

# BEYOND #METOO

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*The #MeToo movement has ushered in a new kind of sexual misconduct accusation—accusation leveled through informal channels of communication. A functional analysis shows that unofficial reporting can advance important ends. But the rise of informal accusation should be of special concern to legal scholars and lawyers, who generally proceed from certain assumptions regarding the primacy of formal systems of accountability. These basic assumptions need revision if, by aiming to satisfy goals that our laws and legal institutions fail to achieve, informal reporting channels are serving as substitutes for the officially sanctioned mechanisms of accountability that monopolize scholarly attention. Unofficial reporting pathways are imperfect legal workarounds; their prevalence means that the law of sexual misconduct has been consigned to a relative state of quiescence. Over time, survivors, long disserved by the criminal law, by campus disciplinary processes, and by workplace complaint structures, have mostly turned away from the systems that have forsaken them. A needed redesign of official complaint channels should be informed by the benefits of informal reporting, along with a commitment to awakening law.*

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## INTRODUCTION

In early October 2017, accusations of sexual assault and harassment against Harvey Weinstein, first published by the *New York Times* and *The New Yorker*,<sup>1</sup> catalyzed the #MeToo movement.<sup>2</sup> As allegations against Weinstein multiplied in the coming weeks and months,<sup>3</sup> the media intensified its focus on sexual misconduct<sup>4</sup> by other powerful men.<sup>5</sup> Soon the coverage of misconduct ranging from

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<sup>1</sup> See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

<sup>2</sup> The “Me Too” campaign originated in 2007, when activist Tarana Burke began a nonprofit to assist victims of sexual harassment and assault. 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>. For a reflection on when a protest campaign like #MeToo becomes a movement, see Beverly Gage, *When Does a Moment Turn into a ‘Movement’?*, N.Y. TIMES MAG. (May 15, 2018), <https://www.nytimes.com/2018/05/15/magazine/when-does-a-moment-turn-into-a-movement.html>.

<sup>3</sup> See Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001>.

<sup>4</sup> “Sexual misconduct” encompasses sexual assault, sexual harassment, and non-actionable sexual abuse. See Kathryn Casteel & Andrea Jones-Rooy, *We Need a Better Way to Talk About ‘Sexual Misconduct,’* FIFTYTHREE (Apr. 17, 2018), <https://fivethirtyeight.com/features/we-need-a-better-way-to-talk-about-sexual-misconduct> (explaining the importance of distinguishing between various types of sexual misconduct). Although the existence of different subordinate categories complicates use of the umbrella term, the “sexual misconduct” rubric provides a way to identify connections between the distinct behaviors that fall under its mantle. See *infra* Section II.B.4 (describing how understandings of what counts as sexual misconduct can evolve).

<sup>5</sup> See Swetha Kannan & Priya Krishnakumar, *A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein*, L.A. TIMES (Dec. 29, 2017), <https://www.latimes.com/projects/la-na-sexual-harassment-fallout>. Over the course of several years preceding the Weinstein story, clusters of high-profile sexual misconduct accusations surfaced against Bill Cosby, Roger Ailes, and Donald Trump, among others, likely seeding the ground for #MeToo. For one pre-Weinstein perspective, see Lani

boorish to criminal expanded to disparate industries and institutions, including publishing, fashion, music, sports, entertainment, architecture, advertising, comedy, philanthropy, hospitality, retail, farm, factory, academia, technology, media, church, and politics.<sup>6</sup> By the close

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Seelinger, *Trump, Cosby, and Why Being a Woman in 2017 Feels Harder than Ever*, BUSTLE (June 17, 2017), <https://www.bustle.com/p/trump-cosby-why-being-a-woman-in-2017-feels-harder-than-ever-65066>.

<sup>6</sup> See, e.g., Patricia Cohen & Tiffany Hsu, *Children's Book Industry Has Its #MeToo Moment*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/business/childrens-publishing-sexual-harassment.html>; Emilia Petrarca, *Fashion's #MeToo Movement Is Loudest on Instagram*, THE CUT (Apr. 5, 2018), <https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html>; Marlow Stern, *'Russell Simmons Is Just the Beginning': Music Industry Braces for #MeToo Impact*, DAILY BEAST (Dec. 15, 2017), <https://www.thedailybeast.com/russell-simmons-is-just-the-beginning-music-industry-braces-for-metoo-impact>; Juliet Macur, *The 'Me Too' Movement Inevitably Spills into Sports*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/sports/olympics/mckayla-maroney-me-too.html>; *Notable Entertainment Figures Accused of Sexual Misconduct in Wake of Harvey Weinstein*, HOLLYWOOD REP. (Nov. 30, 2017), <https://www.hollywoodreporter.com/lists/hollywood-media-men-accused-of-sexual-misconduct-and-harassment-post-weinstein-1057193>; Stassa Edwards, *Women in Architecture Have Their Own Shitty Men List*, JEZEBEL (Mar. 16, 2018), <https://jezebel.com/women-in-architecture-have-their-own-shitty-men-list-1823844222>; Amelia Harnish, *Advertising's #MeToo Movement Picks Up Speed*, REFINERY29 (Mar. 13, 2018), <https://www.refinery29.com/en-us/2018/03/193440/times-up-advertising-female-advertising-executives-sexual-harassment>; David Sims, *Louis C.K. and Abuse of Power in the Comedy World*, ATLANTIC (Nov. 9, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/louis-ck-sexual-misconduct-allegations/545489>; *#MeToo Hits the Nonprofit World*, CHRON. PHILANTHROPY (Apr. 5, 2018), <https://www.philanthropy.com/specialreport/metoo-hits-the-nonprofit-worl/167>; Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why Is the Restaurant Industry so Terrible for Women?*, WASH. POST (Nov. 17, 2017), [https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e\\_story.html](https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html); Yuki Noguchi, *Low-Wage Workers Say #MeToo Movement Is Chance for Change*, NPR (Feb. 6, 2018), <https://www.npr.org/2018/02/06/583428098/low-wage-workers-say-metoo-movement-is-a-chance-for-change>; Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>; Nick Anderson, *Academia's #MeToo Moment: Women Accuse Professors of Sexual Misconduct*, WASH. POST (May 10, 2018), [https://www.washingtonpost.com/local/education/academias-metoo-moment-women-accuse-professors-of-sexual-misconduct/2018/05/10/474102de-2631-11e8-874b-d517e912f125\\_story.html](https://www.washingtonpost.com/local/education/academias-metoo-moment-women-accuse-professors-of-sexual-misconduct/2018/05/10/474102de-2631-11e8-874b-d517e912f125_story.html); Alyssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017), <https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271>; Jill Disis, *The Media Men Who Have Been Accused of Sexual Misconduct*, CNN BUS. (Nov. 30, 2017), <https://money.cnn.com/2017/11/29/media/media-men-accused-of-sexual-misconduct/index.html>; Harry Bruinius, *Churches Struggle with Their #MeToo Moment*, CHRISTIAN SCI. MONITOR (Apr. 20, 2018), <https://www.csmonitor.com/USA/Politics/2018/0420/Churches-struggle-with-their-MeToo-moment>; Dan Corey, *Here's a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 19, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821>.

of 2017, #MeToo had spawned a massive reckoning with a vast continuum of sexual abuse.<sup>7</sup>

More than a year later, the landscape of sexual misconduct allegations looks markedly different from any that has come before. As survivors—mostly women<sup>8</sup>—have found strength in numbers and a growing cultural responsiveness to their claims, the widespread impetus to disclose abuse has intensified. In this rapidly shifting environment, a new system of sexual misconduct accusation has emerged and quickly become dominant. Yet the ascendance of what I will call “unofficial reporting channels”<sup>9</sup>—a collection of informal channels that circumvent the law and law-adjacent institutional structures<sup>10</sup>—has been entirely overlooked.

Channels for reporting<sup>11</sup> sexual misconduct that skirt established complaint pathways should hold special interest for legal scholars and lawyers, who generally proceed from certain assumptions regarding the primacy of formal systems of accountability.<sup>12</sup> These basic assump-

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<sup>7</sup> See Edward Fesenthal, *The Choice: TIME's Editor-in-Chief on Why the Silence Breakers Are the Person of the Year*, TIME (Dec. 6, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers-choice> (explaining why the magazine selected for its “Person of the Year” the women who catapulted the #MeToo movement).

<sup>8</sup> At the most extreme end of the sexual abuse spectrum, nationwide survey data suggest that nearly one in five women have been raped at some point in their lives. MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011) [hereinafter NISVS]. For men, the number is one in seventy-one. *Id.* Transgender people experience sexual violence at rates of nearly one in two. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016) (in the largest survey of transgender people in the United States, forty-seven percent of respondents reported having been sexually assaulted). Data on sexual harassment, while sparse, also shows a steep gender disparity. See Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> (finding that eighty-one percent of women and forty-three percent of men had experienced sexual harassment).

<sup>9</sup> More fully, “unofficial reporting channels,” used interchangeably with “informal reporting channels,” are pathways for complaint other than those established by an institution with authority under the applicable legal framework to process an allegation of misconduct. See *infra* Section II.A.

<sup>10</sup> See *infra* notes 19–21 and accompanying text (noting that sexual misconduct may be regulated by criminal law, by Title IX, and by Title VII, depending on where the misconduct occurs and what it comprises). As I will explain, with regard to each of these legal regimes, established procedures for reporting misconduct generally run through law enforcement officers, campus disciplinary officials, and Human Resources departments, respectively.

<sup>11</sup> Unless otherwise specified, my use of “reporting” throughout this discussion includes not just formal complaints but informal or unofficial disclosures of misconduct as well.

<sup>12</sup> By “formal systems of accountability,” I have in mind the multiple legal regimes governing sexual misconduct. See *supra* note 10. Across disparate settings—whether in the

tions need revision if, as I will argue, by aiming to satisfy goals that our laws and legal institutions fail to achieve, informal reporting channels are serving as substitutes for the officially sanctioned mechanisms of redress that monopolize scholarly attention. Moreover, by viewing unofficial reporting channels as imperfect legal workarounds, we can better discern what these channels accomplish and where they fall short.

To make sense of what is currently unfolding, a proposed taxonomy classifies informal avenues of complaint into four distinct types: the Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion.<sup>13</sup> A functional analysis of these channels establishes that unofficial reporting can advance several important ends.<sup>14</sup>

Even so, there are limits to what informal accusation can accomplish, particularly because it deliberately bypasses official systems of accountability. To be clear, this shunning of the law of sexual misconduct is not a novel development, nor is it unexpected. Sexual abuse victims have long been disserved by the criminal law, by campus disciplinary processes, and by workplace complaint mechanisms.<sup>15</sup> Over time, survivors have mostly turned away from the institutions that have forsaken them.

As the #MeToo movement has gathered force, the law has remained largely missing in action, with the perceived futility of invoking formal accountability measures taken as given. But the near absence of law is too damning to ignore. Rather than remain a dominant feature of our societal approach to sexual assault and harassment, the proliferation of informal complaint underscores the need to invigorate our systems of formalized redress.<sup>16</sup> Unless we are willing

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criminal justice system, on college campuses, or in workplaces—victims must complain through an established channel in order to initiate the process designed to mete out an appropriate measure of accountability. Sexual misconduct in the military is not specifically included in this analysis, although its official systems of accountability (like those discussed in Part I) are underutilized. See generally Michelle A. Mengeling et al., *Reporting Sexual Assault in the Military: Who Reports and Why Most Servicewomen Don't*, 47 AM. J. PREVENTIVE MED. 17, 17 (2014) (“Actual and perceived reporting consequences deter servicemen from reporting.”).

<sup>13</sup> See *infra* Section II.A.

<sup>14</sup> See *infra* Section II.B.

<sup>15</sup> Victims of sexual misconduct come to these different systems with varying needs and desires. Some victims want the abuser to be deterred from further predation. Others want the abuser to be punished or removed from a setting that might involve future shared interaction. Others want an apology or other restorative measures. Still others simply want to be believed, validated, and supported. On each of these dimensions, established systems have largely fallen short.

<sup>16</sup> To be clear, my claim is not that informal reporting should entirely disappear as option, but rather that the frequency of formal reporting (in absolute and relative terms)

to consign the laws that regulate sexual misconduct<sup>17</sup> to a state of perpetual dormancy, the channels that activate legal consequences must be reimagined.<sup>18</sup> By creating a next generation of official reporting channels, we can breathe new life into the law of sexual misconduct, along with the protections it offers victims and accused alike.

This Article proceeds as follows: Part I situates unofficial reporting in its legal context by highlighting the woeful inadequacies of formal channels for reporting sexual assault and harassment, first in the criminal justice system, then on college campuses, and finally in the workplace. The failings of these formal systems lead victims and survivors to turn, increasingly, to back channels. Part II analyzes the functions served by informal reporting and assesses the inevitable tradeoffs entailed. Part III returns to the law, observing that if most victims continue to reject formal reporting channels in favor of informal alternatives, the legal regime governing sexual misconduct will remain moribund. The proposed solution would reengineer formal reporting channels—in the criminal justice system, on college campuses, and in the workplace—by replicating the virtues of unofficial reporting. The conclusion emphasizes the importance of understanding the workings of unofficial reporting if we hope to transform our collective response to sexual misconduct in this time of extraordinary flux.

## I

### FORMAL CHANNELS FOR (NOT) REPORTING SEXUAL MISCONDUCT

Sexual misconduct is regulated by a set of laws that, broadly speaking, target particular settings. On college campuses, Title IX forbids sex discrimination, which implicates a range of sexually abusive behavior.<sup>19</sup> In the workplace, Title VII prohibits actionable sexual

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should increase. Put differently, perpetual lopsidedness in the official/unofficial response ratio would be a significant problem. See Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 Nw. U. L. REV. 825, 872–76 (2019) (arguing that the #MeToo movement cannot achieve its broader policy goals without the state reforming its mechanisms that address sexual violence).

<sup>17</sup> For the sake of simplicity, the body of statutes, regulations and cases that spans the criminal law (as it relates to sexual assault), Title IX (as it relates to sexual misconduct), and Title VII (as it relates to sexual harassment) will be described as “the law of sexual misconduct.”

<sup>18</sup> Substantive law reform is also important, but—in contrast to what has been identified here—this need is widely discussed in existing scholarship.

<sup>19</sup> “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” 20 U.S.C. § 1681(a) (2012). For early recognition of sexual harassment as prohibited sex

harassment.<sup>20</sup> The criminal law, which regulates conduct within a set jurisdiction, is an exception to this institution-based approach.<sup>21</sup> (Even so, as a practical matter, because sexual assault is widely perceived as less serious when it is perpetrated by a fellow student or by a co-worker, the criminal law tends to become less germane in locations also governed by a separate legal regime.)

Across the range of regulatory systems, one common feature persists: Sexual misconduct is seldom addressed through established channels.<sup>22</sup> Regardless of who is designated as gatekeeper—police officer, campus disciplinary authority, Human Resources (HR) representative—sexual abuse victims overwhelmingly opt not to formally report the misconduct. There are many reasons for this but most are variations on the theme of system failure. Reporting rarely results in

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discrimination under Title IX, see *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998), which discusses teacher-student sexual harassment, and *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), which considers peer sexual harassment. Sexual harassment qualifies as discrimination under Title IX if it is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis*, 526 U.S. at 633. A single instance of rape or sexual assault by another student may satisfy this standard. See, e.g., *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (rape and sexual abuse “obviously qualify[ed] as . . . severe, pervasive, and objectively offensive sexual harassment”). For a discussion of how Title IX applies to campus sexual misconduct, see Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *YALE L.J.* 2058, 2061–67 (2016).

<sup>20</sup> “It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .” 42 U.S.C. § 2000e-2(a) (2012). On the theory of sexual harassment as sex discrimination, see CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 143–213 (1979). For early judicial recognition of this understanding, see *Williams v. Saxbe*, 413 F. Supp. 654, 657–61 (D.D.C. 1976), which held that retaliatory actions of a male supervisor, taken against a female employee for declining his sexual advances, are actionable under Title VII. For U.S. Supreme Court recognition, see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986), holding that a claim of hostile environment sex discrimination is actionable under Title VII. For a summary of the development of sexual harassment law, see Kimberly A. Yuracko, *Sexual Harassment Law: An Evolution in Theory, Scope and Impact*, in *EDWARD ELGAR RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE* 284–302 (Robin West & Cynthia G. Bowman eds., 2019).

<sup>21</sup> Another exception is the civil law. Although the civil rights remedy of the Violence Against Women Act (VAWA) was declared unconstitutional, state civil remedies remain generally available. See Krista M. Anderson, *Twelve Years Post Morrison: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors*, 36 *HARV. J.L. & GENDER* 223, 238–45 (2013) (surveying state civil remedies for sexual assault).

<sup>22</sup> This failure undermines equal protection norms. See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 *B.C. L. REV.* 1287 (2016) (arguing that the state’s widespread denial of protection to sexual assault survivors, who are predominantly women, is a hallmark of legal inequality).

perpetrator accountability, but it often exacts a significant toll on victims of sexual harassment and assault. On balance, survivors confront the very real prospect that complaining to authorities will prove costly and, in the end, useless. The law of sexual misconduct is thus largely unenforced, in considerable part because it is scarcely even invoked.<sup>23</sup>

Formal complaint channels serve as conduits for a mere fraction of sexual misconduct allegations; informal mechanisms provide the increasingly attractive alternative. On this view, extra-legal reporting channels spring from the void left by inadequate systemic responses to sexual abuse—a lacuna to which we now turn.

### A. Criminal Justice System

A sizeable majority of sexual assault victims choose never to involve law enforcement officials.<sup>24</sup> According to conservative Justice Department estimates, the population most vulnerable to sexual assault—females ages 18–24<sup>25</sup>—report to police at rates of only twenty percent for college students and thirty-two percent for non-college students.<sup>26</sup> Women of color, both on and off campus, may be even less likely to report sexual assault than their white counterparts.<sup>27</sup>

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<sup>23</sup> It is important to emphasize that enforcement-related concerns extend beyond the underreporting problem. While formal reporting does not necessarily lead to enforcement, it is a requisite for enforcement. Over time, an increase in formal reporting can be expected to generate greater enforcement, not only because formal reports bring cases into the systems with enforcement capacity, but also because an influx of reports may help to reduce gender bias in the processing of complaints. See *infra* Section II.B.3 (explaining how informal reporting can advance epistemic justice). However, boosting the frequency of formal complaint is not a complete corrective for enforcement problems in the criminal justice system, on college campuses, or in the workplace.

<sup>24</sup> See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> (finding that, among rape victims, 19.1% of adult women and 12.9% of adult men reported the crime to police); see also David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1222 (1997) (suggesting the probability that “unreported rapes are, disproportionately, acquaintance rapes,” for reasons that include survivors blaming themselves, viewing the assault as other than “real rape,” and wishing to maintain a relationship with the perpetrator).

<sup>25</sup> See SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 1, 5 (2014) (“For the period 1995–2013, females ages 18 to 24 had the highest rate of rape and sexual assault victimizations compared to females in all other age groups . . . . College-age male victims accounted for 17% of rape and sexual assault victimizations against students and 4% against nonstudents.”).

<sup>26</sup> *Id.* at 9.

<sup>27</sup> See Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, CHRON. HIGHER EDUC. (June 18, 2015), <https://www.chronicle.com/article/Another-Challenge-on-Campus/230977> (describing the reporting gap between white



To make a police report, a complainant must be prepared to speak to multiple officers, who may or may not be specially trained in trauma-informed interview techniques.<sup>28</sup> Depending on the nature and timing of the allegation, detectives may seek to gather corroborative evidence, including forensic evidence (colloquially known as a “rape kit”).<sup>29</sup> Law enforcement officers “typically are prohibited from submitting victims to polygraph or any other truth-telling test,” and officers are instructed not to pressure complainants to “make any decisions regarding their participation in the investigation or prosecution processes.”<sup>30</sup> Many police departments deviate from recommended practices, however, and even under the best of circumstances, a police department’s interest in closing the investigation—by either an arrest or an “unfounded” determination<sup>31</sup>—is often paramount. This makes a process that is bound to be difficult for complainants<sup>32</sup> even more taxing and potentially traumatic.<sup>33</sup>

Apart from these formidable obstacles, one factor that looms large in the survivors’ reporting calculus is the predictability of a non-response, which often stems from what I have called “credibility dis-

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college women and college women of color and positing that the “layers of privilege” required to pursue a complaint through the college administrative process are often less available to minority students). Off campus, commentator Hannah Giorgis has posited that an “impossible hierarchy of acceptable victimhood” means that “black women who walk willingly into the rooms of men they call ‘brother’ are considered undeserving of protection from any violence that happens therein.” Hannah Giorgis, *Many Women of Color Don’t Go to the Police After Sexual Assault for a Reason*, GUARDIAN (Mar. 25, 2015), <https://www.theguardian.com/commentisfree/2015/mar/25/women-of-color-police-sexual-assault-racist-criminal-justice>; see also JENNIFER C. NASH, BLACK WOMEN AND RAPE: A REVIEW OF THE LITERATURE (2009), <https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/nash2009.pdf> (surveying the literature on black women and rape, including studies finding that black women are less likely than white women to report rape).

<sup>28</sup> See Karol Ilagan, *Reporting to Police: A Guide for Victims of Sexual Abuse*, REVEAL (Aug. 11, 2016), <https://www.revealnews.org/article/reporting-to-police-a-guide-for-victims-of-sexual-abuse> (describing what to expect from the reporting process).

<sup>29</sup> See *id.*

<sup>30</sup> *Id.*

<sup>31</sup> See *infra* notes 38–40 and accompanying text (explaining and contextualizing “unfounding” determinations).

<sup>32</sup> See Ilagan, *supra* note 28 (“The interview process can be difficult for a victim, primarily because the detectives will need to ask deeply personal questions. Often, victims are not familiar with the criminal justice system and find it complicated and intimidating.”).

<sup>33</sup> According to one expert, “When victims do report to the criminal justice system, the way in which they’re treated is very distressing to [them] . . . And they do describe it as a second rape or secondary victimization. Something that exacerbates their post-traumatic stress symptoms above and beyond the rape itself.” Marisa Kabas, *What Is ‘Second Rape’ and What Can We Do About It?*, SPLINTER (July 7, 2016), <https://splinternews.com/what-is-second-rape-and-what-can-we-do-about-it-1793860078> (quoting psychologist Rebecca Campbell).

counting.”<sup>34</sup> At every stage of the criminal process, allegations of sexual assault are mostly treated with skepticism, especially in cases involving acquaintances.<sup>35</sup> In short, rape victims often forego the criminal justice system in anticipation of how they believe their case will be (mis)handled.

