# #MeToo & The Courts: The Impact of Social Movements on Federal Judicial Decisionmaking

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*Abstract*

*In late 2017, the #MeToo movement swept through the United States as individuals from all backgrounds and walks of life revealed their experiences with sexual abuse and sexual harassment. After the #MeToo movement, many scholars, advocates, and policymakers posited that the watershed moment would prompt changes in the ways in which sexual harassment cases were handled. This Article examines the impact the #MeToo movement has had on judicial decisionmaking. Our hypothesis is that the #MeToo movement's increase in public awareness and political attention to experiences of sexual misconduct should lead to more pro-claimant voting in federal courts at the district and courts of appeals levels.*

*For district courts, we find that the probability of a pro-employee ruling in a district court increased drastically after November 1, 2017. However, while pro-employee rulings increased in district courts during the #MeToo era, pro-employee rulings decreased in circuit courts during this time period. Our*

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*findings suggest that the #MeToo movement—an extralegal social movement—impacted legal rulings that occurred in its wake before district courts but courts of appeals were more restrained in their reaction to the movement. Importantly, the law and legal standards in place during the time period of our study did not meaningfully change. In short, the #MeToo movement had a statistically significant impact on rulings from district court judges.*

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## INTRODUCTION

There are countless examples throughout American history of social movements that have culminated in changes to legal structures and frameworks.[1] The Women's Movement in the early 1900s contributed to the passage of the 19th Amendment, which guarantees women's suffrage.[2] The 1960s Civil Rights Movement contributed to the passage of Title VII.[3] Social movements have long been understood as having the power to formally influence the law and legal structures, and the interplay between the law and social movements is a well-documented area of study.[4]

The role of social movements and their impact on law and legal policy is of renewed importance to both scholars and advocates. The #MeToo movement was followed by unprecedented support for the #BlackLivesMatter movement following the murder of George Floyd. The back-to-back nature

1. Amna A. Akbar, *Movement Law*, 73 STAN. L. REV. 821, 824 (2021).

2. *See generally* CORAL CELESTE FRAZER, VOTE: WOMEN'S FIGHT FOR ACCESS TO THE BALLOT BOX (2019); AURA LEWIS, THE ILLUSTRATED FEMINIST: 100 YEARS OF SUFFRAGE, STRENGTH, AND SISTERHOOD IN AMERICA (2020).

3. *See* JUDSON MACLAURY, TO ADVANCE THEIR OPPORTUNITIES: FEDERAL POLICIES TOWARD AFRICAN AMERICAN WORKERS FROM WORLD WAR I TO THE CIVIL RIGHTS ACT OF 1964 xvii (2008) (noting that with regard to "the emergence of black labor in the national economy and in improving their opportunities for good jobs . . . [a] key finding . . . is that virtually every major step the government took was the result of strong pressure from the growing civil rights movement"); *see also* Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIS. 1233, 1258 (2016) (discussing how the 1968 sanitation workers' strike and Black Panther organization contributed to the development of socially progressive institutions).

4. *See* Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1554 (2017) ("[Social movements] have now achieved a privileged position in legal scholarship as engines of progressive transformation.").

of these two social movements generated scholarship in law[5] and the social sciences.[6] Both social movements garnered a set of proposed legislative and policy responses.[7] One pending question, however, is what, if any, impact these social movements had on the courts and judicial decisionmaking.

Courts are traditionally perceived as being outside the democratic process and somewhat removed from ebbs and flows of public opinion.[8] Indeed, in a prior study one of us demonstrated that courts of appeals do not respond to shifts in public opinion.[9] That study, however, did not focus on whether or how district court judgments are impacted by public opinion or social movements.[10] And other research suggests that

5. *See, e.g.*, Symposium, *#MeToo and the Future of Sexual Harassment Law*, 128 YALE L.J. 1 (2018); Symposium, *#MeToo*, 71 STAN. L. REV. 1 (2018); Symposium, *Reckoning and Reformation: Reflections and Legal Reponses to Racial Subordination and Structural Marginalization*, 130 YALE L.J. 869 (2021).

6. *See, e.g.*, Linda S. Green et al., *Talking About Black Lives Matter and* #MeToo, 34 WIS. J.L. GENDER & SOC'Y 109 (2019).

7. *See* Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW RSCH. CTR. (June 31, 2018), https://perma.cc/6FXL-V2WC; Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS'N (May 8, 2020), https://perma.cc/L8GA-V75R; ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR, 2020 PROGRESS UPDATE, METOO WORKPLACE REFORMS IN THE STATES (Sept. 2020); Maya King, *Black Lives Matter Goes Big on Policy Agenda*, POLITICO (Aug. 28, 2020), https://perma.cc/S7KG-AZH2 (discussing the "BREATHE Act," a four-part bill which seeks to codify the #BlackLivesMatter "movement's core objectives: redirecting federal funds away from police, prisons and other parts of the criminal justice system and into underserved communities of color"); Lucy Diavolo, *Black Lives Matter Protests Are Inspiring New Laws and Changing the Way People Think About Police*, VOGUE (June 8 2020), https://perma.cc/D9ZD-EGYQ.

8. Orie L. Phillips, *The Courts and American Democracy*, 26 A.B.A. J. 130, 132 (1940) ("But I doubt not the people are frequently impatient with the law's delay, the complexity of its procedure, the tardiness of its processes, and the lack of certainty in its principles and their application.").

9. *See* Matthew E.K. Hall et al., *Holding Steady on Shifting Sands: Countermajoritarian Decision Making in the US Courts of Appeals*, 79 PUB. OP. Q. 504, 505 (2015) ("Contrary to studies of the US Supreme Court, we argue that these intermediate courts play a distinctly countermajoritarian role in the American political system; that is, they resist shifts in public opinion by enforcing consistent legal standards in the face of changing litigant behavior.").

10. Importantly, district court judgments often come in the form of decisions directly from the judges themselves, but they also reflect the

judges—even unelected judges with lifetime appointments—may respond to shifts in public opinion or prevailing social trends.[11]

This Article contributes to both the literature on the impact of social movements and the literature on judicial decisionmaking by focusing on the response by district courts and courts of appeals to the #MeToo movement when adjudicating sexual harassment claims. The rise of the #MeToo movement created an identifiable moment to test the impact of a broad-based social movement on legal adjudication in the federal courts.

Our hypothesis tested in this Article is that the #MeToo movement's increase in public awareness and political attention to experiences of sexual misconduct should lead to more pro-claimant voting in federal courts at the district and courts of appeals levels. For district court judgments, our findings were consistent with our hypothesis. The probability of a pro-employee ruling in a district court increased from .03 to .13 after November 1, 2017, which is a statistically significant shift. For appellate court judgments, however, our findings did not support our expectations. Pro-employee rulings actually decreased in circuit courts during this time period, with the probability of a pro-employee ruling in the circuit court dropping from .43 to .30.

To conduct an analysis centered on the ways in which the #MeToo movement—an identifiable social movement—may have impacted judicial decisionmaking, we have made a number

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judgments and findings of fact by juries. Our study includes both sets of district court judgments.

