

The Global #MeToo Movement

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Editors

Ann M. Noel
David B. Oppenheimer

Berkeley Center on Comparative Equality and
Anti-Discrimination Law

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While women (and men) have been sexually harassed from time immemorial, it wasn't until the 1970s that feminist legal activist scholars gave it a name and a legal theory, and not until 2006 that Tarana Burke gave the movement to express solidarity among survivors in the United States a hashtag—#MeToo. Meanwhile, across the globe, women have found solidarity in joining together to speak out against harassment and violence. In honor of Burke, and all those who have joined in speaking out, we dedicate this book to their activism and vision.

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Contributing to the Global #MeToo Movement

Ann M. Noel¹

In 2006, Tarana Burke, an African American activist working with victims of sexual harassment and assault, coined the phrase “MeToo” on social media to raise awareness of the pervasiveness of sexual abuse and assault in society.² In October 2017, after the *New York Times*³ and *The New Yorker*⁴ broke their stories about multiple accusations of sexual assault by Hollywood producer Harvey Weinstein, the actress Alyssa Milano encouraged women on Twitter to say “#MeToo”⁵ if they too had experienced sexual harassment or assault.⁶

1. Co-Director, Sexual Harassment/Violence Working Group, Berkeley Center on Comparative Equality and Anti-Discrimination Law, former General Counsel, California Fair Employment and Housing Commission.

2. *#MeToo: A timeline of events*, CHI. TRIBUNE, Dec. 6, 2019, <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmistory.html>; <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmistory.html>; 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>.

3. Jodi Kantor and Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES, Oct. 5, 2017, <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

4. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER, Oct. 10, 2017, <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories?verso=true>.

5. #MeToo, TWITTER, <https://twitter.com/hashtag/metoo>.

6. Samantha Smith, *#MeToo: Harvey Weinstein case moves thousands to tell their own stories of abuse, break silence*, WASH. POST, Oct. 16, 2017, <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/>.

If the phrase in 2006 had limited reach beyond Burke's 500 social media followers,⁷ by 2017, with the widespread coverage of the Weinstein scandal, and widespread usage of social media worldwide, the hashtag went viral with 12 million posts, both in the United States and internationally.⁸

In many instances, the movement was producing remarkable changes in how accusations of sexual harassment were perceived and handled by employers, the news media, and society. For the first time, powerful men—producers, directors, news anchors, coaches, and employers—were losing their jobs because of their harassment of persons (usually, but not always, women) over whom they had wielded power.⁹ As Catharine MacKinnon pointed out, “#MeToo was accomplishing changes that the law so far had not. Sexually assaulted women were being believed and valued who had been disbelieved and denigrated.”¹⁰

The Berkeley Center on Comparative Equality and Anti-Discrimination Law (“Center”) Proposes a Book on the Global #MeToo Movement

In October 2017, I was working with my co-editor, Berkeley Law Professor David Oppenheimer, on projects with the Berkeley Center on Comparative Equality and Anti-Discrimination Law, which David had founded in 2011. We were discussing what topics to feature at a conference for the next spring and we were both mesmerized, and more than a little obsessed, with the developments around sexual harassment. David started his career prosecuting, among other workplace misconduct, sexual harassment cases for California's Department of Fair Employment and Housing. I started mine at the California Fair Employment and Housing Commission working with legislators to write good state laws to hold to account sexual harassers and their employers, writing regulations to interpret those laws, and adjudicating as an administrative law judge sexual harassment cases that lawyers like David prosecuted before me.

7. Emma Brockes, *#MeToo founder Tarana Burke: “You have to use your privilege to serve other people,”* THE GUARDIAN, Jan. 15, 2018, <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>.

8. Garcia, *supra*, note 2.

9. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES, Oct. 29, 2018, <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

10. Catharine MacKinnon, in *“This Moment Turned Out to Be Fleeting,”* N.Y. TIMES, Oct. 6, 2018, <https://www.nytimes.com/2018/10/06/opinion/me-too-weinstein-one-year.html>.

Work with the Center gave us a unique international vantage point to examine the problem of sexual harassment. The Center brings together legal scholars, activists, NGO workers, government anti-discrimination agency lawyers and officials, and legal practitioners from six continents to address the problems of systemic inequality and discrimination. Our principal mission is to expand our understanding of inequality and discrimination through the tools of comparative legal studies and to transfer that knowledge from those who study inequality to those who enforce anti-discrimination law (and vice versa).

Although we are a scholarly center, our objective is not simply to study the problem of inequality and discrimination, but to help activists/advocates use the work being done by scholars to bring positive change globally. And the #MeToo movement presented a challenge, a rebuke, and an opportunity for us to acknowledge how current laws had helped but also hindered sexual harassment victims, and to join with activists worldwide to advocate for necessary changes in the law to support victims and to promote gender equality.

Inspired by #MeToo, we formed our Sexual Harassment/Violence Working Group in the fall of 2017 to examine how the global #MeToo movement was affecting the legal and social movements against sexual harassment and violence. I co-direct this Working Group along with California practitioner Amy Oppenheimer,¹¹ who has pioneered professional standards for workplace investigations of harassment allegations. I had served as the former general counsel of California's Fair Employment and Housing Commission. Priding itself as the national leader in development of progressive laws on sexual harassment, the Commission worked with the California legislature to pass innovative laws over the past 30 years, to hold employers and sexual harassers accountable for harassment, and to support harassment victims. Yet with the revelations exploding about widespread sexual harassment affecting women worldwide, including California, it was clear that a complete rethinking about the problem was in order.

Responding to the MeToo movement, the Center held two conferences, in May 2018 and 2019, with thought leaders from universities, industry, NGOs, and government, and with participants from Africa, Asia, Australia, Europe, and North and South America. Our discussions focused on how the worldwide #MeToo movement was changing the public discussion of sexual harassment on every continent. After a series of fascinating reports about the progress the movement has driven, as well as the backlash against women reporting sexual harassment and violence, we decided to write this book on the global impact of

11. Amy is also David's sister. They grew up together in the Civil Rights movement, inspired by the civil rights lawyers of the 1960s, and their parents' activism.

the movement, utilizing many of our conference participants and Center members as our authors.

Assessing This Moment

For the 48 authors of this book—equality scholars, legal practitioners, and activists—the #MeToo movement was a moment of great reckoning. Many of the authors had written books, law review articles, and their PhD theses on the subject, had worked with their legislative bodies to pass laws about harassment, had litigated sexual harassment cases, and had supported activists and victims fighting harassment. Yet as Catharine MacKinnon, who coined the term “sexual harassment” and pioneered its legal claim, has noted, “#MeToo is cultural, driven principally by forces other than litigation, and is surpassing law in changing norms and providing relief for human rights violations that the law did not—in some ways in current form could not, although law is embedded in culture and can and will change with it.”¹² The challenge now is to assess honestly where we’ve been and where we are now at this important moment in the struggle for gender equality. What has the #MeToo movement taught us, what has worked, what has not, and how can we support what needs to come next?

