A CROSSROADS IN TIME: THE IMPLICATIONS OF INTERSECTIONALITY AND #METOO FOR SEXUAL HARASSMENT LAW

Caitlin Beller Mininger[*]

ABSTRACT

Ever since the Supreme Court established sexual harassment as a type of employment discrimination under Title VII, courts have applied fact-specific standards without a clear idea of the scope of workplace sexual harassment. Judges and juries have historically been more likely than not to dismiss and find against claims of (sometime egregious) sexual misconduct because the judicially interpreted standards set the bar so high. #MeToo, a social movement that brought forward thousands of individual stories of sexual harassment and assault experiences, has illuminated many of the realities of these experiences, altering our cultural construction of sexual harassment. The lessons of the social movement can influence a corollary legal movement to change the way judicial standards are applied in sexual harassment cases. This Note examines some of the ways #MeToo can inform sexual harassment law and attempts to apply a critical race feminist lens to these continuing questions.

* J.D. Candidate, 2020, Drexel University Thomas R. Kline School of Law. Thank you to my parents, Barbara Mininger and Michael Beller, for giving me my very first primers on feminism, abolition, and civil rights. Thank you to my friends and colleagues for inspiring me on the path, especially when the road is hard. Thank you to my fellow editors for all their hard work. This one goes out to the silence breakers, the storytellers, and the survivors.

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INTRODUCTION

A woman's supervisor repeatedly tries to kiss her, touches her shoulders, asks her out, and leaves declarations of love in her work area.[1] A trial court and appellate court both determine that this conduct is not sexual harassment.[2] Two waitresses have their case dismissed, despite corroborating one another, when they claim that "their co-workers kissed them, brushed

1. Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 334–35 (7th Cir. 1993).
2. *Id.* at 337.

up against them and made sexual references."[3] Workplace sexual harassment is discrimination on the basis of sex.[4] Yet courts have consistently dismissed flagrant conduct for failing to "constitute harassment in a legal sense," even when it results in real and present obstacles to work.[5]

Barriers to women in the workplace are nothing new. In 1873, a Supreme Court Justice wrote in the concurring opinion of *Bradwell v. Illinois* that "the law of the Creator" limited women to the "noble and benign offices of wife and mother."[6] The Court rejected Myra Bradwell's Fourteenth Amendment equal protection claim, upholding the Illinois Supreme Court decision that had excluded her from the practice of law.[7] Two years later, the Wisconsin Supreme Court denied Lavinia Goodell's petition for admission to the bar, and the chief justice wrote that it would be "revolting" to permit women "to mix professionally in all the nastiness of the world which finds its way into courts of justice."[8] Granted, confronting the nastiness of the world in one's professional space *is* revolting. Women have had to navigate the nastiness of sexual harassment and discrimination at work for as long as women have been working, and that *is* revolting. The mistake of that chief justice, and for so long the workplace culture in America, is believing that the nastiness of the world is immutable: that sexual harassment is something that women just have to put up with if they want to work.

Today, the #MeToo movement has brought the nastiness of sexual harassment and workplace discrimination into greater

3. Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That's Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html.

4. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (upholding a cause of action for hostile work environment sexual harassment under Title VII).

5. Sperino & Thomas, *supra* note 3.

6. Bradwell v. Illinois, 83 U.S. 130, 141 (1873).

7. *Id.*; *see also* JILL NORGREN, REBELS AT THE BAR ix–x (2013).

8. *In re* Goodell, 39 Wis. 232, 245–46 (1875); *see also* NORGREN, *supra* note 7, at x.

focus.[9] The movement began on October 5, 2017 when the *New York Times* broke the story of "high profile actresses" like Ashley Judd and Rose McGowan accusing "Hollywood kingmaker" Harvey Weinstein of gross sexual misconduct.[10] Ten days later, actress Alyssa Milano encouraged sexual harassment and assault survivors to reply "me too" to her tweet in order to present a clearer image of how wide ranging these experiences are.[11] As the idea spread beyond Milano's immediate followers, a simple reply became a hashtag.[12] As #MeToo was tweeted more than 500,000 times by the following afternoon,[13] what emerged was a staggering demonstration of the breadth and commonality of these experiences across race, class, and profession.[14] Perpetrators of sexual harassment in

9. Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 230–35 (2018) (introducing how the #MeToo movement illuminated discrimination and harassment in the workplace).

10. *Id.* at 230–31; *see also* JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT (2019).

11. Alyssa Milano (@ Alyssa_Milano), TWITTER, (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976; L. Camille Hébert, *Contents: Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 321–22 (2018).

12. *Hashtag*, LEXICO, https://www.lexico.com/en/definition/hashtag (last visited Fed. 10, 2020).

13. Stephanie Petit, *#MeToo: Sexual Harassment and Assault Movement Tweeted over 500,000 Times as Celebs Share Stories*, PEOPLE (Oct. 16, 2017, 4:00 PM), https://people.com/movies/me-too-alyssa-milano-heads-twitter-campaign-against-sexual-harassment-assault/.

14. Tippett, *supra* note 9, at 231–32.

television and Hollywood,[15] modeling,[16] hospitality,[17] journalism,[18] and politics[19] were exposed to social, career, or legal consequences at last.[20]

15. *See, e.g.*, Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of "Today"*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes. com/2017/11/29/business/media/nbc-matt-lauer.html (detailing the firing of longtime NBC host Matt Lauer); Andrew Dalton, *New Witnesses Allege Sexual Misconduct by Tavis Smiley*, CHICAGO TRIBUNE (Mar. 23, 2018, 10:44 PM), http://www.chicagotribune.com/entertainment/tv/ct-tavis-smiley-sexual-misconduct-allegations-20180323-story.html (telling the story of the firing of former PBS host Tavis Smiley); Steven Zeitchik, *Disney Animation Guru John Lasseter Takes Leave After Sexual Misconduct Allegations*, WASH. POST (Nov. 21, 2017, 7:13 PM), https://www.washingtonpost.com/news/business/wp/2017/11/21/disney-animation-guru-john-lasseter-takes-leave-after-sexual-misconduct-allegations (stating the Pixar co-founder John Lasseter was placed on sabbatical following a sexual misconduct allegation); Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein,* NBC NEWS (last updated Jan. 10, 2018, 4:34 PM), https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546 (listing Hollywood men accused of sexual misconduct in the weeks following the accusations against Harvey Weinstein).

16. *See, e.g.*, Brian Stelter, *Vogue Publisher Drops Bruce Weber and Mario Testino Over Misconduct Allegations*, CNN: BUSINESS (Jan. 15, 2018, 2:38 AM), https://money.cnn.com/2018/01/15/media/mario-testino-bruce-weber-conde-nast/index.html (providing details of the firing of former Conde Nast models Bruce Weber and Mario Testino).

17. *See, e.g.*, Corey, *supra* note 15 (listing men in hospitality accused of sexual misconduct in the weeks following the accusations of Harvey Weinstein); Dave Jamieson, *"He Was Masturbating…I Felt Like Crying": What Housekeepers Endure to Clean Hotel Rooms*, HUFFPOST (last updated Nov. 20, 2017), https://www.huffingtonpost.com/entry/housekeeper-hotel-sexual-harassment_us_5a0f438ce4b0e97dffed3443 (highlighting the stories and statistics about sexual harassment of hotel workers).

18. *See, e.g.*, John Koblin & Michael M. Grynbaum, *Charlie Rose Fired by CBS and PBS After Harassment Allegations*, N.Y. TIMES (Nov. 21, 2017), https://www.nytimes .com/2017/11/21/business/media/charlie-rose-fired-cbs.html (detailing the firing of former CBS and PBS host Charlie Rose); Camila Domonoske, *Garrison Keillor Accused of "Inappropriate Behavior," Minnesota Public Radio Says*, NPR (Nov. 29, 2017, 12:52 PM), https://www.npr .org/sections/thetwo-way/2017/11/29/567241644/garrison-keillor-accused-of -inappropriate-behavior-minnesota-public-radio-says (stating the former Minnesota Public Radio host Garrison Keller was fired following sexual misconduct allegations); Patrick Hipes, *NPR's "On Point' Radio Host Tom Ashbrook Fired*, DEADLINE HOLLYWOOD (Feb. 14, 2018, 2:34 PM), https://deadline.com/2018/02/tom-ashbrook-on-point-host-fired-npr-wbur-boston-university-1202288818 (detailing the firing of former NPR host Tom Ashbrook); Mike Snider, *NPR News Chief Michael Oreskes Resigns After Sexual Harassment Accusations*, USA TODAY (Nov. 1, 2017, 5:01 PM), https://www.usatoday.com/story/money/media/2017/11/01/npr-news-chief-michael-oreskes-resigns-after-sexual-harassment-accusations/821405001 (telling the story of former NPR news chief Michael Oresekes who resigned following sexual misconduct allegations).

