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Articles

Finding Balance, Forging a Legacy: Harassers' Rights and Employer Best Practices in the Era of MeToo*

By RACHEL ARNOW-RICHMAN**

IT HAS BEEN TWO YEARS since news of serial sexual misconduct by Hollywood mogul Harvey Weinstein triggered the social media phenomenon that became MeToo.¹ While new allegations continue to

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1. On October 5, 2017, the New York Times broke the news of multiple allegations of sexual assault and harassment levied against Miramax founder and Weinstein Company co-chairman Harvey Weinstein, which were perpetrated over the course of decades. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/K6EA-BDD5>]. On October 15, 2017, actress Alyssa Milano triggered an outpouring of responses when she tweeted that anyone who had experienced sexual harassment or assault should reply "me too" to her tweet. Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied*, NBC NEWS (Oct. 15, 2018), <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246> [<https://perma.cc/8V7C-Q6PA>]. Ms. Milano credited Tarana Burke, who in 2007 used "Me Too" as the slogan for her non-profit organization that assists sexual abuse victims. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/K9RU-R7W4>].

surface,² the pace has slowed since the winter of 2018, when rapid-fire accusations against celebrities and other public figures were a near daily occurrence.³ Now it is time to shift from the conscience wrangling that characterized the height of the movement to a more deliberative conversation about best practices going forward. It is time to consider the legacy of MeToo.

That legacy will be defined in large part by the wave of reform surrounding harassment prevention and the institutional handling of complaints. A driving force is the groundswell of state legislative action responding to MeToo, including laws mandating employer-provided training,⁴ limiting confidential settlements,⁵ and broadening the definition of sexual harassment.⁶ But voluntary employer action is an equal, if not more critical, component. Since MeToo, companies

2. High-profile personalities implicated in the last year include musician R.J. Kelly, former CBS CEO and chairman Les Moonves, and opera star Plácido Domingo. See Michael Cooper, *Plácido Domingo Leaves Los Angeles Opera Amid Sex Harassment Inquiry*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/arts/music/placido-domingo-la-opera-sexual-harassment.html?module=inline> [http://perma.cc/X7US-TVV2]; Elizabeth A. Harris, *R. Kelly Charged With 10 Counts of Sexual Abuse in Chicago*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/arts/music/r-kelly-charged-in-dicted.html?searchResultPosition=1> [https://perma.cc/XLP5-MNPA]; Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (Aug. 8, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct> [https://perma.cc/8CK7-6K2H].

3. From November 2017 through February 2018, The New York Times catalogued seventy-one terminations and resignations related to allegations of sexual misconduct, as well as twenty-eight other instances of alleged harassers facing suspensions and other disciplinary measures. See Sarah Almukhtar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall From Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html?mtrref=undefined> [https://perma.cc/Q8VE-RNFA].

4. See, e.g., N.Y. LAB. LAW § 201-g(1)(a) (West, Westlaw through L.2019, Ch. 31, 50–59); ME. REV. STAT. ANN. tit. 26, § 807(3) (West, Westlaw through Ch. 79 of the 2019 First Reg. Sess. of the 129th Leg.); CAL. GOV'T CODE § 12950(a)(3) (West, Westlaw through Ch. 5 of 2019 Reg. Sess.).

5. See, e.g., H.B. 2020, 53rd Leg., 2d Reg. Sess. (Ariz. 2018); CAL. CIV. PROC. CODE § 1001 (West, Westlaw through Ch. 651 of 2019 Reg. Sess.); A.B. A626 (N.Y. 2019); WASH. REV. CODE ANN. § 49.44.210 (West, Westlaw through 2019 Reg. Sess.). In addition, Congress amended the tax code to bar employers from deducting payments or attorneys' fees incurred in sexual harassment or abuse settlements that contain nondisclosure agreements. 26 U.S.C.A. § 162(q)(1) (2012).

6. See, e.g., CAL GOV'T CODE § 12923(b) (West, Westlaw through Ch. 524 of 2019 Reg. Sess.) (providing that a "single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment"); N.Y. EXEC. LAW § 296(1)(h) (West, Westlaw through L.2019 Ch. 360) (effective November 18, 2019) (prohibiting an employer from subjecting any individual to harassment because of the individual's membership in a protected category "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims").

have sought to improve sexual harassment policies and training,⁷ dialed back on the use of mandatory arbitration agreements,⁸ and renewed efforts to recruit and promote women.⁹ Perhaps most visibly, many organizations have acted to promptly terminate or publicly distance themselves from accused harassers.¹⁰

7. See Tracey Breeden, *Driving Change—Expanding Our Commitment to Help End Global Sexual Assault and Gender-Based Violence*, UBER (Nov. 25, 2018), <https://www.uber.com/newsroom/driving-more-change/> [<https://perma.cc/BF3L-WT3Z>] (detailing specialized sexual harassment training for Uber’s customer service representatives and product enhancements focused on providing safer rides for Uber passengers); Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html> [<https://perma.cc/5TLS-JYZ9>] (describing improvements to sexual harassment policies such as performance penalties for employees who fail to complete preventative training); *5-Star Promise*, AM. HOTEL & LODGING ASS’N (Sept. 6, 2018), https://www.ahla.com/sites/default/files/5Star_PR_Brand.pdf [<https://perma.cc/9HA9-U35B>] (detailing safety commitments adopted by hotel chains such as the Hilton, Hyatt, and Marriott International to protect employees from sexual assault and related risks); Jodi Kantor, *#MeToo Called for an Overhaul: Are Workplaces Really Changing?*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html> [<https://perma.cc/X4LA-VCT4>] (describing increased attention to sexual harassment prevention in a variety of market sectors from service industry employers to investment agencies).

8. See e.g., Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html> [<https://perma.cc/JP2U-77QL>]; Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html> [<https://perma.cc/4ZJJ-67QF>]; Angela Morris, *Why 3 Big Law Firms Ended Use of Mandatory Arbitration Clauses*, ABA J. (June 1, 2018), http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses [<https://perma.cc/6S33-J4TM>].

9. At least fifty-four of the accused harassers who resigned or were ousted from high-level positions as a result of the MeToo movement have been replaced by women. See Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/9L2K-D8A7>].

10. See e.g., Keach Hagey & Joe Flint, *CBS Chief Leslie Moonves Steps Down Amid Sexual Misconduct Allegations*, WALL ST. J. (Sept. 9, 2018), <https://www.wsj.com/articles/cbs-ceo-leslie-moonves-expected-to-resign-1536525335> [<https://perma.cc/LN7U-9UTA>] (CBS CEO Les Moonves removed following New Yorker article detailing history of assault and harassment); Megan Twohey, *Harvey Weinstein Is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html> [<https://perma.cc/C5DM-A6BV>] (Weinstein fired two days after allegations of sexual misconduct arose); Brooks Barnes, *The Race to Erase Kevin Spacey*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/movies/kevin-spacey-all-the-money-in-the-world-christopher-plummer.html> [<https://perma.cc/7BHZ-PQ6M>] (Kevin Spacey replaced in otherwise complete film after news broke about his sexual misconduct); Chris Kirkham et al., *Steve Wynn Steps Down as Wynn Resorts CEO*, WALL ST. J. (Feb. 7, 2018) https://www.wsj.com/articles/steve-wynn-to-step-down-as-wynn-resorts-ceo-1517972210?mod=article_inline [<https://perma.cc/4GMQ-6WWF>] (Steve Wynn ousted following Wall Street Journal investigative report on history of sexual misconduct). See generally Lesley Wexler et

These developments are encouraging and essential, but they are also concerning. Employers wield incredible power over their employees, including accused harassers. Many are principally motivated by their own business interests, notwithstanding whatever concerns they may have about injustice, and they do not necessarily have an informed understanding of what sexual harassment is or how perpetrators should be penalized.¹¹ As I have argued elsewhere, employers are likely to make two mistakes in handling accusations of harassment:¹² (1) they are likely to aggressively police sexualized behavior by rank-and-file employees,¹³ and (2) they are likely to simultaneously exercise unwarranted restraint in the face of serial misconduct by the “top dogs” of the workplace.¹⁴

These tendencies jeopardize MeToo’s legacy. Long-term success in eradicating sexual harassment depends on companies’ willingness to permanently reject the culture of silence that has insulated top dog harassers from the consequences of their actions.¹⁵ It also depends on employers’ ability to calibrate their response to alleged harassment by less powerful workers. Strict enforcement of an overly broad anti-sex

al., #MeToo, *Time’s Up and Theories of Justice*, 2019 U. ILL. L. REV. 51, 53–54 (2019) (noting a number of highly publicized examples of prompt and severe repercussions for individuals accused of sexual harassment).

11. See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 33–37 (2016) (describing the “managerialization of law,” whereby employers respond to legal mandates by implementing compliance measures in ways that advance managerial interests); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2087–88 (2003) [hereinafter Schultz, *The Sanitized Workplace*] (describing how employers have leveraged sexual harassment law to tamp down on personal expression, advance productivity goals, and provide justification for eliminating out-of-favor employees).

12. See Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85, 87 (2018) [hereinafter Arnow-Richman, *Of Power and Process*].

13. See *id.* at 95 (describing the problem of the “powerless” harasser).

14. See *id.* at 92 (describing contractual protections for “top dogs” or high-level employees). I draw extensively on this article throughout what follows.

15. The MeToo movement revealed instances in which corporate insiders knew of high-level harassment, failed to stop it, and sometimes helped to conceal the problem. See Kate O’Keeffe & Alexandra Berzon, *Wynn Resort Executives Tried to Hide Misconduct Allegations Against Steve Wynn, Regulators Say*, WALL ST. J. (Apr. 2, 2019), <https://www.wsj.com/articles/massachusetts-regulators-release-report-on-investigation-of-wynn-resorts-11554211385> [https://perma.cc/T3GV-MQJ7] (detailing how executives at Wynn Resorts knew about Wynn’s sexual misconduct as early as 2009); Emily Steel & Michael S. Schmidt, *Bill O’Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html> [https://perma.cc/H5J8-5J73] (noting the company’s decades-long support for O’Reilly despite on-going sexual harassment allegations).

norm can undercut the movement's credibility,¹⁶ discourage victims from reporting,¹⁷ and most pernicious of all, deter men in power from providing the mentoring and professional support women need to achieve true equality.¹⁸

In short, the stakes are high, and the task is tricky. Employers need help—from academics, advocates, and others with expertise regarding sexual harassment and gender discrimination—and that help must come quickly. Employers are sexual harassment's "first responders." Their real-time reactions have an immediate impact and can develop into permanent institutional practices well before emerging legal initiatives come to fruition or can be tested in court.¹⁹ Employers, and indeed the public at large, need a better understanding of the law of sexual harassment, its purpose and scope, the risks it poses

16. See Jesse Singal, *For #MeToo to Work, We Must Draw the Line Between Sexual Assault and Being a Jerk*, REASON (July 9, 2018), <https://reason.com/2018/07/09/for-metoo-to-work-we-must-draw-the-line/> [<https://perma.cc/Y6N8-3PHH>].

