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#MeToo and the Movement to Empower the Female Voice*

by

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Title:

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Panel Information

High-Profile Sexual Harassment Cases: From #MeToo To The Kavanaugh Hearings
Moderator: Meredith Stewart
Speakers: Lisa J. Banks, Sue Ellen Eisenberg & Debra S. Katz

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#MeToo and the Movement to Empower the Female Voice

> *Until very recently issues analogous to sexual harassment, such as abortion, rape, and wife beating existed at the level of an open secret in public consciousness, supporting the (equally untrue) inference that these events were infrequent as well as shameful, and branding the victim with the stigma of deviance. In light of these factors, more worth explaining is the emergence of women's ability to break the silence.* Catherine A. MacKinnon, Sexual Harassment of Working Women[1]

Women have always paid a high price for being heard. Historically, speech has always been synonymous with power. As far back as Homer's *Odyssey*, women were denied leadership roles in civic life, and concomitantly prohibited from using their voice in a public forum. In her book *Women & Power: A Manifesto*, Professor Mary Beard observed that classical literature is replete with examples of women being silenced by men.[2] "As Homer had it, an integral part of growing up, as a man, is learning to take control of public utterance and to silence the females of

[1] New Haven and London, Yale University Press (1979).

[2] London Review of Books (2017).

the species."[3] Penelope, Odysseus' wife, was silenced by her son, Telemachus, when she voiced her opinion during a public gathering. He chastised her for speaking, exclaiming, "Mother, go back up into your quarters, and take up your own work, the loom and the distaff … speech will be the business of men, all men."[4] In Ovid's *Metamorphoses*, the poet tells of the rape of Philomena, a young princess, by her sister's husband, King Tereus. Tereus cuts out Philomena's tongue to disable her ability to either denounce or identify him. Since she is unable to speak, Philomena weaves the story into a tapestry which reveals the crime through the "woven" word.

Countless scholarly writings detail the symbolic meaning of Philomena's rape by King Tereus. For example, one such essay states that: "the story […] reflects similar gender patterns of male domination that are found throughout classical literature. The story of Philomela is especially important because it reflects the difficulty people have talking about events that have silenced them. Often, those who hold positions of power and privilege in society are the ones who enforce the silencing. Although it is hard to speak the truth, either because of inability or reluctance, it is important that it be revealed because often communication is the only way to achieve change or improvement. When people are either unwilling or unable to speak up, problems can lie hidden and fester. The silencing of Philomela reflects the silencing of women throughout history and reminds us that, even today, women can be silenced and over-powered by their male counterparts."[5]

Classical literature is not the only arena in which women were written out of public discourse or otherwise denied speaking parts.[6] Women have historically had their power to represent or assert their interests suppressed. The United States government is a prime example. Women were denied the right to vote during the first 132 years of this country's existence. Passed by Congress on June 4, 1919, and ratified on August 18, 1920, the 19th Amendment granted women the right to vote.[7] In 2019, women comprise only 23.4% of Congress's 535 members (25 in the Senate and 102 in the House of Representatives). This constitutes the largest female representation in U.S. history.[8]

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[3] *Id*. at. pg. 4.

[4] *Id.*

[5] *Ovid and the Censored Voice*, Colby.edu <http://web.colby.edu/ovid-censorship/censorship-in-ovids-myths/philomela-ovid-silencing-censorship/>.

[6] In Shakespeare's, *Titus Andronicus*, for example, the tongue of the raped Lavinia is ripped out *and* her hands are cut off. Not only are women silenced before they can speak, but drastic measures are taken to ensure that they are permanently disabled from having their voices heard.

[7] White women were essentially the only beneficiaries of the right to vote. While the 14th Amendment granted citizenship to freed African American men, they were not given the right to vote until the 15th Amendment was ratified in 1870. African American women were granted that same right under the 19th Amendment but were prevented from exercising that right for several decades.

[8] Center for American Women And Politics, <https://cawp.rutgers.edu/women-us-congress-2019>. This increase over a 100-year period is portrayed as "progress" despite the fact that women compose approximately 50.8% of the total population in the United States. *See* https://www.census.gov/quickfacts/fact/table/US/LFE046217.