11. *See* Matthew E.K. Hall, *The Semi-Constrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 364 (2014) (finding the Supreme Court shifts with public opinion in cases where public interest is strongest); Paul M. Collins Jr. et al., *International Conflicts and Decision Making on the Federal District Courts*, 29 JUST. SYS. J. 121, 124 (2008) ("Therefore, we argue that international crises are likely to elicit a response form the courts that echoes the reactions of the public and Congress."); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019 (2004) ("[S]ince the justices do not have the institutional capacities to give their rulings full effect, they must calculate the extent to which popular decision makers will support their policy initiatives.").

of choices surrounding how to structure our study. Making choices of this nature are, of course, essential to any empirical work and others may choose to engage with the hypotheses presented in a different manner. That said, this Article focuses on the impact of the #MeToo movement[12] on workplace sexual harassment claims that had reached final judgment before a court of appeals between January 2016 and May 2020. This time period provided us with a sample size of 163 adjudicated court of appeals cases, and it allowed us to engage in robust comparison of cases resolved both before and after the #MeToo movement gained widespread attention in October 2017.[13]

Our Article proceeds in four parts. Part I outlines the social movement and judicial decisionmaking literatures that this Article contributes to and builds upon. It then discusses why a focus on sexual harassment adjudication in federal courts—a traditionally stable area of law where claims by plaintiffs tend to be unsuccessful—before and after the #MeToo movement offers a valuable opportunity to study the impact of social movements on judicial decisionmaking. Part II outlines our study design, which compares cases decided before and after the beginning of the #MeToo movement. Of particular importance, we exploited the natural discontinuity created by the sudden and pervasive onset of this social movement and account for a number of possible confounding variables to support our causal inferences. Part III presents our empirical analysis and findings. Part IV discusses some potential normative implications, possible explanations for our study findings, and

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12. Amanda Erickson, *In 2018, #MeToo—and its Backlash—Went Global*, WASH. POST (Dec. 28, 2018), https://perma.cc/W3LY-BVTL

> [Following the] explosive report on Harvey Weinstein, a Hollywood executive accused of harassing and assaulting several women over decades . . . thousands of women spoke out about their own experiences with sexual harassment to show just how common they are. They posted on Twitter, Facebook and other social media sites using the hashtag #MeToo . . . The movement went global. Around the world, women stood up and spoke out about the abuse they have faced at the hands of men.

13. The #MeToo hashtag was created by Tarana Burke in 2006, but it did not gain widespread attention and following until actress Alyssa Milano tweeted the hashtag in October 2017 in response to reports exposing the conduct of Harvey Weinstein. Gurvinder Gill & Imran Rahman-Jones. *Me Too Founder Tarana Burke: Movement is Not Over*, BBC (June 9, 2020), https://perma.cc/BA6R-JHY7.

limitations of our study. We then conclude by summarizing the results of our study.

## I. SOCIAL MOVEMENTS & JUDICIAL DECISIONMAKING

Social movements have impacted American society since its birth, and these movements sometimes lead to changes within the legal system. The question of how social movements relate to judicial decisionmaking has been studied by scholars in various settings for a number of years. This Part outlines two predominant theories of how social movements can impact society and the legal system. This part then discusses current literature regarding the impact of social movements on judicial decisionmaking.

In doing so, this Article utilizes the lens of the #MeToo movement because a subset of the movement has direct applicability to a discrete area of law with clear statutory and legal caselaw that provided concrete guidance to judicial decisionmaking: sexual harassment. We can test the impact of the social movement on judicial decisionmaking with minimal concerns that the movement itself significantly changed the way in which the cases were brought and argued, because the cases we focus upon were already in progress (e.g., the harassment had already occurred and was identified by the alleged victim as harassment) prior to the social movement occurring.[14]

### A. *Social Movement Literature*

When scholars discuss the power of social movements to impact judicial decisionmaking, they are drawing from a rich literature across a number of disciplines. For those who are concerned with the development of legal interventions over time, the power of a social movement can impact a variety of sources that could result in legal change.[15] For example, the movement might impact the populace, which then lobbies the

14. Seven of the cases in our data set were filed after the #MeToo Movement commenced. Nothing we see in the cases suggests that they are materially different than those that were filed prior.

15. *See, e.g.*, Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 (2013) (describing how understanding constitutional change via social movements literature can lead to better understandings of how courts intervene in constitutional matters).

legislature to make change. Additionally, a social movement might impact the courts via judicial decisionmaking. This Article will focus on two theoretical strains in the social movement literature where the #MeToo movement might have salience for judicial decisionmaking, although there are certainly others in legal, sociology, and other scholarly fields.

First, a social movement often leads to a new understanding of what an experience does or does not entail—it can change the framing through which others understand the experience. For example, many social movements engage in "conscious strategic efforts . . . to fashion shared understandings of the world and themselves that legitimate and motivate collective action."[16] The #MeToo movement was a conscious and strategic effort by Tarana Burke when she started the movement in 2006.[17] In 2017, when the #MeToo movement came to life on a large scale within the United States, it presented an opportunity for victims of sexual assault and harassment to express their own experiences. This collective expression of experiences, including in the context of the workplace—where sexual harassment law governs—created an opportunity to reframe general understandings of what was or was not acceptable in the employment setting. In doing so, the reframing of those experiences helped to "identify problems, expose responsible parties, and suggest solutions."[18]

Second, a social movement will often engage in resource mobilization in an effort to bring significant attention to the movement before a variety of audiences—including legal audiences.[19] For instance, soon after the #MeToo movement, numerous legal academics put forth new or revised accounts for how the legal system should respond to the workplace concerns raised by the movement. The *Yale Law Journal* and *Stanford*

16. Doug McAdam et al., *Introduction: Opportunities, Mobilizing Structures, and Framing Processes-Toward a Synthetic, Comparative Perspective on Social Movements*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 1, 6 (1996)

17. Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created—10 Years Ago*, WASH. POST (Oct. 19, 2017), https://perma.cc/4AMX-2FGS.

18. NeJaime, *supra* note 15, at 892.

19. J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 528 (1983) (outlining research mobilization theory as a product of the social movements of the 1960s).

*Law Review*, for instance, joined together to publish over a dozen works of scholarship discussing issues related to the #MeToo movement.[20] These pieces include discussing principles for addressing harassment, sexual harassment in the judiciary, the role of minority women in establishing the #MeToo movement, sex segregation, and more.[21] Similarly, The *University of Chicago Legal Forum* hosted a symposium on *Law in the Era of #MeToo* where scholars discussed a range of issues related to the #MeToo movement, including how to reconceptualize these issues in the workplace.[22] These discussions included panels on institutional responses to sexual harassment and assault, achieving justice for survivors, rhetoric around #MeToo in the media, and more.[23] By engaging in this work, scholars were attempting to push forward renewed visions of how to conceptualize claims of sexual harassment. As quickly as these scholars moved, however, much of the work was published after the window that this study is focused on. The lag in time from idea to execution in legal scholarship would have made it difficult for the new scholarship of these legal elites to have a significant impact on the concerns of the judiciary. That said, statements from these and other influential individuals—policymakers and celebrities—may very well have affected the understanding judges had of the way in which sexual harassment law in the courts did or did not entrench certain practices surrounding sexual harassment in the workplace.

The ways in which a social movement impacts legal interventions are multifaceted. One continual question that scholars have put forth, however, is how social movements affect judicial decisionmaking directly. Judges do not exist in a vacuum. Judges were exposed to the #MeToo movement as it was happening as well as to the resource mobilization that

20. *See, e.g.*, Karen Sloan, *In a First, Yale and Stanford Law Journals Team Up for #MeToo Project*, LAW.COM (June 19, 2018), https://perma.cc/9D86-4GEB; Symposium, *#MeToo and the Future of Sexual Harassment Law*, 128 YALE L.J. 1 (2018); Symposium, *#MeToo*, 71 STAN. L. REV. 1 (2018).

21. Symposium, *#MeToo and the Future of Sexual Harassment Law*, 128 YALE L.J. (2018); Symposium, *#MeToo*, 71 STAN. L. REV. 1 (2018).

