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## Sexual Harassment in the Post-Weinstein World

Joanna L. Grossman

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# Sexual Harassment in the Post-Weinstein World

Joanna L. Grossman\*

*The 2017 iteration of the #MeToo movement has brought tremendous attention to the problem of sexual harassment in the workplace, as well as in a variety of other contexts. We learned that sexual harassment is rampant, varied in form, and harmful, or, more accurately, that it is still all of these things. Sexual harassment at work has existed as long as women have worked, whether paid, valued, or enslaved. The law of sexual harassment has a much more recent provenance. Courts began to recognize harassment as a form of sex discrimination in the early 1980s, and the entire current structure of sexual harassment doctrine was in place by the end of the 1990s. The law, in broad brush, prohibits sexual harassment in the workplace and gives its survivors access to a variety of remedies when the employer permits it to happen. Yet today, almost four decades after the law first categorized sexual misconduct as a form of unlawful discrimination, an average American workplace can feel remarkably like a saloon in the Wild West.*

*This Article will explore the ways in which the #MeToo movement has affected (or might affect) institutional response to sexual harassment. This entails first understanding some early lessons from the #MeToo movement. Then, it explores the legal regime that both unequivocally treats harassment as prohibited and sometimes permits it to flourish. The Article will first consider the nature and degree of the problem, before exploring the development of sexual harassment law and the key components of the current legal doctrine designed to address misconduct. It will turn then to the ways in which existing law is inadequate and has largely failed to address sexual misconduct at work. It concludes with a consideration of whether #MeToo will push institutions harder, or at least differently, to respond to sexual harassment—and at what cost. In the end, it concludes that the #MeToo movement has brought powerful forces to bear on a problem that the law has failed to eradicate, but that larger problems of gender inequity will likely forestall further progress.*

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“[T]he #MeToo movement is accomplishing what sexual harassment law to date has not.”<sup>+</sup>

#### INTRODUCTION

The 2017 iteration of the #MeToo movement has brought tremendous attention to the problem of sexual harassment in the workplace, as well as in other contexts like education, media, the movie and music industries, housing, politics, the military, and sports.<sup>1</sup> We learned that sexual harassment is rampant, varied in form, and harmful, or, more accurately, that it is *still* all of these things. Sexual harassment at work has existed as long as women have worked, whether paid, valued, or enslaved.<sup>2</sup> The *law* of sexual harassment has a much more recent provenance. Courts began to recognize harassment as a form of sex discrimination in the early 1980s, and the entire current structure of sexual harassment doctrine was in place by the end of the 1990s. The law, in broad brush, prohibits sexual harassment in the workplace and gives its survivors access to a variety of remedies when the employer permits it to happen—or fails to respond appropriately when it does. But today, almost four decades after the law first categorized sexual misconduct as a form of unlawful discrimination, an average American workplace can feel remarkably like a saloon in the Wild West.

This Article will explore the ways in which the #MeToo movement has affected (or might affect) institutional response to sexual harassment. This entails first understanding some early lessons from the #MeToo movement. Then, it

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+ Catharine A. MacKinnon, Opinion, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/3E9E-MCHA>].

1. See Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html> [<https://perma.cc/G6ZD-ZKBE>].

2. On the long history of sexual harassment of working women, see KERRY SEGRAVE, *THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993* (1994). See also LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978).

explores the legal regime that both unequivocally treats harassment as prohibited *and* yet sometimes permits it to flourish. The Article will consider first the nature and degree of the problem, before exploring the development of sexual harassment law and the key components of the current legal doctrine designed to address misconduct. It will turn then to the ways in which existing law is inadequate and has largely failed to address sexual misconduct at work. It concludes with a consideration of whether #MeToo will push institutions harder, or at least differently, to respond to sexual harassment—and at what cost. In the end, it concludes that the #MeToo movement has brought powerful forces to bear on a problem that the law has failed to eradicate, but that larger problems of gender inequity will likely forestall further progress.

### I. SHIFTING TERRAIN: THE #METOO MOVEMENT OF 2017

There will be many stories to tell about the year 2017—some of them tragic—but certainly one of the most important ones will be about the year America started to reckon anew with its pervasive culture of sexual misconduct. The cascade quite literally began with Harvey Weinstein, a Hollywood megaproducer whose decades of sexual predation were the subject of a hard-hitting investigative journalism piece published in the *New York Times* on October 5, 2017.<sup>3</sup> The piece chronicled three decades of Weinstein’s imposing himself on actresses and others in the film industry in situations that could be variously characterized as threatening, coercive, and perverse. The story also revealed that Weinstein had entered confidential settlements with at least eight women who had accused him of sexual harassment and assault. Even more was revealed about Weinstein’s behavior in a *New Yorker* article published just a few days later.<sup>4</sup> Together, these articles wove a web of misconduct, retaliation, silencing, and intimidation that might have seemed as farfetched as the plot of one of Weinstein’s own movies. Harvey Weinstein was removed from his own company and later convicted in New York of crimes related to sexual misconduct.<sup>5</sup> The reporters who broke the original story won a Pulitzer

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3. Jodi Kantor & Megan Twohey, *Sexual Misconduct Claims Trail a Hollywood Mogul*, N.Y. TIMES, Oct. 6, 2017, at A1 [hereinafter Kantor & Twohey, *Sexual Misconduct Claims Trail a Hollywood Mogul*]. The painstaking work that led to the publication of this story is detailed in JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019).

4. See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, 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> [<https://perma.cc/3PVG-HF3A>].

5. See Megan Twohey & Jodi Kantor, *With Weinstein Conviction, Jury Delivers a Verdict on #MeToo*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/us/harvey-weinstein-verdict-metoo.html> [<https://perma.cc/56EA-YNT2>].

Prize for Public Service, and the rest of us received an urgent wake-up call about the enormity of the problem of sexual misconduct in our society.<sup>6</sup>

Before Harvey Weinstein, there had been, among others, Roger Ailes, the CEO of Fox News, and Bill O'Reilly, a Fox News television host. Both men were terminated after revelations of serial sexual harassment of female employees, a pattern of conduct that was made possible in part by secret settlements along the way totaling tens of millions of dollars—O'Reilly personally paid thirty-two million dollars to a single complainant.<sup>7</sup> But these scandals, which peaked in July 2016 and April 2017, respectively, dropped in and out of the news cycle with startling speed.<sup>8</sup> There were other cautionary tales, but they were largely ignored as well. In June 2017, for example, the Office of the Inspector General issued a report concluding that sexual harassment was pervasive in the Civil Division of the U.S. Department of Justice and that agency leaders were handling complaints and investigations poorly.<sup>9</sup> This merited only a day of news.

The Weinstein story might well have gone the way of the Fox News ones had it not been for the now-famous tweet by Alyssa Milano on October 15, 2017: “If you’ve been sexually harassed or assaulted, write ‘me too’ as a reply to this tweet.”<sup>10</sup> Tarana Burke, a civil rights activist, founded the Me Too campaign over a decade earlier through a nonprofit organization designed to help women of color who were the victims of sexual harassment or assault.<sup>11</sup> Within just a few weeks of Milano’s

6. See Megan Twohey & Niraj Chokshi, *Company Scrambles as Weinstein Takes Leave and a Third of the Board Resigns*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/harvey-weinstein-sexual-harassment.html> [<https://perma.cc/FB83-7DVK>].

7. On the scandals at Fox News, see, for example, Joanna L. Grossman, *The Potential Legal Train Wreck Ahead for Fox News and Bill O'Reilly*, VOX (Apr. 11, 2017, 9:40 AM), <https://www.vox.com/the-big-idea/2017/4/11/15256462/fox-harassment-lawsuit-ailes-sex> [<https://perma.cc/J7U7-7DNK>].

8. There was commentary on these scandals, but it did not spark the same outrage that Weinstein’s story would just months later. See, e.g., Deborah L. Rhode, *How Unusual Is the Roger Ailes Sexual Harassment Case?*, HARV. BUS. REV. (Aug. 10, 2016), <https://hbr.org/2016/08/how-unusual-is-the-roger-ailes-sexual-harassment-case> [<https://perma.cc/3UHR-HGAF>]; Grossman, *supra* note 7; Joanna L. Grossman & Deborah L. Rhode, *Understanding Your Legal Options if You’ve Been Sexually Harassed*, HARV. BUS. REV. (June 22, 2017), <https://hbr.org/2017/06/understanding-your-legal-options-if-youve-been-sexually-harassed> [<https://perma.cc/LNP8-TDP4>] (drawing lessons from scandals at Uber and Fox News).

9. See Joe Davidson, *Report Finds Sloppy Handling of Sexual Misconduct Cases in Justice Department*, WASH. POST (June 2, 2017, 4:00 AM), <https://www.washingtonpost.com/news/powerpost/wp/2017/06/02/report-finds-sloppy-handling-of-sexual-misconduct-cases-in-justice-department> [<https://perma.cc/M3S6-H2K3>].

10. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), [https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) [[http://web.archive.org/web/20210326212124/https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](http://web.archive.org/web/20210326212124/https://twitter.com/alyssa_milano/status/919659438700670976?lang=en)].

11. See Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They’re Still Being Ignored.*, WASH. POST (Nov. 9, 2017, 5:04 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too> [<https://perma.cc/P2LU-YEDK>]; 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/5EUY-WY96>]. Tarana

tweet, the hashtag #MeToo was used millions of times in eighty-five different countries.<sup>12</sup> #MeToo in English-speaking countries became #YoTambien in Spain, #BalanceTonPorc (“snitch out your pig”) in France, and #QuellaVoltaChe (“that time when”) in Italy; the King of Sweden thought it useful to “look under old rocks.”<sup>13</sup> In the three years since that fateful tweet, #MeToo became more than just a shorthand for an incident of sexual harassment; it morphed into a social movement.

After Weinstein was outed, hardly a day went by over many months without news of another powerful man’s downfall—and a trail of victims telling their long-hidden stories of working for these men under conditions that were, at best, discriminatory and oppressive, and, at worst, downright dangerous. Almost immediately, the story had two pieces—the allegations and the consequences. Public-radio celebrity Garrison Keillor was among those who fell from power.<sup>14</sup> So was Judge Alex Kozinski, a federal appellate judge who retired suddenly after fifteen women, including several former clerks, made allegations of sexual misconduct; by voluntarily leaving the bench, he avoided a formal inquiry into the alleged misconduct.<sup>15</sup> A controversial case involved Democratic Senator Al Franken, who

Burke told the reporter that she panicked and “felt a sense of dread, because something that was part of my life’s work was going to be co-opted and taken from me and used for a purpose that I hadn’t originally intended.” *Id.* But she accepted Alyssa Milano’s explanation that she hadn’t known of the earlier use of the phrase, and the two women moved forward together to create a network of resources for survivors. See Melissa Chan, ‘Now the Work Really Begins.’ *Alyssa Milano and Tarana Burke on What’s Next for the #MeToo Movement*, TIME (Dec. 6, 2017, 8:24 AM), <https://time.com/5051822/time-person-year-alyssa-milano-tarana-burke/> [<https://perma.cc/MKR3-PG3V>].

12. See Catherine Powell, Opinion, *How #MeToo Has Spread like Wildfire Around the World*, NEWSWEEK (Dec. 15, 2017, 8:00 AM), <https://www.newsweek.com/how-metoo-has-spread-wildfire-around-world-749171> [<https://perma.cc/2ZWK-6GHZ>] (describing the global reaction to the #MeToo message).

13. *Id.*

14. Jayme Deerwester, *Garrison Keillor Scandal: ‘Washington Post’ Drops His Syndicated Columns*, USA TODAY (Nov. 30, 2017, 2:27 PM), <https://www.usatoday.com/story/life/people/2017/11/30/garrison-keillor-remains-defiant-statement-his-firing/908352001/> [<https://perma.cc/KF9Z-HBTR>] (reporting that Keillor was fired by Minnesota Public Radio and several newspapers dropped his syndicated columns after inappropriate behavior was alleged).

15. See Molly Olmstead, *Judge Kozinski Steps Down in the Face of Multiple Sexual Harassment Allegations*, SLATE (Dec. 18, 2017, 10:46 AM), <https://slate.com/news-and-politics/2017/12/9th-circuit-judge-alex-kozinski-resigns-following-multiple-allegations-of-sexual-harassment.html> [<https://perma.cc/4JQ5-FMZG>]; Cristiano Lima, *Federal Appeals Court Judge Steps Down Amid Sexual Misconduct Probe*, POLITICO (Dec. 18, 2017, 10:28 AM), <https://www.politico.com/story/2017/12/18/alex-kozinski-retain-sexual-misconduct-allegations-302251> [<https://perma.cc/927P-CTFZ>]. The fall of Judge Kozinski was the subject of many news articles, as well as the focus of women seeking greater accountability in the judiciary. See also Matt Zapposky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017, 2:27 PM), [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](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) [<https://perma.cc/KF5E-RPXV>] (reporting first on allegations against Kozinski); Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11 PM), <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> [<https://perma.cc/GNC6-5L6N>] (giving a first-person account of the subtle but coercive ways in which Kozinski imposed

resigned from the U.S. Senate under pressure after an allegation of mildly inappropriate behavior, and New York Governor Andrew Cuomo was on tenterhooks in early 2021, as several women came forward with accusations of sexual misconduct.<sup>16</sup> A *New York Times* article that ran in December 2017 profiled forty-seven firings in just the first six weeks after the Weinstein bombshell dropped.<sup>17</sup> The information ran as a table, listing name, accusation, fallout, and response. Documentary filmmaker Morgan Spurlock was accused of sexual harassment and rape; he stepped down from his production company, and he acknowledged he was “not some innocent bystander” in the sexual harassment crisis.<sup>18</sup> Chef Mario Batali was accused of inappropriate touching; he was fired by ABC and stepped away voluntarily from his businesses, and he was “deeply sorry for any pain, humiliation or discomfort” that he caused his peers.<sup>19</sup> Matt Lauer, the cohost of *The Today Show*, was accused of sexual assault; he was fired by NBC, and while claiming that some of the reporting was “untrue or mischaracterized,” Lauer conceded there was “enough truth in these stories to make me feel embarrassed and ashamed.”<sup>20</sup> The list goes on and included, notably, U.S. Representative John Conyers Jr., television personality Charlie Rose, comedian Louis C.K., actor Kevin Spacey, and NPR news honcho Michael Oreskes.<sup>21</sup> Republican Congressman Trent Franks resigned after disclosure that he had tried to pay two different legislative

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himself on women and the “strange hypersexualized world of transgressive talk and action that embodied his chambers”); Vivia Chen, *Can We Get Rid of Alex Kozinski?*, CAREERIST (Dec. 13, 2017, 10:16 AM), <https://thecareerist.typepad.com/thecareerist/2017/12/does-kozinski-have-to-go.html> [<https://perma.cc/WD6N-SCAT>].

16. See Amber Phillips, *Al Franken’s Defiant, Unapologetic Resignation Speech, Annotated*, WASH. POST (Dec. 7, 2017, 9:58 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/12/07/al-frankens-defiant-unapologetic-resignation-speech-annotated> [<https://perma.cc/7NEF-7A7W>]. As these events unfolded, I wrote about them in an online column. See, e.g., Joanna L. Grossman, *Reflections on America’s Reckoning with Sexual Harassment*, JUSTIA: VERDICT (Dec. 19, 2017), <https://verdict.justia.com/2017/12/19/reflections-americas-reckoning-sexual-harassment> [<https://perma.cc/TCY9-HWES>]; Joanna L. Grossman, *The Aftermath of the #MeToo Movement*, JUSTIA: VERDICT (June 26, 2018), <https://verdict.justia.com/2018/06/26/the-aftermath-of-the-metoo-movement> [<https://perma.cc/XE58-VMG7>]; Joanna L. Grossman, *Dear Harvey: You Are the Spark that Started the #MeToo Movement*, JUSTIA: VERDICT (Jan. 14, 2020), <https://verdict.justia.com/2020/01/14/dear-harvey-you-are-the-spark-that-started-the-metoo-movement> [<https://perma.cc/C25V-VKXV>]. On Andrew Cuomo, see Luis Ferré-Sadurní & Mihir Zaveri, *Sexual Harassment Claims Against Cuomo: What We Know So Far*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/article/cuomo-sexual-harassment-nursing-homes-covid-19.html> [<https://perma.cc/VP5K-F4G6>].

17. Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> [<https://perma.cc/8WFS-RV9C>] (Feb. 8, 2018).

18. *Id.*

19. Jill Disis, *Mario Batali Steps Away from Business, TV Show amid Sexual Misconduct Allegations*, CNN (Dec. 11, 2017, 2:26 PM), <https://money.cnn.com/2017/12/11/media/mario-batali-sexual-misconduct-allegations/index.html> [<https://perma.cc/JV3H-Z8V7>].

20. Almukhtar et al., *supra* note 17.

21. *Id.*; see also Maria Puente, *Kevin Spacey Scandal: A Complete List of the 15 Accusers*, USA TODAY (Nov. 16, 2017, 12:04 AM), <https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001/> [<https://perma.cc/P44V-RHSF>].

aides five million dollars to have sex with him, get pregnant, and carry the pregnancy to term as a surrogate for him and his wife.<sup>22</sup> Investigative journalists dove deep into stories of individual men and their sexualized reigns.<sup>23</sup> Stories were written not just about individuals but also about companies and entire industries.<sup>24</sup> But the most revealing work has focused on individuals. A more recent study found that 417 high-profile executives and employees, from across the American labor force, were accused of harassment in the first eighteen months after the Weinstein bomb was dropped.<sup>25</sup> To make this list, a harasser had to merit at least seven national news mentions for sexual harassment—a mark of the person’s notoriety and interest to the public.<sup>26</sup> The list includes celebrities, to be sure, but most entrants are high-level executives—a surprising number of CEOs—who are not household names. The organizations that housed fallen men spanned many sectors of the economy—entertainment, finance, law, politics, journalism, etc. NPR and Fox News were equally implicated, as were high-profile donors and members from both major political parties. According to a database maintained by Temin and Company, between October 2017 and April 2019, more than 1,200 high-profile figures were publicly accused of sexual misconduct, half of whom lost their jobs as a result.<sup>27</sup> Ninety-seven percent of the accused perpetrators were male.<sup>28</sup>

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22. See Katie Rogers, *Trent Franks, Accused of Offering \$5 Million to Aide for Surrogacy, Resigns*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/us/politics/trent-franks-sexual-surrogacy-harassment.html> [https://perma.cc/3RYD-BAU9].