Despite this representational increase, the silencing of individual females continues in the congressional sector.[9] During Senator Jeff Sessions' confirmation hearings as Attorney General in 2017, Senator Elizabeth Warren opposed his confirmation on the basis of his record on race and immigration. While reading a letter written by Mrs. Coretta Scott King to the Senate Judiciary Committee in 1986 which highlighted Senator Sessions' conduct of racial discrimination and intimidation, Senator Warren was repeatedly interrupted by male senators. Senate Majority Leader Mitch McConnell invoked Rule XIX to prevent senators from "impugning the motives or conduct" of "[their] colleague from Alabama."[10] As though chastising a child, Senator McConnell defended his actions by declaring: "She was warned. She was given an explanation. Nevertheless, she persisted." This ultimately led to a vote (49-43) silencing Senator Warren for the duration of the confirmation hearings and resulted in her exclusion from the debate. Other male senators, including Jeff Merkley of Oregon, Tom Udall of New Mexico, and Bernie Sanders of Vermont, subsequently read the same letter without objection and without exclusion.

During the Brett Kavanaugh confirmation hearings, Dr. Christine Blasey Ford testified before the Senate Judiciary Committee that she had been sexually assaulted by Justice Kavanaugh, who had forcibly held her down and covered her mouth to muffle her screams and silence her. Predictably, she was terrorized. Almost 30 years later, in 2018, she elected to publicly communicate that sexual assault. And despite being targeted by severe harassment and death threats, both during and after the hearings, she succeeded in being heard.[11]

When considering the power of voice, it is interesting to note that the #MeToo movement has compelled us to consider how to respond when the abuser cries louder than the woman who has been victimized. The quintessential example of this occurred during the Kavanaugh hearings. Justice Kavanaugh cried, yelled, and displayed anger and emotion in public (which is an indulgence that, if exhibited by a woman, would only have served to further stigmatize her). How often did we hear about *his* reputation, *his* family, *his* future as a girls' basketball coach? His position echoed that of another man who similarly sought to silence his female accuser: Justice Clarence Thomas, who famously referred to Anita Hill's testimony as "a high-tech lynching."

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[9] For example, on July 14, 2019, President Trump tweeted that four female congresswomen – Democratic Reps. Ayanna Pressley of Massachusetts, Rashida Tlaib of Michigan, Alexandria Ocasio-Cortez of New York, and Ilhan Omar of Minnesota – should "go back and help fix the totally broken and crime infested places from which they came." Felicia Sonmez and Mike DeBonis, *Trump tells four liberal congresswomen to 'go back' to their countries, prompting Pelosi to defend them.* The Washington Post (July 14, 2019). <https://www.washingtonpost.com/politics/trump-says-four-liberal-congresswomen-should-go-back-to-the-crime-infested-places-from-which-they-came/2019/07/14/b8bf140e-a638-11e9-a3a6-ab670962db05_story.html?noredirect=on&utm_term=.91b4de690eca>. President Trump effectively told these women, three of whom were born in the United States, to "shut up or leave."

[10] Senate Rule XIX is an arcane and seldom used rule adopted in 1902. It states that senators may not "directly or indirectly, by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator." *See* https://www.rules.senate.gov/rules-of-the-senate. The Rule actually originated from a fistfight that occurred between Senators John McLaurin and Ben Tillman, both of South Carolina.

[11] Dr. Ford initially wrote a letter detailing the sexual assault and provided it to Ranking Member of the Senate Judiciary Committee Diane Feinstein, requesting that the letter be kept confidential. Once the press reported on the existence of the letter, Dr. Ford decided to "describe the details of the assault in [her] own words." *See* Written Testimony of Dr. Christine Blasey Ford to U.S. Senate Judiciary Committee, September 26, 2018. *Accessed at*: <https://www.judiciary.senate.gov/imo/media/doc/09-27-18%20Ford%20Testimony.pdf>.

While Justice Kavanaugh did not use racially charged language, he also sought to discredit his accuser by shifting the focus of the victimization from Dr. Ford to himself.