Catharine MacKinnon writes in our first chapter, “We are in the middle of the first mass movement against sexual abuse in the history of the world. Global #MeToo sprung from the law of sexual harassment, quickly overtook it, and is shifting law, cultures, and politics everywhere.”¹³

#MeToo Everywhere—Country Chapters

We asked our extensive network of Center members to write chapters about the MeToo movements in their countries; 36 agreed to do so, writing about 27 countries. We have chapters covering the #MeToo movements in North and South America, Europe, the Middle East, Africa, Asia, and Australia.¹⁴

12. Catharine A. MacKinnon, *Global #MeToo*, *infra*, chapter 1.

13. *Ibid.*

14. Our coverage of the world’s #MeToo movements is extensive, but certainly not encyclopedic. We have only two reports from African countries, Nigeria and South Africa, reflecting our limited contacts there at the time we recruited authors for the book. This is changing. We will hold our 2021 annual conference in Cape Town, South Africa, and we are working with the Africa-based End Sexual Harassment in Africa initiative to create model anti-harassment laws for equality advocates to use to change African countries’ laws on harassment.

Our authors describe the state of equality in their country when the #MeToo movement began and describe how the movement has had an impact in their country. They describe their country's laws regarding sexual harassment (if any) and other laws protecting women against rape, sexual assault, and domestic violence. They describe the reality of the situation: whether these laws are enforced, what barriers there are to people filing complaints of harassment in the workplace or with law enforcement. They address any changes in their country stemming from #MeToo—changes in the law, in activism, in accusers being believed. Finally, they discuss what needs to be done going forward.

For many country chapter authors, their first reaction was to note that the struggle against sexual and other forms of harassment long preceded the #MeToo movement and focusing the story solely around #MeToo was a very U.S.-centric orientation, ignoring struggles for gender equality in all of their individual, country-specific iterations. What the #MeToo movement allowed in the age of social media, however, was for women to be able to share their stories with each other, often anonymously, and through that sharing realize that they were not alone—that on the contrary, the problem is global, and it is enormous.

The United Nations and International Law

Woven through many chapters' stories is how their countries' laws and practices conform to or deviate from international standards of equality, set by United Nations covenants and treaties. We have included a chapter on international United Nations treaties covering harassment, written by Purna Sen, the UN's Executive Coordinator and Spokesperson on Addressing Sexual Harassment and Other Forms of Discrimination.

Intersectionality

In addition to the country chapters, we address and discuss how intersectionality affects the different ways individuals experience harassment. "Intersectionality" is a term coined by University of California, Los Angeles law professor Kimberlé Crenshaw to examine how the interconnected nature of social categorizations such as race, class, and gender, which apply to a given individual or group, create overlapping and interdependent systems of discrimination or disadvantage.¹⁵ So, for example, a woman may be targeted for harassment

15. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHIC. LEGAL F., art. 8 (1989), <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>.

because of her perceived or real vulnerabilities due to disability, caste, or religion in addition to her sex. She may be more likely to be believed or disbelieved because of her race or class. Her economic situation, for example being dependent on tips from male customers to survive, may make her especially vulnerable to sexual harassment. She may be unable to complain about the harassment due to her disability, gender identity, or sexual orientation. The book has chapters discussing intersectional issues with class, sexual orientation and gender, disability, caste, and race, with race discussed at length in the Brazil country chapter.

Techniques to Combat Harassment

MacKinnon writes: “In law, many crucial issues are being newly discussed, fresh and creative solutions proposed. These include consideration of the role and content of nondisclosure agreements, independence of investigation and adjudication, equitability in procedures at all stages, elimination of criminal law standards from civil and administrative adjudications, and—radiating out—equal hiring, equal numbers of women on boards, equal pay and many more women in politics. Anyone who doubted that sexual abuse was central to the second-class status of women might consider what taking it seriously for once on a systemic basis has set off. Outcomes in these cases, with many others, will provide some measures of the distance traveled and the distance yet to go.”¹⁶

Our country chapter authors write about many of these subjects as they have developed in their own countries,¹⁷ but they are discussed in depth in chapters on anti-harassment training and symbolic compliance, corporate governance, non-disclosure agreements, and effective workplace investigations.

Changing the Law on Defamation

At our 2019 conference on sexual harassment, a major topic of conversation for many international presenters was the way that their countries’ strong laws on defamation were squelching any movement by women to come forward, except anonymously, to report harassment, for fear of being sued for defamation. This is a major problem worldwide except in the United States, thanks to a

16. MacKinnon, *supra* note 12.

17. See, for example, *Silent Women? Non-Disclosure Agreements and the #MeToo Movement in the United Kingdom*, Aileen McColgan’s discussion of the role of non-disclosure agreements in the United Kingdom, chapter 12.

landmark U.S. Supreme Court case, *New York Times v. Sullivan*.¹⁸ That decision, and the 1960s civil rights struggle that generated it, are discussed in our last chapter, by co-editor David Oppenheimer.

Common Themes

Although each country discussed in this book tells its own story of triumphs and challenges, common themes emerged across the globe. Harassment is pervasive everywhere. Good laws promoting equality, including international conventions and protocols, can make a positive difference to establish normative standards, but good laws are not enough. They must be enforced, and that takes cultural shifts that #MeToo is helping engender. The problem identified all over the world is that these triumphs that we celebrate—a Hollywood producer finally held to account, a prominent television anchor fired for sexual assault, a ride share app CEO removed from the company that he founded—have all benefited women with the luxury to complain and to seek redress. Denise Abade, the author of our chapter on Brazil, has described the problem and the challenge for #MeToo in her country, but she could have been describing any country, anywhere:

We have to recognize that in Brazil empowerment against sexual harassment is a privilege of a minority armed with information, aware of their rights, who discovered how to arm themselves and know that they will have protection if they do not accept this type of violence. The question is how to get to the other end—where the most vulnerable, with less schooling, with little perception of the social role of women, those without access to the necessary channels to protect themselves. Those who are afraid of being judged, harassed, losing their job or reputation: the vast majority of Brazilians. It is promising what we see happening, but it gives us the misperception that change in society's behavior has come for all. It has not. There is still a gulf between the awareness of the minority and the reconstruction necessary to change the course of history.¹⁹

This is our challenge. We must share what has worked with each other—laws, social media campaigns, support for lawsuits, organizing tactics—and what has failed—inadequate or no laws, social media attacks, censorship and

18. *New York Times Co. v. Sullivan* [1964] 376 U.S. 254 (United States).

19. *Brazilian Sexual Harassment Law and the #MeToo Movement*, *infra*, chapter 7.

lies by governments and powerful interests, bigoted judges and indifferent law enforcement, and no access to justice. We hope that this book contributes to the conversation, and to meaningful solutions.

The Berkeley Center on Comparative Equality and Anti-Discrimination Law

The Berkeley Center on Comparative Equality and Anti-Discrimination Law brings together over 500 scholars, advocates and activists (including NGO workers, government anti-discrimination agency lawyers and officials, PhD candidates and other graduate students, and legal practitioners) from six continents, to address the problems of systemic inequality and discrimination. Our principal mission is to expand our understanding of inequality and discrimination and to transfer that knowledge between those who study inequality to those who enforce anti-discrimination law. Our objective is not simply to study the problems of inequality and discrimination, but to help meaningfully address inequality and discrimination globally.