19. *See, e.g.*, Rachael Bade & Elana Schor, *Capitol Hill's Sexual Harassment Policy "Toothless," "A Joke"*, POLITICO (Oct. 27, 2017, 12:07 AM), https://www.politico.com/story/2017/10/27/capitol-hill-sexual-harassment-policies-victims-244224; Greg Price, *Revenge of #MeToo? How Sexual Assault, Child Molestation Claims Destroyed Roy Moore in Alabama*, NEWSWEEK: U.S. (Dec. 13, 2017, 8:13 AM), https://www.newsweek.com/metoo-alabama-women-vote-jones-746591; Joel Ebert, *Sexual Harassment Troubles Mount in Statehouses Around the Country*, USA TODAY (Nov. 20, 2017,

#MeToo has exposed the fact that perpetrators often retain positions of power precisely because their victims feel cultural pressure in the workplace to not speak out. It has brought greater attention to the fact that many women not only experience sexual harassment, but also choose to remain silent in the face of cultural pressure. In 1881, female attorney Belva Lockwood bought a bicycle because she noticed that the male attorneys with bicycles in Washington D.C. were able to work more quickly.[21] In buying that bicycle, she took on the verbal harassment that came from "showing a bit of ankle."[22] Today, she might not have to accept it.

Only time can tell whether this cultural awakening will continue, or if it will "succumb to the forces of backlash and short attention spans."[23] If the #MeToo movement is not to be merely a blip in the arc of history, it will have to transition into a legal movement through reforms to the law of sexual harassment.[24] Telling a story of abuse can be personally healing, and with the weight of #MeToo stories, the telling has the potential to be systemically healing as well.

The stories that have come out of #MeToo underline more strongly than ever that the so-called "nastiness of the world"[25] faced by women in the workplace is a problem with *the world* rather than with women. The #MeToo movement calls on the heirs of the first women lawyers—those who "had to challenge patriarchy, law, arrogance, prejudice, and the fear of change" to

5:31 PM), https://www.usatoday.com/story/news/nation-now/2017/11/20/sexual-harassment-statehouses/882874001.

20. *See* Tippett, *supra* note 9, at 231–32.

21. NORGREN, *supra* note 7, at 185.

22. *Id.*

23. Hébert, *supra* note 11, at 335–36; *see, e.g.*, Amanda Morris, *#HimToo: Left and Right Embrace Opposing Takes on Same Hashtag*, NPR (Oct. 11, 2018, 5:00 AM) https://www.npr.org/2018/10/11/656293787/-himtoo-left-and-right-embrace-opposing-takes-on-same-hashtag (describing the backlash to #MeToo exemplified by the hashtag #HimToo, which "gained popularity [in the aftermath of the Kavanaugh hearings] among those who believe that men, such as [Justice] Kavanuagh, are victims of false allegations"). .

24. Hébert, *supra* note 11, at 336.

25. *In re* Goodell, 39 Wis. 232, 245–46 (1875).

succeed in their chosen vocation[26]—to push that legacy forward by fitting the law to a new cultural awareness around sexual harassment and discrimination in the workplace.

In the light of the cultural awakening around the #MeToo movement, this Note addresses the law surrounding sexual harassment in the workplace as one facet of the continuum of barriers to women in the workplace, and applies an intersectional lens to contextualize sexual harassment law and culture. The goal of the Note is to propose first steps in transitioning the cultural movement into a legal movement. Additionally, because of the intersection of systems of oppression, no one can have the luxury of being only interested in gender. In an attempt to keep the "feminist method's promise" of "listen[ing] to women's stories,"[27] this Note therefore seeks to bring an intersectional, critical race feminist approach to the culture and law around sexual harassment. I pursue this method with the knowledge I do not reach far enough here—not only in that the works cited focus on the black/white dichotomy to the exclusion of other women of color, but also in that time and space considerations have not allowed for the inclusion of sexual orientation or gender identity in this discussion.

The Note proceeds in four parts. Part I places the argument within a historical narrative of women in the legal profession. Part II grounds the argument in the intersectional theory of Kimberlé Crenshaw. Part III provides cultural context by comparing examples of silence-breaking on the greater political stage and outlining the development of #MeToo. Part IV discusses the particulars of sexual harassment and discrimination law and proposes initial reforms.

26. NORGREN, *supra* note 7, at 204.

27. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, *in* CRITICAL RACE THEORY 34, 39 (Adrien Katherine Wing ed., 2nd ed. 2003).

I. ORIGIN MYTHS: WOMEN LAWYERS LEADING THE WAY FOR WOMEN WORKERS

It is useful to recall the history of discrimination against women in the workplace for two reasons. First, understanding what has come before helps us understand where we are today—today's implicit biases have roots in yesterday's explicit prejudices. It is for this reason that this Note will use a critical race feminist framework for analyzing the state of sexual harassment law: too often the implicit biases of race and sex intersect.[28]

Second, stories about a social movement can form the essence of that social movement. The historian Lisa Tetrault explores this idea in her 2014 book about the transformation of the 1848 convention at Seneca Falls into the myth of the convention at Seneca Falls.[29] Social movements form their identities out of their own stories: these "origin myths" help individual activists adhere to a common purpose and decide the path toward social change collectively.[30]

A myth, in Tetrault's usage, is "a venerated and celebrated story used to give meaning to the world."[31] In the case of the Seneca Falls convention, the story is that Elizabeth Cady Stanton and Lucretia Mott, angry that U.S. women delegates had been denied entry to an anti-slavery convention in London several years earlier, convened the first women's rights convention at Seneca Falls, New York in 1848.[32] There, Stanton made "the first public demand for women's voting rights" and drafted the "Declaration of Sentiments" to formalize that

28. *See infra* Part II.

29. *See* LISA TETRAULT, THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 8 (2014) ("Scholars have only just begun to consider how stories operate in social movements, and how stories are, in fact, essential to the life of social movements, instructing activists about what priorities to prize, how to imagine themselves, how to cohere, and how to move forward.").

30. *Id.*

31. *Id.* at 5.

32. *Id.* at 2.

demand.[33] Susan B. Anthony and Elizabeth Cady Stanton became leaders amidst the early women's movement by crafting the myth around this event, building the Seneca Falls Convention up as the Beginning of the Women's Movement, when really there was "a collection of movements, goals, strategies, and leaders" working for women's rights at the time.[34]

In Tetrault's words, an origin story "does not actually pinpoint a beginning so much as it acts as a filter that people use to impose a certain type of meaning onto a complex and contested landscape."[35] Any force or movement only means what individual people decide it means, and a movement can only advance if its members agree that it has a particular meaning. Stanton and Anthony built the story of Seneca Falls to mythic proportions in order "to market their particular agenda for women's rights" and "insist upon women's place in national memory."[36] With similar intent, this section tells a story about the role women lawyers have played in opening the way for all women into the workplace.

A. *From Republican Motherhood to the Public Sphere*

Underlying the 1873 *Bradwell* decision was a cultural rejection of the notion that women had a right to work under the Fourteenth Amendment.[37] In theory at least, white women had from the Founding many of the rights and liberties fundamental

33. *Id.*

34. *Id.* at 47.

35. *Id.* at 5.

36. *Id.* at 9.

