

203. *See supra* Part III.B.

204. *But see infra* Part V.A (discussing concerns about a bounty encouraging false claims of harassment).

205. *See supra* Part III.C.

206. *See id.*; Cunningham, *supra* note 7.

207. In traditional *qui tam* claims, a whistleblower may receive a percentage of the total recovery, whether obtained through a favorable judgment or through a settlement. *False Claims Act (Qui Tam) Whistleblower FAQ*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/faq/false-claims-act-qui-tam> [<https://perma.cc/368U-R93A>].

bounty? Is there an administrative procedure that must precede any bystander suit, as there is when a direct victim files a harassment claim under Title VII?²⁰⁸ This Article does not purport to answer all of the questions that might be raised by this proposal. In fact, this Article does not argue that the implementation of a bystander bounty is the only—or even the most effective—means of curbing sexual harassment at work. Rather, this concept of a bystander bounty is intended to spark further discussion. If it is clear that bystanders have a significant role to play in mitigating this epidemic of harassment at work,²⁰⁹ and if it is clear that financial incentives have motivated bystanders to come forward in other contexts,²¹⁰ then examining the applicability of a bystander bounty in this context appears to be a fruitful area to explore.

V. POTENTIAL DRAWBACKS ASSOCIATED WITH A BYSTANDER BOUNTY

As detailed above, encouraging bystanders to speak out when they observe workplace sexual harassment carries many benefits. Not only does it shed light on wrongful behavior that otherwise might go unchecked,²¹¹ but it also conveys to the entire workplace—in a way that traditional training has failed to do²¹²—that the responsibility for creating a safe and productive workplace lies with every employee and everyone has an obligation to look out for their peers. Yet despite the clear benefits associated with encouraging bystanders to come forward, using this type of bounty system to induce such reporting presents several significant risks—most notably risks related to the proliferation of false claims, as well as risks related to the privacy and autonomy of the target of workplace harassment.

A. WILL CREATING A BYSTANDER BOUNTY SYSTEM ENCOURAGE THE REPORTING OF FALSE CLAIMS OF HARASSMENT?

One significant concern about monetizing the incentives associated with bystanders reporting workplace sexual harassment is that bystanders may act based on illicit motivations—they may report harassment not out of concern for the well-being of the victim or out of a desire to rid the workforce of this wrongful behavior, but rather because they see a potential for profit. As one group of researchers in this area observed, “While involving observers may result in more harassment problems being identified, it may also result in more false claims with serious consequences

208. In an ordinary Title VII case, a plaintiff must “exhaust” their administrative remedies by first filing a discrimination claim with the EEOC or with a comparable state agency before the plaintiff can bring suit in federal court. 42 U.S.C. §§ 2000e–5(e)(1), (f)(1).

209. See sources cited *supra* note 75.

210. See *supra* Part IV.A.

211. See *supra* Part III.

212. See *supra* Part II.B.

for the accused.”²¹³ Such false claims could arise out of innocent mistakes since witnesses to harassment often will have more limited information about an allegedly inappropriate interaction than the putative victim of any harassment.²¹⁴ Some may fear that injecting a financial motivation into the reporting structure might perniciously motivate individuals to make harassment claims against their peers that lack any factual or legal basis—it might motivate individuals to trump up entirely false allegations of harassment charges in a ploy to accrue financial gain. In the words of one financial crime whistleblower (who in fact refused to take any of the approximately \$8 million award for which he qualified), “You end up with a whole system of people who are motivated by money, and not by justice.”²¹⁵

While these concerns about false claims are understandable, they are overstated for several reasons. First, as a contextual matter, false claims in the context of sexual harassment remain relatively rare. According to the National Sexual Violence Resource Center, the prevalence of false reporting on sexual assault falls between 2% and 10% of all cases.²¹⁶ While instances involving such false allegations—such as the notorious “Duke Lacrosse Scandal”²¹⁷ or the later discredited gang rape allegations that appeared in a 2014 Rolling Stone article²¹⁸—tend to attract signifi-

213. Kulik, Perry & Schmidtke, *supra* note 71, at 48; *see also* Kim Elsesser, *Of All the Gender Issues at Work, Men are Most Concerned About False Harassment Claims from Women*, FORBES (Jan. 10, 2019), <https://www.forbes.com/sites/kimelsesser/2019/01/10/of-all-the-gender-issues-at-work-men-are-most-concerned-about-false-harassment-claims-from-women/?sh=26455137866a> [<https://perma.cc/A9E8-56ZD>] (“Even unproven allegations [of harassment] can damage an individual’s reputation . . .”).

