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Unofficial Reporting in the #MeToo Era

Deborah Tuerkheimer[†]

ABSTRACT

In the age of #MeToo, victims of sexual misconduct are coming forward en masse to allege abuse, finding strength in numbers and a growing cultural responsiveness to their claims. Facilitated by innovative technologies, #MeToo is sparking the creation of new channels for reporting abuse—channels intended to bypass the laws and rules that prohibit sexual misconduct. To make sense of this unexamined development, a proposed taxonomy classifies informal avenues of complaint into four distinct categories: the Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. While unofficial reporting can advance important ends, the rise of informal accusation also raises concerns that bear directly on the need to enhance formalized accountability for sexual assault and harassment.

I. INTRODUCTION

The contemporary movement known as #MeToo emerged in early October 2017 when allegations of sexual assault and harassment against Harvey Weinstein were reported by the *New York Times* and the *New Yorker*.¹ As the Weinstein story developed in the coming weeks and months, the number of allegations publicly leveled against him

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¹ Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/HHY8-4Q59>]; 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> [<https://perma.cc/5LSZ-3SUC>]. The first “Me Too” campaign originated in 2007, when activist Tarana Burke began a nonprofit to assist victims of sexual harassment and assault. See, e.g., 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/GD7A-UC99>].

multiplied.² The media quickly intensified reporting on a range of sexual misconduct³ by other high profile men.⁴ Soon the coverage grew to encompass sexual harassment and assault across disparate industries and institutions, including publishing, fashion, music, sports, entertainment, architecture, advertising, comedy, philanthropy, hospitality, retail, farm, factory, academia, technology, media, church, and politics.⁵

² See Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> [<https://perma.cc/8HG7-KRTR>].

³ “Sexual misconduct” encompasses sexual assault, sexual harassment, and non-actionable sexual abuse. See Kathryn Casteel & Andrea Jones-Rooy, *We Need a Better Way to Talk about ‘Sexual Misconduct,’* FIVETHIRTYEIGHT (Apr. 17, 2018), <https://fivethirtyeight.com/features/we-need-a-better-way-to-talk-about-sexual-misconduct/> [<https://perma.cc/MN25-JUZ>] (explaining the importance of distinguishing between types of sexual misconduct). Although the existence of different subordinate categories complicates use of the umbrella term, “sexual misconduct” highlights connections between the various behaviors that fall under the rubric.

⁴ See Swetha Kannan & Priya Krishnakumar, *A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein*, L.A. TIMES (Dec. 29, 2017), <https://www.latimes.com/projects/la-na-sexual-harassment-fallout/> [<https://perma.cc/A26H-C9BK>]. Over the course of several years preceding the Weinstein story, clusters of high-profile sexual misconduct accusations surfaced against Bill Cosby, Roger Ailes, and Donald Trump, among others, likely seeding the ground for #MeToo. For one pre-Weinstein perspective, see Lani Seelinger, *Trump, Cosby, and Why Being a Woman in 2017 Feels Harder than Ever*, BUSTLE (June 17, 2017), <https://www.bustle.com/p/trump-cosby-why-being-a-woman-in-2017-feels-harder-than-ever-65066> [<https://perma.cc/F5CQ-H9CA>].

⁵ See, e.g., Nick Anderson, *Academia’s #MeToo Moment: Women Accuse Professors of Sexual Misconduct*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/local/education/academias-metoo-moment-women-accuse-professors-of-sexual-misconduct/2018/05/10/474102de-2631-11e8-874b-d517e912f125_story.html?utm_term=.d76b3ad5d2f9 [<https://perma.cc/W3AQ-A58G>]; Harry Bruinius, *Churches Struggle with Their #MeToo Moment*, CHRISTIAN SCI. MONITOR (Apr. 20, 2018), <https://www.csmonitor.com/USA/Politics/2018/0420/Churches-struggle-with-their-MeToo-moment> [<https://perma.cc/XMZ6-D7L2>]; Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/FJ4W-RUT6>]; Patricia Cohen & Tiffany Hsu, *Children’s Book Industry Has Its #MeToo Moment*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/business/childrens-publishing-sexual-harassment.html> [<https://perma.cc/WJ6L-E4N9>]; Dan Corey, *Here’s a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 19, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821> [<https://perma.cc/JP85-FBDD>]; Jill Disis, *The Media Men Who Have Been Accused of Sexual Misconduct*, CNN (Nov. 30, 2017), <https://money.cnn.com/2017/11/29/media/media-men-accused-of-sexual-misconduct/index.html> [<https://perma.cc/PSV4-5TS5>]; Stassa Edwards, *Women in Architecture Have Their Own Shitty Men List*, JEZEBEL (Mar. 16, 2018), <https://jezebel.com/women-in-architecture-have-their-own-shitty-men-list-1823844222> [<https://perma.cc/6A3R-5HU9>]; Amelia Harnish, *Advertising’s #MeToo Movement Picks up Speed*, REFINERY29 (Mar. 13, 2018), <https://www.refinery29.com/en-us/2018/03/193440/times-up-advertising-female-advertising-executives-sexual-harassment> [<https://perma.cc/CG5G-TL9K>]; Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why is the Restaurant Industry So Terrible For Women?*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html?noredirect=on&utm_term=.fd2c12410c67 [<https://perma.cc/LQ9B-NHB6>]; Juliet Macur, *The “Me Too” Movement Inevitably Spills into Sports*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/sports/olympics/mckayla-maroney-me-too.html> [<https://perma.cc/W6WB-UMBS>]; *#MeToo Hits the Nonprofit World*, CHRON. OF PHILANTHROPY (Apr. 5, 2018), <https://www.philanthropy.com/specialreport/metoo-hits-the-nonprofit-worl/167> [<https://perma.cc/F542-ATFK>]; Aly-

By the close of the year, #MeToo had touched off a widespread reckoning with a vast continuum of sexual abuse.⁶

To much of the general public, the realities of sexual violation—mostly experienced by women⁷—was news. It was hardly news, however, to members of the impacted communities. Rather, survivors and those vulnerable to abuse were sharing information all along. Harvey Weinstein’s decades of predation were an “open secret” in Hollywood well before the *New York Times* broke the story,⁸ and the same can be said for many, even most, of the scandals that have erupted since.⁹ It turns out that women were indeed reporting their abuse; they were

ssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017), <https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271> [<https://perma.cc/UAB5-8UQK>]; Yuki Noguchi, *Low-Wage Workers Say #MeToo Movement is Chance for Change*, NPR (Feb. 6, 2018), <https://www.npr.org/2018/02/06/583428098/low-wage-workers-say-metoo-movement-is-a-chance-for-change> [<https://perma.cc/V98X-WTUQ>]; Emilia Petrarca, *Fashion’s #MeToo Movement is Loudest on Instagram*, CUT (Apr. 5, 2018), <https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html> [<https://perma.cc/G4EM-S424>]; David Sims, *Louis C.K. and Abuse of Power in the Comedy World*, ATLANTIC (Nov. 9, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/louis-ck-sexual-misconduct-allegations/545489/> [<https://perma.cc/L8GS-VKDL>]; Marlow Stern, “Russell Simmons Is Just the Beginning”: Music Industry Braces for #MeToo Impact, DAILY BEAST (Dec. 15, 2017), <https://www.thedailybeast.com/russell-simmons-is-just-the-beginning-music-industry-braces-for-metoo-impact> [<https://perma.cc/X3CG-AREW>]; THR Staff, *Notable Entertainment Figures Accused of Sexual Misconduct in Wake of Harvey Weinstein*, HOLLYWOOD REPORTER (Nov. 30, 2017), <https://www.hollywoodreporter.com/lists/hollywood-media-men-accused-of-sexual-misconduct-and-harassment-post-weinstein-1057193> [<https://perma.cc/8CPU-XUMA>].

⁶ See Edward Felsenthal, *The Choice*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers-choice/> [<https://perma.cc/4SM4-P5VG>] (explaining why the magazine selected for its “Person of the Year” the women who catapulted the #MeToo movement).

⁷ At the most extreme end of the sexual abuse spectrum, nationwide survey data suggest that nearly one in five women have been raped at some point in their lives. MICHELLE C. BLACK ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.cc/4R8E-CTC>]. For men, the number is one in seventy-one. *Id.* Transgender people experience sexual violence at rates of nearly one in two. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/M9XF-F8FT>] (in the largest survey of transgender people in the United States, forty-seven percent of respondents reported having been sexually assaulted). Data on sexual harassment, while sparse, also shows a steep gender disparity. See Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [<https://perma.cc/6BL2-B22Y>].

⁸ See Kantor and Twohey, *supra note 1*.

⁹ See, e.g., Reah Bravo, *The Open Secret of Charlie Rose*, N.Y. REV. OF BOOKS (May 4, 2018), <https://www.nybooks.com/daily/2018/05/04/the-open-secret-of-charlie-rose/> [<https://perma.cc/TB6Z-55CV>]; *Food Writer Allison Robicelli Calls Mario Batali Allegations an ‘Open Secret.’* BALTIMORE SUN (Dec. 12, 2017), <https://www.baltimoresun.com/features/baltimore-insider-blog/bs-fe-robicelli-responds-20171212-story.html> [<https://perma.cc/6AM9-ZYW6>]. See generally Sarah Hanson-Young, *The ‘Open Secret’ of Sexual Harassment in the Media is Staggering. There’s Plenty Yet to Come*, GUARDIAN (Dec. 3, 2017), <https://www.theguardian.com/world/commentisfree/2017/dec/04/the-open-secret-of-sexual-harassment-in-the-media-is-staggering-theres-plenty-yet-to-come> [<https://perma.cc/N3G2-SZY9>]; Amanda Hess, *Hollywood Harassment Was an Open Secret. But TV Comedies Took It On*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/arts/sexual-harassment-tv-bystander-aziz-ansari-lena-dunham-tig-notaro.html> [<https://perma.cc/978Y-RBQ>].

simply doing so in uncharted ways. #MeToo has exposed a large decentralized network of information exchange.

