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## #MeToo and Law Talk

*Lesley Wexler*<sup>†</sup>

How Americans talk when they talk about #MeToo is often deeply rooted in the law—even in non-legal settings, participants in the #MeToo conversation often deploy legal definitions of victims and perpetrators, reference legal standards of proof and the role of legal forums, draw explicit or implicit comparisons to legal punishments, and derive meaning from legal metaphors and legal myths. In this essay, I identify and assess the deployment of such law talk to help understand both how legal rhetoric may facilitate the national #MeToo conversation and related legal reforms, but may also simultaneously limit and obscure some of the #MeToo's more transformative possibilities. Such critical engagement seeks to open space for selective pushback, including initial thoughts on the possibilities of reclaiming colloquial law talk to better match the interests at stake in non-legal settings as well as bringing to the forefront the therapeutic, informative, and structural issues law talk might crowd out.

In Part I, I briefly discuss the emergence of two distinct MeToo movements to understand both the non-legal and legal origins of the #MeToo conversation. I begin with 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. Even as these two approaches joined to form the original basis of the #MeToo conversation, I note how law talk was implicitly embedded in #MeToo from the very beginning. I then highlight four ways in which law talk is now shaping much of the public discourse in regards to: (1) who may claim #MeToo status; (2) how commentators use the existence of legal forums to serve a gatekeeping function to #MeToo conversation; (3) what process is demanded in non-legal settings for

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assessment and response to #MeToo claimants; and (4) what consequences are appropriate for #MeToo perpetrators based on legal analogies.

In Part II, I identify some possible benefits to the increasingly dominant law talk. Because America is a highly legalistic country, law may provide an accessible language for a diverse group of people to learn about, think through, and discuss #MeToo related issues. Relatedly, law talk facilitates the borrowing of well-considered legal rules and processes for non-legal settings, rather than forcing participants to construct a wholly new approach. In addition, law talk might help generate or maintain a floor for potential #MeToo claimants, precluding roll-backs of who may persuasively claim to be a victim and what events and perpetrators might be viewed as inherently problematic. Lastly, when individuals approach #MeToo as a fundamentally legal conversation, it might provide a natural feedback loop for legal reform. #MeToo conversations steeped in the law can lay bare the need for procedural reforms on issues such as statutes of limitations or evidentiary standards or substantive reforms regarding definitions of rape, sexual assault, consent, or sexual harassment, so as to change the approach in both legal and non-legal settings. The prevalence of law talk might also provide an obvious entrée into conversations regarding law's creation and enforcement of barriers to transparency and thus facilitate fuller debates about the potential hazards of such barriers as exemplified by non-disclosure agreements or mandatory arbitration.

In Part III, I discuss my increasing concern with law talk's expanding role in the #MeToo conversation. While law might sometimes be an appropriate starting point, as for those claimants who seek formal, legal accountability, the dominance of law talk may sometimes act as a sticky baseline limiting meaningful engagement with those #MeToo claims and claimants whose facts do not easily fit within the bounds of legal impermissibility or whose interests are not served by a legal approach. This stickiness can occur when #MeToo conversation participants: hold mistaken beliefs that specific law governs a situation when in fact it does not; maintain an understanding that the same concerns that inform and create law are coextensive with the concerns implicated by situations not governed by the law's baseline; or use unjustifiably high thresholds to overcome law's baseline as a strong default even in settings where other approaches might better serve welfare or other aims. I also suggest that the dominance of law talk may obscure or crowd out non-legal conversations and concerns. These include attention to structures that create the underlying conditions ripe for abuse; emphasis on victim support rather than perpetrator punishment; and pathways for amends, redemption, and reintegration.

I conclude with three preliminary suggestions in Part III to push back against some perils of law talk in the #MeToo setting. The first is to take up the work of exposing and contesting the inappropriate application of legal baselines in #MeToo conversations. The second is to reclaim colloquial law talk to include victim concerns. Lastly, I urge a re-framing of the national conversation to center therapeutic, informative, and structural concerns.

## I. BACKGROUND

#MeToo is often characterized as a bottom-up moral reckoning with the pervasiveness of sexual harassment and sexual assault in modern society. But even if its origins were therapeutic, restorative, and educational in origin, I suggest in this section that the American #MeToo conversation has always been steeped in the law. Legal definitions, legal rules, legal processes, and legal metaphors pervade the everyday conversations taking place at office coolers,<sup>1</sup> on social media,<sup>2</sup> and in news commentary.<sup>3</sup> In this section, after identifying the presence of law talk, I offer a brief taxonomy of the ways in which law talk is currently shaping the #MeToo conversation to more easily facilitate observation of its beneficial and pernicious effects.

### A. MeToo's Educational, Therapeutic, and Structural Roots

In 2017, New York Times and New Yorker reporters broke the story of Harvey Weinstein's pervasive and horrifying sexual assaults against Hollywood actresses.<sup>4</sup> A few days later, Alyssa Milano posted the tweet heard around the world:

Me too.

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<sup>1</sup> Lynda Tran, *Addressing this #MeToo Moment*, CBS NEWS (July 31, 2018), <https://www.cbsnews.com/news/commentary-addressing-this-metoo-moment/> [<https://perma.cc/L585-ZNCR>].

<sup>2</sup> See generally Jamillah Bowman Williams, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 373 (2019).

<sup>3</sup> Eliza Ennis & Lauren Wolfe, *#MeToo: The Women's Media Center Report*, THE WOMEN'S MEDIA CENTER (2018), <http://www.womensmediacenter.com/reports/media-and-metoo-how-a-movement-affected-press-coverage-of-sexual-assault> [<https://perma.cc/429D-TSBJ>].

<sup>4</sup> 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/T5SY-3SCL>]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/9VMZ-GAJ5>].

Suggested by a friend: “If all the women who have been sexually harassed or assaulted wrote ‘Me too.’ as a status, we might give people a sense of the magnitude of the problem.”

If you’ve been sexually harassed or assaulted, write ‘metoo’ as a reply to this tweet.<sup>5</sup>

The #MeToo hashtag quickly went global with over 2 million #MeToo tweets spanning 85 countries in less than a month.<sup>6</sup> When asked about the tweet and the ensuing response, Milano commented that “[t]he most important thing that it did was to shift the conversation away from the predator [Harvey Weinstein] and to the victim.”<sup>7</sup> It was not styled as a legal reform effort and “[wa]sn’t a call to action or the beginning of a campaign, culminating in a series of protests and speeches and events. It [wa]s simply an attempt to get people to understand the prevalence of sexual harassment and assault in society. To get women, and men, to raise their hands.”<sup>8</sup> In other words, #MeToo was intended to dismantle the preexisting belief that harassment and assault is exceptional.

#MeToo quickly collided with Tarana Burke’s “Me Too,” a ten-year effort to “help survivors of sexual violence, particularly. . . young women of color from low wealth communities, find pathways to healing.”<sup>9</sup> Burke’s Me Too focuses on victims’ needs for empathy, to be understood by normalizing speaking out, taking the focus off the accuser, providing community, and dispelling isolation.<sup>10</sup> At the heart of Burke’s Me Too is the idea of solidarity: “Survivors reaching out to those who don’t understand they are survivors – and helping them to feel whole again.”<sup>11</sup>

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<sup>5</sup> Alyssa Milano @Alyssa\_Milano, TWITTER (Oct. 15, 2017, 1:21PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/7WF5-RRLL>].

<sup>6</sup> Kara Fox & Jan Diehm, *#MeToo’s Global Moment: The Anatomy of a Viral Campaign*, CNN (Nov. 9, 2017), <http://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html> [<https://perma.cc/HQ7B-77NH>].

<sup>7</sup> Joyce Chen, *Alyssa Milano Wants Her ‘Me Too’ Campaign to Elevate Harvey Weinstein Discussion*, ROLLING STONE (Oct. 17, 2017), <https://www.rollingstone.com/movies/movie-news/alyssa-milano-wants-her-me-too-campaign-to-elevate-harvey-weinstein-discussion-123610/> [<https://perma.cc/7P5D-7QAB>].

<sup>8</sup> Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [<https://perma.cc/YV83-BT7U>].

<sup>9</sup> ME TOO, *History and Vision*, <https://metoomvmt.org/about/> [<https://perma.cc/W5PX-DMR5>] (last visited Jan. 13, 2019).

<sup>10</sup> Daisy Murray, *‘Empowerment Through Empathy’ - We Spoke to Tarana Burke, the Woman Who Really Started the ‘Me Too’ Movement*, ELLE (Oct. 23, 2017), <https://www.elle.com/uk/life-and-culture/culture/news/a39429/empowerment-through-empathy-tarana-burke-me-too/> [<https://perma.cc/8VX9-UKZC>].

<sup>11</sup> JUST BE INC., *The Movement*, <http://justbeinc.wixsite.com/justbeinc/the-me-too-movement->

Such solidarity facilitates<sup>12</sup> the way in which Burke's Me Too also takes on larger structural considerations of how "collectively, to start dismantling these systems that uphold and make space for sexual violence."<sup>13</sup> For Burke, the conversation should not focus on individual perpetrators, but instead on "power and privilege."<sup>14</sup> As part of this transformative vision, she deemphasizes individual guilt, and her version of restorative justice facilitates the healing of both victims and perpetrators.<sup>15</sup>

#MeToo and Tarana Burke's "Me Too" were quickly tied together, with Burke tweeting, "It's beyond a hashtag. It's the start of a larger conversation and a movement for radical community healing. Join us. #metoo."<sup>16</sup> The two efforts seemed to merge, if a bit uneasily,<sup>17</sup> and have prompted extensive dialogue online and off about specific incidents as well as about sexual assault and harassment more generally.