23. See, e.g., Katie Benner, *At the Justice Dept.’s Death Penalty Unit, Accusations of Favoritism, Gender Bias and Unwanted Groping*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/politics/justice-department-harassment-bias.html> [https://perma.cc/4GEV-PYRQ] (reporting on the head of the Justice Department’s death penalty unit, Kevin Carwile, who groped at least one woman and “fostered a culture of favoritism and sexism” in his unit); Tom Bartlett & Nell Gluckman, *She Left Harvard. He Got to Stay.*, CHRON. HIGHER EDUC. (Feb. 27, 2018), <https://www.chronicle.com/article/she-left-harvard-he-got-to-stay> [https://perma.cc/J52T-HGQ3].

24. See, e.g., The Young Law. Ed. Bd. of the Am. Law., *YL Board: This Is What Sexual Harassment in the Legal Industry Looks like*, LAW.COM: AM. LAW. (Feb. 28, 2018, 10:37 AM), <https://www.law.com/americanlawyer/2018/02/28/yl-board-this-is-what-sexual-harassment-in-the-legal-industry-looks-like> [https://perma.cc/53RQ-8YHN]; Bethany McLean, *“We All Wear All Black Every Day”: Inside Wall Street’s Complex, Shameful, and Often Confidential Battle with #MeToo*, VANITY FAIR: HIVE (Feb. 27, 2018), <https://www.vanityfair.com/news/2018/02/inside-wall-street-complex-shameful-and-often-confidential-battle-with-metoo> [https://perma.cc/A763-DLL6]; Julie Creswell, Kevin Draper & Rachel Abrams, *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> [https://perma.cc/SJJ2-FFKR].

25. Jeff Green, *#MeToo Snares More than 400 High-Profile People*, BLOOMBERG | QUINT (June 28, 2018, 4:16 AM), <https://www.bloombergquint.com/business/-metoo-snares-more-than-400-high-profile-people-as-firings-rise> [https://perma.cc/4QWK-LCSF].

26. *Id.*

27. Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 395 n.101 (2019) (citing E-mail from Davia B. Temin, CEO, Temin & Co., Inc., to Deborah L. Rhode, Professor of L., Stanford Univ. (Apr. 29, 2019)).

28. *Id.*

Although the firings of particular high-profile men occupied the news for many months, they represented the launch of something much larger.<sup>29</sup> The news of the firings was eye-catching but also mind-numbing at a certain point. The continuous string prompted many to question whether there was an epidemic of sexual harassment. The fact is, however, that harassment was pervasive before the public became aware that it was. Sexual harassment has been a constant problem in the American workplace, as well as in virtually all other sectors of society, as far back as we look. As discussed below, the term “sexual harassment” dates only to the late 1970s when a popular women’s magazine, *Redbook*, published results of a survey in 1976, entitled “*What Men Do to Women on the Job*,” which found sexual comments and advances to be pervasive in the workplace.<sup>30</sup> A series of federal surveys beginning in 1981 reported that four in ten female federal employees experienced harassing behaviors in any given two-year period; this rate never budged, even as law and social norms developed in opposition to sexual harassment.<sup>31</sup>

Several components of the modern story are “new,” however. First, people who have experienced sexual harassment have demonstrated more willingness to report their experiences, whether informally on social media or through more formal avenues. This is notable because studies have repeatedly shown that targets of harassment rarely file formal complaints.<sup>32</sup> As an empirical matter, complaining is the least likely response of a woman to an incident of sexual harassment at work.<sup>33</sup> This is especially true for harassment that is not (or has not yet become) severe.<sup>34</sup> Filing a complaint is an option victims choose only after exhausting all other avenues.<sup>35</sup> For women who forego complaining, it is often because they (rightly) fear retaliation from the harasser or their workplace, and they often worry about

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29. One important question triggered by these firings is about when and under what circumstances these disgraced men should be permitted back into our collective good graces. Another is about what inquiry and analysis should come next. See, e.g., The Times Ed. Bd., Opinion, *Editorial: Alex Kozinski’s Retirement Doesn’t End the Discussion About Sexual Harassment in the Judiciary*, L.A. TIMES (Dec. 19, 2017, 4:00 AM), <https://www.latimes.com/opinion/editorials/la-ed-kozinski-harass-20171219-story.html> [<https://perma.cc/8L9B-DQYB>] (drawing a lesson from the Kozinski saga that “some influential people will abuse their power to take advantage of women (and men) who are dependent on them for their livelihoods and professional advancement” and concluding that the judiciary and “its leaders should join the rest of society in making sure its workplaces are safe for all”).

30. Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149, 217–23.

31. OFF. OF MERIT SYS. REV. & STUD., U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* 36 (1981) [hereinafter USMSPB 1981].

32. *Infra* note 161 and accompanying text.

33. *Infra* note 161 and accompanying text.

34. L. Camille Hébert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 731 (2007).

35. Louise F. Fitzgerald, *Suzanne Swan & Karla Fischer, Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 121 (1995).

being socially ostracized at work and even about damaging the harasser's career.<sup>36</sup> At the same time, victims tend to feel that complaining is futile—that no action will be taken that will make the victim's situation better.<sup>37</sup> The lack of hope for successful redress provides little by way of counterweight against the justifiable fear of adverse consequences.<sup>38</sup> But something has changed. Despite the powerful deterrents to speaking out, women are coming forward, in droves, to tell their stories. It's hard to explain why that moment is now, but the dam broke. And once it did, the flood commenced—a “mass mobilization against sexual abuse,” in Catharine MacKinnon's words, “through an unprecedented wave of speaking out in conventional and social media.”<sup>39</sup> Stories beget more stories; complaints beget more complaints. There's a contagion to the storytelling and perceived safety in numbers. It could be the power of the anti-Trump resistance movement, which has mobilized women around the country to organize, protest, and stand up for themselves. It could be the raunchy and disturbing nature of the allegations in the first few stories to break. It could be that the victimization of celebrities, at the hands of Harvey Weinstein and James Toback, among other perpetrators, brought the issue into our consciousness more clearly. It could be some combination of these factors. But whatever the catalyst, there can be no doubt that this chorus of voices, speaking out against sexual misconduct, is noteworthy. Many of the accusations are based on behavior from the past—a natural flood-letting after years during which victims stayed silent and employers swept credible complaints under the rug in order to preserve the harasser's career or avoid a hit to the institution's reputation. Accusations were at their highest in November 2017, just one month after the Weinstein story broke.<sup>40</sup> Although that initial surge is over, complaints continue at higher rates than before. We can expect higher rates of complaint—and discipline—to continue because the current climate has made it safer for victims to complain and less safe for employers to ignore.

Second, technology and social media have greatly amplified the voices of accusers. It goes without saying that being able to share one's story via Facebook or Twitter has the potential for much more rapid and widespread dissemination than an in-person conversation, a telephone call, or even an email or text message. But it's not just the technological capability that is different; it is also the way we use it. The very nature of how we share details of our lives today has changed the experience of scandal, trauma, healing, and retribution. The Internet is a great connector, helping us all find those who share some views, beliefs, or experiences or whose lives intersect with ours in some way. For most of world history, people lived their lives in small, intimate circles. Face-to-face contacts were the limits of their world. No longer. The Internet means that survivors can find one another,

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36. *Id.* at 122-123.

37. *Id.* at 127.

38. *Id.* at 123.

39. MacKinnon, *supra* note 4.

40. Green, *supra* note 25 (citing data regarding accusations from the company Temin & Co.).

and those interested in their stories can find them, too—journalists, advocates, lawyers, and trolls can all zero in on the latest complaints. The age of social media also reflects a turn away from privacy more generally, a time when people share information about themselves that they once would have worked hard to conceal. In addition to the general power of viral messaging in the age of the Internet, the #MeToo movement has given rise to new ways of sharing information specifically about sexual misconduct—a scattered warning system of sorts. In addition to the many revelations posted on Facebook and Twitter, women have populated a variety of other data-gathering sites with their experiences. An app called Blind permits users to share information anonymously about sexual misconduct in a particular workplace; Glassdoor provides the ability to search anonymous employee reviews.<sup>41</sup> Several industries have seen the creation of open-source spreadsheets where limitless numbers of people can share their harassment experience. “Shitty media men” was the first of the genre—people who had experienced harassment in media could enter their information in a table for all to see—but other industries have similar opportunities to anonymously share experiences. The spreadsheet for sexual harassers in academia has almost 1,900 detailed entries of harassment.<sup>42</sup> Clearly, some of the stories resonated with survivors who had kept silent until now but were now moved to share in very public ways. The sharing is a double-edged sword. On the one hand, it forced women to realize that they, collectively, “live under threat. Not sometimes, but all the time.”<sup>43</sup> On the other, they might realize they are not alone. Monica Lewinsky, arguably the Internet’s first victim, reflected on how differently her experience might have been in the age of social media: “If the Internet was a *bête noire* to me in 1998, its stepchild—social media—has been a savior for millions of women today . . . . Virtually anyone can share her or his

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41. See Dinah Brin, *Social Media Is a Major Consideration in Wave of Sexual Harassment Allegations*, SHRM (Dec. 11, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/social-media-major-consideration-in-wave-of-sexual-harassment-allegations.aspx> [<https://perma.cc/XQ49-GFPD>].

42. See Constance Grady, *Shitty Media Men List Creator Moira Donegan on the Year in #MeToo*, VOX (Oct. 16, 2018, 11:50 AM), <https://www.vox.com/culture/2018/10/16/17955392/moira-donegan-interview-me-too-shitty-media-men-list> [<https://perma.cc/DN8T-KH7V>]; Moira Donegan, *I Started the Media Men List*, CUT (Jan. 10, 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [<https://perma.cc/9ENT-J2DG>]; see also Karen Kelsky, *A Crowdsourced Survey of Sexual Harassment in the Academy*, THE PROFESSOR IS IN (Dec. 1, 2017), <https://theprofessorisin.com/2017/12/01/a-crowdsourced-survey-of-sexual-harassment-in-the-academy/> [<https://perma.cc/P4Q4-RJK9>] (linking a crowdsourced survey of sexual harassment in the academy available at: <https://docs.google.com/spreadsheets/d/1S9KShDLvU7C-KkgEevYTHXr3F6InTenrBsS9yk-8C5M/edit#gid=1530077352> [[http://web.archive.org/web/20190112070836if\\_/https://docs.google.com/spreadsheets/d/1S9KShDLvU7C-KkgEevYTHXr3F6InTenrBsS9yk-8C5M/edit#gid=1530077352](http://web.archive.org/web/20190112070836if_/https://docs.google.com/spreadsheets/d/1S9KShDLvU7C-KkgEevYTHXr3F6InTenrBsS9yk-8C5M/edit#gid=1530077352)]). On sexual harassment in academia and whisper networks, see Jennifer L. Airey, *#MeToo*, 37 TULSA STUD. WOMEN’S LITERATURE 7, 8 (2018).

43. Barbara Kingsolver, Opinion, *#MeToo Isn’t Enough. Now Women Need to Get Ugly*, GUARDIAN (Jan. 16, 2018, 2:00 PM), <https://www.theguardian.com/commentisfree/2018/jan/16/metoo-women-daughters-harassment-powerful-men> [<https://perma.cc/FUG3-RKPV>].

#MeToo story and be instantly welcomed into a tribe.”<sup>44</sup> Regardless of the consequences for individual victims, the widespread sharing and connecting is an essential feature of the #MeToo movement. Voices in chorus became a “hashtag, a movement, a reckoning,” and the “Silence Breakers” were selected as *Time* magazine’s Person of the Year for 2017.<sup>45</sup>

Collective communication led to some new forms of collective action. The initial revelations of harassment led to the creation of Time’s Up, a fund to pay for legal representation of sexual misconduct victims—created by celebrities but designed for the benefit of ordinary workers.<sup>46</sup> The name reflects the conclusion that the “clock has run out on sexual assault, harassment and inequality in the workplace. It’s time to do something about it.”<sup>47</sup> A former lawyer from a top firm that had played a role in protecting Harvey Weinstein from consequences for his sexual misconduct left her practice to launch the Purple Campaign, the mission of which is “to end the systemic problem of workplace sexual harassment that exists across every industry in the United States.”<sup>48</sup> And the wide dissemination of harassment stories has led directly to action by individual companies as well. For example, Susan Fowler, a site reliability engineer at Uber, wrote a 3,000-word essay about harassment she experienced at the company; her words went viral and led to the ouster of the company’s CEO and about twenty other employees who had been accused of harassment or other types of misconduct.<sup>49</sup>

Third, men with credible accusations of harassment against them are being punished. The general history has been to the contrary; employers have largely

44. Monica Lewinsky, *Monica Lewinsky: Emerging from “The House of Gaslight” in the Age of #MeToo*, VANITY FAIR: HIVE (Feb. 25, 2018), <https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo> [<https://perma.cc/BZ6N-43BJ>].

45. Edward Felsenthal, *The Choice*, TIME (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers-choice/> [<https://perma.cc/28TM-SNMK>].

46. TIME’S UP, <https://timesupnow.org> [<https://perma.cc/VQA4-QWF8>] (last visited Mar. 30, 2021).

47. *Id.* The fund is behind a current harassment lawsuit against McDonald’s restaurants. See Melena Ryzik, *In a Test of Their Power, #MeToo’s Legal Forces Take on McDonald’s*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/business/mcdonalds-female-employees-sexual-harassment.html> [<https://perma.cc/D4Q8-RBRK>].

48. Ally Coll Steele, *Why I Left My Corporate Legal Job to Work Full-Time on #MeToo*, WASH. POST (Jan. 25, 2018, 9:02 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/01/25/why-i-left-my-corporate-legal-job-to-work-full-time-on-metoo/> [<https://perma.cc/4RUP-5ZYD>]; see Meghan Tribe, *Ex-Boies Schiller Associate Launches Campaign to End Sexual Harassment*, LAW.COM: AM. LAW. (Jan. 29, 2018, 5:59 PM), <https://www.law.com/americanlawyer/sites/americanlawyer/2018/01/29/ex-boies-schiller-associate-launches-campaign-to-end-sexual-harassment/> [<https://perma.cc/FD8Z-K4DZ>]. Information about the campaign can be found at PURPLE CAMPAIGN, <http://purplecampaign.org> [<https://perma.cc/SM4V-M9Q2>] (last visited Apr. 2, 2021).

49. Johana Bhuiyan, *With Just Her Words, Susan Fowler Brought Uber to Its Knees*, VOX: RECODE (Dec. 6, 2017, 5:16 PM), <https://www.vox.com/2017/12/6/16680602/susan-fowler-uber-engineer-recode-100-diversity-sexual-harassment> [<https://perma.cc/ZY8L-ATUE>]; see Susan Fowler, *Opinion, I Wrote the Uber Memo. This Is How to End Sexual Harassment.*, N.Y. TIMES (April 12, 2018), <https://www.nytimes.com/2018/04/12/opinion/metoo-susan-fowler-forced-arbitration.html> [<https://perma.cc/8TFM-WLDU>].

underreacted to credible evidence of harassment. Some of their inaction can be explained by the infrequency of complaints. But, as discussed in more detail below, even when they do investigate complaints, employers tend to be biased against finding evidence of discrimination and to recast complaints of discrimination as a problem of interpersonal conflicts that might merit an intervention other than discipline. Moreover, when the accused is a high-value employee, employers have tended to weigh the cost of losing an asset in the calculation about how to respond.<sup>50</sup> Severe discipline, however, has been a central element of the #MeToo stories since 2017. “Now, all at once,” Barbara Kingsolver wrote, “women are refusing to accept sexual aggression as any kind of award, and men are getting fired from their jobs. It feels like an earthquake.”<sup>51</sup> When Jeffrey Toobin exposed himself on a Zoom call, he was suspended from his position at the *New Yorker*, even though the timing could not have been worse—two weeks before the presidential election, for which he was a leading national commentator.<sup>52</sup> His experience was relatively typical of the new era. Of the 417 men profiled in the study mentioned above, sixty percent were fired, and some others were subjected to formal repercussions that fell short of firing.<sup>53</sup> Some corporations have been spurred to name women to replace fallen men; others have taken responsibility for better vetting of executives.<sup>54</sup> As author Lindy West wrote in a *New York Times* op-ed,

One of the most breathtaking things about #MeToo—just behind the iron-jawed fury of its deponents—is how swiftly and decisively it pulled conversations about sexual predation from the conceptual to the concrete. After decades of debates and doubts and dissertations and settlements and nondisclosure agreements and whisper networks and stasis and silence, all of a sudden, in one great gust, powerful men are toppling. Talk has become action. The seemingly untouchable have lost jobs, reputations and legacies

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50. To take just one example of this calculus, the Office of the Inspector General found that the Civil Division of the Justice Department reviewed harassment complaints from 2011 to 2016 and found “examples of lower-level workers being punished more harshly than upper-level officials for similar offenses.” Davidson, *supra* note 9. In one case, the official in charge of the investigation wrote that a senior attorney found to have groped the breasts and butts of two female attorneys, and who had been previously reprimanded for “unwelcome sexual and offensive comments,” suffered no punishment for the physical assaults because a suspension “would unnecessarily deprive the government of [his] litigating services.” *Id.*

51. Kingsolver, *supra* note 43.

52. Johnny Diaz & Azi Paybarah, *New Yorker Suspends Jeffrey Toobin After Zoom Incident*, N.Y. TIMES (Nov. 12, 2020), <https://www.nytimes.com/2020/10/19/business/media/jeffrey-toobin-new-yorker-suspended.html> [<https://perma.cc/VP9F-MEFL>].

53. See Green, *supra* note 25; see also MacKinnon, *supra* note + (“No longer liars, no longer worthless, today’s survivors are initiating consequences none of them could have gotten through any lawsuit—in part because the laws do not permit relief against individual perpetrators, but more because they are being believed and valued as the law seldom has.”).

54. See, e.g., Paige Smith, *Boards Rely on Intense Vetting for New Leaders After #MeToo*, BLOOMBERG L. (Jan. 11, 2019, 3:03 AM), <https://news.bloomberglaw.com/daily-labor-report/boards-rely-on-intense-vetting-for-new-leaders-after-metoo> [<https://perma.cc/5QVQ-7EWN>].

overnight. Choices have consequences, even if you are Harvey Weinstein. This is new.<sup>55</sup>

The increase in consequences is evidence that institutions are taking harassment complaints more seriously, but the reliance on firing as the only appropriate response breeds resistance to the movement and, as discussed below, potentially harms women in other ways.

Fourth, as the dust has settled on the initial flurry of scandals, some suspicious institutional practices have emerged. Many of the highest-profile harassers (including Weinstein, Ailes, and O'Reilly) relied on settlements with nondisclosure agreements (NDAs) to resolve complaints quietly and permit the perpetrator to retain a position of power.<sup>56</sup> NDAs have long played an important role in the settlement of certain kinds of disputes, but they appear to have played a more sinister role in these cases.<sup>57</sup> These clauses in settlements exacerbate the much larger effect of forced arbitration, which allows employers to avoid public lawsuits and control many aspects of the external dispute resolution process.<sup>58</sup> In some cases, employers were paying out settlements in order to resolve questions about their liability, but in others, the men themselves were paying off accusers directly.<sup>59</sup> In cases involving public officials, taxpayers were funding settlements.<sup>60</sup> News stories revealed that in some cases, employers were footing the bill to quietly settle harassment lawsuits, and in others, the men themselves were paying off accusers.<sup>61</sup>

55. Lindy West, Opinion, *We Got Rid of Some Bad Men. Now Let's Get Rid of Bad Movies.*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/opinion/sunday/we-got-rid-of-some-bad-men-now-lets-get-rid-of-bad-movies.html> [https://perma.cc/NM6A-8BQ3].