To better understand world-wide comparative inequality, we:

- Convene Working Groups to address specific problems where we see opportunities for scholars and activists to work together, including sexual harassment and violence, disability rights, pay equity, and the equality rights of climate migrants/refugees;
- Hold small conferences of leading thinkers in advocacy, leadership, and scholarship to address inequality issues;
- Convene video-conference scholarly workshops, at which emerging scholars (including PhD candidates and early career academic instructors) present works in progress to experienced scholars from around the globe;
- Hold an annual scholarly conference at which emerging, experienced and senior scholars from six continents meet to present and discuss new work;
- Publish an electronic journal where abstracts of scholarly work by our members and other scholars are distributed to a broad community of academics, practitioners, and activists;
- Publish books on comparative equality and anti-discrimination law and circulate information about our members' new books in the field;

- Bring visiting scholars to Berkeley Law to conduct research and present their work; and
- Cooperate and partner with research centers and NGOs from around the globe.

Our Working Groups combine scholars, advocates, students, activists/practitioners, and industry leaders from around the globe, and meet regularly through video-conferencing, regional meetings, and international meetings. The object of the Working Groups is to move beyond an academic understanding of inequality and discrimination to articulate and disseminate practices that will have a meaningful impact. Although the groups operate in different “silos,” they cross-pollinate their work, as many of the most serious problems in inequality law are intersectional.

Since its formation in 2017, our Sexual Harassment/Violence Working Group has sponsored three conferences in May 2018, May 2019, and February 2020 on sexual harassment and the worldwide #MeToo movement; our members have authored this book; and we are now working with UN Women and a consortium of African scholar/activists on model legislation on sexual harassment.

About Our Authors

Denise Neves Abade is a Brazilian Senior Federal Prosecutor since 1996 and also a Law Professor at Mackenzie Law University Law School, São Paulo, Brazil. She has a PhD in Constitutional and Procedural Law at Valladolid University, Spain, and a Master's degree in Procedural Law at the University of São Paulo, Brazil. She is the President of the Committee for Equality of Gender and Race/Southeast Region at the Federal Prosecution Service. Her entire career, she has focused on inequality and its impact on the integrity of the rule of law: her academic career on fundamental rights in proceedings and, as a Prosecutor, on gender equality, defense of the environment and international judicial cooperation. In Brazil, Prosecutors act not only in criminal proceedings, but also take action required to guarantee diffuse and collective rights.

Zuzana Andreska is a gender studies graduate and law student at the Charles University in Prague, Czech Republic. She has worked for the Department of Gender Equality of the Office of the Czech Government and currently works as a research assistant to Barbara Havelková doing research on feminist legal theory and a critique of androcentrism.

Shreya Atrey is an Associate Professor in International Human Rights Law at the Department for Continuing Education and the Faculty of Law, based at the Bonavero Human Rights Institute at the University of Oxford. Her research is on discrimination law, feminist theory, poverty and disability law. Her monograph, *Intersectional Discrimination* (OUP 2019), presents an account of intersectionality theory in comparative discrimination law. Previously, she was based at the University of Bristol Law School where she taught on Constitutional Rights, Public Law and International Human Rights Law courses. She has been a Max Weber Fellow at the European University Institute, Florence and a Hauser Postdoctoral Global Fellow at the NYU School of Law, New York. She completed BCL with distinction and DPhil in Law on the Rhodes Scholarship from Magdalen College, University of Oxford. She has served as the Chairperson of the Oxford Pro Bono Publico and is currently an associate member of the Oxford Human Rights Hub. Atrey is an Official Fellow of Kellogg College.

Zulaikha Aziz is a human rights attorney and international development specialist, focusing on rule of law, legal empowerment, women's rights and gender equality. She has more than 15 years of experience working in Asia, the Middle East and North Africa, Eastern Europe and the Americas on legal and economic initiatives to improve the lives and livelihoods of women and men around the world. Her work and scholarship focus specifically on the empowerment of the world's most vulnerable communities. She has worked with institutions including the UNDP, UN Women, the World Bank, and USAID as well as local NGOs and civil society organizations. Most recently, she served as the rule of law specialist for The Asia Foundation in Kabul, Afghanistan. Zulaikha has a B.A. in Economics from McGill University, a M.Sc. in International Development Studies from The London School of Economics and Political Science and a J.D. from the University of California, Berkeley School of law.

Ivana Bacik is a barrister and Reid Professor of Criminal Law, Criminology and Penology at Trinity College Dublin. She is a Senator in the Irish Parliament (Oireachtas) for Dublin University (elected 2007, re-elected 2011 and again 2016). Her research interests include feminist theory of law and equality law. She co-authored a major national study on gender in the legal professions (Bacik, Costello and Drew, *Gender InJustice*, 2003); her other publications include *Legal Cases that Changed Ireland* (co-edited with Mary Rogan, Clarus Press, 2016). She chaired the Oireachtas 'Vótáil100' Committee program in 2018 to mark the centenary of women's suffrage in Ireland, and co-chairs the Trinity College Law School Athena SWAN gender equality benchmarking application process.

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The Global #MeToo Movement

The Americas

CHAPTER 2

The #MeToo Movement in the United States: Reckoning with the Law's Failure

Jessica A. Clarke¹

The #MeToo movement has brought the problems of sexual harassment and assault in the United States into sharp focus, exposing the systemic failure of the law for survivors. In October 2017, the *New York Times* and *The New Yorker* magazine reported that media mogul Harvey Weinstein had been sexually harassing women in the entertainment industry since the 1990s.² On social media, an overwhelming number of people responded with the hashtag #MeToo, telling their own stories of sexual assault and harassment.³ In the year after the Weinstein story, more than 200 prominent American men lost their positions as a result of accusations of sexual misconduct.⁴ The movement

1. Professor of Law, Co-Director, George Barrett Social Justice Program, Vanderbilt University, Nashville, TN.

2. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

3. #MeToo, TWITTER, <https://twitter.com/hashtag/metoo>. The hashtag made reference to a campaign started twenty years earlier by activist Tarana Burke to provide survivors of sexual abuse with solidarity and resources. 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>.

4. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>. A few accused women have also been in the headlines. See Hannah Giorgis, *Asia Argento, #MeToo, and the Complicated Question of Power*,

brought new attention to the then-pending criminal prosecutions of actor Bill Cosby⁵ and USA Gymnastics doctor Larry Nassar,⁶ both accused of a series of sexual assaults spanning decades. During the September 2018 hearings to confirm Justice Kavanaugh to the U.S. Supreme Court, Dr. Christine Blasey Ford testified about being sexually assaulted by Kavanaugh when the two were teenagers in the 1980s.⁷ After politicians expressed doubts about Dr. Ford's credibility because she had failed to come forward earlier, survivors began using the social media hashtag #WhyIDidntReport to explain their reasons for not availing themselves of the legal system.⁸

This chapter offers a brief summary of some of the key features of U.S. law on sexual assault and harassment in an attempt to explain why the law has been such a profound failure for survivors. It also discusses legal reform efforts that have been undertaken as a result of the #MeToo movement.

Criminal Law

In the United States, rape and sexual assault are, for the most part, defined by the governments of individual states.⁹ Historically, U.S. law treated rape claims with extraordinary skepticism, both because women were thought to fabricate accusations and because the crime was penalized by the harshest of sanctions, including the death penalty.¹⁰ The law therefore imposed a number of special requirements on victims, including physical resistance, prompt reporting, and corroboration.¹¹ Moreover, because the offense was seen “as an injury to the husband or father of the raped woman” it could not be committed “against

ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/entertainment/archive/2018/08/asia-argento-allegations/568018/>.

