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#METOO, TIME'S UP, AND THEORIES OF JUSTICE

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ABSTRACT

Allegations against movie-mogul Harvey Weinstein and the ensuing #MeToo movement opened the floodgates to a modern day reckoning with sex discrimination in the workplace. High level and high profile individuals across industries have been fired, suspended, and resigned. At the same time, serious concerns have been raised about useful processes for non-privileged women, due process for those accused of misconduct, and the need for proportionate consequences. And there have been calls for both restorative and transitional justice in addressing this problem. But these calls have not been explicit about what sort of restoration or transformation is envisioned.

This article explores the meaning, utility, and complexities of restorative and transitional justice for dealing with sexual misconduct in the workplace. We begin by documenting the restorative origins of #MeToo as well as exploring steps taken, most prominently by Time's Up, to amplify and credit survivors' voices, seek accountability, change workplace practices, and encourage access to the legal system. We then take up the call for restorative justice by exploring its key components—including acknowledgement, responsibility-taking, harm repair, non-repetition, and reintegration—with an eye toward how these components might apply in the context of addressing sexual harassment in the workplace.

We conclude by looking more broadly to the insights of transitional justice. We identify some shared features of transitional societies and the #MeToo setting, including structural inequalities, a history of denial and the normalization of wrongful behavior, and uncertainty about the way forward. We then provide guidance for ongoing reform efforts. First, we emphasize the vital importance of including and addressing the interests of marginalized groups within the larger movement both because we need to know and acknowledge specific intersectional harms and also because doing so helps model the kinds of equal relationships that marginalized groups seek across other dimensions such as race, sexual orientation, gender orientation, and disability. Second, emphasize the need for holism and mixed types of responses in trying to spur societal change.

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INTRODUCTION

A growing number of high profile incidents have recently drawn attention to sex discrimination in the workplace. Allegations against movie-mogul Harvey Weinstein and the ensuing #MeToo movement opened the floodgates to a modern day reckoning with sexist behavior. High level and high profile individuals across industries have been fired, suspended, and resigned over their misdeeds. At the same time, serious concerns have been raised about useful processes for non-privileged women, due process for those accused of misconduct, and the need for proportionate consequences. And there have been calls, most notably from actress Laura Dern in her acceptance speech at the Golden Globes, for the use of "restorative justice" as well as calls, most prominently from actress Minnie Driver, for "transformative justice" in addressing this problem.[1] But these calls have not been explicit about what sort of restoration or transformation is envisioned.

This article explores the meaning, utility, and complexities of restorative and transitional justice for dealing with sexual misconduct in the workplace. Transitional justice links the victim and perpetrator oriented concerns of restorative justice with a broader aim of transformation. In Part I, we document the mechanisms by which #MeToo has ignited a cultural reckoning and identify its restorative and transformative origins. We explore the steps that have been taken in the wake of the #MeToo naming and shaming campaign, most prominently by the Time's Up movement, to amplify and credit survivors' voices, seek accountability, change workplace practices, and encourage access to the legal system. We also note due process concerns about these efforts, including a particular concern with proportionate consequences for varied wrongdoing.

In Part II, we take up the call for restorative justice by exploring its key components—including acknowledgement, responsibility-taking, harm repair, non-repetition, and reintegration—with an eye toward how these components might apply in the context of addressing sexual harassment in the workplace. In doing so, we examine several high profile apologies and other responses to accusations of misconduct and consider the ways in which these responses succeed or fail on these dimensions. We also use the high profile examples of pre-#MeToo offenders Mel Gibson and Ray Rice to illustrate some of the potential and limits of offender reintegration.

In Part III, we turn more broadly to the insights of transitional justice. By looking at responses to wrongdoing in contexts of transitions away from

[1] Kimiko de Freytas-Tamura, *Minnie Driver Calls for 'Truth and Reconciliation' Model to Combat Sexual Assault*, N.Y. TIMES (Feb. 20, 2018).

extended periods of conflict, we glean some lessons for our current societal transformation. We explain why the settings of post conflict societies are appropriate places to look for lessons and warnings, noting that these past transitions share some key features of the context of #MeToo. Such features include structural inequalities, a history of denial and the normalization of wrongful behavior, and uncertainty about the way forward. In particular, we use Part III as an opportunity to explain the importance of linking the sorts of individual responses to past wrongs detailed in Part II to the broader institutional reforms articulated in Part I.

We conclude with some guidance for ongoing reform efforts. First, we emphasize the vital importance of including and addressing the interests of marginalized groups within the larger movement for workplace and societal sex equality. An inclusive approach is necessary both because we need to know and acknowledge specific intersectional harms and also because doing so helps model the kinds of equal relationships that marginalized groups seek across other dimensions such as race, sexual orientation, gender orientation, and disability. Second, we emphasize the need for holism and mixed types of responses in trying to spur societal change. A focus on a singular strategy—such as one rooted in access to litigation and prosecutions—may obscure larger institutional and societal issues. But an approach that tries to bypass that strategy may miss the essential ways law structures interactions and the roadblocks and protections it offers to survivors, alleged perpetrators, and those found to be wrongdoers.

I. A MODERN DAY RECKONING

Several high profile incidents have recently raised the profile of sex discrimination in the workplace. These include: the revelation of the toxic culture at Uber[2] and the toppling of its CEO Travis Kalanick; journalists Megyn Kelly and Gretchen Carlson's accusations of harassment by network head Roger Ailes and subsequent settlements with Fox News;[3] Bill O'Reilly's $32 million dollar sexual harassment settlement and Fox's subsequent decision to renew his contract;[4] and the scandalous revelation that thousands of Marines used a private Facebook group to solicit and share

[2] Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber* , Susan J. Fowler.com (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber; Editorial Board, *Uber's Sexism Lesson: How Not to Build a Tech Company*, CHICAGO TRIB. (Jun. 16, 2017).

[3] Michael M. Grynbaum & John Koblin, *Fox Settles With Gretchen Carlson over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 6, 2016).

[4] Paul Fahri, *Bill O'Reilly Settled Sexual Harassment Claim for 32 Million*, WASH. POST (Oct. 21, 2017).

naked photographs of servicewomen.[5] Pay discrimination also captured the public eye with the Korean Sony hack exposing the extreme pay gap on the movie *American Hustle* and Jennifer Lawrence's subsequent essay about gendered negotiating in Hollywood,[6] Serena Williams' essay on the pay gap for women of color across industries,[7] and Robin Wright and Emmy Rossum's highly publicized demands for pay equity on their hit television shows.[8]

Other cases in the headlines have involved sexual misconduct outside the workplace, including accusations of sexual misconduct against candidate and now President Trump brought by 19 women.[9] More than 50 women have accused Bill Cosby of sexual misconduct;[10] the rape case brought by his former mentee Andrea Constand resulted in a hung jury. The victim impact statement of one anonymous rape victim, Emily Doe, went viral, generating a public backlash against the 6 month prison sentence given to her rapist, Brock Turner.[11]

While all of these events, along with countless other lower profile incidents, set the stage, the efforts of victims like Rose McGowan and the related *New York Times* and *New Yorker* exposés[12] on Harvey Weinstein opened the floodgates to the modern day reckoning with sexual and sexist abuse in the workplace as well as questions of workplace consequences for

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[5] Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues,* Reveal News from the Center for Investigative Reporting (Mar. 4, 2017).

[6] Jennifer Lawrence, *Why Do I Make Less than My Co-Stars*, LENNY (Oct. 13, 2015). This issue dominated a Hollywood Roundtable among top executives. Pamela McClintock & Kim Masters, *Studio Chiefs Unleashed: 6 Top Execs Spar Over Gender Pay, Sony Hack and 'Star Wars' Box Office*, HOLLYWOOD REPORTER (Nov. 4, 2015).

[7] Sarah Marrs, *Jennifer Lawrence's Power*, LaineyGossip.com (Nov. 5, 2015), http://www.laineygossip.com/Jennifer-Lawrence-and-wage-discrepancy-is-first-topic-of-discussion-at-The-Hollywood-Reporters-studio-executive-roundtable/41132.

[8] L.V. Anderson, *Emmy Rossum Reportedly Got the Equal Pay She Asked for on Shameless,* Slate.com (Dec. 15, 2016).

[9] Matt Ford, *The 19 Women Who Accused President Trump of Sexual Misconduct*, THE ATLANTIC (Dec. 7, 2017).

[10] Noreen Malone, *I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen*, NEW YORK: THE CUT (July 26, 2015).

[11] Katie J.M. Baker, *Here Is The Powerful Letter The Stanford Victim Read Aloud To Her Attacker*, Buzzfeednews.com (June 3, 2016), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.njPPvEmgN#.unedmWwQy.

[12] Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER, (Oct. 23, 2017); Jodi Cantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017).

sexist non-workplace behavior.

A. #MeToo: Naming and Shaming

Shortly after the Weinstein story broke, actress Alyssa Milano asked Twitter users to respond using the hashtag #MeToo if they had been sexually harassed or assaulted. Reports flowed in of the all-too-common harassment and physical abuse many experience in the workplace. Some of the reports tagged with #MeToo included workplace behavior that would not violate criminal or civil laws, workplace conduct that was abusive but not sexual or sexist in nature, and sexually violative or sexist behavior in non-workplace settings. Within 24 hours, the hashtag had been posted over half a million times and people started sharing details of their abuse across social media platforms.[13] Alyssa Milano's #MeToo was not styled as a social movement and "[wa]sn't a call to action or the beginning of a campaign, culminating in a series of protests and speeches and events. It [wa]s simply an attempt to get people to understand the prevalence of sexual harassment and assault in society. To get women, and men, to raise their hands."[14] In other words, it was intended to be informative and perhaps enhance the believability of victims.

The seeming apoliticism of #MeToo collided almost immediately with Tarana Burke's preexisting "Me Too" social movement which focuses on women of color and marginalized people in marginalized communities and uses self-identification as a way to build bridges among survivors.[15] Burke quickly tried to tie the two MeToo's together, tweeting, "It's beyond a hashtag. It's the start of a larger conversation and a movement for radical community healing. Join us. #metoo."[16] Burke's vision of healing seems to include: creating connections and sharing empathy among survivors; external recognition of victims by the community; discussions of accountability, transparency, and vulnerability by perpetrators; and considerations of how "collectively, to start dismantling these systems that uphold and make space for sexual violence."[17] Even as she used #MeToo to

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[13] Sophie Gilbert, *The Movement of #MeToo, How a Hashtag Got Its Power*, THE ATLANTIC (OCT. 16, 2017).

[14] Id.

[15] Zenobia Jeffries, *Me Too Creator Tarana Burke Reminds Us This Is about Black and Brown Survivors*, YES! MAGAZINE (Jan. 4, 2018).

[16] Abby Olhaiser, *The Woman Behind Me Too Knew the Power of the Phrase When She Created It 10 Years Ago*, WASH. POST (Oct. 19, 2017).

[17] Daisy Murray, *'Empowerment Through Empathy' - We Spoke To Tarana Burke, The Woman Who Really Started The 'Me Too' Movement*, ELLE (Oct. 23, 2017).

gain visibility, Burke views her MeToo work as inherently different from the hashtag campaign and focused on distinct goals.[18]

The viral #MeToo movement quickly went global with "more than 2.3 million #MeToo tweets from 85 countries" and spawned distinct campaigns in other countries, including France's "Out Your Pig" and Italy's "That Time When."[19] Even countries where sexual abuse and assault are rarely publicly discussed, such as Pakistan and India, have seen prominent women coming forward sharing #MeToo experiences.[20] And of course, several countries had indigenous moments of reckoning prior to the #MeToo moment such as the #NiUnaMenos hashtag that spread across Latin America.[21]

The combination of #MeToo's shift to the outing of specific wrongdoers,[22] investigative journalism,[23] and enhanced public scrutiny has led to the firings, suspensions, or resignations of high level and high profile individuals across industries, including politics,[24] acting and producing,[25]

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[18] Jeffries, *supra* note __.

[19] Kara Fox & Jan Diehm, *#MeToo's Global Moment: The Anatomy of a Viral Campaign*, Cnn.com (Nov. 9, 2017), http://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html.

[20] Euan McKirdy & Sofia Salfi, *Celebrity Pakistani Women Add Voices To #MeToo Movement*, Cnn.com (Jan. 16, 2018), http://www.cnn.com/2018/01/16/asia/pakistan-metoo-prominent-voices-speak-out/index.html (an activist to speak out about the suspension of a professor); Catherine Powell, *#MeToo Goes Global and Crosses Multiple Boundaries*, Council on Foreign Relations, CFR.org (Dec. 15, 2017).

[21] Somini Sentgupta, *The #MeToo Moment: What Happened After Women Broke the Silence Elsewhere?*, N.Y. TIMES (Dec. 22, 2017).

[22] Jessica Valenti, *#MeToo Named the Victims. Now, Let's List the Perpetrators*, THE GUARDIAN (Oct. 16, 2017).

[23] Mike Dang, *Longreads Best of 2017: Investigative Reporting on Sexual Misconduct*, Longreads.com (Dec. 15, 2017).

[24] *Sexual Abusers of 2017*, Ultraviolet.com (Dec. 29, 2017) (mentioning Al Franken, John Conyers, Trent Franks, Tony Cornish); Maggie Haberman, Julie Hirschfield Davis, & Michael S. Schmidt, *Kelly Says He's Willing to Resign as Abuse Scandal Roils White House*, N.Y. TIMES (Feb. 9, 2018) (mentioning Rob Porter and David Sorensen).

[25] Staff, *A Running List of all the Dudes Accused of Sexual Misconduct Since Harvey Weinstein*, CONSEQUENCES OF SOUND (Jan. 2018) (including Kevin Spacey, Jeffrey Tambor, James Toback, Roy Price, John Lasseter, and Mark Schwan).

comedy,[26] media,[27] chefs and restauranteurs,[28] music,[29] photography,[30] and venture capital.[31] Even a few individuals in fields with extensive workplace protections such as academia[32] and the judiciary[33] have been brought low. Internationally, #MeToo and the publicity surrounding the related "Pestminster" list helped fell several high level government officials in the

[26] In addition to Louis CK, comedian TJ Miller is facing employment consequences. Chris Pleasance, *TJ Miller is Replaced as the Spokesman for Mucinex after Being Accused of Hitting and Sexually Assaulting an Ex-Girlfriend*, DAILY MAIL (Feb. 7, 2018).

[27] Dan Corey, *Since Weinstein, Here's a Growing List of Men Accused of Sexual Misconduct*, NBCNEWS.COM (Jan 10, 2018), https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546 (including Matt Lauer, Charlie Rose, Mark Halperin, Leon Wisetler, Glenn Thrush, Tavis Smiley, and Ryan Lizza) ; Ben Sisario, *What Makes Public Radio 'Very Personal' Magnifies Its #MeToo Cases*, N.Y. TIMES (Feb. 18, 2018) (including Garrison Keillor, Leonard Lopate, Jonathan Schwartz, John Kockenberry, Michael Oreskes, David Sweeney, Daniel Zwerdling, Charlie Rose, and Tom Ashbrook).

[28] Vivian Wang, *At Columbia, Three Women, 30 Years and a Pattern of Harassment*, N.Y. TIMES (Dec. 8, 2017); Kim Severson, *After Apologies, Restraurants Struggle to Change*, N.Y. TIMES (Jan. 18, 2018) (including John Besh, Charlie Hallowell, Ken Friedman and Mario Batali). For a scathing takedown of Mario Batali's apology, see Geraldine DeRuiter, *I Made the Pizza Cinnamon Rolls from Mario Batali's Sexual Misconduct Apology Letter*, Medium.com (Jan. 10, 2018), https://medium.com/@everywhereist/i-made-the-pizza-cinnamon-rolls-from-mario-batalis-sexual-misconduct-apology-letter-ef927659cab.

[29] Chloe Cornish & Lauren Leatherby, *Who Are the Men Accused of Sexual Harassment?*, FINANCIAL TIMES, Dec. 8, 2017, https://www.ft.com/content/204ab48c-d54f-11e7-a303-9060cb1e5f44 (discussing Russell Simmons and James Levine).

[30] Vanessa Friedman & Elizabeth Paton, *Terry Richardson Is Just the Tip of the* Iceberg, N.Y. TIMES (Oct. 27, 2017).

[31] Cornish & Leatherby, *supra* note __ (discussing Russell Simmons and James Levine).

[32] Vivian Wang, *At Columbia, Three Women, 30 Years and a Pattern of Harassment*, N.Y. TIMES (Dec. 8, 2017); *Dean Accused of Misconduct Gets New NKU Job after Resigning*, USNews.com (Feb. 22, 2018)(discussing resignation of a Law Dean in the wake of a University finding "sufficient evidence to support a finding of unhealthy culture of fear, intimidation and bullying" but insufficient evidence for a sexual misconduct complaint). Note to self: discuss also Tom Bart & Neil Gluckman, *She Left, He Got to Stay*, CHRON. HIGHER ED. (Feb. 27, 2018) available at https://www.chronicle.com/interactives/harvard-harassment.

[33] *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017).

United Kingdom[34] and spurred resignations in the Canadian government.[35] #MeToo's reception elsewhere in the world has been milder, although some dialogue has been generated in places like China.[36] There has also been some strong resistance with, for example, the labelling of those who have come forward in France as collaborators[37] and the excoriation of Weinstein accuser Asia Argento and the redemption of Silvio Berlusconi in Italy.[38]

Even as a house cleaning is necessary, many worry that #MeToo's victories will be short lived in the absence of deeper structural and cultural changes.[39] Public shaming, for example, may not be a robust option for most employees because of the low profile of those involved.[40] Highlighting this point, Alianza Nacional de Campesinas, representing 700,000 farmworkers, penned a public letter of solidarity to Hollywood women that noted the additional difficulties that non-privileged women face in choosing to name their abusers.[41] In addition, the campaign does not solve ongoing proximity and safety concerns or address questions of workplace protections for the accusers.[42] Scholars like Rebecca Hamilton have voiced further concern that the naming, shaming, and firing cycle could crowd out less visible efforts

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[34] Catherine Powell, *How #MeToo Has Spread Like Wildfire around the World*, Newsweek.com (Dec. 15, 2017) (including Defense Secretary Michael Fallon). Julia Rampen, *Britain's #MeToo Moment Is Taking Down Some of the Most Powerful Men in the Country*, Slate.com (Jan. 25, 2018), https://slate.com/news-and-politics/2018/01/britains-metoo-movement-is-uncovering-a-culture-of-rampant-sexism-and-harassment-in-londons-corridors-of-power.html

[35] Jen Gerson, *If Everyone Knew About the Harassment Problem in Canadian Politics, Why Did Nobody Act?*, THE WALRUS (Feb. 2, 2018).

[36] Gwyneth Ho & Grace Tsoi, *Will MeToo Spread in China?* BBC CHINESE (Jan. 6, 2018).

[37] Rachel Donadio, *France, Where #MeToo Becomes #PasMoi*, THE ATLANTIC (Jan. 9, 2018).

[38] Jason Horowitz, *In Italy, #MeToo Is More Like 'Meh'*, N.Y. TIMES (Dec. 16, 2017).

[39] Take for example the difficulties of overhauling sexist workplace culture at blue collar mainstays like Ford even in the wake of successful lawsuits and Ford's subsequent apology. Susan Chira & Catrin Einhorn, *How Tough Is It To Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017); Susan Chira & Catrin Einhorn, *Ford Apologizes for Sexual Harassment at Chicago Factories* N.Y. TIMES (Dec. 21, 2017).

[40] Amelia Harnish, *The Post-Weinstein Reckoning: What Do We Do Now?*, Refinery29.com (Nov. 29, 2017).

[41] Alianza Nacional de Campesinas, *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017); See also Time's Cover for 2017 Person of the Year which included the elbow of a symbolic silence breaker who wished to remain anonymous. *The Silence Breakers: The Voices that Launched a Movement*, TIME (Dec. 18, 2017).

[42] *Id*. Some international setting magnify such concerns where outing a harasser could lead to retaliation and even honor killings. Alice Rowsome, *Why the #MeToo Movement Has Failed to Take off in Afghanistan*, VICE IMPACT (Jan. 17, 2018).

focused on structural changes.[43]

A related, but distinct, criticism about privilege suggests that #MeToo mostly benefits heterosexual cisgender white women.[44] When #MeToo first went viral, the call for women to name their experiences was thought to exclude men, and gay men in particular; trans and other non-binary persons, as well as lesbians and others who suffered abuse at the hands of women.[45] This led to calls for more inclusive language and a more inclusive campaign generally.[46] Even as some men have felt comfortable sharing their stories,[47] some have also suggested that trans and non-binary persons and women of color should be highlighted as they are more likely to be abused, less likely to be believed, and less likely to garner media or social attention.[48] Even for cisgender women of color who seem to fall squarely within the MeToo ambit, their access to "believability, sympathy and public rage" seems much more limited.[49] MeToo creator Tarana Burke contends that too often black women and girls are viewed as inherently sexual and so are both more likely to be

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[43] Rebecca Hamilton, *No, Naming and Shaming Sexual Offenders Doesn't Always Help*, WASH. POST (DEC. 21, 2017) (such efforts might include such as reshaping HR departments so as to avoid a conflict of interest; enhancing access to legal services, and increasing women in leadership roles).

[44] Some women of color have been reluctant to support MeToo campaigns when they feel insufficiently supported by white women allies. Stephanie Russell-Kraft, *Hundreds of Attorneys Join Time's Up Legal Defense Fund*, BNA (Feb. 1, 2018), http://uslw.bna.com/lwrc/2802/split_display.adp?fedfid=127704891&vname=lw1notallissues&jd=000001614371d7dcad71e7fb30970002&split=0.

[45] Sam Hope, *Me Too: LGBTQ+ People and Sexual Assault*, thequeerness.com (Oct. 17, 2017).

[46] Kyli Rodriguez-Cayro, *Some Members of the LGBTQ Community Feel Excluded by the Me Too Hashtag & Its a Reminder of How Important Inclusive Language Is*, Bustle.com (Oct. 19, 2017).

[47] Anthony Rapp leading the charge on Kevin Spacey's predatory behavior and inspiring Terry Crews to come forward and to file a lawsuit against Adam Venit. *Star Trek's Anthony Rapp Reveals What Drove Him to Go Public with Kevin Spacey Allegation*, ATTITUDE (Jan. 8, 2018); *Terry Crews on His Sexual Accountability Lawsuit: This is About Accountability*, NPR (Dec. 10. 2017); Zach Baron, *Whatever Happened to Brendan Fraser?*, GQ (Mar. 2018); James Van Der Beek, *James Van Der Beek on Twitter Backlash: "Should I Have Just Shut Up?"*, GLAMOUR (Jan. 23, 2018). Jonathon Schaech, *Actor Johnathon Schaech: I Was Molested by Director Franco Zeffirelli*, PEOPLE (Jan. 11, 2018) Anthony Edwards, *Yes Mom, There Is Something Wrong*¸Medium.com (Nov. 10, 2017), https://medium.com/@anthonyedwards/yes-mom-there-is-something-wrong-f2bcf56434b9.

[48] Susan Cheng, *Asian-American Women In Hollywood Say It's Twice As Hard For Them To Say #MeToo*, BUZZFEED NEWS (Feb. 24, 2018), https://www.buzzfeed.com/susancheng/what-metoo-means-for-asian-american-women-in-hollywood?utm_term=.frXQYP48A#.fgB19ojJ4; Meredith Talusan, *How #MeToo Stands to Marginalize Trans and Gender-Nonconforming People*, Them.us (Oct. 27, 2017).

[49] Gillian B. White, *The Glaring Blind Spot of the 'Me Too' Movement*, THE ATLANTIC (Nov. 22, 2017).

harassed and less likely to be heard.[50] In addition, they may fear contributing to racial stereotyping and face pressure not to name same-race aggressors lest the community be further marginalized.[51] Consider, for example, the absence of strong public support for musician R. Kelly's alleged victims,[52] the relative lack of outrage at hip hop mogul Russell Simmons who has been accused of multiple rapes,[53] and avowed feminist Lena Dunham's defense of a white producer from minority actress Aurora Perrineau's rape accusations.[54]

Even given these shortcomings, #MeToo has ignited a cultural reckoning that has prompted increased self-reflection, conversation, and changing perceptions of sexism, sexual harassment, and sexual assault. A frequently cited December 2017 poll on American voters' attitudes concluded that "we are in a new place on gender, sexism and equality," with 85% of respondents saying they are more likely to believe women making allegations of harassment or assault than the men who deny them and increasing numbers of people believing that sexism is a big problem and that the country would be better off with more women in office.[55] But will these attitudinal changes last or make a difference in workplace conditions? One might view #MeToo as a precondition for the success of sexual harassment and sexual violence laws. Professor Catharine MacKinnon, for example, has suggested that the #MeToo movement is "eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims."[56] We turn next to a case study of Hollywood to get a sense of developing legal, structural, and cultural reforms designed to fundamentally alter working conditions for women.

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[50] Tarana Burke, *The Founder of #MeToo Doesn't Want Us to Forget Victims of Color*, PBS NewsHour transcript (Nov. 15, 2017). [Note to self: add empirical support for this contention]

[51] Shree Paradkhar, *#MeToo Opens Door to Voices of Women of Colour*, thestar.com (Oct. 21, 2017).

[52] Danielle Jackson, *In the Wake of Weinstein and #MeToo, Why Does R. Kelly Still Have an Audience?*, LONGREADS (Nov. 8, 2017); Jason Newman, *Surviving R. Kelly*, ROLLING STONE (Oct. 23, 2017).

[53] Shanita Hubbard, *Russell Simmons, R. Kelly, and Why Black Women Can't Say #MeToo*, N.Y. TIMES (Dec. 15, 2017).

[54] Zinzi Clemmons, Twitter (Nov. 29, 2017); Christie D'Zurilla, *Lena Dunham Accused of Hipster Racism after She Initially Defended Girls Writer*, LA TIMES (Nov. 20, 2017).

[55] *What a Difference A Year Makes: Polling Update on Sexism, Harassment, Culture and Equality*, Perry/Undem Report (Dec. 6, 2017). [Note to self: include discussion of numerosity issue & D. Turkheimer in text]

[56] Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018).

B. An Industry Case Study: Hollywood

The Time's Up Initiative, created by female Hollywood insiders,[57] offers one path for building on this momentum and moving beyond the limitations of naming and shaming. The focus of Time's Up is on "sexual assault, harassment and inequality in the workplace."[58] Its aims include the amplification and believability of survivors' voices; the conclusion that "accountability is possible," and access to justice and support for victims.[59] Rather than rely solely on social denunciation, this collective has decided to: "partner with leading advocates for equality and safety to improve laws, employment agreements and corporate policies; help change the face of corporate boardrooms and the C-suite; and enable more women and men to access our legal system to hold wrongdoers accountable." The organization has multiple working groups, including one designed to amplify the voices of "minorities and gays, lesbians, bisexuals and transgender people."[60] In the subsections below, we survey some of their early efforts.

1. Law

a. Enhancing Access

In order to achieve these various goals, Time's Up is delivering information on sexual harassment and how to address it, raising money to subsidize legal support for affected individuals, and providing access to additional resources. [describe information provided as website is built out] For instance, hundreds of lawyers have offered support to Time's Up in the form of pro bono assistance to help victims pursue claims.[61] Because many victims face additional hurdles in their pursuit of litigation such as mandatory arbitration, Time's Up may also attempt to prevent companies in the future from drafting contracts that force harassment and discrimination claims into arbitration.[62] [add more details as they become known]

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[57] Brittany Martin, *Here's the Story Behind Time's Up, Hollywood's Anti-Sexual Harassment Movement*, L. A. MAG. (Jan. 8. 2018), http://www.lamag.com/culturefiles/times-up-golden-globes/ (noting that the efforts were spurred by spurred by a solidarity letter from blue collar working women).

[58] *Dear Sisters* Letter, Timesupnow.com (Jan. 1, 2018).

[59] *Id*.

[60] Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018).

[61] For instance, hundreds of lawyers have offered support in the form of pro bono assistance to help victims pursue claims. Stephanie Russell Kraft, *Hundreds of Attorneys Join Time's Up Legal Defense Fund*, BLOOMBERG BNA U.S. LAW WEEK (Feb. 1, 2018), http://uslw.bna.com/lwrc/2802/split_display.adp?fedfid=127704891&vname=lw1notallissues&jd=000001614371d7dcad71e7fb30970002&split=0.

[62] Marie Solis, *Hollywood's Time's Up Campaign Must Defeat Forced Arbitration, A Sexual Harasser's Best Friend*, Newsweek.com, http://www.newsweek.com/hollywoods-

b. Avoiding Non-Disclosure Agreements

One focus of Time's Up is lobbying efforts for legislation that would prohibit companies from forcing employees to sign non-disclosure agreements which forbid them from speaking publicly about workplace wrongs.[63] Non-disclosure agreements have been deployed by Hollywood employers like Harvey Weinstein and the Weinstein Company as a precondition to settlement.[64] They preclude women who sign them from warning other women,[65] and may lower settlement amounts because of disparate bargaining power and an incentive to settle early. [detail concrete efforts as they become known as well as examples where NDAs have been a problem][66]

2. Workplace Structures

a. Anita Hill Commission

In the wake of the Weinstein scandal, Time's Up Member and Lucasfilm president Kathleen Kennedy proposed an industrywide commission focused on Hollywood culture with "zero-tolerance policies for abusive behavior and a secure, reliable, unimpeachable system in which victims of abuse can report what's happening to them with a confident expectation that action will be taken without placing their employment, reputation or career at risk."[67] It is envisioned that the commission will include labor specialists, lawyers, legal scholars, sociologists, and feminist activists, as well as representatives of studios, unions, guilds, and talent agencies.[68] Anita Hill will chair the commission which seeks to reach broadly to address "power disparity, equity and fairness, safety, sexual harassment guidelines, education and training, reporting and enforcement, ongoing

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times-campaign-forced-arbitration-non-disclosure-agreements-768539.

[63] *Id*.

[64] Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017). They were also used by Herman Cain, Bill O'Reilly, Roger Ailes, and President Trump.

[65] Nicole Karlis, *How Non-Disclosure Agreements Silence Women*, Salon.com (Dec. 10, 2017), https://www.salon.com/2017/12/10/how-non-disclosure-agreements-silence-victims/.

[66] On confidential settlements, *see generally* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457 (2006); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. REV. 2619 (1995); Richard Zitrin, *The Case against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115 (1999).

[67] Staff, *Kathleen Kennedy Proposes Industry Commission and Zero Tolerance in Wake of Weinstein Claims*, THE HOLLYWOOD REPORTER (Oct. 16, 2017).

[68] *Id*.

research and data collection."[69] It seeks to "adopt best practices and create institutional change that fosters a culture of respect and human dignity."[70] [detail concrete efforts as they become known and in Part III return to question of legitimacy of zero tolerance]

b. Unions and Guilds

While they have not traditionally led on this issue,[71] Hollywood guilds are now developing sexual harassment guidelines, initiatives, and codes of conduct.[72] SAG-AFTRA president and 90210 alumnus Gabrielle Carteris, for example, has made addressing sex discrimination a cornerstone of her administration. She was early to condemn Harvey Weinstein, had led panels on the issue, persuaded the AFL-CIO executive council and the International Federation of Actors to increase their efforts to deal with the problem, joined the Anita Hill Commission,[73] and is exploring technological innovations to improve the tracking of reports and enhance training programs for union representatives. The Academy of Motion Picture Arts and Science and the Producers Guild of America have also adopted codes of conduct emphasizing the "values of respect for human dignity, inclusion" and emphasizing "categorical opposition to any form of abuse, harassment, or discrimination on the basis of gender, sexual orientation, race, ethnicity, disability, age, religion, or nationality." [detail additional concrete efforts as they become known- determine what, if anything, they change from the status quo]

3. Culture: Workplace and Otherwise

In addition to supporting access to law, working on legal reform, and creating workplace codes, Time's Up and others are crafting and supporting a variety of initiatives to change workplace culture as well as the culture at large. Efforts to shift the culture involve a variety of practices designed to recognize the value of women. Some focus on creating gender equity in the hope that women in power and women in rooms will be more sensitive to issues of inequality. Others reach more broadly, suggesting that the

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[69] Rebecca Sun, *Top Hollywood Execs Unveil Anti-Sexual Harassment Commission Chaired by Anita Hill*, THE HOLLYWOOD REPORTER (Dec. 15, 2017).

[70] Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017).

[71] Morgan Spector, *Harvey Weinstein's Crimes and SAG's Failure*, JACOBIN (Oct. 2017); Ian Kulgren, *Why Didn't Unions Stop Sexual Harassment?*, POLITICO (Nov. 14, 2017).

[72] David Robb, *Hollywood's Guilds Developing Anti-Harassment Initiatives*, Deadline.com (Jan. 26, 2018).

[73] Dave McNary, *SAG-AFTRA President Gabrielle Carteris Talks State of the Union*, VARIETY (Jan. 18, 2017).

workplace is an appropriate site of consequence for non-workplace sexist behavior. While the descriptions below are not comprehensive, they offer a representative flavor of the post #MeToo Hollywood activity.

a. 50/50 by 2020

One Hollywood initiative to change workplace culture is the adoption of the pre-existing 50-50 by 2020 campaign. For instance, ICM, a talent agency, "has pledged to reach full 50–50 gender parity by 2020 with a special focus on leadership roles."[74] TV mogul and ICM client Shonda Rhimes suggested the benchmark, used in other industries, to change workplace culture into one that is less tolerant of harassment and abuse. She suggests that the primary way to meet the goal is by rethinking workplace mentorship and teambuilding so women are not "shut out of the ways that bonding happens in the workplace."[75] In order to meet its goals, ICM may build on the preexisting work done by Hollywood organizations devoted to gender equity on screen and throughout Hollywood more generally.[76] In making the pledge visible, it creates a mechanism for public accountability. Other major agencies, such as CAA, UTA as well as Vice Media[77] are joining these efforts and it will be interesting to see if it spreads throughout the industry.[78] It is also worth noting that while some agencies are promising gender equity,[79] 50-50 by 2020 actually has a more inclusive focus including people with disabilities, LGBTQIA, and people of color.[80]

b. Pay Equality and Negotiation

While some might view pay discrimination as distinct from the #MeToo movement, activists see it as essential to addressing the core

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[74] Rebecca Sun, *ICM Partners Pledges to Reach 50-50 Gender Parity by 2020*, HOLLYWOOD REPORTER (Dec. 6, 2017).

[75] *Id*. This might help counter the so-risk that men will refuse to mentor women or otherwise be alone with them, following the "Pence Rule," to avoid harassment and thus deny women opportunities to build essential relationships. Jenny Proudfoot, *Saying #Metoo Could Cost you your Dream Job Says Sheryl Sandberg*, MARIE CLAIRE (Dec. 4, 2017).

[76] *Hollywood Agency Promises 50/50 Gender Parity Inspired by Shonda Rhimes*, GirlTalkHQ.com (Dec. 18, 2017), http://girltalkhq.com/hollywood-agency-pledges-50-50-gender-parity-2020-inspired-client-shonda-rhimes/.

[77] 5050by2020.com (last viewed Feb.12, 2018).

[78] Rebecca Sun, *CAA Cancels Pre-Golden Globes Party, Will Help Start Legal Fund for Sex Harassment Victims*, HOLLYWOOD REPORTER (Dec. 11, 2017).

[79] Hollywood insiders have lauded 50-50 as the first real effort to address the systemic nature of the problem, but given that ICM was already performing well in this area compared to its peers, fear that others will prefer to retain the status quo after they have cleaned house rather than follow suit. Rebecca Sun, *CAA Cancels Pre-Golden Globes Party, Will Help Start Legal Fund for Sex Harassment Victims*, HOLLYWOOD REPORTER (Dec. 11, 2017).

[80] 5050by2020.com (last viewed Feb.12, 2018).

problem raised by #MeToo—the devaluation of women.[81] In addition to the Time's Up fund which would be available to facilitate pay discrimination claims, a variety of piecemeal actions to equalize pay are underway. For instance, actresses Debra Messing, Eva Longoria, Laura Dern, and Sarah Jessica Parker shamed the E! Network on live television for underpaying female anchor Catt Sadler,[82] and Carrie Grace resigned her position as the China editor of the BBC after learning of pay disparities.[83] Numerous commentaries shamed actor Mark Wahlberg for demanding 1.5 million dollars to do reshoots necessitated by actor Kevin Spacey's erasure from the film *All the Money in the World*, a shame so compelling that he and his agency donated that amount to Time's Up in actress Michelle Williams name.[84]

Early stages of more systematic efforts may also be underway. For example, Hollywood women are cooperating with one another formally and informally to enhance their negotiating positions.[85] That cooperative ethos

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[81] Tarana Burke, Ai-jen Poo, & Monica Ramirez, *Golden Globes Time's Up Activists to Hollywood: "Failure to Pay Women Fairly Is Another Way of Exacting Violence"* HOLLYWOOD REPORTER (Jan.15, 2017). As Me Too founder Tarana Burke explains,

> Gender-based injustice is pervasive, and comes in all forms and sizes. At the heart of the matter is the reality that women's lives, and our work, are valued less than men's, and this power imbalance is expressed in a plethora of ways: from pay disparity, to limited opportunities for promotion, to failure to recognize our work and contributions, to sexual harassment, abuse and violence. In the words of Audre Lorde, "[t]here is no such thing as a single-issue struggle, because we do not live single-issue lives." As activists who have dedicated our lives to justice and healing, we understand that to achieve equity and help our communities have a shot at our best lives, we must tackle and confront all of the issues that prevent us from reaching our full potential. This includes, but is not limited to, workplace sexual violence, unequal benefits, and pay disparities.. . . while Hollywood is trying to address its problem with sexual violence, we want to underscore that the failure to pay women fairly is another way of exacting violence on women workers by devaluing their worth and contributions.

[82] Judd Legum, *4 Actresses Call out E! for Gender Discrimination — while Live on E!*, ThinkProgress.org (Jan. 7, 2018), https://thinkprogress.org/debra-messing-calls-out-e-for-gender-discrimination-while-live-on-e-3c7487978d37/. *See also*, *Jennifer Lawrence, Catt Sadler Prepping #MeToo, Time's Up Movement TV Docuseries*, HOLLYWOOD REPORTER (Feb. 23, 2018).

[83] Valeriya Safronova, *What We Talk About When We Talk About Pay Inequity*, N.Y. TIMES (Feb 4. 2018).

[84] Jeffrery C. Mays, *Mark Wahlberg and Agency Will Donate $2 Million to Time's Up after Outcry over Pay*, N.Y. TIMES (Jan. 13, 2018).

[85] For instance, Tracy Ellis Ross consulted with other Time's Up actresses about how to address her pay disparity with co-star Anthony Anderson Elaine Lainey Lui, *Intro for January 19, 2018*, Lainey Gossip.com (Jan. 19, 2018), http://www.laineygossip.com/tracee-ellis-ross-reveals-pay-gap-with-anthony-anderson-and-intro-for-january-19-2018/48931.

may also spill over to begin to address intersectional disparities[86] as when actress Jessica Chastain tied her salary to Octavia Spencer's so as to guarantee racial pay equity.[87] The most highly paid dramatic TV actress, Ellen Pompeo, revealed her negotiating difficulties and strategies in the widely industry read HOLLYWOOD REPORTER in hopes of "setting an example for others."[88] A HOLLYWOOD REPORTER ROUNDTABLE also saw high profile actresses sharing negotiating strategies such as refusing to allow male actor's deals to be made first and calling on industry leaders to stop the practice along with challenging the normalization of lower actress pay.[89]

C. Due Process Concerns

While this cultural, legal, and structural reckoning has been welcomed by many, serious concerns have also dominated the recent public conversation. Those skeptical of #MeToo have emphasized the lack of due process in the naming and shaming campaign. Perhaps the most high profile articulation of this position comes from President Donald J. Trump's twitter feed: "Peoples lives are being shattered and destroyed by a mere allegation. Some are true and some are false. Some are old and some are new. There is no recovery for someone falsely accused – life and career are gone. Is there no such thing any longer as due process."[90] In particular, skeptics emphasize the lack of a clear path and procedures by which an accused can successfully contest allegations,[91] judgment by the public rather than by a jury or an independent decision-maker,[92] the risk of false positives, and the potential for

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[86] See e.g. Sydney Scott, *Viola Davis Is Demanding Hollywood Do Better: Pay Me What I'm Worth*, ESSENCE (Feb. 15, 2018)(noting that despite her high claim she has received neither the pay nor the opportunities of similarly situated actresses). Note to self: find study to add to anecdata.

[87] Rachel Leah, *How Jessica Chastain Helped Octavia Spencer Get Equal Pay Was Great and Sadly Necessary*, Salon.com (Jan. 25, 2018), https://www.salon.com/2018/01/25/how-jessica-chastain-helped-octavia-spencer-get-equal-pay-was-great-and-sadly-necessary/.

[88] Lacey Rose, *Ellen Pompeo, TV's $20 Million Woman, Reveals Her Behind-the-Scenes Fight for "What I Deserve"*, HOLLYWOOD REPORTER (Jan. 17, 2017)(including outing her former co-star Patrick Dempsey's disinterest in joint negotiation to maintain pay equity and her decision to take ownership of the show by producing).

[89] Laura Berger, *Jennifer Lawrence, Emma Stone, Jessica Chastain, & More Talk Equal Pay and Abuse in THR Roundtable*, HOLLYWOOD REPORTER (Nov. 16, 2017).

[90] Donald J. Trump, Twitter, @realdonaldtrump (Feb. 10, 2018).

[91] Jonathan Kay, *Post Weinstein, We Must Reform Due Process, Not Abandon It*, NATIONAL POST (Nov. 14, 2017) (decrying an age "when a single career can be destroyed with a Tweet.").

[92] Newt Gingrich has suggested those calling for Franken's resignation were motivated "by this weird puritanism which feels a compulsion to go out and lynch people without a trial." Ana Marie Cox, *Al Franken Isn't Being Denied Due Process. None of These Famous*

disproportionate consequences which are often framed as punishments.[93] While the U.S. Constitution does not generally require due process in non-government employment settings,[94] the desire for a fair hearing by an independent arbiter with proportionate consequences for violations of workplace policies is a pervasive one.

Relatedly, serious disagreement exists over what the appropriate consequences for many of the acts identified as part of #MeToo should be. One might think of it like a Goldilocks problem: some bemoan the "professional death penalty," while others argue, that in many instances, the loss of a job falls far short of a needed criminal or civil remedy for the victims. For instance, what are the appropriate consequences for someone like Al Franken, who was accused of groping and forcibly kissing a number of women?[95] Was a public apology sufficient? An ethics investigation? Resignation? Is accountability through acknowledgement by the wrongdoer sufficient, or do employers, voters, or members of the public need to demand criminal or civil penalties or job loss in order to deter or to punish?[96]

MeToo founder Tarana Burke has pushed back on accusations of the movement's rush to moral flattening,[97] suggesting that while every instance of harassment be investigated and dealt with, not all must result in firing or banishment. She contends that just as "sexual violence occurs on a spectrum so accountability has to happen on a spectrum."[98] Other advocates have also emphasized the need for nuance in meting out punishments[99] and even some #MeToo supporters worry about the difficulties of redemption for those outed under #MeToo and suggest the movement needs to turn to restorative justice

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Men Are, WASH. POST (Dec. 7, 2017).

[93] For now: Emily Yoffe, *Why the MeToo Movement Should Be Ready for a Backlash*, Politico.com (Dec. 10, 2017).

[94] Christine Emba, *We're Misunderstanding Due Process*, WASH. POST (Dec. 1, 2017).

[95] Jacob Pramuk, *Here Are All the Sexual Misconduct Accusations Against Sen. Al Franken*, CNBC (Dec 7, 2017), https://www.cnbc.com/2017/12/07/al-franken-news-list-of-sexual-misconduct-allegations.html.

[96] Harnish, *supra* note __.

[97] Bari Weiss, twitter (Nov. 21, 2017) ("Are others disturbed by the moral flattening going on? Glenn Thrush/Al Franken should not be mentioned in the same breath as Harvey Weinstein/Kevin Spacey.").

[98] Emma Brockes, *MeToo Founder Tarana Burke: You Have to Use Your Privilege to Serve Other People*, THE GUARDIAN (Jan. 15, 2018).

[99] Nellie Bowles, *A Reckoning on Sexual Misconduct? Absolutely. But How Harsh, Women Ask*, N.Y. TIMES (Dec. 5, 2017). *See also* Barbara Kingsolver, *#MeToo Isn't Enough, Now Women Need to Get Ugly*, THE GUARDIAN (Jan 16, 2018), https://www.theguardian.com/commentisfree/2018/jan/16/metoo-women-daughters-harassment-powerful-men ("Raped is not groped is not catcalled on the street: all these are vile and have to stop, but the damages are different.").

as a way to address the needs of victims and oppressors.[100] But what that restorative justice might look like remains uncertain, with certain high profile actions dominating the discussion, such as the victim impact statements and judge's commentary in the high profile sentencing of sports physician Larry Nassar for the sexual abuse of numerous gymnasts and other athletes at Michigan State University and USA Gymnastics,[101] without a more systematic exploration of the foundational practices and premises of restorative justice.

II. RESTORATIVE JUSTICE

As initially ad hoc and now organized responses to and discussions of #MeToo have advanced in Hollywood, [government], and other arenas, scholars and other theorists now need to offer frameworks through which these efforts can be assessed and guided. The last section noted concern about the recognition and recovery of survivors, questions about due process and moral flattening, and hope for far-reaching change to harmful practices and behavior. How might different approaches to justice inform these concerns?

One obvious possibility is that of restorative justice.[102] At the 2018

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[100] Elizabeth Blair, *For the Men #MeToo Has Toppled Redemption Will Take More Than an Apology*, ALL THINGS CONSIDERED (Jan. 9, 2018).

[101] Jonathan Capehart, Christine Emba, Stephen Stromberg & Ruth Marcus, *USA Gymnastics Sex Abuse Victims Deserve Restorative Justice, And Other Victims Do, Too*, WASH. POST ROUNDTABLE (Jan. 25, 2018), https://www.washingtonpost.com/video/editorial/opinion--usa-gymnastics-sex-abuse-victims-deserve-restorative-justice-and-other-victims-do-too/2018/01/25/c0ff929a-021c-11e8-86b9-8908743c79dd_video.html?utm_term=.51ec81c17147; Jenny Hollander, *Larry Nassar Hated Listening to His Victims: Every Predator Should Have To*, Bustle.com (Feb. 1, 2018); Kelly Hayes & Mariame Kabe, *The Sentencing of Larry Nassar Was Not Transformative Justice*, InJusticeToday.com (Feb. 5, 2018) available at https://injusticetoday.com/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645.

[102] Emma Coleman, *Restorative Justice for the #MeToo Movement?*, NEW AMERICA (Feb. 20, 2018); Ann Hornaday, *Enough with Naming and Shaming, It's Time for Restorative Justice in Hollywood*, WASH. POST (Feb. 1, 2018);); Brooke Lober *Rethinking Sex Positivity, Abolition Feminism and the #MeToo Movement: Opportunity for a New Synthesis*, ABOLITION JOURNAL (Jan. 26, 2018); Lesley Wexler, *MeToo, Time's Up, and Restorative Justice*, VERDICT (Jan. 23, 2018); Elizabeth Blair, *For the men #MeToo Has Toppled Redemption Will Take More Than An Apology*, NPR ALL THINGS CONSIDERED (Jan. 9, 2018); Danielle Berrin, *Should We Forgive the Men Who Assaulted Us*, N.Y. TIMES (Dec. 22, 2017); Melissa Harris-Perry, *The #MeToo Backlash Is Already here. This is How We Stop* It, ELLE (Dec. 15, 2017); Judith Levine, *Will Feminism's Past Mistakes Haunt #*MeToo, BOSTON REV. (Dec. 8, 2017); Kai Cheng Thom, *#NotYet: Why I Won't Publicly Name Abusers*, GUTS magazine (Nov. 30, 2017) #metoo, Conveners.org, http://conveners.org/the-responsibility-of-conveners-in-light-of-the-metoo-movement; Kim Tran, *5 Transformative Justice Experts on What We Should Do with Sexual Predators In Our Communities*, EverydayFeminism.com (Nov. 16, 2017).

Golden Globes Awards, Laura Dern used her acceptance speech for best actress to highlight the goals of the Time's Up movement. She included this emphatic plea:

> "I urge all of us to not only support survivors and bystanders who are brave enough to tell their truth, but to promote *restorative justice*. May we also please protect and employ them. May we teach our children that speaking out without fear of retribution is our culture's new North Star."[103]

But this plea leaves ambiguous what restorative justice encompasses in this setting.

Given the rest of Dern's speech, one possible reading speaks directly and exclusively to the restoration and reintegration of women who have suffered employment setbacks at the hands of their harasser and assaulters. Take, for example, Rose McGowan who says she was blacklisted in Hollywood after making internal complaints about her rape at the hands of Harvey Weinstein[104] or Annabella Sciorra who suspects Weinstein had maligned her as a difficult actress[105] or Dana Min Goodman and Julia Wolov who felt a career backlash as result of complaining about Louis C.K.'s forced masturbation viewing. In addition to direct retaliation, harassment and assault can make it difficult to continue to excel in one's chosen profession because of lingering mistrust and emotional trauma.[106] Actress Hilarie Burton, for example, described how she "has refused to audition and refused to work for showrunners she does not already know." She explains that "[t]he fear of being forced into another one of these situations was crippling. I never wanted to be the lead female on any show ever, ever, ever again."[107] Under this interpretation, justice is victim focused and concerned with repairing and restoring the victim.

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[103] Laura Bradley, *Golden Globes 2018: See Laura Dern's Inspiring Acceptance Speech* (Jan. 7, 2018), https://www.vanityfair.com/hollywood/2018/01/golden-globes-2018-laura-dern-speech-big-little-lies (emphasis added).

[104] Mark Townsend, *Rose McGowan: 'Hollywood Blacklisted Me Because I Got Raped'* (Oct. 14, 2017), https://www.theguardian.com/film/2017/oct/14/harvey-weinstein-rose-mcgowan-rape-film.

[105] Ronan Farrow, *Weighing the Costs of Speaking Out Against Harvey Weinstein* (Oct. 27, 2017), https://www.newyorker.com/news/news-desk/weighing-the-costs-of-speaking-out-about-harvey-weinstein.

[106] [Cite academic literature on retaliation and dropping out of the workplace after assault]

[107] Daniel Holloway, *'One Tree Hill' Cast, Crew Detail Assault, Harassment Claims Against Mark Schwahn* (Nov. 17, 2017), http://variety.com/2017/tv/news/one-tree-hill-mark-schwahn-harassment-assault-1202617918/.

But Dern might also have been speaking about the broader understanding of restorative justice as it is used in legal scholarship. This fuller vision of restorative justice focuses not only on the restoration and reintegration of victims, but also of wrongdoers, and addresses the implications of the wrongdoing for the community as a whole. Many modern restorative justice practices developed in response to criminal wrongdoing and grew out of dissatisfaction with traditional criminal law processes that marginalized the role of victims, focused on punishment instead of transformation, and provided limited remedies to address harm.[108] Restorative justice practices have also influenced dispute resolution processes in other settings such as schools,[109] and played a role in international dispute resolution and approaches to transitional justice.[110] While a restorative justice approach is more commonly thought of as appropriate for low-level or less severe offenses or for juvenile offenders,[111] it has also been used in more severe cases, including cases of sexual violence.[112]

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[108] Michael Wenzel, Tyler G. Okimoto, Norman T. Feather, & Michael J. Platow, *Retributive and Restorative Justice*, 32 LAW & HUM. BEHAV. 375, 377 (2008). *See also* Clare McGlynn, Julia Downes, & Nicole Westmarland, *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences, in* SEXUAL VIOLENCE AND RESTORATIVE JUSTICE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 179, 184 (Marie Keenan & Estelle Zinsstag eds. 2017) (describing the peripheral role and lack of control experienced by victims of sexual violence). *See generally* Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NORTHWESTERN UNIV. L. REV. 1693, 1703 (2018) (calling for restorative justice as part of a democratized criminal justice system).

[109] *See, e.g.*, Brenda Morrison, *Schools and Restorative Justice, in* HANDBOOK OF RESTORATIVE JUSTICE 325 (Gerry Johnstone & Daniel Van Ness eds. 2013).

[110] Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 INT'L J. TRANSITIONAL JUST. 339 (2014). More recently, scholars have begun exploring the role of restorative justice in organizational and workplace settings. *See, e.g.*, Laurie J. Barclay & Maria Francisca Saldanha, *Recovering From Organizational Injustice: New Directions in Theory and Research, in* THE OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE 497 (Russell S. Cropanzano & Maureen L. Ambrose, eds. 2015); *Special Issue on Individual and Organizational Reintegration after Ethical or Legal Transgressions: Challenges and Opportunities*, 24 BUS. ETHICS Q. 315 (2014).

[111] Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007). *See also* Dena M. Gromet & John M. Darley, *Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures*, 19 SOC. JUST. RES. 395, 405-407 (2006) (finding that research participants preferred to send cases of lower severity to purely restorative processes, but were less inclined to choose purely restorative processes for more severe cases).

[112] Scholars have debated the appropriateness of restorative practices for cases involving sexual violence. For a set of current views, see ESTELLE ZINSSTAG & MARIE KEENAN (EDS.), RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL, AND THERAPEUTIC DIMENSIONS (2017).

Restorative justice, then, refers to a loose collection of practices or mechanisms that share a number of core commitments, including direct participation of offenders and victims in the process along with representatives of the relevant community; narration of the wrongful behavior and its effects; acknowledgement of the offense and acceptance of responsibility for it by the offender; joint efforts to find appropriate ways to repair the harm done; and reintegration of the offender into the broader community.[113] These processes may provide opportunities for apology, restitution, forgiveness of the offender, an improved understanding of the underlying reasons for the harmful behavior, reconciliation, and new understandings of or renewed commitments to standards for appropriate behavior.[114]

Closely related is the concept of transformative justice. There is existing debate about whether and how restorative and transformative justice differ.[115] Both approaches are concerned with addressing the harm from the perspective of the victim, offender, and community and are focused on accountability. But advocates of transformative justice emphasize, in particular, the need to examine the institutions, structures, norms, and practices that contribute to the wrongdoing as part of an appropriate response.[116] Rather than simply restoring an inequitable status quo, it is important to transform the cultures and institutions that enabled the wrongful

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[113] Menkel-Meadow, *supra* note __, at 164. RJ encompasses a whole host of specific practices, including victim-offender mediation or victim-offender reconciliation programs, family conferencing, truth and reconciliation commissions, peace circles, etc. *Id*.

[114] Menkel-Meadow, *supra* note __. "In its most idealized form, there are four Rs of restorative justice: repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared community." "Restorative justice hopes to harness the commission of wrongful acts to the making of new opportunities for personal, communal, and societal growth and transformation through empowerment of both victims and offenders in direct and authentic dialogue and recognition. It also hopes practically to reduce recidivism and reintegrate wrongdoers into more positive roles and relationships." *Id*.

[115] M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, *in* HANDBOOK OF RESTORATIVE JUSTICE 555 (Dennis Sullivan & Larry Tifft eds. 2006) (exploring whether restorative justice and transformative justice are distinct, whether restorative justice processes "create space" for transformative justice, whether they are on a continuum, or whether they are two names for the same thing). *See also* Howard Zehr, *Restorative or Transformative Justice* (March 10, 2011), https://emu.edu/now/restorative-justice/2011/03/10/restorative-or-transformative-justice/.

[116] *See* Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 143 (Heather Strang & John Braithwaite eds., 2002). *See also* Jelke Boesten & Polly Wilding, *Transformative Gender Justice: Setting an Agenda*, 51 WOMEN'S STUD. INT'L FORUM 75 (2015); Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice,* 25 BERKELEY J. GENDER L. & JUST. 199, 211-12 (2010).

behavior to occur. For justice to be transformative, we must "figure out how the broader context was set up for this to happen, and how that context can be changed so that this harm is less likely to happen again."[117]

Restorative justice has highlighted the importance of victim participation, offender accountability, harm repair, and reintegration.[118] In this section, we explore the key components of restorative justice with an eye toward how they might apply in the context of addressing sexual harassment in the workplace. In doing so, we examine several high profile apologies[119] and consider the ways in which they succeed or fail on these dimensions.[120]

A. Acknowledgement

Those who are injured by another – including those injured by sexual harassment and other forms of sexual violence – desire acknowledgment. In particular, victims desire acknowledgement of their experiences, the specifics of the wrongful behavior, and how they were affected by the behavior.[121] Many victims value the chance to tell their own stories.[122] Acknowledgement

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[117] Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not 'Transformative Justice.' Here's Why*. (Feb. 5, 2018), https://injusticetoday.com/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645.

[118] Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration,* 41 AM. BEHAV. SCI. 769 (1998).

[119] https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html

[120] The satirical celebrity apology generator deftly highlights the rote nature and significant shortcomings of these apologies. https://apologygenerator.com/

[121] Nathalie Des Rosiers, Bruce Feldthusen, & Oleana A. R. Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System,* 4 PSYCHOL., PUB. POL'Y, & L. 433, 442 (1998) (finding that a common reason for pursuing a claim is "public affirmation of the wrong"); Bruce Feldthusen, Oleana A. R. Hankivsky, & Lorraine Greaves, *Therapeutic Consequences of Civil Actions for Damages and Compensation Claims By Victims of Sexual Abuse,* 12 CAN J. WOMEN & L. 66, 75 (2000); Judith Lewis Herman, *Justice From the Victim's Perspective,* 11 VIOL. AGAINST WOMEN 571, 585 (2005) (finding that survivors' "most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgement of harm."). *See generally* Aaron LAZARE, ON APOLOGY 75 (2004) (identifying four aspects of acknowledgement: the responsible party, the offending behavior "in adequate detail," the impact of the behavior, and that the behavior violated social norms); NICK SMITH, I WAS WRONG: THE MEANINGS OF APOLOGIES 28-33 (2008) (describing the importance of a corroborated factual record); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 13 (1991) (noting that "we not only apologize *to* someone but also *for* something.").

[122] Kathleen Daly, *Sexual Violence and Victims' Justice Interests, in* RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL, AND THERAPEUTIC DIMENSIONS 108, 116 (Estelle Zinsstag & Marie Keenan Eds. 2017); Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes,* 29 J. INTERPERSONAL VIOL. 1623, 1642 (2014) (reporting that most survivors of sexual violence who chose to

by the offender – but also from friends, family, and other members of their broader community – confirms the meaning of their experience.[123] Because women have often not been believed,[124] acknowledgement serves the important purpose of recognizing the truth of their experiences and the consequences of the mistreatment.[125] In acknowledging the offense, the offender "says or affirms 'Yes, this is what happened. I agree with the wronged party (and others) as to the facts of the case and how they are being interpreted.'"[126] Acknowledgement can also provide confirmation that the victim was not overreacting or to blame.[127] Acknowledgement of the survivor's experience can also signal community support for the victim.[128]

Part of acknowledging is listening. In fact, research has found that apologies can be more effective when the injured party has been heard and the offender has had time to express understanding of the wrong that was done and how it affected the victim.[129]

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participate in a restorative justice process did so so that they could "say how I was affected").

[123] McGlynn, Downes, & Westmarland, *supra* note __.

[124] MacKinnon, *supra* note __ ("Many survivors realistically judged reporting pointless. Complaints were routinely passed off with some version of 'she wasn't credible' or 'she wanted it.'"); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1 (2017).

[125] Daly, *supra* note __, at 116 (noting that validation involves "affirming that the victim is believed (i.e., acknowledging that offending occurred and the victim was harmed) and is not blamed for what happened"); McGlynn, Downes & Westmarland, *supra* note __ (noting the importance to survivors of a "shared perception of something as existing or true . . . . . Recognition encompasses the significance of the experience being acknowledged"). Louis C.K. – "These stories are true."

[126] TAVUCHIS, *supra* note __, at 57.

[127] Feldthusen, Hankivsky, & Greaves, *supra* note __, at 76 ("I needed to feel that I had done nothing wrong."; Caroline Vaile Wright and Louise F. Fitzgerald, *Angry and Afraid: Women's Appraisal of Sexual Harassment During Litigation*, 31 PSYCHOL. WOMEN. Q. 73 (2007) (finding self-blame to be on dimension of appraisal). *See also* Sophie Gilber, *The Transformative Justice of Judge Aquilina* (Jan. 25, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/ *(*"many of Nassar's accusers spoke of the doubts they experienced about what happened to them, and of wondering whether they could trust their instincts."). *See generally* LAZARE, *supra* note __, at 78 ("by acknowledging the offense, the offender say, in effect, 'it was not your fault.'").

[128] McGlynn, Downes & Westmarland, *supra* note __ (noting a "form of acknowledgement conveying support").

[129] Cynthia McPherson Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201 (2005). *See also* Amy S. Ebesu Hubbard, Blake Hendrickson, Keri Szejda Fehrenbach, & Jennifer Sur, *Effects of Timing and Sincerity of an Apology on Satisfaction and Changes in Negative Feelings During Conflict*, 77 WEST. J. COMM. 305 (2013); Aili Peyton & Ryan Goei, *The Effectiveness of Explicit Demand and Emotional Expression Apology Cues In Predicting Victim Readiness to Accept an Apology*, 64 COMM. STUD. 411 (2013); Michael

Failure to acknowledge the wrongful behavior is not only dissatisfying, but can also result in further offense. Consider, for example, snowboarder Shaun White's initial response to questions about a settled sexual harassment lawsuit, including a disparaging characterization of the event as "gossip."[130] His statement that "I am who I am and I'm proud of who I am. And my friends . . . love me and vouch for me. And I think that stands on its own," did not acknowledge the harm or the victim.[131] He was promptly criticized for further insulting the woman he had harassed.[132] Relatedly, apologies that are conditional ("if I . . ."), cast doubt on the consequences ("if anyone was offended"), or refer only generally to "actions" or "behavior" do not acknowledge the harmful behavior or demonstrate an understanding of its wrongfulness or its effects. Consider Jeffrey Tambor's apology: "I am deeply sorry if any action of mine was ever misinterpreted by anyone as being sexually aggressive or if I ever offended or hurt anyone."[133] This sort of vague apology not only fails to acknowledge the underlying behavior, but it also appears to place fault on the victim for misinterpreting or being overly sensitive.[134]

In contrast, consider the recent interaction of Megan Ganz, a television show writer, and her former boss Dan Harmon. After calling him

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Wenzel, Ellie Lawrence-Wood, Tyler G. Okimoto, & Matthew J, Hornsey, *A Long Time Coming: Delays in Collective Apologies and Their Effects on Sincerity and Forgiveness*, __ POL. PSYCHOL. __ (2017).

[130] Rich Juzwiak, *Shaun White Apologizes After Referring to Sexual Harassment Allegations Against Him as 'Gossip'*, JEZEBEL (Feb. 14, 2018).

[131] *Id*.

[132] Christine Brennan, *As Shaun White Cements Legacy, Why So Little Attention Paid to Sexual Harassment Allegations?*, USA TODAY (Feb. 13, 2018); Errin Haines Whack, *Hero, Harasser, or Both, Shaun White's Newly Complex Legacy*, WASH. POST (Feb. 19, 2018).

[133] Caitlin Flynn, *Jeffrey Tambor's Response to New Sexual Misconduct Allegation Is So Offensive to Sexual Violence Victims* (Nov. 16, 2017), http://www.refinery29.com/2017/11/181477/jeffrey-tambor-sexual-harassment-response-trace-lysette. Or, to take an example from an earlier era, consider former Senator Bob Packwood's repeated refusals to detail the behavior for which he was apologizing in 1992: "I'm apologizing for the conduct that it was alleged that I did." Martin Tolchin, *Packwood Offers Apology Without Saying For What*, N.Y. TIMES (Dec. 11, 1992), http://www.nytimes.com/1992/12/11/us/packwood-offers-apology-without-saying-for-what.html.

[134] Flynn, *supra* note __ (criticizing Jeffrey Tambor's apology—"I am deeply sorry if any action of mine was ever misinterpreted by anyone as being sexual aggressive or if I ever offended or hurt anyone"—as sending a "deeply problematic message to *all* sexual violence survivors that we're overreacting, we 'misinterpreted' a man's intentions, and we should simply give them the benefit of the doubt"); LAZARE, *supra* note __ ("the wrongdoer is saying, in effect, "Not everyone would be offended by my behavior. If you have a problem with being to thin-skinned, I will apologize to you because of your need (your weakness) and my generosity.").

out on Twitter, a virtual community of millions, for his harassment and abuse of her, Dan Harmon recently offered a lengthy apology on his podcast which included a very specific acknowledgment of the variety of ways in which he had created a toxic work environment, including gaslighting and retaliation, and the ways in which it had affected Ganz.[135]

In addition to being specific about the behavior and its consequences, it is important to address those individuals who suffered harm. For all of its other faults,[136] Louis C.K.'s apology effectively acknowledged "five women named Abby, Rebecca, Dana, Julia who felt able to name themselves and one who did not." Contrast this with Charlie Rose's apology to "these women" or Jeffrey Tambor's address to "anyone" who he ever offended or hurt. The failure to speak directly to the individuals who were impacted undermines the ability of the statement to recognize the inherent dignity of those individuals and the impact of the wrongful behavior on them.