Justice Kavanaugh's display of outrage and anger was effective. He "looked like a man falsely accused: furious, fearful, tearing up when he mentioned his parents or his daughters. He laced into his tormentors, determined to clear his name. He gave no ground. He badgered and interrupted the Democrats questioning him."[12] Professor Kate Manne, a feminist philosopher, coined the term "himpathy" to describe "the tendency to dismiss the female perspective altogether, to empathize with the powerful man over his less powerful alleged female victim."[13] Justice Kavanaugh's behavior at the hearing epitomized "himpathy," and it worked. The individual who had truly suffered was himself, not Dr. Ford. Dr. Ford's voice "slipped soundlessly beneath the water."[14] The context of the hearing, as well as how Justice Kavanaugh shifted the narrative, determined the outcome.[15]

A. Legislative Response to #MeToo

Dr. Christine Blasey Ford's testimony comports with the #MeToo Movement's achievement as a societal force giving voice to the voiceless. This movement facilitated the creation of a public environment where confronting one's abuser was met with a receptive and interactive audience which, in turn, compelled state and federal lawmakers to listen and affirmatively respond.

Part of that response has been the passage of new state legislation designed to protect the public expressions of speech as well as to require the inclusion of women on the boards of public corporations to ensure that there is a public venue for such speech. Additionally, new laws have been enacted which specifically invalidate the use of non-disclosure restraints and gag orders in various employment agreements. They also limit or render unenforceable mandatory arbitration agreements which prevent a woman's ability to speak out in a public venue thus depriving the public from "hearing" the victim. The following examples are illustrative:

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[12] Ezra Klein, *The Ford-Kavanaugh sexual assault hearings, explained.* Vox (Sep. 28, 2018). <https://www.vox.com/explainers/2018/9/27/17909782/brett-kavanaugh-christine-ford-supreme-court-senate-sexual-assault-testimony>.

[13] *Id.*

[14] *Id.*

[15] It should be noted that Senator Susan Collins of Maine, whose vote to confirm Justice Kavanaugh was integral in his appointment to the Supreme Court, characterized Dr. Ford's testimony as "painful and compelling." However, she nonetheless concluded that Dr. Ford's claims were unsubstantiated. *See* Stavros Agorakis, *Read the full transcript of Sen. Collins's speech announcing she'll vote to confirm Brett Kavanaugh*. Vox (Oct. 5, 2018). <https://www.vox.com/2018/10/5/17943276/susan-collins-speech-transcript-full-text-kavanaugh-vote>.

1. California

California law now requires female participation on corporate boards by the end of 2019.[16] Senate Bill 826, which was signed into law on September 30, 2018 and which amends the state's Corporations Code, requires every publicly held corporation headquartered in California to have a minimum of one woman on its board of directors by the end of 2019.[17] By July 2021, the bill requires a minimum of two women on public corporate boards in the state with five members and at least three women on boards with six or more. Corporations will be fined $100,000 the first year they fail to meet these requirements and $300,000 for each additional year they do not comply. Corporations will also be fined $100,000 if they do not report the gender ratio of their board of directors to the California Secretary of State.[18]

Having one's voice be heard goes beyond having it protected. There is now a legal requirement for that voice to be present. Other examples of protection include:

- The prevention of employers from compelling employees to sign a non-disclosure agreement to release claims of sexual harassment as a condition for a raise or bonus, or as a condition of employment.[19]
- The protection of individuals from the threat of a defamation lawsuit when a sexual harassment allegation is "based on credible evidence" and without malice. Companies with knowledge of the harassing activity may also warn other potential employers without the threat of a defamation lawsuit.[20]
- The prohibition of confidential settlements or nondisclosure agreements of factual information in cases involving allegations of sexual assault, harassment, or discrimination.[21]

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[16] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826. For purposes of the law, "female" means "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."

[17] *Id.*

[18] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB826. Even California, long a progressive bastion, needs these reforms – as of October 2018, one-quarter of the publicly traded companies headquartered in California did not have any women on their boards. *See* Emily Stewart, *California just passed a law requiring more women on boards. It matters, even if it fails*. Vox (Oct. 3, 2018) <https://www.vox.com/2018/10/3/17924014/california-women-corporate-boards-jerry-brown>.

[19] Senate Bill 1300. This was signed into law September 30, 2018.

[20] Assembly Bill 2770, signed into law on July 9, 2018.

[21] Senate Bill 820, signed into law on September 30, 2018. As a matter of firm practice, we counsel women to not execute financial, retirement, or separation documents that require an affirmation or certification that they are unaware of any non-compliant or unlawful gender discrimination or sexual harassment when they have complained or reported otherwise. With respect to non-disclosure or confidentiality agreements, we understand that it is ultimately the client's/victim's choice whether to execute such agreements.