Many survivors perceive that the police are unlikely to pursue allegations of non-stranger rape.<sup>36</sup> Among non-student survivors, nearly one in five surveyed did not report a sexual assault because “police would not or could not do anything to help.”<sup>37</sup> This concern is well grounded. Little has changed since a 1997 survey exposed the police practice of “unfounding” (or deeming unsubstantiated) rape complaints at disproportionately high rates.<sup>38</sup> Recent empirical research on policing establishes the endurance of pervasive police biases in sexual assault cases<sup>39</sup>—biases that tend to result in prema-

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<sup>34</sup> For a comprehensive look at the skeptical treatment of sexual assault throughout the criminal justice system, see Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017).

<sup>35</sup> *Id.* at 29–30.

<sup>36</sup> See Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014), <http://www.pbs.org/newshour/rundown/four-five-acts-campus-sexual-assault-go-unreported-police> (quoting a victim’s rights lawyer as explaining that the massive underreporting of campus rape is significantly attributable to the fact that victims “know in our society that the only rapes that are taken seriously are those committed by strangers and are significantly violent”).

<sup>37</sup> SINOZICH & LANGTON, *supra* note 25, at 9. The corresponding figure for students is nine percent. *Id.* Apart from their perceptions of the likely police response, victims’ own internalization of the criminal justice system’s longstanding non-pursuit of sexual assault cases is reflected in the category “personal matter,” which was given as a reason for non-reporting by twenty-six percent of students and twenty-three percent of non-students. *Id.*; see also *infra* note 86 (exploring why students might define an incident as “not serious enough to report”). For a discussion of how the identification of serial offenders can address this concern, see *infra* note 274 and accompanying text.

<sup>38</sup> See Bryden & Lengnick, *supra* note 24, at 1230 (“As with all crimes, the police decide whether a reported rape actually occurred, and attempt to determine who committed it. If they want the case to go forward, they ‘found’ the complaint and transmit the file to the prosecutor’s office.”); *id.* at 1233 (“[T]he unfounding rate for rape is roughly four times higher than for other major crimes.”). To make an arrest or “found” a complaint, the police merely require probable cause, a far lower evidentiary burden than the standard of proof of guilt beyond a reasonable doubt that the prosecutor must surmount at trial to convict.

<sup>39</sup> *Id.* at 1243 (“[M]ost observers agree that founding decisions in acquaintance rape cases are strongly affected by the purported victim’s contributory negligence, and by her perceived immorality. . . . If police bias does indeed distort founding decisions, this appears to be the type of case in which most of the distortion occurs.”); see also CASSIA SPOHN & KATHARINE TELLIS, U.S. DEP’T OF JUSTICE, POLICE AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY’S OFFICE 36–82 (2012) (analyzing rapes reported to the Los Angeles Police Department from 2005 to 2009

ture closings of rape investigations (often at the initial stages).<sup>40</sup> Consistent with the nation-wide data,<sup>41</sup> police have systematically mishandled sexual assault allegations in jurisdictions including Los Angeles,<sup>42</sup> Baltimore,<sup>43</sup> St. Louis,<sup>44</sup> New Orleans,<sup>45</sup> New York,<sup>46</sup> Salt

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and finding that the existence of a relationship between the victim and the suspect influenced case processing).

<sup>40</sup> See *The Criminal Justice System: Statistics, RAPE, ABUSE & INCEST NAT'L NETWORK*, <https://www.rainn.org/statistics/criminal-justice-system> (last visited May 13, 2019) (estimating, based on recent FBI and DOJ figures, that out of every 1000 rapes, 230 are reported to the police and only 46 lead to an arrest); Alex Campbell & Katie J.M. Baker, *This Police Department Tosses Aside Rape Reports When a Victim Doesn't Resist "to the Best of Her Ability,"* BUZZFEED (Sept. 8, 2016), <https://www.buzzfeed.com/alexcampbell/unfounded> (identifying eleven police departments with unfounding rates ranging from twenty-four to fifty-four percent). The FBI Uniform Crime Report (UCR) provides annual data on the rate at which certain crimes are closed, or "cleared." See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, OFFENSES CLEARED, CRIME IN THE UNITED STATES, 2015, at 1 (2016), [https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/clearances/clearancetopic\\_final.pdf](https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/clearances/clearancetopic_final.pdf) (explaining how law enforcement agencies can clear an offense by arrest or "exceptional means"). However, the sexual assault clearance rates reported by local law enforcement agencies are not a good indicator of the likelihood that a report will result in an arrest. One important reason is that when "[a law enforcement] agency determines that complaints of crimes are unfounded or false, the agency eliminates that offense from its crime tally through an entry on the monthly report." FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, METHODOLOGY, CRIME IN THE UNITED STATES, 2015, at 2 (2016), [https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resource-pages/2015-methodology\\_final.pdf](https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resource-pages/2015-methodology_final.pdf). Because crimes categorized as unfounded are not used to determine UCR clearance rates, the frequency at which sexual assault offenses are unfounded greatly undermines the utility of the FBI report. See JOANNE ARCHAMBAULT & KIMBERLY A. LONSWAY, *END VIOLENCE AGAINST WOMEN INT'L, CLEARANCE METHODS FOR SEXUAL ASSAULT CASES 20-26* (2007) (discussing methodological issues underlying UCR reports). A separate problem with the UCR is that law enforcement agencies improperly use the "exceptional clearance" classification for rape cases, often because a victim is deemed "uncooperative." *Id.* at 16. See Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Statistics*, 99 IOWA L. REV. 1197 (2014) (arguing that law enforcement officials have used a practice of undercounting rape in official tallies because of cultural hostility to rape complaints and to create the illusion of success in fighting violent crime).

<sup>41</sup> Regarding campus sexual assault allegations in particular, one study of six colleges in the Midwest found that 171 reports to police resulted in only twelve arrests. Todd Lighty et al., *Few Arrests, Convictions in Campus Sex Assault Cases*, CHI. TRIB. (June 16, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-06-16-ct-met-campus-sexual-assaults-0617-20110616-story.html>.

<sup>42</sup> See SPOHN & TELLIS, *supra* note 39, at I (finding that the Los Angeles Police Department cleared only 45.7% of reported rape or attempted rape cases between 2005 and 2009).

<sup>43</sup> See Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010), <https://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html> (reporting that each year, more than thirty percent of cases investigated are "deemed unfounded," which is five times the national average, and "[i]n 4 of 10 emergency calls to police involving allegations of rape, officers conclude that there is no need for a further review, so the case never makes it to detectives").

Lake County,<sup>47</sup> Philadelphia,<sup>48</sup> and Missoula, Montana.<sup>49</sup> Police responses are particularly defective in cases involving women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers.<sup>50</sup>

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<sup>44</sup> See Jeremy Kohler, *What Rape?*, DART CTR. FOR JOURNALISM & TRAUMA (Mar. 3, 2006), <https://dartcenter.org/content/what-rape?section=2> (reporting on the police practice in St. Louis of diverting rape complaints from formal processing channels).

<sup>45</sup> See Laura Maggi, *NOPD Downgrading of Rape Reports Raises Questions*, TIMES-PICAYUNE (July 12, 2009), [https://www.nola.com/news/2009/07/nopd\\_downgrading\\_of\\_rape\\_repor.html](https://www.nola.com/news/2009/07/nopd_downgrading_of_rape_repor.html) (reporting that most reported rapes were classified as noncriminal).

<sup>46</sup> See John Eligon, *Panel Seeks More Police Training on Sex Crimes*, N.Y. TIMES (June 2, 2010), <https://www.nytimes.com/2010/06/03/nyregion/03rape.html> (reporting that the number of forcible rape complaints deemed unfounded had dramatically increased and that the category of sex crimes classified as misdemeanors had grown by six percent). For a more recent discussion of the New York Police Department's inadequate response to sexual assault, see Zolan Kanno-Youngs, *Inside the NYPD Special Victims Unit: Victims Tell Their Stories*, WALL ST. J. (May 8, 2018), <https://www.wsj.com/articles/inside-the-nypd-special-victims-unit-victims-tell-their-stories-1525780801>, which describes a “severely understaffed” Special Victims Division and survivors’ accounts of insensitive, dismissive treatment on the part of detectives.

<sup>47</sup> See Erin Albery & Janelle Stecklein, *Study: Most Rape Cases in Salt Lake County Never Prosecuted*, SALT LAKE TRIB. (Jan. 7, 2014), <https://archive.sltrib.com/story.php?ref=/sltrib/news/57323282-78/cases-rape-police-victim.html.csp> (reporting on an audit of 270 rape cases in Salt Lake County which showed that six percent were prosecuted).

<sup>48</sup> See Mark Fazlollah et al., *Women Victimized Twice in Police Game of Numbers*, PHILA. INQUIRER (Oct. 17, 1999), <http://inquirer.philly.com/packages/crime/html/sch101799.asp> (reporting that hundreds of Philadelphia rape cases per year were “mothballed” by being administratively categorized as an “investigation of person,” and that such cases were not reflected in crime statistics).

<sup>49</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen. for Civil Rights, & Michael W. Cotter, U.S. Attorney for the Dist. of Mont., to John Engen, Mayor, Missoula, Mont. (May 15, 2013), [http://www.justice.gov/crt/about/spl/documents/missoulapdfind\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf) (finding that “there are significant deficiencies in [the Missoula Police Department]’s investigations of sexual assault”).

<sup>50</sup> See AM. CIVIL LIBERTIES UNION, *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 1* (2015), <https://www.aclu.org/report/sexual-assault-domestic-violence-and-policing>. The nationwide survey of more than nine hundred advocates, service providers, and attorneys confirmed “the entrenched nature of long-recognized, gender-driven biases by police against domestic violence or sexual assault claims.” *Id.* at 40. The survey also underscored the problem of police bias against “survivors of color, and against survivors who are poor, Native American, immigrant, or LGBTQ.” *Id.* An intersectional approach to equal protection requires accounting for the multitudinous ways that bias confronts victims. See NASH, *supra* note 27, at 1 (“[B]lack women are less likely to disclose rape, prosecutors are less likely to pursue criminal charges against an assailant when a black woman is the survivor, and jurors are more likely to believe that a white survivor’s assailant is guilty than a black woman’s assailant.”); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (“[T]he violence that many women experience is often shaped by other dimensions of their identities, such as race and class.”).

Overall, the police response to sexual assault is plagued by the pervasive practice of credibility discounting.<sup>51</sup> But this practice is not confined to the policing stage of the criminal process. Even when police substantiate a rape complaint, prosecutors pursue only a fraction of the cases referred.<sup>52</sup> A prosecutor's determination not to charge a defendant may encompass not only his or her own personal skepticism<sup>53</sup> but also the anticipated skepticism of a potential jury.<sup>54</sup> Prosecutorial charging in sexual assault cases, especially those involving acquaintances,<sup>55</sup> is inexorably linked to concerns that jurors will downgrade the accuser's credibility.<sup>56</sup>

Research on prosecutorial charging practices reveals the influence of rampant societal biases surrounding sexual assault.<sup>57</sup> Epitomizing this perspective, one prosecutor acknowledged that her office "does consider jury bias when determining whether to prosecute," adding that "[a] lot of the cultural attitudes about sexual assault come into play in a jury trial and are part of the consideration about whether or not we would be able to prove it beyond a reasonable doubt."<sup>58</sup> This calculus draws on a stock of narratives that "incorpo-

<sup>51</sup> See Tuerkheimer, *supra* note 34, at 27 ("In the field of law enforcement . . . wide-ranging impulses to downgrade the credibility of rape accusers find a capacious outlet.").

<sup>52</sup> See, e.g., Cassia Spohn et al., *Prosecutorial Justification for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206, 213 (2001) (finding that prosecutors in the jurisdiction studied rejected over forty percent of cases at the initial screening stage, and in just over eleven percent of cases, charges were filed but later dismissed, meaning that less than half of the cases received by the office were fully prosecuted).

<sup>53</sup> See Jennifer G. Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, STRATEGIES: PROSECUTORS' NEWSL. VIOLENCE AGAINST WOMEN (Aequitas, Washington, D.C.), Apr. 2014, at 5 ("[P]rosecutors' determinations of the probability of conviction are easily influenced by their own biases, misconceptions or experiences. As such, if prosecutors are not regularly charging, investigating, preparing, and trying seemingly 'challenging' cases, they become *incapable* of determining whether cases are or are not likely to result in a conviction." (emphasis in original) (citation omitted)).

<sup>54</sup> For a more extended discussion of "anticipatory credibility discounting," see Tuerkheimer, *supra* note 34, at 37–41.

<sup>55</sup> See Spohn et al., *supra* note 52, at 207–08 ("Several studies conclude that prosecutors are less likely to file charges if the victim knew the offender. These studies suggest that a prior relationship with the offender may raise questions about the truthfulness of the victim's story . . ." (citations omitted)).

<sup>56</sup> It is difficult to know the extent to which these concerns provide cover for prosecutors themselves to engage in credibility discounting. Regardless of whether the prosecutor's ostensible reliance on the jury's expected response is genuine or correct, however, it results in systemic credibility discounting.

<sup>57</sup> See Tuerkheimer, *supra* note 34, at 37–41 (describing how "credibility discounting" influences the exercise of prosecutorial discretion).

<sup>58</sup> See Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases So Frequently? Rape Survivors Seek Answers*, REWIRE (Mar. 11, 2016), <https://rewire.news/article/2016/03/11/dc-prosecutors-decline-cases-frequently-rape-survivors-seek-answers> (recounting

rate[] stereotypes of real crimes and credible victims.”<sup>59</sup> Framed by an inquiry into how the archetypical juror would assess the complainant’s account, prosecutorial decisionmaking transposes the popular acceptance of rape myths into a rationale for declining to pursue charges.

Given the systemic discounting of complainant credibility at every stage of the criminal process, it should come as no surprise that most survivors do not report their abuse to the police.<sup>60</sup> Indeed, the underreporting phenomenon is as understandable as it is massive. Unless and until the criminal justice system—including the mechanisms for invoking it<sup>61</sup>—recalibrates, survivors will continue to be drawn to alternate outlets for reporting sexual assault.

### B. College Campus

Women in their late teens and early twenties are especially vulnerable to sexual violation.<sup>62</sup> Within this age bracket, although females who are not students experience even higher rates of victimization than their student counterparts,<sup>63</sup> the incidence of sexual assault on campus is alarming.<sup>64</sup> As is true generally, offenders known

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impressions on the part of survivors that prosecutors “seemed to disbelieve their stories or blame them for the alleged assault,” along with a concern that prosecutors were not “carefully scrutiniz[ing]” the available evidence in their cases); *see also* Long & Nugent-Borakove, *supra* note 53, at 5 (warning prosecutors that “the challenge of sexual assault cases may appear, to the inexperienced eye, to be unsurmountable, thus creating a self-perpetuating cycle and a low number of cases being taken forward”).

<sup>59</sup> Spohn et al., *supra* note 52, at 208; *see also* Lisa Frohmann, *Convictability and Discardant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC’Y REV. 531, 537 (1997) (arguing that the prosecutorial categorization of jurors “reveals how prosecutors maintain and reproduce cultural stereotypes about race, class, and gender through their decisionmaking practices”). Relying on an ethnographic study of prosecutorial decisionmaking, Frohmann explains, “prosecutors orient particularly toward ‘the jury,’ an ideal type formed from a composite of their previous trial experience, discussions with other prosecutors, and prosecutors’ general cultural knowledge about the norms and mores around sexuality, heterosexual relations, and violence,” and then decide whether a credible narrative can be told. *Id.* at 535–36.

<sup>60</sup> *See supra* notes 34–35 and accompanying text.

<sup>61</sup> *See infra* Section III.A.

<sup>62</sup> *See supra* note 25 (citing data on rape and sexual assault victimizations).

<sup>63</sup> *See* SINOZICH & LANGTON, *supra* note 25, at 4 (finding that women aged eighteen to twenty-four who were not college students were 1.2 times more likely to be sexually assaulted than women in the same age bracket who attended college and that non-students experienced approximately twice the number of sexual assaults as their student counterparts).

<sup>64</sup> Studies of sexual assault on college campuses indicate that 10.8% of female undergraduates have experienced sexual penetration by force or incapacitation. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 14 (2015), [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf). Surveys that rely on a broader definition of sexual assault that includes forced kissing and fondling

to the victim (as a friend, acquaintance, or intimate partner) commit the vast majority of campus sexual assault.<sup>65</sup>

Underreporting is a significant problem on college campuses.<sup>66</sup> According to the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS), for the period 1995 to 2013, only one in five undergraduate women who experienced rape or sexual assault contacted the police.<sup>67</sup> The National College Women Sexual Victimization Study (NCWSVS), a more focused inquiry into why college sexual assault survivors rarely report through official channels,<sup>68</sup> found that fewer than five percent of completed and attempted rapes were reported to the police, and fewer still to campus authorities.<sup>69</sup>

Among the key findings of the NCWSVS was that college students opted to bypass official channels when they perceived it as unlikely that the complaint would be credited.<sup>70</sup> According to researchers, "incidents were more likely to be reported to the police

have proven controversial. See Jake New, *One in Five?*, INSIDE HIGHER ED (Dec. 15, 2014), <https://www.insidehighered.com/news/2014/12/15/critics-advocates-doubt-oft-cited-campus-sexual-assault-statistic> (describing criticism of the National Institute of Justice's 2007 Campus Sexual Assault Study for its "broad definition of sexual assault" and that "[s]ome argue that an unwanted kiss should not be conflated with other kinds of more severe sexual assault or rape"). Applying this more expansive definition, one in five college women report having been sexually assaulted. See CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 73-74 (2016), <http://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> (reporting that, among 23,000 undergraduates surveyed, 21% of female students said that they had been sexually assaulted while in college, while 7% of male students said the same). Even under a narrower definition of sexual assault, this number seems to hold. See NISVS, *supra* note 8, at 1 (finding that one in five women in the United States had experienced either rape or attempted rape).

<sup>65</sup> See SINOZICH & LANGTON, *supra* note 25, at 7 ("College-age female victims knew their offender in about 80% of rape and sexual assault victimizations, regardless of their enrollment status.").

<sup>66</sup> Early studies identified this same problem. See, e.g., BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 24 exhibit 12 (2000) (reporting that fewer than five percent of sexual assaults were reported to the police).

<sup>67</sup> SINOZICH & LANGTON, *supra* note 25, at 1. The NCVS definition of rape and sexual assault includes threatened, attempted, and completed rape and sexual assault but does not specifically mention incidents in which the victim was "unable to provide consent due to drug or alcohol use . . . or coerced to engage in sexual contact." *Id.* at 2. The NCVS does not collect information about whether victims reported to campus administrators. *Id.* at 9.

<sup>68</sup> The NCWSVS relied on a national survey administered in the spring of 1997 to 4446 female college students enrolled at 233 postsecondary institutions. Bonnie S. Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6, 17 (2003).

<sup>69</sup> *Id.* at 31 ("[W]omen in our sample also were reluctant to involve campus authorities. These authorities were notified in only 2.8% of all incidents of victimization and in 3.2% of all rapes.").

<sup>70</sup> See Tuerkheimer, *supra* note 34, at 28 (observing that sexual assault victims often "preempt the deployment of credibility discounts" by declining to report through official channels).

when they had characteristics that made them more ‘believable’ (e.g., presence of a weapon or assailant who was a stranger).<sup>71</sup> Given widespread tendencies to blame victims for sexual assault,<sup>72</sup> it is unsurprising that alcohol or drug involvement resulted in a “unique effect,” making students “more likely to disclose their victimization to friends, but not to campus authorities.”<sup>73</sup> Students resorted to unofficial channels because they perceived that “proof beyond their testimony was needed to secure police action, that they would not be protected if they disclosed their assailants’ identities, and that a sexual victimization was something sufficiently embarrassing or shameful that it should even be kept from their families.”<sup>74</sup>

In recent years, the treatment of sexual assault on college campuses has shifted dramatically. In 2011, the Obama Administration signaled a willingness to more aggressively enforce the dictates of Title IX.<sup>75</sup> New federal interventions,<sup>76</sup> coupled with notable successes on the part of campus sexual assault activists,<sup>77</sup> underscored universities’ obligation to provide educational environments that do not dis-

<sup>71</sup> Fisher et al., *supra* note 68, at 6.

<sup>72</sup> See Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming*, 17 *AGGRESSION & VIOLENT BEHAV.* 443, 446–49 (2012) (discussing the effect of gender roles and drug and alcohol use on perceptions of sexual assault victims); Eliana Suarez & Tahany M. Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 *J. INTERPERSONAL VIOLENCE* 2010, 2025–26 (2010) (summarizing traits and identities that have a positive relationship with belief in rape myths).

<sup>73</sup> Fisher et al., *supra* note 68, at 6; see also *infra* note 301 (noting that university policies related to substance use can provide a disincentive to reporting misconduct).

<sup>74</sup> Fisher et al., *supra* note 68, at 32; see also CHRISTOPHER P. KREBS ET AL., NAT’L INST. OF JUSTICE, *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY*, at xvii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that the most common reasons given by victims for not reporting to law enforcement were “they did not think it was serious enough to report,” “it was unclear that a crime was committed or that harm was intended,” and “they did not want anyone to know about the incident”).

<sup>75</sup> See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (informing schools of their obligations under Title IX).

<sup>76</sup> For a synopsis of these efforts and their impact, see Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 *YALE L.J.* 1940, 1973–78 (2016), which provides an overview of actions taken by the Department of Education’s Office for Civil Rights to enforce Title IX, and Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 *DUKE L.J.* 1847, 1871–78 (2017), which discusses the Title IX enforcement efforts of the Obama Administration.