22. Christen A. Johnson, *Chicago Tribune on the Legal Forum's Conference "Law in the Era of #MeToo",* CHICAGO TRIB. (Nov. 2, 2018), https://perma.cc/WLJ4-3Z78.

23. *Legal Forum Symposium: Law in the Era of #MeToo*, UNIV. OF CHICAGO L. SCH. (Nov. 2, 2018), https://perma.cc/K876-E7DV.

popped up around the movement. Numerous scholars have, for several years, been dissatisfied with the state of sexual harassment law.[24] Indeed, some of these scholars have viewed the prevailing standard—specifically, the required showing of *severe and pervasive harassment*[25]—to be too high a burden.[26] One question which this Article begins to address is how, if at all, the #MeToo movement has influenced judicial decisionmaking directly.

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24. *See, e.g.*, Matthew C. Hesse & Lester J. Hubble, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASHBURN L.J. 574 (1985); Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997); Linda J. Krieger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY L.J. 115 (1985); Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018); Diane P. Wood, *Sexual Harassment Litigation with a Dose of Reality*, 2019 U. CHI. LEGAL F. 395 (2019).

25. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (holding that sexual harassment must be "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment" to violate Title VII); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993) (requiring the Court to consider "whether an environment is sufficiently hostile or abusive" by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance").

26. *See* L. Camille Herbert, *How Sexual Harassment Law Failed its Feminist Roots*, 22 GEO. J. GENDER & L. 57, 60 (2021) ("Courts have also required that the harassing conduct be 'severe or pervasive' to be actionable and have interpreted that requirement to mean that the conduct must be extremely serious, allowing a wide range of sexually derogatory and denigrating conduct to escape sanction."); Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1826 (2021) ("Not only does this standard place a high burden of proof on the victim, it also has led to ambiguity in federal courts, which have inconsistently interpreted the type of conduct necessary for a violation."); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 31 (2018) ("Research suggests that women of color have a particularly difficult time proving discrimination under existing law."); *see also* E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008) (noting that the 4th Circuit "has likewise recognized that *plaintiffs must clear a high bar in order to satisfy the severe or pervasive test*") (emphasis added); Duncan v. Gen. Motors Corp., 300 F.3d 928, 934 (8th Cir. 2002) (recognizing that plaintiff's burden of demonstrating "severe and pervasive" is a "high threshold").

### B. *The Interplay of Social Movements & Judicial Decisionmaking*

The majority of scholarship that looks at the ways in which social movements or popular opinion might impact judicial decisionmaking has focused on the U.S. Supreme Court. These studies have differed on the question of whether Supreme Court Justices respond directly to public preferences or only indirectly (e.g., through the appointment of new Justices in line with shifts in public opinion).[27] One of us has previously studied the impact that public opinion can have on the decisionmaking of those on the U.S. Courts of Appeals.[28] That study determined that these federal appellate judges tend to resist ideological shifts in public opinion and instead apply consistent rules based on legal standards and requirements, regardless of the underlying

27. *See* Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 352 (2014) (positing that "justices are constrained . . . because they fear nonimplementation of their decisions"); McGuire & Stimson, *supra* note 11 ("[I]n addition to being motivated by their own preferences, the justices are highly responsive to public mood, as well."); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299, 299 (1998) ("[T]he Court may affect public opinion when it initially rules on a salient issue, but that subsequent decisions on the same issue will have little influence on opinion."); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL SCI. REV. 87, 96 (1993) (describing the relationship between Supreme Court decisions and public opinion as "reciprocal"); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 711 (1994) (finding "no evidence for a direct path of influence from public opinion to Court decisions"); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Mood*, 41 AM. J. POL. SCI. 478, 478 (1997) (theorizing that Supreme Court Justices "adjust policy decisions at the margins in response to mass public opinion"); Micheal W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judiciary Decision Making*, 70 J. POL. 293, 293 (2008) ("There is wide scholarly agreement that the frequent replacement of justices has kept the Supreme Court generally attuned to public opinion. Recent research indicates that, in addition to this indirect effect, Supreme Court justices respond directly to changes in public opinion.").

28. Hall et al., *supra* note 9.

facts.[29] However, this Article takes a step back even farther and looks at the ways in which the #MeToo movement impacted judicial decisionmaking, not only at the federal appellate level, but also at the federal district court level. The extent to which judges are influenced by external sources has long interested both scholars and members of the legal profession. As Justice Cardozo once explained, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by."[30] Justice Cardozo recognized that judicial decisionmaking does not occur in a vacuum. In the most ideal situation, judges do their best to apply the law to the facts before them in the most objective manner possible. But judges are human, and they are, as are all people, potentially susceptible to influence.[31] This possibility, as well as related topics, has been the subject of research by scholars across a number of disciplines.

One area of research that has garnered a significant amount of attention is the way judges might be swayed by ideology.[32] This Article, however, is not focused on ideology.

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29. *See id.* at 504 ("[C]ircuit judges actively resist ideological shifts in public opinion, as they issue consistent rulings in the face of varying case facts.").

30. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

31. *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 17 (1881)

> [L]ife of the law has not been logic: it has been experience. *The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed* . . . . Law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. (emphasis added).

32. *See, e.g.*, Hall, *supra* note 11; Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2010); Michael A. Bailey, *Measuring Ideology on the Courts*, *in* THE ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR (Robert M. Howard & Kirk A. Randazzo eds., 2017); Stefanie A. Lindquist & Rorie Spill Solberg, *Judicial Review in the Burger and Rehnquist Courts*, 60 POL. RSCH. Q. 71 (2007); Carolyn Shapiro, *Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79 (2010); Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC'Y INQUIRY 465 (2001); Nancy Staudt et al., *The Ideological Component of Judging in the Taxation Context*, 84 WASH.

Instead, it examines how a social movement might directly affect judicial decisionmaking, with a focus on federal district courts and courts of appeals. In making this inquiry, this Article builds upon a larger literature that explores how public opinion does or does not influence judicial decisionmaking.

Other scholars have examined the potential influence of public opinion on decisionmaking by U.S. Supreme Court Justices.[33] For example, Casillas, Enns, and Wohlfart[34] found "compelling evidence that public opinion serves as an important constraint on the [Supreme] Court's outputs."[35] This was true independent of other factors like Justice ideology and other broader forces that influenced both the public mood and the Court. From this data, Casillas, Enns, and Wohlfarth presented "strong evidence that justices consider public opinion in some decisions."[36] In many ways, some of their findings are unique to the Supreme Court, which is subject to a higher level of scrutiny from the media[37] than federal trial and appellate courts, particularly with regard to individual judges. That said, their findings were notable in empirically demonstrating a relationship between public opinion and judicial decisionmaking. Additionally, some theorists have argued that Supreme Court Justices consider public opinion due to concerns about the Court's legitimacy. "[A] court that cares about its perceived legitimacy must rationally anticipate whether its preferred outcomes will be respected and faithfully followed by relevant publics."[38]

Nevertheless, the fact that judges are susceptible to public opinion does not necessarily suggest that they are responding to

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U. L. REV. 1797 (2006); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

33. *See supra* note 11.

34. Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011).

35. *Id.* at 80.

36. *Id.*

37. *See id.* at 81–82 (describing the effect of potential media coverage on Supreme Court decisions).

