Maximizing #MeToo: Intersectionality and the Movement

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MAXIMIZING #METOO:
INTERSECTIONALITY AND THE MOVEMENT
Jamillah Bowman Williams

Although women of color experience high rates of harassment and assault, they have largely been left at the margins of the #MeToo movement, in terms of (1) the online conversation; (2) traditional social movement activity occurring offline; and (3) resulting legal activity. This article analyzes how race shapes experiences of harassment and how seemingly positive legal strides continue to fail women of color thirty years beyond Kimberlé Crenshaw’s initial framing of intersectionality theory. I discuss the weaknesses of the reform efforts and argue for more tailored strategies that take into account the ineffectiveness of our current Title VII framework, and more specifically, the continuing failure of the law to properly deal with intersectionality. This analysis and the resulting proposal will demonstrate how #MeToo can be leveraged as an opportunity to reshape law and our organizations in a way that better protects all women, and particularly women of color.

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INTRODUCTION

The #MeToo movement prompted millions globally to speak out against sexual harassment, sexual assault, and violence against women, and is now known as the most significant mobilization in the women’s movement in decades. While social media activism, like #MeToo, is theorized to broaden access to movements and build bridges across demographic groups, women of color were largely left out of the conversation. Offline organizing efforts that pre-dated #MeToo also gained legitimacy and momentum from the hashtag, but women of color again were in the shadows. This is particularly problematic given the unique ways that women of color experience harassment and the law’s failure to remedy these offenses. In her seminal work, Kimberlé Crenshaw names this failure of the legal structure the problem of intersectionality: women of color’s dual identities as both racial and gender minorities locate the discrimination they face at the intersection of those identities. Title VII of the Civil Rights Act requires claimants to allege that their harassment was either “because of race” or “because of sex.”

Although some may be hopeful that #MeToo has helped fill this gap through seemingly positive legal strides such as stronger enforcement by the Equal Employment Opportunity Commission (EEOC), increased lawsuits, and new legislation, I argue that the law is less than promising for women of color seeking justice. In reality, the law continues to fail women of color due to numerous barriers that make it nearly impossible to exercise their civil rights. In addition to reforming law to remedy this failure through litigation and compliance, we must also focus more on social and cultural reform to end harassment. Here, my emphasis is on designing reforms that will protect the most disadvantaged and marginalized individuals in our society. While some may argue that centering the reform on women of color is divisive, I argue that it is the most inclusive, because addressing the concerns of the least privileged necessarily also addresses the concerns of those who are more advantaged without the same risk of some segments being left behind.

2 Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987); Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality and Sexual Harassment of Women Students of Color*, 42 HARV 1, 66 (2019) (“It is somewhat ironic that those concerned with alleviating the ills of racism and sexism should adopt such a top-down approach to discrimination. If their efforts instead began with addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly
This comprehensive approach must include legal reform such as expanding the scope of antidiscrimination law to cover all workers (many of those left unprotected are women of color), ending mandatory arbitration, and altering how courts analyze what is considered actionable harassment. The #MeToo movement has already prompted legislators at the state and federal level to introduce numerous bills aimed at tackling workplace sexual harassment. While these reforms attempt to create stronger protections against sexual harassment, they inadequately deal with racism and the compounded disadvantage of intersectional identities. Legal reforms must also be coupled with organizational reform such as greater transparency and more accessible reporting, as well as cultural reform such as changing norms around sexual misconduct, more women of color in leadership, and broader acceptance of collective action.

#MeToo has made clear the prevalence of workplace sexual harassment. While elite white women in the Hollywood spotlight have been the face of the highly visible and popularized #MeToo movement, harassment and assault haunt women of all races and across the socioeconomic spectrum. Although women of color were not at the forefront, there is reason to believe that they experience harassment and assault at rates even higher than white women. Despite the fact that this area of the law is plagued by under-reporting, available statistics indicate that the majority of harassment claims happen outside of elite spaces, where there is significantly disadvantaged would also benefit. In addition, it seems that placing those who currently are marginalized in the center is the most effective way to resist efforts to compartmentalize experiences and undermine potential collective action”); Crenshaw, supra note 1, at 167.

3 J.B. Williams Harassment Dataset (2020).

4 Ashleigh Shelby Rosette et al., Intersectionality: Connecting Experiences of Gender with Race at Work, 38 RES. ORGANIZATIONAL BEHAV. 1, 13 (2018). See Chai R. Feldblum & Victoria A. Lipnic, Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace (U.S. Equal Emp. Opportunity Comm’n), Jun. 2016. “The EEOC received 6696 claims of sexual harassment in 2017, over 80% of which were filed by women (Equal Employment Opportunity Commission, 2018). However, a breadth of evidence suggests that most experiences of sexual harassment go unreported, for a variety of reasons (Feldblum & Lipnic, 2016), complicating estimates of its frequency in organizations. A recent nationally representative study conducted by the organization Stop Street Harassment (2018) found that 38% of women reported experiencing some form of sexual harassment in the workplace, while the latest findings from Pew Research Center (Graf, 2018) report that 55% of women polled said they had experienced sexual harassment both in and outside of the workplace. Because women often fail to formally report sexual harassment and because admitting victimization can be stigmatizing, true estimates of the rates of sexual harassment remain largely unknown. Regardless, the widespread nature of this form of discrimination is evident.” Rosette et al.; See also NAT’L WOMEN’S LAW CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 2 (2018).
less scrutiny and attention. Additionally, studies suggest that racial identity affects who is more likely to experience harassment, the type of harassment, whether or not someone will report harassment, and the likelihood that the report will be investigated.

For example, EEOC data reflect that women of color, especially Black women, are disproportionately subject to workplace sexual harassment. Of all EEOC charges filed by women, women of color file 56 percent of claims, despite representing only 37 percent of women in the workforce. Further, harassment in the workplace seems to be declining over time for white women, but not for Black women. While claims of harassment filed by white women dropped by about 30% between 1997 and 2017, claims filed by Black women remained stagnant over the same time period. This may be partially explained by the fact that sexual harassment is most pervasive in low-wage industries where women of color are overrepresented, and often overlooked. For example, the workforce areas with the highest number of charges include accommodation/food services, retail, health care, and social assistance – each of which have seen the highest number of claims filed by Black women. These women tend to be particularly vulnerable because low-wage industries are characterized by extreme power imbalance, which can spark intimidation and heighten the threat of retaliation and termination. It is important to note that social class is a key intersectional

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7 Union-specific studies showed women of color experienced more overall workplace harassment than any other group, and that it was compounded by racial and sexual harassment (one study showed 20% of white women but 35% of non-white women). Rosette et al., supra note 4.

8 NAT’L WOMEN’S LAW CTR., supra note 4.

9 Rosette et al., supra note 4, at 13.

10 Rosette et al., supra note 4, at 13-14.

11 NAT’L WOMEN’S LAW CTR., supra note 4, at 5.

12 “[P]ower imbalances are often more pronounced and fear of reprisals and job loss deter victims from coming forward.” Frye, supra note 5; Nicole Buonocore Porter, Ending Harassment by Starting with Retaliation, 71 STAN. L. REV. ONLINE 110 (2018–2019); Rosette et al., supra note 2, at 14. “In the sexual harassment studies that have included African American women (Gruber and Bjorn 1982 [on auto workers]; Mansfield et al. 1991 [on tradeswomen and transit workers]; Yoder Aniakudo 1995 [on firefighters]), they report experiencing sexual discrimination and other forms of harassment at higher rates than women of other ethnic groups. Fain and Anderton’s (1987, 302) study of federal employees also found that ‘minority individuals are more likely to be sexually harassed.’ Finally, research on the Los Angeles Police Department, while not focusing specifically on sexual
identity in the context of harassment, yet it is not the basis of a claim under antidiscrimination law. Despite the importance of class, the effects of racism are ubiquitous and experienced across class lines. Just as women of color are disproportionately targeted for sexual harassment, women of color are also frequently subjects of other types of harassment, discrimination and bullying based on their race and sex, which may also lead to the higher rate of claims.

In addition to claims filed, numerous research studies also demonstrate the impact of race on the frequency and intensity of sex harassment experienced. In one of the first quantitative studies examining harassment at the intersection of race and sex, 35% of women of color reported workplace sexual harassment experiences, compared to 20% of white women. Additionally, a longitudinal study found that non-white women in non-supervisory roles suffered more sexual harassment than their white counterparts in similar roles. Women of color often must confront the
combined impact of racial, ethnic, gender and class dynamics that can result in degrading stereotypes about their sexual mores, availability, and expendability, all of which increase their risk of being harassed. Among women of color who experienced sexual harassment, racialized sexual harassment is common, particularly when their harasser is of a different race.

Undocumented immigrant women, who are most often women of color, face especially high rates of harassment and assault in the workplace. Not only are undocumented women overrepresented in low wage work, they are particularly vulnerable because many face language and cultural barriers while on the job. A 2010 study surveyed Mexican immigrant farmworkers in California, where approximately 78% of farmworkers are Latino and 28% are women. In these gender-integrated workplace settings, the interplay of gender, race, and class is on high display due to the demographics and nature of the physically demanding, low-paying work. A survey of 150 Mexican women found that 97% of participants had encountered sexual and gender harassment from both coworkers and supervisors. The harassment they described ranged from jokes and insults to physical touching.

Black and Hispanic women studied self-identifying as victims of sexual harassment.” (Sexual Harassment at the Intersection of Race and Gender, Richardson and Taylor, 2009)

18 Frye, supra note 5. Research has also explored the nuances in the ways women of color react and respond to harassment, and how these behaviors are influenced by race, sex, and class dynamics. Richardson & Taylor, supra note 17. “While focused on gender bias broadly, Williams’ (2014) interviews with women in science revealed that Asian and Black women reported that the harassment they faced based on their gender was difficult to separate from the bias they experienced due to race.” Rosette et al., supra note 4.


20 “For many immigrant women who fill low-wage jobs, their immigration status can weigh heavily as they consider whether to lodge a complaint. This is particularly true for women who don’t speak English making it challenging to know how to report something up the chain of command.” Clare Malone, Will Women In Low-Wage Jobs Get Their #MeToo Moment?, FIVETHIRTYEIGHT (Dec. 14, 2017), https://fivethirtyeight.com/features/the-metoo-moment-hasnt-reached-women-in-low-wage-jobs-will-it/.

21 Irma Morales Waugh, Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women, 16 VIOLENCE AGAINST WOMEN 237 (2010).

22 Id.

23 “For example, one single 29-year-old mother of two children who worked in the grape harvest stated, ‘There are always these jokes. They make sexual jokes or insults saying, ‘women aren’t worth anything except for having children and cleaning the home.’” Another 21-year-old married strawberry picker with three children described feeling anger and indignation at the comments a coworker made to her and her female workmates, ‘You are all...
Although these studies and statistics give some indication of the high rates at which women of color experience harassment, we know that many existing statistics underestimate the true figures due to consistent under-reporting. Women of all races under-report because of fear of retaliation, feeling they will not be believed, and the stigma of victimization. This fear can be exacerbated for women of color who already face racial stigma, who tend to receive less empathy, and who are more likely to be breadwinners, and therefore unable to bear the risk of losing their jobs.

Given the strong anti-immigration sentiments and policy in the current political climate, undocumented workers experience exacerbated fears of speaking up. Beyond typical concerns of retaliation, they also face the harsh reality that they could be reported to immigration authorities and even face deportation. This threat of losing one’s livelihood and being stripped from family and community makes harassment against undocumented women of color highly likely to go unreported. Perpetrators may even directly threaten them with exposure to further exacerbate the power dynamic and get away with the abuse.

As a result, low-wage immigrant women of color face steep roadblocks to benefitting from the kind

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24 Porter, supra note 12; Rosette et al., supra note 4, at 12.
25 Porter, supra note 12; Rosette et al., supra note 4, at 13. Being the “only one” can also exacerbate experiences of harassment. “Working in media, I was often the token. You just smile it off and laugh it off. It’s a tough industry to work in. There was a director when I first started out as a producer who harassed my coworker and me. He touched us inappropriately and often harassed us...you still just see more white women speaking about it. I don’t think black women are equally as empowered yet.”; Jessica Prois & Carolina Moreno, The #MeToo Movement Looks Different For Women Of Color. Here Are 10 Stories., HUFFINGTON POST, Jan. 2, 2018, https://www.huffingtonpost.com/entry/women-of-color-metoo_us_5a442d73e4b0b0e5a7a4992c.
26 Rosette et al., supra note 4, at 14; Amanda Clark, A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska, 16 HASTINGS WOMEN’S L.J. 139 (2004–2005); Waugh, supra note 21; NEUSA GAYTAN & MARALÁ GOODE, LATINAS AND SEXUAL ASSAULT (2013).
27 “The Supreme Court's holding in Hoffman Plastic Compounds, Inc. v. NLRB further limited workplace rights by preventing the NLRB from awarding backpay remedies to undocumented workers on the ground that such awards undermine national immigration policy as set forth in the IRCA....The potential effects of Hoffman [include]... provid[ing] incentives for employers to falsely claim that undocumented workers have no protections at all, thus chilling workers' attempts at enforcement of those rights.” Clark, supra note 26, at 156.
of #MeToo revolution that has heralded higher accountability for men who harass upper-class white women.

In fact, throughout history, America has not treated alleged violations against white women and women of color the same. Although intersectional discrimination claims have become more common since Crenshaw’s pioneering work, women of color are still only half as likely to prevail on their claims in contrast to white plaintiffs. For example, race and sex discrimination or harassment are only half as likely to survive summary judgement as claims alleging a violation based on a single trait (that is, only race or only sex). A review of the case law across federal circuits demonstrates that many courts have not recognized the importance of intersectionality, nor have they learned how to analyze this multifaceted issue. While there are some circuits that have adopted frameworks for analyzing and understanding intersectional claims, others appear flummoxed at how to handle simultaneous race and gender discrimination allegations.

28 “An accountability revolution of the sort we’ve seen in Hollywood might never come in the same way for low-wage workers. In part that’s because what gives women the power to speak out against harassers is, to a certain extent, economic autonomy and a safety net...Women in low-wage jobs, often immigrants, usually can’t afford to call harassment out.” Malone, supra note 20.

29 Rosette et al., supra note 4, at 14; Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, 43 STAN. L. REV. 1241 (1991); Rosalio Castro & Corral, Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims, 6 LA RAZA 159 (1993); e.g. Jeffries v. Harris Cnty Cmty. Action Ass’n, 615 F.2d 1025 (5th Cir.1980); Lam v. University of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994); Rachel Kahn et al., Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation: Multiple Disadvantages, 45 LAW & SOC’Y REV. 991 (2011); Yvette N.A. Pappoe, The Shortcomings of Title VII for the Black Female Plaintiff, 22 UNIV. OF PENN. J. OF L. & SOC. CHANGE 1, 9 (2019). “[Since Crenshaw’s 1991 research[,] intersectional discrimination claims have become more common over the past several decades, and courts have accepted that women of color face discrimination and harassment unique to their dual-subordinate racial and gender identities. Yet, even controlling for the likelihood of filing an intersectional claim, women of color are only half as likely to win their discrimination cases. Although these findings pertain to discrimination broadly, rather than sexual harassment specifically, they suggest that non-White women may face a distinct disadvantage in legal settings.”


