
#METOO: A LOOK AT THE INFLUENCE AND LIMITS OF
“HASHTAG ACTIVISM” TO EFFECTUATE LEGAL CHANGE

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#MeToo was a hashtag posted on social media by men and women to share that they have been victims of sexual assault or harassment. The “Me Too” movement was started by Tarana Burke long before the hashtag was created, and #MeToo is just one example of the use of the hashtag, a social media tool, to launch a topic into the center-stage of media attention. Sexual harassment and assault are illegal under federal and state laws. Federal law and state law, however, are not always the same and each state may have laws that differs from other states. The “Me Too” movement seeks to accomplish changes in such laws, and the hashtag has been instrumental in that process. This Note discusses the history and rise of the hashtag, as well as its usefulness and limitations as a tool to propel and help create legal change through the lens of the #MeToo movement. This Note focuses on federal, California, and Mississippi laws as examples of the changes, or lack thereof, to sexual harassment laws because of the #MeToo movement, and advocates for changes to sexual harassment and assault laws in ways that focus on empowering victims and that align with the goals of the “Me Too” movement. This includes, but is not limited to, encouraging advocates to focus on state-level political and legal changes, and advocating for standardized definitions of terms regarding sexual assault and harassment. Finally, this Note recognizes that while hashtags may not be sufficient on their own, they are an important tool and can be utilized in many ways to bring about desired social and legal change.

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I. INTRODUCTION

Harvey Weinstein, Larry Nassar, Bill Cosby, Matt Lauer, and Justice Brett Kavanaugh all have something in common: they are all high-powered men who have been accused, or even convicted, of sexual harassment or misconduct during the #MeToo movement.¹ Sexual assault and harassment are nothing new. What is new, however, is the renewed interest and attention given to victims of sexual misconduct who have shared their stories through the hashtag #MeToo.² The task behind the movement is simple—anyone who has been sexually harassed or assaulted and wants to participate need only post the hashtag #MeToo on social media.³ Since the first tweet was sent out, a wave of responses has flooded social media⁴ and #MeToo has incited a cry for a change in the way the country, and the world, discusses sexual assault and harassment, and how it treats victims of those acts.⁵

With the proliferation of social media and the ease of connecting and sharing online, the #MeToo movement has connected people from all over the world, emerging from behind computer and cell phone screens.⁶ While the #MeToo

1. *#MeToo: A Timeline of Events*, CHI. TRIB. (May 8, 2020, 7:37 AM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlmlstory.html>.

2. See Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>.

3. See Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

4. *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017, 6:26 PM), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/>.

5. 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/> (“#MeToo is] simply an attempt to get people to understand the prevalence of sexual harassment and assault in society.”).

6. See Louise Burke, *The #MeToo Shockwave: How the Movement Has Reverberated Around the World*, TELEGRAPH (Mar. 9, 2018, 11:08 AM), <https://www.telegraph.co.uk/news/world/metoo-shockwave/>.

movement began long before it captured the attention of much of the world, its mainstream power started with a simple hashtag on Twitter.⁷ With the #MeToo movement, many victims have found the courage to come forward and share their stories of dealing with sexual misconduct, placing a renewed emphasis on an issue that often is purposefully kept secret or silenced as taboo.⁸ But the founders of #MeToo have been very clear: as important as awareness is, it is not their only goal—#MeToo also aims to change the culture and laws dealing with sexual harassment and assault.⁹

While the first major stories to break during the beginning of the #MeToo movement were about high-powered or celebrity men and women,¹⁰ those with high status are not the only perpetrators and victims of sexual assault and harassment. Sexual abuse and harassment affect people of all ages, genders, races, and ethnicities, and pervade all industries.¹¹ The laws throughout each state that deal with these issues are almost as diverse as the people who come forward to share their stories. How the federal government treats certain sexual misconduct is often different than how each state handles it.¹² And even further, individual states often have their own definitions and procedures for handling sexual harassment and abuse cases that differ from other states.¹³ These state-to-state differences in how sexually-based offenses are defined and prosecuted may cause some issues, as most of these cases are prosecuted at the state level.¹⁴ They may cause confusion for victims in understanding the law and shock to those who incorrectly think they know the law.

Currently, sexual harassment is classified as a type of discrimination on the basis of sex prohibited under federal law through Title VII and its illegality at the state level varies by state.¹⁵ As for sexual assault, the states have myriad laws to deal with the wide array of sexually-based offenses, while the federal government criminalizes some of the most heinous forms of sexual assault.¹⁶ Yet, many

7. See, e.g., Milano, *supra* note 3.

8. See Gilbert, *supra* note 5 (“For a long time, most women defined their own sexual harassment and assault in this way: as something unspoken, something private, something to be ashamed of acknowledging.”).

9. *About: History & Vision, ME TOO.*, <https://metoomvmt.org/about/> (last visited May 21, 2020) [hereinafter *About Me Too*].

10. Gilbert, *supra* note 5.

11. *Id.* (“But as horrifying as the allegations against Weinstein have been, more appalling still is the sense that his behavior isn’t uncommon. That in industries across the world, from media to music to modeling to academia, women have encountered their own Weinsteins . . .”).

12. *Compare State by State Guide on Statutes of Limitations*, RAINN, <https://www.rainn.org/state-state-guide-statutes-limitations> (last visited May 21, 2020), with CHARLES DOYLE, CONG. RESEARCH SERV., RL31253, *STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 2–4* (2017).

13. *Sexual Assault Overview*, FINDLAW, <https://criminal.findlaw.com/criminal-charges/sexual-assault-overview.html> (last updated June 25, 2019).

14. See *Sex Crimes*, FINDLAW, <https://criminal.findlaw.com/criminal-charges/sex-crimes.html> (last visited May 21, 2020).

15. See *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/publications/facts-about-sexual-harrassment> (last visited May 21, 2020); *Sexual Harassment Policies in State Legislatures*, NAT’L CONF. ST. LEGISLATURES (Jan. 2, 2018), <http://www.ncsl.org/research/about-state-legislatures/sexual-harassment-policies-in-state-legislatures.aspx>.

16. See *Federal Sex Crimes Explained*, HG.ORG LEGAL RESOURCES, <https://www.hg.org/legal-articles/federal-sex-crimes-explained-39372> (last visited May 21, 2020).

of these laws are outdated, ineffective, or do not punish all types of sexual misconduct, and #MeToo wants to change that.¹⁷ Advocates have been working towards improving many different types of laws relating to sexual harassment and assault. While some of these advocates have been working since before the viral #MeToo movement,¹⁸ the window of opportunity has been widened as #MeToo has thrust these issues center stage and strongly encouraged citizens to engage in these tough discussions and fight for progress.

This Note argues that hashtags, while limited in some respects, have the power to effectuate legal change, utilizing the #MeToo movement as an example. Part II of this Note provides an overview of (1) the history and rise of hashtags in popular culture, (2) the use of hashtags and their development into the phenomenon of “hashtag activism,” (3) the rise of the #MeToo movement, and (4) laws related to sexual harassment and misconduct. Part III analyzes the current federal and state law framework dealing with sexual assault and harassment, as well as bills, laws, and court cases that have come about in the wake of #MeToo and compares them to the goals of #MeToo. Part IV recommends: (1) that advocates focus their efforts on state and local governments, (2) for more standardized definitions for sexual harassment and assault terms, (3) for improvements to be made to laws related to sexual harassment, discrimination, and misconduct that focus on empowering survivors in line with the goals of #MeToo, and (4) that advocates recognize the value of hashtags and the role that hashtags can play in real-world efforts to promote social and legal progress.

II. BACKGROUND

A. History of the Hashtag

The (#) symbol, which many used to know as the “number sign, the pound symbol, or a tic-tac-toe board,” is now known all over the world as the hashtag.¹⁹ Before the use of hashtags existed, Chris Messina, a social technology expert, was an early proponent of using the “pound symbol” to “tag” internet posts and approached Twitter with an idea in August 2007.²⁰ Messina proposed his idea of using pound symbols to “tag posts” as a way for people who were interested in talking about a similar topic to connect.²¹ Twitter, however, did not jump on the idea because Twitter did not have, and Messina did not propose, a system where users could search for the tags or a way to display them.²²

17. See *About Me Too*, *supra* note 9.

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

19. Lexi Pandell, *An Oral History of the #Hashtag*, WIRED (May 19, 2017, 7:00 AM), <https://www.wired.com/2017/05/oral-history-hashtag/>.

20. *Id.*

21. *Id.*

22. *Id.*

While it may not have initially worked out with Twitter, Messina and his friends still liked the idea of tagging posts but were unhappy with the name.²³ Initially called “channels,” the practice of tagging posts using the pound symbol eventually became known as the “hashtag,” borrowing some lingo from computer science and programmer culture.²⁴ A few months after Messina approached Twitter with the idea, “the hashtag had its first breakout success.”²⁵ One web developer, Nate Ritter, noticed a fire happening in San Diego, California in 2007.²⁶ He had tried to update his blog with news about the fire, but the news updates were happening too fast to keep the blog updated, so he turned to Twitter instead.²⁷ Messina reached out to Ritter and suggested that he use the hashtag #SanDiegoFire when he tweeted news about it.²⁸ Ritter started using #SanDiegoFire to keep people on Twitter updated in real time about the “fire, road closures, and . . . evacuation[]” plans.²⁹ Messina noted that “[b]ecause [Ritter] was so prolific and was posting constantly for days, it gave people a taste of what it looks like to have hashtags.”³⁰

Hashtags, as exemplified by #SanDiegoFire, were supposed to be a way for people discussing a similar topic to be able to find and connect with others who were also engaging in a discussion on that topic.³¹ It was not until 2009, after many people began to use hashtags, that Twitter came around to the idea and created tools to be able to sort and link them.³² From that point on, many other social media sites also embraced the use of hashtags. Instagram, which launched in 2010, utilizes hashtags on its posts and Facebook embraced their use in 2013.³³ The hashtag now seems to be an integral part of many social media sites, and even daily life, with people using hashtags when they engage online and even when they speak in person.³⁴

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Simon Piatek, *#SanDiegoFire – The First Successful Example of Hashtag in News Context*, SJ PIATEK (Sept. 7, 2016), <https://sjpiatek.com/2016/09/07/sandiegofire-the-first-successful-example-of-hashtag-in-news-context/>.

30. Pandell, *supra* note 19.

31. *See id.*

32. *Id.*

33. *Id.*; Christina Warren, *Facebook Finally Gets Hashtag Support*, MASHABLE (June 12, 2013), <https://mashable.com/2013/06/12/facebook-hashtag-support/#ypclEixjOPqU>.