At the same time, facilitated by expanding technologies,¹⁰ #MeToo has catalyzed the creation of new channels for reporting sexual misconduct without directly invoking the legal system or law-adjacent institutional structures.¹¹ I will call these mechanisms for reporting sexual misconduct¹² that bypass formalized mechanisms of accountability “unofficial reporting channels” or “informal reporting channels.”¹³

After mapping the unofficial pathways for complaints that have emerged in the #MeToo era, I consider the normative implications of the new sexual misconduct reporting. My focus here is not on the woeful inadequacies of formal mechanisms for addressing sexual assault and harassment—inadequacies that prompt women to relay their abuse through back channels.¹⁴ Instead, without minimizing the importance of functions served by informal reporting,¹⁵ I argue that its proliferation should raise concerns for those committed to improving our societal response to allegations of sexual assault and harassment. By crystallizing these concerns, my hope is to advance a conversation about how best to facilitate lasting change.

This Article proceeds as follows. Part I proposes a taxonomy that classifies informal avenues of complaint into four distinct categories: the Traditional Whisper Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. Part II identifies a trio of dangers that surround the emergence of an informal complaint system. These hazards include a lack of accountability for those who perpetrate abuse, the absence of process and the strategic deployment of that absence by defenders of the status quo, and the weaponization of defamation law in service of silencing would-be accusers. By surfacing significant limitations of an unofficial reporting regime, this discussion underscores the need for reform to activate a largely forsaken law of sexual misconduct.

¹⁰ Technology is powering the evolution of whisper networks as it is simultaneously facilitating the #MeToo movement. For purposes of my argument, it is unnecessary to disentangle the impact of technological innovation from the cultural causes and effects of #MeToo.

¹¹ Sexual misconduct may be regulated by criminal law, by tort law, by Title IX, and by Title VII, depending on where the misconduct occurs and what it comprises.

¹² Unless otherwise specified, my use of “reporting” throughout this discussion includes not just formal complaints, but informal or unofficial disclosures of misconduct as well.

¹³ Informal and unofficial reporting channels (used interchangeably throughout the discussion) are pathways for complaint other than those established by an institution with authority to process an allegation of misconduct under the applicable legal or administrative framework. *See supra* note 11. At times, I will also refer to these channels as informal avenues of complaint.

¹⁴ For a discussion of the inadequacies of formal systems, *see generally* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 101 (2019).

¹⁵ I identify and explore these various functions in separate work. *Id.*

II. A TAXONOMY OF INFORMAL REPORTING CHANNELS

Women have long chosen to share their accounts of sexual abuse with one another rather than report through formal channels.¹⁶ Over time, “whisper networks” have operated in a largely clandestine manner; the communications shared within them, in addition to the networks themselves,¹⁷ have been hidden from the view of all except intended recipients. But the secrecy of a network’s very existence, and even the content of information exchanged, is not an inevitable feature of unofficial reporting channels. One significant feature of the #MeToo era is that whisper networks have exposed themselves to outsiders for the first time.¹⁸

As important, #MeToo has spawned the creation of new kinds of informal reporting channels that are conceptually distinct from whisper networks. These channels amplify accusations of abuse by reaching wider communities and aiming for more ambitious ends—a development that has been greatly facilitated by technology.¹⁹ As new reporting pathways emerge, it is clear that innovation along these lines will continue in the #MeToo era.

Now is an opportune moment to consider how informal reporting channels operate.

A. Variables

On close inspection, unofficial conduits for reporting sexual misconduct vary along three key dimensions. First, can the accuser report

¹⁶ See *infra* note 23. Informal reporting of sexual misconduct can be a form of consciousness-raising. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–64 (1990) (explaining that “[c]onsciousness-raising is an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences”). On the centrality of consciousness-raising practices to feminism, see Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 519 (1982). For historical context, see CAROL HYMOWITZ & MICHAELE WEISSMAN, *A HISTORY OF WOMEN IN AMERICA* 351–55 (1978).

¹⁷ I am using “network” to describe a group of interconnected people who disseminate information, receive information, or both.

¹⁸ See Summer Meza, *What Is a Whisper Network? How Women Are Taking Down Bad Men in the #MeToo Age*, NEWSWEEK (Nov. 22, 2017), <https://www.newsweek.com/what-whisper-network-sexual-misconduct-allegations-719009> [<https://perma.cc/8ZQD-3BF3>] (“This is the year the whisper network went viral, with women sharing their allegations and experiences in forums, spreadsheets, private groups and all over social media.”).

¹⁹ See generally Elizabeth Dwoskin & Jena McGregor, *Sexual Harassment Inc: How the #MeToo Movement Is Sparking a Wave of Start-ups*, WASH. POST (Jan. 5, 2018), https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups/?noredirect=on&utm_term=.3c7ec0e49aad [<https://perma.cc/YJ7D-ZRE6>]; see also *supra* note 10.

anonymously or must the accuser identify herself?²⁰ Second, is the accused named or does the accused remain unidentified?²¹ Third, is access to the channel restricted or is it open to all?²² After discussing each variable in turn, I introduce a taxonomy of informal reporting that uncovers several instructive patterns. This analysis suggests that whisper networks are evolving in ways that are significant, especially from the vantage of law.

1. Accuser anonymity

The oldest and most familiar form of a whisper network features face-to-face information exchange.²³ Women share their accounts of sexual violation with one another in person (and did so well before there was an internet); these reports of abuse can then be further disseminated to other members of the networked group.²⁴

Until the #MeToo era, group outsiders were generally not privy to the existence of whisper networks. This may be changing, however, as victims begin to perceive a greater societal willingness to believe allegations of sexual misconduct and to condemn it. Increasingly, members of traditional whisper networks—some of which have been in operation for decades—are revealing how and why they channeled accounts of abuse.

The Glass Ceiling Club, for instance, was a group of female investment bankers who began convening in the 1990s to talk about “how to make the workplace more female friendly.”²⁵ As one participant recently explained, “our conversations would revert to sharing facts we knew about the men we worked with, [and] yes, it was mostly the same men who preyed on young women.”²⁶ Among the reasons for Glass Ceiling Club members to divulge their experiences with sexual harassment

²⁰ See *infra* notes 23–47 and accompanying text. Given that sexual misconduct is experienced disproportionately by women, I will at times use female pronouns to describe victims and accusers while recognizing that men are also victims and accusers. See *supra* note 7.

²¹ See *infra* notes 48–52 and accompanying text.

²² See *infra* notes 53–62 and accompanying text.

²³ See Julie Creswell & Tiffany Hsu, *Women’s Whisper Network Raises Its Voice*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/04/business/sexual-harassment-whisper-network.html> [<https://perma.cc/E898-AJFT>] (“For as long as women have been in the labor force,” they have gathered to “clue each other into a spectrum of behavior that was often unseen or ignored by their employers,” including sexual misconduct.).

²⁴ See *infra* notes 48–52 and accompanying text (discussing open and restricted networks).

²⁵ Creswell & Hsu, *supra* note 23.

²⁶ *Id.*

was to help protect other women. “Survival hints”—strategies like staying on the public trading floor when engaging with a known harasser—“were shared pretty freely.”²⁷

Another decades-old, person-to-person whisper network centered on Richard Meier, who stands among the world’s most prominent architects.²⁸ In April 2018, multiple allegations of sexual misconduct against Meier were publicly reported, along with details about a decades old whisper network that enabled women to share information about his abuse.²⁹ Beginning in the 1990s, female employees created “a kind of underground in the office that functioned to warn people about what they could expect,”³⁰ as well as to offer safety in numbers.³¹ When one woman alleged that Meier sexually assaulted her, she disclosed this to other women at the firm; “it turned out that everybody had a story.”³² Yet most victims of Meier’s abuse did not report the abuse through formal channels.³³

The classic version of the whisper network exists across a wide swath of workplaces and other contained settings.³⁴ But alongside it, a different model—one that features an anonymous accuser—is becoming

²⁷ *Id.*

²⁸ See, e.g., Robin Pogrebin, *Women Say Richard Meier’s Conduct Was Widely Known Yet Went Unchecked*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/arts/design/richard-meier-sexual-misconduct-allegations.html> [<https://perma.cc/WL4B-VCFJ>].

²⁹ *Id.*

³⁰ *Id.* (quoting Adam Eli Clem, an assistant archivist in Meier’s firm in the mid-1990s). To further protect one another, women “knew to wait for one another at the end of the day to avoid leaving a female colleague alone [with Meier].” *Id.*

³¹ *Id.*

³² *Id.* (quoting Karin Bruckner, who started at Meier’s architecture firm in 1989 and was groped by him against a copy machine.).