31 Rocha Vigil v. City of Las Cruces, 119 F.3d 871 (10th Cir. 1997)(disaggregating a Hispanic woman’s sex and race discrimination claims for the purpose of evaluating her hostile work environment claim); Curtis v. First Watch of Arizona, Inc., 2006 WL 726883
Courts’ failure to comprehend the extent of women of color’s workplace harassment claims has long-lasting effects, even beyond their professional settings. There is ample evidence that harassment and assault are associated with negative mental health outcomes for all victims, but most saliently for women of color.\(^{32}\) These women suffer higher rates of post-traumatic stress disorder, depression, and psychological distress.\(^{33}\) Harassment also affects the victim’s professional growth potential, by causing reduced job satisfaction, lower organizational commitment, increased turnover, and disengagement from work and colleagues.\(^{34}\) Black women have been found to display high levels of resilience when dealing with infrequent sexual harassment, but the same resilience may not protect them from deeper psychological harm when the harassment is experienced on a regular basis.\(^{35}\)

I now turn to some personal narratives to illustrate how sex harassment is often compounded by race harassment for women of color.\(^{36}\) Even without naming Crenshaw’s intersectionality phenomenon directly, women’s first-hand accounts of their experiences identify the difficulty of trying to parse out and draw boundaries between racial and gender bias they experience. Take the case of Emerald-Jane Hunter, a 37-year-old African immigrant who started a public relations firm in Illinois:

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Being black and also from Africa, I would get a lot of ‘I want to get a little piece of chocolate’ or ‘dark chocolate’ references — which is not flattering, because you’re being objectified. These terms stem from a white man in power being curious and never having been with a black woman — and
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\(^{32}\) Rosette et al., supra note 4, at 13-14.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id.
\(^{36}\) Matsuda, supra note 2, at 325-326. "The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes, and identifiable normative priorities emerge. This article, then, suggests a new epistemological source for critical scholars: the actual experience, history, culture, and intellectual tradition of people of color in America. Looking to the bottom for ideas about law will tap a valuable source previously overlooked by legal philosophers."
there is an undertone of subordination.... So white-on-black and black-on-black harassment all have different undertones, but it’s all harassment.\textsuperscript{37}

Women of color are often keenly aware of the cultural and historical factors that contribute to their harassment. For example, Dominican-American artist Zahira Kelly-Cabrera, 34, of Massachusetts states:

The Dominican Republic is where some of the early slave ships arrived in the Americas; it was the place of some of the early indigenous massacres. Colonists thought, ‘You’re wearing a little bit less than the women where we’re from, so you deserve to be sexually assaulted.’ And that’s applied to both native and African women.... Certain bodies are just not as protected as others, and that’s a historical thing dating back to slavery. Right now, the people that have come to the forefront of the #MeToo movement have been cis white women in Hollywood. It kind of ignores the fact that the people who are assaulted and harassed the most are women of color, and we have no recourse.... In general, I think we are seen as hypersexed and not assaultable because we are here to be assaulted, kind of. I’ve had people take way too many liberties with me, groping or whatever, and other people be shocked, and I’m like, ‘Really? Because it happens to me every day.’\textsuperscript{38}

Even in highly visible multinational corporations with powerful unions and human resources departments that implement harassment policies, women of color remain vulnerable and afraid to speak out. Shirley Thomas-Moore, who has worked at Ford Motor Company since the 1980’s, describes the threats associated with reporting harassment:

It’s hard when every day you come in and if you say something and something is done, it gets worse. So that’s why a lot of women do not complain, they don’t say anything. There was one particular situation where this young lady, she finally got enough guts to go up there and report it. But before she could get down to the line, it was already known what she went upstairs for. So who’s telling them? She was taken off that job and put on a harder job.\textsuperscript{39}

Harassers often take advantage of low-wage workers’ roles as mother and breadwinner and often their precarious financial state. Miyoshi Morris, another black woman at Ford, recalls the painful decision she was forced to make:

I was propositioned. I slept with him because I needed my job. I had small children. The mindset and the mentality of that environment is that this is

\textsuperscript{37} Prois & Moreno, supra note 25.

\textsuperscript{38} Id.

the best thing you’ll have, the best thing you can get, you don’t want to lose it. Where else are you gonna go and make this kind of money?"  

Ms. Morris has since left Ford for a job that pays significantly less than her Ford salary because, “no person should have to endure that...you have to force yourself into a place of not feeling anything, of not having any emotion, to exist.”

Immigrant women are also particularly vulnerable because of the language, educational, and cultural barriers they often face, as well as the drastic threat of deportation. One respondent in the aforementioned study of Mexican farmworkers in California, a 33-year-old divorced mother of four, recalls one such incident:

The foreman ‘checked’ my work and got really close to me, pulled down my face scarf and tried to kiss me. He always asks me out and says I will really enjoy having sex with him, and that I would not regret it.... He has done so many things, I can’t even remember them all...once, I was bending down and he said, ‘Hey, I’m going to insert a very pleasurable stick into you.’ This has been happening since last year. He’s married, too. He knows that I’m divorced, and so he thinks I will go out with any baboso [drooling pervert].

Given the high rate at which women of color experience harassment and assault, the unique types of racialized sex harassment they experience, and the compounded forms of structural disadvantage they face in a range of domains, it is particularly important for antidiscrimination law to address their concerns. This Article is organized into three main parts. In Part I, I discuss how intersectionality shapes activism, to help us better understand why women of color have largely been left at the margins of the #MeToo movement. In Part II, I establish the numerous ways antidiscrimination law continues to fail women of color experiencing harassment. And finally, in Part III, I discuss the weaknesses of the current reform efforts growing out of the #MeToo movement, and propose comprehensive legal, organizational, and cultural reforms that will better protect all women, and particularly women of color.

I. INTERSECTIONALITY AND ACTIVISM

A. Intersectionality Theory

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40 Id.
41 Id.
42 Waugh, supra note 21, at 248.
In her landmark work, Kimberlé Crenshaw established a theory of *intersectionality* to explain how women of color have unique experiences shaped by race and sex, and are marginalized under the law.\(^{43}\) She explains:

> The concept of intersectionality denote[s] the various ways in which race and gender interact to shape the multiple dimensions of Black women’s...experiences.... The intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.\(^ {44}\)

This theory illuminates the importance of recognizing multiple intersecting identity traits when developing frameworks for antidiscrimination law.\(^ {45}\) “Because the intersectional experience is greater than the sum of racism and sexism,” she writes, “any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”\(^ {46}\) Crenshaw identifies how critical it is to acknowledge women of color’s experiences with harassment, particularly black women’s, because this harassment not only places black women in personal jeopardy, it also threatens the chances of the black family, many of whom depend on a female wage earner to survive.\(^ {47}\)

Intersectionality theory also critiques the law’s image of discrimination as stemming from discrete claims, which require plaintiffs to prove that they were discriminated against or suffered harassment “because of race” or “because of sex.”\(^ {48}\) This framework fails to acknowledge the complex and overlapping web of racism and sexism, especially as it affects Black women whose experiences of discrimination tend not to operate one-dimensionally, but rather in the shadow of both their race and gender identities. First, as dual minorities, they experience “double-discrimination,” the cumulative effect of facing racial and gender discrimination.\(^ {49}\) Second, Black women also tend to suffer discrimination that is not just the “sum of race and sex,” but rather discrimination for being black women and facing marginalization for that identity.\(^ {50}\) In short, our legal structure’s focus on discrete claims that are connected to individual identity traits makes


\(^{44}\) Crenshaw, *supra* note 29, at 1244.

\(^{45}\) Crenshaw, *supra* note 1, at 140.

\(^{46}\) *Id.*


\(^{48}\) Crenshaw, *supra* note 1.

\(^{49}\) *Id.* at 149.

\(^{50}\) *Id.*
antidiscrimination law ill-equipped to tackle intersectional discrimination in its true form.

In the context of workplace sexual harassment, Title VII fails to properly address intersectional claims because filing a “because of sex” claim requires a woman of color to erase her race. Black women report that their most salient identity is neither their race nor gender independently, but rather the combination of their “gendered racial identity.”\(^{51}\) However, the normative sex harassment claimant is not just a woman but a white woman, which in the United States is commonly seen as \textit{absent of race}, and therefore her experience of “sex” only establishes the benchmark against which Black women’s claims are analyzed.\(^{52}\) As a result, the baseline sexual harassment experience is considered from a white woman’s perspective, effectively erasing Black women’s identities as \textit{women}, while prototypical racial harassment is considered from the normative Black male perspective, erasing Black women’s identities as \textit{Black}.\(^{53}\)

It is no surprise then that intersectionality figures prominently in women of color’s experiences of sexual harassment. Harassment and assault are often layered with complexities of segregation, stereotypes, racial subordination, and low-wage work, related to both their race and sex.\(^{54}\) For example, women of color are often targets of sexual harassment because of racialized stereotypes about their sexuality. While the specific stereotypes vary among women from different racial and ethnic backgrounds, many of these stereotypes are sexual in nature. These biases may influence the perception of women of color’s claims because they tend to normalize sexual harassment.\(^{55}\) False perceptions about the sexual behavior of women in particular racial groups affect how women of color are discussed in

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\(^{51}\) Martinique K. Jones & Susan X. Day, \textit{An Exploration of Black Women’s Gendered Racial Identity Using a Multidimensional and Intersectional Approach}, 79 \textit{SEX ROLES} 1 (2017). “Studies establish that gendered racial identity is more salient and important to Black women than are race and gender independently. When compared to other women, Black women’s understanding of self at the crux of race and gender is nuanced because of their two oppressed identities, both of which shape each other. Furthermore, the oppression women of color endure because of their race and gender perhaps enhances the salience of their intersectional identity and informs the way they construct and assign meaning to this identity (e.g., resilience and strength).”


\(^{53}\) \textit{Id.} at 2201-02.

\(^{54}\) Rosette et al., \textit{supra} note 4, at 12.

\(^{55}\) Leung, \textit{supra} note 6, at 94.
organizational and legal structures, and, as a result, affect how we protect or fail to protect them under existing antidiscrimination laws.\footnote{Id. at 85-86.}

For example, the Jezebel stereotype considers Black women to be highly sexual, seductive, and promiscuous.\footnote{Rosette et al., supra note 4, at 12.} Asian women also suffer from sexual and fetishistic stereotypes that factor into the type of workplace harassment they endure.\footnote{Id.} While sometimes blatant and clearly inappropriate, these racialized stereotypes often emerge in the form of microaggressions. For example, women of color may be referred to in passing as “exotic,” “oriental,” “sassy” or “spicy,” seemingly innocuous words, but ones which have distinct sexual undertones, especially for the subjects who are often familiar with the historical objectification and oppression of the connotations.\footnote{Leung, supra note 6, at 98-99.} Women of color also report the complexity of reconciling these stereotypes with the cultural expectations that some races assume – that a woman will be a quiet, compliant, or even “demure and sexy” presence – resulting in feeling that they lack agency over their own bodies.\footnote{Prois & Moreno, supra note 25.}

In addition to the specific racial tropes that factor into their harassment experiences, women of color are often not viewed with compassion and may be subject to victim-blaming due to racialized stereotypes.\footnote{Ally Flack, Sexual Harassment and Women of Color, Catalyst (Feb. 13, 2018), http://www.catalyst.org/blog/catalyzing/sexual-harassment-and-women-color; The literature from police brutality to the medical system ignoring black women’s health claims supports this idea that dehumanizing has led to ignoring claims of pain and harm made by people of color and women of color, in particular.} Stereotypical perceptions of their gendered racial identity means that employers see women of color not only as more dispensable, but also as less sympathetic or trustworthy when they do report harassment.\footnote{Rosette et al., supra note 4, at 12.} This lack of empathy, along with racism and other social factors, causes harassment to take a unique emotional toll on women of color. For example, studies of women in the military have found that long-term post-traumatic stress disorder (PTSD) effects vary by race.\footnote{Id. at 13. See also NiCole T. Buchanan et al., Black Women's Coping Styles, Psychological Well-Being, and Work-Related Outcomes Following Sexual Harassment, 1 BLACK WOMEN, GENDER + FAMILIES 100 (2007).} The compound effects of sexual and racial harassment in fact increase PTSD symptoms as compared to white...
women’s single-dimensional experience of sexual harassment.64 These outcomes not only reflect the distinct challenges of facing harassment as a woman of color, but also confirm that intersectional harassment is a unique form of discrimination, with some unique consequences.

The complex web of intersectional discrimination is not confined to majority-white workplaces. While all women experience both inter-race and intra-race harassment, women of color may experience particularly challenging cultural dynamics when experiencing harassment and assault within their own communities. As described earlier, Black women tend to identify with their gendered racial identity in more salient ways than their race or gender alone. Yet as members of the black community, they face implicit (and sometimes explicit) pressures to protect the normative Black American. This choice has been described as a “double-edged sword,” with women of color effectively forced to decide whether to align their experience with their normative gender and speak out against harassment, or to protect a member of their racial community from being tarnished by the dominant culture.65

B. Social Media Provides an Opportunity for United Activism

In light of the unique deterrents that women of color face when considering whether to speak out against sexual harassment within their own community, one prominent Black activist identified an opening for a new movement that would shed light on this persistent problem. Tarana Burke first coined the phrase “Me Too” in 2006 to support women and girls of color who had survived sexual violence, encouraging them to come forward with their stories despite the internal racial pressures they faced.66 Over a decade later, white actress Alyssa Milano took to Twitter following the New York Times story accounting the sexual allegations against Harvey Weinstein, tweeting: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet...we might give people a sense of the magnitude of the problem.”67 In the next twenty-four hours, over one million posts included the hashtag #MeToo.68 This series of events has come to be known as the

64 Rosette et al., supra note 4, at 13-14. “The compounded racial and sexual harassment may also exacerbate the lower job satisfaction, reduced organizational commitment, and greater turnover intentions observed among sexual harassment victims (Raver and Nishii (2010)).”
65 Rebecca Leung & Robert Williams, #MeToo and Intersectionality: An Examination of the #MeToo Movement Through the R. Kelly Scandal, 43 J. COMM. INQUIRY 349 (2019).
67 Williams et al., supra note 66.
68 Id.
beginning of the #MeToo movement, collective action against sexual harassment that has taken shape primarily on social media platforms.\textsuperscript{69}

Many advocates of social media activism were optimistic about this move online, theorizing that organizing and expressing grievances on the internet would beneficially erase identities such as race and gender. They argue that if speakers are not immediately identifiable by those identities, they can instead be valued for the substance of their contributions and opinions.\textsuperscript{70} This may also contribute to an enhanced sense of belonging, where one’s marginalized identities are not immediately apparent to those with whom one comes into contact. On a practical level, social media activism can be much more accessible than in-person organizing; the internet lacks traditional geographic, time, or financial barriers, while also disseminating information on a much faster and broader scale.\textsuperscript{71}

Additionally, Twitter usage rates show fewer divides along race, class, and gender lines than traditional social movement activities.\textsuperscript{72} One statistic supporting this perspective finds that the percentage of Black Americans who use Twitter is 22\%, much higher than the 16\% of white Americans who are on Twitter.\textsuperscript{73} Although these numbers do not reflect how each group uses Twitter, what is known as “Black Twitter” is an important phenomenon. In contrast to the marginalization and tokenism that Black activists face in the mainstream media and within broader social movements, channels like Black Twitter allow these groups to reclaim their own narratives both internally and externally.\textsuperscript{74}

Social media platforms can also foster broader organizing efforts and access to a variety of related networks. Hashtags that have been used around police brutality protests like #BlackLivesMatter, #Ferguson, and

\begin{itemize}
\item \textsuperscript{69} Id. at 375.
\item \textsuperscript{70} Zeynep Tufekci, \textit{Twitter and TearGas: The Power and Fragility of Networked Protest} (2017).
\item \textsuperscript{71} Williams et al., supra note 66, at 377.
\item \textsuperscript{72} “Optimists have argued that social media has been, essentially, a power equalizer that broadens access to political activism. Although Twitter is not a representative sample of the U.S. population, some have argued that social media activism has fewer divides along the lines of race, class, and gender than the activism of traditional social movements, due to the Internet’s accessibility.” Id. at 377.
\item \textsuperscript{73} “...some have argued that in assessing the importance of Twitter in the Ferguson protests, we must take into account that, despite the enduring digital divide within the United States, the percentage of African Americans who use Twitter (22 percent) is much higher than that of white Americans (16 percent; Bryers 2014).” Yarimar Bonilla & Jonathan Rosa, \#Ferguson: Digital Protest, Hashtag Ethnography, and the Racial Politics of Social Media in the United States, 42 J. Am. Ethnological Soc’Y 4, 6 (2015).
\item \textsuperscript{74} Bonilla & Rosa, supra note 73, at 6.
\end{itemize}
#HandsUpDontShoot provide entry-points to related tweets by those users and access to broader audiences. This facilitates rapid mobilization and coordination without tangible barriers to participation. This activism quickly brings visibility and specific attention to racialized forms of police brutality in a way that may be used successfully by intersectional victims of racialized violence and harassment.