2. Maryland

Maryland's Disclosing Sexual Harassment in the Workplace Act of 2018 requires employers with at least 50 employees to complete an annual survey disclosing the number of sexual harassment settlements into which the employer has entered.[22] The Act also states that any employment contract, policy, or agreement that waives any "substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment" is null and void.[23] An employer which enforces or attempts to enforce a provision that violates the Act will be liable for the employee's reasonable attorney's fees and costs.[24]

3. Michigan

In Michigan, supervisors may have individual liability for acts of sexual harassment, discrimination, and retaliation.[25] In an effort to avoid that liability, some employers have argued that a supervisor sexually assaulting an employee should be covered under the employee's signed arbitration agreement. However, the Michigan Court of Appeals recently ruled that a supervisor's sexual assault and battery of an employee was conduct unrelated to the employee's employment. Therefore, the assaulted employee was not compelled to arbitrate her claims of assault and battery even though she had previously executed a mandatory arbitration agreement. [26]

Additionally, the Michigan Court of Appeals, in a different matter, held that shortened statutes of limitation provisions found within an employee handbook are unenforceable, thus allowing individuals more time to find—and preserve—their voice.[27]

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[22] https://mccr.maryland.gov/Pages/Sexual-Harassment-Disclosure-Survey.aspx. For each settlement entered into with an employee, the employer must also state the number of settlements entered into with that same employee over the previous ten years.

[23] The Act contains a carveout however: "except as prohibited by federal law." Thus, a valid arbitration agreement under the Federal Arbitration Act that waives these substantive and procedural rights or remedies would likely be enforceable. *See* https://www.billtrack50.com/BillDetail/946323.

[24] *Id.*

[25] *See, e.g.*, *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 697 N.W.2d 851 (2005). A majority of states provide for at least some form of individual supervisor liability in these matters (i.e.; harassment, discrimination, and/or retaliation), including California, Pennsylvania, New Jersey, New York, Massachusetts, and Washington. However, there is no uniformity across the country regarding individual supervisor liability. There is no individual liability under federal law, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act.

[26] *Lichon, et. al. v. Michael Morse*, Court of Appeals No. 339972 (March 14, 2019), found at http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190314_C339972_47_339972.OPN.PDF. The court noted, however, that "under different circumstances, we may conclude that the gravamen of plaintiffs' claims […] are a failure to discipline, or adequately discipline, a fellow employee of the firm for offensive and egregious sexual misconduct and/or sexual harassment [and thus would be arbitable]." *Id.* at 22.

[27] *Mohamed v Brenner Oil Co*, unpublished per curiam opinion of the Court of Appeals, #341899 (February 21, 2019), found at https://law.justia.com/cases/michigan/court-of-appeals-unpublished/2019/341899.html.

4. Texas

#MeToo has also impacted Title IX, which prohibits, among other things, sexual harassment in educational institutions. In Texas, there is pending legislation (currently with the governor for signature) that would penalize universities and their employees for failing to report incidents of sexual assault, dating violence, stalking, and harassment regardless of whether the employee was a witness to the incident or heard about it later. The obligation to report is triggered even if the employee only "reasonably believes" that such an incident occurred.[28] Employees must then promptly report the incident to the institution's Title IX coordinator or its deputy Title IX coordinator. Any employee who fails to do so, regardless of whether that employee is a supervisor, is subject to discharge and faces a maximum of one year in jail if the failure was intended to conceal the incident.[29] Additionally, any employee who, with the intent to harm or deceive, knowingly files a false report is subject to the same penalty.[30] It is questionable whether such legislation will achieve its intended effect as many will experience the enforcement as retaliatory, operating to silence both the victim and witness.

5. New Jersey

New Jersey enacted a law in March of 2019 that banned the use of nondisclosure provisions in any employment contract or agreement that have the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment."[31] Any employment contract waiving substantive or procedural rights or remedies relating to such claims are also against public policy and are therefore unenforceable.[32]

6. Other States' Response

Other states, including Arizona, Maryland, New York, Tennessee, Vermont, and Washington, have addressed the subject of employees being required to sign nondisclosure agreements as a condition of employment. Some, like Washington, ban the use of the agreements at time of hire, while others, like Arizona, ensure that those agreements cannot prevent victims

[28] Senate Bill 212. This reporting obligation obviously does not apply to victims, nor does it apply to information received due to a disclosure at a "sexual harassment, sexual assault, dating violence, or stalking public awareness event sponsored by a postsecondary educational institution or by a student organization affiliated with the institution." Section 51.252(d).

