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The Rules of #MeToo

Jessica A. Clarke[†]

ABSTRACT

Two revelations are central to the meaning of the #MeToo movement. First, sexual harassment and assault are ubiquitous. And second, traditional legal procedures have failed to redress these problems. In the absence of effective formal legal procedures, a set of ad hoc processes have emerged for managing claims of sexual harassment and assault against persons in high-level positions in business, media, and government. This Article sketches out the features of this informal process, in which journalists expose misconduct and employers, voters, audiences, consumers, or professional organizations are called upon to remove the accused from a position of power. Although this process exists largely in the shadow of the law, it has attracted criticisms in a legal register. President Trump tapped into a vein of popular backlash against the #MeToo movement in arguing that it is “a very scary time for young men in America” because “somebody could accuse you of something and you’re automatically guilty.” Yet this is not an apt characterization of #MeToo’s paradigm cases. In these cases, investigative journalists have carefully vetted allegations; the accused have had opportunities to comment and respond; further investigation occurred when necessary; and the employment consequences, if there were any at all, were proportional to the severity of the misconduct. This Article offers a partial defense of the #MeToo movement against the argument that it offends procedural justice. Rather than flouting due process values, #MeToo’s informal procedures have a number of advantages in addressing sexual misconduct while providing fair process when the accused person is a prominent figure.

INTRODUCTION

The #MeToo movement has exposed that sexual harassment and assault remain commonplace and that traditional legal procedures have failed for survivors.¹ The civil and criminal law impose high costs on

[†] Professor of Law, Vanderbilt University Law School. I am grateful to Joni Hersch, Neha Jain, Bethany Davis Noll, David Noll, Richard McAdams, Lesley Wexler, and the faculty at the University of Arizona James E. Rogers College of Law for their advice on this project. Thanks to Emily Lamm for helpful comments and superb research assistance.

¹ Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/J7QL-BZD2>].

those who come forward while offering little in the way of benefits.² Confidential settlements and mandatory arbitration isolate survivors and cloak legal claims in secrecy, impairing the law's ability to promote social change.³ In the absence of effective formal legal procedures, an ad hoc process⁴ has emerged for managing claims of sexual harassment and assault against persons in high-level positions in business, media, and government.⁵ In this ad hoc process, journalists expose misconduct and employers, voters, audiences, consumers, or professional organizations are called upon to remove the accused from a position of power. Since the fall of 2017, a number of survivors have used this informal process to report abuse, and, as a result, over two hundred accused individuals have lost high-profile jobs, roles, or positions.⁶

The backlash came swiftly, invoking concerns of false allegations,⁷ due process,⁸ and overreach.⁹ In September 2018, the Supreme Court confirmation hearings for Justice Brett Kavanaugh inspired the use of the social media hashtag #HimToo to complain about the mistreatment of accused men.¹⁰ President Trump tapped into this vein of popular

² See *infra* notes 31–58, 219–228 and accompanying text.

³ See *infra* notes 49–58 and accompanying text.

⁴ Cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 774 (2017) (“Ad hoc procedure overcomes problems that cannot be solved using the existing procedural structures, and may be necessary to ensure that the civil justice system is able to provide the ordinary desiderata of civil litigation in cases that defy customary judicial management.”).

⁵ See Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. L. REV. 825, 833 (2019) (“#MeToo and its efforts respond directly to the view that the state has failed to impose appropriate consequences on those who commit sexual harassment and sexual assault.”). Cf. Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. 273, 276 (2019) (discussing how “#MeToo has catalyzed the creation of new channels for reporting sexual misconduct without directly invoking the legal system or law-adjacent institutional structures”).

⁶ Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/VTM3-KDJJ>].

⁷ See *Measuring the #MeToo Backlash*, THE ECONOMIST (Oct. 20, 2018), <https://www.economist.com/united-states/2018/10/20/measuring-the-metoo-backlash> [<https://perma.cc/65LW-CAF7>] (reporting that “18% of Americans now think that false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished, compared with 13% in November last year” based on YouGov polls of 1500 Americans).

⁸ See Emily Stewart, *Trump Wants “Due Process” for Abuse Allegations. I Asked 8 Legal Experts What That Means*, VOX (Feb. 12, 2018), <https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump> (“[A]s more and more figures face consequences — financial, political, professional, and legal—for their bad behavior, one term that comes up over and over again is ‘due process.’”).

⁹ See Masha Gessen, *Sex, Consent, and the Dangers of ‘Misplaced Scale,’* NEW YORKER (Nov. 27, 2017), <https://www.newyorker.com/news/our-columnists/sex-consent-dangers-of-misplaced-scale> [<https://perma.cc/MN3F-PWMM>]; Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash> [<https://perma.cc/CVW7-8329>].

¹⁰ Emma Grey Ellis, *How #HimToo Became the Anti #MeToo of the Kavanaugh Hearings*, WIRED (Sept. 27, 2018), <https://www.wired.com/story/brett-kavanaugh-hearings-himtoo-metoo-chr>

backlash in arguing that it is “a very scary time for young men in America” because “somebody could accuse you of something and you’re automatically guilty.”¹¹ With this comment, he connected the allegations against older, powerful men with those against younger ones, perhaps on college campuses. At rallies, the President trivialized the #MeToo movement, joking that “the rules of MeToo” amount to a code of political correctness.¹² Hyperbolic commentators have called the movement a “witch hunt,” “McCarthyism,” and “Soviet Union-style erasure” of accused men.¹³ More temperate observers have expressed the concerns that “trial by media” is “often a hindrance to truth-finding”¹⁴ and that decisions have been made in a “rush to judgment.”¹⁵

In large part, the response to this backlash has been to argue that it is off the mark as a matter of law because the court of public opinion is not constrained by procedural rules.¹⁶ This Article takes a different tack. It identifies a set of emerging procedural norms for making and

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¹¹ Dara Lind, *Trump: “It’s a Very Scary Time for Young Men in America,”* VOX (Oct. 2, 2018), <https://www.vox.com/2018/10/2/17928800/trump-women-doing-great-kavanaugh> [http://perma.cc/EUX8-NGN5].

¹² Betsy Klein, Allie Malloy, & Kate Sullivan, *Trump Mocks the #MeToo Movement at a Rally, Again,* CNN (Oct. 10, 2018), <https://www.cnn.com/2018/10/10/politics/trump-rally-mocks-me-too/index.html> [https://perma.cc/9T9E-863E].

¹³ See, e.g., David M. Perry, *No, #MeToo Is Not a Witch Hunt,* PAC. STANDARD (Jan. 9, 2018), <https://psmag.com/social-justice/no-metoo-is-not-a-witch-hunt> [https://perma.cc/4M7H-LFG5].

¹⁴ Shira A. Scheindlin & Joel Cohen, *After #MeToo, We Can’t Ditch Due Process,* GUARDIAN (Jan. 8, 2018), <https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televitions> [https://perma.cc/QV5P-F5VG].

¹⁵ Elizabeth Bartholet, *#MeToo Excesses,* HARV. CRIMSON, (Jan. 16, 2018) <https://www.thecrimson.com/article/2018/1/16/bartholet-metoo-excesses/> [https://perma.cc/Q453-HHU5].

¹⁶ See, e.g., Ana Marie Cox, *Al Franken Isn’t Being Denied Due Process. None of These Famous Men Are,* WASH. POST (Dec. 7, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/07/al-franken-isnt-being-denied-due-process-none-of-these-famous-men-are/?utm_term=.49f4dfa95a51 [https://perma.cc/9B5B-LNYY] (“But the courts aren’t where our national conversation is taking place, so let’s not dither about the dangers of proclaiming guilt or innocence.”); Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence,* 7 LAWS 21 (2018) (“Critics who contend ‘due process is better than mob rule’ miss the point. The aim, and point, is not (or is not always) criminal prosecution.” (citation omitted)).

evaluating public reports¹⁷ of sexual assault, harassment, and misconduct¹⁸ against high-profile leaders in business, media, and government.¹⁹ It defends these norms against the charge that they violate principles of procedural justice in their treatment of the accused.²⁰ In #MeToo's paradigm cases—reporting on Harvey Weinstein, Bill O'Reilly, Eric Schneiderman, Louis C.K., and others by *The New York Times* and *The New Yorker*—journalists have carefully vetted allegations; the accused have had opportunities to comment and respond; skeptical commentators have scrutinized accusations; decision makers have required corroborative evidence and conducted follow-up investigations when necessary; and the employment consequences, if any, were proportional to the severity and likelihood of the misconduct.²¹ This Article does not argue that every decision in the #MeToo era has been procedurally sound.²² Rather, it argues that in most instances in which high-profile leaders have lost positions, the allegations have been

¹⁷ This Article is interested in the public nature of reports as a characteristic feature of the #MeToo era. It is not focused on the procedures for handling complaints against students under Title IX or against employees under Title VII. The due process implications of these processes, which are often confidential, have been analyzed elsewhere.

¹⁸ This Article uses “sexual misconduct” as a provisional term to describe the broader set of harms illuminated by #MeToo. One controversial feature of #MeToo is that it has contested the legal and social boundaries separating various forms of harm, including, but not limited to: rape, sexual assault, unwanted and coercive sex, child sex abuse, nonsexual but gender-based harassment, harassment inside and outside the workplace, intimate partner violence, homophobic and transphobic harassment, claims against women, claims by men and nonbinary survivors, and claims about the erasure of people of color and other groups. This Article is not the place to resolve these controversies, although it addresses the question of whether the consequences are proportional to the severity of the misconduct in Part IV.E. Where appropriate, this Article refers specifically to certain of these forms of harm.

¹⁹ I am concerned with high-profile abusers who occupy positions that afford them great fame, power, or wealth and whose misconduct therefore counts as newsworthy. See, e.g., Poynter Staff, *Which Sexual Harassment and Assault Stories Should You Cover? Here Are Some Guidelines*, POYNTER (Nov. 29, 2017), <https://www.poynter.org/ethics-trust/2017/which-sexual-harassment-and-assault-stories-should-you-cover-here-are-some-guidelines/> [<https://perma.cc/XR4Y-TN3L>]. Accusations against rank-and-file workers raise different concerns. See Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85, 95–99 (2018). While the boundaries of the category of high-profile employees can be disputed, core cases are easy to identify.

²⁰ This Article does not advance any particular theory of what procedural justice requires. Rather, it responds to specific procedural objections to the #MeToo movement by examining the set of cases of individuals who lost prominent positions in the year after the Weinstein story and evaluating the procedures those individuals were afforded based on principles from due process precedents. This Article does not argue that extralegal processes are ideal for survivors or are a satisfactory alternative to legal reform.

²¹ These Pulitzer Prize winning stories are collected at THE PULITZER PRIZES, THE 2018 PULITZER PRIZE WINNER IN PUBLIC SERVICE (2018), <https://www.pulitzer.org/winners/new-york-times-reporting-led-jodi-kantor-and-megan-twohey-and-new-yorker-reporting-ronan> [<https://perma.cc/3VWQ-SZYL>].

²² I do not defend employment decisions based on anonymous public reports or sparse allegations against high-level leaders; rather, I argue that any such cases are exceptional deviations from emerging procedural norms. See *infra* Part III.

vetted and scrutinized by media, and decision makers have required some form of corroborative evidence or conducted their own investigations before taking action. This set of extralegal norms provides prominent figures accused of sexual misconduct with fair procedural safeguards.

This Article proceeds in four parts. Part I explains the advantages of #MeToo's extralegal procedures over traditional legal procedures, such as those provided by the criminal justice system and workplace sexual harassment law. Part II argues that, even though private actors are not bound by procedural rules outside of legal proceedings, #MeToo's advocates should be concerned with procedural justice for the accused because it is important to the legitimacy of the movement's goals. Part III argues that a set of procedural norms for evaluating extralegal claims of sexual harassment and assault against persons in positions of power is emerging. Part IV defends these emerging norms against various procedural objections: that they are not enforceable; that survivors who failed to pursue formal legal remedies should be barred from pursuing extralegal ones; that #MeToo fails to give the accused a fair hearing; and that it imposes disproportionate consequences. Close examination reveals that the rules of #MeToo, as applied, do not violate basic procedural principles in terms of the rights of the accused.

I. ADVANTAGES OF #METOO'S EXTRALEGAL PROCEDURES

The originators of the #MeToo movement conceived of their project as a "therapeutic, restorative, and educational" effort aimed at structural change and solidarity for survivors.²³ Although the movement's leaders did not envision its aims as identifying individual perpetrators, #MeToo gained national prominence as a result of the Harvey Weinstein story.²⁴ It is now associated with an extralegal process for removing high-level perpetrators from positions of power.²⁵ In this extralegal process, journalists first publicly expose sexual misconduct and then private actors, such as employers, voters, audiences, consumers, or professional organizations, determine whether the accusations warrant removal of the accused. This process enforces an evolving social norm: that sexual misconduct disqualifies a person from holding a position of

²³ See, e.g., Lesley Wexler, *#MeToo and Law Talk*, 2019 U. CHI. LEGAL F. 343, 343 (discussing "Alyssa Milano's informative, hand raising oriented #MeToo hashtag and its intersection with Tarana Burke's victim-centered, empathy-generating and restorative-justice focused Me Too").

²⁴ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/K45D-2XH3].

²⁵ See Carlsen et al., *supra* note 6.

power.²⁶ The process itself is a set of evolving, decentralized, and informal norms, with specific features that are described in detail in Part III. It is not a rights-claiming system in which survivors make demands for justice,²⁷ because the pressure generated by news coverage is the key feature of the system,²⁸ and the only available remedy is removal of the perpetrator. The process is private in the sense that it is not enforced by state actors, but unlike many other forms of private administration, it is public in the sense that it is driven by and occurs in the spotlight of media coverage.

This process has a number of significant limitations, and fails to achieve many of the #MeToo movement's goals. Nonetheless, removing perpetrators from power is an essential component of the reckoning occasioned by the #MeToo movement.²⁹ In this regard, #MeToo's extralegal procedures have a number of important advantages over traditional legal ones in terms of transparency, collective action, and institutional change.³⁰

Legal processes have been largely ineffective in removing high-profile perpetrators. The criminal law is a blunt and unwieldy tool. Sexual offenses are defined narrowly³¹ and are difficult to prove.³² Some research suggests only 5 to 20% of rapes are reported to law enforcement, only 7 to 27% of rapes that are reported to law enforcement are prosecuted, and only 3 to 26% of those that are prosecuted result in conviction.³³ One reason is that the criminal justice system imposes a "credibility discount" on victims.³⁴ On surveys, law enforcement officers

²⁶ See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350 (1997) (discussing definitions of norms by contrast to legal rules).

²⁷ Compare Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 863 (2008) (explaining how employment discrimination law, including sexual harassment law, is a flawed rights-claiming system).

²⁸ Compare William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–36 (1980) (describing a process of "naming, blaming, and claiming" in which an aggrieved individual seeks justice).

²⁹ See, e.g., Lesley Wexler, Jennifer K. Robbennolt, & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 68–81 (discussing principles of restorative justice, which require backward-looking efforts to ensure offender accountability as well as forward-looking efforts to ensure meaningful change).

³⁰ My argument is not that these extralegal processes should supplant legal ones or substitute for legal reform. It is that they serve purposes current legal processes do not.

³¹ For a survey of state laws and discussion of reform efforts, see MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Am. Law Inst., Tentative Draft No. 1, 2014).

³² See, e.g., Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 971 (2008) (discussing research showing "jury reluctance to convict men accused of raping women who have violated traditional sexual mores").

³³ Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 156 (2012).

³⁴ Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166

report that they believe rape claims are far more likely to be false than reports of other crimes, despite the lack of empirical support for this assumption.³⁵ The penalties for sexual offenses—such as harsh prison sentences and lifelong sex offender registration requirements—are so draconian that some survivors may not wish to involve the criminal justice system at all.³⁶

As for workplace sexual harassment law, it is riddled with loopholes and limitations.³⁷ For example, independent contractors, like many of the Hollywood actors who sought opportunities with Weinstein, are not protected by federal law.³⁸ Additionally, federal courts have ratcheted up the standard for how bad harassment must be to violate the law.³⁹ Some courts have held that even repeated instances of unwanted sexual touching do not count as harassment.⁴⁰

Sexual harassment law is particularly ineffective at stopping high-level harassers. In its 2016 study of harassment in the workplace, an Equal Employment Opportunity Commission (EEOC) task force found that workplaces that anoint some employees as “superstar[s]” tend to be “breeding ground[s]” for harassment.⁴¹ When some employees “are privileged with higher income, better accommodations, and different expectations,” they may begin to think “they are above the rules.”⁴² Victims may believe they have nothing to gain but everything to lose from

U. PA. L. REV. 1, 2 (2017); *see also* Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 209 (2017) (“Unlike people who have been robbed, beaten, or defrauded, rape victims must bypass a series of gatekeepers that, beginning with the police, impede the criminal justice system from vindicating victims’ allegations.”).

³⁵ Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers’ Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008) (discussing a survey of 891 police officers, in which 53% believed that 11 to 50% of rape reports by women were false, and 10% believed that between 50 and 100% were false).

³⁶ *See* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1953 (2016).

³⁷ For summaries of some of Title VII’s shortcomings, *see, e.g.*, Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1603–10 (2018); Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014 (2018). Tort law is no answer; sexual harassment law was meant to address the many limitations of tort law. *See generally* Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39 (2018).

³⁸ Title VII applies only to employer/employee relationships. 42 U.S.C. § 2000e-2(a)(1).

³⁹ *See, e.g.*, SANDRA SPERINO & SUJA THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 33–38 (2017) (discussing the requirement that harassment be “severe or pervasive” to violate the law).

⁴⁰ *Id.*

⁴¹ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [<https://perma.cc/AH2R-93VQ>].