<sup>77</sup> See Richard Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES (Mar. 19, 2013), <https://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html> (describing the successes of informal networks of college student activists in drawing attention to universities’ handling of sexual assault complaints).



criminate against female students.<sup>78</sup> This mandate, which exists entirely apart from the criminal justice system,<sup>79</sup> requires administrators to respond to sexual misconduct.<sup>80</sup> Even as federal enforcement of Title IX has become considerably less robust under President Trump,<sup>81</sup> college sexual assault survivors must still be given the option of reporting to campus disciplinary authorities.<sup>82</sup>

Yet students remain exceedingly reluctant to invoke their colleges' formal reporting channels.<sup>83</sup> According to the most recent data from the Association of American Universities, just over a quarter of victims of physically forced penetration reported the incident.<sup>84</sup> Students were even less likely to report incidents of penetration during incapacitation (13.3%) and incidents of forced sexual contact (7.0%).<sup>85</sup> Among the most common reasons for not contacting designated administrators were that the incident was not considered "serious enough,"<sup>86</sup> that the survivor was "embarrassed, ashamed or

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<sup>78</sup> See *supra* note 19 (discussing universities' Title IX obligations).

<sup>79</sup> See *supra* notes 19, 21 and accompanying text.

<sup>80</sup> See *supra* note 19 (explaining that sexual misconduct in educational settings can constitute sex discrimination under Title IX).

<sup>81</sup> See Erica L. Green, *Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html> (describing proposed Title IX regulations under the Trump Administration and their departure from previous guidance). Even under the Obama Administration, the success of federal Title IX enforcement efforts was limited. See Jonah Newman & Libby Sander, *Promise Unfulfilled?*, CHRON. HIGHER EDUC. (Apr. 30, 2014), <https://www.chronicle.com/article/Promise-Unfulfilled-/146299> ("[F]ewer than one in 10 [Title IX complaints] led to a formal agreement between federal and college officials to change campus policies.").

<sup>82</sup> See *Nondiscrimination on the Basis of Sex in Educational Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,472–73 (proposed Nov. 29, 2018).

<sup>83</sup> College reporting procedures vary. For a distillation of best practices, see *Reporting Violence*, KNOW YOUR IX, <https://www.knowyourix.org/?school-reporting=reporting-violence> (last visited Mar. 29, 2019). For examples of how schools discourage reporting, see Letter from Fatima Gross Graves, President & CEO, Nat'l Women's Law Ctr., to Betsy DeVos, Sec'y of Educ. 2–4 (July 11, 2017), <https://nwl.org/wp-content/uploads/2017/07/Letter-to-DeVos-on-Title-IX-Sexual-Violence.pdf>.

<sup>84</sup> CANTOR ET AL., *supra* note 64, at 110 tbl.6-1.

<sup>85</sup> *Id.* The Campus Climate Survey employed an expansive list of reporting agencies that included "agencies concerned with prosecuting offenders (e.g., the Title IX office; campus or local police) to those concerned with assisting the victim with the consequences of the incident (e.g., health care providers; victim services)." *Id.* at 35. "Students were asked if they reported the victimization to any of these places." *Id.*

<sup>86</sup> Fisher et al., *supra* note 68, at 33. This is consistent with earlier research. See KREBS ET AL., *supra* note 74, at xvii (reporting findings from CSA Study). Regarding how to interpret these findings, one researcher has noted that "a salient research issue is what students mean when they define incidents as not serious enough to report." Fisher et al., *supra* note 68, at 33. These responses may be explained by "a false consciousness expressed by women acculturated to see their victimization as somehow acceptable," or, alternatively, "a rational assessment in which female victims decide that reporting coerced

[felt] that it would be too emotionally difficult,” and that the survivor “did not think anything would be done” about the incident.<sup>87</sup> Given the unlikelihood that a school’s Title IX procedures will result in the imposition of serious sanctions,<sup>88</sup> most survivors conclude that the benefits of reporting to campus officials are outweighed by the costs.<sup>89</sup>

This does not mean that survivors stay silent about their abuse. Rather, sexual misconduct on campus—like sexual assault in general and sexual harassment in the workplace—is typically disclosed through informal channels.<sup>90</sup> Unless alternative modes of reporting are introduced on campus,<sup>91</sup> student victims of sexual misconduct will continue to reject what college disciplinary officials have on offer, leaving unfulfilled Title IX’s promise of a nondiscriminatory education.

### C. Workplace

Sexual harassment in the workplace is commonplace.<sup>92</sup> Most recently, a national study of a thousand men and a thousand women asked about harassment and assault in multiple settings.<sup>93</sup> More than a

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sexuality is not worth turning in fellow students when such an act may incur negative reactions from their peers and no real action from the criminal justice system.” *Id.*

<sup>87</sup> CANTOR ET AL., *supra* note 64, at 36.

<sup>88</sup> See Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), <https://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> (finding that the vast majority of disciplinary measures imposed by schools were “minor sanctions” such as “reprimands, counseling, suspensions . . . community service . . . orders that perpetrators write a letter or apology, or make a presentation to a campus advocacy group, or write a research paper on sexual violence”).

<sup>89</sup> See *id.* (“For [survivors], the trauma of assault can be compounded by a lack of institutional support, and even disciplinary action. Many times, victims drop out of school, while their alleged attackers graduate.”). For one detailed account of institutional failure, see Joseph Shapiro, *College Justice Falls Short for Rape Victim*, NPR (Feb. 26, 2010, 12:49 PM), <https://www.npr.org/templates/story/story.php?storyId=12411931>.

<sup>90</sup> See *infra* Section II.B (providing a taxonomy of unofficial reporting channels).

<sup>91</sup> See *infra* Section III.B.

<sup>92</sup> According to the EEOC, “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct . . . creates an intimidating, hostile, or offensive work environment.” *Facts About Sexual Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last visited Feb. 22, 2019). For a proposed reframing that centers “workplace sexism, not sexuality or sexual desire,” see Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 24 (2018), which recasts and updates earlier seminal works.

<sup>93</sup> STOP STREET HARASSMENT, THE FACTS BEHIND THE #MeToo MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 7 (2018), <http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf> (finding that eighty-one percent of women had experienced some form of sexual harassment or assault over the course of their lifetime). The report is based on a nationally representative survey of approximately one

third of the women respondents reported having been sexually harassed on the job.<sup>94</sup> Qualitative accounts, particularly those emerging in the wake of #MeToo, suggest that women who work in predominantly male industries or with a largely male clientele experience sexual harassment at especially high rates.<sup>95</sup>

The most exhaustive contemporary overview of workplace harassment comes from the U.S. Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace.<sup>96</sup> According to the Task Force, the reported incidence of workplace sexual harassment of women varies from twenty-five to eighty-five percent, depending on the questions posed and the sampling method.<sup>97</sup> When researchers asked randomly selected women whether they had experienced one or more "specific sexually-based behaviors, such as unwanted sexual attention or coercion," the rate of reported harassment was forty percent.<sup>98</sup>

The Task Force was careful to note that workplace harassment is intersectional, meaning that people can "experience harassment on

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thousand women and one thousand men, ages eighteen and up, conducted online in early 2018. *Id.*

<sup>94</sup> *Id.* at 21 (reporting that thirty-eight percent of women experienced workplace harassment; the analogous figure for men is thirteen percent). The survey defined sexual harassment to include verbal and cyber, as well as physically aggressive, sexual harassment. *Id.* at 6. "Forced sex acts" were excluded from the definition. *Id.* LGBT people may experience harassment at even higher rates. See HUMAN RIGHTS CAMPAIGN FOUND., DEGREES OF EQUALITY: A NATIONAL STUDY EXAMINING WORKPLACE CLIMATE FOR LGBT EMPLOYEES 21 (2009) (reporting that fifty-eight percent of LGBT respondents in a national survey had heard jokes or derogatory comments made about LGBT people at work).

<sup>95</sup> See *supra* note 6 and accompanying text (listing industries and institutions implicated by #MeToo era misconduct allegations); Stefanie K. Johnson et al., *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (Oct. 4, 2016), <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment> (in a qualitative study of thirty-one women in predominantly male industries, seventy-five percent of respondents reported having been sexually harassed at work).

<sup>96</sup> CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016) [hereinafter EEOC TASK FORCE REPORT], [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm). In June 2018, the EEOC reconvened the Select Task Force. See Alexandra Yoon-Hendricks, *Spurred by #MeToo, a Harassment Task Force Reconvenes*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/12/us/politics/eeoc-harassment-task-force.html>.

<sup>97</sup> EEOC TASK FORCE REPORT, *supra* note 96, at 8–9.

<sup>98</sup> *Id.* When the measure of harassment includes not only unwanted sexual attention or coercion, but also "sexist or crude/offensive behavior," almost sixty percent of women report having experienced harassment. *Id.* at 9; see also *id.* at 10–11 (discussing, relatedly, gender identity-based and sexual orientation-based harassment).

the basis of more than one identity group.”<sup>99</sup> Although research in this area is relatively sparse, one study of these intersectional dynamics found that women of color were more likely to experience higher rates of harassment than either white women or men of color.<sup>100</sup>

Notwithstanding the ubiquity of sexual harassment, it rarely triggers established mechanisms of workplace accountability. Indeed, as with other forms of sexual violation, victims are loath to invoke formal processes. As the Task Force summarized, “the extent of non-reporting is striking.”<sup>101</sup> Women who are sexually harassed exhibit a range of responses that include avoiding the harasser, confronting the harasser, denying or downplaying the seriousness of the situation, and attempting to “ignore, forget or endure” the behavior.<sup>102</sup> The most frequent response is to discuss the problem with family members, friends, and trusted colleagues.<sup>103</sup>

The least common response is to pursue established complaint channels.<sup>104</sup> In two studies, more than two-thirds of workplace harassment victims opted not even to speak about it with a supervisor, manager, or union representative.<sup>105</sup> Even more rarely do victims lodge formal complaints.<sup>106</sup> According to the Task Force, “on average, anywhere from 87% to 94% of individuals did *not* file a formal complaint.”<sup>107</sup> The study explained that employees may choose not to report harassment because they fear “disbelief of their claim; inaction

<sup>99</sup> *Id.* at 13 (“There is increasing evidence that targets of harassment often experience mistreatment in multiple forms, such as because of one’s race and gender, or ethnicity and religion.”).

<sup>100</sup> *Id.* at 14 (citing Jana L. Raver & Lisa H. Nishii, *Once, Twice, or Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace Harassment*, 95 J. APPLIED PSYCHOL. 236, 240–49 (2010)).

<sup>101</sup> EEOC TASK FORCE REPORT, *supra* note 96, at 15. “Non-reporting” in this context means not reporting through formal workplace complaint channels. For a sample complaint procedure, see Society for Human Resource Management (SHRM), *Anti-Harassment and Complaint Procedure*, [https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms\\_000534.aspx](https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_000534.aspx) (last visited Aug. 2, 2019).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 16.

<sup>104</sup> *Id.* Moreover, reporting rates appear to vary depending on the type of harassment at issue. *Id.* In one study, thirty percent of women who experienced “sexually coercive behavior” reported it through formal channels, while “gender-harassing conduct was almost never reported.” *Id.*

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

<sup>106</sup> Women of color may be especially mistrustful of employer complaint processes. See Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1262 (2006) (noting survey results in which women of color put forth various reasons why they distrusted internal complaints processes).

<sup>107</sup> EEOC TASK FORCE REPORT, *supra* note 96, at 16.

on their claim; receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation.”<sup>108</sup>

These concerns are warranted. Employees who complain about their harassment *do* often face retaliation, indifference, and hostility.<sup>109</sup> Given the very real prospect of negative consequences, both professional and personal, it is understandable that most women decide not to report through official channels.<sup>110</sup> As one expert on occupational health summarized, “It is actually unreasonable for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies [or helpful responses by employers] and created further damage to people who had already been harassed.”<sup>111</sup>

Because official procedures for addressing workplace sexual harassment complaints have largely failed women, women routinely resort to informal methods of disseminating information about their abuse. While enabling the harasser to abuse with impunity and leaving intact the power structures that perpetuate workplace inequality,<sup>112</sup> informal pathways nevertheless present as more attractive than established complaint channels. This will remain the case unless and until alternative reporting options are made available in the workplace.<sup>113</sup>

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Across institutional settings—from the criminal justice system, to college campuses, to the workplace—the law of sexual misconduct is

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 16–17 (noting studies showing the high incidence of these negative consequences). Doctrinal requirements make it exceedingly difficult for employees to prevail on a Title VII retaliation claim. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) (requiring proof of “but for” causation, not simply that retaliation was a “motivating factor” in the employer’s decision); *see also* Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 *STAN. L. REV. ONLINE* 49, 50 (2018) (arguing that high barriers to proving retaliation contribute to the problem of harassment).

<sup>110</sup> In general, those most likely to be harassed may be the least likely to report. EEOC TASK FORCE REPORT, *supra* note 96, at 28 (explaining that power disparities in many workplaces can create opportunities for “high-status workers” to exploit “low-status” workers, who may be unaware of how to report harassment or more vulnerable to retaliation for reporting harassment).

<sup>111</sup> *Id.* at 17 n.68 (“[B]ecause remediating the situation did not make the person whole . . . and helpful vs. hurtful responses were each found about 50% of the time, reporting is a gamble that is not worth taking in terms of individual well-being.”).

<sup>112</sup> *See infra* notes 370–71 and accompanying text.

<sup>113</sup> *See infra* Section III.C (describing how official workplace reporting procedures might be improved).

seldom invoked.<sup>114</sup> In its stead, unofficial communications channels have become the default conduits for allegations of abuse.

## II

### THE WORKINGS OF UNOFFICIAL ACCUSATION

Women have long chosen to share their accounts of sexual abuse with one another rather than report through formal legal channels.<sup>115</sup> The “whisper networks” that have emerged alongside largely forsaken formal outlets are often tapped into anonymously or hidden from view altogether.<sup>116</sup> But neither the secrecy of a network’s very existence nor the content of information exchanged are inevitable features of unofficial reporting channels.

The #MeToo era has revealed these whisper networks to outsiders for the first time.<sup>117</sup> The movement has also induced the creation of new types of informal reporting channels that are conceptually distinct from whisper networks. These channels amplify accusations of abuse by reaching wider communities and aiming for more consequential ends, often with the help of modern technology.<sup>118</sup> As new reporting pathways emerge, unofficial reporting has become a force to reckon with.

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<sup>114</sup> See *supra* note 23 and accompanying text (noting the larger problem of under-enforcement).

<sup>115</sup> Informal reporting of sexual misconduct can be a form of consciousness-raising. See *infra* notes 161–63 and accompanying text; see also Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–64 (1990) (“Consciousness-raising is an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences.”). On the centrality of the practice to feminism, see Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 519 (1982), which explains that “[c]onsciousness raising is the major technique of analysis, structure of organization, method of practice, and theory of social change of the women’s movement.” For historical context, see CAROL HYMOWITZ & MICHAEL WEISSMAN, *A HISTORY OF WOMEN IN AMERICA* 351–55 (1978), which documents the rise of consciousness-raising groups in the late 1960s and early 1970s.

<sup>116</sup> I am using “network” to describe a group of interconnected people who disseminate information, receive information, or both.

<sup>117</sup> See Summer Meza, *What Is a Whisper Network? How Women Are Taking Down Bad Men in the #MeToo Age*, NEWSWEEK (Nov. 22, 2017), <https://www.newsweek.com/what-whisper-network-sexual-misconduct-allegations-719009> (“This is the year the whisper network went viral, with women sharing their allegations and experiences in forums, spreadsheets, private groups and all over social media.”).

<sup>118</sup> See generally Elizabeth Dvoskin & Jena McGregor, *Sexual Harassment Inc: How the #MeToo Movement Is Sparking a Wave of Start-ups*, WASH. POST (Jan. 5, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups> (noting the proliferation of new start-ups designing apps to “disrupt” sexual harassment in the contemporary workplace).

### A. *Unofficial Reporting Channels: A Taxonomy*

Unofficial channels for reporting sexual misconduct can best be categorized along two key dimensions.<sup>119</sup> One is whether the accuser is anonymous (or not); the other is whether access to the channel is restricted (or open to the public).<sup>120</sup> I depict the resulting classification as follows:

		Accuser	
		Anonymous	Named
Channel	Restricted Access	Double Secret Whisper Network	Traditional Whisper Network
	Open Access	Shadow Court of Public Opinion	New Court of Public Opinion

To understand the evolution of unofficial reporting channels in the #MeToo era, we begin with the Traditional Whisper Network.

#### 1. *Traditional Whisper Network*

Whisper networks allow women to share their accounts of sexual violation with select insiders, while outsiders remain unaware of the content of the information and often the existence of the network itself.<sup>121</sup> In contrast to the Double Secret Whisper Network, which allows for anonymous reports,<sup>122</sup> the Traditional Whisper Network

<sup>119</sup> I first proposed this taxonomy of unofficial channels for reporting in Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. (forthcoming 2019) (manuscript at 16) [hereinafter Tuerkheimer, *Unofficial Reporting*]. Section II.A of this Article recapitulates the analysis of that earlier work.

<sup>120</sup> An additional variable is whether the accused is named. For the most part, unofficial reporting channels allow participants to identify the accused by name. The notable exception—a #MeToo era channel that expressly prohibits women from naming the accused—is a publicly available spreadsheet that collects accounts of sexual misconduct in academia (sometimes referred to as the Academic Men List). See Karen Kelsky, *When Will We Stop Elevating Predators?*, CHRON. HIGHER EDUC. (Jan. 1, 2018), <https://www.chronicle.com/article/The-Professor-Is-In-When-Will/242110> (explaining that the survey's creator removes names of the accused as soon as they appear in order to avoid possible legal liability).

<sup>121</sup> In their classic formulation, whisper networks allow women to “share secret warnings via word of mouth.” Jenna Wortham, *We Were Left Out*, N.Y. TIMES MAG. (Dec. 13, 2017), <https://www.nytimes.com/interactive/2017/12/13/magazine/the-reckoning-women-and-power-in-the-workplace.html>. Whisper networks can of course be leaky.

<sup>122</sup> See *infra* Section II.A.2.

transmits the allegations of known accusers.<sup>123</sup> In its classic formulation, this entails face-to-face exchange.<sup>124</sup>

The in-person sharing of allegations still occurs in many professional and educational settings.<sup>125</sup> But the spread of technology has allowed Traditional Whisper Networks to flourish even in the absence of face-to-face encounters, as information can be disseminated rapidly across workplaces and large college populations. For example, invitation-only Facebook groups<sup>126</sup> allow women to share their accounts across a geographic divide while keeping their stories within a private virtual space.

## 2. *Double Secret Whisper Network*

The Double Secret Whisper Network relies on technology to spread anonymous allegations within a closed network. The Media Men List, for instance, was created so that women in media could not

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<sup>123</sup> Especially in larger groups of insiders, information may be passed along a chain of network members—in essence, generating hearsay. At some point, if an accusation becomes sufficiently attenuated from the original source, it might be considered “rumor” or “gossip.” See Anne Helen Petersen, *Here’s Why So Many Women Knew the Rumors About Harvey Weinstein*, BUZZFEED (Oct. 8, 2017, 8:12 PM), <https://www.buzzfeednews.com/article/annehelenpetersen/women-believe-other-women> (“[T]he gossip percolating around [Harvey Weinstein] became another form of knowledge, of currency in the economy of how women protect ourselves and others. . . . For women, that knowledge, obtained via gossip or whisper networks, isn’t frivolous or titillating. It is a means of survival.”). Indeed, even if the information received from whisper networks is understood as gossip, insiders tend to perceive it as useful. See Jia Tolentino, *The Whisper Network After Harvey Weinstein and “Shitty Media Men,”* NEW YORKER (Oct. 14, 2017), <https://www.newyorker.com/news/news-desk/the-whisper-network-after-harvey-weinstein-and-shitty-media-men> (“Over time, in my experience, the whisper network always proves reasonably accurate: firings and settlements and investigations accrue to the names you’ve been hearing in different anecdotes for years.”).

<sup>124</sup> One commentator described the information provided as including such tips as “don’t be alone with X”; “In case nobody has mentioned it, Y has raped women”; and “I’d call Z a creep, but I don’t think he’s dangerous in the way W is.” Alex Press, *It’s Time to Weaponize the “Whisper Network,”* VOX (Oct. 17, 2017), <https://www.vox.com/first-person/2017/10/16/16482800/harvey-weinstein-sexual-harassment-workplace> (describing these as “the kinds of warnings whispered in private among women in work spaces”).

<sup>125</sup> For one account, see Tolentino, *supra* note 123. “[S]hortly after I moved to the city, I was introduced to the whisper network . . . for New York media. I had encountered these networks before, in college and grad school and in the Peace Corps.” *Id.*

<sup>126</sup> See Julie Creswell & Tiffany Hsu, *Women’s Whisper Network Raises Its Voice*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/04/business/sexual-harassment-whisper-network.html> (noting that through invitation-only Facebook groups, among other technologies, “women—and some men—are seeking catharsis and validation by sharing their stories”); Tyler Kingkade, *Why Female Comedians Have a Secret World of Facebook Groups*, HUFFPOST (Aug. 31, 2016), [https://www.huffpost.com/entry/women-in-comedy-facebook-groups\\_n\\_57c5e82be4b078581f0fe6ba](https://www.huffpost.com/entry/women-in-comedy-facebook-groups_n_57c5e82be4b078581f0fe6ba) (describing invitation-only Facebook groups for women in stand-up comedy); see also Press, *supra* note 124 (mentioning email and Twitter Direct Messages as conduits for allegations).



only keep the content of the shared information secret from network outsiders, but also shield the identity of the reporter from network insiders.<sup>127</sup> Sorority women at Yale University have used Google Docs in similar fashion.<sup>128</sup>

Galvanized by the #MeToo movement, a wave of startups is designing apps to assist with the anonymous distribution of sexual misconduct allegations on campus and in the workplace.<sup>129</sup> For instance, *Blind* enables employees at more than one hundred companies, including Amazon and Facebook, to chat anonymously about workplace issues including sexual harassment and assault.<sup>130</sup>

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<sup>127</sup> See Moira Donegan, *I Started the Media Men List*, THE CUT (Jan. 10, 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> (describing Donegan's creation of a Google spreadsheet called *Shitty Media Men* in October 2017). The controversial Media Men List was widely covered by the mainstream press, see, e.g., Jaclyn Peiser, *How a Crowdsourced List Set Off Months of #MeToo Debate*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/business/media/media-men-list.html>, and even led to a lawsuit filed by one of the accused men. See *infra* note 244 (describing the defamation complaint recently filed against Donegan by an individual accused on the list).