38. McGuire & Stimson, *supra* note 11, at 1019. *But see* Michael W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 294, 300 (2008) (describing public mood as having a "varied" impact on the different justices).

public opinion purposefully or deliberately. Giles, Blackstone, and Vining's empirical analysis demonstrated that "the effects of public mood on the behavior of [Supreme Court] Justices from 1956-99" appeared to be driven in large part by the replacement of Justices.[39] In other words, as new Justices were appointed to the Court, the Court organically kept pace with public opinion.[40] Additionally, their results suggest that "the most likely explanation for the direct linkage between public mood and decisionmaking by Justices is through attitudinal change,"[41] which confirms Justice Cardozo's initial inclination about the relationship between public opinion and judges.

Much of the literature on judicial decisionmaking and public opinion, like the studies above, focuses on the U.S. Supreme Court. There are, however, studies that have looked at federal courts of appeals. Indeed, Calvin, Collins, and Eshbaugh-Soha looked at how public mood influenced federal courts of appeals judges from 1961 through 2002.[42] They found that public opinion impacts judicial decisionmaking at the court of appeals level indirectly, through judicial replacements and institutional constraints from Congress.[43] Their study did not find evidence that courts of appeals judges are responding directly to changes in public opinion.[44]

This Article provides a unique opportunity to learn how the decisionmaking of judges who adjudicate the vast majority of federal claims in this country—federal district court judges—are impacted by social movements and public opinion. The #MeToo movement swept the country in October 2017.[45] As a result, it is this sort of shock that provides a valuable opportunity to study

39. *See* Giles et al., *supra* note 38, at 300.

40. *Id.*

41. *Id.* at 303.

42. *See generally* Bryan Calvin et al., *On the Relationship Between Public Opinion and Decision Making in the U.S. Court of Appeals*, 64 POL. RSCH. Q. 736 (2011).

43. *See id.* at 737 ("[T]hrough judicial replacements, the legislative and executive branches, reflecting public opinion on the basis of having been elected, select judges who share their ideological orientation.").

44. *See id.* at 743 ("Our results failed to provide evidence that courts of appeals judges respond directly to changes in public mood, whether measured at the circuit or national level.").

45. *See* Gill & Rahman-Jones, *supra* note 13 (noting that the #MeToo movement gained widespread attention in 2017).

how the social movement, and the public's perception of that movement, affected judicial decisionmaking. In particular, the #MeToo movement allowed us to investigate how an increase in public awareness and political attention to experiences of sexual misconduct influenced decisionmaking at both the district and courts of appeals levels. We used this opportunity to test the following two hypotheses.

***Hypothesis 1:*** The #MeToo movement was positively associated with pro-claimant outcomes in U.S. district courts.

***Hypothesis 2:*** The #MeToo movement was positively associated with pro-claimant outcomes in U.S. courts of appeals.

By testing these two hypotheses, this Article builds upon the social movement and judicial decisionmaking literatures. Our findings will allow scholars from across a variety of disciplines to better understand how judges are or are not influenced by contemporary social movements. Additionally, this Article sets up additional lines of inquiry for further study.

## II. STUDY DESIGN: CASES BEFORE & AFTER THE #METOO MOVEMENT

In this Part, we review our analytical approach and the insights we gained about the role of the #MeToo movement on sexual harassment case outcomes. In Part II.A, we present our methodology in selecting what cases to include, what variables we assessed, and how we collected the data. In Part II.B, we consider the limitations behind our methodology. Finally, in Part II.C, we present our hypothesis tests and results.

### A. *Methodology*

#### 1. Data Selection

To identify the potential impact of the #MeToo movement on the disposition of sexual harassment cases in the workplace, we sought to identify cases brought under Title VII that consisted of a claim for sexual harassment. We began our search using the Westlaw case database for any cases mentioning the terms "Title VII" or "sexual harassment."[46]

46. Our initial search query on Westlaw was simple: "sex! harass!" and "Title VII." The results were then pared down further to exclude cases that

In our dataset, we only included cases that had been fully adjudicated in the courts of appeals for a number of reasons. First, not all cases filed in federal district court are viable cases. By limiting our dataset to cases that were appealed, we are focusing our inquiry on the cases we believe to be the most meritorious and contentious at the district court level. We note, however, that the "best" cases for pro-claimants are unlikely to be in our dataset, because they should have settled well before the appellate stage. Second, we chose cases that were fully adjudicated at the court of appeals stage, because it significantly increases the likelihood that the harassment at issue occurred well before the #MeToo movement. Litigation is costly and time intensive, and it would be unusual for these types of cases to work through the courts in an expedited manner. Third, limiting our cases in this manner allowed us to run our analysis on both district court judicial decisionmaking and appellate court judicial decisionmaking. We would not have been able to test both hypotheses without incorporating differences in the cases being analyzed if we had not limited our study in this manner. Others might choose different parameters for a study, but we believed that setting these boundaries for establishing which cases we would study would provide us with the information we were seeking to test and analyze.

From there, we narrowed the search results by date to encompass the cases surrounding the take-off of the #MeToo movement. Tarana Burke initially introduced the phrase "me too" in 2006 in order to raise awareness for victims of sexual abuse.[47] Over a decade later, in early October 2017, the *New York Times* published a detailed account of Hollywood producer Harvey Weinstein's history of sexual harassment against women.[48] On October 15, 2017, Alyssa Milano tweeted, asking anyone who had experienced sexual harassment or sexual assault to "write 'me too' as a reply to this tweet."[49] Burke's "me

analogized to the sexual harassment framework under Title VII; however, it did not directly consider sexual harassment under Title VII.

47. *See* Gill & Rahman-Jones, *supra* note 13.

48. *See generally* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://perma.cc/P5LP-L657.

49. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), https://perma.cc/Z2DQ-QF4W.

too" campaign went viral in a matter of hours after Milano's tweet; "on Facebook, it was shared in more than 12 million posts and reactions in the first 24 hours."[50] The #MeToo movement empowered victims of sexual harassment and assault, many of whom felt pressure to remain silent, to finally speak up and share their stories.[51] We sought to capture what, if any, effect the onset of the 2017 #MeToo movement had on litigation outcomes based on the temporal discontinuity created by this rapid mobilization.

A power analysis indicated that identifying a substantively meaningful effect (10 percentage point increase in the win rate), assuming a baseline of a very low win rate (2 percent), would require a sample of 158 cases.[52] Our initial dataset included only 84 cases from the two-year period between July 2016 and July 2018. Therefore, we expanded our timeframe to collect more data. Our final dataset included 163 cases that had reached final judgment before a court of appeals between January 2016 and May 2020.

The majority of cases, 71.8%, had at least some claims make it to the summary judgment stage but were disposed of there. 19.6% of cases had some or all claims disposed of on a motion to dismiss. One case (0.6%) was disposed of on a judgment on the pleadings. Only 11.0% of cases proceeded to trial and post-trial motions. At summary judgment, the employer won 97.4% of the time.[53] When the employee appealed the summary judgment decision, the employee prevailed in 31.6% of cases. The results

50. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://perma.cc/NV2V-JVMV.

51. *See, e.g.*, Anna North et al., *Sexual Harassment Assault Allegations List*, VOX (last updated Jan. 9, 2019), https://perma.cc/GE9X-FC4C.

52. Our power analysis assumed an 80% power level with $\alpha = .10$ (one-tailed $\alpha = .05$).

53. Employers won the vast majority of these cases when presented at the summary judgment stage. It is, however, important to note that the strongest cases by plaintiff-employees would be the cases most likely to result in settlement. The entire universe of cases brought in federal district court under Title VII for sexual harassment is not indicative of the true universe of legitimate and meritorious sexual harassment cases. Additionally, plaintiffs encounter high burdens in proving sexual harassment claims under current sexual harassment law. Finally, our dataset is limited to cases that were appealed to the courts of appeals. It may be that defendant-employers are less likely to appeal cases when they have lost at the district court level than plaintiffs.

were more even in cases handling post-trial motions. On post-trial motions, the employee prevailed 66.7% of the time before the district court and 50.0% on appeal.