34. *See* Muriel MacDonald, *How #Hashtags Changed the Way We Talk*, TINT (Mar. 9, 2017), <https://www.tintup.com/blog/how-hashtags-changed-the-way-we-talk/>.

B. Hashtag Activism

Social media as a whole is widely praised for its ability to help people all over the world connect with each other and share their stories.³⁵ Even more than just connecting online, social media has also been recognized as a powerful tool that aids in beginning or advancing social movements.³⁶ One of the biggest uses of social media by activists to effect social change began around 2010 with what is known as the “Arab Spring.”³⁷ Uprisings that began in Tunisia and Egypt to protest dictatorship eventually found their way to other countries, such as Libya, where the Libyan dictator was overthrown in 2011.³⁸ The protestors utilized many social media outlets, such as Twitter, YouTube, and Facebook to connect and organize the movements with others interested in the cause.³⁹ Activists during this time also utilized hashtags to “brand what they were doing.”⁴⁰ Armed with social media tools, these uprisings have been referred to by some as the “Twitter Revolutions.”⁴¹ While this is just one example, many have acknowledged that the protests allowed social media to showcase its utility, importance, and power in movements and protests around the world.⁴²

“Hashtag activism” can be thought of as part of social media activism more generally.⁴³ The term is presumed to have been created during the Occupy Wall Street movement in the United States in 2011.⁴⁴ There are differing definitions of what “hashtag activism” means, but they are all similar in some respects.⁴⁵ For the most part, all of the definitions revolve around the idea that hashtag activism is “the use of viral hashtags to raise awareness and foster discussion about

35. See, e.g., Shirley Ayres, *World Social Work Day: How Social Media Helps Make Connections*, GUARDIAN (Mar. 20, 2012, 7:36 AM), <https://www.theguardian.com/social-care-network/2012/mar/20/world-social-work-day-social-media>.

36. Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT’L & COMP. L. REV. 145, 145–46 (2012).

37. *Id.* at 145; Jessi Hempel, *Social Media Made the Arab Spring, but Couldn’t Save it*, WIRED (Jan. 26, 2016, 3:06 PM), <https://www.wired.com/2016/01/social-media-made-the-arab-spring-but-couldnt-save-it/>.

38. Joseph, *supra* note 36, at 145.

39. Hempel, *supra* note 37; Pandell, *supra* note 19.

40. Pandell, *supra* note 19.

41. Joseph, *supra* note 36, at 145–46.

42. See, e.g., *id.* at 152 (“New York University media professor Clay Shirky believes that social media is an important new tool for promoting social and political change.”).

43. See, e.g., Marcia Mundt et al., *Scaling Social Movements Through Social Media: The Case of Black Lives Matter*, SOC. MEDIA & SOC’Y, Oct.–Dec. 2018, at 1, 4 (“[W]e . . . explore how social media platforms, in particular Facebook and Twitter, can provide opportunities for activist groups to broaden movement impact.”).

44. The presumed first use of this word comes from an opinion article published in the Guardian. See Eric Augenbraun, *Occupy Wall Street and the Limits of Spontaneous Street Protest*, GUARDIAN (Sept. 29, 2011, 5:45 PM), <https://www.theguardian.com/commentisfree/cifamerica/2011/sep/29/occupy-wall-street-protest> (“The advent of ‘hashtag activism’ has been greeted with breathless claims about the birth of a new form of technology-based social movement.”).

45. See Caroline Dadas, *Hashtag Activism: The Promise and Risk of “Attention,”* in SOCIAL WRITING / SOCIAL MEDIA: PUBLICS, PRESENTATIONS, AND PEDAGOGIES 17, 17 (Douglas M. Walls & Stephanie Vie eds., 2017) (“[H]ashtag activism: the attempt to use Twitter’s hashtags to incite social change.”); *Hashtag Activism*, TECHOPEDIA, <https://www.techopedia.com/definition/29047/hashtag-activism> (last updated Nov. 12, 2012) (“Hashtag activism is the act of fighting for or supporting a cause that people are advocating through social media. . .”).

specific issues and causes via social media.”⁴⁶ Some early examples of using a hashtag to raise awareness and prompt action about a certain event are #Kony2012, #BringBackOurGirls, and #IceBucketChallenge.⁴⁷ These hashtags were shared a lot, often by celebrities, and attracted a lot of media attention.⁴⁸

#Kony2012 drew national and global media attention after a video was released about Joseph Kony, “a warlord who had led . . . an extremely violent militant movement known for its use of child soldiers in Uganda and central African States.”⁴⁹ In 2012, the video had raised \$28 million to “stop Kony,” but Joseph Kony was still at large as of 2017.⁵⁰ #BringBackOurGirls captured the world’s attention in 2014 after the terrorist group Boko Haram kidnapped 276 schoolgirls in Nigeria.⁵¹ In support of the cause, many high profile figures, such as former first lady Michelle Obama, posted pictures of themselves holding a sign with the hashtag written on it.⁵² As of April 2017, the Nigerian government was still working on securing the release of the remaining 195 girls in captivity.⁵³

The #IceBucketChallenge was a viral sensation in the summer of 2014 in which thousands of individuals participated in having a bucket of ice water dumped on their head to raise money for ALS, also known as Lou Gehrig’s disease.⁵⁴ Although the videos were often mocked, the campaign raised over \$115 million, which helped fund research and development that led to the discovery of a new gene linked to the disease.⁵⁵

Hashtag activism has been criticized from the start.⁵⁶ The main criticism against social media activists has wrapped itself nicely up into the term “slacktivism.”⁵⁷ “A combination of the words ‘slacker’ and ‘activism,’ this term is used to define the phenomenon of people who appear to support a cause, but who rarely put forth true effort to advocate for the change they strive to achieve.”⁵⁸ Critics argue that this type of “low-cost” support, such as joining a Facebook

46. Nora Daly, *Twitter Chat: Can Hashtag Activism Have Real Impact?*, PBS (Aug. 21, 2014, 5:00 PM), <https://www.pbs.org/newshour/nation/twitter-chat-can-hashtag-activism-real-impact/>.

47. Stacey B. Steinberg, *#Advocacy: Social Media Activism’s Power to Transform Law*, 105 KY. L.J. 413, 431 (2016); Daly, *supra* note 46.

48. See Dadas, *supra* note 45, at 22.

49. Adam Taylor, *Was #Kony2012 a Failure?*, WASH. POST (Dec. 16, 2014, 4:00 AM), https://www.washingtonpost.com/news/worldviews/wp/2014/12/16/was-kony2012-a-failure/?utm_term=.fb6383c68e1a.

50. Zack Baddorf, *Uganda Ends Its Hunt for Joseph Kony Empty-Handed*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/world/africa/uganda-joseph-kony-lra.html>; Taylor, *supra* note 49.

51. Conor Gaffey, *Bring Back Our Girls: A Brief History of What We Know About the Missing Chibok Women*, NEWSWEEK (Apr. 14, 2017, 2:50 PM), <https://www.newsweek.com/chibok-girls-boko-haram-583584>.

52. *Id.*

53. *Id.*

54. Katie Rogers, *The ‘Ice Bucket Challenge’ Helped Scientists Discover a New Gene Tied to A.L.S.*, N.Y. TIMES (July 27, 2016), <https://www.nytimes.com/2016/07/28/health/the-ice-bucket-challenge-helped-scientists-discover-a-new-gene-tied-to-als.html>.

55. *Id.*

56. See, e.g., Augenbraun, *supra* note 44 (“While such technologies can be extremely useful tools, they do not represent alternatives to the exhausting, age-old work of meeting people where they are, hearing their concerns, reaching common ground, building trust, and convincing them that it is in their interests to act politically to change their circumstances.”).

57. See Steinberg, *supra* note 47, at 442–43.

58. *Id.* at 443.

group or retweeting a hashtag, serves only to make the individual feel good about themselves and does not actually help the cause.⁵⁹

Another criticism of hashtag activism, and social media activism more broadly, is that the people who participate in the movements tend to oversimplify the issues and are privileged individuals who are often not those that the movement aimed to help.⁶⁰ For example, with the #Kony2012 campaign, many critics focused on how the movement was started by outsider, “do-gooder Americans” and not the Ugandans in whose country this crisis was happening.⁶¹ In addition, even though Kony had been abducting child soldiers since the 1990s, many Americans only got involved when the cause became “trendy.”⁶²

Additionally, people fear hashtag fatigue and are worried that supporters may be satisfied with just a symbol of action and not *real* action.⁶³ As one journalist put it, “[a]nother week, another hashtag, and with it, a question about what is actually being accomplished.”⁶⁴ With a new hashtag complaining of another injustice showing up seemingly every week, the causes may blur together in the minds of the audience or simply be forgotten.⁶⁵ And because of the ease of sending out a tweet or sharing a post, this type of activism is criticized as a “frictionless convenience” that serves as a “public symbol of concern” rather than real concern about and real action taken against the complained of injustice.⁶⁶

While those criticisms may be deserved to an extent, the phenomenon of social media and hashtag activism should not be written off so quickly. Social media, along with hashtags and other tools that come with it, is beneficial because at a minimum it helps people develop their points of view on important topics.⁶⁷ Social media has expanded access to information and “amplifies the message[s] of its users,” reaching a larger audience in a short amount of time.⁶⁸ This increased access to information allows people the opportunity to form opinions on the topic, which leads to conversation, debate, and greater awareness about a topic.⁶⁹

Furthermore, not all hashtags end up forgotten without any action taken at all. For a simple video, the #IceBucketChallenge raised a lot of money that led

59. *Id.*; Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 38 (2011).

60. Dadas, *supra* note 45, at 17–18; Caitlin Dewey, #Bringbackourgirls, #Kony2012, and the Complete, Divisive History of ‘Hashtag Activism’, WASH. POST (May 8, 2014, 4:09 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2014/05/08/bringbackourgirls-kony2012-and-the-complete-divisive-history-of-hashtag-activism/?noredirect=on>.

61. Dadas, *supra* note 45, at 17 (“In the case of the #kony2012 campaign . . . concerns arose about outsider Americans presuming they know how to best address events in another country.”); Dewey, *supra* note 60 (“[T]he documentary (and the hashtag) were organized by do-gooder Americans, not Ugandans.”).

62. Dewey, *supra* note 60.

63. See David Carr, *Hashtag Activism, and Its Limits*, N.Y. TIMES (Mar. 25, 2012), <https://www.nytimes.com/2012/03/26/business/media/hashtag-activism-and-its-limits.html>.