<sup>128</sup> See Abby Jackson, *Women at Yale Say They Developed a Secret Way to Protect Themselves from Dangerous Men Because the School Keeps Failing Them*, BUS. INSIDER (Jan. 23, 2018), <https://finance.yahoo.com/news/women-yale-developed-secret-way-170253829.html> (describing a system that uses “anonymous Google forms to compile the names of men who women say are dangerous, and then prohibit them from attending certain social events”). Similar electronic networks have arisen in other contexts. See Cecilia D’Anastasio, *As Spreadsheet of Accused Abusers Spreads, Anime Conventions Get Their MeToo Movement*, KOTAKU (Jan. 18, 2019), <https://kotaku.com/as-spreadsheet-of-accused-abusers-spreads-anime-conven-1831879237> (“A spreadsheet containing the names of alleged abusers and harassers who attend U.S. anime conventions is making its way around social media as part of a small #MeToo movement in the niche community.”); Chris Quintana, *Anonymous Website Aims to Out Sexual Assaulters at U. of Washington*, CHRON. HIGHER EDUC. (Oct. 9, 2018), <https://www.chronicle.com/article/Anonymous-Website-Aims-to-Out/244755> (describing “Make Them Scared” as a “wiki dedicated to exposing the names of sexual harassers/attackers created in the University of Washington Seattle area”).

<sup>129</sup> See Dwoskin & McGregor, *supra* note 118 (discussing “a wave of businesses emerging in the wake of widespread revelations of sexual misconduct in workplaces” and observing that “[t]he startups, many of which have female founders or co-founders, want to disrupt a costly and persistent problem”); Kari Paul, *New Apps Help Victims of Sexual Assault and Harassment File Anonymous Reports*, MARKETWATCH (June 5, 2018, 1:27 PM), <https://www.marketwatch.com/story/post-weinstein-new-apps-aim-to-out-predators-before-they-become-serial-abusers-2018-01-24> (“Against the #MeToo movement backdrop, a new crop of apps and secure social networks are emerging to help victims report and address sexual harassment and assault. They aim to put the power in women’s hands—and on their phones.”).

<sup>130</sup> See Sarah Buhr, *Uber Employees Are Chatting with Each Other About Uber’s Leadership on Anonymous Workplace App Blind*, TECHCRUNCH (Feb. 25, 2017), <https://techcrunch.com/2017/02/25/ubersecret/> (“[Blind] works by only allowing those within the same company to chat anonymously with each other. . . . There is also a portion of the app called the Tech Lounge where anyone verified to use the app for their workplace can commiserate with other tech workers from other companies.”).

A variation of the Double Secret Whisper Network—one created as an information escrow<sup>131</sup>—narrows the intended audience of an anonymous report to victims of the same perpetrator.<sup>132</sup> Rather than disseminate their accounts to other likely targets (that is, to all designated group members), users share their information even more selectively (that is, exclusively with survivors of an in-common perpetrator).<sup>133</sup>

### 3. *Shadow Court of Public Opinion*

Open access avenues for reporting abuse are an alternative to the network model. When allegations are made anonymously in publicly available channels, they fall into the murky Shadow Court of Public Opinion. Anyone can access these forums—far-flung distribution is intended—but the accuser remains unidentified, making the information more difficult to assess.<sup>134</sup>

Even so, unrestricted channels for anonymously sharing accounts of sexual misconduct are becoming widespread.<sup>135</sup> In public comment threads<sup>136</sup> and Instagram posts,<sup>137</sup> unnamed women have recently exposed alleged predators in children’s literature,<sup>138</sup> advertising,<sup>139</sup>

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<sup>131</sup> See Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 188–91 (2012) (proposing the use of information escrows to mitigate a first-mover disadvantage that surrounds the making of sexual misconduct accusations). Information escrows are mechanisms by which harassment allegations are not forwarded until the escrow agent has received a prespecified number of complementary allegations. *Id.* at 147.

<sup>132</sup> See *infra* notes 316–18 and accompanying text (discussing the functioning of Callisto).

<sup>133</sup> See *infra* notes 316–18 and accompanying text.

<sup>134</sup> See Jenny Kutner, *Sexual Assault Survivors Are Outing Their Rapists on the Anonymous Corners of the Internet*, MIC (Apr. 13, 2016), <https://mic.com/articles/140607/sexual-assault-survivors-are-outing-their-rapists-on-the-anonymous-corners-of-the-internet> (“These apps and sites are typically viewed as backwaters of the internet, defined by seedy rumors and anonymous backbiting. However, many survivors of sexual assault use them to expose their attackers, allowing victims to take control of their experiences.”).

<sup>135</sup> See *id.* (“Due to the stigma associated with sexual assault and the fear of being victim-blamed . . . many survivors feel uncomfortable coming forward with their stories. That’s given rise to reports of rape on anonymous online forums like Yik Yak, Whisper, College Confessions and campus-specific confessional Facebook groups.”).

<sup>136</sup> See Cohen & Hsu, *supra* note 6 (noting that certain details about sexual harassment allegations in the children’s book industry first appeared in comments to a post on Medium).

<sup>137</sup> See Sapna Maheshwari, *Ad Agencies’ Reckoning on Sexual Harassment Comes on Instagram, Anonymously*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/business/media/diet-madison-avenue-instagram.html> (describing allegations in the advertising industry made by Instagram account @DietMadisonAvenue); Petrarca, *supra* note 6 (describing allegations in the fashion industry made by account @ShitModelMgmt).

<sup>138</sup> See Cohen & Hsu, *supra* note 6.

<sup>139</sup> See Maheshwari, *supra* note 137.

and fashion.<sup>140</sup> While these platforms remain controversial<sup>141</sup> and generate questions of legal liability,<sup>142</sup> accusers who choose to publicly expose their abuser without identifying themselves may do so in the Shadow Court of Public Opinion.

#### 4. *New Court of Public Opinion*

The New Court of Public Opinion features allegations against individuals named by accusers who, unlike in the Shadow Court of Public Opinion, are also identified. While there has long existed an outlet for popular judgments outside the court of law, the public's openness to claims of sexual misconduct—and relatedly, accusers' willingness to bring these claims forward—has cultivated a Court of Public Opinion that is entirely new.

The #MeToo movement catapulted sexual misconduct into public view through blockbuster reporting on the Harvey Weinstein story by the *New York Times* and *The New Yorker*.<sup>143</sup> The women in those accounts, many of whom were willing to speak on the record, came forward after years, even decades, to unofficially report their abuse. Since then, in catalytic fashion, many women with allegations against high-profile men—women who, for myriad reasons, opt not to report through formal legal channels<sup>144</sup>—have done the very same.<sup>145</sup> The

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<sup>140</sup> See Petrarca, *supra* note 6.

<sup>141</sup> See, e.g., Karen McKibben, Opinion, *Diet Madison Avenue Is Creating a Culture of Fear. There's a Better Way*, ADAGE (Mar. 5, 2018), <https://adage.com/article/agency-viewpoint/diet-madison-avenue-creating-culture-fear-better-way/312617> (relating that a group of women in advertising released an open letter criticizing the Instagram account for creating a culture of fear); Petrarca, *supra* note 6 (noting that the owner of one Instagram account took down her “Blacklist” website because she felt it was spiraling out of control).

<sup>142</sup> See *infra* notes 242–46 and accompanying text (discussing the law of defamation).

<sup>143</sup> See *supra* note 1 and accompanying text.

<sup>144</sup> After reporting unofficially, several accusers then opted to cooperate with official investigations. See, e.g., Ronan Farrow, *Behind the Scenes of Harvey Weinstein's Arrest*, NEW YORKER (May 24, 2018), <https://www.newyorker.com/news/news-desk/behind-the-scenes-of-harvey-weinsteins-impending-arrest> (explaining that Lucia Evans was contacted by New York Police Department detectives the day after her allegations of sexual assault by Harvey Weinstein were publicly reported in *The New Yorker*; she ultimately agreed to cooperate with Weinstein's prosecution); *Special Prosecutor Interviewing Women Who Accused Eric Schneiderman of Abuse*, N.Y.L.J. (May 23, 2018, 7:37 PM), <https://www.law.com/newyorklawjournal/2018/05/23/special-prosecutor-interviewing-women-who-accused-eric-schneiderman-of-abuse> (describing prosecutors' ongoing interviews with women who first disclosed allegations of abuse by Attorney General Eric Schneiderman in *The New Yorker*); see also Sandra Gonzalez & Emanuella Grinberg, 'Surviving R. Kelly' Spurs Follow-Up Calls from DA, Attorney for Alleged Victim's Family Says, CNN (Jan. 9, 2019, 6:13 AM), <https://www.cnn.com/2019/01/08/entertainment/r-kelly-investigation/index.html> (detailing outreach to accusers by prosecutors in Chicago and Atlanta following the airing of a documentary that publicized multiple allegations of sexual abuse against the singer).

movement is at once fueled by and fueling public allegations of sexual violation.

Women whose abusers are not the subject of intense public interest,<sup>146</sup> however, cannot typically turn to the mainstream media.<sup>147</sup> For most accusers wishing to publicly report abuse extra-legally, Twitter—with its hashtag usage that gave the #MeToo movement its name—is emerging as a central repository for sexual misconduct accusations.<sup>148</sup> Survivors without access to the mainstream media are also using public Facebook posts and blog entries to circulate their allegations in the New Court of Public Opinion.<sup>149</sup>

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<sup>145</sup> See *supra* note 6 and accompanying text; see also Anderson Cooper, *Mario Batali and the Spotted Pig*, CBS NEWS: 60 MINS. (May 20, 2018), <https://www.cbsnews.com/news/mario-batali-and-the-spotted-pig-nyc> (noting allegations against the famous chef); Jim DeRogatis & Marisa Carroll, “*He’s a Predator*”: *Two More Women Speak Out About R. Kelly’s Alleged Sexual Abuse*, BUZZFEED NEWS (May 4, 2018), <https://www.buzzfeednews.com/article/jimderogatis/r-kelly-sexual-abuse-allegations-lizzette-martinez-times-up>; Jane Mayer & Ronan Farrow, *Four Women Accuse New York’s Attorney General of Physical Abuse*, NEW YORKER (May 7, 2018), <https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse>.

<sup>146</sup> #MeToo’s attention to allegations of sexual misconduct by prominent men has unleashed a torrent of disclosures that generate zero public attention. About a month after allegations against Harvey Weinstein were reported in the *New York Times*, Rebecca Traister, a prominent feminist commentator, wrote, “Since the reports of Weinstein’s malevolence began to gush, I’ve received somewhere between five and 20 emails every day from women wanting to tell me their experiences: of being groped or leered at or rubbed up against in their workplaces.” Rebecca Traister, *Your Reckoning. And Mine.*, THE CUT (Nov. 13, 2017), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html>.

<sup>147</sup> *Id.* Even if it were an option, not all women would want their allegations of misconduct publicly reported. See Michelle Togliola, *Why Did Some Women Choose Not to Post a “Me Too” Story? Women Share Why They Didn’t Participate in the Movement*, BUSTLE (Oct. 20, 2017), <https://www.bustle.com/p/why-did-some-women-choose-not-to-post-a-me-too-story-women-share-why-they-didnt-participate-in-the-movement-2961946>; see also Laura Gianino, *I Went Public with My Sexual Assault. And Then the Trolls Came for Me.*, WASH. POST (Oct. 18, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/10/18/i-went-public-with-my-sexual-assault-and-then-the-trolls-came-for-me> (describing the author’s experience of being attacked on and offline after she told her story).

<sup>148</sup> See, e.g., Alison Flood, *Three Women Go Public with Sherman Alexie Sexual Harassment Allegations*, GUARDIAN (Mar. 7, 2018), <https://www.theguardian.com/books/2018/mar/07/three-women-go-public-with-sherman-alexie-sexual-harassment-allegations> (describing accusations that first surfaced on Twitter); Kristine Phillips, *Pulitzer Prize-Winning Author Junot Diaz Accused of Sexual Misconduct, Misogynistic Behavior*, WASH. POST (May 6, 2018), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/05/05/pulitzer-prize-winning-author-junot-diaz-accused-of-sexual-misconduct-misogynistic-behavior> (same).

<sup>149</sup> See, e.g., Kate Thayer, *Sexual Assault Survivors Are Publicly Accusing Attackers on Social Media. But at What Cost?*, CHI. TRIB. (Dec. 14, 2018), <https://www.chicagotribune.com/lifestyles/ct-life-facebook-sex-assault-allegations-20181212-story.html> (relating that a woman used Facebook “to describe, in graphic detail, how a man she knows tried to rape

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In the #MeToo age, victims of sexual misconduct are increasingly drawn to informal accusation. Before advocating reform that incentivizes greater reliance on formal complaint mechanisms,<sup>150</sup> I first consider the functionality of unofficial complaint channels.

### B. *A Functional Analysis of Unofficial Reporting*

Informal reporting advances important ideals while falling short along a number of key dimensions. These shortcomings can best be addressed by the law of sexual misconduct, which is too rarely invoked. To this end, I will argue for a redesign of formal complaint channels that incorporates many of the functions of informal reporting.<sup>151</sup>

#### 1. *Victim Empowerment*

Victims of sexual misconduct often turn to informal reporting channels for reasons that can be grouped under the rubric of empowerment. Notwithstanding variations in the particulars, this is true across all four categories of unofficial reporting: the Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. For present purposes, empowerment can be understood as encompassing three distinctive dynamics: catharsis (emotional relief), validation (affirmation of worth and lived experience), and solidarity (group-based empowerment).

First, informal reporting channels provide a mechanism for women to name their abuse, which can itself be a form of release.<sup>152</sup> Especially because victims of sexual assault and harassment often were, and continue to be, blamed for what happened to them, the act of identifying misconduct—whether anonymously or not, to a select group or to the general public—can itself be cathartic.

Second, women alleging sexual abuse via unofficial channels can find their accounts validated in important ways. As restricted access channels, both the Traditional Whisper Network and the Double

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her, naming him and including his photo in a post that was shared more than 1,000 times in a matter of days”).

<sup>150</sup> See *supra* note 16 (emphasizing that the problem is a lopsidedness in the official/unofficial response ratio rather than unofficial reporting per se).

<sup>151</sup> See *infra* Part III.

<sup>152</sup> See, e.g., Kelsky, *supra* note 120 (describing how one contributor to the spreadsheet remarked that it “was the first time that I have told the full account of what happened to me to anyone, and it has been hugely therapeutic in helping me to process the experience”).

Secret Whisper Network tend to function as survivor-friendly spaces. These supportive environs reinforce the message that the alleged misconduct is wrong and the reporter is not at fault.<sup>153</sup> This is not necessarily true of open access networks—women’s public allegations of sexual violation are frequently treated with hostility, disdain, and disbelief.<sup>154</sup> But the #MeToo movement may be changing this default response,<sup>155</sup> which has made open access channels (namely, the Shadow Court of Public Opinion and the New Court of Public Opinion) increasingly likely sources of victim support.

Validation has yet another dimension. By facilitating the flow of information regarding sexual misconduct, informal reporting channels aggregate complaints, allowing participants to discover previously hidden patterns. These patterns can be individuated, as when a cluster of allegations centers on the same person.<sup>156</sup> The patterns exposed through informal reporting can also be generalized, revealing commonalities in a workplace or industry.<sup>157</sup> More globally, patterns of sexism and misogyny can be connected across disparate sectors of our society,<sup>158</sup> and even throughout the world.<sup>159</sup>

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<sup>153</sup> See, e.g., Donegan, *supra* note 127 (characterizing the Media Men List as “a place for women to share their stories of harassment and assault without being needlessly discredited or judged”). Jess Ladd, the founder of third-party reporting platform Callisto, explained, “When you learn that you’re not the only victim of sexual harassment or assault, you feel less ashamed about your experience and you feel more empowered to share your experience with others.” Bouree Lam, *Can Tech Make the Whisper Network Legitimate?*, REFINERY29 (Feb. 8, 2018), <https://www.refinery29.com/en-us/2018/02/181277/jess-ladd-callisto-app-sexual-assault>. In the words of one contributor to the Media Men spreadsheet, “I just needed one space where I didn’t have to pretend, downplay, excuse, or minimize the harassment.” Kelsky, *supra* note 120.

<sup>154</sup> See generally Tuerkheimer, *supra* note 34, at 3 (describing pervasive practices of credibility discounting); see also Gianino, *supra* note 147 (describing one woman’s negative experiences in the wake of a #MeToo disclosure); Toglia, *supra* note 147 (relating accounts of women who chose not to come forward with their #MeToo allegations).

<sup>155</sup> See *infra* Section II.B.5 (describing institutional change in the wake of #MeToo).

<sup>156</sup> For example, one woman who learned that she had been victimized by the same workplace harasser as other women recounted that “it was kind of reassuring to know we weren’t alone.” See Creswell & Hsu, *supra* note 126.

<sup>157</sup> See, e.g., Donegan, *supra* note 127 (describing how #MeToo precipitated new conversations about sexual harassment patterns in the media industry); Petrarca, *supra* note 6 (discussing newly revealed patterns of abuse in the fashion industry); Ben Schamisso, *These Women Are Exposing the Scale of Sexual Misconduct in Academia*, NEWSY (Mar. 27, 2018), <https://www.newsy.com/stories/medill-metoo-movement-exposes-harrasment-in-academia> (describing increased awareness of the scale of harassment in academia).

<sup>158</sup> See *supra* note 6 and accompanying text.

<sup>159</sup> See *Me Too Rising: A Visualization of the Movement from Google Trends*, GOOGLE TRENDS, <https://metoorising.withgoogle.com> (last visited Apr. 1, 2019) (depicting “Me Too” search trends across different cities around the world through an interactive website).

Third, the communal properties of informal reporting channels, whether closed or open, enable victims of sexual violation to locate their experiences within a larger context. Through the shared experiences of others, women are able to confirm both the accuracy of their understanding of the violation<sup>160</sup> and the gravity of their complaint.<sup>161</sup> This can be individually validating;<sup>162</sup> it can also enhance group solidarity, a collective form of empowerment. By connecting her own violation to those of others, a victim of misconduct can better discern that she is far from alone.<sup>163</sup> This in turn can encourage identification with other members of the subordinated group or groups.

The solidarity enhancing function of informal reporting is limited, however, when network access is restricted, particularly—as is often the case—when it is restricted to the more privileged members of a group.<sup>164</sup> An intersectional approach to understanding the operation of power<sup>165</sup> explains why information sharing in whisper networks tends to exclude those with comparatively less advantage.<sup>166</sup> In contrast, open access channels have the potential to highlight commonali-

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<sup>160</sup> See *infra* notes 186–91 and accompanying text (discussing the concept of hermeneutical injustice); Donegan, *supra* note 127 (observing that “[a]mong the most potent of these powers [that women have] is the knowledge of our own experiences”).

<sup>161</sup> See *supra* note 115 (discussing consciousness-raising methodology).

<sup>162</sup> See *supra* notes 156–59 and accompanying text (discussing how women have responded to seeing others report their experiences).

<sup>163</sup> See, e.g., Colleen Flaherty, ‘*Holding Space*’ for Victims of Harassment, INSIDE HIGHER ED (Dec. 8, 2017), <https://www.insidehighered.com/news/2017/12/08/what-can-crowdsourced-survey-sexual-harassment-academia-tell-us-about-problem> (explaining that the Academic Men List was created to “give victims a place to share their stories, to know they are not alone and to realize the systemic, institutional and patterned nature of sexual abuse in the academy”); Petrarca, *supra* note 6 (noting that since publication of the list of accused harassers, models “know they are not alone”). One woman, describing the impetus for participating in a Twitter exchange regarding harassment allegations against a particular publicist, said “The minute I saw [the Tweets], I felt a surge of—corny as it sounds—sisterhood, and I wanted to let her know that she wasn’t alone.” Rebecca Haithcoat, ‘*I Felt So Trapped: In Indie Music, Sexual Harassment Is an Accepted Nightmare*’, BROADLY (Feb. 26, 2016, 9:00 AM), [https://broadly.vice.com/en\\_us/article/kqgyjx/i-felt-so-trapped-in-indie-music-sexual-harassment-is-an-accepted-nightmare](https://broadly.vice.com/en_us/article/kqgyjx/i-felt-so-trapped-in-indie-music-sexual-harassment-is-an-accepted-nightmare); see also Paul, *supra* note 129 (“Seeing the editor who forced himself on me on the Shitty Media Men list—I didn’t put him there—was one of the moments I felt the least alone in my life . . .”).

<sup>164</sup> See S.E. Smith, *Who Hears the Whisper? The Shitty Media Men List Excludes So Many*, BITCHMEDIA (Jan. 18, 2018, 1:28 PM), <https://www.bitchmedia.org/article/who-shitty-media-men-leaves-out> (“Whisper networks can be incredibly powerful, but only when the signal carries throughout a community, not just among those who already occupy positions of comparative privilege.”).

<sup>165</sup> See generally Crenshaw, *supra* note 50 (highlighting the various ways in which race and gender interact to create structural, political, and representational violence against women of color).

<sup>166</sup> See Smith, *supra* note 164 (“If a whisper network highlights the power of a sisterhood, it also underscores the exclusionary nature of sisterhood.”).

ties between group members, broadly defined<sup>167</sup> (although the Courts of Public Opinion are not without their own set of drawbacks, as we will continue to see).<sup>168</sup>

## 2. Group Member Protection

Women who report sexual misconduct through informal channels often describe a desire to protect others from similar abuse.<sup>169</sup> This impulse stems from the notion that sharing information with potential victims of misconduct—especially in the workplace or on campus<sup>170</sup>—disseminates knowledge that is useful for avoiding a similar experience.<sup>171</sup>

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<sup>167</sup> For example, female farmworkers wrote a letter to Hollywood victims of sexual harassment, noting that “[e]ven though we work in very different environments, we share a common experience of being preyed upon by individuals who have the power to hire, fire, blacklist and otherwise threaten our economic, physical and emotional security.” *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault>.

<sup>168</sup> See *supra* note 147 (noting survivors’ reasons not to disclose publicly); see also *infra* Section II.B.6 (discussing accountability in the informal reporting context).

<sup>169</sup> See, e.g., Whitney Bauck, *Instagram Account @shitmodelmgmt Posts ‘Blacklist’ to Protect Models from Sexual Assault*, FASHIONISTA (last updated Mar. 5, 2018), <https://fashionista.com/2018/02/shit-model-management-fashion-photographers-sexual-misconduct-list> (stating that the public list of alleged harassers in the industry is “intended to help models make informed decisions about who to work with—or not”); Donegan, *supra* note 127 (describing the Media Men List as an “attempt at solving what has seemed like an intractable problem: how women can protect ourselves from sexual harassment and assault”); Petersen, *supra* note 123 (“[W]e’ve become dependent on unofficial modes of communication to protect ourselves.”).