### 2. Variables

To identify any potential confounding variables, we coded a variety of categorical variables for each case, including the dependent variable: the plaintiff's success before the district court and on appeal.

***Plaintiff Success.*** As many have noted, it can be difficult to classify whether a plaintiff has won or lost.[54] If the district court granted an employer-defendant's dispositive motion, we coded the employer as the "winner" before the district court. If the case was affirmed on appeal, we again coded the employer as the "winner" before the court of appeals. If the case was reversed, remanded, or vacated, we coded the employee as the "winner." We used the same approach if the opposite occurred: if the district court denied the employer-defendant's dispositive motion, we coded the employee as the "winner" before the district court. Cases that were vacated or remanded *in part* required determining whether the employee's sexual harassment case was still alive. If so, we coded the employee as the "winner."[55]

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54. *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 569–70 (2001); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 676–84 (1987).

55. For example, in *Collymore v. City of New York*, 767 F. App'x 42 (2d Cir. 2019), the district court granted the employer-defendant's motion to dismiss, and the Second Circuit affirmed in part, vacated in part, and remanded. The Second Circuit concluded that the employee did not state claims for sex or race discrimination, First Amendment retaliation, or *Monell* liability; it did, however, conclude that the employee stated a claim for retaliation for reporting sexual harassment. We therefore classified this case as a "win" for the employee on appeal. In contrast, in *Berndt v. California Department of Corrections & Rehabilitation*, 715 F. App'x 593 (9th Cir. 2017), the jury rendered a verdict in favor of the employer-defendant and the district court denied the employee's new trial motion. The Ninth Circuit affirmed in part, reversed in part, and remanded. We coded the employer-defendant as the "winner" because the Ninth Circuit affirmed the jury's verdict in favor of the employer but reversed and remanded only with respect to the award of certain deposition synchronization costs.

Overall, the employer party prevailed before the district court in 92.0% of cases but only in 63.8% of appeals. The employer won before the district court *and* prevailed on appeal in 64.9% of cases. The employee won before the district court 8.0% of the time but won on appeal in 36.2% of cases. The employee won before the district court *and* prevailed on appeal in only 5.5% of cases. In the subset of cases in which the employee lost before the district court, the employee won on appeal 33.3% of the time. Conversely, an employer who lost before the district court won on appeal only 30.8% of the time.

***The #MeToo Movement.*** We expected that if the #MeToo movement encouraged more victims of sexual harassment to speak up, the number of sexual harassment cases filed and pursued may have increased with the onset of the #MeToo movement. For the purposes of this Article, we define the start of the #MeToo movement as beginning on November 1, 2017—roughly two weeks after the explosion of social media posts using the #MeToo hashtag—by which time conventional media outlets had started to cover the social media phenomenon. We therefore sought to identify whether a plaintiff's chance of success changed after November 1, 2017.

***Party Identities.*** We coded the plaintiff's gender to control for differences in success rates between male and female plaintiffs. We also coded the identity and the gender of the harasser to control for any correlation between success and whether the harasser was a coworker, a supervisor, or a third party,[56] or if the harasser was the same or different gender as the plaintiff. Of the 163 cases, 82.8% of plaintiffs were female. In some instances, the plaintiff was not the harassee but had reported sexual harassment and brought an action alleging retaliation. Thus, some cases were brought by male plaintiffs alleging retaliation for reporting sexual harassment observed against a female colleague. 85.9% of cases involved harassment against a woman. On the other hand, 88.3% of cases involved alleged harassers that were male. 45.1% of cases involved a

56. Third parties included: students, *see, e.g.*, Naumovski v. Norris, 934 F.3d 200 (2d Cir. 2019); Campbell v. Hawaii Dep't of Ed., 892 F.3d 1005 (9th Cir. 2018), customers, *see, e.g.*, Swyear v. Fare Foods Corp., 911 F.3d 874 (7th Cir. 2018); Hales v. Casey's Mktg. Co., 886 F.3d 730 (8th Cir. 2018), and inmates, *see, e.g.*, Fassbender v. Correct Care Sols., LLC, 890 F.3d 875 (10th Cir. 2018).

coworker, 48.6% of cases involved a supervisor, and 16.4% of cases involved harassment by a third party.[57]

***Types of Claim.*** There are two types of sexual harassment claims a plaintiff may bring against an employer: a "quid pro quo" harassment claim, which "involves the conditioning of employment benefits on sexual favors,"[58] or a "hostile work environment" claim, which, "while not affecting economic benefits, creates a hostile or offensive working environment."[59] Accordingly, we identified whether a plaintiff brought a quid pro quo claim, a hostile work environment claim, a retaliation claim, or a combination of claims. The overwhelming majority of cases involved either a hostile work environment, a retaliation claim, or both: 79.1% of cases involved a hostile work environment claim, and 77.9% of cases involved a retaliation claim. Only 6.7% of cases involved a quid pro quo claim. Although the employer won at similar rates across claims at the district court level, employees had a greater chance of success on appeal if their case involved a quid pro quo claim. The employer won at the district court level over 90% of the time, regardless of the type of claim involved. But if the case involved a quid pro quo claim, the employee won on appeal 54.5% of the time compared to 34.1% of the time if the case involved a hostile work environment claim and 37.0% of the time if the case involved a retaliation claim.[60]

***Type of Harassment Conduct.*** We also controlled for the alleged sexually harassing conduct to see if certain types of conduct would be more likely to lead to successfully stating a claim or prevailing. We identified nine overarching categories of behavior that plaintiffs complained of: (1) verbal comments, which included sexual jokes, sexual comments or remarks,

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57. This number is greater than 100% because some of the cases involved multiple harassers.

58. 29 C.F.R. § 1604.11(a)(3) (2023). The distinction between a quid pro quo claim and a hostile work environment claim was recognized in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 62 (1986).

59. *Meritor Sav. Bank, FSB*, 477 U.S. at 62.

60. 42 U.S.C. § 2000e-3 provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

disparagement, or harsher treatment; (2) written or electronic communications, which included inappropriate emails, phone calls, or distribution of images; (3) physical contact, which included physical advances, unwelcome touching, brushing up against, assault, and rape; (4) propositions and advances; (5) staring or peeping; (6) stalking or following; (7) hovering, which included leaning over or blocking spaces; (8) threats or intimidation; and (9) exhibition, which included sexual gestures or miming, suggestive display, or full exposure. Over 70% of cases involved verbal comments. 31.9% cases stemmed from complaints of verbal comments only; 39.9% included verbal comments plus other harassing conduct. 42.9% involved physical contact, 14.1% involved propositions or advances, 12.9% involved written or electronic communications, 11.0% involved exhibition, 6.1% involved staring or peeping, 3.7% involved hovering, 1.8% involved stalking or following, and 1.2% involved threats or intimidation.

We expected that claims involving more serious conduct would be more likely to result in success for the plaintiff. Although the employer won in the bulk of cases at the district court level across all claims, an employee was less likely to prevail on appeal if their claim involved comments only. In claims alleging comments only, an employee won on appeal 21.2% as opposed to 44.6% if the claim alleged harassing comments *and* some other conduct.