B. Responsibility-Taking

Acknowledgement is important. But many victims also desire that offenders accept responsibility or otherwise be held accountable for having caused harm.[137] Responsibility-taking is a central feature of restorative justice. Indeed, most restorative justice programs are specifically designed to be available only in cases in which the offender has acknowledged having engaged in the wrongful acts at issue.[138] Responsibility-taking is also the central feature of apologies – distinguishing apologies from other forms of accounting for wrongful behavior like denial, excuse, or justification[139] – and

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[135] Harmontown, http://www.harmontown.com/2018/01/episode-dont-let-him-wipe-or-flush/.

[136] Leah Fessler, Annalisa Merelli, & Sari Zeidler, *We Edited Louis C.K.'s "Apology" To Make It a Real Apology* (Nov. 10, 2017), https://qz.com/1126593/we-edited-louis-cks-statement-on-sexual-misconduct-to-make-it-a-real-apology/.

[137] Des Rosiers, Feldthusen, & Hankivsky, *supra* note __, at 442 (describing victim for whom reason for pursuing claim was so that the offender would take responsibility); Koss, *supra* note __, at 1642 (finding that most victims who chose to participate in restorative justice process did so "to make the responsible person accountable"); McGlynn, Downes & Westmarland, *supra* note __. Attiya Khan, quoted in Blair, *supra* note __ ("To have him listen to me was almost the most important thing for me. And it was part of him being accountable and taking responsibility. It was so satisfying . . . to have the person who hurt you sit there and listen to you and not blame you for it and admit to what they did . . .").

[138] *See* Koss, *supra* note __. Claire McGlynn, Nicole Westmarland, & Nikki Godden, *"I just wanted him to hear me": Sexual Violence and the Possibilities of Restorative Justice*, 39 J. L. & SOC'Y 213, 216 (2012) (noting that "restorative justice is predicated on an acknowledgement by the offender that a criminal offence has taken place").

[139] *See* ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971); TAVUCHIS, *supra* note __, at 3; Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV.

is central to their potential.[140]

A couple of additional aspects of responsibility taking are worth noting. First, victims may also want those who *enabled* the wrongful conduct to take responsibility for their part in supporting or failing to prevent or stop the wrongful behavior.[141] Second, responsibility taking could, but often does not, extend beyond the original harassing behavior to admit responsibility for subsequent denial, deception, or retaliation. These secondary bad acts often result in significant additional harm and are part of what victims wish to hold offenders accountable.[142]

Rachel Denhollander touched on both of these in her victim impact statement in the Larry Nassar case, when she called out Michigan State University: "[Y]ou need to realize that you are greatly compounding the damage done to these abuse victims by the way you are responding. This, what it took to get here, what we had to go through for our voices to be heard because of the responses of the adults in authority, has greatly compounded the damage we suffer. And it matters."[143] To take another example of the failure to take responsibility for these subsequent wrongful acts, Louis CK's apology did not meaningfully acknowledge his role in costing his victims financial opportunities or the harm imposed by his silence in the face of

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PSYCHOL. 133, 162 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46, 59 (1968). Victims of sexual assault have mixed feelings about apologies – some desire apology, others are more skeptical. Herman, *supra* note __, at 586; Koss, *supra* note __, at 1642. *See also* Des Rosiers, Feldthusen, & Hankivsky, *supra* note __, at 442 (finding that only for some was obtaining an apology a reason for pursuing a claim).

[140] *See, e.g.*, Kristin M. Pace et al., *The Acceptance of Responsibility and Expressions of Regret in Organizational Apologies After a Transgression*, 15 CORP. COMM. 410, 420 (2010); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 486-89, 495-97 (2003) [hereinafter *Apologies and Legal Settlement*]; Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 359-365 (2006) [hereinafter *Settlement Levers*]; Steven J. Scher & John M. Darley, *How Effective Are the Things People Say To Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134-36 (1997); Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465, 476 (2004).

[141] Herman, *supra* note __, at 588.

[142] On "reactive fault" s*ee* Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 931 (2005); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CALIF. L. REV. 1141, 1195-1200 (1983); Jeffrey S. Heimreich, *Does "Sorry" Incriminate? Evidence, Harm, and the Protection of Apology*, 21 CORNELL J. L. PUB. POL'Y 567, 583-84 (2012).

[143] *Read Rachael Denhollander's full victim impact statement about Larry Nassar*, CNN.com (Jan. 30, 2018), https://www.cnn.com/2018/01/24/us/rachael-denhollander-full-statement/index.html.

widespread rumors.[144]

Responsibility taking can be difficult for those accused of wrongdoing even under the best of circumstances. It is often difficult to recognize our own misbehavior, it is embarrassing to admit that we have acted wrongly, and to take responsibility cedes control, creates vulnerability and is a hit to self-image.[145] And the potential legal consequences of taking responsibility can loom large in a context like this one in which there is the possibility for civil lawsuits, criminal prosecution, or both.[146] Those accused of wrongdoing are concerned that to acknowledge and take responsibility for wrongful conduct is to admit legal liability.[147] This can make it even harder to admit wrongdoing for those who may already be hesitant to own up to their behavior and a deterrent even for those who do want to apologize and repair the harm.

A number of states have passed legislation to make some forms of apology inadmissible in civil cases.[148] And discussions in other contexts have

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[144] Gabriel Bell, *Louis C.K. Admits to Sexual Misconduct in Ultimately Disingenuous Confession*, SALON (Nov. 10, 2017) ("As recently as September, the comedian was framing any suggestions that he had engaged in the actions he admits to above as baseless rumors, unworthy of comment. It is remarkable that the only difference between then and now is that these same once-unworthy rumors surfaced in the paper of record. . . . If he had become aware of the gravity of his actions, why exactly did he wait until after the Times report to discuss them?").

[145] *See, e.g.*, CAROL TAVRIS & ELIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (2007). *See also* Tyler G. Okimoto et al., *Refusing To Apologize Can Have Psychological Benefits (and We Issue No Mea Culpa for this Research Finding)*, 43 EUR. J. SOC. PSYCHOL. 22 (2013); Brent T. White, *Saving Face: The Benefits of Not Saying I'm Sorry*, 72 L. & CONTEMP. PROBS. 261 (2009).

[146] *See* Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Robbennolt, *Apologies and Legal Settlement, supra* note __.

[147] Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469 (1997); Saul Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33 (2004).

[148] *See* Robbennolt, *Apologies and Legal Settlement, supra* note __. Similar reforms have been undertaken in Canada and Australia. *See* John C. Kleefeld, *Thinking Like a Human: British Columbia's Apology Act*, 40 U. BRIT. COLUM. L. REV. 769 (2007); Prue Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483 (2005). Passage of the Apologies (Scotland) Bill, https://news.gov.scot/news/passage-of-the-apologies-scotland-bill; Hong Kong's Apology Ordinance, https://www.gld.gov.hk/egazette/pdf/20172129/es12017212912.pdf. It is not clear that most of these statutes would protect the kind of robust apologies contemplated here in this context. Many of these statutes apply only to medical malpractice cases; most make inadmissible the expression of sympathy ("I'm sorry") but not the part of the apology that details the offender's fault. For empirical examinations, see Benjamin Ho & Elaine Liu, *What is the Value of an Apology: An Empirical Analysis of Apology Laws for Medical*

contemplated that offenders might offer "safe" apologies that merely express sympathy, but stop short of taking responsibility. On the other hand, an apology may appropriately "imply . . . agreement to accept all the consequences, social, legal, and otherwise, that flow from having committed the wrongful act."[149] And, as we will see in the next section, repair of the harm done is part of a restorative response.

C. Harm Repair

Restorative justice incorporates the notion that the offender should repair the harm caused by the wrongful behavior.[150] Bishop Desmond Tutu aptly illustrates this notion with a simple example, "If you take my pen and say you are sorry, but don't give me the pen back, nothing has happened."[151] Moreover, restorative justice contemplates dialogue and joint decision making about how best to accomplish that repair.[152] There might be a variety of ways to appropriately repair the harm done to individual survivors.[153] As one survivor of domestic sexual violence noted: "[Y]ou need to ask them, like 'What else is it that you need from me? How can I help you heal after I've wronged you? That's the part that's missing."[154]

One aspect of this repair is financial compensation,[155] which can be an effective component of making amends.[156] Survivors might desire money damages as concrete compensation for tangible economic losses that

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Malpractice, 8 (s1) J. EMPIRICAL LEGAL STUD. 179 (2011); Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141 (2011); Benjamin J. McMichael, R. Lawrence Van Horn, and W. Kip Viscusi, *Sorry Is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk*, SSRN.

[149] Lee Taft, *The Apology Subverted: The Commodification of Apology,* 109 YALE L.J. 1135 (2000).

[150] Menkel-Meadow, *supra* note __.

[151] NANCY BERLINGER, AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS 61-62 (2005).

[152] Menkel-Meadow, *supra* note __.

[153] *See generally* Jennifer K. Robbennolt, John M. Darley, & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Legal Decision-Makers as Goal Managers*, 68 BROOK. L. REV. 1121 (2003) (discussing the "principle of equifinality" which holds that "some goals may be alternately satisfied through multiple pathways").

[154] Attiya Khan, quoted in Blair, *supra* note __.

[155] Financial compensation is an important components of amends. *See, e.g.*, SMITH, *supra* note __, at 80-91 (detailing the components of apologies); Goffman, *supra* note ___, at 113 (same).

[156] *See e.g.*, William P. Bottom et al., *When Talk Is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation*, 13 ORG. SCI. 497 (2002); Scher & Darley, *supra* note ___; Schmitt et al., *supra* note ___; Jeanne S. Zechmeister, *Don't Apologize Unless You Mean It: A Laboratory Investigation of Forgiveness and Retaliation*, 23 J. SOC. & CLINICAL PSYCHOL. 532 (2004).

occurred as a result of the harassment.[157] These might include lost professional opportunities or assignments, the consequences of career interruption, and expenses for physical and mental health care. Survivors might also see money damages as serving more symbolic purposes.[158] For example, for many, money damages signal that their experience and injuries are acknowledged, serve as evidence that the offender has taken responsibility, or reaffirm their self-worth.[159]

Consider, too, that some survivors might be hesitant to seek individual compensation. For example, some might view money as incommensurate with the harm they have suffered and see offered payments as problematic.[160] Victims of sexual and other violence have the right to control their cases and deserve to be accorded the agency to decide the goals of their claims for redress.[161] Indeed, restorative justice takes seriously the role of the victim in helping to define the contours of appropriate remedies for herself.[162]

But the community ought to be cognizant of the social pressures on survivors. In particular, some survivors might be hesitant to claim compensation because of concerns about how they will be viewed – and critiqued – by others. Rachel Denhollander, who spoke out about abuse by Larry Nassar, called out those who "claimed that those of us who have filed lawsuits were ambulance chasers who were looking for a payday. . . . [and] specifically called me out by name and said I'm in it for the money."[163]

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[157] Heather McLaughlin, Christopher Uggen, & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333 (2017).

[158] Deborah Hensler, *Money Talks: Searching For Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417 (2003) (discussing the social meaning of tort damages); Herman, *supra* note __, at 590. For exploration of state-based financial assistance see Robyn L. Holder & Kathleen Daly, *Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors*, 24 INT'L REV. VICTIMOLOGY 25 (2018). Most said that they would have preferred to receive $$ from offender (rather than state). *Id*.

[159] *See* Holder & Daly, *supra* note __ (financial assistance payment "meant acknowledgement and recognition of what had happened").

[160] Des Rosiers, Feldthusen, & Hankivsky, *supra* note __, at 442 (one claimant called her payment "dirty money").

[161] Lesley Wexler, *Ideal Victims and the Damage of a Damage Free Victory*, VERDICT (Sept. 27, 2017), https://verdict.justia.com/2017/09/29/ideal-victims-damage-damage-free-victory.

[162] C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses*, 11 VIOL. AGAINST WOMEN 693, 707 (2005) ("providing multiple options for survivors" is consistent with recognizing women's different "lived experiences"). "Whether a response to sexual violence might nonetheless be able to address the individual preferences of women and the larger systemic issues is not small matter." Id.

[163] *Read Rachael Denhollander's full victim impact statement about Larry Nassar*, CNN.com (Jan. 30, 2018), https://www.cnn.com/2018/01/24/us/rachael-denhollander-full-

Similarly, Andrea Constad's use of her settlement money from a civil case with Bill Cosby was criticized, as she was described as "settl[ing] right into a ritzy Toronto condo after coming to terms with the comedian" and as getting "enough money from the funnyman to score a posh apartment."[164] This sentiment is consistent with the views of many members of the public who believe that those who seek remuneration for sexual violence are simply gold diggers.[165]

Contrast these sentiments with those expressed about Taylor Swift's countersuit against David Mueller in which she alleged that he sexually assaulted her during a meet and greet. Rather than seek compensatory or punitive damages, Swift sought purely symbolic damages.[166] In his closing argument, Swift's attorney commented on the "immeasurable" value of a symbolic verdict.[167] And an op-ed in the New York Times argued that "Taylor Swift's court win may have yielded only a single dollar, but to prove this point was invaluable."[168] But does such a statement also convey that a guilty verdict is not merely immeasurable, but also sufficient? Might such

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statement/index.html. *See also* Debra Cassens Weiss, *How a Gymnast-Turned-Lawyer Helped Bring Larry Nassar to Justice*, ABA J. (Jan. 29, 2018), http://www.abajournal.com/news/article/how_a_gymnast_turned_lawyer_helped_bring_larry_nassar_to_justice/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email; *see also* Holder & Daly, *supra* note __ (describing claimant to state-based program as reluctant to apply because "I didn't want anyone to think that I was going for the money" and another "people could think that the [money] was the only reason why I [applied]").

[164] Lisa Massarella & Danika Fears, *Cosby Accuser Used Settlement To Buy Ritzy Toronto Condo*, PAGE SIX (Jan. 1, 2016), https://pagesix.com/2016/01/01/cosby-accuser-used-settlement-to-buy-ritzy-toronto-condo/.

[165] Earl Ofari Hutchinson, *Commentary: Bill Cosby, And How We Dismiss Victims*, CHI. TRIB. (Dec. 31, 2015), http://www.chicagotribune.com/news/opinion/commentary/ct-cosby-rape-drugs-court-assault-perspec-0104-20151231-story.html; Solomon Jones, *The Generational Divide Over Bill Cosby*, (June 13, 2017), http://www.philly.com/philly/columnists/solomon_jones/the-generational-divide-over-bill-cosby-20170614.html.

[166] Relatedly, in his opening statement, Swift's lawyer argued, "She's not trying to bankrupt this man. . . She's just trying to tell people out there that you can say no when someone puts their hand on you. Grabbing a woman's rear end is an assault, and it's always wrong. Any woman—rich, poor, famous, or not—is entitled to have that not happen." Blair Miller, *Taylor Swift Groping Case: Live Updates From Day 2 in Denver Federal Court* (Aug. 8, 2017), https://www.thedenverchannel.com/news/local-news/taylor-swift-groping-case-live-updates-from-day-2-in-denver-federal-court?page=2

[167] Daniel Kreps, *Jury Sides With Taylor Swift in Groping Trial, Orders DJ to Pay $1*, ROLLING STONE (Aug. 14, 2017), https://www.rollingstone.com/music/news/jury-sides-with-taylor-swift-in-groping-trial-w497780 ("By returning a verdict on Ms. Swift's counterclaim for a single symbolic dollar, the value of which is immeasurable to all women in this situation. . . You will tell every woman . . . that no means no.").

[168] *A Thank You to Taylor Swift*, N.Y. TIMES (Aug. 20, 2018) https://www.nytimes.com/2017/08/20/opinion/a-thank-you-to-taylor-swift.html.

sentiments subtly reinforce to victims that they ought not pursue their self interest in damages so as to better satisfy a societal schema of the "ideal victim"?[169]

Processes to remedy the consequences of sexual assault ought to challenge the taint of monetary damages and the stereotype of the gold digger. Victims deserve to be made whole under the law and to make physical abuse expensive for their alleged abusers. The legal system provides victims of physical assaults monetary damages for important reasons and, for many victims, those damages might be just as important as the judicial acknowledgement of wrongdoing by the defendant.

Despite the importance of compensation, we have not seen public figures accused of sexual harassment offering financial compensation as part of their apologies even as some have acknowledged the significant emotional and potential financial consequences for their victims. Of course, some did provide payments through secret settlements, but by definition, these settlements excluded public acknowledgement of wrongdoing.[170]

Other forms of repair are also appropriate. Community service is often mentioned, particularly community service that relates to the underlying harm doing.[171] Take Ray Rice, the former NFL star caught on video punching his then girlfriend, now wife, Janay Rice in an elevator and then dragging her, facedown and unconscious, out into the hall.[172] Rice has stayed in personal therapy after completing required sessions under his diversion agreement,[173] speaks publicly about his remorse, teaches about domestic violence and decision-making to young men, and volunteers with his old high school team as a mentor.[174] Most recently, despite ever diminishing chances of being drafted back into the league, Ray contributed to the NFL's annual social responsibility presentation on healthy choices and healthy masculinity with a video on his decision-making and what led him to domestic violence.[175] By way of contrast, Brock Turner's offer to speak to

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[169] Lesley Wexler, *Ideal Victims and the Damage of a Damage Free Victory*, JUSTIA (Sept. 29, 2017), https://verdict.justia.com/2017/09/29/ideal-victims-damage-damage-free-victory.

[170] *See supra* note __.

[171] T. F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW (1998).

[172] Amy Davidson Sorkin, *What the Ray Rice Video Really Shows*, NEW YORKER (Sept. 18, 2014).

[173] Josh Dean, *Ray Rice in Exile*, MEN'S FITNESS (Jan. 30, 2018).

[174] Jane McManus, *If Not the Player, Ray Rice Asks You to Forgive the Man*, ESPN.com (Apr. 28, 2017), http://www.espn.com/espnw/culture/feature/article/19248874/if-not-player-ray-rice-asks-forgive-man.

[175] Jane McManus, *Ray Rice to Contribute to NFL's Annual Social Responsibility Presentation to Players, Staff,* ESPN.com (Apr. 17, 2017),

undergraduates about the hazards of excessive drinking is not a meaningful form of repair as it injures further his victim Emily Doe by shifting them blame away from his personal wrongdoing and suggesting instead they were both irresponsible for overconsuming.[176]

Moreover, as we detail in Part III, to be truly restorative and even transformative, repair needs to happen at a societal level, with change occurring to institutions, structures, and social norms.[177]

D. Non-Repetition

Part of affirming the dignity and status of the harmed individual is taking steps to avoid perpetuating similar wrongdoing in the future. Survivors are often motivated to take action in the hope that similar harm will not befall others in the future[178] and to regain a sense that they themselves are safe from continuing harassment.[179] The decision to call out a perpetrator is often, at least in part, prompted by a desire to prevent harm to future victims.[180] This is also one reason why the acceptance of responsibility matters to victims – it is hoped that responsibility taking can be the first step

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http://www.espn.com/nfl/story/_/id/19180539/ray-rice-working-nfl-annual-social-responsibility-presentation. Though one might view as problematic the emphasis on the singularity of the event as both the video and empirical event suggest that is unlikely to be the case. Steve Fishman, *Ray Rice Redemption Campaign*, N.Y. MAG. (Apr. 7, 2015).

[176] Liam Stack, *In Stanford Rape Case, Brock Turner Blamed Drinking and Promiscuity*, N.Y. TIMES (Jun. 8, 2016).

[177] *See infra* Part III. Hayes & Kaba, *supra* note __ ("Transformative justice is . . . a community process . . . [designed to] figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.").

[178] Des Rosiers, Feldthusen, & Hankivsky, *supra* note __, at 442 (finding that a key reason for pursuing a claim is "deterring defendant from harming others"); Feldthusen, Hankivsky, & Greaves, *supra* note __, at 76; GOFFMAN, *supra* note ___, at 113; Koss, *supra* note __, at 1642 (finding that one reason most victims participated in restorative justice process was "making sure the responsible person doesn't do what he did to anyone else."). These motives are also seen in the context of tort litigation, *see e.g.*, Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1004 (2003); Hensler, *supra* note __; Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007). Abigail Abrams, *'I Thought I Was Going to Die': Read McKayla Maroney's Full Victim Impact Statement in Larry Nassar Trial*, Time.com (Jan. 19, 2018), http://time.com/5109011/mckayla-maroney-larry-nassar-victim-impact-statement/.

[179] Estelle Zinsstag & Marie Keenan, *Restorative Responses to Sexual Violence: An Introduction, in* RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL SOCIAL, AND THERAPEUTIC DIMENSIONS 1 (Estelle Zinsstag & Marie Keenan, eds. 2017) (noting that "The difficulty of reimagining a safer and positive future relationship is often one of primary concerns to victims and others affected by the sexual harm."); LAZARE, *supra* note __, at 59-60.

[180] Herman, *supra* note __, at 594.

in a process of learning that leads to changed behavior.[181]

Many of the statements we have seen from public figures accused of sexual harassment have failed to outline how their behavior will change in the future.[182] Even those who acknowledge their past misdeeds seem to have little concrete to offer on this front. For instance, in discussing his groping of Hilarie Burton, Ben Affleck suggested that "we have to as men. . . be really, really mindful of our behavior and hold ourselves accountable and say. 'If I ever was part of the problem, I want to change, I want to be part of the solution.'"[183] Yet, in addition to making a conditional statement about his past behavior, he failed to outline how he would change going forward.[184] Similarly, Dan Harmon's apology which was noteworthy for the level of detail in explaining what he did wrong and how he harmed Megan Ganz lacks specifics when contemplating how to do better in the future.[185]

It is important to note, however, that promises to stop engaging in wrongful behavior must be more than promises. One risk is that offenders will be "quick to apologize, slow to change."[186] Victims emphasize that promises of reform can help repair the harm, but only if the promises are actually carried out.[187] While an apology may be a one time-event, the larger project of amend-making in which it is engaged is often an ongoing endeavor.

E. Redemption and Reintegration

One of the tenets of restorative justice is the reintegration of the offender back into the relevant community.[188] The restorative justice notion

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[181] Cohen, *supra* note __; Scher & Darley, *supra* note ___.

[182] New York Times, *Mea Culpa. Kinda Sorta*, N.Y. TIMES (Dec. 1, 2017).

[183] Stephanie Eckhardt, *Ranking the Absolute Worst Apologies by Men Accused of Sexual Assault Post Harvey Weinstein in 2017*, W MAG. (Nov. 30, 2017).

[184] Telegraph Reporters, *Ben Affleck Dubbed Buttman After More Groping Allegations Emerge*, TELEGRAPH (Oct 12, 2017).

[185] Harmontown, *supra* note __ ("The last and most important thing I can say is just: Think about it. No matter who you are at work, no matter where you're working, no matter what field you're in, no matter what position you have over or under or side by side with somebody, just think about it. You gotta, because if you don't think about it, you're gonna get away with not thinking about it, and you can cause a lot of damage that is technically legal and hurts everybody. And I think that we're living in a good time right now, because we're not gonna get away with it anymore. And if we can make it a normal part of our culture that we think about it and possibly talk about it, then maybe we can get to a better place where that stuff doesn't happen.").

[186] Coker, *supra* note __, at 148.

[187] John Paul Catungal, *LGBTQ2 Apology Is Good Start, But It's Not Enough*, THE CONVERSATION (Nov. 27, 2017), http://theconversation.com/lgbtq2-apology-is-a-good-start-but-its-not-enough-88159 ("The apology must be more than a mere symbolic gesture with little real impact.").

[188] Menkel-Meadow, *supra* note __.

of "earned redemption" anticipates both that offenders will be held accountable for their behavior and that they will be enabled to "earn their way back into the trust of the community."[189]

The reintegration contemplated by restorative justice has been somewhat controversial in the context of sexual violence. Advocates of transformative justice in cases of domestic violence, for example, argue that the reintegration of the offender is "important but secondary to enhancing the victim's autonomy."[190] And studies of the preferences of survivors of domestic violence, while reflecting survivors' desire for many aspects of restorative justice, have suggested that survivors prioritize "their own need for reintegration with their communities, rather than the offenders' need for reintegration."[191]

In the wake of #MeToo and Time's Up, individuals in Hollywood have contemplated what might be necessary for redemption and reintegration. Bryan Cranston, for example, allowed that there was room for a second chance for Weinstein and Spacey, but recognized that "it would take tremendous contrition on their part and a knowingness that they have a deeply-rooted psychological emotional problem and it takes years to mend that. . . If they were to show us that they put the work in, and are truly sorry, and making amends, and not defending their actions, but asking for forgiveness, then maybe down the road there is room for that, maybe so. . . . We shouldn't close it off and say, 'To hell with him, rot and go away from us from the rest of your life.' Let's not do that."[192] Women involved in the leadership of Time's Up have also grappled with this question. Actress Reese Witherspoon granted that "there's a lot of room for reconciliation. I think there's a time to approach people and tell the truth and have them listen thoughtfully and meaningfully and apologize sincerely."[193] At the same time, actress America Ferrera has noted that "[a]s a culture, we've gone from not listening, hearing, or believing women. And how are we going to skip over

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[189] Bazemore, *supra* note __, at 770.

[190] Coker, *supra* note __, at 145.

[191] Herman, *supra* note __, at 598 ("The restorative element of the survivors' vision was most apparent in their focus on the harm of the crime rather than on the abstract violation of the law and in their preference for making things as right as possible in the future, rather than in avenging the past. Their vision was restorative, also, in their emphasis on the importance of community acknowledgement and denunciation of the crime. Their focus, however, was on their own need for reintegration with their communities, rather than the offenders' need for reintegration.").

[192] *Bryan Cranston: 'There May Be a Way Back For Weinstein,'* BBC NEWS (Nov. 13, 2017), http://www.bbc.com/news/av/entertainment-arts-41973917/bryan-cranston-there-may-be-a-way-back-for-weinstein.

[193] https://www.cbsnews.com/video/oprah-winfrey-on-times-up-and-the-climate-of-change/.

the whole part where women get to be heard and go straight to the redemption of the perpetrator. Can't we live in that space where it's OK for perpetrators to be a little bit uncomfortable with what the consequences will be?"[194]

Redemption may begin with apology,[195] but takes more than a simple apology.[196] How much more is required for the offender to rebuild his or her moral and social identity depends, in part, on the nature of the offense – for example, its severity, intentionality, and pervasiveness.[197] And attention to the nuances of these factors is important in order to avoid moral flattening. But appropriate consequences are important. Community responses to the wrongdoing and what communities require from an offender communicate something about the collective's view of the violation, the underlying social norms, and the relative status of the offender and survivor.[198] Censure and meaningful consequences for offenders condemn the treatment of the survivor, confirm the value of the survivor in the community, and reaffirm or (perhaps more appropriately in the case of sexual harassment) recreate a

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[194] *Id*.

[195] Vanessa A. Bee, *Can Penitent Sexual Predators Ever Be Granted Redemption,* CURR. AFF. (Nov. 30, 2017), https://www.currentaffairs.org/2017/11/can-penitent-sexual-predators-ever-be-granted-redemption ("If someone can't bring themselves to make a clear, unequivocal apology. . ., that seems to pretty clearly foreclose the possibility of the community choosing to trust them again in the future.").

[196] Dena M. Gromet & Tyler G. Okimoto, *Back Into the Fold: The Influence of Offender Amends and Victim Forgiveness on Peer Reintegration*, 24 BUS. ETHICS Q. 411 (2014) (finding that organizational peers were more inclined to reintegrate into the workplace an offender who offered strong amends for the wrongdoing); Blair, *supra* note __; Herman, *supra* note __, at 593 ("'Rather than moving victims to forgiveness,' she stated, 'we need to be thinking about moving offenders to contrition and changed behavior. We are looking to get beyond, 'I'm sorry, honey.'"); McGlynn, Downes, & Westmarland, *supra* note __, at 187 ("All survivors spoke of their wish for perpetrators to experience tangible consequences, symbolically and emphatically, to underline the significance and harm of their actions."). *See also* Christopher P. Reinders Folmer, Peter Mascini, & Joost M. Leunissen, *Rethinking Apology in Tort Litigation: Deficiencies in Comprehensiveness Undermine Remedial Effectiveness*, draft (more comprehensive apologies); MARGARET URBAN WALKER, MORAL REPAIR 191 (describing accepting responsibility and acknowledging harm as the "minimal condition" for "setting things right").

[197] People tend to need more elaborate apologies for more culpable offenses. Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 221 (1989); Schlenker & Darby, 1981; see also Struthers et al., 2010. *See also* Jerry Goodstein & Karl Aquino, *And Restorative Justice For All: Redemption, Forgiveness, and Reintegration in Organizations*, 31 J. ORG. BEHAV. 624, 626 (2010) (noting that "[n]ot all transgressions in the workplace should be addressed through restorative justice. One of the factors organizational actors should consider before using restorative justice to address transgressions is the seriousness of the offense."

[198] Wenzel, Okimoto, Feather, & Paltow, *supra* note __.

shared set of social norms and values.[199] Restorative justice approaches contemplate that offenders will engage in all of the other aspects of the restoration as the foundation for reintegration. Thus, to be reintegrated into the community, offenders should make restitution to their victims, engage in service to the relevant community, confront the harm caused by their behavior, and learn from their experience and help others to do so as well.[200]

Mel Gibson provides a possible example of what exile followed by reintegration might look like when an offender makes personal amends, but does not engage in a serious effort to repair the community. After crafting what many view as a deeply anti-Semitic movie (*The Passion of the Christ*) in 2004; getting drunk and calling a police officer "sugar tits" and blaming the Jews for the world's problems in 2006; and threatening his girlfriend, wishing her rape, and using racist profanity in 2010, Hollywood largely turned its back on Gibson.[201] Gibson offered a public apology to the Jewish community in 2006, asking for the community's help on his journey through recovery and a "discussion to discern the appropriate path for healing."[202] For several years, no Hollywood studios directly employed him. High profile

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[199] *See, e.g.*, Daly, *supra* note __, at 118 (describing the importance of "public condemnation and censure"); Herman, *supra* note __ (describing the importance of a "clear and unequivocal stand in condemnation of the offense"); Wenzel, Okimoto, Feather, & Platow, *supra* note __. *See generally* TOM R. TYLER, BOECKMANN, SMITH, & HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997).

[200] Bazemore, *supra* note __, at 771, Tbl. 1. *See also* TAVUCHIS, at 8 (describing apologies as "a form of self-punishment that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered out claims to membership in a moral community suspect or defeasible."); McGlynn, Downes & Westmarland, *supra* note __ (finding that victims want "meaningful consequences. All survivors spoke of their wish for perpetrators to experience tangible consequences, symbolically and emphatically to underline the significance and harm of their actions."); LINDA RADZIK, MAKING AMENDS 5 (2009) ("The sorts of responses that come to mind include feelings of guilt, remorse, or shame; resolutions to behave better in the future; acknowledgements of wrongdoing and blameworthiness; apologies; self-improvement; acts of restitution or reparation; the performance of good deeds that would otherwise be deemed supererogatory; self-punishment; and voluntary submission to punishment at the hands of an authority"). *See also* Gromet & Darley, *supra* note __, at 410 (finding that research participants assigned less punishment (i.e., prison time) to offenders who had gone through processes that involved restorative justice components than to those who did not) and at 417-18 (finding that participants preferred greater punishment when restorative procedures were unsuccessful); Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 LAW & SOC'Y REV. 1 (2009) (finding that people care about simultaneously accomplishing a range of justice goals in responding to wrongdoing).

[201] Sady Doyle, *It Took America Under 10 Years to Forgive Mel Gibson. What Will It Take to Get Rid of Abusers for Good,* ELLE (Nov. 17, 2017).

[202] Mel Gibson, *Mel Gibson's Apology to the Jewish Community,* Anti-Defamation League (Aug. 1, 2006).

celebrities and writers lobbied for his return, vouching for his efforts at reform.[203] They pointed to his personal healing,[204] sincere empathy, attendance at bat mitzvahs and Yom Kippur breakfasts, acknowledgement of the Holocaust, a personal but unpublicized apology to one of the sheriffs he insulted, discreet meetings with Jewish leaders to learn about Judaism and apologize, and his donations to charitable Jewish causes.[205] They argued that he was fundamentally changed from who he was.[206] Not all agree that Gibson has sufficiently atoned, however. Detractors observe that Gibson has made comments that suggest a refusal to publicly wrestle with his past,[207] has shown a profound lack of public remorse,[208] and has shown an unwillingness to engage in ongoing repair.[209] Nonetheless, Gibson has returned to Hollywood. In 2016, he directed *Hacksaw Ridge*, a major motion picture, and in 2017, he starred in the family friendly, big budget movie *Daddy's Home*.[210] While Gibson's advocates may be correct about his personal

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[203] Allison Hope Weiner, *A Journalist's Plea on 10th Anniversary of The Passion of the Christ: Hollywood, Take Mel Gibson Off your Blacklist,* Deadline Hollywood (Mar. 11, 2014).

[204] Billy Nilles, *What Mel Gibson's Rebound Really Says about* Hollywood, Eonline.com (Nov. 11, 2017) (quoting Andrew Garfield "I think it's a good sign that the Academy has acknowledged his work. It's utterly deserved, but it's a really good sign that finally the healing he's been doing internally and in his life and with the people in his life can finally be recognized on the outside.")

[205] Allison Kaplan Somner, *Should Mel Gibson Be Forgiven Because He Helps Holocaust Survivors?,* Haaretz (Mar. 21, 2017); Allison Hope Weiner, *A Journalist's Plea on 10th Anniversary of The Passion of the Christ: Hollywood, Take Mel Gibson Off your Blacklist,* Deadline Hollywood (Mar. 11, 2014).

[206] Mike Fleming Jr., *Robert Downey Jr Q&A: On the Judge, Turning 50 with a New Baby, and Yes to Iron Man 4 – If Mel Gibson Directs It,* Deadline (Oct. 3, 2014) (quoting Robert Downey Jr. "Nobody should make a case for somebody who just wants forgiveness but hasn't changed, but he's a fundamentally different guy.").

[207] Megan Garber, *Mel Gibson Is Not Sorry,* THE ATLANTIC (Nov. 2, 2016) (discussing Gibson's description of his past transgressions as a single moment in time.").

[208] Madeleine Davies, *Mel Gibson Is Unworthy of a 'Comeback" But He's Getting One Anyway,* Jezebel.com (Mar. 1, 2017) (describing Gibson's 2006 arrest and subsequent public leak of his comments as "recorded illegally by an unscrupulous police officer who was never prosecuted for that crime. And then it was made public by him. . So, not fair" and added "And for one episode in the back of a police car on eight double tequilas to sort of dictate all the work, life's work and beliefs and everything else that I have and maintain for my life is really unfair.")

[209] Nick Holdsworth, *Why Mel Gibson Won't Finance More of His Own Films: I'm Not a Fool,* Hollywood Reporter (July 5, 2014) (quoting Mel Gibson "It's behind me; it's an 8 year old story. It keeps coming up like a rerun, but I've dealt with it and I've dealt with it responsibly and I've worked on myself for anything I am culpable for. All the necessary mea culpas have been made copious times, for this question to keep coming up, it's kind of like. . . .I"m sorry they feel that way, but I've done what I need to do."); Ian Phillips, *I'm Jewish and I'm not Ready for a Mel Gibson Comeback,* THIS INSIDER (Nov. 3, 2016).

[210] Other examples: S. E. Cupp, *Is America Too Forgiving? Bill Clinton, Eliot Spitzer,*

remorse, he has fallen short with regard to ongoing public acknowledgement and efforts to repair.[211] Contrast Gibson's private redemption with Ray Rice's eagerness to teach others to avoid his pitfalls.[212]

If reintegration is possible, what about forgiveness? There is evidence that forgiveness can benefit both survivors and offenders, that seeking and granting forgiveness can be physiologically and emotionally beneficial to both parties.[213] But it is important to have a nuanced understanding of what forgiveness is (and is not) and how it fits (or not) into restorative justice.

Forgiveness is "a decision to release or forego bitterness and vengeance" that may (or may not) involve a change in emotions or attitudes toward the offender.[214] In this way, forgiveness is about the forgiver and involves an intrapersonal letting go of resentment, rather than necessarily

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Tiger Woods—All Get Shots at Redemption, N.Y. DAILY NEWS (July 7, 2010), http://www.nydailynews.com/opinion/america-forgiving-bill-clinton-eliot-spitzer-tiger-woods-shots-redemption-article-1.467596 (how readily we forgive says something crucial about our character and our judgment. We don't need to rake our sinners over the coals forever, but perhaps we should be more judicious about rewarding them with million-dollar contracts, as in the case of Woods; positions of influence, as in the case of Spitzer, or blind adoration, as in the case of Clinton. Forgiveness might be good for our souls, but reward does nothing to cleanse theirs.)

[211] *See* Linda Radzik, *Moral Repair and the Moral Saints Problem*, 2 RELIGIOUS INQ. 5 (2013) (discussing the scope of the obligation to atone); SMITH, *supra* note __, at 81 ("We often judge an offender's commitment to reform and forbearance over their lifetime, and any regression can diminish an apology's significance.").

[212] Josh Dean, *Ray Rice in Exile*, MEN'S FITNESS (Jan. 30, 2018) (noting "Ray Rice is sorry. He'll say it even if you don't ask him about it. Like a 12-stepper at a wedding, Rice openly discusses "my incident" or "my awful mistake" to the extent that he may as well wear a sandwich board that reads, "Hi, my name is Ray, and I hit my wife."")

[213] *See, e.g.*, Nathanial G. Wade, William T. Hoyt, Julia E.M. Kidwell, & Everett L. Worthington, Jr., *Efficacy of Psychotherapeutic Interventions to Promote Forgiveness: A Meta-Analysis*, 82 J. CONSULTING & CLINICAL PSYCHOL. 154 (2014) (reviewing studies); Everett L. Worthington, Jr., Charlotte Van Oyen Witvlet, Pietro Pietrini, & Andrea J. Miller, *Forgiveness, Health, and Well-Being: A Review of Evidence for Emotional Versus Decisional Forgiveness, Dispositional Forgivingness, and Reduced Unforgiveness*, 30 J. Behav. Med. 291 (2007) (reviewing studies). *See also* Harry M. Wallace, Julie Juola Exline, & Roy F. Baumeister, *Interpersonal Consequences of Forgiveness: Does Forgiveness Deter or Encourage Repeat Offenses?*, 44 J. EXP. SOC. PSYCHOL. 453 (2008).

[214] Julie Juola Exline, *The Thorny Issue of Forgiveness: A Psychological Perspective*, 13 PEPPERDINE DISP. RESOL. L.J. 13, 17 (2013). *See also* Charlotte vanOyen Witvliet & Lindsey Root Luna, *Forgiveness and Well-Being, in* POSITIVE PSYCHOLOGY: ESTABLISHED AND EMERGING ISSUES (Dana S. Dunn ed., 2018) (describing forgiveness as "(1) emphasizing the humanity of the offender while holding him or her responsible for the transgression, (2) seeing the transgression as evidence that the offender needs to be transformed by learning, growing, or changing, and (3) desiring that good change for the offender."

being focused on interaction with the offender.[215]

Importantly, neither forgiveness nor reintegration should mean that offenders are not to be held accountable, or that they are exempt from punishment or reparations.[216] "Forgiveness is not denying, excusing, minimizing, or tolerating an offense. . . . [F]orgiveness ought to take seriously the safety of the victim (e.g., physically, emotionally, spiritually) and justice oriented responses to the offender."[217] Similarly, forgiveness "is not the same thing as restoring an offender to a prior position,"[218] nor does forgiveness mean that a survivor must reconcile with an offender.[219] And, despite the common refrain, "forgive and forget," forgiveness does not imply forgetting.[220] Indeed, it is important to remember offenses so that offenders

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[215] *See also* Peter Strelan, Ian McKee, Dragana Calic, Lauren Cook, & Lisa Shaw, *For Whom Do We Forgive? A Functional Analysis*, 20 PERSONAL RELATIONSHIPS 124 (2013). Forgiveness is more likely when the risk of exploitation is low and the value of the relationship with the offender is high. Jeni L. Burnette, Michael E. McCullough, Daryl R. Van Tongeren, & Don E. Davis, *Forgiveness Results From Integrating Information About Relationship Value and Exploitation Risk*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 345 (2012). Making amends can provide information about each of these considerations. Laura B. Luchies et al., *People Feel Worse About Their Forgiveness When Mismatches Between Forgiveness and Amends Create Adaptation Risks*, __ J. SOC. REL. __ (2017). For a review of the factors that contribute to forgiveness, see Ryan Fehn, Michelle Gelfand, & Monisha Nag, *The Road to Forgiveness: A Meta-Analytic Synthesis of Its Situational and Dispositional Correlates*, 136 PSYCHOL. BULL. 894 (2010). *See generally* MICHAEL E. MCCULLOUGH, KENNETH I. PARGAMENT, & CARL E. THORESEN (EDS.), FORGIVENESS: THEORY, RESEARCH, AND PRACTICE (2000).

[216] *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 15 (1998) ("In theory, forgiveness does not and should not take the place of justice or punishment. Forgiveness makes a change in how the offended feels about the person who committed the injury, not a change in the actions to be taken by a justice system."); Jeffrie Murphy ("Because I have ceased to hate the person who has wronged me it does not follow that I act inconsistently if I still advocate his being forced to pay compensation for the hard he has done or his being forced to undergo punishment for his wrongdoing."). *See generally*, Peter Strelan, *Justice and Forgiveness in Interpersonal Relationships*, 27 CURRENT DIR. PSYCHOL. SCI. 20 (2018); Michael Wenzel & Tyler G. Okimoto, *On the Relationship Between Justice and Forgiveness: Are All Forms of Justice Made Equal?*, 53 BRIT. J. SOC. PSYCHOL. 463 (2014).

[217] vanOyen Witvliet & Luna, *supra* note __.

[218] *Id*.

[219] Coker, *supra* note __, at 148 ("Reintegration does not require that the victim forgive him and certainly does not require that they reconcile, though it does not foreclose the possibility."); Exline, *supra* note __, at 19-20 ("forgiveness does not imply trust of the offender, nor does it require that people form on continue and ongoing relationship with this person"); vanOyen Witvliet & Luna, *supra* note __. *See also* Joshua N. Hook et al., *Does Forgiveness Require Interpersonal Interactions? Individual Differences in Conceptualization of Forgiveness?*, 53 PERSONALITY & INDIV. DIFF. 687 (2012).

[220] Exline, *supra* note __, at 18.

can learn from them and others can protect themselves as necessary.[221]

In addition, while the inclusion of reintegration as an element of restorative justice may necessitate some "community capacity" for a sort of forgiveness,[222] it does not require that individual survivors must forgive offenders.[223] Nor does accepting an apology mean that the victim will or must forgive.[224] While there can be benefits to forgiving,[225] there can also be costs.[226] Moreover, critics of the use of restorative justice in the context of sexual violence are concerned that survivors will be pressured to forgive.[227] Such pressure can be an additional harm experienced by the survivor: "Pressure to forgive places the victim in an untenable position of once again subordinating her own needs to those of the abuser."[228] In addition, "The authority to view a violation as beyond forgiveness marks one of the survivors' contributions to the community's moral sense."[229] While it is

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[221] *Id*.

[222] Bazemore, *supra* note __, at 785.

[223] Marilyn Peterson Armour & Mark S. Umbreit, *The Paradox of Forgiveness in Restorative Justice, in* HANDBOOK OF FORGIVENESS 491, 492 (Everett L. Worthington, Jr., ed. 2005) ("Restorative justice dialogue fosters the possibility for forgiveness—but only if the victim voluntarily chooses that path."); Bazemore, *supra* note __, at 784 (restorative justice does not imply obligation for individual victim to forgive); Coker, *supra* note __, at 148 ("Reintegration does not require that the victim forgive him and certainly does not require that they reconcile, though it does not foreclose the possibility."). *See also* MINOW, *supra* note __, at 115 ("Equally important is the adoption of a stance that grants power to the victims, power to accept, refuse, or ignore the apology.").

[224] *See* James Strickland, Alfred Allan, & Maria M. Allan, *The Acceptance of Apologies in Corrective Process: Implications for Research and Practice*, 7 Oñati Socio-Legal Series (2017). *See also* Mandeep Dhami, Offer and Acceptance of Apology in Victim-Offender Mediation, 20 CRITICAL CRIMINOLOGY 45 (2012) (finding that victims were much more likely to accept an offender's apology than to forgive).

[225] *See supra* note __. Peter Strelan, Ian McKee, & Nicole T. Feather, (2016). *When and How Forgiving Benefits Victims: Posttransgression Offender Effort and the Mediating Role of Deservingness Judgements*, 46 EUR. J. SOC. PSYCHOL. 308 (2016).

[226] *See, e.g.*, Roy F. Baumeister, Julie Juola Exline, & Kristin L. Sommer, *The Victim Role, Grudge Theory, and Two Dimensions of Forgiveness, in* DIMENSIONS OF FORGIVENESS: A RESEARCH APPROACH 79 (Everrett L. Worthington ed. 1998); Laura B. Luchies, Eli J. Finkel, James K. McNulty, & Madoka Kumashiro, *The Doormat Effect: When Forgiving Erodes Self-Respect and Self-Concept Clarity*, 98 J. PERSONALITY & SOC. PSYCHOL. 734 (2010); Peter Strelan, Shona Crabb, Debbie Chan, & Laura Jones, *Lay Perspectives on the Costs and Risks of Forgiving*, 24 PERSONAL RELATIONSHIPS 392 (2017). *See generally* Jeffrie G. Murphy, *Forgiveness, Self-Respect, and the Value of Resentment, in* HANDBOOK OF FORGIVENESS 33 (Everett L. Worthington, Jr. ed. 2005).

[227] Herman, *supra* note __, at 593 ("expectation of forgiveness as an additional injustice on victims for the comfort and convenience of others.").

[228] Coker, *supra* note __, at 148. *See also* Martha Minow, *Forgiveness, Law, and Justice*, 103 CALIF. L. REV. 1615, 1617 (2015) ("private or public pressure on a victim to forgive can be a new victimization, denying the victim her own choice").

[229] MINOW, *supra* note __, at 116.

important to avoid pressuring survivors to forgive, preventing such pressure can be difficult, in part because an apology "script" prescribes that an apology is to be followed by an acceptance of that apology and forgiveness of the offender.[230]

III. TRANSITIONAL JUSTICE

As explained above, restorative justice practices focus, in particular, on dialogue between the wrongdoer and the person who was wronged, repair of that wrong, and reintegration of the offender into the community. But in addressing the problems of sexual misconduct in the workplace and beyond, some reformers, such as those involved with Time's Up, aspire to more expansive change, including changes in the structures, institutions, and attitudes that have allowed such misconduct to persist. We, therefore, consider the link between more individually oriented responses to wrongdoing and institutional reform. We use the theory and practice of transitional justice to conceptualize that link, particularly as many within #MeToo and society at larger have called for particular modes of transitional justice[231] including truth and reconciliation commissions,[232] and to explore

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[230] *See* Mark Bennett & Christopher Dewberry, *"I've said I'm sorry, haven't I?" A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients,* 13 CURRENT PSYCHOL. 10 (1994); Mandeep K. Dhami, *Effects of a Victim's Response to an Offender's Apology: When the Victim Becomes the Bad Guy,* 46 EUR. J. SOC. PSYCHOL. 110 (2016); Gromet & Okimoto, *supra* note __; Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies,* 92 J. PERSONALITY & SOC. PSYCHOL. 418 (2007). *See also* WILLIAM IAN MILLER, FAKING IT 92 (2003) (arguing that "the victim is as often forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or he forgives because it is embarrassing not to once the wrongdoer has given a colorable apology").

[231] Alex Price, *#MeToo Must Avoid "Carceral Feminism"*, Vox.com (Feb. 1, 2018), https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism (arguing against carceral feminism and in favor of distributive economic solutions).

[232] Deborah King, *#MeToo 2.0: The Movement's Painful Next Step: Moving Forward Is Even More Difficult Than Speaking Up,* PSYCH. TODAY (Jan 26, 2018); Kim Samuel, *Why We Need a Truth and Reconciliation Commission on Sexual Violence,* THE WALRUS (Jan. 24, 2018), https://thewalrus.ca/why-we-need-a-truth-and-reconciliation- commission-on-sexual-violence*/; Sara Davidson, My Ex Was Just #MeTooed. He Had It Coming. But It's Complicated,* L.A. TIMES *(Jan. 21, 2018); Bill McGarvey, Dave Chappelle and the 'Imperfect Allies' the #MeToo Movement Needs,* AM. MAG. (Jan. 12, 2018), https://www.americamagazine.org/arts-culture/2018/01/12/dave-chappelle-and-imperfect-allies-metoo-movement-needs; Lissa Rankin, *Are We Ready for Truth and Reconciliation Around Sexual Violence? #MeToo, wakeup-world.com* (Dec. 18, 2017), https://wakeup-world.com/2017/12/18/are-we-ready-truth-reconciliation-around-sexual-violence-metoo/; Hope Reese, *#MeToo is powerful but will fail unless we do more: feminist Stephanie Coontz on backlash,* Vox.com (Nov. 29, 2017), https://www.vox.com/conversations/2017/11/29/16712514/me-too-feminist-backlash-

the lessons that can be gleaned for current movements, like Time's Up, from broader experiences with transitional justice.

A. Transitional Justice and #MeToo

Before we can address the call for transitional justice, we first must identify what it is. Transitional justice refers to a broad body of multidisciplinary scholarship and practice concentrating on responses to wrongdoing in contexts of transitions toward democracy and away from extended periods of conflict or repression.[233] Such responses encompass many of the practices of restorative justice outlined in Part II, such as apology, reparation, acknowledgement, and commitment to non-repetition. Under transitional justice, these aims, such as acknowledgement, are pursued using a wide range of processes including truth commissions, criminal trials, public memorials, and symbolic reparations. They also encompass processes that do not aim at reintegration, such as programs of lustration whereby individuals are barred from serving in specific public roles.[234]

1. Scale and Scope

The current #MeToo moment reflects some analogous features of the paradigm case of transitional justice. We highlight three such features. First, the wrongs on which transitional justice focuses are not isolated criminal acts.[235] Rather, the focus is on patterns of wrongdoing. Thus, the wrongdoing on which transitional justice processes concentrate are not exceptional in the sense of being uncommon. Victims of the wrongdoing at issue number in the hundreds, tens of thousands, or even hundreds of thousands. Characteristically, wrongdoing on this scale has become normalized; that is, the possibility of being a victim of certain wrongdoing becomes a basic fact

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weinstein-effect; Todd Hixon, *Reconciliation Is The Key To Ending Sexual Harassment In The Workplace,* Forbes.com (Nov.29, 2017), https://www.forbes.com/sites/toddhixon/2017/11/29/reconciliation-is-the-key-to-ending-sexual-harassment-in-the-workplace/#22e8d4213fda.

[233] *See generally* NOMOS LI: TRANSITIONAL JUSTICE (eds. Melissa S. Williams, Rosemary Nagy, & Jon Elster 2012); Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice,* 30 HUMAN RIGHTS Q. 95 (2008); ROBERT ROTHBERG & DENNIS THOMPSON, TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (2000); RUTI TEITEL, TRANSITIONAL JUSTICE (2000); David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55 (2010); David Dyzenhaus, *Judicial Independence, Transitional Justice, and the Rule of Law*, 10 OTAGO L. REV. 345 (2003); Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV.761 (2004). The discussion in this section draws specifically upon the theory of transitional justice developed in COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017).

[234] ROMAN DAVID, LUSTRATION AND TRANSITIONAL JUSTICE: PERSONNEL SYSTEMS IN CZECH REPUBLIC, HUNGARY, AND POLAND (2012).

[235] MURPHY, *supra* note __, chapter 1.

of life and members of targeted groups must adapt their conduct to this reality. The anticipation of being killed, or harassed, or assaulted, or tortured shapes considerations of how to respond to the police or security forces or fellow citizens. The specific nature of the wrongs of interest to transitional justice vary across contexts, though gender-based sexual violence is of recurring concern.

Analogously, the #MeToo movement deals with wrongdoing that has become normalized. One source of the impact of #MeToo is a function of its size and scope. As detailed in Part I, half a million people responded within 24 hours to a call on Twitter to articulate past experience of sexual harassment or assault.[236] The scope of the types of workplaces from which stories have emerged is expansive; few if any industries have emerged untouched.[237] This size and scope is a reflection of the normalization of sexual assault and harassment in the workplace.[238] Such wrongdoing has become a basic fact of life for women in the workforce; the expectation of being harassed or assaulted is something women have to take into account when deliberating about which jobs to accept, which actions from their employers to contest, and how to act in the workplace. Similarly, gendered pay gaps are pervasive and something that increasingly plague women the longer they stay in the workforce.[239] Women must strategize on how to negotiate for higher pay without running afoul and ensuing workplace punishments for running afoul of gender stereotypes.[240] Wrongdoing is thus not exceptional and not the fault of a few isolated bad apples.

2. Pervasive Structural Inequality

Second, the wrongdoing of interest in transitional settings characteristically occurs against a background of what has been called pervasive structural inequality.[241] That is, it occurs against a background of inequality in the institutionally defined terms of interaction among citizens and between citizens and officials. "Institutions" is understood broadly to

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[236] *See supra* note __.

[237] Elizabeth Dworskin & Jena McGregor, *Sexual Harassment, Inc. How the #MeToo Movement Is Sparking A Wave of StartUps*, WASH. POST (Jan. 7, 2017). *See also* Emily Stewart, *These Are the Industries With the Most Reported Sexual Harassment Claims*, Vox.com (Nov. 21, 2017).

[238] ANNA MARIA MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE (2017).

[239] AAUW, *The Simple Truth about the Gender Pay Gap* Report (Fall 2017), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth.

[240] LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2009); LINDA BABCOCK, WHY WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION (2019).

[241] See MURPHY, *supra note* __, chapter 1.

encompass legal, economic, social and cultural institutions. These institutions structure interaction by specifying through rules and norms who is permitted to do what to whom, the penalties for violating rules and norms, and rewards for meeting or exceeding them. We can see this most easily when we consider legal rules. Legal rules structure interaction among citizens by, for example, outlining conduct that is considered legally criminal and thus impermissible, as well as the penalties for violating such standards such as deprivations of life and liberty. The constitution articulates the basic structure of government, including the duties and responsibilities of different branches of government and who is eligible to pursue certain government roles and how such roles may be acquired. Social norms structure interaction in clear though less formally codified ways. Gender norms further specify social norms, by articulating the proper forms of interaction for men and women with members of the opposite sex as well as their own. Gender norms shape how the law is applied and enforced.[242] They also shape the consequences of being a victim of criminal wrongdoing.[243]

There are two senses in which these institutionally defined terms for interaction can be unequal. They can be unequal in that they generate substantially different opportunities for various groups of citizens to do and become things of value, such as being educated, being employed, participating in political institutions, or avoiding prison. That is, the explanation of the differences in rates of employment, or education or participation in political institutions, or incarceration is not substantially a function of the different preferences of various citizens or different choices various citizens made. Rather, it is a function of the different constraints on opportunity that exist for different groups of citizens. So, for example, during apartheid in South Africa and under Jim Crow in the United States, black and white citizens had substantially different opportunities for education, financial success through employment, participation in the political process, and protection under the law. Interaction can also be unequal in the opportunities afforded to different groups of citizens to shape the terms for interaction. During apartheid black South Africans were denied a right to

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[242] BARRY GOLDSTEIN & ELIZABETH LIU, REPRESENTING THE DOMESTIC VIOLENCE SURVIVOR: CRITICAL LEGAL ISSUES, EFFECTIVE SAFETY STRATEGIES (2013); Amy E. Bonomi et.al, "*Meet Me At The Hill Where We Used To Park": Interpersonal Processes Associated With Victim Recantation*, SOCIAL SCI. & MED.1 (2011) American Bar Association Commission on Domestic Violence http://www.abanet.org/domviol/stats.html; Lori L. Heise, Jacqueline Pitanguy & Adrienne Germain, *Violence Against Women: The Hidden Health Burden*. 255 THE WORLD BANK 14; Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 332 (1998-1999).

[243] FIONNUALA NÍ AOLÁIN, NAOMI CAHN, DINA FRANCESCA HAYNES, & NAHLA VALJI, THE OXFORD HANDBOOK ON GENDER AND CONFLICT (2018).

vote and hold office in the South African government, rendering them unable to have a role in determining who passed laws and unable to assume that role themselves. During Jim Crow, black Americans formally held the right to vote, but had serious difficulty exercising that right in practice, due to voting restrictions that disproportionately impacted black voters. Inequality can exist along a continuum, from being present in a limited manner to being pervasive.

Similar to periods of transitional justice, #MeToo is also occurring against a background of institutional inequality. Women in every society, including the United States, continue to face obstacles to equality vis-à-vis men regarding what genuine opportunities are enjoyed and what power to shape the institutional rules and norms exists. Part I highlighted some of the obstacles facing women wanting to hold harassers and abusers to account, including the absence of a genuine opportunity to name abusers without fear of retaliation and without fear of not being believed. It also noted the widespread sense that substantial changes are needed to achieve equal pay for equal work or proportional representation in political offices or in positions of authority in the workplace.[244]

3. Institutional Change and Overcoming Denial

Third, transitional justice explicitly links responding to particular wrongs with broader institutional change. Doing right by victims and treating perpetrators in a fitting manner is important both for its own sake as well as instrumentally important. Victims have claims because they have been wronged, and perpetrators have responsibilities because they have acted wrongly. This is true regardless of the larger societal and structural setting and such claims and obligations should be satisfied for their own sake. Yet, doing so embedded within a larger effort to effect institutional change also lays the foundation for broader societal transformation. Take, for example, an orienting phrase of the first transitional justice movements: "Nunca Mas," or "Never Again." This phrase reflects the importance of ensuring that responses to past wrongs establish conditions for non-recurrence in the future. For transitional justice, the prospects for non-recurrence has increasingly come to be connected to the prospects of enacting broader institutional change, such as promotion of the rule of law and police or security reform. Transitional justice processes which deal with past wrongs

[244] This is not to suggest that the degree of gender inequality is the same across societies; there are important differences in the degree of gender inequality that exists. For an overview of variation in gender inequality see the United Nations Development Programme Gender Inequality Index (GII), which provides data on a range of measures including income, education, employment, representation in government positions http://hdr.undp.org/en/data.

are seen as doing so in ways that contribute to this broader change.

We see these same linkages in the #MeToo movement. Efforts to deal with particular cases of harassment and abuse are being framed as important for their own sake and as helping to draw a line between conduct tolerated in the past that will no longer be tolerated in the future. Such efforts are also being joined with campaigns like Time's Up explicitly focused on broader institutional reform.

Why might we think it reasonable to link responses to past wrongs with broader institutional reform and transformation? One reason is that to change institutions, there must first be recognition that change is needed. Absent such recognition, people will see little reason to devote time and financial resources to changing institutional structures. Moreover, in transitional contexts there is characteristically a history of denial of wrongdoing. This denial takes different forms.[245] It can be outright denial that any wrong took place. Denials of the existence of political prisoners, or the occurrence of rape, or of a killing or massacre take this form. Frequently, government officials are the ones issuing this sort of denial, which is why uncovering the basic truth about past wrongdoing becomes so urgent in the contexts of transition. A second form of denial is descriptive, concerning how certain actions are characterized and described. Instead of acknowledging torture, for example, there is a discussion of 'regrettable excesses.' A third form of denial acknowledges certain factual claims, but distances personal or institutional responsibility for such wrongs. There is the attribution of responsibility to forces contesting a government rather than to government officials. Or ordinary citizens who benefitted from or supported a regime carrying out atrocities fail to see how they may be complicit in the wrongdoing that occurred. Alternately, this downplaying of responsibility can take the form of pointing to wrongs for which one's political opponents were implicated instead of acknowledging and assuming responsibility for wrongdoing of one's own.

These same forms of denial are present in the context of sexual harassment and abuse, though it is not necessarily government officials implicated in such denials. To take a few examples, Michigan State University and USA Gymnastics had long histories of explicitly denying any wrongdoing or abuse by Larry Nassar.[246] Harvey Weinstein systematically

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[245] STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

[246] Denhollander, *supra* note__; Nicole Chavez, *What Others Knew: Culture of Denial Protected Nassar For Years*, CNN (Jan. 25, 2018), https://www.cnn.com/2018/01/23/us/nassar-sexual-abuse-who-knew/index.html; Eric Levenson, *Did Michigan State Fail To Stop Nassar Like Penn State Die With Sandusky*?,

used non-disclosure agreements and private investigations as tools for silencing women who might otherwise speak about harassment and abuse.[247] Partial apologies by Matt Lauer and Al Franken reflect attempts to redescribe actions in ways that minimize their scope and moral import. Framing sex as "unwanted" but not "illegal" is another tool for denying the egregiousness of behavior that occurred. Seeing sexual harassment as an isolated issue posed by the behavior of a few bad men, such as Harvey Weinstein, rather than as pervasive in an industry are ways of downplaying the scope of actors implicated in patterns of abuse.

Each of these forms of denial seeks to minimize or contain the scope of a moral problem. The first seeks to erase the existence of a wrong altogether. The second minimizes the seriousness of the wrong and its consequences. The third minimizes the scope of the problem, seeking to limit the taint of wrongdoing to a few rotten apples instead of pointing to taint implicating organizations or groups. Countering denial thus becomes urgent. Acknowledgement of the existence, seriousness, and widespread net of responsibility for committing, supporting, permitting, or failing to object to wrongdoing of which one knew or suspected or should have known becomes critical. This net of responsibility includes enablers, whose actions allowed abusers and harassers to remain in positions of power and authority even after allegations of wrongdoing were known.

Processes of transitional justice focus precisely on countering these forms of denial and generating this recognition. The mandate of truth commissions, for example, is to document patterns of abuse and, in some cases, the role of institutions (e.g., legal, religious, media, business) in such wrongdoing.[248] Programs of lustration bar individuals from serving in certain official roles, and are predicated on the recognition of the ways in which former officials may have failed to satisfy the responsibilities which their roles demanded.[249] These examples point to the importance of countering denial by directly uncovering and properly characterizing the wrongdoing

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CNN (Feb. 1, 2018), https://www.cnn.com/2018/02/01/us/larry-nassar-michigan-state-sandusky-penn/index.html; Paula Lavigne & Nicole Noren, *OTL: Michigan State Secretes Extend Far Beyond Larry Nassar Case*, ESPN (Feb. 1, 2018), http://www.espn.com/espn/story/_/id/22214566/pattern-denial-inaction-information-suppression-michigan-state-goes-larry-nassar-case-espn

[247] Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements

[248] *See, e.g.*, the SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT (1998), http://www.justice.gov.za/trc/and PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2010).

[249] MONICA NALEPA, SKELETONS IN THE CLOSET: TRANSITIONAL JUSTICE IN POST-COMMUNIST EUROPE (2010).

which took place, as not simply the ordinary misconduct of a few isolated actors in ways that were exceptional, but rather as part of a pattern of behavior that became unexceptional, that targeted groups, and that was committed by groups.

There is, however, an additional link between addressing normalized wrongdoing through processes of transitional justice and pursuing broader societal transformation. This link is a function of the contexts in which transitional justice processes characteristically occur. Processes of transitional justice are characteristically established during periods of serious uncertainty.[250] The broader trajectory of a community is frequently unclear, such that the prospect still remains for a return to war or to repression. The aim to transition away from conflict and repression is aspirational. The broader point is that transformative change is not a given. It may or may not materialize in any given case. This is, in part, a product of the fact that change is not uniformly welcomed. Parties or groups benefitting from continued conflict or a repressive regime will not welcome change. Those who may be implicated in wrongdoing may object to becoming vulnerable to accountability. Against this background, responses to isolated cases assume a broader symbolic importance. Seeking reasons to predict where the trajectory will ultimately go, towards reform or retrenching the status quo, whether and how past wrongs are handled becomes indicative of whether and in what manner broader change will occur.

The #MeToo movement resembles transitional justice in this way as well—it has generated significant uncertainty. The sheer scale of the current moment in terms of stories of sexual assault and harassment have countered longstanding denial of the existence of these wrongs, let alone their pervasiveness.[251] The cascading cases of prominent and powerful figures in influential industries being held to account for their actions has led to claims that the #MeToo moment heralds the beginning of the end of impunity for sexual assault and abuse in the workplace. At the same time, as noted in Part I, worries have been articulated about a backlash against #MeToo, which would undercut possibilities for broader transformation in the normalization of sexual assault and harassment.[252] Objections to the overly puritanical view

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[250] Murphy *supra* note __, chapter 1.

[251] SANDRA SPERINO AND SUJA THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017).

[252] Rebecca Solnit, *Rebecca Solnit on the MeToo Backlash*, LIT HUB (Feb. 12, 2018); Megan Garber, *The Selective Empathy of the #MeToo Backlash*, THE ATLANTIC (Feb. 11, 2014); Kathleen Parker, *A #MeToo Backlash Is Inevitable*, WASH POST (Feb. 2, 2018); Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018); Stassa Edwards, *The Backlash to #MeToo Is Second Wave Feminism*, Jezebel.com (Jan. 11, 2018); Andrew Sullivan, *It's Time to Resist the Excesses of MeToo*, NEW YORK MAG. (Jan.

of advocates of #MeToo have been raised, including by older generations of feminists,[253] at the same time as discussions have broadened to encompass dating norms.[254] Concerns about due process norms for losing jobs or careers based on an accusation have been voiced raising questions of the justice of the pursuit of justice in the current moment.[255]

4. Utility Despite Disanalogies

While #MeToo shares these meaningful affinities with the kinds of cases that fall under the purview of transitional justice, there are also some disanalogies. Importantly, though #MeToo has generated uncertainty, it has done so against a background of broader political certainty. Unlike in paradigm transitional justice cases, the entire trajectory of the community (e.g., whether it is heading to a return to war or towards a stable peace) is not in doubt in most contexts where #MeToo conversations are occurring. The scope of wrongdoing is also narrower than what is often found in paradigm transitional contexts. In transitional contexts, wrongdoing that is gender based but also deeply political, and that encompasses a wide range of types of wrongdoing such as displacement, massacre and in some cases genocide is not also at issue in the present case.

