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Mind the Gap(s): Mitigating Harassment in a Post #MeToo Workplace

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MIND THE GAP(S): MITIGATING HARASSMENT IN A POST #METOO WORKPLACE

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In a post #MeToo workplace, harassment remains pervasive, and harassment law still fails to provide protection for the harms experienced by many workers, particularly those in the most vulnerable jobs. Even when reform efforts are introduced through legislation, courts, and agency guidance, it often does not provide greater power, autonomy, and dignity to women in ways that would more meaningfully protect them from workplace abuse. We are the first to create a database of state legislation, including over 3,000 bills, which allows us to empirically analyze the extent to which lawmakers comprehensively address harassment following the rise of the #MeToo movement. We assess comprehensiveness by examining how responsive legislation is to existing gaps in legal protection during the five years following the 2017 tweet that took #MeToo activism global, relative to the 2016 baseline period. We found that states introduced a wide breadth of reforms to combat harassment and gender inequality, including some changes that address longstanding gaps in legal protection. Gaps persist, however, and in some cases worsened post #MeToo. Going forward, reform efforts by state legislatures – and all legal stakeholders – will prove most effective if they move away from narrow conceptions of sexual harassment and follow the voice of workers, pursuing a broad, multi-layered agenda around gender equity that is responsive to the realities of our evolving workplace and society.

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INTRODUCTION

Tarana Burke coined the phrase "Me Too" in 2006 in support of Black women and girls of color who had survived sexual violence, encouraging them to share their stories despite the many pressures they faced to remain silent.[4] Social media galvanized the movement in 2017 after Alyssa Milano took to Twitter posting "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."[5] The #MeToo[6] hashtag was used 19 million times between 2017 and 2018.[7] Sustained digital participation increased the movement's visibility and sustained its momentum beyond the boom and bust trend typically observed on social media.[8] Online engagement surrounding the #MeToo movement also served as a catalyst for offline action, evolving into highly publicized protests, employee walkouts, and historic strikes.[9] For example, in 2018, McDonalds employees organized a historic multi-state strike against the company's sexual harassment policies.[10] Protesting workers wrote "#MeToo" on posters and covered their mouths with tape, bridging the gap between social media activism and traditional means of protest.[11] After union-led campaigns and employee-staged walkouts, prominent companies in industries from tech to hospitality changed existing workplace policies, such as mandatory arbitration.[12]

Subsequently, the hashtag #TimesUp, referencing the Time's Up Legal Defense Fund (TULDF), was created to solve the issues #MeToo revealed.[13] TULDF sought to support women of color and low-wage workers specifically, raising over $24 million to connect these women to attorneys and media specialists.[14] The movement also brought an increase in enforcement activity at the Equal Employment Opportunity Commission

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[4] Jamillah Williams et al., *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371 (2019).

[5] Alyssa Milano [@Alyssa_Milano], *If You've Been Sexually Harassed or Assaulted Write 'Me Too' as a Reply to this Tweet. Https://T.Co/K2oeCiUf9n*, TWITTER (Oct. 15, 2017), https://twitter.com/Alyssa_Milano/status/919659438700670976.

[6] Williams et al., *supra* note 4, at 374.

[7] *Id.*

[8] *Id.*at 380.

[9] Id. at 383

[10] Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1849.

[11] *Id.*

[12] Id. at 1847, 1850.

[13] Williams et al., *supra* note 4, at 380.

[14] *Id*. at 384.

("EEOC"), the government agency responsible for enforcing workplace discrimination law. In 2018, the EEOC reported that sexual harassment charges were up nationwide – the first increase observed in a decade. In 2018, the EEOC received 7,609 sexual harassment charges compared to the 6,696 charges received in 2017. The EEOC recovered almost $104 million more for those with sexual harassment claims between 2018 and 2021 than between 2014 and 2017. The agency capitalized on #MeToo momentum by increasing lawsuits to enforce sexual harassment law and holding more employers accountable.

This widespread activism also influenced legislatures. In the five years after #MeToo went viral, thousands of bills were introduced – mainly at the state level. These bills covered a wide range of topics related to gender equity in the workplace, including harassment training, nondisclosure agreements, forced arbitration for harassment claims, pay equity, and leave law. This surge of legislative activity was aimed at eliminating harassment and addressing gender equity in the workplace.[15]

While it was clear that legislatures were becoming more attentive to gender equity following the increased activism, it remained unclear whether the new reforms were getting to the root of the issues that cause harassment, and addressing the legal gaps that allow harassment to persist. #MeToo media coverage tended to focus on certain hot topics affecting the elite actresses who came forward, such as the nondisclosure agreements that kept them silent. We argue that a more holistic approach is required both for progress over time, and to reach a broader range of working women. This is not unlike the "Swiss Cheese Model" adapted for use to control the spread of infection during the COVID-19 pandemic.[16] The Swiss Cheese model of risk reduction (SCM), developed by James Reason in the 1990s, visually demonstrates how a variety of strategies and/or actors can work together to reduce risk of harm.[17] In the context of harassment, no single intervention (i.e., restricting NDAs or increasing training) can prevent all harassment, but multiple interventions can make a lasting difference. This is particularly true when the approach aims to reduce gendered power dynamics that make harassment more likely. See Figure 1 (p. 5).

Figure 1. "Swiss cheese" Model for Reducing Harassment

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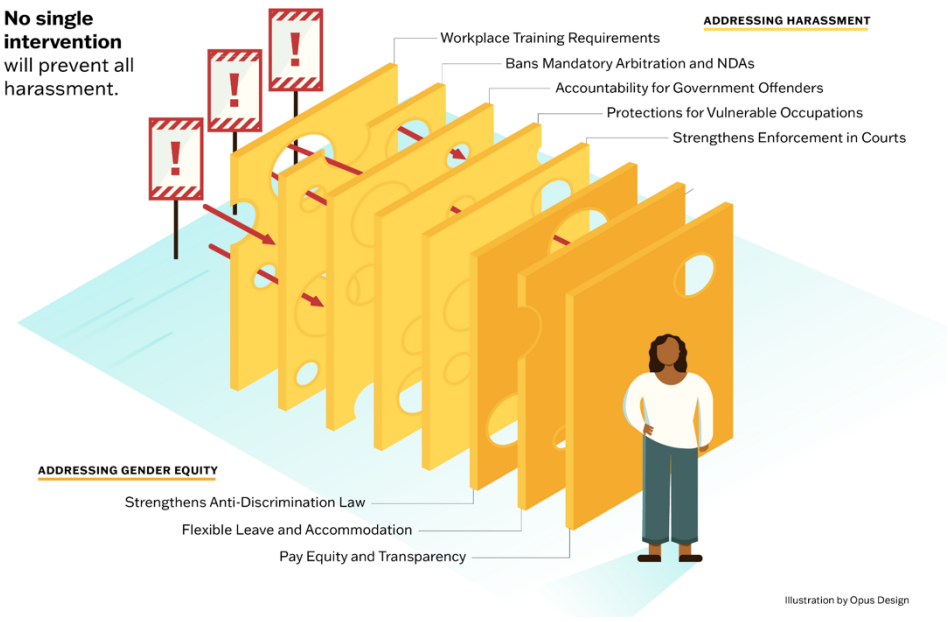
[15] *Id*. at 385.

[16] Williams & Tippett, *Five Years On*; *see also Preventing COVID-19 Using the Swiss Cheese Model*, COXHEALTH (Feb. 22, 2022), https://www.coxhealth.com/newsroom/preventing-covid-19-using-swiss-cheese-model/.

[17] James Reason et. al., REVISITING THE « SWISS CHEESE » MODEL OF ACCIDENT, (2006).



To empirically analyze the extent to which lawmakers were comprehensively addressing harassment and gender equity following #MeToo, our team of researchers and lawyers at Georgetown University collected and coded over 3,000 federal and state bills introduced from 2016-2022, some of which passed into law. We also analyzed how timing, geography, and political factors shaped the legal activity following #MeToo, relative to the 2016 baseline period. Our dataset is defined broadly to include not only all harassment specific legislation, but also legislation that addressed other gender equity issues including pay equity, expanded Title VII coverage, leave and accommodation, and occupational protections that address intersectional subordination. We found that the variety of legislation introduced by state legislators was consistent with the "Swiss Cheese Model" of risk reduction, however, there was wide variation across states.

This Article focuses primarily on state legislation because virtually all reform activity during the sample period occurred at the state level. Harassment law and gender-based reforms more broadly tend to follow a similar pattern of state-led rights protection and/or enhancement due to the gradual trend of federal courts contracting civil rights in the workplace among other venues. Federal lower courts, in particular, have increasingly issued employer-friendly Title VII and ADA decisions that have both formally and informally codified into law.[18] Congressional gridlock has also

[18]Ann McGinley, Laboratories of Democracy: State Law as a Partial Solution to Workplace Harassment, 2023; Ann McGinley, Introduction: A Symposium on Enhancing

led to a standstill with respect to anti-harassment legislation.[19] Moreover, extreme partisanship in both Congress and the judiciary diminishes the likelihood of relying on Congress to act as a check when courts roll back rights, as they have in the past.[20] Only six federal reforms related to harassment and workplace gender equity passed during the five years following #MeToo; of those, only two had system-wide effects – the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 and the Speak Out Act of 2022. By contrast, states have been a hotbed of legislative activity.

A close look at state legislative activity reveals the state-specific innovation and experimentation apparent in the variety of bills introduced. States remain important "laboratories of democracy," as Justice Brandeis coined in 1932, for achieving nationwide rights' protection. Nevertheless, the path from state-specific legislative innovation to systemic federal reform is not linear. Rather, broader effects depend on state-specific efforts influencing a combination of players from different arenas including state courts, state agencies, federal courts, executive action, and even voluntary action by private entities.

We hypothesized that post #MeToo, the most significant activity at the state level would focus on harassment training and nondisclosure agreements, which were scrutinized in the extensive media coverage. While high-profile support for these kinds of reforms did catch the attention of state legislators, with many bills introduced and passed, state legislators also introduced and passed many bills addressing systemic issues such as pay equity, leave law, and reforms to fill gaps in protection left in the legal landscape prior to #MeToo.

While media coverage of the #MeToo movement may have overlooked many of the biggest and more systemic obstacles to workplace gender equity, such as lack of coverage under anti-discrimination law, employer retaliation, Title VII interpretation, and underenforcement, many states began to tackle these issues. We argue that states must continue this momentum not only to mitigate harassment more broadly, but also to address intersectional issues of economic precarity and racism that make harassment more frequent and particularly harmful to low-wage workers who are disproportionately women of color.[21] For example, while women of color

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Civil and Constitutional Rights Through State and Local Action, 2022; Ann McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 1993.

[19] McGinley, Laboratories of Democracy, at 251.

[20] Id.

[21] Jamillah Bowman Williams & Elizabeth Tippett, Five Years on, Here's What #MeToo Has Changed, POLITICO, 2022.

face higher rates of harassment due to compounding systems of subordination, most of the legislation proposed only strengthens protection for claims of sexual harassment or assault, and not intersectional subordination based on sex and race that is a common experience for women of color.[22] As a result, those experiencing intersectional harassment or discrimination based on multiple protected characteristics, including race, ethnicity, or national origin, are left vulnerable.[23] By attempting to remedy harassment 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 and harassment for those individuals, leading to underenforcement.

Nonetheless, our data reveals a broad array of state bills over a sustained period of time, which is a promising development. Complex social problems like harassment have numerous causes, and no single reform will prevent all instances of harassment, encourage employers to respond appropriately, or ensure a just legal remedy for the harm. We expect the net effect of the legislation, along with the social and attitudinal changes resulting from the #MeToo movement, to be positive and lasting. Not all legislation, however, had an equal chance of success to reduce broader trends of harassment. A close examination of the proposed and enacted legislation presents a mixed picture, which we discuss in depth in the empirical analysis that follows.

This Article is organized as follows: Part I explains how and why harassment persists today by looking at its historical origins, the current landscape, and how harassment relates to a growing trend of workplace violence. In Part II, we will discuss the specific gaps in legal protection that allow harassment and gender disparities to persist. In Part III, we offer original empirical analysis that illustrates trends in the anti-harassment and gender equity legislation that emerged during the five years post #MeToo. Finally in Part IV, we discuss the implications of our data for courts, lawmakers, and agencies, including what is still needed to mitigate workplace harassment post #MeToo.

I. THE PERSISTENT NATURE OF WORKPLACE HARASSMENT

This Part provides an overview of the underlying social determinants that yield high rates of workplace harassment over time.

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[22] Andrea Johnson et al., *#MeToo Five Years Later: Progress & Pitfalls in State Workplace Anti-Harassment Laws* 9 (Oct. 2022), https://nwlc.org/wp-content/uploads/2022/10/final_2022_nwlcMeToo_Report.pdf.

[23] Johnson et al., *supra* note 22.

A. The Historical Origins of Harassment

As various scholars have argued, harassment is not principally about sexual desire, but rather a reflection of the distribution of power within the particular workplace and society more broadly.[24] It is a form of social behavior that reflects the dominant group's, in this case men's, ability to exclude, marginalize, or dominate less powerful individuals within the workplace.[25] It can often function to undermine the competence and confidence of marginalized groups, interfere with work performance, while also setting the norm of what is accepted or acceptable behavior.[26] Even harassment that is motivated in whole or in part by sexual desire reflects the perpetrator's power to impose his demands and desires upon others who are poorly positioned to rebuff those demands without consequence.[27]

Harassment therefore serves as a mirror for systemic hierarchy, within the microcosm of the workplace and within the culture and larger historical context of a nation. The subordination of women was a central feature of nineteenth and twentieth century law and work arrangements. Women lost their legal personhood upon marriage through a principle known as coverture, where they could then only acquire property or sign contracts through the legal personhood of their husbands.[28] Women did not secure the constitutional right to vote until 1920.[29] Many factories in the early decades of the twentieth century were explicitly segregated by gender, with women and men working in separate departments at separate pay rates, eating in separate cafeterias and even entering and exiting from different entrances or

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[24] *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 18 (1979) (characterizing harassment as an outgrowth of women's limited opportunities and confinement to certain sex-segregated occupations, arguing that "if part of the reason the woman is hired is to be pleasing to a male boss, whose notion of a qualified worker merges with a sexist notion of the proper role of women, it is hardly surprising that sexual intimacy, forced when necessary, would be considered part of her duties and his privileges"). *See also*, Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It (the Ruth Bader Ginsburg Lecture)*, 29 T. JEFFERSON L. REV. 1, 5 (2006) (criticizing "the prevailing conception of harassment defines it first and foremost as an abuse of women's sexuality"); Elizabeth Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. LAB. & EMP. L. 481, 485 (2018) (critiquing overemphasis on sexual conduct in harassment training).

[25] Schultz, *supra* note 26, at 24, note 122.

[26] *Id.* at 20.

[27] MACKINNON, *supra* note 24, at 18, 25.

[28] AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 9 (1998).

[29] U.S. Const. amend XIX.

on separate schedules.[30] Until 1974, banks could deny loans and credit cards to married women unless their husbands co-signed the application.[31] The legal and social foundation of the United States is one where men have power over women, are superior in status, and are free to control them.

America's history of slavery, segregation and white supremacy is also inextricably intertwined with the history of work, which shapes the experiences of Black and other racialized women.[32] Slavery was in part a workplace hierarchy predicated on violence, and white supremacy.[33] Black women were chattel assets, whose purpose in the economy and social order was to labor and serve White slave masters and their families. White slave masters frequently raped them, bred them to produce more workers, and subjected them to physical and psychological terror to maintain control. After slaves were emancipated, segregation became a workplace reality, with Black women being relegated to the most menial and low wage jobs.[34] Title VII of the Civil Rights Act of 1964 offered reform, but it did not fully dismantle job segregation and workplace hierarchies predicated on White privilege.[35]

Immigrant workers in the United States have also faced shifting, yet persistent forms of discrimination. Although immigrants in the nineteenth and early twentieth century received privileged treatment compared to Black

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[30] See, e.g., GERALD ZAHAVI, WORKERS, MANAGERS, AND WELFARE CAPITALISM: THE SHOEWORKERS AND TANNERS OF ENDICOTT JOHNSON, 1890-1950 82–84 (1988) (describing a female only stitching room); SAMUEL CROWTHER, JOHN H. PATTERSON: PIONEER IN INDUSTRIAL WELFARE 209–10 (1923) (referencing separate women's and men's cafeterias); WILLIAM TOLMAN, INDUSTRIAL BETTERMENT 6 (1900) (referencing staggered shifts).

