‘me too.’ MOVEMENT: WHERE IT’S BEEN AND WHERE IT’S GOING
A NOTE CONCERNING THE PROGRAM MATERIALS

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TARANA BURKE shares the story behind the genesis of the viral 2017 TIME Person Of The Year-winning 'me too.' Movement, and gives strength and healing to those who have experienced sexual trauma or harassment. The simple yet courageous 'me too.' hashtag campaign has emerged as a rallying cry for people everywhere who have survived sexual assault and sexual harassment – and Tarana’s powerful, poignant story as creator of what is now an international movement that supports survivors will move, uplift, and inspire you. #MeToo is not just an overnight hashtag sensation; Tarana has dedicated more than 25 years of her life to social justice and to laying the groundwork for a movement that was initially created to help young women of color who survived sexual abuse and assault. The movement now inspires solidarity, amplifies the voices of thousands of victims of sexual abuse, and puts the focus back on survivors. In her upcoming book, Where the Light Enters, Tarana discusses the importance of the ‘me too.’ Movement as well as her personal journey from “victim to survivor to thriver.” Tarana’s continued work with the ‘me too.’ movement has earned her the honor of being named The Root 100's most influential person of 2018. A sexual assault survivor herself, Tarana is now working under the banner of the ‘me too’ Movement to assist other survivors and those who work to end sexual violence. She is also senior director of programs at Brooklyn-based Girls for Gender Equity. On stage, she provides words of empowerment that lift up marginalized voices, enables survivors across all races, genders, or classes to know that they are not alone, and creates a place for comfort and healing to those who have experienced trauma.
The ‘me too.’ movement was founded in 2006 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. Our vision from the beginning was to address both the dearth in resources for survivors of sexual violence and to build a community of advocates, driven by survivors, who will be at the forefront of creating solutions to interrupt sexual violence in their communities.

In less than six months, because of the viral #metoo hashtag, a vital conversation about sexual violence has been thrust into the national dialogue. What started as local grassroots work has expanded to reach a global community of survivors from all walks of life and helped to de-stigmatize the act of surviving by highlighting the breadth and impact of sexual violence worldwide.

Our work continues to focus on helping those who need it to find entry points for individual healing and galvanizing a broad base of survivors to disrupt the systems that allow for the global proliferation of sexual violence.

Our goal is also to reframe and expand the global conversation around sexual violence to speak to the needs of a broader spectrum of survivors. Young people, queer, trans, and disabled folks, Black women and girls, and all communities of color. We want perpetrators to be held accountable and we want strategies implemented to sustain long term, systemic change.

**How We Do the Work: Supporting Survivor Healing and Community-Based Action to Interrupt Sexual Violence**

The ‘me too.’ movement supports survivors of sexual violence and their allies by connecting survivors to resources, offering community organizing resources, pursuing a ‘me too.’ policy platform, and gathering sexual violence researchers and research. ‘me too.’ movement work is a blend of grassroots organizing to interrupt sexual violence and digital community building to connect survivors to resources.

As the ‘me too’ movement affirms empowerment through empathy and community-based action, the work is survivor-led and specific to the needs of different communities.

Tarana Burke began ‘me too.’ with young Black women and girls from low wealth communities. She developed culturally-informed curriculum to discuss sexual violence within the Black community and in society at large. Similarly, the ‘me too.’ movement seeks to support folks working within their communities to attend to the specific needs of their community/communities, *i.e.*, supporting disabled trans survivors of color working to lead and craft events/toolkits/etc. with other disabled trans survivors. Together, we can uplift and support each other to strengthen a global movement to interrupt sexual violence.
Tarana Burke started the original ‘me too.’ movement in 2006¹ as a way to help to young women of color who survived sexual abuse and assault.² Burke told CBS News in October 2017 that “‘Me Too’ started, not as a hashtag, but as a campaign from an organization that I founded: Just Be Inc.” . . . “And empowerment through empathy was the thing that I felt helped me, was that other survivors who empathize with my situation help me to feel like I wasn’t alone and gave me entry to my healing journey[.]”³

The #MeToo hashtag went viral on Twitter after actress Alyssa Milano encouraged her followers who have been sexually assaulted or harassed to reply ‘me too’ to her tweet in October 2017.⁴ Milano has stated she was not aware of Burke’s contributions to the ‘me too.’ movement when she made her initial tweet and has since credited her publicly.⁵ The hashtag was tweeted nearly a million times in 48 hours, and Twitter confirmed to CBS News in late October 2017 that over 1.7 million tweets included the hashtag, with 85 countries having at least 1,000 #MeToo tweets.⁶

Since then, Tarana Burke has sought to focus the conversation surrounding the ‘me too.’ movement on solutions and “helping women navigate what happens after they disclose an experience.”⁷ “The hashtag has been amazing at drawing the kind of attention we’ve never seen to sexual violence. But, each and everyone of those people who shared it is an individual person who has a story and took a chance,”⁸ Burke stated, “It’s about what happens if someone posts #MeToo and nobody ‘likes’ their status and how to be advocates in our communities. How to talk to children about this. Discussing the sexual harassment teenagers deal with in school.”⁹


⁴ Id.


⁶ See “Time magazine’s Person of the Year,” supra note 3.


⁸ Id.

⁹ Id.
Burke would also like to see “a more intentional public dialogue about accountability, and not just the kind that focuses on crime and punishment, but on harm and harm reduction.”

If we could pull back from focusing on the accused and zero in on the ones speaking out, we would see common denominators that bridge the divide between celebrity and everyday citizens: the diminishing of dignity and the destruction of humanity. Everyday people – queer, trans, disabled, men and women – are living in the aftermath of a trauma that tried, at the very worst, to take away their humanity. This movement at its core is about restoration of that humanity.

. . . .

All of the shouting and headlines about who #MeToo is going to take down next creates a kind of careless perception that invalidates the experiences of survivors who risk everything coming forward, whether it’s telling their stories, sharing a hashtag or being transparent and vulnerable about some of the worst things that have happened in their lives.

Burke seeks to change how society talks about the ‘me too.’ movement, noting it “is a survivors’ movement created for and by those of us who have endured sexual violence. The goal is to provide a mechanism to support survivors and move people to action. Any other characterization severely handicaps our ability to move the work forward.”

The next tangible steps are harnessing the intersectionality of the demographics that #MeToo crosses to advocate and vote for concrete changes at the policy level.

“I think of us as a power base,” . . . “If we voted along those lines in this country and said that we wanted to put people in office that will make our communities less vulnerable, who will pass laws so that we don’t have a rape kit backlog, who will do the things we need to do so that we don’t have to say ‘Me too.’ Who understands that when we say time’s up, we mean time’s up now.”

Moving forward, she also wants to expand the scope of the ‘me too.’ movement in the mainstream, noting that the black women and girls who were the movement’s initial focus, “along with other people of color, queer people and disabled people, have not felt seen

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11 Id.

12 Id.


14 Id.
this year.”

“The depth and breadth of sexual violence in this country can’t be quantified, but it definitely doesn’t discriminate, and we won’t begin to really understand its impact unless we look at the whole story.”

Burke also emphasizes that everyone has a part to play in the ‘me too.’ movement, no matter who you are.

“So when I think about what we can do today, these are the things I tell people all the time: Figure out what your contribution is...if you are an accountant, go volunteer somewhere and do the books,” … “Figure out what your part is, figure out what your passion is and go contribute that somewhere.”

She encourages those seeking to get involved with the movement to look for where resources are missing, especially for marginalized communities. “I’m driven by the gaps, the things that are missing, the areas where marginalized people exist – and where the least resources are available for them.”

Most important of all is keeping the momentum going and for movement participants to stay active, whether as a survivor or an ally. The ‘me too.’ movement has launched a comprehensive website at https://metoomvmt.org/, where survivors and participants may access resources on healing and advocacy. The movement has also partnered with the New York Women’s Foundation to create a fund that will raise $25 million to put toward working to end sexual violence over the next five years. In April 2019, Tarana Burke and Dr. Yaba Blay, the Dan Blue Endowed Chair in Political Science at North Carolina Central University, also embarked on a tour of Historically Black Colleges & Universities (HCBUs) in a “multi-city initiative...centered around creating safe and accountable communities for students, faculty and administrators at HBCUs. They seek to explore the disparity between HCBUs and predominantly white institutions in moving forward the work of the ‘me too.’ movement and begin strategic actions to close the resource gap.

The work of ‘[me too.]’ builds on the existing efforts to dismantle systems of oppression that allow sexual violence, patriarchy, racism and sexism to persist. We know that this approach will make our society better for

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16 Id.

17 “#MeToo Founder Tarana Burke Just Laid Out the Movement’s Next Steps,” supra note 13.

18 Id.

19 “#MeToo Found Tarana Burke on What Needs to Happen after the Hashtag,” supra note 7.


21 “Programs – The ‘me too.’ HBCU Tour with Tarana Burke & Dr. Yaba Blay,” https://metoomvmt.org/hbcutour/.

22 Id.
everyone, not just survivors, because creating pathways to healing and restoration moves us all closer to a world where everyone knows the peace of living without fear and the joy of living in your full dignity.\textsuperscript{23}

\textsuperscript{23} "#MeToo Founder Tarana Burke on the Rigorous Work That Still Lies Ahead," \textit{supra} note 10.
ABSTRACT. Sexual harassment has always been more about sexism than it is about sex. Nearly twenty years ago, Vicki Schultz pioneered a new understanding of sexual harassment that recognized and theorized this empirical reality. The framework she developed in two articles published in the *Yale Law Journal* – *Reconceptualizing Sexual Harassment* and *The Sanitized Workplace* – still holds important lessons for today. The emergence of the #MeToo movement has brought about a welcome, renewed focus on sexual harassment and motivated long-overdue terminations of accused harassers across industries. Yet pervasive narratives still narrowly emphasize sexualized forms of harassment and assault – at the expense of broader understandings of harassment and its causes. This Essay revisits and expands on Schultz’s previous work in the contemporary context, drawing on the technology and film industries as case studies and showing that sex segregation and unchecked, subjective authority are central institutional causes of sex-based harassment. To end harassment will thus require more than firing individual harassers. It will require structural reform to eliminate arbitrary authority and sex segregation at work. Bold solutions are needed if we are to ensure sexual harassment isn’t still prevalent twenty years from now.

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INTRODUCTION

Twenty years ago, I published an article in the Yale Law Journal entitled Reconceptualizing Sexual Harassment.¹ Five years later, I published a follow-up article in the same journal.² These two pieces anchored a body of writing³ that proposed a new theory of sexual harassment. This theory sees harassment as an expression of workplace sexism, not sexuality or sexual desire. Harassment is a way for dominant men to label women (and perceived “lesser” men) as inferior and shore up an idealized masculine work status and identity.⁴

Recent events reveal that body of work as still depressingly relevant. Still relevant because sexual harassment remains far too widespread, despite forty years of activism and legal reform. And still relevant because the need for an adequate theoretical framework to guide action remains as pressing as ever, twenty years later.

Now is the time to reinvigorate theory. With the rise of the #MeToo movement, we are witnessing an extraordinary cultural moment of resistance against sexual harassment – one that could galvanize real change. Most reports have focused on workplace or career-related harassment,⁵ a focus that is unsurprising given the centrality of work and workplace inequality to women’s lives.⁶ For that reason, this Essay focuses on harassment at work, although much of its analysis would apply also to harassment on college and school campuses and in other institutional settings.

⁴ For an explanation of the theory, see Parts I and II infra. For examples of work citing, confirming, or following the theory, see notes 13-18 infra and accompanying text.
There are reasons to be optimistic about the prospects for change. The audacity and sheer number of those who have come forward to tell their stories, the expressions of solidarity between women from different walks of life (Hollywood actors and migrant farm workers, for example), the serious and sustained attention to harassment by the media, the public’s willingness to believe and support so many victims, and the fact that numerous organizations have responded to harassment allegations with serious measures are all hopeful signs. The renewed feminist commitment to activism and reform is also critically important. Legal and social advances to eliminate harassment and discrimination can only be made when feminists of all backgrounds and types come together to demand equality.

Yet, there is also reason for concern – and much more hard work to do – if the current moment is to produce the lasting change that working women and men deserve. This period has produced many enlightening stories, and plenty of activism, but not enough intellectual analysis. The press showcases journalists, survivors, and political pundits discussing harassment, but has featured few scholars in major media outlets. Without serious reflection and analysis, we risk falling into the same traps that have hindered progress repeatedly in the past.

Take, for instance, the issue of remedies. Some commentators say that what is new this time around is that organizations are firing harassers, including formerly untouchable “star” performers. In fact, many of the mighty have fallen. It can, and often does, feel good to see powerful men who have treated others so badly get their come-uppance; it is important for organizations to hold them accountable. But there are inherent limits to such an approach. Firing harassers does nothing to repair the severe professional and personal setbacks suffered by victims, many of whom have left careers they loved and continue to suffer trauma. Nor does firing those individual harassers ensure that similar conduct does not recur in the future. It may provide a short-term deterrent, but sooner or later, other harassers will take their place – unless the underlying conditions that foster harassment in the first place are addressed. If research teaches us anything, it is that harassment is a widespread institutional problem that cannot be solved by firing or punishing harassers one by one.

This Essay revisits my earlier work and breaks new theoretical ground to explain why bold new solutions are needed to eliminate sexual harassment in the current age. Part I briefly elaborates the theory of sexual harassment, describing the wide range of forms of harassment and explaining what is at stake for the harassers from a combined social

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psychological, sociological, and legal perspective. This Part then introduces examples involving Hollywood film producer Harvey Weinstein and the Silicon Valley technology industry to illustrate and further inform the theory. These examples reveal how explicitly sexual misconduct is typically only one manifestation of a broader pattern of sexism, harassment, and discrimination that is motivated less by sexual desire than by a drive to reinforce masculine workplace status and identity. Part III deepens the theory and shows how two prevalent structural features of workplaces encourage harassment: first, the sex segregation of men and women into different positions or roles, and second, the allocation and use of unchecked, subjective authority to determine people’s career and life prospects. This Part returns to Hollywood and Silicon Valley to illustrate these problems, explaining how entrenched sex segregation and unaccountable authority have fostered harassment and discouraged victims from resisting it in both industries. Part IV discusses the implications of this theory and stresses the need for structural reforms – not just individual solutions – in order to end sexual harassment. The Essay ends with a renewed vision for law reform and activism and a call to refashion our workplaces and institutions to ensure greater equality and openness, freedom from arbitrary authority, and freedom from sexual harassment.

I. THEORY

To create lasting change requires an informed theory of sexual harassment: what is harassment? What is in it for the harassers? What causes harassment? To prevent it, what must change?

Two decades ago, I proposed a new theory of harassment that challenged the prevailing orthodoxy. The older view defined sexual harassment as unwanted sexual advances, typically by powerful men toward their female subordinates. I called this view the sexual desire-dominance paradigm. Harassment in that paradigm is a top-down, male-to-female, sexual phenomenon, driven by sexual desire. It has little to do with work or workplace conditions; it is about predatory sexuality. Men merely use their positions at work, in this theory, to satisfy their urge to dominate women sexually.

My theory challenged this narrow sexual focus. In my view, sexual harassment is a means of maintaining masculine work status and identity, not expressing sexuality or sexual desire. Harassment includes not only unwanted sexual advances but also a wide range of other sexist, demeaning behaviors aimed at women and others who threaten settled

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10 See Schultz, supra note 1, at 1686, 1692 (introducing the term); id. at 1686-88, 1692-96, 1698-99, 1702-05 (citing numerous examples of popular incidents, press coverage, academic research, feminist theory, and legal reasoning conforming to this paradigm). For example, the original EEOC guidelines on sexual harassment defined the underlying conduct as “unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.” See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.11 (1997) (emphasis added). Numerous legal decisions limited harassment claims to such sexual conduct. See, e.g., Schultz, supra note 1, at 1716-20 & nn. 166-168 (collecting cases). Some feminists supported this view, analogizing sexual harassment to rape and arguing that it was harmful precisely because it was sexual. See, e.g., CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE STUDY OF DISCRIMINATION (1979); Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 820 (1991). The news media contributed to the problem, publicizing male-female harassment involving sexualized misconduct in salacious terms, while neglecting broader forms of sex-based harassment and discrimination. See Schultz, supra note 1, at 1692-96.
gender norms. Harassment is linked to broader forms of sex discrimination and inequality,\textsuperscript{11} because some men harass women and “lesser men” to preserve their dominant workplace position and related sense of manhood. Sexualized behavior is often a tool of harassment, in this theory, but sexuality is not inherently degrading or discriminatory.\textsuperscript{12} My writing elaborated this view in the context of employment, stressing the importance of traditionally male forms of work to mainstream masculine status and selfhood. But the theory also applies more broadly to other institutions that help shape and reinforce gender identity.

This newer theory has taken hold in many quarters. First and foremost, it has been affirmed in the law. The United States Supreme Court has acknowledged explicitly that workplace harassment does not have to be explicitly “sexual” in content or motivation to be actionable,\textsuperscript{13} and, conversely, that not all sexually tinged conduct amounts to harassment.\textsuperscript{14} Instead, the touchstone is whether the misconduct occurs because of sex. Thus, the law has come to recognize that same-sex harassment is also actionable.\textsuperscript{15} The Equal Employment Opportunity Commission (EEOC) has also clarified that harassment includes any conduct that demeans people at work because of their sex or gender,

\textsuperscript{11} See infra Parts III.A., III.C.1., and III.C.2; see also Schultz, supra note 1, at 1755-74.

\textsuperscript{12} See Schultz, supra note 2, at 2136-39.

\textsuperscript{13} Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (“[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

\textsuperscript{14} Id. (“We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”).

\textsuperscript{15} Id. at 79-80 (holding that Title VII prohibits same-sex harassment and all other forms of harassment that amount to “discriminat [ion] ... because of ... sex’ in the ‘terms’ or ‘conditions’ of employment’). The Editors of the Yale Law Journal circulated the page proofs of my first article to the Justices of the United States Supreme Court while the Oncale case was pending before the Court in 1998. The article criticized equating harassment with sexual conduct, Schultz, supra note 1, at 1704-05, 1713-29, insisted on a “sex-based” definition of harassment that includes both sexual and nonsexual conduct, id. at 1796-1800, and argued that same-sex harassment should be covered under the law, id. at 1774-89, 1801-02. These are all propositions the Oncale Court formally endorsed.
regardless of whether it is sexual in nature.\(^{\text{16}}\) Many lower courts have affirmed and elaborated on these ideas.\(^{\text{17}}\)

\(^{\text{16}}\) The EEOC’s revised definition of sexual harassment, posted in guidance on its website, provides: “It is unlawful to harass a person (or applicant or employee) because of that person’s sex. Harassment can include ‘sexual harassment’ or unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. \textbf{Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex.} For example, it is illegal to harass a woman by making offensive comments about women in general.” \textit{Sexual Harassment, U.S. EQUAL EMP. OPPORTUNITY COMMISSION,} [https://www.eeoc.gov/laws/types/sexual_harassment.cfm] (emphasis added); see also \textit{Harassment, U. S. EQUAL EMP. OPPORTUNITY COMMISSION,} [https://www.eeoc.gov/laws/types/harassment.cfm] (“Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.”).