<sup>170</sup> Beyond the confines of a closed community, it is generally more difficult to protect would-be victims. *But see, e.g.,* Brandon Griggs, *#MeToo Is Succeeding Where Others Failed—to Mute R. Kelly*, CNN (May 10, 2018, 10:24 PM), <https://www.cnn.com/2018/05/10/entertainment/r-kelly-mute-movement-spotify-trnd/index.html> (describing the many allegations of sexual assault lodged against R. Kelly over decades that went largely unaddressed until recently); William Lee, *R. Kelly’s Fall Comes as Chicago, Black Women Finally Turn Their Back on Star*, CHI. TRIB. (May 23, 2018, 12:25 PM), <https://www.chicagotribune.com/entertainment/music/ct-ae-rkelly-reaches-metoo-moment-0523-story.html> (describing how R. Kelly’s hometown of Chicago led the #MuteRKelly campaign). In the wake of the #MuteRKelly campaign and the release of *Surviving R. Kelly*, a documentary series first aired in January 2019, R. Kelly was indicted on a range of sex offenses by offices in both Chicago and New York. See Jason Meisner, Madeline Buckley & Megan Crepeau, *R. Kelly Hit with Federal Indictments in New York, Chicago; Faces New Racketeering, Sex Crime Charges, Allegations He Paid to Recover Sex Tapes and Cover Up Conduct*, CHI. TRIB. (July 12, 2019, 3:57 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-r-kelly-arrested-federal-charges-20190712-6ghntysw3zf3lpncn4owcfzyje-story.html> (summarizing the criminal charges pending against R. Kelly).

<sup>171</sup> More broadly, by facilitating access to fuller information regarding the conduct of fellow community members, informal channels can promote the right of informed association. I thank Ian Ayres for raising this possibility.



At times, warnings spread through unofficial channels yield concrete strategies for minimizing the likelihood of victimization by an alleged abuser. So-called “survivor tips”<sup>172</sup> for the workplace generally involve minimizing time alone with the abuser, which (depending on the employment context) can mean not working late, leaving in groups,<sup>173</sup> remaining in open areas of the workplace,<sup>174</sup> not answering a knock on the hotel room door when traveling,<sup>175</sup> and carefully managing parties and other off-site events.<sup>176</sup> On campus, unofficial reports of abuse result in analogous efforts on the part of warned group members to avoid one-on-one time with an alleged abuser and even to restrict an abuser’s social access to the group altogether.<sup>177</sup>

Despite the significance attached to protection as the rationale for informally reporting misconduct, the shielding capacity of unofficial reporting channels is limited in several respects.<sup>178</sup> Most importantly, with regard to the Traditional Whisper Network and the Double Secret Whisper Network (both restricted access channels), only women who receive the warnings can take action to protect themselves, leaving those without the information just as vulnerable—and arguably even more vulnerable<sup>179</sup>—to abuse. Even women who are privy to the report can remain at risk, as strategies for avoiding alone time with an alleged abuser are often unviable.<sup>180</sup>

Last, the protection rationale for unofficial reporting is premised on the assumption that men who engage in sexual misconduct are prone to reoffend.<sup>181</sup> Unless this tendency is somehow curtailed,

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<sup>172</sup> See, e.g., Creswell & Hsu, *supra* note 126 (describing both the informal and online networks through which women share firsthand knowledge of abusers).

<sup>173</sup> See e.g., Robin Pogrebin, *Women Say Richard Meier’s Conduct Was Widely Known yet Went Unchecked*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/arts/design/richard-meier-sexual-misconduct-allegations.html>.

<sup>174</sup> See, e.g., Creswell & Hsu, *supra* note 126.

<sup>175</sup> See Unsolicited E-mail from confidential source to author (Feb. 23, 2018, 1:47 PM) [hereinafter Unsolicited E-mail to author] (on file with author) (“A key piece of advice was not to answer the hotel room door to let [a law firm partner known for harassing behavior] in when he came looking for documents he wanted to review at midnight.”).

<sup>176</sup> See *id.* (describing the lessons learned by a junior associate after she was harassed by an equity partner at a law firm holiday party).

<sup>177</sup> See Jackson, *supra* note 128 (describing whisper networks at Yale University).

<sup>178</sup> See *infra* note 371 and accompanying text; see also *infra* Section II.B.6 (discussing limited accountability in the informal reporting context).

<sup>179</sup> See *supra* note 164 (noting that restricted access channels tend to serve those with comparative privilege).

<sup>180</sup> This is particularly likely to be the case for employees with relatively less power within a workplace.

<sup>181</sup> See *Test Rape Kits. Stop Serial Rapists.*, END THE BACKLOG (last visited Mar. 31, 2019), <http://www.endthebacklog.org/backlog-why-rape-kit-testing-important/test-rape-kits-stop-serial-rapists> (using case studies to argue that rapists are often serial offenders); Colin McEwan, *New Research Shows What We Know (and Don’t) About Serial Rapists*,

either because abusers are deterred from further wrongdoing, reformed, or incapacitated, they will more than likely find new victims.

### 3. *Epistemic Justice*

Chief among the functions served by unofficial reporting is the correction of epistemic injustice, a distinctive type of injustice in which a person is wronged in her capacity as a knower.<sup>182</sup> Epistemic injustice encompasses testimonial injustice and hermeneutical injustice: Testimonial injustice, the injustice of disbelief, entails the downgrading of a speaker's perceived trustworthiness due to prejudice; hermeneutical injustice, the injustice of misinterpretation, prevents a person from making sense of her experience and protesting it in comprehensible form.<sup>183</sup>

Broadly speaking, when a credibility assessment results from prejudice, a testimonial injustice has occurred.<sup>184</sup> Consider, for instance, a police officer's resort to a gendered misconception to evaluate a rape accuser's credibility. If the initial report is perceived as false, there may be no further investigation; the case will be closed based on faulty factual premises. Even apart from the informational disadvantage that flows to the police officer (and the criminal justice system as a whole), the accuser is significantly harmed "in [her] capacity as a knower" when she experiences testimonial injustice.<sup>185</sup>

A second branch of epistemic injustice—hermeneutical injustice—undermines one's ability to make sense of one's experiences that are not often shared by those with capacity to shape the realm of

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DAILY (Mar. 27, 2018), <https://thedaily.case.edu/new-research-shows-know-dont-serial-rapists> (summarizing research on newly tested sexual assault kits in Cuyahoga County, Ohio). The suggestion that serial perpetrators commit most sexual assault remains contested. See MacKinnon, *supra* note 19, at 2053–55 (evaluating the evidentiary basis for the claim).

<sup>182</sup> See generally MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING* (2007) (exploring the ways in which a person can be wronged "in their capacity as a knower"). It is important to recognize that epistemic injustice has long been an issue in black feminist thought, even prior to Fricker's description of the term. See Rachel McKinnon, *Epistemic Injustice*, 11 PHIL. COMPASS 437, 438 (2016).

<sup>183</sup> For a more extensive discussion, see Tuerkheimer, *supra* note 34, at 41–50.

<sup>184</sup> See FRICKER, *supra* note 182, at 1 ("Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word."). The use of "testimony" in this context does not correspond to its legal meaning; it simply refers to the effort to communicate a factual assertion.

<sup>185</sup> *Id.* When a person is treated as incapable of communicating or giving knowledge appropriately, she is objectified. See *id.* at 139 ("Objects do not speak. When they do, they are by then regarded as objects, not as humans which is what it means to have no credibility." (quoting CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE OF LIFE AND LAW* 182 (1987))).

interpretation.<sup>186</sup> This is commonly experienced as “gaslighting.”<sup>187</sup> In this regard, consider that women are often met with resistance to understanding an experience of nonconsensual penetration as sexual assault—particularly where an acquaintance is the perpetrator and a weapon is not used.<sup>188</sup> Even today, survivors may be led to doubt whether what they experienced as sexual assault qualifies as such.<sup>189</sup> A police officer (or anyone else, for that matter) who responds to a woman’s report of nonconsensual penetration by suggesting that it is not “really rape” compounds this injustice.<sup>190</sup>

This dynamic is vividly portrayed by Susan Estrich’s reflections on having been sexually assaulted by a stranger with an ice pick:

I learned, much later, that I had “really” been raped. Unlike, say, the woman who claimed she’d been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are “asking for it,” and get what they deserve. I would listen as seemingly intelligent people explained these distinctions to me, and marvel; later I read about them in books, court opinions, and empirical studies. It is bad enough to be a “real” rape victim. How terrible to be—what to call it—a “not real” rape victim.<sup>191</sup>

Because social power influences the ability to participate in the construction of social experience,<sup>192</sup> membership in a marginalized or subordinated group tends to correspond to a distinct disadvantage:

<sup>186</sup> See FRICKER, *supra* note 182, at 1 (“[H]ermeneutical injustice occurs . . . when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences.”); see also McKinnon, *supra* note 182, at 441 (“[Hermeneutical injustice] is where a socially disadvantaged group is blocked . . . from access to knowledge, or access to communicating knowledge . . . due to a gap in hermeneutical resources, especially when these resources would help people understand the very existence and nature of the marginalization.”).

<sup>187</sup> See Kelsky, *supra* note 120 (“Part of being socialized in a patriarchal society is a mechanism of internalized gaslighting in which women are conditioned to second-guess themselves, to doubt, to minimize, to do the emotional labor of both defusing situations and reinterpreting them in such a way as to exculpate their harassers . . .”).

<sup>188</sup> The traditional definition of rape required the use of excessive physical force, meaning that nonconsensual penetration *simpliciter* did not constitute sexual assault; this remains the law in about half the states. See Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 342–43 (2017) (“In almost half the states, sexual penetration is not a crime unless there is *both* non-consent *and* some sort of force. *Penetration without consent is not, in itself, a crime.*”). For a summary of reform efforts, see Schulhofer, *supra*.

<sup>189</sup> As Fricker puts it, members of subordinated groups can be prevented from “mak[ing] communicatively intelligible something which it is particularly in [their] interests to be able to render intelligible.” FRICKER, *supra* note 182, at 162.

<sup>190</sup> See *supra* note 24 (describing how endurance of the “real rape” paradigm leads to under-reporting).

<sup>191</sup> Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986).

<sup>192</sup> See FRICKER, *supra* note 182, at 148 (“[T]he powerful tend to have appropriate understandings of their experiences ready to draw on as they make sense of their social experiences, whereas the powerless are more likely to find themselves having . . . at best ill-

Experiences not shared by the powerful find no meaningful outlet in collective notions of reality.<sup>193</sup> This problem is especially acute in certain areas of social life—so-called hermeneutical “hotspots”<sup>194</sup>—that are already defined by unequal participation in the construction of meaning.<sup>195</sup>

In the #MeToo era, the proliferation of sexual abuse allegations is seeding greater epistemic justice. As women in the #MeToo era infuse the collective with new accounts of misconduct, they begin to dismantle the default to doubt that has long characterized societal responses to sexual violence. With more and more accusers coming forward in the Courts of Public Opinion with allegations of abuse (many of which are corroborated and many of which are acknowledged by the perpetrator), it becomes exceedingly difficult to sustain the proposition that most accusations are false.<sup>196</sup> Moreover, in a virtuous cycle, as more women are believed, more become willing to report their abuse. Open access channels thus provide a means of advancing testimonial justice.

Informal reporting channels of all kinds can also promote hermeneutical justice, as women piece together new interpretations of their experiences. Sometimes this takes place within the confines of Whisper Networks. But society writ large may also be on the cusp of incorporating new understandings of sexual violation and its harm. This is because women, in burgeoning numbers, are accessing the Courts of Public Opinion.<sup>197</sup>

#### 4. Norm Evolution

Unofficial reporting not only advances epistemic justice; it also fosters new norms surrounding a continuum of sexual misconduct. By

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fitting meanings to draw on in the effort to render them intelligible.”). As Fricker notes, this recognition is a tenet of feminist theory. *Id.* at 147.

<sup>193</sup> See Tuerkheimer, *supra* note 34, at 48 (describing how an individual who lacks power in a community may have trouble understanding her own experience or conveying it to the larger community in a form that the community can comprehend).

<sup>194</sup> FRICKER, *supra* note 182, at 152 (defining hotspots as “locations in social life where the powerful have no interest in achieving a proper interpretation, perhaps indeed where they have a positive interest in sustaining the extant misinterpretation”); see also *id.* at 151 (stating that hermeneutical disadvantage renders a subject “unable to make sense of her ongoing mistreatment, and this in turn prevents her from protesting it, let alone securing effective measures to stop it”); Tuerkheimer, *supra* note 34, at 46–48.

<sup>195</sup> See FRICKER, *supra* note 182, at 153 (“[W]hen there is unequal hermeneutical participation with respect to some significant area(s) of social experience, members of the disadvantaged group are *hermeneutically marginalized*.”).

<sup>196</sup> See Tuerkheimer, *supra* note 34, at 17–20 (summarizing the best available research on false reporting of sexual assault).

<sup>197</sup> See *supra* notes 143–49 and accompanying text.

sharing their accounts of abuse, women lay bare not just the ubiquity of conduct already defined as sexual violation, but also the violative nature of behaviors not yet perceived as problematic.

Norms can of course evolve within a networked community—that is, within the directly affected group. Ultimately, however, enduring normative transformation seems to require a degree of consensus that extends beyond members of the group harmed by the conduct at issue, outward to those who occupy positions of relative social power. For this reason, open access reporting channels (the Courts of Public Opinion) destabilize settled understandings of what counts as misconduct in ways that restricted access channels (Whisper Networks) do not.<sup>198</sup>

In the time of #MeToo, mention of non-actionable sexual misconduct has occasionally become a flashpoint of controversy, even among feminist commentators.<sup>199</sup> But for many accusers, the inclusion of infractions not currently prohibited by law, or even by custom, is a feature—not a bug—of the movement.<sup>200</sup> Without denying the existence of different categories of sexual misconduct, women who have been victimized by overlooked kinds of abuse are nevertheless insisting that it is wrongful.<sup>201</sup> This move does not collapse categories of misconduct, nor does it equate their varying levels of harm and culpability. What it does is connect the sexist, often misogynistic, strands that run through sexual violation from its most to its least extreme.

To understand how engagement in the Courts of Public Opinion can challenge established norms, consider the story of a woman known as Grace and the comedian Aziz Ansari. In early 2018, Grace's allegation of an unwanted sexual encounter with Ansari was published

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<sup>198</sup> “Courts of Public Opinion” refers to both the Shadow Court of Public Opinion and the New Court of Public Opinion, while “Whisper Networks” refers to both the Traditional Whisper Network and the Double Secret Whisper Network.

<sup>199</sup> See, e.g., Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541> (critiquing the handling of the Aziz Ansari sexual assault allegations).

<sup>200</sup> See Donegan, *supra* note 127 (describing the Media Men List, a spreadsheet that “collected a range of rumors and allegations of sexual misconduct,” including infractions not covered by law, within the publishing industry).

<sup>201</sup> See, e.g., Schamisso, *supra* note 157 (explaining that the Academic Men List includes “things as small as an offhand comment, like, ‘I love it when you wear a skirt in the lab’”); see also Laura Tucker, *Sharing Something from 2013*, MEDIUM (Jan. 10, 2018), [https://medium.com/@laura\\_\\_tucker/jan-10-2018-5d5bbf79f97b](https://medium.com/@laura__tucker/jan-10-2018-5d5bbf79f97b) (publicly accusing then-*L.A. Times* Beijing Bureau Chief and President of the Foreign Correspondents Club of having pressured her into sex over her expressed lack of consent, and emphasizing the blameworthiness of this conduct).

online.<sup>202</sup> Rather suddenly, a public in the throes of grappling with sexual assault and harassment was confronted with untold “stories of gray areas.”<sup>203</sup> Grace’s account—a “Rorschach test” of sexual normativity<sup>204</sup>—came to stand in for these stories, prompting a range of reactions.<sup>205</sup> Even the appropriate vernacular to describe the encounter with Ansari was confusing.<sup>206</sup>

Amidst a fraught effort to begin grappling with sex that results from “pressured consent,”<sup>207</sup> what emerged was a nearly universal consensus that Grace’s account was one with which women were exceedingly familiar.<sup>208</sup> As Jessica Valenti tweeted in the story’s immediate wake: “A lot of men will read that post about Aziz Ansari and see an everyday, reasonable sexual interaction. But part of what women are saying right now is that what the culture considers ‘normal’ sexual encounters are not working for us and [are] often-times harmful.”<sup>209</sup>

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<sup>202</sup> See Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life.*, *BABE* (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>.

<sup>203</sup> See James Hamblin, *This Is Not a Sex Panic*, *ATLANTIC* (Jan. 17, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/this-is-not-a-sex-panic/550547> (summarizing Grace’s account and its aftershocks). Surveying this muddled frontier, one commentator observed that “[t]here is a sizable chasm between an ‘awkward sexual experience’ and sexual assault and its topography is largely unmapped.” Stassa Edwards, *It’s Time to Map the Wilderness of Bad Sex*, *JEZEBEL* (Jan. 19, 2018, 3:20 PM), <https://jezebel.com/its-time-to-map-the-wilderness-of-bad-sex-1822171954>.

<sup>204</sup> See Hamblin, *supra* note 203 (“The story of Aziz Ansari and ‘Grace’ is playing out as a sort of Rorschach test.”).

<sup>205</sup> Caroline Framke, *The Controversy Around Babe.net’s Aziz Ansari Story, Explained*, *VOX* (Jan. 18, 2018, 10:09 AM), <https://www.vox.com/culture/2018/1/17/16897440/aziz-ansari-allegations-babe-me-too> (describing the wide range of responses to Grace’s story, with some finding the account “painfully relatable,” and others critiquing it as “unforgivably irresponsible”).

<sup>206</sup> See, e.g., Jenny Hollander, *You’re Right, Everything Aziz Ansari Did Was Legal*, *BUSTLE* (Jan. 17, 2018), <https://www.bustle.com/p/youre-right-everything-aziz-ansari-did-was-legal-7923237> (“What do we call it when a man repeatedly pressures a woman to engage in sexual acts? What do we call it when a [sic] someone says ‘no,’ but then appears to change their mind? What do we call it when someone feels violated after a sexual encounter?”).

<sup>207</sup> See Deborah Tuerkheimer, *Sexual Violation Without Law: Evidence from #MeToo*, *N.Y.U. ANN. SURV. AM. L.* (forthcoming 2020) (manuscript at 17–19) (on file with author).

<sup>208</sup> See, e.g., Anna North, *The Aziz Ansari Story Is Ordinary. That’s Why We Have to Talk About It.*, *VOX* (Jan. 16, 2018, 10:10 AM), <https://www.vox.com/identities/2018/1/16/16894722/aziz-ansari-grace-babe-me-too> (“[T]he sheer commonness of Grace’s experience . . . makes it so important to talk about.”). Even commentators unsympathetic to Grace’s plight acknowledged the normality of the incident. See, e.g., Bari Weiss, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader.*, *N.Y. TIMES* (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html> (remarking that “every adult woman I know” has had similar “lousy romantic encounters”).

<sup>209</sup> Flanagan, *supra* note 199 (quoting Jessica Valenti (@JessicaValenti), *TWITTER* (Jan. 14, 2018, 7:50 AM), <https://twitter.com/JessicaValenti/status/952568652066443264> [<https://perma.cc/FBK9-GXDJ>]).

Jill Filipovic emphasized the limits of rape as a proxy for problematic sex, noting that we live in a society that “still sees sex as primarily about male pleasure; that continues to position women’s bodies as sexual objects, receptacles and stand-ins for sex itself; and that encourages sexual aggressiveness in men and congeniality and passivity in women.”<sup>210</sup> In short, as a reckoning with sexual assault and harassment morphed to implicate “our broken sexual culture” writ large,<sup>211</sup> we witnessed how informal reporting can contest entrenched cultural norms.

This is not to suggest that consensus around new sexual norms is readily forged, even when women utilize unofficial reporting channels to stretch the boundaries of the unacceptable. Rather, a recalibration can only unfold over time. But #MeToo portends that when women come forward with their yet unaccounted-for experiences of violation, more robust normative frameworks will eventually materialize.

## 5. *Institutional Change*

Of late, unofficial reporting through open access channels is being used to induce institutional change.<sup>212</sup> The Academic Men List, for example, does not identify alleged perpetrators by name, but was deliberately designed to focus attention on the universities and departments where the misconduct was said to occur.<sup>213</sup> Likewise, in the wake of the Weinstein scandal,<sup>214</sup> women in Hollywood have mounted a concerted effort to address sexual harassment in the entertainment industry, for instance, by crafting a standard contract clause prohibiting sexual misconduct.<sup>215</sup> And in the judiciary, after misconduct accusations against Ninth Circuit Judge Alex Kozinski (accusations leveled in the New Court of Public Opinion) led to his

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<sup>210</sup> Jill Filipovic, *The Poorly Reported Aziz Ansari Exposé Was a Missed Opportunity*, GUARDIAN (Jan. 16, 2018, 9:16 PM), <https://www.theguardian.com/commentisfree/2018/jan/16/aziz-ansari-story-missed-opportunity>.

<sup>211</sup> Weiss, *supra* note 208.

<sup>212</sup> In contrast, both the Traditional Whisper Network and the Double Secret Whisper Network are unlikely to accomplish this end.

<sup>213</sup> See Kelsky, *supra* note 120. As the creator of the Academic Men List explained, “I . . . hope [the List] removes all plausible deniability from academic institutions. You are all on notice.” *Id.*

<sup>214</sup> See *supra* notes 1–3 and accompanying text.

<sup>215</sup> See, e.g., Trey Williams, *Women in Hollywood Are Fighting to Change the Culture of Sexual Harassment*, MARKETWATCH (Jan. 3, 2018, 9:56 AM), <https://www.marketwatch.com/story/how-hollywood-is-aiming-to-change-its-culture-of-sexual-harassment-2017-12-28>; see also Sarah Spellings, *Models Want a Legally Binding Contract Against Sexual Harassment*, THE CUT (May 16, 2018), <https://www.thecut.com/2018/05/how-model-alliance-anti-sexual-harassment-program-would-work.html> (describing similar efforts in the fashion industry).

resignation,<sup>216</sup> Chief Justice John Roberts announced a review of the federal bench's response to sexual harassment.<sup>217</sup>

It is too soon to say whether the institutional corrections prompted by informal reporting will prove meaningful and lasting. To be sure, there is good reason to remain cautious about exclusive reliance on the Courts of Public Opinion as a force for change.<sup>218</sup> Even so, unlike networks that restrict access to group members (the Traditional Whisper Network and the Double Secret Whisper Network), open access reporting channels (the Shadow Court of Public Opinion and the New Court of Public Opinion) present the prospect of victims leveraging their experiences to reform the universities, workplaces, professions, and industries that have dismally failed to address sexual misconduct.