³³ *Id.*

³⁴ See, e.g., Emily Alford, *Former NBC News Anchor Linda Vestor on Matt Lauer Allegations: ‘Everybody Knew,’* JEZEBEL (Oct. 17, 2019), <https://jezebel.com/former-nbc-news-anchor-linda-vestor-on-matt-lauer-alleg-1839150737> [<https://perma.cc/6L3G-7M2P>] (reporting that Vestor had been warned by her co-workers to stay away from Lauer because he was “dangerous”); Catherine Crump, *Clerkships Are Invaluable to Young Lawyers. They Can Also Be a Setup for Abuse*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/15/when-women-law-clerks-are-harassed-they-often-have-nowhere-to-turn/?utm_term=.38012bd5914a [<https://perma.cc/S34L-CWBP>] (describing ways in which female clerks were warned to “stay away” from then-Ninth Circuit Judge Alex Kozinski); Wendy Lu, *What #MeToo Means to Teenagers*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/well/family/metoo-me-too-teenagers-teens-adolescents-high-school.html> [<https://perma.cc/VFK4-D8ML>] (According to one high school senior, “[a] lot of female friend groups have a list of—or know about—high school boys who they know have been treating women in a gross way, and make sure their friends stay away from them.”). Anecdotal evidence suggests that similar networks exist in many law schools and law firms. See also An Phung & Chloe Melas, *Women Accuse Morgan Freeman of Inappropriate Behavior, Harassment*, CNN (May 28, 2018), <https://www.cnn.com/2018/05/24/entertainment/morgan-freeman-accusations/index.html> [<https://perma.cc/9FZJ-B83Q>] (explaining that, because staffers at Freeman’s production company “did not feel comfortable talking to senior personnel about their workplace grievances,” some women formed a “survivors club’ where they gathered to vent about their experiences . . .”).

more commonplace. To be sure, the anonymous accuser model is not entirely without precedent.³⁵ In 1990, for example, female students at Brown University generated a list on several bathroom walls of men who allegedly raped them;³⁶ the same tactic has been used on college campuses periodically since then (including at Brown in April 2017).³⁷ But technology has enabled the anonymous accuser version of the whisper network to spread well beyond the confines of universities, making it more ubiquitous than ever before.³⁸

A recent example to have publicly materialized, albeit not by design,³⁹ is the Media Men List (or “Shitty Media Men List,” as it was originally conceived).⁴⁰ According to its creator, former *New Republic* editor Moira Donegan, the “anonymous, crowdsourced document was a first attempt at solving what has seemed like an intractable problem: how women can protect [them]selves from sexual harassment and assault.”⁴¹ Donegan used a Google spreadsheet to collect “a range of rumors and allegations of sexual misconduct, much of it violent, by men in magazines and publishing.”⁴² Although the document was meant to

³⁵ “People have been writing rape lists since the ‘80s and ‘90s, passing out fliers, writing names on doors.” Jenny Kutner, *Sexual Assault Survivors Are Outing Their Rapists on the Anonymous Corners of the Internet*, MIC (Apr. 13, 2016), <https://mic.com/articles/140607/sexual-assault-survivors-are-outing-their-rapists-on-the-anonymous-corners-of-the-internet#.J2yzTJB9i> [<https://perma.cc/2UZQ-LRPX>] (quoting Annie Clark, executive director and co-founder of End Rape on Campus).

³⁶ See, e.g., William Celis, *Date Rape and a List at Brown*, N.Y. TIMES (Nov. 18, 1990), <https://www.nytimes.com/1990/11/18/us/date-rape-and-a-list-at-brown.html> [<https://perma.cc/R9HA-MW8R>].

³⁷ See, e.g., Gwen Everett, *List Alleging Names of Sexual Assaulters Appears on Campus Bathrooms*, BROWN DAILY HERALD (Apr. 27, 2017), <http://www.browndailyherald.com/2017/04/27/list-alleging-names-sexual-assaulters-appears-campus-bathrooms/> [<https://perma.cc/FCN2-R2PH>]. As one former student explained, “students then and now would not write the names of their alleged sexual assailants on bathroom walls if they felt they had a more legitimate avenue to adjudicate campus assault . . .” *Id.* See also George Joseph & Jon Swaine, *Behind Columbia’s ‘Rape Lists’: When Existing Systems Fail, What Then?*, GUARDIAN (June 26, 2014), <https://www.theguardian.com/education/2014/jun/26/columbia-university-students-rape-list-mishandle-sexual-assault> [<https://perma.cc/8TWD-P7X6>].

³⁸ See *infra* notes 56–61 and accompanying text (describing widened dissemination of misconduct allegations).

³⁹ See *infra* note 43.

⁴⁰ See, e.g., Moira Donegan, *I Started the Media Men List*, CUT (Jan. 10, 2018), <https://www.the-cut.com/2018/01/moira-donegan-i-started-the-media-men-list.html> [<https://perma.cc/QD5S-U5DG>]. The Media Men List was controversial and covered widely by the mainstream press. See, e.g., Jaclyn Peiser, *How a Crowdsourced List Set Off Months of #MeToo Debate*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/business/media/media-men-list.html> [<https://perma.cc/ED4L-VXMT>]. See *infra* notes 134–138 and accompanying text (describing the defamation complaint recently filed against Donegan by an individual accused on the list).

⁴¹ Donegan, *supra* note 40.

⁴² *Id.*

be private in the sense that intended recipients were women in the industry⁴³—that is, women in a position to warn or be warned about their predatory colleagues—it quickly went viral and was then made public.⁴⁴ Before Donegan removed the document from the web, more than seventy men had been anonymously named as perpetrators of sexual misconduct, ranging from inappropriate behavior to criminal acts.⁴⁵

In sum, networks featuring anonymous accusers are proliferating in the age of #MeToo.⁴⁶ With the help of technology, women are increasingly able to share accounts of sexual violation without divulging their identities.⁴⁷

2. Identification of accused

Unofficial reporting channels are meant to create safe spaces for women to relate their experiences of sexual misconduct. For the most part, these channels allow participants to identify the accused by name; indeed, the need for a safe space is intricately connected to this very function.

The notable exception is a publicly available spreadsheet that collects accounts of sexual misconduct in academia while expressly prohibiting the naming of an accused.⁴⁸ The creator of the spreadsheet, Karen Kelsky, is a former professor who decided in the wake of the Harvey Weinstein scandal, “somebody needs to do this in the academy.”⁴⁹ Although the spreadsheet does not allow identification of either alleged victims or alleged perpetrators,⁵⁰ it was designed to include the names

⁴³ *Id.* See *infra* notes 48–52 and accompanying text (discussing open and restricted networks).

⁴⁴ *Id.* See also Doree Shafrir, *What to Do with “Shitty Media Men”?*, BUZZFEED (Oct. 11, 2017), <https://www.buzzfeednews.com/article/doree/what-to-do-with-shitty-media-men> [https://perma.cc/ZUP3-38CD].

⁴⁵ Donegan, *supra* note 40. The spreadsheet contained a disclaimer noting, “This document is only a collection of misconduct allegations and rumors. Take everything with a grain of salt.” *Id.* Donegan highlighted in red the names of men who were accused of physical sexual assault by more than one woman. *Id.*

⁴⁶ See, e.g., Sapna Maheshwari, *Ad Agencies’ Reckoning on Sexual Harassment Comes on Instagram, Anonymously*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/business/media/diet-madison-avenue-instagram.html> [https://perma.cc/UH4R-A9UH]; Kutner, *supra* note 35; Petrarca, *supra* note 5.

⁴⁷ In the course of litigation, it is possible for a court to require the unmasking of an anonymous accuser’s identity. See *infra* note 147 and accompanying text. Doxxing is also a threat to anonymity. (Other encryption related concerns lie beyond the scope of this discussion.)

⁴⁸ Karen Kelsky, *When Will We Stop Elevating Predators*, CHRON. HIGHER ED. (Jan. 1, 2018), <https://www.chronicle.com/article/The-Professor-Is-In-When-Will/242110> [https://perma.cc/4TE2-MGZ2]. As the author, who is also the spreadsheet’s creator, explained, she “intentionally left the definition of ‘sexual harassment’ open; contributors may share anything that they feel merits inclusion.” *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* Although some people identified the accused despite instructions to the contrary, Kelsky explained that, “[f]or legal reasons, I removed the names from the Google doc as quickly as I saw

of universities and departments, along with other pertinent information.⁵¹

The spreadsheet was published in December 2017; it quickly went viral and now contains nearly 2500 entries.⁵²

3. Channel access

As whisper networks evolve from the “face-to-face” sharing model,⁵³ important questions of access are arising. In their traditional incarnation, whisper networks are only open to a select group of insiders,⁵⁴ resulting in the exclusion of those who might have equal or greater need for the intelligence, including members of marginalized groups.⁵⁵

This dynamic is beginning to change as technology facilitates the wider dissemination of victims’ accounts.⁵⁶ Information can now be readily shared with a larger group of recipients who satisfy delineated criteria.⁵⁷ Informal reporting has moved beyond the in-person paradigm, granting access to a range of intended recipients, including company co-workers,⁵⁸ industry employees,⁵⁹ and sorority sisters.⁶⁰

them.” *Id.* Kelsky added that some of the men named privately are “still receiving promotions, accolades, chairs, and deanships.” *Id.*

⁵¹ The crowdsourced survey asks participants “what happened and when, what the harasser’s gender and position relative to the victim were at the time (professor, etc.), institution type and field, institutional responses and career consequences for the harasser (if any), and the impact of harassment on the career and health of the person who experienced it.” Colleen Flaherty, ‘*Holding Space*’ for Victims of Harassment, INSIDE HIGHER ED. (Dec. 8, 2017), <https://www.insidehighered.com/news/2017/12/08/what-can-crowdsourced-survey-sexual-harassment-academia-tell-us-about-problem> [<https://perma.cc/6AZ5-FEQD>].

⁵² Karen Kelsky, *Sexual Harassment in the Academy: A Crowdsourced Survey*, <https://docs.google.com/spreadsheets/d/1S9KShDLvU7C-KkgEevYTHXr3F6InTenrBsS9yk-8C5M/htmlview?sle=true#gid=15300773521> [<https://perma.cc/H6SC-3PFQ>].

⁵³ See *supra* notes 25–34 and accompanying text.

⁵⁴ The size of the “insider” group may vary considerably, from small face-to-face gatherings to large technology-facilitated workplace or industry wide chats. See *infra* notes 57–59 and accompanying text.