Despite these important differences, the framework of transitional justice is useful for identifying different kinds of responses to wrongdoing. Responses that focus on perpetrators and victims draw upon a wide range of practices such as apology, reparation and acknowledgement to respond to the claims of victims and demands on perpetrators which wrongdoing generates. From the perspective of transitional justice, these responses may contribute

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12, 2018).

[253] Caitlin Flanagan, *The Humiliation of Aziz Ansari*, THE ATLANTIC (JAN. 14, 2018); Margaret Atwood, *Am I A Bad Feminist*, GLOBE & MAIL (Jan. 3, 2018).

[254] Need to translate: http://www.lemonde.fr/idees/article/2018/01/09/nous-defendons-une-liberte-d-importuner-indispensable-a-la-liberte-sexuelle_5239134_3232.html .; Aurelien Breeden & Elian Peltier, *Response to French Letter Denouncing #MeToo Shows a Sharp Divide*, N.Y. TIMES (Jan. 12, 2018). Interestingly, Catherine Deneuve subsequently apologized to victims of sexual assault. Anna Codrea-Rado, *Catherine Deneuve Apologizes to Victims after Denouncing #MeToo,* N.Y. TIMES (JAN. 15, 2018).

[255] Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, ATLANTIC (Feb. 15, 2018), https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo/553427/; Emily Stewart, *Trump Wants 'Due Process' For Abuse Allegations I Asked 8 Legal Experts What That Means*, Vox (Feb. 12, 2018), https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump; Shira A. Scheindlin & Joel Cohen, *After #MeToo, We Can't Ditch Due Process*, GUARDIAN, (Jan. 8, 2018), https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televictions; *What Kind of Due Process Are Those Accused of Sexual Misconduct Entitled To?* NPR ALL THINGS CONSIDERED (Dec. 22, 2017).

to broader societal transformation.

In addition are those responses that are more directly focused on institutional reform. The direct institutional reform-oriented elements of the #MeToo movement seem to be of two kinds. The first are reforms aimed at making institutions more effective by, for example, addressing obstacles to participation for women or to the participation of women being effective. Many of The Time's Up Initiative are focused on reforms of this kind, including efforts to amplify and enhance the believability of women's stories; to increase the accessibility of the systems for reporting and sanctioning sexual assault, harassment and inequality in the workplace by increasing the supply of lawyers working pro bono on such cases and by raising money to cover costs of legal representation.[256] Other efforts for institutional change would be legislative efforts to enact prohibitions on companies requiring employees to sign non-disclosure agreements forbidding employees from speaking about wrongdoing in the workplace publicly. Similarly, the focus of the Anita Hill Commission is precisely on policy changes that can be implemented to facilitate the reporting of workplace abuse or harassment without fear or risk of penalty.

B. Lessons for #MeToo

The wisdom acquired through the decades of theory and practice of transitional justice can be useful as we navigate the seemingly new terrain created by the #MeToo movement. We end by highlighting two lessons of particular importance: the necessity of paying attention to whose wrongs are addressed and the necessity of a holistic approach to institutional reform.

1. Whose Wrongs?

One criticism of the #MeToo movement is that it has been overly focused on the experiences of heterosexual white cis women, and that, consequently, any responses will disproportionately benefit this group of women. The experience with transitional justice underscores the merits of this criticism. Within transitional justice, there is increasing emphasis on paying attention to the gendered impacts of certain wrongs and the gendered obstacles to participation in transitional justice processes. Similarly, there is increasing emphasis on the experiences and obstacles to participation of historically marginalized groups, including, in particular, indigenous communities. Calls for attention to diversity considerations are found in the choice of transitional justice processes (e.g., whether a criminal trial and/or truth commission will be established and on which wrongs such processes will concentrate); the functioning of such processes (e.g., who are the

[256] *See supra* note __.

commissioners running truth commissions and who are the victims participating); and in the evaluation of the impact and thus the success or failure of transitional justice processes. In this latter category it is common to do analyses of the gendered impact of processes.

Paying attention to whose stories are being told and heard and who is able to participate effectively in transitional justice processes is important.[257] First, the probability of being victimized can vary across members of social groups, as can the consequences of wrongdoing when it occurs. For example, during the Rwandan genocide, the rates of survival among inter-ethnic Hutu and Tutsi married couples varied depending on whether the husband was a Hutu or Tutsi. [258] Similarly, attention to the inclusion of different voices in the process of choosing and designing processes of transitional justice can increase our knowledge of potential obstacles to participation that may exist, the knowledge of which can lead to a more effective process being designed.[259]

Second, by including women and members of historically marginalized groups in processes of transitional justice we avoid duplicating injustice. As mentioned above, the existence, scope and/or subjects of responsibility for wrongdoing are often officially denied during conflict and repression. This denial can itself wrong victims, as their experiences are not acknowledged and their rights go unvindicated. Marginalizing certain groups

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[257] For a more extended discussion of these lines of argument, see Colleen Murphy, *The Ethics of Diversity in Transitional Justice*, __ GEORGETOWN J. L. & PUB. POL'Y __ (forthcoming).

[258] Anuradha Chakravarty, *Interethnic Marriages, the Survival of Women, and the Logics of Genocide in Rwanda*, 2 GENOCIDE STUD. & PREVENTION 235 (2007).

[259] Lia Kent, *Narratives of Suffering and Endurance: Coercive Sexual Relationships, Truth Commissions and Possibilities for Gender Justice in Timor-Leste*, 8 INT'L J. TRANSITIONAL JUST. 289 (2014); Katherine Franke, *Gendered Subjects of Transitional Justice*, 15 COLUMBIA J. GENDER & L. 813 (2006); Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, 3 INT' J. TRANSITIONAL JUST. 114 (2009); Fiona Ross, *Using Rights to Measure Wrongs: A Case Study of Method and Moral in the Work of the South African Truth and Reconciliation Commission*, *in* HUMAN RIGHTS IN GLOBAL PERSPECTIVE: ANTHROPOLOGICAL STUDIES OF RIGHTS, CLAIMS AND ENTITLEMENTS (Jon. P. Mitchell & Richard A. Wilson eds. 2003); FIONA ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA (2003); Katherine Fobear, *Queering Truth Commissions*, 6 J. HUM. RTS. PRAC. 51 (2014); INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, WE WANT TO BE HEARD': OBSTACLES TO WOMEN TAKING PART IN PARTICIPATORY MECHANISMS FOR DEALING WITH VICTIMS OF THE INTERNAL ARMED CONFLICT (2016); https://www.ictj.org/sites/default/files/ICTJ_Report_Colombia_Gender_Reparations_2016.pdf; SUSAN HARRIS RIMMER, GENDER AND TRANSITIONAL JUSTICE: THE WOMEN OF EAST TIMOR (2010).

of victims in transitional justice processes risks wronging them a second time by mimicking the lack of recognition they experienced the first time. Inclusion of women and members of historically marginalized communities in processes of transitional justice not only avoids injustice. It also positively promotes justice, by modeling the kinds of relationships processes of transitional justice ultimately hope to foster. Such relationships are predicated on the equality of all citizens and the equal claim to have rights respected and wrongs acknowledged.

The lessons for the #MeToo movement are clear. Disproportionate focus on heterosexual cis white women and consequent marginalization of those not falling into this narrow category has costs. There are costs because limiting the voices that are heard limits our knowledge of the scope, character and pervasiveness of sexual assault, harassment and abuse in the workplace. Moreover, we risk designing programs of institutional reform to address obstacles to participation facing some, but not all, of those who are affected. We risk perpetuating injustice, rendering invisible for a second time the abuse suffered by certain groups of women. We also lose an opportunity for justice, an opportunity to model in the public disclosure of incidents of abuse and harassment as well as the processes of accountability that unfold the kinds of relationships of equality that are the core of democratic practices of citizenship.

2. Holism

A second insight from experiences with transitional justice is the need to pursue transformation holistically. Holism refers to the process of designing, implementing, and evaluating processes of transitional justice as a society, rather than in isolation or discretely.[260] When there is an aspiration for societal transformation achieved in part by doing right by victims, but the likelihood of achieving transformation is profoundly uncertain, the moral meaning of any particular response to wrongdoing is also uncertain. The risks of moral failure in transitions are significant. Criminal trials risk becoming instruments for victor's justice, instead of the impartial practice of holding perpetrators to account. Reparations risk becoming instruments to buy victim's silence, rather than instruments for transformation.[261] One

[260] TRICIA D. OLSEN, LEIGH A. PAYNE, & ANDREW G. REITER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010); Guidance Note of the Secretary-General, *United Nations Approach to Transitional Justice*, March 2010, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; Pablo de Greiff, *Theorizing Transitional Justice*, *in* NOMOS LI: TRANSITIONAL JUSTICE 31 (Melissa S. Williams, Rosemary Nagy, & Jon Elster eds. 2012); Murphy, *supra* note __, chapter 4.

[261] On the risks of transitional justice see de Greiff, *supra* note __. On transformative reparations see Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J.

source of such risks is the history of dealing with wrongdoing in such contexts. The typical experience of victims of wrongdoing during periods of conflict and repression was of the absence of meaningful justice in the wake of being victimized. Thus, there is a challenge in transitions of doing justice where justice had not been done in dealing with wrongdoing before. Holism recognizes that the expressive function of any particular response (e.g., reparations or trials) will be affected by whatever else does or does not take place in dealing with past wrongs. That is, whether reparations or compensation expresses recognition of the victim as a rights bearer and equal member of the community or expresses an effort to buy victim's silence will be impacted by whether reparations occur as a one-off discrete effort for dealing with wrongdoing or are part of a broader effort to deal with past wrongs and pursue institutional reform. The risk of reparations being experienced as an offer to buy silence increases when they are offered in isolation.

Another reason to pursue transitional justice holistically stems from the limits of any particular kind of response to wrongdoing. Reparations, criminal trials, truth commissions, memorials or direct efforts at institutional reform each have the capacity to deal with some, but not all, of the claims of victims, demands on perpetrators, and broader transformation of relationships needed. Criminal trials hold perpetrators accountable, but do not deal with the losses of victims and victims play an instrumental role. Reparations compensate victims for harms experienced, but in many cases do not directly involve perpetrators or hold them to account. Truth commissions document and uncover the truth about patterns of abuse, but do not compensate for losses resulting from such abuse.

There is an important dimension of transitional justice that facilitates holistic approaches to dealing with past wrongs. This is the fact that transitional justice efforts are characteristically established by the state. While local and informal processes may also take place, they do so against a background of state efforts to deal with past wrongs. Thus, a main challenge is ensuring governments pursuing transitional justice recognize the importance of developing an approach to transitional justice that incorporates different kinds of responses. This dimension is disanalogous with the current structure of the #MeToo movement, which is informal and without an organizing structure. This diffuse set of efforts to deal with widespread sexual abuse, assault and harassment in the workplace is challenging to coordinate for a number of reasons. Knowledge about what efforts are under way requires paying attention to media accounts, which in turn relies up on the comprehensiveness and accuracy of what the media covers. Institutional

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SOC.PHIL. 377 (2006).

reform efforts may be more effective in some domains than others, and where it will be effective depending on where the efforts of particular individuals and informal organizations are directed.

CONCLUSION

We are at the beginning of what may very well be a transitional moment in American workplaces and society at large. In thinking more particularly about how to design processes, alter laws, change social practices, and reform institutions, restorative and transitional justice remind us to do so with an emphasis on the needs of both victims and offenders as well as the larger community. We urge that as reformers move forward, they bear in mind the core principles and lessons of both restorative and transitional justice.

21st Annual Spring Conference

Section of Dispute Resolution

"Legal Educators Colloquiuum"

"A New #MeToo Result: Prohibiting Consent with Executives"

BY

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Michael Z. Green

ABSTRACT:

With the growth of the #MeToo movement since October 2017, more than 200 prominent male executives have lost their jobs. Some pushback has occurred as many of these executives have asserted their behavior was not inappropriate because their acts were consensual. Essentially, this argument requires companies assessing this behavior to find nothing wrong when executives use their vast power and influence to have romantic and sexual relationships with their subordinates who do not say "no."

Those suggesting that the #MeToo movement has gone too far believe it will result in unintended consequences where totally benign and even positive engagement between bosses and subordinates will be circumvented out of a fear of unfairly ending the careers of executives without any real culpability. Incidents of innocent flirting, harmless jokes, and even an initial overture seeking a romantic relationship could lead to total destruction of an otherwise productive executive's career as #MeToo responses have demanded zero tolerance and immediate resignation or termination from executive positions. Critics of the #MeToo movement argue that businesses have responded wrongly by preempting the loyal, happy, and productive relationships occurring in many workplaces where employees have engaged in successful romantic relationships with co-workers and eventually married.

To rebut the claims of disparagement aimed at #MeToo for stigmatizing alleged consenting relationships occurring in the workplace, this Article asserts that the enormous power differentials between corporate executives and their subordinates support a completely preventative measure of banning executives from engaging in consensually romantic as well as sexually offensive behavior with subordinates. With the power to impact not only the subordinate's immediate work situation, a truly influential executive also has the potential to affect the subordinate's entire career in a negative way. Because of these power differentials, a subordinate can never truly know that a response of "no" consent will be received in a positive manner by the executive as "no means no."

Subordinates will always likely fear retaliation for refusing the executive. Even if they acquiesce and begrudgingly or enthusiastically accept the executive's overture, the subordinate faces being viewed as not obtaining any career advancements based on merit. Also, this type of executive behavior sends a broader and overall negative message to all subordinates that the way to advance in the organization will not be based upon merit but through acceding to romantic and sexual overtures.

Retaliation claims and other forms of corporate liability present concerns for the employer even if the underlying conduct by the executive was insufficient to warrant liability for harassment. Corporations should not face this liability risk even if some executives and subordinates might act responsibly and develop positive romantic relationships resulting in productive outcomes for the business. This Article seeks support for subordinates given strong concerns about retaliation through power differentials.

The Article also tackles the issue of consent by proposing that employers require that executives can never assert consent or rely on a failure to say "no" in defense of objections to their romantic overtures. An executive may still attempt to engage in flirting and joking and even pursue romantic relationships, but consent with a subordinate would never be a justifiable defense for this behavior, if challenged. Potential liability and the need to protect against diminishing corporate value for this inappropriate executive behavior in this time of #MeToo provides cause for this response.

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INTRODUCTION: #METOO AND THE GROWING DEBATE ON LEGAL CONSENT

> I recognize…there were times decades ago when I may have made some women uncomfortable by making advance…Those were mistakes, and I regret them immensely. But I always understood and respected—and abided by the principle—that 'no' means 'no,' and I…never misused my position to harm or hinder anyone's career.[1]

--Lesley Roy Moonves

> I certainly understand people who have the viewpoint that any consensual relationship in the workplace is wrong…But there are also other points of view on this. Let me be clear: I own my company….In our employee handbook, while we do not encourage office relationships, we do not forbid them, either. And we don't forbid them because I don't know where your heart is going to lead you. I don't know who you're going to hang out with, or date, or fall in love with. '(There may be)' millions of Americans watching right now who met their spouse at work.[2]

--Tavis Smiley

[1] Ronan Farrow, *As Leslie Moonves Negotiates His Exit From CBS, Six Women Raise New Assault and Harassment Claims*, NEW YORKER, Sep. 9, 2018, https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims (describing allegations against the CBS chief executive by dozens of women that he forced them to give him oral sex, that he exposed himself to these women, and that he used physical violence and intimidation to sexually harass them all without their consent despite his claims acknowledging that he engaged in the sexual acts with three of the women while asserting it was all consensual).

[2] Maeve McDermott, *PBS says 'Tavis Smiley needs to get his story straight' after 'GMA' interview*, USA TODAY, Dec. 18, 2017, https://www.usatoday.com/story/life/people/2017/12/18/tavis-smiley-hits-back-against-misconduct-allegations-im-not-angry-black-man/960332001/ (describing responses by PBS television host Tavis Smiley acknowledging in ABC Good Morning America interview that he had sexual relationships with women who reported to him but they were all consensual).

The #MeToo movement[3] has led to public exposure of a tremendous number of events involving inappropriate sexual and romantic overtures by high profile and extremely powerful persons in virtually all parts of our society.[4] An ongoing question has started to arise from these events: what does consent to a romantic relationship mean today with evolving notions inspired by the overwhelming avalanche of misdeeds being identified through the #MeToo movement?[5] A recent study of men in Britain demonstrated "alarming views about consent and what constitutes rape and sexual violence" when a third of the men believed that "'if a woman has flirted on a date it 'generally wouldn't count as rape' even if she didn't explicitly consent to sex."[6]

Also, several companies have developed an app that they claim can remove the murkiness regarding what represents consent before a sexual encounter.[7] These apps require the parties verify consent through technology before proceeding with any sexual activity.[8] The cold formality of such an arrangement before any sexual activity occurs appears problematic. Further, even taking a selfie as a couple when you digitally sign the app agreement does not address how consent can change at various points along the overall sexual encounter.[9] Unfortunately for those thinking that these apps can provide clarity and protection from assault claims, one developer of a consent app, Michael Lissack, explained: "Consent must be continuous, and short of a chip that can read someone else's mind, we have no way

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[3] *See me too* https://metoomvmt.org; *see also* Christian A. Johnson & KT Hawbaker, *"MeToo": A Timeline of Events*, CHI. TRIB., Feb. 22, 2019, https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html (cataloguing events from the beginning in 2006 when the phrase "me too" was coined by sexual assault survivor, Tarana Burke, to how those words were recast in 2017 as part of an overall groundswell and hashtag movement in response to the public announcement of allegations of sexual assault and misdeeds by movie and entertainment mogul, Harvey Weinstein, to dozens of men and people in power losing their positions as allegations of sexual misconduct came forward, to the current day activities through February 2019 including allegations regarding singer, R. Kelly); *see also #MeToo today: How the movement has evolved since the initial Weinstein allegations*, CHI. TRIB., Dec. 4, 2018, https://www.chicagotribune.com/lifestyles/ct-metoo-20171218-story.html (referring to how "#MeToo paved the way for #TimesUp, a legal defense fund and anti-sexual harassment initiative backed by prominent women in the entertainment industry" and how "[t]he second annual Women's March on Jan. 20 [2018] brought out millions of people across the country").

[4] *See* Sarah Almukhtar, Michael Gold, and Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES, Feb. 8, 2018, https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html.

[5] *See* Nancy Leong, *Them Too*, WASHINGTON U. L. REV. 1, 5 (forthcoming 2019) (describing how the "#MeToo movement has focused on consent").

[6] Rachel Thompson, *Even after #MeToo, research reveals 'alarming' attitudes to consent and sexual assault*, MASHABLE, Dec. 6, 2018, https://mashable.com/article/research-attitudes-what-constitutes-rape/#GD3w5ZGGJqqT, citing END VIOLENCE AGAINST WOMEN, ATTITUDES TO SEXUAL CONSENT, RESEARCH FOR THE END VIOLENCE AGAINST WOMEN COALITION by YouGov, Dec. 2019, https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf.

[7] *See* Edward C. Baig, *Does 'yes' mean 'yes?' Can you give consent to have sex to an app?* USA TODAY, Sep. 26, 2018, https://www.usatoday.com/story/tech/columnist/baig/2018/09/26/proof-yes-means-yes-sexual-consent-apps-let-users-agree-have-sex/1420208002/.

[8] *Id.*

[9] *Id.*

to use technology other than on a moment-by-moment basis."[10]

As a result of many struggles faced by colleges and universities in addressing sexual misconduct on their campuses,[11] Professor Donna Freitas, author of "Consent on Campus: A Manifesto," has also attempted to amplify the division among the sexes in understanding the meaning of consent.[12] A "2015 study by the Association of American Universities reports that among undergraduate students, 23 percent of females and 5 percent of males experience rape or sexual assault through physical force, violence, or incapacitation."[13] Because of these increasing anxieties about sexual assault on campus, "colleges and some states have adopted affirmative consent policies (requiring a clear, unequivocal yes) for sexual conduct, and college freshman are receiving more education about defining consent."[14]

However, some states worried about the problems of consent have pursued legislation seeking to make sure that they teach students what consent means before getting to college by requiring a discussion of the subject in K-12 public school sex education classes.[15] In the midst of questions being raised during the September 2018 Senate confirmation hearings of United States Supreme Court

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[10] *Id.*

[11] *See* John Bowden, *Colleges, universities seeing rise in sexual assault claims, lawsuits,* THE HILL, Sep. 22, 2018 (describing an increase in sexual assault cases and lawsuits leading a number of universities to outsource investigations and hearings). Several high profile university cases involving allegations of sexual misconduct and assault of students have arisen in the last few years. *See, e.g.,* Mac Engel, *Michigan State is the new Baylor representing a broken system*, STAR-TELEGRAM, Jan. 29, 2018, https://www.star-telegram.com/sports/spt-columns-blogs/mac-engel/article197296864. (describing student sexual assault scandals at Michigan State, Baylor, and Penn State universities); Rachel DeSantis, *Students say Dartmouth ignored professors' sexual harassment in lawsuit that alleges 'hot tub parties,' cocaine in class*, NY DAILY NEWS, Nov. 15, 2018 https://www.nydailynews.com/news/national/ny-news-dartmouth-sexual-harassment-lawsuit-20181115-story.html (discussion of allegations of sexual harassment and assault of women students over 15 years by three Dartmouth university professors); Cady Drell, *Inside the USC Sexual Abuse Scandal: Three Women Tell Their Stories*, MARIE CLAIRE, Oct. 26, 2018, https://www.marieclaire.com/politics/a24226946/usc-sexual-abuse-scandal-accusers-stories/ (describing sexual assault scandal regarding campus gynecologist at University of Southern California); Lydia O'Connor & Tyler Kingkade, *If You Don't Get Why Campus Rape is A National Problem, Read This*, HUFFPOST: THE BLOG, June 24, 2016, https://www.huffingtonpost.com/entry/sexual-assault-explainer_us_5759aa2fe4b0ced23ca74f12 (discussion of several university student sexual assault cases including those at Stanford, Vanderbilt, and Baylor)..

[12] *See* Darcel Rockett, '*Eye-opening, disgusting': Professor, harassment victim talks sexual assault and campus life after Kavanaugh*, CHI. TRIB., Oct 14, 2018 https://www.chicagotribune.com/lifestyles/ct-life-consent-on-campus-donna-freitas-20181014-story.html (describing misunderstandings about consent in sexual encounters with college students in our "hookup culture").

[13] *See L*aura Varias, *Saying Yes to Consent Education*, ACSD Education Update Newsletter, Feb. 2017, http://www.ascd.org/publications/newsletters/education-update/feb17/vol59/num02/Saying-Yes-to-Consent-Education.aspx

[14] *Id.*

[15] *See* Amelia Harper, *#MeToo influencing schools to teach consent in sex ed*, EDUC. DIVE, Oct. 2, 2018, https://www.educationdive.com/news/metoo-influencing-schools-to-teach-consent-in-sex-ed/538512/; *see also* Precious Fondren, *In the MeToo era Should Minn. schools be teaching consent?* AUSTIN DAILY HERALD, Nov. 14, 2018, https://www.austindailyherald.com/2018/11/in-the-metoo-era-should-minn-schools-be-teaching-consent/ (describing a failed attempt in Minnesota to require K-12 schools teach consent in sexual education classes as a means to address how problems with sexual assault on university campuses suggested that an effort to reach out to students to understand consent should occur before they get to college).

Justice Brett Kavanaugh about his alleged non-consensual sexual behavior while in high school,[16] the National Public Radio (NPR) "All Things Considered" program debated the issue of the need to teach consent in K-12 sexual education classes.[17] This NPR program also discussed specifically a bill pending in Maryland (ironically the home state of Kavanaugh) requiring the teaching of consent in sex education classes for K-12 students.[18] Despite an initial failed attempt when opposing forces claimed that teaching consent in the schools encouraged and endorsed the prospect of very young children engaging in inappropriate sexual behavior, the Maryland bill eventually passed. The new Maryland legislation included a provision requiring sexual education classes teach K-12 students that consent means "the unambiguous and voluntary agreement between all participants in each physical act within the course of interpersonal relationships."[19]

With concerns about defining sexual consent emerging in schools and on campuses, similar fears have also started to surface in workplace sexual harassment matters.[20] A number of the high-profile cases that came to light as a result of the #MeToo movement involved powerful executives asserting that their romantic overtures and intimate relationships with subordinates were consensual. The lead offender, movie mogul and executive, Harvey Weinstein, continues to claim that his sexual encounters with women in the movie industry were consensual despite facing criminal rape charges.[21] Two other key examples of executives claiming consent are revealed by the comments at the beginning of this

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[16] *See* Haley Sweetland Edwards, *How Christine Blasey-Ford's Testimony Changed America*, TIME, Oct. 4, 2018, (describing allegations by Christine Blasey-Ford of her sexual assault by Brett Kavanaugh in 1982 while both were in high school).

[17] *See* Anya Kametz, *Should We Teach About Consent In K-12? Brett Kavanaugh's Home State Says Yes*, NPR, Sep. 28, 2018, https://www.npr.org/2018/09/28/652203139/should-we-teach-about-consent-in-k-12-brett-kavanaughs-home-state-says-yes.

[18] *Id.*

[19] *See* Harper, *supra* note 15; *see also* Briana Crummy, *How a Teen Girl Got Sexual Consent Taught in Maryland Schools*, NBC, Dec. 8, 2018, https://www.nbcwashington.com/news/local/How-a-Teen-Girl-Got-Sexual-Consent-Taught-in-Maryland-Schools-501922711.html (describing various laws being passed to address consent in schools as sex education including Maryland's new law).

[20] Sexual harassment is about sexism, not sexual acts. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. FORUM 22, 33 (2018). As discussed in Part II, *infra*, workplace sexual harassment law does not focus on consent to sexual advances as in a sexual assault case but whether the advances were "unwelcome" even if voluntary. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); *see also* Martha Chamallas, *The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons*, 10 J. OF TORT LAW 1, 17 (2017) (finding "what is significant is the Court's move away from traditional consent in *Meritor Bank* and its attempt to devise a more protective standard that acknowledges the significance of power disparities between the initiator of sexual conduct and the target. In this respect, unwelcomeness can be looked upon as a more robust version of consent, one which refuses to find consent in instances in which the plaintiff submits or accedes to undesired sex out of concern for retaining her job). .. Even this "unwelcome" requirement gets subsumed by the overall requirement that a hostile environment requires both an objective component (that a reasonable person would find hostile or abusive) and a subjective component (where employee subjectively perceives environment to be abusive). *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

[21] *See* Corinne Ramey, *Harvey Weinstein's Lawyers Say Emails Show Consensual Relationship, Not Rape*, WSJ, Aug. 8, 2018, https://www.wsj.com/articles/harvey-weinsteins-lawyers-say-emails-show-consensual-relationship-not-rape-

Article made by Moonves, former Chairman of the Board, President, and Chief Executive Officer of CBS Corporation and former PBS Entertainment host and CEO of his own production company, TS Media Inc., Smiley. There were also many other executives asserting their sexual interactions with subordinates were consensual when those encounters came to light as part of the #MeToo movement.

This Article proceeds as follows. Part I discusses the abhorrent nature of the abuse of power by some influential executives identified publicly for their sexual misconduct with subordinates after the #MeToo movement helped to expose them. Part II conveys some of the backlash the #MeToo movement has faced about a rush to judgment against those charged and lack of fair mechanisms to defend against unfair charges by involving consenting adults to pursue romantic relationships in the workplace. Part III highlights the pervasive fears about retaliation that deter subordinates from reporting harassment claims especially when powerful executives can destroy careers of those who rejected any romantic or sexual advances. Part IV proposes the thesis that employers have cause to adopt policies prohibiting executives from asserting consent to justify their romantic or sexual encounters with subordinates. In these proposed policies, an executive may never defend any acts of a sexual or romantic nature by asserting the subordinate never said "no." Further, when a subordinate did say "no," the executive could not defend the overtures by saying "no" was accepted without retaliation.

1533322331 (describing Weinstein's lawyer arguing that e-mails with accuser suggested a consensual sexual relationship).

I. #MeToo and the Vile Use of Power-Differential By Executive Harassers

The current iteration[22] of the #MeToo movement spiraled as a result of an October 2017 report in the New York Times[23] and an overall exposé published in the New Yorker magazine.[24] Those documents identified a multitude of women who came forward with allegations of sexual abuse by Weinstein. According to those documents, Weinstein preyed on vulnerable young women seeking to interact with him about employment opportunities with Weinstein's movie studio.[25]

Many of the allegations against Weinstein involved a similar pattern. Women came to meet with Weinstein as a movie studio executive to discuss potential placement in positions within some of his films. These encounters represented "a pattern of professional meetings that were little more than thin pretexts for sexual advances on young actresses and models."[26] Either directly or through his assistants, Weinstein repeatedly steered these women into meeting him in private settings where the women were left alone with him.[27] After he propositioned the women through aggressive overtures, he then attempted to engage in or did engage in sexual activity with the women or in front of the women. Given the powerful role Weinstein played in the movie industry, these women had little chance to

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[22] *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES, Oct. 20, 2017, https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/GD7A-UC99] (describing how a black woman, Tarana Burke, had coined the term, "Me Too," out of concern for women who had experienced sexual abuse more than a decade before the hashtag movement under the same term expanded those concerns); Morgan Greene, *#MeToo's Tarana Burke tells local activists movement "by us and for us' must include women of color*, CHI TRIB., Oct. 11, 2018, https://www.chicagotribune.com/news/local/breaking/ct-met-tarana-burke-me-too-20181010-story.html (describing Tarana Burke's involvement in starting the #MeToo movement and referring to the fall of several powerful men for their misconduct while criticizing some aspects of the movement for not focusing on all those being subjected to sexual violence and harassment and not just white females); *see also* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. FORUM 105, 106(2018) (discussing how Burke originated the term, "me too," and referring to how many women of color complained immediately when the hashtag movement started because Burke's actions in creating the movement more than a decade earlier had not been acknowledged). Burke has also asserted that the #MeToo movement is not just about vindicating claims of white women but all vulnerable persons regardless of race or sex including girls and boys who have been subjected to sexual assault or harassment. Patrick Greenfield, *#MeToo has been misrepresented as plot against men, says founder,* THE GUARDIAN, Nov. 30, 2018, *https://www.theguardian.com/world/2018/nov/30/metoo-has-been-misrepresented-as-plot-against-men-says-founder*.

[23] *See* Jodi Kantor and Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades,* NY TIMES, Oct. 5, 2017, https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/5LSZ-3SUC].

[24] *See* Ronan Farrow, F*rom Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Story*, NEW YORKER, Oct. 23, 2017, https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/HHY8-4Q59].

[25] Kantor and Twohey, *supra* note 23; Farrow, *supra* note 24.

[26] Farrow, *supra* note 24.

[27] *Id.*

respond to him via consent without a tremendous amount of coercion related to fears about their entire acting careers.[28]

As scores of women in the entertainment industry began making allegations about Weinstein's sexually abusive behavior, actress Alyssa Milano sought to highlight the significance of such inappropriate behavior toward women.[29] In an October 18, 2017 communication made on social media via Twitter, Milano invited other women who had been sexually harassed or assaulted to respond by writing "me too" in corresponding tweets as a method to capture the severity of the problem.[30] There is no doubt at this stage that Milano's tweet prompted the growth of an expansive movement now referred to as #MeToo.[31]

Within six months after the Weinstein allegations, concerns about sexual misdeeds by executives had spiked to the point that more than 70 powerful men had been accused of sexual misconduct and lost their powerful places in their industries.[32] The #MeToo movement has inspired throngs of women to come forward from their past silence to expose the loathsome actions of sexual assault and harassment in the workplace by many powerful in addition to Weinstein.[33] A year after the #MeToo movement began, more than 200 powerful men have lost their jobs and brought an awareness of sexual mistreatment of women to the forefront of our society.[34] Some stories demonstrate how powerful men in key executive roles with their companies used their advantageous positions to target vulnerable subordinates who knew their careers were in jeopardy regardless of how they responded. This outing of executives by the #MeToo movement demonstrated a need greater institutional accountability for the conduct of those at the top of the workplace hierarchy.[35]

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[28] *Id.*; *see also* Jane Harris Aiken, *Intimate Violence and the Problem of Consent*, 48 S.C. L. REV. 615, 637 (1997) (discussing how coercion based upon power differentials affects any analysis of meaningful consent).

[29] Garcia, *supra* note 22.

[30] https://twitter.com/alyssa_milano/status/919659438700670976; *see also* Garcia, *supra* note 21 (discussing Milano's tweet leading to a massive social media response).

[31] Garcia, *supra* note 22; *see also* Edward Felsenthal, *The Choice: Time's Editor-in-Chief on Why the Silence-Breakers are the Person of the Year*, TIME, Dec. 18, 2017, http://time.com/time-person-of-the-year-2017-silence-breakers-choice/ [https://perma.cc/4SM4-P5VG] (identifying the importance of the #MeToo movement and how it has moved concerns about mistreatment of women out into the open and with the help of dedicated journalists).

[32] *See* Sarah Almukhtar, Michael Gold, and Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES, Feb. 8, 2018, https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html.

[33] *See* Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements are Women*, NY TIMES, Oct. 29, 2018, https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html

[34] *Id.*; *see also 263 celebrities, politicians, CEOs, and others who have been accused of sexual misconduct since April 2017*, VOX, Jan. 9, 2-19, https://www.vox.com/a/sexual-harassment-assault-allegations-list/ (chronicling sexual harassment misconduct in categories of arts & entertainment, media, business & tech, politics, and other since Fox news host Bill O'Reilly was forced to resign in April 2017 as that departure set the stage for reports against Weinstein).

[35] Rachel Arnow-Richman, *Of Power and Process: Handling Harassers In An At-Will World*, 128 YALE L.J. FORUM 85, 87 (2018) (discussing how companies wrongly tolerate harassment by top-level employees while aggressively policing

For example, Matt Lauer was a highly paid and popular anchor for NBC's network television morning show, Today.[36] Lauer was terminated after a production assistant stated that she had a "consensual" relationship with Lauer while still feeling that Lauer used his extreme power differential to overwhelm her.[37] She agreed that her encounter was not a "crime" but it was Lauer taking "advantage of his power" over her.[38] In fact, she said she "felt like a victim because of the power dynamic" as Lauer pursued "the most vulnerable and the least powerful—and those were the production assistants and the interns."[39] At the time, the production assistant felt "the most powerful man at NBC news is taking interest" in her.[40] At the time of his termination, there were also a number of other allegations by other women about misconduct by Lauer while at NBC.[41]

As one NBC producer explained about Lauer's behavior: "There were a lot of consensual relationships, but that's still a problem because of the power he held. . . .He couldn't sleep around town with celebrities or on the road with random people, because he's Matt Lauer and he's married. So he'd have to do it within his stable, where he exerted power, and he knew people wouldn't ever complain."[42] While no one was suggesting that the acts of Lauer with a production assistant represented the criminal activity of sexual assault in acting without consent, it was also pretty clear that Lauer "should not have engaged[43]" in an intimate relationship with a production assistant given the existence of extreme power differentials.[44]

Billionaire casino mogul, Steve Wynn, represented another key example of an executive whose sexual misconduct was revealed as a result of the #MeToo movement.[45] As coverage of Steve Wynn's pattern of sexually harassing employees became clear, the high pay at Wynn casinos relative to alternative jobs in Las Vegas no longer served to reduce turnover and attract employees despite

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rand and file workers).

[36] *See* Rehmin Setoodeh, *Inside Matt Lauer's Secret Relationship With a 'Today' Production Assistant*, VARIETY, Dec. 14, 2017, https://variety.com/2017/tv/news/matt-lauer-today-secret-relationship-production-assistant-1202641040/ .

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See* Maggie Mallon, *Matt Lauer Once Gave a Female Coworker a Sex Toy as a Gift, According to Bombshell Report*, GLAMOUR, Nov. 29, 2017, https://www.glamour.com/story/matt-lauer-gave-female-coworker-sex-toy-as-gift-variety-report.

[42] *Id*.

[43] Setoodeh, *supra* note 36.

[44] *See* Emily Strohm & Natalie Stone, *Matt Lauer's 'Power Differential' Meant Workplace Affairs Could Not Be Consensual, Expert Says*, PEOPLE, Dec. 15, 2017, https://people.com/tv/hr-expert-explains-matt-lauer-consent/.

[45] *See* Alexandra Berzon, Chris Kirkham, Elizabeth Bernstein, and Kate O'Keeffe et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL ST. J., Jan. 27, 2018, https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953.

widespread risk of sexual harassment. [46] Instead, the disclosure of Wynn's behavior toward several employees led to a culture where there was "acquiescence" [47] without consent until a #MeToo response led to significant financial harm to the company.[48] Wynn resorts stock dropped 40 percent of its value after Wynn stepped down as chief executive officer in the midst of multiple allegations of sexual misconduct. [49]

In another example identified in a quote at the beginning of this Article,[50] former CBS corporation chairman of the board and chief executive officer, Moonves, was charged initially with sexual misconduct by six women in a report published in the New Yorker by Ronan Farrow.[51] Moonves admitted he "had consensual relations with three of the women [charging him with misconduct] some 25 years ago before [coming] to CBS."[52] Moonves also said that he "always understood and respected—and abided by the principle—that 'no' means 'no'."[53] However, beyond the six women in the initial report, Moonves admitted that he" tried to kiss" a female physician along with other various efforts at trying to kiss women without their consent.[54]

Reports also included a number of allegations of retaliation against women who rebuffed Moonves resulted in private financial settlement agreements including non-disclosure clauses preventing the women involved from discussing what happened.[55] Writer, Janet Jones, expressed her fear of retaliation after she rebuffed Moonves' sexual overtures: "The revenge behavior, the 'I'll get you for

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[46] *Id.*; *see also* Kirsten Korosec, *Wynn Resorts Stock Dives After Founder is Accused of Decades-Long sexual Misconduct*, FORTUNE, http://fortune.com/2018/01/26/wynn-resorts-stock-dives-after-founder-is-accused-of-decades-long-sexual-misconduct/ (referring to more than "150 people who recounted abuse by Wynn").

[47] *See* Arthur Kane and Rachel Crosby, *Las Vegas Court Filing: Wynn wanted sex with waitress 'to see how it feels to be with a grandmother*, LAS VEGAS REV. J., Feb. 5, 2018, https://www.reviewjournal.com/news/las-vegas-court-filing-wynn-wanted-sex-with-waitress-to-see-how-it-feels-to-be-with-a-grandmother/ (describing an alleged pattern of Wynn pressuring female employees into having sex and even with one female just because he wanted to sleep with a grandmother and how many of these women agreed to do it to keep their jobs).

[48] *See* Steve Friess, *Long vs. Short: Can Wynn Casinos Recover From Steve Wynn's #MeToo Scandal?* INTELLIGENCER, Jan. 4, 2019, http://nymag.com/intelligencer/2019/01/can-wynn-casinos-recover-from-steve-wynns-metoo-scandal.html.

[49] *Id.; see also* Lucinda Shen, *Wynn Resort Loses $3.5 Billion After Sexual harassment Allegations Surface About Steve Wynn*, FORTUNE, Jan. 29, 2018, http://fortune.com/2018/01/29/steve-wynn-stock-net-worth-sexual-misconduct/ (describing major financial blows endured as a result of #Metoo misconduct of Steve Wynn coming forward)..

[50] Farrow, *supra* note 1.

[51] Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, Aug. 6, 2018, https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct.

[52] *See* William D. Cohan, *Les Moonves Admits to Unwanted Kissing of his Doctor 19 Years Ago*, VANITY FAIR, Sept. 9, 2018, https://www.vanityfair.com/news/2018/09/les-moonves-admits-to-unwanted-kissing-of-his-doctor-19-years-ago (describing Moonves acknowledgement of some of the behavior he is charged with but asserting it was consensual and agreeing he "tried to kiss" a female doctor attending to him and had "deep regret" about it but "[n]othing more happened").

[53] *See* Farrow, *supra* note 51.

[54] Cohan, *supra* note 52.

[55] Farrow, *supra* note 51; Farrow, *supra* note 1.

not kissing me, I'll get you for not doing what the hell I want you to do'—it never quite leaves you."[56]

In an additional example, also referred to in a quote at the beginning of this Article,[57] former PBS entertainment show host, Smiley, as the owner of his production company, was charged with "multiple, credible allegations" of sexual relationships with several subordinates.[58] Even though his multiple relationships with subordinates may have caused them to fear their jobs would be in jeopardy if they did not comply,[59] Smiley argued these past romantic encounters with women subordinates at his own company were always consensual: "If having a consensual relationship with a colleague years ago is the stuff that leads to this kind of public humiliation and personal destruction, heaven help us. . . "[60] Further, Smiley asserted that he believed in women telling the truth that would "lead us to create healthy workspaces" but warned that we must "make sure we don't lose all proportionality in this because if we do, people end up guilty by accusation."[61]

Whether allegedly consensual or not, when extremely powerful executives like Weinstein, Lauer, Moonves, and Smiley use their positions of influence to coerce vulnerable female subordinates into sexual encounters, their actions suggest a level or repugnancy that the #MeToo movement has helped to uncover. By shining a light on these abominable executive actions, the #MeToo movement has also demanded a level of corporate responsibility by forcing companies to take immediate action in rejecting this vile form of executive misconduct. As a result, companies now must explore the appropriate responses to this form of misbehavior by executives while also navigating the backlash towards the #MeToo movement under the guise of merely seeking and engaging in consenting relationships in the workplace.

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[56] Farrow, *supra* note 51. Fear of retaliation is a major reason why women don't report harassment. *See* Margaret Gardiner, *Why Women Don't Report Sexual Harassment*, HUFFPOST: THE BLOG (July 22, 2017), http://www.huffingtonpost.com/Margaret-gardiner/why-women-don't-report-sex_b_11112996.html [https://perma.cc/5L9U-6CLH] (describing the calculation that women are forced to make by staying silent and not reporting harassment in a trade that allows them to keep their jobs instead of facing retaliation especially when the harasser is a very successful person in a position of high power and even if leaving may still need that person as a reference); *see also* Deborah Brake, *Retaliation*, 90 MINN. L. REV. 18, 36-37 (2005) (describing how the choice to not report harassment involves a cost-benefit assessment looking at the overall culture's ability to deter retaliation).

[57] McDermott, *supra* note 2.

[58] Daniel Holloway, *PBS Suspends "Tavis Smiley' Following Sexual Misconduct Investigation (Exclusive),* VARIETY, Dec. 13, 2017, https://variety.com/2017/tv/news/tavis-smiley-pbs-1202639424/.

[59] *See* Cynthia Littleton, T*avis Smiley: "PBS Made a Huge Mistake Here and They Need to Fix it*, VARIETY, Dec. 18, 2017, https://variety.com/2017/tv/news/tavis-smiley-pbs-sexual-harassment-allegations-good-morning-america-1202643616/.

[60] *See* Meena Jang, *PBS Suspends Tavis Smiley Show Amid Sexual Misconduct Claims*, HOLLYWOOD REPORT., Dec. 13, 2017, https://www.hollywoodreporter.com/news/pbs-suspends-tavis-smiley-show-sexual-misconduct-claims-1067489.

[61] *See* Jessica Vacco-Bolanos, *Tavis Smiley Defends Himself After Show is Suspended: "PBS Made a Huge Mistake'*, US MAG., Dec. 18, 2017, https://www.usmagazine.com/celebrity-news/news/tavis-smiley-defends-himself-after-sexual-misconduct-allegations/.

II. #MeToo Backlash and Claims of Uncertainty About Workplace Consent

A. Increasing "Unwelcome" Sexual Harassment Claims as a Result of #MeToo

In Title VII of the Civil Rights Act of 1964,[62] Congress banned discrimination in the workplace because of sex. The Supreme Court confirmed in 1986 that "sexual harassment" constituted discrimination because of sex under Title VII.[63] With respect to sexual harassment claims, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, explained in November 2018 that "[h]its on. . .[its] harassment webpage doubled since the start of the #MeToo movement one year ago."[64] Heightened awareness about sexual harassment has led to the result of more than a 50% increase in the EEOC filing of suits charging sexual harassment and the finding of reasonable cause to believe that discrimination had occurred in 20% more charges in 2018 than in 2017.[65]

Still only about 1 in 4 women feel comfortable coming forward with a complaint of sexual harassment in the workplace.[66] A significant percentage of the women who faced sexual harassment but had not reported it have derived a huge benefit from the #MeToo movement and its encouragement of them to come forward and no longer suffer in silence.[67] However, it is important that these women also file formal complaints with their employers rather than coming forward about it just to their friends and family or via social media.[68]

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[62] Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

[63] *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[64] *See EEOC Convenes Public Meeting on Steps to Transform Workplace Culture to Prevent Harassment*, PRESS RELEASE, Oct. 18, 2018, at https://www.eeoc.gov/eeoc/newsroom/release/10-18-18a.cfm; *see also* Eric Bachman, *In Response to #MeToo, EEOC is Filing More Sexual Harassment Lawsuits and Winning*, FORBES, Oct. 5, 2018, https://www.forbes.com/sites/ericbachman/2018/10/05/how-has-the-eeoc-responded-to-the-metoo-movement/; Jena McGregor, *The #MeToo Effect: Sexual Harassment Charges with the EEOC Rose for the first time in years*, WASH. POST, Oct. 5, 2018, https://www.washingtonpost.com/business/2018/10/05/metoo-effect-sex-harassment-charges-with-eeoc-rose-first-time-years/.

[65] See Bachman, *supra* note 64; *see also* Kari Paul, *One year after Weinstein and #MeToo, sexual harassment financial settlements have soared*, MARKETWATCH, Oct. 7, 2018, https://www.marketwatch.com/story/one-year-after-weinstein-and-metoo-sexual-harassment-financial-settlements-have-soared-2018-10-05; Gene Marks, *EEOC complaints for sexual harassment are booming thanks to Harvey Weinstein and other factors*, THE INQUIRER, Nov. 27, 2018 http://www.philly.com/philly/business/eeoc-sexual-harassment-harvey-weinstein-metoo-20181127.html.

[66] *See* Margaret E. Johnson, THE CONVERSATION, June 5, 2018, https://theconversation.com/only-1-in-4-women-who-have-been-sexually-harassed-tell-their-employers-heres-why-theyre-afraid-97436 (citing Equal Employment Opportunity Commission Task Force survey of employees); *see also EEOC Select Task Force on the Study of Harassment in the Workplace Report of Co-Chairs Chai Feldblum & Victoria Lipnic*, June 2016, at n15 https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686302 (describing survey of employees that "one in four women (25%)" reported experiencing "sexual harassment" in the workplace and up to "50% of women" when not randomly sampled).

[67] Johnson, *supra* note 66 (describing how #MeToo is providing an "effective forum that employees do not believe they have in their workplace" to come forward).

[68] *Id*. ("if employees who have been sexually harassed don't file formal complaints with their companies – without

Furthermore, 75% of those employees who do file formal complaints face some form of retaliation by their employers.[69] In weighing this balance of harm (potential blackballing), subordinates may choose to respond in ways that limit the potential for negative responses from the executive without really consenting. Those limited responses could lead the executive to believe that the subordinate has or wants to consent. What about the subordinate who does capitulate to the executive's advances and engages in sexual encounters? In the landmark decision, *Meritor Savings v. Vinson*,[70] the plaintiff admittedly had multiple sexual encounters with her supervisor, bank vice president executive. "At first she refused, but out of what she described as a fear of losing her job she eventually agreed."[71]

Despite agreeing that she had "intercourse with her boss some 40 or 50 times," Vinson complained of sexual harassment.[72] The Court distinguished acts of volition versus unwelcome acts. Especially given the power imbalance at issue.[73] It is that power differential that makes it easier to understand the subordinate's silent acquiescence despite not welcoming the sexual encounter.[74] While acknowledging this difference, we still see high-profile and extremely powerful executives such as Moonves while at CBS and Smiley while at PBS asserting that any relationships or overtures with subordinates involved consensual activity.

After *Meritor*, employees attempted to couch their claims involving a supervisor as a quid pro quo action where a supervisor made sexual and romantic favors a condition of the subordinate's employment because these acts suggested vicarious employer liability.[75] For acts involving a

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suffering retaliation – it is nearly impossible for employers to take action against the harasser or protect the worker").

[69] *EEOC Select Task Force, supra* note 66, at n.65 (citing Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003)). https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref65; *see also* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. FORUM 121, 125 (2018) (describing EEOC report). A recent study of 387 low wage employees found that 43% of workers reported experiencing employer retaliation as a result of their most recent claim about a justiciable workplace problem in the twelve months before the survey." Charlotte Alexander, *#MeToo and the Litigation Funnel*, 23 EMPLOY. RTS. EMPL L. REV. at 5 n.27 (citing Charlotte S. Alexander & Arthi Prasad, Bottom-Up Workplace Law Enforcement, 89 Ind. L.J. 1069, 1073 (2014)).

[70] *See* Meritor, 477 U.S. 57 (1986).

[71] *Id*. at 60.

[72] *Id.*

[73] "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." Id. at 68.

[74] *See* Kenneth Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057, 1086 (2018) (finding that the Supreme Court's approach to banning unwelcome activity even if it is volitional in *Meritor* makes sense because "the power imbalance between the harasser and the victim may account for the victim's silence and acquiescence" to the sexual behavior); *see also* Noa Ben-Asher, *How is Sexual Harassment Discriminatory*? 94 NOTRE DAME L. REV. ONLINE 25, 26 (2018) (referring to how power differentials make the activity unwelcome as it is common for subordinates to say yes to "be accepted, get promoted, or save [their] job").

[75] *See* Rebecca White, *Title VII and #MeToo*, 68 EMORY J. ONLINE 1, 11-12 (2018) (describing how after *Meritor*

supervisor that did not actually result in an exchange of sexual or romantic favors, a subordinate was relegated to the more challenging claim of establishing a hostile work environment requiring severe and pervasive actions affecting the terms and conditions of employment.[76] As a result, a supervisor could always defend his or her initial overtures that led to a no response as being neither quid pro quo nor hostile environment harassment from a single incident.[77]

The Supreme Court addressed the distinctions between employer liability for quid pro quo and hostile environment harassment by a supervisor in 1998. In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton,* the Supreme Court found that employers are vicariously liable for a supervisor's harassment of a subordinate after taking "a tangible employment action. . .such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[78] If no tangible employment action is taken, the employer may assert a two-part affirmative defense: 1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the alleged victim unreasonably failed to take advantage of preventive or corrective opportunities the employer provided.[79] This so-called *Faragher-Ellerth* affirmative defense focuses on making subordinates report the hostile environment harassment or face losing the claim if the employer establishes the elements. However, it is a short window for the employee to report because even "relatively minor delays in reporting" of even "as short as seven days" may be deemed unreasonable in support of an employer's *Faragher-Ellerth* affirmative defense.[80] However, it is more likely that a subordinate may preempt an employer's use of this defense and have liability imputed directly to the corporation when dealing with an executive harasser who has "'exceptional authority and control' within the organization."[81]

"lower courts had divided the universe of sexual harassment claims into two categories" with quid pro quo where the employer could be held vicariously liable and hostile environment where the employer could not be vicariously liable); *see also* Meritor, 477 U.S. at 72 (finding the issue of vicarious liability premature but suggesting that an employer may have no defense to a quid pro quo claim); Ben-Asher, *supra* note 74, at 25 n.5 (referring to both quid pro quo and hostile environment theories).

[76] White, *supra* note 75, at 7 n.30 (2018) (describing how difficult it is to meet the severe and pervasive requirement but suggesting that #MeToo may change that as it is making it more difficult for employers to tolerate perpetrators).

[77] *See* Davis, *supra* note 74, at 1080-84 (discussing cases identifying how courts read a single incident as insufficient to create a hostile environment even if there was an assault unless it possibly rose to the level of rape, being held captive, and hospitalization resulting from the attack).

[78] Ellerth, 524 U.S. 742, 753 (1998); Faragher, 524 U.S. 775, 807 (1998).

[79] *See* Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807-08.

[80] *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1605 (2018).

Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?

Jean R. Sternlight[1]

"The arc of the moral universe is long, but it bends towards justice."[2]

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[2] This quote is typically attributed to Dr. Martin Luther King, and he certainly did use the phrase. Mychal Denzel Smith, *The Truth About 'The Arc of the Moral Universe,'* HUFFINGTON POST (Jan. 18, 2018), https://www.huffingtonpost.com/entry/opinion-smith-obama-king_us_5a5903e0e4b04f3c55a252a4, *archived at* https://perma.cc/288W-PSVJ. But, it appears that a similar phrase was used much earlier by Theodore Parker, a nineteenth century abolitionist and Unitarian minister. *Theodore Parker and 'The Moral Universe,'* NATIONAL PUBLIC RADIO (Sept. 2, 2010), https://www.npr.org/templates/story/story.php?storyId=129609461, *archived at* https://perma.cc/4PQB-TBQ9.

INTRODUCTION

Today our employment law provides workers with far more protection than once existed with respect to hiring, firing, salary, and workplace conditions. For example, due to complex interactions between social movements,[3] lawmaking, and courts' legal interpretations, advances have been made to eradicate sexual harassment, and better protections are now afforded to religious, racial, and ethnic minorities; women; LGBTQ employees, as well as to older and disabled persons. One only needs to watch movies or television shows portraying society in the 1950s or 1960s to be reminded how much the working world has changed in a lifetime. In contrast to those shows, featuring white working dads and stay-at-home moms,[4] television shows today regularly feature female executives, stay-at-home dads, and diversity of many types.[5]

Despite these gains, continued progress[6] towards justice is currently in jeopardy due to companies' imposition of mandatory arbitration[7] on their

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[3] There is no single definition of "social movement." Tomiko Brown-Nagin defines "social movements" from a progressive political perspective as "politically insurgent and participatory campaigns for relief from socioeconomic crisis or the redistribution of social, political, and economic capital." Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1439 (2005) (citation omitted). However, Lani Guinier and Gerald Torres emphasize that social movements can derive from either the political right or left. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2751 (2014) (mentioning social movements pertaining to abolition, women's suffrage, property rights, and gun rights).

[4] For example, the television series "Mad Men" portrays life in the advertising world in the 1960s, when white men made the money, white women had babies and worked as secretaries, and minorities were largely invisible. *Mad Men* (AMC television series 2007–2015). Or, similarly, the television series "Good Girls Revolt" gives a glimpse into the news room of the 1960s, when men were reporters and women (girls) were research assistants. *Good Girls Revolt* (Amazon Video 2015–2016); *see also* LYNN POVICH, THE GOOD GIRLS REVOLT: HOW THE WOMEN OF NEWSWEEK SUED THEIR BOSSES AND CHANGED THE WORKPLACE (2012).

[5] *See, e.g.*, *Here and Now* (HBO Entertainment 2018) (featuring adopted siblings from Liberia, Colombia and Vietnam, gay and gender-fluid characters, a stay-at-home dad, and an executive mom); *Transparent* (Amazon Video 2014–2017) (starring a transgender parent); *Brooklyn Nine-Nine* (Universal Television 2013–2018) (featuring the struggles and triumphs of an openly gay Black police captain in an interracial same-sex marriage); *The Fosters* (Disney-ABC Domestic Television 2013–2018) (depicting the lives of a likable biracial lesbian couple with four adopted children).

[6] This author appreciates that she is making a value judgment when she calls these changes "progress," and "better," and she understands that some might disagree with her judgment. She is taking this perspective for granted rather than trying to convince readers that these advances are good. Of course, she is not so naïve as to believe that judicial interpretations and reinterpretations only advance rather than impede the cause of greater justice. *See infra* Part I. Indeed, the most recent Supreme Court appointment suggests that we may soon be moving backwards for a time in terms of progressive values at the federal level.

[7] "Mandatory arbitration" refers to employers' use of form contracts that contain provisions requiring employees to agree to arbitrate rather than litigate future disputes. By contrast,

employees.[8] By denying their employees access to court, companies are causing employment law to stultify. This impacts all employees, but particularly harms the most vulnerable and oppressed members of our society for whom legal evolution is most important.

In recent years, there has been much debate about the nature of the interplay between social movements, lawmaking, and legal interpretation. Discouraged by the many social and economic disparities that remain in the United States despite new legislation and important court decisions, some commentators argue that progressives should expend more energy on political organizing and social activism and less on litigation and lobbying.[9] Other scholars are more positive towards the potential impact of litigation, contending that there can be an important feedback relationship between social movements, judicial interpretations, and lawmaking that ultimately advances all three.[10] For example, while recognizing that it is not enough to rely on

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arbitration is sometimes entered into knowingly and voluntarily by higher level employees as well. *See infra* Part II.A. While voluntary arbitration can also lead to stultification of legal development, it is less troubling than its mandatory cousin because voluntary arbitration provisions allow employees to choose their desired dispute resolution process.

[8] This Article draws a sharp distinction between the "employment" setting, by which it means the non-unionized workplace, and the "labor" setting, where employees are assisted and represented by their union. While arbitration often works fairly in the labor setting, this Article critiques its mandatory imposition in the non-unionized employment setting. *See generally* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2702 (2008) (discussing and ultimately critiquing the traditional distinction between employment law and labor law).

[9] *See* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) (summarizing the work of Critical Legal Scholars and others who argue that progressives' frequent focus on legislative and judicial reforms, rather than other means of social action, has impeded rather than aided the cause of justice). This Law Review hosted an important conference on this issue twenty years ago. *See Symposium, Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285, 285–88 (1996). For an example of its content, see, for example Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 289 (1996), explaining that "[p]olitical lawyers use litigation, legislation, mass media, and social science research, assessing the consequences of each particular approach by reference to long-term visions of freedom, equality, and solidarity." *See also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 44–50 (1987) (expressing frustration regarding limited progress to achieve racial justice); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 341 (1991) (asserting, based on empirical research, that it is difficult to achieve meaningful social change through the courts); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW xvi (2015) (urging "an approach [that] includes law reform work but does not center it, and instead approaches law reform work with the caution urged by the critical traditions to which trans politics is indebted and of which it is a part"); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475–78 (2001) (suggesting that "a rule-enforcement approach" is not adequate to resolve modern employment discrimination).

[10] *See, e.g.*, Guinier & Torres, *supra* note 3, at 2749 (defining "demosprudence" as "the study of the dynamic equilibrium of power between lawmaking and social movements"); *see also* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009); Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008). Others have similarly cautioned against overreliance on an organizing model. *See, e.g.*, Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. REV. 443, 491 (analyzing poten-

lawyers to protect "discrete and insular minorities,"[11] Lani Guinier and Gerald Torres argue that "[l]itigation is an essential tactic for social movements."[12] William Eskridge, who has traced various "identity-based movements" throughout history, also recognizes that court decisions and social movements influence one another.[13] But Eskridge also urges that "the judiciary is a necessary safety valve,"[14] emphasizing the need for courts to accommodate both emerging social movements *and* countermovements to ensure the "preservation and adaption of a peaceable pluralism."[15]

Despite the significant divergences in their normative perspectives, all these commentators agree on two critically important points. First, while litigation may not be the only or best way to achieve progressive social change, it is an important means. Even if new laws are passed,[16] they do not enforce

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tial limits and tensions in relying too heavily on an organizing approach, and pointing out that "creative litigation and court-ordered remedies have changed many aspects of the social, political, and economic landscape").

[11] Guinier & Torres, *supra* note 3, at 2749 n.27 (quoting the famous phrase from United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (spelling out a proposed theory of judicial review that relies on protecting the rights of "discrete and insular minorities").

[12] Guinier & Torres, *supra* note 3, at 2756 n.49 (stating, however, that "litigators too often use state power in service of a principle rather than using principle in service of resistance to state power or other concentrations of power that undermine democracy"). Other scholars have made similar suggestions. *See, e.g.*, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 4–7 (2005) (describing intersections between litigation on behalf of immigrant workers and union organizing); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 376–405 (1976) (examining historical events leading up to the *Brown* decision); Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CAL. L. REV. CIR. 157, 157 (2015) (considering "the distinct ways in which the civil rights and social movements for marriage equality helped give rise to a durable socio-political transformation, as reflected in the widespread acceptance of the Court's decision" in Obergefell v. Hodges, 135 S. Ct. 2584 (2018)); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1541–44 (2004) (examining the impact of social movements pre- and post-*Brown* on the interpretation of that decision); Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 967–72 (1997) (pondering why New Zealand, with laws that were more accepting of gay rights than the United States, nonetheless felt less gay-friendly to him than the United States).

[13] William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423 (2001); *see also* Reva B. Siegel & Robert C. Post, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–75 (2007) (proposing a model of "democratic constitutionalism" to understand how forces of public "backlash" help inform constitutional interpretation and urging that such backlash has a constructive purpose).

[14] Eskridge, *supra* note 13, at 423.

[15] *Id.*

[16] In the employment area such new legislation has included Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2012), the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (2006), and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2012).

themselves. Laws are only as potent as they are enforceable.[17] Second, social movements impact not only the steps attorneys take but also the decisions judges make. Long ago, the Legal Realists[18] emphasized that judges are influenced by the "mores of the day,"[19] and more recently Lani Guinier and Gerald Torres have explained that lawyers and judges both influence and are influenced by "popular mobilizations."[20] Sol Wachtler took this position further, justifying judicial lawmaking by the fact that judges, even more than legislators, can see close-up how people and entities are impacted by various legal interpretations.[21]

However, as scholars have considered the appropriate relationship between social movements, legislation, and litigation, they have taken for granted a critically important predicate: the availability of a judicial forum. If companies can continue to use mandatory arbitration to eradicate access to court, where judges are potentially influenced by social movements, social movements will no longer be able to assist the overall progressive trend of our jurisprudence. While the phenomenon of mandatory employment arbitration is not new, recent Supreme Court opinions have encouraged an even greater number of employers to use this practice to force employees to take any disputes to arbitration, rather than to court.[22] This Article will consider this reality and its detrimental implications for the evolution of legal precedent affecting our most vulnerable employees.

For those interested in the relationship between social movements, lawmaking, litigation, and mandatory arbitration, the current and powerful

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[17] *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (discussing the critical enforcement role played by private litigation in the United States); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (same).

[18] For the most famous statement of legal realism, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), in which Holmes said, "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law." *See also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 104 (1921); *see also* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 24 (1960) (observing that legal development is affected by the surrounding occasion and epoch, as well as by pressures of legal doctrine). For a general discussion of legal realism, see Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson, eds., 2005).

[19] CARDOZO, *supra* note 18; *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 96–97 (1982) (explaining that "the legal fabric, and the principles that form it, are good approximations of one aspect of the popular will, of what a majority in some sense desires"); LLEWELLYN, *supra* note 18. By contrast, as many have pointed out, it is not accurate to say that Legal Realists focused on what judges ate for breakfast! *See, e.g.*, Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1923 (2004).

[20] Guinier & Torres, *supra* note 3, at 2745.

[21] Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 17 (1990) ("Unlike the legislature, in a conflict of any importance the judiciary issues an opinion which, if it is 'worth its salt,' positions the case in the contextual, historical, and cultural dimensions making up the legal landscape."). For a contrary perspective on the propriety of judicial lawmaking, see Robert Justin Lipkin, *Which Constitution? Who Decides? The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1132 (2006) (critiquing the practice).

[22] *See infra* Parts II.A–B.

#MeToo movement offers a perfect, albeit depressing, case study.[23] While the #MeToo movement has already exposed many sordid high-profile incidents of alleged harassment, sparked substantial outrage in traditional and social media, and become a talking point in public events and workplaces throughout the country, for the most part this outrage has not yet trickled down to protect ordinary women (and men) in ordinary workplaces. To the contrary, the law of sexual harassment still has a long way to go to catch up with the sentiments being expressed in the #MeToo movement.[24] In the past, one might have expected that the new cultural attitudes surrounding sexual harassment might lead courts to rethink some of their prior restrictive decisions on sexual harassment.[25] However, to the extent that employers are using mandatory arbitration to keep employment disputes out of court, even as powerful a social force as the #MeToo movement may not produce the progressive legal changes one might otherwise have expected. What is true of the #MeToo movement is true of other existing and potential forces for social change as well, such as social movements that might advocate for greater diversity, privacy, or income equality. To the extent companies are permitted to use arbitration to eliminate access to courts, they prevent our law from evolving to become more just. Mandatory arbitration has appropriately been criticized on many constitutional, statutory and policy grounds, and indeed this author has been such a critic,[26] but the potential of mandatory arbitration to harm disempowered persons by stultifying legal development has not yet received sufficient attention.

The remainder of this Article will proceed in four parts. Part I will discuss the important role courts have historically played in reinterpreting existing texts to move towards greater justice. While the Article will focus on employment law, it will also provide examples of judicial reinterpretation from other contexts to demonstrate the impact of social movements on judicial decisions. Part II will then summarize employers' increasing imposition

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[23] *See generally* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. (forthcoming 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236309, *archived at* https://perma.cc/N6KR-RLS7.

[24] *See infra* Part III.B.

[25] *See id.* for a discussion of the disconnect between assumptions of the #MeToo movement and existing case law.