17. See Nicole Porter, *The Perils of Reporting Harassment*, 71 STAN. L. REV. ONLINE 49, 59–60 (2018) (drawing connection between zero tolerance policies, retaliation, and under-reporting of harassment).

18. One-third of executives surveyed by the Society for Human Resource Management ("SHRM") reported changing their behavior toward female colleagues post-MeToo, including by avoiding work interactions with female colleagues. Gillian Tan & Katia Porzecanski, *Wall Street Rule for the #MeToo Era: Avoid Women at All Cost*, BLOOMBERG (Dec. 3, 2018), <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost> [<https://perma.cc/B6BR-S37Q>]. Another survey, conducted by LeanIn.Org, revealed that sixty percent of male managers say they are uncomfortable participating in common job-related activities with women, up from forty-six percent prior to MeToo. See Sheryl Sandberg & Marc Pritchard, *The Number of Men Who Are Uncomfortable Mentoring Women Is Growing*, FORTUNE (May 17, 2019), <http://fortune.com/2019/05/17/sheryl-sandberg-lean-in-me-too/> [<https://perma.cc/EXC7-4Q4S>]; see also Katherine Tarbox, *Is #MeToo Backlash Hurting Women's Opportunities in Finance?*, HARV. BUS. REV. (Mar. 12, 2018), <https://hbr.org/2018/03/is-metoo-backlash-hurting-womens-opportunities-in-finance> [<https://perma.cc/F57F-JGKQ>] (describing the growing reluctance of men to hire, supervise or mentor women in the finance industry). Such actions could constitute gender discrimination in their own right, although violations could be difficult to capture under existing law. *But see* Anthony Michael Kreis, *Defensive Glass Ceilings*, 88 GEO.WASH. L. REV. (forthcoming 2019) (arguing that employment practices that encourage or support men distancing themselves from female employees reflect ambivalent sexism and are actionable under Title VII).

19. According to Professor Lauren Edelman, in the face of legal uncertainty, companies will create and implement practices consistent with their managerial interests that then influence the development of the law, reifying their chosen practices. See EDELMAN, *supra* note 11, at 39–40 (describing the phenomenon of "legal endogeneity" where judges rely on employers' adoption of "symbolic" compliance measures without regard to their effectiveness). For a useful summary of Edelman's work on the "managerialization of law," including its application to employers' use of sexual harassment training, see JoAnna Suriani, Note, *"Reasonable Care To Prevent And Correct": Examining The Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 822 (2018).

to rank-and-file employees accused of harassment, and the imperative of removing legal and institutional obstacles to high-level accountability.

This Article begins that process. Part I dispels common misconceptions about sexual harassment and employment rights generally. It explains how the public's conflation of sex with sexual harassment, combined with the absence of worker due process protections, has laid the groundwork for employer overreach. Part II unpacks the legal and business incentives that deter employers from being equally vigilant against top dog harassers as they are among the rank-and-file. Using text from Weinstein's final employment contract, this Part also reveals precisely how organizations insulate top dogs against the consequences of sexual harassment and how their contracting practices must change to ensure accountability at the top of the corporate hierarchy. Part III proposes best practices for handling accused harassers and considers the potential for voluntary reform within organizations. It argues that effective and sustainable change requires better education about sexual harassment, ongoing scrutiny of corporate behavior, continued solidarity with harassment victims, and a clear roadmap for employers who choose to be at the forefront of this issue.

I. Is MeToo Too Much?

The prevailing response to the MeToo movement has rightfully been one of empathy and support. The public has expressed solidarity with victims, championed their cause, and demanded corrective action by institutions and accountability from their leaders. But the movement has also spawned concern about potential overreach. In the public discourse, this has taken the form of questions about so-called "due process" for harassers,²⁰ culminating most spectacularly in the judicial confirmation hearings of now-Justice Brett Kavanaugh.²¹

20. See, e.g., Shira A. Scheindlin & Joel Cohen, *After #MeToo, We Can't Ditch Due Process*, *GUARDIAN* (Jan. 8, 2018), <http://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televisions> [<https://perma.cc/8CA6-GQJB>]; Michel Martin & Elizabeth Foley, *What Kind of Due Process are Those Accused of Sexual Misconduct Entitled To?*, *NPR* (Dec. 22, 2017), <https://www.npr.org/2017/12/22/573046500/what-kind-of-due-process-are-those-accused-of-sexual-misconduct-entitled-to> [<https://perma.cc/B3WH-3CGJ>]. See generally Jessica Clarke, *The Rules of #MeToo*, *U. CHI. L. F.* (forthcoming 2019) (describing backlash against the movement stemming from fears that accusations of sexual misconduct have been insufficiently vetted).

21. Key senators based the decision to confirm then-Judge Kavanaugh on their belief that the evidence was insufficient to prove he had sexually assaulted Dr. Christine Blasey Ford, per her testimony before the Senate. *Susan Collins's Speech Declaring Support for Brett Kavanaugh*, *N.Y. TIMES* (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/us/politics>

In legal and academic circles it has generated renewed attention to the definition of sexual harassment and the nature of the underlying harm. Such thinkers seek to reorient the conversation toward broader goals of gender equity.

Fueling both strands of this collective unease is an issue of first principles and a core challenge: how to develop best practices that will balance the goals of victim protection and gender equity with fair treatment for those accused. Finding an acceptable equilibrium requires first and foremost a broader understanding of the baseline rights on both sides of the equation. As discussed below, the public has overstated the baseline rights of both harassment victims and alleged perpetrators, leading to legitimate but misplaced fears about the dangers of the movement. A first step toward achieving best practices is correcting those errors.

A. It's About Sexism, Not Sex²²

It is impossible to solve a problem that one does not understand. The MeToo movement has conflated the problem of sexual harassment with that of unwanted sexualized behavior. At times the conversation has converged with the long-standing conversation on sexual predation, “date rape,” and consent.²³ While this is a positive develop-

/susan-collins-speech-brett-kavanaugh.html [https://perma.cc/X6HW-X9XX] (citing “fundamental legal principles [including] due process, the presumption of innocence, and fairness” in announcing vote to confirm). See also *The Kavanaugh Report: Reactions from Senators on the Right and Left*, N.Y. TIMES (Oct. 4, 2018), <https://www.nytimes.com/2018/10/04/us/politics/fbi-report-kavanaugh-senators.html> [https://perma.cc/7MDT-W53P] (quoting Senator Mitch McConnell invoking the principle of “innocent until proven guilty” and cautioning the Senate against “set[ting] a fundamentally un-American precedent” should it fail to confirm Kavanaugh based on Ford’s allegations); Ella Nilsen, *Sen. Jeff Flake Will Vote to Confirm Brett Kavanaugh to the Supreme Court*, VOX (Sept. 28, 2018), <https://www.vox.com/2018/9/28/17913660/jeff-flake-confirmation-vote-brett-kavanaugh-supreme-court> [https://perma.cc/7SAQ-W49P] (quoting Senator Jeff Flake stating his belief “that the Constitution’s provisions of fairness and due process apply here” and citing a lack of “corroborating evidence” in announcing his vote to confirm); see generally Wexler et al., *supra* note 10, at 66 (noting that Kavanaugh’s confirmation process “raised nearly every variation of . . . due process concerns”). I will return to this erroneous conflation of criminal due process protections with those afforded to ordinary employees accused of misconduct in Part I.B *infra*. For now, it is important to note that invocations of due process have exceptional rhetorical force and can be used not only for political advantage but instrumentally to protect the powerful.

22. See Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 18–22 (2018) [hereinafter Schultz, *Open Statement on Sexual Harassment*] (“The problem with workplace harassment is sexism, not sexual desire.”).

23. This phenomenon could be seen in the public’s outrage and subsequent backlash over accusations by a pseudonymous woman that comedian and professed MeToo sup-

ment in some respects, it is also one that poses risks. Certainly all forms of sexual misconduct against women should incur public censure and meaningful consequences, but sexual harassment is a problem that goes beyond issues of unwanted physical contact or even unwanted sexual attention. It reaches the core of how women are treated at work and the degree to which they are able to realize their full economic potential as equal citizens in the labor market.²⁴ In other words, the wrong of sexual harassment is that it discriminates based on gender.

The popular conflation of sex and sexual harassment is partly a semantic error. “Sex” can mean the act of sex or biological sex. Title VII, the key federal statute prohibiting sexual harassment, contains neither the words “sexual” nor “harassment.” The statute prohibits discrimination “with respect to any individual[’s] . . . compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”²⁵ Sex in this context means gender. The theory of

porter Aziz Ansari pressured her to perform oral sex following a dinner date. *See* Katie Way, *I Went on a Date with Aziz Ansari: It Turned into the Worst Night of My Life*, *BABE* (2019), <https://babe.net/2018/01/13/aziz-ansari-28355> [<https://perma.cc/M42J-5WQB>]. *Cf.* Bari Weiss, *Aziz Ansari is Guilty. Of Not Being a Mind Reader*, *N.Y. TIMES* (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html> [<https://perma.cc/WJ8Y-CJDK>] (opining that the accusations against Ansari reflected “deeply retrograde ideas about what constitutes consent [and] sexual violence”) *with* Emma Gray, *On Aziz Ansari and Sex That Feels Violating Even When It’s Not Criminal*, *HUFFPOST* (Jan. 18, 2018), https://www.huffpost.com/entry/aziz-ansari-sex-violating-but-not-criminal_n_5a5e445de4b0106b7f65b346?guccounter=1 [<https://perma.cc/H77W-VK22>] (viewing the Ansari incident as an opportunity “to renegotiate the sexual narratives we’ve long accepted [which requires] having complicated conversations about sex that is violating but not criminal”). *See generally* Rachel Arnow-Richman, *#MeToo: Why We Must Separate Sex from Sexual Harassment*, *S.F. CHRON.* (Jan. 26, 2018), <https://www.sfchronicle.com/opinion/article/MeToo-Why-we-must-separate-sex-from-sexual-12526498.php> [<https://perma.cc/2W2W-9WXM>] (critiquing the public discourse surrounding Ansari for failing to distinguish between accusations of sexual harassment and non-consensual sex); Wexler et al., *supra* note 10, at 56–57 (viewing public debate over Ansari as a contest to define the scope of the movement).

24. I refer to “women” throughout this Article for convenience, but that label should be understood to mean both women and others targeted for adverse treatment based on their gender or gender identity/performance. While the vast majority of victims are women, *see Charges Alleging Sex-Based Harassment*, EEOC (last visited Oct. 10, 2019), https://www.eeoc.gov/eec/statistics/enforcement/sexual_harassment_new.cfm [<https://perma.cc/E2U9-MKGF>] (reporting that fewer than eighteen percent of sexual harassment charges filed annually with the EEOC between 2010 and 2018 were filed by men), sexual harassment can also target men and may target gay and gender non-conforming individuals of both sexes. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (recognizing a claim for male-on-male sexual harassment); Schultz, *Open Statement on Sexual Harassment*, *supra* note 22, at 25–28.