\(^{\text{17}}\) Numerous courts of appeals have reiterated that actionable harassment need not be sexual in nature. \textit{See, e.g., Gregory v. Daly,} 243 F.3d 687, 695 (2d Cir. 2001) (citing Schultz, \textit{supra} note 1, for this proposition). Some courts of appeals have also followed my suggestion that both sexual and nonsexual conduct should be considered together for purposes of assessing whether all alleged misconduct amounts to a hostile work environment. \textit{See e.g., O’Rourke v. City of Providence,} 235 F.3d 713, 730 & n.5 (1st Cir. 2001) (citing Schultz, \textit{supra} note 1, for this proposition); \textit{Durham Life Ins. Co. v. Evans,} 166 F.3d 139, 149 (3d Cir. 1999) (same). Other decisions have acknowledged explicitly that men’s harassing other men for failing to conform to idealized norms of masculinity is sex-based harassment that violates Title VII, a point my work championed. \textit{See, e.g., Rene v. MGM Grand Hotel, Inc.,} 305 F.3d 1061, 1069 n.3 (9th Cir. 2002) (quoting Schultz, \textit{supra} note 1, at 1755 n.387, for the idea that some “male workers may view not only their jobs, but also the male-dominated composition and masculine identification of their work, as forms of property to which they are entitled”). Indeed, after two decades of judicial decisions acknowledging that the harassment of gay men and other gender-nonconforming men and women violates Title VII’s prohibition on sex stereotyping and sex discrimination, some courts of appeals are beginning to hold that discrimination on the basis of sexual orientation is itself a form of sex stereotyping and sex discrimination prohibited under Title VII. \textit{See, e.g., Zarda v. Altitude Express, Inc.,} 883 F.3d 100 (2d Cir. 2018) (\textit{en banc}); \textit{Hively v. Ivy Tech Cmty. Coll. of Ind.,} 853 F.3d 339 (7th Cir. 2017) (\textit{en banc}).
This newer view of harassment has informed a great deal of empirical research, led to exciting new theorizing,\textsuperscript{18} and inspired other progressive legal reforms.\textsuperscript{19} It has also been

\textsuperscript{18} For examples of social science research in this new direction, see George Akerlof & Rachel Kranton, \textit{Economics and Identity}, 3 Q. J. ECON. 715, 733 & n.37 (2000) (citing Schultz, supra note 1, and proposing a new economic approach that considers social identity to explain workplace harassment and labor market outcomes); Jennifer L. Berdahl, \textit{Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy}, 32 ACAD. MGMT. REV. 641 (2007) (following Schultz, supra note 1, in defining sex-based harassment broadly to include nonsexual forms of harassment, rejecting sexual desire or a desire for sexual dominance as adequate explanations for harassment, and proposing a similar theory based on perceived threat to social status and identity); Emily A. Leskinen, Lilia M. Cortina & Dana B. Kabat, \textit{Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work}, 35 J. L. & HUM. BEHAV. 25, 36 (citing Schultz, supra note 1, and arguing that their “empirical results support the theory that harassment is about gender, not sexuality”); and Sandy Welsh, \textit{Gender and Sexual Harassment}, 25 ANN. REV. SOC. 169, 175 (1999) (citing Schultz, supra note 1, to acknowledge broader, nonsexual forms of harassment and calling on social science researchers to take account of harassment that does not fit the “top-down, male-female sexual come-on image of harassment” paradigm).

\textsuperscript{19} Title IX’s reach now extends beyond conduct of a sexual nature, for example, to cover all campus sex- and gender-based harassment, including harassment of gender nonconforming people, as I called for under Title VII. See, e.g., Office for Civil Rights, \textit{Dear Colleague Letter: Harassment and Bullying}, U.S. DEP’T OF EDUC. (Oct. 26, 2010) \url{https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf} (clarifying that peer harassment based on sex, as well as race, color, national origin, or disability, violates Title IX when it is sufficiently severe, pervasive, or persistent to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school, and providing examples of both sexual and gender-based harassment); Office for Civil Rights, \textit{Sex-Based Harassment}, U.S. DEP’T OF EDUC. (Nov. 17, 2017) \url{https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html} (stating that “Title IX requires schools to prevent and remedy two forms of sex-based harassment: sexual harassment (including sexual violence) and gender-based harassment,” and defining the latter to include “unwelcome conduct based on a student’s sex [and] harassing conduct based on a student’s failure to conform to sex stereotypes”); \textit{Departments of Justice and Education Reach Agreement with Tehachapi, Calif., Public Schools to Resolve Harassment Allegations}, U.S. DEP’T OF EDUC. (July 1, 2011) \url{https://www.ed.gov/news/press-releases/departments-justice-and-education-reach-agreement-tehachapi-calif-public-schools-resolve-harassment-allegations} (reporting resolution agreement with California school system where a middle school student committed suicide after experiencing an escalating campaign of verbal, physical, and sexual harassment due to failure to conform to gender stereotypes). For an overview of the relevant law that explains how Title IX relies on Title VII principles, the same principles that I urged in my earlier work, see Adele P. Kimmel, \textit{Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students}, 125 YALE L.J. 2006, 2016-23 (2016).
taken up by many younger feminists and queer theorists, and extended to institutional realms beyond the workplace.

But the old orthodoxy still has cultural currency, and I worry that it will gain ascendancy again in the absence of vigorous public debate and education, impeding our ability to move forward with systemic change. There are signs that many people who identify with the #MeToo movement are guided, consciously or unconsciously, by the older understanding of sexual harassment. The movement was rekindled soon after the story broke about Harvey Weinstein, when actress Alyssa Milano asked her Twitter followers, “If you’ve been sexually harassed or assaulted write ‘me too’ as a response to this tweet.” Although I have found no systematic empirical research on this point, it seems clear that most of

\[\text{References}\]

\[\text{Endnotes}\]

the ensuing #MeToo posts focused on specifically sexual forms of harassment and abuse, including sexual assault, and not on broader patterns of sexism and discrimination. Most of the tweets that were most frequently retweeted in the first month, for example, referenced sexual misconduct. Data visualizations of tweets in that period feature words like “sexual,” “sexually,” “rape,” “survivor,” “violence,” “assault,” “predator,” “abuse,” “exploitation” – all words associated with explicitly sexual forms of misconduct – and names like “weinstein,” “harvey,” “billorello,” “trump,” “louisck,” “roymoorechildmolester” – all people accused of this type of conduct. A survey commissioned in February 2018, The Facts Behind the #MeToo Movement, also focused almost exclusively on sexualized forms of harassment, verbal and physical.

Furthermore, from the beginning, media stories reporting on the movement have, explicitly or implicitly, limited their definition of sexual harassment to unwanted sexual overtures or other specifically sexual forms of abuse – despite the fact that the legal definition of harassment covers broader forms of sex-based misconduct and has done so for twenty years. Notably, the New York Times, whose reporters broke the Weinstein story, has publicly defined “sexual harassment in the workplace” in explicitly sexual terms: “The Times uses the terms ‘sexual harassment’ and ‘sexual misconduct’ to refer to a range of behaviors that are sexual in nature and nonconsensual. The term ‘sexual assault’ usually signifies a felony sexual offense, like rape.” This definition likens workplace sexual harassment to sexual assault and rape – not to other forms of sex-based harassment and discrimination, as the legal definition does. Most press reporting and social coverage

24 See Browne-Anderson, supra note 23 (reporting that some of the most retweeted tweets at the time of analysis included tweets by Monica Lewinsky, Marlee Matlin, Breanna Stewart, and Alice Glass, all of whom have reported specifically sexual relationships and misconduct).

25 See id. (data visualization chart); EZYINSIGHTS, supra note 23 (data visualization chart).


28 The New York Times was apparently aware that the legal definition of sexual harassment is not limited to conduct of a sexual nature. The Times article, noted above, which defines the
about #MeToo has tended to adopt a similarly limited sexual focus, despite two decades of efforts by feminists in law, social science, and activist circles to create a broader, more accurate picture of the harassment and discrimination most working women and LGBTQ people face.

This purely sexual lens represents a step backward, not forward. The law has come to recognize that harassment consists of many forms of sexist, hostile and discriminatory conduct, based on sex or gender stereotypes, that go beyond sexual overtures. Recognizing these broader forms of harassment does not mean that sexual misconduct is not important. It is, of course, crucial to expose and address unwanted sexual advances and assaults in the workplace (and other realms). Sexual abuse has remained hidden in the dark shadows of organizational and social life for too long. We, as a society, must be more willing to acknowledge sexual abuse and talk about it honestly and directly, just as we do other forms of abuse, without a sense of denial, shame, or discomfort. Organizations can and should hold harassers accountable for sexual misconduct just as they do other forms of mistreatment and discrimination, without excusing it as a personal predilection or a perk of the powerful.

But targeting only sexual misconduct without addressing related patterns of sexism and deeper institutional dynamics has serious shortcomings – shortcomings that risk undermining the broader quest for gender equality. This point applies beyond the context of workplace harassment. The #MeToo movement has exposed sexual assaults and abuse in arenas other than workplaces, such as schools, churches, fraternities, families, and prisons. No matter where it appears, sexuality does not exist in a vacuum; sexual behavior is always a product not simply of innate individual desires, but also of institutional forces that evoke, shape, and give it meaning. Thus, regardless of whether sexual misconduct occurs at work or elsewhere, it has inevitably been facilitated and formed by these larger contextual forces. We must address these forces head-on if we are to end the full spectrum of harassment and discrimination of both the sexual and nonsexual kinds.

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newspaper’s use of harassment in sexual terms, refers readers seeking more information to the EEOC’s legal definition of sexual harassment and provides a link. Proulx et al., supra note 27 (linking to https://www.eeoc.gov/laws/types/sexual_harassment.cfm) The linked EEOC web page defining sexual harassment adopts the broader definition approved by the Supreme Court in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), see supra notes 14-16, providing that “[i]t is unlawful to harass a person ... because of that person’s sex” and noting expressly that “[h]arassment does not have to be of a sexual nature.” Laws, Regulations and Guidance: Sexual Harassment, EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sexual_harassment.cfm; see also supra note 27 (quoting the EEOC definition on that page in full).


30 For Title VII and workplace, see sources cited supra notes 14-18. For Title IX and campuses, see sources cited supra note 19.
A. The Broad Range of Sex-Based Harassment

Focusing narrowly on male-to-female, unwanted sexual advances blinds us to the pervasive and pernicious nonsexual forms of sexism and harassment that women and others experience. Harassment does not always consist of unwanted sexual advances; a wide range of nonsexual actions is used to denigrate women and label them as “different” because of their sex.

In fact, contrary to popular perceptions, nonsexual forms of sex-based harassment and hostility are far more prevalent than unwanted sexual overtures. Harassment takes a wide variety of nonsexual forms, including hostile behavior, physical assault, patronizing treatment, personal ridicule, social ostracism, exclusion or marginalization, denial of information, and work sabotage directed at people because of their sex or gender. This harassment is not only directed at heterosexual women: men who do not conform to prescribed images of masculinity and others who threaten established gender norms are subjected to similar harassment. Research suggests that most harassment aims to shore up masculine workplace superiority, not to secure sexual gratification.31 Most of the time, even unwanted sexual overtures are part of a broader pattern of sex-based harassment and hostility.32

Years ago, I elaborated on these points, drawing examples from a wide range of industries, occupations, and jobs.33 By all accounts, little has changed, especially in the traditionally male-dominated industries, organizations, and jobs where harassment is most prevalent. Consider the following examples from the Hollywood film industry and the Silicon Valley technology industry. These industries profoundly impact and shape American society and attract aspirants from all different backgrounds. Both remain highly unequal along sex, gender, and other lines.

31 See, e.g., Berdahl, supra note 18, at 643 (stating that “the most common form of sexual harassment is gender harassment, which involves ... sexist comments, jokes, and materials that alienate and demean victims based on sex rather than solicit sexual relations with them”); Jennifer L. Berdahl, The Sexual Harassment of Uppity Women, 92 J. APPLIED PSYCHOL. 425, 429 (showing that “women with relatively masculine personalities experience[d] the most sexual harassment,” not those with feminine attributes); Heather McLaughlin, Christopher Uggen & Amy Blackstone, Sexual Harassment, Workplace Authority, and the Paradox of Power, 77 AM. SOC. REV. 625, 627 (collecting studies).

32 See, e.g., Jennifer L. Berdahl & Jana L Raver, Sexual Harassment, in 3 AMERICAN PSYCHOLOGICAL ASSOCIATION HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 646 (2011) (collecting studies showing that unwanted sexual attention and sexual coercion co-occurs with gender-based harassment, as well with other types of harassment); Emily A. Leskinen et al., supra note 18, at 25, 31, 34; Sandy Lim & Lilia M. Cortina, Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment, 90 J. APPLIED PSYCHOL. 483, 487, 490; see also Louise F. Fitzgerald, Michele J. Gelfand & Fritz Drasgow, Measuring Sexual Harassment: Theoretical and Psychometric Advances, 17 BASIC & APPLIED SOC. PSYCHOL. 425, 438 (1995).

33 Schultz, supra note 1, at 1755-62; Schultz, supra note 2, at 2074-87.
1. Hollywood’s Harvey Weinstein

Hollywood movie mogul Harvey Weinstein is widely portrayed as the quintessential sexual predator. Yet, a closer look reveals that even his predations were part of a broader campaign of nonsexual abuse, hostility, and sex discrimination. Numerous reports have described Weinstein’s sexual aggressions, revealing how he preyed on young actresses and models seeking to advance in the film industry by allegedly pressuring them for sex, exposing himself, groping them and forcing himself on some of them, enticing them with promises of stardom, and threatening to ruin them if they didn’t go along.

Far fewer reports have covered the nonsexual, but still utterly sexist, forms of abuse Weinstein heaped upon less influential women who worked for him. Zelda Perkins worked as Weinstein’s assistant for nineteen years. She stated that Weinstein repeatedly harassed her in both sexual and nonsexual ways. Not only did Weinstein work in the nude, ask to be massaged and to give her massages, and bathe in front of Perkins, he also yelled and cursed at her continually, and wore her down emotionally, especially after she had the temerity to stand up to him. Perkins says Weinstein never threatened her physically, but “she was constantly threatened ‘emotionally and psychologically.’”

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37 Perkins recounts an early incident: “I remember taking a call in the room when another call came through on another phone. He swore at me to ‘pick up the f***ing phone.’ I said: ‘I’m already on the f***ing phone!’ It sealed my fate as someone who could stand up to him.” Garrahan, supra note 36.

38 Longeretta, supra note 36.
Perkins resigned and tried to sue Weinstein for harassment, but was pressured into a secret settlement in a process she says left her broken. Afterward, Perkins could not find work anywhere in the industry and was so devastated she moved all the way to Central America to heal.

Perkins’s experience was not atypical. According to a complaint filed by the New York State Attorney General after an extensive four-month investigation, Weinstein committed pervasive sexual and nonsexual harassment and discrimination against employees, creating a hostile work environment “permeated with gender-based hostility and inequality.” In addition to unwanted sexual advances, Weinstein “regularly berated women using gender-based obscenities and stereotypes,” yelled that they should leave and make babies since that was all they were good for, demanded to know if they had their periods, and accused them of wanting “special treatment” because of their sex. Weinstein did not target only women for such gendered opprobrium. He also used homophobic slurs and gender-based insults to degrade and scold men and to attack their masculinity.

Certain other forms of harassment, while not gendered in content, were directed only at female employees. The complaint alleges that Weinstein, a physically imposing man, “used his stature and threatening statements ... to demean and frighten female employees ... yelling at them for purported incompetence, cursing in their faces, threatening to end their careers, and describing his intent to harm them, all while walking into them and bringing his face only a few inches from theirs.” He violently punched one employee’s

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39 Garrahan, supra note 36.


42 Weinstein Complaint, supra note 41, at 7.

43 Id. at 9-10 (“H[arvey] W[einsein] regularly called female employees “cunt” or “pussy” when he was angry with them or felt they had done a task poorly or incorrectly, or even just instead of calling them by their first names.”).

44 Id. at 10.

45 Id. (“When Weinstein wanted to particularly degrade or scold men, he called them cunt or pussy as well .... He told one male assistant that he was firing him for being ‘a fucking faggot boy, a stupid fucking faggot boy.’”).

46 Id. at 11.
car seat, and backed her up against a wall while berating her. He often told employees he would kill them or their families, saying he had contacts in the Secret Service and threatening, “You don’t know what I can do.”

Not only did Weinstein harass employees in sexual and nonsexual ways; he also systematically discriminated against female employees in assigned duties and expectations. According to the complaint, he threatened to fire some female assistants “if they did not serve in gendered roles such as providing childcare to his young children, obtaining [his] prescriptions for medicine, and performing other domestic labor such as assisting [his] wife or one of [his] adult daughters.” Weinstein similarly expected female assistants and even female executives who were trained in film production to facilitate and hide his sexual liaisons – a role that male executives were not expected to fill. One beleaguered employee complained to human resources, stating she did “not appreciate being given work my male counterparts are never asked to complete.” When Weinstein berated her and retaliated against her, she left.

Harvey Weinstein’s behavior was extreme, but it illustrates the way harassment works generally. Not only did Weinstein make unwanted sexual overtures, he also routinely harassed and demeaned his employees in other ways that were rooted in sexism and stereotypes. In this regard, Weinstein was far from unusual. Decades of research shows that nonsexual forms of sexism and abuse, directed at women simply because they are women, are far more prevalent than unwanted sexual advances and sexual coercion. Indeed, according to one group of leading researchers, this nonsexual, but still sex-based harassment is not just a side story – it is the modal form of harassment against women in traditionally male-dominated job settings.

47 Id.
48 Id. at 12.
49 Id. at 14.
50 Id. at 15.
51 Id. at 14.
52 Id.
53 See Berdahl & Raver, supra note 32, at 641, 646 (describing studies); Chai R. Felblum & Victoria A. Lipnic, Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace, EQUAL EMP. OPPORTUNITY COMMISSION, nn.15 & 19-20 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686302 [https://perma.cc/Z2KP-77CZ] (collecting recent studies). For one recent study, see Leskinen et al., supra note 18, at 25, 37 (reporting that for women in the military and in law, sex-based or “gender harassment in the absence of unwanted sexual attention or coercion was the most common manifestation of harassment,” with nine out of ten victims facing such harassment).
54 Leskinen et al., supra note 18, at 25 (showing that “gender harassment does not simply provide a backdrop for other kinds of harassment; it is the modal form of sex-based harassment faced by women at work ....”).
2. Silicon Valley

While most of Weinstein’s victims worked in traditionally female roles, many women who work in traditionally male jobs in similarly male-dominated industries have comparable experiences. The stories of engineer Susan Fowler and venture capital junior partner Ellen Pao illustrate how unwanted sexual advances reflect a larger culture of sexism, nonsexual harassment, and sex discrimination in the Silicon Valley technology industry.