[26] *See generally* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005) (pointing out that private companies should not be free to insulate themselves from liability); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015) (critiquing the impact of mandatory arbitration on employees); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RES. 669 (2001) (arguing that mandatory arbitration often impinges on the Seventh Amendment right to jury trial); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996) (contending that the Supreme Court's endorsement of mandatory binding arbitration is erroneous as a matter of statutory interpretation and undesirable as a matter of public policy).

of mandatory arbitration clauses and explore how this phenomenon has severely limited employees' access to court, thereby impeding progressive development of law in the employment context. Part III will then discuss the #MeToo social movement as a case study of how the imposition of mandatory arbitration stymies the progressive evolution of law. It will show that while this social movement has been powerful, employers' use of arbitration clauses in the employment setting has and will significantly prevent courts from reevaluating the law of sexual harassment, thereby blocking progress that might otherwise have occurred. Finally, Part IV will call for legislative reform. Legislation has already been introduced in Congress that would limit the use of mandatory arbitration to varying degrees, and one can hope that the arguments set out in this Article will provide greater impetus to its passage.

I. Courts' Interpretations and Reinterpretations (Often) Bring Greater Justice

Judicial interpretations evolve, often but certainly not inevitably, in a way that reflects increasingly progressive societal values. Such rulings are particularly important for the least powerful groups within our society—such as women, racial or ethnic minorities, poor persons, undocumented immigrants, LGBTQ persons, elderly persons, and the disabled. For example, while the Supreme Court in *Plessy v. Ferguson* held in 1896 that racially segregated facilities could be permissible if "equal, but separate,"[27] nearly sixty years later the Court unanimously held in *Brown v. Board of Education* that "[s]eparate educational facilities are inherently unequal."[28] This reversal did not result from a change in the underlying Constitutional provisions,[29] but instead from a new judicial interpretation of those provisions. This judicial reinterpretation was surely influenced by social movements in support of racial justice.[30] Similarly, whereas the Court in *Bowers v. Hardwick*[31] found in 1986 that a ban on homosexual sodomy did not violate the Equal Protection Clause of the Fourteenth Amendment, the Court concluded just

[27] Plessy v. Ferguson, 163 U.S. 537, 547 (1896).

[28] Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[29] Both *Plessy* and *Brown* were interpreting the same Fourteenth Amendment. By contrast, the Supreme Court's infamous decision in *Dred Scott v. Sanford*, 60 U.S. 393, 403 (1857), that "a negro, whose ancestors were imported into [the United States] and sold as slaves," could never be a citizen of the United States pursuant to the Constitution, was effectively reversed through ratification of the Fourteenth Amendment of the Constitution in 1868 (granting citizenship to all persons born in the United States).

[30] *See* Kluger, *supra* note 12 (discussing social and political movements leading up to *Brown*).

[31] 478 U.S. 186, 191 (1986) (famously stating that the Constitution did not confer "a fundamental right to engage in homosexual sodomy").

the opposite in *Lawrence v. Texas*[32] in 2003. Again, the new decision reflected judicial reinterpretation of existing language, rather than passage of new law. And again, the decision was responsive to a powerful LGBT movement.[33] In *Lawrence*, the Court explained that the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing,"[34] and that homosexuals, like others, "may seek autonomy for these purposes."[35] Most recently the Court expressly reversed its infamous decision in *Korematsu v. United States*,[36] now stating that decision was "gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[37]

In several notable cases in the employment arena, courts have similarly enunciated new interpretations of existing statutes to provide employees with additional rights. The primary federal law protecting employees from discrimination is Title VII of the Civil Rights Act of 1964.[38] The key language of the statute is quite simple, stating:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment because of the individual's race, color, religion, sex, or national origin . . . .[39]

Although the explicit language of the statute does not apply to unconscious discrimination, sexual harassment, or the rights of LGBT persons, courts have, over time, interpreted Title VII to cover these matters and many more.[40]

One early expansive judicial interpretation of Title VII was *Griggs v. Duke Power*.[41] In that 1971 case, the Supreme Court was asked to address whether Title VII prohibited an employer from requiring a high school education or asking employees to pass a general intelligence test in order to be

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[32] 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

[33] *See generally* LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE (2015) (recounting history of LGBT movement both before and after *Bowers* and *Lawrence*).

[34] *Lawrence*, 539 U.S. at 574.

[35] *Id.*

[36] Korematsu v. United States, 323 U.S. 214, 223 (1944) (upholding the constitutionality of the executive order that ordered Japanese-Americans into internment camps during World War II).

[37] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)). Granted, the new *Trump* decision allows much of the odious racial profiling that made the *Korematsu* decision so ignominious.

[38] 42 U.S.C. § 2000e et seq. (1964).

[39] 42 U.S.C. § 2000e-2(a).

[40] *See infra* notes 41–88 and accompanying text.

[41] 401 U.S. 424 (1971).

hired into the better-paying departments.[42] Such a requirement did not explicitly discriminate on the basis of race, and plaintiffs could not prove that the requirements were deliberately adopted in order to disadvantage Black persons or others,[43] but plaintiffs claimed that the requirements had a racially discriminatory impact and ought to be proscribed.[44] The Court found that plaintiffs could prove a violation of Title VII absent proof of discriminatory intent so long as the challenged practices had a "disparate impact."[45] It explained that because the goal of Congress was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"[46] even tests that are neutral on their face or neutral in terms of intent "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[47] Thus, recognizing that the black plaintiffs had "long received inferior education in segregated schools,"[48] the Court found that mere apparent equality of opportunity was insufficient, and that practices must be non-discriminatory not only in form but also in operation.[49] Commentator William Eskridge finds that *Griggs* is best understood in political terms:

> *Griggs* is explicable neither as an exercise in legal analysis nor as an effort by the Justices to read their own values into the statute. Instead, it reflected an emerging political consensus in Washington, D.C., that Title VII would be a dead letter unless regulators and judges could examine employment practices that had discriminatory impacts.[50]

This Supreme Court decision gave rise to an entirely new line of cases that further developed disparate impact protections in employment law.[51]

A few years after *Griggs,* the Supreme Court addressed another critically important lacuna in federal employment discrimination law: whether

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[42] *Id.* at 426–27.

[43] *Id.* at 432.

[44] *Id.*

[45] *See* Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 Wm. & Mary L. Rev. 911, 953–67 (2005).

[46] *Griggs*, 401 U.S. at 429–30.

[47] *Id.* at 430.

[48] *Id.*

[49] *Id.* at 431 (stating that "tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox."). The Court explained that "[t]he touchstone is business necessity," meaning that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*

[50] Eskridge, *supra* note 13, at 495.

[51] Charles A. Sullivan & Michael J. Zimmer, Cases and Materials on Employment Discrimination 167–229 (9th ed. 2017). *See generally* Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59 (1972) (telling the story, from a litigation perspective, of how advocates convinced the Supreme Court to adopt a new definition of discrimination).

and how Title VII regulates sexual harassment. The Court's decisions on gender issues can be considered in the context of ongoing social and political activism pushing for feminism and women's rights.[52] Prior to the Court's unanimous ruling in *Meritor Savings Bank v. Vinson*,[53] it was unclear whether Title VII targeted only "economic" or "tangible" discrimination such as terminations, refusals to hire, or pay disparities.[54] In that case, Michelle Vinson, a teller-trainee at a bank, brought a different kind of claim. She alleged that her supervisor coerced her to have sexual relations with him forty or fifty times over a three year period,[55] touched her in public, exposed himself to her, and even raped her,[56] thereby creating a "hostile work environment."[57] The question for the Supreme Court was whether—assuming these claims could be proven—such conduct would violate Title VII.[58] The Justices held in 1986 that such claims were indeed cognizable under Title VII,[59] once again creating an entirely new line of jurisprudence.[60]

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[52] *See, e.g.*, ESTELLE B. FRIEDMAN, NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN (2007) (placing United States' women's movement in an international and interdisciplinary context). *See also* CATHERINE MACKINNON, BUTTERFLY POLITICS (2017) (arguing that small actions taken by social and political movements have resulted in major systemic changes in the legal regimes governing women).

[53] 477 U.S. 57 (1986).

[54] The defendant argued that even if sexual harassment could constitute gender discrimination, it violated Title VII only when the purported victim suffered a tangible economic loss. *See id.* at 64. As Professor Vicki Schultz has explained, women lost some of the early sexual harassment claims because courts tended to reason that the women's adverse treatment was not "because of sex," as provided in Title VII, but rather because the women refused to engage in sexual relationships with their supervisors. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1701–02 (1998). *See also* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 59–77 (1979) (describing rulings in some of the early Title VII cases).

[55] *Meritor*, 477 U.S. at 60.

[56] *Id.*

[57] The court of appeals found that a violation of Title VII could be predicated on two types of sexual harassment: harassment that conditioned the provision of employment benefits on giving of sexual favors; and harassment that created a hostile or offensive work environment. *See id.* at 62.

[58] The district court had denied relief on the grounds that even assuming the facts were as plaintiff alleged, "that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.* at 61. Thus, the trial court found plaintiff was not the victim of sexual harassment or sexual discrimination while employed at the bank. *Id.*

[59] The Court relied on Equal Employment Opportunity Commission ("EEOC") Guidelines defining sexual harassment and pointed out that the language of Title VII did not preclude hostile environment sexual harassment claims. *Id.* at 64–67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (explaining that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'").

[60] A few years later, in *Harris v. Forklift Sys. Inc.*, the Court further explained that a hostile environment exists where, based on consideration of various circumstances, the workplace was objectively hostile to a reasonable person and subjectively hostile to the plaintiff. 510 U.S. 17, 21-22 (1993) (noting that the circumstances to be considered include the frequency and severity of the conduct, whether the conduct was physical or verbal, and whether the conduct interfered with the employee's work performance). *See generally* Tristin K. Green, *Was Sexual Harassment Law A Mistake? The Stories We Tell*, 128 YALE L.J. FORUM 152,

Then, in *Price Waterhouse v. Hopkins*,[61] the Supreme Court considered another crucial question that was not explicitly addressed in Title VII: whether decisions based on gender stereotyping could constitute gender discrimination. Ann Hopkins, a senior manager in a top accounting firm, was denied partnership. She claimed the denial resulted from gender discrimination evidenced by comments made by some of the male partners,[62] and she presented expert testimony that the partnership selection process "was likely influenced by sex stereotyping."[63] While it may seem obvious today, it was far from clear at the time that gender stereotyping should be recognized as a form of gender discrimination cognizable under Title VII.[64] Ruling in plaintiff's favor on this issue, the Court proclaimed in 1989 "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype with their group."[65] It reasoned:

> An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22; out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[66]

While still requiring plaintiffs to prove that the stereotyping was more than "stray remarks,"[67] and that gender played a role in the decision,[68] this expansive decision opened the door to a broad array of approaches that employees

153–60 (2018) (discussing the line of hostile work environment sexual harassment cases following *Meritor*).

[61] 490 U.S. 228 (1989).

[62] Comments in the file from various partners, including Hopkins's supporters, contained statements that Hopkins was "macho," that she "overcompensated for being a woman," that she should take "a course at charm school," that some objected to her use of profanity "because it's a lady using foul language," and that Hopkins' candidacy should be supported because she "had matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but more appealing lady ptr [sic] candidate." *Id.* at 235.

[63] *Id.* The witness was Dr. Susan Fiske, who based her comments on her review of the partner comments in the file but admitted "she could not say with certainty whether any particular comment was the result of stereotyping." *Id.*

[64] Indeed, the Supreme Court itself infamously relied on gender discrimination in *Bradwell v. Illinois*, 83 U.S. 130 (1872), when it refused to reverse the State of Illinois's determination that Mrs. Myra Bradwell should be denied a law license. While the majority opinion based the denial on its conclusion that the right to be admitted to practice law is not one of the "privileges and immunities" afforded Constitutional protection under the Fourteenth Amendment, *id.* at 139, Justice Bradley concurring based his decision on the "wide differences in the respective spheres and destinies of man and woman," *id.* at 141 (Bradley, J., concurring in the judgment). He stated in particular: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*

[65] *Price Waterhouse*, 490 U.S. at 251; *but cf.* Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1104–12 (9th Cir. 2006) (holding that a woman could be fired for failure to wear makeup because the company's dress code placed an equal burden on men and women).

[66] *Price Waterhouse*, 490 U.S. at 251.

[67] *Id.* at 277 (O'Connor, J., concurring in the judgment).

[68] *See id.*

could rely on in future cases.[69] William Eskridge partially attributes the Court's more expansive approach to sexual harassment "to the normative consensus that the women's movement has brought to the issue."[70]

Among the important issues left open after *Price Waterhouse* was the extent to which Title VII should be interpreted to protect gay, lesbian, and transgender persons against gender discrimination or sexual harassment.[71] For a number of years, it seemed clear that "Title VII's prohibition of 'sex' discrimination applied only to discrimination on the basis of gender and should not be judicially extended to include sexual orientation or gender identity."[72] However, drawing on the power of strong social movements,[73] LGBTQ employees persisted in seeking the protection of Title VII, eventually securing more favorable results. In *Oncale v. Sundowner Offshore Services, Inc.*,[74] the Supreme Court held that a man who claimed that his male co-workers had sexually harassed him could state a claim under Title VII,[75] but did not directly address the question of whether discrimination on the basis of sexual orientation was proscribed by Title VII.[76] The Court concluded that even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it

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[69] *Id.* at 251–52 ("By focusing on Hopkins' specific proof . . . we do not suggest a limitation on the possible ways of proving stereotyping played a motivating role in an employment decision.").

[70] Eskridge, *supra* note 13, at 497.

[71] *See* Sheerine Alemzadeh, *Protecting the Margins: Intersectional Strategies to Protecting Gender Outlaws from Workplace Harassment*, 37 N.Y.U. Rev. L. & Soc. Change 339, 339 (2013) (arguing that "[s]exual harassment jurisprudence is predicated on heteronormative constructions of desire and power in the workplace" and advocating that laws be revised and enacted to better protect all workers).

[72] DeSantis et al. v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327, 329–30 (9th Cir. 1979) (rejecting claims of employees at several different companies who claimed they were fired or forced to quit because they were homosexual). The *DeSantis* court relied on *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (finding a claim of an employee who alleged discrimination on the ground that she was going through a sex change was not protected under Title VII) and *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (refusing to apply Title VII to protect claims of discrimination on the basis of sexual preference).

[73] *See, e.g.*, Faderman, *supra* note 33; *see generally* Eric Marcus, Gay History: The Half-Century Fight for Lesbian and Gay Equal Rights (2009).

[74] 523 U.S. 75 (1998).

[75] Oncale, who worked as a roustabout on an eight-man crew of an oil platform in the Gulf of Mexico, alleged that his co-workers committed numerous sex-related, humiliating actions against him, and that some physically assaulted him and even threatened him with rape. *Id.* at 77.

[76] The trial court had granted summary judgment to the employer, stating that a male has "no Title VII cause of action for harassment by male co-workers." *Oncale*, 523 U.S. at 75. But the Supreme Court found that Title VII protects men as well as women, *id.* at 78, that persons can claim sex discrimination perpetrated by persons who share their same gender, *id.* at 79, and that Title VII covers cases where it can be shown that the workplace was "permeated with discriminatory intimidation, ridicule, and insult and that that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *id.* at 78 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

enacted Title VII,"[77] such claims could be brought under Title VII so long as the purported victim could show that "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex.'"[78]

Post-*Oncale*, as public support for LGBTQ people increased,[79] courts addressed additional questions of whether discrimination on the basis of sexual orientation or transgender status could constitute "discrimination on the basis of sex" under Title VII.[80] Acting en banc, two federal courts of appeals recently held that it could.[81] First, the Seventh Circuit, in *Hively v. Ivy Tech*, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades"[82] and held that "discrimination on the basis of sexual orientation is a form of sex discrimination."[83] Then, in *Zarda v. Altitude Express,* the Second Circuit also found that discrimination on the basis of sexual orientation is proscribed by Title VII.[84] The Second Circuit noted that it had "previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII,"[85] and that these prior decisions were consistent with "the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission

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[77] *Id.* at 79 (observing, in an opinion written by Justice Scalia, that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

[78] *Id.* at 80–82 (remanding the case so that plaintiff could try to prove that the sexually assaultive conduct was engaged in "because of sex"). The Court observed that one way to prove that the conduct was "because of sex" would be to show that the perpetrator was himself homosexual, but the Court also recognized that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* at 79.

[79] For a discussion of how LGBTQ activism influenced the fight for gay marriage, see Goldberg, *supra* note 12. With regard to social movements fighting on behalf of transgender persons, see SPADE, *supra* note 9.

[80] The Supreme Court's *Oncale* decision had sidestepped these important issues. *See* 523 U.S. at 75.

[81] Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 340–41 (7th Cir. 2017); Zarda v. Altitude Express, 883 F.3d 100, 108 (2d Cir. 2018).

[82] *Hively*, 853 F.3d at 340–41 (reversing grant of motion to dismiss claim brought by Hively, an openly lesbian part-time professor).

[83] *Id.* at 341. The Seventh Circuit also took note of a prior Second Circuit decision in which a concurring opinion urged the Circuit to rethink the question of whether Title VII covers sexual orientation claims, emphasizing the changed legal landscape in the past two decades and pointing to multiple legal arguments that had not previously been considered. *Id.* at 342 (citing Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring)).

[84] *Zarda*, 883 F.3d at 108. Plaintiff Donald Zarda claimed he was fired from his job as a sky diving instructor because he came out to a client as gay, in order to put her at ease with how he would be strapped to her during the dive. *Id.* As the Second Circuit describes his claim, Zarda alleged "he failed to conform to male sex stereotypes by referring to his sexual orientation." *Id.* at 107.

[85] *Id.*

("EEOC")."[86] However, the court observed "legal doctrine evolves and in 2015 the EEOC held, for the first time, that 'sexual orientation is inherently a "sex-based consideration;"' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."[87] Discussing the evolution of Title VII interpretation since passage of the statute, the Second Circuit explained, "[B]ecause Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used."[88]

Expansive, progressive judicial decision-making in the context of employment law is not limited to issues pertaining to sexual harassment or LGBTQ status, or even to Title VII. The Ninth Circuit Court of Appeals recently considered changing social attitudes in *Rizo v. Yovino*[89] when it held en banc that employers can no longer evade the restrictions of the Equal Pay Act[90] by calculating employees' salaries based on their prior salary.[91] For many years it was widely assumed that prior salary was a fair measure of one's worth, and a 1982 Ninth Circuit decision had allowed the employer to consider prior salary along with a series of other factors including "ability, education, [and] experience."[92] Rejecting this precedent, the *Rizo* court con-

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[86] *Id.* The two prior Second Circuit cases that disallowed sexual orientation claims under Title VII were *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005).

[87] *Zarda*, 883 F.3d at 107 (quoting Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015)).

[88] *Zarda*, 883 F.3d at 115 (citing, also, to Supreme Court's recognition of hostile work environment claims, even though those do not appear in the statutory text). Along similar lines, the Sixth Circuit Court of Appeals, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, found that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female." 884 F.3d 560, 571 (2018). The Sixth Circuit further found that "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait." *Id.* at 577.

[89] 887 F.3d 453 (9th Cir. 2018).

[90] The Equal Pay Act provides, in relevant part, that no employer shall pay employees of one sex lower wages than those of the opposite sex for jobs of "equal skill, effort, and responsibility, and which are performed under similar working conditions," except pursuant to a seniority system, a merit system, a system that measures quantity or quality of production, or "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

[91] The Ninth Circuit held, "[P]rior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." *Rizo*, 887 F.3d at 456–57.

[92] Kouba v. Allstate Ins. Co., 691 F.2d 873, 874, 877–78 (9th Cir. 1982). The first Ninth Circuit panel to consider *Rizo* felt compelled, by *Kouba*, to allow consideration of prior salary by employers as long as that factor "was reasonable and effectuated some business policy," Rizo v. Yovino, 854 F.3d 1161, 1166 (9th Cir. 2017), *rev'd* 887 F.3d 453 (9th Cir. 2018). However, the en banc panel instead found that "*Kouba*, however construed, is inconsistent with the rule that we have announced in this opinion, [and therefore] it must be overruled." *Rizo*, 887 F.3d at 468.

sidered not only the text of the statute,[93] "basic principles of statutory interpretation,"[94] legislative history of the Equal Pay Act,[95] and decisions from other federal courts of appeals,[96] but also new interpretations of public policy. The en banc panel expressly noted that "over fifty years after the passage of the Equal Pay Act, the wage gap between men and women is not some inert historical relic of bygone assumptions and sex-based oppression,"[97] but rather a gap that continues to persist and "costs women in the U.S. over $840 billion a year."[98] Perhaps the decision in part reflects the power of the #MeToo movement. A 2018 survey of human resources managers found that 48% of companies surveyed stated they were reviewing their pay policies to check for gender inequities.[99]

As the decisions summarized above demonstrate, our understandings of statutes and constitutions evolve over time, influenced by new social perspectives and frequently (albeit not inevitably) leading to a greater protection of rights.[100] Not so very long ago, many in the United States assumed that it was acceptable to separate races in schools, housing, transportation, and marriage; to preclude homosexuals from marrying one another; to hire or refuse to hire people for certain jobs based on their race or gender; to state that a woman's place was primarily in the home; to rely freely on sexual or

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[93] Rizo, 887 F.3d at 460–61.

[94] *Id.* at 461.

[95] *Id.* at 462–64.

[96] *Id.* at 465–68.

[97] *Id.* at 468.

[98] *Id.* at 468 (quoting Brief of Equal Rights Advocates as Amicus Curiae et al. for Plaintiff-Appellee at 11, Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018)) (citing National Partnership for Women and Families, *America's Women and the Wage Gap* 2 (2017), http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf, *archived at* https://perma.cc/KYU6-WUWX).

[99] Julie Carpenter, *#MeToo and #TimesUp Have Pushed 48% of Companies to Review Pay Policies,* CNNMONEY (Feb. 28, 2018), https://money.cnn.com/2018/02/28/pf/gender-pay-gap/index.html, *archived at* https://perma.cc/N4H9-SE6E (citing Challenger, Gray & Christmas, Inc., *Pay Parity Survey: Reviewing Compensation Policies After #TimesUp*, http://www.challengergray.com/press/press-releases/pay-parity-survey-half-companies-reviewing-compensation-policies-after-timesup, *archived at* https://perma.cc/35TD-BS2F (reporting on survey of 150 human resources executives from companies of various sizes in industries throughout the United States)).

[100] Of course, it is also true that rights are sometimes contracted in the employment arena as in others, whether through legislation or court decision. For instance, the Court's decisions in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) have widely been interpreted as letting employers largely off the hook for sexual harassment so long as the employer makes efforts to provide training and an internal complaint system. *See, e.g.*, Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 697–715 (2000). Similarly, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) failed to recognize that sexual harassment may exist even though the harasser is not motivated by sexual desire. A number of scholars have critiqued this perspective on sexual harassment. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1701–02 (1998). Moreover, in *Vance v. Ball State U.*, 570 U.S. 421, 424 (2013), the Court held that a supervisor is defined narrowly as being someone capable of taking "tangible employment actions against the victim"; and in *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001), the Court limited employees' ability to recover on Title VII retaliation claims.

other stereotypes; or to make sexual comments or jokes, and to engage in non-consensual touching, in the workplace setting. These dramatic evolutions in judicial thinking have not happened in a vacuum, but rather in a context of powerful social movements and cultural changes. But, with the rise of mandatory employment arbitration, it is not clear that social movements and cultural changes will continue to have the legal impact they once did.

II. The Rise and Stultifying Impact of Mandatory Employment Arbitration

For social movements and judicial decisions to influence one another, there must be opportunities for judicial intervention. Yet the rapidly growing phenomenon of mandatory employment arbitration in the United States is sharply limiting the number of employees who have access to court. Alexander Colvin has recently estimated that over 50% of the non-unionized private-sector U.S. workforce is covered by mandatory arbitration clauses.[101] In the United States, every employee who is covered by such a clause must bring any claims against their employer via arbitration rather than in court.[102] To acclimate readers to what is often an opaque system, this Part will discuss what employment arbitration is, whether it is legal, and how its impact has generally been discussed in the past. It will then analyze how the growth of mandatory employment arbitration uniquely harms the most vulnerable members of our society by stultifying the development of progressive employment law.

A. What is Employment Arbitration?

To appreciate the impact mandatory arbitration has on individuals and on the development of the law, one must first understand how employment

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[101] Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More Than 60 Million American Workers*, Econ. Policy Inst. 55 (Sept. 27, 2017), epi.org/135056, *archived at* https://perma.cc/CET2-T2VH (reporting results of study showing that 56% of nonunion employees in surveyed companies were subject to mandatory arbitration provisions). Colvin cites earlier work, showing much lower numbers, leading him to conclude that the use of mandatory arbitration clauses has grown very substantially in the past thirty years. *Id.* at 4. For another recent empirical study of employment arbitration, see Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies* 2 (2017), The Emp. Rights Advocacy Inst. for Law & Policy, https://ssrn.com/abstract=3063359, *archived at* https://perma.cc/RN3Z-FWM2 (finding that 80% of Fortune 100 companies, "including subsidiaries or affiliates, have used arbitration agreements in connection with workplace-related disputes since 2010" and that half of those have used arbitral class action waivers).

[102] *See infra* Part II.B. It is also true that if the employer has claims against the employee, such as for breach of contract or defamation, those too must be brought in arbitration, absent a contractual exception.

arbitration "agreements" come into existence.[103] Some commentary on the subject gives the impression of an idealized model in which employees and employers sit down together and discuss how they would prefer to resolve future legal disputes, should they arise. For example, Justice Gorsuch's opening sentence in the Supreme Court's recent 5–4 decision in *Epic Systems Corp. v. Lewis* asks: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"[104] Occasionally this idealized model may accurately reflect the way employment arbitration clauses come into existence. High-level executives or individuals with unique talents may indeed negotiate personal employment contracts, and such contracts may well include arbitration clauses.[105] In addition, some unions may negotiate arbitration clauses that require members to arbitrate not only disputes arising under the contract itself, but also statutory claims.[106]

Generally, however, so-called "agreements" to arbitrate are unilaterally imposed by employers on employees who likely are not aware the terms exist, and, in any case, have little choice but to accept the provision if they want to get or keep their jobs.[107] While the Federal Arbitration Act does require arbitration agreements to be "written,"[108] they need not be signed, and courts have upheld "agreements" formed in a variety of ways.[109]

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[103] Commentators have debated whether form arbitration clauses deserve to be called "agreements." In a legal sense, courts have made clear that they, like other contracts of adhesion, are enforceable. *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW (2014). On the other hand, it is also clear that employees do not typically "agree" to these terms in any meaningful sense, as they often are not aware of the terms much less knowledgeable about their implications. *See* Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 2–5 (2015).

[104] 138 S. Ct. 1612, 1619 (2018). This case holds that companies can use arbitration clauses to prevent workers from filing joint claims or class actions, notwithstanding the protections afforded by the National Labor Relations Act to collective action. *Id.* at 1624–25.

[105] *See* Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 234 (2006). The arbitration clauses entered into by top Fox News broadcasters fall in this category. *See infra* Part III.C.

[106] *See generally* Floyd D. Weatherspoon, *Incorporating Mandatory Arbitration Employment Clauses into Collective Bargaining Agreements: Challenges and Benefits to the Employer and the Union*, 38 DEL. J. CORP. L. 1025 (2014).

[107] *See* Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?* 29 OHIO ST. J. ON DISP. RESOL. 59, 60, 63–65 (2014) (observing that while, in early years, many employment arbitration clauses were individually negotiated by higher level executives, more recently the bulk of clauses are broadly promulgated by employers to cover lower level employees). *See generally* RADIN, BOILERPLATE, *supra* note 103; Sovern et al., *"Whimsy Little Contracts," supra* note 103.

[108] 9 U.S.C. § 2 (2016).

[109] *See* cases cited *infra*. *See also* Blair v. Scott Specialty Gases, 283 F.3d 595, 603 (3d Cir. 2002) (holding that mandatory arbitration provision in employee handbook was enforceable because it was supported by adequate consideration); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997) (holding that arbitration clause was separate from other provisions of employee handbook and constituted an enforceable contract). *But see* Carey v. 24 Hour Fitness, USA, Inc., 669 F.3d 202, 209 (5th Cir. 2012) (finding that arbitration agree-

Mandatory arbitration "agreements" are often imposed in the fine print of employment or related applications,[110] employee handbooks, envelope stuffers, computer click-throughs, or e-mails.[111] The dissent in *Epic Systems*, in fact, noted that the clauses at issue there were e-mailed by several companies to employees who were told if they continued to work at the companies they would be deemed to have accepted the terms.[112] Studies have shown that these kinds of clauses are not, in fact, generally read or understood by employees;[113] certainly these are not the knowing agreements alluded to by Justice Gorsuch.[114] Yet these are precisely the types of provisions imposed by employers in a broad array of industries, including restaurants,[115] big box

ment in employee handbook was illusory); Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 762 (9th Cir. 1997) (holding employee did not agree to arbitrate claims by acknowledging receipt of revised employee handbook).

[110] The claims brought to the Supreme Court reflect that employer promulgated clauses are more common than individually negotiated clauses. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (noting that SEC form U-9 requires all claims by certain securities industry employees to be arbitrated); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (signed employment application); EEOC v. Waffle House, 534 U.S. 279, 283 (2002) (signed employment application); Rent-a-Center West Inc. v. Jackson, 561 U.S. 63, 73 (2010) (arbitration clause imposed as condition of employment).

[111] Alexander Colvin finds that "[a]lthough mandatory employment arbitration is usually established by having employees sign an arbitration agreement, typically at the time of hiring, in some instances businesses adopt arbitration procedures simply by announcing that these procedures have been incorporated into the organization's employment policies." Colvin, *supra* note 101, at 5.

[112] *Epic Systems*, 138 S. Ct. at 1636 n.2 (Ginsburg, J., dissenting). Employees who continue to work for a company that has imposed arbitration may well be deemed to have "agreed" to arbitration. *See* Seawright v. Am. Gen. Fin. Servs., 507 F.3d 967, 972–73 (6th Cir. 2007) (holding that employment arbitration provision was enforceable where employer publicized new program and mailed letters to employees notifying them that they would be covered if they did not quit); Tinder v. Pinkerton Sec., 305 F.3d 728, 734–36 (7th Cir. 2002) (holding employee was bound by arbitration provision imposed after her hiring, even though employee swore she had never seen the brochure introducing the program and could only have avoided program by quitting her job).

[113] *See, e.g.*, Sternlight, *Disarming Employees*, *supra* note 26, at 1320. *See also* Sovern et al., *"Whimsy Little Contracts," supra* note 103.

[114] *Epic Systems*, 138 S. Ct. at 1619. *Cf.* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RES. 559, 569 (2001) (recognizing that employees may well not focus on arbitration requirement in employment agreement but asserting that such provisions should nonetheless be as enforceable as other contractual terms).

[115] *See Waffle House*, 534 U.S. at 282–83; Hightower v. GMRI, Inc., 272 F.3d 239, 240–41 (4th Cir. 2001) (Olive Garden); Dantz v. Am. Apple Grp., LLC., 123 F. App'x 702, 703 (6th Cir. 2005) (Applebee's).

retail establishments,[116] securities firms,[117] law firms,[118] tech companies,[119] and start-ups like Uber.[120]

So what does employment arbitration actually look like, and how does it work? Arbitration can be defined as "a process in which a third party who is not acting as a judge renders a decision in a dispute."[121] Though the details of this process will differ situation-to-situation based on how the provision is written,[122] arbitration in the employment context tends to look a certain way. Employment arbitration is typically initiated by a pleading that looks fairly similar to a complaint that might be filed in court.[123] Subject matter may include statutory claims for discrimination or violations of other federal or state statutes. It can also include common law claims for breach of contract, defamation, business torts, or personal injury. Sometimes claims are brought by the employer against the employee, rather than by the employee against the employer.[124] Once the claim is filed, an arbitrator is selected, often pursuant to rules set by a private organization such as the American Arbitration Association (AAA) or JAMS (formerly Judicial Arbitration and Mediation Services) hosting the arbitration.[125] The process of arbitrator selection typically gives both sides an opportunity to select or de-select arbitrators based

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[116] *See Circuit City*, 532 U.S. at 109; Circuit City Stores. v. Najd, 294 F.3d 1104, 1109 (9th Cir. 2002); Johnson v. Circuit City Stores, Inc., 148 F.3d 373, 374 (4th Cir. 1998).

[117] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (noting that SEC form U-9 requires all claims by certain securities industry employees to be arbitrated).

[118] *See* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 744 (9th Cir. 2003) (holding that law firms may require employees to sign Title VII arbitration agreements). *See also* Brett A. Smith & Joshua L. Schwarz, *Keeping Lawyers Out of Court? A Survey of the Prevalence of Compulsory Arbitration Agreements in Law Firms*, 7 EMP. RTS. & EMP. POL'Y J. 183, 190–95 (2003).

[119] Microsoft recently agreed not to impose arbitration on its employees in sexual harassment claims, but many other tech companies still do so, and Microsoft presumably does as well, in non-sexual harassment claims. *See infra* note 324 and accompanying text.

[120] *See* Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 ARB. L. REV. 43, 45–46 (2017). *See also* Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. L. FORUM 205, 212 (2018).

[121] CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION, BEYOND THE ADVERSARIAL MODEL 383 (2d ed. 2011).

[122] *Id*. at 383–84 (showing arbitration can, for example, be formal or informal, private or public, legalistic or not); *see also* Jean R. Sternlight, *"Arbitration Schmarbitration": Examining the Benefits and Frustrations of Defining the Process*, 18 NEV. L.J. 371, 374 (2018).

[123] For example, the American Arbitration Association, which one study showed handles about half of filed employment arbitration disputes, ALEXANDER J.S. COLVIN & MARK D. GOUGH, COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS AND OUTCOMES: RESEARCH REPORT TO THE ROBERT L. HABUSH ENDOWMENT OF THE AMERICAN ASSOCIATION FOR JUSTICE 34–35 (2014), provides the demand form available here: https://www.adr.org/sites/default/files/document_repository/, *archived at* https://perma.cc/UJ7D-95AV.

[124] *See* Colvin & Pike, *supra* note 107, at 66 (finding that roughly 10% of employment arbitration disputes examined in a particular study involved claims by employers against employees, such as for allegedly breaching the employment contract or defaming the employer).

[125] AAA rules on employment arbitration are provided here: AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT ARBITRATIONS RULES AND MEDIATION PROCEDURES (Oct. 1, 2017), https://www.adr.org/sites/default/files/document_repository/EmploymentRules_Web.pdf, *archived at* https://perma.cc/7P4X-KE5T [hereinafter AAA RULES]. JAMS Employment Arbitration Rules & Procedures are set out here: JAMS EMPLOYMENT ARBITRATION RULES &

on their credentials and whatever else the parties can learn about their prior decisions.[126]

After being selected, the arbitrator sets dates, may allow a limited amount of discovery, and may consider motions, including potentially motions to dismiss or for summary judgment.[127] If the matter is not resolved on a dispositive motion and does not settle, the arbitration hearing typically takes place in a conference room selected by the arbitrator.[128] The neutral arbitrator is often, but not necessarily, an attorney or a retired judge.[129] Either or both parties may be represented by an attorney, but sometimes parties appear pro se.[130] Witnesses may be called and evidence may be presented, but the rules of evidence are usually more relaxed than those that would be used in court.[131]

The arbitrator ultimately writes a decision, but the decision may be fairly short and will not necessarily contain extensive legal reasoning.[132] For

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PROCEDURES (July 1, 2014), https://www.jamsadr.com/rules-employment-arbitration, *archived at* https://perma.cc/LL88-DXJD [hereinafter JAMS RULES].

[126] AAA RULE 13, *supra* note 125, at 16; JAMS RULE 15, *supra* note 125, at 14–15. The fact that arbitrators have an incentive to write decisions that might encourage parties to hire them in the future has given rise to what critics call the "repeat arbitrator" phenomenon: as employers are typically involved in far more disputes than employees, arbitrators have more of an economic incentive to please employers than they do to please employees. *See generally* Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 805 (2013); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP'T. POL'Y J. 189 (1997).

[127] JAMS RULES 17 & 18, *supra* note 125, at 16–17; AAA RULES 9 & 27, *supra* note 125, at 14, 19. The arbitration clause can be drafted to allow or disallow particular types of discovery and particular kinds of motions. *See* Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195, 224 (2017); John M. Townsend, *Drafting Arbitration Clauses Avoiding the 7 Deadly Sins*, 58 DISP. RESOL. J. 28, 36 (2003). Along these lines, the AAA provides a "clause builder" that encourages parties to draft the clause to fit their particular needs. Clause Builder Tool, AMERICAN ARBITRATION ASSOCIATION (Sept. 29, 2018), https://www.clausebuilder.org, , *archived at* https://perma.cc/X9BR-HAPC.

[128] AAA RULE 11, *supra* note 125, at 14; JAMS RULE 19, *supra* note 125, at 18.

[129] AAA Rules require employment arbitrators to be "experienced in the area of employment law." AAA RULE 12(b), *supra* note 125, at 13 (quoting Rule 12(b)). The JAMS clause drafting website notes that parties can determine what qualifications they prefer for their arbitrators. JAMS CLAUSE WORKBOOK 4 (June 1, 2018), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf, *archived at* https://perma.cc/V2VF-FY5P.

[130] One recent study showed that roughly one third of employment arbitrations were filed by employees pro se. Colvin & Pike, *supra* note 107, at 69. When this author conducted her own small study of the 22 cases posted by AAA on Lexis for 2018 as of June 24, 2018, she found just four involved pro se employees.

[131] The JAMS Rules state: "Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product." JAMS RULE 22(d), *supra* note 125, at 19. The AAA Rules state: "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary." AAA RULE 30, *supra* note 125, at 21.

[132] Arbitration decisions in employment cases do, however, tend to be longer than those issued in other business contexts. *See* Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L. L.J. 449, 512 (2005) ("[A]rbitrators—particularly in commercial cases—are not expected to write reasoned opinions attempting to explain and justify their decisions, and the AAA in fact has traditionally discouraged them from doing so."); Dean B. Thompson, *Arbitration Theory & Practice: A Survey of AAA Construction*

example, the AAA Rules require arbitrators to "provide the written reasons for their award unless the parties agree otherwise,"[133] but often the primary focus of the decision is factual, rather than legal. The AAA Rules also require that "[a]n award issued under these rules shall be publicly available, on a cost basis."[134] Currently, AAA employment awards are available, for a fee, from LEXIS, Westlaw, BNA & Kluwer.[135] However, the fact that these decisions are available may not be well known, and other arbitration providers may not make their decisions publicly available. As binding arbitration decisions are extremely difficult to vacate, appellate courts are rarely asked to review the binding awards.[136]

B. Is Mandatory Employment Arbitration Legal?

In the United States,[137] current law clearly permits companies to require their employees to arbitrate future disputes. Although many commentators have argued that mandatory employment arbitration is or should be proscribed by the Federal Arbitration Act ("FAA")[138] or, in certain circum-

Arbitrators, 23 HOFSTRA L. REV. 137, 158 (1994) (summarizing survey of construction arbitrators, 69% of whom reported that they do not usually explain the reasons for their awards).

[133] American Arbitration Association, National Rules for the Resolution of Employment DISPUTES (Including Mediation and Arbitration Rules), R. 34(c) (Jan. 1, 2004), *available at* https://www.adr.org/sites/default/files/National%20Rules%20for%20the%20Resolution%20of%20Employment%20Disputes%20Jan%2001%2C%202004.pdf, *archived at* https://perma.cc/RKE7-GUM7. JAMS Rules similarly provide that an award shall "contain a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the Award is based." JAMS RULE 24(h), *supra* note 125, at 22–23.

[134] AAA RULE 39(b), *supra* note 125, at 23.

[135] E-mail from AAA Vice President Rebecca Storrow to author (June 12, 2018) (on file with author). A search of the LEXIS database revealed 275 published AAA decisions from 2017, and 22 for 2018, as of June 24, 2018. Prior years' decisions are also available.

[136] In the United States, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1–15 (2012), arbitration awards must generally be enforced unless it can be shown that the award was procured by corruption or fraud or that the arbitrators were guilty of misconduct or similar. 9 U.S.C. § 10(a) (2012). Courts have repeatedly held that "mere" errors of law or fact do not justify vacating an arbitral award. *See, e.g.*, Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 100 (7th Cir. 1995) (quoting Gingiss Int'l, Inc. v. Bormet 58 F.3d 328, 333 (7th Cir. 1995)) ("[F]actual or legal errors by arbitrators—even clear or gross errors—do not authorize courts to annul awards."); *see also* MENKEL-MEADOW ET AL., *supra* note 121, at 462–65 (discussing standard for vacating arbitral awards). While some courts have allowed arbitral awards to be vacated for "manifest disregard of the law," this is a very high standard and the Supreme Court's decision in *Hall Street Associates v. Mattel*, 552 U.S. 576, 585 (2008), raises questions whether this challenge even continues to be viable at all under federal law.

[137] Policies in other countries are quite different. In the European Union, for example, employers may not force their employees into arbitration. *See* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 418 (2011) (discussing the fact that many EU jurisdictions refuse to enforce arbitration agreements in employment contracts); *see also* Jean R. Sternlight, *Is the U.S. Out on A Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 848–50 (2002).

[138] 9 U.S.C. § 1 et seq. (1925). Passed in 1925, the FAA was intended to ensure that courts would enforce arbitration clauses entered into knowingly by two business entities. Thus, many

stances, by the Constitution,[139] these arguments have usually failed. Shocking many, in *Gilmer v. Interstate/Johnson Lane Corp.*,[140] a 7–2 Supreme Court ruled in 1991 that a claim brought under the Age Discrimination in Employment Act by a manager in the securities industry could be subjected to compulsory arbitration.[141] The *Gilmer* Court justified its conclusion in part by reasoning that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[142]

However, subsequent decisions soon revealed that the Court prioritizes preserving arbitration over protecting employees' rights.[143] Technically, the *Gilmer* decision was not an employment case, because Mr. Gilmer was required to arbitrate by stock exchange rules, rather than by his brokerage employer.[144] But, the Supreme Court soon made clear that employers could also require their employees to arbitrate claims against their employers, even though Section 1 of the FAA would seem to preclude the practice for all employees involved in interstate commerce.[145] That Section states: "[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or in-

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commentators have argued that the FAA was never meant to support and should not support the use of mandatory arbitration, imposed by a company on employees or consumers. *See, e.g.*, Sternlight, *Panacea or Corporate Tool?*, *supra* note 26, at 697; *see also* IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 192–93 (2013); Margaret Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. L. REV. 99, 157 (2006).

[139] This author has suggested possible constitutional arguments using Article III, the Due Process Clause, and the Seventh Amendment. *See, e.g.*, Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669–733 (2001); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns*, 72 TUL. L. REV. 1, 4 (1997). But courts and some commentators have not been persuaded by these arguments. *See, e.g.*, Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 3 (2005).

[140] 500 U.S. 20 (1991).

[141] The Supreme Court relied on the 1925 Federal Arbitration Act, 9 U.S.C. § 1 et seq., to hold that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Id.* at 26. The decision was surprising to many because it essentially reversed the Court's prior holding in *Alexander v. Gardner Denver*, 415 U.S. 36, 59–60 (1974), which found that employers could not use a collective bargaining agreement to require employees to arbitrate statutory discrimination claims under Title VII. *See generally* Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceanera*, 81 TULANE L. REV. 331, 336–40 (2006).

[142] *Gilmer*, 500 U.S. at 28.

[143] *See generally* Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 116 (2015) (asserting that Court has abandoned its purported concern with protecting consumers' and employees' ability to vindicate their substantive rights in arbitration).

[144] *Gilmer*, 500 U.S. at 39–40.

[145] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122–23 (2001). In other contexts, the Court has defined "interstate commerce" extremely broadly, *Gonzales v. Raich*, 545 U.S. 1, 29 (2005), so such a prohibition would seemingly apply to most workers in our modern economy.

terstate commerce."[146] Nonetheless, in *Circuit City Stores, Inc. v. Adams*, the Court held that employers could generally require individual employees to arbitrate, and that the Section 1 exclusion language should be interpreted extremely narrowly.[147] Then, in *14 Penn Plaza v. Pyett*, the Court concluded that a collective bargaining agreement could require unionized employees to arbitrate statutory employment claims so long as the "arbitration provision expressly covers both statutory and contractual discrimination claims."[148] When the Court's subsequent decision in *American Express v. Italian Colors Restaurant* found that arbitration clauses can impose class action waivers, even when such waivers effectively deny plaintiffs the practical opportunity to bring a claim,[149] it became even clearer that employers could use arbitration clauses to insulate themselves from liability under federal and state employment laws.[150]

The Court's most recent employment arbitration decision, *Epic Systems Corp. v. Lewis*,[151] is one of its most significant and most damaging to employees. Building on *American Express v. Italian Colors*, the Court ruled (5–4) that it was permissible for companies to use mandatory arbitration clauses to prevent employees from joining together in group or class litigation, notwithstanding that the National Labor Relations Act provides all employees with a right to engage in "concerted activities."[152] It is widely predicted that this decision will lead increasing numbers of employers to use forced arbitration to prevent employees from bringing class action suits or

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[146] 9 U.S.C. § 1 (2016). A case now pending in the Supreme Court, *New Prime Inc. v. Oliveira*, 857 F.3d 7 (1st Cir. 2017), *cert. granted*, 138 S. Ct. 1164 (U.S. Feb. 26, 2018) (No. 17–340), raises the question of whether this exclusion even applies to interstate truckers.

[147] *Circuit City*, 532 U.S. at 115–19 (interpreting Section 1's exclusion narrowly to apply only to transportation workers—those directly engaged in interstate commerce). Most academic commentators criticized the Court's approach. *See, e.g.*, SZALAI, *supra* note 138, at 191–92; Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 328, 329 (1997); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 458 (2016); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RES. 259, 279 (1991). *But see* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1345, 1365–72 (1997) (arguing that Section 1 applies only to transportation workers).

[148] 556 U.S. 247, 264 (2009).

[149] 570 U.S. 228, 233–34 (2013).

[150] Although *American Express* involved a claim by restaurants under antitrust law, rather than employment law, there is no reason to believe the Court would have held any differently in an employment case. *See, e.g.*, Sternlight, *Disarming Employees*, *supra* note 26, at 1318–19 n.60 (pointing to management consulting companies' enthusiastic embrace of the *American Express* decision).

[151] 138 S. Ct. 1612 (2018).

[152] The majority rejected employees' argument, previously accepted by the National Labor Relations Board, that class and collective actions are "concerted activities." *Epic Systems*, 138 S. Ct. at 1624–30. The majority also found that even if employees had a protected right it was overridden by the Federal Arbitration Act, which it interpreted as requiring enforcement of all agreements to arbitrate absent generally applicable contract defenses. *Id.*

group litigation of any type.[153] The significance of this is discussed in Part C below.[154]

Employees have limited additional tools at their disposal to challenge the legality of mandatory arbitration requirements. Standard contract arguments like unconscionability, fraud, or lack of agreement are rarely successful.[155] Moreover, the Court's decisions allow employers (and others) to require that arbitrators, rather than courts, consider the question of whether the arbitration clause is enforceable.[156] One need not be too cynical to believe that arbitrators, whose future income depends upon the arbitration going forward, are unlikely to find that an arbitration clause is unenforceable.[157] In short, when United States employers require their employees to resolve claims in arbitration rather than in litigation, employees have little hope of convincing courts to instead allow them to litigate their disputes.

C. Impact of Employment Arbitration Generally

As many commentators have extensively discussed the overall impact of the Supreme Court's employment arbitration jurisprudence, the subject will be treated briefly. This Section will first address the critiques but then also consider some defenses of the practice.

Those skeptical of employers' use of mandatory arbitration worry that this process will substantially harm both individual employees and deterred the public.[158] On the individual side, critics urge that forced arbitration has and will deter meritorious employee claims.[159] Indeed, although more than

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[153] Robert Barnes, *Supreme Court Rules that Companies Can Require Workers to Accept Individual Arbitration*, WASH. POST (May 21, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-that-companies-can-force-workers-into-individual-arbitration/2018/05/21/09a3a968-5cfa-11e8-a4a4-c070ef53f315_story.html?noredirect=on&utm_term=.21432ccf1450, *archived at* https://perma.cc/T4QQ-L2HW; Garrett Epps, *An* Epic *Supreme Court Decision on Employment*, THE ATLANTIC (May 22, 2018), https://www.theatlantic.com/politics/archive/2018/05/an-epic-supreme-court-decision-on-employment/560963/, *archived at* https://perma.cc/ZH9X-U9U5 (noting "the court's decision in *Epic Systems* will inevitably lead to an explosion of these imposed contracts").

[154] *See infra* Part II.C.

[155] *See* F. Paul Bland, Jr., *Is That Arbitration Clause Unconscionable? PROVE IT!*, CONSUMER ADVOC. (Nat'l Ass'n of Consumer Advocates, Washington, D.C.), July-Aug. 2002. Indeed, the Supreme Court has held that when courts are too willing to strike down arbitration clauses as unconscionable, such decisions are preempted by the Federal Arbitration Act. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

[156] Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010) (holding that arbitration clause could delegate, to arbitrators, the responsibility for determining whether the arbitration clause was unconscionable, so long as that delegation was not, itself, unconscionable).

[157] *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 375 (2018) ("Many plaintiffs would be surprised to find that they have entrusted an arbitrator—who, unlike a judge, bills by the hour—to decide the very question whether a dispute should be arbitrated.").

[158] *See* Sternlight, *Creeping*, *supra* note 26, at 1661–65.

[159] *See, e.g.*, Sternlight, *Disarming Employees*, *supra* note 26, at 1328–29; Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 691–93 (2018).

half of the American workforce is now covered by arbitration clauses,[160] just a few thousand American workers file arbitration claims each year.[161] This suppression effect is easily explained. First, employment arbitration clauses often include express language proscribing employees from participating in class or group claims in either litigation or arbitration—a practice that, as noted above, the Supreme Court has endorsed.[162] In fact, Alexander Colvin recently found that roughly 40% of employees covered by arbitration clauses were subject to class action waivers.[163] This is significant because many employment claims cannot feasibly be brought individually. Such claims might be too costly, particularly in relation to expected monetary relief; employees might not even realize they had been harmed or that the harm was unlawful; or individual employees might hesitate to file due to fear of retaliation by their employer or others in the industry.[164] By wiping out class actions and group claims, employers can effectively insulate themselves from much employee liability.[165]

In addition to eviscerating class actions, mandatory arbitration also suppresses claims by making it even harder for employees to retain attorneys than it otherwise would be.[166] Attorneys will be more reluctant to take on an employee's claim if the designated forum reduces the likelihood of success, awards lower monetary damages, and proscribes group claims and class actions.[167] Those few individuals who do proceed to arbitration generally fare worse than they would have in litigation. The best and most recent empirical studies show that employees both win less often and win less money when disputing claims in arbitration rather than in litigation.[168] While pro se repre-

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[160] Colvin, *Growing Use*, *supra* note 101, at 1–2 (reporting that 56.2% of private-sector nonunion employees are subject to mandatory employment procedures).

[161] Sternlight, *Disarming Employees*, *supra* note 26, at 1330 (estimating that only a few thousand employees file arbitration claims each year, even though millions of employees are covered by mandatory arbitration provisions). Though some might suggest that this is because only a minute number of employees have viable claims, the fact that thousands upon thousands of employees file claims in court (when they can) or file claims with the EEOC or state agencies shows that arbitration is truly suppressing claims. *Id.* at 1330–31.

[162] *Epic Systems*, 138 S. Ct. at 1632. While the focus is often placed on class actions, employers may also use arbitration clauses to eviscerate other kinds of group claims.

[163] Colvin, *Growing Use*, *supra* note 101, at 2.

[164] Sternlight, *Disarming Employees*, *supra* note 26, at 1347.

[165] Although some continue to believe that arbitration can be a viable forum for those who have small claims and who cannot obtain legal representation, a recent study shows that very few such employment arbitration claims are filed. *See* Horton & Chandrasekher, *supra* note 147, at 471; *see also* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1, 1 (2011) ("Employment arbitration appears to be a dispute resolution system predominantly based on employee representation by counsel, as is the case with litigation.").

[166] Sternlight, *Disarming Employees*, *supra* note 26, at 1334–36. Even absent arbitration, most employees find it hard to retain attorneys, as they often will lack savings to pay an attorney by the hour, and their damages and likelihood of success may not be sufficient to attract a contingent fee attorney. *Id.*

[167] *Id.*

[168] *Id.* at 1326; *see also* Horton & Chandrasekher, *supra* note 147, at 478–79 (providing detailed statistics on arbitration results).

sentation is a viable alternative in theory, in practice employees do not often attempt to represent themselves in arbitration.[169] This reluctance is understandable; a recent study found the pro se arbitration win rate to be just 7%.[170] One author has cleverly called this suppression effect the "black hole" phenomenon, because claims that might have existed simply disappear.[171] Some critics worry much more about this suppression effect than the fact, which is also true, that those employees who end up in arbitration tend not to do very well.[172]

On the other hand, mandatory employment arbitration does have its defenders. Some have argued that arbitration provides a quicker, cheaper form of dispute resolution. Professor Samuel Estreicher colorfully contended that it is better to provide Saturns (a no-frills car of its day) for everyone, than Cadillacs for the few and rickshaws for most.[173] Studies do confirm that arbitration tends to be quicker than litigation.[174] Supporters of mandatory arbitration also claim that the results of employment arbitration are sometimes favorable to employees,[175] though the studies cited tend to focus on claims brought by higher level employees with voluntarily negotiated agreements rather than on claims brought by employees covered by mandatory arbitration agreements.[176] Some defenders of the practice also urge that the impact of employment arbitration should be considered in the broader context of other employer human resources practices, including complaint processes and mediation, that may serve as an internal mechanism for resolving disputes.[177]

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[169] *See generally* Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 391–400 (2010) (disputing the common view that alternative dispute resolution ("ADR") is necessarily an effective route for unrepresented parties).

[170] Horton & Chandrasekher, *supra* note 147, at 485. And, of course, a "win" may result in only a very small dollar recovery.

[171] *See* Estlund, *Black Hole*, *supra* note 158, at 682. *See generally* Bales, *Quinceanera*, *supra* note 141, at 334 ("One criticism, however, has proven valid: some employers have used their superior bargaining power to impose on employees lopsided agreements that make it all but impossible for employees to pursue valid claims and that deter most employees from even trying to do so."); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012) (critiquing Supreme Court arbitration decisions for suppressing claims).

[172] *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1312.

[173] Estreicher, *Saturns for Rickshaws*, *supra* note 114, at 563. However, studies show that employees do not bring many small claims in arbitration. Sternlight, *Disarming Employees*, *supra* note 26, at 1336; *see also* Colvin & Pike, *Saturns and Rickshaws*, *supra* note 107, at 61 (updating Estreicher's thesis with the benefit of current empirical research).

[174] *See, e.g.*, Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, 11 EM. RTS. & EMP. POL'Y J. 405, 426–27 (2007).

[175] *See, e.g.*, Bales, *Quinceanera*, *supra* note 141, at 347–49.

[176] *See generally* Colvin, *Clarity*, *supra* note 173, at 412–24.

[177] W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 862–63 (2008). *See also* Bales, *Quinceanera*, *supra* note 141, at 343 (noting that many employers impose arbitration as part of a much broader dispute resolution process). At minimum, some commentators urge that it is difficult to assess the impact of forced arbitration, and that we should not condemn the practice without sufficient data. *See, e.g.*, David Sherwyn, Samuel Estreicher, &

Turning to the impact of mandatory arbitration on society more generally, critics have long worried that requiring employees to arbitrate rather than litigate claims will undermine the force of law not only by suppressing claims, but also by requiring claims to be heard privately and limiting easy access to precedent.[178] The fear is that these effects will both undermine public policies and also lessen the deterrence effect of laws that exist but are not effectively enforced.[179] As Geraldine Moohr opines, "arbitration is not an effective forum in which to satisfy the public policy goals of the employment discrimination statutes."[180] This concern applies to other non-discrimination workplace laws and policies as well.[181] For example, Charlotte Garden has explained that forcing contingent workers, such as Uber and Lyft drivers, into arbitration will reduce the deterrent effect of our laws on prohibited unfair labor practices.[182] Parallel arguments have been made in other countries too.[183]

Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1560 (2005).

[178] *See, e.g.*, Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1497 (2004) (pointing out that employment arbitration, which is typically kept private, and often results in determinations lacking in reasoned analysis, "will not have educative or precedential value"); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 704 (2004) (noting that "the lack of [judicial] opinions stunts[s] the growth of the law"). *But cf.* Sternlight, *Creeping*, *supra* note 26, at 1661–75 (setting out traditional public justice critique of arbitration, which is based on the idea that private arbitration may not provide the public good of educating society about law and justice, but also recognizing that a system of justice may also serve other purposes beyond enforcement of the law, including protecting interests in procedural justice and promoting reconciliation).

[179] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2838–39 (2015). *See generally* RADIN, BOILERPLATE, *supra* note 103, at 3–18.

[180] Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 396 (1999). Professor Moohr argues that because employment arbitration is non-governmental, confidential, and final it is less effective than litigation in serving public policy purposes such as deterrence and development of precedent. *Id.* at 426–40.

[181] For example, employees' claims under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012), are increasingly being forced into arbitration. *See* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1125–26 (2012). Arbitration arguably undermines public policy in other areas of law as well. *See* Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1241 (2016) (discussing "informational value" of public litigation). For a related argument in the securities context, see Benjamin P. Edwards, *Arbitration's Dark Shadow*, 18 NEV. L.J. 427, 430 (2018). *Cf.* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 52 (2008) (explaining, in the business context, that arbitration frequently "blocks public access to information revealed in the arbitration").

[182] Garden, *Disrupting Work Law*, *supra* note 120, at 206, 209; *see also* Ruan, *supra* note 180, at 1119–21.

[183] *See, e.g.*, ROSEMARY HUNTER, INDIRECT DISCRIMINATION IN THE WORKPLACE xxiii (1992) (stating that provisions for indirect discrimination are rarely publicized and even more rarely analyzed as an element of a claim). *See generally* Sternlight, *In Search*, *supra* note 177 (comparing U.S., British, and Australian efforts to enforce employment discrimination laws).

Still, some scholars have challenged the idea that arbitration is inherently "lawless." As Christopher Drahozal notes, few have taken the time to try to explain what this supposed lawlessness really means, or to empirically verify the assertion that arbitration is lawless.[184] Is arbitration lawless because arbitration decisions do not contain legal reasoning, or because those decisions are not appealed or published? It is important to remember that arbitration varies substantially from context to context. While it has been said that "many arbitration awards contain no statement of reasons,"[185] in the employment field, by contrast to consumer or commercial settings, arbitrators may well write longer decisions that do contain some reasoning.[186] Upon reviewing the twenty-two AAA decisions made available on LEXIS as of June 2018,[187] this author generally found them to be well-written and several pages long. These decisions tended to focus more on facts than law, which is not surprising given that arbitration awards are equivalent to trial court decisions. Further, even if many employees are required to arbitrate their claims, presumably at least some precedent will continue to exist, because not all employers mandate arbitration of all claims by all employees.[188]

The purpose of this Article is not to resolve these debates, though admittedly this author is convinced that mandatory employment arbitration is harmful to both individual employees and the public at large. Rather, this Article endeavors to draw attention to a less considered issue: whether forcing employment claims into arbitration is *particularly* harmful to the most vulnerable and disempowered members of our society. The terms "vulnerable and disempowered" refer to those groups who are less powerful in the social and political process, whether due to their race, ethnicity, gender, gender preference, lack of economic means, immigrant status, tenuous employment situation, or other factors. One could also call these persons "discrete and insular minorities," the term used by the Supreme Court in its famous

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[184] Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 Loy. L.A. L. Rev. 187, 189–90 (2006).

[185] *Id.* at 192.

[186] Labor arbitration awards are among those that have more detail, though the detail tends to focus on company practices and facts rather than on legal nuances of statutory interpretation. *See* Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 Indus. & Lab. Rel. Rev. 683, 694 (1992) (summarizing review of labor arbitration awards conducted in the 1980s, and concluding that their treatment of statutory issues was often conclusory); *see also* Harry Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study, in* Arbitration—1975: Proceedings of the Twenty-Eighth Annual Meeting of the National Academy of Arbitrators 59, 82 (Barbara D. Dennis & Gerald G. Somers eds., Bureau of Nat'l Affairs 1976) (concluding from survey of arbitrators that it is questionable whether arbitrators are competent to decide statutory employment issues).

[187] The AAA states that it makes redacted versions of all of its employment arbitration decisions available in Westlaw, LEXIS, BNA, and Kluwers databases. E-mail, *supra* note 135.

[188] On the other hand, it may be that employers that mandate arbitration give rise to different claims than those employers that do not mandate arbitration, in which case development of precedent will be skewed. Bales, *Quinceanera*, *supra* note 141, at 366. *See also* Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861, 887 (2004) (stating that if some employers mandate arbitration and others who are more law abiding do not mandate arbitration, the law that is made might evolve in favor of employers).

Carolene Products decision to describe persons who lacked voting power and who therefore needed particular protection from the courts.[189] This Article contends that these groups are harmed more than others by the imposition of mandatory employment arbitration for two reasons discussed below.

D. Particular Impact of Employment Arbitration on the Most Vulnerable Employees

1. Arbitration Clauses Are Especially Likely to Suppress Claims of Vulnerable Employees

As has just been discussed, forced arbitration presents an opportunity for alternative dispute resolution in theory, but actually deters the filing of claims in practice.[190] Compared to litigation, mandatory arbitration makes it harder for employees to secure legal representation,[191] harder for employees to participate in class actions,[192] and it remains hard for employees to bring or prevail on claims brought pro se.[193] While these burdens affect all employees, they fall most heavily on the most vulnerable members of society. The most difficult claims to bring are those that are not clearly supported by existing law,[194] that present evidentiary challenges,[195] that offer minimal or difficult to calculate monetary relief,[196] or that exert high personal and emotional tolls, particularly if brought individually rather than as part of a group.[197] There are several reasons why these factors are likely to affect the disempowered and most vulnerable more intensely than other employees. When vulnerable employees' claims are weaker, due to these factors, they will more likely be suppressed, because lawyers will not be eager to take the claims and because individual employees will hesitate to file them on their own. If the claims also cannot be brought in class actions, that augments the

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[189] *See supra* note 11 and accompanying text.

[190] *See supra* notes 158–172 and accompanying text discussing suppression of claims.

[191] As an intellectual matter, the ability to obtain an attorney is different than the ability to bring a claim. In theory, an employee might successfully bring a claim pro se, either in arbitration or in litigation. However, in the employment discrimination context the reality is that very few, if any, employees will be able to prevail or gain significant relief if they are pro se. Most employment claims are just too hard to be won pro se, in that they require both substantial legal expertise and the ability to gather and organize significant facts. *See generally* Sternlight, *Disarming Employees*, *supra* note 26; Sternlight, *Lawyerless*, *supra* note 168.

[192] *See* Colvin, *60 Million American Workers*, *supra* note 101, at 6.

[193] *See* Horton & Chandrasekher, *After the Revolution*, *supra* note 147, at 25.

[194] *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1335.

[195] *See id.* at 1333.

[196] *See id.* at 1336.

[197] *See, e.g.*, Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 366 (2013) (stating that aggrieved workers "are left with a bleak choice: stay quiet and forego needed wages, try to find a private attorney willing to litigate a modest individual claim or complex class claim, or wait for one's wage claim at a government agency that might never be answered.").

problem. So, when the claims of the most vulnerable employees are shunted to arbitration they become even more difficult to bring than would otherwise be the case. Below, these factors are explained.

First, the claims of disempowered members of society will often tend to be weakest as a matter of law, because the lack of clear legal protection is one reason why these employees are disempowered in the first instance. Imagine that an employee goes to an attorney because she believes she has been discriminated against on the basis of a status that is not explicitly addressed under federal or state law. Knowing that the law does not provide express protection, and that judges (or arbitrators) may not be willing to interpret the law expansively to cover such a claim, the attorney may not be willing to take the case, particularly on a contingent fee basis.[198]

Second, disempowered employees may find it particularly difficult to amass the evidentiary proof necessary to prevail in their case.[199] While many employees face evidentiary challenges, because they lack access to employers' documents and because fellow employees may be afraid to assist them in a claim against the employer, such challenges may well be even greater for members of disfavored groups. Where a straight white man might be able to convince other straight white men to take a bit of a risk and help him with his claim, the vulnerable employee may well face an even greater challenge convincing other people in the workplace to testify in her favor.[200] If those other employees are not members of an oppressed group, they are less likely to bond with the complainant and take a risk to assist them. And, if those other employees are also members of an oppressed group, they may also be reluctant to help because they themselves are also at risk of mistreatment. In short, when disempowered employees seek to present claims they are particularly likely to find themselves in a situation in which even though they should prevail as a matter of law if all of the facts could be known, the reality is that all the evidence is not likely to come out. This may result in claims appearing to be frivolous, even when they are not so.

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[198] Of course, this is a challenge that may diminish over time, depending on the jurisdiction. For example, gay, lesbian, and transgender persons can now proceed more confidently in some jurisdictions on discrimination claims as states and some federal courts are increasingly revising statutes, providing new guidance, or issuing decisions that provide expanded protections. *See* CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 280–99 (9th ed. 2017); *see also* E.E.O.C. v. Boh Brothers Construction Co., LLC, 731 F.3d 444, 455–56 n.7 (5th Cir. 2013) (holding that "the EEOC may rely on evidence that [a supervisor] viewed [an employee] as insufficiently masculine to prove its Title VII claim"). *See generally* L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535 (2009).

