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## #METOO, TIME'S UP, AND THEORIES OF JUSTICE

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*Allegations against movie mogul Harvey Weinstein and the ensuing #MeToo movement opened the floodgates to a modern-day reckoning with sex discrimination in the workplace. High-level and high-profile individuals across industries have been fired, been suspended, or resigned, while others accused of wrongdoing have faced no consequences, gotten slaps on the wrists, or ascended to the highest levels of power. At the same time, serious concerns have been raised about useful processes by which nonprivileged women and men can address harassment, due process for those accused of misconduct, and the need for proportionate consequences. And there have been calls for both restorative and transformative justice in addressing this problem. But these calls have not been explicit about what sort of restoration or transformation is envisioned.*

*This Article explores the meaning, utility, and complexities of restorative justice and the insights of transitional justice for dealing with sexual misconduct in the workplace. We begin by documenting the restorative origins of #MeToo as well as exploring steps taken, most prominently by Time's Up, to amplify and credit survivors' voices, seek accountability, change workplace practices, and encourage access to the legal system. We then take up the call for restorative justice by exploring its key components—including acknowledgement, responsibility-taking, harm repair, nonrepetition, and reintegration—with an eye toward how these*

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components might apply in the context of addressing sexual assault and harassment in the workplace and in the world at large.

We then turn to the insights of transitional justice. We identify several characteristics of transitional societies that are shared with the #MeToo setting, including widespread patterns of misconduct, structural inequalities, a history of denial, the normalization of wrongful behavior, and uncertainty about the way forward. We use these insights to provide guidance for ongoing reform efforts. First, we highlight the importance of including both forward-looking and backward-looking approaches to addressing wrongful behavior. Second, we emphasize the vital importance of including and addressing the interests of marginalized groups within the larger movement. Inclusion facilitates knowing about and acknowledging specific intersectional harms, and also models the kinds of equal relationships that individuals in marginalized groups seek. Third, we emphasize the need for holism in responses that attempt to spur societal change. #MeToo reformers must diversify their strategies and not over-rely on the promise of any particular form of justice.

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## I. INTRODUCTION

A growing number of high-profile incidents have recently drawn attention to sex discrimination in the workplace. Allegations against movie mogul Harvey Weinstein and the ensuing #MeToo movement opened the floodgates to a modern-day reckoning with sexist behavior. High-level and high-profile individuals across industries have been fired, been suspended, and resigned over their misdeeds,<sup>1</sup> while others accused of wrongdoing have faced no consequences, gotten slaps on the wrists, or ascended to the highest levels of power.<sup>2</sup> At the same time, serious concerns have been raised about realistic opportunities for nonprivileged women to address harassment, due process for those accused of misconduct, and the need for proportionate consequences. And there have been calls, most notably from actress Laura Dern in her acceptance speech at the Golden Globes, for the use of “restorative justice” as well as calls, most prominently from actress Minnie Driver, for a transformative justice process to address this problem.<sup>3</sup> But these calls have not been explicit about what sort of restoration or transformation is envisioned. This Article explores the meaning, utility, and complexities of restorative justice for dealing with sexual misconduct in the workplace. In addition, we draw on the insights of transitional jus-

1. 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>.

2. Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blaisey-metoo-supreme-court.html>; see also Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/>; Jenna Marotta, *Beyond Chris Hardwick and James Franco: 12 More Men Back at Work Following Their #MeToo Accusations*, INDIEWIRE (July 27, 2018, 9:00 AM), <https://www.indiewire.com/2018/07/chris-hardwick-james-franco-metoo-men-back-at-work-metoo-1201988069/>. Those allowed to retain their jobs with minor sanctions include our own colleague Jay Kesan. Julie Wurth, *Accusers: Sanctions Against UI Law Professor Fall Short*, CHAMPAIGN NEWS-GAZETTE (Oct. 19, 2018, 6:00 AM), <http://www.news-gazette.com/news/local/2018-10-19/accusers-sanctions-against-ui-law-professor-fall-short.html>.

3. Laura Bradley, *Golden Globes 2018: See Laura Dern’s Inspiring Acceptance Speech*, VANITY FAIR (Jan. 7, 2018, 9:38 PM), <https://www.vanityfair.com/hollywood/2018/01/golden-globes-2018-laura-dern-speech>  
-big-little-lies; Kimiko de Freytas-Tamura, *Minnie Driver Calls for ‘Truth and Reconciliation’ Model to Combat Sexual Assault*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/world/europe/minnie-driver-metoo.html>.

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tice to link the victim and perpetrator-oriented concerns of restorative justice with a broader aim of transformation.

In Part II, we document the mechanisms by which #MeToo has ignited a cultural reckoning and identify its restorative and transformative origins. We explore the steps that have been taken in the wake of the #MeToo naming and shaming campaign, most prominently by the Time's Up movement, to amplify and credit survivors' voices, seek accountability, change workplace practices, and encourage access to the legal system. We also note due process concerns about these efforts, including a particular concern with proportionate consequences for varied wrongdoing.

In Part III, we take up the call for restorative justice by exploring its key components—including acknowledgement, responsibility-taking, harm repair, nonrepetition, and reintegration—with an eye toward how these components might apply in the context of addressing sexual harassment in the workplace. In doing so, we examine several high-profile apologies and other responses to accusations of misconduct, consider the ways in which these responses succeed or fail on these restorative dimensions, and illustrate some of the potential and limits of offender reintegration.

In Part IV, we turn more broadly to a set of insights that come from the transitional justice literature which examines how nations respond to wrongdoing as they transition away from extended periods of conflict or oppression toward systems of democracy. By exploring this literature, we glean some lessons for the current societal transformation associated with the #MeToo movement. We explain why the settings of postconflict societies are appropriate places to look for lessons and warnings, noting that these transitions share some key features of the context of #MeToo. Such features include prevalent wrongdoing, structural inequalities, a history of denial, the normalization of wrongful behavior, and uncertainty about the way forward. In particular, we use Part IV as an opportunity to explain the importance of linking the sorts of individual responses to past wrongs detailed in Part III to the broader institutional reforms articulated in Part II.

We conclude with some guidance for ongoing reform efforts. First, we highlight the importance of incorporating both forward-looking and backward-looking approaches to addressing wrongdoing. Past #MeToo victims deserve justice, accountability, and attention to their harms just as reformers must set their sights on transforming society going forward. Second, we emphasize the vital importance of including and addressing the interests of marginalized groups within the larger movement for workplace and societal sex equality. An inclusive approach is necessary because it is important to know about, acknowledge, and address specific intersectional harms. Taking an inclusive approach also models the kinds of equal relationships that are appropriate across other dimensions such as race, sexual orientation, gender orientation, and disability. Third, we emphasize the need for holism and a range of different strategies in trying to spur societal change. A focus on a singular strategy—such as one rooted in access to litigation and prosecutions—may obscure larger

institutional and societal issues. But an approach that tries to bypass that strategy may miss the essential ways in which law structures interactions as well as the roadblocks and protections it offers to survivors, alleged perpetrators, and those found to be wrongdoers.

## II. A MODERN-DAY RECKONING

Several high-profile, pre-#MeToo incidents raised the profile of sex discrimination in the workplace. These include: the revelation of the toxic culture at Uber and the toppling of its CEO Travis Kalanick;<sup>4</sup> accusations by journalists Megyn Kelly and Gretchen Carlson of harassment by network head Roger Ailes and subsequent settlements with Fox News;<sup>5</sup> Bill O'Reilly's \$32 million sexual harassment settlement and Fox's subsequent decision to renew his contract;<sup>6</sup> the revelation that thousands of Marines used a private Facebook group to solicit and share naked photographs of servicewomen,<sup>7</sup> and Taylor Swift's countersuit against a DJ who grabbed her during a meet and greet.<sup>8</sup> Pay discrimination also captured the public's attention. Examples include: open discussion of the extreme pay gap on the movie *American Hustle*<sup>9</sup> and actress Jennifer Lawrence's subsequent essay about gendered negotiating in Hollywood;<sup>10</sup> tennis champion Serena Williams' essay on the pay gap for women of color across industries;<sup>11</sup> and actresses Robin Wright's and Emmy Rossum's highly publicized demands for pay equity on their hit television shows.<sup>12</sup>

Other instance of wrongdoing in the headlines pre-#MeToo involved sexual misconduct outside the workplace. Nineteen women have raised allegations

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4. Editorial Board, *Uber's Sexism Lesson: How Not to Build a Tech Company*, CHI. TRIB. (June 16, 2017, 11:48 AM), <http://www.chicagotribune.com/news/opinion/editorials/ct-uber-tech-culture-sexism-edit-0618-md-20170616-story.html>; Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN J. FOWLER (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>.

5. Michael M. Grynbaum & John Koblin, *Fox Settles with Gretchen Carlson over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html>.

6. Paul Farhi, *Report: Bill O'Reilly Settled Sexual Harassment Claim from Fox News Contributor for \$32 Million*, WASH. POST (Oct. 21, 2017), [https://www.washingtonpost.com/lifestyle/style/bill-oreilly-settled-sixth-sexual-harassment-claim-for-32-million/2017/10/21/ff34b24c-b68c-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.eb9411ba80b3](https://www.washingtonpost.com/lifestyle/style/bill-oreilly-settled-sixth-sexual-harassment-claim-for-32-million/2017/10/21/ff34b24c-b68c-11e7-9e58-e6288544af98_story.html?utm_term=.eb9411ba80b3).

7. Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL NEWS (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/>.

8. Lesley Wexler, *Ideal Victims and the Damage of a Damage Free Victory*, VERDICT (Sept. 29, 2017), <https://verdict.justia.com/2017/09/29/ideal-victims-damage-damage-free-victory>.

9. This pay gap was exposed by the Korean hack of the Sony corporation. The issue dominated a Hollywood Roundtable among top executives. Pamela McClintock & Kim Masters, *Studio Chiefs Unleashed: 6 Top Execs Spar over Gender Pay, Sony Hack and 'Star Wars' Box Office*, HOLLYWOOD REP. (Nov. 4, 2015, 10:00 AM), <https://www.hollywoodreporter.com/features/studio-chiefs-unleashed-6-top-836272>.

10. Jennifer Lawrence, *Jennifer Lawrence: "Why Do I Make Less than My Co-Stars?"*, LENNY (Oct. 13, 2015), <https://www.lennyletter.com/story/jennifer-lawrence-why-do-i-make-less-than-my-male-costars>.

11. Serena Williams, *Serena Williams: How Black Women Can Close the Pay Gap*, FORTUNE (July 31, 2017), <http://fortune.com/2017/07/31/serena-williams-black-women-equal-pay/>.

12. L.V. Anderson, *Emmy Rossum Reportedly Got the Equal Pay She Asked for on Shameless*, SLATE (Dec. 15, 2016, 3:37 PM), [http://www.slate.com/blogs/xx\\_factor/2016/12/15/emmy-rossum\\_reportedly\\_got\\_the\\_equal\\_pay\\_she\\_asked\\_for\\_on\\_shameless.html](http://www.slate.com/blogs/xx_factor/2016/12/15/emmy-rossum_reportedly_got_the_equal_pay_she_asked_for_on_shameless.html).

of sexual misconduct against candidate and now-President Trump.<sup>13</sup> More than fifty women had accused comedian Bill Cosby of sexual misconduct,<sup>14</sup> and his former mentee, Andrea Constad, had brought a sexual assault case.<sup>15</sup> The criminal and civil cases against sports physician Larry Nassar for the sexual abuse of numerous gymnasts and other athletes at Michigan State University and USA Gymnastics were already drawing national attention.<sup>16</sup> The victim impact statement of one anonymous rape victim, Emily Doe, went viral, generating a public backlash against the six-month prison sentence given to her rapist, Brock Turner.<sup>17</sup>

While all of these events, along with countless other lower profile incidents, set the stage, the efforts of victims like actresses Ashley Judd and Rose McGowan and the related *New York Times* and *New Yorker* exposés<sup>18</sup> on Harvey Weinstein opened the floodgates to the modern-day reckoning with sexual and sexist abuse in the workplace as well as questions of workplace consequences for sexist nonworkplace behavior.

#### A. #MeToo: Naming and Shaming

Shortly after the Weinstein story broke, actress Alyssa Milano asked Twitter users to respond using the hashtag #MeToo if they had been sexually harassed or assaulted.<sup>19</sup> Reports flowed in of the all-too-common harassment and physical abuse many experience in the workplace.<sup>20</sup> Some of the reports tagged with #MeToo included workplace behavior that would not violate

13. Matt Ford, *The 19 Women Who Accused President Trump of Sexual Misconduct*, ATLANTIC (Dec. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/12/what-about-the-19-women-who-accused-trump/547724/>.

14. Carly Mallenbaum, Patrick Ryan & Maria Puente, *A Complete List of the 60 Bill Cosby Accusers and Their Reactions to His Prison Sentence*, USA TODAY (Sept. 26, 2018, 11:27 AM), <https://www.usatoday.com/story/life/people/2018/04/27/bill-cosby-full-list-accusers/555144002/>.

15. Manuel Roig-Franzia, *Bill Cosby Convicted on Three Counts of Sexual Assault*, WASH. POST (Apr. 26, 2018), [https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1f1ee\\_story.html?noredirect=on&utm\\_term=.232e7e32e422](https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1f1ee_story.html?noredirect=on&utm_term=.232e7e32e422).

Cosby's first trial had ended with a hung jury. Hannah Rappleye & Tracy Connor, *Bill Cosby Sexual Assault Trial Ends in Mistrial*, NBC (June 17, 2017, 9:22 AM), <https://www.nbcnews.com/storyline/bill-cosby-scandal/hung-jury-bill-cosby-sexual-assault-trial-ends-mistrial-n772106>.

16. Alice Park, *Who Is Larry Nassar, the Former USA Gymnastics Doctor Aly Raisman Accuses of Sexual Abuse?*, TIME (Nov. 10, 2017, 9:14 AM), <http://time.com/4988116/larry-nassar-mckayla-maroney-sexual-abuse-doctor-usa-gymnastics/>.

17. Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.njPPvEmgN#.unedmWwQy](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.njPPvEmgN#.unedmWwQy).

18. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>; 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>.

19. Sophie Gilbert, *The Movement of #MeToo: How a Hashtag Got Its Power*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>.

20. *Id.*

criminal or civil laws, workplace conduct that was abusive but not sexual or sexist in nature, and sexually violative or sexist behavior in nonworkplace settings.<sup>21</sup> Within twenty-four hours, the hashtag had been posted over half a million times and people started sharing details of their abuse across social media platforms.<sup>22</sup> Alyssa Milano's #MeToo was not styled as a social movement and "[wa]sn't a call to action or the beginning of a campaign, culminating in a series of protests and speeches and events. It [wa]s simply an attempt to get people to understand the prevalence of sexual harassment and assault in society. To get women, and men, to raise their hands."<sup>23</sup> In other words, it was intended to be informative and perhaps enhance the believability of victims.

The seeming apoliticism of #MeToo collided almost immediately with activist Tarana Burke's pre-existing "Me Too" social movement which focuses on women of color and people in marginalized communities and uses self-identification as a way to build bridges among survivors.<sup>24</sup> Burke quickly tied the two MeToo's together, tweeting, "It's beyond a hashtag. It's the start of a larger conversation and a movement for radical community healing. Join us. #metoo."<sup>25</sup> Even as she used #MeToo to gain visibility, Burke views her Me Too work as inherently different from the hashtag campaign and focused on distinct goals.<sup>26</sup> Burke's vision of #MeToo is not about "taking down powerful white men and tearing down their name"<sup>27</sup> but is instead focused on the survivors<sup>28</sup> and on community healing.<sup>29</sup> Even as she emphasizes the role of and focus on survivors, she also recognizes the value of addressing the systems and structures that allow harassment and sexual violence to flourish.<sup>30</sup> Such a vision

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21. See, e.g., Emma Gray, *On Aziz Ansari and Sex that Feels Violating Even When It's Not Criminal*, HUFF. POST (Jan. 16, 2018, 2:37 PM), [https://www.huffingtonpost.com/entry/aziz-ansari-sex-violating-but-not-criminal\\_us\\_5a5e445de4b0106b7f65b346](https://www.huffingtonpost.com/entry/aziz-ansari-sex-violating-but-not-criminal_us_5a5e445de4b0106b7f65b346).

22. Gilbert, *supra* note 19.

23. *Id.*

24. Zenobia Jeffries, *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>.

25. Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It 10 Years Ago*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm\\_term=.951364a29166](https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.951364a29166).

26. Jeffries, *supra* note 24.

27. Erica Carter, *#MeToo Founder Tarana Burke Speaks at Kent State*, KENTWIRED (Apr. 17, 2018), [http://www.kentwired.com/latest\\_updates/article\\_519dcd3a-4250-11e8-9349-cfd9e886110a.html](http://www.kentwired.com/latest_updates/article_519dcd3a-4250-11e8-9349-cfd9e886110a.html).

28. Annie Sciacca, *#MeToo Founder Tarana Burke in East Bay: It's Not About Taking Down Powerful Men*, EAST BAY TIMES (Apr. 15, 2018, 7:08 PM), <https://www.eastbaytimes.com/2018/02/28/me-too-founder-tarana-burke-speaks-to-bay-area-crowd-at-saint-marys-college/>.

29. Alex Tsai, *'Me Too' Activist Uses Social Justice as a Path to Healing*, STANFORD DAILY (May 30, 2018), <https://www.stanforddaily.com/2018/05/30/me-too-activist-uses-social-justice-as-a-path-to-healing/>.

30. Jennifer Smola, *Founder of 'Me Too' Movement Fears Narrative Being Hijacked from Helping Survivors Heal*, COLUMBUS DISPATCH (Apr. 23, 2018, 8:26 PM), <http://www.dispatch.com/news/20180423/founder-of-me-too-movement-fears-narrative-being-hijacked-from-helping-survivors-heal> ("This is about systems. There were systems in place that allowed [perpetrators of sexu-



does not preclude individual accountability, but recenters such efforts as part of survivors' agency and healing.<sup>31</sup> Thus, Burke's vision of healing seems to include: creating connections and sharing empathy among survivors; external recognition of victims by the community; discussions of accountability, transparency, and vulnerability by perpetrators; and considerations of how "collectively, to start dismantling these systems that uphold and make space for sexual violence."<sup>32</sup>

The combination of #MeToo's shift to the outing of specific wrongdoers,<sup>33</sup> investigative journalism,<sup>34</sup> and enhanced public scrutiny has led to the firing, suspension, or resignation of high-level and high-profile individuals across industries, including government and politics,<sup>35</sup> acting and producing,<sup>36</sup> comedy,<sup>37</sup> media,<sup>38</sup> food,<sup>39</sup> music,<sup>40</sup> photography,<sup>41</sup> and venture capital.<sup>42</sup> Even a few

al violence] to behave the way they behaved . . . It has to be a movement about how we dismantle the systems, not the individuals.").

31. For instance, in discussing Harvey Weinstein's arrest, she emphasized that "[t]his is not a moment to revel in how the mighty have fallen but instead in how the silenced have spoken up, stood together and survived." *Reaction to Criminal Charges Filed in New York Against Harvey Weinstein*, ASSOC. PRESS (May 25, 2018), <https://apnews.com/a38564e509e24909b3bcc0c24cc706b4>.

32. Daisy Murray, 'Empowerment Through Empathy'—We Spoke to Tarana Burke, the Woman Who Really Started the 'Me Too' Movement, ELLE (Oct. 23, 2017), <https://www.elle.com/uk/life-and-culture/culture/news/a39429/empowerment-through-empathy-tarana-burke-me-too/>.

33. Jessica Valenti, #MeToo Named the Victims. Now, Let's List the Perpetrators, GUARDIAN (Oct. 17, 2017, 2:00 PM), <https://www.theguardian.com/commentisfree/2017/oct/16/me-too-victims-perpetrators-sexual-assault>.

34. Mike Dang, *Longreads Best of 2017: Investigative Reporting on Sexual Misconduct*, LONGREADS (Dec. 15, 2017), <https://longreads.com/2017/12/15/longreads-best-of-2017-investigations-sexual-misconduct/>.

35. Katie Bender, *At the Justice Dept.'s Death Penalty Unit, Accusations of Favoritism, Gender Bias, and Unwanted Groping*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/politics/justice-department-harassment-bias.html>; Maggie Haberman, Julie Hirschfield Davis & Michael S. Schmidt, *Kelly Says He's Willing to Resign as Abuse Scandal Roils White House*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/us/politics/trump-porter-abuse.html> (mentioning Rob Porter and David Sorensen); *Sexual Abusers of 2017*, ULTRAVIOLET (Dec. 29, 2017), <https://weareultraviolet.org/men-accused-sexual-abuse-2017/> (mentioning Al Franken, John Conyers, Trent Franks, and Tony Comish).

36. Consequence of Sound Staff, *A Running List of All the Dudes Accused of Sexual Misconduct Since Harvey Weinstein*, CONSEQUENCE OF SOUND (Jan. 27, 2018, 10:40 PM), <https://consequenceofsound.net/2018/01/a-running-list-of-all-the-dudes-accused-of-sexual-misconduct-since-harvey-weinstein/> (including Kevin Spacey, Jeffrey Tambor, James Toback, Roy Price, John Lasseter, and Mark Schwab).

37. In addition to Louis C.K., comedian T.J. Miller is facing employment consequences. Chris Pleasance, *TJ Miller Is Replaced as the Spokesman for Mucinex After Being Accused of Hitting and Sexually Assaulting an Ex-Girlfriend*, DAILY MAIL (Feb. 7, 2018, 7:03 AM), <https://www.dailymail.co.uk/news/article-5362259/TJ-Miller-replaced-Mucinex-spokesman-sex-claims.html>.

38. Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC (Nov. 8, 2017, 3:50 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> (including Matt Lauer, Charlie Rose, Mark Halperin, Leon Wisetler, Glenn Thrush, Tavis Smiley, and Ryan Lizza); Ben Sisario, *What Makes Public Radio 'Very Personal' Magnifies Its #MeToo Cases*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/business/media/public-radio-metoo-harassment.html> (including Garrison Keillor, Leonard Lopate, Jonathan Schwartz, John Hockenberry, Michael Oreskes, David Sweeney, Daniel Zwerdling, Charlie Rose, and Tom Ashbrook).

39. Kim Severson, *After Apologies, Restaurants Struggle to Change*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/dining/restaurants-sexual-harassment.html> (including John Besh, Charlie Halliwell, Ken Friedman and Mario Batali). For a scathing takedown of Mario Batali's apology, see Geraldine DeRuiter, *I Made the Pizza Cinnamon Rolls from Mario Batali's Sexual Misconduct Apology Letter*, MEDIUM

individuals in fields with extensive workplace protections such as academia<sup>43</sup> and the judiciary<sup>44</sup> have been brought low.

Even as a house cleaning is necessary, many worry that #MeToo's victories will be short-lived in the absence of deeper structural and cultural changes.<sup>45</sup> Public shaming, for example, may not be a robust option for most employees because of the low profile of those involved.<sup>46</sup> Highlighting this point, Alianza Nacional de Campesinas, representing 700,000 farmworkers, penned a public letter of solidarity to Hollywood women that noted the additional difficulties that nonprivileged women face in choosing to name their abusers.<sup>47</sup> In addition, the naming and shaming campaign does not solve ongo-

(Jan. 10, 2018), <https://medium.com/@everywhereist/i-made-the-pizza-cinnamon-rolls-from-mario-batalis-sexual-misconduct-apology-letter-ef927659cab6>; see also Helen Rosner, *The Moral Responsibility of Restaurant Critics in the Age of #MeToo*, NEW YORKER (Feb. 15, 2018), <https://www.newyorker.com/culture/annals-of-gastronomy/the-role-of-the-restaurant-critic-in-the-age-of-metoo>; Julia Moskin & Kim Severson, *Ken Friedman, Power Restaurateur, Is Accused of Sexual Harassment*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/dining/ken-friedman-sexual-harassment.html?module=inline>.

40. Chloe Cornish & Lauren Leatherby, *Who Are the Men Accused of Sexual Harassment?*, FIN. TIMES (Dec. 8, 2017), <https://www.ft.com/content/204ab48c-d54f-11e7-a303-9060cb1e5f44> (discussing Russell Simmons and James Levine).

41. Vanessa Friedman & Elizabeth Paton, *Terry Richardson Is Just the Tip of the Iceberg*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/style/terry-richardson-sexual-harassment-fashion-photographers.html>.

42. Cornish & Leatherby, *supra* note 40.

43. Associated Press, *Dean Accused of Misconduct Gets New NKU Job After Resigning*, U.S. NEWS & WORLD REPORT (Feb. 22, 2018, 3:48 AM), <https://www.usnews.com/news/best-states/kentucky/articles/2018-02-22/dean-accused-of-misconduct-gets-new-nku-job-after-resigning> (discussing resignation of a Law Dean in the wake of a University finding of "sufficient evidence to support a finding of unhealthy culture of fear, intimidation and bullying" but insufficient evidence for a sexual misconduct complaint); Vivian Wang, *At Columbia, Three Women, 30 Years and a Pattern of Harassment*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/nyregion/columbia-university-sexual-harassment-three-decades.html>. But, for a more typical case, see Tom Bartlett & Nell Gluckman, *She Left Harvard. He Got to Stay.*, CHRON. HIGHER EDUC. (Feb. 27, 2018), <https://www.chronicle.com/interactives/harvard-harassment.include>; see also Wurth, *supra* note 2. See generally Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671 (2018).

44. Matt Zapposky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.203c36f41f26](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.203c36f41f26).

45. Take, for example, the difficulties of overhauling sexist workplace culture at blue collar mainstays like Ford even in the wake of successful lawsuits and Ford's subsequent apology. Susan Chira & Catrin Einhorn, *Ford Apologizes for Sexual Harassment at Chicago Factories*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/ford-apology-sexual-harassment.html>; Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>.

46. Amelia Harnish, *The Post-Weinstein Reckoning: What Do We Do Now?*, REFINERY29 (Nov. 29, 2017, 4:20 PM), <https://www.refinery29.com/en-gb/2017/11/183159/after-me-too-punishment-accountability-what-to-do-next>; see also Nathan Heller, *The Gig Economy Is Especially Susceptible to Sexual Harassment*, NEW YORKER (Jan. 25, 2018), <https://www.newyorker.com/culture/cultural-comment/the-gig-economy-is-especially-susceptible-to-sexual-harassment>.

47. Alianza Nacional de Campesinas, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/>; see also *The Silence Breakers: The Voices that Launched a Movement*, TIME (Dec.

ing proximity and safety concerns or address questions of workplace protections for the accusers.<sup>48</sup> Scholars have voiced further concern that the naming, shaming, and firing cycle could crowd out less visible efforts focused on structural changes.<sup>49</sup>

A related, but distinct, criticism about privilege suggests that #MeToo mostly benefits heterosexual, cisgender, white women.<sup>50</sup> When #MeToo first went viral, the call for women to name their experiences was thought to exclude men, and gay men in particular; trans and nonbinary persons; as well as lesbians and other individuals who suffered abuse at the hands of women.<sup>51</sup> This led to calls for more inclusive language and a more inclusive campaign generally.<sup>52</sup>

Even as some men have felt comfortable sharing their stories,<sup>53</sup> some have also suggested that trans, nonbinary persons, and women of color should be foregrounded as they are more likely to be abused, less likely to be believed,

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18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> (depicting on its cover, the elbow of a symbolic silence breaker who wished to remain anonymous).

48. MAYA RAGHU & JOANNA SURIANI, NAT'L WOMEN'S LAW CTR., #METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY 1–2 (Dec. 2017). Some international settings magnify such concerns where outing a harasser could lead to retaliation and even honor killings. Alice Rowsome, *Why the #MeToo Movement Has Failed to Take off in Afghanistan*, VICE IMPACT (Jan. 17, 2018, 1:15 PM), [https://impact.vice.com/en\\_us/article/qvwmz5/why-the-metoo-movement-has-failed-to-take-off-in-afghanistan](https://impact.vice.com/en_us/article/qvwmz5/why-the-metoo-movement-has-failed-to-take-off-in-afghanistan).