## B. Law as Emerging Background

Despite this initial seemingly non-legal focus of #MeToo founders, the conversation about #MeToo has and is being deeply shaped by law and legal discourse.<sup>18</sup> In this subsection, I briefly introduce four different ways in which law and law talk is now embedded in the #MeToo conversation: (a) scope of #MeToo claims and claimants; (b) forum arguments demanding prior or exclusive engagement with a legal forum in order to participate as a claimant in the #MeToo conversation; (c) process arguments for resolution of #MeToo claims; and (d) concern about proportionate punishment for #MeToo perpetrators.

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c7cf [https://perma.cc/RXQ6-22RM] (last visited Jan. 13, 2019).

<sup>12</sup> Kaitlynn Mendes et al., *#MeToo and the Promise and Pitfalls of Challenging Rape Culture through Digital Feminist Activism*, 25 *EURO. J. WOMEN'S STUD.* 236, 238 (2018).

<sup>13</sup> Murray, *supra* note 10.

<sup>14</sup> Tarana Burke (@TaranaBurke), TWITTER (Aug. 20, 2018, 4:08AM), <https://twitter.com/TaranaBurke/status/1031498206260150272> [https://perma.cc/B4QP-F89N].

<sup>15</sup> Michelle Rodino-Colocino, *Me Too, #MeToo: Countering Cruelty with Empathy*, 15 *COMM. & CRITICAL/CULTURAL STUD.* 96, 98 (2018).

<sup>16</sup> Abby Ohlheiser, *The Woman behind 'Me Too' Knew the Power of the Phrase When She Created It 10 Years Ago*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm\\_term=.a6673cec1967](https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.a6673cec1967) [https://perma.cc/JB7M-RXS9].

<sup>17</sup> Burke has been vocal about her dissatisfaction with the focus on high profile predators against white women and suggested changing the narrative. Elizabeth Wagmeister, *How Me Too Founder Tarana Burke Wants to Shift the Movement's Narrative*, VARIETY (Apr. 10, 2018), <https://variety.com/2018/biz/news/tarana-burke-me-too-founder-sexual-violence-1202748012/> [https://perma.cc/A34C-548R].

<sup>18</sup> Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, 7 *LAWS (SPECIAL ISSUE)*, May 21, 2018, art. 21 at 22.

### 1. Scope

The first use of law talk relates to what actions or events, and relatedly which participants, might have engaged in or been subject to behavior properly considered within the purview of #MeToo.<sup>19</sup> In theory, the question of who may or who should feel entitled to say “#MeToo” need not bear any particular relation to law. But law has informed #MeToo membership from the very beginning. The initial #MeToo hashtag includes two legal terms of art: “sexual harassment” and “[sexual] assault.”<sup>20</sup> While it is unclear whether Alyssa Milano intended to reference the formal legal definition of such concepts or instead gave voice to a more colloquial understanding, she used legally freighted terms. As lawyers and legal scholars, this might seem hard to avoid or inevitable, but one can imagine other ways of expressing the initial call and its scope, such as “survivors of sexual violence or sexist behavior.”<sup>21</sup>

This initial rhetorical grounding of #MeToo in legal terminology and its massive replication through all those that answered and repeated the call matters because law formally defines sexual harassment and assault. As part of the enterprise of determining criminal and civil offenses, the law also creates a dividing line between criminal and tortious behavior on one side and legally permissible on the other. While the law does not explicitly endorse or authorize behavior that might still be morally objectionable, it also does not speak to the non-legal scope of and sanctions for what might be considered lawful, but awful behavior.<sup>22</sup> In other words, the law provides a forum, a set of rules, and a range of consequences for unlawful behavior, but it is largely silent as to lawful behavior. So, for example, if we look to the law for answers, it tells us that, if the alleged facts are true, actress Gabrielle Union or actor Anthony Rapp can lay claim to #MeToo, but probably not Aziz Ansari’s unnamed date;<sup>23</sup> Chloe Dykstra, who detailed being subject to sexist sexual and emotional behavior that many people believe falls

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<sup>19</sup> Such exclusion need not happen via law talk—as arguments that men and marginalized groups had been explicitly excluded or voices were not heard.

<sup>20</sup> See Milano, *supra* note 5.

<sup>21</sup> For instance, she could have posted “If all the women who have been subject to sexist behavior or physically violated in a sexual way wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem.”

<sup>22</sup> See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22 (2018) (discussing how much inappropriate workplace behavior is not deemed “because of sex”).

<sup>23</sup> 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/UZW6-TW6C>].

short of criminality;<sup>24</sup> or women and men made deeply uncomfortable by Joe Biden's non-sexual but overly intimate touching.<sup>25</sup>

## 2. Forum

The second use of law talk relates to how individuals reference the role of legal forums in defining entrance to or participation in the #Me-Too conversation. This form of law talk builds upon the scope argument, that only those meeting legal definitions of assault or harassment can participate, by adding another condition, that only those who were willing to engage legal mechanisms may now share their accounts or seek justice. A stronger version of this argument suggests not only that victims must have engaged legal mechanisms to participate, but that the only appropriate forums in which to discuss their claims are in sites of formal accountability such as courtrooms or an employer's dispute resolution mechanisms.

One might view this forum policing as a variant of Mary Ann Glendon's *Rights Talk*, which documented Americans' tendencies to frame political preferences as instead inviolable individual rights.<sup>26</sup> It emphasizes the rights of perpetrators as holders of due process and such due process as absolute and only vindicated in legal settings. Take, for example, the position of this National Review piece:

If a person is the victim of a crime, that crime should be reported and the accused should have a right to face his or her accuser. This to avoid a trial-by-mob, and to keep people from losing their jobs and having their reputations ruined by a hashtag rather than proof and due process. . . . If sexual harassment is a crime, it should be fought not with hashtags but with the full force of the law. . . . We should criticize the justice system when it fails, but we must follow due process when it comes to crimes, because if we don't, everyone will suffer.<sup>27</sup>

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<sup>24</sup> Chloe Dykstra, *Rose-Colored Glasses: A Confession*, MEDIUM (June 14, 2018), <https://medium.com/@skydart/rose-colored-glasses-6be0594970ca> [<https://perma.cc/W5JB-3KP8>].

<sup>25</sup> David Oskar Marcus, *#MeToo Has Lost Its Way: In Defense of Joe Biden*, THE HILL (Apr. 2, 2019), <https://thehill.com/opinion/campaign/436862-metoo-has-lost-its-way-in-defense-of-joe-biden> [<https://perma.cc/HL74-ZAXS>]; EJ Dickson, *Joe Biden and the #MeToo Generation Gap*, ROLLING STONE (Apr. 3, 2019), <https://www.rollingstone.com/culture/culture-features/biden-metoo-generation-gap-817133/> [<https://perma.cc/978Y-5F3G>] (noting a generational divide in women's response to #MeToo allegations against Joe Biden).

<sup>26</sup> MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). For another modern-day example of this, see Joseph Blocher, *Guns Rights Talk*, 94 BOSTON U. L. REV. 813 (2014).

<sup>27</sup> Annika Hernroth-Rothstein, *#MeToo and Trial by Mob*, NAT'L REV. (Oct. 20, 2017), <https://www.nationalreview.com/2017/10/metoo-meeting-trial-mob/> [<https://perma.cc/973T-52FN>].

The exclusive legitimacy of legal forums is often implicitly or explicitly contrasted with the “court of public opinion,” in which non-legal airings and/or resolutions of claims are derided as witch-hunts, or vigilantism, mob justice,<sup>28</sup> or lynch mobs.<sup>29</sup> To take a few examples, one reporter noted, “[#MeToo once] seemed refreshingly nonpartisan. . . . If there was to be a witch hunt, better that it seek out all the witches, not just those from a particular coven,”<sup>30</sup> lawyer Wendy Kaminer wrote, “Categorically believing accusers turns a mere accusation of wrongdoing into proof that it occurred. Women who cheer this virtually irrefutable presumption of guilt, considering due process for alleged harassers a component of rape culture, are cheering a thoughtless, treacherous form of vigilante feminism,”<sup>31</sup> and commentator Adriana Cohen exhorted, “Those in the #MeToo mob. . . insist we must believe all women who make sexual assault allegations against men, regardless of the facts involved or the evidence.”<sup>32</sup>

### 3. Process

The third form of law talk subjects #MeToo claimants to legal process arguments regardless of whether the claimants have invoked or are participating in a legal proceeding. By legal process, I mean those rules that guide the adjudication of civil or criminal claims, rather than those legal rules and definitions that determine the substantive scope of offenses. So, for instance, many believe individual, non-legal judgments or responses to a #MeToo account are or should be limited by whether an alleged event occurred within a criminal or civil statute of limitations. Those who come forward in present with accounts of events that could no longer be litigated ought to be barred not just from a legal finding of fault or crime but also any such supportive social judgment or collateral consequences for the alleged perpetrator.

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<sup>28</sup> See generally Mary Anne Franks, *Witch Hunts: Free Speech, #MeToo, and the Fear of Women's Words*, 2019 U. CHI. LEGAL. F. 123, 123–147 (2019).

<sup>29</sup> David Hendershot & Janet Weaver, Opinion, *#MeToo is Mob Justice, Not Social Justice*, L.A. TIMES (Sept. 26, 2018), <https://www.latimes.com/opinion/readersreact/la-ol-le-metoo-mob-justice-20180926-story.html> [<https://perma.cc/R6HQ-NLHD>].

