

# Me Too?

## Race, Gender, and Ending Workplace Sexual Harassment

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### INTRODUCTION

On October 5, 2017, the *New York Times* published an exposé that propelled the nation into what has become known as the Me Too era.<sup>1</sup> The exposé detailed nearly three decades of predatory behavior by Harvey Weinstein, one of Hollywood’s most influential producers, toward actresses, aspiring actresses, and female employees of the Weinstein Company.<sup>2</sup> Weinstein’s behavior was an “open secret” in Hollywood. Because of his power and influence, however, few had directly challenged it.<sup>3</sup> The *New York Times’* article changed all of that. Following the *Times’* exposé, prominent Hollywood actresses like Ashley Judd and Gwyneth Paltrow began to speak out about their experiences with sexual harassment and

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1. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>. A few days after the *Times’* article, the *New Yorker* published the results of its own investigation into Weinstein’s behavior. 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>.

2. Kantor & Twohey, *supra* note 1.

3. See *id.*; Megan Twohey et al., *Weinstein’s Complicity Machine*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html>. Importantly, Weinstein was not the only known Hollywood predator. Many influential men had sexually harassed and otherwise abused women in the entertainment industry, but the overwhelming power dynamic rendered most of the survivors voiceless.

assault.<sup>4</sup> Notably, in a post on Facebook and Twitter, Alyssa Milano urged women to acknowledge on social media if they had been sexually harassed or assaulted.<sup>5</sup> The public's feedback was overwhelming. Tens of thousands of women responded "me too," with many sharing their personal stories of abuse.<sup>6</sup> In so doing, these women bore witness to the ubiquitous nature of sexual harassment and sexual assault. Their responses made it possible for other women to speak up and made it impossible for the country to look the other way.

Although the terminology and legal claims are relatively new, sexual harassment and sexual assault are pervasive.<sup>7</sup> Catharine MacKinnon, a renowned feminist and champion of women's rights, states in her path-breaking book, *The Sexual Harassment of Working Women*, that in the 1970s the term "sexual harassment" did not exist.<sup>8</sup> Yet, in her discussions with working women at the time, MacKinnon notes that women shared countless stories of denigration and abuse in the workplace. As they entered previously male-dominated workspaces, men frequently conditioned women's employment opportunities on compliance with male sexual advances. Moreover, work environments were polluted with pornographic material, demeaning language, and other gender-based insults and ridicule.<sup>9</sup> Empirical data from the 1970s are limited, as women worked to describe and to name what they were experiencing. Recent studies, however, estimate that anywhere from 25 to 80 percent of women in the United States experience

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4. See, e.g., Jodi Kantor & Rachel Abrams, *Gwyneth Paltrow, Angelina Jolie and Others Say Weinstein Harassed Them*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/us/gwyneth-paltrow-angelina-jolie-harvey-weinstein.html>; Kantor & Twohey, *supra* note 1. As used in this Essay, the term "sexual harassment" refers to sexually-based conduct (e.g., unwanted sexual demands) as well as gender-based conduct (e.g., acts that demean or denigrate women but that lack a sexual component).

5. 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); Alyssa Milano, FACEBOOK (Oct. 15, 2017), <https://www.facebook.com/AlyssaMilano/posts/1692250500847185>.

6. See *id.* (showing replies from thousands of users). Two days after Milano's post, CBS news reported: "the metoo hashtag had been tweeted nearly a million times on Twitter; and there had been more than twelve million posts, comments and reactions on Facebook by 4.7 million users around the world." Facebook stated that 45 percent of its U.S. users had friends who posted "me too." Associated Press, *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 hours*, CBS NEWS (Oct. 17, 2017), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/> [hereinafter Associated Press, *More Than 12 M "Me Too" Facebook Posts*].

7. See, e.g., *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Dec. 6, 2019).

8. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 27 (1979).

9. See *id.* at 43–46.

workplace harassment in their lifetimes.<sup>10</sup> Although men are subject to sexual harassment and sexual violence, women overwhelmingly remain its targets.<sup>11</sup>

Women's responses to Milano's post put a human face to the statistical data. In addition, with high profile, powerful women pushing for change—empires began to topple, or at least, to tilt. Media moguls like Harvey Weinstein and Bill Cosby were taken down.<sup>12</sup> Journalists and businessmen like Bill O'Reilly, Matt Lauer, Charlie Rose, and Roger Ailes lost their jobs. Celebrity chefs, such as Mario Batali, tumbled. So too did notable politicians like U.S. Senator Al Franken, jurists like Roy Moore and Alex Kozinski, and entertainers like Garrison Keillor, Russell Simmons, and Louis C.K. As of October 2018—a mere year after Me Too went viral—at least 200 prominent businessmen had lost their jobs following public allegations of sexual harassment, and women replaced nearly half of these men.<sup>13</sup>

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10. CHAI FELDBLUM & VICTORIA 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 8 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf). The wide range is in part due to the way in which surveys and other polling instruments are phrased as well as who gets questioned. For example, when the instrument does not define sexual harassment, fewer women report having experienced harassment. When the instrument includes examples of sex-based or gender-based behaviors, the rate of reported harassment increases. *Id.* at 7-9. Importantly, reporting data are often under inclusive. Indeed, approximately ninety percent of persons who say they have experienced harassment never take formal action (e.g., filing a complaint or a charge with the appropriate entity). *Id.* at 8; Amanda Rossie et al., *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, NAT'L WOMEN'S LAW CTR. 1, 2 (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>; Dan Cassino & Yasemin Besen-Cassino, *Race, Threat, and Workplace Harassment: The Dynamics of Harassment in the United States, 1997–2016*, 26 GENDER, WORK & ORG. 1221, 1222 (2019).

11. See, e.g., Rossie et al., *supra* note 10, at 2; Michael Alison Chandler, *Men Account for Nearly 1 in 5 Complaints of Workplace Sexual Harassment with the EEOC*, WASH. POST (Apr. 8, 2018), [https://www.washingtonpost.com/local/social-issues/men-account-for-nearly-1-in-5-complaints-of-workplace-sexual-harassment-with-the-eeoc/2018/04/08/4f7a2572-3372-11e8-94fa32d48460b955\\_story.html?noredirect=on&utm\\_term=.c37f5ba8a18e](https://www.washingtonpost.com/local/social-issues/men-account-for-nearly-1-in-5-complaints-of-workplace-sexual-harassment-with-the-eeoc/2018/04/08/4f7a2572-3372-11e8-94fa32d48460b955_story.html?noredirect=on&utm_term=.c37f5ba8a18e).

12. For an extensive listing of men who have been accused of sexual harassment or assault within the last two years and a summary of their alleged acts, see 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>; Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS (Nov. 8, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546>.

13. See, e.g., Carlsen et al., *supra* note 12.

The overwhelming social media response to Milano's post was not limited to the United States.<sup>14</sup> Me Too has had a global ripple effect.<sup>15</sup> In India.<sup>16</sup> In sub-Saharan Africa.<sup>17</sup> In South America.<sup>18</sup> In southeast Asia.<sup>19</sup> In each of these regions, and elsewhere, women have shared undeniably heartbreaking and raw personal accounts of their experiences.

While one applauds the attention that Me Too has brought to the issue of sexual harassment and sexual assault, some areas within the movement, and within the law, require additional consideration and analysis. This Essay examines three such areas: (1) the absence of an intersectional approach in both lay and legal discussions of sexual harassment and sexual assault; (2) the fact that some men are rebounding without evidence of redemption—and, more critically, that women who come forth still risk considerable backlash; and (3) the fact that U.S. law and lawmakers have been rather conservative in addressing sexual harassment. Analysis of these areas suggests that, while helpful, the social media momentum and greater awareness sparked by Me Too may be inadequate alone to end sexual harassment.<sup>20</sup>

## I. THE NEED FOR INTERSECTIONAL ANALYSES

In the U.S. legal academy, Kimberlé Crenshaw and other Black feminist scholars have analyzed how discussions of gender tend to focus on White middle-

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14. See *supra* note 6. Sexual harassment is obviously not exclusive to U.S. men. This fact alone, however, may not account for the rapid-fire spread of Me Too. Other contributing factors may be the use of social media, which made the hashtag globally accessible and a quickly trending topic. Also, some of the A-list celebrities who spoke out enjoyed a global audience due, in part, one suspects to international fascination with the U.S. entertainment industry.