49. Rebecca Hamilton, *No, Naming and Shaming Sexual Offenders Doesn't Always Help*, WASH. POST (Dec. 21, 2017), [https://www.washingtonpost.com/outlook/no-naming-and-shaming-sexual-offenders-doesnt-always-help/2017/12/21/4210486c-e5bb-11e7-ab50-621fe0588340\\_story.html?utm\\_term=.71fc065240ba](https://www.washingtonpost.com/outlook/no-naming-and-shaming-sexual-offenders-doesnt-always-help/2017/12/21/4210486c-e5bb-11e7-ab50-621fe0588340_story.html?utm_term=.71fc065240ba) (such efforts might include reshaping HR departments so as to avoid a conflict of interest, enhancing access to legal services, and increasing the ranks of women in leadership roles).

50. See generally Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105 (2018). Some women of color have been reluctant to support MeToo campaigns when they feel insufficiently supported by white women allies. *Id.* at 106.

51. Sam Hope, *Me Too: LGBTQ+ People and Sexual Assault*, THE QUEERNESS (Oct. 17, 2017, 4:39 PM), <https://thequeerness.com/2017/10/17/me-too-lgbtq-people-and-sexual-assault/>.

52. Kyli Rodriguez-Cayro, *Some Members of the LGBTQ Community Feel Excluded by the Me Too Hashtag, & It's a Reminder of How Important Inclusive Language Is*, BUSTLE (Oct. 19, 2017), <https://www.bustle.com/p/some-members-of-the-lgbtq-community-feel-excluded-by-the-me-too-hashtag-its-a-reminder-of-how-important-inclusive-language-is-2953162>.

53. Actor Anthony Rapp led the charge on Kevin Spacey's predatory behavior and inspired Terry Crews to come forward and to file a lawsuit against agent Adam Venit. *Star Trek's Anthony Rapp Reveals What Drove Him to Go Public with Kevin Spacey Allegation*, ATTITUDE (Jan. 8, 2018), <https://attitude.co.uk/article/star-treks-anthony-rapp-reveals-what-drove-him-to-go-public-with-kevin-spacey-allegation/16724/>; Michel Martin, *Terry Crews on His Sexual Assault Lawsuit: This Is About Accountability*, NPR (Dec. 10, 2017, 6:43 PM), <https://www.npr.org/2017/12/10/569682236/terry-crews-on-his-sexual-assault-lawsuit-this-is-about-accountability>;

see also Zach Baron, *What Ever Happened to Brendan Fraser?*, GQ (Feb. 22, 2018), <https://www.gq.com/story/what-ever-happened-to-brendan-fraser>; Anthony Edwards, *Yes Mom, There Is Something Wrong*, MEDIUM (Nov. 10, 2017), <https://medium.com/@anthonyedwards/yes-mom-there-is-something-wrong-f2bcf56434b9>; Johnathon Schaech, *Actor Johnathon Schaech: I Was Molested by Director Franco Zeffirelli*, PEOPLE (Jan. 11, 2018, 8:30 AM), <https://people.com/movies/johnathon-schaech-molested-franco-zeffirelli/>; James Van Der Beek, *James Van Der Beek on Twitter Backlash: "Should I Have Just Shut Up?"*, GLAMOUR (Jan. 23, 2018, 8:00 AM), <https://www.glamour.com/story/james-van-der-beek-me-too-movement>.

and less likely to garner media or social attention.<sup>54</sup> Even for cisgender women of color who seem to fall squarely within the MeToo ambit, their access to “believability, sympathy and public rage” seems much more limited.<sup>55</sup> MeToo creator Tarana Burke contends that too often black women and girls are viewed as inherently sexual and so are both more likely to be harassed and less likely to be heard.<sup>56</sup> In addition, they may fear contributing to racial stereotyping and face pressure not to name same-race aggressors lest the community be further marginalized.<sup>57</sup> Consider, for example, the absence of strong public support for musician R. Kelly’s alleged victims;<sup>58</sup> the relative lack of outrage at hip hop mogul Russell Simmons—who has been accused of multiple rapes;<sup>59</sup> avowed feminist Lena Dunham’s initial defense of a white producer against minority actress Aurora Perrineau’s rape accusations;<sup>60</sup> and scholars’ defense of academic Avital Ronell, contending that Title IX ought not be deployed against a woman and engaging in victim-blaming of queer male graduate student Nimrod Reitman.<sup>61</sup>

Society has also grappled with how to define and limit the appropriate scope of this transitional movement. For instance, should the #MeToo conversation and attendant reforms include nonworkplace-related sexual or sexist encounters? While most accept domestic violence as within #MeToo’s purview,

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54. Susan Cheng, *Asian-American Women in Hollywood Say It’s Twice as Hard for Them to Say #MeToo*, BUZZFEED NEWS (Feb. 24, 2018, 7:28 AM), [https://www.buzzfeed.com/susancheng/what-metoo-means-for-asian-american-women-in-hollywood?utm\\_term=.frXQYP48A#fgB190jJ4](https://www.buzzfeed.com/susancheng/what-metoo-means-for-asian-american-women-in-hollywood?utm_term=.frXQYP48A#fgB190jJ4); Meredith Talusan, *How #MeToo Stands to Marginalize Trans and Gender-Nonconforming People*, THEM (Oct. 27, 2017), <https://www.them.us/story/how-metoo-stands-to-marginalize>.

55. Gillian B. White, *The Glaring Blind Spot of the ‘Me Too’ Movement*, ATLANTIC (Nov. 22, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/the-glaring-blind-spot-of-the-me-too-movement/546458/>.

56. *The Founder of #MeToo Doesn’t Want Us to Forget Victims of Color*, PBS NEWSHOUR (Nov. 15, 2017, 6:35 PM), <https://www.pbs.org/newshour/show/the-founder-of-metoo-doesnt-want-us-to-forget-victims-of-color>.

57. Shree Paradkar, *#MeToo Opens Door to Voices of Women of Colour: Paradkar*, STAR (Oct. 21, 2017), <https://www.thestar.com/news/gta/2017/10/21/metoo-opens-door-to-voices-of-women-of-colour-paradkar.html>.

58. Danielle Jackson, *In the Wake of Weinstein and #MeToo, Why Does R. Kelly Still Have an Audience?*, LONGREADS (Nov. 8, 2017), <https://longreads.com/2017/11/08/in-the-wake-of-weinstein-and-metoo-why-does-r-kelly-still-have-an-audience/>; Jason Newman, *Surviving R. Kelly*, ROLLING STONE (Oct. 23, 2017, 5:49 PM), <https://www.rollingstone.com/culture/culture-features/surviving-r-kelly-118608/>.

59. Shanita Hubbard, *Russell Simmons, R. Kelly, and Why Black Women Can’t Say #MeToo*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/opinion/russell-simmons-black-women-metoo.html>.

60. Christie D’Zurilla, *Lena Dunham Accused of ‘Hipster Racism’ After She Initially Defended ‘Girls’ Writer*, L.A. TIMES (Nov. 20, 2017, 10:38 AM), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-lena-dunham-accused-of-hipster-racism-1511203068-htmlstory.html>; Whitney Kimball, *Zinzi Clemmons: ‘It’s Time for Women of Color...to Divest from Lena Dunham’*, JEZEBEL (Nov. 19, 2017, 1:41 PM), <https://jezebel.com/zinzi-clemmons-its-time-for-women-of-color-to-divest-1820587768>.

61. Zoe Greenberg, *What Happens to #MeToo When a Feminist Is the Accused?*, N.Y. TIMES (Aug 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>. Professor and Modern Language Association President Judith Butler has since partially apologized for the letter she wrote in support of Ronell. *Judith Butler Explains Letter in Support of Avital Ronell*, CHRON. HIGHER ED. (Aug. 20, 2018), <https://www.chronicle.com/blogs/letters/judith-butler-explains-letter-in-support-of-avital-ronell/>.

fierce national public debate ensued<sup>62</sup> when *Babe* magazine detailed a woman's description of her nonwork-related date with actor Aziz Ansari as a sexual assault.<sup>63</sup> Critics characterized the account as “revenge porn” with Ansari as the victim<sup>64</sup> and as a setback for #MeToo by characterizing women as helpless and disempowered.<sup>65</sup> Some celebrated the inclusion of lawful but awful sex,<sup>66</sup> and the need for affirmative, enthusiastic consent as part of the #MeToo public discourse,<sup>67</sup> while others wanted to police the line between #MeToo victims of sexual predators and those subject to seeming miscommunications about sexual expectations.<sup>68</sup> Other questions of scope include questions of which workplaces matter, with sex workers<sup>69</sup> and victims of prison rape<sup>70</sup> questioning whether their narratives are welcomed. There are also questions of whether abusive but nonsexual encounters in the workplace count<sup>71</sup> and whether harassment and violence condoned but not caused by employers or employees, such as customer

62. See, e.g., *The Fine Line Between a Bad Date and Sexual Assault: 2 Views on Aziz Ansari*, NPR (Jan. 16, 2018, 4:34 PM), <https://www.npr.org/2018/01/16/578422491/the-fine-line-between-a-bad-date-and-sexual-assault-two-views-on-aziz-ansari>.

63. Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, *BABE* (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>.

64. Caitlin Flanagan, *The Humiliation of Aziz Ansari*, *ATLANTIC* (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>.

65. 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>.

66. Lexy Perez, *Amy Schumer Talks Friend Aziz Ansari's Sexual Misconduct Claim*, *HOLLYWOOD REP.* (Feb. 1, 2018, 8:50 AM), <https://www.hollywoodreporter.com/news/amy-schumer-talks-friend-aziz-ansari-sexual-misconduct-claim-1080874> (Schumer described Aziz's behavior as, “It's not a crime, but it's not cool.”).

67. Fiona Chen, *Why the Aziz Ansari Story and Discussions of Grey Areas Are Central to the #MeToo Movement*, *THE TECH* (Jan. 25, 2018), <https://thetech.com/2018/01/25/me-too-aziz-ansari>; Jessica Valenti (@JessicaValenti), *TWITTER* (Jan. 14, 2018, 9:50 AM), <https://mobile.twitter.com/JessicaValenti/status/952568652066443264>;

Lindy West, *Aziz, We Tried to Warn You*, *N.Y. TIMES* (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/opinion/aziz-ansari-metoo-sex.html>; Brittany Wong, *What Therapists Want Us to Know About Aziz Ansari, 'Bad Sex' and #MeToo*, *HUFF. POST: LIFE* (Feb. 2, 2018), [https://www.huffpost.com/entry/therapists-on-aziz-ansari-me-too\\_n\\_5a6f6ed3e4b01fbefb4b934](https://www.huffpost.com/entry/therapists-on-aziz-ansari-me-too_n_5a6f6ed3e4b01fbefb4b934).

68. Justin Duyao, *Different Perspectives: Aziz Ansari: He Is Not a Predator*, *BISON* (Feb. 15, 2018), <https://thelink.harding.edu/the-bison/2018/02/15/different-perspectives-aziz-ansari-he-is-not-a-predator/>. Some have suggested that rather than limiting #MeToo to sexual violence and misconduct or even to questions of legal permission, #MeToo is well positioned to open the frontier on the societal need for mutual pleasure in sexual contact. Zosia Bielski, *The Next Frontier in Consent: Better Sex*, *GLOBE & MAIL* (Jan. 22, 2018), <https://www.theglobeandmail.com/life/relationships/the-next-frontier-in-consent-better-sex/article37681221/>.

69. Samantha Cooney, *Sex Workers Say They're Being Left Out of the #MeToo Movement*, *TIME* (Feb. 13, 2018), <http://time.com/5104951/sex-workers-me-too-movement/>; Kyli Rodriguez-Cayro, *Sex Workers Can Be Sexually Assaulted Too, and We Need to Talk About It*, *BUSTLE* (Apr. 24, 2018), <https://www.bustle.com/p/sex-workers-can-be-sexually-assaulted-too-we-need-to-talk-about-it-7551815>.

70. Natasha Lennard, *Will the Prison Rape Epidemic Ever Have Its Weinstein Moment*, *INTERCEPT* (Nov. 21, 2017, 3:08 PM), <https://theintercept.com/2017/11/21/prison-rape-sexual-assault-violence/>.

71. Take, for example, actor Jeffrey Tambor's angry explosion at colleague Jessica Walters on the set of *Arrested Development*. Lili Loofbourow, *The Boys of Arrested Development*, *SLATE* (May 25, 2018, 9:06 PM), <https://slate.com/culture/2018/05/arrested-development-interview-the-cast-is-a-boys-club.html>.

harassment in hotels or harassment within church youth groups, is included.<sup>72</sup> As #MeToo is a diffuse, bottom-up movement, it seems likely that people in varied circumstances will continue to name and shame their #MeToo perpetrators, but it is too early to tell whether those outside the mainstream ideal victim will get equivalent public traction.

We turn next to a case study of Hollywood to get a sense of developing legal, structural, and cultural reforms designed to fundamentally alter working conditions for women.

### B. *An Industry Case Study: Hollywood*

The Time's Up Initiative, created by female Hollywood insiders,<sup>73</sup> offers one path for building on this momentum and moving beyond the limitations of naming and shaming. The focus of Time's Up is on "sexual assault, harassment and inequality in the workplace."<sup>74</sup> Its aims include the amplification and believability of survivors' voices, the conclusion that "accountability is possible," and access to justice and support for victims.<sup>75</sup> Rather than rely solely on social denunciation, this collective has decided to "partner with leading advocates for equality and safety to improve laws, employment agreements, and corporate policies; help change the face of corporate boardrooms and the C-suite; and enable more women and men<sup>76</sup> to access our legal system to hold wrongdoers accountable."<sup>77</sup> The organization has multiple working groups, including one designed to amplify the voices of "minorities and gays, lesbians, bisexuals and transgender people."<sup>78</sup> In the subsections below, we survey some of their early efforts.

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72. Becca Andrews, *As a Teen, Emily Joy Was Abused by a Church Youth Leader. Now She's Leading a Movement to Change Evangelical America*, MOTHER JONES (May 25, 2018, 6:00 AM), <https://www.motherjones.com/crime-justice/2018/05/evangelical-church-metoo-movement-abuse/>.

73. Brittany Martin, *Here's the Story Behind Time's Up, Hollywood's Anti-Sexual Harassment Movement*, L.A. MAG. (Jan. 8, 2018), <http://www.lamag.com/culturefiles/times-up-golden-globes/> (noting that the efforts were spurred by a solidarity letter from blue collar working women).

74. *Our Letter of Solidarity*, TIME'S UP (Jan. 1, 2018), <https://www.timesupnow.com/>.

75. *Id.*

76. While Time's Up advocates focus on women, their materials include references to assaults on men and include men as survivors. See, e.g., TIME'S UP, <https://www.timesupnow.com/> (last visited Dec. 7, 2018). Although the website is centered on women's experiences and needs, it also notes that its funds "enable more women and men to access our legal system to hold wrongdoers accountable." *Id.*; see also Lena Wilson, *Ashley Judd Addresses Sexual Misconduct Survivors at Tribeca Film Festival for Time's Up*, SLATE (Apr. 28, 2018, 7:02 PM), <https://slate.com/culture/2018/04/at-tribeca-film-festival-ashley-judd-reads-a-letter-to-sexual-misconduct-survivors-for-times-up.html>.

77. TIME'S UP, *supra* note 74.

78. Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html>.

## I. Law

### a. Enhancing Access

To achieve these various goals, Time's Up is delivering information on sexual harassment and how to address it, raising money to subsidize legal support for affected individuals, and providing access to additional resources. For instance, hundreds of lawyers have offered support to Time's Up in the form of pro bono assistance to help victims pursue claims.<sup>79</sup> Because many victims face additional hurdles in their pursuit of litigation,<sup>80</sup> Time's Up may also attempt to prevent companies from drafting contracts that force harassment and discrimination claims into arbitration.<sup>81</sup>

Since its founding, Time's Up has raised \$22 million dollars for its Legal Defense fund, coordinated 700 volunteer attorneys, and begun the disbursement of funds to over 2,500 people.<sup>82</sup> Most of those requesting assistance are low income wage earners,<sup>83</sup> including plaintiffs at Wal-Mart and McDonalds,<sup>84</sup> but Time's Up has also financed some higher profile individuals, such as Moira Donegan, the compiler and disseminator of the Google document "Shitty Media Men," to enable her to defend herself against a defamation suit brought by a man who contests his appearance on the list.<sup>85</sup>

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79. For instance, hundreds of lawyers have offered support in the form of pro bono assistance to help victims pursue claims. Stephanie Russell-Kraft, *Hundreds of Attorneys Join Time's Up Legal Defense Fund*, U.S.L.W. (Jan. 29, 2018, 6:46 PM), <https://news.bloomberglaw.com/us-law-week/hundreds-of-attorneys-join-times-up-legal-defense-fund>.

80. Amanda Arnold, *How the Supreme Court's Ruling on Arbitration Hurts the #MeToo Movement*, CUT (May 21, 2018), <https://www.thecut.com/2018/05/supreme-court-decision-workers-arbitration-hurts-metoo-sexual-harassment.html>; Porter Wells, *Time Isn't Up on #TimesUp After Supreme Court Class Action Ruling*, U.S.L.W. (May 24, 2018, 5:30 AM), <https://news.bloomberglaw.com/us-law-week/time-isnt-up-on-timesup-after-supreme-court-class-action-ruling>. At the same time, litigation as it currently functions is far from a perfect solution for dealing with sexual harassment claims. See generally ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NEILSEN, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* (2017); SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Toward Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. (forthcoming 2018).

81. See, e.g., Marie Solis, *Hollywood's Time's Up Campaign Still Must Defeat Forced Arbitration, a Sexual Harasser's 'Best Friend'*, NEWSWEEK (Jan. 2, 2018, 5:03 PM), <http://www.newsweek.com/hollywoods-times-campaign-forced-arbitration-non-disclosure-agreements-768539>.

82. Jocelyn Noveck, *Ashley Judd to Assault Survivors: Healing Is Our Birthright*, U.S. NEWS & WORLD REP. (Apr. 28, 2018, 10:46 PM), <https://www.usnews.com/news/entertainment/articles/2018-04-28/ashley-judd-to-assault-survivors-healing-is-our-birthright>.

83. Meera Jagannathan, *Time's Up Leader Tina Tchen Talks What's Next for the \$21M Legal Defense Fund and How Celebs Powered a Movement*, MONEYISH (May 22, 2018, 12:09 AM), <https://moneyish.com/heart/times-up-leader-tina-tchen-talks-whats-next-for-the-21m-legal-defense-fund-and-how-celebs-powered-a-movement/>.

84. See Amanda Arnold, *Time's Up Is Helping McDonalds and Walmart Employees File Sexual-Harassment Claims*, CUT (May 23, 2018), <https://www.thecut.com/2018/05/times-up-fights-sexual-harassment-at-mcdonalds-and-walmart.html>; Michael Corkery, *Low-Paid Women Get Hollywood Money to File Harassment Suits*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/business/hollywood-times-up-harassment.html>.

85. Jonah Engel Bromwich & Jaclyn Peiser, *Time's Up Cofounder to Represent 'Media Men' List Creator*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/style/media-men-list-lawsuit.html>.

## b. Preventing Nondisclosure Agreements

Time's Up is also lobbying for legislation that would prohibit companies from forcing employees to sign nondisclosure agreements which forbid them from speaking publicly about workplace wrongs.<sup>86</sup> Nondisclosure agreements have been deployed by Hollywood employers like Harvey Weinstein and the Weinstein Company as a precondition to settlement.<sup>87</sup> They preclude women who sign them from warning other women<sup>88</sup> and shield the accused from public and criminal scrutiny.<sup>89</sup> So far, at least sixteen states have introduced bills on this issue with six states adopting restrictions.<sup>90</sup>

## 2. Workplace Structures

### a. Anita Hill Commission

In the wake of the Weinstein scandal, Time's Up member and Lucasfilm president Kathleen Kennedy proposed an industrywide commission focused on Hollywood culture with "zero-tolerance policies for abusive behavior and a secure, reliable, unimpeachable system in which victims of abuse can report what's happening to them with a confident expectation that action will be taken without placing their employment, reputation or career at risk."<sup>91</sup> It is envisioned that the commission will include labor specialists, lawyers, legal scholars, sociologists, and feminist activists as well as representatives of studios, unions, guilds, and talent agencies.<sup>92</sup> Anita Hill will chair the commission which seeks to reach broadly to address "power disparity, equity and fairness, safety,

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86. Buckley, *supra* note 78.

87. Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>. They were also used by Herman Cain, Bill O'Reilly, Roger Ailes, and President Trump. James Rufus Koren, *Weinstein Scandal Puts Nondisclosure Agreements in the Spotlight*, L.A. TIMES (Oct. 23, 2017, 6:15 PM), <http://www.latimes.com/business/la-fi-weinstein-nondisclosure-agreements-20171023-story.html#>; Janell Ross, *An Infrastructure of Silence*, WASH. POST (Oct. 12, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/\\_trashed/?utm\\_term=.8d7b2a3c1217](https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/_trashed/?utm_term=.8d7b2a3c1217).

88. Nicole Karlis, *How Non-Disclosure Agreements Silence Victims*, SALON (Dec. 10, 2017, 4:00 PM), <https://www.salon.com/2017/12/10/how-non-disclosure-agreements-silence-victims/>.

89. See Elizabeth Chika Tippet, *The Legal Implications of the MeToo Movement*, MINN. L. REV. (forthcoming) (discussing nondisclosure agreements). See generally Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 74 (2018). On confidential settlements, see generally Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457 (2006); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115 (1999).

90. *States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), <https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/>.

91. THR Staff, *Kathleen Kennedy Proposes Industry Commission and "Zero Tolerance" in Wake of Weinstein Claims*, HOLLYWOOD REP. (Oct. 16, 2017, 9:21 PM), <https://www.hollywoodreporter.com/news/kathleen-kennedy-demands-zero-tolerance-policies-wake-weinstein-allegations-1049421>.

92. *Id.*



sexual harassment guidelines, education and training, reporting and enforcement, ongoing research and data collection.”<sup>93</sup> It seeks to “adopt best practices and create institutional change that fosters a culture of respect and human dignity. . . .”<sup>94</sup>

#### b. Unions and Guilds

While they have not traditionally led on this issue,<sup>95</sup> Hollywood guilds are now developing sexual harassment guidelines, initiatives, and codes of conduct.<sup>96</sup> SAG-AFTRA president Gabrielle Carteris, for example, has made addressing sex discrimination a cornerstone of her administration.<sup>97</sup> She was early to condemn Harvey Weinstein, led panel discussions on the issue, persuaded the AFL-CIO executive council and the International Federation of Actors to increase their efforts to deal with the problem, joined the Anita Hill Commission,<sup>98</sup> and is exploring technological innovations to improve the tracking of reports and enhance training programs for union representatives.<sup>99</sup> The Academy of Motion Picture Arts and Science and the Producers Guild of America have also adopted codes of conduct emphasizing the “values of respect for human dignity, inclusion” and “categorical[] oppos[ition] to any form of abuse, harassment, or discrimination on the basis of gender, sexual orientation, race, ethnicity, disability, age, religion, or nationality.”<sup>100</sup>

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93. Rebecca Sun, *Top Hollywood Execs Unveil Anti-Sexual Harassment Commission Chaired by Anita Hill*, HOLLYWOOD REP. (Dec. 15, 2017, 6:15 PM), <https://www.hollywoodreporter.com/news/top-hollywood-exec-s-unveil-anti-sexual-harassment-commission-chaired-by-anita-hill-1068646>.

94. Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/movies/anita-hill-hollywood-commission-sexual-harassment.html>. While the Commission is still in the early stages, it is looking at technology systems to gather information on abusers and harassers. David Robb, *Anita Hill-Led Anti-Harassment Commission Looking at Technology to Identify Abusers in Entertainment Industry*, DEADLINE (Feb. 28, 2018, 5:45 PM), <https://deadline.com/2018/02/anita-hills-sexual-harassment-commission-technology-identify-abusers-in-hollywood-1202306476/>.

95. See Ian Kullgren, *Why Didn't Unions Stop Sexual Harassment?*, POLITICO (Nov. 14, 2017, 10:58 AM), <https://www.politico.com/story/2017/11/14/why-didnt-unions-stop-sexual-harassment-244883>; Morgan Spector, *Harvey Weinstein's Crimes and SAG's Failure*, JACOBIN (Oct. 17, 2017), <https://www.jacobinmag.com/2017/10/harvey-weinstein-union-sag-aftra-hollywood>.

96. See David Robb, *Hollywood's Guilds Developing Anti-Harassment Initiatives*, DEADLINE (Jan. 26, 2018, 3:24 PM), <https://deadline.com/2018/01/sexual-harassment-hollywood-guilds-fight-abuse-1202270685/>.

97. Dave McNary, *SAG-AFTRA President Gabrielle Carteris Talks State of the Union*, VARIETY (Jan. 18, 2017 10:00 AM), <https://variety.com/2018/tv/news/gabrielle-carteris-talks-state-of-the-union-1202665637/>.

98. *Id.*

99. David Robb, *SAG-AFTRA Developing Sexual Harassment Code of Conduct*, DEADLINE (Jan. 19, 2018, 12:33 PM), <https://deadline.com/2018/01/sag-aftra-sexual-harassment-code-of-conduct-hollywood-actors-metoo-1202263094/>.

100. Pete Hammond, *Motion Picture Academy Moves Forward with Details on Standards of Conduct Initiative—Sends Instructions to Members*, DEADLINE (Jan. 27, 2018, 3:41 PM), <https://deadline.com/2018/01/motion-picture-academy-moves-forward-with-details-on-standards-of-conduct-initiative-sends-instructions-to-members-1202271320/>.

### 3. *Culture: Workplace and Otherwise*

In addition to supporting access to law, working on legal reform, and creating workplace codes, Time's Up and others are crafting and supporting a variety of initiatives to change workplace culture as well as the culture at large. Efforts to shift the culture involve a variety of practices designed to recognize the value of women.<sup>101</sup> Some focus on creating gender equity in the hope that women in power and the involvement of women in discussions in which decisions are made will prompt more sensitivity to issues of inequality.<sup>102</sup> In April 2018, for example, Time's Up announced the "+1/3x initiative," which encourages women to bring another woman to work meetings or events to improve their networking and to make at least three other meaningful connections to help women that they mentor.<sup>103</sup> Other efforts reach more broadly, suggesting that the workplace is an appropriate site of consequence for nonworkplace sexist behavior.<sup>104</sup> While the descriptions below are not comprehensive, they offer a representative flavor of the post-#MeToo Hollywood activity.

#### a. 50-50 by 2020

One Hollywood initiative to change workplace culture is the adoption of the pre-existing "50-50 by 2020 campaign."<sup>105</sup> For instance, ICM, a talent agency, "has pledged to reach full 50-50 gender parity by 2020 with a special focus on leadership roles."<sup>106</sup> TV mogul and ICM client Shonda Rhimes suggested the benchmark, used in other industries, to change workplace culture into one that is less tolerant of harassment and abuse.<sup>107</sup> She suggests that the primary way to meet the goal is by rethinking workplace mentorship and team building so women are not "shut out of the ways that bonding happens in the workplace."<sup>108</sup>

To meet its goals, ICM may build on the pre-existing work done by Hollywood organizations devoted to gender equity on-screen and throughout Hol-

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101. See discussion *infra* Subsection II.B.3.

102. See *infra* Subsection II.B.3.a.

103. Amanda Holpuch, *Celebrities and Activists on Time's Up at Tribeca Festival: 'This Moment Is Here,'* GUARDIAN (Apr. 29, 2018, 11:57 AM), <https://www.theguardian.com/film/2018/apr/29/times-up-tribeca-film-festival>.

104. See *infra* Subsection IV.A.1.

105. *Equity in Hollywood. By the Year 2020, 5050BY2020*, <https://5050by2020.com> (last visited Dec. 7, 2018).

106. Rebecca Sun, *ICM Partners Pledges to Reach 50-50 Gender Parity by 2020*, HOLLYWOOD REP. (Dec. 6, 2017, 6:30 AM), <https://www.hollywoodreporter.com/news/icm-partners-pledges-reach-50-50-gender-parity-by-2020-1064634>.