[31] Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f.

[32] NELL IRVIN PAINTER, SOUTHERN HISTORY ACROSS THE COLOR LINE 21 (2002) ("Historians already realize that including enslaved workers as part of the American working classes recasts the labor history of the United States").

[33] EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 130 (2016) (role of "calibrated torture" in control of work on plantations); CAITLIN ROSENTHAL, ACCOUNTING FOR SLAVERY: MASTERS AND MANAGEMENT 101 (2018); PAINTER, *supra* note 34, at 6 ("slavery rested on the threat and the abundant use of physical violence").

[34] *See*, *e.g.*, Griggs v. Duke Power Company, 401 U.S. 424, 430 (1971) (case involving formerly segregated power plant); KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT 60 (2012) (quantifying rates of racial work segregation over several decades). *See generally,* HARRY HUDSON, WORKING FOR EQUALITY: THE NARRATIVE OF HARRY HUDSON (Randall L. Patton ed., 2015) (describing his experience working at a previously segregated Lockheed Martin plant); RANDALL L. PATTON, LOCKHEED, ATLANTA, AND THE STRUGGLE FOR RACIAL INTEGRATION (2019) (history of employment practices at Lockheed Martin).

[35] STAINBACK & TOMASKOVIC-DEVEY, *supra* note 36, at 147, 168.

workers,[36] there is a long history of discrimination and subordination of immigrant populations, particularly Latino and Asian Americans. These include, for example, the Chinese Exclusion Act[37] and the internment of Japanese Americans during World War II, which kept Asian women workers excluded, marginalized, and exploited.[38] Continuing subordination of both Black and immigrant women is also evidenced by the exclusion of domestic and agricultural workers from the 1938 Fair Labor Standards Act, and the 1935 National Labor Relations Act.[39] These positions are overwhelmingly occupied by immigrant women and Black women, and many are still excluded from these legal protections today making them more vulnerable to discrimination and abuse. Further, while Title VII prohibits discrimination on the basis of national origin, employers are permitted to discriminate against workers on the basis of immigration status.[40]

Workers who belong to more than one subordinated group—such as Black women, immigrant women of color, or Black immigrant women—face compounded marginalization, as Kimberle Crenshaw originally argued in her landmark article on intersectionality.[41] Such discrimination is also replete within the historical record, where a combination of race and sex-based discrimination operated in tandem. For example, the legislative history of Title VII suggests "sex" was included as a protected category based in part on arguments that protecting race but not sex would give Black women an

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[36] For example, European immigrants at the start of the 19th century could be bound to indentured labor – a contract-based term limited form of service – but were not enslaved. ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870 139 (2014) (describing indentured servitude). *See also* Lea VanderVelde, *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE UNIV. L. REV. 727, 758 (2016) (describing the racial hierarchy of workplace violence).

[37] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

[38] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); Korematsu v. United States, 323 U.S. 214 (1944).

[39] Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 637 (2019); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987); Ellen Mutari, *Brothers and Breadwinners: Legislating Living Wages in the Fair Labor Standards Act of 1938*, 62 REV. SOC. ECON. 129, 133 (2004); Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act of 1938*, 26 POLITY 635, 643 (1994).

[40] 8 U.S.C. § 1324a; Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 147–48 (2002).

[41] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

advantage over White women.[42] Likewise, in the 1970s debates over whether to finally include domestic workers in the federal minimum wage law, opponents painted the work itself, performed primarily by women of color, as undeserving of minimum wage, and of the White housewives who employed them as unqualified to calculate wages and hours.[43]

Throughout US history, women and people of color have also been vastly underrepresented in Congress, as well as within state legislatures.[44] Underrepresentation of these groups as lawmakers—both now and historically—reinforce hierarchies and subordination over time, by affecting which types of bills get introduced and passed, and which end up on the cutting room floor. Representation can shape values, priorities, and debate around who is deemed worthy of protection, in what ways, and whether legal interventions are needed to reduce inequality. Men, specifically White men, are also markedly overrepresented in the judiciary, where the laws are enforced.[45] The life experience and perspectives of the judiciary affects their approach to cases and the parties with whom they identify. Biases influenced by one's social position can then get baked into precedent, which later constrains and influences subsequent rulings.[46] Thus, lack of representation in both legislatures and courts can facilitate and exacerbate gaps in the law, ultimately failing to provide accountability, and leaving women workers vulnerable to exploitation and abuse.

B. The Current Landscape of Workplace Harassment

Current national statistics reflect the continued influence of these historical patterns of subordination. Hispanic women earn fifty-seven cents

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[42] Robert C Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & LAW 156 (1997).

[43] Premilla Nadasen, *Citizenship Rights, Domestic Work, and the Fair Labor Standards Act*, 24 J. POL'Y HIST. 74, 81–82 (2012).

[44] Government officials are the ultimate form of leadership in our country, and the sexual harassment allegations that came out in 2017 against a multitude of public officials did not occur overnight. Rather, they were the result of years of government leaders setting a workplace status quo where holding offenders accountable was not the norm or even necessarily possible. Jamillah Bowman Williams, *#MeToo and Public Officials: A Post-Election Snapshot of Allegations and Consequences* 8 (Nov. 2018) https://www.law.georgetown.edu/wp-content/uploads/2018/11/MeToo-and-Public-Officials.pdf.

[45] Laura Moyer et al., *"Better Too Much Than Not Enough": The Nomination of Women of Color to the Federal Bench*, 43 J. WOMEN, POL. & POL'Y 363 (2022).

[46] SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 133 (David Kairys ed., 2017).

for every dollar earned by White, non-Hispanic men.[47] In 2020, Black women earned sixty-four cents for every dollar earned by White, non-Hispanic men.[48] Over time, this gap fuels income and wealth disparities; Black women are estimated to lose nearly 1 million dollars over the course of their careers.[49]

Relatedly, broad societal hierarchies and unevenly distributed power within organizations also affect workplace culture, behavior and policies.[50] Power can take many forms; however, economic power or lack thereof tends to be at the foundation. Thus, when one's labor is devalued, as occurs most substantially with Black and Hispanic women wage gaps compared to White, non-Hispanic men, this fundamentally affects the bargaining power one has with respect to protecting themselves from harassment at work.[51] Economic disparities in bargaining power are compounded by continuing racism and sexism in low-wage industries where women of color are overrepresented.[52]

The EEOC has published a list of workplace conditions that increase the likelihood of harassment. The vast majority of the conditions noted are common features of low-wage industries.[53] For example, low wage and precarious industries such as hospitality, food service, modeling, agriculture, construction, and custodial work often: (1) lack effective policies and procedures, (2) have minimal to no oversight, (3) require working in isolation, and/or (4) prioritize customer and client well-being over the worker.[54] It is thus unsurprising that the women working in these industries experience the highest rates of harassment, among other forms of workplace violence.[55] For example, surveys have found that 65% of casino workers reported unwanted touching by guests, while over half of restaurant workers

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[47] *Women of Color and the Wage Gap*, CENTER FOR AMERICAN PROGRESS (Nov. 17, 2021), https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/.

[48] *Id.*; *see also* Ariane Hegewisch et al., *Black Women to Reach Equal Pay with White Men in 2130*, IWPR (Aug. 13, 2020), https://iwpr.org/black-women-to-reach-equal-pay-with-white-white-men-in-2130/.

[49] *Women of Color and the Wage Gap*, *supra* note 49.

[50] Research shows that the strength with which leaders prevent and respond to harassment in the workplace corresponds to how frequently harassment occurs in that workplace. Junghyun Lee, *Passive Leadership and Sexual Harassment: Roles of Observed Hostility and Workplace Gender Ratio*, 47 PERS. REV. 594 (2018).

[51] Ditkowsky, #UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers (2019)

[52] Ditkowsky, #UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers (2019); NWLC, Out of the Shadows (2018).

[53] NWLC, What Works at Work: Promising practices to prevent and respond to sexual harassment in low-paid jobs (2019).

[54] Id.

[55] Angela Onwuachi-Willig, *What About #UsToo: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105 (2018).

reported sexual harassment as occurring on a weekly basis.[56] One casino worker described how the harassment was intertwined with her wages, stating how a guest wanted to "put the tip on [her] ass," and took back the tip when she refused.[57] Another worker, this time at a hotel, described having to jump over the beds to escape the room of a guest who exposed themselves to her while requesting shampoo.[58] It appears that COVID-19 has only worsened these rates; one study found that 54% of tipped workers, including hospitality and food service, reported an increase in hostility and harassment as they enforced COVID-19 related policies.[59]

Harrowing accounts of harassment are also extremely prevalent among domestic workers and farmworkers, who are among the least protected due to the working conditions and the historical factors discussed above. Studies have found that 48% of domestic workers have had clients expose themselves, while 80% of farmworkers have experienced some form of sexual violence while at work.[60] In many of these cases, low-wage workers' bargaining power is further diminished by language barriers or distrust of government agencies due to immigration status.[61]

Gender and racial hierarchies also shape who has access to leadership positions that hold power in the workplace and in government. For example, women and people of color remain vastly underrepresented within business leadership ranks.[62] These statistics remain stubbornly sticky despite nearly 60 years of antidiscrimination law under Title VII. Reviewing decades of national employment data, sociologists Kevin Stainback and Donald Tomaskovic-Devey, found that Black men and women, as well as White women, made far fewer gains in managerial jobs than in professional jobs.[63] White men retained a disproportionate share of managerial jobs, which these authors attributed to continued White male advantage that led them to be "pushed up in organizational hierarchies." [64]

Women also face gender-based harassment even when they break social/historical norms and move up to the top of the power hierarchy. In these cases, social/historical hierarchy is disrupted and men resist and engage in demeaning behaviors to restore the status quo. Sociologist R.W. Connell

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[56] NWLC, What Works at Work, (2019), at 3.

[57] Ditkowsky, #UsToo, (2019).

[58] Id.

[59] UC Berkeley Food Labor Research Center, No Rights, Low Wages, No Service, (2021); One Fair Wage, Take off your mask so I know how much to tip you., (2020).

[60] NWLC, What Works at Work, (2019), at 3.

[61] Id. at 4.

[62] Kimberly A Houser & Jamillah Bowman Williams, *Board Gender Diversity: A Path to Achieving Substantive Equality in the United States*, 63 WM. & MARY L. REV. 497 (2021).

[63] STAINBACK & TOMASKOVIC-DEVEY, *supra* note 36, at 31, 35.

[64] *Id.* at xxii.

might characterize the problem in terms of "hegemonic masculinity": "practice[s…that allowed men's dominance over women to continue," that "embod[y] the currently most honored way of being a man" and "requir[e] all other men to position themselves in relation to it, and ideologically legitimat[e] the global subordination of women to men."[65] This type of harassment is not necessarily sexual in nature and can consist of taunting, insubordination, and use of demeaning slurs and images. This is less discussed than the harassment that is driven by sexual desire and that which targets low status women. However, at its core, it is driven by systemic power hierarchies that exploit women or put them "in their place," similar to other types of harassment.[66]

A poignant example are the numerous accounts of workplace harassment in law enforcement and the military. In 2018, it was reported that almost 25% of women in active-duty military experienced sexual harassment while in the military.[67] For women veterans, the percentage who reported experiencing sexual harassment rises to 80%, suggesting underreporting may be a significant problem for the military.[68] One particularly horrifying example comes from a female Navy lieutenant. In 1992, she went public with a personal story of being sexually assaulted by "the gauntlet," which was described as a "nightly, coordinated, and systematic sexual assault of women who found themselves on the third floor of the hotel."[69] High rates of harassment are also commonplace in law enforcement. One nationally representative survey of law enforcement officers found that 71% of female law enforcement officers have experienced sexual harassment and/or sexual violence in the workplace.[70] These male dominated environments are high risk, as women are devalued and targeted for breaking gender stereotypes and hierarchies of power.

C. Harassment as a Workplace Hazard

Based on historical and current social realities, we argue that harassment is a workplace hazard that is disproportionately distributed to women, particularly low-wage workers and women of color, creating a health

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[65] R. W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 829 (2005).

[66] Schultz, *supra* note 24.

[67] Rachel Breslin, Black Women in the Military: Prevalence, Characteristics, & Correlates of Sexual Harassment, (2022).

[68] Burbank, STIGMATIZING NARRATIVES IN MILITARY SEXUAL TRAUMA CASES, at 186-87, (2023).

[69] Id. at 190-91.

[70] B.G. Taylor et. al., Sexual Harassment of Law Enforcement Officers: Findings From a Nationally Representative Survey, (2021).

and safety issue, with civil rights and economic justice issues at the core. As such, harassment is best suited to be addressed by a multi-layered hazard prevention model, such as the Swiss Cheese Model we propose above. See Figure 1 (p. 5).

Harassment is a significant hazard to workers' mental, physical, and economic safety following historical trends of gendered and racialized subordination. Studies show workplace harassment is associated with increased rates of (1) stress, (2) anxiety and depression, and (3) post-traumatic stress disorder (PTSD).[71] This effect may be particularly pronounced for women of color as they are vulnerable to harassment on the basis of both race and gender.[72] All three of these mental health effects are risk factors for increased rates of suicidal ideation, which also links workplace harassment to increased rates of suicide.[73]

Workplace harassment frequently co-occurs with, and may even precipitate other forms of workplace violence, including violence-related fatalities.[74] Physical violence can occur in any workplace and among any type of worker, even women in leadership; but, the risk for fatal violence is highest among sales, protective service, and transportation workers, while the risk for nonfatal violence resulting in days away from work is greatest for healthcare and social assistance workers.[75] For women working in low-wage industries, the economic harms associated with workplace harassment can be particularly devastating. Economic violence can take many forms, such as constructive discharge or retaliation for reporting or opposing workplace harassment via termination, demotion, pay cuts, wage theft, or detrimental changes to job terms and conditions such as scheduling.

The detrimental effects of harassment are dangerously cyclical, leaving victims at risk of remaining stuck in these cycles. Like other health and safety hazards, preventing harassment demands multifaceted interventions, and many gaps remain. In Section II, we identify these gaps before turning to our data, which we analyze to examine the effectiveness of the overall policy response post #MeToo.

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[71] Rospenda et. al., IS WORKPLACE HARASSMENT HAZARDOUS TO YOUR HEALTH?, (2005).

[72] Vance et. al., Contextualizing Black Women's Mental Health in the Twenty-First Century: Gendered Racism and Suicide-Related Behavior, (2021).

[73] Vance et. al Contextualizing Black Women's Mental Health in the Twenty-First Century: Gendered Racism and Suicide-Related Behavior, (2021); Hanson, Work related sexual harassment and risk of suicide and suicide attempts: prospective cohort study, (2020).

[74] Rospenda et. al., IS WORKPLACE HARASSMENT HAZARDOUS TO YOUR HEALTH?, (2005).

[75] CDC, OCCUPATIONAL VIOLENCE.

II. LEGAL CONSTRAINTS FAIL TO PROVIDE ACCOUNTABILITY

Title VII of the Civil Rights Act of 1964 contains no reference to the word "harassment." Harassment law is instead a product of regulatory and judicial interpretation of the statutory language that states it is unlawful for an employer "to discriminate…with respect to…conditions, or privileges of employment."[76] Lower courts began to recognize racial, religious and sex-based harassment claims in the 1970s,[77] while the EEOC recognized sexual harassment as a form of discrimination in 1980,[78] and the Supreme Court first solidified the cause of action in the 1986 decision, *Meritor Savings Bank v. Vinson*.[79] The foundation set forth in *Meritor* would be elaborated in subsequent Supreme Court rulings.[80]

In this Part, we discuss ten major limitations of harassment doctrine that leave significant gaps, failing to protect many women who are subjected to harassment at work. If the laws are ineffective, this leaves many victims without remedy, while failing also failing to deter future harassment due to the lack of accountability, weak enforcement of existing law, and restricted access to justice. In Part III, we examine whether the flurry of state reforms during the height of the #MeToo movement began to acknowledge and address these gaps to meaningfully improve protection for working women. In the absence of federal reform, state reform serves as both a laboratory of innovation as well as a way to gauge bipartisan support.