## 6. *Offender Accountability*

Whisper Networks sacrifice the pursuit of offender accountability in the interest of achieving other benefits. For women who report through restricted access channels, whether anonymously or not, this tradeoff is generally accepted as an inherent feature of the network model.<sup>219</sup> Since the recipients of the report are members of the vulnerable community, rather than those in positions of power over the abuser, it is not expected that any mechanisms of accountability will be triggered by a victim's unofficial complaint.

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<sup>216</sup> See Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.

<sup>217</sup> See Valerie Volcovici, *Chief Justice Orders Review of Sexual Harassment Standards in U.S. Judiciary*, REUTERS (Dec. 31, 2017), <https://www.reuters.com/article/us-usa-court-harassment/chief-justice-orders-review-of-sexual-harassment-standards-in-u-s-judiciary-idUSKBN1EP0MP>; see also REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (2018), [http://www.uscourts.gov/sites/default/files/workplace\\_conduct\\_working\\_group\\_final\\_report\\_0.pdf](http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf). In March 2019, the Judicial Conference adopted a new set of workplace conduct rules governing, among other prohibited behaviors, sexual harassment. *Judicial Conference Approves Package of Workplace Conduct Reforms*, ADMIN. OFF. U.S. CTS. (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms>.

<sup>218</sup> See AM. PSYCHOL. ASS'N, WORKPLACE SEXUAL HARASSMENT: ARE EMPLOYERS ACTUALLY RESPONDING? 3 (2018), <http://www.apaexcellence.org/assets/general/2018-sexual-harassment-survey-results.pdf> (finding that the #MeToo movement prompted only ten percent of employers to add new sexual harassment trainings and just eight percent to implement a more stringent sexual harassment policy).

<sup>219</sup> Indeed, for some women, the lack of accountability is a chief benefit. See Donegan, *supra* note 127 (“[T]he value of the spreadsheet was that it had no enforcement mechanisms: Without legal authority or professional power, it offered an impartial, rather than adversarial, tool to those who used it. It was intended specifically not to inflict consequences, not to be a weapon . . .”).



The growing use of open access channels complicates this non-accountability story. When named women come forward in the New Court of Public Opinion, consequences may result.<sup>220</sup> Relatedly, when anonymous women make accusations in the Shadow Court of Public Opinion, these accusations can launch formal processes that may also lead to consequences if an accuser can be identified.<sup>221</sup> In the age of #MeToo, men accused of misconduct in the Courts of Public Opinion have faced job loss,<sup>222</sup> suspension,<sup>223</sup> honors revocation,<sup>224</sup> and economic penalties imposed by businesses and consumers alike.<sup>225</sup> They have also been disgraced in the eyes of family, friends, and the general public (although the longevity of sexual abuse-based stigma is questionable).<sup>226</sup>

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<sup>220</sup> This prospect may implicate concerns for process. *See infra* notes 237–41 and accompanying text (discussing this critique); *see also supra* note 144 (explaining that informal reporting can trigger formal processes).

<sup>221</sup> While the contours of these formal processes are often opaque, a sanctioning body is unlikely to impose a penalty based only on an anonymous accusation. This scenario may change if an anonymous accusation triggers an investigation that generates corroboration of the anonymous account—for instance, a witness, electronic evidence, or an admission by the accused.

<sup>222</sup> *See, e.g.,* Sarah Almkhatar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> (listing men “fired or forced to resign after accusations of sexual misconduct that ranged from inappropriate comments to rape”).

<sup>223</sup> *See, e.g., id.* (listing men who have faced “[s]uspensions and [o]ther [f]allout”).

<sup>224</sup> *See* Susan Adams, *Steve Wynn Loses Naming Rights at U Penn After Sexual Misconduct Allegations*, FORBES (Feb. 1, 2018), <https://www.forbes.com/sites/susanadams/2018/02/01/the-university-of-pennsylvania-is-stripping-steve-wynns-name-from-a-campus-plaza>; Louis Lucero II, *Charlie Rose Has Honors from Two Journalism Schools Rescinded*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/us/charlie-rose-awards.html>; Jane C. Hu, *In the Aftermath of #MeToo, Which Names in Science Should be Replaced?*, QUARTZY (Sept. 19, 2018), <https://qz.com/quartzzy/1394785/replacing-names-in-science-after-metoo>.

<sup>225</sup> *See, e.g., supra* note 170 (describing post-#MeToo responses to longtime sexual misconduct allegations against R. Kelly); *see also* Ben Sisario, *R. Kelly Dropped by RCA Records After Documentary Furor*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/arts/music/r-kelly-rca-sony.html>.

<sup>226</sup> *See, e.g.,* Amanda Arnold, *The Men Who Are Plotting Their Post-#MeToo Comebacks*, THE CUT (Apr. 19, 2018), <https://www.thecut.com/2018/04/comeback-men-sexual-harassment-me-too.html> (describing efforts on the part of Charlie Rose, Mario Batali, Lorin Stein, Matt Lauer, Garrison Keillor, Louis C.K., and Al Franken to make a comeback); Brooks Barnes, *John Lasseter, Ousted from Pixar in #MeToo Wave, Finds New Hollywood Home*, N.Y. TIMES (Jan. 9, 2019), <https://www.nytimes.com/2019/01/09/business/media/john-lasseter-skydance.html> (reporting on powerful entertainment executive’s comeback within months of resigning from the company he founded due to allegations of workplace sexual harassment); *see also* Stassa Edwards, *Redemption Is Inevitable for Powerful Men*, JEZEBEL (Apr. 20, 2018), <https://jezebel.com/setsession?r=https%3A%2F%2Fjezebel.com%2Fredemption-is-inevitable-for-powerful-men-1825364533&sessionId=9017dff6-9d1c-4b50-8bb2-4730357f21a5> (positing the inevitability of “redemption narratives” for men accused of sexual misconduct).

Setting aside whether these consequences are appropriate in any individual case,<sup>227</sup> it is useful to observe that the consequences stemming from the Courts of Public Opinion may qualify as only partial accountability. One precondition for full accountability might be a degree of proportionality between the infraction and the attendant repercussion. Another might entail a level of transparency that enables those harmed by the misconduct to feel vested in the abuser's penance. Perhaps accountability requires a mechanism for conveying collective condemnation of the transgression.

My aim here is not to offer a comprehensive theory of accountability but to gesture at the kinds of considerations that might come into play when we assess what may be missing even when unofficial reporting yields consequences.<sup>228</sup> Further to this concern, most commentators have implicitly presupposed that individual accountability can be analyzed without regard to the relevant legal framework.<sup>229</sup> In my view, it cannot. Although not all sexual misconduct is regulated by law, most of the misconduct being disclosed in the #MeToo era *is* prohibited by criminal law, Title IX, Title VII, or some combination of the three. When this conduct results in only extra-legal consequences, we should be troubled by the gap between the available (formal) redress and the outcome imposed instead. In other words, the measure of accountability cannot be abstracted from what is dictated by our system of laws.

In the New Court of Public Opinion, the limits of accountability are compounded by the problem of inequity. Access to channels that hold the greatest promise of generating some consequence, however inadequate, is markedly unequal. Most victims of sexual assault and harassment do not have connections to mainstream media reporters. Moreover, for women whose abusers are not the subject of intense public interest,<sup>230</sup> resort to traditional media outlets is typically not an option.<sup>231</sup> In sum, those especially vulnerable to workplace sexual misconduct—women of color and women in low-wage jobs—are cut off

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<sup>227</sup> See 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> (calling for a discussion of “alternatives to exile” for those accused of sexual misconduct).

<sup>228</sup> See generally Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (applying theories and practices of transitional justice to the #MeToo movement).

<sup>229</sup> Cf. *supra* notes 9–12 and accompanying text (noting that legal scholarship has largely overlooked the significance of unofficial reporting channels in responding to sexual misconduct).

<sup>230</sup> See *supra* note 146.

<sup>231</sup> See *supra* note 147 and accompanying text.

from mechanisms of informal reporting that, among the unofficial options, offer the greatest hope of prompting a semblance of offender accountability, however imperfect.<sup>232</sup>

### C. *The Future of Unofficial Reporting: A First Assessment*

With the spread of #MeToo, the costs and benefits of divulging abuse have begun to shift in appreciable ways. Assuming this trajectory is maintained, we should expect to see increased activity in the matrices that extend beyond the confines of the Traditional Whisper Network: the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. Victims will be especially drawn to channels that allow them to aggregate allegations against a particular individual—in essence, to use one another’s accounts to bolster the credibility of all accusers.<sup>233</sup>

Yet there is reason to be cautious about the rise of informal accusation.<sup>234</sup> As we have seen, there are meaningful limits on what unofficial reporting can accomplish, especially with regard to perpetrator accountability.<sup>235</sup> Two additional concerns are worthy of mention.<sup>236</sup>

First, informal accusation is characterized by a lack of formal process. While this observation is often harnessed by politicians and commentators who tend to sympathize with the accused,<sup>237</sup> many who

<sup>232</sup> Even social media, which is more accessible than mainstream media to victims of sexual misconduct, may be effectively off limits to many members of marginalized communities. As California Assemblywoman Lorena Gonzalez put it, “The MeToo movement . . . can’t just be for women who have a Twitter account.” Charisse Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY (Oct. 5, 2018), <https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002>.

<sup>233</sup> I have called this “credibility in numbers.” Deborah Tuerkheimer, *What If Only One Woman Had Accused Harvey Weinstein?*, GUARDIAN (Oct. 22, 2017), <https://www.theguardian.com/commentisfree/2017/oct/22/harvey-weinstein-bill-cosby-allegations>. The aggregation of complaints represents an efficient mode of delivering the validation and solidarity long enabled by the Traditional Whisper Network. See *supra* notes 153–57 and accompanying text. Aggregation also provides a partial antidote to the credibility discounting that sexual abuse victims have long endured. See *supra* notes 34–35 and accompanying text. Unfortunately, however, the lone accuser remains relegated to a far more tenuous status, informally perpetuating once-codified legal requirements unique to sexual assault cases. See Tuerkheimer, *supra* note 34, at 21–23 (describing legal rules that expressly embodied a stance of deep skepticism toward rape accusers).

<sup>234</sup> My solution is to adapt formal reporting channels to better account for the needs of survivors. See *infra* Part III.

<sup>235</sup> See *supra* Section II.B.6.

<sup>236</sup> For a more thorough discussion of these concerns, see Tuerkheimer, *Unofficial Reporting*, *supra* note 119 (manuscript at 27–34).

<sup>237</sup> Around the time of then-Judge Kavanaugh’s confirmation hearing, President Trump captured and advanced this line of thinking as follows: “[I]t’s a very scary time for young men in America when you can be guilty of something you might not be guilty of. This is a very difficult time. . . . [S]omebody could accuse you of something and you’re automatically

tend to sympathize with the accuser also worry about a world in which established procedures for investigating and adjudicating allegations of abuse are supplanted by pervasive public shaming and vigilantism.<sup>238</sup>

Although the process critique is often exaggerated,<sup>239</sup> the procedural void that characterizes unofficial reporting matters.<sup>240</sup> Formal investigative procedures are of independent value.<sup>241</sup> At least with respect to contested allegations of abuse, processes triggered by the formal reporting of abuse, assuming they are fair, are generally preferable to adjudication in the Courts of Public Opinion.

A second concern relates to the silencing effects of a weaponized defamation law.<sup>242</sup> When a person makes an unofficial allegation of sexual misconduct, she becomes the potential target of a defamation claim by the individual accused.<sup>243</sup> With the proliferation of reporting in the New Court of Public Opinion and the Shadow Court of Public Opinion, this threat has grown far more significant.<sup>244</sup> Of course, if an

guilty.” Dara Lind, *Trump: “It’s a Very Scary Time for Young Men in America,”* VOX (Oct. 2, 2018, 2:02 PM), <https://www.vox.com/2018/10/2/17928800/trump-women-doing-great-kavanaugh>. Trump then added, “Women are doing great.” *Id.* For a contextual analysis, see Mary Anne Franks, *Witch Hunts: Free Speech, the First Amendment, and the Fear of Women’s Words*, 2019 U. CHI. LEGAL F. (forthcoming 2019).

<sup>238</sup> See, e.g., Shira A. Sheindlin & Joel Cohen, *After #MeToo, We Can’t Ditch Due Process*, GUARDIAN (Jan. 8, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televisions> (arguing for a “swift and fair process” for the accused); see also Masha Gessen, *When Does a Watershed Become a Sex Panic?*, NEW YORKER (Nov. 14, 2017), <https://www.newyorker.com/news/our-columnists/when-does-a-watershed-become-a-sex-panic> (warning of #MeToo turning into a “sex panic”); Caitlin Flanagan, *The Conversation #MeToo Needs to Have*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-right-conversation-for-metoo/551732> (discussing increased due process protections and proportionality as part of the “rocky path that #MeToo must travel if it is to grow from a vehicle of outrage to a mechanism for lasting change”).

<sup>239</sup> See Tuerkheimer, *Unofficial Reporting*, *supra* note 119 (manuscript at 27–30) (identifying where process-related concerns have been overblown and where they have traction).

<sup>240</sup> Apart from substantive concerns, the procedural void matters strategically, since it helps fuel opposition to #MeToo.

<sup>241</sup> A vast literature describes the virtues of procedural justice. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

<sup>242</sup> Defamation is a common-law tort consisting of a false statement of fact that injures the subject’s reputation. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

<sup>243</sup> Accusers may also be sued for statements made in the course of campus disciplinary proceedings. See Tyler Kingkade, *As More College Students Say “Me Too,” Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 15, 2017, 11:26 AM), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing>.

<sup>244</sup> The first high-profile defamation suit in the #MeToo era was filed in October 2018, when Stephen Elliott, a writer accused of sexual assault and harassment in multiple entries on the Media Men List, sued Moira Donegan, creator of the list, and thirty anonymous

allegation of abuse is truthful, a defamation defendant should ultimately prevail. Even so, the prospect of being sued for libel is—or should be—a meaningful deterrent to publicly accusing one’s abuser. Most sexual misconduct victims cannot afford the financial cost of defending a lawsuit, even apart from the psychic toll this effort exacts. Moreover, the confused state of defamation law<sup>245</sup> means that litigation costs in this area are highly uncertain.<sup>246</sup>

For the anonymous sexual abuse complainant whose identity is revealed in the course of defending a defamation claim—as well as for the accuser named at the outset—the defense of truth may allow for ultimate vindication. Even so, prevailing in the end hardly seems satisfying. In an ironic twist, a survivor who deliberately eschews formal reporting channels for whatever reason (but often, to avoid the credibility discount) may eventually wind up in a courtroom anyway, telling her story under the most formal conditions possible, having expended enormous resources along the way, in exclusive service of beating back a claim that she lied about her abuse. With defamation law lurking in the background, no survivor could be faulted for deciding to forsake unofficial reporting altogether and to keep silent about her abuse.

Concerns related to process and to the silencing effects of defamation law are unlikely to dissipate. Still, absent significant improvements to the official alternatives,<sup>247</sup> extra-legal remedies will remain more attractive to most survivors than a turn to law.<sup>248</sup> As we have seen, informal reporting may well be the best option for an individual survivor and, in the aggregate, unofficial complaint has propelled a powerful movement for gender justice.<sup>249</sup> Yet the rise of informal accusation cannot substitute for a functional legal response.<sup>250</sup> Put differently, working around law’s failures is an unacceptable end point.

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Jane Does for \$1.5 million. See *Elliott v. Donegan*, No. 1:18-cv-05680-LDH-SJB, 2018 WL 4940326 (E.D.N.Y. Oct. 10, 2018); see also *supra* notes 127–28 and accompanying text (discussing Media Men List and other anonymous spreadsheets). For analysis of the Donegan lawsuit, see Tuerkheimer, *Unofficial Reporting*, *supra* note 119 (manuscript at 32–34).

<sup>245</sup> See Amy Kristen Sanders & Holly Miller, *Revitalizing Rosenbloom: The Matter of Public Concern Standard in the Age of the Internet*, 12 *FIRST AMEND. L. REV.* 529, 542 (2014) (“Many scholars agree that current defamation standards are confusing, often contradictory, and offer little predictability for parties.”).

<sup>246</sup> For elaboration on the doctrinal complexities that contribute to this confusion, see Tuerkheimer, *Unofficial Reporting*, *supra* note 119 (manuscript at 33–34).

<sup>247</sup> Here I focus on the task of reforming official reporting channels rather than the substantive laws they trigger.

<sup>248</sup> See *supra* Part I.

<sup>249</sup> See *supra* Section II.B.

<sup>250</sup> See *supra* note 22 (highlighting the equality norm at stake).

Without upgrading the complaint channels that activate the law of sexual misconduct,<sup>251</sup> most reporting will continue to bypass formal mechanisms of process and accountability, to the detriment of both accusers and accused.

### III

#### TOWARD A NEXT GENERATION OF FORMAL REPORTING CHANNELS

The #MeToo movement has ignited a new age of informal accusation, which until now has gone unnoticed. Legal scholars and practitioners have special cause to attend to this development, as it bears directly on the relevance of law to address sexual misconduct.<sup>252</sup> If most victims of abuse continue to reject formal reporting channels in favor of Whisper Networks and the Courts of Public Opinion, law risks virtual obsolescence in the sexual violence space.

My contention is not simply that we should find this prospect of interest,<sup>253</sup> but that the widespread abandonment of legal mechanisms for redressing sexual misconduct ought to trouble us. Our laws governing sexual misconduct—primarily statutes criminalizing sexual assault, Title IX, and Title VII—are not perfect; far from it. To accept their current levels of disuse, however, is to relinquish far too much.

Now is an opportune moment for institutions charged with implementing sexual misconduct laws to leverage the burgeoning appeal of unofficial reporting. #MeToo has generated newfound receptivity to allegations of abuse.<sup>254</sup> But for this transformation to impact the workings of law, official channels for reporting abuse must evolve to a multi-tiered system, bringing more misconduct into formal systems for processing.<sup>255</sup> These formal systems, however flawed, instantiate the legal norms that prohibit sexual misconduct; they offer redress for accusers while protecting those accused of misconduct, and they do so

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<sup>251</sup> This is not meant to minimize the importance of reforming substantive laws, doctrines, and enforcement practices, but to surface an area of needed change that has not been identified.

<sup>252</sup> Lawyers and legal scholars should also be particularly attentive to process-related concerns. *See supra* notes 237–41 and accompanying text.

<sup>253</sup> *See supra* notes 11–12 and accompanying text (noting that unofficial reporting should be of particular interest to legal scholars and practitioners).

<sup>254</sup> *See supra* Section II.A.4. For present purposes, it is useful to observe that actors with designated responsibilities for investigating and adjudicating abuse allegations are part of this ongoing transformation.

<sup>255</sup> *See supra* note 23 (describing various facets of the under-enforcement problem).

in myriad ways not provided for by unofficial reporting mechanisms.<sup>256</sup>

Informed by the benefits and drawbacks of informal accusation for survivors of abuse, we turn now to the design of a next generation of formal reporting channels. Like their informal counterparts, these improved complaint channels would prioritize victim empowerment while more effectively advancing the goals of group member protection, offender accountability, and institutional change. Refurbished formal channels would draw on central features of informal accusation—namely, options to report anonymously, to report confidentially, and to escrow the report—in order to bring more allegations into established systems. As I will show, a multi-tiered approach to formal reporting would capture much of the allure of informal accusation, promising to newly invigorate the law of sexual misconduct.

### A. Criminal Justice System

More often than not, as we have seen, victims of sexual assault do not report the crime to police.<sup>257</sup> Without minimizing the related need for improvements in the criminal justice system's downstream response to sexual violence,<sup>258</sup> my focus here remains on the point of access—that is, on the mechanisms in place for survivors to initiate a criminal investigation and for potential adjudication of their allegations.<sup>259</sup>

The traditional pathway for reporting to law enforcement is, at least in theory, fairly straightforward.<sup>260</sup> Once a complainant makes an accusation, the police are responsible for investigating the facts in order to determine whether there is sufficient cause to proceed with

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<sup>256</sup> The protections offered to those accused of misconduct vary depending on the type of allegation, with the criminal justice system providing the most expansive rights and processes, followed by college campuses and workplaces. My point is not that the process that is “due” in these disparate contexts is necessarily sufficient as a practical matter but that formal institutional processes provide some measure of protection for the accused, while informal complaint channels do not.

<sup>257</sup> See *supra* Section I.A.

<sup>258</sup> My own work has often focused on this need. See, e.g., Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1 (2015) (critiquing the criminal law's problematic construction of sexual consent); Tuerkheimer, *supra* note 22 (discussing federal intervention to combat systematic underenforcement).

<sup>259</sup> Most sexual assault allegations, even those reported to the police, do not result in a criminal conviction. See generally Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 154–57 (2012) (documenting the attrition of rape allegations as cases progress through the criminal justice system).

<sup>260</sup> See *supra* notes 28–33 and accompanying text.

an arrest.<sup>261</sup> Beginning with the first encounter, interactions between the police and the alleged victim are framed by an overarching need on the part of law enforcement officers to “clear” the case in one way or another.<sup>262</sup>

From the perspective of complainants, this process is typically unsatisfying. To see why, consider the contrasting appeal of informal reporting. As we have seen, unofficial channels can empower survivors; they can offer a form of protection to would-be victims; they can promote advances in collective knowledge, norms, and institutional responsiveness; and they can hold out the prospect of a measure of accountability, however incomplete.<sup>263</sup>

In most cases, complaining to the police in order to initiate the criminal justice process offers sexual assault survivors none of these advantages. Admittedly, the criminal justice system is not meant to serve the needs of crime victims alone. At times, law enforcement officers (both police and prosecutors) act contrary to the expressed wishes of a victim and appropriately so—public safety or the interest of justice may dictate a course of action more or less lenient than that envisioned by the complainant. Accordingly, importing survivor-centered approaches to reporting into the criminal process, as I advocate, raises tensions. Even so, a system that is vastly underutilized vis-a-vis sexual violence cannot effectively serve its intended functions. To further the many aspirations of the criminal justice system, which has a unique set of imperatives, law enforcement’s complaint channels must become more enticing to sexual assault victims.