⁵⁵ Whisper networks are generally “based on trust, and any social hierarchy is rife with the privilege of deciding who gets access to information.” Jenna Wortham, *We Were Left Out*, N.Y. TIMES MAG., Dec. 2017, at 42.

⁵⁶ After the Media Men list circulated, Jenna Wortham, a woman of color, wrote: “Despite my working in New York media for [ten] years, [the Media Men List] was my first ‘whisper’ of any kind, a realization that felt almost as hurtful as reading the acts described on the list itself.” *Id.* Wortham posited that women of color working in media may have been “perceived as outsiders, or maybe [they] weren’t seen as vulnerable. [They] hadn’t been invited to the happy hours or chats or email threads where such information is presumably shared.” *Id.*

⁵⁷ For instance, closed and secret Facebook groups provide private spaces for sharing allegations of misconduct. See *infra* note 71 and accompanying text.

⁵⁸ See *infra* note 76 and accompanying text.

⁵⁹ *Id.*

⁶⁰ See *infra* note 74.

Accusations are even being disclosed to the public writ large—in other words, informal complaint channels can allow unrestricted access.⁶¹ As the #MeToo movement reshapes societal responses to allegations of sexual misconduct,⁶² channels for informal reporting are becoming almost unrecognizable from the whisper networks of old. These new channels are entirely open and increasingly commonplace.

B. Whisper Networks and Courts of Public Opinion

Unofficial channels for reporting sexual misconduct can best be categorized along two key dimensions: one is whether the accuser is anonymous; the other is whether access to the channel is restricted (or open to the public).

The resulting classification is depicted as follows:

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

To understand the unofficial reporting regime that has taken shape in the #MeToo era, it is useful to begin with the Traditional Whisper Network. We then turn to the remaining matrixes, which I call the Double Secret Whisper Network;⁶³ the Shadow Court of Public Opinion;⁶⁴ and the New Court of Public Opinion.⁶⁵

⁶¹ See *infra* notes 80–96 and accompanying text. Unrestricted access (open) channels will be referred to as courts of public opinion; restricted access (closed) channels will be deemed variations of whisper networks. See *infra* notes 62–65 and accompanying text (depicting and explaining two-by-two matrix).

⁶² See *supra* notes 1–6 and accompanying text.

⁶³ See *infra* notes 72–78 and accompanying text.

⁶⁴ See *infra* notes 80–90 and accompanying text.

⁶⁵ See *infra* notes 92–96 and accompanying text.

1. Traditional Whisper Network

Whisper networks enable women to share their accounts of sexual violation with select insiders.⁶⁶ The content of the information (and often, the existence of the network itself) remains secret—at least to the extent outsiders are not privy to it, as is generally the intent of those within the network.⁶⁷ But, in contrast to the Double Secret Whisper Network, which allows for anonymous reports, networks in this category feature a known source of the accusation.⁶⁸

The classic version of the Traditional Whisper Network entails face-to-face information exchange.⁶⁹ This in-person sharing of allegations is hardly obsolete; anecdotal evidence suggests that whisper networks continue to thrive in many, perhaps even most, workplaces and educational settings.⁷⁰

But because technology has enabled a more robust dissemination of information, no longer must the Traditional Whisper Network rely on face-to-face encounters. Where large or dispersed populations wish to report sexual misconduct within a select community—a particular challenge given changes in workplaces and on college campuses—technology can serve an important function in enhancing the adequacy of distribution channels. Updated formulations of the Traditional Whisper

⁶⁶ See *supra* note 54.

⁶⁷ In their classic formulation, whisper networks allow women to “share secret warnings via word of mouth . . .” Wortham, *supra* note 55. Whisper networks can, of course, be leaky.

⁶⁸ Especially in larger groups of insiders, information may be passed along a chain of network members—in effect, generating hearsay. At some point, if an accusation becomes sufficiently attenuated from the original source, it might be considered “rumor” or “gossip.” Nevertheless, insiders tend to perceive whisper networks as sources of useful information. See Jia Tolentino, *The Whisper Network after Harvey Weinstein and “Shitty Media Men,”* NEW YORKER (Oct. 14, 2017), <https://www.newyorker.com/news/news-desk/the-whisper-network-after-harvey-weinstein-and-shitty-media-men> [<https://perma.cc/RH8U-TKV3>] (“Over time, in my experience, the whisper network always proves reasonably accurate: firings and settlements and investigations accrue to the names you’ve been hearing in different anecdotes for years. Gossip distorts details, but there are ways to test the information. Women ask for and examine sourcing; you know whether the story is firsthand or thirdhand. ‘I’ve heard he gets grabby’ is one type of information, and ‘this guy physically hurt one of my best friends’ is another.”).

⁶⁹ One commentator provided this description: “Hey, just so you know, don’t be alone with X.’ I know you’re new here. In case nobody has mentioned it, Y has raped women. That’s a fact.’ ‘I’d call Z a creep, but I don’t think he’s dangerous in the way W is. I don’t know, I could be wrong.’ These are the kinds of warnings whispered in private among women in work spaces.” Alex Press, *It’s Time to Weaponize the “Whisper Network,”* VOX (Oct. 17, 2017), <https://www.vox.com/first-person/2017/10/16/16482800/harvey-weinstein-sexual-harassment-workplace> [<https://perma.cc/8M2F-DED9>].

⁷⁰ See Tolentino, *supra* note 68 (“Three years ago, shortly after I moved to the city, I was introduced to the whisper network—the unofficial channel that women use to warn each other about men whose sexual behavior falls on the spectrum from creepy to criminal—for New York media. I had encountered these networks before, in college and grad school and in the Peace Corps.”). See, e.g., Crump, *supra* note 34.

network (for instance, invitation-only Facebook groups)⁷¹ enable women identified by name to share their accounts across geographic distance but still within the confines of a private space.

2. Double Secret Whisper Network

The Double Secret Whisper Network relies on technological innovation to anonymize the accuser.⁷² Not only is the content of the information kept secret from network outsiders; the identity of the reporter is also kept secret from network insiders.

This type of network is becoming more commonplace. The Media Men List, which was intended only for women in media,⁷³ is just one example of how Google Docs is being used to facilitate the spread of anonymous allegations within a closed network.⁷⁴

Sparked by the #MeToo movement, a wave of startups is creating apps to assist with anonymous information distribution on campus and in the workplace.⁷⁵ This next generation of the Double Secret Whisper Network allows users to share their accounts of abuse with select audiences but in more technologically sophisticated ways. For instance, Blind enables employees at more than one hundred companies, including Amazon, Microsoft, and Google, to chat anonymously about workplace issues, including, often, sexual harassment and assault.⁷⁶

⁷¹ See Creswell & Hsu, *supra* note 23 (noting that through invitation-only Facebook groups, among other technologies, “women—and some men—are seeking catharsis and validation by sharing their stories”); Press, *supra* note 69 (mentioning email and Twitter Direct Messages as conduits for allegations). See also Tyler Kingkade, *Why Female Comedians Have a Secret World of Facebook Groups*, HUFFPOST (Aug. 31, 2016), https://www.huffingtonpost.com/entry/women-in-comedy-facebook-groups_us_57c5e82be4b078581f0fe6ba [<https://perma.cc/5A4N-5Y3B>] (discussing female comedians’ use of private Facebook groups to exchange information about sexual harassment and assault, among other topics).

⁷² The bathroom list is a non-technological analogue. See *supra* notes 36–37 and accompanying text.

⁷³ See *supra* note 43.

⁷⁴ See *supra* notes 39–45 and accompanying text. Sorority women at Yale University have used Google Docs in similar fashion. See, e.g., Abby Jackson, *Women at Yale Say They Developed a Secret Way to Protect Themselves from Dangerous Men Because the School Keeps Failing Them*, BUSINESS INSIDER (Jan. 23, 2018), <https://www.businessinsider.com/yale-sexual-assault-allegations-2018-1> [<https://perma.cc/5N27-ZWYJ>] (describing a system that uses “anonymous Google forms to compile the names of men who women say are dangerous, and then prohibit them from attending certain social events”).

⁷⁵ See Dwoskin & McGregor, *supra* note 19 (discussing “a wave of businesses emerging in the wake of widespread revelations of sexual misconduct in workplaces,” and observing that “[t]he startups, many of which have female founders or co-founders, want to disrupt a costly and persistent problem”); Kari Paul, *New Apps Help Victims of Sexual Assault and Harassment File Anonymous Reports*, MARKETWATCH (June 5, 2018), <https://www.marketwatch.com/story/post-weinstein-new-apps-aim-to-out-predators-before-they-become-serial-abusers-2018-01-24> [<https://perma.cc/VZ2K-AYS4>] (“Against the #MeToo movement backdrop, a new crop of apps and secure social networks are emerging to help victims report and address sexual harassment and assault. They aim to put the power in women’s hands—and on their phones.”).

⁷⁶ See Sarah Buhr, *Uber Employees Are Chatting with Each Other about Uber’s Leadership on*

A somewhat different iteration of the Double Secret Whisper Network—one designed as an information escrow⁷⁷—narrows the intended audience of an anonymous report to victims of the same perpetrator. Rather than share their accounts with would-be targets (that is, designated group members), users disseminate their information even more selectively.⁷⁸

3. Shadow Court of Public Opinion

Open access channels for reporting abuse are an alternative to the network model. As with restricted access channels, publicly available channels can allow allegations to be made anonymously,⁷⁹ which places them in the rather cloaked domain of the Shadow Court of Public Opinion. Although anyone can access these forums—indeed, far-flung distribution is intended—the accuser remains unidentified, making the information more nebulous.⁸⁰

Anonymous Workplace App Blind, TECHCRUNCH (Feb. 25, 2017), <https://techcrunch.com/2017/02/25/ubersecret/> [<https://perma.cc/RSC7-YU87>] (“[Blind] works by only allowing those within the same company to chat anonymously with each other.”).