56. See, e.g., Jim Rutenberg, *A Long-Delayed Reckoning of the Cost of Silence on Abuse*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/business/media/a-long-delayed-reckoning-of-the-cost-of-silence-on-abuse.html> [https://perma.cc/3YWF-MX3D] (exploring the ways in which Bill O'Reilly, Harvey Weinstein, Bill Cosby, and others were able to keep "their alleged misconduct under wraps with the help of the nondisclosure agreements included as part of the numerous out-of-court settlements that allowed them to admit to no wrongdoing").

57. See generally Vasundhara Prasad, Note, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507 (2018).

58. See generally Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653 (2019); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155 (2019).

59. E.g. Emily Steel & Michael Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html> [https://perma.cc/T5PZ-S2YR].

60. See Jen Fifield, Stateline, *Why Taxpayers Pay When Legislators are Accused of Sexual Misconduct*, PBS (Feb. 8, 2018, 10:25 AM), <https://www.pbs.org/newshour/nation/why-taxpayers-pay-when-legislators-are-accused-of-sexual-misconduct> [https://perma.cc/YAD2-DLUJ].

61. See, e.g., Katie Rogers & Kenneth P. Vogel, *Congressman Combating Harassment Settled His Own Misconduct Case*, N.Y. TIMES (Jan. 20, 2018), <https://www.nytimes.com/2018/01/20/us/politics/patrick-meehan-sexual-harassment.html> [https://perma.cc/B6DN-DCTX] (reporting that Patrick Meehan, a Republican member of Congress from Pennsylvania, used office funds to settle a sexual harassment complaint from an aide). After several scandals along these same lines, the U.S. House of Representatives voted to change its policies on harassment in part by banning the use of

Silence may also have been achieved through more aggressive means. Harvey Weinstein worked with a cadre of “enablers, silencers, and spies” to gather dirt that might be used to undermine any known or future accusers.<sup>62</sup> Because of these techniques, some men who engaged in serious misconduct were protected from consequences and permitted to retain positions of power in which they could continue to misbehave.<sup>63</sup> In other cases, institutions contributed to the problem by removing a perpetrator from their ranks without disclosing any damaging information. The harasser is then able to seek a new position unencumbered by accusations or findings of misconduct. This game of “pass the trash” is more common in some industries than others, but seems to play a significant role in academia and in the legal profession. These individual and institutional practices have already been targeted by some state legislatures in the wake of #MeToo, as they consider legal reforms that might better prevent or redress sexual misconduct.<sup>64</sup>

These initial observations about the impact of the #MeToo movement lead to broader questions about whether it will lead to more permanent changes. The sections that follow will explore the nature and extent of sexual harassment in workplaces today before analyzing the way in which the law’s current approach has shaped the behavior of individuals and institutions.

## II. THE PROBLEM OF HARASSMENT: THEN AND (STILL) NOW

Sexual harassment has been a persistent plague on working women. Experts began surveying workers about the nature and prevalence of the problem in the late 1970s and continue to do so today. Since the original surveys, workers—mostly women—have reported relatively high rates of harassment. In the first major systematic workplace study, conducted by the United States Merit Systems Protection Board and published in 1981, four in ten female respondents reported experiencing at least one incident of harassment in the two years prior to the

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taxpayer funds to settle cases. *See* Natalie Andrews, *House Passes Sexual-Harassment Revamp*, WALL ST. J. (Feb. 6, 2018 3:40 PM), <https://www.wsj.com/articles/house-passes-sexual-harassment-revamp-1517945933> [<https://web.archive.org/web/20180527064932/https://www.wsj.com/articles/house-passes-sexual-harassment-revamp-1517945933>].

62. Megan Twohey, Jodi Kantor, Susan Dominus, Jim Rutenberg & Steve Eder, *Weinstein’s Complicity Machine*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html> [<https://perma.cc/4JX5-JKUZ>]; *see also* Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/YU5T-P9S6>].

63. On the role of NDAs in harassment cases, *see* Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Ayres-1.pdf> [<https://perma.cc/YYZ3-NR6B>].

64. *See generally* Anna North, *7 Positive Changes that Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019> [<https://perma.cc/L3F7-RU8H>].

survey.<sup>65</sup> Subsequent studies have revealed similar or even higher rates of harassment.<sup>66</sup>

Researchers who study sexual harassment use three categories to measure and study the underlying behaviors that might be labeled “sexual harassment.”<sup>67</sup> The following definition of harassment is consistent with social science measures as well as the legal definition:

Sexual harassment (a form of discrimination) is composed of three categories of behavior: (1) *gender harassment* (verbal and nonverbal behaviors that convey hostility, objectification, exclusion, or second-class status about members of one gender), (2) *unwanted sexual attention* (verbal or physical unwelcome sexual advances, which can include assault), and (3) *sexual coercion* (when favorable professional or educational treatment is conditioned on sexual activity). Harassing behavior can be either *direct* (targeted at an individual) or *ambient* (a general level of sexual harassment in an environment).<sup>68</sup>

Surveys designed to measure the frequency and type of sexual harassment set forth a list of behaviors. The list used in a 2016 survey of federal employees is typical of the approach used since 1981, when the first comprehensive surveys were conducted and after sexual harassment became actionable under federal antidiscrimination law.<sup>69</sup>

- Gender Harassment
  - Derogatory or unprofessional terms related to sex or gender
  - Unwelcome sexual teasing, jokes, comments or questions
  - Exposure to sexually oriented material (e.g., photos, videos, written material)
  - Exposure to sexually oriented conversations

65. USMSPB 1981, *supra* note 31, at 36.

66. *See generally* OFF. OF POL’Y & EVALUATION, U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE (1988) [hereinafter USMSPB 1988]; OFF. OF POL’Y & EVALUATION, U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES 13 (1995) [hereinafter USMSPB 1995] (updating surveys from 1981 and 1988); OFF. OF POL’Y & EVALUATION, U.S. MERIT SYS. PROT. BD., UPDATE ON SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE 3–4 (2018) [hereinafter USMSPB 2018], <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT> [<https://perma.cc/C6S5-6XPU>] (reporting results of 2016 survey).

67. Louise F. Fitzgerald, Michele J. Gelfand & Fritz Drasgow, *Measuring Sexual Harassment: Theoretical and Psychometric Advances*, 17 BASIC & APPLIED SOC. PSYCH. 425, 430 (1995).

68. THE NAT’L ACADS. OF SCIS., ENG’G, & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 18 (Paula A. Johnson, Sheila E. Widnall & Frazier F. Benya eds., 2018) [hereinafter NASEM].

69. *See, e.g.*, USMSPB 1981, *supra* note 31, at 34; USMSPB 1988, *supra* note 66; USMSPB 1995, *supra* note 66, at 5 (updating surveys from 1981 and 1988); NAVY PERS. RSCH. & DEV. CTR., U.S. NAVY, NPRDC-TR-92-11, ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY (1992).

- Unwanted Sexual Attention
  - Unwelcome invasion of personal space (e.g., touching, crowding, leaning over)
  - Unwelcome communications (e.g., emails, phone calls, text messages, social media contacts) of a sexual nature
  - Unwelcome sexually suggestive looks or gestures
- Sexual Coercion
  - Offer of preferential treatment in the workplace in exchange for sexual favors
  - Pressure for sexual favors
  - Pressure for dates
  - Stalking (e.g., unwanted physical or electronic intrusion in your personal life)
  - Sexual assault or attempted sexual assault<sup>70</sup>

Researchers have studied sexual harassment since the late 1970s,<sup>71</sup> and, as explained in Part III, the legal definition has been more or less the same since the Supreme Court endorsed in 1986 a definition of actionable harassment that the Equal Employment Opportunities Commission (EEOC) had established in 1980.<sup>72</sup> Although there have been some changes over time, the key characteristics of sexual harassment in the workplace have held steady. Women are much more likely to be sexually harassed than men and to experience it more frequently.<sup>73</sup> As Tarana Burke emphasized, women of color are disproportionately likely to be targets of sexual harassment yet are less likely to be able to enforce their legal rights.<sup>74</sup> Women of color often experience harassment that has both sexual and racial components, and courts are notoriously hostile to complex and hybrid claims.<sup>75</sup>

70. USMSPB 2018, *supra* note 66, at 2.

71. For detailed information about prevalence studies, see JEANETTE N. CLEVELAND, MARGARET STOCKDALE & KEVIN R. MURPHY, *WOMEN AND MEN IN ORGANIZATIONS: SEX AND GENDER ISSUES AT WORK* 230–33, 231 tbl.9.2 (2000).

72. Guidelines on Discrimination Because of Sex: Sexual Harassment, 29 C.F.R. § 1604.11(a) (1980); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

73. USMSPB 1995, *supra* note 66, at 13; USMSPB 2018, *supra* note 66. See generally Vicki J. Magley, Charles L. Hulin, Louise F. Fitzgerald & Mary DeNardo, *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCH. 390 (1999); Remus Ilies, Nancy Hauserman, Susan Schwochau & John Stibal, *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERS. PSYCH. 607, 623 (2003); Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights into Gender and Context*, 38 LAW & HUM. BEHAV. 58 (2014).

74. On race and sexual harassment, see generally Tanya Katerí Hernández, “*What Not to Wear*”—*Race and Unwelcomeness in Sexual Harassment Law: The Story of Meritor Savings Bank v. Vinson*, in *WOMEN AND THE LAW STORIES* 277 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

75. See Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1440 (2009) (finding that multiple claims are less successful than single ones perhaps because judges conclude that multiple claims are less likely to be rooted in fact); Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 992 (2011) (demonstrating lower likelihood of success for intersectional plaintiffs); see also Rosalio Castro & Lucia Corral,

The most common type of harassment falls in the gender harassment category, followed by unwanted sexual attention, and finally, sexual coercion.<sup>76</sup> Across many studies, sexual coercion has been found to be the least common type of behavior.<sup>77</sup> The vast majority of sexual harassment perpetrators are male, even when the accuser is male.<sup>78</sup> People who are targeted or affected by sexual harassment often face repeated harassing behaviors.<sup>79</sup> A majority of complaints involve coworker, rather than supervisory, harassment.<sup>80</sup> But the stories that garner the most attention are those in which the CEO or someone equally powerful is the culprit—think Harvey Weinstein, Roger Ailes, Bill O’Reilly, and Matt Lauer, along with a host of state and federal legislators and other very public figures. A remarkable number of those outed after Weinstein held the highest positions in their respective companies.<sup>81</sup> Supervisory harassment is also more likely to result in a lawsuit.<sup>82</sup> Sexism and sexual harassment are often interrelated,<sup>83</sup> and #MeToo enabled some to make that

Comment, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159 (1993); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 727 (2015); Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30, 32, 41–42 (1981); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN’S L.J. 21 (1991).

76. USMSPB 1995, *supra* note 66, at 16 tbl.4; SOC’Y FOR HUM. RES. MGMT., SEXUAL HARASSMENT SURVEY 5–6 (1999) [hereinafter SHRM SURVEY].

77. E.g., Kimberly T. Schneider, Suzanne Swan & Louise F. Fitzgerald, *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCH. 401 (1997); Marina N. Rosenthal, Alec N. Smidt & Jennifer J. Freyd, *Still Second Class: Sexual Harassment of Graduate Students*, 40 PSYCH. WOMEN Q. 364 (2016); Emily A. Leskinen, Lilia M. Cortina & Dana B. Kabat, *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 LAW & HUM. BEHAV. 25, 36 (2011); SHRM SURVEY, *supra* note 76, at 6 (seven percent); USMSPB 1995, *supra* note 66, at 16 tbl.4 (two percent); *see also* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 565 (2001).

78. USMSPB 1995, *supra* note 66, at 18; Magley et al., *supra* note 73.

79. Rosenthal et al., *supra* note 77; Schneider et al., *supra* note 77.

80. *See* SHRM SURVEY, *supra* note 76, at 5; USMSPB 1995, *supra* note 66, at 18; Kimberly T. Schneider, John B. Pryor & Louise F. Fitzgerald, *Sexual Harassment Research in the United States*, in BULLYING AND HARASSMENT IN THE WORKPLACE 245, 247 (Ståle Einarsen, Helge Hoel, Dieter Zapf & Cary L. Cooper eds., 2d ed. 2011); Rosenthal et al., *supra* note 77.

81. *See* Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [https://perma.cc/RER2-EUJZ] (Oct. 29, 2018).

82. A study of published sexual harassment cases found that a greater proportion of claims involved supervisory rather than coworker harassment. *See* Juliano & Schwab, *supra* note 77, at 564.

83. *See, e.g.*, Margaret S. Stockdale, *The Role of Sexual Misperceptions of Women’s Friendliness in an Emerging Theory of Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 84, 86 (1993) (explaining that those who score high on the “[l]ikelihood to [s]exually [h]arass” scale also demonstrate sexist beliefs); John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 SEX ROLES 269, 277 (1987); Danielle Foulis & Marita P. McCabe, *Sexual Harassment: Factors Affecting Attitudes and Perceptions*, 37 SEX ROLES 773, 776–77 (1997) (explaining that those holding sexist attitudes are less likely to define behavior as sexual harassment); Elizabeth O’Hare & William O’Donohue, *Sexual Harassment: Identifying Risk Factors*, 27 ARCHIVES SEXUAL BEHAV. 561, 576 (1998) (describing how the “existence of sexist attitudes in the workplace” is predictive of sexual harassment); *see also* Juliano & Schwab, *supra* note 77, at 578.

connection more clearly—and to note it as proof that the feminist movement had failed to restructure gender relations to ensure that women “were no longer seen as primarily sexual or reproductive objects.”<sup>84</sup>

Even as the survey instruments have narrowed their scope to align more closely with legal definitions, respondents continue to report high rates of harassment. A 2016 report of an EEOC Task Force found that sixty percent of American women surveyed reported having experienced sex-based harassment.<sup>85</sup> In any two-year period, four-in-ten women will experience at least one instance of harassment.<sup>86</sup> These rates have held steady over several decades, and as much as we might like to think it will level off or decline eventually, millennials report higher rates of harassment than anyone else.<sup>87</sup>

Information that has come to light as a result of the #MeToo movement confirms what we already knew: that sexual harassment continues to be a significant problem. For example, a 2018 PEW research poll found that 59% of women and 27% of men say they have personally received unwanted sexual advances or verbal or physical harassment of a sexual nature, whether at work or elsewhere.<sup>88</sup> Likewise, a Quinnipiac poll found that 69% of women had experienced sexual harassment at work.<sup>89</sup> A poll by LeanIn.org found high rates of harassment among women in senior leadership or technical fields.<sup>90</sup>

84. Eva Cox, *#MeToo Is Not Enough: It Has Yet to Shift the Power Imbalances that Would Bring About Gender Equality*, CONVERSATION (Mar. 18, 2018, 2:56 PM), <https://theconversation.com/metoo-is-not-enough-it-has-yet-to-shift-the-power-imbalances-that-would-bring-about-gender-equality-92108> [<https://perma.cc/55G6-HFED>]; see also Anastasia Powell & Elise Holland, *Beyond #MeToo, We Need Bystander Action to Prevent Sexual Violence*, CONVERSATION (Feb. 13, 2018, 2:07 PM), <https://theconversation.com/beyond-metoo-we-need-bystander-action-to-prevent-sexual-violence-91741> [<https://perma.cc/PJ5K-W6DB>] (noting Australian survey data on the pervasiveness of sexism and discrimination that underlies harassment).

85. See U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC 9 (2016) [hereinafter EEOC, SELECT TASK FORCE], [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) [<https://perma.cc/2JMF-S8Y7>].

86. See *id.*; USMSPB 2018, *supra* note 66.

87. See AMANDA ROSSIE, JASMINE TUCKER & KAYLA PATRICK, NAT’L WOMEN’S L. CTR., *OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN* 10 (2018).

88. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), <http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-MeToo/> [<https://perma.cc/KMM7-5749>].

89. *60% of U.S. Women Say They’ve Been Sexually Harassed Quinnipiac University National Poll Finds; Trump Job Approval Still Stuck Below 40%*, QUINNIPAC UNIV. POLL (Nov. 21, 2017), <https://poll.qu.edu/national/release-detail?ReleaseID=2502> [<https://perma.cc/2U8T-UUV7>].

90. RACHEL THOMAS, LAREINA YEE, MARIANNE COOPER, ALEXIS KRIVKOVICH, ELLEN KONAR, IRINA STARIKOVA, MEGAN ROONEY, KELSEY ROBINSON, MARY NOBLE-TOLLA, MARIE-CLAUDE NADEAU, ALI BOHRER & NICOLE ROBINSON, LEAN IN, *WOMEN IN THE WORKPLACE: 2018* (2018), [https://wiw-report.s3.amazonaws.com/Women\\_in\\_the\\_Workplace\\_2018.pdf](https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2018.pdf) [<https://perma.cc/PRS7-8UJQ>].

While survey results suggest that the level of harassment has stagnated for more than thirty years, harassment-related lawsuits and administrative charges have risen dramatically during the same period. The number of administrative complaints filed with the EEOC continues to grow both in absolute numbers and as a percentage of the total complaints processed.<sup>91</sup> Almost one-third of approximately 90,000 charges received by the EEOC in 2015 included an allegation of workplace harassment.<sup>92</sup> The number of charges with a sexual harassment component increased by twelve percent from 2017 to 2018.<sup>93</sup> Internal reports of harassment have increased somewhat, although they still remain low compared to the rates of harassment reported in surveys. A 2019 report by Navex Global aggregates hotline and compliance reports from several thousand employers—and forty-four million employees—and provides benchmarks by which employers can compare their own experience with complaints. The report found that internal complaints of both harassment and discrimination increased by eighteen percent from 2016 to 2018.<sup>94</sup>

All told, the data support the suggestion of the #MeToo movement that sexual misconduct remains a significant and intractable problem.

### III. SEXUAL HARASSMENT LAW

#### *A. In the Beginning*

Jane Corne and Geneva DeVane filed a lawsuit against their employer, Bausch + Lomb, in the mid-1970s. They alleged that they had suffered discrimination at the hands of their supervisor, who drove them both to resign by subjecting them to relentless verbal and physical sexual advances.<sup>95</sup> The federal judge who heard their case was openly skeptical about the theory that this type of conduct constituted

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91. Charges alleging sexual harassment filed with the EEOC rose from 6,696 in 2017 to 7,609 in 2018. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM’N [hereinafter EEOC CHARGE STATISTICS], <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019> [<https://perma.cc/F2Z6-VSNC>] (last visited Mar. 30, 2021). Preliminary data shows that in 2018, the EEOC recovered nearly seventy million dollars for victims of sexual harassment through litigation and administrative enforcement, up from the \$47.5 million collected in 2017. Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm> [<https://perma.cc/6EX9-JVPK>].