37. *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J. concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . [T]he family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband. . . ."); NORGREN, *supra* note 7, at ix–x ("[M]ost Americans believed that any women who did not need to work outside of her home, or farm, ought not to.").

to the ideal of American life—First Amendment freedoms of speech, worship, assembly, and petition, for instance.[38] But the public sphere belonged to the men.[39] Before and after the Revolutionary War, women "were expected to uphold the ideals of republicanism—liberty, inalienable rights, honesty, sovereignty" within the domestic sphere.[40] This concept of Republican Motherhood envisioned the role of (white) women in civic life solely as husband's counselor and son's educator in "republican virtues."[41]

Despite the myth developed around it, the 1848 women's rights convention at Seneca Falls was not the first or only instance of dissent from the then-existing cultural norm of Republican Motherhood.[42] However, the Declaration of Sentiments and Resolutions produced at the convention provides insight into the frustrations of women's rights activists at the time. [43] This document demanded that women "have immediate admission to all the rights and privileges which belong to them as citizens of these United States."[44] Of particular concern to the drafters of the Declaration of Sentiments was "[w]omen's right to education, fair wages, and

38. NORGREN, *supra* note 7, at 3.

39. *See, e.g.*, *Bradwell*, 83 U.S. at 141 (Bradley, J. concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.").

40. NORGREN, *supra* note 7, at 2–3.

41. *Id.* at 3; LORETTA J. ROSS & RICKIE SOLLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 23 ("[T]he white mother was the fundamental creative symbol of the white nation: dependent but dignified, innocent and pious but wise, a person of deep sentiment but also judicious. She was tethered to the home while shaping the destiny of the nation by raising citizen-sons and future mothers of the Republic.").

42. TETRAULT, *supra* note 29, at 5 ("Movements can and do begin in many places.") Tetrault notes that scholars anchor the beginning of the women's rights movement in different instances. *Id.* For example the "Grimké sisters' practical and theoretical defenses of women as public actors in the 1830s," or the Lowell strikes, or "black women's resist[a]nce to slavery and to the systemic raping of their bodies." *Id.*

43. *See id.*

44. Elizabeth Cady Stanton, *Declaration of Sentiments*, NAT'L PARK SERV., https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm (last visited Feb. 17, 2020).

a place in the professional life of the country."[45] Clearly, relegation to the domestic sphere of Republican Motherhood was not enough.

The Seneca Falls Declaration reflects women's lack of position in the professions at the time; their presence was unknown in this sphere because "all avenues to wealth and distinction" had been closed to them.[46] In medicine, Elizabeth Blackwell was the first woman to graduate from medical school in 1849, but for a decade she was barred from practice and attacked by hate mail.[47] The law was entirely closed to women.[48]

Outside of the Quakers, who had recognized women ministers but did not ordain either men or women, "women wishing the status and authority that accompanied ordination fought deep, long-standing prejudice."[49] Antoinette Brown was one of the few to try, beginning in 1847.[50] She persisted despite the opposition of her family and finished the theological program at Oberlin College, but was not allowed to graduate.[51] Instead, she began a career lecturing on women's rights, temperance, and abolition until she found a Congregational church whose members "understood her vocational calling."[52] Thus, Brown became "the first American woman ordained as a minister in the church of a recognized denomination."[53]

Teaching, as an extension of the Republican Mother's role in bringing moral sensibility to the nation, gained recognition as a suitable profession for women, but only because school boards could keep local taxes low by paying female teachers half as much as their male counterparts.[54] In fact, future attorney and

45. NORGREN, supra note 7, at 5; *see also* Stanton, *supra* note 43.

46. Stanton, *supra* note 44; *see also* NORGREN, supra note 7, at 5–6.

47. NORGREN, supra note 7, at 6 ("[N]o woman taught, mentored, or practiced legal work in the United States.").

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 6–7.

53. *Id.* at 7.

54. *Id.*

two-time presidential candidate Belva Lockwood (she of the ankle-revealing bicycle[55]) began her public life in 1858 with speeches calling for "equal professional status and pay" after she experienced wage discrimination as a teacher.[56]

The turmoil of the Civil War put the burgeoning women's movement on hold, but activism resurged after the war ended in 1865.[57] At that time, women sought "considerably more than . . . the vote—everything from equal wages to control over their bodies to resisting racist violence in the South."[58] Within this context, a number of women sought to break out of the domestic sphere and into the courtroom, pushing for the right to work by "reading law with fathers and brothers, knocking on law school doors, and petitioning county, state, and federal courts for bar privileges."[59] The first women lawyers practiced civil and criminal law, occasionally even in the courtroom, and lobbied on major issues of their day, "including suffrage, temperance, race . . . prison conditions, and international peace and arbitration."[60] These women of the first generation reached ever higher, always "looking for ways to use their knowledge of the law to shape and order society."[61] Their heirs now have an opportunity to use their cultural knowledge to shape and order the law.

B. *The Intersection*

In light of a growing cultural awareness of the ways in which "mainstream" feminism can act as a tool for white supremacy,[62] and this Note's critical concern with intersectionality, it is worth

55. *See supra* note 21 and accompanying text.

56. NORGREN, *supra* note 7, at 9.

57. TETRAULT, *supra* note 29, at 7.

58. *Id.; see also* NORGREN, *supra* note 7, at ix.

59. NORGREN, *supra* note 7, at ix.

60. *Id.* at x–xi.

61. *Id.*

62. *See, e.g.*, Rachel Elizabeth Cargle, *When Feminism Is White Supremacy in Heels*, HARPER'S BAZAAR (Aug. 16, 2018), https://www.harpersbazaar.com/culture/politics/a22717725/what-is-toxic-white-feminism; ROSS & SOLLINGER, *supra* note 41, *passim*.

juxtaposing the experiences of some of the first Black women lawyers against those of white women lawyers outlined above. The history of women's rights movements in the United States is rife with racial division.[63] With the pervasive influence of racial oppression in this country, the stories—those that even get told—of early Black women lawyers are likewise rife with racist pressure. For instance, Charlotte E. Ray was the first woman admitted to the District of Columbia bar; she graduated from Howard Law School and began practicing law in Washington, D.C. in 1872.[64] As Jill Norgren describes it, the combination of Ray's race and sex prevented her from making a living as an attorney; she quit the law and moved to New York City to teach school.[65] Norgren's book about the first American women lawyers mentions only one other Black lawyer, in the endnote accompanying the information on Ray: Ida Platt.[66] Platt, "a member of the second generation of women lawyers," graduated with honors from the Chicago College of Law in 1894 and went on to establish the United States's oldest African American bar association.[67]

If an 1894 graduation puts Ida Platt in the second generation, then earning her J.D. from the University of Pennsylvania in 1927 places Pennsylvania's first Black woman lawyer, Sadie Tanner Mossell Alexander, within the third or fourth generation of women lawyers.[68] When Alexander began her practice in 1927, "[w]hether working as government attorneys

63. *See, e.g.*, TETRAULT, supra note 29, at 7 ("Battles over the relationship of black men's suffrage and women's suffrage divided activists in an acrimonious split that would last the rest of the century. . . . The birth of a divided and chaotic suffrage movement—*within* a rapidly expanding women's movement—left prominent suffragists scrambling to persuade other activists they represented the 'true' *version* of women's rights."); Sabrina Ford, *How Racism Split the Suffrage Movement*, BUST, https://bust.com/feminism/19147-equal-means-equal.html (last visited Feb. 17, 2020); ROSS & SOLLINGER, *supra* note 41, at 23–26, 30–33.

64. NORGREN, *supra* note 7, at xvi.

65. *Id.* at xvi–xvii.

66. *Id.* at xvii, 213–14 n.7.

67. *Id.* at 213–14 n.7.

68. *See* Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, *in* CRITICAL RACE FEMINISM 91, 91 (Adrien Katherine Wing ed., 2nd ed. 2003).

or in private practice, women lawyers remained largely confined to office practice, and the opportunities for black women attorneys were even more limited."[69] Alexander herself described female members of the Philadelphia bar as "extremely limited in numbers," their work confined to "research assistants, brief writers in law firms or banks or for the Attorney General's office."[70] Alexander owed something to her husband's "liberal attitudes toward women lawyers" and insistence on hiring her over the objection of another lawyer at the firm.[71] On the other hand, he set her to the firm's cases in divorce and Orphan's Court, where there was no jury trial work.[72] Jury trials remained a "masculine preserve."[73] As the first black woman lawyer in her state, and one of only fifteen women barred in Philadelphia, Alexander may have considered herself fortunate to have a job in her chosen profession at all.[74] Like other female lawyers of her time, "she registered no protest and found herself engaged in office practice."[75] A power imbalance that creates pressure to stay silent for fear of losing one's work or opportunity also underlies sexual harassment stories that have come to light today as a part of #MeToo.