15. See *Me Too Rising*, GOOGLE TRENDS, <https://metoorising.withgoogle.com/> (last visited Feb. 25, 2020) (dynamic webpage documenting the global spread of Me Too). According to the Pew Research Center, in the first year of Me Too, a majority of #MeToo tweets during high-volume periods were English. However, approximately 29 percent of tweets during this time were in another language. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RESEARCH CTR. (Oct. 11, 2018), [https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/?utm\\_source=Pew+Research+Center&utm\\_campaign=bc6a468ed2EMAIL\\_CAMPAIGN\\_2018\\_10\\_11\\_05\\_08&utm\\_medium=email&utm\\_term=0\\_3e953b9b70-bc6a468ed2-400487317](https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/?utm_source=Pew+Research+Center&utm_campaign=bc6a468ed2EMAIL_CAMPAIGN_2018_10_11_05_08&utm_medium=email&utm_term=0_3e953b9b70-bc6a468ed2-400487317).

16. See, e.g., Furkan Latif Khan & Sushmita Pathak, *Government Official Resigns As #MeToo Movement Gathers Force in India*, NPR (Oct. 16, 2018), <https://www.npr.org/sections/goatsandsoda/2018/10/16/656864272/-metoo-movement-gathers-force-in-india>.

17. See, e.g., Aanu Adeoye, *The Young Women Leading Nigeria's #MeToo Revolution*, VICE (July 27, 2019), [https://www.vice.com/en\\_uk/article/xwnj77/nigeria-me-too-movement-biodun-fatoyinbo](https://www.vice.com/en_uk/article/xwnj77/nigeria-me-too-movement-biodun-fatoyinbo).

18. See, e.g., Daniel Politi & Megan Specia, *Argentina's #MeToo Moment: Actress Shares Account of Assault*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/world/americas/argentina-metoo-thelma-fardin.html>.

19. See, e.g., Elaine Lies, *Top Japanese Finance Bureaucrat Resigns Amid Sexual Harassment Allegations*, REUTERS (Apr. 18, 2018), <https://www.reuters.com/article/us-japan-politics-finance-sexualharassme/top-japanese-finance-bureaucrat-resigns-amid-sexual-harassment-allegations-idUSKBN1HP14T>.

20. Although sexual harassment and assault occur in all areas of life, this essay focuses on sexual harassment in the workplace. The legal analysis is also limited to civil claims.

class women, and how discussions of race tend to focus on Black men.<sup>21</sup> This focus omits, and renders invisible, the experiences and voices of poor women and women of color.

Crenshaw notes that society tends to treat race and gender as separate, mutually exclusive categories of experience and analysis and that this separation puts our focus on privileged individuals within these categories. She writes:

[I]n race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.

. . . . [T]his focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon.<sup>22</sup>

Crenshaw's insight is that race and gender are always interconnected and never exist as separately distinct, disaggregated identities. Professor Angela Harris adds to the analysis by pointing out that there is nothing "essential" about gender or race that causes all women to share the same experience of sexism and all people of color to share the same experience of racism.<sup>23</sup> Because gender is always mediated by race, and race is always mediated by gender, there is no monolithic women's experience, just as there is no monolithic Black, Latinx, or Asian experience. The intersectionality and anti-essentialism critiques also extend to other status markers that situate people differently (e.g., class, gender identity, ability).<sup>24</sup>

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21. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL F. 139, 140 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE. L.J. 365 (1991); Margaret E. Montoya, *Máscaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994). Similarly powerful critiques have been made beyond the legal academy. See, e.g., PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984); BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984); *ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE* (Gloria T. Hull, Patricia Bell Scott & Barbara Smith eds., 1982).

22. Crenshaw, *supra* note 21, at 140 (emphasis added).

23. Harris, *supra* note 21.

24. See, e.g., Rabia Belt, "And Then Comes Life:" *The Intersection of Race, Poverty, and Disability in HBO's The Wire*, 13 RUTGERS RACE & L. REV. 1 (2012); Tina Goethals et al., *Weaving Intersectionality into Disability Studies Research: Inclusion, Reflexivity and Anti-Essentialism*, 2 DiGeSt. J. DIVERSITY & GENDER STUD. 75 (2015) (identifying the wide range of experiences and perspectives of people with disabilities and encouraging intersectional research to better understand these varying experiences and perspectives); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995) (explaining intersectionality and how it may affect a person's experiences in any number of contexts, then putting forward three lessons that practitioners can utilize to prevent further marginalization); Darren Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Queer Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (critiquing the mainstream discourse as being racially exclusive in a way that further marginalizes people who are both people of color and gay, lesbian or otherwise queer) [hereinafter Hutchinson, *Out Yet Unseen*]; Darren Hutchinson, *Symposium: Discrimination and Inequality Emerging Issues "Gay Rights" for "Gay Whites"?* *Race, Sexual*

The trajectory of the Me Too movement illustrates the critical need for an intersectional approach. Importantly, Me Too did not begin in 2017, nor did it begin on Twitter or Facebook. The phrase Me Too was first coined in 2006 by Tarana Burke, a Black woman activist who had just 500 Twitter followers when the *Times*' article broke.<sup>25</sup> In 2006, Burke was living and working in Alabama where she had just founded Just Be, Inc.<sup>26</sup> The organization's goal was to empower and promote the general wellbeing of young girls of color.<sup>27</sup> In her work with Just Be, Burke encountered a number of girls who, both knowingly and unknowingly, disclosed experiences of sexual violence not unlike her own.<sup>28</sup> Burke set up a 'Me Too' Myspace page to raise awareness of the issue and to establish a supportive community.<sup>29</sup> This Myspace page was Me Too's first virtual home, and soon, Me Too became an organization. Thus, from its inception, Me Too was intended "to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing."<sup>30</sup>

Despite Burke's best efforts, the hashtag and the term did not go viral for over a decade. It was not until October 2017 when the Weinstein exposé broke and high-profile celebrities began to speak out about their experiences that the movement amassed widespread attention and support.<sup>31</sup> While these celebrities ought to be admired for their courage,<sup>32</sup> what we have learned is that wealthy celebrities and upper-middle-class White women are more likely than lower-income women and women of color to garner attention when they speak.<sup>33</sup> Their concerns are taken more seriously, and they are more likely to be believed.

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*Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

25. *History and Vision*, ME TOO, <https://metoomvmt.org/about/> (last visited Feb. 25, 2020).

26. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

27. *Id.*; Emma Brockes, *#MeToo Founder Tarana Burke: 'You Have to Use Your Privilege to Serve Other People'*, GUARDIAN (Jan. 15, 2018), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>.

28. Chris Snyder and Linette Lopez, *Tarana Burke on Why She Created the #MeToo Movement— And Where It's Headed*, BUS. INSIDER (Dec. 13, 2017), <https://www.businessinsider.com/how-the-metoo-movement-started-where-its-headed-tarana-burke-time-person-of-year-women-2017-12>.

29. *Id.*

30. *Id.*

31. *Id.*

32. They should also be applauded for creating Time's Up in January 2018. Time's Up seeks to help women across all industries and all classes fight against sexual violence. Time's Up, <https://timesupnow.org/> (last visited Feb. 29, 2020). Time's Up has also collaborated with the National Women's Law Center to develop a Legal Defense Fund "that connects those who experience workplace sexual harassment and related retaliation with legal and media assistance." In addition to providing a network of attorneys, the Fund has committed over \$10 million to fund cases with particular attention to assisting marginalized workers. Stats & Numbers, Time's Up Legal Defense Fund (Nov. 18, 2019), [https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/2019.11.18-Final\\_nwlc\\_TimesUpOneSheetENG.pdf](https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/2019.11.18-Final_nwlc_TimesUpOneSheetENG.pdf). While Time's Up is a much-needed response to the intersectional critique, many more such efforts, by all players across the socio-political spectrum, are required.