64. *Id.*

65. See *id.*

66. Dewey, *supra* note 60.

67. See Joseph, *supra* note 36, at 152.

68. *Id.* at 153–54.

69. *Id.* at 155.

to the discovery of a new gene, and it is unclear what the state of the matter would be if the world had not decided it wanted to focus on the kidnapped girls in Nigeria or the children soldiers in Uganda.⁷⁰ #Komen is another example of what some may consider to be a success of hashtag activism. After the Susan G. Komen foundation, an organization working to fight breast cancer, announced in 2012 that it would no longer donate to Planned Parenthood, #Komen popped up on Twitter and in a short time, the policy was amended and many of the people responsible for the funding decision were no longer a part of the foundation.⁷¹ The same journalist who worried about hashtag fatigue also recognizes the power that hashtag activism holds: “Sure, hashtags come and go, and the so-called weak ties of digital movements are no match for real world engagement. But they are not only better than nothing, they probably make the world, the one beyond the keyboard, a better place.”⁷²

C. The #MeToo Movement

One recent hashtag that has taken the world by storm is #MeToo. In 1997, Tarana Burke listened to a thirteen-year-old girl share her experience of being sexually abused, leaving Burke “speechless” and feeling unable to help or to even tell the young woman “me too.”⁷³ Less than ten years later, in 2006, Burke created Just Be Inc., a nonprofit organization dedicated to helping victims of sexual harassment and assault, and gave her movement the name “Me Too.”⁷⁴ The saying was not widely circulated, however, until it found itself front and center in a national debate in 2017 prompted by actress Alyssa Milano.⁷⁵ Milano sent out a tweet encouraging those who have been sexually harassed or assaulted to reply to her tweet with the words “me too.”⁷⁶ Almost instantaneously, social media became flooded with posts related to #MeToo. It is estimated that within twenty-four hours of Milano’s tweet, there were over twelve million posts, comments, and reactions on Facebook and within forty-eight hours, #MeToo was posted nearly a million times on Twitter.⁷⁷

Milano sent her tweet during the time when rape and sexual misconduct accusations against Hollywood producer Harvey Weinstein were coming to the forefront of media attention.⁷⁸ Weinstein, a Hollywood giant with the power to

70. See *supra* notes 49–55 and accompanying text.

71. Carr, *supra* note 63.

72. *Id.*

73. Garcia, *supra* note 18.

74. *Id.*

75. *Id.*

76. Milano, *supra* note 3.

77. *More Than 12M “Me Too” Facebook Posts, Comments, Reactions in 24 Hours*, *supra* note 4.

78. See Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017, 5:17 AM), [https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?noredirect=on](https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?hpid=hp_hp-top-table-main-weinstein-story#hpid=hp_hp-top-table-main-weinstein-story).

make or break an aspiring artist's career, was publicly accused of sexual misconduct a little over a week before Milano sent out her tweet.⁷⁹ Since then, #MeToo has started many conversations all around the world. #MeToo has been translated into many different languages, including #BalanceTonPorc, #YoTambien, #Ana_kaman, and others, providing men and women of all ages around the world a stage to share their stories about sexual assault and harassment.⁸⁰

Milano sent out the "me too" tweet during a time when the entertainment industry was shaken over the allegations against Weinstein, and many of the first people to publicly speak out were also in the entertainment industry.⁸¹ While the movement has not stayed in a vacuum and has spread outside of Hollywood, many of the publicly accused are high powered men, including celebrities, politicians, and CEOs.⁸² Since April 2017, over 250 people in high-power positions have been accused of sexual misconduct.⁸³ But sexual assault and harassment pervades all industries. Actresses, singers, politicians, engineers, journalists, entrepreneurs, dishwashers, and strawberry pickers are just some of the people to come forward.⁸⁴ It is clear that sexual harassment and misconduct occurs in all industries and can affect all people, regardless of social status.⁸⁵

In 2017, Time Magazine announced its Person of the Year: The Silence Breakers.⁸⁶ These are the men and women who have come forward, raised their voices, and shared their stories to shed light on the problem of sexual harassment and misconduct:

The women and men who have broken their silence span all races, all income classes, all occupations and virtually all corners of the globe. They might labor in California fields, or behind the front desk at New York City's regal Plaza Hotel, or in the European Parliament. They're part of a movement that has no formal name. But now they have a voice.⁸⁷

The cover of Time Magazine has five women whose faces can be seen and the arm of one person whose body and face cannot be seen. Those five women

79. #MeToo: A Timeline of Events, *supra* note 1; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region®ion=top-news&WT.nav=top-news>.

80. Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/> (last visited May 21, 2020).

81. Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied.*, NBC NEWS (Oct. 15, 2018, 4:59 PM), <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246>.

82. Anna North et al., *262 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list/frankie-shaw> (last updated Jan. 9, 2019).

83. *Id.*

84. Zacharek et al., *supra* note 80.

85. See Pflum, *supra* note 81.

86. Zacharek et al., *supra* note 80.

87. *Id.*

are actress Ashley Judd, who was one of the first to come forward with allegations against Weinstein;⁸⁸ singer Taylor Swift, who won a high-profile lawsuit seeking only \$1 from a former radio DJ after he groped her;⁸⁹ Uber engineer Susan Fowler, who wrote a blog post exposing Uber’s culture of sexual harassment;⁹⁰ corporate lobbyist Adama Iwu, who organized a campaign to expose sexual harassment in the California government;⁹¹ and agricultural worker Isabel Pascual, using a pseudonym to protect herself and her family, who was sexually harassed, stalked, and was one of the thousands of farmworkers who marched to show solidarity with the Hollywood stars.⁹² The person not pictured represents those who are unable to speak out about their harassment or assault.⁹³

#MeToo ignited a firestorm of media attention with survivors coming forward and sharing their stories, but Burke wants to make sure that the movement reaches more people than just those in elite circles.⁹⁴ Burke was originally motivated to start her organization to support the survivors of sexual violence, particularly girls and minorities.⁹⁵ From the beginning, the #MeToo movement was supposed to be about the survivors and victims of sexual violence.⁹⁶ Although unaware of Burke’s organization at the time, Milano stated that she thought sending out the “me too” tweet would “get the focus off these horrible men and . . . put the focus back on the victims and survivors.”⁹⁷ The tweet seemed to intend, in part, to be a way to help society understand how many individuals have been affected by sexual harassment and assault.⁹⁸

The #MeToo movement, although it has had widespread support, has not been without its critics.⁹⁹ Some criticize the #MeToo movement for focusing only on wealthy, white women and excluding people of color and poorer people from the narrative, even though it is black women and female employees of “blue-collar workplaces” that face the most sexual harassment and abuse.¹⁰⁰ This criticism also points out that the “Me Too” movement was created over a decade ago by Burke, an African American woman, but “the faces of the cause have often been white and affluent.”¹⁰¹ Other criticisms focus on the notion that some

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *About Me Too*, *supra* note 9.

96. *Id.*

97. Nadja Sayej, *Alyssa Milano on the #MeToo Movement: ‘We’re Not Going to Stand for It Any More,’* GUARDIAN (Dec. 1, 2017, 7:00 AM), <https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse>.

98. See Lesley Wexler et al., *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 51 (2019); Gilbert, *supra* note 5.

99. See Anna North, *The #MeToo Movement and Its Evolution, Explained*, VOX (Oct. 11, 2018, 3:15 PM), <https://www.vox.com/identities/2018/10/9/17933746/me-too-movement-metoo-brett-kavanaugh-weinstein>.

100. Charisse Jones, *When Will MeToo become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY (Jan. 30, 2019, 5:13 PM), <https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/>.

101. *Id.*

“lesser” forms of sexual harassment are getting lumped in with more severe forms.¹⁰² When a list was created to warn women in media about men in the industry who had been accused of sexual misconduct, one critic stated,

[one man] is damned for ‘flirting,’ another for taking ‘credit for ideas of women of color,’ another for ‘multiple employee affairs, inappropriate conversation’ And this chorus of minor offenses is on the same list as brutal rapes, physical assaults, brazen threats, unspeakable cruelty, violence, and misogyny.¹⁰³

Burke started the “Me Too” movement with “young Black women and girls from low wealth communities.”¹⁰⁴ Since Milano sent out her tweet, the grassroots movement has grown to reach survivors of all genders, ages, races, and socioeconomic backgrounds.¹⁰⁵ From the beginning, Burke’s goal for the “Me Too” movement was to “address both the dearth in resources for survivors of sexual violence and to build a community of advocates, driven by survivors, who will be at the forefront of creating solutions to interrupt sexual violence in their communities.”¹⁰⁶ In addition, the movement seeks to “reframe and expand the global conversation around sexual violence” and would like “perpetrators to be held accountable and . . . [to have] strategies implemented to sustain long term, systemic change.”¹⁰⁷ The Me Too organization aims to support survivors in their journey to healing by working with and uplifting each other and providing “community-based action . . . [that] is survivor-led and specific to the needs of different communities.”¹⁰⁸

D. Laws

Sexual misconduct is an umbrella term that can include many inappropriate sexual behaviors.¹⁰⁹ Both federal and state law recognize many categories of inappropriate sexual behavior, including sexual harassment and discrimination, assault, abuse, rape, and so on, with some states going further and deeper than others.¹¹⁰

At the federal level, harassing someone because of that person’s sex is unlawful through Title VII of the Civil Rights Act of 1964.¹¹¹ Sexual harassment generally comes in two forms: hostile work environment and quid pro quo.¹¹²

102. See North, *supra* note 99 (noting “concern[s] that different types of sexual misconduct would be lumped together and punished in the same way”).

103. *Id.*

104. *About Me Too, supra* note 9.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Alexia Fernández Campbell, *The Legal Difference Between Sexual Misconduct, Assault, and Harassment, Explained*, VOX (May 25, 2018, 11:19 AM), <https://www.vox.com/policy-and-politics/2018/1/26/16901998/weinstein-arrest-sexual-assault-harassment-rape-misconduct>.

110. Michelle Cottle, *What Does ‘Sexual Misconduct’ Actually Mean?*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/what-does-sexual-misconduct-actually-mean/548807/>.

111. 29 C.F.R. § 1604.11(a) (2019).