[29] Senate Bill 212; Chuck Lindell, *Texas Senate backs penalties for failing to report sexual violence at colleges*, Statesman (Mar. 26, 2019) <https://www.statesman.com/news/20190326/texas-senate-backs-penalties-for-failing-to-report-sexual-violence-at-colleges>. This bill was sent to the governor on May 25, 2019.

[30] *Id*.

[31] http://www.constangy.net/nr_images/nj-s-121.pdf.

[32] *Id.*

from coming forward in criminal proceedings.[33] Additionally, on June 19, 2019, the New York State Assembly and the Senate passed a bill that:

- Eliminates the "severe or pervasive" standard for proving a sexual harassment claim;
- Bars nondisclosure agreements in settlements involving sexual harassment claims, unless the employee desires one;
- Prevents employers from requiring employees to arbitrate sexual harassment claims; and
- Precludes employers, in sexual harassment claims, from arguing that employees did not utilize an internal harassment reporting process prior to filing a lawsuit in order to avoid liability.[34]

To provide effective disincentives for abuse by managerial employees, all states should also allow for the imposition of individual supervisor liability for incidents of sexual harassment, discrimination, and retaliation.[35]

7. Congressional Response[36]

As a result of #MeToo, Congress has been compelled to modify or rescind its own policies governing the internal processing of sexual harassment complaints. In December 2018, Congress passed the Congressional Accountability Act of 1995 Reform Act, which, among other things:

- Eliminates counseling and mediation as a mandatory prerequisite to filing a lawsuit or formal complaint (and makes them optional);
- Makes lawmakers personally liable for any settlement payment for harassment or retaliation;

[33] https://app.leg.wa.gov/RCW/default.aspx?cite=49.44.210; https://www.azleg.gov/legtext/53leg/2R/bills/hb2020s.pdf.

[34] Braden Campbell, *NY Passes Sexual Harassment, Farmworker Rights Bills*, Law360 (Jun. 20, 2019) <https://www.law360.com/articles/1171201/ny-passes-sexual-harassment-farmworker-rights-bills>. Governor Andrew Cuomo has indicated that he would sign the bill.

[35] This legal expansion may disallow insurability for an obvious intentional tort, which serves as a further disincentive for employers to be lax about regulating and remediating harassment in their workforces.

[36] Many state legislatures have addressed #MeToo by disciplining – even expelling – lawmakers who faced sexual misconduct claims, as well as by adopting more protective harassment policies. Since 2017, for example, at least 90 state lawmakers have been charged with public allegations regarding sexual misconduct claims. Most have occurred since 2017. As of August of 2018, at least 30 lawmakers have resigned or been expelled in the wake of these accusations. *See* The Associated Press, *90 state lawmakers accused of sexual misconduct since 2017,* APNews (Feb. 2, 2019) <https://www.apnews.com/a3377d14856e4f4fb584509963a7a223>; David A. Lieb, *Half of States Address Sexual Misconduct Issues As Me Too Claims Mount*, Huffpost (Aug. 27, 2018). <https://www.huffpost.com/entry/half-of-states-address-sexual-misconduct-issues-as-me-too-claims-mount_n_5b842476e4b072951514f352>.

- Includes specific protections for interns, who are highly vulnerable due to their non-employee status and diminished power; and

- Requires semiannual reports from the Office of Congressional Workplace Rights detailing settlements made in the House or Senate related to harassment and retaliation.[37]

But will Congress walk its talk? In light of Senator Warren and Dr. Ford's treatment at the hands of the Senate, Congress certainly cannot claim to be as protective of a woman's voice as its laws may portray. This is particularly true as Congress has not amended Title VII to allow for individual liability in matters of sexual harassment, discrimination, or retaliation. Internally, Congress has not ascribed to conducting investigations that are legally compliant and consistent with the hallmarks of a properly conducted objective investigation.