For Susan Fowler, the engineer whose February 2017 blog post blew the lid off Uber’s sexist work culture,55 the trouble began on the first day of work, when her manager sent her chat messages saying he was looking for a woman to have sex with. The pass itself was offensive, but what proved to be even more debilitating to her and other women at Uber was the company’s failure to take their complaints and concerns – and the women themselves – seriously.56 Fowler’s complaint about her manager’s behavior, like those of women before her, fell on deaf ears: upper management declined to punish a “high performer,” and the human resources department instead gave Fowler a “choice” to find a new team or expect a poor performance evaluation.57

When Fowler moved to a new team at Uber, the chaos and sexism there were so palpable that women fled in droves. Her director excused the exodus by saying the women “needed to step up and be better engineers,” and a human resources manager suggested a low number of women should be expected in engineering “because sometimes certain people of certain genders and ethnic backgrounds were better suited for some jobs than others.”58 The company even went so far as to deny the women leather jackets that were provided to all the male engineers, saying there were too few women to justify placing an order. After being told she was “on thin ice” for reporting repeated problems to human resources and being threatened with firing, Fowler finally left Uber, like most of her other female colleagues. When she began working at Uber, women were twenty-five percent of her unit’s engineers; by the time she left, that number had dwindled to three percent.59 At Uber, then, the initial sexual overture turned out to be only the first in a crushing series of discriminatory actions that conveyed how little women mattered to the company.

Ellen Pao’s account of her problems as a junior partner at Kleiner Perkins Caufield & Byers, a leading venture capital firm, similarly begins with a sexual overture. Like Fowler’s, Pao’s story ends up providing a larger window into the systematic disrespect and


57 Fowler, supra note 55.

58 Id.

59 Id.
discrimination she and other women face in venture capital and the broader tech industry. On a trip abroad, a fellow junior partner told Pao that he was unhappily married and thought he and she would be “good together.” He asked for her hotel room number, but when she mistakenly gave him the wrong one, he was angry the next day, having gone to the room for a rendezvous and not found her there. Over time, Pao succumbed to his entreaties and they had a brief affair.

When she broke up with him, Pao alleges the man retaliated by sabotaging her career. For five years, according to Pao, her colleague excluded her from business meetings and emails, failed to share crucial job information with her, and tried to steal companies Pao sponsored. More than once, Pao complained to senior partners about this retaliatory harassment, but they did nothing. Instead, the firm promoted the man to senior partner in the group where she worked, giving him even more control over her career. After his promotion, Pao began receiving poor performance reviews. Pao later discovered that the man had sexually harassed another female junior partner — a fact that should have lent Pao’s complaint more credibility — but reporting this discovery did not vindicate Pao’s reputation or prospects at Kleiner Perkins. The firm did eventually let the alleged harasser go (reportedly with a generous severance package), but it also fired Pao and hired a public relations firm to discredit her throughout Silicon Valley.

Pao’s complaint and her later book make clear that the alleged sexual harassment and retaliation she faced was part of broader pattern of sexism and discrimination against women at Kleiner Perkins. Pao alleges that women were systematically excluded from events that presented business opportunities and subjected to rigged rules of the game that doomed them to failure from the start. There were male-only ski trips and dinners to which women were not invited because they would “kill the buzz,” practices that

60 See ELLEN PAO, RESET: MY FIGHT FOR INCLUSION AND LASTING CHANGE (2017).

61 Id. at 94.

62 Id. at 96.

63 Id. at 98.

64 Id. at 112-13.

65 Id. at 111-12, 123, 126.

66 Id. at 116.

67 Id. at 123.

68 Id. at 126-27, 129-135.

69 Id. at 131.

70 Id. at 135, 151.

71 See EMILY CHANG, BROTOPIA: BREAKING UP THE BOYS CLUB OF SILICON VALLEY 143 (2018); PAO, supra note 60, at 124-25, 128.
prevented women (but not men) from serving on the Boards of Directors for the companies they sponsored,\textsuperscript{72} and constant efforts to poach women’s companies, especially when they were out on pregnancy leave.\textsuperscript{73} When Pao complained to her boss about these problems, he reportedly trivialized them or yelled at her and told her to drop it.\textsuperscript{74} Eventually, after realizing that the company was never going to change, Pao filed suit and was fired.\textsuperscript{75}

It is Pao’s description of the “thousand paper cuts,”\textsuperscript{76} the daily humiliations, exclusions, and slights that she and other women suffered at the hands of male higher-ups and peers at Kleiner Perkins, that most clearly reveals the ubiquity and scale of the harassment and discrimination women face in the technology industry generally. Highly educated female engineers and professionals were routinely assigned “domestic” tasks, such as taking notes at meetings, that were never asked of their male colleagues.\textsuperscript{77} As if that were not sufficiently demeaning, the women suffered myriad other acts of hostility and disrespect. In Pao’s words:

[Women] were often talked over and interrupted. When we were able to get a word in, we were ignored. If someone liked our ideas, they would repeat them and get credit .... Our annual performance reviews cast us as poor team players when we tried to claim credit for our work, and our reviewer lists were often stacked with people who were biased against us. We weren’t invited to meetings, included on emails, asked to interview candidates, selected for hiring committees. We had the seats in the back of the room, the offices in the outer reaches, the non-speaking roles at offsites and conferences.\textsuperscript{78}

Not only were such sexist indignities rampant, according to Pao, but racist comments and interactions were also common occurrences.\textsuperscript{79} Despite their social invisibility, these

\textsuperscript{72} PAO, supra note 60, at 76-77, 120-21, 128.

\textsuperscript{73} \textit{id.} at 117-18, 145.

\textsuperscript{74} \textit{id.} at 123, 131.

\textsuperscript{75} \textit{id.} at 135, 151.

\textsuperscript{76} \textit{id.} at 32; see also CHANG, supra note 71, at 123.

\textsuperscript{77} PAO, supra note 60, at 88, 127-28.

\textsuperscript{78} \textit{id.} at 129; see also \textit{id.} at 143 (detailing other microaggressions).

\textsuperscript{79} See, e.g., \textit{id.} at 65-66 (recounting how her boss had specifically requested an Asian woman for her job); \textit{id.} at 86-87 (describing frequent jokes about how all Black and Latinx people were drug dealers and all Indians wore turbans, and comments conflating Asian names); \textit{id.} at 87 (relating how her boss constantly confused her with another Asian female); \textit{id.} at 88 (describing a “turban” joke in a fundraising meeting and having to apologize to an Indian limited partner); \textit{id.} at 89 (relating a comment about “Jewish lightning,” a reference to setting fires on purpose to collect insurance money).
microaggressions take their toll. It is little wonder, then, that the fate of the few women employed at Kleiner Perkins resembled that of Uber’s female engineers. Three years after Pao was fired, every single woman she worked with as a junior partner had left or been forced out of the firm. Like their Uber counterparts, Kleiner Perkins’s higher-ups attributed the decline not to sexism, but to women’s biology, “maternal clocks,” or “a burning desire to ‘opt out.’”

Fowler’s and Pao’s accounts demonstrate that unwanted sexual advances were only one manifestation of much larger problems at their technology companies. Below the surface lay broader patterns of sexism, exclusion, marginalization, and disrespect. Their experiences in this regard were, once again, not unusual. In a 2015 survey of women, most of whom work in Silicon Valley, 60% said they had been sexually harassed or experienced unwanted sexual advances. But a whopping 90% reported witnessing sexist behavior, 88% had questions addressed to male colleagues that should have been addressed to them, 84% said they had been called too aggressive at work, 75% were asked about their family, marital status, or children in interviews, 66% felt excluded from networking activities because of their sex, and 59% said they had not received the same opportunities as their male counterparts. Moreover, almost half the women surveyed said they were asked to do menial tasks, like taking notes or ordering food, that men in their offices were not asked to do. In Silicon Valley, then, as in Hollywood, unwanted sexual advances are only one sign of an exclusionary culture that marginalizes women and preserves the industry as a bastion of masculine authority, competence, and identity.

80 See CHANG, supra note 71, at 123.
81 PAO, supra note 60, at 153.
82 Id. at 142.
85 Id.
86 Id.
87 CHANG, supra note 71, at 118; Vassallo et al., supra note 84.
88 Vassallo et al., supra note 84.
89 Id.
90 Id.
91 Id.
92 See Pui-Wing Tam, How Silicon Valley Came to Be a Land of ‘Bros’, N.Y. TIMES (Feb. 5, 2018),
B. Legal and Social Effects

Focusing narrowly on sexual advances neglects these pernicious nonsexual, but still utterly sexist, forms of harassment, despite the fact that they cause similar professional and personal harms. Not only that, but having such a narrow focus actually helps insulate a great deal of harassment from legal and organizational responsibility. Like explicitly sexual forms of misconduct, nonsexual forms of misconduct are prohibited by employment discrimination law, if at all, only if they are considered harassment; there is no other claim of discrimination that covers them. In addition, exclusively highlighting the harm of sexual advances can make nonsexual forms of harassment look insignificant, leading decisionmakers to find them insufficiently severe to be actionable. Furthermore, reducing sexism to sexual harm can obscure the gender-based motivations underlying nonsexual acts of harassment. By the same token, ignoring evidence of nonsexual harassment can also exonerate unwanted sexual overtures, by considering them in isolation from broader patterns of discriminatory behavior and by making them appear trivial. Years ago, I demonstrated these harms of disaggregating sexual from nonsexual forms of harassment in the law. Despite some progress, these problems have not been fully resolved.

For sources documenting the harms of nonsexual forms of harassment at work, see Leskinen et al., supra note 18, at 37. See also M. Sandy Hershcovis & Julian Barling, Comparing Victim Attributions and Outcomes for Workplace Aggression and Sexual Harassment, 95 J. APPLIED PSYCHOL. 874, 874 (2010) (“Negative outcomes of workplace aggression were stronger in magnitude than those of sexual harassment for 6 of the 8 outcome variables.”).

See Tristin K. Green, Was Sexual Harassment Law a Mistake? The Stories We Tell, 128 YALE L.J.F. 152, 161-69 (2018) (arguing that sexual harassment law has been constructed around individual stories of sexual advances which then obscures how they are tied to broader hostile work environments and ultimately leads to overly narrow reforms).

As I explained in earlier work, both nonsexual and more sexual forms of harassment that do not amount to or culminate in a tangible employment decision, such as firing or demotion, are not typically covered as ordinary disparate treatment. Thus, to be actionable, they must be considered harassment, a form of discrimination in the “terms and conditions” of employment. See Schultz, supra note 1, at 1714-16; see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998).

See Schultz, supra note 1, at 1710-13, 1722-29.

Id. at 1748-55.

Id. at 1720-29; see also id. at 1729-32.

Highlighting sexual harms does not just limit the legal system’s response; it can also lead victims to underreport nonsexual acts of sex- and gender-based hostility. Indeed, without vigorous public education, many people will not even recognize that such acts are “sexual harassment” forbidden by law, policy, or social norms.\textsuperscript{100} For this reason, unlike with overtly sexual harassment, women and other victims may also be more likely to internalize and blame themselves for nonsexual harassment, rather than attributing it to sexism and gender bias for which they are not responsible.\textsuperscript{101}

A poignant example of these problems can be found in the way Harvey Weinstein’s employees were viewed by many people in the film industry and the press. Under the older view of harassment as sexual predation, Weinstein’s only real sins were his sexual advances against women seeking roles in his films. If harassment is limited to “eroticized” behavior, as one source put it, the only true victims are “those who have alleged intense sexual harassment, assault, and rape.”\textsuperscript{102} This perspective exonerated Weinstein’s nonsexual harassment of his employees, portraying them as co-conspirators complicit in luring in victims and covering up sexual misconduct rather than as victims of harassment and discrimination in their own right.\textsuperscript{103} Indeed, after the Weinstein story broke, this view was so prevalent that Weinstein’s staff felt compelled to publish a statement defending themselves from accusations of collaboration.\textsuperscript{104} Under the old view of harassment, then, the very possibility that these employees had themselves suffered sex-based mistreatment was erased, making it impossible to even ask whether Weinstein’s legendary bullying was in fact part of a larger pattern of sex bias and misogyny. It was not until the New York Attorney General’s lawsuit helped reframe harassment and discrimination in

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\textsuperscript{101} \textbf{See generally} Hershcovis & Barling, \textit{supra} note 93, at 874 (showing that victims of sexual harassment were more likely than those of workplace aggression to depersonalize their mistreatment and attribute blame to the perpetrator’s sexism, even though workplace aggression may also have been motivated by gender hostility); \textit{id.} at 883 (reporting that outcomes for workplace aggression were stronger in magnitude than those for sexual harassment on six of eight outcome variables); Deborah Lee, \textit{Gendered Workplace Bullying in the Restructured UK Civil Service}, 31 PERSONNEL REV. 205, 206 (2002) (showing how acts of aggression often understood to be instances of bullying or general hostility are actually gender-based because they are rooted in gender-based expectations for proper workplace behavior).


\textsuperscript{103} \textbf{See id.}

\textsuperscript{104} \textit{Statement from Members of the Weinstein Company Staff}, NEW YORKER (Oct. 19, 2017), https://www.newyorker.com/news/news-desk/statement-from-members-of-the-weinstein-company-staff [https://perma.cc/2PUE-2HUB] (“We all knew that we were working for a man with an infamous temper. We did not know we were working for a serial sexual predator.”).
broader terms, alleging that Weinstein engaged in sexual, nonsexual, and same-sex harassment and discrimination against his male and female employees,\(^\text{105}\) that these employees were revealed as additional victims.

**C. Theoretical Implications**

Not only is it inexcusable to erase the harms of nonsexual forms of harassment, but ignoring them also leads to an inadequate view of the dynamics driving harassment generally. Once we acknowledge that most harassment does not take the form of sexual overtures, it becomes clear that harassment is not and cannot be primarily a means of expressing sexual desire or sexual domination. Most of the time, harassment is not about securing sexual gratification; it’s about putting women (and men who are “not man enough”) down, reinforcing the existing gender order, and reaffirming threatened social identities. This happens in many realms of life, but nowhere is it more pronounced than in work or career-related settings.

For most American men, historically, labor market and workplace superiority has been crucial to hegemonic masculine identity.\(^\text{106}\) Earning more than comparable women, holding a traditionally male job, and possessing skills and authority that women allegedly lack are all central to mainstream masculinity.\(^\text{107}\) Thus, it is unsurprising that women who enter traditionally male-dominated work settings are more likely to experience sex-based harassment than other women.\(^\text{108}\) Research shows this is not simply because these women are more likely to encounter men. Rather, it is because they pose a threat to the masculine composition and image of the men’s jobs and to their sense of manhood.\(^\text{109}\)

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\(^{105}\) See supra notes 42-52 and accompanying text.

\(^{106}\) Hegemonic masculinity is defined as the most favored view of manhood in a particular context, and the one to which all men experience pressure to conform. It is premised on and promotes the exclusion of women and a rank ordering of men. For a clear elaboration of the concept, see David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 523-25 (2010) (explaining hegemonic masculinity and collecting classic sources).


\(^{109}\) Berdahl, *supra* note 18, at 649; Kabat-Farr & Cortina, *supra* note 108, at 68; Schultz, *supra* note 1, at 1762. Research has found, for example, that women who work in jobs traditionally sex-typed as masculine and women with more “masculine” as opposed to traditionally feminine ways of presenting themselves both experience more harassment in male-dominated job settings. *See* Berdahl, *supra* note 31, at 429, 433. Additionally, women with feminist ambitions to enter high-paying and traditionally male fields on equal terms experience more harassment in mostly-male job settings. *See* Anne Maass *et al.*, *Sexual Harassment Under Social Identity Threat: The Computer Harassment Paradigm*, 85 J. PERSONALITY & SOC. PSYCHOL. 853 (2003). Meanwhile, women who supervise men similarly suffer higher rates of harassment, as some men refuse to bow to the
Importantly, it is not only cisgender women who experience such harassment. Both
homosexual and heterosexual men who fail to conform to prescribed images of how “real
men” are supposed to look and behave are also frequently harassed in these settings.110
Lesbians, bisexuals, transgender, and nonbinary people also experience dis-
proportionately high rates of workplace harassment,111 as do women of color.112 These
groups are frequently stereotyped and perceived as challenging prevailing gender
arrangements; their presence as equals threatens the workplace gender hierarchy and
the superior occupational status and social identities of dominant groups.

Once harassment is understood as a means of protecting hegemonic masculine work
status and identity, even unwanted sexualized attention becomes visible as a means of
putting women, gender-nonconforming men, and others who fail to conform to traditional
gender expectations in their place. Research confirms that unwanted sexual advances
and coercion do not occur in isolation, but typically occur in combination with sex-based
or other generalized harassment,113 suggesting motivations beyond a desire for sexual
gratification even for sexualized harassment. Furthermore, men who endorse
stereotypical gender roles are more prone to harass women through sexual114 and
nonsexual means,115 again suggesting motivations beyond sexual desire.

authority of a female. See Heather McLaughlin et al., supra note 31, at 632 (“Female supervisors
are 138 percent more likely to experience any harassing behaviors, [and] they report a rate of
harassment 73 percent greater than that of nonsupervisors.”).

110 See ANN C. MCGINLEY, MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION
THROUGH A DIFFERENT LENS (2016) (describing the harassment of men who fail to conform to
dominant male workers’ expectations for masculinity); Schultz, supra note 1, at 1774-89 (same);
see also Jennifer L. Berdahl & Sue H. Moon, Workplace Mistreatment of Middle Class Workers
Based on Sex, Parenthood, and Caregiving, 69 J. SOC. ISSUES 341 (2013) (showing that fathers
who spend too much time caring for their children are more likely to be harassed than other men).

111 See, e.g., Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender
Discrimination Survey, CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY & LESBIAN TASK
[https://perma.cc/KGT8-BNA7] (reporting that 90 percent of transgender or gender nonbinary
people surveyed had experienced harassment, mistreatment, or discrimination on the job or had
taken actions to avoid this treatment); Christy Mallory & Brad Sears, Documented Evidence of
Employment Discrimination & Its Effects on LGBT People, WILLIAMS INSTITUTE (2011),
http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-
20111.pdf [https://perma.cc/CS6F-VTNZ] (reporting results of studies on workplace harassment
and discrimination against LGBT people).

112 Jennifer L. Berdahl & Celia Moore, Workplace Harassment: Double Jeopardy for Minority
Women, 91 J. APPLIED PSYCHOL. 426, 432 (2006); McLaughlin et al., supra note 31, at 630
(collecting studies).