<sup>30</sup> Grayson Quay, *#MeToo Falls to Tribalism*, AM. CONSERVATIVE (Sept. 25, 2018), <https://www.theamericanconservative.com/articles/metoo-falls-to-tribalism-kavanaugh-ellison-trump/> [<https://perma.cc/22YY-FXG4>].

<sup>31</sup> Interestingly, unlike many, Kaminer is careful to distinguish the settings or goals of therapy and justice. Wendy Kaminer, Opinion, *Beware Vigilante Feminism*, BOSTON GLOBE (Oct. 27, 2017), <https://www.bostonglobe.com/opinion/2017/10/27/beware-vigilante-feminism/> Qix5RT3jJjoVIAzh9Zt9aM/story.html [<https://perma.cc/47NS-8QKU>].

<sup>32</sup> Adriana Cohen, *The #MeToo Mob and Our Judicial System*, REAL CLEAR POL. (Oct. 5, 2018), [https://www.realclearpolitics.com/articles/2018/10/05/the\\_metoo\\_mob\\_and\\_our\\_judicial\\_system\\_138258.html](https://www.realclearpolitics.com/articles/2018/10/05/the_metoo_mob_and_our_judicial_system_138258.html) [<https://perma.cc/L2SJ-GC2Z>].

Relatedly, when assessing the validity of a #MeToo narrative or account, many turn to legal processes to guide their decision-making. Take for instance the public commentary surrounding questions regarding Justice Kavanaugh's fitness for the Supreme Court. Legal questions dominated the public conversations: such as whether Dr. Ford and other alleged victims such as Deborah Ramirez and Julie Swetnik offered up corroborating witnesses or legally admissible evidence; whether Justice Kavanaugh or others "tamper[ed]" with witnesses;<sup>33</sup> whether the evidence offered up satisfy a criminal or civil standard of proof;<sup>34</sup> and whether the presumption of innocence was properly respected.<sup>35</sup>

#### 4. Consequences

The final form of law talk I identify here relates to the consequences for alleged #MeToo perpetrators. Legal analogies and metaphors often pervade the discussion of consequences, with the term "death penalty" frequently used to voice the concern that those found or even simply alleged to be involved in wrongdoing will become unemployable or experience a social death. Take, for example, Gayle King's observation that "I think when a woman makes an accusation, the man instantly gets the death penalty,"<sup>36</sup> or Senator Dick Durbin's comment in the wake of Al Franken's resignation, "there's only one penalty, and it's the death penalty,"<sup>37</sup> or this news commentary, "When the [#MeToo] mob descends on a target of prominence, it's as good as a death sentence, socially and professionally."<sup>38</sup> Others have invoked the Eighth Amendment prohibition against "cruel and unusual punishment."<sup>39</sup>

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<sup>33</sup> Alexandra Hutzler, *Death Threats against Kavanaugh Accuser Christine Blasey Ford Are Witness Tampering, Senator Says*, NEWSWEEK (Sept. 20, 2018), <https://www.newsweek.com/senator-death-threats-kavanaugh-accuser-witness-tampering-1130571> [<https://perma.cc/ZPQ5-G75X>].

<sup>34</sup> 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/XWE2-HBV7?type=image>] (discussing how most of the GOP seemed to follow a criminal standard of proof and how Susan Collins followed the civil standard of proof).

<sup>35</sup> Thomas Jipping, *Losing the Presumption of Innocence*, NAT'L REV. (Sept. 25, 2018), <https://www.nationalreview.com/bench-memos/brett-kavanaugh-presumption-of-innocence/> [<https://perma.cc/VGK8-WSRR>].

<sup>36</sup> Audie Cornish, *Gayle King Thinks #MeToo Needs Due Process Talk*, N.Y. TIMES (June 12, 2018) (Magazine), <https://www.nytimes.com/2018/06/12/magazine/gayle-king-thinks-metoo-needs-due-process.html> [<https://perma.cc/KC27-BHCS>].

<sup>37</sup> *#MeToo's Penalty: Your Job*, WTAX NEWS RADIO, <https://wtax.com/news/101101-metooos-penalty-your-job/> [<https://perma.cc/499S-5TF6>] (last visited Jan. 13, 2019).

<sup>38</sup> Claire Berlinski, *The Warlock Hunt*, AM. INT. (Dec. 6, 2017), <https://www.the-american-interest.com/2017/12/06/the-warlock-hunt/> [<https://perma.cc/899N-JCAL>].

<sup>39</sup> Lionel Shriver, *What's Wrong with Hearing #MeToo Men's Side of the Story?*, SPECTATOR (Sept. 29, 2018), <https://www.spectator.co.uk/2018/09/whats-wrong-with-hearing-metoo-mens-side>

#MeToo conversations often include related concerns that any sanctions be time bound and that #MeToo perpetrators be able to move on with their lives just as other criminals completing state-ordered punishment.<sup>40</sup> Think of Norm MacDonald's comment that

[i]t's weird that you can commit murder and go to prison and do your time and then everybody goes, 'He's done his time, he deserves to work, how dare you treat him as less than you just because he murdered a guy,' because he did his penance for it. And yet the Twitter mob, there is no sentence for it. But I think we're going to return to reason and realize you shouldn't ban a person for life for doing something that you couldn't even put him in prison for.<sup>41</sup>

Or consider this online commentator referencing alleged #MeToo perpetrators speaking out to defend themselves, "Yet even worse is the increasing frequency and severity of punishment for anyone attempting to commute this career death sentence by daring to give voice to the possibility of innocence or mitigating circumstances."<sup>42</sup>

## II. BENEFITS

Given that so much of the #MeToo conversation is steeped in and policed by law talk, I use Part II to discuss some potential benefits to such rhetorical moves, before explaining in Part III why such benefits might not materialize or be experienced by all or even most participants in the conversation. I begin here by identifying here four possible positive features of law talk. First, law talk is familiar and pervasive in American culture. Even those without law degrees or legal expertise are generally comfortable engaging in conversations using the language of the law to order their judgments and opinions. Second, law and related law talk can provide off-the-rack defaults in non-legal settings, allowing participants in #MeToo conversations to easily systematize their understandings of events rather than needing to reinvent the wheel for governing concepts. It offers a preexisting system to determine who is a

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-of-the-story [<https://perma.cc/6EY4-S9YT>].

<sup>40</sup> Opinion, *What to Do with the 'Bad Men' of the #MeToo Movement*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/opinion/bad-men-metoo-movement.html> [<https://perma.cc/ENC7-ABN2>].

<sup>41</sup> Scott King, *Norm Macdonald on New Show, Burt Reynolds, Dirty Work 2? And Louis C.K.*, FORBES (Sept. 10, 2018), <https://www.forbes.com/sites/scottking/2018/09/10/norm-macdonald-on-new-show-burt-reynolds-dirty-work-2-and-louis-c-k/#9af433e2ca9d> [<https://perma.cc/7HSD-HSAZ>].

<sup>42</sup> E. Olson, Comment to *#MeToo Casualty Ian Buruma Was the Editor We Needed*, QUILLETTE (Sept. 26, 2018), <https://quillette.com/2018/09/26/metoo-casualty-ian-buruma-was-the-editor-we-needed/> [<https://perma.cc/U9UP-PMET>].

victim and what is an appropriate punishment. Relatedly, law talk and the underlying law from which it emerges can establish a floor to guard against participants in the #MeToo conversation who wish to exclude potential victims or exonerate potential perpetrators who do satisfy legal definitions. And lastly, the pervasiveness of law talk might help generate a natural feedback loop into legal reform. Since participants are already contemplating and debating legal standards, they might push for reform when those concepts fail them in non-legal settings.

#### A. Accessible to Americans

One ostensible benefit of rendering #MeToo a legal conversation is that law talk and legal thinking are generally accessible to America's diverse population. While not everyone in the United States is well versed in the law, commentators from de Tocqueville to Mary Ann Glendon have noted that "lawyers' habits of mind, as well as their modes of discourse, 'infiltrate through society right down to the lowest ranks.'"<sup>43</sup> Most people living in the United States discussing #MeToo have at least a passing familiarity with concepts and terms embedded in law, such as due process, presumptions of innocence, sexual harassment, and sexual assault.<sup>44</sup>

#### B. Off-the-Rack Defaults

Second, law talk allows participants to borrow "off-the-rack" legal terms to deploy in non-legal settings.<sup>45</sup> Just as contract law can provide "off-the-rack" terms and rules to deploy in private settings, the civil and criminal law can supply terms and concepts "for free,"<sup>46</sup> enabling participants to concentrate on: the application of the law to facts, legal reforms, structural and cultural changes, or even expressions of empathy.<sup>47</sup> For instance, civil law both defines the term "sexual harassment"

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<sup>43</sup> GLENDON, *supra* note 26, at 1 (citing de Tocqueville and noting that such patterns continue today).

<sup>44</sup> This is not to say relevant therapeutic or scientific discourses are necessarily less accessible, though they might be. Rather, the point is that a legally oriented discourse is a familiar one.

<sup>45</sup> Using a preexisting body of law as an off-the-rack solution in another legal setting is a common strategy. Scholars and legislators often experiment, taking the terms, rules, and/or baselines from one area and arguing for their application or consideration in other settings so as to build upon existing understandings of the world with which people are already familiar. For an intriguing example, see Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (using commercial partnership default rules to contemplate default rules to govern polygamous relationships).

<sup>46</sup> There's no such thing as free. Nod to STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING TOO* (1994).