33. While one must admire and support courageous women like Christine Blasey Ford, Alyssa Milano, Ashley Judd, Gwyneth Paltrow and others, one must not overlook or discount the historical presence of women of color as change agents in this area. See Tanya Kateri Hernández, "What Not to

The voices of relatively privileged women thus tend to shape discussions of sexual harassment and sexual assault, even though such violations disproportionately affect more marginalized women. Data from the Equal Employment Opportunity Commission show that low-wage women in the food, retail, and health care industries filed the highest number of sexual harassment and assault charges between 2012 and 2016.<sup>34</sup> These same data show that Black women are three times as likely as non-Hispanic White women to experience sexual harassment at work.<sup>35</sup> While sexual harassment and assault occur in all workplaces and at all levels of employment, a heavy focus on high-profile celebrities obscures what happens in agricultural fields, in hotel rooms, in bars and restaurants, and in retail stores where workers often hold low-wage jobs, are often women of color, and often live paycheck to paycheck. Viewing sexual harassment and sexual assault through a narrow lens makes it harder to see how racism and classism render poor women and women of color especially vulnerable, yet simultaneously suspicious. As Emily Martin, President for Workplace Justice at the National Women’s Law Center has noted, alleging sexual harassment is:

scary for anybody, but it’s especially threatening if you don’t have a financial cushion and your paycheck is the only thing standing between your family and homelessness . . . [Moreover,] [o]ur willingness to believe victims of harassment and violence is not extended to all victims equally . . . If you’re poor, you may be found less credible when you tell your story.<sup>36</sup>

Similarly, Professor Tanya Hernández, has argued that the harassment women of color face is “particularly debilitating” because it combines both sexist attitudes and racial stereotypes.<sup>37</sup> For example, Hernández notes that “[w]omen of color are frequently depicted as sexually promiscuous, sexually available, and sexually voracious.”<sup>38</sup> This ‘continuing myth of promiscuity,’ Hernández

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*Wear*—*Race and Unwelcomeness in Sexual Harassment Law: The Story of Meritor Savings Bank v. Vinson*, in *WOMEN AND THE LAW STORIES* 277, 278 (Elizabeth Schneider & Stephanie Wildman eds., 2011) (explaining that Black women “brought most of the early precedent-setting sexual harassment cases”). Similarly, one must not forget that the experiences of wealthy White women do not represent the experiences of all women. Indeed, these omissions have been major sources of criticism for Me Too. See Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 *YALE L.J.F.* 105 (2018); Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They’re Still Being Ignored*, *WASH. POST* (Nov. 9, 2017), <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/>.

34. Rossie et al., *supra* note 10, at 16.

35. *Id.* at 4 (noting that out of the charges filed by women, 56 percent were by women of color, who make up only 37 percent of the workforce); see also Cassino & Besen-Cassino, *supra* note 10, at 1235 (concluding that “women of color are much more likely to experience sexual harassment in the workplace, and the benefits that have come from greater awareness of sexual harassment have benefitted white women more than others”).

36. Alana Semuels, *Low-Wage Workers Aren’t Getting Justice for Sexual Harassment*, *ATLANTIC* (Dec. 27, 2017), <https://www.theatlantic.com/business/archive/2017/12/low-wage-workers-sexual-harassment/549158/> (quoting interview with Emily Martin).

37. Hernández, *supra* note 33, at 299.

38. *Id.*

explains, shapes both the types of harassment women of color face as well as their likelihood of being believed.<sup>39</sup>

Erasure of the activism and experiences of poor women and women of color is not merely part of the social discourse in the United States; it is also reflected in the ways in which U.S. law is taught and created. In other words, this erasure is embedded in our governing structures. To illustrate this point, consider *Meritor Savings Bank, FSB v. Vinson*,<sup>40</sup> the first case in which the U.S. Supreme Court recognized sexual harassment as a form of prohibited sex discrimination under Title VII of the Civil Rights Act of 1964.<sup>41</sup>

*Meritor Savings Bank, FSB v. Vinson*

In 1974, Mechelle Vinson began working for Meritor Savings Bank as a teller-trainee.<sup>42</sup> Over the next four years, the bank promoted Vinson to teller, head teller, and assistant branch manager. Shortly after her probationary period ended, Vinson alleged that Sidney Taylor, who was an assistant vice-president of the bank and the manager of one of its branches, began to harass her. She testified that Taylor repeatedly demanded sexual favors, fondled her in front of other employees, exposed himself to her, and forcibly raped her on several occasions. Vinson initially refused Taylor's sexual demands but eventually complied because she feared losing her job. Vinson testified that she had sex with Taylor forty to fifty times over the course of her employment.<sup>43</sup> Because Vinson was afraid of Taylor, she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedures.<sup>44</sup>

Taylor denied all of Vinson's allegations, contending that they were in response to a business-related dispute. The Bank also denied Vinson's allegations, asserting that "any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval."<sup>45</sup>

In its groundbreaking opinion, the U.S. Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII, noting "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."<sup>46</sup> Although the case reached the Court on a hostile environment theory, by adopting the

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39. *Id.* at 299–300. Hernández notes that societal stereotypes "may encourage co-workers and supervisors to be sexually explicit around women of color or to request information about their sex lives." *Id.* at 300. These stereotypes have also "resulted in women of color being accused of inviting the sexual and physical abuses they suffer." *Id.*

40. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

41. 42 U.S.C. § 2000e–2(a)(1) (2018). Title VII prohibits employers from discriminating against employees based on race, color, religion, sex, or national origin.

42. The facts in this paragraph are reported in the Supreme Court's opinion. *Vinson*, 477 U.S. at 59–61.

43. *Id.* at 60.

44. *Id.* at 61.

45. *Id.* at 60.

46. *Id.* at 65.

EEOC's definition of harassment<sup>47</sup> the Court endorsed both quid pro quo and hostile environment claims. Quid pro quo claims involve unwelcome employer demands for sexual favors in return for an employment benefit or to avoid an employment detriment. Hostile environment claims involve unwelcome conduct that is sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment.<sup>48</sup>

In addition to recognizing sexual harassment as a form of prohibited sex discrimination, the Court in *Meritor* made at least three important doctrinal determinations favorable to plaintiffs. First, the Court rejected the Bank's argument that psychological or environmental harm is insufficient to state a claim and that a plaintiff must show "a tangible loss" of an "economic character."<sup>49</sup> In rejecting this contention, the Court noted that Title VII's language is not limited to economic or tangible harm. Rather, the Court found "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>50</sup>

Second, in determining whether certain behavior is actionable, the Court made clear that the standard is "unwelcomeness," not "voluntariness." The Court stated:

the fact that sex-related conduct was voluntary in the sense that the complainant was not forced to participate against her will is not a defense to a sexual harassment suit brought under Title VII... The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome. . .<sup>51</sup>

Third, the Court held that a plaintiff's failure to use an employer's complaint mechanism is not fatal. The Court noted that leniency may be particularly appropriate when the employer's policies do not specify the type of behavior that is prohibited and do not provide a mechanism for a plaintiff to bypass her harasser when seeking redress.<sup>52</sup>

In reaching these conclusions, the Court significantly advanced the ability of complainants to seek redress for workplace sexual harassment. Unfortunately, however, the Supreme Court omitted any reference in its analysis to Vinson's age,

47. At the time, the EEOC Guidelines defined prohibited harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* The Guidelines also stated, "such sexual misconduct constitutes prohibited sexual harassment whether or not it is directly linked to the grant or denial of an economic quid pro quo, where 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." *Id.*

48. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

49. *Vinson*, 477 U.S. at 64–65.

50. *Id.* at 64 (citations omitted).

51. *Id.* at 68.

52. *Id.* at 72–73 ("Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor.").

race, or economic class. Indeed, students often assume that Mechelle Vinson was an older, middle-class, White woman.<sup>53</sup> She, however, was not. Both Vinson and Taylor were Black.<sup>54</sup> Vinson was 19 when she met Taylor.<sup>55</sup> She grew up poor and was a high school dropout with a general education diploma (“GED”)—a subsequently earned equivalent to a high school diploma.<sup>56</sup> Prior to her employment at the bank, Vinson had worked in lower level, female-dominated jobs in the service industry.<sup>57</sup> In contrast, Taylor was old enough to be Vinson’s father. He had worked his way up the bank’s hierarchy from janitor to assistant vice-president.<sup>58</sup> He was a father of seven children, the deacon of his church, and was revered by the local community.<sup>59</sup>

We suggest that inclusion of these facts would have more clearly exposed the power dynamics at play between Vinson and Taylor and in sexual harassment cases more generally. Their inclusion would have demonstrated the ways in which race, class, and age intersect to heighten the vulnerability of certain women, particularly young, poor, women of color. For example, Vinson’s economic marginality and limited educational training likely created a sense of extreme excitement at being afforded a chance at upward mobility. This same economic marginality, however, meant that Vinson feared losing her job and therefore likely endured Taylor’s unwanted sexual advances and assaults for years without utilizing the bank’s complaint mechanisms. Similarly, revealing that Vinson was a teenager would have shown how age, combined with Vinson’s lack of social stature, likely created a sense of horror, betrayal, and helplessness when Vinson became the target of someone she viewed as a father figure.