***Judge Characteristics***. Finally, an extensive literature has established that individual characteristics of judges influence decisionmaking in U.S. federal courts.[61] Given the

61. *See* Laura P. Moyer et al., *Diversity, Consensus, and Decision Making: Evidence from the U.S. Courts of Appeals*, 8 POL., GROUPS, & IDENTITIES 822, 825–26, 829 (2020) (noting that increased diversity in federal appellate courts have led to more disagreement amongst judges and more dissents); Rebecca Reid et al., *Trading Liberties for Security: Groupthink, Gender, and 9/11 Effects on U.S. Appellate Decision-Making*, 48 AM. POL. RSCH. 402, 403–05 (2020) (explaining that difference between genders on appellate courts result in differing opinions during times of war); Matthew E.K. Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL LEGAL STUD. 574 (2010) (discussing and modeling data on heterogeneity in the courts of appeals); LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RSCH. Q. 788, 789–91 (2016) (providing evidence showing that diversity affects trial judge rulings).

gender dynamics inherent in many sexual harassment claims, the gender of the judges involved in these cases may be especially relevant. Therefore, we controlled for both the gender and implied partisan affiliation of the judges who decided each case. For the district court cases, we included dichotomous indicators for a female judge and a judge appointed by a Democratic president; for the court of appeals cases, we controlled for the number of female judges and the number of judges appointed by Democratic presidents on each panel.

### B. *Analysis*

We conducted two separate analyses to test the relationship between the #MeToo movement and plaintiff success in federal sexual harassment cases. First, we tested the relationship between the onset of the #MeToo movement and plaintiff success in federal district court. Next, we tested the relationship between the #MeToo movement and plaintiff success in the U.S. court of appeals. Because the dependent variables were dichotomous in both analyses, we used logistic regression.[62] We calculated robust standard errors clustered on circuit to account for potential interdependence within circuits based on circuit precedents, norms, or culture.[63] And, as described above, we controlled for the parties' identities, the type of claim, the type of harassment conduct, and the characteristics of the judge (or, for court of appeals cases, the judges) who heard each case.

## III. FINDINGS

Table 1 presents descriptive statistics and bivariate correlations for our data. Below, we separately present the results of our analyses for the U.S. district courts and the U.S. courts of appeals.

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62. Our results were also robust to using ordinary least squares regression, rare events logistic regression, and a logistic model fit by penalized maximum likelihood regression. Gary King & Langche Zeng, *Logistic Regression in Rare Events Data*, 9 POL. ANAL. 137–63 (2001); David Firth, *Bias Reduction of Maximum Likelihood Estimates*, 80 BIOMETRIKA 27 (1993).

63. Our results were also robust to using a multilevel logistic regression model with random intercepts for circuit, but the random intercepts were not statistically significant ($\chi^2 = 0$).

### A. *District Court Analyses*

Table 2 presents the results of our logistic regression analyses of district court cases. Model 1 includes only the indicator for the #MeToo movement; Model 2 also includes our control variables. Most of the control variables were not statistically significant. However, the presence of a female harassee, a supervisor harasser, and a female judge were all negatively and significantly associated with plaintiff success in sexual harassment cases in U.S. district court.

Most importantly, as expected (Hypothesis 1), the start of the #MeToo movement was positively and significantly associated with plaintiff success—both with, and without, controlling for possible covariates. Therefore, we can reject the null hypothesis that the #MeToo movement was not associated with district court decisionmaking in sexual harassment cases. The magnitude of this effect was quite striking. Based on the analysis in Model 2, the probability of a pro-plaintiff ruling was only .02 before the #MeToo movement and more than 0.14 after the #MeToo movement—a sevenfold increase in plaintiff victories.

Table 1: Descriptive Statistics and Correlations

| Variable | M | *SD* | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. Plaintiff Success in District Court | .08 | .27 | 1.00 | | | | | | | | | | | | | |
| 2. Plaintiff Success in Circuit Court | .36 | .48 | .20* | 1.00 | | | | | | | | | | | | |
| 3. #MeToo Movement | .53 | .50 | .20* | −.11 | 1.00 | | | | | | | | | | | |
| 4. Female Harassee | .86 | .35 | −.14 | −.10 | −.05 | 1.00 | | | | | | | | | | |
| 5. Female Harrasser | .12 | .32 | .04 | −.03 | −.05 | −.19* | 1.00 | | | | | | | | | |
| 6. Supervisor Harrasser | .46 | .50 | −.13 | .07 | −.08 | −.14 | .04 | 1.00 | | | | | | | | |
| 7. Hostile Work Environment | .79 | .41 | −.06 | −.08 | .04 | −.05 | −.10 | −.22* | 1.00 | | | | | | | |
| 8. Retaliation Claim | .78 | .42 | −.07 | .00 | .03 | .14 | −.06 | .15 | −.09 | 1.00 | | | | | | |
| 9. Quid Pro Quo Harrassment | .07 | .25 | .01 | .10 | −.03 | −.17* | .29* | .21* | .03 | −.10 | 1.00 | | | | | |
| 10. Alleged Comments | .72 | .45 | −.12 | −.21* | −.03 | −.10 | −.09 | .03 | .19* | −.04 | −.05 | 1.00 | | | | |
| 11. Female District Judge | .25 | .44 | −.06 | .13 | −.01 | −.14 | .03 | .21* | −.06 | .04 | .02 | −.02 | 1.00 | | | |
| 12. Democratic District Judge | .59 | .49 | .06 | −.05 | .06 | −.01 | −.03 | .03 | −.06 | .08 | −.13 | −.19* | .11 | 1.00 | | |
| 13. # of Female Circuit Judges | .99 | .82 | .00 | −.00 | −.02 | .08 | −.14 | −.08 | .01 | −.08 | −.12 | −.20* | −.05 | .05 | 1.00 | |
| 14. # of Democratic Circuit Judges | 1.55 | .99 | −.12 | .07 | −.04 | −.01 | .07 | .14 | −.09 | .11 | .13 | −.16 | .10 | .00 | .17* | 1.00 |

*Note.* Table reports the mean (M), standard deviations ($SD$), and correlations for our data. $N = 163$. * $p < .05$.

Table 2: The #MeToo Movement and Sexual Harassment Cases in U.S. District Courts

| | Model 1 | | Model 2 | |
|---|---|---|---|---|
| | $\beta$ | *Robust S.E.* | $\beta$ | *Robust S.E.* |
| #MeToo Movement | 1.70* | (0.57) | 2.24* | (0.85) |
| Female Harassee | | | −2.38* | (0.88) |
| Female Harrasser | | | −0.10 | (0.33) |
| Supervisor Harrasser | | | −1.91* | (0.87) |
| Hostile Work Environment | | | −1.33 | (1.01) |
| Retaliation Claim | | | −0.52 | (0.49) |
| Quid Pro Quo Harrassment | | | 0.45 | (1.41) |
| Alleged Comments | | | −0.94 | (0.81) |
| Democratic District Judge | | | 0.83 | (0.73) |
| Female District Judge | | | −1.59* | (0.64) |
| Intercept | −3.62* | (0.68) | 0.16 | (1.81) |
| Pseudo $R^2$ | 0.07 | | 0.24 | |

Table reports the results of logistic regression analyses of plaintiff success in sexual harassment cases in U.S. district courts. $*p < .05$ (two-tailed test); robust standard errors were clustered on circuit. $N = 163$.

### B. *Court of Appeals Analyses*

Table 3 presents the results of our logistic regression analyses of court of appeals cases. Model 3 includes only the indicator for the #MeToo movement; Model 4 also includes our control variables. Most of the control variables were not statistically significant. However, the presence of a female harassee, female harasser, and an allegation involving comments were all negatively and significantly associated with plaintiff success in sexual harassment cases in the courts of appeals.