Yet others argue that virtual spaces not only fail to erase cultural identities, but that these platforms are in fact largely shaped by them. On a technological level, there is ample evidence that algorithms that promote new stories can be plagued by and perpetuate racism and sexism. Additionally, despite the low access barriers to free online platforms, any form of “speaking out” can take heavy emotional and reputational costs on participants. This deterrent is especially problematic for immigrants who face the threat of deportation, as well as low-wage workers and heads of households whose steady incomes are vital to their and their family’s survival.

Despite these barriers, the question remains: will the benefits of social media activism shape an inclusive online movement where all voices are heard? The current moment has been referred to as the “fourth wave” of feminism. One of the novel aspects of this wave is that women of color have been vocal about the importance of bringing an intersectional lens to the issues at play, rebuking feminist leaders who ignore the diverse experiences of all types of women. Yet divisions continue to persist within the current movement. A study of Black women who attended the Women’s March of 2017 found feelings of being marginalized and “alone in our pleas and cries for justice” for their specific community.

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75 Id. at 8; In police brutality contexts, “social media participation becomes a key site from which to contest mainstream media silences and the long history of state-sanctioned violence against racialized populations.” Id. at 12.
76 Williams et al., supra note 66, at 378.
77 See, e.g. TUFKCI, supra note 70, at 154-56 about how opaque algorithms shaped who saw news about the protests in Ferguson and at what point they were made aware of them.
78 Williams et al., supra note 66, at 379.
80 Id.
81 Black women participating in the 2016 women’s march reflected, “We found ourselves alone in our pleas and cries for justice, for the end to the killing of our children and husbands and fathers and brothers, for the cessation of the systematic dismantling of our families, and for recognition that our lives and the lives of the ones we love do matter.” S.T. Holloway, Why This Black Girl Will Not Be Returning To The Women’s March: Y’all Have Fun Though, HuffPost (Jan. 19, 2018), https://www.huffpost.com/entry/why-this-black-girl-will-not-be-
C. Divided We Stand: From Support of Black Survivors to Hollywood Hashtag

Given broad access to social media, lower barriers to participation, and increased demands for an intersectional approach to feminism, #MeToo had the potential to have very inclusive participation across demographics, strong alliances, and coalitions, but the movement has fallen short of this opportunity. The experiences of white, affluent, and educated women have dominated the narrative, with a focus on bringing down high profile assailants, which is not how Burke envisioned it. Women of color participated in the online conversation at very low rates, while white women ages 25-50 were vastly overrepresented. A joint study by the Massive Data Institute and Gender + Justice Initiative at Georgetown University estimates that less than 1% of tweets with the hashtag #MeToo were identifiable to a Black participant. So while the hashtag broadened participation significantly, the phrase “Me Too” went from having an intersectional focus on the unique issues facing women of color to mainstream, more elite, and overwhelmingly white.

Crenshaw’s framework set forth in Mapping the Margins helps us understand the low participation of women of color in the #MeToo movement. This framework explains how race and gender intersect to

82 “Today we find ourselves in what is being referred to as the ‘fourth wave’ feminist movement (Heather Casey, A Brief History of Civil Rights in the United States: Feminism and Intersectionality, Georgetown Law Library (2017), http://guides.ll.georgetown.edu/c.php?g=592919&p=4172371) and while some view it as a continuation of previous iterations of the movement, women of color have been vocal in demanding an intersectional approach to viewing oppression and issues spearheaded by feminists. Women of color are calling out those who embrace a [white] feminism that willfully ignores the lives and experiences of diverse women. Similar to our Black foremothers of the past, Black women participating in the 2016 women’s march reflected, ‘We found ourselves alone in our pleas and cries for justice, for the end to the killing of our children and husbands and fathers and brothers, for the cessation of the systematic dismantling of our families, and for recognition that our lives and the lives of the ones we love do matter.’” Holloway, supra note 81; Vickery, supra note 79, at 407.
86 Crenshaw, supra note 29.
shape the *Structural*, *Political*, and *Representational* nature of experiences with harassment and assault. Structuring the move involves each of these dimensions, which helps us understand why it may be especially difficult for women of color’s voices to be heard throughout the movement.

*Structural intersectionality* refers to how race and gender intersect to make the way women of color experience harassment and the reforms to remedy harassment qualitatively different than that of white women. Women of color’s experiences are dissimilar from those of the high status white women who have become the face of the movement, so its resulting reforms do not inherently take their needs into account. Many women of color face poverty, childcare responsibilities, and lack social capital and job skills – which is only exacerbated by racial disadvantage. These inequities are compounded by structural discrimination in housing and employment, which create different realities and needs for women of color than the reforms envisioned by elite white women. For example, compared to their white counterparts, women of color face different concerns and fears of retaliation, different economic realities, and different perspectives of the justice system.

These different structural realities have led many women of color to express feelings of exclusion and disillusionment with [white] feminism in general and the #MeToo movement more specifically. The primary concern is that while the mainstream movement professes to value what it means to be a Black female citizen, the historical dominant feminist movement has been known to prioritize salient issues for white women over other women, thus failing to confront the ways that white supremacy compounds on the injustices that women of color face.

This blind spot relates to *Political intersectionality*, which explores how both feminist and antiracist movements have marginalized the abuses faced

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87 Id.
88 Id.
89 Id. at 1245-46. “Women of color are differently situated in the economic, social, and political worlds. When reform efforts undertaken on behalf of women neglect this fact, women of color are less likely to have their needs met than women who are racially privileged.” Id. at 1250.
90 Holloway, *supra* note 81.
91 “Holloway powerfully articulates feelings of exclusion and disillusionment a number of Black women have expressed with [white] feminism that does not see value in the lives and realities of what it means to be a Black female citizen. While the very survival of our nation’s Black citizens depends on confronting and dismantling white supremacy in public and private spaces, white feminists have been known to turn a blind eye to issues of injustice affecting Black lives. Thus, leaving Black women to shoulder the burden of combating the triple oppressions of racism, sexism and classism.” Vickery, *supra* note 79, at 407.
by women of color. On the antiracist side, the movement views the Black male as the normative narrative, while on the feminist side, the white woman is considered the prototypical victim. As a result, these efforts have frequently proceeded as if they occur on mutually exclusive terrains. The experiences of women of color, therefore, are not only subordinated by each movement, but are essentially forced to pick a side in the many instances where the two groups pursue conflicting political agendas.

As Crenshaw writes,

The problem is not simply that both discourses fail women of color by not acknowledging the ‘additional’ issue of race or of patriarchy but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.

Thus, as women of color are left at the margins, this limits the potential of the political action that can address their unique challenges. White women striving for change are aware that if the grievances projected are those of women of color, the movement loses some power and perceived legitimacy. For this reason, throughout history Black women have resorted to creating parallel campaigns that give voice to their experiences. There are signs that this may have been occurring on Black Twitter, with hashtags such as #SurvivingLoudly started by a 17-year-old Black female victim of assaults by others in the Chicago music scene and #MuteRKelly. Yet historic trends suggest that even when Black women mobilize in these ways,

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92 Id. Crenshaw, supra note 29, at 1242-44, 1298.
93 Crenshaw, supra note 29, at 1242. “[W]omen of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas…” and “Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices.”
94 Id. at 1252.
their stories continue to garner less empathy than do their white peers.\textsuperscript{98} White women, on the other hand, benefit from being the “wives, daughters, and mothers” that overwhelmingly white male politicians in all levels of government visualize when they engage in political activities related to women’s rights.\textsuperscript{99} This divide can only be bridged once white women acknowledge the privileges from which they have benefitted and even reinforced, and take action to remedy the past with genuine inclusivity rather than token representation.\textsuperscript{100}

At the same time, people of color may worry that attempts to bring awareness to sexual harassment and assault may have a correlative negative impact on the Black community by appearing to confirm deleterious stereotypes.\textsuperscript{101} Even Black female victims may want to “protect” Black men by not contributing to #MeToo for the benefit of the Black community, a calculation which inherently reflects a male lens of what is good for the “broader” Black community. This is at least partly a product of history, dating back to slavery and Jim Crow, during which by its very nature, Black women were separated from white women, aligning their experiences and causes more with Black men than white women, despite intra-group differences in their anti-racist goals and efforts. Thus, many women of color see white women as their political adversaries because of their whiteness, and political alignment with white men, rather than allies because of their female-ness.\textsuperscript{102}

\textsuperscript{98} Beavers, \textit{supra} note 95.

\textsuperscript{99} Carbado & Harris, \textit{supra} note 52, at 2236-37. “White women have long benefitted from and negotiated their lives in ways that reproduce white in-group favoritism. When white men think about their wives, their daughters, their mothers, their aunts, and their grandmothers, they are thinking about white women.”

\textsuperscript{100} Vickery, \textit{supra} note 79, at 408. “Resolution can only occur once this reality is faced and actions taken to rectify past transgressions. Words alone will not solve this systemic problem – white feminists must act to work with women of color to dismantle white supremacy within organizations and society. This means rejecting harmful stereotypes and racist assumptions and unequivocally declaring and embracing the movement that Black lives matter.”; BELL HOOKS, \textit{AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM} (1981). “Women of color will always be at odds with white women as long as the goal of liberation is based on attaining the power that white men possess “[...] for that power denies unity, denies common connections, and is inherently divisive.”

\textsuperscript{101} Crenshaw, \textit{supra} note 29, at 1253.

\textsuperscript{102} Carbado & Harris, \textit{supra} note 52, at 2233 (“white women have been active agents in the private and public regimes of white supremacy...In this respect, Crenshaw’s theory of intersectionality might serve as a reminder here of the importance of centering the issue of power over the question of identity, even as the specific experiences of women who are identified and who identify in particular ways are central to productive theorizing....White women and white men are in a coalition every bit as real as the coalition between Black women and Black men. In this respect, it bears emphasizing that, as a historical matter, by
Two prominent examples of this complexity are the accusations against Clarence Thomas and R. Kelly. After Anita Hill’s testimony about the nature of her allegations during Justice Thomas’ confirmation hearings in 1991, Thomas himself invoked racial stereotypes to discredit the hearings by calling them a “high-tech lynching for uppity blacks.” Crenshaw has described Thomas’ loaded language as intentionally suggesting that “sexual harassment is a white women’s issue,” and that when Black women allege abuse they are doing nothing more than “betraying the interests” of Black communities. According to one source, Black support of Thomas doubled after his provocative comment.

Nearly twenty years later, similar dynamics were on display in the sexual assault allegations against rapper R. Kelly in 2019. Despite years of allegations preceding the #MeToo movement, even when women began to speak out more forcefully in the post-#MeToo era, Black women had to uniquely consider the “complicated balance” of their gendered racial identity in making allegations against a prominent Black male. Because R. Kelly was a powerful figure in the Black community, there was significant resistance within the community to contributing to persistent stereotypes about violent Black men, despite the victims being Black as well. Leung and Williams argue that the turning point was the documentary “Surviving R. Kelly,” making the Black female victims visible to a wider audience, putting their emotional trauma and psychological damage on display to gain

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and large, white women have politically aligned themselves with white men. A crude but telling example of what we mean is reflected in the politics of presidential elections. In no recent presidential election has a majority of white women voted for the Democratic candidate. This is true even with respect to Hillary Clinton’s historic presidential run against serial harasser and alleged rapist Donald Trump. The majority of white women voters in that electoral cycle voted for the Republican candidate, Donald Trump. Which is to say, they voted in line with the majority of white men. Had white women voted for Hillary Clinton at the rate of Black women, we would have had our first female president.”)

104 Heck, supra note 103.
105 Id.
106 Leung & Williams, supra note 65, at 367.
107 “[#MuteRKelly hashtag originator] Odeleye said racial progress was a key factor in the polarization that took place within the African American community: ‘You have this powerful person that is beloved in the African-American community and then you have a victim that no one cares about. And the greater society perpetuates stereotypes about black women that internally you start to believe. We’ll believe if it is a convenient excuse not to have to deal with the reality of R. Kelly and how we have been supporting and enabling him for decades.’”; Surviving R. Kelly: Black Girls Matter (television broadcast, Lifetime Jan. 5, 2019). Leung & Williams, supra note 65, at 365.
empathy and legitimacy.\textsuperscript{108} This reinforces the idea that Black victims experience lower levels of empathy when they allege harassment, forcing them to put their trauma on public display in order to work toward recovery from the abuse they have endured.

The cultural portrayal of Black victims intertwines with \textit{Representational intersectionality}, a cultural construction of women of color that omits and disempowers them. The ways that Black women are represented (or lack thereof) in cultural imagery serves to crystallize the tropes and stereotypes that contribute to this representational imbalance in the first place.\textsuperscript{109} This was evident in the media’s representation of #MeToo victims as famous and predominately white celebrities, which reinforced marginalization of women of color’s experiences within the movement. Although optimists argue that social media activism is capable of building bridges across demographic groups with similar grievances, women of color seemed to lack identification with the online #MeToo movement, many describing #MeToo as “too white for me” because it co-opted Burke’s work and Black women were absent from the core voices and leadership.\textsuperscript{110} This representation, and invisibility, may have influenced how much traction the movement gained online, as well as the publicity, mass outcry, and power

\textsuperscript{108} Leung & Williams, \textit{supra} note 65., at 366.
\textsuperscript{109} “When one discourse [race/gender] fails to acknowledge the significance of the other, the power relations that each attempts to challenge are strengthened...Perhaps the devaluation of women of color implicit here is linked to how women of color are represented in cultural imagery.” Crenshaw, \textit{supra} note 29, at 1282. “The media are persuasive in focusing public attention on specific events, issues, and persons in determining the importance people attach to public matters.” Eugene F. Shaw, \textit{Agenda-Setting and Mass Communication Theory}, 25 INT’L COMM. GAZETTE 96 (1979). In other words, the media determine what topics are relevant and should be talked about in the public. This theory highlights the media’s role in determining what the public should be informed about and occurs as a cumulative effect; that is, the more a topic gains publicity, the more it is repeated in the news. Repetition of a topic is one way the media chooses which topics to show the public, and its effects are “more significant when an issue being covered lasts over a greater time interval, while others maintain that the greatest levels of influence occur when information has recently been assigned priority by the media.” Natalia Aruguete, \textit{The Agenda Setting Hypothesis in the New Media Environment}, 28 COMUNICACION Y SOCIEDAD 35, 39 (2017). The media has the potential to shape and influence the way the public perceives and forms opinions about a certain issue. The way the media frames an issue “can have a marked impact on one’s overall opinion.” Dennis Chong & James N. Druckman, \textit{Framing Theory}, 10 ANN. REV. POL. SCI. 103, 106 (2007). In addition, framing theory also involves “the interaction between individuals’ prior knowledge and predispositions” and offers the public “alternative ways of defining issues, endogenous to the political and social world.” Claes H. de Vreese, \textit{News Framing: Theory and Typology}, 13 INFO. DESIGN J. & DOCUMENT DESIGN 51, 35 (2005).
\textsuperscript{110} Beavers, \textit{supra} note 95.
gained by anti-harassment efforts occurring offline, but potentially to the
detriment of women of color.