Race adds an additional layer of complexity. As noted earlier,<sup>60</sup> stereotypes of Black women as loose, sexually promiscuous, and lacking in sexual morals are pervasive in the United States.<sup>61</sup> Knowing it is likely that their allegations will be viewed with deep skepticism, that their characters will be attacked, and that their harassers will walk away relatively unscathed, Black women like Mechelle Vinson may be reticent to report harassing behavior. Further heightening their reluctance are the pressures of racial loyalty, which can include the expectation not to air the

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53. This observation is based on Professor Jones’ experience teaching employment discrimination law.

54. Importantly, Mechelle Vinson was not the only Black woman to figure prominently in the development of sexual harassment law. See Hernández, *supra* note 33, at 278.

55. *Mechelle Vinson’s Tangled Trials*, WASH. POST (Aug. 11, 1986), <https://www.washingtonpost.com/archive/lifestyle/1986/08/11/mechelle-vinsons-tangled-trials/40688848-d73c-4856-8a41-cff3e74277ba/>. For a detailed overview of the facts in *Meritor*, see Hernández, *supra* note 33, at 281–84. For additional analysis of the important interplay of race and class in the case, see Angela Onwuachi-Willig, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 303, 319 (Kathryn M. Stanchi et al. eds., 2016).

56. *Mechelle Vinson’s Tangled Trials*, *supra* note 55.

57. *See id.*

58. *Id.*

59. *Id.*

60. *See supra* notes 38–39 and accompanying text.

61. For analysis of the pernicious consequences of these and other stereotypes, see generally Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017 (2017).

dirty laundry<sup>62</sup> of sexism within the Black community, and the fear of being labeled a race traitor.

While the analysis thus far has focused primarily on the intersection of race, gender, and class, it also applies to other constitutive aspects of identity.<sup>63</sup> For example, scholars have discussed the ways in which conversations around sexual orientation and gender identity often employ a white, heterosexist norm that renders invisible the experiences of people of color in LGBTQIA communities.<sup>64</sup> Merely identifying with a nonheteronormative sexual orientation and/or gender identity heightens vulnerability to all forms of subordination, including sexual harassment and sexual assault. Race further compounds this vulnerability. For example, nearly half (47 percent) of the respondents in the 2015 U.S. Transgender Survey said that they had been sexually assaulted at some point in their lifetimes.<sup>65</sup> Among those respondents who identified as Black or African American, more than half (53 percent) reported having been sexually assaulted at some point in their lifetimes.<sup>66</sup> The figures for Latino/a; American Indian and Alaska Native; and Native Hawaiian, and Pacific Islander respondents were 48,<sup>67</sup> 65,<sup>68</sup> and 56 percent, respectively.<sup>69</sup> Unfortunately, future outcomes for individuals with these

62. “Airing dirty laundry” is an idiom that refers to the sharing of negative information with outsiders. *Air One’s Dirty Laundry*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/air%20one%27s%20dirty%20laundry>.

63. See Emily Flores, *The #MeToo Movement Hasn’t Been Inclusive of the Disability Community*, TEENVOGUE (Apr. 24, 2018), <https://www.teenvogue.com/story/the-metoo-movement-hasnt-been-inclusive-of-the-disability-community>; S.E. Smith, *Disability Should Be Integral to the #MeToo Conversation*, REWIRE.NEWS (Nov. 2, 2017), <https://rewire.news/article/2017/11/01/disability-integral-metoo-conversation/>; Meredith Talusan, *How #MeToo Stands to Marginalize Trans and Gender-Nonconforming People*, THEM (Oct. 27, 2017), <https://www.them.us/story/how-metoo-stands-to-marginalize>.

64. See, e.g., C. RILEY SNORTON, *BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY* (3d ed. 2017); Darren Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFFALO L. REV. 1 (1999); Hutchinson, *Out Yet Unseen*, *supra* note 24; Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of “Sexual Orientation,”* 48 HASTINGS L.J. 1293, 1314 (1997).

65. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY*, 5, 15 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. The U.S. Transgender Survey is the “largest survey examining the experiences of transgender people in the United States, with 27,725 respondents from all fifty states” in 2015. *Id.* at 4.

66. SANDY E. JAMES, CARTER BROWN, & ISAIAH WILSON, 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 14-15 (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf>. Thirty-five percent of Black respondents identified as transgender men, 34 percent as non-binary, 30 percent as transgender women, and 2 percent as crossdressers. *Id.* at 3.

67. SANDY E. JAMES & BAMBY SALCEDO, 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF LATINO/A RESPONDENTS 15016 (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSLatinReport-Nov17.pdf>.

68. SANDY E. JAMES, TRUDIE JACKSON, & MATTEE JIM, NAT’L CTR. FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF AMERICAN INDIAN AND ALASKA NATIVE RESPONDENTS 15 (Nov. 2017), <https://transequality.org/sites/default/files/docs/usts/USTS-AIAN-Report-Dec17.pdf>.

69. SANDY E. JAMES & GLENN MAGPANTAY, NAT’L CTR. FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF ASIAN, NATIVE HAWAIIAN, AND PACIFIC

intersectional identities look particularly bleak, given that U.S. anti-discrimination law to date offers very limited, and inconsistent, protection against discrimination on the basis of sexual orientation and gender identity.<sup>70</sup>

In sum, to properly understand and remedy sexual harassment and sexual assault, issues of race, class, gender identity, and age, among other things, need to be in the foreground, not rendered invisible or ignored. A truly intersectional approach would reveal the larger context in which harassment occurs. It would also underscore that harassment and sexual assault are about power, not desire, and would expose how various status markers shape people's experiences in the workplace.<sup>71</sup> Highlighting this power dynamic is critically important as harassers strategically target those whom they perceive as most vulnerable.<sup>72</sup>

## II. BACKLASH

In addition to its failure to produce a robustly intersectional analysis of sexual harassment and sexual assault, one wonders about the potential for Me Too to bring about lasting change. To be sure, a few individuals have been successfully prosecuted. For example, in 2018, Bill Cosby was sentenced to three to ten years in prison for sexual assault,<sup>73</sup> and, in 2020, a New York jury found Harvey Weinstein

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ISLANDER RESPONDENTS 17 (Dec. 2017), <https://transequality.org/sites/default/files/docs/usts/USTS-ANHPI-Report-Dec17.pdf> ("More than one half (56%) of Native Hawaiian/Pacific Islander respondents had experienced sexual assault in their lifetimes, compared to 40% of Asian respondents.").

70. The U.S. Congress has failed repeatedly to enact federal legislation that would prohibit discrimination on these bases. See Eric Bachman, *What is the Equality Act and What Will Happen If It Becomes a Law?*, FORBES (May 30, 2019), <https://www.forbes.com/sites/ericbachman/2019/05/30/what-is-the-equality-act-and-what-will-happen-if-it-becomes-a-law/#2774c91d5fe4>. While the EEOC has concluded that Title VII covers sexual orientation and gender identity, the courts have yet to consistently resolve this question. *Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641 (July 15, 2015); *Macy v. Holder*, EEOC No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012). It is unclear how the U.S. Supreme Court will resolve this matter in the cases before it this term. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, *Altitude Express v. Zarda*, 139 S. Ct. 1599 (2019); *Bostock v. Clayton Ct. Bd. of Comm'rs*, 723 F.App'x 964 (11th Cir. 2018) *cert. granted sub nom.*, *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019); *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Funeral Homes, Inc.*, 844 F.3d 560 (6th Cir.) (2018), *cert. granted in part sub nom.* *R.G. & G.R. Funeral Homes v. Equal Emp't Opportunity Comm'n*, 139 S. Ct. 1599 (2019).

71. For additional analysis of race and class dynamics in sexual harassment cases, see Rossie, et al., *supra* note 10, at 4 (explaining that women of color are disproportionately more likely to experience workplace harassment); Hernández, *supra* note 33, at 277–306; Leah Fessler, *The Poorest Americans are 12 Times as Likely to be Sexually Assaulted as the Wealthiest*, QUARTZ (Jan. 3, 2018), <https://qz.com/1170426/the-poorest-americans-are-12-times-as-likely-to-be-sexually-assaulted/>.

72. Cassino & Besen-Cassino, *supra* note 10, at 1236 (noting that "harassers are conscious of power relationships, and choose to target more vulnerable women in their workplaces"). The lack of information about and understanding of the intersectional nature of identity not only distorts our view of sexual harassment and sexual assault, it can also affect the success rates and remedies available to those who assert intersectional claims. See Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger, & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991 (2011) (finding that plaintiffs who "make intersectional claims are only half as likely to win their cases as plaintiffs who allege a single basis of discrimination").