25. 42 U.S.C. § 2000e-2(a)(1) (2012).

liability for sexual harassment evolved from that language and it gained traction—and ultimately judicial recognition—in situations involving non-consensual sex or other forms of unwanted sexualized behavior.²⁶ The paradigmatic sexual harassment scenario remains one in which a woman is subjected to unwanted sexual attention or accedes to sexual demands tied to implicit, explicit, or perceived threats of job repercussions by her boss.²⁷

But a discriminatory work environment—one in which women are routinely subjected to hostile treatment—can result equally from non-sexualized acts of abuse that target on the basis of gender.²⁸ Figure 1 illustrates the distinction and reveals the risks of equating sexual harassment with sexual misconduct.

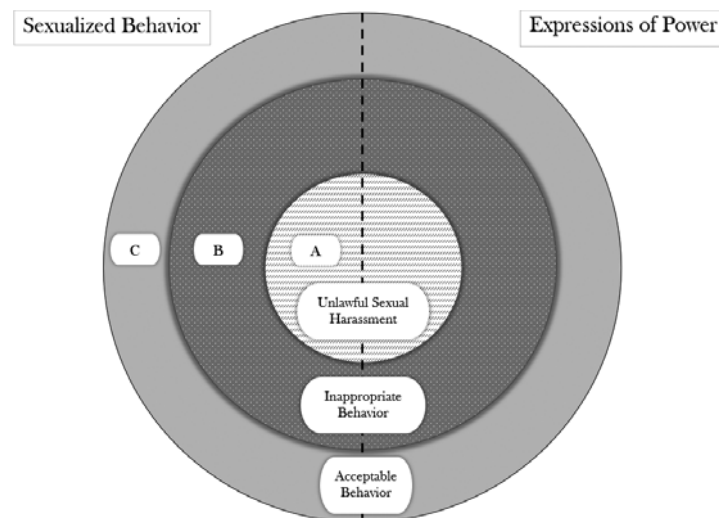


Figure 1

26. In 1986, the Supreme Court recognized a claim of “hostile environment” sex discrimination.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986). The case involved a bank teller who was repeatedly fondled, followed, and pressured for sex by her supervisor, a bank vice-president, over the course of her four-year employment. *Id.* at 59. The Court relied on the EEOC’s 1980 guidelines—the agency’s first attempt to address sexual harassment—and the “terms and conditions” language of the statute. *Id.* at 63 (citing Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1985)). See generally Reva B. Siegel, *A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW 1* (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing evolution of sexual harassment as a theory of sex discrimination).

27. See Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 *YALE L.J. F.* 22, 30 (2018) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*] (noting that the “old orthodox” of sexual harassment as desire-based “still has cultural currency”).

28. See *id.* at 34–35; Schultz, *Open Statement on Sexual Harassment*, *supra* note 22, at 20.

This figure divides potentially objectionable employee conduct into sexualized behavior on the left and expressions of power on the right. Unlawful sexual harassment, represented by the gray-and-white-striped circle in the center, can involve either or both. The MeToo movement has focused almost exclusively on sexualized behavior that would fall on the left side of this figure, while ignoring what is on the right. There are two problems with this reductive understanding of harassment. First, it leaves out expressions of power that, while not sexualized, discriminate on the basis of gender. This form of harassment, represented by the right side of Section A, may include patronizing behavior, abusive language, shunning, exclusion, pranks, threats, endangerment, and even physical assault.²⁹ It may be accompanied by explicit references to gender or trade on gender stereotypes, or it may be gender-based only insofar as it exclusively targets women. Its defining feature is that it reinforces traditional gender roles and male privilege by isolating, undermining, and stigmatizing those who threaten them.³⁰

Second, but equally problematic, is the potential for overreach. Not all sexualized behavior at work is unlawful. The United States Supreme Court has held that in order to be actionable under Title VII, sexual harassment must be severe or pervasive, not merely unwelcome.³¹ Sexualized conduct that meets this standard is represented by the left side of Section A. A good deal of the harassment surfaced by MeToo would easily fall into this category. This includes not only the pattern of rape and sexual assault perpetrated by Weinstein, the movement's posterchild harasser,³² but also the conduct of many of

29. See Schultz, *Open Statement on Sexual Harassment*, *supra* note 22, at 19; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 27, at 31.

30. See Schultz, *Open Statement on Sexual Harassment*, *supra* note 22, at 22; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 27, at 28.

31. *Meritor Sav. Bank, FSB*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 83 (1998) ("The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment."); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (noting that to constitute a Title VII violation, the environment must "reasonably be perceived, and [be] perceived, as hostile or abusive").

32. See Michael Gold, *Harvey Weinstein is Accused of Sexually Assaulting a 16-Year-Old Model*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/nyregion/harvey-weinstein-sexual-assault-teenager.html> [<https://perma.cc/E93D-8ZYY>] (reporting that "[m]ore than 80 women have accused [Weinstein] of sexual harassment, including unwanted touching and pressure to perform sexual favors in return for parts" over a period of decades). While Weinstein is arguably in a class of his own, others who have been accused of equally serious crimes include Wynn, Russell Simons, and R. Kelly. See generally Alexan-

MeToo’s “lesser” culprits whose repeated offensive acts and solicitations, while not necessarily criminal or exclusively physical, could objectively result in an intolerable working environment.³³

But the same cannot be said for all of the sexual conduct that has come under the movement’s spotlight. Section B represents inappropriate sexualized behavior that falls outside the legal definition of harassment—what some have called “lawful but awful” sexual behavior.³⁴ Conduct in this section could include an offensive but isolated incident of unwanted sexual attention or multiple instances of inappropriate but milder behavior, such as a pattern of sexual jokes or banter.³⁵ Section C represents behavior that is unobjectionable or even, at times, desirable. This might include consensual interactions or inoffensive acts or statements, such as non-pressured romantic overtures between non-supervisory employees or situationally appropriate references to sex or sexuality.³⁶ In the race to respond to

dra Berzon & Micah Maidenberg, *Wynn Resorts Executives Ignored Sexual Misconduct Claims Against Steve Wynn*, WALL ST. J. (Jan. 29, 2019), <https://www.wsj.com/articles/wynn-resorts-to-settle-nevada-regulators-probe-11548711027> [https://perma.cc/J4AM-WSMJ] (noting extensive reports of sexual harassment committed by Wynn over years); Harris, *supra* note 3 (detailing several counts of sexual abuse and other misconduct committed by R. Kelly against minors); Melena Ryzik, *Russell Simmons Faces New Rape Accusation in a First-Person Account*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/arts/music/russell-simmons-rape-accusation.html> [https://perma.cc/H86N-HNKY] (detailing several rape and assault accusations against Mr. Simons).

33. This might include celebrity chef Mario Batali’s use of offensive language, groping, and other physically and verbally intimidating behavior, and news personality Charlie Rose’s repeated solicitations and acts of physical exposure. See Julia Moskin, *Mario Batali Exits his Restaurants*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/dining/mario-batali-bastianich-restaurants.html> [https://perma.cc/3ENL-TE9T]; Nathaniel Popper, *CBS Settles with Women Who Accused Charlie Rose of Sexual Harassment*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/business/cbs-settles-lawsuit-charlie-rose.html> [https://perma.cc/HB5X-C3CA].

34. Wexler et al., *supra* note 10, at 57.

35. Examples of behavior that would arguably fall within this category include retired Circuit Judge Alex Kozinski’s display of pornography on a work server, Denver Mayor John Hancock’s sexually-tinged text messages to his female security detail, and former Arizona Representative Trent Franks’ effort to induce a staffer to serve as a surrogate mother. See Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down After Accusations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017), <https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html> [https://perma.cc/F4DK-62U3]; *Denver Mayor Michael Hancock’s Sexual Harassment Accuser Says She Wants an Investigation*, DENVER POST (Mar. 18, 2019), <https://www.denverpost.com/2018/03/18/michael-hancock-sexual-harassment-investigation/> [https://perma.cc/6LXJ-F87U]; Katie Rogers, *Trent Franks, Accused of Offering \$5 Million to Aide for Surrogacy, Resigns*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/us/politics/trent-franks-sexual-surrogacy-harassment.html> [https://perma.cc/7AHH-UJRA].

36. See, e.g., *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (holding that plaintiff-employee could not reasonably perceive as unlawful colleagues’ discussion of a

MeToo, employers may react disproportionately to objectionable but lawful behavior or unwittingly penalize behavior that is *neither* objectionable nor unlawful.³⁷

To be sure, neither victims nor employers should have to tolerate inappropriate sexualized behavior in the workplace irrespective of the law. The legal threshold for actionable harassment under Title VII is high—arguably too high—and there is likely a subset of behavior within Section B that *ought* to be deemed unlawful harassment.³⁸ Ab-

sexual innuendo, found in a job application, that was reviewed in the course of employment); *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 225–26 (2006) (finding script writer for adult-humored sitcom, “Friends,” had no cognizable claim of sexual harassment stemming from sexual antics and coarse talk that occurred in connection with the creative process).

37. See Rebecca Hanner White, *Title VII and the MeToo Movement* 68 EMORY L.J. ONLINE 1014, 1014–15 (2018) (“[MeToo] allegations range from . . . rape or repeated forcible touchings [to] . . . conduct reasonable people may consider ‘merely offensive’ Some of these allegations involve conduct that federal law prohibits; other allegations, quite frankly, do not.”). At least some MeToo reports have outed consensual relationships between managers and employees in ways that suggest these interactions are on par with harassment. See, e.g., Alicia Ritcey, *Intel’s Krzanich Will Relinquish \$45 Million by Resigning as CEO*, BLOOMBERG (Jun. 21, 2018), <https://www.bloomberg.com/news/articles/2018-06-21/intel-s-krzanich-to-relinquish-45-million-by-resigning-as-ceo> [https://perma.cc/M23K-G3JH]; Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the ‘Father of Android’*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html> [https://perma.cc/4WUB-9BMT]. See generally Schultz, *The Sanitized Workplace*, *supra* note 11, at 2086–87 (discussing the risk and consequent harms of employer condemnation of welcome sexualized behavior).