<sup>47</sup> FRANK EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 34 (1991) ("Corporate Law is a set of terms available off the rack so that participants in

and has a body of case law to interpret what set of facts constitute sexual harassment. Thus, for those in the #MeToo conversation who use the term “sexual harassment” as a shorthand rather than describing all of the events they experience, other individuals might already have a basic understanding, informed by the law, as to what that experience might be.<sup>48</sup> Rather than needing to hash out the facts, they might be able to move past a definition of terms and towards empathy and support. Or for those interested in enhancing civil remedies or reducing barriers for claimants to come forward in non-legal settings, they need not first have a conversation about what constitutes sexual harassment. Similarly, for those concerned about fairness to those outed in a Facebook post or a whisper network as a #MeToo perpetrator, they can use due process protections as understood under the Fifth Amendment as a default for protections to be applied in the workplace or in social settings.

### C. Baseline/Floor

Third, law talk can also impose an informal floor in non-legal settings, ensuring that participants in the #MeToo conversation cannot persuasively narrow #MeToo claims, procedures, or punishments beneath what the law would dictate. While many scholars have noted the limitations of Title VII’s definition of harassment and its increasingly narrow interpretation by courts,<sup>49</sup> it might nevertheless provide a useful floor against those who seek to narrow it even further. For instance,<sup>50</sup> while some might subjectively or normatively believe that sexist, but not sexual, behavior cannot constitute sexual harassment, and those subject to it ought not claim the mantle of #MeToo, law talk may provide an important check. As Schultz and Soucek nicely illustrate, the law’s understanding of sexual harassment is broad, including “the

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corporate ventures can save the cost of contracting . . . Corporate codes and existing judicial decisions supply these terms ‘for free’ to every corporation, enabling the venturers to concentrate on matters that are specific to their undertaking.”)

<sup>48</sup> Thanks to Jessica Clarke for pointing out that it is not just law, but the related consciousness raising groups that enabled this possibility. And thanks for the hard work of feminists like Catherine MacKinnon and Lin Farley that enabled such a shift. Reva B. Seigel, *Introduction: A Short History of Sexual Harassment*, in CATHERINE A. MACKINNON & REVA B. SIEGEL, DIRECTIONS IN SEXUAL HARASSMENT LAW (2003).

<sup>49</sup> SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW (2017).

<sup>50</sup> For another example, though many suggest that one cannot rape one’s wife, the law conclusively states otherwise, and the law can inform social as well as legal understandings. Irin Cormon, *Why Are So Many Men Confused About What Sexual Consent Means*, WASH. POST (Oct. 13, 2017), [https://www.washingtonpost.com/outlook/what-counts-as-improper-sexual-contact-its-becoming-harder-to-tell/2017/10/13/b15506c6-af8e-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.3ff46c7142f5](https://www.washingtonpost.com/outlook/what-counts-as-improper-sexual-contact-its-becoming-harder-to-tell/2017/10/13/b15506c6-af8e-11e7-9e58-e6288544af98_story.html?utm_term=.3ff46c7142f5) [<https://perma.cc/C36Q-J37B>]; FED. BUREAU OF INVESTIGATION, FREQUENTLY ASKED QUESTIONS ABOUT THE CHANGE IN THE UCR DEFINITION OF RAPE (2014).

endless ways employees are undermined, excluded, sabotaged, ridiculed, or assaulted because of their sex—even if not through words or actions that are ‘sexual’ in nature. . . .”<sup>51</sup> The Supreme Court’s interpretation is broader than many others that have been offered, including the one that the New York Times has employed and everyday linguistic usage, which often focuses on touching.<sup>52</sup>

By creating a floor that includes some defined set of victims, it also helps rhetorically guard against the discounting or minimization of alleged actions of alleged perpetrators. So, for instance, when people observe that Al Franken’s behavior is not the equivalent of Harvey Weinstein,<sup>53</sup> it is helpful to counter that Al Franken’s alleged behavior was at the very least tortious.<sup>54</sup> One need not be a moral monster to be appropriately considered within #MeToo’s ambit, and the law can helpfully disentangle the confusion.

Law talk can also help protect against related minimization by virtue of elapsed time or the youth of the perpetrator. So, when Harvey Weinstein defends his actions as “com[ing] of age in the 60’s and 70’s, when all the rules about behavior and workplaces were different,”<sup>55</sup> one can point to the laws against rape and assault that existed at the time. Or for those who try to downplay the allegations against Justice Kavanaugh as a simple example of “boys will be boys,” the law then and

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<sup>51</sup> Vicki Schultz & Brian Soucek, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 227 (2019).

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

<sup>53</sup> Chris Varias, *Rob Schneider: In Showbiz . . . All You Get to Keep Is the Stories*, CINCINNATI ENQUIRER (Jan. 02, 2018), <https://www.cincinnati.com/story/entertainment/2018/01/02/rob-schneider-showbiz-all-you-get-keep-stories/996743001/> [<https://perma.cc/U4BU-85V3>].

<sup>54</sup> For example, take this paragraph from cultural commentator Masha Gessen:

The case of Franken makes it all that much more clear that this conversation is, in fact, about sex, not about power, violence, or illegal acts. The accusations against him, which involve groping and forcible kissing, arguably fall into the emergent, undefined, and most likely undefinable category of “sexual misconduct.” Put more simply, Franken stands accused of acting repeatedly like a jerk, and he denies that he acted this way. The entire sequence of events, from the initial accusations to Franken’s resignation, is based on the premise that Americans, as a society, or at least half of a society, should be policing non-criminal behavior related to sex.

Masha Gessen, *Al Franken’s Resignation and the Selective Force of #MeToo*, NEW YORKER (Dec. 7, 2017), <https://www.newyorker.com/news/our-columnists/al-franken-resignation-and-the-selective-force-of-metoo> [<https://perma.cc/F9NZ-LUWU>]. Those well versed in the law and willing to engage in law talk might remind Gessen and Gessen’s readers that the law includes civil wrongdoings, like torts, in addition to criminal wrongdoings and that many of the allegations against Franken raise colorable claims of tortious behavior.

<sup>55</sup> Harvey Weinstein, *Statement from Harvey Weinstein*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/interactive/2017/10/05/us/statement-from-harvey-weinstein.html> [<https://perma.cc/R9CB-2B8X>].

now defines such alleged actions as illegal even if engaged in by a 17-year-old boy.<sup>56</sup>

Law talk and its provision of a protective floor need not and indeed has not been limited to possible #MeToo claimants, but also includes potential #MeToo perpetrators and enablers. Due process defines a minimum set of protections afforded to criminal defendants, and as explained above, many have argued that decision-makers or accusers must provide this level of protections and cannot go below them. Similarly, in assessing the role of enablers and participants, one might use the criminal law to define a minimal level of contribution before one ought to be sanctioned, even if such sanctions are not imposed by the state. For instance, think of William Shatner's comments, "I keep asking who is policing [the #MeToo movement] because there's a lot using it for their own personal vendettas that have nothing to do with the points of the movement."<sup>57</sup>

#### D. Legal Reform Feedback Loop

Lastly, structuring #MeToo as a legal conversation even in non-legal settings might create a natural feedback loop into legal reforms. By integrating the law into the conversation, the law's limitations are unlikely to be overlooked. To the extent that advocates find that particular legal standards do not match their needs or expectations, they can press for legislative reform. A brief list of possible reforms that are currently being pursued include: altering federal or state definitions for concepts like intent, discrimination, harassment for sex crimes and torts,<sup>58</sup> expanding workplaces covered by harassment policies,<sup>59</sup> and using private codes of conduct to offer more expansive definitions than those offered

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<sup>56</sup> Megan Garber, *Brett Kavanaugh and the Revealing Logic of 'Boys Will Be Boys'*, ATLANTIC (Sept. 17, 2018), <https://www.theatlantic.com/entertainment/archive/2018/09/brett-kavanaugh-and-the-revealing-logic-of-boys-will-be-boys/570415/> [<https://perma.cc/9LM3-6Q47>].

<sup>57</sup> Ryan Parker, *William Shatner Likens #MeToo Movement to French Revolution if Not Policed*, HOLLYWOOD REP. (Dec. 22, 2018), <https://www.hollywoodreporter.com/news/william-shatner-likens-metoo-movement-french-revolution-not-policed-1171559> [<https://perma.cc/7S55-EQVF?ty=pe=image>]; Ryan Parry & Josh Boswell, *William Shatner as He Defends Christmas Classic Baby It's Cold Outside from the Censors and Says He Now Has to Refrain from Complimenting Women on Their 'Great Legs'*, DAILY MAIL (Dec. 18, 2018), <https://www.dailymail.co.uk/news/article-6504445/William-Shatner-says-MeToo-hysterical-like-French-Revolution.html> [<https://perma.cc/68SA-QXWS>].

<sup>58</sup> Ginia Bellafante, *The #MeToo Movement Changed Everything. Can the Law Catch Up?*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/nyregion/metoo-movement-schn-eiderman-prosecution.html> [<https://perma.cc/8C6B-J4Z4>].

<sup>59</sup> Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW TRUSTS (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws> [<https://perma.cc/9AXK-MN8F>].

in the law.<sup>60</sup> Other reforms relating to forum access include: lengthening or abolishing statutes of limitations for #MeToo related crimes,<sup>61</sup> pushing against the legality of mandatory pre-dispute arbitration,<sup>62</sup> and limitations on nondisclosure agreements.<sup>63</sup>

### III. CONCERNS ABOUT LAW TALK'S LEGAL BASELINE AND PRELIMINARY SUGGESTIONS

While law talk might help order and set the floor for the national #MeToo conversation as discussed above, I have deep concerns about the ways in which this legal floor may also act as a ceiling. Those engaged in colloquial law talk often use law as a sticky baseline from which to assess the validity of #MeToo claims, claimants, processes, and responses. This essay's descriptive aim is to help clarify, as with other baselines, how colloquial law talk's legal baseline acts to foreclose some options “not by the logic of the rules, but rather by the terms of the discourse through which arguments are made. These baselines define the normative starting points of . . . analysis,”<sup>64</sup> and I argue, for too many, the ending point as well. In this section, I identify two ways in which this baseline worrisomely manifests in the #MeToo conversation.