92. EEOC, SELECT TASK FORCE, *supra* note 85, at iv, 6.

93. Press Release, U.S. Equal Emp. Opportunity Comm’n, *supra* note 91. The number of sexual harassment charges decreased slightly in 2019. *See* Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020), <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data> [<https://perma.cc/Q36T-8KYV>]; *see also* Nigel Chiyaya, *New Data on #MeToo’s First Year Shows ‘Undeniable’ Impact*, NBC NEWS (Oct. 11, 2018, 10:54 AM), <https://www.nbcnews.com/news/us-news/new-data-metoo-s-first-year-shows-undeniable-impact-n918821> [<https://perma.cc/QVM2-72J2>].

94. CARRIE PENMAN & RAINA HATHORNE, NAVEX GLOB., 2019 ETHICS & COMPLIANCE HOTLINE BENCHMARK REPORT 38–39 (2019) (“Our data indicates a growing inclination to speak up and a fundamental shift in employees’ willingness to tolerate harassment.”).

95. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 162 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

unlawful discrimination under Title VII of the Civil Rights Act of 1964, which, among other things, prohibits employment actions based on a person's sex.<sup>96</sup> Rejecting their claim, the judge observed that previous cases of sex discrimination "arose out of company policies" and involved "apparently some advantage to, or gain by, the employer from such discriminatory practices."<sup>97</sup> Here, in contrast, the supervisor's "conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. . . . [He] was satisfying a personal urge."<sup>98</sup> Such an interpretation of the law would force employers to "have employees who were asexual" since that would be the "only sure way . . . [to] avoid such charges."<sup>99</sup>

The ruling in *Corne v. Bausch & Lomb* was followed a year later by a similarly dismissive one involving a supervisor's sexual assault of a subordinate employee. Title VII, the judge wrote, was "not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley."<sup>100</sup> These rulings were characteristic of an era in which sexual harassment had yet to achieve even the first step on the path toward a legal remedy. In a landmark article, Felstiner, Abel, and Sarat examined the complex social process that leads from an injury to a legal remedy. They identified three steps in the emergence of a legal dispute: naming ("saying to oneself that a particular experience has been injurious"); blaming ("when a person attributes an injury to the fault of another individual or social entity"); and claiming ("when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy").<sup>101</sup> Despite a slow start, working women and then federal courts did come to understand sexual harassment as a type of actionable discrimination. The catalyst was emerging social awareness about the pervasive problem of sexual imposition, followed by Catharine MacKinnon's path-breaking 1979 book, *The Sexual Harassment of Working Women*, in which she put forth both a theoretical justification and a set of substantive legal principles for recognizing sexual harassment as discrimination.<sup>102</sup>

In 1980, the EEOC issued guidelines that adopted MacKinnon's framework wholesale. The guidelines defined actionable harassment as

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an

96. 42 U.S.C. § 2000e.

97. *Corne*, 390 F. Supp. at 163.

98. *Id.*

99. *Id.* at 163–64.

100. *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

101. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–36 (1980–1981).

102. CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 207–13 (1979).

individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.<sup>103</sup>

These guidelines were sandwiched between a 1979 *Redbook* magazine survey, which found unwelcome sexual comments and advances to be pervasive in the workplace, and the first survey of federal government employees in 1981, both of which suggested that sexual harassment was a common experience for women at work.<sup>104</sup> By the time the Supreme Court first agreed to hear a sexual harassment case, there was a growing chorus of outrage over the treatment of women at work. Sexual harassment was the “quintessential feminist harm . . . [T]he term was invented by feminist activists, given content by feminist litigators and scholars, and sustained by a wide-ranging body of scholarship generated largely by feminist academics.”<sup>105</sup> Sexual harassment had its first moment in public consciousness when Anita Hill accused Supreme Court nominee Clarence Thomas of sexually harassing her while he served as chair of the agency charged with implementation of federal antidiscrimination laws.<sup>106</sup> Although he was confirmed, the public airing of her claim catalyzed feminist advocacy, litigation, and a growing recognition by judges that sexual harassment impeded equal employment opportunity for women.

### B. Contemporary Standards

In 1986, the Supreme Court heard its first sexual harassment case, *Meritor Savings Bank v. Vinson*.<sup>107</sup> The Court affirmed the growing consensus that quid pro quo harassment (the explicit conditioning of an employment consequence on sexual submission) and hostile environment harassment (the unwelcome conduct of a sexual nature that has the effect of creating a hostile, offensive, or abusive work environment) are actionable forms of intentional discrimination.<sup>108</sup> And while the Court agreed that the plaintiff must prove that the harassment was “unwelcome,” it held that voluntariness and welcomeness were not the same thing.<sup>109</sup> A plaintiff might tolerate incidents of harassment or submit to a boss's sexual advances without welcoming them. A question raised but not fully resolved in *Meritor* was about the

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103. Guidelines on Discrimination Because of Sex: Sexual Harassment, 29 C.F.R. § 1604.11(a) (1980). This section of the Guidelines was rescinded in 1999 and replaced with new guidelines reflecting new Supreme Court opinions on employer liability, as discussed below.

104. Safran, *supra* note 30, at 217; USMSPB 1981, *supra* note 31, at 36.

105. Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 37–38 (1993).

106. See generally Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445 (1992) (discussing her reaction to the response from her Senate Judiciary Committee testimony).

107. 477 U.S. 57, 64 (1986).

108. *Id.* at 65.

109. *Id.* at 68.

proper standard for employer liability for workplace harassment.<sup>110</sup> When is it reasonable to hold employers liable for conduct that it might or might not have the ability to control? The *Meritor* Court rejected both a rule of automatic liability and a rule of no liability—the anchors of a wide spectrum of lower-court rulings that preceded *Meritor*. But it did not settle on a clear rule. Rather, the Court directed lower courts to consider “agency principles” because Title VII defines “employer” to include “agents.”<sup>111</sup> Courts disagreed about the right approach in the wake of *Meritor*. The employer liability questions would come to dominate sexual harassment litigation, but the Court meanwhile decided two additional cases on the standard for actionable harassment. In 1993, in *Harris v. Forklift Systems, Inc.*, the Court held that hostile environment harassment is actionable when a reasonable person in the victim’s shoes would perceive it as hostile or abusive, perhaps long before it causes severe psychological injury.<sup>112</sup> Further, the Court held in *Oncala v. Sundowner Offshore Services* that same-sex harassment can be actionable as long as the plaintiff can prove the misconduct occurred “because of sex.”<sup>113</sup> The Court also decided a set of cases interpreting Title VII’s ban on retaliation, some robustly protecting against it, some not.<sup>114</sup>

In 1998, the Supreme Court revisited the question of employer liability that it had left open in *Meritor*. In two cases, the Court addressed the issues that had resulted in the most division among lower courts—the weight due an employer’s harassment policy in determining liability and the consequence for an employee’s failure to make use of an available grievance procedure. In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Court set out a new framework for employer liability. For harassment by supervisors that results in a tangible employment action, employers are automatically liable because the harassing supervisor is typically “aided by the agency relation,” a standard basis for imputing liability from agent to master.<sup>115</sup> But for supervisory harassment without a tangible consequence, employers may raise a two-prong affirmative defense in order to avoid liability or damages:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary

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110. *See id.* at 70.

111. *Id.* at 72.

112. 510 U.S. 17, 21 (1993).

113. 523 U.S. 75, 79–80 (1998).

114. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (interpreting broadly Title VII to protect against retaliatory actions, whether work-related or not, that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination”); *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 555 U.S. 271, 279 n.3 (2009) (protecting witnesses and third-parties as well as victims against retaliation); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71 (2001) (undercutting protection by holding that only objectively reasonable complaints of discrimination trigger protection against retaliation).

115. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 742 (1998).

elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>116</sup>

The definition of a supervisor took on new importance after these rulings, and the Court eventually decided another case, *Vance v. Ball State University*, in which it narrowed that definition to include only those with the power to “take tangible employment actions against the victim.”<sup>117</sup> This standard excludes many who hold the power to dictate important aspects of an employee’s working conditions despite lacking the power to hire and fire. The Court in these cases also noted approvingly that employers can be held liable for harassment by coworkers or third parties if they knew or should have known of the behavior and failed to take prompt and effective remedial action.<sup>118</sup> Employers may also be subject to “alter ego” liability when the harasser is so high in the company that his or her actions are fairly imputed to the company directly.<sup>119</sup>

Perhaps this wasn’t obvious when the Supreme Court handed down its rulings in *Faragher* and *Ellerth*, but the affirmative defense sparked a clear shift from substance to procedure. Sexual harassment litigation revolves around whether employers *have* policies and procedures rather than whether they have been successful in their efforts to prevent or respond to problems of sexual misconduct. This shift was by design. Justice Kennedy wrote in *Ellerth* that the very purpose of Title VII is “to encourage the creation of anti-harassment policies and effective grievance mechanisms.”<sup>120</sup> The Court cemented the focus on the existence of procedures the following year in *Kolstad v. American Dental Association*, in which the Court held that the availability of punitive damages turns on whether the employer made good-faith efforts to comply with Title VII, which can be proven with policies and procedures.<sup>121</sup>

Against this evolving legal landscape, courts have been hearing sexual harassment cases for just over four decades. During that time, employers have dramatically changed their practices to better minimize liability for harassment. Where have these developments left us?

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116. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

117. 570 U.S. 421, 424 (2013).

118. *See Faragher*, 524 U.S. at 799 (noting that courts have “uniformly judg[ed] employer liability for co-worker harassment under a negligence standard”); 29 C.F.R. § 1604.11(d) (2020) (“With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”).

119. *Ellerth*, 524 U.S. at 758.

120. *Id.* at 764.

121. 527 U.S. 526, 545 (1999).

## IV. LEGAL LIABILITY AND EFFORTS TO PREVENT AND CORRECT HARASSMENT

The Supreme Court's clarification of the standards of liability toward the end of the twentieth century kicked the liability-minimizing machine into high gear. At the same time, lower federal courts were considering the contours of the new liability regime. Much of the activity revolved around the meaning and application of the affirmative defense, which, in effect, imposes a requirement that employers adopt anti-harassment policies and procedures and that those who experience harassment complain promptly. An employer can avoid liability or damages only if both parties fail—the employer did not take reasonable care to prevent and correct sexually harassing behavior *and* the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.”<sup>122</sup> Courts were quick to coalesce around the importance of policies and procedures and lost sight of the law's purpose of promoting employment equality through the elimination of sexually harassing behaviors. This was unfortunate but understandable given Justice Kennedy's remarkable declaration in *Ellerth* that the very *purpose* of Title VII is “to encourage the creation of anti-harassment policies and effective grievance mechanisms.”<sup>123</sup>

In addition to a singular focus on policies and procedures rather than the actual problem of harassment, courts tended to make two additional moves that have undermined the law's ability to tackle the problem of harassment. First, even though the two prongs of the affirmative defense are clearly stated in the conjunctive, some courts have collapsed the two prongs of the affirmative defense, contrary to the clear mandate of the Supreme Court, and instead hold that employers who satisfy just the first prong about their own efforts to prevent and correct harassment are off the hook.<sup>124</sup> Second, when applying the second prong of the defense that focuses on victim response, courts took a harsh, unrealistic view of how quickly and assertively employees must complain about harassment and how many obstacles they must overcome to do so.<sup>125</sup> These examples are just two of many pieces of evidence about the way in which substantive civil rights protections have been narrowed in the context of sexual misconduct. This is the case despite the fact that the Court has always spoken strongly about the harms of sexual harassment and the need for antidiscrimination law to protect against it. Forty years after the first articulation of sexual harassment as a wrong, the law remains insufficient to redress

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122. *Faragher*, 524 U.S. at 807.

123. *Ellerth*, 524 U.S. at 765.

124. *See, e.g.*, *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153, 164 (D. Md. 2000) (holding that an employer can avoid liability by proof of the first prong alone); *Brown v. Henderson*, 155 F. Supp. 2d 502, 512 (M.D.N.C. 2000) (same).

125. *See, e.g.*, *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1292–93 (11th Cir. 2003) (finding a two-and-a-half-month delay in complaining unreasonable as a matter of law); *Green v. Wills Grp., Inc.*, 161 F. Supp. 2d 618, 626 (D. Md. 2001) (finding it unreasonable that employee complained to wrong person by mistake); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001) (refusing to excuse the failure to report harassment based on a fear of retaliation); *see also Hébert*, *supra* note 34, at 715–16.

it. Moreover, we have made little progress in our collective understanding of the ways in which sexual misconduct operates to the systematic disadvantage of women in the workplace.

#### *A. Incentives for Employers*

It doesn't take long for legal rules to be translated into practical advice by lawyers, commentators, consultants, and human resource professionals. For sexual harassment, this process happened in a remarkably unified fashion. Employers coalesced quickly around a standard set of preventive and corrective measures in the wake of the Supreme Court's rulings in *Faragher* and *Ellerth*. There is no individual liability under Title VII, so the incentives to minimize liability fall to employers.<sup>126</sup>

Employers have an incentive to prevent quid pro quo harassment because such behavior, if proven, results in automatic liability.<sup>127</sup> The best prevention mechanisms for employers include better screening and hiring practices, more effective training, and better monitoring during employment. The power employers have to undertake these activities was part of why the Supreme Court decided on a rule of automatic liability.<sup>128</sup> This type of misconduct represents only a small percentage of litigated cases not only because it is less common but also because it is more severe and thus likely to be settled quietly rather than through contentious litigation. The bulk of employers' efforts to minimize liability are responding to the affirmative defense's call that they be able to prove they undertook reasonable measures to prevent harassment and reasonable measures to correct harassment once it occurred. These incentives are sometimes reinforced by employers' insurance policies that condition coverage on certain preventative and corrective measures.<sup>129</sup>

An employer's duty to prevent harassment can be satisfied through the adoption of formal anti-harassment policies, the provision of anti-harassment training, and the use of other concrete measures such as anonymous reporting systems or use of an ombudsperson. The Supreme Court stopped short of requiring formal policies, but wrote in *Faragher* that

[w]hile proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances

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126. See, e.g., *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313–17 (2d Cir. 1995); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995).

127. *Faragher*, 524 U.S. at 790.

128. See *id.* at 803.

129. See, e.g., John D. Canoni, *Sexual Harassment: The New Liability*, 46 RISK MGMT. 12, 16 (1999) (“EPLI will become more popular—even applying for such insurance is helpful because carriers will not cover a company unless its employment policies and procedures are in order.”).

may appropriately be addressed in any case when litigating the first element of the defense.<sup>130</sup>

Courts have been strict with employers who do not have policies but flexible as to the type of policy that might be deemed sufficiently preventative. Policies should describe prohibited conduct, identify individuals to whom complaints should be brought, provide a bypass procedure to ensure no victim will have to complain to the harasser, and offer a user-friendly grievance procedure.<sup>131</sup> A clause that specifically prohibits retaliation will provide further support for an employer's claim of reasonable prevention.<sup>132</sup> Policies must also be sufficiently disseminated.<sup>133</sup> As one appellate court applied the standard, distribution of an adequate policy provides "compelling proof" of adequate prevention, which can only be rebutted with evidence that the "employer adopted or administered [it] in bad faith or that the policy was otherwise defective or dysfunctional."<sup>134</sup> Other courts have applied the standard in a more rigorous way by also evaluating whether the disseminated policies are "reasonably designed and reasonably effectual."<sup>135</sup>

Courts often suggest that employers take additional preventative measures such as anti-harassment training, although they rarely find the presence or absence of training dispositive on the question of liability.<sup>136</sup> As part of a general preventative effort, the existence of training weighs in the employer's favor;<sup>137</sup> the lack of training

130. *Faragher*, 524 U.S. at 807. The EEOC has taken the position that small businesses may be able to satisfy this prong of the affirmative defense without a formal, written policy as long as they have informal mechanisms in place for preventing harassment. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1999-2, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS § V.C (1999) [hereinafter EEOC ENFORCEMENT GUIDANCE].

131. *See, e.g.*, *Molnar v. Booth*, 229 F.3d 593, 601 (7th Cir. 2000); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1297-99 (11th Cir. 2000); *Gentry v. Exp. Packaging Co.*, 238 F.3d 842, 847-48 (7th Cir. 2001); *O'Rourke v. City of Providence*, 235 F.3d 713, 736 (1st Cir. 2001); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1180 (9th Cir. 2001); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001).

132. *See, e.g.*, *Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 565 (D. Md. 2000).

133. *See Faragher*, 524 U.S. at 808.

134. *Barrett*, 240 F.3d at 266; *see also Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999).

135. *Reese v. Meritor Auto., Inc.*, 113 F. Supp. 2d 822, 827 (W.D.N.C. 2000), *aff'd*, 246 F.3d 667 (2001); *see also Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1268 (M.D. Ala. 2001); *Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1068 (M.D. Tenn. 2000).

136. *See, e.g.*, Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears: Companies Review Policies to Avoid 'Ellerth' Liability*, 21 NAT'L L.J. 1,1 (1998); Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 156-61 (2001); *Shaw*, 180 F.3d at 812-13; *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1028 (10th Cir. 2001); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 510 (6th Cir. 2001).

137. *See, e.g.*, *Nicholson v. Dart Container Corp.*, 602 F. Supp. 2d 760, 764 (S.D. Miss. 2008); *McCurdy v. Ark. State Police*, 275 F. Supp. 2d 982, 992 (E.D. Ark. 2003), *aff'd*, 375 F.3d 762 (8th Cir. 2004); *Maddin v. GTE of Fla., Inc.*, 33 F. Supp. 2d 1027, 1032 (M.D. Fla. 1999); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 877 (9th Cir. 2001).

weighs against it.<sup>138</sup> Some states require employers to offer training, at least in some circumstances.<sup>139</sup> Employers also sometimes take additional steps to prevent harassment (or nip it in the bud), such as monitoring employee email for offensive language or images, providing remedial training for individuals, instituting anonymous hotlines, and so on. The legal relevance of these measures is unclear.<sup>140</sup> A conundrum in the world of harassment prevention is that employers get clear credit for setting up a complaint procedure but effectively penalized under the second prong of the affirmative defense if an employee who experiences harassment makes use of it. Employers thus have an incentive to devise a system that appears to elicit complaints but actually suppresses them.