73. Eric Levenson & Aaron Cooper, *Bill Cosby Sentenced to 3 to 10 Years in Prison for Sexual Assault*, CNN (Sept. 26, 2018), <https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html/>.

guilty of criminal sexual assault and rape.<sup>74</sup> A decade ago, the idea of holding these men accountable was unthinkable; they were considered too powerful to confront. Their convictions, thus, are evidence of progress and of the power of Me Too.<sup>75</sup> As Tarana Burke observed after the Weinstein verdict: “For so long these women believed that he was untouchable and could never be held responsible, but now the criminal justice system has found him guilty . . . That sends a powerful message.”<sup>76</sup>

Notwithstanding this progress, one might legitimately ask whether guilty verdicts for Hollywood moguls will produce positive spillover effects in less visible labor markets (for example, in hotels, manufacturing facilities, agricultural fields, retail stores, and restaurants). Will prosecutors and the public be as willing to commit the required time and resources to pursue harassers who are not high profile and whose accusers are not well known? It bears remembering that other prominent men, whose empires appeared to teeter temporarily, are resurfacing in the public arena. For example, Roy Moore, the former chief justice of the Alabama Supreme Court and accused pedophile, is again running for public office.<sup>77</sup> Garrison Keillor, the ousted NPR host, is now doing stand-up comedy shows to sold-out audiences,<sup>78</sup> as is comedian Louis C.K., who admitted to inappropriate behavior with women.<sup>79</sup>

More damning, perhaps, to the prospect of lasting change is the fact that women who come forward with charges of sexual harassment still seem to face considerable pushback. Indeed, while some empires have toppled—or

74. Maria Puente, Associated Press, *Harvey Weinstein’s Sex-Crime Charges Streamlined by Judge in Consolidation Move*, USA TODAY (Sept. 6, 2019), <https://www.usatoday.com/story/entertainment/celebrities/2019/09/06/harvey-weinsteins-sex-crime-charges-streamlined-judge/2235732001/>; Full Coverage: *Harvey Weinstein Is Found Guilty of Rape*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html#link=4eb956ff>. Weinstein is also facing charges in California. Jan Ransom, *Now Weinstein Faces Charges He Raped a Woman at a Beverly Hills Hotel*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/nyregion/harvey-weinstein-los-angeles-trial.html>.

75. 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?searchResultPosition=6> (noting the #MeToo movement helped propel the prosecution). But see Nicole Sperling, *Harvey Weinstein Is Gone, But Hollywood Is Still A Man’s World*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/business/media/harvey-weinstein-hollywood.html> (arguing that while there have been signs of progress in Hollywood, major obstacles to inclusion remain).

76. Jill Cowan, *What to Know About the Harvey Weinstein Verdict*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/us/harvey-weinstein-verdict-la.html?searchResultPosition=14>.

77. Joseph Ax, *Alabama’s Roy Moore Launches 2020 Senate Bid Despite Republican Party Opposition*, REUTERS (June 20, 2019), <https://www.reuters.com/article/us-usa-election-moore/alabamas-roy-moore-launches-2020-senate-bid-despite-republican-party-opposition-idUSKCN1T1L159>.

78. Associated Press, *Garrison Keillor Returns to Spotlight Following Sexual Misconduct Claim*, USA TODAY (Dec. 18, 2018), <https://www.usatoday.com/story/life/people/2018/12/18/garrison-keillor-sexual-misconduct-claim/2346871002/>.

79. Evie Fordham, *Comedian Louis CK Sells Out World Tour Dates in Israel, Italy, Switzerland*, FOX NEWS (Nov. 10, 2019), <https://www.foxbusiness.com/lifestyle/louis-ck-budapest-basel-new-stand-up>. See also Sperling, *supra* note 75, discussing other men in the movie industry who have returned to work following allegations of sexual misconduct or close associations with those who have been accused.

temporarily teetered, fueling hope for broader cultural transformation—the national discourse around sexual harassment and sexual assault remains deeply troubling. Women who challenge their attackers risk their reputations, their jobs, and their lives.<sup>80</sup> They are accused of lying, of being insane, and of having provoked or invited the sexual misconduct.<sup>81</sup> Even when they are believed, what happens to women is too often ignored or brushed aside.<sup>82</sup>

All of the above issues were evident in 1991, when the Senate Judiciary Committee considered then-Judge Clarence Thomas for appointment to the U.S. Supreme Court. In her book, *Speaking Truth to Power*, Professor Anita Hill writes of the threats of rape, sodomy, and death that she received after her allegations of sexual harassment against Thomas became public.<sup>83</sup> She describes the not-so-subtle suggestion that she was lying and/or engaging in political gamesmanship, noting: “I can’t count the number of times since October 1991 that I have been asked, ‘Why did you wait ten years to raise charges of sexual harassment against Clarence Thomas?’”<sup>84</sup> Professor Hill recounts the doubting gazes of U.S. Senators who asked if she had fantasized about Judge Thomas or had otherwise invited or welcomed his behavior.<sup>85</sup> She writes about those who appeared to be more concerned with appointing Judge Thomas to the Supreme Court than they were with thoroughly investigating his fitness for the job and with understanding what women who experience sexual harassment endure. She describes the pressure of racial loyalty, recalling that even the African-American community was divided over whether she should have spoken or remained silent—over whether it was preferable to air the dirty laundry or to sacrifice gender justice in the quest for racial equity.<sup>86</sup>

Perhaps Shakespeare was correct when he wrote *what’s past is prologue*.<sup>87</sup> Twenty-seven years after the Hill-Thomas hearings, Dr. Christine Blasey Ford received similar backlash when her allegations of sexual assault against then-Judge Brett Kavanaugh became public in the fall of 2018. During her testimony before the Senate Judiciary Committee, Dr. Ford described the hate mail and death

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80. Johnny Edwards & Jennifer Peebles, *Her Sexual Harassment Complaint Led to a Fight For Her Reputation*, ATLANTA JOURNAL-CONSTITUTION (Oct. 27, 2018), <https://www.ajc.com/news/state—regional/her-sexual-harassment-complaint-led-fight-for-her-reputation/0Byj8YOItKkXFZuGDhorj>; Sam Levin, *Women Accusing Trump of Sexual Harassment Are Lying, Says White House*, GUARDIAN (Oct. 28, 2017), <https://www.theguardian.com/us-news/2017/oct/27/donald-trump-sexual-harassment-claims-women-lying-white-house/>.

81. See *supra* notes 78–80. For example, during Harvey Weinstein’s trial, Weinstein’s lawyer argued that Weinstein’s accusers had engaged in consensual relationships with him to advance their careers and that they were responsible for any adverse consequences that may have occurred. See Jan Ransom and Alan Feuer, *Weinstein’s Lawyer Says Accusers Had a Choice in Sexual Encounters*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/nyregion/harvey-weinstein-trial.html>.

82. See *supra* notes 78–81.

83. ANITA HILL, *SPEAKING TRUTH TO POWER*, 129, 270 (1997).

84. Some people accused Hill of conspiring to prevent Thomas’ appointment, when in fact she wanted to keep her story private. *Id.* at 131.

85. *Id.* at 181–82.

86. *Id.* at 199–200, 257.

87. WILLIAM SHAKESPEARE, *THE TEMPEST*, act 2, sc. 1.

threats that forced her to hire a security detail and leave her family home.<sup>88</sup> Like Hill, Dr. Ford's credibility was repeatedly questioned and attacked.<sup>89</sup> Some commentators claimed that Dr. Ford was part of a left-wing conspiracy to thwart Kavanaugh's appointment, suggesting that Dr. Ford either made up the allegations or brought them forward only to assist with Kavanaugh's defeat.<sup>90</sup> Indeed, in a press conference the day before Dr. Ford's testimony, Donald Trump repeatedly asked why Dr. Ford waited thirty-six years to report the assault.<sup>91</sup> Later in the same week, at a political rally, President Trump mocked Dr. Ford's "I don't know" responses to questions posed during the hearing.<sup>92</sup> As was the case with Professor Hill, some thought that even if Kavanaugh had assaulted Dr. Ford, he should nonetheless be appointed to the Supreme Court to ensure a conservative majority. In other words, sexual harassment could be excused for partisan advantage. In this respect, one notes Senator Majority Leader Mitch McConnell's insistence to "plow right through" and move to confirm Kavanaugh as quickly as possible<sup>93</sup>—even if "plowing through" meant refusing to order a thorough FBI investigation, to hear corroborating witnesses, or to permit testimony from others who had accused Judge Kavanaugh of inappropriate conduct.<sup>94</sup>

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88. *Christine Blasey Ford's Opening Statement for Senate Hearing*, NPR (Sept. 26, 2018), <https://www.npr.org/2018/09/26/651941113/read-christine-blasey-fords-opening-statement-for-senate-hearing>. Weeks after the hearings ended, Dr. Ford continued to receive death threats. Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR (Nov. 8, 2018), <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say>.