214. *See* Kulik, Perry & Schmidtke, *supra* note 71, at 48 (“[O]bservers frequently have incomplete information and a tendency to overemphasize dispositional explanations.”).

215. Keefe, *supra* note 145.

216. *See* Holly Yan & Nicole Chavez, *Trump Says It’s a “Scary Time” Time for Men. Here Are the Stats on False Sexual Assault Claims.*, CNN (Oct. 3, 2018), <https://www.cnn.com/2018/10/03/health/sexual-assault-false-reports/index.html> [<https://perma.cc/P24L-WFFQ>]; *see also* Katty Kay, *The Truth About False Accusations by Women*, BBC (Sept. 18, 2018), <https://www.bbc.com/news/world-us-canada-45565684> [<https://perma.cc/2B3C-UZ5U>] (“Over the past 20 years, only 2–10% of rape accusations . . . are proven to be fake . . .”); Sandra Newman, *What Kind of Person Makes False Rape Accusations?*, QUARTZ (May 11, 2017), <https://qz.com/980766/the-truth-about-false-rape-accusations> [<https://perma.cc/D4L6-T5CX>]; *cf.* Anita Raj, *Worried About Sexual Harassment—Or False Allegations? Our Team Asked Americans About Their Experiences and Beliefs*, THE CONVERSATION (May 13, 2019), <https://theconversation.com/worried-about-sexual-harassment-or-false-allegations-our-team-asked-americans-about-their-experiences-and-beliefs-116715> [<https://perma.cc/GVL7-GNJ5>] (discussing 2019 study of approximately 2,000 Americans in which one third of respondents admitted to perpetrating sexual harassment or assault, but where only 2% of men and 1% of women said that they had been accused of such behavior). Admittedly, “sexual assault” differs from “sexual harassment” in significant ways, with sexual harassment seeming to encompass a much broader range behavior. Presumably, all instances of workplace sexual assault would be considered sexual harassment as well, but many inappropriate behaviors that fall short of sexual assault also would be deemed sexual harassment. *See* Danielle Sepulveres, *What’s the Difference Between Sexual Assault and Harassment? Let’s Break it Down.*, WASH. POST (Dec. 21, 2017), <https://www.washingtonpost.com/news/soloish/wp/2017/12/21/whats-the-difference-between-sexual-assault-and-harassment-lets-break-it-down> [<https://perma.cc/BNX3-EMKU>].

217. *See* Newman, *supra* note 216.

218. *See id.*

cant publicity, an examination of the system as a whole reveals that such false accusations are not the norm, but rather are outliers.²¹⁹ Moreover, in those rare cases where false allegations do arise, scant evidence supports *financial gain* as a motivation for bringing these spurious claims. According to one study—a 2017 report conducted by the U.S. National Institute of Health—individuals asserting false claims of sexual assault tend most commonly to be motivated primarily by emotional gain.²²⁰ Specifically, individuals may assert false claims of sexual assault in order to cover up their own behavior—perhaps as a teenager trying to hide their sexual activity or an adult trying to cover up adultery.²²¹

More importantly, to the extent that concerns remain about the potential for false claims in this context, additional safeguards against false claims can be found within existing legal rules. For example, imposing stringent pleading standards on any bystander bounty suits could minimize the risk of false claims. Under the pleading regime imposed by *Bell Atlantic Corp. v. Twombly*²²² and *Ashcroft v. Iqbal*,²²³ on a very basic level, plaintiffs cannot allege facts that are “merely possible.”²²⁴ Rather, under this pleading regime, a complaint “must bring forth sufficient factual allegations that nudge a claim across the line from conceivable to plausible” by alleging facts that are “reasonable and likely to occur.”²²⁵ While this doctrine certainly contains significant nuance beyond the basic rule stated here, it would seem to indicate that a plaintiff bringing a bystander bounty suit could not move forward with a claim based on mere conjecture or generality; instead, the plaintiff would have to include fairly specific allegations in order to survive a motion to dismiss.

