

# #METOO, WRONGS AGAINST WOMEN, AND RESTORATIVE JUSTICE

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## INTRODUCTION

In the era of #MeToo, allegations of sexual harassment and assault have been surfacing at a staggering pace. Serial accusations against high profile perpetrators, such as Harvey Weinstein, Donald Trump, and Brett Kavanaugh, catapulted this issue into the national spotlight in a way our country has never seen. The #MeToo movement has supported those survivors who have found the courage to tell their stories, encouraged others to do so when ready, and raised awareness about sexual harassment and assault. The allied #TimesUp initiative focused on improving workplace safety and equality for women. However, despite these harbingers of change and progress, change has been slow to come and far from linear, leaving the following questions unanalyzed: How should we, as a society, address those individuals who committed crimes, indignities, and disrespect against women? What are the most effective avenues of compensation, redress, and healing for individual women who have been wronged? This Article argues that restorative justice is an underexplored avenue to redress wrongs against women and one that might best serve survivors, perpetrators, and our country as a whole.

As a nation, despite this heightened awareness, we have not addressed the more specific issue about how to confront those

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individuals who have been accused of these wrongs surfaced by #MeToo and how to redress those who have been harmed individually. Even after 18 months of #MeToo allegations, lawsuits, prosecutions, professional comebacks, and analysis, we are still merely posing questions about what is to be done. A NEW YORK TIMES editorial in 2018<sup>1</sup> aptly posed the inquiry in its title, “What do we Do with These Men?”<sup>2</sup> It queried, “[w]hat do we want from abusers? Under what terms should they be allowed to return to normal life? Is there a way to explore possibilities of redemption that don’t put more of a burden on the people harmed in the first place?”<sup>3</sup> And then in response, the writer admitted, “I don’t have answers to those questions.”<sup>4</sup>

This article seeks to begin a dialogue to answer that question by considering how to address the individuals involved in these workplace wrongs: both the accused perpetrators and the survivors. This article, in Part I, considers the allegations that have surfaced against high-profile perpetrators as a sample of the range of accusations raised generally through the #MeToo movement.

Part II analyzes the current responses available to redress the wrongs identified. The civil and criminal justice systems provide legal responses to sexual assault and harassment; social media and traditional media have also come to play a responsive role in this movement. The article considers the efficacy of both systems in delivering the resolutions we seek. This section also analyzes the pros and cons of media justice and its potential for delivering just and desirable outcomes for victims and society alike.

<sup>1</sup> As late as February of 2019, on a typical news cycle day, we are still just posing questions. The Washington Post editorial page that day included no fewer than two editorials that addressed sexual violence by merely asking questions about what we as a society can do and “where do we go from here?” See Fred Hiatt, “*Racism, Rape and Judging the Past*,” WASH. POST (Feb. 9, 2019), [https://www.washingtonpost.com/opinions/when-to-fire-your-governor/2019/02/10/9d4cf5de-2bc1-11e9-b2fc-721718903bfc\\_story.html?utm\\_term=.2693584fd76e](https://www.washingtonpost.com/opinions/when-to-fire-your-governor/2019/02/10/9d4cf5de-2bc1-11e9-b2fc-721718903bfc_story.html?utm_term=.2693584fd76e) [<https://perma.cc/N8TX-K23H>]; Jennifer Rubin, “*What do Virginia’s Scandals Tell Us?*” WASH. POST (Feb. 7, 2019), <https://www.amestrib.com/opinion/20190207/jennifer-rubin-what-virginia8217s-scandals-tell-us> [<https://perma.cc/93A3-CJNW>].

<sup>2</sup> Katie J.M. Baker, *What Do We Do With These Men?*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/sunday/metoo-comebacks-charlie-rose.html> [<https://perma.cc/LT26-TYGP>].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Finally, Part III turns to the potential of restorative justice, a therapeutic form of dispute resolution that has enormous potential for eliciting the outcomes we seek from wrongs surfaced in the #MeToo movement and those gender-based workplace wrongs that will continue to plague our country until further progress is made toward true gender-equality, respect, and understanding.

## I. #METOO ALLEGATIONS AND WHAT FOLLOWS

This section explores the allegations and the repercussions for both alleged perpetrators and survivors to support our analysis of what is lacking in our effective response to #MeToo allegations in the workplace,

In 2006, social activist Tarana Burke coined the “me too” term to promote solidarity among survivors of sexual assault and sexual harassment.<sup>5</sup> In 2017, hashtag #MeToo, based on Burke’s original term, went viral on social media and became a rallying call for increased consciousness of gendered wrongs and for support for survivors<sup>6</sup> – for those who report their perpetrators and for those who might not.<sup>7</sup> Celebrity use of the hashtag transformed it from a tool of social activism to a cultural moment. In publicly naming perpetrators, Alyssa Milano,<sup>8</sup> Reese Witherspoon,<sup>9</sup> Jennifer Lawrence<sup>10</sup> and others invited survivors nationally and internationally to take a stand together

<sup>5</sup> Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase when She Created It – 10 Years Ago*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm\\_term=.7b82ae8b4a1c](https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.7b82ae8b4a1c) [https://perma.cc/3ZHC-ECGN].

<sup>6</sup> *Id.*

<sup>7</sup> Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/2QN3-6CYE].

<sup>8</sup> *Id.*

<sup>9</sup> Libby Hill, *#MeToo: Reese Witherspoon says a director sexually assaulted her when she was 16*, L.A. TIMES (Oct. 17, 2017, 8:57AM), <https://www.latimes.com/entertainment/la-et-entertainment-news-updates-reese-witherspoon-shares-her-story-of-1508254090-htmllstory.html> [https://perma.cc/AA2Q-S9ZW].

<sup>10</sup> Judith Vonberg, *Jennifer Lawrence: I was treated ‘in a way that now we would call abusive,’* CNN (Feb. 28, 2018, 1:11PM), <https://www.cnn.com/2018/02/28/entertainment/jennifer-lawrence-amanpour-interview-intl/index.html> [https://perma.cc/C3J3-G28D].

against gender harassment and sexual assault. Hundreds of thousands of people accepted the invitation.<sup>11</sup>

In the months following the tidal wave of #MeToo allegations, the country engaged in conversations and debates about what sexual assault, harassment, and gendered abuse of power is and what particular harm it imposes.<sup>12</sup> Accused perpetrators such as Harvey Weinstein and Matt Lauer lost their high-powered jobs;<sup>13</sup> others

<sup>11</sup> Riley Griffin et al., *#MeToo's First Year Ends with More than 425 Accused*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/> [<https://perma.cc/EY24-S5N90>]; Garcia, *supra* note 7.

<sup>12</sup> See generally #MeToo, *One Year On*, ECONOMIST (Sept. 27, 2018), <https://www.economist.com/leaders/2018/09/27/metoo-one-year-on> [<https://perma.cc/6CSK-PM6X>] (“Mr. Weinstein had been protected by an unspoken assumption that in some situations powerful men can set their own rules. Over the past year that assumption has unraveled with welcome speed.”); Sopan Deb, *Aziz Ansari Addresses Sexual Misconduct Accusation During New York Set*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/arts/aziz-ansari-sexual-misconduct-accusation.html> [<https://perma.cc/F2LH-59EY>] (“The article was criticized for its reporting methods, but nonetheless set off a debate about dating culture and the boundaries of the #MeToo movement during its height.”); Constance Grady & Anna North, *Kavanaugh's Hearing is a Test of How Much We Care about Sexual Assault*, VOX (Sept. 27, 2018, 8:04 AM), <https://www.vox.com/policy-and-politics/2018/9/24/17876302/brett-kavanaugh-christine-ford-hearing-me-too> [<https://perma.cc/D35F-RDDT>] (“But in the lead-up to Ford’s testimony, the media, politicians, and ordinary Americans have managed to relitigate nearly all the major questions that the #MeToo movement has brought up over the past year.”); Cara Kelly & Aaron Hegarty, *#MeToo Was a Culture Shock. But Changing Laws Will Take More than a Year*, USA TODAY (Oct. 5, 2018, 12:28 PM), <https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/> [<https://perma.cc/4T6E-6J4M>] (“We found that since #MeToo began, elected officials passed 261 laws that directly addressed topics championed by the movement, just a slight uptick from the 238 in the year prior.”).