5. Jen Kirby, *Bill Cosby Found Guilty of Sexual Assault*, VOX (Apr. 26, 2018), <https://www.vox.com/2018/4/26/17272470/bill-cosby-trial-verdict-guilty-sexual-assault-andrea-constand>.

6. Kerry Howley, *Everyone Believed Larry Nassar*, THE CUT (Nov. 19, 2018), <https://www.thecut.com/2018/11/how-did-larry-nassar-deceive-so-many-for-so-long.html>.

7. *Read Christine Blasey Ford's Prepared Statement*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/christine-blasey-ford-prepared-statement.html>.

8. #WhyIDidntReport, Twitter, <https://twitter.com/hashtag/metoo>.

9. In the U.S. federal system, violent crime is generally a state matter. *See United States v. Morrison*, 529 U.S. 598, 618 (2000).

10. Model Penal Code: Sexual Assault and Related Offenses 10 (Am. Law Inst., Tentative Draft No. 1, 2014). The laws were not applied in a racially neutral manner, and black men accused by white women were more likely to be convicted. *Id.*

11. *Id.* at 9.

a female victim of previously unchaste character.”¹² As a result of feminist advocacy beginning in the 1970s, these requirements now find themselves on shaky legal footing.¹³ But outdated ideas continue to have an influence over what cases are reported to law enforcement, what cases are pursued by the prosecutors who have the discretion to decide whether to bring charges, and what cases are convincing to the juries who must determine that a defendant is guilty beyond a reasonable doubt.¹⁴

Early American courts borrowed their definition of rape from English common law: “carnal knowledge of a woman forcibly and against her will.”¹⁵ In recognition of the harms of same-sex assaults and assaults by women against men, most U.S. jurisdictions now define offenses in gender-neutral terms, by reference to particular acts and body parts.¹⁶ While historically a victim was required to resist “to the utmost,” that requirement has now given way.¹⁷ But the roles of force and consent remain debated. A majority of states now penalize sex without consent, even in the absence of force.¹⁸ But many still define rape to require that the perpetrator used force in addition to requiring sexual penetration, even in the absence of consent.¹⁹ Definitions of force vary, with some states defining force broadly to include “circumstantial coercion or intimidation.”²⁰

In 2012, the American Law Institute (ALI), a nongovernmental organization of U.S. legal professionals, began revising the sexual assault provisions of the Model Penal Code, an influential set of model criminal laws. The ALI’s 2017 draft includes “sexual penetration or oral sex without consent” as a separate offense, apart from “forcible rape.”²¹ This offense would require that the perpetrator acted “knowingly” or “recklessly.”²² The ALI has approved a defi-

12. *Id.*

13. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 *YALE L.J.* 1940, 1946-49 (2016).

14. *Id.* at 1950-53.

15. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *210 (1765).

16. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 7-9 (Am. Law Inst., Tentative Draft No. 3, 2017).

17. *Id.* at 26. Eight states still have “a formal resistance requirement, meaning that resistance is required unless it would be futile or likely result in injury.” *Id.* In these states, resistance may be verbal. *Id.* at 27.

18. *Id.* at 40-41 (surveying U.S. state statutes and case law as of October 2016).

19. *Id.* at 23.

20. *Id.* at 23-24.

21. *Id.* §§ 213.1-.4, at 49, app. A. The proposed definition of “forcible rape” includes “using physical force or restraint, or making an express or implied threat of bodily injury of physical force or restraint.” *Id.* § 213.1, at 13.

22. *Id.* § 213.4, at 50, app. A.

inition of consent to mean “a person’s willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.”²³ “A clear verbal refusal—such as ‘No,’ ‘Stop,’ or ‘Don’t,’—establishes the lack of consent”;²⁴ but consent may be absent even without such a statement.²⁵ This concept is known as “contextual consent.”²⁶ There remain disagreements over what circumstances might “nullify apparent consent” such as “force, fraud, and coercion,” among other issues.²⁷ The ALI’s project has been controversial due to specific policy arguments as well as generalized opposition to rape reform “attributable to misogyny.”²⁸

U.S. law once required a victim’s “prompt complaint” as a prerequisite to a sexual assault prosecution, on the theory that victims who did not immediately report could not be trusted.²⁹ While this rule has been abandoned, many U.S. states still have statutes of limitations that bar claims if they are not brought within a certain time period, sometimes ten years or less.³⁰ These time limitations were reportedly the reason that, out of the sixty women who had accused Bill Cosby of rape and other crimes, prosecutors could only bring one case, that of Andrea Constand.³¹ Although they could not bring charges, several accusers were permitted to testify at Cosby’s re-trial about how he had drugged and sexually assaulted them, lending support to Constand’s accusations.³²

23. *Id.* § 213.0(a)-(b), at 51, app. B.

24. *Id.* § 213.0(e).

25. *Id.* § 213.0(c) (“Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining there was consent.”).

26. *Id.* at 44.

27. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 *LAW & INEQ.* 335, 344–46 (2017). For critique of the proposed rules, see Catharine A. MacKinnon, *Rape Redefined*, 10 *HARV. L. & POL’Y REV.* 431, 474 (2016).

28. Schulhofer, *supra* note 27, at 336.

29. MPC Tentative Draft No. 1, *supra* note 10, at 86.

30. RAINN, State by State Guide on Statutes of Limitations, <https://www.rainn.org/state-state-guide-statutes-limitations>.

31. Jen Kirby, *Bill Cosby Found Guilty of Sexual Assault*, *VOX* (Apr. 26, 2018), <https://www.vox.com/2018/4/26/17272470/bill-cosby-trial-verdict-guilty-sexual-assault-andrea-constand>.

32. Jeannie Suk Gerson, *Bill Cosby’s Crimes and the Impact of #MeToo on the American Legal System*, *NEW YORKER* (Apr. 27, 2018), <https://www.newyorker.com/news/news-desk/bill-cosbys-crimes-and-the-impact-of-metoo-on-the-american-legal-system>. Cosby was retried because his first trial, which occurred before the #MeToo movement, ended with a hung jury. *Id.* At the first trial, only one additional accuser testified, while at the re-trial, five did. *Id.*

Historically, U.S. law required “corroborative evidence” such as physical injuries for claims of rape,³³ and even with that evidence, jurors were instructed to regard a victim’s testimony with particular caution.³⁴ While these rules have been eliminated or curtailed,³⁵ the criminal justice system continues to impose an informal “credibility discount” on victims in rape cases.³⁶ Some researchers estimate that only 7 to 27 percent of rapes that are reported to law enforcement are prosecuted, and only 3 to 26 percent result in conviction.³⁷ Surveys reveal that law enforcement officers believe reports of rape are much more likely to be false than reports of other crimes, despite the lack of evidence to support this assumption.³⁸ The criminal justice system imposes a particular credibility discount on “women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers.”³⁹ Even prosecutors who do not personally discount the credibility of survivors may decide not to bring cases because they predict that jurors will not believe survivors.⁴⁰ One of Harvey Weinstein’s accusers caught Weinstein admitting to sexually assaulting her on tape, yet prosecutors still thought there was not enough evidence to bring a case.⁴¹

While U.S. rape law once turned on the victim’s chastity, inquiries into the victim’s sexual history are now barred by evidentiary rules called “rape shield laws.”⁴² And yet defense lawyers can still “re-victimize the complainant through subtle, but still dehumanizing, cross-examinations” about the victim’s dress and behaviors leading up to the rape, implying that the victim was to blame.⁴³

33. MPC Tentative Draft No. 1, *supra* note 10, at 87–88.

34. *Id.* at 89.