Moreover, any bounty system could require an even higher pleading threshold for bringing these claims—something akin to the special pleading standard required for bringing fraud claims, where the circumstances of any fraud must be pleaded “with particularity.”²²⁶ In fraud cases, courts impose this heightened pleading requirement because, as one court has observed, “Fraud is a serious charge, easy to allege and hard to prove.”²²⁷ To the extent that courts harbored similar concerns about these types of bystander bounty suits, such a heightened pleading standard could be applied here.

219. See Yan & Chavez, *supra* note 216.

220. See Kay, *supra* note 216.

221. See *id.*; see also Newman, *supra* note 216 (identifying teenagers fearful of getting in trouble—whether for sexual activity or just a missed curfew—as one of the most common reasons for a woman claiming false rape). For a somewhat different perspective regarding the prevalence of false allegations in this context, see generally Daniel B. Yeager, *The Temptations of Scapegoating*, 56 AM. CRIM. L. REV. 1735 (2019).

222. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

223. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

224. See Monette Davis, *Applying Twombly/Iqbal on Removal*, AM. BAR ASS’N (Apr. 30, 2020), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/applying-twombly-iqbal-on-removal> [<https://perma.cc/ZL4W-T7ST>].

225. *Id.*

226. See FED. R. CIV. P. 9(b).

227. *In re Drs. Hosp. of Hyde Park, Inc.*, 308 B.R. 311, 322 (Bankr. N.D. Ill. 2004).

The legal system also incorporates a fairly robust series of sanctions and penalties that can be imposed upon parties who engage in frivolous litigation. Under Federal Rule of Civil Procedure 11, anyone filing a pleading or motion before a court is attesting that “it is not being presented for any improper purpose, such as to harass,”²²⁸ that “the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law,”²²⁹ and that “the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”²³⁰ Violating any of these provisions potentially subjects a party to significant sanctions,²³¹ including significant monetary penalties or a responsibility to pay their opponent’s reasonable attorneys’ fees.²³² Admittedly, as with the pleading standards discussed above, the application of these sanctions and penalties often is more complicated than simple rule statements might imply, and prevailing in these types of counteroffensive motions can be difficult for defendants since courts are mindful of not wanting to chill individuals’ rights to bring well-intentioned legal claims (even when those claims ultimately are not successful).²³³ But for a bystander who sought to wholly fabricate a false harassment claim against an alleged perpetrator, potential sanctions still would remain a significant threat, hopefully deterring that bystander and others from filing unfounded claims.

Finally, as an additional safeguard against the harm that could arise from false claims in this context, courts could elect to keep these bystander bounty claims away from public access until they demonstrate sufficient indicia of reliability. As noted above, in the context of traditional *qui tam* claims, the plaintiff files their action “under seal,” meaning that it remains out of the public domain for a period of time—in that situation, for at least sixty days, while the government decides whether it wants to intervene in the action.²³⁴ A similar requirement could be imposed in the context of a sexual harassment bystander bounty suit. The courts could keep such suits under seal for a period of time to allow for some minimal investigation of the plaintiff’s claims, including a determination as to whether the alleged target of the harassment intends to cooperate with the suit or otherwise corroborate the allegations. Absent such cooperation or corroboration by the alleged victim, not only would con-

228. FED. R. CIV. P. 11(b)(1).

229. FED. R. CIV. P. 11(b)(2).

230. FED. R. CIV. P. 11(b)(3).

231. See FED. R. CIV. P. 11(c)(1) (empowering a court, upon finding a Rule 11 violation, to “impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation”).

232. See FED. R. CIV. P. 11(c)(4).

233. See FED. R. CIV. P. 11 advisory committee’s note to 1983 amendment (“The rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.”).

234. See sources cited *supra* note 155 and accompanying text.

cerns about a false claim increase, but the suit itself would seem unlikely to succeed. As discussed in greater detail below, the alleged direct victim of any harassment will virtually always be a key witness in this type of case, such that their refusal to participate would undermine the bystander’s suit, likely to a fatal degree.²³⁵ Thus, a court could dismiss any claims not sufficiently corroborated during the established period of time without ever lifting the seal under which they were filed, significantly minimizing the ramifications of any claims that turned out to be false.

B. WILL CREATING A BYSTANDER BOUNTY SYSTEM VIOLATE THE PRIVACY INTERESTS OF VICTIMS WHO WOULD PREFER NOT TO DISCLOSE THEIR EXPERIENCE?