Many have also argued that women of color, and Black women in
particular, did not participate in the online movement, because throughout
history, they have been undervalued and their pain has not been taken
seriously, both by white women and others.111 For example, the only women
of color who spoke out against Harvey Weinstein, Lupita Nyong’o and Salma
Hayek, were also the only two directly denied and rejected of the 40 some
allegations. Despite the opportunities for intersectionality that social media
seemed to afford, the movement’s offline developments reflect it has not met
that potential.

D. Racialized Power Dynamics in Offline #MeToo Activity

While social media has been a prominent tool used throughout the
#MeToo movement, the hashtag has also spurred traditional offline
movement activity, including walkouts, strikes, marches, and protests. This
highly publicized offline activism also helped drive several high-profile
resignations and greater accountability connected to sexual assault and
workplace safety.112 However, similar to online #MeToo activity, offline
activity has also suffered from being insufficiently intersectional, with
protests often focused on the experiences of white, affluent, and educated
women.

As detailed below, it appears as though #MeToo social movement
organizations managed predominantly by white women have insufficiently
incorporated women of color. Some of these organizations have received
criticism for this lack of inclusion and have attempted to address these
disparities. However, these organizations have failed to successfully support
or use their platform to lobby for legal or social changes that address specific
workplace harassment suffered by women of color. In contrast, #MeToo
social movement organizations managed predominantly by women of color
have been more successfully intersectional.113 These organizations, some of
which predated the #MeToo online movement, benefitted from the increased
media attention garnered from #MeToo online activities, and have lobbied

111 Id.
112 Williams et al., supra note 66.
113 Just Lunning, McDonald’s Employees Launch “MeToo” Movement for the Fast Food
Chain, NEWSWEEK (May 22, 2019), https://www.newsweek.com/mcdonaldss-employees-
launch-metoo-movement-fast-food-chain-1433430.
for new laws and workplace policies for the types of harassment women of color face.\textsuperscript{114}

Some of the offline #MeToo social movement organizations managed predominantly by white women have attempted to be more intersectional, but with varying degrees of success. For example, the hashtag #TIMESUP, an offshoot of #MeToo, led to an organization created by women in the entertainment industry on January 1, 2018 to raise money for a legal defense fund.\textsuperscript{115} TIME’S UP has divided advocacy efforts into specific programs for legislation, litigation, industry-specific parity efforts, and public awareness.\textsuperscript{116}

The stated purpose of the TIME’S UP Legal Defense Fund (TULDF) is to support lower income women and women of color who have been sexually assaulted or harassed in the workplace.\textsuperscript{117} TULDF was formed, in part, as a response to early critiques that lower income women and women of color were being left out of the #MeToo conversation.\textsuperscript{118} However, a majority of the 300 actresses, female agents, writers, directors, producers, and entertainment executives that created the fund were white.\textsuperscript{119} High profile representatives and funders of TIME’S UP include white actresses such as


\textsuperscript{116} Time’s Up Now is a 501(c)(4) organization that engages in political lobbying, and other affiliate industry-specific groups such as Time’s Up Advertising, Time’s Up Tech, Time’s Up Health Care, Time’s Up Entertainment, and; \textit{About, Time’s Up Now}, https://timesupnow.org/about/; \textit{TIME’S UP Legal Defense Fund Awards $750,000 to Organizations Serving Low-Wage Workers Who Experience Sexual Harassment in the Workplace}, NWLC (Aug. 14, 2018), https://nwlc.org/press-releases/time-up-legal-defense-fund-awards-grants-workers-experience-sexual-harassment/.

\textsuperscript{117} Buckley, supra note 115.


Gwyneth Paltrow, Angelina Jolie, Ashley Judd, and Laura Dern.\textsuperscript{120} While there are a number of TIME’S UP representatives who are women of color, including Oprah Winfrey, extensive media coverage of the #MeToo and #TIMESUP movement has focused on white leaders of the TULDF movement, providing them with high profile visibility.\textsuperscript{121}

TULDF is housed and administered by the National Women’s Law Center Fund, LLC.\textsuperscript{122} It provides funding and referrals for legal and public relations support for individuals who have experienced workplace sexual harassment and related retaliation. The actresses and advocates collaborated with NWLC lawyers Tina Tchen, Robbie Kaplan, and Fatima Goss Graves, two of whom are women of color.\textsuperscript{123} The defense fund connects individuals experiencing sex discrimination – including sexual harassment – at work, at school, or in accessing health care, with attorneys. Participating lawyers agree to provide a free initial consultation to individuals who contact them through the network and in some instances can take on sexual harassment or other sex discrimination cases free or for a reduced fee.

In its first year, TULDF received 4,915 requests for legal assistance. Those reaching out to the fund come from every industry, with two-thirds of women seeking assistance identified as low-wage workers.\textsuperscript{124} Although the group declared its mission to “show solidarity with survivors of sexual harassment, assault, abuse and related retaliation in all industries – especially low-income women and people of color,” only one-third of women seeking requests identified as women of color.\textsuperscript{125} While TULDF has not provided demographic data on the race breakdown of requests that have been


\textsuperscript{121} See infra, Part I.C.

\textsuperscript{122} See infra, Part I.C.


\textsuperscript{124} Our Staff, TIME’S UP FOUNDATION, https://timesupfoundation.org/about/our-leadership/our-staff/ (last visited March 23, 2020). Fatima Gross is the first African-American woman ever elected as President and CEO of the National Women’s Law Center.


\textsuperscript{125} Id. The racial breakdown of those seeking legal assistance is as follows: 60.5% White, 17.2% Black, 8.1% Hispanic/Latinx (remainder Pacific Islander and Native American). Of those requesting assistance, 68.5% identified as low income and approximately 10% identify as being a member of the LGBTQ community.
successfully connected with legal representation, the data suggest that women of color may be underrepresented. This may be partly due to the fact that even well intentioned plaintiff’s attorneys realize the difficulty in prevailing with these complex intersectional cases given our current legal landscape, thus decline to take the risk.

TIME’S UP has also attempted to address intersectional disparities by providing funding to nonprofits that specifically serve low-wage workers and women of color. In August 2018, TIME’S UP awarded $750,000 in grants to support eighteen nonprofit organizations, including Alianza Nacional de Campesinas, and others across the country serving low-wage workers who have experienced sexual harassment and related retaliation in the workplace. Alianza Nacional de Campesinas was founded in 2012 and was the first national organization to represent the country’s 700,000 women farmworkers. One of Alianza’s central goals has been to expose the rampant sexual harassment and exploitation on farms.

While the fundraising for organizations like Alianza Nacional de Campesinas is a positive step, TIME’S UP has not introduced any proposals tackling reforms to federal provisions that are likely to substantially assist low-wage workers of color, such as Alianza farmworkers. For example, TIME’S UP has supported legislation to remedy the lack of federal safety protections for individuals working for businesses with less than 15 employees, but has not made it a key issue in 2019 or 2020.

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126 Id. As of November 2019, the fund was committed to 174 cases.
128 TIME’S UP Legal Defense Fund Awards $750,000 to Organizations Serving Low-Wage Workers Who Experience Sexual Harassment in the Workplace, supra note 115.
Sharyn Tejani, Director of the TIME’S UP Legal Defense Fund, has published work advocating for changes to Title VII and has argued to expand coverage to employers with fifteen or more employees. See Sarah D. Heydemann & Sharyn Tejani, Legal Changes
offered policies that would protect immigrant workers—many of whom are uniquely vulnerable to sexual harassment while at work and less likely to report incidents of harassment.\footnote{After examining all of the federal, state, and corporate policies available on the Time’s Up website, none of the policies mention immigration or immigrant women. TIME’s up has launched initiatives to tackle workplace sexual harassment in different industries and for different groups, including: TULDF; Time’s Up Entertainment; Time’s Up Advertising; Time’s Up UK; Time’s Up Tech; Times Up Healthcare. See Our Work, TIME’s Up, https://timesupnow.org/work/. (last visited May 30, 2020). Time’s Up does not have a separate initiative for immigrant women. Time’s Up has appeared to launch a separate branch, Time’s Up Women of Color (WOC), but they do not have a separate website documenting their work. See Time’s Up WOC, Women of Color are Leading the Way, https://timesupnow.org/about/women-of-color-are-leading-the-way-at-times-up/ (last visited May 30, 2020).}

Instead, TIME’S UP advocacy has focused on proposals for substantive legal policy changes addressing equal pay and prohibition on non-disclosure disagreements.\footnote{Time’s Up Now, Time’s Up 2020, supra note 130; Time’s Up Now, Time’s Up 2019, supra note 130.} The organization has announced that it is calling on 2020 Presidential candidates to support pay equity, end sexual harassment, expand access to child care, and expand paid family and medical leave.\footnote{Time’s Up Now, Time’s Up 2020, supra note 130.} While these proposals would seemingly benefit all women in the workplace, none of these proposals directly address issues that are unique to women of color.

Other social movement organizations led predominantly by white women have also failed to successfully incorporate intersectional voices into their offline activities. The Women’s March, the largest single-day protest in U.S. history, took place in January 2017 after the inauguration of Donald Trump.\footnote{Jia Tolentino, The Somehow Controversial Women’s March on Washington, NEW YORKER (Jan. 18, 2017), https://www.newyorker.com/culture/jia-tolentino/the-somehow-controversial-womens-march-on-washington/.} The event originated the evening after the November 2016 election, when attorney Teresa Shook in Hawaii and New York fashion designer Bob Bland separately called on Facebook for a women’s protest.\footnote{Id.} Eventually, Shook and Bland, both white women, combined their events.\footnote{Brewer & Dundes, supra note 115.} The Women’s March has faced criticism since its inception for being a space

\textit{Needed To Strengthen the #MeToo Movement}, 22 RICH. PUB. INT. L. REV. 237, 241 (2019), available at https://scholarship.richmond.edu/pilr/vol22/iss2/8 (\textquotedblleft Although not discussed in detail in this article, one of the primary changes necessary in Title VII is an increase in coverage.\textquotedblright)
for primarily white, cisgender women. In addressing these criticisms, Bland acknowledged that the women who initially began organizing the march were almost all white. Furthermore, the march was originally named the “Million Woman March,” appropriating the name of a historic protest for Black women’s unity and self-determination that took place in Philadelphia in 1997.

In response to these early critiques, the Women’s March organizers asked prominent non-white activists to get involved, including Linda Sarsour, Tamika Mallory, and Carmen Perez. While this expanded panel of leaders professed to support an intersectional platform, that position in turn invoked some women’s “white fragility” and attendant feelings of exclusion, leading to further tension within the theoretically inclusive Women’s March. Ultimately, interviews conducted both before and during the 2017 March suggested that underrepresented women felt that issues that mattered most to them, including racism, discrimination, police brutality, LGBTQ inclusivity, and immigration were relegated in favor of issues that matter most to straight, white, middle-class women. In 2018, three of the organization’s founders resigned following allegations of anti-Semitism. Although Women’s Marches were organized again in January 2018 and 2019, the March has failed to generate ongoing popular support or visibility largely due to these internal tensions.

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138 Brewer & Dundes, _supra_ note 115.
139 Jessica Gantt-Shafer et al., _Intersectionality, (Dis)Unity, and Processes of Becoming at the 2017 Women’s March_, 42 WOMEN’S STUD. COMM. 221 (2019).
141 Id. “While the leaders of the March welcomed an intersectional agenda, many white women felt excluded. In response to what some might characterize as white fragility, several Black women noted that this contemporary reaction of many white liberal women to intersectionality – an aim to understand ‘not only the lived experiences of black women but also how they can be liberated’ – too closely mimicked those of previous iterations of white-centered feminist movements.”
142 Interviewees suggested that the march provided white women with a means to protest the election rather than a way to address social injustice disproportionately affecting lower social classes and people of color. Interviewees believed that a racially inclusive feminist movement would remain elusive without a greater commitment to intersectional feminism. Brewer & Dundes, _supra_ note 115.
143 Sarmiento, _supra_ note 137.
Unsurprisingly, other protests organized by predominantly white women in predominantly white fields have also failed to be inclusive. In October 2018, 20,000 Google employees walked out of corporate offices in 50 cities after demanding an overhaul of Google’s sexual harassment policies, particularly the company’s policy of forced arbitration. Of the seven employees who organized the Google Walkout for Real Change, five were white women. These organizers demanded an end to forced arbitration for all employees, a commitment to pay equity, data on racial and gendered compensation gaps, sexual harassment transparency reports, clearer policies for reporting sexual misconduct, and employee representation on Google’s Board of Directors. In response, Google CEO Sundar Pichai announced changes to the policies, including optional arbitration for cases of sexual misconduct. The decision followed in the footsteps of similar policy changes made by other tech giants, including Microsoft and Uber. Facebook followed suit soon thereafter.

The Google Walkout protesters did acknowledge the technology industry’s issues with racial inequality and advocated for greater transparency on racial compensation gaps. However, the organizer’s demands neglected larger social or workplace issues faced by minority groups. For example, the organizers’ demands failed to discuss workplace discrimination faced by racial and ethnic minorities, particularly women of

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146 Id.


148 Id.


color beyond pay equity. While women in every racial and ethnic group are significantly underrepresented in the tech sector relative to men, the gaps for Asian, Black, and Latina women are staggering. Roughly 49% of the tech sector is represented by white men. 151 Sixteen percent of the tech sector is represented by white women, in comparison to only 5% of Asian women, 3% of Black women and 1% of Latina women. 152

Google’s responses to the Walkout similarly neglect the intersectional challenges faced by women of color. For example, Google’s move to end forced arbitration only involved cases of sexual harassment, and did not include racial harassment or other cases of workplace discrimination. 153 The company also failed to provide any response to organizers’ demand for pay-data transparency that may help identify racial and intersectional compensation gaps.

In sum, the offline protest activity of social movements predominantly organized by white women in the wake of #MeToo suggests that their advocacy has targeted social and legal issues that are particularly important to middle-class or affluent white women. Many of these groups have advocated for pay equity and an end to mandatory arbitration and non-disclosure agreements in sexual harassment cases. While other racial and social groups may benefit from these policies, they do not specifically address policies or problems unique to low-wage workers or women of color.