When constructing this architecture, a chief lesson of informal reporting is that accusers should be given more control over their reports. Survivors must always retain the traditional option of initiating a standard investigation with its corollary focus on case closure.<sup>264</sup> But a wider array of pathways must be made available.

Piloting of options in the reporting space is already underway in select police departments around the country.<sup>265</sup> In these depart-

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<sup>261</sup> For a discussion of truncated sexual assault investigations, see Tuerkheimer, *supra* note 34, at 28–36.

<sup>262</sup> See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2013, at 1 (2014), [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic\\_final.pdf](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final.pdf) (providing an overview of various clearance classifications).

<sup>263</sup> See *supra* Section II.B.

<sup>264</sup> See *supra* notes 261–62 and accompanying text.

<sup>265</sup> See, e.g., Avery Lill, *Oregon Detective Pioneers New Sexual Assault Reporting Program*, NPR (Sept. 2, 2016, 8:02 AM), <https://www.npr.org/2016/09/22/491932615/oregon-detective-pioneers-new-sexual-assault-reporting-program> (discussing Oregon’s “You Have Options” Program). For a listing of the law enforcement agencies participating in the “You Have Options” Program, which launched in Ashland, Oregon in 2013, see



ments, mirroring aspects of the Traditional Whisper Network, complainants are permitted to relay an account confidentially and without consequence to the alleged perpetrator.<sup>266</sup> As an alternative, complainants can authorize a limited investigation aimed at assessing not only the strength of the case (by the gathering of additional evidence), but also the likelihood that the accused is a serial offender.<sup>267</sup> At any time, complainants can ratchet up or down the intensity of the investigation and, relatedly, its potential impact on the alleged perpetrator.<sup>268</sup>

By offering options short of full-blown investigation, police officers are able to better respond to survivors' varying interests<sup>269</sup>—interests that are currently being pursued, for the most part, outside formal reporting channels. For instance, with regard to victim empowerment, the confidential reporting alternative gives a survivor time to consider how she would like to proceed,<sup>270</sup> while at the same time

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*Report, YOU HAVE OPTIONS PROGRAM*, <https://www.reportingoptions.org/report> (last visited Apr. 1, 2019). See generally KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, *END VIOLENCE AGAINST WOMEN INT'L (EVAWI), ALTERNATIVE REPORTING METHODS: ESSENTIAL CONCEPTS AND COMPONENTS* (2015), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=593> (summarizing commonplace attributes of alternative reporting mechanisms). See also SEEK THEN SPEAK, <https://www.seekthenspeak.org> (last visited Aug. 29, 2019) (offering a digital aid that gives survivors the option to remain “in control of the information you share, who you share it with, and what you want to happen with it”).

<sup>266</sup> *Explore Your Options, YOU HAVE OPTIONS PROGRAM*, <https://www.reportingoptions.org/reporting-options> (last visited May 23, 2019) (“An Information Only report includes any report of sexual assault where at the reporting party’s request no investigative process beyond a victim interview and/or a complete or partial Inquiry into Serial Sexual Assault (ISSA) is completed.”); see also *infra* notes 270–78 and accompanying text.

<sup>267</sup> See *Explore Your Options, supra* note 266 (explaining that a limited investigation may go beyond interviewing the victim and assessing whether the accused is a serial offender to include “interviewing of witnesses and collection of evidence such as a sexual assault forensic examination (SAFE) kit”).

<sup>268</sup> In certain situations, law enforcement agents may be under a legal obligation to pass along a confidential report—where, for instance, the report involves child abuse allegations, threatens public safety, or triggers Title IX requirements. See *Roles and Responsibilities of a Participating Law Enforcement Agency, YOU HAVE OPTIONS PROGRAM*, <https://www.reportingoptions.org/roles-and-responsibilities> (last visited Apr. 9, 2019) (noting that participating law enforcement agencies should take reasonable steps to inform complainants prior to a report being made when their confidentiality may be legally impermissible).

<sup>269</sup> See *supra* note 15.

<sup>270</sup> Victims often need time to decide how to proceed and may want to speak to family and friends about the incident before lodging a formal (public) complaint. See Katie Van Syckle, *The Tiny Police Department in Southern Oregon that Plans to End Campus Rape*, *THE CUT* (Nov. 9, 2014), <https://www.thecut.com/2014/11/can-this-police-department-help-end-campus-rape.html> (describing how the “You Have Options” initiative developed in response to these needs).

preserving evidence that could become critical should the case ultimately proceed.<sup>271</sup> Moreover, depending on the listener's reaction, describing the assault can prove cathartic for a survivor.<sup>272</sup> Especially if police officers are freed from the need to immediately lapse into case building-or-breaking mode, there may be a greater tendency to validate an accuser when she relates her experience.<sup>273</sup>

The desire to protect others can likewise be satisfied by a multi-pronged reporting system. With even limited information, police may discover that an individual is suspected of other assaults, increasing the odds that the alleged perpetrator, if unpunished, will continue to re-offend.<sup>274</sup> When they join forces,<sup>275</sup> survivors gain the credibility that often requires numbers.<sup>276</sup> Complainants can also take comfort in knowing that, regardless of whether a confidential report or partial investigation is ultimately converted into a full investigation,<sup>277</sup> law enforcement is able to store reliable intelligence for the future.<sup>278</sup>

Apart from enhancing survivor empowerment and group member protection, alternative formal reporting channels facilitate perpetrator

<sup>271</sup> Should a case ultimately proceed to trial, a complainant's exercise of the confidential reporting option would allow prosecutors to blunt a typical line of cross-examination that focuses on delay in bringing allegations to the police.

<sup>272</sup> See *supra* note 152 and accompanying text (discussing the catharsis enabled by unofficial reporting).

<sup>273</sup> See Sirin Kale, *The Cop Pioneering a New Approach to Reporting and Investigating Sexual Assault*, VICE (Sept. 29, 2016, 1:21 PM), [https://www.vice.com/en\\_us/article/evg4wn/the-cop-pioneering-a-new-approach-to-reporting-and-investigating-sexual-assault](https://www.vice.com/en_us/article/evg4wn/the-cop-pioneering-a-new-approach-to-reporting-and-investigating-sexual-assault) (quoting the detective who founded "You Have Options" as explaining: "[W]hat we need to be saying is, 'Hey, I recognize that's stuff you're not ready to talk about yet, so how about we just talk about what you can today and we can come to the other stuff later?'").

<sup>274</sup> When an accused individual is identified as a potential serial offender, accusers who were initially reluctant to proceed with a formal criminal complaint may become convinced of the need to punish a perpetrator. See *supra* note 156 and accompanying text; see also *infra* notes 316–22 (discussing Callisto's matching function).

<sup>275</sup> See *supra* text accompanying notes 160–68 (describing how unofficial reporting channels can generate feelings of solidarity in survivors). When survivors learn of an accused's other victims only after recounting the assault (in contrast to the typical chronology of informal reporting), later attacks on complainant credibility may be somewhat less effective.

<sup>276</sup> See *supra* note 233 and accompanying text (describing "credibility in numbers"); *infra* note 322 and accompanying text (discussing the first-mover reporting disadvantage). Later in the criminal process, the general prohibition on character evidence at trial tends to complicate the strength-in-numbers approach to bolstering credibility. See FED. R. EVID. 404(b)(1). The admission of "other acts" testimony for a non-propensity purpose in sexual assault prosecutions is beyond the scope of this discussion.

<sup>277</sup> See *supra* note 264 and accompanying text (emphasizing that the complainant should at all times retain this option).

<sup>278</sup> See *supra* Section II.B.2 (discussing the protection rationale for informally reporting). Outside the sexual assault context, the use of both anonymous tips and confidential information is standard practice for police departments. The implications for public safety are complex.

accountability. Providing options brings more reports into the system,<sup>279</sup> leading to more arrests and more prosecutions.<sup>280</sup> As important, if less obvious, the availability of several reporting options can strengthen cases that enter the system, enhancing the prospect of a successful prosecution.<sup>281</sup> When survivors come forward with their accusations early, even if only to lodge a confidential report or to prompt a partial investigation,<sup>282</sup> corroborative evidence can more readily be gathered. In addition, liberated from the need to respond to law enforcement officers bent on case closure, survivors may be afforded the best opportunity to provide an accurate account.<sup>283</sup>

Unlike Whisper Networks, which produce no accountability,<sup>284</sup> and the Courts of Public Opinion, which result in partial accountability at best,<sup>285</sup> a functioning criminal justice system can hold abusers to account. Official reporting options that offer survivors flexibility further this end.<sup>286</sup>

As more sexual assault reports enter the system, police and prosecution responses can be expected to improve.<sup>287</sup> This progress will come from a deepening of law enforcement's understanding of the dynamics of sexual violation,<sup>288</sup> especially sexual assault that deviates from the stranger rape paradigm.<sup>289</sup> Over time, de facto impunity for

<sup>279</sup> See Van Syckle, *supra* note 270 (noting that since the Ashland Police Department launched "You Have Options," the number of reports more than doubled).

<sup>280</sup> Although we can expect increased reporting to result in more arrests and prosecutions, it will not likely lead to a proportional rise in arrests and prosecutions. See *supra* note 23 (describing gender bias in the criminal justice system). To my knowledge, researchers have yet to examine the downstream effects of increasing reporting.

<sup>281</sup> See JOANNE ARCHAMBAULT & KIMBERLY A. LONSWAY, DIRECT ANONYMOUS REPORTING: MULTIDISCIPLINARY PROTOCOLS OFFER ALTERNATIVE OPTION FOR VICTIMS 7–8 (2011) (on file with author) (emphasizing the importance of victim cooperation in sexual assault cases and explaining why the "victimless" or "evidence-based" approach to prosecution sometimes used to treat domestic violence cases is not appropriate for handling sex crimes).

<sup>282</sup> See *supra* notes 266–68 and accompanying text (explaining these alternative reporting options).

<sup>283</sup> See Kale, *supra* note 273 (describing how, when formal complaints were the only option, complainants' first descriptions of sexual violence were not always as accurate as they could be).

<sup>284</sup> See *supra* note 219 and accompanying text.

<sup>285</sup> See *supra* notes 220–32 and accompanying text.

<sup>286</sup> Although an increase in reports might raise concerns for the capacity of any given law enforcement agency to respond appropriately, it suffices for present purposes to note that resource allocation will always reflect departmental priorities.

<sup>287</sup> See *supra* Section II.B.5 (discussing how informal reporting can advance institutional change).

<sup>288</sup> See *supra* notes 182–96 and accompanying text (discussing how informal reporting can bring about greater epistemic justice).

<sup>289</sup> For an early challenge to the stranger rape paradigm, see Estrich, *supra* note 191, at 1092.

even the most egregious sexual misconduct<sup>290</sup> will erode, and collective notions of what counts as criminal can evolve.<sup>291</sup>

### B. College Campus

As we have seen, college reporting channels are vastly underutilized by student survivors of sexual assault, most of whom never relate the incident to disciplinary authorities.<sup>292</sup> There are many reasons for this widespread reluctance to lodge a formal complaint,<sup>293</sup> but because standard reporting systems do little to address survivors' concerns, pervasive underreporting persists.

Universities have adopted a range of procedures designed to comply with Title IX requirements and, loosely speaking, to advance their educational mission.<sup>294</sup> Yet across institutions, the rigidity of the formal reporting process<sup>295</sup> is often a deterrent for victims contemplating their options, especially in the immediate aftermath of an assault.<sup>296</sup> While the formal complaint process must remain in place, other avenues should be available to meet the needs of those not willing, or not yet ready, to initiate a full-blown investigation and adjudication.<sup>297</sup>

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<sup>290</sup> See *supra* Section I.A (describing the under-enforcement of laws prohibiting sexual assault); see also Ricardo Lopez, *Me Too Founder Says Looming Weinstein Arrest Is 'Cathartic' for Survivors of Sexual Assault*, VARIETY (May 24, 2018), <https://variety.com/2018/film/news/tarana-burke-harvey-weinstein-1202821447> (quoting Tarana Burke on the prosecution of Harvey Weinstein as “super cathartic for a bunch of the survivors, or even survivors who are not necessarily victimized by him”). One Weinstein victim explained her decision to cooperate with the Weinstein prosecution: “I know how this has changed my life for the worse. How he took away my self-esteem and personal power. And knowing I can take it back, and stop him from doing that to another woman, I couldn't let that go.” Farrow, *supra* note 144.

<sup>291</sup> See *supra* Section II.B.4 (discussing the possibility of normative shift).

<sup>292</sup> See *supra* Section I.B.

<sup>293</sup> See *supra* Section I.B.

<sup>294</sup> See *supra* note 83 (describing college reporting procedures).

<sup>295</sup> This rigidity may stem in part from legitimate concerns on the part of college administrators (and their lawyers) regarding compliance with regulations and guidance under Title IX. See Eric Kelderman, *College Lawyers Confront a Thicket of Rules on Sexual Assault*, CHRON. HIGHER EDUC. (June 25, 2014), <https://www.chronicle.com/article/College-Lawyers-Confront-a/147349> (describing the legal terrain under Obama); see *supra* note 81 (describing Title IX enforcement under the Trump Administration).

<sup>296</sup> See *supra* notes 88–89 and accompanying text.

<sup>297</sup> A draft of the American Law Institute's *Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities* (which has not yet been approved by ALI membership) is consistent with this approach. The draft (on file with author) reads: “In order to facilitate reporting of sexual assault and related misconduct, multiple avenues of reporting and efforts to allow the alleged victims of such misconduct substantial influence over whether their reporting is made known to the alleged perpetrators are widely believed to be helpful.” PRINCIPLES OF THE LAW, STUDENT

Sexual misconduct on campus undermines a victim's access to an equal education—it is a problem of sex discrimination, as the governing legal framework recognizes.<sup>298</sup> Alternative reporting options should take into account the benefits of unofficial reporting, with a particular emphasis on the empowering potential of informal complaint.<sup>299</sup> Complaint channels that prioritize catharsis and validation can help to mitigate the subordinating effects of sexual violation.

For instance, one central aim of any reporting system must be to provide survivors with confidential support and counseling. While colleges have struggled with how widely to impose mandatory notification duties,<sup>300</sup> confidential resources (counselors, social workers, psychologists, health care providers) are exempted from the obligation to report allegations to the Title IX office. Victims who speak with confidential resources may of course choose also to report through the standard channels. But these channels, again, are unattractive to most survivors. More innovative reporting systems can be designed to embed empowering features.<sup>301</sup> Rather than exclusively rely on a separate apparatus to provide victims with confidential support, universities should create a formal complaint channel that can fulfill this function, while at the same time fostering community protection, offender accountability, and institutional change.<sup>302</sup>

Technology can assist in achieving these ends. For example, Callisto is a platform created in 2016 “by survivors, for survivors.”<sup>303</sup> It offers users three options, which can be exercised at any time: create a time-stamped record of an incident, to be stored for future

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SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES § 3.1 reporters' notes (AM. LAW INST., Discussion Draft 2018).

<sup>298</sup> See *supra* note 19 and accompanying text.

<sup>299</sup> See *supra* Section II.B.1.

<sup>300</sup> See Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 73–84 (2017) (describing the pervasiveness of wide-net policies and the downsides of that approach).

<sup>301</sup> The failure on the part of many colleges and universities to provide “amnesty” for students allegedly assaulted while engaging in a violation of the disciplinary code (for example, using drugs) is a deterrent to reporting that is worthy of separate attention.

<sup>302</sup> See *supra* Section II.B.

<sup>303</sup> See *About*, CALLISTO, <https://stanford.callistocampus.org/about/who-we-are> (last visited Feb. 23, 2019). Callisto's mission is “to combat sexual assault, empower survivors, and advance justice. . . . by enabling survivors to make the reporting decision best for them and by improving the outcome of reports.” *Id.* Callisto is already partnering with fourteen institutions of higher education, including Stanford University, the University of Oregon, and the University of Southern California, and the non-profit is expected to expand. CALLISTO, YEAR 3: 2017–2018 ACADEMIC YEAR REPORT, at 3, 16 (2018) [hereinafter CALLISTO YEAR 3 REPORT], [https://www.projectcallisto.org/Callisto\\_Year\\_3\\_final.pdf](https://www.projectcallisto.org/Callisto_Year_3_final.pdf).

use or deleted;<sup>304</sup> submit the report directly to the school's Title IX office;<sup>305</sup> or commit to reporting if another student names (or has named) the same perpetrator.<sup>306</sup> While Callisto is still in relatively early stages of implementation,<sup>307</sup> preliminary data suggests that, on campuses that have adopted the platform, students are creating a record sooner and more often choosing to relay the report.<sup>308</sup>

Several features of the system explain its appeal.<sup>309</sup> To incorporate the advice of experts on trauma-informed interview techniques, Callisto's website bakes in empathy, using language that is "soft, comforting, understanding and compassionate."<sup>310</sup> Users are "encourage[d] . . . to take breaks so they do not feel pressured to finish or write something with which they are uncomfortable."<sup>311</sup> An effort is made to "[e]xplain the risk and benefits of using the form for reporting,"<sup>312</sup> and to "[p]rovide transparency throughout the form."<sup>313</sup> Overall, Callisto seeks to effectuate its mission—which expressly includes empowering survivors<sup>314</sup>—with a "survivor-centered approach [that] increases the chances that a survivor will report, and

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<sup>304</sup> The creation of the record is guided by a series of prompts meant to elicit details that will be helpful to any later investigation; instead of sequential questions, users respond to a "flow of questions [crafted] for memory retrieval and reconsolidation." See CALLISTO, YEAR 2: 2016–2017 SCHOOL YEAR REPORT 11 (2017) [hereinafter CALLISTO YEAR 2 REPORT], [https://www.projectcallisto.org/Callisto\\_Year\\_2\\_highres.pdf](https://www.projectcallisto.org/Callisto_Year_2_highres.pdf).

<sup>305</sup> Callisto claims that reports submitted to the Title IX office through its system "led to more rapid and thorough investigation and reduced the chances for human error." *Id.* at 5.

<sup>306</sup> *Id.* at 3. Notably, if an accused student is named by a second individual, both complaints are forwarded to the Title IX office. A different matching function model might inform each accuser about the additional allegation without requiring either to formally report. Given that protecting others is a main impetus for reporting, students may be especially likely to report where a perpetrator is believed to be a repeat offender—that is, where the danger to others is perceived as more urgent. See *infra* notes 360–61 and accompanying text.

<sup>307</sup> See *supra* note 303.

<sup>308</sup> CALLISTO YEAR 3 REPORT, *supra* note 303, at 3 ("Survivors who visited Callisto were six times more likely to report than those who did not."); see also CALLISTO YEAR 2 REPORT, *supra* note 304, at 6 (noting that, "on average, students using Callisto created a record 3 months after the incident and reported four months after," as compared to students in schools without Callisto, who, on average, reported in month eleven).

<sup>309</sup> According to its most recent report, "100% of sexual assault survivors who visited Callisto would recommend it to a friend who was sexually assaulted." CALLISTO YEAR 3 REPORT, *supra* note 303, at 3.

<sup>310</sup> *Id.* at 13. In addition, Callisto uses "light, soft colors, young iconography, and pillowy drop shadows to create a calming, approachable design." *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* For users who indicate that they are not "ready" to report, the site provides information regarding counseling options. *Id.* at 6, 16.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 3.

that they will experience positive emotional and adjudicative outcomes.”<sup>315</sup>

To augment the odds that a survivor will report, Callisto allows victims to select a “match” option, which places the account in an information escrow.<sup>316</sup> If another account names (or has already named) the same perpetrator, the complainants are notified—in essence, creating a fully customized network—and a report is forwarded to the Title IX office. The match can provide added assurance to each survivor that the incident is “serious,”<sup>317</sup> insofar as the perpetrator is an alleged repeat offender.<sup>318</sup> A match can also provide validation<sup>319</sup> and solidarity,<sup>320</sup> as well as enhance the credibility of another victim.<sup>321</sup> In short, because the many obstacles to leveling a sexual misconduct accusation create a “first-mover disadvantage to reporting,”<sup>322</sup> the matching function works to eliminate this disadvantage.

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<sup>315</sup> *Id.* Whether adjudicative outcomes will improve remains to be seen. In theory, earlier reporting and more accurate memorializing of a complainant’s account might well enhance credibility in later proceedings, but there are reasons to be cautious about drawing this conclusion. In particular, the effects of criminal discovery requirements and student privacy rules (including the Family and Educational Rights and Privacy Act, or FERPA) could complicate the adjudicative landscape.

<sup>316</sup> See Ayres & Unkovic, *supra* note 131, at 147 (explaining the role of a matching escrow agent); see also ANJANA RJAN ET AL., CALLISTO: A CRYPTOGRAPHIC APPROACH TO DETECT SERIAL PREDATORS OF SEXUAL MISCONDUCT 1 (2018), <https://www.projectcallisto.org/callisto-cryptographic-approach.pdf> (describing Callisto’s matching escrow technology).

<sup>317</sup> See *supra* note 86 and accompanying text (noting that many survivors choose not to report because they perceive the incident as insufficiently serious); see also *supra* note 35–37 and accompanying text (describing a similar dynamic in the criminal justice context).

<sup>318</sup> Callisto contends that ninety percent of assaults are committed by repeat offenders, who perpetrate an average of six assaults. CALLISTO YEAR 3 REPORT, *supra* note 303, at 5. Research on serial sexual offense is limited and conflicting. See MacKinnon, *supra* note 19, at 2053–55 (evaluating the evidence); see also Ian Ayres, Michael Chwe & Jessica Ladd, *Act-Sampling Bias and the Shrouding of Repeat Offending*, 103 VA. L. REV. ONLINE 94, 95 (2017) (arguing that low reporting rates obscure the prevalence of repeat offending). Regarding its matching system, Callisto reports that about fifteen percent of users who enter the system are “matched” with a victim of the same offender. *What We Do*, CALLISTO, <https://www.projectcallisto.org/what-we-do#campus> (last visited May 9, 2019).

<sup>319</sup> See *supra* notes 153–59 and accompanying text.

<sup>320</sup> See *supra* notes 160–68 and accompanying text.