8. Contrary Responses

While states have passed laws increasing protections for harassment victims, some new laws extend enhanced protections or rights to the alleged harassers. For example, the Sixth Circuit Court of Appeals ruled, in 2017 and 2018, that colleges and universities are required to hold Due Process hearings regarding allegations of sexual harassment and/or abuse involving students. At those hearings, the alleged harasser must be able to question his accuser.[38] Ignoring the obvious chilling effect, the Sixth Circuit also held that the accused's "agent" (who may be an attorney) may conduct the questioning, which could invariably create a disparity in quality of representation based on income and social status. The U.S. Department of Education proposed changes to Title IX which would codify these protections. Additionally, the Department's changes would narrow the definition of sexual harassment to "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the school's education program or activity."[39] These kinds of legislative changes would impose arduous, if not impossible, standards of proof and, therefore, act as a disincentive to speaking out.

Additionally, it must be noted that nine states – Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Utah – passed strict anti-abortion laws this year. Most of these bills ban abortions after a fetal heartbeat can be detected, which is typically around six weeks of pregnancy.[40] Some states do not even allow for exceptions in cases of rape or incest, and some criminalize performing an abortion with significant prison time – in Alabama, for example,

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[37] https://www.congress.gov/bill/115th-congress/house-bill/4822/text.

[38] *Doe v. Cincinnati,* 872 F.3d 393 (6th Cir. 2017)*; Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

[39] The former definition was broader. Sexual harassment was defined as "unwelcome conduct of a sexual nature" that included "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." *Department of Education Issues Proposed Title IX Regulations on Sexual Harassment*, AGB (Feb. 22, 2019) <https://agb.org/news/agb-alerts/department-of-education-issues-proposed-title-ix-regulations-on-sexual-harassment/>.

[40] Alabama's law imposes an absolute ban on abortion, while Utah's and Arkansas' prohibit most abortions at 18 weeks. *What's going on with the abortion laws? A state-by-state look*. NBC News. Accessed July 17, 2019. <https://www.nbcnews.com/news/us-news/guide-anti-abortion-laws-state-n1012566>.

performing an abortion is a felony punishable by 10 to 99 years or life in prison.[41] While other states have passed laws preserving a woman's right to make an autonomous decision about her own reproductive health – Illinois and Vermont, for example – in response to these "heartbeat bills," these restrictive laws, passed in order to challenge *Roe v. Wade*, show the ultimate punishment and criminalization of a woman's voice. Women in these states have lost the power of self-determination, i.e.; autonomy over their own bodies. As has often occurred throughout history, power has been taken away from women; pregnancy – an inherently feminine condition – has been misappropriated by the male voice.

B. #MeToo in the Legal Profession

While women comprise a smaller percentage of attorneys – approximately 38% of attorneys are women while approximately 46.9% of the labor force as a whole is female – the largest problem in the legal profession is not the *hiring* of women, but their *advancement, equal treatment*, and *retention*.[42] For example, The 2018 Law360 Glass Ceiling Report, which surveyed more than 300 U.S. firms, reported that while 45% of non-partner attorneys were women, 24% of partners were women. Only 21% of equity partners at the largest private firms were female, and only 12% of the highest leadership roles were held by women.[43] Implicit biases play a significant role in this disparity, as female attorneys (especially women of color) are expected to work harder than their peers to "prove themselves" as equal. These attorneys are also expected to fit into a stereotypically "female" range of behaviors, including "appropriate" aggression and assertiveness.[44] It is not uncommon for law firms to exclude women from having equal access to the same quality assignments, exposure to clients, or networking opportunities as their male counterparts. This prevents female attorneys from adequately demonstrating their abilities or resolving enough cases to warrant, in the opinion of firm management, compensation increases, bonuses, or promotions.[45] Some female attorneys are excluded from assignments based on a client's preference to work with a male attorney. Granting or capitulating to such preferences is unlawful. However, female lawyers who are income members or partners are prevented from protesting such action in a public venue. In many instances, they are often constrained by operating agreements which they were required to sign as a condition of becoming a partner or member. These agreements provide for a near-total, if not complete, forfeiture of their employment rights

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[41] *Id.*

[42] Jennifer Cheeseman Day, *More Than 1 in 3 Lawyers Are Women*, Census.gov (May 8, 2018) <https://www.census.gov/library/stories/2018/05/women-lawyers.html>; *Quick Take: Women in the Workforce – United States,* Catalyst (Jun. 5, 2019) <https://www.catalyst.org/research/women-in-the-workforce-united-states/>.

[43] *See* Cristina Violante and Jacqueline Bell, *Law360's Glass Ceiling Report, By The Numbers*, Law360 (May 28, 2018) <https://www.law360.com/corporate/articles/1047285>. The disparity is even greater for women of color – only 2.7% of equity partners are women of color.