⁴² *Id.* Additionally, “power can make an individual feel uninhibited and thus more likely to engage in inappropriate behaviors.” *Id.* (citing Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265 (2003)).

reporting misconduct by chief executives, rainmakers, and moguls.⁴³ Institutions have incentives to shield their anointed ones from scandal.⁴⁴ Those institutions may conclude that the benefits of retaining a superstar are worth the costs of misconduct.⁴⁵ High-level employees are more likely to have contracted for protection against termination, meaning their institutions realize that actions against them will be drawn-out and expensive.⁴⁶

The legal rules for reporting sexual harassment allow institutions to sweep it under the rug. In order to prevail in a sexual harassment case, most employees must first attempt to make use of their employer's internal complaint process.⁴⁷ Yet research has found only 30% of victims do so.⁴⁸ When victims do report, internal processes may result in confidential settlements that allow serial harassers to continue.⁴⁹ For example, Fox News host Bill O'Reilly was accused of a series of incidents of sexual harassment and other misconduct, but his accusers received payouts, totaling \$45 million, in exchange for their silence.⁵⁰ Fox News hired private investigators to seek out damaging information about one victim, and then agreed to destroy the materials the investigators had found as part of a settlement.⁵¹ In other cases, employees are required, as a condition of the job, to sign away their rights to public litigation by

⁴³ See, e.g., 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?login=smartlock&auth=login-smartlock> [https://perma.cc/D79H-48C8] (quoting a memo from a former assistant of Harvey Weinstein: "I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. The balance of power is me: 0, Harvey Weinstein: 10."); MEGAN KELLY, SETTLE FOR MORE 302 (2016) (Explaining that she did not report Roger Ailes because, "if I caused a stink, my career would likely be over. Sure they might investigate, but I felt certain there was no way they would get rid of him, and I would be left on the wrong side of the one man who had power at Fox.").

⁴⁴ Arnow-Richman, *supra* note 19, at 87.

⁴⁵ FELDBLUM & LIPNIC, *supra* note 41; see also, e.g., Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed his Contract*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html?module=inline> [https://perma.cc/VU7R-VBT4].

⁴⁶ Arnow-Richman, *supra* note 19, at 92–95.

⁴⁷ This rule generally applies when the harasser is a supervisor. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

⁴⁸ Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469–96 (J. Barling & C. L. Cooper eds., 2008).

⁴⁹ See, e.g., Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [https://perma.cc/R7YM-MNCV].

⁵⁰ Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html> [https://perma.cc/P86H-7TPR].

⁵¹ *Id.*

agreeing that any claims be settled in confidential arbitral proceedings.⁵²

Moreover, it is administratively difficult and time consuming for individual survivors to invoke legal remedies. Class action lawsuits could minimize these burdens, helping plaintiffs to attract higher-quality lawyers and offering them more leverage against the economic power of their employers.⁵³ Yet there have been relatively few sexual harassment class actions.⁵⁴ Courts regard sexual harassment as “more individualized than many types of employment discrimination claims” because each plaintiff must prove the harassment was “unwelcome” as a subjective matter.⁵⁵ In recent years, the Supreme Court has made the requirements of class certification more stringent.⁵⁶ Additionally, many employers require their workforces to sign away their rights to class proceedings along with their rights to litigation.⁵⁷ In a series of recent decisions, the Supreme Court has made “class arbitration waivers nearly bulletproof.”⁵⁸

By contrast, #MeToo’s procedures are open, relatively simple, collective, and effective in removing high-level perpetrators. It is one of #MeToo’s distinctive features that accusations are public.⁵⁹ #MeToo

⁵² See, e.g., Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, DEALB%K (July 15, 2014), <https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/> [<https://perma.cc/VQ2M-2LU4>]. One study found mandatory arbitration clauses cover 56% of non-union private-sector workers. ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION 1* (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf> [<https://perma.cc/L9AD-X3C7>]. For a discussion of how forced arbitration deters claims, see Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Toward Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 201–05 (2019).

⁵³ See, e.g., Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 484 (1992).

⁵⁴ Melissa Hart, *Litigation Narratives: Why Jensen v. Ellerth Didn’t Change Sexual Harassment Law, But Still Has a Story Worth Telling*, 18 BERKELEY WOMEN’S L.J. 282, 288 (2003) (“There appear to have been only ten reported cases between 1995 and 2002 in which courts considered sexual harassment claims as part of a federal class action suit.”).

⁵⁵ *Id.* at 293; Tristin K. Green, *Was Sexual Harassment Law A Mistake? The Stories We Tell*, 128 YALE L.J.F. 152, 166 (2018) (“Judges have constructed an individualized harassment law that revolves around stories of ‘personal advances,’ even though in most cases harassment is not an individualized problem.”).

⁵⁶ See, e.g., Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 153, 176–77 (2015) (discussing challenges for plaintiffs bringing civil rights class actions after the Supreme Court’s 2011 decision in *Wal-Mart v. Dukes*).

⁵⁷ COLVIN, *supra* note 52, at 2 (reporting that 30.1% of employers that require mandatory arbitration also require class waivers).

⁵⁸ Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 5 n.27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238460 [<https://perma.cc/Z2DX-UXVR>].

⁵⁹ See, e.g., Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/P7NS-U728>].

claimants have been lauded as “silence breakers.”⁶⁰ The public pressure generated by #MeToo has overcome legal barriers to speaking out. #MeToo allows survivors to band together—creating networks of support, lending credibility to one another’s claims, and exposing that problems are systemic rather than isolated occurrences or the fault of individual victims. Journalists have reported a snowball effect: a source who would otherwise have stayed silent might go on the record if she could be told she was the third, fourth, or fifth named source for an article.⁶¹ Some of the numbers are staggering—after journalist Glenn Whipp wrote about allegations by thirty-eight women against filmmaker James Toback, he was contacted by two hundred additional accusers.⁶² Sources may resist coming forward out of “self-blame, guilt, and complicity,” but when informed about additional victims, they realize, “It can’t be 30 or 40 women’s fault.”⁶³

The #MeToo movement has been stunningly effective in removing perpetrators from positions of power. In the year prior to the Weinstein news stories, fewer than thirty prominent people lost positions due to public accusations of sexual misconduct.⁶⁴ In the year after, over two hundred did.⁶⁵ By incapacitating offenders, #MeToo has prevented them from further abusing their positions of power to harm others. The threat of public exposure may also deter other leaders, and those who aspire to leadership, from engaging in misconduct. It is important to note, of course, that incapacitating and deterring high-level harassers only assists a privileged pool of potential victims, and only in a limited set of circumstances.⁶⁶ Most perpetrators are not high-level leaders or

⁶⁰ *Id.*

⁶¹ *8 Reporters Reflect on the Challenges of Covering Sexual Harassment*, NIEMAN REPS. (Nov. 13, 2017), <https://nimanreports.org/articles/reporters-on-their-stories-about-male-abuses-of-power/> [<https://perma.cc/RE3U-DA3C>] (quoting restaurant critic Brett Anderson on his reporting on celebrity chef John Besh). For example, Leigh Corfman, who reported that Roy Moore had sexually abused her when she was fourteen years old, was at first reluctant to come forward, but told *The Washington Post* that “If they found additional people, I would tell my story.” Adam Edelman, *Roy Moore Accuser Leigh Corfman: I Didn’t Deserve to Be Preyed Upon*, NBC NEWS (Nov. 20, 2017), <https://www.nbcnews.com/politics/politics-news/roy-moore-accuser-leigh-corfman-i-didn-t-deserve-be-n822416> [<https://perma.cc/U7QB-23KL>].

⁶² Glenn Whipp, *200 More Women Share Their James Toback Stories after 38 Accuse Director of Sexual Harassment*, L.A. TIMES (Oct. 23, 2017), <https://www.latimes.com/entertainment/movies/la-et-mn-toback-follow-up-20171023-story.html> [<https://perma.cc/2N97-BQGG>].

⁶³ *8 Reporters Reflect*, *supra* note 61 (quoting editor Michelle Cottle).

⁶⁴ Carlsen et al., *supra* note 6.

⁶⁵ *Id.*

⁶⁶ See Rebecca Traister, *Your Reckoning. And Mine.*, THE CUT (Nov. 2017), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html?> [<https://perma.cc/NDZ7-P6U9>] (“There are also women who do want to go on the record, women who’ve summoned armies of brave colleagues ready to finally out their repellent bosses. To many of them I must say that their guy isn’t well known enough, that the stories are now so plentiful that offenders must meet a certain bar of notoriety, or power, or villainy, before they’re considered newsworthy.”).

celebrities.⁶⁷ Survivors without fame and fortune are less likely to find investigative journalists eager to tell their stories. The media has focused on white women, even though women of color experience higher rates of sexual violence.⁶⁸ Even when their stories are covered, “[b]lack victims of sexual abuse are often disregarded.”⁶⁹ Low-wage,⁷⁰ blue collar,⁷¹ and immigrant workers⁷² are particularly vulnerable to abuse, but are less able to speak out and less likely to be heard when they do.⁷³ Transgender and nonbinary survivors have received little coverage,⁷⁴ despite the fact that they are at higher risk of sexual assault.⁷⁵ Popular attention has focused on a stock narrative involving an older man who

⁶⁷ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 19 n.4 (2018) (collecting studies showing coworker harassment is more prevalent).

⁶⁸ Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They’re Still Being Ignored*, WASH. POST (Nov. 9, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/?utm_term=.358786061779 [<https://perma.cc/M9DQ-TRPL>]. See also Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 107 (2018) (“The recent resurgence of the #MeToo movement reflects the longstanding marginalization and exclusion that women of color experience within the larger feminist movement in U.S. society.”).

⁶⁹ Kimberlé Williams Crenshaw, *I Believe I Can Lie*, BAFFLER (Jan. 17, 2019), <https://thebaffler.com/latest/i-believe-i-can-lie-crenshaw> [<https://perma.cc/XY5K-WX9V>]; see also Jemele Hill, *R. Kelly and the Cost of Black Protectionism*, ATLANTIC (Jan. 11, 2019), <https://www.theatlantic.com/entertainment/archive/2019/01/r-kelly-and-cost-black-protectionism/580150/> [<https://perma.cc/Q4JX-A2LU>] (discussing the “prolonged indifference” to claims by black girls and women against musician R. Kelly).

⁷⁰ Lia Russell, *Saying #MeToo Is Harder for Low-Wage Workers*, AM. PROSPECT (May 3, 2018), <https://prospect.org/article/saying-metoo-harder-low-wage-workers> [<https://perma.cc/U8V9-NR7X>].

⁷¹ See, e.g., Susan Chira & Catrin Einhorn, *Decades after the Company Tried to Tackle Sexual Misconduct at Two Chicago Plants, Continued Abuse Raises Questions about the Possibility of Change*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/UW8J-7UNW>] (discussing racial and gender dynamics that contributed to sexual harassment of blue-collar workers at Ford’s Chicago plants).

⁷² See generally BERNICE YEUNG, IN A DAY’S WORK: THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA’S MOST VULNERABLE WORKERS (2018).

⁷³ Stories have not focused on how dynamics like class can make certain women more vulnerable to abuse. Josephine Livingstone, *The Task Ahead for Feminism*, NEW REPUBLIC (Nov. 17, 2017), <https://newrepublic.com/article/145850/task-ahead-feminism> [<https://perma.cc/UV65-HEHX>] (“Important contextual information—that Roy Moore allegedly chose working-class women and children to abuse, for example—has been lost.”).

⁷⁴ See, e.g., Ebony Miranda, *Did #MeToo Forget About Me?*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/smarter-living/the-edit-me-too.html> [<https://perma.cc/YAE7-TKGX>].

⁷⁵ SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 15 (Dec. 2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/A8A2-WTTK>] (reporting that 47% of transgender survey respondents had been “sexually assaulted at some point in their lifetime,” and 10% “were sexually assaulted in the past year”).

demands sexual favors from a younger, less-powerful woman, or occasionally a man.⁷⁶ Sexist but non-sexual forms of workplace harassment have often been overlooked, as have the connections between sexual abuse and broader patterns of gender-based inequality, power dynamics, and institutional dysfunction.⁷⁷

Yet all these criticisms—the failure to address harassment by low-level employees, the failure to attend to intersectional dynamics involving race, class, LGBTQ, and immigration status, and the failure to address non-sexual forms of harassment—are commonly made of legal processes. What is interesting about #MeToo is how, in many cases, it has achieved what the law could not.⁷⁸ #MeToo’s procedures are distinctive in specifically asking whether sexual assault, harassment, or misconduct should disqualify an individual from important office. This is not the question asked by the criminal or civil justice systems, although loss of employment is sometimes a collateral consequence of a conviction or judgment.

Despite the limits of the strategy, the #MeToo movement’s ability to remove abusive leaders is an accomplishment because of what it says about gender and power. The movement has the potential to redefine the conditions for holding power, celebrity, and wealth in our society. The Weinstein story came one year after a presidential election in which the winning candidate had bragged on video that being famous meant he could grope women without first asking for their consent.⁷⁹ Prior to

⁷⁶ For stories involving male perpetrators and male victims, see, e.g., Laura Bradley, “I Was Terrified, and I Was Humiliated”: #MeToo’s Male Accusers, *One Year Later*, VANITY FAIR (Oct. 4, 2018), <https://www.vanityfair.com/hollywood/2018/10/metoo-male-accusers-terry-crews-alex-winter-michael-gaston-interview> [<https://perma.cc/5QNH-HXC2>]; Adam B. Vary, *Actor Anthony Rapp: Kevin Spacey Made A Sexual Advance Toward Me When I Was 14*, BUZZFEED NEWS (Oct. 30, 2017, 12:37 AM), <https://www.buzzfeednews.com/article/adambvary/anthony-rapp-kevin-spacey-made-sexual-advance-when-i-was-14> [<https://perma.cc/D5LW-FU5L>]. When women abuse men, the story is told as if it were “man bites dog.” Headlines insinuate that such cases somehow undermine the movement, rather than demonstrating the problems with unconstrained power. See, e.g., Kim Severson, *Asia Argento, a #MeToo Leader, Made a Deal With Her Own Accuser*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/asia-argento-assault-jimmy-bennett.html> [<https://perma.cc/Y6MP-WTW6>]; Zoe Greenberg, *What Happens to #MeToo When a Feminist Is the Accused?*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html> [<https://perma.cc/E6ZA-ZUJG>].

⁷⁷ See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 24 (2018); Rebecca Traister, *This Moment Isn’t (Just) About Sex. It’s Really About Work*, THE CUT (Dec. 10, 2017), <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html> [<https://perma.cc/8TML-UYNG>].

⁷⁸ See MacKinnon, *supra* note 1.

⁷⁹ David A. Fahrenthold, *Trump Recorded Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.4c56ec64c6e1 [<https://perma.cc/7P4J-ZAJK>] (“You know I’m automatically attracted to beautiful—I just start kissing them. It’s like a magnet. Just kiss. I don’t even wait. And when you’re a star, they let you do it. You can do anything . . . Grab them by the p---y.”).

October 2017, reports of sexual assault, harassment, and misconduct by powerful men were “an almost wholly open secret, sometimes even having been reported in major outlets, and yet somehow ignored, allowed to pass, unconsidered.”⁸⁰ What has changed is that some of these reports are being taken seriously “and treated as disgraceful and outrageous misconduct with which no self-respecting company or university can afford to be associated.”⁸¹ In asking whether sexual assault, harassment, and misconduct are disqualifying, voters, corporate boards, consumers, and other decision makers have made clear that survivors matter, that sexual assault and harassment are unacceptable, and that those who fail to treat all people as equals, regardless of sex, are unfit to hold high office.

It is true that removing harassers from high places will not resolve all harassment.⁸² As Professor Vicki Schultz has written, “sooner or later, other harassers will take their place—unless the underlying conditions that foster harassment in the first place are addressed.”⁸³ However, there are some positive signs here. Many of the institutions that have undergone leadership transitions in the wake of #MeToo reports have taken the opportunity to consider gender diversity. Out of 201 male leaders who lost their positions due to sexual harassment, almost half were replaced by women.⁸⁴ Nonetheless, removing perpetrators does not provide restitution to victims. To truly address sexual assault, harassment, and misconduct, comprehensive legal, public health, and education strategies are required. But in the course of calls for comprehensive change, it is important not to diminish the #MeToo movement’s accomplishments in ending high-level impunity.

II. WHY PROCEDURAL JUSTICE MATTERS

Because of their employment consequences for accused individuals, #MeToo’s informal procedures are controversial.⁸⁵ Calls for due process

⁸⁰ Rebecca Traister, *Why the Harvey Weinstein Sexual-Harassment Allegations Didn’t Come Out Until Now*, THE CUT (Oct. 5, 2017), https://www.thecut.com/2017/10/why-the-weinstein-sexual-harassment-allegations-came-out-now.html?utm_source=tw&utm_medium=s3&utm_campaign=sharebutton-t [<https://perma.cc/3YG7-M8WV>].

⁸¹ Catharine A. MacKinnon, *‘This Moment Turned Out to Be Fleeting’ Nine Reflections on #MeToo, One Year On*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/opinion/me-too-weinstein-one-year.html> [<https://perma.cc/DQU4-LYF8>].

⁸² For a discussion of the goals of the #MeToo and Times Up movements, see Murray, *supra* note 5, at 867. For more comprehensive suggestions on reform, see Schultz, *supra* note 67.

⁸³ Schultz, *supra* note 77, at 26. These underlying conditions include sex segregation and unstructured authority. *Id.* at 48–53.

⁸⁴ See Carlsen, *supra* note 6; Schultz, *supra* note 67, at 22–25 (discussing the links between sex segregation and harassment).

⁸⁵ See *supra* notes 10–12 and accompanying text.

have taken various forms, from exhortations not to rush to judgment,⁸⁶ to arguments that those making employment decisions should adopt procedural safeguards applicable to criminal, civil, or administrative proceedings,⁸⁷ to the insistence that only criminal courts can hear claims.⁸⁸ Many of these arguments rest on mistaken assumptions about the law and the troubling suggestion that high-profile men, most of them white, deserve exceptional protections against false allegations. But #MeToo advocates should still be concerned about the charge of a rush to judgment.