35. *Id.* at 88–89.

36. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 2 (2017).

37. Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 156 (2012).

38. In one survey of 891 police officers, 53 percent believed that between 11 and 50 percent of women falsely report rape, and 10 percent believed that between 50 and 100 percent of women make false reports. Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers’ Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008).

39. Tuerkheimer, *supra* note 36, at 31.

40. Lonsway & Archambault, *supra* note 37, at 159.

41. Farrow, *supra* note 2.

42. MPC Tentative Draft No. 1, *supra* note 10, at 91–94.

43. Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 446 (2006).

Studies demonstrate that sexual assaults are the most underreported of all serious crimes.⁴⁴ As the #WhyIDidntReport discussion revealed, survivors have many reasons for not coming forward, including concerns that they will be not be believed by police and fear of reprisals from their perpetrators and communities.⁴⁵ Consider Maryville, Missouri, where, in 2012, after a 14-year-old girl reported that she had been raped by a 17-year-old football player, the girl's family was subjected to vitriolic harassment, her mother was fired from her job, and the family's home was burned down under suspicious circumstances.⁴⁶

While rape is no longer a crime punishable by death, a punitive movement in criminal justice reform has succeeded in implementing draconian penalties for those convicted of sex offenses, such as onerous public registration requirements.⁴⁷ Some opposition to rape reform today is driven by legitimate concerns about these draconian penalties, as well as the general dysfunction of the U.S. criminal justice system in terms of dramatic racial disparities, stark class biases, and mass incarceration.⁴⁸ The image of the assailant that underlies punitive reforms is that of a predatory stranger, rather than the more common experience of rape by intimates and acquaintances.⁴⁹ This view may paradoxically make efforts to recognize abuse more difficult. For example, for decades, Bill Cosby's accusers "were met, mostly, with skepticism, threats, and attacks on their character," perhaps because of Cosby's sitcom image as America's dad.⁵⁰ And one curious aspect of the Larry Nassar case is that gymnasts had long been reporting his sexual abuse, but because it was difficult to square their stories with Nassar's generous personality and effective medical care, the gymnastics

44. Studies show varying reporting rates between 16 and 42 percent. MPC Tentative Draft No. 1, *supra* note 10, at 14.

45. For survey evidence on reasons survivors do not report, see DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 7 tbl. 9 (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410>.

46. Dugan Arnett, *Nightmare in Maryville: Teens' Sexual Encounter Ignites a Firestorm Against Family*, KANSAS CITY STAR (Oct. 12, 2013), <https://www.kansascity.com/news/special-reports/maryville/article329412.html>.

47. Anderson, *supra* note 13, at 1953.

48. Schulhofer, *supra* note 27, at 350–51.

49. According to one survey, only 14.1 percent of women and 15.1 percent of men who reported they were raped said that their assailant was a stranger. MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 22 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

50. Noreen Malone & Amanda Demme, "I'm No Longer Afraid": 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen, THE CUT (July 26, 2015), <https://www.thecut.com/2015/07/bill-cosbys-accusers-speak-out.html#barbara-bowman>.

community did not turn against him until a police officer found his cache of child pornography.⁵¹

The #MeToo movement has drawn attention to the lack of resources devoted to rape and sexual assault by law enforcement.⁵² A 1994 federal law, the Violence Against Women Act (VAWA) provides funding to law enforcement agencies, courts, and private organizations to address domestic and sexual violence.⁵³ These funds have supported the creation of special law enforcement units devoted to sexual violence, services for victims, and community education, among other things.⁵⁴ VAWA requires that state and local governments pay for sexual assault survivors to undergo forensic medical examinations to collect DNA, photographic, and other evidence.⁵⁵ This evidence is stored in containers known as “rape kits.”⁵⁶ Because sexual assault investigations were not prioritized for many decades, a backlog developed in which thousands of kits were left unanalyzed.⁵⁷ State and local governments have recently devoted funds to reduce these backlogs and used rape-kit evidence to open new investigations.⁵⁸ In the wake of #MeToo, a number of U.S. states have passed laws to ensure that rape-kit evidence is analyzed in a more timely manner.⁵⁹

51. Howley, *supra* note 6.

52. See, e.g., Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW STATELINE (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws>.

53. 34 U.S.C. § 12291 (2012).

54. U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, THE 2016 BIENNIAL REP. TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT xi-xvii (2016), <https://www.justice.gov/ovw/page/file/933886/download>.

55. 34 U.S.C. § 10449.

56. OFFICE OF MANHATTAN DIST. ATTORNEY, TEST EVERY KIT: RESULTS FROM THE MANHATTAN DISTRICT ATTORNEY'S OFFICE'S SEXUAL ASSAULT KIT BACKLOG ELIMINATION GRANT PROGRAM 4 (“MANHATTAN DIST. ATTORNEY”) (2019), <https://www.manhattanda.org/wp-content/uploads/2019/03/Test-Every-Kit-Results-from-the-Manhattan-District-Attorneys-Offices-Sexual-Assault-Kit-Backlog-Elimination-Grant-Program.pdf>.

57. *Id.* at 6; Steve Reilly, *Tens of Thousands of Rape Kits Go Untested Across USA*, USA TODAY (July 16, 2015), <https://www.usatoday.com/story/news/2015/07/16/untested-rape-kits-evidence-across-usa/29902199/>.

58. See, e.g., MANHATTAN DIST. ATTORNEY, *supra* note 56, at 2–3, 17–18.

59. See, e.g., 2019 TEX. SESS. LAW SERV. Ch. 408 (H.B. 8) (Vernon's); 2019 MD. LAWS Ch. 33 (S.B. 767) (West); 2019 WASH. LEGIS. SERV. Ch. 93 (S.S.H.B. 1166) (West).

Antidiscrimination Law

In addition to criminal justice, U.S. law also addresses sexual abuse as a civil rights issue. This is as a result of the work of feminist lawyers and activists in the 1970s, such as Catharine MacKinnon and Lin Farley.⁶⁰ Sexual harassment law in the United States first developed as an interpretation of Title VII of the Civil Rights Act of 1964, a federal statute that prohibits employment discrimination “because of . . . sex.”⁶¹ Under Title VII, victims of sexual harassment may bring civil suits against their employers. A federal administrative agency, the Equal Employment Opportunity Commission (EEOC), is also authorized to bring suit on behalf of victims. But the statute’s reach is limited by a number of substantive, procedural, contractual, and practical barriers. While some individual states have passed laws to fill the gaps left by Title VII, many have not, leaving a patchwork of protection throughout the United States.