As explained in Part I, colloquial law talk is being deployed in non-legal settings to police the boundaries of #MeToo in numerous ways including but not limited to:

- constraining the conversation to workplace harassment governed by Title VII and thus excluding other settings

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<sup>60</sup> Christine Herman, *U of I Law Faculty & Staff Call for Overhaul of Campus Sexual Misconduct Policies*, WILL ILL. PUB. MEDIA (Oct. 23, 2018), <https://will.illinois.edu/news/story/u-of-i-law-faculty-staff-call-for-overhaul-of-campus-sexual-misconduct-poli> [<https://perma.cc/2RWY-NQ3Z>].

<sup>61</sup> Deborah Tuerkheimer, Opinion, *Let's Ease Statutes of Limitations in Rape Cases*, WASH. POST (May 25, 2018), [https://www.washingtonpost.com/opinions/lets-ease-statutes-of-limitations-in-rape-cases/2018/05/25/d21db6c0-6044-11e8-9ee3-49d6d4814c4c\\_story.html?utm\\_term=.4a1289faba55](https://www.washingtonpost.com/opinions/lets-ease-statutes-of-limitations-in-rape-cases/2018/05/25/d21db6c0-6044-11e8-9ee3-49d6d4814c4c_story.html?utm_term=.4a1289faba55) [<https://perma.cc/W563-NGUY>].

<sup>62</sup> L. Camile Hébert, *Is “MeToo” Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 333–335 (2018); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115<sup>th</sup> Cong. (Dec. 6, 2017).

<sup>63</sup> Beitsch, *supra* note 59; Bowman Williams, *supra* note 2.

<sup>64</sup> Jack M. Beerhmann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 916 (1989) (“Baselines embody important moral and political choices, but because they are starting points for analysis, they tend to suppress discussion of these choices. They therefore have the effect of masking the political underpinnings of legal rules.”).

such as dating and domestic violence,<sup>65</sup> and excluding lawful, but awful<sup>66</sup> sexual encounters from the debate<sup>67</sup>

- opposing the inclusion of those who have violated (or are perceived to have violated) the law, such as sex workers,<sup>68</sup> those in prison,<sup>69</sup> and those in detention based on their immigration status<sup>70</sup>

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<sup>65</sup> David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, in *LAW IN EVERYDAY LIFE* 123, 129–130 (Austin Sarat & Thomas R. Kearns eds., 1993).

<sup>66</sup> Lawful, but awful sex is also often coterminous with the terms bad sex Stassa Edwards, *It's Time to Map the Wilderness of Bad Sex*, JEZEBEL (Jan. 19, 2018), <https://jezebel.com/its-time-to-map-the-wilderness-of-bad-sex-1822171954> [<https://perma.cc/HKT9-XLHW>]; Lili Loofbourow, *The Female Price of Male Pleasure*, WEEK (Jan. 25, 2018), <https://theweek.com/articles/749978/female-price-male-pleasure> [<https://perma.cc/UE5X-54A6>]; Collier Meyerson, *#MeToo Is Changing the Definition of 'Bad Sex'*, NATION (Jan. 24, 2018), <https://www.thenation.com/article/metoo-is-changing-the-definition-of-bad-sex/> [<https://perma.cc/V8Z7-S92R>]; grey zone sex, Jessica Bennett, *The #MeToo Moment: Navigating Sex in the 'Gray Zone'*, N.Y. TIMES (Feb. 23, 2018), <https://www.nytimes.com/2018/02/23/us/the-metoo-moment-navigating-sex-in-the-gray-zone.html> [<https://perma.cc/B3NQ-PYMK>]; unenthusiastic, Gaby Hinsliff, Opinion, *Consent Is Not Enough: If You Want a Sexual Partner, Look for Enthusiasm*, GUARDIAN (Jan. 29, 2015), <https://www.theguardian.com/commentisfree/2015/jan/29/rape-consent-sexual-partner-enthusiasm> [<https://perma.cc/HZ7C-AYC9>]; or unwanted, Anonymous, *We Need to Talk about Sexual Assault in Marriage*, VOX (Mar. 8, 2018), <https://www.vox.com/first-person/2018/3/8/17087628/sexual-assault-marriage-metoo> [<https://perma.cc/BM2E-GXK5>].

<sup>67</sup> Justin Duyao, *Aziz Ansari: He Is Not A Predator*, BISON (Feb. 15 2018), <https://thelink.harvard.edu/the-bison/2018/02/15/different-perspectives-aziz-ansari-he-is-not-a-predator/> [<https://perma.cc/R3BC-NGTY>]. Some have suggested that rather than limiting #MeToo to sexual violence and misconduct or even to questions of legal permission, that MeToo is well positioned to open the frontier on the societal need for mutual pleasure in sexual contact. Zosia Bielski, *The Next Frontier in Consent: Better Sex*, GLOBE & MAIL (Jan. 23, 2018), <https://www.theglobeandmail.com/life/relationships/the-next-frontier-in-consent-better-sex/article37681221/> [<https://perma.cc/WJ4Y-JN2U>]; See, e.g., *The Fine Line Between a Bad Date and Sexual Assault: 2 Views on Aziz Ansari*, NPR ALL THINGS CONSIDERED (Jan. 16, 2018), <https://www.npr.org/2018/01/16/578422491/the-fine-line-between-a-bad-date-and-sexual-assault-two-views-on-aziz-ansari> [<https://perma.cc/UP2H-HP6Z>]; Way, *supra* note 23; Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/> [<https://perma.cc/G6XS-N45V>]; Bari Weiss, Opinion, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html> [<https://perma.cc/XUN6-L5SR>].

<sup>68</sup> Samantha Cooney, 'They Don't Want to Include Women Like Me.' *Sex Workers Say They're Being Left Out of the #MeToo Movement*, TIME (Feb. 13, 2018), <http://time.com/5104951/sex-workers-me-too-movement/> [<https://perma.cc/7VPU-WJ9B>]; Kyli Rodriguez-Cayro, *Sex Workers Can Be Sexually Assaulted Too, And We Need To Talk About It*, BUSTLE (Apr. 24, 2018), <https://www.bustle.com/p/sex-workers-can-be-sexually-assaulted-too-we-need-to-talk-about-it-7551815> [<https://perma.cc/75AE-3VQF>].

<sup>69</sup> Natasha Lennard, *Will the Prison Rape Epidemic Ever Have Its Weinstein Moment?*, INTERCEPT (Nov. 21, 2017), <https://theintercept.com/2017/11/21/prison-rape-sexual-assault-violence/> [<https://perma.cc/K8UM-TZP9>].

<sup>70</sup> Alfonso Serrano, *Immigration Advocates: Immigrant Detainees Must Be Included in the #MeToo Conversation*, COLORLINES (Jan. 9, 2018), <https://www.colorlines.com/articles/immigration-advocates-immigrant-detainees-must-be-included-metoo-conversation> [<https://perma.cc/4AYH-TNSF>]. While those detained may not have violated the law, some are using their uncertain legal status to try to exclude them from the conversation.

- discounting the accounts of those who failed to engage the relevant criminal or civil machinery
- demanding the application of constitutional due process protections
- using criminal law's standards of evidence and proof

#### A. Good Faith Mistakes

One worrisome form of colloquial law talk simply reflects a category error. Participants genuinely, but incorrectly, believe that specific substantive or procedural laws apply in settings in which they do not. They apply legal standards because they believe such standards are binding framework rules for assessing substance and providing appropriate procedure. For instance, some Americans might think a criminal statute of limitations governs a confirmation hearing or an employment proceeding. Or an employer might believe he is only entitled to fire someone accused of harassment or assault who has been convicted of crime, engaged in behavior that rises to the level of a crime, or at the very least violated a civil statute. Some might think that the presumption of innocence must apply to social determinations of wrongdoing. These beliefs inform not only an individual's own role when he or she is called upon to make a decision, but might also inform what one thinks others must do.

My suggestions for these types of baseline mistakes are profoundly modest. As colloquial law talk can often inadvertently slip or intentionally move between descriptive claims about what the law demands and normative claims that the law's demands ought to dictate or strongly inform situations that they do not govern, those seeking to unmask the use of the law as a baseline must themselves not fall prey to their own category errors. So, in those instances in which one is appropriately attempting to counter the mistaken application of law as a baseline, one must be humble about the potential of simple error correction, whether in real life social conversations, on social media, via journalism, or other parts of the conversation. While one might initially think legal scholars and lawyers are in the best position to correct such mistakes, the debasing literature suggests simple information correction, particularly in settings where people's beliefs are deeply held, partisan, or identity constitutive, can sometimes trigger a backfire effect further entrenching the mistaken belief.<sup>71</sup> Much like with the work on vaccines, this is an

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<sup>71</sup> Sara Pluviano et al., *Misinformation Lingers in Memory: Failure of Three Pro-Vaccination Strategies*, 12 PLOS ONE (July 27, 2017), <https://doi.org/10.1371/journal.pone.0181640> [<https://perma.cc/4F9X-95YS>].

area that might benefit from further empirical work both to determine whether the backfire effect is likely to be engaged,<sup>72</sup> and if so, what the most effective method of error correction is, including subsidiary issues such as who ought to engage in error correction and under what conditions.