113 See, e.g., Berdahl & Raver, supra note 32, at 646 (collecting studies showing that unwanted
sexual attention and sexual coercion co-occurs with gender-based harassment, as well as with
other types of harassment); Fitzgerald et al., supra note 32; Lim & Cortina, supra note 32.

114 See generally John B. Pryor, Sexual Harassment Proclivities in Men, 17 SEX ROLES 269

115 See Berdahl, supra note 31, at 429 (showing that women with relatively masculine personalities
Based on this and other research, modern theorization rejects sexual desire or a desire for sexual domination as the best explanation for sexual harassment.116 Most of the time, the problem is not that harassers are individual perverts or “creeps” who abuse their work positions to get sex.117 Instead, they are industry kingpins or workplace dominants who use sex and other “technologies of sexism” to reinforce their organizational and social positions. From the perspective of the harassers, demanding sexual favors is no different from other sexist demands: regardless of whether a boss pressures female employees to tolerate sexual misconduct, to suffer his angry tirades, to serve food or clean up at work, to take notes or “tone down” their behavior, to endure being ignored and interrupted, to sit in the back and avoid the limelight, or to attend to his personal needs, these are all patronizing, sex-based demands that preserve gender hierarchy and remind women of their proper place. If harassment is defined narrowly in terms of sexual overtures, this sexist, demeaning behavior disappears from view.

A broader theoretical lens makes it possible to see that ultimately, what is at stake for harassers is maintaining a sense of masculine prerogative and status in and through their work – one that depends on displaying mastery and superiority over women, and denigrates men they do not consider “real” men. From this perspective, harassing other people and getting away with it confirms and even enhances their superior status. Organizational tolerance, coverups, and nondisclosure agreements become just another sign of their hyper-masculine workplace success and stardom.118 As Harvey Weinstein’s former assistant Zelda Perkins put it: “I don’t think he’s a sex addict. He’s a power addict .... With Harvey, there was no such word as no.”120

II. FOUNDATIONS

To have an adequate theory of harassment, it is not enough to understand what the harassers stand to gain. It is even more important to understand the industry dynamics and organizational conditions that foster and fuel harassment.

116 See, e.g., Ackerlof & Kranton, supra note 18; Berdahl, supra note 18; Kabat-Farr & Cortina, supra note 108.


119 See id. (reporting the views of Cathy Schulman, Oscar-winning film producer and president of Women in Film, on the connections between entrenched sexism in Hollywood, the prevalence of powerful men harassing women, and “bullying tactics, payouts, and non-disclosure agreements”).

120 Longeretta, supra note 36.
There are many such factors, but here I will stress two structural features of industries and fields in which harassment is known to flourish: sex-segregated work and subjective, unconstrained authority. My earlier work emphasized the importance of sex segregation to harassment, focusing primarily on peer harassment. But in considering the many reports from the #MeToo movement that involve harassment by highly positioned men, and in analyzing the question of organizational power, I have come to appreciate the importance of the second factor as well.

On closer inspection, it is no accident that Hollywood and Silicon Valley are rife with harassment. Both industries are characterized by a high degree of sex segregation, where mostly men hold leadership positions and favored jobs, while women are greatly outnumbered or are concentrated in less highly-regarded roles. Similarly, both industries grant executives and managers vast unchecked subjective discretion to hire and promote people; success depends on navigating informal social networks and impressing high-status kingmakers who have the subjective authority to make or break careers and life prospects. These factors – sex segregation and unconstrained, personalistic authority – set the stage for sexual harassment.

A. Sex Segregation

The sex segregation of work is both a cause and consequence of harassment. Sex segregation means men hold the most powerful or prized jobs, while women hold lower-status positions. This state of affairs fosters sex stereotypes – for example, a sense that men are leaders or geniuses while women are followers. Segregation primes these stereotypes, prompting the dominant group to perceive any minorities who enter their jobs as “different” and out of place, and to close ranks against them to defend their position and status. Because men’s work roles still tend to afford them higher status, men’s stake in preserving their superior workplace positions and associated masculinities is typically stronger than women’s in preserving traditionally female jobs and related femininities. For this reason, men are more likely than women to engage in harassment and more likely to do so when they work in traditionally male-dominated settings, as discussed above.

Sex segregation also makes it more difficult for those in the minority to resist harassment. Without the power and safety that comes with more equal numbers, women and others who are harassed cannot effectively censor or counter stereotypes and cannot effectively deter, resist, or report harassment. Nor can they participate effectively in shaping the organization’s cultures and norms, or in changing the organization’s structures and

121 Schultz, supra note 99, at 41-46 (identifying the structural vulnerability of workers and a lack of fair and equal access to the legal system as additional risk factors); Feldblum & Lipnic, supra note 53 (identifying several risk factors for sexual harassment, including lack of diversity, gender nonconformity, isolated workspaces, customer-drive compensation, alcohol-consuming cultures, decentralized authority, and significant power disparities).

122 See, e.g., Schultz, supra note 1, at 1756-1761; Schultz, supra note 2, at 2139-2144.

123 For extended theoretical discussions of the relationship between sex-segregation and sex-based harassment that make these points, see Schultz, supra note 1, at 1756-60; Schultz, supra note 2, at 2132-36, 2139-45, 2173-77.

124 Berdahl, supra note 31, at 433.
practices in ways that foster greater inclusion and equality. Research shows that skewed numbers leave women outnumbered and vulnerable at work, left to curry favor or compete with men on an unequal basis.\textsuperscript{125}

Harassment, in turn, further fuels sex segregation and stereotyping. By driving women away or discouraging them from male-dominated fields, and labeling the women who pursue them as different and less capable, harassment reinforces both horizontal and vertical segregation\textsuperscript{126} and confirms perceptions that women are not suited for traditionally “masculine” jobs or leadership roles. Similarly, by pressuring women in traditionally female-dominated jobs to tolerate sexist demands, harassment reinforces vertical sex segregation by confirming ideas that women do and should naturally submit to male authority. Thus, segregation and harassment reinforce each other in a self-perpetuating cycle.

\section*{B. Unconstrained, Subjective Authority}

It is not only the gendered nature of the hierarchy that fuels harassment: it is also the nature of the hierarchy itself. Harassment is fueled by employment systems that give higher-ups unchecked, subjective authority to make or break other people’s careers on their own subjective say-so, without the use of objective criteria or external oversight to constrain their judgments.

By unconstrained, subjective authority, I refer to the use of subjective selection systems for hiring, assigning, promoting, paying, firing, and evaluating people.\textsuperscript{127} First, these systems vest broad discretion in individual executives, managers, or supervisors to evaluate people based on their own personal judgment, free from external oversight or accountability. In addition, these systems are often subjective in the sense that managers deploy unmeasurable, nonobjective criteria, such as “leadership potential” or “cultural fit.” Furthermore, even if some managers rely on objective criteria, the selection process may still be subjective in another sense, namely a lack of uniformity or consistency. Subjective systems typically make little or no effort to ensure that all managers use the same criteria to assess candidates or that they weigh or apply those criteria in the same way to all candidates. The result of all these factors is a lack of transparency, for candidates cannot ascertain in advance what it takes to succeed in these systems. These systems

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\textsuperscript{126} See Schultz, \textit{supra} note 2, at 2140-43 (explaining how both horizontal sex segregation, the tendency of men and women at similar organizational levels to work in different jobs, and vertical sex segregation, the tendency of women to be concentrated in lower-level positions supervised by men, both encourage harassment).

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sometimes also involve an additional dimension of subjectivity: the use of tightly knit social networks to recruit and attract new talent. These networks privilege the subjective judgment of not just one executive or manager, but multiple industry insiders or peers, to recommend candidates based on their reputations or social connections. Finally, the term unconstrained, subjective authority can refer not only to subjective hiring and evaluation, but also to the unfettered authority to direct and control the day-to-day work and activities of subordinates.

It is well known that unconstrained, subjective selection systems foster discrimination. Research demonstrates that processes that give managers unfettered discretion to make decisions about employees or aspirants based on their own subjective judgment facilitate stereotyping and discrimination.\(^{128}\) Psychological research further shows that people, such as managers, whose positions give them a high degree of power to affect other people’s lives by providing or withholding resources or administering punishments are more prone to engage in stereotyping, because they are less likely to attend to individuating information about them.\(^{129}\) For these reasons, the law has long recognized that without objective guideposts or oversight to ensure candidates are treated evenhandedly, managers in subjective systems often fall back on stereotypes and bias in making employment decisions.\(^{130}\) Managers in these systems also tend to hire people who look like themselves to reduce uncertainty and foster trust.\(^{131}\) Where employment systems lack more defined ways to evaluate skill, moreover, candidates often must depend on tight social networks to acquire jobs and advance their careers. It is well known that these networks, too, often operate to exclude women and other outsiders.\(^{132}\)


\(^{130}\) See, e.g., Rowe v. Gen. Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (“recogniz[ing] that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination”). For additional cases, see Schultz, supra note 8, at 1063 n.364.

\(^{131}\) For the classic study, see KANTER, supra note 125, at 48-63 (discussing how managers resort to “homosocial reproduction” to reduce uncertainty); see also James N. Baron et al., In the Company of Women: Gender Inequality and the Logic of Bureaucracy in Start-Up Firms, 34 WORK & OCCUPATIONS 35 (2007); Roscigno et al., supra note 128; Natalie Wreyford, Birds of a Feather: Informal Recruitment Practices and Gendered Outcomes For Screenwriting Work in the UK Film Industry, 63 SOC. REV. 84 (2015).

Here I extend these older observations to offer a new insight: just as unfettered, subjective authority facilitates discrimination in hiring and promotion, it also fosters sex-based harassment. This is true for two different reasons. First, giving higher-ups the authority to hire, promote, and fire people based on their own subjective judgment increases their power to exercise arbitrary and abusive authority over employees. Employees have no basis for demanding accountability in the absence of any objective standards or opportunity for oversight, especially in the typical at-will employment scenario. Industry cultures in which career advancement turns on connections rather than more objective credentials only intensify the problem, because they give higher-ups even more power to blackball those who cross or displease them.

But the problem is not simply that positions characterized by unchecked authority permit harassment and abuse; it is that they actually encourage it. Research shows that the nature of the authority vested in such positions inculcates in those who occupy them a sense of entitlement to wield arbitrary authority over people “beneath” them, simply by virtue of the fact that their positions give them the power to do so. In one classic study, managers vested with institutional power to control employees’ behavior (by firing or demoting them and paying them less) increased their attempts to control subordinates, devalued subordinates’ work efforts and performance, viewed them as objects of manipulation, and desired greater social distance from them. This study laid the groundwork for a metamorphic theory of power, “which asserts that through the repeated exercise of power individuals adopt more vainglorious self-concepts and as a consequence [come to] denigrate the less powerful.” Unchecked institutional authority, in other words, begets a growing sense of personal power and self-aggrandizement. Both formal and informal sources of authority over others can feed this sense of power.

At one level, these insights simply reflect the truism that sexual harassment is about power. But what is lacking in that observation is a specification of the nature and source of that power. Men’s power in the workplace is not merely attributable to higher levels of testosterone or patriarchal conditions in society at large, as is often claimed. Instead, it

133 See generally PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT), at 37 (Elizabeth Anderson ed., 2017); Rachel Arnow-Richman, Of Power and Process: Handling Harassers in an At-Will World, 128 YALE L.J.F. 85 (2018) (arguing that at-will employment, employer contracting practices, and sexual harassment law combine to produce a world in which employers tolerate sexual harassment by top-level employers).

134 Keltner et al., supra note 129, at 266.


136 Keltner et al., supra note 129, at 266.

137 See Jeanette N. Cleveland and Melinda E. Kerst, Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship, 42 J. VOCATIONAL BEHAV. 49, 55-57 (1993) (explaining the sources of informal power male employees can exercise over female peers); see also Schultz, supra note 1, at 1751-52, 1764-65 (showing how male workers who have the ability to informally train, inform, or otherwise affect the work performance of their female peers acquire power over them).

is attributable to the unchecked, subjective authority that is vested in many men’s organizational positions by companies, industries, and the law. As Donald Trump put it, “when you’re a star, they let you do it. You can do anything.” Leading the Trump Organization, the Miss Universe pageant, and The Apprentice are what put him in the position of being a “star,” not simply being male in a sexist society. Positions that grant people such unfettered subjective authority foster discrimination, harassment, and abuse.

C. Contemporary Examples

Together, then, sex segregation and unchecked authority shape industries and workplaces in ways that actively encourage harassment and disable victims from stopping it. The result is that too many men simply have too much unfettered authority to make or break the careers of the people who depend on them for their livelihoods and job prospects. Where both factors are present, they create a perfect storm for sexual harassment, as illustrated by Hollywood and Silicon Valley.

1. Hollywood

The Hollywood film industry is highly segregated by sex. Women are grossly underrepresented in all important behind-the-scenes roles in major film. Although women are around half of film school students, in 2016 women made up only 7% of all directors of the top 250 grossing films and only 17% of all behind-the-scenes roles on those films – figures that dropped from 2015. Women made up only 24% of producers, 17% of editors and executive producers, 13% of writers, 5% of cinematographers, and 3% of composers. The figures for female directors are even bleaker than they appear, because the studios hire the same women on a repeat basis. Among the 900 top grossing films between 2007 and 2016, there were only thirty-four unique female directors. Only three were Black.


141 Lauzen, supra note 140, at 2-3.

Women also fare worse than men on screen. They garner fewer lead roles and fewer speaking roles overall. When they do appear in film, they play more sex-stereotyped and auxiliary roles. Women claimed lead roles in only twenty-nine percent of the top 168 films for 2015, and only thirty-four percent of the top 100 films of 2016. This on-screen inequality is traceable, at least in part, to the dearth of women in key decisionmaking and behind-the-scenes roles. A growing body of evidence demonstrates that women's speaking roles increase dramatically as the number of women in directing roles increases.

Not only is the film industry highly sex-segregated, but it also runs on unconstrained, subjective authority and reputational capital. From the studio executives and producers downward, Hollywood vests enormous, unchecked discretion in mostly male decisionmakers to hire the talent to produce and distribute films. For example, the major studios and talent agencies use secret lists and closed social networks to initially screen directors. It is well documented that these mechanisms disadvantage women. In one recent study, studio executives and agents who were asked to name people on the lists frequently failed to name any women directors. In addition, the subjective criteria and processes for assessing talent encourage studios to fall back on stereotypes. Studios envision film directors as commanding and inherently masculine, and presume that women lack the inclination or ability to direct films, particularly those in high-budget genres. The high degree of financial risk and uncertainty involved in filmmaking and distribution exacerbates these problems, leading filmmakers and funders to reject female


144 Smith et al., supra note 142, at 1.


148 Smith et al., supra note 145, at 18.

149 Id. at 4-5 (“[O]ne explanation for [female directors being perceived to make films for a less significant portion of the marketplace than men] is the tendency to ‘think director, think male,’” or to describe the job of a director or profitable film content in masculine terms.”).
directors or restrict them to “women’s films.” Similar considerations dictate casting decisions for actors, encouraging the use of race- and sex-stereotyped “breakdowns” and choices by studio executives, producers, directors, and writers, who themselves remain overwhelmingly white and male.

The authority vested in studio executives and filmmakers to hire and direct talent has fostered widespread abuse; the tyrannical and predatory Hollywood boss has long been both an American legend and a lived reality. According to a wide array of sources, discrimination and harassment are endemic in the industry. To change this situation requires appreciating its institutional foundations, rather than attributing these problems to individual pathology or generic patriarchy.

2. Silicon Valley

Like the Hollywood film industry, the Silicon Valley technology industry is sex-segregated and characterized by top-down, subjective decisionmaking. Commentators have drawn parallels between the problems for women in these two industries.

For years, women have been underrepresented in leadership and prized technical roles in Silicon Valley. Given the industry’s historic resistance to disclosing diversity-related data, definitive numbers are hard to come by. In 2013, engineer Tracy Chou posted on Medium asking people to share their companies’ data. Pressure for transparency followed, and some companies finally began to release data. In 2014, women held only 17% of the technical jobs at Google, 20% at Apple, 15% at Facebook, and 10% at

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150 ACLU Letter, supra note 146, at 5-9.


154 Mundy, supra note 83 (describing the opposition of several tech companies to a Freedom of Information Act request filed by the San Jose Mercury News for the Department of Labor to release data on the composition of their workforces).


Twitter. In 2017, the number was 20% at Google and 19% at Facebook. Women are even scarcer in leadership roles, comprising only 12.5% of executives at Silicon Valley companies compared to 18% in the S&P 100.

Silicon Valley’s technology companies ought to attract a higher-than-average share of women; their location in the liberal San Francisco Bay Area should make them bastions of inclusion and progress. Instead, Bay Area tech companies do worse than others in an industry that is already sex-segregated: in Silicon Valley, women occupy 20% of computing jobs, while women hold 25% of computing jobs in the rest of the country, and nearly 39% of those in Washington, D.C., the city that tops the list for treating women in tech fairly. Despite advances in some markets, the technology industry has remained inhospitable to women generally. In fact, women’s share of computing jobs has declined dramatically over the past two decades, falling to only 25% from a high of 36% in 1991.

Like Hollywood, Silicon Valley relies heavily on top-down, subjective leadership decisions and male social networks that disadvantage women. It begins with the venture capitalists who fund tech start-ups. In 2016, ninety-three percent of the partners at top venture capital funds were men, and ninety-eight percent of the founders they funded were men. Predicting which tech entrepreneurs will succeed is a subjective and imperfect art.