⁷⁷ Emerging platforms like Callisto facilitate the “matching” of accusations in order to connect victims of the same perpetrator. See Anjana Rajan et al., *Callisto: A Cryptographic Approach to Detect Serial Predators of Sexual Misconduct*, PROJECT CALLISTO (Mar. 29, 2018), <https://www.projectcallisto.org/callisto-cryptographic-approach.pdf> [<https://perma.cc/A23U-Q6UP>]. See generally Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145 (2012) (arguing that information escrows can be deployed as an alternative method for both deterring and punishing repeat sexual violations).

⁷⁸ *Id.*

⁷⁹ Accusers may wish to remain anonymous to avoid the common repercussions of identifying themselves with a sexual misconduct allegation. See Itay Hod & Sharon Waxman, *After #MeToo: 12 Accusers Share What Happened Next, From Firing to More Trauma*, WRAP (Oct. 16, 2018), <https://www.thewrap.com/aftermetoo-12-accusers-what-happened-next-firing-more-trauma-harvey-weinstein/> [<https://perma.cc/39EZ-VYPE>]; see also *infra* note 81 and accompanying text.

⁸⁰ See Kutner, *supra* note 35 (“These apps and sites are typically viewed as backwaters of the internet, defined by seedy rumors and anonymous backbiting. However, many survivors of sexual assault use them to expose their attackers, allowing victims to take control of their experiences. This shift has led to questions about the degree to which school administrations should be paying attention to what’s said on these platforms, and what they can—and should—do about it.”).

Such avenues for sharing accounts of sexual misconduct are seemingly widespread.⁸¹ Of late, with #MeToo's focus on workplace harassment,⁸² allegations often cluster around particular industries.⁸³ In comment threads⁸⁴ and Instagram posts,⁸⁵ both of which allow public access to anonymous accusations, unnamed women have recently exposed alleged predators in children's literature,⁸⁶ advertising,⁸⁷ and fashion.⁸⁸ Notwithstanding the controversial nature of these platforms⁸⁹ and questions of legal liability that surround them,⁹⁰ for accusers intent on publicly exposing their abuser without identifying themselves, the Shadow Court of Public Opinion beckons.

4. New Court of Public Opinion

In the past two years, the #MeToo movement has made significant inroads in attacking longstanding societal dismissal of sexual misconduct claims.⁹¹ One way to understand this dynamic is that it is at once fueled by, and fueling, public allegations of sexual violation. What catapulted #MeToo was blockbuster reporting on the Harvey Weinstein story.⁹² The women in those accounts, many of whom were willing to speak on the record, came forward after years, even decades, to report

⁸¹ See *id.* (“Due to the stigma associated with sexual assault and the fear of being victim-blamed by the police or their university’s administration, many survivors feel uncomfortable coming forward with their stories. That’s given rise to reports of rape on anonymous online forums like Yik Yak, Whisper, College Confessions and campus-specific confessional Facebook groups.”).

⁸² See *supra* notes 1–6 and accompanying text.

⁸³ For a campus-based Shadow Court of Public Opinion, see Chris Quintana, *Anonymous Website Aims to Out Sexual Assaulters at U. of Washington*, CHRON. HIGHER ED. (Oct. 9, 2018), <https://www.chronicle.com/article/Anonymous-Website-Aims-to-Out/244755> [<https://perma.cc/68A7-TKL7>] (describing “Make Them Scared” as a “wiki dedicated to exposing the names of sexual harassers /attackers created in the University of Washington Seattle area”).

⁸⁴ See *infra* note 86 and accompanying text.

⁸⁵ See Maheshwari, *supra* note 46 (describing allegations in the advertising industry); Petrarca, *supra* note 5 (describing allegations in the fashion industry).

⁸⁶ See Cohen & Hsu, *supra* note 5.

⁸⁷ See Maheshwari, *supra* note 46.

⁸⁸ See Petrarca, *supra* note 5.

⁸⁹ See, e.g., Patrick Coffee, *‘Diet Madison Avenue’ Goes Dark on Instagram as Female Agency Veterans Publish Oppositional Letter*, ADWEEK (Mar. 5, 2018), <https://www.adweek.com/agencies/diet-madison-avenue-goes-dark-on-instagram-as-female-agency-veterans-publish-oppositional-letter/> [<https://perma.cc/VNS6-7NUR>]; Petrarca, *supra* note 5; Kutner, *supra* note 35.

⁹⁰ See *infra* notes 128–147 and accompanying text (discussing accusers’ vulnerability to defamation claims).

⁹¹ See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 20–41 (2017) (identifying and documenting the phenomenon of “credibility discounting” in sexual violence cases).

⁹² See *supra* note 1 and accompanying text. For thorough accountings of these extraordinary reporting feats, see JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019); RONAN FARROW, *CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS* (2019).

their abuse unofficially. Since then, many women with allegations against high-profile men—women who, for myriad reasons, chose not to report through formal legal channels⁹³—have done the very same, forsaking anonymity (unlike those who make public accusations in the Shadow Court of Public Opinion) in the New Court of Public Opinion.⁹⁴

Twitter—with its use of a hashtag that gave the #MeToo movement its name—is also emerging as a repository for sexual misconduct accusations.⁹⁵ As the movement advances, we can expect that survivors will

⁹³ See Hod & Waxman, *supra* note 79. After reporting unofficially, several accusers then opted to cooperate with official investigations. See, e.g., Ronan Farrow, *Behind the Scenes of Harvey Weinstein's Arrest*, NEW YORKER (May 24, 2018), <https://www.newyorker.com/news/news-desk/behind-the-scenes-of-harvey-weinsteins-impending-arrest> [<https://perma.cc/6WDU-VDWB>] (explaining that, the day after her allegations of sexual assault by Harvey Weinstein were publicly reported in the *New Yorker*, one accuser was contacted by New York Police Department detectives and agreed to cooperate with Weinstein's prosecution); Associated Press, *Special Prosecutor Interviewing Women who Accused Eric Schneiderman of Abuse*, N.Y. L. J. (May 23, 2018), <https://www.law.com/newyorklawjournal/2018/05/23/special-prosecutor-interviewing-women-who-accused-eric-schneiderman-of-abuse/> [<https://perma.cc/SZT5-4KUS>] (describing prosecutor's ongoing interviews with women who first disclosed allegations of abuse by Attorney General Eric Schneiderman in the *New Yorker*).

⁹⁴ See *supra* note 5. See also Anderson Cooper, *Mario Batali and the Spotted Pig*, CBS 60 MINS. (May 20, 2018), <https://www.cbsnews.com/news/mario-batali-and-the-spotted-pig-nyc/> [<http://perma.cc/D6JN-4EYA>]; Jim DeRogatis & Marisa Carroll, "He's A Predator": Two More Women Speak Out About R. Kelly's Alleged Sexual Abuse, BUZZFEED (May 4, 2018), <https://www.buzzfeednews.com/article/jimderogatis/r-kelly-sexual-abuse-allegations-lizette-martinez-times-up> [<https://perma.cc/298D-SQPU>]; Jane Mayer & Ronan Farrow, *Four Women Accuse New York's Attorney General of Physical Abuse*, NEW YORKER (May 7, 2018), <https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse> [<https://perma.cc/5258-P2F8>]. Given the professional training of, and constraints on, reporters, stories of sexual misconduct that appear in the mainstream media are typically well corroborated. See, e.g., Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—with Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.201fe12ef99a [<https://perma.cc/G2BM-J5ZB>]; Kantor & Twohey, *supra* note 1; Mayer & Farrow, *supra* note 94. Although the term "credibly accused" has become a staple of secondary reporting on #MeToo allegations, not all reporting on sexual misconduct allegations is immune from criticism. For one #MeToo era story that was widely perceived as falling short of journalistic standards, see Katie Way, *I Went on a Date with Aziz Ansari. It Turned Into the Worst Night of My Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355> [<https://perma.cc/X8SS-M5Z3>].

⁹⁵ See, e.g., Alison Flood, *Three Women Go Public with Sherman Alexie Sexual Harassment Allegations*, GUARDIAN (Mar. 7, 2018), <https://www.theguardian.com/books/2018/mar/07/three-women-go-public-with-sherman-alexie-sexual-harassment-allegations> [<https://perma.cc/X3XJ-FEHU>] (describing accusations that first surfaced on Twitter); Molly Olmstead, *A Woman Accused a Prominent State Senator of Raping Her. She Says She Was Inspired by Christine Blasey Ford's Testimony*, SLATE, Sept. 28 2018, <https://slate.com/news-and-politics/2018/09/joe-fain-washington-state-senator-rape-investigation.html> [<https://perma.cc/PF6Z-5LL5>]; Kristine Phillips, *Pulitzer Prize-Winning Author Junot Diaz Accused of Sexual Misconduct, Misogynistic Behavior*, WASH. POST (May 6, 2018), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/05/05/pulitzer-prize-winning-author-junot-diaz-accused-of-sexual-misconduct-misogynistic-behavior/?utm_term=.45b050865128 [<https://perma.cc/NM4X-R65Z>].

more routinely bring their allegations to the New Court of Public Opinion.⁹⁶

III. INFORMAL REPORTING DANGERS

The sudden ascendance of an unofficial reporting regime is, in many ways, a mark of progress. Newfound willingness on the part of countless women and men to complain about sexual misconduct indicates that the benefits of informally reporting abuse—anonously or not—are increasingly perceived as outweighing the costs. Nothing that follows is meant to deny the functionality of unofficial reporting channels in a world where official systems for redressing sexual misconduct are largely ineffectual.⁹⁷ But there are risks associated with the rise of informal accusation, particularly if official mechanisms for processing allegations of abuse do not simultaneously evolve so as to become, sooner or later, the primary repositories for these allegations.