107. *Id.*

108. *Id.* This might help counter the offsetting risk that men will refuse to mentor women or otherwise be alone with them, following the "Pence Rule," to avoid harassment and thus deny women opportunities to build essential relationships. Jenny Proudfoot, *Saying #Metoo Could Cost You Your Dream Job Says Sheryl Sandberg*, MARIE CLAIRE (Dec. 4, 2017, 9:36 AM), <https://www.marieclaire.co.uk/entertainment/people/sheryl-sandberg-metoo-backlash-554561>.

lywood more generally.<sup>109</sup> Making the pledge visible creates a mechanism for public accountability. Other major talent agencies, such as CAA and UTA, as well as Vice Media<sup>110</sup> are joining these efforts, and it will be interesting to see if such undertakings spread throughout the industry.<sup>111</sup> It is also worth noting that while some agencies are focused on gender equity,<sup>112</sup> 50-50 by 2020 actually has a more inclusive focus, including equity for people with disabilities, LGBTQIA, and people of color.<sup>113</sup>

Another mechanism for achieving parity relies on the use of contractual “inclusion riders.”<sup>114</sup> Developed by Dr. Stacy Smith and the Annenberg Inclusion Initiative, the inclusion rider seeks to

counter bias in interviewing/auditioning and hiring/casting in specific employment positions in the entertainment industry. . . . The inclusion rider is a flexible and adaptable framework that actors/content creators should consider together with counsel prior to signing on to their next project. The inclusion rider does not provide for quotas. It simply stipulates consideration of the deep bench of talented professionals from historically underrepresented groups and strongly encourages hiring and casting of qualified individuals from under-represented backgrounds.<sup>115</sup>

While a few high-profile individuals have taken up the call for inclusion riders, most studios, talent agencies, and guilds have not yet made commitments.<sup>116</sup> That might be changing, as Warner Brothers recently announced a company-wide policy to increase diversity both on and off screen.<sup>117</sup>

The call for gender parity and diversity has expanded beyond the films themselves. The 50-50 by 2020 initiative has gotten film festivals, such as the Cannes Film Festival, to sign equality pledges for their executive boards and commit to making their selection processes more transparent.<sup>118</sup> Similarly,

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109. *Hollywood Agency Promises 50/50 Gender Parity Inspired by Shonda Rhimes*, GIRLTALKHQ (Dec. 18, 2017, 10:05 AM), <http://girltalkhq.com/hollywood-agency-pledges-50-50-gender-parity-2020-inspired-client-shonda-rhimes/>.

110. 50/50 BY 2020, *supra* note 105.

111. Rebecca Sun, *CAA Cancels Pre-Golden Globes Party, Will Help Start Legal Fund for Sex Harassment Victims*, HOLLYWOOD REP. (Dec. 11, 2017, 3:26 PM), <https://www.hollywoodreporter.com/news/caa-cancels-golden-globes-party-will-start-legal-defense-fund-sex-harassment-cases-1066558>.

112. Hollywood insiders have lauded 50-50 as the first real effort to address the systemic nature of the problem, but given that ICM was already performing well in this area compared to its peers, some fear that others will prefer to retain the status quo after they have cleaned house rather than follow suit. *Id.*

113. 50/50 BY 2020, *supra* note 105.

114. See *Annenberg Inclusion Initiative*, USC ANNEBERG SCH. FOR COMM’N & JOURNALISM, <https://annenberg.usc.edu/research/aii> (last visited Dec. 7, 2018).

115. *Id.*

116. Ricardo Lopez, *Inclusion Riders Boast High Profile Support, but Lack Commitment from Most Studios*, VARIETY (Apr. 11, 2018, 9:45 AM), <https://variety.com/2018/biz/news/inclusion-riders-1202749738/>.

117. Sam Levin, *Warner Bros. to Launch Inclusion Rider Diversity Policy with Michael B. Jordan Film*, GUARDIAN (Sept. 5, 2018, 5:56 PM), <https://www.theguardian.com/film/2018/sep/05/warner-bros-adopts-company-wide-inclusion-policy-to-boost-diversity>.

118. Jake Coyle, *Cannes Leaders Sign Pledge to Improve Gender Equality*, INDEPENDENT (May 14, 2018, 12:55 PM), <https://www.independent.ie/entertainment/movies/cannes-leaders-sign-pledge-to-improve-gender-equality-36904963.html>.

drawing on statistics from the USC Annenberg's Inclusion Initiative, actress Brie Larson has called for more diversity in film criticism.<sup>119</sup>

b. Pay Equality and Negotiation

While some might view pay discrimination as distinct from the #MeToo movement, activists see it as essential to addressing the core problem raised by #MeToo: the devaluation of women.<sup>120</sup> In addition to the Time's Up fund, which would be available to facilitate pay discrimination claims, a variety of piecemeal actions to equalize pay are underway. For instance, actresses Debra Messing, Eva Longoria, Laura Dern, and Sarah Jessica Parker shamed the E! Network on live television for underpaying female anchor Catt Sadler,<sup>121</sup> and Carrie Gracie resigned from her position as the China editor of the BBC after learning of pay disparities.<sup>122</sup> Numerous commentators shamed actor Mark Wahlberg and his agents for demanding \$1.5 million to do reshoots necessitated by actor Kevin Spacey's erasure from the film *All the Money in the World*, after co-star Michelle Williams volunteered to do the reshoots for free.<sup>123</sup>

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119. Cady Lang, 'Reviews Matter.' *Brie Larson Calls for More Diversity in Movie Reviews with Speech*, TIME (June 14, 2018), <http://time.com/5312618/brie-larson-women-in-film/>.

120. Tarana Burke, Ai-jen Poo & Monica Ramirez, *Golden Globes Time's Up Activists to Hollywood: "Failure to Pay Women Fairly Is Another Way of Exacting Violence,"* HOLLYWOOD REP. (Jan. 15, 2018, 5:45 AM), <https://www.hollywoodreporter.com/news/golden-globes-times-up-activists-hollywood-failure-pay-women-is-way-exacting-violence-guest-column-1074683>. As Me Too founder Tarana Burke explains:

Gender-based injustice is pervasive, and comes in all forms and sizes. At the heart of the matter is the reality that women's lives, and our work, are valued less than men's, and this power imbalance is expressed in a plethora of ways: from pay disparity, to limited opportunities for promotion, to failure to recognize our work and contributions, to sexual harassment, abuse and violence. In the words of Audre Lorde, "[t]here is no such thing as a single-issue struggle, because we do not live single-issue lives." As activists who have dedicated our lives to justice and healing, we understand that to achieve equity and help our communities have a shot at our best lives, we must tackle and confront all of the issues that prevent us from reaching our full potential. This includes, but is not limited to, workplace sexual violence, unequal benefits, and pay disparities . . . . While Hollywood is trying to address its problem with sexual violence, we want to underscore that the failure to pay women fairly is another way of exacting violence on women workers by devaluing their worth and contributions.

*Id.*

121. Judd Legum, *4 Actresses Call Out E! for Gender Discrimination—While Live on E!*, THINKPROGRESS (Jan. 7, 2018, 7:06 PM), <https://thinkprogress.org/debra-messing-calls-out-e-for-gender-discrimination-while-live-on-e-3c7487978d37/>; see also Chris Gardner & Sam Reed, *Jennifer Lawrence, Catt Sadler Prepping #MeToo, Time's Up Movement TV Docuseries*, HOLLYWOOD REP. (Feb. 23, 2018, 7:29 PM), <https://www.hollywoodreporter.com/live-feed/jennifer-lawrence-catt-sadler-prepping-metoo-times-up-movement-tv-docuseries-108>

8150.

122. Valeriya Safronova, *What We Talk About When We Talk About Pay Inequity*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/business/wage-gap-gender-discrimination.html>. The BBC ultimately apologized to Gracie and provided backpay. *BBC Apologises to Carrie Gracie Over Pay*, BBC NEWS (June 29, 2018), <https://www.bbc.com/news/entertainment-arts-44655335>.

123. The shame seemed to be compelling enough that Wahlberg and his agency donated \$2 million to Time's Up in actress Michelle Williams's name. Jeffery C. Mays, *Mark Wahlberg and Agency Will Donate \$2 Million to Time's Up After Outcry Over Pay*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/arts/mark-wahlberg-michelle-williams.html>.

Early stages of more systematic efforts may also be underway. For example, Hollywood women are cooperating with one another formally and informally to enhance their negotiating positions.<sup>124</sup> That cooperative ethos may also spill over to begin to address intersectional disparities.<sup>125</sup> Actress Jessica Chastain, for example, recently tied her salary to Octavia Spencer's in order to guarantee racial pay equity.<sup>126</sup> The most highly paid dramatic TV actress, Ellen Pompeo, revealed her negotiating difficulties and strategies in a widely read industry publication in the hope of "setting an example for others."<sup>127</sup> An industry roundtable also saw high-profile actresses sharing negotiating strategies such as refusing to allow male actor's deals to be made first, calling on industry leaders to stop the practice of differential pay, and challenging the normalization of lower actress pay.<sup>128</sup>

#### 4. *Male Allies*

Women have been at the forefront of Time's Up, with many Hollywood men reluctant to add their voices.<sup>129</sup> Some male advocates, however, are doing the work of allies by speaking out and initiating reforms. Most prominently, the late Anthony Bourdain vocally and unwaveringly supported the #MeToo movement, calling on everyone to engage in serious self-reflection about both their past and future behavior.<sup>130</sup> A few high-profile African American men

124. For instance, Tracee Ellis Ross consulted with other Time's Up actresses about how to address her pay disparity with co-star Anthony Anderson. Elaine Lainey Lui, *Intro for January 19, 2018*, LAINEY GOSSIP (Jan. 19, 2018, 8:44 AM), <http://www.laineygossip.com/tracee-ellis-ross-reveals-pay-gap-with-anthony-anderson-and-intro-for-january-19-2018/48931>.

125. See, e.g., Sydney Scott, *Viola Davis Is Demanding Hollywood Do Better: 'Pay Me What I'm Worth'*, ESSENCE (Feb. 15, 2018), <https://www.essence.com/celebrity/viola-davis-equal-pay-hollywood/> (noting that despite her high acclaim, she has received neither the pay nor the opportunities of similarly situated actresses).

126. Rachel Leah, *How Jessica Chastain Helped Octavia Spencer Get Equal Pay Was Great and Sadly Necessary*, SALON (Jan. 25, 2018, 5:45 PM), <https://www.salon.com/2018/01/25/how-jessica-chastain-helped-octavia-spencer-get-equal-pay-was-great-and-sadly-necessary/>.

127. Lacey Rose, *Ellen Pompeo, TV's \$20 Million Woman, Reveals Her Behind-the-Scenes Fight for 'What I Deserve'*, HOLLYWOOD REP. (Jan. 17, 2017, 5:00 AM), <https://www.hollywoodreporter.com/features/ellen-pompeo-tvs-20-million-woman-reveals-her-behind-scenes-fight-what-i-deserve-1074978> (including outing her former co-star Patrick Dempsey's disinterest in joint negotiation to maintain pay equity and her decision to take ownership of the show by producing).

128. Laura Berger, *Jennifer Lawrence, Emma Stone, Jessica Chastain, & More Talk Equal Pay and Abuse in THR Roundtable*, WOMEN & HOLLYWOOD (Nov. 16, 2017), <https://womenandhollywood.com/jennifer-lawrence-emma-stone-jessica-chastain-more-talk-equal-pay-and-abuse-in-thr-roundtable-4ce0871deea8/>.

129. See, e.g., Cristina Escobar, *Men's Silence at the Golden Globes, Don't Worry We Fixed It for You*, REPRESENTATION PROJECT (Jan. 8, 2018), <http://therepresentationproject.org/mens-silence-at-the-golden-globes-dont-worry-we-fixed-it-for-you/>; David Marchese, *In Conversation: Seth Rogan*, VULTURE (Apr. 30, 2018), <http://www.vulture.com/2018/04/seth-rogan-in-conversation.html> ("There are so many people with real things to contribute to the #MeToo discussion that anything I say is not going to add anything useful.").

130. Anthony Bourdain, *On Reacting to Bad News*, MEDIUM (Dec. 12, 2017), <https://medium.com/@Bourdain/on-reacting-to-bad-news-28bc2c4b9adc>. Take, for instance, his response to allegations against his friends in the restaurant industry:

In these current circumstances, one must pick a side. I stand unhesitatingly and unwaveringly with the women. . . . Right now, nothing else matters but women's stories of what it's like in the industry I have loved and celebrated for nearly 30 years—and our willingness, as human beings, citizens, men and women alike, to hear them out, fully, and in a way that other women can feel secure enough, and have faith

such as John Legend supported Time's Up's efforts to "MuteRKelly."<sup>131</sup> On a more systematic level, the #AskMoreofHim campaign, crafted by a small group of Hollywood males, encourages men to do the work of changing cultural attitudes, beliefs, and behaviors.<sup>132</sup> The campaign details ways in which men can do this, including "approaching gender violence as a men's issue," questioning their own attitudes, and engaging in bystander intervention<sup>133</sup> "for everything from sexist and degrading comments, right up to domestic violence and sexual assault."<sup>134</sup> One founding member, actor David Schwimmer, helped launch a #ThatsHarassment campaign which uses public service announcements to help viewers identify the pervasiveness of workplace abuse.<sup>135</sup>

### C. Due Process Concerns

While this cultural, legal, and structural reckoning has been welcomed by many, serious concerns have also dominated the recent public conversation. Those skeptical of #MeToo have emphasized the lack of due process in the naming and shaming campaign. Perhaps the most high-profile articulation of this position comes from President Donald J. Trump's Twitter feed.<sup>136</sup> In particular, skeptics emphasize the lack of a clear path and procedures by which an

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enough that they, too, can tell their stories. We are clearly at a long overdue moment in history where everyone, good hearted or not, will HAVE to look at themselves, the part they played in the past, the things they've seen, ignored, accepted as normal, or simply missed—and consider what side of history they want to be on in the future.

*Id.* Bourdain's role as an advocate has been complicated by posthumous allegations that he paid hush money to silence a male actor with a #MeToo claim against Bourdain's then girlfriend Asia Argento. Hannah Giorgis, *Asia Argento, #MeToo and the Complicated Question of Power*, ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/entertainment/archive/2018/08/asia-argento-allegations/568018/>.

131. Britni Danielle, *Black Women Have Been Speaking Up About R. Kelly for Years, Where Are the Men?*, CHI. TRIB. (May 8, 2018, 3:10 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-rkelly-allegations-sex-cult-0508-20180507-story.html#>.

132. Jackson Katz & Jennifer Siebel Newsom, *How Hollywood Men Can Lead #AskMoreofHim Campaign*, HOLLYWOOD REP. (Mar. 2, 2018, 6:20 AM), <https://www.hollywoodreporter.com/news/how-hollywood-men-can-lead-askmoreofhim-campaign-guest-column-1090128>.

133. *See generally* REPRESENTATION PROJECT, <http://therepresentationproject.org/> (last visited Dec. 7, 2018).

134. *See* THR Staff, *David Arquette, David Schwimmer Join Hollywood Men and Activists to Launch AskMoreOfHim Campaign*, HOLLYWOOD REP. (Mar. 2, 2018, 6:05 AM), <https://www.hollywoodreporter.com/news/david-arquette-david-schwimmer-join-hollywood-men-activists-launch-askmoreofhim-campaign-1090121>; *see also* REPRESENTATION PROJECT, *supra* note 133.

135. Darcel Rockett, *#MeToo Gets Some Help from David Schwimmer with Chicago's New #ThatsHarassment Campaign*, CHI. TRIB. (Apr. 23, 2018, 12:40 PM), <http://www.chicagotribune.com/lifestyles/ct-life-thats-harassment-campaign-metoo-20180423-story.html>.

136. "Peoples [sic] lives are being shattered and destroyed by a mere allegation. Some are true and some are false. Some are old and some are new. There is no recovery for someone falsely accused - life and career are gone. Is there no such thing any longer as Due Process?" Donald J. Trump (@realdonaldtrump), TWITTER (Feb. 10, 2018, 7:33 AM), <https://twitter.com/realdonaldtrump/status/962348831789797381?lang=en>. He doubled down on this argument during the Kavanaugh confirmation hearings. Meagan Vazquez & Kate Sullivan, *Trump Apologizes to Kavanaugh for Sexual Misconduct Allegations During Confirmation*, CNN (Oct. 9, 2018, 6:52 AM), <https://www.cnn.com/2018/10/08/politics/brett-kavanaugh-swearing-in-donald-trump-white-house/index.html>.

accused can successfully contest allegations,<sup>137</sup> judgment by the public rather than by a jury or other independent decision-maker,<sup>138</sup> the risk of false positives, and the potential for disproportionate consequences that are often framed as punishments.<sup>139</sup> While the U.S. Constitution does not generally require due process in nongovernment employment settings,<sup>140</sup> the desire for a fair hearing by an independent arbiter with proportionate consequences for violations of workplace policies is pervasive.<sup>141</sup> Nearly a year after the emergence of #MeToo, the Senate confirmation for now-Supreme Court Justice Brett Kavanaugh raised nearly every variation of these due process concerns and sparked the emergence of the #HimToo movement.<sup>142</sup>

Relatedly, serious disagreement exists over what the appropriate consequences should be for many of the acts identified as part of #MeToo. One might think of it like a Goldilocks problem: some bemoan the “professional death penalty,”<sup>143</sup> while others argue, that in many instances, the loss of a job falls far short of a needed criminal or civil remedy for the victims.<sup>144</sup> For instance, what are the appropriate consequences for someone like former Senator Al Franken, who was accused of groping and forcibly kissing a number of women?<sup>145</sup> Was a public apology sufficient? An ethics investigation? Resignation? Is accountability through acknowledgement by the wrongdoer sufficient, or do employers, voters, or members of the public need to demand criminal or civil penalties or job loss in order to deter or to punish?<sup>146</sup> The conduct identi-

137. Jonathan Kay, *Post-Weinstein, We Must Reform Due Process, Not Abandon It*, NAT'L POST (Nov. 14, 2017, 12:24 PM), <https://nationalpost.com/opinion/jonathan-kay-post-weinstein-we-must-reform-due-process-not-abandon-it> (decrying an age “when a single career can be destroyed with a Tweet”).

138. Newt Gingrich has suggested those calling for Franken’s resignation were motivated by “this weird puritanism which feels a compulsion to go out and lynch people without a trial.” Ana Marie Cox, *Al Franken Isn’t Being Denied Due Process. None of These Famous Men Are*, WASH. POST (Dec. 7, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/12/07/al-franken-isnt-being-denied-due-process-none-of-these-famous-men-are/?utm\\_term=.54a07cb878e7](https://www.washingtonpost.com/news/posteverything/wp/2017/12/07/al-franken-isnt-being-denied-due-process-none-of-these-famous-men-are/?utm_term=.54a07cb878e7).

139. Emily Yoffe, *Why the #MeToo Movement Should Be Ready for a Backlash*, POLITICO MAG. (Dec. 10, 2017), <https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057>. To take a specific example, see Jacinda Barrett’s defense of Chris Hardwick. Hilary Lewis, *Jacinda Barrett Defends Ex-Boyfriend Chris Hardwick Amid Misconduct Scandal*, HOLLYWOOD REP. (June 26, 2018, 8:40 AM), <https://www.hollywoodreporter.com/news/jacinda-barrett-defends-boyfriend-chris-hardwick-1123318>.

140. Christine Emba, *The ‘Due Process’ Assault Freak-Out Is a Fever Dream*, WASH. POST (Dec. 1, 2017), [https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e\\_story.html?utm\\_term=.5d1f2188fff1](https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e_story.html?utm_term=.5d1f2188fff1).

141. See generally E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

142. See generally Lesley Wexler, *#MeToo and Colloquial Due Process*, 22 RICHMOND PUB. INT. L. REV. (forthcoming 2019) (article on file with the author); see also Anna North, *#HimToo, the Online Movement Spreading Myths about False Rape Allegations, Explained*, VOX (Oct. 10, 2018, 3:50 PM) <https://www.vox.com/policy-and-politics/2018/10/10/17957126/himtoo-movement-pieter-hanson-tweet-me-too>.

143. Yoffe, *supra* note 139.

144. Cox, *supra* note 138.

145. Jacob Pramuk, *Here Are All the Sexual Misconduct Accusations Against Sen. Al Franken*, CNBC (Dec. 7, 2017, 12:22 PM), <https://www.cnbc.com/2017/12/07/al-franken-news-list-of-sexual-misconduct-allegations.html>.

146. Harnish, *supra* note 46.

fied via #MeToo, moreover, encompasses a range of behaviors that fall along a spectrum and merit a range of different consequences.

MeToo founder Tarana Burke has panned the moral flattening<sup>147</sup> that has occurred, suggesting that while every instance of harassment should be investigated and dealt with, not all must result in firing or banishment. She contends that just as “sexual violence occurs on a spectrum so accountability has to happen on a spectrum.”<sup>148</sup> Other advocates have also emphasized the need for nuance in meting out punishments,<sup>149</sup> and even some #MeToo supporters worry about the difficulties of redemption for those outed under #MeToo and suggest the movement needs to turn to restorative justice as a way to address the needs of both victims and oppressors.<sup>150</sup> But what that restorative justice might look like remains uncertain. Certain high-profile cases—including discussion of the victim impact statements and judge’s commentary in the sentencing of Larry Nassar for the sexual abuse of gymnasts<sup>151</sup>—have used the language of restorative justice, but advocates have been moving forward without a more systematic exploration of the foundational practices and premises of restorative justice.

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147. Bari Weiss (@bariweiss), TWITTER (Nov. 21, 2017, 9:05 AM), <https://twitter.com/bariweiss/status/933018615347073029> (“Are others disturbed by the moral flattening going on? Glenn Thrush/Al Franken should not be mentioned in the same breath as Harvey Weinstein/Kevin Spacey.”).

148. Emma Brockes, *MeToo Founder Tarana Burke: ‘You Have to Use Your Privilege to Serve Other People,’* GUARDIAN (Jan. 15, 2018, 12:57 AM), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>.

149. Nellie Bowles, *A Reckoning on Sexual Misconduct? Absolutely. But How Harsh, Women Ask*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/business/sexual-harassment-debates.html>; see also Barbara Kingsolver, *#MeToo Isn’t Enough, Now Women Need to Get Ugly*, GUARDIAN (Jan. 16, 2018, 2:00 PM), <https://www.theguardian.com/commentisfree/2018/jan/16/metoo-women-daughters-harassment-powerful-men> (“Raped is not groped is not catcalled on the street: all these are vile and have to stop, but the damages are different.”).

150. Elizabeth Blair, *For the Men #MeToo Has Toppled, Redemption Will Take More Than an Apology*, NPR ALL THINGS CONSIDERED (Jan. 9, 2018, 4:52 PM), <https://www.npr.org/2018/01/09/576798813/for-the-men-metoo-has-toppled-redemption-will-take-more-than-an-apology>.

151. Jonathan Capehart, Christine Emba, Stephen Stromberg & Ruth Marcus, *USA Gymnastics Sex Abuse Victims Deserve Restorative Justice, and Other Victims Do, Too*, WASH. POST ROUNDTABLE (Jan. 25, 2018, 4:01 PM), [https://www.washingtonpost.com/video/editorial/opinion—usa-gymnastics-sex-abuse-victims-deserve-restorative-justice-and-other-victims-do-too/2018/01/25/c0ff929a-021c-11e8-86b9-8908743c79dd\\_video.html?utm\\_term=.51ec81c17147](https://www.washingtonpost.com/video/editorial/opinion—usa-gymnastics-sex-abuse-victims-deserve-restorative-justice-and-other-victims-do-too/2018/01/25/c0ff929a-021c-11e8-86b9-8908743c79dd_video.html?utm_term=.51ec81c17147); Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not ‘Transformative Justice.’ Here’s Why.*, APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/>; Jenny Hollander, *Larry Nassar Hated Listening to His Victims: Every Predator Should Have to*, BUSTLE (Jan. 24, 2018), <https://www.bustle.com/p/larry-nassar-hated-listening-to-the-women-he-abused-every-predator-should-have-to-8008006>.



## III. RESTORATIVE JUSTICE

As responses to and discussions of #MeToo—initially ad hoc and now more organized—have advanced in Hollywood and other arenas, scholars and other theorists should help offer frameworks through which these efforts can be assessed and guided. The #MeToo movement has generated public discussion and spurred concrete actions but has also engendered concern about the recognition and recovery of survivors as well as questions about due process and moral flattening. It has also spawned hope for far-reaching change to harmful practices and behavior. How might different approaches to justice inform these possibilities?

One obvious possibility is that of restorative justice.<sup>152</sup> At the 2018 Golden Globes Awards, Laura Dern used her acceptance speech for best actress to highlight the goals of the Time's Up movement. She included this emphatic plea:

I urge all of us to not only support survivors and bystanders who are brave enough to tell their truth, but to promote *restorative justice*. May we also please protect and employ them. May we teach our children that speaking out without fear of retribution is our culture's new North Star.<sup>153</sup>

But this plea leaves ambiguous what restorative justice encompasses in this setting.

Given the rest of Dern's speech, one possible reading speaks directly and exclusively to the restoration and reintegration of women who have suffered employment setbacks at the hands of their harasser and assaulters. Take, for ex-

152. Avary, *The Responsibility of Conveners in Light of the #Metoo Movement*, CONVENERS.ORG (Jan. 31, 2018), <http://conveners.org/the-responsibility-of-conveners-in-light-of-the-metoo-movement>; Danielle Berrin, *Should We Forgive the Men Who Assaulted Us*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/opinion/metoo-sexual-assault-forgiveness.html>; Blair, *supra* note 150; Kai Cheng Thom, *#NotYet: Why I Won't Publicly Name Abusers*, GUTS (Nov. 30, 2017), <http://gutsmagazine.ca/notyet/>; Emma Coleman, *Restorative Justice for the #MeToo Movement?*, NEW AMERICA (Feb. 20, 2018), <https://www.newamerica.org/millennials/dm/restorative-justice-metoo-movement/>; Melissa Harris-Perry, *The #MeToo Backlash Is Already Here. This Is How We Stop It*, ELLE (Dec. 15, 2017), <https://www.elle.com/culture/career-politics/a14437760/the-metoo-backlash-how-to-stop-it/>; Ann Hornaday, *Enough with Naming and Shaming: It's Time for Restorative Justice in Hollywood*, WASH. POST (Feb. 1, 2018), [https://www.washingtonpost.com/lifestyle/style/enough-with-naming-and-shaming-its-time-for-restorative-justice-in-hollywood/2018/02/01/416ccf80-0518-11e8-b48c-b07fea957bd5\\_story.html?noredirect=on&utm\\_term=.4866f2c33e89](https://www.washingtonpost.com/lifestyle/style/enough-with-naming-and-shaming-its-time-for-restorative-justice-in-hollywood/2018/02/01/416ccf80-0518-11e8-b48c-b07fea957bd5_story.html?noredirect=on&utm_term=.4866f2c33e89); Judith Levine, *Will Feminism's Past Mistakes Haunt #MeToo*, BOS. REV. (Dec. 8, 2017), <http://bostonreview.net/gender-sexuality/judith-levine-will-feminisms-past-mistakes-haunt-metoo>; Brooke Lober, *(Re)thinking Sex Positivity, Abolition Feminism and the #MeToo Movement: Opportunity for a New Synthesis*, ABOLITION J. (Jan. 26, 2018), <https://abolitionjournal.org/rethinking-sex-positivity-abolition-feminism-metoo-movement-opportunity-new-synthesis/>; Kim Tran, *5 Transformative Justice Experts on What We Should Do with 'Sexual Predators' in Our Communities*, EVERYDAY FEMINISM (Nov. 16, 2017), <https://everydayfeminism.com/2017/11/me-too-transformative-justice/>; Lesley Wexler, *#MeToo, Time's Up, and Restorative Justice*, VERDICT (Jan. 23, 2018), <https://verdict.justia.com/2018/01/23/metoo-times-restorative-justice>.