1. The Individuation of Harassment Evidence

As early as 1986 in *Meritor v. Vinson*, the Supreme Court imposed a compartmentalized frame on harassment cases, treating it as a matter of

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[76] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

[77] Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (race-based harassment claim involving Latina employee assigned exclusively to Latino patients); Compston v. Borden, Inc., 424 F. Supp. 157, 160 (S.D. Ohio 1976) (religious harassment); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), vacated and remanded Williams v. Bell, 587 F.2d 1240, 1242 (D.C.Cir. 1978), Williams v. Civiletti, 487 F.Supp. 1387, 1389 (D.D.C. 1980) (sex-based harassment). See also, Rhonda Reaves, One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases, 38 U. Rich. L. Rev. 839, 889 (2004).

[78] 45 Fed. Reg. 74676 (Nov. 10, 1980) (to be codified in 29 C.F.R. § 1604.11).

[79] Catharine A. MacKinnon & Reva B. Seiegal, Directions in Sexual Harassment Law 20 (2004).

[80] For example, in Meritor Savings Bank v. Vinson, the Supreme Court held that workplace sexual harassment is sex-based discrimination that violates Title VII of the Civil Rights Act.

individual offenders and targeted victims as opposed to broader systemic harms in an organization. *Meritor v. Vinson* was brought by a Black woman, Mechelle Vinson, who was subject to sexual advances, repeated demands for sexual favors, fondled in front of other workers, followed to the restroom, and forcibly raped on several occasions by the bank vice president.[81] The bank had a grievance procedure, but would have required Vinson to report the misconduct to her supervisor – the perpetrator of the harassment.[82]

From the outset, the Court failed to assess Vinson's story comprehensively. It treated her harassment as an isolated circumstance and refused to consider the evidence of harassment other women at the bank were experiencing alongside Vinson as relevant to the question of whether the harasser cultivated an environment that violates Title VII.[83] This is despite the lower court's holding that even where a woman is not the object of harassment herself, there may be a valid Title VII claim if the atmosphere fostered pervasive harassment. Instead, Justice Rehnquist concluded that the District Court did not allow the presentation of a "wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief."[84]

This blinkered view of harassment is at odds with the concept of a hostile work "environment" which can pervade and impact the workplace beyond one individual victim. The Court's individualized approach also represents a marked departure from other claims available under Title VII of the Civil Rights Act. As early as the 1971 case of *Griggs v. Dukes*, the Court acknowledged that discrimination can operate systemically within a workplace and therefore permitted a wide variety of evidence from multiple sources.[85] In these Title VII discrimination cases, including "disparate impact," "pattern or practice," or "systemic" cases, the law acknowledges group offenses even if individual experiences of discrimination vary and are effectuated by multiple actors and systems within an organization.[86] Consequently, the Court does not begin from the presumption that discrimination is limited to a single bad actor within the organization who has engaged in misconduct targeting a single individual.

Courts further compound the individuation of harassment claims through the routine enforcement of settlement and severance agreements

[81] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).
[82] Id.
[83] Green, supra.
[84] Meritor, 477 U.S. at 61
[85] Griggs v. Duke Power Company
[86] Systemic Enforcement at the EEOC, https://www.eeoc.gov/systemic-enforcement-eeoc

containing non-disclosure provisions.[87] Such non-disclosure provisions conceal harassment, making it difficult to detect and root out patterns of abuse.[88] Settlement agreements commonly include non-disclosure provisions, and employers and their counsel often refuse to settle a case without some form of confidentiality provision. While some victims may want confidentiality[89], this requirement often pressures victims to sign and remain silent in order to achieve some type of closure. This manner in which non-disclosure provisions are included in settlement agreements serves to limit collective grievances, opportunities to negotiate, and accountability for repeat perpetrators and organizations that foster hostile work environments.

2. Mandatory Arbitration Provisions

Access to legal justice under Title VII has also historically been barred for many workers by mandatory arbitration provisions. Approximately 56% of non-union private sector workers are required to sign mandatory private arbitration agreements,[90] which represents roughly 60 million American workers.[91] Of those, 30% have signed agreements that include class-action waivers.[92] Arbitration agreements have become particularly prevalent since the 2011 Supreme Court ruling, *AT&T v. Concepcion*, which enabled companies to enforce class and collective action waivers through arbitration.[93] Arbitration agreements divert claims from the public court system to private arbitration, where neither the filings, rulings,

[87] *See* Abigail Stephens, *Contracting Away the First Amendment? When Courts Should Intervene in Nondisclosure Agreements*, 28 WM. & MARY BILL RTS. J. 541, 542 (2019) ("courts regularly enforce even those contracts that require parties to waive their constitutional rights").

[88] Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 53 (2018); Marissa Ditkowsky, *#UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 26 UCLA WOMEN'S L.J. 69, 96, 100 (2019).

[89] Mutual non-disclosure can be a preferred approach for everyone involved – women of all backgrounds can be fearful of unwanted disclosure by their employer or the perpetrator.

[90] Alexander J.S. Colvin & Econ. Pol'y Inst., *The Growing Use of Mandatory Arbitration* 9 (Sep. 2017) https://files.epi.org/pdf/135056.pdf.; Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018)(reviewed the volume of claims filed in arbitration, and estimated that arbitration agreements had suppressed between 315,000 and 722,000 employment claims over the course of 10 years)

[91] *Id.* at 10.

[92] *Id.* at 11.

[93] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013).

or proceedings are open to the public.[94] Even if the arbitration agreement does not require the victim to maintain the secrecy of the proceedings, arbitration is to a much greater extent shielded from public view, including media coverage and scholarly research.

Arbitration often offers poorer remedies for plaintiffs. Where the arbitration agreement includes a class action waiver, the employee cannot file a collective claim in court or in arbitration, forcing them to bring an individual claim no matter the fact pattern.[95] Arbitration also offers few avenues for appeal, leaving workers little recourse if the arbitrator issues a bad ruling. Arbitration can further inhibit access to justice because claimants then have difficulty finding a lawyer willing to file a claim in arbitration when the deck is so heavily stacked against them. Research shows women of color are more likely to be denied access to courts due to mandatory arbitration than white women.[96] This is due to the particular prevalence of these clauses in low-wage industries where women of color are overrepresented.[97] Thus, low-wage workers, who are already uniquely vulnerable to workplace violations including harassment and retaliation, suffer the most from contracts restricting their ability to access a court of law.

3. Coverage Gaps Constrain Workers' Access to Courts

Many workers are not covered by key antidiscrimination and labor law statutes, leaving them with no legal recourse, regardless of the merits of the claim. Title VII only covers claims against "employers," and by extension claims brought by "employees."[98] This coverage restriction means that independent contractors lack any form of protection under Title VII.

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[94] Jean R Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155 (2019); Duchicela, *supra* note 72, at 70–71 ("If an employee has signed an arbitration agreement, before or during their employment, their sexual misconduct claim will be preempted by the FAA").

[95] Sternlight, *supra* note 80, at 177.

[96] Bowman Williams, Jamillah. "Maximizing #MeToo: Intersectionality & the Movement." 2021

[97] M. Isabelle Chaudry et al., *Private Courts, Biased Outcomes: The Adverse Impact of Forced Arbitration on People of Color, Women, Low-Income Americans, and Nursing Home Residents* (Feb. 2022) https://progressivereform.org/publications/private-courts-biased-outcomes-forced-arbitration-rpt/; *see also* M. Isabelle Chaudry & Jamillah Bowman Williams, *Banning Workers from Suing Their Employer Hurts People of Color and Women Most*, THE HILL (Feb. 21, 2022), https://thehill.com/opinion/civil-rights/595208-banning-workers-from-suing-their-employer-hurts-people-of-color-and/.

[98] Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (defining an "employer" as covered by the Act to be person with "fifteen or more employees")

Independent contractors make up over a third of the nation's workforce,[99] and around [one half] of these unprotected independent contractors are women.[100] Many of these are low-paid jobs in industries such as personal services, transportation, and educational services.[101] 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.[102] Research has shown that women and/or people of color are also overrepresented in most industries that tend to misclassify their workers as independent contractors.[103]

Title VII also largely excludes the most physically vulnerable low-wage workers from protection–often immigrants and women of color. For example, domestic workers who serve as housekeepers, nannies, babysitters, or home health care aides, are often excluded from coverage if they are employed directly by individuals rather than agencies, as those individuals generally do not employ more than 15 employees.[104] This means that women like live-in worker, Etelebina Hauser, report having nowhere to turn for legal protection despite being "consistently groped" and pressured for "sexual services."[105] Domestic workers are often physically isolated from other workers, which further removes sources of social support and solidarity that might otherwise facilitate internal complaints and remediation. The physical isolation of private homes also tends to limit transparency and oversight of workplace practices. Thus, it is no surprise that studies indicate one third of domestic workers face gender, race, language, or immigration-based abuse.[106]

Undocumented workers are nominally covered by Title VII of the Civil Rights Act,[107] but the law does not prohibit workers from being fired –

[99] Maximizing #MeToo, supra, at 1817.
[100] Id.
[101] Id. Interns and student trainees also tend to be excluded from coverage as non-employees, even though their low status on the office hierarchy makes them easy targets for exploitation and poorly positioned to complain internally about their treatment.
[102] Id.
[103] Id. at 1818.
[104] Maximizing #MeToo, supra, at 1815-16.
[105] Ditkowsky p. 126
[106] Terri Nilliasca, Note, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 403 (2011). [citing DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY 1, (2006), available at http:// www.datacenter.org/wp-content/uploads/homeiswheretheworkis.pdf].
[107] See Rios v. Enter. Ass'n Steamfitters Loc. Union 638 of U.A., 860 F.2d 1168, 1173 (2d Cir. 1988) (Title VII must apply to undocumented workers, at least to the extent that those protections do not conflict with immigration laws.); See also EEOC v. Tortilleria "La Mejor", 758 F. Supp. 585, 590-91 (E.D. Cal. 1991) (Finding Title VII applies to undocumented aliens).

or deported – for their immigration status.[108] These workers are also unlikely to be awarded back pay due to their immigration status, which reduces the legal risk for employers.[109] Immigrant workers make up a majority of the workforce in specific industries, including agricultural work. In these cases, the threat of termination or deportation largely cuts off any meaningful access to justice, and makes them particularly vulnerable targets for harassment.

Coverage gaps that predominantly affect women of color and immigrants are no historical accident.[110] As previously discussed, occupations in which women of color and immigrants predominated were intentionally excluded from landmark federal employment legislation in the twentieth century.[111] Employers have continued to treat women of color both as invisible and as their labor to control. Roles like nannies and maids are disproportionately held by immigrant women of color, traditionally employed in private homes, mostly White middle- and upper-class that lack transparency and adequate oversight, giving them the liberty to take advantage of these workers.[112]

4. Retaliation Law and Its Effect on Underreporting

The legal standard for Title VII retaliation claims, which requires plaintiffs to show that the retaliatory conduct was "materially adverse" fails to deter low-level and informal retaliation.[113] Most courts find neither ostracizing or harassing conduct rise to the level of an adverse employment action for purposes of a retaliation claim under Title VII. They construe the harm as not significant enough to deter someone from filing a charge.[114] Courts have even held that a negative performance review is not sufficiently

[108] See Egbuna v. Time-Life libraries, Inc.,153 F.3d 184 (4th Cir. 1998) (Finding an employer cannot be held liable for refusing to hire someone who is not authorized to work in the United States); See also Cortezano v. Salin Bank & Trust Co., 680 F.3d 936 (7th Cir. 2012) (Upholding summary judgment in favor of an employer where the plaintiff claimed under Title VII she was discharged because of her marriage to a Mexican immigrant).

[109] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002) (Finding the NLRB did not have the authority to award back pay to undocumented workers who were illegally fired for engaging in protected labor organizing activity because they were not legally present in the United States).

[110] See discussion, infra, Part II.A.1

[111] Maximizing #MeToo, supra, at 1814-15.

[112] Heidi Shierholz, Econ. Pol'y Inst., Briefing Paper No. 369, Low Wages And Scant Benefits Leave Many In-Home Workers Unable To Make Ends Meet, https://www.epi.org/publication/in-home-workers/.

[113] Title VII; D.J. Steele, PROTECTING PROTECTED ACTIVITY, 2020; D.J. Steele, Enforcing Equity, 2023.

[114] Buonocore Porter, supra n. 224 at 54.

"material" to support a retaliation claim.[115] And as previously noted, judges with lifetime or fixed term appointments may not recognize the threat that would deter a reasonable worker who lacks such security. One study, for example, revealed that many of the employment actions courts have held are not "materially adverse" would actually dissuade participants from reporting.[116]

The threat of retaliation can be a particularly powerful deterrent for marginalized populations.[117] Underrepresented groups within a particular workplace – such as women in non-traditional occupations, or women of color in majority White occupations – have less access to internal social networks and political capital within the workplace, which both increases the likelihood and the detrimental effect of informal social sanctions. The fear of job loss and unemployment for a low wage worker can be so economically threatening to the employee's livelihood that it deters them from reporting even extreme misconduct. Concerns about retaliatory deportation can weigh even more heavily on an employee's decision making. Moreover, even where actual retaliation is absent, workplace culture that fosters the threat of retaliation alone can deter victims from reporting.

Fears about retaliation for at-will employees who complain about harassment are particularly well-founded, despite whatever assurances human resources may provide about the company's policy regarding retaliation. Even though retaliation for speaking up against harassment and discrimination is prohibited by law, it is a common workplace reality.[118] Complainants may face formal action, such as termination, demotion, or pay cuts, as well as informal social sanctions. These repercussions originate not only from the perpetrator, but also from co-workers or supervisors who side with the perpetrator or perceive the complaint as disruptive. Studies have demonstrated that these negative consequences, such as being ostracized by coworkers, follow harassment reports more often than not.

5. Rigid Administrative Exhaustion Requirements Block Access to Justice

Title VII's administrative filing requirement imposes a notably short time window – less than a year – for plaintiffs to bring a harassment claim. Before Title VII claimants can file a lawsuit against an employer, they must file an administrative claim with the Equal Employment Opportunity Commission within 180 days of the last occurrence of harassment.[119] Any

[115] Id.
[116] Id. at 55.
[117] D.J. Steele, Enduring Exclusion, 2022.
[118] D.J. Steele, Rationing Retaliation Claims, 2023.
[119] 42 U.S.C. 2000e-5(e)(1); National R.R. Passenger Corp v. Morgan, 536 U.S. 101

lawsuit brought by an employee that has failed to timely file an administrative claim will be dismissed for failing to exhaust administrative remedies. This aggressive window can be unrealistic for traumatized workers who may be afraid to speak up about harassment or who may not recognize that the workplace harms they suffered qualified as unlawful harassment until years later. The narrow administrative filing window can be particularly detrimental for the vulnerable workers previously described, who may be concerned about retaliation and job loss.

These workers might reasonably choose job security over the possibility of a lawsuit, such that they may not be ready to file a legal claim until they have secured adequate support or alternate employment. Moreover, gaps in access to legal services and information often preclude workers from even knowing about the administrative filing requirement.

6. Severe or Pervasive Requirement Excludes Strong Claims

To prove harassment under Title VII, the plaintiff must show that they were subject to unwelcome comments or conduct on the basis of a protected category (race, sex, religion, color, or national origin) that was so "severe or pervasive" as to alter the conditions of plaintiff's employment and create an "abusive or hostile work environment."[120] The "severe or pervasive" language originated in *Meritor*, although the court did not initially define the term.[121] In a subsequent 1993 ruling, *Harris v. Forklift*, the Supreme Court elaborated on the meaning of the phrase, listing several non-exhaustive factors that affect whether conduct is deemed severe or persuasive, such as (1) the frequency of the conduct; (2) the severity of the conduct; (4) whether is the conduct is physically threatening or humiliating, or "a mere offensive utterance"; and (5) whether the conduct unreasonably interferes with work performance.[122]

As several commentators have observed, the "severe or pervasive" requirement has evolved to impose a very high burden of proof on the victim.[123] For example, lower courts have inconsistently and often

(2002) ("It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purpose of determining liability.") State discrimination laws generally do not offer substantially more lenient administrative filings deadlines. Many set the deadline at 180 days, some at 300 days. Even the most generous states do not exceed one year.