157 Mundy, supra note 83.
158 CHANG, supra note 71, at 7.
162 CHANG, supra note 71, at 7; see also The Current State of Women in Computer Science, COMPUTERSCIENCE.ORG [hereinafter Current State of Women], https://www.computerscience.org/resources/women-in-computer-science [https://perma.cc/PZ56-6W7S] (reporting the same statistics).
venture capital firms fall back on familiar stereotypes and insider networks, preferring young, white, male Ivy-League or Stanford dropouts who resemble other tech innovators.\textsuperscript{165} Indeed, many tech companies start off as collaborations among close college friends, who then hire additional friends or acquaintances through close-knit social networks such as fraternities.\textsuperscript{166} Tech entrepreneurs look for a combination of hard skills and subjective qualities, such as innovative thinking and an ability to work cooperatively with others in a competitive setting.\textsuperscript{167} It is well known that when managers use their own judgment to hire people based on such subjective factors, they favor those who resemble themselves,\textsuperscript{168} further screening out women and confirming impressions that tech competence is masculine. Relying on tight social networks has a similar exclusionary effect,\textsuperscript{169} even where the underlying groups from which the network is drawn do not explicitly discriminate. Start-ups that hire based on personal connections are less likely to integrate women into core technical roles from the get-go, and this gender inequality gets built into the logic of the firm and persists over time.\textsuperscript{170}

Despite widespread use of such insider-favoring processes, there is a prevalent view among tech personnel that the industry is a meritocracy.\textsuperscript{171} Silicon Valley entrepreneurs often share a libertarian philosophy, believing that markets reward talent and effort.\textsuperscript{172} Furthermore, most believe strongly that tech success requires innate genius.\textsuperscript{173} These beliefs, too, can foster and justify stereotyping. Like perceptions that women lack the creativity or commanding presence to be great film directors, cultural images of tech genius almost never have a female face. Research shows that fields such as computer science, mathematics, and philosophy that prioritize inborn brilliance systematically disadvantage women because such brilliance is perceived as a male characteristic.\textsuperscript{174}

The business model for startups, which emphasizes starting from scratch and dispensing with rules in pursuit of the bottom line, exacerbates these tendencies by granting managers enormous autonomy and glorifying star performers.\textsuperscript{175} In an industry that

\begin{itemize}
\item \textsuperscript{165} CHANG, supra note 71, at 54-55; PAO, supra note 60, at 85-86; Kolhatkar, supra note 163.
\item \textsuperscript{166} See supra note 131.
\item \textsuperscript{167} See Richard Ford, Civil Rights 2.0: Encouraging Innovation to Tackle Silicon Valley’s Diversity Deficit, 11 STAN. J.C.R. & C.L. 155, 161-62.
\item \textsuperscript{168} See supra note 131.
\item \textsuperscript{169} See supra notes 132 & 147.
\item \textsuperscript{170} Baron, supra note 131.
\item \textsuperscript{171} See Ford, supra note 151, at 160, 163-67.
\item \textsuperscript{172} Chang, supra note 71, at 60-63; Kolhatkar, supra note 163; Mundy, supra note 83.
\item \textsuperscript{173} Kolhatkar, supra note 163; Mundy, supra note 83.
\item \textsuperscript{174} Sarah-Jane Leslie, et al., Expectations of Brilliance Underlie Gender Distributions Across Academic Disciplines, 347 SCIENCE 262 (2015).
\item \textsuperscript{175} Kolhatkar, supra note 163.
\end{itemize}
features libertarian values, unconstrained authority, and clubbish social networks, it is unsurprising that many who occupy tech’s exalted positions develop a strong sense of entitlement to do what they want, including to other people.

III. CHANGE

The implications for activism and law reform are clear. To end sexual harassment requires large-scale changes, not individualized solutions.\(^{176}\) Scholars, lawmakers, advocates, activists, policymakers, managers, employees, and citizens must work together to eliminate sex segregation and abandon unnecessarily subjective selection processes and arbitrary authority in favor of more inclusive, open, and accountable organizations.

Recognizing that structural workplace conditions like sex segregation and unconstrained supervisory authority encourage harassment reveals why some solutions are doomed to fail. It will not work to try to re-educate or sensitize harassers through workplace training or debiasing, for example, as many companies and consultants are doing.\(^{177}\) Most harassers already know their behavior bothers their victims or are indifferent to their feelings; they are harassing them in order to reinforce their own status, power, and social identity. Thought control will not work and instead frequently backfires.\(^{178}\) Nor will it be enough to punish or shame harassers for abusing their power. It is not simply bad behavior, but the carte-blanche authority that supports and encourages that behavior that must be restrained; in many high-flying positions, mistreating subordinates is so ingrained that it is seen as a central part of the job. Ending harassment is not about retraining or restraining boorish men. Organizational training and in-house complaints have been tried and have largely failed.\(^{179}\) Without addressing the nature of the hierarchy head-on, we can expect the revolving door of harassers to continue.

\(^{176}\) See Schultz, supra note 2, at 2172-74. The need for systemic changes, as opposed to individual remedies, is a constant theme in employment discrimination law. See generally LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 127-33 137-38 (2017); TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (2017).

\(^{177}\) See Mundy, supra note 83 (describing use of implicit bias training in Silicon Valley).

\(^{178}\) See id. (discussing how implicit bias training can backfire); Michelle M. Duguid & Melissa C. Thomas-Hunt, Condoning Stereotyping? How Awareness of Stereotyping Prevalence Impacts Expression of Stereotypes, 100 J. APPL PSYCHOL. 343 (2015).

Nor will it work to have rules, popularly represented by Vice President Mike Pence’s personal rule of never dining alone with women, that limit contact between the sexes.\textsuperscript{180} These rules, like proposals to draw stricter boundaries between work and after-hours activities,\textsuperscript{181} are premised on the old idea that harassment is driven by sexual desire. They rest on the assumption that removing the opportunity for people to have personal contact solves the problem. Yet organizations cannot possibly limit contact between all the people who might conceivably be attracted to each other, at work or after hours. If we should have learned anything by now, it is that we cannot rid the workplace of all sexual attraction, behavior and expression – and indeed, trying to do so is ill-advised. It does not cure sexism and it risks disproportionate harms to sexual and racial minorities, who are often stereotyped and as overly sexual.\textsuperscript{182} Additionally, efforts to do so would be futile because the problem driving sexual harassment is not sexual desire; it is entrenched workplace sexism.

More fundamentally, such rules are based on a misguided effort to control individual thought and behavior, rather than reshape the organizational conditions that channel that behavior in harmful ways. True, unwanted sexual advances and other sexual humiliations are often used as a weapon to exclude or humiliate women and others. But so are myriad other nonsexual actions, as described above. These rules encourage even more sex segregation, casting all male-female interactions as inherently sexual and denying women the same informal access to powerful sponsors and social networks afforded to their male peers. Once we understand that sex segregation is a cause of – and not a solution to – sexual harassment, it becomes clear that ending harassment requires tearing down the barriers of sex and gender that prevent people from interacting with each other as workplace and social equals, rather than erecting new ones. The targeted barriers must include those formed by race, sexual orientation, disability, and the like, not simply sex and gender.

First and foremost, then, ending sex-based harassment means ending workplace sex segregation and inequality. I advocated this position years ago, but not enough advocates and policymakers took up the challenge. This time around, antiharassment activists seem to grasp this point and are pressing to integrate male-dominated jobs, occupations, and industries. The #TimesUp movement’s original “Dear Sisters” letter, for example, called for “a significant increase of women in positions of leadership and power across industries” and “equal representation, opportunities, benefits and pay for all women workers, not to mention greater representation of women of color, immigrant women, and lesbian, bisexual, and transgender women” in all industries.\textsuperscript{183} An affiliated group, 5050by2020,  


\textsuperscript{182} See Schultz, supra note 2, at 2158-63.

seeks to integrate women into all core leadership positions in Hollywood. Reform groups in Silicon Valley are similarly advocating for gender parity in entrepreneurial and technical roles. Similar demands are being made for racial and sexual minorities in other unequal industries.

Time-honored principles and lessons from employment discrimination law can further the project. Although the business benefits of diversity may induce some companies to act, historically, few American industries made significant strides toward race or gender integration without major campaigns to enforce Title VII or other laws prohibiting workplace discrimination. Even today, the fight to end sex segregation, inequality, and harassment must include initiatives by state and federal agencies and private class actions to

2018/01/01/arts/02women-letter.html [https://perma.cc/8LVM-7594].


188 In the early days of Title VII enforcement, for example, the federal government challenged racial segregation in many leading industries, including steel, trucking, construction, telecommunications, manufacturing, law enforcement, firefighting, and even motion pictures. See, e.g., Int’l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (truck); United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 834 (5th Cir. 1976) (steel). After pressure from the women’s rights movement, the federal government also began to challenge sex segregation in industries such as steel, telecommunications, and retail. See Schultz, supra note 8, at 1031-35.
enforce these laws.\textsuperscript{189} The risk of being blackballed in industries that run on social networks and reputational capital is too high for individuals facing discrimination to bear the burden of bringing lawsuits alone. During the Obama Administration, the federal government began pursuing film studios and tech firms that discriminate in hiring, promotion, and pay. The Department of Labor sued Google, Oracle, and Palantir for sex-based hiring and pay disparities,\textsuperscript{190} and the EEOC began investigating the major Hollywood studios for sex discrimination by failing to hire female directors.\textsuperscript{191} We should insist that these efforts continue.

Lawsuits like these should also challenge sex-based harassment, clarifying its link to vertical and horizontal forms of sex segregation and exposing the full spectrum of sexual and nonsexual harassment and unequal treatment – the “thousand paper cuts” that debilitate so many women and gender-nonconforming people. Advocates can also push for innovative remedies to address and prevent the recurrence of harassment, such as numerical goals to ensure that women of all races are fully integrated into prized jobs and leadership positions on equal terms\textsuperscript{192} – not just in token numbers – and that men are similarly integrated into traditionally female jobs. Breaking up these patterns of inequity is crucial to giving marginalized people the presence and power to resist harassment and stereotyping – and, ultimately, to changing the hearts and minds of incumbents who do not yet see them as equals. Campaigns to reach shareholders, advertisers, and customers can press for similar results and remedies. Law’s aspirations can be mobilized in many settings, pressing for recognition that harassment is an expression of endemic workplace sexism and not a problem of individual sexual advances.\textsuperscript{193}

But integration alone will not end harassment; unless the hierarchy itself is restructured, women will simply join the ranks of the overly powerful and will inevitably succumb to the temptations to abuse others that these positions induce in the people who hold them. Scholars have begun to reinvigorate the case for eliminating unnecessarily subjective and arbitrary authority by bosses in the workplace.\textsuperscript{194} Eliminating unnecessary workplace

\textsuperscript{189} See Schultz, supra note 99, at 22-25.


\textsuperscript{193} See Green, supra note 94, at 167-69.

\textsuperscript{194} See ANDERSON, supra note 133; Cynthia Estlund, Rethinking Autocracy at Work, 131 HARV. L. REV. 795 (2018) (reviewing ANDERSON, supra note 133).
hierarchy is a massive and difficult undertaking that will require long-term efforts on multiple fronts, including employment and labor law reforms, labor and political activism, and tort and contract liability to reshape and restrain higher-ups’ arbitrary and abusive authority. Many activists are also rightly working on the problem from the bottom up, seeking reforms that will empower employees and reduce their structural vulnerability. Employment discrimination law also holds important lessons for the effort to reign in subjective authority. From its inception, Title VII jurisprudence condemned unduly subjective supervisory authority and closed social networks as breeding grounds for discrimination and stereotyping. Lawyers at the Department of Justice Civil Rights Division and elsewhere secured interpretations of the law pressuring employers and labor unions to abandon highly subjective selection systems that fostered bias or favored people who knew or resembled incumbents. They fought for more open processes that advertised jobs equally to all, specified relevant skills in advance, and evaluated candidates on a more objective, uniform, and evenhanded basis. Civil rights lawyers succeeded in many industries, rationalizing the workplace in ways the labor movement had sought for decades. In the name of eliminating race discrimination, the early Title VII revolution helped reign in purely subjective decisionmaking and reliance on exclusionary social networks in favor of more open, neutral processes that created greater opportunities not only for racial minorities, but for all aspirants who were not favored insiders.

It is time for a new revolution. These same principles should be adapted to today’s economy and brought to bear in industries that have not yet fully implemented them. People seeking careers in Hollywood, Silicon Valley, and many other industries and firms


197 See, e.g., United States v. Georgia Power Co., 474 F.2d 906, 925 (5th Cir. 1973) (invalidating as racially discriminatory an employer’s use of word-of-mouth recruiting because it would exclude Blacks from the “web of information” regarding job opportunities); Rowe v. Gen. Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (invalidating as racially discriminatory promotion and transfer procedures that rely on the subjective evaluation of foremen as a “ready mechanism for discrimination”); Local 53 of Int’l Assoc. of Heat & Front Insulators v. Vogler, 407 F.2d 1047, 1053-54 (5th Cir. 1969) (invalidating as racially discriminatory a union requirement restricting helpers to sons or close household relatives of a current union member).


199 See Schultz, supra note 198.
cannot count on having the benefit of open hiring processes, objective credentials, or identifiable career paths – factors that create more rationalized employment and hiring systems. Instead, aspirants must pursue and please powerful sponsors and maintain the right social connections if they hope to break into the business. Hollywood has avoided greater rationalization partly because the film industry runs on discrete projects and short-term contracts; third parties, such as talent agencies, buffer accountability. Silicon Valley firms have operated in a free-wheeling, informal environment that has evaded transparency, such as reporting basic employment data.

In an economy in which soft skills and social networks have become even more important, it is crucial to demand greater openness, objectivity, and accountability. Advocates and agencies have begun to recognize as much. For example, the ACLU’s demand for the EEOC to investigate the film industry not only complains of continuing sex segregation: it targets the role of the studios’ and talent agencies’ discriminatory use of highly subjective hiring practices. Feminist advocacy organizations in Silicon Valley recommend measures to rationalize unduly subjective selection processes, including open recruiting, structured interviews, more objective criteria, and more standardized decisionmaking. Consultants and even a few prominent companies, such as Google, espouse a similar approach. By now, it is clear that the tech industry can no longer be left to regulate itself. State and federal agencies and public interest advocates should throw their weight behind these efforts and demand measures to discipline subjective decisionmaking and dismantle discrimination, as occurred in other leading sectors long ago. While some degree of subjectivity in hiring and supervision is unavoidable, excessively arbitrary supervisory authority and oligopolistic insider-favoring networks can and should be restrained by law and activism. These systems foster not only targeted discrimination and harassment, but also generalized cronyism and abuse. Ultimately, it is not only women and racial and sexual minorities, but all employees and aspirants, who stand to benefit from structural reforms.

CONCLUSION

The #MeToo movement has renewed women’s – and all people’s – dreams and demands for equal, inclusive workplaces characterized by relations of respect and solidarity, rather than discrimination and abuse. We have been here before. This time, let us not be lulled

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200 See Bielby & Bielby, supra note 147, at 369-70 (discussing the rise of employment contracts and the role of talent agencies); Allen J. Scott, A New Map of Hollywood: The Production and Distribution of American Motion Pictures, 36 REGIONAL STUD. 957, 958-59 (2002) (describing major studios as systems houses that produce a small number of blockbuster films, while relying on a system of flexible specialization for producing most films through discrete contracts with third parties, including independent studios and talent agencies).

201 See Mundy, supra note 84; Kolhatkar, supra note 163.

202 ACLU Letter, supra note 146, at 2-4, 6.


204 Mundy, supra note 83.

205 See ANDERSON, supra note 133, at 48-52, 128-30, 135-38.
into focusing on symptoms and individual solutions. We must insist that our institutions take on the crucial tasks of dismantling sex segregation and restructuring unconstrained subjective authority in favor of more equal, open, and accountable institutions. Eliminating segregation is crucial if women and men of all types are to interact and work together as equals. Constraining subjective authority is equally important. Not only can reigning in that authority reduce discrimination and stereotyping, but it can also help eliminate harassment and abuse. When bosses and benefactors no longer have carte blanche authority to make or break people’s careers on their own say-so, they will have far less ability to mistreat, harass, and retaliate against the less powerful. In the name of equality, in the name of humanity, it is time to demand: no more kings; no more kingmakers.
ABSTRACT. There has been significant progress in protecting employees from sexual harassment over the past twenty years. Courts have recognized that sexual harassment is perpetrated by and against people of all sexes and genders, takes sexual and nonsexual forms, and is often motivated by bias and hostility, not sexual desire. Yet sexual harassment persists and remains largely unreported. The #MeToo and #TimesUp movements have motivated more people to speak out about sexual harassment, but many of those now choosing to speak remain vulnerable to retaliation. This Essay provides the perspective of an attorney whose practice focuses on plaintiff-side employment law in California. It explores the ways that state laws can offer greater protections to employees, using California as a model. It then reflects on some of the shortcomings of current state and federal law. Finally, it discusses some of the proposed legislation that, inspired by the #MeToo and #TimesUp movements, seeks to prevent harassment and to protect employees who come forward.

INTRODUCTION

Twenty years after the publication of Vicki Schultz's *Reconceptualizing Sexual Harassment*,¹ there is finally broad recognition by courts that harassment is perpetrated by and against people of all sexes and genders, takes both sexual and nonsexual forms, and is often motivated by bias and hostility, not sexual desire. Yet sexual harassment persists and remains largely unreported. The #MeToo and #TimesUp movements have motivated more people to speak out about sexual harassment, but many of those now choosing to speak remain vulnerable to retaliation. This Essay provides the perspective of an attorney whose practice focuses on plaintiff-side employment law in California. It explores the ways that state laws can offer greater protections to employees, using California as a model. It then reflects on some of the shortcomings of current state and federal law. Finally, it discusses some of the proposed legislation that, inspired by the #MeToo and #TimesUp movements, seeks to prevent harassment and to protect employees who come forward.

I. CHANGING PERSPECTIVES ON SEXUAL HARASSMENT LAW

In the fourteen years I have practiced as an employee-rights attorney in California, I have seen both a broadening in the types of sexual harassment cases that courts recognize and changes in the way that employers handle such cases.

Twenty years ago, the U.S. Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex sexual harassment was actionable under Title VII.\(^2\) Before *Oncale*, many courts viewed sexual harassment in very narrow terms: it was sexualized conduct that men directed at women. Indeed, Schultz’s groundbreaking article, *Reconceptualizing Sexual Harassment*, argued that by focusing on sexualized behaviors, many courts were ignoring conduct that was nonsexualized but nevertheless sex based.\(^3\) In doing so, courts failed to recognize how men used harassment to undermine women’s competence and to drive them out of their jobs.\(^4\)

In *Oncale*, the Court confirmed that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”\(^5\) Instead, the Court said, Title VII’s prohibition on sexual harassment “must extend to sexual harassment of any kind that meets the statutory requirements,” including, for example, harassment “motivated by general hostility to the presence of women in the workplace.”\(^6\)

Today, courts recognize that a wide variety of conduct can create a hostile work environment. Sexual harassment is perpetrated by and against people of all sexes and genders.\(^7\) It takes all kinds of forms – sexual and nonsexual.\(^8\) It is often motivated by bias and hostility, not sexual desire.\(^9\) And sexual harassment can be perpetrated by a variety

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\(^3\) See Schultz, supra note 1, at 1713-38.

\(^4\) Id. at 1755-74.

\(^5\) *Oncale*, 523 U.S. at 80.

\(^6\) Id. (emphasis added).


\(^9\) See Feldblum & Lipnic, supra note 8; cf. CAL. GOV’T CODE §12940(j)(4)(C) (West 2018) (“‘Harassment’ because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.”).
of individuals, from supervisors, to coworkers, to subordinates, and even third parties such as customers.\textsuperscript{10}

In my practice, I have seen firsthand the broadening and development of sexual harassment law. A recent client's situation – modified slightly to remove identifying information – is illustrative of conduct that has come to be recognized as unlawful sexual harassment over the past twenty years. This case highlights the influence of the unfolding #MeToo and #TimesUp movements on employer responses to sexual harassment complaints.