One response to the due process backlash is that technically, procedural requirements do not apply to most employment decisions. Criminal penalties like incarceration cannot be imposed outside of the criminal justice system, and so the rules of criminal justice, such as the requirement that proof be established beyond a reasonable doubt, do not apply outside of that system. The Constitution's Due Process Clause seldom applies to employment decisions. The main reason is that it does not generally bind non-state actors—such as private employers, voters, consumers, and shareholders.⁸⁹ The Due Process Clause only protects a subset of public employees, such as those with a recognized property interest in continued employment, for example, because of a collective bargaining agreement, state statute, employer policy, or contract that only allows discharge for cause.⁹⁰ Job applicants do not have any such

⁸⁶ See, e.g., Bartholet, *supra* note 15.

⁸⁷ See, e.g., Editorial Board, *The Presumption of Guilt*, WALL ST. J. (Sept. 21, 2018), <https://www.wsj.com/articles/the-presumption-of-guilt-1537570627> [<https://perma.cc/54A8-C4ZY>] (arguing that “the set of facts [Christine Blasey Ford] currently provides wouldn’t pass even the ‘preponderance of evidence’—or 50.01% evidence of guilt—test that prevails today on college campuses”).

⁸⁸ See, e.g., Mollie Hemmingway, *The Kavanaugh Allegation Process Is a Miscarriage of Justice for Everyone*, FEDERALIST (Sept. 19, 2018), <https://thefederalist.com/2018/09/19/the-kavanaugh-allegation-process-is-a-miscarriage-of-justice-for-everyone/> [<https://perma.cc/E4JT-DN9Z>] (“[T]he Senate is still an inappropriate place to litigate claims of sexual assault. Since Maryland apparently doesn’t have a statute of limitations on felony sex assault, charges could still be filed there if the case is strong enough to do so.”).

⁸⁹ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982) (discussing the “state action” requirement for certain constitutional claims, which requires that “the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State”). Even a scholar making the unlikely argument (rejected by every court to consider it) that due process applies to Title IX proceedings by private universities against students, see Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEXAS L. REV 15, 26 (2017), recognizes that due process does not apply to private employers in their proceedings against employees, *id.* at 48.

⁹⁰ See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

entitlements.⁹¹ Individuals who choose to resign rather than face further scrutiny waive any rights to due process.⁹² Due process also protects a public employee's liberty interest in their professional reputation, but only if the government falsely claims that an employee engaged in misconduct.⁹³ This right does not apply if it was the media that disclosed the information.⁹⁴

It is a widely-accepted myth that U.S. workers have automatic job protection.⁹⁵ In many U.S. jurisdictions, private employers are permitted to consider any entanglement by a worker with the criminal justice system as a ground for firing—even one resulting in an acquittal.⁹⁶ The reason most employers created internal complaint processes to resolve sexual harassment claims was to avoid lawsuits from victims, not to protect the interests of accused employees.⁹⁷ The Fair Credit Reporting Act was amended in 2003 to allow employers to conduct investigations

⁹¹ *Id.* (“To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”).

⁹² *See, e.g.,* *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 173–75 (4th Cir. 1988) (holding that “the mere fact that the choice is between comparably unpleasant alternatives—e.g., resignation or facing disciplinary charges—does not of itself establish that a resignation was induced by duress or coercion, hence was involuntary”).

⁹³ *See, e.g.,* *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam) (where the constitutional deprivation consists of a false and stigmatizing report about a public employee, due process requires the employee be given “an opportunity to clear his name” (quoting *Roth*, 408 U.S. at 573)). This right applies even if the employee has no property interest in continued employment. *Owen v. City of Independence*, 445 U.S. 622, 630 n.10 (1979). But a liberty interest alone is not sufficient for a claim; there must also be some sort of employment action, such as a termination. *See Paul v. Davis*, 424 U.S. 693, 709 (1976). The employee must also show the disclosure caused a stigma that harmed their future prospects for employment. *See, e.g., Cannon v. Vill. of Bald Head Island, N. Carolina*, 891 F.3d 489, 502–05 (4th Cir. 2018). Nonetheless, a name-clearing hearing does not result in reinstatement. *Codd*, 429 U.S. at 628.

⁹⁴ *Wojcik v. Massachusetts State Lottery Comm’n*, 300 F.3d 92, 103–04 (1st Cir. 2002).

⁹⁵ Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997) (reporting on survey results demonstrating that workers “consistently overestimate the degree of job protection afforded by law, believing that employees have far greater rights not to be fired without good cause than they in fact have”).

⁹⁶ Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 88–89 (2017) (“There is no comprehensive federal law safeguarding the employment rights of people without convictions, although Title VII and the Fair Credit Reporting Act (“FCRA”) extend protections in certain situations. A handful of state and local laws grant strong, enforceable rights, but most jurisdictions offer none.”). While some states have “ban-the-box” laws that forbid employers from asking about criminal records on job applications, those laws do not forbid employers from considering an applicant’s criminal history after making a provisional employment offer. Shelle Shimizu, *Beyond the Box: Safeguarding Employment for Arrested Employees*, 128 YALE L.J.F. 226, 233–35 (2018) (surveying employment protections based on criminal records).

⁹⁷ Arnov-Richman, *supra* note 19, at 97.

of employment-related misconduct or legal violations without any notice to the accused.⁹⁸ If an outside investigation results in some type of adverse employment action, an employer is only required to provide the accused with “a summary containing the nature and substance” of the investigator’s report.⁹⁹ The accused is not entitled to the names of any sources.¹⁰⁰ Union employees may have contractual rights to challenge their employers’ decisions through grievance processes, but these arrangements are diminishing in frequency.¹⁰¹ Employees with unusual bargaining power, such as ousted CBS chief Les Moonves, may be able to negotiate for the right to be terminated only under certain conditions, and may therefore avail themselves of formal legal procedures to challenge an employer’s finding of misconduct.¹⁰² This group of sheltered high-level employees cannot complain about lack of process.

The argument that those accused of sexual misconduct should receive special procedural protection, while those accused of other forms of misconduct do not, is a troubling form of exceptionalism. It “harken[s] back to a time when rape victims faced unique hurdles in criminal prosecution”¹⁰³ based on widespread beliefs “that women have a tendency to lie about rape and sexual assault.”¹⁰⁴ Exceptional procedural protections may also be rooted in a sexist view of gender roles that presupposes that accused men have special entitlements to their careers, professional reputations, and future prospects because they are men, while women whose careers are derailed by harassment have not lost anything of value because they are women.¹⁰⁵ Many commentators argue it is hypocritical to insist on due process for the accused but not access to justice for survivors.¹⁰⁶ This exceptionalism also raises questions about

⁹⁸ 15 U.S.C. § 1681a(y)(1)(B). This exemption does not apply under certain conditions, including if the employer discloses the results of an external investigation to the public. *Id.* § 1681a(y)(1)(D).

⁹⁹ *Id.* § 1681a(y)(2).

¹⁰⁰ *Id.*

¹⁰¹ Arnov-Richman, *supra* note 19, at 97.

¹⁰² See, e.g., Elizabeth Tippet, *CBS’ Moonves Scandal Shows Why Corporate America Needs Tougher CEO Pay Contracts*, CONVERSATION (Dec. 19, 2018), <https://theconversation.com/cbs-moonves-scandal-shows-why-corporate-america-needs-tougher-ceo-pay-contracts-109050> [<https://perma.cc/266J-3NJ7>].

¹⁰³ Anderson, *supra* note 36, at 2000 (discussing “rape or sexual assault exceptionalism”).

¹⁰⁴ *Id.* A 1940 treatise on evidence described “errant young girls and women coming before the courts in all sorts of cases” with “psychic complexes” that take the form of “contriving false charges of sexual offenses by men.” 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 459 (3d ed. 1940). The treatise warned: “On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.” *Id.*

¹⁰⁵ See KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 218 (2018).

¹⁰⁶ Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo>

racism—why are #HimToo advocates not concerned with procedural defects of the criminal justice system that disadvantage racial minorities?¹⁰⁷

Nonetheless, it is worthwhile to confront procedural objections on their own terms. To say that prominent people accused of sexual assault, harassment, and misconduct should not be permitted exceptional protections is not to say that normal principles of procedural fairness should be suspended.¹⁰⁸

If the #MeToo movement is to maintain its moral authority as a mechanism for disqualifying those who have committed serious forms of sexual misconduct from high-level positions of power, it must attend to principles of procedural justice.¹⁰⁹ Research from social psychology demonstrates that whether an authority is considered legitimate depends on whether people think its procedures are fair.¹¹⁰ With respect to legitimacy, fair procedures are more important than favorable outcomes.¹¹¹ Procedure may be particularly important when the “correct” outcome is not objectively clear.¹¹² Much of the debate over the Kavanaugh nomination was trained on procedural disputes, such as the propriety of raising an allegation at a late stage, the thoroughness of the FBI’s investigation, and the appropriate burdens and standards of proof.¹¹³ People care about being treated fairly because it expresses

/553427/ [https://perma.cc/ECY2-A33N] (“[F]airness also requires that those reporting violence and harassment be fully heard.”).

¹⁰⁷ See, e.g., Ayesha Rascoe, *Trump Pushes Due Process for Some, ‘Lock’ Them Up for Others*, NPR (Oct. 5, 2018), <https://www.npr.org/2018/10/05/654347194/trump-pushes-due-process-for-some-for-others-lock-them-up> [https://perma.cc/F7L7-9HB2] (discussing President Trump’s commitment to due process for his Supreme Court nominee but not the five black and Latino teenagers who were wrongfully convicted in New York’s “Central Park Five” rape case).

¹⁰⁸ Nor does the goal of ending sexual assault, harassment, and misconduct justify an “at will” employment regime that allows arbitrary terminations and is unfair to low-level workers accused of any type of misconduct. See Arnov-Richman, *supra* note 19, at 99–103.

¹⁰⁹ Cf. Murray, *supra* note 5, at 874–75 (“[A]t some point, the criticisms of #MeToo—concerns about due process and vigilantism—may make this kind of extralegal regulation unsustainable in the long term.”); Wexler, *supra* note 23, at 14 (“If the #MeToo Movement is perceived as deeply unfair, much of society is unlikely to willingly participate in its call for a social reckoning”).

¹¹⁰ Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 115, 133 (1992) (discussing research showing “a key factor affecting legitimacy across a variety of settings is the person’s evaluation of the fairness of the procedures used by the authority in question”); see also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). This research pertains to whether particular authorities are considered legitimate. Tyler & Lind, *supra* at 117. It suggests the legitimacy of the #MeToo movement may be in question to the extent that the public regards it as an authority in motivating decision makers such as boards, employers, voters, or consumers to remove accused leaders without fair process.

¹¹¹ Tyler & Lind, *supra* note 110, at 133.

¹¹² *Id.* at 134.

¹¹³ See, e.g., Abigail Abrams, *Here’s Sen. Susan Collins’ Full Speech about Voting to Confirm Kavanaugh*, TIME (Oct. 5, 2018), <http://time.com/5417444/susan-collins-kavanaugh-vote-transcript/> [https://perma.cc/SN5G-VRWA].

their equal status as group members.¹¹⁴ Thus, critics of the #MeToo movement have seized on slogans like “believe all women” as evidence of the movement’s aspirations to “mob rule.”¹¹⁵ Such slogans frame #MeToo as a battle of the sexes, inviting men to imagine themselves as falsely accused, rather than as potential victims themselves, or as people who share a stake in gender equality and the elimination of sexual abuse.¹¹⁶ If #MeToo’s extralegal procedures do not appear to adhere to basic procedural standards, those procedures will lose the persuasive force on which they depend, and the reckoning occasioned by the movement will prove to have been a fleeting one.

III. #METOO’S PROCEDURAL NORMS

An examination of high-profile cases in the #MeToo era reveals that rather than ignoring procedural justice, decisionmakers have relied on a set of evolving procedural norms for resolving these claims. One norm is that allegations are vetted by journalists according to the standards of that profession. Once aired publicly, allegations are scrutinized by skeptical commentators and other journalists. In the #MeToo era, allegations are unlikely to result in formal employment consequences unless they are “corroborated” in a colloquial sense of that term, or confirmed by follow-up investigations.

A. Vetting and Scrutiny

Journalistic standards require that reporters verify facts, seek both sides, and attribute information to its sources.¹¹⁷ The profession regards

¹¹⁴ Tyler & Lind, *supra* note 110, at 140 (“To the extent that a procedure is seen as indicating a positive, full-status relationship, it is judged to be fair, and to the extent that a procedure appears to imply that one’s relationship with the authority or institution is negative or that one occupies a low-status position, the procedure is viewed as unfair.”).

¹¹⁵ See, e.g., Bari Weiss, *The Limits of ‘Believe All Women,’* N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html> [<https://perma.cc/598H-YSBK>]. For a thoughtful response, see Sady Doyle, *Despite What You May Have Heard, “Believe Women” Has Never Meant “Ignore Facts”*, ELLE (Nov. 29, 2017), <https://www.elle.com/culture/career-politics/a13977980/me-too-movement-false-accusations-believe-women/> [<https://perma.cc/S9Y7-SLCE>].

¹¹⁶ Cf. Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENGLAND L. REV. 1309, 1311 (1992) (“Men’s fear of being victimized [by unfair enforcement of rules against sexual abuse] is only indirectly and ambiguously related to whatever the reality might turn out to be. The fear varies from man to man, but there is still an unmistakable group interest in avoiding having to worry about enforcement excesses; it is in direct conflict with women’s interest in not having to worry about being abused.”).

¹¹⁷ SOC’Y PROF’L JOURNALISTS, CODE OF ETHICS (2014), <https://www.spj.org/pdf/spj-code-of-ethics.pdf> [<https://perma.cc/GG2G-D2KM>]. The Society for Professional Journalists is “the largest voluntary association of news reporters and editors in the United States” and its Code of Ethics is widely cited. Jane E. Kirtley, *Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case*, in INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM 145 (Howard M. Wasserman ed., 2011).

its “core function” as “getting the facts right.”¹¹⁸ Journalists are advised to employ “verification routines” to avoid errors before publication,¹¹⁹ and issue corrections of errors caught by readers after publication.¹²⁰ High-profile magazines employ independent research editors to confirm the factual details of their print stories.¹²¹ While many outlets do not have regular fact-checking processes for online content, they focus scrutiny on investigative pieces and those that could give rise to liability.¹²² Ethical journalism also requires consideration of both sides, which means reporters must “[d]iligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing.”¹²³ Another principle of ethical journalism is transparency: journalists should explain their methods and sources to readers, so readers themselves can assess the potential for errors and bias.¹²⁴ This requires that stories identify the sources for particular pieces of information,¹²⁵ and explain any decisions to allow sources to remain anonymous.¹²⁶ Journalists in the #MeToo era recognize that these rules cannot be suspended in reporting on sexual assault.

Before the #MeToo movement, there were two notorious instances of misreporting on campus sexual assault: (1) the 2006 news coverage of accusations of sexual assault by members of the Duke Lacrosse team;¹²⁷ and (2) a retracted 2014 article in *Rolling Stone Magazine* about an alleged rape at a fraternity party at the University of Virginia.¹²⁸ In the Duke case, a prosecutor who was up for re-election fed falsehoods and sound bites to uncritical reporters.¹²⁹ Ultimately, other

¹¹⁸ Kelly McBride & Tom Rosenstiel, *Introduction*, *THE NEW ETHICS OF JOURNALISM: PRINCIPLES FOR THE 21ST CENTURY* 5, 5 (Kelly McBride & Tom Rosenstiel, eds., 2013).

¹¹⁹ Lucas Graves & Michelle A. Amazeen, *Fact-Checking as Idea and Practice in Journalism*, in *OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION* (2019).

¹²⁰ See, e.g., Margaret Sullivan, *Make No Mistake, but if You Do, Here's How to Correct It*, N.Y. TIMES PUBLIC EDITOR'S BLOG (Jan. 16, 2013, 5:45 PM), <https://publiceditor.blogs.nytimes.com/2013/01/16/make-no-mistake-but-if-you-do-heres-how-to-correct-it/> [<https://perma.cc/737M-EPRF>].

¹²¹ Stephanie Fairington, *In the Era of Fake News, Where Have All the Fact-Checkers Gone?*, COLUM. JOURNALISM REV. (Feb. 23, 2018), https://www.cjr.org/business_of_news/fact-checking.php [<https://perma.cc/2YDG-YCZ6>]; Susan Sivek & Sharon Bloyd-Peshkin, *Where Do Facts Matter? The Digital Paradox in Magazines' Fact Checking Practices*, 12 JOURNALISM PRACTICE 400 (2018).

¹²² See Fairington, *supra* note 121; Sivek & Bloyd-Peshkin, *supra* note 121.

¹²³ SOC'Y PROF'L JOURNALISTS, *supra* note 117.

¹²⁴ BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 114 (3rd ed. 2013).

¹²⁵ *Id.*

¹²⁶ *Id.* at 117.

¹²⁷ Kirtley, *supra* note 117, at 146–52; Rachel Smolkin, *Justice Delayed*, AM. JOURNALISM REV. (Aug./Sept. 2007).

¹²⁸ Sheila Coronel, Steve Coll, & Derek Kravitz, *Rolling Stone's Investigation: 'A Failure that Was Avoidable'*, COLUM. REV. JOURNALISM (Apr. 5, 2015), http://www.cjr.org/investigation/rolling_stone_investigation.php [<https://perma.cc/HA2L-S23V>].