Another significant concern about creating a bounty for bystanders who report claims of workplace sexual harassment is that doing so might lead bystanders to usurp the wishes of harassment victims. If a direct victim of harassment herself does not wish to report the behavior—if she wishes to keep this potentially traumatic, embarrassing, or painful experience private—why should her coworker be permitted not only to violate that desire but to financially profit from doing so? As noted above, sexual harassment can be a humiliating, harrowing, and disempowering experience—one that can manifest in dire physical, emotional, and psychological trauma for its victims.²³⁶ Any system set up to deal with (and presumably reduce) sexual harassment in the workplace must account for the interests of those who are victims of that harassment. It would defy logic to try to mitigate this harassment with a system that further *traumatizes* the victims of this behavior.

While these concerns undoubtedly are valid, various steps could be taken to implement this bystander bounty system in a manner that would protect direct victims from further trauma. For example, to the extent that a harassment victim’s concerns revolve around maintaining her privacy, the “in camera” mechanism previously discussed—where bystander bounty complaints would be kept under seal with the court while the claims were investigated—could provide protection in this respect.²³⁷ Moreover, from a practical perspective, a bystander likely could not successfully pursue a bounty claim without the cooperation of the original harassment victim. If the original victim of the harassment declines to corroborate the bystander’s allegations—or even perhaps denies the allegations—the bystander bounty suit seems unlikely to proceed. This, in many ways, parallels the situation that arises in the context of domestic violence or sexual assault allegations. In some cases, a victim of domestic violence or sexual assault may elect not to press charges against her attacker, perhaps due to concerns about her own safety, the safety of her

235. See *infra* Part V.B.

236. See *supra* Parts II, III.A.

237. See sources cited *supra* notes 154–55 and accompanying text.

loved ones, or due to intimidation or psychological trauma.²³⁸ In such cases, as much as the state may wish to pursue charges against the perpetrator of the violence or assault, it may become virtually impossible to do so.²³⁹ Without the cooperation—or at least corroboration—of this essential witness, the state’s case often falls apart.²⁴⁰ So too, in the context of a bystander bounty for workplace harassment; while the bystander may suffer real harm from witnessing this behavior,²⁴¹ and may themselves wish to vindicate these harms by bringing this type of claim, they will be unlikely to succeed without the cooperation of the target of the harassment.²⁴²

These concerns about a harassment victim’s privacy and autonomy, while unquestionably important and valid, also must be examined within a broader context. Workplace sexual harassment is not *only* personal harm; it also causes broader, more collective damage. On a basic level, harassment can significantly damage the organization within which it occurs.²⁴³ One need only look at the ripple effects of the scandals involving Harvey Weinstein, Matt Lauer, and countless others to recognize the *organizational* harm that likewise arises from workplace sexual harassment.²⁴⁴ As Professor Nancy Leong has observed, “Institutions have purposes . . . [or] mission[s],”²⁴⁵ and “[w]hen other interests compete or interfere with an institution’s mission, the institution is weakened and becomes less effective at fulfilling its mission”²⁴⁶ The Weinstein and

238. See Nana Knight, “*I Want to Drop This Case*”: *Dealing with Uncooperative Victims in Domestic Violence Cases*, <https://www.co.monterey.ca.us/Home/ShowDocument?id=97342> [<https://perma.cc/3874-2Y89>]; see also Karyna Pukaniuk, *Can Domestic Violence Charges Be Dropped in California?*, LAWYRINA, <https://lawrina.com/blog/how-to-drop-domestic-violence-charges-in-california> [<https://perma.cc/QTH2-GJ2E>] (“[I]t is sometimes the victim who wishes to retract their allegations against the defendant and no longer press charges.”); Dana Littlefield, *Rape Trials: What Happens When There is No Victim Testimony?*, SAN DIEGO UNION-TRIB. (June 24, 2017, 12:00 AM), <https://www.sandiegouniontribune.com/news/courts/sd-me-skorniak-notebook-20170623-story.html> [<https://perma.cc/9FV4-N9U8>] (discussing difficulties of proving rape charges without victim testimony).

239. See Knight, *supra* note 238; see also Littlefield, *supra* note 238.

240. See Knight, *supra* note 238 (“This lack of cooperation often impedes the successful prosecution of domestic violence cases and makes some cases downright impossible to prove.”); see also Pukaniuk, *supra* note 238 (citing “insufficient evidence,” “contradicting statements,” and “no independent witnesses” as common reasons for dropping domestic violence charges in California).