Laura worked as a designer for an advertising agency, reporting directly to its creative director, Paul. Her team was comprised mostly of women. Paul, a gay man, regularly expressed misogynistic views about women. He used sexist slurs, mocked women's appearances if he did not consider them beautiful or thin enough, and he denigrated their work. Laura felt sick to her stomach every time she had to interact with Paul. But as the primary earner for her family, she was too afraid of retaliation to speak up. She simply could not afford to lose her job. All of the other women working there appeared to quietly tolerate the abuse, and upper management was aware of Paul's conduct but did nothing to stop it.

Over several months, Laura found that the stress and discomfort from being around Paul were affecting other aspects of her life. She did not have much of an appetite and lost about ten pounds. She suffered from insomnia for the first time in her life. She found herself snapping at her husband and children. And she dreaded going to work each morning. She went to her doctor, who diagnosed her with anxiety and put her on a medical leave for a few weeks. It was then that she decided to consult with counsel to see if what Paul was doing was illegal and if there was a way for her to get out of this predicament.

After she retained me, I sent a letter to the company, describing Paul's conduct and their legal exposure. The company, in turn, provided the letter to their outside counsel. Outside counsel immediately recognized the problem and agreed that a negotiated exit from the company was in everyone's best interest. Laura, with severance in hand (and a confidentiality agreement that contained a mutual nondisparagement provision), left to find her next job. I do not know whether Paul ever suffered any consequences for his actions.

The following year, Laura found another job at a similar company. Days into her new role, she was shocked to discover that her new supervisor, Rick, was not much of an improvement over Paul. He, too, was overtly hostile toward his female subordinates. He belittled and demeaned them and made sexist comments about women in general. Once again, Laura was filled with dread.

But, in the time between when Laura left her prior job and started the new one, the #MeToo and #TimesUp movements had taken hold. This time, inspired by the movements, Laura decided that she would not suffer in silence. Over the course of a couple of weeks, she made sure to note down all the sexist comments and hostile behaviors that Rick directed at the women in the office. Laura then went to human resources at her new job and made a formal complaint, sharing these examples and listing out the names of the witnesses who were present each time.

The human resources department acted swiftly. It suspended Rick, conducted a thorough investigation, and despite his critical role at the company, ultimately terminated him. Laura felt empowered and vindicated, and the other women, who had tolerated Rick’s behavior for years, expressed their gratitude.

Twenty years ago, many courts would not have recognized Paul or Rick’s behaviors as creating a hostile work environment that would be actionable as sexual harassment.\(^{11}\) Neither man was acting out of sexual desire, and most of their comments were not of a sexual nature. Today, however, there is no dispute that such conduct, if proven, would be actionable.

Despite the law’s protections, however, sexual harassment persists. Fifty-eight percent of women surveyed by the Equal Employment Opportunity Commission have experienced sex-based harassment.\(^{12}\) Workplaces at greater risk for sexual harassment include those with “high-value” employees, significant power disparities, younger employees, or homogenous workforces. They also include workplaces where employees do not conform to gendered norms, or focus on customer service or client satisfaction, and workplaces that encourage drinking, or are isolated and decentralized.\(^{13}\)

My own experiences bear this out. I have represented clients in all of these situations, including clients who were sexually harassed by company owners and managers (who had free rein to do as they saw fit without anyone to hold them accountable), clients who were among only a few women in male-dominated environments (across the salary spectrum – from surgeons to warehouse workers), clients who worked in companies where “bro culture” prevailed and drinking was encouraged, and clients whose supervisors were allowed to get away with nonsexual abuse because it was not seen as “sexual harassment.”

Compounding this dismal reality, most of this sexual harassment goes unreported. For example, one study found that gender-harassing conduct was almost never reported; unwanted physical touching formally reported only 8% of the time; and sexually coercive behavior reported by only 30% of women who experienced it.\(^{14}\) When harassment is reported, the consequences can be dire: an estimated 75% of employees who speak out against workplace mistreatment faced some form of retaliation.\(^{15}\) Reporting “at best does

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11 See Schultz, supra note 1, at 1720. Schultz argued that many courts were focusing on the sexualized behaviors in hostile work environment claims and were failing to recognize nonsexualized but sex-based forms of harassment. Id. at 1713-38. She revealed how men use harassment – both sexualized and nonsexual – as a tool to undermine women’s competence, drive them out of male-dominated jobs, and keep them in their place in female-dominated jobs. Id. at 1755-74. Thus, she argued, courts should center their analysis on the competence-undermining impact of harassment in order to reconnect sexual harassment law to its original mission of fighting sex discrimination. Id. at 1769-75.

12 Feldblum & Lipnic, supra note 8, at 9-10 & n.21.

13 Id. at 25-29.

14 Id. at 16.

15 Id. This remains true despite Title VII’s legal protections. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (holding that Title VII’s antiretaliation provision protects against
not make things worse and at worst leads to retaliation, minimization of complaints, and additional injury to the reporter.”¹⁶ I have seen retaliation that ranges from the overt – termination – to the more subtle and difficult-to-prove. It has taken the form of increased scrutiny, withdrawal of support, lower ratings on performance reviews, changes in assignments, changes in work schedules, and subtle aggressions that can undermine a person’s security and success. Given the likelihood of retaliation, it is no surprise that most people who are sexually harassed believe that the safest course of action is inaction.

Most sexual harassment cases that come my way have a retaliation component. Potential clients often contact me after trying to resolve the matter in their workplaces internally, only to have the situation deteriorate. The remainder do not have faith in their employers’ internal reporting processes, are too afraid to go through it on their own, or feel that the situation is irreparable and want out.

Once again, however, change is afoot. Even one year ago, Laura’s complaint at her new company may not have received the same response. This is especially true because of Rick’s high-level role at the company. Rarely have I seen companies terminate someone as high-ranking and valuable as Rick for such conduct. However, the #MeToo and #TimesUp movements have galvanized the public, leading people to speak out who would not have done so before, while motivating many employers to respond lest they face the consequences of inaction.¹⁷ These movements have created space and an appetite for the expansion of employee rights and protections.

III. STATE LAWS CAN OFFER GREATER PROTECTIONS

In protecting workers against discrimination and harassment, federal civil rights laws such as Title VII of the Civil Rights Act of 1964 serve as a floor of protection, not a ceiling.¹⁸ California, with its Fair Employment and Housing Act (FEHA), serves as an excellent model of the wider coverage and broader protections that state laws can provide to employees.


⁰¹⁸ See 42 U.S.C. §2000e-7 (2012) (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”).
California first passed the predecessor to the FEHA in 1959.\textsuperscript{19} It prohibited discrimination in employment based on race, religion, color, national origin, and ancestry.\textsuperscript{20} Over the years, the FEHA has been expanded to protect employees from other forms of discrimination and harassment, including mistreatment based on age, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, and military and veteran status.\textsuperscript{21} The FEHA expressly prohibits harassment based on protected categories, including sexual harassment, and has done so for decades.\textsuperscript{22}

Federal civil rights law operates differently. Unlike the FEHA, Title VII does not expressly address sexual harassment or any other type of workplace harassment. Rather, courts have interpreted Title VII’s prohibition on discriminating against any individual with respect to the “terms, conditions, or privileges of employment,”\textsuperscript{23} as including harassment that is sufficiently severe or pervasive to alter the conditions of employment.\textsuperscript{24}

The Supreme Court has laid out the elements necessary for a plaintiff to prevail on a claim for hostile work environment sexual harassment under Title VII:

1) He or she was a member of a protected group;\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{19} See Ann M. Noel & Phyllis W. Cheng, Through Struggle to the Stars: A History of California’s Fair Housing Law, 27 CAL. REAL PROP. J. 3, 3-4 (2009). It was then called the Fair Employment Practices Act. \textit{Id}.
  \item \textsuperscript{20} \textit{Id}. at 4.
  \item \textsuperscript{21} See CAL. GOV’T CODE §12940(a) (West 2018). In 2003, the California legislature amended the FEHA to include gender in its definition of “sex.” \textit{See id}; 2003 Cal. Stat. 1685. It incorporated by reference then-Penal Code section 422.76, which defined gender as “the victim’s actual sex or the defendant’s perception of the victim’s sex, and includes the defendant’s perception of the victim’s identity, appearance, or behavior, whether or not that identity, appearance or behavior is different from that traditionally associated with the victim’s sex at birth.” 2003 Cal. Stat. 1689. In 2011, the California Legislature amended the FEHA again to specifically name as protected categories “gender,” “gender identity,” and “gender expression.” \textit{See} 2011 Cal. Legis. Serv. Ch. 719 (West).
  \item \textsuperscript{22} CAL. GOV’T CODE §12940(j) (West 2018).
  \item \textsuperscript{24} \textit{See} Meritor Sav. Bank v. Vinson, 477 U.S. 57, 57 (1986). \textit{Vinson} was the first Supreme Court decision to address sexual harassment. The Court explained that “the 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.” \textit{Id}. at 64 (quoting \textit{City of L.A. Dept of Water & Power v. Manhart}, 435 U.S. 702, 707 n.13 (1978)). The Court pointed to the “substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.” \textit{Id}. at 65.
  \item \textsuperscript{25} This element simply requires that the plaintiff be a member of a group protected by Title VII – that the plaintiff is a woman (or a man) is enough to satisfy this requirement. \textit{See}, e.g., Quick v. Donaldson Co., 90 F.3d 1372, 1377 (8th Cir. 1996) (citing \textit{Vinson}, 477 U.S. at 66-67).
\end{itemize}
2) He or she was subjected to unwelcome behavior;\textsuperscript{26}

3) This behavior was “because of … sex”;\textsuperscript{27}

4) The harassing conduct was “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment’”;\textsuperscript{28}

5) The employer should bear responsibility for the harassing conduct.\textsuperscript{29}

California courts have adopted the same standards under the FEHA.\textsuperscript{30}

While Title VII and the FEHA’s sexual harassment provisions have much in common, the FEHA provides protections and benefits that Title VII does not, including coverage of more employees, expanded liability for harassment, greater remedies, and mandated training. I discuss each of these below.

\textbf{A. Protections for More Working Individuals}

The FEHA’s harassment prohibitions apply to all employers; there is no minimum number of employees required.\textsuperscript{31} The law’s broad scope has a significant impact. In California, over eighty percent of businesses employ fewer than nine employees.\textsuperscript{32} More than fifteen percent of California’s workforce works for such small employers and is therefore not protected by Title VII.\textsuperscript{33} The FEHA’s protection ensures that no employer, regardless of size, can harass an employee with impunity. In addition, the FEHA’s protections against sexual harassment apply not only to an employee or job applicant but also to “an unpaid

\begin{footnotes}
\item[26] Vinson, 477 U.S. at 68.
\item[28] Id. at 78; Vinson, 477 U.S. at 67.
\item[29] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (identifying the circumstances under which an employer may be held vicariously liable for the acts of a supervisory employee whose sexual harassment of subordinate employees has created a hostile work environment); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (same).
\item[31] CAL. GOV’T CODE §12940(j)(4)(A) (West 2018). All other types of claims under the FEHA can be brought only against employers with five or more employees. Id. §12926(d).
\item[33] See id.
\end{footnotes}
In contrast, Title VII applies only to employers with fifteen or more employees and does not protect independent contractors or unpaid volunteers.35

B. Expanded Liability for Harassment

Under the FEHA, if a supervisor commits sexual harassment, the employer is strictly liable – regardless of whether the employer knew about the conduct.36 In contrast, under Title VII, if there has been no tangible employment action by a supervisor (such as termination, demotion, or pay cut), an employer can raise an affirmative defense if it establishes “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”37 Strict liability under the FEHA for supervisor harassment makes one fewer impediment to a plaintiff succeeding in her case.

Under the FEHA, an employer must take immediate and corrective action if it learns of harassment and must take all reasonable steps to prevent harassment ex ante.38 Failure to prevent harassment is a separate cause of action distinct from the claim of harassment itself. Such a failure serves as a basis for broader discovery to uncover what a company and its leadership knew (including with respect to prior complaints), how it responded (including whether it investigated and/or took corrective action), and what else could have been but was not done to prevent harassment.

34 CAL. GOV’T CODE §12940(j)(1) (West 2018). “Person providing services pursuant to a contract” is interpreted broadly to cover independent contractors. Id. §12940(j)(5). Nationally, there are an estimated 500,000 to 1 million unpaid interns working each year. Derek Thompson, Work Is Work: Why Free Internships Are Immoral, ATLANTIC (May 14, 2012), https://www.theatlantic.com/business/archive/2012/05/work-is-work-why-free-internships-are-immoral/257130 [https://perma.cc/P7E2-396H].

35 42 U.S.C. §2000e(b) (2012); Murray v. Principal Fin. Group, Inc., 613 F.3d 943, 944 (9th Cir. 2010); see also Keiko Rose, Volunteer Protection Under Title VII: Is Remuneration Required?, 2014 U. CHI. LEGAL F. 605 (2014), https://chicagounbound.uchicago.edu/uclf/vol2014/iss1/12 [https://perma.cc/YFN5-FH79] (discussing Title VII’s potential coverage of volunteers). Note that a separate California law – the Unruh Civil Rights Act – also prohibits sexual harassment in a broader variety of professional contexts. CAL. CIV. CODE §51.9 (West 2018). It applies where there is a business, service, or professional relationship between the parties that is difficult to terminate, including relationships with physicians, psychotherapists, attorneys, social workers, bankers, trustees, landlords, property managers, teachers, and other similar relationships. Id.

36 CAL. CODE REGS. tit. 2, §11034(f)(2)(C)(1) (2017); see CAL. GOV’T CODE §12940(j)(1). The employer is also liable for sexual harassment by non-employees and employees who are not supervisors or agents if it “knows or should have known of this conduct and fails to take immediate and corrective action.” Id.


38 CAL. GOV’T CODE §12940(k) (West 2018).
The FEHA also provides for individual liability against harassers, while Title VII does not. A significant benefit of this is that plaintiffs can remain in state court because individual harassers are almost always state residents who would defeat diversity, preventing removal to federal court. I discuss the benefits of remaining in state court in Part IV.E below.

C. Greater Remedies

The FEHA does not have any caps on compensatory or punitive damages, except what is constitutionally permissible, whereas Title VII limits such damages to a combined total of between $50,000 for the smallest employers to $300,000 for the largest employers. Seven-figure verdicts and settlements are not uncommon in FEHA cases, and even higher verdicts are awarded.

The FEHA’s lack of a cap on damages is an important tool given the role of punitive damages in deterring unlawful behavior. Consider two record-breaking California verdicts: *Chopourian v. Catholic Healthcare West*, a sexual harassment and retaliation case that went to trial in 2012, in which the jury awarded the plaintiff $3,720,488 in economic damages, $39,000,000 in noneconomic damages, and $125,000,000 in punitive damages; and *Juarez v. AutoZone Stores, Inc.*, a pregnancy discrimination, harassment, and retaliation case that went to trial in 2014, in which the jury awarded $872,709.52 in compensatory damages and $185,000,000 in punitive damages.

In addition, while both Title VII and the FEHA provide that prevailing plaintiffs be awarded their attorneys’ fees, California state courts are expected to award fee enhancements (also called multipliers) to take into account factors such as the difficulty of the case, the attorneys’ skills, and the contingent nature of the fee award. In contingency cases, absent circumstances that would render a fee award unjust, a fee enhancement must be used. The rationale is that “[a] lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant...

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39 Id. §12940(j)(3); CAL. CODE REGS. tit. 2, §11034(f)(2)(C)(4).

40 See *Dyna-Med, Inc. v. Fair Emp’t & Hous. Comm’n*, 743 P.2d 1323, 1342 (Cal. 1987) (explaining that “[p]otential liability for punitive damages is a substantial incentive for employers to eliminate, or refrain from committing, unlawful employment practices” and that “the possibility of ‘punitive damages may enhance the willingness of persons charged with violations to offer fair settlements ....’”).


to accept fee award cases.”

By contrast, under Title VII, fee enhancements are disfavored. Given that attorneys have usually invested hundreds of hours of time into a FEHA case, the time a trial is completed, a multiplier can increase the fee award by hundreds of thousands of dollars – further incentive for employers to abstain from illegal conduct and to promptly settle meritorious cases.

**D. Mandated Training**

The FEHA requires that employers with fifty or more employees provide two hours of sexual harassment training and education to supervisory employees within six months of their assumption of a supervisory position, and once every two years thereafter. This training, which must be conducted by subject-matter experts, must include information and practical guidance regarding state and federal sexual harassment laws, ways to prevent and correct harassment, and the remedies available to those who experience sexual harassment. It also must cover harassment based on gender identity, gender expression, and sexual orientation.

**E. The Ability to Remain in State Court**

By asserting a claim under the FEHA rather than under Title VII, a plaintiff can remain in state court so long as she can defeat diversity. There are many advantages to remaining in state court. A significant advantage is that at the outset of a case, parties are allowed one peremptory challenge to disqualify a judge without showing cause, allowing some control over who presides over their case.

Employee plaintiffs in state court also have greater discovery rights. They have no limits on the number or length of depositions, the ability to use form interrogatories, including

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46 *Ketchum*, 17 P.3d at 742 (quoting John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 480 (1981)).


48 CAL. GOV’T CODE §12950.1 (West 2018). However, failure to comply with this requirement does not in and of itself result in liability to an employer in a sexual harassment action. *Id.* at §12950.1(e).

49 *Id.* §12950.1.

50 *Id.*


52 CAL. CIV. PROC. CODE §170.6 (West 2018).

53 *Id.* §2025.290.
those tailored to employment cases,\textsuperscript{54} and the ability to serve as many special interrogatories as needed (over the default limit of thirty-five) with a simple declaration of necessity.\textsuperscript{55}

Plaintiffs also have more time to oppose motions for summary judgment. The Federal Rules of Civil Procedure allow a motion for summary judgment to be filed fourteen days before the hearing, with the opposition due seven days before the hearing, giving the plaintiff only a week to oppose the motion.\textsuperscript{56} In contrast, in California state court, notice of a summary judgment motion and supporting papers must be served on all other parties at least seventy-five days before the hearing date (which itself must be held no later than thirty days before the date of trial), while the opposing papers must be filed fourteen days before the hearing.\textsuperscript{57} The discovery cutoff in state court is thirty days before trial\textsuperscript{58} such that a plaintiff has about two months to conduct further discovery to aid in opposing the motion.