89. To be sure, opinion polls show that more Americans believed Ford than Kavanaugh in the days following the hearings. Daniel Bush, *More Americans Believe Ford Than Kavanaugh, According to New Poll*, PBS (Oct. 3, 2018), <https://www.pbs.org/newshour/nation/more-americans-believe-ford-than-kavanaugh-according-to-new-poll>. Kavanaugh was nonetheless appointed to the U.S. Supreme Court.

90. Judge Kavanaugh reiterated this sentiment in his now somewhat infamous opening statement to the Senate Judiciary Committee. Meg Wagner et al., *Brett Kavanaugh and Christine Blasey Ford Testify on Sex Assault Allegations*, CNN (Sept. 27, 2018), [https://www.cnn.com/politics/live-news/kavanaugh-ford-sexual-assault-hearing/h\\_59d94a76d6396019441a5c14bba1041b](https://www.cnn.com/politics/live-news/kavanaugh-ford-sexual-assault-hearing/h_59d94a76d6396019441a5c14bba1041b).

91. Katie Reilly, *Here's Everything President Trump Said During an 81-Minute Press Conference about Kavanaugh, Rosenstein and More*, TIME (Sept. 27, 2018), <http://time.com/5407665/president-trump-press-conference-transcript/>.

92. Maggie Haberman & Peter Baker, *Trump Taunts Christine Blasey Ford at Rally*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/trump-me-too.html>. Unlike Trump, some Senators seemed to want it both ways—to support both Ford and Kavanaugh. Those in this camp asserted that although they believed Dr. Ford might have been assaulted, the assailant was not Judge Kavanaugh. In other words, notwithstanding Dr. Ford's statement that she was 100 percent sure that Kavanaugh assaulted her, Dr. Ford was mistaken. Steve Benen, *Dr. Ford Is "100 percent" Certain About Her Kavanaugh Allegation*, MSNBC (Sept. 27, 2018), <http://www.msnbc.com/rachel-maddow-show/dr-ford-100-percent-certain-about-her-kavanaugh-allegation>. This argument implies that Dr. Ford was either psychologically confused or crazy. Either way, she was presumably unworthy of belief.

93. Associated Press, *McConnell Says Senate Will 'Plow Right Through' to Confirm Kavanaugh*, PBS NEWS HOUR (Sept. 21, 2018), <https://www.pbs.org/newshour/politics/mcconnell-says-senate-will-plow-right-through-to-confirm-kavanaugh>.

94. See Arthur Delaney, Elise Foley & Igor Bobic, *Republicans Resist Additional Witnesses at Next Brett Kavanaugh Hearing*, HUFFPOST (Sept. 18, 2018), [https://www.huffpost.com/entry/republicans-resist-additional-witnesses-at-next-kavanaugh-hearing\\_n\\_5ba116ece4b04d32ebfd216b](https://www.huffpost.com/entry/republicans-resist-additional-witnesses-at-next-kavanaugh-hearing_n_5ba116ece4b04d32ebfd216b); Chris

To be sure, Me Too has created a greater awareness of the prevalence of sexual harassment and sexual assault in the United States. Yet, it is unclear whether this awareness will result in a temporary uptick in sexual harassment charges,<sup>95</sup> as was also the case after the Hill-Thomas hearings,<sup>96</sup> or whether it will lead to more convictions, discharges, and systemic reforms.<sup>97</sup> The thematic similarities in the nation's discourse during the Hill-Thomas and Ford-Kavanaugh hearings suggest that much work remains to be done. Indeed, a significant and powerful portion of the U.S. population seems not to care about sexual harassment. It characterizes women who speak out as hysterical and crazy, on the one hand, or as lying, crafty, manipulators, on the other. Given this sustained backlash, twenty-seven years after the Hill-Thomas hearings and over forty years after Catherine MacKinnon published *Sexual Harassment of Working Women*, it is not surprising that sexual harassment and sexual assault remain hugely under reported.<sup>98</sup>

### III. LEGAL IMPEDIMENTS

For sexual harassment to end, we need to do more than transform our social discourse, we need aggressive institutional reforms as well. Yet, as we will next explain, a key mechanism—the law—has taken a rather conservative approach to sexual harassment.

In our earlier discussion of the *Vinson* case, we mentioned the ways in which U.S. law has historically failed to address the intersectional nature of women's identities and to focus sufficient attention on the experiences of poor women and women of color.<sup>99</sup> But the law also fails more generally in the way that it conceives the legal remedy to sexual harassment. As noted earlier, harassment includes

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Megerian, Jennifer Haberkorn & Sarah D. Wire, *FBI Investigation of Kavanaugh Leads to Fresh Acrimony as McConnell Pushes for Vote*, L.A. TIMES (Oct. 2, 2018), <https://www.latimes.com/politics/la-na-pol-kavanaugh-court-investigation-20181002-story.html>.

95. In fiscal year 2018, the EEOC filed 66 lawsuits challenging workplace harassment, which represented a more than 50 percent increase over fiscal year 2017. The Commission also reported a 13.6 percent increase in charges from fiscal year 2017, and a 23.6 percent increase in reasonable cause findings in fiscal year 2018. *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> (last visited Feb. 25, 2020). See also Press Release, Equal Emp't 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>

96. See Christina Cauterucci, *Sexual Harassment Claims Spiked After the Clarence Thomas Hearings. They're Spiking Again Now*, SLATE (Oct. 9, 2018), <https://slate.com/news-and-politics/2018/10/eeoc-2018-sexual-harassment-metoo-clarence-thomas-anita-hill.html>.

97. See, e.g., Maya Salam, *Toppled Men Are Down, But Not Necessarily Out*, N.Y. TIMES (Oct. 19, 2018) <https://www.nytimes.com/2018/10/19/us/metoo-men-sexual-harassment.html>.

98. *Get Statistics: Sexual Assault in the United States*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., <https://www.nsvrc.org/node/4737> (last visited Nov. 8, 2018); Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUSTICE (Oct. 4, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported>; Rossie et al., *supra* note 10, at 2 (noting that 87 to 94 percent of those who face sexual harassment do not file a formal complaint).

99. See *supra* Part I.

unwelcome sexual advances as well as unwelcome conduct that is so severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment.<sup>100</sup>

What remains unclear is whether the allegedly harassing behavior is to be evaluated from the point of view of a reasonable person—or whether the standard should be that of a reasonable woman, or a reasonable victim in the plaintiff's shoes. In *Harris v. Forklift Systems, Inc.*,<sup>101</sup> the U.S. Supreme Court set forth a two-part test for determining whether a hostile environment exists. The tests include both objective and subjective components. Conduct must be sufficiently severe or pervasive to create “an environment that a reasonable person would find hostile or abusive” and the victim must subjectively perceive the environment to be abusive. In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>102</sup> the Court subsequently stated that “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering ‘all the circumstances’.”<sup>103</sup> While this phrasing invites a more contextual analysis, it alone does not indicate adoption of a reasonable woman or a reasonable victim standard. Indeed, the Court says the environment should be assessed from the point of view of a “reasonable person” in the plaintiff's position.

Importantly, each of the above articulated standards—reasonable person, reasonable woman, and reasonable victim—necessitates a different level of attention to the specific context and power dynamics between the parties. The reasonable person standard places the lowest value on the surrounding context. It disregards intersecting identities and characteristics that may be of particular importance in sexual harassment and assault cases, and instead requires the factfinder to employ the same generic standard of analysis employed in a range of other claims. Thus, employment of a reasonable person standard perpetuates existing inequalities by failing to adjust for experiential differences.

By contrast, the reasonable woman standard provides somewhat of an intermediary approach. Although analysis under this standard would not include other characteristics that heighten vulnerability such as race, age, and socioeconomic status, this standard at least accounts for gender differences. Scholars making the “reasonable woman” argument maintain that the “reasonable person” standard is male-centered and ignores the ways in which gender differently situates people in society.<sup>104</sup> For example, because of their differing experiences with—and distinct vulnerabilities to—sexual assault and rape, women frequently hold different viewpoints from men about the same factual

100. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60, 67 (1986).