<sup>13</sup> Brooks Barnes, *Harvey Weinstein, Fired on Oct. 8, Resigns from Company's Board*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/business/media/harvey-weinstein-sexual-harassment.html> [<https://perma.cc/Z67J-4KT7>] (“Following allegations of sexual harassment against Harvey Weinstein, the movie and television studio he helped to found swiftly fired him as an employee.”); Paul Farhi, *'Today' Show Host Matt Lauer Fired After Claims of 'Inappropriate Sexual Behavior'*, WASH. POST (Nov. 29, 2017), [https://www.washingtonpost.com/lifestyle/style/today-show-host-matt-lauer-fired-after-claims-of-inappropriate-sexual-behavior/2017/11/29/ee85bf42-d4fd-11e7-b62d-d9345ced896d\\_story.html?utm\\_term=.63379078ae91](https://www.washingtonpost.com/lifestyle/style/today-show-host-matt-lauer-fired-after-claims-of-inappropriate-sexual-behavior/2017/11/29/ee85bf42-d4fd-11e7-b62d-d9345ced896d_story.html?utm_term=.63379078ae91) [<https://perma.cc/E4ZD-EMEX>] (“The wave of sexual harassment allegations roiling American society broke over a familiar figure, “Today” host Matt Lauer, who was fired by NBC

withstood and derided the allegations, such as Donald Trump and Brett Kavanaugh;<sup>14</sup> and still others took responsibility and stepped aside from their jobs, such as Minnesota Senator, Al Franken.<sup>15</sup> Survivors, although better supported than in previous years, remain the target of derision,<sup>16</sup> skepticism,<sup>17</sup> and even aggression.<sup>18</sup> Vocal

News on Wednesday for what its chairman termed "inappropriate sexual behavior.").

<sup>14</sup> Eliza Relman, *The 23 Women Who Have Accused Trump of Sexual Misconduct*, BUSINESS INSIDER (Feb. 25, 2019, 1:40 PM), <https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12> [<https://perma.cc/35G2-9CY5>] ([Trump said] "Total fabrication. The events never happened. Never. All of these liars will be sued after the election is over."); Seung Min Kim et al., *Kavanaugh Hearing: Supreme Court Nominee Insists on His Innocence, Calls Process 'National Disgrace'*, WASH. POST (Sept. 27, 2018), [https://www.washingtonpost.com/politics/kavanaugh-hearing-christine-blasey-ford-to-give-senate-testimony-about-sexual-assault-allegation/2018/09/27/fc216170-c1c3-11e8-b338-a3289f6cb742\\_story.html?utm\\_term=.b86115b2b126#KAVANAUGH](https://www.washingtonpost.com/politics/kavanaugh-hearing-christine-blasey-ford-to-give-senate-testimony-about-sexual-assault-allegation/2018/09/27/fc216170-c1c3-11e8-b338-a3289f6cb742_story.html?utm_term=.b86115b2b126#KAVANAUGH) [<https://perma.cc/823E-P6D6>] ("Supreme Court nominee Brett M. Kavanaugh angrily denied allegations of sexual misconduct and called his confirmation process a 'national disgrace' during testimony before a Senate committee Thursday.").

<sup>15</sup> Sheryl Gay Stolberg et al., *Al Franken to Resign From Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html> [<https://perma.cc/5B3T-VK3G>] ("In his speech, Mr. Franken, who counted himself an ardent defender of women's rights, called the national reckoning 'an important moment' that was 'long overdue,' adding, 'We were finally beginning to listen to women about the ways in which men's actions affect them.'").

<sup>16</sup> See Ken Armstrong & T. Christian Miller, *When Sexual Assault Victims Are Charged with Lying*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/opinion/sunday/sexual-assault-victims-lying.html> [<https://perma.cc/2FST-Q34L>] ("The women accusing the Republican Senate candidate Roy Moore of sexual misconduct have faced doubt and derision.").

<sup>17</sup> See Nia Decaille & Rachel Hatzipanagos, *What 'Surviving R. Kelly' Tells Us about Race and Sexual Assault*, WASH. POST (Jan. 11, 2019), [https://www.washingtonpost.com/nation/2019/01/11/what-surviving-r-kelly-tells-us-about-race-sexual-abuse/?utm\\_term=.1d4eea08f2eb](https://www.washingtonpost.com/nation/2019/01/11/what-surviving-r-kelly-tells-us-about-race-sexual-abuse/?utm_term=.1d4eea08f2eb) [<https://perma.cc/3SKH-3K3X>] ("The backlash against the accusers illustrates how black girls face harsh skepticism when revealing trauma in a society that effectively erases their girlhood, according to Epstein.").

<sup>18</sup> See Elizabeth Williamson et al., *For Christine Blasey Ford, a Drastic Turn From a Quiet Life in Academia*, N.Y. TIMES (Sept. 19, 2018), <https://www.nytimes.com/2018/09/19/us/politics/christine-blasey-ford-brett-kavanaugh-allegations.html> [<https://perma.cc/3ZYB-WWNL>]; Glenn Kessler & Meg Kelly, *Fact-Checking President Trump's Statements About Sexual Misconduct Allegations*, WASH. POST (Sept. 26, 2018), <https://www.washingtonpost.com/>

survivors are heroes to some<sup>19</sup> and villains to others.<sup>20</sup> In short, the #MeToo movement has not provoked linear movement toward gender equality, safety, and bodily autonomy, nor has it established heightened awareness of the appropriate contours of the exercise of power in or out of the workplace. While its long-term implications remain to be seen, central contributions of the movement have been awareness of prevalence of wrongs against women, the abuse of power by men in positions of privilege, the ability of those who have endured sexual abuse and harassment to speak out collectively, and the need

politics/2018/09/27/fact-checking-president-trumps-statements-about-sexual-misconduct-allegations/?utm\_term=.7df27fcd6ae6 [https://perma.cc/2CLD-7SD5]; Gayle King, *The Gayle King Interview with R. Kelly*, CBS NEWS (Mar. 9, 2019, 12:33 PM), <https://www.cbsnews.com/news/r-kelly-interview-full-coverage-of-the-gayle-king-interview-with-r-kelly-on-cbs-2019-03-08/> [https://perma.cc/NK9B-AN5Z].

<sup>19</sup> See Michelle Goldberg, *Christine Blasey Ford's Sacrifice*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/opinion/blasey-ford-kavanaugh-hearing.html> [https://perma.cc/RNF5-Y3NL] (“Watching her push through her evident terror was profoundly inspiring”); Jodi Kantor et al., *How Saying #MeToo Changed Their Lives*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/arts/metoo-movement-stories.html> [https://perma.cc/5ZB8-AKLU] (“Now we talk because now the culture is listening to us.”); Vanessa Grigoriadis, *“This is Bigger Than Myself”: How the Women of the U.S. Gymnastics Team Found Their Voice*, VANITY FAIR (May 29, 2018, 5:00 AM), <https://www.vanityfair.com/news/2018/05/how-the-women-of-the-us-gymnastics-team-found-their-voice> [https://perma.cc/49U6-K8SC] (“A new archetype was being created: the righteously angry gymnast.”).