By contrast, social movements organized predominantly by women of color have been more successful in acknowledging and advocating for social and legal policies that are intersectional. Organizations led by women of color and specific to low-wage workers have a better understanding of these issues. In September 2018, for example, McDonald’s employees organized the first ever multi-state strike against the company’s existing sexual harassment policies. The workers carried signs that said “#MeToo McDonald’s” and wore tape over their mouths. The strike was predominantly led by working class women of color. 154 By May 2019, over twenty employees had filed legal action against McDonald’s claiming that sexual

152 Id.
assault occurred while on the job. In August 2019, McDonald’s announced that it would initiate mandatory training for all employees at U.S. restaurants for workplace anti-harassment. McDonald’s CEO resigned a few months later after disclosing his romantic involvement with another employee.

Although the McDonald’s protest focused on sexual harassment policies, the organizers also advocated for other social and legal issues indirectly related to harassment which would lead to greater equality and empowerment of low-wage workers and women of color. The McDonald’s nationwide strike asked for stronger sexual harassment policies, but also demanded increased union rights and advocated for $15 hourly pay. African Americans, Latinos, and women make up a disproportionate number of workers making below $15 an hour, while workers of color, including Native Americans, African Americans, Latinos, and Pacific Islanders often benefit the most from the protection of unions. Unions are shown to better represent low-wage workers’ interests through collective bargaining agreements, resulting in better employment and salary agreements, as well as advocate for legislative policies that protect workers’ rights.

Unite Here, a labor union that primarily represents the hospitality industry, teamed up with union leaders in cities such as Chicago, Seattle, and Washington, DC to organize massive campaigns advocating for hotels to provide panic buttons to hotel workers. Major hotel chains, including Marriott, Hilton, and Hyatt, subsequently introduced policies to provide panic

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155 Lunning, supra note 113.
157 Id.
161 In 2019, 7.1 million employees in the public sector belonged to a union, compared with 7.5 million workers in the private sector. Among major race and ethnicity groups, Black workers had a higher union membership rate in 2019 (11.2 percent) than workers who were White (10.3 percent), Asian (8.8 percent), or Hispanic (8.9 percent). Union Members Summary, U.S. Bureau of Labor Statistics (Jan. 22, 2020), https://www.bls.gov/news.release/union2.nr0.htm.
162 Raphelson, supra note 114.
buttons at all their properties by 2020. Unite Here represents 300,000 working people across Canada and the United States. Members are predominantly women and people of color. In addition to panic buttons, Unite Here members also protested against hotel chains for subpar wages and inadequate healthcare. As a result, in December 2018, union members’ contracts with Marriott incorporated a guarantee of GPS-enabled panic buttons for housekeepers, a ban on guests with a history of sexually harassing workers, and an historic level of wage and benefit increases.

These landmark outcomes reflect the vital importance of including and addressing the interests of marginalized groups within the larger movement for workplace and societal sex equality. An inclusive approach is necessary because it is important to be aware of, acknowledge, and address specific intersectional harms. Taking an inclusive approach also models the kinds of equal relationships that are appropriate across other dimensions such as race, sexual orientation, gender orientation, and disability. Moreover, a range of different strategies is necessary to spur societal change. Focusing on a singular strategy, such as legal reforms, may obscure larger institutional and societal issues.

II. LAW CONTINUES TO FAIL WOMEN OF COLOR 30 YEARS AFTER CRENSHAW’S INTERSECTIONALITY INSIGHTS

The Equal Employment Opportunity Commission (EEOC), the government agency responsible for enforcing workplace discrimination law, has reported that sexual harassment charges are up nationwide – the first increase observed this decade. The agency has capitalized on #MeToo momentum by increasing lawsuits to enforce sexual harassment law and hold employers accountable. The EEOC has filed 50% more of these lawsuits than it did during the previous year and recovered $70 million for sexual harassment victims in FY 2018, compared to the $47 million it recovered during FY 2017. In terms of outcomes, the EEOC reported an increase in cause findings from 970 in FY 2017, to 1,199 in FY 2018. The agency also

164 Who We Are, Unite Here!, https://unitehere.org/who-we-are/ (last visited April 4, 2020).
165 Id.
167 Id.
facilitated more successful conciliations, with nearly 500 in FY 2018, compared to 350 in 2017.  

As discussed above, as of February 8, 2019, the TIME’S UP Legal Defense Fund had fielded 4,915 requests for assistance from all 50 states and raised $24 million for victims to seek justice. While this is impressive, along with increased EEOC efforts, the potential is limited due to the shortcomings of our current legal framework, which inadequately protects all women, but particularly women of color. The current anti-harassment legal protections leave women of color excluded, silenced, marginalized, dehumanized, and blocked.

A. Women of Color are Disproportionately Excluded from Federal Protection

Federal and state legal gaps in protection against discrimination and harassment have placed many women of color in particularly precarious situations. Federal antidiscrimination laws, including Title VII, generally only cover employers with fifteen or more employees. Under Title VII, domestic workers, temporary workers, independent contractors, farm workers, interns, and those working for small employers are not legally protected, despite the fact that they are vulnerable targets.

litigation: “If the EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a ‘Letter of Determination’ telling them that there is reason to believe that discrimination occurred.”

169 Id. “The Letter of Determination invites the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation. Conciliation is a voluntary process, and the parties must agree to the resolution – neither the EEOC nor the employer can be forced to accept particular terms.”

170 42 U.S.C. § 2000b. “Small employers” are those with fewer than 15 employees. See Katherine V.W. Stone, Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers, 27 BERKELEY J. EMP. & LAB. L. 251, 251, 263 (2006). In-home workers are more than 90% female, and are disproportionately immigrants. One out of every nine foreign-born female workers with a high school degree or less works in an in-home occupation; Tara Kpere-Daibo, Unpaid and Unprotected: Protecting Our Nation’s Volunteers Through Title VII, 32 UALR L. REV. 135, 136 (2009). “Courts have not applied the statutory protections that exist for paid employees to unpaid workers, and legislatures have failed to increase protections for volunteers as well.” Id. at 150. “Arguably, volunteers and unpaid workers are more susceptible to harassment and discrimination because of their status as “non-employees.” One possible reason is that supervisors and coworkers may see volunteers as a temporary workforce – more susceptible to harassment because they will soon leave. Similarly, particularly in intern situations, there is often a large imbalance of power between the worker and the supervisor. This position of power is often abused….in addition to these factors, with the current status of the laws, unscrupulous employers or supervisors may exploit the fact that the law provides no recourse
Domestic workers, such as nannies, maids, and home healthcare aides who work in private homes, are disproportionately women of color and immigrants.\textsuperscript{171} In 2017, there was a conservative estimate of 7.6 million undocumented, migrant workers in the United States.\textsuperscript{172} These workers face barriers because of their intersectional identities, as they tend to be situated at the nexus of immigration status, gendered caretaking work, private home worksites that lack transparency or objective oversight, and legacies of racism.\textsuperscript{173} At the same time, their largely white middle- and upper-class employers benefit from this lack of regulation and privacy of the home sphere, allowing them “unfettered access and power” over their employees’ work and bodies.\textsuperscript{174} As a result, studies show that one-third of these workers report that they have faced gender, race, language, or immigration-based abuse.\textsuperscript{175} Yet federal law fails to provide redress in many of these cases, where the private employer has at most a handful of paid workers, falling short of the fifteen person threshold for the relevant legal protections.\textsuperscript{176}

Similarly, the vast majority of farmworkers are women of color. There are approximately two to three million people employed as farmworkers, many from Mexico, with women making up approximately 32% of that workforce.\textsuperscript{177} Roughly 80% of women farmworkers have said for unpaid workers; they are ineligible for damages, reinstatement, or even injunctive relief under the current employment laws. These results are contrary to public policy.”


\textsuperscript{173} “As previously discussed, the private nature of the worksite, the immigration status of the worker, the gendered nature of the work, and the legacies of slavery and White supremacy are all vectors of oppression that come to bear on domestic workers.” Nilliasca, \textit{ supra} note 171.

\textsuperscript{174} Id. at 390.

\textsuperscript{175} Id. “Therefore, it is not surprising that one-third of domestic workers report abuse from their employer based on race, language, or immigration status. In addition, due to the gendered nature of the work and the location of the work in the employer’s home, many women domestic workers suffer gender-based sexual harassment.”

\textsuperscript{176} Id.at 403. “Under federal law, most domestic workers are not covered under Title VII protection, as it is only extended to employees of enterprises with at least fifteen employees.…. [D]omestic workers are effectively excluded, as the majority of employers only employ one or two domestic workers in their household.”

\textsuperscript{177} Id.
they had experienced some form of sexual violence on the job.\footnote{Id.} Compounding on the frequent harassment they face, farmworkers often are unable to file EEOC harassment charges because Title VII only applies to larger businesses, offering no safety protections for individuals working outside of those parameters.\footnote{Small Business Frequently Asked Questions, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/employers/small-business/1-do-federal-employment-discrimination-laws-enforced-eeoc-apply-my (last visited March 30, 2020).} Further, undocumented workers are particularly vulnerable to illegal harassment, discrimination, and other workplace violations because it is known that they not entitled to legal remedies on account of their immigration status.\footnote{These arguments often cite a 2002 Supreme Court decision, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), in which the Court held that the National Labor Relations Board (NLRB) did not have the authority to award the remedy of back pay to undocumented workers who were illegally fired for engaging in a protected labor organizing activity because they were not legally present in the United States. Although this decision was limited to collective bargaining rights and back pay, employers and their attorneys have attempted to extend this ruling to impair other fundamental rights and remedies undocumented workers are entitled to under labor and employment laws, including freedom from sexual harassment. Washington State has included immigration provisions into harassment language.} Thus, undocumented immigrants lack protection under federal and state law, even though they make up a large proportion of the workforce in specific industries, including agricultural work.\footnote{Dan Kosten, Immigrants as Economic Contributors: They Are the New American Workforce, NAT’L IMMIGRATION FORUM (June 5, 2018), https://immigrationforum.org/article/immigrants-as-economic-contributors-they-are-the-new-american-workforce/. “According to a report by the Department of Labor based on a survey of agricultural workers in 2013-2014, nearly half (47 percent) of farmworkers had no work authorization.”}

Over a third of the nation’s workforce are independent contractors, who are similarly left unprotected from discrimination and harassment.\footnote{Contingent Workers Now Make Up 34% of the US Labor Force, Quartz (Nov. 24, 2015), https://qz.com/472248/contingent-workers-now-make-up-34-of-the-us-labor-force/.} Almost half of these unprotected independent contractors are women.\footnote{U.S. BUREAU OF LABOR STATISTICS, Contingent and Alternative Employment Arrangements Summary (June 7, 2018), https://www.bls.gov/news.release/conemp.nr0.htm.} Many of these positions are low-paid jobs in industries such as personal services, transportation, and educational services. Women of color frequently land in these jobs due to the low barriers to entry, discrimination in other parts of the labor market, and the need for supplemental income.\footnote{Research has shown that women and/or people of color are also}
overrepresented in most of the industries that tend to misclassify their workers as independent contractors, despite the underlying facts suggesting that they fit the legal definition of employees.\footnote{Charlotte S. Alexander & Arthi Prasad, \textit{Bottom-Up Workplace Law Enforcement: An Empirical Analysis}, 89 \textit{Ind. L.J.} 1069 (2014).}

Even when workers do surpass these basic barriers and are covered under the existing laws, the “bottom-up” nature of the system can harm marginalized populations specifically.\footnote{Id.} Alleging a claim of workplace harassment under Title VII requires the worker herself to identify the violation and come forward formally. Rigid statutes of limitations have inhibited many victims’ ability to file claims. The statute of limitations to file sexual harassment claims under federal law is only 180 or 300 days, which is not enough time for many victims to process, reflect, and decide how to move forward.\footnote{42 U.S.C. § 2000e-2 (2006); Joanna Grossman, \textit{Moving Forward Looking Back: A Retrospective on Sexual Harassment Law}, 95 B.U. L. Rev. 1029 (2015). (explaining that the statute of limitation is “180 or 300 days, depending on the level of coordination between the federal and state anti-discrimination agencies’”); National Women’s Law Center, \textit{Selected Title IX Practice Issues}, in \textit{Breaking Down Barriers} 89 (2015). [https://perma.cc/N5AF-7JML].}

The most vulnerable workers including women, low-wage, under-educated, and undocumented workers often lack the requisite legal knowledge or awareness of the structures they must navigate.\footnote{Id. at 1071-73.} The incentives for coming forward may also be outweighed by the threats of retaliation, loss of income, and even deportation, especially when they lack faith in their employer’s response to the complaint.\footnote{Id.} As a result, women of color, who are already vulnerable, also face significant hurdles to being adequately protected from workplace misconduct.\footnote{Id. at 1073.} Although some state and federal legislatures have introduced laws seeking to remedy these barriers, they do not sufficiently address these gaps in protection.\footnote{\textit{See infra, Part III.A.}}

\textbf{B. Mandatory Arbitration Silences Women of Color}

Another prominent legal issue raised throughout the #MeToo movement has been mandatory arbitration, which can be used to deny victims of harassment access to the courts, while also shielding problematic employers from public exposure. All too often, mandatory arbitration clauses

\footnote{Id. at 1073.}
are unilaterally imposed and used by employers to ensure that all sexual harassment allegations remain confidential, thereby protecting both the individual harasser and the company.

Since the early 2000’s, employers’ use of mandatory arbitration has more than doubled, with over 55% of employers currently requiring these agreements. Research shows that women of color are more likely to be denied access to courts due to mandatory arbitration because these clauses are particularly prevalent in low-wage industries. Thus, low-wage workers, who are already uniquely vulnerable to workplace violations including harassment, also suffer the most from these clauses restricting their ability to access a court of law. Although harmful for all workers, mandatory arbitration can be particularly detrimental for women of color suffering harassment. On a practical level, it can be hardest for these workers to obtain legal representation for their claims, especially when there is a lack of precedent to support their position because of the opaque nature of arbitration. Many plaintiff’s attorneys see private arbitration as a dead end, because of the extremely low odds of prevailing.

Unlike the judicial system, arbitration also limits transparency for victims of harassment because it limits access to class action claims, it does not offer an appeals process, and the opinions are kept private, so there is

192 M. Isabelle Chaudry, An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims, 43 SETON HALL LEGIS. J. 215, 217 (2019) (although ADR can be effective in some circumstances “because of the speediness, the cost, and the parties’ ability to control the process.”)
193 Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers 1 (Economic Policy Institute), Apr. 6, 2018. “Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.”
194 Colvin, supra note 193. Women and African Americans are more likely to be subject to mandatory arbitration.
195 Id.
197 Michael J. Zimmer, Title VII’s Last Hurrah: Can Discrimination Be Plausibly Pled?, 2014 U. CHI. LEGAL F. 19, 25 (2014). “Data concerning the arbitration of employment discrimination claims is even more difficult to find because arbitration is private and confidential. California law requires the American Arbitration Association (AAA), the primary (but not the only) arbitration provider, to publish data concerning its provision of employment arbitration services. Over a four-year period, the AAA nationally administered arbitration in almost 4,000 cases, with 1,213 decided by an award after a hearing. Employees won just over 21 percent of the cases, with a median award amount of $36,500, which was much less than the average award in court decisions.”
often no public record of the claims filed nor the outcome of the hearings.\textsuperscript{198} This not only shields employers from accountability, but also does not establish precedent to help shape the law and inform future cases.\textsuperscript{199} This is particularly problematic for legal issues like intersectional claims, where the law is evolving and courts are grappling with how to properly analyze the claims. Since arbitration sidesteps the EEOC or formal administrative agencies, this substantially limits public awareness of harassment claims and proceedings, which is one reason that the EEOC announced opposition to arbitration in 1997.\textsuperscript{200}

Compounding on the secrecy inherent in mandatory arbitration, non-disclosure agreements in employment contracts and confidential settlement agreements are also frequently used to silence victims and shield harassers.\textsuperscript{201} The consequence for disclosure can be that the employee must pay liquidated damages, which can be even greater than the amount received in the settlement itself.\textsuperscript{202} This monetary consequence has a disproportionate impact on low-wage workers, whose hands are tied by their inability to pay the steep fee.\textsuperscript{203} Furthermore, other victims with more resources are better

\textsuperscript{198} Colvin, supra note 193, at 2. “Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures – meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through collective legal action.”; Chaudry, supra note 192, at 228. It has been argued that this lack of judicial review undermines the public function of litigation: “By closing off access to proceedings, eliminating judicial precedent, and allowing parties to write their own laws, we compromise society’s role in setting the terms of justice.” Chaudry, supra note 192, at 217–18. “[A]rbitration proceedings also permit the “private settlement” of the claims of the accuser – allowing the harasser to claim no wrongdoing. Among the traditional arguments for preference for deciding claims in a public court, as opposed to a private adjudication system, are that: (1) court proceedings are part of the public record and, as a result, the abuser’s identity is not confidential, and (2) plaintiffs have an appeal process, whereas in arbitration, the arbitrator’s decision is final. Of course, there are some exceptions relating to the arbitrator’s failure to adhere to the constraints placed on the arbitrator by the parties’ agreement and, perhaps, the public policy exception.”