[199] A claim may be valid, in some theoretical sense, but if an employee cannot provide witnesses or documents in support of their allegations, they will not be able to prevail.

[200] *See, e.g.*, Lea VanderVelde, *Where Is the Concept of Good Faith in the Restatement of Employment?*, 21 EM. RTS. & EMP. POL'Y J. 335, 360 (2017) (providing two examples of in-group bonding exercises in employment context); Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 38 (2015) (discussing the use of in-group bonding to maintain white supremacy).

Third, the most vulnerable employees will tend to have a particularly hard time showing substantial damages because their socioeconomic status in society is often already low due to discrimination.[201] Low provable damages, in turn, diminish access to justice, because attorneys are less likely to take low damages cases on a contingent fee basis.[202] If a person earning low wages is terminated from their job, denied a promotion, or not hired, their wage loss damages are lower than that of a high wage earner who is harmed in the same way. For example, if an employee earning only $20,000 a year is fired, their backpay claim is far lower than the otherwise similar claim of someone who was fired from a job paying $300,000 a year. This does not mean that the lower paid employee suffered less injury, but only that our system of justice is inherently biased against low-income persons.

Finally, the most vulnerable members of society often most need the opportunity to bring claims as part of a group, rather than individually.[203] Disempowered people such as the poor, minority group members, or persons lacking legal immigration status are less likely to be aware of their legal rights and financially can least afford to bring a claim individually.[204] As well, such people may more likely fear embarrassment, retaliation, deportation, or the substantial emotional burdens that inevitably come with bringing a claim against one's employer.[205] Thus, when arbitration clauses are used to

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[201] Women and minority group members, for example, are paid substantially less than white males even when they hold comparable jobs. Alexandra N. Phillips, *Promulgating Parity: An Argument for A States-Based Approach to Valuing Women's Work and Ensuring Pay Equity in the United States*, 92 TUL. L. REV. 719, 722–27 (2018).

[202] *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1334–38 (discussing cost-benefit analysis used by plaintiff-side employment attorneys to decide whether to take a case on a contingent fee basis); *see also* Rob Rubinson, *A Theory of Access to Justice*, 29 J. LEG. PROF. 89 (2005) (explaining that while the vast majority of legal disputes involve low-income litigants, the vast majority of public and private dispute resolution resources are allocated to disputes between organizations or high-income persons, because those are the ones who can afford access to justice).

[203] Group claims include class actions but also other kinds of multi-party claims, such as joinder of claims under FED. R. CIV. P. 20, collective claims under the Fair Labor Standards Act, or multi-district litigation. All these can be proscribed by arbitration provisions. *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1343–52.

[204] *See* Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 346–49 (2008) (reviewing empirical evidence that demonstrates how social class and socioeconomic inequalities impact an individual's access to justice); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (presenting results of empirical study showing that poor persons and minority group members are hesitant to even investigate filing civil claims, due to lack of trust in the legal system and desire to see themselves as self-sufficient).

[205] The issue of reluctance to report or file claims has been discussed extensively with respect to workplace harassment. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/task_force_report.cfm, *archived at* https://perma.cc/PT2G-6ZXH (finding that approximately 90% of workers who say they have experienced harassment never file charges or complaints).

eliminate the right to group or collective action, again it is the most vulnerable who suffer the most.[206]

In short, while we have already seen that the imposition of arbitration suppresses claims, this burden will fall particularly heavily on disempowered employees.[207] When an attorney sees not only a claim that is a long shot from a legal or evidentiary standard, but also a claim that must be brought in arbitration, where win rates and recoveries are lower, they are less likely to handle the case. The effect is amplified because poor people and minority group members generally have the most difficulty retaining legal representation.[208] And, when arbitration is used to eliminate group and class claims, the impact is greatest for those disempowered employees who are least able to bring claims individually. The resulting suppression will harm not only the individual, vulnerable employees who have suffered injury in the workplace, but also other persons in such groups and the public at large by preventing further development of the law that might have otherwise occurred in court.

2. *Employment Arbitrators Are Less Likely than Courts to Issue Influential Progressive Decisions*

Let us assume that the vulnerable employee does manage to bring a claim in arbitration. Will the employee be able to win that claim? And, if they do win, will they win in a way that begins to change the law for others as well as themselves? As was previously discussed, courts often interpret statutes and constitutional provisions more expansively over time, particularly when social movements are pushing them in a more progressive direction.[209] Unfortunately, it is highly unlikely that this progressive trend will be mirrored in the realm of arbitration. This is not because the people who are arbitrators are inherently different than the people who are judges.[210] Nor is

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[206] *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1343–52 (discussing critical importance of class actions and group claims in employment context). *See also* Garden, *Disrupting Work Law*, *supra* note 120, at 205 ("[T]he ubiquity with which gig economy companies require or encourage their workforces to resolve their disputes in individual arbitration proceedings . . . make it unlikely that large swaths of gig economy workers will, as a practical matter, be able to resolve their employment status in any forum.").

[207] *See generally* Sternlight, *Disarming Employees*, *supra* note 26.

[208] Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 710, 714–18 (2012) (reporting on empirical studies showing that pro se employees in employment discrimination litigation typically fare substantially worse than represented employees, and that African Americans, Hispanics and Asian Americans were significantly more likely to be pro se than were White employees).

[209] *See supra* Part I. Of course, there is certainly no guarantee that courts will protect the less powerful members of society. We can only say with confidence that judicial lawmaking will follow the overall trend of current culture. Wachtler, *Judicial Lawmaking*, *supra* note 21, at 14.

[210] Indeed, many arbitrators are retired judges. *See* James Middlemiss, *Life After the Bench: Retired Judges Embrace ADR*, FIN. POST (Mar. 19, 2014), https://business.financialpost.com/legal-post/life-after-the-bench-retired-judges-embrace-adr, *archived at* https://perma.cc/

this a reflection of any express contractual or regulatory limit being placed on arbitrators that would prevent them from interpreting law more expansively or writing progressive decisions. Nonetheless, for reasons discussed below, it seems quite unlikely that arbitrators would issue bold progressive decisions often enough, or with a high enough degree of impact, for arbitration to be a viable source of protection for vulnerable employees.

An employment arbitration decision rendered by an AAA arbitrator in 2018 illustrates arbitrators' reluctance to make new law.[211] In this case, the claimant, who had worked as an on-camera meteorologist for a television station for twenty-nine years before her contract was not renewed, alleged that she was the victim of discrimination on the basis of sex and/or age.[212] The arbitrator asked the parties to brief the question of whether these two types of discrimination might be combined to form a claim for intersectional discrimination—suggesting that plaintiff could try to show "discrimination against women over the age of 40."[213] The arbitrator reported that claimant cited cases in which courts had recognized such an "intersectional" discrimination claim based on race and sex,[214] and that courts have also recognized a "sex plus" or "gender plus" category, where a person was discriminated on the basis of a combination of gender and a neutral unprotected category.[215] However, the arbitrator noted that the plaintiff "has not cited any case authority recognizing an intersectional claim based on sex and age."[216] Further, the arbitrator stated that while "[t]he general definition of intersectional discrimination would *logically* apply to a claim based on the combination of any two or more characteristics protected by any statute, such as sex and age,"[217] "[t]he arbitrator is not authorized to, and will not, create a combined age and sex claim, when she has not been shown that a federal court

SHR3-QQUF; *see also* Will Carless, *Judge Who Ruled Against Arbitration Activist Now an Arbitrator*, VOICE OF SAN DIEGO (Aug. 12, 2013), https://www.voiceofsandiego.org/topics/news/judge-who-ruled-against-arbitration-activist-now-an-arbitrator/, *archived at* https://perma.cc/M79P-3YGN; Reynolds Holding, *Judges' Action Cast Shadow on Court's Integrity / Lure of High-Paying Jobs as Arbitrators May Compromise Impartiality*, SF GATE, Oct. 9, 2001, https://www.sfgate.com/news/article/Judges-action-cast-shadow-on-court-s-integrity-2870890.php, *archived at* https://perma.cc/E7V5-KF8C.

[211] 2018 AAA Employment LEXIS 18 (Feb. 23, 2018).

[212] *Id.* at 1.

[213] *Id.*

[214] *Id.* at 2 (citing Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032–35 (5th Cir. 1980); Harrington v. Cleburne Cty. Bd. of Educ., 251 F.3d 935, 937 (11th Cir. 2001); Lam v. Univ. of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994).

[215] *Id.* at 2 (citing Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1089 (5th Cir. 1975)). The issue of "intersectional" discrimination claims has received substantial attention in academia after initial discussion by Professor Kimberle Crenshaw. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). For an example of a more current discussion, see Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107 (2017).

[216] 2018 AAA Employment LEXIS 18, at 2 (Feb. 23, 2018).

[217] *Id.*

has done so."[218] Apparently having agonized at least a bit over this issue, the arbitrator went on to state the following in a footnote:

> The arbitrator's real world observations indicate that a person who is in more than one protected class, for example, a woman over the age of 40, or an African-American woman over the age of 40, sometimes faces barriers in employment that, for example, men over the age of 40, or women under the age of 40, or white men over the age of 40, do not experience. But the arbitrator's personal opinion is not an appropriate substitute for legal authority, and she is not authorized to merge elements of two different statutory schemes—Title VII and the ADEA—when neither the courts nor Congress have done so.[219]

Along similar lines, the arbitrator also raised the question of whether a media company would run afoul of the law by trying to cater to a younger demographic by hiring younger meteorologists.[220] But again, unlike many judges might behave, the arbitrator stated she was reluctant to rule on this issue without seeing prior case law or other authorities that supported the same exact point raised by the complainant.[221] While this single opinion cannot be generalized to cover all arbitrators and all judges, it is a real life exemplar of the hypothesized phenomenon—an arbitrator proving unwilling to issue a decision expanding legal precedents.

To understand why employment arbitrators are less likely than judges to issue progressive decisions, consider that arbitrators face an incentive structure that tends to discourage the issuance of opinions that expand upon existing legal protections. Employment arbitrators are trying to make a living, which they do by being hired and rehired by disputants. They therefore may not want to write creative progressive decisions that present a greater risk of getting vacated.[222] Such an outcome could annoy current disputants[223] and discourage others from hiring that arbitrator in the future. More specifically, such an outcome could displease the *employer* disputant, to the detriment of the arbitrator. Employers, particularly large corporate employers, are repeat players who frequently hire arbitrators in multiple cases; individual employ-

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[218] *Id.* at 3. For those who may be curious, the arbitrator in this case was Penn Payne, a woman based in Georgia whose web site shows she has substantial experience as an attorney, arbitrator, and mediator. Penn Payne LLC, https://www.pennpayne.com/profile, *archived at* https://perma.cc/4LBM-V6YK (last visited June 24, 2018).

[219] 2018 AAA Employment LEXIS 18, at 3 n.3 (Feb. 23, 2018).

[220] *Id.* at 23.

[221] *Id.* at 25. The arbitrator was also reluctant to allow claimant to use evidence of gendered dress expectations or environment (calling show a "boys club" and calling set a "man cave" to prove her termination was due to gender discrimination). *Id.* at 32.

[222] As previously noted, it is quite difficult to vacate arbitral awards and losing parties may not even try to get an award vacated. *See supra* note 136.

[223] While no party likes to lose, losing is far easier to take if the award seems consistent with existing judicial precedents, rather than a creative expansion of existing law.

ees may dispute only a single claim over the course of a lifetime and thus have less market influence.[224]

Further, because arbitrators are hired privately they "have limited incentive to consider the effects of their awards on third parties,"[225] such as on the public. As Geraldine Moohr has explained, "[b]ecause their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public."[226] These same incentives may lead arbitrators to write relatively short decisions, if they provide reasoned decisions at all. Parties are likely not eager to pay arbitrators' hourly fees for scholarly opinions that are not necessary to resolve their own disputes.[227]

While some scholars have suggested that this private focus might lead arbitrators to refrain from following the law,[228] others have found that arbitrators nonetheless likely do at least try to follow the law.[229] Indeed, commentators who have considered this matter in depth tend to be less concerned that arbitrators will issue "lawless" decisions, and more concerned that arbitrators will be "overly cautious and slavishly follow, rather than distinguish, precedents."[230] As noted above, following existing precedent closely may be seen as more defensible than making new law. One

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[224] *See supra* note 126 and accompanying text (discussing the "repeat arbitrator phenomenon").

[225] Drahozal, *supra* note 184, at 192.

[226] Moohr, *Goals*, *supra* note 179, at 436. Similarly, the disputants who are hiring the arbitrators are presumably interested in their own dispute, but not likely interested in paying the arbitrator extra to write a more scholarly or innovative decision that might somehow aid third parties.

[227] *See* Moohr, *Goals*, *supra* note 179, at 457–59 (stating that parties are not likely to fund law that seriously disadvantages them).

[228] Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 725 (1999) (stating "arbitrators often do not apply the law"). The idea is that arbitrators might care more about meeting the common-sense needs of disputants than strictly following legal requirements. Historically, arbitration was valued more for expertise, expediency, and common-sense solutions than for legal reasons. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 5 (observing that historically businesses chose arbitration because it was different from litigation, offering expertise, confidentiality, and relative finality).

[229] Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 514 (2005) ("Now I imagine it is fair to say that arbitrators usually do try their best to model their awards on what courts would do in similar cases—and that as often as not they succeed in doing so. That is at least what the scanty empirical evidence seems to suggest, and it corresponds as well to a plausible account of the likely nature of arbitrator incentives. What courts and codes have previously said is a natural starting point, after all—while inertia often does the rest—to the point that deciding in conformity with these rules of law will often simply appear to the arbitrator to be the path of least resistance."); *see also* Drahozal, *supra* note 183, at 194 (agreeing that arbitrators most likely most often try to follow the law).

[230] Moohr, *Goals*, *supra* note 179, at 436; *see also* Stephen A. Plass, *Privatizing Antidiscrimination Law with Arbitration: The Title VII Proof Problem*, 68 MONT. L. REV. 151, 173 (2007) (urging that whereas courts have been willing to rely on circumstantial evidence to support discrimination claims, arbitrators are less willing to do so and need to catch up with courts' approach).

author explains that "because the prevailing party in an employment arbitration is likely to require judicial assistance to enforce the award, arbitrators can be expected to draft awards that courts will perceive as legitimate."[231]

Even if arbitrators were to issue scholarly decisions that advanced novel, progressive interpretations of employment law, such decisions would likely not have much precedential impact. The metaphor of the tree falling in the forest is apt: assuming that an arbitrator were to write an opinion that could potentially advance the law, it likely would not be seen by many people. As has been discussed, arbitrator awards are not necessarily published; when they are, the reality is they are not often read. Few reporters, lawyers, or even law professors are likely to dig through decisions written by individual employment arbitrators, other than the arbitrator assigned to their particular case. Unlike judicial opinions, which often get attention in blogs, newspaper articles, journals, and websites, arbitration decisions are also rarely discussed in the media.[232]

Moreover, even if substantial arbitration decisions were to receive public attention, they likely would not get much respect as potential precedent. As noted, arbitration awards are not appealable on their merits[233] and thus will not lead to substantive appellate decisions from influential courts. The EEOC identified this problem back in 1997, when it issued its Policy Statement on Mandatory Binding Arbitration of Employment Disputes as a Condition of Employment.[234] Stating that "arbitration, by its nature, does not allow for the development of law," the EEOC explained that as judicial review of arbitral decisions "is limited to the narrowest of grounds," "arbitration affords no opportunity to build a jurisprudence through precedent."[235] Mark Weidemaier goes further to suggest that "[i]n employment arbitration . . . efforts to create a system of arbitral precedent would . . . likely encounter skepticism or hostility, especially in substantive domains [like statutory discrimination claims] widely believed to be within the exclusive domain of

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[231] W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 Wm. & Mary L. Rev. 1895, 1954 (2010) (arguing that arbitrators are not likely to create distinct arbitral precedent).

[232] This is something of a self-perpetuating phenomenon. Arbitration decisions are not scoured and discussed because they are not deemed important. And, arbitration decisions are not deemed significant in part because they are not regularly read and discussed.

[233] The Federal Arbitration Act requires courts to confirm arbitration awards, with very few exceptions, and allows them to be vacated only in extreme circumstances. *See supra* note 136.

[234] EEOC Notice No. 915.002 (1997), *reprinted in* 133 Daily Lab. Rep. (BNA) at E (July 11, 1997).

[235] *Id.* at Section V(A)(2)*; see also* Section IV(B) (discussing that the public nature of the judicial process enables public higher courts and also Congress to ensure that employment discrimination laws are properly interpreted and applied).

public adjudicators."[236] Ultimately, as Geraldine Moohr puts it, "Congress has not authorized arbitrators to develop the law."[237]

Given these factors, mandatory arbitration deprives society of a forum that can respond to social momentum and develop progressive laws.[238] If arbitrators do not typically issue progressive or innovative decisions, and if any such decisions are not likely to be seen or cited, those members of our society who are most in need of expanded legal protection will suffer most from its absence under mandatory arbitration schemes. Whether they be racial or ethnic minorities, women, immigrants, transgender persons, older or disabled persons, or part-time workers, those whose legal protections are fragile or nonexistent stand to lose the most when arbitration is substituted for litigation. This harm will fall not only upon those individual employees who are actually covered by arbitration clauses, but also upon other workers who might be indirectly impacted by the loss of progressive judicial precedent.

Admittedly, the preceding argument contrasts arbitral decisions with written judicial opinions, whereas juries, rather than judges, may ultimately hear those litigated employment claims that make it all the way to trial. The Civil Rights Act of 1991,[239] for example, affords a jury trial to employees who claim discrimination on the basis of race, gender, ethnicity, or religion.[240] Although arbitral decisions may not always be accompanied by substantial legal reasoning and may not be easy to access, they likely contain more reasoning than a jury award, which has none. However, this argument overlooks the fact that jury awards are often linked to judicial decisions that do contain legal reasoning. Before a case makes it to the jury, a judge will often issue a ruling on motions to dismiss or for summary judgment.[241] After

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[236] Weidemaier, *Toward a Theory of Precedent in Arbitration*, *supra* note 230, at 1948; *see also id.* at 1952 ("[E]mployment arbitrators in the United States are not likely to produce a system of precedent because, in this context, arbitrators will lack lawmaking legitimacy."). In non-employment contexts arbitral decisions may also be scorned as precedent because arbitrators need not be attorneys or have legal training. Moohr, *Goals*, *supra* note 179, at 435.

[237] Moohr, *Goals*, *supra* note 179, at 435.

[238] Taking decisions out of courts may also affect judges' rulings when they do hear cases. Myriam Gilles has warned that "[w]hen judges are no longer confronted regularly with the civil claims of the poor . . . they will become unversed in and desensitized to the underlying factual issues that affect lower-income groups." Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1561 (2016).

[239] Pub. L. No. 102-166, 105 Stat. 1071.

[240] In a sexual harassment case, for example, a jury would ultimately decide whether the work environment was "hostile" or "abusive" depending on "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." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[241] *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (reversing district court grant of summary judgment, where district court had found Title VII did not give rise to harassment claim by male employee regarding harassment by males); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (reversing district court grant of motion to dismiss claim alleging discrimination against homosexual violates Title VII); Zarda v. Altitude Express, 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (reversing district court's grant

the case is heard by the jury, the trial court may rule on a motion to set aside the jury's verdict as a matter of law.[242] An appellate court may be asked to review the jury's verdict[243] or the jury instructions.[244] Through these kinds of decisions, judges spell out the meaning of our employment law, and these kinds of decisions will disappear to the extent employment disputes are sent to arbitration.

Further, the fact that most litigated cases are settled or decided on motions, rather than resolved at trial[245] does not negate the argument that arbitration stultifies progressive development of the law by denying plaintiffs access to the courts. While it is true that the vast majority of litigated cases are resolved before trial, judges do often issue many decisions along the way. These decisions, on matters such as motions to dismiss and motions for summary judgment, refine relevant law[246] and influence the settlements that are ultimately reached.[247] When a dispute is handled in arbitration, by contrast, any such dispositive motions are handled by arbitrators and do not ultimately get resolved by appellate courts.[248]

Does the preceding discussion reflect a real problem, or are these just musings of an academic who has been battling mandatory arbitration for

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of summary judgment to employer on ground that sexual orientation claims could not be brought under Title VII); *see generally* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517, 549 (2010) (discussing that summary judgment motions by defendants are more likely to be filed, and granted, in employment discrimination cases than in other kinds of cases).

[242] *See, e.g.*, Westmoreland v. Prince George's Cty., No. 09-CV-2453, 2013 WL 6629054 (D. Md. Dec. 17, 2013) (rejecting defendant's motion for judgment as a matter of law that would have overturned jury's finding in favor of plaintiff on retaliation claim).

[243] *See, e.g.*, Rubinstein v. Admin. of the Tulane Educ. Fund, 218 F.3d 392, 402 (5th Cir. 2000) (reviewing, and ultimately affirming, jury's verdict in favor of plaintiff on Title VII retaliation claim).

[244] *See, e.g.*, Huff v. Sheahan, 493 F.3d 893, 899 (7th Cir. 2007) (reviewing and reversing trial court's jury instruction in claim regarding hostile work environment).

[245] During the twelve-month period ending March 31, 2018, 286,595 civil cases (excluding land condemnation) were filed in the U.S. District Courts. Court action only occurred in 234,655 cases. Of those, 202,397 were terminated or resolved before trial, and 29,745 were terminated or resolved during or after the pretrial hearing. Further, of the remaining 2,513 cases, 807 were tried in bench trials, and 1,706 were tried by juries. Overall, 0.9% of the total cases reached trial. U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken—During the 12-Month Period Ending March 31, 2018, http://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2018/03/31, *archived at* https://perma.cc/D545-PGKZ.

[246] *See supra* note 239.

[247] As with litigated disputes, many arbitration matters settle, but the settlements in the two arenas will likely be different, reflecting the fact that an employee who does not settle in litigation will have a better chance of prevailing and recovering more relief than would an otherwise similarly situated employee in arbitration. Sternlight, *Disarming Employees*, *supra* note 26, at 1322 & n. 87; *see also* Colvin, *Empirical*, *supra* note 165, at 6 (observing that differences in settlement practices between litigation and arbitration may either depress or increase the arbitration win rate relative to litigation).

[248] *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1327.

over twenty years? Let us look to the powerful #MeToo movement to see how these issues are playing out today in court and in arbitration.

III. #MeToo—An Illustration of How Mandatory Arbitration Stymies Progress Towards Justice

A. The #MeToo Revelations as a Social Movement

The #MeToo movement is, without doubt, a powerful social phenomenon. When the *New York Times* and *New Yorker* magazine suddenly exposed the alleged sexual transgressions of movie mogul Harvey Weinstein,[249] actress Alyssa Milano posted a tweet calling upon victims to reveal if they too had been sexually harassed or assaulted.[250] Within twenty-four hours the #MeToo hashtag had been used 500,000 times.[251] The power of the resulting movement led Time magazine to name the "silence breakers" of the #MeToo movement Time's Person of the Year for 2017.[252]

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[249] 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, *archived at* https://perma.cc/Q4NZ-J2MS; 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, *archived at* https://perma.cc/AA7M-VQKU.

[250] Margaret Renkl, *The Raw Power of #MeToo*, N.Y. Times, Oct. 19, 2017, https://www.nytimes.com/2017/10/19/opinion/the-raw-power-of-metoo.html, *archived at* https://perma.cc/23N8-RGK2.

[251] *Id.* Ten years prior, Tarana Burke initiated a "Me Too" movement focused on women of color and other marginalized people. Zenobia Jeffries, *Me Too Creator Tarana Burke Reminds Us This Is About Black and Brown Survivors*, Yes! Magazine, Jan. 4, 2018, https://www.yesmagazine.org/people-power/me-too-creator-tarana-burke-reminds-us-this-is-about-black-and-brown-survivors-20180104, *archived at* https://perma.cc/R6JU-M9Q2; *see also* Abby Olhaiser, *The Woman Behind Me Too Knew the Power of the Phrase When She Created It 10 Years Ago*, Denv. Post, Oct. 19, 2017, https://www.denverpost.com/2017/10/19/metoo-woman-sexual-harassment-assault/, *archived at* https://perma.cc/X32J-3J24.

[252] Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, Time, Dec. 18, 2017, http://time.com/time-person-of-the-year-2017-silence-breakers, *archived at* https://perma.cc/SN6F-EPVG. Although the #MeToo movement has primarily focused on claims brought by women against men, it is important to remember that some of the harassment allegations have been brought by men or boys against men. *See, e.g.*, Isabel Vincent & Melissa Klein, *Legendary Opera Conductor Molested Teen for Years: Police Report*, N.Y. Post, Dec. 2, 2017, https://nypost.com/2017/12/02/legendary-opera-conductor-molested-teen-for-years-police-report/, *archived at* https://perma.cc/PG2R-JAEA; Lauren Holter, *Anthony Rapp's Claims Against Kevin Spacey Are a Reminder that Sexual Assault Happens to Men, Too*, Bustle (Oct. 31, 2017), https://www.bustle.com/p/anthony-rapps-claims-against-kevin-spacey-are-a-reminder-that-sexual-assault-happens-to-men-too-3067274, *archived at* https://perma.cc/FK98-THNK. Despite Michael Crichton's book *Disclosure* and the subsequent movie, telling the story of a woman boss harassing a male subordinate, it is rare for men to bring claims against women. *See* Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, *in* 1 The Sage Handbook of Organizational Behavior 469, 476 (J. Barling & C.L. Cooper eds., 2008). *But see* Zoe Greenberg, *What Happens to #MeToo When a Feminist is the Accused?*, N.Y. Times, Aug. 13, 2018, https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html, *archived at* https://perma.cc/VC23-GM58; Jacey Fortin, *Accused of Sexual Harassment, An-*

The #MeToo movement has had broad implications throughout the world.[253] Harvey Weinstein has been arrested and charged with various counts of sexual assault.[254] We have seen the firing, resignation, or embarrassment of leading men in the world of Hollywood,[255] politics,[256] news media,[257] cooking,[258] technology,[259] entertainment,[260] the armed forces,[261] law,[262]

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drea Ramsey Ends Kansas Congressional Run, N.Y. TIMES, Dec. 15, 2017, https://www.nytimes.com/2017/12/15/us/andrea-ramsey-harassment.html, *archived at* https://perma.cc/K2B9-CCHG.

[253] *See* Kara Fox & Jan Diehm, *#MeToo's Global Moment: The Anatomy of a Viral Campaign*, CNN (Nov. 9, 2017), https://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html, *archived at* https://perma.cc/56VK-5LQ3; Catherine Powell, *How #MeToo Has Spread Like Wildfire Around the World*, NEWSWEEK, Dec. 15, 2017, http://www.newsweek.com/how-metoo-has-spread-wildfire-around-world-749171, *archived at* https://perma.cc/4HWV-C5F4.

[254] Maya Salam, *Harvey Weinstein's Arrest Comes After Months Long Downward Spiral*, N.Y. TIMES, May 24, 2018, https://www.nytimes.com/2018/05/24/us/harvey-weinstein-charges.html, *archived at* https://perma.cc/MM2T-XHV3.

[255] Eric Levinson & Aaron Cooper, *Bill Cosby Guilty on All Three Counts in Indecent Assault Trial*, CNN (Apr. 26, 2018), https://www.cnn.com/2018/04/26/us/bill-cosby-trial/index.html, *archived at* https://perma.cc/R3Y5-SGDM; Mark Kennedy, *'House of Cards' Cancelled Amid Kevin Spacey Sexual Assault Allegations*, THE STAR (Oct. 30, 2017), https://www.thestar.com/entertainment/2017/10/30/kevin-spacey-apologizes-after-allegations-by-tv-actor-anthony-rapp.html, *archived at* https://perma.cc/V6AU-SBGM.

[256] Matt Ford, *The 19 Women Who Accused President Trump of Sexual Misconduct*, THE ATLANTIC, Dec. 7, 2017 https://www.theatlantic.com/politics/archive/2017/12/what-about-the-19-women-who-accused-trump/547724/, *archived at* https://perma.cc/Y3ZG-38EG; Dan Merica, *Women Detail Sexual Allegations Against Trump*, CNN, (May 10, 2018), https://www.cnn.com/2017/12/11/politics/donald-trump-women-allegations/index.html, *archived at* https://perma.cc/RE5X-V7VS; Meghan Keneally, *Sen. Al Franken's Accusers and the Allegations Against Him*, ABC NEWS (Dec. 6, 2017), https://abcnews.go.com/US/sen-al-frankens-accusers-accusations-made/story?id=51406862, *archived at* https://perma.cc/3G5N-LWGN; James Salzer, *Lobbyist Files Sexual Harassment Complaint Against Georgia Lawmaker*, POLITICALLY GEORGIA (Mar. 9, 2018), https://politics.myajc.com/news/state—regional-govt—politics/lobbyist-files-sexual-harassment-complaint-against-georgia-lawmaker/ERcsb7xkuU8PrRA6q3wv5L/, *archived at* https://perma.cc/5JGD-CBF7.

[257] Michael M. Grynbaum & John Koblin, *Anchor Ousted at Fox News Accuses Chief of Harassment*, N.Y. TIMES, July 7, 2016; John Koblin, Emily Steel & Jim Rutenberg, *As Accusations Build, Murdoch Ushers Ailes Out at Fox News*, N.Y. TIMES, July 22, 2016; Sydney Ember, *Michael Oreskes Quits NPR Amid Sexual Harassment Accusations*, N.Y. TIMES (Nov. 1, 2017), https://www.nytimes.com/2017/11/01/business/media/mike-oreskes-npr-sexual-harassment.html, *archived at* https://perma.cc/66ZA-FXN3; Maya Salam, *Minnesota Public Radio Drops Garrison Keillor Over Allegations of Improper Conduct*, N.Y. TIMES, Nov. 29, 2017, https://www.nytimes.com/2017/11/29/business/media/garrison-keillor-fired.html, *archived at* https://perma.cc/88LQ-83SL.

[258] Kim Severson, *After Apologies, Restaurants Struggle to Change*, N.Y. TIMES, Jan. 18, 2018 https://www.nytimes.com/2018/01/18/dining/restaurants-sexual-harassment.html, *archived at* https://perma.cc/KD6N-VWQ6 (discussing accusations against chef Mario Batali).

[259] Richard Morgan, *Uber CEO Takes Leave of Absence Amid Sexual Harassment Scandal*, N.Y. POST, June 13, 2017, https://nypost.com/2017/06/13/uber-ceo-takes-leave-of-absence-amid-sexual-harassment-scandal/, *archived at* https://perma.cc/L6YL-57TA.

[260] Lisa Respers France, *Louis C.K. Accused of Sexual Misconduct in Bombshell Report*, CNN (Nov. 10, 2017), https://www.cnn.com/2017/11/09/entertainment/louis-ck-sexual-misconduct/index.html, *archived at* https://perma.cc/6R7F-3HHY.

[261] *See, e.g.*, Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL NEWS FROM THE CTR. FOR INVESTIGATIVE REPORTING (Mar. 4, 2017), https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/, *archived at* https://perma.cc/3JPG-V7HY.

and many other contexts.[263] Oprah Winfrey announced at the Golden Globes Ceremony that "a new day is on the horizon."[264] While the #MeToo movement has relied extensively on social media and public demonstrations of alliance, it has also achieved institutional support. January 1, 2018 marked the founding of the Time's Up Initiative, which created a legal defense fund that provides subsidized legal aid to victims of sexual abuse in the workplace.[265] The fund is managed by the National Women's Law Center, and it has expanded its mission more broadly to "address[ ] the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential."[266] Within its first five weeks of existence, Time's Up raised $20 million.[267]

Yet questions remain as to whether this powerful social movement will make meaningful changes in all kinds of workplaces. Many of the loudest voices in the #MeToo movement are celebrities who can galvanize the support of thousands of people with the click of a button. In contrast, victims who are farmworkers,[268] hotel workers,[269] autoworkers,[270] sportswear execu-

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[262] *See, e.g.*, Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST, Dec. 8, 2017, https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.4426209350ef, *archived at* https://perma.cc/ENB7-U8ZK.

[263] A list compiled in late February 2018 is already out of date. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (Feb. 26, 2018), https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations, *archived at* https://perma.cc/P7RV-CV58.

[264] Sophie Gilbert & Tori Latham, *Full Transcript: Oprah Winfrey's Speech at the Golden Globes*, THE ATLANTIC (Jan. 8, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/full-transcript-oprah-winfreys-speech-at-the-golden-globes/549905/, *archived at* https://perma.cc/MJT9-RD4L; *see also* Catherine A. MacKinnon, *#MeToo and Law's Limitations*, N.Y. TIMES, Feb. 4, 2018, at A19 ("The #MeToo movement is accomplishing what sexual harassment law to date has not.").

[265] TIME'S UP, https://www.timesupnow.com/ (last visited Aug. 22, 2018), *archived at* https://perma.cc/2K6U-H4F2.

[266] TIME'S UP, https://www.timesupnow.com/#ourmission-anchor, *archived at* https://perma.cc/7JNJ-WE4W; *see also* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/, *archived at* https://perma.cc/P5LT-DVZM (updated Mar. 22, 2018, originally published Mar. 8, 2018).

[267] Natalie Robehmed, *With $20 Million Raised, Time's Up Seek 'Equity and Safety' in the Workplace*, FORBES (Feb. 6, 2018), https://www.forbes.com/sites/natalierobehmed/2018/02/06/with-20-million-raised-times-up-seeks-equity-and-safety-in-the-workplace/#6c0ac277103c, *archived at* https://perma.cc/AD6M-5M8Q.

[268] *See, e.g.*, Time Staff, *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/, *archived at* https://perma.cc/D3NZ-VUNN.

[269] *See, e.g.*, Dave Jamieson, *'He was Masturbating . . . I Felt like Crying': What Housekeepers Endure to Clean Hotel Rooms*, HUFFINGTON POST (Nov. 18, 2017), https://www.huffingtonpost.com/entry/housekeeper-hotel-sexual-harassment_us_5a0f438ce4b0e97dffed3443, *archived at* https://perma.cc/PX2D-M523.

[270] *See, e.g.*, Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES, Dec. 19, 2017, https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html, *archived at* https://perma.cc/2FRS-M2TN.

tives,[271] tech experts,[272] or provide security in airports[273] may not find that the #MeToo movement works immediately or easily to rid their workplaces of sexual harassment.[274] They may, instead, need the help of the law and of lawyers.

B. The Law of Sexual Harassment Has Not Caught Up to #MeToo

While public opinion is waxing strongly against sexual harassment and inappropriate sexual conduct in the workplace, the law of sexual harassment has not caught up with this trend. At least not yet. Many of the actions and comments that have led to resignations, terminations, and public opprobrium would likely not produce legal liability under existing precedent.[275] As numerous excellent scholars have already discussed this issue in depth,[276] this

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[271] *See, e.g.*, Julie Creswell et al., *At Nike, Revolt Led by Women Leads to Exodus of Male Executives*, N.Y. TIMES, Apr. 28, 2018, https://www.nytimes.com/2018/04/28/business/nike-women.html, *archived at* https://perma.cc/YP5D-LJB2 (detailing that while a number of male executives were eventually pushed out at Nike, it took a great deal of time and many failed efforts).

[272] *See generally* EMILY CHANG, BROTOPIA: BREAKING UP THE BOYS' CLUB OF SILICON VALLEY (2018).

[273] *This American Life: LaDonna*, CHICAGO PUBLIC RADIO (May 25, 2018), https://www.thisamericanlife.org/647/ladonna, *archived at* https://perma.cc/ZX3W-Z325 (telling the story of an airport security worker who endured substantial sexual harassment over a lengthy period of time).

[274] Although much of the empirical sexual harassment literature has focused on White/European American women, it may be that other groups are harassed in equal or greater numbers, and reporting behavior may also vary across racial and gender lines. *See* EEOC SELECT TASK FORCE, *supra* note 204, at 11 (citing Tamara A. Bruce, *Racial and Ethnic Harassment in the Workplace*, *in* GENDER, RACE, AND ETHNICITY IN THE WORKPLACE: ISSUES AND CHALLENGES FOR TODAY'S ORGANIZATIONS (Margaret Foegen Karsten, M. ed., 2006)). *See also* Cortina & Berdahl, *supra* note 251, at 477 (reporting a lack of definitive information on these issues). We also lack good empirical information on harassment experienced by members of the LGBT community. EEOC SELECT TASK FORCE, *supra* note 204, at 10–11 (summarizing an array of studies showing at least 35% of openly LGBT persons reported being harassed at work, with transgender persons reporting even higher rates of harassment).

[275] For example, Minnesota Senator Al Franken was compelled to resign his seat for allegedly forcibly kissing a radio news anchor and subsequently groping her on an airplane. Phil McCausland, *Sen. Al Franken 'Embarassed and Ashamed' Following Sexual Harassment Allegations*, NBC NEWS (Nov. 26, 2017), https://www.nbcnews.com/politics/congress/sen-al-franken-embarrassed-ashamed-following-sexual-harassment-allegations-n824026, *archived at* https://perma.cc/9WVP-945N. New York Times reporter Glenn Thrush was suspended after four women came forward, alleging that Thrush kissed and touched them without their consent. Sydney Ember, *Glenn Thrush, New York Times Reporter, Accused of Sexual Misconduct*, N.Y. TIMES, Nov. 20, 2017, https://www.nytimes.com/2017/11/20/business/media/glenn-thrush-sexual-misconduct.html, *archived at* https://perma.cc/XBG2-XQEV. Yet, as will be seen, unauthorized touching or even kissing is not necessarily sufficient to support a claim for sexual harassment under federal law. *See infra* notes 278–287 and accompanying text.

[276] *See, e.g.*, Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. (forthcoming 2019) (manuscript at 9); Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE (2018); Kate Webber Nunez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463 (2018); *see also* Sandra F. Sperino and Suja A. Thomas, *When Harassment Isn't Harassment*, N.Y. TIMES, Nov.

Article will lightly cover the subject as background to the arbitration discussion.[277]

Title VII of the Civil Rights Act of 1964 governs claims for sexual harassment under federal law.[278] Under this law, to prevail on a claim that inappropriate comments or physical contact created a "hostile work environment,"[279] the plaintiff must show that the conduct was more than "merely offensive."[280] Rather, such conduct must be "severe and pervasive," "unwelcome,"[281] and "because of sex."[282] Although this may not sound like too high a standard, the law books are replete with cases that apply these standards in an extremely demanding fashion to reject claims many #MeToo activists would have assumed constitute sexual harassment. For example, affirming a grant of summary judgment on plaintiff's hostile work environment claim, the Eighth Circuit discussed multiple prior decisions in which plaintiffs failed to prove a hostile work environment despite seemingly favorable evidence. In the first case plaintiff had "evidence that a supervisor sexually propositioned her, repeatedly touched her hand, requested that she draw an image of a phallic object to demonstrate her qualification for a posi-

29, 2017, at A31 (observing that "courts routinely dismiss cases brought by workers who claim their supervisors propositioned them, kissed them or grabbed their breasts"); Catherine A. MacKinnon, *#MeToo and Law's Limitations*, N.Y. TIMES, Feb. 4, 2018, at A19; Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM), https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts, *archived at* https://perma.cc/5AEW-QVUG.

[277] Both the Stanford Law Review and the Yale Law Journal recently published online symposia devoted to the implications of the #MeToo movement for sexual harassment law. *See generally #MeToo and the Future of Sexual Harassment Law*, https://www.stanfordlawreview.org/metoo-symposium/, *archived at* https://perma.cc/UGA2-TFR7; *#MeToo and the Future of Sexual Harassment Law*, https://www.yalelawjournal.org/collection/MeToo, *archived at* https://perma.cc/R8TB-EYA7.

[278] 42 U.S.C. §2000(e) et seq. While alleged victims can potentially state claims under state statutes or common law as well, depending on the circumstances, this analysis will focus on claims brought under federal law.

[279] As has already been discussed in this Article, *see supra* notes 53–60 and accompanying text, even the recognition of hostile environment claims was a significant advance in the interpretation of Title VII, as for some time prior courts viewed supervisors' insistence that subordinates sleep with them or be fired as mere personal conduct, rather than workplace discrimination. *See* Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 54, at 1701–04. Note that sexual harassment claims can also potentially be brought where the plaintiff alleges sex was demanded as a quid pro quo for obtaining or retaining the job or employment benefits. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). However, those cases can also be very hard to win because courts often find alleged conduct has not affected the plaintiff's "employment benefits." *See, e.g.*, Jones v. Clinton, 990 F. Supp. 657, 679 (E.D. Ark. 1998) (finding that, even assuming Clinton engaged in inappropriate sexual conduct with Paula Jones, Jones could not prevail on claims either that the conduct was a quid pro quo for employment or that she had suffered employment detriments).

[280] Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

[281] *Meritor*, 477 U.S. at 67–68 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'").

[282] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 75 (1998) (finding that same sex harassing conduct can only violate Title VII if it is "because of" sex, and that Title VII is not a "general civility code").

tion, displayed a poster portraying the plaintiff as 'the president and CEO of the Man Hater's Club of America,' and asked her to type a copy of a 'He–Men Women Hater's Club' manifesto."[283] In the second case, "a supervisor had rubbed an employee's back and shoulders, called her 'baby doll,' 'accus[ed] her of not wanting to be "one of [his] girls,"' suggested once in a long-distance phone call 'that she should be in bed with him,' and 'insinuat[ed] that she could go farther in the company if she got along with him.'"[284] Then, in the third cited case, the court had ruled that a plaintiff "had not established actionable harassment" even though he "asserted that a harasser asked him to watch pornographic movies and to masturbate together, suggested that the plaintiff would advance professionally if the plaintiff caused the harasser to orgasm, kissed the plaintiff on the mouth, 'grabbed' the plaintiff's buttocks, 'brush[ed]' the plaintiff's groin, 'reached for' the plaintiff's genitals, and 'briefly gripped' the plaintiff's thigh."[285] Considering all of this precedent, the Eighth Circuit in 2013 similarly found the trial court had not erred in granting summary judgment to defendant on plaintiff's hostile work environment claim, even though plaintiff provided evidence that her supervisor had put his arms around her on two occasions, kissed her face, and demanded she use tweezers to remove an ingrown facial hair from his chin.[286] Nor is the Eighth Circuit uniquely hostile to sexual harassment claims; other jurisdictions have issued plenty of similar decisions.[287]

In addition to facing an uphill battle to show that alleged conduct is "severe," "pervasive," and "unwelcome," plaintiffs in sexual harassment cases face other significant hurdles due to courts' interpretations of Title VII. For example, plaintiffs will fail if they complain about sexual harassment

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[283] McMiller v. Metro, 738 F.3d 185, 188 (8th Cir. 2013) (per curiam) (quoting Duncan v. General Motors Corp., 300 F.3d 928, 931–35 (8th Cir. 2002)) (affirming grant of summary judgment on hostile work environment claim but remanding for consideration of quid pro quo harassment claim).

[284] *McMiller*, 758 F.3d at 188–89 (quoting Anderson v. Fam. Dollar Stores of Ark., Inc., 579 F.3d 858, 862 (8th Cir. 2009)).

[285] *Id.* at 189 (quoting LeGrand v. Area Res. for Cmty. and Hum. Serv., 394 F.3d 1098, 1100–03 (8th Cir. 2005)).

[286] *Id.* at 188 (affirming grant of summary judgment on hostile work environment claim but remanding for consideration of quid pro quo harassment claim).

[287] *See, e.g.*, Paul v. Northrop Grumman Ship Sys., 309 F. App'x 825, 829 (5th Cir. 2009) (holding that single instances of offensive touching including supervisor rubbing pelvic region against employee's hips and buttocks and touching employee's stomach and wrist are not objectively offensive or severe enough to support a claim of sexual harassment); Bowman v. Shawnee St. Univ., 220 F.3d 456, 464 (6th Cir. 2000) (affirming summary judgment for a woman accused of sexually harassing a male employee in part because the abuse was not pervasive enough, even though woman had rubbed male employee's shoulder, grabbed his buttocks, and made sexually charged comments); Adusumilli v. City of Chicago, 164 F.3d 353, 361–62 (7th Cir. 1998) (finding that 'simple teasing,' offhand comments, and four "isolated" incidents of touching of the hand, arm and buttocks by another co-worker did not constitute severe and pervasive sexual harassment). *See also* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 32–40 (2017).

either too soon[288] or too late.[289] Also, the Supreme Court has issued two decisions that allow companies to elude liability in sexual harassment cases as long as they can show that they took reasonable steps to prevent and correct any hostile work environment (for example, by instituting a training program) and that the victim failed to take advantage of internal mechanisms designed to prevent harassment.[290] Case law also makes it very difficult for sexual harassment victims to prove that any negative employment consequences were caused by gender-related harassment.[291]

Also, while Title VII proscribes retaliation against those who complain of sexual harassment or other forms of discrimination,[292] courts' interpretations of Title VII have also made it tough for plaintiffs to win these claims.[293] Plaintiffs' retaliation claims fail, for example, if the initial conduct complained of was not sufficiently egregious,[294] if the plaintiff cannot show a

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[288] A claim is essentially brought too soon if the employee has complained of conduct that the court ultimately finds was not sufficiently severe to count as "severe and pervasive" under Title VII. For example, Kate Nunez explains that much of the conduct endured by female reporters at Fox News might not have been sufficient to support a legal claim. Nunez, *supra* note 275, at 493.

[289] It is easy to file too late, as plaintiffs must file a charge of discrimination with the Equal Employment Opportunity Commission within either 180 or 300 days of at least one of the acts of which they complain, depending upon the jurisdiction. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002). This time period can be quite short, particularly if a victim is agonizing over whether filing a complaint may further harm her employment situation or prospects. *See, e.g.*, Baldwin v. Blue Cross/Blue Shield, 480 F.3d 1287, 1307 (11th Cir. 2007) (finding plaintiff's claim was untimely where she waited three and a half months to report the conduct, even though she delayed "because she feared being fired and felt that silence would best serve her career interests").

[290] Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) (holding that an employee is a "supervisor," whose actions potentially make an employer vicariously liable, only when the employer has empowered that harassing employee to take tangible employment actions against the victim); Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (holding that employers are subject to vicarious liability for supervisors' sexual harassment, but are able to assert an affirmative defense that the employer's conduct was reasonable in attempting to prevent harassment of which the plaintiff employee unreasonably failed to take advantage).

[291] Alleged victims face multiple problems in proving causation. They must show that any alleged negative employment consequences were attributable to harassment, and they must also prove that the nature of the harassment was attributable to sex. *See* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1703 (2002).

[292] 42 U.S.C. § 2000e-3(a).

[293] *See* Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, STAN. L. REV. ONLINE (2018), https://www.stanfordlawreview.org/online/ending-harassment-by-starting-with-retaliation/, *archived at* https://perma.cc/LA58-8F9X.

[294] *See, e.g.*, Grosdidier v. Broad. Bd. of Governors, 709 F.3d 19, 24 (D.C. Cir. 2013) (affirming grant of summary judgment on retaliation claim because "no reasonable employee could believe that the conduct about which she complained amounted to a hostile work environment under Title VII"). Most courts do not require that the complained of conduct be unlawful, so long as the employee reasonably and in good faith believed it to be unlawful. *See, e.g.*, EEOC v. Rite Way Serv., 819 F.3d 235, 237 (5th Cir. 2016). However, the Supreme Court has left open the possibility that perhaps retaliation protection is afforded only where the conduct is actually unlawful. *See* Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001); *see generally* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 924 (2008) (retaliation claim fails if harassment is not sufficiently severe).

materially adverse employment action was taken against her,[295] or if the plaintiff cannot sufficiently prove a causal relationship between her complaints and any action taken against her.[296] Former Fox News anchor Megyn Kelly explained the dilemma faced by many victims:

> I knew the reality of the situation: if I caused a stink, my career would likely be over. Sure they might investigate, but I felt certain there was no way they would get rid of him, and I would be left on the wrong side of the one man who had power at Fox. I'd get labeled a troublemaker, someone who is overly sensitive—all the things we too often hear about women who don't tolerate harassment. I didn't want any of that. I just wanted to do my job.[297]

In short, these cases demonstrate that the law of sexual harassment is not yet in sync with the notions of justice demanded by the #MeToo social movement. Still, a number of commentators have expressed hope that the #MeToo social movement will eventually encourage courts to interpret sexual harassment law more sympathetically to victims.[298] As Rebecca Hanner White has emphasized:

> A law's interpretation can shift and change over time, and it is possible that the #MeToo movement will lead judges (and juries should a case proceed past summary judgment to trial) to think differently, and more empathetically, about how workplace harassment affects women and to assess whether it is actionable accordingly.[299]

Sandra Sperino and Suja Thomas have similarly expressed hope that the #MeToo movement will encourage judges to rethink earlier cases that have led them to dismiss so many claims of harassment as not sufficiently severe or pervasive to be legally cognizable:

> In the early and mid-1990s, the federal courts wrestled with the meaning of the "severe or pervasive" standard, and judges during that period created a very high bar for plaintiffs to meet. Unlike typical workers, these judges had lifelong job security and power-

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[295] *See, e.g.*, Higgins v. Gonzalez, 481 F.3d 578, 585–86, 590 (8th Cir. 2007) (finding that withholding of mentoring is not a sufficiently materially adverse act to count as retaliation under Title VII).

[296] *See* Nunez, *supra* note 276, at 484–85 (discussing difficulty in proving causation in retaliation claims under Title VII).

[297] MEGYN KELLY, SETTLE FOR MORE 302 (2016) (discussing why Kelly did not file a formal complaint against Roger Ailes).

[298] Of course commentators also hope that the #MeToo movement will lead judges and others to better understand the factual perspective of alleged victims, and to more frequently believe their accounts, in addition to interpreting the law more favorably.

[299] White, *supra* note 276, at 3. White quotes Professor Deborah Rhode as stating: "Often times it takes a kind of cultural consciousness raising moment like the one that we're having now to force a reevaluation of standards." *Id.* at 3 n.9.

> ful positions. They also did not have the benefit of deliberating with a large group of people with different experiences as a jury does. These early cases have cast a long shadow, and today, some judges appear to simply be following the standards set by earlier courts. These standards have not aged well.[300]

Catherine MacKinnon also expresses optimism: "[s]exual harassment law can grow with #MeToo. Taking #MeToo's changing norms into the law could—and predictably will—transform the law as well."[301]

There are early signs that the #MeToo movement is already beginning to have some influence on judges. In a recent decision, the Third Circuit Court of Appeals reversed a trial court decision granting summary judgment to the employer in a sexual harassment case, holding that a jury must be given a chance to opine on whether the employee acted reasonably when she failed to report the sexual harassment through an internal reporting mechanism.[302] The court specifically alluded to the #MeToo movement in its analysis, stating "[t]his appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by victims."[303] In particular, the court found that while Supreme Court case law generally protects employers from liability when employees fail to timely report their claims, recent news stories and studies show that the failure to report is widespread and can be justifiable.[304] This is a clear example of how social movements can impact the development of law. Unfortunately, however, given the arbitration landscape discussed in this Article and applied to the sexual harassment context below, these moments of judicial reinterpretation in the area of sexual harassment may be few and far between. Many judges may not even get a chance to rethink these older standards.

C. Arbitration Clauses and the #MeToo Movement

Arbitration clauses are already significantly constraining the claims that might have arisen out of the #MeToo movement, thereby stagnating the development of sexual harassment law. In 2016, then Fox News star Gretchen Carlson filed a complaint against Roger Ailes, at that time Chairman and CEO of Fox News, in New Jersey Superior Court.[305] Carlson alleged that Ailes had made numerous inappropriate comments and sexual advances, and also retaliated against her for complaining about her co-host's sexist behav-

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[300] Sperino & Thomas, *supra* note 276, at A31.
[301] MacKinnon, *supra* note 275, at A19.
[302] Minarsky v. Susquehanna Cty., 895 F.3d 303, 306 (3rd Cir. 2018).
[303] *Id.* at 313 n.12.
[304] *Id.*
[305] Nunez, *supra* note 276, at 467; Complaint and Jury Demand, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 6, 2016), https://assets.documentcloud.org/documents/2941030/Carlson-Complaint-Filed.pdf, *archived at* https://perma.cc/X5UJ-DMEL.

ior.[306] It is likely that Carlson sued only Ailes, and not Fox News itself, in an effort to elude the arbitration clause contained in her contract,[307] but Ailes still sought to have the lawsuit dismissed so that any issues would be resolved in arbitration.[308] Ultimately, because Fox News and Carlson settled, the courts did not decide whether the claim would have been heard in arbitration rather than litigation.[309] However, when another Fox News host, Andrea Tantaros, brought a sexual harassment lawsuit against Roger Ailes, Ailes and the other defendants won a motion in court relegating the matter to confidential arbitration.[310] Fox News ultimately settled these and other claims and eventually terminated alleged perpetrators Bill O'Reilly and Roger Ailes,[311] but only after the allegations received substantial public attention and a public outcry led advertisers to withdraw sponsorships.[312]

The link between sexual harassment and mandatory arbitration has also gained a lot of attention in the tech world. Susan Fowler, who wrote a now famous blog blowing the whistle on sexual harassment committed against female engineers at Uber,[313] has also been extremely active in drawing the connection between ongoing sexual harassment and forced arbitration. For example, Fowler filed an amicus curiae brief in *Epic Systems*, urging that the Supreme Court prohibit companies from using forced arbitration to prevent employees from bringing group or class claims.[314] In the brief, Fowler explains that she, like hundreds of thousands of other Uber workers, was required to sign an arbitration provision including a class action waiver.[315] She also notes that many other tech companies, including Google and Facebook, require their workers to agree to arbitration including class action waivers.[316] Fowler urges that taking away the class action from tech workers is particularly harmful because, in the "gig economy," workers realistically lack other economic weapons of concerted action such as the strike or picket line.[317]

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[306] Nunez, *supra* note 276, at 467–68.

[307] *Id.* at 469.

[308] John Koblin, *Lawyers for Fox News Chairman Want Harassment Suit in Arbitration*, N.Y. Times, July 9, 2016, at B6.

[309] Nunez, *supra* note 276, at 469–70.

[310] *Id.* at 471–72.

[311] *Id.* at 465. Emily Steel & Michael Schmidt, *Fox News Ousts O'Reilly, A Host Central to Its Rise*, N.Y. Times, Apr. 20, 2017, at A1.

[312] Nunez, *supra* note 276, at 465. *See also* Jim Dwyer, *Ex-Host Charges Fox News with Retaliation for Harassment Complaints*, N.Y. Times, Aug. 23, 2016, at B3; Michael M. Grynbaum & John Koblin, *Anchor Ousted at Fox News Accuses Chief of Harassment*, N.Y. Times, July 7, 2016, at A1.

[313] Susan J. Fowler, *Reflecting on One Very, Very Strange Year at Uber,* Susan J. Fowler Blog (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber, *archived at* https://perma.cc/ML5C-EC2Z; *see also* Mike Isaac, *Uber Fires 20 Amid Investigation into Workplace Culture*, N.Y. Times, June 6, 2017, at A1.

[314] Brief for Susan Fowler as Amicus Curiae in Support of Respondents, Epic Systems Corp. v. Lewis, 584 U.S. __ (2018) (No. 16-285), 2017 WL 4325881, at *2–3.

[315] *Id.* at *2, *5–6.

[316] *Id.* at *7 n. 8.

[317] *Id.* at *9 (explaining that workers who do not come into a physical office have fewer opportunities to do old-fashioned picketing or engage in other kinds of concerted activity).

Fowler has also been working with the California Labor Federation in support of a proposed California statute intended to block forced arbitration.[318] She has stated, "[f]orced arbitration is a kind of legal loophole that these companies could use—companies like Uber—to cover up illegal behavior."[319] And Ms. Fowler also wrote an op-ed for the *New York Times* urging that Congress adopt legislation ending the use of mandatory arbitration to block sexual harassment claims.[320]

While employees in certain high profile industries may be reasonably well positioned to gain substantial attention for their claims despite being covered by private arbitration clauses, most employees do not have this advantage of a public platform to raise these issues. News media realistically cannot and will not give coverage to most allegations of sexual or other misconduct brought by lower level employees in businesses throughout the economy. For this reason, a number of advocates, including Gretchen Carlson herself, have urged companies throughout the economy to stop forcing their employees into arbitration. She tweeted: "EVERY organization should end forced arbitration because keeping victims silent is how sexual predators can get away with it for years (or decades)."[321]

Other advocates have similarly drawn a direct connection between sexual harassment and binding arbitration clauses, demanding that companies change their practices.[322] For example, actress Reese Witherspoon, who has been speaking out about sexist behavior in Hollywood, has stated, "[n]o more forced arbitration agreements for sexual harassment cases makes a safer work environment."[323] Numerous advocacy organizations joined together to write a letter to Google in February 2018 urging that company "to end the use of forced arbitration provisions in your employee contracts and to restore your employees' rights to access the court system after disputes

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[318] Johana Bhuiyan, *Susan Fowler's Next Act: Ending Forced Arbitration, Which Blocks Workers from Suing Their Employers*, Recode (Apr. 18, 2018), https://www.recode.net/2018/4/18/17252032/susan-fowler-uber-forced-arbitration-labor-bill-california, *archived at* https://perma.cc/89C9-2MYG.

[319] *Id.*

[320] Susan Fowler, *I Wrote the Uber Memo. This is How to End Sexual Harassment*, N.Y. Times, Apr. 12, 2018, https://www.nytimes.com/2018/04/12/opinion/metoo-susan-fowler-forced-arbitration.html, *archived at* http://perma.cc/86KA-BZB4.

[321] Danielle Paquette, *Microsoft Just Handed #MeToo a Major Victory*, Wash. Post, Dec. 20, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/12/20/microsoft-just-handed-metoo-a-major-victory/?utm_term=.1543045cdc7e, *archived at* https://perma.cc/S2KT-NU52.

[322] As will be discussed, advocates including more than fifty attorneys general have also asked Congress to protect victims of sexual harassment by passing legislation to limit companies' use of forced arbitration. *See infra* notes 346–347 and accompanying text; *see also* Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, Wall St. J., Jan. 25, 2018, https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201, *archived at* https://perma.cc/UH37-QR3B.

[323] Paquette, *supra* note 321.

arise with your company."[324] Also, Gizmodo asked ten major tech companies to ban forced arbitration in order to fight sexual harassment in Silicon Valley.[325]

In a few instances, companies have agreed to act in the public interest (or have given in to public shaming, depending on one's degree of cynicism) to abolish forced arbitration for certain types of claims. Microsoft ended its use of forced arbitration clauses with respect to sexual harassment claims in December 2017.[326] Similarly, Uber and Lyft have now ended forced arbitration of sexual harassment and assault claims by employees, drivers, or customers, though Uber still blocks class actions in both arbitration and litigation.[327] Meanwhile, several major law firms agreed to stop using forced arbitration to require summer associates and others to arbitrate sexual harassment and other claims, after a Harvard Law School Lecturer tweeted about the clauses.[328] Heightening the pressure, fourteen top law schools have asked law firms that interview on campus to disclose whether or not they plan to require summer associates to agree to arbitration.[329]

While social pressure has been effective in the aforementioned contexts, many and likely most companies still force sexual harassment victims and other employees to bring any claims they may have in arbitration, rather

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[324] Letter from more than forty public interest organizations to Larry Page (Feb. 7, 2018), https://www.citizen.org/sites/default/files/employment_arb_sign-on_letter_google.pdf, *archived at* https://perma.cc/3AFV-HE83.

[325] Melanie Ehrenkranz, *Silicon Valley Needs to Ban Forced-Arbitration Agreements. We Asked 10 Tech Companies if They Will*, GIZMODO (Feb. 9, 2018), https://gizmodo.com/silicon-valley-needs-to-ban-forced-arbitration-agreemen-1822313732, *archived* at https://perma.cc/2ERP-NC2S.

[326] Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT BLOG (Dec. 19, 2017), https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/, *archived at* https://perma.cc/N7BH-3AE3 (blog from Microsoft President Brad Smith stating "we are waiving the contractual requirement for arbitration of sexual harassment claims in our own arbitration agreements for the limited number of employees who have this requirement"); Paquette, *supra* note 321. Microsoft also announced its support of a proposed federal law, discussed *infra* note 346, that would bar most companies from employing forced arbitration in employment cases. Smith, *Microsoft Endorses*, *supra*.

[327] Staff, *Uber and Lyft End Forced Arbitration of Sexual Harassment and Assault Claims*, CEB GLOBAL (May 15, 2018), https://www.cebglobal.com/talentdaily/uber-ends-forced-arbitration-of-sexual-harassment-claims-pledges-transparency/, *archived at* https://perma.cc/TVA2-PYED.

[328] *See* Debra Cassens Weiss, *After Social Media Outcry, Munger Tolles Will No Longer Require Mandatory Arbitration*, A.B.A. J. (Mar. 26, 2018), http://www.abajournal.com/news/article/after_social_media_outcry_muner_tolles_will_no_longer_require_mandatory_arb, *archived at* https://perma.cc/AA9C-DU7K. *See also* Stephanie Francis Ward, *Orrick Follows Munger Tolles in Dropping Mandatory Arbitration Agreements: Will More Firms Follow?*, A.B.A. J. (Mar. 28, 2018), http://www.abajournal.com/news/article/orrick_follows_munger_tolles_in_dropping_mandatory_arbitration, *archived at* https://perma.cc/WKT2-DC8D.

[329] Meghan Tribe, *Top Law Schools Ask Firms to Disclose Summer Associate Arbitration Agreements*, AM. LAW. (May 14, 2018), https://www.law.com/americanlawyer/2018/05/14/top-law-schools-ask-firms-to-disclose-summer-associate-arbitration-agreements/, *archived at* https://perma.cc/TW2E-F4WP.

than litigation.[330] When Gizmodo reached out to ten major tech companies and asked them to get rid of their forced arbitration clauses, the request had limited success.[331] Amazon and Verizon denied using such clauses, and none of the additional major companies agreed to get rid of the provisions.[332]

Given these circumstances, the #MeToo movement provides a clear, real-time example of the individual and societal consequences of mandatory arbitration discussed throughout this Article. By preventing historically disempowered female workers from gaining access to court, many American companies suppress their employees' ability to pursue relief for their injuries and prevent the development of more progressive law that might otherwise have occurred in light of widespread social momentum.

IV. Call for Legislative Reform

So, what is to be done?

A. Congress Can Fix This

In one sense, the reform is easy. The Supreme Court's arbitration jurisprudence derives from one statute, the 1925 Federal Arbitration Act.[333] While many, including this author[334] and multiple current or former Supreme Court Justices,[335] believe the Court has grossly misinterpreted this statute, it seems highly unlikely the Court and its newest members will change their approach any time soon. However, the good news about errors in statutory interpretation is that passage of new laws can fix them. To this end, over a period of now more than sixteen years, legislators have introduced various Arbitration Fairness Acts that would prevent companies from using form contracts to impose arbitration on consumers and employees.[336] While such

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[330] The last major study on the question of how many companies impose mandatory arbitration on their employees was published in 2017 by Alexander Colvin and showed that 56% of companies did so. *See* Colvin, *Growing Use*, *supra* note 101. While it is conceivable that this number might have shrunk, it is also quite possible it has risen, particularly as companies have been reassured by the Supreme Court in *Epic Systems* that it is permissible to use mandatory arbitration to insulate themselves from employment class actions. *See supra* notes 152–153 and accompanying text. An accurate current count of the number of companies that force arbitration on their employees must await new empirical research.

[331] *See* Ehrenkranz, *supra* note 325.

[332] *Id.*

[333] 9 U.S.C. § 1 et seq.

[334] *See* Sternlight, *Panacea or Corporate Tool?*, *supra* note 26, at 697; *see also* Szalai, *supra* note 138; Moses, *supra* note 138, at 157; Schwartz, *Claim-Suppressing Arbitration*, *supra* note 171, at 244; Gross, *Justice Scalia's Hat Trick*, *supra* note 143, at 145.

[335] Moses, *supra* note 138, at 122–30 (mentioning several Supreme Court Justices who have taken issue with the Court's interpretation of the Federal Arbitration Act).

[336] Such proposals have taken various forms since the Arbitration Fairness Act was first introduced in 2002. Sometimes such proposed statutes have also included protections for franchisees or those who would present civil rights claims. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. *See generally* Jean R. Sternlight, *Hurrah for the Consumer Financial*

Acts have varied somewhat in their details,[337] they have shared the same fate: none has been passed by, or even come close to passing, either House of Congress.[338] The Chamber of Commerce, as well as others, have firmly resisted such legislation,[339] and while Democrats have tended to be supportive,[340] Republicans have not.[341]

The #MeToo movement has given energy to an effort to pass a narrower law focused on protecting court access for victims of sexual harassment.[342] A bill entitled the Ending Forced Arbitration of Sexual Harassment Act of 2017,[343] was introduced in both the House and the Senate at the end of 2017.[344] Significantly, the bill was sponsored not only by Democrats, such as Senator Kristen Gillibrand, but also by Republican Senator Lindsey Graham. The key provision of the bill provides that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute."[345] The bill received a letter of support from fifty-six

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Protection Bureau: Consumer Arbitration as a Poster Child for Regulation, 48 ST. MARY'S L.J. 343 (2016) (discussing policy justifications for regulating mandatory arbitration).

[337] The most recent proposed Arbitration Fairness Act, H.R. 1374 & S. 2203, would prohibit a pre-dispute arbitration agreement from being enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong.

[338] H.R. 1374 (introduced in Mar. 2017, only 81 cosponsors); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (introduced in Dec. 2017, only 17 cosponsors).