For Sadie Alexander, for her peers, and for women today, experiences in the workplace with customers or clients, co-workers and bosses are "overlaid with layers of race- and gender-based prejudices and perceptions."[76] No origin myth for women lawyers can be complete without recognizing the intersection of racism and sexism. Likewise, no discussion of sexual harassment as it pertains to women can be complete

69. *Id.* at 92.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 94.

without consideration of the intersection between racism and sexism.

II. CRITICAL RACE FEMINISM: GREATER THAN THE SUM OF RACISM AND SEXISM

Forming a cohesive social movement requires an inclusive construction that addresses all members of the movement. If the women's rights movement can understand how identities intersect, and how, consequently, oppression based on identities like race and sex intersect, the movement will be better able to address the needs of all women. The following sections explore the concept of intersectionality, an analytical tool that explores combinations of identities that include the idea of "woman," rather than seeking to create a monolithic identity of "Woman" within differences that exist.

A. *Intersectionality Generally*

Intersectionality is about reconstructing the way we look at identity. The term "intersectionality" arose from an intersecting-streets metaphor used by law professor Kimberlé Williams Crenshaw in a 1989 article analyzing how the combination of Black women's identities (Black + woman) led to a gap in anti-discrimination doctrine.[77] That article, in the words of Professor Ange-Marie Hancock, "sparked nearly twenty-five years of academic work, equality legislation, and human rights advocacy around the world."[78]

In her second major article using intersectionality as an analytical tool, Crenshaw suggests that people could use their differences to empower themselves and others to build a more

77. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 4 U. CHI. LEGAL F. 139, 139–40 (1989) [hereinafter Crenshaw I]; Ange-Marie Hancock, *Empirical Intersectionality: A Tale of Two Approaches*, 3 U.C. IRVINE L. REV. 259, 260 (2013).

78. Hancock, *supra* note 77.

productive social fabric.[79] This lauding of difference was a revolutionary idea in the context of a women's movement that had built a national myth in order to unify its disparate parts.[80] Before Crenshaw, emphasizing the differences between Black people and white people had seemed only a way of maintaining the "power of domination."[81] Rather than seeking to eliminate the social significance of categories like race and gender, among others, intersectionality emphasizes "intragroup differences" as a way of highlighting, rather than erasing, the experiences of women of color.[82] The framework rejects the notion that so-called colorblindness is a hallmark of equality. To ignore the role that race plays in the lives of people of color ultimately erases their experiences from the narrative.

Intersectionality thus treats each facet of a person's identity as a separate social construction: a cluster of ideas, norms, privileges, and stereotypes around which power is assigned or exercised.[83] "Black" conjures different ideas than "white." "Woman" conjures different ideas than "man." Intersectionality emphasizes that "Black woman" ought to conjure different ideas than either "Black man" or "white woman." The intersections of each sub-identity—race, sex, gender, sexual orientation, class, and so on—form the whole of an individual's identity. Crenshaw's brand of critical race feminism calls for the greater feminist movement to recognize and use the intersections that already exist within it when articulating the movement's identity.

Crenshaw used intersectionality to frame "race and gender in the context of violence against women of color," but recognized that the tool might be applicable more broadly.[84]

79. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) [hereinafter Crenshaw II].

80. See *supra* notes 29–36 and accompanying text (describing how Susan B. Anthony and Elizabeth Cady Stanton created a myth around the beginning of the Women's Movement).

81. Crenshaw II, *supra* note 79.

82. *Id.*

83. *Id.* at 1296–97.

84. *Id.* at 1296.

Intersectionality is a "way of mediating the tensions between assertions of multiple identity and the ongoing necessity of group politics."[85] To unpack that statement a little: collective action is a useful means for traditionally underrepresented or oppressed people to exert political power that can make change. However, each individual within a collective movement brings an individual intersectional identity to the movement, and where those identities align with others in the movement, subgroups can form. The variety of women's movements at the time of the Seneca Falls convention provides an example.[86] Using intersectionality, members of the movement can recognize and then use their differences to form a cohesive movement without obliterating the voices of those who do not "fit" the overall vision. Crenshaw envisioned intersectionality's ability to mediate between the individual and the movement as an antidote to white feminism's gender essentialism.[87]

B. *The Intersectional Critique of Gender Essentialism*

The goal of this Note is to propose first steps in transitioning the cultural movement of #MeToo into a legal movement through law reform. The very first step in that process must be reckoning with the ways in which white feminism has itself been used as a tool of oppression.[88] Gender essentialism in white feminist thought is one example of the means by which people of color have been excluded from the feminist movement's narrative.

Gender essentialism is the idea "that there is a monolithic 'women's experience' that can be described independently of other facets of experience like race, class, and sexual

85. *Id.*

86. *See* TETRAULT, *supra* note 29, at 47–51 (detailing the "multiplication of movements" present within the suffragist movement across the United States).

87. *See* Crenshaw II, *supra* note 79, at 1299.

88. *See* Cargle, *supra* note 62 (showing one understanding of white feminism as a tool of white supremacy).

orientation."[89] There are other types of essentialism, in particular race essentialism, based on the different categories of identity.[90] The problem with gender essentialism is that the majority rules even within a minority: thus, "in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all."[91] Gender essentialism in feminist thought is therefore related to an idea termed *white solipsism*, "the tendency to think, imagine, and speak as if whiteness described the world."[92] The effect "reduce[s] the lives of people who experience multiple forms of oppression to addition problems," where each essential piece of an identity category will be added up to the whole.[93] In more concrete terms, the gender essentialism critique argues that essentialist analysis of either "Blackness" or "womanhood" ignores and erases the particularity of the experience of the identity "Black womanhood." As Angela Harris identifies the problem, "in an essentialist world, black women's experience will always be forcibly fragmented before being subjected to analysis, as those who are 'only interested in race' and those who are 'only interested in gender' take their separate slices of [their] lives."[94] In reality, a person's experience will always be more than the sum of its parts.

Avoiding a gender essentialist take on sexual harassment law is of particular interest to this Note because its author is a white woman and gender essentialism is a white woman's problem. Analyzing the prevalence of essentialism in feminist thought, Angela Harris identifies three reasons it is so common. First, it is "intellectually convenient, and to a certain extent cognitively ingrained."[95] Second, it "carries with it important emotional and

89. Harris, *supra* note 27, at 34.

90. *Id.*

91. *Id.*

92. *Id.* at 40 n.2 (quoting Adrienne Rich, *Disloyal to Civilization: Feminism, Racism, Gynephobia*, *in* ON LIES, SECRETS, AND SILENCE 275, 299 (1979) (internal quotation marks omitted)).

93. Harris, *supra* note 27, at 34.

94. *Id.*

95. *Id.*

political payoffs."[96] Questioning one's own biases and privileges is therefore a necessary component to a non-essentialist method. Third, it "often appears (especially to white women) as the only alternative to chaos, mindless pluralism, and the end of the feminist movement."[97] As seen in the Seneca Falls example, previous leaders of "The Feminist Movement" have sought to unify disparate factions by manufacturing a unifying narrative of the movement.[98]

But the pursuit of a "general theory" or a "one-size-fits-all approach" will inevitably set some members of the full group as the normative center. Stories with a single protagonist are the easiest to follow: a unifying theory of identity requires a single definition, and anything that differs slightly from that definition will merely be shades off the norm. For example, feminist theorist Catharine MacKinnon, who "laid the groundwork for a legal definition and theory of sexual harassment,"[99] developed a "nuance theory" that "assumes the commonality of all women," and consequently treats differences as "a matter of 'context' or 'magnitude,' that is, nuance."[100] MacKinnon's work purported to be "sensitive to the notion that different women have different experiences."[101] It generalized the experience of "all women" and provided qualifying statements, "often in footnotes," to supplement the general theory with "the subtle nuances of experience that

96. *Id.*

97. *Id.* at 34–35.

98. *See* TETRAULT, *supra* note 29, at 47.

99. Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, *in* CRITICAL RACE FEMINISM 349, 366 n.51 (Adrien Katherine Wing ed., 2nd ed. 2003); *see also* David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1269 (2001) (noting MacKinnon is "credited with originating the legal prohibition against sexual harassment"). MacKinnon's book *Sexual Harassment of Working Women* is the book that paved the way for these recognitions. See *generally* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979).

100. Harris, *supra* note 26, at 37.

101. *Id.*

'different' women add to the mix."[102] However, in defining women of color as "different," the theory covertly turns white women into "the norm, or pure, essential Woman."[103] It is inherently hypocritical: MacKinnon's position is that being female is more than a "context" or "magnitude" of being human, and yet her theory essentially posits that being black is no more than a context or magnitude within being female.[104]

Rather, intersectionality posits that the combination of identities, say woman and Black, creates its own whole identity, say Black womanhood, that cannot be wholly contained within either "woman" or "Black." In such an instance, the "intersectional experience is greater than the sum of racism and sexism."[105] By analogy, then, each individual member of a group that identifies with "woman" brings a unique interpretation of that identity, and there can be no pure, essential Woman. In applying an intersectional method, one must avoid gender essentialism by accounting for individual combinations of coequal identity types. Rather than seeking a reform that will benefit all women, reformers must recognize that what works for the traditionally privileged straight, wealthy white woman might not work for a Black woman or a Hispanic woman or another white woman who is lesbian, or poor.

III. #METOO AND A CHANGING CULTURAL LANDSCAPE

#MeToo catapulted to national awareness in October 2017 after a viral tweet from actress Alyssa Milano encouraged people to share "me too" if they had experienced sexual harassment or assault, with the goal being to demonstrate the vast scope of this problem in American culture.[106] Within the first twenty-four hours, according to reports, people on Twitter had used the hashtag over 500,000 times as they told stories of

102. *Id.*
103. *Id.*
104. *See id.*
105. Crenshaw I, *supra* note 77, at 140.
106. Hébert, *supra* note 11, at 321–22; Petit, *supra* note 13.

their own experiences with sexual harassment and assault.[107] But, the "MeToo movement" was actually established in 2006 by Tarana Burke, the founder and director of Just Be Inc., and the senior director of Girls for Gender Equity.[108] Burke began the MeToo movement to "empower young women of color who have been sexually abused, assaulted, or exploited, women from marginalized communities."[109]

MeToo in this iteration prioritized "the survivors of sexual harassment and assault that occur in ordinary work spaces, or schools, churches, homes of friends or family members, or the streets of their neighborhoods."[110] Where the 2017 iteration centered the stories of relatively high-powered women like celebrities, Burke's MeToo emphasized those who "lack the resources, class status, or even the acceptable skin color to have their stories told."[111] Thus, a movement which has been used to begin, or continue, a discussion about equality has its roots in the race and class privileged co-opting of an already-existing movement, a movement originally aimed at helping the least privileged within the broader identity group. It does not negate the utility or necessity of the larger movement. It does, however, mean that the "mainstream" should be careful not to presume it speaks for the whole.

A. *Change and Continuity: Anita Hill and Christine Blasey Ford*

The Supreme Court's legal standard for sexual harassment under Title VII of the Civil Rights Act seems unlikely to change in light of the present composition of the Court. Twenty-seven years separated the nominations of Clarence Thomas and Brett Kavanaugh, and yet the "unmistakable parallels" between the

107. Hébert, *supra* note 11, at 322; Petit, *supra* note 13.

108. Zenobia Jeffries Warfield, *Me Too Creator Tarana Burke Reminds Us This Is About Black and Brown Survivors*, YES! MAG. (Jan. 4, 2018), https://www.yesmagazine.org/people-power/me-too-creator-tarana-burke-reminds-us-this-is-about-black-and-brown-survivors-20180104.

109. *Id.*

110. *Id.*

111. *See id.*

treatment of Professor Anita Hill when she accused Thomas and Dr. Christine Blasey Ford when she accused Kavanaugh "raise questions of how much has in fact changed as a result of the '[#]MeToo' movement."[112] For Professor Hébert at least, comparing the Thomas and Kavanaugh hearings and the treatment of Hill and Ford "does suggest that at least some members of the Senate Judiciary Committee may have comprehended both the seriousness of the allegations and their relevance to service on the Court" this time around.[113]

Even so, it cannot be denied that the intersection of the race issue played a significant role in Justice Thomas's confirmation as his "use of powerful racial imagery transformed him from sexual harasser to racial victim."[114] Emma Coleman Jordan assesses it as "perhaps the single most important element leading to his confirmation."[115] His use of race worked to his advantage, reminding black voters, "the critical segment of public opinion," that he as a black man "was in danger of being oppressed for being uppity, by going beyond his assigned station in life."[116] Somehow, this technique worked for Brett Kavanaugh as well. While the white, prep-school-educated judge could not credibly call the hearing on Dr. Ford's allegations a "high-tech lynching,"[117] he *could,* and did, trade on the sympathy, and arguably the fears, of every white (Republican) man on the Senate Judiciary Committee. He *could* prey on the conservative conspiracy-theory that the Clintons were behind this "targeted political hit." In the era of #MeToo, the backlash to the movement often focuses on the threat of the false allegation tearing down the once-respected man in

112. Hébert, *supra* note 11, at 324.

113. *Id.*

114. Emma Coleman Jordan, *Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings*, *in* CRITICAL RACE FEMINISM 367, 370 (Adrien Katherine Wing ed., 2nd ed. 2003).

115. *Id.*

116. *Id.* (quoting Interview with Professor Patricia King, Georgetown University Law Center, in Washington D.C. (Oct. 24, 1991) (internal quotation marks omitted)).

117. *Id.* at 369 (quoting statement of Clarence Thomas, Supreme Court Justice nominee, opening statement before the S. Judiciary Comm., Oct. 12, 1991 (internal quotation marks omitted)).

power.[118] It was the fear of this "reverse oppression" that gave Kavanaugh the foothold he needed, and that gave Senator Lindsey Graham the outrage to break the Republican side's silence.

Emma Coleman Jordan also highlights a number of the "pre-existing racial and sexual stereotypes" that undercut Anita Hill's credibility during the Thomas hearings, some of which remain extant to undercut Christine Blasey Ford.[119] These include the notions that men sexually harass when women encourage their sexual interest; that lower status women fabricate claims against men of higher status because they have "something to gain from publicity, no matter how unflattering," and that many sexual harassment claims are fabricated and therefore must be independently corroborated.[120] Additionally, much as a misunderstanding of the effect trauma has on survivors' memory threaded through the analysis of Dr. Ford's testimony, "the fact that [Anita Hill] only revealed specific details of Thomas's pornographic references gradually" undercut her credibility.[121] Then and now, "the norm for women who have undergone traumatic experiences was a fact lost on both the senators and the public."[122] The promise of the #MeToo movement is that, perhaps culturally, we are approaching a better understanding of the pervasiveness of sexual harassment, and of the severe trauma it can inflict.

118. *E.g.*, Amanda Morris, *#HimToo: Left and Right Embrace Opposing Takes on Same Hashtag*, NPR (Oct. 11, 2018, 5:00 AM), https://www.npr.org/2018/10/11/656293787/-himtoo-left-and-right-embrace-opposing-takes-on-same-hashtag (discussing the rise of #HimToo, a hashtag largely popularized by supporters of Justice Kavanaugh, who utilized the hashtag to express their belief that #MeToo exposed innocent men to unfounded accusations of sexual misconduct).

119. Jordan, *supra* note 114, at 367.

120. *Id.*

121. *Id.* at 370.