\textsuperscript{200} Sternlight, supra note 196, at 190.

\textsuperscript{201} Only four states – Illinois, New Jersey, New York, and Oregon – passed bills in 2018 and 2019 prohibiting non-disclosure agreements as a condition of employment for all types of harassment and discrimination. In 2018 and 2019, only New Jersey, New York, and Illinois passed laws prohibiting non-disclosure provisions in settlement agreements for all types of harassment and discrimination; Chaudry, supra note 192, at 234.

\textsuperscript{202} Chaudry, supra note 192.

\textsuperscript{203} Elizabeth C. Tippett, The Legal Implications of the MeToo Movement, 103 MINN. L. REV. 229, 249–51 (2019); It has also been argued that these agreements actually constitute impermissible retaliation against the accuser by imposing a financial penalty if they choose to speak about the experience. However courts are reluctant to take this position regarding NDAs in a settlement because they profess to encourage settlements in the interest of case resolution; see also Vasundhara Prasad, If Anyone Is Listening, #MeToo: Breaking the
equipped to utilize other avenues for speaking out, such as speaking to the media about the problem of sexual harassment generally or engaging in political activism. These NDAs ultimately have the effect of protecting the perpetrator over the victim, by indirectly allowing them to continue their behavior without facing public or professional ramifications.

It is important to note the counterargument, however, that low-wage women of color and immigrants may be particularly harmed from bills that eliminate confidentiality agreements wholesale. While these critics do not favor the overly restrictive NDAs that are common practice today, they report that many women fear the consequences of public exposure both in terms of their future professional prospects, and employers’ ability to reciprocate speaking out against the accuser. Still, they acknowledge the need for reforming the current landscape of NDAs for a more balanced approach. As discussed below, many of the #MeToo bills proposed at the state level seek to eliminate these secrecy provisions in cases of sexual harassment and sexual assault, but fail to address other harassment and discrimination claims.

C. Women of Color Are Marginalized Due to False Dichotomy

In addition to being excluded and silenced due to the core challenges of lack of coverage, lack of due process, and lack of transparency in the current legal landscape, women of color are also marginalized through weak enforcement of the intersectional harassment claims that do make it through these barriers landing in state or federal court. For example, women of


206 Id.

207 Prasad, supra note 203.

208 See infra, Part III.A.

color pursuing litigation are marginalized due to the courts’ pressure to separate out experiences of harassment into the false dichotomy of “Because of Race” or “Because of Sex.”

Claim intersectionality refers to lawsuits where plaintiffs allege discrimination based on at least two protected categories, i.e. because of race and because of sex. Empirical research has found that plaintiffs bringing intersectional claims are less than half as likely as plaintiffs bringing single claims to win their cases. Even within those statistics, Black women are more likely to lose their cases than are Black men who bring intersectional claims (e.g. because of race and because of age). One potential reason for these dismal rates is judges’ lack of understanding of the nuanced types of discrimination and harassment that plaintiffs at the intersection of multiple marginalized groups face. Rather than taking account of the intertwined and compounded nature of the racialized and sexualized abuses, courts often treat each claim separately and distinctly. After disaggregating, the court then finds each claim insufficiently severe or pervasive on its own to survive summary judgment.

For example, in EEOC v. Champion International Corp., a Black female plaintiff alleged both racial and sexual harassment. The one incident of harassment included being threatened after she observed sexual harassment of co-workers, and being told by the perpetrator to “Suck my d%^k you black bi%^d@#” while he exposed himself and held his penis. There were also several substantial references to lynching and the KKK. Although the court called the racial incidents “deplorable” and “offensive,”


210 Best et al., supra note 29, at 994–95.
211 Best et al., supra note 29, at 1009. See also Kotkin, supra note 31, at 1440 (2009). “A sample of summary judgment decisions reveals that employers prevail on multiple claims at a rate of 96 percent, as compared to 73 percent on employment discrimination claims in general.”
212 Best et al., supra note 29, at 1009.
213 Best et al., supra note 29, at 991; Kotkin, supra note 31, at 1442 (noting that judges struggle to understand or are frustrated by claims that allege multiple traits in employment discrimination cases). Kotkin suggests that judges dismiss intersectional claims at higher rates because analyzing intersectional claims requires a more complex analysis into the kind of proof that would make out a violation, id. at 1473.
214 Id. “One is at a loss to determine what sort of single incident would be severe enough if this incident, as described by Jackson, is not even sufficient to get to the jury.”
215 Id. at 111-12; EEOC v. Champion International Corp. (N.D. Ill. 1995).
it held that the treatment did not rise to meet a Title VII violation. Again, by disaggregating the incidents, the court failed to recognize the cumulative effect of the environment on the plaintiff’s working conditions. These cases reflect not only the trouble that courts have with understanding intersectional claims, but also the restrictive lens through which they consider how offensive behavior must be to violate civil rights law.

In *Rocha Vigil v. City of Las Cruces*, a Hispanic female plaintiff alleged a hostile work environment based on both sex and race. The discrimination she faced was a product of her situation at the intersection of both protected categories. The plaintiff alleged that her supervisor offered her “X-rated software,” left pornography in her desk drawer and repeatedly requested that she go flying with him. Plaintiff also alleged that her “supervisor frequently referred to Hispanic individuals in derogatory terms such as ‘wetbacks,’ and when she complained to her supervisor about his discriminatory comments and actions, he responded, ‘I didn’t know that Mexicans had rights.’” Rather than analyze these claims together to determine whether or not the plaintiff, a Hispanic woman, was subject to a hostile work environment, the court analyzed the sexual harassment and racial discrimination claims separately. The court determined that “her supervisor’s single attempt to give her pornographic software [was] not reasonably regarded as giving rise to an abusive environment” and she did not offer specific enough allegations regarding her supervisor’s request to go flying to prevail at summary judgment for her sexual harassment claim. For the racial discrimination claim, the court found that summary judgment was appropriate because the harassment had not occurred frequently enough to result in a change in working conditions. By disaggregating the two claims at issue, the court ignored how these incidents in the aggregate could result in a hostile work environment for a Hispanic woman. Despite the lack of requirement to do so in either the text or case law of Title VII, courts appear to be unable to figure out how to mesh the two types of discrimination,

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216 Id. at 112.
217 Id.
219 See *Rocha Vigil*, 1997 WL 265095, at *1-2; Beiner, supra note 218, at 108.
220 *Rocha Vigil*, 1997 WL at *1-2; Beiner, supra note 218, at 108.
221 *Rocha Vigil*, 1997 WL at *3; Beiner, supra note 218, at 109.
224 Beiner, supra note 218, at 109.
and instead consider each separately, making each claim appear weaker than the reality of the context would suggest.\textsuperscript{225}

Some have also argued that, due to the lack of a coherent doctrinal framework, judges generally view intersectional plaintiffs as less credible.\textsuperscript{226} They believe that if a person asserts too many grounds for discrimination, it is more likely that the claims lack merit.\textsuperscript{227} As a result, many plaintiffs face pressure to choose to bring one claim or the other in order to improve their chances of success.\textsuperscript{228} As long as this difficult choice remains, intersectional victims’ claims will not be able to capture the nefarious nature of the discrimination they face, which often draws on both racial and sexual stereotypes.\textsuperscript{229} Instead, if a plaintiff of color chooses to bring a claim solely based on sexual harassment, in order to minimize the impact of racial stereotypes on outcomes in the courtroom, they may try to strategically minimize the racial nature of the harassment and instead emphasize the ways that their experience resembles normative sexual harassment.\textsuperscript{230} While this strategy may help to simplify the individual claim in order to better connect with white judges or jurors, in the long-run, this approach masks the intersectionality of the harassment, failing to create precedent for future similarly-situated claimants.\textsuperscript{231}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Kotkin, supra note 31, at 1442 (noting that Judges struggle to understand or are frustrated by claims that allege multiple traits in employment discrimination cases). “Without a doctrinal structure from which to analyze complaints of this sort, judges seem to treat them as the child who cried wolf: If a person asserts so many grounds for discrimination, it is unlikely that any of them are grounded in fact.”
\item Id.
\item Leung, supra note 6, at 97. The reality is that “…attorneys working to combat systemic discrimination and harassment in the workplace are faced with the decision of whether to address sex discrimination with intersectional legal theories.”
\item Id. at 93-94.
\item Id. at 96
\item Id. at 96-97. “This does not create law that is the most protective of women with intersectional identities, nor does it focus on a narrower construction of the issue that would allow women to raise a broader class of potential claimants…..” For example, in Dukes v. Walmart, “…plaintiffs took a race-blind approach to fighting discrimination, instead pursuing a claim based on the amount of discretion given to managers, which resulted in shockingly low promotion rates for women employees. While this resulted in one of the largest proposed classes in American litigation, it also neglected to address experiences of women of color specifically or to explore possible racial disparities in the hiring and promotions at Wal-Mart.”
\end{enumerate}
\end{footnotesize}
D. Women of Color are Dehumanized by the Severe/Pervasive Threshold

Under federal law, although harassment is considered a form of discrimination under Title VII of the Civil Rights Act, the plaintiff must show that the harassment consisted of severe or pervasive conduct so offensive as to alter the terms or conditions of the plaintiff’s employment. The conduct also must objectively and subjectively meet this standard, meaning that the plaintiff must show that a reasonable person would believe that the conduct was sufficiently severe or pervasive to create a hostile or abusive work environment in order to violate federal law, as well as that this particular plaintiff experienced it as such. Unfortunately, lower courts have misinterpreted the standard to be higher than the Supreme Court intended, rejecting claims for conduct that may be egregious, offensive to a reasonable person, and in some cases even criminal. Not only does this standard place a high burden of proof on the victim, it also has led to ambiguity in federal courts, which have inconsistently interpreted the type of conduct necessary for a violation.

While the Supreme Court in *Harris v. Forklift Systems, Inc.* listed several non-exhaustive factors to be considered in the severe or pervasive analysis, many courts have misinterpreted the opinion to require that conduct be “severe, frequent and physically threatening,” effectively requiring severe and pervasive conduct.

235 In LeGrand v. Area Resource, the Eighth Circuit has interpreted the severe or pervasive standard to be a “demanding” one, and has found that cases in which a victim was subject to demeaning remarks and even the touching of intimate body parts inadequate behavior to meet the severe or pervasive standard. The Tenth Circuit held in *Morris v. City of Colorado Springs* found that a surgeon’s inappropriate comments towards the plaintiff female nurse were insufficiently severe or pervasive enough to constitute a Title VII hostile work environment. Although she subjectively felt uncomfortable, the court reasoned that in light of the totality of the facts at hand, the workplace was not an objectively hostile environment. On the other hand, the Second Circuit held in *Howley v. Town of Stratford* that a single instance of a supervisor’s particularly offensive and extended remarks was sufficient to create a hostile work environment, when considered in the specific professional context at hand. For further contrast to each of those cases, the Ninth Circuit has held that in light of particular circumstances, even a one-time breast fondling did not meet its “extremely severe” standard for one-time physical incidents.
Some courts have set the bar so high for Title VII workplace harassment that they are even permitting conduct that would qualify as sexual assault under criminal law.\textsuperscript{237} For example, in\textit{ Garcia v. ANR Freight System, Inc.}, the plaintiff alleged that a supervisor during a training program grabbed her, asked to spend the night together, and brushed against her breast.\textsuperscript{238} Ms. Garcia left the job within only a few months, due to headaches and general nervousness caused by the incident and the environment. The court held that the three incidents did not meet the severe or pervasive standard, because they were “random, isolated, and brief.” In the court’s opinion, “even if the incidents interfered with her ability to perform the job, it cannot be said that her terms and conditions of employment had been altered or that she had been subjected to an abusive working environment.”\textsuperscript{239} This type of analysis relegates women of color, like Ms. Garcia, to the state of property who can be harassed at the discretion of their supervisor with no legal recourse, because in the court’s view, it does not alter the “terms and conditions” of her employment. This disturbingly suggests that the terms and conditions the employee signed up for may include enduring this type of treatment from her employer.

The objective component of the severe or pervasive analysis is a particular issue for women of color, as the standard assesses whether a “reasonable person” in that context would consider the harassment hostile,

\textsuperscript{237} Id. at 111. Blough v. Hawkins Market, Inc., 51 F.Supp.2d 858 (N.D. Ohio 1999): the case involved several incidents over a nine-month period, including patting plaintiff’s butt, grabbing her crotch, trying to kiss her and engaging in self-stimulation in front of her which, according to the court, “were isolated and insufficiently severe or pervasive.”; Hannigan-Haas v. Bankers Life and Casualty Co., 1996 WL 139402 (N.D. Ill. 1996): an incident where a Senior Vice President pressed himself up against the plaintiff and tried to kiss her, touch her breasts and other body parts “was insufficient as a matter of law...because it was only one act.”