<sup>20</sup> See Roy Moore Sues Women Who Accused Him of Sexual Misconduct, BBC (May 1, 2018), <https://www.bbc.com/news/world-us-canada-43964909> [https://perma.cc/XJS5-T5BY] (“We intend to show the people of Alabama that a political conspiracy came about to ruin his campaign for Senate and to defame him, to defame his character so the people of Alabama would not vote for him in the special Senate election.”); Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017, 11:26 AM), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [https://perma.cc/QWZ9-T4QF] (“Now, John was blaming her for his loss of a job at a law firm and demanding that she pay damages for having hurt his reputation, his career prospects, and his physical and emotional well-being.”); Catherine Cherkasky, *Christine Blasey Ford is No Poster Child for Women’s Rights: A Female Attorney’s Perspective*, USA TODAY (Oct. 5, 2018, 8:55 AM), <https://www.usatoday.com/story/opinion/voices/2018/10/04/false-accusations-kavanaugh-ford-innocent-column/1488329002/> [https://perma.cc/3MN6-HL2N] (“It is a display of hysteria to rally around Ford — ignoring the inconsistencies and omissions in her tale — as the poster child of women’s rights.”).

for a culture shift that reduces the pervasiveness of this misconduct and the conditions that facilitate it.

The #MeToo allegations differ wildly in scope, severity, and nature. They are impossible to classify because of their breadth. In one day alone, 609,000 posts associated with the hashtag appeared<sup>21</sup> and over 14 million tweets included the tag.<sup>22</sup> The TimesUp Legal Defense Fund, which focuses on legal action against those who commit sexual harassment, reported as of October 2018 that it had received approximately 3,500 complaints from “farm workers and fast-food, retail, and other industry employees.”<sup>23</sup>

We know this is the tip of the iceberg when we look at what is likely not being reported. A Washington Post/ABC News poll reported that more than half of women in America had experienced “unwanted sexual advances,”<sup>24</sup> in or out of the workplace. A broad survey of 1,000 women found that 75% of women said they had experienced verbal sexual harassment; 51% of women reported unwanted sexual touching.<sup>25</sup> Thirteen percent on the job.<sup>26</sup> The survey’s findings regarding the action victims take further revealed that we need to take stronger action to confront shameful, disrespectful, and frequently illegal behavior. Fewer than 2% of victims of sexual harassment or assault confront the harasser.<sup>27</sup> One in 10 women reported seeking to change their job assignments or quitting in response to the harassment.<sup>28</sup> A mere 1 in 10 women filed an official complaint or sought police intervention in response to the behavior.<sup>29</sup> And there is a great cost to these acts. The Washington Post/ABC News poll found that 31% of women reported anxiety or depression in the aftermath of sexual harassment or assault.<sup>30</sup>

While it’s challenging to analyze the repercussions for the typical perpetrator or survivor of #MeToo revelations, given their anonymity,

<sup>21</sup> Griffin et al., *supra* note 11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Susan Chira, *Numbers Hint at Why #MeToo Took Off: The Sheer Number Who Can Say Me Too*, N.Y. TIMES, Feb. 24, 2018, at A17.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also Griffin et al., *supra* note 11 (citing EEOC data that three out of four people who experience harassment at the workplace do not report the behavior).

<sup>30</sup> Chira, *supra* note 24.

allegations against high profile perpetrators enjoyed less anonymity and therefore lend themselves to analysis. According to Bloomberg, in its first year, #MeToo surfaced allegations against 429 prominent people in diverse industries of sexual misconduct in the workplace.<sup>31</sup> Another count puts the number closer to 800.<sup>32</sup> The entertainment and political world were particularly affected by allegations. Bloomberg estimated that one year after the initial revelations, 96 individuals in politics and government had been accused of sexual misconduct; 96 in entertainment; 58 in arts and music; and 48 in media.<sup>33</sup>

In the year prior to #MeToo, according to the NEW YORK TIMES, fewer than 30 people in prominent positions were terminated or resigned amid sexual misconduct allegations.<sup>34</sup> However, in the first year after the #MeToo campaign began, more than 201 powerful people were reportedly fired or quit based on allegations of sexual assault or sexual harassment.<sup>35</sup>

Yet most wrongdoers stayed right where they were. A review of 219 high-profile individuals accused between April 2017 and May 2018 illustrates that of the 66 accused of sexual misconduct by a single accuser, employers terminated only 15% for that conduct.<sup>36</sup> Out of the 181 who were accused by multiple accusers, employers terminated 18%.<sup>37</sup> Many who had some disruption to their careers have staged come backs. For example, comedian Louis C.K. has begun performing again.<sup>38</sup> Actor Jeffrey Tambor, who was fired from the show *Transparent* after allegations of sexual misconduct had arisen, returned to the spotlight three months later, back in his role in *Arrested Development*.<sup>39</sup>

<sup>31</sup> Griffin et al., *supra* note 11.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/M9G4-8HX5>].

<sup>35</sup> *Id.*

<sup>36</sup> Laurie S. Kohn, Professional Research (on file with author).

<sup>37</sup> *Id.*

<sup>38</sup> Carlsen et al., *supra* note 34.

<sup>39</sup> Maria Puente, *Are #MeToo Men Ready for a Comeback? Not All Accused Figures Have Slunk Away in Shame*, USA TODAY (Aug. 28, 2018), <https://www.usatoday.com/story/life/people/2018/08/28/metoo-men-ready-comeback-not-all-slunk-away-shame/950837002/> [<https://perma.cc/G88P-6TGN>].

What results do we want for those who have committed these wrongs and for those who have been wronged? Do we want these wrong doers to be permanently excommunicated? Do we want their names to be alight in infamy? If so, for how long? For what behavior? Should all wrong doers be treated the same?

As a society, we need to care about these repercussions because long-term change only happens when we actually confront the underlying conduct and understand why happened and how to avoid occurring in the future. We need to care because excommunication is not a possibility in the modern world. These wrong doers reappear and in fact, they may well have something to contribute. But we also need to care because these wrong doers harmed individuals and offender-excommunication, prosecution, shaming, or even payment of compensatory damages may not address those injuries.

To best address the wide range of wrongs committed, the accompanying wide range the attitudes of those accused of the wrongdoing, and the array of those who suffered that wrongdoing, a variety of interventions should be available. Those interventions should provide the opportunity for those who have committed wrongs against women in the workplace to take responsibility, understand the impact of their actions, and reform their behavior if possible. As a society and an economy, we benefit most when those who have wronged can rejoin the community.<sup>40</sup> For those who have been wronged, our interventions should provide options best suited to their own healing. For some, that healing might come from monetary compensation; for others from retribution and punishment; and still for others, the healing might come from apologies, compassion, and understanding. The #MeToo movement raised these questions and hinted at the massive problem we have around sexual misconduct in our professional world. Yet, it has not yet provided a blueprint for change.

## II. LEGAL AND SOCIAL MEDIA RESPONSES AND THEIR EFFICACY

This section analyzes the effectiveness of our legal system and media responses to the needs presented by those who have wronged and those who have been wronged. Considering the civil justice

<sup>40</sup> Jill Filipovic, *How to Find Room for Forgiveness in the #MeToo Movement*, TIME (Feb. 26, 2018), <http://time.com/5160427/forgiving-sexual-assault-perpetrators-metoo/> [https://perma.cc/G4J3-SAD5].

system, then the criminal system, this section ends by analyzing the efficacy of informal justice responses such as public shaming, peacemaking, and media.