## B. Sticky Default

Law also emerges as a conversational baseline when individuals understand the formal inapplicability of the law, but they use the law as a sticky governing default. In such circumstances, individuals could, at least in theory, be convinced to abandon the law as the appropriate lens, but they would require the satisfaction of a high persuasive threshold to do so. Such a default concerns me for several reasons.

In many #MeToo settings, law may not be an appropriate framing for conversation or for resolution. For instance, if someone like Chloe Dykstra or Aziz Ansari's anonymous date wants to identify herself or himself as a #MeToo survivor on social media, responding with criminal standards to assess such a claim may be both inappropriate and counterproductive. It unnecessarily forecloses an emerging cultural dialogue<sup>73</sup> about the harms of coercive and unwanted sex; the uneven burdens regarding the provision of sexual pleasure;<sup>74</sup> the benefits of seeking affirmative<sup>75</sup> and enthusiastic consent;<sup>76</sup> the costs to society when we only account for the harms and benefits of unlawful behavior;<sup>77</sup> as well as the even larger conversations about gender, sex, power, and equality. An unchallenged legal default in the #MeToo conversation implicitly concludes that law is the only forum and the only language through which we can understand and address such issues. But by definition, such an approach will prevent a better understanding of the true nature of harms for which the law has not accounted or the creation

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<sup>72</sup> Kathryn Haglin, *The Limitations of the Backfire Effect*, RESEARCH & POLITICS (July–Sept., 2017), <https://journals.sagepub.com/doi/pdf/10.1177/2053168017716547> [<https://perma.cc/5MXZ-3MPF>].

<sup>73</sup> Constance Grady, *The Uproar over the New Yorker Short Story "Cat Person," Explained*, VOX (Dec. 12, 2017), <https://www.vox.com/culture/2017/12/12/16762062/cat-person-explained-new-yorker-kristen-roupenian-short-story> [<https://perma.cc/S4ZK-7JCP>].

<sup>74</sup> Breanne Fahs & Eric Swank, *The Other Third Shift?: Women's Emotion Work in Their Sexual Relationships*, 28 *Feminist Formations* 46 (2016).

<sup>75</sup> Samantha Cooney, *The Aziz Ansari Allegation Has People Talking About 'Affirmative Consent.'* *What's That?*, TIME (Jan. 17, 2018), <http://time.com/5104010/aziz-ansari-affirmative-consent/> [<https://perma.cc/4N8R-CWRX>].

<sup>76</sup> Maggie Serota, *Aziz Ansari Addresses Sexual Misconduct Allegations in Standup Set*, SPIN (Feb. 12, 2019), <https://www.spin.com/2019/02/aziz-ansari-addresses-sexual-misconduct-standup-nyc/> [<https://perma.cc/V52L-KNA3>].

<sup>77</sup> Robin Kar & Lesley Wexler, *#MeToo: Counting the Collective Harm of Missing Women's Work*, JUSTIA (Mar. 5, 2019), <https://verdict.justia.com/2019/03/05/metoo-counting-the-collective-harm-of-missing-womens-work> [<https://perma.cc/JHV7-PLM5>].

of a new cultural consensus of a better approach.<sup>78</sup> In addition, I echo the worries of other scholars who have aptly noted that such policing of #MeToo claims may “dampen [survivors’] ability to seek out or receive support, acceptance and healing through consciousness-raising discourse.”<sup>79</sup>

In addition, law makes the best sense as an “off-the-rack” default when it reflects the consensus that the relevant group would have reached with sufficient time and resources. So, in the contract setting, Fischel and Easterbrook assume off-the-rack rules make sense for contract drafters because there are “lots of terms . . . that almost everyone will want to adopt.”<sup>80</sup> Of course, borrowing and transplantation can sometimes work in unforeseen conditions and unanticipated domains,<sup>81</sup> but I am concerned about their unthinking adoption in a time and place of significant social contestation.

To be more concrete, much disagreement exists both among scholars and society at large on both the substance and the procedure that governs the law itself. A robust agreement does not exist as to what constitutes or what should constitute rape, sexual harassment, and consent in legal settings. For example, existing state rape laws vary on the definition of the underlying offense as well as to a host of consent issues including the requirement of affirmative consent, the relevant age for consent, the importance of difference in age between the alleged victim and alleged perpetrator, the role and determination of incapacity, and the importance of marital status.<sup>82</sup> Nor is there widespread agreement among the public as to what ought to constitute sexual assault or sexual harassment.<sup>83</sup> Simply importing the legal standards sidesteps the deep divisions related to these definitions and imports them into a new setting. While I noted above that increased use of such definitions might spur legal reform, the significant hurdles to new legislation and the need for concomitant social shifts and structural change create a real

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<sup>78</sup> Julianne Escobedo Shephard, *The Next Step for #MeToo Is Into the Gray Areas*, JEZEBEL (Sept. 24, 2018), <https://jezebel.com/the-next-step-for-metoo-is-into-the-gray-areas-1829269384> [<https://perma.cc/GR9P-JAZV>].

<sup>79</sup> Gash & Harding, *supra* note 18.

<sup>80</sup> EASTERBROOK & FISCHEL, *supra* note 47.

<sup>81</sup> Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 28–30 & nn.14–20 (2014).

<sup>82</sup> *Laws in Your State*, RAINN (Last visited Aug. 9, 2019), [https://apps.rainn.org/policy/?\\_ga=2.257230472.2042468811.1556473013-624410638.1543422985](https://apps.rainn.org/policy/?_ga=2.257230472.2042468811.1556473013-624410638.1543422985) [<https://perma.cc/K7WR-WMF3>].

<sup>83</sup> William Cummings, *Americans Agree Sexual Harassment Is a Problem, They Just Don't Always Agree What It Is*, USA TODAY (Nov. 18, 2017), <https://www.usatoday.com/story/news/nation/2017/11/17/americans-agree-sexual-harassment-problem-they-just-dont-always-agree-what/864621001/> [<https://perma.cc/7Y5Z-CQM9>].

burden on claimants in imposing contested legal standards in non-legal settings.

In addition, even if one thinks the substance and procedure govern legal settings fairly well, the same concerns that inform and create law are rarely coextensive with the concerns implicated by situations not governed by the law's baseline. Colloquial law talk sometimes obscures a real mismatch between law's purposes in legal settings and its application to non-legal settings, where different interests exist or ought to be balanced differently. For instance, under criminal law, given the state's role in imposing a possible deprivation of liberty, it makes sense that the Constitution would offer a fulsome promise of due process with a neutral decision-maker, notice of accusations, and the right to confront an accuser. But even in many legal settings, one can often satisfy due process without providing robust protections.<sup>84</sup> While reasonable disagreements about how to forge a path forward from #MeToo exist, the unthinking application of strong due process norms to settings that involve no deprivations of constitutionally protected interests is problematic.

Third, and somewhat relatedly, the use of law as a strong default may make it more difficult to deploy other approaches that better serve welfare or goals that are distinct from the law. American law, both criminal and civil, focuses on the provision of justice. In so doing, it attends to individual fault and individual wrongdoing, rather than directly addressing larger structural and cultural issues or even victim needs beyond compensation.<sup>85</sup> While such a limited approach might be appropriate for the criminal and tort system, this is why societies and particularly those going through moments of social upheaval contemplate using other mechanisms for social change as well. Of course, although the limitations of the law do not per se preclude adopting a therapeutic or structural approach to #MeToo issues, I have shown above how the use of a sticky legal baseline makes that more difficult. Given

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<sup>84</sup> Thanks to Professors Jamelle Sharpe and Arden Rowell for suggestions. *See Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting out the test for what process Due Process requires and concluding that a pre-deprivation hearing was not required in social security disability contexts. *See also* *U.S. v. Reed*, 41 M.J. 449 (C.A.A.F. 1995) (while due process applies to persons before court martial, seventeen-month delay between identification of accused as a suspect and bringing charges did not violate due process); *Ingraham v. Wright*, 430 U.S. 651 (1977) (concluding due process does not require either notice or opportunity for hearing prior to certain forms of corporal punishment) *Schaughnessy v. U.S. ex rel. Mezei* (holding that an alien could be permanently excluded without a hearing), 345 U.S. 206 (1953); *Nielsen v. Preap*, 586 U.S. 139 (2019) (holding that unauthorized immigrants may be detained indefinitely once taken into criminal custody). While I believe more robust protection may be owed in many of these settings, the existing law finds otherwise.

<sup>85</sup> It is worth noting that the law does serve other functions aside from backward looking justice, such as providing restraining orders and injunctions.

these concerns, I conclude with two preliminary thoughts on paths forward.