One limitation of sexual harassment law is that Title VII applies only to certain employer/employee relationships, leaving many workers out in the cold.⁶² Although independent contractors, such as most sharing-economy workers, freelancers, vendors, and consultants, make up 10 percent of the American workforce, they are beyond the law’s reach.⁶³ For this reason, most of the actors who spoke out against Harvey Weinstein would not have claims under Title VII. In addition to exempting many workers, Title VII also exempts certain employers such as the federal judiciary,⁶⁴ the military,⁶⁵ and those businesses that employ fewer than fifteen people.⁶⁶ Low-wage and immigrant workers, although ostensibly permitted to bring claims, are unlikely to have the information, time, access to counsel, or resources to do so.⁶⁷ While the EEOC may bring claims on behalf of these workers, its resources are limited.

60. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 1–39 (Catherine A. MacKinnon & Reva Siegel eds., 2004).

61. 42 U.S.C. § 2000e-2(a)(1) (2012).

62. *See, e.g.*, *Murray v. Principal Fin. Group, Inc.*, 613 F.3d 943, 944 (9th Cir. 2010).

63. Bureau of Labor Statistics, Economic News Release, *Contingent and Alternative Employment Arrangements Summary* (June 7, 2018), <https://www.bls.gov/news.release/conemp.nr0.htm>.

64. Nancy Gertner, *Sexual Harassment and the Bench*, 71 *STAN. L. REV. ONLINE* 88, 89 (2018).

65. Michael I. Spak & Alice M. McCart, *Effect of Military Culture on Responding to Sexual Harassment: The Warrior Mystique*, 83 *NEB. L. REV.* 79, 99 (2004).

66. 42 U.S.C. § 2000e(b) (2012).

67. Elizabeth Kristen et al., *Workplace Violence and Harassment of Low-Wage Workers*, 36 *BERKELEY J. EMP. & LAB. L.* 169, 180 (2015).

Even plaintiffs with the wherewithal to bring suit may conclude it is a losing proposition. Litigating a sexual harassment claim can be time consuming and emotionally devastating; U.S. discovery rules require that plaintiffs repeatedly recount the details of their abuse to hostile adversaries in a process that can take years.⁶⁸ Under Title VII, victims may be entitled to reinstatement, lost wages, and other such restitution, but sexual harassment does not always result in these types of damages.⁶⁹ The law also allows compensatory damages for harms such as emotional distress, and punitive damages to penalize and deter employers, but those types of damages are capped, up to a combined maximum of \$300,000.⁷⁰ Moreover, to win punitive damages, a plaintiff must make the extraordinary showing that her employer “discriminate[d] in the face of a perceived risk that its actions will violate federal law.”⁷¹ These limits not only reduce a plaintiff’s incentive to bring suit, they also undermine the deterrent value of sexual harassment law.⁷²

If a victim does decide to bring a case, her claim will have to meet a stringent set of substantive requirements. To prove a claim of sexual harassment, a plaintiff must generally establish that: (1) the harassment was because of sex; (2) the harassment was severe or pervasive; (3) the harassment was unwelcome; and (4) there is a basis for employer liability. Federal courts analyze these elements mechanically and often dismiss a plaintiff’s case before trial if she lacks sufficient evidence of any one of them.

Because sexual harassment is a species of sex discrimination under federal law, a plaintiff must demonstrate that she was targeted “because of sex.”⁷³ Both men and women can be targeted because of sex, and there is no requirement that the harasser be of a different sex than the victim.⁷⁴ Courts generally presume that harassment motivated by sexual desire was because of sex.⁷⁵ But there is no requirement that the harassing words or conduct be of a sexual nature.⁷⁶ Courts have also found harassment was because of sex where the harasser expressed hostility toward men or women in the workplace, where men or women were

68. For one account of the toll sexual harassment litigation can take on plaintiffs, see CLARA BINGHAM & LAURA LEEDY GANSLER, *CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW* (2002).

69. 42 U.S.C. § 1981a (2012).

70. *Id.*

71. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 536 (1999).

72. See Joni Hersch, *Efficient Deterrence of Workplace Sexual Harassment*, 2019 U. CHI. L.F. 147.

73. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

74. *Id.*

75. See Jessica Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 536 (2013).

76. *Oncale*, 523 U.S. at 80.

singled out for worse treatment, and where the harasser targeted the victim because of the victim's failure to conform to gender stereotypes.⁷⁷

Despite the many ways that harassment can be because of sex, courts myopically focus on sexual desire and sexualized harms. This myopia obscures how sexual harassment is also a manifestation of “workplace sexism”: “a way for dominant men to label women (and perceived ‘lesser men’) as inferior and shore up an idealized masculine work status and identity.”⁷⁸ For example, harassers might target a woman with misogynist insults that are not sexual but are certainly sexist. Some male supervisors who feel uncertain about how to interact with women as a result of the #MeToo movement might exclude women from networking opportunities, refuse to mentor women, or not invite women to dine or travel with them.⁷⁹ This is also harassment because of sex.

Moreover, the judicial preoccupation with sexualized harassment makes it more difficult to see how race-based and sex-based harassment might overlap and coincide, or how LGBTQ plaintiffs can be victims of sexual harassment by straight coworkers.⁸⁰ Some courts construe a claim of sexual harassment to require a plaintiff to be a member of a “protected class,” even though there is no such requirement in Title VII, which covers all “individual[s].”⁸¹ These courts reason that LGBTQ plaintiffs are bringing claims based on sexual orientation or transgender status, rather than as members of the protected classes of men or women.⁸² At the time of this writing, the U.S. Supreme Court is considering whether discrimination on the basis of sexual orientation or gender identity is “because of . . . sex” under Title VII.⁸³

A second element is that the harassment was “severe or pervasive,” both as an objective matter, meaning in the estimation of a reasonable person, and as a

77. See Clarke, *supra* note 75, at 535–39. On similar theories, nonbinary people can also be targeted for harassment because of sex. See Jessica Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 924–25 (2019).

78. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 24 (2018).

79. See, e.g., Gillian Tan & Katia Porzecanski, *Wall Street Rule for the #MeToo Era: Avoid Women at All Cost*, BLOOMBERG (Dec. 3, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost>.

80. See, e.g., Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 67–69 (2018).

81. Jessica Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 123–26 (2017).

82. *Id.*

83. *Bostock v. Clayton Cty. Bd. of Comm'ners*, 723 F. App'x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

subjective matter, meaning in the victim's own estimation.⁸⁴ Harassment need not cause psychological or tangible economic harm to meet this standard.⁸⁵ Courts consider factors including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."⁸⁶ A single incident—such as sexual assault or a quid-pro-quo demand for sexual favors—may be sufficient.⁸⁷

Notoriously, lower federal courts have raised the bar for what counts as "severe or pervasive."⁸⁸ Many of the incidents exposed by the #MeToo movement would not qualify as harassment under this harsh standard. For example, in one case, a female law enforcement officer alleged that her male supervisor had tried to kiss her and called her a "frigid bitch" when she refused him, showed up at her home to tell her he loved her, commented on her appearance, chased her around the office, picked her up and lifted her over his head, rubbed against her, and attempted to look down her shirt, among other incidents over the course of her four years working in his department.⁸⁹ The court dismissed the case because the conduct "was not that frequent."⁹⁰ Another problem is that courts often disaggregate allegations of harassment into separate categories for analysis—for example, separating racial and sexual harassment,⁹¹ or sexual and non-sexual forms of harassment⁹²—in order to find that no one category meets the "severe or pervasive" standard.