38. Many have condemned judicial interpretation of the severe or pervasive element of sexual harassment for imposing an extraordinarily high bar to recovery. See, e.g., SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 151–57 (2017). In the wake of MeToo, at least two states have passed legislation altering and eliminating the severe or pervasive requirement under state law, and more may follow. See CAL. GOV’T CODE § 12923(b) (West, Westlaw through Ch. 524 of 2019 Reg. Sess.); N.Y. EXEC. LAW § 296 (West, Westlaw through L.2019 Ch. 360) (effective November 18, 2019). An open question is whether the MeToo movement will lead federal courts to reconsider or update their application of that standard under Title VII. Some scholars have suggested as much. See, e.g., L. Camille Hébert, *Is “MeToo” Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL’Y J. 321, 326 (2018); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 241–43 (2018); Rebecca Hanner White, *Title VII and the MeToo Movement*, 68 EMORY L.J. ONLINE 1014, 1015–16 (2018). It is also possible to see the MeToo movement as an attempt to address this defect in the law through private social action. See Catherine A. MacKinnon, *#MeToo and Law’s Limitations*, N.Y. TIMES, Feb. 4, 2018, at A19 (characterizing MeToo as an “uprising of the formerly disregarded” that has overcome the legal “logjam” of a system that perpetuates the inequalities that sexual harassment law was designed to overcome); Melissa Murray, *Consequential Sex: #Metoo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. L. REV. 825, 868 (2018) (describing MeToo as an effort to “advance an alternative set of sexual norms that sharply condemn and denounce harassment and assault” in the face of the state’s “anemic response”). My focus in this Article, however, is on how the law is understood and implemented by employers rather than judges. It is possible that employers are

sent that normative justification, employers may have legitimate business reasons for promptly addressing unprofessional and inappropriate activity, whether to prevent it from ripening into sexual harassment or simply to maintain decorum, productivity, and positive morale. Employers may even have reasons for prohibiting otherwise acceptable behavior within Section C, such as where a consensual relationship creates a conflict of interest or the risk or perception of unfair treatment.³⁹

The issue is not whether employers should act on these concerns but whether popular misconceptions, propagated and reified by MeToo, will lead to unduly punitive responses. If employers lack an understanding of the scope and the harm of sexual harassment they are likely to be overzealous, as well as misdirected, in their response to sexualized behavior.⁴⁰

B. Due Who? The Non-Rights of At-Will Employees

A separate but compounding problem is the absence of any legal backstop that could protect harassers. Just as public discourse reflects a skewed perception of the scope of sexual harassment law, it also overestimates the legal protections afforded to those accused.⁴¹ In short, most accused harassers have no recourse against improvident discipline or termination.

over-enforcing sexual harassment norms—in effect going too far—even while courts under-enforce and do too little.

39. See Nancy Leong, *Them Too*, 96 WASH. U. L. REV. 941 (forthcoming 2019) (arguing that intimate relationships between individuals in disparate positions of power in workplaces and educational institutions should be barred regardless of consent in the interest of protecting third parties).

40. Research on union grievances supports this conclusion. Studies show that unionized workers terminated or disciplined in situations involving alleged sexual harassment or other sexual misconduct succeed in grieving their employers' decisions at a rate of approximately forty-five to fifty percent. See Arnow-Richman, *Of Power and Process*, *supra* note 12, at 98; Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517, 1538–39 (1999); Margaret A. Lucero et al., *Protecting the Rights of Alleged Sexual Harassment Perpetrators: Guidance from the Decisions of Labor Arbitrators*, 16 EMP. RTS. & RESP. J. 71 (2004). In other words, in nearly half of the arbitration awards studied, the employer's disciplinary response to employee sexual misconduct was determined to be excessive or unjustified.

41. Research suggests that workers generally overestimate the degree of legal protection they enjoy in their jobs, and that these misconceptions persist even when workers are given information about the at-will nature of their employment. Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, U. ILL. L. REV. 447, 479–80 (1999).

Discussion surrounding accused harassers has sounded lofty themes such as due process and the presumption of innocence.⁴² Yet such concepts operate solely in the sphere of governmental deprivations of freedoms.⁴³ In contrast, the animating principles governing private workplace relationships are freedom of contract and employment at-will. In every state but one, private employers are presumptively entitled to terminate an employee for any reason or for no reason, and they are permitted to exercise that discretion with or without notice or process.⁴⁴

The doctrine of employment at-will, combined with zealous anti-harassment protocols, make for a dangerous mix when it comes to accusations of sexual misconduct. Unfair outcomes can come at any stage of an employer's response. Figure 2 illustrates three scenarios under which employers may act without "cause" when investigating accusations of harassment.⁴⁵

42. See *supra* notes 21–22.

43. See Clarke, *supra* note 20 (discussing public confusion regarding applicability of due process principles and presumption of innocence); Wexler et al., *supra* note 10, at 66–67 (describing skepticism about the MeToo movement rooted in fear of false allegations and disproportionate consequences); Lesley Wexler, #MeToo and Procedural Justice, 22 RICHMOND PUB. INT. L. REV. 13, 18 (2019) (asserting that traditional due process notions are a poor fit for the MeToo context).

44. The exception is Montana. See MONT. CODE ANN. § 39-2-904(1)(b) (West, Westlaw through chapters effective July 1, 2019 of the 2019 Sess.) (making involuntary discharge a statutory violation where "the discharge was not for good cause"). All other states subscribe to employment at-will. For background on the employment at-will doctrine and its contested history, see generally Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1520–21 (2014) [hereinafter Arnow-Richman, *Mainstreaming Employment Contract Law*]; Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 456–60 (2008); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125–29 (1976).

45. The meaning of "cause" varies depending on context. See, e.g., Part II *infra* (describing the use of idiosyncratic definitions of cause in executive employment agreements). When considering application of the concept to rank-and-file employees, the unionized workplace provides a useful analogy. In that context, "cause" to terminate or discipline is often analyzed with reference to seven specific questions. See DISCIPLINE AND DISCHARGE IN ARBITRATION 2-5 to 2-7 (Norman Brand & Melissa H. Brand eds., 3rd ed. 2014). The three columns in Figure 2 draw on what I have previously described as the three basic areas of inquiry covered by these seven "tests." See Arnow-Richman, *Of Power and Process*, *supra* note 12, at 101–02. These areas of inquiry consist of: (1) questions about the applicable rules (i.e., whether the grievant's conduct violated the employer's rules and whether those rules were just and transparent), (2) questions about the employer's process, (i.e., whether the employer conducted a thorough and prompt investigation of the alleged misconduct), and (3) questions about whether the employer's responsive action was proportionate to the grievant's offense.

	Substantive Rationale	Procedural Dimensions	Disciplinary Response
Scenario 1	BAD	—	—
Scenario 2	GOOD	BAD	—
Scenario 3	GOOD	GOOD	BAD

Figure 2

In Scenario 1, the employer acts without a justifiable substantive basis, as where an employer disciplines or terminates a worker for perceived unlawful behavior that is actually inoffensive or non-discriminatory.⁴⁶ In that situation, the employer, motivated by a skewed understanding of sexual harassment, acts for a *bad reason*.

In Scenario 2, the employer has a more sophisticated understanding of sexual harassment, but it can be mistaken about what occurred as a factual matter. In a world where employers are not required to provide workers with an opportunity to contest or appeal allegations against them, an employer may act with legitimate concern about unlawful behavior, yet without sufficient proof as to whether the alleged conduct occurred, who perpetrated it, and in what context. Such an employer acts with *good reason* but through *bad process*.

Finally, in Scenario 3, an employer undertakes a fair process that supports the culpability of the accused, but is immoderate in its response. In an at-will employment regime, there is no requirement that employers calibrate disciplinary action to the degree of misconduct. The employer is free to terminate employees in the context of a first time offense, or where the harassment could be cured through lesser discipline. Such an employer acts with *good reason*, using *good process*, but chooses a *bad response*.

So do accused harassers get due process? The question is replete with irony: There is no due process in an at-will workplace. Since background law permits employers to terminate or discipline employees for *no* reason and with *no* process, employers may *a fortiori* take those actions for misguided reasons, relying on inadequate proof or poor procedures.⁴⁷ It is not harassers in particular who lack and require due process; it is all employees.⁴⁸

46. In other words, conduct that would fall within Sections B or C in Figure 1.

47. See Clarke, *supra* note 20, at 14 (“The argument that . . . those accused of sexual misconduct should receive special procedural protection, while those accused of other forms of misconduct do not, is a troubling form of exceptionalism.”).

48. The obvious implication is that *all* employees should receive some form of procedural protection at work. See Arnov-Richman, *Of Power and Process*, *supra* note 12, at 100 (“If workers had greater job security and greater voice in determining their working condi-

A deeper irony is that harassers may actually get *more* process than those accused of other forms of workplace misconduct because employers gain a litigation advantage vis-à-vis the harasser's victim by investigating her complaint. Under the United States Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*⁴⁹ and *Farragher v. Boca Raton*,⁵⁰ employers can avoid hostile work environment liability by showing they acted to prevent and correct sexual harassment.⁵¹ In other words, when accused harassers are able to avail themselves of internal processes to challenge the accusations against them or their consequences, it is generally a byproduct of the employer's efforts to protect itself from legal liability to the victim.

Hence the final irony: Where private employers provide process to the accused, it is, at best, a self-serving undertaking. At worst, it is inherently biased. Terminating the accused is the ultimate evidence that an employer took steps to end the harassment in satisfaction of the corrective action element of the *Ellerth/Farragher* defense, even if the harassment allegations are ultimately unsubstantiated.⁵² Employers score no points for exercising restraint in the face of uncertainty about alleged harassment or for seeking to calibrate their response to its severity. Indeed doing so may create a material issue of fact on the adequacy of the employer's response, precluding an award of summary judgment in its favor.⁵³ In sum, there is no reason to expect

tions, they would be less vulnerable both to workplace harassment and to overzealous discipline following harassment allegations."); Clarke, *supra* note 20, at 30 ("The solution, for those concerned about due process, is to extend some form of protection against arbitrary terminations to all employees [as opposed to] carving out special protections against allegations of a sexual nature."). That claim, however, is beyond the scope of this Article. For an argument that at-will employees should be entitled to advance notice of termination and other procedural protections, see Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 467–78 (2016); Arnow-Richman, *Mainstreaming Employment Contract Law*, *supra* note 44, at 1554–67.

49. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 746 (1998).

50. *Farragher v. Boca Raton*, 524 U.S. 775, 779 (1998).

51. To succeed, employers must also prove that the victim failed to reasonably avail herself of the employer's process for resolving her complaint. *Burlington Indus.*, 524 U.S. at 746; *Farragher*, 524 U.S. at 779.

52. See, e.g., *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971 (5th Cir. 1999) (praising school district's "vigorous" response to teacher's allegation of harassment and upholding summary judgment where district removed principal and accepted his resignation upon concluding that his conduct "could create the perception" of a hostile work environment).

53. See, e.g., *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 312–13 (3d Cir. 2018) (reversing award of summary judgment because, although employer terminated harasser after receiving formal notice of plaintiff's complaint, it previously issued only verbal reprimands and warnings of possible termination in response to harasser's prior inappropriate behavior with other employees); *Hotchkiss v. CSK Auto Inc.*, 918 F.Supp.2d 1108, 1120 (E.D.

employers to safeguard the due process interests of the accused when investigating sexual harassment and every reason to fear that some accused harassers might be unfairly swept up in a rush to judgment.⁵⁴

II. Or is MeToo Too Little?

This Article has suggested there is reason to be concerned about overzealous discipline of alleged sexual harassers, at least with respect to ordinary employees. However, MeToo has not focused on ordinary employees. It has been trained almost exclusively on executives, owners, moguls, and celebrities—the top dogs of the workplace. In contrast to the rank-and-file, who are often viewed as expendable, these employees may be deemed too valuable to lose.⁵⁵ They also enjoy extensive contractual protections against unjustified termination. Thus, top dog harassers are likely to receive not just fair process, but undue leniency when faced with sexual harassment accusations.