112. *Id.*

For a hostile work environment claim to be actionable, the harassment must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”¹¹³ Distinct from a hostile work environment claim, quid pro quo harassment occurs when a workplace “authority figure offers or . . . hints that he or she will give [an] employee something . . . in return for that employee’s satisfaction of a sexual demand[,]” such as a raise, promotion, or “say[ing] he or she will not fire or reprimand [that] employee.”¹¹⁴

Each state has its own laws dealing with sexual harassment, meaning that laws may differ from one state to the next.¹¹⁵ An analysis of each state’s sexual harassment laws is outside the scope of this Note. Therefore, this Note will use California and Mississippi as contrasting examples of the types of state sexual harassment laws. “The California Fair Employment and Housing Act (“FEHA”) protects California employees,” independent contractors, and unpaid interns “from sexual harassment.”¹¹⁶ Mississippi, in contrast does not have any general state sexual harassment laws, so if an individual wants to make a claim of sexual discrimination against an employer, it must be done through the local office of the U.S. Equal Employment Opportunity Commission (“EEOC”).¹¹⁷

The EEOC is the entity “responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex . . . national origin, age . . . , disability or genetic information.”¹¹⁸ The EEOC can investigate allegations of discrimination covered under the law and make a finding, which could lead to the EEOC engaging in settlement negotiations or filing a lawsuit against an employer it found to have engaged in prohibited discrimination.¹¹⁹

II. ANALYSIS

It has been over two years since the #MeToo movement hit the mainstream. While the movement has certainly garnered a lot of attention, the question still remains—is the legal landscape in regard to sexual abuse and harassment any different now than it was before the movement started? There seem to be differing opinions, with some viewing the movement as an impetus for cultural and

113. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

114. *What is Quid Pro Quo Harassment?*, FINDLAW, <https://employment.findlaw.com/employment-discrimination/what-is-quid-pro-quo-harassment.html> (last updated Dec. 4, 2018).

115. *State by State Sexual Harassment Law*, TRAINING ABC (Oct. 28, 2018, 6:17 AM), <https://www.trainingabc.com/sexual-harassment-law-in-all-50-states/>.

116. *Id.*

117. *Id.*

118. *EEOC Education and Outreach Program*, OIG: EQUAL EMP. OPPORTUNITY COMMISSION, <https://oig.eeoc.gov/eeoc-education-and-outreach-program-0> (last visited May 21, 2020).

119. *Id.*

legal change,¹²⁰ while others are a bit more skeptical.¹²¹ It is difficult to say exactly how the legal landscape will be affected, as many of the proposed bills have not been passed and may not ever be, but there are proposals that seek to address the topics focused on the #MeToo movement.

A. Current Sexual Discrimination, Harassment, and Abuse Laws

The federal government and all fifty states have laws criminalizing or providing sanctions for certain sexually-based crimes.¹²² Most sexually motivated crimes are prosecuted at the state level, and each state has its own laws about definitions of sex crimes and punishments, which can lead to differences across state lines in how sexual discrimination, harassment, and abuse is handled.¹²³ Additionally, federal laws often differ from state laws.¹²⁴

1. Federal Laws

Most sexually motivated crimes are prosecuted at the state level,¹²⁵ but there are certain ones that fall under the jurisdiction of the federal government.¹²⁶ Currently, federal sex offenses are codified in Title 10 of the U.S. Code, which relates to the armed forces,¹²⁷ and Title 18.¹²⁸ Title 18 of the U.S. Code currently punishes, among other crimes, aggravated sexual abuse (also known as rape),¹²⁹ sexual abuse,¹³⁰ sex crimes involving minors and those in custody,¹³¹ and abusive sexual contact crimes.¹³² These crimes often carry with them hefty punishments.¹³³ The federal government also maintains a federal sex registry where any individual who is convicted of a sex offense must register and keep their registration current.¹³⁴

120. See, e.g., Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws>.

121. See, e.g., Cara Kelly & Aaron Hegarty, *#MeToo Was a Culture Shock. But Changing Laws Will Take More Than a Year*, USA TODAY (Oct. 5, 2018, 12:28 PM), <https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/>.

122. *Sex Crimes*, *supra* note 14.

123. *See id.*

124. *Id.*

125. See Daniel C. Vock, *As Outcry Over Sexual Harassment Grows, Focus Shifts to State Legislatures*, GOVERNING (Oct. 18, 2017), <http://www.governing.com/topics/politics/gov-sexual-harassment-state-legislatures.html>.

126. *Understanding Federal Sex Crimes*, HG.ORG LEGAL RESOURCES, <https://www.hg.org/legal-articles/understanding-federal-sex-crimes-22784> (last visited May 21, 2020).

127. 10 U.S.C. §§ 920(a)–920(c) (2018).

128. 18 U.S.C. §§ 2241–2248 (2018).

129. 18 U.S.C. § 2241 (2018).

130. 18 U.S.C. § 2242 (2018).

131. 18 U.S.C. § 2243 (2018).

132. 18 U.S.C. § 2244 (2018).

133. See, e.g., 18 U.S.C. § 2241(c) (2018).

134. 34 U.S.C. § 20913 (2018).

Sexual harassment, however, is largely a matter of employment discrimination and civil rights laws.¹³⁵ Under Title VII of the Civil Rights Act of 1964, which applies to the federal government, sexual harassment is a prohibited form of sex discrimination.¹³⁶ It is illegal to harass someone “because of that person’s sex,” but the “[h]arassment does not have to be of a sexual nature . . . and can include offensive remarks about a person’s sex.”¹³⁷ For example, it is unlawful to “harass a woman by making offensive comments about women in general.”¹³⁸ Yet, not all sexual conduct in the workplace is actionable. The law does not prohibit “simple teasing, offhand comments, or isolated incidents that are not very serious.”¹³⁹ Harassment becomes illegal when it is “so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision.”¹⁴⁰ Both men and women are protected under Title VII’s prohibition of sexual discrimination and the harasser and victim can be of the same sex.¹⁴¹

Sexual harassment is divided into two main categories: quid pro quo and hostile work environment.¹⁴² While quid pro quo and hostile work environment harassment are distinct categories of sexual harassment that violate Title VII, “the line between the two is not always clear and the two forms of harassment often occur together.”¹⁴³ Quid pro quo harassment occurs when “submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”¹⁴⁴ For example, it is unlawful for a manager or other supervisor to tell a woman applicant that she must have sex with him in order to get the job.¹⁴⁵

Hostile work environment harassment takes many forms and there are numerous factors considered to determine if an individual’s work environment is hostile or abusive, but the focal point of the inquiry asks if “the conduct ‘unreasonably interferes with an individual’s work performance’ or creates ‘an intimidating, hostile, or offensive working environment.’”¹⁴⁶ Examples of behavior that can create a hostile work environment include displaying “pornographic pic-

135. *Facts About Sexual Harassment*, *supra* note 15.

136. *Id.*

137. *Sex Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited May 21, 2020).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

142. U.S. EQUAL EMP. OPPORTUNITY COMM’N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990).

143. *Id.*

144. *Id.*

145. Press Release, U.S. Equal Emp. Opportunity Comm’n, Draper Development LLC to Pay \$80,000 to Settle EEOC Sexual Harassment Suit (Dec. 11, 2018), <https://www1.eeoc.gov/eeoc/newsroom/release/12-11-18.cfm?renderforprint=1>.

146. POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, *supra* note 142 (alteration omitted).

tures . . . touching and grabbing, sexual remarks or jokes[,] and . . . physical interference with movement.”¹⁴⁷ A harassed individual does not need to demonstrate a “tangible employment action or economic injury,” such as being fired or demoted, in order to assert such a claim.¹⁴⁸

In 1998, the United States Supreme Court decided *Faragher v. City of Boca Raton*¹⁴⁹ and *Burlington Industries, Inc. v. Ellerth*.¹⁵⁰ In both cases, the Court “established automatic vicarious liability for employers in ‘supervisor’ cases where a tangible [adverse] employment action [such as discharge or demotion] is taken against the harassed employee.”¹⁵¹ The Court allowed an affirmative defense, however, in response to a hostile work environment claim that did not have evidence of a tangible adverse employment action.¹⁵² The affirmative defense requires the defendant to show that (1) the employer took “reasonable care to prevent and correct promptly any sexually harassing behavior” and (2) the “employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm.”¹⁵³

2. *California and Mississippi State Laws*

Not all states have the same laws in place regarding inappropriate sexual behavior and not all states have had the same reaction to the #MeToo movement.¹⁵⁴ Analyzing the current laws of all fifty states is outside the scope of this Note, but the wide disparity in how states addressed sexual harassment before the #MeToo movement can be seen by just examining California and Mississippi. The first #MeToo social media post was in Fall of 2017,¹⁵⁵ therefore this Section will discuss laws in place or introduced before 2018.

Even before the #MeToo social media movement, California was a state with many “robust policies on [sexual] misconduct in the workplace.”¹⁵⁶ For example, FEHA requires employers to take “all reasonable steps necessary to prevent discrimination and harassment from occurring.”¹⁵⁷ As part of these steps,

147. *Sexual Harassment that Creates a Hostile Work Environment*, ADVOCATES FOR HUMAN RIGHTS, http://www.stopvaw.org/sexual_harassment_that_creates_a_hostile_work_environment#_ednref2 (last updated Feb. 2019).

148. *Id.*

149. *Faragher v. City of Boca Raton*, 524 U.S. 775, 775 (1998).

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

151. *Ellerth*, 524 U.S. at 764–65; 52 AM. JUR. *Proof of Facts* 3D § 2.5 (2019).

152. *Ellerth*, 524 U.S. at 764–65.

153. *Id.*; 52 AM. JUR. *Proof of Facts* 3D, *supra* note 151, § 9.

154. *See #MeToo, Time’s Up and the Legislation Behind the Movement*, BILLTRACK50 (Feb. 15, 2018), <https://www.billtrack50.com/blog/social-issues/civil-rights/metoo-times-up-and-the-legislation-behind-the-movement/>.

155. Milano, *supra* note 3.

156. *See* Beitsch, *supra* note 120.