153. Laura Bradley, *Golden Globes 2018: See Laura Dern's Inspiring Acceptance Speech*, VANITY FAIR (Jan. 7, 2018, 9:38 PM), <https://www.vanityfair.com/hollywood/2018/01/golden-globes-2018-laura-dern-speech>  
-big-little-lies (emphasis added).

amples, actress Rose McGowan, who says she was blacklisted in Hollywood after making internal complaints about her rape at the hands of Harvey Weinstein,<sup>154</sup> Annabella Sciorra, who suspects Weinstein had maligned her as a difficult actress,<sup>155</sup> and comedians Dana Min Goodman and Julia Wolov, who experienced career backlash after they complained about Louis C.K.'s masturbation.<sup>156</sup> In addition to direct retaliation, harassment and assault can make it difficult to continue to excel in one's chosen profession because of lingering mistrust and emotional trauma. For instance, actress Hilarie Burton described how she "has refused to audition and refused to work for showrunners she does not already know."<sup>157</sup> She explained that "[t]he fear of being forced into another one of these situations was crippling. I never wanted to be the lead female on any show ever, ever, ever again."<sup>158</sup> Under this interpretation, justice is victim-focused and concerned with repairing and restoring the victim.

But Dern might also have been speaking about the broader understanding of restorative justice as it is used in criminal justice circles. This fuller vision of restorative justice focuses on not only the restoration and reintegration of victims but also of wrongdoers, and it addresses the implications of the wrongdoing for the community as a whole.<sup>159</sup> Many modern restorative justice practices—such as victim-offender mediation—developed in response to criminal wrongdoing and grew out of dissatisfaction with traditional criminal law processes that marginalized the role of victims, focused on punishment instead of transformation, and provided limited remedies for addressing harm.<sup>160</sup> Restorative justice practices have also influenced dispute resolution processes in other settings such as schools,<sup>161</sup> and have played a role in international dispute resolution and approaches to transitional justice.<sup>162</sup> While a re-

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154. Mark Townsend, *Rose McGowan: 'Hollywood Blacklisted Me Because I Got Raped'*, *GUARDIAN* (Oct. 14, 2017, 7:05 PM), <https://www.theguardian.com/film/2017/oct/14/harvey-weinstein-rose-mcgowan-rape-film>.

155. Ronan Farrow, *Weighing the Costs of Speaking Out Against Harvey Weinstein*, *NEW YORKER* (Oct. 27, 2017), <https://www.newyorker.com/news/news-desk/weighing-the-costs-of-speaking-out-about-harvey-weinstein>.

156. Madeleine Aggeler, *What Happened to the Women Louis C.K. Harassed?*, *CUT* (Aug. 30, 2018), <https://www.thecut.com/2018/08/what-about-the-careers-of-louis-ck-victims.html>.

157. Daniel Holloway, *'One Tree Hill' Cast, Crew Detail Assault, Harassment Claims Against Mark Schwahn*, *VARIETY* (Nov. 17, 2017, 3:38 PM), <http://variety.com/2017/tv/news/one-tree-hill-mark-schwahn-harassment-assault-1202617918/>.

158. *Id.*

159. Michael Wenzel, Tyler G. Okimoto, Norman T. Feather & Michael J. Platow, *Retributive and Restorative Justice*, 32 *LAW & HUM. BEHAV.* 375, 376 (2008).

160. *Id.* at 377; see also Clare McGlynn, Julia Downes & Nicole Westmarland, *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences*, in *RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS* 179, 184 (Marie Keenan & Estelle Zinsstag eds., 2017) (describing the peripheral role and lack of control experienced by victims of sexual violence). See generally Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 *NW. U. L. REV.* 1693, 1703 (2018) (calling for restorative justice as part of a democratized criminal justice system).

161. See, e.g., Brenda Morrison, *Schools and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* 325 (Gerry Johnstone & Daniel Van Ness eds., 2013).

162. Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 *INT'L J. TRANSITIONAL JUST.* 339 (2014). More recently, scholars have begun exploring the role of

storative justice approach is most commonly thought of as appropriate for low-level or less-severe offenses or for juvenile offenders,<sup>163</sup> it has also been used in more severe cases, including cases of sexual violence.<sup>164</sup>

Restorative justice, then, refers to a loose collection of practices or mechanisms that share a number of core commitments, including: direct participation of offenders and victims in the process along with representatives of the relevant community; narration of the wrongful behavior and its effects; acknowledgement of the offense and acceptance of responsibility for it by the offender; joint efforts to find appropriate ways to repair the harm done; and reintegration of the offender into the broader community.<sup>165</sup> These processes may provide opportunities for apology, restitution, forgiveness of the offender, an improved understanding of the underlying reasons for the harmful behavior, reconciliation, and new understandings of or renewed commitments to standards for appropriate behavior—though these are not all necessary or guaranteed.<sup>166</sup>

Restorative justice highlights the importance of victim participation, offender accountability, harm repair, and reintegration.<sup>167</sup> Thus, we explore the key components of restorative justice with an eye toward how they might apply in the context of addressing sexual harassment in the workplace. In doing so, we examine several high-profile apologies and other responses to miscon-

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restorative justice in organizational and workplace settings. *See, e.g.*, Laurie J. Barclay & Maria Francisca Saldanha, *Recovering from Organizational Injustice: New Directions in Theory and Research*, in THE OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE 497 (Russell S. Cropanzano & Maureen L. Ambrose eds., 2015); Jerry Goodstein et al., *Individual and Organizational Reintegration After Ethical or Legal Transgressions: Challenges and Opportunities*, 24 BUS. ETHICS Q. 315 (2014).

163. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 163 (2007); *see also* Dena M. Gromet & John M. Darley, *Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures*, 19 SOC. JUST. RES. 395, 405–07 (2006) (finding that research participants preferred to send cases of lower severity to purely restorative processes but were less inclined to choose purely restorative processes for more severe cases).

164. Scholars have debated the appropriateness of restorative practices for cases involving sexual violence. For a set of current views, see RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL, AND THERAPEUTIC DIMENSIONS (Estelle Zinsstag & Marie Keenan eds., 2017).

165. Menkel-Meadow, *supra* note 163, at 164. Restorative justice encompasses a whole host of specific practices, including victim-offender mediation or victim-offender reconciliation programs, family conferencing, truth and reconciliation commissions, and peace circles. *Id.*

166. *Id.* at 162. “In its most idealized form, there are four Rs of restorative justice: repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared community.” *Id.*

Restorative justice hopes to harness the commission of wrongful acts to the making of new opportunities for personal, communal, and societal growth and transformation through empowerment of both victims and offenders in direct and authentic dialogue and recognition. It also hopes practically to reduce recidivism and reintegrate wrongdoers into more positive roles and relationships.

*Id.* at 164.

167. Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 AM. BEHAV. SCI. 768, 771–72 (1998).

duct<sup>168</sup> and consider the ways in which they succeed or fail on these dimensions of restorative justice.<sup>169</sup>

#### A. Acknowledgement

Those who are injured by another—including those injured by sexual harassment and other forms of sexual violence—desire acknowledgment.<sup>170</sup> In particular, victims desire acknowledgement of their experiences, the specifics of the wrongful behavior, and how they were affected by the behavior.<sup>171</sup> Many victims value the chance to tell their own stories.<sup>172</sup> Acknowledgement by the offender—but also from friends, family, and other members of their broader community—confirms their experience.<sup>173</sup> Because women have often not been believed,<sup>174</sup> acknowledgement serves the important purpose of recognizing the

168. Sarah Almukhtar, Michael Gold & Larry Buchanan, *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>.

169. The satirical celebrity apology generator deftly highlights the rote nature and significant shortcomings of these apologies. Dana Schwartz, CELEBRITY PERV APOLOGY GENERATOR, <https://apologygenerator.com> (last visited Oct. 23, 2018).

170. Nathalie Des Rosiers, Bruce Feldthusen & Oleana A. R. Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 440 (1998); see also Leah Litman, Emily Murphy, & Katherine H. Ku, *A Comeback but No Reckoning*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html> (criticizing the closing of an investigation into allegations against former Ninth Circuit Judge Alex Kozinski without “validated, agreed-upon hard truths of what happened”).

171. Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (finding that a common reason for pursuing a claim is “public affirmation of the wrong”); Bruce Feldthusen, Oleana A. R. Hankivsky & Lorraine Greaves, *Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse*, 12 CAN. J. WOMEN & L. 66, 75 (2000); Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 585 (2005) (“[Survivors’] most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgement of harm.”); Gijs van Dijck, *Victim-Oriented Tort Law in Action: An Empirical Examination of Catholic Church Sexual Abuse Cases*, 15 J. EMPIRICAL LEGAL STUD. 126, 128 (2018) (finding that recognition or validation was a primary goal). See generally AARON LAZARE, ON APOLOGY 75 (2004) (identifying four aspects of acknowledgement: the responsible party, the offending behavior “in adequate detail,” the impact of the behavior, and that the behavior violated social norms); NICK SMITH, I WAS WRONG: THE MEANINGS OF APOLOGIES 28–33 (2008) (describing the importance of a corroborated factual record); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 13 (1991) (“[W]e not only apologize to someone but also for something.”).

172. Kathleen Daly, *Sexual Violence and Victims' Justice Interests*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 108, 116 (Estelle Zinsstag & Marie Keenan eds., 2017); Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1643 (2014) (reporting that most survivors of sexual violence who chose to participate in a restorative justice process took part so that they could “say how I was affected”).

173. McGlynn, Downes & Westmarland, *supra* note 160, at 182.

174. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017); Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (“Many survivors realistically judged reporting pointless. Complaints were routinely passed off with some version of ‘she wasn’t credible’ or ‘she wanted it.’”).

truth of their experiences and the consequences of the mistreatment.<sup>175</sup> In acknowledging the offense, the offender “says or affirms ‘Yes, this is what happened. I agree with the wronged party (and others) as to the facts of the case and how they are being interpreted.’”<sup>176</sup> Acknowledgement can also provide confirmation that the victim was not overreacting or to blame.<sup>177</sup> And acknowledgement of the victim’s experience can also signal community support for the victim.<sup>178</sup>

Part of acknowledging is listening. In fact, research has found that apologies can be more effective when the injured party has been heard and the offender has had time to express understanding of the wrong that was done and how it affected the victim.<sup>179</sup>

Failure to acknowledge the wrongful behavior is not only dissatisfying but can also result in further offense. Consider, for example, snowboarder Shaun White’s initial response to questions about a settled sexual harassment lawsuit, including a disparaging characterization of the event as “gossip.”<sup>180</sup> His statement that “I am who I am and I’m proud of who I am. And my friends . . . love me and vouch for me. And I think that stands on its own,” did

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175. Daly, *supra* note 172, at 116 (noting that validation involves “affirming that the victim is believed (i.e. acknowledging that offending occurred and the victim was harmed) and is not blamed for what happened”). McGlynn, Downes, and Westmarland note the importance to survivors of a “shared perception of something as existing or true . . . . Recognition encompasses the significance of the experience being acknowledged.” McGlynn, Downes & Westmarland, *supra* note 160, at 182. Louis C.K. acknowledged that “[t]hese stories are true.” Chloe Melas, *Louis C.K.: ‘These Stories Are True,’* CNN (Nov. 10, 2017, 9:54 PM), <https://www.cnn.com/2017/11/10/entertainment/louis-ck-apology/index.html>.

176. TAVUCHIS, *supra* note 171, at 57. See generally William L. Benoit, *Crisis and Image Repair at United Airlines: Fly the Unfriendly Skies*, 1 J. INT’L CRISIS & RISK COMM. RES. 11, 22 (2018) (“[I]t is not enough to apologize for *something*—one must apologize for the perceived offense.”).

177. Feldthusen, Hankivsky & Greaves, *supra* note 171, at 76 (“I needed to feel that I had done nothing wrong.”); Caroline Vaile Wright & Louise F. Fitzgerald, *Angry and Afraid: Women’s Appraisal of Sexual Harassment During Litigation*, 31 PSYCHOL. WOMEN Q. 73, 77–79 (2007) (finding self-blame to be one dimension of appraisal); see also Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/> (“[M]any of Nassar’s accusers spoke of the doubts they experienced about what happened to them, and of wondering whether they could trust their instincts.”); Litman, Murphy & Ku, *supra* note 174 (describing how Kozinski’s response to the allegations against him suggested oversensitivity and lack of humor). See generally LAZARE, *supra* note 171, at 78 (“[B]y acknowledging the offense, the offender says, in effect, ‘it was not your fault.’”).

178. McGlynn, Downes & Westmarland, *supra* note 160, at 182 (noting a “form of acknowledgement conveying support”).

179. Cynthia McPherson Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201, 202, 206 (2005); see also Amy S. Ebesu Hubbard et al., *Effects of Timing and Sincerity of an Apology on Satisfaction and Changes in Negative Feelings During Conflict*, 77 W. J. COMM. 305, 308, 317 (2013); Aili Peyton & Ryan Goei, *The Effectiveness of Explicit Demand and Emotional Expression Apology Cues in Predicting Victim Readiness to Accept an Apology*, 64 COMM. STUD. 411, 426–29 (2013); Michael Wenzel, Ellie Lawrence-Wood, Tyler G. Okimoto & Matthew J. Hornsey, *A Long Time Coming: Delays in Collective Apologies and Their Effects on Sincerity and Forgiveness*, 39 POL. PSYCHOL. 649, 651 (2018).

180. Rich Juziak, *Shaun White Apologizes After Referring to Sexual Harassment Allegations Against Him as ‘Gossip,’* JEZEBEL (Feb. 14, 2018, 11:05 AM), <https://jezebel.com/shaun-white-apologizes-after-referring-to-sexual-harass-1822993076>.

not acknowledge either the harm or the victim.<sup>181</sup> He was promptly criticized for further insulting the woman he had harassed.<sup>182</sup>

In similar ways, apologies that are conditional (“if I . . .”), cast doubt on the consequences (“if anyone was offended”), or refer only generally to “actions” or “behavior” do not acknowledge the harmful behavior or demonstrate an understanding of its wrongfulness or its effects. Consider actor Jeffrey Tambor’s apology: “I am deeply sorry if any action of mine was ever misinterpreted by anyone as being sexually aggressive or if I ever offended or hurt anyone.”<sup>183</sup> This sort of vague apology not only fails to acknowledge the underlying behavior but it also appears to place fault on the victim for misinterpreting or being overly sensitive.<sup>184</sup>

In contrast, consider the recent interaction of Megan Ganz, a television show writer, and her former boss Dan Harmon. After Ganz called Harmon out on Twitter, a virtual community of millions, for his harassment and abuse of her, Harmon offered a lengthy apology on his podcast which included a very specific acknowledgment of the variety of ways in which he had created a toxic work environment, including gaslighting and retaliation, and the ways in which it had affected Ganz.<sup>185</sup>

181. *Id.*

182. Christine Brennan, *As Shaun White Cements Legacy, Why So Little Attention Paid to Sexual Harassment Allegations?*, USA TODAY (Feb. 13, 2018, 10:49 PM), <https://www.usatoday.com/story/sports/columnist/brennan/2018/02/13/shaun-white-gold-medal-sexual-harassment-allegations/335956002/>; Errin Haines Whack, *Hero, Harasser, or Both? Shaun White’s Newly Complex Legacy*, WASH. POST (Feb. 19, 2018), [https://www.washingtonpost.com/sports/olympics/hero-harasser-or-both-shaun-whites-newly-complex-legacy/2018/02/19/05250b6c-155a-11e8-930c-45838ad0d77a\\_story.html](https://www.washingtonpost.com/sports/olympics/hero-harasser-or-both-shaun-whites-newly-complex-legacy/2018/02/19/05250b6c-155a-11e8-930c-45838ad0d77a_story.html).

183. Caitlin Flynn, *Jeffrey Tambor’s Response to New Sexual Misconduct Allegation Is So Offensive to Sexual Violence Victims*, REFINERY29 (Nov. 16, 2017, 10:00 PM), <http://www.refinery29.com/2017/11/181477/jeffrey-tambor-sexual-harassment-response-trace-lysette>. Or, to take an example from an earlier era, consider former Senator Bob Packwood’s repeated refusals to detail the behavior for which he was apologizing in 1992: “I’m apologizing for the conduct that it was alleged that I did.” Martin Tolchin, *Packwood Offers Apology Without Saying for What*, N.Y. TIMES (Dec. 11, 1992), <http://www.nytimes.com/1992/12/11/us/packwood-offers-apology-without-saying-for-what.html>.

184. LAZARE, *supra* note 171, at 92–93 (“[T]he wrongdoer is saying, in effect, ‘Not everyone would be offended by my behavior. If you have a problem with being too thin-skinned, I will apologize to you because of your need (your weakness) and my generosity.’”). Caitlin Flynn criticized Jeffrey Tambor’s apology: “I am deeply sorry if any action of mine was ever misinterpreted by anyone as being sexually aggressive or if I ever offended or hurt anyone”—as sending a “deeply problematic message to *all* sexual violence survivors that we’re overreacting, we ‘misinterpreted’ a man’s intentions, and we should simply give them the benefit of the doubt . . .” Flynn, *supra* note 183. On evasive, ambiguous, and equivocal apologies, see generally Zohar Kampf, *Public (Non-) Apologies: The Discourse of Minimizing Responsibility*, 41 J. PRAGMATICS 2257, 2258 (2009). These might include expressing willingness to apologize or claiming to have already apologized, without actually apologizing; simultaneously “apologizing” and denying the offense; apologizing for the outcome, but not the act; or using language that “blurs” the offense (*e.g.*, referring generally to an “incident” or “harm”). *Id.* at 2260–66.

185. *Don’t Let Him Wipe or Flush*, HARMONTOWN (Jan. 10, 2018), <http://www.harmontown.com/2018/01/episode-dont-let-him-wipe-or-flush/>. In another case, when film blogger Devin Faraci apologized to his target, Caroline, she noted that “[i]t felt important that he was apologizing, but he was also telling me what he was apologizing for. It didn’t just feel like trying to sweep it under the carpet to me.” *#MeToo, Now What?: The Accuser and the Accused* (PBS television broadcast Feb. 09, 2018), <https://www.pbs.org/video/the-accuser-and-the-accused-fnc15l/>.

In addition to being specific about the behavior and its consequences, it is important to personally address those individuals who suffered harm. For all of its other faults,<sup>186</sup> Louis C.K.’s apology effectively acknowledged “five women named Abby, Rebecca, Dana, Julia who felt able to name themselves and one who did not.”<sup>187</sup> Contrast this with Charlie Rose’s apology to “these women”<sup>188</sup> or Jeffrey Tambor’s address to “anyone” who he ever offended or hurt.<sup>189</sup> The failure to speak directly to the individuals who were impacted undermines the ability of the statement to recognize the inherent dignity of those individuals and the impact of the wrongful behavior on them.

### B. Responsibility-Taking

Acknowledgement is important. But many victims also desire that offenders will go beyond acknowledgement to accept responsibility or otherwise be held accountable for having caused harm.<sup>190</sup> Responsibility-taking is a central feature of restorative justice.<sup>191</sup> Indeed, most restorative justice programs are specifically designed to be available only in cases in which the offender has acknowledged having engaged in the wrongful acts at issue.<sup>192</sup> Responsibility-taking is also the central feature of apologies—distinguishing apologies from other forms of accounting for wrongful behavior like denial, excuse, or justification<sup>193</sup>—and is central to their potential.<sup>194</sup>

186. Leah Fessler, Annalisa Merelli & Sari Zeidler, *We Edited Louis C.K.’s “Apology” to Make It a Real Apology*, QUARTZ (Nov. 10, 2017), <https://qz.com/1126593/we-edited-louis-cks-statement-on-sexual-misconduct-to-make-it-a-real-apology/>.

187. *Id.*

188. Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—with Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), [https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them—with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d\\_story.html?utm\\_term=.02393cd45f6c](https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them—with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.02393cd45f6c).

189. Almkhtar, Gold & Buchanan, *supra* note 168.

190. Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (describing victim who-pursued claim so that the offender would take responsibility); Koss, *supra* note 172, at 1642 (finding that most victims who chose to participate in restorative justice process did so “to make the responsible person accountable”); McGlynn, Downes & Westmarland, *supra* note 160, at 182, 189.

To have him listen to me was almost the most important thing for me. And it was part of him being accountable and taking responsibility. It was so satisfying . . . to have the person who hurt you sit there and listen to you and not blame you for it and admit to what they did . . . .  
Blair, *supra* note 150 (quoting Attiya Khan).

191. McGlynn, Downes & Westmarland, *supra* note 152, at 182.

192. See Kathleen Daly, *The Limits of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 134, 135 (Dennis Sullivan & Larry Tift eds., 2006) (Restorative justice “deals with the penalty (or postpenalty) not fact-finding phase of the criminal process.”); Koss, *supra* note 164, at 1624; Clare McGlynn, Nicole Westmarland & Nikki Godden, “I Just Wanted Him to Hear Me”: *Sexual Violence and the Possibilities of Restorative Justice*, 39 J. L. & SOC’Y 213, 216 (2012) (“[R]estorative justice is predicated on an acknowledgement by the offender that a criminal offence has taken place.”).

193. See ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971); TAVUCHIS, *supra* note 171, at 3; Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV. PSYCHOL. 133, 162 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46, 59 (1968). Victims of sexual assault have mixed feelings about apologies—some desire apology, others are more skeptical. Herman, *supra* note 171, at 586; Koss, *supra*

A couple of additional aspects of responsibility-taking are worth noting. First, victims may also want those who *enabled* the wrongful conduct to take responsibility for their part in supporting or failing to prevent or stop the wrongful behavior.<sup>195</sup> Second, responsibility-taking could, but often does not, extend beyond the original harassing behavior to admit responsibility for subsequent denial, deception, or retaliation. These secondary bad acts often result in significant additional harm and are part of the behavior for which victims wish to hold offenders accountable.<sup>196</sup>

Gymnast Rachel Denhollander touched on both of these in her victim impact statement in the Larry Nassar case when she called out Michigan State University:

[Y]ou need to realize that you are greatly compounding the damage done to these abuse victims by the way you are responding. This, what it took to get here, what we had to go through for our voices to be heard because of the responses of the adults in authority, has greatly compounded the damage we suffer. And it matters.<sup>197</sup>

To take another example of the failure to take responsibility for these subsequent wrongful acts, Louis CK's apology did not meaningfully acknowledge his role in costing his victims financial opportunities or the harm imposed by his silence in the face of widespread rumors.<sup>198</sup>

Responsibility-taking can be difficult for those accused of wrongdoing, even under the best of circumstances. It is often difficult to recognize our own misbehavior, and it is embarrassing to admit that we have acted wrongly. Taking responsibility cedes control, creates vulnerability, and can be a hit to

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note 172, at 1642; *see also* Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (finding that only for some was obtaining an apology a reason for pursuing a claim).

194. *See, e.g.*, Kristin M. Pace et al., *The Acceptance of Responsibility and Expressions of Regret in Organizational Apologies After a Transgression*, 15 CORP. COMM. 410, 420 (2010); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 486–89, 495–97 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 359–65 (2006) [hereinafter Robbennolt, *Settlement Levers*]; Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134–36 (1997); Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465, 476 (2004).

195. Herman, *supra* note 171, at 588.

196. On “reactive fault,” *see* Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 931 (2005); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1195–201 (1983); Jeffrey S. Helmreich, *Does “Sorry” Incriminate? Evidence, Harm, and the Protection of Apology*, 21 CORNELL J.L. PUB. POL’Y 567, 583–84 (2012).

197. *Read Rachael Denhollander’s Full Victim Impact Statement About Larry Nassar*, CNN (Jan. 30, 2018, 7:34 AM), <https://www.cnn.com/2018/01/24/us/rachael-denhollander-full-statement/index.html> [hereinafter *Denhollander Victim Impact Statement*].

198. Gabriel Bell, *Louis C.K. Admits to Sexual Misconduct in Ultimately Disingenuous Confession*, SALON (Nov. 10, 2017, 7:29 PM), <https://www.salon.com/2017/11/10/louis-ck-statement-apology/>.

As recently as September 2017, the comedian was framing any suggestions that he had engaged in the actions he admits to above as baseless rumors, unworthy of comment. It is remarkable that the only difference between then and now is that these same once-unworthy rumors surfaced in the paper of record. . . . If he had become aware of the gravity of his actions, why exactly did he wait until after the Times report to discuss them?

*Id.*



self-image.<sup>199</sup> And the potential legal consequences of taking responsibility can loom large in a context like this one in which there is the possibility for civil lawsuits, criminal prosecution, or both.<sup>200</sup> Those accused of wrongdoing are concerned that to acknowledge and take responsibility for wrongful conduct is to admit legal liability.<sup>201</sup> This can make it even harder to admit wrongdoing for those who may already be hesitant to own up to their behavior and a deterrent even for those who do want to apologize and repair the harm.

A number of states have passed legislation to make some forms of apology inadmissible in civil cases.<sup>202</sup> And discussions in other contexts have contemplated that offenders might offer “safe” apologies that merely express sympathy and stop short of taking responsibility.<sup>203</sup> On the other hand, an apology may appropriately imply “agreement to accept all the consequences, social, legal, and otherwise, that flow from having committed the wrongful act.”<sup>204</sup> And, as we will see in the next Section, repair of the harm done is part of a restorative response.

### C. Harm Repair

Restorative justice incorporates the notion that the offender should repair the harm caused by the wrongful behavior.<sup>205</sup> Archbishop Desmond Tutu aptly

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199. See, e.g., CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 216–17 (2007); see also Tyler G. Okimoto et al., *Refusing to Apologize Can Have Psychological Benefits (and We Issue No Mea Culpa for this Research Finding)*, 43 EUR. J. SOC. PSYCHOL. 22, 23 (2013); Karina Schumann, *The Psychology of Offering an Apology: Understanding the Barriers to Apologizing and How to Overcome Them*, 27 CURRENT DIRECTIONS PSYCHOL. SCI. 74, 75–76 (2018); Brent T. White, *Saving Face: The Benefits of Not Saying I’m Sorry*, 72 LAW & CONTEMP. PROBS. 261, 264 (2009).

200. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010 (1999); Robbenolt, *Apologies and Legal Settlement*, *supra* note 194, at 462.

201. Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 469 (1997); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 35 (2004).

202. See Robbenolt, *Apologies and Legal Settlement*, *supra* note 194, at 462. Similar reforms have been undertaken in Canada and Australia. See John C. Kleefeld, *Thinking Like a Human: British Columbia’s Apology Act*, 40 U. B.C. L. REV. 769–70 (2007); Prue Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483, 483 (2005); see also Press Release, Scottish Government, Passage of the Apologies (Scotland) Bill (Jan. 1, 2016), <https://news.gov.scot/news/passage-of-the-apologies-scotland-bill>; Hong Kong Apology Ordinance, No. 12, (2017) O.H.K., § 1. It is not clear that most of these statutes would protect the kind of robust apologies contemplated here in this context. Many of these statutes apply only to medical malpractice cases; most make inadmissible the expression of sympathy (“I’m sorry”) but not the part of the apology that details the offender’s fault. For empirical examinations, see Benjamin Ho & Elaine Liu, *What’s an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws*, 8 J. EMPIRICAL LEGAL STUD. 179, 179 (2011); Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141 (2011); Benjamin J. McMichael, R. Lawrence Van Horn & W. Kip Viscusi, *Sorry Is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk*, 71 STAN. L. REV. (forthcoming 2018).

203. Cohen, *supra* note 200, at 1010; see generally Robbenolt, *Apologies and Legal Settlement*, *supra* note 194.

204. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1140 (2000).