A brief description of the common features of executive contracts illustrates why. Almost universally, high-level contracts override the default rule of employment at-will and provide the executive with a robust form of job security.⁵⁶ Such contracts are usually structured as fixed-term appointments, guaranteeing the executive a period of sev-

Wash. 2013) (noting that corrective action must be sufficient not only to dissuade the harasser but also to dissuade others from similar conduct, and merely issuing a verbal warning and reading a copy of the company's sexual harassment policy was insufficient corrective action). This is not to say that an employer can obtain summary judgment only in cases of termination. To the contrary, courts routinely award summary judgment to employers based on questionable demonstrations of preventive and corrective action. See SPERINO & THOMAS, *supra* note 38, at 19–23. The point rather is that promptly terminating the accused harasser is clear evidence that the employer acted effectively to end the complained of behavior.

54. Courts have made clear that to satisfy the *Ellerth/Faragher* affirmative defense, employer investigations need only be reasonable and need not ensure “due process” for the accused. See, e.g., *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1304 (11th Cir. 2007) (“[T]here is nothing in [*Faragher* or *Ellerth*] requiring a company to conduct a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment. All that is required of an investigation is reasonableness [which] may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth.”).

55. See Clarke, *supra* note 20, at 6 (discussing the perception that certain “superstar” employees are worth the cost of their misconduct); Hébert, *supra* note 38, at 324 (observing that prior to MeToo, “many companies saw the harms caused by sexual harassment as not sufficient to counterbalance the benefits to those companies provided by the harassers”).

56. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 246–48 (2006) (finding that the “overwhelming bulk” of CEO contracts—340 out of a 375 contract sample—are “just cause” contracts).

eral years of employment, subject to limited termination rights.⁵⁷ Termination clauses generally give the employer a choice to terminate for “cause” or for “no-cause,” albeit with serious financial consequences to the company in the event of the latter.⁵⁸ Contracts typically define cause explicitly, usually in the form of a list of justifications that comprise the exclusive bases for a penalty-free termination prior to the expiration of the contract.⁵⁹ Within this structure, the no-cause provision operates as a type of liquidated damages clause in the event that the employer terminates for a non-enumerated reason.⁶⁰ Altogether, the effect is to severely constrain the company’s discretion to terminate, even in the face of possible misconduct.⁶¹

The contract of MeToo’s most infamous harasser offers a stark example. Weinstein’s final contract with the Weinstein Company Holdings granted him a three-year term from December 31, 2015, through December 31, 2018, but permitted the company to terminate him for cause at any time during the term.⁶² As to the meaning of “cause,” the agreement provided:

For purposes of this Agreement, “[C]ause” shall mean only: (i) a willful failure or refusal by you to follow [Board instructions] or your knowingly taking any action [requiring Board approval] without approval; (ii) the perpetuation by you of a material fraud against the Company [determined through arbitration]; (iii) a conviction for a felony involving fraud, dishonesty or moral turpitude, after the exhaustion of all possible appeals; (iv) an indictment for [such a felony] if it is determined by a vote of the majority of the Board [including one Co-Chairman] to cause serious harm to the Company; (v) a willful violation of the Code of Conduct if it is determined by a vote of a majority of the Board [including one Co-Chairman] that such violation has caused serious harm to the Company; or (vi) a material breach by you of [this agreement] provided that, in the case of each of clauses (i), (v) and (vi) above, the Board has first notified you in writing, within a reasonable time . . .

57. *Id.* at 247.

58. *Id.*

59. *Id.*

60. *Cf.* Ralph Weber, *Severance Pay, Sales of Assets, and the Resolution Of Omitted Cases*, 82 COLUM. L. REV. 593, 597 (1982) (suggesting that in ordinary employment relationships, an employer’s severance plan “in essence serves as a liquidated damages clause, compensating an employee for the breach of an agreement, implicit in the employment relationship, that he will hold his job as long as he performs well”).

61. *See generally* Tippet, *supra* note 38, at 284–87 (asserting that such clauses create uncertainty about whether sexual harassment qualifies as cause, leading employers to pay partial or full severance to avoid a legal dispute).

62. Letter Agreement Between Weinstein Company Holdings and Harvey Weinstein, para. 2, at 1, para. 14, at 12–13 (Oct. 20, 2015) (on file with author) [hereinafter “Weinstein Letter Agreement”].

of such action or omission by you . . . and you have not cured the particular action or omission complained of within thirty (30) days . . . provided further . . . the payment by you of any costs incurred by the Company as a result of a violation of [this agreement] shall constitute a cure of such violations.⁶³

In the event that the company chose to terminate Weinstein for one of the enumerated reasons, the contract relieved it of any financial obligations it would otherwise have owed over the remainder of the term.

A close reading of the above definition of cause makes plain how well-insulated top dog employees like Weinstein are against the risk of termination for alleged sexual harassment or any other form of misconduct. The clause begins by limiting the definition of cause to the listed circumstances: these are the “only” meanings of that term, and the clause contains no “catch-all” provision.⁶⁴ The subparts describe the exclusive grounds for terminating in narrow, precise terms.⁶⁵ Some impose a scienter requirement. To constitute cause, a refusal to follow orders or—of particular relevance to a potential termination for sexual harassment—a violation of the company’s Code of Conduct must be “willful.”⁶⁶ Several subparts contain qualifying language regarding the severity of the underlying misconduct. Only “material” breaches and specifically identified felonies constitute cause; lesser crimes or other forms of misconduct do not justify a for-cause termination.⁶⁷ Finally, Code of Conduct violations and felony indictments are not grounds in themselves but must, respectively, “have caused” or be “reasonably expected” to cause “serious harm” to the company.⁶⁸

On top of these pro-employee substantive terms, the Weinstein termination clause contains built-in procedural protections that further limit employer discretion. In the event of an enumerated felony conviction, the criminal appeals process provides the necessary review, and the company is precluded from terminating for cause prior to the employee’s exhaustion of all appeals.⁶⁹ For wrongdoing not involving a criminal conviction, the clause creates an internal system of employer accountability. Fraud against the company is determined

63. *Id.* para. 14, at 12–13.

64. *Id.*

65. *Id.*

66. *Id.* para. 14 (i), 14 (v), at 12–13.

67. *Id.* para. 14(iii), 14(vi), at 13.

68. *Id.* para. 14(iv), 14(v), at 13.

69. *Id.* para. 14(iii), at 13 (stating that the enumerated felonies are those involving fraud, dishonesty, or moral turpitude).

through private arbitration.⁷⁰ Conduct causing “serious harm” to the company is evaluated by the Board of Directors.⁷¹ A majority vote, including at least one Co-Chairman, must find that the requisite degree of harm (or, depending on which prong is at issue, potential for harm) exists.⁷²

Finally, the clause gives the employee the right to advance notice and an opportunity to cure in situations involving neglect or derogation of board authority, Code of Conduct violations, or the material breach of key provisions of the agreement.⁷³ Upon discovering grounds for termination under any of those subparts, the Board of Directors must notify the employee “within a reasonable time . . . specifying in reasonable detail the facts supporting such determination.”⁷⁴ The employee then has thirty days to correct the complained-of behavior.⁷⁵ Perhaps most generous of all, the clause provides that the executive’s reimbursement of costs incurred by the company as a result of a material breach “shall constitute a cure of such violations.”⁷⁶

In short, the process of terminating a top dog harasser is a minefield. From today’s vantage point, it may seem clear that Weinstein could have been terminated for cause under prong (v) of his termination clause,⁷⁷ but that determination would have been more difficult prior to the watershed accusations that brought to light the full extent of his misconduct and sent the company into bankruptcy.⁷⁸

70. *Id.* para. 14(ii), at 13. The agreement appears to contain a drafting error on this point. The relevant clause provided in full: “(ii) the perpetuation [sic] by you of a material fraud against the Company is [sic] determined by final decision pursuant to Paragraph 25 [dealing with arbitration].” Presumably “is” in this clause should read “as,” or the word “which” prior to “is” was omitted, otherwise the clause states how fraud is determined without stating that fraud is a ground for termination. In addition, the drafters presumably meant to write “perpetration” of a fraud, not “perpetuation.”

71. *Id.* para. 14(iv), 14(v), at 13.

72. *Id.* Achieving such a vote would be nothing short of miraculous as Harvey Weinstein was himself one of the two Co-Chairmen; the other was his brother, Robert Weinstein. *See id.* para. 2(a), at 1.

73. *Id.* para. 14(i), 14(v), 14(vi) at 12–13.

74. *Id.* para. 14(vi), at 13.

75. *Id.*

76. *Id.*

77. Despite currently being under indictment for several counts of rape and sexual assault, Weinstein still could not be terminated under clause (iii) or (iv), dealing with crimes of moral turpitude, insofar as the language of those clauses requires either a final conviction or a specially constituted vote of the board. *Id.* para. 14(iii), 14(iv), at 13.

78. The Weinstein Company filed for bankruptcy in March 2018 following five months of “turmoil” in the wake of Weinstein’s termination for sexual misconduct. *See* Jonathan Randles, *Weinstein Co. Files for Bankruptcy as Part of Deal With Lantern Capital*, WALL ST. J. (Mar. 20, 2018), <https://www.wsj.com/articles/weinstein-co-to-file-for-bankruptcy-as-part-of-deal-with-lantern-capital-1521513365> [https://perma.cc/PM3A-WPQD].

Plus, few harassers engage in conduct so extreme. A company faced with less egregious misconduct, but constrained by a similar clause, would have legitimate doubts as to whether it could lawfully terminate the accused. Per the agreement, it would have to conclude not only that the executive's behavior violated the company's Code of Conduct, but that it was committed willfully and caused serious harm to the company. Conduct perpetrated by the executive under the mistaken, if naïve, belief that it was inoffensive or somehow welcome to the victim might not constitute a "willful" violation.⁷⁹ Similarly, the mere risk of sexual harassment liability or reputational damage might not constitute serious harm to the company.⁸⁰

If the company chose to terminate despite its uncertainty, it would be risking a breach of contract action by the executive⁸¹—one in which the company would likely bear the burden of proving the termination was for cause.⁸² The company would have to weigh the substantial costs of litigation against the uncertain prospect of success.

79. There does not appear to be reported caselaw interpreting the meaning of "willful" in an executive employment contract. For purposes of determining the availability of liquidated or punitive damages in connection with a statutory employment violation, courts require conduct that is done with knowledge, malice, or reckless disregard. *See, e.g.,* Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) (claims under 42 U.S.C. § 1981a); Angela A. Wortche, *Defining Willfulness Under the ADEA*, 69 MARQ. L. REV. 451 (1986) (claims under the Age Discrimination in Employment Act).

80. There are few reported decisions involving the interpretation of material harm in executive contracts. Those that exist generally evaluate whether actual harm to the business was serious enough to be material. *See, e.g.,* Jones v. Hous. Auth. of Fulton Cty., 726 S.E.2d 484, 487–88 (Ga. App. 2012) (finding that CEO's ratification of improper diversion of federal funds caused material harm to the business constituting cause to terminate); Lyons v. Midwest Glazing, 265 F.Supp.2d 1061, 1073–74 (N.D. Iowa 2003) (finding that product manager's negative attitude and poor morale infected employees and harmed the business justifying termination). If actual financial damage is not necessarily sufficient to constitute material harm in all cases, it seems unlikely that courts would treat the risk of harm as material. *Cf.* Tippett, *supra* note 38, at 286 (speculating that harassment that has not been publicly disclosed may not constitute "material damage" constituting cause).