### A. *The Civil Justice System*

In response to sexual harassment or sexual assault, the civil justice system offers a range of causes of action. A civil tort suit permits an aggrieved party to seek monetary damages from an alleged perpetrator or those who could be held responsible for the wrong and resulting injury and to ask for that behavior to be enjoined.<sup>41</sup> Although long-available through the civil justice system, tort causes of action for sexual assault generally<sup>42</sup> and sexual harassment in the workplace<sup>43</sup> have been increasing rapidly.<sup>44</sup>

Civil suits boast some advantages for victims of sexual harassment and assault in the workplace. Civil suits, as opposed to criminal prosecutions, allow victims to remain in control of the case. As plaintiffs, they can determine the course of the case and whether to pursue it. Further, victims can request a range of flexible relief including injunctions, punitive, and compensatory damages. With a lower burden of proof, civil cases permit litigants to prevail more easily in court. In addition, the formality and public nature of the proceeding can serve to vindicate a victim's account in a public way.

Based on these advantages, some research suggests that civil suits for sexual assault and harassment may offer certain therapeutic benefits to plaintiffs. For example, a study of Canadian civil actions for sexual assault found that 35% reported attaining a more positive outlook from the case.<sup>45</sup> Of those surveyed, 27% said they would

<sup>41</sup> See, e.g., Haley Sweetland Edwards, *California Dishwasher Receives \$250,000 Settlement in Prominent #MeToo Case*, TIME (May 8, 2018, 6:14PM), <http://time.com/5269935/sandra-pezqueda-sexual-harassment-metoo-settlement/> [<https://perma.cc/V4NS-DDMG>].

<sup>42</sup> See ELLEN BUBLICK, CIVIL TORT ACTIONS FILED BY VICTIMS OF SEXUAL ASSAULT: PROMISE AND PERILS(2009), [https://vawnet.org/sites/default/files/materials/files/201609/AR\\_CivilTortActions.pdf](https://vawnet.org/sites/default/files/materials/files/201609/AR_CivilTortActions.pdf) [<https://perma.cc/62BD-S763>].

<sup>43</sup> See U.S. Equal Emp't Opportunity Comm'n, *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplaceharassment.cfm> [<https://perma.cc/PW5V-Y4JW>] (showing the EEOC filed 66 lawsuits challenging workplace sexual harassment, more than a 50% increase from Fiscal Year 2017).

<sup>44</sup> See generally BUBLICK, *supra* note 42.

<sup>45</sup>*Id.* at 4.

recommend pursuing a civil case to other sexual assault survivors; compared with 18% who indicated regretting their decisions.<sup>46</sup>

At the same time, civil suits cannot be viewed as a panacea for those who have experienced workplace sexual assault and harassment. The duration of a civil case – often multiple years – can further traumatize a victim.<sup>47</sup> The complexity of a tort case also mandates hiring an attorney, which can be challenging and often prohibitively costly for many victims.<sup>48</sup> A tort action can involve extensive and invasive discovery, which could deter filing, pursuing a case, or significantly traumatize a plaintiff. A victim filing a tort claim for sexual assault must also be prepared to make public filings, appear in an open courtroom, and be cross examined on a range of issues that might include prior sexual behavior and her contributory negligence for the assault or harassment at issue.

Civil judges reflect the spectrum of societal attitudes toward gender bias and sexual misconduct. A litigant seeking redress for misconduct against her could appear before a sympathetic judge or a judge who has dogmatic opinions about sexual conduct and consent that could appear antagonistic.<sup>49</sup> As such, a litigant takes a risk when she walks into court for justice.

<sup>46</sup> *Id.*

<sup>47</sup> See Jason Schultz, *Can Women Judges Help Make Civil Sexual Assault Trials More Therapeutic*, 16 WISC. WOMEN'S L.J. 53, 66 (2001) (citing a study of sexual assault litigants).

<sup>48</sup> See Alexandra Brodsky & Claire Simonich, *Helping Rape Victims After the Brock Turner Case*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/11/opinion/rape-victims-deserve-better-mandatory-minimums-wont-help.html> [<https://perma.cc/RWD2-KRFR>] (“The law in California makes it easier to take sexual abusers to court than it is in most other states, but legal representation is often prohibitively expensive.”).

<sup>49</sup> See Schultz, *supra* note 47, at 66 (citing a study of sexual assault litigants and recounting vignettes from study of sexual assault litigants who complained about judicial attitudes); see also Ian Austen, *Robin Camp, Canadian Judge, Resigns Over Handling of Rape Trial*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/world/canada/canada-judge-robin-camp-resigns.html> [<https://perma.cc/4DHW-K95E>] (“The council found that he repeatedly referred to the complainant, 19, as “the accused” and frequently suggested that she had not been vigorous or creative enough in trying to stop the assault.”); Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce Advocate: The Judge*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html> [<https://perma.cc/878R-8TS2>] (“Belying the stone-faced image of dispassionate jurists, Judge Aquilina has emerged as an unusually fierce victims’ advocate in a sentencing hearing.”).

From a therapeutic perspective, civil cases might be problematic for many of the same reasons. The Canadian study of tort litigants further found that a full 84% of survivors reported “some kind of negative emotional consequences including a sense of loss of control over the process, mental anguish, depression, suicidal tendencies, frustration, anger, and a feeling that the system was not dealing with them in a responsive or personal manner.”<sup>50</sup> Although the civil justice system may meet the needs of some survivors of workplace sexual assault and harassment, the system is not designed to meet many of the needs of those who have been wronged in the workplace or to address the underlying conditions and perspectives of those who have perpetrated these wrongs.

### ***B. The Criminal Justice System***

Individuals who have been the victims of sexual violence in the workplace may also seek redress from the criminal justice system or the system might initiate charges on its own. According to the FBI, rape prosecutions jumped to an unprecedented level in 2017 in the aftermath of the high-profile allegations related to the #MeToo movement.<sup>51</sup> In that year alone, the number of rapes that took place both within and outside of the workplace reported by the FBI jumped from nearly 126,400 in 2016 to 166,000 in 2017.<sup>52</sup> Under federal law, an individual charged with sexual assault or rape may be tried and punished at any time without limitation.<sup>53</sup>

Even in the face of tough criminal penalties federally and locally, criminal prosecution has significant drawbacks. The criminal justice system can fall short in supporting victims and enhancing offender accountability on a number of levels. First, the rate at which police investigate and close sexual assault cases is at a record low;<sup>54</sup> second prosecutors bring few prosecutions for sexual assault relative to the

<sup>50</sup> See Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 4 (2009).

<sup>51</sup> Jim Mustian & Michael R. Sisak, *Despite #MeToo, Rape Cases Still Confound Police*, AP NEWS (Dec. 28, 2018, 2:20 AM), <https://www.apnews.com/6fd581b03bf343cd8724543bc555eed9> [<https://perma.cc/WPR9-PKMU>].

<sup>52</sup> *Id.*

<sup>53</sup> 10 U.S.C. § 843 art. 43 (2017).

<sup>54</sup> See generally Bublick, *supra* note 50.

number of complaints;<sup>55</sup> third, prosecution success rates remain low;<sup>56</sup> and fourth, the criminal justice system has neither proven to serve its goal of rehabilitating offenders nor does it offer support to complaining witness/survivors.

The "clearance rate" – that is the rate at which criminal cases are successfully closed – appears to be an all-time low according to the FBI.<sup>57</sup> In 2017, the clearance rate was 32%, down from its high in 1964 of 62%.<sup>58</sup> This low clearance rate is likely the result of a confluence of factors. Police might be willing to keep cases open longer.<sup>59</sup> Sexual assault cases, in addition, are difficult to investigate because victims often raise rape allegations after a significant delay, making investigation more challenging.<sup>60</sup> Further, prosecutors may now be pursuing a wider swath of case than in past decades. Due to a greater awareness of the dynamics of sexual assault between those who know each other, police and prosecutors are now more likely to open cases even when the victim and alleged perpetrator are familiar with each other. A relationship between victim and alleged perpetrator traditionally resulted in police and prosecutors dismissing allegations as either unsolvable or lacking merit.<sup>61</sup>

However, there is also evidence that this low clearance rate is attributable to police investing limited resources and energy into a crime about which they continue to view with skepticism.<sup>62</sup> News reports are replete with victims recounting tales of police neglecting their complaints,<sup>63</sup> humiliating them for seeking prosecution for what

<sup>55</sup> *What to Expect from the Criminal Justice System*, RAINN (Apr. 8, 2015), <https://www.rainn.org/articles/what-expect-criminal-justice-system> [<https://perma.cc/9KFU-6QCC>].