\textsuperscript{239} Johnson, \textit{supra} note 234, at 113.
intimidating, and threatening.\footnote{Onwuachi-Willig, supra note 118.} While this standard is said to be objective, in reality, it is judged by a predominantly white male judiciary and thus based on their experiences and perspectives. These judges may not only have difficulty understanding how it feels to be in the position of facing multiple forms of discrimination and harassment, but also may have biases that operate to favor the male perpetrators.\footnote{Id. at 110; “...as numerous reports from October and November of 2017 demonstrate, men and women tend to define sexual harassment in very different terms. The reports also found that men struggle to define what crosses the line between flirtation or rudeness and sexual harassment, and their uncertainty about how to respond often leads to no response at all. This is particularly striking in light of surveys that suggest as many as one in three American women has been sexually harassed at work.” Leung, supra note 4, at 83.} For example, this standard does not take into account the complexities of intersectional identities, where gender and racial subordination may be compounded to create particular vulnerabilities to harassment.\footnote{Onwuachi-Willig, supra note 118, at 110. “It also disregards how a complainant’s own understanding of others’ perceptions about her group or groups, whether based on race, sex, or other identity factors like religion and age, can shape her own response to the harassment she is enduring.”} Racialized sex stereotypes can also color perceptions of witnesses, fact-finders and others, including whether the plaintiff contributed to the harassment, the extent to which she is harmed by the perpetrator, and whether enduring the conduct is within the realm of her role as worker.\footnote{Leung, supra note 6, at 82.}

Problems also arise when an outsider, a judge, carrying his or her own biases and perceptions, tries to assess what is objectively hostile in a particular work context. The baseline workplace is inherently one created and governed by white men, thus establishing the normative office environment from a white male-centric perspective, to the disadvantage of female complainants, including women of color.\footnote{See Montandon v. Farmland Industries, Inc., 116 F.3d 355, 358, (8th Cir. 1997); see also Barbour v. Browne, 181 F.3d 1342, 1349 (D.C. Cir. 1999); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010–11 (7th Cir. 1999); Vaughn v. Pool Offshore Co., a Div. of Pool Co. of Texas, 683 F.2d 922, 924–25 (5th Cir. 1982). The Tenth Circuit utilizes the term “blue-collar” workplace. See Gross v. Burggraf Const. Co., 53 F.3d 1531, 1537 (10th Cir. 1995).} For example, several circuits will identify the so called “social context” of the workplace in evaluating motivation, objective and subjective severity, and whether the conduct was unwelcome.\footnote{Onwuachi-Willig, supra note 118.; “Resilience” can be a harmful stereotype; black women are perceived to have higher pain tolerance in medical studies, which may be similar here in harassment context.} In this analysis, courts will make rampant assumptions about
crude language and behavior being more typical and therefore acceptable, and thus not rising to an offensive level within that context.\footnote{Leung, \textit{supra} note 6, at 110-11.}

In \textit{Gross v. Burggraf Const. Co.}, the Tenth Circuit held that a claim of sex discrimination must be evaluated “in the context of a blue collar environment where crude language is commonly used by male and female employees.”\footnote{53 F.3d at 1538 (finding that plaintiff being referred to as a “cunt,” “dumb” and with other profanity, as well as being referred to over the company radio with the statement, “Mark, sometimes, don’t you just want to smash a woman in the face?” are not perceived as hostile or abusive in the construction industry).} After taking into account the nature of her workplace apart from the harassment she faced, the court found that the conduct the plaintiff alleged was insufficiently severe or pervasive in light of the context.\footnote{\textit{Id.} at 1547.} This tolerance for a certain level of sexual misconduct has the effect of making women in those environments more vulnerable to harassment than their counterparts in the white-collar workforce, by forcing them to demonstrate a higher level of harassment in order to advance their claims.\footnote{Onwuachi-Willig, \textit{supra} note 118, at 110-11.} This ultimately subjects low-wage women of color to court-sanctioned harassment, and reinforces the power imbalance and inequities that already exist in those spheres.\footnote{\textit{Id.}}

Some courts have altered the approach to instead consider the harassment from the perspective of a “reasonable woman.” However, it has been argued that moving to this standard alone is unlikely to be inclusive of the experiences of women of color.\footnote{\textit{Id.} See also Saba Ashraf, \textit{The Reasonableness of the “Reasonable Woman” Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act}, 21 \textit{Hofstra Law Review} 483, 499 (1992) (arguing that courts’ usage of a “reasonable woman” standard in cases of sexual harassment “suggests that the only subjective characteristic to be ascribed to the reasonable person is the characteristic of the plaintiff on the basis of which the harassment is being claimed….If the very reason put forth for the allowance of a gender-specific reasonable person standard is that men and women have widely divergent perceptions of conduct which constitutes sexual harassment, then any time a group to which the plaintiff belongs, and the group to which s/he does not belong (based on a certain characteristic) have widely divergent perceptions of such conduct, the standard used should account for the difference in perceptions.”)}

\footnote{Onwuachi-Willig, \textit{supra} note 118.}
gender, but also any other identity traits that add dimension to her workplace experience. Yet that approach may also negatively draw on courts’ implicit biases and internalized stereotypes, which may undermine the inclusive goal by raising judges’ thresholds for the alleged behavior.

E. Claims are Blocked By an Overwhelmingly White Male Judiciary

Each of the aforementioned problems with enforcement are compounded by the fact that courts are increasingly granting summary judgment in Title VII cases, even when unresolved issues of fact exist, and when it may be very reasonable to rule in the plaintiff’s favor. This has substantially weakened harassment law because it fails to create opportunities for further exploration of the issues, as well as substantive precedent for future cases. The Supreme Court has held that whether summary judgment is appropriate is “determined by the underlying substantive law” of the claim, and that whether there is a genuine issue of fact depends on whether a reasonable jury could find for the non-moving party. The Court has also cautioned that summary judgment should not be overused so as to “denigrate” the jury’s role. This means that Title VII harassment claims, which are considered under the totality of the circumstances, are generally “improper” for resolution under summary judgment because at that stage the court is unable to adequately consider the extensive evidence involved in the assessment.

In practice, however, courts are increasingly deciding issues like the fact-intensive severe or pervasive standard at the summary judgment phase, without allowing the jury to weigh in on what they find to be objectively

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253 Onwuachi-Willig, supra note 118. (“Courts should adopt a standard based on a reasonable person with the complainant’s intersectional and multidimensional identity, rather than the ostensibly objective reasonable person standard, or even the presumably more inclusive reasonable women’s standard.”)

254 Leung, supra note 6, at 93-94 (“Courts have historically placed a lot of weight on how women are treated in relation to other women of their racial or ethnic background….Because people frequently accept the stereotypes they see in popular culture or other visual mediums as truth, they have a higher tolerance for such conduct.”)

255 Beiner, supra note 218, at 72. Summary judgment may be used as a way for courts to deal with increased Title VII dockets after the Clarence Thomas hearings. Id. at 72-73.


258 Beiner, supra note 218, at 91; Even further, the standard is being improperly applied. The Harris Court emphasized that under the totality of circumstances analysis, “no single factor is required” in order to assert a hostile environment case, yet some courts grant summary judgment in the absence of all factors being met, while many others require at least a majority of the factors to be satisfied.
reasonable. This is troublesome because a jury of peers has traditionally been the primary venue for analyzing human behavior and cultural attitudes that are inextricable from Title VII hostile work environment inquiries. The nature of the “reasonable person” standard necessarily involves these types of assessments, considering both local and professional norms as perceived by a jury of one’s peers. Additionally, plaintiffs are unable to present the way that they experienced the harassment subjectively before a jury, leaving a single elite judge to determine whether the nature of the plaintiff’s experience aligns with his or her own assumptions about tolerable behavior. Whether or not the plaintiff would ultimately win, she is entitled to present her case to a reasonable jury, rather than rely on a single judge’s perspective, typically someone imposing perspectives of both white and male privilege.

However, there are situations where courts demonstrate proper understanding of the summary judgment standard in relation to totality of the circumstances analyses. For example in Smith v. St. Louis University, the Eighth Circuit overruled the trial court’s grant of summary judgment, which had improperly required a “tangible psychological injury,” as well as rejected other conduct that presented genuine issues of material fact that should have been presented to a jury for their consideration. The court acknowledged that whether or not the plaintiff would have ultimately succeeded, “the issue at this stage is whether the plaintiff should have been given the opportunity to try.” In light of the increasingly conservative judiciary hostile to civil rights, this problem does not seem likely to be improved upon in the near future.

At the summary judgement stage, courts also analyze whether the plaintiff has “reasonably” reacted to the alleged harassment in terms of reporting the behavior under the Faragher/Ellerth affirmative defense.

259 Id. at 97-98.
260 Id. at 102.
261 Id. at 133-34.
262 Id. at 102
263 Id. at 133-34.
264 Johnson, supra note 234, at 117.
265 Id.
267 Johnson, supra note 234, at 82-83.
Faragher/Ellerth defense allows employers to escape liability if it is determined that: (1) the employer exercised reasonable care to prevent and promptly correct the harassing behavior (such as having a reporting policy or grievance procedure) and (2) the plaintiff employee unreasonably failed to take advantage of these preventative or corrective measures. This again invites judges to apply their own professional experiences and biases as to whether they would feel comfortable reporting inappropriate behavior, a perspective that is likely very different from a female plaintiff, especially a woman of color or low-wage worker. In short, potential for biases face women of color at all stages of the litigation process.

III. REFORMS PROPOSED TO PROTECT WOMEN OF COLOR

A multifaceted approach is required to address the complexity of harassment in the workplace and the very real limitations of the law protecting women of color. I propose a comprehensive reform that includes organizational reform and cultural reform. This strategy will benefit all victims of harassment and is particularly critical for women of color. I will also address proposed legal reforms that have been introduced at the federal and state level. While these reforms attempt to create stronger protections against sexual harassment, they have inadequately dealt with race or intersectional identities. Absent significant organizational and cultural changes, proposed legal remedies will continue to fail women of color.

A. Proposed #MeToo Legal Remedies Fail to Protect Women of Color

While #MeToo may have prompted more victims to seek justice and accountability, our current antidiscrimination laws are weak which means that long-term change will be limited if the movement does not lead to more significant legal reform. This particularly impacts women of color because, as described above, they are more marginalized and excluded under current anti-harassment legal protections than white women. #MeToo has inspired activists to push for legal changes addressing the need for stronger federal and state protections against sexual harassment. To examine the actual and potential policy changes following #MeToo, my research team reviewed all proposed, passed, and pending state and federal legislation that explicitly addresses sexual harassment and gender equity from October 2016 to January

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268 Id.
269 Johnson, supra note 234, at 128-29.
270 Matsuda, supra note 2, at 327.
271 See infra Part II.
Legislators in several states have cited the #MeToo movement in discussing passed legislation and California has even coined some of the new laws the “#MeToo Bills.”

Despite the surge in bills proposed, the state and federal remedies proposed thus far in the #MeToo movement have inadequately dealt with race or intersectional identities. For example, few of the bills proposed address the specific issues and legal gaps discussed above that uniquely impact women of color. Rather, a significant number of bills directly address issues that have been popularized in the media by predominantly white female activists of the #MeToo movement. From October 2016 to January 31, 2020, fewer than thirty (30) of 841 bills introduced in state legislatures dealing with workplace harassment incorporated the words “race,” “minority,” “minorities,” or “ethnicity.” Less than ten (10) of the bills introduced included the words “sexual orientation” or “gender identity.” None of the bills introduced at the state level used the word “intersectional” or “intersectionality.” None of the bills introduced at the state level incorporated the words “immigrant(s)” or “women of color.”

Instead, the proposed state and federal remedies primarily address pay equity, sexual harassment training, and prohibitions on mandatory arbitration and non-disclosure agreements. While these remedies seemingly benefit all women, many neglect to identify or adequately address problems that particularly challenge women of color. For example, numerous states have introduced legislation to end mandatory arbitration and non-disclosure agreements.

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272 My research team includes research assistant Austin Donohue and librarian Savanna Nolan; Methodology: using Legiscan, we performed a legislative search for each state for the legislative sessions incorporating bills introduced from October 2016-present (2017, 2018, 2019 & 2020 legislative sessions). Our initial search was: “sexual harassment” OR “equal pay” OR “sexual misconduct” OR “gender equity” OR “gender equality.” From there, we searched each individual bill to see if there were any parts of the bill that applied generally to harassment, equal pay, gender equity, whether it was through increased awareness, mandatory training, or some other expansion or limitation on current law.
274 Supra note 272 (methodology).
275 Id.
agreements in sexual harassment cases. From October 2016-January 31, 2020, fourteen states introduced legislation prohibiting employers (or in some cases government officials) from requiring employees to participate in mandatory arbitration. Twenty-two states introduced legislation prohibiting nondisclosure agreements for employees concerning allegations of sexual harassment. Most of the legislation proposed, however, would only limit mandatory arbitration and non-disclosure agreements for claims of sexual harassment or assault. As a result, those experiencing intersectional harassment or discrimination based on other protected characteristics, including race, ethnicity, or national origin, may still be vulnerable to these types of agreements.

By attempting to remedy discrimination against women, without considering experiences unique to women of color, or other groups with multiple marginalized identities, legal remedies will ultimately fail to root out discrimination for those individuals. A few states have attempted to offer expanded legal protections which better address intersectional identities. The New York legislature, for example, has passed a series of bills which include sweeping changes aimed at strengthening protections for workers of any protected class who face discriminatory harassment in the workplace.

The most significant changes to New York’s new legislation include:

- Eliminating the “severe or pervasive” standard from discriminatory and retaliatory harassment cases;
- Prohibiting an employer from relying upon the Faragher/Ellerth defense to avoid liability. The fact that an individual did not make a

277 In recent years, several state legislatures have sought to reinstate victims’ right to share their stories, including those of Pennsylvania, New York, and California. While these bills vary both substantively and in terms of their success in getting passed, they aim to restore public disclosure and transparency to the process.

278 J.B. Williams Harassment Dataset (2020).

279 Id.


281 Leung, supra note 6, at 85; Matsuda, supra note 2, at 325. “The actual experience, history, culture, and intellectual tradition of people of color in America” is necessary to incorporate the “bottom up” approach to legal reform.

282 Plaintiffs will need to meet the lower standard of demonstrating that the alleged harassment rises above the level of “petty slights and trivial inconveniences.” New Workplace Discrimination and Harassment Protections, NEW YORK STATE DIVISION OF HUMAN RIGHTS (Aug. 12, 2019), https://dhr.ny.gov/workplaceharassment.
harassment complaint to their employer will NOT be determinative of whether an employer is liable;

- Extending the statute of limitations to three years for sexual harassment complaints under the New York State Human Rights Law;
- Prohibiting mandatory arbitration of all claims of discrimination—an expansion from existing legislation, which prohibited mandatory arbitration of sexual harassment claims only; and
- Prohibiting employers from including non-disclosure provisions in settlement agreements for all claims of discrimination—not only sexual harassment claims—unless the condition of confidentiality is the plaintiff’s preference.

A few other states have enacted similar legislation with strengthened protections.\(^{283}\) For example, California has begun to make some incremental progress with additional legislation that will specifically reach women of color. In 2018 California passed a bill that added a section to the California Labor Code pertaining to farm labor contractors’ requirement to provide sexual harassment trainings to employees.\(^{284}\) California has the largest number of farmworkers in the United States.\(^{285}\) California also introduced legislation addressing sexual harassment training in other low-wage positions, including janitorial work and construction.\(^{286}\)

\(^{283}\) For example, Maryland has also introduced legislation that would extend certain protections for all types of harassment, not just sexual or gender based. States have also sought to cover more workers and smaller employers. Since 2018, three jurisdictions, including New York and Maryland, have passed laws extending provisions protecting employees from all types of harassment to all employers regardless of size. See Alexia Fernández Campbell, *Kamala Harris Just Introduced a Bill to Give Housekeepers Overtime Pay and Meal Breaks*, Vox (Jul. 15, 2019), https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act; Oregon extended their statute of limitations for filing any discrimination claim to five years. Oregon was the only state in 2018 or 2019 to pass a law that also extends the statute of limitations on filing any discrimination claim, not just sexual harassment. Connecticut extended the statute of limitations for filing sexual harassment to 300 days. Maryland extended the statute of limitations for filing sexual harassment claims in court to between 2-3 years.