[120] Meritor Sav. Bank, 477 U.S. at 68 (1986).

[121] Id.

[122] Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

[123] Judith J. Johnson, License to Harass Women: Requiring Hostile Environment Sexual

improperly interpreted the type of conduct necessary for a violation. In some courts, the standard has been deemed so high that it may reject claims for conduct that may be egregious, offensive, and in some cases even criminal.[124] This significantly impacts outcomes of cases, as the "severe or pervasive" requirement has become a common basis upon which courts grant summary judgment against plaintiffs. Judges have ruled that things like indecent exposure, being threatened and referred to as a Black bi[***], and being offered pornography by one's boss, are not sufficiently severe or pervasive, thus dismissing the cases on summary judgement.[125] This leaves the plaintiff demoralized and without remedy, and allows the employer to shield itself from accountability.[126]

Other lower courts have misinterpreted the *Harris v. Forklift* opinion to require that conduct be "severe, frequent and physically threatening," effectively requiring severe *and* pervasive conduct, that is also physical in nature.[127] In *McGraw v. Wyeth-Ayerst Lab'ys*, for example, the court held that repeated propositions, yelling, and non-consensual kissing by a supervisor was neither severe nor pervasive.[128] Extreme lower court rulings can have a lasting effect, as courts later rely on those fact patterns and judicial interpretations in justifying outcomes in favor of employers in subsequent cases.[129]

7. The "Objectively" Hostile or Abusive Standard is Out of Touch

Closely related to the "severe or pervasive" requirement is the requirement that the working environment be both "subjectively" and "objectively" hostile or abusive. This means that the plaintiff perceived the conduct as hostile or abusive, and that a "reasonable person" in that situation would have found it hostile or abusive.[130]

Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment, 62 MD. L. REV. 85, 86 (2003); Sandra Sperino & Suja Thomas, Boss Grab Your Breasts? That's Not (Legally) Harassment, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html; SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL 30-52 (David Kairys ed., 2017).

[124] Johnson supra note 123 at 86.

[125] Jamillah Williams, Maximizing MeToo, 2021, at 1823.

[126] SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL 30-52 (David Kairys ed., 2017).Summary judgment rulings, as Sandra Sperino has observed, are particularly problematic in the employment contexts, where a predominantly white male judiciary substitutes its own experiences, perspectives, and biases for that of a jury, whose experiences more closely reflect that of the various parties involved in the litigation.

[127] Maximizing #MeToo, supra, at 1826.

[128] Maximizing #MeToo supra, at 1826.

[129] SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL 37.

[130] Harris v. Forklift Systems, Inc., 510 U.S. at 22.

Defining reasonableness has proven difficult as courts appear to lack a clear standard.[131] In a 1998 case, *Oncale v. Sundowner Offshore Services, Inc*., the Court further noted that ensuring whether or not something is objectively hostile or abusive is crucial to "ensure that courts and juries do not mistake ordinary socializing in the workplace as discriminatory."[132] Here, the Supreme Court clarified that determining severity "requires careful consideration of the "social context in which particular behavior occurs."[133]

The "objective" component of the hostile or abusive standard has also proven problematic. In the summary judgment context, judges superimpose or extrapolate from their own experience in deciding what a "reasonable person" would consider hostile and abusive.[134] Yet the judge's own assumptions about tolerable behavior can be tainted by White and male privilege in ways they may not recognize. As previously discussed, the pervasive influence of hegemonic masculinity can lead judges to discount hostile aspects of the work environment simply because they are commonplace, or fit within traditional workplace norms.[135]

For example, in *Oncale*, Justice Scalia recounted a variety of workplace behaviors that he considered inoffensive, such as a football player being smacked on the buttocks by his coach – which very well could be experienced as hostile.[136] However, when courts – and juries – are instructed to ignore the plaintiff's actual (subjective) experience and focus on what a hypothesized "reasonable" (objective) other would consider harassment, it is an implicit invitation to default to a frame wherein workplace culture is largely defined by and governed by White men.[137]

Broader representation in the judiciary may begin to address this bias. In other research, we have found that there is a significant disconnect between judges' assessments of what is "objectively" abusive and hostile, and a lay person's assessment, which may mean that judges are disconnected from social realities and evolving social norms. However, bias doesn't only impact judges. Racialized and sex stereotypes can also color perceptions of

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[131] Danielle A. Bernstein, Reasonableness in Hostile Work Environment Cases After #metoo, 28 Mich. J. Gender & L. 119 (2021); see also Danielle Bernstein, #MeToo Has Changed the World—Except in Court, 2021.

[132] 523 U.S. 75, 81 (1998).

[133] See Id; See also Michael J. Frank, The Social Context Variable in Hostile Environment Litigation, 77 NOTRE DAME L. REV. 437 (2002); Melissa K. Hughes, Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis, 76 S. CAL. L. REV. 1437, 1439 (2003).

[134] Melissa K. Hughes, Through The Looking Glass: Racial Jokes, Social Context, And The Reasonable Person In Hostile Work Environment Analysis, at 1480.

[135] Id. at 1476-77.

[136] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. at 82.

[137] Angela Onwuachi-Willig, What About #UsToo?: The Invisibility of Race in the #MeToo Movement; see also Melissa K. Hughes, supra n. 158.

witnesses, fact-finders and others, clouding their view whether the plaintiff contributed to the harassment, the extent to which they feel she is harmed by the perpetrator, and whether enduring the conduct is deemed acceptable and within the realm of her role as worker.[138]

8. The Standard for Vicarious Liability

As a general matter, when an employee commits a Title VII violation, the law imposes strict liability. For example, when an employee engages in sex-based discrimination or retaliates against an employee for speaking out about it, courts do not inquire whether the employer should be held vicariously liable for the conduct. Employers are simply liable for the violation. Harassment, however, is the exception. In *Meritor*, the Supreme Court first raised the question of whether there might be some circumstances in which employers might not be held vicariously liable for harassment.[139] This question was settled in two 1998 cases decided together, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* ("Faragher/Ellerth").[140] In those cases, the Supreme Court imported tort principles into the employment discrimination context. The majority opinion held that employers would only be held strictly liable for harassment committed by a supervisor where the plaintiff experienced a tangible employment action, such as a demotion, firing, or pay cut.[141] The Court also imposed a negligence standard when coworkers were responsible for harassment. Under this rule, employers would only be held liable for harassment that they knew or should have known about, and they failed to take action to correct it.[142]

In cases involving supervisory harassment where the plaintiff suffered no tangible employment action, the Court created a new affirmative defense for employers. Even when a plaintiff proves a successful harassment case, which is an uphill battle due to the constraints discussed in this section, the employer can assert an affirmative defense to evade liability. Joanna Grossman argued that the defense effectively insulates employers from liability following an initial complaint about harassment.[143] To assert the

[138] Angela Onwuachi-Willig, What About #UsToo?: The Invisibility of Race in the #MeToo Movement; see also Melissa K. Hughes, supra n. 158.

[139] Meritor Sav. Bank, FSB v. Vinson.

[140] Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998); Faragher v. City of Boca Raton, 524 U. S. 775 (1998).

[141] Id.

[142] Id.

[143] Joanna L. Grossman, The First Bite is Free: Employer Liability for Sexual Harassment, 61 U. of Pitt. L. Rev. 671 (2000); Tippett, Elizabeth C. "The Legal Implications of the MeToo Movement." 2018.

defense, an employer must show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (the "*Faragher/Ellerth* defense").[144]

Beyond the exceptional nature of the Court's departure from a strict liability framework, courts have also interpreted the *Faragher/Ellerth* defense in an expansive manner, favoring employers. In many cases, courts merely require employers to maintain anti-harassment and complaint policies, without inquiring into the effectiveness or reviewing the culture broadly.[145] This trend of "judicial deference" is largely why anti-harassment policies and practices have proliferated in the workplace, many of which have been found to be ineffective at curbing harassment.[146]

Likewise, the *Faragher/Ellerth* defense directs the blame for a hostile work environment on a plaintiff who was slow or reluctant to complain internally, rather than on the perpetrator or the employer. However, high rates of retaliation give many employees a valid reason to pause when reporting harassment or otherwise using grievance procedures.[147] Only one in four women subjected to sex-based harassment reported it using an internal grievance procedure; even fewer filed a charge with the Equal Employment Opportunity Commission.[148] At present, it is possible for a plaintiff to file a hostile work environment claim, and despite evidence to her benefit, lose, merely because she herself failed to utilize the internal grievance procedures

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[144] Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998); Faragher v. City of Boca Raton, 524 U. S. 775 (1998).

[145] Lauren B. Edelman, The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth; see also Edelman & Cabrera, Sex-Based Harassment and Symbolic Compliance, (2020) (identified several cases in which courts applied the Faragher/Ellerth defense despite evidence that the employer's complaint process was flawed).

[146] Lauren B. Edelman, Working Law: Courts, Corporations, and Symbolic Civil Rights, 173-4, 184-88 (2016) (argues that judicial deference to internal employer systems significantly reduces the incentive for employers to ensure that they offer fair or just outcomes to employees who make use of those systems); Lauren B. Edelman et. al., When Organizations Rule: Judicial Deference to Institutionalized Employment Structures, 2011; Susan Bisom-Rapp, Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession, 24 T. JEFFERSON L. REV. 125, 145 (2002); Frank Dobbin and Alexandra Kalev, The promise and peril of sexual harassment programs, 2019.

[147] At the summary judgment stage, judges are invited 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, immigrant, or low-wage worker. See also Lauren B. Edelman, Working Law: Courts, Corporations, and Symbolic Civil Rights, 173-4, 184-88 (2016); Frank Dobbin and Alexandra Kalev, The promise and peril of sexual harassment programs, 2019.

[148] *Id.*

created by the employer.[149]

9. Damage Caps Fail to Remedy Harms

The remedies available in Title VII cases include injunctive relief, reinstatement,[150] back pay, compensatory damages, punitive damages, and attorneys' fees and costs.[151] Compensatory damages – that is, damages for pain and suffering – are subject to a statutory cap according to employer size.[152] For employees with fewer than 100 employees, compensatory and punitive damages cannot exceed $50,000; for 200 or fewer employees, the cap is $100,000; for 500 or fewer the cap is $200,000 and those with 500 employees or more, the cap is $300,000.[153]

Damage caps for compensatory and punitive damages can be particularly harmful in harassment cases when devastating psychological effects are common.[154] Such effects can include depression, anxiety, stress, post-traumatic stress disorder, suicidal ideations, and adjustment disorders among others.[155] One study found that nurses who experience sexual harassment are three to eight times more likely to suffer from depression than women who were not harassed.[156] These negative mental health outcomes have also been shown to have profound impact on long term job related outcomes, including lack of initiative, lower job satisfaction, increased propensity to leave, and financial problems.[157]

In addition, other forms of available relief may not be especially meaningful in harassment cases. Although some employees quit or are fired in connection with workplace harassment, many harassment victims continue to work throughout the abuse, such that they are not eligible for back pay.

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[149] Tristin K. Green, Was Sexual Harassment Law a Mistake? The Stories We Tell, The Yale L.J.F., June 18, 2018.

[150] Front pay is available as an equitable remedy where reinstatement is infeasible or inappropriate. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001).

[151] 42 U.S.C. 2000e-5(g); 42 U.S.C. 1981 (1991 Amendment to Title VII that provided for compensatory damages and punitive damages; punitive damages available for discrimination "with malice or reckless indifference to the federally protected rights of an aggrieved individual"); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (backpay); Kolstad v. American Dental Association, 527 U.S. 526 (1999) (interpreting "malice" and "reckless indifference" standard for purposes of punitive damages).

[152] 42 U.S.C. 1981(a), (b) (3).

[153] Id.

[154] Mamoona Mushtaq, Safia Sultana and Iqra Imtiaz, *The Trauma of Sexual Harassment and its Mental Health Consequences Among Nurses*, 25 J. of the Coll. of Physicians and Surgeons - Pakistan 675, 676 (2015).

[155] Id.

[156] Id.

[157] Id.

This is particularly problematic for low wage workers who are economically vulnerable and cannot afford to quit their jobs. Ironically, staying longer and enduring more prolonged harassment and abuse, may end up resulting in lower damages. Conversely, if the employee was terminated, reinstatement may not be a useful remedy, as the plaintiff may be reluctant to return to an abusive workplace. Compensatory and punitive damages, along with attorneys' fees and costs, may be the most important forms of relief available to harassment claimants. Yet damage caps force courts and juries to limit relief to plaintiffs to whom they might have made a much larger award to compensate for pain and suffering and to punish the employer for maintaining a hostile work environment.[158]

Damage caps also limit access to justice. Because many plaintiff-side lawyers operate on contingency fee, a harassment claimant suing a small or even mid-size employer may have difficulty finding a lawyer willing to sue when the maximum recovery is less than $100,000. The effect of damage caps can be especially pronounced for low-wage workers, women of color, and immigrant workers engaged in domestic work or agricultural labor. When the size of recoverable wages is low due to a low base wage, plaintiffs are even more reliant on compensatory and punitive damages to attract the interest of a potential lawyer. Domestic workers, agricultural workers, and even restaurant and food-service workers may find themselves on the low end of the damage caps because they work for smaller operations. In such cases, a worker's ability to find legal representation may ultimately depend on whether they can allege a separate tort or statutory claim not subject to the damage caps, or live in a state that offers more generous discrimination remedies under state law.

Damage caps also reduce deterrent effects on delinquent employers.[159] With minimal penalties, many employers are disincentivized to improve their responses to sexual misconduct in the workplace or to change workplace culture. Once again, vulnerable workers are doubly cursed – their employers know that their workers may not be covered by the statute , and if they are covered, they may not find an attorney or recover very much. Facing little prospect of a big-ticket lawsuit, employers in these industries can turn a blind eye to harassment with little fear of accountability.

10. Implied Hierarchy of Harassment Claims

Even prior to the #MeToo movement, the dominant narrative

[158] 42 U.S.C. § 1981(a)(3)

[159] Section 1981 claims, for example, are not subject to damage caps, but can only be brought on the basis of race. 42 U.S.C. 1981. See Saint Francis College et al, v. Al-Khazraji, 481 U.S. 604, 610 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987).

surrounding workplace harassment involved a subordinate White woman subjected to unwelcome sexual conduct or requests for sexual favors by a high-ranking White man. This scenario, for example, commonly appeared in early harassment training from the 1980s and 1990s.[160] It was also to some extent reflected in the earliest EEOC regulations, which defined harassment in terms of sexual conduct and specifically referenced "quid pro quo" harassment, where a supervisor requests sexual favors in exchange for some workplace benefit or the avoidance of harm.[161]

This frame was not, however, compelled by the case law,[162] and it operates to the disadvantage of all other harassment claims that do not involve sexual conduct or that are brought on the basis of other protected classes. Intersectional claims brought on the basis of more than one protected category – often women of color experiencing racism and sexism – are at particular disadvantage. Nowhere in the case law does the Supreme Court assert that sexual conduct forms a necessary part of a harassment claim, or that certain protected classes are more deserving of relief than others.[163] Nevertheless, the narrative of harassment as primarily a problem of sexual misconduct towards White women has had a measurable effect on lower court jurisprudence over time. This effect is well-documented in scholarly literature. Indeed, Pat Chew and Robert Kelly's empirical study of harassment claims concluded that judges tend to discount race-based harassment claims.[164] Women of color pursuing litigation are further marginalized due to the courts pressure to separate out experiences of

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[160] Elizabeth Tippett, Harassment Trainings: A Content Analysis, 2017.

[161] Catherine MacKinnon, Sexual Harassment of Working Women: A Case of Sex, 1979; EEOC.gov, Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, 1990.