<sup>56</sup> *Id.*

<sup>57</sup> Mustian & Sisak, *supra* note 51.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Shalia Dewan, *Why Women Can Take Years to Come Forward With Sexual Assault Allegation*, N.Y. TIMES (Sep. 18, 2018), <https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html> [<https://perma.cc/YC9C-V44V>].

<sup>61</sup> See Mustian & Sisak, *supra* note 51.

<sup>62</sup> *Id.*

<sup>63</sup> See Mustian & Sisak, *supra* note 51 (recounting an anecdote of a rape survivor in Minnesota who was put indefinitely on hold when she called the investigator to discuss her case).

police feel is an example of a victim “asking for it,”<sup>64</sup> or discouraging prosecution.<sup>65</sup>

Despite greater public discussion of sexual assault, even in the aftermath of the height of #MeToo revelations, sexual assault remains an under-prosecuted crime with low prosecution success rates. In the United States, one in five women and one in seventy-one men will be sexually assaulted during their lifetime, yet few perpetrators convicted.<sup>66</sup> Many victims of sexual assault have negative experiences with the criminal justice system, beginning with fear of even reporting.<sup>67</sup> In 2006, a study revealed that 80% of survivors were reluctant to seek further help after their first police interaction.<sup>68</sup> During the trial, these victims’ testimony may be the only piece of evidence, which leaves their credibility and reliability up for attack during cross-examination.<sup>69</sup> Many victims experience post-traumatic stress disorder, therefore, re-living their trauma in the court room can be particularly painful.<sup>70</sup>

For these reasons, criminal prosecution for workplace sexual assault has limited value in terms of enhancing accountability or by perpetrators and of bringing healing and peace to victims.

### ***C. Public Shaming, Peacemaking, Media, and Education***

The #MeToo movement had also unleashed responses outside the legal system. In the aftermath of the torrent of specific allegations against specific high-profile individuals, our country has seen wide scale informal public justice responses, including peacemaking, reconciliation, and media campaigns.

<sup>64</sup> Beverly Engel, *Stop Shaming Victims of Sexual Assault for Not Reporting*, PSYCHOL. TODAY (Sept. 23, 2018), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201809/stop-shaming-victims-sexual-assault-not-reporting> [<https://perma.cc/ZV3L-DHAR>].

<sup>65</sup> *See Id.*

<sup>66</sup> *Sexual Assault in the United States*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, <https://www.nsvrc.org/statistics> [<https://perma.cc/5NQY-QKL2>].

<sup>67</sup> *See* Simon McCarthy-Jones, *Survivors of Sexual Violence are Let Down by the Criminal Justice System – Here’s What Should Happen Next*, THE CONVERSATION (Mar. 28, 2018, 5:28 AM), <http://theconversation.com/survivors-of-sexual-violence-are-let-down-by-the-criminal-justice-system-heres-what-should-happen-next-94138> [<https://perma.cc/XEF8-FCV9>].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

Spontaneous peacemaking and reconciliation have occurred as a result of the #MeToo movement. Stories of individuals, motivated by the publicity of high-profile allegations, and the groundswell of victims naming the wrongdoing have appeared in media. For example, one online writer shared a story about a friend who received a text message with an apology for how he acted during an intimate moment with her years earlier: “[H]e said he remembered one particular night during which he might have pressured her into engaging in things she wasn’t comfortable doing. He wanted to apologize . . . and asked her if there was anything he could to make amends.”<sup>71</sup>

The Procter and Gamble Corporation, in response to #MeToo allegations, released a new advertisement for Gillette that first aired in January 2019 - an example of both media shaming as well as media inspiration. The advertisement, which rolled out Gillette’s new slogan, “The Best a Man Can Get – It’s only by challenging ourselves to do more that we can get closer to our best,” features images of boys being bullied, women being harassed, and messages urging men to show respect, fight toxic masculinity, and intervene when they see bullying.<sup>72</sup> Entitled “We Believe,” the spot is nearly two minutes in length and logged more than 27 million views on YouTube within a few days of its release.

While these efforts may make some headway at changing societal beliefs about sexual misconduct and victim empowerment, for the most part, these efforts fail to address individual reconciliation and accountability.

Individual peacemaking inspired by the #MeToo movement is inspiring and encouraging but it is ad hoc. Further, not all survivors of sexual misconduct would welcome unsolicited outreach by those who wronged them. The contact, in and of itself, could be retraumatizing if undertaken without facilitation, consent, and support.<sup>73</sup>

To the extent efforts to inspire better behavior incorporate shaming, such initiatives often provokes defensiveness and backlash.

<sup>71</sup> Emma Coleman, *Restorative Justice for the #MeToo Movement?*, NEW AMERICA (Feb. 20, 2018), <https://www.newamerica.org/millennials/dm/restorative-justice-metoo-movement/> [https://perma.cc/B99B-3JXE].

<sup>72</sup> Erik Brady, *Gillette Stirs Controversy With Ad That Seems Planned For Super Bowl But Isn't*, USA TODAY (Jan. 16, 2019, 7:25 PM), <https://www.usatoday.com/story/sports/2019/01/16/super-bowl-gillettes-non-super-bowl-ad-stirs-up-controversy/2598779002/> [https://perma.cc/39FM-7QA7].

<sup>73</sup> See McCarthy-Jones, *supra* note 67.

Take, for example, the Gillette advertisement. Within days of the campaign's release, the negative comments on social media and "dislikes" outpaced positive responses by a large margin.<sup>74</sup> The campaign also sparked editorials and op-ed pieces<sup>75</sup> that may, in the end, empower those who feel justified in exercising and promoting masculinity that endangers and intimidates others.

Or take the statement of Donald Trump in regard to the #MeToo movement: "it's a "very scary time for young men in America, where you can be guilty of something you may not be guilty of."<sup>76</sup> The vociferous support for Justice Brett Kavanaugh also exemplifies the backlash our country has seen in response to #MeToo.<sup>77</sup>

The #MeToo movement has destabilized the status quo and made us think and talk. But it has yet to provide effective avenues for wrongdoers to confront and address their behavior and for survivors to seek redress and healing when the traditional legal system is insufficient.

### III. WHY IS RESTORATIVE JUSTICE AN ANSWER?

Those avenues, while not well-paved, may well be found in restorative justice interventions. This section explores and defines restorative justice theory and illustrates how such programs could meet the needs of those not well served by our current legal responses.

#### A. *Theory*

Restorative justice, a conflict resolution process that seeks to address harm by bringing together victims, responsible parties, and others has increasingly appeared in juvenile justice interventions in the

<sup>74</sup> Denise Lee Yohn, *Three Mistakes Gillette Made That Super Bowl Advertisers Should Avoid*, FORBES (Jan. 29, 2019, 5:37 AM), <https://www.forbes.com/sites/deniseyohn/2019/01/29/three-mistakes-gillette-made-that-super-bowl-advertisers-should-avoid/#344cdfa02394> [<https://perma.cc/D3M7-U9BA>].

<sup>75</sup> *Id.*

<sup>76</sup> Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/> [<https://perma.cc/5FCE-TLRZ>].