[339] The most recent version of the Arbitration Fairness Act has no Republican co-sponsors in either House of Congress. Cosponsors: H.R. 1374—115th Congress (2017–2018), CONGRESS.GOV, http://www.congress.gov/bill/115th-congress/house-bill/1374/cosponsors, *archived at* https://perma.cc/S3KQ-GSBF; Cosponsors: S. 537—115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/537/cosponsors, *archived at* https://perma.cc/42WZ-G4Y2.

[340] The Chief sponsors of this bill were Senator Al Franken and Representative Hank Johnson.

[341] Cosponsors: H.R. 1374—115th Congress (2017–2018), CONGRESS.GOV, http://www.congress.gov/bill/115th-congress/house-bill/1374/cosponsors, *archived at* https://perma.cc/S3KQ-GSBF; Cosponsors: S. 537—115th Congress (2017-2018), Congress.gov, https://www.congress.gov/bill/115th-congress/senate-bill/537/cosponsors, *archived at* https://perma.cc/42WZ-G4Y2.

[342] This smaller bill follows in the tradition of some other smaller bills that Congress has passed to eliminate mandatory arbitration in particular subject areas. For example, in the wake of the financial crisis Congress passed legislation proscribing the imposition of mandatory arbitration with respect to consumer mortgages. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Another statute blocks federal contractors from using mandatory arbitration provisions to prevent victims of sexual assault from bring claims in court. *See* Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3409 (2009). A third law prevents payday lenders from imposing mandatory arbitration on members of the armed services. *See* Military Lending Act, 10 U.S.C. § 987 (2006); *see also* Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 Fed. Reg. 43560-01 (2015).

[343] S. 2203, 115th Cong. (2017); H.R. 4570, 115th Cong. (2017).

[344] Although the title of the bill and the lobbying on its behalf have focused specifically on sexual harassment, in fact the bill language is somewhat broader and would protect all claims of sex discrimination, not just those involving sexual harassment.

[345] Arbitration Fairness Act of 2017, S. 2203, 115th Cong. § 402(a).

attorneys general—those from all fifty states and also a number of U.S. territories.[346] The letter stated:

> While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims . . . . Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.[347]

This legislation has also received support from many other advocates and organizations.[348] Nonetheless, this bill, like the Arbitration Fairness Act, has not yet made it out of committee in either the House or Senate due to opposition from Republicans and the business community.[349] With greater political action, perhaps the Arbitration Fairness Act, or at least the narrower bill focused on sex discrimination, will eventually be passed by Congress and signed by a President. Such corrective legislation is critically important to protect our progress towards greater justice.

Some may suggest that the Arbitration Fairness Act is too extreme and that rather than proscribing mandatory employment arbitration altogether we should simply regulate the practice, perhaps to lessen its impact on vulnerable employees. While this purportedly moderate solution may initially sound appealing, this author has explained elsewhere why it is ultimately unavailing. So long as employers are imposing arbitration, they will always have an incentive to devise a process that protects themselves at the expense of their employees. And, even the wisest of regulators will likely not be able to solve this problem. First, employers and their lobbyists will resist serious regulation such as the elimination of class action waivers. Second, for every meaningful regulation imposed, employers will likely be able to think of another way to skew the process. And third, as a logistical matter, it is very difficult to imagine either a government agency or private attorneys general who could meaningfully review employer arbitration programs on an individual

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[346] Debra Cassens Weiss, *Give Victims of Workplace Sexual Harassment Access to Courts, 56 U.S. Attorneys General Tell Congress*, A.B.A. J., (Feb. 13, 2018), http://www.abajournal.com/news/article/give_victims_of_workplace_sexual_harassment_access_to_courts_56_us_attorney, *archived at* https://perma.cc/SJW7-ELS7.

[347] Letter from the National Association of Attorneys General to Congressional Leadership, NAAG (Feb. 12, 2018), https://coag.gov/sites/default/files/contentuploads/ago/press-releases/2018/03/03-14-18/finalletter-naagsexualharassmentmandatoryarbitration1.pdf, *archived at* https://perma.cc/S8LV-Z8ZG. The bill has also been supported by Microsoft. *See supra* note 326.

[348] *See, e.g.*, Employee Rights Advocacy Institute for Law & Policy, *The Facts on Forced Arbitration: How Forced Arbitration Harms America's Workers*, http://employeerightsadvocacy.org/wp-content/uploads/2017/12/The-Institute-Faces-of-Forced-Arbitration-Sexual-Harassment-Fact-Sheet.pdf, *archived at* https://perma.cc/LU6H-626U ("The time has come to shine a light on workplace sexual harassment and drive offenders out of the shadows. So long as courts embrace forced arbitration clauses and endorse class and collective action bans, pervasive workplace sexual harassment will continue to go unchecked . . . . Tell Congress to end forced arbitration in the American workplace today.").

[349] *Supra* note 338.

basis. In short, while it may sound appealing to solve the mandatory employment arbitration problem through regulation rather than through elimination, upon reflection, regulation proves to be quite infeasible.[350]

B. Alternatives to Federal Legislation

If Congress fails to pass legislation proscribing the use of mandatory arbitration in the employment setting, it will be very difficult to protect employees' interest in justice and to ensure that employment law can continue to evolve.[351] Although one might reasonably believe that individual states could pass laws to protect their employees from forced arbitration,[352] the Supreme Court has made it clear that the Federal Arbitration Act preempts most state legislation in this area. In a controversial series of decisions, the Court has proclaimed repeatedly that states cannot legislate to undermine the viability of arbitration "agreements."[353] Nonetheless, mandatory arbitration opponents have tried to develop legislation states could pass that would not be deemed preempted.[354] However, states have been reluctant to adopt such legislation,[355] so whether it would pass the Supreme Court's preemption test remains to be seen.

A second alternative to federal legislation is federal administrative regulation. For a short time under President Obama, various federal agencies were on a path to rein in mandatory arbitration in particular contexts.[356] Aca-

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[350] *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1353–54.

[351] Some commentators are more optimistic than this author that states or federal administrative agencies might step in to defeat the use of mandatory arbitration in the employment setting. *See* Garden, *supra* note 120, at 226–32 (discussing possible regulation by federal agencies and possible use of representative suits like California's Private Attorney General Act); Nunez, *supra* note 276, at 510–12 (discussing proposed Model State Consumer and Employee Justice Enforcement Act).

[352] *See generally* Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY: A J. OF IDEAS, Spring 2017, No. 44 (urging that substantial progressive change can be accomplished at the state level).

[353] *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 269 (1995) (holding an Alabama statute proscribing enforcement of pre-dispute arbitration agreements was preempted); Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) (holding that Montana statute requiring arbitration clauses in franchise contracts "be typed in underlined capital letters on the first page of the contract" was preempted because provision applied only to arbitration agreements).

[354] *See* MODEL STATE CONSUMER & EMP. JUSTICE ACT (Nat'l Consumer Law Ctr. 2015); David Seligman, *The National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act: Protecting Consumers, Employees, and States from the Harms of Forced Arbitration Through State-Level Reforms*, 19 J. CONSUMER & COM. L. 58, 63 (2016).

[355] California passed a law of this sort a couple years ago but the Governor refused to sign it into legislation. Edward Lozowicki, *Governor Brown Vetoes California Bill Prohibiting Arbitration of Employment Claims*, A.B.A. (Jan. 15, 2016), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2016/gvr-brown-vetoes-ca-bill-prohibiting-arbitration-employment-claims.html, *archived at* https://perma.cc/JC8E-T4HL.

[356] The best known of these efforts was the regulation almost adopted by the Consumer Financial Protection Bureau, which would have prevented companies from using arbitration clauses to eliminate financial consumers' opportunity to participate in class actions. The CFPB had put such a proposed notice out for public comment and was poised to adopt the rule, but

demics were excited about the possibilities,[357] which might have extended to employment. However, in the current political climate it no longer seems imminent that any federal agency will seek to limit companies' use of forced arbitration. To the contrary, several efforts that were far underway were reversed by the Trump administration in fairly short order.[358]

In sum, while a federal legislative "fix" for mandatory arbitration does not appear to be imminent, it nonetheless is clear that Congress is our last best hope for restoring employees' access to court and protecting the continued evolution of employment law.

Conclusion

There are many good reasons to critique mandatory employment arbitration. This author has been challenging courts' acceptance of mandatory arbitration for more than twenty years on a variety of policy and Constitutional grounds. As previously explained, companies' use of mandatory arbitration harms individual employees, and also harms the larger public.

This Article offers a critique of the practice of mandatory employment arbitration from a fresh perspective. While employment arbitration hurts all employees, it particularly harms the most vulnerable members of our workforce. Social movements may galvanize support for individuals who, on their own, are politically and economically disempowered.[359] Courts can play a key role in converting the momentum of social activism into meaningful legal change. But in order to do so, claims need to get through the courthouse door. As we are witnessing in real-time with #MeToo, mandatory arbitration prevents employees from bringing claims in court, thereby blocking judges from considering evolving social mores when reviewing older

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then President Trump's appointees pulled the proposed regulation. Sylvan Lane, *Trump Repeals Consumer Arbitration Rule, Wins Banker Praise*, The Hill (Nov. 1, 2017), http://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking, *archived at* https://perma.cc/7CT7-73KS.

[357] *See, e.g.*, David L. Noll, *Regulating Arbitration*, 105 Calif. L. Rev. 985, 988 (2017); Daniel Deacon, *Agencies and Arbitration*, 117 Colum. L. Rev. 991 (2017); Sternlight, *Hurrah*, *supra* note 336, at 375 (discussing various agencies' efforts to limit or eliminate mandatory arbitration in areas such as consumer finance, education, and medical care).

[358] Julia Horowitz, *Trump Kills Rule That Made It Easier for People to Sue Banks*, CNN Money (Nov. 1, 2017), https://money.cnn.com/2017/11/01/news/trump-repeals-cfpb-arbitration-rule/index.html, *archived at* https://perma.cc/E749-PG4X; Mark Kantor, *Department of Education Suspends Arbitration Regulation*, A.B.A. (July 7, 2017), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2017/department-of-education-suspends-arbitration-regulation.html, *archived at* https://perma.cc/S99L-ZZS6; Robert Pear, *Trump Moves to Impede Consumer Lawsuits Against Nursing Homes*, N.Y. Times, Aug. 18, 2017, https://www.nytimes.com/2017/08/18/us/politics/trump-impedes-consumer-lawsuits-against-nursing-homes-deregulation.html, *archived at* https://perma.cc/QR54-K7JQ.

[359] Of course, as has been noted, social movements may also sometimes go in an anti-progressive direction—limiting abortion, attacking immigration, and advocating gun rights. *See* Guinier & Torres, *supra* note 3. While the progressive trend is not inevitable, the point of the Article is that it will be impeded by mandatory arbitration that denies access to courts.

legislation. In this way, mandatory arbitration is stymying the very evolution of law.

By focusing on #MeToo as well as the numerous empirical studies undertaken in this area, we can see that mandatory arbitration does not provide a viable alternative to court. Individual arbitrators may be progressive and willing to respond to new ways of thinking, but it is not realistic to rely on arbitrators to issue the next groundbreaking decisions expanding the rights of transgender persons, victims of sexual harassment, or any other vulnerable group. These issues will rarely make their way to arbitration due to the plethora of hurdles in complainants' ways. And even if they do, arbitrators are far less likely than judges to issue creative and forward-thinking interpretations of existing laws. That has not been and likely will never be the role of arbitrators, who by the nature of the job are more cautious and incentive-driven. Moreover, even if an arbitrator were to issue a bold decision, it would be seen by few and have little if any impact on the further development of the law.

For those who believe that the arc of the moral universe bends towards justice, mandatory arbitration is demolishing that arc. Therefore, those who care about the most vulnerable members of our society must continue to call upon Congress to pass legislation to eliminate the use of mandatory arbitration.[360] Only in this way can we hope to ensure that that social movements and courts continue to reinforce one another and thereby keep our moral universe progressing towards justice.

[360] While this Article has focused on the use of mandatory arbitration in the employment context, its use in consumer and other settings has a similar impact, undercutting progressive legal developments. So, the conclusion calls for elimination of mandatory arbitration generally rather than only in the employment context.

The Legal Implications of the MeToo Movement

Elizabeth C. Tippett[1]

Abstract

This Article examines the implications of the MeToo movement for employment law and employment practices. Employers are likely to face increased liability for harassment, as courts eventually update their standards for what qualifies as "severe or pervasive" harassment, and demand more of employers seeking to establish the *Faragher/Ellerth* defense. Employers also face greater risks of public scandals, as employees speak out and state legislatures limit the enforceability of non-disclosure agreements.

Consequently, employers can be expected to take a more punitive approach to documented instances of harassment. This will not only include termination, but also meaningful intermediate forms of discipline like a demotion or the removal of supervisory responsibilities. To limit their potential liability associated with these more punitive measures, employers are likely to modify standard language in executive employment agreements and privacy policies.

Lastly, the Article explores how standard harassment policies may have contributed to the problems exposed by the MeToo movement. The Article advocates for transparent harassment policies that disclose the contextual factors that influence disciplinary decisions. Employers should also draft broader discrimination policies that treat discriminatory and harassing comments by supervisors as a breach of trust. These changes would harmonize employer policies with their underlying litigation risks, and better convey employer expectations in the MeToo era.

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[1] Associate Professor, University of Oregon School of Law. Thank you to Amber Lesher, Anne Stuller, and Catharine Roner-Reiter for their research assistance. I am also grateful to the editors of the Minnesota Law Review, including Sarah DeWitt, Lesley Roe and Anthony Ufkin.
Arguments, analysis and footnotes from this article appear in my written testimony before the Equal Employment Opportunity Commission on June 11, 2018, https://www.eeoc.gov/eeoc/task_force/harassment/6-11-18.cfm.

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Introduction

On October 5, 2017, the New York Times broke the Harvey Weinstein story. High profile actresses including Ashley Judd and Rose McGowan accused Weinstein of propositioning and assaulting them while pursuing acting roles.[2] In years past, Weinstein enjoyed a high level of power and prominence as a Hollywood kingmaker, producing blockbusters like *Pulp Fiction*,

[2] 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.

Good Will Hunting, and *Shakespeare in Love*.[3] The Weinstein story kept growing as additional stars described similar experiences.[4] Weinstein was fired by his own company[5] on October 8, 2017, which has since declared bankruptcy.[6] He has since been arrested on rape charges.[7]

On October 15, 2017, actress Alyssa Milano asked her Twitter followers to reply with the hashtag #metoo if they had experienced harassment or assault.[8] Her tweet went viral, and the #metoo hashtag has since been used over 12 million times.[9] Although Milano's tweet brought global attention to the MeToo movement, it originated from activist Tarana Burke. Burke started the movement in 2007[10] and used the term "metoo" to express solidarity with girls and women who experienced sexual assault.[11]

In the weeks and months following the Weinstein revelations, a number of prominent men in media, journalism, and politics were accused of harassment or assault, often by multiple women.[12] These included television hosts Charlie

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[3] *Id.*

[4] Jacey Fortin, *The Women Who Have Accused Harvey Weinstein*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/us/harvey-weinstein-accusations.html; Lupita Nyong'O, *Speaking Out About Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/opinion/lupita-nyongo-harvey-weinstein.html; Salma Hayek, *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.

[5] Megan Twohey, *Harvey Weinstein Is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html.

[6] Brooks Barnes, Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements, N.Y. TIMES (March 19, 2018), https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html.

[7] Benjamin Mueller and Alan Feuer, *Arrested on Rape Charges, Weinstein Posts $1 Million Bail*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/nyregion/harvey-weinstein-arrested.html.

[8] Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/.

[9] *Id.*

[10] Emma Brockes, *Me Too Founder Tarana Burke: 'You have to use your privilege to serve other people'*, THE GUARDIAN (Jan. 15, 2018), https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault.

[11] *Id.*

[12] Dan Corey, *Since Weinstein, Here's a Growing List of Men Accused of Sexual Misconduct*, NBC NEWS (Jan. 10, 2018, 1:34 PM), https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546.

Rose,[13] Matt Lauer,[14] and Tavis Smiley;[15] several high ranking hosts at National Public Radio;[16] and Disney producer John Lasseter.[17] (All but Lasseter were fired.)[18] Actor Kevin Spacey was accused of assaulting a 14-year-old boy.[19] Comedian Louis CK was accused of lewd conduct by fellow comedians and coworkers.[20] Chefs Mario Batali and John Besh were likewise accused of harassment. Twenty-five women at Besh's company described a hostile work environment where complaints were ignored.[21] Multiple male models accused prominent photographers Mario Testino and Bruce Weber of sexual misconduct.[22]

The MeToo movement also reached politicians in federal and state government. Senator Al Franken, Representative Blake Farenthold, and Representative John Conyers resigned in the wake of harassment allegations.[23] These accusations revealed an arcane system for handling harassment complaints in Congress, where complainants[24] were forced to continue working

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[13] Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—With Nudity, Groping, and Lewd Calls*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.bfa71467df82.

[14] Ellen Gabler, Jim Rutenberg, Michael M. Grynbaum & Rachel Abrams, *NBC Fires Matt Lauer, the Face of 'Today'*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html.

[15] Corey, *supra* note 12.

[16] Mike Snider, *NPR news chief Michael Oreskes resigns after sexual harassment accusations*, USA TODAY (Nov. 1, 2017, 1:06 P.M.), https://www.usatoday.com/story/money/media/2017/11/01/npr-news-chief-michael-oreskes-resigns-after-sexual-harassment-accusations/821405001/.

[17] Steven Zeitchik, *Disney Animation Guru John Lasseter Takes Leave After Sexual Misconduct Allegations*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/21/disney-animation-guru-john-lasseter-takes-leave-after-sexual-misconduct-allegations/?utm_term=.b1776c4e258b.

[18] *Id.*

[19] Corey, *supra* note 12.

[20] *Id.*

[21] *Id.*

[22] Brian Stelter, *Vogue Publisher Drops Bruce Weber and Mario Testino Over Misconduct Allegations*, CNN (Jan. 15, 2018, 2:38 AM), http://money.cnn.com/2018/01/15/media/mario-testino-bruce-weber-conde-nast/index.html.

[23] Dan Corey, *Here's a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 16, 2017, 5:08 P.M.), https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821.

[24] I generically refer to employees accusing other employees of harassment as "complainants," and on occasion, "plaintiff" in the context of legal disputes. For purposes of reader fluency, I refer to complainants as "victims" in recounting salient events from the MeToo movement, or to more clearly distinguish a complainant from the accused employee.

with the harasser during a thirty-day "cooling off" period. Former judge Roy Moore lost a heavily contested Alabama senate race after several women accused him of aggressively pursuing them as teenagers.[25] Prominent politicians in state politics were likewise accused of harassment.[26]

The MeToo movement galvanized complaints in other industries.[27] Alianza Nacional de Campesinas wrote an open letter of solidarity to women in Hollywood, noting endemic problems of harassment in agriculture.[28] The New York Times published an exposé of decades of harassment and related litigation in an auto plant.[29] MeToo reinvigorated complaints about widespread harassment and assault of hotel workers.[30] It also brought renewed attention to Silicon Valley, where programmer Susan Fowler's accusations of harassment at Uber went viral earlier in 2017.[31]

The MeToo movement also revealed the ways in which the law can be misused to enable and conceal harassment. Weinstein successfully covered his tracks for decades using contracts, threats, and a powerful network.[32] Weinstein entered into multiple settlement agreements containing non-disclosure and non-disparagement provisions.[33] In some cases, these agreements not only prohibited the victim from disparaging

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[25] Greg Price, *Revenge of #MeToo? How Sexual Assault, Child Molestation Claims Destroyed Roy Moore in Alabama*, NEWSWEEK (Dec. 13, 2017, 8:13 A.M.), http://www.newsweek.com/metoo-alabama-women-vote-jones-746591.
[26] Joel Ebert, *Sexual Harassment Troubles Mount in Statehouses Around the Country*, USA TODAY (Nov. 20, 2017, 5:31 PM), https://www.usatoday.com/story/news/nation-now/2017/11/20/sexual-harassment-statehouses/882874001/; Rachael Bade & Elana Schor, *Capitol Hill's Sexual Harrassment Policy 'Toothless,' 'A Joke'*, POLITICO (Oct. 27, 2017, 12:07 AM), https://www.politico.com/story/2017/10/27/capitol-hill-sexual-harassment-policies-victims-244224.
[27] A. Elaine Lewis, *Who is at Highest Risk of Sexual Harassment?*, ACLU (Jan. 18, 2018, 3:15 PM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment.
[28] TIME Staff, *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/.
[29] Susan Chira & Catrin Einhorn, *How Tough is it to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html.
[30] Dave Jamieson, *'He was Masturbating...I felt like Crying': What Housekeepers Endure to Clean Hotel Rooms*, HUFFINGTON POST (Nov. 18, 2017, 8:01 AM), https://www.huffingtonpost.com/entry/housekeeper-hotel-sexual-harassment_us_5a0f438ce4b0e97dffed3443.
[31] Maya Kosoff, *The Toxic Backlash of Silicon Valley's Boys' Club*, VANITY FAIR (Dec. 7, 2017, 11:16 AM), https://www.vanityfair.com/news/2017/12/the-toxic-backlash-of-silicon-valleys-boys-club.
[32] Kantor & Twohey, *supra* note 1.
[33] *Id.*

Weinstein but forced her to speak about him in a positive manner if contacted by the press.[34] On other occasions, Weinstein threatened to destroy victims' reputations if they spoke out.[35] One victim called the police and successfully recorded an apparent admission by Weinstein on tape.[36] Nevertheless, Weinstein appears to have successfully used his influence to end the investigation.[37]

Time Magazine declared the MeToo movement its Person of the Year.[38] The movement has continued into 2018 and featured prominently at the Golden Globe awards, where Oprah Winfrey applauded women for sharing their truth, and promised young girls "that a new day is on the horizon."[39]

Inevitably, the movement leads to the question of what comes next.[40] The Time's Up Initiative, led by prominent lawyers and Hollywood power players, including Shonda Rhimes and Eva Longoria, issued a summary of their proposed response.[41] Anita Hill, who famously testified against Clarence Thomas at his Supreme Court confirmation hearing, is chairing a committee on harassment in media.[42] A number of states, including New York, New Jersey, Pennsylvania, and California are considering legislation banning certain types of non-disclosure agreements.[43] Congress is working on changes to its

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[34] *Id.*
[35] *Id.*
[36] Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, THE NEW YORKER (Oct. 10, 2017, 10:47 AM), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories.
[37] *Id.*
[38] Jonah Engel Bromwich, *'The Silence Breakers' Named Time's Person of the Year for 2017*, N.Y. TIMES (Dec. 6, 2017), https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html.
[39] Sophie Gilbert & Tori Latham, *Full Transcript: Oprah Winfrey's Speech at the Golden Globes*, THE ATLANTIC (Jan. 8, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/full-transcript-oprah-winfreys-speech-at-the-golden-globes/549905/.
[40] TIME'S UP, *Our Letter of Solidarity*, TIME'S UP GROUP, LLC (Jan. 1, 2018), https://www.timesupnow.com/#ourmission-anchor.
[41] Lorena Blas, *Hollywood's A-list women launch anti-harassment initiative Time's Up*, USA TODAY LIFE (Jan. 1, 2018, 5:55 PM), https://www.usatoday.com/story/life/people/2018/01/01/hollywood-women-times-up-anti-sexual-harassment-project-reese-witherspoon-shonda-rhimes/994268001/.
[42] Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017), https://www.nytimes.com/2017/12/15/movies/anita-hill-hollywood-commission-sexual-harassment.html.
[43] Ilyse Schuman & Betsy Cammarata, *Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements?*, LITTLER (Jan. 9, 2018), https://www.littler.com/publication-press/publication/lawmakers-take-aim-

process for handling harassment complaints by congressional employees.[44] Legislators have also introduced bills restricting the use of arbitration agreements in harassment disputes,[45] and separately require employers to disclose settlements of harassment and discrimination claims.[46]

This Article describes the potential legal and practical implications of the MeToo movement, and evaluates them within the context of past scholarly commentary.

First, the Article provides a summary of harassment law, and the respects in which judicial interpretations of harassment law might change in the wake of MeToo. As Sandra Sperino and Suja Thomas argued, judges may update their application of the "severe or pervasive" standard for harassment to reflect modern norms rather than rely on dated lower court rulings.[47] Courts may also grow more stringent in their application of the *Faragher* defense, which relates to the reasonableness of the employer's efforts to prevent and address discrimination. The MeToo movement revealed defects in employers' internal compliance systems, which may make judges and juries more receptive to arguments that the employer's efforts were unreasonable.

Next, the Article summarizes legal rules relating to the enforceability of non-disclosure provisions. It then examines how proposed legislation regarding non-disclosure could affect employer contracting practices. Employers are likely to include more carve-outs when they demand secrecy of employees through confidentiality agreements, social media policies, and in settlement agreements. The proposed legislation will also likely limit, or even preclude, related provisions in settlement agreements that restrict employee speech, like non-disparagement provisions, non-cooperation clauses, and provisions relating to affirmative statements. The legislation

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will-metoo-curb-nondisclosure-or-arbitration; S.B. 6382A, 2007 Leg. (N.Y. 2007); S.B. 820, 1999 Leg. (Cal. 1999); California Senate Bill 820; A.B. 5287, Leg. 1990 (N.J. 1990); S.B. 999, Leg. 1991 (P.A. 1991).

[44] Leigh Ann Caldwell, *House Unveils Landmark Sexual Harassment Overhaul Bill*, NBC News (Jan. 18, 2018, 3:49 P.M.), https://www.nbcnews.com/politics/congress/house-unveils-landmark-sexual-harassment-overhaul-bill-n838436.

[45] H.R. 4734, 115th Cong. (2017). For a discussion of the proposed arbitration reforms, see my written testimony before the EEOC of June 11, https://www.eeoc.gov/eeoc/task_force/harassment/6-11-18.cfm.

[46] H.R. 4729, 115th Cong. (2017).

[47] Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That's Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html.

will also limit employers' ability to promise secrecy to employees accused of misconduct.

The MeToo movement, particularly when combined with shifts in judicial interpretations and legal reforms, stands to have a lasting effect on employer disciplinary practices. Employers are likely to continue to take a more punitive approach to documented harassment. A more punitive approach will encompass a broader range of meaningful discipline than termination alone, and will likely include demotions, promotion denials, pay cuts, or other loss of status. Employers are also likely to alter executive employment contracts and privacy policies to provide themselves with more latitude to discipline employees for documented harassment, and to disclose those decisions as needed.

The Article concludes by recommending revisions to employer harassment and discrimination policies. Harassment policies should be more transparent, and explain the contextual factors that influence the company's assessment of the severity of policy violation. Antidiscrimination policies should explain that supervisors are entrusted to maintain the integrity of the company's personnel decisions, which includes refraining from conduct or comments that would cast doubt on their ability to maintain the company's commitment to equal opportunity. In combination, such revisions avoid some of the false dilemmas and confusion that have arisen following the MeToo movement. These changes are also better aligned with the employer's true litigation risks, and basic notions of fairness and trust.

I. SHIFTS IN INTERPRETATIONS OF EXISTING LAW

This Part provides an overview of harassment law and related scholarly commentary. It then examines how courts might alter their application of existing law in the wake of the MeToo movement. In particular, courts may relax their application of the "severe or pervasive" requirement, and impose more exacting standards on employers seeking to establish the *Faragher/Ellerth* defense.

A. CURRENT LAW

Title VII of the Civil Rights Act contains no explicit reference to harassment. However, the Supreme Court recognized harassment as a form of discrimination in the 1986 decision,

Meritor Savings Bank v. Vinson.[48] The *Meritor* decision defined harassment as severe or pervasive conduct so offensive as to alter the terms or conditions of the plaintiff's employment.[49] Meritor was a sexual harassment case, but its ruling applied to harassment on the basis of other protected categories under Title VII, citing a lower court ruling recognizing harassment on the basis of race.[50]

The Supreme Court elaborated on and refined *Meritor*'s definition in subsequent rulings. The 1993 decision, *Harris v. Forklift*, declared that harassment must be both subjectively and objectively offensive to qualify as harassment—meaning the complainant must have been offended by the conduct, and the conduct must be offensive to a reasonable person.[51] The 1998 decision, *Oncale v. Sundowner*, included a number of refinements to existing law. It held that harassment must be motivated by the plaintiff's membership in a protected category to qualify as harassment.[52] The Court also clarified that sexual conduct was not required to prove harassment claims, and reinforced the status of harassment claims as a variant of other types of discrimination claims.[53] *Oncale* further cautioned courts against enforcing Title VII's anti-harassment mandate as a "civility code."[54] Lastly, it urged courts to consider the context in which the conduct occurred, noting that a "coach smack[ing] [a football player] on the buttocks as he heads onto the field" is different from similar conduct in an office.[55]

Since *Meritor*, the Supreme Court has specified the conditions under which employers will be vicariously liable for harassment. While employers are strictly liable for discrimination and retaliation,[56] harassment claims have produced more uncertainty regarding employer liability. Harassment has been historically viewed as closer to a tort claim, a "frolic or detour" that solely benefits the harasser, rather than employer broadly.[57] Consequently, courts have been reluctant to hold employers strictly liable. At the same time, courts recognize that a supervisor's harassing acts are enabled

[48] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).
[49] *Id.* at 67.
[50] *Id.* at 66.
[51] Harris v. Forklift Sys., 510 U.S. 17, 21–22 (1993).
[52] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998).
[53] Steven Wilborn, *Taking Discrimination Seriously: Oncale and the Fare of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 678 (1999).
[54] *Id.* at 703.
[55] Oncale, 523 U.S. at 80.
[56] Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 PITT. L. REV. 671, 732 (1999–2000).
[57] Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998).

by the power delegated to him through the employer.[58] This has led courts to develop a somewhat complex series of standards governing vicarious liability for harassment.

Vicarious liability for harassment under Title VII depends on whether the putative harasser is a co-worker or supervisor.[59] If the harasser is a co-worker, the plaintiff must show that the employer was negligent in its handling of harassment: that the employer knew or should have known about the harassment and failed to act.[60] If the harasser is a supervisor, the employer is strictly liable if the supervisor took some form of tangible employment action against the plaintiff, like a demotion, firing or pay cut.[61] For example, if an employee rebuffs a supervisor's overtures and the supervisor responds by punishing the employee with a demotion, the employer would be strictly liable.

In the absence of a tangible employment action, the employer is presumed liable unless the employer can establish an affirmative defense under the 1998 Supreme Court rulings, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*[62] ("*Faragher* defense"). Employers can establish the *Faragher* defense if (i) the employer took reasonable measures to prevent or redress the harassment, and (ii) the plaintiff unreasonably fails to take advantage of those measure.[63] As originally articulated by the Supreme Court, a plaintiff's claim is preserved if they make a complaint through an employer's proffered internal complaint mechanism. However, some subsequent Court of Appeals decisions have held that a reasonable response from the employer—even when the employee complains—is sufficient to insulate the employer from liability.[64]

Commentators have criticized harassment law for producing uncertainty over what qualifies as harassment.[65] David

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[58] *Id.* at 805.

[59] Under the 2013 decision, Vance v. Ball State Univ., 570 U.S. 421, 424-428 (2013), a "supervisor" is an employee "empowered [by the employer] to take tangible employment actions against the victim…such has hiring, firing, failing to promote [or] reassignment." In other words, a supervisor must have formal authority over the harassment victim, not just the informal power to direct their activities.

[60] *Faragher*, 524 U.S. at 799.

[61] *Id.* at 807.

[62] Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); *Faragher*, 524 U.S. 775 (1998).

[63] *Faragher*, 524 U.S. at 807.

[64] *Id.* at 807; Indest v. Freedom Decorating, Inc., 164 F.3d 258 (1999).

[65] David Sherwyn, Michael Heise & Zev. G. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1272 (2001) ("Difficulties

Sherwyn, Michael Heise and Zev Eigen captured this sentiment when they observed that "difficulties with determining what type of conduct qualifies as unlawful sexual harassment continue to vex academicians, legal scholars, and practitioners."[66] Michael Frank devoted an entire law review article to figuring out what the Supreme Court might have meant in *Oncale v. Sundowner* when it instructed courts to consider the "social context" in evaluating a harassment claim.[67]

The flexible nature of the Supreme Court standard for harassment has given lower courts considerable latitude. Scholars have devoted significant attention to these lower court interpretations, criticizing them for framing harassment primarily, or solely in terms of sexual conduct.[68] One study found that cases involving "sexualized conduct directed at individual victims" are more successful than those "involving differential but nonsexual conduct and conduct demeaning to women in general."[69] Other scholars observed similar patterns in harassment based on race, religion, and age.[70] Indeed, an empirical study by Pat Chew and Robert Kelley found that

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with determining what type of conduct qualifies as unlawful sexual harassment continue to vex academicians, legal scholars, and practitioners."); Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 442 (2002) (noting the complexity of implementing the Supreme Court's instruction to consider the "social context" in evaluating harassment claims); Melissa Hughes, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437, 1439 (2003) (describing the standard for harassment as "inherently vague").

[66] Sherwyn, Heise & Eigen, *supra* note 65 at 1272.

[67] Frank, *supra* note 66.

[68] Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 5 (2006); Ann Juliano & Stewart Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 549 (2001) (cases involving "sexualized conduct directed at individual victims" are more successful than those "involving differential but nonsexual conduct and conduct demeaning to women in general"); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061, 2061 (2003).

[69] Juliano & Schwab, *supra* note 68 at 549; Schultz, *Understanding Sexual Harassment Law, supra* note 68 at 16-17.

[70] Pat Chew & Robert Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006); Hughes, *supra* note 65 at 1439 (noting the difficulty of applying harassment standard to race-based context). *Cf.* Judith Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 119 (2003) (arguing that "courts tolerate conduct in sexual harassment cases that would not be tolerated in racial harassment cases"); Robert Gregory, *You Can Call me a 'Bitch' Just Don't Use the 'N-Word': Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 742 (1997) (arguing that courts resolve ambiguities in favor of plaintiffs claiming race-based harassment but not sex harassment).

judges tended to discount evidence of race-based harassment unless it was "overtly race-linked," such as a noose or a racial epithet.[71]

Scholars have also criticized the *Faragher* defense. Joanna Grossman argued that strict liability would produce a stronger incentive to prevent harassment claims.[72] Grossman observed that the *Faragher* defense essentially insulates employers from liability following an initial harassment complaint, such that "the first bite is free."[73] Similarly, an empirical study by David Sherwyn, Michael Heise and Zev Eigen found that courts tended to apply the *Faragher* defense in a manner that was generally favorable to employers.[74] Courts deemed employees to have "unreasonably failed" to make use of the employer's complaint system if they waited longer than a few months to complain.[75] Sherwyn et al also identified a number of rulings in the employer's favor even when an employee made a timely complaint.[76] The authors concluded that harassment training had no effect on whether employers successfully asserted the defense.[77]

B. RELAXING THE SEVERE OR PERVASIVE REQUIREMENT

MeToo may ultimately influence how courts interpret the "severe or pervasive" requirement in harassment law. In a 2003 law review article, Judith Johnson argued that lower courts misused the "severe or pervasive" requirement to "excuse" "egregious conduct that, in many cases would be criminal or at least would outrage any reasonable person."[78] Sperino and Thomas made this case in a 2017 New York Times op-ed, urging lower courts to reject excessively stringent interpretations of the "severe or pervasive standard."[79] Drawing on their book, *Unequal*,[80] which documented larger trends in the ways courts undermine discrimination law, Sperino and Thomas recounted

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[71] Chew & Kelley, *supra* note 70 at 106.
[72] Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000). *Cf.* Sherwyn Heise & Eigen, *supra* note 66 at 1267 (recommending that the defense be revised to "focus exclusively on the employer's action").
[73] Grossman, supra note 72 at at 671.
[74] Sherwyn Heise & Eigen, *supra* note 66.
[75] *Id.* at 1297.
[76] *Id.* at 1295.
[77] *Id.* at 1300–01.
[78] Johnson, *supra* note 70 at 119.
[79] Sperino & Thomas, *supra* note 47.
[80] SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL 30-52 (David Kairys ed., 2017).

numerous cases involving highly offensive conduct that the court deemed insufficiently severe or pervasive to proceed to trial.[81]

Sperino and Thomas hypothesized that overly stringent judicial application of the "severe or pervasive" standard may have resulted from outlier decisions in early harassment jurisprudence, written by overwhelmingly older male judges hostile to harassment claims.[82] These decisions had an outsized influence on later jurisprudence: judges disinclined toward a particular case had a substantial body of law to support their own crimped interpretation. Johnson, by contrast, argued that lower courts were misinterpreting Supreme Court jurisprudence in their overemphasis on the "severe or pervasive" standard. Johnson argued that the focus of the inquiry should instead be on whether the environment is "objectively hostile or abusive."[83] She also found that lower courts tended to limit the plaintiff's ability to introduce evidence of harassment through unfavorable rulings on the "continuing violations" doctrine.[84]

Judges of all stripes may be influenced by MeToo in ways that alter their application of the legal rules.[85] MeToo gave a microphone to victims willing to share their experience of harassment. It showcased the lasting impact an act of groping, for example, had on their well-being. These stories provided context for the severity or pervasiveness of the conduct from the victim's perspective. Over time, judges may update their application of legal standards for "severe or pervasive" and "objectively hostile" behavior accordingly.

This narrative shift could also support an alternate explanation for why some judges[86] previously defined "severe or pervasive" too narrowly. Supreme Court jurisprudence has

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[81] *Id.* at 34-36.
[82] *Id.* at 37.
[83] Johnson, *supra* note 70, at 86.
[84] *Id,* at 123-129.
[85] As Catharine MacKinnon observed in an op-ed, "Sexual harassment law can grow with #MeToo" and that "changing norms….will…transform the law as well." Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES, (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html.
[86] Additionally, the question of whether judges broadly dismiss cases that should have been sent to a jury is an empirical question that has not yet been answered. Sperino and Thomas's book cited a few dozen cases, but did not assess whether those questions were the exception rather than the rule. Id at 34-36. The cases might, for example, have represented extreme examples within a broader distribution of case law. Similarly, while Johnson leveled a similar critique against judges for crimped interpretations of the "continuing violations" doctrine that resulted in failed claims, the analysis does not necessarily support the empirical conclusion that those cases are representative of all claims. *See* Johnson, *supra* note 70 at 123-129.

emphasized that harassment law is not a civility code, and that harassment should be distinguished from usual workplace interactions.[87] Judges may have been overly fearful of treading into "civility code" territory, which led to stringent rulings on the "severe or pervasive" standards.[88] While public debates over MeToo have included some hand wringing over whether ambiguous conduct meets colloquial definitions of harassment,[89] a much larger proportion of high profile MeToo stories involved outrageous conduct that was left unaddressed.[90] The cost of leaving harassment unaddressed may now be more salient for judges, and perhaps make them less likely to rule for defendants on summary judgment.

The uncertain and flexible nature of the legal standard for harassment, which has produced so much scholarly criticism,[91] may also liberate judges to move toward a more lenient standard for what qualifies as harassment. Judges may, for example, focus more heavily on larger questions of whether the conduct is "objectively hostile or abusive," as Johnson advocated.[92] Just as courts inclined to rule in the employer's favor have the freedom to rely on cases that take a crimped view of the "severe or pervasive" standard,[93] so too do they have the freedom to cite more liberal interpretations in their rulings.

C. MORE RESTRICTIVE FARAGHER DEFENSE

In the same way that the MeToo movement shed light on the "severe or pervasive" standard, it also exposed problems with the way employers implemented their internal processes.[94] Revelations that high-level employees previously kept their jobs despite multiple harassment complaints suggested that employers failed to meaningfully redress the problem. Weinstein served as the case in point, where legal structures like employment agreements, internal complaints procedures, and

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[87] *See* Oncale v. Sundowner, 523 U.S. 775 (1998).
[88] Blomker v. Jewell, 831 F.3d 1051, 1057 ("The Supreme Court has cautioned courts to be alert for workplace behavior that does not rise to the level of actionable harassment.", and describing numerous cases involving offensive behavior that did not meet the legal standard)
[89] Doreen McAllister, *#MeToo Movement Has Gone Too Far, Catharine Deneuve Says*, THE TWO-WAY, BREAKING NEWS FROM NPR, (January 10, 2018), https://www.npr.org/sections/thetwo-way/2018/01/10/576986585/-metoo-movement-has-gone-too-far-catherine-deneuve-says.
[90] *Post-Weinstein, These are the powerful Men Facing Sexual Harassment Allegations*, GLAMOUR, (April 27, 2018), https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations.
[91] *See* citations, *supra* notes 65 - 67.
[92] *See* Johnson, *supra* note 70 at 86.
[93] Sperino & Thomas, *supra* note 80.
[94] *See* discussion *infra* at Part IV.

contracts were used to further conceal Weinstein's misdeeds, rather than fix the problem.[95]

Both legal scholars and social scientists have devoted considerable attention to evaluating employer practices to prevent and address workplace harassment and discrimination. In a 2001 law review article, Susan Sturm hailed internal employer processes as the preferred approach for advancing employee rights. Sturm's model contrasted what she characterized as "first generation discrimination," involving overt discrimination and workplace segregation, with "second generation discrimination," involving more subtle and complex patterns of exclusion and bias.[96] Sturm argued that courts are good at "elaborat[ing] general legal norms" but employers are best positioned to effectuate those norms through internal processes, organizational change, and flexible implementation.[97] From this vantage point, the *Faragher* decision was a welcome development because it "encourage[d] the development of workplace processes that identify the meaning and possible solutions to the problem of sexual harassment."[98]

By contrast, sociologists Lauren Edelman, Frank Dobbin, and Erin Kelly took a much more skeptical stance towards internal processes like harassment policies and complaint procedures.[99] These scholars observed that employers adopted internal mechanisms to address discrimination and harassment long before there was a legal justification for doing so.[100] Dobbin and Kelly argued that the expansion of these processes represented an effort by human resource managers to expand their power and influence in the organization.[101] Edelman argued that these internal processes represent a form of "symbolic compliance" intended to signal the employer's "attention to" legal norms.[102] Symbolic compliance signals to employees, courts, regulatory agencies, and the public that the employer cares about compliance.[103] The efficacy of those processes is secondary.

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[95] See citations *supra* notes 32 - 37.
[96] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 466–69 (2001).
[97] *Id.* at 522-524.
[98] *Id.* at 481.
[99] Frank Dobbin & Erin Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organization*, 112 AMER. J. OF SOCIOLOGY 4 (2007); LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 101 (2016).
[100] Dobbin and Kelly, *supra* note 99 at 4.
[101] *Id*. at 4.
[102] Edelman, *supra* note 99 at 101.
[103] *Id*. at 101.

Even as MeToo revealed employers' failures, it also revealed courts' failure to hold employers accountable for ineffective processes.[104] Lauren Edelman and Susan Bisom-Rapp argued that courts have been too lenient with respect to what qualifies as "reasonable measures" to prevent and redress harassment.[105] Edelman identified a number of cases in which courts credited employers for the adoption of "reasonable" processes under the *Faragher* defense, despite evidence that the employer's process was flawed or unfair.[106] The Heise, Sherwyn, and Eigen study likewise found that "reasonable measures" appeared to be limited to whether the employer had adopted a credible policy regarding harassment.[107]

MeToo may also influence how courts and juries evaluate evidence in support of the *Faragher* defense.[108] Like the "severe or pervasive" standard, MeToo also made salient the possibility, and even likelihood, that an employer's processes might be inadequate. Popular attention to these defects will likely embolden plaintiffs' lawyers to obtain discovery on those defects[109] and to argue forcefully for the relevance of such evidence in discovery disputes.

Challenging the employer's internal processes may also take the form of "me too" evidence. "Me too" evidence is a term of art in employment disputes, which refers to evidence that other employees have suffered similar harms at the hands of the same supervisor or in the same department. In the 2008 Supreme Court decision *Sprint/United Mgmt. Co. v. Mendelsohn*,[110] the Supreme Court instructed trial courts to make case-by-case

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[104] *Id.* at 174–77, 180–81.

[105] Edelman supra note 139 at 99; Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 133 (2002). See also Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STANFORD L. REV. ONLINE (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187025.

[106] Edelman *supra* note 99 at 173–74, 184–86.

[107] Sherwyn Heise & Eigen, supra note 65 at 1304. That study was completed in the years immediately following the *Faragher* decision. It may have made sense to impose a relatively lenient standard in the early days of the defense, on the notion that employers needed time to ramp up their internal processes (though of course, they had been largely installed years prior). Now twenty years later, employers have little excuse for problematic internal structures.

[108] It may also influence how courts and juries evaluate evidence of negligence, which is relevant for cases involving coworker harassment.

[109] For example, statistics suggesting the employer's complaint system was biased, that it responded slowly to harassment complaints, or that it failed to discipline employees for harassment. The plaintiff might present testimony from employees claiming to have been mistreated in the complaint process.

[110] Sprint/United Mgmt. Co. v. Mendelsohn, 552 US 379 (2008)

determinations as to the relevance of "me too" evidence.[111] The years to come may see renewed efforts by plaintiffs to use "me too" evidence to challenge the reasonableness of the employer's response to a complaint.[112] "Me too" evidence may reveal, for example, that prior employees experienced harassment in the department over a period of years, which the employer failed to remediate.[113]

Courts may become more demanding with respect to disciplinary actions undertaken by an employer following a documented incident of harassment. Previously, courts did not consider an employer's decision to retain a documented harasser to be fatal to the employer's defense.[114] Courts tended to focus less on discipline, and more on whether the employer disseminated a policy and attempted to investigate the complaint.[115] While courts expected employers to undertake

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[111] Prior to that decision, some courts recognized a legal doctrine (known as the "me too" doctrine) categorically barring the use of such evidence. See generally, Emma Pelkey, *The Not Me Too Evidence Doctrine in Employment Law: Courts' Disparate Treatment of Me Too versus Not Me Too Evidence in Employment Discrimination*, 92 OR. L. REV. 545 (2013).

[112] *See e.g.* Waterson v. Plank Road Motel Corp., 43 F.Supp.2d 284, 288 (introducing me too evidence); Hawkins v. Anheuser-Busch, Inc. (6th Cir. 2008) 517 F.3d 321, 325 (permitting "other act" evidence).

[113] *See e.g.* Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475 (5th Cir. 2002) (four additional employees in the same position testified about early harassment and the company's failure to respond); Hawkins, 517 F.3d at 337-338 (discussing evidence of harassment involving other women). Rutter Group, *Employer Liability for Workplace Harassment*, PRACTICE GUIDE: FEDERAL EMPLOYMENT LITIGATION, 5:336 ("Practice pointer: Employers should consider a possible disadvantage to asserting the Ellerth/Faragher defense: It may open the door for plaintiff to introduce evidence of the employer's prior mishandling of unrelated incidents of sexual harassment").

[114] *See e.g.* Tutman v. WBBM-TV, Inc./CBS, Inc. 209 F.3d 1044, 1049 (7th Cir. 2000) (following racial harassment by supervisor, employer merely gave him a written warning, was ordered to participate in an interpersonal skills training, and offered to rearrange schedules to avoid contact between supervisor and victim; court deemed employer's response reasonable); Indest v. Freeman Decorating, Inc., 164 F.3d 258, 267 (5th Cir. 1999) (employer responded to harassment complaint by providing a written and verbal reprimand and promising victim she would not need to work at the same trade shows as harasser, response deemed adequate to satisfy Faragher defense); Savino v. CP Hall Co., 199 F.3d 925, 936 (7th Cir. 1999) (crediting employer response that "made it much more difficult for Popper to oppress Savino without being observed by others"); *Cf.* McGinest v. GTE Service Corp., 360 F.3d 1103, 1120 (9th Cir., 2004)("Remedial measures must include some form of disciplinary action….which must be proportionate to the seriousness of the offense"); Swenson v. Potter, 271 F.3d 1184, 1193 (9th Cir. 2001).

[115] The Ninth Circuit's analysis in Holly D. v. California Institute of Technology suggests that it views the defense primarily in terms of whether the employer had a harassment policy that "identified contact personnel" and investigation procedures. 339 F.3d 1158, 1177 (9th Cir. 2003). Arguments about an employer's failure to respond adequately following a harassment complaint were relevant only insofar as they suggested the policy was

some preventative measures, that standard could be satisfied with a stern warning or some effort to separate the complainant from the accused, including offering the complainant a transfer.[116] For example, in a Ninth Circuit opinion written by Judge Kozinski (who himself resigned in 2017 following multiple accusations of harassment), the court noted that an investigation counts as a remedial measure because "an investigation is a warning, not by words but by action."[117]

Going forward, employers should not expect that superficial disciplinary measures following an investigation will satisfy the *Faragher* defense. First, as I will discuss in greater detail below, employers have already begun taking a more punitive approach with documented harassers, including publicly terminating high level employees and disclosing the reason for the termination. In an environment where termination is a common response to substantiated acts of harassment, superficial forms of discipline start to look less reasonable. The MeToo movement has made the costs of ineffective discipline more salient for employers. The continued misconduct of a documented harasser becomes foreseeable, and makes the employer's inaction less reasonable.

Technological changes are likely to accelerate this trend. Previously, notions of "reasonableness" were made in the abstract, without data about how employers made decisions. However, cloud-based ethics and HR management tools are starting to close this information gap.[118] Cloud-based software

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"unreasonably implemented". Id at 1177. This is consistent with Sherwyn et al's findings that the strongest predictor of whether an employer satisfied the affirmative defense was whether it had a policy that it disseminated to employees with a reporting mechanism available. Sherwyn, Heise & Eigen, *supra* note 65 at 1283; *See also*, Brenneman v. Famous Dave's of America, Inc., 507 F.3d 1139, 1145 (8th Cir. 2007) (whether the employer exercised reasonable care consists of two components, "prevention and correction" where "the employer must have exercised reasonable care to prevent harassment…and promptly corrected any sexual harassment that occurred.")

[116] See e.g. Andreoli v. Gates, 482 F.3d 641, 644 (3d Cir. 2007) (in cases involving co-worker harassment, "We have found an employer's actions to be adequate, as a matter of law, where management undertook an investigation of the employee's complaint within a day…spoke to the alleged harasser…and warned the harasser that the company does not tolerate any sexual comments or actions"); Brenneman v. Famous Dave's of America, Inc., 507 F.3d 1139 (8th Cir. 2007)(employer responded adequately when it offered to transfer to complainant to another restaurant); *Tutman*, 209 F.3d at 1049 ("the question is not whether the punishment was proportionate to [the supervisor's] offense but whether [the employer] responded with remedial action reasonably likely under the circumstances to prevent the conduct from recurring"); *Indest*, 164 F.3d at 267.

[117] Swenson v. Potter, 271 F.3d 1184, 1193 (9th Cir. 2001).

[118] See Caroline Switzer, Justin Castillo, Donald Farmer, Benchmarking, https://www.convercent.com/resource/converge17/Converge17-Benchmarking.pdf; Navex Global, 2017 Ethics & Compliance Training

used by multiple employers enable the software maker to aggregate practices and generate statistics about how other employers have responded in similar situations.[119] This information could provide cover for an employer, or undermine the reasonableness of a decision.[120] If most employers retain an employee after a substantiated complaint of harassment by a subordinate, then the statistics would protect employers by making their decision appear reasonable.[121] However, once employers begin to shift their behavior towards a more punitive approach, employers that depart from the norm appear unreasonable.

In the MeToo era, plaintiff's lawyers may place greater emphasis on an employer's faulty practices in arguments before judges and juries. One might readily imagine a jury trial where one of the ultimate issues to be decided is whether the employer behaved negligently[122] or reasonably in response to harassment.[123] Because MeToo brought so much attention to the failure of employers' compliance measures, a plaintiff's lawyer might play up the holes in the employer's system. The lawyer might present statistics about the number of complaints, and the employer's disciplinary track record following substantiated complaints. The lawyer might elicit client testimony about how they were mistreated during the complaint process. Alternatively, the lawyer could cross-examine human resources or managers to suggest the process was biased against complainants. The lawyer might also show clips of the

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Benchmark Report, https://www.navexglobal.com/en-us/resources/benchmarking-reports/2017-ethics-compliance-training-benchmark-report?RCAssetNumber=2427.

[119] *See* Caroline Switzer, Justin Castillo & Donald Farmer, *Benchmarking*, CONVERCENT, https://www.convercent.com/resource/converge17/Converge17-Benchmarking.pdf (last accessed May 29, 2018); *2017 Ethics & Compliance Training Benchmark Report*, Navex Global, https://www.navexglobal.com/en-us/resources/benchmarking-reports/2017-ethics-compliance-training-benchmark-report?RCAssetNumber=2427 (last accessed May 29, 2018).

[120] While this information tends to be limited to the employers that use the platform, that information could be discoverable if the employer used and consulted the benchmarks in making its own decisions. One might also imagine third party companies making aggregate information available publicly on an annual basis to inform industry leaders and attract new business.

[121] Elizabeth C. Tippett, *Adapting to the New Risk Landscape,* HARVARD BUSINESS REVIEW (Feb. 1, 2018).

[122] A negligence standard applies to co-worker harassment. Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998).

[123] This would be in connection with the employer's assertion of the Faragher defense, involving supervisor harassment. *Faragher*, 524 U.S. at 807.

employer's boring harassment training program,[124] using it to further demonstrate the employer's lack of commitment to addressing harassment. While evidence of this sort was available prior to MeToo, national attention to these issues may make the jury more receptive to them. Judges may also attach more importance to this evidence and be less inclined to grant summary judgment on questions of negligence or reasonableness.

Part IV, below, will return to the question of how employers may alter their disciplinary practices, and related policies, over time. But first, Parts II and III examine the legal tools employers previously used to maintain the secrecy of harassment and discrimination claims, and how legislative reforms may limit their availability.

II. STATES ADDRESS NON-DISCLOSURE AGREEMENTS

Restrictions on an employee's ability to publicly disclose harassment come in two forms: (1) standard employer policies or agreements intended to protect the company's business secrets and overall reputation; and (2) settlement agreements that resolve an employment-related dispute or lawsuit. These two types of restraints are treated quite differently under existing legal rules.

A. EXISTING LAW.

With respect to the first category, employees arguably have the right to publicly disclose harassment or discrimination under Title VII of the Civil Rights Act and the National Labor Relations Act, regardless of contrary language in a policy or contract. By contrast, courts are more likely to enforce secrecy provisions in a settlement agreement, on the theory that it promotes dispute resolution.

Title VII broadly protects employees from retaliation for "opposition" to harassment or discrimination in the workplace.[125] While such opposition typically consists of internal complaints to the employer, there is some authority for the proposition that more public forms of disclosure are protected. In the Supreme Court decision, *Crawford v. Nashville*, an employee sought protection from retaliation after

[124] For a content analysis of harassment trainings, see Elizabeth Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. LAB & EMP. L. __ (2018).
[125] 42 U.S.C. § 2000e-3(a).

participating in (though not initiating) a company's internal harassment investigation.[126] Ruling in the employee's favor, the court explained that an employee need not go so far as "writing public letters" or "taking to the streets" to qualify as protected "opposition" under the statute.[127] This implied that the court considered these more public forms of opposition to be protected as well. Similarly, a Fifth Circuit decision from 1981 held that public picketing against an employer's discriminatory practices could qualify as protected opposition.[128] A 1983 case from the Ninth Circuit held that writing a public letter to the school board complaining about an employer's practice was also protected under the opposition clause.[129]

However, cases involving public opposition also held that it must be reasonable, and that "excessive" opposition, or opposition that "significantly disrupt[s] the workplace" or the plaintiff's productivity,[130] is not protected. This means that an employee's decision to reveal harassment or discrimination on social media, perhaps through a #metoo post, is subject to some but not unlimited protection.[131] If an employer decides to punish a #metoo employee under its social media policy, that employee may have a retaliation claim.[132] But the employer may be able to defend the case if it can establish the post was unreasonable or excessively disruptive.

An employee's social media posts about harassment or discrimination may be independently protected under Section 7 of the National Labor Relations Act (NLRA). Section 7 protects the right of all employees—even if their workplace is not unionized[133]—to engage in "concerted activity…for mutual aid or

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[126] Crawford v. Nashville, 555 U.S. 271, 275 (2009).
[127] *Id.* at 276.
[128] Payne v. McLemore's Wholesale & Retails Stores, 654 F.2d 1130 (5th Cir., 1981).
[129] EEOC v. Crown Zellerbach Corp., 720 F.2d 1008 (9th Cir. 1983).
[130] *Id.* at 1015; *Payne*, 654 F.2d at 1143; Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976).
[131] See Payne v. WS Services, LLC, 216 F.Supp.3d 1304, 1319 (W.D.Ok. 2016) (rejected applicant who complained in Facebook posts and worse a homemade sandwich board in public not protected based on defamatory comments, as well as disparaging comments unrelated to gender discrimination); Caplan v. L. Brands/Victoria's Secret Stores, LLC, 210 F.Supp.3d 744, 754-755 (W.D.Penn. 2016) (plaintiff's Section 1981 retaliation claim because Facebook post containing a picture of a "Klu Kluz Klan reminiscent hooded person" did not "objectively complai[n]…about…race discrimination").
[132] Emmanuel v. Cushman & Wakefield, Inc., Case No. 1:13-CV-2894, Aug. 26, 2015, 2015 WL 5036970 at *2 (S.D.N.Y. 2015) (retaliation claim alleging termination a few months after employee complained about pregnancy discrimination on Facebook).
[133] Regina Robson, *"Friending" the NLRB: The Connection between Social Media, "Concerted Activities" and Employer Interests*, 31 HOFSTRA LAB. &

protection."[134] During the Obama administration, the National Labor Relations Board (NLRB) took an expansive view of concerted activity, asserting that employers violate Section 7 when they punish employees for social media activity.[135] The NLRB also opined that overly restrictive social media policies can violate Section 7.[136]

For example, the NLRB held that an employer violated Section 7 when it fired employees for Facebook posts discussing how to respond to a co-worker's gripes about their job performance.[137] The NLRB reasoned that the co-workers "made common cause" in their protest of the co-worker's claims, and "were taking a first step towards group action to defend themselves."[138] The work-related nature of the discussion on matters that affected them jointly brought the activity under the protection of Section 7.[139]

A social media post describing harassment or discrimination arguably falls within this expansive frame of protected Section 7 activity. A MeToo post would clearly qualify as work-related. The "metoo" hashtag has frequently been characterized as an expression of solidarity, and the phrase itself suggests a collective cause.[140] The post might not only serve to mobilize

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EMP. L. J. 81, 84 (2013) (noting that almost all of social media policies drawing commentary from the NLRB involved non-union workforces).

[134] D.R. Horton, 357 NLRB No. 184 (2012); Murphy Oil USA, Inc., 361 NLRB No. 72 (2014).

However, like the Title VII context, social media posts can lose protection where their content would raise other legitimate business concerns. for example, in Richmond District Neighborhood Ctr. & Ian Callaghan, the Board found that Facebook posts were not protected by Section 7 because they advocated insubordination. 361 NLRB No. 74 at *3 (Oct. 28, 2014). See also Three D, LLC, 361 NLRB 31 at *1 (Aug. 22, 2014) ("online employee communications can implicate legitimate employer interests, including the 'right of employers to maintain discipline in their establishments'"); Ariana Levinson, *Solidarity on Social Media,* 2016 COLUM. BUS. L. REV. 303, 313 (2016). *Cf.* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123 (2017) (Facebook post protected despite use of profanity).

[135] NATIONAL LABOR RELATIONS BOARD, THE NLRB AND SOCIAL MEDIA, https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited Feb. 11, 2018). *See e.g.* Three D, LLC 361 NLRB No. 31 at *3 (Aug. 22 2014) (Facebook discussion about employer's failure to properly calculate tax withholding protected concerted activity). *But see* Levinson, *supra* note 134 at 307, 310 (arguing that the NLRB decisions were in line precedent, and noting that appellate courts have affirmed the Board's decisions).

[136] *See* NATIONAL LABOR RELATIONS BOARD, GENERAL COUNSEL MEMO 14-04, https://www.nlrb.gov/reports-guidance/general-counsel-memos.

[137] Hispanics United of Buffalo, Inc. & Carlos Ortiz, 37 NLRB 359, 369–370 (Dec. 14, 2012).

[138] *Id.*

[139] *Id.*

[140] See Levinson, *supra* note 134 at 320 ("the fact that posts to social media are intended to be shared by others including co-workers is the underlying

others within a workplace who have experienced similar harassment or discrimination, but it might also mobilize those unaffected but nevertheless outraged by the conduct.[141] #MeToo can also be a starting point for workplace mobilization around questions of employer practices with respect to promotion, compensation, or even safety concerns.[142] However, NLRB protection may be fleeting. The Board consists of political appointees, who serve a five-year term appointed by the President.[143] As terms run out on Obama appointees to the Board, Trump appointees are likely to make more conservative rules, and may take a narrower approach to their interpretation of concerted activity.[144]

While Title VII and the NLRA offer some authority for the proposition that employees may speak notwithstanding a confidentiality agreement or social media policy, those rules don't apply in the case of settlement agreements. Settlement agreements are treated quite differently as a matter of law because they waive rights otherwise protected under Title VII or the NLRA. Courts routinely enforce settlement contracts containing provisions restricting an employee from talking

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rationale for finding that 'liking' a co-worker's post is concerted activity. It sets the groundwork for potential future action by raising awareness about the issue and by discussing it").

[141] For example, in one case examined by the NLRB, an employer terminated an employee after complaining about a manager's sexist remark on Facebook, as well as the treatment of other employees. National Labor Relations Board, Office of the General Counsel, Memorandum OM 12-31 at 19-20, January 24, 2012. The NLRB deemed her actions concerted activity, though the reasoning was strongly rooted in her assistance of fellow employees. *Id.* *See* Levinson, *supra* note 134 at 319 (noting that "even in a circumstance where one employee complains to non-coworkers, the employee may be engaging in concerted activity… the employee might post to complain to a government official, a union representative, or the media"); Robson *supra* note 133 at 94 (citing Alleluia Cushion Co Inc. 221 NLRB 999 (1975) (explaining that Board decisions generally "pinned concerted activity, not to the subject matter of the action, but on the existence of affirmative indications of interest from co-workers or a call for group action")

[142] Robson, supra note [x] at 103 ("where face-to-face communications are limited or absent, however, the number of co-worker 'friends' responding to a post, and the content of their messages, appear to affect the determination of whether the action is concerted.")

[143] 29 USC 153 (2018); William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Process*, 64 EMORY L. J. 1501, 1506 (2015).

[144] Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions through the Clinton & Bush II Years*, 37 BERKELEY J. OF EMP. & LAB. LAW 223, 284 (empirical study finding that NLRB "appointees…act as partisans once on the Board, and this partisanship appears to be magnified if they…sit on a panel with other co-partisans"); Josh Eidelson, *Trump's Labor Board Picks Are Scaring Away Unions*, BLOOMBERG, February 14, 2018, https://www.bloomberg.com/news/articles/2018-02-14/trump-s-nlrb-scorned-by-grad-students.

about the dispute or making disparaging statements about the employer.[145] These agreements do not offend public policy, in the courts' view.[146]

Rather, courts assume they are promoting settlement, party autonomy, and the possibility of bringing finality to otherwise rancorous disputes.[147] This line of reasoning accords with a rich body of literature regarding the policy merits and costs of a judicial system that relies heavily on settlements to function. Carrie Menkel Meadow offered a moral defense of settlement, arguing that the dispute belongs to the parties themselves, not to the public.[148] When parties prefer to settle, the justice system does right by effectuating their intent.[149] Menkel Meadow supports confidentiality provisions, arguing that parties' preferences should prevail and that it is "antidemocratic and ultimately harmful to our legal and political system to insist that

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[145] Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007).

[146] Carlini v. Gray Television Group, Inc., No. A-15-1239 (May 2, 2017), (Neb.Ct.App. 2017), 2017 WL 1653624 at *4 (finding employee breached settlement agreement containing non-disclosure agreement); Gulliver Schools Inc. v. Snay, 137 So.3d 1045, 1046, 1048 (3d Dist. 2014) (finding breach of confidentiality provision in settlement agreement where claimant disclosed settlement to daughter, who posted about it on Facebook); Smelkinson Sysco v. Harrell, 162 Md.App. 437 (2005); Mathis v. Controlled Temperature, Inc., 2008 WL 782634 at *7 (finding breach of settlement agreement when employee disclosed to future employer that she "won" a legal dispute with her former employer and "a 'little bit' about how she was harassed by the owner, manager, or her boss' and that she 'had some problems with her manager treating her badly."). *See e.g.* Robinson v. Harrison Transportation Svcs. Inc., No. 5:15-CV-298, June 30, 2016, 2016 WL 3647616 (E.D.N.Ca. 2016) (withholding approval of confidentiality provision in settlement of FLSA case); Goldberg v. Egg Harbor TP School Dist., No. 11-1228 (D.N.J. 2011) 2011 WL 5554501 at *7 (refusing to enforce confidentiality provision in settlement agreement with public employer because public records laws required their disclosure). *Cf.* Tujetsch v. Bradley Dental, LLC, No. 09C5568 (Dec. 8, 2010) 2010 WL 5099981 at *2 (N.D.Ill. 2010) (noting that a non-disclosure agreement in a settlement agreement without an exception for lawful court orders and subpoenas would be unenforceable).