157. Anthony Zaller, *Five Employer Obligations to Prevent Sexual Harassment in the Workplace*, CAL. EMP. L. REP. (Nov. 10, 2017), <https://www.californiaemploymentlawreport.com/2017/11/five-employer-obligations-prevent-sexual-harassment-workplace/>.

employers must have a written antiharassment, antidiscrimination, and retaliation prevention policy and must create a definition of sexual harassment.¹⁵⁸ Furthermore, employers should explain how harassment cases will be handled and should prohibit retaliation against employees who file complaints.¹⁵⁹ Prior to the updated laws as a result of #MeToo, California required employers with fifty or more employees to provide two hours of sexual harassment training to supervisory employees every two years.¹⁶⁰ Additionally, employers were required to distribute to employees a brochure containing information about FEHA, including how the Act defines sexual harassment, obligations of the employer, examples of sexual harassment, and how to file a complaint.¹⁶¹

Not all states treat sexual harassment the same; Mississippi lags behind most of the others in having comprehensive laws about a range of sexual misconduct and in embracing #MeToo.¹⁶² “Mississippi offers a stark example of how laws related to sexual violence have not kept pace with modern ideas about crime. It . . . does [not] have criminal laws that clearly forbid unwanted sexual touching as groping and fondling.”¹⁶³ One law professor finds that having laws forbidding groping is important because it sends a message that society condemns that behavior and that the perpetrator pay a penalty, albeit a small one, for such an act.¹⁶⁴ Some believe that the lack of such laws may indicate a bigger problem: states “frequently are behind in keeping laws in line with changing ideas and attitudes toward sexual violence.”¹⁶⁵

As for sexual harassment, it is not much different. Mississippi lacks its own comprehensive sexual harassment laws concerning private employers.¹⁶⁶ A victim who works for an employer covered by Title VII would need to file a sexual harassment or discrimination claim through Mississippi’s EEOC office.¹⁶⁷ This means that there is little protection for individuals who are the victims of sexual harassment and work for an employer not covered by Title VII. In such a situation, the victim’s likely only recourse would be through pursuing a common law assault and battery claim, which would require the harassment to have included some form of unwanted physical contact.¹⁶⁸

Just from that brief comparison of California and Mississippi laws before #MeToo, it is clear that states can vary greatly in what kinds of laws they have,

158. *Id.*

159. *Id.*

160. Jeff Daniels, *New State Laws: From Workplace Harassment Protections to Mandating Women on Boards*, CNBC (Dec. 28, 2018, 9:19 AM), <https://www.cnbc.com/2018/12/28/new-state-laws-in-california-elsewhere-inspired-by-metoo-movement.html>.

161. Zaller, *supra* note 157.

162. Bernice Yeung, *In 2 States, Sexual Assault Laws Lag Far Behind the Mainstream*, CTR. FOR INV. REP. (Aug. 25, 2015), <https://www.revealnews.org/article/in-2-states-sexual-assault-laws-lag-far-behind-the-mainstream/>.

163. *Id.*

164. *Id.*

165. *Id.*

166. *State by State Sexual Harassment Law*, *supra* note 115.

167. *Id.*

168. *Sexual Harassment—What Is It and What Can Be Done?*, PANTER L. FIRM PLLC (Sept. 13, 2018), <https://www.craigpanterlaw.com/2018/09/13/sexual-harassment/>.

how many, and the content of such laws on sexual harassment and discrimination. While the laws may not perfectly represent the entire state's attitudes towards these issues, they do provide some insight into the priorities and emphasis that states place on preventing and remedying sexual harassment and other sexual misconduct. Many of these issues, and others, have received renewed interest, and new legislation, since the #MeToo movement.¹⁶⁹

B. How #MeToo is Planning to Change, and Has Already Changed, Some Federal and State Laws

The vast majority of states across the country have introduced some type of legislation about sexual harassment in response to the #MeToo movement, with some bills being successful, others failing, and the future of many remaining uncertain.¹⁷⁰ This Note will continue to use federal law, California, and Mississippi as examples of changes, or the lack thereof, in the wake of #MeToo.

1. Laws at the Federal Level

“Sexual harassment and assault is not about sex, it is about power.”¹⁷¹ One way that perpetrators gain power over their victims is by silencing them.¹⁷² A powerful tool used to silence victims is the nondisclosure agreement (“NDA”), and it is used often.¹⁷³ Harvey Weinstein used NDAs as a tool to avoid accountability and continue his abuse for at least twenty years.¹⁷⁴ For many victims, the sanctions that come from the violation of an NDA are very real threats; “[t]he monetary damages attached to violating a [NDA] make it impractical for most victims to ever consider breaking it.”¹⁷⁵ NDAs may, however, also serve an important role for victims as some victims may value the privacy that NDAs bring.¹⁷⁶

Many states, such as California,¹⁷⁷ and Congress have taken aim at the use of NDAs in workplace sexual misconduct claims.¹⁷⁸ In Congress, a bipartisan bill called the Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (“EMPOWER”) Act, which has passed in the

169. *See id.*

170. *See Johnson, supra* note 154.

171. Jessica Levinson, *Non-Disclosure Agreements Can Enable Abusers. Should We Get Rid of NDAs for Sexual Harassment?*, NBC: THINK (Jan. 24, 2018, 3:19 AM), <https://www.nbcnews.com/think/opinion/non-disclosure-agreements-can-enable-abusers-should-we-get-rid-nca840371>.

172. *Id.*

173. *See id.* (noting that NDAs have been used by Harvey Weinstein, Roger Ailes, Bill O'Reilly, Larry Nasser, and others).

174. Kathy Gurchiek, *States Take Action Against Nondisclosure Agreements*, SHRM (Aug. 28, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/states-take-action-against-nondisclosure-agreements.aspx>.

175. Levinson, *supra* note 171.

176. *See* Danielle Paquette, *How Confidentiality Agreements Hurt—and Help—Victims of Sexual Harassment*, WASH. POST (Nov. 2, 2017, 11:40 AM), https://www.washingtonpost.com/news/wonk/wp/2017/11/02/how-confidentiality-agreements-hurt-and-help-victims-of-sexual-harassment/?utm_term=.1b043038b52b.

177. *See infra* Section III.B.2.

178. Gurchiek, *supra* note 174.

House of Representatives, would bar employers from requiring employees to sign NDAs related to workplace harassment, although voluntary agreements as part of a legal settlement are not banned.¹⁷⁹ The EMPOWER Act would also require public companies to disclose the number of sexual harassment claims that it settles and how much it pays out in the settlement.¹⁸⁰ The bill is a direct response to the number of sexual harassment claims that have been unearthed as a result of the #MeToo movement.¹⁸¹

Shortly after the EMPOWER Act was introduced, another bill was introduced.¹⁸² This bill, the Ending Secrecy About Workplace Sexual Harassment Act, would “require reporting by employers of the number of settlements with employees regarding claims of discrimination on the basis of sex, including verbal and physical sexual harassment” to the EEOC.¹⁸³ This bill recognizes that sexual harassment is a widespread problem in every industry, at every level of employment, and aims to end the secrecy surrounding sexual harassment claims.¹⁸⁴

Another way that abusers often exercise power over their victims is through forced arbitration.¹⁸⁵ For many employees, their employment contract contains a clause stating that arbitration will be the method used to resolve claims of sexual harassment, denying the claimant the opportunity to go to court.¹⁸⁶ The provision requiring arbitration is often found in the “fine print of lengthy employment contracts” and is usually worded in “boilerplate ‘take it or leave it’” language, which could mean that some victims are unaware that they are bound by arbitration until they attempt to file a lawsuit.¹⁸⁷

Arbitration has some benefits, including that it may move more quickly than normal court proceedings and may provide the victim more privacy.¹⁸⁸ Mandatory arbitration, however, also has the effect of silencing the victim as it often shields the accused’s wrongdoing from the public.¹⁸⁹ In addition, the employer often has a better chance of winning or coming out ahead in the settlement

179. H.R. 6406, 115th Cong. (2d Sess. 2018).

180. *Id.*

181. Alexia Fernández Campbell, *A New House Bill Would Bar Companies from Using Nondisclosure Agreements to Hide Harassment*, VOX (July 18, 2018, 3:20 PM), <https://www.vox.com/2018/7/18/17586532/sexual-harassment-bill-ban-nondisclosure-agreements-ndas-congress-metoo>.

182. Ending Secrecy About Workplace Sexual Harassment Act, H.R. 4729, 115th Cong. (1st Sess. 2017).

183. *Id.*

184. *Id.* §§ (a), (b)(1).

185. Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, L.A. LAWYER, May 2018, at 12, 14.

186. See Jeremy R. Lange, *Growing Push to Eliminate Mandatory Arbitration of Sexual Harassment Claims*, 27 WISC. EMPL. L. LETTER 6 (May 2018).

187. Manatt Phelps & Phillips LLP, *AGs Urge Legislation Ending Arbitration for Sexual Harassment Claims*, LEXOLOGY (Mar. 8, 2018), <https://www.lexology.com/library/detail.aspx?g=60c97620-b1af-4180-97ef-3531be1411da>.

188. See Lange, *supra* note 186.

189. See Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow*, WASH. POST (Nov. 12, 2018, 3:42 PM), https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.4d623df5cb05.

and avenues for appeal are often restricted or unsuccessful.¹⁹⁰ If employees do win, they often receive less money than they would in court.¹⁹¹ As a result, forced arbitration has the effect of perpetuating sexual harassment and abuse in the workplace because of the cloud of secrecy surrounding it and the negative effect that it has on the victim's willingness to make a claim.¹⁹²

There has been some movement by lawmakers, both federal and state, that would work to dismantle forced arbitration in some sexual assault and harassment claims. A bill was introduced in the Senate that would end forced arbitration of sexual harassment claims.¹⁹³ The Ending Forced Arbitration of Sexual Harassment Act of 2017 states that for disputes between employers and employees that would be based on a claim under Title VII, "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute."¹⁹⁴ The National Association of Attorneys General, representing the Attorneys General of all fifty states plus D.C., American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands, sent a letter to the leadership of both the House and the Senate asking "for [their] support and leadership in enacting needed legislation to protect the victims of sexual harassment in the workplace."¹⁹⁵ As of now, the bill has been referred to the Committee on Health, Education, Labor, and Pensions but no further action has been taken.¹⁹⁶

The federal judiciary has not been immune from the #MeToo movement. "As the #MeToo movement gained prominence in 2017, the federal judiciary came under fire from former law clerks who said warnings to respect the confidentiality of judicial deliberations effectively muted complaints about judges who made lewd proposals or bullied their clerks."¹⁹⁷ The Judicial Conference, the governing body for federal courts, has implemented changes in response to complaints that the system in place "discourages employees from reporting abusive or harassing behavior."¹⁹⁸ The rule changes were spurred in large part as allegations of Ninth Circuit Judge Alex Kozinski's inappropriate sexual behavior emerged, causing Judge Kozinski to ultimately apologize and resign.¹⁹⁹ The new rules explicitly state that the judicial code of conduct prohibits "unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault" and

190. Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html>; McGregor, *supra* note 189.

191. *See id.*; McGregor, *supra* note 189.

192. *See* Lange, *supra* note 186.

193. Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

194. *Id.*

195. Letter from National Association of Attorneys General to Congressional Leadership, Mandatory Arbitration of Sexual Harassment Disputes (Feb. 12, 2018), <https://www.manatt.com/Manatt/media/Documents/Articles/AGs-letter.pdf>.