241. See *supra* Part III.A.

242. See Knight, *supra* note 238; Littlefield, *supra* note 238; Pukaniuk, *supra* note 238. Of course, because workplace sexual harassment may take place in a somewhat more public setting than domestic violence or sexual assault—both of which commonly occur out of the sight of *any* other witnesses—it may be somewhat easier to proceed in a bystander harassment case without the direct victim’s cooperation than it would be in these other contexts.

243. See Schulte, *supra* note 23.

244. See Fink, *supra* note 28, at 290, 292–93 (discussing severe legal and financial consequences for The Weinstein Company as a result of Weinstein’s behavior); see *supra* Parts I, II.

245. Leong, *supra* note 1, at 971 (internal quotation omitted).

246. *Id.* While Professor Leong’s research in this context focuses on *consensual* relationships within institutions, where some power disparity exists between participants in the

Lauer scandals not only involved horrific physical, emotional, and psychological damage for the women who were targeted, but also inflicted tremendous harm upon the organizations within which their perpetrators worked.²⁴⁷ Employees lost faith in their employers’ mission;²⁴⁸ entire companies were branded as bad actors (in some cases, rightfully so) based upon this highly publicized misconduct;²⁴⁹ in the case of the Weinstein Company, financial ruin soon resulted.²⁵⁰

Allowing bystanders to remain silent when they observe harassment also can increase this appalling behavior, impacting other women in the workplace. According to one set of researchers, “When observers are excused from responsibility for [sexual harassment] prevention, this enhances the ambiguity around defining [sexual harassment] and diminishes the moral intensity of the issue.”²⁵¹ Indeed, according to these researchers, “[O]ver time, nonintervention [by bystanders] actually may create an environment that encourages [sexual harassment].”²⁵² Thus, while the intended target of workplace harassment may choose not to pursue their rights by disclosing their harasser’s misdeeds, the harm that he or she has experienced—while primary—is not the *only* harm in play. It may be in the interest of the organization to seek consequences for a workplace harasser.

Finally, in addition to the harm suffered by the organization as a whole as a result of workplace sexual harassment, bystanders themselves may be victims of this behavior. In her article, *Them Too*, Professor Nancy Leong explores the harm that third parties suffer when sexual behavior (even of a “consensual” nature) takes place within a workplace or other institution.²⁵³ Observing that “sexual behavior does not occur in a vacuum,”²⁵⁴ she argues that such behavior “occurs in a particular context and therefore has significant consequences beyond the participants in the behavior.”²⁵⁵ Professor Leong describes significant harms that others—bystanders—may experience from being exposed to a sexualized workplace, particularly where that sexualization occurs within the context of an institutional power disparity; individuals may experience material losses, such as the loss of a job or other professional opportunity, particularly when sexual favoritism toward the object of harassment is in play.²⁵⁶ They may experience decreased enjoyment of their job or a tense work-

relationship, *id.* at 945–46, her concerns undoubtedly would apply with equal force in the context of *nonconsensual* sexual “relationships” at work.

247. *See supra* Part III.A.

248. *See* Williams, *supra* note 30 (observing that harassment “stops victims from putting ideas forward in the workplace . . . [n]ot to mention the morale of an organisation in which sexual harassment is allowed to continue”).

249. *See* Fink, *supra* note 28, at 286–89, 292–93.

250. *See id.* at 292–93.

251. Bowes-Sperry & O’Leary-Kelly, *supra* note 50, at 303–04.

252. *Id.* at 304.

253. *See* Leong, *supra* note 1, at 941–42.

254. *Id.* at 945.

255. *Id.*

256. *See id.* at 959–61.

place environment due to sexual behavior.²⁵⁷ Leong further notes that this workplace sexual behavior may exacerbate existing gender inequities at work.²⁵⁸ Again, Professor Leong finds these potential concerns even in the context of *consensual* sexual relationships at work, where an institutional power disparity exists.²⁵⁹ One would imagine that the consequences for bystanders would be even more dire after witnessing what they believed to be *nonconsensual* workplace sexual (mis)behavior. Thus, even if the intended targets of workplace sexual harassment may not wish to pursue justice against the perpetrators of such conduct, bystanders separately may have an interest in seeking a remedy for the harm that *they* experienced from this behavior.²⁶⁰