205. Menkel-Meadow, *supra* note 163, at 162.

illustrates this notion with a simple example: “If you take my pen and say you are sorry, but don’t give me the pen back, nothing has happened.”<sup>206</sup> Moreover, restorative justice contemplates dialogue and joint decision-making about how best to accomplish that repair.<sup>207</sup> There might be a variety of ways to appropriately repair the harm done to individual survivors.<sup>208</sup> As one survivor of domestic sexual violence noted: “[Y]ou need to ask them, like ‘What else is it that you need from me? How can I help you heal after I’ve wronged you?’ That’s the part that’s missing.”<sup>209</sup>

One aspect of this repair is financial compensation,<sup>210</sup> which can be an effective component of making amends.<sup>211</sup> Survivors might desire money damages as concrete compensation for tangible economic losses that occurred as a result of the harassment.<sup>212</sup> These might include lost professional opportunities or assignments, the consequences of career interruption, and expenses for physical and mental health care. Survivors might also see money damages as serving more symbolic purposes.<sup>213</sup> For example, for many, money damages signal that their experience and injuries are acknowledged, serve as evidence that the offender has taken responsibility, or reaffirm their self-worth.<sup>214</sup>

Some survivors might be hesitant to seek individual compensation. For example, some might view money as incommensurate with the harm they have suffered and see offered payments as problematic.<sup>215</sup> “Victims of sexual and other violence have the right to control their cases and deserve to be accorded the agency to decide the” goals of their claims for redress.<sup>216</sup> Indeed, restorative

206. NANCY BERLINGER, *AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS* 61 (2005).

207. Menkel-Meadow, *supra* note 163, at 164.

208. See generally Jennifer K. Robbennolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Legal Decision-Makers as Goal Managers*, 68 *BROOK. L. REV.* 1121, 1128 (2003) (discussing the “principle of equifinality” which “holds that some goals may be alternately satisfied through multiple pathways”).

209. Blair, *supra* note 150 (quoting Attiya Khan, a Toronto-based filmmaker).

210. Financial compensation is an important component of amends. See, e.g., GOFFMAN, *supra* note 186, at 113 (detailing the components of apologies); SMITH, *supra* note 171, at 80–91 (same).

211. See e.g., William P. Bottom et al., *When Talk Is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation*, 13 *ORG. SCI.* 497, 497 (2002); Scher & Darley, *supra* note 194, at 127; Schmitt et al., *supra* note 194, at 466; Jeanne S. Zechmeister et al., *Don’t Apologize Unless You Mean It: A Laboratory Investigation of Forgiveness and Retaliation*, 23 *J. SOC. & CLINICAL PSYCHOL.* 532, 536 (2004).

212. Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 *GENDER & SOC’Y* 333, 352 (2017).

213. Deborah Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 *DEPAUL L. REV.* 417, 423 (2003) (discussing the social meaning of tort damages); Herman, *supra* note 163, at 590. For exploration of state-based financial assistance, see Robyn L. Holder & Kathleen Daly, *Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors*, 24 *INT’L REV. VICTIMOLOGY* 25, 30 (2018). Most said that they would have preferred to receive money from the offender (rather than the state). *Id.* at 40.

214. See Holder & Daly, *supra* note 213, at 35 (financial assistance payment “meant acknowledgement and recognition of what had happened”).

215. Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (One claimant called her payment “dirty money.”).

216. Wexler, *supra* note 8.

justice takes seriously the role of the victim in helping to define the contours of appropriate remedies for herself.<sup>217</sup>

But the community ought to be cognizant of the social pressures on survivors. In particular, some survivors might be hesitant to claim compensation because of concerns about how they will be viewed—and critiqued—by others. Rachel Denhollander, who spoke out about abuse by Larry Nassar, called out those who “claimed that those of us who have filed lawsuits were ambulance chasers who were looking for a payday. . . . [and] specifically called me out by name and said I’m in it for the money.”<sup>218</sup> Similarly, Andrea Constad’s use of her settlement money from a civil case with Bill Cosby was criticized, as she was described as “sett[ing] right into a ritzy Toronto condo after coming to terms with the comedian” and as getting “enough money from the funnyman to score a posh apartment.”<sup>219</sup> This sentiment is consistent with the views of many members of the public who believe that those who seek remuneration for sexual violence are simply gold diggers.<sup>220</sup>

Contrast these sentiments with those expressed about musician Taylor Swift’s countersuit against DJ David Mueller in which she alleged that he sexually assaulted her during a meet and greet.<sup>221</sup> Rather than seek compensatory or punitive damages, Swift sought purely symbolic damages.<sup>222</sup>

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217. C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses*, 11 VIOLENCE AGAINST WOMEN 693, 707 (2005) (“[P]roviding multiple options for survivors” is consistent with recognizing women’s different “lived experiences.”). “Whether a response to sexual violence might nonetheless be able to address the individual preferences of women and the larger systemic issues is no small matter.” *Id.*

218. *Denhollander Victim Impact Statement*, *supra* note 197; see also Debra Cassens Weiss, *How a Gymnast-Turned-Lawyer Helped Bring Larry Nassar to Justice*, ABA JOURNAL (Jan. 29, 2018, 7:00 AM), [http://www.abajournal.com/news/article/how\\_a\\_gymnast\\_turned\\_lawyer\\_helped\\_bring\\_larry\\_nassar\\_to\\_justice/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/how_a_gymnast_turned_lawyer_helped_bring_larry_nassar_to_justice/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email). A claimant to a state-based program is described as reluctant to apply because “I didn’t want anyone to think that I was going for the money” and another because “people could think that the [money] was the only reason why I [applied].” Holder & Daly, *supra* note 213, at 33.

219. Lisa Massarella & Danika Fears, *Cosby Accuser Used Settlement to Buy Ritzy Toronto Condo*, PAGE SIX (Jan. 1, 2016, 6:34 AM), <https://pagesix.com/2016/01/01/cosby-accuser-used-settlement-to-buy-ritzy-toronto-condo/>. At Cosby’s second trial, defense lawyers attempted to “show that Mr. Cosby was the victim of someone who hatched a plot to siphon money from a rich entertainer.” Grahan Bowley & Jon Hurdle, *Bill Cosby Jury to Hear Account That His Accuser Was Scheming*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/arts/television/bill-cosby-jury-to-hear-account-that-his-accuser-was-scheming.html>.

220. Earl Ofari Hutchinson, *Commentary: Bill Cosby, and How We Dismiss Victims*, CHI. TRIB. (Dec. 31, 2015, 3:01 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-cosby-rape-drugs-court-assault-perspec-0104-20151231-story.html>; Solomon Jones, *The Generational Divide Over Bill Cosby*, INQUIRER (June 13, 2017, 9:25 PM), [http://www.philly.com/philly/columnists/solomon\\_jones/the-generational-divide-over-bill-cosby-20170614.html](http://www.philly.com/philly/columnists/solomon_jones/the-generational-divide-over-bill-cosby-20170614.html).

221. Blair Miller, *Taylor Swift Groping Case: Live Updates From Day 2 in Denver Federal Court*, ABC 7 DENVER (Aug. 8, 2017, 5:38 AM), <https://www.thedenverchannel.com/news/local-news/taylor-swift-groping-case-live-updates-from-day-2-in-denver-federal-court>.

222. Relatedly, in his opening statement, Swift’s lawyer argued:

She’s not trying to bankrupt this man. She’s just trying to tell people out there that you can say no when someone puts their hand on you. . . . Grabbing a woman’s rear end is an assault, and it’s always wrong. Any woman—rich, poor, famous, or not—is entitled to have that not happen.

In his closing argument, Swift's attorney commented on the "immeasurable" value of a symbolic verdict.<sup>223</sup> And an op-ed in the *New York Times* argued that "Taylor Swift's court win may have yielded only a single dollar, but to prove this point was invaluable."<sup>224</sup> But does such a statement also convey that civil liability is not merely immeasurable but also sufficient? Might such sentiments subtly reinforce to victims that they ought not pursue their self-interest in damages so as to better satisfy a societal schema of the "ideal victim"?<sup>225</sup>

Processes to remedy the consequences of sexual assault ought to challenge the taint of monetary damages and the stereotype of the gold digger. Victims deserve to be made whole under the law, and making sexual misconduct expensive for alleged abusers may have a deterrence function. The legal system provides victims of physical assaults with monetary damages for important reasons, and, for many victims, those damages might be just as important as the judicial acknowledgement of wrongdoing by the defendant.

Other forms of repair are also appropriate. Apologies can serve to repair some aspects of the harm.<sup>226</sup> And community service is often mentioned, particularly community service that relates to the underlying harm.<sup>227</sup> For an example in a related context, take Ray Rice, the former NFL star caught on video punching his then-girlfriend, now wife, Janay Rice in an elevator and then dragging her, facedown and unconscious, out into the hall.<sup>228</sup> Rice remains in personal therapy after completing required sessions under his diversion agreement,<sup>229</sup> speaks publicly about his remorse,<sup>230</sup> teaches about domestic violence and decision-making to young men, and volunteers with his old high

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*Id.*

223. Daniel Kreps, *Jury Sides with Taylor Swift in Groping Trial, Orders DJ to Pay \$1*, ROLLING STONE (Aug. 14, 2017), <https://www.rollingstone.com/music/music-news/jury-sides-with-taylor-swift-in-groping-trial-orders-dj-to-pay-1-195885/> ("By returning a verdict on Ms. Swift's counterclaim for a single symbolic dollar, the value of which is immeasurable to all women in this situation. . . You will tell every woman . . . that no means no.").

224. Laura Bates, *A Thank You to Taylor Swift*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2017/08/20/opinion/a-thank-you-to-taylor-swift.html>.

225. Wexler, *supra* note 8.

226. See, e.g., Chloe Dykstra, *Rose-Colored Glasses: A Confession.*, MEDIUM (June 14, 2018), <https://medium.com/@skydart/rose-colored-glasses-6be0594970ca> ("PS: To the man who tried to ruin my future: A sincere and heartfelt apology could have made my last four years a hell of a lot easier."). See generally Heather Strang & Lawrence William Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 22.

227. TONY F. MARSHALL, HOME OFF. RES. DEV. & STAT. DIRECTORATE, RESTORATIVE JUSTICE: AN OVERVIEW 26 (1999).

228. Amy Davidson Sorkin, *What the Ray Rice Video Really Shows*, NEW YORKER (Sept. 8, 2014), <https://www.newyorker.com/news/amy-davidson/ray-rice-video-shows>.

229. Josh Dean, *Ray Rice in Exile*, MEN'S J. (Jan. 30, 2018), <https://www.mensjournal.com/sports/ray-rice-exile>.

230. *Id.* ("Ray Rice is sorry. He'll say it even if you don't ask him about it. Like a 12-stepper at a wedding, Rice openly discusses 'my incident' or 'my awful mistake' to the extent that he may as well wear a sandwich board that reads, 'Hi, my name is Ray, and I hit my wife.'")

school team as a mentor.<sup>231</sup> Most recently, despite ever-diminishing chances of being drafted back into the league, Rice contributed to the NFL's annual social responsibility presentation on healthy choices and healthy masculinity with a video on his decision-making and what led him to domestic violence.<sup>232</sup> By way of contrast, convicted rapist Brock Turner's offer to speak to undergraduates about the hazards of excessive drinking is not a meaningful form of repair as it further injures his victim Emily Doe by shifting the blame away from his personal wrongdoing and suggesting instead they were both irresponsible for overconsuming alcohol.<sup>233</sup>

Finally, as we detail in Part IV, to be truly restorative and even transformative, repair needs to happen at a societal level, with change occurring to institutions, structures, and social norms.<sup>234</sup>

#### D. *Nonrepetition*

Part of affirming the dignity and status of the harmed individual is taking steps to avoid perpetuating similar wrongdoing in the future. Survivors are often motivated to take action against offenders in the hope that similar harm will not befall others in the future<sup>235</sup> and to regain a sense that they themselves are safe from continuing harassment.<sup>236</sup> The decision to call out a perpetrator is often, at least in part, prompted by a desire to prevent harm to future victims.<sup>237</sup>

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231. Jane McManus, *If Not the Player, Ray Rice Asks You to Forgive the Man*, ESPN (Apr. 28, 2017), <http://www.espn.com/espnw/culture/feature/article/19248874/if-not-player-ray-rice-asks-forgive-man>.

232. Jane McManus, *Ray Rice to Contribute to NFL's Annual Social Responsibility Presentation to Players*, ESPNW (Apr. 18, 2017), [http://www.espn.com/nfl/story/\\_id/19180539/ray-rice-working-nfl-annual-social-responsibility-presentation](http://www.espn.com/nfl/story/_id/19180539/ray-rice-working-nfl-annual-social-responsibility-presentation). Though one might view as problematic the emphasis on the singularity of the event as both the video and empirical evidence suggest that is unlikely to be the case. Steve Fishman, *Ray Rice Redemption Campaign*, N.Y. MAG. (Apr. 7, 2015, 8:00 AM), <http://nymag.com/intelligencer/2015/04/ray-rice-redemption-campaign.html>.

233. Liam Stack, *In Stanford Rape Case, Brock Turner Blamed Drinking and Promiscuity*, N.Y. TIMES (June 8, 2016), <https://www.nytimes.com/2016/06/09/us/brock-turner-blamed-drinking-and-promiscuity-in-sexual-assault-at-stanford.html>.

234. See *infra* Part III; Hayes & Kaba, *supra* note 151 (“Transformative justice is . . . a community process . . . [designed to] figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.”).

235. GOFFMAN, *supra* note 193, at 113; Des Rosiers, Feldthusen & Hankivsky, *supra* note 170, at 442 (finding that a key reason for pursuing a claim is “detering defendant from harming others”); Feldthusen, Hankivsky & Greaves, *supra* note 171, at 76; Koss, *supra* note 172, at 1642 (finding that one reason most victims participated in restorative justice process was “making sure the responsible person doesn’t do what he did to anyone else”); see Abigail Abrams, *‘I Thought I Was Going to Die’: Read McKayla Maroney’s Full Victim Impact Statement in Larry Nassar Trial*, TIME (Jan. 19, 2018), <http://time.com/5109011/mckayla-maroney-larry-nassar-victim-impact-statement>. These motives are also seen in the context of tort litigation. See e.g., Thomas H. Gallagher et al., *Patients’ and Physicians’ Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1004 (2003); Hensler, *supra* note 213, at 421; Tamara Relis, “*It’s Not About the Money!*”: *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007).

236. LAZARE, *supra* note 171, at 59–60; Estelle Zinsstag & Marie Keenan, *Restorative Responses to Sexual Violence: An Introduction*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL SOCIAL, AND THERAPEUTIC DIMENSIONS 1, 6 (Estelle Zinsstag & Marie Keenan eds., 2017) (“The difficulty of reimagining a safer and positive future relationship is often one of primary concerns to victims and others indirectly affected by the sexual harm.”).

237. Herman, *supra* note 171, at 594.

This desire is also one reason why the acceptance of responsibility matters to victims—it is hoped that responsibility-taking can be the first step in a process of learning that leads to changed behavior.<sup>238</sup>

Many of the statements we have seen from public figures accused of sexual harassment have failed to outline how their behavior will change in the future.<sup>239</sup> Even those who acknowledge their past misdeeds seem to have little concrete to offer on this front. For instance, in discussing his groping of actress Hilarie Burton, actor Ben Affleck suggested that “we have to as men . . . be really, really mindful of our behavior and hold ourselves accountable and say ‘If I was ever part of the problem, I want to change. I want to be part of the solution.’”<sup>240</sup> Yet, in addition to making a conditional statement about his past behavior, he failed to outline how he would change himself going forward.<sup>241</sup> Similarly, Dan Harmon’s apology, which was noteworthy for the level of detail it provided about what he did wrong and how he harmed Megan Ganz, lacks specifics when contemplating how to do better in the future.<sup>242</sup>

It is important to note, moreover, that promises to stop engaging in wrongful behavior must be more than promises. One risk is that offenders will be “quick to apologize, slow to change.”<sup>243</sup> Victims emphasize that promises of reform can help repair the harm, but only if the promises are actually carried out.<sup>244</sup> While an apology may happen at a particular moment in time, the larger project of amends-making, in which it is embedded, is often an ongoing endeavor.

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238. Cohen, *supra* note 200, at 1021; Scher & Darley, *supra* note 194, at 129–30.

239. See *Mea Culpa. Kinda Sorta.*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/interactive/2017/12/01/us/harassment-apologies-annotated.html>.

240. Stephanie Eckardt, *Ranking the Absolute Worst Apologies by Men Accused of Sexual Assault Post Harvey Weinstein in 2017*, W MAG. (Nov. 30, 2017, 12:30 PM), <https://www.wmagazine.com/story/worst-apologies-by-men-harvey-weinstein-kevin-spacey-charlie-rose>.

241. *Ben Affleck Dubbed Buttman After More Groping Allegations Emerge*, TELEGRAPH (Oct. 12, 2017, 4:37 PM), <https://www.telegraph.co.uk/films/2017/10/12/ben-affleck-dubbed-buttman-groping-allegations-emerge>.

242. *Don't Let Him Wipe or Flush*, *supra* note 185 (“The last and most important thing I can say is just: Think about it. No matter who you are at work, no matter where you’re working, no matter what field you’re in, no matter what position you have over or under or side by side with somebody, just think about it. You gotta, because if you don’t think about it, you’re gonna get away with not thinking about it, and you can cause a lot of damage that is technically legal and hurts everybody. And I think that we’re living in a good time right now, because we’re not gonna get away with it anymore. And if we can make it a normal part of our culture that we think about it and possibly talk about it, then maybe we can get to a better place where that stuff doesn’t happen.”).

243. Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 148 (Heather Strang & John Braithwaite eds., 2002).

244. John Paul Catungal, *LGBTQ2 Apology Is Good Start, But It’s Not Enough*, CONVERSATION (Nov. 27, 2017), <http://theconversation.com/lgbtq2-apology-is-a-good-start-but-its-not-enough-88159> (“The apology must be more than a mere symbolic gesture with little real impact.”).

*E. Redemption and Reintegration*

One of the tenets of restorative justice is the reintegration of the offender back into the relevant community.<sup>245</sup> The restorative justice notion of “earned redemption” anticipates both that offenders will be held accountable for their behavior and that they will be enabled to “earn their way back into the trust of the community.”<sup>246</sup> These dual goals mean that “we face a difficult post-#MeToo conversation, about how we collectively deal with men who have been outed as perpetrators of assault, harassment, and misconduct.”<sup>247</sup>

The reintegration contemplated by restorative justice has been somewhat controversial in the context of sexual violence. Advocates of transformative justice in cases of domestic violence, for example, argue that the reintegration of the offender is “important but secondary to enhancing the victim’s autonomy.”<sup>248</sup> And studies of the preferences of survivors of domestic violence, while reflecting survivors’ desire for many aspects of restorative justice, have suggested that survivors prioritize “their own need for reintegration with their communities, rather than the offenders’ need for reintegration.”<sup>249</sup>

In the wake of #MeToo and Time’s Up, individuals in Hollywood have contemplated what might be necessary for redemption and reintegration. Actor Bryan Cranston, for example, allowed that there was room for second chances for offenders like Weinstein and Spacey, but recognized that

it would take tremendous contrition on their part. And a knowingness that they have a deeply-rooted psychological emotional problem and it takes years to mend that. If they were to show us that they put the work in, and are truly sorry, and making amends, and not defending their actions, but asking for forgiveness, then maybe down the road there is room for that, maybe so. . . . We shouldn’t close it off and say, “To hell with him, rot and go away from us from the rest of your life.” Let’s not do that.<sup>250</sup>

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245. Menkel-Meadow, *supra* note 163, at 162.

246. Bazemore, *supra* note 167, at 770.

247. Anna Silman, *7 Actresses on Whether the Men of #MeToo Should Get a Path to Redemption*, CUT (May 1, 2018), <https://www.thecut.com/2018/05/should-metoo-perpetrators-be-allowed-a-path-to-redemption.html>; see also Linda Martin Alcoff, *This Is Not Just About Junot Díaz*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/opinion/junot-diaz-metoo.html> (“[W]e have a responsibility to think about the future—specifically, a future in which repentant sexists might have a place” and calling for society to “think through the important issue of how to demand individual responsibility from abusers while also being vigilant about our collective and institutional responsibility, to develop critiques of the conventions of sexual behavior that produce systemic sexual abuse.”).

248. Coker, *supra* note 243, at 145.

249. Herman, *supra* note 171, at 598 (“The restorative element of the survivors’ vision was most apparent in their focus on the harm of the crime rather than on the abstract violation of the law and in their preference for making things as right as possible in the future, rather than in avenging the past. Their vision was restorative, also, in their emphasis on the importance of community acknowledgement and denunciation of the crime. Their focus, however, was on their own need for reintegration with their communities, rather than the offenders’ need for reintegration.”).

250. Bryan Cranston: *‘There May Be a Way Back for Weinstein,’* BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/av/entertainment-arts-41973917/bryan-cranston-there-may-be-a-way-back-for-weinstein>.

Women involved in the leadership of Time's Up have also grappled with this question. Actress Reese Witherspoon granted that "there's a lot of room for reconciliation. I think there's a time to approach people and tell the truth and have them listen thoughtfully and meaningfully and apologize sincerely."<sup>251</sup> At the same time, actress America Ferrera has noted:

As a culture, we've gone from not listening, hearing, or believing women. And how are we going to skip over the whole part where women get to be heard and go straight to the redemption of the perpetrator. Can't we live in that space where it's OK for perpetrators to be a little bit uncomfortable with what the consequences will be?<sup>252</sup>

Redemption may begin with an apology<sup>253</sup> but may take more than a simple apology.<sup>254</sup> How much more is required for the offender to rebuild his or her moral and social identity depends, in part, on the nature of the offense—for example, its severity, intentionality, and pervasiveness.<sup>255</sup> And attention to the nuances of these factors is important in order to avoid moral flattening. But appropriate consequences are important. Community responses to the wrongdoing and what communities require from an offender communicate

251. *Oprah Winfrey on Time's Up and the Climate of Change*, CBS NEWS (Jan. 13, 2018), <https://www.cbsnews.com/video/oprah-winfrey-on-times-up-and-the-climate-of-change/>.

252. *Id.*

253. Vanessa A. Bee, *Can Penitent Sexual Predators Ever Be Granted Redemption*, CURRENT AFF. (Nov. 30, 2017), <https://www.currentaffairs.org/2017/11/can-penitent-sexual-predators-ever-be-granted-redemption> ("If someone can't bring themselves to make a clear, unequivocal apology . . . that seems to pretty clearly foreclose the possibility of the community choosing to trust them again in the future.")

254. Blair, *supra* note 150; Dena M. Gromet & Tyler G. Okimoto, *Back Into the Fold: The Influence of Offender Amends and Victim Forgiveness on Peer Reintegration*, 24 BUS. ETHICS Q. 411, 411 (2014) (finding that organizational peers were more inclined to reintegrate into the workplace an offender who offered strong amends for the wrongdoing); Herman, *supra* note 71, at 593 ("Rather than moving victims to forgiveness," she stated, "we need to be thinking about moving offenders to contrition and changed behavior. We are looking to get beyond, 'I'm sorry, honey.'"); McGlynn, Downes & Westmarland, *supra* note 160, at 187 ("All survivors spoke of their wish for perpetrators to experience tangible consequences, symbolically and emphatically, to underline the significance and harm of their actions."); *see also* MARGARET URBAN WALKER, MORAL REPAIR 191 (2006) (describing accepting responsibility and acknowledging harm as the "minimal condition" for "setting things right"); Christopher P. Reinders Folmer, Peter Mascini & Joost M. Leunissen, *Rethinking Apology in Tort Litigation: Deficiencies in Comprehensiveness Undermine Remedial Effectiveness 2* (Jan. 31, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3113196>.

255. People tend to need more elaborate apologies for more culpable offenses. Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 226 (1989); Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271, 275 (1981); *see also* Jerry Goodstein & Karl Aquino, *And Restorative Justice for All: Redemption, Forgiveness, and Reintegration in Organizations*, 31 J. ORG. BEHAV. 624, 626 (2009) ("Not all transgressions in the workplace should be addressed through restorative justice. One of the factors organizational actors should consider before using restorative justice to address transgressions is the seriousness of the offense."); Julian V. Roberts & Loretta J. Stalans, *Restorative Sentencing: Exploring the Views of the Public*, 17 SOC. JUST. RES. 315, 319–20 (2004) ("[R]estorative proportionality" requires repair that is "more onerous in relation to the degree of harm inflicted, and . . . related to repairing the harm . . . caused."); L. Walgrave & H. Geudens, *The Restorative Proportionality of Community Service for Juveniles*, 4 EUR. J. CRIME CRIM. L. & CRIM. JUST. 361, 375–76 (1996) (arguing that a proportional or "correct" restoration is "to be determined on the basis of a link between the severity of the material, relational and social harm caused by the offence and the degree of restorative effort required by the offender"); C. Ward Struthers et al., *Interrelationship Among Injured Parties' Attributions of Responsibility, Appraisal of Appropriateness to Forgive the Transgressor, Forgiveness, and Repentance*, 40 J. APPLIED. SOC. PSYCHOL. 970 (2010).



something about the collective's view of the violation, the underlying social norms, and the relative status of the offender and survivor.<sup>256</sup> Censure and meaningful consequences for offenders condemn the offender's treatment of the survivor, confirm the value of the survivor in the community, and reaffirm or (perhaps more appropriately in the case of sexual harassment) recreate a shared set of social norms and values.<sup>257</sup>

Restorative justice approaches contemplate that offenders will engage in all the other aspects of the restoration as the foundation for reintegration.<sup>258</sup> Thus, to be reintegrated into the community, offenders need not become "moral saint[s]"<sup>259</sup> but should make restitution to their victims, engage in service to the relevant community, confront the harm caused by their behavior, and learn from their experience while helping others to do so as well.<sup>260</sup> Insufficient attention to building this foundation for redemption can cause efforts at reintegration or "comebacks" to fall flat.<sup>261</sup> As actress Ashley Judd notes,

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256. Wenzel, Okimoto, Feather & Paltow, *supra* note 159, at 385. *See generally* Katie J.M. Baker, *What Do We Do With These Men?*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/sunday/metoo-comebacks-charlie-rose.html> (noting importance of societal grappling with what to require for reintegration).

257. *See, e.g.*, Daly, *supra* note 172, at 118 (describing the importance of "public condemnation and censure"); Herman, *supra* note 163, at 585 (describing the importance of a "clear and unequivocal stand in condemnation of the offense"); Wenzel, Okimoto, Feather & Paltow, *supra* note 159, at 379–80. *See generally* TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997).

258. Menkel-Meadow, *supra* note 163, at 162.

259. Linda Radzik, *Moral Repair and the Moral Saints Problem*, 2 RELIGIOUS INQ. 5, 13 (2013).

260. Bazemore, *supra* note 167, at 771, Table 1; *see also* LINDA RADZIK, *MAKING AMENDS* 5 (2009) ("The sorts of responses that come to mind include feelings of guilt, remorse, or shame; resolutions to behave better in the future; acknowledgements of wrongdoing and blameworthiness; apologies; self-improvement; acts of restitution or reparation; the performance of good deeds that would otherwise be deemed supererogatory; self-punishment; and voluntary submission to punishment at the hands of an authority"); TAVUCHIS, *supra* note 171, at 8 ("[Apologies are] a form of self-punishment that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered out claims to membership in a moral community suspect or defeasible."); Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 LAW & SOC'Y REV. 1, 1 (2009) (finding that people care about simultaneously accomplishing a range of justice goals in responding to wrongdoing); Gromet & Darley, *supra* note 163, at 410, 417 (finding that research participants assigned less punishment (*i.e.*, prison time) to offenders who had gone through processes that involved restorative justice components than to those who did not and that participants preferred greater punishment when restorative procedures were unsuccessful); McGlynn, Downes & Westmarland, *supra* note 160, at 187 ("[Victims want] meaningful consequences. All survivors spoke of their wish for perpetrators to experience tangible consequences, symbolically and emphatically to underline the significance and harm of their actions."); Walgrave & Geudens, *supra* note 255, at 376–77 (discussing the restoration of public losses via service to the community).

261. Cara Buckley, *Tig Notaro Doesn't Want to Hear About Disgraced Men Coming Back*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/arts/television/tig-notaro-louis-ck-metoo.html>; Stassa Edwards, *Redemption Is Inevitable for Powerful Men*, JEZEBEL (Apr. 20, 2018, 1:30 PM), <https://jezebel.com/redemption-is-inevitable-for-powerful-men-1825364533>; Amber Tamblyn, *Amber Tamblyn: I'm Not Ready for the Redemption of Men*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/opinion/im-not-ready-for-the-redemption-of-men.html>; Lindsay Zoladz, *The #MeToo Mudslide*, RINGER (Apr. 19, 2018, 5:40 AM), <https://www.theringer.com/2018/4/19/17254878/metoo-comeback-narrative-louis-ck-mario-batali>; *see also* Roxane Gay, *Louis C.K. and Men Who Think Justice Takes as Long as They Want It To*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/opinion/louis-ck-comeback-justice.html>; Litman, Murphy & Ku, *supra* note 204.