101. *Harris*, 510 U.S. at 17, 21-22.

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

103. *Id.* at 81 (quoting *Harris*, 510 U.S. at 23).

104. See, e.g., Bonnie B. Westman, *The Reasonable Women Standard: Preventing Sexual Harassment in the Workplace*, 18 WILLIAM MITCHELL L. REV. 795, 827 (1992) (concluding that the “Eighth Circuit should adopt the reasonable woman standard as a means of reducing sexual harassment and as a small, but important, step in creating greater equality in the workplace. As a result of adopting this standard, the defense attorney will have to focus on the victim's perspective and show that the plaintiff is not reasonable in her assessment of the situation in order to be successful.”).

circumstances.<sup>105</sup> Thus, reducing or eradicating sexual harassment requires standards that will encourage men to be proactive and to think about their conduct from a woman's viewpoint. As the Ninth Circuit Court of Appeals has noted:

If we only examine[] whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.<sup>106</sup>

Of the three standards, the "reasonable victim in the plaintiff's shoes" standard places the highest value on context. Analysis under this standard would necessarily include analysis of a plaintiff's sex, race, and class, among other things. By placing context in the foreground, this standard has the greatest potential to identify and account for intersectional differences.<sup>107</sup> This potential, however, is still waiting to be actualized.

Another area in which the law arguably fails to properly address sexual harassment and assault in the workplace is through the provision of an affirmative defense that allows employers to escape liability for the harassing acts of supervisors. The U.S. Supreme Court has held that if a supervisor takes a tangible employment action against a harassed employee (for example, refuses to hire or promote an individual, or terminates her), then the employer is always liable as the negative consequence is a direct result of the power the employer has delegated to the supervisor.<sup>108</sup> However, when no tangible employment action occurs, like in many hostile environment cases, then an employer can escape liability by showing: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>109</sup> The Court explained that allowing this two-pronged affirmative defense "encourag[es] forethought by employers and saving action by objecting employees."<sup>110</sup>

Yet, many commentators have disagreed with the Supreme Court, arguing that because employers vest supervisors with authority by virtue of their titles and

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105. See, e.g., Kelly Virella, *We Asked Women What the Kavanaugh Vote Means for the Next Generation*, 40,000 Responded., N.Y. TIMES (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/reader-center/women-kavanaugh-confirmationxp.html>.

106. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

107. See generally Onwuachi-Willig, *What About #UsToo?*, *supra* note 33, at 119 ("to ensure that judicial analyses of sexual harassment claims leave room for the experiences of women of color, courts should adopt a standard based on a reasonable person with the complainant's intersectional and multidimensional identity, rather than the ostensibly objective reasonable person standard, or even the presumably more inclusive reasonable women's standard").

108. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 790-92 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

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

110. *Id.*

positions, employers and supervisors are one and the same.<sup>111</sup> These commentators therefore maintain that employers should be strictly liable for the acts of their supervisors.<sup>112</sup> The invocation of strict liability in this context would be more protective of complainant's rights in that it recognizes that employers are best situated to prevent and redress discriminatory practices by supervisors, and it would offer the strongest incentive for them to do so. Strict liability, without the possibility of an affirmative defense, would also keep the focus on the harasser's behavior, instead of opening up avenues to shift blame to the victim. Strict liability would appreciate the reality of how difficult it is for individuals to report harassment and assault. As previously discussed, stigma and potential backlash are major deterrents to reporting sexual harassment and assault.<sup>113</sup> Thus, the affirmative defense penalizes survivors—and protects employers—in a social context that makes reporting difficult.

The affirmative defense has created other difficulties for those invested in eradicating workplace harassment. In short, it gives employers an out. Instead of trying to rid the workplace of harassment, employers may be incentivized to enact harassment policies that feign care and concern about harassment. Compliance becomes more about protecting the employer's reputation and insulating the employer from liability, and less about eliminating harassment. In providing employers with an affirmative defense, the Supreme Court did not want to place too heavy of a burden on employers—that is, of trying to prevent harassment at all costs. Yet, in so doing, the Court created an environment where some employers will do the legal bare minimum.<sup>114</sup>

#### IV. LOOKING TO THE FUTURE

If the law has been somewhat conservative in addressing sexual harassment, and if social movements tend to be transitory, then what are the prospects for lasting, transformative change? This Essay has been largely critical and may not seem overly optimistic. There may, however, be reason to hope. As we explain below, Me Too has revealed the power of social media to create global coalitions and to reduce stigma. Further, Me Too provides an opportunity for men to step up to the plate in the fight against workplace harassment and assault.

The ubiquity of social media alone makes it noteworthy. According to a recent Pew Research Center report, 73 percent of adults in the United States use

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111. See Onwuachi-Willig, *supra* note 55, at 319. See generally David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66 (1995).

112. *Id.*

113. See *supra* Part II.

114. These observations are based on Professor Jones' cumulative conversations with legal practitioners. See also *The #MeToo Effect: Do Women and Men Think Gender Equity is Advancing in Their Workplace?*, Have Her Back Consulting, [https://haveherback.com/static/downloads/Have-Her-Back-Consulting\\_MeToo-Survey.pdf](https://haveherback.com/static/downloads/Have-Her-Back-Consulting_MeToo-Survey.pdf) (last visited Feb. 28, 2020) (showing a perceived "authenticity gap" where "[w]hat companies say they care about when it comes to gender equity does not match up with their actions towards advancing it").

YouTube, and 69 percent use Facebook.<sup>115</sup> Widespread social media use is not unique to the United States. Indeed, in October 2019, Facebook announced that its family of apps<sup>116</sup> boasts more than 2.8 billion monthly users,<sup>117</sup> including 288 million active daily users from Europe alone.<sup>118</sup> In other words, social media use is pervasive. It has the power to transcend borders, with published content instantly reaching the pockets of people all over the globe. The virality of Me Too illustrates this benefit. As noted in the Introduction, millions of users reacted to Alyssa Milano's post within the first forty-eight hours.<sup>119</sup>

While not without limitations,<sup>120</sup> social media has the potential to counter some of the major deterrents to reporting sexual harassment and assault. Data show that women do not report sexual harassment and assault because they feel isolated, they fear retaliation and backlash, and they worry that with no other witnesses to an incident, they will not be believed.<sup>121</sup> Because of Me Too and the incredible response to Milano's post, women now know they are not alone when they speak out.<sup>122</sup> Social media allows an individual woman to connect her story immediately to the stories of other women—to know that her experience is not

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115. Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RESEARCH CTR. (Apr. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/>.

116. The Facebook family consists of four apps—Facebook and its companion Messenger app, as well as Instagram and WhatsApp.

117. Salvador Rodriguez, *Facebook Stock Rises on Better-Than-Expected Revenue and Earnings*, CNBC (Oct. 30, 2019), <https://www.cnbc.com/2019/10/30/facebook-fb-q3-2019-earnings.html>.

118. *Id.*

119. See Associated Press, *More Than 12 M "Me Too" Facebook Posts*, *supra* note 6.

120. The ubiquitous presence and use of social media is not costless. Harassing conduct and backlash also take place through this mechanism. Maeve Duggan, *Online Harassment 2017*, PEW RESEARCH CTR. (July 11, 2017) (finding that "four-in-ten Americans have personally experienced online harassment"), <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/>; Onwuachi-Willig, *supra* note 33, at 116 (describing online harassment experienced by Leslie Jones). In addition, frequent discussion of sexual harassment and assault can trigger adverse responses in survivors. See, e.g., Maggie Koerth, *What It's Like To Watch #MeToo When It Is You, Too*, FIVETHIRTYEIGHT (Mar. 16, 2018), <https://fivethirtyeight.com/features/what-its-like-to-watch-metoo-when-it-is-you-too/>; Sarah McCammon, *In the Wake of #MeToo, More Victims Seek Help for Repressed Trauma*, NPR (Dec. 27, 2017), <https://www.npr.org/2017/12/27/573146877/in-the-wake-of-metoo-more-victims-seek-help-for-repressed-trauma>. Thus, any embrace of social media must simultaneously account for these limitations.

121. See *Reporting of Sexual Violence Incidents*, NAT'L INST. OF JUSTICE (Oct. 25, 2010), <https://nij.ojp.gov/topics/articles/reporting-sexual-violence-incidents>. See also L. Camille Hebert, *Why Don't Reasonable Women Complain About Sexual Harassment*, 82 IND. L.J. 711 (2007) (discussing how blaming the victim affects sexual harassment cases).