¹²⁹ See, e.g., Kirtley, *supra* note 117, at 158–59 (“[M]any in the media, by accepting the ‘official

journalists helped to uncover information that undermined the prosecutor's case against the accused players and led to his disbarment.¹³⁰ In the University of Virginia case, the *Rolling Stone* reporter failed to verify basic facts told to her by the accuser, failed to speak with the friends the accuser identified as being present on the night in question, failed to give the accused fraternity enough details about the incident to enable a response, and failed to make clear that the article's only source for certain information was the accuser, despite the contrary advice of a fact checker.¹³¹ At *Rolling Stone's* request, *The Columbia Journalism Review* issued a report on what went wrong, concluding that "[t]he magazine set aside or rationalized as unnecessary essential practices of reporting" and that the magazine's "failure . . . need not have happened, even accounting for the magazine's sensitivity to [the accuser]'s position."¹³²

Investigative journalists have heeded the lessons of these incidents in reporting on #MeToo.¹³³ *The New York Times* reporters verified the accuracy of their story about Harvey Weinstein "through interviews with current and former employees and film industry workers, as well as legal records, emails and internal documents from the businesses he has run, Miramax and the Weinstein Company."¹³⁴ They interviewed people that Weinstein's victims had confided in about his abuse at the time, such as friends and relatives.¹³⁵ They gave Weinstein an opportunity to comment on the story and printed his statement as well as quotations from his lawyer.¹³⁶ They attributed the facts they reported to specific sources, or explained why sources wished to remain anonymous.¹³⁷ In the #MeToo era, some journalists have established their own standards as to what sort of corroborative evidence is required for

version' of the alleged crime without question, effectively became mouthpieces of the government (or of other powerful institutions, such as Duke University), largely ignoring other voices. They accepted the prosecution's version of events, taking officials' words at face value and reporting them without challenge.")

¹³⁰ *Id.* at 144; *see also id.* at 154.

¹³¹ Coronel, Coll, & Kravitz, *supra* note 128.

¹³² *Id.*

¹³³ *See* Poynter Staff, *supra* note 19 (discussing standards for sourcing and verification, including the caution that "While it is often impossible to verify specific claims of sexual harassment or assault, it is important to verify as much as possible about the story including: If the source says she shared her story with friends or family, can you confirm that?, Can other facts around the story be checked, including employment dates and times, travel events, emails or text messages? Are there any documents or evidence that support the general story?"); Sivek & Bloyd-Peshkin, *supra* note 121, at 15 (quoting magazine editors about their reactions to the *Rolling Stone* case).

¹³⁴ Kantor & Twohey, *supra* note 43.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* One source, for example, "who asked not to be identified to protect her privacy, said a nondisclosure agreement prevented her from commenting." *Id.*

a newsworthy story.¹³⁸ For example, they ask accusers, “Who did you tell after this happened?” so that they may confirm the story with the people the accuser confided in.¹³⁹

It is true that not every example of #MeToo reporting has been Pulitzer-prize winning journalism, but even stories that have received criticism have met basic standards. In a controversial story posted on Babe.net, an anonymous 23-year-old photographer, referred to as “Grace,” accused 34-year-old comedian Aziz Ansari of pressuring her into sexual activity while the two were on a date.¹⁴⁰ The story was criticized for its “execution”: it was told in a tone befitting a tabloid, it included details best described as gossip, and it failed to address its subject with “range or depth.”¹⁴¹ But the story was not criticized for reporting falsehoods, misattributing information, or failing to seek both sides. It attributed the facts to Grace and confirmed her story with text message records and the friends she had confided in.¹⁴² It posted a text message in which Ansari told Grace, “Clearly, I misread things in the moment and I’m truly sorry,” as well as a statement in which Ansari admitted to sexual activity, but disputed whether there was any indication that it was other than consensual.¹⁴³ Some journalists have criticized the story for its haste, which could make it appear as though the editors did not conduct “due diligence.”¹⁴⁴ But Babe.net conducted sev-

¹³⁸ Jessica Bennett, gender editor for *The New York Times*, has refused to publish reports of sexual assault unless there are two other individuals to attest that the victim reported the assault to them at the time. Alexandra Botti & T.J. Raphael, *How Journalists Corroborate Sexual Harassment and Assault Claims*, PRI (Dec. 18, 2017), <https://www.pri.org/stories/2017-12-18/how-journalists-corroborate-sexual-harassment-and-assault-claims> [<https://perma.cc/HKG5-JYYV>].

¹³⁹ *Id.*

¹⁴⁰ 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> [<https://perma.cc/GZ29-NVL5>]. Grace stated that Ansari aggressively pressured her into performing oral sex and engaging in other sexual activity, despite her “non-verbal cues,” such as “pulling away,” and her “verbal cues,” such as telling him “next time” and stating that she did not want to “feel forced.” *Id.*

¹⁴¹ Julianne Escobedo Shepherd, *Babe, What Are You Doing?*, JEZEBEL (Jan. 16, 2018), <https://jezebel.com/babe-what-are-you-doing-1822114753?rev=1516127284762> [<https://perma.cc/WN5U-DTY7>].

¹⁴² Way, *supra* note 140.

¹⁴³ *Id.*

¹⁴⁴ Caroline Franke, *The Controversy Around Babe.net’s Aziz Ansari Story, Explained*, VOX (Jan. 18, 2018), <https://www.vox.com/culture/2018/1/17/16897440/aziz-ansari-allegations-babe-me-too> [<https://perma.cc/35XL-N6WB>] (“Is it possible to do your due diligence on a story in [one week] given the space and resources? Sure. Does it leave you and your subject vulnerable to probing criticism about whether you did your due diligence? Absolutely.”).

eral interviews, fact-checked the story, and sought the advice of a lawyer.¹⁴⁵ The story did not end Ansari’s career; rather, Ansari “mostly disappeared from public life” for a few months before resuming his stand-up comedy.¹⁴⁶

In a few instances, allegations of sexual assault against particular individuals have been aired without vetting by journalists. Some people have posted specific accusations on social media sites such as Twitter.¹⁴⁷ Others have authored blog posts and essays.¹⁴⁸ There are also examples of crowdsourced lists,¹⁴⁹ such as the “Shitty Media Men List:” a google document circulated in October 2017 that allowed anonymous users to collect “rumors and allegations of sexual misconduct, much of it violent, by men in magazines and publishing.”¹⁵⁰ Journalists are particularly wary of crowdsourced allegations.¹⁵¹ It is difficult to find examples of instances in which employment actions were taken against high-profile individuals based solely on anonymous allegations that were not vetted by journalists.¹⁵² In a few cases, allegations on anonymous lists resulted

¹⁴⁵ Kerry Flynn, *What is Babe? Meet the Site that Published the Aziz Ansari Allegation*, MASHABLE (Jan. 15, 2018), <https://mashable.com/2018/01/15/what-is-babe-aziz-ansari-sexual-misconduct-allegation/#hroXzRfCVmqQ> [<https://perma.cc/9CP2-KU9Y>].

¹⁴⁶ Sopan Deb, *Aziz Ansari, Sidelined by Accusation, Plays to a Big Crowd Back Home*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/arts/television/aziz-ansari-standup-charleston.html> [<https://perma.cc/YPM9-WV5P>].

¹⁴⁷ See, e.g., Travis M. Andrews, *CBS Is Dropping Jeremy Piven’s Show Amid Sexual Misconduct Allegations Against the Actor*, WASH. POST (Nov. 27, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2017/11/28/cbs-is-dropping-jeremy-piven-drama-amid-sexual-misconduct-allegations-against-the-actor/?utm_term=.ae2384bb5c8e [<https://perma.cc/YXE5-CTDZ>] (discussing allegations against actor Jeremy Piven, including one posted on Twitter).

¹⁴⁸ See, e.g., Chloe Dykstra, *Rose-Colored Glasses: A Confession*, MEDIUM (June 14, 2018), <https://medium.com/@skydart/rose-colored-glasses-6be0594970ca> [<https://perma.cc/2GMF-YGG2>]; Leeann Tweeden, *Senator Al Franken Kissed and Groped Me Without My Consent, and There’s Nothing Funny About It*, 790KABC (Nov. 16, 2017), <http://www.kabc.com/2017/11/16/leann-tweeden-on-senator-al-franken/> [<https://perma.cc/Q2VH-BPA7>].

¹⁴⁹ See, e.g., Murray, *supra* note 5, at 869 (discussing anonymous “crowdsourced registries” and their critics); Tuerkheimer, *supra* note 5, at 9–13 (discussing anonymous accusations).

¹⁵⁰ Moira Donegan, *I Started the Media Men List; My Name is Moira Donegan*, THE CUT (Jan. 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [<https://perma.cc/D3F6-4UBV>]. Donegan’s purpose was not to subject accused men to consequences; rather, it was to open up the traditional whisper networks that warn women of danger. *Id.*

¹⁵¹ One journalism professor has advised reporters to “[t]hink of an anonymous crowdsourced list as Wikipedia wrapped in razor blades. By all means examine it—but do so carefully or there may be a lot of blood on your hands.” James Warren, *A Word of Caution: Documents Like that Media Men List Are Like ‘Wikipedia Wrapped in Razor Blades,’* POYNTER (Jan. 12, 2018), <https://www.poynter.org/ethics-trust/2018/a-word-of-caution-documents-like-that-media-men-list-are-like-wikipedia-wrapped-in-razor-blades/> [<https://perma.cc/4QTK-PATJ>] (quoting Jill Geisler, the Bill Plante Chair in Leadership and Media Integrity at Loyola University Chicago). When reporting on allegations of sexual misconduct that have become public through, for example, Twitter, experts on journalistic ethics advise that reporters should question the sources of the allegation, look for corroborating evidence, explain the context of the allegation and whether there is any supporting evidence, and inform readers of all the relevant information so that they are able to assess the facts for themselves. KOVACH & ROSENSTIEL, *supra* note 124, at 124–25.

¹⁵² *But see* Bari Weiss, *What Do You Do When You Are Anonymously Accused of Rape*, N.Y.

in internal investigations that led to resignations.¹⁵³ A number of the claims that came to light during the #MeToo movement—including those against Harvey Weinstein, Kevin Spacey, and Matt Lauer—had been the subjects of “blind items” and gossip columns for years.¹⁵⁴ But those allegations did not have employment consequences for these accused celebrities until after they had received attention from investigative journalists.¹⁵⁵

Moreover, even after a story appears, journalists subject high-profile allegations to critical scrutiny, and different media outlets report on alternative perspectives and updated information.¹⁵⁶ The Shitty Media Men list’s allegations against one individual received critical coverage in *The New York Times*.¹⁵⁷ Commentators rushed to the defense of Aziz

TIMES (Oct. 13, 2018), <https://www.nytimes.com/2018/10/13/opinion/stephen-elliott-moira-donegan-media-men.html> [<https://perma.cc/A38F-TDQU>] (discussing the defamation suit brought by writer Stephen Elliott based on an anonymous assertion on the Shitty Media Men list that he had been the subject of “rape accusations”). Elliott claims that the false rape allegation harmed his professional reputation, causing him to be disinvited from events and reducing his opportunities to publicize a new book. Stephen Elliott, *How an Anonymous Accusation Derailed My Life*, QUILLETTE (Sept. 25, 2018), <https://quillette.com/2018/09/25/how-an-anonymous-accusation-derailed-my-life/> [<https://perma.cc/5LX9-2LHB>]. Others question whether “What happened is that years of behaving badly (not criminally) caught up to him.” Marisa Siegel, *Firsthand*, RUMPUS (Sept. 26, 2018), <https://therumpus.net/2018/09/firsthand/> [<https://perma.cc/53YV-SHS8>] (accusing Elliott of sexist behavior in the workplace).

¹⁵³ See, e.g., Alexandra Alter & Sydney Ember, *Paris Review Editor Resigns Amid Inquiry into His Conduct with Women*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/books/lorin-stein-resigns-the-paris-review.html> [<https://perma.cc/3SM9-GGK9>]; A.J. Chavar, *Exclusive: National Geographic Investigated a Top Photo Editor for Sexual Misconduct. He Left Quietly, but Women Are Speaking Out*, VOX (Jan. 31, 2018, 12:33 PM), <https://www.vox.com/2018/1/29/16934552/exclusive-national-geographic-sexual-misconduct> [<https://perma.cc/MRS2-LPDC>].

¹⁵⁴ Alyssa Bereznak, *Blind Item Revealed: How a Scorned Form of Gossip Changed Hollywood*, RINGER (Dec. 13, 2018), <https://www.theringer.com/2018/12/13/18138512/blind-item-revealed-how-a-scorned-form-of-gossip-changed-hollywood> [<https://perma.cc/C95D-FUAX>]. “Blind items” are “anonymous snippets of gossip that require readers to guess the parties involved.” *Id.* They are left “intentionally vague” so that “only the publication’s savviest readers” know who they refer to. *Id.* For one example, see, e.g., Ramin Setoodeh, *Ashley Judd Reveals Sexual Harassment by Studio Mogul*, VARIETY (Oct. 6, 2015), <https://variety.com/2015/film/news/ashley-judd-sexual-harassment-studio-mogul-shower-1201610666/> [<https://perma.cc/N3BK-93RQ>].

¹⁵⁵ See, e.g., *supra* note 21; Vary, *supra* note 76. The immediate cause of Matt Lauer’s termination was an internal complaint, but at the time he was fired, journalists had been investigating allegations against him for months. Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017), <https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/> [<https://perma.cc/QKB8-WQNQ>].

¹⁵⁶ More than a year after allegations against former Senator Al Franken led to his resignation, commentators continue to critically question the evidence against him. See, e.g., Jane Mayer, *The Case Against Al Franken*, NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> [<https://perma.cc/ZLZ3-N4YE>]; Emily Yoffee, *Democrats Need to Learn From Their Al Franken Mistake*, ATLANTIC (Mar. 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/democrats-shouldnt-have-pressured-al-franken-resign/585739/> [<https://perma.cc/TV9D-R4MT>].

¹⁵⁷ Weiss, *supra* note 115.

Ansari, taking issue with Grace's characterization of what had happened to her as "sexual assault"¹⁵⁸ and arguing that Ansari's conduct had been unfairly equated to worse behavior.¹⁵⁹ There was a swift and critical response to allegations by Julie Swetnick that Supreme Court nominee Brett Kavanaugh may have participated in a gang rape in the 1980s.¹⁶⁰ The reaction to this allegation demonstrates the vetting norm: commentators criticized Michael Avenatti, Swetnick's lawyer, for submitting an affidavit containing Swetnick's statement rather than allowing journalists to first investigate the claim.¹⁶¹ Media reports questioned Swetnick's account, character, and credibility.¹⁶² Rather than having an adverse impact on Kavanaugh's confirmation prospects, many commentators believe that the weakness of Swetnick's allegation cast more credible allegations in a negative light.¹⁶³

B. Investigation and Corroboration

Another informal norm is that allegations do not generally result in specific employment consequences unless they are borne out through formal investigation, corroborated, or both. Corroboration is not a formal legal requirement. Historically, a claim of rape required "corroborative evidence," such as physical injuries, because rape allegations were treated with exceptional skepticism.¹⁶⁴ But today, credible evidence could be a single victim's testimony, depending on the circumstances.¹⁶⁵ The corroboration requirement has come to have a specific meaning in #MeToo discussions: that in the very least, an accusation

¹⁵⁸ Way, *supra* note 140.

¹⁵⁹ For a summary of just some of the critical reaction, see Franke, *supra* note 144.

¹⁶⁰ Aaron Blake, *Did Michael Avenatti Help Doom the Case Against Brett Kavanaugh?*, WASH. POST (Oct. 5, 2018), <https://www.washingtonpost.com/politics/2018/10/05/did-michael-avenatti-help-doom-case-against-brett-kavanaugh/> [<https://perma.cc/9P4X-5GZM>]. See also Mayer, *supra* note 156 (critically assessing the decision of a radio station website to post an essay by Leeann Tweeden accusing Al Franken of sexual misconduct without first requesting comment from Franken or fact checking Tweeden's statements).

¹⁶¹ *Id.*; Jackie Kucinich et al., *Democrats to Michael Avenatti: You're Not Helping in the Kavanaugh Fight*, DAILY BEAST (Sept. 24, 2018), <https://www.thedailybeast.com/democrats-to-avenatti-youre-not-helping-in-the-kavanaugh-fight> [<https://perma.cc/5H4S-6B34>] (stating that Senator Chris Coons (D-DE), "suggested Avenatti should have followed in the footsteps of [Dr. Christine Blasey] Ford, who 'attempted to contact news outlets and the committee before Judge Kavanaugh was confirmed as being the nominee'" and another "Democratic source" as saying, "If he had vetted it through a media outlet and had journalists represent it in a well-reported way or have the committee introduce it, it would have been better").

¹⁶² Blake, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ Anderson, *supra* note 36, at 2000.

¹⁶⁵ Tuerkheimer, *supra* note 34, at 2.

must be supported by more evidence than a single victim's statements.¹⁶⁶ Accusations by multiple victims qualify.¹⁶⁷ *The New York Times* made a list of "prominent people who lost their main jobs, significant leadership positions or major contracts, and whose ousters were publicly covered in news reports" as a result of sexual misconduct allegations in the year following the Weinstein story.¹⁶⁸ By my count, out of the 202 cases listed by the *New York Times*, only fifty involved a single accuser, and in ten of those instances, the accused person admitted to some form of wrongdoing.¹⁶⁹ Out of the forty remaining cases, in all but five, the media reported there was some type of investigation.¹⁷⁰

¹⁶⁶ Whether this is a fair rule for survivors is a different question. Cf. MacKinnon, *supra* note 1 ("[I]n cases of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.")

¹⁶⁷ This is not the legal meaning of corroboration. Legal rules sometimes limit "me too" evidence. See, e.g., Jeannie Suk Gerson, *Bill Cosby's Crimes and the Impact of #MeToo on the American Legal System*, NEW YORKER (Apr. 27, 2018), <https://www.newyorker.com/news/news-desk/bill-cosbys-crimes-and-the-impact-of-metoo-on-the-american-legal-system> [<https://perma.cc/2M4R-WFSZ>]. It may be akin to the legal requirement of "numerosity" for a class action lawsuit. See FED R. CIV. P. 23. I am grateful to Lesley Wexler for pointing out this analogy.