[44] Liane Jackson, *Race and gender bias is rampant in law, says new report that also offers tools to fight it*, ABAJournal (Sept. 6, 2018) <http://www.abajournal.com/news/article/race_and_gender_is_bias_rampant_in_law_says_new_report_that_also_offers_too>.

[45] Iris Bohnet, *Tackling 'the Thin File' That Can Prevent a Promotion*, The New York Times (Oct. 3, 2017) <https://www.nytimes.com/2017/10/03/business/women-minority-promotion.html>.

and remedies predicated largely on a "man-made" definition of member/partner requiring forfeiture of employee status.[46]

Even if they are not subject to these agreements, many female attorneys fear being subjected to retaliation should they report incidents of discrimination or harassment, even when reporting is mandatory. This is also true when they seek to report the harassment commonly found in law firm "fraternity cultures,"[47] a fear exacerbated by a belief that the discriminatory or harassing behavior will not be remediated particularly if the harasser is a rainmaker. The legal profession is, inherently, one where power dynamics, control, and authority take center stage. When a woman seeks to challenge that environment, she is often silenced or subsequently branded as a troublemaker or whistleblower. This reputation invariably will impact her future employment opportunities.

Despite the impact of the #MeToo movement, sexual harassment and discrimination remain entrenched within the legal profession. Until the legal industry engages in proactive and preventative measures to ensure equal employment opportunities, female attorneys will be deprived of a level playing field.

C. Strategic Considerations when Speaking One's Truth

Whether to speak or not to speak, that is the question. This question can only be answered by the woman who has been victimized by sexual harassment or assault. Each such woman owns the right to decide whether she should speak at all, and if so, when and in what context. The power to control the narrative is essential. Most often, context determines outcome.

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[46] Equity partners and members are not considered employees, so they do not have any protections under Title VII. These protections are what they are exchanging for the right to have an equity or ownership stake in the firm and may make decisions in line with that status (i.e.; hiring and firing other attorneys). They are treated more like employers than employees. However, these operating agreements have been applied to *non*-equity partners or income members, who do *not* have such a stake in, or control over, the firm and should therefore be protected under Title VII – the same is true for independent contractors. After all, whether a party is an employee "depends on 'all of the incidents of the relationship…with no one factor being decisive.'" *Clackamas Gastroenterology Assoc. P.C. v. Wells*, 538 U.S. 440, 451 (2003) (stating that a party's relationship to the employer may have indicia of ownership as well as indicia of employment). As the *Clackamas* Court recognized, titles are not determinative of employment status: "Today there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." *Id*. at 446.

Often, these documents are treated as proprietary and are not disclosed absent litigation. Even absent blanket waivers of rights, many may still contain arbitration agreements. Partnership or member agreements should only concern those matters having to do with the partnership relationship, not an *employment* relationship. As Justice Ginsburg noted in her dissent in *Clackamas*, "'There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship.'" *Id*. at 451 (Ginsburg, J. dissenting) (*quoting Goldberg v. Whitaker House Cooperative, Inc*., 366 U.S. 28, 32 (1961)).

[47] In a 2018 report, which was based on a 2016 survey of 2,827 in-house and firm attorneys, 70% of female attorneys stated that they have experienced sexist comments, stories, and jokes, and 25% reported encountering some form of unwelcome sexual advances or harassment. *See* fn. 44.

For instance, the articulation of a complaint or charge of sexual harassment which has been reported and is being "heard" within the context of a legislative hearing or investigation (such as those convened to address both Professor Anita Hill and Dr. Ford's matters) is characterized by a diminished ability to control the narrative. By comparison, litigation may provide a more level playing field where the umpire/judge, along with the lawyers, control the introduction of evidence. Within the context of a lawsuit, the Brett Kavanaughs of the world would be prohibited from making speeches about self-proclaimed victimization.[48]

Litigation is not the only means by which victims of sexual harassment are able to have their voices heard. Women must be able to choose when and how to be vocal, if they elect to be vocal at all. Having the power to control the narrative is imperative. In appropriate circumstances, complaints of misconduct can or should be reported to law enforcement agencies or attorneys.[49] Investigations can be conducted to secure corroborating evidence of the harassment on a pre-litigation basis. An employee may file a charge with the EEOC, which may conduct an investigation. The EEOC may also elect to file a lawsuit since it is not bound by private arbitration agreements. An individual may elect to follow the lead of Rachel Denhollander, who chose to report sexual misconduct to the media. With one e-mail to the Indianapolis Star in September 2016, Ms. Denhollander triggered an investigation that led to the termination and criminal prosecution of Dr. Larry Nassar, the physician and serial pedophile who had been employed at Michigan State University.[50] Therefore, the choice of context can be determinative of the outcome and help identify what steps should be taken to reach that outcome.