The dominance of unofficial reporting is best understood as a problem of transition.⁹⁸ Rather than remain a dominant feature of our societal approach to sexual assault and harassment, the proliferation of informal complaints should underscore the need to invigorate our systems of formalized redress.⁹⁹ The alternative scenario—perpetual lopsidedness in the official/unofficial response ratio¹⁰⁰—raises several sets of concerns.

A. Limited Accountability

Whisper networks sacrifice the pursuit of offender accountability in the interest of achieving other benefits. For women who report through restricted access channels, regardless of whether they did so anonymously, this tradeoff is generally accepted as an inherent feature

⁹⁶ See Kate Thayer, *Sexual Assault Survivors Are Publicly Accusing Attackers on Social Media. But at What Cost?*, CHI. TRIB. (Dec. 14, 2018), <https://www.chicagotribune.com/lifestyles/ct-life-facebook-sex-assault-allegations-20181212-story.html> [<https://perma.cc/8WCU-ZYL5>] (“A Chicago woman took to Facebook last week to describe, in graphic detail, how a man she knows tried to rape her, naming him and including his photo in a post that was shared more than [a thousand] times in a matter of days.”).

⁹⁷ For a thorough analysis, see Tuerkheimer, *supra* note 14.

⁹⁸ See Lesley Wexler, Jennifer Robbenolt & Colleen Murphy, *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 90–107 (2019) (applying theories and practices of transitional justice to the #MeToo movement).

⁹⁹ See Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 880 (2019) (noting that the current “colonization” of the state’s regulatory space by the #MeToo movement appears to be temporary).

¹⁰⁰ To be clear, I am not arguing that informal reporting should entirely disappear as an option but rather that the frequency of formal reporting should increase in both relative and absolute terms.

of the network model.¹⁰¹ Since the recipients of the report are members of the vulnerable community, rather than those in positions of power over the abuser, it is highly unlikely that any mechanisms of accountability will be triggered by a victim's unofficial complaint.

The growing use of open access channels complicates this account. When named women come forward in the New Court of Public Opinion, consequences may result.¹⁰² Relatedly, when anonymous women make accusations in the Shadow Court of Public Opinion, these accusations can launch formal processes that may also lead to consequences.¹⁰³ In the age of #MeToo, men initially accused of misconduct in the Courts of Public Opinion (which include both the Shadow Court of Public Opinion¹⁰⁴ and the New Court of Public Opinion)¹⁰⁵ have faced job loss,¹⁰⁶ suspension,¹⁰⁷ revocation of honors,¹⁰⁸ and economic penalties imposed by businesses and consumers alike.¹⁰⁹ They have also been disgraced in

¹⁰¹ Indeed, for some women, the lack of accountability is a chief benefit. See Donegan, *supra* note 40 (“[T]he value of the spreadsheet was that it had no enforcement mechanisms: Without legal or professional power, it offered an impartial, rather than adversarial, tool to those who used it. It was intended specifically not to inflict consequences, not to be a weapon . . .”).

¹⁰² For a discussion of the process concerns raised, see *infra* notes 116–127 and accompanying text.

¹⁰³ As a general proposition, formal processes move forward only if an accuser is identified and willing to cooperate with investigators. While the contours of these processes are varied and often opaque, sanctioning bodies are unlikely to impose a penalty based only on an anonymous accusation. The scenario change may change, of course, where an anonymous accusation triggers an investigation that generates corroboration of the account—for instance, a third-party witness, electronic evidence, or an admission by the accused.

¹⁰⁴ See *supra* notes 71–90 and accompanying text.

¹⁰⁵ See *supra* notes 91–96 and accompanying text.

¹⁰⁶ See Sarah Almkhatar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall From Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> [<https://perma.cc/JVX9-DUKD>] (listing men “fired or forced to resign after accusations of sexual misconduct that ranged from inappropriate comments to rape”).

¹⁰⁷ See *id.* (listing men who have faced “suspensions and other fallout”).

¹⁰⁸ See Susan Adams, *Steve Wynn Loses Naming Rights at U Penn After Sexual Misconduct Allegations*, FORBES (Feb. 1, 2018), <https://www.forbes.com/sites/susanadams/2018/02/01/the-university-of-pennsylvania-is-stripping-steve-wynns-name-from-a-campus-plaza/#2add4767df5> [<https://perma.cc/EL7G-TZ2K>]; Louis Lucero II, *Charlie Rose Has Honors from Two Journalism Schools Rescinded*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/us/charlie-rose-awards.html> [<https://perma.cc/CZ7Z-SPUA>]; Jane C. Hu, *In the Aftermath of #MeToo, Which Names in Science Should be Replaced?* QUARTZY (Sept. 19, 2018), <https://qz.com/quartzy/1394785/replacing-names-in-science-after-metoo/> [<https://perma.cc/JFJ9-AXK9>].

¹⁰⁹ See, e.g., DeRogatis & Carroll, *supra* note 94 (describing post-#MeToo responses to longtime sexual misconduct allegations against R. Kelly). In the wake of the #MuteRKelly campaign and the release of *Surviving R. Kelly*, a documentary series first aired in early 2019, Kelly was indicted on a range of sex offenses by multiple prosecutor's offices. See Jason Meisner, Madeline Buckley, & Megan Crepeau, *R. Kelly Hit with Federal Indictments in New York, Chicago; Faces New Racketeering, Sex Crime Charges, Allegations He Paid to Recover Sex Tapes and Cover Up Conduct*, CHI. TRIB. (Jul. 12, 2019), <https://www.chicagotribune.com/news/criminal-justice/ct-r-kelly-arrested-federal-charges-20190712-6ghntysw3zf3lpncn4owcfzyje-story.html> [<https://perma.cc/VU2J-ZAQP>] (summarizing the criminal charges pending against Kelly).

the eyes of family, friends, and the general public, although the sustained effects of sexual abuse-based stigma remain to be seen.¹¹⁰

Momentarily bracketing concerns related to process,¹¹¹ it is useful to observe that the consequences stemming from the Court of Public Opinion may qualify as only partial accountability. One precondition for full accountability might be a degree of proportionality between the infraction and the attendant repercussion. Another might entail a level of transparency that enables those harmed by the misconduct to feel vested in the abuser's penance. Perhaps accountability requires a mechanism for conveying collective condemnation of the transgression. And so on.

My aim here is not to elaborate a thick meaning of accountability but to gesture at the kinds of considerations that might come into play when we assess what is missing even when unofficial reporting yields consequences.¹¹² Further to this concern, many commentators have presupposed that individual accountability can be analyzed without regard to the relevant legal framework. In my view, it cannot. Although not all sexual misconduct is regulated by law, much of the misconduct being disclosed in the #MeToo era *is* prohibited by criminal law, tort law, Title IX, Title VII, or some combination. When this conduct results in only extra-legal consequences, there is a troubling gap between the available formal remedy and the outcome imposed instead. In other words, the measure of accountability cannot be abstracted from what is dictated by our system of laws.

In the Courts of Public Opinion, the limits of accountability are compounded by the problem of inequity. Access to channels that hold the greatest promise of generating some consequence, however inadequate, is markedly unequal. Most victims of sexual assault and harassment do not have connections to mainstream media reporters. Moreover, for women whose abusers are not the subject of intense public

¹¹⁰ See Amanda Arnold, *The Men Who Are Plotting Their Post-#MeToo Comebacks*, CUT (Apr. 19, 2018), <https://www.thecut.com/2018/04/comeback-men-sexual-harassment-me-too.html> [<https://perma.cc/KBA6-G274>] (describing comeback efforts on the part of Charlie Rose, Mario Batali, Matt Lauer, Lorin Stein, Garrison Keillor, Louis C.K., and Al Franken); Stassa Edwards, *Redemption Is Inevitable for Powerful Men*, JEZEBEL (Apr. 20, 2018), <https://jezebel.com/redemption-is-inevitable-for-powerful-men-1825364533> [<https://perma.cc/A3T3-ZKHV>]; Rebecca Traister, *Too Much, Too Soon*, CUT (Aug. 28, 2018), <https://www.thecut.com/2018/08/louis-c-k-and-matt-lauer-what-to-do-their-comebacks-mean.html> [<https://perma.cc/L5Y4-UDFC>].

¹¹¹ See *infra* notes 116–127 and accompanying text.

¹¹² For a discussion of the tenets of accountability in the restorative justice context, see Wexler et al., *supra* note 98, at 68–81 (discussing the importance of responsibility taking, harm repair, redemption and reintegration).

interest,¹¹³ resort to traditional media outlets is typically not an option.¹¹⁴ In short, those especially vulnerable to workplace sexual misconduct—women of color and women in low-wage jobs—are cut off from mechanisms of informal reporting that, among the unofficial options, may offer the greatest hope of prompting offender accountability, however meager.¹¹⁵

B. Process Void (and Its Strategic Deployment)

Alongside the resurgence of the #MeToo movement, unmistakable signs of resistance or “backlash” have emerged.¹¹⁶ Among the primary drivers of this opposition is a concern for innocent men tarnished without the benefit of a fair process. This fear of false allegations has become

¹¹³ #MeToo’s attention to allegations of sexual misconduct by prominent men has unleashed a torrent of disclosures that never generate public attention. About a month after allegations against Harvey Weinstein were reported in the *New York Times*, Rebecca Traister wrote:

Since the reports of Weinstein’s malevolence began to gush, I’ve received somewhere between five and [twenty] emails every day from women wanting to tell me their experiences: of being groped or leered at or rubbed up against in their workplaces. They tell me about all kinds of men—actors and publishers; judges and philanthropists; store managers and social-justice advocates; my own colleagues, past and present—who’ve hurt them or someone they know. It happened yesterday or two years ago or [twenty]. Few can speak on the record, but they all want to recount how the events changed their lives, shaped their careers; some wish to confess their guilt for not reporting the behavior and thus endangering those who came after them. 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.