All told, plaintiffs benefit tremendously from trying their cases in California state courts. State court juries are generally considered more diverse and plaintiff-friendly because they are selected from “sources inclusive of a representative cross-section of the population of the area served by the court,” including from the Department of Motor Vehicles’ list of licensed drivers, the list of registered voters, telephone directories, and utility lists.\textsuperscript{59} Attorneys are permitted to directly question jurors during 	extit{voir dire} without unreasonable or arbitrary time limitations and are permitted to submit written jury questionnaires.\textsuperscript{60} Finally, the single most important reason to remain in state court: a plaintiff in state court need only convince three-fourths of jurors about the merits of the case, as opposed to needing to convince a unanimous jury in federal court.\textsuperscript{61}

Because the protections and remedies under the FEHA are greater than those under federal law, and because there are advantages to remaining in state court, California employment lawyers usually assert FEHA claims on behalf of their clients.\textsuperscript{62}

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\textsuperscript{54} See Form Interrogatories – Employment Law, JUD. COUNS. OF CAL., \url{http://www.courts.ca.gov/documents/disc002.pdf} [https://perma.cc/P49V-VPNE].

\textsuperscript{55} CAL. CIV. PROC. CODE §2030.040 (West 2018).

\textsuperscript{56} \textbf{FED. R. CIV. P. 6(c)}.\textsuperscript{57} CAL. CIV. PROC. CODE §437c (West 2018).

\textsuperscript{58} Id. §2024.020.

\textsuperscript{59} Id. §197; Schlehr & Riggins, \textit{supra} note 51.

\textsuperscript{60} CAL. CIV. PROC. CODE §222.5 (West 2018).

\textsuperscript{61} \textit{See id.} §613.

\textsuperscript{62} \textit{See} Schlehr & Riggins, \textit{supra} note 51.
IV. LEGAL SHORTCOMINGS

Even with the expansive protections of the FEHA, sexual harassment persists, and employees are still afraid to express their opposition to sexual harassment. I believe there are two primary reasons for this. First, companies often fail to take significant corrective action when the alleged harasser is someone of value to an organization. Such a move, even if legally required and the right thing to do, can come at a great cost for the organization. Thus, companies may turn a blind eye to harassment and even shelter harassers, exposing the complaining employees to retaliation. Second, given the prevalence of retaliation, many employees have good reason not to formally complain – or even informally express discomfort – about harassing conduct. It can be difficult for an employee to establish that a supervisor’s harassing conduct was offensive to her when she, out of self-preservation, never voiced her discomfort or may have appeared to be a willing participant or indifferent bystander.

A. Companies Act to Protect Harassers Who Are Valuable

I have observed that companies are often swift to act when the accused harasser is someone fungible. They usually recognize their legal exposure and make the wise business decision to take immediate corrective action as is required by law. The same cannot be expected when the accused harasser holds a role that is key to the company – say a high-level executive, a large revenue generator, a renowned professor, or someone whose knowledge, connections, or skills cannot easily be replaced.63

One may ask, for example, why Fox News continued to support Bill O’Reilly despite known sexual harassment settlement payouts totaling approximately $45 million over the years.64 It was a calculated economic decision: the dollar amount of O’Reilly’s settlements pales in comparison to the revenue he generated as Fox News’s top asset.65 The New York Times reported that, from 2014 through 2016, O’Reilly’s show, The O'Reilly Factor, generated more than $446 million in advertising revenues.66 It was only when advertisers started dropping his show that Fox News took action.67 This is part of the power of the #MeToo and #TimesUp movements: employers understand that negative publicity

63 See Feldblum & Lipnic, supra note 8, at 16.

64 Emily Steel & Michael S. Schmidt, Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html [https://perma.cc/PA4H-CVJY] (reporting that publicly known settlements involving Mr. O’Reilly have totaled $45 million, and that Fox News renewed his contract well aware of these settlements).


66 Id.

resulting from a failure to take action against a sexual harasser can have a devastating impact on their bottom lines.

Companies that knowingly employ and protect serial harassers have gone to great lengths to prevent such publicity. They have benefitted from the ability to require a confidentiality or nondisclosure provision as a condition of employment or of settlement of harassment claims. These nondisclosure agreements not only protect an accused harasser from public censure in one instance but also undermine the likelihood that future cases of harassment will succeed. Subsequent victims lose the benefit of learning about the prior harassment. This, in turn, means that they lose the ability to identify these other women to help corroborate their claims. While some of this information may eventually be uncovered when litigation is underway, an attorney will approach a case very differently from the outset if she knows that there are other witnesses who can corroborate a harassment claim. She may choose not to take on a case without such corroboration or may encourage the harassed employee to settle the case early out of a fear that a jury or arbitrator may conclude that the case is one of “he said, she said.” In addition, evidence that an employer repeatedly shielded a serial harasser, or condoned harassment in general, serves as a basis for punitive damages. When this conduct is covered up and shielded from disclosure, it limits a plaintiff’s ability to prove that punitive damages are warranted, which in turn limits the law’s ability to deter such conduct.

Companies sheltering known harassers also benefit from the ability to impose mandatory arbitration agreements. This in turn prevents lawsuits from entering the public record and instead pushes cases into private forums that shroud the process in secrecy. The use

68 Though I use it here to characterize others’ potential reactions, I am of the strong belief that the phrase “he said, she said” should be purged from our lexicon. This phrase first became popular in the early 1990s, with its first common usage referring to Professor Anita Hill’s allegations of sexual harassment by then-Supreme Court nominee Clarence Thomas. See William Safire, On Language: He-Said, She-Said, N.Y. TIMES (Apr. 12, 1998), https://www.nytimes.com/1998/04/12/magazine/on-language-he-said-she-said.html [https://perma.cc/7C49-C67L]. The problem with the phrase is that it suggests that when there are two conflicting accounts without other witnesses, the truth is unknowable. In fact, there are many ways to assess the credibility of both witnesses to determine who is more likely to be telling the truth. These include: the person’s demeanor when testifying, the consistency of their testimony over time, whether any fact is verifiably false, the quality of their memory, whether they have been untruthful in the past, and their motives to lie. Cf. CAL. EVID. CODE § 780 (West 2018) (listing factors to consider in determining whether a witness is credible).

69 Congress sought to address these issues in the new tax law by denying tax deductions for settlement payments in sexual harassment cases where there is a nondisclosure agreement. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, §13307, 131 Stat. 2054.; Robert Wood, Tax Write-Offs in Sexual Harassment Cases After Harvey Weinstein, N.Y. STATE BAR ASS’N J. 11 (Feb. 2018), http://www.woodllp.com/Publications/Articles/pdf/Tax_Write-Offs_NYSBA.pdf [https://perma.cc/3ZSW-8T6]. However, it is unlikely that this will make a large dent in the prevalence of nondisclosure agreements given that the parties may be able to characterize the settlements in ways that minimize the impact of the new law. See Wood, supra.

70 For example, the American Arbitration Association’s employment rules provide that “[t]he arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.” Employment Arbitration Rules and Mediation Procedures, AM. ARB. ASS’N 23 (2009), https://www.adr.org/sites/default/files/Employment%20Rules.pdf [https://perma.cc/9793-JWYZ]. The JAMS employment rules provide that it and the arbitrator “shall
of these private forums makes it more difficult for people who have been subjected to sexual harassment to find other witnesses and victims who could corroborate their accounts.\(^\text{71}\) Unfortunately, over half of American employees have been forced to sign mandatory arbitration agreements as a condition of employment.\(^\text{72}\) However, in light of the #MeToo and #TimesUp movements, there is a growing effort to end forced arbitrations in sexual harassment cases.\(^\text{73}\)

In 2002, the California Legislature sought to provide more transparency and greater accountability with respect to arbitration by adding section 1281.96 to the California Arbitration Act.\(^\text{74}\) Section 1281.96 requires that private arbitration companies publish, at least quarterly, cumulative reports compiling information over the past five years regarding their consumer arbitrations.\(^\text{75}\) The reports must be “directly accessible from a

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make the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.” JAMS Employment Arbitration Rules & Procedures, JAMS (2014), https://www.jamsadr.com/rules-employment-arbitration [https://perma.cc/F8PC-PE8Z].

\(^\text{71}\) Much has been written about how arbitration stacks the deck against employees in general. See, e.g., Alexander J.S. Colvin, An Empirical Study of Employment Arbitration: Case Outcomes and Processes, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (finding that employee win rates and award amounts are substantially lower in arbitration than in employment litigation trials).


\(^\text{74}\) CAL. CIV. PROC. CODE §§1280-1294.4 (West 2018). The California legislature was troubled by reports that employers that mandated arbitration were benefiting from forcing consumers and employees into private forums where they enjoyed advantages from being a “repeat player.” See id.

\(^\text{75}\) CAL. CIV. PROC. CODE §1281.96(a) (West 2018). The reports must include eleven categories of information, including the name of the nonconsumer party (if it is a corporation or business), the name of the consumer’s attorney and law firm, the nature of the dispute, the type of disposition of the dispute, and the total number of times that the nonconsumer party has previously been a party in an arbitration administered by the arbitration company. Id.
conspicuously displayed link” and in a searchable format. While the identities of the complainants remain confidential, a potential plaintiff can use this information to find out whether the employer has been sued before and can potentially contact prior complainants’ counsel to see if additional information can be discovered. Unfortunately, nondisclosure agreements may make such informal investigation less fruitful, but a plaintiff has the ability to overcome that impediment through the use of a subpoena to compel testimony at a deposition.

If a company stands behind a “superstar” employee, or simply gives him a slap on the wrist, the harassed employee may have limited recourse if she wants to keep her job. If she reports to the harasser, there may be nowhere that she can be moved while maintaining comparable duties, responsibilities, and pay, and she may instead simply end up reporting to the same person, but now with a target on her back. Further, allowing harassment by high-value employees to persist exposes even those who are removed from those individual’s supervision to further harassment by permitting a culture of harassment to permeate. As Psychology Professor Mindy Bergman explained in her testimony before the EEOC:

Workplaces that tolerate harassment have more of it and workplaces that are less tolerant of harassment have less of it. This is a circular problem, because when harassment occurs and organizational leaders do not take it seriously, then the message is that harassment is tolerated, so then it becomes even more OK to harass – and when harassment is taken seriously and shut down, then the message is that harassment is not tolerated.

B. Retaliation Persists

Often, when I am contacted by current employees who are being harassed and just want the bad behavior to stop so that they can do their job in peace, I am hesitant to help. While complaining internally may lead the company to investigate and take corrective action, it is just as likely to lead to retaliation. Will their complaints just make their situation worse? Are they better off trying to live with the conduct until they cannot take it anymore? A retaliatory termination can have a devastating impact on a person’s life and career. I have seen it play out when I have tried to help a harassed employee.

Retaliation can take place months or even years later, making it extremely difficult to connect to protected activities. And while retaliation can sometimes be blatant, it often takes subtle forms that may be difficult to prove. For example, an employee can lose the support of the management team, feel socially ostracized, or suffer repercussions that are difficult to pin on their protected activity. Further, a calculating employer with animus can deliberately paper an employee’s file, documenting alleged failures or inadequacies in

76 CAL. CIV. PROC. CODE §1281.96(b) (West 2018).
77 Bergman Testimony, supra note 16.
78 Id.
such a way that, by the time the employee is terminated, she appears to be a problem employee who was justly discharged.79

The reality is that when subtle or well-calculated retaliation happens, employees have very limited recourse. Most plaintiff-side employment lawyers work on a contingency-fee basis.80 To take on a case, a lawyer must be convinced that she can prove the claims and that any recovery would be worthwhile. When there is alleged retaliation that is subtle or appears difficult to prove, unless the harassment claim is a strong one that can stand on its own, the employee will have a difficult time finding competent counsel to represent her. While employees without counsel can file charges or complaints with the EEOC or with its California equivalent, the Department of Fair Employment and Housing (DFEH), in hopes that those agencies will pursue the claim on their behalves, the odds of having a difficult claim substantiated are low. For example, in 2016, the DFEH investigated 4,799 complaints, settled 1,036 complaints, and filed only 31 lawsuits in court.81

For this reason, while the #MeToo and #TimesUp movements have empowered people to speak out against harassment, I do not believe that those who speak up are much safer today than they were before the movements took hold in situations where a decisionmaker harbors retaliatory animus. This is because, while more employers may be motivated to take corrective action, those who wish to retaliate can still do so in a manner that leaves employees with limited recourse. We owe it to sexual harassment victims – and to the brave colleagues and coworkers who step forward to substantiate their claims at great personal risk – to ensure that those who speak up are protected.

C. Power Imbalances Color Questions of Unwelcomeness and Offense

To establish a cause of action for a hostile work environment, a plaintiff must establish that the harassing behavior was both subjectively and objectively offensive so that the plaintiff did, and a reasonable person would, find it abusive and hostile.82 Under the FEHA,

79 Once such retaliation has taken place, I encourage employees to swiftly begin looking for their next job because there is no way to repair the broken working relationship. I also encourage them to protest loudly and clearly. They should make their own record showing that, until they spoke up against harassment or other unlawful conduct, they received positive performance feedback and support from their supervisors, but that everything changed after their complaints. At the least, this can help demonstrate that the entire subsequent paper trail has been part of an orchestrated plan to drive the employee out of the workplace and may motivate an employer to work toward an amicable resolution.

80 The FEHA and Title VII provide for statutory attorneys’ fees to a prevailing plaintiff, which means that low-wage workers are not without recourse. However, ability to recover attorneys’ fees if the case goes to trial is only one factor in overall valuation of a case. Other factors include the overall strength of the case, the employee’s damages (considering both economic losses and emotional distress), whether punitive damages are warranted, and whether a judgment is collectible. Further, most workers would not be able to afford hiring an employment attorney on an hourly basis.


elements include that the plaintiff was “subjected to unwanted harassing conduct” because of a protected status, that the conduct was subjectively offensive, and that it was also objectively offensive. That is, a plaintiff must prove that a reasonable woman (or other protected category) in the plaintiff’s circumstances would have considered the work environment to be hostile or abusive, and that the plaintiff considered the work environment to be hostile or abusive.\footnote{See California Civil Jury Instructions (CACI) No. 2521B (2017).}

Sometimes, however, it is difficult for a plaintiff to demonstrate that the defendant’s conduct was unwelcome and subjectively offensive. A plaintiff need not explicitly say that the conduct was unwelcome, but that would certainly help establish that she was offended. Yet when the perpetrator of unwelcome conduct is a plaintiff’s supervisor or someone with authority over her, it is difficult to say whether she should dare voice her discomfort and risk retaliation. Acting out of a fear of retaliation, many people who are subjected to unwelcome conduct that offends them choose to “go along to get along.” For some, that may mean saying nothing and pretending that they are not upset. For others, it may mean relenting and participating in the conduct, even if they did not initiate it.\footnote{In \textit{Vinson}, the Supreme Court rejected the argument that because the plaintiff ultimately had a sexual relationship with her supervisor, there was no harassment. The Court stated: “The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” \textit{Vinson}, 477 U.S. at 68.}

They may not speak out until they reach a breaking point.

It is not surprising that harassers most frequently target vulnerable employees. As workplace investigator and trainer Fran Sepler shared in her testimony before the EEOC:

\begin{quote}
[S]ingle parents, people in the midst of a divorce or separation, people who were developmentally promoted, recent immigrants and people making low wages were more frequently targeted for harassment and bullying than others. What these people have in common is an intense reliance on their wages and a foreboding sense that they cannot afford to lose their job. Fear of reprisal or retaliation, and the subsequent fear of job loss lengthens the incubation period and the harassment continues until the individual’s calculus is that they cannot bear the harassment for one more minute – by then the problem has become far less manageable and more traumatic to the target.\footnote{Meeting of the Select Task Force on the Study of Harassment in the Workplace – Written Testimony of Fran Sepler, President, Sepler & Associates, EQUAL OPPORTUNITY EMP. COMMISSION (Sept. 18, 2015), [https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm) [https://perma.cc/2PUQ-MUV5]. Sepler defined “developmentally promoted” as “employees who were hired for an entry level or administrative job and promoted into roles of greater responsibility without meeting the requirements contained in the position description for the roles they currently hold.” \textit{Id}.}
\end{quote}

Women of color, in particular, are more vulnerable; they face a greater risk of sexual harassment than white women and at a greater risk of racial harassment than men of
Further, “there is a considerable correlation between experiencing sexual harassment and experiencing racial/ethnic harassment.”

V. POSSIBLE SOLUTIONS IN PROPOSED LEGISLATION

Acting on the momentum of the #MeToo and #TimesUp movements, state legislators have leapt into action, hoping to do more to protect employees and others who have been subjected to or opposed sexual harassment. This legislative term, in the wake of the #MeToo and #TimesUp movements, California legislators have introduced bills that would help those who have been sexually harassed. These include bills that seek to limit confidentiality and nondisparagement provisions, restrict mandatory arbitration, increase recordkeeping and training requirements, create individual liability for retaliation, and extend the statute of limitations for FEHA claims. Below, I discuss how each of these would help create strong incentives for employers to prevent and remedy sexual harassment in the workplace.

A. Limiting Confidentiality Provisions in Settlement Agreements

California already prohibits settlement-agreement provisions that prevent the disclosure of factual information related to claims involving certain types of sexual conduct, including childhood sexual abuse and any act that may be prosecuted as a felony sex offense. The prohibition was enacted because, “[w]hile confidentiality agreements may help to facilitate settlements of individual claims, they also put the public at risk by hiding sexual predators from law enforcement and the public at large.”

The Stand Together Against Non-Disclosures (STAND) Act, Senate Bill 820 — sparked by the revelation that Harvey Weinstein’s predatory behavior toward women was kept secret through the use of confidentiality provisions — would expand that prohibition. The STAND Act would prohibit such confidentiality provisions in the settlement agreement of any civil actions where the pleadings state a cause of action for: sexual assault; workplace harassment or discrimination based on sex; failure to prevent workplace harassment or discrimination based on sex; sexual harassment in a business, service, or professional relationship; and sex discrimination, harassment, or retaliation by the owner of a housing

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86 Bergman Testimony, supra note 16.

87 Id.

88 For example, New York Senate Bill S7848A, which passed the Senate and Assembly, is a comprehensive bill that seeks to combat sexual harassment in the workplace. S.B. S7848A, 2017-2018 Leg. Sess. (N.Y 2018). In relevant part, S.B. S7848A limits confidentiality of factual information in settlement agreements, prohibits mandatory arbitration of sexual harassment claims, requires employers to take all reasonable steps to prevent harassment, makes employers liable for sexual harassment by non-employees, and allows for individual liability for sexual harassment. Id.

89 CAL. CIV. PROC. CODE §1002(a) (West 2018).

accommodation.\textsuperscript{91} Addressing concerns that a plaintiff may want confidentiality to preserve her own privacy rights, the bill allows employees to request confidentiality.\textsuperscript{92} If enacted, any confidentiality provision in violation of the new law entered into on or after January 1, 2019, will be void as a matter of law and against public policy.\textsuperscript{93} The STAND Act would make it more difficult and expensive for employers to support and protect serial harassers.