Contrary to our expectations (Hypothesis 2), the start of the #MeToo movement was *negatively* associated with plaintiff success in these courts (significantly so when controlling for possible covariates). Therefore, we cannot reject the null

hypothesis that the #MeToo movement was not associated with court of appeals decision making in sexual harassment cases. In fact, it is possible that the movement was associated with a decline in plaintiff success in these courts. Indeed, based on the analysis in Model 4, the probability of plaintiff success in a court of appeals decreased from .43 before the #MeToo movement to .30 after it started.

Table 3: The #MeToo Movement and Sexual Harassment Cases in U.S. Courts of Appeals

| | Model 3 | | Model 4 | |
|---|---|---|---|---|
| | $\beta$ | *Robust S.E.* | $\beta$ | *Robust S.E.* |
| #MeToo Movement | −0.55 | (0.29) | −0.65* | (0.30) |
| Female Harassee | | | −0.85* | (0.38) |
| Female Harrasser | | | −0.89* | (0.44) |
| Supervisor Harrasser | | | 0.13 | (0.33) |
| Hostile Work Environment | | | −0.21 | (0.45) |
| Retaliation Claim | | | 0.21 | (0.72) |
| Quid Pro Quo Harrassment | | | 0.77 | (0.96) |
| Alleged Comments | | | −1.15* | (0.53) |
| # of Female Circuit Judges | | | −0.09 | (0.18) |
| # of Democratic Circuit Judges | | | 0.07 | (0.18) |
| Intercept | −0.29 | (0.22) | 1.26 | (0.77) |
| Pseudo $R^2$ | 0.01 | | 0.08 | |

Table reports the results of logistic regression analyses of plaintiff success in sexual harassment cases in U.S. courts of appeals. $*p < .05$ (two-tailed test); robust standard errors were clustered on circuit. $N = 163$.

## IV. NORMATIVE IMPLICATIONS

### A. *Why Might District Court Judges Have Been More Responsive to the #MeToo Movement?*

Several reasons might help explain why district court judges may have been more responsive to the #MeToo movement than courts of appeals judges. A common theme of these explanations, however, revolve around the role that district

courts play in the judicial system—namely, serving as the primary forum by which witnesses, evidence, accounts, and stories are presented and heard.

### 1. Individualized Impact on Judges

One explanation for our findings at the district court level may be that the judges were in fact genuinely impacted by the narratives portrayed under the #MeToo movement, such that it changed their understanding of what should constitute "severe" or "pervasive" misconduct. Under the current standard of sexual harassment, such behavior must amount to being severe or pervasive misconduct.[64] This analysis is very broad and generalized. However, through the #MeToo movement, society watched as millions began to share their own stories of experiencing sexual harassment and assault, providing the public and judges with valuable insights into the variance and diversity this issue poses.[65] Exposure to these narratives both in and out of the courtroom may have changed what judges viewed to be severe or pervasive. This is not to say, of course, that judges succumbed to societal pressures on the issue in order to rule in a particular way. Rather, the #MeToo movement may have helped illustrate the different manifestations of what constitutes "severe" and "pervasive" based on the multitude of stories shared, which in turn helped enable judges to examine and weigh these facts and testimony with a more educated understanding. And, given that district courts are the primary factfinders in a case, these district court judges, with their new understanding of harassing conduct, may have been swayed by the facts and testimony, thereby resulting in an increase in pro-plaintiff decisions.

### 2. In-Chamber and Collegial Influence on Judicial Decisionmaking

A second explanation for our findings may be that the speed and reach of the #MeToo movement might have influenced the

64. *See* Herbert, *supra* note 26 and accompanying text.

65. *See* Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), https://perma.cc/D5KT-QRLW (finding that the hashtag was used over nineteen million times on Twitter).

behaviors and understandings of those who surround district court judges during their decisionmaking processes. Judges are human; they neither live nor perform their judicial duties in a vacuum. Indeed, judges' understandings and opinions can and are, often shaped by both their colleagues and law clerks.[66] When the public's awareness of sexual harassment and misconduct increased as a result of the #MeToo movement, so too is it likely that some of those working alongside district court judges also gained increased knowledge and awareness of these issues. This, in turn, may have led to a judge's increased awareness and change in their own understanding of severe or pervasive conduct by discussing these issues with their colleagues and clerks, resulting in a change in how these judges approached these cases and ultimately ruled. This scenario could also be true for juries and the influence of their colleagues, families, and friends, since our Article analyzes cases that went in front of both judges and juries at the district court level.

3. #MeToo's Influence on Litigation Strategies and Evidence

Another explanation for the district court findings may be due to changes in litigation strategy and the types of information presented in court that seek to influence the judge. Unlike cases in the courts of appeals, district court cases are heard by a single judge.[67] As a result, plaintiffs need only to sway one individual with their facts and pleadings. This reality, galvanized by the heightened narrative surrounding sexual assault, may have empowered parties and individuals to file more suits and become more engaged in these cases compared to before the movement, in order to bring about change through the legal process. After all, the purpose of the #MeToo movement was to change people's perception and empower victims of sexual harassment and assault to speak out. Accordingly,

66. Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1782 (2005) (noting that judges "can be swayed by an articulate and well-reasoned argument from a colleague with a differing opinion . . . . '[J]udges have a common interest, as members of the judiciary, in getting the law right, and as a result . . . are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.").

67. There are, of course, instances where juries will hear and decide cases.

harassees and plaintiffs may now be less afraid to tell their stories or reveal certain details as a result of the movement, knowing that many other people have also gone through similar situations.[68] Witnesses too may feel more galvanized to participate in a trial, being more educated in the experiences of harassees and desiring to help harassees after exposure to the movement.[69] Therefore, if district court judges are now more frequently and directly hearing from harassees and witnesses about their accounts in greater detail and a more empowered light, these district court judges may have been influenced by these effects of the movement in their decisionmaking.

The reality is that any attempt to explain how and why district court judges were changed by the Movement must recognize some combination of these reasons. Public perception and national awareness of sexual assault and harassment dramatically increased during this period,[70] which in turn may have changed what judges now consider to be severe and pervasive misconduct and ultimately may be led judges to rule differently in these types of cases. The #MeToo movement also changed how individuals are willing to talk about their own experiences with sexual assault and harassment,[71] which could have possibly influenced how these stories and facts are presented in the district courts.

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68. *See* Ro'ee Levy & Martin Mattson, The Effects of Social Movements: Evidence from #MeToo (unpublished manuscript) (Mar. 16, 2022), https://perma.cc/3CEA-FADV (finding harassees were more empowered and felt more support following the Movement); *see also* Rebecca Seales, *What Has #MeToo Actually Changed?*, BBC (May 12, 2018), https://perma.cc/68LE-CYCR (noting that "other [victims of sexual harassment and abuse] have reported feeling less alone, saying it encouraged them to address past trauma by talking to loved ones, counsellors, or people with similar experiences" as a result of the #MeToo movement).

69. *See, e.g.*, Eric Levenson, *Witnesses at Harvey Weinstein Trial Show How #MeToo has Changed Whose Voices Matter*, CNN (Feb. 9, 2020), https://perma.cc/AFU4-NY5V (noting that "'prior bad act' witnesses are becoming more common in sexual violence trials like those involving Weinstein . . . . Their rise is one clear example of how the #MeToo movement and its broader impact has changed the American legal system.").

70. *See supra* notes 47–48 and accompanying text.

71. *See supra* note 51.

### B. *Why Might the Appellate Courts be Reluctant to Respond to the Movement?*

The reasons in the previous discussion that seek to explain the change in judicial behavior at the district court level may also help to explain why we saw a lack of change at the court of appeal level.