The affirmative defense also provides employers with an incentive to respond to complaints of harassment, as well as to known incidents even if not the subject of a complaint. Although the rules of liability are different, employers can also be held liable for harassment of their employees by supervisors, coworkers, or third parties.<sup>141</sup> The negligence standard gives employers an incentive to intervene in cases where they know or suspect harassment has occurred.

Reasonable care to correct harassment is based on two employer actions: maintaining an appropriate grievance procedure (overlapping with the rules on prevention) and responding appropriately to actual complaints.<sup>142</sup> The grievance procedure should be constructed in a manner to elicit complaints (subject to the perverse incentive discussed above to suppress complaints simultaneously). Courts have given their imprimatur to varied complaint procedures and given employers tremendous discretion to determine what manner of complaint is necessary to trigger a formal investigation.<sup>143</sup> Beyond simply maintaining a complaint procedure, employers must also adequately respond to known incidents of harassment, whether they learn of it through a formal complaint or other means.<sup>144</sup> The response should

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138. See, e.g., *U.S. EEOC v. Dave's Supermarkets, Inc.*, 2011 U.S. Dist. LEXIS 19881, at \*47 (N.D. Ohio Mar. 1, 2011); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812, 821 (W.D.N.Y. 1998); *Gordon v. S. Bells, Inc.*, 67 F. Supp. 2d 966, 983 (S.D. Ind. 1999).

139. See CAL. GOV'T CODE § 12950.1(a) (2021); CONN. GEN. STAT. § 46a-54 (2021); 775 ILL. COMP. STAT. 5 / 2-105(B)(5)(c) (2020); VT. STAT. ANN. tit. 21, § 495h (2021). The EEOC implores employers to offer general anti-harassment training to all employees, as well as targeted training to supervisory employees. See Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Launches New Training Program on Respectful Workplaces (Oct. 4, 2017) [hereinafter EEOC Press Release, *Respectful Workplaces*], <https://www.eeoc.gov/eeoc/newsroom/release/10-4-17.cfm> [<https://perma.cc/M8QA-BXSL>].

140. See David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1300–01 (2001).

141. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998); see also 29 C.F.R. § 1604.11(d) (2020).

142. See *Molnar v. Booth*, 229 F.3d 593, 601–02 (7th Cir. 2000); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1269 n.22 (M.D. Ala. 2001); *Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 565 (D. Md. 2000).

143. See, e.g., *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1297–99 (11th Cir. 2000).

144. See, e.g., *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 510 (6th Cir. 2001).

ordinarily include an investigation and, if harassment is found, responsive measures reasonably calculated to stop the harassment.<sup>145</sup> Thus, a court found the employer could be held liable when a corporate officer responded to one victim's formal complaint by telling her "that things had been that way for a long time at [this company], that the business world was full of pricks like Charlie . . . and . . . to get used to it because that is the way the business world was."<sup>146</sup> An employer can successfully avoid liability if its measures are successful in stopping the harassment.<sup>147</sup>

Employers learned quickly after *Faragher* and *Ellerth* about their newly clarified obligations. Information came from a variety of sources, one of which was EEOC guidelines published the following year in 1999.<sup>148</sup> But much of the knowledge was transmitted through intermediaries like consultants and professional associations. Like much advice for employers, this was styled generally as "recipes for legal compliance." In other words, the advice spelled out the steps necessary to avoid lawsuits rather than how to eliminate the underlying problem.<sup>149</sup> The response by employers was nothing short of rapid. Some employers already had policies and procedures that might have dealt with discrimination, courtesy of a movement that began in the late 1960s after the enactment of Title VII and the surrounding uncertainty about employers' responsibilities in the discrimination context.<sup>150</sup> But policies dealing with harassment didn't appear until after the Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson*, which made clear that liability turned at least in part on employer behavior.<sup>151</sup> But within a year after the *Faragher* and *Ellerth* decisions, ninety-seven percent of employers in one survey had written policies prohibiting sexual harassment.<sup>152</sup> Most of these policies included the legally required elements and were disseminated in standard ways. Many employers took additional measures as well, including offering or mandating anti-harassment training. More than half of employers provide sexual harassment prevention training; larger organizations are especially likely to do so.<sup>153</sup> Employers formalized their corrective measures, with; the vast majority of employers instituted formal investigatory processes for sexual harassment.<sup>154</sup> Many also instituted mediation or arbitration to resolve harassment complaints without resort to litigation.

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145. See, e.g., *Beard v. S. Flying J, Inc.*, 266 F.3d 792, 799 (8th Cir. 2001); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000); *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1181 (9th Cir. 2001).

146. *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1208–09 (10th Cir. 2000).

147. See *Swingle v. Henderson*, 142 F. Supp. 2d 625, 637 (D.N.J. 2001), *aff'd*, 35 F. App'x 39 (3d Cir. 2002); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932–34 (7th Cir. 1999).

148. See EEOC ENFORCEMENT GUIDANCE, *supra* note 130.

149. Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 980–81 (1999); see also James J. Oh, *Internal Sexual Harassment Complaints: Investigating to Win*, 18 EMP. RELS. L.J. 227, 227 (1992).

150. See Bisom-Rapp, *supra* note 149, at 968.

151. See 477 U.S. 57, 71–73 (1986).

152. See SHRM SURVEY, *supra* note 76, at 6.

153. See *id.* at 8.

154. See *id.*

*B. Responses to Harassment*

The rules of employer liability create incentives for those who experience sexual harassment as well. The second prong of the affirmative defense, which requires the employer to prove that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,” is the main source of an incentive to promptly complain.<sup>155</sup> By complaining promptly and through correct channels, the victim of harassment can prevent the employer from satisfying the affirmative defense.<sup>156</sup> Although it is entirely unclear how most harassment victims would learn about the affirmative defense or other standards for employer liability, courts treat victims as if, like employers, they should be expected to respond appropriately to legal incentives. As discussed above, courts have strictly enforced the victim’s duty to complain.<sup>157</sup> Courts also expect victims to comply with the procedures for internal dispute resolution set out by the employer, as long as the policy containing the procedures was made available to employees.<sup>158</sup> Victims are also expected to cooperate with the employer’s investigation, despite fears of retaliation or concerns about confidentiality.<sup>159</sup> Victims are not permitted the luxury of either waiting to see whether a problem escalates, nor taking the time to evaluate whether the benefits of complaining outweigh the likely costs.<sup>160</sup> Courts discourage watching and waiting even though retaliation is a very likely result of a complaint and a successful resolution is unlikely.<sup>161</sup>

Unlike employers, who tend to behave precisely in the ways the law predicts, employees who experience harassment deviate substantially from expectations for a “typical” victim. In reality, people who experience harassment primarily respond in ways that are informal, internal, and nonconfrontational.<sup>162</sup> Filing a complaint with an employer is the least likely course of action.<sup>163</sup> According to a

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155. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

156. See *infra* text accompanying notes 245–250.

157. See, e.g., Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the “Rational Actor,”* 51 WM. & MARY L. REV. 183, 239 (2009) (“[M]ost courts interpret *Faragher* and *Ellerth* as imposing an employee duty to complain internally about harassment, to do so promptly, and to do so in all cases lacking a highly specific threat of retaliation.”).

158. See, e.g., *Mernik v. Classic Cars, Inc.*, No. 3:99-CV-1327-P, 2000 U.S. Dist. LEXIS 9373, at \*34–35 (N.D. Tex. June 28, 2000), *aff’d*, 273 F.3d 1095 (5th Cir. 2011).

159. See, e.g., *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 643 (7th Cir. 2000); *Marsicano v. Am. Soc’y of Safety Eng’rs*, No. 97-C7819, 1998 WL 603128, at \*7 (N.D. Ill. Sept. 4, 1998); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269–70 (4th Cir. 2001).

160. See *Matvia*, 259 F.3d at 269.

161. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001). *But see* *Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1069 (M.D. Tenn. 2000); *Young v. R.R. Morrison & Son, Inc.*, 159 F. Supp. 2d 921, 927 (N.D. Miss. 2000).

162. See, e.g., Fitzgerald et al., *supra* note 35; Theresa M. Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 136–41 (2001).

163. See, e.g., David E. Terpstra & Douglas D. Baker, *The Identification and Classification of*

comprehensive study of federal employees, forty-four percent of those who had experienced sexual harassment took no action in response, while only twelve percent reported the conduct to a supervisor or other official.<sup>164</sup> “The single most common response of employees who are targets of sexual harassing behaviors hasn’t changed . . . since 1980. That response has been, and continues to be, to ignore the behavior or do nothing.”<sup>165</sup> Our unrealistic expectations for victims are exacerbated by the fact that studies show hypothetical victims respond much more assertively and formally than actual victims.<sup>166</sup> In the real world, seeking “institutional/organizational relief” is a last resort.<sup>167</sup>

### 1. *Evaluating the Effectiveness of Typical Measures*

If the legal system worked well, it would operate to prevent harassment and compensate victims, the twin goals of Title VII. Or it would at least bring us substantially closer to those goals. As we saw in the previous section, employees who experience harassment are often underprotected because they respond to harassment in ways different than we expect, making it difficult to prevail under the existing rules of liability. But the regime masks another equally serious error. It permits employers to avoid liability or damages for taking measures to prevent or correct harassment regardless of whether they are likely to work. The law rewards cosmetic compliance over success in preventing or remediating the underlying problem of harassment.

Human resource professionals often claim that “their biggest problem with the issue of sexual harassment is that the majority of employees are uncertain as to what constitutes sexual harassment.”<sup>168</sup> The implication is that differences in perception may be neutralized by clear policies or training about the boundaries between acceptable and unacceptable conduct.<sup>169</sup> But studies on the causes of harassment do not support a large role for so-called boundary differentiation as an

*Responses to Sexual Harassment*, 10 J. ORGANIZATIONAL BEHAV. 1 (1989); see also Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 37 (1993) (reviewing studies).

164. See, e.g., USMSPB 1995, *supra* note 66, at 29–30. All available studies confirm low rates of reporting. See, e.g., Louise F. Fitzgerald, Sandra L. Shullman, Nancy Bailey, Margaret Richards, Janice Swecker, Yael Gold, Mimi Ormerod & Lauren Weitzman, *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 162 (1988).

165. See, e.g., USMSPB 1995, *supra* note 66, at 29.

166. Gutek & Koss, *supra* note 163, at 37 (reviewing surveys and studies).

167. Fitzgerald et al., *supra* note 35, at 120.

168. Gerald L. Blakely, Eleanor H. Blakely & Robert H. Moorman, *The Effects of Training on Perceptions of Sexual Harassment Allegations*, 28 J. APPLIED SOC. PSYCH. 71, 72 (1998) (citing J.J. Laabs, *HR Puts Its Sexual Harassment Questions on the Line*, 74 PERS. J. 36 (1995)).

169. Douglas D. Baker, David E. Terpstra & Bob D. Cutler, *Perceptions of Sexual Harassment: A Re-Examination of Gender Differences*, 124 J. PSYCH. 409, 410, 415 (1990); Douglas D. Baker, David E. Terpstra & Kinley Larntz, *The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment*, 22 SEX ROLES 305, 320 (1990); William H. Hendrix, Justin D. Rueb & Robert P. Steel, *Sexual Harassment and Gender Differences*, 13 J. SOC. BEHAV. & PERSONALITY 235, 248 (1998).

explanation.<sup>170</sup> Employers and employees alike often perceive that anti-harassment policies are effective at reducing the amount of misconduct, but the stagnant level of harassment in the wake of widespread adoption of policies tells a different story.<sup>171</sup> Empirical studies show a cognizable but limited role for policies and information campaigns in reducing harassment, particularly less severe forms.<sup>172</sup> However, studies found that these methods are not as effective in targeting more severe forms of harassment, especially if the behavior is directed at a specific person. For misconduct of that nature, more proactive methods that convey a true commitment by the employer to actively control the work environment are necessary. The research is summed up fairly by the conclusion of one researcher that “sexual harassment is curtailed only when an organization makes a concerted . . . and highly visible effort to deal with the problem.”<sup>173</sup>

Anti-harassment training, which the law encourages but does not require, holds more promise than policies and procedures. In theory, training programs are designed to increase awareness of sexual harassment and, in turn, to change both attitudes and behavior.<sup>174</sup> Based on an assumption that this is an effective approach, former EEOC chair Eleanor Holmes Norton claimed that “[s]exual harassment has developed as one of the great lessons in how education can have an effect on an offensive practice.”<sup>175</sup> The EEOC continues to recommend that employers use “periodic training” to “ensure that its supervisors and managers understand their responsibilities under the organization’s anti-harassment policy and complaint procedure.”<sup>176</sup> This training, the EEOC recommends, “should explain the types of conduct that violate the employer’s anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.”<sup>177</sup> In 2018, the EEOC launched

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170. See, e.g., Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 35–37 (1998); Antonia Abbey, *Misperceptions of Friendly Behavior as Sexual Interest: A Survey of Naturally Occurring Incidents*, 11 PSYCH. WOMEN Q. 173 (1987); Catherine B. Johnson, Margaret S. Stockdale & Frank E. Saal, *Persistence of Men’s Misperceptions of Friendly Cues Across a Variety of Interpersonal Encounters*, 15 PSYCH. WOMEN Q. 463 (1991); Frank E. Saal, Catherine B. Johnson & Nancy Weber, *Friendly or Sexy? It May Depend on Whom You Ask*, 13 PSYCH. WOMEN Q. 263 (1989).

171. USMSPB 1995, *supra* note 66, at 40–41 (noting that respondents deemed a policy among the “most effective an organization could take,” while also reporting that policies did not seem to change behavior of employees).

172. James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment*, 12 GENDER & SOC’Y 301, 316 (1998).

173. See *id.*; John B. Pryor, Christine M. LaVite & Lynette M. Stoller, *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction*, 42 J. VOCATIONAL BEHAV. 68 (1993).

174. Blakely et al., *supra* note 168, at 80.

175. Ronni Sandroff, *Sexual Harassment in the Fortune 500*, 13 WORKING WOMAN 69, 73 (1988).

176. EEOC ENFORCEMENT GUIDANCE, *supra* note 130, § V.C.2.

177. *Id.*

a new training program to foster “respectful workplaces.”<sup>178</sup> Survey respondents share the EEOC’s optimism about the effectiveness of training.<sup>179</sup>

While most courts tend to view anti-harassment training as relevant to the question of employer liability, there is much more variation in the way they value it than there is with policies and procedures. Unlike anti-harassment policies and internal grievance procedures, training in most circumstances is not considered a mandatory measure.<sup>180</sup> In cases brought under Title VII, no employer has ever failed to succeed on the affirmative defense or failed to refute an allegation of negligence *solely* because it failed to offer anti-harassment training.<sup>181</sup> A few courts have faulted companies for failing to offer training pursuant to their own policies that mandated it,<sup>182</sup> but courts in only a single jurisdiction, interpreting state rather than federal law, have held training to be an essential component of liability avoidance.<sup>183</sup>

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178. EEOC Press Release, *Respectful Workplaces*, *supra* note 139.

179. USMSPB 1995, *supra* note 66, at 43.

180. Several states, however, require at least certain employers to offer training. *See, e.g.*, CAL. GOV’T CODE § 12950.1(a) (2021) (requiring employers with fifty or more employees to provide “at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees” and to repeat training every two years); CONN. GEN. STAT. § 46a-54(15) (2021) (requiring employers with more than three employees to provide sexual harassment training to supervisory personnel); 775 ILL. COMP. STAT. 5 / 2-105(B)(5)(c) (2020) (requiring, among other things, that state agencies provide sexual harassment training to all employees); ME. REV. STAT. ANN. tit. 26, § 807 (2021) (requiring workplaces with fifteen or more employees to conduct anti-harassment training for all employees covering basic information about harassment law and internal grievance procedures and to offer additional training for supervisory employees that focuses on their unique responsibilities to address problems of harassment); VT. STAT. ANN. tit. 21, § 495h (2021) (requiring all employers to adopt a policy against sexual harassment and encouraging them to offer sexual harassment training to all employees).

181. *See, e.g.*, *Dugger v. Or. Rest. Servs., Inc.*, No. CV. 05-547-PK, 2006 U.S. Dist. LEXIS 17893, at \*18–19 (D. Or. Mar. 28, 2006) (finding employer’s preventive efforts reasonable despite the lack of periodic harassment training); *Wahlstrom v. Metro-North Commuter R.R. Co.*, 89 F. Supp. 2d 506, 524 (S.D.N.Y. 2000) (noting that “Title VII does not require employers to provide [anti-harassment] training to every employee” and finding that employer took adequate preventative measures even though only managers received training); *Caldwell v. Leavitt*, 378 F. Supp. 2d 639, 664 (M.D.N.C. 2005), *aff’d in part, rev’d in part*, 289 Fed. App’x 579 (4th Cir. 2008) (finding that employer undertook reasonable preventative efforts even though no formal training was offered); *cf. Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001) (holding that employer’s prevention efforts were not inadequate solely because employees could not recall the details); *Hernandez-Payero v. Pereira*, 493 F. Supp. 2d 215 (D.P.R. 2007) (reversing summary judgment for employer because there were genuine issues of fact about the adequacy of its remedial measures; the fact that training was voluntary, rather than mandatory, and that one alleged harasser did not receive training were among the many issues raised by plaintiff to defeat employer’s defense).

182. *See EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 510, 514 (6th Cir. 2001) (noting that a jury might reasonably infer the company’s anti-harassment policy was “in name only” given the failure to provide training mandated by the company’s official procedures); *see also Mancuso v. City of Atlantic City*, 193 F. Supp. 2d 789, 804 (D.N.J. 2002).

183. *See Gaines v. Bellino*, 801 A.2d 322, 330 (N.J. 2002) (noting, under New Jersey’s Law Against Discrimination, that for an employer to earn a “safe haven from vicarious liability,” it must, among other things, offer “training for workers, supervisors, and managers concerning how to recognize and eradicate unlawful harassment;” training must be mandatory for supervisors and offered to all other employees); *Tarr v. Bob Ciasulli’s Mack Auto Mall, Inc.*, 822 A.2d 647, 654–55 (N.J. Super. Ct. App. Div. 2003) (holding employer liable for harassment where it failed to have a formal

The variation among courts comes both in the way they conceptualize the purpose of anti-harassment training and the weight they give it. With respect to purpose, courts might consider training as a means of preventing harassment, as a corrective measure for harassment, or as an inducement to victims to complain about harassment. They might also use training as evidence of the employer's subjective intent to maintain a workplace free of harassment or view training as a serious effort to reduce retaliation against victims who complain. The particular purpose for which the training is valued will dictate *who* is supposed to have attended—the supervisor who should have been monitoring the situation, the perpetrator who would have been deterred before engaging in harassing behavior or successfully re-educated afterward, the victim who should have known how to file an internal complaint, or the manager designated to receive or handle complaints who should have known how to respond to an internal grievance once filed. Within each possible purpose, courts also vary in the significance they accord anti-harassment training. And, in many, many cases, training is simply included in the recitation of facts or listed among a litany of actions the court seems to take into account when reaching general conclusions about the reasonableness or sufficiency of employers' actions when dealing with past or prospective harassment.