<sup>321</sup> See *supra* note 233 and accompanying text.

<sup>322</sup> See Ian Ayres, *Is There a First-Mover Disadvantage to Reporting Sexual Assault?*, FORBES (Oct. 18, 2015, 10:52 AM), <https://www.forbes.com/sites/whynot/2015/10/18/is-there-a-first-mover-disadvantage-to-reporting-sexual-assault> (describing survivors’ fear of “negative social consequences,” concerns that their assaults were not “serious enough to report,” and confusion over “where to go or who to tell” as obstacles to reporting); see also Ian Ayres, *Meet Callisto, the Tinder-Like Platform that Aims to Fight Sexual Assault*, WASH. POST (Oct. 9, 2015), [https://www.washingtonpost.com/opinions/using-game-theory-technology-to-fight-sexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699\\_story.html](https://www.washingtonpost.com/opinions/using-game-theory-technology-to-fight-sexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699_story.html) (explaining that survivors often decline to report due to fear of

In cases not involving known serial offenders, the first-mover disadvantage remains untouched.<sup>323</sup> A more global concern is that the promise of matching reifies a longstanding belief that one woman's account alone is not enough to establish a violation.<sup>324</sup> A narrowly defined "match" option overlooks the commonalities that connect seemingly disparate sexual assaults, enabling victims, other students, and college administrators to persist in the view that a single accusation is suspect.<sup>325</sup> At the same time, it is also likely (albeit not inevitable) that, over time, the increased number of complaints generated by alternative reporting channels<sup>326</sup> will result in greater offender accountability.<sup>327</sup> If so, more survivors will presumably be encouraged to come forward.<sup>328</sup>

Holding offenders responsible for sexual misconduct is one main component of a college's Title IX obligation to its students.<sup>329</sup> But prevention efforts are also crucial to providing a nondiscriminatory educational environment.<sup>330</sup> In this regard, colleges often turn to campus climate surveys,<sup>331</sup> which vary considerably in their approach to col-

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retaliation, fear of negative social consequences, and fear of being accused of fabricating their assault).

<sup>323</sup> Separate constellations of concern cluster around the system's reliance on Facebook for matching and the risk of exposing confidential information—a security threat that cannot be entirely eliminated by encryption. The cost of partnering with Callisto (or other similar platforms) may also be an obstacle for some institutions. See Sara Ashley O'Brien, *She Wants Her Rape Reporting Software to Be Universal*, CNN BUS. (Mar. 31, 2017, 12:44 PM), <https://money.cnn.com/2017/03/31/technology/callisto-sexual-assault-software> (noting that Callisto charges a setup fee of \$5000 to \$10,000, plus an annual subscription).

<sup>324</sup> See *supra* note 233 and accompanying text.

<sup>325</sup> Information escrows of this kind may not directly advance the epistemic justice and norm related functions of informal reporting, although over time they may contribute to progress on these fronts. See discussion *supra* Sections II.B.3, II.B.4.

<sup>326</sup> See *supra* note 308 and accompanying text (describing one alternative reporting channel that has generated more reporting).

<sup>327</sup> See *supra* Section II.B.6.

<sup>328</sup> See *supra* notes 196–97 and accompanying text (identifying a reporting/belief feedback loop); *infra* notes 369–70 and accompanying text (describing the relationship between reporting and accountability in the workplace context).

<sup>329</sup> See *supra* note 19 and accompanying text.

<sup>330</sup> See Jake New, 'Do Not Step Away,' INSIDE HIGHER ED (Jan. 26, 2017), <https://www.insidehighered.com/news/2017/01/26/college-leaders-discuss-future-title-ix-sexual-assault-prevention-efforts> (explaining the importance of continued prevention efforts in an era of relaxed federal enforcement of Title IX).

<sup>331</sup> The use of climate surveys was a key recommendation in the 2014 "Not Alone" report from the White House Task Force to Protect Students from Sexual Assault. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 7–8 (2014), <https://www.justice.gov/ovw/page/file/905942/download>. In October 2016, the Justice Department issued similar guidance for Title IX Coordinators. See Bea Hanson, *Best Practices: Campus Climate Surveys*, DEP'T OF JUSTICE (Oct. 14, 2016), <https://www.justice.gov/archives/ovw/blog/best-practices-campus-climate-surveys>.



lecting data.<sup>332</sup> At their best, such surveys can be used to guide the design of education and safety efforts,<sup>333</sup> but more granular information about sexual misconduct incidents, conveyed in near-real time to the Title IX coordinator, would be additionally valuable.<sup>334</sup>

To this end, colleges might consider offering—in addition to a standard reporting channel<sup>335</sup> and a multi-tiered reporting option<sup>336</sup>—an anonymous reporting mechanism designed to collect pertinent information about alleged misconduct, excluding the identity of the perpetrator.<sup>337</sup> An anonymous report of this kind would not initiate a formal investigation into any particular individual (who, again, would remain unnamed).<sup>338</sup> But, along with other similar reports, it could potentially focus the university’s attention on geographic hotspots, problematic days and times, patterns of offending, and relevant demographic characteristics of alleged victims and perpetrators. College administrators should welcome this particularized data, which could then be used to target prevention efforts.

In sum, the availability of alternative reporting options on college campuses can further the goals of institutional change, survivor empowerment, community protection, and offender accountability.

<sup>332</sup> See Jake New, *Creating the Right Campus Climate Survey*, INSIDE HIGHER ED (July 29, 2016), <https://www.insidehighered.com/news/2016/07/29/campus-climate-surveys-abound-does-disagreement-over-what-works-best> (describing disagreement over the merits and shortcomings of different campus climate surveys).

<sup>333</sup> See EVERFI, *SEXUAL ASSAULT CAMPUS CLIMATE SURVEY GUIDE: BEST PRACTICES RECOMMENDATIONS, TEMPLATES, AND SAMPLE SURVEY 3* (2017), <https://everfi.com/wp-content/uploads/2017/04/Sexual-Assault-Campus-Climate-Survey-Best-Practices-Recommendations-Templates-and-Sample-Survey.pdf> (noting that climate surveys can help campuses “define the problem,” “set appropriate goals,” encourage them “to be more intentional in their prevention efforts,” deliver “more targeted, impactful, and cost-effective programming,” and “garner additional resources and broader institutional commitment”).

<sup>334</sup> Callisto reportedly aggregates information for colleges but does not specify the type of information conveyed, apart from the gender of users, the class standing of users at the time of the incident, and the time (season and hour) of platform use. See CALLISTO YEAR 3 REPORT, *supra* note 303, at 3, 4, 11, 13.

<sup>335</sup> See *supra* notes 292–96 and accompanying text.

<sup>336</sup> See *supra* notes 297–322 and accompanying text.

<sup>337</sup> See *supra* note 120 (discussing the Academic Men List, a spreadsheet containing allegations of harassment in academia, with named institutions and unnamed perpetrators).

<sup>338</sup> Laws in Minnesota, Connecticut, and Texas require colleges to provide for anonymous reporting of a sexual assault, including identification of the accused. See Alex Samuels, *Measures Targeting Sexual Assault on College Campuses Get Legislative Approval*, TEX. TRIB. (May 28, 2017, 7:00 PM), <https://www.texastribune.org/2017/05/28/measures-target-sexual-assault-college-campuses-gets-legislative-appro/>; Kim Soffen, *How One State Is Giving More Power to Students in Reporting Sexual Assaults on Campus—Anonymously*, WASH. POST (Aug. 2, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/02/how-one-state-is-giving-more-power-to-students-in-reporting-sexual-assaults-on-campus-anonymously/>.

But these advantages cannot be realized if most incidents of sexual misconduct remain outside the purview of those with the responsibility to address it.

### C. Workplace

As in the law enforcement context, procedures for reporting sexual misconduct in the workplace are generally single-tracked,<sup>339</sup> and this rigidity has become ossified.<sup>340</sup> To the extent employers provide alternative reporting mechanisms, they tend to do so simply by designating more than one possible recipient for the complaint.<sup>341</sup> (Because a supervisor may also be an offender, employers must identify multiple complaint recipients.<sup>342</sup>) But this allowance has done little to incentivize reporting.<sup>343</sup> As we have already seen,<sup>344</sup> the vast majority of sexual harassment victims never invoke official channels.

For this dynamic to change, established workplace channels should be reconfigured to reflect the lessons learned from informal reporting. Women turn to Whisper Networks and the Courts of Public Opinion because of the benefits they provide (and the costs of the more established options). A range of workplace reporting options deliberately crafted to achieve these same ends<sup>345</sup>—and even to

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<sup>339</sup> See *Anti-Harassment Policy and Complaint Procedure*, SOC'Y FOR HUMAN RESOURCE MGMT., [https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms\\_000534.aspx](https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_000534.aspx) (last visited Apr. 1, 2019) (“Complaints should be submitted as soon as possible after an incident has occurred, preferably in writing. The HR director may assist the complainant in completing a written statement or . . . the HR director will dictate [a] verbal complaint.”).

<sup>340</sup> For objections to the legal requirement that, unless they suffer a concrete employment consequence, victims of hostile work environment harassment must first report through an internal complaint channel, see Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 42–43 (2018).

<sup>341</sup> See EEOC TASK FORCE REPORT, *supra* note 96, at 38 (explaining that effective harassment policies include “[a] clearly described complaint process that provides multiple, accessible avenues of complaint” (i.e., alternative individuals to whom the complaint can be made other than the immediate supervisor)).

<sup>342</sup> See Allan H. Weitzman & Marissa A. Mastroianni, *The Faragher Legacy: Still Going Strong After Twenty Years of Attacks and Counter-Measures*, 68 LAB. L.J. 143, 147 (2017) (“[A]t a minimum, a complaint procedure should ‘encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.’” (alteration in original) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998))).

<sup>343</sup> For a more global critique of “barriers to rights mobilization” by victims of workplace harassment (sexual and other), see LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 159–61 (2016).

<sup>344</sup> See *supra* Section I.C.

<sup>345</sup> See, e.g., *infra* note 354 and accompanying text.

extend beyond what informal reporting delivers<sup>346</sup>—can best fulfill the promise of Title VII.<sup>347</sup>

A multi-tiered reporting system might include several avenues for complaint,<sup>348</sup> depending on the size and organizational structure of the business.<sup>349</sup> While preserving the traditional reporting pathway, which allows a victim to formally initiate a full-blown investigation (typically by the HR department), employers should also offer both anonymous and confidential reporting options.

For instance, a company might create an anonymous whistleblower-type hotline specifically meant for reporting harassment.<sup>350</sup> As in the corporate compliance context, where such hotlines are commonplace,<sup>351</sup> an anonymous report—or a series of reports collected over time—might be sufficiently specific to allow for an investigation.<sup>352</sup>

In the #MeToo era, a variation on this process has unfolded repeatedly, albeit in an ad hoc manner, as anonymous accusations made in the Shadow Court of Public Opinion have sparked related

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<sup>346</sup> See *infra* notes 370–71 and accompanying text.

<sup>347</sup> See *supra* note 20 (describing Title VII’s protections against sexual harassment).

<sup>348</sup> See EEOC TASK FORCE REPORT, *supra* note 96, at 41. The Task Force reported “broad support for reporting systems that are multifaceted, including a choice of procedures, and choices among multiple ‘complaint handlers.’” *Id.* A “robust reporting system might include options to file complaints with managers and human resource departments, via multi-lingual complaint hotlines, and via web-based complaint processing,” along with “various mechanisms for addressing the situation, depending on the type of conduct and workplace situation.” *Id.*

<sup>349</sup> The Task Force recognized that the operational needs and resources of small businesses, start-up ventures, and the like, will differ significantly from large, established employers with dedicated human capital systems or “C Suites of senior leadership.” *Id.* Nevertheless, “the principle of offering an accessible and well-running reporting system remains the same.” *Id.* Unions can also play an important role in facilitating the reporting of sexual harassment by ensuring that the employer’s policies are supportive of victims and fair toward the accused. *Id.* at 40–41.

<sup>350</sup> See Linklaters Responds to #MeToo with Whistleblowing Hotline, LAW. FIRM NEWS (May 2, 2018), <https://lawyerfirmnews.com/2018/05/02/linklaters-responds-to-metoo-with-whistleblowing-hotline>.

<sup>351</sup> See Kobi Kastiel, *Elements of an Effective Whistleblower Hotline*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 25, 2014), <https://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline> (“[A]n internal whistleblower hotline is a critical component of a company’s anti-fraud program, as tips are consistently the most common method of detecting fraud.”). To comply with the Sarbanes-Oxley Act, “99% of surveyed publicly traded companies offer an anonymous hotline to employees as a means of reporting suspected unethical or potentially unlawful activity.” *Id.* There are obviously important differences between the investigation of sexual misconduct and the investigation of corporate fraud.

<sup>352</sup> Any remedial measures that result would necessarily depend on the findings of the investigation.

workplace investigations.<sup>353</sup> Providing a whistleblower hotline—or, currently in development, an internet-based equivalent<sup>354</sup>—would formalize these procedures, allowing all employees the same access currently afforded those with high-profile accusations. This development would have the added benefit of signaling that employers are open to receiving<sup>355</sup> and, wherever possible, acting upon anonymized information.<sup>356</sup>

For victims who prefer to maintain control of their report, at least at the outset, employer-sanctioned confidential reporting to an online third-party platform may be an attractive option.<sup>357</sup> Although still in early stages of application to the workplace, Callisto—a type of information escrow, as mentioned above<sup>358</sup>—enables an employee to input a time-stamped description of the alleged misconduct, which is held in abeyance unless and until she chooses to share it.<sup>359</sup> To this end, the platform includes a matching function that notifies victims if another

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<sup>353</sup> See *supra* notes 220–23 and accompanying text; see also Paula M. Weber & Caron Gosling, *A Sexual Harassment Sea Change for Employers?*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Jan. 12, 2018), <https://www.pillsburylaw.com/en/news-and-insights/a-sexual-harassment-sea-change-for-employers.html> (“[S]ocial media supercharges the potential for sexual harassment allegations against work colleagues and could lead to consequences for employers who fail to act quickly and appropriately.”).

<sup>354</sup> See, e.g., Dvoskin & McGregor, *supra* note 118 (explaining how the website and app tEQuitable offers employees a channel for confidentially discussing complaints while providing employers with data that allows them to “uncover systemic patterns” and “improv[e] . . . workplace culture”); Laurie Segall, *Startup Offers Anonymous Harassment Reporting Tool*, CNN Bus. (Nov. 16, 2017, 9:20 AM), <https://money.cnn.com/2017/11/15/technology/allvoices-sexual-harassment-reporting-tool/index.html> (describing AllVoices, a third party platform that allows employees to anonymously report harassment directly to the company’s CEO or board).

<sup>355</sup> See Palmer Morrel-Samuels, *Getting the Truth into Workplace Surveys*, HARV. BUS. REV., Feb. 2002, <https://hbr.org/2002/02/getting-the-truth-into-workplace-surveys> (noting that companies can benefit from anonymous workplace surveys, although many assessments are poorly designed).

<sup>356</sup> The investigation would likely rely on interviews with multiple employees with whom the alleged harasser works (any one of whom, unbeknownst to HR, could be responsible for the anonymous report).

<sup>357</sup> The workplace application of Callisto is currently being piloted in the tech space. See *supra* notes 316–22 and accompanying text; see also Lux Alptraum, *Can Callisto Transform How Silicon Valley Deals with Sexual Harassment?*, VERGE (Apr. 17, 2018, 1:54 PM), <https://www.theverge.com/2018/4/17/17247566/callisto-platform-silicon-valley-sexual-harassment>.

<sup>358</sup> See Ayres & Unkovic, *supra* note 131 (explaining information escrows).

<sup>359</sup> The EEOC has recognized the potential merits of such “information escrow” systems. See EEOC TASK FORCE REPORT, *supra* note 96, at 41 n.180 (“[We] encourage employers and other stakeholders to seek out and explore new and creative methods like these for the prevention of harassment, and encourage researchers to further examine escrow systems and gather evidence of their utility.”).

employee identifies the same perpetrator,<sup>360</sup> on the theory that an employee will be more willing to pursue a formal complaint if joined by a fellow survivor.<sup>361</sup>

If well implemented, each of these alternative complaint mechanisms—anonymous reports to HR or management and confidential reports to a third party, held in escrow—can satisfy many of the functions currently served by Whisper Networks and the Courts of Public Opinion.

First, with respect to victim empowerment, multiple avenues for complaints increase the likelihood that accusers will be willing to identify and describe their abuse, thereby enhancing the prospect of catharsis.<sup>362</sup> Second, procedures that disaggregate the memorialization of an accusation from any ensuing investigation can more readily validate the victim's experience and her decision to report the incident.<sup>363</sup> Third, with respect to empowerment, the matching feature of a third-party reporting platform can boost solidarity,<sup>364</sup> as can a fruitful investigation launched in response to an anonymous tip.<sup>365</sup>

While not as communal as Whisper Networks or as public as the Courts of Public Opinion, anonymous and confidential reporting systems can also advance epistemic<sup>366</sup> and normative<sup>367</sup> conceptions of harassment. Apart from leading to more workplace investigations, these alternative forms of reporting may facilitate more expansive thinking about the very meaning of harassment.<sup>368</sup> Information about what is occurring in the workplace, regardless of whether it leads to a formal complaint, is essential for any institution committed to monitoring and improving its culture. More flexible reporting channels can ultimately occasion new understandings on the part of employers and employees alike.<sup>369</sup>

<sup>360</sup> See *supra* notes 316–22 and accompanying text (discussing the platform's matching function).

<sup>361</sup> See *supra* notes 233, 274, 317 and accompanying text (analyzing the benefits of matching).

<sup>362</sup> See *supra* notes 152–53 and accompanying text.

<sup>363</sup> See *supra* notes 154–57 and accompanying text.

<sup>364</sup> As compared to the Traditional Whisper Network, matching systemizes the process that allows victims of the same offender to find one another, but it does not surface patterns of harassment that extend beyond an individual perpetrator.

<sup>365</sup> See *supra* notes 350–52 and accompanying text.

<sup>366</sup> See *supra* Section II.B.3.

<sup>367</sup> See *supra* Section II.B.4.

<sup>368</sup> See Schultz, *supra* note 92, at 27 (“To create lasting change requires an informed theory of sexual harassment: What *is* harassment? What’s in it for the harassers? What causes harassment? What must change?”).

<sup>369</sup> On the difficult problem of workplace secrecy and recent legislative efforts to address it, see Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment*

Perhaps the greatest appeal of alternative complaint channels lies in the promise of accountability—both individual and institutional. In the workplace setting, the two are inexorably linked. As the EEOC Task Force explained: “An employer that has an effective anti-harassment program, including *an effective and safe reporting system*, a thorough workplace investigation system, and proportionate corrective actions, communicates to employees by those measures that the employer takes harassment seriously,” thereby incentivizing reporting and enabling the employer to put an end to the misconduct.<sup>370</sup>

Without overhauling workplace reporting, this positive cycle will remain aspirational. Whisper Networks in particular cannot induce durable institutional change. Quite the opposite: Absent viable channels for complaint, women are presented with a seemingly intractable status quo—one defined by steep and gendered hierarchies that enable a range of sexual harassment while protecting perpetrators from consequences. Unless the current backdrop of pervasive non-reporting is upended, women will continue to be reminded that they are less than equal in the workplace.

One female lawyer, who practiced for decades with multiple law firms, described this reality as follows:

There is a cultural phenomenon in large law firms where some of the more senior women seek to protect the younger female targets from the worst behavior of their male colleagues. This protective behavior can be both good and bad. In my experience, it prevents the most severe and immediate harm—rape or assault—but also sends all the wrong messages because no one is openly confronting the bad guy or making him stop. I learned as a very young associate that unwanted sexual attention from men in a position of power was going to be a normal part of my professional life, that it was a normal part of being a woman in a law firm, that it was not acceptable to confront it directly, and that not only was I powerless to make it stop, but that none of the women who did their best to warn me behind closed doors had any power to make it stop. In the end, that’s an extremely belittling message. Even the women who would otherwise be my role models had no power in any meaningful sense because they couldn’t stop their male partners from touching me inappropriately or assure me that my career would be safe if I stood up for myself. If I wanted a successful career as a lawyer, I had to learn how to bob and weave, while pasting a smile on my face, so

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*Settlements*, NATION (Jan. 12, 2018), <https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements>.

<sup>370</sup> EEOC TASK FORCE REPORT, *supra* note 96, at 34 (emphasis added). The Report calls this “a positive cycle that can ultimately reduce the amount of harassment that occurs in a workplace.” *Id.*

that no man's ego would get bruised in the process of me refusing to have sex with him.<sup>371</sup>

Formal reporting channels, successfully reengineered, hold the promise of more effectively challenging this systemic discrimination. For victims of sexual harassment, workplace equality requires, at minimum, feasible mechanisms for complaint.

### CONCLUSION

Victims of sexual misconduct who are newly stepping forward to report their abuse are reshaping the #MeToo landscape. As women find strength in numbers and a growing cultural responsiveness to their claims, the widespread impetus to disclose misconduct is intensifying. In this rapidly shifting environment, the rise of informal accusation has gone little noticed.

Unless we are willing to accept a state of perpetual dormancy in the law governing sexual misconduct,<sup>372</sup> the pathways that activate legal redress must be reimagined.<sup>373</sup> By creating a range of options, institutions can replicate many of the benefits of informal reporting, which in turn will lead more survivors to invoke formal systems. Over time, greater openness to allegations of sexual misconduct outside the law should produce greater receptivity to allegations of sexual misconduct within the law.

Women have always found outlets for recounting their experiences of abuse. Whether behind closed doors, in small groups of similarly situated women or now, increasingly, in wide-open spaces using hashtags and mainstream media, survivors are insisting that their violation matters. The law should no longer remain, for all practical purposes, outside their reach.

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<sup>371</sup> Unsolicited E-mail to author, *supra* note 175; *see also* Pogrebin, *supra* note 173 (describing women in Richard Meier's firm as having "been disturbed by a sense of helplessness" induced by the fact that Meier's behavior "was common knowledge . . . but no one seemed to have the power to stop it").

<sup>372</sup> *See supra* note 22 and accompanying text.

<sup>373</sup> It is worth underscoring that substantive law reform is also necessary, but—in contrast to the imperative that has been identified here—this is widely discussed in existing scholarship. *See supra* note 18.