1. Reforming colloquial law talk

Any participant in the #MeToo conversation who sees a mismatch between the law as default and the interests at stake may attempt to refashion or reform colloquial law talk.<sup>86</sup> Some of that work is already occurring. Given the bottom up nature of the #MeToo conversation and its non-legal origins, the turn to the legal baseline has not been unnoticed and has been hotly contested at least by some.<sup>87</sup> To take one highly salient example, many demanding a discussion about presidential nominee Joe Biden's non-sexual, intimate touching strongly reject the idea that Biden's behavior need be unlawful or sexually motivated to be relevant to the modern reckoning.<sup>88</sup> But relatedly, the forms of accountability they call for also differ substantially from those requested for criminal sexual assault or tortious sexual harassment.<sup>89</sup>

I suggest here that one mode of contestation would be to better match people's legal intuitions to the actual interests at stake on both sides when the law is invoked in non-legal settings. On the one hand, one might dig into various processes and procedural protections and explain why they ought to be considered satisfied even if the criminal law protections were not applied. Again, to return to the due process example, when invoked it seems to stem from the deeply held intuition in America that people ought to be treated fairly. So, what should fairness look like in non-legal settings? Professor Clarke's piece does a nice job explaining why many settings, such as journalistic reporting and workplace investigations, do in fact comport with our intuitions of fairness.<sup>90</sup> One might also mine the procedural fairness literature for thoughts on what processes have shown to be acceptable, but, equally important, one also needs to search it for evidence and explanations of processes

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<sup>86</sup> Of course, legal baselines are not always sticky and sometimes people are able to argue persuasively that the wrong baseline is being used in a given setting. For example, Professor Sunstein has compellingly argued that the Supreme Court used the wrong baseline in *Lochner v. New York*, 198 U.S. 45 (1905). Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

<sup>87</sup> Tarana Burke, @TaranaBurke, TWITTER, (Aug. 20, 2018, 4:14AM), <https://twitter.com/TaranaBurke/status/1031499602623643650> [<https://perma.cc/UQC8-VNWA>].

<sup>88</sup> Lucy Flores, *Joe Biden and the Apologies that Weren't*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/opinion/joe-biden-lucy-flores-apology.html?searchResultPosition=3> [<https://perma.cc/5JCR-W9AJ>]; Marle Solis, *Reckoning with the Joe Bidens of the #MeToo Movement*, BROADLY (Apr. 11, 2019), [https://broadly.vice.com/en\\_us/article/8xz4nb/joe-biden-allegations-inappropriate-touching-me-too](https://broadly.vice.com/en_us/article/8xz4nb/joe-biden-allegations-inappropriate-touching-me-too) [<https://perma.cc/3AN3-2S98>].

<sup>89</sup> Jill Filipovic, *Joe Biden Still Has to Answer for Decades of Bad Choices*, VANITY FAIR (Apr. 4, 2019) <https://www.vanityfair.com/style/2019/04/joe-biden-apology-advice> [<https://perma.cc/ZWN2-FGBE>].

<sup>90</sup> See generally Jessica Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37 (2019).

that have been considered unfair across various settings. If the #MeToo movement is perceived as deeply unfair, much of society is unlikely to willingly participate in its call for a social reckoning.<sup>91</sup>

Second and equally important, colloquial law talk might provide an opening for the salience of the violations of victims' colloquial due process. If we are to account for interests of and burdens on accusers in order to provide fairness, we ought to balance the ledger by also accounting for potential MeToo claimants' interests and burdens.<sup>92</sup> In the #MeToo era, what does it mean to be fair to accusers? As Professors Gash and Harding have noted, invocations of due process include an "assumption and an expectation that normal legal pathways are clear of obstacles for victims of sexual violence, when in fact these pathways are ridden with obstacles and peril."<sup>93</sup> At the very least, I think such due process for all should include: allowing victims to remain a focus of the #MeToo narrative,<sup>94</sup> dismantling bias against believing them,<sup>95</sup> rejecting numerosity to take complaints seriously,<sup>96</sup> taking complaints seriously by initiating investigations, maintaining investigations even if the alleged harasser leaves the workplace,<sup>97</sup> and providing sanctions proportionate to any findings made. Relatedly, society ought to engage the need for reintegration of victims who were retaliated against for coming forward or for being harassed in the first instance just as seriously as it engages the question of reintegration of the profoundly undeserving.<sup>98</sup>

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<sup>91</sup> Tammi Walker, *Fixing What's Wrong with How Universities Adjudicate Sexual Misconduct Claims: How Procedural Change Can Encourage Cooperation*, 2018 WISC. L. REV. 111 (2018).

<sup>92</sup> While the victims' rights movement has focused generally on the ways in which the criminal justice might be unfair to victims and their families, I want to emphasize instead the way in which unfairness seems to particularly plague those contesting sexual assault, sexual harassment, and related behavior like domestic violence and emotional abuse.

<sup>93</sup> Gash & Harding, *supra* note 18, at 22. See also Catharine A. MacKinnon, *Reflections on Law in the Everyday Life of Women*, in *LAW IN EVERYDAY LIFE* 109 (Austin Sarat & Thomas R. Kearns eds., 1993) (suggesting "Either the law does not apply (to women's experiences), is applied to women's detriment, or is not applied at all.").

<sup>94</sup> Ijeoma Oluo, *Due Process Is Needed For Sexual Harassment Accusations—But for Whom?*, ESTABLISHMENT (Nov. 13, 2017), <https://medium.com/the-establishment/due-process-is-needed-for-sexual-harassment-accusations-but-for-whom-968e7c81e6d6> [<https://perma.cc/KY7G-89E5>].

<sup>95</sup> 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-meto/553427/> [<https://perma.cc/2RGM-VXN6>].

<sup>96</sup> See generally Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL. F. 273 (2019).

<sup>97</sup> Leah Litman et al., Opinion, *A Comeback but No Reckoning*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html> [<https://perma.cc/2ETV-DWVE>].

<sup>98</sup> Megan Garber, *The Leaked Louis. C.K. Set Is Tragedy Masked as Comedy*, ATLANTIC (Dec. 31, 2018), <https://www.theatlantic.com/entertainment/archive/2018/12/louis-ck-leaked-tape/579220/> [<https://perma.cc/S9X4-JV5Q>]; Joe Berkowitz, *The Bad Men of 2017 Have Somehow Gotten Worse*, FAST COMPANY (Dec. 31, 2018), <https://www.fastcompany.com/90286891/the-bad-men-of-2017->

To take a different example, one might push back on the law as providing a floor or a ceiling to #MeToo claiming. Many have celebrated the inclusion of lawful, but awful sex<sup>99</sup> and the need for affirmative, enthusiastic consent as part of the #MeToo public discourse.<sup>100</sup> Scholars and journalists are now spending intellectual capital to map the terrain of lawful, but awful encounters<sup>101</sup> and the unequal burdens they often place on women.<sup>102</sup> A robust defense of the benefits of self-identification and self-definition ought to be offered and defended, particularly when #MeToo claimants are not making a legal claim or seeking legal justice. Contrast Professor MacKinnon's 1993 observation about rape, "Many women, no matter how violated they were, do not call what happened to them rape if they do not think a court would agree with them. In this ultimate triumph of law over life, law tells women what happened to them and many of us believe it,"<sup>103</sup> with Tarana Burke's embrace of a bottom up approach to #MeToo, noting "It's your movement. It's our movement. It is a survivors' movement. You are in it if you say you're in it."<sup>104</sup>

It is important to note that reform of colloquial law talk need not be unidirectional. Given #MeToo's focus on consent and coercion, it should be noted that not all legal violations need give rise to #MeToo claims. For instance, sometimes the state may have an interest in crim-

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have-somehow-gotten-worse [https://perma.cc/HH5J-RBF6].

<sup>99</sup> Lexy Perez, *Amy Schumer Talks Friend Aziz Ansari's Sexual Misconduct Claim*, HOLLYWOOD REP. (Feb. 1, 2018), <https://www.hollywoodreporter.com/news/amy-schumer-talks-friend-aziz-ansaris-sexual-misconduct-claim-1080874> [https://perma.cc/8RWD-SAEW] (Schumer describes Aziz's behavior: "It's not a crime, but it's not cool.").

<sup>100</sup> Lindy West, Opinion, *Aziz, We Tried To Warn You*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/opinion/aziz-ansari-metoo-sex.html> [https://perma.cc/2TKL-A5GE?type=image]; Mariel Cariker, *Sexual Assault Allegations Against Aziz Ansari Spark Twitter Debate*, METIZA (Jan. 14, 2018), <https://metiza.com/need-to-know/sexual-assault-allegations-aziz-ansari-s-park-twitter-debate/> [https://perma.cc/WH5B-6QMG], citing Jessica Valenti, TWITTER (Jan. 14, 2018), [https://twitter.com/JessicaValenti?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/JessicaValenti?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) [https://perma.cc/43PY-Y78K]; Brittany Wong, *What Therapists Want Us to Know about Aziz Ansari, 'Bad Sex' and #MeToo*, HUFFPOST (Feb. 2, 2018), [https://www.huffpost.com/entry/therapists-on-aziz-ansari-me-too\\_n\\_5a6f6ed3e4b01fbbefb4b934](https://www.huffpost.com/entry/therapists-on-aziz-ansari-me-too_n_5a6f6ed3e4b01fbbefb4b934) [https://perma.cc/425V-JS5]; Fiona Chen, Opinion, *Why the Aziz Ansari Story and Discussions of Grey Areas Are Central to the #MeToo Movement*, TECH (Jan. 25, 2019), <https://thetech.com/2018/01/25/me-too-aziz-ansari> [https://perma.cc/5Z7T-TPU9].

<sup>101</sup> See Mendes et al., *supra* note 12; see also Robin West, *Manufacturing Consent*, BAFFLER (2018), <https://thebaffler.com/salvos/manufacturing-consent-west> [https://perma.cc/ZD5Q-URW6]; KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* (2017).

<sup>102</sup> Sara L. Maurer, *The #MeToo Movement Isn't about Women's Frailty. It's about Women's Labor*, CHRON. OF HIGHER ED. (Jan. 7, 2018), <https://www.chronicle.com/article/The-MeToo-Movement-Isn-t/242179> [https://perma.cc/9YTF-82XQ].

<sup>103</sup> MacKinnon, *supra* note 933.