[162] The earliest lower court rulings to recognize harassment claims involved a Latina dental assistant who was aggrieved by her employer's decision to segregate its dental patients, and a religious harassment claim involving a Jewish employee subject to numerous derogatory epithets. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971); Compston v. Borden, Inc., 424 F. Supp. 157, 160 (S.D. Ohio 1976). As previously noted, the first Supreme Court case to recognize harassment, *Meritor*, was brought by a Black woman. Subsequent Supreme Court jurisprudence involved a variety of plaintiffs and fact patterns, including a White woman subjected to denigrating sexual and gender-based comments by her supervisor (*Harris v. Forklift*), White female lifeguards subject to sexual conduct by their supervisors and ignored by human resources (*Faragher*); a White man subjected to humiliating and violent conduct by his male coworkers (*Oncale*); and a Black woman subject to racial slurs and taunting by a White woman (*Vance v. Ball State*). Harris v. Forklift, 510 U.S. 17 (1993); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Vance v. Ball State Univ., 570 U.S. 421 (2013).

[163] EEOC filing statistics also dispute the implicit narrative that sexual harassment claims predominate over other types of harassment claims.

[164] Chew and Kelley, Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases, https://journals.library.wustl.edu/lawreview/article/id/3893/.

harassment into the false dichotomy of "Because of Race" or "Because of Sex," when these are commonly intertwined.[165] Empirical research has found that plaintiffs bringing intersectional claims are less than half as likely as plaintiffs bringing single claims to win their cases.[166] Even within those statistics, Black women are more likely to lose their cases than Black men who bring intersectional claims (e.g. because of race and because of age).[167]

In summary, harassment law is subject to a variety of gaps that enabled workplace harassment to continue in the decades leading up to the #MeToo movement. Next, we turn to the question of whether the many legislative reforms wrought by the #MeToo movement addressed these gaps.

III. AN EMPIRICAL ANALYSIS OF STATE AND FEDERAL GENDER EQUITY LEGISLATIVE ACTIVITY, 2016-2022

In previous scholarship, we discussed the ability of social movements to promote legal change.[168] While the window of opportunity may be small, #MeToo, like the mass Black Lives Matter protests during the summer of 2020, has the potential to generate staying power and remain influential on legal policy.[169] This is especially true if lawmakers, courts, and agencies, alike, follow the lead of workers who have been organizing for harassment-free workplaces long before #MeToo.[170] Doing so will provide stakeholders an appropriate goalpost they can measure their efforts against as they attempt improve to mitigate workplace harassment.

This article builds on prior work that has begun to investigate the legal implications #MeToo, but with an emphasis on empirical analysis.[171] Questions we explore include: (1) Has #MeToo effectively shifted the law forward in addition to raising awareness and sparking debate? (2) What topics were centered in bills versus introduced as secondary topics within proposed legislation? (3) To what extent did political factors such as state party lines and representation of women lawmakers influence the volume of bills introduced and passed? And (4) To what extent did legislators take a comprehensive vs. a narrow approach to workplace harassment?

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[165] Williams. Beyond Sex-Plus.
[166] Maximizing #MeToo, at 1822.
[167] Id.
[168] Jamillah Bowman Williams, Naomi Mezey, and Lisa Singh, #BlackLivesMatter: Getting from Contemporary Social Movement to Structural Change, 2021; Jamillah Bowman Williams, Naomi Mezey, and Lisa Singh, #BlackLives Matter: From Protest to Policy, 2021.
[169] Bowman Williams, et. al., #BlackLivesMatter: From Protest to Policy, 2021, at 105.
[170] Id.; See also D.J. Steele, Enduring Exclusion, 2022.
[171] Elizabeth Tippett, The Legal Implications of the MeToo Movement, 2018; Jamillah Bowman Williams, #MeToo as Catalyst: A Glimpse into 21st Century Activism, 2019..

A. Methodology

To examine the actual and potential policy changes following #MeToo, our research team collected a corpus of 3,916 state bills[172] and 255 federal bills relating to workplace gender equity, discrimination, and harassment that were introduced between 2016 and 2022. The corpus was collected through a legislative search of Legiscan, NexisUni, and Westlaw using 75 different search terms intended to identify relevant legislation (See Appendix A).

The search terms were generated to identify a broad range of workplace gender equity legislation rather than more narrowly focused harassment bills for several reasons. As articulated in Part II, harassment is a complex systemic problem stemming from a variety of social, political and cultural factors. To the extent the legislation helps to address the underlying inequity – such as pay equity – the intervention may ultimately help to reduce harassment indirectly over time.[173] We therefore sought to capture the full range of legislative interventions to enable us to evaluate them collectively. Taking a broader approach to harassment reform also allows us to identify patterns in and across legislative bills, including the extent to which the bills are individualized, offering siloed remedies for individual cases or, institutionalized, delegating responsibility to employer training, policy, or practices, or systemic which are broader in scope, and affecting many workers across industries.

The initial corpus contained a substantial number of duplicative bills, typically as a result of nearly identical legislation that was introduced separately in both the House and Senate of a particular state legislature. Potential duplicates were flagged manually based on similar or identical bill names, numbers, or descriptions. The textual similarity of potential duplicates was then assessed using the "compare" function in Adobe Acrobat Pro, which counts and highlights all textual differences. Pairs of bills where 80% or more of the text was identical were deemed duplicates, and one copy of the duplicate bill was discarded for the substantive coding and quantitative analysis. The final corpus analyzed herein contained 3,012 state bills and 255 federal bills ("Legislative Corpus").

We then coded for the substantive topic of the bills pulled into our dataset through the criteria listed in Table 1.[174] Bills fell into one of eleven topic groups, as defined below.

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[172] The search covered all 50 states plus the District of Columbia.

[173] *See* discussion *infra* at subsection F.

[174] This variable captures what the researchers believe to be the Primary topic; when bills cover two or more topics, the additional topics are coded as Secondary topics.

Table 1. State Legislative Topics

Topic	Definition
Transparency	Bills that implement new reporting or recordkeeping on employers regarding harassment or assault, or that restrict the use of non-disclosure provisions in employment contracts or settlement agreements.
Government Officials & Contracts	Bills that regulate the conduct of government officials, lobbyists or government contractors, such as requirements that legislatures adopt harassment policies for members; prohibiting public funds from being used to settle harassment claims; or requiring state contractors to adopt certain employment practices.
Anti-Harassment Practices	Bills that require some or all employers to adopt anti-harassment practices, such as training, policies, notices, or procedures to investigate harassment. Also includes bills that extend unemployment benefits to employees who quit due to harassment.
Anti-Discrimination Law	Bills that extend or expand anti-discrimination protections, such as expanding coverage or adding new protected categories such as sexual orientation, family status, marital status, or victims of domestic violence.
Leave	Bills that mandate paid or unpaid leave or that provide for accommodation for pregnant or nursing mothers.
Pay Equity	Bills that alter legal rules, hiring practices, or compensation practices relating to pay disparities or withholding of promotion or opportunities on the basis of sex, such as equal pay laws, prohibitions on requesting salary history, protection for pay discussions in the workplace, or mandatory pay disclosures.
Occupational	Bills that expand or create legal protections for sectors or occupations that predominantly employ women such as domestic work, hospitality, hotels, and janitorial services.
Enforcement	Bills that alter or expand legal rules or remedies relating to harassment, discrimination, leave/accommodation, equal pay, non-disclosure agreements, private arbitration, or workplace bullying.
Mandatory Arbitration	Bills that attempt to alter the enforceability of private arbitration provisions in employment contracts.
Equal Rights Amendment	Bills that ratify or pass the Equal Rights Amendment.

Other[175]	Bills that do not fit into the above categories, many of which are symbolic in nature, such as designating "Equal Pay Day," establishing commissions or reports. Also includes laws regarding vocational training in non-traditional occupations, and gender diversity in boards of directors.

Each bill summary was reviewed and coded by a member of our five-person research team, which included four researchers with a JD and an economics PhD fellow. Where the summary was not sufficient to code the bill into one of the above-listed categories, the researcher reviewed the full text of the bill. Bills that fell outside the scope of the study – such as laws relating to cyberbullying, rape kits, or "street harassment" – were removed from the Legislative Corpus.

Many of the bills in the Legislative Corpus were "bundled," that is, they sometimes included a variety of separate measures.[176] Where a given bill covered more than one of the relevant topics, it was coded using a "primary" topic and any additional topics received a "secondary" classification. For example in 2019, the Connecticut legislature introduced a bill that would amend multiple statutes to establish "economic equality for women," including by requiring equal pay for equal work, increasing the minimum wage, requiring paid family and medical leave, and requiring annual anti-harassment training for companies with fewer than twenty employees among others.[177] Thus, while this bill was coded primarily as a Pay Equity bill, it also was secondarily classified under Anti-Harassment Practices, Leave, and others.

Where bills presented a close case regarding the applicable category, members of the team discussed the bill and made a final decision. Coding decisions were also cross-checked using keyword searches within the Legislative Corpus specific to each subcategory[178] (See Appendix B). Keyword searches within the Legislative Corpus were also used to populate

[175] The bulk of the 'Other' category consists of bills that engage with harassment and/or gender equity in a symbolic way rather than substantively. Examples include bills that create Days or Months to honor gender inequities that other bills in the dataset are seeking to redress. Other bills considered symbolic are those that commission Task Forces or Studies on harassment and/or gender equity reform more broadly. The rest of the 'Other' category were outliers such as grants/vocational training for women in 'High-Wage, High-Demand' jobs, regulation on law enforcement and military, and bills requiring the appointment and disclosure of women on boards.

[176] *See* tbl.2 *infra*.

[177] S. 68 (Conn. 2019), https://legiscan.com/CT/text/SB00068/2019.

[178] Keyword searches within the corpus were performed using the Quanteda package in R. *See* Kenneth Benoit & Kohei Watanabe, *Quantitative Analysis of Textual Data: Quanteda*, https://quanteda.io/ (last visited Jun. 16, 2023).

subcategories of bills within the "Enforcement" category relating to harassment law reforms.[179]

B. Volume of Gender Equity Legislation Post- #MeToo

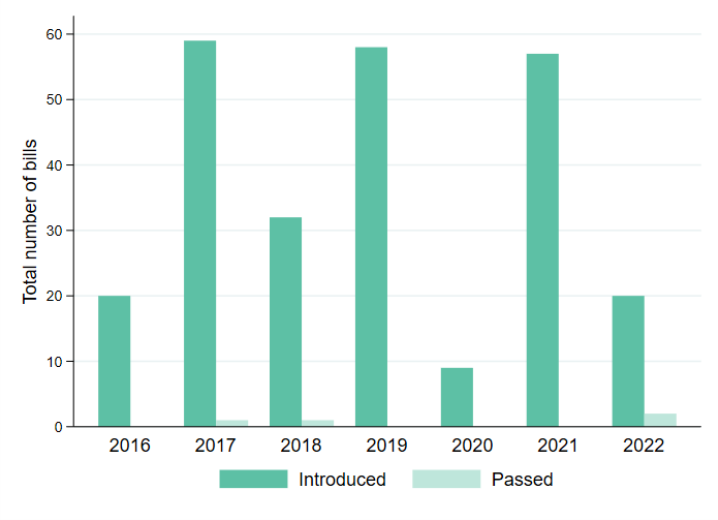
1. Federal Reforms

The #MeToo movement produced few legislative successes at the federal level between 2016-2022. Although many bills were introduced, few of them passed. By contrast, there has been a massive wave of #MeToo-related legislation at the state level. This flurry of legislative activity took place in statehouses across the country and continued for a sustained period – extending throughout 2022.

In the U.S. Congress, from 2016 to 2022, 255 bills were introduced relating to sexual harassment, sexual assault, and gender equity in employment. See Figure 2 (p. 36). There was a sharp rise in bills between 2016 and 2017, from 20 to fifty-nine (59). Congress continued to introduce legislation at a high rate in 2018 and 2019 – reaching 38 bills in 2019. Proposed legislation then dropped sharply in 2020, with 5 bills introduced that year.

[179] These subcategories are illustrated in Table __, *infra*.

Figure 2: Federal Gender Equity Bills (2016-2022)



At the federal level, only six #MeToo related bills passed during the sample period, and three of those bills are very limited in scope. The most wide-reaching bill was the Ending Force Arbitration of Sexual Assault and Sexual Harassment Act of 2021–discussed in greater detail in Part V(E).[180] In 2022, Congress also passed the Speak Out Act of 2022, which limits the enforceability of non-disclosure and non-disparagement clauses relating to sexual harassment and assault.[181] Another substantive change came from the National Defense Authorization Act for Fiscal Year 2022, which created additional reporting requirements for sexual harassment in the military – an industry at high risk of workplace harassment among other forms of workplace violence.[182]

The remaining laws that passed at the federal level were quite limited in scope. Two such bills related to lawmakers themselves – one mandates anti-harassment training for Senators and Senate employees,[183] and the other makes lawmakers financially liable for harassment settlements.[184] A third bill was symbolic in nature, designating April as National Sexual Assault

[180] Pub. L. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401-402).

[181] Pub. L. No. 117-224, 136 Stat. 2290 (2022) (codified at 42 U.S.C. §§ 19401-19404).

[182] Pub. L. 117-81, 135 Stat. 1541 117 (2021).

[183] S. Res. 330, 115th Cong. Sess. (2017) (enacted).

[184] Congressional Accountability Act of 1995 Reform Act, Pub. L. 115-397, 132 Stat. 5927 (2018) (codified at scattered sections of 2 U.S.C.).

Awareness and Prevention Month.[185]

2. State Reforms

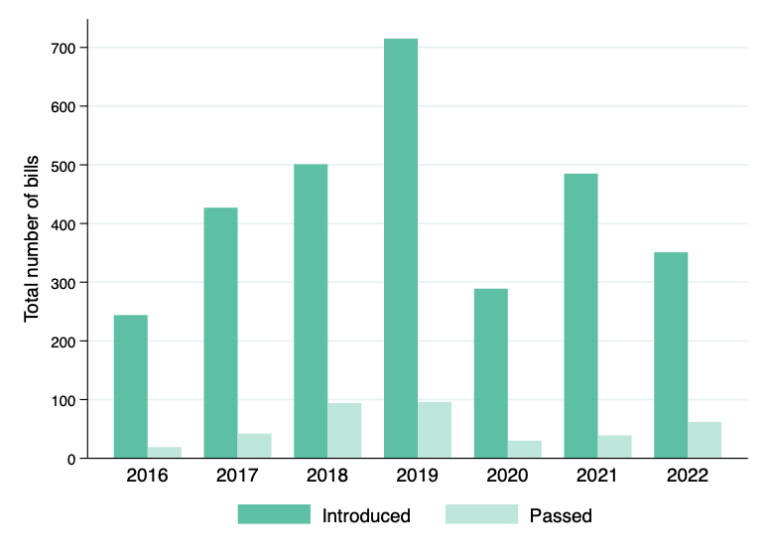
As aforementioned, the vast majority of harassment and gender equity legislation was introduced and passed by state legislatures rather than Congress. We will begin the state legislation analysis by looking at state-specific and political trends in introduction and passage rates of gender equity bills between 2016 and 2022. We will then take a closer look at the potential for bipartisan support of gender equity bills before moving to topical analysis; there, our goal is primarily to examine how well legislation has been able to fill the gaps in legal protection that leave so many workers vulnerable to harassment and other gender-based workplace harm.

A. General Trends

Broadly speaking, states introduced – and passed – a large number of #MeToo related bills between 2016 and 2022. Since 2016, states introduced approximately 3,000 such bills, of which 382 passed – a passage rate of 12.7%. As Figure 3 (p. 38) illustrates, some amount of gender-related legislative activity predated the viral spread of the #MeToo movement in 2017, with 244 relevant bills introduced in 2016, though only 19 such bills passed. The volume of #MeToo related legislation nearly doubled between 2016 and 2017, with 427 bills introduced, of which 42 passed. Legislative activity continued to rise year over year even after the extensive media coverage faded, peaking in 2019 at 715 bills introduced, of which 96 passed. Legislative activity was somewhat lower in 2020 - 2022, but remained above 2016 baseline level. These trends suggest that the legislative momentum of the #MeToo movement continued for several years.

[185] S. Res. 603, 117th Cong. Sess. (2022) (enacted).

Figure 3: Federal Gender Equity Bills (2016-2022)



There was substantial variation between states in the volume of legislation introduced, as illustrated in Figure 4 (p. 40). The most active state legislatures were New York (340 bills), followed by New Jersey (208 bills), Mississippi (151 bills), California (113 bills), Illinois (112 bills), and West Virginia (112). Other states with a relatively high volumes of legislative activity were not confined to consistently Democratic "blue" states,[186] and included "swing"[187] and Republican leading states, including Virginia, Michigan, Minnesota, Pennsylvania, Texas, Hawaii and Missouri.