[147] Hasbrouck v. BankAmerica Housing Svcs., 187 F.R.D. 453, 459, 461 (N.D.N.Y. 1999) (in refusing to order disclosure of confidential settlement of harassment claim, noting that "while protecting the confidentiality of settlement agreements encourages settlement, which is in the public interest, permitting disclosure would discourage settlements, contrary to the public interest" and that "there is a strong public interest in encouraging settlements and in promoting the efficient resolution of conflicts"); EEOC v. Northlake Foods, Inc. 411 F.Supp.2d 1366, 1369 (issuing protective order precluding EEOC from disclosing amount of settlement in discrimination case). *But see* Waterson v. Plank Road Motel Corp., 43 F.Supp.2d 284, 288 (N.D.N.Y. 1999) (permitting "me too" evidence from an employee who had settled a discrimination and harassment claim, despite non-disclosure provision in settlement agreement).

[148] Carrie Menkel Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement*, 83 GEO. L. J. 2663, 2680 (1995).

[149] *Id.* at 2692.

all disputes be publicly aired."[150] Scott Moss evaluated confidential settlements from a law and economics standpoint, observing that confidentiality provisions broadly facilitated settlements by widening the bargaining range.[151] Where employers value confidentiality more than individual employees, their willingness to pay a secrecy premium made agreements possible where the parties wouldn't otherwise agree.[152]

An opposing body of literature questions the public policy implications of settlement.[153] In the employment context, Minna Kotkin argued that settlements render discrimination and harassment invisible, because settled claims do not appear or disappear from the docket.[154] Kotkin claimed that confidentiality provisions are not really a matter of choice for discrimination plaintiffs because "corporate defendants insist on such clauses."[155] Ultimately, she argued such settlements are problematic because they impair "the right of the public to know."[156]

B. PROPOSED LEGISLATION.

In recent months, largely spurred by the MeToo movement, several states, including Pennsylvania, New York, and California are considering or have passed prohibitions on

[150] *Id.* at 2684.
[151] Moss, *supra* note 145 at 878.
[152] *Id.* at 879.
[153] In *Against Settlement*, Owen Fiss argued that settlement undermines the function of the judicial system in a number of respects. Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1075 (1984). Settlements deprive parties of the fact-finding process of discovery and a judicial decision on the merits. *Id.* at 1085. Settlements crimp the development of important precedent. *Id.* at 1087-1089. Fiss also argued that settlements exacerbate existing power imbalances, where information asymmetries, resource limitations, and risk aversion lead less powerful parties to settle at a discount. *Id.* at 1076-1077. Scholars offered a number of responses to Fiss' claims. Amy J. Cohen, *Revisiting Against Settlement: Some Reflections On Dispute Resolution And Public Values*, 78 FORDHAM L. REV. 1143, 1163–68 (2009) (summarizing ADR literature responding to Fiss' claim). First, as David Luban observed, it is neither feasible nor desirable for courts to adjudicate every case, and an overload of precedent would likely produce substantial inconsistency in legal rules. David Luban, *Settlements and the erosion of the Public* Realm, 83 GEO. L. J. 2619, 2643 (1995). Second, the civil justice system tends to do a poor job of addressing power imbalances. Carrie Menkel Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement*, 83 GEO. L. J. 2663, 2688 (1995). *See also* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE LAW J. 950, 966-968 (1979).
[154] Minna Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929 (2006).
[155] *Id.* at 929.
[156] *Id.* at 947.

certain types of non-disclosure agreements.[157] California is considering multiple bills.[158] New York has already passed one law relating to non-disclosure and is considering a second bill.[159]

The proposed bills vary in three important respects. First, they vary in terms of the types of disclosures that cannot be restricted through contract. They also vary as to whether they limit all agreements, or only agreements signed under certain conditions. And third, some contain an exception for non-disclosure provisions requested by the victim.

Table 1. Proposed Non-Disclosure Legislation

Bill	**Provisions covered**	**Types of agreements**	**Exception for victim requests**
Ca SB 820	Provisions that prevent the disclosure of factual information relating to sex harassment and sex discrimination claims.	Post-filing settlement agreements	Yes. Settlement amount can also remain confidential.
Ca AB 3080	Prohibitions on disclosing harassment, or opposing any unlawful practice	Essentially any contracts with contractors or employees	No.
Ca SB 1300	Non-disparagement provisions that prevent employees from disclosing unlawful conduct, including harassment	Condition of employment	No
NY SB 7507C (Part KK, Subpart D)	Prevent the disclosure of the underlying facts and circumstances of a sexual harassment claim	Settlement agreements	Yes, for mutual non-disclosure, with 21 days to consider, and 7-day revocation period.
NY SB 6382A	Provisions with the purpose of effect of concealing information relating to a claim of discrimination, non-payment of wages, retaliation, harassment or violation of public policy	All contracts	No
PA SB 999	Impairs or attempts to impair the ability of a person to report a claim of sexual misconduct	All contracts	No, but victim's name and amount of settlement can be confidential.

[157] N.Y. S.B. S6382A; Ca. S.B. 820; Ca. S.B. 1300; Ca. S.B. 3080; Pa. S.B. 999. New Jersey considered a bill but it did not pass. N.J. S.A. 5287
[158] Ca. S.B. 820; Ca. S.B. 1300; Ca. S.B. 3080.
[159] NY SB 7507C.

The two narrowest bills are the proposed California Senate Bill 820, and New York Senate Bill 7507C, which was passed as part of the state budget.[160] Both of them are limited to settlement agreements, and in the case of California Senate Bill 820, only post-filing settlement agreements.[161] Both are also somewhat limited in terms of the claims covered – New York's is limited to sexual harassment, while California's is limited to sex-based discrimination and harassment claims. Both also include an exception if the victim requests a secrecy provision.[162] Pennsylvania's proposed bill is somewhat circumscribed. It is limited to claims involving sexual misconduct, but covers all contracts and does not provide for a procedural exception that would allow the victim to request confidentiality. [163]

Both New York and California are also considering broader statutes. California's Assembly Bill 3080 would prohibit employers from imposing contracts that prevent employees from disclosing "an instance of sexual harassment" or "opposing any unlawful practice."[164] California's Assembly Bill 1300 would limit non-disparagement agreements entered into as a condition of employment. Similarly, New York's proposed Senate Bill 6382A would render unenforceable any contract "with the purpose or effect of concealing the details relating to a claim of discrimination, non-payment of wages or benefits, retaliation, harassment, or violation of public policy in employment." [165] The last of these, "violation of public policy in employment," refers to a common law whistleblower claim that protects employees from retaliation for disclosures that advance a public policy interest articulated by the state courts or legislatures.[166] This covers a broad range of whistleblowing, including matters of consumer harm,[167] health and safety,[168] criminal conduct,[169] and even environmental harms.[170] The New York law effectively covers any disclosure an employee might make about unlawful conduct, employment-related or otherwise.

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[160] Cal. S.B. 820, § 1(a); NY SB 7507C (Part KK, Subpart D)
[161] *Id*.
[162] Cal. S.B. 820, § 1(b).
[163] Pa. S.B. 999.
[164] Cal. AB 3080. This bill would be limited to contracts imposed "as a condition of employment" but also provisions "as a condition of entering any contractual agreement." This would seemingly cover any agreement where the disclosure is not optional for the employee.
[165] N.Y. 6382 § 2.
[166] RESTATEMENT (THIRD) OF EMPLOYMENT LAW, §§ 5.01-5.03 (AM. LAW INST. 2015).
[167] Tameny v. Atlantic Richfield, 610 P.2d 1330 (1980).
[168] Hobsen v. Mclean Hosp. Corp., 819 F.Supp 110 (D. Mass. 1988); O'Sullivan v. Mallon, 390 A.2d 149 (N.J. Super Ct. Law Div. 1978).
[169] Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981).
[170] Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987).

In sum, while Title VII and Section 7 of the NLRA may protect employees who speak out against harassment, those rights can be waived through settlement agreements. A number of states have sought to alter this state of affairs by rendering certain secrecy-related provisions unenforceable. Part III examines how employers are likely to change their practices in response to such legislation.

III. PRACTICES COMPELLED BY LEGISLATIVE CHANGES

The MeToo movement is broadly moving employment practices to a form of forced transparency. Employees who have experienced harassment or discrimination are more likely to speak publicly, forcing employers to respond. In addition, proposed state legislation seeks to limits employers' ability to use contracts to restrain employees from speaking publicly.

If states pass legislation restricting secrecy for harassment or other employment claims, it will limit, though not eliminate, provisions in employer contracts and policies that restrict employee speech. As explained in greater detail below, employers can continue to use some of their existing contract and policy provisions, provided they contain a carve out for certain types of disclosures. Other types of provisions will need to be narrowed or removed entirely, especially provisions that promise secrecy to an employee accused of misconduct.

Next, the Article examines how proposed legislation will limit employers' ability to demand—and promise—confidentiality through their contract and policies.

A. CARVE-OUTS IN CONFIDENTIALITY AGREEMENTS AND SOCIAL MEDIA POLICIES

While public debates about secrecy provisions have generally centered on settlement agreements containing non-disclosure provisions, secrecy provisions also appear in standard employee forms and policies, in particular, confidentiality agreements and social media policies.

Employees typically sign some form of confidentiality agreement at the start of their employment.[171] These

[171] Joshua Mates, *Tips for Onboarding Employees to Early-Stage Companies*, COOLEYGO, https://www.cooleygo.com/tips-onboarding-employees-early-stage-companies/ (last accessed Feb. 8, 2018) (stating "It is essential that every

agreements restrict an employee's ability to disclose the company's confidential information. The term "confidential information" is typically defined in terms of "information relating to the company's business, research and development," followed by a non-exhaustive list of business information, like business plans, technical information, and source code.[172] Depending on how the contract is worded,[173] such provisions may not even cover disclosures relating to an employee's experience of harassment or discrimination in the workplace. As a matter of contract interpretation, such experiences may fall outside the definition of "confidential information" and the employee would be free as a contractual matter to disclose such information.[174]

Employers also use policies to restrict employee speech. The growth of social media has led employers to be especially concerned that employees will use it to disparage their products or work environment in ways that will impair their brand.[175] Consequently, employers commonly adopt policies that limit how current employees can use social media, even away from work. These policies vary but generally require that employees disclaim that they are not speaking on the company's behalf.[176]

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employee (including founders and other executives) sign a confidential information and inventions assignment agreement.").

[172] M. SCOTT MCDONALD & JACQUELINE C. JOHNSON, UNFAIR COMPETITION AND INTELLECTUAL PROPERTY PROTECTION IN EMPLOYMENT LAW: CONTRACT SOLUTIONS AND LITIGATION GUIDE 180 (2014).

[173] *Id.* at 180–81 (describing variants in contract language).

[174] *But see* Coady v. Harpo, Inc., 719 N.E. 2d 244, 247 (Ill. App. Ct. 1999) (enforcing confidentiality agreement that prohibited employee from disclosing any information "related to or concerning [Oprah] Winfrey and/or her business or private life…and/or Harpo's employment practices or policies").

[175] See e.g. Elizabeth Allen, *You Can't Say That on Facebook: The NLRA's Opprobriousness Standard and Social Media*, 45 WASH. U. J. L. & POL'Y 195 (2014) (note).

[176] *See e.g. Adidas group social media guidelines*, https://www.gameplan-a.com/wp-content/uploads/2016/04/adidas-Group-Social-Media-Guidelines.pdf; Three D, LLC, 361 NLRB 31 at *8 (2014) (social media policy required employees to "include a disclaimer that the views you share are yours and not necessarily the views of the Company."); *Best Buy Social Media Policy*, BEST BUY, http://forums.bestbuy.com/t5/Welcome-News/Best-Buy-Social-Media-Policy/td-p/20492 (last visited May 30, 2018); *Ford Motor Company's Digital Participation Guidelines*, FORD, https://www.scribd.com/doc/36127480/Ford-Social-Media-Guidelines; WILLIAM H. FRANKEL, BRADLEY G. LANE, CHRISTOPHER M. DOLAN & TIMOTHY K. SENDEK, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE INTELLECTUAL PROPERTY COMPLIANCE PROGRAM Section 4:68 (8th ed. 2017) ("Express only your personal opinions…Clearly state that your views do not represent the views of the [name of employer], other employees, members, customers, or suppliers."); Daniel Oberdorfer *et al.*, *Policy on blogging, social networking, tweeting, and other public discourse on the internet*, WEST'S LEGAL FORMS, Section 5.92 ("You must explicitly and conspicuously state that the views you

They also remind employees not to disclose company confidential information.[177] An aggressive social media policy will attempt to prohibit employees from saying anything disparaging about the company or its product.[178]

Whether employers make changes to these form policies and agreements will depend in part on the breadth of the legislation ultimately passed. Where the law only limits settlement agreements, employers need not make changes to their standard confidentiality agreements and social media policies.[179]

If states pass broader legislation, employers are likely to include carve-outs to their confidentiality agreement and social media policies. The carve-outs might explain, for example, that the term "confidential information" does not include information regarding harassment, discrimination or other unlawful conduct. Of course, an argument could be made that such carve outs are not strictly necessary. Depending on the wording of the contract, the term "confidential information" could be interpreted to exclude disclosures of unlawful conduct. Absent state legislation, federal protections essentially create an

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are articulating are your own and not the views of the Company. You must not state or imply you are speaking for the Company.")

[177] *See e.g.* FRANKEL, *supra* note 176 at Section 4:67 ("I will not disclose, publish or use, directly or indirectly, any information of the [name of employer] or of any person or firm working on conjunction with [name of employer], unless I receive express authorization from the [name of employer]."); *IBM Social Computing Guidelines*, IBM, https://www.ibm.com/blogs/zz/en/guidelines.html; *Best Buy Social Media Policy,* BEST BUY, (last updated July 21, 2016), http://forums.bestbuy.com/t5/Welcome-News/Best-Buy-Social-Media-Policy/td-p/20492.

[178] *See e.g.* FRANKEL, *supra* note 176 at Section 4.68, Section 4.68 ("Avoid using statements, photographs, video or audio….that disparage customers, members, employees of [name of employer], suppliers"). Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004)(company violated Section 7 when social media policy prohibited "making disparaging comments about the company through any media, including online blogs, or other electronic media or through the media"). *Cf.* Christopher Calsyn, *Employer Social Media Policies: The 'Do's and Don'ts'*, LEXISNEXIS, https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2013/05/04/employer-social-media-policies-the-dos-and-don-ts.aspx (last visited May 30, 2018) (advising companies not to "include blanket prohibitions on defaming or otherwise damaging the reputation of co-workers, clients or the company"); David Greenhaus, *IT Resources & Communications Systems Policy,* PRACTICAL LAW ("remember that you are also bound by [EMPLOYER NAME]'s policy against [defamation or disparagement]"). As discussed in greater detail below, these broad policies may already violate Section 7 of the National Labor Relations Act.

[179] Sometimes settlement agreements incorporate these earlier policies by reference. In those situations, the settlement agreement should contain a carve out for the types of speech restrictions enumerated in the applicable statute.

implied exception to confidentiality agreements and social media policies. Nevertheless, because intellectual property can be so critical to a company's business, it will not want to risk the enforceability of its confidentiality provision, or the agreement as a whole. Carve-outs will therefore be viewed as a prudent measure to ensure the integrity of confidentiality agreements.

Social media policies are likely to include similar carve-outs for provisions in the policy that limit an employee's speech. However, employers might not necessarily want employees to know that they are entirely free to speak out on matters that could be extremely embarrassing to the company or damage their brand. Consequently, employers have an incentive to obscure the nature of the carve out through technical language. For example, some employers responded to NLRB decisions regarding concerted activity with vague carve-outs, even as the NLRB cautioned that such language would not pass legal muster.[180] Some employers included exceptions in their social media policy for "rights under the National Labor Relations Act" without explaining what the term means,[181] or noted that the policy did not apply where prohibited by law.[182] In the context of harassment and discrimination, employers have an incentive to use coded language in their carve outs, such as included exceptions for disclosures "protected by law" (which does not reveal the scope of the carve out).

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[180] *See also* Levinson *supra* note 134 at 314, 335 (noting some uncertainty over the type of carve out that would be satisfactory to the NLRB); Martin Luther Mem'l Home, Inc., 343 NLRB 647 (2014) (policies violation Section 7 when "employees could reasonably construe the language to prohibit Section 7 activity"); Three D, LLC, 361 NLRB 31 (Aug 22, 2014) (the NLRB has scrutinized social media policies and found a section 7 violation where "employees would reasonably interpret it to encompass protected activities."). *See also* Robson, *supra* note 133 at 87, 97 (noting Section 7 violations where employers discipline pursuant to an overbroad social media policy).

[181] *See e.g* FRANKEL, *supra* note 176 at Section 4:67 (form social media policy contains carve out providing "This provision does not apply to employees' right to discuss terms and conditions of employment and engage in concerted activities under Section 7 of the National Labor Relations Act"); Oberdorfer supra note 177, ("Nothing in this policy is intended or will be construed to restrict any of your rights under the National Labor Relations Act…or your rights to discuss the terms and conditions of your employment.") But see Practical Law Labor & Employment, Company Social Media Use Guidelines (containing a much more specific carve out for concerted activity, referencing "discussing wages, benefits, or terms and conditions of employment[, forming, joining or supporting labor unions] [, bargaining collectively through representatives of their choosing] [, raising complaints about working conditions for their and their fellow employees' mutual aid or protection], or legally required activities.")

[182] *See supra* note 180.

B. NARROWER LANGUAGE IN SETTLEMENT AGREEMENTS WITH COMPLAINANTS

Settlement agreements with employees alleging harassment will likewise be affected by the proposed legislation, although the precise effect will depend on the structure of the law. Most of the proposed legislation renders certain restraints unenforceable, whether in connection with litigation or not.[183] By contrast, California's proposed Senate Bill 820 is an amendment to the Code of Civil Procedure, and its scope is limited to "civil actions" where the pleadings allege sexual assault, sex-based harassment or sex-based discrimination.[184] Because the statute is limited to post-filing settlements, secrecy-related provisions would still be permitted in settlement agreements signed before a case is filed.

Settlement agreements (often labeled "separation agreements" or "separation and release agreements") can contain several different types of provisions that might limit an employee's ability to speak out:

- **Non-disclosure provision.** Non-disclosure provisions can prohibit the employee from revealing the amount of the settlement, discussions leading up to the settlement, the fact of the settlement agreement, or even the facts giving rise to the dispute.[185]

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[183] N.Y. S.B. S6382A; Ca. S.B. 1300; Ca. S.B. 3080; Pa. S.B. 999; NY SB 7507C (Part KK, Subpart D).

[184] Cal. S.B. 820 Section 1(a).

[185] Form Of Voluntary Employment Separation Agreement And Release, U.S. SECURITIES & EXCHANGE COMMISSION, https://www.sec.gov/Archives/edgar/data/74303/000119312504036954/dex10u.htm (last visited May 30, 2018). *See also* Carlini v. Gray Television Group, Inc., 2017 WL 1653624 at *1 (quoting settlement agreement providing that the "existence of this Agreement, the substance of this Agreement, and the terms of this Agreement shall be kept absolutely and forever confidential"); Gulliver Schools v. Snay, 137 So.3d 1045 at 1046 (confidentiality provision of settlement agreement provided that "the plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this agreement"); Mathis v. Controlled Temperature, Inc., 2008 WL 782634 at*6 (settlement agreement provided "the fact of and terms of this Agreement are strictly confidential and shall not verbally or through disclosure in writing of any kind be communicated…to any person or entity by any means"); Wesson v. FMR, LLC, 34 Mass.L.Rptr. at fn4 (2017) ("Employee will keep the existence, terms, and amount of this Agreement in strictest confidence and not disclose any information concerning this Agreement to anyone other than her lawyer, her spouse, immediate family members, financial adviser, accountants or as required by law").

- **Non-disparagement provision.** Non-disparagement provisions, in their narrow form, only prohibit the employee from engaging in defamation, slander or libel.[186] Broader non-disparagement provisions prohibit the employee from making statements that are harmful to the reputation of the other party to the agreement.[187]

- **Non-cooperation clause.** Non-cooperation clauses prohibit parties from cooperating with others in litigation against the company, although they typically include a carve out for subpoenas or court orders.[188]

- **Affirmative statements**. In its more mundane form, a settlement agreement might contain a promise to provide a neutral recommendation.[189] However, the Harvey Weinstein scandal revealed some instances where settlement agreements

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[186] *Separation Agreement and Mutual Release*, U.S. SECURITIES & EXCHANGE COMMISSION, https://www.sec.gov/Archives/edgar/data/1096560/000129707705000001/ex10_27.htm.

[187] *Mutual Release and Non-Disparagement Agreement*, U.S. SECURITIES & EXCHANGE COMMISSION, https://www.sec.gov/Archives/edgar/data/866054/000086605404000014/release.htm; see also Carlini, 2017 WL 1653624 at *1 (referencing settlement agreement providing that "Employee will not make any disparaging public remarks about the Company or any of its officers, directors, agents, or employees"), Smelkinson Sysco v. Harrell, 162 Md.App. 437, 442 (2005) (non-disparagement provision stated "Mr. Harrell agrees not to disparage the Company and the Company agrees not to disparage Mr. Harrell"); Mathis v. Controlled Temperature, Inc., 2008 WL 782634 at*6 (agreement provided that "she shall not verbally or in writing by any means to any other person…disparage, criticize, condemn, or impugn the reputation or character of CTI, its shareholders, affiliates, agents, officers, directors and/or employees"). *See also,* Wesson v. FMR, LLC, 34 Mass.L.Rptr. at fn3 (non-disparagement provisions where employer promised to deliver signed statements from enumerated managers agreeing "not to make any statements, take any actions, or conduct themselves in any way that adversely affects Employee's…personal or professional reputation or endeavors").

[188] Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 21 (2002). *See also* Smelkinson Sysco v. Harrell, 162 Md.App. at 437 (enforcing provision that plaintiff would "neither voluntarily aid nor voluntarily assist in any way third party claims made or pursued against the company").

[189] *See e.g.* Mathis v. Controlled Temperature, Inc. 2008 WL 782634 at *11 (settlement agreement provided "upon request, it shall provide a neutral reference for Mathis' future employment, confirming the dates and positions of her employment with CTI only"); Wesson v. FMR, LLC, 34 Mass.L. Rptr. at fn3 (in settlement, employer agreed to sign a reference document attached to the agreement);

> required victims to make affirmative statements. In one case, Weinstein required one of his victims to sign an attached statement about her work experience, which would be then used to undermine her credibility should she later take a contrary public position.[190] In another contract, Weinstein required a signatory to say "something positive" if she was ever contacted by the media.[191]

The proposed legislation will tend to affect the enforceability of all four types of provisions. These statutes reach provisions that prevent the disclosure of information about certain claims, and all the above-listed provisions could have that effect.[192] For example, when a victim discloses workplace harassment, it will have a detrimental effect on the employer's reputation, and thereby breach a broad non-disparagement provision. Enforcement of that non-disparagement provision would prevent an employee from disclosing the facts of her case, and would therefore be unenforceable as written.

The legislation may also affect the enforceability of narrow non-disparagement provisions, which prohibit only statements that qualify as defamation, libel, or slander. As a technical matter, these provisions do not restrict a victim from making truthful statements about the company or its employees. Indeed, an employee who speaks out is subject to liability for defamation, libel, and slander regardless of whether the employee agrees to refrain from doing so in a contract. Nevertheless, it is not difficult to imagine how such a provision would make an employee fearful of speaking and in that respect, prevent or suppress an employee's disclosure of facts relating to her case. Consequently, it is possible such provisions would likewise be declared unenforceable as written.

Likewise, a non-cooperation agreement could prevent a victim from disclosing harassment to another employee considering suing the employer, which also has the "effect of" concealing the facts. Affirmative statements could have the "effect of" concealment, where the victim worries it will be used

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[190] Terry Gross, *'Times' Reporters Describe How A Paper Trail Helped Break The Weinstein Story*, NATIONAL PUBLIC RADIO (Nov. 15, 2017) https://www.npr.org/2017/11/15/564310240/times-reporters-describe-how-a-paper-trail-helped-break-the-weinstein-story.

[191] *Id.*

[192] N.Y. S.B. S6382A ("purpose or effect of concealing"); Ca. S.B. 820 ("prevents the disclosure of factual information"); Ca. S.B. 3080 ("prohibiting …from disclosing"); Pa. S.B. 999 ("suppresses or attempts to suppress"). *Cf* Ca. S.B. 1300 (limited to non-disparagement agreements).

to impeach her credibility, or where a forced positive statement falsely suggests the absence of misconduct.

Some speech-restricting provisions may be salvageable in some states through carve-outs or clarifying language. For example, a non-disparagement provision might be salvageable with a carve-out stating that nothing in the agreement should be interpreted to limit an employee's ability to disclose harassment, or other claims enumerated in the statute.

By contrast, non-cooperation clauses and affirmative statement clauses rest on somewhat shakier ground. Even before the MeToo movement, commentators have questioned the legality of such clauses. Although non-cooperation clauses typically contain an exception for subpoenas, critics note that such exceptions nevertheless hamper the civil justice system by making past litigants unavailable as voluntary witnesses. Jon Bauer argued that attorneys should not permit clients to sign such clauses because they violate attorney ethics rules, which prohibit attorneys from actions "prejudicial to the administration of justice."[193] Stephen Gillers went further, arguing that lawyers commit obstruction of justice when they request non-cooperation clauses.[194]

While an employer's promise to provide the victim with a truthful recommendation letter would not necessarily run afoul of the statutory restrictions, provisions requiring victims to make affirmative statements would be problematic. Requiring an employee to make an affirmative statement implies that it is contrary to what the victim would otherwise say, and therefore may be inaccurate or misleading.[195] Such provisions would consequently be suspect under the proposed legislation, with the exception of pre-filing agreements under California's Senate Bill 820.[196]

In summary, while employers will still be able to demand some speech restrictions through settlement agreements, those restrictions will be substantially limited.

However, the legislation may also have some unintended effects, as it relates to the victim's ability to request secrecy of

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[193] Jon Bauer, *Buying Witness Silence: Evidence_Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 481 (2008). *But see* Smelkinson Sysco v. Harrell 162 Md.App. at 456 (enforcing non-cooperation provision).

[194] Stephen Gillers, *supra* note 188 at 21.

[195] These provisions are, however, exceptionally rare.

[196] It might also be permissible if requested by the victim under California SB 820 and New York SB 7507C, but such statements would likely need to be mutual for them to be credibly interpreted as "requested by" the victim.

the employer. For broader legislation without an express exception for victim requests, non-disclosure provisions may need to include a carve out allowing the employer to disclose facts relating to the case. Similarly, broad non-disparagement provisions in the victim's favor may need to include a carve-out allowing the employer to disclose truthful facts. By contrast, narrow non-disparagement provisions might be enforceable to protect the victim, since they wouldn't operate to conceal the misconduct.

The possibility that this legislation might restrict a victim's ability to request secrecy from the employer implicates larger policy debates raised in the literature.[197] Prominent plaintiff's lawyer Gloria Allred argued that some plaintiffs prefer secrecy and their preferences should be honored.[198] As Carrie Menkel-Meadow argued, parties should be able choose, since the dispute "belongs to them." However, as Minna Kotkin argues, the choice is illusory; if employers are allowed to ask for these provisions, they will. Indeed, the California statute would appear to allow the victim to "request" a mutual non-disclosure provision, which could potentially be susceptible to employer manipulation.[199]

The legislation may also have an unintended effect with respect to parties' bargaining strategy. Scott Moss' law and economics analysis is instructive. As he observed, a California rule that restricts secret settlements post-filing, but permits

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[197] In addition, Scott Moss' analytical framework would predict that the New York, Pennsylvania, and New Jersey approach may have distributive implications for plaintiffs and make such cases more difficult to settle overall. In a regime where employers value secrecy more than employees, employees are able to extract a higher settlement than they otherwise would as a result of settlement. Moss *supra* note 90 at 879. Removing that option may mean lower settlements for plaintiffs, or in some cases no settlement. *Id.* at 889. Nevertheless, lower settlement rates may be preferred as a matter of public policy. The premium plaintiffs have received in the past for confidential settlements could be characterized as a "negative externality" in economic terms, because the promise of confidentiality comes at the expense of future victims who could have benefited from the information. MeToo is a case in point, as the high-profile harassers identified in 2017 were revealed to have harassed multiple victims. Corey, *supra* note 12. In this view, prohibitions on pre- or post-filing provisions correct the negative externality, and essentially force employers to address the risk that the accused employee may engage in similar misconduct in the future.

[198] James Rufus Koren, *Weinstein scandal puts nondisclosure agreements in the spotlight*, L.A. TIMES, (Oct. 23, 2017), http://www.latimes.com/business/la-fi-weinstein-nondisclosure-agreements-20171023-story.html (quoting Allred).

[199] A better approach would be to draft asymmetric legislation. Such legislation could permit claimants to contractually restrain an employer from publicly disclosing information about their case, but limit the employer's ability to restrain the claimant. Such an option would give the victim elective secrecy – the victim would be assured that the employer would not talk without their consent but would be able to speak about their own claim.

them on a pre-filing basis, would push employers towards early settlement, which would save litigation costs overall.[200] While such an approach would generally promote settlement, it also undermines the transparency-related goals that motivated the legislation in the first place. It is also likely to create an adverse selection problem, where employers have an incentive to settle the most egregious cases before they are revealed in litigation.[201] If California legislators intended to expose the worst abuses of settlement agreements, Senate Bill 820 is unlikely to achieve that result. After all, cases that have been filed with a court are already part of the public record, providing some notice to current and future employees about sexual harassment or discrimination. By contrast, Harvey Weinstein was able to conceal his conduct by settling cases as quickly as possible on a pre-filing basis.[202] A California SB 820 type rule would enable future Harvey Weinsteins to continue in that pattern, unless they happen to encounter a plaintiff who refuses to settle pre-filing.

If the ultimate purpose of legislation is to expose misconduct that had previously been concealed, California would come closer to doing so through a rule that prohibited all such agreements (pre-filing or otherwise), or through a rule that only prohibits secrecy for *pre-filing* settlements. A pre-filing rule would permit secrecy provisions in settlements after a case has been filed. That would enable both parties to use the restrictions to protect their reputations, while satisfying the public interest in having some record of a claim. Indeed, in recent months, victims have used non-disparagement and non-disclosure agreements to their advantage, arguing that harassers violated those provisions when they suggested that the claimant's lawsuit lacked merit.[203] Even before the MeToo movement,

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[200] Moss, *supra* note 90, at 886, 889.

[201] Jennifer B. Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1116 (2017)("[E]mployers have a financial incentive to settle the most egregious discrimination claims before a lawsuit is filed"); Zev Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J. L. & POL'Y 261 (2016) ("employers settle cases with bad facts at early stages").

[202] Terry Gross, '*Times' Reporters Describe How a Paper Trail Helped Break the Weinstein Story*, NATIONAL PUBLIC RADIO, Nov. 15, 2017, https://www.npr.org/2017/11/15/564310240/times-reporters-describe-how-a-paper-trail-helped-break-the-weinstein-story.

[203] Gene Maddaus, *Two More Accusers Sue Bill O'Reilly for Defamation*, VARIETY, (December 20, 2017), http://variety.com/2017/biz/news/bill-oreilly-defamation-more-accusers-1202646279/.

victims periodically sued to enforce non-disparagement and non-disclosure provisions.[204]

Another option might be to draft asymmetric legislation that would allow the victim to restrain the employer from discussing her case without her prior consent, but that would prohibit the employer from demanding secrecy from the victim. Such an option would give the victim elective secrecy— the victim need not keep the information secret at a later date, but would be assured that the employer would keep such information confidential. If the victim chooses to speak out at a later date, courts could treat such speech as a waiver of the employer's promise of confidentiality, which would enable the company to respond in the event of a public relations crisis.

C. NO MORE PROMISES OF SECRECY TO THE ACCUSED EMPLOYEE

Perhaps the most significant, and underexamined, effect of the legislation will be in limiting employers' ability to make secrecy-related promises to employees accused of harassment. This may result in broader policies where employers refuse to make secrecy-related promises to any departing executive. On those occasions where employers agree to enter into such provisions, they will likely be substantially narrowed or include carve outs commensurate with the scope of the statute.

While media coverage of settlement agreements has focused almost exclusively on harassment victims, it is also quite common for departing executives to enter into settlement agreements with employers. Executives entitled to severance under their executive employment contracts often include provisions requiring them to sign a release to receive that

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[204] *See e.g.* Tomson v. Stephan, 696 F.Supp. 1407, 1414 (1988) (suit alleged breach of confidentiality provision when defendant asserted publicly that the claim was "totally unfounded"). In the Tomson case, the claimant ultimately survived summary judgment based on a separate "false light" publicity claim, that challenged the defendant's public assertions that her claim was "totally unfounded". *Id.* at 1412-1413. *See also* Halco v. Davey, 919 A.2d 626, 630 (Me. 2007) (employee stated cognizable breach of contract claim based on non-disclosure and non-disparagement provision when sheriff publicly stated that the county had a "really good case"); Wesson v. FMR, LLC 34 Mass.L.Rptr. at *7 (employee sued for breach of settlement provisions relating to providing an employment reference); Welsh v. City and County of San Francisco, No. C-93-3722 (Nov. 27, 1995) 1995 WL 714350 (complainant alleged defamation against police chief for calling her harassment lawsuit "absolutely absurd" and "false and malicious"). *But see* Mathis v. Controlled Temperature, 2008 WL 782634 *7 (finding breach of non-disparagement provision of settlement agreement where the plaintiff told a prospective employer that she had been harassed and that she 'won' her dispute).

severance.[205] In addition, employees accused of harassment or other misconduct sometimes threaten to sue their employers for claims such as defamation,[206] privacy violations,[207] or breach of contract.[208] Even if these claims lack merit,[209] the employer may

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[205] Richard Harroch, *Negotiating Employment Agreements: Checklist of 14 Key Issues*, FORBES, (Nov 11, 2013), https://www.forbes.com/sites/allbusiness/2013/11/11/negotiating-employment-agreements-checklist-of-14-key-issues/#667fd60d24c6 (advising that executives should be required to sign a release in order to receive severance); *Form of Executive Employment Agreement*, IDEXX LABORATORIES, https://www.sec.gov/Archives/edgar/data/874716/000087471607000002/exh10_5formemployagmt.htm(last visited May 30, 2018) (requiring executive to sign a release to receive severance); Form of Executive Employment Agreement, MIDSTATES PETROLEUM COMPANY, INC., https://www.sec.gov/Archives/edgar/data/1533924/000119312512018816/d248475dex107.htm (same); *Executive Employment Agreement*, SYMANTEC CORPORATION, https://www.sec.gov/Archives/edgar/data/849399/000119312512366711/d394740dex1001.htm (last visited May 30, 2018) (same).

[206] Rudebeck v. Paulson, 612 N.W.2d 450, 454 (2000) (manager's defamation claim in response to harassment lawsuit unviable due to qualified privilege); Welsh v. City and County of San Francisco, 1995 WL 714350 at *9 (statements alleged to be defamatory covered by the litigation privilege); Meyerson v. Harrah's East Chicago Casino, 67 Fed.Appx. 967 (7th Cir. 2003) (affirming summary judgment against defamation claim by accused, because "truth is a complete defense to defamation").

[207] Smith v. Arkansas Louisiana Gas Co., 645 So.3d 785, 791 (2d Cir. 1994)(qualified privilege applies to privacy claims, including false light and "unreasonable public disclosure of embarrassing private facts" where "an employer who undertakes an investigation of employee misconduct is protected by a qualified or conditional privilege when making a statement in good faith, on a subject in which the employer has an interest or duty, to persons having a corresponding interest or duty"); Lloyd v. Quorum Health Resources, LLC, 31 Kan.App.2d 943, 1001 (Kan.Ct.App. 2003)(elements of false light/invasion of privacy are "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person"). The court in Lloyd v. Quorum also noted that defamation and false light claims are similar in that "truth and privilege are defenses available in both causes of action." *Id*. at 1002.

[208] Carlton v. Dr. Pepper Snapple Group, Inc., 228 Cal.App.4th 1200, 1208 (breach of contract claim brought by accused employee properly dismissed because he failed to identify contractual promises that were breached); Wong v. Digitas Inc., No. 3:13-CV-00731 (D.Conn. 2015) 2015 WL 59188 at *3, 7 (harassment procedures in anti-harassment policy did not create an exception to the employment-at-will doctrine that would require the employer to interview the accused before terminating him). *See also* Martin v. Baer, 928 F.2d 1067, 1072-1073 (11th Cir. 1991) (affirming summary judgment claim against accused employee alleging breach of contract and infliction of emotional distress, which were eventually dismissed on the basis that harassment policy did not create an implied duty to those accused of harassment and the absence of intentional conduct on the part of the employer); Orr v. Meristar Vermont Beverage Corp., No. 2003-143, Aug. Term 2003 at *2 (Vt. 2003) 2003 WL 25745111 (affirming summary judgment on breach of contract claim brought by accused).

[209] *See e.g.* Rudebeck 612 N.W.2d at 454 (2000) (manager sued employer and complainant for defamation in response to employee's harassment lawsuit);

nevertheless enter into some form of settlement agreement in order to eliminate the risk of any subsequent lawsuit.[210]

While settlement agreements are typically drafted to consist almost exclusively of promises in the employer's favor, attorneys for departing executives commonly request that certain promises be made mutual. These include three of the four types of provisions previously discussed: non-disclosure provisions, non-disparagement provisions, and promises to make affirmative statements.[211]

While employers may have previously been somewhat receptive to such requests, they would no longer be feasible under the proposed legislation. First, a provision where the employer promises not to disclose information about the accused in connection with a harassment claim would not be enforceable under any of the proposed statutes. Such a provision would clearly prevent or suppress disclosures relating to the harassment.

Similarly, a broad non-disparagement provision would prevent or have the effect of concealing the employer's ability to speak about the misconduct, which would violate the statute. Narrow non-disparagement provisions are difficult to assess where they restrain employers. In theory, employers ought to understand that a promise not to defame the employee does not preclude them from disclosing truthful information. Nevertheless, as to accused employees, employers might be fearful that repeating or conveying information from the victim could expose them to liability and therefore restrict them from speaking. If so, such a provision could have the "effect of" concealment, violating the proposed New York law.

Welsh v. City and County of San Francisco, 1995 WL 714350 (accused filed counterclaim against harassment plaintiff for defamation, but lost on summary judgment for failing to exhaust administrative remedy); Rausman v. Baugh, 248 A.D.2d 8, 10 (N.Y.2.Ad. 1998) (supervisor terminated for harassment brought defamation claim against complainant and the employer).

[210] For example, accused harassers may have valid claims for indemnification under state law. Rudebeck v. Paulson, 612 N.W.2d at 455 (Delaware Chancery Code provides for "mandatory indemnification for any person who is a party to a lawsuit 'by reason of the fact that he is or was a director, officer, employee or agent of the corporation'"); Del. Ch. Code Section 145(c) (requiring indemnification of attorneys' fees where director or officer "has been successful on the merits or otherwise in the defense of any action"); Cal. Lab. Code Section 2802 (providing for indemnification for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties").

[211] Non-cooperation clauses are not something that a company would be willing to make mutual.

Employers are also likely to be reluctant to provide positive recommendation letters as part of a settlement with an accused harasser. A letter that contains positive information about the accused, while omitting information about the accusations, may have the effect of concealing misconduct.

These same factors might limit an employer's willingness to make secrecy-related promises to any executive in the course of negotiating settlement and release agreements upon their departure. Even if an individual has not been accused of misconduct, the employer might later learn of accusations against that employee. At that later point in time, those provisions would serve to prevent disclosures of misconduct, in violation of the rule. To avoid this problem, employers may prefer to avoid secrecy promises in these agreements altogether, or to include carve outs for disclosures relating to claims specified in the statute.

IV. VOLUNTARY CHANGES TO DISCIPLINARY PRACTICES

Employers are likely to make substantial changes to their practices beyond those compelled by law. The MeToo movement produced a substantial shift in the risks associated with harassment claims. Before MeToo, harassment was viewed as a risk that employers could largely contain. Harassment is not a new legal risk; employers now have some thirty years of experience in dealing with harassment claims and even longer experience with discrimination lawsuits. Consequently,[212] harassment claims were routine enough to be viewed as a cost of doing business, which did not demand substantial scrutiny or revision of their practices. In addition, employers could mitigate the risk of a large lawsuit through Employment Practices Liability Insurance, which can cover both the fees and the settlement or judgment associated with harassment claims.[213]

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[212] Jena McGregor, *Fear and panic in the HR department as sexual harassment allegations multiply*, WASH. POST, (Nov. 30, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/11/30/fear-and-panic-in-the-h-r-department-as-sexual-harassment-allegations-multiply/?noredirect=on&utm_term=.8974f793f59a (quoting HR consultant, who stated "The playbook for HR, when it comes to sexual harassment, is a 25- to 30-year-old playbook", which in, short consisted of "employees made a complaint, HR took time to investigate, and the matter generally stayed private until it could be resolved.").

[213] THE 2017 HISCOX EMPLOYEE LAWSUIT HANDBOOK, HISCOX INC. 1, 6 (2017) https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf (among employment charges that resulted in defense and settlement, average cost was $160,000; insured company's out-of-pocket cost in connection with those charges was $50,000); *EPLI Claims Reach Tipping*

MeToo altered this calculus considerably because employees suddenly felt free to air their experiences of harassment publicly. This imposed reputational costs overlooked in prior decisionmaking by employers. The risk of bad publicly is less manageable, and potentially far greater, than the risk of litigation. First, public grievances are not confined to the statute of limitations, which require plaintiffs to file with the EEOC less than a year after the discrimination occurred.[214] Employees might complain publicly about harassment that occurred years or even decades prior. Second, public complaints are not subject to the legal constraints that tend to cabin an employer's liability. The court of public opinion is not so concerned about whether the conduct met the formal legal requirements for "severe or pervasive" conduct or whether the employer's response was legally "reasonable." MeToo revealed the chasm between public expectations and legal realities, portraying employer practices as unfair, and employees' treatment as outrageous.[215]

Social media makes brands precarious at a time when brand and reputation represent a substantial part of a company's value. In some cases, the brand may be most of a company's value. The Weinstein company filed for bankruptcy.[216] Wynn Resorts lost $2 billion in stock value after its founder and chief executive faced harassment accusations.[217] Venerable media

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Point Amid Anti-Sexual Harassment Movement, MYNEWMARKETS.COM, (February 21, 2018), https://www.mynewmarkets.com/articles/183182/epli-claims-reach-tipping-point-amid-anti-sexual-harassment-movement ("the insurance industry is expecting a wave of employment practices liability insurance (EPLI) claims to roll in following the recent storm of sexual harassment allegations", and noting that EPLI policies will "mostly likely" cover such claims).

[214] The filing deadline depends on whether a state or local agency enforces a similar law, in which case the usual 180 day deadline is extended to 300 days. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/timeliness.cfm (last visited May 30, 2018).

[215] It is a variation of what scholars have been saying for some time, albeit in much more theoretical fashion—that employers have not done right by victims, and the law has not done enough to help. Scholars, however, assumed the law would lead in fixing the problem. And there was at least some reason to think that might be the case. Catharine MacKinnon has argued that judicial opinions recognizing harassment predated and indeed altered cultural shifts and changing norms around harassment. *See* Catharine MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L. J. 813, 817 (2002). But MeToo produced a different course of events, where changing cultural norms act directly on employer practices, with or without changing legal rules.

[216] Barnes, *supra* note 6.

[217] John Foley, *Wynn Resorts' Slide Shows Sexual Misconduct is a Financial Risk*, N.Y. TIMES, (January 26, 2018), https://www.nytimes.com/2018/01/26/business/dealbook/steve-wynn-sexual-misconduct.html

brands, including NBC, PBS, NPR and CBS have seen their public image tarnished. In recent months, public revelations have shifted from accusations involving celebrities to those involving previously unknown executives at well-known companies and non-profits like Nike, Bank of America, Humane Society, the New York City Ballet, and Monster Energy.[218] Harassment, previously viewed as a contained liability, has morphed into a bet-the-company risk.[219]

This shift imposes a form of forced transparency on employers, where they must presume that misconduct might make its way to the public stage and they will have to defend their approach to an angry public. Legal reforms will exacerbate concerns about bad publicity as employers can no longer contain victims through contracts and policies.

Within this environment, employers are also likely to face heightened legal risks. The MeToo movement may embolden more complainants to come forward about their experiences of harassment, which increases the number of potential lawsuits employers face. If courts ultimately relax the standard for "severe or pervasive" harassment and demand more of employers attempting to establish the *Faragher* defense, employers face greater potential liability. These risks put pressure on employers to identify ways to limit their exposure to future claims.

Employers are now changing their practices, and will likely continue to do so. Employers have already proven more willing to terminate documented harassers.[220] This newfound

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[218] Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 68 Men Accused of Sexual Misconduct and Their Fall From Power*, N.Y. TIMES, (Feb. 8, 2018), https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html; Emily Peck, *Monster Energy Vice President Accused Of Sexual Harassment Resigns*, HUFFINGTON POST, (Jan. 31, 2018), https://www.huffingtonpost.com/entry/monster-energy-john-kenneally-resigns_us_5a722351e4b05253b275370a; Jessica Silver-Greenberg & Matthew Goldstein, *Bank of Americas Executive Departs after Misconduct Claim*, N.Y. TIMES, (January 19, 2018) https://www.nytimes.com/2018/01/19/business/bank-of-america-sexual-misconduct-omeed-malik.html; Julie Creswell, Kevin Draper & Rachel Adams, *At Nike, Revolt Led by Women Leads to Exodus of Male Executives*, N.Y. TIMES, (April 18, 2018), https://www.nytimes.com/2018/04/28/business/nike-women.html

[219] Jena McGregor, *supra* note 212 (human resources consultant characterized employers as "worried these meteorites could be coming…but they have no idea how to protect their house.").

[220] *Id.*; Elisabeth Ponsot, *All the Men Held to a Higher Standard than Trump, starting with Billy Bush*, QZ, (November 29, 2017), https://qz.com/1141014/matt-lauer-to-charlie-rose-all-the-media-men-held-to-a-higher-sexual-misconduct-standard-than-donald-trump/.

willingness to terminate will also open up alternate avenues for meaningful discipline that employers previously avoided, such as demotions, promotion denials, and substantial pay cuts. Employers are likely to revise their privacy policies, and to draft broader definitions of "cause" in their executive employment agreements. While investigation processes have been the subject of some criticism during the MeToo movement, those critiques conflate the employer's processes with the results-oriented approach employers previously took to discipline.

A. INVESTIGATIONS ARE NOT THE PROBLEM

The MeToo crisis subjected employer complaint and investigation processes to scrutiny on several different fronts. One form of scrutiny, generally characterized as the "due process" critique, worries that employers are rushing to judgment and failing to investigate harassment complaints with sufficient care.[221] This critique was often invoked in connection with the Matt Lauer scandal, where NBC terminated Lauer within a few days of when it first received a formal employee complaint.[222]

A second critique takes the opposite position: that employer investigations serve only to "paper over" a file by documenting weaknesses in the employee's claim to protect from a future harassment lawsuit.[223] In this view, the employer was not taking an even-handed view of the complainant's allegations, but instead trying to game the facts in its favor. A third line of attack argued that employees don't use internal complaint

[221] Constance Grady, *Are men accused of harassment being denied their due process? Or are the victims?*, VOX, (Jan. 8, 2018), https://www.vox.com/culture/2018/1/6/16855434/weinstein-reckoning-sexual-harassment-due-process-daphne-merkin-keillor-franken.
[222] Christine Emba, *We're Misunderstanding Due* Process, WASH. POST, (Dec. 1, 2017),, https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e_story.html?utm_term=.eea4ec60ad7e.
[223] Noam Scheiber & Julie Cresswell*, Sexual Harassment Cases Show the Ineffectiveness of HR*, N.Y. TIMES, (Dec. 12, 2017), https://www.nytimes.com/2017/12/12/business/sexual-harassment-human-resources.html; Tovia Smith, *When It Comes to Sexual Harassment Claims, Whose Side is HR Really On?*, NATIONAL PUBLIC RADIO, (November 15, 2017), https://www.npr.org/2017/11/15/564032999/when-it-comes-to-sexual-harassment-claims-whose-side-is-hr-really-on.

systems because they don't trust them.[224] Critics thus advocated for processes that employees find more trustworthy.[225]

Contrary to both the first and second critique, employers are quite capable at getting to the bottom of the factual issues and can do so quite efficiently. It is their refusal to act on what they know that made the process appear flawed, and eroded trust in the system.

Employers have always been quite careful about their investigation practices, and are likely to remain so.[226] The due process critique suggests a lack of familiarity with the speed and efficiency of harassment investigations.[227] Many harassment investigations are relatively straightforward. The employer interviews the complainant and the accused, as well as any other witnesses that either party identifies as having relevant

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[224] Danny Crichton, *HR has lost the trust of employees. Here is who has it now*, TECH CRUNCH, (February 10, 2018), https://techcrunch.com/2018/02/10/hr-has-lost-the-trust-of-employees-here-is-who-has-it-now/.

[225] In response, a number of third party complaint handlers have popped up following MeToo, claiming to provide impartial information collection, and investigation for employers. Elizabeth Dwoskin and Jena McGregor, *Sexual Harassment Inc.: How the #MeToo movement is sparking a wave of startups*, WASH. POST, (January 5, 2018), https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups/?utm_term=.bee2aaba7a57 A 2012 proposal by Ian Ayres and Cait Unkovic to use "information escrows" to gather employee complaints has also received considerable attention. Information Escrows, Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 147 (2012); Conor Friedersdorf, *How to Identify Serial Harassers in the Workplace*, THE ATLANTIC, (Nov. 28, 2017), https://www.theatlantic.com/politics/archive/2017/11/whisper-networks-20/546311/. Their system would involve a third party that promises to maintain the secrecy of information provided unless enumerated conditions have been met, for example, if two or more people complain about the same person. Ayres & Unkovic, *supra* note 225 at 147. An information escrow, they argue, would avoid the "first-mover disadvantage," a reluctance on the part of harassment victims to be the first person to complain. *Id.*
These technological solutions, however, represent a solution to the wrong problem. They presume the problem is employers' failure to conduct a proper investigation (either too favorable to the complainant or to the accused), which then distorts their judgment at the end. But the problem never was the way employers collected information. It was what employers did with the information — or more to the point, failed to do — once it had already been gathered.

[226] Employers benefit from a qualified privilege from defamation for statements made in connection with an investigation. However, that privilege may be unavailable if the employer "makes allegations without investigation or identifying the source of complaints". Rudebeck v. Paulson, 612 N.W.2d at 454.

[227] *See* Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L. J. ONLINE (2018) (observing that "harassers arguably get more due process than most at-will employees, owing to their employers' efforts to protect themselves from victims' lawsuits.")

information about the alleged harassment.[228] If any of the interviewees identify relevant written evidence—such as emails or text messages—the employer will collect those as well.[229] The company will then decide which facts are disputed, and if they are disputed, which witness was most credible in their account.[230] If the investigation only involves a few witnesses and a small quantity of documents, an employer could easily get to the bottom of the matter reasonably quickly.

Employers are unlikely to start cutting corners on their investigations in the post-MeToo era. Conducting a defensible investigation has always formed part of successfully asserting the *Faragher* defense, and therefore will remain part of the playbook for defending against claims brought by the victim. Employers also tend to be thorough in their investigations to protect against claims brought by the accused. A flimsy or incomplete investigation risks producing factual errors. In an environment where employers might feel compelled to disclose the results of their investigation, a diligent process, and a high degree of certainty about the accuracy of the results, protects against potential defamation and false light claims.[231] In other words, robust investigation practices will remain a good investment for employers.

The second critique—that employers tends to document the investigation in a way that favors their interests—is accurate, but less consequential than it seems. Employers essentially conduct two investigations at once. One is the documented version that tells a story most favorable to the employer. The

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[228] Sabrina Dunlap & Heather Sussman, *Investigating Sexual Harassment Complaints: Procedures and Guidelines*, MASSACHUSETTS CONTINUING LEGAL EDUCATION, DRAFTING EMPLOYMENT DOCUMENTS IN MASSACHUSETTS, Volume II, Chapter 15 (2016), Exhibit 15B ("WHO to Interview: complainant, alleged harasser, witnesses, any persons who complainant and/or alleged harasser identify as persons with knowledge, any persons whom company believes may have knowledge"); EMPLOYMENT DISCRIMINATION LAW AND LITIGATION, FIRST PRONG OF AFFIRMATIVE DEFENSE: PREVENTING OR CORRECTING HARASSMENT, Section 5:27 (2017) ("Investigations generally are conducted when the target of harassment, the alleged harasser, and any witnesses are interviewed without the presence of a coworker or representative").

[229] McGregor, *supra* note 212, (lawyer reports that "with clear evidence more often available in the form of emails, texts, or other electronic posts…the days of he-said, she-said have essentially been eliminated by technology" because "somebody's got a screenshot somewhere."); Sabrina Dunlap & Heather Sussman, *supra* note 228, at Section 15.2.6.

[230] David Benck & Tessa Thrasher Hughes, 20 No. 3 ACCA DOCKET 72, EMPLOYMENT/LABOR LAW (March 2002) 82-83 ("The investigator should review the statements provided by the complainant, the alleged harasser, and the witnesses and assess the veracity of all concerned."); Buchanan Ingersoll, *How to Conduct a Harassment Investigation*, 9 No. 11 PA. EMP. L. LETTER 2 (1999).

[231] *See supra* notes 235 - 239.

second is an unofficial, undocumented, and unflinching assessment of the problem for purpose of accurately gauging potential liability. This is the version that human resources tells to the legal department or outside counsel over the phone. It is also the version upon which the employer makes a decision.[232]

Ultimately, the flaw in employer processes has not been the investigation process but results-oriented decisionmaking that tends to favor inaction. Before MeToo, employers had strong business incentives to take non-punitive responses to harassment, particularly where the harasser was perceived as valuable to the business.[233] This disciplinary failure led victims to lose confidence in the employer's complaint process, and made employees reluctant to complain. By contrast, in an environment where companies hold employees accountable for harassment, complainants are more likely to view the employer as an honest broker and consequently make use of the internal processes available to them.

B. THREAT OF TERMINATION MAKES OTHER TYPES OF DISCIPLINE POSSIBLE

As previously noted, in the MeToo era, employers seem more willing to terminate high-level harassers following an investigation. Terminating the harasser serves several purposes. First, it prevents other employees in the workplace from being affected. Second, it removes constraints on the victim's career, which might otherwise be compromised through a continued reporting relationship to the harasser or a transfer to another department. Third, it mollifies the victim, making them less likely to publicly complain about harassment. Lastly, it provides a defensible story about the employer's response if the harassment is later publicly disclosed.

Once termination becomes a common response to harassment, it also makes other meaningful forms of discipline—like a demotion or promotion denial—possible.

This argument seems counterintuitive, but it aligns with theory and practice from the field of negotiation. In the negotiation context, the value of a proposed agreement is measured in terms of the harasser's best alternative to a

[232] It is true that the paper record does not fairly portray the plaintiff's claims in the event of subsequent litigation. However, should the case proceed to litigation, the plaintiff can construct their own account through the discovery process, and portray the employer's records as biased.

[233] Arnow-Richman, *supra* note 227 ("we need greater institutional accountability for the conduct of the top dogs along with greater protection for the rank-and-file").

negotiated agreement ("BATNA").[234] In a pre-MeToo context, executives assumed that their employer would be reluctant to terminate them, and would almost certainly not disclose their termination publicly, because it would be too costly to the employer's reputation. Executives also knew that they might be difficult to replace, and that the loss of revenue associated with their talent would be salient. If the company imposed discipline that the executive would find unpalatable, the executive could always leave to work for a competitor. In negotiation terms, the executive's BATNA was quite good. Even though companies did not negotiate explicitly with employees over the terms of their discipline, they would have chosen a form of discipline that was preferable to the executive's BATNA. So, they would select superficial forms of discipline, like training, or a letter in the harasser's personnel file.

The MeToo movement altered the balance of power between highly positioned harassers and companies. Executives now know that the employer would seriously consider termination, and may even do so publicly, for all of the reasons previously described. Executives also know that if they quit, their prospects for reemployment may not be as good as they once were, since companies may perform more due diligence regarding whether the executive had been accused of misconduct. The executive's BATNA is substantially worse. This gives the company a lot more latitude to impose serious discipline. The company knows that the executive is unlikely to quit. While the company could simply terminate the employee, it now has the flexibility to impose other forms of meaningful discipline, like a demotion, loss of supervisory responsibility, promotion denial, pay cut, transfer to an undesirable location, or a "zero" on their annual performance review.

Depending on the context, these intermediate forms of discipline might be appropriate. For example, a demotion or transfer for the accused might make it possible for the victim to continue on the preexisting career path with minimal disruption. It may also reduce the harasser's power and status, which will cabin the harasser's opportunity to harass others. And, depending on the context, an intermediate form of discipline might be proportional to the misconduct and support a defensible narrative should the harassment later become public.

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[234] ROGER FISHER & WILLIAM URY, GETTING TO YES.

C. WARNINGS IN PRIVACY POLICIES THAT DISCIPLINARY DECISIONS MAY BE DISCLOSED

MeToo also altered employers' willingness to publicly disclose a decision to terminate a documented harasser following an investigation. Employers previously treated personnel files as sacrosanct and attempted to avoid public terminations of high level employees at any cost. High level executives accused of misconduct who were effectively terminated were given the option to resign in public. Part of this was in the company's financial interests; revealing employee misconduct would reflect poorly on the company. Employers were also worried about litigious former executives who might threaten a defamation claim[235] or even a "false light" invasion of privacy claim.[236] MeToo changed this calculus because the allegations of harassment were often already public or soon to be made public. In this context, a public disclosure of employee discipline did not produce a public scandal so much as mitigate it.

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[235] For a statement to be defamatory it must be "communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him or her in the estimation of the community." Lewis v. Equitable Life Assur., Soc'y, 389 N.W.2d 876, 886 (1986). However, employers can assert a qualified privilege. *Id.* at 890. Where an employer can establish qualified privilege, the plaintiff must show "bad faith, actual malice, or abuse of the privilege through excess publication." *Id.* at 388. Where "management honestly and sincerely believed [the complainant's] allegations of sexual harassment…there [was] insufficient evidence in the record to support the allegations of malice or bad faith." Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380, 391 (5th Cir., 1987) (employer's internal bulletin about sexual harassment was subject to a qualified privilege). In that case, the court reasoned that "co-workers have a legitimate interest in the reasons a fellow employee was discharged. Of course, employees have a strong interest in not being fired. An employer also has an interest in maintaining employee morale and protecting its business interests." *Id.* at 386. *See also* Ludlow v. Northwestern University, 79 F.Supp.3d 824, 828 (N.D.Ill. 2015)(dismissing false light and defamation claims, because university's statements were "substantially true" and not "highly offensive"); Turner v. Wells, 198 F.Supp.3d 1355, 1358 (S.D.Fl. 2016 (law firm's public investigation findings and conclusions not actionable defamation because statements were not false or were pure opinion); Bisso v. De Freest, 251 AD.2d 953, 953 (1998) (qualified privilege protected employer's statement to other employees that accused had been terminated for harassment).

[236] There is also a related privacy claim known as "false light" - which refers to publicity that places an individual in a false light that "would be highly offensive to a reasonable person" and in "reckless disregard as to the falsity of the publicized matter." Tomson v. Stephan, 696 F.Supp. at 1410 (quoting the Restatement Section of Torts, Section 652E). Lloyd v. Quorum Health Resources, LLC, 31 Kan.App.2d 943, 1001 (Kan. Ct. App. 2003) (elements of false light/invasion of privacy are "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person").

Crises have a way of focusing a company's attention on policies and contracts that created risks associated with its preferred course of action. One such source of risk is its policy around privacy. Employee privacy is a flexible concept that derives from a combination of reasonable employee expectations, and employer behavior and promises that bolster or undermine those expectations.[237]

Employees sometimes assert "false light" privacy claims, which requires them to prove that the company engaged in publicity that "falsely represent(s) the person" and is "highly offensive to a reasonable person."[238] However, employers have a qualified privilege if they investigate the claim and the statement was made in "good faith" to persons with an interest or duty in the subject matter.[239] The best protection against such a claim, as previously noted, is a diligent investigation that produces a high degree of certainty as to the accuracy of the findings. Employers are also likely to remain restrained about public comments because they will need to explain why the public had an interest in the findings to avail themselves of the qualified privilege.

Nevertheless, on the rare occasion where employers decide to make a public disclosure (or even an internal disclosure that may find its way to social media), revisions to the privacy policy provide a marginal benefit. In privacy cases generally, questions of the offensiveness of an intrusion will depend in part on expectations of privacy. These expectations are influenced by the employer's conduct.[240]

An employer's policies and practices regarding personnel files and personnel information is somewhat relevant to whether an employee can establish a privacy claim in connection with public disclosure of that personnel information. Historically, employers were extremely reluctant to disclose anything in an

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[237] Borse v. Piece Goods Shop, Inc., 963 F2d 611 (3d Cir 1992).
[238] *See supra* note 236.
[239] Smith v. Arkansas Louisiana Gas Co., 645 So.3d 785, 791 (2d Cir. 1994) (qualified privilege applies to privacy claims, including false light and "unreasonable public disclosure of embarrassing private facts" where "an employer who undertakes an investigation of employee misconduct is protected by a qualified or conditional privilege when making a statement in good faith, on a subject in which the employer has an interest or duty, to persons having a corresponding interest or duty").
[240] O'Connor v. Ortega, 480 US 709 (1987) (where employer provided employee with the only key to certain physical locations, which were not typically accessed by others, employee more likely to have a reasonable expectation of privacy in that location).

employee's personnel file,[241] particularly findings of misconduct and discipline resulting from those findings. This secrecy extended even to the victim who complained of harassment in the first place, who might never learn whether the accused employee received any discipline at all. This practice might theoretically bolster an employee's claim that they had a reasonable expectation of privacy in that information, and that disclosing such information was highly offensive.[242]

Employer policies rarely make promises that all personnel information will be kept confidential. They have not, however, sought to disclaim those expectations either. By contrast, employers have been quite thorough in disclaiming employee rights to privacy in several other types of information, which they tend to update as technology develops.[243] For example, employee privacy policies (often called "computer use policies") frequently disclaim any right to privacy of any information on a company-owned computer, on the employee's internet usage on that computer, or on company email.[244] Employers may also

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[241] Thomas Wilson, *Privacy in the Employment Relationship: Other types of Testing*, PRACTICAL LAW LABOR & EMPLOYMENT ("Personnel records should be maintained in a secure location, such as a locked file cabinet or password-protected electronic file. They should be made available only to individuals with a legitimate business need to access the files.")

[242] I use the term "theoretically" because there are very few cases in the private sector alleging pure "invasion of privacy" claims based on disciplinary disclosures, as opposed to claims for defamation or false light publicity, where truth is an absolute defense. McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996) (no invasion of privacy claim where store manager told employee's relatives that the plaintiff resigned because of his health, and where "an unidentified store employee told a friend [of the plaintiff] who already knew that he was HIV positive"); Magdaluyo v. MGM Grand Hotel LLC, Case No. 2:14–cv–01806, February 24, 2017 (D.Nev. 2017) 2017 WL 736875 at *4 (no cognizable invasion of privacy claim based on allegations that employer spread rumors about him). *Cf.* Allen v. Verizon Wireless, No. 3:12–cv–482, June 6, 2013 (D.Conn. 2013) 2013 WL 2467923 at *8 (cognizable privacy allegations based on unauthorized access to FMLA certification and contact with plaintiff's doctor). The analysis herein draws upon other types of privacy cases from the employment context; public employees have additional privacy-related protections under the Fourth Amendment. *See* See e.g. O'Connor v. Ortega, 480 US 709 (1987); Borse v. Piece Goods Shop, Inc., 963 F2d 611 (3d Cir 1992).

[243] *See e.g.* Greenhaus, *supra* note 177 (policy prohibiting harassment on computer systems, and disclaiming any expectation of privacy in any "message, file, data, document, fascimile, telephone conversation, social media post, conversation or any other kind or form of information or communication transmitted to, received, or printed from, or stored or recorded on the company's electronic information and communications systems")

[244] *A sample company policy in email and Internet usage*, AM. B. ASS'N, https://apps.americanbar.org/buslaw/blt/ndpolicy1.html (last visited May 30, 2018); Cecil A Lynn III, *Enforcement of Employment Computer Privacy Policies*, AM. B. ASS'N, https://www.americanbar.org/content/dam/aba/administrative/labor_law/meet

reveal various forms of surveillance through their privacy policies.[245] However, employers have not yet included personnel files, misconduct, and discipline in the list of information for which employees should not expect to have a right to privacy.[246]

The strength of privacy claims based on public disclosures of discipline is somewhat unknown, since such practices used to be quite uncommon. However, MeToo revealed that protecting a company's reputation may require them to publicly disclose their disciplinary or termination decisions, and investigation results. Employers may also feel greater pressure to disclose such information to others within the organization, for example, to disclose the information to leadership to make them aware of a potential scandal. After MeToo, employers may also decide that it is in their best interests to disclose disciplinary decisions to the victim.[247]

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ings/2008/ac2008/070.authcheckdam.pdf; Jeanne Sahadi, *Can your employer see everything you do on your company phone?*, CNN MONEY, (August 27, 2015), http://money.cnn.com/2015/08/27/pf/using-smartphones-from-work/index.html.

[245] STEPHEN P. PEPE, SCOTT H. DUNHAM & KATHLEEN B. HAYWARD, *Corporate policy on employee privacy and electronic technology*, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE FAIR HIRING AND TERMINATION COMPLIANCE PROGRAM, Section 4:25 (9th ed. 2017) (sample policy, providing that "In the past, some employees have assumed that information accessed through or stored on the computer they use at work, or generated as part of [name of corporation's] electronic mail, instant messaging, text messaging, or voice mail systems was private. That assumption is incorrect.").