“There’s an appropriate sequence. Accountability, introspection, restitution, then redemption. You don’t get to skip the stages that lead to redemption.”<sup>262</sup>

In a similar vein, consider one reaction to #MeToo offenders’ desire to reintegrate:

It’s one thing to say that people who have harmed others, and feel remorse, deserve an opportunity to make amends, and shouldn’t be pariahs forever. Most people shouldn’t be defined by the worst thing they’ve ever done.

There’s a difference, however, between arguing that someone merits a second chance, and insisting that he didn’t do anything all that wrong in the first place, that his accusers are exaggerating, or that his humiliation makes him the real victim. . . .

. . . I feel sorry for a lot of these men, but I don’t think they feel sorry for women, or think about women’s experience much at all. And maybe that’s why the discussion about #MeToo and forgiveness never seems to go anywhere, because men aren’t proposing paths for restitution. They’re asking why women won’t give them absolution.

I’m not interested in seeing these #MeToo castoffs engage in Maoist struggle sessions to purge their patriarchal impulses. But maybe they’d find it easier to resurrect their careers if it seemed like they’d reflected on why women are so furious in the first place, and perhaps even offered ideas to make things better.<sup>263</sup>

Redemption and reintegration takes real work.

The experience of actor Mel Gibson provides a possible example of what exile followed by reintegration might look like when an offender makes personal amends but does not engage in a serious effort to repair the community. After crafting what many view as a deeply anti-Semitic movie (*The Passion of the Christ*) in 2004; getting drunk and calling a police officer “sugar tits” and blaming the Jews for the world’s problems in 2006; and threatening his girlfriend, wishing her rape, and using racist profanity in 2010, Hollywood largely turned its back on Gibson.<sup>264</sup> Gibson offered a public apology to the Jewish community in 2006, asking for the community’s help on his journey through recovery and a “discussion to discern the appropriate path for healing.”<sup>265</sup> For

262. Quoted in Anna Silman, *7 Actresses on Whether the Men of #MeToo Should Get a Path to Redemption*, CUT (May 1, 2018), <https://www.thecut.com/2018/05/should-metoo-perpetrators-be-allowed-a-path-to-redemption.html>; see also Devin Faraci, *#MeToo, Now What?*, PUB. BROADCASTING SERV. (television broadcast Feb. 9, 2018), <http://www.pbs.org/video/the-accuser-and-the-accused-fnc15/> (“You don’t just get to show up and say, ‘Hey sorry, my bad’ and then just keep going. That’s not how it works.”).

263. Michelle Goldberg, *The Shame of the MeToo Men*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/opinion/columnists/metoo-movement-franken-hockenberry-macdonald.html>.

264. Sady Doyle, *It Took America Under 10 Years to Forgive Mel Gibson. What Will It Take to Get Rid of Abusers for Good?*, ELLE (Nov. 17, 2017), <https://www.elle.com/culture/a13796102/mel-gibson-redemption-harvey-weinstein-sexual-assault/>.

265. Mel Gibson, *Mel Gibson’s Apology to the Jewish Community*, ANTI-DEFAMATION LEAGUE (Aug. 1, 2006), <https://www.adl.org/news/letters/mel-gibsons-apology-to-the-jewish-community>.

several years, no Hollywood studios directly employed him. High-profile celebrities and writers then lobbied for his return, vouching for his efforts at reform.<sup>266</sup> They pointed to his personal healing,<sup>267</sup> sincere empathy, attendance at bat mitzvahs and Yom Kippur breakfasts, acknowledgement of the Holocaust, a personal but unpublicized apology to one of the sheriffs he insulted, discreet meetings with Jewish leaders to learn about Judaism and apologize, and his donations to charitable Jewish causes.<sup>268</sup> They argued that he was fundamentally changed from who he was.<sup>269</sup>

Not all agree that Gibson has sufficiently atoned to warrant his public reintegration. Detractors observe that Gibson has made comments that demonstrate a refusal to now publicly wrestle with his past,<sup>270</sup> has shown a profound lack of public remorse,<sup>271</sup> and has evinced an unwillingness to engage in ongoing repair.<sup>272</sup> Nonetheless, Gibson has returned to Hollywood. In 2016, he directed *Hacksaw Ridge*, a major motion picture, and in 2017, he starred in the

266. Allison Hope Weiner, *A Journalist's Plea on 10<sup>th</sup> Anniversary of 'The Passion of the Christ': Hollywood, Take Mel Gibson Off your Blacklist*, DEADLINE (Mar. 11, 2014, 2:48 PM), <https://deadline.com/2014/03/mel-gibson-career-hollywood-deserves-chance-697084/>.

267. Billy Nilles, *What Mel Gibson's Rebound Really Says About Hollywood*, E! ONLINE (Nov. 11, 2017, 4:00 AM), <https://www.eonline.com/news/892897/what-mel-gibson-s-rebound-really-says-about-hollywood> (Andrew Garfield said, "I think it's a good sign that the Academy has acknowledged his work. It's utterly deserved, but it's a really good sign that finally the healing he's been doing internally and in his life and with the people in his life can finally be recognized on the outside.").

268. Allison Kaplan Somner, *Should Mel Gibson Be Forgiven Because He Helps Holocaust Survivors?*, HAARETZ (Mar. 21, 2017, 1:15 AM), <https://www.haaretz.com/life/film/premium-should-mel-gibson-be-forgiven-because-he-helps-holocaust-survivors-1.5451320>; Weiner, *supra* note 258.

269. Mike Fleming Jr., *Robert Downey Jr. Q&A: On 'The Judge,' Turning 50 with a New Baby, and Yes to 'Iron Man 4'—If Mel Gibson Directs It*, DEADLINE (Oct. 3, 2014, 8:41 AM), <https://deadline.com/2014/10/robert-downey-jr-qa-the-judge-iron-man-4-mel-gibson-845359/> (Robert Downey Jr. said, "Nobody should make a case for somebody who just wants forgiveness but hasn't changed, but he's a fundamentally different guy.").

270. Megan Garber, *Mel Gibson Is Not Sorry*, ATLANTIC (Nov. 2, 2016), <https://www.theatlantic.com/entertainment/archive/2016/11/mel-gibson-is-not-sorry/506225/> (discussing Gibson's description of his past transgressions as a single "moment in time").

271. Madeleine Davies, *Mel Gibson Is Unworthy of a 'Comeback,' But He's Getting One Anyway*, JEZEBEL (Mar. 1, 2017, 2:20 PM), <https://jezebel.com/mel-gibson-is-unworthy-of-a-comeback-but-hes-getting-o-17928>

28959. Davies describes Gibson's 2006 arrest and subsequent public leak of his comments as "recorded illegally by an unscrupulous police officer who was never prosecuted for that crime. And then it was made public by him . . . So, not fair" and added, "[a]nd for one episode in the back of a police car on eight double tequilas to sort of dictate all the work, life's work and beliefs and everything else that I have and maintain for my life is really unfair. *Id.*

272. Nick Holdsworth, *Why Mel Gibson Won't Finance More of His Own Films: 'I'm Not a Fool' (Q&A)*, HOLLYWOOD REP. (July 5, 2014, 12:28 PM), <https://www.hollywoodreporter.com/news/why-mel-gibson-wont-finance-716811> ("It's behind me; it's an 8-year-old story. It keeps coming up like a rerun, but I've dealt with it and I've dealt with it responsibly and I've worked on myself for anything I am culpable for. All the necessary mea culpas have been made copious times, for this question to keep coming up, it's kind of like . . . I'm sorry they feel that way, but I've done what I need to do."); Ian Phillips, *I'm Jewish, and I'm Not Ready for a Mel Gibson Comeback*, THIS INSIDER (Nov. 3, 2016, 5:32 AM), <https://www.thisinsider.com/why-im-not-ready-to-forgive-mel-gibson-2016-11>.

family-friendly, big-budget movie *Daddy's Home*.<sup>273</sup> As of the writing of this Article, Gibson also stars in three postproduction movies.<sup>274</sup>

While Gibson's advocates may be correct about his personal remorse, he has fallen short with regard to ongoing public acknowledgement and efforts to repair.<sup>275</sup> Even if he has taken the necessary steps with regard to his victims and with himself, public efforts would better allow others to learn from his example, demonstrate his break from the past, and provide the public with better information from which to debate the sufficiency of his efforts and sincerity, which, in turn, could contribute to the ongoing public dialogue about acceptable behavior.

If reintegration is possible, what about forgiveness? There is evidence that forgiveness can benefit both survivors and offenders, that seeking and granting forgiveness can be physiologically and emotionally beneficial to both parties.<sup>276</sup> But it is important to have a nuanced understanding of what forgiveness is (and is not) and how it fits (or does not fit) into restorative justice.

Forgiveness is "a decision to release or forego bitterness and vengeance" that may (or may not) involve a change in emotions or attitudes toward the offender.<sup>277</sup> In this way, forgiveness is about the forgiver and involves an intrapersonal letting go of resentment, rather than necessarily being focused on interaction with the offender.<sup>278</sup>

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273. For other examples, see S.E. Cupp, *Is America Too Forgiving? Bill Clinton, Eliot Spitzer, Tiger Woods—All Get Shots at Redemption*, N.Y. DAILY NEWS (July 7, 2010, 4:00 AM), <http://www.nydailynews.com/opinion/america-forgiving-bill-clinton-eliot-spitzer-tiger-woods-shots-redemption-article-1.467596> ("[H]ow readily we forgive says something crucial about our character and our judgment. We don't need to rake our sinners over the coals forever, but perhaps we should be more judicious about rewarding them with million-dollar contracts, as in the case of Woods; positions of influence, as in the case of Spitzer, or blind adoration, as in the case of Clinton. Forgiveness might be good for our souls, but reward does nothing to cleanse theirs.")

274. *Mel Gibson Filmography*, IMDB, <https://www.imdb.com/name/nm0000154/> (last visited Dec. 7, 2018).

275. See SMITH, *supra* note 171, at 81 ("We often judge an offender's commitment to reform and forbearance over their lifetime, and any regression can diminish an apology's significance."); Radzik, *supra* note 259, at 13 (discussing the scope of the obligation to atone).

276. See, e.g., Nathaniel G. Wade et al., *Efficacy of Psychotherapeutic Interventions to Promote Forgiveness: A Meta-Analysis*, 82 J. CONSULTING & CLINICAL PSYCHOL. 154, 167 (2014) (reviewing studies); Everett L. Worthington et al., *Forgiveness, Health, and Well-Being: A Review of Evidence for Emotional Versus Decisional Forgiveness, Dispositional Forgiveness, and Reduced Unforgiveness*, 30 J. BEHAV. MED. 291 (2007) (reviewing studies); see also Harry M. Wallace, Julie Juola Exline & Roy F. Baumeister, *Interpersonal Consequences of Forgiveness: Does Forgiveness Deter or Encourage Repeat Offenses?*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 453 (2008).

277. Julie Juola Exline, *The Thorny Issue of Forgiveness: A Psychological Perspective*, 13 PEPP. DISP. RESOL. L.J. 13, 17 (2013); see also Charlotte vanOyen Witvliet & Lindsey Root Luna, *Forgiveness and Well-Being*, in POSITIVE PSYCHOLOGY: ESTABLISHED AND EMERGING ISSUES 131, 133 (Dana S. Dunn ed., 2018) (Forgiveness is described as "(1) emphasizing the humanity of the offender while holding him or her responsible for the transgression, (2) seeing the transgression as evidence that the offender needs to be transformed by learning, growing, or changing, and (3) desiring that good change for the offender.")

278. See Peter Strelan et al., *For Whom Do We Forgive? A Functional Analysis*, 20 PERS. RELATIONSHIPS 124 (2013). Forgiveness is more likely when the risk of exploitation is low and the value of the relationship with the offender is high. Jeni L. Burnette et al., *Forgiveness Results from Integrating Information About Relationship Value and Exploitation Risk*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 345 (2012). Making amends

Importantly, neither forgiveness nor reintegration should mean that offenders are not to be held accountable, or that they are exempt from punishment or reparations.<sup>279</sup> “Forgiveness is not denying, excusing, minimizing, or tolerating an offense. . . . [F]orgiveness ought to take seriously the safety of the victim (e.g., physically, emotionally, spiritually) and justice oriented responses to the offender.”<sup>280</sup> Thus, forgiveness and accountability can co-exist, and making amends should be a precursor to reintegration. Similarly, forgiveness “is not the same thing as restoring an offender to a prior position,”<sup>281</sup> nor does forgiveness mean that a survivor must reconcile with an offender.<sup>282</sup> And, despite the common refrain “forgive and forget,” forgiveness does not imply forgetting.<sup>283</sup> Indeed, it is important to remember offenses so that offenders can learn from them and others can protect themselves as necessary.<sup>284</sup>

In addition, while the inclusion of reintegration as an element of restorative justice may necessitate some “community capacity” for a sort of forgiveness,<sup>285</sup> it does not require that individual survivors must forgive offenders.<sup>286</sup> Nor does accepting an apology mean that the victim will or must

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can provide information about each of these considerations. Laura B. Luchies et al., *People Feel Worse About Their Forgiveness When Mismatches Between Forgiveness and Amends Create Adaptation Risks*, J. SOC. REL. 2017, at 37. For a review of the factors that contribute to forgiveness, see Ryan Fehn, Michelle Gelfand & Monisha Nag, *The Road to Forgiveness: A Meta-Analytic Synthesis of Its Situational and Dispositional Correlates*, 136 PSYCHOL. BULL. 894, 896 (2010). See generally MICHAEL E. MCCULLOUGH, KENNETH I. PARGAMENT & CARL E. THORESEN (EDS.), FORGIVENESS: THEORY, RESEARCH, AND PRACTICE (2000).

279. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 15 (1998) (“In theory, forgiveness does not and should not take the place of justice or punishment. Forgiveness makes a change in how the offended feels about the person who committed the injury, not a change in the actions to be taken by a justice system.”); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 33 (1988) (“Because I have ceased to hate the person who has wronged me it does not follow that I act inconsistently if I still advocate his being forced to pay compensation for the harm he has done or his being forced to undergo punishment for his wrongdoing.”). See generally, Peter Strelan, *Justice and Forgiveness in Interpersonal Relationships*, 27 CURRENT DIR. PSYCHOL. SCI. 20 (2018); Michael Wenzel & Tyler G. Okimoto, *On the Relationship Between Justice and Forgiveness: Are All Forms of Justice Made Equal?*, 53 BRIT. J. SOC. PSYCHOL. 463 (2014).

280. vanOyen Witvliet & Luna, *supra* note 277, at 132.

281. *Id.*

282. Coker, *supra* note 243, at 143 (“Reintegration does not require that the victim forgive him and certainly does not require that they reconcile, though it does not foreclose the possibility.”); Exline, *supra* note 269, at 20 (“[F]orgiveness does not imply trust of the offender, nor does it require that people form or continue an ongoing relationship with this person.”); vanOyen Witvliet & Luna, *supra* note 277, at 132; see also Joshua N. Hook et al., *Does Forgiveness Require Interpersonal Interactions? Individual Differences in Conceptualization of Forgiveness?*, 53 PERSONALITY & INDIV. DIFF. 687, 687 (2012).

283. Exline, *supra* note 277, at 18.

284. *Id.*

285. Bazemore, *supra* note 167, at 785.

286. Marilyn Peterson Armour & Mark S. Umbreit, *The Paradox of Forgiveness in Restorative Justice*, in HANDBOOK OF FORGIVENESS 491, 492 (Everett L. Worthington, Jr. ed., 2005) (“Restorative justice dialogue fosters the possibility for forgiveness—but only if the victim voluntarily chooses that path.”); Bazemore, *supra* note 167, at 784 (restorative justice does not imply obligation for individual victim to forgive); Coker, *supra* note 243, at 148 (“Reintegration does not require that the victim forgive him and certainly does not require that they reconcile, though it does not foreclose the possibility.”); see also MINOW, *supra* note 279, at 115 (“Equally important is the adoption of a stance that grants power to the victims, power to accept, refuse, or ignore the apology.”).

forgive.<sup>287</sup> While there can be benefits to forgiving,<sup>288</sup> there can also be costs.<sup>289</sup>

Moreover, critics of restorative justice in the context of sexual violence are concerned that survivors will be pressured to forgive.<sup>290</sup> Think, for example, of actress Jessica Walters weeping during a *New York Times* interview as her male colleagues expressed support for co-star Jeffrey Tambor and then granting Tambor forgiveness through tears.<sup>291</sup> Such forgiveness might well have been voluntary and genuine. But it may also have been a recognition that failure to forgive would mean continued diminishment of her harm and a public perception that she was now the one at fault for holding a grudge.<sup>292</sup> Such pressure can be an additional harm experienced by the survivor: “[p]ressure to forgive places the victim in an untenable position of once again subordinating her own needs to those of the abuser.”<sup>293</sup> As Burke has explained, “#MeToo, in a lot of ways, is about agency. It’s not about giving up your agency, it’s about claiming it.”<sup>294</sup> In claiming their agency, victims may choose to forgive or not to forgive. The power, moreover, “to view a violation as beyond forgiveness marks one of

287. See Mandeep Dhali, *Offer and Acceptance of Apology in Victim-Offender Mediation*, 20 CRITICAL CRIMINOLOGY 45, 45 (2012) (finding that victims were much more likely to accept an offender’s apology than to forgive). See generally James Strickland, Alfred Allan & Maria M. Allan, *The Acceptance of Apologies in Corrective Process: Implications for Research and Practice*, 7 ONATI SOCIO-LEGAL SERIES 421 (2017) (discussing the interplay between apologies and forgiveness between victims and offenders).

288. Peter Strelan, Ian McKee & Nicole T. Feather, *When and How Forgiving Benefits Victims: Post-transgression Offender Effort and the Mediating Role of Deservingness Judgements*, 46 EUR. J. SOC. PSYCHOL. 308, 308 (2016).

289. See, e.g., Roy F. Baumeister, Julie Juola Exline & Kristin L. Sommer, *The Victim Role, Grudge Theory, and Two Dimensions of Forgiveness*, in DIMENSIONS OF FORGIVENESS: A RESEARCH APPROACH 79 (Everett L. Worthington ed., 1998); Laura B. Luchies et al., *The Doormat Effect: When Forgiving Erodes Self-Respect and Self-Concept Clarity*, 98 J. PERSONALITY & SOC. PSYCHOL. 734 (2010); Peter Strelan, Shona Crabb, Debbie Chan & Laura Jones, *Lay Perspectives on the Costs and Risks of Forgiving*, 24 PERSONAL RELATIONSHIPS 392, 393 (2017). See generally Jeffrie G. Murphy, *Forgiveness, Self-Respect, and the Value of Resentment*, in HANDBOOK OF FORGIVENESS 33 (Everett L. Worthington, Jr. ed., 2005).

290. Herman, *supra* note 171, at 593 (“She viewed the expectation of forgiveness as an additional injustice on victims for the comfort and convenience of others.”).

291. Sopan Deb, *Jason Bateman Apologizes to Jessica Walter over Jeffrey Tambor Comments*, N.Y. TIMES, (May 24, 2018), <https://www.nytimes.com/2018/05/24/arts/television/arrested-development-jason-bateman-apologizes-jessica-walter-jeffrey-tambor.html>.

292. Claire Fallon, *Who Gets Angry and Who Has to Give It Up*, HUFF. POST (May 27, 2018, 11:00 AM) [https://www.huffingtonpost.com/entry/jessica-walter-arrested-development-anger\\_us\\_5b09a994e4b0568a880bf5c1](https://www.huffingtonpost.com/entry/jessica-walter-arrested-development-anger_us_5b09a994e4b0568a880bf5c1); Melanie McFarland, *Arrested Development Returns and There’s Something Rotten in the Banana Stand*, SALON (May 25, 2018, 7:00 PM) <https://www.salon.com/2018/05/25/arrested-development-returns-theres-something-rotten-in-the-banana-stand/>.

293. Coker, *supra* note 243, at 148; see also Martha Minow, *Forgiveness, Law, and Justice*, 103 CAL. L. REV. 1615, 1617 (2015) (“[P]rivate or public pressure on a victim to forgive can be a new victimization, denying the victim her own choice[.]”).

294. Emma Brockes, *#MeToo Founder Tarana Burke: ‘You Have to Use Your Privilege to Serve Other People’*, GUARDIAN (Jan. 15, 2018, 12:57 AM), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>; see also Elizabeth Wagmeister, *Activist Tarana Burke on How Trump’s Presidency Has Been a Catalyst for Me Too Movement*, VARIETY (Apr. 25, 2018, 1:18 PM) <https://variety.com/2018/politics/news/tarana-burke-president-trump-me-too-movement-1202750465/> (“What the movement does is give people a way forward, it helps people take ownership of their own destiny and say this presidency and this administration is not going to give us what we need, we are the ones that we’ve been waiting for.”).

the survivors' contributions to the community's moral sense.<sup>295</sup> While it is important to avoid pressuring survivors to forgive, preventing such pressure can be difficult, in part because an apology "script" prescribes that an apology is to be followed by an acceptance of that apology and forgiveness of the offender.<sup>296</sup>

Appropriate processes to address #MeToo claims must grapple with these difficult questions of redemption and reintegration, in addition to addressing the acknowledgement and repair of harm.

#### IV. TRANSITIONAL JUSTICE

Restorative justice practices focus on dialogue between the wrongdoer and the person who was wronged, repair of that wrong, and reintegration of the offender into the community.<sup>297</sup> But for restorative practices to be truly transformative, they must also examine the institutions, structures, norms, and practices that contribute to the wrongdoing as part of an appropriate response.<sup>298</sup> Rather than simply restoring an inequitable status quo, it is important to transform the cultures and institutions that enabled the wrongful behavior to occur. For justice to be transformative, we must "figure out how the broader context was set up for this to happen, and how that context can be changed so that this harm is less likely to happen again."<sup>299</sup>

Thus, in addressing the problems of sexual misconduct in the workplace and beyond, many reformers—such as those involved with Time's Up—aspire to more expansive change, including changes in the structures, institutions, and attitudes that have allowed such misconduct to persist.<sup>300</sup> We therefore consider

295. MINOW, *supra* note 279, at 116.

296. See Mark Bennett & Christopher Dewberry, "I've Said I'm Sorry, Haven't I?" *A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients*, 13 CURRENT PSYCHOL. 10 (1994); Mandeep K. Dhami, *Effects of a Victim's Response to an Offender's Apology: When the Victim Becomes the Bad Guy*, 46 EUR. J. SOC. PSYCHOL. 110 (2016); Gromet & Okimoto, *supra* note 247; Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418 (2007); see also WILLIAM IAN MILLER, FAKING IT 92 (2003) ("The victim is as often forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or he forgives because it is embarrassing not to once the wrongdoer has given a colorable apology.").

297. See generally Wenzel, Okimoto, Feather & Paltow, *supra* note 159.

298. See Coker, *supra* note 243; see also Jelke Boesten & Polly Wilding, *Transformative Gender Justice: Setting an Agenda*, 51 WOMEN'S STUD. INT'L F. 75 (2015); Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. GENDER L. & JUST. 199, 211–12 (2010). Debate exists about whether and how restorative and transformative justice differ. M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 555 (Dennis Sullivan & Larry Tiff eds. 2006) (exploring whether restorative justice and transformative justice are distinct, whether restorative justice processes "create space" for transformative justice, whether they are on a continuum, or whether they are two names for the same thing); see also Howard Zehr, *Restorative or Transformative Justice* (Mar. 10, 2011), <https://emu.edu/now/restorative-justice/2011/03/10/restorative-or-transformative-justice/>.

299. Hayes & Kaba, *supra* note 151. On misogyny specifically, see generally KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY (2018).

300. MANNE, *supra* note 299, at 27.

the link between more individually oriented responses to wrongdoing and this broader institutional reform.

Transitional justice concentrates on responses to wrongdoing in contexts of transitions away from extended periods of conflict or repression toward democracy.<sup>301</sup> Dozens of societies across the globe have pursued transitional justice in recent decades, including South Africa following the end of apartheid<sup>302</sup> and Eastern Europe after the fall of communist regimes.<sup>303</sup> Prominent contemporary examples include Sri Lanka, following the ten-year conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (“LTTE”),<sup>304</sup> as well as Colombia, as it navigates an end to a more than fifty-year conflict between the government and the Revolutionary Armed Forces of Colombia (“FARC”).<sup>305</sup> Transitional justice responses encompass many of the practices of restorative justice outlined above, including apology, reparation, acknowledgement, and commitment to nonrepetition.<sup>306</sup> Under transitional justice, these aims are pursued using a wide range of processes including truth commissions, criminal trials, public memorials, and symbolic reparations. Also used are processes that do not aim at reintegration, such as programs of lustration whereby individuals are barred from serving in specific public roles.<sup>307</sup>

Many within #MeToo and the society-at-large have called for particular responses that are consistent with those used in the context of transitional justice,<sup>308</sup> including truth and reconciliation commissions,<sup>309</sup> reparations,<sup>310</sup> and

301. See generally NOMOS LI, TRANSITIONAL JUSTICE (Melissa S. Williams et al. eds., 2012); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000); David Dyzenhaus, *Judicial Independence, Transitional Justice, and the Rule of Law*, 10 OTAGO L. REV. 345 (2003); David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55 (2010); Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95 (2008); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762 (2004). The discussion in this section draws specifically upon the theory of transitional justice developed in COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017).

302. Colleen Murphy, *The Ethics of Diversity in Transitional Justice*, GEO. J.L. & PUB. POL’Y (forthcoming) (on file with authors).

303. MURPHY, *supra* note 301, at 66.

304. Murphy, *supra* note 302, at 1–2.

305. *Id.* at 1.

306. Leebaw, *supra* note 301, at 101.

307. ROMAN DAVID, LUSTRATION AND TRANSITIONAL JUSTICE: PERSONNEL SYSTEMS IN CZECH REPUBLIC, HUNGARY, AND POLAND 67 (2012).

308. Alex Price, *#MeToo Must Avoid “Carceral Feminism,”* VOX (Feb. 1, 2018, 8:40 AM), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> (arguing against carceral feminism and in favor of distributive economic solutions).

309. Sara Davidson, *My Ex Was Just #MeTooed. He Had It Coming. But It’s Complicated*, L.A. TIMES (Jan. 21, 2018, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-davidson-me-too-ex-20180121-story.html>; Todd Hixon, *Reconciliation Is the Key to Ending Sexual Harassment in the Workplace*, FORBES (Nov. 29, 2017, 6:00 AM), <https://www.forbes.com/sites/toddhixon/2017/11/29/reconciliation-is-the-key-to-ending-sexual-harassment-in-the-workplace/#22e8d4213fda>; Deborah King, *#MeToo 2.0: The Movement’s Painful Next Step*, PSYCHOL. TODAY (Jan. 26, 2018), <https://www.psychologytoday.com/us/blog/mining-the-headlines/201801/metoo-20the-movement-s-painful-next-step-0>; Bill McGarvey, *Dave Chappelle and the ‘Imperfect Allies’ the #MeToo Movement Needs*, AM. MAG. (Jan. 12, 2018), <https://www.americamagazine.org/arts-culture/2018/01/>



public memorials.<sup>311</sup> Thus, we use the theory and practice of transitional justice to conceptualize the link between individually oriented responses and processes of institutional and societal reform. In addition, we explore the lessons that can be gleaned for current movements, like Time's Up, from broader experiences with transitional justice.

### A. *Transitional Justice and #MeToo*

The current #MeToo moment reflects some analogous features of the paradigm cases of transitional justice. We highlight four such features, while also noting some important disanalogies.