However, the states with very little legislative activity – those that introduced ten or fewer #MeToo related bills between 2016 and 2022 – were "red" states: Arkansas (4 bills), South Dakota (6 bills), North Dakota (7 bills), Montana (7 bills), Idaho (9 bills) and Wyoming (10 bills). Nevertheless, the sustained engagement of most states in #MeToo legislation suggests that there was more sustained legislative interest and energy around #MeToo related gender equity reform than the partisan gridlock in Congress would suggest.

Figure 4 (p. 40) also highlights the years in which bills were

[186] Nathaniel Rakich, How Red Or Blue Is Your State?, FIVETHIRTYEIGHT (May 27, 2021),

[187] We used the FiveThirtyEight "partisan lean" index to classify states as "swing," "blue," or "red." "Swing" states refer to states with a partisan lead in favor of either party within a 5-percentage point margin. "Blue" refers to states with a partisan lead in favor of the Democratic Party exceeding 5 percentage points. And "red" refers to states with a partisan lead in favor of the Republican Party exceeding 5 percentage points.

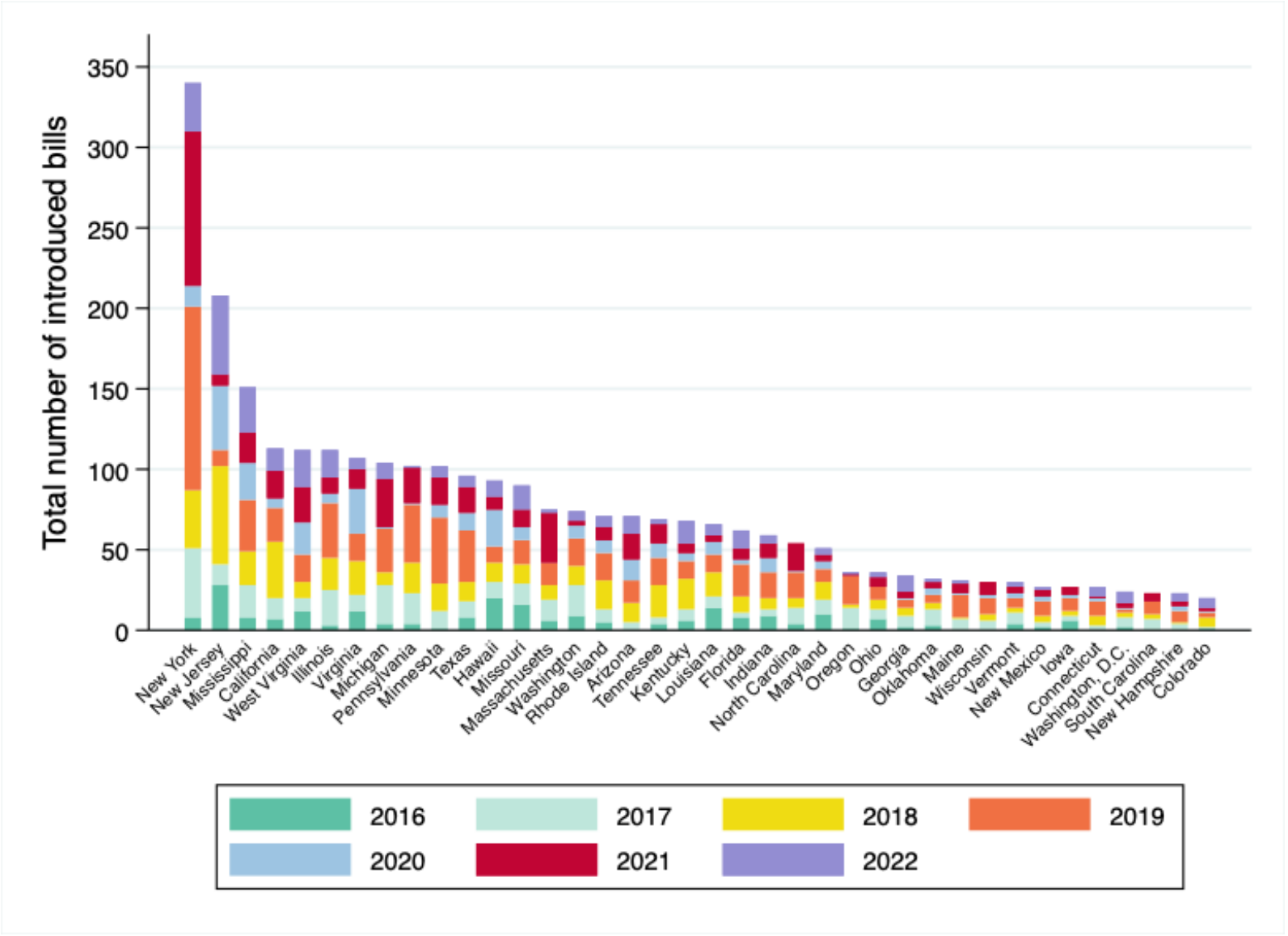
introduced in each state, indicated by color within each bar. Although each state had more legislative activity in some years than others, they generally depict some legislative activity during each year in the sample period. This further suggests sustained legislative activity over time, not just across states writ large, but within each state.

The states that passed the most #MeToo related bills were similar, but not identical, to those that introduced the most #MeToo related legislation, with California in the lead (73 bills), followed by Illinois (31), New York (27), Washington (25), New Jersey (17), Virginia and Maryland (15 each), Nevada (13), then Louisiana, Oregon and Maine (12 each). See Figure 4 (p. 40).

Although "blue" states predominate the list, the most prolific bill-passing states also included a solidly "red" state (Louisiana), and two swing states (Nevada and Virginia). The group of states that passed between 5 and 10 bills also included a handful of swing or red states, including Pennsylvania, Texas, Arizona, Tennessee and Kentucky, each of which passed 5 bills. Ten states failed to pass any #MeToo bills. Of these, 7 were "red" states, and 3 were "swing" states.[188] In other words, the volume of bills passed in any given state is somewhat more reflective of the partisan divides between red states and blue states than the volume of bills introduced.

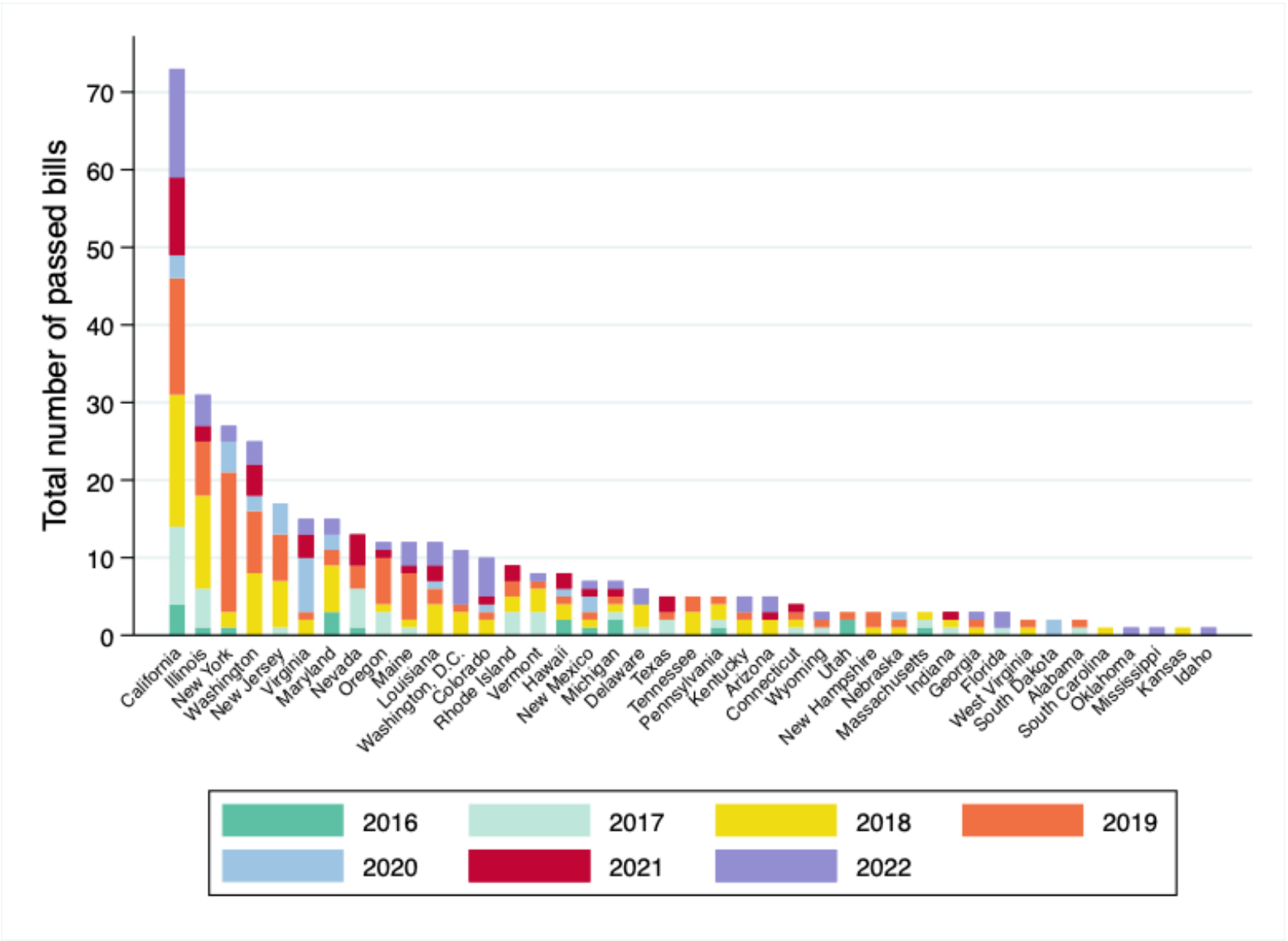
[188] The red states were Missouri, Ohio, Iowa, Alaska, Montana, North Dakota, and Arkansas. The swing states were Minnesota, North Carolina and Wisconsin.

Figure 4. Bills Introduced by State (2016-2022)[189]



[189] Only states with at least 20 introduced bills were included in Figure 4 (p. 40).

Figure 5. Bills Passed by State (2016-2022)[190]



C. Political Trends in Gender Equity Legislation Post- #MeToo

Now that we have a sense of the general landscape with respect to state legislation post #MeToo, we can take a closer look at the political trends.

[190] Only states that passed at least one bill were included Figure 5 (p. 41).

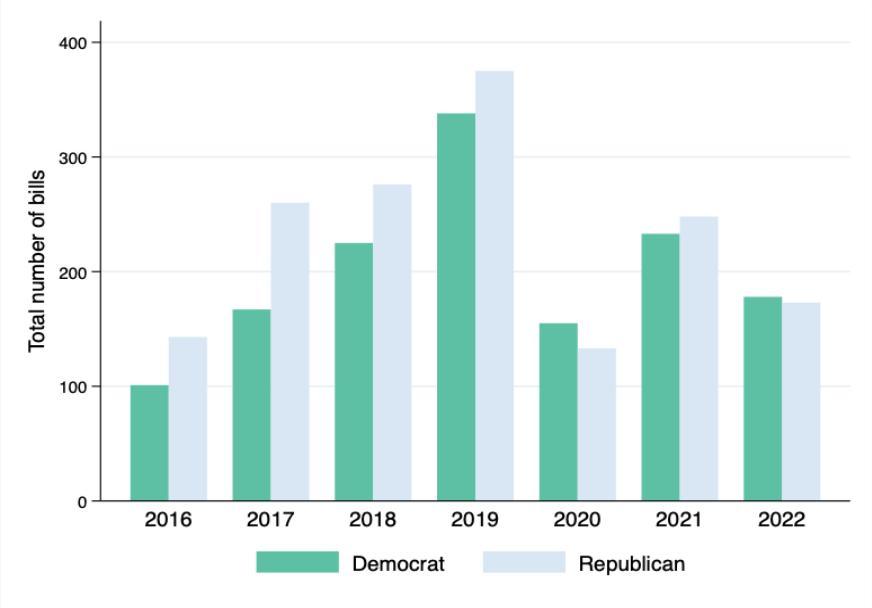
While all states introduced some harassment and gender equity reform legislation, there are trends in region, party, and even representation of women in legislatures, that provide information about who is leading the charge with respect to introducing and/or passing legislation that produces effective change.

a. Political Party

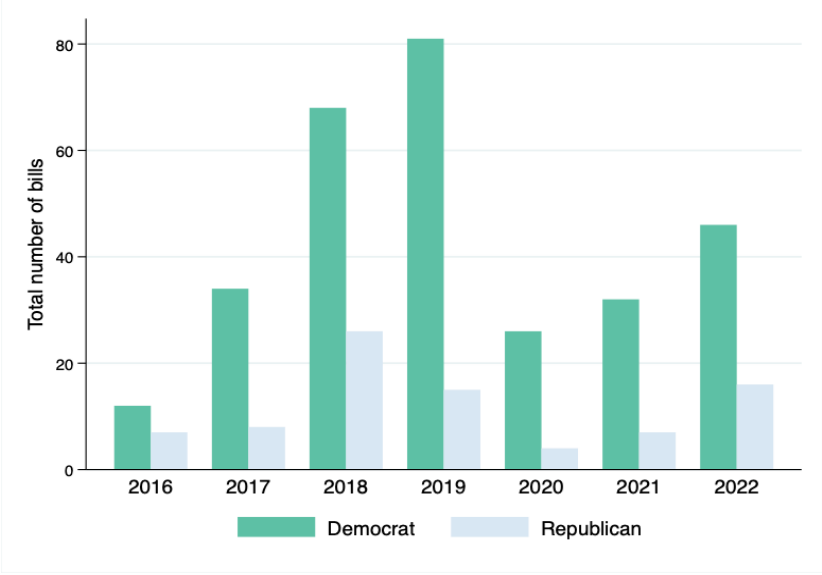
Figure 6 (p. 45) presents a more direct breakdown of the relationship between partisanship and #MeToo legislation. Throughout much of the sample period, more #MeToo related bills were introduced in Republican-led legislatures, relative to Democrat-led legislatures. However, Democratic legislatures passed far more bills than Republican-led legislatures by a margin of 3.6 to 1. These results suggest that there was substantial legislative interest in #MeToo related topics in both Republican and Democratic state legislatures – and perhaps even a greater level of experimentation in Republican legislatures – but far less momentum to pass those bills in Republican states.

Figure 6. Bills Introduced and Passed by Party Majority and Year[191]

a. Introduced bills



b. Passed bills

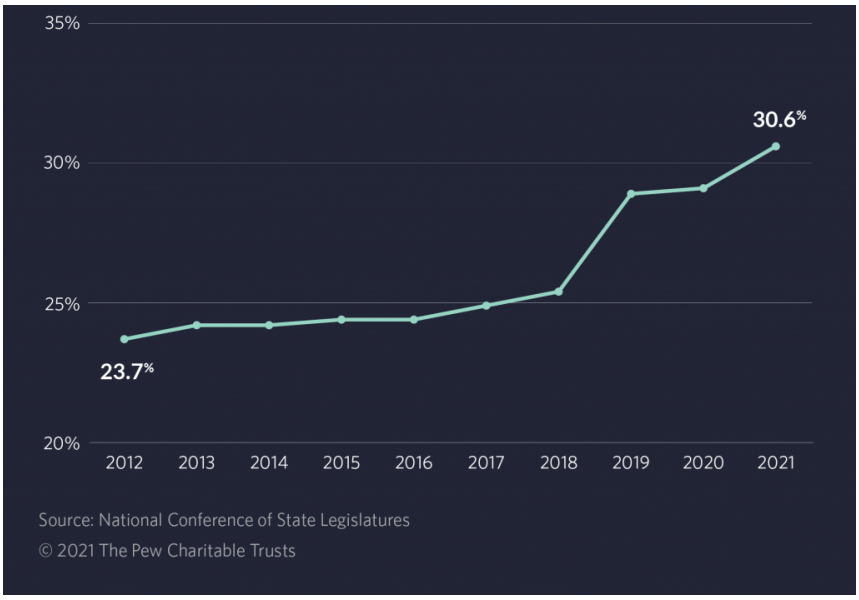


[191] This figure does not include seven laws introduced in Alaska that had "N/A" for party majority.

b. Representation of Women Lawmakers

Part I discussed the historical exclusion and underrepresentation of women and racialized minorities in the lawmaking process. From 2016 to 2021, as the conversation around #MeToo and gender equity broadened, the percentage of women in state legislatures grew to record numbers in many states.[192] See Figure 7 (p. 46).