81. Some high-profile corporate ousters have already spurred litigation. *See* Parneros v. Barnes & Noble, Inc., No. 1:18-CV-07834, 2019 WL 4090620 (S.D.N.Y. Oct. 4, 2019) (former Barnes & Noble CEO initiated breach of contract suit against former employer); Tom McParland, *Ex-CBS Head Moonves to Fight for \$120M Severance in Arbitration*, AM. LAW. (Jan. 17, 2019), <https://www.law.com/litigationdaily/2019/01/17/moonves-to-fight-for-120m-severance-in-arbitration-with-cbs-407-4274/> [<https://perma.cc/3LHX-UHFZ>] (former CBS CEO Moonves plans to invoke arbitration clause of his agreement to challenge denial of severance pay).

82. Courts typically hold that an employer has the burden of proving cause when terminating an employee under a for-cause employment contract. *See, e.g.,* Ross v. Garner Printing Co., 285 F.3d 1106, 1113 (8th Cir. 2002); Hammond v. T.J. Litle & Co., 82 F.3d 1166, 1176–77 (1st Cir. 1996); Harig v. Progress Rail Servs. Corp., 166 F.Supp.3d 542, 550 (D. Md. 2015); New England Stone, LLC v. Conte, 962 A.2d 30, 33 (R.I. 2009); *cf.* Restatement of Employment Law § 2.04, cmt. d (Am. Law. Inst. 2015) (opining that in definite

Weinstein's contract, like those of many executives, binds the parties to private arbitration, and it places financial responsibility for that process on the company, regardless of who invokes it.⁸³ It also contains a one-way fee-shifting provision in favor of Weinstein. In the event that Weinstein prevails "on *at least one* material matter in dispute," the company must "pay *all* [of his] fees and expenses," including his attorneys' fees.⁸⁴ This could mean that even if the company succeeded in establishing cause to terminate, Weinstein could still recoup his fees were he to prevail on another disputed issue, such as the scope of his indemnification rights or his entitlement to past compensation.⁸⁵ There is no parallel provision shifting the company's fees and costs to Weinstein in the event of an employer victory.

In sum, when it comes to accusations of harassment, the respective positions of top dogs and the rank-and-file could not be further apart. Whereas at-will employees have almost no protection against a mistaken or overzealous act of discipline or termination, the top dogs of the workplace are, for practical purposes, almost immune from any adverse action. Public concern about so-called due process for accused harassers is legitimate, but has been misplaced.⁸⁶ We need not be concerned about the high-profile harassers toppled by the MeToo movement; but we should be concerned about the possible ripple effects on ordinary employees.

III. Finding Balance, Forging a Legacy

How then should we move forward in establishing protocols regarding accused harassers? And how can we ensure a positive long-term legacy for the MeToo movement? Part of the answer lies in pro-

term contracts, the better understanding is that employers must have proof of actual cause and may not justify termination based on a reasonable belief that cause existed).

83. Weinstein Letter Agreement, *supra* note 62, para. 25, at 16 ("Each party shall pay the fees of their respective attorneys . . . , the expenses of their witnesses, and all other expenses connected with presenting their Claims or defense(s) Other costs of arbitration shall be borne by the Company.").

84. *Id.* (emphasis added).

85. In this way, the agreement prevents a judicial interpretation of the meaning of "prevailing party" that could lead to a reduction or denial of fees were Weinstein to sue but achieve mixed results. *See generally* John R. Schleppenbach, *Winning the Battle but Losing the War: Towards a More Consistent Approach to Prevailing Party Fee Shifting In The Contractual Context*, 12 FLA. A. & M. U. L. REV. 185, 198–209 (2017) (discussing absence of caselaw and common applications of judicial discretion in interpreting and applying fee-shifting clauses).

86. *See* Clarke, *supra* note 20, at 18–27 (arguing that high-level harassers have been fairly treated from an "extralegal" process perspective).

moting a better understanding of sexual harassment itself, but it is also important to bear in mind the lack of workers' rights more generally. There are neither public mandates requiring employers to handle rank-and-file employees fairly, nor any laws limiting the contractual protections afforded to top dogs. Because of this, much will depend on voluntary employer action. Forging a legacy requires advocates to harness employer good will and maintain the current demand for institutional accountability.

A. Toward Best (Better?) Practices

Employers and their lawyers are working to establish best practices for preventing and responding to sexual harassment.⁸⁷ Protocols for handling accused harassers should be part of that effort, but they must be approached cautiously and conscientiously. This Part offers preliminary thoughts on employer efforts that might limit the risks of both over- and under-enforcement.

1. Education and Moderation

To ensure fair treatment of rank-and-file employees accused of harassment, employers must do two things: educate and moderate. Educating means undertaking the necessary teaching and learning to fully understand sexual harassment: its scope, its limits, the nature of the harm, and its relationship to gender discrimination. Moderating means responding to sexual harassment in a manner reflective of that understanding and, as with any inappropriate behavior, proportionate to the conduct in question.

When faced with allegations of sexual harassment, employers, acting through their human resources professionals or other managers, will generally initiate an investigation. This makes sense as a compliance matter—employers must act to redress complaints of discrimination in order to avoid liability to the victim—and a fair and thorough investigation is also a critical part of ensuring some form of “due process” for the accused. But investigators must know what they are investigating and why. Too often the process of investigating a complaint is

87. Legal news outlets and human resources sites are flush with commentary by management-side counsel explaining how best to respond to the movement. *See, e.g.*, Nancy Saperstone & Rebecca Blake, *Addressing #MeToo in the Workplace and HR's Response*, WORKFORCE (May 21, 2018), <https://www.workforce.com/2018/05/21/addressing-metoo-workplace-hrs-response/> [<https://perma.cc/D46N-2KDD>]; David Weiss & Matt Purdue, *The Need For New Legal And PR Strategies In The #MeToo Era*, LAW360 (Apr. 10, 2019), <https://www.law360.com/articles/1147188/the-need-for-new-legal-and-pr-strategies-in-the-metoo-era> [<https://perma.cc/WPK5-CDRJ>].

seen purely as a quest for factual truth, one that will get to the bottom of the proverbial “he-said-she-said” problem. Contrary to popular belief, however, the greater challenge lies not in determining what occurred, but in choosing the appropriate response.⁸⁸

Attention to nuance and context is important. As discussed in Part I, not every sexual joke, innuendo, or even sexual overture is necessarily sexual harassment.⁸⁹ Employers who focus only on those types of interactions are unlikely to identify non-sexualized harassment or uncover broader patterns of discriminatory behavior within the workplace.⁹⁰ Employers should consider whether complained-of behavior is harmful and offensive based on gender, and whether it—along with other inappropriate behavior—undermines women’s ability to access workplace opportunities, flourish in their positions, and realize their long-term career goals.

Employers can take concrete steps toward achieving this understanding by tapping into sources other than their “go-to” management law firms. Academics from many disciplines—sociology, psychology, gender studies, and of course law—have much to contribute to education and training. Legal scholars have already published articles and other materials that can further employers’ understanding of sexual harassment.⁹¹ A dialogue among corporate decision-makers, their counsel, human resources professionals, and engaged academics can do much to help employers identify and correct the full range of potentially harassing behavior.

In the event that an informed investigation into accusations of harassment uncovers sanctionable conduct, the punishment must fit the crime. Not every inappropriate act requires termination, even if it

88. Cf. Tippet, *supra* note 38, at 276 (“Employers are quite capable at getting to the bottom of the factual issues and can do so quite efficiently.”).

89. See Part I.A *infra*.

90. See Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. F. 152, 159–65 (2018) (describing how judicial focus on particular perpetrators vis-à-vis complaining victims tends to disregard the contributing behavior of other employees as well as the effects on other potential victims); Schultz, *Open Statement on Sexual Harassment*, *supra* note 22, at 44–45 (noting that ridding the workplace of individual harassers “one by one” will not “prevent similar harassment from recurring in the future” because “[e]ventually, other harassers will take their place”).

91. See, e.g., Tippet, *supra* note 38, at 299–302 (providing a model harassment and discrimination policy) Schultz, *Open Statement on Sexual Harassment*, *supra* note 22 (identifying ten principles for addressing sexual harassment and providing related reform proposals). Additional documents prepared for this purpose by the Author can be found at <https://www.law.du.edu/about/people/rachel-arnow-richman> [<https://perma.cc/WUG9-LMU7>].

could rise to the level of sexual harassment.⁹² Employers should treat sanctionable conduct as they would other forms of unlawful behavior or serious workplace misconduct, applying informal systems of progressive discipline to ensure a calibrated response. In unionized workplaces, where rank-and-file employees enjoy contractual protection against arbitrary termination, employers meting out discipline must consider how other workers have been treated for similarly egregious behavior.⁹³ Non-unionized employers should do this as well. The comparators need not be other sexual harassers. Employers can benchmark their disciplinary response against past treatment of workers accused of other forms of discrimination. They can also rely on their past responses to other types of wrongful behavior or policy violations, such as engaging in nepotism, disclosing confidential information, flouting conflicts of interest rules, or retaliating against employees based on their speech or whistleblowing activity.

Finally, employers should take care to look beyond the individual accused when considering appropriate responsive action. Employers should not make an example of one employee, neglecting to consider the institutional choices that may have set the stage for harassing behavior.⁹⁴ Gender-segregated jobs, the absence of women in leadership, exclusively male networks of control, and a work culture that tolerates abuses of power all perpetuate stereotypes and normalize harassment.⁹⁵ It is neither fair to the accused, nor a solution to the problem, to condemn a single bad actor when the structure of institution is equally if not principally to blame.

2. Contracting with Potential Harassers

When it comes to top dogs, the opposite is required: Employers need to ratchet up a notch, starting with how they draft and negotiate executive contracts. Definitions of cause should preserve employer flexibility to terminate in the event of conduct that could reasonably be perceived as sexual harassment. This can be done by explicitly list-

92. See Hébert, *supra* note 38, at 332–33 (“Views about the appropriate disciplinary or other actions to be taken in response to sexual misconduct by a misguided romantic suitor may differ substantially than what might be viewed as appropriate action to take against a serial predator.”).

93. See DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 45 (describing the “non-discrimination” test of just cause in which the arbitrator asks whether “the employer [has] applied its rules, orders, and penalties evenhandedly . . . to all employees”).

94. See Green, *supra* note 90, at 166 (arguing that “a story that fails to see the ways in which harassment ties to broader work environments . . . leads to overly narrow calls for reform”).

95. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 27, at 48.

ing sexual harassment as grounds for cause.⁹⁶ It can also be done by removing qualifying language that limits the employer's ability to terminate for policy violations or contract breaches absent serious harm or intentional conduct.⁹⁷ Depending on the structure of the contract, both types of changes may be required.⁹⁸ Whatever drafting conventions ultimately develop, the goal must be to enable companies to terminate top dogs for conduct that either alone, or in combination with similar conduct, could create a hostile work environment based on gender.⁹⁹

Broadening definitions of cause however, is merely a first step. Other common provisions of executive contracts are similarly in need of reform. Fine systems or other paths for "curing" misconduct that replenish the institutional coffers without redressing the harm or ensuring future compliance should be eliminated.¹⁰⁰ The same should be done with broad indemnification clauses that protect executives from personal liability in the event they are sued for wrongful conduct.