122. *Id.*

B. *What the Social Movement Can Do Now*

The present conversation about sexual harassment began when the New York Times broke the Harvey Weinstein scandal.[123] After months of investigation, pleading with sources to go on the record, and dodging the ploys of private intelligence operatives, journalists Jodi Kantor and Megan Twohey published their article detailing what many in Hollywood had whispered about, but no one would openly confirm.[124] The producer had, for decades, "exploit[ed] . . . the workplace to manipulate, pressure, and terrorize women."[125] Settlements with nondisclosure agreements were a primary tactic Weinstein's team used, although the "language of the deals made them look less like aboveboard legal transactions and more like cover-ups."[126] Therefore, Kantor and Twohey's ability to break the silence on a public stage constituted a revelation about sexual harassment and assault in this country.[127]

The conversation thus sparked, it gathered momentum as more and more survivors came forward with their own stories, until "a critical mass of corroborated or credible complaints" piled up against more than a dozen men by October 2017.[128] The conversation then morphed into a movement: a "wake-up call for the many employers that knew it could happen, but assumed not in their workplace."[129] #MeToo caused "a number of prominent and powerful men [to lose] their positions or employment opportunities."[130] Where the past saw those who experienced sexual harassment at work remain silent with the

123. Tippett, *supra* note 9, at 230; Braden Campbell, *#MeToo Changed Workplaces, But That's Just a Start*, LAW360 (Oct. 5, 2018, 6:29 P.M.), https://www.law360.com/articles/1089425/-metoo-changed-workplaces-but-that-s-just-a-start.

124. KANTOR & TWOHEY, *supra* note 10, at 1–3.

125. *Id.* at 4.

126. *Id.* at 52.

127. *Id.* at 1.

128. Campbell, *supra* note 123, at 2; *see also* Tippett, *supra* note 9, at 231–33.

129. Campbell, *supra* note 123, at 2 (internal quotation marks omitted).

130. Hébert, *supra* note 11, at 322.

belief that "nothing would come from their complaining, or worse, that they would be shunned or fired for speaking out," the power of #MeToo lies in encouraging survivors to come forward with their stories.[131]

Sometimes the belief that it was better to remain silent would be actively reinforced by coworkers as well as the perpetrators themselves.[132] In perhaps the most extreme example, Kantor and Twohey describe Harvey Weinstein's use of Black Cube, an intelligence firm, to track, influence, and intimidate both his would-be accusers and the journalists investigating their stories.[133] The fact that the worst offenses often come from those with the most power within a workplace only exacerbates the problem of silence.[134] Indeed, what makes the movement extraordinary is the fact that before #MeToo, *survivors* were more likely to suffer "negative employment consequences" than perpetrators.[135] When *Time Magazine* named the "Silence Breakers" as the 2017 Person of the Year, some of the ordinary people, "farmworkers, housekeepers, and hospital workers . . . used pseudonyms or appeared anonymously because of fears of retribution."[136]

Soon after the beginning of #MeToo, there were hopes that the movement would make "all gender bias taboo."[137] Certainly in that moment there were signs of a cultural shift in the way employers treated harassers.[138] It also appears that the movement has engendered greater conversation and introspection around the issue.[139] There is concern, however, that individual moments of reckoning are not enough to create

131. Campbell, *supra* note 123.

132. *See* KANTOR & TWOHEY, *supra* note 10, at 59.

133. *Id.* at 91–95.

134. Campbell, *supra* note 123, at 2.

135. Hébert, *supra* note 11, at 323; *see also* KANTOR & TWOHEY, *supra* note 10, at 55–57.

136. Hébert, *supra* note 11, at 322.

137. Vivian Chen, *Are Women Finally Making Progress Against Inequality?*, LAW.COM: AM. LAW. (May 1, 2018, 2:21 PM), https://www.law.com/americanlawyer/2018/05/01/are-women-in-law-finally-empowered-to-speak-out-against-inequality/.

138. *See id.*

139. Campbell, *supra* note 123, at 2.

"any lasting change."[140] Some feel that a "liability and incident-based framework is not going to move the needle within an organization or within the country."[141] And too often, being able to come forward with a #MeToo story is a function of a survivor's other privileged identities and the social support she has to catch her if she loses her job or faces other retaliation.[142]

The most important effect of #MeToo may just be that women who allege sexual harassment will be believed more frequently than they have been in the past.[143] With so many stories being told, it is harder to dismiss claims as "deranged or spiteful lies"—previously "a frequent defense."[144] The weight and volume of #MeToo stories make it harder to be skeptical when the common theme is that sexual harassment is, in reality, a frequent occurrence in the workplace. Storytelling has been recognized not only as a way of binding movements, but also as a means of healing the wounds caused by oppression. Much like the storytelling methods of truth and reconciliation in the Transitional Justice model,[145] #MeToo stories of workplace sexual harassment have paved the way for better understandings of the abuses of the powerful.

As a result of #MeToo, the culture appears prepared to proceed on an individual basis. Individuals affected by sexual harassment are perhaps more likely to come forward, and juries are perhaps more inclined to believe them when they do. But until wide systemic change to the way sexual harassment claims are treated in the courts is possible, it's unclear what the #MeToo movement's legacy can be.

140. *Id.*

141. *Id.*

142. *See id.*

143. Hébert, *supra* note 11, at 323.

144. *Id.*

145. *See* Richard L. Goldstone, *Transitional Justice in Practice: The Importance of Context in Confronting Legacies of Mass Abuse*, 11 DREXEL L. REV. 835, 840–41 (2019) ("The most common form of transitional justice has been truth and reconciliation commissions. The victims are provided with a platform to speak about their experiences and, in that way, to receive public acknowledgment of what they suffered. It also has the benefit of compelling the public to 'look the beast in the eye' as Desmond Tutu put it." (footnotes omitted)).

IV. FITTING LAW TO CULTURE

Historically, when women found barriers to their opportunity to work from the courts, the legislative branch offered a solution.[146] For example, Lavinia Goodell (whose Wisconsin Supreme Court bar admission petition prompted that state supreme court justice to observe that allowing women to engage in the work of the courts would be "revolting")[147] prevailed at the Wisconsin legislature in 1877 when it enacted a law she had drafted that "prohibit[ed] denial of admission to the bar on account of sex."[148] Two years later, Belva Lockwood[149] gained admission to the United States Supreme Court bar after lobbying Congress for anti-discrimination legislation that opened the entire federal bar to women lawyers. [150] Prior to #MeToo, the courts' interpretations of anti-discrimination legislation frequently denied remedy for victims of workplace harassment and discrimination. From an intersectional viewpoint, the courts frequently deny women of color remedy by artificially fragmenting their experiences of workplace harassment and discrimination. This section discusses the gaps in judicial law and potentials for change in light of the changing culture, first in overall workplace discrimination claims and then in the particular juncture of the law where race and sex intersect.

A. *Sexual Harassment Law*

While Title VII of the Civil Rights Act of 1964 prohibits employer discrimination on the basis of sex,[151] sexual harassment has been included within the definition of "discrimination" only to the extent of judicial interpretation of

146. NORGREN, *supra* note 7, at x.

147. *Id.* at 65.

148. *Id.* at 68.

149. *See id.* at 185 (discussing Belva Lockwood as the woman who bought a bicycle to compete with her male counterparts and was criticized because the bicycle revealed her ankles).

150. *Id.* at x, 70.

151. 42 U.S.C. § 2000e-2–e-17 (2019).

the statute.[152] In fact, no federal statute expressly addresses workplace sexual harassment.[153] Title VII as enacted does not contemplate a cause of action for employees "who were subjected to unwanted sexual advances without suffering any tangible loss."[154] Rather, the legal theory of sexual harassment was first developed by Professor Catharine MacKinnon in her 1979 book *Sexual Harassment of Working Women*, where she defined sexual harassment as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."[155]

The following year, 1980, the Equal Employment Opportunity Commission published guidelines under Title VII that included sexual harassment, and from there courts "routinely held that hostile-environment sexual harassment did in fact create a cause of action."[156] In 1986, the United States Supreme Court ruled in *Meritor Savings Bank v. Vinson* that sexual harassment did constitute a legal cause of action as a violation of Title VII.[157] The Court acknowledged two types of sexual harassment: (1) quid pro quo and (2) hostile environment.[158] While "quid pro quo" can be "readily defined as wages, hours, or other terms and conditions of employment which a supervisor or employer predicates on the acquiescence of unwanted sexual favors,"[159] it can be difficult to succeed on

152. *See, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 752–53 (1998) (discussing *quid pro quo* harassment as a form of discrimination); Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (establishing an affirmative defense for vicarious liability of employers in sexual harassment claims); Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (discussing different approaches courts have on whether harassment is discrimination); Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (finding discrimination does include creating hostile work environment); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (finding severe or pervasive sexual harassment is actionable for discrimination claims).