[246] *See* Greenhaus, *supra* note 177 (no reference to personnel files in IT Resources and Communications Systems Policy); Pepe, *supra* note 245 (no disclaimer regarding personnel file); *The PG&E, Code of Conduct*, PG&E 1, 34 (Feb. 2018), http://www.pgecorp.com/aboutus/pdfs/PGE_EmployeeCodeConduct_MECH_Digital_AltLinks.pdf (noting employees have "no expectation of privacy" in using "a PG&E work space, computer voicemail, or system" but also referring to employee information, including "performance evaluations" as "confidential").

[247] *See* Bisso v. Freest et al., 251 A.D.2d at 953 (statement at staff meeting protected by qualified privilege because "employees [had] worked with plaintiff" and "had a legitimate interest in knowing that a serious sanction had been imposed for violating of a workplace rule"); RESTATEMENT OF EMPLOYMENT LAW § 6.02 (Am. Law. Inst. 2014) (qualified privilege applies to statements made to "employer's own employees and agents"); *Id.* at Reporter's Notes, Comment c ("Not all jurisdictions recognize intra-employer or intra-corporate communications as publications for purposes of defamation law"). For example, in Smith v. Arkansas Lousiana Gas Co., a number of employees complained about abusive language and harassing behavior by a mid-level department manager. 645 So.3d at 791. Following an investigation, the manager was demoted. A handful of managers were informed of the demotion, as well as 30-35 other personnel who worked in the accused manager's facility. The court held that the disclosures were made in good faith because the company had "reason to believe they were truthful" as a result of their investigation. *Id* at 791.

Consequently, employers are likely to add disclaimers in their privacy policies providing that employees do not have a right to privacy based on their own misconduct, and that employers reserve the right to disclose investigation results and discipline.[248]

D. BROADER DEFINITIONS OF "CAUSE" IN EXECUTIVE EMPLOYMENT CONTRACTS

The background rule under American law is employment-at-will, where employees can be terminated at any time for any reason or no reason, with or without notice.[249] Most employees are subject to the at-will rule, and if they have a contract, it incorporates the presumption of at-will employment.[250] However, high level executives are more likely to have employment agreements with individually negotiated terms.[251] These executives in many cases remain at-will, in the sense that employers do not place any restriction on their ability to fire even an executive at a moment's notice.[252] However, such

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[248] *But see,* Holland, Hart LLP, *Montana Supreme Court Stresses Right of Privacy in Employment Records*, 18 No. 11 MONT. EMP. L. LETTER 4 (Dec. 2013) ("employees in Montana have a reasonable expectation of privacy in their personnel files"). In assessing whether public employees have a constitutionally protected privacy right in their personnel file, determining that a discovery order requiring the disclosure of personnel files in litigation did not contravene a right to privacy. Denver Policeman's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 436 (10th Cir. 1981).

[249] *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 2.01.

[250] *See* generally, Foley v. Interactive Data Corp., 765 P2d 373, 376 (1988).

[251] Arnow-Richman, *supra* note 227.

[252] For example, the Society for Human Resource Management's form agreement provides for a form agreement provides for a three year employment term, subject to a notice period to be specified by contracting parties, and a pay in lieu of notice provision. This is somewhat equivalent to at-will employment in the sense that the employer can terminate the employee without notice as long as it is willing to provide some pay in lieu of notice. *Agreement: Executive Employment Contract*, SOCIETY FOR HUMAN RESOURCES, (May 17, 2016), https://webcache.googleusercontent.com/search?q=cache:yzj-XCQMWnsJ:https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/executiveemploymentagreement.aspx (form agreement provides for a three year employment term, subject to a notice period to be specified by contracting parties, and a pay in lieu of notice provision which the company may elect). *But see* Executive Employment Contract between Geovic, Inc. & Gary Morris, https://www.sec.gov/Archives/edgar/data/1398005/000102189007000084/geovicform10ex1011.htm (last visited May 30, 2018) (must provide 30 days notice and severance if terminated for reasons other than cause); Key Executive Employment Contract: Allen v. Ambrose, https://www.sec.gov/Archives/edgar/data/1030219/000103221003000497/dex1015.htm (last visited May 30, 2018) (in the event of termination without cause, most provide 60 days notice and approval by a majority of the board, and severance, and payment for unexercised stock options); Society for

agreements can impose substantial severance payments for terminations other than for "cause."[253]

The combination of stock and severance can cost a company millions of dollars. One famous case involved former Hewlett Packard CEO Mark Hurd, who was terminated in connection with a harassment scandal, and nevertheless walked away with a severance package valued at $34.5 million.[254] Although shareholders sued over the payout, arguing that the termination met the definition for a "cause" termination, the Board evidently did not feel sufficiently confident in a "cause" finding to send Hurd packing without severance.[255]

"Cause" definitions can vary, depending on past practice and the amount of power wielded by the executive.[256] For those with the most bargaining leverage, "cause" can be defined quite narrowly, consisting of gross negligence, bankruptcy, death, physical or mental incapacity, *conviction* of a felony or gross misdemeanor, or willful fraud or misconduct that materially damages the company.[257] As applied to a harassment case, a

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Human Resource Management, Agreement: Executive Employment Contract, May 17, 2016 (form agreement provides for a three year employment term, subject to a notice period to be specified by contracting parties, and a pay in lieu of notice provision which the company may elect) https://webcache.googleusercontent.com/search?q=cache:yzj-XCQMWnsJ:https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/executiveemploymentagreement.aspx.

[253] *See e.g.* Executive Employment Contract with Barry Berlin, https://www.sec.gov/Archives/edgar/data/908311/000119312512501007/d454051dex102.htm (last visited May 30, 2018) (providing for "termination pay in an amount equal to 2.99 times the average of the last three years compensation" if the agreement is terminated by the employee for any reason other than cause); Form of Executive Employment Agreement - John P. Foley, https://www.sec.gov/Archives/edgar/data/1533924/000119312512018816/d248475dex107.htm (termination without cause entitled to bonus payments, 12 months of severance).

[254] Mary Thompson, *HP CEO Hurd's Severance Pay Could Hit $40 Million: Experts*, CNBC, (Aug. 9, 2010), https://www.cnbc.com/id/38624369.

[255] Id.

[256] *See also* Arnow Richman *supra* note 227 (noting that "egregious harassment could fall within some" definitions of cause but not others).

[257] *See e.g.* Key Executive Employment Contract, https://www.sec.gov/Archives/edgar/data/1030219/000103221003000497/dex1015.htm; Employment Contract Gary R. Morris, https://www.sec.gov/Archives/edgar/data/1398005/000102189007000084/geovicform10ex1011.htm (last visited May 30, 2018) (conviction of a crime, among other conditions).

Here too, Harvey Weinstein presents an extreme example, where is contract actually specified that harassment would not be a terminable offense, but would instead trigger a fine. Bryan Sullivan, *Kevin Spacey And Harvey Weinstein Employment Agreements Say A Lot About Hollywood*, FORBES, (Nov. 15, 2017), https://www.forbes.com/sites/legalentertainment/2017/11/15/kevin-spacey-

company bound by a contract of this sort would need to show that the harassment resulted in "materia[l] damage" to the company in order to qualify as "cause." If the harassment hasn't yet been made public, it may not have yet done material damage, thus giving rise to a dispute over the contract terms. A risk averse company might respond by providing a partial or full severance payout in exchange for a release of all claims under the contract.

Other types of contract provisions can give rise to disputes over whether an executive is entitled to severance. For example, some contract provisions provide that a company may not terminate the executive for a violation of company policy without a certain period of notice and an opportunity for the executive to "cure" the violation, "if curable."[258] Such language would give rise to a dispute over whether harassing conduct is in fact "curable."[259] The executive's lawyer might argue that harassment is curable, through coaching and training, and a promise not to engage in further misconduct. For its part, the company would argue that it is not curable, since the harassment has already occurred and the executive cannot undo or fix the misconduct. However, the question of curability would likely be sufficiently contested that the company may be tempted to settle a dispute of this sort, again in exchange for partial or full severance.[260]

Going forward, companies will likely draft their contracts in a way that avoids these costs in the event of harassment. This could be readily accomplished by defining "cause" to include "a determination by the company, in its sole discretion, that executive has violated the company's policy against harassment, discrimination or retaliation." Moreover,

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and-harvey-weinstein-employment-agreements-say-a-lot-about-hollywood/#4e3ba40f573c.

[258] *See e.g.* Employment Contract Gary R. Morris, *supra* note 257 (employee right to notice and 21 days to cure in the event of conduct "that has damaged or will likely damage the reputation or standing of the company"); Executive Employment Contract with Barry N. Berlin, https://www.sec.gov/Archives/edgar/data/908311/000119312512501007/d454051dex102.htm (executive given opportunity to cure "professional incompetence" within 15 days notice). Harvey Weinstein's contract essentially says the harm would be "cured" each time he paid a fine. Erik Sherman, *Harvey Weinstein's Ultimate Enabler Is His Employment Contract, Says a New Report,* INC., https://www.inc.com/erik-sherman/harvey-weinsteins-ultimate-enabler-is-his-employment-contract-says-a-new-report.html (last accessed Feb. 11, 2018).

[259] *See* Arnow Richman, *supra* note 227 (discussing harassment case involving a dispute over curability).

[260] Even with narrow definitions of cause such as these, companies could still technically fire the executive for harassment without notice. However, doing so could be quite costly.

corporate boards and insurance companies may push for broader definitions of cause to ensure that decisions will not be skewed by the financial penalties of termination.

In summary, employers are likely to take more punitive approaches to harassment, and to alter their policies and contracts to provide them with the latitude to carry out that discipline.

V. FIXING HARASSMENT & DISCRIMINATION POLICIES

This Part argues that broadly drafted harassment policies contributed to some of the harms revealed by the MeToo movement. Broadly worded policies gave employers the discretion to enforce their policies selectively, in some cases applying it strictly to address the risk of future discrimination claims, and in other cases declining to intervene if the conduct did not meet the legal definition of harassment. Because employees were never informed of the way employers applied the harassment policy, the policies themselves have become suspect, leading some to question whether employers should apply a "zero tolerance" harassment policy.[261]

This Part recommends that employers revise their harassment and discrimination policies to be more transparent, which will also better align with employers' true litigation risk, and their actual decisionmaking. Harassment policies should be revised to provide more information on the types of factors that influence employer judgments on the severity of the policy violation. Discrimination policies should be revised to explain that supervisors occupy a position of trust with respect to maintaining and implementing the company's policy of equal employment opportunity. When supervisors make disparaging or harassing comments based on an employee's membership in a protected category, the policy should explain that it is a breach of that duty of trust, which the company takes seriously. This revision aligns with a company's discrimination-related risks, and frames the problem in an intuitive way that parallels company ethics policies.

[261] Allen Smith, *#MeToo Postings about Bosses Merit Discussions with HR*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, Nov. 20, 2017, https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/metoo-postings-about-managers.aspx (referencing "zero-tolerance sexual harassment policies").

A. THE PROBLEM WITH HARASSMENT POLICIES

Harassment policies may have contributed to the problems that gave rise to the MeToo movement in ways that employers do not recognize. Legal scholar Vicki Schulz has been especially critical of harassment policies. In a famous 2003 article, *The Sanitized Workplace*, Vicki Schultz argued that employers tended to portray and define harassment primarily in terms of sexual conduct.[262] Schultz examined scores of employer harassment policies and found that they relied heavily on the EEOC's 1980 guidelines, which focused on sexual conduct, rather than definitions based on Supreme Court jurisprudence.[263] Schultz also observed that these policies prohibited a wide range of sexual conduct that might not legally qualify as harassment.[264] Schultz argued that employers have an interest in defining harassment as a matter of boorish male behavior[265] to avoid addressing the more challenging question of providing meaningful equal employment opportunity in the workplace.[266]

Broadly worded policies provide a number of benefits for employers. First, they give employers considerable flexibility. Where a broad swath of conduct technically violated the harassment policy, it gave employers the freedom to punish violations depending on the context of the harassment and the employer's willingness to punish or protect the harasser based on business preferences. Second, broad policies enable employers to intervene before the conduct rises to the level of severe or pervasive conduct.

Third, broad harassment policies help to limit the employer's discrimination-related liability. Suppose, for example, that a supervisor makes a derogatory comment about a subordinate's protected status such as their race or gender. Unless the comment is an epithet or slur, it will not give rise to a harassment claim. It also will not give rise to a discrimination claim, because that would require a tangible employment action,

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[262] Vicki Schultz, *The Sanitized Workplace*, 112 Yale L. J. 2061, 2095 (2003).
[263] *Id.* at 2095.
[264] *Id.* at 2095.
[265] *Id.* at 2067.
[266] *Id.* at 2067. More recently, Schultz observed that "highlighting sexual harms…can also lead victims to underreport nonsexual acts of sex- and gender-based hostility"). Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. REV. ONLINE (2018-2019) https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again.

like a termination, demotion, or difference in pay.[267] However, the comment could be extremely damaging for the employer if the employee is later fired, demoted, or denied a promotion. A single comment could represent "smoking gun" evidence of the supervisor's discriminatory intent when they later fire the employee.[268] Thus, broadly worded policies help employers guard against comments that might later get the employer in trouble.

However, broad harassment policies impose hidden costs. Both the policies, and related training,[269] routinely encouraged employees to report any policy violation to the company. Victims then assumed that companies would punish all policy violations, when in fact employers disciplined selectively and proportionally. This information gap led victims to feel surprised and betrayed when an apparent violation of the harassment policy produced no discipline. The employer's inaction then eroded the credibility of the employer's system, and made other victims less likely to complain.

Broad harassment policies are not very persuasive. Beyond the employer's failure to enforce them, policies that prohibit wide swaths of conduct in an undifferentiated manner start to

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[267] *See e.g.* Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 744 (7th Cir. 2002); Jones v. Spherion Atl. Enter., LLC 493 F. App'x 6, 9 (11th Cir. 2012); Mitchell v. Vanderbilt Univ., 389 F.3d 177 (6th Cir. 2004).

[268] Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (supervisor's use of the word "boy" to refer to African American employee could be used as evidence of discriminatory animus); Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989); Miles v. MNC Corp., 750 F.2d 867, 874 (11th Cir. 1985) (plant manager's statement that "half of them weren't worth a shit", with reference to black women, direct evidence of discriminatory motive); Lilly v. Flagstar Enter., Inc., M.D. Ala. 2001, 2001 WL 849537 at *2 (denying summary judgment in sex discrimination claim where supervisor previously made comments like "pregnant women are lazy" and that he "hates to terminate males" because "they are heads of their household"); Felix v. The Boeing Co., No. 98-56638 at *1 (9th Cir., 2000) (direct evidence based on supervisor's past derogatory statements regarding Latinos, and statement "Why would I want another one of them?"); Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189-90 (1997) (collecting cases involving direct evidence of discrimination). Discriminatory statements are sometimes excluded as "stray remarks", depending on whether the statement was made by a decision-maker, whether they related to the decision-making process, whether they were more than "merely vague, ambiguous or isolated remarks" and whether they were proximate in time to the employment decision. Morgan v. New York Life Ins. Co., 559 F.3d 425, 432 (6th Cir. 2009). *See also* Silver v. North Shore Univ. Hosp., 490 F.Supp.2d 354 (S.D.N.Y. 2007) (discussing the case law on stray remarks); Belgrave v. City of New York, No. 95 Civ. 1507 (JG) 1999 WL 692034, at *29 (E.D.N.Y. Aug. 31, 1999) ("Even stray remarks in the workplace by persons who are not involved in the pertinent decision making process.., may suffice to present a prima facie case provided those remarks evidence invidious discrimination").

[269] Tippett, *Harassment Trainings*, *supra* note 124.

resemble civility codes. Employees know implicitly that not all of the prohibited conduct is equally problematic, which can lead them to bristle at the employer's attempt to control their behavior and question the validity of the legal rules.

In addition, overly broad harassment policies are likely to produce avoidance behaviors that discriminate against underrepresented groups.[270] The supervisor may decide that the best way to avoid inadvertently violating the policy is to avoid contact with those who might accuse them of harassment. For example, a supervisor might exclude female subordinates from business lunches, networking events, or client development opportunities. This then limits the employee's opportunity for advancement—the supervisor is less familiar with her skill and potential and she receives less coaching and advice. The employee's client base may also suffer, which may limit her compensation or prospect for promotion. Consequently, widespread avoidance behaviors could give rise to a class action claim for discrimination.[271]

In the media, harassment and discrimination tend to be placed on opposite sides of a continuum.[272] On one end, sexual

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[270] In a Pew Research Poll, half of respondents said that MeToo has made it more difficult for men to know how to interact with women in the workplace. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RESEARCH CENTER (April 4, 2018) http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/. *See also* Tippett, *Harassment Trainings*, *supra* note 124 (noting avoidance related risks when harassment trainings make harassment law appear complex and fail to discuss the importance of inclusion); Vicki Schulz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, STANFORD L. REV. ONLINE (June 2018)("fear of being accused of harassment for benign comments or interactions can also encourage higher-ups to exclude or avoid women").

[271] Where avoidance works to the overall disadvantage of employees on the basis of gender, or other protected category, it could serve as the basis for a lucrative class action claim. For example, in Velez v. Novartis, 5,600 female sales employees sued the drug maker for unequal pay and promotion practices, after they were stuck at the bottom of the sales hierarchy for lack of access to networks and training. Velez v. Novartis Pharm. Corp., 04 CIV 09194 CM, 2010 WL 4877852, at *1 (SDNY Nov 30, 2010); Grant McCool & Jonathan Stempel, *Novartis in $175 million gender bias settlement*, REUTERS, Jul. 14, 2017, https://www.reuters.com/article/us-novartis-settlement/novartis-in-175-million-gender-bias-settlement-idUSTRE66D57Z20100714. Although this case did not explicitly involve a failure to mentor female workers, mentorship from men would have been necessary to climb up the ranks of a sales organization that was largely dominated by men. In addition, the same theory and legal claims at issue in the Novartis case could be readily applied to a context where men, especially highly placed men, stop mentoring women.

[272] Clare Cain Miller, *Unintended Consequences of Sexual Harassment Scandal*, N.Y. TIMES (Oct. 9, 2017)

harassment rules are underenforced but men are less fearful of interacting with women.[273] On the other end, sexual harassment is strictly enforced and men hide from women.[274] Within this frame, the question becomes where to find the "balance" between opposing rights. The frame falsely assumes that workplaces unconstrained by harassment rules will do a better job of advancing women and other underrepresented groups.

The other end of this false dichotomy is to double down on preexisting policies by implementing a "zero tolerance" rule for harassment.[275] "Zero tolerance" is an ambiguous term. It might mean that employees will not avoid punishment for their first offense. "Zero tolerance" might also mean that all violations of the harassment policy will be treated as equally severe. However, this will prove extremely difficult to implement over time. The employer will inevitably be confronted with the dilemma of how to respond to relatively mild allegations of harassment. Employers must then choose between an excessively punitive approach—where punishment exceeds even what the victim might have preferred—and unofficial departures from the "zero tolerance" policy.

B. THE PROBLEM WITH DISCRIMINATION POLICIES

Current discrimination policies are drafted to mirror legal rules. They prohibit employment decisions that are based on an employee's membership in a protected category. Unlike harassment policies, they do not provide space for an employer to intervene before an actual discrimination claim arises. This produces two big gaps with respect to advancing equal employment opportunity in the workplace. First, it does not address the denial of smaller workplace opportunities that could add up over time. Consider, for example, the story of Susan

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https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html

[273] Tolerating harassment does not necessarily work to the advantage of women in the workplace. Many of the industries where harassment was revealed to be most rampant or most tolerated where industries that were male dominated or where men occupied the top rungs of the organization. While male fears around harassment may disadvantage women, tolerating harassment is no fix.

[274] Schultz, *Reconceptualizing…Again*, supra note 266 (noting that "sex segregation is a cause of – and not a solution to – sexual harassment").

[275] Erin Gloria Ryan, *When #MeToo Becomes #YouToo*, Daily Beast, Dec. 27, 2017, https://www.thedailybeast.com/when-metoo-becomes-youtoo; Jonathan Brock, Billie Pirner Garde and Marcia Narine Weldon, *What exactly is zero tolerance on sexual harassment*?, Boston Globe, Jan. 2 2018, https://www.bostonglobe.com/opinion/2018/01/02/what-exactly-zero-tolerance-sexual-harassment/3mKqMjzMDll3UZqgWoXu7N/story.html.

Fowler's viral complaints at Uber.[276] Although they included claims of harassment—in particular a proposition from her supervisor—they also included numerous examples of low level discrimination—a leather jacket denied to female engineers, a transfer denial that may have been partly motivated by discrimination.[277] Human resources proved unresponsive, and apparently suggested that Fowler herself may have been the source of the problem.[278] While it might be easy to attribute Fowler's story to the culture at Uber, her experience with human resources may have reflected a crimped discrimination policy that overlooked discrimination that did not yet exceed the legal threshold.

Second, current discrimination policies fail to capture discriminatory comments unaccompanied by an adverse employment action. As previously noted, this leaves the employer exposed if the same supervisor later denies a promotion to the affected employee or terminates their employment.

C. A BETTER APPROACH

Ultimately, it is a mistake to assume the problem is an inherent conflict between harassment and discrimination law, where one must be chosen at the expense of another. Rather, the problem is the gap between employers' actual practice, and their stated policy. Employers need to be more transparent about how their harassment policies are applied, and the contextual factors that influence their decisionmaking. They also need to stop using harassment policies as a pretext to reduce discrimination-related liability, and instead craft broader discrimination policies. This will bring both policies closer to employer practices, and to effectuating the broader goals of both harassment and discrimination law. These changes will also render the policies more credible and persuasive to employees.

A more transparent harassment policy could still define harassment relatively broadly. (See Appendix.) However, this policy would also explain the contextual factors[279] that influence

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[276] Susan Fowler, *Reflecting On One Very, Very Stranger Year at Uber*, Susan Fowler, (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

[277] *Id*.

[278] *Id*.

[279] Oncale v. Sundowner Offshore Servcs., Inc., 523 US 75, 81 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts

its judgments when applying the policy and meting out punishment. The company could explain, for example, that harassment by supervisors, and especially high ranking employees, will be treated as proportionally more serious,[280] given the ways in which power differences can limit the victim's ability to engage in self-help measures. It could also explain that violence, assault, and threats of violence will be presumed to be extremely serious as an employment matter,[281] and may result in a call to the police. Serious misconduct should include hostile acts that could be experienced as threatening to employees on the basis of gender, race, religion, national origin, disability, and other protected categories. This might include for example, epithets and slurs, as well as symbolic acts like a noose, blackface, swastikas, vandalism, or maliciously damaging an employee's property or car.[282] The company could also explain factors that may influence its determination of the severity or frequency[283] of the conduct, such as the work environment and

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performed." and judges those behaviors requires "common sense, and an appropriate sensitivity to social context")

[280] Brooks v. City of San Mateo, 229 F.3d 917, 924, note 9 (9th Cir., 2000) (coworker groping insufficient to satisfy severe or pervasive standard, but assault by supervisor "may well be"); Quantock v. Shared Marketing Servcs., Inc., 312 F.3d 899 (7th Cir. 2002) (repeated propositions from boss met standard);Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998) (repeated comments from supervisor); Boyer-Liberto v. Fountainbleau Corp., 786 F.3d 264 (4th Cir. 2015) (racial slur from informal supervisor, made in connection with "explicit, angry threats that she was on the verge of utilizing her supervisor power to terminate [plaintiff's] employment"); Venter v. City of Delphi, 123 F.3d 956, 975 (7th Cir. 1997) (persistent proselytizing by supervisor); Robles v. Agreserves, Inc., 158 F.Supp.3d 952, 984 (repeated comments denigrating religion by foreman);

[281] Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993) (in assessing whether conduct qualifies as severe or pervasive, considering "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"); Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 190 (5th Cir. 2012) ("deliberate and unwanted touching of intimate body parts can constitute severe sexual harassment"); Fuller v. Idaho Dept. of Corrections 865 F.3d 1154, 1162-4 (9th Cir. 2017) (rape); Ellison v. Brady, 924 F.2d 872, 880 (gradual escalation of conduct, including increasingly disturbing letters);

[282] Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (noose); Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 280 (4th Cir. 2015) (racial slur); Snell v. Suffolk County, 782 F.2d 1094 (nose photo, KKK info, locking co-workers out of bathroom); Tademy v. Union Pacific Corp., 614 F.3d 1132 (10th Cir. 2008)(noose, epithets); EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 316 (referring to coworker as "Taliban" "towel head" and "are you on our side or are you on the Taliban's side"); Collins v. Executive Airlines, Inc., 934 F.Supp. 1378, 1381 (noose, blackface); Garcez v. Freightliner Corp., 188 Or.App.397, 400 (Or. Ct. App. 2003) (coworker's use of racial epithets, property destruction).

[283] Reeves v. CH Robinson Worldwide, 594 F.3d 798, 803 (2d Cir. 2007) ("substantial corpus of gender-derogatory language" used nearly every day by coworkers); Freeman v. Dal-Tile Corp., 750 F.3d 413, 417, 422 (4th Cir., 2014) (co-worker's frequent gender-derogatory language, sexual comments, and

surroundings, whether the conduct was humiliating or degrading,[284] and disregarding attempts by the victim or others to stop or avoid the conduct. Employers could reserve the right to terminate employees for serious incidents of misconduct not specifically enumerated in the policy, in their sole discretion. The employer could also consult employees in crafting the language to ensure that it is consistent with their assessments of proportionality.

This approach brings employer policies regarding discipline more in line with the actual legal standards for evaluating harassment claims. The legal standards offer the benefit of being proportional and contextual, and the result of decades of consideration. These contextual factors likely appeal to employee's innate sense of justice and proportionality. Second, it brings the policy closer to how employers actually evaluate harassment complaints.[285] While employers might prohibit everything on paper, and the paper trail might minimize the severity of the conduct, the actual standard they use for imposing discipline looks closer to the legal standard. This will continue to be true even in a broader context where employers take a more punitive approach than in the past. Articulating those standards makes the employer's policy more transparent, which serves the expectations of both victims and the accused.

A more transparent harassment policy will, upon close inspection, reveal that less serious incidents of harassment—like comments about an employee's membership in a protected category—do not represent the most serious forms of harassment. While these comments could be harassment, they should be handled within the context of a broader antidiscrimination policy.

Discrimination policies present an opportunity to explain the significance of such comments, as well as low level discrimination, in a way that will be meaningful to employees. The policy could explain, for example, that supervisors occupy a

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racial comments); Feingold v. New York, 366 F.3d 138, 150-151 (2d Cir. 2004) (routine anti-Semitic remarks by coworkers).

[284] Harris, 510 US at 22; Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998) (repeated comments from supervisor over a 2-year period, including one over a loudspeaker); Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 146 (2d Cir. 2014)("steadily intensifying drumbeat of racial insults, intimidation, and degradation over a period of more than three years").

[285] Of course, articulating the circumstances that influence disciplinary decisions is not without risk, specifically mentioning some types of misconduct necessarily leaves others out. While including a disclaimer is helpful, there is nevertheless a risk of a breach of implied-in-fact contract claim if the employer departs from its articulated standard.

position of trust in the organization.[286] (See Appendix.) They are entrusted with providing opportunities for advancement equally among those who report to them, without regard to their membership in a protected category. It is analogous to an employee entrusted to handle large sums of money on the employer's behalf, which imposes special responsibilities regarding how that money should be handled.[287] Part of upholding that trust means devoting care and attention to how they distribute formal and informal opportunities for advancement. It also means refraining from making comments or engaging in conduct that would cast doubt on their impartiality. When a supervisor makes denigrating comments about a subordinate's gender, race, or religion, it suggests they are not giving everyone an equal shot. The same is true if they do nothing to address discriminatory comments on the part of an employee's coworkers. Where a supervisor violates that duty of trust, it is proper for the employer to discipline them, which may even mean removing them from their decision-making role.

Framing discrimination as a breach of trust also aligns with the way companies structure their code of ethics and conflict of interest policies.[288] Employees that represent the company with respect to third parties have a special duty of trust to maintain the company's image and project the employer's values with

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[286] Justice Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 333 (2002) ("the fiduciary concept…had its origin in the law of trust, where its literal meaning-faithfulness-correctly described the duty of responsibility owed by one who held title, but not ownership, to property of another"); RESTATEMENT (THIRD) OF AGENCY, Section 8.01 (2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."); RESTATEMENT (THIRD) OF EMPLOYMENT LAW, Section 8.01 ("Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment"); Lyman Johnson & David Millon, Recalling Why Corporate Officers are Fiduciaries, 46 WM. & MARY L. REV. 1628-1630 (Discussing the fiduciary duties of corporate officers).

[287] RESTATEMENT (SECOND) OF TRUSTS, § 174 (1959) ("the trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"); John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625, 656 (1995) (discussing the duty of prudent administration).

[288] Oracle Code of Ethics and Business Conduct, www.oracle.com/us/corporate/investor-relations/cebc-176732.pdf at p47 ("The term 'conflict of interest' describes any circumstance that could cast doubt on your ability to act in Oracle's best interests and to exercise sound business judgment unclouded by personal interest or divided loyalties"); *Code of Ethics and Business Conduct*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT (Dec. 1, 2014), https://webcache.googleusercontent.com/search?q=cache:wvBF8ZAmctgJ:https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_014093.aspx ("we must avoid any relationship or activity that might impair, or even appear to impair, our ability to make objective and fair decisions when performing our jobs.")

respect to honesty and integrity. Employees intuitively understand that paying a bribe to a government official, no matter how small, could be extremely damaging to the company's legal interests and integrity.[289] Likewise, employees also understand the notion that dishonest conduct, for example a false claim for reimbursement or misuse of the company's credit card, is extremely problematic not just because of the amount of money at issue, but because it raises serious questions about future conduct. The same is true in the discrimination context.

Although codes of conduct often reference discrimination and harassment, they tend not to be framed in terms of integrity and breach of a duty of trust. Instead, discrimination is characterized as something the company "doesn't" do.[290] Likewise, harassment is framed as disrespectful,[291] or as a productivity drag due to decreased interpersonal trust.[292]

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[289] *The Kraft Heinz Company Employee Code of Conduct*, KRAFTHEINZ, www.kraftheinzcompany.com/ethics_and_compliance/code-of-conduct.html (last visited May 30, 2018) (*hereinafter* KraftHeinz) ("We are strictly prohibited from directly or indirectly giving, offering, promising or authorizing anything of value - no matter how small - to any government official or agency…or any other individual to corruptly secure a business advantage").

[290] *Oracle Code of Ethics and Business Conduct*, ORACLE 1, 47, www.oracle.com/us/corporate/investor-relations/cebc-176732.pdf (last visited May 30, 2018) ("The term 'conflict of interest' describes any circumstance that could cast doubt on your ability to act in Oracle's best interests and to exercise sound business judgment unclouded by personal interest or divided loyalties"); *Code of Ethics and Business Conduct*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, (Dec. 1, 2014), https://webcache.googleusercontent.com/search?q=cache:wvBF8ZAmctgJ:https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_014093.aspx ("[Company name] is an equal employment/affirmative action employer and is commitment to providing a workplace that is free of discrimination of all types from abuse, offensive or harassing behavior.")

[291] *Code of Conduct*, VERIZON, *www.verizon.com/about/our-company/code-conduct* (last visited May 30, 2018) ("Respect. We know it is critical that we respect everyone at every level of our business. We champion diversity, embrace individuality and listen carefully when others speak."); KraftHeinz supra note 289, at 4 ("Keep interactions with your fellow employees professional and respectful."); PG&E, supra note 246 at 11 ("Conduct yourself in a professional manner and treat others with respect, fairness and dignity.")

[292] *Owens Corning Code of Conduct*, OWENS CORNING 1, 12, *https://s21.q4cdn.com/…downloads/…ethics/Owens-Corning-Code-of-Conduct.pdf,* (last visited May 30, 2018) ("We depend on each other's knowledge and support, so it is especially important to treat our fellow employees with respect and dignity. Harassing behavior creates an uncomfortable workplace where people don't trust each other - which keeps us from reaching our goals."); *Society for Human Resources Management, Code of Ethics*, *supra* note 287 ("We all deserve to work in an environment where we are treated with dignity and respect. [Company name] is committed to creating such an environment because ti brings out the full

Instead, codes of conduct should explain that a supervisor's discriminatory conduct casts doubt on their ability to make future employment decisions. If that supervisor is later permitted to decide which employees to promote, for example, that comment could qualify as a 'smoking gun' of the supervisor's discriminatory intent. The policy should explain that it is therefore proper for the employer to intervene before the supervisor's decision is tainted by the discriminatory comment. That intervention need not necessarily be excessively punitive when compared to the conduct at issue. But it should be adequate to remove any doubt as to the fairness of later employment decisions relating to the employees affected by the comment.

Such a policy would help limit an employer's liability. But it also places the conduct within its correct context. The employer is not intervening out of concern for overly sensitive employees, nor is it seeking to regulate speech. Instead, it is protecting the integrity of the decision-making process for all employees.

Conclusion

The MeToo movement is still unfolding, and may yet lead to even broader changes than those currently described here. These include examinations of pay equity, paid leave, and discrimination against those with caregiving responsibilities. It may also lead to additional innovations in employee practices, fueled by a hungry tech industry ready to test new approaches with real time analytics.

Employer practices will continue to be negotiated and revised. Because prior systems of interlocking employment policies and practices were so entrenched, changing one policy or practice inevitably affects the implementation of others. Shifting cultural expectations may also produce a backlash, which will likewise demand an employer response.

Legal rules will both lead and follow changes in employer practices. Restrictions on settlement agreements and arbitration provisions will change contracting practices, employer litigation, and settlement strategies. On the other hand, if legislators fail to act, employers will likely seize the opportunity to expand social media policies and their use of arbitration agreements.

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potential in each of us, which, in turn, contributes directly to our business success.")

Nevertheless, disruption can be fruitful. Ultimately, the MeToo movement injects democracy into the workplace, by pushing employers toward transparency and accountability. Without secrecy for cover, employers must finally show their work, and figure out what it means in practice to provide everyone with an equal opportunity to succeed.

Appendix – Model Policies

Harassment Policy

Federal and state law protects an employee's right to work in an environment that is free of harassment. Under the law, the term "harassment" means offensive comments or conduct directed at an employee because of their membership in a protected category, like their gender, race, color, religion, national origin, disability, age, or veteran status. State law also protects employees against harassment based on [insert additional state law protections].[293]

To satisfy the legal standard for harassment, the offensive conduct must be so severe or frequent that it has the effect of altering the employee's work environment. In other words, the work environment would need to be very bad for someone to win a court case.

A very bad work environment is a low bar. We hold ourselves – and you – to higher standards. We strive to create a work environment where employees can focus on their job, without being pigeonholed or judged based on stereotypes, or constantly reminded that they are different. Our workplace also prioritizes inclusion, where everyone has a chance to make important work connections, gain valuable experience, and take on challenging opportunities.

Our policy prohibits harassing conduct, even if it is not severe or frequent enough to meet the legal standard. So don't make jokes or comments that mock or denigrate others based on their background or status. Don't post derogatory or demeaning material in your physical workspace, on your computer, or over email (and consider how your behavior online might bleed into the workplace). Offensive physical contact, leering, and blocking other people's movement are also unacceptable.

When assessing your own behavior, consider how your comments – along with comments from others – might add up over time. For example, a few casual comments to a pregnant woman about her size might seem isolated to you. But if everyone does it, that means she's hearing a constant stream of comments, to the exclusion of work-related discussions or enjoyable small talk unrelated to her appearance. The same thing goes for casual comments motivated by someone's religion, race or disability, for example. Constantly reminding someone

[293] Brackets refer to information for the employer to complete.

that you are hyper-focused on how they are different is probably not going to help them succeed in the workplace.

Sexual conduct may violate the harassment policy, especially when it involves employees in authority positions. Employees deserve to be able to focus on their job, without having to fend off the advances of others they can't readily avoid. Employees also shouldn't have to worry about the awkwardness of how their boss will respond to being rebuffed. Or whether their supervisor views them as an object, instead of recognizing their productivity and potential. Sexual conduct can also be a form of harassment where it is used to marginalize or punish others, even those of the same gender.

If you have experienced harassment, please do not suffer in silence. Reporting the behavior enables us to help put a stop to the behavior, and ensure that others are not affected as well. You can report harassment to [your supervisor, human resources….insert other reporting options].

We investigate reports of harassment we receive, unless the complainant requests that we do not investigate. (The absence of an investigation may limit our ability to respond. Consequently, we may independently decide to investigate harassment involving allegations of serious or widespread harassment.) Investigations usually consist of interviewing the complainant, the person accused of harassment, and any others identified as witnesses. We may also collect relevant documents, like emails or text messages. In cases involving violence, assault, rape, or threats of violence, we may also contact law enforcement.

If we determine a harassment complaint is substantiated, we will then decide how to stop the conduct, as well as hold the employee who violated the policy accountable. Our disciplinary decisions generally reflect the seriousness of the policy violation. A minor violation of the harassment policy might mean talking with the employee about his or her behavior and why it is a problem. More serious violations of the policy could mean immediate termination, or other serious forms of discipline that reduce the employee's rank, responsibilities, compensation, or performance evaluation.

Some of the factors that tend to bear upon the seriousness of a harassment claim include:

- whether the harassment involved physical contact
- whether the conduct involved epithets or slurs

- whether the conduct involved symbolically offensive or threatening acts, such as swastikas or a noose
- whether the conduct involved vandalism or damage to property
- whether the conduct was humiliating or degrading
- whether the conduct limited the victim's access to work opportunities or tools needed to perform his/her job
- the physical environment in which the harassment occurred
- the social context in which the harassment occurred
- whether the conduct was repeated

As with all disciplinary matters, we ultimately reserve the discretion to decide whether and how to discipline employees. Common sense, fairness, and business exigencies may dictate that we make decisions regarding harassment not specifically set forth in this policy.

Discrimination Policy

Under federal and state law, employees have the right to equal opportunity when it comes to important employment decisions like hiring, promotion, pay, or termination decisions. That means that these decisions cannot be motivated by an employee's gender, race, religion, national origin, age, disability, color or veteran status. State law also protects employees on the basis of [insert state law protections].

However, we hold ourselves to a higher standard than the legal rules require. We expect supervisors to show a high degree of integrity in distributing both formal and informal workplace opportunities. This means taking care to ensure equal opportunity in areas like networking opportunities, challenging assignments, training opportunities, mentoring, client engagement, and other similar opportunities that affect an employee' career trajectory over time.

In our company, supervisors hold a special position of trust to maintain the integrity of these employment decisions. They breach that duty of trust when they engage in conduct or comments that raises serious questions about their ability or willingness to provide opportunities on an equal basis. In particular, derogatory or demeaning comments about an employee's religion, disability, gender, age, race or other legally protected status, suggest that supervisor cannot be trusted to provide a level playing field. Other harassing behavior by a supervisor may raise similar questions about the supervisor's integrity regarding the discrimination policy. In other words,

even a minor violation of the company's harassment policy by a supervisor may be a serious violation of the company's discrimination policy.

If you have experienced discrimination, or have questions about the integrity of the decisionmaking process, please let us know. Reporting at an early stage can help us fix the process and restore trust before the stakes get even higher. You can contact human resources [insert any other reporting options].

We will then investigate the situation, which generally consists of interviewing you, interviewing the supervisor, and reviewing relevant documents, including documents bearing on the decision-making process, if any. If a complaint is substantiated, we will then assess how to remediate the situation, address the supervisor's breach of trust, and improve the decision-making process.

Retaliation Policy

Employees perform a valuable service to the company by bringing important information to our attention through [their supervisor or to HR].[294] We also recognize that it takes courage to formally report harassment, discrimination or other unlawful conduct.

Encouraging employees to use and trust our complaint system demands that supervisors and co-workers support those who have used the complaint system. Retaliation against another employee for using our complaint system is strictly prohibited.

[294] This language should parallel earlier language about how to report a harassment complaint.

Using Evaluations in Mediation
(AAA HANDOOK ON MEDIATION, 2010)

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CHAPTER 31

USING EVALUATIONS IN MEDIATION

Dwight Golann and Marjorie Corman Aaron[*]

I. Introduction

Evaluation is a controversial issue. Some mediation theorists believe that the technique has no place in "true" mediation, a purely facilitative process in which parties are left free to make their own judgments about the merits of a case without interference from the mediator.[1] We hold a

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[1] Some commentators believe that for a mediator ever to evaluate raises ethical questions. For example, the Standards of Conduct for Mediators promulgated by the American Arbitration Association and the American Bar Association, state that "A mediator shall conduct the mediation fairly, diligently and in a manner consistent with the principle of self-determination by the parties."

The ABA/AAA standards do not say explicitly whether or not mediators are allowed to evaluate, but the commentary to them states that "Mixing the role of a mediator and the role of a professional advising a client is problematic...A mediator should, therefore, refrain from providing professional advice" and refers to the option of sending parties outside the process for a "neutral evaluation." For an interesting discussion of the practice-of-law issue, *see* Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*; Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES 57, 74 (June 1996).

At the same time, many of the nation's most respected mediators use evaluation in their work, considering it an appropriate tool in certain situations. *See, for example*, Jonathan Marks, *Evaluative Mediation—Oxymoron or Essential Tool?* AM. LAW (May 1996).

different view. Evaluation is a legitimate weapon in the mediator's arsenal, one that can be either effective or explosive depending on how and when it is used.

II. Evaluation Defined

What is evaluation? It is a process in which a neutral expresses an opinion as to the likely outcome or value of a legal claim or defense were it to be adjudicated. Evaluation can focus on either a single issue or on the overall result in a case. It can be expressed in ranges ("the damages could range from $25,000 to $75,000"); numeric probabilities ("40% chance"); or as a precise number ("a $100,000 case"). An evaluation can be expressed with certainty ("The plaintiff will win...") or studied vagueness ("I have some doubts about...").

Evaluation is sometimes hard to distinguish from "reality testing." Almost all mediators are willing to reality test—that is, to question disputants about the strengths and weaknesses of their cases. In this role, a mediator acts as a devil's advocate, pushing the disputants to become more realistic without completely revealing his or her personal opinion about the merits. However, as mediators become more and more familiar with the facts and arguments, it is almost inevitable that they will form views about how a court would rule on a case. Parties, not expecting mediators to be potted-plants, are aware that the judgment-formation process is going on.

Mediators may be less successful than they think at hiding their opinions about the merits. Reality testing is a spectrum in which the line between mere testing and evaluation is not always clear. For example, a phrase such as "What are your thoughts on the causation issue?" is unlikely to be controversial. But such commonly-asked questions as "Do you think there's a problem on causation?," "What would you say in response to their argument on causation?," "Don't you have a causation problem here?" or "You don't think that's an issue?" are increasingly likely to be interpreted as evaluative opinions. Even if the language used by a mediator is scrupulously neutral, his or her feelings about the strength of an argument may well show unconsciously in facial expressions and body language. It is likely that litigants perceive evaluation going on in many situations where a mediator would describe behavior as "reality testing."

The fact that evaluative input of this nature is common in mediation makes it important for mediators to understand how to do an evaluation

properly, and for lawyers to know when to request that such techniques be applied.

III. Benefits and Dangers

Like most other tactics, evaluation has both potential benefits and dangers. In the case of evaluation, however, both the risks and the advantages are relatively large.

A. Benefits

An evaluator's primary goal is to change litigants' assessments of the strength of their adjudication alternatives. Often both sides in a legal dispute honestly believe that they are likely to win in court. Mediators find that when parties put their predictions in terms of percentages, their forecasts often total 150% or more; that is, each side thinks that it has a much better than even chance of prevailing. Given these clashing predictions, it is not surprising that even good faith negotiations often reach impasse.

The causes of such misjudgments are complex. Psychologists have demonstrated, for example, that people tend to form perceptions of situations quickly, then unconsciously ignore any information that contradicts their view, a phenomenon called selective perception. People's judgments are also influenced by their roles in litigation, an effect known as advocacy distortion.

For example, in an experiment at Harvard Law School, students were given identical files describing an auto accident, then asked to evaluate the plaintiff's chance of winning in court. Those assigned the role of lawyer for the accident victim assessed her chances of prevailing at a mean of 65%. By contrast, students who were given the same case file but told that they represented the defendant insurance company gave the plaintiff only a 48% chance. Similar discrepancies appeared in the students' estimates of the damages the plaintiff would recover if she won: "plaintiffs" placed the damages at a mean of $264,000, while "defendants" projected only $188,000. Harvard Business School students asked to carry out the same study showed very similar biases. These kinds of advocacy distortions are nearly universal.[2]

[2] These findings are consistent with the results of a long series of experiments showing that the roles people adopt in both litigation and non-litigation contexts often impair their ability to analyze data accurately. *See, for example,* Max. H. Bazerman,

Evaluation can cut through litigants' misjudgments about the merits of a case. When disputants hear that a neutral person, after studying the facts and listening to the arguments, disagrees with their predictions of victory, they are motivated to look again at the case and ask what the evaluator has seen that they have not. Evaluation can thus help disputants overcome the impact of selective perception, advocacy bias and other factors that distort parties' assessment of the merits.

An evaluation can also satisfy psychological needs. It may give litigants the emotional experience of having a day in court, in which they can present their arguments to a neutral person. If bargainers realize that concessions are necessary, but do not want to move from entrenched positions without having a rationale, an opinion can provide the necessary psychological cover. Similarly, insurance adjusters, government officials, and others who must answer to supervisors and constituencies outside the mediation, often welcome an evaluation because they can use it to deflect after-the-fact criticism of their decision to settle. Finally, evaluations can help to resolve internal disagreements within a bargaining team, for instance by assisting a litigator who sees serious risks in a case persuade an unrealistic client of the need to settle.

B. Dangers

Unfortunately, evaluations pose dangers that may outweigh their benefits. First, an evaluation may freeze the bargaining process. Once the parties to a mediation know that an evaluation is coming, they are likely to stop negotiating: After all, why confront painful decisions about concessions when the neutral will soon vindicate one's position? But once the evaluation is given, it may be treated as a "take it or leave it" offer. After a respected outsider has stated the "right" or "fair" result in a case, it is very hard for a defendant to offer more, or a plaintiff to accept less, than the number the evaluator has set. The strength of this "take it or leave it" effect is inversely proportional to the confidence of the negotiators in themselves and in the evaluator. The more concerned a bargainer is about being second-guessed by a client or supervisor, the less willing he or she will be to accept a result less favorable than the evaluation.

Equally significant is the potential impact of an evaluation on the mediator's credibility with the litigants. A neutral's greatest asset in

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Negotiator Judgment: A Critical Look at the Rationality Assumption, 27 AM. BEHAV. SCI. 211, 220-22 (1983).

bringing about a settlement is the rapport and confidence that he or she develops with the parties and their counsel. As long as litigants see the mediator as an honest, neutral and competent facilitator of the process, they are willing to listen to tough questions, accept coaching about their bargaining tactics, and consider settlement recommendations that require painful compromises.

If, however, a mediator delivers an evaluation too quickly or in the wrong way, the "losers" in the evaluation are likely to react badly. A party, its lawyer, or both may decide that the neutral has "gone over to the other side." Perhaps, they think, the neutral has been duped by clever arguments, or seduced by promises of future business. Indeed, if the evaluator disagrees with both sides, as is quite possible, everyone can be left angry. Once this happens, even the most innocent comment or gesture by the mediator will be filtered through feelings of suspicion and antagonism. A badly-done evaluation can destroy the mediator's power to influence the losers, and perhaps everyone, in a case.

There are less dramatic dangers as well. Evaluators focus on the legal merits and may fail to address less obvious barriers which may be frustrating a settlement. If the problem, for example, is that a key decision maker in any settlement is not at the bargaining table, an evaluation is unlikely to uncover the issue. If the obstacle is a party's unresolved feelings of grief, a lawyer's anger, or other strong emotions, an evaluation, with its emphasis on legally-relevant facts, will not deal with it. In general, evaluation does not address the hidden issues that often drive lawsuits. More seriously, evaluation tends to hide these issues because it focuses the disputants solely on the legal merits of the case. Evaluation, in other words, often "solves" the wrong problem and, by doing so, obscures serious hidden causes of impasse.

All this said, the right kind of evaluation, done at the right point and handled in the right way, can be the ingredient that breaks a seemingly-hopeless deadlock.

IV. How to Give an Effective Evaluation

A. Whether to Evaluate

Our basic advice about whether to evaluate is "only if necessary." Unless required to break an impasse, evaluation's inherent risks, make it unwise.

The fundamental diagnostic questions that a mediator should ask in every dispute are the following:

- What obstacles are preventing the parties from settling this dispute themselves?
- What mediative strategies are most likely to overcome these barriers and bring about a settlement?

In most cases, the barriers that are frustrating agreement, such as procrastination, the need to vent arguments and emotions, poorly conducted positional bargaining, lack of information or hidden psychological issues, do not relate to the parties' view of the merits. Specific mediative strategies are available to address these issues,[3] making evaluation inappropriate.

In some situations, however, even after other barriers have been diagnosed and treated, the major obstacle to settlement remains the parties' (or their lawyers') inability or refusal to accurately assess the value of their trial alternative. Even pointed reality testing has not (or is unlikely to) overcome the effects of selective perception, advocacy bias and other psychological forces that distort litigants' perceptions.[4] In such situations, a mediator's only remaining options may be either to conduct an evaluation or admit defeat. If evaluation is the BATL (Best Alternative to Litigating),[5] there's no harm in the attempt.

B. When to Evaluate

As should be clear from this discussion, we believe in delaying an evaluation until as late in the mediation process as possible. Waiting serves several important purposes. First, it allows the mediator to explore fully the other possible obstacles to settlement. If, for example, a key issue in a dispute is a party's need to express grief over a loss or anger at a business partner, deferring an evaluation allows the mediator to discover the issue and work on it. This kind of exploration is much more difficult after an evaluative "verdict" has been handed down.

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[3] For a discussion of these and other barriers and specific strategies to address them, *see* GOLANN ET AL., MEDIATING LEGAL DISPUTES (2009).

[4] For a discussion of other psychological forces that can distort a litigant's assessment of the legal merits, and methods to deal with them other than evaluation, *see id.*

[5] Our apologies to Roger Fisher and William Ury, the inventors of the concept of Best Alternative to a Negotiated Agreement, or "BATNA." *See* R. FISHER, W. URY AND B. PATTON, GETTING TO YES (1991) pp. 97-106.

Even if the problem is limited to the legal merits, it does not follow that an evaluation is always required. The cause of the parties' differing assessments of the merits may be that one side lacks key information; if so, a mediator's initial response should be to arrange a data exchange. If, instead, the problem is that one side fears that a settlement would create a precedent, a neutral should focus on confidentiality guarantees. In our experience, it is usually possible to solve many merits-related problems without the need for an explicit evaluation by the mediator.

A second reason not to evaluate quickly is that a mediator will have more time to build and strengthen the parties' trust. As the process goes forward, parties and lawyers get to know the mediator much better on both a professional and a personal level. In formal sessions, the participants are able to watch the mediator in action and observe how he or she handles challenges. During informal conversations and telephone contacts, the parties and counsel begin to get to know the mediator as a person. In this way, an effective mediator can gradually build up the disputants' trust and confidence. The mediator can then draw on this reserve to cushion the shock of an unwelcome opinion on the merits. Also, the mediator will have the opportunity to learn more about the parties in order to phrase his or her evaluation in terms that will be most palatable to the audience.

In addition, when a mediator prefaces the evaluation with questions and discussion of the merits, the parties often become more realistic about their cases, narrowing the scope of any opinion that the mediator must offer. The litigants may also realize that weaknesses in their case which they had hoped to keep hidden are in fact apparent to the other side. Finally, the disputants see that the mediator has heard them out and is seriously grappling with the facts and arguments they raise. The participants also learn that the mediator is raising their strongest arguments with their adversaries. As the mediation progresses, then, the disputants appreciate both that the mediator is giving them a fair hearing and has "done the homework." They are able to come to terms with the fact that the holes in their case are known.

There is one final "when" issue: Should a mediator obtain the consent of the parties before going forward with an evaluation? At one level, this is an issue of contract. Some mediation agreements require neutrals to get the assent of all parties before offering an evaluation,

while other forms leave the issue to the mediator's discretion.[6] A mediator owes participants the obligation to discuss process issues. But if, after this is done, the parties choose to remain in the mediation, it is best that the neutral retain the discretion to evaluate if necessary to stimulate a settlement.

Our overall advice about when to give an evaluation is this: Evaluate as late in the process as possible. As a rule of thumb, never do so until at least the first round of caucuses is completed. Only consider evaluating after you have had a reasonable chance to diagnose and treat other obstacles to agreement, using less risky tactics such as reality testing, and have talked with the disputants about your intentions. In our view, evaluation should usually be the final and almost never the first, arrow in a mediator's quiver.

V. What Standard to Apply?

The most common standard used in evaluations is one of prediction: The neutral attempts to forecast how an arbitrator, judge, or jury would resolve certain issues or the entire case, if the party opted for a binding decision.

This predictive standard may seem self-evident, but in practice it is not. Mediators sometimes focus on how they personally would decide a case. This is irrelevant, however, since neutrals rarely serve as judges in their own unsuccessful mediations.[7] This standard is also dangerous because it puts the mediator into the position of personally rejecting one or both parties' arguments, making it even more likely that they will come to view him or her as an enemy.

Another standard mediators sometimes apply is: "What will it take to settle this case?" In other words, given the negotiation dynamic, what package of terms is likely to be minimally acceptable to everyone in the dispute? If, for instance, one side is stubbornly unrealistic about the

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[6] For example, the model agreement developed by the CPR Institute of Dispute Resolution requires that all parties assent before an evaluation can be given, but the standard JAMS agreement leaves the issue to the mediator. The American Arbitration Association has no specific rule on the subject, but as noted in note1, the ABA/AAAACR STANDARDS OF CONDUCT FOR MEDIATORS can be read to define "neutral evaluation" as a process separate from mediation.

[7] The exception, of course, is the process known as "med-arb," in which the disputants consent to have the mediator render a binding decision if they cannot reach agreement.

likely court outcome, a "What will it take?" opinion might bend the proposed terms toward that view in order to secure agreement that is easier for parties to accept. Although there is nothing inherently wrong with this approach, a serious problem arises when disputants think that they are hearing a pure merits-based evaluation but instead receive a "What will it take?" recommendation. For a mediator to offer a settlement recommendation under the guise of a legal evaluation is both unethical and capable of creating serious practical problems when parties discover that they have been misled.

Evaluators should give their best "straight" prediction of how the likely decision maker would resolve an issue or case. However, when the litigants explicitly agree to receive a settlement recommendation rather than a merits evaluation, then a "What will it take?" opinion is appropriate.

VI. Structuring the Evaluation

The first issue for a mediator to consider is whether he or she will perform the evaluation, or suggest a person outside the process. There are many advantages to an outsider's evaluation. First, it distances the mediator from the process, greatly reducing the risk that a disappointed disputant will hold the results against the mediator. Second, the mediator and lawyers can select an evaluator with the credentials most likely to impress the parties, without concern about balancing evaluative credentials with facilitative skills. If, for example, the parties would be most swayed by a prediction from an eminent jurist, they can retain a former chief justice without worrying about whether he or she knows how to mediate.

A third advantage of going outside is that it allows the mediator to focus energies on a single role: that of facilitator. Fourth, it solves the nagging issue of what a mediator who also evaluates should do with any information that may have been disclosed on a confidential basis in caucuses.[8]

There are practical difficulties, however, with using an outside evaluator. First, unless the two roles are assigned at the outset, making arrangements for an outsider to come in will usually require adjournment

[8] One possible solution is for the mediator to disclose that his or her assessment rests in part on "secret ammunition" confided by one side. Among other things, this makes it easier for each party to understand the neutral's opinion.

of the process and disrupt its momentum. When parties are allowed to cool off, they may harden their positions. Second, retaining an outsider is more expensive than having the mediator give an opinion, and many cases will not support the cost and delay of additional briefing. Finally, even with the mediator's assistance, the parties may be unable to agree on who should perform the evaluation. For these reasons, the parties almost always request that the mediator take on the task.

A. Limit the Issues

The next question is how much of the case to evaluate. Novices often assume that an evaluation must cover the entire dispute, but this is not so. The legal issue driving the parties' impasse may be a relatively narrow one (for instance, will the liquidated damages clause of a contract be enforced?). If so, there is no need to evaluate other issues on which the parties are closer to agreement. Indeed, if the evaluator's view of those other issues differs from that of the parties, evaluation would stimulate disagreement rather than resolve it.

B. Piggyback Whenever Possible

A corollary to not evaluating issues unnecessarily is to build on the parties' opinions as much as possible. A plaintiff, for example, may have a realistic take on liability but an inflated view about damages. If so, it is more effective for an evaluator to say that he or she will accept the party's liability percentage "for argument's sake," although perhaps noting mild disagreement with it, then press the evaluator's opinion about the likely damages. It is easier to change a person's mind on one issue than two, and an evaluator's "concession" on one point will often induce disputants to accept his or her views about other, more controversial issues in the case.

C. Think about Who Needs to be Influenced

One's tendency is to assume that evaluations are done solely for people in the mediation room. This is often not true. The real cause of an impasse may be a decisionmaker in a distant city who has not participated in the mediation or felt its impact. Or negotiators may be hesitating out of fear that a decision to compromise will expose them to criticism from supervisors or outside constituencies. If the problem is absent decisionmakers, the evaluation can often be used as an event to get their attention, and sometimes their actual presence at the scene.

There is something about the idea of even a non-binding "verdict" being handed down that brings a case onto the radar screens of persons who have felt too busy to pay attention to it before.

If the issue is fear of being second-guessed, and the potential critic cannot be brought to the mediation, it may make sense to put the evaluation in the form of a written opinion that a party can take to his or her constituency or place in a case file. If an evaluation is to be used to convince persons outside the process, the credentials and public reputation of the evaluator become more important than his or her personal qualities. In such circumstances, a mediator will not be able to use the trust he or she has built up during the proceeding to sell the result, and may want to select a third person whose resumé will impress an absent decisionmaker.

Example: A mediator was working on a dispute between a government loan agency and a borrower who had defaulted on his mortgage. As the mediation went forward, it became clear that the loan foreclosure had been handled badly by the original lender, making it difficult now for the agency, which had inherited the loan, to collect on it. Still, the agency refused to settle the case. In caucus, the agency disclosed that it needed a letter from the mediator evaluating the case and endorsing the result in order to settle. The agency was not willing to have the letter shown to the borrower; instead, it would be used by the agency to convince a review board to approve the deal. The borrower's counsel agreed to these terms, the mediator wrote the letter, and the case was settled.

D. Choices in Effective Format

Before undertaking an evaluation, consider what format will maximize its contribution to a settlement:

- What data will the evaluator receive? For example, will the parties rely on existing documents or prepare special briefs? Note that special briefing is more likely to be necessary if an outsider is brought in to do the evaluation.
- Do the parties need the feeling of having a "day in court"? Will the evaluation have more weight if they are allowed to make formal arguments? If so, consider conducting the process in a "moot court" format.
- Should the opinion be delivered in caucuses or during a joint session? If it is delivered to the disputants in each others'

presence, the losers may feel humiliated; creating anger that will disrupt the process. If, on the other hand, the evaluation is presented in separate caucuses, the disputants may suspect that the evaluator is delivering different opinions to the two sides.

We rarely ask for special briefing because it would usually require adjourning the process. We also avoid "moot courts," because to hold, one risks elevating the importance of an evaluation from impasse-breaking tool to final pronouncement in a case. We also strongly favor delivering evaluations in caucus. This is not in order to deliver different legal analysis or numerical evaluations to each side. Rather, it is because evaluating in caucus allows us to use phrasing and arguments calculated to help the listeners to accept our opinion. In caucus one can, for example, piggyback one's views on bits of confidential information that party has shared. The mediator-evaluator could, for instance, concede that an opposing witness might be lying as that party has been arguing but go on to say that the witness has a demeanor that would impress a jury. Evaluating in caucus allows us to more frankly acknowledge strengths in each side's arguments, and build on that foundation to deal with more controversial issues.

The problem of demonstrating that the evaluator is delivering the same opinion in each caucus is a real one. It can be addressed, for example, by writing a bullet point form of the evaluation on a flip chart or notepad and carrying it from one caucus room to another. Putting the opinion in writing has the extra benefit of giving visual reinforcement to unwelcome news and reduces opportunities for the parties to engage in "selective perception" of the evaluation.

E. Consider Language, Culture and Commonality

A mediator's choice of language, tone and cultural referents in presenting an evaluation will greatly influence its impact on the parties. One's individual and cultural background is what it is. But a bit of chameleonship in style and manner can increase the persuasiveness of the opinion, particularly when its content is critical. If, for example, one party (whose team may include a lawyer, expert and several client representatives) is informal, given to slang and colorful metaphor, it may be effective to use that style in their caucus. If the other party is more formal, deliberate and analytical, the mediator will do well to choose a tone and language likely to resonate with that group. In short, this advice on choice of style and manner is "When in Rome...," particularly when

the substance of the message is relatively unfavorable. This is another reason to present evaluations in private caucuses with each side.

F. Be Empathetic

Acknowledge the listening party's concerns and arguments and why a result you see as likely or possibly may seem unfair or surreal. Predictions are not pronouncements of right and wrong; you can actively listen to and reflect or empathize with a party's feelings and responses.

G. Emphasize Differences in Perspective

It is sometimes difficult for disputants to accept that someone who has the same information as they do nevertheless disagrees strongly with their judgments. One defense is to emphasize that in doing an evaluation, you are not giving your personal opinion about what is a fair resolution, but instead are predicting how other people whom the disputants have never met (a judge or jury) would react.

We also note the special advantages of being neutral. Because we are not arguing the case and have no personal stake in its outcome, we are free to think about it from the perspective of an uninvolved person. It is difficult for disputants to admit that their judgment may be distorted by their roles in the case (although they readily see that the condition affects their opponents and perhaps their clients). Our practice is to mention the point but not to stress it heavily.

H. Distance Yourself from the Opinion

As we have noted, it is very important that the mediator not become personally identified with an unwelcome opinion. One method of doing this is to follow the guidelines set out above: empathize with the problem that this creates, note that you will never sit in judgment on the matter, use the language of prediction, and so on.

Another way for mediators to distance themselves is to use the technique known as decision analysis. Decision analysis is a mathematical technique that allows analysts to break down a case into a series of choices and chances (win on summary judgment or not; win or lose at trial; recover a high, medium or low verdict, etc.). The case is then "graphed out" in a way that lets the parties see the possible outcomes in the litigation and weigh the probabilities of each one. Individual choices and chances are then multiplied out, yielding an overall monetary value for the case. Decision analysis allows mediators

to talk with disputants in a relatively dispassionate way about what could happen if a dispute is adjudicated. It allows both the neutral and the parties to "let go" of emotional arguments and consider litigation risks in a logical manner. Also, because participants are asked to discuss and estimate the percentage likelihood of success on each issue before calculating its impact on the case's overall discounted value, they may provide more honest assessments. For this reason, decision analysis can be a constructive vehicle for discussing the parties' or the mediator's case evaluation.[9]

VII. Conclusion

Evaluations rarely end cases themselves. Rather, they provide a strong "dose of reality" that helps break down differences in how the parties assess their no-agreement alternatives. Assuming an evaluation is necessary; therefore, mediators need to think in advance about how to use them to promote further negotiations:

1. Is reflection or consultation time needed? In simpler cases where the decisionmakers are present, a mediator can give an evaluation orally and then ask for a new offer. But when the case is complex, the results shocking to the listeners, or the evaluation calls for an offer outside a negotiator's authority to settle, an adjournment will probably be needed.

2. What kind of bargaining should occur after the evaluation? Who should make the next concession? Are inventive terms possible that would obscure or cushion one side's defeat in the evaluation? Should the mediator make a compromise proposal, to some degree influenced by evaluation results? If so, should the proposal be presented as a "mediator's proposal" basis that allows each side to conceal its willingness to agree unless the other side has assented as well?[10]

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[9] For an explanation of how decision analysis can be used in mediation, *see* Marjorie C. Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEGOTIATION J. 123 (1995); M. C. AARON, Chapter 8 *in* MEDIATING LEGAL DISPUTES, *supra* n. 3

[10] The essence of a "mediator's proposal" is that the mediator proposes the same package of settlement terms to all sides, but under the ground rule that each side can tell the mediator in confidence whether the package is acceptable. If so, there is a deal. If not, the rejecting party will never learn whether its adversary was willing to compromise. This

Evaluations can help break through seemingly impassable merits-based barriers. A mediator should not evaluate, however, without some plan for what he or she will do on the other side to bring the negotiation to closure.

We do not advocate that evaluation be used in most cases, or even as a tool of first (or second) resort in those situations where it is likely to be helpful. Nor do we contemplate a model in which evaluation overshadows the facilitative aspects of mediation: quite the contrary. We do suggest that evaluation is merely a more transparent, honest extension of the practice of "reality testing" which has long been a part of legal mediation orthodoxy. When traditional techniques fail to persuade a party holding a deeply-held, but unrealistic, view of the merits, direct evaluation may be the mediator's only alternative to declaring an impasse. Then, evaluation is appropriate. Because of its inherent risks, however, evaluation should be undertaken only with skill and careful attention to its role within the mediation process.

format makes it easier for a party to explore a compromise without endangering its bargaining position if an agreement is not reached.