Figure 7. Percent of State Legislators Who Are Women, 2012-2021



We next analyzed the relationship between the average representation of women in each state legislature 2016 to 2022, and the volume of gender equity legislation the state passed during that same time period. The results indicate that generally speaking, states with more women lawmakers tended to pass more gender equity legislation in the years following #MeToo than states with fewer women lawmakers.[193] See Figure 8 (p. 46).

Most states tended to cluster together along party lines. For example, traditionally red states including West Virginia, Wyoming, Alabama and South Carolina had state legislatures with less than 20% of women lawmakers and also passed less than ten gender equity bills between 2016

[192] Data from National Conference of State Legislatures

[193] One exception was California which was an outlier in that it had dramatically higher bill passage rate. This ended up skewing the data drastically, it was removed from the scatterplot.

and 2022. By contrast, Democratic strongholds such as Illinois, New York, and Washington had legislatures with between 30% and 40% women lawmakers, as well as over 20 gender equity bills passed in each of these states between 2016 and 2022. This suggests that Democratic states may be leading the way with respect to maximizing anti-discrimination legislation put forth – in line with the Swiss Cheese Model of risk reduction. However, the substance of the bills passed is another critical part of the analysis.

Figure 8. Frequency of Gender Equity Legislation Passed, by Mean % Women Lawmakers, 2016-2022

D. Topical Analysis of Gender Equity Legislation Post-MeToo

This section takes a closer look at the types of bill topics introduced and/or passed and examine whether the activity was responsive to the gaps in protection previously identified in Parts I and II. We found that states attempted to pass a variety of legislative measures on a number of topics related to gender equity and workplace harassment. The breadth of introduced bill topics is promising, as it suggests legislators are open to taking a multi-layered approach to increasing protection and minimizing harassment especially in industries at particular risk.

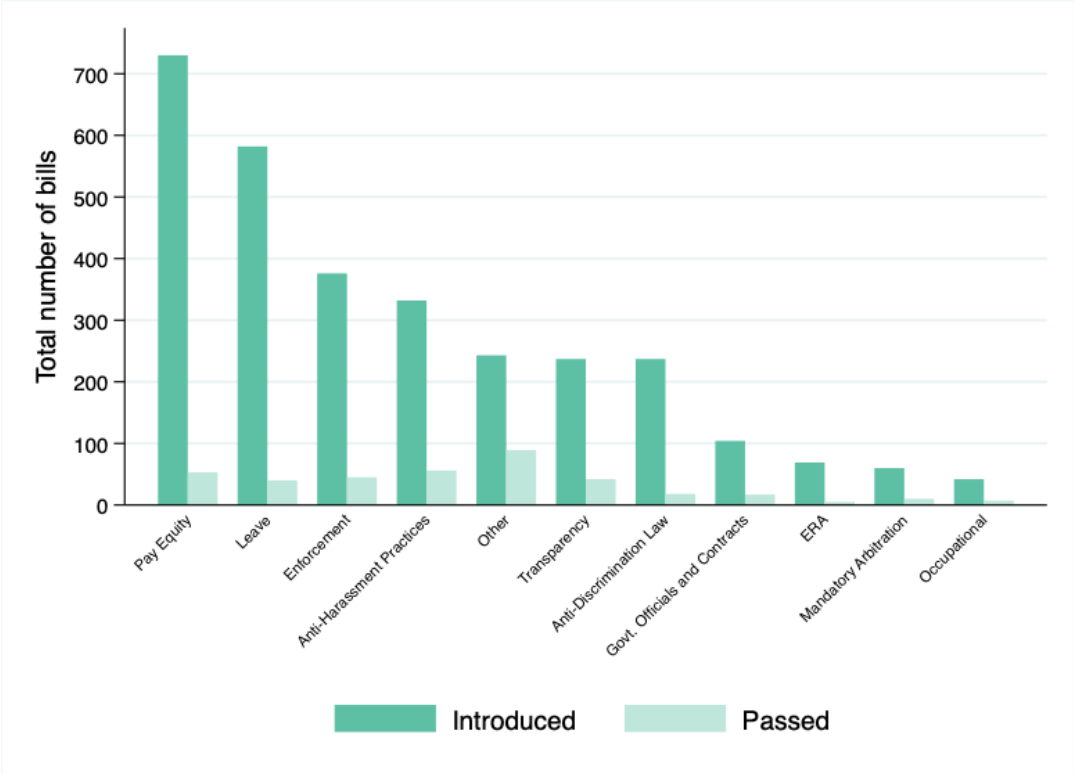
Figures 9 and 10 display the introduced and passed bills according to the topic of the legislation. As Figure 9 (p. 48) illustrates, pay equity was the

most common topic of proposed legislation, with more than 700 bills introduced. Leave laws were the second most common topic, with 582 bills proposed. Enforcement bills – which included a variety of reforms to strengthen protections by changing legal rules and remedies – were the third most prevalent, with 376 bills. Laws mandating changes to employer practices and policies ("Anti-Harassment Practices"), such as harassment training and grievance procedures, came in fourth, with 332 bills.

The topics most commonly passed in the legislature did not correspond to the topics that were most frequently introduced. The most commonly passed topic was "Other," which predominantly consisted of symbolic legislation, such as designating an "Equal Pay Day," expressing a policy position, or establishing a task force. The second most commonly passed topic was laws relating to Anti-Harassment Practices, closely followed by laws relating to Pay Equity.

Figure 9. Number of State Gender Equity Bills, By Primary Topic

The volume of bills introduced on specific topics could ultimately be viewed as a proxy for broad legislative interest in a topic, where pay equity and leave garnered the most interest. Legislative volume may also be an



indicator of legislative creativity and innovation around a particular topic. Pay equity bills in particular produced a wide variety of proposals to address the underlying problem, ranging from pay disclosure rules, protection from retaliation, new forms of equal pay mandates, or restrictions on the types of information employers can use to calculate pay rates. Republican led states were often as creative in this regard as Democratic ones.

For example, West Virginia introduced a bill entitled the "Katherine Johnson Fair Pay Act of 2019" in honor of Katherine Coleman Johnson, an African American mathematician born and educated in West Virginia. She was awarded the Presidential Medal of Freedom despite facing segregation and wage discrimination along with the rest of her Black female crew. The bill would prohibit an employer from 1) banning pay discussion in the workplace formally through waiver or informally and 2) inquiring about prospective employees' wage or salary history.[194] Utah and Wyoming also took steps to bolster equal pay protections; in 2016 and 2019, respectively, both states passed legislation increasing fines for employers and legal remedies for victims of wage discrimination.[195]

Many states also used a bundling approach, by adding in additional topics that were "secondary" to a primary bill topic.[196] Once secondary topics are included, the "Other" category remains the most commonly passed topic. However, other types of reforms received a substantial boost by including "secondary" topic codes, particularly the "Enforcement" category, which rises to second place when secondary topics are included. Likewise, anti-discrimination law reforms were much more frequent when adding analysis of secondary topics. This suggests that legislators are strategizing – proposing a bill on a primary topic (e.g. Pay Equity) that may garner wider support, and then in the same bill, adding other protections that are less likely to be presented and supported in standalone bills.

These secondary "hidden" topics are of note because they tend to add substance to bills that may otherwise lack the ability to promote effective change. We measure the effectiveness of a bill by assessing its ability to fill at least one of the many gaps identified in harassment and anti-discrimination law. The ability to fill these "holes," to use the Swiss Cheese Model analogy, indicates an appropriate focus on how harassment and other gender inequities in the workplace are actually experienced by today's most vulnerable workers. For example, many of the workers most vulnerable to harassment also have extremely limited economic bargaining power due to various

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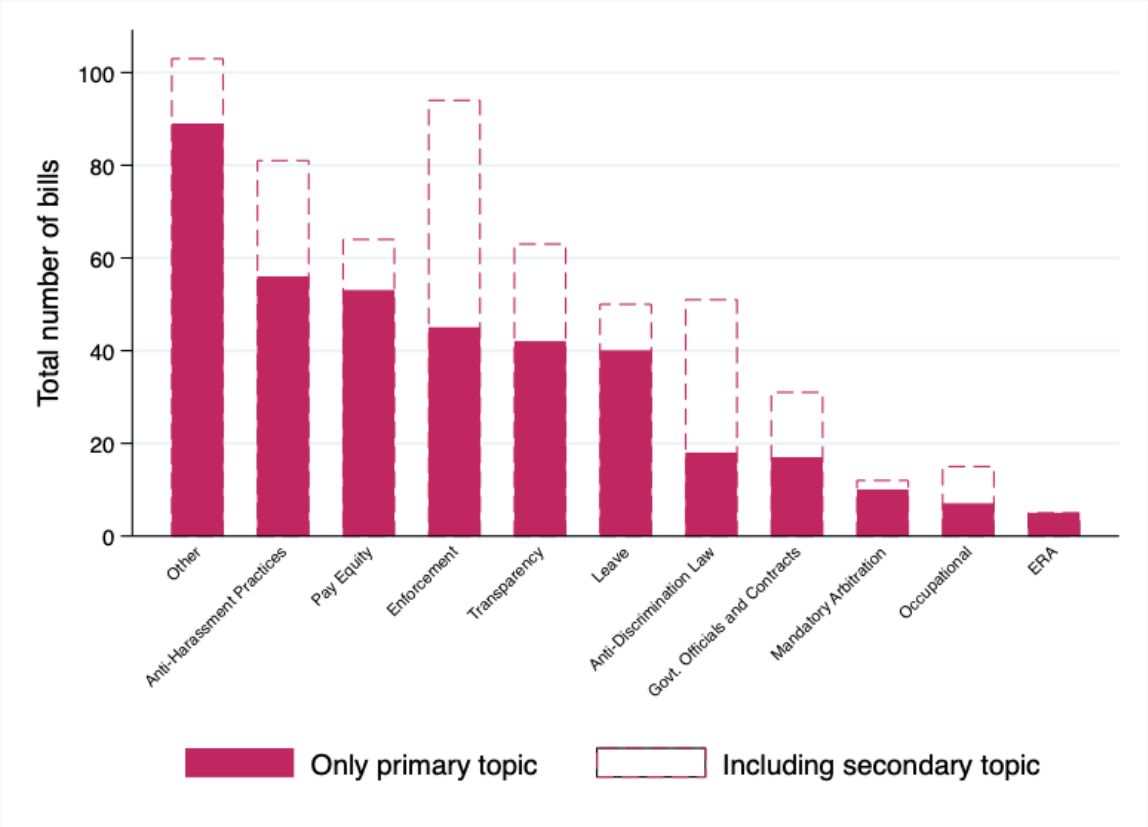
[194] S. 412, Reg. Sess. (W. Va. 2019).

[195] S. 185, Gen. Sess. (Utah 2016) (enacted); H. 71, 65th Leg., Gen. Sess. (Wyo. 2019) (enacted).

[196] *See* discussion *supra* at note 174.

factors including the racial and gender pay gap. To bolster these workers' ability to fight existing wage discrimination, many state legislators added a cause of action into pay equity reform bills that would have otherwise lacked an enforcement mechanism that allowed workers to take their claims in court.

Figure 10. Total Number of State Gender Equity Bills Passed, By Topic



Secondary topics were a common feature of the dataset: almost 40% of bills had one or more secondary topics See Table 2 (p. 52). The most common topic bundle combined Pay Equity and Enforcement (307 bills), followed by Leave and Enforcement (200 bills). This bundle tended to reflect that new leave or pay equity laws were typically more substantive in nature, and drafted with some sort of enforcement remedy beyond fines for employer violations – thereby increasing workers' access to courts. For example, in 2016, even before the #MeToo activism, California passed an Equal Pay for Equal Work bill that was both systemic and substantive, and included a bundle of enhanced protections. This new law not only prohibits wage discrimination, but also creates a cause of action for employees aggrieved by wage discrimination, as well as a prohibition on retaliation against employees

seeking enforcement of the law.[197]

Table 2 (p. 52) also reveals less intuitive combinations, such as bundling Anti-Discrimination Law along with other bill topics. One example of this strategy comes from New York, where the 2020 legislature introduced an extensive bill that bolstered discrimination and harassment enforcement remedies and expanded protected classes to include individuals experiencing these harms on the basis of their sexual orientation and gender identity, marital status, familial status, and more.[198] This strategy was also adopted in many Leave laws, which were frequently accompanied by reforms to Anti-Discrimination Law (75 bills). Pay Equity was also commonly paired with reforms to Anti-Discrimination Law (41 bills). This bundled approach, thus, may have served as an effective strategy to effect systemic broadening of statutory protection without attracting undue attention and opposition.

Indeed, it appears that strategically "bundling" topics increased the ability of legislatures to pass reform that either 1) create or strengthen a variety of enforcement mechanisms for harassment and other gender equity claims, or 2) broadened coverage under anti-discrimination statutes. Although standalone bills involving these reforms had less success, legislators appear to have successfully tacked them on to bills involving other subjects.

Table 2. Common Bundles of Workplace Gender Equity Topics

	Secondary topic

[197] A. 1676, 2015-2016 Gen. Assemb., Reg. Sess. (Cal. 2016) (enacted).

[198] S. 3817, 242nd State Assemb., Reg. Sess. (N.Y. 2019).

Primary topic	Anti-Discrimination Law	Anti-Harassment Practices	Enforcement	Govt. Officials and Contracts	Leave	Mandatory Arbitration	Occupational	Other	Pay Equity	Transparency
Anti-Discrim. Law		5	60	21	10		1	2	3	1
Anti-Harassment Practices	25		29	11	2	4	9	3	1	37
Enforcement	25	12		5	2		3	4	6	9
Govt. Officials and Contracts	8	58	11		1			1	1	19
Leave	75		200				18	6	2	27
Mandatory Arbitration	2	3	20	10				1		12
Occupational	1	12	12		3				1	5
Other	7	8	3	1	7				16	8
Pay Equity	41	1	307	47	7		22	1	5	54
Transparency	6	10	36	28	1	14	8	2	1	

Reform initiatives that aim to strengthen enforcement mechanisms and broaden coverage under Title VII to protect more workers are essential because they increase access to the courts. Reform will not reduce the prevalence of harassment and other gender inequities if impacted workers are unable have their claim addressed by the court system. It is also, true, however, that the judiciary needs reform itself, particularly with respect to its interpretation of the severe/pervasive standard, the objectively hostile standard, the *Faragher/Ellerth* defense, and retaliation. Until the judiciary is more in touch with the realities of the workplace, it is unclear how well this new wave of workers with access to the courts will fare.

Progressive coastal states such as California and New York provide examples of legislative agendas that substantially shift how workplace harassment is conceptualized by courts.[199] This legislation attempts to fill gaps caused due to both federal and state courts introducing heightened legal standards that lead to underenforcement.[200] Both of these states also amended

[199] Johnson et al., *supra* note 21, at 8.

[200] Post Me-Too, New York lowered the severe or pervasive standard, eliminated the *Faragher/Ellerth* affirmative defense, and instituted training requirements. S. 6577, 242nd

laws to expand protections for harassment and discrimination to include more protected categories as well.[201]

Some states also improve enforcement by extending the administrative filing period of harassment and/or discrimination claims. Five states (California, Connecticut, Maryland, New York, and Oregon) extended the administrative filing deadline.[202] Of these, three states extended the deadline for all discrimination claims.[203] This is particularly important for low-wage workers, for whom inadequate filing deadlines exacerbate existing pressure to use limited time and resources to at once both find a job and seek legal recourse for harm suffered.