It is important to note that many women struggle for years speaking about having been victimized by sexual harassment or assault, let alone reporting it. According to Dr. Rosalind B. Griffin, "[a] sexually harassed victim tends to avoid anything associated with the event, in at least three of the following ways: efforts to avoid thoughts or feelings associated with the trauma; efforts to avoid activities or situations that arouse recollections of the trauma; inability to recall an important aspect of the trauma[, and] markedly diminished interest in significant activities[.]"[51]

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[48] If the accused harasser asserts mental or emotional harm as a result of the complaint against him, plaintiff's counsel may seek an Independent Medical Examination of the accused to evaluate his psychiatric status.

[49] Reporting to a law enforcement agency or attorney may grant the individual protection under a state's Whistleblower Protection Act. In Michigan, for example, reporting to a state or federal law enforcement agency, or an individual's own attorney, affords such protections. *See* Mich. Comp. Laws § 15.361 et. seq.; *McNeill-Marks v. Midmichigan Med. Center-Gratiot*, 316 Mich. App. 1 (2016).

[50] Other arrests and convictions have followed. On June 13, 2019, William Strampel, a former Michigan State University dean and the former supervisor of Larry Nassar, was found guilty of misconduct in office as well as two counts of willful neglect of duty. In her words, Ms. Denhollander sent that initial e-mail with a hope "that it would give a voice to others who have also been victims." It worked. During Nassar's sentencing, 155 other victims testified. *See* Elizabeth Joseph and Lauren del Valle, *Former Michigan State Dean guilty of misconduct in office and willful neglect of duty*, CNN (Jun. 13, 2019) <https://www.cnn.com/2019/06/12/us/msu-strampel-conviction-nassar/index.html>; Mark Alesia, Marisa Kwiatkowski and Tim Evans, *Rachel Denhollander's brave journey: Lone voice to 'army' at Larry Nassar's sentencing*, IndyStar (Jan. 24, 2018), <https://www.indystar.com/story/news/2018/01/24/larry-nassar-usa-gymnastics-sexual-abuse-rachael-denhollander-mckayla-maroney-aly-raisman/1060356001/>.

[51] Dr. Rosalind B. Griffin, *A Forensic Psychiatrist Reflects on Sexual Harassment*, in African American Women Speak Out on Anita Hill-Clarence Thomas, Wayne State University Press, edited by Dr. Geneva Smitherman, Distinguished

This is why the refrain of asking why a woman did not come forward earlier – a question that is all too common – is an invalid supposition. The question supposes that a woman *wanted* to or *could* come forward, when this is often not the case. As Dr. Griffin explains:

> It is assumed that there is always an opportune time. For instance, as soon as the first sign of sexual harassment occurs, the victim should run to the employment assistance office, the supervisor, or a law enforcement agency. However, such a knee-jerk reaction generally presents the victim as hysterical and oversensitive, and so it is to her credit that she waits until she has sufficient evidence to prove her case. Often it is unfortunate that she must be the one to prove her innocence and her victimization.[52]

A woman should have an ability to choose how she reports her harassment or assault, but she should not be penalized for taking the time she needs to mentally and physically recover before doing so.

D. Conclusion

As Catharine MacKinnon pointed out, the #MeToo movement is "eroding the two biggest barriers to ending sexual harassment in law and life: the disbelief and trivializing dehumanization of its victims."[53] With the public disclosure and discussion of sexual harassment and misconduct, a woman's voice now may challenge "structural misogyny, along with sexualized racism and class inequalities" more than ever before.[54] To paraphrase Dr. Martin Luther King, Jr., the #MeToo movement has advanced the arc of the moral universe closer to justice.

Professor and Director of African American Language and Literacy Program, Michigan State University (1995), page 201.

[52] *Id.* at pages 205-06.

[53] Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, New York Times (Feb. 4, 2018) <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

[54] *Id.*