196. *All Actions S.2203-115th Congress (2017-2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2203/all-actions?overview=closed#tabs> (last visited May 21, 2020).

197. Josh Gerstein, *Judges Make Rules Changes to Address #MeToo Complaints*, POLITICO (Mar. 12, 2019, 5:10 PM), <https://www.politico.com/story/2019/03/12/judges-sexual-misconduct-me-too-1218482>.

198. *Id.*

199. *Id.*

that a judge may be subject to discipline for creating a hostile work environment.²⁰⁰ Additionally, the new rules allow for an informal complaint process in an effort to make staff and employees feel more comfortable coming forward.²⁰¹ The federal courts also established a “national Office of Judicial Integrity to provide another route for complaints and education of staff and judges on how to address workplace issues.”²⁰² Judges can be reprimanded for their inappropriate behavior but only Congress can remove a federal judge through impeachment.²⁰³

Although how courts respond to sexual harassment and abuse claims is not the focus of this Note, it is important to note that federal courts have had to interpret sexual harassment claims brought under Title VII and therefore the judiciary might have some reactions to the #MeToo movement as well. “The first federal cases recognizing sexual harassment as a violation of Title VII were decided in the mid-1970s.”²⁰⁴ Much has changed since then in how courts interpret federal sexual harassment claims.²⁰⁵ In 2018, at least one court acknowledged that its decision about a Title VII claim was handed down amidst the #MeToo movement.²⁰⁶ The Third Circuit, in *Minarsky v. Susquehanna County*, heard the appeal of a hostile work environment claim brought under Title VII.²⁰⁷

In that case, the plaintiff, Sheri Minarsky, claims she was the victim of unwanted sexual advances by her supervisor, Thomas Yadlosky, and sought to hold Yadlosky and her employer, Susquehanna County Department of Veteran’s Affairs (“the County”), liable.²⁰⁸ Minarsky claimed that nearly every week, Yadlosky would attempt to kiss her on the lips, would approach her from behind and embrace her, massage her shoulders, touch her face, and one Christmas, asked her to kiss him under the mistletoe.²⁰⁹ Furthermore, Yadlosky often questioned Minarsky about her whereabouts during her breaks and whom she was eating lunch with, would call her at her home and ask her personal questions, becoming agitated if she did not respond, and would send her sexually explicit messages and emails.²¹⁰

Minarsky stated that she asked Yadlosky to stop, but he did not.²¹¹ Yadlosky had been reprimanded on two separate occasions for his behavior towards other women.²¹² Minarsky claimed that she feared speaking up to Yadlosky because he knew that she needed her job to pay for her daughter’s cancer treatments

200. *Id.*

201. *Id.*

202. *Id.*

203. U.S. CONST. art. I, III.

204. Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 457 (2002).

205. *See id.* at 457–58 (“Over the last twenty-five years, federal law prohibiting sexual harassment in employment has continued to develop . . .”).

206. *See Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 313 n.12 (3d Cir. 2018).

207. *Id.* at 310.

208. *Id.* at 306.

209. *Id.* at 306–07.

210. *Id.* at 307.

211. *Id.*

212. *Id.*

and because if she tried to protest his harassment, Yadlosky would become “nasty.”²¹³ Minarsky contends that she did not report the harassment to the Chief County Clerk or County Commissioner in part because of the unsuccessful prior reprimands.²¹⁴

In response to these allegations, the County asserted the *Faragher-Ellerth* affirmative defense.²¹⁵ One of the two elements of this affirmative defense requires the court to determine whether the complaining employee “unreasonably failed to take advantage of any sexual harassment policy, or failed to avoid harm otherwise.”²¹⁶ This required the Third Circuit to determine if Minarsky’s failure to report her employer’s sexual harassment was unreasonable because if it was unreasonable, then Yadlosky and the County may not be liable.²¹⁷

The district court, in granting summary judgment in favor of the County, found that Minarsky’s silence was unreasonable, stating, “[t]he County’s reasonable policies and responses . . . are set in stark contrast to the plaintiff’s refusal or unwillingness to avail herself of the County’s anti-harassment policy to bring Yadlosky’s conduct to the attention of County officials.”²¹⁸ The Third Circuit observed, however:

This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual’s employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred. While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee’s non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment. Recent news articles report that studies have shown that not only is sex-based harassment in the workplace pervasive, but also the failure to report is widespread.²¹⁹

In an apparent nod to the #MeToo movement and all the stories of harassment surfacing as a result, the Third Circuit acknowledged the framework of the laws

213. *Id.*

214. *Id.* at 308.

215. *Id.* at 310.

216. West, *supra* note 204, at 460.

217. See *Minarsky*, 895 F.3d at 310–11.

218. *Id.* at 311.

219. *Id.* at 313 n.12.

it was working within but also recognized that the cultural landscape was shifting. And this shift may have an impact on how society, or a jury of one’s peers, would interpret a legal standard. As a result, the Third Circuit vacated the district court’s order granting summary judgment and remanded the case, finding that a jury, upon hearing all the evidence, could determine that Minarsky’s actions were objectively reasonable.²²⁰

2. *California and Mississippi State Laws*

Though an analysis of current and proposed laws of all fifty states is beyond the scope of this Note, the stark difference in how states addressed sexual harassment before and after the #MeToo movement can be seen by examining California and Mississippi laws.

California became the epicenter for the #MeToo movement because the Weinstein scandal centered around Hollywood, so it is no surprise that the state is taking the lead in drafting legislation to further protect workers from sexual harassment through an array of new laws.²²¹ This includes legislation mandating female representation on the boards of public companies²²² and a prohibition on employers requiring an employee to release a harassment claim in exchange for additional benefits from the employer.²²³

Since late 2019, California has mandated that every publicly traded corporation headquartered in the state have women serving on its board of directors.²²⁴ Numerous studies have found that publicly traded companies perform better when women serve on their boards,²²⁵ however, a study in 2017 found that over one-fourth of Russell 3000 index companies based in California had *no* women serving on their boards.²²⁶ The law requires all publicly traded corporations with four or fewer directors to have a minimum of one female director on its board.²²⁷ If the corporation has five directors, then there must be a minimum of two female directors; if a corporation has six or more directors, then it must have a minimum of three female directors.²²⁸ Failure to comply with the law will result in a fine of \$100,000 for the first violation and \$300,000 for any subsequent violations.²²⁹

The law has not been without critics pointing out the potential downsides, such as potentially making it “more difficult for companies to improve racial and

220. *Id.* at 317.

221. Daniels, *supra* note 160.

222. SB 826 § 2(a), Reg. Sess. (Cal. 2018).

223. CAL. GOV’T CODE § 12964.2 (West 2019).

224. CAL. CORP. CODE § 301.3 (West 2019); Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, L.A. TIMES (Sept. 30, 2018, 4:00 PM), <https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html>.

225. S.B. 826 § 1(c), Reg. Sess., (Cal. 2018).

226. *Id.* § 1(e)(2).

227. *Id.* § 2(b).

228. *Id.*

229. *Id.* §§ 2(e)(1)(B)–(C).

ethnic diversity” on their boards.²³⁰ In a signing message, Governor Jerry Brown recognized that the law is not without its difficulties and potential legal challenges, but emphasized that “it’s high time corporate boards include the people who constitute more than half of the ‘persons’ in America.”²³¹

One aim of the #MeToo movement was to implement strategies “to sustain long term, systemic change.”²³² This legislation is aimed to “boost the California economy [and] improve opportunities for women in the workplace” because if something is not done proactively, it could “take 40 or 50 years to achieve gender parity” on company boards.²³³ Mandating women on boards aligns with the goals of the #MeToo movement because it takes aim at the corporate structure and system which could “not only improve opportunities for women and girls but also improve productivity” of the corporation as a whole, potentially leading to greater systemic change than just leaving the status quo alone.²³⁴

California also passed a law that “lowers the threshold for the state’s sexual harassment training requirements for employers.”²³⁵ Under the prior law, California required employers with fifty or more employees to provide two hours of sexual harassment training to employees.²³⁶ The new law now requires employers of five or more employees to provide at least two hours of sexual harassment training to supervisors and one hour of training to non-supervisory employees.²³⁷ The law provides for some flexibility, such as allowing employers to provide the trainings in segments or doing it in group settings rather than individually.²³⁸ The trainings must include “information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims,” and practical examples aimed at instructing supervisors on how to prevent harassment, discrimination, and retaliation.²³⁹ Employers are also authorized to bolster their sexual harassment training by providing bystander intervention training.²⁴⁰

Additionally, California has made it unlawful for an employer, “in exchange for a raise or bonus, or as a condition of employment or continued employment” to require an employee to (1) sign a release of claim or right under FEHA or (2) sign a nondisparagement agreement or any other document that “purports to deny the employee the right to disclose information about unlawful

230. Abigail Hess, *California Just Became the First State to Require Women on Corporate Boards*, CNBC (Oct. 1, 2018, 2:20 PM), <https://www.cnbc.com/2018/10/01/california-law-will-require-women-on-corporate-boards.html>.

231. *Id.*

232. *About Me Too*, *supra* note 9.

233. S.B. 826 § 1(a), Reg. Sess. (Cal. 2018).

234. *See Hess*, *supra* note 230.

235. S.B. 1343 § 2(a), Reg. Sess. (Cal. 2018).

236. Daniels, *supra* note 160.

237. S.B. 1343 § 2(a), Reg. Sess. (Cal. 2018).

238. *Id.*

239. *Id.*

240. S.B. 1300 § 3, Reg. Sess. (Cal. 2018).

acts in the workplace, including, but not limited to, sexual harassment.”²⁴¹ The purpose of the law is to “provide all Californians with an equal opportunity to succeed in the workplace” and recognizes that individuals have a “right to work in a place free of improper discrimination” that disrupts the victim’s “emotional tranquility” in the workplace, “the victim’s ability to perform the job,” and undermines “the victim’s personal sense of well-being.”²⁴²

Similar to the forbidden California employment practice of forcing an employee to sign an agreement preventing the employee from disclosing sexual harassment in the workplace, a new California law took effect in January of 2019 that forbids secret settlements or the use of NDAs in settlement agreements in an effort to prevent the suppression of factual information in cases involving allegations of sexual assault, harassment, or discrimination.²⁴³ The claimant in sexual assault and harassment cases can, however, elect to keep his or her identity private in a settlement agreement,²⁴⁴ which may be desirable to many victims.²⁴⁵

The #MeToo movement aims to “reframe and expand the global conversation around sexual violence” and to “disrupt the systems that allow for the global proliferation of sexual violence.”²⁴⁶ While changing the conversation around sexual misconduct and violence will need to happen outside of the workplace with a cultural and social shift, it needs to happen in the workplace as well.²⁴⁷ Mandating trainings for many more employers and employees and giving a framework for what is to be discussed is a step towards accomplishing this goal of the #MeToo movement, even if it does not totally accomplish it.