153. Sherwyn, *supra* note 99, at 1269.

154. *Id.*

155. MACKINNON, *supra* note 99, at 1.

156. Sherwyn, *supra* note 99, at 1270.

157. 477 U.S. 57, 64–65 (1986).

158. *See id.* at 62.

159. Sherwyn, *supra* note 99, at 1271.

such a claim because the Court has since determined that employees must prove a "tangible effects" in order to recover.[160]

A claim of hostile environment discrimination does not require a showing of solely economic loss, provided the employee can prove conduct "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[161] However, as many legal scholars have observed, determining what conduct rises to the level of "severe and pervasive" has troubled the courts, practitioners, and scholars ever since.[162] Historically, judges have often held what some might consider highly shocking conduct to be not severe and pervasive enough to state a claim of sexual harassment.[163]

And yet, the #MeToo Movement "has taught the public that sexual harassment and sexual assault are pervasive in our society, and that millions of women can be counted among its targets."[164] The movement has highlighted the fact that even "common sexual conduct" can be severe within the context of a problem so serious and harmful that it "needs to be addressed rather than ignored."[165] As Professor L. Camille Hébert so aptly observes, "the realization that a large number of women have been targeted and harmed by sexual harassment, but have remained silent for years, may help shape the way in which the courts apply the rules by which employers can be held liable for

160. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753–54 (1998).

161. *Meritor Sav. Bank*, 477 U.S. at 67 (citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (internal quotation marks omitted).

162. *See, e.g.*, Sherwyn, *supra* note 99, at 1271–72 ("[T]hese terms remain far from clear, and lower courts struggle to determine what constitutes a hostile environment.…Difficulties with determining what type of conduct qualifies as unlawful sexual harassment continue to vex academicians, legal scholars, and practitioners. This uncertainty helps spawn numerous theories as to what is, and why people engage in, sexual harassment."); Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437 (2002) (analyzing the meaning of the *Oncale* Court's instruction to consider "social context" in hostile work environment claims).

163. *See supra* notes 1–6 and accompanying text.

164. Hébert, *supra* note 11, at 324.

165. *Id.* at 326.

the sexually harassing conduct."[166] Historically, legal challenges to sexual harassment claims have been rare, and successful challenges even rarer.[167] As the social changes brought on by the #MeToo movement make it more likely for those who have been sexually harassed to come forward with claims, the movement can also encourage changes in the legal culture to make those claims more likely to succeed.

B. *Potentials for Change in Light of #MeToo*

Cultural change brought on by #MeToo may result in changes in judicial attitudes toward (a) a more informed understanding of what discrimination based on sex means, (b) a more sensitive application of the "severe and pervasive" standard, and (c) adjusting the application of the *Faragher* affirmative defense for employers in vicarious liability claims.

1. *Because of sex: less like sex and more like discrimination*

In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court emphasized that a plaintiff bringing a sexual harassment claim "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *discrimination* . . . because of . . . sex."[168] Thus, discrimination on the basis of sex may be proved by showing that "the harassment was motivated by sexual desire or by gender hostility, as well as that the harassment represented different treatment of men and women."[169] As Professor Hébert has discussed, the traditional assumption of courts has been that sexual harassment most typically involves sexual advances by men to women, prompted by sexual desire.[170] However, many reported cases actually involve conduct more readily

166. *Id.*

167. *Id.* at 325.

168. 523 U.S. 75, 81 (1998) (internal quotation marks omitted).

169. Hébert, *supra* note 11, at 327; *see also Oncale*, 523 U.S. at 80–81.

170. Hébert, *supra* note 11, 327.

characterized as "hostile and degrading . . . motivated by . . . an effort to degrade and objectify its targets."[171] Adhering to the "motivated by sexual desire" framework, courts are more hesitant to find particular conduct serious enough to be classified as sexual harassment because such conduct has been "deemed socially acceptable."[172] In other words, prior to #MeToo, a man "expressing admiration or desire for a woman he finds sexually attractive [was] generally considered to be acting the way that society expects men to act, even if he undertakes that action in a less than socially accepted way."[173]

The stories that came to light through #MeToo underlined the fact that sexual harassment is more commonly "conducted by serial harassers rather than by misunderstanding suitors."[174] The movement changed cultural ideas about sexual stereotypes in which women in a workplace are often "expected to be sexually available to more powerful men."[175] An increased cultural awareness on the part of judges and juries about how sexual harassment can be motivated by gender discrimination may make these factfinders more willing to find this type of conduct outside the norm.[176]

2. *What constitutes "severe or pervasive" misconduct*

Judges may also look to #MeToo stories as an indication of what is the norm in sexual harassment, "rather than rely on dated lower court rulings."[177] The current legal standard for proving sexual harassment is "severe or pervasive" conduct.[178]

171. *Id.* at n.23 (citing L. Camille Hébert, *Sexual Harassment as Discrimination 'Because of . . . Sex: Have We Come Full Circle?*, 27 OHIO N.L. REV. 439 (2001)).

172. *Id.* at 327.

173. *Id.*

174. *Id.* at 327.

175. *Id.*

176. *See id.*

177. Tippett, *supra* note 9, at 235–36; *see also* Sperino & Thomas, *supra* note 3.

178. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) ("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." (internal quotation marks omitted)).

What is considered "severe or pervasive" depends on the cultural understanding of sexual harassment in the workplace. In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that Title VII only protects against conduct "severe or pervasive enough to create an objectively hostile or abusive work environment," and which the victim herself perceives as abusive by "actually alter[ing] the conditions of [her] employment."[179] The ends of the spectrum are clear: the rape of an employee by a supervisor will be found severe, day-in-day-out taunting and use of sexual epithets will be found pervasive.[180] On the other hand, the conduct of a supervisor who asks an employee out on a date once and treats her no differently after refusal will never meet the threshold.[181] Everything in between has been subject to uncertainty, and historically courts have "err[ed] on the side of dismissal."[182] The federal courts interpreting the standard in the 1990s set the bar very high for plaintiffs, and these interpretations "have not aged well," particularly in light of #MeToo.[183]

It is a problem that is perhaps not entirely unique to sexual harassment law. As law professors and authors Sandra Sperino and Suja Thomas explain, employment discrimination overall has "come to operate in a fundamentally different legal universe from other kinds of claims" over the last fifty years.[184] "A host of procedural, evidentiary and substantive mechanisms" have grown up to strongly favor employers, in race discrimination lawsuits as well as sexual harassment suits.[185] Sperino and Thomas suggest that Congress could either amend Title VII "to ensure the courts interpret its language broadly," or otherwise legislate away court-created doctrines

179. 510 U.S. 17, 21–22 (1993).
180. Sperino & Thomas, *supra* note 3.
181. *Id.*
182. *Id.*
183. *See id.*
184. *Id.*
185. *Id.*

like the severe and pervasive standard.[186] However, general Congressional deadlock and the attitudes of senators during the Kavanaugh hearings suggests that the current Congress is unlikely to move quickly on any kind of reform legislation to Title VII. The easiest way for #MeToo to reach the severe and pervasive conduct standard appears to be in changing the attitudes of judges in interpreting the standard.[187]

3. *Adjusting the* Faragher/Ellerth *defense for employer liability*

As a result of #MeToo's "reveal[ing] defects in employers' internal compliance systems," factfinders may be less willing to accept the *Faragher* defense and find an employer's "efforts to prevent and address discrimination" reasonable.[188] Because employers are strictly liable for discrimination and retaliation but harassment has more in common with tort claims while still "enabled by the power delegated to [a harasser] through the employer," courts have developed "a complex series of standards governing vicarious liability for harassment."[189]

Under *Faragher v. City of Boca Raton*, vicarious liability for harassment depends on whether the perpetrator was a coworker or a supervisor.[190] In the case of coworkers, liability attaches if the plaintiff can prove negligence on the part of the employer, requiring a showing that the employer knew or should have known about the harassment and subsequently failed to act to prevent the harassment, or discouraged the filing of complaints in some way, or failed to implement measures to correct the behavior once complaints were made.[191] In the case of supervisors, strict liability attaches in cases falling more in the quid pro quo category than the hostile work environment category: where the supervisor takes a tangible retaliatory

186. *Id.*

187. *See* Tippett, *supra* note 9, at 237–43.