<sup>104</sup> Shia Diefotze, *#MeToo Founder Addresses the Movement*, UAF SUN STAR (Apr. 23, 2018), <http://uafsunstar.com/metoo-founder-addresses-the-movement/> [https://perma.cc/ZT6Z-KG3Y].

inalizing behavior such as incest or statutory rape or sex between a person in power such as a therapist or clergy person and a person in their trust or a state university professor and a student, but it seems at least theoretically possible in some small subset of those cases all parties are truly willing and voluntary participants. The State may legitimately choose to outlaw such behavior, but the statutorily protected person ought not be labelled a #MeToo victim or survivor if she or he does not choose to view her or himself that way.

## 2. Reframe

In a more radical move, participants in the #MeToo conversation might instead more aggressively challenge legal framing. Many options for reframing exist—I suggest three possibilities here. First, to return to the justification for the original #MeToo tweet, the #MeToo conversation might be recentered on victims and their needs beyond accountability for their perpetrators. Second, to the extent that the conversation is about perpetrators and accountability, society needs to think seriously and creatively about the concept of earned redemption instead of emphasizing carceral analogies of death penalties and time served. In theory, and perhaps in practice, these conversations can occur simultaneously, but both America's historical experience with carceral feminism and my anecdotal observation of the last two years of #MeToo law talk conversations suggests they are far too often mutually exclusive.

To begin, law talk is not a particularly useful vehicle for addressing victim needs such as immediate trauma care, opportunities for long-term healing, and workplace reintegration. A focus on dissecting individual stories for their truth or falsity and subsequent consequences for perpetrators ignores and may even tradeoff with the need for greater awareness of and resources for healing.<sup>105</sup> In my opinion, law talk has helped Times Up raise millions of dollars for litigation so that victims could move from non-legal sites to legal sites to resolve their claims and defend themselves from retaliation and defamation,<sup>106</sup> but where is the parallel financial outpouring to help victims afford therapy, to assist community provision of healing resources, and to get victims fully reintegrated back into the working world?<sup>107</sup> While legal determinations

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<sup>105</sup> Aisha Harris, *She Founded Me Too, Now She Wants to Move Past the Trauma*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html> [https://perma.cc/K54T-XD6S].

<sup>106</sup> Constance Grady, *Time's Up Was at the Center of the 2018 Golden Globes. One Year Later, What Has Come of It?*, VOX (Jan. 6, 2019) <https://www.vox.com/culture/2019/1/4/18165557/golden-globes-times-up-legal-defense-fund-sharyn-tejani> [https://perma.cc/R8TP-2C9E].

<sup>107</sup> Diana Falzone, *You Will Lose Everything: Inside the Media's #MeToo Blacklist*, VANITY FAIR (Apr. 9, 2019), <https://www.vanityfair.com/news/2019/04/the-metoo-blacklist> [https://perma.cc/P7TE-DS75]; Robin Kar & Lesley Wexler, *#MeToo: Counting the Collective Harm of Missing*

can serve important functions, as Professor Aya Gruber notes, carceral feminism with its emphasis on “equaliz[ing] and civiliz[ing] the criminal justice system’s treatment of female victims” has in the past traded off with or made more difficult efforts to “provid[e] access and resources to [female] victims, and creat[e] programs to address the economic and social realities that kept women in abusive relationships or led them to remain silent about rape.”<sup>108</sup> Without a conscious reframing, a law talk centered #MeToo may facilitate these same tradeoffs and unaddressed harms that plagued victims of domestic violence in the 1980s and 1990s. In other words, while victims of unlawful #MeToo behavior should have equal opportunities for criminal and tort justice as victims of other crimes, a single minded focus on such may ignore or even displace what many victims would find most helpful particularly in non-legal settings.

In addition, law talk’s approach also fails to grapple seriously with a meaningful path for perpetrators. As noted above, law talk often frames any mode of accountability as punishment and then assesses its perceived proportionateness in specific cases. Take, for instance, former radio host and #MeToo perpetrator John Hockenberry’s plea for absolution,<sup>109</sup> “Is a life sentence of unemployment without possibility of furlough, the suffering of my children, and financial ruin an appropriate consequence?”<sup>110</sup> While I am skeptical that the vast majority of #MeToo perpetrators will serve anything that approaches a non-legal life sentence,<sup>111</sup> I also worry about the poverty of conceptions of perpetrator accountability and reintegration. In much of the law talk #MeToo conversation, there seems to be no ground other than silent reacceptance after a brief period of social sanction as evidenced by law talk’s “time served” sentiment or banishment reflected in law talk’s “death penalty” analogy. Law, and criminal law in particular, may have little to tell us about imagining a meaningful path back to full participation in society

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*Women’s Work*, JUSTIA (Mar. 5, 2019), <https://verdict.justia.com/2019/03/05/metoo-counting-the-collective-harm-of-missing-womens-work> [<https://perma.cc/5UQZ-UVJ7>].

<sup>108</sup> Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 748–49 (2007). *See also id.* at 801 (“Although there were salient reasons for feminists to reform the criminal justice system, once they engaged state power, it became the primary if not singular focus of the movement.”).

<sup>109</sup> For an excellent piece discussing why absolution is inappropriate in the #MeToo setting, *see* Michelle Goldberg, *The Shame of the MeToo Men*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/opinion/columnists/metoo-movement-franken-hockenberry-macdonald.html> [<https://perma.cc/36WT-56UT>].

<sup>110</sup> John Hockenberry, *Exile*, HARPER’S (Oct. 2018), <https://harpers.org/archive/2018/10/exile-4/> [<https://perma.cc/G5ZE-EAPZ>].

<sup>111</sup> For a partial list of high profile individuals accused of #MeToo wrongdoing along with the latest developments, *see Sexual Harassment and Assault Allegations*, VOX (last updated Jan. 9, 2019), <https://www.vox.com/a/sexual-harassment-assault-allegations-list/paul-haggis> [<https://perma.cc/7S8J-7AZM>].

besides simply a passage of time.<sup>112</sup> In addition to pressing for legal reforms or expansion of law talk, advocates might highlight the dangers of importing the worst punitive impulses of criminal law and carceral feminism into non-legal settings<sup>113</sup> and instead point participants toward the concept of restorative justice. While some of the most important acts of restorative justice such as apologies, promises of non-repetition, and efforts to prevent others from engaging in #MeToo related acts are not required by the law, they would help serve the interests of the victims and society,<sup>114</sup> as well as provide perpetrators a roadmap towards earned redemption and fuller societal reintegration.

### CONCLUSION

As we enter the third year of the #MeToo landscape, Americans are properly struggling with this great societal reckoning. While such a transformation will necessarily involve both law and law talk, this essay suggests a deeper understanding of how law talk functions can help participants to push back against its misuses, excesses, and oversights. As lawyers and legal scholars, we are uniquely positioned to point out the ways in which law talk might distort our understandings of victims and perpetrators outside the legal setting. I suggest here that instead of only zooming in on the crime and punishment of individual perpetrators, we ought to consider refocusing on victims' needs as well as on the possibilities for earned redemption of perpetrators. Many have already

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<sup>112</sup> Moreover, in practice, for many criminals, time served does not reflect a path back to full integration. Between felon disenfranchisement, background checks for employment, housing limitations, and the difficulty of compliance with probation and parole requirement, many criminals never experience something that resembles full participation in society. Brentin Mock, *Released Inmates Will Need More Than a 'Ban the Box' Measure to Rejoin Society*, CITY LAB (Nov. 2, 2015), <https://www.citylab.com/equity/2015/11/obama-ban-the-box-released-inmates-hurdles/413470/> [https://perma.cc/3T9Z-X4FM].

<sup>113</sup> For examples of others worried about the importation of carceral feminism into the #MeToo debate, see Judith Levine, *Will Feminism's Past Mistakes Haunt #MeToo?*, BOSTON REV. (Dec. 8, 2017), <http://bostonreview.net/gender-sexuality/368judith-levine-will-feminisms-past-mistakes-haunt-metoo> [https://perma.cc/6H69-N8CF]; Alex Press, *#MeToo Must Avoid 'Carceral Feminism'*, VOX (Feb. 1, 2018), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> [https://perma.cc/MK86-WVFJ]; OPEN SOC'Y FOUND., *Righting Carceral Feminism's Wrongs in a #MeToo Era*, (Mar. 6, 2018), <https://www.opensocietyfoundations.org/events/righting-carceral-feminism-s-wrongs-metoo-era> [https://perma.cc/C4XQ-RYQV]. For a sample of those discussing the historical harms of carceral feminism, see, e.g., Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 7, 2014), <https://www.jacobinmag.com/2014/10/against-carceral-feminism/> [https://perma.cc/275V-WQHK]; Lise Gotell, *Reassessing the Place of Criminal Law Reform in the Struggle against Sexual Violence*, in RAPE JUSTICE 53, 53–71 (Anastasia Powell ed., 2015); Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365 (2016).

<sup>114</sup> Lesley Wexler et al., *#MeToo and Theories of Justice*, 2019 U. ILL. L. REV. 45; Lesley Wexler & Jennifer Robbenolt, *#MeToo and Restorative Justice: Realizing Restoration for Victims and Offenders*, ABA DISPUTE RESOLUTION MAG. (Win. 2019), [https://www.americanbar.org/groups/dispute\\_resolution/publications/dispute\\_resolution\\_magazine/2019/winter-2019-me-too/metoo-and-restorative-justice/](https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/metoo-and-restorative-justice/) [https://perma.cc/WNR9-L44Y].

taken up this call and I am hopeful that scholars, commentators, and members of the public will be more mindful when engaging in law talk in the #MeToo landscape.