For instance, Weinstein's contract provides:

You [Weinstein] will be fully indemnified and held harmless by the Company to the fullest extent permitted by law from any claim, liability, loss, cost or expense of any nature (including attorney's fees . . .) incurred by you . . . which arises, directly or indirectly, in whole or in part out of any alleged or actual conduct, action or inaction on your part in or in connection with or related in any manner to your status as an employee, agent, officer, corporate director, member, manager, shareholder, partner of . . . the Com-

96. See, e.g., Letter Agreement Between CBS Corp. and Leslie Moonves, para. 10(a)(vi), at 23 (Oct. 15, 2012) (on file with author) [hereinafter "Moonves Letter Agreement"] (listing as grounds for termination "your willful and material violation of any policy of the Company . . . including, but not limited to, policies concerning . . . *sexual harassment*") (emphasis added).

97. See, e.g., Letter Agreement Between Barnes & Noble and Demos Parneros, para. 2(c)(i)(E), at 2 (Nov. 17, 2016) (on file with author) (including as a basis for cause to terminate "your material breach of this Agreement or of any other contractual duty to, written policy of, or written agreement with the Company").

98. For instance, the effectiveness of a clause in CBS's and Les Moonves' agreement, explicitly identifying violations of the company's sexual harassment policy as cause for termination, is diminished by qualifying language that such violations must be "willful." Moonves Letter Agreement, *supra* note 96, para. 10(a)(vi), at 23.

99. See Tippet, *supra* note 38, at 287 (predicting broader definitions of cause in executive agreements post-MeToo).

100. See, e.g., Weinstein Letter Agreement, *supra* note 62, para. 14(vi), at 13; *supra* Part II; see generally Tippet, *supra* note 38, at 286–87 (critiquing such clauses for enabling executives to avoid or dispute termination through promises of corrected behavior and future compliance).

pany . . . unless such claim, liability, loss, cost or expense is a result of you not acting in good faith on behalf of the Company¹⁰¹

In other words, the company must reimburse Weinstein for any loss he incurs while acting in any capacity on behalf of the company, conceivably including liability in connection with sexual harassment.¹⁰²

To be sure, Weinstein's indemnification clause does not apply to losses resulting from a failure to act in good faith, which would appear on its face to preclude indemnification in connection with many of his actions.¹⁰³ Yet the power of that exception is significantly diminished by subsequent language granting Weinstein the benefit of the doubt:

You shall be entitled to a presumption that you acted in good faith. To the maximum extent allowed by law, all amounts to be indemnified hereunder including reasonable attorneys' fees shall be promptly advanced by the Company until such time, if ever, as it is determined by final decision pursuant to [the dispute resolution clause] below that you are not entitled to indemnification hereunder (whereupon you shall reimburse the Company for all sums theretofore advanced).¹⁰⁴

Under this clause, a presumption of good faith, along with the obligation to front Weinstein's attorney's fees, attaches automatically. It is only at some uncertain point in the future that the company *may* be able to recover those costs should it choose to initiate *and pay for* private arbitration pursuant to the contract's dispute resolution provision.¹⁰⁵ In short, not only are companies unable to freely terminate executives for their misconduct, in many situations they also have to pay for the resulting damage.

Assuming employers change the way they draft top dog contracts, they will next need to reconsider how they enforce them. Broader definitions of cause and other adjustments to standard language can give companies more leeway to terminate top dog harassers, but corporate boards must be willing to use it. Boards of directors are often reluc-

101. Weinstein Letter Agreement, *supra* note 62, para. 7, at 4–5.

102. Federal law does not impose personal liability on harassers, but many state anti-discrimination laws do. *See generally* Shannon Clark Kief, *Individual Liability of Supervisors, Managers, Officers or Co-employees for Discriminatory Actions Under State Civil Rights Act*, 83 A.L.R. 5th 1 (2000). In addition, various intentional tort claims could be pursued against an individual defendant in connection with harassing behavior, such as battery, false imprisonment, or intentional infliction of emotional distress. *See, e.g.*, *Reeves v. Hologram*, No. BC643099 (Cal. Dec. 7, 2016). *See generally* WORKPLACE HARASSMENT LAW, 16-1 to 16-7 (Gilbert F. Casellas & Diane M. Soubly eds., 2d ed., 2018).

103. Weinstein Letter Agreement, *supra* note 62, para. 7, at 4–5.

104. *Id.* para. 7, at 5 (emphasis added).

105. *Id.* para. 25, at 16–17.

tant to exercise for-cause termination clauses even if they have a credible basis for doing so. The directors may prefer to maintain positive relationships (and sometimes ongoing business connections) with the departing executive, or they may fear terminating for cause will jeopardize their company's reputation in the market for their next hire.¹⁰⁶ Google's infamous treatment of Android founder, Andy Rubin, offers a seminal example. According to media reports last year, Rubin left Google in 2014 with \$90 million in severance despite credible accusations that he forced a subordinate to perform oral sex in a hotel room.¹⁰⁷

Instead of this lenient treatment, corporate boards must be willing to exercise their power. CBS's ouster of CEO Les Moonves offers a rare but welcome example. In September 2018, the network announced that Moonves would be terminated without severance following revelations that he had engaged in acts of bodily exposure, physical violence, intimidation, and retaliation.¹⁰⁸ The company committed \$20 million of what it would have paid Moonves in severance to organizations supporting the MeToo movement.¹⁰⁹ That is not to say that CBS's motives were purely altruistic. Board decisions about how and under what circumstances to separate top dogs from the company are always complex.¹¹⁰ However, CBS's willingness to terminate Moon-

106. This problem was made infamous by the 2005 shareholder derivative action brought against the Walt Disney Company in connection with the costly "no cause" termination of CEO Michael Ovitz. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). That litigation challenged the board's \$140 million payout to Michael Ovitz after his brief and stormy tenure as CEO, arguing that it breached the board's fiduciary duty to the company. For background on the case, *see generally* Holger Spamann, *In re Walt Disney Co. Derivative Litigation*, 119 HARV. L. REV. 923 (2006) (analyzing the court's conclusion that none of the officers or directors of the Walt Disney Company breached their fiduciary duties).

107. Google subsequently invested in the venture firm that Rubin founded after exiting the company. Wakabayashi & Benner, *supra* note 37.

108. *CBS Corporation and National Amusements Announce Resolution of Governance Disputes and Transition to New Leadership*, CBS CORP. (Sept. 9, 2018), <https://www.cbscorporation.com/cbs-corporation-and-national-amusements-announce-resolution-of-governance-disputes-and-transition-to-new-leadership/> [<https://perma.cc/ECW4-JR35>]; Rachel Abrams & David Enrich, *'Transaction' Sex and a Secret Resignation Letter: Takeaways from a Report on Les Moonves*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/business/les-moonves-cbs-report-takeaways.html> [<https://perma.cc/S5B8-G4GB>].

109. Meg James & David Ng, *CBS Picks Groups to Get \$20 Million for #MeToo Causes, Taken from Les Moonves' Severance*, L.A. TIMES (Dec. 14, 2018), <https://www.latimes.com/business/hollywood/la-fi-ct-cbs-metoo-money-moonves-20181214-story.html> [<https://perma.cc/5TW6-WTJD>]. Wynn was also separated without severance, albeit without the mammoth donation and consequently with less fanfare. Kirkham et al., *supra* note 10.

110. The departure of Moonves and his board allies was part of a deal that ended shareholder litigation challenging controlling shareholder Shari Redstone amidst a dis-

ves publicly provides a model of what we might hope for from companies in the future.¹¹¹

B. Leveraging Law and Public Sentiment

That, of course, is the crucial question: Can we expect employers in the wake of MeToo to do a better job aligning their treatment of accused harassers with the goals of anti-discrimination law? Or will companies revert to business-as-usual once public attention to sexual harassment dissipates?¹¹²

I am reasonably optimistic that companies will do more to police sexual harassment and misconduct by top dog executives going forward. This is partly because of public outrage over examples like Google's Andy Rubin are being subverted into legal action. Earlier this year, Google shareholders filed several lawsuits alleging that the company's failure to redress sexual harassment by corporate bigwigs affected its share value and harmed investors.¹¹³ Similar lawsuits were filed against Wynn Resorts following allegations of rampant sexual misconduct by disgraced CEO Steve Wynn.¹¹⁴ A suit brought against Fox News in connection with the secret settlement of harassment

pute over a proposed merger with Viacom. Joe Flint, *Suit Accuses Current, Former CBS Executives of Insider Trading*, WALL ST. J. (Feb. 12, 2019), <https://www.wsj.com/articles/suit-accuses-current-former-cbs-executives-of-insider-trading-11550016859> [<https://perma.cc/88Y6-H687>]. Thus, the company stood to gain from Moonves's departure irrespective of the allegations. To root out top dog harassments, companies must be willing to fire for cause, regardless of the relational or business context. *See generally* Rachel Arnow-Richman, *CBS CEO Moonves' Ouster is a Too Rare Case*, S.F. CHRON. (Sept. 18, 2018), <https://www.sfchronicle.com/opinion/openforum/article/CBS-CEO-Moonves-ouster-is-a-too-rare-case-13238793.php> [<https://perma.cc/U28L-MPGJ>] (“If #Metoo is to have lasting impact, companies must take a hard line against high-level harassment, not just when it aligns with their other interests.”).

111. *See generally* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1662 (2018) (recommending companies consider terminating CEOs for sexual misconduct, noting that “the damage to a firm’s value from losing an iconic CEO may be far less than the reputational consequences of a high-profile sexual harassment scandal”).

112. *See* Hébert, *supra* note 38, at 323 (noting that “[p]rior incidents in which sexual harassment has grabbed the national attention . . . have arguably not had staying power”).

113. *In Re Alphabet, Inc. Shareholder Derivative Litig.*, Docket No.19CV341522 (Cal. Jan. 10, 2019) (consolidated suit); *see generally* Mark Bergen et al., *Google Board Sued for Hushing Claims of Executive Misconduct*, BLOOMBERG (Jan. 10, 2019), <https://www.bloomberg.com/news/articles/2019-01-10/google-board-sued-for-hushing-misconduct-claims-against-rubin> [<https://perma.cc/NQ2B-XQ5N>].