Policymakers urge training, employees are optimistic about its usefulness, and the law values it, even if unevenly. The research is more agnostic on the usefulness of training. There is relatively little data on the prevalence of training.<sup>184</sup> There is even less on its effectiveness.<sup>185</sup> Unfortunately, sexual harassment training programs often lack well-articulated theoretical or empirical foundations, which makes evaluation a challenge.<sup>186</sup> Varying along many dimensions (e.g., length, formality, amount of integration with other training and/or employees' normal work routine), such programs lack consistent rationales, goals, or procedures, and little research exists to guide their development or to assess their effectiveness.

Few studies exist that empirically evaluate programs designed to prevent sexual harassment. Those that do tend to find a positive but limited benefit. There

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policy against it and failed to provide any training on the issue), *aff'd in part, rev'd in part*, 853 A.2d 921 (N.J. 2004); *cf.* *Stevenson v. Precision Standard, Inc.*, 762 So. 2d 820, 823 (Ala. 1999) (noting testimony of plaintiff's expert that sexual harassment was inadequate because it was not mandatory, conducted only once, and attended only by supervisors). A handful of federal cases have suggested that training is an essential component of an "effective" policy, but no court has decided a case in which that standard was applied to preclude the employer from prevailing on the affirmative defense. *See, e.g.*, *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349–50 (6th Cir. 2005) (noting that "an effective policy should at least . . . provide for training regarding the policy").

184. A notable exception is Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481 (2018).

185. *See* Bisom-Rapp, *supra* note 136, at 164 ("There is, in light of currently available research, absolutely no scientific basis for concluding that harassment training fosters employee tolerance and greatly alters workplace culture.").

186. *See* Elizabeth O'Hare Grundmann, William O'Donohue & Scott H. Peterson, *The Prevention of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 175, 175–76 (William O'Donohue ed., 1997).

is more evidence that training affects the knowledge of participants rather than their attitudes or behavior.<sup>187</sup> The existing studies are perhaps more notable for their limits than their findings. Many involve questionable or nonexistent comparison groups or rely on small samples composed entirely of students. One well-designed study found that while training increased knowledge, it also made participants evaluate the effectiveness of the employer's grievance procedures less favorably, perhaps because some learned what they *could* do as much as what they *could not* do.<sup>188</sup> This study also found that individual attitudes and perceptions of the organization's tolerance of harassment were quite resistant to change.<sup>189</sup> More research is desperately needed to support the frequent call from experts for more sexual harassment awareness training.

As flawed as many of the preventative efforts are, the corrective measures are often worse. The law has the broad effect of internalizing dispute resolution and leaving control over the process to employers. One major flaw is that the entire system is predicated on the assumption that employers learn of harassment after victims complain. But, as discussed above, victims rarely file formal complaints. Research suggests that not only are victims unlikely to learn about the rules that place such a premium on filing an internal complaint, but also that even if they know of them, they will be unlikely to conform their behavior. Victims cite two primary reasons for foregoing formal complaint mechanisms. First, they fear retaliation and the potential consequences for economic security.<sup>190</sup> Second, they tend to believe a complaint will be futile, leaving them no better off and perhaps worse.<sup>191</sup> More research is needed about the conditions that might encourage more reporting.<sup>192</sup> Women of color are even less likely to report harassment because they are more likely to suffer economic vulnerability, to lack mobility in the workforce, to be disbelieved, to lack social support, and to distrust internal complaint

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187. See, e.g., Sandra J. Maurizio & Janet L. Rogers, *Sexual Harassment and Attitudes in Rural Community Care Workers*, 16 HEALTH VALUES 40, 41 (1992) (finding that participants who completed training were more likely to correctly define sexual harassment, understand its legal ramifications, evaluate it as more of a problem at work than they previously thought, and report fewer victim-blaming attitudes).

188. Vicki J. Magley, Louise F. Fitzgerald, Jan Salisbury, Fritz Drasgow & Michael J. Zickar, *Changing Sexual Harassment Within Organizations via Training Interventions: Suggestions and Empirical Data*, in THE FULFILLING WORKPLACE: THE ORGANIZATION'S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH (Ronald J. Burke & Cary L. Cooper eds., 2013).

189. See *id.*

190. Fitzgerald et al., *supra* note 35, at 122–23; see also Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 J. VOCATIONAL BEHAV. 102, 110–11 (1993). The law significantly underappreciates the role retaliation plays in shaping victim behavior. See, e.g., Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49 (2018).

191. Fitzgerald et al., *supra* note 35, at 127.

192. See Linda Brooks & Annette R. Perot, *Reporting Sexual Harassment: Exploring a Predictive Model*, 15 PSYCH. WOMEN Q. 31, 33 (1991).

procedures.<sup>193</sup> Moreover, racialized sexual stereotypes can make it difficult for women of color to convince a factfinder that sexual behavior is unwelcome—or that it is severe or pervasive enough to cause harm.<sup>194</sup> As Maria Ontiveros observed, for example, “Latinas are often perceived as readily available and accessible for sexual use, with few recriminations to be faced for abusing them.”<sup>195</sup> Black women have been central to the development of sexual harassment law—the plaintiff in the first sexual harassment case to reach the Supreme Court was a black woman—and yet are marginalized by activists and less likely to benefit from the movement’s successes.<sup>196</sup> Class status also intersects with sexual harassment to disadvantage lower-income women and those who work in traditionally male-dominated jobs. As Angela Onuachi-Willig observes, “courts have reified class bias, inequities, and stereotyped perceptions of blue-collar workers in sexual harassment law by insisting that the bar for proving sexual harassment is higher in blue-collar work environments because crass and crude language are common in such environments.”<sup>197</sup>

Suffice it to say that the near-universal adoption of anti-harassment policies and procedures has done little to alter the forces that keep most victims from complaining about harassment. Moreover, the rules of liability do not give employers the incentive to undertake efforts that might make complaining less fraught, such as eliminating gender imbalance in the workplace and maintaining tight control over the work environment. As explained above, the sweet spot for employers is a system that appears to elicit complaints while quietly squelching them.

When complaints do reach the employer, we see many potential flaws. Internal investigations are the centerpiece of the remedial approach endorsed by the Supreme Court, but there is no oversight of the investigations actually performed. Employers must conduct an investigation, but there is no real means to differentiate a masterful one from a botched one. One federal appellate court went so far as to

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193. See Hernández, *supra* note 74, at 295; see also Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST (Feb. 13, 2018), <https://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color> [https://perma.cc/976K-XD5H] (noting lower penalties for and lower prosecution rates of those who assault women of color).

194. See Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 185, 190–94 (1997).

195. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993).

196. See Angela Onuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 107 (2018); see also DeNee L. Brown, *She Said Her Boss Raped Her in a Bank Vault. Her Sexual Harassment Case Would Make Legal History.*, WASH. POST (Oct. 13, 2017, 8:17 AM), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history> [https://perma.cc/ZT9B-4D2R]; GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN’S LIVES AT WORK* 81–105 (2016).

197. Onuachi-Willig, *supra* note 196, at 110.

declare that it already has “enough to do” and that its job “does not include micromanaging internal investigations.”<sup>198</sup>

Internal investigations are plagued by some common pitfalls that undermine their fairness (actual and perceived) and effectiveness.<sup>199</sup> Investigations tend to fall short on measures of procedural justice (how the decision is made), interactional justice (how people are treated during the process), and distributive justice (whether the result is fair).<sup>200</sup> A flawed investigation is not only a problem for the incident at issue, but it also deters future complaints. The challenge of maintaining confidentiality is significant, and victims often cite this as a reason for foregoing an internal grievance procedure.<sup>201</sup> Second, all parties tend to view the investigation as biased.<sup>202</sup> Bias is likely unavoidable and undermines the ability of any procedure to deliver justice. The most significant problem is that the person handling the internal complaint, often a human resources employee, will have to transition from a purportedly neutral factfinder during the internal process to a fact witness for the employer in any eventual lawsuit.<sup>203</sup> This colors that person’s perspective from the outset. It should come as no surprise that in-house factfinders tend to be biased in favor of the institution, nor that they harbor their own explicit and implicit biases.<sup>204</sup> A lawsuit against Microsoft revealed that female employees had filed 118 complaints of gender discrimination between 2010 and 2016, and the internal investigation unit, part of what Microsoft describes as a “fair and robust system,” concluded that only *one* was founded.<sup>205</sup> Investigators may also have their own predispositions about sexual harassment that affect their the way they collect and evaluate evidence.<sup>206</sup> Gender, for example, may play a role, as men tend to take sexual harassment less seriously than women.<sup>207</sup> The bias can be hard to spot or

198. See *Baldwin v. Blue Cross/Blue Shield*, 480 F.3d 1287, 1304 (11th Cir. 2007).

199. See Peter W. Dorfman, Anthony T. Cobb & Roxanne Cox, *Investigations of Sexual Harassment Allegations: Legal Means Fair—or Does It?*, 39 HUMAN RESOURCES MGMT. 33 (2000) (outlining best practices for harassment investigations).

200. See *id.* at 34 (describing three basic measures of justice used in fields of management and organizational theory).

201. See Edward J. Costello Jr., *The Mediation Alternative in Sex Harassment Cases*, ARB. J., Mar. 1992, at 16, 17–18.

202. See *id.* at 18; Jonathan Day, *The Problem of Perceptions: Reasons for Outsourcing the Sexual Harassment Investigation*, 27 EMP. RELS. TODAY, Spring 2000, at 101, 103.

203. Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 506 (1993).

204. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1587 (1991).

205. Rachel Lerman, *118 Gender-Bias Complaints at Microsoft, but Firm Found Only 1 Was ‘Founded,’ Lawsuit Says*, SEATTLE TIMES (Mar. 20, 2018, 11:03 AM), <https://www.seattletimes.com/business/microsoft/female-microsoft-workers-file-118-gender-bias-complaints-in-7-years-but-firm-finds-only-1-was-founded/> [https://perma.cc/246Y-49HR].

206. Cf. Liza H. Gold, *Addressing Bias in the Forensic Assessment of Sexual Harassment Claims*, 26 J. AM. ACAD. PSYCHIATRY L. 563, 563 (1998).

207. See Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See It . . . Some Won’t*, HARV. BUS. REV. (March 1981), <https://hbr.org/1981/03/sexual-harassmentsome-see-itsome-wont> [https://perma.cc/6SLX-7798]; Gutek & Koss, *supra* note 163, at 44.

prove because even neutral procedures can produce biased results. Context matters. If women are relatively powerless within a particular institution or workplace, their complaints may be more likely to trigger retaliation.<sup>208</sup> Moreover, investigations are often carried out without the safeguards necessary to ensure fairness such as specialized training for the investigator.<sup>209</sup> Finally, the desire to avoid disrupting the work environment may also undercut the employer's skill at handling internal investigations.<sup>210</sup> Many of the problems faced by employers in investigating their own employees may be solved by deferring to neutral third-parties, but this is rarely done.<sup>211</sup>

The problems with internal dispute resolution are exacerbated by a legal regime that has no mechanism for measuring success—nor makes any attempt to do so. Employers might adopt better policies—or spend more time studying whether their existing policies work—if the law penalized them for failing to prevent or respond to sexual harassment appropriately. But there is reason for skepticism about internal investigations, even if the law spurred employers to work harder at maintaining a just system. The overriding purpose of antidiscrimination laws such as Title VII is to prevent discrimination in the workplace. Sociologists have raised important questions about whether any internal dispute resolution system is up to the task. Lauren Edelman, Howard Erlanger, and John Lande studied internal dispute resolution (IDR) systems to assess the extent to which they serve as an adequate substitute for legal processes.<sup>212</sup> One concern they identified is that employers have an interest in resolving grievances without necessarily naming the problem as discrimination or preventing it from recurring.<sup>213</sup> The law, these researchers found, plays a relatively small role in the internal handling of complaints.<sup>214</sup> Internal investigation handlers tend to recast discrimination as a managerial problem.<sup>215</sup> This permits the conflict to be addressed without “labeling and condemning discrimination where it does in fact exist.”<sup>216</sup> But the renaming can harm the interest in redress of the target and fail to deter similar behavior in the future. The flaws these researchers have identified are significant enough to raise questions about whether the law should require or even encourage the internal resolution of discrimination complaints, rather than permitting targets to take their grievances immediately to the legal system.

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208. See Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCH. 497, 500 (1991).

209. See, e.g., Mark L. Lengnick-Hall, *Checking Out Sexual Harassment Claims*, HR MAG., Mar. 1992, at 77, 81; see also Dorfman et al., *supra* note 199, at 33.

210. See Costello, *supra* note 201, at 17–18.

211. See Day, *supra* note 202, at 106; Susan Gardner & Kathryn Lewis, *Sexual Harassment Investigations: A Portrait of Contradictions*, SAM ADVANCED MGMT. J., Autumn 2000, at 29, 33.

212. See Edelman et al., *supra* note 203.

213. See *id.* at 499–500.

214. *Id.* at 500.

215. *Id.* at 511.

216. *Id.* at 516. One caveat to this finding is that the authors found complaint handlers “most likely to recognize discrimination in sexual harassment cases.” *Id.* at 523.

## 2. Omitted Measures

While it is easy to catalog the flaws in the measures that are most commonly taken by organizations in their efforts to navigate sexual harassment liability, our time might be better spent focusing on the measure they have no incentive to take—but which might work. The law pays no attention at all to organizational culture, ignores ties between harassment and gender equity more generally, and is ill-equipped to deal with avoidance practices that men sometimes lapse into in response to increased enforcement of sexual harassment law.

Decades of research into sexual harassment confirm that organizational culture is a strong correlate with levels of harassment. “[Organizational] [c]limate is an important driver of harassment because it is the norms of the workplace; it basically guides employees . . . to know what to do when no one is watching.”<sup>217</sup> Organizational factors relate to the workplace environment rather than the characteristics of any particular individual who works there. Organizational culture is defined as “the collectively held beliefs, assumptions, and values held by organizational members.”<sup>218</sup> Organizational climate is the “shared perceptions within an organization of the policies, practices, and procedures in place (i.e., why they are in place; how people experience them; how they are implemented; what behaviors in the organization are rewarded, supported, and expected.)”<sup>219</sup> Organizational culture and climate work in tandem—the climate reflects the culture, and the culture shapes the climate.

The impact of leader behavior on the organizational culture and climate holds true in the context of sexual harassment. Studies show that managers’ attitudes of harassment positively correlate with the level of harassment.<sup>220</sup> Even more relevant to many recent #MeToo scandals, situations in which those in power share sexist views and engage in sexually harassing behavior can facilitate and encourage others to engage in sexually harassing behavior.<sup>221</sup> Studies show, for example, that men

217. Select Task Force Meeting of June 15, 2015 – Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Written Testimony of Mindy Bergman, Associate Professor of Psychology, Texas A&M University, U.S. Equal Emp. Opportunity Comm’n (June 15, 2015), <https://www.eeoc.gov/written-testimony-mindy-bergman-associate-professor-psychology-texas-am-university> [<https://perma.cc/6SK9-ELDA>].

218. Cailin S. Stamarski & Leanne S. Son Hing, *Gender Inequalities in the Workplace: The Effects of Organizational Structures, Processes, Practices, and Decision Makers’ Sexism*, 6 FRONTIERS PSYCH., no. 1400, Sept. 2015, at 1, 7; see also Marion McCollom, Book Review, 19 ACAD. MGMT. REV. 836, 836 (1994) (reviewing HARRISON M. TRICE & JANICE M. BEYER, *THE CULTURE OF WORK ORGANIZATIONS* (1993)); EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 219 (4th ed. 2010).

219. NASEM, *supra* note 68 at 121; Isis H. Settles, Lilia M. Cortina, Janet Malley & Abigail J. Stewart, *The Climate for Women in Academic Science: The Good, the Bad, and the Changeable*, 30 PSYCH. WOMEN Q. 47, 48 (2006).

220. Pryor et al., *supra* note 173, at 70.

221. Inez Dekker & Julian Barling, *Personal and Organizational Predictors of Workplace Sexual Harassment of Women by Men*, 3 J. OCCUPATIONAL HEALTH PSYCH. 7, 7–8 (1998); Elissa L. Perry, Carol T. Kulik & James M. Schmidtke, *Individual Differences in the Effectiveness of Sexual Harassment Awareness Training*, 28 J. APPLIED SOC. PSYCH. 698, 702 (1998); Pryor et al., *supra* note 173, at 79.

with a high propensity to sexually harass women are even more likely to harass after witnessing an authority figure engage in sexually exploitative behavior.<sup>222</sup> Surveys of particular workplace environments confirm this effect. For example, a survey conducted by the Department of Defense showed that a higher percentage of harassing incidents occurred where the commanding officer was deemed to encourage harassment.<sup>223</sup> Another study found that the viewing of a sexist film increased the likelihood that the less sexist men would engage in gender harassment.<sup>224</sup> Men who are shown a video portraying successful women in STEM fields are less likely to send unsolicited sex jokes or to profess a willingness to engage in sexual coercion than men who are shown sexist TV clips.<sup>225</sup> As the National Academies of Sciences, Engineering, and Medicine (NASEM) report observes based on available research,

[A] person that has proclivities for sexual harassment will have those behaviors greatly inhibited when exposed to role models who behave in a professional way as compared with role models who behave in a harassing way, or when in an environment that does not support harassing behaviors and/or has strong consequences for these behaviors.<sup>226</sup>

Studies show that the converse is also true—men are less likely to engage in sexual harassment when those behaviors are not exhibited or condoned by authority figures in the workplace.<sup>227</sup> While leaders at the top have great influence on the organization's culture, managers throughout the hierarchy also influence the climate and culture.<sup>228</sup>

All of this is complicated by an additional wrinkle—it is difficult for employers to address misconduct by executives. The internal grievance structures are least likely to effectively resolve the problems created by an executive's misconduct, and those with oversight such as board members or other executives are likely to be hesitant to take action against high-ranking executives, especially the CEO, for fear of damaging the operational side of the business, the company's reputation, or the career of a colleague who they might otherwise hold in high regard. The recent scandals involving Harvey Weinstein, Roger Ailes, and Les Moonves illustrate these

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222. Pryor et al., *supra* note 173, at 79.

223. DEF. MANPOWER DATA CTR., U.S. DEP'T OF DEF., DMDC REP. NO. 96-014, 1995 SEXUAL HARASSMENT SURVEY (1996); Pryor et al., *supra* note 173, at 71.

224. Robert T. Hitlan, John B. Pryor, Matthew S. Hesson-McInnis & Michael Olson, *Antecedents of Gender Harassment: An Analysis of Person and Situation Factors*, 61 *SEX ROLES* 794, 799 (2009).