122. Some data suggest that women are more likely to report sexual harassment in the aftermath of Me Too. See *supra* note 95. In addition, in a recent study by Leanne Atwater et al., 74 percent of women said they thought they would be more willing to speak out against harassment in the aftermath of Me Too. Leanne E. Atwater et al., *Looking Ahead: How What We Know About Sexual Harassment Now Informs Us of the Future*, 48 ORGANIZATIONAL DYNAMICS 5 (2018). Interestingly, 77 percent of men said that they would be more careful in the future about potentially inappropriate behavior. *Id.* Some data suggest that men are also more vocal about experiencing sexual harassment and assault as a result of Me Too. See Rebecca Seales, *What Has #MeToo Actually Changed?*, BBC NEWS (May 12, 2018), <https://www.bbc.com/news/world-44045291>.

isolated. Moreover, a post draws attention to a harasser's acts and can go viral almost instantly. Such visibility offers the potential for public shaming and some degree of protection against backlash, as reports of negative employer action can lead to outrage and supportive, collective action from others. Thus, social media offers the potential for group action and global coalitions. With women worldwide bonding together to create new norms and realities, there is indeed the potential for lasting change.

While women's activism has been at the forefront of Me Too, the movement offers men a chance to either exacerbate the status quo, or to become change agents. Over the past two years, some men (and women) have complained that Me Too has spawned a rush to judgment, with harassment allegations leading to condemnation and dismissals before adequate investigations have occurred. Notably, in the aftermath of sexual assault allegations against Supreme Court nominee Brett Kavanaugh, President Donald Trump said, "it's a very scary time for young men in America when you can be guilty of something that you may not be guilty of."<sup>123</sup> Trump added, "[m]y whole life, I've heard you're innocent until proven guilty . . . but now you're guilty until proven innocent."<sup>124</sup> In addition to complaining that they are presumed guilty, some men have stated that because of Me Too they no longer know how to interact with women in the workplace, or that they feel uncomfortable doing so. In a recent survey by LeanIn.org and Survey Monkey, 60 percent of surveyed male managers said they were uncomfortable participating in common work activities with women, such as mentoring, working alone, or socializing together. This represented a 32 percent jump from the previous year. In addition, the survey reported that "senior-level men are now far more hesitant to spend time with junior women than junior men across a range of basic work activities."<sup>125</sup> Thus, the Mike Pence rule seems to be flourishing.<sup>126</sup>

To be sure, we must ensure that adequate factual investigations are done, that both sides are heard, and that penalties are calibrated to fit the severity of a harasser's acts. However, we must also resist the all too frequent characterization

123. Rebecca Morin, *Trump on Sexual Assault Claims: 'It's a Very Scary Time for Young Men in America,'* POLITICO (Oct. 2, 2018), <https://www.politico.com/story/2018/10/02/trump-kavanaugh-very-scary-time-for-young-men-861268>. The President's remarks echoed the sentiments of his son, Donald Trump, Jr., who stated that he feared more for his sons than his daughters following the Kavanaugh controversy. *Id.*; Lindsey Bever, *Trump Jr. Says Wave of Sexual Assault Accusations Makes Him Worry for Sons More Than Daughters*, WASH. POST (Oct. 1, 2018), <https://www.washingtonpost.com/politics/2018/10/01/trump-jr-says-wave-sexual-assault-accusations-make-him-worry-sons-more-than-daughters/>.

124. Morin, *supra* note 123.

125. *Working Relationships in the #MeToo Era: Key Findings*, LEAN IN, <https://leanin.org/sexual-harassment-backlash-survey-results> (last visited Feb. 25, 2020). *See also* Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo* (Apr. 4, 2018), <https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/> (51 percent of surveyed respondents indicating that the increased focus on sexual harassment and assault has made it harder for men to know how to interact with women in the workplace).

126. The Mike Pence rule stems from an interview in which the Vice President said that he never eats alone with women other than his wife to avoid accusations of sexual harassment. Harris O'Malley, *Treating Men Like Idiots is the Wrong Way to Stop Sexual Harassment*, WASH. POST. (Feb. 1, 2018) (referencing efforts that some businesses are taking to implement the Mike Pence rule), <https://www.washingtonpost.com/news/post-nation/wp/2018/02/01/for-men-in-the-metoo-era-the-mike-pence-rule-is-the-easy-way-out/>.

of women as scheming, lying, false accusers and of men as total innocents. The false-accuser trope is belied by the considerable psychological, economic, and social barriers that women must overcome in order to speak out and to be heard. Instead of becoming defensive, men might use this moment to work in solidarity with women. As some men have noted, solidarity requires more than responding #IHearYou on Twitter.<sup>127</sup> Rather, it requires, at minimum, three things. First, instead of limiting their interactions with women, which may constrict women's employment opportunities,<sup>128</sup> men might try listening to women. As more women speak out, the Me Too moment offers men an incredible opportunity to learn about women's workplace experiences and about how certain norms and behaviors impede women's opportunities. Second, in addition to listening, men might also consider scrutinizing their own behaviors and asking how their actions may be viewed from the perspective of someone on the opposite end of the power spectrum—by someone who is not white, male, economically secure, or cisgender. And lastly, as men adjust their own actions, they must also speak out in opposition to the harassing behavior and ridiculous commentary of others. This work may not be comfortable. But moments of discomfort are frequently opportunities for growth. Fortunately, Me Too offers numerous examples of men who have acknowledged that ending sexual harassment is not women's work.<sup>129</sup> It requires all of us.

#### CONCLUSION

In conclusion, sexual harassment and assault are pervasive. Although Me Too has brought attention and renewed passion to these issues, there is still much work to be done. Women often encounter tremendous backlash when their allegations of harassment and sexual assault become public. Notably, many of the celebrities behind Me Too were middle- or upper-middle class and had some degree of racial and economic privilege. If these women found it difficult to share their experiences

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127. Rex Huppke observes:

Men need to do more than fire off a tweet with a hashtag. Men need to do something internal, something that won't produce a public show of support, something far more difficult than rote words of encouragement.

... We, as men, need to hear the stories of women who've been sexually harassed and sexually assaulted by men. But we also need to examine our own thoughts and behaviors and make sure we haven't, in ways small or large, done something to allow those stories to unfold. And if we have, we need to do everything we can to make it stop.

Now.

Rex Huppke, *Men's Response to the #MeToo Campaign Must Be More Than Hashtags*, CHI. TRIB. (Oct. 18, 2017), <https://www.chicagotribune.com/columns/rex-huppke/ct-met-me-too-sexual-harassment-huppke-20171018-story.html>.

128. Cutting women out of social interactions where business gets conducted quite obviously limits their opportunities for advancement.

129. For example, in an October 2017 tweet, Nathan Thompson writes, "When it comes to the #MeToo movement, I see men wondering what they can do to help. This is my list. 1. Be quiet. 2. Listen. 3. Learn. 4. Lead/teach young men by example. 5. Stand up to friends and family who act in an abusive manner. 6. Stand behind women, not in front." Nathan Thompson, @natepthomps, TWITTER, (Oct. 16, 2017), [https://twitter.com/natepthomps/status/919837373671895040?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E919837373671895040&ref\\_url=https%3A%2F%2Fwww.bbc.co.uk%2Fbbcthree%2Farticle%2F99087acf-d8c2-408b-8209-f22b7f633744](https://twitter.com/natepthomps/status/919837373671895040?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E919837373671895040&ref_url=https%3A%2F%2Fwww.bbc.co.uk%2Fbbcthree%2Farticle%2F99087acf-d8c2-408b-8209-f22b7f633744).

and to endure the resulting pushback, one can only imagine what it is like for poor, young women who may lack adequate educational training, family support, and resources. Women who are surviving on the margins and struggling to make ends meet are especially vulnerable, yet they are largely invisible in contemporary discussions of sexual harassment and sexual assault in the United States. This Essay has argued that advocates for change must see and give voice to these women. We must expose that harassment and sexual assault are about power, not desire, and show how race, class, age, and gender identity, among other things, shape women's experiences in the workplace. In addition, the law must not shy away from contextual analysis; rather judges and law makers should craft doctrine with sufficient flexibility to take into consideration the myriad circumstances in which sexual harassment and sexual assault occur. Indeed, they *must* do so if sexual harassment and assault are to be actually and appropriately remedied.