114. *Ferris v. Wynn Resorts Ltd.*, No. 2:18-CV-00479, 2018 WL 6411351 (D. Nev. Dec. 4, 2018); *DiNapoli v. Wynn*, Docket, No. A-18-770013-B (D. Nev. Feb. 22, 2018) (judgment rendered following settlement). For background on this litigation *see* Hemel & Lund, *supra* note 111, at 1625–26.

claims against News Chair Roger Ailes and Anchor Bill O'Reilly ended in a \$90 million court-approved settlement in April 2019.¹¹⁵ Experts predict there is more litigation on the horizon.¹¹⁶

Of course, it is by no means clear that shareholder suits can succeed in establishing corporate liability. The law of corporate obligations defers heavily to the judgment of the company's directors, and there are procedural as well as substantive obstacles to such claims.¹¹⁷ Even so, the initiation of shareholder litigation can exert a powerful force on companies as the multimillion-dollar settlement against Fox News suggests.¹¹⁸ Nor are derivative suits the only sources of exposure. Fox News's harassment settlements also drew the attention of the New York United States Attorney General's Office, which in 2017 launched an investigation into possible securities violations based on the company's failure to disclose those payments to investors.¹¹⁹ Wynn Resorts was brought up on charges before the Nevada Gaming Commission.¹²⁰ The company was forced to pay a \$20 million fine for turning a blind eye to Wynn's decades-long pattern of sexual misconduct.¹²¹

Faced with the prospect of litigation, companies and their lawyers will inevitably respond. There is anecdotal evidence that corporate lawyers are now accounting for the risk of a sexual harassment scandal

115. See Hemel & Lund, *supra* note 111, at 1621–23 (discussing Fox litigation); Emily Steel, *Fox Establishes Workplace Culture Panel After Harassment Scandal*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/business/media/fox-news-sexual-harassment.html> [<https://perma.cc/7LE2-Y56S>] (reporting on settlement).

116. See generally Dunstan Prial, *Attorneys Predict Wave Of #MeToo Investor Suits*, LAW360 (Mar. 18, 2019), <https://www.law360.com/articles/1012534/print?section=assetmanagement> [<https://perma.cc/M24F-Q5LF>] (suggesting the Wynn Resorts litigation “could be the tip of the iceberg for companies [and is] an inevitable consequence of shifting cultural priorities”); Hemel & Lund, *supra* note 111, at 1612–27 (discussing recent and past shareholder lawsuits arising out of sexual harassment and misconduct).

117. See Hemel & Lund, *supra* note 111, at 1628 (describing applicable legal framework and circumstances under which shareholders are most likely to prevail).

118. See *id.*; Prial, *supra* note 116 (predicting greater settlement value for such cases despite legal challenges).

119. See Emily Steel & John Koblin, *Fox News' Harassment Payments are Under Investigation, Lawyer Says*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/business/media/fox-news-sexual-harassment-payments.html> [<https://perma.cc/J8H6-DJ6Q>].

120. Tiffany Hsu, *Wynn Resorts Fined \$20 Million over Handling of Steve Wynn Misconduct Claims*, N.Y. TIMES (Feb. 26, 2019), <https://www.nytimes.com/2019/02/26/business/wynn-vegas-nevada-gaming-commission.html> [<https://perma.cc/FF6K-55HL>].

121. *Id.* Both the Nevada Commission and a subsequent investigation by Massachusetts regulators found that numerous high-ranking individuals within the company, including the CEO and several former general counsel, knew about Wynn's behavior and failed to act. O'Keefe & Berzon, *supra* note 15; Berzon & Maidenberg, *supra* note 32.

in drafting mergers and acquisition agreements.¹²² One can envision executive employment contracts undergoing a similar change, granting companies more robust termination rights in the event of the executive's wrongful behavior.¹²³ Once drafting conventions develop, they tend to endure.¹²⁴ In the long run, this may translate into better policing of high-level harassment overall, as well as less generous terms of exit for perpetrators.

I am somewhat less sanguine about what will happen to rank-and-file employees accused of harassment. Decisions regarding these workers happen entirely outside the public spotlight and are ordinarily not subject to any form of legal review. Adding to the problem, many legal reforms that would incentivize companies to take harassment seriously—for instance, lifting damage caps on victims' claims¹²⁵—may inspire even more aggressive investigations and discipline against the accused. A roll back of the *Ellerth/Farragher* defense to hostile work environment liability, however, could be an exception. Scholars and advocates have long lambasted this defense for fomenting a culture of “file cabinet compliance” that gives employers a false sense of comfort and unwarranted liability protection.¹²⁶ As discussed previously, the

122. See Chelsea Naso, #MeToo Movement Molds New Protections in Mergers, LAW360 (Jan. 18, 2019), <https://www.law360.com/articles/1119874/-metoo-movement-molds-new-protections-in-mergers> [<https://perma.cc/Y28P-SHZN>].

123. I am currently undertaking an empirical study of CEO contracts pre- and post-MeToo that will determine the degree to which termination and other pro-employee clauses change. See Rachel Arnov-Richman & Steven Davidoff Solomon, *Anticipating Harassment: The Changing Norms of Executive Contracts Post-MeToo* (forthcoming 2020).

124. The concept of “sticky boilerplate” has been used to explain why drafters persist in using standard clauses that do not serve their purposes, debunking the formal law and economics view that standard forms are efficient. See MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 10–11 (2013). For a useful taxonomy of the biases and externalities that underlie contract “stickiness,” see Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 977 (2014).

125. See, e.g., Schultz, *Open Statement on Sexual Harassment*, *supra* note 22, at 47 (urging Congress to remove Title VII damages caps to enable low-wage victims to obtain attorneys).

126. Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004); see also Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1 (2001) (arguing that to avoid liability employers should be required to demonstrate the effectiveness of their harassment education and prevention programs rather than their mere existence); Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85 (2006) (arguing that judicial applications of *Ellerth* and *Faragher* have contravened the policy underlying the affirmative defense and advocating for vicarious liability whenever a harasser abuses power conferred by his

defense also gives employers an incentive to penalize harshly.¹²⁷ Overruling this caselaw would be a rare change that could benefit both victims and those accused.

As for incentivizing voluntary reform, there is a promising recent increase in employee-concerted activity responding to MeToo. On November 1, 2018, 20,000 Google employees abandoned their desks in fifty cities across the globe in the “Walkout for Real Change Movement.”¹²⁸ The demonstration was triggered by media reports of Andy Rubin’s outlandish severance package and company efforts to shield other top dog employees from sexual harassment allegations.¹²⁹ But the movement was actually a culmination of long-brewing employee grievances reaching beyond issues of sexual harassment or even gender equity. The Andy Rubin story broke during a time of escalating internal tension over Google’s work on a censorship-compatible search engine for the Chinese government.¹³⁰ That same year the company ditched its bid to secure a military contract with the Pentagon amidst strong employee backlash.¹³¹

That context reveals the potential for broader workplace reform achieved through MeToo-inspired organizing.¹³² In addition to improved sexual harassment procedures and other changes to advance gender equity, the Walkout for Real Change Movement demanded wide-reaching reforms aimed at leveling the corporate playing

employer); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L. J. 3 (2003) (arguing that *Ellerth/Faraher* represents a “victory for a misguided culture of compliance, one in which liability is measured not by whether employers successfully prevent harassment, but instead by whether they comply with judicially created prophylactic rules” and advocating for Congressional overruling of the affirmative defense in favor of automatic liability).

127. See Part I.B *infra*.

128. See Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [<https://perma.cc/F9VU-7EQ8>].

129. See *id.*

130. See Kate Conger & Daisuke Wakabayashi, *Google Employees Protest Secret Work on Censored Search Engine for China*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/technology/google-employees-protest-search-censored-china.html?module=inline> [<https://perma.cc/5J97-W6QE>].

131. See Drew Harwell, *Google to Drop Pentagon AI Contract After Employee Objections to the ‘Business of War’*, WASH. POST (June 1, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/06/01/google-to-drop-pentagon-ai-contract-after-employees-called-it-the-business-of-war/?utm_term=.F73443622b6a [<https://perma.cc/GD7Z-Q9MT>].

132. I refer here to informal grassroots organizing by employees rather than traditional union organizing. For a thoughtful discussion of how and why labor unions should take a role in ensuring workers’ freedom from harassment, see generally Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56 (2019).

field.¹³³ These included the elevation of the company's diversity officer to the C-suite level; an end to forced arbitration agreements; and, boldest of all, an employee representative on the company's Board of Directors.¹³⁴ Google responded, at least in part. Days after the protest, it publicly renounced its reliance on private arbitration for harassment claims and later, in response to continued employee pressure, the use of arbitration agreements altogether.¹³⁵ Google's move spurred other tech giants to reevaluate their own arbitration practices.¹³⁶ Google has also promulgated numerous changes to its sexual harassment and Equal Employment Opportunity practices and made repeated public statements of commitment to working with employees toward additional reforms.¹³⁷

Other demands have yet to be addressed, and the movement continues its work.¹³⁸ What is promising and inspiring, however, is that workers have connected sexual harassment and the special treatment of corporate darlings to matters of employee input and voice in corporate decision making and to a concern with workers' rights writ large.¹³⁹ If MeToo leads workers to demand and ultimately secure some of these desired changes, one might hope that the rising tide will lift all boats.

133. Some of these reforms include a revamped complaint system and sexual harassment "transparency report." See Claire Stapleton et al., *We're the Organizers of the Google Walkout. Here Are Our Demands*, CUT (Nov. 1, 2018), <https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html> [<https://perma.cc/A9CP-QEBH>].

134. *Id.*

135. See Conger & Wakabayashi, *supra* note 7; Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html> [<https://perma.cc/7SD4-8P5M>].

136. See Wakabayashi & Silver-Greenberg, *supra* note 8.

137. See Conger & Wakabayashi, *supra* note 7; Jillian D'Onfro, *A Post-Walkout Google Goes Public with Updated Harassment and Discrimination Policies, Promises to 'Listen'*, FORBES (Apr. 25, 2019), <https://www.forbes.com/sites/jilliandonfro/2019/04/25/a-post-walkout-google-goes-public-with-updated-harassment-and-discrimination-policies-promises-to-listen/#17ed09e076b1> [<https://perma.cc/G9BC-LXAK>].

138. See Suhauna Hussain, *Google Workers Protest 'Culture of Retaliation' with Sit-In*, L.A. TIMES (May 1, 2019), <https://www.latimes.com/business/la-fi-tn-google-walkout-protest-retaliation-20190501-story.html> [<https://perma.cc/C9G6-2DAR>] (reporting on employee concerted activity since the November 1, 2018 walkout, including a May Day 2019 protest against retaliation). The movement maintains a Twitter feed.

139. See Crain & Matheny, *supra* note 132, at 112–22 (connecting the goals of the MeToo movement with interests in worker safety and job security that traditionally have been the subject of collective bargaining).

Conclusion

Eradicating workplace sexual harassment is an imperative and a challenge. So too is treating workers fairly at all levels of the organization. This Article has focused on one aspect of the emerging response to MeToo—developing best practices for handling accused harassers. The movement’s principal focus has been and should continue to be vindicating the rights of victims and preventing future harm. Yet the ways in which employers treat accused harassers—the extent to which they choose to enforce their policies and against whom—tell us a great deal about what we can expect the movement to accomplish. Whether employers are motivated to protect their brand, appease their workforce, avoid liability, or are genuinely inspired to forge a more just and diverse workplace, they will be a powerful force in shaping the legacy of MeToo. As those of us who advocate for victims seek to influence, assess, and at times counteract their choices, we should take care to remember: Not all harassers are created equal.