VI. CONCLUSION

One of the most telling quotes that has emerged from the endless rehashing of the #MeToo Movement comes from one of Harvey Weinstein's former assistants: "I feel sick that his bullying was allowed to flourish in public and no one ever said, 'This isn't acceptable.' If you raised it, you were laughed off as naive; there was the underlying feeling that maybe you just weren't good enough to really impress him."²⁶¹ For a variety of reasons, bystanders simply must be encouraged to speak up—to no longer look away from or deny or laugh off the mistreatment of others in the workplace. Bystanders facilitate the greater exposure of these misdeeds, providing more eyes and ears than just those of the victim.²⁶² Encouraging bystanders to come forward also can shift the culture of a workplace, communicating in an unambiguous way that harassment will not be tolerated in that environment.²⁶³ Perhaps most importantly, involving bystanders in the solution to workplace sexual harassment signals to others in the workplace (and to society at large) that sexual harassment is not a problem experienced by a few individuals—by those who

257. See *id.* at 961–62; see also EEOC TASK FORCE REPORT, *supra* note 4, at 58 (“[M]ost co-workers are not comfortable when harassment occurs around them, even when they are not the direct victims of the harassment.”).

258. See Leong, *supra* note 1, at 966–70.

259. See generally *id.*

260. One additional concern that has come up in the context of these bystander bounty claims is perhaps best (if unartfully) described as their “ick factor”—the idea that it somehow devalues the good deed of reporting workplace sexual harassment if one receives monetary compensation for doing so. Without negating or otherwise downplaying that reaction, this Article leaves such ethical and philosophical questions for another day. The focus of this Article simply is to suggest a different approach to resolving the seemingly-intractable problem of workplace sexual harassment—to start a new conversation regarding this important topic. To the extent that this approach might prove effective in reducing workplace harassment, this Article leaves it to others to debate any moral or ethical consequences associated with the bounty mechanism that has been suggested for spurring this change.

261. Gentleman & Watt, *supra* note 117.

262. See *supra* Part II.B.

263. See Fink, *supra* note 28, at 297–306 (arguing that reducing harassment requires shifting workplace culture).

are directly targeted by such behavior.²⁶⁴ Rather, sexual harassment is part of a shared problem, one which all members of society have an obligation to fight.

The handwringing surrounding sexual harassment at work—regarding the pervasiveness of the problem and the dearth of effective solutions—is in many ways understandable. Sexual harassment taps into topics that individuals often find difficult to discuss: sex, power, inequality, and secrecy. It is hard to find solutions for a problem that society still struggles to fully understand. Moreover, as noted above, sexual harassment often plays out in ways that feel complicated, both for those who experience the behavior and for those who observe it, tapping into rational fears about retribution for exposing the behavior and forcing people to reconceive individuals who they perhaps once admired or respected.²⁶⁵ Yet the time has long passed to find a better remedy for this seemingly intractable workplace problem because the consequences for failing to do so are simply too dire.²⁶⁶ This Article has suggested one possible new approach to this dilemma.

While providing a bounty to bystanders to encourage them to report harassment is not the only approach to solving this problem,²⁶⁷ the use of a financial incentive—a bounty—to encourage bystanders to come forward has worked well in other contexts, including contexts where bystanders may experience countervailing forces similar to those present for observers of sexual harassment context.²⁶⁸ Concerns about retaliation for speaking up may never go away, and people may always fall prey to psychological forces that seem to normalize remaining silent. But self-interest can be a powerful force. If a financial incentive can push individuals past their fears and discomfort and nudge them to step forward, then such a bounty—if applied with appropriate safeguards in place—may be one piece of the solution that moves the conversation about workplace sexual harassment away from handwringing and toward real progress.

264. *See generally id.*

265. *See supra* Part III.C.

266. *See* McGirt, *supra* note 128 (bemoaning the “opportunity costs paid by the millions of women who privately abandon promising career paths, or who would face poverty and ruin if they were forced to leave their low-wage jobs” when harassment remains unreported).

267. *See, e.g.*, EEOC TASK FORCE REPORT, *supra* note 4, at 66–71 (providing summary of recommendations); Bisom-Rapp, *Sex Harassment Training*, *supra* note 56, at 74–75 (describing various suggestions for reducing workplace harassment); *cf.* Fink, *supra* note 28, at 285–86, 289, 308–14, 320–26, 331 (suggesting use of the faithless servant doctrine to penalize and deter harassment).

268. *See supra* Part IV.A.