Rebecca Traister, *Your Reckoning. And Mine.*, CUT (Nov. 12, 2017), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html> [<https://perma.cc/P6SU-B7TF>].

¹¹⁴ See *id.* To be sure, even if were an option, not all women would want their allegations of misconduct publicly reported. See Michelle Togliola, *Why Did Some Women Choose Not to Post a “Me Too” Story? Women Share Why They Didn’t Participate in the Movement*, BUSTLE (Oct. 20, 2017), <https://www.bustle.com/p/why-did-some-women-choose-not-to-post-a-me-too-story-women-share-why-they-didnt-participate-in-the-movement-2961946> [<https://perma.cc/S9EY-JVKE>]. See also Laura Gianino, *I Went Public with My Sexual Assault. and Then the Trolls Came for Me.*, WASH. POST (Oct. 18, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/18/i-went-public-with-my-sexual-assault-and-then-the-trolls-came-for-me/?noredirect=on&utm_term=.19586c035348 [<https://perma.cc/P7QR-SP6V>].

¹¹⁵ Even social media, which is more accessible than mainstream media to victims of sexual misconduct, may be effectively off-limits to many members of marginalized communities. See generally Jamillah Bowman Williams, *Big Data Insights: #MeToo, Law, and Social Change*, 2019 U. CHI. LEGAL F. 371 (2019). As California Assemblywoman Lorena Gonzalez put it, “The MeToo movement . . . can’t just be for women who have a Twitter account.” Charisse Jones, *When Will MeToo Become WeToo? Some Say Voices of Black Women, Working Class Left Out*, USA TODAY (Oct. 9, 2018), <https://www.usatoday.com/story/money/2018/10/05/metoo-movement-lacks-diversity-blacks-working-class-sexual-harassment/1443105002/> [<https://perma.cc/9VLX-DMHY>].

¹¹⁶ See, e.g., 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/S9HW-68SV>].

more widespread in the time of #MeToo;¹¹⁷ increasingly, it is deployed to discredit the movement as a whole.¹¹⁸

It is not only politicians and commentators on the right who have expressed a concern for the lack of process that attends informal reporting.¹¹⁹ Many progressives worry about a world in which established procedures for investigating and adjudicating allegations of abuse are supplanted by pervasive public shaming and vigilantism.¹²⁰

In evaluating the strength of process related arguments, it is important to carve out the category of cases where an informal report initiates a formal investigative process, which then results in a meaningful sanction. Even when official procedures are triggered in this arguably unorthodox manner—that is, through unofficial complaint—process norms have been vindicated.¹²¹

Those who decry the absence of process in the Courts of Public Opinion might remain concerned about cases that bypass entirely mechanisms of formal investigation. As I have discussed, these cases tend to yield a limited set of consequences for the accused abuser.¹²²

¹¹⁷ According to a survey of 1500 Americans after one year of the #MeToo movement, 18% of respondents believe that “false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished,” as compared to 13% in November 2017. *Measuring the #MeToo Backlash*, *ECONOMIST* (Oct. 20, 2018), <https://www.economist.com/united-states/2018/10/20/measuring-the-metoo-backlash> [<https://perma.cc/KZV5-432S>]. The proportion of respondents who think that “women who complain about sexual harassment cause more problems than they solve” grew slightly from 29 to 31%. *Id.* A separate survey of more than a thousand Americans reported that more than 40% of respondents believe that the #MeToo movement has “gone too far.” Tovia Smith, *On #MeToo, Americans More Divided by Party than Gender*, *NPR* (Oct. 31, 2018), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender> [<https://perma.cc/TM85-NLV8>]. The problem of false allegations is perceived to be widespread by members of both parties, although the effects of party affiliation are pronounced (more so than the effects of gender): 77% of Republicans characterize false allegations of sexual assault as common while 37% of Democrats do so. *Id.*

¹¹⁸ Around the time of then-Judge Kavanaugh’s confirmation hearing, President Trump captured and advanced this line of thinking as follows: “[I]t’s a very scary time for young men in America when you can be guilty of something you might not be guilty of. This is a very difficult time . . . somebody could accuse you of something and you’re automatically guilty.” Dara Lind, *Trump: “It’s a Very Scary Time for Men in America,”* *VOX* (Oct. 2, 2018), <https://www.vox.com/2018/10/2/17928800/trump-women-doing-great-kavanaugh> [<https://perma.cc/M3NY-N8AH>]. Trump then added, “Women are doing great.” *Id.* For a contextual analysis, see generally Mary Anne Franks, *Witch Hunts: Free Speech, the First Amendment, and the Fear of Women’s Words*, 2019 U. CHI. LEGAL F. 123, 123–46 (2019).

¹¹⁹ See, e.g., Masha Gessen, *When Does a Watershed Become a Sex Panic?*, *NEW YORKER* (Nov. 17, 2018), <https://www.newyorker.com/news/our-columnists/when-does-a-watershed-become-a-sex-panic> [<https://perma.cc/9488-WA97>]; Shira Sheindlin & Joel Cohen, *After #MeToo, We Can’t Ditch Due Process*, *GUARDIAN* (May 8, 2018), <https://www.theguardian.com/commentisfree/2018/jan/08/metoo-due-process-televisions> [<https://perma.cc/6Q7W-QZ9T>].

¹²⁰ See Caitlin Flanagan, *The Conversation #MeToo Needs to Have*, *ATLANTIC* (Jan. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-right-conversation-for-metoo/551732/> [<https://perma.cc/88A4-BRQB>]. See, e.g., Gessen, *supra* note 119.

¹²¹ There is considerable variation in the process that is required, if any, before an adverse action can be taken in the employment and educational contexts.

¹²² See *supra* notes 101–115 and accompanying text.

And many, if not most, of these consequences have followed some acknowledgement of wrongdoing on the part of the man accused. Yet when it comes to men who do profess their innocence, the shaming function potentially served by informal reporting in the Courts of Public Opinion is itself a source of considerable angst.¹²³

As a normative matter, the extent to which men should be shielded from public accusations of sexual misconduct (and the stigma that may result) is subject to debate.¹²⁴ Unless the status quo changes, recognition of this entitlement would exist in deep tension with not only free speech norms but also the reality that formal complaint processes are often stacked against the accuser.¹²⁵

At the same time, the procedural void that characterizes unofficial reporting matters. It matters strategically insofar as it powers opposition to #MeToo. It also matters substantively, since neutral investigative procedures are of independent value.¹²⁶ Moving forward, efforts should increase official reporting in relation to unofficial complaint, answering legitimate process concerns.¹²⁷ So too might this blunt the #MeToo backlash that is driven by incipient panic over mobs of angry, lying women eviscerating innocent men.

C. Weaponization of Defamation Law

When a person makes an unofficial allegation of sexual misconduct, she or he becomes the potential target of a defamation claim by the individual accused.¹²⁸ With the ascendance of complaint in the Courts of

¹²³ For those whose livelihood depends on consumer popularity, the stigma associated with sexual misconduct can have market related implications. *See, e.g.*, Gabrielle Bluestone, *Louis CK Cancelled by Everyone*, VICE NEWS (Nov. 10, 2017), https://news.vice.com/en_us/article/pazz9g/louis-ck-cancelled-by-everyone [<https://perma.cc/N28P-E2F7>]. *But see* Marina Fang, *Louis C. K. Jokes About Sexual Harassment In New Set, Appears To Have Learned Nothing Again*, HUFFPOST (Jan. 17, 2019), https://www.huffpost.com/entry/louis-ck-comeback_n_5c4096bbe4b041e98ffb7333 [<https://perma.cc/D6WC-WQ6T>] (describing sold-out shows in the comedian's "comeback tour").

¹²⁴ There is no legal entitlement to such a shield. Indeed, the First Amendment generally protects the right of an accuser to level truthful accusations in the Courts of Public Opinion. For a discussion of the law of defamation, which regulates the publication of false statements, *see infra* notes 128–148 and accompanying text.

¹²⁵ *See* Tuerkheimer, *supra* note 14.

¹²⁶ A vast literature describes the virtues of procedural justice. *See* ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 10, 30–34 (1988).

¹²⁷ In a separate project, I propose ways of redesigning formal complaint channels to more effectively incentivize official reporting. *See* Tuerkheimer, *supra* note 14.

¹²⁸ Accusers may also be sued for statements made in the course of campus disciplinary proceedings. *See* Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing for Defamation*, BUZZFEED (Dec. 15, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing> [<https://perma.cc/D2W3-EAPN>]. While most states grant speakers a privilege (a defense to defamation liability) for statements made to law enforcement officials, application of the privilege to Title IX proceedings remains a more open question. *See infra* note 145.

Public Opinion, this threat has grown far more significant. To be sure, if an allegation of abuse is truthful,¹²⁹ a defamation defendant should ultimately prevail.¹³⁰ Even so, the prospect of being sued for libel is—or should be—a meaningful deterrent to publicly accusing one’s abuser. Most sexual misconduct victims cannot afford the financial cost of defending a lawsuit, even apart from the psychic toll this effort exacts. Moreover, the confused state of defamation law means that litigation costs in this area are relatively uncertain.¹³¹

In the face of this uncertainty, the fact that so many women are using social media to name their alleged abuser is, on first glance, puzzling.¹³² One simple explanation for the ubiquity of informal reporting is that its benefits¹³³ are perceived as sufficient to outweigh the prospect of litigation and its attendant costs. It is not clear, however, that the risk of legal liability is typically included in accusers’ calculus.