¹⁶⁸ Carlsen et al., *supra* note 6. I do not claim that this is a comprehensive set of cases. This list reflects the judgments of *New York Times* reporters about what qualifies as "prominent." It includes only men, although there are at least three women—Asia Argento, Andrea Ramsey, and Avital Ronnell—who lost opportunities on account of reports of sexual misconduct. One consulting firm claims to have compiled its own proprietary list of over 900 people, including twenty-nine women, whose names have appeared in "at least seven news articles as accused of behavior that includes sexual harassment, assault, abuse or rape and condoning and/or helping to hide such behavior" since December 2015. See Jessica Brice & Jeff Green, *Woman Compiling MeToo Names Says They're the Tip of the Iceberg*, BLOOMBERG (Oct. 17, 2018), <https://www.bloomberg.com/news/articles/2018-10-17/woman-compiling-metoo-names-says-they-re-tip-of-the-iceberg> [<https://perma.cc/KW6Z-FAHN>].

¹⁶⁹ This count is based on news stories in addition to the *New York Times* article. A chart describing those sources is on file with the author.

¹⁷⁰ One of the five exceptions involved allegations detailed in a sexual harassment lawsuit. Jessica Sidman & Anna Spiegel, *The Inside Story of Mike Isabella's Fallen Empire*, WASHINGTONIAN (Nov. 26, 2018), <https://www.washingtonian.com/2018/11/26/the-inside-story-of-mike-isabellas-fallen-empire/> [<https://perma.cc/3ZYH-VUHK>]. Two involved allegations of criminal conduct. Anita Busch, *Tom Sizemore Dropped From Thriller 'The Door' After Sexual Misconduct Allegations*, DEADLINE HOLLYWOOD (Nov. 15, 2017), <https://deadline.com/2017/11/tom-sizemore-sexual-misconduct-allegations-dropped-from-horror-film-the-door-1202208846/> [<https://perma.cc/A6GU-YFG5>]; Michael Schneider, *T.J. Miller Replaced as Mucinex Spokesman, Coinciding With Sexual Assault Allegations*, INDIEWIRE (Feb. 6, 2018), <https://www.indiewire.com/2018/02/tj-miller-mucinex-jason-mantzoukas-super-bowl-ad-1201925909/> [<https://perma.cc/QXT3-4SAT>]. In one case, there was evidence in the form of text messages that a lawmaker had communicated with a teenage girl in ways legislative leaders regarded as inappropriate. Keith M. Phaneuf, *Angel Arce to Resign From General Assembly*, CT MIRROR (Mar. 7, 2018), <https://www.courant.com/politics/hc-pol-arce-texts-whats-next-20180327-story.html> [<https://perma.cc/W4WQ-6DY5>]. And in one case, the accused and his employer denied that the allegations of harassment were related to his decision to resign. Rachel Monahan, *Former Portland Mayor Sam Adams Has Abruptly Left his Job at a D.C. Think Tank*, WILLAMETTE WEEK (Dec. 6, 2017), <https://www.wweek.com/news/city/2017/12/06/former-portland-mayor-sam-adams-has-abruptly-left-his-job-at-a-d-c-think-tank/> [<https://perma.cc/6AJ2-W96A>].

One evolving norm in the #MeToo era is that institutions generally conduct investigations. Out of the 95 cases in which the accused individual did not admit to wrongdoing or resign,¹⁷¹ there were reports of investigations in all but 27.¹⁷² Sexual harassment investigations are a commonplace function of human resources departments.¹⁷³ Institutions often hire outside counsel for high-profile or sensitive investigations.¹⁷⁴ When a corporation conducts an internal investigation into sexual harassment by an existing employee, it is advised to apply the “preponderance of the evidence standard,” which means deciding whether misconduct was more likely than not to have occurred.¹⁷⁵ This is because sexual harassment is a civil matter, and the preponderance of the evidence standard is commonly used in civil cases, rather than the higher “beyond a reasonable doubt” standard used in criminal matters.¹⁷⁶ As in criminal cases, a survivor’s credible testimony alone may be sufficient evidence.¹⁷⁷ Nonetheless, “[m]any employers falsely believe that if there are no independent witnesses, there can be no finding of harassment,” while others “balk[] at making a finding that conduct occurred” because of concerns about the impact on the accused person’s career.¹⁷⁸

The details of most internal investigations are confidential. But a number of these investigations have come out in favor of the accused.¹⁷⁹ The Ford-Kavanaugh controversy—in which the FBI investigated Dr. Christine Blasey Ford’s allegation that she had been sexually assaulted by Kavanaugh when they were teenagers before the Senate voted to confirm Kavanaugh to the Supreme Court—is a notable example, but

¹⁷¹ Those who resign rather than face an investigation cannot complain about lack of process. See *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 173–75 (4th Cir. 1988).

¹⁷² Many of the cases in which there was no employer investigation involved investigative journalism that uncovered corroborating evidence, such as the reporting on Harvey Weinstein. See *supra* note 21.

¹⁷³ See, e.g., AMY OPPENHEIMER & CRAIG PRATT, INVESTIGATING WORKPLACE HARASSMENT: HOW TO BE FAIR, THOROUGH, AND LEGAL 50 (2002).

¹⁷⁴ *Id.* at 62.

¹⁷⁵ *Id.* at 108–09; see also Dori Meinert, *How to Investigate Sexual Harassment Allegations*, SHRM (Jan. 8, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/how-to-investigate-sexual-harassment-allegations.aspx> [<https://perma.cc/R9DP-SH4D>].

¹⁷⁶ OPPENHEIMER & PRATT, *supra* note at 109 (explaining that if an employer applies the “beyond a reasonable doubt” standard and finds no harassment occurred, but then a civil jury finds that harassment did occur based on a “preponderance of the evidence,” there is a risk that the jury will “question the employer’s good faith and may award significant damages to the complainant.”).

¹⁷⁷ *Id.* at 110.

¹⁷⁸ *Id.*

¹⁷⁹ My focus is not the fairness of these investigations, because they are not unique features of the #MeToo moment, and they are not extralegal in the same sense; rather, they have insinuated themselves into the fabric of sexual harassment law. See, e.g., LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 183–88 (2016).

there are also others.¹⁸⁰ For example, after actor Chloe Dykstra published an essay accusing her ex-boyfriend, television host Chris Hardwick, of emotional abuse and sexual assault, Hardwick's employer AMC suspended him and conducted an internal investigation with the assistance of an outside law firm.¹⁸¹ After the investigation, Hardwick was reinstated.¹⁸² After eight women accused actor Morgan Freeman of harassment in forms such as “demeaning comments” and “unwanted touching,”¹⁸³ the National Geographic network, which was producing a series by Freeman, and SAG-AFTRA, which had awarded Freeman a SAG Life Achievement Award, both conducted investigations and decided not to take any adverse action against Freeman.¹⁸⁴ After Pulitzer-prize winning author Junot Díaz was accused of misconduct, including an incident of forcible kissing, three institutions—the Pulitzer Prize board, M.I.T., where he teaches, and the *Boston Review*, where he is a fiction editor—each conducted investigations and decided to take no action against him.¹⁸⁵

In other contexts, how strong the evidence must be to justify an employment decision and what type of evidence counts as corroborative has been the subject of debate. During the Kavanaugh confirmation hearings, some commentators argued that because of the importance of a Supreme Court appointment, the Senate should disqualify the nominee if there were “credible” evidence of sexual misconduct—a lower

¹⁸⁰ See, e.g., German Lopez, *The FBI Investigation of Kavanaugh Was Doomed from the Start*, VOX (Oct. 5, 2018), <https://www.vox.com/policy-and-politics/2018/10/5/17940738/fbi-investigation-kavanaugh-thorough-limits> [https://perma.cc/V7P7-Z32Y].

¹⁸¹ Dykstra, *supra* note 148. With respect to sexual assault, Dykstra stated that “I let him sexually assault me.” *Id.* While Dykstra did not identify Hardwick by name, she included enough details to allow readers to identify him. Corinne Heller, *Chris Hardwick Returning to AMC After Sexual Assault Investigation*, E! NEWS (Jul. 25, 2018, 2:28 PM), <https://www.eonline.com/news/944736/chris-hardwick-s-talk-show-pulled-by-amc-amid-sexual-assault-claims> [https://perma.cc/CRV7-PZMF].

¹⁸² Heller, *supra* note 181 (reporting that AMC released the following statement: “We take these matters very seriously and given the information available to us after a very careful review, including interviews with numerous individuals, we believe returning Chris to work is the appropriate step”).

¹⁸³ An Phung & Chloe Melas, *Women Accuse Morgan Freeman of Inappropriate Behavior, Harassment*, CNN (May 28, 2018, 11:56 PM), <https://www.cnn.com/2018/05/24/entertainment/morgan-freeman-accusations/index.html> [https://perma.cc/EM26-A27S].

¹⁸⁴ David Robb, *Morgan Freeman to Keep SAG Lifetime Achievement Award Following Harassment Probe*, FOX NEWS (Sept. 7, 2018), <https://www.foxnews.com/entertainment/morgan-freeman-to-keep-sag-lifetime-achievement-award-following-harassment-probe> [https://perma.cc/FXP6-GTDC].

¹⁸⁵ Julia Jacobs, *Junot Díaz Welcomed Back by Pulitzer Prize After Review into Sexual Misconduct Claims*, GUARDIAN (Nov. 19, 2018), <https://www.theguardian.com/books/2018/nov/19/junot-diaz-welcomed-back-by-pulitzer-prize-after-review-into-sexual-misconduct-claims> [https://perma.cc/ASL6-CQ3Z].

standard than the preponderance of the evidence.¹⁸⁶ Senator Susan Collins, however, one of the last senators to announce her vote in favor of Justice Kavanaugh's confirmation, stated that a preponderance of the evidence standard should apply.¹⁸⁷ While Collins found Dr. Ford's testimony to be "sincere, painful, and compelling," she concluded that Ford's allegations were insufficient due to the lack of "corroborating evidence."¹⁸⁸ This was despite the fact that Ford had confided in her husband and a counselor about her sexual assault in 2012.¹⁸⁹

Thus, when public allegations of sexual assault, harassment, or misconduct are raised against high-level leaders, a set of informal norms has developed for evaluating whether those allegations warrant dismissal. These norms require that public allegations be vetted according to journalistic standards of verification, attribution, and seeking both sides. The allegations should be specific enough to permit the accused person to respond meaningfully and to allow for further scrutiny by the media and the public. Before action is taken, decision makers require an admission of misconduct by the accused, corroborative evidence, or a formal investigation. Terminations of high-level employees based on single accusations alone are deviations from these norms. Critics of #MeToo have brought to light few, if any, such cases.¹⁹⁰

IV. RESPONDING TO PROCEDURAL OBJECTIONS

This Part defends #MeToo's informal procedural system against the charge that it is unfair to the accused on procedural grounds. Overlooking the fact that legal procedures are not required in extralegal contexts, this Part addresses the fairness concerns that underlie the procedural justice critique. Specifically, it responds to the objections that

¹⁸⁶ See, e.g., Kate Shaw, *How Strong Does the Evidence Against Kavanaugh Need to Be?*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/opinion/kavanaugh-blasey-allegation-disqualify.html> [<https://perma.cc/SG8P-5QBX>].

¹⁸⁷ David A. Graham, *Susan Collins Says She Believes Survivors—Just Not Ford*, ATLANTIC (Oct. 5, 2018), <https://www.theatlantic.com/politics/archive/2018/10/susan-collins-kavanaugh-sexual-assault/572347/> [<https://perma.cc/3YP7-7E8U>] ("This is not a criminal trial, and I do not believe that claims such as these need to be proved beyond a reasonable doubt. Nevertheless, fairness would dictate that the claims at least should meet a threshold of more likely than not as our standard." (quoting Senator Collins)).

¹⁸⁸ Abrams, *supra* note 113 (quoting Senator Collins). Later, Senator Collins stated that she thought Dr. Ford was mistaken about the identity of her assailant. Caroline Kelly, *Collins: 'I Do Not Believe That Brett Kavanaugh Was' Ford's Assailant*, CNN (Oct. 7, 2018), <https://www.cnn.com/2018/10/06/politics/collins-sotu-kavanaugh-cnntv/index.html> [<https://perma.cc/3G2W-KNDX>].

¹⁸⁹ *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.b9d91041e335 [<https://perma.cc/653E-77AT>] (testimony of Christine Blasey Ford that "My husband recalls that I named my attacker as Brett Kavanaugh.").

¹⁹⁰ See *supra* notes 152 & 170 (collecting news stories on cases that might arguably fit into this category); *infra* notes 289–293 (discussing Andrea Ramsay).

#MeToo's procedural norms are unenforceable; that survivors have waived their rights to complain informally by failing to use legal procedures; that only formal legal tribunals are equipped to handle claims; that #MeToo's procedures fail to provide the accused with notice of the claims against them, a fair opportunity to respond, or the right to confront their accusers; and that consequences have been disproportionate to the severity of the misconduct. A close examination of cases in the #MeToo era demonstrates these complaints lack basis in fact or are not supported by principles of procedural fairness.

A. Unenforceability

One criticism of the rules of #MeToo, as I have described them, is that they are not "rules" at all; they are a loose set of informal standards without enforcement mechanisms. There is no guarantee that these norms will be applied consistently or apolitically. Opponents make slippery slope arguments about what might result from the lack of hard-and-fast rules to screen out frivolous or abusive allegations.¹⁹¹ They express the concern that enforceable standards are required when the accused lacks power, money, or fame.¹⁹² However, defamation law and an aggressive media have provided checks on abusive allegations, and there are principled reasons for treating for high- and low-level employees differently.

While journalistic standards such as accuracy, seeking both sides, and attribution are not legally enforceable on their own, investigative journalists operate in the shadow of defamation law.¹⁹³ Defamation law casts a longer shadow over extralegal processes of the sort I am describing as characteristic of the #MeToo era, because journalists are unlikely to be liable for reporting the statements of law enforcement officials, as

¹⁹¹ See, e.g., Hemmingway, *supra* note 88 ("You can't establish a precedent where anyone can make an unverifiable and murky claim against another person to kill his nomination and career."); Benjamin Wittes, *I Know Brett Kavanaugh, But I Wouldn't Confirm Him*, ATLANTIC (Oct. 2, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/why-i-wouldnt-confirm-brett-kavanaugh/571936/> [<https://perma.cc/SK9Z-P3CP>] ("Even assuming that Christine Blasey Ford's allegations are entirely accurate, rejecting him on the current record could incentivize not merely other sexual-assault victims to come forward—which would be a salutary thing—but also other late-stage allegations of a non-falsifiable nature by people who are not acting in good faith.")

¹⁹² Emily Yoffe, *Why the #MeToo Movement Should Be Ready for a Backlash*, POLITICO (Dec. 10, 2017), <https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057> [<https://perma.cc/PT3X-3K5N>].

¹⁹³ Kirtley, *supra* note 117, at 144–45. Libel, for example, is a tort that allows a plaintiff to sue a defendant who has made a false claim that damaged their reputation. In New York, to prove a claim of libel, a plaintiff must show: "(1) a written defamatory factual statement concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special damages or per se actionability." *Chau v. Lewis*, 771 F.3d 118, 126–27 (2d Cir. 2014). Allegations of sexual misconduct may qualify as per se actionable. RESTATEMENT (SECOND) OF TORTS, § 574 (1977).

they did in the Duke Lacrosse case.¹⁹⁴ In the University of Virginia case, by contrast, the *Rolling Stone* article was not based on any legal filings or statements by law enforcement.¹⁹⁵ The author of the *Rolling Stone* story lost her job.¹⁹⁶ Nicole Eramo, a university administrator accused of mishandling sexual assault complaints in the article, won a \$3 million defamation verdict.¹⁹⁷ Because Eramo was a public figure, she had the heavy burden to convince the jury, by “clear and convincing evidence,” that *Rolling Stone* reported the story with “actual malice.”¹⁹⁸ This standard requires that the defendant made a defamatory statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁹⁹ In the *Eramo* case, the court noted that “departure from journalistic standards is not a determinant of actual malice, but such action might serve as supportive evidence.”²⁰⁰ The jury’s verdict made clear it believed the recklessness standard was met.

Like journalists, individual bloggers and social media users can be sued for libel for making accusations of sexual assault, harassment, and misconduct.²⁰¹ Some accusers have been persuaded to take down social media posts based on the mere threat of legal action.²⁰² While the burden lies with the defamed person to demonstrate the accusation was false, many accusers do not have the resources or wherewithal to defend

¹⁹⁴ Kirtley, *supra* note 117, at 153 (explaining that “it is both easier and legally safer for journalists to rely on official sources. Conducting parallel and independent investigations exposes journalists to a greater risk of legal liability for inaccurate, incorrect, or defamatory statements, while relying on official sources protects them in their ‘fair reports’ of government documents and actions”).

¹⁹⁵ Coronel, Coll, & Kravitz, *supra* note 128.

¹⁹⁶ T. Rees Shapiro & Emma Brown, *Rolling Stone Settles With Former U-Va. Dean in Defamation Case*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/local/education/rolling-stone-settles-with-u-va-dean-in-defamation-case/2017/04/11/5a564532-1f02-11e7-be2a-3a1fb24d4671_story.html [<https://perma.cc/39FG-Z27X>].

¹⁹⁷ *Id.* The defendants filed a motion to vacate the judgment, but the case settled before it was resolved. *Id.*

¹⁹⁸ *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 869 (W.D. Va. 2016).

¹⁹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). “Reckless disregard” means that the defendants “entertained serious doubts as to the truth of [their] publication.” *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). Victims who are not public figures may generally prevail on the lesser showing that the defendant was negligent. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 3:30 (2d ed. 2018).

²⁰⁰ *Eramo*, 209 F. Supp. 3d at 871.

²⁰¹ Tyler Kingkade, *As More College Students Say “MeToo,” Accused Men Are Suing for Defamation*, BUZZFEED NEWS (Dec. 5, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing#.r1W1WVZPE> [<https://perma.cc/7W7U-TJTW>].

²⁰² Susan Seager, *#MeToo Stories Can Lead to Libel Suits*, THE WRAP (Nov. 4, 2017), <https://www.thewrap.com/brett-ratner-melanie-kohlier-sexual-assault-rape-hollywood-harvey-weinstein/> [<https://perma.cc/7SA6-6SQB>] (discussing how an accuser was persuaded to remove a Facebook post by the threat of a libel suit).

against a lawsuit.²⁰³ Thus, the threat of defamation liability may squelch even true allegations.