#### 1. *Scale and Scope*

The wrongs on which transitional justice focuses are not isolated criminal acts.<sup>312</sup> Rather, the focus is on *patterns* of wrongdoing.<sup>313</sup> Thus, the wrongs of interest to transitional justice processes are not exceptional in the sense of being uncommon. Victims of the wrongdoing at issue in transitional societies number in the hundreds, tens of thousands, or even hundreds of thousands.<sup>314</sup> Characteristically, wrongdoing on this scale has become normalized; that is, the possibility of being a victim of certain wrongdoing becomes a basic fact of life, and members of targeted groups must adapt their conduct to this reality.<sup>315</sup> The anticipation of being killed, or harassed, or assaulted, or tortured shapes considerations of how to respond to the police, to security forces, or to fellow citizens.<sup>316</sup> The specific nature of the wrongs of interest to transitional justice vary across contexts, though gender-based sexual violence is of recurring concern.<sup>317</sup>

Analogously, the #MeToo movement deals with wrongdoing that has become normalized. One source of the impact of #MeToo is a function of its size and scope. As detailed in Part II, half a million people responded within twen-

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12/dave-chappelle-and-imperfect-allies-metoo-movement-needs; Lissa Rankin, *Are We Ready for Truth and Reconciliation Around Sexual Violence? #MeToo*, WAKE UP WORLD (Dec. 18, 2017), <https://wakeup-world.com/2017/12/18/are-we-ready-truth-reconciliation-around-sexual-violence-metoo/>; Hope Reese, *#MeToo Is Powerful but Will Fail Unless We Do More: Feminist Stephanie Coontz on Backlash*, VOX (Nov. 29, 2017, 11:40 AM), <https://www.vox.com/conversations/2017/11/29/16712514/me-too-feminist-backlash-weinstein-effect>; Kim Samuel, *Why We Need a Truth and Reconciliation Commission on Sexual Violence*, WALRUS (Jan. 24, 2018, 1:31 PM), <https://thewalrus.ca/why-we-need-a-truth-and-reconciliation-commission-on-sexual-violence/>.

310. Sarah Jaffe, *The Collective Power of #MeToo*, DISSENT (Spring 2018), <https://www.dissentmagazine.org/article/collective-power-of-me-too-organizing-justice-patriarchy-class>.

311. Kerri MacDonald, *She Painted Portraits of 'Overlooked' Women. Then She Made a Dress*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/insider/overlooked-women-obits-newspaper-dress-highschool-student-metoo.html>; Amisha Padnani & Jessica Bennett, *Overlooked*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/interactive/2018/obituaries/overlooked.html>.

312. MURPHY, *supra* note 301, at 47.

313. *Id.* at 49–66.

314. See Murphy, *supra* note 302, at 2.

315. MURPHY, *supra* note 301, at 55.

316. *Id.* at 63.

317. See Murphy, *supra* note 302, at 6–10.

ty-four hours to a call on Twitter to articulate past experiences of sexual harassment or assault.<sup>318</sup> The scope of the types of workplaces from which stories have emerged is expansive; few, if any, industries have emerged untouched.<sup>319</sup> This size and scope is a reflection of the normalization of sexual assault and harassment in the workplace.<sup>320</sup> Such wrongdoing has become a basic fact of life for women in the workforce; the expectation of being harassed or assaulted is something women have to take into account when deliberating about which jobs to accept, which actions by employers or coworkers to contest, and how to act in the workplace.<sup>321</sup> Similarly, gendered pay gaps are pervasive and increasingly plague women the longer they stay in the workforce.<sup>322</sup> Women must strategize about how to negotiate for higher pay without prompting workplace backlash for contravening gender stereotypes.<sup>323</sup> Wrongdoing is thus not exceptional and not attributable to a few isolated bad apples.

Given the scale of wrongdoing at issue, a question salient for both #MeToo and transitional justice is how to scope responses. That is, questions arise as to the basis for deciding *which* wrongs, committed *by whom* and *against whom*, and during *what period of time* will be the subject of a response.<sup>324</sup> To see how the scope of responses to wrongdoing becomes the subject of contestation, consider South Africa. The decision to have the South African Truth and Reconciliation Commission focus on the killings, abductions, torture, and severe ill-treatment that were the extraordinary violence of apartheid as opposed to the infrastructure of apartheid itself was the subject of extensive critique.<sup>325</sup> Objectors to the scope of this response noted that its focus rendered pass laws and forced removals, for example, as background context for wrongdoing and not as wrongs themselves.<sup>326</sup> In terms of perpetrators, critics objected to the decision to treat members of the government's security forces and members of rebel groups in the same way, arguing this falsely equated the actions of agents of oppression with the actions of agents of liberation.<sup>327</sup> Finally, some opposed

318. Gilbert, *supra* note 9.

319. Elizabeth Dwoskin & Jena McGregor, *Sexual Harassment Inc: How the #MeToo Movement is Sparking a Wave of Start-Ups*, WASH. POST (Jan. 5, 2017), [https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups/?noredirect=on&utm\\_term=.ea1419548b23](https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups/?noredirect=on&utm_term=.ea1419548b23); see also Emily Stewart, *These Are the Industries with the Most Reported Sexual Harassment Claims*, VOX (Nov. 21, 2017, 1:50 PM), <https://www.vox.com/identities/2017/11/21/16685942/sexual-harassment-industry-service-retail>.

320. ANNA-MARIA MARSHALL, *CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE* 85–86 (2017).

321. *Id.* at 64.

322. KEVIN MILLER & DEBORAH J. VAGINS, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP: FALL 2018 EDITION* 7 (2018), <https://www.aauw.org/resource/the-simple-truth-about-the-gender-pay-gap/>.

323. See generally LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003) [hereinafter BABCOCK & LASCHEVER, *NEGOTIATION AND THE GENDER DIVIDE*]; LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION* (2007).

324. Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the South African Truth and Reconciliation Commission of South Africa (TRC)*, 32 *DIACRITICS* 33, 35 (2002).

325. *Id.* at 37, 58.

326. *Id.* at 58.

327. See, e.g., Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 *MOD. L. REV.* 1, 13–14 (2000).

the decision for the mandate to cover abuses that occurred between 1960 and 1994 rather than going back to 1948, when the state began to implement apartheid.<sup>328</sup>

Questions of scope matter because they shape the narrative of wrongdoing that emerges from processes for dealing with wrongdoing. Processes like truth commissions provide in their final reports a narrative summary of who was wronged and who was responsible for victimization.<sup>329</sup> In contexts where wrongdoing becomes normalized, this characteristically means that certain victims and certain perpetrators will not be formally acknowledged.<sup>330</sup> Though no single correct answer to the question of how to delimit the scope of any particular process of transitional justice may exist, it is critical to be aware of the consequences of how the scope is defined. One such consequence is that certain groups of victims of particular wrongs and certain groups of perpetrators may need to be dealt with by future processes.<sup>331</sup> This lesson is salient for #MeToo. Not all who are subject to harassment and assault may be the focus of current responses, and nonworkplace-related sexual harassment may be justifiably set aside by advocates who are focused on countering workplace harassment. As the discussion of scope highlights, however, setting aside such cases does not entail setting aside the legitimate claims that victims of nonworkplace-related wrongdoing have and the requirements for accountability of nonworkplace perpetrators.<sup>332</sup>

To take a specific, and difficult, example of how scope matters, consider that transitional justice must often struggle with how to address those who are both victims and perpetrators.<sup>333</sup> In World War II, for example, many Jews acted as “kapos” (prison functionaries and supervisors) within the concentration camps in order to receive preferential treatment, but they were still themselves imprisoned and under duress.<sup>334</sup> In conflicts in a range of countries, including Colombia, Liberia, and Myanmar, child soldiers who were kidnapped and forced to join the military themselves engaged in horrific acts of violence.<sup>335</sup>

Should they be subject to criminal prosecutions or receive mitigated sentences? How should a public narrative account for their roles as both victims and perpetrators, if at all? Should efforts to provide amends and reparations be different than for other victims and should efforts to reintegrate such offenders be different than for other perpetrators?

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328. Mamdani, *supra* note 324, at 35.

329. Luke Moffett, *Reparations for ‘Guilty Victims’: Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms*, 10 INT’L J. TRANSITIONAL JUST. 146, 162 (2016).

330. *Id.* at 155.

331. *Id.* at 167.

332. Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 3 (2009).

333. Tristan Anne Borer, *A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa*, 25 HUM. RTS. Q. 1088, 1091 (2003); Moffett, *supra* note 321.

334. Mark A. Drumbl, *Tragic Perpetrators and Imperfect Victims*, ASSER INST. (Sept. 27, 2017), <http://www.asser.nl/about-the-institute/asser-today/tragic-perpetrators-and-imperfect-victims>.

335. MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 27 (2012).

Similarly, in the #MeToo context, some of those accused of wrongdoing were themselves victims of similar traumas. Take, for example, author Junot Diaz, who published the story of his childhood rape by a male and detailed how it led him to behave toxically in his romantic relationships with women.<sup>336</sup> A few weeks later, female writers revealed that he had harassed and belittled women in the workplace as well.<sup>337</sup> As institutions reviewed their associations with him and considered possible sanctions,<sup>338</sup> how, if at all, should they have accounted for Diaz's revelation that he was a victim and his nonrevelation that he may have been a workplace perpetrator?<sup>339</sup> Or take the example of actress Asia Argento, a leading proponent of the #MeToo movement. How should we understand her accountability for allegedly statutorily raping a male actor after she was allegedly raped by Harvey Weinstein?<sup>340</sup>

The scholarship and practice of transitional justice is just starting to fully address the question of how to justly respond to complex victims. While much remains to be theorized and put into practice, two points of consensus are emerging. The first is that complex victims deserve to be recognized as victims and included in reparations schemes that address the wrongs to which they were subjected.<sup>341</sup> The second is that victimhood does not preclude accountability for wrongdoing for which complex victims are then responsible.<sup>342</sup> As the trial of Dominic Ongwen at the International Criminal Court illustrates, being abducted as a child does not remove liability for wrongdoing committed later as an adult.<sup>343</sup> Given the relative newness of this

336. Junot Diaz, *The Silence: The Legacy of Childhood Trauma*, NEW YORKER (Apr. 16, 2018), <https://www.newyorker.com/magazine/2018/04/16/the-silence-the-legacy-of-childhood-trauma>.

337. Amanda Arnold, *Author Alisa Valdes on Junot Diaz: 'He Mistreated Me, and I Was Severely Punished for it.'* CUT (May 6, 2018), <https://www.thecut.com/2018/05/alisa-valdes-describes-junot-dazs-misogynistic-abuse.html>.

338. Alexander Alter, *Junot Diaz Cleared of Misconduct by M.I.T.*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/books/junot-diaz-cleared-of-misconduct-by-mit.html>; Louis Lucero II, *Junot Diaz Steps Down as Pulitzer Chairman Amid Review of Misconduct Allegations*, N.Y. TIMES (May 10, 2018), <https://www.nytimes.com/2018/05/10/books/junot-diaz-pulitzer-prize.html>; *A Letter from Deborah Chasman and Joshua Cohen*, BOS. REV. (June 5, 2018), <http://bostonreview.net/editors-note/boston-review-letter-deborah-chasman-and-joshua-cohen>.

339. Diaz's response to workplace wrongdoings did not include any recognition of the truth of specific accounts and frustrated many in its vagueness.

I take responsibility for my past . . . That is the reason I made the decision to tell the truth of my rape and its damaging aftermath. This conversation is important and must continue. I am listening to and learning from women's stories in this essential and overdue cultural movement. We must continue to teach all men about consent and boundaries.

Anna Silman, *Junot Diaz Responds to Allegations of Sexual Misconduct and Verbal Abuse*, CUT (May 4, 2018), <https://www.thecut.com/2018/05/author-junot-diaz-accused-of-sexual-misconduct-verbal-abuse.html>.

340. Giorgis, *supra* note 130.

341. Lesley Wexler, *Transitional Justice Lessons Regarding Complex Victims for #MeToo*, VERDICT (Aug. 24, 2018), <https://verdict.justia.com/2018/08/24/transitional-justice-lessons-regarding-complex-victims-for-metoo>.

342. *Id.*

343. *Id.* As Stephen Colbert aptly put it, "accountability is meaningless unless it's for everybody." Emily Zenler, *Watch Stephen Colbert's Plea For 'Accountability' After Les Moonves Allegations*, ROLLING STONE (July 31, 2018), <https://www.rollingstone.com/tv/tv-news/watch-stephen-colberts-plea-for-accountability-after-les-moonves-allegations-705044/>.

discourse and literature, it may be that #MeToo practices can inform transitional justice even as #MeToo may be informed by transitional justice.

## 2. *Pervasive Structural Inequality*

The wrongdoing of interest in transitional settings characteristically occurs against a background of what has been called “pervasive structural inequality.”<sup>344</sup> That is, it occurs against a background of inequality in the institutionally defined terms of interaction among citizens and between citizens and officials.<sup>345</sup> Legal, economic, social, and cultural institutions structure interaction by specifying, through rules and norms, who is permitted to do what to whom, the penalties for violating these rules and norms, and the rewards for meeting or exceeding them.<sup>346</sup> We can see this most easily when we consider legal rules. Legal rules structure interaction among citizens by, for example, outlining conduct that is considered legally criminal and thus impermissible, as well as the penalties for violating such standards.<sup>347</sup> Constitutions articulate the basic structures of government, including the duties and responsibilities of different branches of government, who is eligible to pursue certain government roles, and how such roles may be acquired.<sup>348</sup> Social norms structure interaction in clear, though less formally codified, ways.<sup>349</sup> Gender norms further specify social norms by articulating the proper forms of interaction across and within genders.<sup>350</sup> These norms shape how the law is applied and enforced<sup>351</sup> as well as frame the consequences of being a victim of criminal wrongdoing.<sup>352</sup>

There are two senses in which these institutionally defined terms for interaction can be unequal. They can be unequal in that they generate substantially different opportunities for groups of citizens to do and become things of value, such as being educated, being employed, participating in political institutions, or avoiding prison.<sup>353</sup> Differences in rates of employment, education, participation in political institutions, or incarceration, then, are not substantially a function of the different preferences or choices of those citizens.

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344. See MURPHY, *supra* note 301, at 41.

345. See *id.* at 41–43.

346. *Id.* at 41–42.

347. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86(8) VA. L. REV. 1603, 1603 (2000).

348. *Id.* at 1629 n.57.

349. *Id.* at 1601 n.8.

350. *Id.* at 1638.

351. BARRY GOLDSTEIN & ELIZABETH LIU, REPRESENTING THE DOMESTIC VIOLENCE SURVIVOR: CRITICAL LEGAL ISSUES \* EFFECTIVE SAFETY STRATEGIES 1–6 (2013); Amy E. Bonomi et al., “Meet Me at the Hill Where We Used to Park”: *Interpersonal Processes Associated with Victim Recantation*, 73 SOC. SCI. & MED. 1054, 1054 (2011); Lori L. Heise, Jacqueline Pitanguy & Adrienne Germain, *Violence Against Women: The Hidden Health Burden*, 255 WORLD BANK DISCUSSION PAPERS 1, 14 (1994); Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim’s Right to Counsel*, 34 GONZ. L. REV. 329, 332 (1998–1999).

352. FIONNUALA NÍ AOLÁIN, NAOMI CAHN, DINA FRANCESCA HAYNES & NAHLA VALJI, THE OXFORD HANDBOOK ON GENDER AND CONFLICT XXXVIII (2018).

353. *Id.* at 205.

Rather, these differences are a function of the different constraints on opportunity that exist for different groups of citizens. So, for example, during apartheid in South Africa and under Jim Crow in the United States, black and white citizens had substantially different opportunities for education, financial success through employment, participation in the political process, and protection under the law.<sup>354</sup>

Interaction can also be unequal in the opportunities afforded to different groups of citizens to shape the terms for interaction. During apartheid, black South Africans were denied a right to vote and hold office in the South African government, rendering them unable to have a role in determining who passed laws and unable to assume that role themselves.<sup>355</sup> During Jim Crow, black Americans formally held the right to vote but had serious difficulty exercising that right in practice due to voting restrictions that disproportionately impacted black voters.<sup>356</sup> Inequality can exist along a continuum, from being present in a limited manner to being pervasive.

Similar to periods of transitional justice, #MeToo is occurring against a background of institutional inequality. Women in every society, including the United States, continue to face obstacles to equality vis-à-vis men regarding what genuine opportunities are enjoyed and what power to shape the institutional rules and norms exists.<sup>357</sup> Part II highlighted some of the obstacles facing women wanting to hold harassers and abusers to account, including the absence of a genuine opportunity to name abusers without fear of retaliation and without fear of being disbelieved.<sup>358</sup> It also noted the widespread sense that substantial changes are needed to achieve equal pay for equal work or achieve proportional representation in political offices or in positions of authority in the workplace.<sup>359</sup>

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354. The racial gap in opportunities in both South Africa and the United States remains today, even after the formal end of apartheid and Jim Crow. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 207 (2010); Lynsey Chutel & Dan Kopf, *All the Charts That Show South Africa's Inequality Is Only Getting Worse*, QUARTZ: AFRICA (May 10, 2018), <https://qz.com/africa/1273676/south-africas-inequality-is-getting-worse-as-it-struggle-to-create-jobs-after-apartheid>.

355. Francis X. Clines, *The South African Vote: The Overview; After 300 Years, Blacks Vote in South Africa*, N.Y. TIMES (Apr. 27, 1994), <https://www.nytimes.com/1994/04/27/world/the-south-african-vote-the-overview-after-300-years-blacks-vote-in-south-africa.html>.

356. See ALEXANDER, *supra* note 354, at 187.

357. See BABCOCK & LASCHEVER, *NEGOTIATION AND THE GENDER DIVIDE*, *supra* note 323, at 18; see also Lesley Wexler & Colleen Murphy, *A Beginning, Not an Ending: #MeToo and the Kavanaugh Confirmation*, VERDICT (Oct. 6, 2018), <https://verdict.justia.com/2018/10/06/a-beginning-not-an-ending-metoo-and-the-kavanaugh-confirmation>.

358. See generally MANNE, *supra* note 299.

359. This is not to suggest that the degree of gender inequality is the same across societies; there are important differences in the degree of gender inequality that exists. For an overview of variation in gender inequality see the United Nations Development Programme Gender Inequality Index (GII), which provides data on a range of measures including income, education, employment, and representation in government positions. UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT DATA (1990–2017)*, <http://hdr.undp.org/en/data> (select “Dimension” to search for specific data).

### 3. *Institutional Change and Overcoming Denial*

Transitional justice explicitly links responding to particular wrongs with broader institutional change.<sup>360</sup> Doing right by victims and treating perpetrators in a fitting manner is important both for its own sake as well as for instrumental reasons. Victims have claims because they have been wronged, and perpetrators have responsibilities because they have acted wrongly. This is true regardless of the larger societal and structural setting, and such claims and obligations should be satisfied for their own sake. Yet doing so within a larger effort to effect institutional change also lays the foundation for broader societal transformation. Take, for example, an orienting phrase of the first transitional justice movements: “Nunca Mas,” or “Never Again.”<sup>361</sup> This phrase reflects the importance of ensuring that responses to past wrongs establish conditions for nonrecurrence in the future. For transitional justice, the prospects for nonrecurrence have increasingly come to be connected to the prospects of enacting broader institutional change, such as promotion of the rule of law and police or security reform.<sup>362</sup> Transitional justice processes which deal with past wrongs are seen as doing so in ways that contribute to this broader change.<sup>363</sup>

We see these same linkages in the #MeToo movement. Efforts to deal with particular cases of harassment and abuse are being framed as important for their own sake but also as helping to enforce the idea that certain conduct tolerated in the past will no longer be tolerated in the future.<sup>364</sup> And efforts to address individual cases are also being complemented by campaigns like Time’s Up that are explicitly focused on broader institutional reform.<sup>365</sup>

Why might we think it reasonable to link responses to past wrongs with broader institutional reform and transformation? One reason is that to change institutions, there must first be recognition that change is needed. Absent such recognition, people will see little reason to devote time and financial resources to changing institutional structures. Moreover, in transitional contexts, there is characteristically a history of denial of wrongdoing.<sup>366</sup> This denial takes different forms.<sup>367</sup> It can be outright denial that any wrong took place. Denials of the existence of political prisoners, or the occurrence of rape, or of a killing or massacre take this form.<sup>368</sup> Frequently, government officials are the ones issuing this sort of denial, which is why uncovering the basic truth about past wrongdoing becomes so urgent in the contexts of transition.<sup>369</sup> A second form

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360. See MURPHY, *supra* note 301, at 1.

361. See, e.g., ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED, NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 6 (1986).

362. See MURPHY, *supra* note 301, at 1.

363. *Id.*

364. Wexler & Murphy, *supra* note 357.

365. Solis, *supra* note 81.

366. See Wexler, *supra* note 341.

367. See generally STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

368. *Id.* at 124–25.

369. *Id.* at 10.

of denial is descriptive, concerning how certain actions are characterized and described. Instead of acknowledging torture, for example, there is a discussion of “regrettable excesses.”<sup>370</sup> A third form of denial acknowledges certain factual claims but distances personal or institutional responsibility for such wrongs.<sup>371</sup> There might be, for example, the attribution of responsibility to forces contesting a government rather than to government officials. Or ordinary citizens who benefitted from or supported a regime carrying out atrocities fail to see how they may be complicit in the wrongdoing that occurred. Alternately, this downplaying of responsibility can take the form of pointing to wrongs for which one’s political opponents were implicated instead of acknowledging and assuming responsibility for wrongdoing of one’s own.

These same forms of denial are present in the context of sexual harassment and abuse, though it is not necessarily government officials implicated in such denials. To take a few examples, Michigan State University and USA Gymnastics had long histories of explicitly denying any wrongdoing or abuse by serial predator Larry Nassar.<sup>372</sup> Harvey Weinstein systematically used non-disclosure agreements and private investigations as tools for silencing women who might otherwise speak about harassment and abuse.<sup>373</sup> Partial apologies by Matt Lauer<sup>374</sup> and Al Franken<sup>375</sup> reflect attempts to redescribe actions in ways that minimize their scope and moral import. Framing sex as unwanted but not illegal can sometimes be another tool for denying the egregiousness of behavior that occurred.<sup>376</sup> Characterizing sexual harassment as isolated incidents committed by a few extremely bad apples, rather than acknowledging its pervasiveness, narrows the scope of actors implicated in patterns of abuse.

Each of these forms of denial seeks to minimize or contain the scope of a moral problem. The first seeks to erase the existence of a wrong altogether. The second minimizes the seriousness of the wrong and its consequences. And the third seeks to limit the taint of wrongdoing to a few rotten apples instead of pointing to taint that implicates organizations or groups. Thus, countering denial becomes urgent. Acknowledgement of the existence, seriousness, and widespread net of responsibility for committing, supporting, permitting, or failing to object to wrongdoing of which one knew, suspected, or should have known becomes critical. This net of responsibility includes enablers, whose actions al-

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370. MURPHY, *supra* note 301, at 144.

371. COHEN, *supra* note 367, at 8–11.

372. Nicole Chavez, *What Others Knew: Culture of Denial Protected Nassar For Years*, CNN (Jan. 25, 2018, 11:21 AM), <https://www.cnn.com/2018/01/23/us/nassar-sexual-abuse-who-knew/index.html>; *Denhol-lander Victim Impact Statement*, *supra* note 190; Paula Lavigne & Nicole Noren, *OTL: Michigan State Secrets Extend Far Beyond Larry Nassar Case*, ESPN (Feb. 1, 2018), [http://www.espn.com/espn/story/\\_/id/22214566/pattern-denial-inaction-information-suppression-michigan-state-goes-larry-nassar-case-espn](http://www.espn.com/espn/story/_/id/22214566/pattern-denial-inaction-information-suppression-michigan-state-goes-larry-nassar-case-espn); Eric Levenson, *Did Michigan State Fail to Stop Larry Nassar Like Penn State Did with Jerry Sandusky?*, CNN (Feb. 1, 2018, 2:13 PM), <https://www.cnn.com/2018/02/01/us/larry-nassar-michigan-state-sandusky-penn/index.html>.

373. Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>.

374. Corey, *supra* note 38.

375. *Id.*

376. Perez, *supra* note 66.



lowed abusers and harassers to remain in positions of power and authority even after allegations of wrongdoing were known.

Processes of transitional justice focus precisely on countering these forms of denial and generating this recognition.<sup>377</sup> The mandate of truth commissions, for example, is to document patterns of abuse and, in some cases, the role of institutions (*e.g.*, legal, religious, media, business) in such wrongdoing.<sup>378</sup> Programs of lustration bar individuals from serving in certain official roles, and are predicated on the recognition of the ways in which former officials may have failed to satisfy the responsibilities which their roles demanded.<sup>379</sup> These examples point to the importance of countering denial by directly uncovering and properly characterizing the wrongdoing which took place, as not simply the ordinary misconduct of a few isolated actors in ways that were exceptional, but rather as part of a pattern of behavior that became unexceptional, that targeted groups, and that was committed by groups.

#### 4. *Uncertain Trajectory*

There is, however, an additional link between addressing normalized wrongdoing through processes of transitional justice and pursuing broader societal transformation. This link is a function of the contexts in which transitional justice processes characteristically occur. Processes of transitional justice are characteristically established during periods of serious uncertainty.<sup>380</sup> This uncertainty means that the broader trajectory of a community is unclear, such that a return to war or to repression remains a possibility. In the context of transitional justice, the aim to transition away from conflict and repression is aspirational.<sup>381</sup> Transformative change, therefore, is not a given. It may or may not materialize in any given case. This is, in part, a product of the fact that change is not uniformly welcomed. Parties or groups benefitting from continued conflict or a repressive regime will not welcome change. Those who may be implicated in wrongdoing may object to becoming vulnerable to accountability. Against this background, responses to isolated cases assume a broader symbolic importance.<sup>382</sup> Seeking reasons to predict where the trajectory will ultimately go, towards reform or retrenching the status quo, whether and how past wrongs are handled become indicative of whether and in what manner broader change will occur.

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377. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 8 (2010).

378. *See, e.g.*, TRUTH & RECONCILIATION COMMISSION, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, vol. 2 (1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%202.pdf>; HAYNER, *supra* note 368, at 13.

379. MONIKA NALEPA, SKELETONS IN THE CLOSET: TRANSITIONAL JUSTICE IN POST-COMMUNIST EUROPE 4 (2010).

380. MURPHY, *supra* note 301, at 38–82.

381. *Id.* at 66–70.

382. *Id.* at 83.

The #MeToo movement resembles transitional justice in this way as well—it has generated significant uncertainty. The sheer scale of the stories of sexual assault and harassment have countered longstanding denial<sup>383</sup> of the existence of these wrongs, let alone their pervasiveness.<sup>384</sup> The cases of prominent figures being held to account has led to optimism that the #MeToo moment heralds the beginning of the end of impunity for sexual assault and abuse in the workplace.<sup>385</sup> At the same time, as noted in Part II, there is also worry about a #MeToo backlash.<sup>386</sup> Some of the uneasiness relates to scope. At the same time, as discussions have broadened to encompass dating norms,<sup>387</sup> some revered feminists have criticized #MeToo advocates as overly puritanical.<sup>388</sup> Others, raising concerns about due process norms for addressing accusations, have suggested that #MeToo justice is no justice at all.<sup>389</sup> Individuals might defer to these concerns as reasons not to believe, not to hire, and not to mentor specific women.<sup>390</sup> Such a backlash could also undercut the possibilities for broader societal transformation in the normalization of sexual assault and harassment.<sup>391</sup> As we witness reform efforts and individual gains at the same time

383. Denial refers to information that is known at some level but not acknowledged.

384. SPERINO & THOMAS, *supra* note 80, at 32–33.

385. Corey, *supra* note 38.

386. *See supra* Part II.