Power imbalance between employer and employee is one part of the system that can allow for the proliferation of sexual misconduct.²⁴⁸ States like California that are giving victims the information needed to understand what is not appropriate behavior and more chances to come forward to share their story, without fear of losing their job or being bound by an NDA, may be acting in accordance with the goals of #MeToo by disrupting the power imbalance that so often leaves victims feeling powerless and helpless.²⁴⁹ California serves as an example of how even states that already had relatively robust laws in place seeking to prevent and remedy sexual harassment, discrimination, and abuse can recognize that their laws are not perfect and can still make progress in the wake of the #MeToo movement.

Mississippi stands in contrast to California in terms of legal reactions to the #MeToo movement thus far. Beginning in 2018, Mississippi has proposed at least eleven bills that address sexual harassment.²⁵⁰ All eleven of those bills died

241. *Id.* §§ 4(a)(1)(A), (2)(A).

242. *Id.* § 1(a).

243. S.B. 820 §1(a), Reg. Sess. (Cal. 2018).

244. *Id.* § 1(c).

245. *See, e.g., supra* text accompanying notes 171–76.

246. *About Me Too, supra* note 9.

247. *Id.* (“[T]he ‘me too’ movement affirms empowerment through empathy and community-based action, the work is survivor-led and specific to the needs of different communities.”).

248. *See* Zacharek et al., *supra* note 80.

249. *See supra* text accompanying notes 171–76.

250. *See* Johnson, *supra* note 154 (select “Mississippi” from “The Bills” dropdown options).

in committee.²⁵¹ One bill sought to create a state private right of action for sexual harassment,²⁵² as Mississippi currently does not have one.²⁵³ This effort ultimately failed.²⁵⁴ Although politics may have gotten in the way in this instance, this effort shows that states are listening to #MeToo and attempting to make changes, even though those changes may not happen quickly or easily.

IV. RECOMMENDATION

The #MeToo movement was clear about what its goals were and what change it hoped to see as a result of the movement.²⁵⁵ Cultural shifts do not happen overnight and neither does legal change, but the two are tied together and can help influence each other. While it is difficult to say that the goals of #MeToo have been completely realized, progress, in the form of proposed and passed legislation and greater awareness, has been made.²⁵⁶ Yet there can be even more progress and change. This Note suggests that supporters of preventing and remedying sexual assault, harassment, and misconduct target their policy efforts at state and local governments. Furthermore, those policy changes should include efforts to update and refine the definitions of sexually violent acts, to make changes to laws related to sexual harassment and misconduct in ways that focus on survivors. Finally, supporters should continue using hashtags and empowering victims.

A. Advocates Should Direct Their Efforts at Influencing State Policies and Laws

“The rallying cry among fashionable American lawyers and legal educators is ‘globalism.’ Yet, many of the most vexing issues of social policy and legal institutions are found at the local level.”²⁵⁷ Indeed, most sexual assault crimes and laws are based on state, rather than federal, law.²⁵⁸ That is not to say that how the federal government treats sexual assault and harassment is not important, but cases are mostly handled at the state level. As a result, while advocates may want to pursue federal objectives, state governments should be given special attention. Mississippi is an example of this. For many advocates, it may be a glaring issue that the state currently does not have comprehensive laws forbidding sexual harassment in the workplace, meaning that the victim must rely on federal law, if it applies, or attempt to fashion a legal theory that makes another law

251. *See id.*

252. H.B. 1441, Reg. Sess. (Miss. 2018).

253. *See supra* text accompanying notes 166–68.

254. *MS HB1441: Sexual Harassment; Create a State Cause of Action*, BILL TRACK 50, <https://www.billtrack50.com/BillDetail/925046> (last visited May 21, 2020).

255. *See supra* text accompanying notes 95–98.

256. *See supra* Section III.B.

257. Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 627 (2001).

258. *See Vock, supra* note 125.

applicable.²⁵⁹ Advocating for changes in the federal law may be helpful to increase the number of employers who are covered, and thus increase the number of victims who can have actionable claims, but seeking changes at the state-level would go more to the heart of the issue and perhaps elicit the change truly desired.²⁶⁰

In addition, access to legislators and influence on their actions are very important to accomplishing policy change.²⁶¹ Constituents will generally have an easier time getting in contact with or catching the ear of their state representatives, rather than their congressional representatives or senators who split their time between their state and Washington, D.C.²⁶² Many interest groups already target their lobbying activities at a single state,²⁶³ so activists should be aware of this when deciding where to expend their efforts and resources to effect policy changes. Some issues may captivate the attention of the nation as a whole and having federal legislation passed may be a laudable goal, but for many issues, including those of sexual harassment, state legislatures are an extremely important tool that should not be ignored or underutilized.

One goal of the #MeToo movement was to build a community of advocates to be “at the forefront of creating solutions to interrupt sexual violence in their communities.”²⁶⁴ As discussed above, if advocates focus their attention on state and local governments, they may be able to work towards #MeToo’s goal of bettering communities and building a strong coalition of advocates who seek to help others, especially minorities, find solutions for the problems caused by sexual violence and harassment.²⁶⁵

B. Definitions for Inappropriate Sexual Behavior Should be Standardized

Differing definitions for terms related to sexual violence or misconduct can make victims unsure about what they have experienced or others unsure about what they are doing or seeing.²⁶⁶ Some groups have been calling for uniform definitions of inappropriate sexual behavior or to “call it what it is” since before the #MeToo movement hit the mainstream.²⁶⁷ Yet, the window of opportunity presented by the #MeToo movement means that the time is ripe to consider what

259. See *Sexual Harassment—What Is It and What Can Be Done?*, *supra* note 168.

260. See *id.*

261. See Nathan Grasse & Brianne Heidbreder, *The Influence of Lobbying Activity in State Legislatures: Evidence from Wisconsin*, 36 LEGIS. STUD. Q. 567, 568–69 (2011).

262. See, e.g., Susan Cornwell & Megan Cassella, *Members of Congress Are Trying to Spend as Little Time in Washington as Possible*, BUS. INSIDER (Feb. 1, 2016, 9:40 AM), <https://www.businessinsider.com/members-of-congress-are-trying-to-spend-as-little-time-in-washington-as-possible-2016-2>.

263. Jennifer Wolak et al., *Much of Politics is Still Local: Multi-State Lobbying in State Interest Communities*, 27 LEGIS. STUD. Q. 527, 550 (2002).

264. *About Me Too*, *supra* note 9.

265. See *supra* text accompanying notes 94–96.

266. See Jessica Valenti, *When You Call Rape Anything but Rape, You Are Just Making Excuses for Rapists*, GUARDIAN (Apr. 24, 2014, 7:30 AM), <https://www.theguardian.com/commentisfree/2014/apr/24/rape-game-of-thrones>.

267. See *id.*; Jessica Valenti, *Ending Rape Illiteracy*, NATION (Oct. 23, 2012), <https://www.thenation.com/article/ending-rape-illiteracy/>.

certain sexual behaviors are called and how they are defined. Creating consistent definitions can help individuals be aware of their own conduct, of the situations they are put in, and how to talk about those issues.

Even an act like rape can have varying definitions that may confuse people, including people who think they already know what it means. In 2012, the Office of the Attorney General “announced a newly revised definition of rape for nationwide data collection.”²⁶⁸ The FBI now utilizes the new definition in its reporting system.²⁶⁹ The FBI’s reporting system previously utilized the 1927 definition of forcible rape, which was defined as “the carnal knowledge of a female, forcibly and against her will.”²⁷⁰ This outdated and narrow definition excluded male rape victims, did not include rape with an object, and did not recognize a victim’s inability to give consent because of mental or physical incapacity.²⁷¹ The new definition is: “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”²⁷²

Compare the new definition with that of Mississippi. In Mississippi, rape is defined as “assault with intent to forcibly ravish any female of previous chaste character.”²⁷³ Mississippi’s definition is very antiquated and unlikely consistent with how most people think about rape.²⁷⁴ This definition is similar to the 1927 definition that the FBI previously used, although the FBI recognized its shortcomings.²⁷⁵ Like the 1927 FBI definition, the very gendered Mississippi law would limit its reach to only a “chaste” female victim; male victims will have to seek justice under another statute. Although state courts will presume that a rape victim is chaste, many prosecutors will instead rely on the state’s attempted sexual battery statute which has no “previous chaste character” requirement.²⁷⁶

The same argument can be made for other sexual misconduct, such as sexual harassment. While changing the legal definition of a word may seem to have minimal impact, these definitions do have an effect on the disposition of cases if they are ever litigated because they could affect whether or not the abuser is found liable and could affect the sanction imposed.²⁷⁷ While many people do not regularly rely on statutes to help them define terms, they may be surprised to find

268. *An Updated Definition of Rape*, U.S. DEP’T JUST. ARCHIVES (Jan. 6, 2012), <https://www.justice.gov/archives/opa/blog/updated-definition-rape>.

269. *Id.*

270. *Id.*

271. *See id.*

272. *Id.*

273. MISS. CODE ANN. § 97-3-71 (West 1962).

274. *See* Ronni Mott, *Intent to Ravish*, JACKSON FREE PRESS (June 20, 2012, 3:23 PM), <http://www.jacksonfreepress.com/news/2012/jun/20/intent-to-ravish/>.

275. *See An Updated Definition of Rape*, *supra* note 268 (“The change sends an important message to all victims that what happens to them matters, and to perpetrators that they will be held accountable. It was because of the voices of survivors, advocates, law enforcement personnel and many others that [the] FBI . . . was able to make this important change within the FBI’s Uniform Crime Report (UCR) Summary Reporting System . . .”).