225. Anne Maass, Mara Cadinu & Silvia Galdi, *Sexual Harassment: Motivations and Consequences*, in *THE SAGE HANDBOOK OF GENDER AND PSYCHOLOGY* 341, 350 (Michelle K. Ryan & Nyla R. Branscombe eds., 2013).

226. NASEM, *supra* note 68, at 46.

227. Pryor et al., *supra* note 173, at 80.

228. Settles et al., *supra* note 219, at 48.

challenges, as well as the very serious risks of not addressing executive sexual misconduct.<sup>229</sup>

An organization's climate is by far the most significant predictor of harassment. Research makes clear that workplace norms influence both the level of harassment and how victims respond to it.<sup>230</sup> Organizational culture, which both reflects and can reinforce societal culture, can play a role in facilitating or suppressing sexual harassment. Industrial organization scholars suggest that sexual harassment is "the result of certain opportunity structures created by organizational climate, hierarchy, and specific authority relations."<sup>231</sup> This means, in effect, that men have more opportunity to victimize women given the "prevailing organizational structure in our society, in which most positions of authority are held by men, who often practice their power and exploit their organizational positions for sexual profit."<sup>232</sup> This might explain why sexual harassment levels are higher in traditionally male occupations.<sup>233</sup> Harassment can also be explained in part by

229. See, e.g., Kantor & Twohey, *Sexual Misconduct Claims Trail a Hollywood Mogul*, *supra* note 3; Twohey & Chokshi, *supra* note 6. On the scandals at Fox News, see, for example, Grossman, *supra* note 7; Creswell et al., *supra* note 24; Rutenberg, *supra* note 56 (exploring the ways in which Bill O'Reilly, Harvey Weinstein, Bill Cosby, and others were able to keep "their alleged misconduct under wraps with the help of the nondisclosure agreements included as part of the numerous out-of-court settlements that allowed them to admit no wrongdoing"); Rachel Abrams & Edmund Lee, *Les Moonves Obstructed Investigation into Misconduct Claims, Report Says*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/business/media/les-moonves-cbs-report.html> [<https://perma.cc/W4PJ-26WY>].

230. Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED SOC. PSYCH. 877 (1997); Sandra S. Tangri, Martha R. Burt & Leann B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33, 37–38 (1982); Lach & Gwartney-Gibbs, *supra* note 190, at 108–09; Mary Sullivan & Deborah I. Bybee, *Female Students and Sexual Harassment: What Factors Predict Reporting Behavior?*, 50 J. NAT'L ASS'N FOR WOMEN DEANS ADM'RS & COUNS. 11 (1987); Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequents of Workplace Sexual Harassment*, 60 PERS. PSYCH. 127 (2007); Dekker & Barling, *supra* note 221, at 8; Theresa M. Glomb, Wendy L. Richman, Charles L. Hulin, Fritz Drasgow, Kimberly T. Schneider & Louise F. Fitzgerald, *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 309, 322–23 (1997); Hitlan et al., *supra* note 224.

231. Tangri et al., *supra* note 230, at 34; see also Jeanette N. Cleveland & Melinda E. Kerst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, 42 J. VOCATIONAL BEHAV. 49, 63 (1993).

232. Azy Barak, Yael Pitterman & Rivi Yitzhaki, *An Empirical Test of the Role of Power Differential in Originating Sexual Harassment*, 17 BASIC & APPLIED SOC. PSYCH. 497, 498 (1995) (citing Tangri et al., *supra* note 230, at 37–38); see also Chamallas, *supra* note 105, at 40 n.10 (describing Catharine MacKinnon's theory of sexual harassment as structuralist, stressing that "women are susceptible to harassment because of occupational segregation, a situation in which most women occupy low status, low paying jobs and tend to be supervised by men"); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 (1990) (employing similar structuralist approach to analyzing sex inequality in the workplace).

233. See Gruber, *supra* note 172, at 314 (finding that "[g]ender predominance is an important predictor of both physical threat and sexual materials"); James E. Gruber, *The Sexual Harassment Experiences of Women in Nontraditional Jobs: Results from Cross-National Research*, PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON SEX AND POWER IN THE WORKPLACE: A CONFERENCE TO

sociocultural theory. Gendered power differentials in society as a whole can contribute to sexual harassment in the workplace. Under this theory, sexual harassment is

an abuse of the powerful over the powerless. Because of the patriarchal structure of our society and culture, men (who are more likely to be powerholders) are more likely than women to sexually harass. And women, who are more likely to be powerless, are more likely than men to be sexually harassed.<sup>234</sup>

Drawing on this theory, feminist theorists describe sexual harassment as only “one manifestation of a pervasive cultural enforcement of gender inequality.”<sup>235</sup> This approach focuses on the ways in which men are socialized into “domineering sexual behaviors” and women are socialized into complementary passive and acquiescent roles.<sup>236</sup> A variety of data points reinforce this explanation for sexual harassment, including the disproportionately high number of male harassers and female victims, as well as the high rates of harassment in workplaces with a big disparity in the number of men and women employed.<sup>237</sup> Although we know that power plays a significant role in the occurrence of sexual misconduct, we know little about how to predict its consequences beyond that most harassers will be male and most targets will be female.<sup>238</sup> But if we dismantle the gender hierarchy that continues to form society’s scaffolding, we may find that it ameliorates the problem of sexual misconduct at the same time.

If one wanted to make predictions about the likelihood that sexual misconduct might occur in a particular workplace, one would look at studies correlating harassment with certain types of organizational environments. This offers more promise than an in-depth analysis of the causes of harassment. Studies, for example, have found a correlation between sexual harassment and measurable variables such as the “visibility and contact in sex-integrated jobs; the sex ratio; occupational

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PROMOTE WOMEN AND MEN WORKING PRODUCTIVELY TOGETHER 128 (1992); Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433, 441 (1986); Robert E. Niebuhr & Wiley R. Boyles, *Sexual Harassment of Military Personnel: An Examination of Power Differentials*, 15 INT’L J. INTERCULTURAL RELS. 445, 452 (1991).

234. Stockdale, *supra* note 83, at 96; *see also* Barak et al., *supra* note 232, at 498–99 (describing harassment as “basically a product of norms, values, stereotypes, myths, and general relevant expectations and beliefs that prevail in Western society, which generally delineate male dominance over women”).

235. Tangri et al., *supra* note 230, at 35; *see also* Barak et al., *supra* note 232, at 499 (describing the “sexual harassment phenomenon chiefly as an exhibition of attempts of male dominance to overpower females and emphasiz[ing] female subordination and even ownership”); Nicholas Davidson, *Feminism and Sexual Harassment*, 28 SOC’Y 39, 41 (1991) (describing feminist definition of sexual harassment by reference to the presumption “that the man holds power with which he is able to coerce the woman [to submit to sexual advances]”).

236. *See* Tangri et al., *supra* note 230, at 40.

237. *Id.* at 41.

238. *Id.* at 40–41.

norms; one's job function; and availability of grievance procedures and job alternatives."<sup>239</sup>

There has also been important work done in understanding the connection between workplace norms and sexual harassment. Sexual harassment is more likely in highly sexualized work environments, male-dominated work environments, and work environments in which the employers exercise little or no control over behavior.<sup>240</sup> The level of harassment is also inversely correlated with perceived equal employment opportunity.<sup>241</sup> Harassment will flourish in workplaces in which there is simply a norm of employer tolerance or even subtle encouragement of harassing behavior.<sup>242</sup> Studies also show that "norms set by local management importantly contribute to the occurrence of sexual harassment"; in other words, there is a correlation between whether management effectively reacts to sexual harassment and whether it continues to occur.<sup>243</sup> If "top management condones sexual harassment by ignoring it, discouraging complaints, or participating in it, then those disposed to sexually harass will be likely to do so."<sup>244</sup>

An empirical study by Elizabeth O'Hare and William O'Donohue used a four-factor model for predicting and explaining sexual harassment and found that the strongest risk factors for harassment were "a lack of knowledge about grievance procedures for sexual harassment, an unprofessional atmosphere, and the existence of sexist attitudes in the workplace."<sup>245</sup>

This research on organizational factors that contribute to harassment is so important to understanding the predicament unearthed by the 2017 #MeToo movement. The law has utterly failed to capture this aspect of organizational behavior. The law is designed neither to measure organizational culture nor to reward or punish an employer for the culture they have fostered (or failed to foster). Culture doesn't fit within the rules of liability that are premised on identifying a bad actor and determining the employer's level of culpability in facilitating that actor's misconduct. This approach might overpenalize an institution that maintains a strong egalitarian culture but is stunned by an outlier's misconduct, but likewise, it is likely to miss the many subtle things an institution might do to egg on or overlook the behavior of many in its midst. Leadership and accountability are the two most

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239. *Id.* at 38–40 (predicting identity of victims and harassers, and level of harassment, based on varying organizational factors).

240. *See id.* (explaining the role of local norms and employer control in fostering sexual harassment).

241. *See* Lafontaine & Tredeau, *supra* note 233, at 441.

242. *See* Pryor et al., *supra* note 173, at 78 (applying the concept of "behavioral contagion" to sexual harassment); *id.* at 70 (concluding, based on survey data, that "sexual harassment seems to be more likely to occur when local norms permit such behavior").

243. *Id.* at 73.

244. *Id.* at 80; *see also* Theresa M. Glomb, Liberty J. Munson, Charles L. Hulin, Mindy E. Bergman & Fritz Drasgow, *Structural Equation Models of Sexual Harassment: Longitudinal Explorations and Cross-Sectional Generalizations*, 84 J. APPLIED PSYCH. 14, 26 (1999) (finding a relationship between organizational tolerance and sexual harassment).

245. O'Hare & O'Donohue, *supra* note 83, at 576.

significant movers of organizational culture. Values and culture come from the top, but they do not survive without reinforcement at every level with concrete actions. As the research proves, policies and procedures are not self-executing; effective enforcement is what matters. Well-handled complaints can help improve an egalitarian and anti-harassment culture; poorly handled ones can diminish it. The key characteristics of an organization with permissive attitudes toward harassment are (1) perceived risk to targets for complaining, (2) a perceived lack of sanctions against offenders, and (3) the perception that one's complaints will not be taken seriously.<sup>246</sup> Organizational tolerance is associated with higher levels of all three types of sexual harassment discussed in Section I. Indeed, the "degree to which a particular organization's climate is seen by those in the organization as permissive of sexual harassment has the strongest relationship with how much sexual harassment occurs in the organization."<sup>247</sup> One meta-analysis that combined data from forty-one studies (covering almost 70,000 survey respondents) found the perception of organizational tolerance of harassment to be the single best predictor of sexual harassment in a workplace.<sup>248</sup> Studies clearly show that the level of enforcement of a company's policies affects the incidence of harassment.<sup>249</sup> Yet, the quality of enforcement measures is the aspect least captured by the rules of employer liability. The *Faragher/Ellerth* rules are not a good fit for measuring these institutional qualities. If one were to sum up the flaws in the current system in a single phrase, "lack of accountability" might well be the most apt one. As the president of Federally Employed Women said of a report about the mishandling of sexual misconduct complaints at the Department of Justice, "What is alarming about the Civil Division and what rings true for the entire labor force is the lack of accountability for individuals committing acts of sexual misconduct due to the absence of punitive procedures."<sup>250</sup>

The second gaping omission in sexual harassment law involves the horizontal and vertical integration of women in the workplace—up and down the scale within an employer's hierarchy and across the occupational spectrum. Researchers have always known—and been able to prove—that sexual harassment does not occur separate and apart from other types of gender inequity. Sexual harassment is more common in work forces with poor gender integration. As Catharine MacKinnon has observed, the "dynamics of inequality have preserved the system in which the more power a man has, the more sexual access he can get away with compelling."<sup>251</sup> People with highly stereotyped attitudes about gender score higher on the

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246. NASEM, *supra* note 68, at 47; *see also* Charles L. Hulin, Louise F. Fitzgerald & Fritz Drasgow, *Organizational Influences on Sexual Harassment*, in 5 *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* 127, 129–30 (Margaret S. Stockdale ed., 1996).

247. NASEM, *supra* note 68, at 121; Willness, *supra* note 230.

248. Willness et al., *supra* note 230.

249. Pryor et al., *supra* note 173, at 72.

250. Davidson, *supra* note 9, at 2.

251. MacKinnon, *supra* note +.

“likelihood to sexually harass” scale.<sup>252</sup> Victims are less likely to complain about harassment when they are greatly outnumbered by men at work. Women of color are more likely to be harassed than white women. These are just a few of the data points that show the interrelationship between sexual harassment and other types of inequality. But one side effect of the #MeToo movement is that other stories of racial and gender inequality may gain more traction. Recent surveys show that the vast majority of respondents believe sexual harassment is more symptomatic of widespread problems in society than the product of individual bad actors, and most agree that while the issue of sexual harassment is very important, sexual harassment is just one symptom of a larger set of gender problems.<sup>253</sup> If one looks, there is plenty to see. Occupational segregation remains entrenched; the gender wage gap is stark and hasn’t lessened much since the 1980s; women do not advance at the same rates in most occupations nor reach the same heights as their male counterparts; and studies abound showing the persistence of implicit and explicit bias in addition to the vestiges of past discrimination. The fact that there are more CEOs of large companies named John than there are women (of any name) is telling.<sup>254</sup> And perhaps the first step is to understand that sexual harassment is part and parcel of a broader system of gender inequity. We would do better to tackle the many ways in which working women labor unequally—in every respect from pay to advancement to biased evaluation—before narrowing our focus to sexual misconduct. But, again, the law sees no connection between sexual harassment and gender equity and is woefully inadequate for addressing gender equity alone.

A third omission is the law’s failure to grapple with gender avoidance practices. The increased pressure and escalated discipline for sexual misconduct come with gender sidelining—minimizing the risk of a sexual harassment accusation by limiting contact at work with women. The #MeToo movement has been followed in short order by “backlash against backlash,” because “power does not willingly cede its clout.”<sup>255</sup> The practice of avoiding women at work is well-documented and has become more pervasive in the #MeToo era. A survey by the *Harvard Business Review* found that sixty-four percent of male executives expressed reluctance to meet one-on-one with junior female colleagues; a *New York Times* survey discovered that forty-five percent of men felt it inappropriate to dine alone with a female coworker, and twenty-two percent thought the same of attending a meeting alone with a

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252. See Stockdale, *supra* note 83, at 84, 86.

253. John Gramlich, *10 Things We Learned About Gender Issues in the U.S. in 2017*, PEW RESEARCH CENTER: FACT TANK (Dec. 28, 2017), <https://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/> [<https://perma.cc/E2M7-GFF3>]. For a more extended analysis, see generally JOANNA L. GROSSMAN, *NINE TO FIVE: HOW GENDER, SEX, AND SEXUALITY CONTINUE TO DEFINE THE AMERICAN WORKPLACE* (2016).

254. Claire Cain Miller, Kevin Quealy & Margot Sanger-Katz, *The Top Jobs Where Women Are Outnumbered by Men Named John*, N.Y. TIMES: UPSHOT (Apr. 24, 2018), <https://www.nytimes.com/interactive/2018/04/24/upshot/women-and-men-named-john.html> [<https://perma.cc/W7L5-86BW>].

255. Kingsolver, *supra* note 43.

female coworker.<sup>256</sup> Studies also suggest that this behavior has increased specifically to avoid the perception of harassment.<sup>257</sup> Such practices clearly violate Title VII when they affect women's work opportunities, yet they are both pervasive and hard to prove. Gender sidelining is likely to be most damaging in careers where success depends on networking, mentoring, or business-building. Moreover, the premise on which men often admit to avoidance behaviors—that they are worried about false accusations—is unfounded. Survey data shows that false reports of harassment and other types of sexual misconduct are extremely uncommon but that false denials of improper conduct are extremely high. The estimated rate of false reports of rape and sexual assault are between two to ten percent.<sup>258</sup> The estimates for false reports of sexual harassment in the workplace are as low or lower.<sup>259</sup> Employers surveyed report that at most two to three percent of sexual harassment complaints are false.<sup>260</sup> The rate of false reports is so low at least in part because coming forward with an allegation of sexual harassment is not costless. Employees who voice such complaints risk retaliation, social ostracization, and other types of adverse consequences.<sup>261</sup> Moreover, research shows that truly false reports—allegations of

256. Sylvia Ann Hewlett, *As a Leader, Create a Culture of Sponsorship*, HARV. BUS. REV. (Oct. 8, 2013), <https://hbr.org/2013/10/as-a-leader-create-a-culture-of-sponsorship> [<https://perma.cc/P84H-7JMY>]; Claire Cain Miller, *It's Not Just Mike Pence. Americans Are Wary of Being Alone with the Opposite Sex.*, N.Y. TIMES: UPSHOT (July 1, 2017), <https://www.nytimes.com/2017/07/01/upshot/members-of-the-opposite-sex-at-work-gender-study.html> [<https://perma.cc/7F48-NYUK>]; see also Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV. (Sept.–Oct. 2019), <https://hbr.org/2019/09/the-metoo-backlash> [<https://perma.cc/V8T7-HW8A>].

257. See *Harassment-Free Workplace Series: The Executive View*, SHRM (Oct. 4, 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/harassment-free-series-executive-view.aspx> [<https://perma.cc/DR4N-XRCF>] (reporting new survey data showing that one-third of executives engaged in gender avoidance behaviors in order to avoid the perception of harassment).

258. See, e.g., KIMBERLY A. LONSWAY, JOANNE ARCHAMBAULT & ALAN BERKOWITZ, END VIOLENCE AGAINST WOMEN INT'L, FALSE REPORTS: MOVING BEYOND THE ISSUES TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 34 (2019), <http://evaw.threegate.com/Library/DocumentLibraryHandler.ashx?id=38> [<https://web.archive.org/web/20201031161228/http://evaw.threegate.com/Library/DocumentLibraryHandler.ashx?id=38>]; David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1318 (2010); LIZ KELLY, JO LOVETT & LINDA REGAN, HOME OFFICE RESEARCH STUDY 293: A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES (2005); Jackie Fielding, *Men Fear False Allegations. Women Fear Sexual Misconduct, Assault, and Rape.*, MINN. L. REV.: DE NOVO ARCHIVE (Nov. 25, 2018), <https://minnesotalawreview.org/2018/11/25/men-fear-false-allegations-women-fear-sexual-misconduct-assault-and-rape/> [<https://perma.cc/A9BZ-S9PA>].

259. See SHRM SURVEY, *supra* note 76, at 6.

260. “It is estimated that less than one percent of sexual harassment claims are false.” John W. Whitehead, *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMP. L. REV. 773, 776 (1998).