\textbf{B. Prohibiting Nondisparagement Agreements and Certain Releases of Claims}

Senate Bill 1300 seeks to address two practices that employers have used to silence employees and to strip them of their rights: (1) nondisparagement agreements that gag employees from disclosing information about sexual harassment and other unlawful acts (often presented to employees at the outset of their employment as a condition of employment), and (2) releases of claims presented in exchange for a raise, bonus, or as a condition of continued employment.\textsuperscript{94} The Bill prohibits these practices and makes them unenforceable as contrary to public policy. Similarly, Assembly Bill 3080 would make it a violation of the FEHA for an employer to prohibit an employee or contractor from disclosing sexual harassment that the person suffered, witnessed, or discovered in the workplace.\textsuperscript{95}

These bills would stop companies from being able to silence witnesses and to force employees to give up their rights so they can keep their jobs. For example, the CEO of a large apparel company routinely forced workers to sign nondisparagement agreements, releases of claims, and forced arbitration clauses, providing them surreptitiously as modeling contracts or routine paperwork to receive a raise or bonus.\textsuperscript{96} He often gave them to the employees to sign after they were sexually harassed or assaulted, stripping away any legal recourse they had for the conduct they had endured.\textsuperscript{97}

\textbf{C. Prohibiting Mandatory Arbitration}

Assembly Bill 3080 also seeks to address the harms created by mandatory arbitration provisions, as discussed above. It would prohibit employers from requiring that any


\textsuperscript{92} Cal. S.B. 820. It remains to be seen how this will play out. Some plaintiffs may volunteer confidentiality in hopes of negotiating a higher settlement amount.

\textsuperscript{93} Id.


\textsuperscript{97} Id. at 3.
applicants or employees waive any right, forum, or procedure with respect to any violation of the FEHA as a condition of employment, continued employment, or receipt of a benefit. This would include the right to file and pursue a civil action. It would also make actionable any retaliation against an employee for refusing to consent to such an impermissible waiver. As forced arbitration applies to the majority of employees, has a devastating impact on the value of employees’ cases, and also pushes cases into private forums, this Bill, if successful, would significantly affect how employees who have been sexually harassed fare when they move forward with their cases.

D. Expanding Recordkeeping Requirements

Even when employees sue for sexual harassment, they may have a difficult time learning about prior complaints of sexual harassment if the employer maintains no records of them. Assembly Bill 1867 seeks to remedy this issue by requiring employers with fifty or more employees to maintain records of employee complaints of sexual harassment for ten years from the date of filing. This will heighten the consequences for employers if they fail to prevent and correct sexual harassment because the records will allow employees to find corroborating witnesses and evidence of inadequate corrective action that can serve as a basis for punitive damages.

E. Extending the Statute of Limitations

Many people empowered by the #MeToo and #TimesUp movements have come forward with their own harassment claims, only to learn that their claims are outside of the statute of limitations period. For claims under the FEHA, the statute of limitations is short – only


101 See SHARE Act (Stopping Harassment & Reporting Extension), CONSUMER ATT’YS CAL. ET AL., http://www.caoc.org/docDownload/815911 [http://perma.cc/BRK4-68FL] [hereinafter SHARE Act] (“Most low wage workers who suffered harassment or discrimination are not aware of their legal rights and do not know that they are time barred if they do not file with the DFEH within a year. By the time they realize harassment is against the law, they are usually past the time to file or close to having their statute expire.”).
a year\textsuperscript{102} -- as compared to two years for a personal injury claim,\textsuperscript{103} three years for fraud,\textsuperscript{104} and four years for a written contract dispute.\textsuperscript{105} The Stopping Harassment and Reporting Extension (SHARE) Act, Assembly Bill 1870, which has broad bipartisan support, would extend the statute of limitations to three years.\textsuperscript{106} This change will benefit employees silently suffering through harassment because they need their jobs. It will buy them more time to move on, potentially into roles where retaliation for speaking out is less of a concern.\textsuperscript{107} It will also benefit those employees who are unfamiliar with their rights, providing them more time to consult counsel.

\textbf{F. Making Individuals Liable for Retaliation}

As discussed above, the fear of retaliation is what inhibits most harassed employees from complaining. Senate Bill 1038 addresses retaliation directly by imposing individual liability against an employee of a FEHA-covered entity who retaliates against another employee for engaging in protected activity. Liability would attach regardless of whether the employer or covered entity knew or should have known about the conduct.\textsuperscript{108} This would allow harassed employees to hold their harassers accountable for both harassment and any retaliation they suffer from coming forward. It would also hold liable managers, human resources personnel, and others at the company who subjected harassed employees to further harm instead of remedying the situation. The Bill would also serve to help plaintiffs defeat diversity in order to stay in state court.

Senate Bill 1038 serves as a legislative fix for \textit{Jones v. Lodge at Torrey Pines Partnership},\textsuperscript{109} a 2008 case in which the California Supreme Court held that supervisors could not be individually liable for retaliation under the FEHA, despite clear language of the FEHA’s antiretaliation provision applying to “any employer, labor organization, employment agency, or person.”\textsuperscript{110} As Justice Carlos Moreno explained in his dissent in \textit{Jones}, individual liability for harassment but not retaliation incentivizes retaliation: “the

\begin{itemize}
\item \textsuperscript{102} CAL. GOV’T CODE §12960(d) (West 2018).
\item \textsuperscript{103} CAL. CIV. PROC. CODE §335.1 (West 2018).
\item \textsuperscript{104} CAL. CIV. PROC. CODE §338(d) (West 2018).
\item \textsuperscript{105} CAL. CIV. PROC. CODE §337 (West 2018).
\item \textsuperscript{106} See Assemb. B. 1870, 2017-2018 Leg., Reg. Sess. (Cal. 2018); see also SHARE Act, supra note 101.
\item \textsuperscript{107} There are, however, risks in waiting too long, including that documentary evidence disappears, witnesses scatter and become more forgetful, and claims are perceived as stale. Three years strikes the right balance: giving workers enough time to bring their claims forward while allowing employers to have closure with the passage of time.
\item \textsuperscript{109} 177 P.3d 232 (Cal. 2008).
\item \textsuperscript{110} CAL. GOV’T CODE §12940(h) (West 2018).
\end{itemize}
supervisor risks no additional liability for retaliating and might avoid liability for harassment as well, if he or she successfully ‘discourages’ the employee from pursuing a claim.”

G. Declaring Legislative Intent Regarding Sexual Harassment Law

Over the years, the elements of a claim for sexual harassment law have been read in a manner that makes it difficult for a plaintiff to prevail. The “severe or pervasive” standard in particular has far too often been used by judges as a basis to grant summary judgment or even to set aside a jury verdict. For example, in Brooks v. City of San Mateo, 911 operator Patricia Brooks was harassed and assaulted by her supervisor, Steven Selvaggio, who touched her stomach, made comments about her sexiness, physically blocked her from leaving, then forced his hand underneath her sweater and bra and grabbed her bare breast. The district court granted summary judgment, which was affirmed on appeal. The Ninth Circuit, in an opinion by Judge Alex Kozinski, held that Selvaggio’s conduct was not “severe” by objective standards:

[W]e cannot say that a reasonable woman in Brooks’s position would consider the terms and conditions of her employment altered by Selvaggio’s actions. Brooks was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job in the longterm, especially given that the city took prompt steps to remove Selvaggio from the workplace.

In Brennan v. Townsend & O’Leary Enterprises, Inc., the plaintiff Stephanie Brennan alleged that she was subjected to gender harassment in violation of the FEHA when, among other things, women were repeatedly referred to by sexual epithets, were forced to sit on a manager’s lap and subjected to other sexually demeaning conduct, and were prodded about their dating lives. Brennan, a successful vice president of advertising, tolerated this conduct for years, until she complained about an email forwarded to her that referred to her as a “big-titted, mindless one.” After that, members of management stopped speaking to her, stopped attending her meetings, and the owner decided that her performance review was “overgenerous” and expressed his desire to mark her down in areas that her supervisor did not agree with. Her efforts to change company culture and her requests for sexual harassment training were ignored and she ultimately felt she had no choice but to quit.

111 Jones, 177 P.3d at 245 (Moreno, J., dissenting).
112 229 F.3d 917, 921 (9th Cir. 2000).
113 Id. at 926 (footnote omitted).
114 132 Cal. Rptr. 3d 292, 295-98 (Ct. App. 2011).
115 Id.
116 Id. at 298.
117 Id.
A jury found for Brennan on her harassment claim, but the trial court granted judgment notwithstanding the verdict, concluding that there was insufficient evidence that the conduct was either "severe or pervasive." 118 The court of appeals affirmed, also concluding that the conduct described was neither severe nor pervasive. 119

Associate Justice Eileen Moore eloquently dissented, discussing how Brennan “went along to get along” and thrived in her role, but that when “she complained and said enough is enough, as women are permitted to do under the law ... the atmosphere surrounding her job changed completely .... Once she complained, she became a marked woman, and had no choice but to find other employment.” 120 In other words, “[w]hen the overtly sex-based acts are combined with the pattern of retaliation that lasted from Brennan’s complaint to her departure, those acts constitute sufficient evidence of a hostile work environment.” 121

Cases like Brooks and Brennan demonstrate the barriers that some courts have created for sexual harassment plaintiffs. Senate Bill 1300 seeks to declare legislative intent with respect to sexual harassment law, removing these barriers and affirming favorable cases.

First, the Bill would confirm that actionable harassment need not have caused a decline in the employee’s performance, instead defining harassment as conduct that “suffi ciently off ends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine the victim’s personal sense of well-being.” 122

Second, the Bill would confirm that a single incident of harassment can be severe even absent extreme circumstances, rejecting Brooks: “A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff’s work performance or created an intimidating, hostile, or offensive working environment.” 123

118 Id. at 298-99.

119 Id. at 305.

120 Id. at 313 (Moore, J., dissenting).

121 Id. at 316.

the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffi ces to prove that a reasonable person subjected to the discriminatory conduct would fi nd, as the plaintiff did, that the harassment so altered working conditions as to make it more diffi cult to do the job.

Id. at 25.

123 Cal. S.B. 1300.
Third, the Bill would affirm the California Supreme Court’s rejection of the federal “stray remarks doctrine,” which has been used to discount discriminatory statements made outside of the decisionmaking process or by nondecisionmakers:

The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination.124

Fourth, the Bill asserts that the legal standard for sexual harassment must be consistent across workplaces:

It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties.125

Fifth, the Bill reiterates that summary judgment should rarely be granted in harassment cases, explaining that they “involve issues ‘not determinable on paper.”’126

H. Holding Employers Accountable for Failing to Prevent Discrimination or Harassment

Employers have a legal duty to take steps to prevent discrimination and harassment, and to correct any such conduct once they learn of it. However, an employer can only be found liable for the separate cause of action of failing to take reasonable steps to prevent discrimination or harassment if the plaintiff prevails on the underlying discrimination or harassment claim.127 Senate Bill 1300 would provide a remedy for a plaintiff subjected to workplace harassment even if the conduct itself did not meet the threshold to be legally actionable (for example, if it did not meet the “severe or pervasive” standard) if “the employer knew that the conduct was unwelcome to the plaintiff, that the conduct would meet the legal standard for harassment or discrimination if it increased in severity or become pervasive, and that the defendant failed to take all reasonable steps to prevent the same or similar conduct from recurring.”128

124 Id. §1(c) (affirming Reid v. Google, 235 P.3d 988 (Cal. 2010)).

125 Id. §1(d) (rejecting Kelley v. Conco Cos., 126 Cal. Rptr. 3d 651 (Ct. App. 2011)).

126 Id. §1(e) (affirming Nazir v. United Airlines, Inc., 100 Cal. Rptr. 3d 296 (Ct. App. 2009)).


128 See S.B. 1300, 2017-2018 Leg., Reg. Sess. (Cal. 2018). Although some may be concerned that this would incentivize employees to bring forward trivial cases, the reality of contingency fee practices is that lawyers would be unlikely to take such cases.
I. Increasing Training Obligations

Senate Bill 1300 also seeks to make the antiharassment training that California employers provide more robust.129 Currently, employers with fifty or more employees must provide sexual harassment training to supervisors. This Bill would expand that requirement significantly, requiring that all employers with five or more employees provide sexual harassment training to all of their employees.130 Second, it would require that employers “provide information to each employee on how and to whom harassment should be reported as well as provide information on how to contact the department to make a complaint regarding a violation of the laws regarding workplace discrimination, harassment, and retaliation.”131 Third, it would require “bystander intervention training,” which has been recommended as a way to train bystanders to identify potential harassment and to act when they see it. Bystander training also serves to emphasize a company’s commitment to nonretaliation.132 Quality sexual harassment training for all employees can be used to set the tone at an organization and to convey a company’s commitment to ensuring that all its employees enjoy a workplace free of harassment and discrimination. Training that makes clear how complaints should be made, that they will be taken seriously, and that the company will take measures to protect complaining employees from retaliation serves to encourage more people to come forward. This protects both the employees and the company itself – as issues are corrected before they escalate.

J. Creating a Rebuttable Presumption of Unlawful Retaliation for Negative Actions After Complaints of Sexual Harassment

Assembly Bill 3081 creates a rebuttable presumption that negative actions taken within ninety days of an employee’s participation in advancing a sexual harassment claim are unlawful retaliation.133 However, it does so not by amending the FEHA but by creating a separate cause of action under the California Labor Code; the Bill prohibits an employer from discharging or in any manner discriminating against an employee because of their status as a victim of sexual harassment. The rebuttable presumption is an excellent proposal. At a minimum, this provision would force a ninety-day “cooling off” period where

129 See id.
130 Id. Assembly Bill 3081 would extend the FEHA’s training requirement to all employers with twenty-five or more employees. See Assemb. B. 3081, 2017-2018 Leg., Reg. Sess. (Cal. 2018).
131 Id. §3(e).
132 Feldblum & Lipnic, supra note 8, at 57. Other bills include provisions expanding protections from sexual harassment to those in professional relationships with investors, directors, producers, and elected officials. See, e.g., S.B. 224, 2017-2018 Leg., Reg. Sess. (Cal. 2018). Multiple bills target sexual harassment in the California legislature, including: Assembly Bill 403, which imposes criminal and civil liability on a Member of the Legislature or legislative employee who retaliates against an employee for making a protected disclosure, including of sexual harassment, Assemb. B. 403, 2017-2018 Leg., Reg. Sess. (Cal. 2018); and Assembly Bill 1750, which would allow a public entity to recoup settlement funds that it paid to settle a sexual harassment claim against an elected official if an investigation substantiates the claim, Assemb. B. 1750, 2017-2018 Leg., Reg. Sess. (Cal. 2018).
employers would have a strong disincentive from taking negative actions against employees who have complained of harassment. Yet existing protections against retaliation for making a sexual harassment claim already exist under the FEHA, and the rebuttable presumption as proposed should be applied to claims made under the FEHA, not through a separate cause of action. A similar rebuttable presumption is codified in the California Health and Safety Code to protect whistleblowers who report unsafe patient care and conditions in health facilities."**

Alternatively, Legislators could adopt into the FEHA the burden of proof used for claims brought under section 1102.5 of the California Labor Code, California’s general employee whistleblower protection law. Section 1102.5 protects employees who disclose information about what they reasonably believe violates federal, state, or local rules, statutes, regulations or ordinances. These disclosures may be made externally to a government or law enforcement agency or to a public body conducting an investigation, inquiry or hearing, or internally “to a person with authority over the employee, or to another employee who has the authority to investigate, discover, or correct the violation or noncompliance.”

Once an employee who asserts a claim under section 1102.5 demonstrates by a preponderance of the evidence that a protected activity was a contributing factor to a negative action against the employee, “the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by section 1102.5.” This increases the burden of proof on the defendant, who must now demonstrate by clear and convincing evidence that it would have taken the same action anyway. Because Section 1102.5’s burden-shifting framework does not contain any time limitations, as would a rebuttable presumption directed only at conduct within a certain time frame, it addresses retaliation regardless of timing.

While complaining about unlawful sexual harassment is a protected activity under both the FEHA and section 1102.5, only the FEHA currently provides for attorneys’ fees for a prevailing plaintiff, thus making FEHA claims more valuable. Further, the Department of Fair Employment and Housing has the authority to enforce the FEHA, while the California Labor Commissioner enforces the Labor Code. Given the DFEH’s experience enforcing the FEHA, and the extensive body of law that has addressed retaliation under the FEHA, it is important to ensure that the protections for claims brought under the FEHA are as broad as claims brought under other laws that prohibit the same conduct.

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134 However, this would not offer greater protections in situations where the employer’s retaliation is calculated and the employer is willing to wait until sufficient time passes to take retaliatory action.

135 CAL. HEALTH & SAFETY CODE §1278.5(d)(1)-(2) (West 2018).

136 CAL. LAB. CODE §1102.5(a) (West 2018). It also protects employees who refuse to participate in unlawful conduct.

137 CAL. LAB. CODE §1102.6 (West 2018).
VI. FURTHER TARGETING OF RETALIATION

As discussed above, the proposed measures that would prohibit the silencing of victims and the concealment of prior harassment would go a long way in addressing workplace harassment. However, I believe that measures targeting retaliation can have the most positive effect in reducing sexual harassment. We must directly address the risks and consequences of retaliation suffered by employees who protest workplace sexual harassment, and the chilling effect this has on some employees’ willingness to come forward with their own stories. Below I make one additional proposal.

To address the fact that employees are often afraid to protest harassment as it occurs because of a fear of retaliation, I propose a rebuttable presumption that harassing conduct was unwelcome and subjectively offensive in the following three circumstances:

1) If the harasser is a supervisor with the ability to take negative employment actions;

2) If the employee can demonstrate that she was aware of other employees being sexual harassed and that the employer knew about the harassment; or

3) If the employee can demonstrate that she was aware of previous retaliation in the workplace against others who complained about harassment or other prohibited conduct.

The presumption would apply if the alleged conduct meets all of the other elements of the claim. That is, the conduct would still need to be objectively offensive and shown to have been initiated by the supervisor, even if the plaintiff testifies that she quietly acquiesced or went along to protect herself. A rebuttable presumption in the first circumstance would deter supervisors from using their positions of power to freely harass employees. The rebuttable presumptions in the second and third circumstances would account for the reality that many employees are deterred from complaining about their own harassment if they know their employer tolerates harassment or retaliates against complaints. This presumption would further incentivize employers to take corrective action and would address the fact that harassment is more prevalent in those organizations that condone it.

CONCLUSION

We have made significant progress in protecting employees from sexual harassment over the past twenty years. Sexual harassment protections cover a broad range of conduct directed at employees, whether sexual or nonsexual, based on desire or hostility, and directed by and at persons of all genders. The #MeToo and #TimesUp movements have motivated people to speak out about sexual harassment and abuse. However, harassers and the companies that protect them continue to benefit from secrecy in settlement agreements and in arbitration. Retaliation remains a serious concern, particularly when the harassment is committed by a high-ranking person. As more people are empowered to step forward, we must ensure that their voices are not silenced and that they are protected. Proposed legislation out of California represents a promising effort to ensure that we capitalize on these movements and keep their momentum going.