<sup>77</sup> Zack Beauchamp, *Lindsey Graham, Brett Kavanaugh, and the Unleashing of White Male Backlash*, VOX (Sep. 28, 2018, 12:20 PM) <https://www.vox.com/policy-and-politics/2018/9/28/17913774/brett-kavanaugh-lindsey-graham-christine-ford-backlash> [<https://perma.cc/43VE-M7V7>].

United States since the 1970s.<sup>78</sup> Interventions seek to address criminal wrongdoing and the harms caused by engaging not only the offender, but the victim and relevant community alike. By addressing survivors' needs and engaging offenders' capacity for rehabilitation, restorative justice practitioners seek to work outside or alongside the traditional criminal and civil justice system to achieve broader and more flexible case resolutions. According to one supporter of restorative justice,

[a]dvocates suggest that restorative justice combines the possibilities of making the offender accept the nature and extent of the harm done by the offence and of his own responsibility for that harm; providing some measure of reparation to the victim (individual and/or community) who has been harmed, and taking steps to reduce the likelihood of a future offence, so that diversion [from the traditional justice system] is not at the expense of effective action.<sup>79</sup>

Restorative justice seeks to address the rupture between the parties.<sup>80</sup> The principle is “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>81</sup> As one commentator noted “in order to address the wrong and to ensure that it does not happen again, one must address the state of the relationship in which the wrong occurred and strive to establish an ideal state of equality.”<sup>82</sup>

Restorative justice seeks to offer a broader range of outcomes for involved individuals than they might find in the traditional justice system. Through restorative justice, one may attain reparation, reconciliation, and transformation.<sup>83</sup> “At its core, [restorative justice] emphasizes interdependence between citizens and families and

<sup>78</sup> HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 3 (2002).

<sup>79</sup> Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616, 620 (2002).

<sup>80</sup> ZEHR, *supra* note 78, at 28; Paul C. Friday, *Community-Based Restorative Justice: The Impact on Crime*, in CRIME PREVENTION AND NEW APPROACHES 370, 371 (Helmut Kury et al. eds., 2003) (“[T]here are three primary stakeholders from a restorative justice perspective: victim, offender and community.”).

<sup>81</sup> ZEHR, *supra* note 78, at 40.

<sup>82</sup> JENNIFER LLEWELLYN & ROBERT HOWSE, LAW COMM'N OF CANADA, *RESTORATIVE JUSTICE – A CONCEPTUAL FRAMEWORK* 41 (1999), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2114291](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114291).

<sup>83</sup> ZEHR, *supra* note 71, at 28–32; Derek Brookes, *Evaluating Restorative Justice Programs*, RESTORATIVE JUST. ONLINE, <http://www.restorativejustice.org/10fulltext/brookes> [<https://perma.cc/EE3K-M6EJ>].

assumes that all cultures will find this approach more emotionally satisfying than retribution.”<sup>84</sup> Restorative justice also seek to provide a forum that offers more holistic healing than the traditional justice system – one that creates the potential for understanding, responsibility-taking, and a pathway to redemption.

### **B. History**

Restorative justice principles and patterns have been used throughout history,<sup>85</sup> and particularly in Native American and Native Canadian justice systems as well as in indigenous populations in South Africa, Australia, and New Zealand. Restorative justice influences can be seen in high profile justice programs such as the Truth and Reconciliation Commission in South Africa.<sup>86</sup> In the 1970s, restorative justice programs began to appear in the juvenile justice system and over the years have infiltrated additional legal arenas.<sup>87</sup> By the mid-1990’s the term “restorative justice,” and its programs were in increasing use in the United States and abroad.<sup>88</sup> In 2002, the United

<sup>84</sup> Peggy Grauwiler et. al., *Justice is in the Design: Creating a Restorative Justice Treatment Model for Domestic Violence*, in *FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE: A HANDBOOK OF GENDER-INCLUSIVE THEORY AND TREATMENT* 579, 580 (John Hamel & Tonia Nicholls eds., 2006) (citing John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME AND JUSTICE* 1 (1999)).

<sup>85</sup> Commentators identify many examples throughout history of criminal justice practices which focused on the victim’s needs and restoring the relationships between offender, victim, and the community. *See generally*, e.g., Chris Cunneen, *Reviving Restorative Justice Traditions?*, in *THE HANDBOOK OF RESTORATIVE JUSTICE* 113 (Gerry Johnstone & Daniel W. Van Ness eds., 2007); Elmar G. M. Wietekamp, *The History of Restorative Justice*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 157 (Gordon Bazemore & Lode Walgrave eds., 1999).

<sup>86</sup> The Truth and Reconciliation Commission (TRC), though it shared the goals of restoration and individual and community heading, differs from pure restorative justice programs in significant ways.

<sup>87</sup> Grauwiler, *supra* note 84, at 580; *see generally*, e.g., MARLENE A. YOUNG, *RESTORATIVE COMMUNITY JUSTICE: A CALL TO ACTION* (1995); Ted Keys & Anna Rockhill, *Family Group Decision Making in Oregon*, in *FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE* 271 (Gale Burford & Joe Hudson eds., 2000); Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equity and Harmony*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 157 (Burt Galaway & Joe Hudson eds., 1996).

<sup>88</sup> Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice*, 11 *VIOLENCE AGAINST WOMEN* 603, 606 (2005).

Nations Commission on Crime Prevention and Criminal Justice passed a declaration of basic principles stating that restorative justice programs should be an element of criminal case processing.<sup>89</sup> Over the past several decades, many U.S. jurisdictions have begun to experiment with restorative justice principles in the criminal justice system as evidenced by the large number of state statutes either encouraging or mandating the use of restorative justice.<sup>90</sup>

<sup>89</sup> Friday, *supra* note 80, at 370; *see also* The Eleventh U.N. Cong. on Crime Prevention and Crim. Just., Bangkok, Thailand, Apr. 18–25, 2005, *Bangkok Declaration: Synergies and Responses: Strategic Alliances in Crime Prevention and Crim. Just.*, ¶ 32 (“To promote the interests of victims and the rehabilitation of offenders, we recognize the importance of further developing restorative justice policies. . .”).

<sup>90</sup> ALA. CODE § 12-25-32 (West 2015) (incorporating restorative justice principles of victim offender mediation and victim impact panels into sentencing); CAL. PENAL CODE § 13826.6 (West 2014) (providing for mediation in gang situations under a Gang Violence Suppression Program); COLO. REV. STAT. ANN. § 13-3-116 (West 2017) (creating a “restorative justice coordinating council” to provide assistance and education related to restorative justice programs); DEL. CODE ANN. tit. 11, § 9501 (West 2019) (establishing victim-offender mediation in criminal cases at the discretion of the Attorney General); FLA. STAT. ANN. § 985.155 (West 2014) (permitting the state attorney to refer any first-time, nonviolent juvenile offender accused of committing a delinquent act to a Neighborhood Restorative Justice Center); HAW. REV. STAT. ANN. § 353H-31 (West 2013) (allowing for the use of restorative justice practices such as victim impact panels in adult offender reentry programs and services); LA. STAT. ANN. § 46:1846 (West 2012) (allowing victims and offenders to communicate if participating in a restorative justice program administered through the Department of Public Safety and Corrections); MINN. STAT. ANN. § 611A.775 (West 2009) (allowing for the establishment of restorative justice programs by community-based organizations paired with the local government); MISS. CODE ANN. § 63-11-30 (West 2015) (allowing for the substitution of attendance at a victim impact panel for jail time in drunk driving cases); MO. ANN. STAT. § 217.777 (West 2009) (allowing victim-offender mediation to be a condition of probation); MONT. CODE ANN. § 2-15-2013 (West 2013) (explaining the restorative justice grant program within the Montana Department of Justice, designed to promote the use of restorative justice practices throughout the state and provide technical assistance to local and state jurisdictions and organizations interested in implementing the principles of restorative justice); OHIO REV. CODE ANN. § 307.62 (West 2009) (establishing victim-offender mediation as part of a crime victims assistance program); OKLA. STAT. ANN. tit. 22, § 991a (West 2014) (establishing victim impact panels and victim-offender mediation as components of sentencing); 75 PA.C.S. § 3804 (West 2014) (incorporating victim impact panels into sentencing for drunk drivers); TENN. CODE ANN. § 16-20-102 (West 2010) (creating a Victim-Offender Mediation Center to provide victim-offender mediation for felony, misdemeanor, and juvenile delinquency cases); TEX. GOV'T CODE ANN. § 508.324 (West 2009) (allowing