#### 1. Lack of Judicial Exposure to Compelling Facts and Influence

Unlike district court judges who are tasked with hearing first-hand accounts and compelling testimony, appellate courts almost exclusively deal with established facts and evidence in the record.[72] This means that court of appeals judges will not be exposed to the emotional weight of plaintiff and witness testimony, nor appreciate the increased willingness of witnesses to participate and testify on plaintiffs' behalf.[73] The lack of compelling testimony and limitations to examining the facts on record may therefore have limited the court's exposure to the movement and help explain our difference in findings. The absence of juries within courts of appeals may also explain our differential findings in the courts of appeals by removing another source of societal pressure and external influence that may have shaped the outcomes at the district court level.

#### 2. Appellate Safeguards Against Undue Internal Influence

Second, the #MeToo movement's influence on judges' decisionmaking at the district court and court of appeals levels may vary based on the unique structure of these courts. Unlike district courts, where only one judge presides over a case, appellate court decisionmaking operates under a panel structure, where multiple judges must vote on the outcome of a

72. *See Appellate Courts and Cases—Journalist's Guide*, U.S. CTS., https://perma.cc/4K5L-F68U (last visited Nov. 12, 2023) ("The court of appeals makes its decision based solely on the trial court's or agency's case record.").

73. *See About the U.S. Courts of Appeals*, U.S. CTS., https://perma.cc/7T8F-X5ZZ (last visited Nov. 12, 2023) ("The appellate courts do not . . . hear new evidence [or] . . . hear witnesses testify.").

particular case.[74] While court of appeals judges are still subject to the internal influence of their chamber's law clerks and colleagues, like that of district court judges, the court of appeals' panel structure may help to combat social movements and public influence more than the trial format. By having multiple judges hear oral arguments and gather together for conference and debate, an appeals judge may be more exposed to other contrasting views that are not aligned with their own philosophy or beliefs nor that of their chamber's clerks and colleagues. This, in turn, can influence and shape their decisionmaking and possibly undermine the influence of emotional or idiosyncratic testimonials.

3. Accounting for Resource Mobilization Theory

Lastly, resource mobilization theory might also help account for our findings that court of appeals judges were less susceptible to change by the #MeToo movement. Under this theory, "social movement scholars claim that elites [like the courts] quiet social unrest by absorbing movement actors into established institutional arrangements. In other words, elites co-opt movement leadership."[75] Applying this argument to the #MeToo movement, it is possible that that courts of appeals ultimately assigned cases in such a way as to mitigate the impact and influence of the movement on judicial decisionmaking in order to maintain the status quo. Such explanation is not unfounded. Previous research by Hall, Kirkland, and Windett found that courts of appeals tend to adopt a counter majoritarian role within the judicial system by "resist[ing] shifts in popular opinion by issuing judicial rulings counter to the public's shifting preferences."[76] Thus, while district courts may have been more susceptible and willing to act outside legal precedent to find severe and pervasive conduct in sexual harassment cases based on new knowledge and public awareness, courts of appeals judges, in contrast, might have been more likely to purposefully resist these external forces in order to combat the sudden shift towards pro-plaintiff rulings.

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74. *See Appellate Courts and Cases—Journalist's Guide*, *supra* note 72 ("Appeals normally are decided by randomly assigned three-judge panels.").

75. NeJaime, *supra* note 15, at 897.

76. Hall et al., *supra* note 9, at 521.

A full understanding of why the #MeToo movement failed to bring about change in the decisionmaking of courts of appeals is likely based on a combination of these reasons, rather than one single factor. The courts of appeals function in such a way as to mitigate the influence of social movements and public pressure within the courtroom. Moreover, the use of panels may help to diminish the internal influence and knowledge judges receive within their own chamber, leading to a more tempered consideration and decision in a case. Ultimately, the district courts and appellate courts are intrinsically different in their roles, and these differences provide logical rationales for the results found in this study.

### C. *Limitations*

While small datasets can be extremely valuable in uncovering larger trends, we must always be mindful of the limitations of our data. First, our dataset includes only 163 federal cases that resulted in a judicial opinion at the court of appeals over a four-and-a-half-year period—a very small snapshot. Our data does not paint a full picture of the Title VII sexual harassment litigation landscape.[77] Notably missing are the claims that did not make it to court and the data regarding settlements and settlement amounts.[78] Settlement agreements often include nondisclosure or confidentiality terms that prohibit parties from disclosing the relevant facts or the terms of the settlement.[79] This, in turn, makes it difficult to assess the total number and types of sexual harassment claims more broadly.[80] The power dynamic between employer and employee, the incentives to both the employer and employee to keep the sexual harassment confidential, and the confidence in one's

77. *See* Juliano & Schwab, *supra* note 54, at 552 n.9 ("Very few instances of sexual harassment reach litigation.").

78. *See id.* at 556–57 (observing that most claims are resolved without filing a claim and "[m]ost filed cases are settled or dropped").

79. "The growing wave of sexual harassment cases against high-profile figures has revealed that the use of nondisclosure or confidentiality provisions in settlement agreements has forced many women to keep their sexual harassment allegations private." Chase J. Edwards & Bradford J. Kelley, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, AM. BAR ASS'N BUS. L. TODAY (Oct. 17, 2018), https://perma.cc/EB9Q-DAN2.

80. *See id.*

claim or defense each may also play a role in a party's decision to engage in settlement discussions, accept a settlement offer, or proceed in court. We also collected data only on cases that had been decided before the courts of appeals. Our dataset thus is under-inclusive of cases in the midst of the appeals process or pending a decision and of losing parties who chose not to appeal.[81]

We also recognize the human judgment involved in categorizing types of harassing conduct and in determining the types of conduct present in each case. Creating broad categorical buckets necessarily fails to capture with precision the individual facts of each case. For example, our overarching categories do not reflect severity. "Comments" included everything from comments about someone's appearance to crude jokes to humiliating comments targeting a plaintiff. Thus, any statistical predictions based on harassment type did not account for the severity, frequency, or history of harassing conduct.

We attempted to methodologically and objectively assess the data but recognize the inherent human decisionmaking that comes with "coding" the cases. With those caveats, we are nevertheless enthusiastic about what trends that data reveal and the questions prompted from our study. We identified a statistically significant change in district court decisionmaking after the #MeToo movement, which suggests that these judges were impacted by the world around them. Lawyers understand that the law does not develop in a vacuum, and our study shows that this long-standing belief may just be true.

## CONCLUSION

This Article demonstrates one way in which the #MeToo movement impacted judicial decisionmaking. Our hypothesis was proven for district courts: the #MeToo movement's increase in public awareness and political attention to experiences of sexual misconduct did lead to more pro-claimant voting in federal courts at the district court levels. Our hypothesis did not,

81. We recognize that the decision to focus on fully resolved cases could create concerns regarding selection bias. That said, we thought it important to know how both the district court and the court of appeals reacted to the #MeToo movement. Moreover, the farther away we get from the height of the #MeToo movement, we were concerned that its impact may not be as salient.

however, hold at the appellate court level. Our findings suggest that the #MeToo movement—an extralegal social movement—impacted legal rulings that occurred in its wake before district courts, but that courts of appeals were more restrained in their reaction to the movement.

These findings are important for many reasons, but two seem to be of special importance. First, the findings demonstrate that district courts were not insulated to the social movement going on around them. Second, they demonstrate that appellate courts were more likely to remain stable in their decisionmaking, which poses important explanatory questions for scholars to investigate in the future. For example, did the multi-judge panel create the stability? Scholars focused on judicial decisionmaking should think carefully about the ways in which moments of significant societal change might impact the ways judges behave and, potentially, changes in how existing legal structures are applied.