261. See, e.g., Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 604–05 (2007); see also Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57–58 (2006) (describing retaliation that followed complaint of sexual harassment); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 725 (2000) (“For women in professional careers, such as law, medicine, or

conduct that did not happen—are usually easy to ferret out during the course of a proper investigation.<sup>262</sup> True claims may be unsubstantiated, or true but not in violation of any relevant laws or policies, but those are also determinations that cannot be made without a full investigation.

#### CONCLUSION

There can be no doubt that the #MeToo movement has shifted the societal terrain. It provoked new, if uncomfortable, conversations and provided a common language for talking about a pervasive problem, even if it did not unite a critical mass around common goals. It capitalized on the unsung work of activists of color, who had laid the groundwork for collective action, forcing a painful realization that it was not until famous white woman sounded the alarm that many rose up to support them. As actress Gabrielle Union pointed out, “I don’t think it’s a coincidence whose pain has been taken seriously. Whose pain we have showed historically and continued to show. Whose pain is tolerable and whose pain is intolerable. And whose pain needs to be addressed *now*.”<sup>263</sup>

Whatever the spark, the #MeToo movement has also increased polarization in our already divided country, an effect that was seen in voter views of Justice Brett Kavanaugh’s confirmation to the Supreme Court in the face of a credible allegation of sexual assault. But institutions like employers and universities do not have the luxury of just digging in on one pole or the other. As they struggle to compete in a complex world, they must respond to the #MeToo movement and the ways in which it has challenged business-as-usual practices.

The 2017 #MeToo movement is a stark reminder that the legal regime is imperfect—and certainly not omnipotent. We have invested great faith in the development of legal doctrine while ignoring the persistence of the problem. To a certain degree, this state of affairs was predictable. From an institutional perspective, sexual harassment has always been treated like a legal problem, but its roots are so much deeper. As Catherine MacKinnon pointed out, “It is widely thought that when

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academics, silence in the face of harassment may be a calculated measure to avoid losing the sponsorship or mentorship of an older, more established male partner, doctor, or tenured professor.”); Brian S. Klaas & Angelo S. DeNisi, *Managerial Reactions to Employee Dissent: The Impact of Grievance Activity on Performance Ratings*, 32 ACAD. MGMT. J. 705, 711 & tbl.1 (1989) (reporting results of study showing that supervisors deflated performance evaluations to punish employees who file and prevail in grievances against public sector employer); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 257–60 (2004) (analyzing types of retaliation against those who complain of sexual harassment); Richard B. Peterson & David Lewin, *Research on Unionized Grievance Procedures: Management Issues and Recommendations*, 39 HUM. RES. MGMT. 395, 401 (2000) (finding lower measures on attendance, promotion rates, performance rates, and higher departure rates for union workers who filed grievance compared with those who did not).

262. See LONSWAY ET AL., *supra* note 258, at 36–37

263. Hayley Krischer, *We’re Going to Need More Gabrielle Union*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/style/gabrielle-union-memoir.html> [https://perma.cc/2X2T-N3HW].

something is legally prohibited, it more or less stops.”<sup>264</sup> But, she continued, “[t]his may be true for exceptional acts, but it is not true for pervasive practices like sexual harassment, including rape, that are built into structural social hierarchies.”<sup>265</sup> Employers manage their risk of being sued for sexual harassment much like they manage their risk of a workers’ compensation claim or a fire or any type of lawsuit. Sexual harassment is bad, in this world view, because it might lead someone to bring a lawsuit under Title VII or some other applicable antidiscrimination statute. What that translates to in practice is a set of precautionary and reactive measures that align closely with the rules of liability for sexual harassment. Employers turn to policies, procedures, and training as the means of preventing and responding to sexual harassment because those are the things that courts reward when assessing liability. The rule-compliance that has become the benchmark by which employers and victims are measured is a fatal flaw. Susan Bisom-Rapp has described this problem with respect to antidiscrimination law generally as “masking rather than eliminating workplace bias.”<sup>266</sup> The liability rules in place overlook the significant control employers exercise over the workplace and their ability to establish norms of respect and equality, to respond to problems in a manner that both resolves them and encourages future victims to come forward, and to discipline offenders. Forty years into this adventure, there can be no doubt that very good rule-compliance can coexist with startling levels of harassment and untold consequences for women’s equal employment opportunity.

With a liability-minimizing approach, institutions reduce the number of lawsuits and increase the chance of success when they are filed. The win rate for plaintiffs in discrimination cases is lower than for all other civil causes of action. Moreover, if the strategy fails—and an institution is found liable for harassment—the worst-case scenario is often not that bad for the employer.<sup>267</sup> Under Title VII, damages are capped at low rates that have not risen since first enacted in 1991. Under Title IX, damages are not capped, but the threshold for liability is set so high that it is virtually impossible for a plaintiff to prevail against an educational institution in a sexual harassment case. We overestimate the degree to which law can change culture.<sup>268</sup> Civil rights laws often have the effect of making overt discrimination covert. That allowed us to believe that harassment was becoming less common—and we became complacent. The stories and scandals that emerged as a result of the #MeToo movement have broken that spell but do not provide an obvious way forward.

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264. MacKinnon, *supra* note 4.

265. *Id.*

266. Bisom-Rapp, *supra* note 149, at 1039.

267. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

268. See Debbie S. Dougherty, *The Omissions that Make So Many Sexual Harassment Policies Ineffective*, HARV. BUS. REV. (May 31, 2017), <https://hbr.org/2017/05/the-omissions-that-make-so-many-sexual-harassment-policies-ineffective> [<https://perma.cc/MX9U-7X9X>] (focusing on the role of organizational culture in facilitating harassment).

The landscape has shifted, however, perhaps seismically. Those uncontrollable forces, which threaten significant reputational and economic harm, may prove to get employers to refocus on preventing and responding to harassment rather than on the meaningless proxies the law encourages. In a better world, employers would assess the prevalence and nature of harassment in their own workplaces before identifying the strategies and efforts most likely to address their version of the problem and its dire consequences for women. Most importantly, employers might have an incentive to evaluate their efforts—and pivot if the results are disappointing.

There are many obstacles to change in the sexual harassment context. A core problem is that the typical employer's approach to preventing and correcting harassment relies on victim reporting—a system endorsed and incentivized by the Supreme Court in a series of cases about sexual harassment liability. But most harassment victims do not report incidents of harassment to an authority figure inside or outside the workplace. Reporting is, in fact, the least common response of women who experience harassment—something only eight to fifteen percent of them do. Increasing reporting is no easy task, however. Women who do not report harassment cite futility—the belief that nothing will be done to fix the situation—and the fear of retaliation as their primary reasons for keeping quiet. When a woman makes this calculation and concludes that the benefits of reporting are outweighed by the costs, she is often right. Studies show that discrimination victims who file formal complaints end up worse off than those who don't.

The #MeToo movement may address the futility concern, since employers feel greater pressure to take action in response to complaints—and might be held accountable at least by the public if the measures they take are merely calculated to minimize liability rather than to stop the harassment from recurring with the same or other victims. But it is too soon to tell. In addition to the greater number of firings noted in the recent study, there is other evidence that business-as-usual might not be tolerated as much in the future. While #MeToo may have triggered backlash, it has also induced many people to believe women (itself now a saying and hashtag). The movement is “eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims.”<sup>269</sup>

The movement has also spurred institutions to take a close look at their own practices and propose or mandate reform. Google and Facebook, for example, voluntarily eliminated forced arbitration for sexual harassment claims.<sup>270</sup> The ABA

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269. MacKinnon, *supra* note 4.

270. See Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow.*, WASH. POST (Nov. 12, 2018, 1:42 PM), <https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/> [<https://perma.cc/V75T-8FHT>]; see also Terri Gerstein, Opinion, *End Forced Arbitration for Sexual Harassment. Then Do More.*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook->

House of Delegates passed a resolution urging a variety of changes in legal profession employers.<sup>271</sup> The National Academies of Science, Engineering, and Medicine has just published a comprehensive and wide-ranging report on the nature, prevalence, and consequences of sexual harassment in academia.<sup>272</sup> Other professions and academic associations have redefined professional misconduct to include sexual harassment. It's too early to take stock of the changes because the lasting and effective ones might be few and far between. But it is safe to say that sexual harassment is being taken more seriously by a variety of institutional players.

The #MeToo movement has brought more attention to sexual harassment, to be sure, and spurred some efforts to quantify the problem across different industries.<sup>273</sup> In addition to changes in awareness, the movement has provoked some changes in state law already.<sup>274</sup> Thirteen states, for example, have banned or

employment.html [https://perma.cc/8JT4-LN9B]. The problem of sexism and sexual misconduct in big tech is an open secret. *See, e.g.,* Lerman, *supra* note 205.

271. *See* ABA House of Delegates, Resolution 107B (2019), [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2019/house-of-delegates-resolutions/107b](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2019/house-of-delegates-resolutions/107b) [https://web.archive.org/web/20201031085359/https://www.americanbar.org/news/reporter\_resources/midyear-meeting-2019/house-of-delegates-resolutions/107b/] [https://perma.cc/4B4H-J7JT].

272. *See* NASEM, *supra* note 68.

273. *See, e.g.,* WORKING MOTHER RSCH. INST., #METOO WORKPLACE STUDY (2018); ELYSE SHAW, ARIANE HEGEWISCH, M. PHIL & CYNTHIA HESS, INST. FOR WOMEN'S POL'Y RSCH., SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS (2018); "A Movement, Not a Moment": Lessons from the Fair Food Program for the Growing Fight Against Sexual Harassment and Assault in the Workplace, COAL. IMMOKALEE WORKERS (Jan. 2, 2018), <http://ciw-online.org/blog/2018/01/in-these-times-sexual-harassment/> [https://perma.cc/JR4N-GTN6]; Alexia Fernández Campbell, *Housekeepers and Nannies Have No Protection from Sexual Harassment Under Federal Law*, VOX (Apr. 26, 2018, 1:10 PM), <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws> [https://perma.cc/8QG9-WYL8]; Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (Nov. 20, 2017, 4:59 PM), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/> [https://perma.cc/F22K-9GVM]; ROSSIE ET AL., *supra* note 87; LAUREN SUGERMAN, CHI. WOMEN IN TRADES, #METOO IN TRADITIONALLY MALE-DOMINATED OCCUPATIONS: PREVENTING AND ADDRESSING SEXUAL HARASSMENT (2018); EDISON RSCH. & MARKETPLACE, SEXUAL HARASSMENT IN THE WORKPLACE: #METOO, WOMEN, MEN, AND THE GIG ECONOMY (2018); Katherine Yon Ebright, *Taking #MeToo Seriously in the Legal Profession*, 32 GEO. J. LEGAL ETHICS 57 (2019).

274. *See generally* Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229 (2018); L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321 (2018); Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS'N (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/> [https://perma.cc/A5ZA-DRNK]. *See also* MacKinnon, *supra* note + ("Taking #MeToo's changing norms into the law could—and predictably will—transform the law as well. Some practical steps could help capture this moment. Institutional or statutory changes could include prohibitions or limits on various forms of secrecy and nontransparency that hide the extent of sexual abuse and enforce survivor isolation, such as forced arbitration, silencing nondisclosure agreements even in cases of physical attacks and multiple perpetration, and confidential settlements.").

restricted nondisclosure agreements that cover sexual misconduct.<sup>275</sup> Some states have extended their statute of limitations for filing a sexual harassment claim.<sup>276</sup> Seven states changed their labor laws to guarantee tipped employees full minimum wage before tips, in recognition of the vulnerability of service workers to sexual misconduct.<sup>277</sup> Five states have also extended their sexual harassment law to cover independent contractors.<sup>278</sup> There have been no changes yet on the federal level. The BE HEARD Act, which would introduce wide-ranging changes to bolster protections against workplace harassment, was proposed in May of 2019 but has not moved past its initial introduction in the House.<sup>279</sup>

These early reforms only scratch the surface of changes that might improve the law's efficacy in addressing sexual misconduct in the workplace. The #MeToo movement should inspire us to revisit sexual harassment law—the once great hope for equalizing the workplace—more broadly. Sandra Sperino and Suja Thomas make a compelling case, for example, that the definition of sexual harassment itself is part of the problem, as courts have used the “severe or pervasive” element of existing doctrine to excuse all but the most extreme forms of harassment.<sup>280</sup> A few states have eliminated or modified this requirement in response to the #MeToo movement.<sup>281</sup> As discussed at great length above, the rules of liability for harassment conceal many land mines for victims and too many safe harbors for employers. We could revisit known legal obstacles like Title VII's short statute of limitations, the lack of individual liability for harassers, weak protection against retaliation, and so

275. These states include Arizona, California, Illinois, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington. *See* OR. REV. STAT. § 659A.370 (2020); H.R. 21, 54th Leg., 2d Sess. (N.M. 2020); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2021); S. 121, 218th Leg., Reg. Sess. (N.J. 2019); S. 75, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); H.R. 248, 2019 Leg., 80th Sess. (Nev. 2019); VA. CODE ANN. § 40.1-28.01 (2021); S. 820, 2018 Leg., Reg. Sess. ch. 953 (Cal. 2018); H.R. 2020, 53d Leg., 2d Reg. Sess. (Ariz. 2018); H.D. 1596, 438th Gen. Assemb., Reg. Sess. (Md. 2018); TENN. CODE ANN. § 50-1-108 (2021); H.R. 707, 2018 Gen. Assemb., Reg. Sess. (Vt. 2018); S. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

276. 2019 Conn. Acts 19-16 (Reg. Sess.); H.D. 679, 439th Gen. Assemb., Reg. Sess. (Md. 2019); S. 6577, 2019 Leg., 2019–2020 Reg. Sess. (N.Y. 2019); OR. REV. STAT. § 659A.875.

277. These states include Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington. *See Minimum Wages for Tipped Employees*, U.S. DEP'T LAB. (Jan. 1, 2021), <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped> [<https://perma.cc/8MDM-GF54>].

278. These states include Delaware, Illinois, Maryland, New York, and Vermont. *See* S. 6577, 2019 Leg., 2019–2020 Reg. Sess. (N.Y. 2019); H.R. 679, 2019 Leg., Reg. Sess. (Md. 2019); S. 224, 2018 Leg., Reg. Sess. (Cal. 2018). H.R. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018); S. 75, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); H.R. 707, 2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

279. *See* H.R. 2148, 116th Cong. (2019); *see also* Vania Leveille & Lenora M. Lapidus, *The BE HEARD Act Will Overhaul Workplace Harassment Laws*, ACLU (Apr. 10, 2019, 11:15 AM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/be-heard-act-will-overhaul-workplace-harassment-laws> [<https://perma.cc/84NC-BPBS>].

280. *See* Sandra F. Sperino & Suja A. Thomas, Opinion, *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> [<https://perma.cc/V2RF-8MK3>]; SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

281. *See, e.g.*, WASH. REV. CODE ANN. § 28A.640.020 (West 2021).

many others.<sup>282</sup> Given the current split in power in the federal government, action to address sexual harassment is unlikely. But some states have moved quickly to pass laws making it easier for harassment victims to come forward—and harder for those credibly accused to hide their behavior. California, by way of example, did both. It passed a law granting whistleblower protections to legislative staff members, who were unprotected by existing laws that applied to other state employees, after revelation of a culture of sexual misconduct in the state legislature.<sup>283</sup> It also passed a law narrowing the legal use of nondisclosure agreements in cases involving sexual harassment or assault.<sup>284</sup> New York, California, and Illinois have also passed new laws that make sexual harassment training mandatory in some contexts, and California created personal liability for harassers.<sup>285</sup> Along with questions about whether the law has gone far enough are questions about whether, in some respects, it has gone too far. This movement provides an opportunity to consider those questions as well—and perhaps to rethink what equality and justice require in this context.<sup>286</sup>

Regardless of whether the law is reformed, employers must now assess the risk not only from potential lawsuits, which they have developed a good deal of comfort in managing, but also from a variety of other external sources. As discussed in Part I, the #MeToo hashtag has been used millions and millions of times; no form of social media is immune from #MeToo shares and re-shares. Media stories abound about sexual harassment (and sexual harassers), and, in some industries, people crowdsource spreadsheets to document harassment. These outlets for

282. For an analysis of some of the lowest hanging fruit, see Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008).

283. See, e.g., Kathleen Ronayne, *California Legislative Staff Get Whistleblower Protections*, AP (Feb. 5, 2018), <https://apnews.com/article/f7fb899d741244bc9fd52ef877bec11d> [<https://perma.cc/U37J-PWA7>]; see also CAL. GOV'T CODE §§ 9149.30–9149.36 (West 2021) (codifying the Legislative Employee Whistleblower Protection Act).

284. See CAL. CIV. PROC. CODE § 1001 (West 2021) (providing that a settlement agreement that “prevents the disclosure of factual information” related to claims of sexual harassment or assault is “void as a matter of law and against public policy”). Vermont passed a law mandating that agreements to settle sexual harassment cases be accompanied by an express disclosure that the victim is still able to disclose the harassment to any government agency or to comply with a valid request for discovery in civil litigation. See VT. STAT. ANN. tit. 21, § 495h (2021).

285. See Christiansen, *supra* note 274, at 2.

286. On some of these questions, see Judith Levine, *Will Feminism's Past Mistakes Haunt #MeToo?*, BOS. REV. (Dec. 8, 2017), <http://bostonreview.net/gender-sexuality/judith-levine-will-feminisms-past-mistakes-haunt-metoo> [<https://perma.cc/8AXC-M59C>]; Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019); Nora Stewart, *The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgment of Those #MeToo Leaves in the Dark*, 87 FORDHAM L. REV. 1693 (2019); Masha Gessen, *When Does a Watershed Become a Sex Panic?*, NEW YORKER (Nov. 14, 2017), <https://www.newyorker.com/news/our-columnists/when-does-a-watershed-become-a-sex-panic> [<https://perma.cc/R4QK-R6QS>]; Masha Gessen, *One Year of #MeToo: Punishing Individual Abusers Is Not the Same as Justice*, NEW YORKER (Oct. 10, 2018), <https://www.newyorker.com/news/our-columnists/one-year-of-metoo-punishing-individual-abusers-is-not-the-same-as-justice> [<https://perma.cc/EG6K-AX9B>].

survivors create new kinds of threat for employers—scandal, bad press, customer boycotts, employee walkouts, drops in ratings, loss of investors, damage to recruiting efforts, and so on. These potential consequences of a “#MeToo” problem can be both devastating to an institution and difficult to navigate. The Twittersverse will not be appeased by revelation of a really solid sexual harassment policy in the wake of an exploding scandal; nor will it consider a settlement that buys silence as a satisfactory outcome. It is these forces that might, finally, force institutions to focus on the problem of sexual harassment directly. Preventing harassment will prevent scandal. Adequately addressing complaints of harassment will mute outrage. This is why Catharine MacKinnon observed, in the quote at the head of this Article, “[T]he #MeToo movement is accomplishing what sexual harassment law to date has not.”<sup>287</sup>

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287. MacKinnon, *supra* note 4.