Restorative justice principles have resulted in a range of justice programs. The programs can be divided into two major models that would be responsive to #MeToo resolutions: Victim-offender mediation and family group conferences. Victim-offender mediation (VOM), which is the oldest<sup>91</sup> and most-wide spread restorative justice model,<sup>92</sup> features face-to-face meetings between the victim and the perpetrator accompanied by one or more mediators. As of 2001, there were approximately 320 victim-offender mediation programs in the U.S. and Canada and more than 700 in Europe.<sup>93</sup> In the United States, VOM appeared in the 1970s.<sup>94</sup>

VOM's central principles dictate that a victim has the desire and strength to represent her needs, to talk honestly, and that the offender

victim-offender mediation at the request of the victim for offenders on parole or released to mandatory supervision); UTAH CODE ANN. § 62A-15-501 (West 2015) (recognizing that it is state policy to utilize victim impact panels to assist persons convicted of drinking under the influence to gain a full understanding of the severity of their offense); VT. STAT. ANN. tit. 28, § 910 (West 2018) (defining the responsibilities of Community Reparative Board members in facilitating the state's Restorative Justice Program); WASH. REV. CODE ANN. § 13.40.070 (West 2009) (allowing victim-offender mediation for juveniles at the discretion of the prosecutor, juvenile court probation counselor, or diversion unit); WIS. STAT. ANN. § 938.34 (West 2009) (allowing for victim-offender mediation to be a part of the disposition of a juvenile offense).

<sup>91</sup> Loretta Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in The Battered Women's Movement*, BATTERED WOMEN'S JUSTICE PROJECT 9 (2003); Paul McCold, *The Recent History of Restorative Justice: Mediation, Circles, and Conferencing*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 23, 24 (Dennis Sullivan & Larry Tift eds., 2006).

<sup>92</sup> See generally Mark S. Umbreit et al., *Victim-Offender Dialogue in Violent Cases: A Multi-Site Study in the United States*, 2007 ACTA JURIDICA 22, (2007); see also Christa Pelikan & Thomas Tenczek, *Victim Offender Mediation and Restorative Justice: The European Landscape*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 64, (Dennis Sullivan & Larry Tift eds., 2006) ("VOM is just one – but in the European context the most important – model, or practice of restorative justice.").

<sup>93</sup> Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, 2001 JUV. JUST. BULL. 1, 2 (2001).

<sup>94</sup> See generally Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, fn. 68–85 (2010) (discussing the history of VOM).

will take responsibility for his actions.<sup>95</sup> Most victim-offender mediations involve three elements: screening; dialogue sessions; and sessions between the co-mediators and each party.<sup>96</sup> In the initial screening process, a facilitator will have a series of private dialogues with each party to determine if the program is appropriate for the conflict.<sup>97</sup> Victim safety vitally informs screening decisions.<sup>98</sup> Dialogue sessions between the parties themselves are the heart of the program. Together with co-mediators, the parties meet face-to-face to brainstorm resolution of issues.

Family Group Conferencing [FGC], also called Restorative Conferencing, developed later than VOM, but has also spread globally and beyond the scope of its initial application.<sup>99</sup> Family group conferencing was first implemented in New Zealand in 1989 to handle youth violence and child welfare cases.<sup>100</sup> Conferences engage a broad swath of the community in reaching resolution. For example, the conference organizer convenes a group of concerned family, community, and friends to participate that may include police, and individuals who are central in the lives of the victim or offender.<sup>101</sup> According to one proponent of FGCs, “[t]hese conferences can be viewed as citizenship ceremonies of reintegrative shaming...The theory of FGC is that discussion of the harm and distress caused to the victim and the offender’s family will communicate shame to the offender.”<sup>102</sup> Another supporter generally describes the intent of FGC as follows: “The safety conference, and more broadly a coordinated

<sup>95</sup> Alan Edwards & Jennifer Haslett, *Domestic Violence and Restorative Justice: Advancing the Dialogue* 7, VICTIM OFFENDER MEDIATION ASSOCIATION (VOMA), [<https://perma.cc/E7SM-RT78>].

<sup>96</sup> *Id.* at 6, 7.

<sup>97</sup> *Id.* at 6.

<sup>98</sup> *Id.* at 5.

<sup>99</sup> See generally McCold, *supra* note 91, at 30–34.

<sup>100</sup> See Bazemore & Umbreit, *supra* note 93, at 2, 5; Frederick & Lizdas, *supra* note 91.

<sup>101</sup> See John Braithwaite & Kathleen Daly, *Masculinities, Violence, and Communitarian Control*, at 226, [http://johnbraithwaite.com/wp-content/uploads/2016/03/Masculinities\\_Violence\\_1994.pdf](http://johnbraithwaite.com/wp-content/uploads/2016/03/Masculinities_Violence_1994.pdf) [<https://perma.cc/9Q6J-K2VG>]; Joan Pennell & Gale Burford, *Family Group Decision Making and Family Violence*, in *FAMILY GROUP CONFERENCES: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE* 171 (Gale Burford & Barbara Hudson eds., 2000) (describing a particular FGC in a domestic violence case).

<sup>102</sup> See Braithwaite & Daly, *supra* note 101, at 226.

and inclusive response, is a way to displace assumptions. It is a way to build the individual and collective strength to reshape connections, make sound choices, and promote the safety of women and children from diverse cultures.”<sup>103</sup>

### C. *Application to Workplace Sexual Misconduct Cases*

Restorative justice’s emphasis on understanding, healing, accountability, and community healing makes its interventions well-suited to certain cases arising about of the #MeToo movement. For the reasons discussed in Section II, the traditional justice system may fall short for many of these cases. Further, given that many cases that have surfaced from the #MeToo moment involve sexual harassment, which is not criminally actionable, the criminal justice system is not an option for redress. Restorative justice can address sexual harassment and sexual assault and can flex and innovate based on the needs of the parties involved.

Where the justice system may fall short for those who have committed wrongdoing and survivors alike, restorative justice may provide a pathway toward redemption and accountability as well as healing. In a criminal prosecution, the defendant is not incentivized to take true responsibility for his actions. He is discouraged from testifying on his own behalf<sup>104</sup> – even during sentencing after a conviction or guilty plea.<sup>105</sup> While the system encourages guilty pleas, that encouragement leads to greater judicial efficiency, not accountability or healing.<sup>106</sup> Judge Aquilina, who presided over the Larry Nassar case, sat through the victim impact statements of 156 survivors of Nassar’s sexual misconduct.<sup>107</sup> Reflecting on those statements and on her experience generally on the bench, Judge Aquilina explained what victims really want is an answer to the question: “why?” Why did he do this to me?<sup>108</sup> The system is set up to make this dialogue impossible. Similarly, in the civil justice system

<sup>103</sup> See generally Pennell & Burford, *supra* note 101.

<sup>104</sup> See, e.g., U.S. CONST. amend. V.