This may change with the filing of the first high-profile defamation suit in the #MeToo era.¹³⁴ In October 2018, Stephen Elliott, a writer accused of sexual assault and harassment in multiple entries on the Media Men List, sued Moira Donegan, creator of the list, and thirty

¹²⁹ See Tuerkheimer, *supra* note 91 (analyzing the available research on false sexual assault reporting to police). I am aware of no studies specifically examining the veracity of extra-legal accusations (including anonymous accusations) of sexual misconduct.

¹³⁰ Defamation is a common law tort consisting of a false statement of fact that injures the subject’s reputation. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

¹³¹ See *infra* notes 142–147 and accompanying text.

¹³² Perhaps in part because the early high-profile #MeToo accusations did not generate lawsuits, the legal risks associated with Courts of Public Opinion reports are just beginning to enter the public discourse. See, e.g., Andreas Redd et al., *Student-Created Website Allowing for Anonymous Sexual Assault Allegations Vulnerable to Defamation Charges*, DAILY U. WASH. (Oct. 1, 2018), http://www.dailyuw.com/news/article_dd14bf34-c5f6-11e8-a705-cf14683d53a3.html [<https://perma.cc/5T2W-YAL7>]; Thayer, *supra* note 96.

¹³³ See Tuerkheimer, *supra* note 14 (cataloguing multiple functions served by informal reporting channels).

¹³⁴ Stephen Elliott’s not the only high-profile defamation suit filed since October 2017. See, e.g., Ben Paviour, *Virginia Lt. Gov. Justin Fairfax Files \$400 Million Lawsuit Against CBS*, NPR (Sept. 12, 2019), <https://www.npr.org/2019/09/12/760291624/virginia-lt-gov-justin-fairfax-files-400-million-lawsuit-against-cbs> [<https://perma.cc/XN5S-LAM3>]; Megan Graham, *Anonymous Instagram Account Diet Madison Avenue Sued for Defamation*, ADAGE (May 24, 2018), <https://adage.com/article/agency-news/anonymous-instagram-account-diet-madison-avenue-sued-defamation/313645/> [<https://perma.cc/32QG-C9TL>]; Randall Roberts, *Electronic Producer and DJ William “the Gaslamp Killer” Bensussen Files Defamation Lawsuit against Accusers*, LA TIMES (Nov. 14, 2017), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-electronic-producer-and-dj-william-the-1510687064-htmllstory.html> [<https://perma.cc/88A6-UDFV>]; Claudia Rosenbaum, *Crystal Castles Singer Ethan Kath Sues Alice Glass over Rape and Abuse Claims*, BUZZFEED (Nov. 3, 2017), <https://www.buzzfeednews.com/article/claudiarosenbaum/crystal-castles-singer-ethan-kath-sues-alice-glass-over> [<https://perma.cc/M5T8-MTD4>]; But see Nardine Saad & Amy Kaufman, *Brett Ratner Drops Defamation Lawsuit against Rape Accuser Melanie Kohler*, LA TIMES (Oct. 2, 2018), <https://www.latimes.com/entertainment/la-et-entertainment-news-updates-2018-brett-ratner-drops-defamation-lawsuit-1538511141-htmllstory.html> [<https://perma.cc/T2QL-BWP3>].

Jane Does for \$1.5 million.¹³⁵ Elliott’s complaint alleges that he was defamed by the knowing and malicious publication and circulation of false allegations.¹³⁶ The lawsuit immediately garnered national media attention.¹³⁷

Whether Elliott ultimately prevails—or even survives a motion to dismiss¹³⁸—his complaint spotlights the jeopardy that attends unofficial reporting. With the ascendance of the Shadow Court of Public Opinion and the New Court of Public Opinion, allegations that once were confined within restricted access channels (the Traditional Whisper Network and the Double Secret Whisper Network) can be disseminated in ways that make accusers especially ripe targets for libel actions. Elliott’s lawsuit not only impacts Donegan,¹³⁹ but also the Jane Does who may now be “unmasked.”¹⁴⁰ Importantly, the suit has the potential to deter accusers around the country who may be contemplating a public accusation of sexual misconduct.¹⁴¹ In essence, the defamation claim targets the very engine of #MeToo—unofficial reporting channels.

Compounding the chilling effects of being named as a defamation defendant¹⁴² is an unsettled doctrinal landscape that complicates efforts to predict a legal outcome or even whether litigation will reach the expensive and often grueling discovery stage.¹⁴³ Apart from ambiguities surrounding the law of defamation,¹⁴⁴ a suit like Elliott’s—that is, one

¹³⁵ Complaint at iv, *Elliott v. Donegan*, 2018 WL 4940326 (E.D.N.Y. Oct. 10, 2018) (No. 18 Civ. 5680). See also *supra* notes 39–45 and accompanying text (discussing Media Men List).

¹³⁶ Although Elliott asserts that he is a “private citizen who is neither a politician nor a celebrity,” he also alleges that the defendants acted with malice. *Id.* at 3. See *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

¹³⁷ See, e.g., Jonah Engel Bromwich, *Writer who Appeared on ‘Media Men’ List Sues Its Creators*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/style/stephen-elliott-moira-donegan-media-men-list.html> [<https://perma.cc/RM9D-WEGG>].

¹³⁸ See Ruth Spencer, *Robbie Kaplan Sees Right through Stephen Elliott’s Lawsuit*, CUT (Oct. 19, 2018), <https://www.thecut.com/2018/10/robbie-kaplan-moira-donegan-stephen-elliott-lawsuit.html> [<https://perma.cc/29Q9-3XSF>].

¹³⁹ See *infra* note 147 and accompanying text. Even scholars who argue that courts have interpreted § 230 too broadly would likely view the creator of a spreadsheet (like Donegan) as immune from liability for its content. See, e.g., Danielle Citron Keats & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

¹⁴⁰ See *infra* note 147 and accompanying text.

¹⁴¹ As Donegan’s attorney Robbie Kaplan has suggested, “the point of the case is not actually to succeed against [Donegan], or maybe not even to go forward with the case at all, but to file it to send a strong message to other women that if [they] do this [they] will be sued.” Spencer, *supra* note 138.

¹⁴² See *supra* notes 130–131 and accompanying text (observing that the costs of defending against a defamation claim may itself serve as a powerful deterrent to speech).

¹⁴³ See Christina Cauterucci, *Does Stephen Elliott’s Lawsuit against Moira Donegan Have a Chance to Succeed?*, SLATE (Oct. 12, 2018), <https://slate.com/news-and-politics/2018/10/stephen-elliott-moira-donegan-lawsuit-analysis.html> [<https://perma.cc/QF3X-82CG>] (discussing a divergence of practitioners’ views).

¹⁴⁴ See, e.g., *supra* note 136.

that involves anonymous allegations, or allegations aggregated online by a third party, or both—raises at least two questions that continue to vex courts.¹⁴⁵ First, when can a defendant claim immunity under Section 230 of the Communications Decency Act, which generally protects an entity from liability for third-party content, provided the entity does not at least, in part, develop or create the allegedly defamatory content?¹⁴⁶ And, second, when can anonymous speakers who are sued prevent their identities from disclosure, thereby protecting accusers' independent interests in preserving anonymity and foreclosing legal liability?¹⁴⁷

For the anonymous sexual abuse complainant¹⁴⁸ whose identity is revealed in the course of defending a defamation claim—as well as for the accuser named from the outset—the defense of truth may allow for ultimate vindication. Even so, the promise of a defamation verdict for the defendant hardly seems satisfying. In an ironic twist, a survivor who eschewed formal reporting channels may ultimately find herself in a courtroom, telling her story under the most formal conditions possible, having expended enormous resources along the way in exclusive service of beating back a claim that she lied about her abuse. With defamation law looming in the background, no survivor could be faulted for deciding to forsake unofficial reporting altogether and simply keep silent about her abuse.

IV. CONCLUSION

The costs and benefits of divulging abuse have begun to shift in appreciable ways. Assuming this trajectory continues, we will surely see greater activity in the matrixes that extend beyond the confines of the Traditional Whisper Network: the Double Secret Whisper Network, the Shadow Court of Public Opinion, and the New Court of Public Opinion. The proliferation of unofficial reporting in the #MeToo era reflects and portends progress. Yet the continued rise of informal reporting against

¹⁴⁵ More than half the states have passed some form of Anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation, which further complicates this terrain.

¹⁴⁶ For a summary of competing judicial approaches to the interpretation of Section 230, see Yaffa A. Meeran, *As Justice So Requires: Making the Case for a Limited Reading of § 230 of the Communications Decency Act*, 86 GEO. WASH. L. REV. 257, 267–74 (2018).

¹⁴⁷ For an overview of judicial unmasking standards, see Matthew Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 847–60 (2010); Ethan B. Siler, *Yelping the Way to a National Statutory Standard for Unmasking Internet Anonymity*, 51 WAKE FOREST L. REV. 189, 194–202 (2016). For a litigator's guide to unmasking, see Paul Alan Levy, *Litigating Civil Subpoenas to Identify Anonymous Internet Speakers*, 37 LITIG. 27 (2011).

¹⁴⁸ See *supra* notes 79–81 and accompanying text (describing the rise of the Shadow Court of Public Opinion and explaining why accusers may wish to remain anonymous).

the backdrop of a mostly dormant law of sexual misconduct is of concern. A meaningful societal response to sexual misconduct must entail a commitment to activating formal mechanisms of accountability.