One concern with respect to the Ford-Kavanaugh hearings was that taking Dr. Ford's allegations seriously would incentivize future accusers to invent stories against their political enemies that are non-falsifiable, and so cannot be disproven or deterred with defamation law.²⁰⁴ For example, Senator Collins stated that the fact that the "outlandish allegation" of gang rape by Julie Swetnick "was put forth without any credible supporting evidence and simply parroted public statements of others" had underscored the importance of "the presumption of innocence."²⁰⁵ Yet aggressive and skeptical reporting serves as a check on such accusations. By the time of Senator Collins's statement the media had already subjected Swetnick's allegation to extensive scrutiny.²⁰⁶ That allegation was regarded as so improbable that it was not even investigated,²⁰⁷ and Swetnick and Avenatti were referred to the Justice Department for criminal investigation for making false statements.²⁰⁸ Journalists also corrected other false reports, as with the allegations, later recanted, that Kavanaugh had committed sexual assault on a boat in Rhode Island.²⁰⁹ It is true that outright hoaxes have been attempted.²¹⁰ But they are not easy to pull off because of the media's vigilance in verifying facts and skepticism about partisan motives.²¹¹ Journalists have succeeded in uncovering bad faith allegations, as in one

²⁰³ *Id.*

²⁰⁴ See *supra* note 191.

²⁰⁵ Abrams, *supra* note 113 (quoting Senator Collins).

²⁰⁶ See, e.g., David Bauder, *NBC Faces Scrutiny for Interview with Kavanaugh Accuser*, AP NEWS (Oct. 3, 2018), <https://www.apnews.com/c5ecf76c62ec4c398e35020b5df01061> [<https://perma.cc/G84H-HRJB>]; Michael E. Miller et al., *Who is Julie Swetnick, the Third Kavanaugh Accuser?*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/local/who-is-julie-swetnick-the-third-kavanaugh-accuser/2018/09/26/91e16ed8-c1bc-11e8-97a5-ab1e46bb3bc7_story.html [<https://perma.cc/LFW9-848E>].

²⁰⁷ See Lopez, *supra* note 180.

²⁰⁸ SENATE COMM. ON THE JUDICIARY, *Swetnick, Avenatti Referred for Criminal Investigation* (Oct. 25, 2018), <https://www.judiciary.senate.gov/press/rep/releases/swetnick-avenatti-referred-for-criminal-investigation> [<https://perma.cc/H9U3-KTL2>].

²⁰⁹ Nicholas Fandos & Michael D. Shear, *Before Kavanaugh Hearing, New Accusations and Doubts Emerge*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/kavanaugh-calendar.html> [<https://perma.cc/G3X4-84NB>] (discussing an individual from Rhode Island "who charged—and then recanted Wednesday night—that Judge Kavanaugh had raped a woman on a boat in Newport, R.I.").

²¹⁰ See, e.g., Natasha Bertrand, *Mueller Wants the FBI to Look at a Scheme to Discredit Him*, ATLANTIC (Oct. 30, 2018), <https://www.theatlantic.com/politics/archive/2018/10/special-counsel-refers-scheme-targeting-mueller-to-fbi/574411/> [<https://perma.cc/QCJ2-JV39>].

²¹¹ See, e.g., Jill Abramson, *The GOP Thinks #MeToo Is a Chance to Exploit the 'Biased' Press*, INTELLIGENCER (Nov. 19, 2018), <http://nymag.com/intelligencer/2018/11/gop-thinks-metoo-is-a-chance-to-exploit-the-biased-press.html>.

instance in which the nonprofit group Project Veritas attempted to embarrass *The Washington Post* by planting a false story of sexual abuse about then-Senate candidate Roy Moore.²¹²

Another concern is that the news media will not provide “due diligence” when accusations are brought against workers who do not possess fame, power, or prestige.²¹³ Rank-and-file workers may then find themselves terminated based on mere reports of harassment or jokes and banter that are sexualized but inoffensive. But this problem is already occurring, and it is one that long predates the #MeToo movement.²¹⁴ Many employers believe there are economic reasons to suppress all sexuality in the workplace, not just harmful forms of harassment.²¹⁵ While highly-paid executives often have contracts that provide them with the assurance that they will not be terminated without cause, most lower-level employees can be fired at will.²¹⁶ The solution, for those concerned about due process, is to extend some form of protection against arbitrary terminations to all employees.²¹⁷ It would be perverse to respond to this concern by carving out special protections against allegations of a sexual nature, or to refrain from holding those at high levels accountable when careful journalism exposes sexual misconduct.

B. Waiver, Timeliness, and Jurisdiction

Another procedural argument is that victims who failed to pursue relief through legal channels—like the civil and criminal law—should not be able to raise claims informally. This argument may be about waiver: that it is unfair for survivors who chose not to exercise their rights to legal relief to raise claims outside legal processes, especially after the lapse of time. Or it may be a jurisdictional point: that formal legal fora should have exclusive jurisdiction over claims of sexual assault and harassment, as informal processes are incompetent to handle such issues. This genre of argument rests on a number of false premises.

²¹² Beth Reinhard et al., *Woman’s Effort to Infiltrate The Washington Post Dated Back Months*, WASH. POST (Nov. 29, 2017), https://www.washingtonpost.com/investigations/womans-effort-to-infiltrate-the-washington-post-dates-back-months/2017/11/29/ce95e01a-d51e-11e7-b62dd9345ced896d_story.html [https://perma.cc/T252-G5E6].

²¹³ Yoffee, *supra* note 192 (expressing the worry that the #MeToo movement “will eventually move past this moment of shocking allegations against famous men, and should soon focus on the many nonfamous people in quotidian circumstances. But top news organizations are not likely to provide as much due diligence about those cases”).

²¹⁴ See generally Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

²¹⁵ *Id.*

²¹⁶ Arnow-Richman, *supra* note 19, at 89.

²¹⁷ See, e.g., *id.* at 101–02.

The “waiver” version of this argument rests on false premises regarding the availability of legal recourse. “Waiver” is a procedural doctrine that prevents a party from raising an issue when they had an opportunity to bring it up at some earlier point, but failed to do so. A key premise here is that a person had a fair opportunity and the incentive to raise an issue at an earlier point.²¹⁸ But the law fails to prohibit much conduct widely regarded as sexual abuse, and those prohibitions that do exist are systematically underenforced.²¹⁹ Survivors understand this.²²⁰ In response to the question why she didn’t report, Actor Ashley Judd asked, “Were we supposed to call some fantasy attorney general of moviedom?”²²¹

Those recent cases in which the law has achieved ostensible successes only go to show the law’s abject failure. Twenty-years of complaints against USA Gymnastics doctor Larry Nassar by young gymnasts were not taken seriously until the police found child pornography on his hard drive.²²² For decades before his conviction for sexual assault, Bill Cosby’s accusers “were met, mostly, with skepticism, threats, and attacks on their character.”²²³ Recording artist Taylor Swift, who reported that she was groped by a radio host while posing for a photograph, did not attempt to avail herself of any legal remedies until two years later, when she found herself a defendant in a suit brought by the radio host claiming that Swift had lied about the assault and caused him to be fired from his job.²²⁴ He lost his case, and the jury granted

²¹⁸ See, e.g., *United States v. Ticchiarelli*, 171 F.3d 24, 32–33 (1st Cir. 1999) (“Whether there is a waiver depends not, . . . on counting the number of missed opportunities (hearings, motions, etc.) to raise an issue, but on whether the party had sufficient incentive to raise the issue in the prior proceedings.”).

²¹⁹ See *supra* notes 33–58 and accompanying text. Professor Duncan Kennedy has called this the “tolerated residuum” of sexual abuse. Kennedy, *supra* note 116, at 1320. It serves not only the interests of abusers, but also the individual interests of those men who imagine themselves more likely to be falsely accused than sexually abused, and who wish to avoid the burden of worrying about “excess or inaccurate enforcement” of the law. *Id.*

²²⁰ See, e.g., #WhyIDidntReport, TWITTER, <https://twitter.com/hashtag/WhyIDidntReport> [<https://perma.cc/FCG7-JBGS>].

²²¹ Zacharek, *supra* note 59.

²²² Kerry Howley, *Everyone Believed Larry Nassar. The Predatory Trainer May Have Just Taken Down USA Gymnastics. How Did He Deceive So Many For So Long?*, THE CUT (Nov. 19, 2018), <https://www.thecut.com/2018/11/how-did-larry-nassar-deceive-so-many-for-so-long.html> [<https://perma.cc/C4W6-3BQA>] (“Over the course of at least 20 years of consistent abuse, women and girls reported to every proximate authority.”).

²²³ Noreen Malone & Amanda Demme, *I’m No Longer Afraid: 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture that Wouldn’t Listen*, THE CUT (July 26, 2015), <https://www.thecut.com/2015/07/bill-cosbys-accusers-speak-out.html#barbara-bowman> [<https://perma.cc/PAY5-BHR2>].

²²⁴ Eliana Dockterman, *‘I Was Angry.’ Taylor Swift on What Powered her Sexual Assault Testimony*, TIME (Dec. 6, 2017), <http://time.com/5049659/taylor-swift-interview-person-of-the-year-2017/> [<https://perma.cc/3767-N3Y2>].

Swift the \$1 she had requested in symbolic damages.²²⁵ Despite being one of the best-selling recording artists of all time, Swift found herself blamed for what had happened.²²⁶ Her experience with the legal process was “demoralizing.”²²⁷ Swift said, “Going to court to confront this type of behavior is a lonely and draining experience, even when you win, even when you have the financial ability to defend yourself.”²²⁸ The #MeToo movement has demonstrated that survivors might now be taken seriously. Survivors should not be faulted for waiting until the time when they might be heard to come forward.

Another version of this argument is about timeliness—that victims are using the court of public opinion to circumvent the statutes of limitations that apply to civil and criminal cases, long after evidence has gone stale, memories have faded, and social norms about appropriate conduct have changed.²²⁹ But an unfortunate feature of sexual abuse is that it causes delayed reporting by intimidating survivors through threats of shaming and retaliation, and by convincing survivors that they were to blame, that they overreacted, or that they misinterpreted what happened.²³⁰ Moreover, legal deadlines for bringing claims are too short. Title VII sexual harassment claims must be brought within an exceptionally short timeframe, generally less than a year.²³¹ While reformers have succeeded in eliminating or expanding statutes of limitations for rape in many states, in others the time limit may be as short as six years.²³² These sharp deadlines should not be applied by decision

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* (“When I testified, I had already been in court all week and had to watch this man’s attorney bully, badger and harass my team including my mother over inane details and ridiculous minutiae, accusing them, and me, of lying.”).

²²⁸ *Id.*

²²⁹ See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (explaining that statutes of limitations provide defendants with “repose,” “encourage the prompt presentation of claims,” and “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”).

²³⁰ Cf. Jessica Henderson Daniel, *Statement of APA President Regarding the Science behind Why Women May Not Report Sexual Assault*, AM. PSYCHOL. ASS’N (Sept. 24, 2018), <https://www.apa.org/news/press/releases/2018/09/report-sexual-assault.aspx> [<https://perma.cc/N8NW-3FYK>] (explaining that survivors may not report for any number of reasons, including “fear for their safety, being in shock, fear of not being believed, feeling embarrassed or ashamed, or expecting to be blamed.”).

²³¹ Anne Lawton, *Tipping the Scales of Justice in Sexual Harassment Law*, 27 OHIO N.U. L. REV. 517, 519–22 (2001) (criticizing the short statute of limitations for sexual harassment claims, and pointing out that, for example, under Ohio law there is a four-year statute of limitations for breach of a sales contract).

²³² See Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 769–70 (2018).

makers asking whether an accused person is fit to hold high office. Decision makers may appropriately consider the passage of time and resulting lack of evidence as a factor in assessing the likelihood of the misconduct.

Yet another variation on this argument is that the court of public opinion is ill-suited for truth-finding, so real courts should have exclusive jurisdiction. This argument overestimates the truth-finding capacity of the criminal justice system, which is focused on plea bargaining,²³³ and the civil justice system, which is directed at settlement.²³⁴ It underestimates the independent media, which has long served as a check on arbitrary and unfair legal proceedings, monitoring and exposing miscarriages of justice.²³⁵ While it is true that the public may rush to judgment rather than examining whether media reports adhere to basic journalist standards, public judgments tend to be ephemeral rather than having any lasting career consequences for celebrities.²³⁶ Institutions have acted with more care, often engaging their own investigators.²³⁷ Moreover, the argument that any given dispute can only be tried in one tribunal is inconsistent with the practice of U.S. courts. O.J. Simpson's acquittal in the criminal case against him for the murders of Nicole Brown Simpson and Ronald Goldman did not bar the victim's families from relitigating the matter in a civil suit alleging wrongful death or a custody proceeding to terminate his parental rights.²³⁸ In

²³³ See, e.g., George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (discussing how the criminal justice system is dominated by plea bargaining); Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019) (discussing "fictional pleas" in which offenders plead guilty to crimes they did not commit to avoid trials that place them at risk of extreme consequences).

²³⁴ See, e.g., Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925 (2000).

²³⁵ As the Supreme Court has reflected:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). The Duke Lacrosse incident provides one example of how the press can serve as a check on irresponsible prosecutors. See, e.g., *supra* note 130 and accompanying text.

²³⁶ See, e.g., Joanna Piacenza, *How #MeToo Impacts Viewers' Decisions on What to Watch*, MORNING CONSULT (May 28, 2018), <https://morningconsult.com/2018/05/28/how-metoo-impacts-viewers-decisions-what-watch/> [<https://perma.cc/TJ8S-A7FK>] (surveying 2202 U.S. adults about whether allegations of misconduct against twenty performers would affect their viewership, and finding that "allegations against only two — Kevin Spacey and Louis C.K. — spurred more people to say their viewership habits would change as a result").

²³⁷ See *supra* Section III.B.

²³⁸ STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 1024–25 (4th ed. 2012).

each of these cases, there was something different at stake, and so a different standard of proof was appropriate.²³⁹

What standard of proof ought to apply when a person holding or seeking high office is publicly accused of sexual misconduct has appropriately been the subject of public debate.²⁴⁰ The standard should be calibrated by balancing the risks of a “false negative (i.e., failing to impose consequences when the allegation is in fact true)” against the risks of a “false positive (i.e., imposing consequences when the accused is in fact innocent).”²⁴¹ In the context of the Ford-Kavanaugh hearings, for example, the risk of a false negative was that a person who had committed sexual assault would be confirmed to a lifetime Supreme Court appointment where he would “cast the deciding vote on matters of women’s liberty and equality.”²⁴² The risk of a false positive was that Kavanaugh would have remained a judge on a lower court, and another “highly qualified jurist” would have taken his place on the Supreme Court.²⁴³ Thus, a “substantial” or “credible” evidence standard might be more appropriate for nominations to high-profile positions, rather than the higher preponderance of the evidence standard that is commonly applied by investigators.²⁴⁴ The risk that accused individuals will continue to abuse their power is also a relevant consideration in this calculation.²⁴⁵

Career consequences and reputational harms for the accused are relevant but too often overvalued. The decisions of any particular institutional decisionmaker, consumer, or audience member on the merits of a #MeToo claim do not bind all others.²⁴⁶ For example, while it is true that Justice Kavanaugh might have suffered some further degree of reputational harm if he had not been confirmed, the Senate’s ultimate vote did not “absolve Judge Kavanaugh in the court of public opinion.”²⁴⁷ A finding of “credible” or “substantial” evidence is just that; it is

²³⁹ *Id.*

²⁴⁰ See *supra* notes 186–189 and accompanying text.

²⁴¹ See, e.g., Daniel Hemel, *Burdens of Proof for Sexual Misconduct Claims in Senate Confirmations and on College Campuses*, MEDIUM (Sept. 23, 2018), <https://medium.com/whatever-source-derived/burdens-of-proof-for-sexual-misconduct-claims-in-senate-confirmations-and-on-college-campuses-ed6347713674> [<https://perma.cc/3BYD-NTU9>].

²⁴² See Shaw, *supra* note 186.

²⁴³ See Hemel, *supra* note 241.

²⁴⁴ See *id.* (discussing the substantial evidence standard); Shaw, *supra* note 186 (arguing for a “credible accusation” standard).

²⁴⁵ See Hemel, *supra* note 241.

²⁴⁶ Different employers may conduct their own investigations, see, e.g., Jacobs, *supra* note 185, and may sometimes reach different conclusions, see, e.g., Erik Wemple, *CNN Reinstates Ryan Lizza*, WASH. POST (Jan. 25, 2018), https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/01/25/cnn-reinstates-ryan-lizza/?utm_term=.afb7cd3dd9b4 [<https://perma.cc/YU3G-2RMD>].

²⁴⁷ See Hemel, *supra* note 241.

not any sort of final determination.²⁴⁸ The lack of finality in the court of public opinion may work to the advantage of the accused, who can re-litigate his case as long as the media remains interested in the story.²⁴⁹ And in discussions of reputational harm to the accused, it is important to recognize there is an inverse and corresponding risk of reputational harm to accusers whose claims are determined to be without merit.²⁵⁰

C. Notice and Hearing

Another set of concerns relates to the basic due process principle that “a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.”²⁵¹ Assuming due process applies, it requires “some kind of hearing.”²⁵² But the Supreme Court has held that the particular requirements for that hearing depend on the circumstances.²⁵³ Under the circumstances, #MeToo’s informal procedural norms provide high-profile individuals with all process that is due.

Lack of notice does not seem to be the main due process complaint in the #MeToo era. Unlike some Title IX proceedings and workplace investigations, the defining feature of #MeToo reporting is that allegations are made publicly, with detailed news coverage. Before a story is even published, journalistic standards require that a person accused of serious misconduct be given an opportunity to respond, along with enough information about the story to make that response meaningful.²⁵⁴ Journalists include these responses in their stories and publish new stories when accused persons or their lawyers wish to add to the response.²⁵⁵

²⁴⁸ *Id.*

²⁴⁹ See *supra* note 156 (citing sources re-evaluating of the accusations against former Senator Al Franken over a year after his resignation).