387. Aurelien Breeden & Elian Peltier, *Response to French Letter Denouncing #MeToo Shows a Sharp Divide*, N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/world/europe/france-sexual-harassment.html>; Anna Codrea-Rado, *Catherine Deneuve Apologizes to Victims After Denouncing #MeToo*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/arts/catherine-deneuve-me-too.html>; *Nous Défendons une Liberté d'Importuner, Indispensable à la Liberté Sexuelle*, LE MONDE (Jan. 13, 2018, 3:11 PM), [https://www.lemonde.fr/idees/article/2018/01/09/nous-defendons-une-liberte-d-importuner-indispensable-a-la-liberte-sexuelle\\_5239134\\_3232.html](https://www.lemonde.fr/idees/article/2018/01/09/nous-defendons-une-liberte-d-importuner-indispensable-a-la-liberte-sexuelle_5239134_3232.html). On dating, see also Vanessa K. Bohns & Lauren DeVincent, *Rejecting Unwanted Romantic Advances Is More Difficult Than Suitors Realize*, SOC. PSYCHOL. & PERSONALITY SCI. (forthcoming).

388. Margaret Atwood, *Am I a Bad Feminist*, GLOBE & MAIL (Jan. 15, 2018), <https://www.theglobeandmail.com/opinion/am-i-a-bad-feminist/article37591823/>; Flanagan, *supra* note 60.

389. Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo/553427/>; Shira A. Scheindlin & Joel Cohen, *After #MeToo, We Can't Ditch Due Process*, GUARDIAN (Jan. 8, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televictions>; Emily Stewart, *Trump Wants "Due Process" for Abuse Allegations. I Asked 8 Legal Experts What That Means*, VOX (Feb. 12, 2018, 3:08 PM), <https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump>; *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>. *But see* Christine Emba, *The 'Due Process' Assault Freak-Out Is a Fever Dream*, WASH. POST (Dec. 1, 2017), <https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/> 2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e\_story.html?noredirect=on&utm\_term=.b0d072d3ea06.

390. Erin Reimel, *Popular Life Coach Tony Robbins Tried to Mansplain #MeToo—and Movement Founder Tarana Burke Responded*, GLAMOUR (Apr. 7, 2018, 1:39 PM), <https://www.glamour.com/story/tony-robbins-metoo-burke-response>; 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>; Stephanie Thomson, *#MeToo Is Having Unexpected Consequences for Working Women*, WORLD ECON. F. (Mar. 7, 2018), <https://www.weforum.org/agenda/2018/03/metoo-campaign-women-isolated-at-work/>.

391. Stassa Edwards, *The Backlash to #MeToo Is Second Wave Feminism*, JEZEBEL (Jan. 11, 2018, 3:15 PM), <https://jezebel.com/the-backlash-to-metoo-is-second-wave-feminism-1821946939/>; Megan Garber, *The*

that we observe significant recalcitrance and pushback, we note this is reminiscent of the uncertainty that characterizes political transition. Sustained movement toward democracy is not inevitable and neither is the #MeToo sexual revolution.

### 5. *Utility Despite Disanalogies*

While #MeToo shares these meaningful affinities with the kinds of cases that fall under the purview of transitional justice, some disanalogies also exist. Importantly, though #MeToo has generated uncertainty, it has done so against a background of broader political certainty.<sup>392</sup> Unlike in paradigm transitional justice cases, the entire trajectory of the community (e.g., whether it is heading to a return to war or towards a stable peace) is not in doubt in most contexts where #MeToo conversations are occurring. The scope of wrongdoing is also narrower than what is often found in paradigm transitional contexts. In transitional contexts, wrongdoing that is gender-based but also deeply political, and that encompasses a wide range of types of wrongdoing such as displacement, massacre, and in some cases genocide, is not unusual.<sup>393</sup> This broader wrongdoing is not at issue in the same way in the #MeToo case.<sup>394</sup>

Despite these important differences, the framework of transitional justice is useful for identifying different kinds of responses to wrongdoing. Responses that focus on perpetrators and victims draw upon a wide range of practices such as apology, reparation, and acknowledgement to respond to the claims of victims and demands on perpetrators which wrongdoing generates.<sup>395</sup> From the perspective of transitional justice, these responses may contribute to broader societal transformation.

In addition are those responses that are more directly focused on institutional reform. The direct institutional reform-oriented elements of the #MeToo movement seem to be of two kinds. The first are reforms aimed at making institutions more effective by, for example, addressing obstacles to participation, particularly effective participation, by women.<sup>396</sup> Many of Time's Up's projects

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*Selective Empathy of #MeToo Backlash*, ATLANTIC (Feb. 11, 2014), <https://www.theatlantic.com/entertainment/archive/2018/02/the-selective-empathy-of-metoo-backlash/553022/>; Kathleen Parker, *A #MeToo Backlash Is Inevitable*, WASH. POST (Feb. 2, 2018), [https://www.washingtonpost.com/opinions/a-metoo-backlash-is-inevitable/2018/02/02/51d2d626-0860-11e8-b48c-b07fea957bd5\\_story.html?utm\\_term=.6c2b25aa3f60](https://www.washingtonpost.com/opinions/a-metoo-backlash-is-inevitable/2018/02/02/51d2d626-0860-11e8-b48c-b07fea957bd5_story.html?utm_term=.6c2b25aa3f60); Rebecca Solnit, *Rebecca Solnit on the MeToo Backlash*, LITERARY HUB (Feb. 12, 2018), <https://lithub.com/rebecca-solnit-on-the-metoo-backlash/>; Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, N.Y. MAG. (Jan. 12, 2018), <http://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html?gtm=top&gtm=bottom>; Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash>.

392. Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 12, 17 (2006).

393. *Id.* at 14–15.

394. *But see id.* at 16 (arguing that the scale of violence against women is comparable to conflict and demands an international response to reset the political frameworks that allow it).

395. MURPHY, *supra* note 301, at 84.

396. *See, e.g.*, Martin, *supra* note 73.

are focused on reforms of this kind, including efforts to amplify and enhance the believability of women's stories; to increase the accessibility of the systems for reporting and sanctioning sexual assault, harassment, and inequality in the workplace by increasing the supply of lawyers working pro bono on such cases; and to raise money to cover costs of legal representation.<sup>397</sup> Some of Time's Up's efforts are aimed at all women in need, while others focus on discrete industries such as the newly formed Time's Up Advertising, Time's Up Finance, and Time's Up Venture partnerships.<sup>398</sup> Other efforts for institutional change include legislative efforts to enact prohibitions on companies requiring employees to sign nondisclosure agreements forbidding employees from speaking about wrongdoing in the workplace publicly.<sup>399</sup> Similarly, the focus of the Anita Hill Commission is on policy changes that can be implemented to facilitate the reporting of workplace abuse or harassment without fear or risk of penalty.<sup>400</sup>

### B. *Lessons for #MeToo*

The wisdom acquired through the decades of theory and practice of transitional justice can be useful as we navigate the seemingly new terrain created by the #MeToo movement. We end by highlighting three lessons of particular importance: the need to respond to individual cases, the necessity of paying attention to whose wrongs are addressed, and the importance of a holistic approach to institutional reform.

#### 1. *Backward- and Forward-Looking Dimensions of Justice*

Insofar as #MeToo and Time's Up aspire to achieve broader societal change, it is critical not to lose sight of the particularity of victims and the need to respond to what happened to them for its own sake. Justice is not only forward-looking but backward-looking as well.<sup>401</sup> Victims deserve a response to the wrongdoing they experienced intrinsically and not just because or only if a response will facilitate broader societal change.

To take one example, Time's Up has implemented both forward-looking and backward-looking agendas. The 50-50 by 2020 partnership attempts to restructure pay negotiations, and the embracing of inclusion riders all focus on forward-looking social change.<sup>402</sup> At the same time, Time's Up has also championed significant funding for backward-looking litigation efforts.<sup>403</sup>

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397. *Id.*

398. TIME'S UP ADVERTISING, [www.timesupadvertising.com](http://www.timesupadvertising.com) (last visited Dec. 7, 2018); TIMES UP: PRESS FORWARD, [www.timesupnow.com/press](http://www.timesupnow.com/press) (last visited Dec. 7, 2018); TIME'S UP/VENTURE, <https://www.timesupnow.com/venture> (last visited Dec. 7, 2018).

399. Solis, *supra* note 81.

400. See Sun, *supra* note 93.

401. Posner & Vermuele, *supra* note 301, at 766.

402. See *supra* Subsection II.B.3.a.

403. See, e.g., Michael Corkery, *Low-Paid Women Get Hollywood Money to File Harassment Suits*, N.Y. Times (May 22, 2018), <https://www.nytimes.com/2018/05/22/business/hollywood-times-up-harassment.html>.

Time's Up, however, has been reluctant to directly confront how to address art made by perpetrators and how to facilitate other backward-looking aspects of restorative and transitional justice such as reparations or public truth-telling. Of course, as we explain below, no one reform actor need define the reform agenda nor claim responsibility for all efforts. Our point is simply that, at this moment of possible transitional justice, advocates must consider a comprehensive vision of justice that aims to both alter the future and reckon with the past. Transitional justice experiences elsewhere teach us that creation of the new future is inextricably linked with a retelling of the past.<sup>404</sup>

## 2. *Whose Wrongs?*

One criticism of the #MeToo movement is that it has been overly focused on the experiences of heterosexual, white, cis women, and that, consequently, any responses will disproportionately benefit this group of women.<sup>405</sup> The experience with transitional justice underscores the merits of this criticism. Within transitional justice, there is increasing emphasis on paying attention to the gendered impacts of certain wrongs and the gendered obstacles to participation in transitional justice processes.<sup>406</sup> Similarly, there is increasing emphasis on the experiences and obstacles to participation of historically marginalized groups, including, in particular, indigenous communities.<sup>407</sup> Calls for paying greater attention to diversity and intersectionality are found in the choice of transitional justice processes (*e.g.*, whether a criminal trial or truth commission will be established and on which wrongs such processes will concentrate); the functioning of such processes (*e.g.*, who are the commissioners running truth commissions and who are the victims participating); and the evaluation of the impact and thus the success or failure of transitional justice processes.<sup>408</sup> In this latter category, it is common to do analyses of the gendered impact of processes.<sup>409</sup>

Paying attention to whose stories are being told and heard and who is able to participate effectively in transitional justice processes is important.<sup>410</sup> First, the probability of being victimized can vary across members of social groups,

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404. See *supra* Part IV.

405. See generally Onwuachi-Willig, *supra* note 50.

406. See generally INT'L CTR. FOR TRANSITIONAL JUST., "WE WANT TO BE HEARD": OBSTACLES TO WOMEN TAKING PART IN PARTICIPATORY MECHANISMS FOR DEALING WITH VICTIMS OF THE INTERNAL ARMED CONFLICT (2016); see also *Gender Justice*, INT'L CTR. FOR TRANSITIONAL JUST. (2018), <https://www.ictj.org/our-work/transitional-justice-issues/gender-justice>.

407. See, *e.g.*, Elizabeth Adetiba, *Tarana Burke Says #MeToo Should Center Marginalized Communities*, NATION (Nov. 17, 2017), <https://www.thenation.com/article/tarana-burke-says-metoo-isnt-just-for-white-people/>; see also *Transitional Justice and the Struggle for Indigenous Rights*, INT'L CTR. FOR TRANSITIONAL JUSTICE (Feb. 8, 2013), <https://www.ictj.org/news/transitional-justice-and-struggle-indigenous-rights>.

408. VASUKI NESIAH ET AL., INT'L CTR. FOR TRANSITIONAL JUSTICE, TRUTH COMMISSIONS AND GENDER: PRINCIPLES, POLICIES, AND PROCEDURES (2006).

409. See, *e.g.*, ROSLYN WARREN ET AL., INCLUSIVE JUSTICE: HOW WOMEN SHAPE TRANSITIONAL JUSTICE IN TUNISIA AND COLOMBIA (2017).

410. For a more extended discussion of these lines of argument, see Colleen Murphy, *The Ethics of Diversity in Transitional Justice*, 18 GEO. J.L. & PUB. POL'Y 822 (2018).

as can the consequences of wrongdoing when it occurs. For example, during the Rwandan genocide, the rates of survival among inter-ethnic Hutu and Tutsi married couples varied depending on whether the husband was a Hutu or Tutsi.<sup>411</sup> Similarly, attention to the inclusion of different voices in the process of choosing and designing processes of transitional justice can increase our knowledge of potential obstacles to participation that may exist, the knowledge of which can lead to the design of more effective processes.<sup>412</sup>

Second, by including women and members of historically marginalized groups in processes of transitional justice and taking seriously their experiences, we avoid duplicating injustice. As mentioned above, the existence, scope, or subjects of responsibility for wrongdoing are often officially denied during conflict and repression.<sup>413</sup> This denial can itself wrong victims as their experiences are not acknowledged and their rights go unvindicated. Marginalizing certain groups of victims in transitional justice processes risks wronging them a second time by mimicking the lack of recognition they experienced the first time. Inclusion of women and members of historically marginalized communities in processes of transitional justice not only avoids injustice but also positively promotes justice by modeling the kinds of relationships processes of transitional justice ultimately hope to foster. Such relationships are predicated on the equality of all citizens and the equal claim to have rights respected and wrongs acknowledged.

The lessons for the #MeToo movement are clear. Disproportionate focus on heterosexual, cis, white women and the consequent marginalization of those not falling into this narrow category has costs. There are costs because limiting the voices that are heard limits our knowledge of the scope, character, and pervasiveness of sexual assault, harassment, and abuse in the workplace. Moreover, we risk designing programs of institutional reform that address obstacles to participation facing some, but not all, of those who are affected. We risk perpetuating injustice, rendering invisible for a second time the abuse suffered by certain groups of women as well as men. We also lose an opportunity for justice, an opportunity to model in the public disclosure of incidents of abuse and harassment as well as the processes of accountability that unfold the kinds of relationships of equality that are the core of democratic practices of citizenship.

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411. Anuradha Chakravarty, *Interethnic Marriages, the Survival of Women, and the Logics of Genocide in Rwanda*, 2 GENOCIDE STUD. & PREVENTION 235, 235 (2007).

412. See generally SUSAN HARRIS RIMMER, GENDER AND TRANSITIONAL JUSTICE: THE WOMEN OF EAST TIMOR (2010); FIONA C. ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA (2003); Fiona C. Ross, *Using Rights to Measure Wrongs: A Case Study of Method and Moral in the Work of the South African Truth and Reconciliation Commission*, in HUMAN RIGHTS IN GLOBAL PERSPECTIVE: ANTHROPOLOGICAL STUDIES OF RIGHTS, CLAIMS AND ENTITLEMENTS 163–82 (Richard Ashby Wilson & Jon. P. Mitchell eds., 2003); Katherine Fobear, *Queering Truth Commissions*, 6 J. HUM. RTS. PRAC. 51 (2014); Katherine M. Franke, *Gendered Subject of Transitional Justice*, 15 COLUM. J. GENDER & L. 813 (2006); Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, 3 INT'L J. TRANSITIONAL JUST. 114 (2009); Lia Kent, *Narratives of Suffering and Endurance: Coercive Sexual Relationships, Truth Commissions and Possibilities for Gender Justice in Timor-Leste*, 8 INT'L J. TRANSITIONAL JUST. 289 (2014).

413. See *supra* Part IV.

#MeToo and Time's Up have made some initial strides toward inclusivity. For instance, Tarana Burke promotes an inclusive #MeToo movement "for both women and men, including transgender men and women."<sup>414</sup> She embraces a bottom-up approach to self-definition, noting that "[#MeToo] isn't a woman's movement. It's your movement. It's our movement. It is a survivors' movement. You are in it if you say you're in it."<sup>415</sup>

Similarly, after early concerns that the movements might fail women of color, Time's Up has begun to emphasize the essential role of women of color in the movement.<sup>416</sup> The women of color of Time's Up joined forces with a grassroots effort<sup>417</sup> to #MuteRKelly. This campaign built on extensive investigative work<sup>418</sup> to call for a criminal investigation and ask corporations and venues to cut ties with R. Kelly.<sup>419</sup> While no music service has banned R. Kelly, Apple, Spotify, and Pandora all stopped promoting his music.<sup>420</sup> Spotify also used this occasion to announce a new policy to police hate on its platform and removed a less high-profile rapper, XXXTentacion, for behavior similar to R. Kelly's.<sup>421</sup> While some expressed concern about Time's Up targeting a high-profile black man,<sup>422</sup> Tarana Burke responded with an emphasis on public ac-

414. Annie Sciacca, *#MeToo Founder Tarana Burke in East Bay: It's Not About 'Taking Down' Powerful Men*, EAST BAY TIMES (Apr. 16, 2018, 5:31 AM), <https://www.eastbaytimes.com/2018/04/15/me-too-founder-tarana-burke-speaks-to-bay-area-crowd-at-saint-marys-college-2/>.

415. Raven Palmer, *#MeToo Founder Addresses the Movement*, SUN STAR (Apr. 23, 2018), <http://uafsunstar.com/metoo-founder-addresses-the-movement/>.

416. Ariana Brockington, *Nina Shaw, Laura Dern Stress Importance of Intersectionality in Time's Up Movement*, VARIETY (May 22, 2018, 10:53 AM), <https://variety.com/2018/scene/news/laura-dern-nina-shaw-intersectionality-times-up-1202818580/> ("Women of color are totally woven into the fabric of Time's Up . . . There is going to be no getting to the finish line without each other; women of color are everywhere in addition to having our own niche within Time's Up, in which we're able to help shed a light on all the issues of culture as they relate to abuse of power.").

417. Danielle, *supra* note 131.

418. Mark Caro, *The Lonely Crusade of Jim DeRogatis*, CHI. MAG. (Oct. 16, 2017), <http://www.chicagomag.com/Chicago-Magazine/November-2017/The-Lonely-Crusade-of-Jim-DeRogatis/>.

419. Time's Up, *Women of Color Within Times Up Join #MuteRKelly Protest*, ROOT (Apr. 30, 2018, 8:00 AM), [https://www.theroot.com/women-of-color-within-times-up-join-muterkelly-protest-1825646793?utm\\_source=theroot\\_twitter&utm\\_medium=socialflow](https://www.theroot.com/women-of-color-within-times-up-join-muterkelly-protest-1825646793?utm_source=theroot_twitter&utm_medium=socialflow).

420. William Lee, *R. Kelly's Fall Comes as Chicago, Black Women Finally Turn Their Back on Star*, CHI. TRIB. (May 23, 2018, 12:25 PM), <http://www.chicagotribune.com/entertainment/music/ct-ae-rkelly-reaches-metoo-moment-0523-story.html>. In addition, several concerts have been cancelled. Morgan Greene, *Is R. Kelly's Time Up? Movement Takes Aim at Chicago-Born R&B Singer*, CHI. TRIB. (MAY 4, 2018, 11:00 AM), <http://www.chicagotribune.com/entertainment/music/ct-met-rkelly-metoo-career-20180503-story.html>.

421. Andrew Flanagan, *Starting with R. Kelly, Spotify Pulls Artists from Playlists for 'Hateful Conduct'*, NPR (May 10, 2018, 12:31 PM), <https://www.npr.org/sections/therecord/2018/05/10/610051559/starting-with-r-kelly-spotify-pulls-artists-from-playlists-for-hateful-conduct>.

422. *A Shocking Number of Black Women Are Defending R. Kelly on Twitter*, NEWSONE (May 4, 2018), <https://newsone.com/3796805/r-kelly-defending-tweets-black-women/>. Criticism included R. Kelly's own declaration that the letter was a lynching. Anastasia Tsioulcas, *#Metoo Founder Tarana Burke Responds to R. Kelly*, NPR (May 1, 2018, 4:57 PM), <https://www.npr.org/sections/therecord/2018/05/01/607448801/-metoo-founder-tarana-burke-responds-to-r-kelly>.

countability<sup>423</sup> and noted that all of his victims have been black and brown girls.<sup>424</sup>

### 3. *Holism*

A third insight from experiences with transitional justice is the need to pursue transformation holistically. Holism refers to the process of designing, implementing, and evaluating processes of transitional justice as a group, rather than in isolation or discretely.<sup>425</sup> The risks of moral failure in transitions are significant. Criminal trials risk becoming instruments for victor's justice, instead of the impartial practice of holding perpetrators to account.<sup>426</sup> Reparations risk becoming instruments to buy victim's silence, rather than instruments for transformation.<sup>427</sup> One source of such risks is the history of dealing with wrongdoing in such contexts. The typical experience of victims of wrongdoing during periods of conflict and repression was of the absence of meaningful justice in the wake of being victimized. Thus, there is a challenge in transitions of doing justice where justice had not been done in dealing with wrongdoing before. Holism recognizes that the expressive function of any particular response (e.g., reparations or trials) will be affected by whatever else does or does not take place in dealing with past wrongs.<sup>428</sup> That is, whether reparations or compensation expresses recognition of the victim as a rights-bearer and equal member of the community or expresses an effort to buy a victim's silence will

423. See Tsioulcas, *supra* note 422 ("This is not a lynching . . . You know, we are only a week out of the national monument to lynching being opened in Montgomery, Ala. and the history, and the reality of lynching in America is so, so painful and so real. This is not a public lynching. This is a call for public accountability." "So what we've seen in the last six months," Burke continues, "is a wave of accountability happen where corporations have stepped away from men, even if in the short term, to have authentic investigations into allegations. We have seen 24 years of allegations leveled against R. Kelly, and he has gone unscathed. So what the letter does is join the #MuteRKelly campaign, that was well on its way already, and joined the chorus of black women around the country who have been saying we want some accountability. Those things have to be interrogated. And I think at the very least we need to see corporations step away from them until we have satisfactory investigation into these allegations.").

424. Doha Madani, *R. Kelly Says the Time's Up Campaign Against Him Is 'Unjust and Off-Target.'* HUFF. POST (Apr. 30, 2018, 6:21 PM), [https://www.huffingtonpost.com/entry/r-kelly-times-up-me-too\\_us\\_5ae773b3e4b055fd7fceb19](https://www.huffingtonpost.com/entry/r-kelly-times-up-me-too_us_5ae773b3e4b055fd7fceb19).

425. MURPHY, *supra* note 301, at 160–92; TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* 24–25 (2010); Pablo de Greiff, *Theorizing Transitional Justice*, in *NOMOS LI: TRANSITIONAL JUSTICE* 31–77 (Melissa S. Williams, Rosemary Nagy & Jon Elster eds., 2012); U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (Mar. 2010), [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

426. See Colleen Murphy, *Transitional Justice, Retributive Justice and Accountability for Wrongdoing*, in *THEORIZING TRANSITIONAL JUSTICE* 59 (Claudio Corradetti, Nir Eiskovits & Jack Rotondi eds., 2015); Gary J. Bass, *Why Not Victor's Justice*, WASH. POST (Feb. 15, 2002), [https://www.washingtonpost.com/archive/opinions/2002/02/15/why-not-victors-justice/b9f4aa5e-ee70-47e9-9942-262d8dc33ded/?noredirect=on&utm\\_term=.cbbef66a8797](https://www.washingtonpost.com/archive/opinions/2002/02/15/why-not-victors-justice/b9f4aa5e-ee70-47e9-9942-262d8dc33ded/?noredirect=on&utm_term=.cbbef66a8797).

427. On the risks of transitional justice see de Greiff, *supra* note 425. On transformative reparations see Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377 (2006).

428. See MURPHY, *supra* note 301, at 160–92; OLSEN, PAYNE & REITER, *supra* note 416, at 99. See generally de Greiff, *supra* note 416; U.N. Secretary-General, *supra* note 425.



be impacted by whether reparations occur as a one-off, discrete effort for dealing with wrongdoing or are part of a broader effort to deal with past wrongs and pursue institutional reform. The risk of reparations being experienced as an offer to buy silence increases when they are offered in isolation.

Another reason to pursue transitional justice holistically stems from the limits of any particular kind of response to wrongdoing. Reparations, criminal trials, truth commissions, memorials, or direct efforts at institutional reform each have the capacity to deal with some, but not all, of the claims of victims, demands on perpetrators, and broader transformation of relationships needed. Criminal trials hold perpetrators accountable but do not deal with the losses of victims, and victims play an instrumental role.<sup>429</sup> Reparations compensate victims for harms experienced but in many cases do not directly involve perpetrators or hold them to account.<sup>430</sup> Truth commissions document and uncover the truth about patterns of abuse but do not compensate for losses resulting from such abuse.<sup>431</sup>

There is an important dimension of transitional justice that facilitates holistic approaches to dealing with past wrongs. This is the fact that transitional justice efforts are characteristically established by the state.<sup>432</sup> While local and informal processes may also take place, they do so against a background of state efforts to deal with past wrongs.<sup>433</sup> Thus, a main challenge is ensuring that governments pursuing transitional justice recognize the importance of developing an approach to transitional justice that incorporates different kinds of responses. This dimension is disanalogous with the current structure of the #MeToo movement, which is informal and without an overall organizing structure. This diffuse set of efforts to deal with widespread sexual abuse, assault, and harassment in the workplace is challenging to coordinate for a number of reasons. Knowledge about what efforts are underway requires paying attention to media accounts, which in turn relies upon the comprehensiveness and accuracy of those accounts. Institutional reform efforts may be more effective in some domains than others, and where they will be effective depends on where the efforts of particular individuals and informal organizations are directed.

## V. CONCLUSION

Time will tell if the #MeToo moment can spur a successful transformation of American society. We note that with societal revolutions, much like state transitions toward democracy, the work is hard, tangible progress can be slow, and sometimes the end-product does not meaningfully upend the old status quo.

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429. DAVID TAYLOR, IMPUNITY WATCH, VICTIM PARTICIPATION IN TRANSITIONAL JUSTICE MECHANISMS: REAL POWER OR EMPTY RITUAL? 8–12 (2014).

430. See, e.g., Simon Robins, *Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal*, 5 INT'L J. TRANSITIONAL JUST. 75, 91–92 (2011).

431. HAYNER, *supra* note 377, at 76–77.

432. See *Transitional Justice Overview*, U.S. DEP'T OF ST. (May 16, 2016), <https://www.state.gov/j/gcj/transitional/257566.htm>.

433. *Id.*

For #MeToo, the early evidence is mixed. On the one hand, we have documented efforts at backward-looking justice with high-profile criminal indictments, a wave of civil litigation, and a rash of firings as well as forward-looking justice including renewed efforts by the EEOC,<sup>434</sup> the introduction of legislation,<sup>435</sup> and innovative approaches by private actors like Time's Up.<sup>436</sup> On the other hand, we have also observed significant hostility toward the goals of #MeToo and groups like Time's Up as well as deep skepticism about their means.<sup>437</sup> Workplaces, ranging from corporations to religious institutions to universities, still stubbornly protect and enable wrongdoers.

Given the uncertainty of this moment, we have suggested that those designing processes, altering laws, changing social practices, and reforming institutions, including those doing such work at our own institution,<sup>438</sup> do so with an emphasis on the needs of both victims and offenders as well as the larger community. As advocates move forward, they would do well to bear in mind the core principles and lessons of both restorative and transitional justice. The insights of restorative justice give us guidance by which society, communities, and those persons directly involved can assess the efforts of individuals and institutions to respond to wrongdoing. Transitional justice provides a useful touchstone by which advocates and scholars can better understand and theorize some of the vexing questions complicating the #MeToo conversation and the efforts of groups like Time's Up.

But much work remains. Cultural shifts and individual adjustments do not happen overnight, and the changes already wrought by the #MeToo conversation may not yet be deeply embedded. It will likely take a mix of public and private actions, by individuals and collectives, to bridge the gap from a moment and a movement to a transition that is transformative.

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434. Christine McLaughlin, *Is the EEOC #MeToo Guidance Coming?*, NAT'L L.R. (June 20, 2018), <https://www.natlawreview.com/article/eec-metoo-guidance-coming>.

435. *See supra* Subsection II.B.1.b; *see also* Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW (July 31, 2018), <https://www.pewtrusts.org/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws>.

436. *See supra* Section II.B.

437. *See supra* Section II.C.

438. Julie Wurth *Sexual Misconduct Allegations Have UI's Attention*, NEWS-GAZETTE (Nov. 6, 2018, 7:00 AM), <http://www.news-gazette.com/news/local/2018-11-06/sexual-misconduct-allegations-have-uis-attention>.html; Julie Wurth, *Law Faculty Call on UI to Overhaul Sexual-Misconduct Policies*, NEWS-GAZETTE (Oct. 23, 2018, 9:29 PM) <http://www.news-gazette.com/news/local/2018-10-23/law-faculty-call-ui-overhaul-sexual-misconduct-policies.html>.