188. *Id.* at 236.

189. *Id.* at 238.

190. 524 U.S. 775, 807 (1998).

191. *Id.* at 799–800; Vance v. Ball State Univ., 570 U.S. 421, 448–49 (2013).

action against the plaintiff like demoting or firing her.[192] Without a tangible employment action, there is a presumption toward liability in the creation of a hostile work environment, rebuttable by the employer establishing the affirmative *Faragher* defense.[193] There are two elements to a *Faragher* defense, both measured on a reasonableness standard: (1) that the employer took measures to prevent the harassment, and (2) that the plaintiff failed to make appropriate use of those measures.[194]

The cultural shift around #MeToo "exposed problems with the way employers implemented their internal processes."[195] Many high-level employees remained in their positions despite growing lists of harassment complaints, suggesting a pervasive failure by employers to "meaningfully redress the problem."[196] Such revelations may serve to adjust the courts' understanding of the first element of the *Faragher* defense by redefining what is acceptable corrective action by employers fielding sexual harassment complaints.[197] Additionally, the new awareness of the serial nature of many perpetrators' conduct can increase the requirements of an employer's response under either the affirmative defense or the negligence standard.[198] Finally, the sheer number of women coming forward with similar stories spanning years, and similar reasons for remaining silent until now, should engender a more realistic view in the courts of what constitutes a plaintiff's reasonable use of an employer's reporting measures under the second element of the *Faragher* defense.[199]

The #MeToo movement has led to increased cultural awareness around the realities of sexual harassment in this country. These shifting cultural norms present an extraordinary

192. *Faragher*, 524 U.S. at 807–08.

193. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. at 807.

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

195. Tippett, *supra* note 9, at 243.

196. *Id.*

197. *See* Hébert, *supra* note 11, at 330–31.

198. *See id.* at 332.

199. *See id.*

opportunity for all stakeholders in civil justice to reform the legal notions of what is reasonable, severe, or pervasive in the context of sexual harassment.

C. *Intersectionality and Discrimination Law*

The gender essentializing problem of normalizing white women's experiences to the marginalization of black women's experiences has already been analyzed in a legal context. For instance, Kimberlé Williams Crenshaw's first intersectional work examined the limitations of anti-discrimination law, finding that "in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women."[200] As Crenshaw explains:

> Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.[201]

Therefore, the existing framework "for translating 'women's experience' or 'the Black experience' into concrete policy demands" is fundamentally flawed from an intersectional viewpoint "[b]ecause the intersectional experience is greater than the sum of racism and sexism."[202]

200. Crenshaw I, *supra* note 77, at 140.

201. *Id.* at 149.

202. *Id.* at 140.

Similarly, in the context of discrimination claims under Title VII, Judy Scales-Trent argues that "[i]f the race stigma alone is sufficient to trigger strict scrutiny review, the race stigma plus an additional stigma (sex) should entitle the group to an even higher level of scrutiny and protection by the Court."[203] While Scales-Trent acknowledges that this is an unlikely approach for the Supreme Court, she offers it as the "logical next step" for a court brave enough to implement it.[204] Ultimately, "[a] legal analysis that recognizes the factions created by the larger society is only recognizing the historical and social realities that make certain remedies necessary."[205]

As discussed above, Catharine MacKinnon developed the legal theory of sexual harassment. At the same time, it is MacKinnon's work that drew the critique of gender essentialism from Kimberlé Crenshaw and other intersectional thinkers discussed in Section II of this Note. When the very basis of the legal theory has gender essentialist roots, it is not clear that it can be used to benefit those whose experiences it sought to marginalize. The changes to judge-made sexual harassment law proposed in this Note can only ever be a first step in a greater reform of discrimination law in general. Making sexual harassment law fairer to women of color is not a project to be accomplished by one white law student. But, any person seeking to turn the cultural movement around sexual harassment into a legal movement that actually provides justice for survivors must keep the question of racial equity in mind.

CONCLUSION

#MeToo exposed people to "the ways in which the law can be misused to enable and conceal harassment."[206] The work of

203. Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, *in* CRITICAL RACE FEMINISM 42, 45 (Adrien Katherine Wing ed., 2d ed. 2003).

204. *Id.* at 46.

205. *Id.* at 47 n.19.

206. Tippett, *supra* note 9, 234.

reforming these miscarriages of justice has already begun.[207] Judges and juries are empowered to redefine legal standards in light of a shifting cultural awareness.[208]

Strangely for a profession so committed to advancing justice for others, the #MeToo movement hasn't directly affected the legal industry much. "Lawyers—in particular, female lawyers—often tend to shy away from publicly sharing personal stories of sexual harassment or even from generally supporting the #MeToo movement out of fear it will draw unwelcome scrutiny from superiors and clients."[209] Female attorneys are finding their own ways of creating community online, behind privacy protections, and "[m]uch of the conversation these days has evolved toward helping female lawyers weave their way through the implicit gender bias and sexism that form the cornerstone of sexual misconduct."[210] Certainly these are necessary steps in establishing safe and healthy workplace environments for lawyers. Meanwhile, the #MeToo movement has opened up a whole new world of trial advocacy for enterprising or social-justice-minded plaintiffs' attorneys to expose rampant misconduct on the part of perpetrators and employers alike.[211]

The culture change spurred by #MeToo is not enough, however. It is perhaps as much "a diversion of energies and a tragic repetition of racist patriarchal thought" to repeat what critical race feminists have already been saying for nearly forty years as it is for women "to educate men as to our existence and

207. *Id*. at 234–35 ("The Time's Up Initiative, led by prominent lawyers and Hollywood power players . . . issued a summary of their proposed response. Anita Hill . . . is chairing a committee on harassment in media. A number of states . . . are considering legislation banning certain types of non-disclosure agreements. Congress is working on changes to its process for handling harassment complaints by congressional employees. Legislators have also introduced bills restricting the use of arbitration agreements in harassment disputes, and separately require employers to disclose settlements of harassment and discrimination claims.").

208. *See* discussion *infra* Part IV.

209. Natalie Rodriguez, *Beyond #MeToo: How Female Lawyers Are Mobilizing Online*, LAW360 (Mar. 18, 2018).

210. *Id.*

211. *See* Tippett, supra note 9, 248–49.

our needs" or for "women of color to educate white women—in the face of tremendous resistance" as to their existence, differences, and place in the movement.[212] As Audre Lorde noted in 1979, a majority requiring the minority to educate it is "an old and primary tool of all oppressors to keep the oppressed occupied with the master's concerns."[213] And yet paradoxically, the difficulties and differences that arise from intersectional identities cannot be addressed unless they are spoken about—spoken about over and over again in new ways and old. The trauma of sexual harassment cannot be addressed unless these stories are told. The journey of turning this cultural moment into a legal movement of redress should begin with the first steps discussed here.

The work toward someday ending workplace sexual harassment entirely, so that redress is itself unnecessary, has to begin from the ground up—in negating fear of retaliation and increasing the usefulness in speaking up. As Tarana Burke, founder of the #MeToo movement said, "[w]e have to talk to survivors for what they need. We are the ones who have to define what justice looks like."[214] It is a goal that requires cultural change as much as it requires legal change. As Tarana Burke also noted, it is unlikely that we can "legislate [our] way into teaching somebody to treat another person as a human being."[215] Perhaps the only real way to change the culture is to teach the meaning of consent to the next few generations—to "really interrogate the way that we raise [a]nd . . . socialize our

212. Ford, *supra* note 65 (quoting AUDRE LORDE, THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE 3 (1984)).

213. *Id.* (quoting AUDRE LORDE, THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE 3 (1984)).

214. Chris Snyder & Linette Lopez, *Tarana Burke on Why She Created the #MeToo Movement—And Where It's Headed*, BUS. INSIDER (Dec. 13, 2017, 10:16 AM), https://www.businessinsider.com/how-the-metoo-movement-started-where-its-headed-tarana-burke-time-person-of-year-women-2017-12.

215. Warfield, *supra* note 108.

children"[216]—and to put more women into positions of power to break up the old boys' clubs.[217]

216. *Id.*

217. Campbell, *supra* note 123.