A relatively small number of bills sought to increase the damages available in harassment claims. These bills were also somewhat successful, with four states – Virginia, Nevada, New York and Connecticut – increasing available damages. Many but not all passed bills did so by 1) allowing discrimination plaintiffs to recover both compensatory and punitive damages 2) removing damage caps for victims of discrimination based on employer size. In some states, such as Nevada, damage caps remain, limiting the impact of recent increases in available damages.[204]

IV. DISCUSSION & IMPLICATIONS

When analyzing the legislative activity over time, we found that while proposed bills began to address a wider range of systemic gender equity issues over the time period;[205] as with many movements, reform efforts gradually fizzled out over time. Importantly, however, they never returned below the 2016 baseline activity. These empirical results suggest that while the #MeToo movement may have sustained some of its initial impact on harassment and gender equity reform over the past five years, progress may be stagnating. Avoiding further stagnation requires legal stakeholders to offer workers consistent harassment and gender equity reform that are responsive to the changing realities of the 2024 workplace.

Gen. Assemb. (N.Y. 2019) (enacted).

[201] Johnson et al., *supra* note 21, at 5.

[202] Four of these five states extended the filing period for harassment and discrimination claims. New York extended the administrative filing period for "sexual harassment" only.

[203] A. 9, 2019-2020 Gen. Assemb., Reg. Sess. (Cal. 2019) (enacted); S.B. 726, 80th Leg., 2019 Reg. Sess. (Or. 2019) (enacted); H.729, 2021-2022 Gen. Assemb., Reg. Sess. (Vt. 2022) (enacted).

[204] S.B. 177, 80th Leg. (Nv. 2019) (enacted).

[205] B24-0649, 24th Council (D.C. 2023) (enacted); H. 1, 149th Gen. Assemb. (Del. 2017) (enacted); S. 2986, 218th Leg. (N.J. 2019) (enacted); S. 5258, 66th Leg., Reg. Sess. (Wash. 2019) (enacted).

A. Did States Fill Any Gaps?

State legislation partially filled gaps left by federal law. While state legislators took a broad approach to introducing harassment and gender equity reform, they took a narrower approach to amending harassment law. While we did see efforts to combat noted gaps in protection such as mandatory arbitration at both the state, and even federal level, these efforts are typically limited to banning mandatory arbitration of sexual harassment claims – leaving harassment on other bases, as well as other discrimination claims unprotected. This creates challenges for plaintiffs experiencing harassment based on multiple categories or those experiencing both discrimination and harassment, which often occur together.

At the same time, state legislatures seriously attempted, and in many cases, succeeded in expanding the list of protected classes protected by anti-discrimination law. For example, some states have expanded protections to cover workers excluded from Title VII coverage, such as those working for small employers, independent contractors, and unpaid interns among many others.[206] Some have also expanded liability and remedies for harassment by removing Title VII's affirmative defense against harassment as well as its caps on compensatory and punitive damages for victims of harassment.[207]

The most unexpected finding came from the Enforcement bill category. Enforcement was the third most introduced bill topic, suggesting stronger legislative support than expected. Moreover, when we considered secondary topics, the number of Enforcement bills nearly doubled. Upon closer look at the data, it appears that this may be a strategy among state legislators, who add enforcement mechanisms to increase access to the courts in a variety of harassment and gender equity issues including pay equity, leave/accommodation, and anti-discrimination law, that attract broader support. In result, there will likely be an influx of new plaintiffs who are able to have their day in state court. While this is generally good news, it also highlights the continuing and glaring failure of the judiciary to remedy the harassment that is experienced and brought before the courts. Expanding coverage to additional workers and increasing their access to the courts will only work if they are encountering a judiciary that is responsive to power hierarchies and realities of the workplace, while also being serious about curtailing harassment. It is clear that there is still work to be done in this respect, and we look forward to conducting further research examining the topical granularity of the Enforcement bills in our database and how future

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[206] Ramit Mizrahi, *Sexual Harassment Law after #MeToo: Looking to California as a Model*, 128 YALE L.J. 121, 126–28 (2018).

[207] *Id.* at 130.

clams fare in court.

On the federal level, several bills failed in their attempt to remedy the judicially created harassment doctrine outlined in Part II. HB8698, for example, introduced in October 2020 sought to amend Title VII to overturn Supreme Court jurisprudence that is unfavorable to victims of harassment, including *Alexander v. Sandoval*,[208] *Vance v. Ball State*,[209] and *Faragher/Ellerth*.[210] This would enhance enforcement by allowing plaintiffs to sue under Title VII based on evidence of disparate impact, strengthening plaintiff's ability to sue under a theory of vicarious liability, and reducing the likelihood of judicial deference to employer anti-harassment policies and procedures, despite ineffectiveness. The bill also created a broader exception to the Federal Arbitration Act for all employment related rights and remedies under federal and state law, not just sexual harassment. It would also have expanded available remedies by allowing plaintiffs to collect pre-trial attorney's fees.[211] HB8698 would prohibit employment discrimination on the basis of sexual orientation and gender identity, a proposal that was ultimately rendered moot by the Supreme Court's 2020 decision in *Bostock v. Clayton*.[212]

Knowing the effect of the #MeToo movement on legislative agendas and bill passage rates is important for those who wish to maintain and expand the momentum that was fueled and, in some cases, created by these movements. More specifically, legislators and other legal decision-makers, including the courts and government agencies, should make workers' voices central to their work. Following the lead of worker organizers whose anti-harassment advocacy efforts predated the groundswell of attention brought by the #MeToo movement will not only bring consistency, but also timeliness and specificity to the anti-harassment agendas set by various legal stakeholders. Below, we outline four specific issues that we believe should be central to advocacy efforts, in particular, due to their deleterious effects on workers most vulnerable to workplace harassment.

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[208] Overturning the Supreme Court's decision in *Alexander v. Sandoval*, would allow a private right of action under Title VII Section 703 based on evidence of disparate impact. The *Sandoval* decision has prohibited private individuals from challenging specific types of disparate impact discrimination, state regulations with the effect of discriminating against classes of individuals. Alexander v. Sandoval, 532 U.S. 275 (2001)

[209] Vance v. Ball State Univ., 570 U.S. 421 (2013).

[210] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[211] Congress, H. R. 8698.

[212] Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

B. Legal Gaps in Need of Greater Attention

While the past five years following the #MeToo movement has seen reforms pass that were more systemic and bipartisan than anticipated, major gaps remain allowing harassment to remain as a threat. Harassment and gender equity reform is particularly in need of (1) more systemic changes with greater oversight, transparency, and accountability, (2) greater focus on intersectional harms, (3) well-informed enforcement efforts by judges, attorneys, and agencies alike, and (4) more creative strategies to deal with retaliation.

1. Symbolic Action and Individuation of Harassment Continues, and Even Worsens?

Our analysis revealed a substantial number of reforms that were symbolic in nature, which encourages institutional "window dressing," to merely signal enhanced rights, but without effective policies or cultural shifts.[213] Some states created days of honor or remembrance, without adding substance of additional protections or enforcement, which we do not expect to make a meaningful difference beyond raising public awareness about harassment and other gender equity issues. Others condoned behavior of a government official or stated policy support for an issue, without actually making changes that change circumstances for women on the ground. Many states also created task forces and commissions to study issues of harassment and gender equity, but subsequent legislation would be needed to effectuate any changes proposed by these groups. Symbolic reforms may even be counterproductive to the extent they "check the box" by passing a related bill, creating the appearance of having addressed the problem. This can provide political cover, while failing to implement more meaningful systemic reform.

Even more troubling is the continued popularity of bills imposing harassment training requirements. While these bills can have substantive impact, research has shown that unless certain conditions – such as transformative leadership or bystander-specific training – are met, trainings are likely to be ineffective at promoting changes to workplace behavior. Moreover, training requirements can even be counterproductive. Legal

[213] One prominent category we coded as symbolic were bills ratifying the Equal Rights Amendment to the United States Constitution, however; the Equal Rights amendments that apply to state constitutions may potentially be meaningful at the state level, to the extent they serve to protect reproductive rights following the Dobbs decision. Equal Rights Amendments are of questionable efficacy at the federal level, as the original ERA contained a seven-year deadline, and the Senate has not passed a House resolution lifting the deadline. Nevertheless, state legislators introduced 69 bills relating to the ERA and passed 5.

stakeholders, thus, need to be aware of how training requirements tend to individuate harassment, making it about individual perpetrators rather than broader shifts in workplace culture, power dynamics, and worker dignity that are required. Training, grievance procedures, and investigations that focus on damage control may obscure the systemic patterns so often present in harassment and discrimination cases. In the current landscape, given the central role of the *Faragher/Ellerth* defense, these employer practices and procedures do more to insulate the employer from liability than they do to mitigate workers' risk of harassment or other gender-based harms.

2. Greater Focus on Intersectional Harms

Congress and state legislatures can, and should, also introduce more legislation protecting specific industries where women of color are overrepresented. This includes not only domestic workers, but independent contractors, farmworkers, healthcare, hospitality, retail, and restaurant workers.[214] Although state legislatures have stepped up to fill substantial federal gaps in coverage post #MeToo, barriers to enforcement remain and limit potential impact. To be effective, more systemic reform efforts are required that go beyond harassment law to also broaden protections across legal doctrines to the benefit of all women workers. This means, in particular, supporting state and federal legislative agendas that close gaps for the most vulnerable women workers, including low-wage workers, women of color, workers with disabilities, and LGBTQIA workers.

Importantly, this requires moving away from the narrow interpretation of sexual harassment by judicial precedent and envisioning a new legal agenda around gender equity reform that is responsive to the reality of our evolving workplace and society. Doing so will require not only our policymakers, but also agencies and courts, to internalize gender inequity, rather than sexual desire, as the foundation of workplace harassment, highlight how it is exacerbated by low-wage employment, and acknowledge how its impact, in many cases, compounds for women with additional protected characteristics, in precarious work, segregated working conditions,

[214] Elyse Shaw et al., *Undervalued and Underpaid in America: Women in Low-Wage, Female-Dominated Jobs* (Nov. 2016), https://iwpr.org/wp-content/uploads/2020/09/D508-Undervalued-and-Underpaid.pdf; 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/. In 2017 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. *See* S. 295, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).

and occupationally isolating jobs.[215]

3. Navigating an Employer-Friendly Judiciary

As aforementioned, our legislative analysis suggests plaintiffs will have greater access to the courts in the near future; but, we must further question and examine what that means if the judiciary continues to constrain harassment and gender equity doctrine. This is a key moment for employment and civil rights lawyers to advocate effectively for their clients and in doing so, set new precedents, for the court. Doctrinal areas in need of innovation include the "severe and pervasive" requirement, the "objectively" hostile or abusive standard, and the *Faragher/Ellerth* affirmative defense.

4. Dealing with Retaliation is Required for Reforms to Work

Strengthening judicial enforcement is also important in the context of retaliation, which continues to go hand-in-hand with harassment. Despite high rates of retaliation and its role in deterring victims from speaking up and using existing protections, state legislative agendas failed to pass measures that would more effectively deal with this issue. Solving the problem of retaliation requires more than changes to anti-retaliation laws; it also requires stronger enforcement that would incentivize systemic changes to workplace culture. In addition to legislation strengthening anti-retaliation protections generally, more bills should focus on identifying and mandating what specific behaviors are considered retaliatory. These reforms could include retaliatory actions such as substantive changes to terms of employment, disclosing personnel files, contacting immigration authorities, or threatening to report an employee's immigration status.[216] Doing so would signal the legislature's recognition that retaliation is rooted in systemic power imbalances, and is particularly threatening for workers in low-wage industries and/or with intersectional identities including race and national origin.

CONCLUSION

Considerable legislative progress has been made in the first five years after #MeToo went viral. Overall, more harassment and gender equity reform has occurred than expected, and through a more varied and comprehensive approach than first predicted. This is particularly true at the state level where

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[215] Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018).

[216] *Id.*

new laws also offer greater coverage and enforcement remedies under civil rights statutes regardless of worker classification and with consideration of their occupational hazards and intersectional vulnerabilities.

While it is clear that the #MeToo movement moved the law forward with respect to harassment and gender equity, more work needs to be done, particularly with respect to centering the interests of workers most vulnerable to harassment. Various institutions, including judges, lawmakers, and agencies, contributed to the dissonance between the legal enforcement of, and the realized experience of workplace harassment. This dissonance is then distributed widely via media, leading to public apathy and confusion about the current landscape of workplace harassment and related gender equity issues.

This does not mean, however, that effective and responsive reform efforts are out of reach. Legislators and regulators alike should consult anti-harassment worker organizers in crafting future reform. Doing so will enable legal branches to establish greater consistency in their treatment of harassment and remain up-to-date with the rapidly changing realities of workplace harassment. This, in turn, will have the desired effect of closing the gaps between how harassment is enforced on the books, how it is enforced in the workplace, and how it is experienced by working women.

Federal actors should also make fruitful use of state level innovation to ensure that state-level successes achieve a broader impact. Now that states have provided evidence of bipartisan support for these issues, Congress and federal agencies including the EEOC, DHHS, and even OSHA, should step in and offer a more systemic approach that covers the multitude of gender equity issues that contribute to harassment.

Lastly, our goal is for our dataset to be used as a public resource, from which further research can be developed with the hope of providing concrete findings regarding the effectiveness of state-specific harassment and gender equity legislation. In turn, this research can be used to bolster the advocacy efforts by worker organizers. Doing so will enable legal stakeholders to remain in conversation with those best situated to determine the needs of a given workplace with respect to preventing harassment – the workers, themselves.

Appendix A.

Search Terms Used to Identify #MeToo Related Legislation

Abusive Work Environment	Gender	Pay Parity	Sexual Orientation
anti-SLAPP	Gender Expression	Predispute Arbitration	Sexual penetration
Antidiscrimination	Gender Identity	Pregnant Workers	Sexual Violence
Compensation History	Gender Representation	Public Right to Know	Sodomy
Confidentiality Agreement	Gratuities	Rape	Stalking
Confidentiality Clause	Harassment	Retaliation	Statute of Limitations
Confidentiality Provision	Harassment Complaints	Salary Experience	Statutory Right
Cyberbullying	Harassment Prevention	Salary History	Unauthorized Disclosure
Denim Day	NDA	Sex	Wage Disclosure
Discrimination	Non-biased Compensation	Sexual Abuse	Wage Discrimination
Discrimination Complaints	Non-consensual	Sexual Arousal	Wage Disparities
Domestic Violence	Nonconsensual dissemination	Sexual Assault	Wage Disparity
Equal Pay	Nondisclosure Agreement	Sexual Assault Awareness	Wage History
Equal Rights	Nondisparagement Agreement	Sexual battery	Wage Secrecy
Equal Rights	Paid Family Leave	Sexual Discrimination	Workplace Bullying
Equal Rights Amendment	Panic Button	Sexual Gratification	Workplace Climate
Ethics Violation	Panic Device	Sexual Harassment	Workplace Misconduct
Family Leave	Pay Disparity	Sexual Intimidation	Workplace Protections
Forced Arbitration	Pay Equity	Sexual Misconduct	

Appendix B.

Search Terms Used on Bill Corpus to Verify Topic Coding

Topic	Search Terms
Anti-Discrimination	"gender identity" "gender expression" "sexual orientation" "pregnan" "famil* status" "marital status" "famil* responsibility"
Equal Rights Amendment	"equal rights amendment" "ratification"
Harassment Training/Policies/Procedures	"sexual harassment training" "sexual harassment prevention" "complaint process" and "complaint procedure"
Leave/Accommodation	"paid family leave" "safe" "paid sick leave" "domestic violence" "accommodation" "pregnan*" "adoption" and "foster"
Mandatory Arbitration	"mandatory arbitration" "forced arbitration" "arbitration agreement"
Occupational Protections	"domestic" "hotel" "farm" "janitor" "artist" "panic" "bill of rights" "entertainment" "gratuit*"
Pay Equity	"wage discrimination" "pay dispar" "equal pay for equal work" "equal pay" "salary history" "wage history" and "pay equity"
Enforcement	"severe" "pervasive" "statute of limitations" "punitive damages" "compensatory damages" "damages" and "tort"
Regulates Government Officials/Lobbyists/State Contractors	"lobbyist" "state contract" "legislator" "members of the legislature" "legislative staff" "public officials" and "expel"
Transparency/NDAs	"disclosure" "employment history" "non-disclosure agreement" and "nondisclosure agreement"
Other	"task force" "study" "high-wage, high-demand" "law enforcement" and "boards"