276. MISS. CODE ANN. § 97-3-95 (West 1988); Yeung, *supra* note 162.

277. *See Sex Crime: Definitions and Penalties Mississippi*, RAINN, <https://apps.rainn.org/policy/policy-crime-definitions.cfm?state=Mississippi&group=3> (last updated Mar. 2020) (defining rape and sexual battery under Mississippi law and noting the differences between the punishments for each crime).

that some of these definitions are a relic of another time and, for example, that their previous sexual history may have a bearing on the outcome of their case.²⁷⁸ Having varying definitions can create inconsistencies in the way that people think about a crime or a how court interprets a statute, which is further evidence for why more standardized definitions would be helpful. Furthermore, individuals may not know if actions against them constitute some sort of sexual misconduct—they may not know if they are being unlawfully harassed or grabbed.²⁷⁹

Another goal of the #MeToo movement was to “reframe and expand the global conversation around sexual violence to speak to the needs of a broader spectrum of survivors.”²⁸⁰ Changing definitions may seem like a small step, but it helps to reframe and expand the conversation around sexual violence. For example, updating Mississippi’s definition of rape, and others similar to it, may serve as a framework for the recognition that men can be raped as well. This would help further the goal of the #MeToo movement, which recognizes that “[y]oung people, queer, trans, and disabled folks” should also be included in the conversation on sexual violence.²⁸¹ In addition, having similar definitions for acts of sexual violence or harassment can help further the conversation so that everyone has a similar starting point and basis to begin from.

278. See Mott, *supra* note 274.

279. See Skye Schooley, *Workplace Harassment: How to Recognize and Report It*, BUS. NEWS DAILY (Mar. 11, 2019), <https://www.businessnewsdaily.com/9426-workplace-harassment.html>.

280. *About Me Too*, *supra* note 9.

281. *Id.*

*C. Advocate for Changes in Law Relating to Sexual Harassment and
Discrimination in Ways that Empower Survivors*

The #MeToo movement has encouraged many citizens and lawmakers to take a stand and advocate for changes in laws relating to sexual assault and harassment.²⁸² Many of the changes discussed pertain to mandating women on boards, the use of NDAs and secret settlements, and the release of claims as a condition of employment.²⁸³ There were many other laws proposed or passed in states around the country that relate to sexual harassment or violence that this Note did not discuss but that are also very important, such as laws aimed at testing rape kits and extending the statute of limitations for civil allegations.²⁸⁴ These changes should be welcomed and encouraged.

In addition, legislators should keep the victim or survivor's best interest in mind when fashioning new or amending old legislation. An example of doing so can be seen with limiting the use of NDAs and forcing a victim to give up a claim in order to stay employed.²⁸⁵ All non-frivolous civil claims should be evaluated in order to fairly determine whether to hold the accused civilly liable. Some victims do not even get the chance to share their story, however, because of NDAs or because they have signed a document releasing their otherwise valid claim.²⁸⁶ Perpetrators of sexual violence and harassment use these tools to silence victims, which may lead to inadequately punishing the abuser for their actions and could prevent the victim from obtaining justice.²⁸⁷ By limiting the use of these methods, victims may be empowered to find their voice and be able to bring a claim against their abuser. The survivor is kept in mind by recognizing that these claims are usually very sensitive and personal, such as in the California law previously discussed that also allows for a provision to protect the victim's identity, if so desired.²⁸⁸

From the beginning, "Me Too," even before it became viral sensation #MeToo, has been about the survivors and their empowerment.²⁸⁹ Changing the laws regulating the use of NDAs, the testing of rape kits, and the release of actionable claims, for example, fit perfectly into the goals of the #MeToo movement and are positive steps forward that may make a world of difference for victims. These laws would help survivors "find pathways to healing" by providing closure and the ability to seek justice, by ending the cloud of silence surrounding this topic to "expand the global conversation" and allow survivors to lead the way in building a diverse "community of advocates," to hold perpetrators accountable for their actions, and to start "long term, systemic change."²⁹⁰

282. See *supra* Section III.B.

283. See *supra* Section III.B.

284. See Beitsch, *supra* note 120.

285. See *supra* text accompanying notes 179, 245.

286. See Levinson, *supra* note 171.

287. See *supra* Section II.B.1.

288. S.B. 820 §1, Reg. Sess. (Cal. 2018).

289. *About Me Too*, *supra* note 9.

290. *Id.*

D. Do Not Underestimate the Power of Hashtags

With social media, people can connect with their neighbors, people hundreds or thousands of miles away, or people in a different country with just a few clicks on their phone or computer. These people, perhaps unknown to each other but united by a common purpose, can come together, share their stories, and find support in one another through hashtags on social media. Additionally, if they want to plan a march, protest, or other event, some obstacles in planning are alleviated through the use of hashtags and social media.²⁹¹

Hashtags should be recognized for the value that they hold. They help to raise awareness about certain issues on a platform that reaches people on all corners of the world and they can do so for little cost.²⁹² Social activism has a “broad reach and deep impact.”²⁹³ People and businesses notice hashtags and may make changes in accordance with the movements those hashtags support.²⁹⁴

The #MeToo movement is so much more than a hashtag, but the hashtag added to the success of the movement. #MeToo has been one social media movement whose power cannot be denied. “The movement set a spark among victims, providing them with a platform and the safety in community to share experiences and bring to light the rampant problem of sexual harassment, thereby humanizing victims and bringing sexual harassment to the forefront in politics and business.”²⁹⁵

Recently, Gillette, a razor brand, released an ad that caused a flurry of heated remarks, both in favor of and against the message of the ad.²⁹⁶ The ad gave nod to many sentiments of the #MeToo movement and aimed to combat toxic masculinity.²⁹⁷ It began by showing men who were “sexually harassing women, mansplaining, and bullying.”²⁹⁸ The tone changes about halfway through the ad—“the narrator proclaims that something has changed and that ‘there will be no going back,’ as it focuses on men who are being “caring and empathetic[,]” stepping in to do the right thing by preventing other men from catcalling or bullying.²⁹⁹ The ad concludes by displaying the traditional Gillette tagline, “The Best A Man Can Get,” encouraging men to think about that phrase in a new light.³⁰⁰ Many have applauded the ad for taking a step in the right direction and taking on the issue of toxic masculinity, while others are calling the

291. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1545 (2018).

292. *Id.*

293. *Id.* at 1546.

294. *See, e.g., id.* at 1557 (discussing how the #BoycottNRA movement resulted in some corporations using their voice and influence to support the movement by removing discounts offered to NRA members).

295. Allison C. Williams, *The #MeToo Movement: What We Have Learned and Where We Need to Go*, 81 TEX. B. J. 852, 852 (2018).

296. Tovia Smith, *Backlash Erupts After Gillette Launches a New #MeToo-Inspired Ad Campaign*, NPR (Jan. 17, 2019, 5:00 AM), <https://www.npr.org/2019/01/17/685976624/backlash-erupts-after-gillette-launches-a-new-metoo-inspired-ad-campaign>.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

ad “offensive and insulting” to men.³⁰¹ A spokesperson for Gillette did not seem surprised by the mixed reviews stating, “Successful brands today have to be relevant and engage consumers in topics that matter to them” and have to take a stand on important societal issues, no matter how controversial they may be.³⁰²

The form by which Gillette released its ad showcases the importance and utility of social media and hashtags. Gillette released the ad on Twitter on January 14, 2019.³⁰³ In less than a month, the tweet garnered over 238,000 retweets, 581,000 likes, and 53,000 responses.³⁰⁴ Gillette did not fail to recognize the utility of the hashtag because when Gillette first tweeted the ad, it included a brief description and the hashtag #TheBestMenCanBe.³⁰⁵ Even those who oppose the message Gillette was promoting have utilized a hashtag, #BoycottGillette.³⁰⁶ Whichever side of the fence you may find yourself on, for nearly any social topic, there is likely a hashtag out there for you.

The #MeToo movement seeks to “reframe and expand the global conversation around sexual [assault and harassment,]”³⁰⁷ and the hashtag can be a great tool for doing exactly that. After all, while Tarana Burke started the “Me Too” movement long before the hashtag, #MeToo helped propel the movement to the center stage, prompting conversation and action that the movement had not yet seen.³⁰⁸ While the hashtag is an intangible thing and it was the people behind it who actually went out and made a difference, like Tarana Burke and other supporters, it is difficult to imagine where the movement would be had it not been for #MeToo.

301. *Id.*

302. *Id.*

303. Gillette (@Gillette), TWITTER (Jan. 14, 2019, 10:31 AM), <https://twitter.com/Gillette/status/1084850521196900352>.

304. *Id.*

305. *Id.*

306. #boycottgillette, TWITTER, https://twitter.com/hashtag/boycottgillette?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Ehashtag (last visited May 21, 2020).

307. *About Me Too*, *supra* note 9.

308. *See id.* (“In less than six months, because of the viral #metoo hashtag, a vital conversation about sexual violence has been thrust into the national dialogue.”).

V. CONCLUSION

“The impact of the #MeToo movement is undeniable,” said Victoria Lipnic, Commissioner and former acting chair of the EEOC.³⁰⁹ The goals, stories, and purpose behind the #MeToo movement existed long before the hashtag garnered mainstream media attention.³¹⁰ The movement cannot be reduced to *just* a hashtag, as it embodies the real survivors, victims, and allies of those affected by sexual misconduct and harassment. Yet, without the hashtag, the movement may not have gained the traction that it did, leading to greater awareness of the pervasive issue of sexual assault and harassment and steps towards legal change.

No legal solutions to the problems posed by sexual assault and harassment, including the solutions proposed in this Note, will be perfect, easy, inexpensive, or quick. But progress of any kind, including incremental progress, is important, meaningful, and, over time, can lead to big changes.³¹¹ Progress may start with something small—like a hashtag—which can be used to garner more attention and support about a social cause. Hashtags are now so engrained in our social culture that people use them for virtually anything—from sharing thoughts about a new movie or popular destinations in a city to inciting a movement that causes people from all over the world to come together and share their stories.³¹² It is true that hashtags alone may not be enough. Behind each hashtag, however, is a person who supports a cause and armed with a network of other supporters and widespread awareness, advocates can go and fight for the progress that they envision. Hashtags are a valuable tool in today’s world, and their utility, as shown by the #MeToo movement, should not be denied or underestimated.

309. Nigel Chiwaya, *New Data on #MeToo’s First Year Shows ‘Undeniable’ Impact*, NBC NEWS (Oct. 11, 2018, 12:54 PM), <https://www.nbcnews.com/news/us-news/new-data-metoo-s-first-year-shows-undeniable-impact-n918821>.

310. See *About Me Too*, *supra* note 9.

311. See Teresa Amabile & Steven J. Kramer, *The Power of Small Wins*, HARV. BUS. REV. (May 2011), <https://hbr.org/2011/05/the-power-of-small-wins>.

312. See, e.g., Alison Kanski, *5 Ways the Hashtag Influenced Our Culture*, PR WEEK (Aug. 23, 2017), <https://www.prweek.com/article/1442689/5-ways-hashtag-influenced-culture>.