A third element of a harassment claim is that the harassment be unwelcome. Early on, U.S. courts recognized that it is not a defense to sexual harassment that the victim voluntarily submitted to sexual interaction; it is sufficient that the harassment was unwelcome.⁹³ This was an improvement over a doctrine that would have allowed a victim's consent to be a defense. While the unwelcomeness element is not an issue in many reported cases, it may still focus undue attention on the victim's personal history and response to the harassment,

84. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

85. *Id.*

86. *Id.* at 23.

87. SANDRA SPERINO & SUJA THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 33 (2017).

88. *Id.* at 33–38.

89. *Mitchell v. Pope*, 189 F. App'x 911, 913 n.3 (11th Cir. 2006).

90. *Id.* at 913.

91. Clarke, *supra* note 81, at 127–29.

92. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1713–29 (1998).

93. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

limiting the cases plaintiff's lawyers are willing to bring and inviting defense attorneys to engage in intrusive and humiliating discovery into a plaintiff's personal life.⁹⁴

A final element is employer liability. One quirk of U.S. harassment law is that under Title VII, only employers are liable; individual harassers may not be sued.⁹⁵ There are three tiers of employer liability. The highest level is automatic liability. An employer is automatically liable if (a) the harasser took a "tangible employment action" against the victim, meaning some sort of official act of the enterprise, such as a demotion, or (b) the harasser is one of the company's highest officials.⁹⁶ Thus, if the victim lost her job, or if her harasser were Harvey Weinstein and she was an employee of the Weinstein Company, liability would be automatic. But much harassment is informal, and most harassers do not have their names on the building.

A second tier of employer liability is known as the *Faragher/Ellerth* standard.⁹⁷ It applies if there is no basis for automatic liability, but the harasser was the victim's supervisor. Under this standard, the employer has the burden of proving that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁹⁸ The lowest tier of liability applies when the harasser was a coworker, customer, or other person who was not the plaintiff's supervisor, in which case it is the plaintiff who has the burden of proving the employer was negligent.⁹⁹

This complicated employer liability scheme renders sexual harassment law ineffective in a wide swath of cases. When liability is not automatic, claims will be barred unless victims took advantage of their employer's "preventative or corrective opportunities" by promptly reporting the harassment. Yet studies have

94. Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 *YALE J.L. & FEMINISM* 131, 151–52, 155 (2008).

95. Victims of sexual harassment may bring common-law tort claims against individual perpetrators under state law, but they seldom do for a variety of reasons, notably the lack of liability insurance funds that might provide compensation should they prevail. Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 *J. TORT L.* 39, 47–48, 52–53 (2018).

96. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758, 761–63 (1998).

97. *Id.* at 753; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

98. *Burlington Industries, Inc.*, 524 U.S. at 765.

99. *See, e.g., Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994). This same negligence standard often applies in common-law tort claims against institutions that employed perpetrators of sexual abuse, making it difficult for survivors to win their cases. *See* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 *VAL. U. L. REV.* 133, 136 (2013).

found that 70 percent of sexual harassment victims never complain internally.¹⁰⁰ Victims do not complain because “they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.”¹⁰¹ Moreover, “employers often create policies and grievance procedures that are ineffective or inaccessible or involve fear of retaliation. And courts, for their part, often fail to distinguish between effective and ineffective organizational policies.”¹⁰²

According to one study, 75 percent of employees who complained faced some sort of retaliation.¹⁰³ While Title VII forbids retaliation, the U.S. Supreme Court has made it more difficult to prove than other violations of the statute.¹⁰⁴ As a general matter, plaintiffs are only protected if they have filed an official complaint with a federal agency or if they had a reasonable belief that the harassment was illegal.¹⁰⁵ This can put victims in a double bind: if a victim complains about her supervisor’s harassment too early, and then that supervisor fires her in retaliation, a court may conclude she did not have a reasonable belief her harassment was severe or pervasive, and so her firing was permissible.¹⁰⁶ But if that plaintiff waits until the supervisor’s harassment becomes severe or pervasive, a court may conclude that she failed to promptly take advantage of corrective opportunities provided by the employer, and therefore the *Faragher/Ellerth* defense immunizes the employer from liability.

In addition to these substantive requirements, there are unusual procedural hurdles for sexual harassment claims. Before bringing suit, a plaintiff must first file a “charge” with the EEOC or state agency, so that agency can attempt to resolve the case or decide whether it should bring suit on the plaintiff’s behalf. Plaintiffs have a short time frame, generally 300 days, but sometimes as few as 180 days, in which to bring that charge.¹⁰⁷ By contrast, a typical statute of

100. Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469–96 (J. Barling & C. L. Cooper eds., 2008).

101. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

102. LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 62 (2016).

103. Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003).

104. *See* Univ. Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013).

105. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001).

106. Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 139 (2014).

107. 42 U.S.C. § 2000e-5(e)(1) (2012).

limitations for breach of contract is six years, with no requirement that a charge be filed with any agency first.¹⁰⁸

On top of the substantive and procedural barriers, there may also be contractual barriers to suit. As a condition of hire, many U.S. employers require that their employees sign agreements limiting their rights to pursue sexual harassment claims. These agreements may require that charges of sexual harassment be settled in arbitration rather than litigation,¹⁰⁹ or they may bar class-wide claims,¹¹⁰ and they may require confidentiality.¹¹¹ Whether or not there is an agreement to arbitrate, employers often require nondisclosure agreements as a condition of any settlement of a sexual harassment claim, shielding harassers and the company from public scrutiny.¹¹² Many commentators blamed confidentiality agreements for the persistence of Harvey Weinstein's harassment.¹¹³

As a result of the #MeToo movement, some U.S. states have passed laws limiting the use of nondisclosure agreements.¹¹⁴ Others have attempted to limit mandatory arbitration agreements,¹¹⁵ even though federal courts have struck down similar laws as preempted by a federal statute, the Federal Arbitration

108. *See, e.g.*, MASS. GEN. LAWS ch. 260 § 2 (2019).

109. ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION 1* (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>.

110. *See* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

111. Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, DEALBOOK (July 15, 2014), <https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/>. While arbitration and other such agreements do not bind the EEOC, the EEOC can bring only a fraction of meritorious cases. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295–96 (2002).

112. Alexia Fernández Campbell, *A New House Bill Would Bar Companies from Using Nondisclosure Agreements to Hide Harassment*, VOX (July 18, 2018), <https://www.vox.com/2018/7/18/17586532/sexual-harassment-bill-ban-nondisclosure-agreements-ndas-congress-metoo>.

113. *See, e.g.*, Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017), <https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda>.

114. CAL. CIV. PRO. § 1001 (West 2019) (forbidding nondisclosure agreements if a victim has filed a civil or administrative complaint); N.Y. GEN. OBLIG. § 5-336 (McKinney 2018) (forbidding nondisclosure agreements unless it “is the complainant’s preference”); N.J. STAT. ANN. § 10:5-12.8 (West 2019) (providing that nondisclosure agreements are unenforceable against current or former employees). Some states have forbidden certain nondisclosure agreements as conditions of employment. CAL. GOV’T CODE § 12964.5 (West 2019); TENN. CODE ANN. § 50-1-108 (2018); MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018); VT. STAT. ANN. tit. 21, § 495h(g)-(h) (2018); WASH. REV. CODE 49.44.210 (2018). A California law nullifies any agreement that would prevent a person from testifying about alleged criminal conduct or sexual harassment at the request of an administrative agency, legislature, or court. CAL. CIV. CODE § 1670.11 (West 2019).