<sup>105</sup> *Id.*

<sup>106</sup> Areva Martin, *The Judge in Larry Nassar’s Case Honored Criminal Justice – and Victims*, TIME (Jan. 26, 2018), <http://time.com/5121265/judge-rosemarie-aquilina-served-justice-larry-nassar/> [<https://perma.cc/CSM6-QK27>] (This topic will be explored far more deeply in a subsequent article).

<sup>107</sup> See *id.*

<sup>108</sup> Judge Rosemarie Aquilina’s remarks at the University of Kansas Journal of Law and Public Policy Symposium on March 1, 2019.

alike, defendants who admit to the underlying allegations merely increase their liability.

The shortcomings of the criminal justice system, explored in Section II.B., for survivors include loss of autonomy, control, and little opportunity for healing. On the civil side, survivors face high economic burdens and limited relief.

Restorative justice interventions, while they also have shortcomings, address the deficiencies of the traditional legal system in meaningful ways. Both offender and survivor must opt-in to a restorative justice intervention; therefore, from the outset, the process is voluntary and therefore more likely to address the needs of both parties. During a restorative justice intervention, the offender has to face the victim and take responsibility for his or her actions that caused harm.<sup>109</sup> The process gives victims back some of the power they lost during the sexual misconduct by allowing them to confront those who wronged them and participate in the process.<sup>110</sup> Restorative justice is uniquely poised to invite and host a conversation about the critical question, “why?” Unlike existing legal responses, restorative justice is designed to respect the dignity of both those who have done wrong and those who have been wronged. True change and understanding cannot take place without dignity and respect.

Restorative justice proponents also seek to provide a forum that offers more holistic healing than the traditional justice system – one that makes room for understanding, responsibility-taking, and forgiveness – precisely what is missing from existing responses for perpetrators and victims and precisely what many need to move forward. Restorative justice provides the opportunity for a deeper forgiveness borne from understanding and in conversation with the wrongdoer. Much research has been done on the healing power of forgiveness. One can forgive unilaterally, but forgiveness without an apology, responsibility-taking, and understanding can only go so far.<sup>111</sup>

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Lori Gottlieb, *Dear Therapist: Is it Possible to Apologize for a Sexual Assault*, ATLANTIC (Nov. 2, 2018), <https://www.theatlantic.com/family/archive/2018/11/sexual-assault-apologize/573502/> [https://perma.cc/744X-NU8S].

Like domestic violence, cases involving sexual violence have, to a large extent, been excluded from restorative justice programs.<sup>112</sup> Opponents point out that the informality of restorative justice and its intimacy, could make it dangerous and intimidating to survivors who might be subject to coercion.<sup>113</sup> For that reason, few examples of restorative justice addressing sexual misconduct can be analyzed.

However, the few that exist provide optimistic examples. Hawaii, for example, has a state program that works to rehabilitate sex offenders through a restorative justice structure.<sup>114</sup> Barry Coyne, the program's administrator, describes the program as teaching the offenders to take responsibility for the "conscious, deliberate choice" they made.<sup>115</sup> Offenders in the program listen to the 911 calls of victims of sexual assault in order for them to fully understand the pain their actions have caused.<sup>116</sup> This program began in Hawaii in 1988 and has treated more than 800 sex offenders.<sup>117</sup> The program recidivism rate is extremely low, as only 20 of the program's "graduates" have returned to prison for a new sex related crime.<sup>118</sup> Restorative justice is a way to bring real healing for victims and to actually address the underlying reasons for the misconduct and the belief systems that motivate those who commit the wrongs.

Programs to address sexual assault on college campuses have also developed under the restorative justice model. At Skidmore College, Campus PRISM (Promoting Restorative Initiatives for Sexual Misconduct) involves a network of international professionals who seek to establish, pilot, and promote restorative justice programs to address campus sexual assault.<sup>119</sup> The founder reports that the program

<sup>112</sup> See Ilene Seidman & Jeffrey J. Pokarak, *Justice Responses to Sexual Violence*, in *VIOLENCE AGAINST WOMEN AND CHILDREN* 137, 151–52 (Mary P. Koss, Jacquelyn W. White & Alan E. Kazdin eds. 2011) (noting that crimes against women are generally excluded from restorative justice interventions).

<sup>113</sup> See *id.*

<sup>114</sup> See Rui Kaneya, *This Program Offers Sex Offenders Second Chances – And It's Working*, HUFFPOST (Nov. 1, 2015, 5:59 PM), [https://www.huffingtonpost.com/entry/sex-offender-treatment-program-hawaii\\_us\\_560d98f3e4b0af3706e01324](https://www.huffingtonpost.com/entry/sex-offender-treatment-program-hawaii_us_560d98f3e4b0af3706e01324) [<https://perma.cc/SHT3-6X7J>].

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Campus PRISM, *Promoting Restorative Initiative for Sexual Misconduct on college campuses*, SKIDMORE, <https://www.skidmore.edu/campusrj/prism.php> [<https://perma.cc/N687-Z55Z>].

seeks to “create the conditions where it is possible for someone who has caused [sexual violence] harm to acknowledge and take responsibility for that harm.”<sup>120</sup> He also explains that offenders seek the opportunities provided by restorative justice: “Often if you give people a pathway to accountability, they will take it, because otherwise their existence has become a purgatory where they know what they’ve done is wrong, they want to avoid the punitive outcome or going to jail or being expelled, but they would like to make amends if possible.”<sup>121</sup>

Restorative justice is flexible enough to be a dispute resolution mechanism for any wrong. In fact, it could be argued that it is particularly well-equipped for resolution of disputes with differential power between victim and perpetrator because it has a built-in support system for victim. In both conferencing and victim-offender mediation, both the person who has committed the wrong and the survivor are invited to involve supporters, family, and those who can help move toward healing.<sup>122</sup> The group assembled in the room can support the individual who committed the offense to allow him to hear the impact of his wrongdoing and to ultimately take responsibility. That same group can help level the playing field for a survivor who feels intimidated or coerced by the other person. However, all those involved in this intervention must have insight into and competence in the dynamics of sexual assault and be prepared to intervene, guide, and, if necessary, terminate the session.

#### IV. CONCLUSION

At present, we offer limited interventions for offenders and for victims of workplace sexual harassment and assault and those we offer may well not address the true harms of the wrongdoing. The inadequacy of our responses is illustrated by the prevalence of the problem, the consistency of our society’s confusion about how to

<sup>120</sup> *Restorative Justice in the time of #MeToo*, VICTORIA BUS. SCH. (Jul. 28, 2018) <https://www.victoria.ac.nz/vbs/about/news/1666292-restorative-justice-in-the-time-of-metoo> [<https://perma.cc/4HMZ-H6LU>].

<sup>121</sup> *Id.*

<sup>122</sup> Sujatha Baliga, *A different path for confronting sexual assault*, VOX (Oct. 10, 2018, 8:10 AM), <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle> [<https://perma.cc/45JQ-SCQL>].

confront it, and the extreme pain survivors endure when they attempt to seek justice and healing, if they even dare to do so.

To best address the wide range of wrongs committed, the accompanying wide range the attitudes of those accused of the wrongdoing, and those who suffered that wrongdoing, a range of interventions should be available. Those interventions should provide the opportunity for those who have committed wrongs against women to take responsibility, understand the impact of their actions, and reform their behavior if possible. As a society and an interdependent economy, we benefit most when those who have wronged can rejoin the community. For those who have been wronged, our interventions should provide them with options best suited to their own healing. For some, that healing might come from monetary compensation; for others from retribution and punishment; and still for others, the healing might come from apologies, compassion, and understanding.

We must consider the potential of restorative justice, a therapeutic form of dispute resolution that has enormous potential for eliciting the outcomes we seek from wrongs surfaced in the #MeToo movement and those gender-based wrongs that will continue to plague our country until further progress is made toward true gender-equality, respect, and understanding.