²⁵⁰ See Hemel, *supra* note 241 (discussing the consequences of the allegation for Christine Blasey Ford, who went into hiding with her family to avoid harassment).

²⁵¹ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (alteration in original) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

²⁵² Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1267 (1975) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974)).

²⁵³ *Mathews*, 424 U.S. at 335 (setting forth an inquiry that considers three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”).

²⁵⁴ This was a failing of the reporting by *Rolling Stone* on rape at the University of Virginia. Coronel, Coll, & Kravitz, *supra* note 128 (“If both the reporter and checker had understood that by policy they should routinely share specific, derogatory details with the subjects of their reporting, *Rolling Stone* might have veered in a different direction.”).

²⁵⁵ See *supra* Section III.A.

The objection might be that there is no trial-like procedure with a neutral adjudicator that would allow individuals accused of sexual misconduct to clear their names. However, in many cases, employers hire outside investigators to conduct formal investigations and announce the results publicly.²⁵⁶ The more highly-paid the accused, the more likely it is that they are protected by a contract that gives them the right to contest the factual basis for any termination in court or arbitration.²⁵⁷

Even when the accused person does not have contractual protections, principles of due process do not require a formal trial. Cases in which a public employee is entitled to a “name clearing hearing” to rebut a public charge of misconduct made by a government employer are instructive here.²⁵⁸ No particular procedures are prescribed for every such hearing.²⁵⁹ Rather, courts engage in a functional inquiry, balancing the costs and benefits of additional procedure in each case.²⁶⁰ Due process does not necessarily require an adjudicator who is independent of the employer.²⁶¹ Some courts have held that no oral hearing is required in cases in which the employee had a “high degree of access to the news media.”²⁶² This is because, as a public figure, the dismissed employee is unlikely to “need a formal hearing as a forum in which to repeat his side of the story.”²⁶³ The cost of requiring a trial-like procedure in this context is that government employers would never disclose

²⁵⁶ See *supra* notes 173–185 and accompanying text.

²⁵⁷ See Arnow-Richman, *supra* note 19, at 92.

²⁵⁸ For more discussion of “name clearing hearings,” see *supra* notes 93–94 and accompanying text.

²⁵⁹ See, e.g., *Wojcik v. Massachusetts State Lottery Comm’n*, 300 F.3d 92, 103 (1st Cir. 2002) (“The purpose of the hearing is only to allow the employee to clear his name of the false charges; compliance with formal procedures is not necessarily required.”); *Moody v. Cty. of Santa Clara*, No. 5:15-CV-04378-EJD, 2018 WL 2267662, at *4 (N.D. Cal. May 17, 2018) (“Due process imposes no hard and fast requirements on what constitutes an adequate ‘name-clearing’ hearing, including, for example, whether it must be public, evidentiary in nature, or held prior to deprivation of the liberty or property interest.”).

²⁶⁰ See, e.g., *Gunasekera v. Irwin*, 551 F.3d 461, 469–71 (6th Cir. 2009) (applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)).

²⁶¹ See, e.g., *Harrell v. Cty of Gastonia*, 392 Fed. App’x 197, 205 (4th Cir. 2010) (“[G]overnmental officials conducting such hearings will often be employed by the same governmental entity that made the decision being challenged, and those officials are still presumed to be fair and impartial in conducting proceedings.”).

²⁶² See, e.g., *Baden v. Koch*, 799 F.2d 825, 832 (2d Cir. 1986) (holding that the plaintiff “could presumably have called a press conference and provided any further defense of his record or explanation of his removal from office that he desired to give”); see also *Moody*, 2018 WL 2267662, at *4.

²⁶³ *Baden*, 799 F.2d at 832; see also *Esposito v. Metro-N. Commuter R. Co.*, 856 F. Supp. 799, 807–08 (S.D.N.Y. 1994) (“[A]s plaintiff concedes, because media interest in his story was so intense, he had, and took advantage of, ready and pervasive access to the public to refute the allegations against him. Indeed, as the plethora of newspaper articles contained in the record demonstrates, plaintiff was not shy about publishing his version of events, and the media was more than willing to report it”).

high-level misconduct;²⁶⁴ a result that would allow serial harassers to move to their next high-level job without accountability.

Another variation on this complaint is that the decision makers under the rules of #MeToo—such as boards of directors, corporate officers, voters, political party leaders, consumers, or audiences—are prone to conflicts of interest and motivated reasoning.²⁶⁵ The argument may be that decision makers are under undue pressure from the #MeToo movement to act decisively,²⁶⁶ or that politicians and businesspeople will weaponize accusations to embarrass and distract their opponents.²⁶⁷ This may be an argument for shifting factfinding responsibilities to outside investigators. But it is not a reason for decision makers to altogether abdicate responsibility for evaluating allegations of sexual misconduct against their leaders. Just as with other serious allegations, it is incumbent on those with decision-making authority to evaluate facts critically, exercise independent judgment, and attempt to remain fair-minded and neutral.

D. Confrontation

Another complaint might be that there is no opportunity to confront the accuser, to cross-examine them, or to otherwise scrutinize their account. But, for the most part, decision makers have not acted on disputed allegations against high-level perpetrators unless accusers have been willing to come forward and respond to scrutiny.

The complaint about the right to confrontation may overstate what the law requires. In criminal cases, the Sixth Amendment affords a right of confrontation;²⁶⁸ and in civil cases, rules of evidence prohibit certain forms of hearsay.²⁶⁹ But what rights apply outside these contexts is controversial. In name-clearing hearings for public employees,

²⁶⁴ Cf. *Baden*, 799 F.2d at 833 (“If we were to hold that a government executive’s public statement of reasons for a discretionary personnel decision automatically triggered a requirement for a formal trial-type hearing, executives would be tempted to refrain from explaining their personnel actions in public, a result contrary to the strong policy of maintaining an informed electorate.”).

²⁶⁵ It is not clear which direction biases will point in. For example, some survey evidence suggests that sexual misconduct allegations have little effect on film and television audiences, with some audience members reporting they are more likely to watch a performer after accusations emerge. Piacenza, *supra* note 236.

²⁶⁶ See Arnow-Richman, *supra* note 19, at 86 (“With harassment in the spotlight, many [employers] are likely to conclude that a swift and severe response to any allegation of misconduct is the only way to avoid a public relations nightmare.”). With respect to high level employees, institutions may have countervailing incentives to protect incumbent leadership. *Id.* at 87.

²⁶⁷ Cf. Hemmingway, *supra* note 88 (describing the Ford-Kavanaugh hearings as “[a] Senate star chamber full of grandstanding senators on both sides”).

²⁶⁸ U.S. CONST. amend. VI.

²⁶⁹ See FED. R. EVID. 801–07.

some courts have approved procedures that did not allow any cross-examination.²⁷⁰ Some courts have even approved procedures in which the accusers were not named.²⁷¹ With respect to campus sexual assault hearings under Title IX, the Sixth Circuit has held that “some form of cross-examination” is required when the resolution of a claim turns on credibility.²⁷² The court reasoned that cross-examination “takes aim at credibility like no other procedural device . . . to test [a witness’s] memory, intelligence, or potential ulterior motives.”²⁷³ Yet empirical research suggests reasons to doubt the utility of cross-examination as a truth-seeking device.²⁷⁴ Cross-examination also has the potential to subject victims to trauma and deter reporting.²⁷⁵ Thus, a number of courts have held that questioning by a neutral college administrator suffices to ensure fair process in the Title IX context.²⁷⁶

In the #MeToo context, reporters are wary of coming forward with stories in which accusers refuse to be named publicly.²⁷⁷ Journalistic

²⁷⁰ See, e.g., *Miller v. Metrocare Servs.*, 809 F.3d 827, 834 (5th Cir. 2016) (“[W]e decline Miller’s invitation to make confrontation of witnesses a mandatory requirement for an adequate name-clearing hearing.”); *Chilingirian v. Boris*, 882 F.2d 200, 206 (6th Cir. 1989) (holding that a name-clearing hearing did not violate due process even though the plaintiff was not permitted to cross-examine city council members who had voted for his termination or to require that they answer questions he had submitted).

²⁷¹ See, e.g., *Feterle v. Chowdhury*, 148 F. App’x 524, 532 (6th Cir. 2005) (holding that due process was satisfied even though an employee accused of discriminatory misconduct was not provided the names of witnesses who had contributed to a report that was part of the basis for terminating him).

²⁷² *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (“[I]f a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.”).

²⁷³ *Id.* at 582.

²⁷⁴ H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the “Greatest Legal Engine Ever Invented”*, 27 CORNELL J.L. & PUB. POL’Y 145 (2017) (collecting and assessing empirical research). Cross-examination may suggest that the key to the truth is a witness’s demeanor, but “scientific evidence proves that most, if not all, readily observable behavioral cues assumed to indicate deceit do not actually do so.” *Id.* at 155–56. Under the stress of cross-examination, “many cope by simply changing their story regardless of their original answers’ veracity,” particularly victims of sexual abuse. *Id.* at 165. While cross-examination allows lawyers to point out inconsistencies, even truthful witnesses are sometimes unable to recall precise details, and so the technique “highlights the errors of well-intentioned and deceptive witnesses alike.” *Id.* at 158.

²⁷⁵ See Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases*, CHRONICLE OF HIGHER ED. (Jan. 10, 2019), https://www.chronicle.com/article/Keep-Cross-Examination-Out-of-245448?cid=wcontentlist_hp_5 [<https://perma.cc/5DM2-ZHXH>].

²⁷⁶ See, e.g., *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 252 (E.D. Pa. 2012) (holding that prohibiting the student-plaintiff from personally cross-examining the witnesses did not violate due process because the student “was able to cross examine the witnesses by posing questions through the [panel’s] Chair”).

²⁷⁷ SPJ ETHICS COMM., POSITION PAPERS, ANONYMOUS SOURCES, <https://www.spj.org/ethics-papers-anonymity.asp> [<https://perma.cc/AV6S-KVBD>] (last visited Jan. 15, 2019) (discussing the principles that sources should be identified “whenever feasible” and journalists should “[a]lways question sources’ motives before promising anonymity”). The use of an anonymous source should require a supervisor’s approval, and many news organizations have policies on the question. *Id.*;

standards only allow the use of anonymous sources for allegations of sexual assault or harassment if the story is credible, considering factors such as whether there are “multiple, independent anonymous sources making similar claims.”²⁷⁸ In a few stories, multiple anonymous accusers have described a pattern of misconduct, but were unwilling to be named due to fear of reprisals.²⁷⁹ But even if sources go unnamed in a story, journalistic standards require that the accused person receive enough details about the misconduct so as to have a meaningful opportunity to respond.²⁸⁰ For example, in response to anonymous allegations of “inappropriate touching,” restaurateur Mario Batali stated, “Although the identities of most of the individuals mentioned in these stories have not been revealed to me, much of the behavior described does, in fact, match up with ways I have acted.”²⁸¹

Employers are wary of acting on anonymous allegations. During the confirmation hearings for Justice Kavanaugh, for example, the Senate did not act on leaked information about Dr. Ford’s allegations until she came forward.²⁸² In other cases, anonymous allegations prompted employers to conduct investigations.²⁸³ In only two of the 202 cases

see also ANONYMOUS SOURCING, NPR ETHICS HANDBOOK (accessed Jan. 15, 2019), <http://ethics.npr.org/tag/anonymity/> [<https://perma.cc/2B4Z-TSU9>].

²⁷⁸ Poynter Staff, *supra* note 19.

²⁷⁹ See, e.g., Oliver Darcy, *Five Women Accuse Journalist and ‘Game Change’ Co-Author Mark Halperin of Sexual Harassment*, CNN (Oct. 27, 2017), <https://money.cnn.com/2017/10/25/media/mark-halperin-sexual-harassment-allegations/index.html> [<https://perma.cc/8L3B-EV3S>]; Irene Plagianos & Kitty Greenwald, *Mario Batali Steps Away From Restaurant Empire Following Sexual Misconduct Allegations*, EATER (Dec. 11, 2017, 8:01 AM), <https://ny.eater.com/2017/12/11/16759540/mario-batali-sexual-misconduct-allegations> [<https://perma.cc/3X4B-C2PM>]; Jenn Ableson & Sacha Pfeiffer, *Modeling’s Glamour Hides Web of Abuse*, BOSTON GLOBE (Feb. 16, 2018), <https://www.bostonglobe.com/metro/2018/02/16/beauty-and-ugly-truth/c7r0WVsF5cib1pLWXJe9dP/story.html> [<https://perma.cc/WTH7-PT98>] (reporting that three anonymous models accused “Karl Templer, a top stylist, of yanking their breasts, touching their crotches, or aggressively pulling down their underwear without asking them during shoots,” which Templer denied).

²⁸⁰ See Coronel, Coll, & Kravitz, *supra* note 128; Poynter Staff, *supra* note 19 (“Although you may not be naming a source in a story, in most cases it is appropriate to reveal accusers’ names to the accused.”).

²⁸¹ Plagianos & Greenwald, *supra* note 279 (quoting a statement from Mario Batali); see also Darcy, *supra* note 279 (quoting a statement in which Halperin apologized for pursuing relationships with junior colleagues).

²⁸² Eli Watkins, *Timeline: How the Kavanaugh Accusations Have Unfolded*, CNN (Sept. 17, 2018), <https://www.cnn.com/2018/09/17/politics/kavanaugh-ford-timeline/index.html> [<https://perma.cc/4NST-TDLH>].

²⁸³ See, e.g., Frank Pallotta, *John Lasseter Joins Skydance Media After Leaving Disney Following Misconduct Allegations*, CNN Business (Jan. 9, 2019), <https://www.cnn.com/2019/01/09/media/john-lasseter-skydance/index.html> [<https://perma.cc/5UBT-G53G>] (discussing an investigation conducted after unnamed sources alleged sexual harassment); Maureen Ryan, *‘Supergirl,’ ‘Arrow’ Producer Suspended Amid Sexual Harassment Allegations by Warner Bros.*, VARIETY (Nov. 10, 2017), <https://variety.com/2017/tv/news/warner-bros-sexual-harassment-andrew-kreisberg-1202612522/> [<https://perma.cc/DKX4-XYPR>] (discussing how inquiries by *Variety* about anonymous allegations of harassment prompted an investigation by the Warner Brothers’ human resources department).

listed by the *New York Times* did decision makers appear to act based only on news stories with a single anonymous accuser.²⁸⁴

When victims do come forward, their accounts do not evade scrutiny. The prospect of this public scrutiny is a factor that deters reporting.²⁸⁵ For example, the media was skeptical of Julie Swetnick's accusations against Kavanaugh from the outset, reporting on her financial troubles and history of litigation.²⁸⁶ The media has covered the specifics of defamation and wrongful termination cases brought against various accusers.²⁸⁷ While there is no cross-examination in the court of public opinion, there are on-camera interviews. In interviews, journalists can ask questions that might expose inconsistencies in an accuser's story and audiences can assess the accuser's credibility for themselves. NBC Nightly News aired an interview of Swetnick by Kate Snow, in which Snow pointed out discrepancies between Swetnick's answers and an affidavit she had signed under penalty of perjury.²⁸⁸

One exception to the norm that victims come forward involves a woman accused of sexual harassment, Andrea Ramsay, who dropped out of her race to become the democratic nominee for a congressional seat in Kansas in December 2017.²⁸⁹ The Democratic Congressional Campaign Committee (DCCC) had withdrawn its support for Ramsay, seemingly on account of tersely worded allegations that she had sexually harassed a male subordinate in 2005.²⁹⁰ The allegation was made in a Title VII complaint, which means the defendant was the company, not Ramsay herself. Ramsay denied the allegations and stated that she would have opposed the settlement the company ultimately reached

²⁸⁴ See Busch, *supra* note 170; Schneider, *supra* note 170. In another case, an employer acted on the report of a source who was known to it and the accused but whose story was not disclosed to the public. See, e.g., Liam Stack, *Ryan Lizza Fired by The New Yorker over Sexual Misconduct Allegation*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/business/ryan-lizza-sexual-misconduct.html> [<https://perma.cc/T4XT-82W5>]. There may be cases in which employers acted on anonymous reports that were not included in the New York Times' list. See *supra* note 152.

²⁸⁵ See, e.g., Steel, *supra* note 38 (discussing how Bill O'Reilly hired a private investigator to find damaging information about one accuser).

²⁸⁶ Miller et al., *supra* note 206.

²⁸⁷ See, e.g., Maria Halkias, *Scandal Surrounding Alleged Extramarital Affair of Former U.S. Hispanic Chamber Leaders from Dallas Moves into Court*, DALLAS NEWS (July 17, 2018), <https://www.dallasnews.com/business/business/2018/07/17/charges-surrounding-extramarital-affair-former-us-hispanic-chamber-leaders-dallas-moves-court> [<https://perma.cc/X2RU-MUU2>]; Weiss, *supra* note 152.

²⁸⁸ Bauder, *supra* note 206.

²⁸⁹ Lindsay Wise & Bryan Lowry, *Kansas Dem Andrea Ramsey, Accused of Sexual Harassment, Will Drop Out of U.S. House Race*, KAN. CITY STAR (Dec. 15, 2017), <https://www.kansascity.com/news/politics-government/article189931704.html>.