\(^{286}\) *Id.*
passed after janitors in California, self-identified as predominantly immigrant women of color, organized well-publicized protests targeting workplace sexual harassment beginning in early 2016.\textsuperscript{287} California and other states, including Hawaii, Massachusetts, Oregon, Connecticut, Illinois, and Nevada have all passed a domestic workers’ bill of rights.\textsuperscript{288} The #MeToo movement will be unable to effectuate broader change until more of the state and federal remedies address these intersectional issues. State legislative proposals pushing for prohibitions on mandatory arbitration and non-disclosure agreements should seek to extend those protections to all forms of harassment and discrimination, including racial and intersectional forms of discrimination. Similarly, states seeking extensions to statute of limitations should propose laws that extend statute of limitations for all state-based harassment and discrimination claims. State representatives seeking progress in advancing protections against sexual harassment should also not ignore key issues that have a salient impact on women of color, including protections based on immigration status and higher wages.

Incorporating novel intersectional theories of harassment into legal remedies will also offer broader protections for more women. A doctrinal framework based on a dichotomous “because of race” or “because of sex” analysis fails to address the reality of multifactored categories, such as racialized sex harassment. Thus, these reforms will continue to inadequately address social, structural, and legal factors that perpetuate sexual harassment for women of color. In addition to sex harassment law, intersectional theories are also needed to address gaps in protection in a range of other contexts, such as racialized religious harassment, racialized disability harassment, and gender-based age harassment.\textsuperscript{289}

Although state and federal legislatures should continue to pursue reforms, new laws will do little to stop harassment against women of color until there is broad recognition of entrenched racial and economic disparities in the legal system and society more broadly, and how those disparities serve to “legitimate existing maldistributions of wealth and power.”\textsuperscript{290} Just as

\textsuperscript{287} Bernice Yeung, \textit{A Group of Janitors Started a Movement to Stop Sexual Abuse}, \textsc{Frontline} (Jan. 16, 2018), https://www.pbs.org/wgbh/frontline/article/a-group-of-janitors-started-a-movement-to-stop-sexual-abuse/. Service Employees International Union-United Service Workers West, the union which represents janitors in California, stated that the majority of 225,000 janitors in the union were immigrants, 70% of whom were women.

\textsuperscript{288} Campbell, \textit{supra} note 283.

\textsuperscript{289} Chew & Kelley, \textit{supra} note 14, at 60.

\textsuperscript{290} Matsuda, \textit{supra} note 2, at 325. “When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge.”
existing law has failed to address the unique experiences of women of color, proposed reforms will also fail absent significant institutional, cultural, organizational, and social changes.

B. Organizational Reform

In all likelihood, we are unlikely to see swift and effective legal reform that is wide-reaching enough to better protect women of color. Even without significant changes in law, employers can take steps to protect women of color from harassment. Although all organizations suffer from structural discrimination and implicit biases, they can institute changes to policies and workplace culture without waiting or relying on state or federal legislatures to act. I propose that employers use their power to create a workplace culture that values women of all races and across the organizational ladder. Specific policy changes include ending mandatory arbitration, ending secrecy around harassment, making reporting more accessible, adopting effective anti-harassment policies, and holding those who violate those policies accountable.

1. End Mandatory Arbitration Agreements.

Organizations sincerely committed to improving the workplace and ensuring basic dignity for all workers should eliminate mandatory arbitration clauses in employment contracts for all types of harassment and discrimination. As discussed above, women of color are more likely to be

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291 See infra Part II.
292 Substantive legal reform would require significant changes to how the broader culture views harassment and discrimination. See Naomi Mezey, Law as Culture, 13 YALE J.L. & HUMAN. 35, 40 (2001). “I would argue that our understandings and uses of both law and culture are plastic – they cannot help but change and evolve – and that their evolution is mutually informed.”
denied access to courts due to mandatory arbitration. These agreements favor employers and the confidential proceedings exacerbate information asymmetry by enabling organizations to hide workplace toxicity from other employees and from the public. Without public displays of accountability and a fair process, the most vulnerable victims are further deterred from speaking up, perpetuating and reinforcing the cycle of harassment. Even with needed legislative reforms, courts cannot fulfill their enforcement responsibilities unless workers are able to assert their legal rights, resulting in precedent based on judicial interpretations that appropriately advance the law.

2. **End Secrecy.**

Organizations should not force victims to remain silent on issues of discrimination and harassment. Many organizations force employees to sign employment contracts with secrecy clauses, including non-disclosure or non-disparagement agreements. Non-disclosure clauses are generally included in settlement agreements and often prohibit the employee from discussing any discrimination or harassment issues that were the subject of the settlement. As discussed above, the consequences for violating these secrecy provisions have a disproportionate impact on low-wage workers, many of whom are women of color, who cannot pay the fees associated with disclosure. These provisions can allow an employer to conceal a pervasive culture of harassment, preventing workers from knowing about workplace dangers and making them vulnerable to ongoing conduct.

3. **Make reporting more accessible and responsive to challenges facing women of color.**

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294 Id. at 209.
296 Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 249–51 (2019); It has also been argued that these agreements actually constitute impermissible retaliation against the accuser by imposing a financial penalty if they choose to speak about the experience. However courts are reluctant to take this position regarding NDAs in a settlement because they profess to encourage settlements in the interest of case resolution; see also Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 45 (2018).
Employers with inadequate or confusing reporting procedures make employees vulnerable to ongoing harassment and discrimination.297 Workplace harassment is prevalent in low wage work, where there is often no official complaints process.298 A lack of clear policies may make employees less willing or able to report harassment, particularly if the harassing employee is their manager, in their supervisory chain or a senior executive.299 Language barriers may also prevent non-English speakers from reporting incidents of workplace harassment, making reporting difficult for particularly vulnerable populations.300 Employers should regularly inform employees that reporting any incident of harassment or discrimination is encouraged and make the reporting policies widely available to all employees, not just managers, and also make those procedures accessible to all employees, including non-English speakers or employees with disabilities.301 The reporting process itself should clearly indicate the reporting channels for individual employees and should provide multiple reporting options for employees. For example, some companies are creating confidential reporting channels to the board of directors for sexual harassment allegations against senior management, as often the normal channels lead to those same individuals. Other companies are creating specific reporting email inboxes or hotlines that are monitored by appropriate personnel. Many organizations are also establishing accessible, neutral and confidential ombuds offices to help employees discuss their concerns and navigate various reporting options.

4. End shallow compliance mechanisms and adopt practices that work.

Employers should develop robust new practices that ensure meaningful compliance with workplace harassment and discrimination policies. Currently, many organizations have harassment and discrimination policies that focus on minimizing employer liability.302 This focus is

298 Id.
299 Feldblum & Lipnic, supra note 4.
300 “For women who don’t speak English… it can be challenging to know how to report something up the chain of command.” Malone, supra note 20.
301 For example, companies can prominently display the policy in communal workspaces within the organization and send quarterly emails to all employees reminding them of the reporting process.
misplaced, as it does not serve to educate employees on how they and others experience discrimination in the workplace, at both a micro and macro level, nor does it attempt to resolve those disparities. The focus should be less on employer liabilities and how to avoid them, and more on the behaviors and communications that can create a workplace culture free of harassment and bullying.

In order to improve workplace practices as a whole, companies can incorporate performance criteria for incentive-based compensation centered on improving workplace practices. In addition, employers should incorporate policies that will encourage bystanders to feel responsible for workplace culture and encourage them to intervene on behalf of victims and report incidents. Employer compliance procedures should provide specific details as to how the company will investigate the complaint, and the timeline for the investigation. Each complaint should have robust documentation and tracking of allegations, including maintaining records for a minimum of 3-5 years after an employee has left the company. Employers must also ensure that perpetrators of workplace harassment and discrimination will suffer consequences. For example, companies can incorporate clear penalties, including termination or reductions in future compensation for perpetrators.

C. Cultural Reform

Lastly, cultural reform is required to ensure the legal and organizational changes are effective and sustainable over time in order to make a lasting impact on the lives of women. This includes slowly breaking down both the obvious and subtle forms of racism and sexism that are deeply ingrained into our society and institutions. Equity and spreading resources and dignity will shift the current status hierarchy and disrupt existing privileges (white supremacy and patriarchy) that will no doubt lead to some backlash. We can only attempt to be conscious of this and minimize it to the extent possible. Other concrete steps that will lead to broader cultural change include: having a better representation of women of color in leadership who can identify with intersectional issues; ensuring race and gender pay equity and minimum living standards so women of color are less often in subordinate positions; changing norms around harassment starting with our youth; and strengthening collective efforts so that women of color have more power in the labor market and individual workplaces.

1. Women of Color in Leadership

It is essential that women of color are included in leadership positions to enact structural change. At the legislative level, while there have been recent changes to the number of women elected to public office, there is still a significant gap in the number of women of color elected officials. Major executives at prominent businesses in the U.S. continue to be predominantly white and male-dominated. Women of color are similarly underrepresented in the judiciary. It is unrealistic to expect that individuals with little to no understanding or experience with intersectional identities would be able to resolve these issues or to prioritize them.

Moreover, there is a historically deep rooted cultural acceptance of inappropriate sexual behavior by men in power, particularly elected officials and senior executives in multi-million dollar organizations. This culture of inappropriate behavior has not escaped the judiciary, with evidence to suggest that judges engage in sexually harassing behavior. It is unsurprising, therefore, that judges would be dismissive or fundamentally misunderstand claims of sexual harassment, and even more so intersectional harassment, granting summary judgment more frequently in such cases. There is little hope of change without first removing perpetrators of sexual harassment from power. Women of color are uniquely qualified to understand how individuals with intersectional identities experience harassment and

308 Beiner, supra note 218, at 128-29.
discrimination, and so are better suited to propose intersectional remedies to harassment and discrimination. As such, organizations and institutions must elect, appoint, and hire women of color to public office, as senior executives, and as state and federal judges.

2. Pay Equity and Living Wage

It is also crucial to eliminate the structural issues that contribute to the gender and racial wage gaps, which have a direct effect on harassment and discrimination in the workplace. Women who work in positions making less than $15 an hour are more likely than any other demographic to suffer from workplace sexual harassment, and women of color are overrepresented in low wage occupations such as domestic work, retail, and service work. Equal pay has been one of the most prominent topics of the #MeToo movement, and has been widely discussed by women in Hollywood through #TimesUp, and also emphasized by the predominantly white organizers of offline activism, including the Google Walkout.

A significant number of bills introduced since #MeToo have sought to identify gaps in state law that are often barriers to equal pay. While every state has laws prohibiting pay discrimination, many bills introduced after October 2017 in state legislatures sought to expand the scope of protections by targeting areas of workplace discrimination that are often barriers to equal pay. For example, bills were introduced that sought to guarantee equal pay for comparable work or sought to prohibit workplace policies that discourage pay discussions in the workplace. Other bills sought to prohibit employers from screening job applicants based on wage or salary history.

310 Yuki Noguchi, #MeToo Awareness Sharpens Focus on Pay Equity, NPR (Mar. 8, 2019), https://www.npr.org/2019/03/08/701169339/-metoo-awareness-sharpens-focus-on-pay-equity; Wakabayashi et al., supra note 144.
312 J.B. Williams Harassment Dataset, supra note 272; Alabama, Colorado, Connecticut, Florida, Michigan, Mississippi, Virginia introduced laws seeking to guarantee equal pay for equal work.
313 Id.; Hawaii, Illinois, New Jersey, New York, Virginia, Arizona and California introduced bills that would prohibit employees from screening job applicants for past salary history.
Although legislative proposals targeting equal pay would seemingly benefit all women, these bills do not address other wage gaps that have an indirect effect on sexual harassment for women of color, including minimum wage laws. While forty-one (41) states have introduced legislation discussing equal pay in state legislatures since October 2016, only seven states and the District of Columbia have passed $15 minimum wage laws. Cultural changes in institutions regarding wage disparities are necessary to reduce workplace harassment and discrimination for women of color. Absent state measures, employers can take action by instituting policies mandating living wages to all employees, and can also stop requesting prior salary history from prospective employees, which perpetuates gender and racial wage gaps.

3. Change Norms Starting with Youth

In order to cease the ongoing social tolerance for sexual harassment, the culture and norms around harassment and sexual misconduct must change for people of all ages, but starting with our youth. Numerous studies have shown that harassment and discrimination for many intersectional identities begin in early childhood. Moreover, the disparity between the rates of sexual harassment for women of color and white women begin in adolescence – by middle school, women of color are already more likely to experience higher rates of sexual harassment, and more aggressive types of sexual harassment, than their white peers. Children may be permitted to engage in harassment and discrimination at school, and teachers and administrators, who are unable or untrained in handling these types of incidents, may fail to punish or adjust those behaviors, allowing the culture to persist.

314 Id.
316 Nearly half of school children in grades seven through twelve (48%) report having been subject to sexual harassment...many described emotional, physical, and educational responses – not wanting to go to school, feeling sick to their stomach, having trouble sleeping, altering the path they took to school, behavior problems at school, and quitting activities at school. Ann McGinley, Schools as Training Grounds for Harassment, 2019 U. CHI. LEGAL F. 171 (2019), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1644&context=uclf; see Dorothy L. Espelage et al., Understanding Types, Locations, & Perpetrators of Peer-to-Peer Sexual Harassment in U.S. Middle Schools: A Focus on Sex, Racial, and Grade Differences, 71 CHILD. & YOUTH SERV. REV. 174 (2016).
317 Espelage et al., supra note 316, at 178, Table 2.
318 McGinley, supra note 316.
Parents, educators, and administrators must have real conversations with children about conduct and be adequately trained to deal with incidents of harassment and discrimination among children. They should also implement policies and reporting procedures for students to identify these types of behaviors, so they can be addressed. Children should be regularly educated at home and at school about inappropriate conduct, insensitive comments, and intolerance for discrimination for all identities, including race, gender, sexual orientation, and national origin.

4. Strengthen Collective Power

Collective action and unionization are necessary tools for women of color to push for the legal and organizational changes discussed above. By explicitly acting in concert with each other, women of color in specific industries can redistribute power and fight to attain expanded workplace protections and more acceptable terms and conditions of employment. Leadership is needed to coordinate protests to show how race, gender and economic power intertwine to create the conditions for sexual harassment, while also proposing systemic solutions aimed at correcting that power imbalance.319

#MeToo has demonstrated how collective action can lead to broader structural change. Some states have already taken steps to address workplace issues in response to offline social movement and protests organized by women of color in these respective states. For example, in 2018, 2019, and 2020 nine (9) bills were introduced in state legislatures that sought to require hotels to provide panic buttons for hotel workers.320 From 2005 to 2015, hotel and restaurant workers filed at least 5,000 sexual harassment complaints with the Equal Employment Opportunity Commission — more than from any other industry.321 These bills were introduced in states, including California and Illinois, after mass protests in 2018 and 2019 organized by union workers, predominantly women of color, who represent the hospitality industry.

319 Marion Crain & Ken Matheny, Sexual Harassment and Solidarity, 87 GEO. WASH. L. REV. 56 (2019).
320 J.B. Williams Harassment Dataset, supra note 272. These bills were introduced in California, Illinois, New Mexico and New Jersey.
CONCLUSION

Title VII prohibits discrimination and harassment in the workplace, yet the existing legal framework is limited, leaving many women unprotected, particularly women of color. #MeToo brought renewed attention to this issue, demonstrating the high rates of harassment that persist in the workplace, yet women of color were largely left at the margins of the movement. As a consequence, the federal remedies proposed post-#MeToo are insufficient, as they fail to address how intersectional identities play a role in harassment. This is a missed opportunity. While advocates should continue to fight for needed legal reform, a more comprehensive approach is required, including organizational reform and broader cultural reform in order to make a real and lasting impact on the lives of women of color. Absent significant organizational and cultural changes, proposed legal remedies will continue to fail.