115. *See, e.g.*, N.Y. C.P.L.R. § 7515 (McKinney 2019).

Act.¹¹⁶ A new provision of the U.S. tax code forbids employers from deducting settlement payments if the settlement included a nondisclosure agreement, which may reduce the incentives to include these provisions.¹¹⁷

Some individual U.S. states and localities have passed laws providing remedies for sexual harassment where Title VII would not.¹¹⁸ For example, California and New York have extended their laws to cover independent contractors.¹¹⁹ California has gone further to forbid sexual harassment by any person with a “business, service, or professional relationship” with the victim or who “holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party.”¹²⁰ This includes doctors, lawyers, teachers, elected officials, directors, and producers.¹²¹ California’s legislature has also clarified that workplace harassment does not have to meet the “severe or pervasive” standard to be illegal; an employee need only prove that “a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to make it more difficult to do the job.”¹²² Some state courts, including New York’s, have declined to adopt the *Faragher/Ellerth* defense, imposing automatic liability for harassment by supervisors.¹²³ Some states have also extended the statute of limitations, for example, New York’s is three years.¹²⁴ Political polarization at the federal level in the United States makes state-level change a more likely reform strategy for feminists. But state-level change will be piecemeal.

Although legal reforms have been limited, the #MeToo movement has had a major impact in prompting voters, corporate leaders, and other institutional actors to remedy the lack of gender diversity in leadership. In the first mid-term election after the movement went viral, an unprecedented number of

116. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

117. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 131 Stat. 2054.

118. Another popular reform is to increase required trainings by employers. See, e.g., CAL. GOV’T CODE § 12950.1 (West 2019). But research on the efficacy of training programs is mixed. See, e.g., Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will*, HARV. BUS. REV. (Nov. 15, 2017), <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>.

119. CAL. GOV’T CODE § 12940(j)(1) (West 2018); N.Y. EXEC. L. § 296-d (McKinney 2018).

120. CAL. CIV. CODE § 51.9(a)(1).

121. *Id.*

122. CAL. GOV’T CODE § 12923(a) (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 26 (1993) (Ginsburg, J., concurring)). The legislature has also clarified that “[h]arassment cases are rarely appropriate for disposition on summary judgment.” *Id.* § 12923(d).

123. See, e.g., *Zakrzewska v. New Sch.*, 928 N.E.2d 1035, 1038–39 (N.Y. 2010).

124. N.Y. C.P.L.R. 214(2) (McKinney 2018).

women won seats in the U.S. House of Representatives.¹²⁵ The *New York Times* estimates that almost one-half of the 201 prominent men who lost positions as a result of #MeToo-related allegations were replaced by women.¹²⁶ In 2018, California passed a law mandating gender diversity on corporate boards—the first such law in the United States.¹²⁷ These changes reflect the recognition that one structural cause of sexual harassment is the gendered power imbalance in American institutions.¹²⁸

The #MeToo movement has also prompted new efforts by the nonprofit sector to make harassment law more effective, such as the launch of the Time’s Up Legal Defense Fund, an organization that connects victims of workplace sexual harassment with legal representation and public relations assistance, particularly low-income women and people of color.¹²⁹ In its first six months, the Fund “allocated more than \$5 million to 75 cases.”¹³⁰

In addition to Title VII’s bar on sexual harassment in employment, federal statutes also forbid sex discrimination in education,¹³¹ housing,¹³² and health care.¹³³ Interpretations of Title VII often influence the interpretations of these other statutes, for better or worse.¹³⁴ Courts have interpreted Title IX, a 1972 law that forbids sex discrimination in educational programs receiving federal funding, to require schools to stop students from sexually harassing other

125. Mary Jordan, *Record Number of Women Heading to Congress*, WASH. POST (Nov. 8, 2018), https://www.washingtonpost.com/politics/record-number-of-women-appear-headed-for-congress/2018/11/06/76a9e60a-e1eb-11e8-8f5f-a55347f48762_story.html?utm_term=.817eac07048e.

126. Carlsen et al., *supra* note 4.

127. CAL. CORP. CODE § 301.3 (West 2019). The law applies only to certain public corporations with principal executive offices in California. *Id.* The rule defines who is a woman based on self-identification, not sex assigned at birth. *Id.* § 301.3(f)(3).

128. See Dobbin & Kalev, *supra* note 118; Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 22–24 (2018) (collecting studies on the links between sex segregated workplaces and harassment).

129. About Time’s Up Legal Defense Fund, NAT’L WOMEN’S LAW CTR., <https://nwlc.org/times-up-legal-defense-fund/about-times-up-legal-defense-fund/> (last visited Apr. 28, 2019).

130. TIME’S UP LEGAL DEFENSE FUND, TIME’S UP ANNUAL REPORT 6 (2018), <https://nwlc-ciw49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2018/12/TIMES-UP-2018-Version-2.pdf>.

131. 20 U.S.C. § 1681 (2012).

132. 42 U.S.C. § 3604 (2012).

133. 42 U.S.C. § 18116(a) (2012).

134. See, e.g., Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing: Pilot Study Results*, 83 MO. L. REV. 597, 604 (2018).

students.¹³⁵ In 2011, the Obama Administration began aggressively enforcing this law, advising schools that they were required to establish procedures for the fair and prompt resolution of complaints of sexual violence, defined broadly; to designate an employee to coordinate compliance efforts; and to evaluate charges based on the “preponderance of the evidence standard,” which asks whether an event was “more likely than not” and is the general rule in civil cases in the United States.¹³⁶ In November 2018, the Trump Administration announced that it planned to pull back on the Obama-era rules in the interests of protecting the due process rights of the accused.¹³⁷ Despite changes in U.S. presidential administrations, many of the reforms that were prompted by the 2011 guidance have proven popular with school administrations and student activists, and are therefore likely to have staying power.¹³⁸

Conclusion

As a result of feminist reform movements, U.S. law has made tremendous strides in redefining sexual assault and creating remedies for sexual harassment. But these laws remain riddled with loopholes, limitations, and traps for the unwary victim. The #MeToo movement has demonstrated that sexual harassment and assault remain at crisis levels in the United States. But it now seems more likely that incidents will be exposed through investigative journalism, blog posts, or social media, than through formal legal complaints. The new threat of public exposure may better deter and even incapacitate perpetrators. But media attention does not suffice to compensate survivors, to help the many victims whose harassment does not make headlines, or to change underlying structures and attitudes that result in abuse. Sexual entitlement, misogyny, and sexism have proven resilient, often infused with racism, classism, and homophobia. Meaningful change in the United States will require the rethinking of criminal justice and antidiscrimination rules, as well as creative new legal strategies.

135. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649–51 (1999).

136. OFFICE FOR CIVIL RIGHTS, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011).

137. U.S. DEP’T OF EDUC., Press Release, *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All* (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>. At the time of this writing, the proposed rules have not been finalized.

138. Suzanne B. Goldberg, *Is There Really A Sex Bureaucracy?*, 7 CAL. L. REV. ONLINE 107, 114–17 (2016).