²⁹⁰ *Id.* Court documents include very few details about the incident. An EEOC charge attached to the complaint states: "In late March 2005, [Ramsay] made sexual advances toward [the plaintiff] on a business trip," and that after the plaintiff told Ramsay he was not interested in her, she terminated him. Complaint, *Funkhouser v. LabOne, Inc.*, No. 05-cv-02458 (D. Kan. Oct. 25, 2005).

with her accuser.²⁹¹ Ramsay's accuser refused to give his side of the story to the press, perhaps because his settlement included a confidentiality agreement.²⁹² Thus, there was no opportunity for the media to probe the details of the matter. This example is atypical, and the controversy around it demonstrates evolving norms that require accusers to stand by their allegations.²⁹³

E. Proportionality

Another criticism is that the consequences for the accused are not proportional to the severity and likelihood of the accusations. Commentators fear false equivalences and extreme penalties. For example, talk show host Gayle King has said, "I think when a woman makes an accusation, the man instantly gets the death penalty. There has to be some sort of due process here. All of these inappropriate behaviors are not all the same."²⁹⁴ The principle that responses should be proportionate is an important one.²⁹⁵ But #MeToo's critics have overestimated the consequences high-profile men have faced, and underestimated the harms of sexual assault, harassment, and misconduct to its victims.

With respect to high-profile cases, it is not true that consequences have been either automatic or terminal. The public cannot keep track of accusations against celebrities, and it tends to forgive and forget.²⁹⁶ After being fired by Fox News, Bill O'Reilly was hired to host a new show on Newsmax TV.²⁹⁷ As a result of allegations of sexual misconduct

²⁹¹ *Andrea Ramsey Letter: 'I Never Engaged in Any of the Alleged Behavior,'* KAN. CITY STAR (Dec. 15, 2017), <https://www.kansascity.com/news/politics-government/article189934114.html>.

²⁹² Wise & Lowry, *supra* note 289 (Ramsay is quoted as saying "All I can say is the matter has been resolved.").

²⁹³ Two democratic representatives have publicly questioned the DCCC's decision to withdraw its support for Ramsay. Maggie Severns & Marianne Levine, *Both Parties Face Dissent over Handling of #MeToo*, POLITICO (Jan. 29, 2018, 5:01 AM), <https://www.politico.com/story/2018/01/29/congress-sexual-harassment-metoo-372855> [<https://perma.cc/F7Y2-KA6K>].

²⁹⁴ Audie Cornish, *Gayle King Thinks #MeToo Needs Due Process*, N.Y. TIMES MAG. (June 12, 2018), <https://www.nytimes.com/2018/06/12/magazine/gayle-king-thinks-metoo-needs-due-process.html> [<https://perma.cc/HUW9-BH7G>]; *see also* Traister, *supra* note 66 ("MSNBC's Mike Barnicle, himself once having been returned to power after a plagiarism scandal, has mourned publicly for the injury done to his friend and former colleague Mark Halperin, who got canned after being accused of pushing his penis against younger female subordinates: 'He deserves to have what he did deplored,' Barnicle declared. 'But does he deserve to die? How many times can you kill a guy?'").

²⁹⁵ Not only do disproportionate penalties offend basic fairness, but treating all instances of sexual misconduct with "zero-tolerance" can make rules against misconduct less effective. FELDBLUM & LIPNIC, *supra* note 41 (explaining that "zero tolerance" rules "may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior—they simply want the harassment to stop").

²⁹⁶ Piacenza, *supra* note 265 (discussing polling data and quoting public relations executives).

²⁹⁷ *Don't Miss Bill O'Reilly's 'No Spin News' on Newsmax TV*, NEWSMAX (Nov. 20, 2018), <https://www.newsmax.com/newsmax-tv/bill-oreilly-no-spin-news-newsmaxtv/2018/03/28/id/851260/> [<https://perma.cc/6XR6-SG6T>].

that were not disclosed to the public, reporter Ryan Lizza lost his job at *The New Yorker* but was retained by CNN.²⁹⁸ After an investigation into misconduct, *New York Times* reporter Glenn Thrush was removed from his prestigious post at the White House but permitted to return to the newsroom.²⁹⁹ After resigning from the Senate, Al Franken continues to be involved in public life.³⁰⁰ Some celebrities have worked allegations into their performances. In the midst of publicity regarding allegations of his sexual misconduct, musician R. Kelly released a nineteen-minute song titled “I Admit.”³⁰¹ After a documentary aired in which R. Kelly’s accusers were interviewed, “daily streams of his songs in the United States more than doubled, according to Nielsen, from 1.9 million the day before the series began to 4.3 million on its last day.”³⁰² Comedian Louis C.K., who admitted that he abused his position of power to get female comedians into situations where he could masturbate in front of them, is back to performing standup less than one year later, joking that, as a result of the news story, “I lost \$35 million in an hour.”³⁰³ Aziz Ansari is also still performing, but rather than using his platform to make light of the Babe.net story, he has said that “if other men learned from the allegation against him, ‘that’s a good thing.’”³⁰⁴

²⁹⁸ See Wemple, *supra* note 246.

²⁹⁹ Adrienne LaFrance, *The New York Times’s Glenn Thrush Dilemma*, ATLANTIC (Jan. 9, 2018), <https://www.theatlantic.com/business/archive/2018/01/american-newsrooms-are-covering-sexual-harassment-but-whats-happening-inside-the-newsrooms-themselves/550058/> [https://perma.cc/8S5V-96TS].

³⁰⁰ See, e.g., Al Franken, <https://soundcloud.com/user-490403240> [https://perma.cc/AER9-JP4Y] (podcast hosted by Franken with guests including Norm Ornstein, E.J. Dionne, Michael Lewis, and Dana Carvey); Dahlia Lithwick, *How Would Al Franken Question Attorney General Nominee William Barr?*, SLATE (Jan. 15, 2019), <https://slate.com/news-and-politics/2019/01/how-al-franken-would-question-william-barr.html> [https://perma.cc/W7HH-BA2K] (interviewing Franken); Al Franken, *Kavanaugh Supreme Court Hearings Showcase Republican Partisanship, Hypocrisy: Al Franken*, USA TODAY (Sept. 7, 2018), <https://www.usatoday.com/story/opinion/2018/09/07/brett-kavanaugh-supreme-court-hearings-showcase-republican-hypocrisy-column/1215578002/> [https://perma.cc/5P3Y-VQ9Q]. *But see* Mayer, *supra* note 156 (observing that the level of public interest in Franken is a shadow in comparison to his past celebrity as “the most recognizable figure in the Senate”).

³⁰¹ Crenshaw, *supra* note 69 (“A crass effort to marshal his considerable talent to sing his way to clemency, ‘I Admit’ is a coyly titled work of audience-trolling in the vein of O.J. Simpson’s memoir of his ex-wife’s murder case, *If I Did It*.”).

³⁰² Elizabeth A. Harris & Ben Sisario, *Why It Could be Hard to Mute R. Kelly*, N.Y. TIMES (Jan. 13, 2019), <https://www.nytimes.com/2019/01/13/arts/music/mute-r-kelly.html> [https://perma.cc/6P9W-8FAH].

³⁰³ *Louis CK: I’ve Been ‘to Hell and Back’ and Lost \$35 Million*, LAUGHSPIN (Oct. 12, 2018), <https://laughspin.com/louis-ck-west-side-comedy-club-sexual-misconduct/> [https://perma.cc/ZY8E-58AB]. C.K. is one of the world’s highest paid comedians, reportedly earning \$52 million in the twelve months prior to June 2017. Madeline Berg, *Louis C.K.’s Losses: How Much the Sexual Misconduct Scandal May Cost the Comedian*, FORBES (Nov. 10, 2017), <https://www.forbes.com/sites/maddieberg/2017/11/10/louis-c-k-s-losses-how-much-the-sexual-misconduct-scandal-may-cost-the-comedian/#2051da615801> [https://perma.cc/H8FL-A9EA].

³⁰⁴ Anna North, *Aziz Ansari’s New Standup Set, and its Complicated, Necessary Role in #Me-Too*, VOX (Mar. 20, 2019), <https://www.vox.com/2019/3/20/18263783/aziz-ansari-tour-2019-sexual->

This is not to diminish the lost opportunities and career consequences these men have faced. Nor is it to condone mobbing behaviors such as online insults, threats, trolling, or doxing, whether that mobbing is aimed at the accuser or the accused.³⁰⁵ Rather, it is to argue accusations alone have not forced prominent men into professional exile.

The “disproportionality” argument may misunderstand the severity of sexual assault, harassment, and misconduct. It may be based on an all-or-nothing view—long reflected in criminal law—that the problem is an exceptional phenomenon perpetrated by a small number of predators.³⁰⁶ But the problem is not limited to rape, and the harms are not sexual violation alone — the harms are also in how sexual assault, harassment, and misconduct contribute to systemic gender-based inequality.³⁰⁷ For example, the harm of harassment of the sort Louis C.K. perpetrated is in diminishing women’s equal employment opportunities. After complaining about C.K., comedians Dana Min Goodman and Julia Wolov found their opportunities in Hollywood limited because they had to maneuver to avoid his manager.³⁰⁸ As one female stand-up comic put it: “We are all avoiding someone who could help us make money. Female comics do a lot of calculating, finding alternate routes to a career.”³⁰⁹ Another potential comic, Abby Schachner, decided to pursue a different career, in part because of C.K.’s harassment.³¹⁰ Harms to women’s careers may be discounted because of victim-blaming, particularly when the survivors are people of color.³¹¹ Another harm may be in treating women like objects, the butt of the joke, or making light of sexual assault, as when Al Franken posed for a picture placing his hands over the breasts of a sleeping woman as if to sexually

misconduct-allegations [<https://perma.cc/2FCV-KVWJ>] (describing the themes of a recent comedy performance by Ansari as “personal growth and political progress”). See also Doreen St. Félix, *The Productive Ambivalence of Aziz Ansari in his Comeback Netflix Special*, NEW YORKER (July 13, 2019), <https://www.newyorker.com/culture/cultural-comment/the-productive-ambivalence-of-aziz-ansari-in-his-comeback-netflix-special> [<https://perma.cc/N3PH-257F>].

³⁰⁵ “Doxing” is the spread of personal information about an individual in an effort to facilitate harassment. See Leigh Honeywell, *Staying Safe When You Say #MeToo*, ACLU (Feb. 12, 2018), <https://www.aclu.org/blog/privacy-technology/internet-privacy/staying-safe-when-you-say-metoo> [<https://perma.cc/P4W3-8S7V>]. Unfortunately, online mobbing is a risk for accusers. *Id.*

³⁰⁶ See Anderson, *supra* note 36, at 1953.

³⁰⁷ See Schultz, *supra* note 67.

³⁰⁸ Melena Ryzik et al., *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/PM3E-H5QZ>].

³⁰⁹ Laurie Kilmartin, *Being a Female Comic in Louis C.K.’s World*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/opinion/sunday/louis-ck-harassment.html> [<https://perma.cc/FPE4-RR4A>].

³¹⁰ Ryzik et al., *supra* note 308.

³¹¹ See, e.g., MANNE, *supra* note 105, at 225–38.

assault her.³¹² United States Senators should be held to higher standards when it comes to treating all people with dignity and respect.³¹³

Another version of the “death penalty” argument is that there is no path to redemption. Yet there are few examples of attempts at meaningful amends.³¹⁴ Principles of restorative justice require that an apology include acknowledgment of the victim’s experience, responsibility-taking, repair of the harm, and steps to avoid repeating the misconduct.³¹⁵ Rather than attempting amends, many high-profile men who have lost their positions due to credible and severe accusations have sought unproven medical treatments, sometimes in expensive, resort-style residential facilities.³¹⁶ In other cases, they have apologized and received second chances.³¹⁷

³¹² See Dartunorro Clark, *Al Franken Accused of Forcibly Kissing, Groping Leeann Tweeden*, NBC NEWS (Nov. 16, 2017), <https://www.nbcnews.com/politics/congress/sen-al-franken-accused-forcibly-kissing-groping-woman-n821381> [<https://perma.cc/GL9H-BM8U>]. One commentator has said about this photo: “I found it an inoffensive burlesque of a burlesque—they were, after all, on a USO tour, which is a raunchy vaudeville throwback.” Yoffe, *supra* note 156. Cf. Mayer, *supra* note 156 (quoting an individual who was present when the photo was taken as explaining that the picture was a reference to a skit in which Franken’s character attempted to grope Tweeden’s character on the pretense of performing a breast examination). Modern day burlesque might be a sexually liberatory form of feminist camp, but only if all the performers are in on the joke. At best, the picture shows Franken treating Tweeden like a prop, not a performer. About the picture, Franken himself said:

It’s obvious how Leeann would feel violated by that picture. And, what’s more, I can see how millions of other women would feel violated by it—women who have had similar experiences in their own lives, women who fear having those experiences, women who look up to me, women who have counted on me.

Associated Press, *Statement by Sen. Al Franken on Sexual Harassment Allegation*, AP (Nov. 16, 2017), <https://www.apnews.com/3adcb145c40341c384208dec036d2429> [<https://perma.cc/L6QB-K4EP>].

³¹³ Kirsten Gillibrand, *Senator Franken Should Step Aside*, FACEBOOK (Dec. 6, 2017), <https://www.facebook.com/KirstenGillibrand/posts/senator-franken-should-step-aside-i-have-been-shocked-and-disappointed-to-learn-o/10155471770513411/> [<https://perma.cc/W48V-B6HW>] (“We should demand the highest standards, not the lowest, from our leaders, and we should fundamentally value and respect women.”).

³¹⁴ Wexler, Robbennolt, & Murphy, *supra* note 29, at 31 (discussing NFL player Ray Rice’s meaningful efforts at redemption after being caught on video assaulting his then-girlfriend).

³¹⁵ *Id.* at 22–33.

³¹⁶ Benedict Carey, *Therapy for Sexual Misconduct? It’s Mostly Unproven*, N.Y. TIMES (Nov. 27, 2017), <https://www.nytimes.com/2017/11/27/health/sexual-harassment-addiction-treatment.html> [<https://perma.cc/4A52-BYUM>]; Amy Chozick, *Where’s Harvey?*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/style/harvey-weinstein-in-arizona.html> [<https://perma.cc/8BBJ-EZPR>].

³¹⁷ See, e.g., Sean O’Neal, *The Tortured Mind of Dan Harmon*, GQ (May 30, 2018), <https://www.gq.com/story/dan-harmon-rick-and-morty-profile> [<https://perma.cc/489Q-8QKL>] (describing the successful career of Dan Harmon, who apologized for harassment in January 2018); Stacy Perman, *John Lasseter is Attempting Hollywood’s Biggest #MeToo Comeback. How’s that Going?*, L.A. TIMES (Jan. 27, 2019), <https://www.latimes.com/business/hollywood/la-fi-ct-lasseter-skydance-test-case-20190124-story.html> [<https://perma.cc/2C43-F75K>] (discussing controversy over the hiring of John Lasseter to run the animation division of Skydance Media after he had apologized for “missteps” at his previous job).

A more general problem with the disproportionality argument is that it frames the goals of #MeToo's procedures as "retribution" rather than "replacement."³¹⁸ Unlike rank-and-file workers, those at the upper-echelons represent their enterprise and chart its course. Such individuals have lost their positions for making racist³¹⁹ and anti-Semitic³²⁰ remarks, for telling lies,³²¹ and for marital infidelity.³²² As the public faces of businesses, communities, or organizations, these individuals represent their entities' brands, values, or priorities. Their individual misconduct, and how it is managed, sends a message about the larger whole. Moreover, these are the people who make the decisions about what news stories are worth covering, what movies are worth making, what startups are worth funding, and what laws are worth passing, upholding, and enforcing. It should be beyond cavil that those who hold such power should be held to higher standards of accountability. If they are not held accountable for their own wrongdoing, they are unlikely to have the will or the moral authority to hold others accountable.

CONCLUSION

Under the rules of #MeToo, anyone could one day be in the position of evaluating public accusations of sexual misconduct against political figures, entertainers, or executives. Although we may not be state actors, we should take due process seriously. We should consider the source of information and critically evaluate media based on whether it conforms to journalistic standards such as seeking both sides, attribution, and verification. We should not act based on allegations that have not been vetted or are not sufficiently specific to enable the accused to respond meaningfully. We should insist on independent investigations

³¹⁸ See Traister, *supra* note 66.

³¹⁹ See, e.g., Judy Faber, *CBS Fires Don Imus over Racial Slur*, CBS NEWS (July 16, 2007), <https://www.cbsnews.com/news/cbs-fires-don-imus-over-racial-slur/> [<https://perma.cc/9462-V2PD>]; John Koblin, *After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html> [<https://perma.cc/CUP9-3CYP>].

³²⁰ See, e.g., John Patterson, *Is All Forgiven? The Strange, Troubling Resurgence of Mel Gibson*, GUARDIAN (Nov. 23, 2017), <https://www.theguardian.com/film/2017/nov/23/mel-gibson-hollywood-road-rehabilitation> [<https://perma.cc/S79M-LUBS>].

³²¹ See, e.g., John Koblin & Emily Steel, *Brian Williams Gets New Role at Lower Salary*, N.Y. TIMES (June 18, 2015), <https://www.nytimes.com/2015/06/19/business/media/brian-williams-nbc-lester-holt.html> [<https://perma.cc/64BT-MAT8>] (lies about a helicopter incident in Iraq); James B. Stewart, *In the Undoing of a CEO, a Puzzle*, N.Y. TIMES (May 18, 2012), <https://www.nytimes.com/2012/05/19/business/the-undoing-of-scott-thompson-at-yahoo-common-sense.html> [<https://perma.cc/L8EA-XZZ4>] (fabricating a college degree to embellish a resume).

³²² See, e.g., Chris Tognotti, *Whatever Happened to John Edwards? The North Carolina Senator's Fall from Grace Was Quick & Absolute*, BUSTLE (Nov. 5, 2015), <https://www.bustle.com/article/s/121572-whatever-happened-to-john-edwards-the-north-carolina-senators-fall-from-grace-was-quick-absolute> [<https://perma.cc/G62N-KNBK>].

where appropriate. We should apply different considerations to those seeking high office, fame, and fortune and those just seeking to make a living. We should recognize that not all sexual misconduct is equally harmful. But we should not carve out exceptional protections for those accused of sexual forms of misconduct. The #MeToo movement has accomplished something unprecedented in removing abusive leaders from positions of power. The movement should continue to reflect critically on procedural justice if it hopes to achieve a future in which sexual harassment and assault disqualify a person from holding immense power.